**XXX COUNTY/DISTRICT CRIMINAL DIVERSION POLICY**

**(ENACTED XXX, 20\_\_)**

Pursuant to K.S.A. 2018 Supp. 22-2907, the XXX County/District Attorney has established the following written policies and guidelines for the implementation of a criminal defendant diversion program. These guidelines are effective for any cases pending as of or filed after XXX, 20\_\_.

Diversion of prosecution is a privilege and not a right. There is no presumption in favor of the granting of diversion in any case, and the burden of persuasion falls upon the defendant to establish that the granting of diversion in his/her case will serve the ends of justice and the interests of the community. It is not required that an applicant have an attorney to apply for or enter into a diversion agreement.

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County/District Attorney Date

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What is Diversion?

Description:

Diversions are an alternative to trials and plea negotiations as a means to resolving criminal cases. A diversion is an enforceable agreement between a criminal defendant and the County/District Attorney’s Office. The most basic provisions of these agreements are that the defendant will remain law-abiding for the term of the diversion agreement and, upon successful completion, the prosecuting agency will dismiss the charges filed against the defendant. Agreements typically have additional conditions for the defendant to comply with to be successful. A violation of the terms of the agreement or failure to comply with conditions of the agreement may result in the prosecution resuming.

Purpose:

Diversions offer a common-sense way for those with minimal or aged criminal histories to answer for their charges, engage in community-based rehabilitation programs, and make restitution to their victims. It is the goal of the XXX County/District Attorney in enacting these policies that the community will benefit from the rehabilitation of first time offenders or those with minimal criminal histories through diversion by directing those individuals to rehabilitative services rather than probation, jail, or prison which result from conviction. These purposes are ultimately guided by the interests of justice and weighing the benefits to the offender, to any potential victims, and to the community. K.S.A. 2018 Supp. 22-2908(a).

Notice:

Pursuant to K.S.A. 2018 Supp. 22-2907(3): Each defendant shall be informed in writing of the diversion program and the policies and guidelines adopted by the County/District Attorney.

Such notice may be provided in several ways, including: 1) having notice printed on the charging document stating where a written copy of the policy and guidelines may be obtained online or physically; 2) attaching a copy of the policy and guidelines to the copy of the charging document to be served to the defendant at first appearance; or 3) separately serving a copy of the policy and guidelines to the defendant at first appearance.

Eligibility

Diversions not allowed by Statute:

The Legislature has designated specific instances of conduct for which a defendant is barred from receiving a diversion from prosecution; if a defendant is charged with one or more of the following offenses, they are not eligible for diversion by law:

1) If the Current Crime charged is DUI and one or more of the following apply:

1. Prior diversion for DUI;
2. Second or subsequent DUI case; or
3. Injury accident incurred while DUI.

*K.S.A. 2018 Supp. 22-2908(b)(1)(A)–(C)*

2) If the Current Crime is a level 1, 2, or 3 Non-Drug Felony; or a level 1, 2, or 3 Drug Felony.

*K.S.A. 2018 Supp. 22-2908(b)(2)*

3) The current crime is a Domestic Violence Offense and the offender has participated in two or more diversions for domestic violence offense(s) in the previous 5 year period.

*K.S.A. 2018 Supp. 22-2908(b)(3)*

4) No driver or holder of a Commercial Driver’s license may enter into a diversion that would prevent such person’s conviction for a traffic offense, other than parking violation, from appearing on such person’s driving record.

*K.S.A. 2018 Supp. 8-2,150(a)*

Diversions Not Allowed by Office Policy:

\*[This section will be office specific and should be completed by the elected or a representative thereof, it should take into account, the stance of the elected, the interests of justice, and should account for the viewpoints of the community(ies) served by same, if the elected is barring diversion of any offenses or categories of offenses or offenders, the elected should strongly consider providing/setting out a justification for the exclusion in the written policy.]

In addition to those charges which are not diversion eligible by law, the County/District Attorney’s Office will not divert the following [offenses] [types of offenses] [offenders with certain history]:

Specific Crimes:

Categories:

Types of behavior:

Defendant Criminal History:

Procedure

Application

A defendant seeking diversion shall complete the Diversion Application and submit the application to the County/District Attorney’s Office along with the application fee. The Diversion Application is available to any applicant at the County/District Attorney’s Office or online at *URL*

The application must be submitted within [time range] days of the first appearance hearing. Applications received after this time [will/will not] be accepted [on a case by case basis]. No diversion will be considered without submission of an application.

