

Memorandum  
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*District of Columbia*



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Subject: Proposals to Address Internal and External Racial Disparities, and to Repair the Relationship Between USAO-DC and the Community

Date: June 16, 2020

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To: USAO-DC Leadership

From: Working Group of USAO-DC Black AUSAs

### **EXECUTIVE SUMMARY**

As several cities throughout the nation, including the District of Columbia, continue to protest in response to the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and countless other unarmed civilians, the United States Attorney’s Office (“USAO”) for the District of Columbia finds itself at a crossroads in history, and in a unique position to effectuate change, for several reasons.

First, we sit at the nation’s capital—the beacon of American ideals—amidst a city that is currently experiencing protest, unrest and great pain. Our physical proximity to those at the highest levels of government has routinely placed us at center stage, and these last few weeks have been no different in that regard.

Second, we are the only U.S. Attorney’s Office in the country with a local prosecuting division. While other USAOs may have the luxury of deferring to their local prosecuting counterparts—who tend to be most scrutinized when issues of police misconduct and racial disparities in the administration of justice arise—we do not.

Finally, nearly half of the District’s residents are Black, as are the overwhelming majority of the victims, witnesses, and defendants of the crimes we prosecute. If we purport to be an institution that regards these stakeholders as people, rather than merely numbers or statistics, our response to the instant crisis matters. And, make no mistake about it, unequal treatment under the law is a national crisis.

Whether and how we respond to this crisis will undoubtedly impact our credibility, and the trust, or lack thereof, that characterizes our relationship with the community we serve. Our response has the capacity to reduce tensions arising from the perception that prosecutors are an extension of the same “problem” or “system” that facilitates these killings; or, in the alternative, to fuel those tensions. This reality must be acknowledged if we are to maintain any semblance of trust and credibility with this city, and quite frankly, with our colleagues in this office—those expected to carry on with the intricacies of our work in, and for, this community while witnessing the heart-breaking disregard of Black lives.

Accordingly, it is neither a prudent nor a viable option to sit on the fence or waiver on where we stand when it comes to the slaying of unarmed civilians by law enforcement officers. Recognizing and responding appropriately to these injustices does not go against our loyalties to the Department of Justice, the United States Constitution, or the people we have sworn to serve; to the contrary, such actions are the best evidence of such loyalty.

Over the last week, several sections of our office have held meetings to address the impact of our nation's current state of unrest on us as individuals and as prosecutors. The recent conversations with leadership, while only the beginning, undoubtedly reflect acknowledgement that USAO-DC is neither internally immune to the impact of racial inequality as it relates to the experiences of our Black colleagues; nor externally immune, as it relates to the cases that we prosecute. Before these discussions began, a group of Black AUSAs convened a working group to discuss our experiences as Black prosecutors at USAO-DC—our objective being to develop proposals that would improve: (i) the working environment for Black employees within USAO-DC, and (ii) the office's relationship with the diverse communities we serve. While we have vocalized many of the recommendations included herein during our respective section meetings, this memorandum provides concrete and specific written proposals, supported by data, concerning how our office can turn recent discussions into real, impactful, and necessary change.

**Part A** recommends the hiring of a Diversity and Inclusion (“D & I”) Officer with the appropriate training and experience to implement diversity-centered proposals. **Part B** highlights the need to improve upon our current internal implicit bias offerings, and retain an industry expert to serve as the facilitator. **Part C** offers concrete ways in which to repair our relationship with the community by mandating greater participation by AUSAs in community activities, and by placing greater internal value on our Community Prosecution Section. **Part D** highlights the negative racial and social impact of the Felon-in-Possession (“FIP”) Initiative, and suggests proposals for its modification; and **Part E** encourages the retention of a Restorative Justice and Diversion Coordinator, which will have the dual effect of decreasing racial disparities in prosecution and better addressing victims' needs.

