

Prosecutorial Discretion and Civil Rights in Mississippi



A Report of the
Mississippi Advisory Committee to the
U.S. Commission on Civil Rights

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Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Acknowledgments

The Mississippi Advisory Committee (Committee) thanks each of the speakers who presented to the Committee during their April 19, 2019 and May 23, 2019 public meetings. The Committee is also grateful to members of the public who spoke during the selected periods of public comment, and those who shared their testimony in writing.

**Mississippi Advisory Committee to the
U.S. Commission on Civil Rights**

The Mississippi Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the civil rights impact of prosecutorial discretion in Mississippi as part of its responsibility to study and report on civil rights issues in the state of Mississippi. The contents of this report are primarily based on testimony the Committee heard during public hearings on April 19, 2019, and May 23, 2019, as well as related testimony submitted to the Committee in writing during the relevant period of public comment.

When the Mississippi Advisory Committee selected prosecutorial discretion as a subject to explore through the lens of civil rights in Mississippi, the national climate was different. Polarized groups in opposing political parties seemed to be on opposite sides on every issue, especially those related to race and racism.

But the world has changed. During the early months of 2020, a global pandemic stopped all of us. The only people who were active were first responders and medical personnel and, in what seemed to be a revelation to many of us, the group known as “essential workers;” food delivery workers, grocery store attendants, truck drivers. Previously, all of these people had been largely invisible to us but they kept all of us alive and fed and we began to see the disparities that existed between us and them.

And then on May 25, 2020, police officers in Minneapolis arrested and subsequently handcuffed George Floyd for a possible minor infraction. Thanks to a bystander who filmed the incident, the world was able to witness the horrific 8 minutes and 48 seconds that officers held Mr. Floyd on the pavement, with one officer pressing his knee and full weight into Mr. Floyd’s neck. We heard Mr. Floyd’s request to relieve the pressure, his exclamations that he could not breathe and his agonizing cries for his deceased mother.

In the wake of Floyd’s murder, protests erupted around the nation and across the globe, many of them taking up the banner of “Black Lives Matter,” and calling for an end to police violence as well as ending the inequities that exist between whites and people of color. In the more than seventeen days that have passed since, the protests show no signs of abating and, in what appears to be different from the responses to previous officer-involved shootings, they have drawn in whites. Books on understanding racism are selling out and corporations have moved quickly to announce their support of Black Lives Matter and to enact policy changes to address inequity. In Mississippi alone, as of this writing, there have been 31 peaceful protests across the state, in cities and hamlets, many of them led by young people. Some protests center around the recent dismissal of charges against an officer involved in a fatal shooting, so the issues of the day affect even Mississippi.

Two years ago, only 40% of American supported Black Lives Matter and now nearly 3 out of every 4 Americans support the protests.¹ And with over 40% of American saying that race relations are extremely important in their choice for president in the upcoming November election, race relations are now “on par” with the economy and health care as chief campaign issues.²

It is within this context, which appears to offer new promise for addressing, repairing, and ending systemic inequities and racism that we offer our analysis on prosecutorial discretion. We include suggestions for how prosecutors in Mississippi might join the effort to alleviate bias and prejudice from our criminal justice system. While our initial work was informed by the Movement for Black Lives, we could not have anticipated the current pivotal moment in the life of our country. There is an opportunity now to rethink our systems and recreate them to benefit everyone equally. Prosecutors have an awesome power over charging. We hope that they will use our recommendations to take advantage of this moment to respond to this moment, when so many Americans are demanding substantive change.

Susan M. Glisson

Chair, Mississippi Advisory Committee

Mississippi Advisory Committee to the U.S. Commission on Civil Rights

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Nicholas Lott, Jackson

Kimberly Merchant, Greenville

¹ <https://www.washingtonpost.com/politics/2020/06/10/whats-different-about-this-moment-primarily-number-americans-supporting-protests-over-racial-injustice/>

² <https://www.cnn.com/2020/06/08/politics/race-relations-2020-issue-poll-george-floyd/index.html>

TABLE OF CONTENTS

Introduction.....	1
Background.....	2
Summary of Panelists Testimony	7
A. Points of Discretion	7
1. Charging.....	8
2. Bail and Pre-trial Incarceration.....	9
3. Plea Bargaining.....	11
4. Sentencing.....	13
B. Accountability	14
1. Electoral Oversight	14
2. Public Defense	16
3. Justice and Disparate Impact	17
4. Managing Discretion.....	18
C. Addressing Implicit & Explicit Bias	19
D. Availability of Data	20
E. Community Impact	22
Findings and Recommendations	24
A. Findings	24
B. Recommendations	25
Appendix.....	28

INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These committees advise the Commission of civil rights issues in their state that are within the Commission’s jurisdiction.

On December 3, 2018, the Mississippi Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to take up a proposal to review the impact of prosecutorial discretion on racial disparities in incarceration rates in Mississippi. The Committee sought to examine existing disparities in charges, court proceedings, and sentencing by race. The Committee’s examination was also to consider laws pertaining to mandatory sentencing—with a specific focus on drug-related crimes—and the potential disproportionate impact such legislation, paired with prosecutors’ discretion, may have on individuals from different racial and ethnic backgrounds.

In the context of persistent disparities in incarceration rates on the basis of race and color, the Committee examined prosecutors’ broad discretionary power in state and local municipalities across Mississippi. Several federal protections prohibit discrimination in the administration of justice, including:

The U.S. Constitution:

The Sixth (VI) Amendment³ guarantees that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

The Eighth (VIII) Amendment⁴ prohibits “excessive bail,” the imposition of “excessive fines,” and the infliction of “cruel and unusual punishments;”

The Fourteenth (XIV) Amendment⁵ prohibits any state from “abridg[ing] the privileges or immunities of citizens of the United States,” “depriv[ing] any person of life, liberty or property without due process of law,” or denying “to any person within its jurisdiction the equal protection of the laws.”

The Civil Rights Act of 1964:

Title II, Section 201(d)⁶ pays special attention to discriminatory actions supported by the state, or actions carried out “under color of any law, statute, ordinance, or

³ U.S. Const. amend. VI.

⁴ U.S. Const. amend. VIII.

⁵ U.S. Const. amend. XIV.

⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(d), 78 Stat. 241, 243 (codified as 42 U.S.C. § 2000a(d)).

regulation,” or “under color of any custom or usage required or enforced by officials of the State or political subdivision thereof.”

On May 23, 2019 the Committee convened a public meeting in Jackson, Mississippi to hear testimony regarding the civil rights implications of the discretion afforded to prosecutors in the state. The Committee heard additional testimony during a web hearing held April 19, 2019, as well as through the submission of written testimony welcomed during this timeframe. The Committee heard from academics, attorneys, judges, and advocates with perspective on prosecutorial discretion. The Committee made several outreach efforts to the Mississippi Prosecutors Association as well as to several individual prosecutors to invite their testimony. Unfortunately, despite several attempts the Committee was unable to gather testimony from any current prosecutors, except for one District Attorney, as described below.

The following report results from the testimony provided during these hearings, as well as testimony submitted to the Committee in writing during the related period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. The purposes of this report are: (i) to relay the civil rights concerns brought forth by the speakers relating to prosecutorial discretion in Mississippi; and (ii) to provide specific recommendations to the Commission regarding actions that can be taken to understand and address these issues moving forward.

BACKGROUND

Nationally, although African-Americans and Hispanics only make up approximately 32-percent of the U.S. population, they accounted for 56-percent of all incarcerated people in 2015.⁷ Mississippi’s prison population has more than quadrupled in the past 30 years,⁸ and data show that the state has the third-highest imprisonment rate in the country, at 619 prisoners per 100,000 residents.⁹ Because prosecutors are afforded the right to make decisions about charging crimes, offering and accepting plea deals, and sentencing, experts have raised significant concern about the potential for biased or impartial decision making.¹⁰ According to a 2015 analysis of the Reflective Democracy Campaign, 95-percent of elected prosecutors in the United States are white and only 1-percent are women of color.¹¹ This demography is profoundly unrepresentative of the national citizenry. Moreover, it in no way reflects the demographics of those accounted for in the criminal justice system. This issue is of particular

⁷ “Criminal Justice Fact Sheet,” National Association for the Advancement of Colored People (NAACP), <https://www.naacp.org/criminal-justice-fact-sheet/>.

⁸ “Mississippi’s 2014 Corrections and Criminal Justice Reform,” The Pew Charitable Trusts, https://www.pewtrusts.org/~media/assets/2014/09/pspp_mississippi_2014_corrections_justice_reform.pdf.

⁹ “State Imprisonment Rate: Mississippi,” The Sentencing Project, <https://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR> (accessed June 3, 2020).

¹⁰ Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer, “Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences,” *Journal of Research in Crime and Delinquency* 44, no. 4 (November 2007): 4, <https://doi.org/10.1177/0022427807305853>.

¹¹ “Who Prosecutes in America,” Reflective Democracy Campaign, <https://wholeads.us/justice/>.

concern in states such as Mississippi, where there is a documented history of over-incarceration and excessive prosecution. Through this project, the Committee sought to understand the extent to which prosecutorial discretion in Mississippi may contribute to the disproportionate incarceration of people of color.

Prosecutorial Discretion refers to the freedom prosecutors have to decide how to prosecute individual crimes on a case-by-case basis. These decisions include whether or not to pursue charges; how strongly to prosecute a case; whether to accept a plea bargain, grant immunity, or dismiss charges.¹² As recognized by the Supreme Court, prosecutors are also allowed to decide which, if any, crimes to prosecute “when an act violates more than one criminal statute.”¹³ Concern with such discretion arises because humans, by nature, hold biases, and it can be difficult to ensure that these discretionary decisions “[do] not discriminate against any class of defendants.”¹⁴

Racial Discrimination within the justice system has been pervasive throughout U.S. history. Current research indicates that people of color are more likely to be stopped by police officers, arrested, prosecuted, convicted, and to receive harsher sentencing than their white counterparts.¹⁵ Theories regarding this persistence of racial disproportionality in the U.S. criminal justice system include:

- Disadvantages in the court system at younger ages for non-white youth compared to that of their white peers, starting in the juvenile justice system, that may result in a cumulative record (i.e. “three strikes”) of disadvantage over the life course;
- Disproportionately higher arrest rates of people of color;¹⁶ and
- Persistent disparities in severity of punishment, including differentials in prison sentencing across races.¹⁷

Drug Policies. Of particular interest to the Committee is discrimination with the prosecuting and sentencing for drug violations. The *War on Drugs* and other “get tough” legislation enacted

¹² Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 *Seton Hall Cir. Rev.* 1, 6-7 (2009).

