SEATTLE CITY COUNCIL
CENTRAL STAFF

December 7, 2020

MEMORANDUM

To: Members of the Public Safety and Human Services Committee
From: Asha Venkataraman, Analyst
Subject: Proposal for a new defense against prosecution of misdemeanors

On December 8, 2020, the Public Safety and Human Services Committee will discuss the concept of amending the Seattle Municipal Code ("code") to add a defense against prosecution of misdemeanors on the basis that an individual committed a crime to meet an immediate basic need.

During the Council's consideration of the 2021 budget, the Council discussed advancing a proposal described as "duress legislation" that would have codified a defense against prosecution of crimes committed due to poverty or behavioral health issues and included such crimes as eligible for dismissal as de minimis crimes (crimes a judge can dismiss if a defendant's conduct meets certain standards). However, the Council ultimately decided to discuss such a bill after the budget process concluded.

The focus of this memorandum is the concept of creating a poverty defense: making meeting an individual's immediate basic need an affirmative defense to a crime. The memo provides some background to provide context about how an affirmative defense fits into the criminal legal system, identifies some policy considerations for a potential future bill, and outlines next steps. Later committee meetings and memos could address other parts of the original proposal, such as a defense related to behavioral health issues.

Background on Affirmative Defenses[1]

When an individual commits an act that could be a crime, there are multiple stages at which a person can exit the criminal legal system without a conviction. Generally speaking, an affirmative defense is raised in the trial phase. The stages are as follow:

(1) Arrest: The police have the discretion whether to arrest that individual;

(2) Prosecution: The prosecutor can choose whether to file charges or in Seattle's case, refer the individual to a pre-filing diversion program;

(3) Pre-Trial: If the prosecution files charges, the judge can choose whether to dismiss a case or refer the individual to a pre-trial diversion program (in Seattle, the individual

[1] Please note that this is not a legal memo and does not contain every potential procedural or substantive option within the criminal legal system. Rather, this memo is designed to provide a basic overview of how the system commonly functions. Please see further footnotes explaining legal terms of art.

may also be eligible for a specialty court such as Mental Health Court or Community Court); or

(4) Trial: If the case goes to trial, a judge or jury can find that individual not guilty.

If a case reaches the trial stage, the prosecution bears the burden of proving every element of a crime beyond a reasonable doubt. A defendant is not required to prove their innocence but can argue that the prosecution did not meet its burden of proof[2] for each element of the crime or they can assert an affirmative defense.

An affirmative defense allows the defendant to share with the jury the circumstances under which an individual committed a crime and operates to excuse or justify what is otherwise unlawful conduct by an individual.[3] In other words, an individual accused of the crime concedes that the crime was committed but asserts a justification for the crime that would excuse them from criminal liability for committing it.

The defendant must prove an affirmative defense by a preponderance of the evidence standard,[4] which is lower than the reasonable doubt standard. Assuming that there is sufficient evidence that the jury should consider the affirmative defense, the judge then provides the jury instructions about how to consider the affirmative defense. The jury is responsible for determining whether each party has met the standard required and can find the individual guilty, not guilty, or innocent.

For example, the code currently contains an affirmative defense of duress, in which a judge or jury can find that an individual committed an otherwise criminal act but is not guilty if all of the following circumstances apply:

(1) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he/she or another would be exposed to immediate death or immediate grievous bodily injury; and

(2) That such apprehension was reasonable upon the part of the actor; and

(3) That the actor would not have participated in the crime except for the duress involved.[5]

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[2] The burden of proof describes who has the duty to provide evidence and the level of evidence required to support a claim. As noted in the text, in a criminal case, the prosecution bears the burden of proving that an individual committed a crime beyond a reasonable doubt.

[3] Other times in which a defendant can share their circumstances include sentencing, but this occurs after conviction.

[4] The party must demonstrate that the claim is probably more true than not (greater than a 50% chance).

[5] *See* SMC §12A.04.170.A. The defense is "not available if the actor intentionally or recklessly places himself/herself in a situation in which it is probable that he/she will be subject to duress" or solely if a married person acted on their spouse's command. SMC §§12A.04.170.B, C.

In addition, Washington State also recognizes the common law[6] defense of necessity. Common law necessity is a defense to a charge if:

(1) The defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm;

(2) The harm sought to be avoided was greater than the harm resulting from a violation of the law;

(3) The threatened harm was not brought about by the defendant; and

(4) No reasonable legal alternative existed.[7]

Any affirmative defense brought in a case before the Seattle Municipal Court would only apply to misdemeanor crimes, as those are the crimes over which the Court has jurisdiction.

