



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

SENTENCING GUIDELINES COMMISSION

January 19, 2018

TO: SGC Members

FROM: Chair Hauge

**SUBJECT: General Criminal Charging and Disposition Considerations,
Kitsap County Circa 2006-2014**

The first step in a Deputy Prosecutor's review of a criminal referral (usually the police reports describing the substance of the complaint) is to determine whether the transaction described in the reports constitutes a crime. A crime is conduct identified in the Revised Code of Washington, or the relevant county or city code that warrants punishment by the government: taking the offender's liberty, property, or both. We cannot file a criminal charge simply because we as community representatives find conduct to be offensive or dangerous. If homicide was not defined as a crime by the legislature, we could not charge a killer with murder.

The Deputy Prosecutor next has to determine whether there is enough admissible evidence to sustain a charge. At this stage, the Deputy's analysis is guided by the Rules of Evidence set by the state Supreme Court. The Rules are based on principles of fairness that have stood the test of time. They are designed to protect against the possibility that a person might be wrongfully convicted, and they do not always make common sense. For example, evidence that a defendant has been involved before in a crime or crimes similar to one charged undoubtedly suggests that he or she might be guilty of the current offense. But evidence of prior bad acts can be admitted only in very carefully limited circumstances. An offender's criminal history would almost never be given to a jury. The fear is that consideration of a defendant's prior conduct would overwhelm all other factors and possibly lead to conviction of an innocent person.

The next decision point is whether to file even if there is sufficient admissible evidence. In most cases, this is not a major consideration. But in some circumstances punishment may not be the just result. Our

Standards and Guidelines address this situation. Factors that may justify no charges for conduct that could be considered criminal include situations where the violation was technical or insubstantial and caused no harm, situations in which the harm caused is minor and the costs of prosecution are great (for example, the case would require us to force uncooperative witnesses to travel a great distance), and cases where the cooperation of the defendant will aid the investigation of more serious crimes. If this decision presents itself, the responsible Deputy Prosecutor will discuss the matter with his or her supervisors.

A similar decision, and one that comes up much more frequently, is whether the offender should be offered a diversion program. When dealing with juveniles, the choice is straightforward: the legislature has decreed that diversion shall be offered to most first-time misdemeanor or gross misdemeanor offenders. There is no mandatory diversion for adults. However, we have developed a number of alternatives to straight punishment. We have guidelines for making this decision, but they don't cover every situation. Because we couple every offer of an adult diversion program with a demand for a confession to the underlying crime, we tend to err on the side of extending the offer in problematic cases. The exception is the offer of a Pre-Trial Diversion Agreement (PDA) in a misdemeanor Domestic Violence (DV) case. By definition, DV is a violent offense. Therefore, we offer diversion only in DV cases that become problematic because of the lack of evidence.

We strive to charge accurately but conservatively, with the expectation that the offender will accept responsibility for his or her actions. If the offender chooses not to accept responsibility, we will seek to amend the charge upward before trial. We feel it is fair to increase the potential punishment if the defendant refuses to accept responsibility for his or her actions. And it is certainly fairer to the jury. At trial, our goal is to provide the jury with as much information about the defendant as possible. One of the basic rules of evidence is that we can in most cases talk only about the conduct we charge. By charging a higher degree or more crimes, we can give the jurors a more complete picture of the criminal transaction.

If we file a charge, the matter is set for trial. If we decline to file charges, the file goes into our records, and nothing more happens until we get more information or until a fresh look reveals a way to develop a case. The decision to decline to file charges is not necessarily the end of the case.

Whenever a Deputy Prosecutor decides that no charges can be filed, notice of that decision is given to the originating police agency. The notice gives the reasons for the decline and states that the police agency can have the decision reviewed by the Deputy Prosecutor's supervisor and, if that is not satisfactory, by the Elected Prosecutor. Our local law enforcement agencies are not shy about using the review process. If a case is sent back for follow-up investigation, we track the amount of time taken for response. If we get no response within a reasonable time, we will formally decline the case. Any follow-up investigation, whether the case has been declined or not, will trigger further review of the matter.

Most cases result in guilty pleas. In the vast majority of criminal cases, there is no doubt who did the crime or that we can prove it. If we seek a fair disposition there is no reason for a defendant to force a trial—especially if we have more charges to add, even if those charges are problematic. It is the rare defendant who will risk a trial on a charge they may beat if they have a reasonable alternative.

However, no defendant will plead guilty unless we show we are ready to take the case to trial. Therefore, we prepare to try every charge we file. Moreover, once a charge is filed, we have to be ready to try it in relatively short order. By court rule, we have to bring defendants to trial within 60 days of filing the charge. If the defendant is freed pending trial, we have 90 days to prepare to try the case. This is not a very long time to prepare the case, and if we miss the deadline, the case is dismissed.

