

## SECTION 15: THEFT, MALICIOUS MISCHIEF AND RELATED OFFENSES

### I. FILING

#### A. EVIDENTIARY SUFFICIENCY

Theft and related property offenses 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.

#### B. DIRECT REFERRAL FOR MISDEMEANOR PROSECUTION AND EXPEDITED OFFENSES

In certain property crimes cases that legally qualify as felonies, but that involve relatively minor losses, the State may conclude that the ends of justice are better served by having the case prosecuted as a misdemeanor rather than a felony. When such a case takes place in a jurisdiction with an independent municipal court, such cases will be declined back to law enforcement with instructions to refer the case to the relevant municipal prosecutor to be reviewed for possible misdemeanor filing in municipal court. When such a case takes place in unincorporated King County or where the case involves crimes investigated by certain statewide investigative agencies, the case will be internally referred to the District Court Unit to be reviewed for possible misdemeanor filing in King County District Court.

An Expedited Offense is a crime that legally qualifies as a felony, but the prosecutor's office files in District Court as an attempted Class C felony to expedite the case's resolution.

The following offenses should ordinarily be directed for original filing in municipal or district court or be filed as expedited offenses, even if the defendant already has a pending case, whether in Superior Court or as an expedited in District Court.

In the appropriate case, the State may exercise its discretion to file a case into Superior Court as a felony or to dismiss a case previously filed into District Court as an expedited and refile the case as a felony in Superior Court. In making such a decision, the State may consider factors including but not limited to a defendant's criminal history, high impact offenders, other pending criminal cases or the nature of the current offense. Filing and trial deputies should consult with their supervisors if they believe they have identified a case in which such discretion should be exercised.

1. Theft, Theft of Leased/Rental Property, Failure to Return Leased/Rental Property, and Defrauding an Innkeeper.
  - a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property or services taken or attempted to be taken is less than \$2,000 (excluding Theft in the First Degree from a person, see Section 15, I.C.2).
  - b. The case should be filed as an Expedited Offense where the total fair market value of the property or services taken or attempted to be taken is between \$2,000 and \$7,500 (excluding Theft in the First Degree from a person, see Section 15, I.C.2).

See Section C.1 (below) for the definition/discussion of “market value” for these purposes.

Further, the KCPAO does not charge Failure to Return Leased Property for rental cars in most cases. Exceptions to this standard include cases involving fraud or deception (e.g., the renter provides a false identity to the car rental agency). In all other cases, the victim rental car company should pursue its civil remedies.

2. Theft with Intent to Resell, Organized Retail Theft, and Retail Theft with Special Circumstances.
  - a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property taken or attempted to be taken is less than \$2,000.
  - b. The case should be filed as an Expedited Offense where the total fair market value of the property taken or attempted to be taken is between \$2,000 and \$7,500.

See Section C.1 (below) for the definition/discussion of “market value” for these purposes.

Regardless of the above, if an Organized Retail Theft involves three or more aggregated incidents, the KCPAO will charge it as a felony so long as it legally qualifies as one.

3. Forgery and Unlawful Issuance of Bank Checks.
  - a. The case should be directly referred for misdemeanor prosecution where the total face value of the written instruments is less than \$2,000.
  - b. The case should be filed as an Expedited Offense where the total value of the written instruments is between \$2,000 and \$7,500.
4. Possession of Stolen Property and Trafficking in Stolen Property.

- a. The case should be directly referred for misdemeanor prosecution where the total fair market value of the property possessed, attempted to be possessed, trafficked, or attempted to be trafficked is less than \$2,000.
- b. The case should be filed as an Expedited Offense where the total fair market value of the property possessed, attempted to be possessed, trafficked, or attempted to be trafficked is between \$2,000 and \$7,500.

See Section C.1 (below) for the definition/discussion of “market value” for these purposes.

5. Malicious Mischief

- a. The case should be directly referred for misdemeanor prosecution where the total value of the property damage is less than \$2,000.
- b. The case should be filed as an Expedited Offense where the total value of the property damage is between \$2,000 and \$7,500.

6. Identity Theft

- a. The case should be directly referred for misdemeanor prosecution where the total value taken or attempted to be taken is less than \$2,000.
- b. The case should be filed as an Expedited Offense where the total value taken or attempted to be taken is between \$2,000 and \$7,500.

