


MEMORANDUM

TO: Eric Holmes, City Manager

FROM: Jonathan Young, City Attorney 

DATE: December 3, 2020

SUBJECT: Updated Criminal Prosecution Priorities: DWS-III *
* Driving While License Suspended Third Degree

Overview

The Vancouver City Attorney's Office is committed to advancing our understanding of who is, and is not, benefitting from the institutions our society has created. Where possible, we will seek opportunities to lawfully balance inequities that exist and repair inequities in our systems.

To this end, beginning January 2021, the City Attorney's Office will be piloting changes to our prosecution practices relative to the crime of "Driving While License Suspended in the Third Degree" (DWS-III).

While the requirement that motorists maintain a valid driver's license is certainly one ingredient in the overall recipe of traffic safety, prosecution trends increasingly suggest that bringing and maintaining criminal charges for DWS-III disproportionately impacts community members who are Black, Indigenous, and People of Color, as well as those who are of low or moderate financial means.

The 2021 DWS-III Pilot Program will bring two important changes to the City Attorney's prosecution practices:

1. The City Attorney's Office will offer qualifying individuals referred for DWS-III the opportunity to participate in a pre-citation diversion program. If completed, no infraction or criminal charges will be filed.
2. Prosecution standards will be revised to call for the use of civil infractions (rather than criminal charges) where appropriate, for those who do not choose to participate in the DWS-III Pre-Citation Diversion.

Anatomy of a DWS-III Case: While most people can quickly describe the elements of crimes like “assault,” “theft” or “DUI,” very few non-lawyers can accurately distinguish the elements of DWS-III as compared to DWS-I or DWS-II.

DWS-III referrals generally arise in instances where someone has received a ticket for a moving violation (e.g., speeding or rolling through a stop sign) and then fails to pay the ticket or show up in court to contest it. When this happens, the District Court notifies Washington State Department of Licensing (DOL). DOL sends the driver a notice that their license may be suspended; if the individual fails to timely contest, their driver’s license is suspended by the state. The next time this individual gets in their car and drives, they are committing the misdemeanor Driving While License Suspended in the Third Degree (DWS-III). (RCW 46.20.342(1)(c)).

By contrast, a person who has been declared a habitual offender, or who drives after having their license revoked due to impairment, commits the crime of DWS-I or DWS-II (respectively), and may be charged with a gross misdemeanor. It is generally agreed that DWS-I and DWS-II have a strong nexus to community traffic safety. The City Attorney’s Office is not proposing any changes to its current practices of charging DWS-I and DWS-II offenses as crimes.

The problem is that prosecution trends increasingly suggest that this charge disproportionately impacts community members who are Black, Indigenous and People of Color, as well as those who are of lower financial means.

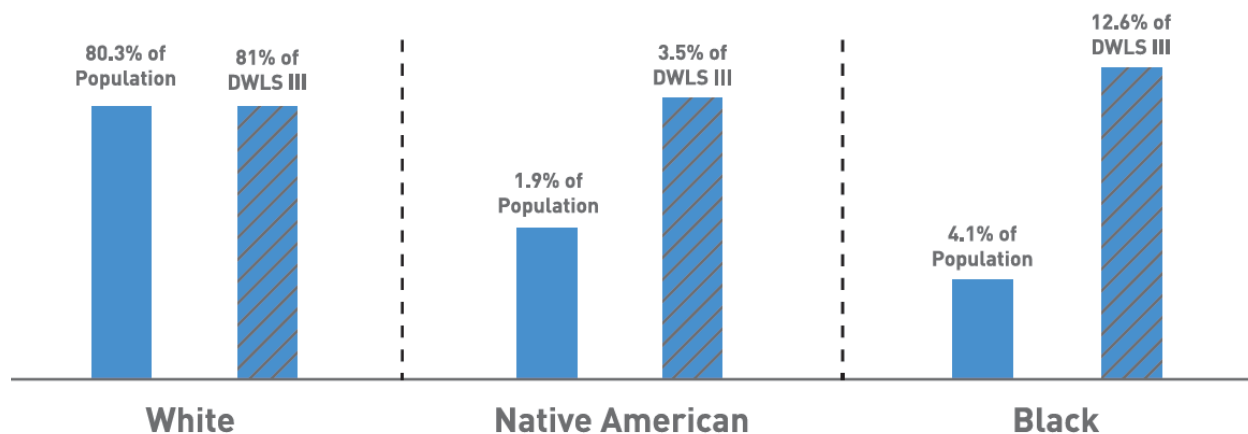
Nexis to Social Justice Reform: Within the 2017 Harvard Law Review commentary [“The President’s Role in Advancing Criminal Justice Reform”](#) Barack Obama observed that state and local government action is needed to advance criminal justice reform by addressing the criminalization of poverty. Practices that criminalize poverty “destroy trust, deprive our fellow Americans of their fundamental rights, and have too often led to a two-tiered system in which the poor are not accorded the equal protection under the laws to which they are entitled under the U.S. Constitution.” (130 Harv. L. Rev. 811.)

