State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

IN OPPOSITION TO:

S.B. 1018 (RAISED) AN ACT CONCERNING PROSECUTORIAL ACCOUNTABILITY.

JOINT COMMITTEE ON JUDICIARY
March 10, 2021

The Division of Criminal Justice respectfully opposes S.B. 1018, An Act Concerning Prosecutorial Accountability, and recommends the Committee take NO ACTION on this bill. While the Chief State's Attorney and the State's Attorneys who comprise the leadership of the Division understand and support the intentions of this legislation, we believe that the Division is addressing these concerns through its own initiative and with the advice and support of the Criminal Justice Commission and community stakeholders throughout the state.

Less than two years ago, Public Act 19-59, An Act Increasing Fairness and Transparency in the Criminal Justice System, was signed into law and Connecticut became first state to begin collecting prosecutorial data statewide. The Division fully supported this initiative, and it received the rare unanimous votes in both chambers. The case management system began collecting statewide data on January 1, 2021. At the time the transparency bill was being debated, the proponents of this bills stated, "all of us need numbers on what prosecutors are doing." And yet, before that system even has the chance to collect the "numbers" to be reviewed to determine areas of the system that can be improved, this bill has been raised under the guise of "accountability."

The Division has progressed without the need for statutory reform. Over the last decade, the prison population in this state has been reduced by half, as evidenced by recent prison closings. Connecticut also detains a much smaller percentage of defendants prior to trial than do many other states, including those identified as having more progressive detention policies like New Jersey. Connecticut received nationwide attention for the Early Screening and Intervention Program, which takes an important approach to reducing crime and improving outcomes for offenders by identifying and addressing the root cause of their criminal behavior. There are community engagement boards at both the district level and, as of this year, the statewide level, so that leaders in all aspects of the community can meet regularly with the Chief State's Attorney or State's Attorney and have an open forum for candid discussion about the criminal justice system and exploring ways in which it can improve. Finally, with the help of the Governor through his budget recommendations, the Division will be creating a Conviction Integrity Unit to ensure confidence

in convictions well after sentencing. Yet, even with these proactive measures to better our criminal justice system, this bill seeks to legislate the independence away from the State's Attorneys.

Section 2 of S.B. 1018 seeks to reduce state's attorneys' terms from eight years to five. The eight-year term was created to mirror that of our judges, who are also constitutional officers of our justice system. Moreover, a review of the legislative history surrounding the constitutional amendment creating the Division shows that terms were intended to outlast that of a sitting governor so as to be "totally insulated from the political process." In practice, these terms are vital for continuity, division morale, implementation of long term change in a judicial district, and the ability to build relationships within the community the state's attorney serves. Shortened terms disrupt these roles.

Section 3 proposes to require the Division of Criminal Justice Advisory Board to adopt policies dealing with very specific matters and circumstances – some of which are fully outside of the prosecutor's control. By way of background, the Advisory Board historically has not served as the policy-making body for the Division. It was established originally in response to concerns raised by the State's Attorneys themselves about the unwillingness of the then-Chief State's Attorney to call regular meetings of the State's Attorneys as a group. The Advisory Board continues to meet monthly to discuss topics such as trends noticed in a district, how best to respond to a certain issue raised in a case, and changes other states have adopted in criminal justice. It has not had Division policies on its agenda, as policy-making issues have been left to a separate meeting called by the Chief State's Attorney for the overall operation of the Division.

This process has proved productive. The Division currently has more than 100 official policies covering topics such as ethics, eyewitness identification processes, immigration enforcement and civil detainers, and disclosure obligations. Many of the policies are the result of continuing review and examination by internal Division committees appointed by the Chief State's Attorney and composed of State's Attorneys and other staff. Currently we have internal committees responsible for reviewing matters concerning DCJ management, training, legislation, and operations, which includes such areas governing investigations and prosecutorial functions. The Division believes this internal system is not only sufficient, but the appropriate manner in which to address many of the policy areas identified in S.B. 1018.

S.B. 1018 also seeks to have the approval of any and all policies sit with the Criminal Justice Commission, with public testimony on revising any and all such policies. This threatens the independence of the Division. Under the state constitution, the power to prosecute cases rests solely in the Division, through the State's Attorneys and the Chief State's Attorney. Inherent in that power is the power to set policies that the Division believes are necessary to ensure that justice is done. Neither the proponents of this bill, the public, nor the Criminal Justice Commission has the authority to set policy for the Division.

Indeed, the Commission should not be vested with the power to set policy for the Division. Two members of the Commission are judges and two other members are criminal defense attorneys. The Division was removed from the Judicial Branch and put into the Executive Branch in 1984 with the adoption of Article XXIII of the Amendments to the Constitution because the legislature recognized the need to have prosecutors that were independent of the judiciary.

Similarly, there is an inherent conflict in having a criminal defense attorney have any type of authority over the Division's policies. While, ultimately, the Commission would be voting whether the Division's policies cover all of the areas addressed in this bill, the process described would clearly give it influence in the creation of those policies.

