

Utah Law Enforcement Planning Agency's
Project on Criminal Justice
Standards and Goals

JUDICIAL SYSTEMS

SCREENING AND DIVERSION

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Approved by
Judicial Systems Task Force
Utah Law Enforcement Planning Council
August 1974



CALVIN L. HAMPTON
GOVERNOR

STATE OF UTAH
OFFICE OF THE GOVERNOR
SALT LAKE CITY

October 22, 1975

Dear Citizens:

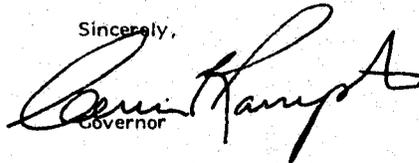
This pamphlet is one of a series of reports of the Utah Council on Criminal Justice Administration. The Council's five Task Forces: Police, Corrections, Judicial Systems, Community Crime Prevention, and Information Systems, were appointed on October 16, 1973 to formulate standards and goals for crime reduction and prevention at the state and local levels. Membership in the Task Forces was drawn from state and local government, industry, citizen groups, and the criminal justice profession.

The recommendations and standards contained in these reports are based largely on the work of the National Advisory Commission on Criminal Justice Standards and Goals established on October 20, 1971 by the Law Enforcement Assistance Administration. The Task Forces have sought to expand their work and build upon it to develop a unique methodology to reduce crime in Utah.

With the completion of the Council's work and the submission of its reports, it is hoped that the standards and recommendations will influence the shape of our state's criminal justice system for many years to come. Although these standards are not mandatory upon anyone, they are recommendations for reshaping the criminal justice system.

I would like to extend sincere gratitude to the Task Force members, staff, and advisors who contributed something unknown before--a comprehensive, inter-related, long-range set of operating standards and recommendations for all aspects of criminal justice in Utah.

Sincerely,


Governor

SCREENING AND DIVERSION

**JUDICIAL SYSTEMS
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4.1 SCREENING CRITERIA

STANDARD

The need to halt formal or informal action concerning some individuals who become involved in the criminal justice system should be openly recognized. This need may arise in a particular case because there is insufficient evidence to justify further proceedings or because -- despite the availability of adequate evidence -- further proceedings would not adequately further the interests of the criminal justice system.

An accused should be screened out of the criminal justice system if there is not a reasonable likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal. In screening on this basis, the prosecutor should consider the value of a conviction in reducing future offenses, as well as the probability of conviction and affirmance of that conviction on appeal.

An accused should be screened out when the advantages and disadvantages to be derived from prosecution or diversion would be outweighed by the costs of such action.

Among the factors to be considered in making this determination are:

1. Reasonable doubt as to the accused's guilt; or as to the likelihood of obtaining a conviction;
2. The impact of further proceedings upon the accused and those close to him, especially the likelihood and seriousness of financial hardship or family life disruption;
3. The value of further proceedings in preventing further offenses by other persons, considering the extent to which subjecting the accused to further proceedings could be expected to have an impact upon others

who might commit such offenses, as well as the seriousness of those offenses;

4. The value of further proceedings in preventing future offenses by the offender, in light of the offender's commitment to criminal activity as a way of life; the seriousness of his past criminal activity, which he might reasonably be expected to continue; and the likelihood that programs available as diversion or sentencing alternatives may reduce the likelihood of further criminal activity;

5. The value of further proceedings in fostering the community's sense of security and confidence in the criminal justice system;

6. Whether the cost of prosecution, in terms of prosecutorial time, court time, and similar factors, is disproportionate to the benefits to be gained from prosecution.

7. Any improper motives of the complainant;

8. Prolonged non-enforcement of the statute on which the charge is based;

9. The likelihood of prosecution and conviction of the offender by another jurisdiction; and

10. Any assistance rendered by the accused in apprehension or conviction of other offenders, in the prevention of offenses by others, in the reduction of the impact of offenses committed by himself or others upon the victims, and any other socially beneficial activity engaged in by the accused that might be encouraged in others by not prosecuting the offender.

