BLURRED LINES: AN ANALYSIS OF WHETHER PROSECUTORIAL DISCRETION EXTENDS TO LESSENING A SENTENCE EX-POST IN LIGHT OF THE SEPARATION OF POWERS DOCTRINE

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I. INTRODUCTION

In 2018, the Pennsylvania Supreme Court decided in *Commonwealth v. Brown* that Philadelphia District Attorney Larry Krasner could not reduce or alter a death penalty verdict.[1] The court held that without a judicial reason for error or remand, a prosecutor cannot change an imposed sentence. While the DA's job is to decide whether a death penalty sentence should be initially pursued, until recently, it was rare for a prosecutor to request that an imposed sentence be changed. This comment explores the limits of prosecutorial discretion and whether reducing an imposed sentence is or could become an appropriate role for prosecutors.

The comment will be broken up into six parts. The first part is an introduction to *Brown* and why what recently occurred in Pennsylvania is groundbreaking for the greater prosecutorial field. The second section will then explore what prosecutorial discretion means in light of Article II of the U.S. Constitution, and how the role of the prosecutor is separate from the judicial sector. The third section analyzes one of the big dividing lines between Article II and Article III: the differences between prosecutorial charging power and judicial sentencing power. In the fourth section, I discuss how, given the recent increase in trust for prosecutors and a growing distrust for judicial decisions, the differences charging versus sentencing decisions is blurred. This is especially true in cases where prosecutors aim to reduce a sentence.

In the fifth section I note that, despite a desire for judgment finality, judges have had the ability to alter jury verdicts for years with no upset in the validity of the justice process. In states that have expanded this power to include prosecutors, courts have noted that prosecutors, like judges, have a strong interest in assuring justice. Especially if a prosecutor suggests a sentence that cuts against his adversarial interest, these states note it should be within their role to assure justice is found.

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[1] 196 A.3d 130, 146 (Pa. 2018) [hereinafter *Brown*].

In the sixth section, I conclude that courts are split on whether prosecutors changing sentence ex-post is within prosecutorial discretion. Though some courts consider this a violation of the separation of powers, prosecutors in these jurisdictions should not give up in trying to assure defendants receive appropriate sentences. I recommend that prosecutors focus their arguments on the fact that this is not the first time an attorney has held a different interpretation of the law than his predecessor. Solicitors General have successfully convinced courts to take different stances of the law as a result of differing presidential administrations' beliefs. If prosecutors made arguments that mirrored this stance, they could successfully change sentences without expressly expanding prosecutorial discretion and violating the separation of powers.

II. *COMMONWEALTH V. BROWN* CHANGES PROSECUTORIAL LANDSCAPE

In *Commonwealth v. Brown*, Lavar Brown was convicted for the death of Robert Crawford.[1] On December 10, 2003, Brown, then age 24, was standing in Philadelphia near a school and subway station with a friend.[2] A short time later, Brown saw Robert Crawford, then age 33, approaching, and Brown stated, "[t]here go that pussy."[3] Brown then approached Crawford and shot him, without provocation, multiple times in the back.[4] On May 31, 2005 the court found him guilty of first-degree murder, possessing an instrument of a crime, and carrying a firearm without a license.[5] On June 2, 2005, following the penalty phase of trial, the jury returned, unanimously, a decision that the defendant should be sentenced to death.[6]

Brown appealed his conviction and raised many issues, one of them being that he received ineffective assistance of trial counsel during the penalty phase of his trial.[7] On April 9, 2018, Philadelphia District Attorney Larry Krasner filed a joint motion confessing error to Brown having ineffective trial counsel.[8] The motion further argued that the sentence should be vacated and a lesser sentence be imposed.[9] The Commonwealth's brief argues that prosecutorial discretion clearly allows for a prosecutor to vacate and remand for a lesser

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1 *Id.* at 139.

2 *Id.* at 137.

3 *Id.*

4 *Id.*

5 *Id.* at 139.

6 *Id.*

7 *Id.* at 140.

8 *Id.* at 141. Ineffective assistance of counsel occurs when the defendant's attorney has failed to adequately perform his duties as counsel, and the defendant is prejudiced as a result. *See* Commonwealth v. Hanible, 30 A.3d 429, 439 (Pa. 2011).

9 *Brown,* 196 A.3d at 142.

sentence.[10] Brown's brief furthered that the courts for years have reversed convictions when both parties agree to an error, and this Court should have followed this trend.[11]

The court responded that Brown must argue his counsel provided ineffective assistance during the penalty phase of trial and convince the fact-finder to rule in his favor.[12] A court must then conduct "a judicial merits review favorable to the petitioner before any relief may be granted."[13] The court thus disagreed with the Commonwealth's prosecutorial discretion argument, holding that a prosecutor changing an imposed sentence would violate the "respective roles and powers of prosecutors and courts with respect to jury verdicts."[14] Further, the court decided that the prosecution's confession of error is not a substitute for judicial review because the court, not another attorney, should decide whether appropriate representation was provided to the defendant.[15] Chief Justice Christine Donohue wrote that the jury-approved death sentence would remain, and "the differing views of the current office holder" couldn't change that.[16]

Despite the court refusing Krasner's argument to extend prosecutorial power, *Brown* opens a greater constitutional question surrounding the actual limits of prosecutorial discretion. It is important to analyze the expanding nature of prosecutorial discretion in light of recent court precedent and greater legislative decisions to best understand the contemporary role of a prosecutor and where the profession is expanding.

