

Unlocking the Black Box of Prosecution: Key Questions for Community Members

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Introduction

Just a few years ago, prosecutors' elections occurred without much public attention, discussion of policy positions or, often, even a challenger against the incumbent. Today, the role of the prosecutor has become one of the central topics of discussion in the criminal justice reform movement. Despite recent attention on prosecutors and their elections, however, the role of the prosecutor remains one of the least understood and least transparent in American government—so much so that it is often called the “black box” of America’s criminal justice system. Yet prosecutors play a hidden but critical role in driving—or reducing—mass incarceration.

In order to shed light on the role of prosecutors, the Vera Institute of Justice (Vera) created a web-based tool called **Unlocking the Black Box of Prosecution**, outlining what prosecutors do and how they can work to advance equal justice. The questions in it can help both community members and prosecutors evaluate the policies and practices that shape the decisions that line prosecutors—the staff attorneys who handle criminal cases—make every day. Divided into seven key decision points—charging, bail, diversion, discovery, case processing, pleas, and sentencing—the guide serves as a starting point for conversations between prosecutors and the communities they serve about how they can reshape their role—and the justice system as a whole.

This guide is a supplement to the web-based tool, providing a format where the information can be printed and shared. It is a limited summary of the material in the tool, and readers are encouraged to visit the site for more comprehensive information. Below are the key questions community members can ask their local prosecutor’s office to learn

more about how prosecutors are making decisions and the impact they have on the community.

Key decision points



Charging

After an arrest, police present the case to a prosecutor, who decides whether to prosecute the individual and what charges to bring. The charging decision affects all subsequent decisions in a person’s case, including the amount of bail, the plea deal offered, and the length and type of any ultimate sentence, including whether the sentence triggers immigration consequences like deportation.

1. What office guidelines or policies inform prosecutors’ charging decisions?

Learn more: Office policies typically outline how prosecutors should evaluate a case for sufficient evidence and how they should weigh various factors—like the harm caused by the alleged crime, the victim’s cooperation, and the arrested person’s past contact with the criminal justice system—in making a charging decision. Charging decisions can also be impacted by community and political factors, like a lead prosecutor’s relationship with local law enforcement or public perceptions and media depictions of crime. Learning about the office’s policies is a way to understand how the lead prosecutor expects line prosecutors to put the office’s values and goals into practice. Ask your lead prosecutor what factors are used to evaluate cases that are referred for prosecution and how charging decisions are made.

For more information

To read the full report, <https://www.vera.org/unlocking-the-black-box>. For more information about this report, contact Jamila Hodge, director, Reshaping Prosecution, at jhodge@vera.org. The Vera Institute of Justice is a justice

reform change agent. Vera produces ideas, analysis, and research that inspire change in the systems people rely upon for safety and justice, and works in close partnership with government and civic leaders to implement it. Vera is currently pursuing core priorities of

ending the misuse of jails, transforming conditions of confinement, and ensuring that justice systems more effectively serve America’s increasingly diverse communities. For more information, visit www.vera.org.

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2. Are there any categories of less serious charges that the office instructs prosecutors to decline to prosecute in most instances?

Learn more: An office may have a policy of declining lower-level charges—such as possession of small amounts of marijuana or small dollar shoplifting cases—even if there is sufficient evidence, because the prosecutor believes the offense does not threaten public safety enough to warrant a response by the criminal justice system. Declining to prosecute cases is the most direct way that prosecutors can mitigate the overreach of the criminal justice system. Prosecutors can curb some of the detrimental effects of overpolicing, particularly in communities of color, by making thoughtful decisions about when *not* to prosecute. Find out if your lead prosecutor has a declination policy that goes beyond cases that lack sufficient evidence—one in which cases are refused based on the office's priorities and values.



Bail

Bail is supposed to ensure that people will return to court for future hearings on their cases. But money bail creates a perverse system in which people with money—regardless of the danger they may present—are able to buy their freedom, while people without money remain in jail. Although prosecutors don't set bail, they can play a vital role in changing bail practices because their recommendations are one of the most significant factors affecting whether bail is set and in what amount.

1. What guidelines or training do prosecutors receive to inform their bail recommendations?

Learn more: A lead prosecutor may provide staff with guidelines or training about making pretrial release recommendations, such as always requesting bail in specific types of cases or routinely recommending release in lower-level cases. In some jurisdictions, prosecutors' offices do this liberally, while in others they rarely if ever consent to release. Though a judge or magistrate ultimately sets bail, prosecutors can play a powerful role in minimizing pretrial incarceration by advocating for the release of people who do not pose a serious threat to public safety.