NATURE OF THE STANDARD

It should be realized "screening" is divorced from "diversion," which will be covered in standard 5.1 and 5.2. Screening involves the

cessation of formal criminal proceedings and the removal of the individual from the system. Diversion, in contrast, is halting or suspending formal proceedings before conviction on the condition that the individual will do something in return.

The prosecutor sees the full variety of the human condition. The legal remedies he has available must answer as much as possible each situation which comes before his desk.

UTAH STATUS AND COMMENTS

a) Utah Law: The proposed procedural section of the Penal Code, Title 77, chapter 2, has included these criteria word-for-word, except for the phrase in number four "the possibility that further proceedings might have a tendency to create or reinforce commitment on the part of accused to criminal activity as a way of life."

b) Where Utah Differs: The present code makes no mention of screening. It has been shown that voluntary implementation does not work.

ALTERNATE STANDARDS

The ABA has proposed a slightly differing set of criteria:

(i) the prosecutor's reasonable doubt that the accused is, in fact, guilty;

(ii) the extent of harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction.

The NDAA has put out a more practical and political set of criteria.

1. Does the prosecutor think the individual is guilty?
2. Will it result in a conviction?
3. Will the time and effort which will have to be spent on this case be justified if a conviction is obtained?
4. Is there pressure from another agency or division of government?
5. Will a conviction make it appear that the prosecutor is being heartless?
6. Is the prospective defendant someone well-known in the community so that the resulting publicity would impose a more severe penalty than justified?
7. Would the resulting sentence be too severe for the crime committed?
8. Is this an area in which juries are loath to convict?
9. Would it be better to wait until he commits another offense with a stronger set of facts for the prosecution?

10. Would he be valuable as a witness in another trial or against parties involved with him?

11. Will the probable judge who will be hearing this case be favorable?

12. Even though the possibility of a conviction is slim, should it be undertaken because the defendant appears to be guilty of other offenses for which he was not charged?

13. Should the case be prosecuted, in spite of a doubtful outcome, since civil rights are involved?

14. What are the prosecutor's personal feelings?

15. Can this case be transferred to another court or to another agency for civil penalties?

METHOD OF IMPLEMENTATION

The legislature and the county and city attorneys are the major implementing agencies involved. Legislative passage of the proposed procedural section of the penal code revision is necessary.

4.2 SCREENING PROCEDURE

STANDARD

Police, in consultation with the prosecutor, should develop guidelines for the taking of persons into custody. Those guidelines should embody the factors set out in Standard 4.1 After a person has been taken into custody, the decision to proceed with formal prosecution should rest with the prosecutor.

No complaint should be filed or arrest warrant issued without the formal approval of the prosecutor. Where feasible, the decision whether to screen a case should be made before such approval is granted. Once a decision has been made to pursue formal proceedings, further consideration should be given to screening an accused as further information concerning the accused and the case becomes available. Final responsibility for making a screening decision should be placed specifically upon an experienced member of the prosecutor's staff.

The prosecutor's office should formulate written guidelines to be applied in screening that embody those factors set out in Standard 4.1. Where possible, such guidelines, as well as the guidelines promulgated by the police, should be more detailed. The guideline should identify specifically as possible those factors that will be considered in identifying cases in which the accused will not be taken into custody or in which formal proceedings will not be pursued. They should reflect local conditions and attitudes, and should be readily available to the public as well as to those charged with offenses, and to their lawyers. They should be subjected to periodic re-evaluation by the police and by the prosecutor.

When a defendant is screened after being taken into custody, a written statement of the prosecutor's reasons should be prepared and kept on file in the prosecutor's office. Screening practices in a prosecutor's office should be reviewed periodically by the prosecutor himself to assure that the written guidelines are being followed.

The decision to continue formal proceedings should be a discretionary one on the part of the prosecutor and should not be subject to judicial review, except to the extent that pretrial procedures provide for judicial determination of the sufficiency of evidence to subject a defendant to trial. Alleged failure of the prosecutor to adhere to stated guidelines or general principle of screening should not be the basis for attack upon a criminal charge or conviction.

