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December 5, 2019

Honorable Raúl Torrez  
Bernalillo County District Attorney  
520 Lomas Blvd NW  
Albuquerque, NM 87102

Dear District Attorney Torrez:

Thank you for submitting your questions regarding the use of conviction rates as a measurement of prosecutorial performance. The Association of Prosecuting Attorneys (APA) is a national association dedicated to supporting and enhancing the effectiveness of prosecutors in their efforts to create safer communities, ensure justice, and uphold public safety. At APA, we support evidence-based sentencing and prosecutorial practices that prevent crime, ensure equal justice, and ultimately make communities safer. Using data to determine effective strategies to address root cause of those accused of committing crimes, creating alternatives to prosecution, and using restorative justice practices have become the national standard in assessing performance.

In the national discourse on model prosecutorial practices, conviction rates are not considered a reliable method of assessing prosecutorial performance. Below, we provide more detailed responses to your questions that draw on APA's experience engaging with prosecutors throughout the country. If you would like additional information, we would be happy to provide it.

**1) What is the commonly understood definition of a conviction used by prosecutors in the United States? Are mistrials commonly categorized as a "loss" within the calculation of a conviction rate? Are you aware of any office or system in the nation that gathers data on which party or participant in a trial is responsible for a mistrial?**

The commonly understood definition of "conviction" is a finding presented by a prosecuting agency, including a sustained guilty charge or charges, a reduction in felonies, misdemeanors or alternative charges or a plea to a different charge that related to the criminal activity.

Mistrials are not commonly categorized as a "loss" within the calculation of a conviction rate. Mistrials are considered another category entirely. Within this alternate category, a mistrial is either a jury mistrial or a mistrial for other reasons. For example, if a trial is not recorded at all because a case was not finalized as either conviction or non-conviction, or if the mistrial ended up in a dismissal, it would be a considered a non-conviction. If a hung jury is the cause of mistrial, the office would record the next jury verdict. In many instances, after a mistrial occurs, there is a plea resolution, which would either be a conviction or a non-conviction.



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We are not aware of any office that carries out mistrial studies.

**2) Are conviction rates considered the best metric for assessing a prosecutor's performance? If they are not considered the best metric can you explain why? Are there other more useful metrics in common use within the profession?**

No, conviction rates are unequivocally not nor are they considered the best metric for assessing a prosecutor's performance.

Prosecutors are ministers of justice, and conviction in any single case does not indicate that justice was administered for all parties. An overemphasis on conviction rates can create perverse and even dangerous incentives. Violent crimes, such as sexual assault, child abuse, and domestic violence all have lower conviction rates and measuring success by number of convictions would incentivize leaving these difficult-to-win cases unprosecuted. Instead, prosecutors would be incentivized to over prosecute and try drug offenses in order to obtain high conviction rates. This matrix does not advance public safety which is why offices across the country do not use convictions to define success.

The role of the prosecutor is to make communities safer and ensure justice. Conviction rates are not a reliable metric of overall performance, because traditional sentencing and incarceration are just one of many instruments used by prosecutors to ensure justice and public safety. Offender rehabilitation, restorative justice practices, and alternatives to prosecution all ultimately resolve a case and do not rely on traditional convictions. Recidivism, diversion practices, and the safety of victims and communities are metrics, which can help measure prosecutorial performance.

In the 10 years of APA trainings and conferences, we have never hosted a panel discussion on conviction rates. At the behest of prosecutors throughout the country, our programming encourages prosecutors to seek alternatives, utilize risk and needs assessments, and work with evidence-based decision-making practices. We believe that "success" as a prosecutor's office is achieved through a community-based problem-solving framework, in which key partners can work collaboratively in creating and implementing strategies for safer communities. As conviction rates are neither a reliable measure of justice nor community safety, it cannot be used to measure overall prosecutor performance.

Doing this work in a way that ensures justice and community safety ultimately requires adequate staffing that is not commensurate with conviction rates. One of APA's former board chairs, Milwaukee County District Attorney John Chisholm, discusses the notion of "assembly line justice." The police arrest, and then prosecutors determine if there is enough proof to proceed, file, and send it to court. This turns prosecutors into case processors, and requires the least staff time, but it divorces the work from the goals of the justice system. Prosecutors have an obligation to do more.



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**3) Are you aware of any criminal justice system that measures prosecutorial performance and efficiency based upon the number of counts that result in conviction as a percentage of all counts included in the original charging instrument? Based on your experience and knowledge do you have any perspective on the use of such a metric?**

APA is not aware of any criminal justice system that measures prosecutorial performance and efficiency based upon the number of counts that result in conviction as a percentage of all counts included in the original charging instrument.

As stated above, prosecutors are tasked with administering justice, and not simply ensuring convictions. Being involved in plea negotiations to dismiss counts or in a trial situation where a count is charged in the alternative has nothing to do with the measures of prosecutorial performance. The number of charges is not an outcome that should be evaluated but is instead merely a number that is high or low due to the merits of each case.

When prosecutors make charging decisions, they are making a preliminary determination as to how a case may be presented to the ultimate fact finder. Prosecutors need open avenues to determine how a case will be presented, which are alternative theories. The use of alternative theories of liability as well as issues regarding the true time period of the crime are very common practices, especially homicide and sexual assault cases, which may be filed years after the incident. Alternative charging options are an important tool for prosecutors to ensure that they can address the crimes committed and make adjustments when warranted. Penalizing this discretion by measuring prosecutorial performance on the counts included in the original charging instrument is inefficient, ineffective, and does not address any public safety objective, while binding prosecutors when there is an appropriate legal tool available that is widely used throughout the country.

Pursuing justice means using all available instruments to ensure justice and safer communities. Placing such a high value on conviction rates, especially including some measure of the charged counts does not advance that goal.

Respectfully Submitted,

David LaBahn  
President and CEO