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Prosecutor Backlog Causes, Data and Solutions

The pandemic has impacted all corners of society, including the criminal legal system. One significant issue is that grand juries and trials are suspended in most jurisdictions, resulting in an unprecedented backlog in many aspects of a prosecutor's work. The following is a list of considerations to help prosecutors identify the extent of their backlog and to suggest steps that can be taken to reduce the backlog.¹

Charging Stage

Reasons for the Charging Backlog

Backlogs in charging can occur for a number of reasons and should be identified. These reasons include:

- Insufficient processes or staff in the prosecutor's office to allow for initial charging in a pandemic
- Insufficient processes or staff in the police department or forensic laboratory to gather sufficient evidence needed for initial charging.
- No means of conducting a preliminary hearing
- No grand jury or limited grand jury
- No filing to prevent the running of speedy trial due to court backlogs

Size of the Charging Backlog

The charging backlog can be difficult to identify if an office does not have a robust case management system. This is particularly true since there are always cases pending resolution in a prosecutor office even in the best of times. However, every office should be able to provide some estimate the number of backlogged matters. Each of the categories below should be compared to the same time period last year.

¹ This document contains input from members of the weekly PCE National calls, particularly Chief Deputy Prosecuting Attorney Dan Clark (King County, WA – Seattle), Chief Deputy ADA Nell Christiansen (Clark County, NV – Las Vegas), Criminal Division Chief Diane Russell (Cuyahoga County Prosecutor's Office, OH – Cleveland), Chief Deputy District Attorney Ann Swegle (Sedgwick County District Attorney's Office, KS - Wichita) and Chief Deputy Attorney General Kirsten Heine (Pennsylvania), all of whom contributed to the list. Members of the Best Practices Committee of the District Attorneys Association of the State of New York also contributed to this compilation of ideas. Please send any additional items for the list to Kristine Hamann at khamann@pceinc.org.

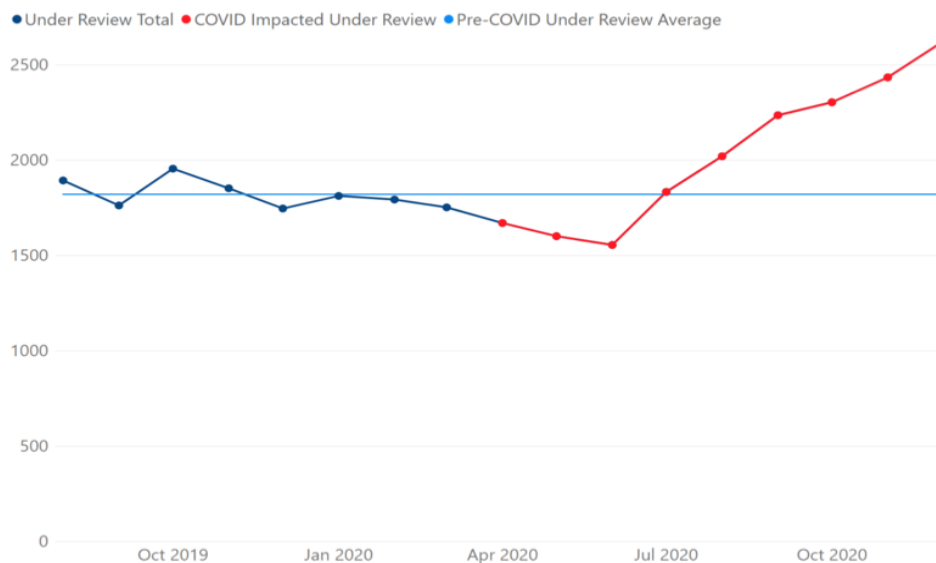


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The following are categories of charging backlogs that can be tracked. Where possible, the types of crimes that are in this backlog can also be identified, e.g. violent crime, non-violent crime, DV, sex crimes etc. This tracking will inform the best approaches for a targeted response.

- Cases awaiting initial charging
 - Felonies
 - In-custody
 - Out of custody
 - Misdemeanors
 - In-custody
 - Out of custody
- Felonies awaiting indictment
 - In-custody
 - Out-of-custody

Example: Cases Under Review (out of custody) (King County Prosecuting Attorney's Office)



Time Needed to Work Through the Charging Backlog

Once the extent of the backlog is determined, prosecutors can provide an estimate of how many additional hours it will take to get through the charging backlog. For



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example, if hypothetically there are now 100 more cases awaiting charging than last year and charging takes 2 hours a case, then there is a 200-hour manpower backlog. This will illustrate for the community, the police and office funders the reason for the delay and the need for additional staff.

Review Screening/Acceptance Criteria

To prevent the growth of the backlog, prosecutors can re-consider the types of cases they are accepting for prosecution. Also, if there are alternative ways to address the cases, that does not impact public safety, this can also be considered.

- **Deflect Low Level Offenses:** Explore ways to deflect cases from the criminal justice system either before arrest or before charging. For example, can unlicensed driving cases be handled through a civil proceeding? Can this be done without the defense bar?
- **Divert Low Level Offenses:** Divert cases to remedial programs rather than put them through the criminal justice system. Work with the defense bar on what cases can be diverted soon after charging.
- **Reconsider Charging Thresholds:** Heighten standards for charging certain crimes, for example, higher charging thresholds for amount of drugs needed for possession with intent to sell controlled substance.
- **Require police paperwork, videos, statements and evidence up front.** Prosecutors can create a stricter policy for intake which requires all police paperwork and evidence before a case will be considered for charging. This will improve the ability to assess the case and save wasted time later.

