

To: Transition Team for Governor-elect Lamont and Lt. Governor-elect Bysiewicz
From: Prosecutorial Reform Working Group, Criminal Justice Committee
Re: Prosecutorial Reform Recommendations
Date: December 31, 2018

This memo considers implementation of the Governor-elect's policy goals with respect to prosecutorial reform.

I. CRIMINAL JUSTICE COMMISSION

A. Issue Background

There is a discernable lack of transparency, oversight, and accountability in Connecticut's criminal justice system. In particular, there is a substantial lack of these important measures regarding the work of prosecutors in the state. The state of Connecticut is unique, as it is only one of three states that appoints, rather than elects, its prosecutors. Connecticut prosecutors are appointed, and the Chief State's Attorney, Deputy Chief State's Attorneys and 13 State's Attorneys are reappointed, by the Criminal Justice Commission and employed by the Division of Criminal Justice. Prior to 1984, prosecutors were appointed by judges. In 1984, a state constitutional amendment created the Criminal Justice Commission, dictated its membership, and gave it the power to appoint state's attorneys for judicial districts. Connecticut General Statutes Chapter 886 further gives the Criminal Justice Commission its authority and dictates the parameters of its work. There is much secrecy around the work of the Commission and the Division of Criminal Justice. The Commission holds its meetings without adequate notice and does not invite public comment on its work. Comprehensive and accessible data about the work of prosecutors in the state does not exist. In fact, the Division of Criminal Justice is exempted from the Freedom of Information Act in almost all instances, making it all but impossible to learn about the Division's work. These circumstances have created a lack of transparency, oversight, and accountability that must be remedied.

Prosecutorial reform is necessary to increase transparency and create oversight and accountability in Connecticut's criminal justice system. Transparency is critical for democracy, yet there is little data about the work of the Criminal Justice Commission and the Division of Criminal Justice. Oversight and accountability are necessary to ensure that the state's criminal justice system is working to administer justice fairly, rather than to administer prison sentences to those who should not be incarcerated. It is necessary to create accountability for Connecticut's prosecutors and to gather data about their work to better understand how, and if, the system is working. Many people who interact with prosecutors or view the system from afar have little confidence in the system because of its opaqueness and the lack of avenues for the public to submit critiques of, and present their concerns about, prosecutors. Reforms that create transparency and allow public input would increase the public's confidence in the criminal justice system. Access to data would also allow for evaluation of the criminal justice system and, should it be necessary, additional reforms to improve the system for the betterment of Connecticut residents.

B. Recommended Reforms

The working group recommends reforms to improve the functioning and transparency of the Criminal Justice Commission and increase transparency around the Division of Criminal Justice's work. First, the Governor and Legislature should make important reforms to the Criminal Justice Commission to give it additional authority and more autonomy, require transparency around its meetings and opportunities for public input, and ensure representation of the justice-impacted community on the Commission. Second, the Legislature should pass legislation requiring broad data collection regarding the state's prosecutorial work in the Division of Criminal Justice.

1. Criminal Justice Commission

Four reforms would make a significant difference in the Commission's ability to accomplish its work, the Commission's impact on prosecutors and their work, the opportunity for the public and policymakers to participate in the Commission's work, and the Commission's priorities.

a. Expanded Authority

The Legislature should expand the Commission's authority and responsibilities by amending Chapter 886 of the Connecticut General Statutes, the chapter that gives the Criminal Justice Commission its authority. In addition to the authority to appoint prosecutors, the Commission should have the power to make formal recommendations to the Division of Criminal Justice regarding the types of cases prosecutors should prioritize and to set expectations regarding prosecutors' work. This would allow the Commission to give the Division guidance regarding the types of criminal activity on which it should focus and the Division's goals, ensuring the Division spends its time and resources on the most important cases and on activities that will advance its goals. Having statutorily-created authority to set expectations for the work of prosecutors would give the Commission the ability to appropriately evaluate the work of individual prosecutors, allowing it to make better decisions regarding reappointments. This would also allow both potential and appointed prosecutors to understand what the Commission and the public expects of them. Additionally, it would enable the Commission to more easily determine what prosecutorial misconduct is and would build much-needed accountability into the process.