¹³ *Ibid.*, 6.

¹⁴ *Ibid.*

¹⁵ According to sociologists Darrell Steffensmeier, Noah Painter-Davis, and Jeffery Ulmer at the University of Pennsylvania: “reviews of the sentencing literature on race effects conclude that on average, black and Hispanic defendants are more likely to be sentenced to prison or jail than whites and somewhat more likely to receive longer prison sentences” (Darrell Steffensmeier, Noah Painter-Davis, and Jeffery Ulmer, “Intersectionality of Race, Ethnicity, Gender, and Age on Criminal Punishment,” *Sociological Perspectives* 60, no. 4 (November 2016), <https://doi.org/10.1177/0731121416679371>). See also Rebecca C. Hetey et al., “Data for Change: A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014,” *Stanford SPARQ* (June 2016), <https://stanford.app.box.com/v/Data-for-Change>.

¹⁶ According to the American Psychological Association’s *Monitor on Psychology* 47(11), statistics released by the local St. Anthony Police Department in Falcon Heights, Minnesota, where Philando Castile was fatally shot by an officer after being pulled over for a broken taillight, showed that about 7-percent of residents in the area are black, but they account for 47-percent of arrests (Kirsten Weir, “Policing in black & white,” *Monitor on Psychol.* 47, no. 11 (December 2016): 36, <https://www.apa.org/monitor/2016/12/cover-policing.aspx>).

¹⁷ Steffensmeier, Painter-Davis, and Ulmer, “Intersectionality.”

since the 1980s (at state and federal levels) has disproportionately affected African-Americans.¹⁸ Even though drug use and sales are similar across racial and ethnic lines, studies indicate that blacks and Latinos are far more likely to be criminalized for drug use than whites. In 2007, Ulmer, et. al found that approximately 28-percent of white males, for example, received mandatory sentencing for drug offences, whereas 48.4-percent of black males in the same sample did; likewise, black males facing “three strikes” punishments received mandatory sentencing approximately 61-percent of the time, with only 24.5-percent of white males receiving the same.¹⁹

While it is generally agreed upon that offense characteristics and prior criminal history are the main influencers of mandatory sentencing, case processing and sentencing norms, political constraints, and social characteristics are also heavily influential on prosecutorial discretion.²⁰

Implicit Bias. Implicit bias is the unconscious attitudes and stereotypes that shape what we believe about others and how we act toward them.²¹ Research has shown that these biases are subconscious and are not accessible through introspection.²² Biases develop across a lifetime through direct and indirect messaging and can create differing feelings and attitudes toward others based on characteristics such as race, ethnicity, age, and appearance.²³ Social scientists have found unconscious or implicit biases to be pervasive; they do not necessarily align with declared beliefs, and they tend to favor individuals’ own in-group.²⁴ Implicit biases affect all people and in the context of the criminal justice system, if left unaddressed, may pose a serious threat to the administration of justice. One way to reduce implicit bias is through what academics call “social contact theory” or “intergroup contact theory.”²⁵ The theory “states that under appropriate conditions interpersonal contact is one of the most effective ways to reduce prejudice between majority and minority group members.”²⁶

Prosecutorial Discretion and the Fourteenth Amendment. The existence and invisibility of prosecutorial discretion threatens four of the Fourteenth Amendment’s requirements: the rule of law, equal citizenship, equal law enforcement, and a fair process of plea negotiation.

First, due process of law requires that the distinction between those subject to criminal punishment, and those who are not, be articulated explicitly and publicly in a way that those to

¹⁸ “Bjerk found that prosecutors used their charge reduction discretion to circumvent three-strikes mandates for some defendants. He found that this kind of circumvention of three-strikes mandatory minimums was moderately less likely to occur for men, Hispanics, and, to a lesser extent, Blacks. Farrell found that Blacks, males, and those convicted by trial were more likely to receive firearms mandatory minimums” (Ulmer, Kurlychek, and Kramer, “Prosecutorial Discretion.”).

¹⁹ Ibid.

²⁰ Ibid.

²¹ “Understanding Implicit Bias,” The Ohio State University Kirwan Institute for the Study of Race and Ethnicity, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ “Gordon Allport’s Contact Hypothesis,” Facing History and Ourselves, <https://www.facinghistory.org/sounds-change/gordon-allports-contact-hypothesis>

²⁶ Ibid.

be punished may contest openly. Our system of prosecutorial discretion and underenforced criminal statutes does not, however, allow Mississippians to determine who will be punished merely by looking at places like title 97 of the Mississippi Code. Those statutes only determine the outer boundaries of prosecutors' powers, and without answering one critical question for any system of criminal justice: at what cost are offenders to be investigated and punished? It is certainly true that violations of our state's criminal laws need not be investigated and punished the maximum possible extent. Prosecutorial discretion reflects the fact that criminal law is not to be pursued come what may, no matter the cost. The legislature knows that prosecutors will decide when the costs of prosecution and punishment are too much. But the manner and occasions in which these countervailing considerations override the need for law enforcement—that is, just *how* vigorous our criminal justice system should be, in light of its impact on individuals, families, and communities—is entirely invisible, and shielded from the adversarial testing characteristic of our best traditions of due process. Prosecutors assess costs and benefits on the basis of assessments of the facts of each case that are invisible and hidden from scrutiny and testing. Due process requires those who live under the law to be able to contest the facts that represent the real grounds of their punishment.

Second, equal civil rights for all citizens in the same circumstances requires that the distribution of invisible non-enforcement decisions be impartial. Mississippi has grown beyond many of its historic inequalities in civil rights. But it is painfully difficult to tell which ones. Are prosecutors and police equally vigorous in pursuing criminal investigations and prosecutions for suspected offenders or victims in all communities? With our current system of prosecutorial discretion, we cannot know. Respect for the criminal justice system itself—and the law and order that such respect fosters—requires that groups of citizens *see* that they are treated impartially when they suspect lingering inequality in civil rights. Citizens take breaches of the community's standards of behavior less seriously if the system is, or reasonably seems to be, unfair. The reputation of the criminal justice system suffers—as does its ability to do its job—when they suspect that the law is enforced against some groups in ways they are not enforced against other groups in the same circumstances. Moreover, if our state's law is to express equal respect for all of its citizens, the impartiality of its criminal justice system must be made clear and manifest. Mississippi's recent track record on the promotion of equal citizenship in the criminal justice system is not uniformly poor. But with respect to the performance of prosecutors in making decisions equally for all citizens, we do not even have the data to compile a track record at all.

Third, victims who *seek* the enforcement of the criminal law cannot know if they are receiving the literal "protection of the laws" equally with victims of other crime. Our criminal justice system produces extraordinarily important benefits, of course, as well as imposing costs. But is it pursuing those benefits in an evenhanded way? Given our history, Mississippians reasonably worry about the prosecutors and police with respect to both sides of the ledger. Do crimes that affect some communities get more attention and vigor than crimes that affect other groups? We cannot know without better data. Our law has long seen that the very first job of government is to supply protection from violence in exchange for obedience to the state's

authority. Over eight centuries ago, Magna Charta put such a duty just after paragraph 39's law-of-the-land provision that was later adapted into the due process clause. Paragraph 40 promised that the state would not "sell, or deny, or delay right or justice to anyone." Many early interpreters of the Fourteenth Amendment associated the paragraph-40 requirement with the Equal Protection Clause ("nor deny to any person within its jurisdiction the equal protection of the laws"). Both the state's positive actions and its passive inactivity are to be governed by law. Leaving the law *unenforced* in haphazard, unfair, or unequal ways is as constitutionally problematic as the haphazard, unfair, or unequal enforcement of the law. And given the lack of data about how prosecutors exercise their discretion, Mississippians reasonably suspect that both sorts of violations occur frequently.

Fourth, plea bargaining in the shadow of unarticulated, unexplained prosecutorial discretion makes it impossible to know whether higher punishments for those convicted after a trial, relative to the punishments for those convicted after a guilty plea, are proper. While all defendants have a right to trial by jury under the Sixth and Fourteenth Amendments, they need not exercise it. Those who plead guilty naturally receive less punishment. But in evaluating this system of negotiation, it is critical to distinguish two possible pictures of how it can work. On the first picture, the punishment inflicted after a jury trial represents what the community genuinely thinks offenders deserve as a matter of justice because they have committed a crime. In this picture, the lower punishment for those who plead guilty represents a proper reward for saving the community the cost of a trial. A second picture is possible, however. The punishment inflicted after a guilty plea might instead represent what the community genuinely thinks offenders deserve as a matter of justice. In this picture, the higher punishment for those invoking Sixth and Fourteenth Amendment rights represents an improper penalty for requiring the prosecution to go through with a trial. This second picture is not how our criminal justice system should operate. It would not be proper under the Fourteenth Amendment to give an offender additional punishment—beyond what justice requires—simply as a penalty for requiring a trial. It would likewise not be proper to *threaten* additional punishment as such a penalty. When prosecutors attempt to convince defendants to plead guilty, then, assessing the justice and fairness of the pressure brought to bear on them requires knowing the exact contents of the rejected option: what prosecutors tell defendants that they will face if they do not plead guilty. Does the threatened additional punishment if defendants were to go to trial represent a genuine assessment of what they deserve (i.e., the absence of a proper reward) or instead an additional penalty on top of justice (i.e., the imposition of an improper penalty)? Without visible prosecutorial policies on how they exercise their discretion, it is impossible to know.

Through this study, the Committee sought to examine racial discrimination that may occur in Mississippi's criminal justice system. The Committee focused on the potential disproportionate impacts that result from prosecutors' discretionary decision making in the matters of incarceration, mandatory sentencing, life without parole, and the death penalty.

SUMMARY OF PANELISTS TESTIMONY

The public meetings on April 19, 2019, and May 23, 2019, included testimony from academics, attorneys, judges, community members and other advocates with informed perspectives on prosecutorial discretion. Speakers were selected to provide a diverse and balanced overview of prosecutorial discretion as a civil rights issue.