Additionally, as noted, many of these proposed policies cover topics outside the control of the prosecutor. For example, one of the areas identified is diversionary programs, including policies on "eligibility" and "eliminating costs to defendants." However, the Judicial Branch determines eligibility through their Court Support Services Division, the legislature sets the fees for each program, and the court determines waivers of any such fees. As another example, the bill includes policies that govern the use of investigatory grand juries. Yet, the use of investigatory grand juries in this state is strictly regulated. Our statutes provide that investigatory grand juries can only be used for specifically identified crimes. They also provide that a prosecutor seeking to empanel a grand jury must make an application to a panel of judges in which the prosecutor has to provide a full and complete statement of the status of the investigation and the evidence collected, a full and complete statement of the facts and circumstances that cause the prosecutor to believe the investigation will lead to a finding of probable cause, and identify other investigative procedures that have been tried and the reasons why they have failed or the nature of the crime that leads the prosecutor to believe they would fail if tried. A three judge panel decides whether or not a grand juror will be appointed to conduct the investigation. In light of the specificity of the statute and the judicial oversight of the use of a grand jury, what need could there possibly be for the Division to set policies in this area?

Finally, with respect to Section 3, the bill appears to impose a "one size fits all" approach to prosecution that is not only unwise, but also unjust. It is ***impossible*** to create policies that attempt to identify all of the factors that can be taken into consideration in making some of decisions and/or recommendations prosecutors make on a daily basis. Each case, each defendant, and each victim is unique. In creating policies that limit the number of factors that can be taken into consideration in making decisions, we run the risk of creating a one size fits all, cookie cutter type of justice. Yes, the Division supports the collection of data to provide greater insight and transparency on the criminal justice system, but we must not allow "data-driven" rules to create a system of cookie cutter justice that deprives the defendant, the victim, and society of justice determined on the basis of the unique facts and circumstances of each case.

The same holds true for the sweeping proposals included in Section 5 that would apply to the "performance report" of each State's Attorneys. This section would make "performance" purely data-driven without any context for the cases from which this data was pulled. This model undoubtedly would lead to prosecutors focusing on the statistics, rather than resolving cases in the best interest of justice and public safety. The identified data points clearly favor prosecutorial leniency to an inordinate degree. However, our prosecutors already utilize their discretion to the benefit of the defendant when proper. Nearly a quarter of defendants have cases dismissed after using a diversionary program, and almost 40% of the remaining cases are not pursued due to the discretion of the prosecutors.

Moreover, as with the policies, many of these data points are beyond the control of the prosecutors. For example, the "[t]otal number of continuances granted" is proposed as a measure

to determine whether the prosecutors "timely" administered their cases. However, it is not limited to continuances requested by the state and, in fact, most continuances are at the defendant's request. Another example is judging prosecutors on disparate impacts on demographic groups by the number of arrests, length of sentences, amount of court fees or fines, and restitution amounts ordered. Yet, law enforcement makes the arrests and judges order sentences, fines, and restitution.

With respect to the "health of communities impacted by prosecution," prosecutors are to be judged on the percentage of defendants who successfully complete diversionary programs and the percentage of people were "homeless or without permanent or stable dwellings" after being released from prison. Prosecutors cannot be held responsible when adults chose not to complete a diversionary program, and they certainly cannot be responsible for the housing of individuals after incarceration.

This proposed legislation unfairly targets prosecutors, when other state employees, such as judges, public defenders, probation officers, parole officers, bail commissioners, Department of Corrections officials, etc. all play a part in these statistics. Yet, we are aware of no other state agency head or independent constitutional officer for whom such specific and distinct provisions are established in statute. It also should be noted that unlike many other agency heads and high-level administrators, the Chief State's Attorney and the State's Attorneys, as members of the bar, are subject to the Rules of Professional Conduct and disciplinary processes applied to all attorneys, and, further to the specific rules and responsibilities applied only to prosecutors in the Rules of Professional Conduct and through case law. The Division also is subject to audit by the Auditors of Public Accounts, who conduct detailed audits not only of the agency's financial records and policies, but on a host of other matters, including, of particular interest with regard to this legislation, the handling of complaints from the public.

To imply that there is a lack of accountability, as the title of S.B. 1018 itself would appear to, is simply not the case. Significant measures to assure the accountability of the Chief State's Attorney and State's Attorneys are in place, and are reviewed and enhanced on an ongoing basis.

With respect to State's Attorney evaluations, the Division implemented a policy this year which requires a 360-degree evaluation of every State's Attorney every two years. The review will be conducted by the Chief State's Attorney, as well as at least one other State's Attorney. The review will be exhaustive and not only seek the input of individuals within the Division, but also those with which the State's Attorneys frequently work – victim advocates, law enforcement, judges, community leaders, etc. We also have met with other interested parties, including the American Civil Liberties Union of Connecticut, to discuss their concerns. We will continue to do so and while we welcome input of all interested parties, we must again stress the constitutional obligations and responsibilities to which we have taken a sworn oath.

Finally, section 7 of the bill, which would repeal General Statutes Section 51-277c that requires the Division to give priority to crimes involving physical violence and crimes involving the use of a firearm, is contrary to the interests of public safety. Because such crimes present the greatest danger to public safety they are and should remain a priority for the Division. There simply is no reason to repeal Section 51-277c.

In conclusion, the Division of Criminal Justice respectfully opposes S.B. 1018 and recommends the Committee take NO ACTION on this legislation, allowing the Division to continue its ongoing and concerted efforts to address the issues involved. We thank the Committee for affording this opportunity to provide input on this matter and would be happy to provide any additional information the Committee might require or to answer any questions that you might have.