



# WASHTENAW COUNTY

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### **POLICY DIRECTIVE 2021-01: POLICY ELIMINATING “ZERO TOLERANCE” POLICIES AND SETTING STANDARDS FOR PLEA BARGAINING CONDUCT AND DIVERSIONARY OPPORTUNITIES**

#### **I. Introduction and Background**

Every criminal case involves a unique human story. No two cases are exactly alike, nor is the factual background that brought a person within the criminal justice system’s orbit. The wide array of conduct that is criminalized in our justice system, moreover, means that a person can end up in the justice system for any number of reasons. A person, for example, may end up running afoul of the law because of poverty, substance-use issues, mental health struggles, trauma, or simple human error or forgetfulness.

Yet for decades, “zero tolerance” policies have held sway within (and adjacent to) our criminal-justice system. “Zero tolerance policies,” broadly defined, “construe all conduct the same regardless of context.”<sup>1</sup> Under a “zero tolerance” policy, anyone who engages in certain conduct (a drug offense, say, or a crime involving a weapon) must face inflexible sanctions, regardless of the factual circumstances underlying that offense.

The phrase “zero tolerance policy” was popularized in the 1980s, to describe federal policies related to the so-called War on Drugs.<sup>2</sup> Zero-tolerance laws popularized during that era included “mandatory minimum sentences, [and] three strikes laws.”<sup>3</sup> Eventually, the concept was also adopted by schools—who imposed mandatory suspension or expulsion for “not only drugs and weapons but also tobacco-related offenses and school disruption.”<sup>4</sup> More recently, zero-tolerance policies have been prominently applied in the immigration context. In 2018, the Trump Administration announced its intent to prosecute *all* “unauthorized immigrant parents traveling with their children,” resulting in the separation of some 3,000 children from parents who were being prosecuted, and later in so-called “family detention.”<sup>5</sup>

The idea behind zero-tolerance policies is straightforward. Proponents of zero-tolerance assert that when a community “accepts” certain behaviors, it leads to a downward spiral, and ultimately to “endemic” crime.<sup>6</sup> Zero-tolerance policies also have been touted for eliminating

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<sup>1</sup> S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 Wash. U.L. Rev. 271, 273 (2014).

<sup>2</sup> *Id.* at 323 n. 27.

<sup>3</sup> *Id.* at 323 n. 27 (quoting Kathy Koch, *Zero Tolerance: The Issues*, 10 CQ RESEARCHER 188 (2000)) (cleaned up).

<sup>4</sup> *Id.* at 323 n. 27.

<sup>5</sup> See Human Rights Watch, *Q&A, Trump Administration’s “Zero Tolerance” Immigration Policy* (Aug. 16, 2018).

<sup>6</sup> Michael Hiltzik, *The Truth About ‘Zero Tolerance’: It Doesn’t Work And Always Leads to Disaster*, *The Los Angeles Times* (2018).

human discretion—and thus promoting fairness. “Discretion,” in the words of one zero-tolerance advocate, “is often applied inconsistently.”<sup>7</sup> A criminal sentence, on this account, should not depend on “how sympathetic a judge is, or whether she’s having a bad day.”<sup>8</sup> “Even worse, zero-tolerance advocates contend that “discretion can lead to discrimination.”<sup>9</sup> “The benefit of zero-discretion rules and laws,” according to their proponents, “is that they ensure that everyone is treated equally.”<sup>10</sup>

But whatever the theoretical arguments, zero-tolerance policies simply have not worked. “Decades of research,” for example, “have failed to show that mandatory sentences for gun crimes impact crime rates.”<sup>11</sup> Similarly, “[i]n the juvenile justice context, zero-tolerance policies have been deemed a failure by many, if not most, policy experts.”<sup>12</sup> Even proponents of zero-tolerance policies “acknowledge that there is little data” to support the proposition that such policies are associated “with declines in crime.”<sup>13</sup> In the words of one scholar, “[z]ero tolerance policies are a classic example of policy by anecdote: implementing a policy not based on analysis of data but because a news story is broadly covered and compels some policy response.”<sup>14</sup>

And far from eliminating the biased exercise of discretion, zero-tolerance policies appear to have exacerbated it. In schools, zero-tolerance “policies have had a disproportionate impact on students of color, particularly African-American students.”<sup>15</sup> In the criminal-justice system, Black people are disproportionately likely to be subject to “mandatory minimum” sentencing laws.<sup>16</sup> And “data from police departments around the country shows that officers using the zero-tolerance strategy focused their arrests on African-American men in poor neighborhoods.”<sup>17</sup>

These lessons should hold sway—with particular force—to prosecutors. In prosecutors’

Times (June 22, 2018), *available at* <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-zero-tolerance-20180622-story.html>.

