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ANALYSES OF PROSECUTORIAL POWER AND DISCRETION IN MISSISSIPPI:
EVALUATING PROPOSALS TO ADDRESS MISCONDUCT AND ABUSE

By
Lucy Pruitt

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of
the requirements of the Sally McDonnell Barksdale Honors College.

Oxford
May 2020

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ABSTRACT

LUCY PRUITT: Prosecutorial Power and Discretion In MS (Under the direction of Dr. Kyle Fritz)

This thesis seeks to create a policy proposal in order to address incidences of prosecutorial misconduct and abuse of discretion in the Mississippi criminal justice system. To do so, the author has summarized and analyzed seven criminal cases in which defendants have become victims of prosecutorial misconduct in order to shed light on the lack of prosecutorial accountability in the state's criminal justice system. In an attempt to solve the problem, the author has developed a novel grading rubric in order to objectively and systematically analyze and evaluate previously proposed policy recommendations by legal experts and justice organizations. The successes and failures of each policy according to their evaluations of hypothetical implementation revealed the unique challenges to criminal justice reform attempts in the state of Mississippi. Taking these challenges and further characteristics of the state into account, the author recommends greater prosecutorial transparency policies be implemented in the state, mandating that prosecutor's offices disclose necessary data and information upon requests to the research agencies and judicial organizations studying incidences of prosecutorial abuse of power in Mississippi. The author also recommends that the Mississippi legislature and government officials create a research funding mechanism that would support and foster collaboration across such organizations.

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Introduction

In 1996, Curtis Flowers, an African American man from Winona, MS, was charged with the murders of four people at a local furniture store. Maintaining his innocence for over 20 years, Flowers was tried and convicted of the crime not once or even twice, but six times. In each of the trials, the leading prosecutor was District Attorney Doug Evans, who committed prosecutorial misconduct and abused his powers of discretion endlessly throughout the duration of this entire case and was never professionally disciplined or stopped (Baran, 2019). Flowers continued appealing his convictions and having them overturned due to misconduct by Doug Evans after each trial. Those outside of Winona or a surrounding area probably had not learned of this strange and unsettling case, until a group of investigative journalists decided to figure out exactly what was keeping this case from final resolution (Baran, 2019). The reasons they found were none other than pervasive instances of prosecutorial misconduct, abuses of power, and lack of any accountability or disciplinary measures to follow—even when they resulted in the overturning of convictions (Baran, 2019). The case eventually made its way to the Supreme Court of the United States in early 2020, drawing new waves of media and public attention to Mississippi’s criminal justice system (*Flowers v. Mississippi*, No. 17–9572, 588 U.S. 2019).

The case of Curtis Flowers raises two key questions: (1) why can a prosecutor continue to abuse his power with no professional discipline or accountability, and (2)

how frequently does prosecutorial abuse of power take place in Mississippi? The main issue at hand is that most prosecutors' offices do not attempt to gather basic information about their practices, nor write and publish policies which guide their decision-making or inform the public (Fortier, 2019). The most comprehensive nationwide survey of state prosecutors' offices, completed by the Urban Institute in 2018, found little prosecutorial data collection even in terms of basic case records (Fortier, 2019). The survey collected data on "foundational case information," which included the number of cases per office, number of charges, and records of case proceedings. The study's results reported that less than half of the offices nationally surveyed collect these basic data points, and even fewer publish the results. Only 24 percent of offices surveyed reported making any available data analyses public (Fortier, 2019). This lack of data collection has long been the norm among prosecutors' offices for a variety of reasons, but—besides the hassle involved in developing more bureaucratic paperwork—it is mostly due to the fact that there are almost no legal requirements that prosecutors record or publish any data (Spohn, 2018).

Because state prosecutors are not required to record or report information regarding their cases, the only cases of prosecutorial misconduct or abuse of power which are recognized or documented are those which the court system has been forced to acknowledge and resolve. Unless called to attention, these injustices may go unrecognized and unresolved. Further, this lack of data means the frequency by which these incidences of prosecutorial misconduct or abuse of power are happening is unknown, and there is no telling how many have happened in the past. Many of these cases of misconduct go unnoticed or unfought for years or even decades, and this is an

issue that will be exhibited in the wide variations in timelines in the case studies I will present in Chapter 2. Information regarding prosecutorial misconduct or abuses of discretion in Mississippi is only available in cases where the abuse has come to light, some of which I discuss in Chapter 2. As a whole, these case studies are narratives which collectively tell the story of Mississippi's problem of unchecked prosecutorial discretion. The frequency of prosecutorial abuse of discretion in Mississippi is unknown, but these cases show that it occurs more often than it should and with no consequences for the prosecutors, only for the victims of their discretion.

The case of Curtis Flowers, along with a handful of others, is further examined and analyzed in the second chapter of this thesis which exhibits the particular threats to constitutional rights and judicial practices by unchecked discretionary powers of Mississippi prosecutors in the criminal justice system. The goal of this thesis is to study and analyze prosecutorial misconduct in Mississippi in order to develop a policy recommendation which will prevent such injustices in the future by allowing us to better identify and address cases of prosecutorial misconduct in the state's criminal justice system. By researching these known injustices and why they occur, as well as analyzing policy proposals from legal experts and organizations, I will explore ways to best prevent or minimize prosecutorial misconduct in MS, providing a novel rubric for evaluating some proposals and ranking them accordingly. By the end of the thesis, I will have answered the questions: (1) why should Mississippi implement greater safeguards against prosecutorial abuses of discretion and power? And (2) how should Mississippi implement these safeguards?

The state of Mississippi was chosen for many reasons, much of which comes from a combination of my current location as a student at the University of Mississippi, background in studies of Mississippi public policy, and a deeper cultural understanding of the state as a whole gained throughout my entire life's residency. More importantly, however, is the reason to believe that Mississippi's historical reputation of racism, classism, and political corruption is not merely historical. These distinct characteristics and "old habits" of the state will need to be met with a tailored approach to prosecutorial reform. To adequately grasp the scope of prosecutorial misconduct in Mississippi, it is important to understand the history of discriminatory laws and policies which still deeply influence the state today. And although state-approved legislative action—such as Jim Crow Law—is no longer at play, the many implications of those policies—and the mindsets behind them—have yet to be completely eradicated.

In order to examine the possible problem of prosecutorial misconduct in Mississippi, I have compiled and analyzed seven case studies in which justice failed to be served by the court and are best explained by abuse of prosecutorial power. The facts and details of these case studies were found through a variety of media publications, including investigative podcasts, documentary films, independent case studies, local newspaper articles and editorials, and public exoneration records. Each of these sources has been corroborated by publicly released information regarding the cases, ensuring media bias or sensationalism has not exaggerated or falsified the facts of the cases for any purposes, including receiving greater attention. Because of the lack of officially recorded and reported data, finding recorded cases of prosecutorial misconduct, for the most part, was only possible if the case decision was overturned due to a cited offense or received

ample media attention. Without the media attention and certain investigators' and journalists' dedication to justice, many of these cases of injustice would not have been resolved or even noticed, and for this reason, the cases of injustice and prosecutorial misconduct which have flown under the radar and been neglected by the justice system are unknown. These seven cases are just a handful of the cases of prosecutorial misconduct and abuse of discretion in Mississippi, and they were each chosen in particular due to the amount of information available from various corroborated sources which has shown a lack of prosecutorial accountability and/or consequences for proven acts of misconduct.

Chapter 2

Understanding the Extent of the Problem

First, I will analyze available data and examine seven cases of injustice in the Mississippi Criminal Justice System, which collectively exhibit the problem of prosecutorial misconduct and abuse of power in Mississippi. The power of the American prosecutor has been a thoroughly discussed variable in the still inexplicit equation for criminal justice in the United States (Bellin, 2019). The first step in understanding just how impactful state prosecutors are on the lives of criminal defendants is learning the implicit difference in prosecutorial power and prosecutorial discretion. Essentially, discretion is the free choice that prosecutors are allowed when using their state-given powers to impose authority upon defendants (Davis, 2009). The line dividing power and discretion is often incredibly blurred as there is substantial overlap in this context. The ability to choose from a vast—or arguably infinite—array of options is what distinguishes prosecutors as powerful in a way other traditionally considered powerful government officials are not; discretion is not the same as power (Bellin, 2019). This thesis focuses on the ability of prosecutors to abuse their discretion and suffer no professional consequences.

In these case studies, I have focused on the means by which prosecutors can stretch the limits of their power through the use of discretion and suffer no professional consequences. Some of these case studies feature the same leading prosecutor, while

others feature relevant attorneys or government officials aiding in the injustice. The cases include defendants from an array of racial and socioeconomic backgrounds but are mostly comprised of racial minorities and people from disenfranchised communities. The analyses of the case studies also discuss the general attitude and disposition towards the actions of these prosecutors.

As explained in the introduction, information about state prosecutors' decisions and the reasons which drive them remains largely hidden from public view. The available statistics on prosecutorial decision-making are recorded at the broadest level and effectively camouflages cases of abuse, systemic discrimination, and patterns which do not align with office policies. This lack of transparency has earned prosecutors' offices the reputation of being "black boxes" (Fortier, 2019). The kinds of powers which prosecutors hold are not infinite, but when discretion is left unchecked, their powers create infinite possibilities—whether for the defendant or society overall. Their powers begin with the (1) charging decision, including (1a) who to charge, if anyone at all, (1b) with what to charge them and whether to stack charges. Next prosecutors decide (2) whether to offer a plea bargain, (2a) what plea bargain may be offered, and (2b) when the defendant must respond to the plea. Should the accused accept the prosecutor's offer and admit his/her guilt in exchange for a potentially lighter sentence, the defendant is ruled guilty and therefore has no right to appeal in the interest of innocence.

Because most—97 percent of federal cases and 94 percent of state cases—end in plea bargains, there really is no way to estimate how many innocent people plead guilty out of fear of getting a worse sentence by trial, were not allowed knowledge of exculpatory evidence, or were unfairly coerced into the plea (Goode, 2012). For this very

reason, no cases of prosecutorial misconduct or abuse of power through the plea-bargaining process could be included in this thesis. Once a defendant pleads guilty, he/she gives up the right to appeal based on conviction, because—somewhat obviously—a guilty plea is the defendant admitting his/her guilt in order to avoid the possibility of sentencing through a jury trial. Therefore, cases of prosecutorial abuse of power or misconduct rarely come to light in plea bargain cases and do not exist in enough detail for this study.

Should the accused choose to go to trial, the prosecutors are in control of the (3) composition of the case against them, including the powers to (4) choose expert or eye-witnesses to testify, and (5) offer incentives to witnesses—particularly “jailhouse” informants—in order to gain their testimonies. Prosecutors are also considered (6) co-investigators of their crimes, meaning they have the power to (6a) access, and (6b) evaluate the worth or relevance of evidence in a case (Davis, 2009).

Much like any criminal justice official, prosecutors rely on their own discretion while making the very first decision in criminal cases, and all throughout to the last. With no guidelines or specific rules, there are infinitely many ways for prosecutors to design an outcome they particularly like. Their choices in these decisions are almost purely discretionary and go virtually unreviewed. Prosecutors also have resources and connections within the legal system which creates a huge power imbalance in a criminal trial when a defendant is given an overworked public defender (Levine et al., 2016). Prosecutors have the power (7) to exclude people from sitting on a jury, and they have complete control over the grand jury process, delaying or changing schedule as preferred. As the (8) sole interpreters of the court proceedings for the jury members by translating

legal terms, the general line of business, and direction of the trial for the jury, prosecutors hold great influence over the members of the jury, and jurors rarely act independently of the prosecutor (Davis, 2009).

In 1976, the U.S. Supreme Court ruled in *Imbler v. Pachtman* that prosecutors cannot be sued in civil courts for abuses of their powers, “no matter how severe.” The Criminal Justice Section of the American Bar Association (ABA) provides the standards of practice for judges, defense attorneys and prosecutors, but it is widely acknowledged that these standards are merely aspirational. None of the actors of justice in this equation is required to follow, consider, or be disciplined from violating any of these standards. Only after one or more complaints against a prosecutor has been filed will a state Bar Association take into consideration the possibility of a prosecutor’s violation of justice (Davis, p. 15, 2009). The reason for this decision, is essentially the fact that prosecutorial power and discretion are necessary for the justice system to function in any relatively efficient way. Prosecutors are law enforcement officers in court on behalf of the state or federal governments, and they play a huge role in the inherent functionality of the court system. Police officers make the arrests and reports, but prosecutors take the cases from there, deciding whether a crime was committed and every decision involving incarceration afterward. “In a world of scarcity, prosecutors are the key gatekeepers who ration criminal justice” (Bibas, 2010). But scarcity of time and resources is not the only reason why prosecutorial discretion is so necessary to America’s—and by extent, Mississippi’s—criminal justice system.

