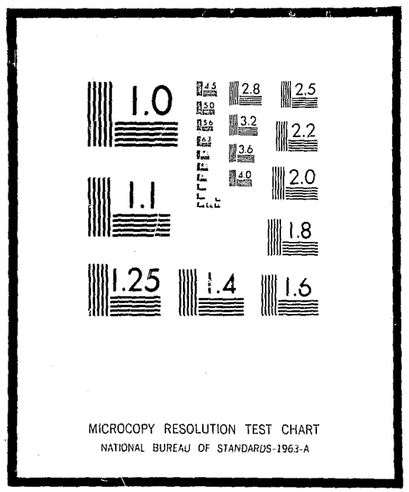

ISSUES IN PRE-TRIAL SCREENING

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"...we must improve the manner in which our criminal justice system operates. Effective deterence to law-breaking is currently lacking, in part because our criminal justice system simply does not operate effectively."[1]

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[1] Remarks of President Gerald R. Ford on Crime in the United States before the U.S. Congress, June 19, 1975.

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PREFACE

In an attempt to learn more about the criminal justice system, the Law Enforcement Assistance Administration (LEAA) is sponsoring research in many topic areas relating to criminal justice. This research is being done on a national scale, with concern for the multitude of like programs being run throughout the United States.

One topic area with which LEAA is concerned is pre-trial screening. LEAA has set out several tasks which must be completed in examining pre-trial screening; one of these is an examination of the emergent issues in the actual operation of pre-trial screening programs. This paper provides what we believe to be a concise overview of those issues. As will be evident from our discussion of these issues, we believe them to lie in the domain, explored by some social theorists,[2] in which the nature of prior choices enhances or precludes the opportunity to exercise subsequent options.

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[2] See Jean-Paul Sartre, Being and Nothingness (Secaucus, N.J.: Citadel Press, 1965); Edmund Husserl, Cartesian Meditations (New York: James H. Heineman, Inc., 1975); Martin Heidegger, Being and Time (New York: Harper and Row, 1962); Peter L. Berg, et.al., The Homeless Mind (New York: Random House, 1973); and works of other phenomenological theorists.

INTRODUCTION

The perspective taken in reviewing the issues, we believe, will be useful to planners and prosecutors. The approach is not simply a review of what has already been said about pre-trial screening; this is not just an outline of the topic areas identified by experts, but rather an examination of expert knowledge in terms of a set of issues which may be seen as directly affecting the pre-trial screening process.

In addition to a review of books and articles, sources consulted include representatives of the American Bar Association, legal and social scholars, and reports from operating pre-trial screening programs.

The issues, outlined below, cover the following areas: a review of the definition of screening; an examination of pre-trial screening in terms of decision-making, procedures or operations which determine the way pre-trial screening functions in an office, and the administrative means by which procedures are institutionalized and monitored within the office. By looking at the issues in terms of this schema we will be able to determine what information is lacking and needs to be provided to inform planners and prosecutors attempting to improve the criminal justice system.

These issues, though representative of the framework from which this paper will develop, require further amplification if the importance of these elements is to be understood. Thus we have chosen three factors which appear to affect each of the issues discussed above. These factors are: the definition of screening and the relationship between policy and the establishment of a pre-trial screening program; the fact that the major purpose of screening is to aid the prosecutor in establishing a uniform charging

procedure; and, finally, the probable impacts alternative charging policies may have on the criminal justice system.

Essentially, pre-trial screening is an intake and review procedure, whereby the prosecutor or his assistants attempt to determine, based upon information given them by law enforcement agencies, what type of action should be taken with regard to a particular case. The importance of pre-trial screening is demonstrated by the fact that it is the stage at which the charging decision is made. Basic to this decision is the prosecutor's judgement of the quality of evidence in the case and his evaluation of the probability of completing the prosecution successfully. Clearly decisions at charging, as at any level, should not be capricious. The desire to prevent arbitrary decision-making is one important element in screening. Various pre-trial screening programs have attempted to minimize capricious decision-making by establishing explicit rules or policy guidelines which the prosecutor and his staff use in determining whether or not to prosecute.

Essentially, the policy establishes the prosecutor's strategy, his preferences among the operational options open to him. The further implications of the various prosecutorial policies are so far reaching that we consider analysis of the policy determinants and consequences, in terms of effects on the actual operation of the criminal justice system and on the agencies, organizations, and institutions bordering it, to be the most fundamental of the issues in the actual operation of pre-trial screening programs.

Whether implicit or explicit, the policy and rules which govern the way cases are actually screened results from the various internal and external constraints influencing the prosecutor. Examples of internal constraints are the number and ability of assistants available for use in the screening process and the prosecutor's perception of his role. External constraints include police reporting mechanisms, the state and federal constitution, and the political and social values of the community the prosecutor serves. The actual or emergent policy reflects the response of the prosecutor to his situation and indicates some outcomes in the criminal justice system as being preferred over others. To institute pre-trial screening as a program requires that a policy be established. Once established, the policy preferences largely determine how the program will actually operate in terms of the final disposition of the cases in the criminal justice system and the dominant routings to those final dispositions.

The second factor, that the major purpose of screening is to insure a uniform system of charging, is also tied to the notion of policy. Miller, in discussing the charging decision states that the goal of intake and review is "to insure uniformity in charging both in its evidence-sufficiency and policy aspects. . . ."[3]

Uniformity in charging, and the accountability of the staff of the prosecutor's office, are largely based on the successful translation of policy guidelines into appropriate decisions for each case reviewed. In that

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[3] Frank W. Miller, Prosecution: The Decision to Charge a Suspect With a Crime (Boston: Little, Brown and Company, 1969), p. 16.

sense, uniformity of charging and staff accountability are dependent upon the prosecutor's policy guidelines.

