



Case Screening & Charging Strategies for Improving Case Processing

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The Case Pro Network is an initiative of the John D. and Catherine T. MacArthur Foundation’s Safety and Justice Challenge (SJC), which seeks to reduce over-incarceration by changing the way America thinks about and uses jails. Led by the Justice Management Institute, the Case Processing Network aims to share successful case processing strategies from SJC and non-SJC sites and to enhance the case processing work already begun in several SJC sites. Case processing delays have contributed to backlogs and excessive caseloads in courts, to the overuse of jails pretrial, and ongoing racial and ethnic disparities in the jail population. The network is designed to allow members to hear from other jurisdictions about their success with the elements of case processing, to brainstorm and discuss common barriers to case processing improvements, and to learn how to mitigate bias and advance equity.

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Introduction

Annually, about 43 percent of all criminal cases are ultimately dismissed (18% of felonies and 25% of misdemeanors). (Ostrom, 2020) Considering that there are roughly 5 million felony cases and 13 million misdemeanor cases filed annually, this means that an estimated 900,000 felony cases and 3.25 million misdemeanor cases are dismissed after filing. One need not stretch the imagination far to understand the impact this volume of post-filing dismissals has on workload and timely case resolution. As an example, data from a sample of prosecutors' offices nationally show in 2020 that it took an average of 241 days from filing to the dismissal of felony cases and 273 days for misdemeanor cases (Kutateladze, n.d.)

These numbers raise many questions about how prosecutors and courts might be better positioned to manage case processing and workload more effectively. This mini guide explores the prosecutor's role in case management and the screening and filing strategies they can use to reduce post-filing dismissals, which in turn will allow for greater attention on serious criminal offenses.

Why Screening & Charging Is an Important Tool in Case Management

Historically, case management has been thought of as falling exclusively under the purview of courts, with a focus on docket management practices that ensure the timely resolution of cases. Yet, effective case management is very much a systemic effort. Prosecutors have the unique power within the justice system to determine whether or not to file charges and which charges they will pursue. Rigorous case screening provides the opportunity to assess the strength of evidence, decline cases that are likely to be dismissed, withdraw charges without *prima facie* evidence, engage in plea negotiations sooner, and place cases into tracks based on complexity and need. As such, prosecutors play a major role in setting the foundation for the system to process and manage cases in a timely manner.

In reviewing cases that are either referred or initially charged by law enforcement, prosecutors have the authority to increase, decrease, add, or remove charges as part of the screening and charging process based on a number of criteria as well as office policy. Joan Jacoby (1979) created a typology of prosecutor case processing approaches and outcomes that helps define

the importance of case screening and filing on overall case processing. Specifically, Jacoby identified four primary models:¹

1. Legal sufficiency focuses on the extent to which the elements of a crime are present and which charges should be filed, resulting in a large volume of cases being accepted for prosecution but results in most cases being resolved through plea agreements;
2. System efficiency focuses on faster case resolution, reduction of backlogs in the courts, and maximization of available resources, which is driven by a rigorous screening process to weed out weak cases and downgrade charges to dispose of cases by plea agreement;
3. Trial sufficiency focuses on charging those cases in which there is a strong likelihood of conviction at trial and focuses less on resolving cases by plea; and
4. Defendant rehabilitation emphasizes the use of deflection and diversion for individuals whose behavior is more appropriately addressed through treatment or other non-judicial resources.

What if prosecutors engaged in new, more rigorous screening and charging practices? How many fewer cases might enter the system each year rather than being dismissed a few hundred days after charging? Imagine what the impact could be on prosecutorial, defense, and judicial caseload, freeing up time to handle cases that need time and attention.

Over the years, prosecutorial caseloads have grown tremendously and have further been exacerbated by the COVID-19 pandemic. As such there is increased pressure to dispose cases quickly, which is why understanding the intent behind and utility of different models is important. Given that 94 percent of cases never proceed to trial and most that are not dismissed are disposed through plea negotiations (The Marshall Project, n.d.), it is not surprising that the legal sufficiency standard, alone, without effective screening for *prima facie* evidence, or additional emphasis on other standards, results in easily downgraded or dismissed charges.

Rigorous screening based on all the screening models by experienced prosecutors has been shown to significantly reduce case dismissals, charge dismissals and reductions, and the length of time to reach a plea agreement. (Wright, 2002; Merrill, Milks, & Sendrow, 1973) To promote effective case management, rigorous screening should include:

¹ These models are not necessarily mutually exclusive, as evidenced in how the National District Attorney's Association and the American Bar Association, define the standards for case screening.

