

REINING IN THE PROSECUTOR:
"Probable Cause to Charge" Hearings

A Lifers' Group Report

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| Assist | Advocate | Inform |

ABSTRACT

The history of and contributions made by legislatures and prosecutors to the growth of mass incarceration in the U.S. over the last four decades are briefly summarized. Prosecutors have become the most empowered and influential actors in the U.S. criminal justice system. Prosecutors have taken advantage of a continuing plethora of new and longer, often mandatory sentences enacted by legislatures even though crime rates have fallen markedly since a peak in the early 1990s. Life and very long sentences have become the new norms as prosecutors, with unfettered ability to select from multiple new charges and mandatory minimums, are able to restrict judges' discretion to adjust sentences to individual offenders and circumstances. Defendants are often handicapped because of limited pretrial discovery, compelling them to plead out in 95% of criminal cases in order to avoid the threat of extreme and onerous sentences if they opt for and lose at trial. A proposal is offered to diminish the excessive influence of prosecutors to file charges designed simply to maximize sentences. This would empower judges to hold "probable cause to charge" hearings, arbitrating the charges to be filed based on a review of the preliminary evidence and circumstances of the crime. Judges would tailor charges to be appropriate, fair and in the overall interests of justice, thereby providing for a more level playing field between prosecutors, defendants and judges during plea bargaining and at trial.

Author's Note: This essay was written and submitted for possible inclusion in a book, "What We Know", to be written by incarcerated people and published by The New Press in 2020. The idea behind the book was to elicit "specific, serious, well-defined suggestions...how to improve a particular aspect of any part of our current [criminal justice] system". The request also asked authors to include elements of their own "personal story in service of illuminating the suggested reform". This essay was a runner-up selection, not to be included in the book, but eligible to be published on the website: www.smartoncrime.us/whatweknowbook. (December 2019)

REINING IN THE PROSECUTOR: "Probable
Cause to Charge" Hearings

by

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"I been in hell all my life", lamented released prisoner, 22-year-old Shaquille Brown, to his court appointed attorney upon leaving Massachusetts maximum security prison, MCI-Souza-Baronowski Correctional Center, on a snowy day in March 2017. And, only three months later, the mother of 20-year-old Christopher Austin would be confronted with the lifelong hell of losing her son to an apparently senseless, mistaken identity murder. Today, Brown sits in Suffolk County jail awaiting trial for Austin's murder.

Brown was born to a mother addicted to crack cocaine and alcohol, the likely cause of his lifelong disability and functional impairments. Early on diagnosed with ADHD and prescribed Adderall, he would eventually be diagnosed with severe emotional and neurodevelopmental impairments complicated by limited impulse control and an inability to read social cues. Upon the death of a supportive grandmother, he was returned to the care of his still addicted mother. He began to drink and smoke, then stopped taking his Adderall, stating it made him sluggish. He intersected with law enforcement during those early years and was repeatedly arrested for minor offenses including larceny and possible assault of a police officer. At 13 he was committed to juvenile detention where three years later he, together with another youth, assaulted a staff member. He was sentenced to 2½ years in county jail plus 5 years of probation. While in county jail he was prescribed antipsychotic medications for his difficulties controlling his impulses and emotions. Released at 19, he was soon arrested for illegal gun possession, a charge which would be dismissed but which was sufficient to violate his probation. He landed in state prison to serve the remainder of his 5 year probation sentence. There it was apparently decided that he did not need mental health treatment and he was taken off all medication. After a violation for marijuana possession, he was placed in solitary confinement where he was eventually charged with biting a correctional officer after a cell extraction. Although he was subsequently acquitted of this charge, it triggered a disciplinary hearing which sentenced him to two years in the highly restrictive Departmental Disciplinary Unit

where he was once again in solitary confinement for 23 hours per day. After a stressful and difficult year, he was transferred to the Secure Treatment Program at SBCC where he continued to be held in solitary confinement, although now receiving psychotherapy; albeit, this administered in group sessions with each man fully shackled and locked inside a small individual wire cage resembling nothing more than a tall dog crate. His appeal for a transfer to a residential treatment unit where he could spend more time outside his cell and receive more individualized treatment was denied. He was finally released in March 2017, with no referral to ongoing treatment, his attorney told by the Department of Mental Health that he didn't qualify. With little support, he had difficulty adjusting, did poorly and by May was entirely on his own. Then, on June 28, 2017, Christopher Austin was shot in the head and killed outside a convenience store, apparently without provocation. Police subsequently arrested and charged Brown with Austin's murder in July 2017. He is currently awaiting trial in Suffolk County jail.¹

