1.0 PROSECUTION STANDARDS

The following is intended to provide prosecutors and other employees in the Juab County Attorney's Office with guidelines in their exercise of their duties, including prosecutorial discretion. These guidelines are not intended to deprive individual prosecutors of their discretion; rather, they are intended to establish the acceptable outside parameters within which individual discretion can be exercised.

The general standard for prosecution is that a prosecutor should not institute, cause to be instituted, or permit to continue pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction at trial. In other words, prosecutors in the Juab County Attorney's Office should only file and/or continue the prosecution of criminal charges for which there exist admissible facts and evidence to minimally establish each element of the charge(s).

In certain situations, there may be good cause to decline to file, or discontinue prosecution of, charges, even when such are supported by sufficient admissible evidence. There are also situations where, for good cause, prosecutors should file fewer or lesser charges than the evidence might support. Factors that may contribute to such circumstances are:

A. The extent of the harm caused by the offense was minimal.
B. The authorized punishment in relation to the particular offense or offender is highly disproportionate.
C. The evidence strongly suggests improper motives of the complainant—but only where there is minimal evidence in addition to the complainant's statement(s) corroborating the offense.
D. Reluctance of the victim to testify. However, all reasonable efforts should be made to persuade victims of violent crimes to testify and in the event victim refuses, the prosecutor should assess the viability of the prosecution without the victim's testimony or consider legal means to procure the victim's testimony despite the reluctance or refusal.
E. Significant cooperation of the accused in the apprehension or conviction of others.
F. Availability and likelihood of prosecution for the same or related offense by another jurisdiction.

There are also circumstances or conditions that a prosecutor may *not* consider when instituting, continuing, or discontinuing the pendency of charges. These reasons include, but are not limited to:

A. The Office's or prosecutor's conviction rate.
B. The acts or behavior of the suspect's or defendant's attorney.
C. Any personal or political advantages or disadvantages that might be involved in bringing or foregoing prosecution in a case.

D. Pressure from a supervising attorney to make a decision inconsistent with the individual prosecutor's reasonable case evaluation and belief regarding his or her ethical obligation in the matter.
E. The race, color, gender, age (except in juvenile court), religion, sexual identity, sexual preference, religion, or national origin of any person. Disability may be considered only with regard to a defendant's ability form the requisite *mens rea*. Immigration status may only be considered with regard to the general case evaluation (e.g., the availability of witnesses).

Regarding the number of charges to file, the prosecutor should file charges that adequately encompass the offense(s) committed and rationally address the nature and scope of the criminal activity.

The express intent of this Office is to hold accountable those who violate the law and to attain justice for victims and our community. When screening and prosecuting cases that intent should be kept in mind.

1.1 CASE SCREENING

District and Justice Court Cases.

Screening Defined: A case is considered screened by a prosecutor when:

A. An Information is filed with the court and all pertinent information is saved into the current case management system;
B. The case is declined and notice is given to the case officer either in writing or verbally; or
C. A request for additional information is sent to the appropriate person.

Timing: Prosecutors should screen cases by the earlier of the following:

A. Before an arrestee's Initial Appearance before the Court.
B. Within 10 business days of receipt.
C. For defendants not in custody, complicated cases, and cases wherein the prosecutor needs to interview victims or witnesses: ordinarily within 30 business days of receipt.
D. For defendants in custody: prosecutors should screen, to the best of their abilities, from the Probable Cause Statement in the case. If it is determined that an Information will be filed, such screening should be filed, pursuant to Utah Rules of Criminal Procedure 9(c)(4)(A), by 3:00 p.m. on the fourth calendar day after the defendant was booked or before the expiration of any granted extension period pursuant to Utah R. Crim. P. 9(c)(4)(B). If the time periods expire on a weekend or legal holiday, the Information must be filed by 3:00 p.m. of the next business day.

For in-custody suspects, if a prosecutor determines to decline or request further information that will not be returned prior to the 4-day period noted above, the prosecutor should promptly inform the court and the Juab County Jail of this Office's intent not to file, in order to facilitate the release of the suspect.

When a case is successfully filed with a court, the assigned prosecutor's legal assistant should change the case status in the current case management system from "Pending" to "Open."