We train and encourage all deputy prosecutors in the criminal divisions to go to trial. However, we do not consider the won/loss record to be critically important. Cases go to trial for a number of reasons. Primarily, a case goes that far because the defendant thinks our proof will not be enough to prove the charge beyond a reasonable doubt. In other words, only the most difficult cases go to trial. Moreover, a prosecutor has the ability to control his or her won/loss record. If trial looms, the prosecutor can avoid the confrontation by either reducing or dismissing the charge. Certainly a DPA must show that he or she is competent to take a case to trial. But once that has been established, the more significant question is whether the deputy is willing to go to trial when necessary. In many cases, particularly the more serious ones, our only evidence is less than perfect. But to hold the defendant accountable, we have to go forward. It is more important to maintain the integrity of the system than it is to win every case.

Diversion Programs

Diversion programs have long been part of American law's response to crime. In the most basic form, a diversion is a choice by the prosecuting authority to divert an offender away from the process of formal prosecution. The offender is expected to accept responsibility for his or her criminal behavior and make amends to the community by some means other than straight punishment. At a minimum, the offender usually makes restitution, undertakes some kind of program aimed at helping him or her avoid criminal behavior in the future, and pays some or all of the cost of the program. The charging authority provides the incentive of a reduced charge or no charge at all if the offender completes the program. Generally, a diversion is offered to first-time offenders and only when the potential charge is for a minor or nonviolent crime.

Diversion offers benefits to all the parties to the agreement. The offender avoids a harsher punishment and may come through the process with no criminal record at all. The charging authority gains a number of things—all positive.

An accepted offer of diversion should mean no trial or appeal. The amount of restitution and the terms of payment can be dictated in the contract. Diversion also creates the opportunity to shift at least some of the costs of disposing of the crime to the offender. In many cases, particularly felonies in Washington, a court may be barred after formal conviction from ordering treatment as a condition of a sentence. Or if a court orders treatment for an underlying addiction or other behavioral health issue, the judge may lack the means to ensure that treatment is successfully completed. A diversion rests on the agreement of the offender to fulfill the terms of the contract. This shifts the burden to the offender to complete whatever treatment the contract specifies and to meet the payment schedule.

Perhaps most importantly, a successful diversion results in an offender actually accepting responsibility for their behavior. If an offender completes the contract, he or she has to face the full consequences of the criminal act. From making restitution to confronting, through treatment, the cause of his or her

criminality, a successful diversion brings home the consequences in a way that straight punishment seldom can.

Diversion Programs can be criticized. We have tried to anticipate the issues and deal with them in our practices. First, the opportunity to avoid a conviction or to obtain a reduction in the charges can sound soft on crime. However, we interpret our mission statement, “Seek the Just Result,” to encompass obtaining justice for the community as a whole. We serve this goal by turning criminal defendants away from future offending behavior. Certainly serious crimes demand serious punishment. But if an offender’s crimes have been limited to drug use—distinguished from entrepreneurial drug dealing—and property crimes, if the crime is absolutely inconsistent with the offender’s prior behavior and not aggressively violent, or if the case is one in which we trade the slim possibility of conviction for control sufficient to increase the possibility of future good behavior, diverting the offender from the criminal track is the right choice.

A diversion does not allow the offender to escape responsibility. To get the benefit of the bargain—dismissal or reduction of a charge—the offender must satisfy this office and the Court that they have changed. The offender will be required to spend at least a year working on changing his or her behavior and paying restitution. Often the offender will be required to undergo treatment and supervision for two or more years. The diversion contract also provides that upon the offender’s failure to fulfill the diversion contract, they will be convicted and punished with dispatch. In every diversion contract the offender waives all rights that would stand in the way of a conviction and confesses to the underlying crime. If a court finds that the offender breached the contract, and that revocation is not unreasonable, *St. v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984), the waiver and confession are filed, the offender convicted, and the court imposes sentence.

A diversion contract can also give the impression that the offender is buying his or her way out of trouble. Some years ago City Attorneys (as distinguished from County Prosecutors) in the Tri-Cities were offering dismissals to DUI offenders in return for donations of substantial sums of money—in some cases \$2,000.00 or more—to “charities.” This practice was, and is, illegal and resulted in serious consequences for those lawyers improperly using their authority. Even the collection of restitution can create the suggestion that a crime is being excused in return for money. This impression is false. In our diversion contracts restitution is central, but the heart of the agreement is the defendant’s commitment to make amends, to change his or her ways, and to accept close supervision of his or her life for a long time. The money is the smallest part of the deal. Indeed, if the offender is indigent we will find some way to work around their lack of funds—if they commit themselves to the contract.

