



24 February 2021

## MEMORANDUM

SUBJECT: Interim COVID-19 Reduction Plan

### Background

As with every aspect of life, the criminal justice system in King County has been impacted by the ongoing COVID-19 pandemic. Since March of 2020, the King County Superior Court has been operating at a significantly reduced capacity. Among other things, the restrictions necessary due to COVID-19 have and continue to significantly limit the number of trials and hearings that can take place. In addition, the King County Executive has outlined guidelines to reduce the daily inmate population at the King County Jail to allow for increased social distancing for the health and safety of staff and inmates. At the same time, both national and local violent crime rates have continued to rise, with homicides and domestic violence crimes reaching historic levels.

This confluence of events—particularly the reduced court capacity, which is a decision made separately by the court—has nearly doubled the number of criminal cases pending in King County Superior Court and threatens to grind the system to a halt. The court typically handles approximately 3,250 cases at any one time. That number has now skyrocketed to over 6,500 due to the above factors. Though King County Prosecuting Attorney's Office (KCPAO) deputy prosecutors have been working diligently to prepare cases for charging and trial, the time it takes to resolve a case in the system is continuing to grow—it can take weeks to schedule a plea and may take years for a case to go to trial. In a typical year, we try about 200 jury trials. We have over 1200 set now.

At the same time, the economic impacts of COVID-19 have had a very real and negative impact on the King County budget. As a result, the KCPAO's 2021 – 2022 operating budget has been decreased forcing us to make even tougher choices as to the cases we can address.

In light of these stark realities, the KCPAO must reprioritize its very limited resources to address the more serious cases in the system. This includes crimes against persons, repeat property offenders, particularly egregious economic offenses, domestic violence, sexual assault, acts of violence, weapons cases, crimes against children, and homicides.

At the same time, the KCPAO is assisting the King County Executive's Office in developing a Community Diversion Program (CDP) to divert first-time, low-level property offenders and some drug offenders out of the criminal justice system and into community programs where they can still be held accountable in a manner that reduces recidivism. (The program does not include repeat felony offenders or people suspected of violent or sexually motivated crimes.)

While the CDP will ultimately help address some of the current problem, the criminal justice system cannot wait for that program to be fully developed and implemented. As such, the KCPAO has identified a number of cases—both currently filed and awaiting filing—that either:

- Would be eligible for the CDP if it were currently up and running; or
- Would not necessarily be eligible for the CDP, but still constitute the lowest priority felony cases in the system.

These cases will either not be filed, will be dismissed without prejudice (meaning that they still could be filed later), or will be offered a substantial reduction in charges in exchange for a plea. The KCPAO has worked diligently to ensure that the only cases where this will be done are ones where the defendant has little to no felony criminal history, where there is either no restitution owed to a victim or where restitution will be imposed as part of a plea, and where the defendant has spent a number of months in the community with little to no additional criminal activity. In these ways, the KCPAO seeks to ensure that the impacts to individual victims will be minimized.

This is not an action taken lightly. However, after careful consideration the KCPAO has concluded that it is an appropriate and necessary step. Unless immediate action is taken to address the glut of cases in the system—caused by reduced court capacity in decisions made separately from KCPAO—there is a real risk that the KCPAO’s ability to effectively prosecute the most serious offenses will be severely hampered. In addition, implementing this policy now will better serve the goals of ensuring fairness and preserving consistency between current KCPAO practices and those that will be implemented under the CDP.

### **Applicability and Limitations:**

The criteria and presumptions below apply only to cases filed prior to the effective date of implementation of the Community Diversion Program. For these purposes, “filed” includes cases where the KCPAO has reviewed the case and a filing decision has been approved by a filing supervisor, but the case has not yet been filed in King County Superior Court. The KCPAO reserves the right to modify, suspend, or end any of the below criteria and presumptions at any time in its sole discretion.

The criteria and presumptions below apply to felonies filed by the Criminal Division of the KCPAO both in KCSC and in KCDC (pursuant to the expedited felony program).

The criteria and presumptions below are intended solely for the guidance of KCPAO Deputy Prosecuting Attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the county or state. These criteria and presumptions are intended to structure and guide discretionary decisions, not to create mandatory requirements.

