

Statement of Premal Dharia

Executive Director, Institute to End Mass Incarceration

**Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security**

March 26, 2021 Hearing:

“From *Miranda* to *Gideon*: A Call for Pretrial Reform”

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Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to testify. I have spent my entire career working within and around the criminal legal system and am grateful for this opportunity to discuss important measures Congress could undertake to address our country’s addiction to incarceration and punishment and the crisis of mass incarceration that is devastating our communities.

Introductory Remarks

The United States leads the world in the rate at which it incarcerates its people. We have 4 percent of the global population, but 20 percent of the global prison population. With nearly 2 million people in prison on any given day, the United States incarcerates approximately the same total number of people as the two largest countries on earth, India and China, combined. Our per capita incarceration rate is roughly six to nine times higher than comparable countries like France, Germany, Canada, or the United Kingdom, and is two to three times higher than Russia, Saudi Arabia, and Iran.¹

Nor is our addiction to incarceration limited to prisons. In 2018, more than 10.7 million people entered U.S. jails—the equivalent of locking up every person in Portugal, Greece, or Sweden. A large number of people in jail on any given day (490,000 in 2018) have not been convicted of any crime but are instead awaiting trial and presumed innocent.² As advocates have noted in the New York Times, “Current pretrial incarceration rates defy all historical norms. There are more legally

¹ Roy Walmsely, World Prison Brief, *World Prison Population List* (12th ed. 2018).

² Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates in 2018* 2, tbls. 1 & 3 (2020); see also *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (holding that every person charged with a crime enjoys a constitutionally guaranteed “presumption of innocence”).

innocent people behind bars in America today than there were convicted people in jails and prisons in 1980.”³

This addiction to incarceration has, of course, been documented and described in a variety of forms – books, film, scholarship, policy analysis. And there are multiple root causes that intersect with each other. But we cannot lose sight of the clear historical trajectory of racism and white supremacy that plays a part. As the Prison Policy Initiative reports, populations of those detained pretrial have more than doubled over 15 years – and they are disproportionately Black and Hispanic. Across the country, Black and brown people are at least 10-25% more likely than white people to be detained pretrial or to have to pay money bail. Young Black men are about 50% more likely to be detained pretrial than their white counterparts.⁴

This is not an accident, and it did not just happen on its own. We make choices every day – political choices, policy choices, cultural choices – that shape our systems. When it comes to the criminal legal system, many of those choices have not only been made in the context of a history of racial oppression, but also in the context of political narratives that stoke fear and ignore evidence.

Today, I would like to discuss a variety of pretrial reforms that Congress could pursue that will not, on their own, fix the larger crisis, but that will make inroads toward the kind of thoughtful change we need – and that are grounded not in unfounded emotional responses but in evidence and facts. There is a growing trend to address pretrial reform from this standpoint: encompassing evidence and seeking meaningful, sustainable solutions that will improve the lives of hundreds of thousands of people and work to end mass incarceration.

I am encouraged that the Subcommittee is holding this hearing because the pretrial component of our criminal legal system is not just in need of reform, but serves, in many ways, as the catalyst for so many other problems in the system.

Ultimately, regardless of where you fall on the political spectrum or in your views about the best way to end the unfairness and harm caused by the criminal legal system and mass incarceration, it is hopefully safe to assume that there is a universal desire to keep our communities healthy and safe, and that differences arise when we think about *how* to get there. It is also important to take a step back, given those differences, to make sure we are all using the same definition of “public safety,” a phrase that has in some ways taken on a life of its own. Popular conceptions of dangerousness, of violence, and of who commits crimes and why are very often not based in evidence or fact. Harm is,

³ Chelsea Barabas et al., *The Problems With Risk Assessment Tools*, N.Y. Times (July 17, 2019), [Opinion | The Problems With Risk Assessment Tools - The New York Times \(nytimes.com\)](https://www.nytimes.com/2019/07/17/opinion/the-problems-with-risk-assessment-tools.html).

⁴ Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Pol’y Initiative (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

of course, very real, as is violence. And our communities need to find ways to both address harm and to address the people and circumstances that cause it.

But how we do that has to be grounded in what is real – in what the evidence says about what actually increases harm in our communities, and about what risk and dangerousness really mean. We also have to recognize that our efforts to respond to harm or prevent harm can themselves cause harm, often to and within the very communities we are trying to protect. For instance, a recent study conducts a “Rawlsian cost-benefit analysis” to attempt to include the harm caused by pretrial detention in our calculations.⁵ Indeed, just three days of pretrial detention is enough to upend a person’s housing, employment, financial stability, and family wellbeing.⁶ We often consider the risk of future crime when determining what “public safety” means. But as the authors of the new study above encourage, it is past time we started considering the real human and community costs of removing people from their families, from their jobs, and from their homes when we think and talk of “public safety.” Among so many other lessons, the global COVID-19 pandemic has taught us important lessons about the need to consider what public safety means when a lethal infection is ravaging our communities. Is it safer to increase transmission by keeping people locked inside a potentially infected vault? The pandemic upended entrenched notions of “safety.”