Discretion is key to functionality in our system because of the need for human contact, interaction, and experience. Justice often requires extended periods of time to be

served. In the meetings, hearings, and proceedings of a criminal case, the prosecutor becomes acquainted with the details of the case and must often make intimate and impactful decisions in care of those details. Should the discretion be allocated to a more efficient or less-personal process, the criminal justice system would lose even more of the care and humanity so necessary for real, holistic justice. However, these powers, which are so necessary to the overall system and so impactful on the lives of citizens, are not subject to review or consequences for their discretion at the prosecutorial stage. As legal scholar Angela Davis writes, “legal exercise of prosecutorial discretion is largely responsible for the tremendous injustices in our criminal justice system” (Davis, p. 17, 2009). The issue arises only when prosecutors abuse their discretion and powers and are not held accountable for the impacts they have on the lives of defendants and their families. Discretion, as aforementioned, is absolutely necessary for the efficiency of the criminal justice system; however, accountability—or lack thereof—is equally as impactful and problematic when it comes to truly seeking justice.

Throughout this chapter, I have analyzed and summarized seven cases of prosecutorial misconduct and abuses of discretion in Mississippi, organized in Table 1 in the order which they appear in Chapter 2. These cases were selected for analyzation based on the particular actions of the prosecutors in each respective case and the lack of professional or legal consequences for such actions. While these cases are far from the only cases of prosecutorial misconduct or abuse of power in Mississippi, they collectively show the types of powers and discretionary decisions which prosecutors may abuse in order to obtain convictions but not justice. Table 1 lists the name of the defendant, the year(s) during which the case took place, the name of the prosecutor, the location and

county in Mississippi, and the particular powers and discretionary actions which were subject to abuse in each respective case as listed and described in the beginning of this chapter.

Table 1

Case	Year(s)	Location	Prosecutor	Power(s) Abused
<i>Curtis Flowers</i> v. <i>State of Mississippi</i>	1996 – current	Winona, MS (Montgomery County)	District Attorney Doug Evans	#7 Selection of Jurors & #4 Witnesses (Informants)
<i>Justin Blakeney</i> v. <i>State of Mississippi</i>	2010 – 2017	Ellisville, MS (Jones County)	District Attorney Anthony Buckley	#1a Who to Charge, #4 Witnesses (Informants), & #5 Incentives
Andreacchio Case	2014 – current	Meridian, MS (Lauderdale County)	District Attorney Bilbo Mitchell	#1a Who to Charge & #4 Witnesses (Expert)
<i>Levon Brooks</i> v. <i>State of Mississippi</i>	1992 —2008	Brooksville, MS (Noxubee County)	District Attorney Forrest Allgood	#4 Witness (Expert) & #6 Investigation (Access to Evidence)
<i>Kennedy Brewer</i> v. <i>State of Mississippi</i>	1995 – 2001	Brooksville, MS (Noxubee County)	District Attorney Forrest Allgood	#4 Witness (Expert) & #6 Investigation (Access to Evidence)
<i>Sabrina Butler</i> v. <i>State of Mississippi</i>	1989 – 1995	Columbus, MS (Lowndes County)	District Attorney Forrest Allgood	#1a Who to Charge & #8 Mis- Leading the Jury
<i>Cedric Willis</i> v. <i>State of Mississippi</i>	1997 – 2006	Jackson, MS (Hinds County)	Circuit Court Judge Bobby DeLaughter & District Attorney Ed Peters	#1a Who to Charge, #3 Prosecuting Case, & #6b Evaluation of Evidence

Flowers v. State of Mississippi

Power(s) and Point(s) of Discretion Abused:

#4 Witnesses (Informants) & #5 Witness Incentives & #7 Selection of Jurors

A prime example of this unchecked power and immunity of prosecutors is the still ongoing criminal case of Curtis Flowers, an African American man in Winona, MS, who was charged with four murders at a local furniture store where he had previously worked. Early on the morning of July 1996, an employee at a small town, family-owned furniture store in Winona, MS, and found that four of his coworkers had been fatally shot. The victims of the shooting at Tardy Furniture—owner and 59-year-old Bertha Tardy, 16-year-old Derrick "Bobo" Stewart, 42-year-old Robert Golden, 45-year-old Carmen Rigby—were well-known and loved members of the town, and this was likely the most violent and shocking crime Winona had ever seen. Understandably, local police, highway patrol investigators, and the district attorney were under much pressure from the tight-knit community to find and convict the killer, so when their investigation settled on one suspect, they were eager to convict. Unlike the extremely vast majority of criminal cases in the US Criminal Justice System, this case did not end in a plea bargain.

Maintaining his innocence for over two decades, Curtis Flowers went to trial and was convicted of the four murders at Tardy Furniture, but the case did not end there. In fact, Flowers continued to win his appeals, be granted a new trial, and be convicted and sentenced to death six times over 23 years. In each of these six trials, District Attorney Doug Evans has served as lead prosecutor, and throughout the past two decades, Curtis Flowers's main residence has been on death row, and for multiple counts of prosecutorial misconduct throughout the trials, each conviction has been overturned or retried. This

strange case made it back into headlines all over the United States in 2019, thanks to the podcast series *In the Dark* by APM Reports. A team of investigative journalists led by Madeleine Baran and Parker Yesko called the country's attention back to the Tardy Furniture murders by conducting their own investigation into the murders, prosecutorial actions, and reasons behind the six overturned convictions under one prosecutor. Baran succinctly summarizes the case as, "the story of a black man from a small town in Mississippi who has spent the past 21 years fighting for his life, and a white prosecutor who has spent that same time trying just as hard to execute him" (APM Reports, 2018). Eventually, Flowers's lawyers appealed his case all the way to our nation's highest court, and in August of 2019, the Supreme Court of the United States granted Flowers a writ of certiorari and decided to hear his case—not to decide innocence or guilt, just to review his most recent trial and conviction, again.

In a 7-2 ruling, the Justices reversed Flowers's conviction and decided that the district attorney and prosecutor Doug Evans—at least in this most recent trial—had violated Flowers's constitutional rights by committing 'Batson violations' through intentionally removing African-Americans from the jury at the sixth trial, in 2010 (*Batson v. Kentucky*, 2019). And while the Justices' decision was based only on Flowers's sixth trial, Flowers's lawyer Sheri Johnson of Cornell University's Death Penalty Project made sure to include District Attorney Doug Evan's history of using his power to strike potential African American members of the jury. Throughout all six of Curtis Flowers's trials, 61 of the 72 jurors were white. "None of the four juries that convicted Flowers had more than one African-American. Montgomery County, where the murders took place, is roughly 45 percent black," (Baran & Yesko, 2019).

Unfortunately, racially segregating juries is not the end of prosecutorial misconduct in this case, but as previously mentioned, the U.S. Supreme Court only reviewed Flowers's case based on alleged and subsequently proven Batson violations in the sixth trial. Altogether, four of Flowers's six trials and convictions were overturned due to prosecutorial misconduct, and they were not all solely Batson violations. In 1997, during Flowers's first trial, Maurice Hawkins and Frederick Veal testified that Flowers had confessed to them in the Leflore County Jail of his guilt in the Tardy Furniture murders. Their accounts of Flowers's statements were completely inconsistent with each other and the facts of the case overall.

Hawkins stated that one night in jail, Flowers told him that "He hate[d] [that] he had to kill his own cousin." The prosecution used this statement as an admission of guilt to Hawkins in trial, despite the fact that none of the victims at Tardy Furniture were in any way related to Flowers. District Attorney Doug Evans also used Veal's testimony in Flowers's first trial, stating that Curtis had told him after he committed the murders, "He smoked some crack... I will say a thousand dollars' worth." This statement was proven false in court when during cross-examination, Flowers's defense attorney Billy Gilmore asked Veal, "Are you aware that the police picked [Flowers] up immediately after this, and they didn't say anything about him being on crack?" Veal said he did not know this (Baran, 2019).

Later in a sworn affidavit, Veal said the statement he gave while in jail and his subsequent testimony were crafted in the presence of the District Attorney and the case investigator, based on details they provided. "They couldn't have believed it... I didn't tell them that he confessed. They came to me and told me what to say," Veal said. And

in his affidavit to Curtis Flowers' lawyers, Hawkins stated, "Flowers never told me that he killed anybody" (Baran, 2019).

Prosecutors have the legal and ethical obligation to not only verify the truth of their witnesses' statements, but also to report any doubt or evidence that an informant's statements may not be true. In addition, prosecutors are legally required to inform the court and the defense of any benefit promised to the informant or witness in exchange for his/her testimony, and in closing arguments of the first trial, Doug Evans said that Hawkins and Veal had "absolutely nothing to gain" from testifying for the prosecution. Later, in the affidavit, Hawkins said that he understood some pending charges against him would be dropped in exchange for his testimony, and Veal said under oath that he was convinced to testify by offers of leniency for his charges and even a cash reward, which he also said he never received. Both witnesses claim these offers were their reasons for testifying to false information against Flowers in court (Baran, 2019).

The offering of leniency or other kind of reward from prosecution in exchange for information from—especially criminal—informants is a common practice across the United States criminal justice system, and there is a widespread understanding among the incarcerated populations in America that coming forward with information will be rewarded. This type of bargain can lead to terribly unjust consequences. According to a 2005 report by Northwestern University School of Law entitled "The Snitch System," testimony of criminal informants is the leading cause of wrongful convictions in death penalty cases in the United States (Northwestern University, 2005).

In recent years, several states have considered legislation that would subject the use of criminal informants to added scrutiny. These have included outright bans on

“snitches” in capital cases, pretrial reliability hearings, stricter caps on monetary benefits offered, and enhanced tracking and disclosure requirements, for instance, revealing how many previous cases an informant has testified in (Baran, 2019). But the former commissioner of the Mississippi Department of Corrections as well as former police chief of Jackson, Robert Johnson believed jailhouse informants should not be automatically disregarded. “There’s a heavy duty to check out the information and determine whether or not it's legitimate,” he said (Baran, 2019). “You have to be skeptical, but that's not saying you reject all the information.” Johnson added that investigators and prosecutors should not be allowed to send inmates into cells specifically to extract a confession. “That’s a tactic that's suspect in my estimation and really shouldn't be used. If there’s information that comes your way from a random assignment of people from a cell, then that’s fine. But to do that with the specific intent of soliciting information is ripe for abuse.”

While it is true that very few criminal cases are tried in court six times, the case of Curtis Flowers—or, more accurately in terms of this paper, Doug Evans—serves as just one example of the real extent of prosecutor power. Eventually, all of Flowers’s appeals, hearings, trials, and help from the media pushed his case all the way up to the Supreme Court. While the decision was in favor of Flowers, our most sacred court did not quite set the record straight. If the Supreme Court decided Doug Evans was prosecuting unfairly, surely there would be some other repercussion than yet another overturned conviction. Or, should Doug Evans be disciplined somehow? Actually, the Supreme Court made the same decision the lower courts had been making this whole time,

overturning convictions—not acquitting Flowers, but sending him back to the stage of indictment.

As for district attorney and prosecutor Doug Evans, general counsel for the Mississippi Bar Adam Kilgore said that he could not confirm nor deny any existence of a bar complaint. He also told reporters, “Presently, he [Doug Evans] is active and in good standing.... A case just being reversed does not automatically mean that an attorney has committed an ethics violation” (Ross, 2019). This means the case goes back to Winona, and back in the hands of district attorney Doug Evans, again. Evans is running unopposed for re-election in 2019, and as of June 2019, the Mississippi Bar has corroborated Kilgore’s statement in confirming Evans’s “good standing” (APM Reports, 2019). Not just a prosecutor, but a District Attorney, was found guilty of misconduct in the highest court of our nation, and other than having to endure some public embarrassment, he remains professionally unaffected in the highest degree. This, sadly, is not surprising. Mississippi elected officials are seldom removed from office or disciplined by more than a letter to the editor or nasty campaign ad from their opposition.

Justin Barrett Blakeney v. Mississippi

Power(s) and Point(s) of Discretion Abused:

Powers #1a Who to Charge, #4 Witnesses (Informants), & #5 Incentives

Another example of a prosecutor’s discretion, use of incentivizing informants, and immunity for his/her such choices is that of *Justin Blakeney v. State of Mississippi*. On August 10, 2010, Justin Barrett Blakeney called 911 to report that his girlfriend’s two-year-old daughter Victoria Viner (“V.V.”) had collapsed and was non-responsive. Blakeney and V.V.’s mother Linda Viner had been dating for eight months and living

together for approximately six months. V.V. had attended daycare when Blakeney first moved in, but in an effort to save money, Blakeney began babysitting V.V. at home because he did not work at the time. Blakeney would watch V.V. from around 10 a.m. when Viner left for work until around 2 p.m. when Viner returned home.

On this particular morning, V.V. was still asleep in her crib at the time Viner left for work, and around 10:30 a.m. Blakeney saw that V.V. was awake. “Blakeney stated that he noticed that V.V. had squinted her eyes and thought that she had a headache. Blakeney picked her up from her crib and placed V.V. on the floor. He began walking into the kitchen with V.V. following behind. Blakeney stated that he had taken two steps into the kitchen when he heard what sounded like a loud thump. Blakeney turned around and saw V.V. lying face down on the carpet. When Blakeney picked her up, V.V. was unresponsive and limp. V.V. then began to tense and clench both her fists to her chest. Blakeney called 911 and then called Viner at work. Viner also called 911 and, when asked if V.V. had been having medical problems lately, stated that V.V. had been throwing up and had been cranky. Viner stated that she had been giving V.V. Tylenol because she had not felt well” (*Justin Blakeney v. State of Mississippi*, 2017).

