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Kitsap County Prosecuting Attorney

Mission Statement
And
Standards and Guidelines

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Introduction

This document will be used primarily by deputy prosecutors and other professionals in the criminal justice system. It's a guidebook for understanding the public prosecution function in Kitsap County, Washington. A judge, a lawyer, or a police officer can find in it the answers to most of their questions about our approach to charging and disposing of criminal cases. We hope it becomes a useful tool.

However, its true value comes from the way it was developed. The process began in 1995. In that year, a volunteer group of citizens donated weeks of their time to understanding and questioning our procedures. They also stepped forward with suggestions on what our priorities should be. Their work produced our first set of Standards and Guidelines, and it stood the test of time very well. But after eight years it was time to re-examine our procedures. We asked Leadership Kitsap (LK) to help update this guidebook.

The Leadership Kitsap Alumni Connection Team assumed the job of putting our working group together. LK alumni Terrie O'Neill, Mike Savage, and Rick Tift led this part of the effort. They gathered representatives from local government, our police agencies, the defense bar, and the community at large. Leadership Kitsap graduate Janet Mayberry agreed to act as our chair.

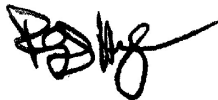
Just as before, the review team spent many evening hours making the effort to understand the role of our office. Then they challenged us on how we define that role and meet our obligations. Their questions were direct, and we had to give straight answers. Our Standards and Guidelines, the 2003 version, is as good as it is because of their hard work.

Thanks to Leadership Kitsap for building the review team, and thanks to the following individuals, all of whom participated in the production of this working document. They exemplify the cooperative spirit that makes Kitsap County special.

Janet Mayberry, Chair and LK Grad.
Arthur Avedisian, Vice-Chair
Rick Bialock,
Patty Bronson,
Chris Casad,
Paul Drzewiecki,
Cindy Goetzmann,
The Hon. Jim Henry, Poulsbo City Council
Tim Kelly,
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Sincerely,



Russell D. Hauge
Kitsap County Prosecuting Attorney

Mission, Goals and Priorities

Mission Statement of the Office of Kitsap County Prosecuting Attorney

Seek the Just Result

Goals of the Office of the Kitsap County Prosecuting Attorney

1. To respond appropriately and as quickly as is possible to a request for service from any person or entity entitled to that service, particularly victims of crimes.
2. To do all we can to protect the interests of victims within the criminal justice system.
3. To recruit, develop, and maintain a diverse staff committed to our mission and capable of effectively discharging all of our duties and obligations.
4. To support our staff by providing a congenial and safe workplace, opportunities for professional growth, a manageable workload, and fair compensation.
5. To regularly report to the public, in a coherent manner, our activities and candid evaluation of the performance of our duties and obligations.
6. To establish and maintain effective working relationships with the courts, the police agencies, the corrections agencies and all the other entities of the justice system.
7. To promote good relations among the governmental entities we serve.

Priorities of the Office of the Kitsap County Prosecuting Attorney

1. **Aggressive and efficient prosecution, ensuring accountability for criminal behavior in Kitsap County. We will allocate our resources to address the following issues in descending order:**
 - a. Violent crime against children, including sexual assaults and domestic violence (DV);
 - b. Violent crime against others, including sexual assaults and domestic violence (This category includes vehicular homicide, vehicular assault, felony DUI and multiple DUI offenders);
 - c. Juvenile offenders;
 - d. Hate/bias crime;
 - e. Identity theft and economic crimes against vulnerable persons (e.g. the elderly; the disabled);
 - f. Adult drug offenses;
 - g. Alcohol-related traffic offenses;
 - h. Offenses involving animal abuse, provided, however, that offenses against service animals shall be treated as violent crimes against persons;
 - i. Economic crime
(Priority proportional to adverse economic impact: the greater the impact— whether on an individual, individuals or business interests, the greater our devotion of resources to seeking sanction);
 - j. Major traffic offenses not a function of drug or alcohol abuse;
 - k. Restitution for victims of violent crime;
 - l. Confiscation of the fruits of drug crime;
 - m. Restitution for victims of economic crime;
 - n. Prosecution of traffic infractions;
2. **Sound legal advice to, and vigorous advocacy for our County clients.**
3. **Appropriate, aggressive, and efficient establishment and enforcement of child support obligations.**

Kitsap County Prosecuting Attorney General Standards and Charging Disposition Guidelines

Introductory Note:

These General Standards and Guidelines serve several purposes. First, Standards and Guidelines help ensure uniformity in the exercise of discretion by the members of the Office of the Kitsap County Prosecuting Attorney. Next, these Standards and Guidelines provide notice to the other participants in the justice system of the presumptive approach of the Prosecutor's Office. Departure from these Standards and Guidelines should be the subject of inquiry by any interested party. Finally, these Standards and Guidelines are intended to show our commitment to the public to explain fully and be accountable for our actions. We want the public to know how and why we reach the decisions required of us as representatives of the citizens of the State of Washington. However, these Standards and Guidelines are advisory only. The only right or entitlement they are intended to create is the right to a careful review by this office. They are specifically not intended to, nor do they, confer any other substantive or procedural rights or entitlements on any person or persons.