The Juvenile Court offers diversion to most offenders charged with misdemeanors and gross misdemeanors. The legislature mandates this practice for virtually all first-time non-felony offenses. The Prosecutor has the option to offer diversion in subsequent cases. The return is good. Across the state, and since the program started many years ago, just around 80% of diverted juveniles never come back to the justice system.

In the District and Municipal Courts we offer diversion in problematic cases. We offer what we call a Pre-Trial Diversion Agreement or PDA. A Driving Under the Influence of Intoxicants (DUI) case may be problematic because the breath test is low enough to make acquittal a real possibility. There may be procedural errors in the investigation that increase the likelihood that the case will be dismissed. Or the

case may become problematic because there are other more serious DUI cases ahead of it on the calendar. We consider a DUI more serious if it involves a repeat offender, a high breath alcohol test, an accident, or children in the vehicle. Those are the cases that need to be tried. Faced with a choice between the dismissal of a case because we have run out of time for trial or gaining some control over the defendant through a diversion contract, we will choose diversion every time.

We can face the same choice in a misdemeanor domestic violence (DV) case. These are by definition violent offenses, so we don't make the choice lightly. But sometimes when trial approaches, the victim becomes reluctant to testify. This is a well-known phenomenon in DV cases. The victim may be afraid of losing her only means of support, she could think she will lose her children, she may fear for her life, or all these factors may be present. We can proceed to trial and likely lose. Then all we have accomplished is giving the abuser the impression that he can get away with it, and with that sense of empowerment push the violence to the next level. Or we can offer a diversion—the chance that the offender will avoid conviction, but only if he dances to the strings attached to the contract. The strings include Domestic Violence Perpetrator treatment, the promise to refrain from future acts of violence, and a confession to the current charge to hold over his head. We have structured our DV diversion contracts to give us at least a reasonable chance that we will be able to control the future behavior of the offender—to prevent him from beating his wife or girlfriend. This is often the best we can do.

Felony drug cases present a different set of circumstances, but the goal is the same: obtaining control over the offender in the hope that we can prevent him or her from committing more crimes. Our Drug Court offers motivated drug offenders a chance to beat their addiction. In the Drug Court, the diversion contract is not the most important part of the deal. In Drug Court the heart of the exchange is the interaction between the offender and the Drug Court Judge. The offender has to commit to more than treatment and supervision. He or she will also have to come before the Judge on a weekly basis. The Judge will review the offender's progress, or lack of it, in open court before all the other Drug Court participants. The consequences are immediate: compliance with the contract is praised; non-compliance is sanctioned. This is a powerful motivator. The most recent studies by the Washington Institute for Public Policy show that for every dollar spent on Drug Court we get that dollar back and much more.

We have recently begun offering diversion contracts to some adult felony offenders outside of Drug Court. The program is aimed at property offenders with little or no criminal history. Budget cuts at the State level led to a situation where these offenders were receiving little time in custody and virtually no supervision when released into the community—a situation that we saw as virtually insuring that the offender would commit more crimes. We concluded that we had to change our approach or resign ourselves to an even faster revolving door. This is how we responded. We developed and published a set of criteria—guidelines, not a cookbook—for consideration for diversion from criminal prosecution. An offender is considered if the report of the incident suggests he or she might be a likely candidate or if the attorney for the offender asks for the option. If the offender qualifies and agrees to accept the contract, we file the charge as a felony complaint in our District Court. We do this to avoid adding to the workload of the Superior Court Judges.

With the complaint we file the waivers necessary to preserve jurisdiction for the period of the diversion contract. The offender also executes a confession to be used if they fail to fulfill the terms of the diversion contract. Those terms always include restitution and may have a variety of other conditions. If substance abuse is part of the problem, and it almost always is, treatment will be required. Regular

contact with someone in a supervisory role is necessary both to ensure compliance and to support the efforts of the offender. We utilize a private contractor, paid for by the offender, to provide this service. The offender will be required to meet with the contract supervisor regularly. If necessary, we can bring the offender back before the District Court Judge. The Drug Court experience has taught us that a conversation with a Judge, the embodiment of status and authority in our legal system, can revitalize an offender's commitment to the diversion contract.

If the offender succeeds in performing the contract, we will enter a dismissal of the charges in the District Court. If the offender fails, and the District Court confirms the breach, he or she is brought before the Superior Court for imposition of sentence.

We have expanded the range of diversion options because they work. They allow us to exercise some control over offenders who might otherwise avoid all consequences, they conserve resources, and they give offenders a chance to change for the better.