Regardless of the above, if an Identity Theft involves one or more of the following circumstances, the KCPAO will file it as a felony so long as it legally qualifies as one: (1) use or possession of three or more different victims’ financial information; (2) evidence of manufacturing personal identifications; (3) evidence that the suspect targeted a vulnerable victim; (4) evidence that the victim's information was stolen in a residential burglary, robbery, or theft from a person; (5) evidence that the defendant opened financial accounts in a victim’s name and/or took over an account belonging to a victim; or (6) the identity theft led to the incorrect filing of criminal charges against the victim and/or the entry of false information in the public record.

7. Burglary in the Second Degree Involving Trespassed Shoplifters

- a. The case should be directly referred for misdemeanor prosecution where the total value of the theft is less than \$2,000.
- b. The case should be filed as an Expedited Offense where the total value of the theft is between \$2,000 and \$7,500. These cases will typically be expedited as Theft in the Second Degree (Burglary in the Second Degree is a Class B felony and, therefore, cannot be expedited merely by charging attempted Burglary 2).

See Section C.1 (below) for the definition/discussion of “market value” for these purposes.

If the case is one that would be directly referred as a Burglary, but would be filed as an expedited as an Organized Retail Theft, it should be treated as the latter. If the case is one that would be directly referred or expedited as a Burglary, but would be filed as a felony as an Organized Retail Theft, it should be treated as the latter.

8. Burglary in the Second Degree of Fenced Areas, Carports, Detached Garages, and Similar Structures
  - a. The case should be directly referred for misdemeanor prosecution where the total value of the theft is less than \$2,000.
  - b. The case should be filed as an Expedited Offense where the total value of the theft is between \$2,000 and \$7,500. These cases will typically be expedited as Theft in the Second Degree (Burglary in the Second Degree is a Class B felony and, therefore, cannot be expedited merely by charging attempted Burglary 2).

See Section C.1 (below) for the definition/discussion of “market value” for these purposes.

Regardless of the above, if the Burglary involves one or more of the following circumstances, the KCPAO will file it as a felony so long as it legally qualifies as one: (1) The defendant’s criminal history or police intelligence indicates the defendant is part of organized illegal activity, (2) the defendant’s criminal history or police intelligence indicates that the defendant is especially prolific or that his or her criminal activities are escalating, (3) the defendant’s entry was with the intent to commit a crime against a person or to commit another violent crime, or (4) the defendant is classified as a High Priority Repeat Offender pursuant to Section 22 of these FADS.

9. The total value of property, as stated above, controls the appropriate jurisdiction for filing, even if multiple accomplices were involved.
10. A DUI may be filed with any of the above noted expedited crimes.
11. Exceptions for Property Offenses.
  - a. A defendant who has received 3 or more direct misdemeanor referrals or expedited felonies in an 18-month period is not eligible for either a direct misdemeanor referral or an expedited filing. The case should be filed into Superior Court as a felony or into Drug Diversion Court if otherwise eligible.

## C. CHARGE SELECTION

1. Degree – Value for Theft and related offenses

Where the degree is determined by the value of the property, caution should be used to ensure that adequate proof of the requisite value is present before a charge is filed. Value means the market value at the time and place of the theft. [9A.56.010\(21\)](#). In the case of goods offered for sale at retail, the retail price should be used. In situations other than retail, testimony from someone who can be qualified as an expert in the value of the particular item is generally necessary. The measure of “value” is not the cost to the original owner or the replacement value.

If a reasonable issue exists as to the value of the property, the case should be evaluated with the most conservative value controlling, even if that means the case is declined to municipal court, expedited, or filed at a lower degree.

2. Theft from a Person - [RCW 9A.56.030\(b\)](#).

Theft in the first degree shall be filed as a felony into Superior Court when property is obtained without significant struggle or injury. Robbery in the second degree shall be filed if there was a significant struggle or injury to the victim. The vulnerability of the victim shall be considered in assessing the amount of force or threat of force used.