NATURE OF THE STANDARD

This standard suggests a procedure to be used in a prosecutor's office to facilitate effective use of screening, safeguard the defendant's rights and provide a check to indiscriminate use of screening by allowing the police or private complainant a course to the courts. This would be an administrative policy.

As is the case with Standard 4.1, screening has two objectives. The first is to stop proceedings against persons when action will be fruitless, as in situations where insufficient evidence exists. As soon as it can be determined that the individual cannot be convicted, the individual should be freed from further non-voluntary involvement with the criminal justice system.

The second objective is to employ screening when it seems likely a conviction could be obtained, but when more important cases demand attention and allocation of resources. This also applies when cost-base analysis proves prosecution to be inadvisable, such as the processing of a minor bad check charge. (It was found, for example, that it cost between \$10,500 and \$12,700 to process a twenty-five dollar bad check through the criminal justice system; including office cost, manpower cost, etc.)

UTAH STATUS AND COMMENTS

a) Utah Law: The proposed procedural section of the penal code, Title 77, chapter 2, contains those parts of this standard which are susceptible to legislation. The part remaining deals with in-office practices and the situation in Utah shown by the survey (see attached) of the prosecutor's offices.

b) Where Utah Differs: As stated in Standard 1.1, current Utah law has no provision for screening. Though screening is given lip service by most prosecutors, no actual screening (as outlined in Standard 1.1 and

1.2) is practiced. An expanded and detailed method of using screening in a prosecutor's office complete with physical layout conceptions, forms, charts, and practical suggestion, is put out by both the National District Attorneys Association and the National Center for Prosecution Management.

METHOD OF IMPLEMENTATION

The legislature and the county and city attorneys are the major implementing bodies. Legislative passage of the proposed procedural section of the penal code revision is necessary.

5.1 DIVERSION CRITERIA

STANDARD

In appropriate cases offenders should be diverted into non-criminal programs before formal trial or conviction.

Such diversion is appropriate where there is a likelihood that conviction could be obtained but the benefits to society from channeling an offender into an available non-criminal diversion program outweigh any harm done to society by abandoning criminal prosecution. Among the factors that should be considered favorable to diversion are:

1. The relative youth of the offender;
2. The willingness of the victim to have no conviction sought;
3. Any likelihood that the offender suffers from a mental illness or psychological abnormality which was related to his crime and for which treatment is available; and
4. Any likelihood that the crime was significantly related to any other condition or situation such as unemployment or family problems that would be subject to change by participation in a diversion program.

Among the factors that should be considered unfavorable to diversion are:

1. Any history of the use of physical violence toward others;
2. Involvement with organized crime or the habitual criminal offender;
3. A history of anti-social conduct indicating that such conduct has become an ingrained part of the defendant's lifestyle and would be particularly resistant to change; and
4. Any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.

Another factor to be considered in valuating the cost to society is that the limited contact a diverted offender has with the criminal justice system may have the desired deterrent effect.

NATURE OF THE STANDARD

Diversion means halting or suspending criminal action before conviction on the condition that a defendant will cooperate in a non-penal program of rehabilitation and restitution. Action taken after conviction is not diversion because it is done within the criminal justice process and cannot be said to "divert" the defendant out of the system. Diversion is used when prosecution is undesirable because of undue harm to the defendant or his underlying problem, because of the apparent futility of prosecution in preventing future offenses, or because formal prosecution fails to meet the needs of the victim. Availability of treatment, counseling, or mediation procedures is also important.

Two patterns are found in diversion, in-house and interagency. In-house diversion keeps the direct responsibility for completion of the program within the prosecutor's office. Interagency diversion shifts the

direct responsibility to another agency, such as Odyssey House if the defendant is a drug abuser, although the choice of reopening prosecution if the defendant does not complete the program remains with the prosecutor's office.

This program has two benefits. It allows individualization of penalties in which treatment is tailored specifically to the defendant. This allows the prosecutor's office to use its own judgment in seeking less than the minimum punishment prescribed by law. The use of diversion is also less costly. The defendant may still be a productive member of society and the state need not pay for his incarceration.