- Early assessment by experienced prosecutors;
- Reasoned selection based on probable cause;
- Legal sufficiency, system efficiency, and trial sufficiency;
- Mitigating factors like mental illness as it relates to defendant rehabilitation, and public interest;
- Categorization of cases by complexity; and
- Charging.

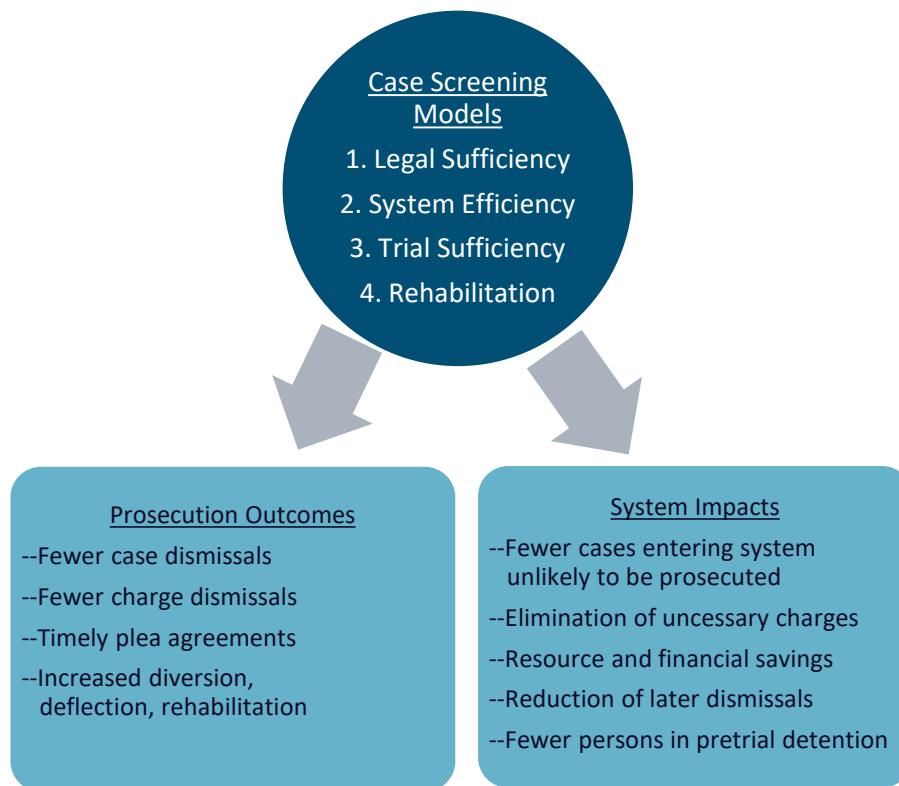
Such screening practices allow prosecutors to identify which cases are likely to be dismissed; which cases might be appropriate for diversion or deflection; which cases can be resolved quickly; and which cases should be assigned to prosecuting attorneys for formal charging/indictment on felony cases, additional discovery, settlement negotiation, or to bring to trial.

Impact of Rigorous Screening & Charging on the System

As gatekeepers to the adjudication process, rigorous screening by prosecutors and charging practices can have the greatest impact on prosecutorial workload. Investment of resources early in the adjudication process helps prosecutors control where they want and need to focus their time, eliminating the use of costly resources for cases that will ultimately be dismissed, and identifying cases that can be resolved quickly. These all have significant implications for the capacity of all justice system stakeholders to manage cases more effectively, to make better use of limited resources, to safely reduce the overuse of jails, and to reduce racial and ethnic disparities in the justice system, as shown in Figure 1.

Over the years, there have been several research studies that demonstrate quantifiable results associated with rigorous case screening and charging. Specific findings and documented benefits are discussed in the sections below. They range from reducing the volume of cases that don't meet legal sufficiency or statutory requirements, elimination of unnecessary extra charges, financial savings, and reduction of later dismissals.