At the hospital, V.V. was diagnosed with a diffuse injury throughout her brain. She was taken off life support and pronounced dead on August 12, 2010. Her death was ruled a homicide, caused by blunt force trauma to her head at the hands of Blakeney, who was subsequently charged with her murder. The prosecution, led by District Attorney J. Buckley, enlisted the help of two jailhouse informants, Gregory “Hobo” Hancock and Randall “Satan” Smith. With the assistance of these two informants, the prosecution developed the theory that Blakeney murdered V.V. in order to become a member of the

Aryan Brotherhood, a notorious white supremacist gang to which both informants belonged. The prosecution used both informants to gain evidence of Blakeney's supposed plan, and both Hancock and Smith were currently working on behalf of the State to incriminate Blakeney when they first engaged in conversation with him working on behalf of the State to elicit incriminating evidence to provide to the prosecution.

The prosecution only notified the defense of its intent to use Hancock, Smith, and three previously undisclosed expert witnesses less than two weeks before the start of the trial; and although the defense filed a motion for a continuance, the trial court denied the motion, and the trial commenced as scheduled. At trial, Hancock and Smith testified and their statements to police were admitted into evidence. Even though there was no evidence that Blakeney had any interest in joining the Aryan Brotherhood prior to the death of V.V., he was convicted of her murder and sentenced to death. During his appeal, the Mississippi Supreme Court began its review by noting that capital murder cases are subject to greater scrutiny than other types of cases, explaining, "we have long taken a different approach in reviewing capital cases. In such matters, we employ a higher level of scrutiny." The Court reversed Blakeney's conviction and specified several errors made at trial, as well as counts of prosecutorial misconduct.

The first error the Court noted was that the trial court should have granted a continuance to Blakeney and his attorneys when the prosecution notified him of its intent to use Smith and other undisclosed witnesses so close to the start of the trial. The Court concluded that because "the prosecution's late disclosure of previously undisclosed witnesses left the defense without adequate time to prepare, we find that a continuance should have been granted." Second, the Mississippi Supreme Court determined that both

Hancock and Smith were working for the State when they first spoke with Blakeney, and his right to counsel had already attached. This means that, as the U.S. Supreme Court decided in *Massiah v. United States*, 377 U.S. 201 (1964), a defendant may not be interrogated without a lawyer once the right to counsel has attached, unless he or she waives that right. Hancock and Smith's objective to obtain incriminating evidence on Blakeney as agents of the State "amounts to secret interrogations that were equivalent to direct police interrogations, which is expressly prohibited by *Massiah*." The Mississippi Supreme Court concluded that admitting the evidence obtained by the informants violated Blakeney's Sixth Amendment right to counsel.

The third reason the Court cited as a means to reverse Blakeney's conviction was prosecutorial misconduct. The Court concluded that the prosecution engaged in misconduct when they failed provide the defense with the results of the ATF's electronic evaluation of cellphones and computers found in Blakeney's residence. The prosecution claimed that there was no exculpatory evidence and then disposed of the material; however, the Court rejected that explanation, reasoning that any evidence found on the electronic devices could have supported Blakeney's claim that only after V.V.'s death and his own imprisonment did Blakeney attempt to join the Aryan Brotherhood for protection in prison. Because the prosecution threw out the evidence, whether it was exculpatory is unknown, but his alleged desire to join the Aryan Brotherhood could not have been the motive for killing V.V.

Suppression of exculpatory evidence violates the defendant's due process rights regardless of whether it was done in good faith or bad faith. However, this case presents a slightly more complex situation because the material at issue may or may not have been

exculpatory. Thus, this case requires a showing of bad faith by the prosecution to constitute a violation of due process, as decided by the U.S. Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Mississippi Supreme Court did determine that the actions by the prosecution in handling the evidence was in bad faith. Undoubtedly, if there had been any incriminating evidence found in the electronic material, the prosecution would have used it against Blakeney; therefore, it is more likely that evidence which undermined the prosecution's theory of motive was found in the electronic evidence, so the prosecution's disposal of the material did constitute bad faith. The Mississippi Supreme Court held that the three foregoing reversible errors denied Blakeney the opportunity to present a complete defense, and consequently, the Court reversed his conviction and sentence and remanded his case for a new trial on the merits (Gates, 2017).

Andreacchio

Power(s) and Point(s) of Discretion Abused:

Power #1 Who to Charge #4 Witnesses (Expert)

To best get a taste for the political and social environment of Mississippi, a recording of Captain Jay Arrington of the Meridian Police District—in a leaked secret recording which was later published in the *Culpable* podcast series—stated, “I’ve had cases where police shoot an unarmed guy in the back that aren’t pursued [by the district attorney]. I got [a case of] a cop that was getting a big TV from Best Buy and forging the credit out, that wasn’t pursued because he was a good baseball player in high school.” This next case study shows exactly how deeply the nepotism and political networks run in Mississippi.

Important here to mention is that people of color and racial minorities are not the only consistent victims of the Mississippi Criminal Justice System. On February 26, 2014, in Meridian, MS, 22-year old Christian Andreacchio was found dead in the bathroom of his apartment from a single gunshot wound to the head. Andreacchio's girlfriend Whitley Goodman and his friend Dylan Swearingen were both at the apartment that day. Andreacchio was supposed to be working offshore on a tug boat but had come home because of an apparent fight with Goodman. After just 45-minute investigation by Meridian police, then-police chief James Lee arrived at the scene, stopped the investigation, and ruled Christian's death a suicide, all despite the clear and substantial evidence indicating Christian's death was in fact a homicide and possibly premeditated murder. The crime scene was altogether inconsistent. Christian's position was inconsistent with his state of rigor mortis when police arrived, as well as the position of the gun, blood spatter, and bullet hole location in the wall. Even the coroner ruled his cause of death as "undetermined," which should instinctively raise red flags about the incredibly quick investigation. Witness statements contradicted and confused the situation the more they were collected. And neither Goodman nor Swearingen were questioned by investigators, despite the positive results of gunshot residue on both of their hands, as well as Goodman's theft of Christian's cell phone—which she initially stated could not be found, only to produce it from her purse when later questioned. His family has spent the past six years hiring private investigators and lawyers to convince and prove to state and local law enforcement agencies that Christian's death was not suicide.

Before recusing himself in February 2017, for being “too close to the family,” District Attorney Bilbo Mitchell was the prosecutor assigned to Andreacchio’s case, and, for all intents and purposes, successfully managed to stop any progress in the case. Although the state of Mississippi’s forensic crime lab is seriously underfunded and has not been able to take on any new cases, Mitchell refused to allow the Andreacchio family to outsource a forensic lab to analyze the DNA sample on the trigger of Christian’s gun (Fowler, 2018). When they finally were allowed to outsource, Mitchell called a few connections and told them “to hold up on the DNA testing until he had talked to Knox & Associates (crime scene re-constructionists hired by the Andreacchios) because if they had enough to take to grand jury he was just going to go with what they had” (Royal, 2017).

The Mississippi Attorney General Jim Hood’s office took over the case at Mitchell’s request, and although there was an attempt to indict Goodman and Swearingen for “culpable negligence,” no further progress has been made in establishing legal responsibility for Christian Andreacchio’s death (Cooper, 2019). His mother Rae Andreacchio has an ongoing petition to move the MS Department of Justice to investigate the multiple agencies for “corruption and conspiracy engaged in by multiple individuals in efforts to circumvent justice for Christian's murder” (Andreacchio, 2019). Through 24 episodes of the investigative podcast *Culpable*, the Andreacchio family has accumulated vast amounts of evidence supporting their accusations of corruption and conspiracy against Mississippi government and legal officials. These names include former DA Bilbo Mitchell, current DA Kassie Coleman, AG Prosecutor Marvin Sanders, AG Investigator Gypsi Ward, AG Investigator Roger Wade, and Director of the AG

Public Integrity Unit Tony Green. These are prosecutors and officers of the court who have obstructed justice and will not face consequences for it.

Levon Brooks v. State of Mississippi

&

Kennedy Brewer v. State of Mississippi

Power(s) and Point(s) of Discretion Abused:

#4 Witness (Expert) & #6 Investigation (Access to Evidence)

The University of Mississippi School of Law has worked with national and local sects of The Innocence Project to develop The George C. Cochran Innocence Project in Mississippi. The Project is committed to providing legal representation to Mississippi state prisoners who have served significant periods of incarceration and have “cognizable claims” of wrongful conviction. The Project has also provided explicitly documented cases of prosecutorial misconduct and injustices in the Mississippi criminal justice system. The Innocence Project has aided in the exonerations of many wrongfully convicted men and women in Mississippi, but the cases of Levon Brooks and Kennedy Brewer in particular reveal the frightening inner-workings of prosecutors and their witnesses. These two cases share many similarities, including the same crime modus operandi (MO), prosecutor, and forensics expert.

On September 15, 1990, three-year-old Courtney Smith was asleep in her bedroom which she shared with her six-year-old and one-year-old sisters, and her 26-year-old uncle was asleep in the next room. At a late hour in the night, Smith was abducted from her home in Brooksville, Mississippi. Two days later, her body was found in a pond near her house. She had been brutally sexually assaulted and strangled to

death. Levon Brooks became a suspect in the case initially because of his ties to Smith's family as he had previously dated her mother. Dr. Steven Hayne—a now-disgraced but once revered Mississippi pathologist—performed an autopsy on Smith and found possible bite marks on her wrist. He then referred the case to Dr. Michael West, a similarly renounced forensic dentist in Mississippi, who had often worked with Hayne on other cases in the past. West confirmed that the marks on Smith's body were from human teeth. More than a week later, law enforcement interviewed Smith's six-year-old sister who said she had seen the abduction take place, and based on the girl's identification, Levon Brooks was arrested and charged with capital murder. Brooks was tried in Noxubee County, Mississippi, in January 1992. The lead prosecutor District Attorney Forrest Allgood used the unreliable testimony of the victim's 6-year-old sister, claiming that the child had known Brooks and was sure she saw him abduct her sister. Allgood's case also relied upon the "expert" Dr. West, who went on to testify at Brook's trial that two of Brooks' teeth "indeed and without a doubt...matched" the marks on the victim's body, and "it could be no one but Levon Brooks that bit this girl's arm." Levon Brooks received a life sentence without the possibility of parole.

Just two years later, an eerily similar and horrifying abduction and murder took place. In the early morning of May 3, 1992, three-year-old Christine Jackson—whose mother, Gloria Jackson, was dating Kennedy Brewer at the time—was abducted from her home in Noxubee County, raped, and murdered. On this particular evening, Brewer was babysitting Christine and her two younger siblings, both of whom were Brewer's biological children with Gloria. Just as in Courtney Smith's case, Christine was found two days after her abduction in a creek near her home. Because there was no sign of

forced entry, police suspected Brewer. District Attorney Forrest Allgood theorized that Brewer had sexually assaulted and murdered Jackson in her home and carried her body to the creek after the fact; however, Allgood disregarded the broken window near the child's bedroom where an intruder could have entered and exited undetected with the child. Brewer's trial began in March 1995, and although a semen sample had been taken from the crime scene, it was deemed insufficient for DNA testing. Allgood once again called upon Dr. Steven Hayne, who claimed to have found bite marks on the victim and referred the case to Dr. West. West concluded that 19 bite marks found on the victim's body were "indeed and without a doubt" inflicted by Brewer, further testifying that all 19 marks were made only by Brewer's top two teeth and his bottom teeth had made no impression. As it turned out, none of the marks on Christine's body were proven to be bite marks at all; in fact, some of the marks were proven to actually have been caused Dr. West's method of pressing denture-like molds of Brewer's teeth into Christine's skin (York, 2019). Unfortunately, the testimonies of Dr. Hayne and Dr. West were basis of the prosecution's case against both Brooks and Brewer, and their testimonies were enough to convince a judge and jury of their guilt. Brewer was found guilty and sentenced to death.

Of the roughly 60 people on death row in Mississippi, Dr. West has testified as an expert witness in about 40 of those cases. West proclaimed his findings to be so certain in each of his analyses that the scientific community began calling his work into question and discrediting him by the time of Brewer's trial. Although Dr. West was the first member ever to be suspended from the American Board of Forensic Odontology, the court allowed his testimony for decades. In addition, Dr. Hayne, who was never certified by the American Board of Pathology—meaning he neither passed his pathology exam

requirements nor completed his residency and fellowship training—repeatedly testified in court that he was board certified, committing perjury on the witness stand in each of his testimonies. However, at the time of both of these trials and for decades overall, Dr. Hayne was the “go-to, de facto” pathologist for most of the state of Mississippi (Smith, 2018).