A possible risk of diversion is that society must sacrifice some security in allowing a law-breaker to remain outside prison. It appears in some studies, however, that the rate of recidivism is dramatically lower among participants of diversion programs than among ex-inmates. In the long run, then, society's security may be better served by the use of diversion programs.

This standard advocates diversion as a legitimate and appropriate part of the criminal justice system. It also suggests a general approach toward determining which offenders are appropriate for diversion. This standard is in close harmony with standards and programs developed by the American Bar Association, National Center for Prosecution Management and National District Attorneys Association.

UTAH STATUS AND COMMENTS

a) Utah Law: Title 77, chapter 2 of the procedural section of the proposed penal code revision adds to number 2 in the 3rd paragraph involvement with "habitual criminal offenders," and makes no mention of the last paragraph, as the last paragraph is not susceptible to law.

b) Where Utah Differs: Present Utah law makes no mention of diversion. Diversionary practices, if present at all in a prosecuting attorney's office, are informal.

METHOD OF IMPLEMENTATION

The legislature and the city and county attorneys are the major implementing agencies involved. Legislative passage of the procedural section of the proposed penal code revision is necessary.

5.2 DIVERSION PROCEDURES

STANDARD

Sec. 1 Authority of Prosecuting Attorney Required - When. -- Unless otherwise proved by statute, no information shall be filed before a magistrate charging the commission of any felony or misdemeanor unless and until the prosecuting attorney shall first authorize the filing of such information. This restriction shall not apply in cases where the magistrate has reasonable cause to believe that a party arrested may escape detention or custody prior to such approval being obtained unless such information be filed. This requirement shall not be construed as preventing a peace officer from arresting a suspect without a warrant when circumstances are such that the law allows such an arrest or retaining him in custody until such authority can be obtained or an information filed as herein provided.

Sec. 2 Diversion from Prosecution. -- [1] The term "diversion" shall mean halting or suspending, before conviction, the criminal proceedings against a person upon the condition or agreement that he will agree to participate in a rehabilitation program, designed to change his behavior, or make restitution to the victim of the crime, or do something

else in return for the halting or suspending of such proceedings, and upon the fulfillment of which requirements, prosecution shall be dismissed.

[2] Offenders may be diverted into non-criminal programs before conviction in appropriate cases in the manner and in accordance with the guidelines as herein provided. Diversion may be deemed appropriate where there is a substantial likelihood that conviction can be obtained and the benefits to society from channeling an offender into an available non-criminal diversion program outweigh any harm done to society by delaying and then dismissing criminal prosecution. For the purpose of diversion, placing the offender under the supervision of the adult parole and probation department upon a voluntary probationary basis shall be deemed to be such a non-criminal diversion program.

In determining whether or not diversion is appropriate, the following factors, among others, should be considered favorable to diversion:

- [a] The relative youth of the offender;
- [b] The willingness of the victim and others involved to have no conviction sought;
- [c] Any likelihood that the offender suffers from a mental illness or psychological abnormality which was related to the crime and for which treatment is available;
- [d] Any likelihood that the crime was significantly related to any other condition or situation such as employment or family problem that would be subject to change by participating in a diversion program;
- [e] Whether the limited contact a diverted offender would thus have with the criminal justice system would have the desired deterrent effect.

Likewise, the following factors, among others, should be considered unfavorable to diversion:

- [a] Any history of the use of physical violence toward others;
 - [b] Involvement with habitual criminal offenders or organized crime;
 - [c] A history of anti-social conduct indicating that such conduct has become an ingrained part of the defendant's lifestyle and would be particularly resistant to change;
 - [d] Any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.
- [3] At any time after the filing of an information or indictment and prior to conviction in an appropriate case, the prosecuting attorney may, by written agreement with the defendant and filed with the court, or by motion to and upon order of the court, divert an offender to a non-criminal diversion program upon such terms and conditions as any be agreed upon with the defendant or approved by the court; provided, however, that where the diversion program involves a significant deprivation of an offender's liberty, such diversion shall be permitted only under a court-approved diversion agreement. A diversion program that provides for a substantial period of confinement in an institution shall not be approved unless the court specifically finds that the defendant is subject to non-voluntary detention in the institution under non-criminal statutory authorizations for such institutionalization. Any diversion program shall be subject to the approval of defendant's attorney, and defendant shall have the right to be represented by counsel during negotiations for diversion and the execution of any agreement therefor or any court hearing thereon. Any agreement for diversion, whether it requires court approval or not, shall contain a full, detailed statement of those things expected of the defendant and of the reasons for diverting the defendant. Any decision by a prosecuting attorney not to divert a particular defendant shall not be subject to judicial review.