All of this is important as we strive to enact policies and practices that are fair, racially equitable and that lead to increased safety and flourishing in our communities. One way to diagnose where at least some of the flaws in the system are is through an assessment of wrongful convictions. The number of documented exonerations recorded in a national registry currently stands at 2,755 and continues to grow.⁷ This number, however, is surely dwarfed by the true number of innocent people who have been convicted, as formal exonerations tend to focus on people wrongly convicted of the most serious crimes, leaving aside all the many people who have been accused of lesser offenses, caved to the pressure to plead guilty, and spent years in prison as a result. Our conviction of the innocent is of course important because of the fact of their innocence. But it also tells us something essential and more fundamental about our system: that the methods and policies we use are riddled with the

⁵ Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* (Va. Pub. Law & Legal Theory Research Paper No. 2021-14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787018.

⁶ Prison Policy Initiative, *Releasing People Pretrial Doesn't Harm Public Safety*, (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/>; Pretrial Justice Institute, *3DaysCount™ for State-Level Change*, <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> (last visited Mar. 23, 2012).

⁷ The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Mar. 23, 2021).

potential for error, and thus must be constantly questioned and analyzed. We cannot sit back and assume we are doing things right. Indeed, we are quite clearly doing things wrong.

In the end, as you make policy decisions, this kind of analysis, based on evidence and facts, must prevail over uninformed decision-making and the politics or rhetoric of fear.⁸

I will now address a series of points in the pretrial system where intervention is needed and where reform would go a long way toward addressing injustice. Each of these areas, individually, create daily injustices for the people involved in the system. And together, they contribute to the mass incarceration crisis that our government must urgently address.

Plea Bargaining

Approximately 98% of criminal convictions in federal courts are produced by a guilty plea, with high rates of guilty pleas in many states as well.⁹ Nearly every single person who is in a prison is there because they pled guilty. And they have generally done so without adequate access to effective counsel,¹⁰ without adequate discovery or information about their case, without adequate investigation or expert consultation,¹¹ and with the specter of increased penalties and charges

⁸ Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, The Marshall Project (May 13, 2013) <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

⁹ See U.S. Courts, *Federal Judicial Caseload Statistics 2020 Tables*, tbl.D-4; see also Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum. L. Rev. 1303, 1375-76, tbls. 2-3 (2018) (reporting plea rates across states).

¹⁰ See Attorney General Eric Holder, Remarks to the Am. Bar Ass'n Nat'l Summit on Indigent Defense (Feb. 4, 2012) ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. As a result, too many defendants are left to languish in jail for weeks, or even months, before counsel is appointed.... [T]his represents a crisis."); ABA Standing Comm. on Legal Aid & Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 686-87 (2007) (documenting the problems of high public defender caseloads).

¹¹ See, e.g., Donald J. Farole, Jr. & Lynn Langton, U.S. Dep't of Justice, Bureau of Justice Statistics, *County-Based and Local Public Defender Offices*, 2007, at 1 (2010), <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf> ("Forty percent of all county-based offices employed no investigators. Among offices receiving less than 1,000 cases in 2007, nearly 9 in 10 (87%) had no investigators on staff.").

hanging over their heads.¹² Our system is not the system of adversarial trials envisioned by its creators; it is, instead, a “system of pleas,” one grounded in coercion, imbalance, and opacity.¹³

In short, that system of pleas is the true dominant force in the criminal legal system and the context in which any discussions of pretrial reform must operate. Likewise, the flaws of plea bargaining manifest in a number of procedural rules and obligations that can be changed. Even discrete reforms that may not seem individually significant could make inroads at the kind of thoughtful change we need to dismantle the machinery of mass incarceration.

Working to eliminate this coercion is essential to ending our system of mass incarceration, in which people are removed from their communities and incarcerated, subjected to onerous conditions and surveillance, and marked with punishments they will carry for the rest of their lives – in large part because we choose to allow prosecutors to possess a set of tools that they can use to extract guilty pleas. Prosecutors can pursue pretrial detention, they can up-charge cases, they can threaten offenses that carry mandatory minimum sentences, they can withhold discoverable material, they can obscure police misconduct. And because they can do all of this, not only do guilty pleas result, but the transparency mechanisms built into our criminal process – such as suppression hearings to examine police misconduct – evaporate.

¹² See, e.g., Crespo, *supra* at 1310-1315.

¹³ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting “the reality that criminal justice today is for the most part a system of pleas, not a system of trials”). For a sampling of academic criticism of plea bargaining’s systemic and individual injustices, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 883–84 (2009) (“The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor’s prejudices and biases to dictate outcomes. . . . Indeed, researchers have found that, even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions.” (footnote omitted)); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 (2004) (arguing that “plea bargaining . . . bases sentences in part on wealth, sex, age, education, intelligence, and confidence”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 878 (1995) (“[T]he prosecutor’s one-sided control of plea bargaining impacts poorer defendants to a greater extent than it impacts wealthier defendants.”); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 27–31 (2013) (describing racially disparate charging practices); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Legal Stud. 75, 78 (2015) (same).