By its very nature, a referral for DWS-III typically arises due to a driver’s failure to pay legal fines. As a result, it is not surprising that DWS-III prosecutions disproportionately impact those who are of low or modest financial means. Further, DWS-III cases typically require multiple court appearances, each of which causes non-salaried defendants to lose earnings. If a DWS-III criminal defendant fails to appear, the court issues a warrant that may disqualify the individual from employment opportunities or public benefits. Non-indigent defendants found guilty of DWS-III must also pay court fees. In 2020, a DWS-III conviction carried a minimum of \$424.50 in court fees. For a minimum wage worker, \$424.50 equates to over 31 hours of labor. A warrant may be issued if a defendant fails to pay court-ordered fees.

In 2019, the Vancouver City Attorney's Office charged approximately 4500 cases. Of these, DWS-III charges made up 1140 cases -- roughly a quarter of the City's criminal caseload. The 1,140 DWS-III cases filed by the City in 2019 reflect the following dynamics:

- 58% (661) had at least one warrant issued;
- 53% (609) were still pending as of July 2020;
- 29% (333) were resolved guilty of DWS-III as of July 2020;
- 158 defendants (47% of all cases resolved guilty) were ordered to pay \$0 in fees, most likely because the court found the defendant to be indigent);
- The remaining 175 (53% of all cases resolved guilty) were ordered to pay a total of \$25,717. Of this amount, as of July 2020, only \$3,041 had been paid.

In summary, DWS-III defendants of low and modest means are severely impacted by DWS-III prosecutions, often in ways that more financially affluent defendants are not. As one might suspect, financial disparities translate to racial inequities. Charges for DWS-III disproportionately disadvantages community members who are Black, Indigenous, and People of Color. As reflected in the 2015 statewide DWS-III filings:



Source – ACLU of Washington analysis of Administrative Office of the Courts Data.

Black community members are roughly three times as likely to be charged with DWS-III as white people. Indigenous community members are approximately twice as likely to be charged with DWS-III as white people. [“Driven to Fail, the High Cost of Washington's Most Ineffective Crime – DWS-III,”](#) ACLU of Washington

(2017).¹ There are several other practical reasons to explore changes to the DWS-III program at this time:

- Neighboring jurisdictions in Oregon regard similar conduct as a Class A civil infraction. (Oregon Revised Statute 811.175.)
- The current COVID-19 pandemic has required suspension of the expiration dates of thousands of driver's licenses – creating a potential backlog of renewals. (Washington State Emergency Proclamation 20-41.)
- The current COVID-19 pandemic has created backlogs in criminal case trial schedules; numerical caps on jail inmates to reduce the spread of infection; and higher caseloads in other areas such as the Domestic Violence Prosecution Center.
- Appropriate changes to the DWS-III program stand to afford greater policy alignment with City Council's 2021-2022 Financial Policies which now include community safety as well as social justice as recognized priorities.

2021 DWS-III Prosecution Changes: Historically, referrals for DWS-III have been charged as misdemeanor criminal charges. While the City Attorney's Office already has a DWS-III Diversion Program, the benefits of that program have historically only been available after an individual has been charged with a crime.

Beginning in January 2021, the City Attorney's Office will make two important changes to the City's DWS-III diversion program:

1. Creation of a Pre-Citation Diversion Program. The DWS-III pre-citation diversion program will be able to be completed in two ways: (1) working with City Attorney's Office Staff to obtain successful license reinstatement; or (2) remaining offense-free for 6 months.
2. Revision of Prosecution Standards. Revised 2021 standards will call for the use of civil infractions (rather than criminal charges) where appropriate, for those who do not choose to participate in the DWS-III Pre-Citation Diversion program.

The City Attorney's Office plans to study the results of these program changes after one year and evaluate the need for further program refinements.

¹ Regrettably, the City Attorney's Office has found – and the ACLU acknowledges, too – that no data is available regarding the impacts of DWS-III on members of the Latinx community. Efforts to improve criminal justice data collection remains the subject of ongoing efforts within the City Attorney's Office and was a factor in the City Attorney's 2021-22 Budget Request for funding a new criminal case tracking system. This budget request was approved by the Vancouver City Council in November 2020 with projected procurement and implementation in 2022.