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Racial Disparities in Prosecutorial Outcomes

An analysis of felony cases accepted for prosecution by the Denver District Attorney's Office in the City and County of Denver

REPORT HIGHLIGHTS:

- The researcher found **racial and ethnic differences across three of the four points of prosecutorial discretion examined:** dismissals, deferred judgments, and referrals to drug court.
- There was **no evidence of racial and ethnic differences in plea offers**, the fourth point of prosecutorial discretion examined.
- Results of the study demonstrate a **persistent set of disadvantages faced by Black and Hispanic defendants.**
- The findings point to the importance of **increasing structures and processes to support racial justice**, including collecting and examining data across multiple points of prosecutorial discretion.

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As I was considering whether to run to be Denver's District Attorney, I had concerns regarding the disproportionate representation of people of color in the criminal justice system. When I was elected, an important goal for me was to determine how the Denver DA's Office could focus our efforts to ensure fair justice for all — including the community, victims, and those accused of criminal offenses. The Denver District Attorney's Office holds great power in determining how justice is both administered and perceived by the community. Prosecutors must view the criminal justice system through a wide lens that looks not only at individual cases but also at what kind of society we want to have. The People of Denver have entrusted me and my office with the constitutional duty of advancing a society that holds people accountable for their criminal actions and strives for justice and equity. It is an awesome responsibility.

Behind the thousands of cases we handle each year are dedicated public servants who believe in the rule of law, who care about our community, and who are tasked with doing what is right in a cumbersome and multi-faceted system. I have full confidence in the outstanding people who work in the Denver DA's Office. For the public to trust that we are ethical public servants, committed to equity and fairness, we must be transparent in our work and must be willing to let others assist us in examining how the office operates and identifying what we can do better.

We were fortunate that Dr. Stacey Bosick, then at the University of Colorado-Denver, and the Colorado Evaluation and Action Lab at the University of Denver were willing to engage with us in this important years-long study. I want to thank them and acknowledge their work. I also want to thank the prosecutors in the Denver DA's Office who were willing to take the time for frank conversations about our work. This study is being presented to district attorneys' offices throughout the state as a catalyst for serious discussion, and for the study of equity in the criminal justice system.

I am pleased, but not surprised, that the study found no racial or ethnic disparities in general plea bargaining by our office, let alone any prevalent issues of racism, bias, or implicit bias. The study highlights a couple of areas that we need to examine further, and we will capitalize on the opportunity to do so.

Among other things, the report highlights the need to examine more closely our practices in offering deferred judgments. The report also makes recommendations that we were already working on prior to the report's release. For example, the drug court has been completely restructured with a harm-reduction approach. I'm pleased to report the data from that program is reflective of Denver's racial demographics.

In conclusion, I welcome this examination of the Denver District Attorney's Office — an office that is committed to provide transparent, trusted, and equal justice for all.

Sincerely,

Beth McCann
Denver District Attorney, 2nd Judicial District



Abstract

Prosecutors' ability to exercise a wide degree of discretion has the potential to contribute to equitable—or inequitable—outcomes for defendants in the United States criminal justice system.

This study sought to explore the presence and extent of racial and ethnic differences in case outcomes within the Denver District Attorney's Office. Drawing on administrative data case files for adult felony cases accepted for prosecution between July 1, 2017 and June 30, 2018 and interviews with Denver prosecutors, we examined four key points of prosecutorial discretion: dismissals, deferred judgments, plea agreements, and referrals to drug court.

Administrative data and case file review showed differences between White, Black, and Hispanic defendants. Specifically:

- Cases involving Black defendants were more likely than cases involving White defendants to be dismissed during prosecution. Cases involving Hispanic defendants were equally likely to be dismissed as cases involving White defendants.
- Among cases that were not dismissed, cases involving White defendants were more than twice as likely to be deferred than cases involving either Black or Hispanic defendants.
- Race and ethnicity were not associated with charge reductions in plea agreements.
- Drug felony cases involving White defendants were more likely to be handled in drug court rather than handled in district court or by some other unit, compared to drug felony cases involving Black and Hispanic defendants.

Interviews with Denver prosecutors provided additional insight. Overall, interviewees shared a common concern about the overrepresentation of people of color in the criminal justice system and pointed to the system itself as contributing to racial disparities. When considering the role of prosecution in ameliorating or exacerbating these disparities, interviewees:

- Felt that prosecutors are unable to correct for social inequalities that may serve as the underlying causes of offending.
- Did not agree about prosecutors' role in ameliorating disparities caused by policing.
- Described using tangible and subjective factors in making plea offers, some of which they acknowledged are connected to race and ethnicity.

This Denver-based study represents an important first step in understanding racial and ethnic difference in case outcomes. This study represents an effort on the part of the Denver District Attorney's Office, under the leadership of District Attorney Beth McCann, to expand the use of data, improve transparency, and hold themselves accountable for the equitable treatment of defendants. The recommendations to further evaluate case refusals and dismissals, review eligibility requirements to support equitable outcomes, increase processes to support cultural awareness and racial justice, and improve ongoing data collection and review may have application to other judicial districts within Colorado and nationally as well.



Table of Contents

Abstract.....ii

Introduction1

Description of the Study.....1

Key Findings.....2

Implications.....4

 Evaluate the Rationale and Timing of Case Refusals and Dismissals 5

 Review Eligibility Requirements to Support Equitable Outcomes 6

 Increase Processes to Support Cultural Awareness and Racial Justice 7

 Improve Ongoing Data Collection and Review 7

Methods.....10

 Case Data 10

 Interviews with Prosecutors 11

Limitations.....13

Detailed Results.....16

 Quantitative Results..... 16

 Felony Cases for which the Top Charge was Not a Drug Felony 16

 Case Outcomes 17

 Cases in which a Drug Felony was Entered as the First Charge 23

 Qualitative Results 27

 The Criminal Justice System Contributes to Racial Disparities..... 27

 Prosecutors Felt Unable to Correct for the Social Inequalities that May Underlie Offending 29

 Prosecutors had Mixed Feelings about their Role in Ameliorating Disparities Caused by Policing..... 30

 Prosecutors Described Using Tangible and Subjective Factors in Making Plea Offers, Some of Which They Acknowledged are Connected to Race and Ethnicity..... 32

 Divergent Views of Interviewees of Color 34

Conclusion35

Appendix A. Colorado Criminal Code: Classes for Felonies and Drug Felonies36

Appendix B. Interview Protocol37

Endnotes39



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Data Sources

This research draws on administrative records and original case documentation for felony cases accepted for prosecution by the Denver District Attorney's Office between July 1, 2017 and June 30, 2018 and qualitative interviews with 20 Denver District Attorney's Office prosecutors conducted between August and November of 2020.

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Note on Gender-Inclusive Language

The Colorado Evaluation and Action Lab affirms our commitment to the use of gender-inclusive language. Throughout this report, we follow the guidance of the Associated Press Stylebook and the Chicago Manual of Style and use the gender-neutral, singular "they" when appropriate.



Introduction

The overrepresentation of Black and Hispanic individuals in the United States criminal justice system is a well-established fact, one that cannot be fully explained by differences in criminal behavior. Criminological research has identified numerous examples of systemic bias in the criminal justice system, including higher rates of police presence in Black and Hispanic communities and harsher sentencing guidelines.

The prosecutors' office is an often overlooked, yet important potential source of racial disparities.¹ There is both a need for prosecutorial discretion and a responsibility to advocate for greater consistency across prosecutors and audits to hold offices accountable for racial disparities.² Yet the prosecutor's office is rarely studied in criminology and criminal justice, largely because District Attorneys tend to be unable or unwilling to make their data available.³ Indeed, a 2018 National Survey of Prosecutors conducted by the Urban Institute noted widespread gaps in data availability and analysis.⁴ This has led to a significant shortfall in knowledge about case processing decisions and has slowed efforts to ensure equitable justice.^{5, 6, 7}

This researcher-practitioner collaboration takes a step toward rectifying this shortfall. This study represents an effort on the part of the Denver District Attorney's (DA's) Office, under the leadership of DA Beth McCann, to expand the use of data, improve transparency, and hold themselves accountable for the equitable treatment of defendants.

Description of the Study

The purpose of this study was to better understand the role prosecutorial discretion plays in shaping racial and ethnic disparities in the criminal justice system. This study explored a range of prosecutorial outcomes, with the aim of identifying opportunities for improvement. In addition, the study sought to identify data collection opportunities that would facilitate regular review of prosecutorial outcomes for the purpose of continuous improvement. The central questions guiding the study were:

Are there racial and ethnic disparities in the prosecutorial outcomes of felony criminal cases filed with the Denver DA's Office?

If so, how do these differences vary across key points of discretion: dismissals, deferred judgments, plea agreements, and referrals to drug court?

We used administrative records and original case documentation from the Denver DA's Office for adult felony cases accepted for prosecution between July 1, 2017 and June 30, 2018 (n=6,839), which allowed two years for the cases to reach a final disposition. Due to challenges that arose as a result of the COVID-19 pandemic, we were only able to obtain detailed information for a subsample of cases for which the top charge was not a drug felony (n=2,932, hereafter referred to as "cases"). We explored differences in rates of case dismissals, deferred judgments, and plea agreements among cases involving White, Black, and Hispanic defendants. We used logistic regression analysis, a statistical technique to estimate the probability of an event occurring; this method allowed us to compare cases of similar severity while accounting for the defendant's age and gender.



In addition, exploratory analyses were conducted on cases for which the top charge was a drug felony (n=2,885, hereafter referred to as “drug felony cases”). For these cases we used logistic regression to explore differences among cases involving White, Black, and Hispanic defendants in rates of referrals to drug court.

Quantitative data was supplemented with qualitative interviews to contextualize the results and better understand factors that may be contributing to differences across race and ethnicity. In total, we conducted interviews with 20 Denver DA prosecutors (hereafter referred to as “interviewees”).

In this report, the term “cases” refers to adult felony cases accepted for prosecution by the DA’s office between July 1, 2017 and June 30, 2018 for which the top charge was not a drug felony.

Key Findings

Cases involving Black defendants were more likely to be dismissed.

Cases involving Black defendants were significantly more likely than cases involving White defendants to be dismissed during prosecution.

Black defendants experienced a 31% higher probability of having their cases dismissed than White defendants.

Case dismissal is a frequent prosecutorial outcome, second only to the overwhelming majority of plea agreements. 12.2% of the 2,872 cases accepted for prosecution were ultimately dismissed. These do not include cases that were dismissed as part of a global plea deal (when a defendant had multiple cases).