<sup>7</sup> Bruce Schneier, *Zero Tolerance Really Means Zero Discretion*, Schneier on Security (Nov. 4, 2009), *available at* [https://www.schneier.com/essays/archives/2009/11/zero\\_tolerance\\_reall.html](https://www.schneier.com/essays/archives/2009/11/zero_tolerance_reall.html).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Dr. Anne Mahar & John S. Cooper, *The Problems of Mandatory Sentencing: The Troubling Legacy of Michigan’s Felony Firearm Law*, Safe & Just Michigan (2020) at 8, *available at* [https://www.safeandjustmi.org/wp-content/uploads/2020/10/The\\_Problems\\_of\\_Mandatory\\_Sentencing.pdf](https://www.safeandjustmi.org/wp-content/uploads/2020/10/The_Problems_of_Mandatory_Sentencing.pdf).

<sup>12</sup> Sarah Sherman-Stokes and Wendy Kaplan, *Zero Tolerance And Detention Don’t Work In Juvenile Justice. They Don’t Work In Immigration Either*, Justice Policy Institute (July 18, 2018), *available at* <http://www.justicepolicy.org/news/12176>.

<sup>13</sup> Mitchell, *supra* n. 1, at 323, *see also, e.g.*, Hiltzik, *supra* n. 6.

<sup>14</sup> Mitchell, *supra* n. 1, at 323 (quoting Michael Harris, *New National Data Shows Racial Disparities in School Discipline*, Nat’l Ctr for Youth Law (2012).

<sup>15</sup> *Id.* at 275.

<sup>16</sup> *See, e.g.*, Mahar & Cooper, *supra* n. 11, at 12 (discussing disproportionate impacts of Michigan’s mandatory minimum felony firearm law); *see also* Citizens for Racial Equity in Washtenaw (CREW), *Race to Justice* (Aug. 2020) at 20, *available at* <https://www.citizensforracialequitywashtenaw.org/crew-s-report> (discussing same in Washtenaw County).

<sup>17</sup> Timothy Williams and Joseph Goldstein, *In Baltimore Report, Justice Dept. Revives Doubts About Zero-Tolerance Policing*, The New York Times (Aug. 10, 2016)

offices, zero-tolerance policies manifest themselves through inflexible policies that preclude certain case outcomes if a defendant was charged with a certain crime. A zero-tolerance policy, for example, precludes misdemeanor plea deals if a person was charged with a certain offense. It precludes the availability of diversion, deflection, or deferred-sentence opportunities for people who were charged with certain crimes. Ultimately, as in other contexts, prosecutorial zero-tolerance policies in prosecutors' offices "construe all conduct the same regardless of context."<sup>18</sup>

And while zero-tolerance policies are universally problematic, they are particularly troubling when maintained by prosecutor's offices. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."<sup>19</sup> As the United States Supreme Court has repeatedly emphasized, a prosecutor's overarching goal in a criminal case "is not that it shall win . . . but that justice shall be done."<sup>20</sup> A one-sized-fits-all approach to justice—divorced from the factual circumstances of each unique case—is not justice at all.

Accordingly, the Washtenaw County Prosecutor's Office will no longer maintain "zero tolerance" policies. **All previous policies which prohibited Assistant Prosecuting Attorneys (APAs) from offering or accepting a particular plea bargain or case resolution are rescinded, effective immediately.** The only exception is the *Domestic Violence/Homicide Prevention Protocol*. Domestic violence is an offense for which recidivism rates are particularly high, and the risk of serious injury and death is severe.<sup>21</sup> The Prosecutor's Office is thus proceeding carefully before enacting any changes to its current domestic violence policies. The *Domestic Violence/Homicide Prevention Protocol* remains in effect until further notice.