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10 Commonwealth's Brief in Support of Joint Motion to Vacate and Remand for Resentencing at 6-9, Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018) (No. 728 CAP).

11 Appellant's Brief in Support of Joint Motion to Vacate Death Sentence and Remand for Resentencing to Life Without Parole at 7-8, Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018) (No. 728 CAP).

12 *Brown,* 196 A.3d at 150.

13 *Id.* at 145. Furthermore, because the defendant never spoke up and objected to his counsel's effectiveness, the court held that he waived his rights to appeal on this issue at a later time. *Id.* at 184.

14 *Id.* at 149.

15 *See id.* at 145–46 (maintaining the court's authority to conduct judicial review on the matter).

16 *Id.* at 149.

III. THE ROLE OF A PROSECUTOR AND SEPARATION OF POWERS

Though *Brown* was a Pennsylvania state law case,[17] prosecutorial discretion is derived from Article II of the U.S. Constitution.[18] The executive branch retains broad discretion to enforce the nation's criminal laws. The power of prosecutorial discretion is based on many Article II clauses, including: The Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause.[19] The executive branch is given broad discretion because delegates of the President are designated by statute to help him discharge his constitutional responsibilities and "take [c]are that the [l]aws be faithfully executed."[20] In the absence of clear and convincing evidence, courts are to presume that these delegates - particularly prosecutors - have properly discharged their official duties.[21]

Traditionally, the role of a prosecutor is separate from the judicial process because Article II gives the prosecutor charging power while Article III provides the court with sentencing power.[22] As defined in the U.S. Constitution, it is the job of the executive delegates to determine what charges should be brought upon a defendant, and the judiciary to determine how strictly the defendant should be punished for a guilty charge.[23] However, sentencing versus charging powers are not clearly defined in Article II or III, and courts may mistake the duties of a prosecutor for those of the judiciary.

One such confusion has been: Who has the authority to assure a case be brought to trial? In *Inmates of Attica Correctional Facility v. Rockefeller*,

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17 In Pennsylvania, "[a] District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case," Commonwealth v. Stipetich, 652 A.2d 1294, 1295 (Pa. 1995) (quoting Commonwealth v. DiPasquale, 246 A.2d 430, 432 (Pa. 1968)).

18 U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause) ("The executive Power shall be vested in a President of the United States of America.").

19 *See id.*; *Id.* at cl. 8 (Oath of Office Clause) ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"); *Id.* at cl. 1 (Pardon Clause) ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."); *Id.* at § 3 (Take Care Clause) ("[H]e shall take Care that the Laws be faithfully executed."). *See also*, Donald A. Daugherty, *The Separation of Powers and Abuses in Prosecutorial Discretion*, 79 J. CRIM. L. & CRIMINOLOGY 953, 973 (1988) (describing Justice Scalia's discussion of prosecutorial discretion's Article II origins in his *Morrison v. Olsen* dissent).

20 U.S. CONST. art. II, § 3.

21 United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

22 *See id.* (describing the relationship between the U.S. constitutional powers delegated to prosecutors through Article II and those delegated to the judiciary through Article III).

23 U.S. CONST. art. II, § 1, cl. 1; *Armstrong*, 517 U.S. at 464.

plaintiff inmates filed actions against the defendants, the government of New York, and state and local officials.[24] The case arose out of the Attica Prison uprisings where prisoners demanded better living conditions and political rights.[25] The plaintiffs alleged that state and local officials failed their prosecutorial duty to bring action against officers and administrators for alleged wrongful conduct.[26] The court ruled that this was a decision beyond judicial oversight,[27] and that courts are not to direct prosecutors which defendants they should take action against.[28] Courts are refrained from overturning discretionary decisions of prosecuting authorities, and decisions made under prosecutorial discretion are determined to be not reviewable by the courts under the separation of powers doctrine.[29]

While cases like this demonstrate that it is clearly within the role of a prosecutor to bring charges against a defendant, it is also within the prosecutor's discretion to dismiss charges. According to the Federal Rules of Criminal Procedure rule 48(a), "[t]he government may, with leave of court, dismiss an indictment, information, or complaint."[30] The extent/limitations of "with leave of court" have not expressly been defined, but this rule nonetheless clearly vests some discretion in the courts in reviewing charge dismissal. Caselaw has suggested, however, that legislatures enacted the "with leave of court" language to protect defendants against prosecutorial harassment.[31] Thus, courts have recognized two circumstances in which the district court may deny leave to dismiss an indictment: (1) when the defendant objects to the dismissal, and (2) when dismissal is clearly contrary to the manifest public interest.[32]

Even with this explicit check on prosecutorial discretion, courts are still limited in what is reviewable, even when the defendant objects, or when it is

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24 Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 377 (2d Cir. 1973).