Cases involving Black defendants were more likely to be dismissed than cases involving White defendants. After controlling for the defendant's age, gender, and case severity, Black defendants experienced a 31% higher probability of having their cases dismissed than White defendants. After controlling for the defendant's age, gender, and case severity, cases involving Hispanic defendants were equally likely to be dismissed as cases involving White defendants.

Although the higher rate of dismissals of cases involving Black defendants might appear to suggest an advantage, it is important to note that these cases were initially accepted for prosecution. Data were not available to examine if there were racial disparities in acceptance of cases for prosecution.



Judgments in cases involving White defendants were more likely to be deferred.

Among cases that were not dismissed, cases involving White defendants were more than twice as likely to be deferred than cases involving either Black or Hispanic defendants.

A deferred judgment is a generous form of plea agreement that affords a defendant the opportunity to either have their case dismissed entirely or have the most egregious charges dismissed if the defendant can complete a period of supervision or avoid additional offenses for a given period of time. The decision to offer a deferred judgment may be influenced by factors including the defendant's prior criminal history and the defendant's and prosecutors, defense attorneys, and judge's evaluation of the likelihood that the defendant will be successful in avoiding subsequent criminal activity.

Judgment in 3.9% of cases were deferred. The majority (60%) of these deferrals required no supplementary plea, while 40% were accompanied by a guilty plea to a misdemeanor charge (which does not receive the benefit of a deferred judgment). White defendants experienced over twice the probability of having their cases deferred than Black or Hispanic defendants.

Logistic regression models that controlled for the defendant's age, gender, and case severity indicated that Black and Hispanic defendants experienced 30% and 46% lower odds, respectively, than White defendants of receiving deferred judgments. Cases involving Black and Hispanic defendants were more likely than cases involving White defendants to end up in a plea agreement or go to trial.

Race and ethnicity were not associated with charge reductions in plea agreements.

Among cases that ended in a plea, there were no statistically significant differences by race and ethnicity in whether the defendant pled to the top charge in the case, the extent to which the case was pled down, or whether the case was pled to a misdemeanor.

Logistic regression models showed no statistically significant differences by race and ethnicity in the benefit of a plea agreement to the defendant. After controlling for the defendant's age, gender, and case severity, Black, Hispanic, and White defendants were just as likely to experience a reduction of the top charge, as well as to plea down from a felony to misdemeanor.

Among those who experienced a reduction of the top charge, Hispanic defendants experienced reductions of lesser magnitude; however, this difference was not statistically significant. Hispanics were disproportionately represented among cases reduced by a single level (e.g., F3 to F4) and underrepresented among cases reduced by three or more levels (e.g., F3 to F6).



Drug felony cases involving White defendants were more likely to be handled in drug court.

Drug felony cases involving White defendants were significantly more likely to be handled in drug court rather than handled in district court or another unit compared to drug felony cases involving Black and Hispanic defendants.

Cases where a drug felony charge was the initial top charge numbered 2,885 of the 6,839 adult felony cases (42.2%) filed for prosecution in Denver. Nearly half of all classes of drug felony cases had White defendants. The majority were Drug Felony Class 4 (DF4), the lowest level of drug felony, although Black defendants were overrepresented among DF3s.

Admission into drug court is generally limited to those without extensive criminal histories and to defendants who are viewed as likely to benefit from treatment and to defendants willing to accept the terms of the drug court plea and sentence. Controlling for class of felony, age, and gender, White defendants had twice the probability of Black and Hispanic defendants of having their cases moved to drug court rather than be tried in district court or by another unit within the DA's office.

Implications

Prosecutorial discretion is a complex topic. The project as a whole illustrates the importance of collecting and examining data across multiple points of prosecutorial discretion. Routine tracking of this type of quantitative data is the foundation for engaging in thoughtful dialogue about what the data are telling the DA's Office about how to systematically address equity issues.

When examined together, results of this study demonstrate a persistent set of disadvantages faced by Black and Hispanic defendants in the criminal justice system. Below are four recommendations for the Denver DA's Office to consider when working within their own office—and with other judicial system actors:

1. Evaluate the Rationale and Timing of Case Refusals and Dismissals
2. Review Eligibility Requirements to Support Equitable Outcomes
3. Increase Processes to Support Cultural Awareness and Racial Justice
4. Improve Ongoing Data Collection and Review

These recommendations were developed based on our reflections on the quantitative results as well as a snapshot of key insights provided by interviewees (for full interview results, see the [Detailed Results](#) section).

On April 8, 2021, the Denver District Attorney's Office is hosting a forum in partnership with the Colorado Lab and Colorado District Attorney's Council bringing DA's from across the state virtually together to discuss "Is Your Data Trying to Tell You Something?"



Evaluate the Rationale and Timing of Case Refusals and Dismissals

Although the higher rate of outright dismissals of cases involving Hispanic and Black defendants might appear to suggest an advantage benefiting non-White offenders, it is important to note that these cases were initially accepted for prosecution. The DA's Office reports that approximately 30% of cases are declined for prosecution each year; however, since initial case acceptance data was not available for this study, it is unclear whether the percentage of cases accepted for prosecution differs across race and ethnicity.

In deciding whether to accept a case for prosecution, interviewees described needing to move through cases very quicklyⁱ which did not allow much time to fully examine evidence (e.g., to watch body-worn camera footage or evaluate the quality of witness testimony). Further along in the life of the case, prosecutors might discover that there is insufficient evidence. For example, one interviewee explained that the police summary may say that the defendant was initially pulled over for a cracked windshield, but "if I don't see it in the camera, the jury is not going to see it in the camera, and I've got to drop the case."

In light of these findings, an important first step is to explore the opportunity for additional time during the initial review and analysis of cases at the point of filing. Rejecting cases destined for dismissal at this initial stage could prevent collateral damage to defendants, including stigma, family disruption, and lost employment. The need for additional time should be weighed against current statute¹ and the potential for collateral consequences of keeping individuals in custody for long periods of time.

It is also important to further explore and document the rationale for case dismissals and the timing at which they occur during the life of a case. One interviewee described pressure from a drug detective to continue pursuing a case after it was discovered to be founded on an improper search. The detective advocated that the prosecution process itself would "bother [the defendant], and they would at least have a criminal case for some period of time." Although this prosecutor dismissed the case, pointing to ethics, further understanding the rationale for and timing of dismissals—in cases like this one—could provide useful insight for the DA's Office.

To support ongoing improvement and enhance transparency, the DA's Office should regularly collect and review data on case refusals and dismissals using a racial justice lens to further evaluate the types and quality of cases that are filed for prosecution. It is also important to understand—and distinguish—the reasons for refusing cases and the reasons for dismissing cases.

ⁱ The District Attorney must adhere to Colorado Rule of Criminal Procedure 5(a)(1) when filing felony cases. Rule 5(a)(1) requires "a felony complaint, information, or indictment shall be filed...without unnecessary delay in the proper court and a copy thereof given to the defendant." In Denver, for defendants that remain in custody after arrest, the courts have interpreted this rule as requiring the filing of felony charges within 72 hours of arrest.



Review Eligibility Requirements to Support Equitable Outcomes

Certain prosecutorial outcomes, including referrals to drug courts and deferred judgments, require defendants to meet eligibility criteria, both for acceptance and to maintain engagement. This recommendation focuses on the need to review these requirements with an equity lens, considering how requirements might unintentionally negatively impact certain types of defendants, in particular, those who are Black or Hispanic or who are experiencing poverty or mental health problems.

During the study time period (2017-2018), defendants had to meet a set of eligibility criteria to participate in drug court, which were collaboratively developed by a range of stakeholders in the criminal justice system (e.g., prosecutors, judges, courts, probation, public defenders).ⁱⁱ For example, defendants must not have had a significant criminal history (e.g., a sex offense). Thus, certain individuals were automatically excluded without the discretionary decision making of the prosecutors. Likewise, factors such as a significant criminal history can weigh heavily in the discretionary decision making of the prosecutors as to whether or not to offer a deferred judgment. As previously noted, interviewees described Black and Hispanic defendants as disproportionately more likely to have criminal histories for a variety of reasons, including improper stops and over policing. *Therefore, even if criteria are applied equally, certain types of defendants may be more likely to benefit—or be negatively impacted.* In developing alternatives such as specialty courts, the stakeholders in the Denver criminal justice system could consider if and how criteria can be structured to promote equitable outcomes for defendants, for example, whether there are more nuanced ways of considering criminal history that more clearly and equitably identify risk.

Interviewees also identified the challenge that some defendants faced in meeting the requirements for sentencing alternatives. Interviewees described needing to evaluate the likelihood that defendants would be successful in drug treatment programs and/or avoiding future offending, and they often did so by considering their current life circumstances such as housing and employment. For example, a prosecutor recalled a case in which the defense attorney actively discouraged the prosecutor from offering the defendant a deferred judgment. The defendant was experiencing homelessness and mental health setbacks. The defense attorney had argued that such an offer would be “setting my guy up to fail.” To support defendants who are experiencing poverty or mental health problems, the DA’s Office could continue to explore whether there are social services or supports that could accompany a disposition and help set defendants up for success.

To support ongoing improvement and enhance transparency, the DA’s Office could regularly collect and review data on deferred judgments. The DA’s Office can explore opportunities for White, Black, and Hispanic defendants with similar risk levels to benefit equally from these alternatives. With the introduction of new specialty courts to address addiction-motivated criminal behavior, it will be important to evaluate whether some defendants are more likely than others to have their offending attributed to addiction and be offered treatment options. This will require better tracking of whether defendants meet eligibility requirements and why. Ideally, this can be captured in the case management system.

ⁱⁱ The drug court that existed at the time of this study is no longer functioning. There were changes to Colorado drug laws in 2019, which lowered many drug charges from a felony to a misdemeanor, and the development of two new specialty courts in 2020—developed by the DA’s office, in cooperation with other court stakeholders to address addiction-motivated criminal behavior.



Increase Processes to Support Cultural Awareness and Racial Justice

This recommendation focuses on creating opportunities for the DA’s Office to increase its focus on racial justice. First, the DA’s Office can support prosecutors with additional trainings and office discussions on issues such as implicit bias and cultural differences. Interview results suggest that it would be beneficial for continued trainings to further explore the fact that defendants have unequal access to resources such as college, formal medical diagnoses, and steady employment and have diverse expressions of concepts such as family structure, contributions to society, and remorse. These trainings could support prosecutors in considering how their interpretations of risk and worthy mitigation may be influenced by their own biases and by the White, middle- and upper-class norms and values that have been prioritized in the criminal justice system. To support creative problem solving, the DA’s Office can identify trainings that promote a culture in which difficult but necessary conversations about inequality and privilege can take place.