* * *

It is probably impossible at this point to dissect the exact role that prosecutors played in the doubly tragic trajectory traveled by Shaquille Brown, or whether a different strategy might have led to better outcomes for these two unfortunate men and their families.

Here we will briefly review the insidiously collaborative roles that legislatures and prosecutors have played in contributing to continued mass incarceration in the United States even as crime rates have fallen significantly over the last 25 years. While there are multiple causes, there seems little doubt that the preeminent role that prosecutors have acquired contributes to the excessive incarceration and lengthy sentence structure that characterize the U.S. criminal justice system. We end with a suggested model to rein in some of the dominant influence that prosecutors currently possess.

In 2008, when Brown was committed to Juvenile Detention, Massachusetts routinely ensnared children as young as 7 in the criminal justice system. Although diagnosed with mental health problems, Brown ended up in a correctional rather than therapeutic environment that likely exacerbated his condition. The county jail sentence followed by five years of probation made him vulnerable to prolonged incarceration. Although eventually dismissed, the gun charge nevertheless was sufficient to send him to prison for 5 more years

¹ I acknowledge Maria Cramer, staff writer for the Boston Globe, for her detailed narrative of Shaquille Brown's story (Boston Globe, November 25, 2018, A1).

for probation violation. But perhaps we should not be surprised about this tragic outcome because this story is far from unique. What is clear is that this story exposes the sad failings of multiple public agencies that are hoped to promote public safety and prevent crime.

* * *

Students of criminal justice don't need to be reminded that the United States, with less than 5% of the world's population, incarcerates over 2 million prisoners, roughly 25% of the worldwide total; or that U.S. rates of incarceration exceed those of all other nations, including some of the most repressive regimes such as Russia, Georgia and China. Another 10-12 million persons pass through county jails each year. And, added to these distressing numbers are another 7-8 million ensnared in correctional supervision, such as parole or probation, often intrusively monitored by GPS anklets.

Many experts have tabulated that between 1980 and the present, U.S. federal and state incarceration rates have quintupled from approximately 100/100,000 population to over 500/100,000. This startling escalation began during the 1980s while crime rates were rising sharply, but continued unabated even though both violent and property crime rates dropped precipitously over the decades following the peak in the early 1990s. Looked at from a different angle, incarceration rates for violent crimes increased from approximately 250 prisoners per 1000 such crimes to approximately 1250 prisoners per 1000 violent offenses between the 1980s and the present. Similarly, incarceration rates for property crimes increased from approximately 25/1000 offenses to over 175/1000 property crimes. Both rates have been rising steadily since the late 1970s and show no signs of abatement even now after more than 20 years of consistent declines in crime rates. Many have mistakenly assumed that most of the increase is due to the "war-on-drugs" but such confusion is based mostly on the federal prison population, roughly half of whom are convicted of drug crimes. The federal population, however, represents only approximately 10% of the combined federal and state prisoner population. Proportions are vastly different in state prisons where only approximately 15% of prisoners are incarcerated primarily for drug crimes. There, 50-70% of the population carry so-called violent offenses.

Observers and students speculate that these high rates of incarceration have multiple causes. Additionally, some have praised the policies leading to

increased incarceration, arguing that they have contributed to the decrease in crime by sequestering a criminal population. However, most experts today agree that no more than a third of the reduction in crime can be attributed to mass incarceration. Many also agree that we have crossed a threshold, and that current rates now exceed their economic and societal cost benefits.

