Advisory Memorandum

To: U.S. Commission on Civil Rights
From: Connecticut State Advisory Committee
Date: May 1, 2019
Subject: Advisory Memorandum on Pending Legislation

Per its statutory mandate, the U.S. Commission on Civil Rights establishes advisory committees and charges them with collecting and providing information, findings, and recommendations about civil rights matters in their states to the Commission. In keeping with these responsibilities, based on the racial disparities in the state's criminal justice and correctional systems, the Connecticut Advisory Committee (Committee) held a briefing on April 2, 2019, to examine the prosecutorial appointment process and prosecutorial practices in the Connecticut criminal justice system and whether these contribute to the racial disparities.

The Connecticut General Assembly's Joint Committee on Judiciary passed legislation out of its committee to increase transparency around the work of prosecutors in Connecticut. The proposed legislation would require the collection, reporting, and publication of important data about Connecticut's criminal justice system.

In consideration of the testimony heard at its briefing, the Connecticut Advisory Committee recommends that the Connecticut Legislature: (1) enact legislation regarding prosecutorial transparency and data collection; (2) provide additional funding for prosecutorial training; (3) increase opportunities for the public to be heard in the prosecutorial appointment process and policy priorities; and, (4) support the expansion of the Chief State's Attorney's existing Early Screening and Intervention Program. This memorandum was adopted unanimously by the Connecticut Advisory Committee on April 17, 2019.

The Connecticut Advisory Committee's Briefing, Background, and Initial Recommendations

Briefing

The Committee convened the April 2, 2019, briefing to continue its work on examining racial disparities in the Connecticut criminal justice system, which started with its briefing on racial profiling in December 2011, which "uncovered some issues that ultimately led to a revitalization of the Penn Act."[1] The Committee continued this work in 2017 when it examined disparities in the use of solitary confinement.[2] While visiting Connecticut correction facilities, the Committee observed that the population inside Connecticut's prisons does not reflect the demographics of the state because while Connecticut as a whole is majority white, the majority of Connecticut's prison population is comprised of inmates of color. The Committee wanted to examine the

[1] Chairman David McGuire, introductory remarks, Briefing Before the Connecticut State Advisory Committee to U.S. Commission on Civil Rights, Hartford, CT, Apr. 2, 2019, transcript, p. 5 (hereinafter cited as *Hartford Briefing*).
[2] *See* https://www.usccr.gov/press/2017/PR-02-03-17.pdf.

underlying factors that contribute to these disparities, which are some of the worst in the country.[3] The Committee invited presenters to help it understand whether Connecticut's prosecutorial appointments and prosecutorial practices were contributing factors in the racial disparities in Connecticut's criminal justice and correctional systems.

At the briefing, the Committee heard from nine invited panelists and members of the public.[4] All nine panelists largely agreed that additional data collection and reporting would greatly assist policy makers in diagnosing and addressing the causes of racial disparities on Connecticut's criminal justice system.[5] The panelists were in agreement on most of the principles outlined below. A consistent theme throughout the briefing was that criminal justice reform is a nonpartisan issue; it impacts all citizens and residents.

The Committee learned that there is growing awareness of the power that prosecutors have in the criminal justice system. One scholar has observed that nationally, "[o]ver the last 40 years, prosecutors have amassed more power than our system was designed for, and they've mostly used it to put more people in prison, contributing to the scourge of mass incarceration which continues to rip apart poor communities, especially if they're mostly black or brown."[6] These are "disastrous results for millions of people churning through the criminal justice system.[7]

Connecticut, over the last few years, has been working to reform its criminal justice system through the collaborative efforts of the Chief State's Attorney's Office, various state agencies and other organizations to move towards methods of data-driven policy-making.[8] The Committee learned of recent efforts by Connecticut prosecutors to adopt holistic new approaches to their work, including implementing early screening and intervention programs, developing resource coordinators and greater prison interactions with the Department of Correction.[9]

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[3] Morgan testimony, *Hartford Briefing*, transcript p. 104 (referencing Connecticut ranks sixth amongst states with the highest black/white differential in its prison population).