## **PROPOSALS AND RECOMMENDATIONS**

### **A. Hire a Diversity and Inclusion (“D & I”) Officer**

Hiring a D&I Officer must be a top priority for this office. The way forward will be long and arduous. Implementing D&I proposals, whether in response to this memorandum or the series of meetings that have taken place across our internal divisions, will require a dedicated individual with a specific skill-set, and relevant experience. Such a position exists in other parts of the department, such as the Bureau of Alcohol and Tobacco, and within our nation's military branches. The person in this role will be deputized to:

- Co-chair the USAO Diversity Committee, with the Principal Assistant USA;
- Coordinate and support diversity-related programming and trainings, including a robust implicit bias training regimen, discussed *infra*;
- Create and oversee a new voluntary D&I mentoring initiative;
- Generate ideas and content to communicate and promote D&I initiatives in the office;

- Participate in the preparation of the U.S. Attorney, the External Affairs Section, and other leadership for all public speaking engagements on behalf of our office;
- Develop relationships with local law student affinity groups, such as the Black Law Students Association, as well as other entities representing underprivileged and underserved populations;
- Assist with the recruitment of diverse attorneys and support staff;
- Maintain and analyze internal metrics related to D&I strategy, specifically as it pertains to hiring, promotion, and retention;
- Assist with basic training as it relates to issues affecting diverse populations, including the D.C. transgender community;
- Serve as a contact for diverse interns;
- Attend diversity-related events and trainings;
- Keep abreast of D&I developments in the legal profession;
- Ensure that all AUSAs and support staff are treated fairly and equally when disciplinary matters arise;
- Perform other duties as assigned, including those focused on community service and wellness initiatives for diverse communities.

**B. Improve and Expand Implicit Bias Training**

It is widely acknowledged that implicit bias can affect how prosecutorial discretion is exercised at every stage of the criminal justice process. This is true even when statistically controlling for prior criminal record and severity of the crime at issue. In 2016, recognizing these realities, the Department of Justice announced a department-wide implicit bias training for all prosecutors and law enforcement personnel.<sup>1</sup> To our knowledge, this robust department-wide training program never went into effect at the USAO-DC. While there may be a short module incorporated into basic training, no such training is currently offered to senior prosecutors on an on-going basis. Accordingly, we recommend that:

- All attorneys, victim-witness advocates, and support-staff be required to participate in mandatory annual implicit-bias training, and certify that they have completed the same;
- Such training must be provided by an industry-recognized individual or organization, such as The National Training Institute on Race and Equity (NTIRE). To date, NTIRE has provided training to multiple local prosecutors' offices throughout the country, and to the U.S. Attorney's Office for the Northern District of Georgia.<sup>2</sup>

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<sup>1</sup>“Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel” (June 27, 2016) available at: <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel>.

<sup>2</sup> Information on NTIRE's implicit bias is available at the following links: [https://d1fa577f-c8d0-450d-992f-00340043ce61.filesusr.com/ugd/647e86\\_ad9dcd600a1344cdbc54cd4fa55ddb3.pdf](https://d1fa577f-c8d0-450d-992f-00340043ce61.filesusr.com/ugd/647e86_ad9dcd600a1344cdbc54cd4fa55ddb3.pdf).

### C. Bridge the Gap Between Our Office and Our Community

To be most effective in our roles, and to do our jobs in a way that inspires trust, prosecutors must understand the needs and circumstances of the communities they represent. One important area in which our AUSAs require more education and greater understanding involves the mechanics and consequences of release conditions. Our office must ensure that AUSAs recognize (i) the financial burden imposed by these conditions of supervision; (ii) the consequences inherent to the most minor, technical violation; and (iii) how the tendency to “pile on” these conditions sets a defendant up for failure. Similar evidence of the growing disconnect between our office and the community is our lack of familiarity with the living conditions at the DC jail. This lack of awareness was most recently highlighted by our reliance on flawed DOC representations at the onset of the COVID-19 crisis.