A commonly cited reason for the relentlessly increasing rates of incarceration per crime committed is the dramatic increase in sentence length which allows prisoners to accumulate in prisons. Before the increase in crime during the 1980s, sentences even for murder and other severe crimes tended to allow release within 10-15 years, either through sentence termination, release on parole and probation, or commutation of sentence. Today, many sentences are longer, life sentences have proliferated, and commutations have virtually disappeared. Ashley Nellis at The Sentencing Project has reported that nationally the rates of life sentences rose dramatically, increasing 465% from 34,000 in 1984 to 158,000 in 2012. And, if one adds in virtual life sentences of 50 years or more, a total of 206,000 prisoners in the U.S. were serving life or virtual life sentences in 2016. This represents almost 10% of the total national prisoner population. Such sentences, most offering no hope of redemption or release, were once thought to be reserved for only the most serious and depraved criminals, those totally beyond any possibility of rehabilitation or change. Yet, until the recent U.S. Supreme Court decisions in Montgomery v Louisiana and Miller v Alabama, there were thousands of Life Without the possibility of Parole (LWOP) sentenced offenders who committed their crime before the age of 18. As has been well documented by scientific study and now validated by the U.S. Supreme Court, such young persons are virtually guaranteed to be both the least culpable and also have the greatest capacity for change and rehabilitation. Additionally, many lifers committing their crime as adults are first-time offenders who are unlikely to reoffend if they were released. For all prisoners it is well established that people age out of their propensity to commit crimes. In general, crime rates are highest among the young, especially those under 30, and progressively drop as people age, making life sentences counterproductive as released aging prisoners much more rarely reoffend.

Massachusetts, the state in which this writer is serving a LWOP sentence, is generally considered a quintessentially liberal state. Startlingly, even here the LWOP prisoner population has expanded to the point

that it now ranks as the second highest percentage of such prisoners in all 50 states. In large part, this is a consequence of Massachusetts having replaced the death penalty 34 years ago with mandatory LWOP for first degree murder. In such cases, judges have no discretion to impose lesser sentences, no matter any mitigating factors or circumstances. And, the same mandatory LWOP sentence applies under the felony-murder rule. Until 2018, the felony-murder rule in Massachusetts required mandatory LWOP if anyone died during the commission of a felony even if defendants had no direct part in or any intent to cause the death. As long as they were implicated as co-venturists in the underlying felony, defendants were held responsible for any deaths. The current law now requires defendants to personally have an intent to kill; however, that decision applies only prospectively, leaving all those previously convicted under felony-murder to continue serving LWOP sentences.

Consequently, it is not surprising that Massachusetts has seen its number of life-sentenced prisoners steadily growing (see figure). Currently, 13% of state prisoners are serving LWOP and another 12% are serving Life with the possibility of parole after 15 years. Many of these are repeatedly denied parole, leaving them, like the LWOP prisoners, to die in prison. In part because of the large number of lifers, by 2011 Massachusetts prisoners were on average the third oldest in the U.S. with 19.4% aged 50 and older, trailing only New Hampshire (19.8%) and West Virginia (20%). By 2018 the percentage of older prisoners had skyrocketed by 40% to comprise 27% of all prisoners. Notably, 46% of life-sentenced prisoners in Massachusetts are aged 50 or older.

There is now ample evidence that very long sentences not only do not have greater deterrent effects than more moderate terms, but rather that they may actually decrease public safety. Prisoners too long isolated from family, community and work opportunities become progressively more likely to fail upon reentry, recidivating at higher rates because of increased difficulties adjusting into society after release. Additionally, LWOP and virtual life sentences that keep prisoners incarcerated to age and die in prisons are, for the most part, economically and morally undesirable and counterproductive. These elderly, often sick, prisoners are the most costly to imprison and the least likely to endanger public safety if released. Making such prisoners eligible for parole offers a rational basis to assess whether they are safe to release without reoffending while facilitating and reducing the moral and