A. Points of Discretion

Sometimes referred to as the “gatekeepers of justice,”²⁷ prosecutors are arguably the most powerful officials in the American criminal justice system.²⁸ Panelist Alesha Judkins of FWD.us²⁹ pointed out that the State of Mississippi has the third highest incarceration rate in the U.S.³⁰ Ms. Judkins went on to describe the enormous influence that prosecutors have on these numbers: “[prosecutors] are involved in every aspect of someone’s life, starting from arrest all the way until they have the opportunity for probation or parole. At each opportunity they have the discretion to say whether or not incarceration should be an option.”³¹ Prosecutors determine whether and how much bail to request,³² and they hold key roles in discovery, offering plea bargains, and recommending sentencing,³³ including when to seek the death penalty.³⁴ Law Professor Matthew Steffey testified, “there is nothing real in any given case that limits what a prosecutor can do.”³⁵ Judge Carol White-Richard, who has served as a public defender, a prosecutor, and a judge, testified that prosecutors have at least as much authority as judges do.³⁶ Criminal law Professor Ronald Wright suggested that a prosecutor’s influence may begin even before arrest. He noted that law enforcement officers often informally consult with prosecutors about a wide range of decisions, such as whether or not they have probable cause for a search, or whether or not to pursue a particular witness.³⁷ Four key areas of prosecutorial discretion--*Charging, Negotiating Bail and Pre-Trial Incarceration, Plea Bargaining, and Sentencing*--are discussed below.

²⁷ Kimberly Kaiser, testimony, *Briefings Before the Mississippi Advisory Committee to the U.S. Commission on Civil Rights: Civil Rights and Prosecutorial Discretion in Mississippi*, Jackson, MS, May 23, 2019, transcript, p. 15 (hereinafter *Jackson Briefing*).

²⁸ Angela J. Davis, testimony, *Web Hearing Before the Mississippi Advisory Committee to the U.S. Commission on Civil Rights*, April 19, 2019, transcript, p. 7 (hereinafter *Web Hearing*); Tom Testimony, *Jackson Briefing*, p. 68 lines 16-21.

²⁹ FWD.us is a political non-partisan advocacy organization “focused on fixing the failed immigration and criminal justice systems that have locked too many out of the American Dream for too long.” Ms. Judkins serves as the Mississippi State Director for Criminal Justice Reform. See <https://www.fwd.us/>.

³⁰ Judkins Testimony, *Jackson Briefing*, p. 13 lines 15-23.

³¹ *Ibid.*, pp. 13-14; see also, Kaiser Testimony, *Jackson Briefing*, p. 15 lines 3-24.

³² Judkins Testimony, *Jackson Briefing*, p. 14; Tom Testimony, *Jackson Briefing*, p. 70 lines 13-19.

³³ Wright Testimony, *Web Hearing*, p. 4 lines 6-17.

³⁴ Kaiser Testimony, *Jackson Briefing*, p. 15 lines 13-24.

³⁵ Steffey Testimony, *Jackson Briefing*, p. 63 line 25 – p. 64 line 5.

³⁶ White-Richard Testimony, *Jackson Briefing*, p. 123 lines 14-24.

³⁷ Wright Testimony, *Web Hearing*, p. 3 lines 9-19.

1. Charging

Once law enforcement presents a case to the prosecutor, it is within the prosecutor's discretion to determine whether or not to bring charges.³⁸ A prosecutor may choose to drop a case, or to divert it into a non-criminal court program, such as a drug treatment program.³⁹ District Attorney Scott Colom noted that in some cases this discretion can function as an accountability measure for police.⁴⁰ When a prosecutor does file charges, he or she also has the discretion to determine what charges to file. Professor Wright explained, "if there's an assault that happened, there's probably going to be half a dozen different versions of that assault statute that are possible to charge in any given typical fact setting."⁴¹

Panelists noted that charging decisions have become increasingly impactful over the past decade as new sentencing rules have removed discretion from judges at sentencing and transferred it to prosecutors at the point of charging.⁴² Judge White-Richard provided the example of a defendant charged with possession of .1 gram of cocaine. This specific act could be charged as either a misdemeanor or a felony, at the prosecutor's discretion.⁴³ Though if convicted the judge will ultimately oversee sentencing, the charge itself determines the maximum legal penalties--in this case, up to one year of incarceration for a misdemeanor and up to three years for a felony.⁴⁴ The judge has limited discretion for sentencing based on the charges the prosecutor brings forward.⁴⁵

District Attorney Scott Colom testified that in Mississippi, the grand jury system provides some oversight into the indictment process.⁴⁶ According to Mr. Colom, in a grand jury, it is the prosecutor's responsibility to challenge the investigators in the case, in effect acting as a pseudo-defense attorney.⁴⁷ This is to ensure a legally strong case prior to indictment.⁴⁸ Mr. Colom described the practice of one District Attorney who did not regularly review cases before presenting to a grand jury. "In that scenario...you're going to get a lot more indictments because you don't even know what questions to ask the investigator. And you don't know when the investigator may not be shining a light on the deficiencies in the case."⁴⁹ Increased indictments create pressure for prosecutors to get sentences or strong plea deals,⁵⁰ regardless of the justice in the action.⁵¹ Mr. Colom noted that his office has used its prosecutorial

³⁸ Wright Testimony, *Web Hearing*, p. 3 lines 20-31; Colom Testimony, *Jackson Briefing*, p. 117 lines 2-9; White-Richard Testimony, *Jackson Briefing*, p. 123 line 25 – p. 124 line 4.

³⁹ Wright Testimony, *Web Hearing*, p. 3 lines 28-39.

⁴⁰ Colom Testimony, *Jackson Briefing*, p. 117 lines 1-24.

⁴¹ Wright Testimony, *Web Hearing*, p. 3 line 40 – p. 4 line 5; *see also* Davis Testimony, *Web Hearing*, p. 7 lines 12-18.

⁴² Wright Testimony, *Web Hearing*, p. 5 lines 1-15; Kaiser Testimony, *Jackson Briefing*, p. 15 lines 20-24.

⁴³ White-Richard Testimony, *Jackson Briefing*, p. 124 lines 5-24.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Colom Testimony, *Jackson Briefing*, p. 116 lines 19-25.

⁴⁷ *Ibid.*, p. 118 lines 4-21.

⁴⁸ *Ibid.*, p. 118 lines 15 – p. 119 line 7.

⁴⁹ *Ibid.*, p. 120 lines 2-23.

⁵⁰ *Ibid.*, p. 120 lines 14-23.

⁵¹ *Ibid.*, p. 121 lines 3-25.

discretion to reduce the number of cases presented to the grand jury, by extension also decreasing the number of indictments.⁵² Mr. Colom suggested that when used well, prosecutorial discretion in charging decisions can be a powerful tool in reducing the prison population, and does not carry the pressure of similar discretionary decisions such as sentencing, which often receive a lot more media attention.⁵³

Joshua Tom, Legal Director of the ACLU of Mississippi, testified that often times rather than seeking justice however, prosecutors use their discretion to seek the harshest possible charges carrying the harshest possible sentences.⁵⁴ Mr. Tom described the case of one man with a history of severe mental illness with no serious criminal history. This defendant was sentenced to forty-two years in prison for possession of less than one gram of cocaine because the prosecutor chose to use his discretion to combine several of the harshest possible charges carrying the harshest sentences.⁵⁵ He similarly described the case of an Oregon man who was traveling through Madison County, Mississippi. The man was charged with drug trafficking and was sentenced to eight years in prison for possession of 2.89 ounces of marijuana that he had purchased legally in Oregon.⁵⁶ This, despite evidence that he was not trafficking; rather the marijuana was for personal use.⁵⁷ Mr. Tom noted that if this defendant had been stopped in neighboring Hinds County, he would have likely been put in pretrial diversion, rather than incarcerated, highlighting the inconsistencies in the justice system stemming from prosecutorial discretion.⁵⁸

2. *Bail and Pre-trial Incarceration*

Prosecutors have discretion to determine whether and how much bail to request.⁵⁹ While the Committee acknowledges that prosecutors do not hold final authority on bail, panelists testified that judges often give careful consideration to prosecutors' requests.⁶⁰ Joshua Tom of the ACLU of Mississippi described "the status quo" in Mississippi as one where prosecutors, rather than allowing people to go through the criminal justice process outside of jail, choose to recommend bail "often in unaffordable amounts" leading to mass pre-trial incarceration⁶¹ that some have likened to debtors' prison.⁶² Mr. Tom pointed out that over the past fifty years the prison population in the United States has exploded from approximately 300,000 to 2.3 million people.⁶³ District Attorney Scott Colom testified that about half of the prison population in

⁵² Ibid., p. 119 lines 8-11.

⁵³ Ibid., p. 119 lines 8-22.

⁵⁴ Tom Testimony, *Jackson Briefing*, p. 73 lines 16-21.

⁵⁵ Ibid., p. 72 line 1 – p. 73 line 21.

⁵⁶ Ibid., p. 73 line 22 – p. 75 line 2.

⁵⁷ Ibid., p. 74 lines 4-10.

⁵⁸ Ibid., p. 74 lines 15-24.

⁵⁹ Judkins Testimony, *Jackson Briefing*, p. 14; Tom Testimony, *Jackson Briefing*, p. 70 lines 13-19.

⁶⁰ White-Richard Testimony, *Jackson Briefing*, p. 124 line 25 – p. 125 line 8; *see also* Tom Testimony, *Jackson Briefing*, p. 70 lines 13-15, p. 87 lines 8-10.

⁶¹ Tom Testimony, *Jackson Briefing*, p. 70 lines 13-24.

⁶² De Gruy Testimony, *Jackson Briefing*, p. 82 lines 6-16.

⁶³ Tom Testimony, *Jackson Briefing*, p. 69 lines 19-21.