Charging Standards and Guidelines

General Standard:

It is the policy of the Office of the Kitsap County Prosecuting Attorney to charge the crime or crimes that accurately reflect the defendant's criminal conduct, taking into account reasonably foreseeable defenses, and for which we expect to be able to produce at trial proof beyond a reasonable doubt.

Charging Factors:

In determining what charge or charges to file, the charging deputy prosecutor will consider fully the following factors:

1. Standards of Evidentiary Sufficiency:

- a. Crimes against persons.** Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. (RCW 9.94A.411). The category, "Crimes Against Persons" includes, but is not limited to the following named charges:

1. All homicide including vehicular homicide and manslaughter
2. Rape, all degrees
3. Child Molestation, all degrees
4. Kidnapping, all degrees
5. First, Second, and Third Degree Assaults/Assault of a Child
6. Fourth Degree Assault, Domestic Violence Setting
7. Fourth Degree Assault, Special Sexual Motivation
8. Vehicular Assault, and Felony DUI
9. First and Second Degree Robbery
10. First and Second Degree Arson
11. First and Second Degree Burglary
12. First and Second Degree Extortion
13. Incest
14. First Degree Promoting Prostitution
15. Intimidating a Juror
16. Communicating with a Minor
17. Intimidating a Witness
18. Bomb Threat against a Person
19. Unlawful Imprisonment
20. Any crime not specifically listed in which a hate/and/or bias is a motivating factor
21. Violations of the Uniform Controlled Substances Act involving delivery, manufacture, or possession with intent to deliver a controlled substance
22. Promoting a Suicide Attempt
23. Riot (if against a person)
24. Stalking
25. Custodial Assault
26. Domestic Violence Court Order Violation
27. Counterfeiting (if violation of RCW 9.16.035(4))
28. Indecent Liberties
29. Intimidating a Public Servant
30. Attempting to Elude a Pursuing Police Vehicle

- b. Crimes against property/other crimes.** Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised. The category "Crimes Against Property/Other Crimes" includes, but is not limited to, the following named charges:

1. First and Second Degree Escape
2. First and Second Degree Theft
3. First and Second Degree Perjury
4. First and Second Degree Introducing Contraband
5. First and Second Degree Possession of Stolen Property
6. Bribery
7. Bribing A Witness
8. Bribe received by a Witness
9. First and Second Degree Malicious Mischief
10. Second Degree Theft
11. Second Degree Escape
12. Second Degree Introducing Contraband
13. Second Degree Possession of Stolen Property
14. Second Degree Malicious Mischief
15. First Degree Reckless Burning
16. Taking A Motor Vehicle W/O Authorization
17. Forgery
18. Welfare Fraud
19. Second Degree Perjury
20. Second Degree Promoting Prostitution
21. Tampering With a Witness
22. Trading in Public Office
23. Trading in Special Influence
24. Receiving/Granting Unlawful Compensation
25. Bigamy
26. Willful Failure to Return from Furlough
27. First and Second Degree Theft of Livestock
28. Violations of the Uniform Controlled Substance Act Involving Simple Possession
29. All Other Unclassified Felonies
30. Bomb Threat (if against property)
31. Escape from Community Custody
32. Riot (if against property)

Charging Standards and Guidelines (Continued)

Charging Only After Complete Investigation:

Charges should not be filed until the investigation is complete. RCW 9.94A.411. A prosecuting attorney depends on law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure through follow-up communication with the investigators that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following:

1. The interviewing of all material witnesses, together with the obtaining of written statements whenever possible;
2. The completion of necessary laboratory tests; and
3. The obtaining, in accordance with constitutional requirements, of the suspect's version of the events.
4. If the initial investigation is incomplete, a prosecuting attorney should insist upon further investigation before a decision to prosecute is made, and specify what the investigation needs to include.
5. The prosecutor should be fully advised of the investigatory techniques that were used in the case investigation including:
 - a. Polygraph testing;
 - b. Hypnosis;
 - c. Electronic surveillance; and
 - d. Use of Informants
6. **Exceptions:** In certain situations, a prosecuting attorney, with the permission of the Prosecutor or relevant Division Chief or Senior Deputy Prosecuting Attorney may authorize filing of a criminal Information or Complaint before the investigation is completed if:
 - a. Probable cause exists to believe the suspect is guilty; and
 - b. The suspect presents a danger to the community or is likely to flee if not apprehended; or
 - c. The arrest of the suspect is necessary to complete the investigation of the crime.

In the event that the exception to the standard is applied, the prosecuting attorney shall obtain a commitment from the law enforcement agency involved to complete the investigation in a timely manner. If the subsequent investigation does not produce sufficient evidence to meet the normal charging standard, the charge should be dismissed.

