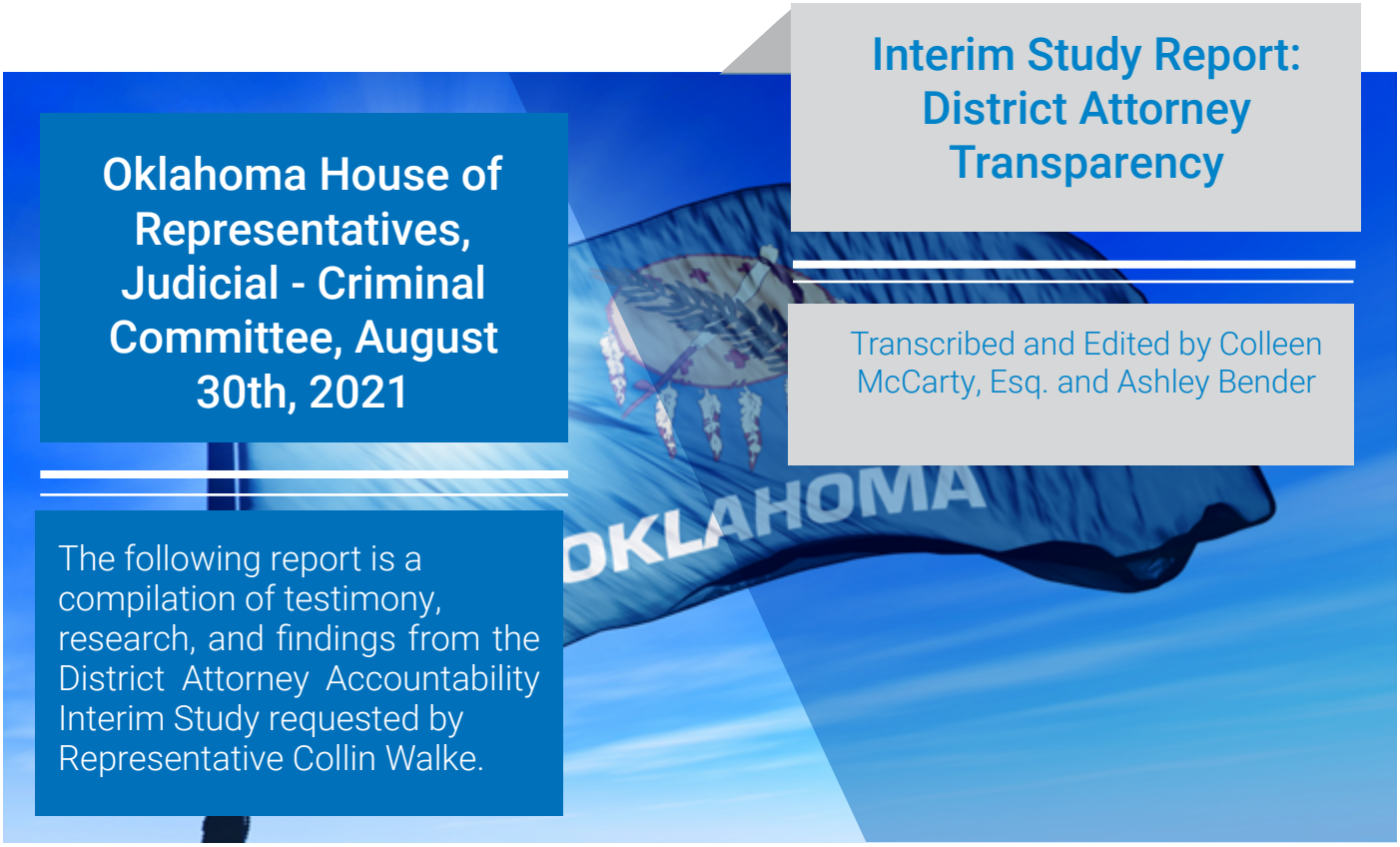
OKLAHOMANS FOR CRIMINAL JUSTICE REFORM



Interim Study Report: District Attorney Transparency

Oklahoma House of Representatives, Judicial - Criminal Committee, August 30th, 2021

Transcribed and Edited by Colleen McCarty, Esq. and Ashley Bender

The following report is a compilation of testimony, research, and findings from the District Attorney Accountability Interim Study requested by Representative Collin Walke.

Oklahomans for Criminal Justice Reform is a 501(c)3 with a mission to advocate for criminal justice reform in Oklahoma through research-driven policy and reform efforts that improve public safety by reducing the state's dependence on incarceration. We are dedicated to providing the most up to date news and research on criminal justice reform in Oklahoma.

The Oklahoma House of Representatives heard an interim study on the topic of District Attorney Accountability on August 30th, 2021 in the Judicary - Criminal Committee Chaired by Representative Rande Worthen. The report compiles the information that was presented by the various experts from across the United States.

Panelists included Honorable Judge William Kellough, Jeff Smith a district attorney in District 16, Liz Komar of Fair and Just Prosecution, Dr. Stephen Galoob a Professor of Law at University of Tulsa College of Law, Ron Wright a Professor of law at Wake Forest University.

The study pulled together experts and research and best practices from across the country on this topic. We have compiled the research into this report that deep dives into the research and takeaways presented to the committee.

"As we move further into reform efforts in Oklahoma, we cannot avoid reforming the one of the bedrocks of our criminal justice system: the prosecutor's office," Colleen McCarty, Deputy Director of Oklahomans for Criminal Justice Reform, said.

JUDGE WILLIAM KELLOUGH

The Honorable William Kellough, Attorney and former Tulsa County District Judge. Judge Kellough also serves as the Chairman of the board for First Step Male Diversion. He is also a member of the Legal Advocacy and Justice Committee of the Mental Health Association of Oklahoma.

"I understand that my task today is to discuss my practical experience as a criminal felony judge so that you can better evaluate the current law and practices of state court prosecutors and decide if legislative changes or additional laws are in order."

"Thank you for inviting me to participate in this interim study of the practices of Oklahoma District Attorneys and their pivotal role in the criminal justice system. I understand that my task today is to discuss my practical experience as a criminal felony judge so that you can better evaluate the current law and practices of state court prosecutors and decide if legislative changes or additional laws are in order.