The charging decision's effects upon the remainder of the criminal justice system, the third factor, are clearly crucial, if an examination of pre-trial screening is to be complete. Because the charging decision is a gate-keeper activity, filing or failing to file a charge in a particular case or type of cases is a signal to other elements of the criminal justice system of the prosecutor's basic orientations. For example, a prosecutor may decide not to pursue a case even though the complaint made by the police appears to be amply supported by evidence and the police charge appropriately made, perhaps due to the volume of work in the prosecutor's office or a backlog of cases in the courts. Sufficient accumulation of similar instances constitute a signal to law enforcement agencies that, from the prosecutor's point of view, they are inappropriately burdening the criminal justice system.

Participants in the criminal justice system have come to understand the criterion of trial sufficiency as meaning that the prosecutor has determined to his own satisfaction that the case being charged has a high probability of resulting in a conviction. When trial sufficiency is used as a standard in pre-trial screening, the prosecutor is signaling his expectation of a conviction to other members of the justice system. Cases charged under this standard may be assumed by members of law enforcement agencies to have been well charged and amply investigated; the decision to charge thus affirms the appropriateness of the actions taken by them. For the judiciary, processing cases on a trial sufficiency basis asserts the prosecutor's intent not to carry cases of marginal win probability to trial. At the

same time, carrying a case forward under trial sufficiency criteria is an assertion of the prosecutor's expectations regarding such matters as adequate trial court capacity and appropriate cooperation from the bench.

Summary

It is not enough to note that the principle purposes of pre-trial screening are to remove from the caseload those cases which would not meet the test of probable cause, or that pre-trial screening has as its goal the elimination of arbitrary decision-making. Those issues which must be explored include the concepts underlying pre-trial screening, its use as a decision-making tool, and the procedures, operations, and administrative elements which govern pre-trial screening. Nor do these issues constitute the limits of discussion. We have added the following factors as a means by which to expand and elaborate upon the issues mentioned above: the relationship between policy and the establishment of a pre-trial screening program; uniformity of the charging decision; and the impact of the charging decision on other elements in the criminal justice system. This schema for analysis of the issues concerning pre-trial screening has been chosen because, as we have noted, intake and review represents an important decision stage in the prosecution of a case. As we will attempt to show in the following section, it is also a stage about which little is known.

PRE-TRIAL SCREENING AS A PROCESS

The literature on pre-trial screening seems to be dominated by one theme, procedures for reaching charging decisions and the effectiveness of pre-trial screening for reducing court loads. In part, this emphasis seems to have arisen from a failure to consider the place of pre-trial screening in the broader context of the criminal justice system and to explore its relationship with and effects on other elements of that system. When emphasis is placed on pre-trial screening as a procedure for reaching a charging decision, the discussion is turned away from consideration of the impact of elements in the criminal justice system, other than the prosecutor's office, on the decision process and from the broader effects of pre-trial screening. In essence, such discussions become procedural manuals, emphasizing steps and considerations necessary to assure well-grounded decisions. It is our belief that the operation of pre-trial screening programs may be better understood by examination of pre-trial screening as a process, by attempting to describe the stages in that process and by noting the diversity of outcomes permitted by pre-trial screening and the various effects of pre-trial screening on elements of the criminal justice other than the relationship between the prosecutor's office and the judicial system.

We intend to discuss pre-trial screening as a process which extends over time, and operates in conjunction with other elements in the criminal justice system as law enforcement agencies, judges, and correctional officials, among others. In that context it becomes important to examine the decision to charge or not charge, divert or differ in terms of the effects that decision has on other elements of the system and, conversely, to consider influences other elements of the system are likely to have on the charging decision. The definitions of screening which appear in the literature are deficient in not considering the elements making up the screening function such as the type of information presented to the prosecutor, the actors involved in the reviewing procedure, the stages of review, and the variety of outcomes which might be expected, that is, many of the internal variables which affect the way a system would operate; and all the external variables which impact upon the decision-making process.

The more limited view of pre-trial screening which is evident in the literature is not necessarily a function of the authors' failures to comprehend charging, but a failure to comprehend that intake and review is part of a process which functions over time and in relation to other processes operating simultaneously. Examples of the lack of understanding and the inability to see pre-trial screening as a process are apparent in several major sources in the literature.

The intake and review procedure, fundamental aspects or pre-trial screening process, is dependent upon discretionary powers available to prosecutors. The importance of these discretionary powers is evident in the discussions of pre-trial screening in the literature.

Kenneth Culp Davis sees discretion, or the means used in the decision to charge, as an opportunity to determine what charge would be desirable under the circumstances after the facts and the law are reviewed.[4]

Brian A. Grosman, quoting Roscoe Pound states,

> that discretion is an "authority conferred by law to act in certain conditions or situation in accordance with an official's . . . considered judgement and conscience.".[5]

Neither definition or subsequent discussion considers the impact of the use of discretion on anything other than the official making the decision or the fact that decisions require inputs from other components in the criminal justice system. In addition, both definitions are inadequate since neither places limits on the locus of these discretionary powers or yields an unambiguous basis for evaluations of their use. They also fail to account for the various ways in which discretion may be used and most of the internal and all of the external variables which affect the decision-making process.

Lewis R. Katz expands the definition somewhat to include consideration of the level of charge to be made, as well as the decision whether to charge or not which he says occurs by evaluation of the evidence in terms of the law.

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[4] Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (Chicago: University of Illinois Press, 1973), p. 25.

[5] Roscoe Pound, "Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case," 35 New York University Law Review 925 (1960), p. 926, quoted in Grosman, p. 31.

He also notes that, because the facts are often not exact, the prosecutor must use his "judgement" as to what charge would be most correct.[6] This definition, though drawing our attention to problems inherent in law enforcement reporting, also fails to provide any suggestions on how to carry out the process.

Frank W. Miller appears to give the concept of charging the most serious consideration. Substantially agreeing with the above definitions, Miller directs his attention to the options in the actual operation of the pre-trial review procedure. He states,

> Three principal methods might be utilized . . . . The most obvious one would be as complete as possible an examination and evaluation of evidence available at the time the charging decision must be made. A second would be the establishment of intra-office review procedures, and a third the development of specialists within the office or reliance on specialists in other departments.[7]

The Miller definition is important because it reflects several key and fundamental elements in the decision-making process. The first is a concern with the set of information available to the prosecutor or his assistant. For a proper decision to be made, the information presented to the prosecutor must be complete and accurate; thus the quality of the information entering the prosecutor's office will clearly impact upon the charging decision. Because prosecutors will often have more than one law enforcement agency reporting to them the method of reporting and quality of reports are likely to vary. Thus it becomes relevant to consider how variations in the quality

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[6] Lewis R. Katz, Justice is the Crime: Pretrial Delay in Felony Cases (Cleveland: The Press of Case Western Reserve University, 1972), p. 73.