Proposal for Legislation

The proposal for discussion is whether and how to codify a new affirmative defense that would allow an individual to assert that they committed a crime to meet an immediate basic need. The criminal legal system is ill-suited to address the root cause of "crimes of poverty" and any involvement in the criminal legal system and incarceration causes harm. As such, Central Staff understands that the intent of the proposal is to provide an exit from the system at trial and without further involvement in the system for those crimes committed because a person cannot otherwise afford to meet their immediate basic needs.

The City Attorney has stated that he has been exercising his discretion to move away from prosecuting property crimes that appear to be committed out of survival necessity.[8] However, existing practice does not guarantee future exercise of discretion by another City Attorney in this way, nor does it solve for cases that the City Attorney continues to prosecute when there is a disagreement about whether an individual was committing the crime to fulfill their basic needs. The affirmative defense would provide another potential way for an individual to exit out of the criminal legal system.

Issues Identified

Though the concept of an affirmative defense based on poverty may be straightforward, drafting language to reflect the appropriate procedural and legal intent can be more nuanced and have substantive impacts. There are several potential issues associated with this proposal for the Council to consider. Each is accompanied by options, the list of which is not exclusive and could be further explored based on Councilmember interest.

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[6] Common law can be described as law derived from custom and judicial precedent rather than codified within statute or ordinance. The defense does not need to be codified for a defendant to raise it.

[7] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.02 (4th Ed).

[8] *See* Attachment A (Letter from Seattle City Attorney Pete Holmes to Seattle City Councilmembers, *Re duress and de minimis proposal*, October 30, 2020).

1. Location in the Code

There are several potential locations in the code where the Council could place such a defense.

If within the definition of duress, it would automatically become part of the existing defense. However, existing jury instructions would need to change to reflect the addition; and it could be difficult to apply existing duress case law, as previous precedent will not have accounted for this new part of the definition. If in a new section of the code, wholly new jury instructions would likely be required.

Options:

A. Place the new affirmative defense within the existing duress defense by broadening the definition of duress.
B. Create a new section of the code in the criminal defenses chapter.
C. Place within another code location based on further research and engagement.

2. Elements of the Defense

Policy choices could materially affect the likelihood of a defendant successfully employing the new affirmative defense. In general, the more elements a defendant has the burden of proving, the harder it could be to use the defense, depending on the content of the additional elements. Following is an example of how this might play out:

If the Council's policy is that the only element that the individual would need to prove is that they participated in the crime with the intent to meet an immediate basic need, the defendant would have to prove that their need met the definition of "immediate basic need" (either a codified definition or interpretation of existing case law) and show that their intent was to meet this need.

On the other hand, potential legislation could add other required elements, substantively increasing what a party would need to prove. The existing common law necessity defense, which has some similarity to the new proposed affirmative defense, requires proof of no reasonable alternative to committing the act. One potential approach would be to codify the proposed defense (that the individual participated in the crime with the intent to meet an immediate basic need) and add that the individual had no reasonable alternative to committing the act to satisfy the immediate basic need. Doing so would require determining what entails a reasonable alternative, whether the standard is what the defendant actually knew or what a reasonable person should have known, and as discussed in the next section, upon whom the burden of proof should lie for each element.

Options:

A. The legislation requires that the defendant must only prove that they had an immediate basic need and they committed the crime to satisfy it.

B. The legislation requires Option A and that a party must prove that the defendant had had no reasonable alternative to committing the crime.
C. The legislation requires either Option A or Option B and adds additional elements to the affirmative defense.
D. The legislation requires some other version of elements described in the preceding options to be proven, to be determined with further research and engagement.

3. Burden of proof

Any legislation would need to determine whether the burden of proof for more than the primary elements of a new affirmative defense lies with the defense or the prosecution. For example, if the Council wanted to add the "no reasonable alternative" to the analysis of the defense, the Council might consider how placing the burden of proof on one party or the other would affect the case.

Adding a "no reasonable alternative" element and requiring the defendant to prove it could create a heavy burden on a defendant whose focus in committing the crime is purportedly trying to meet their basic and immediate needs—spending the time to exhaust alternatives might imply that the need itself is not immediate. Shifting the burden back on the prosecution to prove that a reasonable alternative did exist could be one way to solve for this problem. Theoretically, the Council could add to every misdemeanor the requirement that the defendant had no reasonable alternative, making it an element to prove beyond a reasonable doubt for each crime.

Alternatively, the burden could shift back to the prosecution to prove no reasonable alternative existed after the defendant argues that the individual participated in the crime with the intent to meet an immediate basic need. But the Council may also consider the challenge in placing the burden on the prosecutor to determine what reasonable alternatives did exist, and further research regarding how prosecutors prove state of mind or intent in other crimes could inform whether this is a similar burden or a new and larger challenge.