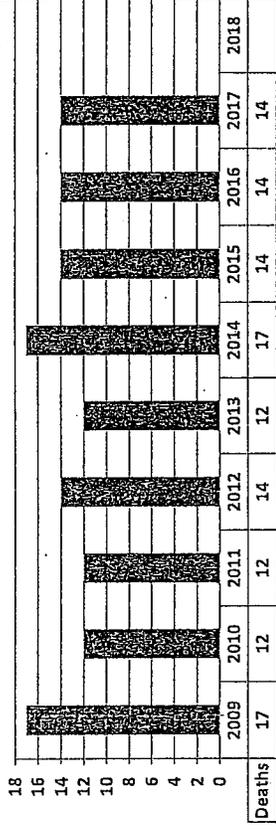
Massachusetts
LIFE SENTENCED PRISONERS
Jan 1, 1999- Jan 1 2018

—○— First Degree
—■— Second Degree

NUMBER OF PRISONERS

65 juvenile first degree
lifers were reclassified
in 2014 after being made
eligible for parole

Yearly Lifer Deaths in Prison



	Jan-99	Jul-99	Jan-00	Jul-00	Jan-01	Jul-01	Jan-02	Jul-02	Jan-03	Jul-03	Jan-04	Jul-04	Jan-05	Jul-05	Jan-06	Jul-06	Jan-07	Jul-07	Jan-08	Jul-08	Jan-09	Jul-09	Jan-10	Jul-10	Jan-11	Jul-11	Jan-12	Jul-12	Jan-13	Jul-13	Jan-14	Jul-14	Jan-15	Jul-15	Jan-16	Jul-16	Jan-17	Jul-17	Jan-18	Jul-18
First Degree	695	706	723	756	793	808	823	842	851	889	917	938	957	987	1017	1042	1057	1070	1021	1030	1036	1035	1048	1056	1066	1070														
Second Degree	850	867	871	862	854	865	842	842	842	842	866	852	846	846	888	888	916	930	952	990	988	986	971	977	982	982	988													

financial costs of their special needs and medical care.

Another major driver of U.S. mass incarceration, as has been persuasively argued by John Pfaff², is the proliferation, mindset, and increasing power of prosecutors nationally. As Pfaff shows, the number of prosecutors increased 18% from 17,000 to 20,000 between 1970 and 1990, the period of peak increases in crime. Then, between 1990 and 2007, the number of line prosecutors increased a further 50%, to 30,000; even as crime rates fell 30 to 40%. Between 1970 and 1990, average prison admissions per prosecutor increased, almost tripling, and then held steady between 1990 and 2007. Notably, arrests decreased markedly during the latter period, 1990 to 2007. By contrast, the fraction of arrests leading to filings of felony charges was greatly increased. Much of the increase in prosecutor productivity was made possible by the proliferation of plea bargaining which became the modus operandi by which 95% of criminal cases are settled. Prosecutors found it ever easier to force plea resolutions by threatening drastically longer sentences based on the myriads of mandatory minimum sentences and sentence enhancements enacted by legislatures persuaded by the furor of crime wave predictors--a wave that had already passed and which was markedly subsiding.

These changes came about in part because neither legislators, prosecutors, the public nor the media were aware that the "crime wave" had peaked in the early 1990s. Even many criminologists remained so convinced that crime was still accelerating that they warned about an expected wave of "super-predators" and one; James A. Fox of Northeastern University in Boston, predicted "bloodbaths". None of this ever happened but, fueled partly by the media's discovery and continued addiction to sensationalized crime reporting, the overall perception remained that there was an urgent need to strike back against a cataclysmic--but in reality nonexistent--crime wave.

Further facilitating the ability of prosecutors to force plea bargains is that defendants and defense attorneys are often kept in the dark about the evidence against them. Defendants have very limited opportunities to receive comprehensive discovery during plea bargains, allowing prosecutors to bluff and exaggerate the amount and reliability of the evidence. This information is often withheld during plea bargaining, forcing the defense to negotiate from ignorance. The defendant may be left with a Hobson's choice of accepting a plea for what might be a "reasonable" sentence by forgoing a trial (sometimes

² John F. Pfaff. "Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform". (Basic Books, New York, 2017).

even if innocent) or go to trial and face the possibility of a very extreme sentence if convicted. The latter is possible because prosecutors are able to pile on additional onerous charges and sentence enhancements based on the many harsh laws and mandatory minimums enacted over the last three decades. With these tools, prosecutors can virtually force judges to impose horrific sentences if they obtain a conviction. Judges are often left with little or no discretion to tailor sentences to the individual crime or defendant. These laws have been difficult to repeal because of inertia, complemented by legislators' fears that a released prisoner, possibly subject to a longer sentence had the law not been repealed, might reoffend in a sensationalized manner and threaten their re-election: the so-called "Willie Horton effect" that contributed to Massachusetts Governor Dukakis' presidential loss to H. W. Bush.