Staff development could be supported by further diversifying the DA’s Office, especially with regard to race and ethnicity, and providing additional opportunities for collaborative decision making where diverse perspectives are valued. In interviews, prosecutors of color stressed the importance of office diversity in developing a broader appreciation for and perspective on the lives and issues of people of color.

In addition to working within their own sphere, the DA’s Office can look for opportunities to support racial justice with partner agencies. While prosecutors reported an overall positive relationship with the police, they also described questionable, and sometimes inappropriate, police behavior or weak evidence that undermined the prosecution of a case. Interviewees described feeling frustrated when the evidence for a police stop, especially stops for mechanical violations, were not recorded in the officer’s body-worn camera footage. Interviewees reported varying levels of ability to and comfort in talking with police about how police behavior impacts the strength of the case. The DA’s Office has the opportunity to develop clear guidelines to lift up areas of potential concern and support an improved quality of police work.

The Denver DA’s office has established an internal committee to review instances of questionable police conduct that arise during review of existing cases. When justified, the DA’s office and the Denver Police Department have agreed that concerns will be shared and used for officer training and cases will be dismissed.

Improve Ongoing Data Collection and Review

This research involved extensive review of case documentation in order to abstract key information for analysis. To engage in ongoing reflection and learning, this recommendation focuses on creating structures that support ongoing data collection. More efficient structures for the data collection would support the DA’s Office in routinely examining and sharing data—and support greater accountability.

First, steps should be taken to ensure that the case administration data are entered completely and consistently across users. Although not atypical for administrative data, substantial review and cleaning of



data was required prior to analysis. In addition, results point to the importance of systematically capturing additional data elements, in particular:

- the defendant's ethnicity (in addition to race);ⁱⁱⁱ
- the defendant's race and ethnicity for cases that are refused for prosecution;
- the rationale and timing of a dismissal;
- the defendant's eligibility for alternative sentencing;
- whether the final plea was part of a global offer; and
- an evaluation of the quality of the plea deal.

Discussions with the DA's Office suggest that it is difficult to ascertain the quality of a plea deal from the quantitative changes in charge level. For example, knowing that a case was pled down two steps, from an F2 to an F4, fails to capture the complexities of a deal. Pleas from a felony to a misdemeanor and whether the plea resulted in incarceration are particularly consequential to the lives of defendants. Moving forward, it will be important for the DA's Office to foster agreement among its prosecutors and the communities they serve about what constitutes a favorable plea deal. The case management system can then be tailored to more effectively and systematically capture the aspects of a plea deal that are most relevant.

ⁱⁱⁱ In 2019, the Denver DA's Office began consistently tracking ethnicity in its case management system.



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Methods





Methods

The study used a mixed-methods approach that supplemented the statistical analysis of quantitative case data with qualitative interviews with prosecutors in the Denver DA's Office.

Case Data

The primary data used in this study were derived from administrative records and original case documentation for all 6,839 adult felony cases accepted for prosecution during a one-year period (July 1, 2017 to June 30, 2018). The study excluded juvenile defendants. This timeframe was selected so that the review could occur at least two years after the initial acceptance of all of the cases, allowing ample time for prosecution to conclude.

A team of research assistants systematically reviewed each case at the Denver DA's Office. The first step of review consisted of identifying defendant's ethnicity. This was necessary because when the case records were transferred into the case management system from the Denver Police Department, they included only the defendant's race (as identified by the police department). Hispanic defendants were generally identified as White and, less frequently, as Black or African American. In absence of self-identified race and ethnicity information, the research assistants identified ethnicity based on the defendant's name and identification photos.

In spring 2020, the research assistants began a second stage of review which consisted of reviewing a subsample of cases and coding evidentiary material, witness demographics, and other case characteristics, but the work was terminated in March 2020 due to the COVID-19 pandemic.

In fall 2020, a subset of cases was distributed to members of the DA Research Working Group, approximately 15 individuals, most of whom were prosecutors, who could access the cases while working remotely. This subset consisted of cases for which the most severe or top charge was not a drug felony (n=3,810 of the 6,839 total cases during the study period). These cases were prioritized for two primary reasons. First, the charges for drug felonies operate on a different scale (DF1-DF4) than other felonies (F1-F6) rendering it difficult to calculate and compare plea reductions across the full population of felony cases (see [Appendix A](#)). Second, disposition outcomes in drug felony cases are heavily influenced by drug court eligibility requirements that are not recorded in the case management system and would have required more extensive review of the original case documentation.

The Working Group focused on reviewing cases for accuracy and identifying cases involved in global dispositions and deferred judgments. The Working Group provided brief narratives on each case, which aimed to provide the researcher with a deeper understanding of the use of discretion and the relevance and impact of various case outcomes. Primarily due to time constraints, the Working Group was only able to review 2,932 of the 3,810 cases for which the top charge was not a drug felony (representing 77% of all cases for which the top charge was not a drug felony).

These data were de-identified and transferred to the researcher in November 2020. Data were analyzed using logistic regression. Three models were estimated for each prosecutorial outcome, where successive



models included additional covariates. To ease interpretation of race and ethnic differences, marginal probabilities were also calculated.

In addition, at the request of the DA's Office, a set of exploratory analyses were conducted on the 2,885 felony drug cases. These cases, drawn from the full sample of adult felony cases (n=6,839), were those in which a drug felony was entered as the first charge ("Count 1") in the case management system. While the first charge is often the most severe charge, this method does not account for charges added during the life of the case. These cases were not included in the Working Group's review to identify final outcome or whether the case was part of a global disposition. Therefore, the logistic regression models were limited to a single outcome: whether the case was referred to drug court.

Interviews with Prosecutors

Interviews with prosecutors were conducted in order to understand their perspectives on a range of topics including the role of mitigation in shaping prosecutorial discretion, the culture of the Denver DA's Office, and the prosecutor's views on the overrepresentation of racial and ethnic minorities in the criminal justice system. The researcher developed the interview questions, and then workshopped these questions with the DA Research Working Group. The Working Group offered suggestions on question wording, guidance on the use of legal terminology, and ideas about questions that should be included or eliminated.

In August 2020, the DA's Office generated a list of the 90 prosecutors employed at that time. A sample of 20 prosecutors was randomly selected and invited by email to participate in a qualitative interview. Five prosecutors declined or did not respond after two invitations. After 20 interviews, the researcher deemed that saturation of content was reached (interviews did not yield new themes); therefore, in accordance with best practices,⁸ no additional interviews were conducted.

The interviews were semi-structured meaning that the researcher asked participants predetermined questions (see [Appendix B](#)), but also used follow-up questions or moved between questions based on the participants' responses. The interviews took place by Zoom or telephone, depending on the prosecutor's preference, and averaged 70 minutes in duration. The interviews were audio-recorded and transcribed in real-time using Otter.ai, then reviewed for transcription accuracy.

Interview transcripts were uploaded into Atlas.ti, a qualitative analysis software. To analyze the data, the researcher took an inductive approach, beginning with a broad interest in how prosecutors performed their work and how they perceived the relationship between race and ethnicity and the criminal justice system. The researcher worked iteratively to develop and refine codes, identify key themes, and look for disconfirming evidence of themes.⁹ The researcher met with the DA Research Working Group to share the draft themes, verify the researcher's understanding of prosecutorial terminology, and clear up factual information about case processing.

Fifteen (75%) of the interviewees were White and 12 (60%) were male. The experience of the prosecutors ranged from under a year to over 20 years in the Denver DA's Office with a median of about six years, although several had prior experience before coming to the Denver office. As shown in Table 1, the demographics of the interview sample aligned with the overall population of Denver prosecutors in the



DA’s Office. While the number of prosecutors of color interviewed was small, they were generally representative of the diversity in the office, which was limited. Of the five prosecutors who declined to be interviewed, four were White and two were female (not displayed).

Table 1: Demographics of Prosecutors Employed by the Denver District Attorney’s Office

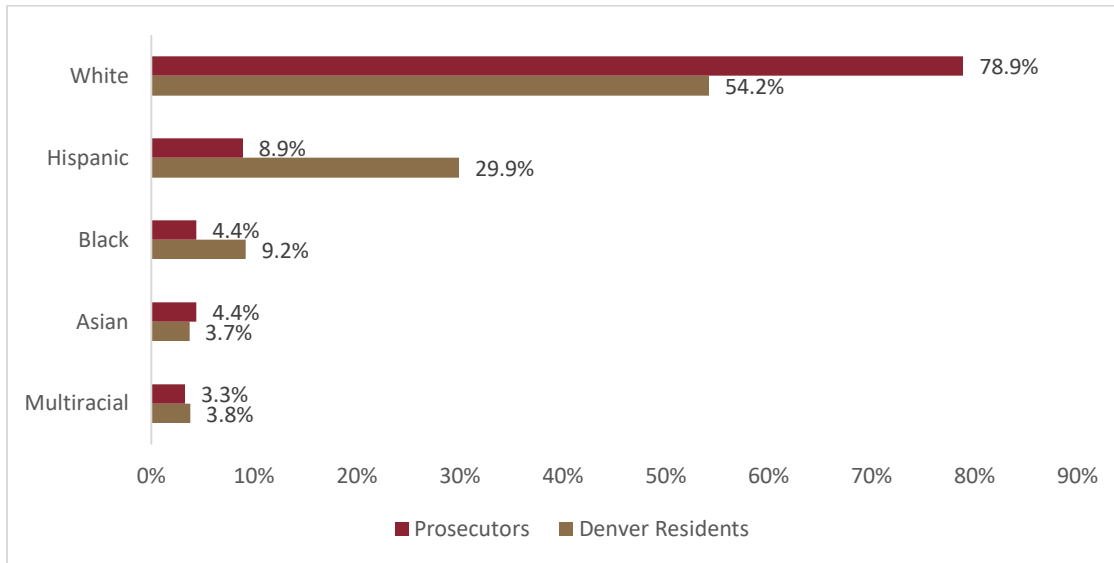
	Entire Office in Aug 2017 (n=82)	Entire Office in Aug 2020 (n=90)	Sample Interviewed (n=20)
Race/Ethnicity			
White	79.3%	78.9%	75.0%
Non-White	20.7%	21.1%	25.0%
Hispanic	7.3%	8.9%	-*
Asian	6.0%	4.4%	-*
Black	4.8%	4.4%	-*
Multiracial	2.4%	3.3%	-*
Gender			
Male	45.1%	48.9%	60.0%
Female	54.8%	51.1%	40.0%
Years of Service			
Mean	8.6	7.8	7.2
Median	6	6	6

Note. *Not reported in order to avoid identification

When looking at the race and ethnicity of Denver prosecutors in relation to the race and ethnicity of Denver residents¹⁰ (Figure 1), prosecutors have a greater proportion of individuals who identify as White and a lower proportion of individuals who identify as Black or Hispanic.