Exceptions to the General Standards:

The Office of the Kitsap County Prosecuting Attorney may depart from the general charging standards in a particular situation under the following circumstances:

1. It may be proper to charge a particular defendant with a crime with less evidence available than would normally be required if the defendant, as judged by his or her past behavior, presents a threat to public safety.
2. It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution. RCW 9.94A.411(1)(c).
3. It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement and conviction of the new offense would not merit any additional direct or collateral punishment, the new offense is either a misdemeanor or a felony which is not particularly aggravated, and/or conviction of the new offense would not serve any significant deterrent purpose. RCW 9.94A.411(d).
4. It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county and conviction of the new offense would not merit any additional direct or collateral punishment, conviction in the pending prosecution is imminent, and/or the new offense is either a misdemeanor or a felony which is not particularly aggravated. RCW 9.94A.411(e).
5. It may be proper to decline to charge where the cost of locating or transporting witnesses or the burden on prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question. This reason should be limited to minor cases and should not be relied upon in serious cases. RCW 9.94A.411(f).
6. It may be proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law. RCW 9.94A.411(g).
7. It may be proper to decline to charge where information from an accused will reasonably lead to the conviction of others who are responsible for more serious criminal conduct or who represent a greater danger to the public interest. RCW 9.94A.411(h).

Charging Standards and Guidelines (Continued)

8. It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involved the following crimes or situations:
 - a. Non-Domestic Violence assault cases where the victim has suffered little or no injury. Care should be taken to ensure that the victim's request is freely made and is not the product of threats, or pressure by the accused. 9.94A.411(i);
 - b. Crimes against property, not involving violence, where no major loss was suffered; and
 - c. Where doing so would not jeopardize the safety of society.
9. It may be proper to decline to file charges where there is a prior relationship between the parties and the circumstances leading up to the crime suggest that the victim shares responsibility for the transaction. However, this factor shall not be considered when the criminal transaction encompasses an act of domestic violence.
10. It may be proper to decline to file charges where the suspect has agreed to pay restitution or has agreed to return property to the victim.
11. It may be proper to decline to file charges where the suspect has cooperated with law enforcement or is willing to cooperate with law enforcement in the future.
12. Application of criminal sanctions would be contrary to legislative intent. RCW 9.94A.411(1)(a).
13. The statute that prohibits the defendant's criminal conduct is an antiquated statute that serves no deterrent or protective purpose in today's society. RCW 9.94A.411(1)(b).

Prohibited Factors:

The following facts shall never be considered in determining the appropriate charge or charges:

1. The gender or marital status of the defendant;
2. The race or ethnic origin of the defendant;
3. The creed or religion of the defendant;
4. The economic or social class of the defendant; and/or
5. The sexual orientation of the defendant

Firearm Forfeiture:

Whether or not there is sufficient evidence to sustain a criminal charge with proof beyond a reasonable doubt, firearms involved in any referred criminal transaction **should be considered for seizure and forfeiture, provided that firearms belonging to and used by a victim in defense of him-or-herself or in the defense of others shall not be forfeited.**

Appeal of Decision to Decline to File Charges:

The specific reasons for declining a case shall be set forth on a decline form which shall become part of the Prosecutor's case file. A copy of the form shall be given to the officer representing the police agency that originated the case. The decline form shall state that the decision to decline may be appealed to the Chief of the relevant Criminal Division or to the Prosecutor. The Prosecutor shall personally review any decline at the request of the Chief of the originating police agency, or his or her designee, or of the Sheriff, or his or her designee.

Any citizen involved in a criminal transaction in any capacity other than as a suspect or defendant may also seek review of the decision to decline to file the charges. Inquiry should first be directed to the deputy prosecutor responsible for the charging decision. If necessary, further inquiry shall be directed to the Chief of the relevant Criminal Division and then, in turn, to the Prosecutor. If the inquiry reaches the Prosecutor, the response to the citizen shall be in writing and made part of the permanent case file.

Charging Standards and Guidelines (Continued)

The Charging of Enhancements in Felony Cases:

This provision applies to (1) deadly weapon enhancements pursuant to RCW 9.94A.602 and 9.94A.510; (2) school zone enhancements for controlled substance violations pursuant to RCW 69.50.435 and 9.94A.510; (3) custody enhancements for controlled substance violations pursuant to RCW 69.50.401 and 9.94A.510, and (4) to any other enhancement of punishment that can be applied through the exercise of the prosecutor's discretion.

It is the policy of the Office of the Kitsap County Prosecuting Attorney that enhancements should be charged conservatively. This policy assumes that a defendant will be charged with a crime or crimes that accurately reflect his or her criminal conduct. However, enhancements will be considered in every appropriate case and may be charged if the addition of the enhancement would more accurately reflect the defendant's criminal conduct. In addition, enhancements may be added through amendment to the original charge if that amendment would enhance the strength of the State's case at a trial.

Multiple Counts and Degree of Crime:

Charges should be filed which adequately describe the nature of the defendant's conduct. Other offenses may be charged if they are necessary to enhance the strength of the State's case at trial or will result in restitution to all victims. RCW 9.94A.411.

Counts and degrees of charge should initially be filed conservatively. Cases *shall* not be charged with multiple counts or with enhanced degrees of a crime or crimes in order to later obtain a guilty plea by offering to drop charges or counts. The defendant will be expected to plead guilty to the initial Complaint or Information or go to trial.

Charge Upgrade:

If the defendant does not plead guilty to the initial charge or charges, additional counts may be added, the degree of the crime may be increased, and enhancements may be added to the original charges to increase the strength of the State's case at trial and/or to ensure restitution to all victims of the defendant's criminal conduct.