Declinations: Open communication between the prosecutor and the case officer are a high priority of the County Attorney's Office and when a prosecutor declines to file a case, such decision and the reasoning supporting the decision should be communicated to the officer either in writing or verbally. If declinations are made due to a perceived error on the part of the officer, such communication should include the error and recommendations for improvement. Prosecutors should make notes in the current case management system of the reasons for declining a case and document the method of communication that was made to the case officers, victims and/or witnesses. Prosecutors, or their legal assistant, should change the status of the case in the current case management system from "Pending" to "Declined."

Requests for further information: When a prosecutor requests further information from a person, she or he should change the status of the case in the current case management system from "Pending" to "Request Further Information." A prosecutor and his or her assistant should regularly review the cases that are in this status. If a case has been in "Request Further Information" status for more than 60 days, it should generally be declined until additional information is received. If a prosecutor declines to file charges based upon not receiving the requested information, the prosecutor shall communicate to the case officer that charges are being declined, but that screening can be re-opened upon receipt of the requested information. Prosecutors should make notes in the current case management system of the requested further information in a case and note the method of communication that was made to the case officers, victims and/or witnesses.

Requests for further information or investigation are to be used with purpose and common sense. The purpose is not to make a perfect case—only a prosecutable one. Accordingly, prosecutors should not request or require unnecessary additional investigation. The prosecutor should file and prosecute charges when he or she has sufficient admissible evidence to prove each element of the charges she or he intends to file. The prosecutor should request additional information when significantly greater charges could be filed, or the case would be significantly strengthened with some reasonable additional investigation.

Juvenile Court Cases.

Screening Defined: A case is considered screened by a prosecutor when:

A. The prosecutor has reviewed the police report and recommended the police agency to refer certain allegations to the juvenile court; or
B. The prosecutor receives a request from the juvenile court to petition previously referred allegations; or
C. Declining allegations:
    a. In cases that are reviewed prior to juvenile court referral, the prosecutor communicates the declination and the reason for the declination to the case officer and agency;
    b. In cases that are reviewed after the juvenile court referral, the prosecutor communicates declining to petition the matter to the case officer and marks each declined allegation "PCA" (Petition Denied by Prosecutor) in CARE.

2.0 FORFEITURE OF SEIZED PROPERTY

Utah Code provides for the criminal and civil forfeitures of property seized by law enforcement that is determined to have been used to facilitate the commission of a crime or is proceeds of any criminal activity. Because criminal forfeiture requires the highest burden of proof (beyond a reasonable doubt), prosecutors in this Office will typically seek forfeiture of property under the criminal procedure. All statutory procedures will be followed, whether in a criminal or civil action.

Criminal forfeiture of seized property shall be sought by prosecutors in cases where the law enforcement officer has followed the statutory procedures for seizure and notice. Prosecutors shall exercise great care to ensure the property rights, where expressed and limited in statute, of both innocent and guilty property holders are protected.

Generally, prosecutors should seek to forfeit all guns used in the commission of an offense according to the statutory procedure.

3.0 DISCOVERY OBLIGATIONS

This Office recognizes its duty to comply with Utah Rule of Criminal Procedure 16 and the Due Process clauses of the United States and Utah constitutions requiring production of all *Brady* and *Giglio* material. The disclosure of exculpatory material and impeachment evidence is part of the constitutional guarantee to a fair trial. *See Brady v. Maryland*, 373 U.S. 83 (1963)*, Giglio v. United States*, 405 U.S. 150 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. Because these are constitutional obligations, prosecutors must disclose *Brady* and *Giglio* evidence to all defendants regardless of whether the defendant makes a request for exculpatory or impeachment evidence.

The constitution requires disclosure of "material" exculpatory and impeachment evidence. Evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419 (1995). Recognizing that it is sometimes difficult to assess the materiality of the evidence before trial, prosecutors will generally take a broad view of materiality and err on the side of disclosure.

<u>Potential Impeachment Disclosures of Law Enforcement Officers</u>

Giglio requires, in addition to disclosing exculpatory evidence, that information which could be used to impeach government witnesses must be disclosed, including when a witness is a police officer or government employee. Because this Office is deemed to have constructive knowledge of potential impeachment material held by the law enforcement agencies with whom we work, we have an affirmative obligation to ascertain such information from those agencies. To that end, the County Attorney will collect *Brady/Giglio* evidence that should be reviewed for

potential discovery disclosure when a police officer or government employee will be called as a witness at trial.

It is important to note that the mere fact that the Office has collected *Brady/Giglio* evidence related to an officer is not a comment by this Office regarding the person's future viability as a witness, on his or her reputation, or on the person's ability to serve in his or her current capacity.

