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# PROSECUTION AND PUBLIC DEFENSE:

THE PROSECUTOR'S ROLE IN SECURING A  
MEANINGFUL RIGHT TO AN ATTORNEY

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ROY L. AUSTIN, JR., KIRK BLOODSWORTH,  
CARLOS J. MARTINEZ, AND ALLISON GOLDBERG

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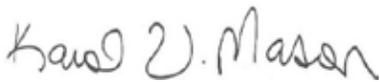
# A Letter from the Co-Chairs of the IIP Advisory Board

The Executive Session on Reimagining the Role of the Prosecutor in the Community (Executive Session), hosted by the Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP), is guiding high-level culture change in the field of prosecution. Through a series of facilitated convenings and conversations spanning three years, the Executive Session brings together the foremost experts in the field of prosecution – elected prosecutors, legal professionals, scholars, policy experts, and individuals directly impacted by the justice system.

The collaborative research and engagement that informs the Executive Session enables a thorough dive into some of the most complex topics facing prosecutors and their communities: reimagining the role of the prosecutor in a democratic society; producing public safety while reducing harms created by the criminal justice system; and addressing the legacy of racial inequality and structural injustice, to name a few. In order to disseminate these conversations into the field, Executive Session members partner to undertake research and author papers, with an eye towards developing innovative responses. The papers are based on the opinions of the authors, available research, and insight from Executive Session members. While the papers do not represent a consensus of all members, they have been informed by critical engagement and collaborative discussion amongst members. The expertise and diversity of members provide a nuanced lens to some of the most pressing topics in the field of prosecution, and to the criminal justice system overall.

The Executive Session and the papers emerging from it are intended to uplift the evolving role of prosecutors and their power to facilitate the creation of an increasingly equitable and effective American criminal justice system.

For further information about the Executive Session on Prosecution or the IIP, please write to [IIP\\_JohnJay@prosecution.org](mailto:IIP_JohnJay@prosecution.org).



Karol Mason  
President  
John Jay College of Criminal Justice



Cyrus Vance, Jr.  
District Attorney  
New York County, New York

# Prosecution and Public Defense: The Prosecutor's Role in Securing a Meaningful Right to an Attorney

## Executive Summary

Public defenders have faced mounting caseloads and declining budgets for years. While well-documented in court cases and research reports, this crisis has yet to be remedied through adequate funding or policy and practice change. The insufficient time and resources that public defenders have undermines representation for, and the life and liberty of, their clients.

All legal stakeholders should be concerned with the state of indigent defense and its implications for constitutional protections, equality under the law, and justice. In our adversarial system, prosecutors, in particular, have a role to play in securing a meaningful right to an attorney.

Today there is unprecedented focus on the power of the prosecutor. With discretion to charge, recommend bail, and condition pleas, prosecutors are amongst the most powerful stakeholders in the criminal justice system. As communities demand, and prosecutors strive towards, a more equitable and effective justice system, prosecutors should be prepared to answer: How are you going to ensure a robust defense for all?

This paper outlines tangible steps for prosecutors to meet this aim:

- 1. Support funding for public defense.**
- 2. Promote mechanisms of oversight and accountability in prosecution.**
- 3. Implement discovery best practices (open-file discovery, automatic and mandatory disclosures, timing, certification, and remedies for noncompliance).**
- 4. Ensure the integrity of forensics.**
- 5. Institute case and conviction reviews.**
- 6. Remedy consequences of arrest or conviction.**
- 7. Collect and publish case data.**
- 8. Scrutinize arrests and decline to prosecute low-level cases.**
- 9. Endorse alternatives to cash bail.**
- 10. Advocate for alternatives to incarceration.**

# AUTHORS

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## **ROY L. AUSTIN, JR.**

### **Partner, Harris, Wiltshire, & Grannis LLP**

Roy L. Austin, Jr. joined the D.C. law firm Harris, Wiltshire & Grannis LLP as a partner in 2017. Mr. Austin began his career as an Honors Trial Attorney with the Criminal Section of the Civil Rights Division investigating and prosecuting hate crime and police brutality cases around the country. In 2002, he joined the D.C. U.S. Attorney's Office where he prosecuted domestic violence, adult and child sexual assault, human trafficking, homicide and fraud and public corruption cases. In 2009, Mr. Austin returned to the D.C. U.S. Attorney's Office as Coordinator of the D.C. Human Trafficking Task Force. In January 2010, Mr. Austin was appointed Deputy Assistant Attorney General (DAAG), Civil Rights Division where he supervised the Criminal Section, and the Special Litigation Section's law enforcement (police departments, corrections and juvenile justice) portfolio. Among numerous other matters, Mr. Austin worked on cases involving the New Orleans Police Department, Missoula law enforcement and the Maricopa County Sheriff's Office. In March 2014, Mr. Austin joined the White House Domestic Policy Council as Deputy Assistant to the President for the Office of Urban Affairs, Justice and Opportunity. In this position, Mr. Austin co-authored a report on Big Data and Civil Rights, worked with the President's Task Force on 21st Century Policing, helped develop the Police Data Initiative, worked on expanding reentry assistance and was a member of President Obama's My Brother's Keeper Task Force. He has served as an adjunct trial advocacy professor at George Washington University Law School and the Washington College of Law. Mr. Austin received his B.A. from Yale University and his J.D. from The University of Chicago.



## **KIRK BLOODSWORTH**

### **Interim Executive Director, Witness to Innocence**

Kirk Bloodsworth is the Interim Executive Director of Witness to Innocence. A honorably discharged former Marine, Kirk Bloodsworth is the first person in the United States exonerated from death row by DNA testing. In 1984 he was arrested for the rape and murder of nine-year-old Dawn Hamilton. He was sentenced to death in Baltimore County, Maryland, in 1985.

In 1992, Kirk read about a new forensic breakthrough called DNA fingerprinting, and lobbied successfully for prosecutors' approval for its use on evidence collected at the crime scene in 1985. The tests incontrovertibly established Kirk's innocence, and he was released in June 1993. In December 1994, Maryland Governor William Donald Schaefer granted Kirk a full pardon based on innocence, and he receive compensation. In 2003, the real killer was caught and sentenced to life.

In addition to his work for Witness to Innocence, Kirk has been an ardent supporter of the Innocence Protection Act (IPA) since its passage by Congress in February 2000. The IPA established the Kirk Bloodsworth Post-Conviction DNA Testing Program, a program that helps states defray the costs of post-conviction DNA testing. He previously served as a program officer for the Justice Project in Washington, DC, and is the subject of the book *Bloodsworth: the True Story of the First Death Row Inmate Exonerated by DNA* by Tim Junkin. He is also the subject of a documentary directed by Gregory Bayne titled *Bloodsworth: An Innocent Man* which was released February 2, 2016.



## **CARLOS J. MARTINEZ**

### **Public Defender, Miami Dade, FL**

Carlos J. Martinez, the first Hispanic elected Public Defender in the US, is Miami-Dade County's Public Defender. He was elected in 2008, and re-elected in 2012 and 2016 without opposition. Mr. Martinez manages an office with a \$30 million budget comprised of approximately 400 employees, handling approximately 75,000 cases each year. Prior to law school, Mr. Martinez worked his way up from being a car wash attendant to managing multiple gas stations for Exxon Company USA, including the most profitable station in the Southeastern US. In the Public Defender's Office, Mr. Martinez represented thousands of clients before working as an administrator for more than a decade. He has instituted numerous programs to help troubled youth get on the right track. He has been active in addressing the crisis of minority children cycled from schools to prisons and in protecting the confidentiality of juvenile records. Mr. Martinez chaired the Representation Subcommittee of The Florida Bar's Commission on the Legal Needs of Children, served on the Supreme Court of Florida Steering Committee on Drug Courts and the Steering Committee on Families and Children, a National Institute of Corrections' National Advisory Committee, the Florida Blueprint Commission on Juvenile Justice, the Florida Department of Juvenile Justice Zero Tolerance Task Force. And most recently, as government lawyer liaison to The Florida Bar Board of Governors. Mr. Martinez has served on technical assistance and training teams across the United States and Latin America, including the Inter-American Drug Abuse Control Commission (Dominican Republic, Chile and Mexico), the Honduran National Office of Public Defense, and the Public Defender Offices in Schenectady County (NY), San Bernardino County (CA), Maricopa County (Phoenix, AZ), and Marion County (Indianapolis, IN).



