SCREENING & POLICE / PROSECUTOR RELATIONS

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Between the private life of the citizen and the public glare of criminal accusations stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.

Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.

For that reason we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Young v. U.S. ex rel. Vuitton et Fils S.A., et al, 481 US 787 (1987)

“The prosecutor has more control over the life, liberty and reputation than any other person in America.”

Former U.S. Supreme Court Justice Robert Jackson

"SCREENING"

“Screening” means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

UCA sec 77-2-2

PROSECUTORIAL RESPONSIBILITY - SCREENING

The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued.

NDAA National Prosecution Standards 4-1.1

PROSECUTORIAL DISCRETION - SCREENING

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

NDAA National Prosecution Standards 4-1.2

FACTORS TO CONSIDER - SCREENING

Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest. Factors that may be considered in this decision include:

a. Doubt about the accused's guilt;
b. Insufficiency of admissible evidence to support a conviction;
c. The negative impact of a prosecution on a victim;
d. The availability of adequate civil remedies;
e. The availability of suitable diversion or rehabilitative programs;
f. Provisions for restitution;
g. Likelihood of prosecution by another criminal justice authority;

cont.

h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;

i. The charging decisions made for similarly situated defendants;

j. The attitude and mental status of the accused;

k. Undue hardship that would be caused to the accused by prosecution;

l. A history of non-enforcement of the applicable law;

m. Failure of law enforcement to perform necessary duties or investigations;

n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;

cont.

o. Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life;

p. Whether the accused has already suffered substantial loss in connection with the alleged crime;

q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction.

NDAA National Prosecution Standards 4-1.3

SCREENING – PRE-ARREST

- Less pressure on the prosecutor
- Can complete investigation
- Can talk to investigating officers
- Can staff case with others in the office or with other colleagues
- Determine how to bring the defendant to court
  - Summons or warrant

SCREENING – POST-ARREST

- Suspect booked into jail on charges as determined by law enforcement
- Determine what charges are appropriate and necessary to insure that justice is served
- Pressure to file the case
- If some charges are filed you may lose the opportunity to file more serious charges in the future
- Does the case need further investigation?

EVIDENCE

- Police Reports
- Witness statements
- Defendant's statement
- Photographs
- 911 calls
- Diagrams
- Criminal history of the defendant
- Medical records
- Prior bad acts
- Physical evidence
- Reports on testing of evidence
- Body Camera Footage

ADDITIONAL CONSIDERATIONS

- Corroborating evidence
- Quantity v. Quality of the evidence
- Elements of each crime
- Jurisdiction
- Enhancements
  - Weapons
  - Gang
  - Prior convictions

FACTORS NOT TO CONSIDER - SCREENING

Factors that should not be considered in the screening decision include the following:

a. The prosecutor's office rate of conviction;
b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime;
e. The impact of any potential asset forfeiture to the extent described in Standard 4-7.4.

NDAA National Prosecution Standards 4-1.4

The "Tough Prosecutor"

Creighton Horton

"[O]ne of the most difficult things you must do as a prosecutor is be willing to decline a case if it's not there, despite the considerable pressure that can be brought to bear to induce you to file."

The "Tough Prosecutor"

Creighton Horton

"[I]f you take your role as a prosecutor seriously, you must be willing to exercise your independent prosecutorial discretion and at times disappoint officers you work closely with and with whom you want to maintain good relationships. It's not easy to do, particularly with officers you work with on an ongoing basis, but you cannot delegate such decisions to the police without abrogating your responsibility as a prosecutor."

The "Tough Prosecutor"

Creighton Horton

How to maintain good relationships with officers:

1. Work hard with them on the cases you file, and
2. Decline cases respectfully.

STANDARD FOR FILING

Probable Cause

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

Utah Rules of Professional Conduct, Rule 3.8 Special Responsibilities of a Prosecutor

STANDARD FOR FILING?

Beyond a Reasonable Doubt

- Extremely high degree at this stage of the prosecution
- Should be reserved for trial

STANDARD FOR FILING

Reasonable Likelihood of Success

- Recommended standard to use
- Gives you a higher degree of analysis including consideration of possible defenses without going to the extreme
- A good standard by which to compare all of the evidence and possible charges

FURTHER INVESTIGATION?