Brady/Giglio Evidence

This Office will collect *Brady/Giglio* related to an officer or government employee when any of the following has occurred: actions of dishonesty, misconduct, or actions involving moral turpitude (i.e., actions that involve either fraud or base, vile, and depraved conduct that shocks the conscience). In particular, when the following has occurred the Office will collect evidence related to the matter:

A. A police agency, court, quasi-judicial body, or civil service commission has found the officer or employee culpable of dishonesty, misconduct, or moral turpitude and such is communicated to this Office. This Office will encourage agencies to communicate such information to us in the furtherance of our prosecutorial duties.
    a. If this Office receives or is aware of a reported, non-anonymous allegation of dishonesty, misconduct, or moral turpitude, but the allegation was not investigated or no finding was made, the County Attorney, after consultation with the officer's or the employee's agency, may investigate (if necessary) and make a finding whether the officer or employee was culpable of the allegation. A finding of culpability is *Brady/Giglio* evidence that this Office will collect.
B. An officer or employee has been administratively sanctioned for, or there is evidence of, racial, religious, or personal bias against a defendant individually or as a member of a group.
C. An officer or employee has a prior adult conviction for a criminal offense or has a pending charge or criminal offense (excluding minor traffic offenses).

Not all findings of misconduct (as opposed to dishonesty or moral turpitude), even those resulting in the officer's or employee's discipline, are considered misconduct for purposes of the *Brady/Giglio* evidence. Misconduct for purposes of the *Brady/Giglio* evidence that this Office collects is a finding that the officer or employee intentionally conducted an unlawful search or seizure, intentionally obtained a confession in direct violation of the constitution, intentionally failed to follow legal requirements or agency policies for the collection, storage, or analysis of evidence, or engaged in similar behavior. *A ruling that evidence will be suppressed at trial or a finding of mistake or error does not amount to* Brady/Giglio *evidence in and of itself.*

Misconduct occurs when a police agency, court, quasi-judicial body (including, but no limited to, Utah Peace Officers Standards and Training) or civil service commission finds that the officer or employee intentionally or knowingly violated the constitutional rights of a person, or the

officer's conduct was a gross deviation from agency policies or law (i.e., no reasonable officer would have acted similarly under the circumstances).

Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an officer or employee are not considered to be *Brady* or *Giglio* information. Similarly, sustained findings of dishonesty or misconduct are not considered to be *Brady* or *Giglio* information if a reviewing body (court, civil service commission, etc.) has overturned such a finding. This Office has no obligation to disclose preliminary, challenged, or speculative information. *See United States v. Agurs*, 427 U.S. 97, 109, n. 16 (1976). Pending criminal or administrative *investigations* are also preliminary in nature and do not become *Brady/Giglio* evidence until findings are made.

Duty to Disclose

The assigned prosecutor shall have the responsibility of notifying the defendant of *Brady/Giglio* evidence. At least 30 days before any trial, the assigned attorney shall review the *Brady/Giglio* evidence to determine whether impeachment information exists for any officer or employee witness and consult with the County Attorney or Chief Deputy regarding all law enforcement witnesses that will be called at trial. The attorney will note in the current case management system when the check/consultation was made, a description of the information disclosed, and how notification was made. Due to the personal nature of *Brady/Giglio* evidence, such disclosures shall not be made in open court on the record or filed with the Court in a public document. Prior to disclosure of *Brady/Giglio* evidence, the assigned prosecutor shall seek a protective order from the Court, restricting dissemination of such evidence beyond the defendant and defense counsel, except for in court impeachment. A *Brady/Giglio* disclosure shall be made in writing to the defense or the *pro se* defendant, with a request for acknowledging receipt of the information. The acknowledgement by the defense shall be saved in the electronic case file for the case. Any *Brady/Giglio* evidence shall be conveyed to the defense only on the particular case being tried before the court.

In cases where it is unclear whether *Giglio* requires this Office to disclose an officer's or government employee's conduct, the County Attorney will request the trial court review the matter *in camera* and rule on the Office's duty to disclose. The County Attorney will notify the officer or employee of the time, date, and location of the *in camera* hearing and will cooperate with counsel for the officer or employee.

All employees of the Juab County Attorney's office, if they become aware of potential impeachment information, shall promptly disclose such information to the County Attorney for possible gathering of *Brady/Giglio* evidence. Anytime *Brady/Giglio* evidence is collected or deleted (after appropriate findings of exoneration), the County Attorney will inform the head or lead supervisor of the officer's or employee's agency.