Options:

A. The burden of proof for all elements of the affirmative defense lies with the defendant.
B. The prosecution has an opportunity to rebut the affirmative defense or prove additional elements to defeat the affirmative defense.
C. The burden of proof is distributed in some other way, to be determined with further research and engagement.

4. Applicability to all misdemeanors

Another potential issue involves whether this affirmative defense should apply broadly to all misdemeanors, with a few, if any, exceptions (an inclusive approach) or should not apply broadly and only apply to a select number of misdemeanors (an exclusive approach).

An inclusive approach would allow a defendant to raise the defense for any misdemeanor under the Court's jurisdiction, even if the likelihood of success of asserting the defense is low or in cases where it seems logically unlikely to be applicable to the charge. But it also allows the defendant the option of determining for themselves whether to assert the defense and a judge or jury would make the ultimate decision as to whether the defense has been sufficiently raised and would succeed.

An exclusive approach would tailor the applicability of the defense to the most likely charges to which it should apply and could potentially remove the possibility of unlikely hypotheticals within which it could be asserted. However, it does remove the choice from the defendant about whether to assert it in those misdemeanor cases to which it does not statutorily apply and does not allow the defendant to perform their own weighing and analysis of what the best approach to their case should be. It also removes the ability of the judge or jury to even consider the circumstances under which a crime was committed if it turns out that the defense would be appropriate for a crime to which it is not legally applicable.

Options:

A. Inclusive approach.
B. Exclusive approach.
C. Some other approach, to be determined with further research and engagement.

5. Basic needs vs. resale

Lastly, there is a potential for a new affirmative defense to be used not only in those cases where a defendant is trying to meet an immediate basic need (i.e., stealing a sandwich because the defendant is hungry) but also in cases where merchandise is stolen for resale (i.e., stealing cell phones to resell so that the defendant can pay rent). Depending on the Council's intent, potential legislation could include or exclude resale from the defense's applicability.

Options:

A. Do not apply the defense to resale by defining the term "immediate basic need" to be clear that the need itself is literally immediate such that the time it would take to resell an item would rule out the basic need qualifying as "immediate" and/or stating that sale, resale, or trade of an item is not within the scope of the defense.
B. Apply the defense to resale by removing the term "immediate" and/or do not include a statement providing exclusions from the scope of the defense.
C. Some other approach, to be determined with further research and engagement.

Next Steps

The issues described above are an initial step in analyzing this proposal. Central Staff anticipates the need for analysis of additional options for resolution of these issues, identification of other issues associated with this proposal, and further analysis and issue identification addressing the remaining parts of the original proposal. Councilmembers will continue to engage in discussion with stakeholders and determine whether and how to move forward after the conclusion of Council recess, in 2021.

Attachments:

A. Letter from Seattle City Attorney Pete Holmes to Seattle City Councilmembers, Re duress and de minimis proposal, October 30, 2020

cc: Dan Eder, Interim Director

Seattle
City Attorney's Office
Peter S. Holmes, City Attorney

October 30, 2020

Seattle City Council President M. Lorena González
Seattle City Councilmember Lisa Herbold
Seattle City Councilmember Debora Juarez
Seattle City Councilmember Andrew Lewis
Seattle City Councilmember Tammy Morales
Seattle City Councilmember Teresa Mosqueda
Seattle City Councilmember Alex Pedersen
Seattle City Councilmember Kshama Sawant
Seattle City Councilmember Dan Strauss
Seattle City Hall
600 4th Avenue, 2nd Floor
Seattle, WA 98104

Via email

Dear Councilmembers:

I am writing regarding the proposal to redefine the terms "duress" and "de minimis" to create new means of defense for certain misdemeanor-level offenses rooted in poverty, behavioral health crises, or substance abuse. I understand model language was developed by the King County Department of Public Defense (DPD) in partnership with other advocacy organizations, and some of that content may inform a forthcoming refined proposal to be sponsored by Councilmember Herbold. DPD's model legislation has received significant attention over the past few days, so in the interests of transparency and candor I am writing all of you to share my and my office's thoughts and suggestions regarding this proposal. These legislative decisions are yours to make, and I hope my perspective provides you some insight that may help shape your decisions should you decide to adopt a bill.

This letter reflects my policy input regarding this proposal, not my office's legal advice, so we do not consider it attorney-client privileged. My attorneys are always available to provide privileged legal advice regarding any proposed legislation through a separate communication.