## **ALLISON GOLDBERG**

### **Policy Advisor, Institute for Innovation in Prosecution**

Allison Goldberg is a Policy Advisor with the Institute for Innovation in Prosecution (IIP) at John Jay College of Criminal Justice. Prior to joining the IIP, Ms. Goldberg served in the White House Domestic Policy Council's Office of Urban Affairs, Justice and Opportunity during the Obama Administration, where she collaborated with policymakers, practitioners and advocates to advance criminal justice reform and civil rights. She previously worked at Liberty Hill Foundation, which funds community organizers advocating for economic justice, environmental justice, and LGBTQ equality in Los Angeles County. She received her BA in Political Science and Peace Studies from Loyola Marymount University and her MPhil in Criminology from the University of Cambridge.

# Prosecution and Public Defense: The Prosecutor's Role in Securing a Meaningful Right to an Attorney

Roy L. Austin, Jr., Kirk Bloodsworth, Carlos J. Martinez, and Allison Goldberg

## I. PROSECUTION AND PUBLIC DEFENSE

Kirk Bloodsworth was convicted and sentenced to death for a crime he did not commit. Charged with sexually assaulting and brutally killing a nine-year old girl, Mr. Bloodsworth began his trial after just three meetings with his defense counsel. He was convicted based on the testimony of five purported eyewitnesses, three of whom could not identify him in a line-up but saw him on TV after the crime was committed. After initially refusing, the prosecution finally agreed to DNA testing in Mr. Bloodsworth's case. After nine years in prison, two of which were spent on death row, Mr. Bloodsworth was exonerated in 1993.<sup>1</sup>

While the details of Mr. Bloodsworth's case are nuanced and devastating on numerous levels, two facts in particular are the focus of this paper: the quality of his defense and the means of the prosecution.

The Sixth Amendment guarantees all people accused of crimes the right to a speedy public trial, the right to an impartial jury, the right to information regarding the accusation, and the right to counsel. Given these constitutional guarantees, how was it possible for Mr. Bloodsworth's case to proceed as it did? How could he have met with his public defender a mere three times when his life and liberty were on the line? How was he sentenced to state-sanctioned death based on faulty eyewitness testimony? Why did the prosecution initially resist testing DNA evidence? While these

questions are specific to Mr. Bloodsworth's case, they are also corollary to the state of public defense today. They highlight the adversarial nature of the criminal justice system and the implications for persons accused, their families, communities, and victims.

There is no shortage of literature about the crisis of public defense, yet there has been a limited focus on the role of prosecutors in ensuring adequate counsel for the accused. With discretion over law enforcement priorities, charging, pretrial detention recommendations, sentencing recommendations, and plea conditions, a prosecutor's decisions affect a case at every stage of the criminal justice process. As democratically elected officials<sup>ii1</sup> and the chief local law enforcement officer, prosecutors are among the most powerful stakeholders in the criminal justice system and have the means and the mandate to use their platform to advocate for strong defense. Authored by Mr. Bloodsworth, a death row exoneree and advocate; Roy L. Austin, Jr., a former prosecutor, current litigator, and national policy expert; and Carlos J. Martinez, one of the few elected public defenders in the country,<sup>iii2</sup> serving Miami-Dade County, Florida, this paper provides (i.) a concise overview of the state of public defense; (ii.) rationale delineating how the right to counsel is vital to the prosecutor's mission; and (iii.) a path forward with tangible suggestions to strengthen indigent defense and to ensure equal justice for all.

<sup>1</sup> Prosecutors are currently elected in all but four states – Connecticut, Delaware, New Jersey, and Rhode Island.

<sup>2</sup> Public defenders are currently elected in Florida, Tennessee, and a few jurisdictions in California and Nebraska.

## II. THE STATE OF PUBLIC DEFENSE AND ITS IMPLICATIONS FOR JUSTICE

A significant portion of cases tried in the U.S. utilize indigent defense, or public defenders. Across the country, there are approximately 1,000 public defender offices at the state and local levels with about 15,000 litigating attorneys receiving over 4 million indigent defense cases a year,<sup>iv</sup> with significant variation in caseloads and budgets across jurisdictions.<sup>v</sup> In 2012, state governments spent \$2.3 billion nationally on indigent defense, comprising about ten percent of total judicial-legal expenditures by state government.<sup>vi</sup> Misdemeanors and ordinance violations constituted more than half of indigent defense cases,<sup>vii</sup><sup>3</sup> and over 80 percent of individuals charged with violent felonies in the country's largest counties qualified for indigent defense.<sup>viii</sup>

### ***1. Mounting Caseloads and Limited Funding***

The 1963 Supreme Court case *Gideon v. Wainwright*, which addressed the Sixth Amendment, held that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>ix</sup> But despite this court-affirmed right to counsel, individuals who qualify for indigent defense encounter significant structural obstacles to securing representation. Compounding this issue, public defenders’ offices across the country face mounting caseloads and limited funding.<sup>x</sup> From 2008 to 2012, state government indigent defense expenditures had an average annual decrease of 0.2 percent.<sup>xi</sup> And in 2007, nearly three-quarters of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney.<sup>xii</sup>

The convergence of growing caseloads with diminishing budgets has significant implications for the quality of public defense and for the life and liberty of individuals charged. According to the American Bar Association (ABA), “thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time,

resources, or in some cases the inclination to provide effective representation.”<sup>xiii</sup>

As caseloads exceed nationally-recognized professional standards, public defenders are left with insufficient time to dedicate to each case they are assigned.<sup>xiv</sup> There have been numerous lawsuits filed against public defenders’ offices for failing to provide adequate counsel,<sup>xv</sup> including in Louisiana, where 85 percent of people accused depend on access to public defense, and where 33 of the 42 public defender offices have stopped accepting new cases or put clients on waiting lists due to a dearth of resources.<sup>xvi</sup> A class-action lawsuit in Louisiana advanced in early 2019, with Judge Todd Hernandez writing, “The enforcement of or protection of individual constitutional rights can never be dependent upon the availability of public funds ... Whether the public defense system in the State of Louisiana violates federal and state constitutional rights of the class plaintiffs ... is a factual question that must be decided at trial.”<sup>xvii</sup> A separate court ruling in Louisiana recently struck down an agreement between the DeSoto Parish District Attorney’s Office and the Public Defender’s Office, in which the prosecutor was giving the public defender a portion of revenue from his traffic ticket diversion program. While the public defender said that his office needed the money in order to function, the judge found that the contract created a significant conflict of interest for the public defender, who is supposed to operate independently.<sup>xviii</sup> Other lawsuits relating to inadequate representation were filed in 2017 in South Carolina, and in Missouri, where “public defenders spend less than 20 percent of the minimum time recommended by the [ABA] per case.”<sup>xix</sup> In 2008, the Public Defender’s Office that Mr. Martinez now leads in Miami-Dade County moved to decline or withdraw from cases due to excessive caseloads and workload that undermined counsel’s “legal and ethical obligations to the defendants.” In 2013, in related litigation, the Florida Supreme Court affirmed the right to “competent” counsel, which includes adequate time for investigation

<sup>3</sup> Individuals charged with misdemeanors in particular often face barriers to accessing indigent defense, including not being informed of their right to counsel, being coerced into waiving counsel, or being required to pay an application fee for counsel.