District Attorney Forrest Allgood and the courts of Mississippi have the responsibility and obligation to ensure expert witness testimony is, in fact, the testimony of an expert witness and not the falsified or preferred results of law enforcement. According to the co-founder of the national Innocence Project, Peter Neufeld, Allgood has put more people on death row than any current, working prosecutor in the state (York, 2019). Brooks and Brewer are just two of the many cases he has prosecuted, and they justifiably raise questions about the lack of accountability in prosecutorial procedure in Mississippi. Leroy Riddick, a state medical examiner in Alabama who has testified in opposition to Hayne, has repeatedly explained that, “All of the prosecutors in Mississippi know that if you want to be sure to get the autopsy results you want, you take the body to Dr. Hayne” (Balko, 2007). During both of these cases, Allgood stood by the testimonies of Dr. Hayne and Dr. West, despite the growing doubt of their scientific legitimacy. Allgood continued to employ both doctors in his cases, long after they had both been widely considered frauds (Balko, 2015).

In fact, when the national Innocence Project learned of Brewer’s case and decided to look into it, they also found Brook’s case. To the lawyers in the national Innocence Project, it was obvious that the abduction and murders of Courtney Smith and Christine Jackson had the same modus operandi and were committed by the same person, a serial

pedophile and murderer. Both cases were child abductions with similar sexual assault strangulation patterns, and afterwards the victims were deposited in bodies of water. When this was brought to the attention of law enforcement in MS, it was immediately dismissed as impossible. Peter Neufeld stated, “They said ‘it couldn’t be the same person, because we had the first guy locked up when the second one happened’” (York, 2019). Both crimes actually were committed by the same person, Justin Albert Johnson. Although he was a suspect in both cases who gave DNA samples to law enforcement as well, he was not the man Forrest Allgood wanted to prosecute at the time. Although in 2001, DNA evidence exonerated Brewer, District Attorney Forrest Allgood spent years fighting against both Brook’s and Brewer’s appeals, defending their convictions, and indefinitely keeping them from justice. Because of Allgood’s adamant actions to obstruct justice, Brewer remained in prison for seven more years after DNA proved his innocence.

After the Brooks and Brewer cases, the Innocence Project attempted to have Hayne’s medical license revoked. Hayne responded by filing a defamation lawsuit, which was settled in 2012. Hayne and his supporting prosecutors blamed his inaccurate toxicology and lab reports on a lab in Texas, called ExperTox, which had performed the tests. ExperTox described Hayne’s “sloppy methods” and told the Jackson Clarion-Ledger newspaper that the lab had already ceased any work with Mississippi prosecutors. They stated, “We didn’t feel as comfortable with samples coming from that state as we did with other states” (Balko, 2014). During the discovery phase of the defamation lawsuit, the Innocence Project discovered new information about Hayne and the way the state’s prosecutors, coroners, and judges encouraged and knowingly protected his fallible work for decades.

The Mississippi Innocence Project, headed by Tucker Carrington, compiled a dossier on Hayne, eventually filing pleadings in four cases in which Hayne's testimony was both critical to securing the conviction and has since been disproved by other medical examiners. Of the four cases, three were in the post-conviction phase, meaning the convicted had exhausted all of his/her appeals. Neufeld stated that West "deliberately fabricated evidence and conclusions which were not supported by the evidence, the data or the rules of science but ... because they were consistent with the prosecutor's theory" (The Innocence Project, 2008). As explained before, prosecutors have the legal and ethical obligation to not only verify the truth of their witnesses' statements, but also to report any doubt or evidence that an informant's statements may not be true. The prosecutor's decision to not only choose but to also actively defend the testimony of debunked "experts" should be seriously questioned if not disciplined in some way.

In these two cases, it is very clear that the justice system did not work; however, according to District Attorney Allgood, "Nobody wants to put the wrong guy in jail or execute the wrong guy... [but] in a very real sense, in these two cases, the system did work. Nobody died." Though his logic here may seem intact—because both Brooks and Brewer were eventually freed—someone did die because of these actions. If Courtney's death had been properly handled and prosecuted, or if Allgood had not actively worked against the hearings of Brook's appeals, Christine Jackson might never have been killed. In addition, and just as importantly, if Allgood had not abused his discretion and powers as a prosecutor, these two innocent men would not have lost years of their lives to wrongful incarceration, and they would not have to carry with them the stigma and psychological trauma of being imprisoned.

Sabrina Butler v. State of Mississippi

Power(s) and Point(s) of Discretion Abused:

Power #1a Who to Charge & #8 Misleading the Jury

On April 12, 1989, 17-year-old Sabrina Butler realized her nine-month-old son, Walter, had stopped breathing. She attempted to resuscitate him, then quickly rushed him to the Columbus hospital where he was pronounced dead. Butler reported to medical professionals and police her account of finding the child not breathing and her unsuccessful resuscitation attempts. Walter's autopsy revealed that his obviously swollen stomach was due to severe internal injuries and bleeding. Dr. Hicks, the pathologist who performed the autopsy, stated that these injuries were caused by some type of blunt trauma, or "substantial blunt force to the abdomen" (One For Ten, 2012). For hours following the death of her child, Butler was questioned by medical personnel and police. She gave multiple contradicting statements, but ultimately transcribed and signed a statement in which she confessed to abusing and killing Walter. Less than 24 hours after Walter died, Sabrina Butler was charged with capital murder for the death of her nine-month-old son. When filing the murder charge, the law enforcement said they were aware of her obvious grief and her diagnosis of being "borderline mentally retarded [sic]," but decided to disregard its effects along with any effects of her grief when evaluating the accuracy of Butler's statement (Balko, 2014).

In 1989, Butler was indicted by the grand jury of Lowndes County, for capital murder in the killing of Walter Dean Butler "while engaged in the commission of felonious child abuse and/or battery of the child" (One For Ten, 2012). She was convicted and sentenced to lethal injection in a jury trial on March 8, 1990. District

Attorney Forrest Allgood served as the prosecuting attorney for the state of Mississippi, and in the closing argument, Allgood made comments upon Butler's failure to take the stand in her own trial, such as:

“Ladies and Gentlemen, that is an admission of guilt, but I submit to you she hasn’t told you the whole truth yet... Ladies and Gentlemen, those bruises were not inflicted by the same wound that created the massive internal injuries that subsequently killed this child. It could not have happened. So, Ladies and Gentlemen, she has not yet told you the whole truth of the torment she subjected her son to. You still don’t know the whole story. Incredible, unbelievable evasion from start to finish. Ladies and Gentlemen, is that what an innocent person does?” (One For Ten, 2012).

Despite objections from Butler’s defense counsel, these remarks were permitted by the trial judge, Ernest Brown, so Sabrina Butler was convicted and sentence to death for the murder of her nine-month-old son. On appeal to the Mississippi Supreme Court, Butler’s conviction was overturned on the grounds of prosecutorial misconduct, as District Attorney Forrest Allgood instructed jurors to assume guilt from Butler’s failure to testify. These comments misled the jury and consequently denied Sabrina Butler her constitutional rights to due process. The Supreme Court also noted in its opinion that while prosecutors may comment on the weight and worth of the evidence in a case, including the various statements made by the defendant, District Attorney Forrest Allgood

“still had a clear duty to refrain carefully from making any remark which directly or indirectly drew the jury’s attention to the fact that Butler did not

take the stand... The prosecution could hardly have made the point plainer if it had simply come out and said ‘There is a lot more to tell, but Butler has not seen fit to get on the witness stand and tell you’ (*Sabrina Butler v. State of Mississippi*, 1990).

The Justices’ decision held Allgood’s remarks in this case to be “an error, so egregious in fact that even if there had been no objection at trial, [the Court] would nevertheless have been obligated to reverse” (One For Ten, 2012). Forrest Allgood’s name has now come up in this thesis a number of times in multiple cases, making one ask exactly question this thesis is asking: how can a prosecutor make these kinds of decisions for so long and never be stopped or held accountable.

Cedric Willis v. The State of Mississippi

Power(s) and Point(s) of Discretion Abused:

Powers #1 Who to Charge, #3 Prosecuting Case, & #6b Evaluation of Evidence

In 1994, the city of Jackson, MS, experienced a spree of violent armed robberies. Within five days of each other, during two of these robberies, the assailant raped a woman and murdered Carl White, Jr. Ballistics reports showed that the same gun was used in each of the crimes as well as in three other armed robberies occurring within two hours of White’s murder. After his photograph had been shown to the victims off of an alleged tip received by Jackson police, the victims from both crimes mistakenly identified 19-year-old Cedric Willis as the assailant; and despite absolutely no physical evidence, Willis was arrested for the two robberies including the rape and murder. A year after his arrest, DNA testing of the rape kit taken from the rape victim proved Willis was not the

rapist. The prosecutors of the case decided to drop the rape charges and try Willis only for the murder and robbery of Carl White, Jr. and his family.

They pushed for conviction, asking that the jury not hear that DNA evidence had excluded Willis from a crime which involved the same gun that killed Carl White, Jr., or that this same gun was used in three other robberies within two hours of his murder to which Cedric Willis could not have been connected. The jury only heard the heart-wrenching testimony of the victims, and the prosecutors won a conviction, sentencing Cedric Willis to life in prison, plus 90 years. Willis served nearly 12 years in prison before the Innocence Project of New Orleans began investigating his case in 2004 and helped him prove his innocence. New Orleans Innocence Project Director Emily Maw frequently encounters wrongful convictions and works to correct them, often through mistaken witness identification or accidentally mishandled evidence. What she encountered in the case of Cedric Willis was something considerably more insidious. The *Jackson Free Press* reported in 2006 that former Hinds County District Attorney Ed Peters and his then-assistant district attorney, Bobby DeLaughter, excluded DNA evidence in 1994 that would have likely exonerated Willis of the crime. Maw said she suspects Peters and DeLaughter knew the DNA evidence would throw their conviction and successfully appealed to Judge Breland Hilburn to dump it (WLBT, 2009).

The two prosecutors Ed Peters and Bobby DeLaughter who tried Cedric Willis were never disciplined for their misconduct or obstruction of justice in this case. Although—true to their characters—both lost their law licenses in an unrelated criminal investigation by the federal government, and DeLaughter was sentenced to 18 months in prison on a federal obstruction of justice charge. So while DeLaughter and Peters were

punished for some misconduct within their positions, they suffered no consequences for their prosecution of Cedric Willis.

These cases which were shown at the beginning of Chapter 2 in Table 1 and analyzed throughout the chapter are not the only incidences of such injustices in the state, but they are the ones which have been recognized over past decades and exhibit the lack of prosecutorial accountability which allows for such injustices to continue. From these cases, we have learned that there is a problem within the Mississippi criminal justice system that shields errant prosecutors from consequences for abusing their discretion. In the next chapter, I will present the framework through which I will attempt to mitigate this problem by evaluating policy proposals with a novel grading rubric.

Chapter 3

Methodology: How to Solve the Problem

In searching for a way to address this potential abuse, I scoured academic and legal journals from universities and research institutions for policy proposals which attempt to address these particular powers while also respecting their necessity in the justice system. The three chosen policies are those which are aimed most directly at addressing the risks of prosecutorial discretion in Mississippi as explained in Chapter 2. The policy proposals show a range of potential reforms and solutions. They are categorized based on their individual method of approaching the problems being addressed. The categories include (1) requiring more transparency and data collection of Mississippi prosecutors' decisions, (2) judicial review and disciplinary reform, and (3) creating Conviction Integrity Units and Best Practices Committees to review the actions of prosecutors. In my research, I have found that most judicial reforms which attempt to reduce the risks of prosecutorial discretion fall under these three policy approaches—excluding a few radical proposals or any from vastly different court systems. The specific articles chosen from each category are those which were accompanied by ample and recent research and/or empirical data and have been implemented in closely similar ways in state courts across the country.

These proposals will be valued based on their expected impacts on the reconciliation of the need for prosecutorial discretion and its subsequent risks. I will also

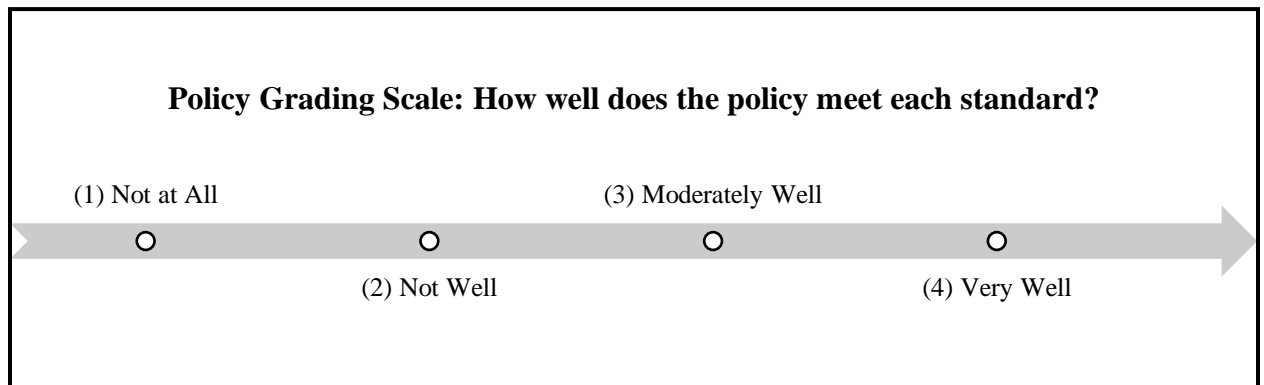
be evaluating these policies based on the likelihood of their respective implementation in Mississippi, where many—if not most—of the state officials are the perpetuates for such stagnant progress in Mississippi’s economic and social standing. The standards by which I evaluate and rank these proposals will be according to a set rubric of ideal policy goals and implications. These proposals are then scored and ranked based on how well each individual policy theoretically meets each of the standards. There are three standards by which the proposals are scored, all equally weighted as they are each of the same importance in the implementation of a solution. The three standards are efficacy, equity, and feasibility. These standards were chosen in particular because together they capture the overall goal of what a criminal justice reform policy would need to achieve to become a successful policy. Should a policy be ineffective in solving the problem at hand, unequitable in its impacts, or unfeasible in its implementation, the policy would fail to truly better the Mississippi criminal justice system or do much more than add to the bureaucratic red-tape in the state. The overall goal of each standard is explained through a respective subset of questions which will be asked of each proposal in order to evaluate if and how well the policies achieve the standards.