None of this is set in stone. We can make changes that move us, even if slowly, toward justice. I encourage you to consider all of these proposals against the backdrop of the systemic forces at play, and to push for change.

Arrest

Even though the word arrest signals a single moment, there are so many factors involved in who is and is not arrested, what that process is like, and what happens upon arrest. There are encounters that do not lead to arrest, there are different forms of letting people know they are to face charges or court, including not taking them into custody, and there is of course the process that follows if a person is taken into custody. All of these play important roles in the pretrial process, and are thus important points for potential intervention.

Street Encounters

A great many criminal cases start with an interaction between a civilian and a police officer.

In addition to serving as the site of much police misconduct and violence, these police “contacts” are often the front door to the pretrial phase of the criminal system’s process. Indeed, it is often these encounters through which police develop the allegations and alleged evidence that is used to support requests for pretrial detention or conditions, to support decisions about what to charge, and to construct a plea offer that sets up negotiations or bargaining.

These encounters, however, can also be coercive, as scholars have noted for decades.¹⁴ Because of this, there is a real opportunity to intervene in a way that minimizes the potential for abuse. Police should be required to verbally inform all people with whom noncustodial street encounters are initiated that they are free to leave, and to reinforce that caution by maintaining physical distance, not touching or holding weapons, making both hands visible, and by implementing safeguards, including that the exercise of the constitutional right to leave cannot be used against a person in any way, including informal retaliation.

Reducing Custodial Arrest

Custodial arrest is the direct precursor to the pretrial system. In 2014, 11.2 million people were formally arrested in the United States, with Black people once again overrepresented in the arrested population.¹⁵ Arrests can cause harms and lead to systemic abuses in their own right, in addition to producing downstream effects on the pretrial process and ultimately on mass incarceration. There

¹⁴ See, e.g., David Cole, *No Equal Justice* (New Press 1st Ed. 2000).

¹⁵ Bureau of Justice Statistics, Arrest Data Analysis Tool, <https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#>.

are important steps that can be taken within the arrest process itself to address these problems. But we can also take steps to reduce the high number of custodial arrests themselves.

Specifically, we can and should reflect on some of the hard-earned lessons of the COVID-19 pandemic. With respect to arrests and policing, one clear shift was the expanded use of cite-and-release (a process by which people are issued a summons to report to court, rather than being arrested) as an alternative to taking people into custody for every alleged violation; this approach can and should be implemented more widely.¹⁶ Adopting such practices more broadly would have tremendous positive effects both on the resources currently used to effectuate custodial arrests and on the experiences, stability and decision-making of those facing criminal charges.

Access to Counsel, the Effective Assistance of Counsel, and the Right to Present a Defense

As our courts have recognized countless times over the past several decades, the right to counsel, to the effective assistance of counsel,¹⁷ and to present a defense¹⁸ are all bedrock constitutional principles of our legal system.¹⁹ In order to ensure that those principles are more than mere words, we must guard against structural impediments – even subtle ones – to their implementation. Indeed, to overcome the possibility of constructive denial of the right to counsel, reforms of the current landscape are crucial. I will provide several examples and suggestions for steps Congress can take to ensure that these constitutional guarantees are not hollow in their implementation.

The Supreme Court has held that as a matter of constitutional law the right to counsel “attaches” only at the initiation of judicial proceedings, not arrest. The “attachment” of counsel, moreover, does not mean that counsel will actually be provided when judicial proceedings start. Rather, the right to have counsel appointed arises only at “critical stages” of the proceedings.²⁰ Both of these

¹⁶ Alexi Jones and Wendy Sawyer, *Arrest, Release, Repeat: How police and jails are misused to respond to social problems*, Prison Pol’y Initiative (August 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>

¹⁷ *United States v. Cronin*, 466 U.S. 648 (1984) (defining that the right to the effective assistance of counsel as the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing); *Strickland v. Washington*, 466 U.S. 668 (1984) (laying out the standard for determining whether the assistance of counsel was effective).

¹⁸ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁹ *Chambers v. Mississippi*, 410 U.S. 284 (1973).

²⁰ *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (holding that the right to counsel attaches when formal judicial proceedings begin).

doctrinal frameworks rely on outdated analyses, do not account for the reality of police practices in the 21st century, and importantly do not reflect at all on the context of mass incarceration, how we got here, and what lessons can be learned about what we are doing wrong. As noted in a report jointly authored by the Sixth Amendment Center and the Pretrial Justice Institute:

If it were always the case that the right to counsel attached before any critical stage occurred, then it would be a fairly simple and straight-forward matter for the magistrate before whom a defendant appears to appoint counsel for an indigent defendant and that counsel could then be prepared for and present at the first critical stage following. But things are not so clearly ordered in our criminal justice systems and there are wide variations among jurisdictions in the procedures they follow. A defendant may be arrested before or after the formal institution of prosecution. A defendant may be in custody or may be at liberty at the time of the first appearance before a magistrate. Law enforcement may arrest a defendant and wish to interrogate him, giving rise to the critical stage of custodial interrogation, before he is brought before a magistrate for the first appearance. A prosecutor may desire to offer a plea bargain to a defendant who is under investigation prior to that defendant ever being arrested or brought before a magistrate for the first appearance. The events in a criminal case proceeding can and do occur in almost any order at all.²¹

In other words, whether or not a person will actually see their right to counsel actualized depends on the happenstance of local procedures – the sequencing of different parts of the pretrial process. States, moreover, can manipulate that sequencing to avoid the constitutional requirement, with the result that people can spend tragically long periods of time incarcerated without ever meeting their attorney.