[7] Miller, p. 16.

of information by various sources are weighted by prosecutors. One might ask whether all of the information is considered or whether some information is immediately discounted and, if the latter is the case, what the bases are on which some data sources are given greater credence than others. Looking to future activities of the pre-trial screening project, it then becomes important to consider whether individual prosecutors systematically discount some sources and whether there is implicit agreement among prosecutors or classes of prosecutors about which sources are less reliable or credible.

Another area neglected in most explications of the pre-trial screening process is that of the degree to which policy regarding various aspects of the process have been formulated and publicized with appropriate operational guidelines and the extent to which evaluative standards have been developed to allow prosecutors or others to conduct administrative reviews in order to determine whether policy objectives are being attained and, if not, the location and reasons for shortfalls.

President Ford, in a statement to Congress, noted:

> . . . prosecutors all too often lack efficient systems to monitor the status of the numerous cases they handle. If improved management techniques could be made available to prosecutors, the likelihood of swift and sure punishment would be substantially increased.[8]

The same need for monitoring charging decisions and case dispositions is obvious, if the goal of pre-trial screening is also to assure uniformity of, and hence accountability for, charging decisions.

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[8] Remarks of President Gerald R. Ford on Crime in the United States before the U.S. Congress, June 19, 1975.

Finally, the presence of either specialists in a particular area of prosecution, or generally experienced assistant prosecutors in the intake and review section is likely to insure greater knowledge from which to judge the merits of a case. The familiarity of these assistants with the office is also likely to result in familiarity with the prosecutor's policy and in turn aid the prosecutor in his attempts to carry that policy forward.

Nonetheless, the inclusion of the above elements still does not provide a complete definition. Included should be those elements in screening which reflect the policy of the office and contribute to the decision-making process. What must be included in any definition of screening are notions of policy, no program may function without it; operations, or the means by which a program is carried out; and controls, or the technique by which the prosecutor is able to insure that his policy is being enforced. In addition, in describing a system it is necessary to include those aspects of the intake and review process which impact upon the rest of the criminal justice system. For example, improvements in the charging process could result in more cases being placed before the courts (and with a higher proportion of successful prosecutions). This, in turn, could have second order consequences for police reporting systems as initial charges come to more accurately reflect those made by the prosecutor. As a result, the present obvious discrepancy between initial charges and final outcomes might be reduced. Other examples of the effects of changes in pre-trial screening procedures on the criminal justice system would include the potential effects of more effective charging upon court caseloads and upon the police reporting systems (as improved reporting to insure more cases are put before the courts).

The ABA Standards[9] materially extend the basic conceptualization of Miller. Like Miller, the ABA recognizes that pre-trial screening is a process which results in placing cases with sufficient evidence to support a conviction before the courts. But the ABA Standards, unlike Miller, go further by directing attention to the decision itself as a critical point in the process and then by elaborating factors other than the weight of the evidence in terms of applicable law that have a bearing on the conclusions reached by prosecutors in pre-trial screening decisions. Other considerations prior to the actual decision include:

(1) the prosecutor's reasonable doubt that the accused is in fact guilty;

(2) the extent of the harm caused by the offense;

(3) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(4) possible improper motives for a complainant;

(5) prolonged non-enforcement of a statute, with community acquiescence;

(6) reluctance of the victim to testify;

(7) cooperation of the accused in the apprehension or conviction of others;

(8) availability and likelihood of prosecution by another jurisdiction.[10]

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9 American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (approved draft) (New York: American Bar Association, 1971).

10 Ibid., pp. 7-8.

The ABA discussion explores various stages in making the decision to charge. But, essentially, it is a further elaboration of Miller's belief that for proper charging what is needed is a careful and rational review of the information available to the prosecutor. Thus, while the ABA has provided the prosecutor with a frame of reference in which to operate, it and the others still do not provide an adequate model from which one might plan a pre-trial screening unit, institute that unit, and evaluate it. Furthermore, none of these descriptions provide an understanding of the impact screening might have on the broader criminal justice system. Thus, we conclude that any adequate analytical model of the pre-trial screening process must include the following:

(1) theoretical notions of discretion and charging as evidenced in the Pound and Davis definitions;

(2) recognition of types of decisions that will have to be made, by whom they will be made, how they will be made, and based upon what information;

(3) awareness of the various roles the prosecutor may adopt, (as, for example, an arm of the law enforcement agencies they serve, an interpreter of the law or determiner of the way in which the law should be applied in a given situation, and as policymaker or by attempting to determine what methods for dealing with crime will be socially most profitable for the community);

(4) internal constraints or those aspects of his office over which the prosecutor has control (as resource allocation, and office policies); and

(5) external constraints of his environment, or those aspects of the criminal justice system which limit or determine the capacity in which the prosecutor will function.

These factors, when properly articulated seem to provide the basic elements of a more comprehensive analytic model which may also be seen as a "working" definition, while at the same time, retaining the theoretical insights of previous analysts of pre-trial screening.

Summary

In examining some of the literature on pre-trial screening we found the discussions to focus on the dynamics of the screening process,[11] the variations in application of the concept,[12] and the effects of pre-trial screening on other components of the criminal justice system or to analyze ways in which pre-trial screening options are channeled or constrained by other components in the criminal justice system.[13] Yet despite the covering of broad topic areas, none of the works surveyed presented a comprehensive description of the pre-trial screening process. The reasons for this are that the literature has confined itself to a discussion of pre-trial screening in ideal terms, without consideration for the reasons that certain events, as variation in pre-trial screening programs, take place, and without regard for the multiplicity of events both internal and external to the office of the prosecutor which will impact upon any decision-making process.