Figure 1: Case Screening Outcomes & Impacts



Screening Cases that are Unlikely to be Prosecutable

Both the American Bar Association (ABA) and the National District Attorneys Association (NDAA) have published standards for case screening which stress the importance of filing charges that are supported by probable cause, likely to support conviction beyond a reasonable doubt, and are in the best interests of justice (American Bar Association, 2017, National District Attorneys Association, n.d.). Standard 4-1.3 goes further in enumerating specific factors that should be considered during screening that include availability of diversion and rehabilitative programs, attitude and mental status of individuals accused of offenses, prior non-prosecution or non-enforcement of the applicable law, failure of law enforcement to perform necessary duties or investigation, negative impact of prosecution on a victim, and if the amount of harm (or loss) caused by the alleged crime is large enough to warrant criminal prosecution. (National District Attorneys Association, n.d.; pp. 50-51) All of these factors share a common purpose—to help prosecutors assess which cases should be pursued—and under this lens, rigorous screening is a fundamental part of the process.

Gershowitz (2019) examined the benefits of prosecutorial screening of potential criminal cases prior to arrest and found that such screening prevents unnecessary arrests and wrongful convictions. In doing so, the burden on judges, clerks, prosecutors, and public defenders can be dramatically reduced. Specifically, Gershowitz spent a weekend observing the intake process at the Harris County, Texas District Attorney's Office and documented dozens of cases that were declined because the prospective charges did not meet the legal definition set forth in the statute or because it would be impossible to prove all the elements of the offense. What was unique in Harris County is that this review was done in conjunction with law enforcement prior to the issuance of arrest warrants.

Elimination of Unnecessary Charges

Police often file complaints with charges that may or may not be necessary. In JMI's experience working with prosecutors, public defenders, and courts, these charges are often ancillary and driven by situational aspects of the arrest. The most common examples include terroristic threats (threats of violence at the time of arrest that often lack the legal requirement of imminent threat); evading or resisting arrest; and charges after pretextual stops (e.g., for broken taillights). Thorough review prior to charging of such offenses can help ensure unnecessary charges are not filed—either by declining the charges outright or if the charges are part of a singular incident, by filing only one count rather than multiple. (Gershowitz, 2019)

As an example, prosecutors in the San Francisco, California District Attorney's Office Intake Unit use a rigorous screening process for cases that arise from pretextual stops and those presented by law enforcement officers who have a history of misconduct. In these instances, prosecutors use a stringent review process, not only of the primary offense, but also the inclusion of offenses related to resisting arrest, evading arrest, and terroristic threats to determine if such charges are necessary or should be declined.²

Unnecessary charges have also been explored in the context of creating leverage for plea negotiations in which the prosecutor has the ability to offer a plea "bargain" through the dismissal of unnecessary charges. (Bibas, 2004; Lynch, 2003) Research conducted by Wright & Miller (2002) found that more rigorous screening eliminates the use of unnecessary or inflated charges as leverage for negotiating plea agreements. Such results are seen as indicators of a more fair and just system. (Wright, 2002)

² These observations were noted during interviews with prosecutors in the San Francisco DA's office as part of technical assistance on case management provided by JMI.

Resource & Financial Savings

As noted earlier, the majority of criminal cases, not dismissed, are resolved by plea. However, from the point of charging through plea negotiation, individuals are often held in local jails awaiting disposition of their cases. Many of these cases, as documented earlier, will be dismissed after charging, but the costs of pretrial detention could be avoided with more rigorous case screening. (Plaff, 2012; Bazelon, 2019)

A study conducted by Texas A&M University of prescreening arrest and filing charges, in El Paso County, Texas, in which prosecutors screen cases prior to the issuance of arrest warrants, showed that the prosecutor's office rejected 19 percent of cases. These rejections saved the county approximately \$1.5 million in costs associated with transportation, pretrial detention, magistrate appearances, and appointed counsel. (Carmichael, 2006)

The benefits of screening and filing extend beyond financial savings to include human capital. Prosecutorial workload assessments demonstrate that rigorous screening has a positive benefit on both workload and caseload. Specifically, offices that declined a larger number of cases had more time to devote to more serious cases and had more reasonable caseloads than offices that declined fewer cases. (Nugent-Borakove, 2002)

Rigorous screening allows prosecutors to resolve the weakest cases first, earlier in the process, while creating space for those cases that should stand for trial.

In addition, research has shown that using charges as leverage in minor cases can have a huge financial impact for counties and states, primarily because individuals often remain in pretrial detention during plea negotiations when many, if not all, of the charges end up being dismissed. (Baughman, 2020; Bazelon, 2019) Certainly, the COVID-19 pandemic spotlighted this issue in many places around the country, where large criminal case backlogs emerged as a result of court closures. In response, prosecutors in New Orleans and other jurisdictions, set up a process for quickly and rigorously screening both new incoming law enforcement referrals and reviewing pending cases to decline or dismiss charges for cases that were unlikely to move forward.