25 *Id.* at 376-377.

26 *Id.* at 378.

27 *Id.* at 383.

28 *Id.* at 379 (citing United States *ex rel.* Schonbrun v. Commanding Officer, 402 F.2d 371, 374 (2d Cir. 1968).

29 *See id.* at 379–80 (citing United States v. Cox, 342 F.2d 167 (5th Cir. 1965) (reasoning that the control over criminal prosecutions falls under executive power, which is separate and distinct from that of the judiciary). *See also* United States v. Oldfield, 859 F.2d 392, 398 (6th Cir. 1988) (choosing which charges to bring falls within prosecutorial discretion and is not reviewable by the courts in light of separation of powers doctrine).

30 FED. R. CRIM. P. 48(a).

31 *See, e.g.*, Rinaldi v. United States, 434 U.S. 22, 29 n. 15 (1977) ("The principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, *e. g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection.").

32 *Id.*

"clearly contrary to the public interest."[33] For example, in *U.S. v. Jacobo-Zavala*, just before trial, the prosecution and defense struck up a deal that charges would be dismissed in exchange for a guilty plea.[34] The prosecutor informed the court of her intent to drop the charges, but the trial court refused.[35] The court "did not consider the dismissal to be in the public interest," and forced the trial to continue.[36] On appeal, the decision of the trial court was found to violate the separation of powers doctrine.[37] The court does not have endless leeway in deciding whether or charging a defendant is within the public interest; charging is for the prosecutor to decide.[38]

This is not to say that there are no checks on prosecutorial discretion. Limitations assure that prosecutors are not bringing arbitrary charges or are being unfair to certain defendants.

In our system, so long as the prosecutor has probable cause, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitary classification."[39]

Decisions in which a prosecutor violates his official duties should be subject to judicial review to assure defendants' their rights and due processes.[40] To help assure defendants' rights, prosecutors are bound by the 2001 Model Rules of Professional Conduct. Model Rule 3.8 requires a prosecutor to disclose facts that may be a hindrance to his or her case in order to pursue the furtherance of justice.[41] If the prosecution finds any new information relating to possible innocence for a client, regardless of when he learns of these facts, he has an obligation to disclose them.[42] The American Bar Association has defined a prosecutor to be "an officer of the court" whose primary duty is to

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33 *Id.*

34 241 F.3d 1009, 1011 (8th Cir. 2001).

35 *Id.*

36 *Id.*

37 *See id.* at 1014 (holding that the "decision not to prosecute . . . is central to . . . executive power . . ." and that the district court "overstepped its authority" by interfering with that decision).

38 *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (dismissing capital charges and refusing to take action is within prosecutorial discretion and is not subject to judicial review).

39 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

40 *Id.*

41 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2000).

42 *Id.*

seek justice within the bounds of the law, not merely to convict.[43] Even if some facts may weaken the prosecutor's case, he has an obligation to report them to assure the defendant a fair trial and his due process rights.

In light of these limitations, prosecutors retain relatively expansive power. The rationale behind vast prosecutorial discretion is that prosecutors should be free from any conflicts of interest so that true justice can be accomplished.[44] Because prosecutors often have heavy caseloads and must make quick charging decisions, their decisions are, understandably, given deference to prevent a backflow in the court.[45] Courts are likely to defer to a prosecutor's charging decision unless there is a clear violation of a defendant's due process rights.[46]

IV. THE BLURRING OF EXECUTIVE AND JUDICIAL POWER

In recent years, both courts and prosecutors have become unsure of what constitutes judicial versus executive powers.[47] Part of this confusion is due to recent political decisions[48] that have increasingly bestowed more sentencing influence on prosecutors, despite Article III traditionally noting this to be a duty of the court.[49] This might initially seem unusual because sentencing influence is a form of judicial power. However, an example of this shift in power is mandatory minimum sentencing.[50] "Mandatory-minimum sentencing policies and the consequent displacement of discretion from judges to prosecutors reflect a larger political trend toward distrust of and

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43 CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017) ("The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgement in the performance of the prosecution function.").

44 *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); Commonwealth v. Chmiel, 173 A.3d 617, 631 (Donohue, j., concurring) ("The prosecutor's duty to seek justice trumps his or her role as an advocate to win cases for the Commonwealth.").

45 Amy Grossman Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMPLE LAW QUARTERLY 35, 35-37 (1982).

46 *Id.* at 41.

47 Jeffrey Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 427-28 (2007).

48 *See, e.g.,* Memorandum from Eric H. Holder, Jr., Atty. Gen., U.S. Dep't of Justice, to All Federal Prosecutors on Department Policy on Charging and Sentencing (May 19, 2010) (on file with the University of Pennsylvania Journal of Constitutional Law) (providing guidance to federal prosecutors on their advocacy at sentencing).