Mississippi is comprised of inmates being held for misdemeanors simply because they cannot post bail.⁶⁴

Panelists noted that the purpose of bail is to ensure that a person will show up for court,⁶⁵ and to prevent further public threat if there is concern a defendant may re-offend.⁶⁶ However, testimony suggested that bail is often used for other, illegitimate purposes such as to pressure defendants into taking plea deals,⁶⁷ to appease political pressure to appear tough on crime,⁶⁸ or to drive the profits of bail bondsmen.⁶⁹ Panelists raised concern that pre-trial incarceration itself makes it more likely for defendants' to be convicted and to receive harsher sentencing, limiting their right to a fair trial. Mr. Tom testified, "The mere fact of pre-trial detention on its own raised the probability that a person will be convicted or plead guilty."⁷⁰ Mr. Colom testified, "any prosecutor that is being honest will tell you it is much easier to get someone to plead guilty if they are in jail."⁷¹

In addition to concern that pre-trial incarceration may limit a defendant's right to a fair trial, panelists also cited disparate impact concerns resulting from bail and pre-trial incarceration decisions. Mr. Tom described a "two-tiered justice system" in Mississippi where black and brown defendants are significantly less likely to be able to post bail and thus more likely to face pre-trial incarceration.⁷² Mr. Steffey similarly testified, "an observer can be excused for thinking that municipal court is a place to process black defendants back to jail,"⁷³ while Mr. Colom observed, "the poorest among us are the people that are staying in jail... simply because they cannot make bail."⁷⁴

Panelists also questioned the effectiveness of cash bail to serve the purpose of ensuring defendants appear in court and do not re-offend while awaiting trial.⁷⁵ Mr. Tom noted that both California and Washington D.C. have eliminated cash bail, and data indicate that defendants continue to show up in court at the same rate, while the vast majority do not re-offend.⁷⁶ Mr. Steffey noted that Alaska has also recently eliminated cash bail, and the state has some population similarities that could be helpful for the State of Mississippi to observe.⁷⁷

⁶⁴ Colom Testimony, *Jackson Briefing*, p. 114 lines 1-17; *see also* Tom Testimony, *Jackson Briefing*, p. 69 lines 19-24.

⁶⁵ Judkins Testimony, *Jackson Briefing*, p. 14 lines 10-24.

⁶⁶ Colom Testimony, *Jackson Briefing*, p. 114 lines 1-17.

⁶⁷ *Ibid.*, p. 115 line 11 – p. 116 line 18.

⁶⁸ *Ibid.*

⁶⁹ Steffey Testimony, *Jackson Briefing* p. 86 lines 6-11; p. 83 lines 1-4.

⁷⁰ Tom Testimony, *Jackson Briefing*, p. 70 lines 10-12; *see also* de Gruy Testimony, *Jackson Briefing* p. 46 lines 18-22.

⁷¹ Colom Testimony, *Jackson Briefing*, p. 115 lines 22-25.

⁷² Tom Testimony, *Jackson Briefing*, p. 75 lines 19-25.

⁷³ Steffey Testimony, *Jackson Briefing*, p. 85 lines 8-14.

⁷⁴ Colom Testimony, *Jackson Briefing*, p. 114 lines 12-17.

⁷⁵ *Ibid.*, p. 113 lines 12-15; Colom Testimony, *Jackson Briefing*, p. 114 lines 1-17.

⁷⁶ Tom Testimony, *Jackson Briefing*, p. 79 line 16 – p. 80 line 1.

⁷⁷ Steffey Testimony, *Jackson Briefing*, p. 88 lines 22-25.

Panelists discussed the following alternatives and potential reforms related to cash bail, which could serve the purposes of effectively protecting public safety and ensuring most defendants return to court:

- Attorney Matt Eichelberger testified that alternatives such as home confinement, ankle monitoring, or pre-trial probation can be more effective than cash bail, and still allow people to maintain their family life.⁷⁸
- Attorney Joshua Tom suggested requiring due process in evaluating (1) the likelihood a defendant will return to court and (2) whether or not a defendant presents a public safety risk in order to bring about increased fairness in bail decisions.⁷⁹
- State Public Defender Andre de Gruy testified that efforts as simple as sending text messages reminding defendants to show up in court have demonstrated a higher response rate than being released under bail.⁸⁰
- Both Mr. Tom and Mr. de Gruy discussed the data system in California which functions as a “risk assessment” for defendants – people identified as high risk do not get bond, while everyone else is released on their own recognizance.⁸¹
- Mr. Eichelberger testified that unsecured bonds, in which a defendant simply signs a promissory note and is then released, are also effective. If the defendant fails to appear in court, they are taken into custody, fined, and then usually held until the termination of their proceedings.⁸²
- Mr. Tom recommended that Mississippi eliminate cash bail for all misdemeanor offenses, which make up 80% of the criminal justice system.⁸³

3. *Plea Bargaining*

In Mississippi, between 95% and 97% of cases are resolved with a plea deal, and panelists testified that prosecutors have enormous control over this process.⁸⁴ Mr. Tom noted that despite a constitutional right to a fair trial, “prosecutors are currently charging people at a rate that makes it impossible to take all of them to trial.”⁸⁵ Therefore, he concluded, “judges and prosecutors rely on pleas to keep the system moving.”⁸⁶ Mr. Colom similarly testified that “Our American criminal justice system is not about people having trials anymore. It’s about people

⁷⁸ Eichelberger Testimony, *Jackson Briefing*, p. 85 line 20 – p. 86 line 5.

⁷⁹ Tom Testimony, *Jackson Briefing*, p. 87 lines 1-13.

⁸⁰ De Gruy Testimony, *Jackson Briefing*, p. 82 lines 17-24.

⁸¹ Tom Testimony, *Jackson Briefing*, p. 80 lines 4-21; de Gruy Testimony, *Jackson Briefing*, p. 80 line 24 – p. 82 line 16.

⁸² Eichelberger Testimony, *Jackson Briefing*, p. 83 lines 5-20.

⁸³ Tom Testimony, *Jackson Briefing*, p. 86 lines 20-25.

⁸⁴ Davis Testimony, *Web Hearing*, p. 7 lines 18-42; Wright Testimony, *Web Hearing* p. 4 lines 10-12; White-Richard Testimony, *Jackson Briefing*, p. 138 line 21 – p. 139 line 14.

⁸⁵ Tom Testimony, *Jackson Briefing*, p. 71 lines 3-6.

⁸⁶ *Ibid.*

pleading guilty. You're going to have to create an entirely different system if you are going to have people exercise their Sixth Amendment rights..."⁸⁷

Judge White Richards testified that some prosecutors use penalty enhancements as "punishment" for defendants who refuse plea deals and wish to exercise their right to a trial.⁸⁸ Law Professor Angela Davis of American University Washington College of Law testified that often times prosecutors will "pile on" charges in order to compel a defendant to take a plea deal—whether or not they are actually guilty—for fear of a worse outcome at trial.⁸⁹ For example, a prosecutor may offer to drop one or more charges if a defendant pleads guilty to another charge.⁹⁰ Charging decisions require a much lower standard of proof (probable cause) than is required to convict a person at a trial (beyond a reasonable doubt), so it is relatively easy for prosecutors to indict on several charges.⁹¹ Professor Davis testified, "if a person's faced with six, seven, eight charges, each of which might carry a mandatory minimum sentence, you could see how even an innocent person might feel compelled to take the plea" rather than to go to trial.⁹²

Prosecutors may use plea bargains to pressure defendants into forgoing other rights as well. Judge White Richard provided the example of several district attorneys who will use a plea deal to prevent a defendant from filing a motion to suppress certain evidence, or to dismiss certain charges. "In [many] of our districts...if you file a motion to suppress the statement, motion to dismiss for failure to read the defendant his rights, plea offer is off the table."⁹³ These pressures may lead to unjust outcomes for defendants. Judge White Richard testified that in her courtroom she oversees a lot of "open pleas," where the defendant pleads guilty but does not accept the deal from the prosecutor for sentencing. "...most of the times when I get that, the defendant is saying, 'I really didn't do this, but my attorney told me it was in my best interest to plea. And so now I'm here begging you to not give me any time.'"⁹⁴

A prosecutor's power and discretion regarding plea deals can lead to inconsistencies in criminal justice outcomes. Some prosecutors may be more inclined to recommend diversion programs such as drug court in their pleas, while others may not.⁹⁵ Judge White Richard noted that prosecutor's personal backgrounds, beliefs, experiences, and biases often determine the terms that a prosecutor offers for a plea.⁹⁶ Professor Davis testified that implicit biases affect all people, including prosecutors. Even if those biases are unconscious, they may lead to

⁸⁷ Colom Testimony, *Jackson Briefing*, p. 122.

⁸⁸ White-Richard Testimony, *Jackson Briefing*, p. 125 line 9 – p. 126 line 1.

⁸⁹ Davis Testimony, *Web Hearing*, p. 7 lines 22-42; *see also* Colom Testimony, *Jackson Briefing*, p. 121 line 21 – p. 122 line 4.

⁹⁰ Davis Testimony, *Web Hearing*, p. 7 lines 22-42.

⁹¹ *Ibid.*, p. 7 lines 29-32.

⁹² *Ibid.*, p. 7 lines 33-42; Steffey Testimony, *Jackson Briefing*, p. 63 lines 2-8.

⁹³ White-Richard Testimony, *Jackson Briefing*, p. 129 lines 4-9.

⁹⁴ *Ibid.*, p. 139 line 25 – p. 140 line 17.

⁹⁵ White-Richard Testimony, *Jackson Briefing*, p. 131 lines 7-25.

⁹⁶ *Ibid.*

disparities in the deals that prosecutors offer to different defendants, perpetuating racial disparities seen throughout the criminal justice system.⁹⁷

With awareness of these challenges, some prosecutors have chosen to use their discretion to increase fairness and individual consideration of each case. Mr. Colom described his efforts in establishing “procedural justice.” When negotiating plea deals with defendants, he explains the reasoning behind his offer and he allows the defendant to give input regarding what is fair, with the agreement that the negotiations will not be used against them.⁹⁸

4. Sentencing

Prosecutors hold key roles in recommending sentencing, including when to seek the death penalty.⁹⁹ Judge White Richard testified that similar to the use of plea deals, prosecutors sometimes use this discretion to deter a defendant from exercising his/her constitutional rights. She described one trial in which the defense wanted to move for a mistrial because evidence had been withheld. The prosecutor responded by threatening to seek the death penalty, even though the death penalty had not been previously considered.¹⁰⁰ She testified, “This was a case that you did not believe deserved to have the death penalty on the table. But because if they exercise a constitutional right of the defendant...you are now going to put this man’s life in jeopardy...and this case is three or four years old.”¹⁰¹

Panelists explained that there is judicial review of sentencing decisions, however, this review is limited and not often exercised.¹⁰² Mr. de Gruy noted that the Supreme Court will only review sentences following a trial, “so 98 percent of the cases you get no sentence review at all.”¹⁰³ For cases that do receive sentencing review, as long as it is within the statutory range, the court will most often uphold it.¹⁰⁴ Mr. de Gruy testified that this lack of review contributes to some of the disparate impact seen in the criminal justice system. For example, he discussed a review of home burglary cases with aggravated assault that showed the only people getting sentenced to more than ten years were black men.¹⁰⁵ Mr. de Gruy suggested that more meaningful sentencing review, including an improved indigent defense system, could work to address much of the disparities evident in sentencing.¹⁰⁶ Additional discussion of indigent defense follows in later sections of this report.