In August of 2018, New York became the first state in the nation to increase prosecutor accountability by creating an independent commission to investigate allegations of prosecutorial misconduct. The New York Legislature passed the bipartisan legislation creating the 11-member commission to ensure the proper administration of justice in its criminal justice system. Connecticut's Criminal Justice Commission has the authority to investigate prosecutorial misconduct, but their authority is limited to the allegations against the Chief State's Attorney, Deputy Chief State's Attorneys and 13 State's Attorneys. Oversight of assistant state's attorneys is controlled by a collective bargaining agreement which supersedes the authority of the Criminal Justice Commission. Providing Connecticut's Criminal Justice Commission with additional

authority regarding criminal justice priorities and expectation-setting would be a step towards additional accountability for the state's prosecutors.

b. Increased Autonomy

The Legislature should amend Connecticut General Statutes Section 51-275a(f) to improve the Criminal Justice Commission's autonomy by housing the Commission within the Connecticut Office of Policy and Management, rather than the Division of Criminal Justice. The Commission's position within the Division and use of Division staff for support hinders its ability to make difficult decisions about prosecutors and prosecutorial work. Housing the commission within OPM would allow the Commission to be more autonomous. Additionally, the Commission could utilize OPM staff to analyze data it receives from the Division, which would inform many of its decisions.

c. Meeting Transparency and Public Input

The Governor should recommend reforms to the Criminal Justice Commission that would increase transparency around, and create opportunity for public input about, the Commission's work. The Commission currently notices its meetings on its website shortly before they occur. The Governor should recommend that the Criminal Justice Commission notice its meetings on its website and in another location where it is likely to be seen by the public and that the Commission give a week's notice of meetings, so that members of the public and policymakers have the opportunity to attend. The Governor should recommend that the Commission also give notice of prosecutors up for reappointment in their district so that people can weigh in on the reappointments. The Governor should recommend that the Commission hold its meetings in the Legislative Office Building in Hartford, which would allow more people to easily locate and attend the meetings in a building that is appropriate for public comment. To facilitate the ability of the public to weigh in on the Commission's work, the Governor should recommend that the Commission provide reasonable opportunities for public comment regarding the appointment and reappointment of prosecutors, priorities of the Division of Criminal Justice, and related subjects during its public meetings. In addition to the Governor making these recommendations to the Commission, the Legislature should statutorily require that the Commission implement these transparency and public input changes to ensure that they carry on beyond this Administration. Ideally, the Connecticut Network would cover the meetings to allow those who cannot attend the opportunity to watch them on television and online. The Governor should make this recommendation to the Commission.

d. Commission Composition

The composition of the Commission greatly affects its priorities and direction. It should be a balanced group reflecting multiple perspectives. The Governor should follow through on his promise of appointing a justice-impacted person who shares his commitment to ending mass incarceration to the Commission. It is important to have at least one justice-impacted person on the Commission to ensure the Commission focuses on ending mass incarceration in the state. Formerly incarcerated people are experts in the criminal justice system, and Connecticut should

include their expertise in decisions about the justice system's future. The Commission should also include someone with experience working with victims of crime.

2. *Data Collection*

Instituting broad data collection about prosecutorial work in the state would create much-needed transparency of the criminal justice system. Prosecutors in Connecticut hold a tremendous amount of power, yet there is little available data about the cases they take, case outcomes, and defendants they prosecute. The Legislature should pass legislation that would mandate the Division of Criminal Justice to collect and compile specific data about its work and submit an annual report with the data to the Criminal Justice Commission. The Legislature should require the annual report to include, but not be limited to, data around charging, pretrial detention, bail, plea deals, diversionary programs, and sentencing. In Appendix D of its September 2018 brief, *Collecting and Using Data for Prosecutorial Decisionmaking*, the Urban Institute provides a self-assessment tool for prosecutors' offices that includes a comprehensive list of metrics it recommends offices collect.¹ The Urban Institute suggests that prosecutors' offices collect data in the categories of screening and charging, pretrial release, alternative options, and plea bargaining and sentencing, as well as recommending the collection of additional metrics. The Legislature should use this list as a starting point for the data it should require the Division of Criminal Justice to collect and report. According to Connecticut prosecutors, the Division of Criminal Justice currently has funding to create a digital case management system and is in the process of completing the system.