Before addressing the issues which I think are relevant to this study, I want to express my appreciation for the bipartisan and creative spirit with which the legislature has tackled criminal justice reform in the past few years. I have had the privilege of working with Sen. Julie Daniels by helping, at her invitation, to draft Senate Bill 951 which was introduced in the last session. This bill will, when passed, totally re-vamp our antiquated and regressive system of assessing and collecting criminal fines and costs. Sen. Daniels, along with other members of her Republican caucus, sees the wisdom in making this process fair as well as efficient.

I also have worked closely for the past 9 months with Tulsa County stakeholders, led by the District Attorney's office, to create a community court in north Tulsa which will serve as another way to divert deserving, low level offenders from prison and into treatment for drug and alcohol misuse and associated anti-social behaviors.

I mention these two initiatives to highlight the progress we are making and the need for even more cooperative, bipartisan work to create an environment of best practices for the state of Oklahoma. A study of the role of the prosecutor, which we are undertaking today, certainly falls in line with these other initiatives.

My intent is not to be accusatory or judgmental, but simply to point out the current state of the law and practice in criminal courts in Oklahoma. Willingly or not, the District Attorney's role far exceeds every other participant in the system in power and influence. My co-presenters and I are here today to shine a light on that situation and recommend areas of concern and need for reform.

My experience in dealing with the power and sometimes excessive overreach of the prosecutor falls into two general areas: exercise of prosecutorial discretion in charging crimes and bargaining for sentences and in the conduct of criminal trials themselves.

The authority to charge crimes is vested solely in the District Attorney except for rare instances when a grand jury is convened. There are virtually no limits on this authority. This absolute discretion often negatively impacts outcomes in two basic areas: determining the severity of the charges and the number of counts.

The ability to control the severity of the charge can be illustrated by a common situation. Possession of controlled dangerous substances, illegal drugs, is now a misdemeanor. However, one factual event can give rise to different interpretations. A prosecutor intent on increasing numbers of convictions can enhance the severity of this charge from simple possession to a felony by alleging "intent to distribute", an often illusive concept. This more serious charge must be supported by evidence such as proximity of large amounts of cash or a list of persons in a notebook who appear to be drug customers. These are highly subjective associated circumstances. The result is greater leverage for the DA in the plea bargaining process. And who knows if it will result in addressing the real societal problem in this scenario: drug addiction.

The only other participant in this process with any power, the trial judge, has only a very limited role to play. In extreme circumstances of overcharging, the case can be dismissed. This rarely occurs. And of course no jury, representative of community values, is allowed to weigh in since the case is bargained privately and essentially in secret.The number of crimes or counts charged is also subject to absolute discretion and sometimes abuse. This authority allows the state to agree to dismiss lesser charges in consideration for agreement to plead guilty to crimes which the state deems more likely to achieve its desired results of a conviction.

Other presenters will discuss these aspects of prosecutorial abuse in greater detail. From my perspective, again, the trial judge in Oklahoma, who was elected by the people to ensure fairness and justice, does not have any moderating role in setting the severity or number of criminal charges.

95%

Plea agreements account for over 95% of all convictions.

Alongside this unlimited discretion is the fact that in Oklahoma, as in nearly every criminal jurisdiction in the United States, plea agreements account for over 95% of all convictions. By setting the severity and number of counts, the prosecutor is obviously nearly always in a superior position in all plea negotiations.

I am aware that some judges informally intervene in the plea bargaining process either by invitation or as an exercise of power. Almost always, the purpose for this intervention is to get the defendant to plead, in order to take one more case off of the docket. This shows the judge's electorate and peers administrative efficiency. I never inserted myself in the process. I felt that it was borderline unethical.

I am aware that some judges informally intervene in the plea bargaining process either by invitation or as an exercise of power. Almost always, he purpose for this intervention is to get the defendant to plead, in order to take one more case off of the docket. This shows the judge's electorate and peers administrative efficiency. I never inserted myself in the process. I felt that it was borderline unethical. The judge's influence, when exercised, is a powerful inducement. Defendants and the state, for that matter, deserve to have their bargain (with all of its flaws) arise in a marketplace free of coercion. My point is that you should not allow yourselves to ignore the legal impotence of judges in this process by simply condoning off-the-record, judicial arm twisting.

I want to hasten to add that my criticism of the charging or plea bargaining process is not informed specifically by my experience with the Tulsa County District Attorney team appearing before me. I have the utmost respect for all of them. During my tenure, several assistant DA's were dismissed by executive action for misconduct or ethical violations. I am sure, however, that there is a wide disparity among District Attorney's offices in policing themselves to root out bad apples. We simply do not know because there is no reliable, accessible data on this subject.

Assuming that the majority of DA's act responsibly in the exercise of their power and discretion, this does not mean that the legislature should turn a blind eye. Laws are created to mark boundaries and limits for the unscrupulous, the ambitious and those for whom the end clearly justifies the means. That is why we are here today.

The other area for prosecutor misconduct occurs in the courtroom which is admittedly controlled by the trial judge. Prosecutorial excesses often occur by the DA failing to provide exculpatory evidence as required under the Brady doctrine, engaging in improper closing arguments, racially profiling and discriminating in jury selection and introducing unconstitutionally tainted or false confessions. In such cases, the trial judge has the authority and duty to intervene. And if he or she fails to do so, the Court of Criminal Appeals can correct the trial court error.

In many of the trials I presided over, prosecutors tested the limits of due process in all of the above mentioned areas. To some extent, this is the nature of our adversarial system. But the remedies available to me were situational and limited to the case at hand.

I was fortunate to not experience any acts so egregious that I felt compelled to refer a prosecutor to the bar association for sanctions. Of course, other judges in Oklahoma have done exactly that with, I suspect, mixed results.

The Oklahoma Bar Association is not a generally useful forum for addressing prosecutorial misconduct. The reason is largely because the ethical rules governing the conduct of trials, applicable to both civil and criminal cases, are so broad and ill-defined that only the most egregious conduct is subject to sanction. And there is a bias, perhaps subconscious, among the lawyers who administer and sit in judgment of ethical violations, to give prosecutors the benefit of the doubt and criminal defendants just the opposite.