Non-Disclosure of the *Brady/Giglio* Evidence

Except for the lawfully required disclosure to a defendant's attorney as described above, *Brady/Giglio* evidence and its contents shall not be disclosed to any person or entity—law enforcement or others—without the express consent of the County Attorney. A disclosure in

violation of this police would subject the employee to discipline up to and including termination. The *Brady/Giglio* evidence is classified by this Office to be protected under Utah Code § 63G-2-305(18).

Witness Inducements

Prosecutors have a constitutional obligation to disclose to the defense impeachment evidence of all witnesses, not just officers and government employees. This includes any benefits or inducements that have been or will be provided to witness who inform or testify, whether made by law enforcement or this Office. The benefits/inducements that must be disclosed include, but are not limited to:

A. Dropped or reduced charges against the witness.
B. Immunity.
C. Sentencing agreements or expectations of an action/inaction by our Office at sentencing.
D. Assistance in a state or local criminal proceeding.
E. Considerations regarding forfeiture of assets.
F. Assistance in deportation or other immigration status considerations.
G. S- or U-Visas.
H. Monetary benefits.
I. Non-prosecution agreements.
J. Agreements to inform other law enforcement or prosecution entities regarding the extent of a witness' assistance or making substantive recommendations on the witness' behalf.
K. Relocation assistance.
L. Consideration or benefits of culpable or at-risk third parties.

Witness Credibility

The Constitution, as interpreted by *Brady*, also requires prosecutor's disclose certain information that can call into question a witness's credibility. To that end, prosecutors must disclose the content of:

A. Victim and witness recantations
B. Changes made to the victim or witness original statements, whether written or verbal.
C. Information that comes to the prosecutor's attention that calls into question any aspect of the witness's or victim's original statements, whether written or verbal.

In short, prosecutors must disclose any information that calls into question the reliability of any evidence to be used in the case.

Pre-Trial Discovery Review with Case Officer

In order to ensure we have provided all evidence required by these policies, Rule 16, *Brady* and *Giglio*, the lead prosecutor and/or his or her legal assistant on any case that is set for trial shall meet with the case officer to review the documents that this Office possesses. The prosecutor

and legal assistant will verify with the case officer that we have received all evidence known to the law enforcement agency and assisting agencies. The prosecutor and his or her assistant shall ensure, at least two weeks before trial, that all evidence that should be disclosed to the defense, both in this Office's files as well as in any assisting law enforcement agency's files, has been disclosed to the defense, whether exculpatory or inculpatory.

<u>Open File Policy and the Discovery Process</u>

This Office will provide to the defense copies or written notice of all unprivileged information received by this Office in any particular case in which a defense attorney has filed an appearance with the Court, or in which a defendant formally waives counsel and appears on his or her own behalf. This Office asserts all legal privileges allowed under statute and rule to the extent allowed by law. These privileges include, but are not limited to: work product privilege, government informer privilege, lawyer-client privilege, victim communications privilege, victim contact information. No employee may waive these privileges on behalf of this Office without the express consent of the County Attorney or Chief Deputy.

Legal assistants shall make all disclosures, other than media (e.g. pictures, videos), electronically using the current case management system, which time and date stamps the date the disclosures were made. The date and method of media and other disclosures made outside of the current case management system shall be recorded in the case management system Disclosures to self-represented defendants can be made by sending hard copies to the defendant, provided such is noted in the current case management system. Every effort will be made to document each disclosure made to the defense in the current case management system.

Legal assistants will, prior to sending discovery, redact (1) all social security numbers, other than the defendant's and (2) the phone numbers and addresses of the victims of crimes (including those of victim family members). Additionally, unless otherwise ordered by the court, this Office will not send images of pornography or explicit pictures of victims as discovery. Instead, the assigned prosecutor and his or her legal assistant will notify the defense of the existence of such material and arrange for the defense to view the material at our office or at the offices of the relevant law enforcement or other agency.

4.0 PLEA BARGAINING

<u>General Guidelines.</u>

Every plea negotiation should take into account the following factors:

A. The strength of admissible evidence in the case;
B. The desires of the victim(s);
C. The desires of the case officer or case agency;
D. The severity of the crime;
E. The extent a particular defendant participated in the crime;
F. The defendant's criminal history;
G. The likelihood of defendant rehabilitation;

H. The defendant's attitude;
I. Judicial economy;
J. The timeliness of the defendant's offer to plead guilty;
K. The necessity of a trial to uphold confidence in the criminal justice system, the law enforcement community, or the County Attorney's Office.