49 U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

50 *See, e.g.*, Ulmer et al., *supra* note 47 at 427-28.

disempowerment of judges and, simultaneously, growth in the trust in and empowerment of prosecutors."[51]

Mandatory minimum sentencing is not the only instance of enhancing prosecutorial duties and limiting judicial review. There have been recently-added provisions in the Federal Sentencing Guidelines with regards to sentence reductions. Section 5K1.1 of the Federal Sentencing Guidelines, the "Substantial Assistance to Authorities (Policy Statement)" notes, "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution . . . the court may depart from the [otherwise mandatory] guidelines."[52] This provision has greatly limited the judge's role in even the sentencing process. Under the Guidelines, the prosecutor can not only bring whatever charge he deems appropriate, but also "make a very precise selection of the ultimate sentence[.]"[53] "[T]he judge's role is simply to ratify the choice of sentence determined by the prosecutor."[54]

Prosecutorial discretion not only extends directly in sentencing hearings, but prosecutors also influence sentencing when they decide which charges to bring and in which court to bring a claim. In *Manduley v. Superior Court*, for example, the district attorney filed charges in adult court against eight minors.[55] The DA did so pursuant to a California law that granted DAs the discretion to file charges against specified minors in state court without a requirement that the juvenile court first determine the minor is unfit for juvenile court.[56] A claim brought in adult court has different sentencing options than does a charge brought in juvenile court. Despite this limitation upon the court's sentencing abilities, the California appellate court found that it did not violate the separation of powers doctrine for a prosecutor to decide when and if charges should be brought pursuant to this law.[57] According to the court, when

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51 *Id.* (citing Jill Farrell, *Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?*, 5 JUSTICE RESEARCH AND POLICY 95 (2003)). *See also* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997)).

52 U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2018).

53 Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, CRIM. JUST., Fall 1990, at 4.

54 *Id.*

55 Manduley v. Super. Ct., 41 P.3d 3, 8 (Cal. 2002).

56 *Id.*

57 *Id.* at 13. *See also* Nicole Scialabba, *Should Juveniles be Charged as Adults in the Criminal Justice System?: Results of "tough on crime" policies demonstrate that they have failed,* AMERICAN BAR ASSOCIATION (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/ ("It is typically within the prosecutor's discretion to determine [if adult or juvenile courts] will initiate the criminal charge . . . There has been a rise in [these types of] prosecutorial discretion laws.").

bringing a defendant to court is considered a traditional aspect of prosecutorial charging discretion and does not intrude upon the judicial function.[58]

Prosecutors have been given even greater deference in their subjective decisions of appropriate punishments. Under the United States Attorney General, Eric Holder, in 2013, the Department of Justice ("DOJ") conducted a comprehensive review of the criminal justice system.[59] In a memo, the DOJ identified five goals in order to combat inequities in the criminal justice process.[60] One of these goals was "to promote fairer enforcement of the laws and alleviate disparate impacts on the criminal justice system."[61] To achieve this goal, Holder aimed to enact "meaningful sentencing reform." He wanted to change charging policies so that low-level, non-violent drug offenders without expansive criminal histories would no longer be charged with "draconian mandatory minimum sentences."[62] The prosecutor was to, instead, suggest "sentences better suited to [the defendant's] individual conduct rather than . . . excessive prison terms[.]"[63]

In light of the Holder Memo, caselaw, and changes in sentencing guidelines, there appears a trend towards allowing prosecutors a greater influence in sentencing decisions, specifically around creating more individualized, lenient sentences. From a practical standpoint, this makes sense, because prosecutors better understand the weaknesses in cases and more intimate details about the defendant. While the judge only can base a sentence off of the information presented before him, a prosecutor has a more holistic understanding of the case and can make a more appropriate judgment in sentencing.[64]

While these changes have not explicitly allowed prosecutors to alter final verdicts, there appears to be an element of suggesting lesser, more humane sentences that gives prosecutors greater deference.[65] Third Circuit Judge

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58 *Id.* at 195.

59 *See generally*, U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (August 2013), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf.

60 *Id.*

61 *Id.*

62 *Id.* at 3.

63 *Id.*

64 *See, e.g.*, Brief as Amici Curiae Supporting the Prosecution at 9, Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018) (No. 728 CAP) ("Because the proper exercise of [prosecutorial] discretion requires prosecutors to have a high degree of knowledge of the specific facts and consequences of each case as well as the policy and other implications to pursue any particular prosecution, courts are 'properly hesitant to examine' the decisions that fall within a prosecutor's discretion.") (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

65 *See, e.g.*, In re Wilson, 879 A.2d 199, 211-12 (Pa. Super. 2005) (commenting that a prosecutor is bound to "withdraw charges when [he] concludes, after investigation, that the prosecution lacks a legal basis.").