As a general matter, AUSAs need opportunities to interact with the community beyond the interview and preparation of witnesses and victims. In addition, prosecutors’ offices around the country have recognized the flaw in deputizing prosecutors to make recommendations on detention and sentencing without first exposing prosecutors to the inner workings of local jails.<sup>3</sup> Accordingly, we recommend the following changes to our Superior Court Rotation Program:

- Rotating AUSAs should be given the option to participate in either: (i) a 3-6 month community prosecution rotation; **or** (ii) mandatory quarterly reporting, certifying that they have attended at least 3 community events, inclusive of ANC meetings, district-wide meetings, and events organized by the community prosecution section.
  - Both options should include a requirement that AUSAs conduct at least one community education training session. These trainings should include topics such as, how to seal an arrest and how to register a firearm. Such trainings would greatly increase our credibility with the community—the latter also supporting our prosecution of local and federal gun crimes. For instance, how much more compelling is a CPWL case if we can say the accused was afforded opportunities to attend such trainings, but declined?
- USAO Leadership should coordinate with the D.C. Jail to arrange for jail tours for new AUSAs (which will be mandatory for all AUSAs in the Superior Court Division). Forty prosecutors’ offices around the country have pledged to participate in such a program.<sup>4</sup>

In short, a prosecutor’s first encounter with her district should not be visiting a crime scene; nor should prosecutors be “putting people in places they haven’t seen or walked

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<sup>3</sup> Justin Jouvenal, *They send people to prison every day. Now, they are pledging to visit*, Wash. Post, Nov., 25, 2019, available at: [https://www.washingtonpost.com/local/legal-issues/they-send-people-to-prison-everyday-now-they-are-pledging-to-visit/2019/11/22/5e0ff274-0d64-11ea-97ac-a7ccc8dd1ebc\\_story.html](https://www.washingtonpost.com/local/legal-issues/they-send-people-to-prison-everyday-now-they-are-pledging-to-visit/2019/11/22/5e0ff274-0d64-11ea-97ac-a7ccc8dd1ebc_story.html).

<sup>4</sup> *Id.*

through.”<sup>5</sup> Encouraging these measures will help us restore our relationship with the residents of the District of Columbia, and also with the defense.

#### **D. End or Amend FIP-Initiative to Avoid Disparate Impact on Communities of Color**

In January 2019, the Criminal Division implemented the FIP-Initiative, which authorizes the transfer of certain felon-in-possession cases from our Superior Court Division to our Criminal Division. As further explained below, the FIP-initiative, as currently administered, disproportionately targets poor communities of color, with little statistical evidence that the program has had any impact on reducing violent crime. Taking lessons from the “War on Drugs,” which is now widely regarded as a failure due to its limited success in curtailing drug trafficking, and its contribution to mass incarceration in communities of color,<sup>6</sup> the FIP initiative’s potential for harm should be closely examined in the interests of justice.

Currently, the FIP-initiative places undue emphasis on the district where the FIP arrest occurs (e.g., only arrests generated in Police Districts 5, 6 and 7 are transferred to federal court), while giving little consideration to the nature and characteristics of the individual defendant facing prosecution. The following points and statistics offer insight into the shortcomings of this approach.

According to data published by the District of Columbia Office of Planning, D.C. State Data Center,<sup>7</sup> and the Government of the District of Columbia:

- MPD District 5, primarily comprised of Ward 5, is 65% Black;
- MPD District 6, primarily comprised of Ward 7, is 93% Black;
- MPD District 7, primarily comprised, of Ward 8 is roughly 90% Black;
- 15.9 to 34.2 percent of Wards 5, 7, and 8 live below the poverty line;

#### **Compare to:**

- MPD Districts 1, 2, and 3, primarily comprised of Wards 1, 2, 3, and 6, are collectively less than 31% Black;
- Wards 2 and 3 are less than 10% Black;
- District 4, primarily comprised of Ward 4 and a portion of Ward 5, is 51% to 65% Black;
- 8.1- 13.6 percent of Wards 1, 2, 3, 4, and 6, live below the poverty line.<sup>8</sup>

Thus, it is undebatable that the FIP program targets poor, predominantly Black neighborhoods.

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<sup>5</sup> *Id.*

<sup>6</sup> Marc Mauer & Ryan King, A 25-Year Quagmire: The War on Drugs and its Impact on American Society (Sept. 2007), available at: [sentencingproject.org/publications/a-25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society/](http://sentencingproject.org/publications/a-25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society/).