Figure 1: Race and Ethnicity of Prosecutors (2020, n=90) and City of Denver Residents (2019, n=727,211)



Note. Due to small sample sizes, individuals that identify as Native American or another race are not depicted.

Limitations

This study represents a first step toward understanding the relationship between race and ethnicity and prosecutorial outcomes in Denver. The study was scoped based on what quantitative analysis could be conducted using the data the DA’s Office currently collects in its case management system. However, the outcomes of criminal cases are impacted by the specifics of a case including the strength of evidence and victim characteristics, neither of which are consistently collected in the system. While deeper review of original case files was planned, this work was cut short by the COVID-19 pandemic. The study is therefore limited in its ability to provide full context for the patterns described in this report.

The study’s measure of plea agreements was also limited. Simply counting the “steps down” (e.g., a F2 to a F4) is oversimplified and does not capture more life-impacting aspects of a deal including sentencing recommendations. Evaluating whether incarceration is disproportionately recommended is an important next step.

Likewise, this study represents a “snapshot” (point in time estimate) of prosecutorial outcomes from cases in 2017 to 2018; it does not show changes in outcomes over time. Since the election of DA Beth McCann in 2016, there have been numerous changes within the DA’s Office such as sentencing changes to drug and low-level offenses. Moreover, in recent years there has been increased public awareness around racial injustice—policing in particular. The interview questions, which acknowledged this trend, may have influenced some of the prosecutor’s views about the sources of racial disparities and their role in ameliorating injustice. Such a dynamic context casts light on the need for ongoing evaluation and auditing of prosecutorial outcomes.



This study focused primarily on adult felony cases for which the top charge was not a drug felony. Because drug felonies are charged on a different scale than other felonies ([Appendix A](#)), additional work is needed to determine how best to operationalize a favorable plea in cases involving drug and other charges.

Although this study included a cursory look at referrals to drug court, this work was largely exploratory and leaves much to be examined. There are many reasons why a case may be referred to drug court including: drug court eligibility requirements, defendants' prior criminal record, and defendants' life circumstances and willingness to pursue drug or alcohol treatment. Due to the time constraints on the project along with DA staff and researcher transitions, we were unable to identify additional variables that may have proven helpful in understanding the outcomes of drug felony cases including circumstances of the case, type of defense counsel, and whether the defendant had multiple cases pending. Moreover, there were sweeping changes to drug laws in Colorado in 2019, making possession of most drugs a misdemeanor (rather than a felony) and enabling the DA's Office to help develop two new specialty courts to handle cases motivated by drug addiction.¹¹ Results of our exploratory analysis point to the importance of monitoring referrals to these new courts to ensure equitable outcomes.

Finally, future research efforts might expand the scope to include juvenile cases and misdemeanor cases. Juvenile cases are particularly critical in capturing the early interactions with the criminal justice system that are consequential to later life outcomes.



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Detailed Results





Detailed Results

The results of this study are organized into two parts. First the quantitative results are presented. Then, the themes identified from the analysis of the qualitative data are described. The [implications](#) reflect a synthesis of the quantitative and qualitative aspects of this project.

Quantitative Results

Felony Cases for which the Top Charge was Not a Drug Felony

Defendant Characteristics

Table 2 outlines the demographics of adult defendants involved in the 2,932 felony cases for which the top charge was not a drug felony (hereafter referred to as “cases”). About one-third were White (39.0%) or Hispanic (32.3%), while 26.7% were Black. The defendants were disproportionately male (83.4%). The mean and median ages of the defendants were 34.1 and 32, respectively.

Table 2: Demographics of Case Defendants for Which the Top Charge was Not a Drug Felony (n=2,932)

	Number	Percent
Race/Ethnicity		
White	1,143	39.0%
Black	782	26.7%
Hispanic	947	32.3%
Native American	26	0.9%
Asian	23	0.8%
Multiracial	2	0.7%
Another Race or Unknown	9	3.1%
Gender		
Male	2,445	83.4%
Female	487	16.6%
Age		
	<i>Mean</i>	<i>Median</i>
	34.1	32

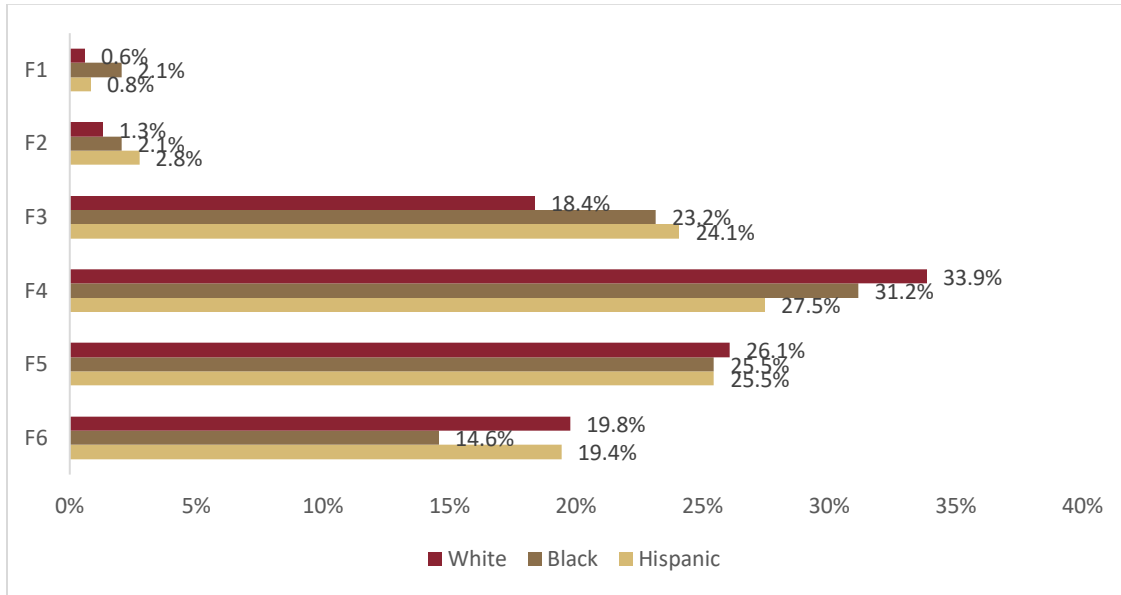
Charges

Top charge refers to the most severe among the charges in a given case, where a Felony 1 (F1) is the most severe level of felony and a F6 is the least severe level of felony charge (see [Appendix A](#)). The top charge may be an initial charge or may be added during the life of the case. Overall, F1 and F2 charges were rare in Denver County, representing only 3.4% of all cases in the sample during the study period. Aggregated across race/ethnicity groups, the proportion of F3 (21.5%), F4 (31.3%), F5 (25.7%), and F6 (18.2%) charges were more evenly distributed.



Figure 2 shows the top charge by race and ethnicity. The percentages of Black and Hispanic defendants facing a felony charge more severe than a F4 (i.e., F1, F2, or F3) were each about seven percentage points higher (29.0% and 28.2%, respectively) than the 21.6% of White defendants facing a felony charge more severe than a F4.

Figure 2: Top Charge Across Cases, by Race and Ethnicity (n=2,872)



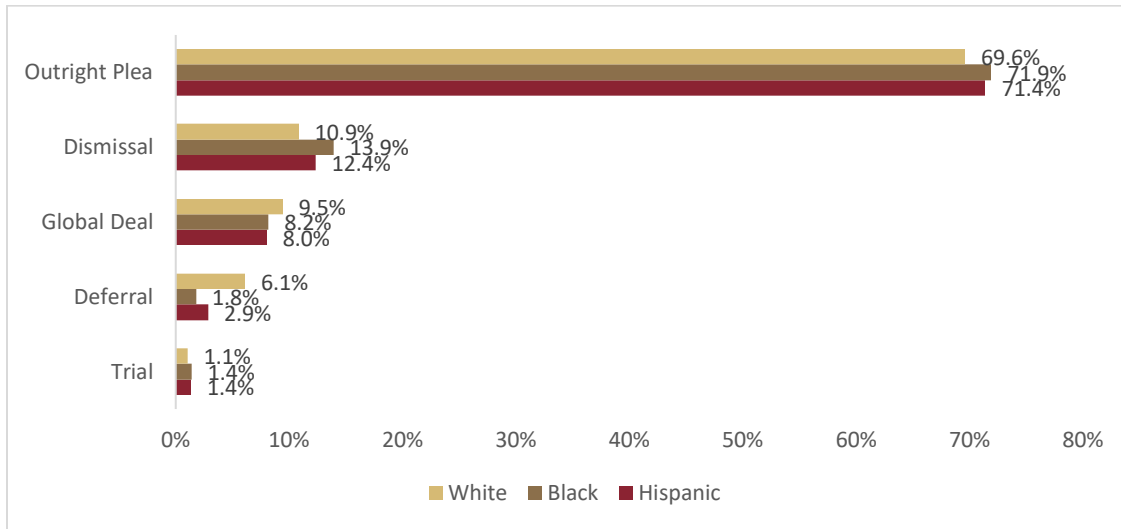
Case Outcomes

At the time of review, most cases (97.6%) had been resolved. Seventy-one percent of cases had been resolved through an outright plea agreement (plea agreements that were not part of global offers or deferred judgments). The next most common outcome was dismissal: 12.2% of cases had been dismissed entirely. These dismissals did not include cases that were dismissed as part of a global offer (such cases are represented as “global deals”). Other outcomes included having been resolved as a part of a global deal (8.5%), having been deferred (3.9%), or having gone to trial (1.3%). Case reviewers were unable to determine the final disposition in 0.9% of cases.

Defendants did not experience these outcomes equally by race and ethnicity. As shown in Figure 3, White defendants more frequently received global deals and deferrals when compared to Black and Hispanic defendants. Cases involving Black and Hispanic defendants were slightly more likely than cases involving White defendants to end in an outright plea, be dismissed entirely, or go to trial.