Stephanos Bibas considered this when he stated, "[e]forcement leeway is most troubling when it lets prosecutors push the envelope and expand liability under vague statutes . . . . Far more central to prosecutorial discretion, however, is the power to narrow liability by choosing not to enforce the law or seek the maximum penalty."[66] When a prosecutor suggests a stricter sentence than would initially be imposed, it is considered a greater threat to judicial review because it could violate the defendants' due process rights. On the contrary, if a prosecutor suggests more lenient sentences than a judge might impose should a case go to trial, courts are more willing to grant deference to his opinion.

The question surrounding the limits of prosecutorial discretion from *Brown* is an unusual issue for the court; historically, it was rare for prosecutors to change imposed sentences. In *Brown*, the court refused to decide when prosecutorial discretion ends, despite clarifying when it can be applied expansively or narrowly.[67] Even though charging directly impacts the possible sentences of the defendant, it is entirely within the prosecutor's discretion to determine if he even wishes to bring a capital charge in the first place.[68] If the prosecutor decides that this is no longer a viable charge to bring, it makes sense that he should be able to dismiss that charge and bring another claim.

V. ALTERING JURY VERDICTS

Despite greater deference being given to prosecutors in recent years, prosecutorial discretion has still not expanded to include changing a sentence after it has already been imposed. Although it's a newer question of law whether or not prosecutors should be allowed to alter jury verdicts, judges have had the power to overturn jury verdicts since the late nineteenth and early twentieth centuries.[69] Judgements notwithstanding the verdict ("JNOV") allow a judge to make a ruling that is contrary to the jury's guilty verdict if the judge finds that no reasonable jury could have made this decision in light of the evidence presented at trial.[70] Though, traditionally, it is the job of the jury to

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66 Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 372 (2010).

67 Commonwealth v. Brown, 196 A.3d 130, 145 (Pa. 2018).

68 *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899, 1907 (2016) ("The importance of this decision [to bring a capital charge] and the profound consequences it carries makes it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.").

69 Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 450 (2013).

70 *See, e.g.*, 725. ILL. COMP. STAT. 5/115-4(k) (2013) ("When . . . at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may . . . make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the

make determinations of fact and the judge's job to make findings of law, this distinction has been blurred in light of the expansion of JNOVs. Part of the rationale behind this expansion was a growing distrust in juries' findings as cases grew to be more complex and involved multiple independent issues to decide.[71] Edson Sunderland, a principal drafter of the Federal Rules of 1938, noted, "[m]en temporarily called from the ordinary affairs of life, untrained in the law, are incapable of performing the functions of judges in any but the most primitive communities."[72]

Though some judges remain hesitant to overturn juries' decisions, many have also embraced JNOVs, at least in part, because of increased docket pressure and a desire for judgment finality.[73] While a concern in *Brown* is that expanding prosecutorial discretion would disrupt the finality of a jury's verdict, judges have had the ability to alter verdicts for centuries. Despite the Pennsylvania Supreme Court deciding otherwise, some courts have determined that changing imposed sentences is within a prosecutor's duty if this is in the true interest of justice. For example, in *United States v. Maloney*, the Ninth Circuit held that it was appropriate for a prosecutor to vacate and remand a case, even after a conviction, because the reviewing prosecutor was concerned that the trial prosecutor should not have made a specific closing argument and wanted to assure the defendant a fair trial.[74]

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defendant."); NEB. REV. STAT. § 25-1315.02 (2004) ("If judgment was entered, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."); N.Y. CRIM. PRO. § 440.10 (2019) ("At any time after entry of judgment, the court may, upon motion of the defendant, vacate such judgment . . . ."); 231 PA. CODE § 227.1 (2015) (2019) ("After trial and upon the written Motion for Post-Trial Relief filed by any party, the court may: (1) order a new trial as to all or any of the issues; or (2) direct the entry of judgment in favor of any party; or (3) remove a nonsuit; or (4) affirm, modify or change the decision; or (5) enter any other appropriate order."); S.C. R. CRIM. PRO. 50(b) (2019) ("If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.").

71 Lerner, *supra* note 69, at 461.

72 Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 302-303 (1913).

73 Lerner, *supra* note 69, at 465.

74 United States v. Maloney, 755 F.3d 1044, 1046 (2014). *See also*, *Ex parte* Rhone, 900 So.2d 455, 457 (Ala. 2004) (remanding for post-conviction proceedings after the State conceded on appeal that the trial court had erred in denying petitioner's request to amend his petition); Green v. State, 251 So.3d 798, 799, 800-801 (Ala. Crim. App. 2016) (remanding on appeal because the State conceded that this case must be remanded for resentencing when the defendant was not properly allocuted); State v. Laws, 51 N.J. 494, 514-515 (1968) (vacating a death sentence and imposing life without parole where conviction of first degree murder was proper, but there was error in the sentencing phase: "Under all of the circumstances, *including the prosecutor's waiver of the death penalty*, we have no hesitancy in concluding that there is adequate appellate power to modify the judgments of conviction . . . so that each of the defendants will stand convicted of murder in the first degree with sentence of life imprisonment.") (emphasis added).