<sup>4</sup> For a fuller discussion on the ways in which fines and fees criminalize poverty, undermine constitutional guarantees, and create a conflict of interest for law enforcement, see the US Department of Justice’s “Investigation of the Ferguson Police Department,” 2015

and preparation.<sup>xx</sup> But despite such rulings that confirm the right to an adequate defense, stark shortcomings persist. There has yet to be sufficient resources invested in public defense to remedy existing deficiencies or to meet the constitutional standards of reasonably effective counsel.<sup>xxi</sup>

Moreover, while the excessive workload of public defenders poses significant cause for concern, other forms of indigent defense also deserve scrutiny. State-funded court-appointed attorneys, for instance, also serve as indigent defense in many states.<sup>xxii</sup> The quality of court-appointed counsel varies widely between jurisdictions, and the difference between public defenders and court-appointed counsel can be significant. For instance, a study by the RAND Corporation found that in Philadelphia, where one in five indigent murder defendants are randomly assigned public defenders while the rest receive court-appointed private attorneys, there were considerable differences in case outcomes: “Compared to appointed counsel, public defenders in Philadelphia reduce their clients’ murder conviction rate by 19% and lower the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.<sup>xxiii</sup> Similar disparities have been found in the federal system.<sup>xxiv</sup> These disparate outcomes are disconcerting in a system that is expected to produce equal justice.

In the Miami-Dade County litigation, the public defender presented uncontroverted evidence showing that with the reduced resources and increasing number of clients and cases, he could not competently, diligently, and without conflict of interest, represent additional clients. Yet the elected prosecutor, along with the Florida Prosecuting Attorneys Association, repeatedly interjected herself to oppose the public defender’s request to decline new appointments. The Miami-Dade prosecutor also tried to prevent the ABA from filing an amicus brief detailing ethical opinions and

guidelines previously promulgated by the ABA.<sup>xxv</sup> In this scenario, the prosecutor was actively obstructing the right to competent counsel. Imagine if a prosecutor faced with that same situation would instead join the defender and advocate for adequate resources.<sup>6</sup> This new approach has become reality. Ten years after the litigation, the same Miami-Dade prosecutor and public defender together sought higher starting salaries for prosecutors and defenders.

### **ii. Equal Protection Under the Law**

The lack of adequate indigent defense is both a symptom and a cause of systemic inequities that exist throughout the criminal justice system. This deficit fundamentally undermines not only the Sixth Amendment, but also the Fourteenth Amendment’s guarantee of equal protection.

Research, human narrative, and other evidence has documented the ways in which low-income individuals and people of color are disproportionately affected by the criminal justice system at every stage, from stop and arrest, through bail, charging, sentencing, and even upon reentry.<sup>xxvi</sup> The explicit and implicit biases that lead to the overrepresentation of low-income individuals and people of color in the criminal justice system manifest in a “two-tiered justice system,”<sup>xxvii</sup> where those who can afford bail and a private attorney are more likely to be able to exercise their constitutional protections, and those who cannot confront compounding hurdles to justice, at the cost of their liberty.

### **iii. Innocent Unless Proven Guilty**

The ramifications of this two-tiered system are significant – presumption of innocence, the very foundation of the justice system, is at stake. According to a 2017 issue brief by the Institute for Innovation in Prosecution, “Of the 630,000 people in jail today, 443,000 are awaiting trial. That is, 7 in 10 people behind bars in the nation’s more than 3,000 jails are presumed innocent ... and 90 percent of those awaiting trial in jail are incarcerated because they

<sup>5</sup> In federal courts, where about three-quarters of all defendants rely on counsel funded by the government, indigent defendants with court-appointed attorneys received sentences of about eight months longer than those with public defenders.

<sup>6</sup> Former US Attorney General Eric Holder created the Office for Access to Justice in the Department of Justice “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth or status.” This Office, which has been dismantled by the current administration, co-authored a number of Amicus Briefs and Statements of Interest that supported greater resources for public defenders – see, e.g., *Adam Kuren, et al. v. Luzerne County, et al.*, *Hurrell-Harring v. State of New York*, and *Wilbur v. City of Mount Vernon*.

have not paid bond”<sup>xxviii</sup> The Bureau of Justice Statistics (BJS) reports that, “About half of defendants using a public defender or assigned counsel, compared with over three-quarters employing a private attorney, were released from jail prior to trial.”<sup>xxix</sup> People of color and low-income individuals disproportionately have public defenders or assigned counsel, and are disproportionately denied bail and detained pretrial.<sup>xxx</sup> The manifestations and implications of the plea machinery are discussed in further detail throughout this paper.

The inadequacy of indigent defense also contributes to wrongful convictions, in cases ranging from misdemeanors to felonies to capital cases, as Mr. Bloodworth’s case exemplifies. This should startle prosecutors on multiple levels. Wrongful convictions not only have monumental consequences for defendants, but directly harm victims as well, when the person who committed the crime is not identified. It took more than a decade after Mr. Bloodworth was exonerated to identify the person who killed the nine-year-old girl.<sup>xxxi</sup> The National Registry of Exonerations reports 2,195 exonerations in the U.S. since 1989, amounting to 19,350 years lost in prison.<sup>xxxii</sup> A study by the Innocence Project found that “54 of the first 255 DNA exonerees (21%) raised claims of ineffective assistance of counsel. In the overwhelming majority of these appeals, the courts rejected the claims (81%), however, in seven cases, courts agreed with appellants and found ineffective assistance of counsel, leading to reversals of convictions for six exonerees and new representation in one case.”<sup>xxxiii</sup> We also cannot ignore that based on exonerations, it appears that innocent African-Americans are more likely to be convicted than innocent Whites.<sup>xxxiv</sup>

It is a common cliché to say that the arrest, charge, conviction, and incarceration of even one innocent individual constitutes an unconscionable miscarriage of justice. But the sad reality is that far too many in the criminal justice system simply accept that this is a regular occurrence, a price to be paid for increased public safety. But the right to counsel is more than just a mechanism to prevent wrongful convictions – for even, and perhaps especially, those who commit a crime deserve adequate defense, constitutional

protections, and the pursuit of justice. Adequately resourced, the defense serves as a check on unbridled government power. Indeed, as is evidenced in the Exclusionary Rule, the criminal justice system is built in such a way as to mandate protections for everyone touched by the criminal justice system and to limit state power.<sup>xxxv</sup> It is the responsibility of prosecutors to ensure the protection of these rights not only because it is constitutional and just, but because it is central to their mission of enhancing public safety and ensuring fairness.

### **III. THE RIGHT TO COUNSEL: FUNDAMENTAL TO PROSECUTOR’S MISSION OF PUBLIC SAFETY AND FAIRNESS**

The state of public defense and its implications for justice, especially for traditionally marginalized communities, raises significant questions about the legitimacy of the criminal justice system at its most basic level, and about the role and responsibilities of the prosecutor. After an arrest, an individual faces charges, a pretrial hearing, and, in more than 90 percent of cases that are disposed, a plea deal.<sup>xxxvi</sup> The defense counsel’s most obvious role is to build a defense for the accused, whether in obtaining pretrial release, charge reductions, or dismissals. But data shows this “defense” process is compromised for millions of individuals. In a system in which persons are presumed innocent unless proven guilty, how can cases proceed when a person does not have adequate, much less zealous, representation? How much faith can the general public have in a system in which the vast majority of people facing charges do not exercise their constitutional right to a public trial? What is the role of the prosecutor – a public official dedicated to enforcing the law and representing the public – in ensuring that all individuals in the justice system have a reasonably adequate defense?

#### ***1. The Adversarial System***

The adversarial nature of the criminal justice system today begs these and other pivotal questions. In a system in which the defense and the prosecutor are on opposing sides, how do the aims of winning a case affect the pursuit of justice? What should a prosecutor do when she knows that a defendant is

receiving inadequate counsel? And, how can a prosecutor who is judged by winning cases be expected to take unrequired steps to level the playing field?

In Mr. Bloodsworth's case, prosecutors and police withheld potentially exculpatory evidence in their pursuit of a guilty verdict. Even after this led a court to overturn his conviction in 1986, Mr. Bloodsworth was retried, convicted, and sentenced to two life terms. Part of the reason for this second conviction, Mr. Bloodsworth believes, is because his case was tried beyond the court of law, in the court of public opinion. His picture was repeatedly shown on TV, tainting eyewitness testimony. Like many defendants, he was labeled an "enemy of the people." During the trial, the prosecutor described him as a "monster." Following his exoneration, the prosecutor went as far as saying, "I believe that he is not guilty, I'm not prepared to say he's innocent." Even in less egregious cases, the dehumanizing language used to describe people accused and the adversarial nature of the justice system can convolute prosecutors' focus and means, placing their aims on a conviction rather than on justice.