[4] The Agenda is attached as an Appendix. Participants included Connecticut government officials: the deputy chief state's attorney, the state's attorney for the Judicial District of Middlesex, the Under Secretary for the Office of Policy and Management Criminal Justice Policy and Planning Division, and the supervising Public Defender for the Judicial District of Middletown. Other panelists included the Associate Dean & Executive Director, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, the chief of social justice in the Brooklyn District Attorney's Office, the chief of the Philadelphia District Attorney's Office Conviction Integrity Unit, and a representative from Fair and Just Prosecution, an advocacy group that brings together newly elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.

[5] *See* Gailor testimony, *Hartford Briefing*, transcript pp. 16-17; Pelka testimony, *Hartford Briefing*, transcript pp. 27-35; Lawlor testimony, *Hartford Briefing*, transcript pp. 40-41, 43-46 and 68-69; Reiss testimony, *Hartford Briefing*, transcript pp. 88-89; Hollway testimony, *Hartford Briefing*, transcript pp. 90-91; Morgan testimony, *Hartford Briefing*, transcript pp.104-105 and 109; Komar testimony, *Hartford Briefing*, transcript pp. 112-114; Cummings testimony at pp. 133-135.

[6] Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, at xxv.

[7] Ibid.

[8] *See* Connecticut Criminal Justice Policy Advisory Commission March Meeting, recorded March 28, 2019 http://ct-n.com/ctnplayer.asp?odID=16158.

[9] Lawlor testimony, *Hartford Briefing*, transcript pp. 15 and 66. *See also* The Early Screening and Intervention Program (ESI) - The Division of Criminal Justice's Report to the Joint Standing Committee on the Judiciary on PA 17-205: An Act Establishing a Pilot Program to Provide Enhanced Community Services to those in the Criminal Justice System, February 1, 2019.

Several panelists addressed the lack of data about prosecutorial work in Connecticut and noted the increasing consensus that transparency in the prosecutorial process would allow policymakers and the public to better evaluate the state's criminal justice system and, if necessary, implement reforms to decrease racial disparities. To determine if similar people are being treated fairly and equitably by prosecutors and the criminal justice system as a whole, data is necessary. Oversight, accountability, and public engagement are necessary and data collection will allow this to happen.

Background

Connecticut's Division of Criminal Justice includes the Office of the Chief's State Attorney, State Attorneys, and the Criminal Justice Commission. The Criminal Justice Commission is an autonomous body constitutionally charged with appointing all state prosecutors employed in the Division of Criminal Justice. The Criminal Justice Commission's creation was approved by Connecticut voters as a constitutional amendment in November 1984.[10] The Criminal Justice Commission "makes appointments of statutorily mandated prosecutors, as well as other prosecutors requested by the Chief State's Attorney, who is responsible for the administration of the Division of Criminal Justice."[11]

Connecticut is one of only three states that appoint its prosecutors rather than electing them. The Committee heard that the appointment system for state prosecutors limits the discretion that each respective State's Attorney's office has on the selection and hiring of new attorneys. This means that the selection, appointment, and reappointment of attorneys is solely determined by the Criminal Justice Commission.[12] At the briefing, the deputy chief state's attorney said that in his memory there has only ever been one prosecutor who was not reappointed by the Criminal Justice Commission in the last 25 years.[13]

The Committee heard that members of the Criminal Justice Commission do not have the outcome data to independently evaluate applicants before them; rather they must rely on a review submitted by the Chief State's Attorney.[14] The Committee also learned that until earlier this year all meetings of the Commission were held at the Division of Criminal Justice's headquarters with no formal way for the public to engage in the meetings.[15] The committee found that the historical makeup, limited independent resources, and practices of the Criminal Justice Commission could contribute to the racial disparities in the system.