⁹⁷ Davis Testimony, *Web Hearing*, p. 8 lines 1-25.

⁹⁸ Colom Testimony, May 23, 2019 Transcript, p. 121 lines 13-20.

⁹⁹ Wright Testimony, *Web Hearing*, p. 4 lines 6-17; Kaiser Testimony, *Jackson Briefing*, p. 15 lines 13-24; White-Richard Testimony, *Jackson Briefing*, p. 126 lines 4-5.

¹⁰⁰ White-Richard Testimony, *Jackson Briefing*, p. 126 lines 2-24.

¹⁰¹ *Ibid.*

¹⁰² Wright Testimony, *Web Hearing*, p. 4 lines 10-17; White-Richard Testimony, *Jackson Briefing* p. 138 line 21 – p. 139 line 14.

¹⁰³ De Gruy Testimony, *Jackson Briefing*, p. 89 lines 18-24.

¹⁰⁴ *Ibid.*, p. 89 line 24 – p. 90 line 6.

¹⁰⁵ *Ibid.*, p. 90 lines 7 – 21.

¹⁰⁶ *Ibid.*, p. 90 lines 14 – 21.

B. Accountability

Professor Wright noted that a system of checks and balances exists throughout much of the U.S. legal system: “Typically, in U.S. governmental systems, we try to fragment power...the governmental actor is checking in with somebody else and really has to get them to sign off, to agree, on most important questions.”¹⁰⁷ However, Professor Wright described prosecutors as “flying solo”¹⁰⁸ in much of their decision making, with the ability, in many cases, to make choices “even over the objection of the judge,” the police, or the defense attorney involved in the case.¹⁰⁹ This singular authority has expanded over the past decade, as sentencing rules have removed discretion from judges and moved it to the prosecutor at the point of charging.¹¹⁰ A decline in the rate of criminal trials over the past few decades has also reportedly correlated with an increase in guilty pleas.¹¹¹

1. Electoral Oversight

Professor Angela Davis of the American University School of Law noted that the majority of criminal cases in the United States are handled by elected state and local prosecutors.¹¹² Absent other meaningful oversight, the only way to ensure fairness and accountability in prosecutor’s discretion is through elections.¹¹³ Joshua Tom of the ACLU of Mississippi testified, “Across the country we are seeing a wave of district attorneys elected on explicit platforms of ending mass incarceration and systemic racism and using their discretion to do so.”¹¹⁴ Mr. Tom concluded, “if voters react to reduce mass incarceration and racial disparities it is the prosecutor’s duty to carry out the wishes of the people who elected them. Should prosecutors not do that, voters should...vote them out.”¹¹⁵ District Attorney Scott Colom testified that he was elected on a platform of reducing the prison population in 2015.¹¹⁶ As District Attorney, Mr. Colom has focused his work on addressing serious violent crime and trying to find ways outside of the prison system to rehabilitate people with drug addictions.¹¹⁷

Shifting such priorities through the electoral process remains a challenge, however. Law Professor Matthew Steffey argued that prosecutorial disparities are inevitable when prosecutors are accountable only to the electorate. “It is literally impossible to tell a large group of people who don’t answer to anybody in any systemic way that they have to be consistent. I think if

¹⁰⁷ Wright Testimony, *Web Hearing*, p. 4 lines 27-35.

¹⁰⁸ *Ibid.*, p. 4 line 27 – p. 5 line 15.

¹⁰⁹ *Ibid.* For more information about prosecutor accountability, see Parker Yesko, “In the Dark: Why don’t prosecutors get disciplined?” *APM Reports*, September 18, 2018, <https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined>.

¹¹⁰ Wright Testimony, *Web Hearing*, p. 5 lines 1-15; Kaiser Testimony, *Jackson Briefing*, p. 15 lines 20-24.

¹¹¹ Wright Testimony, *Web Hearing*, p. 5 lines 1-15.

¹¹² Davis Testimony, *Web Hearing*, p. 9 lines 25-32.

¹¹³ *Ibid.*

¹¹⁴ Tom Testimony, *Jackson Briefing*, p. 76 lines 18-25; *see also* Davis Testimony, *Web Hearing*, p. 9 lines 25-32; Colom Testimony, *Jackson Briefing*, p. 111 lines 13-17.

¹¹⁵ Tom Testimony, *Jackson Briefing*, p. 76 lines 10-17.

¹¹⁶ Colom Testimony, *Jackson Briefing*, p. 111 lines 3-17.

¹¹⁷ *Ibid.*

they tried to be consistent, it would be impossible.”¹¹⁸ Mr. Colom testified that when he was running for the office of District Attorney, he did not have a model to look at to achieve the goal of reducing incarceration.¹¹⁹ He also testified that while there is general public will to reduce the prison population and focus on rehabilitation, most prosecutors and judges still see this approach as “radical” and “they view the traditional model as keeping people safe.”¹²⁰ Professor Davis testified that there are a number of campaigns currently targeted at educating the electorate about the importance of district attorney races.¹²¹ However, the electorate often does not pay much attention to them; as a result incumbents often run unopposed and serve for decades.¹²² Mr. Tom of the ACLU underscored the importance of such public engagement. “First we need the public to express what they want their prosecutors to do. Some prosecutors perpetuate mass incarceration policies because they think the electorate wants that or because no one knows what they do.”¹²³

Professor Cliff Johnson of the University of Mississippi School of Law spoke of Mississippi’s long standing culture as one of being “tough on crime.”¹²⁴ He described incarceration as a “habit” in Mississippi, “something to which judges, prosecutors, and the electorate have shown great commitment.”¹²⁵ District Attorney Colom similarly noted that prosecutors and judges often feel intense political pressure to appear “tough on crime.”¹²⁶ He said that prosecutors trying to use their discretion to increase diversion and decrease incarceration are vulnerable to attack ads portraying them as “too lenient;” prosecutors and judges do not face the same vulnerability for being “too tough.”¹²⁷ Prosecutors and judges who use their discretion for diversion or other alternatives to incarceration are also vulnerable to receiving blame if a defendant is released and then goes on to commit another crime.¹²⁸

When asked about alternative models, Professor Steffey testified that the State of Connecticut runs all prosecutions through a statewide prosecutor; individual prosecuting attorneys are appointed by a bipartisan committee, instead of electing them each at the local level.¹²⁹ Mississippi’s constitution provides only that a district attorney for each district “shall be selected in the manner provided by law.”¹³⁰ Therefore, Mr. Steffey noted that the Mississippi legislature could chose an appointed or “hybrid” system of selecting district attorneys; though historically this has always been done by local election.¹³¹ Mr. Steffey cautioned that in such

¹¹⁸ Steffey Testimony, *Jackson Briefing*, p. 62 lines 2-9.

¹¹⁹ Colom Testimony, *Jackson Briefing*, p. 111 lines 18-23.

¹²⁰ *Ibid.*, p. 135 lines 2-22.

¹²¹ Davis Testimony, *Web Hearing*, p. 9 line 33 – p. 10 line 5.

¹²² *Ibid.*, p. 9 lines 25-32.

¹²³ Tom Testimony, *Jackson Briefing*, p. 76 lines 1-9.

¹²⁴ Johnson Testimony, *Web Hearing*, p. 10 lines 23-31; *see also* Tom Testimony, *Jackson Briefing* p. 69 lines 1-6.

¹²⁵ Johnson Testimony, *Web Hearing*, p. 10 lines 23-31.

¹²⁶ Colom Testimony, *Jackson Briefing*, p. 141 line 23 – p. 142 line 16.

¹²⁷ *Ibid.*

¹²⁸ Johnson Testimony, *Web Hearing*, p. 11 lines 11-23; *see also* Colom Testimony, *Jackson Briefing*, p. 141 line 23 – p. 142 line 16.

¹²⁹ Steffey Testimony, *Jackson Briefing*, p. 78 lines 16-25.

¹³⁰ *Ibid.*, p. 79 lines 1-13.

¹³¹ *Ibid.*

an appointment system there is usually also a “recall provision” providing authority for review and retention decisions.¹³² Mr. Eichelberger cautioned that there may be separation of powers concerns with legislative involvement in such an appointment process, because prosecution authority usually falls under the executive branch.¹³³

2. *Public Defense*

Outside of the electoral oversight, a robust public defense system is the only other measure by which a prosecutor’s discretion may be reviewed and challenged. However, Angela Davis of American University School of Law testified that public defenders are often overworked and do not have the resources to do the necessary investigative work.¹³⁴ Cliff Johnson of the University of Mississippi School of Law pointed out that Mississippi is one of only six states in the country without a state funded public defense system, and only seven of the state’s eighty-two counties even have full time public defenders’ offices.¹³⁵ Mr. Johnson went on to describe a system in which public defense is often handled part time by lawyers with other practices, leading to a lack of independence on the part of public defenders: “the bottom line being that if you file too many motions and you raise too much hell as a defense lawyer, then ultimately judges can become unhappy...and you can risk your job.”¹³⁶ Mr. Johnson referred to a March 2018 report of the Sixth Amendment Center which raised concern regarding undue judicial interference and conflicts of interest between judges and appointed public defenders that may seriously compromise the effectiveness of indigent counsel.¹³⁷

Deficiencies in the indigent defense system in Mississippi also perpetuate racial disparities in the justice system. Mr. Johnson pointed out that 32.3% of African Americans in Mississippi live in poverty while only 13.2% of Whites do, and this poverty creates vulnerability.¹³⁸ To illustrate, Judge White Richard testified that the difference between getting five years’ incarceration for possession of a firearm and getting house arrest is often adequate legal representation.¹³⁹ State Public Defender André de Gruy testified that defendants reliant on public defense may be incarcerated pre-trial without ever seeing a lawyer at all for three to six months, leading to a higher likelihood of conviction, prison time, and longer sentences.¹⁴⁰ He concluded, “The beginning of this problem of racial disparity in the criminal justice system has to start with the discussion of our lack of indigent defense system.”¹⁴¹

¹³² Ibid., p. 91 lines 1-16.

¹³³ Eichelberger Testimony, *Jackson Briefing*, p. 78 lines 8-13.

¹³⁴ Davis Testimony, *Web Hearing*, p. 7 lines 36-38.

¹³⁵ Johnson Testimony, *Web Hearing*, p. 12 lines 30-40.