A further consequence of these extreme, legislatively mandated, sentences which may be meted out to those who do risk trial and are convicted, is that this justifies harsher and longer sentences even for those accepting pleas. In essence, the system now has developed a vindictive streak to punish those who choose to exercise their right to trial, a paradox certainly not anticipated by the framers of the Constitution. What is certain is that it has become much easier for prosecutors to get ever longer sentences.

Prosecutors additionally have the benefits of support from an extensive array of state resources in the form of police, medical examiners, crime labs, and the state's deep financial pockets. Defendants, often relying only on public defenders and limited resources, have scant opportunities to counter or offer alternative explanations for often ambiguous or even erroneously interpreted evidence or facts.

In short, prosecutors have unparalleled discretion and power to select multiple and onerous charges from the vast menus now available thanks to legislatures' persistent if unfounded fears and perceptions about the high levels of crime. And, as we have seen, the usual arbiters of criminal trials, the judges, have little discretion to adjust sentences while defendants are frequently operating from positions weakened by lack of information and threats of exaggerated sentences. What then are possible remedies for this apparent imbalance between prosecution and defendants?

One proposal to remedy the imbalance between prosecution and defense is to expand the number of public defenders (who service about 80% of criminal

defendants) and to provide them with greater resources. There is also an urgent need to make available investigative and analytic resources to counter-balance the assistance that police, crime labs and other supportive agencies provide to prosecutors. Further, most crime labs are prosecution-oriented and may at times minimize the reliability of exculpatory results or exaggerate the validity of inculpatory findings. It has been shown this may occur by deliberate and conscious or even inadvertent, subconscious bias, but either requires that the defense needs to effectively counter these claims with independent investigation and analysis. Recent findings, summarized by the 2009 Academy of Science Report on Forensic Science, have demonstrated that many so-called reliable and "infallible" forensic techniques have been vastly overstated in courts for many years, not infrequently leading to false convictions. However, such discredited evidence is occasionally still used and new, possibly dubious techniques, are constantly added. This means that defense resources need to be robust to counter exaggerated or even erroneous conclusions.

A practical example of such a problem can be found in this writer's case. Here an apparently innocuous cast of a footprint on a dirt path suddenly morphed into a crucial piece of evidence when, during the trial, a crime lab forensic analyst for the first time unexpectedly identified it as the heelprint of the defendants's sneaker. This previously unavailable interpretation was then used by the prosecution to formulate its theory of the crime and to repeatedly and substantially undermine the credibility of this author's testimony. The heelprint became inculpatory because, while the defendant was known to have left footprints at the scene, his description of his movements was not consistent with a heelprint pointing in the direction of the victim. It was not until years after the conviction that a defense expert determined and attested that the supposed heelprint was in fact the product of two overlapping toeprints. This testimony would have been entirely consistent with the defendant's trial testimony and corroborated his story. Importantly, the prosecution's forensic analyst subsequently recanted her trial testimony in an affidavit, admitting that she had made a mistake: the print was indeed made by two overlapping toeprints. But the damage had been done, the defendant's credibility critically undermined at trial, and the prosecution's damning attack validated. However, in the appellate setting, this serious evidentiary mistake was called "harmless error" because, while it did cast doubt on the

validity of the verdict, the appeals court felt it was insufficient, by itself, to overturn the verdict (which was deemed the required standard).