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[10] Constitution of the State of Connecticut, Article XXIII (1984). The Criminal Justice Commission is composed of the Chief State's Attorney and six members nominated by the Governor and appointed by the General Assembly, two of whom must be judges of the Superior Court. The Governor appoints the Chairperson, and the members of the Commission volunteer their service to the State of Connecticut; they are not compensated.

[11] *See* Connecticut's Official State Website, https://portal.ct.gov/DCJ/Criminal-Justice-Commission/Criminal-Justice-Commission/Criminal-Justice-Commission-Landing-Page.

[12] Lawlor testimony, *Hartford Briefing*, transcript p. 11.

[13] Ibid., at p. 59.

[14] Ibid., at pp. 38-39.

[15] Ibid. at pp. 36-38. Deputy chief state's attorney Lawlor explained that a public notice for comment is advertised in law journals, law publications and on the division of criminal justice website; however, these publications are not typically accessed by the common public. Lawlor also explained that a recent public information meeting occurred at the state capitol, but that the Criminal Justice Commission did not otherwise normally hold such meetings.

The Committee learned that there are several factors that currently limit the Division of Criminal Justice's ability to produce meaningful data on prosecutorial policy and conduct. First, State's Attorney's offices do not have an electronic case management system; instead, the office is paper-based office and prosecutors work with physical "buckets of files."[16] An electronic case management system would facilitate the collection of data about prosecutions.[17]

Second, the Division is not currently required to report on prosecutorial work to the state, policymakers, or the public due to its historical autonomy. Third, the Division is not considered a public entity in most instances under the Connecticut Freedom of Information Act, making it exempt from most requests for information. This makes it difficult, if not impossible, for the public to learn about prosecutors' decisions. Connecticut prosecutors are part of the Executive Branch and are considered the highest-ranking law enforcement officers in a given jurisdiction; they are responsible for executing Connecticut's laws and are distinct from the functions of the Judicial Branch.

Finally, the Division lacks resources. The current budget for training in the Chief State's Attorney's office is $26,000 for 425 individuals, including 236 prosecutors.[18] This amounts to $61 of training per professional. The training budget for the Office of the Chief Public Defender is almost five times that amount, i.e., $126,000 for approximately 370 individuals including approximately 200 attorneys,[19] which amounts to $340 per professional.[20] The Committee heard that prosecutors from other states invest heavily in innovative and continuous legal education programs.[21]

The panelists testified about prosecutorial transparency in other states and how Connecticut can implement provisions similar to those in other states to increase transparency around prosecutorial work. There is a trend of increasing transparency about prosecutorial practices around the nation in an effort to measure the efficacy and consistency of this work. The panelists described their own experiences with prosecutorial reform in California, Illinois, New York, Pennsylvania, Texas, and Wisconsin.[22] Prosecutors in these areas, as well as others across the country, have moved towards more data collection and transparency. They have found that focusing on data helps drive innovation and reform.[23] Objective data about the criminal justice

[16] Ibid., 43.
[17] Ibid., 43-44.
[18] Ibid., 14.
[19] Hartford, CT, CT Division of Public Defender Services, The Annual Report of the Chief Public Defender, 2017, p. 15.
[20] This investment by the Public Defenders is even greater when including the dedicated staffing of a Director of Legal Training & Education and an administrative assistant. McKay testimony, *Hartford Briefing*, transcript, p. 26.
[21] Cummings testimony, *Hartford Briefing*, transcript, p. 148 (referencing the Philadelphia DA Office's training program which includes an eight-week, full-time training course for new prosecutors and mandatory weekly training courses for experienced prosecutors). Reiss testimony, *Hartford Briefing*, transcript, pp. 86 and 150.
[22] Specifically, San Francisco and Santa Clara County, California; Cook County (containing Chicago), Illinois; Brooklyn, New York; Philadelphia, Pennsylvania; Dallas and Houston, Texas; and Milwaukee, Wisconsin. *See* Morgan at pp. 107-108 (Cook County, IL; Santa Clara, CA; Brooklyn, NY; Milwaukee, WI). *See* Cummings testimony at p. 155 (Houston, TX).
[23] Cummings testimony, *Hartford Briefing*, transcript, pp. 76-78. Reiss testimony at p. 86. Hollway testimony at pp. 94-97. Komar testimony at pp. 114-115.