The adversarial system is also evident in jury selection. A new study from the Jury Sunshine Project, led by Ronald F. Wright at Wake Forest University School of Law, confirmed the long-held belief that racial bias permeates peremptory juror challenges.<sup>xxxviii</sup> "Folk wisdom ... is that prosecutors use these challenges to remove nonwhite jurors, who are statistically more likely to acquit," states Wright.<sup>xxxix</sup> Data from the Jury Sunshine Project confirms this: "prosecutors remove about 20 percent of African-Americans available in the jury pool, compared with about 10 percent of whites. Defense attorneys, seemingly in response, remove more of the white jurors (22 percent) than black jurors (10 percent) left in the post-judge-and-prosecutor pool." While this data does not reveal motives for these challenges, one can extrapolate from the persistence of the data that prosecutors are aiming to create a jury sympathetic to their case, at the expense of constitutional protections. "In a system that already disproportionately prosecutes people

of color, hedging the constitutional rights of defendants can be particularly harmful," cautions Wright. This oppositional structure is exacerbated by the unequal playing field between prosecution and public defense.

This imbalance is evident in a number of ways. For example, the Brennan Center for Justice reports that nationally, states spent \$2.2 billion on indigent defense in 2012, compared to the total nearly \$6 billion budget of all state prosecutors' offices in 2007.<sup>xi</sup> Moreover, 40 percent of county-based public defender offices employed no investigators in 2007,<sup>xii</sup> while on the prosecutor's side, medium-sized offices (serving a population of 100,000 to 249,999) employed a median of two investigators, with larger offices employing more.<sup>xiii</sup> These resources are in addition to investigations conducted by the police and sheriff's departments, which support the prosecutor's case. Given these differences in resources and capacity, public defenders cannot be expected to fully and constitutionally defend their clients and effectively challenge the government's evidence.

### ***ii. The Plea Machinery***

When a person is held on cash bail and detained pretrial, he faces significant incentives to enter a plea. Despite the constitutional right to a fair and speedy public trial, people can be detained for years before being convicted.<sup>7</sup> Even short-term periods of incarceration carry significant and destabilizing consequences, hindering access to public benefits and housing, straining childcare and custody, and damaging ties to employment.<sup>xliii</sup> Whether a defendant is detained or not, prosecutors often tell defendants that they will face steeper penalties after trial if they are found guilty, including lengthier sentences and/or more stringent sanctions. This is a threat that usually proves true.<sup>xliiv</sup> In an analysis of the use and implications of trial penalties, the National Association of Criminal Defense Lawyers (NACDL) notes that the significant discrepancy between reduced sanctions proffered in plea deals, relative to the potentially strenuous

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<sup>7</sup> Kalief Browder was accused of stealing a backpack and held on Rikers Island for three years, nearly two of which he spent in solitary confinement. He refused to accept a plea deal for a low-level crime he did not commit, and his case was eventually dismissed. But the trauma of his pre-trial detention had lasting effects. He committed suicide in 2015. His story spurred national attention on the pressure to plea, the realities of cash bail, and solitary confinement.

sanctions faced at trial, poses a substantial risk to defendants, and “raises serious doubt that the initial sentences were reasonable in the first place.”<sup>xlv</sup> NACDL adds, “there is ample evidence that federal criminal defendants are being coerced to plead guilty.”<sup>xlvi</sup> In addition to trial penalties, prosecutors often set deadlines to pressure defendants to enter a plea deal. Plea deadlines loom large over defense counsel, who often do not have sufficient time to investigate cases or obtain access to evidence. In many states, in fact, prosecutors are not mandated to provide complete discovery until right before trial, so in the vast majority of cases that result in a plea deal, many defendants never see evidence against them. Facing the harms of detention, the risk of trial penalties, and limited information about allegations against them, many “defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring,” writes the ABA.<sup>xlvii</sup> By entering a plea deal, defendants incur a criminal record and collateral consequences including barriers to public aid, education, employment, and civic engagement. Another penalty seldom discussed is the presumption of guilt that attaches to that convicted individual in the event he is arrested on a subsequent offense. While these collateral consequences may initially seem negligible compared to pretrial detention and the risk faced at trial, they are actually significant and enduring for people charged, their families, and communities.<sup>xlviii</sup>

Given the implications of plea deals for people accused and constitutional standards, why would prosecutors pursue and defense attorneys recommend plea deals so often? The reason may be that for all court stakeholders – prosecutors, defense attorneys, and judges (many of whom used to be prosecutors) – plea deals require far less time and fewer resources than a trial. For prosecutors, plea deals factor into their conviction rates, a traditional metric of prosecutorial success, and reduce the professional risk of losing a trial. For defense counsel, the risk of trial penalties necessitates that they explain to their clients the potential benefits of a plea, including a more lenient sentence and quicker resolution. Thus, while prosecution and defense may

debate the terms of a plea deal, the plea machinery in fact weakens many of the expected benefits of the adversarial system, such as a public trial, adversarial testing of evidence, and forcing a prosecutor to prove guilt beyond a reasonable doubt.<sup>xlix</sup>

The use of cash bail, the significant fiscal and human costs of pretrial detention, and the incentives given by prosecutors and inadequate or under-resourced defense place substantial pressure on defendants to enter a plea. Research is only beginning to unearth the detriments of this system that those directly impacted have long documented. Thus far, the plea machinery benefits have been couched in terms of efficiency, without regard to the delegitimizing costs of such an unjust system. And the public is increasingly asking: what would the system look like – and could it function more effectively – if more cases went to trial?

### ***iii. Case Processing***

This question must be considered within the context of case processing today. Legal professionals often express concern that the system would break from sheer caseload if more cases went to trial rather than resulting in pleas. But evidence demonstrates that in many ways, the system is already broken. What if the focus, instead, was on how caseloads can be reduced?

Prosecutors receive a case after police make an arrest. There is significant empirical evidence documenting the implicit and explicit biases that are present in policing practices, and these can be exacerbated (if not created) in prosecution. In a study on implicit bias in prosecutors’ offices, the Vera Institute of Justice showed how accepting the majority of cases from police and compounding charges during plea negotiations (a routine practice in many prosecutors’ offices), can contribute to disparate outcomes for defendants,<sup>li</sup> while also increasing the workload of public defenders.

Prosecutors have an opportunity and a responsibility to limit their case intake. One way to achieve this goal is by not pursuing charges for low-level offenses that pose a limited public safety risk, such as marijuana possession,

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<sup>8</sup> Judge Gerard E. Lynch has argued that the US now operates an “administrative” system of justice.

as discussed in further detail below. Limiting case intake can help prosecutors alleviate racial disparities, allowing them to focus their resources on serious crime while simultaneously limiting the caseload of their local public defender's office. If prosecutors charged fewer people, both prosecutors and public defenders would have fewer cases. Defenders would have more time to dedicate to the preparation of each case and could more effectively represent each client. There would be less incentive to recommend plea deals, because counsel would have sufficient information about the case and the client to put forth an effective defense. This rationale leads to a smaller criminal justice footprint, where fewer individuals, families, and communities are impacted by arrests, charges, and convictions, and where the justice system as a whole earns greater trust and legitimacy.

#### ***iv. Mission and Metrics of the Prosecutor's Office***

This reimagined framework aligns with the existing mission of prosecutors – to enhance safety and ensure fairness – but it requires a reimagining of the metrics of the prosecutor's office. Traditionally, prosecutors evaluate the effectiveness of their office by conviction rates (which includes guilty pleas).<sup>iii</sup> By winning a case, prosecutors feel that they are meeting the mandate of their office to secure justice and enforce the law. While this at least partially stems from the adversarial nature of the criminal justice system, it is also based on the belief that the accused is guilty, and that the prosecutor's – the people's – evidence demonstrates this fact. In an effort to fulfill one's campaign promises to keep their constituents safe, elected prosecutors demonstrate that they are charging, convicting, and incarcerating lots of people.