3. Unlawful Issuance of Bank Checks (U.I.B.C.) - [RCW 9A.56.060](#).

Unlawful issuance of bank checks or drafts ([RCW 9A.56.060](#)) charges shall be filed only if there is clear and convincing evidence that the defendant (a) knew that there were insufficient funds or credit to cover the instrument drawn or delivered and (b) acted with intent to defraud. Examples of sufficient proof include certified letters to a defendant's address, deposit of a small amount of money to open an account and checks written for amount far in excess of the initial deposit, or inculpatory statements by the defendant.

4. Access Device (credit cards, etc.) - [RCW 9A.56.010\(3\)](#).

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument. The fact that the access device was not yet activated or was closed by the true owner does not negate its status as an access device under this statute.

Where a defendant possesses, uses, or attempts to use stolen access devices, normally identity theft charges pursuant to [RCW 9.35.020](#) should be filed, rather than possession of stolen property in the second degree or theft in the second degree. See subsection 7. Identity Theft below; see also subsection 10.b. Aggregation and Unit of Prosecution below. If the defendant elects to go to trial, sufficient additional counts may be added to characterize the defendant's conduct, to ensure restitution to all victims, and to enhance the strength of the State's case at trial.

5. Forgery - [RCW 9A.60.020](#).

Every case of forgery requires identification of the defendant by a witness to the specific act (makes, completes, alters, possesses, utters, offers, or puts off as true). Other circumstantial evidence of identity may support the filing of additional counts such as multiple checks to the defendant where identity is established with the other checks, inculpatory statements by the defendant, or the defendant's fingerprints are on the check.

Evidence to show the defendant knew the written instrument was forged is also required. Presentation of a forged check without more is ordinarily insufficient to prove knowledge. Examples of such evidence may include leaving the bank or business without the written instrument, running from police, using a false identity, admissions or implausible statements regarding knowledge, prior theft related convictions, etc.

6. Malicious Mischief - [RCW 9A.48.070](#) and [9A.48.080](#).

a. Cases based upon an "interruption or impairment" of public service shall not be filed as first degree unless the interruption or impairment is substantial in its impact upon the public. All other cases shall be filed as second degree.

b. Cases involving damages of less than \$7,500 in value shall be filed as second degree and expedited (see [Section 21](#)).

7. Identity Theft - [RCW 9.35.020](#).

One count normally should be filed for each victim. However, if sufficient aggravating circumstances exist so that one count per victim does not adequately label the conduct or results in an insufficient presumptive standard range, then one count per use of financial information or identifying information may be filed. See [RCW 9.35.001](#). Examples of aggravating circumstances may include amount of loss, abuse of trust, or a vulnerable victim.

8. Money Laundering - [RCW 9A.83.020](#).

Money laundering charges should be filed only when there is sufficient evidence that a person conducted or attempted to conduct a financial transaction involving the proceeds of a specified unlawful activity, knowing the proceeds were from a specified unlawful activity, and when one of the following is present:

- a. The actor knows that the transaction is designed in whole or in part to:
  - (1) conceal or disguise the nature, location, source, ownership, or control of the proceeds; or
  - (2) avoid a transaction reporting requirement under federal law.

OR

- b. The standard range for the specified unlawful activity charged alone is clearly too lenient in light of the purposes of the Sentencing Reform Act. When money laundering charges are filed together with another crime, charge a sufficient number of money laundering counts so that the resulting standard range adequately represents the seriousness of the criminal activity.

9. Mail Theft [RCW 9A.56.370](#) and Possession of Stolen Mail [RCW 9A.56.380](#).

One count of mail theft or possession of stolen mail should be filed for every incident involving 10 pieces of stolen mail with three different addresses if sufficient evidence exists that the defendant knew the mail was stolen or took the mail without a lawful purpose. Careful consideration should be given to whether the volume of mail possessed or taken is sufficient to support a charge of identity theft. The definition of mail does not include junk mail, and pictures of the stolen mail will usually be needed to prove the definition of mail.