<sup>7</sup> D.C. demographic data is reported by Ward, whereas, MPD and USAO track arrests and prosecutions by police district. The geographical comparison of city ward to police district is not 1:1. For example, Ward 5 is geographically larger than police district 5. Further, in January 2019 MPD updated the MPD district map, slightly changing the boundaries of some districts from the year prior. Therefore, this section makes it best attempt to accurately represent ward demographic data by police district.

<sup>8</sup> See <https://dcdataviz.dc.gov/node/1371176> for more information on demographic statistic by ward.

In addition, the FIP-initiative does not impose a threshold criminal history requirement before the arrestee can face federal prosecution. Thus, the practical result of the FIP-initiative is as follows:

- Defendant A commits a FIP in the third district, and has a history of violent criminal offenses. However, because he is arrested in the third district, he will be charged in D.C. Superior Court;
- In stark contrast, Defendant B who is arrested for FIP in the seventh district, with a history of only non-violent drug offenses, will be subject to harsher federal penalties and a longer period of supervised release.

Considering the racial and economic differences between the third and seventh districts, the overall impact and optics of the FIP-initiative are, at best, troubling. While, historically, the number of violent crime reported in MPD Districts 5, 6, and 7 has exceeded the number of violent crime reported in other districts, MPD’s statistical crime reports do not support the selective targeting of districts 5, 6, and 7. To be sure, the total number of violent crime reported between June 2019, and June 2020, as compared to the prior fiscal year, *increased* in the First, Third, Fifth, and Seventh districts.<sup>9</sup>

District	Total Violent Crime (06/15/18- 06/14/19)	Total Violent Crime (06/15/19-06/14/20)
1	410	446
2	311	299
3	627	678
4	424	389
5	630	652
6	942	838
7	671	688

Further, while reports of total violent crime have decreased in the Second, Fourth, and Sixth districts over the previous year: (i) gun-involved robberies have increased in the Second District; (ii) reported homicides have increased in the Fourth District; and (iii) Assault with Dangerous Weapon (gun) offenses have increased in the Sixth District. In addition, it is important to note that the Third and Fourth Districts are known to have high incidences of gang violence, a point currently overlooked by the FIP-initiative. Given that gun-related and/or violent crime has increased, in some form, in all districts over the prior year, the FIP-initiative’s select emphasis on districts 5, 6, and 7 is illogical. Accordingly, we recommend the following:

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<sup>9</sup> MPD Crime Data District Map, available at: <http://crimemap.dc.gov/Report.aspx>.

- A data-driven approach: Criminologists have long concluded that “deterrence is primarily a function of the *certainty* of punishment, not its *severity*.”<sup>10</sup> In other words, increasing the penalty associated with FIP convictions by transferring certain FIP defendants to federal court is not an effective means of deterring gun related crime. The current application of the FIP-initiative, which assumes that increased penalties equate to deterrence, thus defies sound research principles.
- To the extent objective, data-based justifications exist for the FIP-initiative, we recommend that the office:
  - Remove the district-specific requirement of the FIP initiative; and
  - Restructure the FIP initiative to take criminal history into account. Here are some suggestions:
    - As a general matter, no defendant should be charged in federal court under the FIP-initiative unless the individual has been convicted of at least one prior crime of violence for which the defendant was released from confinement and/or subject to supervised release or probation within ten years of the instant offense. This approach is supported by extensive research which correlates recidivism to a criminal history of violent crime.<sup>11</sup>
    - Outside of these parameters, no individual should be charged in federal court under the FIP-initiative unless a particularized review of the defendant’s criminal history, including arrests and investigations, provide a compelling reason for the defendant’s transfer to federal court.
- Lastly, should the FIP-initiative criteria undergo revision, this working group recommends that Criminal Division leadership invite input from interested attorneys to ensure that the potential for disparate impact on communities of color is addressed at the outset, and not in hindsight.

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<sup>10</sup> Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, The Sentencing Project (Nov. 5, 2018), available at: <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/>.

<sup>11</sup> U.S Sentencing Commission, *Recidivism Among Federal Violent Offenders*, available at: <https://www.ussc.gov/research/research-reports/recidivism-among-federal-violent-offenders>.