Do you need additional evidence or can you go forward with the evidence that you have?

What is the likelihood that further investigation will uncover additional evidence?

REMEMBER

Your case rarely gets better than the day you file it!

PROSECUTORIAL RESPONSIBILITY - CHARGING

It is the ultimate responsibility of the prosecutor's office to determine which criminal charges should be prosecuted and against whom.

NDAA National Prosecution Standards 4-2.1

PROPRIETY OF CHARGES

A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.

NDAA National Prosecution Standards 4-2.2

FACTORS TO CONSIDER - CHARGING

The prosecutor should only file those charges that are consistent with the interests of justice. Factors that may be relevant to this decision include:

a. The nature of the offense, including whether the crime involves violence or bodily injury;

b. The probability of conviction;

c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;

d. Potential deterrent value of a prosecution to the offender and to society at large;

e. The value to society of incapacitating the accused in the event of a conviction;

f. The willingness of the offender to cooperate with law enforcement

FACTORS TO CONSIDER - CHARGING

g. The defendant's relative level of culpability in the criminal activity;

h. The status of the victim, including the victim's age or special vulnerability;

i. Whether the accused held a position of trust at the time of the offense;

j. Excessive cost of prosecution in relation to the seriousness of the offense;

k. Recommendation of the involved law enforcement personnel;

l. The impact of the crime on the community;

m. Any other aggravating or mitigating circumstances.

HOW MUCH IS ENOUGH?

Deliberate overcharging is a disservice to:

- Fellow prosecutors
- The reputation of the prosecutor's office
- Criminal justice system

Reminders

Victim's Rights - Notification of Filing

- Notification of filing felony charges – 7 days
  - UCA sec 77-38-3

- Notification of filing DV cases – 5 days
  - UCA sec 77-36-7

POLICE PROSECUTOR RELATIONS

Goals:

- Appreciate the difference in perspectives
- Concentrate on interpersonal relationships

Prosecutor perspective

- Divinely appointed
  - "Prosecutor is the representative, not of the ordinary party…but of a sovereignty…."
  - Primary responsibility to see that justice is accomplished

Prosecutor Expectations

- Officers will:
  - Do good work
  - Screen only well prepared cases
  - Continue to help after screening
  - Remain interested
  - Show up when subpoenaed
  - Goal is conviction

Officer Perspective

- A chase is fun, a report is not
- Prosecutors do not know….
- Pressured to get case off desk
- Goal is arrest
- We just plea down all of their cases anyway

Officer Expectations

- Prosecutors will:
  - Work hard
  - Be inventive
  - Help when needed
  - Treat officers as equals
  - Respect others time

Communicate

- No “Because I said so.”
  - Do not ask for anything unless you are willing and able to explain why you need it
  - Communicate about decisions
  - No threats

Learn

- About police investigations, procedures, challenges
- About the street
- About individual officers

Build Credibility

- Know the law
- Work hard
- Be willing to help
- Try even difficult cases
- Go see what they do – Ride Alongs

Teach

- Law
- Procedure
- What successful cases need
- What you expect
- Best opportunities may be informal

Respect

- Their abilities
- Their opinions
- Their needs
- Their time – DO I NEED THIS WITNESS?

Show Respect

- Assume the best
- Listen
- Be on time
- Subpoena carefully
- Watch meaningless meetings
- Watch meaningless assignments
- Sometimes go to them

Prosecutor Behavior

- Do not make rash promises
- Accept Fault
- Praise often
- Remand Carefully
  - No temper tantrums
  - Letters to supervisors?
  - No public criticism

Prosecutor / Police Relations 101

Ken Wallentine

1. Work hard.
2. Show the police the respect they deserve.
3. Learn about what the police do.
4. Train an officer who does something wrong.
5. Don't call an officer at home unless it is urgent.
6. If you don't like something an officer did, tell him. Don't just complain.
7. Communicate.
8. Assist in law enforcement training.
9. Prosecute aggressively and fairly. Defend the cop's reputation.
10. Take blame and apologize when appropriate.