Reduction of Later Dismissals and Individuals in Pretrial Detention

Although there are limited studies that examine the impact of screening and charging on later dismissal of cases, data, as noted above, shows that approximately 18 percent of felony cases and 25 percent of misdemeanor cases are dismissed annually. (Ostrom, 2020) As demonstrated by the Vera Institute of Justice (2014), rigorous screening practices have been shown to decrease later dismissals by 10 percent. For many prosecutors' offices, this translates into hundreds, if not thousands, of fewer cases.

Moreover, many individuals are detained pretrial. Given the the average length of time for felony (241 days) and misdemeanor (273 days) dismissals, (Kutateladze, n.d.), more rigorous case evaluation at the screening stage will significantly reduce the average length of stay in jail and help to ensure jail bed space is reserved for those individuals who are in most need of pretrial detention. In addition, as demonstrated by Carmichael (2006), where rigorous screening is done prior to arrest or issuance of an arrest warrant, there is a demonstrable reduction in the number of individuals who are booked into jails.

Screening & Charging Strategies

Screening and charging strategies vary widely among prosecutors' offices. In addition to the standards recommended by NDAA and the ABA, there are several principals that should be considered to help set the foundation for effective case management and case processing:

- Reduce the practice of multiple charges, as appropriate, when one charge will suffice.
- When cases are likely to be pled to a lower charge, file that charge rather than a more serious charge.
- Assess whether or not filing charges will result in a more desirable outcome than use of alternatives to prosecution, such as referrals for mental health or abuse treatment, mediation, or other social services.

Each of these principles is intended to eliminate the use of charges as leverage to reach a plea agreement, reduce plea negotiation time, ensure more timely trial readiness, and bring cases to resolution more quickly. Moreover, each of these principles requires screening processes that will yield the desired outcomes.

Figure 2: Screening & Charging Process



Rigorous screening by experienced prosecutors can also help categorize cases into complex and non-complex cases. Complexity can be defined as simply those cases that are likely to go to trial (complex) and those that are likely to resolve by plea (non-complex). The following illustrate how an office might differentiate between complex and non-complex cases:

- Complex cases:
 - Felonies involving complex legal issues, complex evidence, offense categories such as serious violent crimes with victims, and multiple defendant crimes
 - Misdemeanors involving complex legal issues or categories such as driving under the influence or domestic violence with victims
- Non-complex cases which generally may include all other non-violent felonies, misdemeanors, traffic offenses, and ordinance violations unless the facts and circumstances of the case make it unusually complex

Organizing cases in tracks, whether by complexity or another means, allows the office to identify which cases can and should be resolved quickly. This enables the office to focus its resources on preparing for more complex cases and ensuring that pretrial court events are devoted to substantive cases and issues and not docket churn.

Components of Rigorous Screening

Throughout the miniguide, the rationale for and the benefits of rigorous screening have been discussed, but what does this mean in practice for prosecutors' offices? Through its work on case processing and case management, JMI has identified four primary components that define a rigorous screening process:

1. Conduct early and careful assessment of each law enforcement referral by experienced prosecutors;

2. File charges for the most serious crime that the facts will support at trial;
3. Restrict charge bargaining; and
4. Provide training, oversight, and other internal control mechanisms to ensure uniformity and consistency.

Each of the components is discussed briefly below.

Conduct Early and Careful Assessment

As noted earlier, senior prosecutors with trial experience bring greater insight into determining the strength of a case in terms of legal sufficiency, system sufficiency, trial sufficiency, and rehabilitation. Beyond the “sufficiency tests,” experienced prosecutors are more likely to recognize other factors in a case that may eventually lead to a dismissal of some or all charges, what the likely charges are going to be at disposition based on how similar cases have been disposed in the past, and if the individual is a suitable candidate for pre- or post-charging diversion.

As part of the early assessment of cases, careful reviews of probable cause, mitigating factors (if known), and *prima facie* evidence can yield important information about the likely complexity of cases, which allows for cases to be placed into tracks. These reviews should also include evaluations of witness statements and other available evidence, possible legal arguments, defense strategies, and likely response of a judge or jury at trial—all of which are closely tied to case complexity.