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11 See ibid., Miller and Grosman.

12 See Grosman and Davis.

13 See Katz.

Most of the descriptions of pre-trial screening have attempted to generalize the screening process and to discuss discretionary elements involved, but none of the sources indicated a clear understanding of the dynamics of the process, nor offered a concise description of the process as it actually operates. The observation that intake and review culminates in a decision to charge or not charge a suspect with commission of a crime, and the parallel observation that this decision involves discretionary behavior on the part of the prosecutor or his assistants demands further exploration of the areas open to the exercise of prosecutorial discretion, the range of choices available to the prosecutor in making his charging decision, and the way in which prosecutorial discretion is differentially exercised given client type and community atmosphere. In addition, because of the orientation of the authors toward emphasis of the outcomes of the pre-trial screening procedure, several complex issues inherent in intake and review were avoided. For example, only minimal consideration is given to internal and external constraints which confront the prosecutor, while examination of the impact of screening on other components of the criminal justice system is nearly totally lacking. However, because of the diversity of perspectives used in the descriptions of pre-trial screening, the writings of the authors surveyed do make a major contribution toward understanding the system and do provide a valuable point of departure for the elaboration of a more comprehensive anlytical model. The remainder of this paper is devoted to efforts toward elaboration of a preliminary analytical model of the pre-trial screening process. The criticisms leveled against the authors reviewed above are not meant to detract from the value of their work but rather to indicate our perception of the need for more explicit elaboration of the

analytic model implicit in their works. We fully expect that similar criticism will be valuable for the improvement of the model we are proposing in this paper.

AN ANALYTICAL MODEL OF PRE-TRIAL SCREENING

Three elements appear to affect the outcome of pre-trial screening. The first is the decision to charge, second is the procedure by which decisions are reached, and third is administration. The decision to charge or not charge a defendant with commission of a crime is the end result of pre-trial screening. The procedures or method by which decisions are made is reflected in the various intake and review procedures in effect in the prosecutor's office. For example, the involvement of individuals responsible for pre-trial diversion in screening will affect the ways in which decisions are made. Administration or management of an office will determine the ways in which accountability is insured for decisions made, as well as having other consequences. For example, the procedures chosen for carrying out policy, and the type of staff present will be reflected in how an office functions.

While analytically distinct, these three elements are empirically linked; decisions will reflect office procedures, administration will reflect staffing, and so forth. Initially, however, we must assume their separability if we are to understand the workings of the pre-trial screening process. While the posited empirical linkage between these areas contributes to the complexity and variation in the actual operation of pre-trial screening processes, considering each of these sub-processes separately in the analysis promises some advantages in specifying the relationship of the parts of the larger process to each other. In the following pages each element in the pre-trial screening process will be examined in light of the issues discussed above. The discussion will then turn to consideration

of the set of information used to evaluate a case, the decisions or choices available to the prosecutor at the time of charging, and the means by which the policy of the prosecutor is carried out.

The Decision to Charge

The decision to charge or not charge a suspect with commission of a crime, and the level of charge made, represent the weighing of information available to the prosecutor against his policy. The prosecutor must make his decision based on the belief that:

(1) the individual is guilty;

(2) the prosecution of the case will result in a conviction;

(3) the effort made to prepare the case will result in a conviction equal to the effort expended;

(4) the influence of public opinion will be in the prosecutor's favor;

(5) the resulting sentence will match the crime; and

(6) the jurors are not loath to convict.[14]

Though the choices available to the prosecutor --

(1) to charge;

(2) not to charge;

(3) defer prosecution

(4) divert; or

(5) return the case to the source of information for further investigation --[15]

appear simple and direct, the decision to charge is neither a simple one, nor one which stands autonomous from the rest of the criminal justice system.

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[14] American Bar Association Project on Standards for Criminal Justice, p. 24

[15] National Center for Prosecution Management, The Prosecutor's Screening Function (Chicago: National District Attorneys Association, 1973), p.3.

The selection of any of the choices available requires the prosecutor to be aware of the impact of such decisions on the system as a whole. The difficulty inherent in the decision to charge is seen in the following statement by Miller:

> Four problem situations are identifiable. In the first of them, either the evidence is insufficient to convince the prosecutor that the suspect is guilty, or to convince him that a jury would think so. In all of the other situations, the prosecutor is convinced that the suspect is guilty. In the second situation, the prosecutor realizes that he cannot surmount the preliminary examination, or that the case will fail at trial, because the evidence on which he bases his conclusion of guilt is not available to him at the preliminary examination or at the trial. In this situation . . . he will ordinarily decline to prosecute/. . . [thus] the standard for determining evidence sufficiency is the probability of conviction in addition to the probability of guilt. . . .
>
> The third problem situation also posits evidence available to convince the prosecutor of the suspect's guilt. It differs from the second, however, in that the prosecutor has no reason to doubt that the jury will also believe [in the suspect's guilt.] But, in some situations juries, or even judges, will not convict . . . for reasons of policy wholly unrelated to guilt . . . . Ordinarily prosecutors will not charge under these circumstances either.
>
> The final problem situation involves the traditional discretion of the prosecutor. Even though he is convinced of the guilt of the suspect . . . a prosecutor will decline charge when he believes that prosecution is not in the community's interest. . . . In the latter two [problem situations], the decision not to charge is based on factors unrelated to the ability of the prosecutor to convince the judge or jury of the fact that the suspect did the acts complained of . . .[16]

The charging choices and how they are used are a function of prosecutorial policy, and will, in part, determine the effectiveness of the criminal justice system. For this reason great attention must be directed toward this aspect of prosecution.

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16 Miller, pp. 27-28.

The approach taken by many of the authors discussing pre-trial screening has been to view the charging decision in ethical terms.[17] As a result several crucial issues are not faced. For example, the impact of the court structure on the charging decision may result in fuzzy distinctions between felonies and misdemeanors. If a single court processes all criminal cases prosecutors have a tendency not to separate felonies and misdemeanors in their intake and review, with resultant confusion as to what charge is most appropriate given the nature of the crime. If the court structure is bifurcated, with separate courts for misdemeanors and felonies, commonly misdemeanors will not be screened in the efficient manner in which felonies are reflecting a lack of commitment to dealing effectively with lesser crimes. Yet the court structure and other elements of equal importance are not seen to impact upon the decision to charge.