Specific Limitations

Ultimately, the responsibility for the disposition of virtually all felony criminal cases in Juab County rests with the County Attorney. This responsibility is delegated to individual prosecutors and their exercise of discretion and judgment. However, some cases, by their very nature, are more severe or consequential than the norm, thus requiring the approval of Office administration prior to any offer of plea bargain. Accordingly, the following charges will not be compromised, dismissed, or declined without the prior approval of the County Attorney or Chief Deputy County Attorney:

A. Homicide of any degree;
B. Any felony sexual offense involving rape of a child, object rape of a child or sodomy of a child when the defendant is pleading to a charge that does not include mandatory prison;
C. Any agreement contrary to the desires of the victim(s), or any agreement when the victim has not been contacted.
D. Because of the potential for harm to others, prosecutors will not compromise speeding citations written for 100 miles per hour or above, regardless of the other charges to which the defendant pleads.

The following agreements are also prohibited without the approval of the County Attorney or Chief Deputy County Attorney:

A. Any agreement that does not require the defendant to make full monetary restitution to victim(s), to the extent monetary restitution is known. A defendant must agree to pay the full known amount of restitution as part of every plea bargain.
B. In cases where a criminal forfeiture has been filed, any agreement to compromise charges unless the defendant has agreed to forfeit the property, unless it becomes evident the forfeiture is contrary to the purpose specified in Utah Code Title 24, Chapter 4.
C. *Sery* pleas. A voluntary guilty or no contest plea is a waiver of the right to appeal all non-jurisdictional issues, including alleged pre-plea constitutional violations, unless the right is preserved by a pre-plea agreement with the prosecutor. Prosecutors in this Office will not make *Sery* plea agreements without the approval of the County Attorney or Chief Deputy County Attorney. *See State v. Sery*, 758 P.2d 935 (Utah 1988).
D. Diversion agreements.

Pleas in Abeyance. It is the normal practice of this Office to not offer pleas in abeyance in District Court cases, other than for problem-solving courts. Exceptions are left to the individual prosecutor's discretion noting the following guidelines:

1. A plea in abeyance agreement generally should not be used when felonies are reduced to misdemeanors. In other words, if a plea in abeyance agreement is entered, the felonies should be pleaded to as part of the agreement.
2. Plea in abeyance agreements in cases that involve charges originally filed as first- or second-degree felonies must be approved by the County Attorney or Chief Deputy, even if the charges are reduced to third degree felonies as part of the plea agreement.
3. Plea in abeyance agreements are prohibited in cases involving sexual or physical abuse.
4. Statutory laws prohibit the use of pleas in abeyance for certain crimes (e.g. DUI and Domestic Violence crimes). Prosecutors should be familiar with these legal prohibitions and not enter into any such agreements.

5.0 SENTENCING RECOMMENDATIONS

It is often difficult in felony cases to assess an appropriate recommendation for sentencing without the benefit of a pre-sentence investigation. Information such as complete criminal histories (in-state and out-of-state) and prior probation performance can be crucial to a prosecutor making an appropriate sentencing recommendation. To that end, sentencing recommendations in felony cases ordinarily should only be entered into after a pre-sentence report has been provided by Adult Probation & Parole, with the following exceptions, after considering the seriousness of the crimes, the defendant's known criminal history, and where the defendant will score on the Sentencing Commission's Adult Sentencing Guidelines Matrices:

A. A prosecutor may agree to a one- or two-step reduction of the degree of crime pursuant to Utah Code § 76-3-402 either at the time of sentencing or upon successful completion of probation. Two-step reductions in cases involving person crimes must be approved by the County Attorney or Chief Deputy.
B. An agreement to a specific length of jail.
C. An agreement to no further jail time, if appropriate.
D. An agreement to not request prison, if appropriate.
E. In misdemeanor cases, an agreement to court probation, if appropriate.
F. An agreement to private probation, if appropriate.

6.0 COLLECTION OF FINES AND FEES

This Office does not engage in or participate in the collection of fines and fees in any criminal or juvenile case. No employee shall accept a payment of fines and fees but shall direct those attempting to pay to the appropriate court or supervising agency.

No fines and fees will be charged for any program offered by this Office.