I will conclude by conceding that in spite of my experience and the opinions I express here today, I do not have any specific recommendations for legislation. Other speakers may have remedies in mind; and certainly as you continue to learn and investigate the scope of this problem, legislation whose purpose is to create a more level playing field, may become apparent.

I do, however, have two general themes to guide your further review and possible legislative action. First, there must be greater transparency in the charging of crimes and the bargaining for convictions. This will require the compilation of statistics generated by the actions of district attorneys: for example, the number of pleas of guilty among demographic and ages and between District Attorney districts, severity of sentences by district, choice of charges and the number of counts by district, and so on. This information can and should be tallied and widely published under legislative direction. Today, to my knowledge, it is not.

Second, as legislators I suggest that you examine the role of the trial judge in the plea bargaining process to make it more in line with the expectations of the public. I recall that in some of my high profile cases, the media reported a controversial plea agreement as my action when, in reality, it was the action of the DA. Ethically, I was unable to publicly correct the record. I would advocate that if a judge is going to get the credit or blame for the ultimate disposition of the case, he or she ought to have an actual role to play other than a rubber stamp.

Thank you again for your time and attention. I look forward to seeing the issue of prosecutorial conduct be the subject of more intense legislative scrutiny."

JEFF SMITH

Mr. Smith is the elected DA for District 16, which encompasses Leflore and Latimer counties. Mr. Smith has been a DA since January 2007. Mr. Smith counts it as a privilege to serve as DA especially in Southeastern Oklahoma.

"I talked about ethics before. The special rule of ABA Ethics that applies to prosecutors - Rule 3.8. The first line of the notes on that rules says "Prosecutors are ministers of justice." We're not supposed to just seek convictions. I believe that. I believe we need to do the right thing. The fair thing. "

Mr. Smith is the elected DA for District 16, which encompasses Leflore and Latimer counties. Mr. Smith has been a DA since January 2007. Mr. Smith counts it as a privilege to serve as DA especially in Southeastern Oklahoma.

There are a number of things that need to be addressed and categorized.

The first thing that needs to be sorted out is the charging decisions of prosecutors. Mr. Smith cannot speak for the other DA's offices in the state, he can only speak for his own. However, he has to have evidence to charge a crime. In the case of PWID - there are other elements that have to be there before you charge the crime. IF you find someone with an amount of marijuana but they have ledgers, scales, or baggies -- or the amount of drugs is too large for personal use -- those are the types of indicators we look for when charging Possession with Intent.

As a DA you must have the evidence before you charge.

There is an ethical component in being a prosecutor. We do have as DAs almost unlimited discretion in charging -- but the way you exercise that discretion is of the utmost importance.

There are some bodies that we answer to in regards to the **ethical decisions** we make. The Ethics Commission is one. The Judge did not think the Ethics Commission has a lot of teeth and sometimes they don't. ABA Ethics Rule 3.8 (see more in the graphic below) is a special rule directed at prosecutors. It is not directed at prosecutors because we're bad guys - it's directed at us because we have special obligations.

We should not be trying our cases on the courthouse steps. The other side is not corralled in the same regard. We try our cases in the courtroom with sufficient, admissible evidence. The evidence should prove your case beyond a reasonable doubt. They should not be hoping that the evidence will show up later. That is not the way it's done in my office.

The prosecutors in my office have to justify their decisions to me and why charges are being assigned. I ask my people to think about the reasons they are assigning charges and counts to get them to think about it and understand their reasoning.

American Bar Association Model Rule of Professional Conduct 3.8: The Special Responsibilities of a Prosecutor:

The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) 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; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit; (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

The same goes for counts. You charge the crimes that the evidence will support.

The public expects public safety.

The DA has two functions: to prosecute crimes occurring in their district and to advise county officers.

We have **checks and balances** - we have **peer review**, we have **ethics,** we have the multi-county **grand jury** if we're doing something wrong. I have known of District Attorneys who have gone to prison for misconduct. DA's have been removed from office under the removal statutes. If I am doing something wrong or against the law and its egregious enough to meet the standard for removal - that option exists. I know that. That's why I stay away from stuff like that. I have worked too hard to get where I am to throw it away on some case. Either its there, or it's not. That's the way we should be conducting ourselves.

The courts are a great check and balance, if they will be. We have judges that will not accept plea agreements if they don't agree with the terms. Judge Kellough suggests that this forces parties to trial when they do not want to go. That's too bad. The defendant has a constitutional right to trial. The judge saying that the plea is not fair -- they're the final arbiters of what's fair in their courtroom. We're going to trial. If we want to plea the case, we need to back up and rework the plea. Judges should not be involved in plea bargaining. The defendant needs to be sure he's getting a fair referee when the time comes.

I talked about **ethics** before. The special rule of ABA Ethics that applies to prosecutors - Rule 3.8. The first line of the notes on that rules says "Prosecutors are ministers of justice." We're not supposed to just seek convictions. I believe that. I believe we need to do the right thing. The fair thing. That should pervade everything we do as prosecutors

Training. I agree training is an issue. I have been involved in training for all the baby DA's. The ones who are new to the system and who don't know. I want the best people prosecuting in the state of Oklahoma. I want the best quality people prosecuting. It's hard to keep them because out there in the real world you can make more money and it's more glamorous. And now with the McGirt decision we compete with the federal government, and we compete with the tribes who can pay more money. That's terrific. I want the best people. They go somewhere else, then we know we have gotten the best people. The training has to include the ethical component of what we do. When we go into a courtroom, we must know it's clean. We must know the other side got everything in evidence. I am held **accountable** - I can be held accountable and removed from office if my assistance get dinged for not turning over discovery. We have an open file system in my office where we hand over the file. My evidence doesn't change whether we hand over the file or we don't. My evidence is my evidence.

I don't understand a lot of these concepts. Things like using tainted evidence to get a conviction. Many folks down in Southeastern Oklahoma, I see a lot of times. Their different generations of the same family. If we don't get them this time we will see them again. They'll be back. Get them when you can get them. Get them **fair.** That's the way we should be prosecuting.