Upon submission of the application, a staff member of the County/District Attorney’s Office will review the application and statutory factors in determining whether diversion is an appropriate resolution to the case. If a diversion application is denied by the reviewing staff member, the defendant will receive written notice that a diversion will not be offered to resolve the case and, where practicable, a brief description of the reason(s) cited for the denial.

Diversion Conference

Pursuant to K.S.A. 2018 Supp. 22-2907, the written diversion policies of each County/District Attorney shall provide for a diversion conference and other procedures in those cases where the County/District Attorney elects to offer diversion. In all cases, the defendant shall be present and shall have the right to be represented by counsel during the diversion conference with the County/District Attorney or designee. No statements made by the defendant or his/her attorney in any diversion conference or in any other discussion of the proposed Agreement shall be admitted as evidence in criminal proceedings on crimes charged based upon the allegations giving rise to the present case.

A defendant will be notified of his/her right to a diversion conference under the provisions of the “Notice” section above and upon request will be scheduled for a diversion conference with a staff member of the County/District Attorney’s Office. The purpose of the conference is to determine the appropriateness of diversion as a means to resolving the case. If no diversion conference is requested, the determination to grant or deny diversion will be based on the information provided in the diversion application, the applicant’s criminal history, and the facts of the case including the victim’s wishes.

Factors Considered (non-exhaustive list, other factors may be considered)

Pursuant to K.S.A. 2018 Supp. 22-2908, “in determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the reviewing authority shall consider at least the following factors among all factors considered”:

* Nature of the crime and any surrounding circumstances.
* Any special characteristics or circumstances of the defendant.
* Whether the defendant is a first-time offender and whether the defendant has previously participated in diversion.
* Whether the diversion program is appropriate for the needs of the defendant.
* Whether there is a probability that the defendant committed such crime as a result of an injury or disability connected to service in a combat zone in the armed forces of the United States.
  + If yes, whether there is a probability that the defendant will cooperate with and benefit from inpatient or outpatient treatment provided by U.S. Veteran’s Affairs (VA).
* The impact of diversion on the community.
* Recommendations, if any, of the involved law enforcement agency.
* Recommendations, if any, of the victim(s).
  + Victim Notification is required pursuant to K.S.A. 2018 Supp. 74-7333, K.S.A. 2018 Supp. 22-3436, and KS Const. Art. 15 § 15.
* Provisions for restitution, along with the defendant’s likely ability to make restitution payments.
* Any relevant mitigating circumstances.

*K.S.A. 2018 Supp. 22-2908(a)(1)-(12)*

The County/District Attorney’s Office will review other factors that may be applicable to an individual case and determine whether diversion is appropriate on a case by case basis. If a diversion application is denied upon weighing these factors, a written notice of denial will summarize the reason(s) for the denial.

Diversion Agreement

Waiver of Rights

Each diversion agreement will include a waiver of rights, the defendant’s diversion agreement will not be accepted or filed unless they agree to these waivers; all waivers of these rights should consist of a written waiver of the following rights and a waiver colloquy on the record before a Court.

1. The Defendant has the right to be represented by counsel at all stages of misdemeanor and felony charges. If the defendant elects to proceed with diversion without counsel, the defendant knowingly and voluntarily waives the right to be represented by counsel.
2. The defendant knowingly and voluntarily waives all rights to a speedy arraignment and trial, and right to a trial by jury as provided under the State and Federal Constitutions, and the statutes of the State of Kansas.
3. The defendant understands that every accused has the right to a trial, the right to confront and cross-examine witnesses, the right to present evidence and to testify on said defendant’s behalf, and the right to compel the attendance of witnesses through a subpoena, and the defendant knowingly and voluntarily waives these rights.
4. The defendant understands that at trial the State bears the burden to prove the defendant guilty beyond a reasonable doubt, and that the defendant shall be presumed innocent throughout the trial.
5. The defendant understands and agrees that if the diversion agreement is revoked, a trial on the charge(s) will be had on the stipulation of facts, and the defendant shall not be permitted to present additional evidence concerning guilt or innocence at a trial.
6. If successful, the defendant understands that the charge(s) pending against him/her will be dismissed with prejudice, and that violation of any term of this agreement or failure to strictly comply with the terms thereof may result in revocation of the diversion and resumption of the criminal proceedings.
7. The defendant has the right to a diversion conference with the attendance of his/her attorney. This right is deemed waived upon the return of a signed and executed diversion agreement to the County/District Attorney’s Office.