The policies are graded on a 4-point scale according to if and how well they achieve each of the three standards: (1) Not at All (2) Not Well, (3) Moderately Well, or (4) Very Well. The policies’ cumulative scores are the averages (means) of their three standard whole number scores—the higher the score the better the policy. For example, if Policy X was an effective policy in that it would create a system by which prosecutors were undoubtedly held more accountable for their discretionary decisions, Policy X would receive a score of 3 or 4 in Efficacy, depending on the details and theoretical

impacts of the policy. If the implementation of Policy X would create greater equity among prosecutors' decisions while also reducing protections and anonymity of witnesses or victims, the policy would receive a score of 2 or 3 in Equity. Further, if the implementation of the policy was unsustainably expensive or otherwise infeasible, the policy would receive a score of 1 or 2 in Feasibility—similarly explained by greater detail and analysis of the policy.

After analyzing the specifics of prosecutorial misconduct in Mississippi as well as proposed policies, this thesis will tailor (and/or combine) the most appropriate and highest scoring policy (or policies) according to the rubric in order to address the problem of prosecutorial misconduct in Mississippi.

Figure 1



Three Standards:

Efficacy

- *Does the policy prevent or discourage prosecutors from abusing their power?*

The policy approaches the risks of prosecutorial discretion in decision-making in a way which may either prevent prosecutors from abusing their powers completely or discourage them from abuse of power through a deterrent method. The policy must also

address and resolve cases of proven prosecutorial misconduct and unjust discretionary decisions in a retroactive disciplinary measure. The policy should address the risks of prosecutorial discretion in a way which secures greater measures of accountability and/or prescribed consequences for any unjust discretionary decisions in the Mississippi criminal justice system. A successful policy recommendation, when implemented, would ensure that the Mississippi criminal justice system is achieving its goal to find justice, not just secure convictions. A policy which fails to bring the attention of prosecutors to the impacts of their potentially reckless discretion or does not hold prosecutors more accountable for such decisions will receive a lower score when evaluated.

Equity

- *Does the policy negatively impact one (social, racial, etc.) group more than another?*

Equity refers to carrying out justice system activities with proper regard for equality, fairness, proportionality, and constitutional protections afforded to defendants and convicted offenders. A successful policy would address the risks of prosecutorial discretion in a way which would increase the equality and equity of decisions and outcomes for all criminal defendants under the jurisdiction of the Mississippi criminal justice system. A policy which does not tighten the disparity gap of criminal justice outcomes between defendants from disenfranchised communities and those from more fortunate backgrounds will be scored lower in the evaluation; further, if the implementation of the policy would result in disparate or unfavorable outcomes for any population subgroup, the policy will receive a lower score.

- *Will it increase equity among decisions in the justice system?*

The policy must assure equal treatment and handling of like offenders and charges, giving equal weight to legally relevant factors in sentencing. The policy proposal must allow for greater review of cases and outcomes to ensure equitable decisions in charging and sentencing are being made for like offenders. A policy which fails to be equitable or achieve a greater level of equity among decisions and outcomes of the prosecutors and the Mississippi criminal justice system as a whole, the policy will be scored lower in the evaluation.

Feasibility

- *Could/Would the policy be passed by the Mississippi governing bodies?*

The policy must be politically feasible, meaning the Mississippi legislature or government entity would be convinced of the necessity and propriety of the policy enough to legislate or implement the policy. The issue that arises pertaining to the feasibility of adopting new policies or legislation in the state of Mississippi is that those who have the power to enact change either do not believe in the existence or prevalence of the problem or they themselves are proponents of the problem. A feasible policy would likely be accepted and supported by government officials in Mississippi, such as the state legislature, state Supreme Court, or other government office with the proper jurisdiction. If a policy theoretically would not likely be accepted or supported by the necessary government officials, the policy will receive a lower score in feasibility.

- *Does the policy allow the justice system to function effectively?*

Rates of crime and recidivism have long served as critical measures for the performance of the nation's criminal justice system. Lower crime rates and fewer instances of repeat offenders represent the basic goals of public safety to which all

components of the criminal justice system theoretically contribute; however, rates of crime and recidivism are not the only, nor necessarily the best, measures of what criminal justice institutions do. Effective criminal justice systems are capable of investigating and adjudicating criminal offences effectively and impartially, while ensuring that the rights of suspects and victims are protected (OECD, 2015). They ensure that state and local law enforcement receive the funding, training, and support from the federal and state governments at the level needed to serve the communities and to promote safety and wellness. The administration of criminal justice in the United States and in Mississippi calls for economically applying available resources to accomplish statutory goals as well as to improve public safety and respect taxpayers (Dilulio, et al., 1993). If a policy were to increase the amount of bureaucratic red tape in the justice system or further keeps the state from progressing in the number of just outcomes, the policy will be considered unfeasible and will receive a lower score.

- *Is it financially feasible?*

Mississippi is the poorest state in the United States of America, with a per capita income of \$20,670 (2012). Mississippi continues to have among the nation's highest rates of poverty, income inequality, uninsured population, and the lowest household incomes (Nave, 2017). The Mississippi legislature (or other government entity) would have to appropriate funds to the implementation and continuance of the policy, and there would undoubtedly be a need for federal assistance as funding will be a challenge in a relatively poor state. The policy must be financially feasible for the state of Mississippi in particular, and given the realities of Mississippi's continuing budget situation, it is

important that a policy proposal, no matter how potentially effective in managing this issue, is not so expensive as to be considered out of hand.

This rubric and grading scale will now be applied to three policy proposals in the following chapter, “Evaluating Policy Proposals.” Each of the proposals will be described and discussed briefly to explain the goals and intricacies of the respective policy, and each will then be graded according to the rubric in order to discern which policy would best address prosecutorial misconduct and abuses of discretion Mississippi.

Chapter 4

Evaluating Policy Proposals

In this chapter, I have chosen three policy proposals from legal experts and criminal justice reform organizations which are aimed at addressing the risks of prosecutorial discretion. As aforementioned, each of these policies falls under a category of policy approaches to criminal justice reform, including transparency and data collection, judicial disciplinary reform, and retroactive reviews of convictions by Conviction Integrity Units and Best Practices Committees. In this section, I will describe each policy briefly in an introductory manner before applying the rubric from the Methodology chapter. The three policies being discussed are: (1) the Prosecutorial Transparency Act (2) restricting the Harmless Error Rule; and (3) implementation of Conviction Review Units. After each respective description of the proposal, the policies will be analyzed, scored, and compared based on how well each policy meets the standards of efficacy, equity, and feasibility as according to the rubric.

Policy Description #1: Transparency and Data Collection

The first policy recommendation is focused on data collection and transparency of decisions in state prosecutors' offices. In an article titled, "Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration," the Prosecutorial Transparency Act was proposed at the end of a thorough prosecutorial research project in 2019, by Nicole Zayas Fortier, advocacy and

policy counsel with the ACLU's Campaign for Smart Justice, in affiliation with JustLeadershipUSA, the Urban Institute, Fair and Just Prosecution, and the Brennan Center for Justice. Though Fortier and the legal organizations which assisted in this prosecutorial research project have provided the specific policy being analyzed in this section, they are far from the only people and organizations to propose prosecutorial transparency in an act of recording and publishing data. The "Prosecutorial Transparency Act," is attached as an Appendix to the report and is a model bill that provides a template for state legislatures and was chosen for analysis and evaluation because of the recency of its data culmination and research.

This proposed legislation identifies and defines data points that must be collected and reported by prosecutors, focusing on characteristics and conditions which provide insight into a prosecutor's critical thinking and decision-making. These points include the demographics of the charged individual, charge description, initial charge and possible penalties, charge modifications and corresponding penalties, bail type, bail amount, plea offer, date of plea offer, dates of pretrial detention, case disposition, sentence type, sentence conditions, and sentence length. This legislation also requires that all prosecutors' offices in the state provide this data on an annual basis to a central state agency that is responsible for making the data publicly available and issuing annual analyses and reports. The Transparency Act guides the state agency through a 3-year implementation plan that could be enacted on a rolling basis, for example, by beginning with the reporting of only a subset of data points in the initial years, and/or beginning by reporting by the largest state prosecutors' offices.

The legislation also requires prosecutors to identify their written policies and codes of conduct in each respective office, making those policies public or requiring prosecutors to disclose the absence of such policies. These policies include matters such as bail and sentencing practices, plea bargain guidelines, discovery practices, prosecuting youth as adults, and screening for mental health. Adoption of this legislation also requires basic reporting on staffing, training, and disciplinary practices in the prosecutor's office. The principle goal of this policy is to allow communities and court systems to demand greater consequences for egregious actions, as well as demand better representation where prosecutors' offices do not employ a staff which is representative of the community; further, this information could create the opportunity for the community to develop better trust in their prosecutors by seeing those who engage in misconduct being held accountable. The adoption of the Transparency Act also calls for the creation of an Advisory Board that includes representatives of impacted communities as well as criminal defense attorneys who can enforce compliance by prohibiting a prosecutor's office from receiving state funding should that an office fail to comply with the Act's provisions.

As discussed in Chapter 2, state prosecutors report very little data on critical decisions, and of that data, even less is accessible by the public. Prosecutors seldom even make public their office policies and guidelines by which they exercise their powers on a daily basis. People and communities damaged by mass incarceration are all too familiar with the consequences of prosecutorial decision-making. Making data and policies transparent is critical in revealing systemic problems, motivating policymakers, and

developing effective solutions. This model legislation would require all prosecutors to make their policies public, and to record and report data.

Part IV of the report provides an overview of the “Prosecutorial Transparency Act” that includes potential solutions to issues of concern in the implementation of the policy, including ways to address costs, privacy concerns, and logistical administrative burdens on small prosecutors’ offices. This report shows that setting basic minimum transparency standards for all prosecutors in a state is not only desperately needed, but also possible. Legislating mandatory statewide data reporting on prosecutorial decisions would allow for actual public access to prosecutors’ policies and to data that would improve accountability and decision-making by prosecutors as well as increasing the public’s trust.

The exercise of prosecutorial discretion is best judged in each specific context—from decisions to modify charges, offer diversion, or engage in plea-bargaining—but that context is often invisible without more information than is currently available. Prosecutorial transparency reform acts, similar to this one, have been implemented in several states already. For example, in 2008, the state attorney for the Eight Judicial Circuit in Florida began tracking prosecutors’ decision-making in his district throughout the lives of their cases. Along with increased managerial and administrative efficiency, the data collection “enabled his office to define success as achieving just and fair case outcomes, rather than the number of convictions” (Fortier, 2019). The office developed new metrics and programs which helped to better explain prosecutorial decisions and allowed the prosecutors to publicly share their office’s new definition of judicial “success.” Also, in March 2018, the Florida legislature passed a comprehensive criminal

data collection and disclosure law, Senate Bill 1392 (Florida Senate, 2018). This bill is the first and only statewide data policy of its kind in the United States as of right now, requiring each county to identify and publish standardized, robust information related to pretrial release, bonds, charges, plea, sentencing, and demographics (Fortier, 2019). This allowed for information, which was previously extremely difficult to access, to foster exponentially better understanding and availability for study by researchers, press, and the public. Florida lawmakers and government officials anticipate that this data collection and transparency reform will “be the first step toward greater data-driven reforms of the criminal legal system... [and] that the availability of race and ethnicity data will allow watchdogs to more easily and conclusively spot issues of racial bias in the system” (Fortier, 2019).

Policy Evaluation #1: Transparency and Data Collection

Efficacy

- *Does the policy prevent or discourage prosecutors from abusing their power?*

By collecting, analyzing, and publishing data on how they use their discretion, prosecutors will know that their decisions are public knowledge. This policy could create a greater sense of self-accountability in prosecutors, as they know that the electorate will surely hold them accountable if they do not themselves. A primary goal of this proposal is to create a stronger connection between prosecutors and the public, so it could also allow the community to build a trusting relationship with their prosecutors, knowing that they can hold the prosecutors accountable through elections and public demand. As in Florida, justice “watchdogs” would also more easily be able to identify and expose prosecutorial abuses of discretion. If the greatest points of prosecutorial decision-making

are public knowledge, the public and the prosecutors will be able to clearly see any cognitive biases and unjust practices at work. As Fortier writes, “Greater transparency allows voters to evaluate whether prosecutors have followed through on their promises, allowing them to make informed choices at the voting booth. For communities where trust with prosecutors has been eroded by decades of punitive practices, transparency is one small but necessary step to restoring dialogue and ultimately improving the prosecutors’ responsiveness to community needs” (Fortier, 2019).