I have four attorneys and anyone who wants to live in God's country (I'm biased) can come live and work down there - I have an opening. I know the majority of DAs in this state feel the same way - I know that because I have had conversations with them about these issues.

LIZ KOMAR

Fair and Just Prosecution (FJP) is a national nonprofit organization that works with recently-elected reform-minded chief prosecutors to help them translate their reform goals into policies and action. FJP also provides technical assistance and opportunities for learning, and produces materials containing recommendations and best practices – including issue briefs on various topics, such as "21 Principles for the 21st Century Prosecutor," post conviction justice; as well as a recent proposal for a Presidential Task Force on 21st Century Prosecution.

"It's an honor to appear before you and thank you for the opportunity to discuss methods for improving prosecutorial accountability and transparency. I'm Liz Komar, the Director of Strategic Initiatives at Fair and Just Prosecution. I also served as an ADA in Brooklyn, NY."

We work with nearly 70 elected prosecutors from across the country; all are committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. These elected leaders hail from urban and rural communities and span the political spectrum. We regularly bring this inspiring new generation of leaders together to share lessons learned, discuss innovations, collaborate with leading experts, and distill their experiences into best practices. I'm happy to share some of those best practices and innovations today.

Today I plan to discuss -

1. The duty of prosecutors and the role prosecutors can play in creating and addressing racial disparities, wrong ful convictions or unjust case outcomes.
2. Some of the contributors to those unjust outcomes (both unintentional and intentional).
3. Avenues for accountability and remedies
4. And I hope you'll take away the need to not simply improve individual accountability for prosecutors who in tentionally engage in wrongdoing, but also the need for an array of mechanisms to address systemic bias and improve accountability and transparency.

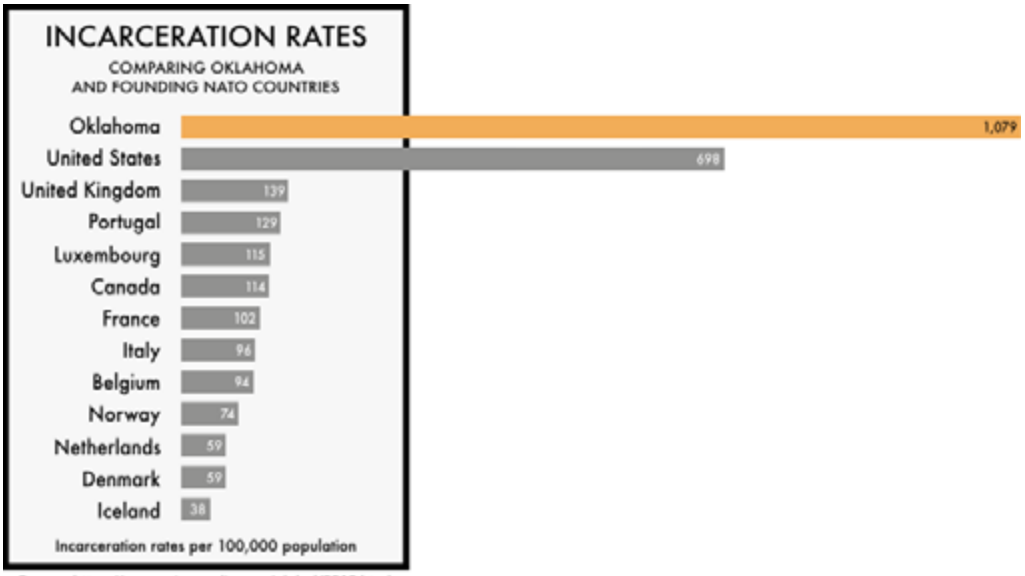
The Role of prosecutors- Before exploring models of prosecutorial accountability, it's helpful to touch on the unique duties of prosecutors: The essential duty of a prosecutor is to pursue justice and fairness. Justice means not only holding people accountable when they harm the community, but also seeing and addressing the root causes of harm, be it poverty, substance use disorder, or mental illness.

And justice isn't just an outcome – it's a way of doing business. Seeking justice means conducting investigations and prosecutions with the utmost of integrity, transparency, and accountability. And finally, at the core of justice is acknowledging the historic harm that excessively punitive and biased policies have wrought on many communities and continually working to prevent and correct those past practices. Increasingly, a new generation of elected prosecutors across the country have interpreted that duty to include regularly reviewing past cases for errors and misconduct, as well as other efforts to

The "Black Box" of Prosecutors' Offices - Prosecutors have unparalleled and nearly-unchecked discretion in their charging and plea bargaining decisions. Given the power that prosecutors have over charging, bail recommendations, plea offers, and sentence recommendations - more than courts, legislators, or any other justice system player. **In the aggregate, prosecutors' choices are the key drivers of outcomes, whether that's the rates of mass incarceration or the degree of racial disparities.** Given that until very recently almost no data has been available regarding how prosecutors make these decisions, very little research has been done into how prosecutors exercise their far reaching discretion.

The general public and researchers are generally not aware of whether prosecutors consistently charge like cases alike - including what sorts of limits, supervision, or guidelines prosecutors work within. And since the general public generally doesn't know what sorts of information prosecutors rely upon, when making their decisions, prosecutors offices have accordingly been called a "black box" for their inscrutability - and that makes it challenging to detect prosecutorial misconduct, let alone estimate the scope of prosecutorial injustice in the US.
Prosecutorial misconduct generally means intentional wrongdoing by prosecutors, but prosecutors can unintentionally be responsible for injustice on a far larger scale in their policies contribute to mass incarceration and increased racial disparities.

And to quantify some of that prosecutorial injustice…. The US has **the highest incarceration rate** in the world and seek the longest sentences in the world. Oklahoma historically has had an incarceration rate even higher than that of the United States as a whole - and the highest in the world in 2016. And despite Oklahoma's efforts to reduce it's incarceration rate, Oklahoma's incarceration rate remains extraordinarily high.



