

Public Defender Involvement in Diversion Programs

As background on pre-trial intervention and diversion programs, the state constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they may simply decide not to prosecute the offense in its entirety.¹ Absent a statute to the effect, "a court has no power ...to dismiss a criminal prosecution except at the instance of the prosecutor."² Additionally, where a solicitor makes a decision, "such as there shall be no pretrial diversion programs established for summary court cases - that decision is binding and must be followed."³

While solicitors are responsible for all diversion and pre-trial intervention programs, the General Assembly has stated its intent is that they are "cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety."⁴ Since the clients of public defenders are eligible for diversion programs, circuit public defenders may have an informed opinion on the types of programs that may or may not be successful in helping reduce recidivism.

The Committee asks the Commission on Indigent Defense what it, and circuit public defender's offices, involvement (e.g., input into structure of current programs or additional programs to offer in the future; etc.) is in the diversion and pre-trial intervention programs, outside of plea negotiations for indigent clients. The agency provides the information in Table 1 in its September 7, 2018 letter to the Committee.⁵

Table 1. Public defender involvement in diversion programs, if any, by circuit.

Circuit	Circuit Public Defender involvement in Diversion Programs in their Circuits
1 Calhoun, Dorchester, Orangeburg	1 st Circuit has little direct involvement in the diversion programs. The exception may be that we do have a public defender on the Dorchester drug court review and recommendation committee. This group reviews persons enrolled in the program who have not followed all the requirements and recommends their retention or expulsion from the program. We also have a staff person in Orangeburg and Dorchester Counties who seeks alternative sentencing programs for persons with addiction, mental health and vocational issues. While not technically a diversion program it creates alternatives to traditional incarceration for clients by getting them into programs to help treat the underlying issues in their lives.
2 Aiken, Bamberg, Barnwell	2 nd Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit. Recently, the CPD Office has been asked to attend weekly Drug Court meetings, so we could advise participants who were being sanctioned or locked up. We have asked to start a Mental Health Court, but there has been no progress.
3 Clarendon, Lee, Sumter, Williamsburg	3 rd Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.

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<p>4</p> <p>Chesterfield, Darlington, Dillon, Marlboro</p>	<p>4th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p>
<p>5</p> <p>Kershaw, Richland</p>	<p>Other than homeless court, the 5th Circuit Public Defender Office does not have any input in this process at all. Our Solicitor runs all programs and does not request any input from the CPD.</p>
<p>6</p> <p>Chester, Fairfield, Lancaster</p>	<p>6th Circuit Public Defender Office is involved in the Drug Court Multidisciplinary Team, who have input into who gets in the program and the treatment and sanctions imposed on the participant. Other than Drug Court the CPD had no input in any other Diversion Program in their circuit.</p>
<p>7</p> <p>Cherokee, Spartanburg</p>	<p>In Spartanburg County, the public defender had some input in the creation of the Drug Court program and, most recently, in the Juvenile Drug Court program. But in the Seventh Circuit, the public defender had no input in other solicitor-run diversion programs, other than negotiations to get our clients in the program.</p> <p>There was an attempt to create a Veteran's Court program, in which the CPD attempted to get involved. However, when the solicitor's office decided to make it a diversion program run by their office, the CPD had no input, and the solicitor's office has gotten one or two private attorneys to volunteer to represent the clients in the "Veteran's Court." The CPD Office is not involved in this program at all.</p>
<p>8</p> <p>Abbeville, Greenwood, Laurens, Newberry</p>	<p>8th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p>
<p>9</p> <p>Berkeley, Charleston</p>	<p>In Charleston County, the Public Defender's Office is involved in structure and teamwork supporting in Adult Drug Court, the Adult Mental Health Court, and the Juvenile Drug Court. The same is true in the Berkeley County Adult Drug Court.</p> <p>Charleston County has an active Criminal Justice Coordinating Council. The PD plays an active role. We have the MacArthur Safety and Justice Initiative funding that has fostered the local police looking for alternatives to arrest. This includes a Crisis Stabilization Center for police calls involving mentally ill persons who can safely be referred to this clinic and then back into the mental health system. We are adding sobering beds for police calls where an intoxicated person can safely be diverted from arrest for drunk calls to a place to sober up. We also are advocating for additional probate supervision with mental health for offenders who are mentally ill and incompetent and unable to be restored to competency.</p>