Figure 3: Final Disposition Across Cases, by Race and Ethnicity (n=2,872)



The next step of the analysis examined whether racial and ethnic differences in case outcomes were present after controlling for key factors that might influence the outcome, including the defendant's age and gender as well as the top felony level charged in the case (top charge). For each outcome, we developed three logistic regression models:

- The base model (Model 1) only included race and ethnicity (no controls).
- Model 2 included variables for age and gender.
- Model 3 included age, gender, and top charge.

Cases involving Black defendants were more likely to be dismissed.

Cases involving Black defendants were significantly more likely than cases involving White defendants to be dismissed during prosecution.

Black defendants experienced a 31% higher probability of having their cases dismissed than White defendants.

Regression results for case dismissal are presented in Table 3. These models compared the outcome of having a case dismissed to entering an outright plea, receiving any deferred judgment, or having a case go to trial (cases involved in global dispositions were excluded from this analysis).

Model 1 (the base model) shows that Black defendants experienced 1.35 times higher odds of having their cases dismissed, when compared to White defendants. In Model 2, which controlled for age and gender, the odds ratio associated with being a Black defendant remained significant. Likewise, the relationship between age and dismissal was statistically significant, suggesting that older defendants were more likely to have their cases dismissed.



Model 3 adds additional controls for the top charge in the case. After controlling for age, gender, and top charge, Black defendants experienced 1.37 times higher odds of having their cases dismissed than White defendants. After controlling for the defendant's age, gender, and case severity, cases involving Hispanic defendants were equally likely to be dismissed as cases involving White defendants. Somewhat counterintuitively, the severity of the top charge was not significantly associated with whether the case was dismissed.

Table 3: Logistic Regression Results for Dismissal of Cases (Odds Ratios)

	Model 1 (n=2,531)	Model 2 (n=2,531)	Model 3 (n=2,531)
Race/Ethnicity			
White (ref)	-	-	-
Black	1.35*	1.34	1.37*
Hispanic	1.22	1.22	1.25
Age			
		1.02**	1.01**
Gender			
Male	-	1.33	1.34
Female (ref)	-	-	-
Top Charge			
F1	-	-	0.24
F2	-	-	0.81
F3	-	-	0.81
F4	-	-	1.18
F5	-	-	0.90
F6 (ref)	-	-	-

*p <0.05, **p <0.01, ***p <0.001

As described in the qualitative results, the prosecutors who were interviewed viewed the ability to dismiss a case as a particularly important use of prosecutorial discretion. As one interviewee noted, “I do love the concept of ‘in the interest of justice’ because not everything fits into a box...Prosecutorial discretion and being able to dismiss something in the interest of justice, without any other explanation beyond that—I think it’s helpful.”

Judgments on cases involving White defendants were more likely to be deferred.

Among cases that were not dismissed, cases involving White defendants were more than twice as likely to be deferred than cases involving either Black or Hispanic defendants.



Regression results for deferred judgment models are presented in Table 4. These models compared the outcome of receiving any deferred judgment to entering an outright plea or having a case go to trial. Results suggest that cases involving White defendants were significantly more likely to experience deferred judgment than cases involving Black or Hispanic defendants.

Model 1 (the base model) shows that Black and Hispanic defendants had significantly lower odds of receiving a deferred judgment. This relationship remained significant after the addition of the defendant's age and gender in Model 2 as well as the addition of controls for case severity in Model 3. After controlling for age, gender, and top charge, cases involving Black and Hispanic defendants had 0.30 times lower odds and 0.46 times lower odds, respectively, of receiving a deferred judgment than cases involving White defendants.

Table 4: Logistic Regression Results for Deferred Judgment of Cases (Odds Ratios)

	Model 1 (n=2,181)	Model 2 (n=2,181)	Model 3 (n=2,104)
Race/Ethnicity			
White (ref)	-	-	-
Black	0.28***	0.28***	0.30***
Hispanic	0.44***	0.44***	0.46***
Age			
		0.99	0.99
Gender			
Male	-	0.57**	0.60*
Female (ref)	-	-	-
Top Charge			
F1	-	-	(omitted)
F2	-	-	(omitted)
F3	-	-	0.40**
F4	-	-	0.96
F5	-	-	1.04
F6 (ref)	-	-	-

*p < 0.05, **p < 0.01, ***p < 0.001.

Note. F1 and F2 cases were dropped when modeling M3 due to lack of variation; no F1 or F2 cases were deferred.

As described in the qualitative results, White defendants may be more likely to receive a deferred judgment in part due to their ability to bring social support to court. Some interviewees noted feeling reluctant to offer deferrals to those whose lives appeared “disorderly.” One interviewee felt that “part of why there’s more criminality in [the Black] community, is that they don’t have support and families. They don’t have the family structure. And when I see a mom come into court, it affects how I plead.” While the interviewee’s observation was that White defendants were more likely to bring social support to court, they went on to explain, “When I have a 20-year-old African American man, with a mom who’s 40 coming to court, I’m more likely to take a chance.”



Race and ethnicity were not associated with charge reductions in plea agreements.

Among cases that ended in an outright plea, there were no statistically significant differences by race and ethnicity in whether the defendant pled to the top charge in the case, the extent to which the case was pled down, or whether the case was pled to a misdemeanor.

Regression results for plea agreements are presented in Table 5. Plea agreements differ in quality. One measure of quality, while imperfect, involves charge reduction. These models examined whether the defendant pled to the top charge in the case.

Among cases that ended in an outright plea, there were no statistically significant differences by race and ethnicity in whether the defendant pled to the top charge in the case. Gender was the only defendant characteristic that was significantly associated with whether the plea involved a reduction from the top charge in the case. Controlling for race and ethnicity, age, and case severity, being male is associated with 0.66 times lower odds of benefiting from a reduction from the top charge (Model 3). All else equal, female defendants had a 7% higher probability, when compared to males, of experiencing any reduction.

Table 5: Logistic Regression Results for Any Plea Reduction of Cases (Odds Ratios)

	Model 1 (n=2,186)	Model 2 (n=2,186)	Model 3 (n=2,164)
Race/Ethnicity			
White (ref)	-	-	-
Black	1.01	1.01	0.96
Hispanic	0.88	0.85	0.82
Age			
		0.99	0.99
Gender			
Male	-	0.69*	0.66*
Female (ref)	-	-	-
Top Charge			
F1	-	-	1.41
F2	-	-	1.91
F3	-	-	3.00***
F4	-	-	1.26
F5	-	-	1.14*
F6 (ref)	-	-	-

*p <0.05, **p <0.01, ***p <0.001



To look closer within plea agreements, we examined cases in which the defendant pled to a charge lower than the top charge in the case (n=1,649 cases) to identify how many levels the charge was reduced. Just under half (44.6%) of the cases were reduced by one level, for example, cases that were reduced from a F3 top charge to a F4 final conviction. One-level reductions also included F6 cases in which a misdemeanor was the highest charge on which the defendant was ultimately convicted. Roughly one-third (35.1%) of cases were reduced by two levels. These included cases that were reduced from, for example, a F3 to a F5. They also included F5 cases in which a misdemeanor was the highest charge on which the defendant was convicted. Finally, 20.3% of cases were reduced by three or more levels.

Table 6 shows the relationship between the number of levels a case was reduced and race and ethnicity. Among defendants who pled guilty to a reduced charge, fewer Hispanic defendants received a three-level reduction (16.7%), when compared with White (21.1%) and Black (23.2%) defendants. Results of the chi-square test, used to determine the relationship between race and ethnicity and the level of reduction, was not statistically significant, however, suggesting that these patterns may be the result of chance.

Table 6: Number of Levels a Case was Reduced during Plea Agreements, by Race and Ethnicity (n=1,649)

Race/Ethnicity	One-Level Reduction	Two-Level Reduction	Three-Level Reduction
White	284 43.8%	227 35.0%	137 21.1%
Black	192 41.6%	163 35.3%	107 23.2%
Hispanic	260 48.2%	189 35.1%	90 16.7%
Total	736 44.6%	579 35.1%	334 20.3%

p=0.085

Finally, we examined the magnitude of charge reduction by comparing cases in which a felony was or was not reduced to a misdemeanor. Regression results are presented in Table 7. After controlling for age, gender, and top charge, there were no significant differences between White, Black, and Hispanic defendants for whether a felony was reduced to a misdemeanor. Gender was the only characteristic that was significantly associated with the outcome. Controlling for defendant’s age, race and ethnicity, and case severity, male defendants experienced about half the odds of female defendants of pleading down to a misdemeanor. All else equal, female defendants had a 46% higher probability, when compared to males, of having their felony cases reduced to misdemeanors.



Table 7: Logistic Regression Results for Whether a Case was Pled to a Misdemeanor (Odds Ratios)

	Model 1 (n=2,034)	Model 2 (n=2,034)	Model 3 (n=2,012)
Race/Ethnicity			
White (ref)	-	-	-
Black	0.97	0.99	1.22
Hispanic	0.85	0.87	0.89
Age			
		1.01	1.00
Gender			
Male	-	0.51***	0.52***
Female (ref)	-	-	-
Top Charge			
F1	-	-	(omitted)
F2	-	-	0.05***
F3	-	-	0.04***
F4	-	-	0.29***
F5	-	-	0.34***
F6 (ref)	-	-	-

*p<0.05, **p<0.01, ***p<0.001

Note. F1 cases were omitted in Model 3 because none concluded in a misdemeanor.

Cases in which a Drug Felony was Entered as the First Charge

As noted, exploratory analyses were conducted on the 2,885 cases in which a drug felony was entered as the first charge ("Count 1") in the case management system (hereafter referred to as "drug felony cases"). Table 8 outlines the demographics of adult defendants involved in such cases. Just under half of the defendants were White (47.3%), 29.2% were Hispanic, and 21.3% were Black. The defendants were disproportionately male (74.4%). The mean and median ages of the defendants were 35.4 and 34, respectively.