The practical reality is that, in our criminal legal system, the true process of prosecution and liberty deprivation begins at the street encounter, when the policing arm of the state restricts a person's liberty, generally by effectuating an arrest. The right to counsel should thus attach, at a minimum, upon arrest. And in order to ensure that that right is not toothless, counsel should be made affirmatively available at this stage.²²

Under current law, people who are taken into custody and facing interrogation are entitled not to be questioned without counsel present. In practice, what this means is that those people – regardless of age, sophistication, legal experience, disability, vulnerability, or any other factor – must actively and clearly demand the presence of counsel.²³ Moreover, because current law only prohibits questioning

²¹ The Sixth Amendment Center & The Pretrial Justice Institute, *Early Appointment of Counsel* (2014) https://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf.

²² Fair Trials, *Station House Counsel* (Oct. 20, 2020) <https://www.fairtrials.org/publication/station-house-counsel>.

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that, under the Fifth Amendment, any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a

the person further once an invocation is made, people who exercises their “right to counsel” during police interrogation typically do not get an attorney at all. Instead, they wait at the police station or some other holding cell for an unknown period of time without information as to what will happen next, before simply being taken to court with no explanation as to what is happening to them. Needless to say, this process is disorienting and traumatic. In addition to being locked in crowded cells for extended periods of time, people are cut off from their families (including potentially children or loved ones in need of care) and their employment (which can threaten their job stability).

People in such a situation need more than the theoretical, largely insubstantial “right to counsel” so famously described in the *Miranda* warnings read on TV. They need the *actual* right to counsel.

Congress can and should take action to make this right more than a theory. Indeed, it’s not just one discrete right at stake: as described above, there are multiple constitutional rights implicated: the right to counsel, the right to the effective assistance of counsel, and the right to present a defense. And the danger of coercion is pervasive. Indeed, by the time people facing charges see a lawyer in court, key decisions have already been made by other actors in the system with respect to charging and bail – decisions which will be determinative for many who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.²⁴ The Registry of Exonerations has documented that 12% of exonerations arise from false confessions – including 36% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.²⁵ And as noted in a different report by the Registry: “In part, *Miranda* was a step in the Supreme Court’s campaign to eliminate violence in interrogations. But *Miranda* also ratified the “modern practice of in-custody interrogation [which] is psychologically, rather than physically, oriented... Instead of regulating the process of non-violent interrogation, the court required police to give warnings before they start, and then only continue if the suspect waives his right to silence. But most do waive their rights at the outset of the ordeal; it’s hard to tell an officer who has you

knowing, voluntary, and intelligent manner.); *Davis v. United States*, 512 U.S. 452, 459 (1994) (“[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.”).

²⁴ Fair Trials, *Station House Counsel* (Oct. 2020)

https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf.

²⁵ The National Registry of Exonerations, *False Confessions Table* (Mar. 17, 2020)

<http://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf>

under arrest that you won't talk to him. After that, the issue almost never comes up again. By the time they confess, *Miranda* is a distant memory, if not entirely forgotten."²⁶

Just as is the case throughout Europe, counsel should be physically available at the police station to those who have been taken into custody. In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.²⁷ In 2016, legislation was passed making police station access to counsel mandatory across the European Union.

Denial of access to counsel at the police station bears a direct link to the United States' unique crisis of mass incarceration, and we need action. To complement the provision of counsel at arrest, and recognizing that no part of our criminal legal system operates in a silo, policies should be pursued and encouraged that engage other actors in the system around the same rights. For example, prosecutors could and should enact policies in which statements taken outside the presence of counsel are not used as evidence (directly or indirectly) in prosecutions and investigations. Public defender offices and appointed counsel systems should receive the necessary support to ensure provision of counsel upon arrest. And, with respect to any interrogations themselves, a number of internationally recognized and utilized procedures and protections should be implemented to ensure transparency, lack of coercion, and the meaningful existence of these rights. For example:

- 1) interrogations should be limited in length and suspects should be informed upfront of the cap on time,²⁸ as length is directly correlated to the likelihood of false confession;²⁹

²⁶ The National Registry of Exonerations, *For 50 Years You've had "the Right to Remain Silent"* (June 12, 2016)

<http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx>.

²⁷ Fair Trials, *Station House Counsel* (Oct. 2020).

https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

²⁸ White, Welsh S., *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 143 (1997) ("Based on the empirical evidence, an interrogation's length seems directly related to its likelihood of producing a false confession. In nearly all of the documented cases involving false confessions by suspects of normal intelligence, the interrogation proceeded for several hours, generally more than six.")