Source: https://www.prisonpolicy.org/global/2018.html

Racial disparities permeate every aspect of the criminal legal system and Oklahoma has one of the highest rates of Black imprisonment in the US. The US criminal legal system is characterized by **punitive excess.** We could release a substantial number of people from prison without negatively affecting public safety. Recent Brennan Center study found that 39% of incarcerated individuals could be released safely - that amounts to 860,000 people. The vast majority of people who commit crimes, even very serious crimes, grow out of that behavior as they mature.

Systemic unfairness, bias, and misconduct are pervasive enough that we have a serious problem with **wrongful convictions.** Nearly 2,900 people have been exonerated in the United States since 1989. Together, these cases amount to over 25,000 years of wrongful incarceration. Similar to other system failures, people of color have disproportionately borne the weight of wrongful convictions, being significantly more likely than white people to be wrongfully convicted and subsequently exonerated. Those wrongful conviction numbers fail to capture. however, the millions of people with shorter or less serious wrongful convictions, disproportionate sentences, and racially disparate case outcomes.

Individual intentional misconduct is one cause of unjust prosecutorial outcomes - but far from the driver of systemic injustice. Below are some of the factors that contribute to a justice scale that is permanently tipped toward the state.

Systemic racial and economic bias - Racial and economic disparities are deeply entrenched within the criminal legal system. Meanwhile, other inequities often intersect with and deepen these disparities. Fines and fees and cash bail systems often perpetuate cycles of poverty that increase crime and socio- economic disparities. Individuals with mental illness are vastly overrepresented at every stage of the criminal justice system, and as a result, jails and prisons

have become the largest mental health treatment facilities in the country.

Meanwhile, the racial disparities within the criminal legal system are not simply the product of a few bad actors engaged in misconduct. Bias is common across all fields and prosecutors are not immune. Research has repeatedly shown that the best of intentions are not adequate protection against racially-biased decision-making. And within the context of a country in which housing, education, healthcare, and myriad other policies have historically intentionally marginalized people of color -- disparities within those social supports create corresponding disparities in the criminal legal system.

Systemic unfairness - Systemic bias in favor of prosecutors over the defense can also contribute to unjust case outcomes and misconduct.

The coercive role of plea bargaining - as touched on by the judge - can be a significant driver of systemic unfairness. 95% of cases are disposed of by plea, and no one has visibility to who gets pleas, how long they are for, and what factors drive plea recommendations.

Metrics of success - Success within prosecutors offices' is all too often measured in conviction rates and lengthy sentences - as opposed to just case resolutions and community well being. This culture incentivizes intentional and unintentional misconduct.

Brady and discovery- Likewise, legal but insufficient Brady and discovery practices - such as turning over evidence on eve of trial -- can lead to unfair outcomes. Considering most public defenders and appointed defense attorneys are struggling under immense caseloads and massive funding gaps, it stands to reason that any unfair or oppressive tactics practiced by the State are unable to be adequately checked.

The Bench - Across the country, the judges tend to disproportionately be former prosecutors. This can lead to a courtroom culture of bias and excuse-making for the state's shortcomings.

Error - Mistaken eyewitness identification, false confessions and faulty forensic science have all caused miscarriages of justice by prosecutors. Many practices that were once standard we now understand as deeply flawed - including our understanding of the culpability of children and young adults. As our knowledge about the shortcomings of human memory, the coercive effect of previously accepted police and prosecutorial practices and the lack of scientific foundation for many forensic techniques grows, we must have a mechanism to correct convictions secured through these means.

Intentional Misconduct - The problem of insufficient accountability for intentional misconduct is not unique to Oklahoma. Innocence Project and the Veritas Initiative studied five states over a five-year period and identified 660 cases in which courts found prosecutorial misconduct. Of these, only one prosecutor was disciplined. Nationally, prosecutors are almost entirely immune from civil lawsuits even when they intentionally violate the laws. Existing state grievance processes rarely result in disbarment or other significant consequences for prosecutors. Likewise, many courts and defense counsel are reluctant to refer even serious cases of apparent misconduct to existing grievance entities, in part because of fear of retaliation, long case processing times, and limited confidence that complaints will be fairly investigated and addressed. This makes oversight by public agencies and the courts all the more critical. Improving prosecutorial oversight and accountability through the creation of independent oversight entities is one avenue to improved accountability.

Efforts nationwide to improve prosecutorial accountability and transparency - Improved individual accountability for prosecutors who commit intentional misconduct is a starting place. Public trust is essential for public safety. That means that minimal consequences for prosecutors who publicly engage in misconduct undermine the integrity of the entire criminal legal system - and therefore public safety If survivors and witnesses don't have faith in the integrity of the criminal legal system, they report crimes and cooperate with the police at lower rates. Improved individual accountability is not a remedy to systemic bias or injustice. Nor does it guarantee a remedy to those harmed by prosecutorial misconduct.

Research by the Innocence Project found that the majority of prosecutorial misconduct findings by courts are ruled harmless. This means a court has concluded it wouldn't have changed the case's outcome had the error or misconduct not been committed. Such rulings minimize the problem, signaling to prosecutors that error or misconduct is acceptable - and they also offer an insufficient remedy to those harmed by prosecutorial misconduct. This finding is particularly troubling, because research has shown that misconduct in harmful error cases and misconduct in harmless error cases is generally comparable—the harmless/ harmful distinction is not based on the prosecutor's conduct but on the perceived strength of the evidence against the defendant.

So in short, methods for improving prosecutorial accountability, such as strengthening oversight, and remedies for people who have experiences are not necessarily equivalent - and beyond individual prosecutorial accountability, it's helpful to consider creating well-defined pathways to post-conviction justice.

Post-conviction justice- Post-conviction justice refers to reviewing the integrity of convictions or the proportionality of sentences outside the appeal and habeas corpus process. In the context of DAs offices specifically, I'll highlight two innovations which are becoming increasingly widespread and which benefit from legislative support: conviction integrity units and sentence review units

CIUs - Conviction Integrity Units - They help identify and release wrongfully convicted serving prison time - in cases of both actual innocence and procedural injustice They enhance community trust by addressing both real and perceived unfairness in the criminal legal system. CIUs can reduce the likelihood of errors occurring in the future when past cases are used as case studies to identify problematic practices, trends, and policies that can be changed going forward. Essentially, CIU cases can be teachable moments for the entire prosecution staff. So far, 65 jurisdictions have such units, 28 of which were created since 2018 — and their work has already had a significant impact.