Courts that have allowed prosecutors so much latitude in altering imposed sentences have clung to language that these changes are within the interests of justice. This same rationale is one of the guiding reasons judges have been given so much latitude in altering imposed sentences: To help ensure that defendants are appropriately and fairly being convicted. Courts that have expanded prosecutorial discretion have recognized merit in a prosecutor's decision to have a downward sentence, primarily because this directly cuts against the prosecutor's interest.[75]

In California, this expansion is being taken one step beyond the courts through the enactment of legislation that supports the legitimization of this power.[76] In 2017, California District Attorney Jeff Rosen worked to get Arnulfo Garcia, a man who changed his life for the better during a life-sentence, re-sentenced through support of a habeas petition.[77] Through this experience, Rosen realized that the limitations imposed on prosecutors for changing sentences they believe to be unjust forces prosecutors to go through creative "gymnastics to get people resentenced."[78] As a result, Rosen, other District Attorneys, and criminal reform organizations supported a bill that allows prosecutors this discretion. Under the bill, if a prosecutor makes a recommendation for a more lenient sentence, even after someone has already spent years in prison, the judge would be obligated to impose the new sentence.[79] The rationale behind this bill is that it allows for all sentences to be kept up with modern sentencing practices and offers leniency in situations the prosecutor deems appropriate.[80]

While some have acknowledged and accepted this expansion of prosecutorial discretion, not all courts believe this is an appropriate role for prosecutors. In 2019, U.S. District Judge Goldberg ruled on the same issue and, again, denied Krasner's brief for a sentence reduction. In that case, *Wharton v. Vaughn*, the defendant, Wharton, was sentenced to the death penalty after he and his co-defendant, Eric Manson, were found guilty of murdering Ferne and Bradley Hart in their home in 1984.[81] Wharton received the death penalty while Manson was sentenced to life in prison.[82] Since he was

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75 *See, e.g.*, *Maloney*, 755 F.3d at 1046 (commending a U.S. district attorney for moving summarily to reverse a defendant's conviction, vacate his sentence, and remand his case to the district court).

76 Kyle C. Barry, *A New Power for Prosecutors is on the Horizon—Reducing Harsh Sentences*, THE APPEAL, (Sep. 7, 2018), https://theappeal.org/a-new-power-for-prosecutors-is-on-the-horizon-reducing-harsh-sentences/.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 Wharton v. Vaughn, 371 F. Supp. 3d 195, 196 (E.D. Pa 2019).

82 *Id.*

sentenced to death, Wharton has repeatedly appealed his conviction to no avail. In 2019, Wharton, yet again, appealed his conviction claiming an ineffective assistance of counsel.[83] This time, the Philadelphia DA, Krasner, said he would not fight the appeal and asked the judge to grant summary relief by taking the death penalty off the table.[84] Krasner further argued that if the court did so, he would not seek a new death sentence in state court.[85] The court denied Krasner's motion, saying it would not change its opinion just for Krasner's personal beliefs when many DAs have come before him saying the opposite.[86] Wharton's death sentence remains.[87]

At least within Pennsylvania's Commonwealth, a prosecutor's attempt to vacate an imposed sentence has been held as a violation of the separation of powers. Despite the cases mentioned above, many courts are, understandably, hesitant to forgo so much of the sentencing power that Article III initially bestowed upon them. While the conversation surrounding expanding prosecutorial post-conviction influence is just beginning, in courts that do not support this expansion, prosecutors will need to shift tactics and make arguments that do not threaten or intrude upon the court's power.

VI. EXPANDING PROSECUTORIAL POWER BY MIRRORING THE SOLICITOR GENERAL'S CHANGE IN LEGAL INTERPRETATION

While more prosecutors are beginning to challenge the breadth of prosecutorial discretion, this is not the first time an attorney has interpreted the law differently from predecessors. Anytime there is a change in the presidency, the new President appoints a Solicitor General.[88] The Solicitor General has the dual responsibility of being an advocate for the president while also being a counselor to the justices.[89] The Solicitor General helps the justices reach the appropriate result in the law, particularly in light of the shifts in beliefs of the administrations.[90] The position bridges the executive and the judicial branch, especially surrounding advancing the law in light of a presidential administration's political agenda.

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83 *Id.* at 197. *See also*, Julie Shaw, *Judge Denies Krasner Office's Request to Vacate Death Penalty in 1984 Double Murder*, THE PHILADELPHIA INQUIRER (Mar. 4, 2019), https://www.inquirer.com/news/district-attorney-larry-krasner-death-penalty-judge-mitchell-goldberg-robert-wharton-bradley-hart-sam-hart-20190304.html.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 Lincoln Caplan, *The Political Solicitor General: The "Tenth Justice" and the Polarization of the Supreme Court*, HARVARD MAGAZINE, Sept.-Oct. 2016, at 49.