The importance of accurate charging for example, is not only supported by the desire to provide defendants with equal protection under the law, but also because of the importance of insuring that a stated policy is carried out, such that it becomes an effective tool to crime deterrence. Very little information has been provided on how one determines whether or not proper decisions are being made by assistants based upon the policy of the office. If we are to test for the accuracy and efficiency of the screening process, examination of the correlation between the charging decision and the final disposition of the case in terms of the policy is necessary.

If evaluation of the pre-trial screening process is to be sensitive to the options open to prosecutors in their charging decisions as a means of

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17 See American Bar Association Project on Standards for Criminal Justice and Miller.

effectively pursuing prosecutorial policy, the evaluative methodology used must provide accurate data for each outcome or disposition. Evaluation of the extent to which a given prosecutor's pre-trial screening program is operating effectively requires establishment of his goals, whether implicit or explicit. As we shall attempt to demonstrate later, prosecutorial policy in part is a reflection of issues and promises made in the campaign for office and is further shaped by forces in the community as well as in the electoral process. The use of rejection rates at the time of screening as an indicator of effectiveness of operation is tantamount to arguing that an effectively managed prosecutor's office attains one end solution, conviction, with a high degree of frequency. Our position, which is further elaborated below and in other products of this study, is that since a variety of outcomes are desirable and "legitimate" dispositions of the cases brought before prosecutors, the policy for disposition of cases must be described in detail as an essential first step to assembling data in sufficient detail as to determine the extent to which actual outcomes match those sought by the prosecutor and his staff.

The Operations Process

The procedural policies of a prosecutor's office, in general, and the way in which information is reviewed, in particular, will affect the ability of the criminal justice system as a whole to deal with certain types of criminal behavior. If Miller is correct in saying: "It remains true, however, that in the usual case, maximum efforts to scrutinize each piece of evidence carefully are not made."[18] then the decision-making and operations processes are not being used effectively. For screening to be effective the American Bar Association suggests that a clear and precise review of a case is required.[19]

In order to properly determine whether a suspect should be charged, and at what level, the prosecutor must have adequate information available to him. Grosman limits his discussion to information provided by the police: the facts of the case, and the arrest record or "rap sheet."[20] Miller includes interviews with witnesses, the victim and defendant; and reports from other criminal justice system components. He notes: the information generally available to the prosecutor when making his decision are the police officer, the police report or summary of the alleged crime and occasionally witnesses, the suspect and the victim.[21] The presence of witnesses, the suspect and the victim at the time a case is reviewed is largely dependent on the prosecutor's

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[18] Miller, p. 16.

[19] American Bar Association Project on Standards for Criminal Justice, p. 27.

[20] Grosman, pp. 20-21.

[21] Miller, p. 19.

policy or on the decision of the reporting police officer.[22] In some cases, but by no means routinely, reports of medical examiners, results of polygraph tests, physical evidence either of the crime or the condition of the victim are examined by the prosecutor.[23] Occasionally, defense attorneys are permitted to present arguments about the sufficiency of evidence and even to call the prosecutor's attention to additional evidence.[24]

Examination in the field indicates that review of information in a clear and precise manner is not taking place and resultant charging is often inaccurate. The fault, however, should not be seen to lie entirely with either the prosecutors or pre-trial screening programs. Many jurisdictions require that the prosecutor or his assistant charge the defendant within one to three days after arrest. This time constraint denies the prosecutor access to much information necessary to make a proper charging decision, since much information may be discovered by the investigators after the charge has been leveled. Some offices have difficulty obtaining information from the police, and even when that information is obtained its accuracy may be questioned. Those offices which have demonstrated the ability to review cases carefully, and charge accurately generally have the luxury of easily obtaining good information, and the needed time (ten or more days) in which to make decisions. Nonetheless, within the constraints they experience, those offices faced with poor review and charging could improve their situation by increasing staff

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22 Grosman, p. 25 and Miller, p. 17.

23 Miller, p. 19.

24 Ibid., p. 16.

size or by more effectively allocating resources to the intake and review section, primarily by assigning the most experienced assistants to screening.

In evaluating pre-trial screening programs it is important to note the types of information available to the prosecutor, the time constraints placed upon proper review, and the policy of the prosecutor as to what type of information should be reviewed. For example, the information the prosecutor or his assistant may have available to them are:

(1) Documentary materials:
   (a) the complaint,
   (b) evidence summary,
   (c) arrest record or "rap" sheet, and
   (d) reports from other criminal justice system personnel (medical examiner reports and correction department reports);

(2) Interviews with:
   (a) the victim(s),
   (b) witness(es),
   (c) defendant(s),
   (d) arresting police officer(s), and
   (e) other investigator(s); and

(3) Comment and Argument from:
   (a) defense attorney(s), and
   (b) persons outside the criminal justice system (citizens, public officials, the press, pressure groups, and civic leaders.)

The time constraint upon the prosecutor's review function may be as little as one day or as long as twenty-one days,[25] and may vary according to the type of case the prosecutor is reviewing. The prosecutor's policy might reflect the impact of various information types upon the decision-making within his office by determining that certain information is not necessary for, and shall not be used in, charging. Nonetheless, if we can rule out the factor of time, and the prosecutor's policy as the basic reasons for non-review of certain types of information then we may assume that the presence or absence of materials to some extent implies the cooperation of persons outside the prosecutor's office. Thus power, influence, and related behavioral categories become relevant points to consider in an analysis of the operations of the decision-making process, insofar as they result in some types of information being brought forward and others not being present.

The extent to which groups outside the prosecutor's office cooperate in providing required information will partially determine prosecutorial policy. To understand why a pre-trial screening program is operating in a way peculiar to itself, the impact of external variables must be considered. An examination of discretion as used by other elements of the criminal justice system will allow us to demonstrate further the impact of external variables upon pre-trial screening.

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[25] Determined by on-site visits.