Such forensic errors are not rare and are frequently never revealed or revealed only after defendants have been convicted--and then are often brushed aside as harmless errors by appellate courts. Other examples include the belated retractions by the FBI of now invalidated testimony about fiber, hair and bitemark identifications, exaggerated testimony about the reliability of bullet-lead analysis as well as toolmark and ballistic evidence, and even serious overstatements about the reliability of fingerprints. All these are amply documented by the National Academy Report on Forensic Science. Even DNA, long considered infallible, recently has been revealed as occasionally unreliable because of the ease with which DNA transfers between sources, as well as because of errors of interpretation of mixed samples, especially when quantities of DNA are limiting.

Some have proposed changing prosecutorial culture as another option to improve the balance between prosecutors and defendants. It has been suggested that changing attitudes and giving prosecutors better information about the economic and moral consequences of their actions can be helpful. For example, Adam Foss, a former prosecutor in Boston, has formed Prosecutor Impact, an organization working to expose and educate prosecutors about the practical consequences of their policies and decisions and how conventional "wisdom" may be counterproductive and actually increase the likelihood of future offenses. Recently, in Philadelphia, he helped reform-minded new District Attorney Larry Krasner by taking newly hired assistant district attorneys to visit prisons, to talk to lifers sentenced to LWOP as teenagers, and also to familiarize them about homelessness. It is hoped that learning to understand the realities about those less fortunate may make prosecutors more aware of the consequences of their decisions and choices.

The public has also joined in by electing, in select situations, progressive and reform-minded district attorneys like Krasner in Philadelphia; Karen Ogg, the first democrat elected as DA in 40 years in Harris County, Texas; and most recently, Rachel Rollins in Boston. All three ran on progressive, smart-on-crime platforms in which they specifically eschewed typical tough-guy rhetoric and policies. They have all begun or plan to implement policies to reduce unnecessary incarceration and ensnarement in the criminal justice system. For example, Rollins has announced that she will no

longer prosecute 15 low level crimes, instead redirecting these offenders to restorative justice and diversionary programs. All three have changed bail policies, reducing reliance on cash bail which frequently criminalizes poverty by jailing pre-trial suspects simply because they cannot afford even small bails. Of course, the predominant result of these laudable interventions affect mostly low-level crimes and will do little to reduce mass incarceration. They may, however, have important long-term benefits, especially by allowing low-level and youthful offenders to avoid the harmful consequences of unnecessary incarceration, which so often precipitates subsequent lifelong involvement with crime and criminal justice.

Although these and other ideas may be laudable and constructive, by themselves they are unlikely to foster real change in most district attorney offices. Some of the reasons include personal and professional ambition. While elections for district attorneys are generally low profile and often marked by low turnout, many district attorneys use these positions as stepping stones to higher office. This has certainly been true in Massachusetts where for decades many candidates for governor have risen from the ranks of district attorneys. Other positions they have sought include State Attorney General, congressperson, and senator. Similarly, assistant district attorneys are typically rated by their conviction rates and the sentences they achieve. Not only personal pride and ambition are at stake here, but also monetary rewards in terms of promotions and, often, eventual successful recruitment by prestigious law firms intent on hiring the most successful litigators. Additionally, ~~prosecutors are protected by "absolute immunity" laws that shield them from~~ lawsuits for most legal wrong-doings, making prosecutorial accountability a rare concern. This aura of invincibility and power added to personal and political ambition is inherently seductive and potentially corrupting, likely influencing many in prosecutorial offices.

Consequently, it would appear that an independent arbiter is required. We have as a model the requirement that judges must authorize search warrants based on probable cause analysis. We now propose that at or immediately after arraignment, judges should be empowered to arbitrate which charges are reasonable to be filed, based on the evidence and the circumstances of the crime. This is separate from the role of grand juries in that such "probable cause to charge" hearings would be public and also that grand juries are not trained to assess the level of charges that are appropriate. The prosecutor