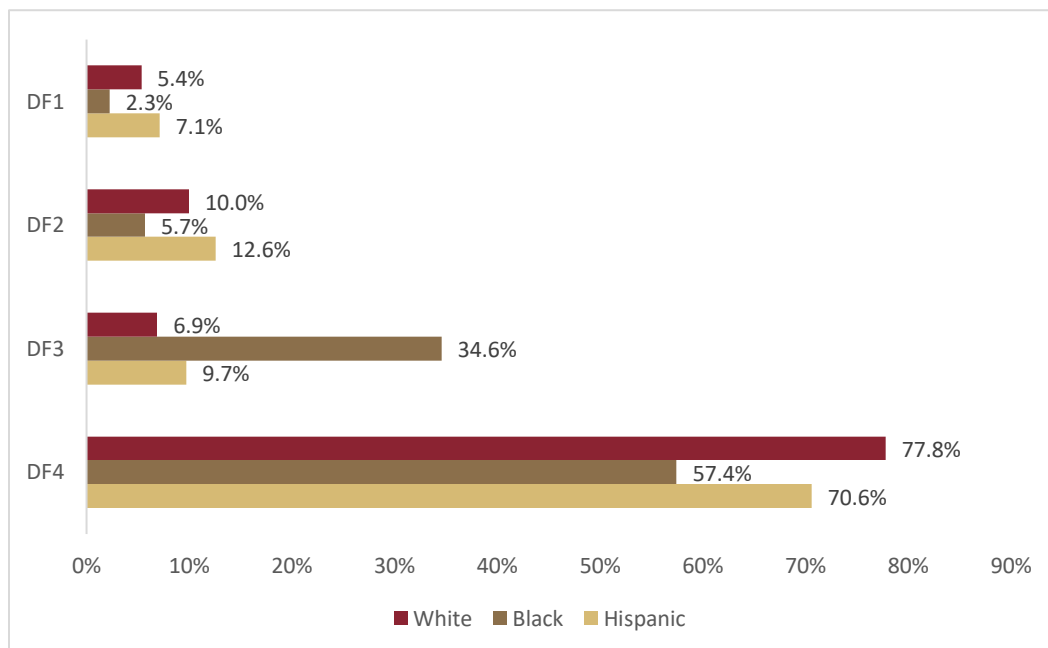
Table 8: Demographics of Case Defendants in Which a Drug Felony was Entered as the First Charge (n=2,885)

	<i>Number</i>	<i>Percent</i>
Race/Ethnicity		
White	1,364	47.3%
Black	613	21.3%
Hispanic	843	29.2%
Native American	10	0.4%
Asian	33	1.1%
Multiracial	12	0.4%
Other/Unknown	10	0.4%
Gender		
Male	2,145	74.4%
Female	740	25.7%
Age		
	<i>Mean</i>	<i>Median</i>
	35.4	34

In examining the Count 1 charge across the drug felony cases, most (71.1%) were DF4s, the lowest level of drug felony, while 13.7% were DF3, 9.9% were DF2, and just 5.3% were DF1 (see [Appendix A](#)). In most cases, the Count 1 charge represents the top or most severe charge in the case. However, in other cases, more serious charges are added during the life of the case and would not be represented as Count 1.

Defendants were not equally represented by race and ethnicity across Count 1 charges in the cases. As shown in Figure 4, Black defendants were significantly overrepresented among DF3s and underrepresented among DF4s ($p < 0.001$).

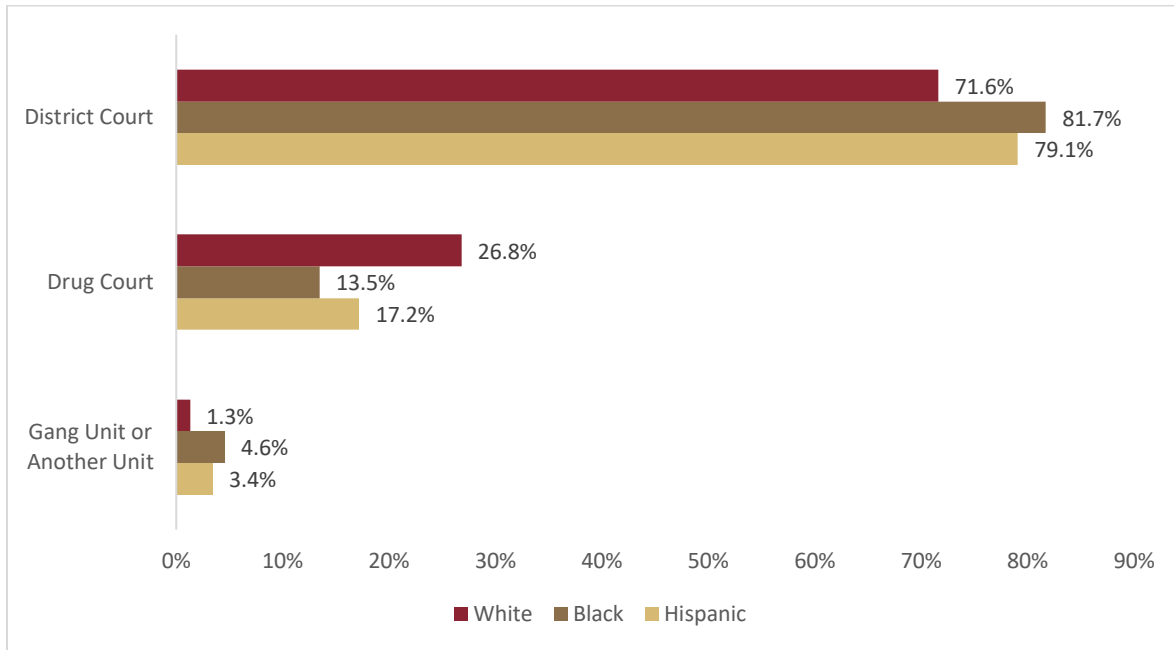
Figure 4: Count 1 Charges Across Drug Felony Cases, by Race and Ethnicity (n=2,820)





Over three quarters of drug felony cases (76.3%) were handled in district court. About a fifth (20.9%) were handled in drug court and less than 3% were handled by the DA’s Gang Unit or another unit. There is a statistically significant relationship between the court handling the case and the defendant’s race and ethnicity ($p < 0.001$). As shown in Figure 5, White defendants were about twice as likely as Black or Hispanic defendants to have their cases referred to drug court.

Figure 5: Courts Handling Drug Felony Cases by Race and Ethnicity (n=2,820)



Drug felony cases involving White defendants were more likely to be handled in drug court.

Drug felony cases involving White defendants were significantly more likely to be moved to drug court rather than handled in district court or by some other unit compared to drug felony cases involving Black and Hispanic defendants.

After controlling for age, gender, and case severity, Black and Hispanic defendants were significantly less likely to have their drug felony cases handled in drug court. As shown in Table 9, among those of the same age and gender, who were involved in cases of similar severity, Black defendants experienced 0.55 times lower odds of having their cases moved to drug court compared to White defendants. Hispanic defendants experienced 0.61 times lower odds compared to White defendants.



Table 9: Logistic Regression Results of Whether a Drug Felony Case was Handled in Drug Court (Odds Ratios)

	Model 1 (n=2,820)	Model 2 (n=2,820)	Model 3 (n=2,820)
Race/Ethnicity			
White (ref)	-	-	-
Black	0.42***	0.47***	0.55***
Hispanic	0.57***	0.57***	0.61***
		1.01	0.47***
Age			
Gender			
Male		0.52***	1.00
Female (ref)		-	-
Count 1 Charge			
DF1			0.02***
DF2			0.07***
DF3			0.25***
DF4 (ref)			-

*p <0.05, **p <0.01, ***p <0.001



Qualitative Results

The [20 prosecutors interviewed](#) for this study shared unique perspectives and experiences that highlighted the complex role of prosecutors in the criminal justice system. From these individual interviews, we noted a common concern among interviewees about the overrepresentation of people of color in the criminal justice system. The interviewees overwhelmingly pointed to the system itself as contributing to racial disparities.

Thus, the results of the study are presented by first describing the overarching key theme, *the criminal justice system contributes to racial disparities*. Then, three themes related to the role of prosecution in ameliorating or exacerbating these disparities are presented: (a) prosecutors felt unable to correct for the social inequalities that may underlie offending; (b) prosecutors had mixed feelings about their role in ameliorating disparities caused by policing; and (c) prosecutors described using tangible and subjective factors in making plea offers, some of which they acknowledged are connected to race and ethnicity. Within each of these themes, interviewees offered a variety of perspectives. This section of the report concludes by highlighting some divergent perspectives from interviews with prosecutors of color.

The Criminal Justice System Contributes to Racial Disparities

Prosecutors felt unable to correct for the social inequalities that may underlie offending.

Prosecutors had mixed feelings about their role in ameliorating disparities caused by policing.

Prosecutors described using tangible and subjective factors in making plea offers, some of which they acknowledged are connected to race and ethnicity.

The Criminal Justice System Contributes to Racial Disparities

The researcher asked interviewees whether they believed there is systemic racism in the criminal justice system. Though the details of their responses varied, interviewees were united in affirming that racism was a problem. Some were particularly straightforward. For example, when asked, “Do you believe that there is systemic racism in the criminal justice system?” one interviewee responded, “Is water wet? Yes. Yes. Yes, there is.”



Interviewees who found the answer “obvious” or “undebatable” readily pointed to examples in which racism is especially transparent. It is worth noting that the interviews for this study occurred in the summer of 2020, on the heels of nationwide protests against police brutality, including the killing of George Floyd, a Black male, by a white Minneapolis police officer. It is possible that this context influenced the prosecutors’ examples, which overwhelmingly centered on police work. As one interviewee explained:

“In the law enforcement system as a whole racism is, I think, obviously, and clearly apparent...in terms of neighborhoods that are policed more than others, contacts with defendants for less-than-ideal reasons that can, on paper, be written off as legitimate, but just don't pass the smell test.”

This interviewee continued, articulating how historical discrimination in the home mortgage industry has contributed to the disproportionate representation of people of color in the criminal justice system.

“It goes even so far back to redlining and the idea that there are neighborhoods that, because society as a whole is so steeped in systemic racism, we've created these ghettos that obviously have much higher incidence of crime because poverty is higher, education is less. The people don't have what they need, in terms of health care, and in terms of their own welfare and well-being.”

This interviewee was not alone in pointing out that racism is rooted in the history of the United States. Another noted that racism is “embodied in our institutions.” While another explained how the nation’s “get tough on crime” approach to public safety in the later quarter of the 20th century stacked the odds against people of color, explaining:

“There are juveniles who had really terrible childhoods because their fathers were put in prison because of harsh sentencing penalties in the 80's and early 90's. They had a family of four being raised by a single mother who had a high school education because of all the societal and economic hardships put in place by...racist policies that America has had for decades.”

Another interviewee asked rhetorically, “If this person grew up in different circumstances, in a different neighborhood, would they have ended up in this position?”

