

MARSHALL COUNTY ATTORNEY'S OFFICE
1201 Broadway
Marysville, KS 66508

DIVERSION POLICY

INTRODUCTION

The Marshall County Attorney adopts and publishes the following policy governing diversions of criminal and traffic offenses:

Kansas law provides that a county attorney may propose a diversion agreement if it appears that diversion would be in the interests of justice and of benefit to both the defendant and community. K.S.A. 22-2907(1). This is the goal of every diversion entered into by this office.

Diversions are criminal matters that are stayed. K.S.A. 22-2909. "Diversion" means referral of a defendant in a criminal case to a supervised performance program prior to adjudication. K.S.A. 22-2906(3). Reasonable conditions are typically imposed in diversion agreements in the interests of justice and to serve the defendant and community.

A diversion is an agreement between the prosecution and the defendant in a criminal (including traffic) case that is entered into prior to trial. The prosecution agrees to halt further court proceedings on the charge(s) being diverted for a fixed period of time on the condition that the defendant fulfills certain requirements. If the defendant fulfills all requirements of diversion, the charge(s) appearing on the complaint will be dismissed with prejudice. If the defendant fails to comply with all the requirements of diversion, then court proceedings are resumed. A diversion is similar to probation; however, the diversion period occurs prior to conviction, while a probation period occurs after conviction.

Diversion applications are handled on a case-by-case basis. Diversion is a privilege and not a right. There is no presumption in favor of diversion in any case. The burden to prove an applicant is a good candidate to learn through diversion, rather than probation, and still assure public safety, falls upon the applicant/defendant. Diversions are not available in all types of cases.

GENERAL DIVERSION INFORMATION:

The county attorney represents the State of Kansas and cannot represent you or advise you in your criminal case, including traffic cases. You have the right to obtain your own attorney to review your case and help you determine if a diversion is right for you.

The county attorney generally considers only cooperative, first-time offenders of certain low-level crimes for diversion in accordance with all the applicable provisions of the law, some of which are discussed herein. More specifically, only certain misdemeanors and only certain traffic offenses are generally even considered for diversion.

Misdemeanors involving controlled substances are not considered for diversion unless the defendant is a juvenile offender.

The following traffic offenses are not considered for diversion:

- DUI if the applicant has a prior DUI or has received a DUI diversion in their lifetime
- Driving While Suspended 2nd or Subsequent
- Driving While Habitual Violator
- Fleeing and Eluding
- Duty of Driver Involved in Injury or Fatality Accident
- Duty of Driver Involved in a Property Damage Accident
- Duty of Driver to Exchange Information and Render Aid
- Duty of Driver Striking Unattended Vehicle or Property
- Duty of Driver to Report to Law Enforcement Agency
- Speeding tickets involving high speeds of 90 mph in a 65 mph zone; or, speeds 25 mph or more over the speed limit.

The county attorney may, due to the unique facts and circumstances of a case, consider allowing a diversion beyond the normal scope.

The county attorney may, after considering all relevant factors, deny a diversion even to a first-time offender of a low-level misdemeanor or traffic case.

Generally, there is no charge for asking the county attorney's office for a diversion and receiving an answer. If you do not agree with the answer, you may hire an attorney and/or complete the attached application for diversion and formally request a second determination. In that case, the county attorney's office will respond to your request in writing.

CONSIDERATIONS FOR DIVERSION:

In determining whether a diversion is in the best interests of justice and of benefit to the defendant and the community, the county attorney shall consider certain factors, including, but not limited to, factors set forth in K.S.A. 22-2908 (a), and amendments thereto. As of 2017, the factors to be considered shall include at a minimum, but shall not be limited to, the following :

- (1) The nature of the crime charged and the circumstances surrounding it;
- (2) any special characteristics or circumstances of the defendant;
- (3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;
- (4) whether there is a probability that the defendant will cooperate with and benefit from diversion;
- (5) whether the available diversion program is appropriate to the needs of the defendant;

- (6) whether there is a probability that the defendant committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone, as defined in section 112 of the federal internal revenue code of 1986, in the armed forces of the United States of America;
- (7) if subsection (a)(6) applies to the defendant, whether there is a probability that the defendant will cooperate with and benefit from inpatient or outpatient treatment from any treatment facility or program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard with the consent of the defendant, as a condition of diversion;
- (8) the impact of the diversion of the defendant upon the community;
- (9) recommendations, if any, of the involved law enforcement agency;
- (10) recommendations, if any, of the victim;
- (11) provisions for restitution; and
- (12) any mitigating circumstances.