All other policies that can be construed as "zero tolerance" policies, however, are hereby rescinded. These include, but are not limited to:

- **All policies, formal or informal, which prohibit APAs from offering certain plea deals.** This includes all policies which categorically prohibit an APA from "pleading down" a case charged as a felony to a misdemeanor. It also includes all policies which categorically prohibit "pleading down" a case from one type of charge to another (e.g., an aggravated offense to a non-aggravated offense; a substance-use offense to a non-substance-use offense).
- **All policies, formal or informal, which prohibit APAs from offering, or acquiescing to, diversion into a problem-solving court.** This includes all policies which prohibit an APA from allowing a defendant to be diverted into a drug court, mental-health court, or veteran's court if that defendant is accused of certain categories of crimes.

<sup>18</sup> Mitchell, *supra* n. 1 at 273.

<sup>19</sup> American Bar Association, *Model Rules of Professional Conduct*, R.3.8: *Special Responsibilities Of A Prosecutor – Comment*, available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8/).

<sup>20</sup> *United States v. Young*, 470 U.S. 1, 25 (1985); *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>21</sup> See Viet Nguyen & Mia Bird, *Tailoring Domestic Violence Programs to Reduce Recidivism*, Public Policy Institute of California (June 12, 2018); National Coalition Against Domestic Violence, *Guns and Domestic Violence*, available at [https://assets.speakcdn.com/assets/2497/guns\\_and\\_dv0.pdf](https://assets.speakcdn.com/assets/2497/guns_and_dv0.pdf).

- **All policies, formal or informal, which prohibit APAs from offering, or acquiescing to, deferred sentencing options.** This includes all policies which prohibit an APA from offering, or acquiescing to, (1) a deferred sentence under the Holmes Youthful Trainee Act, (2) a “7411” plea for first-time drug offenses,<sup>22</sup> or (3) any other deferred sentencing option.
- **All policies, formal or informal, which prohibit APAs from offering, or acquiescing to, a combination of a deferred sentencing option with a reduction in charging.** For example, so-called “double bite” policies—which prohibit APAs from offering a reduction of a charge in combination with a deferred sentence—are hereby rescinded.
- **All policies which categorically require an APA to obtain a guilty or no-contest plea in order to receive a deferred sentence or adjournment.**
- **All policies, formal or informal, which require the imposition of “habitual offender” designations.**

Fundamentally, “zero tolerance signals a lack of trust in the judgment of people in authority in the field and on the ground — exactly where such judgment is most needed.”<sup>23</sup> To be sure, zero-tolerance policies may render “enforcement easier and perhaps cheaper.”<sup>24</sup> In the final analysis, though, zero-tolerance policies shirk the prosecutor’s “responsibility for case-by-case evaluations in complicated situations.”<sup>25</sup> And without prosecutors “taking the time to examine every case . . . the target population suffers and pays.”<sup>26</sup> The Washtenaw County Prosecutor’s Office will no longer maintain such policies.

Several points, however, should be emphasized. *First*, the rescission of all zero-tolerance policies does not mean that APAs should not consider the seriousness of an underlying offense when making (or agreeing to) plea offers. It is extraordinarily unlikely, for example, that an armed robbery charge will be appropriate for a reduction to a misdemeanor. Absent exceptional circumstances, APAs should not be consenting to such a case resolution. The rescission of zero-tolerance policies simply means that APAs should consider all relevant circumstances when engaging in plea bargaining—and that APAs are not *categorically* precluded from any particular outcomes.

APAs should always keep public safety front-and-center when engaging in plea bargaining. APAs should only offer (or agree to) case outcomes that reasonably ensure public safety.

*Second*, it is the policy of this Prosecutor’s Office to seek the case outcome that imposes the *least restrictive outcome* that will ensure public safety. An APA should not insist on jail or prison time if the APA does not believe that incarceration is necessary to ensure the safety of the community.

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<sup>22</sup> See MCL 333.7411.

<sup>23</sup> Hiltzik, *supra* n. 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

*Third*, APAs should bear in mind that the stigma of a conviction can impose severe, long-lasting consequences. A criminal conviction—even one that does not require jail or prison time—can make it more difficult for a person to obtain employment, secure housing, or continue their education. These dynamics are particularly pronounced when a person is convicted of a felony. Accordingly, when engaging in plea bargaining, APAs should not rigidly insist that a defendant plead guilty to a particular offense if a guilty plea will not meaningfully promote public safety.