I. Key Principles Regarding Scope and Focus of CIUs/conviction review

- CIUs must go beyond innocence cases.
- Innocence is just one type of injustice.
- Convictions obtained through violations of due process or other legal obligations - or through misconduct by law enforcement - have, over the years, eroded trust in the justice system.

II. Classes of cases CIUs should be expanded to address

- Convictions obtained through prosecutorial or law enforcement misconduct.
- Convictions tainted by ineffective assistance of defense counsel.
- Guilty pleas obtained as a result of misconduct by prosecutors or law enforcement.
- Misdemeanor cases, which make up 80 percent of criminal convictions and carry significant collateral con sequences.
- Cases should not be excluded from review simply because:
- They are on appeal
- Defendant pled guilty
- Defendant has already served the sentence.

Sentencing Second Chances - Meanwhile, Sentence Review Units address **unjust past sentences** - but often unlike CIUs, to be effective, they must be accompanied by second look laws that give prosecutors the ability to legally revise sentences. There is an increasing acknowledgment today that many of the sentences handed down in the "tough on crime" era, or imposed as a result of statutes enacted in that era, are disproportionate to the crime or the unique characteristics of the defendant. There is a strong element of systemic racism in disproportionate sentencing. People of color receive disproportionately harsh punishments, and two-thirds of those serving life sentences today are Black or brown. Implementing SRUs to address unfair or disproportionate sentencing, or convictions obtained through questionable tactics, will help to rebuild community trust in the system.

Elected prosecutors across the country have created Sentencing Review Units, including Dan Satterberg in Seattle, Eric Gonzalez in Brooklyn, Rachael Rollins in Boston, Marilyn Mosby and Aisha Braveboy in MD, and Chesa Boudin and George Gascon in California.

But often -- unlike CIUs -- to be effective, they must be accompanied by second look laws that give prosecutors the ability to legally revise sentences. For example, CA and WA legislatively created a mechanism for prosecutors to bring cases back into court for sentences to be reviewed.

Second look laws are simply giving people an opportunity to show that they should be released - not a guarantee. The purpose of Second Look laws isn't to let everyone out of prison; it's simply to stop throwing everyone away.

So in summary, prosecutors have a duty to both forward and backward looking justice. Multiple factors can contribute to unjust outcomes - including intentional misconduct, but also systemic bias and unfairness. Improving individual accountability for prosecutors who engage in misconduct is a good first step. There's also the need for an array of mechanisms to address systemic bias and improve accountability and transparency - such as post-conviction justice units or laws to improve conviction integrity and offer sentencing second chances.

DR. STEPHEN GALOOB

Chapman Professor of Law at the University of Tulsa College of Law with a Ph.D. from U.C. Berkeley's Jurisprudence and Social Policy Program

"It is my honor to address you on this important topic. There is a growing recognition that prosecutors are a key—perhaps the key—component in our criminal legal system."

I'd like to discuss three areas of prosecutorial accountability that, in my view as a scholar of criminal justice generally and of Oklahoma's system in particular, seem urgent to me.

Accountability for Resistance - The first area of accountability is accountability for resistance. Let's take the example of Oklahoma's State Question 780. As we all know, State Question 780, among other things, made possession of any controlled dangerous substance a misdemeanor. State Question 780 passed in November 2016 and went into effect in June of 2017.

However, SQ 780 did not change Oklahoma's criminal offense of Possession With Intent to Distribute a Controlled Dangerous Substance. This law criminalizes possessing CDS "with intent to manufacture, distribute, or dispense." Like the PWID laws of roughly half of other states, Oklahoma's law does not utilize objective factors to determine intent to distribute. After the passage of SQ 780, PWID remained a felony that is punishable by a maximum of 5 years imprisonment on a first offense for cannabis and 7 years for other controlled dangerous substances. According to the most recent public data from Oklahoma's Pardon and Parole Board, PWID is the second-most common charge for those incarcerated in Oklahoma's prisons.[1]

Let's examine patterns of criminal charging in the time before and after SQ 780 went into effect based on data from Open Justice Oklahoma that were published in a 2019 article that I co-authored with Colleen McCarty and Ryan Gentzler in the Federal Sentencing Reporter. Comparing 2017 to 2018, total felony charges for simple possession fell from 18,942 to 4,841—a 74.4 percent drop. Moreover, the combined number of felony and misdemeanor charges for simple possession declined by 25 percent. However, the number of charges for Possession With Intent to Distribute rose from 3176 to 3607 in 2018—an increase of approximately 14%. Statewide, the total number of charged felonies unrelated to drug possession and distribution was virtually unchanged between 2017 and 2018.

---

1 Galoob, Gentzler, & McCarty, "Oklahoma's State Question 780: Reform and Resistance," Federal Sentencing Reporter, Volume 31, No. 3, p. 182.

So, while overall crime was flat, charges for one particular crime (the crime most closely related to the offense that was defelonized by SQ 780) rose by 14%. These data are consistent with the hypothesis that, having been blocked from charging felony possession of CDS by State Question 780, Oklahoma prosecutors charged PWID rather than misdemeanor possession in at least some cases that, prior to SQ 780, would have been charged as felony simple possession.

The pattern of charging PWID rather than Possession might be lauded by some, for example as prosecutors continuing to go after serious offenders despite being hamstrung by SQ 780. On the other hand, this pattern might be condemned—for example, as a way that prosecutors resisted the clear will of Oklahomans to dial back the use of criminal legal tools in response to a public health crisis. We give virtually unreviewable discretion to prosecutors to make initial decisions about how to charge crimes. Because of the extent to which our criminal legal system involves plea bargaining, the prosecutor's initial charge is the overwhelming driver of ultimate sentencing decisions.

Whichever view you take about this pattern of charging in the wake of SQ 780, it seems to be important enough to at least debate it publicly. Yet in the absence of the kind of extraordinary effort by Ryan Gentzler at Open Justice Oklahoma, we wouldn't have any idea that this pattern existed in the first place. We need a way to allow legislators, media, and ordinary citizens to understand these patterns in order to hold prosecutors accountable for them.