The Legislature should require the Criminal Justice Commission to analyze the data it receives from the Division and publish the data report and the Commission's analysis of the data on its website annually. Having access to such data from the Division of Criminal Justice would enable the Commission to make better informed decisions about prosecutor appointments and reappointments, as well as the Division's priorities and goals.

In addition to aiding the Commission in its work, the availability of this data is important for the public and policymakers to understand what is happening in the state's criminal justice system. Without the collection, dissemination, and analysis of data, those outside of the Division are unable to determine if current practices are successful, efficient, and cost-effective. Particularly because of the Division of Criminal Justice's Freedom of Information exception, it is imperative to memorialize a data collection requirement in statute to ensure important data is available. In particular, data on case outcomes, paired with demographic data of the people involved, would illuminate inequities in the system. People of color are overrepresented in Connecticut state prisons and jails. However, without data on the prosecutorial process, it is impossible to know if racial disparities are rooted in the prosecutorial decision-making process. Shining a light on the criminal justice system leads to accountability and, when necessary, reform to the administration of justice. To better equip the public and policymakers to evaluate important aspect of Connecticut's criminal justice system, the Legislature should require the annual collection, dissemination, and analysis of data on prosecutorial work in the state.

¹ The materials are available here: <https://www.urban.org/research/publication/collecting-and-using-data-prosecutorial-decisionmaking>.

By requiring this data, Connecticut would follow in the footsteps of Florida, which passed legislation requiring the release of data by state prosecutors. Florida's Legislature passed legislation in March of 2018 that requires state agencies to collect data regarding prosecutorial work that will be published in a central database. Additionally, multiple county attorneys' offices around the nation have begun to release aggregate data about prosecutorial work. For example, Cook County, Illinois, which includes Chicago; New York County, New York; and Santa Clara County, California have released data on race throughout the prosecutorial process.

C. Priorities and Impact

A priority for prosecutorial reform is creating a mechanism for understanding what is occurring in the state's criminal justice system. Transparency in the work of the Criminal Justice Commission and the Division of Criminal Justice would allow for the evaluation of the administration of justice in Connecticut. Such evaluation, which is only possible with data collection and dissemination, would lead to an understanding of whether the current system is operating effectively and efficiently, highlight the successes and failures of the system, expose inequities in the system, and inform additional reform of prosecutorial work.

Challenges to these reform include the current lack of technology to collect and report on prosecutorial data. Though the Division of Criminal Justice is not currently using technology that allows it to collect the data the Legislature should require it to collect, the Division will have the ability to collect this data in the near future. The Division already has funding for a new system, so no new funding would be required.

The implementation of these reforms would result in cost-saving and spur economic growth in the state. These reforms would work to curb mass incarceration, resulting in savings for the Department of Correction. The Division of Criminal Justice and the justice system as a whole would save money because these reforms would lead to a more effective and efficient criminal justice system. Prosecutor resources would be used only when necessary to preserve public safety, rather than to prosecute low-level and victimless crimes. This would streamline the system and prevent it from being bogged down with unnecessary cases.