While some electorates may be more or less inclined to foster the goals of transparency—such as an electorate which is more kind to the racist or classist biases in their court systems—the importance of institutionalizing transparency is that it extends the information beyond the immediate citizenry. We can see this happen particularly in Winona, MS, in the case of Curtis Flowers; outside reporters came to the state to investigate and incite change. They were not always welcomed by the community of Winona, and in fact, reported many instances of Winona citizens proclaiming that there was nothing wrong with Doug Evans’s actions (Baran, 2019). The bare-bones knowledge of the case of Curtis Flowers opened up the possibility for outside pressures to emerge and help achieve the goals of justice, and greater transparency in all cases in the state of Mississippi would allow for even more opportunities for change.

As shown in the Chapter 2, the exercise of prosecutorial discretion varies widely and is best judged in case-by-case context. This legislation would document cases from beginning to end and exhibits prosecutorial decisions in this specific context. No matter the type of power or discretionary decision made, the transparency of these data points will allow greater and more thorough reviews of those decisions. The data collected after

the implementation of this policy would allow individual decisions of prosecutors to be analyzed and compared, and it would ensure that the abuses of discretion and power pointed out in Chapter 2 are public knowledge and subject to consequences if inappropriate or unjust.

Efficacy Score: 4

Equity

- *Does the policy negatively impact one group (social, racial, etc.) more than another?*

The policy only addresses occurring and future incidences of prosecutorial abuse of power and discretion. This leaves the millions of Americans who were prosecuted before the policy's implementation without the data on their trials to showcase potential prosecutorial misconduct. The policy does not address past cases of prosecutorial misconduct, so many of these cases will continue to be unrecognized and unresolved, so the issue of current prosecutors in the Mississippi criminal justice system who should have been disciplined in the past will still not face the consequences for those past actions. Only new cases of prosecutorial misconduct following the implementation of this legislation would be subject to review and potential discipline.

In addition to the absence of retroactive solutions to risks of prosecutorial discretion in Mississippi, there are also privacy concerns which arise with any governmental collection, centralization, and publishing of personal information. These concerns must be addressed carefully and with safeguards put in place to protect civilians against misuse or accidental disclosure. The Prosecutorial Transparency Act addresses these concerns by (1) assigning a unique identifier (random number) in place of names,

(2) providing that only de-identified data is released publicly; and (3) declining to collect some especially sensitive information, such as people's sexual orientation or immigration status.

- *Will it increase equity among prosecutor's decisions in the justice system?*

The policy will most certainly increase equity among decisions and outcomes in the Mississippi criminal justice system through the public's, reviewing court's, and prosecutors' new ability to analyze cases and identify discrepancies in the treatment of individuals. As people will be able to point to specific cases which resulted in certain outcomes, they will also be able to clearly review prosecutorial data and evaluate the equity and fairness among their decisions.

Equity Score: 3

Feasibility

- *Could/Would the policy be passed by the Mississippi governing bodies?*

As far as likelihood of implementation in Mississippi, I am unsure how convinced the state legislature will be by the necessity of such a financial and thorough undertaking. The Mississippi legislature has been historically unwilling to pass legislation which may be interpreted as not hard-on-crime. In 2019, the ACLU of Mississippi tracked and documented criminal justice reform bills in the state, unveiling the legislature's strong resistance to such reform proposals. Most, if not all, criminal justice reform acts died in committee and were not presented, let alone debated, by members of either the Mississippi House of Representatives or Senate. For example, House Bill 192 was an act to create a task force to study and address the disparity of African-American males in the judicial system. House Bill 198 was a criminal justice reform act which would give

nonviolent offenders the opportunity to reduce their sentences by meeting certain criteria, such as passing subject area tests. House Bill 223 was a simple reform bill which would create a procedure to allow a special prosecutor to act on behalf of the District attorney when he or she is absent or unable to perform his or her duties. Each of these criminal justice reform acts died in committee.

- *Does the policy allow the justice system to function effectively?*

Logistically, ensuring uniform and consistent reporting from offices of so many different capacities presents significant challenges. The Prosecutorial Transparency Act addresses this challenge by having a centralized state agency take responsibility for designing a uniform reporting system to collect and analyze the gathered data, as well as enforce the collection and reporting of data from prosecutors' offices. The creation of this agency relieves some of the burden on smaller offices, while also creating a state-level body to analyze all of the data provided. Reliably tracking and analyzing more data can lead to vastly improved capacities to make informed decisions about everything from human resources to choosing case strategies. The data can also assist individual offices in compiling annual reports and streamlining budget proposals, as well as grant requests for lawmakers or other law enforcement agencies. Managers of prosecutors' offices will be able to better measure performance of their staff and increase the efficiency and quality of work in the office, and they will also be better able to locate and supervise attorneys who are not meeting the standards of the office and justice system or are violating the constitutional rights of criminal defendants. Further, prosecutors will be able to more easily track court appearances and filing deadlines through the system after implementation. This act would take time and detailed effort to achieve its goals,

creating more work for lawyers or any employee of the criminal justice system; however, as technology advances and the compilation of data becomes streamlined and second-nature, a centralized reporting mechanism would increase the efficiency of the justice system in the long run.

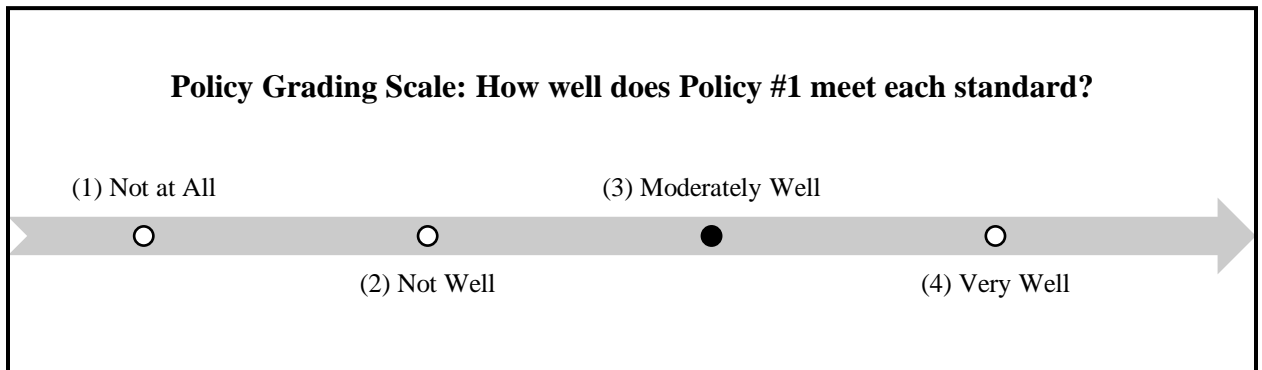
- *Is it financially feasible?*

The implementation of the Prosecutorial Transparency Act would require the allocation of additional resources in Mississippi to create new capacity within a central state agency and to support prosecutors' offices where additional infrastructure is needed to collect the mandated data. Unfortunately, in a particularly poor state compared to the rest of the nation, the concerns about cost may be a halting point in implementing the policy; however, some prosecutors' offices already have budgets which could reasonably be expected to facilitate the development of additional data infrastructure with existing resources. Before any fiscal note is attached to a state's Prosecutorial Transparency Act, a detailed assessment must be made of what additional resources are actually needed to facilitate data collection, and it should be noted that major components of the Act—collecting and publicly sharing data, policies, and staffing information—would call for expensive investments in technology but would have considerable returns.

Feasibility Score: 2

Overall Score: 3

Figure 2



Policy Description #2: Judicial Review and Disciplinary Reform

The second policy recommendation up for evaluation comes from Thomas Sullivan and Maurice Possley’s article from 2015, titled, “The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform.” Falling under the category of judicial review and disciplinary reform, this proposal recommends that prosecutorial disciplinary measures be reformed through the United States Supreme Court, state Supreme Courts, and state legislature’s restriction of the harmless error rule. For much of American legal history, any error in trial which violated a defendant’s constitutional right to a fair trial required reversal. The doctrine allowing a constitutional error to be “harmless” did not arrive until 1967, in *Chapman v. California*, when the Supreme Court created a couple of new rules: (1) constitutional errors can be “harmless,” and (2) constitutional errors require reversal unless the government proves the error was “harmless beyond a reasonable doubt.” The second rule placed a heavy burden on the government, suggesting that most errors would continue to result in reversal, but the first rule resulted in the Court’s acknowledging that some errors were “so basic to a fair trial that their infraction can never be treated as harmless,” such as the admission of a coerced

confession (Newland, et al., 2019). Under the “harmless error” legal doctrine, appellate judges routinely affirm convictions tainted by legal—particularly prosecutorial—error when confident that the appealing defendant is indeed guilty. Harmless error is one of the most frequently used doctrines in all of criminal appeals, and profoundly influences the behavior of all parties in the criminal justice system (Newland, et al., 2019).

The precise rules of “harmless error” are often unclear and depend on the type of error that has occurred in a trial on a case-by-case basis. If the error in question has not affected a defendant’s constitutional rights, a reviewing court may reverse his/her conviction only on the basis that the error had “substantial or injurious effect or influence in determining the jury’s verdict.” If the error has affected the defendant’s constitutional rights, the court must decide whether the error was a “structural error” or a “trial error.” Structural errors can never be considered harmless, and are direct violations of justice and constitutional rights, such as the denial of the rights to counsel, an impartial judge, or biased jury trial. These errors result in automatic conviction reversal. Trial errors, such as the use of erroneous or illegally seized evidence, must be reversed unless the state can prove that the error was “harmless beyond a reasonable doubt” (Newland, et al., 2019).

The problems inherent in the harmless error rule are many, well-known, and not limited to breaches of the Brady rule—throwing out or excluding possibly exculpatory evidences. Often, reviewing court opinions that do call attention to prosecutorial violations of established rules nevertheless affirm convictions, creating little or no deterrent value to prosecutors’ deciding to not disclose evidence beneficial to a defendant’s case. These reviewing court decisions have had the effect of emboldening

aggressive prosecutors, as seen with District Attorneys Forrest Allgood and Doug Evans. The harmless error doctrine particularly causes issues when applied to cases of violations of constitutional rights. Harmless error ignores important constitutional values because the sole focus on a defendant's guilt distracts from the mission of justice overall. Constitutional rights are there to ensure equality, and focusing only on guilt in these cases of violated constitutional rights under the current applications of the harmless error doctrine disregards those values.

Harmless error also violates constitutional law by ignoring the Supreme Court's ruling that "harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed." Reviewing courts frequently skip the question of whether an error has occurred, and conclude that any possible error which may have occurred was "harmless" (Newland, et al., 2019). By not deciding whether a constitutional error did occur in trial, the reviewing courts fail to perform their basic functions of clarifying the laws which govern the actions of prosecutors and the justice system in general.

In Mississippi criminal courts, the harmless error doctrine focuses exclusively on the perceived strength of the government's evidence against the defendant. "Generally, this Court has applied the harmless error doctrine in only cases where the evidence of defendant's guilt was 'overwhelming'" (Smith, 136 So. 3d at 435). This means that if the government's evidence appears strong—or rather, the court is certain of the defendant's guilt—the court will not carefully consider the ways in which an error might have affected the jury's verdict, as the "beyond-a-reasonable-doubt test" mandates. The reviewing court will simply affirm the conviction. In only relying on the observed

strength of the prosecutor's case, reviewing courts essentially make "the fact-finding role" of the jury irrelevant; therefore, the current use of this doctrine violates a defendant's Sixth Amendment rights to a trial by jury. This means that when a reviewing court decides that any of the government's evidence was illegally admitted, there is no longer a verdict based exclusively on legal evidence. Further, if an appeals court excludes this illegal evidence and the remaining legal evidence allows any inference of innocence, the proper allocation of Sixth Amendment rights would require a full reversal of the conviction. This would mean that a jury—not a group of appellate judges who did not attend the trial—can legally decide whether the defendant is guilty or not. There is no presence or appearance which conveys body language, demeanor, or other vocal implications which can be included in the transcripts of trials given to the appellate courts, and basing a conviction solely on a trial transcript often leads to cognitive biases and false conclusions of guilt (Sullivan, et al., 2015).

Nowhere in the U.S. Constitution does it say that any violation of its protections can be "harmless," but the Supreme Court has offered several justifications for the harmless error doctrine it created. The first justification is that harmless error is necessary to avoid the time and expense of retrials and to conserve "scarce judicial resources" (Singh, 2012). The second justification for the harmless error doctrine is that it "promotes public respect for the criminal process by focusing on the underlying fairness of the trial" (Newland, et al., 2019). The courts assume that the public sees an affirmed conviction as true and without error, generating greater public respect and trust in their prosecutors. This is a particularly weak justification for the harmless error doctrine, as affirming illegally found convictions only creates a false trust in the judicial

system, and further, it promotes the lack of transparency of the judicial system as well as the public's ignorance to constitutional violations. The false public trust of the judicial system merely ensures a greater safeguard for the courts from the threat of resistance.