Exploration of the activities of elements of the criminal justice system outside the prosecutor's office show that they too have discretionary powers and that these powers are as potent for the operation of pre-trial screening as the powers available to the prosecutor. Police discretion, for example, can severely limit the capacity of the prosecutor to deal with certain types of crimes.[26] Lewis Katz underscores this point when he states: "Policy decisions such as deployment of forces and responses to citizen calls will, in large part, set the tone for the selection of crimes to be prosecuted."[27] In addition, the decision-making capacity, the training, and the personal attitudes of an individual officer will affect the arresting and charging decisions made at the arrest stage.[28] The desire to see the suspect convicted will influence the policeman's decision to arrest, and the report which is sent to the prosecutor's office. For example,

> The officer may choose not to arrest because he knows the courts are clogged and is aware of how many times he will have to appear in court before a particular case is resolved. Although a decision to limit the case flow is not one for the beat officer but is more properly one for the police leadership, in conjunction with the prosecutor and the courts, the officer may nevertheless set himself up as the decision-maker.[29]

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[26] Katz, p. 93.

[27] Ibid., p. 93.

[28] Ibid., p. 95.

[29] Ibid., pp. 98-99.

Of equal, if not greater importance, is the role of the detective in the charging process. Once the policeman has filed his report, the detective in charge of the case "has almost total discretion as to whether to proceed . . . ."[30] Once the detective has determined the sufficiency of evidence the suspect is either booked or dismissed. In theory, when this decision is made all police involvement ends. Nonetheless, concern with the final outcome of the case will continue even though the ultimate decision to charge or not charge is the prerogative of the prosecutor.[31]

Judicial discretion in dealing with cases may limit the prosecutor's ability to gain his desired ends. The desire to see criminals prosecuted, and convicted is assumed to take priority among prosecutors. However, the policy of the presiding judges may affect the prosecutor's ability to control the ultimate disposition of cases. For example, it may be known that the policy of the judges is to be very harsh on those convicted of burglary, no matter what the circumstances or motivating causes of the burglary might be. As a result, the prosecutor may decide that cases involving

30 Katz, p. 103.

31 See Ibid., American Bar Association Project on Standa.ds for Criminal Justice, and Miller.

burglaries must be very carefully reviewed because the circumstances and motivating causes of the crime may vary considerably from offense to offense. If the offense was committed to make economic gain, the prosecutor might determine that the defendant should be treated as harshly as the judges desire, but if the offense was committed to sustain a drug habit the prosecutor might decide that some other method, such as diversion to a drug program, is desirable so as to insure that the cause is treated rather than the symptom. More directly, the presence of a judiciary soft on criminal behavior, and in conflict with a prosecutor believing in harsh treatment of criminals, may force the prosecutor to establish a policy of trial sufficiency requiring that the charge against the suspect equal the level at which the case could be won in court. If conviction were obtained, it would force the judge to at least deal with the criminal in terms of the conviction obtained. Conversely, if the judiciary were harsh on criminals, yet the prosecutor believes that a moderate approach is better, the prosecutor would be forced to move more in the direction of pre-trial diversion programs which he would control, so as to insure dispositions of cases as desired.

The use of discretion by parole boards in determining whether or not to release a prisoner has been seen to be overly arbitrary, due to lack of guidelines which determine what aspects of the criminal's behavior should be judged in order to make a proper decision.[32] For example, the ability of a

32 Peter B. Hoffman and Don M. Gottfredson, Parole Decision Making ("Paroling Policy Guidelines: A Matter of Equity, Supplemental Report Nine," Davis, California: National Council on Crime and Delinquency Research Center, June, 1973.)

parole board to release those prisoners whom they believe to have exhibited behavior indicative of rehabilitation is absolute. Nonetheless, the prosecutor may find that the rate of recidivism is very high, and conclude that incarceration is not working. Based on his belief that incarceration is not working to rehabilitate the criminal, and that parole boards are not responding to this fact, the prosecutor may determine that alternative means by which to deal with criminals are necessary. A need may therefore be shown to exist for further development of pre and post-trial diversion programs so as to lessen the rate of recidivism, and, in turn, benefit the society.

Time constraints, information types, and the use of discretion outside the office of the prosecutor are examples of the external variables which must be considered in any evaluation of pre-trial screening programs. Their importance, we believe, cannot be overstated, and yet we have found little consideration of them in the literature. The problem inherent in not considering these elements is the inability to perceive that the actual operation of pre-trial screening incorporates not only the desires of the prosecutor, but his reaction to what is taking place in the rest of the criminal justice system through adaption of his screening procedures to particular situations.' The extent to which review is possible, the type of review which is institutionalized, and the value of that review are, in part, a function of the external variables which affect decision-making.

Additional variables within the prosecutor's office must also be considered. For example, the extent to which screening is used in an office may reflect the prosecutor's perception of his role. A prosecutor "is influenced by the geographic and demographic makeup of his or her

jurisdiction. The size, population and type of jurisdiction affects the type and number of crimes. . . .'[33] Prosecutors' roles may vary as a result of their own interpretation of their duties. We have determined that three role models exist. The prosecutor may perceive his role as being (1) the upholder of laws; (2) the interpreter of laws; and (3) as policy-maker. In addition, individual prosecutors may function in one or more roles either at the same or differing times. The distinctions between these roles, nonetheless, is important because of the varying impact each role model has on the criminal justice system. For example, as upholder of laws the prosecutor serves as an arm of law enforcement agencies or the courts, abdicating all discretionary power. As interpreter of laws the prosecutor allows himself the use of discretion, but only within the context of whether to limit or expand prosecution of particular types of cases. As policy-maker the prosecutor begins to develop rules and policy pertaining not only to specific crime types, but examines alternative means by which to deal with certain crime types as diversion, deferred prosecution and the like. The emphasis moves from carrying out only those functions derived through the law and the criminal justice system to concern with the social system and the impact of criminal behavior on it.

The dominant perspective of the literature on prosecutorial behavior is an ethical orientation as to how the prosecutor should perceive his role.[34]

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[33] Joan E. Jacoby, "Case Evaluation: Quantifying Prosecutorial Policy," Judicature, 58:10, May, 1975, p. 487.