According to K.S.A. (2015 Supp.) 22-2908 (d), the terms “major depressive disorder,” “polytrauma,” “post-traumatic stress disorder” and “traumatic brain injury” shall mean the same as such terms are defined in K.S.A. 21-6630, and amendments thereto.

Please note that the legislature may from time to time update or change the factors for diversion that must be considered. The viewer is responsible for checking the most up-to-date law, or contacting the county attorney’s office at (785) 562-3491 to inquire if the legislature has changed the factors under the law that must be considered before a diversion is granted.

DIVERSIONS PROHIBITED BY LAW:

Be aware that K.S.A. (2015 Supp.) 22-2908 (b) prohibits the county attorney from entering into a diversion under certain circumstances which include:

- (1) The complaint alleges a violation of K.S.A. 8-1567 (DUI), and amendments thereto, and the defendant: (A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (B) has previously been convicted of or pleaded nolo contendere to a violation of that statute or a violation of a law of another state or of a political subdivision of this or any other state, which law prohibits the acts prohibited by that statute; or (C) during the time of the alleged violation was involved in a motor vehicle accident or collision resulting in personal injury or death;
- (2) The complaint alleges that the defendant committed a class A or B felony or for crimes committed on or after July 1, 1993, an off-grid crime, a severity level 1, 2 or 3 felony for nondrug crimes, a drug severity level 1 or 2 felony for drug crimes committed on or after July 1, 1993, but prior to July 1, 2012, or a drug severity level 1, 2 or 3 felony committed on or after July 1, 2012; or
- (3) The complaint alleges a domestic violence offense, as defined in K.S.A. 21-5111, and amendments thereto, and the defendant has participated in two or more

diversions in the previous five year period upon complaints alleging a domestic violence offense.

Please note that the legislature may from time to time update or change the offenses that cannot qualify for diversion by law. The viewer is responsible for checking the most up-to-date law, or contacting the county attorney's office at (785) 562-3491 to inquire if the legislature has changed the law pertaining to offenses that cannot qualify for diversion.

DIVERSION REQUIREMENTS IMPOSED BY LAW:

Be aware that K.S.A. (2015 Supp.) 22-2908 (c), imposes certain additional requirements on diversions for offenses rooted in article 10 of chapter 32 of the Kansas Statutes Annotated. Thus, with respect to the Kansas Department of Wildlife and Parks licensing, permits and offenses set forth in K.S.A. 32-1001 et seq., the conditions of diversion shall include, but not be limited to, the following requirements imposed by law:

(c) [The} diversion [must carry] the same penalties as the conviction for the corresponding violations. If the defendant has previously participated in one or more diversions for violations of article 10 of chapter 32 of the Kansas Statutes Annotated, and amendments thereto, then each subsequent diversion shall carry the same penalties as the conviction for the corresponding violations.

Please note that the legislature may from time to time update or change the additional requirements that are imposed upon diversions by law. The viewer is responsible for checking the most up-to-date law, or contacting the county attorney's office at (785) 562-3491 to inquire if the legislature has changed the law.

JUVENILES:

The legislature recently adopted new laws pertaining to juvenile offenders, including Immediate Intervention Programs as set forth in K.S.A. (2017 Supp.) 38-2346 and related law.

At the current time, juveniles in Marshall County are still considered for diversion in accordance with policies issued by the Marshall County Attorney's office. However, the juvenile law will be considered when evaluating whether a juvenile qualifies for diversion.

TYPICAL DIVERSION FEES/COSTS:

There are fees/costs and requirements associated with a diversion. Examples include, but are not limited to: fines, court costs, restitution, court-appointed attorney fees, KBI laboratory testing fees, community service/donations, diversion fee, and other requirements apply. If it appears you qualify for a diversion, you can request that the Marshall County Attorney's Office provide you an estimate based upon the offense(s) for which you were charged. Once you decide to enter into a diversion agreement, the written diversion agreement itself will also set forth all costs, fees and requirements.

APPLYING FOR DIVERSION:

A person desiring a diversion may contact the Marshall County Attorney's Office by phone (785) 562-3491; or call to set up an appointment to visit the office; or by referral by the court. The terms of your diversion, based upon the underlying offense and circumstances, will be explained to you. There is no cost for the initial request for a diversion.