Prosecutors interviewed suggested that economic disadvantage was important to consider alongside racial injustice. One interviewee noted, “I think the economic disparity goes hand in hand with racial disparity,” and went on to emphasize the relevance of race, stating “obviously, overpolicing, access to education, access to jobs, you know, systemic racism within the United States...the history of the United States.” Though uncommon, a few interviewees felt socioeconomic status played a *larger* role than race in influencing one’s interactions with law enforcement. Even these interviewees, however, did not entirely dismiss the impact of race. This is exemplified in the following response to the question about systemic racism in the criminal justice system:

“To some extent, yes, I do think that that's the case. In my experience, I think the biggest factor is socioeconomic status. You know, poor White people come in just as much as poor Black people, and poor Mexican people, and poor Asian people. So, I think socioeconomic status is the biggest driver of stereotypes and maybe where we're spending our time policing. But race does play a part in that.”



This overarching theme of *the criminal justice system contributes to racial disparities* frames how interviewees described the role of prosecution in ameliorating or exacerbating these disparities.

Prosecutors Felt Unable to Correct for the Social Inequalities that May Underlie Offending

Despite their shared agreement that race and economic injustice contribute to disproportionality in the criminal justice system, interviewees described an obligation to work within the system. “It’s not a perfect system” offered one interviewee, “[but] it’s the system that we have. And I think it works.” Moreover, interviewees described the need to correct for societal inequity as residing outside of their role as a prosecutor. As one interviewee described:

“If we were to help them get all these services, would this person be committing crimes?...I think the problem and the very unfortunate limitation with the criminal justice system is a lot of times we don't have the ability to help with those services. We can't really help. We can give referrals, but we can't help people with housing and help people with homelessness and lack of education and all of those things that might lead up to them committing crimes in the first place.”

Because correcting for social inequity was outside of their role, interviewees generally felt that racial injustice needed to be addressed outside of the criminal justice system. As one interviewee described:

“I know it's a problem, I just don't know—like everyone else, I don't know what the solution is. I would like to think that the solution occurs before it hits our table. I think the institutional racism happens because of the situations people are placed in from a much earlier stage than when officers get there.”

What was important to the interviewees, then, was being as fair and equitable as possible in their limited role as a prosecutor. This is the part of the criminal justice system over which they had ownership and, while they could not control what cases came to them, they felt able and ethically obligated to ensure fair justice on a case-by-case basis. One interviewee asked, “You’re looking at the aggregate. Am I right in saying that?” They went on to offer:

“What’s really hard is that I never think about things in the aggregate. It is literally every case on its own. And that's we're supposed to do to be fair. We want to treat this person the right way...the victim and this defendant the right way.”

Interviewees felt that they were bound to consider only the circumstances of the cases as they were presented to them; a couple noted that it would be unfair to adjust the outcome of a case to benefit defendants of color. They could not work to offset the racial inequities despite their acceptance that these inequities may have led to a disproportionate number of cases against defendants of color within their caseload. This was articulated by one interviewee as such:

“Yes, there is systemic racism from top to bottom. And law enforcement is equally complicit in all of that. I just hope that by the time a case reaches us, we are treating defendants individually



fairly...There is a role for systemic injustice to be taken into consideration when making an offer in a case, but it's not as big as defense attorneys would [suggest]. Because if that were the case, it would become unfair that similarly situated defendants who have similarly situated criminal histories and committed a similar crime would be treated differently if one was a minority and one was not."

Finally, interviewees overwhelmingly expressed good intentions that they were not exacerbating racial inequity in the criminal justice system. They described themselves and their colleagues as "progressive" and supportive of initiatives such as diversion programs. One interviewee noted, "We have a lot of really good prosecutors who have the mindset of what I would consider a progressive prosecutor." Another suggested the Denver DA's Office may be an outlier in this regard, describing:

"I obviously hope I don't contribute to systemic racism. I feel like I don't, and I feel that the people I work with—we all think we don't. So, I don't know what's going on in other DA offices and other states because you see stuff on the news. Maybe Colorado's different...We also have a lot more rules that are really favorable towards the defense, like our discovery rules. It's all, in my opinion, in their favor and so it creates a more fair system I guess."

Prosecutors had Mixed Feelings about their Role in Ameliorating Disparities Caused by Policing

While prosecutors were generally positive about their relationship with the Denver Police Department, they also pointed to policing strategies and behavior as disproportionately impacting communities of color and contributing to the overrepresentation of non-White defendants in the criminal justice system. There was a lack of consensus among interviewees about the prosecutors' role in ameliorating disparities caused by policing.

"I know it's a problem, I just don't know what the solution is. I would like to think that the solution occurs before it hits our table."

- Denver Prosecutor

When asked about the relationship between the Denver DA's Office and the Denver Police Department, interviewees typically responded positively. For example, one prosecutor remarked: "I think overall we have a pretty good relationship with them" and went on to describe how police detectives, in particular, were helpful collaborators in problem solving and addressing concerns about cases. When asked about systemic racism in the criminal justice system, this same prosecutor described concerns, "I see where police focus their attention, and what they consider 'proactive policing.' You know, like, only doing drug stings along the Colfax corridor...an area that's predominantly African American or Hispanic."

Similar to their view that prosecutors are unable to correct for social inequalities that may serve as the underlying causes of offending, prosecutors felt unable to correct for disparities brought on by the focus of policing on communities of color. Interviewees described needing to handle the cases they were assigned on an individual basis.

When pressed on whether it bothered them that individuals who are Black or of low socioeconomic status are more likely to drive cars in poor condition, for example, and thus more likely to be contacted, one



interviewee responded: “No. Because I can't dismiss all cases with windshield cracks. No, because we get murder defendants that way, too. So, if we deem them all illegitimate then we lose a lot of the important cases too.”

While prosecutors felt unable to correct for the racial/ethnic disproportionality among the cases that came before them, they did feel empowered, indeed obligated, to refuse or dismiss cases in which questionable police behavior was apparent within a case they were prosecuting. For example, one interviewee noted:

“If we think it doesn't meet the ethical filing standard, or it doesn't pass the smell test, or if we probe and we inquire of the involved officer to justify her decision, and if we aren't satisfied, we're gatekeepers, and it's our role to make sure that the case doesn't go forward, we absolutely have an active role in that there's no question.”

Interviewees described dismissing cases based on questionable police behaviors only after the case had already been accepted, however. Interviewees described the need to move quickly through case processing due to that heavily caseloads. Legally, prosecutors also face an urgency to file cases without “unnecessary delay” so as not to prolong a defendant's time in custody. As one interviewee noted:

“When I was in county doing misdemeanors my caseload was like, just insane. You're going through pretty quick. I mean you're triaging there. So, you know, if it's a driver's license case. I'm looking at the reason for the stop. I'm going to look for the probable cause, just to make sure that it's good. And then I'm going to...make sure that we can prove the elements of the crime charge, and then I'm pretty much putting an offer on that case...”

Due to the speed at which cases needed to be reviewed, interviewees described a tendency to rely on police summaries of body-worn camera footage during the initial intake, especially when the defendants were being held in custody. Further along in the life of the case, they might discover that the footage was not sufficient evidence. For example, one prosecutor explained that the police summary may say that the defendant was initially pulled over for a cracked windshield, but “if I don't see it in the camera, the jury is not going to see it in the camera, and I've got to drop the case.”

Interviewees suggested that there were a limited number of officers who repeatedly brought problematic cases. As one interviewee noted:

“I think for the most part, there are really good police officers in Denver, who are really good at their jobs and...set a really high standard and really serve the community....It's sort of like the same names you see popping up and over and over, and you're like: This case seems a little weird. The stop's a little weird. Oh, it's this officer.”

Interviewees found traffic stops for mechanical violations particularly suspicious. One interviewee described the following example as though confronting the police officer:



“You do nothing but write tickets for this and whatever it is that's obstructing their vision can never be seen on body-worn camera. If you're saying there's a crack in the windshield, then make sure your body-worn gets the windshield...It is pretty interesting that on all of the cases that you bring us with this being of reason for the stop, you can never see that in the body-worn camera.”

Prosecutors described more egregious police behavior as less common. One interviewee described pressure from a drug detective to continue pursuing a case after it was discovered to be founded on an improper search. The detective advocated that the prosecution process itself would “bother [the defendant], and they would at least have a criminal case for some period of time.” The prosecutor dismissed the case, pointing to ethics. Another interviewee expressed concern when learning that an arresting officer repeatedly demanded that a Hispanic defendant “speak English” during the arrest.

Overall, interviewees reported varying levels of ability to and comfort in talking with police about how police behavior impacts the strength of the case. As one described, “Sometimes I do; sometimes I don't. There's no rhyme or reason, it's just expediency and speed.” Another interviewee described their plans to address such matters with the police:

“No one gets...contacted...for jaywalking...and yet this young Black male [was] contacted for it? That initial contact of course was very suspect....So, ultimately, I dismissed that case. [Interviewer: When you dismissed it, then did you take it back to the police?] Ah, no, actually I should do that...It was recently, so that's actually something I should do. And I will do that. I'm going to add it to my to-do list.”

Another interviewee proposed that the DA's Office could take a stronger role in addressing police behavior. “We can force them to change,” they argued. “Start filing charges against cops...refusing cases from cops who have a history of bad acts or acts of dishonesty. If you watch a guy's body-worn, it's like these reports never match up. We have the power to say, you know what, we're not going to take cases from Officer [Name].”

Prosecutors Described Using Tangible and Subjective Factors in Making Plea Offers, Some of Which They Acknowledged are Connected to Race and Ethnicity

Interviewees identified a host of factors that influenced prosecutorial discretion and shaped the plea offer made on a case. Some of these factors can be understood as tangible, whereas, others are better understood as subjective. Examples of tangible factors included: lack of a criminal history, participation in treatment programs, mental health diagnoses, stable employment, secure housing, and payment of restitution. On their face, these factors may appear unrelated to race; however, when prompted, interviewees understood that White defendants were more likely to be able to supply them. Although interviewees recognized unequal access to mitigation, they struggled with what to do about it. One interviewee explained:

“If you're someone who committed a crime but have the potential to contribute to society—to be an upstanding member of society—and that's what we say our goal is...we want rehabilitation. We want to put this person back on track. We want them to be a good member of society. So, when



you have someone come in who is already in that situation...It's really hard to argue for prison on a case like that...But then you have a young Black kid, [and] his family's not there."

Interviewees acknowledged how the use of mitigation benefited defendants with greater financial resources. As one interviewee explained:

"I guess there are problems with how I take in mitigation. I've noticed that I've given better deals to people who've gone into inpatient therapy treatment...so now I'm giving a better deal to a person that essentially has more resources to address it."