**Crimes Included:**

For purposes of the below, **ONLY** the following crimes are included in each category:

<b><u>Property Crimes:</u><sup>1</sup></b>	<b><u>VUCSA Crimes:</u></b>
<ul style="list-style-type: none"> <li>• Burglary 2</li> <li>• Cheating 1</li> <li>• Criminal Impersonation 1</li> <li>• Failure to Return Rented or Leased Property</li> <li>• Forgery</li> <li>• Identity Theft 1<sup>2</sup></li> <li>• Identity Theft 2</li> <li>• Malicious Mischief 1</li> <li>• Malicious Mischief 2</li> <li>• Possession of Stolen Mail</li> <li>• Possession of Stolen Property 1</li> <li>• Possession of Stolen Property 2</li> <li>• Possession of a Stolen Vehicle</li> <li>• Theft 1</li> <li>• Theft 2</li> <li>• Theft of Mail</li> <li>• Theft of a Motor Vehicle</li> <li>• Theft of Rental Property</li> <li>• TMV 1</li> <li>• TMV 2</li> <li>• Trafficking in Stolen Property 1</li> <li>• Trafficking in Stolen Property 2</li> <li>• UIBC</li> <li>• Vehicle Prowling 1</li> </ul>	<ul style="list-style-type: none"> <li>• Possession</li> <li>• Possession with Intent (PWI)</li> <li>• Delivery</li> <li>• Delivery of Bunk</li> <li>• Manufacturing</li> </ul>

**Definitions**

For purposes of the below, the following definitions apply:

- Dismiss/Dismissal/Dismissed/Dismissal Agreement – The State will dismiss the case without prejudice. The State specifically reserves the right to refile the case for any reason at any time prior to the running of the Statute of Limitations.
- Stem from a Same Incident – Charges stem from the same incident if the defendant is charged with two or three felonies based on a single act that violates multiple criminal statutes or if they occurred at the same time. For this purpose, it does not matter whether the charges have been filed under one or more cause numbers.

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<sup>1</sup> The following crimes have been intentionally excluded from this list: Insurance Fraud, Mortgage Fraud, Theft from a Vulnerable Adult, Vehicle Prowling 2

<sup>2</sup> Identity Theft 1 is excluded from this list when it is based on the “knowingly targets a senior or vulnerable victim” prong of the statute.

- Example: A defendant cashes a fraudulent check for \$5,001—using another individual’s name and bank account number—at a check cashing establishment and is charged with Identity Theft 1, Forgery, and Theft 1 under the same cause number. All three charges would stem from the same incident.
- Example: A defendant is arrested driving a stolen vehicle and, search incident to arrest, is found to possess three grams of heroin and a stolen credit card and is charged with Possession of a Stolen Vehicle and Possession of Stolen Property—Access Devices under one cause number and VUCSA: Possession under a separate cause number. All three charges would stem from the same incident.
- Example: A defendant burglarizes two businesses on consecutive days and is charged with two counts of Burg 2 under the same cause number. These charges would NOT stem from the same incident.

### **Enumerated Property Crimes**

- Property crimes charges that would constitute the defendant’s **first** felony convictions should presumptively be dismissed **unless** one or more of the following factors is present:
  1. The defendant is currently charged with three or more felonies stemming from different incidents OR four or more felonies stemming from the same incident.
    - In other words, two otherwise eligible felonies should presumptively be dismissed regardless of whether they stem from the same incident and three otherwise eligible felonies should presumptively be dismissed if they stem from the same incident.
    - In instances involving multiple charges, it is irrelevant whether they are charged under one or more than one cause number and whether they are charged in King County or other counties. (Although KCPAO is—obviously—not able to dismiss charges filed in other jurisdictions.)
  2. The case involves restitution to a victim in any amount unless the victim has indicated that they do not wish to pursue restitution.
    - If this is the only precluding criteria and the amount of restitution is \$5,000 or less, the defendant will presumptively be offered a gross misdemeanor with a deferred sentence with the only condition of sentence being the payment of restitution
  3. The defendant has a previous felony conviction (at any time) OR more than five convictions for property crimes (felony or misdemeanor) over the last three years OR has had a charge previously dismissed pursuant to these criteria/presumptions.
    - If the prior felony is an out-of-state conviction that is not comparable to a Washington felony, that would not count as a previous felony conviction for these purposes. However, KCPAO will not affirmatively screen for such cases and will only conduct a comparability analysis if the issue is raised by defense.
    - If the prior felony conviction is a Washington felony that would have itself been eligible for dismissal under this policy, the pending case could still be dismissed with the approval of the relevant unit chair. However, KCPAO will not affirmatively screen for such cases and will only review the prior felony if the issue is raised by defense.

