

RCW 9.94A.411 Evidentiary sufficiency. (1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where 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.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent - It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute - It may be proper to decline to charge where the statute in question is antiquated in that:

(i) It has not been enforced for many years; and

(ii) Most members of society act as if it were no longer in existence; and

(iii) It serves no deterrent or protective purpose in today's society; and

(iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimis Violation - 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.

(d) Confinement on Other Charges - It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iii) Conviction of the new offense would not serve any significant deterrent purpose.

(e) Pending Conviction on Another Charge - It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) Conviction in the pending prosecution is imminent;

(iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iv) Conviction of the new offense would not serve any significant deterrent purpose.

(f) High Disproportionate Cost of Prosecution - It may be proper to decline to charge where the cost of locating or transporting, 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.

(g) Improper Motives of Complainant - 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.

(h) Immunity - It may be proper to decline to charge where immunity is to be given to an accused in order to prosecute another where the accused's information or testimony 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.

(i) Victim Request - It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

(i) Assault cases where the victim has suffered little or no injury;

(ii) Crimes against property, not involving violence, where no major loss was suffered;

(iii) Where doing so would not jeopardize the safety of society.

Care should be taken to insure that the victim's request is freely made and is not the product of threats or pressure by the accused.

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

Notification

The prosecutor is encouraged to notify the victim, when practical, and the law enforcement personnel, of the decision not to prosecute.

(2) Decision to prosecute.

(a) STANDARD:

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. With regard to offenses prohibited by RCW 9A.44.040, 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, 9A.44.089, and 9A.64.020 the prosecutor should avoid pre-filing agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW 9.94A.670.

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.

See table below for the crimes within these categories.

CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

CRIMES AGAINST PERSONS

Aggravated Murder (RCW 10.95.020)

1st Degree Murder (RCW 9A.32.030)

2nd Degree Murder (RCW 9A.32.050)

1st Degree Manslaughter (RCW 9A.32.060)

2nd Degree Manslaughter (RCW 9A.32.070)

1st Degree Kidnapping (RCW 9A.40.020)

2nd Degree Kidnapping (RCW 9A.40.030)

1st Degree Assault (RCW 9A.36.011)

2nd Degree Assault (RCW 9A.36.021)

3rd Degree Assault (RCW 9A.36.031)
 4th Degree Assault (if a violation of RCW 9A.36.041(3))
 1st Degree Assault of a Child (RCW 9A.36.120)
 2nd Degree Assault of a Child (RCW 9A.36.130)
 3rd Degree Assault of a Child (RCW 9A.36.140)
 1st Degree Rape (RCW 9A.44.040)
 2nd Degree Rape (RCW 9A.44.050)
 3rd Degree Rape (RCW 9A.44.060)
 1st Degree Rape of a Child (RCW 9A.44.073)
 2nd Degree Rape of a Child (RCW 9A.44.076)
 3rd Degree Rape of a Child (RCW 9A.44.079)
 1st Degree Robbery (RCW 9A.56.200)
 2nd Degree Robbery (RCW 9A.56.210)
 1st Degree Arson (RCW 9A.48.020)
 1st Degree Burglary (RCW 9A.52.020)
 1st Degree Identity Theft (RCW 9.35.020(2))
 2nd Degree Identity Theft (RCW 9.35.020(3))
 1st Degree Extortion (RCW 9A.56.120)
 2nd Degree Extortion (RCW 9A.56.130)
 1st Degree Criminal Mistreatment (RCW 9A.42.020)
 2nd Degree Criminal Mistreatment (RCW 9A.42.030)
 1st Degree Theft from a Vulnerable Adult (RCW 9A.56.400(1))
 2nd Degree Theft from a Vulnerable Adult (RCW 9A.56.400(2))
 Hate Crime (RCW 9A.36.080)
 Indecent Liberties (RCW 9A.44.100)
 Incest (RCW 9A.64.020)
 Vehicular Homicide (RCW 46.61.520)
 Vehicular Assault (RCW 46.61.522)
 1st Degree Child Molestation (RCW 9A.44.083)
 2nd Degree Child Molestation (RCW 9A.44.086)
 3rd Degree Child Molestation (RCW 9A.44.089)
 1st Degree Promoting Prostitution (RCW 9A.88.070)
 Intimidating a Juror (RCW 9A.72.130)
 Communication with a Minor (RCW 9.68A.090)
 Intimidating a Witness (RCW 9A.72.110)
 Intimidating a Public Servant (RCW 9A.76.180)
 Bomb Threat (if against person) (RCW 9.61.160)
 Unlawful Imprisonment (RCW 9A.40.040)
 Promoting a Suicide Attempt (RCW 9A.36.060)
 Criminal Mischief (if against person) (RCW 9A.84.010)
 Stalking (RCW 9A.46.110)
 Custodial Assault (RCW 9A.36.100)
 Domestic Violence Court Order Violation (RCW 7.105.450,
 10.99.040, 10.99.050, 26.09.300, 26.26B.050, or 26.52.070, or any of
 the former RCW 26.50.110 and 74.34.145)
 Counterfeiting (if a violation of RCW 9.16.035(4))
 Felony Driving a Motor Vehicle While Under the Influence of
 Intoxicating Liquor or Any Drug (RCW 46.61.502(6))
 Felony Physical Control of a Motor Vehicle While Under the
 Influence of Intoxicating Liquor or Any Drug (RCW 46.61.504(6))
 Felony Hazing (RCW 28B.10.901(2)(b))