¹³⁶ Ibid., p. 12 line 30 – p. 13 line 5.

¹³⁷ Sixth Amendment Center, *The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services*, March 2018, <https://sixthamendment.org/mississippi-report/>.

¹³⁸ Johnson Testimony, *Web Hearing*, p. 12 lines 13-21.

¹³⁹ White-Richard Testimony, *Jackson Briefing* p. 126 line 25 – p. 128 line 5.

¹⁴⁰ De Gruy Testimony, *Jackson Briefing*, p. 46 line 7 – p. 47 line 1; *see also* Steffey Testimony, *Jackson Briefing*, p. 61 lines 18-21.

¹⁴¹ De Gruy Testimony, *Jackson Briefing*, p. 46 line 7 – p. 47 line 1.

3. *Justice and Disparate Impact*

Law Professor Matthew Steffey testified that one of the greatest challenges with broad, unchecked prosecutorial discretion is the inevitable inconsistencies that surface in the justice system.¹⁴² He said, “we will inevitably have disparities from place to place when we elect essentially unsupervised district attorneys around the state that are accountable only to the electorate.”¹⁴³ Steffey cautioned that these inconsistencies undermine public confidence in the system and “the willingness of victims to come forward and witnesses to make themselves available.”¹⁴⁴ He noted that these inconsistencies also often fall along racial lines.¹⁴⁵ Similarly, Assistant Professor of Legal Studies Dr. Kimberly Kaiser testified that “when the use of discretion leads to unwarranted disparities based on race, ethnicity, gender or other non-legally relevant factors...this discretion can substantially undermine the legitimacy of the criminal justice system.”¹⁴⁶

Despite these challenges, Dr. Kaiser pointed out the importance of some discretion. She testified, “Prosecutors may be more familiar with the unique characteristics of individual cases or particular nuances that warrant different decisions and outcomes.”¹⁴⁷ Other panelists also noted that prosecutorial discretion can be used in the service of justice.¹⁴⁸ Attorney Joshua Tom, Legal Director at the American Civil Liberties Union of Mississippi testified, “...without changing a law, without changing any police conduct, prosecutors can decide to change their decisions on what and how harshly they charge, and thereby, tomorrow make an impact on mass incarceration and racial disparities in mass incarceration.”¹⁴⁹ Professor Steffey similarly noted that prosecutorial discretion can be used to further just goals: “some amount of prosecutorial discretion is critical. It allows mercy in the system...without some discretion...a prosecutor and a judge could be forced to do things...that don’t serve the end goals.”¹⁵⁰ Professor Steffey qualified this position by noting that prosecutors’ discretion must be balanced with some consistency: “...some amount of discretion in whether to charge and what to charge is essential for mercy, but some amount of consistency is also necessary to avoid the disparities we see...in enhancements and diversions and in transfers.”¹⁵¹

¹⁴² Steffey Testimony, *Jackson Briefing*, p. 62 lines 2-13.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, p. 66 line 17 – p. 67 line 2.

¹⁴⁵ *Ibid.*, p. 66 line 17 – p. 68 line 3; *see also*, Tom Testimony, *Jackson Briefing*, p. 71 lines 13-25.

¹⁴⁶ Kaiser Testimony, *Jackson Briefing*, p. 16 lines 1-9; *see also* Lambright Testimony, *Jackson Briefing* p. 25 lines 18-24.

¹⁴⁷ Kaiser Testimony, *Jackson Briefing*, p. 16 lines 1-4.

¹⁴⁸ Colom Testimony, *Jackson Briefing*, p. 136 lines 6-25; Eichelberger Testimony, *Jackson Briefing*, p. 55 lines 6-24; Davis Testimony, *Web Hearing*, p. 9 line 33 – p. 10 line 5; Lambright Testimony, *Jackson Briefing*, p. 26 lines 4-8.

¹⁴⁹ Tom Testimony, *Jackson Briefing*, p. 71 lines 13-18; p. 77 lines 10-20.

¹⁵⁰ Steffey Testimony, *Jackson Briefing*, p. 61 lines 4-11.

¹⁵¹ *Ibid.*, p. 61 lines 12-17.

4. *Managing Discretion*

Attorney Matt Eichelberger cautioned that limiting prosecutors' discretion could lead to challenges such as determining who should have the power to "check" prosecutor's decisions, and how.¹⁵² He cited several sexual assault cases he had worked with in which the victim did not want to move forward with prosecution, "The victim should not be made to go forward in those cases, simply because we have a prosecutor who feels his hands are tied. The victim should drive that prosecution."¹⁵³ He described his experience working with a judge in Hinds County, who demanded a review before allowing prosecutors to drop a case.¹⁵⁴ In one case in particular, the judge pushed a sexual assault victim to move forward with a trial and considered compelling her to testify against her will.¹⁵⁵ He concluded, "...we have to be very, very, careful what checks we place on prosecutorial discretion, and we need to be careful about with whom we vest that power to check prosecutorial discretion."¹⁵⁶ Mr. Eichelberger suggested that rather than impose limits on prosecutors' discretion, a much better way to reduce overall incarceration is to focus on sentencing reform, penalty enhancements, and improving reentry programs.¹⁵⁷

Several panelists suggested that requiring prosecutors to explain their decisions could go a long way toward striking a balance between allowing for discretion in the system while increasing fairness and transparency.¹⁵⁸ Judge White Richard recommended implementing a "point system" to determine bail and sentencing decisions, in order to eliminate bias and create more uniformity.¹⁵⁹ Prosecutors making decisions outside of the standards set forth for a specified number of points would be required to justify those decisions.¹⁶⁰ Judge White Richard said that at a minimum, simply shedding light on prosecutor's decisions can prompt them to be more conscious of how they use it.¹⁶¹ Regardless of how a prosecutor's discretion is managed, Mr. Tom noted that the Rules of Professional Responsibility hold prosecutors to a "distinctive standard of responsibility, given their special role in the criminal justice system. They are administrators of justice. They're not simply advocates. Their duty is to seek justice, not simply to convict."¹⁶²

¹⁵² Eichelberger Testimony, *Jackson Briefing*, p. 57 line 4 – p. 58 line 12.

¹⁵³ *Ibid.*, p. 57 lines 4-15.

¹⁵⁴ *Ibid.*, p. 57 line 4 – p. 58 line 12.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, p. 58 lines 13-16.

¹⁵⁷ *Ibid.*, p. 59 lines 2-14.

¹⁵⁸ Colom Testimony, *Jackson Briefing*, p. 136 lines 6-25 & p. 145 lines 17-24; *see also* White-Richard Testimony, *Jackson Briefing*, p. 145 lines 3-16 & p.157 line 24 – p. 158 line 8; Kaiser Testimony, *Jackson Briefing* p. 33 line 2 – p. 34 line 11; de Gruy Testimony, *Jackson Briefing* p. 51 lines 16-24.

¹⁵⁹ White-Richard Testimony, *Jackson Briefing*, pp. 132-134; p. 157 line 12 – p. 158 line 15; Colom Testimony, *Jackson Briefing*, p. 158 lines 16-25.

¹⁶⁰ White-Richard Testimony, *Jackson Briefing*, p. 158 lines 1-8.

¹⁶¹ *Ibid.*, p. 146 lines 4-18.

¹⁶² Tom Testimony, *Jackson Briefing*, p. 69 lines 12-18.

C. Addressing Implicit & Explicit Bias

Throughout this study, the Committee sought to understand the potential connection between the many points of prosecutorial discretion, and the significant, pervasive racial disparities apparent in the criminal justice system today. While panelists agreed that most prosecutors do not intend to perpetuate racial disparities in the justice system,¹⁶³ they also noted the important influence of Mississippi's troubled history of racial discrimination.¹⁶⁴ Professor Matthew Steffey acknowledged that people acting "in what they understand to be good faith is not...a lot of solace"¹⁶⁵ in the face of such pervasive disparities. Steffey suggested that prosecutors "of good faith" could learn to make better decisions by becoming aware of the cognitive biases that affect "...unsupervised, unguided discretion."¹⁶⁶

Judge White Richard pointed out that prosecutors, just as all people, bring their beliefs, backgrounds, and experiences into every decision they make.¹⁶⁷ These biases show up in tangible ways. Nsombi Lambright, Executive Director of One Voice Mississippi,¹⁶⁸ reported that Black Mississippians make up thirty-seven percent of the state population but represent fifty-seven percent the state's prison population.¹⁶⁹ She referenced a 2011 report of the American Civil Liberties Union¹⁷⁰ which found that Black Mississippians go to prison for drug charges "three to one over white Mississippians."¹⁷¹

Ms. Lambright attributed these racial disparities to both implicit and explicit biases in the criminal justice system.¹⁷² She noted that while the State of Mississippi has increased funding for prosecution; funding for prevention, drug treatment, and mental health services has lagged.¹⁷³ She contrasted prosecutors' "enthusiasm" to prosecute crimes in communities with a reluctance to prosecute "officer involved shootings and violent acts under federal hate crimes statutes."¹⁷⁴ She testified that these failures perpetuate "a belief in vulnerable communities that there are two different justice systems: one for the rich and one for the poor and people of color."¹⁷⁵

¹⁶³ Davis Testimony, *Web Hearing*, p. 8 lines 10-16; Steffey Testimony, *Jackson Briefing*, p. 63 lines 9-15.

¹⁶⁴ Kaiser Testimony, *Jackson Briefing*, p. 20 lines 2-7; Johnson Testimony, *Web Hearing*, p. 10 lines 32-34.

¹⁶⁵ Steffey Testimony, *Jackson Briefing*, p. 63 lines 16-18.

¹⁶⁶ *Ibid.*, p. 63 lines 19-24.

¹⁶⁷ White-Richard Testimony, *Jackson Briefing*, p. 131 lines 20-25; *see also* Johnson Testimony, *Web Hearing*, p. 10 line 32 – p. 11 line 2.

¹⁶⁸ One Voice is a state-wide nonprofit organization with a mission to raise the voices of traditionally silenced communities in Mississippi." *See*: <http://onevoicems.org/>. Ms. Lambright also Co-Chairs the Criminal Justice Committee of the Mississippi NAACP. Lambright Testimony, *Jackson Briefing*, p. 21 line 19 – p. 22 line 8.

¹⁶⁹ Lambright Testimony, *Jackson Briefing*, p. 22 line 22 – p. 23 line 3.