*Fourth*, and relatedly, APAs are expected to seriously consider, and to liberally grant, plea bargains and case outcomes that allow a defendant to avoid a criminal record. As discussed in further detail below, these include Holmes Youthful Trainee Act status, and diversion into problem-solving courts. Criminal records should not be imposed for criminal records' sake. If a case outcome can ensure public safety without imposition of a criminal record, that is the outcome that should be pursued.

*Fifth*, and finally, APAs should seek to ensure that a defendant or victim's race, sex, religion, sexual orientation, gender identity, national origin, or socioeconomic status does not play any role in determining a case outcome. To be clear: “leveling down,” not “leveling up,” is the lodestar. If an APA would make a plea offer to a wealthy, white defendant, that same benefit of the doubt should be given to other defendants in similar circumstances.

APAs should be aware that the Prosecutor's Office will be engaging in a third-party audit relating to racial disparities in case outcomes, and that an APA's individual decisions relating to plea bargaining may be highlighted by that audit. A pattern of biased decisionmaking in plea bargaining may be subject to corrective action. An APA's inability or unwillingness to correct biased decisionmaking may be cause for disciplinary action, including termination.

## II. Policy Directive

**1. Immediate Recission of “Zero Tolerance” Policies:** All policies that categorically prohibited APAs from offering—or agreeing to—case outcomes, by virtue of the crime charged, are hereby rescinded. Going forward, APAs are expected to consider the individual facts at the center of each case, and to pursue the case outcome that is in the interest of justice.

Specifically, this Policy permits APAs to exercise full discretion, unconstrained by any policies, with respect to the following:

- (A) **Reduction of Charges:** APAs have full discretion to reduce charges—as part of a plea bargain or otherwise—when doing so would be in the interest of justice and would not threaten public safety. A charge, for example, may be reduced from a felony to a misdemeanor; from an aggravated charge to a non-aggravated charge; or from a statutorily delineated second or subsequent offense to a first offense (when such a reduction is permitted by law).<sup>27</sup>

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<sup>27</sup> Certain Michigan laws prohibit the Prosecutor's Office from charging an incident as a “first offense” if the defendant already has a “first offense” on their record. For example, Michigan law provides that a first minor-in-possession-of-alcohol offense is a civil infraction. But a person can “be found responsible or admit responsibility”

- (B) Diversion into Problem Solving Courts: APAs have full discretion to consent to diversion into a problem-solving court (such as a drug court, mental health court, or veteran’s treatment court). APAs may consent to diversion for any offense, when doing so would be in the interest of justice and would not threaten public safety.

Some problem-solving courts in Washtenaw County (e.g., the Veteran’s Court) exist only in district court—which has jurisdiction only over misdemeanor offense. In some circumstances, it may be necessary to reduce a charge (e.g., from a felony to a misdemeanor) for a defendant to be diverted into a problem-solving court. It may also be necessary to reduce a charge to avoid statutory prohibitions on enrollment in problem-solving courts. APAs may consent to such reductions where doing so would be in the interest of justice and would not threaten public safety.

- (C) Holmes Youthful Trainee Act/7411/Prosecutor’s Deferred Sentences: APAs have full discretion to allow a defendant to receive a deferred sentence and dismissal under the Holmes Youthful Trainee Act<sup>28</sup>, MCL 333.7411, or any other deferred sentencing program. APAs should consent to such deferred sentences where doing so would be in the interest of justice and would not threaten public safety.

In some circumstances, it may be necessary to reduce a charge for a defendant to receive a deferred sentence. By way of example, young defendants are not eligible for Holmes Youthful Trainee Act status if charged with a “major controlled substance offense.”<sup>29</sup> Accordingly, as a precondition to receiving Holmes Youthful Trainee Act status, it may be necessary to reduce a charge that is a “major controlled substance offense.” APAs may consent to such a reduction where doing so would be in the interest of justice and would not threaten public safety.

- (D) Combination of Reductions, Deferred Sentences, and Diversion: APAs have full discretion to offer, or consent to, any combination of reductions, deferred sentences, and diversions. Where, for example, it would be in the interest of justice to combine (1) a reduction of a charge with (2) Holmes Youthful Trainee Act status, APAs may offer or consent to that combination.
- (E) Guilty/No Contest Pleas: APAs have full discretion to offer, or consent to, case outcomes which do not involve a guilty or no-contest plea. APAs may offer or consent to such outcomes where doing so would be in the interest of justice and would not threaten public safety.