system in San Francisco and Houston is allowing policymakers to make changes to ensure better outcomes in the system.[24] Prosecutors from states that collect and report data noted that they do not consider these responsibilities to be onerous, rather they argued data collection is a worthwhile endeavor given the seriousness of prosecutors' work and the impact it has on defendants and victims as well as their families and communities.[25]

There was general consensus that plea bargaining is among the most important types of data to collect.[26] The majority of all cases that end in conviction are the result of a plea bargain, not a trial.[27] Prosecutors have wide plea bargaining discretion and can have significant leverage in plea negotiations. Nationally, over 95 percent of cases are resolved by plea bargains,[28] therefore more information on charging decisions and plea bargain practices is needed.

Initial Recommendations

The Committee is encouraged that the General Assembly is considering legislation on this important subject. It applauds the Judiciary Committee for recognizing the need for prosecutorial transparency and data collection and urges the General Assembly to do the same.

The Committee recommends to the Commission that any law regarding prosecutorial transparency include the following:

1. *A requirement for the Division of Criminal Justice to collect and publicly report on important data*. Data collection is important to understand the work of prosecutors and may help policymakers to assess the reason(s) for racial disparities in the Connecticut criminal justice system. Data can be used to determine if prosecutors' practices are effective in administering justice in a fair and equal way. Annual reporting to the Office of Policy and Management, the Criminal Justice Commission, and the Connecticut General Assembly's Joint Committee on Judiciary – as is done by the Office of the Chief Public Defender – should be required. This should be available to the public, albeit in a form that protects the privacy rights of victims, juvenile offenders, and defendants whose records have been expunged.

   The Committee recommends that any law regarding prosecutorial transparency require collection and reporting on the following disaggregated, case level data by docket number:

   a. Information about defendants, including the following data: total number of defendants prosecuted; total number of defendants prosecuted for felonies and for misdemeanors; age; race or ethnicity; sex; physical or mental disability; zip code of primary residence; veteran status; and indigency finding by Judicial Branch, if applicable.
   b. Plea deals, including at least the first and last plea deal offers by charging offense.

[24] Hollway testimony, *Hartford Briefing*, transcript, pp. 94-97. Cummings testimony at p. 155.
[25] Reiss testimony, *Hartford Briefing*, transcript, pp. 128-129.
[26] Ibid.
[27] Cummings testimony, *Hartford Briefing*, transcript, pp. 127-128.
[28] *See* National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, 2018, p. 14. *See also* Marks-Hamilton testimony, *Hartford Briefing*, transcript, p. 161.

c. Information about defendants under the age of eighteen, including the following data: total number of cases referred to a juvenile probation officer, total number of cases dealt with informally and dealt with formally, total number of cases dealt with formally that are mandatory transfers and the number that are discretionary transfers requested by prosecutors, and the total number of cases that are transferred back to juvenile court after a discretionary transfer request.
d. Arrests, arraignments, and continuances.
e. Bail or bond and pretrial release determinations, including prosecutors' recommendations and time held.
f. The use of diversionary programs, non-judicial sanctions, and court fees or fines.
g. Dispositions by charge, including disposition by entry of *nolle prosequi*.