would need to lay out sufficient evidence, including potentially exculpatory evidence, to convince the judge that there is reasonable probable cause that the charges requested by the prosecutor are commensurate with and appropriate for the evidence and the circumstances of the crime. Such a process would simultaneously enhance judges' abilities to deny or set responsible bail, allow defense attorneys and defendants to appropriately negotiate any possible pleas, while permitting judges to decide if the totality of the charges the prosecutor intends to file are in the best interests of fairness and justice. This may reduce the use of coercive measures to pressure defendants to plead when there may be little rational justification to seek very extreme sentences. The end result of this hearing would be a negotiated agreement between judge and prosecutor, not unlike a process currently used during plea agreements. The transparency and the public nature of such hearings should help to mitigate the most unreasonable threats of enhanced charges during plea bargaining while making it more likely that the charges the defendant faces are fair and just. This proposal will also tend to normalize the level of charges based on what most other similarly situated defendants have faced, a mechanism which would reduce racial and socioeconomic bias which often remains a concern.

We concede that it might be too cumbersome to require such "probable cause to charge" procedures for all crimes or sentences. It may be appropriate to limit such hearings only to more serious felonies that carry heavy penalties and long sentences. By inserting an impartial judge, the personal ambitions and professional incentives that currently and possibly always will play a role in prosecutions should be mitigated. American jurisprudence and the U.S. Supreme Court have made clear that the appropriate role of the prosecutor is not to obtain a guilty verdict or maximize the penalty; and it is certainly not to terrorize defendants with threats of extreme sentences. Rather, prosecutors, as officers of the court, are mandated to seek fair and equitable justice. Nevertheless, the inherently adversarial nature of the U.S. criminal trial system will almost always tend to polarize prosecutors to seek the outcomes most favorable to their position and their ambitions rather than the outcomes that are most just.

While it is unlikely that either this proposal to insert a "probable cause to charge" hearing, or any other single intervention, will prevent all instances of prosecutorial excess and bias, inserting a neutral arbiter plus

public scrutiny into the charging process is likely to be beneficial. Such a process would limit unreasonable threats of excessive sentences while also allowing defendants to make more informed plea decisions. Overall, the process is much like the one that requires judges to approve search warrants based on a probable cause to search. Most criminologists now recognize that the prosecutor has become the most empowered and influential actor in the criminal justice system. Such an imbalance of power is simply not appropriate in a system that prides itself on the fiercely adversarial nature of criminal trials. The mandate must be to find truth and justice, not to win at all costs. Reining in a little of the prosecutor's power should help restore a more appropriate sense of balance and equity that is currently lacking. Further, subjecting prosecutors to the need to weigh and justify the choice of which charges to file may contribute to greater awareness about the consequences of these decisions, something that is likely to have a salutary effect on fairness. Finally, exposing charging decisions to the bright light of open court hearings will help to reassure the public that their concerns about balancing punishment with rehabilitation, and incarceration with public safety, are being met.

* * *

Whether such an intervention might have led to a different outcome for Shaquille Brown is imponderable. However, the decision to commit him to juvenile detention at 13 and then charge and ultimately jail a fragile, disturbed youth of only 16 with little regard for his mental health was almost certain to end badly. This was especially true because the long period of probation put him at great risk of a relatively long term of incarceration in state prison under conditions virtually certain to make him decompensate. Can there be much doubt that these decisions contributed significantly to Brown's sad, even tragic, arc of life? Or, that possibly they may have been important factors leading to Christopher Austin's unjustifiable murder?

A D D E N D U M

Since completion of this essay, the final chapter has been written on Shaquille Brown. Brown was tried and convicted of first degree murder on June 3, 2019, then sentenced to the LWOP (life without the possibility of parole) sentence that is mandatory in Massachusetts. He has joined the approximately 1100 other LWOP prisoners in MA prisons who are destined to die in prison with no second chance, no matter if they demonstrate redemption or rehabilitation. Thus ends this tragic saga, very likely facilitated by a criminal justice system very much in need of reform. Massachusetts currently houses four times more LWOP prisoners than either the entire state of New York or the five other New England states combined.

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To partner with families and other stakeholders to create solutions for sentencing reform, promote meaningful parole opportunities for all lifers, and assist lifers and long-termers to live positive lives both inside and outside of prison

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Advocate

Coordinate with any organization striving for similar goals in order to provide an effective use of penal and rehabilitative resources

Inform

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