Charge Reduction:

Although a defendant will be expected to plead guilty to the degree of charge and number of counts filed, in certain circumstances a plea agreement with a defendant in exchange for a plea of guilty to a lesser charge or charges may be necessary and in the public interest. Such situations may include the following:

1. To correct an error made in the original charging decision; or
2. Evidentiary problems appear that make conviction on the original charge or charges doubtful and which were not apparent at the time of filing; or
3. Facts are discovered that mitigate the seriousness of the defendant's conduct; or
4. Reconsideration shows a material change in the charging or exception factors described above.

Reductions in the severity of the charge or number of counts shall be made only upon approval of a Senior Trial Deputy, the relevant Division Head or the Prosecuting Attorney. The person authorizing the reduction shall be identified in the case file.

Dismissals:

Dismissals shall be appropriate only in the following circumstances:

1. To correct an error made in the original charging decision; or
2. Evidentiary problems appear that make conviction on the original charge or charges doubtful and which were not apparent at the time of filing; or
3. Reconsideration shows a material change in the charging or exception factors described above.

Dismissals must be approved by the relevant Division Head, Senior Deputy Prosecuting Attorney or the Prosecutor. Reasons for the dismissal shall be set forth in the case file.

Sentencing Recommendations, General Considerations

General Standard:

In recommending sentences to the Court, and consistent with RCW Chapter 9.94A, Washington's Sentencing Reform Act, it is the policy of the Office of the Kitsap County Prosecuting Attorney to:

1. Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
2. Promote respect for the law by providing punishment which is just;
3. Be commensurate with the punishment imposed on others committing similar offenses;
4. Protect the public;
5. Offer the offender an opportunity to improve him-or-herself;
6. Make frugal use of the State's resources; and
7. Reduce the risk of reoffense by offenders in the community

The policies expressed above should apply equally to prosecutions of felonies, misdemeanors and juvenile matters.

Sentence Recommendation at Charging; Withdrawal of Plea Agreements:

With the charging document, or as soon as is reasonably possible thereafter, a proposed Plea Agreement in the form currently prescribed by the relevant Court should be delivered to the Defendant or his or her counsel. The sentencing recommendation contained in the Proposed Plea Agreement may be accepted by the Defendant by a plea of guilty through the date of the Omnibus or Pre-Trial Hearing or other relevant hearing in District or Juvenile Court unless earlier withdrawn.

1. If the Defendant fails to accept the Offer at or before the Omnibus or Pre-Trial hearing or other relevant hearing in District or Juvenile Court, the Proposed Plea Agreement should be withdrawn. If not withdrawn at this point, the reasons for extension of the deadline for acceptance of the agreement, and the new deadline, shall be entered in the Prosecutor's case file.
2. If withdrawn, a notation that the Proposed Plea Agreement has been withdrawn, with the date of withdrawal, shall be placed in the Prosecutor's case file by the responsible deputy prosecutor.
3. The defendant, through counsel, shall be notified in writing that the Proposed Plea Agreement is withdrawn. A new recommendation in accordance with these policies, the Sentencing Reform Act, and with any additional counts, charges, or enhanced degrees may be communicated to the defendant by the assigned Trial Deputy. Any subsequent plea agreement that reduces the charge or the number of counts must be approved by the Prosecutor, the Chief of the relevant criminal division, or a Senior Deputy Prosecutor assigned to a criminal division.

Disposition Factors:

The charging deputy shall consider the following factors in making a sentence recommendation:

1. Whether the defendant has a history of criminal activity and the seriousness of said criminal history;
2. Whether the defendant agrees to an early plea (this takes into account that an early plea reduces the impact upon the limited resources of the criminal justice system and avoids the adverse impact of further hearings and a trial upon the victim and witnesses);
3. Whether the suspect has agreed to pay restitution or has agreed to return property to the victim;
4. Whether the defendant cooperated with law enforcement or is willing to cooperate with law enforcement in the future;
5. Potential evidentiary problems which may make obtaining a conviction doubtful;
6. The probable effect on witnesses;
7. A request by the victim when it is not the result of pressure from the defendant; and
8. Any of the charging factors and exceptions listed above. This would include any factors that were not sufficient to merit declining to file a charge or charges, but do merit consideration in making a sentencing recommendation.

Prohibited Factors:

The following facts shall never be considered in determining the appropriate sentence recommendation:

1. The gender or marital status of the defendant;
2. The race or ethnic origin of the defendant;
3. The creed or religion of the defendant;
4. The economic or social class of the defendant; and/or
5. The sexual orientation of the defendant.

Firearm Forfeiture:

Without exception, all plea agreements and judgements will require the forfeiture of any and all firearms used by the defendant.

All Plea Agreements to be Honored:

All plea offers made by any prosecutor and accepted by the defendant according to the terms of the offer shall be honored and fairly presented. However, all plea agreements are conditional. The Prosecutor's office is released from the plea agreement's obligations if the agreement is found to be based upon a significant mistake of fact or a significant misrepresentation if the defendant has committed additional criminal acts between the date of the guilty plea and the sentencing date, if the defendant fails to appear for sentencing or otherwise acts in such a fashion so as to have significantly changed the circumstances of (or actually breached) the agreement.