Review Plea Policies

Plea guidelines in existence before the pandemic can be revisited in a number of ways:

- **Special Calendar for Pending Cases:** The office can create a special calendar for pending cases with a significantly reduced plea. This can be done in collaboration with the defense bar. E.g. in Wichita Kansas such a special calendar was successful in disposing of many backlogged cases.
- **For New Cases – Provide a Best Offer at the First Court Appearance:** Work with senior prosecutors to develop reduced plea guidelines to dispose of cases as soon as possible. However, without ongoing grand juries or trials, there may be little incentive for the defense to accept any type of plea.



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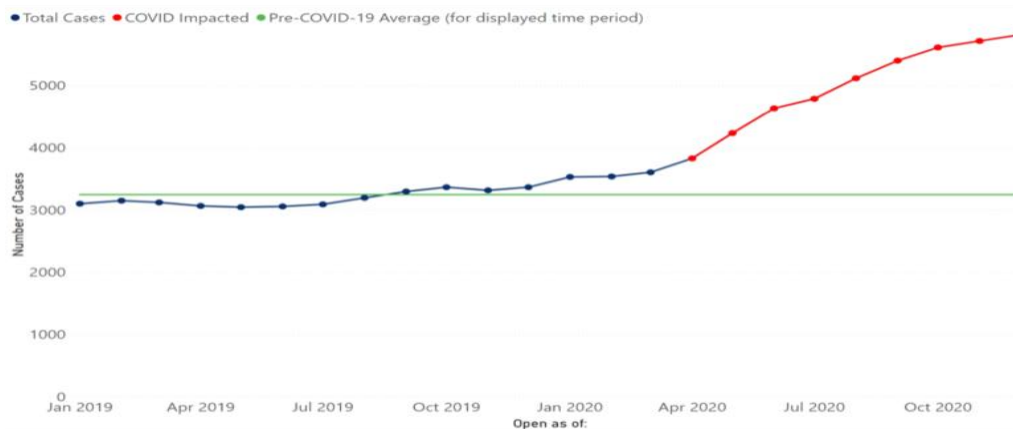
- **Collaborate with the Courts to Create a Disposition Calendar:** Some judges are particularly good at obtaining dispositions. Create a calendar of trial ready cases so that there can be a disposition conference. The court's calendars will be backlogged as well, so they have a motive to participate.
- **Plea Reviews:** Work with the courts and the defense to create a plea review process. Defense and prosecution will complete discovery, and the prosecutor will provide the best possible plea offer. E.g. this process is used in the Cuyahoga County Prosecutor's Office (OH).

Post-Charging Backlogs

Even when cases are being charged in a timely manner, almost every prosecutor office in the country will have a backlog of undisposed cases due to the closing of the courts. An office can do a comparison between cases awaiting disposition last year vs. cases pending now. The cases can be broken down into categories as this analysis will assist with triaging varying approaches to the cases.

- Felonies
 - Violent
 - Non-violent

Example - All Cases King County Prosecuting Attorney's Office





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- Misdemeanors
 - Person crimes
 - Non-person crimes
- Other Violations and Offenses

Other Types of Backlogs

Backlogs can occur in other areas outside of charging and trials. Other areas to review for a backlog are:

- Victim services
- Treatment and Diversion Services
- Community Outreach
- Grant filings and other budget submissions
- Clerical work, such as data entry and filing

Time Needed to Work Through the Disposition Backlog

The office can do a calculation of how long it will take to try the cases in the backlog. Using an average time of trial multiplied by the number of backlogged cases (with a reasonable estimate of cases that will actually go to trial), an approximation of the additional court days needed to work through the backlog can be created. This can be compared to available court days. Some prosecutors have estimated that it could take years to work through the backlog.

Increase Court Capacity

The backlogs are mostly driven by the shutdown of the courts and the grand juries. Increased capacity is needed to address the backlog. When the pandemic is over, the backlog will still exist, and the courts will need extra capacity to dig through the backlog. Some ideas to increase capacity includes:

- Expand the use of time-saving virtual proceedings and explore legislation needed to allow for the virtual proceedings to continue past the pandemic. The defense has many objections to virtual proceedings will be need to be addressed before this can be a viable solution.
- Recruit senior or retired judges to do hearings and other routine matters.
- Prioritize the use of courtrooms for criminal trials. If the courtrooms are used for non-trial purposes, move those to another location, or make them virtual.
- Increase the number of judges assigned to criminal matters or re-assign them from civil matters.



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Dismissals

In some jurisdictions with large, unmanageable backlogs, it may be impossible to sufficiently reduce the backlog. This is especially true if there is no cooperation from the courts or the defense. In this case, cases may be dismissed due to the running of the Statute of Limitations or Speedy Trial. In anticipation of this, the office should develop a triage system for what cases should be dismissed, so that cases are not randomly dismissed. The office policy should consider the seriousness of the crime, the ability to complete the case in a timely fashion, and the needs of victims.

Outreach to Police, Community and Elected Officials

Prosecutors may get push-back from the police, the community and elected officials for having a backlog or for changing policies to address the backlog. The dismissal of cases can be particularly controversial. Before the pandemic is over, prosecutors should be meeting with the police to explain the backlog, the risks of the backlog and steps taken to ameliorate the backlog. The prosecutor should make efforts to explain the backlog and its implications to the police, the community, elected officials and the media. This outreach should start before the end of the pandemic.

Research

The pandemic may force prosecutors to change their charging, plea and disposition policies. It would be very useful to study the impact of these changes and track the suspects/defendants who are treated differently as a result of the pandemic. Local universities may be happy to participate in such research. The essential question is whether public safety was impacted by the new policies.