 CRIMES AGAINST PROPERTY/OTHER CRIMES
 2nd Degree Arson (RCW 9A.48.030)
 1st Degree Escape (RCW 9A.76.110)
 2nd Degree Escape (RCW 9A.76.120)
 2nd Degree Burglary (RCW 9A.52.030)

1st Degree Theft (RCW 9A.56.030)
 2nd Degree Theft (RCW 9A.56.040)
 1st Degree Perjury (RCW 9A.72.020)
 2nd Degree Perjury (RCW 9A.72.030)
 1st Degree Introducing Contraband (RCW 9A.76.140)
 2nd Degree Introducing Contraband (RCW 9A.76.150)
 1st Degree Possession of Stolen Property (RCW 9A.56.150)
 2nd Degree Possession of Stolen Property (RCW 9A.56.160)
 Bribery (RCW 9A.68.010)
 Bribing a Witness (RCW 9A.72.090)
 Bribe received by a Witness (RCW 9A.72.100)
 Bomb Threat (if against property) (RCW 9.61.160)
 1st Degree Malicious Mischief (RCW 9A.48.070)
 2nd Degree Malicious Mischief (RCW 9A.48.080)
 1st Degree Reckless Burning (RCW 9A.48.040)
 Taking a Motor Vehicle without Authorization (RCW 9A.56.070 and
 9A.56.075)
 Forgery (RCW 9A.60.020)
 2nd Degree Promoting Prostitution (RCW 9A.88.080)
 Tampering with a Witness (RCW 9A.72.120)
 Trading in Public Office (RCW 9A.68.040)
 Trading in Special Influence (RCW 9A.68.050)
 Receiving/Granting Unlawful Compensation (RCW 9A.68.030)
 Bigamy (RCW 9A.64.010)
 Eluding a Pursuing Police Vehicle (RCW 46.61.024)
 Willful Failure to Return from Furlough
 Escape from Community Custody
 Criminal Mischief (if against property) (RCW 9A.84.010)
 1st Degree Theft of Livestock (RCW 9A.56.080)
 2nd Degree Theft of Livestock (RCW 9A.56.083)

ALL OTHER UNCLASSIFIED FELONIES

Selection of Charges/Degree of Charge

(i) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

(A) Will significantly enhance the strength of the state's case at trial; or

(B) Will result in restitution to all victims.

(ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

(A) Charging a higher degree;

(B) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

(b) GUIDELINES/COMMENTARY:

(i) Police Investigation

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following:

- (A) The interviewing of all material witnesses, together with the obtaining of written statements whenever possible;
- (B) The completion of necessary laboratory tests; and
- (C) The obtaining, in accordance with constitutional requirements, of the suspect's version of the events.

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.

(ii) Exceptions

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete 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 complaint should be dismissed.

(iii) Investigation Techniques

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;
- (D) Use of informants.

(iv) Prefiling Discussions with Defendant

Discussions with the defendant or his/her representative regarding the selection or disposition of charges may occur prior to the filing of charges, and potential agreements can be reached.

(v) Prefiling Discussions with Victim(s)

Discussions with the victim(s) or victims' representatives regarding the selection or disposition of charges may occur before the filing of charges. The discussions may be considered by the prosecutor in charging and disposition decisions, and should be considered before reaching any agreement with the defendant regarding these decisions. [2023 c 196 § 2; 2023 c 52 § 2; 2021 c 215 § 98; 2019 c 46 § 5008. Prior: 2017 c 272 § 2; 2017 c 266 § 5; prior: 2006 c 271 § 1; 2006 c 73 § 13; prior: 2000 c 119 § 28; 2000 c 28 § 17; prior: 1999 c 322 § 6; 1999 c 196 § 11; 1996 c 93 § 2; 1995 c 288 § 3; prior: 1992 c 145 § 11; 1992 c 75 § 5; 1989 c 332 § 2; 1988 c 145 § 13; 1986 c 257 § 30; 1983 c 115 § 15. Formerly RCW 9.94A.440.]

Reviser's note: This section was amended by 2023 c 52 § 2 and by 2023 c 196 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title—2023 c 196: See note following RCW 28B.10.901.

Effective date—2022 c 268; 2021 c 215: See note following RCW 7.105.900.

Finding—Intent—2017 c 266: See note following RCW 9A.42.020.

Effective date—2006 c 73: See note following RCW 46.61.502.

Application—2000 c 119: See note following RCW 10.31.100.

Technical correction bill—2000 c 28: See note following RCW 9.94A.015.

Construction—Short title—1999 c 196: See RCW 72.09.904 and 72.09.905.

Severability—1999 c 196: See note following RCW 9.94A.010.

Effective date—Savings—Application—1988 c 145: See notes following RCW 9A.44.010.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.