Sentencing Recommendations: Felonies

General Standard:

In making a sentencing recommendation, the responsible Deputy Prosecuting Attorney shall consider the disposition factors listed in the previous section. In light of those factors, the responsible Deputy Prosecuting Attorney shall consider a recommendation within the standard range established by the Sentencing Reform Act, RCW 9.94A, for the crime or crimes charged. Recommendations for exceptional sentences shall be made only after review by the head of the Case Management Division, the head of the Trial Division, the Chief Deputy Prosecutor, or the Prosecutor.

Concurrent v. Consecutive Sentences:

A separate sanction should generally be imposed for every separate instance of criminal misconduct.

1. Whenever a person is to be sentenced for two or more current offenses, it is a statutory presumption that the sentences shall be served concurrently. RCW 9.94A.589(1)(a). Consecutive sentences may only be imposed under the exceptional sentence provision of RCW 9.94A.505 and RCW 9.94A.535. *A defendant charged with multiple crimes should generally be sentenced to consecutive sentences where authorized by statute.*
2. If the court finds that some or all of the current offenses encompass the same criminal conduct, then those current offenses shall be counted as one crime. The offender, however, shall be sentenced for the current offense with the highest offender score. RCW 9.94A.411(1)(a).

Persistent Offenders: “Three Strikes; You’re Out,” Initiative 593, and Two Strikes for Sex Offenders:

Initiative 593, the “Three Strikes and You’re Out” initiative, was intended by the voters to limit prosecutorial and judicial discretion and to severely punish the listed category of offenders. Accordingly, the Prosecutor’s Office will not, by practice or policy, delete from the list of crimes chosen by the voters as the “most serious offenses.” RCW 9.94A.030(28).

In what is known as the “Two Strikes” legislation, the Legislature has also defined “Persistent Offender” as a person who has once previously been convicted of rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree or burglary in the first degree; or an attempt to commit any crime listed in this subsection.

Initiative 593 and the acts of the legislature shall be considered amendments to the Sentencing Reform Act and not a re-enactment of the Habitual Criminal Act.

1. Filing of a Persistent Offender case will only occur with the approval of the Prosecuting Attorney or his or her designee.
2. Because of the severity of the punishment to be imposed upon conviction, Persistent Offender cases will not be filed in marginal or extremely circumstantial cases. A decision not to seek Persistent Offender sanctions on a defendant otherwise qualified will be approved by the Prosecuting Attorney or his or her designee if unavailable.
3. Should the trial or sentencing deputy believe circumstances justify a letter to the Governor requesting early consideration of clemency for a persistent offender, such request shall be directed to the Prosecuting Attorney for approval.

Sentencing Recommendations: Misdemeanors

Maximum Sentences:

The District Court sentencing authority is set forth in RCW 3.66.067-.069, as modified by *Avlonitis v. Seattle District Court*, 97 Wn.2d 131, 641 P.2d 169 (1982).

1. Gross Misdemeanors - maximum sentence of 365 days and/or a \$5,000.00 fine. 9A.20.010.
2. Misdemeanors - maximum sentence of 90 days and/or \$1,000.00 fine. 9A.20.010. However, in some cases, the maximum penalties may be lower. E.g. Alcoholic Beverage Control Statutes, RCW Chapter 66.
3. All recommendations shall be for the maximum sentence authorized by law, with some portion of the maximum sentence suspended (or in limited cases deferred) upon the defendant's compliance with conditions over a two or five year period of suspension (or deferral).

Concurrent v. Consecutive Sentences:

Whenever a person is convicted of two or more offenses arising from a single incident, the prosecutor should recommend concurrent sentences. In all other circumstances, the prosecutor should recommend that consecutive sentences be imposed. *See* RCW 9.92.080.

1. Normally, a separate sanction should be imposed for every separate instance of criminal misconduct. There should be no illusion that once a person has committed a crime, other crimes can be committed with impunity. For example, the prosecutor should recommend consecutive sentences for all counts charged when (through separate acts) the accused has victimized two or more people.
2. Likewise, a defendant who is already on probation and who is convicted of a new offense should receive separate sentences for the original offense *and* the most recent conviction. In other words, multiple charges or counts generally should be treated individually.
3. Consequently, concurrent sentences should be recommended only where the offenses arise from a single incident. Even then, consecutive sentences may be recommended if multiple charges were purposefully filed to more accurately reflect the defendant's criminal activity.

Deferred v. Suspended Sentences:

There are two types of probationary sentences—deferred and suspended. In both instances, the Court holds back a portion of the punishment imposed on condition that the defendant meet the Court's conditions. The court may revoke a deferred or suspended sentence at any time prior to entry of an order dismissing the case (deferred), the expiration of the maximum term, or entry of an order terminating probation. *Jaime v. Rhay*, 59 Wn.2d 58, 365 P.2d 722 (1961); *State v. Alberts*, 51 Wash.App. 450, 754 P.2d 128 (1988), RCW 3.66.069. The court may place a defendant on probation for up to two years by suspending or deferring the sentence. RCW 3.66.067-.069.