2. *Adequate funding to provide more substantial training for prosecutors*. Connecticut prosecutors currently receive some internally-provided training to curb implicit bias and promote equal treatment of all. The deputy chief state's attorney and the supervising public defender of the Middletown Judicial District both testified, however, that additional training resources would be beneficial.[29] The legislature should appropriate adequate funding to the Division of Criminal Justice for bringing trainers into the division, sending prosecutors to trainings, or both. Prosecutors should engage in ongoing training including, but not limited to, anti-bias training, cultural competency training, and training on the impact of prosecutors' decisions. Other new areas of training for Connecticut prosecutors can include collateral consequences on education, employment, housing, and immigration for defendants. Furthermore, all prosecutors should be required to visit prisons of various security levels, to better understand the impacts of different areas of the criminal justice system on defendants. The Committee recommends the creation of a dedicated Training Director to focus on seeking out the latest best practices being developed across the country, while developing guest speaker programming and seeking out grant opportunities from private foundations and other external sources of funding.

3. *Opportunities for the Community to Engage in the Appointment of Prosecutors.* Transparency, accountability, and responsiveness to the community are incredibly important in the appointment and reappointment of prosecutors. The legislature should consider ways to broaden the mandate of the Criminal Justice Commission and to allow the public meaningful access to the appointment and reappointment of prosecutors. This would allow the Criminal Justice Commission to incorporate the public voice into the appointment and reappointment process. The Criminal Justice Commission should also provide greater opportunities for transparency and feedback by holding meetings in venues easily accessible to legislators and the public, when appropriate.

4. *Expansion of the Early Screening and Intervention (ESI) program including the development of more Resources Coordinators.* During the briefing, the Committee heard from the deputy chief state's attorney that there have been promising outcomes from current efforts to screen low-level offenses prior to being formally charged and put into the "meat grinder" of the criminal justice system.[30] The Committee applauds these efforts and recommends the expansion

[29] Lawlor testimony, *Hartford Briefing*, transcript, pp. 13-15. McKay testimony at pp. 22-27.
[30] Lawlor testimony, *Hartford Briefing*, transcript, p. 67 ("…giving prosecutors that ability to spend the time to decide what's the right thing with a case prior to being charged and being kind of put into the meat grinder of the

of the current ESI program into more prosecutor offices with the goal of an eventual statewide rollout of the program.

The Committee recognizes that that these new areas of data-driven focus by other state prosecuting offices and national research scholars represent a major shift, which can take time but ultimately be viable with adequate commitment and funding.[31]

The Committee is reviewing the testimony and materials submitted for the record and intends to release a report to the Commission, including recommendations to create a Conviction Integrity Unit, create a robust fellowship program to recruit diverse applicants, and development of a long-term plan to move to a paperless system.

criminal justice system will pay big dividends for a lot of people and will allow us to do our core mission of doing justice in a more fair and thoughtful way.").

[31] Cummings testimony, *Hartford Briefing*, transcript, p. 129-132.

Connecticut Advisory Committee
U.S. Commission on Civil Rights

Briefing on Racial Disparities and Prosecutorial Practices in the Connecticut Criminal Justice System

Tuesday, April 2, 2019

Legislative Office Building, Room 1C, 300 Capitol Avenue, Hartford, CT

AGENDA

I. Welcome and Introductions: 10:00 a.m.

II. Panel One: 10:05 a.m. – 11:15 a.m.

- Michael Gailor, State's Attorney, Judicial District of Middlesex
- Kevin Lawlor, Deputy Chief State's Attorney for Operations, Division of Criminal Justice
- James McKay, Public Defender, Supervisor, Middletown Judicial District
- Marc Pelka, Undersecretary of Criminal Justice Policy and Planning, Office of Policy and Management, State of Connecticut

Panel Two: 11:30 a.m. – 1:00 p.m.

- Patricia Cummings, Supervisor, Conviction Integrity & Special Investigations Unit, Philadelphia District Attorney
- John Hollway, Associate Dean & Executive Director, Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School
- Liz Komar, Director of Innovations and Site Learning, Fair and Just Prosecution
- Jamelia Morgan, Associate Professor of Law and Robert D. Glass Scholar, University of Connecticut School of Law
- Meg Reiss, Chief of Social Justice, Kings County District Attorney, Brooklyn, NY

III. Public Comment Session: 1:15 p.m.

IV. Adjournment