However, simply locking up a lot of people for lengthy sentences can be counterproductive, and prosecutors have a duty to consider the actual impact of these decisions. Those most impacted by the criminal justice system, both defendants and victims, disproportionately come from low-income communities of color that face structural obstacles to accessing counsel and justice, while also confronting the significant costs – fiscally and on a human level – of incarceration. As is often said “today's victim is tomorrow's defendant.” Prosecutors

have a responsibility to rethink sources of harm and consider how and when prosecution and incarceration actually enhance public safety, and when they do not.<sup>iii</sup> As democratically elected officials, prosecutors are directly accountable to the communities they serve. While prosecutors' mission is to represent the state and protect the people, they must also appreciate that this responsibility extends to those who face charges. By considering the empirical research and data on the state of indigent defense; the needs of their communities, including those directly impacted by the justice system; and the human testimony documenting the impact of inadequate defense, prosecutors can imagine new metrics founded on community-centered standards of safety, equity, wellness, and human dignity.

How can these metrics be realized? Prosecutors across the country are beginning to consider how to move these principles into practice and to pursue justice rather than just convictions. While overcoming deeply entrenched practices is not easy, it is necessary, and there are tangible steps that prosecutors can immediately take to support and ensure robust defense.

#### **IV. A PATH FORWARD**

For there to be any notion of justice, there must be a robust defense bar. The discussion above has highlighted existing obstacles to adequate counsel, and why the prosecutor has a vested interest in ensuring this constitutional right. Outlined below are concrete steps that prosecutors can take within their jurisdictions to strengthen the right to an attorney, including i. supporting funding for indigent defense; ii. ensuring transparency and integrity in their offices; and iii. minimizing the criminal justice footprint.

##### ***i. Ensure a Robust Defense: Support Funding and Oversight Mechanisms***

###### ***a. Support Funding for Public Defense***

A principal obstacle to effective and competent counsel today is the large workloads of and limited funding dedicated to public defense. According to the ABA, (front line) prosecutors have a special responsibility to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”<sup>iv</sup> But head prosecutors should do

more. Prosecutors, as democratically elected officials and chief local law enforcement officers, have a strong voice in policy debates and legislative matters, and an important public platform to support funding for indigent defense. While it is unlikely, and potentially detrimental, to expect prosecutors to point out flaws in their own cases or the deficits of specific counsel, it is reasonable to expect that elected prosecutors support funding for public defenders' offices, as resources for indigent defense is in fact fundamental to prosecutors' mission of safety and fairness. Chief prosecutors and chief public defenders can also work together to speak to state legislatures for greater budget allocations towards crime labs, alternatives to incarceration, and other common goals.

There are also opportunities for prosecutors to consider and support reinvestment from interconnected inequities. Imagine if the millions spent on certain types of prosecutions, were instead invested in ensuring a meaningful right to effective and competent counsel. For instance, it is estimated that between 1982 and 1997, the cost of capital trials to county budgets was \$1.6 billion.<sup>lv</sup> Other studies focusing on individual states have found similar results. In Maryland,<sup>lvi</sup> for instance, where Mr. Bloodsworth was sentenced to the death penalty, a 2008 study by the Urban Institute found that "the lifetime cost to Maryland taxpayers [for the] capitally-prosecuted cases will be \$186 million."<sup>lviii</sup> If directed towards ensuring a robust defense rather than towards state-sanctioned execution, these significant state expenditures could transform the justice system.

Several elected prosecutors have voiced their decisions to not pursue the death penalty in states where it is still permitted. District Attorney Beth McCann of Denver, Colorado has stated, "I don't think that the state should be in the business of killing people."<sup>lix</sup> In King County, Washington, Prosecuting Attorney Dan Satterberg called on the legislature to repeal the state's death penalty law, asserting, the "uncertain path to execution in our state may take 20 years ... and is simply not worth the time, the money, nor the delay in the delivery of justice."<sup>lxi</sup> PA Satterberg also noted that innocent people have been placed on death row in other parts of the country. Indeed, 162 people, including

Mr. Bloodsworth, have been released from death row after evidence of their innocence was produced.<sup>lxii</sup> Newly-elected Philadelphia District Attorney Larry Krasner ran on a platform including the promise that he would "never" seek the death penalty, citing its costs and racial biases.<sup>lxiii</sup> There is ample research documenting these biases based on the race of the defendant and the race of the victim. African-Americans comprise 42 percent of those on death row, but just 13 percent of the U.S. population.<sup>lxiv</sup> According to Equal Justice Initiative (EJI), "Fewer than 5 percent of all murders in Alabama involve black defendants and white victims, but over 52 percent of black death row prisoners have been sentenced for killing someone white."<sup>lxv</sup> EJI adds, "only two of the 42 elected District Attorneys in Alabama are black."

Unfortunately, such bold stances against the death penalty do not come without risks. In 2017, when Aramis Ayala, Florida's first and only elected African-American prosecutor, chose to seek life without parole rather than the death penalty in a murder case, then-Governor Rick Scott removed 30 homicide cases from her office and the state legislature cut \$1.3 million from her budget and reduced her staff by 21 people.<sup>lxvi</sup> After State's Attorney Ayala filed a petition against the Governor, the Florida Prosecuting Attorneys Association (FPAA) filed an amicus brief against SA Ayala, claiming that she "violated the separation-of-powers doctrine by effectively setting her own policy."<sup>lxvii</sup> FPAA's petition revealed the often-retributive mindset of prosecutors, and the challenge in considering new ways to exercise discretion. As Mr. Austin argued in his representation of SA Ayala, this decision, which was based on fiscal costs and public safety outcomes, should have been in the sole discretion of the State's Attorney. When the Governor usurped her power and the Florida Supreme Court denied her petition, they raised significant questions about prosecutors' authority as elected officials and their capacity to use their discretion to fulfill the responsibilities of their office.<sup>lxviii</sup> Moreover, they undermined democracy, as 99.7 percent of voters in Orange-Osceola County, Florida voted for SA Ayala in the general election, entrusting her to exercise her discretion to pursue justice.

*b. Promote Mechanisms of Oversight and Accountability*

The Ayala case, the delegation of judicial-legal expenditures, and the present state of public defense raise significant questions about oversight and accountability of prosecutors, the government, and their discretion. Is the prosecutor's discretion a point of debate within the executive branch? Or is it a tool that should be monitored by the electorate? What are current mechanisms of oversight and accountability of prosecutors and how effective are they?

Prosecutors are the most consistently-elected law enforcement actors in the U.S., elected in more jurisdictions than sheriffs, judges, or public defenders.<sup>lxxix</sup> However, while elections are designed to be a means of accountability where candidates must articulate their policies, priorities, and records, this mechanism has traditionally not been as strong as it could be for prosecutors. According to a 2009 study by Ronald F. Wright, 85 percent of incumbent prosecutors run unopposed, compared with 35 percent of state legislative incumbents.<sup>lxxx</sup> Moreover, as discussed throughout this paper, of those who do campaign during elections, prosecutors generally tout their conviction rates and sentence lengths, metrics that do not effectively convey the ways in which they are enhancing safety and ensuring fairness.<sup>lxxxi</sup>

However, the power of the prosecutor has recently been under increasing scrutiny, with unprecedented attention focused on prosecutor elections. While the criminal justice system is designed to hold those who commit crimes accountable, communities across the country are demanding that the system itself must also be held to account. As communities call for prosecutor candidates to demonstrate their commitment to building a more equitable and effective criminal justice system, prosecutors are increasingly heeding the call. In prosecutor elections in 2016 and 2018, there was an acute focus in a number of races on prosecutor records beyond conviction rates, including on how prosecutors are minimizing the criminal justice footprint and reducing racial disparities. This shift amongst constituents and prosecutor candidates accompanies a growing recognition that prosecutors wield

significant power, and should represent their entire jurisdiction including victims, witnesses, and people accused.