1. **Suspended Sentence** (RCW 9.95.210; RCW 9.92.060, RCW 3.66.067-.069)—The court imposes a jail term and/or fine (up to the maximum) and suspends some or all of the jail and/or fine on conditions much the same as a deferred sentence. Unlike a deferred sentence, though, with a suspended sentence the court has entered the conviction which will not be dismissed at the end of the probationary period.
2. **Deferred Sentence** (RCW 8.95.210; RCW 3.66.067-.069)—The court (having entered a finding of guilt on the facts) defers the imposition of sentence for up to two or five years on certain conditions, including jail time, payment of fines, participation in counseling and/or treatment, or other conditions. At the end of the deferral period, if the defendant has complied with the conditions of probation, the finding of guilt is removed and the case is dismissed.

After successful completion of a period of deferral, the defendant is entitled to withdraw the guilty plea or guilty finding, enter a plea of not guilty, and have the case dismissed. RCW 3.66.067.

A deferred sentence in a traffic case does not remove the conviction from the defendant's driver's record, nor does it remove a criminal conviction from the defendant's police record or prosecution record, and these facts should be made clear to the defendant. It does allow a defendant to have the court record reflect the judge's finding of not guilty and dismissal.

A deferred sentence is to be distinguished from a *deferred finding* which is very seldom appropriate. *See* Deferred Findings comment in the next section.

The prosecution should help ensure that some method is available to enforce the conditions of a suspended or deferred sentence. Supervised probation for a specific period of time is the preferred method. Occasionally, the defendant's attorney will agree to submit proof of compliance within a specific time. For minor offenses involving simple conditions, the preferable approach is to request a clerk's review of the file near the end of the probationary period. This avoids setting unnecessary court hearings, and still leaves sufficient time to file a motion to revoke if necessary.

Sentencing Recommendations: Misdemeanors (Continued)

Supervised Sentences:

The prosecutor *shall* recommend a supervised sentence if the case involves Domestic Violence or a second or subsequent DUI. First time DUI offenders are not placed on supervised probation.

The prosecutor *should* consider recommending a supervised sentence if the case involves alcohol, drugs, or anger management problems. Supervised sentences should be avoided in other situations due to the lack of probationary resources.

Deferred Findings:

The prosecutor shall always oppose a defense motion for deferral of a finding in a criminal case. A deferred finding occurs whenever a judge declines to enter a ruling on guilt or innocence. A briefly delayed decision to allow the judge time to consider the evidence is not a deferred finding; but courts sometimes improperly defer finding for the purpose of avoiding a decision altogether, or reducing or dismissing the case later, or protecting the defendant's driving record. In such cases, the prosecutor should always make the following points in arguing against the deferred finding:

- A deferred finding in a traffic case avoids compliance with the statute requiring prompt notification to DOL of the court's disposition. RCW 46.20.171.
- A defendant who forfeits bail (but who may be innocent) receives a conviction on his/her record, but a guilty defendant who receives a deferred finding does not.
- The arresting officer, citizens, witnesses and prosecutor have a right to learn of the court's decision on the facts.
- A delayed finding may result in the court being inadvertently influenced by pre-sentence reports, prior record (or lack thereof) and other aspects of the sentencing which have nothing to do with guilt or innocence.
- The court lacks statutory/case law authority to enter a deferred finding.

Alternate Dispute Resolution:

In appropriate cases, the parties to a criminal transaction may be referred to alternative dispute resolution services (ADR). Such a referral may be appropriate in a case where the defendant and complaining witnesses will continue in a relationship no matter what the outcome of the criminal case may be. For instance, if the defendant and the complaining witness or witnesses share a family relationship or are neighbors, a conviction will not likely prevent the parties from engaging in further disputes. **PROVIDED**, however, that ADR shall not be considered in cases involving allegations of domestic violence.

Guidelines for Specific Recommendations:

These guidelines cover the recommendations to be made for the most common offenses encountered in District Court. Offenses not specifically covered shall be treated in accordance with the most analogous type of crime which is covered. Questions in this area should be directed to the appropriate supervising deputy prosecutor.

The prosecutor may deviate from these guidelines provided the reason for doing so is explained to the supervising deputy prosecutor, the court, and noted in the prosecution file. In other words, these guidelines cannot be substantially disregarded without an exceptionally adequate reason.

Diversion

Introductory Note:

Prosecutorial discretion in the charging process has historically provided a basis for informal diversion from the criminal justice system, including noncriminal disposition and pre-trial diversion—

(a) The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, CHAPTER 3—THE PROSECUTION FUNCTION, **Standard 3-3.8.**

The Commentary to the ABA Standard provides guidance to prosecuting authorities concerning proper exercise of this discretion.

“The opportunity to dispose of a case that is otherwise supported by probable cause by resort to other corrective social processes, before or after formal charge or indictment without pursuing the criminal process, should be given careful consideration in appropriate situations. Indeed, it has long been the practice among many experienced prosecutors to defer prosecution upon the fulfillment of certain conditions... Where diversion of the defendant is successful, the dismissal of charges or the suspension of sentence will be appropriate.”