If your diversion is granted, you will receive paperwork for your review prior to signing and providing a payment to the county attorney's office, including a Stipulation of Facts, Diversion Agreement, and Diversion Order. If you do not have an attorney, you will be expected to sign a Waiver of Right to be Represented by an Attorney. If you have an attorney, the paperwork will be provided to your attorney for review and your attorney will contact you with regards to signing the documents and payment. Once the county attorney's office receives a signed copy of all documents and the required payment, the county attorney will sign and file the diversion documents with the court.

If your diversion is denied, you or your attorney will be told why.

If you do not agree with the initial denial of your diversion, **you may hire an attorney and/or complete the attached application for diversion and formally request a second determination for a \$25 fee that must be submitted with your application in order to be considered.**

It has been our experience that many people learn from a diversion and do not re-offend. We often find it a positive and pleasant experience to work with people on diversion. Our office wants you to succeed. However, it is up to you. If a diversion is granted, it is your responsibility to comply with the terms and conditions of diversion. If the terms and conditions of diversion are not met, a motion to revoke your diversion may be filed. Please note the Statement of Facts will be presented at court at that point to seek a conviction. When diversion proceedings are resumed at any level, the proceedings are based upon the record of the stipulation of facts.

The diversion policy of the Marshall County Attorney may be modified at any time.



Laura Johnson-McNish
Marshall County Attorney

SIGNED AND EFFECTIVE DATE: January 1, 2018

DIVERSION APPLICATION
(Effective January 1, 2018)

If your diversion was denied and you disagree with the determination, you may complete this application stating your position. A \$25 fee must be received or your application will not be considered.

NAME: _____ PHONE: _____

ADDRESS: _____
Street City State Zip

YOUR AGE: _____ YOUR DATE OF BIRTH: _____

YOUR DRIVER'S LICENSE AND STATE # _____

YOUR ATTORNEY'S NAME: _____

Are you in school? If so, what school, and what grade/level?

List all your prior convictions (provide name of offense, year occurred, and where the offense occurred. Attach additional sheets if necessary):

Do you have a CDL (Commercial Driver's License): _____ yes _____ no What State? _____

Have you received a prior diversion? Please provide name of offense, year and where occurred:

Why do you disagree with the denial of your diversion request? Why do you believe you are a good candidate for diversion? (Attach additional pages if necessary)

GENERAL INFORMATION REGARDING DIVERSIONS
 COSTS/FEEES/REQUIREMENTS
 (As of January 1, 2018)

Generally, adult diversions include the following costs:

Diversion Fee	\$ 25 to \$100	\$25 Minimum to \$100 maximum
Court Costs	\$108 or \$158	\$108 Traffic or \$158 misdemeanor
Fines	\$	(Based upon underlying offense)
Restitution	\$	(Based upon underlying offense)
Booking Fee	\$ 45	
Court Appointed Attorney Fees	\$300	\$0 if no attorney
Donation LETF *	\$ 75	\$0 if Diversion Fee is \$100
Donation to LETF or Community Service Hours **	25 hours	

* LETF: Law Enforcement Training and Equipment Fund

** Community Service Hours: A donation of \$250 to the LETF can be made in lieu of community service hours.

Typically the 25 hours of community service must be provided to a not-for-profit organization that is exempt by the IRC under 501(c)(3), or a governmental entity that levies taxes. Community service hours require proof of time donated signed by a person who supervised the donated time.

Some diversions have additional costs, for example:

KBI Lab Fees \$400

Diversions at times impose additional costs as part of the requirements, such as the cost of an alcohol and drug information class; the cost of an alcohol and drug evaluation and treatment; the cost of a batterer's intervention evaluation and treatment; the cost of a mental health evaluation and treatment, etc. Approved providers must be used for evaluations and treatment. The payment of these costs is between the provider and the diversion applicant. Only the requirement that the task be completed will be set forth in the diversion.

The applicant for diversion must pay \$100 plus court costs in order for the diversion to be filed. The remaining costs itemized in the diversion agreement can be paid as a condition of diversion throughout the diversion period. Extensions of diversions may be requested in order to obtain more time to pay off the cost of the diversion.

Juvenile diversions are similar, except for the following:

Diversion Fee	\$25
Community Service Hours:	10 hours