At the federal level, the Inspector General and the Office of Professional Responsibility investigate allegations of wrongdoing or misconduct and have the power to ensure accountability if a federal prosecutor breaches her obligation or is unfit to fulfill her role. There is currently no such oversight body in many states and localities – an opportunity for improvement. In August 2018, New York Governor Andrew Cuomo signed a bill that would create a commission to investigate complaints about prosecutorial misconduct among the state's 62 district attorneys.<sup>lxxii</sup> But the District Attorneys Association of the State of New York filed a lawsuit against the bill, effectively halting it with no alternative oversight measures proposed.<sup>lxxiii</sup>

As opposed to the elected position that most state and local prosecutors occupy, public defenders are elected only in Florida, Tennessee, and a few jurisdictions in California and Nebraska.<sup>lxxiv</sup> It has been argued that public oversight of public defenders feels less crucial than that of prosecutors, because defense is legally and ethically bound to represent the legal interests of their clients. But these obligations are often more stringent on paper than in practice.

In the 1984 case *Strickland v. Washington*, David Washington sought habeas corpus relief after his defense counsel did not seek character witnesses or a psychiatric evaluation and Mr. Washington was subsequently sentenced to death. While the U.S. Court of Appeals granted Mr. Washington's petition and wrote that defendants have a right to "reasonably effective assistance given the totality of the circumstances,"<sup>lxxv</sup> the Supreme Court reversed this judgment, upholding Mr. Washington's conviction and sentence. The Supreme Court ruling created a two-part test to determine whether defense is inadequate: it must be shown that (1) counsel's performance fell below an "objective standard of reasonableness," and (2) more adequate counsel would lead to a different outcome. In practice, this standard places a high burden of proof on defendants to prove inadequate counsel.<sup>lxxvi</sup> In a 1996 ruling,

the Texas Court of Criminal Appeals upheld a capital conviction when defense counsel slept through parts of the trial, stating, “Although we do not condone Benn’s [the sleeping attorney’s] behavior, viewing the totality of circumstances, appellant [George McFarland] fails to make any showing that he was not effectively represented at trial.” Because Benn had co-counsel, his representation was deemed adequate in the eyes of the law.<sup>lxxvii9</sup> Such court rulings have systematically weakened defendants’ constitutional protections under the Sixth Amendment with ramifications that continue to this day.

Beyond the courts and local efforts, national legal organizations have tried to define normative standards for effective and competent defense. The ABA’s *Ten Principles of a Public Defense Delivery System*, for example, is frequently cited as the standard for “delivering indigent criminal defense that is effective, efficient, ethical, and conflict-free.”<sup>lxxviii</sup> The ABA’s *Principles* has also been cited in studies and lawsuits showing a deficit of adequate defense. Additionally, the ABA adopted the *Eight Guidelines of Public Defense Related to Excessive Workloads* to address the issues of inadequate resources to competently represent defendants. But again, there are few mechanisms in place to ensure that these standards are upheld or to levy accountability when they are violated. And when a ruling or a report finds inadequate defense and affirms the right to counsel, rarely do these findings result in the designation of resources to strengthen indigent defense and remedy the imbalance. For individuals charged who find themselves with insufficient representation, there are limited options for relief. Moreover, if they enter a plea, as the vast majority of individuals convicted do, they face structural obstacles to even seeking relief or accountability of their counsel.<sup>lxxix</sup> While the judge or jury could, theoretically, monitor the actions of the prosecutor and the defense counsel, the prevalence of plea deals makes this improbable.

While general incompetence can be found on both sides of the courtroom, all local criminal justice stakeholders – prosecutors,

defense, judges, and court watchers<sup>lxxx</sup> – should seek to improve the quality of defense, pursue remedies for people who did not receive adequate representation, and ensure that constitutional standards are upheld. The adversarial system, as well as the general belief amongst prosecutors that the person before them is guilty and should be held to account, reduces the probability that prosecutors will raise these concerns. Prosecutors should be tasked with advocating for adequate resources to ensure that defense counsel has the capacity to meet the needs of their clients, and should take measures to enhance transparency and integrity within their own offices.

**ii. Ensure Transparency and Integrity: Implement Discovery Best Practices, Forensics Standards, Case and Conviction Reviews, and Data Collection and Publication**

**a. Discovery**

A key component of the adversarial system today is discovery practices, which in many jurisdictions, preclude the person charged from knowing evidence against them until right before trial. In most states, this means that only the very few defendants who go to trial ever see the evidence against them. Rather than prompting the testing and scrutiny of evidence – a process that could better ensure justice – the oppositional structure of the justice system leads many prosecutors to not disclose evidence until they are mandated to do so. This not only hinders the defense’s ability to build a case and prepare for trial, it also pressures defendants to enter a plea, ultimately compromising due process. Mr. Bloodworth did not see the serology report used in his case until trial, nor was it ever explained to him. The report cited that the blood found at the scene was different from Mr. Bloodworth’s O Type, a fact his counsel did not raise and no one sought to question, despite the profound exculpatory potential of this evidence.

The legal system operates on the presumption of innocence. The burden is on the prosecutor to prove guilt beyond a reasonable doubt. However, the “presumption of innocence is

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<sup>9</sup> Benn was retained counsel.

seriously damaged when the defense is given insufficient opportunity to cast doubt upon the prosecution's case."<sup>lxxxix</sup>

In an effort to uphold constitutional protections, Texas adopted what is deemed to be a national model and several other jurisdictions are considering how to ensure open file discovery.<sup>lxxxii</sup> The New Jersey Supreme Court, for instance, recently ruled that prosecutors must provide evidence if they move to have someone detained before trial. The ruling followed statewide bail reform, which eliminated cash bail and required that pretrial detention must be based solely on a person's risk. Thus, "under the old system, defendants were only entitled to discovery later in court proceedings, often months after their arrest. But bail reform pushed up that timeline, and the Supreme Court dispute centered on how much discovery a defendant should get immediately after their arrest, when they have a right to due process under the Constitution because the judge can now order them held without bail."<sup>lxxxiii</sup> While prosecutors argued that open file discovery could undermine active investigations and harm witness protection, the court ruled that constitutional guarantees took priority. Prosecutors and other stakeholders should monitor the impact of the New Jersey ruling.

Additionally, a 2007 report by the Justice Project outlines discovery best practices, including open-file discovery, automatic and mandatory disclosures, timing, certification, and remedies for noncompliance. The report highlights Colorado's discovery procedures, which mandate that prosecutors provide "written or recorded statements of the accused and co-defendants as soon as possible (but no later than twenty calendar days after the filing of charges) and that grand jury transcripts should be provided no longer than thirty days after indictment. All other discoverable materials should be provided no later than thirty days before trial."<sup>lxxxiv</sup> Clear and codified timeframes for discovery can provide standards for constitutional proceedings and quality defense. In order to ensure that due process is upheld and in order to avoid any miscarriage of justice, it is in prosecutors' best interest to consider the potential for and impact of strengthening discovery procedures and standards of evidence in their jurisdictions.

#### *b. Forensics*

It was Mr. Bloodsworth's own research and advocacy that led to the testing of DNA in his case. After reading about DNA evidence used to identify and charge a person in the U.K., Mr. Bloodsworth realized it could also be used to review his conviction. When he first advocated for this, the prosecution said that all DNA evidence had been destroyed. It was only because the judge in his second trial retained a sample in his chambers that the DNA could be tested, ultimately leading to his exoneration. Mr. Bloodsworth was the first person on death row to be exonerated based on DNA evidence. In 1996, Mr. Bloodsworth's case was one of several highlighted in a National Institute of Justice (NIJ) report about "the importance and utility of DNA evidence [and ongoing] challenges to the scientific and justice communities."

The evolution of forensics and the importance of evidence validity require prosecutors to use their power to ensure the highest standards of integrity in the courtroom, including by resisting evidence based on questionable science. A report issued in 2016 by the President's Council of Advisors on Science and Technology (PCAST) documented ways to strengthen and ensure the validity of forensic science. The report identified two important gaps in the way forensic evidence is used in the nation's legal system: "(1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable."<sup>lxxxv</sup> The report aimed to help close these gaps by strengthening the methods with which evidence is collected, tested, and analyzed, and by identifying evidence based on faulty science yet routinely used in criminal cases, such as hair, bullets, bitemarks, and tire or shoe treads. According to NIJ, many of those who have been exonerated based on DNA were initially convicted based on such questionable evidence.