In this office we utilize three kinds of diversion programs. In dealing with juvenile offenders, the legislature has obligated us to divert all youth the first time they commit a minor offense. In the District and Municipal Courts, we use pre-trial diversion agreements (PDAs) to relieve court congestion by diverting first-time offenders and defendants in problematic cases. Our adult felony diversion program offers an opportunity to avoid felony conviction to certain low risk property offenders and to select drug offenders.

Diversion Guidelines

Juvenile Diversion:

- “Diversion—A first time misdemeanor offender will be sent to the Juvenile Department Diversion Unit. A second misdemeanor offense may be sent to diversion if the circumstances warrant. Factors the charging deputy shall consider in determining whether to divert the second offense include: length, seriousness, and recency of the alleged offender’s criminal history and the circumstances surrounding the commission of the alleged offense.” RCW 13.40.050.
- Following the law, we cooperate with the Superior Court Juvenile Department by determining which offenders qualify under the statute.

Pre-Trial Diversion Agreements (PDAs), District and Municipal Courts:

- The decision when to PDA a case is less-than-scientific. Generally, most non-DV or non-DUI/Physical Control cases will be PDA’d if no aggravating factors are present. PDAs may also be offered the morning of trial due to court congestion and/or speedy trial problems. However, when faced with the need to choose among a number of cases all set for trial on the same day, priority should be given to the most aggravated Domestic Violence and DUI cases.
- Evidence problems also justify PDA usage, even if the case has aggravating factors. However, prior to offering a PDA based upon proof problems, the responsible DPA should speak with a Division Chief or a Senior DPA if significant aggravating factors are present.
- DUI cases may be offered a PDA if a first offense, no aggravating factors are present, and a BAC of 0.12 or less. DUI PDA cases will not be dismissed, however. The typical DUI PDA will be to amend the charge to first degree negligent driving upon successful PDA compliance.
- DV cases can and do become more problematic over time so evidence problems often result in a PDA being offered even with the presence of aggravating factors. The DPA, if possible, should speak with a Division Chief or a Senior DPA if significant aggravating factors are present, however, prior to offering a PDA in a DV case based upon proof problems.
- If aggravating factors are present but a case is problematic (i.e. conviction by jury is unlikely), less-than-one-year DPAs are expected to speak with a Division Chief or a Senior DPA prior to offering a PDA if possible. Of course, if in a time crunch in court, the DPA should always make his or her best call and thereafter speak with the Division Chief to discuss the DPA’s decision. Continuing cases for a DPA to speak with a Division Chief or Senior DPA (or to permit the defense attorney to speak with a Division Chief or a Senior DPA) is discouraged due to court congestion problems.

Felony Diversion Guidelines

Felony Diversions:

Many minor non-violent felony offenses are committed by first time offenders as a result of substance abuse and/or unusually bad judgment. If an offender is addicted to controlled substances, criminal behavior is likely to continue unless the offender receives treatment. In other minor felony cases involving first time offenders, less expensive alternatives to costly incarceration exist, and those alternatives may succeed at lessening the risk of further criminal behavior. In addition, the conditions of diversion will allow more supervision than currently available for a minor felony conviction.

One alternative is Drug Court. We screen the referrals of felony possession of controlled substances for prior sex offenses or violent crimes, including burglary and eluding a police vehicle. If there are none, in most cases we will offer the offender the opportunity to take judicially supervised treatment instead of going to jail. If the offender completes the program, the charge is dismissed. If they fail, having already confessed to the crime, they are convicted of the underlying offense and sentenced.

A similar diversion program will work with some other minor felony offenders. The defendant's incentive to avoid a felony conviction will help to guarantee prompt restitution and compliance with other conditions of diversion.

Felony Diversion Screening Factors

Felony Diversion Screening Factors:

To identify offenders who will be offered diversion either through Drug Court or some other option, we will use the following criteria:

1. The Seriousness of the Current Offense

- No sex crimes or violent crime, including eluding a police vehicle, will be considered for diversion.
- First Degree Burglary (a violent offense) and Residential Burglary are excluded from consideration. Second Degree Burglary generally will not be considered for diversion. However, it may be considered if approved by the Chief of Case Management or the Prosecutor. If a case of second degree burglary is considered, particular attention will be paid to the likelihood that the offender would have encountered another person in the course of the crime.

2. Criminal History

Generally a history of sex or violent offenses, including eluding a police vehicle, will disqualify an offender. A history of Residential Burglary will also generally disqualify an offender unless the offense was disposed of in Juvenile Court. Exceptions must be approved by the Chief Deputy supervising the program or by the Prosecutor.

3. Strength of the Case

In considering Drug Court, the strength of the State's case should generally not be a factor. However, in diversion other than Drug Court, if, in the opinion of the Chief of Case Management or the Prosecutor, there would be value in exerting some control over the offender through a diversion program, a problematic case may be considered.

4. Ability to Pay Associated Costs

No person shall be denied diversion solely on present inability to pay the associated costs. However, the willingness to commit to pay future costs or to perform alternative community service is a factor that may be used in determining eligibility for a diversion program.