²⁹ Mark Costanzo & Richard A. Leo, *Research and Expert Testimony on Interrogations and Confessions* 69-98 (Expert Psychological Testimony for the Courts, 2007) (asserting that imposing a time limit of 4 hours, more than 2 times the length of a typical interrogation, will not meaningfully undermine law

- 2) interrogations should be recorded;³⁰
- 3) interrogations should be free of coercion – including the ability of the police to lie in order to secure certain responses.³¹

The Criminal Court Process

Right to Counsel, to the Effective Assistance of Counsel, and to Present a Defense

As discussed previously, the rights to counsel, to the effective assistance of counsel, and to present a defense apply throughout the criminal process. There can be no meaningful debate that our system of indigent defense in the United States, despite the promises of *Gideon*, is in crisis.³² As we work toward a future in which fewer and fewer people are brought into the carceral system, we must simultaneously ensure that those who are prosecuted are provided with the effective counsel to which they are guaranteed. In reality, this means providing resourced, quality indigent defense in an organized, responsive fashion. It also means ensuring that those defenders can provide effective assistance through investigation, expert consultation, and other defense services that must be provided by the government when it elects to pursue prosecution. This applies, of course, to Federal

enforcement efforts to elicit true confessions, but will lead to significantly fewer false confessions elicited with the aid of exhaustion.)

³⁰ The Innocence Project, *False Confessions & Recording of Custodial Interrogations* <https://innocenceproject.org/false-confessions-recording-interrogations/>. (last visited Mar. 23, 2021).

³¹ This issue was just addressed by Dr. Saul Kassin in the New York Times in January 2021, *see* Saul Kassin, *It's Time for Police to Stop Lying to Suspects*, N.Y. Times, Jan. 29, 2021 <https://www.nytimes.com/2021/01/29/opinion/false-confessions-police-interrogation.html> (“That’s why there is a consensus on this issue within the scientific community. The American Psychology-Law Society published a white paper cautioning of the risk of presenting false evidence; the American Psychological Association passed a resolution stating the same. In a recent survey of 87 Ph.D. confession experts worldwide, 94 percent endorsed as highly reliable the proposition that “presentations of false incriminating evidence during interrogation increase the risk that an innocent suspect would confess”; 100 percent agreed “misinformation about an event can alter a person’s memory for that event.”)

³² *See* note 10, *supra*.

Public Defender offices; it also applies, however, to panel and appointed attorneys who represent approximately forty percent of those who appear before the federal bench.³³

Court Hearings

When the COVID-19 pandemic struck, our criminal legal system went into shock. It was – and is – entirely unprepared to function when faced with such a devastating public health crisis. Much harm and death has resulted from our system’s unwillingness to confront, head-on, the very real dangers presented by COVID-19.³⁴ Over 47,000 people in the custody of the Bureau of Prisons (BOP) have tested positive, and 227 have died, in addition to 4 BOP staff member deaths.³⁵ Prosecutions did not stop, but court hearings did, and as a result countless people continue to wait to be heard in their cases.

We must learn from this disastrous response and adopt policies and structures to ensure our system can operate in a public health crisis. But there are also some responses to the pandemic that resulted in a positive shift. Many court systems relieved people of the burden to come physically to court or to meetings in person and allowed for hearing rescheduling and other administrative matters to be handled with ease. Moreover, in response to the pandemic, the system started to address the transportation, housing, family and employment challenges that many impacted by the system have *always* faced. It should not have taken a widespread crisis to make these hardships apparent to those in power. Allowing those whose lives are directly upended by the criminal legal system to reschedule hearings, to appear virtually, and to conduct meetings and check-ins remotely – with their voluntary, informed consent – could have tremendous impacts on the ability of people to maintain employment and to navigate the hurdles of childcare, transportation, and the costs associated with all of those things. And, because so many “returns” to incarceration are through violations – of pretrial release, of probation, and other forms of supervision – grounded in missed appointments, missed phone calls, and missed court hearings, this kind of policy shift has a direct bearing on the larger crisis of mass incarceration itself.

And one additional point here, unrelated to the pandemic’s impact directly, but always relevant and supported by the discussion above, is that court hearings should never occur without counsel present. In many places around the country, first appearances and arraignments are done outside the

³³ U.S. Courts, *Defender Services*, <https://www.uscourts.gov/services-forms/defender-services> (last visited Mar. 23, 2021).

³⁴ Madeleine Carlisle and Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, Time (Dec. 28, 2020); Keri Blakinger and Keegan Hamilton, *“I Begged them to Let Me Die:” How Federal Prisons Became Coronavirus Death Traps*, The Marshall Project (June 18, 2020);

³⁵ Federal Bureau of Prisons, COVID-19 Data Locator: <https://www.bop.gov/coronavirus/> (last visited March 23, 2021).

presence of counsel. This is a true abrogation of the right to counsel, and it cements the coerciveness of the process that has led us to mass incarceration.