89 *Id.*

90 *Id.*

Despite changing political beliefs being so prominent in contemporary news, Solicitor Generals have been changing interpretations of the law since Archibald Cox started the trend of filing briefs under John F. Kennedy's presidency.[91] As one of the first Solicitor Generals to start this trend, Cox felt more constrained by past court precedents.[92] However, Charles Fried, the Solicitor General under President Reagan, filed nearly double the amount of amicus briefs as did Cox.[93] Fried did not feel constrained by court precedent.[94] For example, he held a different interpretation of the legality of abortion just three years after the courts had affirmed abortions were, in fact, legal.[95] According to Fried, "[i]n a real sense, the Solicitor General is responsible for the government's legal theories, its legal philosophy."[96] The Solicitor General, though still an important counselor to the Court, has become an important player in enacting political agendas.

Under the Trump administration, the Solicitor General, Noel Francisco, has reversed the positions of the Obama administration in four major court cases.[97] For example, previous Solicitor Generals have read the National Voter Registration Act to hold a requirement that a state can only remove someone from its voter rolls if it has reliable evidence that the person moved away and is no longer a resident. However, the current administration abandoned this reading because this requirement "is found nowhere in the text of the law."[98] Thus, the Solicitor General advocated upholding a recent Ohio law that allowed the state to remove individuals from the voting rolls if they had not voted in four years and did not respond to an inquiry assuring state officials that they still lived within the state.[99]

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91 LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 198 (1987). *See also*, Caplan, *The Political Solicitor General*, *supra* note 88, at 50 (noting that more solicitor generals started to file amicus briefs stating different opinions of the law than previous solicitor generals).

92 *Id* at 188.

93 Caplan, *The Political Solicitor General*, *supra* note 88, at 50.

94 *Id.*

95 *Id.*

96 CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 14 (1991).

97 Caplan, *The Political Solicitor General*, *supra* note 88, at 53. *See also* Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. TIMES (Aug._28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html (discussing how the Justices of the Supreme Court have reacted when changes in the government's legal positions appear to be influenced by the President's politics).

98 Caplan, *The Political Solicitor General*, *supra* note 88, at 53.

99 *Id.* As a result of the law, Ohio sent notice to approximately one-fifth of its registered voters (around 1,500,000 people) in 2012 inquiring whether they still lived in the state since they have not voted within the past four years. Only 15% returned their cards stating that they had not moved while 4% returned their cards confirming that they had moved. The remaining 80% of individuals who did not return their cards had their voter registration cancelled by the state. *Id. See also,* Husted v. A. Phillip

Though some Solicitor Generals have been successful in changing the court's interpretation of the law, courts are usually hesitant to break away from past precedents and beliefs. In *Kiobel v. Royal Dutch Petroleum Co.,* the Solicitor General under the Obama administration, Donald B. Verrilli Jr., made an argument that the government's position had changed regarding whether American courts may hear some cases concerning human rights abuses in foreign countries.[100] The Court rejected this claim saying that, under the Alien Tort Statute, the presumption had always been that U.S. law does not apply extraterritorially.[101] Chief Justice Roberts's response to Verrilli echoed the argument against Krasner in *Wharton* by saying, "[y]our successors may adopt a different view . . . . [w]hatever deference you are entitled to is compromised by the fact that your predecessors took a different position."[102]

Despite Chief Justice Roberts' concerns, the Supreme Court was still persuaded to side with Verilli's differing perspective in *US Airways Inc., v. James McCutchen*, where it was noted that courts should read the common-fund doctrine to apply in paying for attorney in medical expenses whenever an employer's contract is silent on this issue.[103] As Chief Justice Roberts stood by his support for past precedent in his dissent, he simultaneously noted that "the position that the United States is advancing today is different from the position that the United States previously advanced."[104] Though it may be difficult for the Solicitor General to change the Court's interpretation in every circumstance, this position, historically, has successfully spearheaded changes in law.

While Krasner's argument to expand prosecutorial sentencing powers - at least in the Commonwealth - violates the separation of powers, prosecutors could mirror the Solicitor General's arguments in future cases and say they have different interpretations of the law than did their predecessors. For example, in *Brown*, Krasner supported the defense's position that there was an ineffective assistance of counsel.[105] If Krasner made an argument that his understanding of "ineffective assistance of counsel" differed from his

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Randolph Inst., 138 S. Ct. 1833, 1846 (2018) (holding that the Ohio program complied with the National Voter Registration Act); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (holding that arbitration agreements in employer contracts must now be upheld even though, under the Obama Administration, the court took a different stance in support of the employee's rights under the National Labor Relation Act).

100 *569* U.S. 108, 123 (2013) (citing Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 8 n.1, *Kiobel*, *569* U.S. 108 (No. 10-1491)).

101 *Id.* at 124.