4. The defendant has had a first appearance on a different case since January 1, 2020, and a filing decision has not yet been made.
  - The preclusion does not apply if the case has been diverted, referred to a misdemeanor court, or if there is some other evidence that the case will not be referred for filing.
5. The case involves > \$10,000 in actual or attempted loss. (Note: Actual and attempted loss are both different concepts than the amount of restitution owed.)
  - Example: The defendant steals the victim's identity and unsuccessfully uses it to attempt to cash a \$100,000 check. While the actual loss and the restitution amount would be \$0 (because the attempt was unsuccessful), the charge would not be eligible for dismissal because the attempted loss was greater than \$10,000.
  - Example: The defendant embezzles \$15,000 from their employer, but later pays all of it back. While the restitution amount would be \$0 (because the victim had already been paid back), the actual loss was still over \$10,000 and the charge would not be eligible for dismissal.
6. The case is one that would be prosecuted by ECU's Complex Fraud, Elder Abuse, HIPRO, Mortgage Fraud, or Insurance Fraud groups or is otherwise pre-assigned.
  - This would be a presumptive disqualifier only and the case could still be dismissed with the approval of the ECU Chair
7. The case is a GPS-FFIT Task Force case.
8. The case involves property taken during a Residential Burglary or Burglary 1 where the evidence (other than the mere possession of the property) suggests that the defendant committed the burglary (either as principal or accomplice).
9. The case is a felony due to aggregating three or more crimes.
  - Example: A Theft 1 based on aggregating three or more Theft 2s/3s
10. The property at issue in the case is real property (i.e. land).
  - Example: A forgery where the forged document is a quit-claim deed that ostensible transfers property of land from the victim to the defendant
11. The case involves the forgery or improper alteration of a public record.
12. The case involves the defendant opening a financial account in the victim's name or taking over a victim's account.
13. The case involves the defendant manufacturing fake IDs (i.e. WADL, WAID, passports, etc.).
14. The case involves the commission of a crime by an elected official in the exercise of their public duties.
15. The evidence suggests that the defendant specifically targeted the victim with the intent to cause harm to the victim beyond that implicit in the crime.
  - Example: An ID Theft where stealing the victim's identity is part of an ongoing pattern or harassment against the victim
16. Other circumstances specific to the case, or the defendant, suggest that dismissal of the case is inappropriate.

- In the case of the dismissal of two or more felonies, the KCPAO will run a criminal history on the defendant three – six months following dismissal and reserves the right to refile the dismissed charges if new charges have been referred or charged since the date of dismissal (whether in King County or elsewhere).

### **Enumerated VUCSA Crimes**

- A VUCSA charge that would constitute the defendant's **first** felony convictions should presumptively be dismissed **unless** one or more of the following factors is present:
  1. The defendant is currently charged with three or more felonies stemming from different incidents OR four or more felonies stemming from the same incident.
    - In other words, two otherwise eligible felonies should presumptively be dismissed regardless of whether they stem from the same incident and three otherwise eligible felonies should presumptively be dismissed if they stem from the same incident.
    - In instances involving multiple charges, it is irrelevant whether they are charged under one or more than one cause number and whether they are charged in King County or other counties. (Although KCPAO is—obviously—not able to dismiss charges filed in other jurisdictions.)
  2. Possession of more than 10 grams total (considering all drugs regardless of whether they are charged or not) or more than 100 pills.
    - Example: A defendant who possessed 7 grams of methamphetamine and 4 grams of heroin would not be eligible for dismissal even if only charged with VUCSA: Possession of Methamphetamine
  3. The drugs involved—whether charged or uncharged—included fentanyl or M-30 pills believed to be counterfeit oxycodone containing fentanyl.
  4. The charge of Possession, Delivery, or PWI is directly related to a fatal overdose or the defendant is believed to have delivered drugs that led to a fatal overdose, regardless of whether charges were filed related to the overdose.
  5. The defendant has a previous felony conviction (at any time) OR more than five convictions for VUCSA crimes (felony or misdemeanor) over the last three years OR has had a charge previously dismissed pursuant to these criteria/presumptions.
    - If the prior felony is an out-of-state conviction that is not comparable to a Washington felony, that would not count as a previous felony conviction for these purposes. However, KCPAO will not affirmatively screen for such cases and will only conduct a comparability analysis if the issue is raised by defense.
    - If the prior felony conviction is a Washington felony that would have itself been eligible for dismissal under this policy, the pending case could still be dismissed with the approval of the relevant unit chair. However, KCPAO will not affirmatively screen for such cases and will only review the prior felony if the issue is raised by defense.
  6. The defendant has had a first appearance on a different case since January 1, 2020, and a filing decision has not yet been made.
    - The preclusion does not apply if the case has been diverted, referred to a misdemeanor court, or if there is some other evidence that the case will not be referred for filing

7. The defendant was in possession of a firearm at the time of the crime, regardless of whether the possession was lawful.
  8. Other circumstances specific to the case or the defendant suggests that dismissal of the case is inappropriate.
- In the case of the dismissal of two or more felonies OR if the dismissal is of a charge of PWI, Delivery, Manufacturing, or Delivery of Bunk, KCPAO will run a criminal history on the defendant three – six months following dismissal and reserves the right to refile the dismissed charges if new charges have been referred or charged since the date of dismissal (whether in King County or elsewhere).