*K.S.A. 2018 Supp. 22-2909(a)(1)*

Standard Conditions

The following conditions will be drafted into every diversion agreement created by the County/District Attorney’s Office. While additional conditions may be placed in specific agreements, those listed here will be adopted into every agreement regardless of severity level, character of defendant, or circumstances of the charge(s).

1. The defendant agrees not to violate the laws of the United States, or of any State, or of any political subdivision of any state, during the term of the agreement. An arrest, notice to appear, summons, or conviction on new charges may result in revocation of this agreement.
2. The defendant agrees to make payment of all diversion costs in full pursuant to the terms of the agreement. Failure to make payments as required by the terms of the agreement may result in revocation.
3. The diversion may be supervised by self-report forms, phone meetings, in person meetings, or any combination thereof. The conditions of the supervision will be laid out in the agreement.
   1. The defendant will have the duty to report to the supervising authority within [time range] any of the following: 1) Any change in contact information (residence, phone, email, etc.); 2) Any contact with law enforcement; or 3) Any change in employment.
4. As a condition of diversion, the defendant will verify under penalty of revocation of the agreement that all information contained in the diversion agreement and the diversion application are a true, accurate, and full accounting of the information known to the defendant at the time of signing each document. The defendant will have a continuing duty to report any change of information contained in either document. Falsified, inaccurate, or incomplete information, including failure to timely correct the same, will be considered a violation of the agreement and may result in revocation.
5. Pursuant to the agreement, the parties will enter a stipulation of facts. In the event of revocation, the underlying charge(s) will be brought to trial before the bench solely on the facts stipulated pursuant to the agreement. Neither party will be permitted to object to the Court’s consideration of the stipulations, nor introduce additional evidence during the guilt finding phase.

In addition to the above conditions, K.S.A. 2018 Supp. 22-2909(a)–(l) set out mandatory conditions for specific offenses. Any diversion agreement diverting one of these offenses will include those conditions set forth in the applicable subsection.

Supervision/Monitoring

Responsibilities

It shall be the responsibility of the County/District Attorney’s Office to establish supervision and progress tracking of each diversion participant throughout the duration of diversion. It shall be the responsibility of the defendant to strictly adhere to the conditions and provisions of the agreement and to provide proof of compliance with the same in a timely manner. Diversion may be supervised through in-person meetings, phone conferences, or self-reporting forms at any scheduled time range agreed to in the diversion (i.e. weekly, bi-weekly, etc.). Missing a scheduled meeting, conference, or submission of self-report form may constitute grounds for revocation.

In determining how best to supervise and track each defendant’s progress, the County/District Attorney’s Office may enlist the services of a Diversion Officer, Court Services, Community Corrections, or other third-party supervision agency to supervise the defendant’s adherence to the terms of the diversion. These may include, but are not limited to, course providers, mediation services, or mental health facilities depending on the conditions of the diversion.

Deadlines

The agreement or instruction letter will include deadlines for completion of all conditions of the diversion. These deadlines will include time to pay in full, time to complete any courses, instructions to submit urine analyses (UAs) if applicable, and time to provide proof of compliance with other diversion conditions.

The diversion supervisor will inform the defendant through the agreement or instruction letter of these deadlines. It shall be the duty of the defendant to comply with all deadlines. Failure to complete all conditions on or before the applicable deadline may constitute grounds for revocation. The County/District Attorney’s Office has no obligation to provide notice of a violation or an opportunity to remedy the same prior to seeking revocation of the diversion agreement.

Successful Completion

Upon the defendant successfully satisfying all terms of the agreement, the County/District Attorney’s Office will file appropriate paperwork with the Court to dismiss the diverted charges with prejudice. The defendant will be discharged from any further obligations regarding those charges which were successfully diverted.

*K.S.A. 2018 Supp. 22-2909(a)(1)*