Circuit	Circuit Public Defender involvement in Diversion Programs in their Circuits
<p>10 Anderson, Oconee</p>	<p>10th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p> <p>Anderson County has recently formed a Criminal Justice Coordinating Council (CJCC), so the CPD Office may be more involved if other diversion programs are created. There is discussion of a mental health court and veterans court presently.</p>
<p>11 Edgefield, Lexington, McCormick, Saluda</p>	<p>11th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p>
<p>12 Florence, Marion</p>	<p>12th Circuit Public Defender Office has no input in the PRI program. However, for the Juvenile Drug Court and Adult Drug/DUI Court our office has an attorney present at the weekly meetings of these Courts. As each of the participant's names are brought up and their progress is tracked, our attorney weighs in on discussions concerning the participants' promotion through the program. Alternatively, if a participant has violated the rules and is facing sanctions, our attorney participates in the decision about the appropriate sanction to be faced for the violation.</p>
<p>13 Greenville, Pickens</p>	<p>13th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p>
<p>14 Allendale, Beaufort, Colleton, Hampton, Jasper</p>	<p>14th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p>
<p>15 Georgetown, Horry</p>	<p>15th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p> <p>Horry and Georgetown Counties have the following Programs: Mental Health Court, Drug Court, PTI, and Life Recovery. Only the Solicitor can admit a potential defendant even though there are defense attorneys on both the Mental Health and Drug Court "Boards".</p>
<p>16 Union, York</p>	<p>16th Circuit Public Defender Office has no input into the structure of the current Diversion Programs in their Circuit.</p> <p>This is vastly different from the way we originally set up our Drug Court back in the mid-1990s. During the inception of Drug Court, we were very involved in the process and helped shape not only policy but had input in determining how to handle participants who were struggling in the program. Unfortunately, that is no longer the case. Over the years the Solicitor's office has gained more control over the process, and as a consequence our influence has diminished.</p>

¹ State v. Needs (S.C. 1998) 333 S.C. 134, 508 S.E.2d 857, rehearing denied.

² State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977), citing to State v. Brittain, 263 S.C. 363, 210 S.E.2d 600 (1974); see also Op. S.C. Attorney General 1999 WL 1390355 (November 29, 1999) (“The determination to proceed with criminal charges is a function of the executive branch of government, not the judicial branch. State v. Tootle, 330 S.C. 512, 500 S.E.2d 481 (1998) (stating that “judicial discretion cannot be substituted for that of an executive body.”) As a general rule, the prosecuting officer’s decisions to prosecute and dismiss are almost entirely within his discretion.”)

³ Op. S.C. Attorney General, 2018 WL 3494001 (July 3, 2018); see also, Order of Chief Justice re Pretrial Diversion Programs, September 12, 2003 (“THEREFORE, IT IS ORDERED THAT pursuant to S.C. Code Ann. Section 17-22-10 et. seq., only solicitors of this State are authorized to establish a pretrial intervention program. Accordingly, no other agency, municipality, county government or member of the judiciary, either circuit, municipal, or magistrate, shall establish, recognize by use refer or permit the referral of any offender to any other pretrial intervention or other diversion’ program resulting in the non-criminal disposition of any offense not addressed in this Order or approved by the solicitor. Only solicitors are statutorily authorized to effect a non-criminal disposition of a charge pending against an offender in the event that offender successfully completes an authorized pretrial intervention program. According, a magistrate, municipal, or circuit court judge has no authority to effect a non-criminal disposition of any charge based on the completion of a diversion program without the consent of the solicitor. Finally, no magistrate, municipal, or circuit court judge shall issue an order directing the destruction of any official records relating to an offender’s arrest without the written consent of the solicitor or his designee verifying the offender has successfully completed the pretrial intervention program operated by the solicitor or any other diversion program that has been-approved for use by the solicitor.”)

⁴ 2010 Act No. 273 (Omnibus Crime Reduction and Sentencing Reform Act), Part II, Section 44, eff January 1, 2011.

⁵ S.C. House of Representatives, House Legislative Oversight Committee, “Letter from SCCID to Oversight Subcommittee with attachments (Sept. 7, 2018), Agency’s Response to Oversight Subcommittee’s August 17, 2018 Letter, Questions #4,” under “Committee Postings and Reports,” under “House Legislative Oversight Committee,” under “Indigent Defense, Commission on,” and under “Correspondence,” [https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/IndigentDefense/Letter%20from%20SCCID%20to%20Oversight%20Subcommittee%20with%20attachments%20\(Sept.%207,%202018\).pdf](https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/IndigentDefense/Letter%20from%20SCCID%20to%20Oversight%20Subcommittee%20with%20attachments%20(Sept.%207,%202018).pdf) (accessed October 12, 2018).