10. Multiple Counts

- a. Initial Filing – Number of Counts
  - (1) One count normally should be filed for each crime/victim up to a maximum of three counts. However, if the offender has committed a current major economic offense or series of current offenses as described in [RCW 9.94A.535\(3\)\(d\)](#) then the number of counts filed to adequately label the conduct shall be as follows:

- (a) loss of between \$20,000 - \$50,000, normally files all chargeable counts up to four counts,
  - (b) loss between \$50,000 and \$100,000, normally file up to seven counts, and
  - (c) loss in excess of \$100,000, normally file all chargeable counts up to ten counts.
- (2) Other considerations when determining the number of charges to file include the statute of limitations (see subsection 5. Statute of Limitations below), multiple victims, and the presence of aggravating factors such as abuse of trust or a vulnerable victim (such as an elderly or mentally disabled victim). Additionally, in major economic offenses over \$100,000, it may be necessary to file all chargeable counts, even in excess of ten counts, to adequately label the criminal conduct.
- (3) Ordinarily theft by embezzlement should be charged rather than forgery when the method of theft is by writing/altering checks that were lawfully possessed.
- (4) Crimes ancillary to the principal theft, such as perjury, forgery, possession of stolen property, money laundering, etc. should not be filed initially unless there are insufficient available counts to result in an offender score consistent with the disposition standards, or helpful to show an element of the offense, or there are statute of limitations issues.
- (5) The statute of limitations may be considered in the initial charging decision. If the statute of limitations will run within 6 months of filing charges, normally all charges that are supported by the evidence should be filed to ensure that the State does not lose the ability to pursue all the appropriate charges.

b. Aggregation and Unit of Prosecution

Multiple thefts committed as part of a common scheme or plan may be aggregated in order to charge a higher degree pursuant to [RCW 9A.56.010\(21\)\(c\)](#). Similarly, multiple counts of UIBC may be aggregated under [RCW 9A.56.060\(3\)](#).

The State must elect whether to charge each separate theft as an individual count or aggregate all thefts into one count of theft. State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003); State

v. Carosa, 83 Wn. App. 380, 921 P.2d 593 (1996); State v. Turner, 102 Wn. App. 202, 6 P.3d 1226 (2000) (prohibiting separating out counts from the same victim based on different schemes of theft); and State v. Hoyt, 79 Wn. App. 494, 904 P.2d 779 (1995) (prohibiting separating out counts from the same victim based on different ranges of time only). Essentially, the State must elect to charge each separate act as an individual count, or charge one aggregate count.

Simultaneous possession of stolen property belonging to more than one victim must be aggregated into a single count pursuant to the unit of prosecution rule. State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003). Every possession of a stolen access device, however, is a separate crime, State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (although if the access devices belong to the same victim, they are the same criminal conduct).

## II. DISPOSITION

### A. CHARGE REDUCTION

#### 1. Degree

A defendant will normally be expected to plead guilty to the degree charged and number of counts filed or go to trial. In certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest. See [RCW 9.94A.411](#) (Statewide Prosecuting Standards). Additionally, evidentiary problems which make conviction on the original charges doubtful and which were not apparent at filing, the discovery of facts which mitigate the seriousness of the defendant's conduct, and the correction of errors in the initial charging decision may also require a reduction in the initial charge in exchange for a guilty plea.

Caseload pressure or the expense of prosecution may not normally be considered. The exception policy shall be followed before any reduction is offered in all cases after a trial date has been set.

Where a case was filed into Superior Court but due to a change in FADS would now be expedited, the felony should ordinarily be reduced to a misdemeanor.

#### 2. Dismissal of Counts

Normally, counts will not be dismissed in return for a plea of guilty to other counts. The factors listed above may be considered in determining whether a count shall be dismissed. Caseload pressures or the cost of prosecution may not otherwise normally be considered. The exception policy shall be followed before a dismissal of charged counts is offered in all cases after a trial date is set.

## B. SENTENCE RECOMMENDATION

### 1. Determinate Sentence

Normally, a determinate sentence within the standard range shall be recommended. Recommendations outside the specified range shall be made only pursuant to the exception policy. All exceptions shall be discussed with the victim before being finalized.

### 2. Restitution

The State will recommend full lawful restitution.

### 3. Community Custody

The State will recommend Community custody as required by law.

### 4. DNA Identification

A DNA sample must be collected from every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, unless the Washington State Patrol Laboratory already has a DNA sample from an individual for a qualifying offense. [RCW 43.43.754](#).