[4] Under any diversion program, whether with or without court approval, suspension of criminal prosecution for longer than one year shall not be permitted and in any diversion agreement, the defendant shall waive his constitutional right to an otherwise speedy trial. If during the period of deferred prosecution the defendant has complied with the conditions thereof, the court shall dismiss the information of indictment and the defendant shall not thereafter be subject to further prosecution for the offense involved therein or for any lesser included offense, and the defense of double jeopardy authorized in the Utah Criminal code shall be fully applicable thereto. Deferral of prosecution shall not be deemed a conviction; and, when dismissed as provided herein, the matter shall be treated as if the charge had never been dismissed.

[5] If during the diversion period the defendant fails to comply with any term or condition of the diversion agreement, the prosecuting attorney shall have discretionary authority to determine whether the defendant has violated such agreement, and if so, to reinstate and proceed with the prosecution upon written notice to the defendant and the court, which shall set forth the reasons for such action; provided, however, that if the diversion program has received, prior court approval, the decision of the prosecuting attorney to reinstate the prosecution shall be subject to court review and approval or disapproval. At any time the court for good cause may upon its own motion order a diverted defendant to appear and show cause why the diversion agreement should not be terminated and the prosecution proceed. If the court finds after such order and hearing that the defendant has failed to comply with any term or condition of the diversion agreement, the court may order the prosecuting attorney to proceed with the prosecution, and such prosecution of the diverted offense shall not bar any prosecution arising from any offense of the defendant that constituted a violation of any term or condition of the diversion agreement by which the original prosecution was deferred.

NATURE OF THE STANDARD

A successful diversion program is designed to raise visibility of diversion, give it regularity, eliminate capricious and biased decisions, and raise the efficiency of the diversion process.

Diversion procedures and guidelines should be made public and legitimized in the public view by use of the court's authority involving deprivation of a defendant's liberty. A defense lawyer should be present at all negotiations, and specific safeguards should be emphasized to foster acceptance, both public and within the criminal justice system.

The program must have guidelines and written procedures to give it regularity and fairness. A written agreement should be made for all diversions, specifying what is expected of the defendant and what the prosecution gives in return. A written record of a diversion decision should be kept, whether or not the defendant was diverted, giving the basis for the decision.

These records should be reviewed periodically by the senior prosecutor. The staff doing the diversion negotiations and making the decisions should be experienced and well-qualified, reflecting the importance diversion should have in the criminal justice system.

Several books written by the staff of the National District Attorneys Association and by the National Center for Prosecution Management give an excellent guide to the day-by-day management of a diversion program. Every prosecutor's office should take advantage of this expertise.

UTAH STATUS AND COMMENTS

a) Utah Law: Present Utah law does not mention diversion. Title 77, chapter 2 of the procedural section of the proposed penal code revision follows this standard, with the exceptions listed in b).

b) Where Utah Law Differs: Title 77, chapter 2 of the procedural section of the proposed penal code revision differs from the standard in two areas: Number five is deleted, and in the proposed code a written statement giving reasons for diversion and expectations of the defendant must be included in the agreement. In the standard a written agreement is required only if the diversion does not involve a diversion agreement between defendant and prosecution, or the defendant comes under a category where diversion is common practice and the defendant is not diverted.

An excellent guidebook in various facets of diversion is put out by the National District Attorneys Association and would be useful in our prosecutor's office.

METHOD OF IMPLEMENTATION

The legislature and the county and city attorneys are the major implementing bodies. Passage of the procedural section of the proposed penal code revision is necessary.

END