Despite landmarks in scientific research and rulings over the last two decades, faulty evidence persists in the justice system. Less than four months into the Trump Administration, then-Attorney General Jeff Sessions ended

the National Commission on Forensic Science, a partnership between the U.S. Department of Justice and independent scientists that was working to raise standards of scientific evidence. Absent federal leadership on research and criteria to evaluate the validity of evidence, state and local prosecutors should ensure that all evidence meets the highest standards of scientific integrity, and public defenders must have the capacity and inclination to present, review, and challenge evidence.

### *c. Case and Conviction Reviews*

Prosecutors across the country are increasingly building infrastructure within their offices for case and conviction reviews. Conviction integrity units (CIUs) and other review mechanisms help ensure that ADAs are trained in ethics and best practices, prevent wrongful convictions, and review claims of prosecutorial misconduct and claims of innocence.<sup>lxxxvi</sup> There are ongoing debates within the field about whether CIUs should be used to overturn convictions based on legal innocence (beyond a reasonable doubt) or definitive innocence; whether CIUs should be granted for people who pled guilty, i.e., admitted guilt (taken in the context of the many pressures to plea discussed above); and how lessons from CIUs should be ingrained within a prosecutor's office.

Darcel Clark, District Attorney of Bronx, New York, implemented a CIU in her office within her first few months. By April 2017, DA Clark's CIU reviewed 41 cases, conducted 10 in-depth investigations, and asked a judge to vacate two murder convictions.<sup>lxxxvii</sup> The CIU falls within DA Clark's Professional Responsibility Bureau, which also includes a Litigation Training Unit, a Best Practices Committee, and an Ethics Committee. Ingraining the CIU within a bureau that advances best practices more broadly can help to ensure that all ADAs are prioritizing ethics, safety, fairness, and justice over winning a case.

CIUs are invaluable in helping to identify errors on the back-end after a case is closed, but they also have the potential to be used as a tool to inform front-end procedures in order to prevent

future errors. If a conviction is overturned, prosecutors have a responsibility to scrutinize that case and every decision-point that led to a conviction. Analyzing these cases closely may initially cause hesitation. Many sitting judges are former prosecutors, so overturning convictions may spur unease on the bench, while within the office, senior prosecutors who have risen through the ranks based on now-questionable convictions may resist any action that could jeopardize their record. Rather than being deterred, however, prosecutors can ease some of this tension by emphasizing structural lessons and forward-looking accountability,<sup>10</sup> except in instances of evident misconduct. The focus on lessons to inform structural changes can help to prevent future erroneous charges and convictions from occurring.

In order to prevent future injustices like the one he endured, Mr. Bloodworth has been a consistent advocate for stronger protections for victims and individuals accused. His work helped lead to the Justice for All Act, which includes the Kirk Bloodworth Postconviction DNA Testing Grant Program, which helps states defray the costs of post-conviction DNA testing. But significant work remains. Mr. Bloodworth emphasizes that even after he was exonerated, he had to report his felony conviction on job applications, hindering potential employment opportunities.<sup>lxxxix11</sup> Prosecutors have a duty not only to ensure that their offices provide strong conviction reviews, but also that exonerated individuals have access to compensation, reentry support, and all available legal remedies.

### *d. Consequences of Arrest or Conviction*

With recognition of the significant hurdles that collateral consequences pose beyond the term of a sentence, prosecutors are increasingly taking responsibility on the front-end of case processing to ensure that defendants are aware of the potential implications of a conviction. In *Padilla v. Kentucky*, the Supreme Court ruled that defense counsel must inform their clients who are not U.S. citizens that a plea deal may result in deportation.<sup>xc</sup> This ruling recognizes that any notion of equal

<sup>10</sup> For more on "forward-looking accountability," see the National Institute of Justice's "Sentinel Event" initiative.

<sup>11</sup> Mr. Austin worked on the federal government's reentry initiatives during the Obama Administration, working to ensure that all formerly incarcerated people, including exonerees, have access to opportunities for reentry and reintegration.

justice is compromised if one person receives a finite sanction, and another endures a life sentence of deportation. The implications of this decision extend to broader collateral consequences that a plea deal may produce.<sup>xci</sup> While defense attorneys have a mandate to inform their clients, prosecutors too have a vested interest in ensuring that people facing charges understand the consequences of a conviction, including a plea deal. Many prosecutors across the country have refined their office's policies in order to align with *Padilla*. For instance, County Attorney John Choi (Ramsey County, Minnesota) and District Attorney Eric Gonzalez (Kings County, New York) have hired immigration attorneys to guide people facing charges, and they are considering alternative plea deals and sanctions that do not trigger deportation.<sup>xcii</sup>

In November 2018, the New York Supreme Court ruled in *People v. Suazo* that jury trials are required when a person charged faces risk of deportation. Writing for the majority, Judge Leslie Stein stated, "It is now beyond cavil that the penalty of deportation is among the most extreme and that it may, in some circumstances, rival incarceration in its loss of liberty."<sup>xciiii</sup> The case, involving a misdemeanor charge against Saylor Suazo, a Honduran citizen, has potentially significant implications for the consideration of collateral consequences beyond deportation and the right to trial. Prosecutors and other criminal justice stakeholders would be wise to watch how the trial impacts New York, and to consider how they can use their discretion to minimize collateral harm.

Because of the inadequacy of the *Strickland* standard, which places the burden on defendants to prove inadequate counsel, what obligation should prosecutors have to monitor arrests proactively and not retrospectively after someone has been harmed by the wrongdoing? What better examples exist of the need for proactive measures than the highly publicized instances of widespread wrongdoing in the Biscayne Park and Baltimore police departments?<sup>xciiv</sup>

Throughout state courts in the United States, there are hundreds of thousands of low-level misdemeanor and criminal traffic cases every year where the defendant has no attorney. The judge or magistrate cannot legally advise an unrepresented defendant. But what about the prosecutor? In the role as minister of justice, shouldn't the prosecutor be ensuring that the stop of the defendant was constitutional? Shouldn't the prosecutor's office have an early warning system to detect trends in bad arrests by specific officers, units, or departments, whether due to lack of probable cause for the charge or Fourth or Fifth Amendment constitutional violations? Should prosecutors create a "Brady list" for officers who routinely violate Fourth or Fifth Amendment rights?<sup>xcv</sup> Should they create a "no call" list for officers who have lied under oath? Because of the potential conflict of interest for a prosecutor that has to work with local law enforcement to make her cases, should there be a statewide mechanism to investigate instances of wrongdoing or perjury? These questions seem particularly urgent, as recent research reveals that in many jurisdictions, prosecutors file charges in the vast majority of arrests, with little scrutiny over the policing practices or arresting charges. Visiting Law Professor at Harvard Law School Alexandra Natapoff writes, "In jurisdictions with such low declination rates, over 90 percent of arrests convert to criminal charges without much scrutiny; getting arrested is tantamount to being charged with a crime."<sup>xcvi</sup>

#### *e. Data*

In order to fully understand the impact of prosecutors' decisions, there is a need for comprehensive data.<sup>12</sup> Within prosecutors' offices and jurisdictions more broadly, there has been little data collected or published on prosecutorial discretion. Several organizations involved in criminal justice, including the MacArthur Foundation, Measures for Justice, and the Vera Institute of Justice are currently developing initiatives to improve data collection and analysis in prosecution. There are also immediate, straightforward steps that prosecutors can take to harness the power of data in their office.

<sup>12</sup> Calling for more transparency to address disparities, the State of Florida adopted the most comprehensive criminal justice data bill in the nation in 2018 (SB 1392).