Accountability for Lack of Training - The second area for accountability is for training prosecutors to implement changes in the criminal law. To illustrate this point, let's consider the example of House Bill 2751, which became effective on November 1, 2016. Among other things, House Bill 2751 changed several credit card-related offenses from felonies with a 3 year maximum sentence for first conviction to misdemeanors.

Data provided from Open Justice Oklahoma indicate that there were nearly 150 instances where people were sentenced to serve prison time for credit card-related felonies between 2017 and 2019, even though none of these offenses were actually felonies during this period due to HB 2751.

While I believe that prosecutorial resistance provides the best explanation for the increase in the first example of PWID and SQ 780, I think there's a different explanation for the persistence of charging credit card offenses as felonies—namely, a lack of training for line prosecutors. For example, nearly half of the instances of felony charges for credit card-related crimes between 2017 and 2019 occurred in one District Attorney office.

Having access to better data would allow supervisors to pinpoint the performance of line prosecutors in updating their charging decisions based on law changes. It would also help identify the need for training prosecutors to avoid charging misdemeanors as felonies.

What's true in the case of changes to Oklahoma's credit card crimes might be true in for many other legislative changes to Oklahoma criminal law. Creating comprehensive data on charging and sentencing would provide a crucial basis for ensuring that prosecutors implement criminal law in a fair and accurate way.

Accountability for Racial and Geographic Disparities - A third area for prosecutorial accountability regards disparities within and between offices.

There's a significant scholarly literature finding racial disparities in prosecutorial charging and criminal sentencing. For example, one study of federal data found that Black defendants received almost 10% longer sentences than white defendants arrested for the same crimes, and that at least half of this gap can be explained by the discretionary charging decisions of prosecutors.[2] Currently, there's no way to determine whether there is such a racial discrepancy in Oklahoma's criminal justice system, let alone whether or how much the charging decisions of Oklahoma prosecutors might contribute to it.

10%

Black defendants received almost 10% longer sentences than white defendants

There also appear to be significant geographic disparities in charging and sentencing in Oklahoma. Take the examples that I described above regarding Possession With Intent to Distribute in the wake of SQ 780 and charging felony credit card offenses after the passage of House Bill 2751. The DA office that saw the most significant uptick in PWID charges between 2017 and 2018 also saw largest number of cases of felony credit card charges between 2017 and 2019.

There is also good reason to expect other geographical variations in the charging of specific crimes, particularly with drug-related crimes. There are a number of offenses that can be "stacked" on top of drug distribution felonies to increase the prospective sentence that a defendant faces as well as to significantly increase the legal financial obligations on a defendant.

---

2 Rehavi and Starr, Racial Disparity in Federal Criminal Charging and its Sentencing Consequences (2012).

These offenses include Use of a Communications Device to Facilitate Drug Trafficking (under 13 O.S. § 176.3(8)), Possession of Controlled Substance Without a Tax Stamp (under 68 O.S. § 450.8), and Acquiring Proceeds Derived From Illegal Drug Activity (under 63 O.S. § 2-503.1).

Many criminal law practitioners that I have talked with strongly suspect that there are pathologies in how these tag-along drug offenses are charged and whether they are dismissed through plea bargaining. I am currently working with Open Justice Oklahoma to examine whether there are significant geographical disparities in charging, and I would be happy to include the product of our research as an addendum to the written version of these remarks for any Representative who would be interested in the topic.

Racial disparities in charging are an offense to the constitutions of the United States and the Oklahoma constitution. Geographic disparities in charging are similarly offensive to our republican form of government. The crime or crimes that defendants is charged with should be based on what they did, not where they did them or what their race is. Creating a comprehensive database of prosecutorial decision making along the lines that Professor Wright (will describe/described) would help illuminate whether our prosecutors are faithfully implementing the laws of our state and allow Oklahomans to hold them accountable if they are not.

RON WRIGHT

Professor of law at Wake Forest University, area of research is prosecutorial accountability and transparency.

"Prosecutors in a democracy that respects the rule of law must be accountable to two sources: the law (from various sources) and public preferences about enforcement priorities."

I am a Law Professor at Wake Forest University, and worked as a prosecutor years ago. These days, I do field research about state prosecutors, relying on interviews and case processing data.

I try to help state prosecutors and legislatures place into a national context the practices that they see in their own state.

Prosecutors in a democracy that respects the rule of law must be **accountable to two sources**: the law (from various sources) and public preferences about enforcement priorities.

Prosecutors **normally keep themselves within bounds;** they are accountable to law and public priorities through their own character and routine practices. But we do have to be ready when those normal guardrails fail.

Often when we think about accountable prosecutors, we think about case-specific accountability: ways to respond AFTER the prosecutor crosses a line in a particular case.

During my few minutes of testimony today, **I'll summarize the limits on those case-specific forms** of accountability, and then I will describe a strategy for accountability that focuses more on **general policies and trends.**

This broader strategy depends on **collecting data**, using it for **internal** office management, and **sharing some** of it outside the office for public transparency.

Limited tort liability - Tort liability is a common strategy for holding people accountable for their actions when they violate the law and harm others.

The traditional doctrine of **"absolute immunity"** for prosecutors makes this strategy unavailable. It's not truly absolute, but it's pretty close. And it's stronger than the "qualified immunity" that protects law enforcement officers.

A few state legislatures have debated changes to this immunity doctrine; one or two statutes passed recently in this arena (Colorado 2020).

This immunity doctrine, however, is not at the center of my remarks today. Even if you were to weaken or eliminate this immunity, it would only address accountability to LAW, and only in extreme and clear cases. This will never be a centerpiece for promoting good prosecutor choices.

Limited ethics discipline - Prosecutors are subject to regulation by the state bar, and bar authorities can discipline them for violations of ethical rules, including Rule 3.8.

We know from Fred Zacharias's studies based on data from the 1990s (79 N.C. L. Rev. 721-778 [2001]) that prosecutors faced investigations and sanctions less often than other lawyers.