Interviewees also elucidated how the involvement of private attorneys often improved a defendant's outcome in a case. Private attorneys, because of their cost, are more accessible to defendants with greater financial resources. Interviewees explained that private attorneys have a lower caseload than public defenders, can invest more time in researching the case, and establish mediation. One interviewee described:

"[Private attorneys] get paid a lot and have nothing better to do than to send you an email every other day, and present mitigation, and file motion that you have to respond to ad nauseum, and they will try to whittle you down. [Interviewer: And does it work?] It does work. We have high caseloads...[The defendant] will pay half the restitution upfront. Normally I would try to get this guy to go to prison, but you know, the victim is going to get half the money upfront. That's a big consideration."

In addition to tangible factors that influence mitigation, interviewees identified factors that were more subjective or open to interpretation. As one interviewee described, "There are some things that just resonate with us...on a humanity level." Examples of these factors included: having one's life "on track," demonstrating effort to reform, exhibiting remorse, having a supportive family, showing respect, and contributing positively to society. For example, some interviewees noted feeling reluctant to offer deferrals to those whose lives appeared "disorderly." As one interviewee noted, "When I see a mom come into court, it affects how I plead...When I have a 20-year-old African American man, with a mom who's 40 coming to court, I'm more likely to take a chance."

Interviewees thought through the implications of considering these factors aloud during the interview. As one described:

"It goes to the whole deep-seated issue of treating similarly positioned people similarly. You want people who committed the same types of crimes to get the same general punishment. But then, in practice, it's really difficult because, you know, some people can articulate things better than others. Does that mean they're not similarly treated? Or does that just mean that they're getting a benefit? Because they can just speak better?"

As they wrestled with their ability to prove a case beyond a reasonable doubt, interviewees also sought to imagine how defendants, victims, and witnesses would be seen by juries during a trial. "I'm looking at [the defendant's] demeanor—whether they appear compelling," explained one interviewee. Another



suggested: “The better spoken [a defendant] is, and the cleaner they look, the more a jury is going to trust them.”

Interviewees were asked whether these more subjective forms of mitigation might contribute to inequities, for example, whether some defendants are brought up to express remorse and respect in ways that are consistent with the expectations of predominately White lawyers and judges, whether social support might look different in Black families, or whether stable family structure might look different in Hispanic families. Interviewees were generally receptive to these possibilities. One noted that White defendants benefit from privilege, sharing, “It’s privilege all day!” Another stated, “I don’t think I thought about it like that before, but it’s like [White defendants] have mitigation already built into their lives.”

A related issue was the challenge that some defendants faced in meeting the requirements for sentencing alternatives. Prosecutors described needing to evaluate the likelihood that defendants would be successful in drug treatment programs and/or avoiding future offending, and they often did so by considering their current life circumstances, such as housing and employment. One prosecutor recalled a case in which the defense attorney actively discouraged the prosecutor from offering the defendant a deferred judgment. The defendant was experiencing homelessness and mental health setbacks. The defense attorney had argued that such an offer would be “setting my guy up to fail.”

Divergent Views of Interviewees of Color

Overall, interviewees of color generally expressed views that aligned with those of White interviewees; however, there were two primary differences. First, interviewees of color described how being a person of color helped them understand the nuances in the lives of defendants of color. As one interviewee noted:

“I think it's one thing to say ‘I care about fairness for black and brown people’ in a country that was started and [has been] seeped [in] white supremacy for so long. There's difference between saying it...and having experienced what it's like to feel less than—to have less or feel less than. And I think it definitely helps you assess cases [when you] have that experience.”

Interviewees of color expressed concern that White prosecutors would view them as overly sympathetic toward non-White defendants, principally defendants of their own race or ethnicity. As one interviewee asked, “Am I going to be judged [by other prosecutors in the office]?” They went on to describe a case against a defendant with a similar race and ethnicity. The defense brought mitigation that this prosecutor was uniquely positioned to understand. The interviewee described, “I was apprehensive to take that in. Should I just look at this as my White colleagues [would]...or should I say that I understand some of these [race and ethnicity-based] situations that may have contributed to this?”

Second, interviewees of color were more likely to discuss the importance of office diversity in developing a broader appreciation for and perspective on the lives and issues of people of color. One interviewee questioned, “If you don't have enough minorities, are minorities going to be vocal about these issues? Am I going to be drowned out by the masses?” Another expressed, “We need to stop hiring all these young kids from middle America who just want to change the world, one [minority] kid at a time, you know? We need to hire people from the community.”



Conclusion

In recent years, there has been heightened public concern about the problems of mass incarceration and the disproportionate treatment of people of color by the criminal justice system. Although prosecutors play a central role in a criminal justice system, there have been few studies that have examined the extent of racial and ethnic disparities in prosecutorial outcomes. Drawing on administrative data, case files, and interviews with prosecutors from the Denver DA's Office, this study examined racial and ethnic differences across four key points of prosecutorial discretion: dismissals, deferred judgments, plea agreements, and referrals to drug court.

Quantitative results point to a persistent set of disadvantages faced by Black and Hispanic defendants. Prosecutors that were interviewed acknowledged the racial inequality that exists in the criminal justice system yet felt limited in their ability to remedy injustice in their role. The nature of the position requires them to take each case on its own and how it is presented to them. Yet the study points to avenues along which prosecutors do hold potential to advance racial equity, for example, in:

- Reviewing cases and deciding which will be accepted—and taking steps to ensure that cases that will eventually be dismissed are refused from the start.
- Collaborating with Denver criminal justice system stakeholders to ensure eligibility requirements for deferred judgments, specialty courts, and diversion programs support equitable outcomes.
- Supporting further racial and ethnic diversity among their staff and new ways of supporting greater cultural awareness and understanding.
- Continuing to collect and review data to better understand the dynamic role of prosecution over time.

This study shines light on an often overlooked, yet important potential source of racial disparities: the prosecutor's office. This researcher-practitioner collaboration has taken a step toward improving prosecutorial transparency and identifying actionable opportunities. Other DA's Offices can consider how they might expand the use of data to improve transparency and hold themselves accountable for the equitable treatment of defendants.



Appendix A. Colorado Criminal Code Classes for Felonies and Drug Felonies

Table A1: Classes for Felonies

Colorado Criminal Code						
Felonies committed on or after July 1, 1993						
Presumptive Range			Exceptional Circumstances			
Class	Minimum	Maximum	Minimum	Maximum	Mandatory Parole 2018-Current	* 2017 Mandatory Parole
1	Life Imprisonment	Death	Life Imprisonment	Death		
2	8 Years \$5,000 fine	24 Years \$1,000,000 fine	4 Years	48 Years	5 Years (COV) 3 Years (non-COV)	5 Years
3 Extraordinary Risk Crime	4 Years \$3,000	12 Years \$750,000	2 Years	24 Years	3 Years	5 Years
	4 Years \$3,000 fine	16 Years \$750,000	2 Years	32 Years	3 Years	
4 Extraordinary Risk Crime	2 Years \$2,000 fine	6 Years \$500,000	1 Year	12 Years	3 Years	
	2 Years \$2,000 fine	8 Years \$500,000	1 Year	16 Years	3 Years	
5 Extraordinary Risk Crime	1 Year \$1,000 fine	3 Years \$100,000	6 Months	6 Years	2 Years	
	1 Year \$1,000 fine	4 Years \$100,000	6 Months	8 Years	2 Years	
6 Extraordinary Risk Crime	1 Year \$1,000 fine	18 Months \$100,000 fine	6 Months	3 Years	1 Year	
	1 Year \$1,000 fine	2 Years \$100,000	6 Months	4 Years	1 Year	

Table A2: Classes for Drug Felonies

Drug Felony Penalties					
Applies to any drug crime committed on or after Oct. 1, 2013 (see 18-1.3-401.5, C.R.S.)					
Level	Minimum	Maximum	Mandatory Parole	Fine	DOS (Drug Offender Surcharge)
DF1	8 Years	32 Years	3 Years	\$5,000 - 1,000,000	\$4,500
	Presumptive	Aggravated			
DF2	4-8 Years	8-16 Years	2 Years	\$3,000 - \$750,000	\$3,000
DF3	2-4 Years	4-6 Years	1 Year	\$2,000 - \$500,000	\$2,000
DF4	6 mos.-1 Year	1-2 Years	1 Year	\$1,000 - \$100,000	\$1,500



Appendix B. Interview Protocol

Thank you for agreeing to talk with me today. As you know, the Denver District Attorney's office currently has a collaborative grant from the Colorado Evaluation and Action lab to better understand racial disparities in the criminal justice system. Most of the research involves analyzing data from the JustWare case files. The goal of these interviews is to provide better context for the data and the work you do. The questions are not intended to make you uncomfortable. Your participation in this interview is completely voluntary, and you can also decline to answer any questions at any time. Your name and any identifying information will be left out of any and all reporting of the study's findings. Do you consent to participating in this interview? Do you mind if I record this conversation so that I don't have to take notes?

1. How long have you been a prosecutor? What attracted you to this work?
2. Can you walk me through what it's like for you to review a case for the first time? (Follow up on time spent, aspects focused on.)
3. How does your approach to prosecuting cases compare to other prosecutors in the office?
4. In your role as a prosecutor, you have some discretion in the prosecution of a case. Can you tell me about when during the life of a case, your discretion comes into play?
5. What influences your decision to mitigate charges in a case? (How do you acquire this information?)
6. What influences your decision to enhance charges in a case? (How do you acquire this information?)
7. Under what circumstances are you most likely to dismiss a case?
8. Would you tell me about how COVID-19 has shaped your work? Have there been changes in the way you prosecute cases? (Follow up on use of discretion.) Are there new ways of handling cases that you think will stay in place even after COVID subsides?
9. I understand that the relationship between prosecutors and police varies by district (or city/state). How would you describe the relationship between the Denver DA and Denver PD?
10. Police are increasingly under scrutiny for excessive violence against minorities, African-Americans in particular. How does this impact the work you do?
11. Do you believe there is systemic racism in the criminal justice system?
12. What is the prosecutor's role in responding to racial injustice?
13. If you were explicitly asked to identify the race and/or ethnicity of a defendant on a case, what information would clue you in?



14. How do you think the demographics of a defendant influence how you prosecute a case?
(Follow up on race/ethnicity; gender.)
15. Can you tell me about the demographics of your social groups? To what extent do you interact with people of color outside of prosecuting cases?
16. How have administrative changes in the office influenced how you process cases over the years?
(Follow up on DA's platform.)
17. What additional information would help me to understand how you prosecute cases?
18. Is there anything else you would like to share that would help me understand racial disparities in the criminal justice system and the role prosecutors play?



Endnotes

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