Simple data collection on case intake can help identify charges that are driving caseloads and racial disparities. For instance, prosecutors can obtain significant information about their office's impact by implementing a policy that ADAs collect information on the demographics of defendants and officers, arresting charges and charges filed, and outcomes at each stage of case processing. By integrating data collection within their offices, prosecutors can also help to identify disparities in process and outcomes; among private counsel, public defenders, and court-appointed attorneys; factors that lead to case dismissal; and motion practices and metrics of their office's efficacy, including recidivism but also encompassing broader areas of equity and community well-being. This data can help to refine prosecutors' strategies, focus their resources on the most pressing public safety issues, and increase system legitimacy.

Collecting and publishing data can also improve trust with local communities and provide the public with more effective standards by which to evaluate their prosecutor. For instance, communities can use data to evaluate whether charges and case outcomes have a disparate impact, how public resources are used in case dispositions, plea deals, and sentencing recommendations, and even whether prosecutors use peremptory challenges in a discriminatory way.<sup>xcvii</sup> New metrics and mechanisms for transparency are central to the prosecutor's role as an elected official, and to community trust. Reports on the data can help the prosecutor better explain court processes and outcomes. When communities can see the strategies behind and impact of their prosecutors' decisions, they are more likely to believe in the mission of and engage with prosecutors. Transparency is vital for prosecutors' legitimacy, an essential component of engaging with victims and witnesses. Ensuring transparency is also critical to the prosecutor's role as an elected official, and can enhance mechanisms of oversight and accountability.

**iii. Minimize the Criminal Justice Footprint: Decline to Prosecute, Implement Alternatives to Cash Bail, Promote Alternatives to Incarceration**

While each of the above actions can help improve access to justice, there is also an increasing recognition of the need to

minimize the overall criminal justice footprint. With discretion at the juncture of arrest and incarceration, prosecutors can help direct people away from the criminal justice system, minimizing the harms of state supervision and criminal records. By declining to prosecute, implementing alternatives to cash bail, and promoting alternatives to incarceration, prosecutors can decrease caseloads and burdens on their staff and on public defenders, focus resources on the most pressing public safety issues, and advance a more equitable and effective criminal justice system.

***a. Decline to Prosecute***

Prosecutors are increasingly using their discretion to decline to prosecute cases that do not pose an immediate threat to public safety. This is partly in response to the growing scrutiny of and public pressure on prosecutors, and in response to the empirical data and human testimony revealing the costs of mass incarceration. By limiting case intake, prosecutors can focus their finite resources on pressing public safety issues, and can help to limit the mounting caseloads that public defenders face.

For example, in Miami-Dade County, Florida, State Attorney Katherine Fernandez Rundle (with the support of the Public Defender, the Florida Department of Juvenile Justice, the Dade Chiefs of Police Association, the County Commission, the municipalities, and the Miami-Dade Juvenile Services Department) instituted the juvenile civil citation program more than a decade ago. Civil citation allows an individual who would otherwise be charged with a misdemeanor offense to instead perform community service and not become saddled with a criminal arrest record. That program was expanded to adults several years ago.

In Manhattan, New York District Attorney Cyrus Vance, Jr. announced that his office will no longer prosecute several low-level offenses, including possession of marijuana. In the announcement, DA Vance cited, "that black and Hispanic individuals in neighborhoods of color continue to be arrested for marijuana offenses at much higher rates than their similarly situated counterparts in predominantly white communities," and that these arrests have a harmful impact on "job searches,

schooling, family members, immigration status, and community involvement.”<sup>xcviii</sup> DA Vance’s decision to decline to prosecute marijuana possession and other low-level offenses (such as fare evasion, or jumping the subway turnstile) contributed to a reduction in Manhattan’s annual misdemeanor caseload from nearly 100,000 to less than 50,000.<sup>xcix</sup>

Other offices around the country have declined to prosecute financially-related traffic offenses, low-level theft, and quality of life crimes, such as loitering. Further research should examine the impact of these decisions on public safety, the caseloads of public defenders, and racial disparities within the system.

#### *b. Alternatives to Cash Bail*

Given the ways in which pretrial detention impacts case outcomes, the presumption of innocence, and disparities throughout the criminal justice system, prosecutors have a role and a responsibility to build a pretrial system that does not rely on cash bail.<sup>c</sup> By examining local jail data, including how many individuals are held on low-level offenses and what charges are driving pretrial detention, prosecutors can take action to reduce reliance on cash bail, using their discretion to devise and implement policies that reduce the criminalization of poverty and enhance safety.

Cook County, Illinois State’s Attorney Kim Foxx announced in March 2017 that her office was reforming their bail policies. After analyzing data from the local Sheriff’s Department that revealed that over 200 people were held on bonds under \$1,000 and that specific low-level offenses were driving pretrial detention, SA Foxx instructed her ADAs to affirmatively support release on recognizance when individuals were held on bonds up to \$1,000, had no prior violent history or other risk factors, and when the current offense is a misdemeanor or low-level felony. Her office also instituted complementary policies that narrowed the scope of prosecution for retail theft – raising the felony threshold from \$300 to \$1,000 – and declined to prosecute financially-related traffic cases.<sup>ci</sup>

In Washington, DC, where cash bail was eliminated in 1992, 91 percent of released defendants remained arrest-free through adjudication, and 90 percent of released defendants made all scheduled court

appearances, according to a 2017 study.<sup>cii</sup> Reducing reliance on cash bail and pretrial detention will reduce plea deal incentives, better ensure due process, and enable defense to focus on the evidence of a case and the needs of their client.

#### *c. Alternatives to Incarceration*

Prosecutors should also examine initiatives that promote alternatives to incarceration and advocate for those with documented success. The Justice Reinvestment Initiative, for instance, has supported 35 states in diverting funds from incarceration to programs proven to reduce recidivism. In fact, crime has gone down across the country at the same time that national incarceration rates have fallen significantly.<sup>civ</sup> While deferred sentencing has regularly been a part of the justice system, further expansions and institutionalizing of similar initiatives could provide significant benefits.<sup>cv</sup>

Prosecutors also have a role in promoting and implementing diversion and restorative justice programs that have demonstrated benefits. Dan Satterberg, Prosecuting Attorney in Seattle, Washington, has been integral in the success of Law Enforcement Assisted Diversion (LEAD), which prevents the arrest and charge of people involved in non-violent drug crimes and instead provides them with services and resources to “break the cycle of incarceration, homeless[ness], and incarceration.”<sup>cvi</sup> Restorative justice alternatives to prosecution and incarceration, such as those led by San Francisco District Attorney George Gascón, provide a process “to hold individuals accountable for their actions in a manner that actually ‘makes it right’ for those they have impacted – from the direct victim of their act to themselves, their families, and their communities.”<sup>cvii</sup> DA Gascón has incorporated Restorative Justice Alternatives into Neighborhood Courts<sup>cviii</sup> and Make It Right, a diversion program for young people that contributed to a 76 percent “decline in referrals of youth to the juvenile justice system from 1999-2016.”<sup>ciix</sup>

These and other examples from across the country demonstrate how prosecutors can minimize the criminal justice footprint, reduce the burden on indigent defense, and lessen the harms associated with criminal justice

involvement. While prosecutors should advocate for system-level changes to ensure adequate defense, they should also use their discretion to take immediate steps that can curtail the expansive reach of the criminal justice system.

As the power of the prosecutor garners unprecedented attention and the public demands a more just system, there is a need for further discussion and public debate about the role of the prosecutor in ensuring adequate defense, whether through supporting funding requests by public defense, reduction in cases prosecuted, open discovery mechanisms, or cash bail reforms. How does this impact the adversarial nature of the criminal justice system? How does it relate to the goals and metrics of a

prosecutor's office? How can the public institute meaningful oversight and accountability mechanisms for the criminal justice system – including and especially over prosecutors, whose decisions affect the lives of individuals charged, their families, communities, and the public? Though there are not yet clear answers to any of these questions, the voices of those directly impacted by the criminal justice system, the research of those committed to dissecting the mechanisms and impact of prosecution and defense, and prosecutors and public defenders striving to raise the standards of their professions are beginning to drive towards a more equitable and effective criminal justice system that ensures constitutional protections and justice for all.

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