2. Does the office recommend release in some cases? If so, how often and in what kinds of cases?

Learn more: Prosecutors' bail recommendations must be based on a strong commitment to both the presumption of innocence and reserving pretrial detention for people who present a serious threat to community safety. A prosecutor may recommend pretrial release on one's own recognizance or with specific release conditions such as drug testing, check-ins with a pretrial supervision officer, or orders to stay away from a particular person or location. Because release of low-risk individuals can curb the excessive use of pretrial detention, find out if your local prosecutor's office has guidelines that encourage line prosecutors to recommend release on recognizance in appropriate cases.



Diversion

Diversion programs offer a wide range of alternatives to traditional prosecution. They can be run by the courts, law enforcement, community-based organizations and nonprofits—or the prosecutor's office. Diversion programs can provide an effective off-ramp from the criminal justice system to services and treatment related to the underlying issues that may lead to someone's alleged criminal behavior.

1. Does the office offer any diversion programs? In what types of cases? Who is eligible for those programs and what are the requirements and costs of participation?

Learn more: Diversion programs offer a wide range of alternatives to traditional prosecution. The programs allow a person who has been arrested to connect with services such as drug treatment or cognitive behavioral therapy instead of subjecting them to criminal case processing. Burdensome program requirements can increase failure rates, so program components should be tailored to a person's needs. Some diversion programs require costly fees, which unfairly disqualify people who would otherwise be eligible. Some offices ensure that their diversion programs are free or that fees may be waived or paid through community service. Find out if your office makes diversion programs widely available regardless of ability to pay.

2. What happens to the cases of individuals who successfully complete the diversion program? Are their charges dropped by the office?

Learn more: Individuals who successfully complete diversion programs avoid a criminal conviction. Ideally, increasing participation in diversion programs will shrink the number of people with criminal records and all the collateral consequences that attach to them—like limitations on eligibility for jobs, housing, student loans, and other public benefits.



Discovery

Evidence in criminal cases is known as “discovery”—and its availability to the defense is largely controlled by the prosecutor. The Supreme Court has affirmed that people are entitled to discovery before a criminal trial, but what is turned over and when varies from office to office.

1. Does your local prosecutor’s office turn over discovery to defense counsel early enough in the case so that the individual is given a fair chance to fight the case?

Learn more: To ensure that people accused of crimes and their attorneys have time to prepare an adequate defense, prosecutors must provide discovery early in a case, such as at arraignment in a case. Arraignment is a hearing in court during which the person charged is informed of the charges against him and asked to enter a plea of guilty or not guilty.

2. What materials are disclosed to the defense?

Learn more: Some state statutes describe in detail what kinds of discovery must be turned over, such as recordings, lab results, witness statements, or grand jury transcripts. Others are not as prescriptive. Many offices practice discovery disclosure without a formal policy dictating when and how specific items of discovery should be disclosed—and practices may vary from prosecutor to prosecutor. Other offices follow a better practice and have a policy that outlines what discovery must be turned over, and some even practice “open file” discovery, turning over everything the prosecutor has to ensure the fairest outcome possible. A few offices have

even made their discovery policies publicly available or have discussed them publicly, further increasing transparency.

3. What does the office do to ensure that evidence favorable to the defendant is turned over?

Learn more: All prosecutors are required to comply with the Supreme Court’s mandate in *Brady v. Maryland* to disclose evidence favorable to the defendant. Many offices leave it to individual prosecutors to determine what is favorable and how to meet their disclosure obligations. These determinations can vary from prosecutor to prosecutor. To ensure fairness to the accused and the integrity of convictions, offices should institute guidelines outlining what material must be turned over to the defense.



Case processing

The Sixth Amendment guarantees the right to a speedy trial—and prosecutors play a big role in ensuring this right is upheld. Although many states have speedy trial statutes that recommend specific time frames for charges to be filed and for the case to go to trial, these aren’t binding. In practice, it can take months, even years, for a case to reach a resolution. Every decision a prosecutor makes impacts the timely resolution of a case.

1. What policies and procedures does the office have in place to comply with state speedy trial guidelines?

Learn more: State statutory guidelines for speedy trial can be found in the state’s criminal procedure law or penal code. While such time standards are not mandatory, the expectations outlined can serve as helpful benchmarks against which to compare to the average case processing times for cases prosecuted by your local office. Find out if your office has guidelines to help its prosecutors meet these goals so that individuals who choose to go to trial do not have to wait for months or even years to get their day in court.

2. What is the average time for misdemeanor and felony cases charged by the office to be resolved?

Learn more: The National Center for State Courts recommends that 90 percent of misdemeanor cases be resolved within 90 days, and 90 percent of felony cases within six months. Is your local office meeting these goals? If not, can the lead prosecutor explain why and outline a plan to ensure fair and efficient processing of cases?