Speedy Trial Protections

Even prior to COVID-19, speedy trial rights were irregularly enforced. The pandemic threw an enormous wrench into the administration of courts and trials and, rather than follow existing law and release from incarceration those who could not be timely tried, prosecutors and courts around the country found paths to changing and expanding the rules to allow for exceptions and thus, in many cases, to allow for indefinite pretrial detention.³⁶ As a consequence, people have been languishing behind bars at a far greater rate since the pandemic started. But this structural problem is not a new one. The constitutional speedy trial right sets only a floor, and in truth leaves far too much room for extensive pretrial delays. Likewise, the federal Speedy Trial Act can be circumvented. Legislation is needed to ensure that pretrial delays are avoided – and that cases end and people who retain their presumption of innocence are released if their government cannot afford them a trial in a speedy fashion.

Discovery

Intertwined with the rights to counsel & to present a defense is the issue of discovery: specifically, what information is provided to defense counsel and the person they represent, and when.³⁷ In civil cases, discovery is broad and the disclosure process is structured to ensure complete disclosure to both sides, with a goal of creating a level playing field. Despite the stakes being critically higher in criminal cases, a far more secretive and imbalanced approach is taken, in which prosecutors can withhold a number of items from the defense and are only obligated to reveal certain categories of information and evidence at certain times. Indeed, it is in part because of the impossibility of creating categories that are clearly and fairly defined that discovery disputes commonly arise – and that our system of coercive plea-bargaining and uninformed convictions exists. Michael Morton’s case is a clear example of this; after being wrongfully convicted and spending 25 years in prison for

³⁶ Betsy Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, Politico (March 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

³⁷ See, e.g., Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, THE CHAMPION 26 (May 2013), <https://www.nacdl.org/Article/May2013-PursuingDiscoveryinCriminalCas> (“[A]n effective argument can be made that the Sixth and Fourteenth Amendments to the U.S. Constitution require full disclosure to the defense of all records and materials prior to trial in a criminal case.”).

the murder of his wife before being exonerated by DNA, the Texas Legislature passed the Michael Morton Act in 2013, mandating open-file discovery in criminal cases.³⁸

To minimize the potential for error and confusion as to what requires disclosure, and to enhance fairness and allow for informed decision-making at all stages, all prosecutors should be required to maintain “open file” discovery, in which their files are made available to the defense for review. According to the Justice Project:

“To best protect a defendant’s right to due process and improve the system’s ability to efficiently resolve cases, states should enact more expansive discovery laws comparable to the laws governing discovery in civil cases. Open-file discovery grants the defense access to all unprivileged information that (with due diligence) is known or should be known to the prosecution, law enforcement agencies acting on behalf of the prosecution, or other agencies such as forensics testing laboratories working for the prosecution. An open-file policy reduces discretionary decisions in determining what evidence is “material” (meaning that it will affect the outcome of trial) and “exculpatory” (meaning that it will tend to negate guilt or mitigate a sentence) and should thus be disclosed to the defense. By allowing the defense access to the state’s entire file, open-file discovery reduces the potential for error and the inefficiencies inherent in making the decisions on an item-by-item basis.”³⁹

Fair and Just Prosecution (FJP), an organization that works with elected prosecutors around the country on policies that promote safety and fairness, has written about the importance of expanding criminal discovery.⁴⁰ In its brief, FJP highlights the reforms implemented by a number of courts and prosecuting agencies, including legislation mandating open file discovery in North Carolina,⁴¹ and a number of federal district courts that require early disclosure.

The question of timing is also a key one: in addition to trials, discovery plays an important role in the fairness and reasoned decision-making of bail hearings, preliminary hearings, motions hearings, investigation and plea negotiations. It also affects the ability to present mitigation and to make meaningful arguments at sentencing. Because 98% of all convictions in the federal system arise

³⁸ Brian Rogers, *New Law Forces Prosecutors to Turn Over Evidence Against Suspects*, Hous. Chron. May 16, 2013, <https://www.houstonchronicle.com/news/houston-texas/houston/article/New-law-forces-prosecutors-to-turn-over-evidence-4522558.php>

³⁹ The Justice Project, *Expanded Discovery in Criminal Cases* [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf](https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf) (last visited Mar. 23, 2021)

⁴⁰ Fair and Just Prosecution, *Promoting Transparency and Fairness Through Open and Early Discovery Practices* (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf

⁴¹ N.C. Gen. Stat. § 15A-903.

from guilty pleas,⁴² there is an urgent need to assess the provision and scope of discovery disclosures prior to plea negotiations. Indeed, many if not most people currently facing prosecution in the United States are making life-altering decisions without the benefit of meaningful information about the allegations against them.

Within the broad category of discovery, there are also discrete categories of material that have been identified by the courts: *Brady* material, *Giglio* material and *Jencks* material. I will take them in turn.