This policy proposal argues that a more stringent formulation of the harmless error rule is needed to rid the justice system of the prosecutors who do not adhere to the principle that their primary duty is to achieve justice rather than a record of convictions. While the harmless error doctrine has good legal intent, the current application of the doctrine allows prosecutors to comfortably engage in misconduct and receive no consequences. Convictions must be legally attained, and whether a conviction is the end result regardless of a prosecutor's mistake, routinely deeming errors "harmless" without ensuring the ultimate fairness of the trial is a threat to the goal of justice as a whole.

The authors of this policy recommend that if errors occur during criminal trials due to misconduct of law enforcement personnel, the trial court and reviewing court judges and/or attorneys should call for a new trial unless the court is convinced beyond a reasonable doubt that the error (1) was not due to intentional conduct on the part of law enforcement personnel, and (2) did not affect the defendant's right to a fair trial. These questions would be answered by the trial and reviewing court judges and attorneys after questioning and investigating the actions of the prosecutor. Further, unless it is abundantly clear that the prosecutor's misconduct was not intentional and did not affect the outcome of the trial, the court should refer the matter to disciplinary authorities, with the transgressor's name included. More rigorous and strict applications of harmless error policies are needed in order to send clear messages to the errant prosecutors that they must conform their conduct to applicable rules of justice, or they will be publicly named

and cited as the reason for injustice, the need for a retrial, and irresponsible use of power and government resources.

Policy Evaluation #2: Judicial Review and Disciplinary Reform

Efficacy

- *Does the policy prevent or discourage prosecutors from abusing their power?*

Restricting the harmless error rule in reviewing court cases could discourage prosecutors from abusing their power, as they would be reprimanded more often and much more publicly. Mississippi prosecutors—those who routinely abuse their powers in the comfort of assuming reviewing courts will ultimately find their errors to be harmless—would be far less reckless with their discretion if the harmless error rule was clearer and more punitive. The idea that any violation of a constitutional right or access to a fair trial could be harmless is a dangerous and threatening sentiment to all Americans. Appellate courts and judges should apply the harmless error doctrine much more firmly in order to ensure that the constitutional rights of all defendants—and all American citizens for that matter—are protected and valued. Prosecutors would be more likely to review their decisions before acting upon them if they knew that any real consequence would occur should they violate the rights of a defendant or illegally utilize their power to achieve a conviction.

Unlike the first policy proposal, however, this policy does not guarantee that all of the major decisions a prosecutor makes in a criminal case are public knowledge—meaning they would not be subject to public/electorate review and analysis. Only the decisions and actions which occur during a trial and are actively appealed by the defendant would ever be subject to review by either appellate courts or the public.

Moreover, the likelihood of trial and reviewing court judges or attorneys catching and subsequently calling attention to a prosecutorial error allows for these officers of the court to have plausible deniability. There is no guarantee they would notice or act upon any error they may have witnessed. For these reasons, I believe that while this policy would help discourage or prevent prosecutors from abusing their powers, restricting the harmless error rule would not prevent potential abuse from prosecutors as well as the Transparency Act.

Efficacy Score: 2

Equity

- *Does the policy negatively impact one group (social, racial, etc.) more than another?*

As a policy that is directed towards righting the wrongs of prosecutors, no social group or particular demographic of American citizens would be negatively impacted, only prosecutors found guilty of error in criminal trials. The policy would be equitable in that convicted offenders could continue to appeal their convictions, even after they had used all of their appeals, as long as they could point to legitimate error by the prosecutor in their trial.

- *Will it increase equity among prosecutor's decisions in the justice system and promote the overall goal of justice?*

I believe this policy would increase accountability among prosecutors and would promote the overall goal of justice; however, there is no guarantee that it will increase equity among all of many the decisions prosecutors make in the duration of a criminal case. There is no telling how more punitive judgments of prosecutorial misconduct will

affect the equity and equality of decisions prosecutors make across all criminal cases. While this policy would allow for more appeals and retrials when errors have been committed by prosecutors in a criminal trial, the policy would not necessarily ensure that prosecutorial decisions themselves would become more equitable across the life spans of all cases. Restricting the harmless error rule could discourage inequitable decisions being made by prosecutors at least during criminal trials, but there is no assurance that more stringent use of the harmless error doctrine would increase equity of decisions made across individual cases.

Equity Score: 2

Feasibility

- *Could/Would the policy be passed by the Mississippi governing bodies?*

Whereas the United States Supreme Court decided the restrictions and characteristics of the harmless error doctrine, and as Mississippi is a conservative state with little chance of proactively questioning the greater American courts, I feel the Mississippi legislature would not enact this policy. However, in light of recent events in the Curtis Flowers case and the national attention brought to Mississippi prosecutors in the past two years, the Mississippi Supreme Court might possibly be more inclined to implement a stricter harmless error doctrine, but as the public's attention fades away from this case in particular, the chances of implementation decrease every day.

- *Does the policy allow the justice system to function effectively?*

An argument against the feasibility of a stricter harmless error rule is that if appellate courts did reverse all convictions which were proven to include constitutional violations, the resulting number of retrials could create overwhelming court dockets. An

important counter-argument is that harmless error does not necessarily reduce the amount of time that judges spend on criminal cases in comparison to the time they would spend with stricter harmless error. This policy, if applied correctly, would not only decrease the number of prosecutorial abuses of power which necessitate a retrial, but also with the standards of the policy's beyond-a-reasonable-doubt test, the stricter harmless error rules would shift a large portion of work to appellate judges. In each layer of review of a criminal appeal, at least three judges will hear the case, and each of those judges must examine the entire trial record in order to analyze the evidence of both the prosecutor and defendant, as well as any possible effects that an error may have had on a conviction.

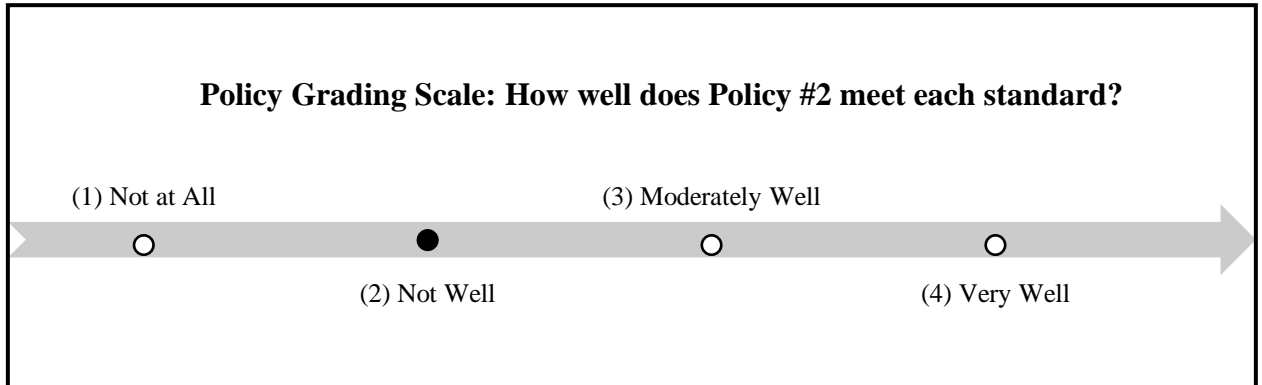
- *Is it financially feasible for Mississippi?*

In the analysis of the previous question, the argument that there would not be an overwhelming increase in court dockets, the Mississippi criminal justice system should be able to handle the possibility of more retrials. That being said, the state of Mississippi is already considered "behind" in court cases, as the state crime lab is underfunded, undermanned, and egregiously lacking in its ability to handle its current level of cases in a timely manner (Fowler, 2018). This has been a fact known for years now, and there seems to be little if any real effort by the state government of Mississippi to fix that problem; so, while more retrials in MS may be technically financially feasible, the ability of appellate courts to review newly discovered evidence or re-test old evidence will be a huge barrier to the efficacy of this policy. In addition, public defenders are commonly overworked and have far too many cases for them to provide the best defense to each of their clients. Keeping older cases on their dockets would only worsen the problem of not being able to properly dedicate themselves to the defense in each case.

Feasibility Score: 2

Overall Score: 2

Figure 3



Policy Description #3: Conviction Review Units

The third and final policy proposal to be analyzed and graded is found in John Hollway’s and the University of Pennsylvania Law school’s “Conviction Review Units: A National Perspective” from 2016. The policy recommendation argues for the implementation of a Conviction Review Unit (CRU), sometimes called a Conviction Integrity Unit (CIU), which conducts extrajudicial, fact-based reviews of convictions in order to investigate plausible allegations of actual innocence. A CRU is typically contained within a local prosecutor’s office. A CRU dedicated to collaborative, good-faith case reviews designed to ensure the factual integrity of a conviction should be independent, flexible, and transparent in its work.

A CRU would be an independent agency in each prosecutorial office in Mississippi which reports directly to the District Attorney (DA) or prosecuting attorney, or head of the prosecutor’s office, and would not be contained within the Office’s appellate or post-conviction/habeas unit. The unit would be led by a well-respected

attorney with ample prosecutorial and criminal experience, and would lead the effort to protect defendants and the justice system against cognitive or confirmatory biases by including at least one external criminal defense attorney in the process of CRU policy definition, case screening, case investigation, and recommendations for action (Hollway, 2016). The CRU personnel should be trained on specific judicial standards including errors known to lead to inaccurate conviction, discrepancies in past and current advancements in scientific and forensic evidence, and investigative techniques useful for cold cases (Hollway, 2016). The CRU would also exclude any personnel who participated in a case currently under review by the CRU, limiting participation in such cases only to the provision of information regarding unclear factors of a case.

A CRU should be flexible in that it will accept any and all cases for review which contain a plausible claim of factual innocence for the conviction obtained, and “review all petitions on their factual merits and not on non-substantive grounds” (Hollway, 2016). This means that the CRU would permit review of petitions in which the defendant plead guilty to the charges or where the sentence has been completed. The unit would review cases where due process supports allegations of innocence, such as, in the cases of ineffective defense counsel, newly discovered evidence, or official misconduct. The CRU would also allow for petitions to be resubmitted in the case of discovering newly credible evidence.

Convictions would be vacated where there is clear and convincing evidence of innocence, or where in the interests of justice, the CRU believes that the current evidence does not support the conviction beyond a reasonable doubt. In addition, the unit will communicate openly with the petitioner or petitioner’s counsel regarding their respective

case's review, as well as share any evidence gathered and explain its reasoning for decisions and actions following such review. The CRU would encourage open exchange of information, including open file discovery and the disclosure of information discovered during the unit's investigation, leaving out any information which could endanger any third parties. The CRU would define any information to be withheld from the petitioner during the unit's review and establish a process for third-party review of the information to ensure good judicial reasoning behind not disclosing specific information.

In addition, a CRU would help foster a "culture of learning from error within the prosecutor's office," suggesting reforms to prevent the recurrence of errors that resulted in an inaccurate conviction (Hollway, 2016). In seeking to prevent the recurrence of such errors, the Conviction Review Unit should:

1. Conduct a root cause analysis or "Just Culture Event Review," separate and apart from the CRU case review, on each case where a recommendation is made to alter a conviction, to understand and address the circumstances and environments that allowed one or more errors to occur in the administration of justice;
2. Identify improved policies and procedures for each stakeholder that might prevent the recurrence of the error(s) that permitted the flawed conviction to occur; and
3. Construct a process to implement, publicize, and evaluate those modifications throughout the jurisdiction (Hollway, 2016).

The Conviction Integrity Unit should have no structural ties to any prosecutor's office, and it might be expected that a CRU investigation into may be received less than

enthusiastically from prosecutors in the jurisdictions where the cases originated. Further, the unit would have subpoena power to aid in its investigations as any recommendations made by the unit would lack the power of law. In order to ensure proper preventions for such actions be put in place, the CRU would present its findings to the relevant DA's Office in a public hearing to a judge.

Policy Evaluation #3: Conviction Review Units

Efficacy

- *Does the policy prevent or discourage prosecutors from abusing their power?*

Conviction review units would not necessarily prevent prosecutors from abusing their power; however, they may discourage such actions. Because the units can present their post-investigation findings to a judge in court and make public policy recommendations which call out the mistakes made in previous trials, there is a much greater chance that any possible prosecutorial misconduct which aided in achieving a conviction would be recognized and acknowledged by the justice system, state officials, and the public. This could increase self-accountability among prosecutors and judicial accountability among the entities meant to discipline and manage faulty prosecutions, as well as the public's ability to hold prosecutors accountable in elections. The public may be better able to see the errors in prosecutions by learning the CRUs recommendations and following up on if and how well those recommendations were accepted or implemented. Seeing as how this policy is not directed towards prosecutorial accountability, but rather incidences of wrongful or unjust convictions, the policy would not guarantee that prosecutors would change their behaviors or act upon their discretionary decisions any more carefully. This policy only ensures that some

prosecutorial decisions which may or may not have led to a wrongful conviction would be reviewed and possibly resolved.