II. SCREENING/CHARGING OF CASES

In Connecticut, unlike in most other states and jurisdictions, the police select charges after warrantless arrests and send these charges (set forth on a complaint) directly to the court clerk's office. The case then appears on the court docket—without prosecutors first reviewing the case and determining if it should even come to court (and, if so, what charges should be filed). Prosecutors typically see case files for the first time on the morning of a defendant's first appearance. In misdemeanor cases, the prosecution can proceed simply on the police's complaint whereas in felony cases a prosecutor must file an information. (*See Practice Book* § 36-11). Under this existing system, prosecutors must act affirmatively to remove cases from the court system—i.e., by dismissing the case, nolling the charges, or, in felony cases, informing the court that an information will not be filed. Under this system, prosecutors usually do not conduct a detailed review of the case before it is presented in court because they do not receive documentation from the police sufficiently in advance of the court appearance and do not have

sufficient staff to devote to this early review of cases. There are various negative effects of this system, including:

- Individuals are required to appear in court to face charges (often for multiple court dates) when the individual and society would be better served by the person receiving treatment of underlying issues (e.g., substance abuse, mental illness) without the need for criminal justice involvement.
- Cases are brought to presentment (and often subject to a number of continuances) that do not meet the standards for prosecution (e.g., because of insufficient evidence).
- Defendants are referred to statutory diversion programs that may be unnecessary.
- Cases requiring prosecution are often subject to many continuances and delay because of the volume of cases in the system—which can result in stale evidence, a strain on victims, and lengthy time spent in pretrial detention for defendants.
- Some cases are over-charged and some are under-charged.

In response to this problem, the Criminal Justice Division (with seed money from the Singer Foundation) created in May 2017 Early Screening and Intervention (ESI) Units in State’s Attorneys offices in Bridgeport and Waterbury. The Units are now in place as well in New Haven, Hartford (Community Court), New London, and Norwich. (Public Act 17-205 endorsed this program). The Units are staffed by a dedicated full-time prosecutor and a resource counselor (often a social worker). In cases involving low-level offenses, the ESI prosecutor works together with police departments, public defenders, judicial personnel, and a network of state and community providers to provide the state’s attorney’s office with more accurate, timely, and complete information so the best case outcomes can be achieved in the most efficient manner. The resource counselor gathers information about a defendant’s needs and provides information about services (defendants have an opportunity to consult with a public defender if they want).

These ESI Units should be supported and expanded to other court jurisdictions—the programs will save costs for Connecticut by reducing the number of court appearances, continuances, unnecessary referrals to statutory diversion programs, and time spent in pretrial detention. Recidivism will be reduced by referring individuals to appropriate treatment programs rather than incarcerating them. We also recommend that prosecutors involved in these Units be provided with regular implicit bias training.

Beyond support for the ESI Units, the Governor should support Connecticut moving towards a system where prosecutors review all cases and make charging decisions before the case comes into the judicial system. In some cases, charges should never be filed because there is no state interest in the prosecution, sufficient evidence is lacking, or the individual and society are better off simply diverting the person to treatment. It would be vastly better if prosecutors could make these determinations upfront rather than dismissing cases months later—after multiple court appearances. Changing the charging system in Connecticut would make a tremendous difference in the lives of many individuals and families, and result in a huge cost savings for the state. The system cannot be changed overnight, and sufficient time and resources must be provided to ensure a smooth transition.

III. CONCLUSION

The reforms outlined above would reduce mass incarceration and lead to fewer people being impacted by the system and racial disparities in the criminal justice system. In particular, the reforms will ensure communities of color are not overrepresented in Connecticut's courts and prisons. With fewer people caught in the justice system and with criminal records, fewer people would be discriminated against because of their criminal histories. In turn, this would lead to more people in the workforce and additional residents who would be able to provide for themselves and their families. More working Connecticut residents would equate to more people with money to spend in the state's economy, spurring economic growth.

There would also be a generational effect from these reforms. With over 13,600 people incarcerated in Connecticut, a large number of Connecticut residents are impacted by having a family member involved in the criminal justice system. Communities of color are particularly affected by involvement in the justice system. Keeping people out of prison and giving them the chance to be contributing members of society sets their children and grandchildren up for more success, creating a better Connecticut for all.

Prosecutorial reform is imperative in Connecticut to ensure the criminal justice system is operating fairly, effectively, and efficiently. The Governor and the Legislature should take the aforementioned actions to implement necessary reforms.