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to a first minor-in-possession offense only once. MCL 436.1703. Accordingly, the Prosecutor’s Office is not permitted by law to reduce a subsequent minor-in-possession offense to a first minor-in-possession offense. Assistant Prosecuting Attorneys should, however, consider reducing a second or subsequent minor-in-possession charge to a civil infraction such as littering. See MCL 324.8902.

<sup>28</sup> MCL 762.11 *et seq.*

<sup>29</sup> See MCL 762.11(2)(b); MCL 761.2 (definition of “major controlled substance offense”).

**2. Domestic Violence/Homicide Prevention Protocol:** Notwithstanding anything else in this Policy, the *Domestic Violence/Homicide Prevention Protocol* remains in effect. That Protocol supersedes, where applicable, any general directives provided in this Policy.

By way of example, the *Domestic Violence/Homicide Prevention Protocol* prohibits reduction of domestic violence charges “to Assault & Battery or disorderly conduct.” That specific admonition trumps this Policy’s general provision allowing a reduction of charges where it is in the interest of justice. APAs should not reduce domestic-violence offenses to non-domestic violence offenses.

**3. Application to Currently Pending Cases:** This Policy applies to all cases that are currently being prosecuted by the Washtenaw County Prosecutor’s Office, and for which a final judgment has not yet been entered. APAs should seek to resolve their current cases in accordance with this Policy—not in accordance with any formal or informal policies that were previously maintained by the Prosecutor’s Office. For purposes of this paragraph, it shall be considered a “final judgment” if a plea agreement has reached but a defendant has not yet been sentenced. Absent exceptional circumstances, APAs should not seek to undo plea agreements that were previously reached.

**4. General Considerations:** When making, or considering, a plea offer, APAs should consider the following non-exhaustive list of factors. These factors should be considered in the totality of circumstances; none should be considered dispositive. APAs should bear in mind that it is the general policy of this Prosecutor’s Office to seek the *least restrictive case resolution* that will *protect public safety*.

- **Age of the offender:** As younger brains are still developing, a younger defendant is more likely to “age out” of crime, and is more likely to be the appropriate beneficiary of deferral or diversionary programs.
- **Collateral Consequences:** APAs should consider how the collateral consequences of a criminal conviction will affect a defendant’s ability to maintain a job, secure housing, or continue their education. APAs should pay particular attention to collateral consequences related to immigration status, as conviction (or a guilty plea) can render a person deportable or ineligible for withholding of removal. It is the policy of this Prosecutor’s Office to seek to avoid restrictive collateral consequences wherever possible, and to ensure—to the extent practicable—that the only collateral consequences of a conviction are those that are necessary to ensure public safety.
- **Criminal History:** A person without a lengthy criminal history is less likely to pose a threat to public safety, and is more likely to be the appropriate beneficiary of a reduction, deferral, or diversion. In considering criminal history, APAs should be cognizant of (1) the racial disparities that have historically existed with respect to criminal charges in Washtenaw County and the State of Michigan<sup>30</sup>, and (2) the sometimes arbitrary nature of when a person is charged with a crime. APAs should consider criminal history to the

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<sup>30</sup> See, e.g., Citizens for Racial Equity in Washtenaw (CREW), *Race to Justice* (Aug. 2020) at 20, available at <https://www.citizensforracialequitywashtenaw.org/crew-s-report>.

extent a criminal history indicates a person poses a danger to the community. Absent more, for example, a criminal history largely involving marijuana offenses does not indicate dangerousness. Given wide rates of marijuana usage, such a history may indicate only that a person was unlucky enough to get caught with marijuana, or it might be reflective of broader racial disparities with respect to marijuana arrests and charges.<sup>31</sup>