1) *Brady* and *Giglio*. Named after the landmark case of *Brady v. Maryland*,⁴³ *Brady* material is that which could tend to exculpate a person or would go toward reducing the potential penalty faced. And named after the Supreme Court case *Giglio v. United States*,⁴⁴ *Giglio* material is a subset of *Brady* material that encompasses any information that impeaches the credibility of government witnesses, including law enforcement officers. Under current rules in most places, disclosure of both types of material is dependent on a prosecutor's assessment of the "materiality" of the evidence. This approach is problematic⁴⁵ for a number of reasons,⁴⁶ including that it puts the prosecutor in the difficult—if not impossible—position of serving as both a strong advocate for the government's interests and as an impartial decisionmaker as to whether evidence will be helpful to the defense: "[T]he prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case."⁴⁷ Many have called for legislation or policies that would make clear that the materiality standard (while potentially relevant when assessing *Brady* violations after the fact) has no bearing on a prosecutor's obligation to disclose

⁴² See U.S. Courts, *Federal Judicial Caseload Statistics 2020 Tables, Table D-4* (March 31, 2020), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables>.

⁴³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁴⁴ *Giglio v. United States*, 405 U.S. 150 (1972).

⁴⁵ Gershman, Bennett L., *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007).

⁴⁶ See, e.g., Abel, Jonathan, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743 (2015); NAT'L ASS'N OF CRIM. DEF. LAW., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014), <https://www.nacdl.org/getattachment/d344e8af-8528-463cbba4-02e80dfced00/material-indifference-how-courts-are-impeding-fair-disclosure-in-criminal-cases.pdf>

⁴⁷ *Bagley v. United States*, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting).

information in the first place.⁴⁸ Further, there is currently no established constitutional obligation that *Brady* material be disclosed prior to plea negotiations, which is, in the vast majority of cases, when it is the most relevant.⁴⁹ Here, too, legislation can substantially improve matters by raising the floor of legal protections.

2) *Jencks*. Subsection (a) of the Jencks Act, 18 U.S.C. §3500, provides that no statement of a government witness “shall be the subject of subp[er]na, discovery, or inspection until said witness has testified on direct examination in the trial of the case.” As practicing attorneys, be they prosecutors or defenders, know well, witness testimony is often the most central evidence in a case, which means that witness statements about the events in question are essential information for the accused. The Jencks Act withholds that information from people and makes it all but impossible to fully prepare an adequate and informed defense. Many have called for the elimination – or, at a minimum, the reform – of the Act.⁵⁰ The timing of disclosure – after direct examination – is unreasonable and puts a tremendous strain and disadvantage on the defense. And of course, the presumption of a direct examination signals that a trial is underway, meaning that there is no obligation whatsoever to provide these materials pursuant to the Jencks Act during the course of plea negotiations.

Late last year, with bipartisan support, Congress passed the Due Process Protections Act (DPPA), which directly amended Federal Rule of Criminal Procedure 5.⁵¹ The DPPA requires that courts, at the initial appearance, remind prosecutors of their *Brady* obligations and potential consequences for noncompliance. The bipartisan recognition of prosecutorial failures in passing the DPPA reflects admirable intent, but more must be done. The Act does no more than require a reminder and warning. It does not take any affirmative steps to meaningfully address the inequity in the current process, or the reality that guilty pleas are being taken on a daily basis without access to this essential material. The DPPA does not require, for example, that prosecutors provide *Brady* material in the context of plea negotiations. It does not require prosecutors to certify on the record that they satisfied their obligations. And it does not require the government to provide open-file discovery.

⁴⁸ Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U Rev. L. & Soc. Change 407 (2014).

⁴⁹ McMunigal, Kevin C., *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007). See also Brandon L. Garrett, *Convicting the Innocent* 168–70 (2011); Emily M. West, *Innocence Project, Court Findings Of Prosecutorial Misconduct Claims In Post-Conviction Appeals And Civil Suits Among The First 255 DNA Exoneration Cases* (2010); *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 Cardozo L. Rev. 2037, 2071 (2010) (presentation by Terri Moore, First Assistant, Dallas County District Attorney’s Office).

⁵⁰ Paul K. Rooney, and Elliot L. Evans, *Let’s Rethink the Jencks Act and Federal Criminal Discovery*, 62 A.B.A. J. 10, 1313–16 (1976).

⁵¹ Due Process Protections Act (“DPPA”), P.L. No. 116-182, 134 Stat. Ann. 894. (2020).

Given the reality that our criminal legal system is a system of guilty pleas, any meaningful reform must account for the information that is critical to making informed decisions during plea negotiations.

The recent rise in national conversations about police behavior points to one straightforward reform that can be undertaken immediately, as it is already grounded in existing constitutional law: *Giglio* obligations must be expansively interpreted, must include all police complaints (regardless of status), must seek to uncover and report expressions of white supremacy in police departments and among law enforcement officers,⁵² and must earnestly seek to make transparent to the defense any issues implicating the credibility of any officers involved in a case.