¹⁷⁰ Judith Greene and Patricia Allard, *Numbers Game: The Vicious Cycle of Incarceration in Mississippi's Criminal Justice System*, American Civil Liberties Union of Mississippi, March 2011, <https://www.aclu.org/report/numbers-game-vicious-cycle-incarceration-mississippi-criminal-justice-system>.

¹⁷¹ Lambright Testimony, *Jackson Briefing*, p. 23 lines 4-15.

¹⁷² *Ibid.*, p. 22 line 22 – p. 23 line 3.

¹⁷³ *Ibid.*, p. 24 lines 13-23.

¹⁷⁴ *Ibid.*, p. 25 lines 18-24.

¹⁷⁵ *Ibid.*

Professor Steffey discussed several forms of bias, including confirmation bias, hindsight bias, motivated reasoning, and the reiteration effect.¹⁷⁶ He noted that literature is available to increase knowledge of these biases and there are effective tools to guard against them.¹⁷⁷ He testified that people “of good faith” could learn to make better decisions by becoming more aware of and policing against such cognitive biases in their work.¹⁷⁸ In order to address the continued influence of implicit and explicit bias in the criminal justice system, panelists suggested the following:

- Mr. Steffey suggested that requiring prosecutors to justify charging, bail, and sentencing decisions on race neutral grounds would “give an opening towards addressing cognitive bias for prosecutors who want to do better.”¹⁷⁹
- Professor Angela Davis described initiatives in Washington, D.C. as well as in Milwaukee, WI, where officials instituted a “system wide” implicit bias training, including judges, prosecutors, defense attorneys and others.¹⁸⁰
- Judge White Richard described learning about a hospital in Chicago where implicit bias was leading to patients with serious medical conditions being inappropriately discharged and later dying at home.¹⁸¹ The hospital responded by designing a “points” system, based on a patient’s symptoms. The number of points, rather than the doctor, then determined whether a patient would be admitted or discharged.¹⁸² Judge White Richard suggested a similar points system could help reduce or eliminate the impact of implicit bias in bail and sentencing decisions.¹⁸³

D. Availability of Data

A 2018 study of the Urban Institute suggested that collecting data to track “whether prosecutors are meeting their own justice and safety goals could help balance [prosecutors’] desire for consistency with the discretion they desire.”¹⁸⁴ This same study found, however, that “...limited data is available to identify, understand, and evaluate the decisions that prosecutors make at each of the key points in case processing.”¹⁸⁵ Professor Ronald Wright testified that even when prosecutors do collect and review data internally, the information systems do not exist to compare their data to other similar jurisdictions.¹⁸⁶ He noted, “...so if I want to know

¹⁷⁶ Steffey Testimony, *Jackson Briefing*, p. 65 line 4 – p. 66 line 16.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., p. 63 lines 19-24.

¹⁷⁹ Ibid., p. 104 lines 3-7.

¹⁸⁰ Davis Testimony, *Web Hearing*, p. 18 lines 9-19.

¹⁸¹ White-Richard Testimony, *Jackson Briefing*, p. 132 line 18 – p. 133 line 17.

¹⁸² Ibid., p. 133 line 18 – p. 134 line 1.

¹⁸³ Ibid., p. 134 lines 2-21.

¹⁸⁴ Frederick and Stemen 2012b, as cited in: Robin Olsen et al., “Collecting and Using Data for Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors’ Offices,” *Urban Institute, Justice Policy Center*, September 2018, p. 3,

https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf.

¹⁸⁵ Ibid., p. 2. See also Kaiser Testimony, *Jackson Briefing* p. 16 line 22 – p. 17 line 2.

¹⁸⁶ Wright Testimony, *Web Hearing*, p. 5 line 16 – p. 6 line 2.

what my office is doing...to contribute to racial disparities in the use of prison or other aspects of criminal justice, it's very hard to know.”¹⁸⁷

Dr. Kimberly Kaiser, Assistant Professor of Legal Studies at the University of Mississippi, testified that available data on prosecutorial discretion is “limited and mixed in regards to the influence of race and ethnicity.”¹⁸⁸ Kaiser noted that over 50 years ago, in 1967, the U.S. Presidential Commission on Law Enforcement and Administration of Justice (AKA the Presidential Crime Commission), published a report¹⁸⁹ recommending increased transparency in prosecutors’ decision making.¹⁹⁰ Unfortunately however, the past 50 years have not resulted in any significant improvements in this transparency.¹⁹¹ This lack of data on prosecution is especially remarkable in part, because national databases *do* exist to understand many other aspects of the criminal justice system, such as crime data, police data, sentencing data, and corrections data.¹⁹² Kaiser testified, “unlike judges, prosecutors do not need to provide justification for when they decide not to charge someone, or when they decide to impose a mandatory minimum, or engage in plea bargaining with a defendant.”¹⁹³ From a civil rights perspective, the lack of data regarding prosecutorial discretion is particularly troubling, because it makes it impossible to understand prosecutors’ decisions and motivations, and to identify and change problematic behaviors.¹⁹⁴

State public defender André de Gruy described his office’s efforts to understand the impact of prosecutorial discretion based on the data that is available in Mississippi. While this data does not allow a review of the specific details of each case, Mr. de Gruy described a system in which prosecutors’ decisions may indeed contribute to racial disparities in incarceration rates.¹⁹⁵ He cited transfer data, for example, which describes the transfer of youth defendants, age 13-17, to adult court for property crimes or low level drug crimes.¹⁹⁶ Mr. de Gruy noted, “black kids are far more likely to be transferred,” and the decision to transfer is being made by the county prosecutor.¹⁹⁷ Similarly, a disturbing eighty percent of people charged with “enhanced” sentencing for drug crimes are black defendants.¹⁹⁸ In contrast, defendants receiving reduced sentences, those being diverted to pretrial intervention programs run by local prosecutors, and those sent to drug court, are disproportionately white.¹⁹⁹ De Gruy pointed out that while a judge may be involved, prosecutors make the recommendation for these types of decisions.²⁰⁰

¹⁸⁷ Ibid., p. 5 lines 31-39.

¹⁸⁸ Kaiser Testimony, *Jackson Briefing*, p. 18 lines 3-16.

¹⁸⁹ Ibid., p. 15 lines 3-12.

¹⁹⁰ Ibid., p. 15 lines 3-12; p. 18 lines 14-16; p. 20 lines 8-13; p. 21 lines 5-15.

¹⁹¹ Ibid., p. 20 lines 8-13; p. 36 lines 11-17.

¹⁹² Ibid., p. 20 lines 14-22; p. 36 lines 11-17.

¹⁹³ Ibid., p. 18 lines 9-16.

¹⁹⁴ Ibid., p. 20 line 23 – p. 21 line 4; Wright Testimony, *Web Hearing*, p. 5 line 40 – p. 6 line 2.

¹⁹⁵ de Gruy Testimony, *Jackson Briefing*, pp. 47-53.

¹⁹⁶ Ibid., p. 47 line 15 – p. 48 line 10.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., p. 52 lines 11-25.

¹⁹⁹ Ibid., p. 51 lines 2-24.

²⁰⁰ Ibid., p. 51 lines 16-17.

As an example legislative remedy to these concerns, Professor Wright cited a recent Florida statute²⁰¹ allowing the state to collect data from each prosecutorial district “that will allow for comparison across districts, and to watch for trends over time.”²⁰² Wright felt this approach was a particularly positive one given that it does not impose control over the prosecutor’s office, “but instead gives the prosecutor’s office some ability to make informed and humane decisions” based on more accurate and complete information.²⁰³ Wright suggested other states might further explore this approach.²⁰⁴

Improved data collection can be a powerful tool to help reduce disparities racial disparities in the criminal justice system. Panelists described improved data collection, including requiring prosecutors to justify certain decision points, as a starting point to identify areas in need of change.²⁰⁵ Law Professor Angela Davis described the Prosecution and Racial Justice program of the Vera Institute of Justice, which has developed “A Prosecutor’s Guide for Advancing Racial Equity.”²⁰⁶ Through this initiative, several prosecutors volunteered to allow researchers to collect data on the race of the victims and defendants, and to compare that data to various decision making points to determine “whether or not the race neutral decisions these prosecutors were making were in fact creating racial disparities.” Through this research, participating prosecutors found that “indeed...there were points of which they were unintentionally causing these disparities.”²⁰⁷ Importantly, upon discovering this problem, some prosecutors were able to use this information to reduce the racial disparities in their offices.²⁰⁸

E. Community Impact

Throughout their testimony, panelists highlighted the impact prosecutors’ decisions can have on the communities they serve. Nsombi Lambright described the creation of a “false narrative about the ability of incarceration to rehabilitate individuals and to solve crime problems.”²⁰⁹ She lamented the prioritization of law enforcement, jails, and prisons over mental healthcare, public education, housing, and food.²¹⁰ She described the tension many families feel because of injustices such as racial profiling, police brutality, and disparities in the court system: “the role of prosecutors and judges is very tense and tumultuous in the African-American community. While families want to be protected against theft and violent acts, they also want fairness and justice.”²¹¹ She recounted the reports of victims, years after a crime has occurred,

²⁰¹ 2018 Fla. Laws Ch. 2018-127.

²⁰² Wright Testimony, *Web Hearing*, p. 6 lines 3-10; *see also* Tom Testimony, *Jackson Briefing* p. 80 lines 6-10.

²⁰³ Wright Testimony, April 19, 2019 Transcript, p. 6 lines 7-14.

²⁰⁴ *Ibid.*, p. 6 lines 10-14.

²⁰⁵ Kaiser Testimony, May 23, 2019 Transcript, pp. 33-35.

²⁰⁶ “A Prosecutor’s Guide for Advancing Racial Equity,” *Vera Institute of Justice*, November 2014, <https://www.vera.org/publications/a-prosecutors-guide-for-advancing-racial-equity>.

²⁰⁷ Davis Testimony, *Web Hearing*, p. 9 lines 5-24.