File Charges that the Facts Will Support at Trial

This particular component is directly associated with the sufficiency tests described above. However, rigorous screening also provides opportunities for other factors to be weighed in the charging decision. First, some prosecutors have made policy decisions to not pursue certain low-level offenses (for example, Shelby County, Tennessee prosecutors established a policy to decline driving on suspended license charges and in Columbus, Ohio, the city prosecutor created a policy to decline possession of marijuana cases). In these situations, a threshold question arises during screening and filing—is this a charge or a case that the office wants to result in conviction and sanctions? In the case of marijuana possession, this is often referred to as decriminalization, the policies for which often extend to law enforcement, and may even be driven by local ordinances that are in tension with state criminal codes. In other words, prosecutors typically promulgate local policies and practices and are not creating policies in a vacuum.

Second, it is also important to critically examine the facts of the case to ensure that allegations of fact, aligned with the charges, are reasonably accurate. For some prosecutors, such as those in the San Francisco, California District Attorney's Office, this means an intensive review of cases stemming from pretextual stops and those cases that rely solely on the word of officers with documented serious misconduct, especially those cases without sufficient *prima facie* evidence. This allows the prosecutors at intake to decline any unnecessary charges and to ensure that only the most serious crime supported by the facts is charged.

Restrict Charge Bargaining

With heavy prosecutor caseloads and criminal case backlogs in the courts, there is pressure to process cases with expediency. Given the fact that the majority of cases are resolved by plea, and often on or near trial dates, multiple charges are frequently accepted by prosecutors with an understanding that some charges will be dropped to reach plea agreements. However, the research shows that such a practice leads to more "churn" in the system, longer times to case resolution, and more dismissals later in the process. Offices that use rigorous screening and restrict charge bargaining have more cases disposed by guilty plea as charged, earlier in the process, and fewer dismissals later in the process. (Wright, 2002)

For example, the King County, Washington (Seattle) District Attorney's Office created a process by which prosecutors offered their "best and final" deal after arraignment. The foundation for doing this was a screening process that focused on charging based on what the highest reasonable charge that would hold individuals accountable and could be proven at trial. To restrict charge bargaining and to avoid "prosecutor shopping" among defense attorneys looking for a better offer, the office also required supervisory prosecutors to review and approve any change to charges after cases were filed. Prosecutors in San Francisco have a similar approach of reviewing any changes in charges after the initial offer. In Fulton County, Georgia, some Superior Court judges will only take an open (non-negotiated) plea after the pretrial conference or plea deadline.

Ensure Uniformity and Consistency

Although prosecutorial discretion is a foundation of the prosecutor's role, effective case processing and caseload management are premised on uniformity and consistency. While this does not limit discretion, it does mean that prosecutors' offices that engage in rigorous screening and charging must do so with uniformity and consistency. Research on screening and charging has demonstrated that offices achieve better outcomes with regard to early case resolution and reductions in the number of dismissals later in the process when the screening/charging process is reinforced with training, oversight, and internal control mechanisms to achieve uniformity and consistency. (Wright, 2002)

As noted above, supervisory approval of charge changes after filing is one form of oversight and internal control, however, some prosecutors' offices have built in mechanisms in their case management systems to provide another level of internal control. In Camden, New Jersey, the prosecutor has worked with the Superior Court and defense to set up a pre-indictment conference for felonies (indictable offenses) that is held one day every week. At this conference, the objective is "to negotiate with defense lawyers on pleas – guilty plea, plea to disorderly offense, plea to an accusation." If no plea is arranged, the case proceeds to a grand jury Indictment.

Implementing Rigorous Screening & Charging

Prosecutors' offices vary in size, organizational structure, and caseloads. As such, the process for implementing rigorous screening and charging will look different from office to office. Despite this, there are three basic implementation steps that should be followed: dedicated screening/charging function, clear and measurable goals for screening and charging, and plea negotiation policies.

Dedicated Screening & Charging Function

Much of the guide has been dedicated to the importance of the screening and charging function and the need for experienced prosecutors to carry out this function. How this happens in reality is often dependent on the size of the prosecutor's office and its organizational structure. In general, offices should create a position (or positions) or an intake unit to handle the screening and charging function. For smaller offices and those offices that use vertical prosecution (e.g., cases are assigned to specialized units or tracks upon referral for screening and charging and subsequent prosecution), this would ideally involve one or two experienced prosecutors assigned to screen and charge cases for the entire office or for the specialized unit. In larger offices and those that practice horizontal prosecution (e.g., different prosecutors handling different parts of the adjudication process or a hybrid of intake then assignment to specialized units), a dedicated unit that handles screening of all cases is preferred to ensure consistency and uniformity.