[34] American Bar Association Project on Standards for Criminal Justice and Miller.

> The prosecutor ordinarily should prosecute if after full investigation he finds that a crime has been committed, he can identify the perpetrator, and he has evidence which will support a verdict of guilty.[35]

> In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved . . . the prosecutor should not be deterred from prosecution by the fact that his jurisdiction's juries have tended to acquit for a given type of crime. . . . The prosecutor should not bring or seek charges greater in number of degree than he can reasonably support. . . .[36]

An exception to the above position is made by George Fraser Cole.

> Only those cases in which there is a high probability of conviction will be brought into the courtroom. Prosecutors suggested that they had the administrative experience and expertise to make judgements concerning the disposition of cases. . . . They expressed the attitude that the rules of the system should give them freedom to make decisions for the good of the defendant as well as for society.[37]

The contrast in these views is important for the purposes of this paper because we believe that it is not enough to know what the prosecutor should do; we wish to know what he is doing. Though it may be the function of the prosecutor to bring those cases before the courts which are important, even if not winnable, the presence of an overworked and understaffed criminal justice system makes it apparent that ways must be found to make the system more effective. Pre-trial screening is one of many ways because it permits the prosecutor the advantage of substantial review of cases prior to their

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[35] American Bar Association Project on Standards for Criminal Justice, p. 93.

[36] Ibid., p. 34.

[37] George Fraser Cole, The Politics of Prosecution: The Decision to Charge (Ann Arbor, Michigan: Xerox University Microfilms, 1968) p.158.

being charged, and allows the prosecutor the freedom to discard those cases which he believes do not serve societal interests.

There is an inherent conflict between the prescribed or ethical view of screening, and the actual process. One method by which we might be able to determine why this discrepancy exists is to look at the prosecutor's perception of his role by determining how information flows through the system, and examining the resultant charging decisions and the controls used to insure that proper decisions, from the prosecutor's point of view, are made. For example, a decision to accept the police charge as stated in the police report at all times indicates that the prosecutor believes that his role is to act as an arm of the law enforcement agencies which make information available. To allow the courts to review all police charges and permit them to accept or reject or alter the charges as they see fit would mean that the prosecutor believes that he must abdicate his discretionary power to another element of the criminal justice system. Conversely, the implementation of a screening program which not only accepts and rejects cases, but also diverts certain types of offenders to various rehabilitation programs, indicates that the prosecutor sees himself not only as a lawyer whose responsibility is to allow the ultimate disposition of a case to take place in the courts, but as a policy-maker who believes that he is capable of providing offender rehabilitation services to the community outside of the normal criminal procedures.

If we see that information flows more or less directly from the law enforcement agency to the trial assistant with little review or consideration of the type of charge leveled by the police, or if we see that cases are

presented to the court prior to a prosecutor's review, and the resultant charges directly in line with the opinions of the judges presiding at these "review hearings," then we may assume that the prosecutor sees himself as an arm of the law enforcement agencies or courts. On the other hand, if we find that information coming into the prosecutor's office is very carefully reviewed, and that the prosecutor's policy prescribes that certain types of cases, as first time burglaries by a drug addict, should be diverted to rehabilitation programs, and the information is forwarded to a diversion person in the office for his review, we can argue that the prosecutor has stepped outside of the law, and into the field of social welfare in order to deal with some of the crime problems of the community, thereby making him a policy-maker.

The Prosecutor's Screening Function[38] attempts to set out certain guidelines on how information flows should operate, and the types of choices and controls which should be institutionalized in order to develop an effective screening program. Yet more important then its prescriptive function is its discussion of the various areas which must be dealt with for pre-trial screening to become operational. These areas of concern include:

(1) physical layout of the screening office;

(2) allocation of the workload;

(3) control of inputs into the office;

(4) screening guidelines to insure the assistants ability to make decisions in line with the prosecutor's policy;

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[38] National Center for Prosecution Management, The Prosecutor's Screening Function: Case Evaluation and Control (Chicago: National District Attorneys Association, 1973).

(5) record keeping; and

(6) formal case evaluation techniques for screening.

In particular, those areas of the operations which we must concern ourselves with in an evaluation of pre-trial screening are: the distribution of work through the office, as it will reflect the allocation of resources to particular functions and demonstrate the importance or lack thereof of intake and review; the formal case evaluation techniques employed, as they will indicate how well institutionalized a screening program is; and the control of input, as it will indicate the extent to which intake has been limited and review refined.

By examining the operations process, a topic area not discussed in the literature, we have expanded the possibility for an accurate evaluation of what takes place in a screening program. The importance of the operations process is that it permits us to determine why certain charging decisions are being made. For example, the charging decision reached by the prosecutor or his assistant can only be as good as the information received; the ability of the prosecutor to "renovate" the criminal justice system will reflect his perceptions of his role as prosecutor. We believe that it is not enough to know what decision is being made by the prosecutor when he charges an indivdual with commission of a crime. We must as well know why that decision is being made. By accounting for various elements beyond the prosecutor's control, the external variables, as well as those variables in his control as workload allocation and case evaluation techniques we are capable of explaining how certain decisions are reached, and therefore why.

The Management Process

Visits to numerous prosecutors' offices will demonstrate that ideas of management appear foreign to some prosecutors. Explanations of this fact may vary, but certainly we may include such reasons as their training and lawyer-client relationships. Nonetheless, the institution of a formal structure to handle prosecutorial functions implies that responsibility for certain tasks must be delegated to persons other than the prosecutor himself, and accountability for these functions must be established within the office. For management purposes it is important that tasks be delineated so as to inform the employee of the extent and limits of his functions, and that accountability for the proper carrying out of the task lies with him. For evaluation purposes we must ask how the system operates, how the effectiveness of a program is measured, how the effectiveness of an individual is measured, and what types of data are needed to explain or predict program and individual effectiveness.