Release of Defendants

Pre-Trial Release–General Standard:

It is the Policy of the Kitsap County Prosecuting Attorney's Office to recommend to the Court the imposition of pre-trial release conditions sufficient to ensure that the accused will not pose a danger to others in the community, will not interfere with the administration of justice, and will be present at later hearings. It is intended that this policy will be consistent with that expressed by the Washington State Supreme Court in Criminal Rule 3.2.

1. In considering whether and under what conditions to recommend the release of the accused, all Deputy Prosecutors shall consider the following:
 - The nature of the crime charged, e.g. whether a crime against persons or a property crime;
 - The criminal history of the accused (including arrests and other justice system contacts); and
 - The concerns of the victim.

2. Release without conditions or on Personal Recognizance **should generally** be opposed if any of the following circumstances exist:
 - A. **Nature of Offense.**
 - Crimes against the person involving actual or threatened violence;
 - Crimes involving weapons;
 - Crimes involving sophisticated methods which indicate they are part of a continuous scheme; and
 - Drug crimes involving a drug trafficker: A “drug trafficker” is an offender booked into the jail for violation of the Uniform Controlled Substances Act and meets one or more of the following criteria: delivered any amount of a controlled substance to another; or possessed with intent to deliver or manufacture a controlled substance; or claims membership in or is putatively a member of an organization involved in drug trafficking; or possessed any amount of controlled substances and lacks a verified Kitsap County address and/or his or her true identify is in question; or has a prior felony conviction within five years or pending charges of violating the Uniform Controlled Substance Act;
 - Crimes involving a member of criminal organization;
 - The allegation involves Domestic Violence.

B. **Prior Criminal Record.**

- The suspect's prior criminal record is sufficiently serious as to justify a sentence recommendation of over six months in jail or a prison sentence.
- The suspect is on community supervision or parole or has pending criminal charges in any court.
- The suspect faces a mandatory minimum sentence of thirty days or more.

C. **History of Response to Legal Process.**

- The suspect has in his or her record any prior instances of failure to respond to legal process in other than minor traffic offenses.

D. **Prior Specific Misconduct.**

- The suspect has a history of verbal or physical acts indicating he or she presents a danger to specific others or to the community generally, such as a past or present record of threats to victims or witnesses, a record of community offenses while on pretrial release, and/or use or threatened use of deadly weapons, especially to victims or witnesses.

Post Conviction Release–General Standard:

A defendant who has been found guilty of a felony and is awaiting sentencing **should** be detained unless the court finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released. RCW 10.64.025. It is the policy of the Kitsap County Prosecuting Attorney's Office to recommend that a defendant be detained after being found guilty of a felony.

1. **Exceptions:** The Prosecutor's Office may recommend or join in a recommendation that the defendant not be incarcerated pending sentencing on a felony in the following circumstances:
 - Where the nature of the crime is such that the expected sentence will not include time in custody;
 - Where a recommendation that the defendant be detained would likely violate the incarceration recommendation in the plea agreement. For example, if the standard range is 0-90 days and we anticipate recommending 30 days or less, it may be appropriate to accede to a defense request to allow release pending sentencing; and
 - Where the conviction is for Property Crime and there is no indication that the defendant is likely to flee or pose a danger of reoffense or to the safety of any other person.

Release Pending Appeal; General Standard:

It is the policy of the Kitsap County Prosecutor's Office to recommend that a defendant be detained pending any appeal.

1. **Exceptions:** The Prosecutor's Office may recommend or join in a recommendation that the defendant not be incarcerated pending appeal if the sentence of the Court includes no time in custody.

Bench-Bar-Press

General Standard:

Recognizing that the Bench, Bar and Press Committee of Washington has issued a Statement of Principles and Considerations concerning publicity of criminal proceedings (May, 1983), and, further, recognizing that the Statement of Principles is not meant to be mandatory, the Kitsap County Prosecuting Attorney's Office hereby adopts as guidelines the following considerations concerning the release of information in a pending criminal matter:

1. It is appropriate to make public the following information concerning an adult defendant:
 - Name, age, residence, employment, marital status, and similar background information;
 - The substance or text of the charge, keeping in mind the privacy interests of the victim;
 - The identity of the investigating and arresting agency and the length of the investigation; and
 - The circumstances immediately surrounding an arrest.
2. It is not appropriate to make public the following information concerning any defendant:
 - Opinions about a defendant's character, or about his or her guilt;
 - Admissions, confessions or the contents of a statement or alibis attributable to the defendant;
 - References to the results of investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, DNA tests or other lab tests;
 - Statements concerning the credibility or anticipated testimony of prospective witnesses; and
 - Opinions concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.
3. All Deputy Prosecutors should expect that their statement about a case will be reported to the media. Such statements should be made in a time and manner contributing to public understanding of the criminal justice system, rather than influencing the outcome of a trial.
4. Other than a factual description of public proceedings in which a deputy has him-or-herself been directly involved, all inquiries regarding a pending matter should be directed to a Division Head or Senior Deputy Prosecuting Attorney.

Russell D. Hauge
Kitsap County Prosecuting Attorney
Mission Statement And
Standards And Guidelines



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