

DUI PRE-TRIAL DIVERSION SUPPLEMENT

1. All pre-trial diversion referrals are discretionary decisions made after a consideration of the totality of the circumstances surrounding the particular offense to be referred and the particular offender to be referred. Meeting the objective “criteria” does not create an entitlement to pre-trial diversion.

2. Some confusion has arisen in the past as to what constitutes a “crash.” This is not a term that can be sufficiently defined to cover every situation which may arise. Every driver has a duty to not strike other things or beings with their vehicle. A breach of that duty may arise from simple negligence, culpable negligence, or a knowing or intentional criminal action. When someone is driving while impaired and they strike another thing or being with his or her vehicle, if there is *any* causation attributable to the defendant, then that is sufficient to charge the defendant with DUI property damage, bodily injury, serious bodily injury, or DUI manslaughter. The pre-trial diversion program, is a discretionary program, however, and it need not have the same exact standards as what would be required for an enhanced DUI charge. Therefore, for the purposes of consideration into the pre-trial diversion program, a “crash” certainly includes:

- a. Hitting another human being with a vehicle;
- b. Hitting an animal with a vehicle;
- c. Hitting someone else’s vehicle; or
- d. Hitting someone else’s public or private tangible property.

A “crash,” like anything else, can be established by circumstantial evidence. Damage to the defendant’s vehicle, and damage to other things and beings, can circumstantially establish that a “crash” has occurred. However, this is subject to a totality of circumstances analysis, and just because, for example, a flat tire standing alone may not force the inescapable conclusion that a “crash” has occurred, it does not create an entitlement to participation in the pre-trial diversion.

A low-speed collision with a cement block at the front of some parking spaces which does not result in damage to the cement block will not mean an automatic exclusion from pre-trial diversion, but rather, than circumstance will be considered in the totality of circumstances analysis.

“Driving Pattern and/or decision to drive must not have created a substantial public safety concern.”

3. Anyone who operates a motor vehicle while impaired by alcohol or controlled substances presents a risk to all of the people and things that share the roadways (and surrounding areas) with such a person. The *mens rea* for DUI is the same as DUI with property damage, DUI with personal injury, DUI with serious bodily injury, and DUI manslaughter. The legislature and the courts have found that it is fair that impaired drivers who damage property, injure people, seriously injure people, and kill people while driving under the influence be punished more severely despite the fact that they all share making the same intentional choice to drive while impaired and there is no requirement that a separate intent to damage property, injure people, or kill people be proven.

4. Therefore, the driving while impaired statutory scheme is somewhat premised on a results based analysis rather than an evaluation of a particular offender's *mens rea* or even breath or blood alcohol levels. Thus, while one impaired driver may be stopped for a non-moving infraction such as a faulty license tag light and have a breath alcohol level of .210g/210L and be accepted into pre-trial diversion, another may have a driving pattern that creates a substantial public safety concern and have a breath alcohol level of .090g/210L.

5. There is no way to sufficiently define what is or is not "a driving pattern and/or decision to drive which creates a substantial public safety concern" sufficiently to cover every driving pattern scenario. However, some factors seem relevant to this analysis:

a. A driver who is asleep, passed out, blacked out, or otherwise not conscious, and is not in a legal parking space, is a strong demonstration that his or her decision to drive created a substantial public safety concern. If a driver is so impaired that his or her more rudimentary brain functions controlling consciousness and unconsciousness are malfunctioning, this goes well beyond simply impairing the higher functions first affected by ethanol and controlled substances. Essentially, there is a safer inference to be drawn that this particular driver was much closer to being a DUI manslaughter defendant than another impaired driver.

b. A driver who cannot maintain his or her vehicle on the roadway is a strong demonstration that his or her decision to drive created a substantial public safety concern. Countless DUI manslaughters and DUI SBIs arise from pedestrians and people waiting at bus stops being hit by impaired drivers.

c. A driver who goes the wrong way on a one way street, or especially a high speed expressway, is a strong demonstration that his or her decision to drive created a substantial public safety concern.

d. A driver who would have committed DUI property damage, personal injury, serious personal injury, or DUI manslaughter but for the evasive actions of another or others is a strong demonstration that his or her decision to drive created a substantial public safety concern.

e. A driver who runs a stop light or a stop sign is a strong demonstration that his or her decision to drive created a substantial public safety concern. The totality of the circumstances, as with every case, shall be considered, and the totality of circumstances include: the visibility of the intersection from each direction, the volume of vehicular and pedestrian traffic, the speed the defendant was driving, and the length of time the light was red.

This is in no means an exhaustive description of what a "crash" and "substantial risk" include, but is rather meant to provide logical factors to consider when considering referring an offender to pre-trial diversion because they reflect the logical factors that in part go into deciding whether any offender is to be approved for pre-trial diversion.