Each of these areas of discoverable material are critical areas for intervention. The late and inconsistent disclosure of each precludes informed decision-making, eliminates fairness, and goes further in terms of process, as other important avenues available by law to criminal defendants are not pursued because of a lack of relevant information. For example, when guilty pleas are taken early in a case, there are generally no motions hearings to address the potential constitutional rights implicated in a street encounter or arrest. As a result, one of the system's primary methods for uncovering police misconduct or illegality – through 4th Amendment litigation – is eliminated, and police misconduct is increasingly obscured. Moreover, experts are not retained to conduct analysis, and investigation is not done that could uncover critical evidence. All of these resulting patterns further entrench the racial disparities that manifest in police behavior in terms of who is stopped, searched, and arrested. And the guilty pleas that are entered into are done without the full breadth of information that the law, on paper, suggests should be made available. And so coercion is also entrenched.

This is all fundamentally problematic in its own right. Millions of people are behind bars in our country, most of them having pled guilty. We will never know how many of those convictions were obtained fairly or are reflective of guilt or supported by the weight of our criminal laws as they may appear on the books. Indeed, 2,755 people have been exonerated in our country since 1989, based on a number of factors. And while Black people make up 13% of our country's population, they make up 47% of those exonerates.⁵³ Discovery reform is a racial justice issue, and a fairness issue.

⁵² Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 205 (2019), <https://law.lclark.edu/live/files/28080-lcb231article2johnsonpdf>; see also *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments*: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform, 116th Cong. 11 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University).

⁵³ Sydney Stephens, *Race and Wrongful Convictions*, Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/Race-and-Wrongful-Convictions.aspx>.

Jury Pools

Juries are, of course, selected during trial. But the pools of people from which potential jurors emerge are selected far earlier than that. And jury pool composition is ripe for reform.⁵⁴ Indeed, federal courts around the country have begun to undertake efforts to ensure that jury pools are more reflective of the communities in which they serve.⁵⁵ This is a racial justice issue, as studies consistently correlate the racial makeup of jury pools with outcomes for people facing prosecution. The current methods of enlisting potential jurors are themselves in need of change. For example, Black and Latinx residents are more likely to experience housing and employment instability, making it harder to receive juror questionnaires and to miss work in order to serve.⁵⁶ In order to ensure the constitutional right to a fair cross-section of the community, standards for reflectiveness could be imposed, requiring a certain composition that reflects a community's population. Additionally, people with felony convictions in many states and in federal courts are still precluded from juror service, despite research demonstrating that there is no reasonable basis for such an exclusion,⁵⁷ and despite the stark racial disparity in our criminal system,⁵⁸ in which one-third of Black men have felony convictions.⁵⁹ California recently passed SB310, removing the exclusion and allowing almost all people with felony convictions to serve on juries.⁶⁰ Federal reform can directly address this

⁵⁴ Judge William Caprath et al., *Assessing and Achieving Jury Pool Representativeness*, 55 *The Judges' J.* 2, 16 (Spring 2016).

⁵⁵ U.S. Courts, *Courts Seek to Increase Jury Diversity* (May 19, 2019), <https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity>.

⁵⁶ Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sep. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>.

⁵⁷ James M. Binnall, *Twenty Million Angry Men: The Case for Including Convicted Felons in our Jury System* (2021).

⁵⁸ Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People With Criminal Records*, Prison Pol'y Initiative (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

⁵⁹ Race & Justice News, *One-Third of Black Men Have Felony Convictions*, The Sentencing Project (Oct. 10, 2017), <https://www.sentencingproject.org/news/5593/>.

⁶⁰ S.B. 310, 2019 Sen., Reg. Sess. (Ca. 2019).

unfounded disenfranchisement, and the resulting racial disparities, by removing the exclusion from juror eligibility requirements.⁶¹

Indigent Defense

Finally, I want to address an issue near and dear to my heart and career: indigent defense. When the Supreme Court handed down *Gideon v. Wainwright* in 1963,⁶² it did so without a roadmap for implementation. And so we have an enormous jigsaw puzzle of indigent defense services in every state, city, county and municipality in the country, in addition to in the federal courts. It's a recipe for injustice. And indeed, that's what we have – overburdened, under-resourced public defenders, jurisdictions with no institutional defender office, a lack of pay parity with prosecutors, and so many other issues.⁶³ And beyond the issue of pay parity, there is also the question of infrastructure and resource parity. Hundreds of thousands of people are making uninformed, unsupported decisions that will change the course of their lives forever, all because they do not have access to the counsel the Constitution tells them they should have. The federal government needs to take responsibility for this crisis, and it should do so with the guidance and insight of defenders. Prosecutors are routinely involved in policy-making at every level; defenders should be, as well – on this issue and countless others. By implementing standards for best practices and attaching those to federal grants, the federal government can play a meaningful role not just in offering financial support but incentivizing meaningful changes. Indigent defense is at the heart of every other reform: public defenders are the only actors in the system that advocate alongside and for those impacted by it. They are the system's voice of accountability.⁶⁴ They are essential to any system that claims to involve justice.

Thank you again for holding this hearing and for inviting me to present testimony.

⁶¹ U.S. Courts: Juror Qualifications, <https://www.uscourts.gov/services-forms/jury-service/juror-qualifications>.

⁶² 372 U.S. 335 (1963).

⁶³ Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, The Guardian (Sep. 7, 2016), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

⁶⁴ See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247 (1988).