- **Input from Officer in Charge:** The officer in charge of the investigation often has key information available regarding the factual backdrop against which a crime occurred. APAs should therefore consider input from the officer in charge when considering the appropriate disposition of a case
- **Intentional Disregard for the Law/Moral Culpability:** APAs should consider the degree to which the facts of the case indicate an intentional disregard for the law, and/or moral culpability. This consideration necessarily requires looking beyond the elements of the charge. By way of example: a person can be charged with carrying a concealed weapon (a felony) if that person carries a “pistol concealed on or about his or her person, or . . . in a vehicle . . . without a license to carry the pistol as provided by law.”<sup>32</sup> There is an obvious difference in culpability between (1) a person who intentionally carries a concealed weapon in a public place, without ever having sought a license; and (2) a person who has a firearm in one’s car, but whose concealed-carry license expired two weeks earlier. The former situation apparently involves an intentional disregard for the law; the latter apparently involves simple human forgetfulness.
- **Poverty/Economic Status:** A person whose actions were a result of poverty is less likely to be deserving of a harsh criminal sentence.
- **Public Safety:** APAs should always consider the degree to which the facts of the case demonstrate that a defendant poses a risk of public safety. Ensuring public safety must be a priority in any case disposition.
- **Sentencing Guidelines:** Michigan’s sentencing guidelines should always be considered when making or accepting any plea offer.
- **Substance Use/Mental Health:** A person whose actions were caused by substance use or mental health issues is more likely to be the appropriate beneficiary of deferral or diversionary programs.
- **Victim’s Wishes:** APAs should always consider the expressed wishes of any victim of a crime. Nothing in this Policy should be read to supersede or undermine the rights granted to victims under the William Van Regenmorter Crime Victim’s Rights Act.<sup>33</sup>

**4. Prior Criminal Record:** As discussed above, an individual’s prior criminal record is a relevant factor for an APA to consider when determining an appropriate case outcome. A lengthy criminal record—particularly one that encompasses crimes that harm the community—is an indicator that a person may pose a threat to public safety, or may require more restrictive

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<sup>31</sup> See American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (Apr. 17, 2020), available at <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/>.

<sup>32</sup> MCL 750.227

<sup>33</sup> MCL 780.811 *et seq.*



conditions of a sentence and/or intervention.

A person's record, however, is merely one consideration of many. Consistent with this Policy, a prior criminal record does not categorically bar a defendant from any case outcome that would otherwise be appropriate. By way of example: a young person should not be denied Holmes Youthful Trainee Act status simply because that young person has a prior criminal record.

**5. Holmes Youthful Trainee Act—Application Strongly Favored:** As outlined above, APAs have full discretion to consent to Holmes Youthful Trainee Act status for youthful defendants.<sup>34</sup> The Holmes Youthful Trainee Act provides young people who have made a mistake to move forward with life, unburdened by a criminal record—if that young person avoids further brushes with the law. A young person under the age of 21 may receive Holmes Youthful Trainee Act status with or without the prosecutor's consent; “consent of the prosecuting attorney” is required for young people between the ages of 21 and 24.<sup>35</sup>

Application of the Holmes Youthful Trainee Act is *strongly* favored by the Prosecutor's Office. Where appropriate and applicable, Holmes Youthful Trainee Act status should be presumed. In general, APAs should not object to Holmes Youthful Trainee Act designation for young people under the age of 21. APAs should generally consent to such a designation for people between the ages of 21 and 24.

Wherever possible, APAs should seek to avoid saddling a young person with an unnecessary criminal record. As indicated above, Holmes Youthful Trainee Act status may be granted in combination with a reduction of a charge, including from a felony to a misdemeanor.

An APA should withhold consent under the Holmes Youthful Trainee Act only where the facts of the case indicate that application of the Act would threaten public safety. Where the Holmes Youthful Trainee Act is applied, supervision should be the least restrictive necessary to ensure the safety of the community. For example, community supervision is preferred to in-custody supervision.

**6. Habitual Offender Designation—Application Strongly Disfavored:** If a prosecutor designates a defendant a “habitual offender,” that defendant faces a severe sentencing enhancement—up to *double* the sentence that defendant would have otherwise received.<sup>36</sup> These sentences are often disproportionate to the instant offense, and often result in a far longer prison sentence than is necessary to ensure public safety.

As a result, “habitual offender” designations are strongly disfavored by the Washtenaw County Prosecutor's Office. A person should be designated a habitual offender only if there is a cognizable reason to believe that the maximum prison sentence for their instant offense will not adequately ensure public safety. Absent extraordinary circumstances, a person should not be designated a “habitual offender” if more than 3 years have passed since they were last subject to

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<sup>34</sup> Prosecutorial consent is required for any person between the ages of 21 and 24 to receive Holmes Youthful Trainee Act status. See MCL 762.11(1).