In order that these questions be answered certain management procedures must be established which will permit effectiveness measures to be developed. For example, methods by which to monitor program and individual behavior are necessary. Yet our review of material on pre-trial screening demonstrates that effectiveness of operations is not discussed. In Grosman[39] we find a very limited discussion of administration. He states:

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[39] Grosman, pp. 67-68.

> persons become objects and products which must be processed through the system. The prosecuting system acts as an effective machine for the production of convictions and the processing and disposition of convicted persons into institutions set up to deal with them. The chief aim of the system is to control the efficiency of the process and guarantee the continuance of the stream without inordinate delay and complication.[40]

Grosman's analysis of system effectiveness is correct, and useful but he has not provided any indication of the mechanisms or procedures that would be necessary to evaluate the system's effectiveness.

The failure of prosecutors to institute, or even be concerned with management procedures is best explained by Cole:

> In seeking to understand some of the administrative problems of the prosecutor's office, it will be necessary to work outside of existing organizational theory. For this theory has not yet dealt with organizations possessing the major characteristics of the prosecutor's office: a collegial relationship among decision-makers, ill-defined hierarchical relations with other agencies, and the influence of a professional body.[41]

Though Cole is wrong in stating that existing organizational theory does not deal with a collegial organization[42] he does state correctly that systems analysis has not been applied to the prosecutor's office. The

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[40] Ibid., p. 58.

[41] Cole, p. 90.

[42] See Max Weber, The Theory of Social and Economic Organization (New York: The Free Press of Glencoe, 1947), Arthur L. Stinchcombe, "Formal Organizations," in Sociology: An Introduction, Neil J. Smelser, ed. (New York: John Wiley and Sons, Inc., 1967), Wolf V. Heydebrand, Hospital Bureaucracy: A Comparative Study of Organizations (New York: Dunellen Publishing Company, 1973), pp. 19-32, and Edward Gross, "Universities as Organizations: A Research Approach," The American Sociological Review 33:518-544.

literature on pre-trial screening is devoid of attempts to view the prosecutor's office as a system.

The charging choices available to the prosecutor, those used, and the resultant types of decisions will reflect the policy of the office and the type of role the prosecutor will choose to take on. For choices to be made correctly, or at least fulfill the expectations of the prosecutor strict rules must be established. The effectiveness of these rules in carrying out the prosecutor's policy can only be determined if some type of monitoring system exists. Despite Cole's assertion that traditional models of organization do not hold, an office of adequate size will have some type of hierarchical structure. That structure will define roles within the organization. In order to insure that individuals filling these roles make the correct choices it is necessary to institute policy and have feedback mechanisms which indicate what choices have been made, and the results of those choices are demonstrated by the way a case is disposed of at some point after screening. The collegial nature of the prosecutor's office does not preclude the institution of a monitoring system. Trust in the ability of one's assistants to fulfill their roles and carry out the prosecutor's policy is important, but a prosecutor's policy is only as good as the manner in which it is put into action. To insure its proper application, an organization must be instituted and that organization must be monitored.

CONCLUSION

To examine pre-trial screening as a process means to see it as a continuum functioning over a specific period of time, and impacting upon other prosecutorial functions and all other elements of the criminal justice system. The decision to charge, and the management and operations processes function as a unit within the prosecutorial process. The literature, on the whole, has failed to see these processes working as a unit because they have failed to consider the various elements which constitute pre-trial screening. Rather, the literature has viewed pre-trial screening in terms of its final result: the decision to charge. The fundamental error implicit in this view is the autonomy of a decision.

Decisions cannot be separated from the review procedure established, the information provided by law enforcement agencies, the possible charging choices, and the role the prosecutor may take on. We have defined pre-trial screening as an intake and review procedure, whereby the prosecutor and his assistant attempt to determine, based upon information given them by law enforcement agencies, whether any and what type of action should be taken. In another paper, we have also established an analytic model of screening which incorporates what we feel to be lacking in existing discussions: operations and management processes, and external and internal variables. Screening cases in particular ways results from the information available to the prosecutor, the possible charging choices at his disposal, and the prosecutorial role adopted.

The importance of the interaction between the various elements which go into forming a pre-trial screening program is underscored by one school of

social theory[43] which has shown that the nature of prior choices enhances or precludes the opportunity to exercise subsequent options. An example of this in the criminal justice field might be the decision by the prosecutor to not prosecute or divert suspects in victimless crimes. The impact of this decision would be felt at all levels of the criminal justice system, from the police to the courts. Coles, for example, calls this interaction "exchange." In addition there will be an impact upon the office of the prosecutor. The decision to make certain choices, as the diversion of those suspected of victimless crimes, will necessitate that certain programs be instituted in the prosecutor's office or in the community. The presence of diversion programs will expand both the quantity and quality of choices available to the prosecutor, and the presence of differing charging choices among prosecutors will reflect differences in policy.

The failure of the literature on pre-trial screening to discuss the operations process fully has resulted in a lack of ready criteria for the assessment of intake and review. Those who have studies the pre-trial screening process have failed to see it as part of either the prosecutorial system or the criminal justice system. The result is, in part, a failure to see pre-trial screening as part of a continuum rather than as a isolated act and as a means to an end, the disposition of a case, rather than as a goal in itself. Screening cannot be separated out from the larger system of which it is part in order that it be evaluated. It is an implicit part of that system, and must be treated as such. Finally, the lack of discussion of management procedures

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[43] See p. v, fn. 1.

indicates that little consideration has been given to the crucial question of how does one insure that the prosecutor's policy is being carried out?

If further evaluation of pre-trial screening is to be carried out, it must be done so with regard to the various issues which have been raised in this paper. The lack of consideration of these issues in the past has not provided a complete analysis of what has actually taken place nor an adequate perspective from which to say that certain types of changes are necessary, if intake and review is to function more effectively. A more complete evaluative framework is clearly needed.

Finally, we believe the importance of pre-trial screening cannot be understated. Pre-trial screening represents an important advance in the prosecution of cases. It permits the prosecutor to utilize the tools available to him in far more effective ways by eliminating those cases which would only clog up the system and exploring those cases which have validity and may result in conviction. Therefore, adequate evaluation of pre-trial screening is necessary to conclusively show its work.

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