Patterns to Explore

- *Are there patterns in the types of cases or charges that are declined?*
- *Are there patterns with regard to the types of charges that are dismissed after filing?*
- *Are there certain types of charges that are routinely negotiated down as part of a plea agreement?*

In jurisdictions that have a bifurcated court system (e.g., limited and general jurisdictions courts), the ideal arrangement is a dedicated set of attorneys or unit that screens all case types, regardless of which court a potential case might be prosecuted in. The rationale for this arrangement is that referrals from law enforcement often include multiple offenses (e.g., felonies and trailing misdemeanors) which could be handled in different courts. For example, some jurisdictions require misdemeanors be resolved in one court prior to felonies in the general jurisdiction court. By screening all cases through a dedicated set of attorneys or unit (rather than by misdemeanor or felony offense, for example), the intake prosecutor can make informed decisions about whether the case is better suited for resolution in the limited jurisdiction court or the general jurisdiction court.

Clear and Measurable Goals for Screening & Charging

The decision whether or not to accept a case and which charges to file is an important one for prosecutors. The nature of the screening and charging goals should align with the elected or appointed prosecutor's overall vision for their office. The goals might focus on increasing the number of individuals who are diverted from the system, earlier resolution of cases, reducing the number of individuals who plea to lesser charges, or reducing dismissals after the filing of charges. Examples of clear and measurable goals include the following:

- Reduce the number of cases that are dismissed after the filing of charges by 10 percent
- 90 percent of misdemeanors that are disposed by plea are done so within 60 days of filing
- 90 percent of felony defendants that plea reach disposition at the completion of discovery and before a pretrial hearing or other appropriate time-driven standard
- Increase the ratio of guilty pleas as charged to guilty pleas to lesser charges

Goals should be communicated with line prosecutors through written policies or guidelines, along with the specific factors that prosecutors should be considering in their decision-making. Having clearly articulated goals allows both the elected prosecutor and supervisory prosecutors to assess whether or not screening and charging practices are having the intended effect(s). As an evaluative tool, goals also provide an internal control mechanism to assess whether or not there is uniformity and consistency among line prosecutors in screening and charging.

Plea Negotiation Policies

To support rigorous screening and charging, the office should consider developing plea negotiation policies that generally discourage changes in criminal charges once filed unless there are compelling reasons for the changes. Such policies should be data-driven (data which are also tied to the articulation of screening and charging goals). In particular, current

declination and dismissal patterns should be examined to identify if patterns exist in the types of cases or charges that are routinely declined, routinely charged and later dismissed, or routinely pled down to a lesser charge. The findings from this analysis will identify which cases are most likely to plea and to what charges as well as what types of cases/charges are regularly dismissed. Understanding what the pattern is will provide guidance for establishing charging policies.

Policies should also consider different internal control mechanisms to ensure uniformity and consistency. Such mechanisms might include supervisor approval of prosecuting attorneys' decisions to dismiss or amend charges after filing, or requiring that attorneys indicate in writing their reasons for dismissing charges or offering a plea to a lesser charge.

Conclusion

A system is only as effective as the sum of its parts. With prosecutors serving as the gatekeepers to the adjudication process, an investment of resources in the screening function can have significant long-term, positive impacts on the system as a whole. Prosecutors have a unique ability to set the foundation for effective case management through the use of rigorous screening and charging policies and practices.

As the research has shown, such policies and practices can significantly improve prosecutorial time for handling cases, particularly serious and complex cases, by resolving less complex cases in a more timely manner either through declination or securing plea agreements earlier in the process. Likewise, prosecutors' performance has traditionally been evaluated on dismissal rates, conviction rates, and wrongful convictions. Using the practices described in this miniguide can help reduce dismissals, increase the number of individuals who plead guilty as charged, and guard against wrongful convictions.

The impacts of rigorous case screening also expand beyond prosecution. Early and intensive case screening mitigates expending limited time and money on weak cases for all parties—prosecutors, defense attorneys, and judges. In addition, critical case evaluation, by experienced prosecutors, has also proven to have significant benefits for the justice system as a whole. These include freeing up time on court dockets to cost savings stemming from decreases in pretrial detention and average length of stay, fewer court events, and less transportation costs.

Applying the screening and charging principles discussed in this mini guide, along with the strategies for implementing the principles, are not easy endeavors. However, the benefits that

result from reducing caseloads and case backlogs, along with the resource and costs savings, are critical for the system as a whole to ensure effective case management.

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