Prosecutors tell me that the atmosphere has changed. They are far more frequently disciplined and investigated these days, in their view.

And there are early signs of experimentation with different forums to adjudicate these complaints. For instance, New York now has a specialized ethics panel, a model similar to judicial councils

The current level of activity of bar disciplinary proceedings against prosecutors is something that merits serious empirical study. We need to update Zacharias, and we need to learn about enough states to make generalizable conclusions.

Nevertheless, whatever we learn from empirical study of this type, a robust bar disciplinary process will only address accountability to LAW (not to public enforcement priorities) and will only reach extreme and clear-cut cases.

Data Transparency: Two Examples - A broader type of accountability – one that is the centerpiece of my recommendation to you – looks to shape the future behavior of prosecutors via data transparency. This data promotes **policy-and-trend accountability** rather than case-specific accountability.

Note the **current limited data collection** and dissemination in the typical jurisdiction.

Who uses this data after it is collected? Better collection and dissemination of data allows prosecutor **managers,** criminal justice **experts, journalists,** and ultimately **voters** to see trends, to confirm that prosecutors are delivering on their promises, to see the effects of chosen policies.

Current **non-profits** are now promoting examples of deeper data collection and analysis of the data for purposes of internal management and external evaluation of the prosecutor's office.

- Measures for Justice (external users of data)
- Prosecutorial Performance Indicators, funded by MacArthur and led by FIU and Loyola-Chicago (both internal management uses of data and external community relationships).

Some state legislatures have recently invested in data to keep the public better informed about the performance of prosecutors and the criminal courts. I recommend two states in particular that merit your closer attention.

The Florida Legislature created (in 2018, amended in 2019) § 900.05 and § 943.6871, Florida Statutes. These statutes established a framework for an expanded criminal justice data collection and sharing that is known as the Criminal Justice Data Transparency (CJDT) initiative.

The CJDT contributors of data include the clerks of court, state attorneys, public defenders, county detention facilities, the Florida Department of Corrections, Justice Administrative Commission, and criminal regional conflict counsel. The database tracks bond amounts, charges.

The CJDT contributors of data include the clerks of court, state attorneys, public defenders, county detention facilities, the Florida Department of Corrections, Justice Administrative Commission, and criminal regional conflict counsel. The database tracks bond amounts, **charges filed, charge dispositions**, demographics of arrestees and defendants. This data makes **cross-district comparisons** possible.[3]

---

3 A NEW LAW WAS SUPPOSED TO MAKE FLORIDA'S CRIMINAL JUSTICE DATA RADICALLY TRANSPARENT. IT FAILED.

State gave FDLE $1.75 million to build, plus $666,000 per year for 9 staffers. The full arrival of the data has been delayed, both by pandemic and the predictable start-up problems such as standardizing the data definitions. Local agencies (clerk of court, state's attorney, public defender, police, sheriff) are required to submit data or lose state funding.

Connecticut legislature passed SB 880, which the governor signed into law in 2019. Data designated for collection under this law include demographic information about people accused or convicted of a crime (race, sex, ethnicity, age, and zip code), prosecutors' actions on charging, plea deals, diversionary programs, and sentencing. All data about the people accused or convicted in a case and the victims in a case is anonymized to protect their identities.

Two features to highlight from Florida and Connecticut:

1. Both laws specify types of **reports to generate** on a mandated schedule.
2. The state offers **fiscal support** to prosecutors for this function

Conclusion - Electronic data has been **slow to arrive** in the criminal courts in state systems. We have been able to reconstruct what happened in a single case, but it has been awfully hard to see what happens across time or across categories of cases.

The arrival of this data can **supplement** the bar discipline and tort suits that will necessarily reach only a few extreme cases.

It will make **elections of prosecutors more meaningful** and give voters the tools to make choices that used to be invisible to them.

Accountable prosecutors will welcome the chance to **show their work** to the voters.

FLORIDA'S CRIMINAL JUSTICE DATA TRANSPARENCY INITIATIVE - BY THE NUMBERS

$1.75 MILLION

There was $1.75 million of initial investment to establish the data collection protocols and create uniform data definitions.

9 STAFFERS

The ongoing staffing requirement for an agency like this is 9 people in Florida, which has a population of 21 million. Oklahoma has a population of approximately 4 million.

$600,000

Once the original investment was in place, the ongoing cost was about $600,000 to the state.

Summation

Prosecutors are the most important part of the criminal justice system, and their offices have the power to completely change the way criminal justice is administered across the state.

Actions

95 %

of cases are disposed of by plea bargain. This means prosecutors have control and discretion over 95% of cases, and that data is not reported or clearly understood.

39 %

of incarcerated people could be released with no impact to public safety. Recent Brennan Center study found that 39% of incarcerated individuals could be released safely - that amounts to 860,000 people. The vast majority of people who commit crimes, even very serious crimes, grow out of that behavior as they mature.

14 %

the increase in PWID charges in the year after SQ780 went into effect. This indicates an abuse in charging discretion for cases that could have been filed as misdemeanor possession but were instead charged as felonies.

- We currently know very little about how prosecutorial decisions are being made across the state of Oklahoma. From charging decisions, to plea recommendations, to counts filed

- Voters, victims, defendants, and researchers could all collaborate on a better system together if we had data to reflect on. Prosecutors will jump at the chance to show their good work

The first step to good decision making as a state is to have good criminal justice data.

If we don't know who is being prosecuted, how they are being prosecuted, and which alternatives are being most heavily utilized, how can we ensure justice is being delivered?

Actions

01 Data and insights have been slow to arrive in the criminal justice system. We have the tools and the ability to understand data on a macro level, which is just as important as ensuring justice is being administered case by case.

02 SB880, passed in 2019 in Connecticut, is a great place to look for a bill that authorizes data collection and demographic data throughout the criminal justice system.

03 The Criminal Justice Data Transparency Initiative in Florida takes this a step further with an ongoing investment in transparency, research, and clarity.

04 An investment in prosecutorial and pre-trial data is a crucial first step to diagnosing and eliminating systemic issues in Oklahoma's criminal justice system that have led us to being the number one incarcerator in the world.