3. Does the office have a procedure for early or expedited case resolution?

Learn more: Many courts use expedited dockets—sometimes called “rocket dockets”—to more quickly process and resolve certain types of cases. Some prosecutors’ offices also have processes for early disposition—where the person charged can resolve with fewer court dates, especially for certain categories of offenses, such as drug or traffic cases. Find out if your prosecutor’s office has such a process, which can help resolve less complicated cases faster.



Pleas

Nowhere is the power of the prosecutor more evident than during the plea bargaining process, a practice in which the prosecutor largely controls the charges offered, the sentence length, the type of sentence, and any conditions of community supervision. Often, a plea is the only way individuals can quickly return home if they are in jail on bond in a case that would otherwise take months or years to process.

1. What guidelines or policies are prosecutors given for making plea offers?

Learn more: One way to ensure that plea bargaining is done consistently and fairly is for the lead prosecutor to issue guidelines about its practice. Some offices also require peer or supervisor review of plea offers, which can aid less experienced attorneys, increase consistency across the office, and ensure that office practices conform to its policies.

2. How often are plea offers made that are below the top charge? What about a case would allow a prosecutor to come down from the top charge?

Learn more: The top charge is the most severe offense with which the individual has been charged. Frequent plea offers made on lesser charges can indicate that prosecutors may have brought more serious charges than necessary as leverage, in part so they can later reduce them in exchange for a guilty plea. To see if this might be happening in your community, find out if your office tracks how often cases are resolved on lesser charges.



Sentencing

If a person has been found or pled guilty, the prosecutor typically recommends a sentence to the judge. Prosecutors have tremendous discretion within sentencing ranges set by state law and their recommendations carry great weight, affecting whether someone returns home or whether they are incarcerated for a few months or a number of years. Prosecutors are uniquely positioned to influence judges to impose sentences that are fair and focused on addressing the needs of both the victim and the person convicted.

1. What guidelines or policies are attorneys given to inform their sentencing recommendations?

Learn more: A prosecutor’s office may have guidelines for the range of sentences its attorneys should recommend, or it may leave sentencing recommendations up to individual attorneys, causing practice to vary within a single office. Office policies can standardize practice so that people are treated similarly regardless of the attorney prosecuting their cases, and can encourage sentencing recommendations that don’t involve incarceration in more classes of cases.

2. Does the office have a policy for recommending sentences other than incarceration in some cases?

Learn more: Prosecutors can reduce unnecessary incarceration by recommending non-incarceratory sentences in appropriate cases and limiting the prevalence and length of probation sentences, which can lead to incarceration for technical violations of supervision for things like missed appointments with supervisors or failed drug tests.

Pursuing equal justice: Analyzing and remedying disparities

Disparities can creep in at many stages of a criminal case due to individual biases and systemic racism, but prosecutors' offices won't know—and won't be able to make changes to rectify them—unless they collect and analyze case outcomes by race and gender to find these issues. For example, issues of systemic racism can lead to racial disparities in charging, bail, diversion, and sentencing when factors like an individual's previous criminal history are taken into account, given that communities of color have historically been overpoliced.

1. Does the office analyze its decisions by race and gender to identify whether disparities exist and, if so, does it take any meaningful action to remedy those?

Learn more: Offices should routinely evaluate the disparities at key points in cases. In particular, offices must consider how policies and decisions that seem neutral in their design and application may have disparate effects. For example, many prosecutors' decisions are informed by whether someone has had prior contact with the system and the nature of that contact. These factors affect the full range of decisions on a case, including the charging decision, whether bail is set and at what amount, whether the individual is eligible for diversion, the plea offer, and the sentencing recommendation. Policies, guidelines, and instruction on what prosecutors' should consider when making each critical decision should aim to mitigate disparities inherent in over-reliance on such factors as past arrests, past convictions, housing status, and employment.

Your local prosecutor represents YOU

Prosecutors are accountable to the communities they serve not just on Election Day, but throughout their terms. They are responsible for representing “the people,” including individuals who are accused and their loved ones, those who are harmed, and all who live in their jurisdiction. In this moment of unprecedented focus and advocacy around prosecutors and reform, members of the public have a profound role to play in how prosecutors reshape their role to pursue equal justice and reduce incarceration.

You can look up your local prosecutor, when they were elected, their stances on six key policy areas, and their contact information on Color of Change's website “Winning Justice,” at www.winningjustice.org. Make your voice heard. Let your local prosecutor know what matters to you by asking them the questions in this guide and others that are important to you in order to better understand how decisions are currently being made for your community. Tell your prosecutor what you would like your local justice system to look like and the goals you believe he or she should prioritize.