<sup>35</sup> MCL 762.11.

<sup>36</sup> See MCL 769.10-769.13.

supervision (*i.e.*, jail, prison, parole, or probation). A person also should not be designated a “habitual offender” based on a past conviction of a different type. For example, a person should not be designated a “habitual offender” for a violent crime if their only past conviction was for felony possession of a controlled substance.

To the extent “habitual offender” designations are made, multiple past charges arising from a single incident should count only as a single prior offense.

A defendant will typically be designated a habitual offender following bind-over into circuit court after the preliminary examination. If an APA wishes to designate a defendant as a “habitual offender,” the APA must make that request, in writing, to either (1) the First Assistant Prosecuting Attorney in charge of general felony trials, or (2) if the case is a vertical prosecution such as for criminal sexual conduct or child abuse, to the First Assistant Prosecuting Attorney overseeing that prosecution. Upon approval by the relevant First Assistant Prosecuting Attorney, a habitual-offender designation will be entered.

The APA requesting habitual offender status must detail, in writing, the reasons for that designation in the case tracking notes—including why the APA believes that public safety cannot adequately be served by the maximum sentence for the instant offense.

## **6. Diversion to Problem-Solving Courts—Dismissal Upon Graduation To Be Granted**

**Wherever Lawful:** When a defendant is diverted into a problem-solving court—such as a drug court, a mental-health court, or a veteran’s treatment court—APAs should, where lawful, offer complete dismissal of charges upon completion of that problem-solving court’s programming.

Under Michigan law, when a person has completed problem-solving court programming, prosecutors have broad (though not total) discretion to “discharge and dismiss the proceedings,” without an adjudication of guilt.<sup>37</sup> It is the policy of this Office to grant dismissal in *all cases where it can be lawfully offered*. A person who has completed problem-solving court programming has expended considerable effort to treat the underlying issues that brought them into the criminal-justice system. Saddling a person with a criminal record serves no useful purpose.

Michigan law, however, prohibits total dismissal of charges under certain circumstances. For drug court, a person may not obtain total dismissal of charges (even with the prosecutor’s consent) if that person is charged with, or pleaded guilty to, a “traffic offense.”<sup>38</sup> In both drug court and mental health court, dismissal is not permitted if a person has previously been subject to the Holmes Youthful Trainee Act, a deferred sentence under MCL 333.7411, or if the defendant has previously participated in the relevant problem-solving court.<sup>39</sup>

In circumstances where dismissal is not legally available, APAs should consent to the least restrictive conditions that can legally be imposed upon completion of problem-solving court programming.

<sup>37</sup> See, *e.g.*, MCL 600.1076 (drug court); MCL 600.1098 (mental health court).

<sup>38</sup> MCL 600.1076(4)(d).

<sup>39</sup> MCL 600.1076(4) (drug court); MCL 600.1098(3) (mental health court).

**7. Probationary Terms:** When seeking probation as part of a sentence, APAs should act in accordance with the separately issued “Policy Regarding Recommended Probation Terms.” See Policy Directive No. 2021-11, *Policy Regarding Recommended Probation Terms* (forthcoming).

**8. Serious/High-Profile Offenses—Consultation with Supervisor:** This Policy grants APAs broad discretion to resolve cases in the interest of justice. APAs should be aware, however, that their decisions in any case reflect on the Office as a whole. Accordingly, APAs should consult with their supervisors in any case involving death, in any case involving first-degree criminal sexual conduct, and in any case likely to attract significant public interest.

**9. No Substantive Rights Created:** This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney’s Office. Nothing in this Policy purports to affect the legality or propriety of any judicial action, or law enforcement officer’s actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

**10. Exceptions:** All cases are different, and this Policy accordingly provides guidance that is presumptive only. Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



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Eli Savit  
Prosecuting Attorney, Washtenaw County

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### Acknowledgements

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This Policy represents the views of the Office of the Prosecuting Attorney. The acknowledgement of those who provided guidance does not imply ratification by them, or by the organizations with which they are affiliated. Organizational affiliations are for identification purposes only.