First, several of the provisions in this bill codify what my office already practices. Since I became City Attorney in 2010, I have worked to move the City Attorney's Office away from prosecuting property crimes that appeared to be committed out of survival necessity; for example, no city prosecutor is interested in sending an impoverished new parent to jail for stealing baby food. It's not only a just choice by prosecutors, it's also one reenforced by Seattle jurors who are loath to convict for crimes committed out of pure necessity. I have also long supported efforts to divert defendants with behavioral health issues to appropriate treatment rather than traditional prosecution when there is evidence that treatment may help address the defendant's behavior.

My office has made great strides in expanding diversion opportunities, thanks in large part to our strong collaboration with DPD, the Seattle Municipal Court, and community stakeholders. While codifying many of the elements in DPD's proposal isn't necessary to continue reducing traditional prosecution and expanding diversion opportunities, I can appreciate your interest in adding permanency to the way Seattle approaches prosecution alternatives. Thank you again, Councilmembers, for recently allocating my office funding to conduct a racial equity toolkit to expand pre-filing diversion opportunities to those older than 24-years-old.

I do have concerns that other elements of DPD's draft proposal could negatively impact our existing diversion efforts and our specialty court programs such as Mental Health Court and Veterans Treatment Court. However, with some revisions, which I discuss below, I believe you could make constructive additions to Seattle's criminal legal code.

Currently, the proposal treats both "meeting an immediate basic need" and "experiencing symptoms of a behavioral health disorder" the same. We suggest treating them separately because in the courtroom context poverty and mental health issues present distinct challenges.

We believe "meeting an immediate basic need" is best structured exclusively as an affirmative defense that a defendant can raise at trial, while "experiencing symptoms of a behavioral health disorder" is better structured as a diversion alternative that a judge can order where certain criteria are present. When a behavioral health crisis causes a person to assault a stranger, dismissing the case without the judge also directing the person to treatment could potentially leave that person's unique condition unaddressed. A new statutory diversion structure would better complement Seattle Municipal Court's existing mental health programs and, in our view, better serve defendants.

We also suggest removing the amendments to the "de minimis infraction" section of the Seattle Municipal Code – that section is a little-used provision stemming from amendments to the Seattle Municipal Code in the early 1970s with no parallel in Washington state law, and the concepts raised in the proposal could be better implemented with different statutory structure.

For the “meeting an immediate basic need” defense, rather than amending the existing “duress” affirmative defense, we suggest the common law “necessity” affirmative defense be codified into the Seattle Municipal Code. The necessity defense, the elements of which are as follows (taken from Washington Pattern Criminal Jury Instruction 18.02), largely addresses the issues raised in the proposed additions to the “duress” defense:

> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
> (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
> (3) the threatened harm [to the defendant] was not brought about by the defendant; and
> (4) no reasonable legal alternative existed.

On the mental health provisions, we recommend removing the “experiencing symptoms of a behavioral health disorder” language from the proposed affirmative defense and “de minimis” sections and instead placing it within a new statutory diversion structure, which could formalize an approach similar to that already used by Seattle’s therapeutic Mental Health Court and Veterans Treatment Court. We suggest structuring this so a defendant could ask a judge to order diversion (with treatment) in lieu of prosecution (i.e., with dismissal of charges upon completion of a diversion/treatment program) if the defendant can establish that (1) the facts underlying the elements of the charged offense were a result of the defendant experiencing symptoms of a behavioral health disorder, (2) diversion/treatment in lieu of prosecution is reasonably likely to address the defendant’s conduct that led to the charges, (3) diversion/treatment in lieu of prosecution does not present a demonstrated risk to public safety, and (4) a suitable diversion/treatment program is available. We recommend including the Municipal Court (along with the CAO and DPD) in discussions regarding the specifics of this language and identifying appropriate diversion/treatment programs.

We believe restructuring DPD’s proposed legislation along these lines would keep it consistent with the spirit of the proposal while setting it up to function more practically and effectively within the Seattle Municipal Court’s structure. More important than any legislation you could adopt or amendment I could recommend is that resources must be provided to assist individuals with the underlying issues that led to them to committing the crime. Whether the funds are federal, state, county, local, or philanthropic, there is a very real need. My office has been in dialogue with DPD regarding their proposal earlier this week, and we are happy to participate in further discussions with Councilmembers and staff, DPD, the Municipal Court, and all other stakeholders as these concepts develop.

Very truly yours,

Peter S. Holmes
Seattle City Attorney

cc: Director Anita Khandelwal, King County Department of Public Defense
Presiding Judge Willie Gregory, Seattle Municipal Court
Judge Faye Chess, Seattle Municipal Court
Judge Andrea Chin, Seattle Municipal Court
Judge Anita Crawford-Willis, Seattle Municipal Court
Judge Adam Eisenberg, Seattle Municipal Court
Judge Catherine McDowall, Seattle Municipal Court
Judge Damon Shadid, Seattle Municipal Court
Mayor Jenny Durkan