Conviction Review Units have become more common. According to the annual report of the National Registry of Exonerations (NRE) released in 2018, 42 of 139 exonerations involved Conviction Integrity Units. While the number of CIUs is increasing, they are still considered rare. There are around 2,300 prosecutor's offices in the United States, and about 98.5 percent of offices do not contain CRU (Rice, 2018). Further, the existence of a CRU does not guarantee much, as many of those established currently have accomplished little to nothing. Of the 33 CRU (or CIU) offices registered in the report, only 12 have ever exonerated anyone and another 5 have only exonerated one (Rice, 2018). Further, achieving exonerations retroactively is not going to prevent or discourage prosecutors from abusing their discretionary decision-making powers. CRUs may help the overall goal of achieving justice, but it would do little to address the risks of prosecutorial misconduct.

Efficacy Score: 1

Equity

- *Does the policy negatively impact one group (social, racial, etc.) more than another?*

An underlying issue within Conviction Review Units is that in order to submit a petition, convicted defendants require legal help which they might not have. As mentioned before, public defenders are commonly overworked and often have too many cases to provide the best defense to each of their clients. Keeping older cases on their dockets would only worsen the problem of not being able to properly dedicate themselves

to the defense in each case, and conviction review units would only increase the number of cases to which public defenders are assigned. This creates an inequality among defendants who have the financial resources to maintain their own defense counsel, further widening the gap between the quality and effectiveness of public defenders versus paid counsel. The CRU would also take on whichever cases were most riddled with misconduct as they would be reasonably limited to some manageable numbers of cases. This would create more inequity across cases because some would be deemed more worthy than others.

- *Will it increase equity among prosecutor's decisions in the justice system and promote the overall goal of justice?*

The ability of the CRU's to present their findings to a judge in court and make public recommendations for the prevention of any future errors would surely promote the overall goal of justice in theory. In practice, the implementation of a conviction review unit could possibly increase equity among decisions in some cases—those which are chosen to be reviewed. In addition, the CRUs would decide whether or not the error warrants a reversal of conviction and retrial or whether the error did not result in a wrongful conviction. In a sense, the CRUs would be the taskforce which decides whether an error was both harmless to the trial and unintentional, instead of the trial court and reviewing court judges who would make that decision in the previous policy. The justice achieved by the CRU would be completely reliant on those who make up the unit, meaning that a biased or corrupt CRU would not increase equity among prosecutors' decisions. cases which the unit reviews, if not in prosecutorial decisions themselves.

Equity Score: 2

Feasibility

- *Could/Would the policy be passed by the Mississippi governing bodies?*

As the description of this proposal admits, conviction review units may not be warmly welcomed by prosecutor's offices, and whereas many Mississippi government officials either have been state prosecutors or have close and confident relationships with state prosecutors, it is somewhat unlikely that the state officials necessary to implement this CRUs would support the creation of any agency to be 'watchdogs' and question the integrity of state prosecutors. The state legislature would likely be more inclined to legislate the collection of data for public knowledge or reform legal policy than fund a taskforce of babysitters to do the job that the court system of Mississippi is failing to do.

- *Does the policy allow the justice system to function effectively?*

As previously mentioned in this chapter, the state of Mississippi is already considered "behind" in court cases, as the state crime lab is underfunded, undermanned, and lacking in its ability to efficiently or effectively handle its current level of cases (Fowler, 2018). A conviction review unit would require the allocation of resources to ensure the unit was in any way effective in righting past wrongs of criminal courts; and while Mississippi may be technically financially capable of reallocating resources or designating funding to judicial reform efforts—much like the ability of appellate courts discussed in the second proposal analysis—the ability of conviction review units to review newly discovered evidence or re-test old evidence will be barred by the state crime lab's inability to process the current number cases they have.

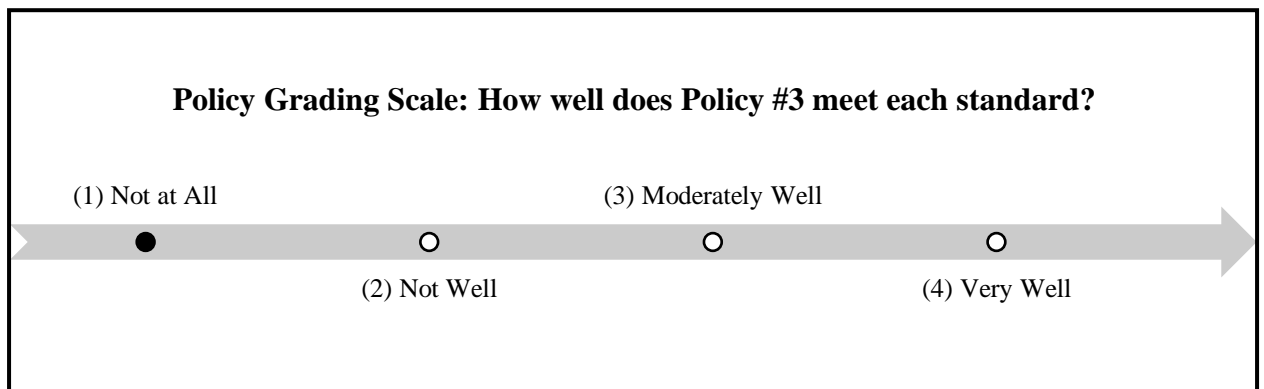
- *Is it financially feasible?*

The implementation of the Conviction Review Unit would require the allocation of additional resources in Mississippi to create new capacity within the Mississippi criminal justice system within prosecutors' offices which would build additional infrastructure to ensure the CRU's ability to function. As aforementioned, Mississippi is a particularly poor state compared to the rest of the nation, and cost concerns will undoubtedly be a main point of opposition from those who would not support this policy. While this policy may consider reallocations of the state budget in a similar way to those necessary for the theoretical implementation of Policy #1, the money potentially spent on CRUs would be better spent on a more effective and equitable policy, such as the data collection in Policy #1.

Feasibility Score: 1

Overall Score: $1.\bar{3} \approx 1$

Figure 4



Chapter 5

Policy Recommendations: Solving the Problem

Throughout the evaluation process of the policy proposals introduced in the previous chapter, I have explored three policy options which have promised to solve the problem of prosecutorial misconduct and abuses of power in American criminal justice systems. What became most apparent in the theoretical implementation of each of these policies in Mississippi are the reasons for which the state of Mississippi has consistently refused to recognize or acknowledge any particular problem with its prosecutors at all: politics. The policy which scored the highest in my evaluations was the Transparency Act, which nonetheless received a score of less-than-perfect—or “4: Very Well”—in the theoretical feasibility of its implementation for this very reason. In searching for any possible policy options regarding any and all types of criminal justice reform which have been introduced to the state legislature in recent years, I found myriads of policies had, indeed, been introduced; each of them died in committee or was not enacted for some other reason (ACLU, 2019).

Feasibility seems to be the greatest challenge to reform efforts in the state of Mississippi; however, feasibility is not given more or less weight in evaluations. This is because truly feasible policies in Mississippi are passed and implemented by the legislature and other government officials regularly, but that does not mean any of these policies are necessarily effective in addressing the issues for which they are aimed nor

helping to increase equity among lives and treatment of all citizens within the state. Hypothetically, if we suspend our disbelief for a moment and consider the policy options as if feasibility were not a challenge in Mississippi, the Prosecutorial Transparency Act (Policy #1) would be the ideal policy for the state of Mississippi, according to my evaluations in the previous chapter. The Mississippi state legislature should enact the Prosecutorial Transparency Act (PTA) and mandate all prosecutor's offices to record and report each of the data points and further requirements, publishing the information on each respective prosecutor's office website. As state prosecutors are elected public servants, the public is entitled to information regarding the practices of prosecutors and their decision-making processes. A state agency (either newly established or currently operating) should be allocated proper funding to ensure the recording and reporting of the prosecutorial decision-making process by prosecutors themselves as outlined in the Transparency Act and the publishing of data in a timely and consistent fashion. Should a prosecutor's office not comply with the Act, that prosecutor's office shall be ineligible to receive funding from the state's general fund (or other budgetary allocation). Funding would only resume after full compliance with the requirements of the Act, after the prosecutor's office provides the mandated information from the beginning of its non-compliance and through the current date. The state agency in charge of ensuring compliance with the Act will conduct a review and decide whether or not to certify that the prosecutor's office is now in compliance with this Act.

However, while this would be the ideal policy to implement, the feasibility of this policy—as discussed various times throughout this thesis—is entirely reliant on the Mississippi state legislature's support. In expectation of the legislature's opposition to

this Act, there are steps which I believe must be taken in order to convince the state legislature and government officials of the need for this policy implementation. The political barriers and deeply rooted “ole boys’ club” mentality is no reason to cease efforts in trying to reform Mississippi’s criminal justice system. On the contrary, continuing to research and show these characteristics to the world and Mississippians themselves is more than necessary to convince state leaders and the electorate to hold our state’s criminal justice system—particularly prosecutors—accountable.

In order to prove the issue at hand is problematic enough to warrant the implementation of the Prosecutorial Transparency Act, the topic must be further researched, documented, and widely published with fervent advocacy. For this to happen, there must be independent researchers who can grow the small body of research from this thesis focusing on the state of Mississippi with adequate funding, time, and support from national and state justice organizations as well as main actors in the Mississippi justice system itself. The research in this thesis is particularly limited by the general lack of transparency of prosecutor’s offices, allowing only the summarization and documentation of undeniable cases of injustice which have already received attention in the state and even nationally. Further, the policies which were evaluated were chosen with Mississippi in mind, yet they are only three of the endless number of ideas and proposals in existence which aim to make the justice system more fair and just. There are undoubtedly policy proposals which exist that I did not encounter that may offer better solutions to the risks of prosecutorial discretion in Mississippi. However, in order to successfully create a solution for the problem shown in Chapter 2, there must be a fully comprehensive understanding of the problem, and in order to fully understand the

problem, we must be able to access the information which reveals the true depth of the problem. This thesis is only a small scratch on the surface of deep-seated judicial problems in Mississippi, but I have—to the best of my ability at this time—sought to expose these issues and call for greater accountability among all actors in our state criminal justice system.

My strongest suggestion and recommendation for the state of Mississippi is to create a research funding mechanism which would support and foster collaboration across already existing research agencies and judicial organizations in their quests to better understand and reveal problems inherent in the Mississippi criminal justice system. I also recommend that the state legislature mandate all prosecutors' offices openly release requested information to research institutions and justice organizations for the purpose of encouraging further investigation and examination of the problems explored in this thesis. Prosecutor's offices have often been referred to as "black boxes" and provide little information to the public concerning the detailed characteristics of their practices, but it is entirely feasible for the state legislature to require prosecutor's offices to release requested information to researchers, saving only the information which may endanger the judicial integrity of an ongoing case. Should any researcher or institution working to reveal injustices in the Mississippi criminal justice system request and subsequently be denied access to information necessary for their studies, the Mississippi legislature should provide a way to report the denied request and evaluate the prosecutor's office reasons for denying access to the information. With financial assistance and outward support from the state government, researchers, judicial institutions, and civil rights organizations will be better able to understand and develop policy solutions which may work to

incrementally solve the problem, as the state of Mississippi is not easily or quickly receptive to change. Of course, it is a possibility that government actors who have a vested interest in maintaining the status quo will balk at these potential reforms or choose not to respect the findings of the data, but only further and more concrete research will be able to convince government officials of the real problems in Mississippi's criminal justice system. At the very least, this type of research may further shed light on the risks of prosecutorial discretion in Mississippi, which in and of itself would foster greater transparency and bring political pressure on refractory policymakers.

Chapter 6

Conclusion

While Mississippi's inherently racist, classist, and sexist reputation has improved in recent decades, the state continues to face deeply-rooted issues concerning corruption, nepotism, and a "good ole boy" mentality. And though the state is no longer implementing outwardly racist and discriminatory policies, such as Jim Crow Laws, Mississippi's history of such policies has confined racial minorities to social stations of second-class citizens, creating perpetual cycles of socioeconomic and educational struggles within racial subpopulations.

Unfortunately, in the state of Mississippi, it is more than just historical policies which are keeping these cycles in rotation. Racism is deeply imbedded in southern culture, and these sentiments are—both knowingly and unknowingly—passed on to generations of southerners who must decisively and actively un-learn the discriminatory views of those who came before us. As I have learned through conducting research for my senior honors thesis on prosecutorial misconduct in Mississippi, individuals in positions of power may or may not realize their actions are discriminatory and racist; nonetheless, these leaders hold authority over the lives of the underprivileged, and there is no accountability standard in place to ensure these inequitable actions are prevented and/or disciplined. The state leaders and government officials who play a large yet overtly uncredited role in the social and judicial injustices at hand are inarguably state

prosecutors, who wield dominating powers over the lives of all citizens subject to their discretion only. In order for Mississippi to move forward, we must exhibit and acknowledge the pervasive issues of prosecutorial misconduct and abuses of power which continue to perpetuate the cycles of racist and classist disparities in the state of Mississippi, threaten the constitutional rights of all citizens involved in the justice system, and contribute to the state's relatively high incarceration rate in a nation which is facing mass incarceration crisis overall.

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