## **E. Hire a Restorative Justice & Diversion Coordinator**

The hiring of a dedicated Restorative Justice and Diversion Coordinator would be a significant step toward reducing racial disparities in the administration of justice in the District of Columbia. Although only 46% of DC’s population is Black, 92% of the DC jail is black.<sup>12</sup> These disparities stem from (i) policies and practices that disproportionately target poor Black neighborhoods, such as the overly-aggressive police tactics employed by MPD’s Gun Recovery Unit, and (ii) a multitude of societal factors that drive the crime rate—many of which can be traced to systemic racism (e.g., redlining). Thus, the development of a research based restorative justice (“RJ”) and diversion program can ameliorate these racial imbalances, while also better addressing victims’ needs.

Research confirms that an effective restorative justice regimen yields substantial benefits to the community and to victims. Less than half of crime survivors will report to the police,<sup>13</sup> and only half of that population will participate in an investigation beyond the grand jury stage.<sup>14</sup> Accordingly, under a traditional prosecution model, we only reach 25% of survivors. In contrast, according to the first ever national survey of survivors,<sup>15</sup> 69% of violent crime survivors prefer alternatives to incarceration for holding offenders accountable. In addition, when given the choice between RJ and the traditional approach, 90% of violent crime survivors choose RJ.<sup>16</sup>

Accordingly, we recommend that USAO-DC hire a trained and experienced Restorative Justice & Diversion Coordinator who will:

- Develop a research-driven restorative justice program that can be relied upon as either an alternative, or addition, to traditional prosecution when appropriate in misdemeanor and felony cases, and in non-violent and violent crime scenarios. This program will include the review and expansion of any restorative justice offerings currently available in the misdemeanor section;
- Lead all internal training on the newly-implemented restorative justice policy;
- Oversee all of USAO-DC’s diversion programs;
- Serve as the USAO-DC liaison to the Court regarding all restorative justice and diversion programs;
- Coordinate with local stakeholders to establish restorative justice interventions;
- Maintain program data collection requirements;

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<sup>12</sup> Jails and Justice: A Framework for Change (Oct. 2019), available at: <http://www.courtexcellence.org/uploads/publications/FrameworkForChange.pdf>, at 16.

<sup>13</sup> Office of Justice Programs, *Fewer than Half of Victims Report Violent Crimes*, <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/blogs-2017/2017-blog-ncvs.htm>.

<sup>14</sup> Interview of Danielle Sered, Executive Director of Common Justice, available at: <https://soundcloud.com/siriusxm-news-issues/danielle-sered> (see timestamp 4:10-6:19 of the interview).

<sup>15</sup> Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice, available at: <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report-1.pdf>.

<sup>16</sup> Danielle Sered (Common Justice), *Prison isn’t a preferred punishment, even by violent-crime survivors* (Dec. 31, 2019), available at: [https://www.washingtonpost.com/opinions/prison-isnt-a-preferred-punishment-even-by-violent-crime-survivors/2019/12/31/9b4b5f44-28e3-11ea-9cc9-e19cfbc87e51\\_story.html](https://www.washingtonpost.com/opinions/prison-isnt-a-preferred-punishment-even-by-violent-crime-survivors/2019/12/31/9b4b5f44-28e3-11ea-9cc9-e19cfbc87e51_story.html).



- Attend on-going trainings on restorative justice and diversion issues to remain abreast of industry trends;
- Serve as the office expert on restorative justice best-practices.

## CONCLUSION

There are many ways in which the District of Columbia currently stands out as an example of progressive and justice-minded prosecution. From laws eliminating cash bail, to the high standards imposed by the D.C. Court of Appeals regarding disclosure of impeachment and *Brady* evidence, and a rigorous adversarial system that includes one of the most respected public defender agencies in the country, we are—in many ways—a model to be replicated. Looking inward and toward the future, however, we see myriad opportunities for our office to further push the envelope on equal justice. The last several weeks have highlighted the various ways in which our criminal justice system falls short of administering equal justice. We, as public servants and *Berger*<sup>17</sup> prosecutors, must acknowledge and address these shortcomings, while also learning from them with urgency. We look forward to continued conversations with USAO Leadership on these and other proposals relating to diversity and fair and balanced justice, toward the goal of collaborative, data-driven change.

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<sup>17</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

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