²⁰⁸ *Ibid.*

²⁰⁹ Lambright Testimony, *Jackson Briefing*, p. 25 lines 1-7.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*, p. 22 lines 9-21.

who feel that the incarceration of the offender did “very little” to ease their pain.²¹² Ms. Lambright noted that in states where prosecutors focus on opportunities for restitution between crime victims and the individuals who caused them harm, crime rates are lower.²¹³

Alesha Judkins pointed out that even before a person is convicted of any crime, a prosecutor’s decisions such as setting a very high bail can leave people destitute, causing huge financial hardship and making it difficult for them to provide for their families.²¹⁴ Joshua Tom of the ACLU of Mississippi similarly testified that those facing pre-trial incarceration often lose their housing, jobs, and even children.²¹⁵ Andre de Gruy pointed out the incompatibility between recent efforts in the child welfare system to avoid removing a child from his or her mother because the mother used drugs, and some prosecutor’s apparent eagerness to remove a mother from her children through incarceration due to drug use.²¹⁶ Each of these decisions contributes to ongoing cycles of generational poverty, particularly within the Black community²¹⁷ and run counter to the goals of rehabilitation and positive community reintegration.

Panelists Asya Branch shared her personal experience as the child of an incarcerated parent. Her father was incarcerated when she was in sixth grade.²¹⁸ She has three siblings, including a sister who was just two years old at the time of their father’s arrest. Her youngest sister still suffers from separation anxiety because of the experience.²¹⁹ Ms. Branch and her siblings were left shaken and confused, and Ms. Branch reported experiencing nightmares for months afterward.²²⁰ She described feeling stigmatized at school, losing their family home, and experiencing financial instability and emotional distress as a result of her father’s removal from the family.²²¹ Ms. Branch recommended that families of incarcerated individuals receive more support, and that where possible parents be notified in advance so that arrests are not made in front of the children.²²²

In order to improve community relations and create a more positive working relationship, Ms. Lambright pointed out that some prosecutors are working with community groups to set goals and objectives that are supportive of the community, and to review progress on those goals.²²³ Dr. Kaiser suggested that in order to improve relations, it is important to redefine measures of success for prosecutors to focus on alternatives to incarceration and successful reentry, rather than conviction rates.²²⁴

²¹² Ibid., p. 25 lines 8-15.

²¹³ Ibid., p. 25 lines 15-17.

²¹⁴ Judkins Testimony, *Jackson Briefing*, p. 14 lines 3-9.

²¹⁵ Tom Testimony, *Jackson Briefing*, p. 70 lines 4-9.

²¹⁶ De Gruy Testimony, *Jackson Briefing*, p. 53 lines 11-23.

²¹⁷ Lambright Testimony, *Jackson Briefing*, p. 22 line 22 – p. 23 line 3.

²¹⁸ Branch Testimony, *Jackson Briefing*, p. 8 lines 10-13.

²¹⁹ Ibid., p. 9 line 18 – p. 10 line 4.

²²⁰ Ibid., p. 9 lines 1-17.

²²¹ Ibid., p. 10 lines 5-25.

²²² Ibid., p. 12 lines 4-12.

²²³ Lambright Testimony, *Jackson Briefing*, p. 40 lines 5-21.

²²⁴ Kaiser Testimony, *Jackson Briefing*, p. 37 lines 9-16.

FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.²²⁵ The Mississippi Advisory Committee submits the following findings and recommendations to the Commission for review:

A. Findings

1. Prosecutors hold significant discretion and influence throughout the criminal justice system, particularly in charging decisions, setting bail, negotiating pretrial incarceration, plea bargaining, and sentencing.
2. Prosecutors determine whether to bring charges, drop a case, or seek alternatives such as diversion or treatment programs. If a prosecutor does bring charges, the specific charges brought has a determinative impact on a defendant's sentencing.
3. Prosecutors make recommendations regarding bail and pretrial incarceration; judges most often accept these recommendations.
 - a. Cash bail often results in the pre-trial incarceration of low-income defendants, who are disproportionately people of color. This perpetuates significant economic and racial disparities, resulting in a "two-tiered" justice system with significant race and class divisions.
 - b. Pretrial incarceration itself raises the probability that a person will be convicted or plead guilty.
 - c. Data from jurisdictions that have eliminated or reduced the use of cash bail suggest that bail does not increase the likelihood of a defendant appearing in court; strategies such as sending text messages to remind people to appear in court may be just as effective or even more effective than bail.
4. The current justice system does not have the capacity for most cases to go to trial; therefore, it relies on plea bargains to move people through the system.
 - a. Some prosecutors add penalty enhancements and/or combine multiple charges in order to compel a defendant to take a plea bargain, for fear of a worse outcome at trial.
 - b. Prosecutors may also use plea offers to deter defendants from using legally available procedures such as filing a motion to suppress certain evidence, or to drop charges due to improper law enforcement procedures.
 - c. Plea offers may lead to inconsistencies in criminal justice outcomes, as prosecutors' personal biases and experiences may determine the terms of the offer.
5. Prosecutors hold key roles in recommending sentencing, including when to seek the death penalty. Judicial review of sentencing decisions is limited and not often

²²⁵ 45 C.F.R. § 703.2.

- exercised. When sentencing does receive judicial review, judges most often uphold the prosecutor's recommendations.
6. There is little accountability or review of prosecutor's discretionary decisions. The primary mechanism for prosecutor accountability is through the electorate.
 - a. Differing electoral priorities result in inconsistencies in prosecutor's approach and priorities across jurisdictions.
 - b. There is a need for increased public engagement and participation in reviewing prosecutors' decisions and holding them accountable.
 - c. "Tough on crime" culture may make it difficult for prosecutors who wish to reduce incarceration and promote more restorative interventions to be elected and retained.
 7. Public defense is another mechanism to provide prosecutor accountability.
 - a. Mississippi is one of only six states that does not have a state funded public defense system.
 - b. Independent reports have raised concern regarding judicial interference and conflicts of interest between judges and appointed public defenders that may seriously compromise the effectiveness of indigent counsel.
 8. Prosecutors are not immune from implicit and explicit biases that affect their decision making. These biases may perpetuate racial disparities in the justice system and damage public confidence.
 - a. Anti-bias training may help prosecutors to address cognitive biases and make better decisions in their work.
 - b. Requiring prosecutors to justify charging, bail, and sentencing decisions on race-neutral grounds may work to address some biases and reduce disparities.
 9. Data systems do not exist to objectively evaluate prosecutors' decision making. Prosecutors who collect and maintain data internally do not have the information systems available to compare their data to similar jurisdictions.
 10. Prosecutors who have collected data for internal review have been able to use this data to successfully reduce racial disparities in their offices.
 11. Prosecutorial discretion has a significant impact not only on the defendant involved, but on the entire surrounding community.
 - a. Prosecutors' decisions can cause people to lose jobs, housing, and custody of their children before they have been convicted of a crime.
 - b. Prosecutors can also use their discretion in collaboration with community members to redefine measures of success and promote successful reentry and alternatives to incarceration.

B. Recommendations

1. The **U.S. Commission on Civil Rights** should conduct a national study on the impact of prosecutorial discretion on racial disparities in the criminal justice system, including in the incarcerated population.
 - a. The study should include a review of the prosecution data that is currently being collected and shared by prosecutors across the country.

- b. The Commission should make recommendations to the U.S. Congress and the U.S. Department of Justice regarding prosecution data that should be standardized and collected at the national level.
2. The U.S. Commission on Civil Rights should issue the following recommendations to the **U.S. Department of Justice, Office of Civil Rights:**
 - a. Require all prosecutors receiving federal funding to collect and report on data including the total number of defendants prosecuted; class of charges; and defendants' demographic information including race, sex, age, zip code of primary residence, and indigency findings.
3. The U.S. Commission on Civil Rights should issue the following recommendations to the **Mississippi State Legislature and Office of the Governor:**
 - a. Eliminate the use of cash bail for all misdemeanor offenses in Mississippi; require justification for the use of cash bail in felony cases.
 - b. Require all prosecutors to collect and report on data including the total number of defendants prosecuted; class of charges; and defendants' demographic information including race, sex, age, zip code of primary residence, and indigency findings.
 - c. Establish and fully fund an independent, state-wide public defense system.
4. The U.S. Commission on Civil Rights should issue the following recommendations to the **Office of the Attorney General, State of Mississippi:**
 - a. Decline to make recommendations of cash bail for defendants facing misdemeanor charges; provide justification for its use in felony charges.
 - b. Establish an objective, race-neutral protocol to evaluate the public safety and flight risk of defendants. Decline to recommend the pretrial incarceration of defendants evaluated as low-risk.
 - c. Establish a community-based task force to identify and begin tracking markers of prosecutor success beyond conviction rates and sentencing outcomes.
 - d. Establish an internal review protocol to ensure consistency and fairness in plea offerings. Prohibit the use of charging decisions, penalty enhancements, and other discretionary practices to pressure defendants to accept plea offers.
 - e. Require anti-bias training of all prosecutors in the Office.
5. The U.S. Commission on Civil Rights should issue the following recommendation to the **State of Mississippi Judiciary Administrative Office of the Courts:**
 - a. The Office should establish and implement procedures for contacting and reminding people of upcoming court appearances, utilizing technology such as automated text messaging and voice calls.
6. The U.S. Commission on Civil Rights should issue the following recommendation to the **National Association of Attorneys General, Civil Rights Committee:**
 - a. Establish a working group to review the influence of prosecutors' discretion on racial disparities in conviction and incarceration rates. Develop guidelines and recommendations for addressing areas of concern.
 - b. Require all member prosecutors to undergo annual anti-bias training.
 - c. Establish a committee to review and highlight "alternative" measures of prosecutor's accountability and success beyond conviction rates.
7. The U.S. Commission on Civil Rights should issue the following recommendations to the **Mississippi Prosecutor's Association:**

- a. Establish a working group to review the influence of prosecutors' discretion on racial disparities in conviction and incarceration rates. Develop guidelines and recommendations for addressing areas of concern.
- b. Require all member prosecutors to undergo annual anti-bias training.
- c. Establish a committee to review and highlight "alternative" measures of prosecutor's accountability and success beyond conviction rates.

APPENDIX

- A. Meeting Materials, April 19, 2019 Web Hearing
 - i. Transcript
 - ii. Agenda
 - iii. Meeting Minutes
 - iv. Panelist Presentation Slides
- B. Meeting Materials, May 23, 2019 Hearing in Jackson, MS
 - i. Transcript
 - ii. Agenda
 - iii. Meeting Minutes
- C. Written Testimony
 - i. Somil Trivdei, Senior Staff Attorney, ACLU of Mississippi

April 19, 2019 Meeting Materials Available at:

<https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000000rEz5AAE>

May 23, 2019 Meeting Materials Available at:

<https://www.facadatabase.gov/FACA/apex/FACAPublicCommitteeDetail?id=a0zt0000001i74AAA>

**Mississippi Advisory Committee to the
United States Commission on Civil Rights**



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