102 Liptak, *Trump's Legal U-Turns*, *supra* note 97.

103 US Airways, Inc. v. McCutchen, *569* U.S. 88, 101 n.7 (2013).

104 Transcript of Oral Argument at 32, US Airways, Inc. v. McCutchen, *569* U.S. 88 (2013) (No. 11-1285).

105 Brief as Amici Curiae Supporting the Prosecution, *supra* note 64, at 16.

predecessors, he could be successful in persuading the court to vacate the verdict and remand for a new sentencing hearing.

If attorneys are successful in convincing courts to change their interpretations of the law, given other increases in legislative power and political trust for prosecutors, it would not be surprising for state or federal legislatures to enact a statute that would authorize prosecutors to have the discretion to reduce sentences in the limited circumstance when both the defense and State agree on a motion to reduce or vacate a sentence. In fact, this may be the natural next step for humanizing sentences.[106]

Though there is a concern that these statutes could intrude on judicial power, in light of recent caselaw and legislative decisions,[107] this would likely not be the case when the prosecution is seeking a lesser sentence than the court originally imposed. Though a prosecutor seeking stricter punishment for a defendant could disparately effect and prejudice certain defendants, courts have been more deferential to prosecutorial decisions when it comes to lessening sentences or encouraging more humane treatment of defendants.[108]

Some may worry that expanding prosecutorial influence in sentencing could be giving prosecutors too much power as a practical matter. They may argue that allowing prosecutors this discretion would leave them unchecked by the system. Though unbridled prosecutorial discretion is never a goal, it is important to remember that prosecutors, especially as public officials with their reputations and careers in the spotlight, have the unbridled check of the democratic process.[109] For example, Larry Krasner is one of Philadelphia's

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[106] Bibas, *supra* note 66, at 372.

[107] *See, e.g.*, United States v. Maloney, 755 F.3d 1044, 1046; Barry, *supra* note 76.

[108] *See* e.g, *Maloney*, 755 F.3d at 1046 (deferring to a prosecutor's decision to reverse a conviction and vacate the sentence); *Ex parte* Rhone, 900 So.2d 455, 457 (Ala. 2004) (remanding for post-conviction proceedings after the State conceded on appeal that the trial court had erred in denying petitioner's request to amend his petition); Green v. State, 251 So.3d 798, 800-801 (Ala. Crim. App. 2016) (remanding on appeal because the State conceded that this case must be remanded for resentencing when the defendant was not properly allocated.); State v. Lewis, 51 N.J. 494, 514-515 (1968) (vacating a death sentence and imposing life without parole where conviction of first degree murder was proper, but there was error in the sentencing phase. "Under all of the circumstances, *including the prosecutor's waiver of the death penalty*, we have no hesitancy in concluding that there is adequate appellate power to modify the judgments of conviction, as we do now, so that each of the defendants will stand convicted of murder in the first degree with sentence of life imprisonment.") (emphasis added).

[109] *See, e.g.*, William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L. J. 1325, 1342 (1993) ("[P]rosecutorial discretion in the American legal system must be seen as part of a political tradition that is built on a preference for *local control* over political power and on an aversion to strong centralized government authority and power.") (emphasis in original) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 346-47 (Henry Reeve trans., Cambridge, University Press 2d Ed. 1863)). *See also* Robert L. Misner, *Recasting Prosecutorial Discretion,* 86 J. CRIM. L. & CRIMINOLOGY 717, 731 (1996) ("The history of the development of the office of prosecutor has

more progressive District Attorneys.[110] Krasner ran and was elected on a campaign that wanted to reduce the number of harsh sentences some defendants receive.[111] Krasner said he wanted to reduce the amount of people who would be sentenced to and receive the death penalty.[112] Despite this more lenient sentencing limitations, Krasner was elected to be the DA by his constituents.[113]

If the greater public is not satisfied with the sentencing decisions that officials like Krasner make, the public can choose to vote them out of office and instead elect an individual whose sentencing beliefs better reflect the sentiment of the community. Perhaps this is one of the reasons policy-makers and legislatures, in recent years, have blurred the duties outlined in Articles II and III, deferring more power to the prosecutor and limiting judicial oversight. When a prosecutor suggests that a sentence be reduced, especially when the public has voted that prosecutor into office, lessening the sentence could be viewed as a more democratic decision.

VII. CONCLUSION

Prosecutorial discretion has been a widely debated and expanded concept throughout judicial history. The original intent of Articles II and III in the United States Constitution note that the executive branch, which includes prosecutors, primarily handles charging,[114] and the judicial branch primarily handles sentencing.[115] However, recent changes in legislative procedures and policy have blurred this distinction by providing more power to prosecutors and limiting the weight of judicial oversight.

Despite this enhancement of prosecutorial power, the Pennsylvania court in *Commonwealth v. Brown* decided not to grant both the prosecution and defense's appeal to vacate the capital sentence for Mr. Brown. As it is rare for

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the clear theme of . . . local representation applying local standards to the enforcement of essentially local laws.") (internal quotation marks omitted) (citation omitted).

110 *See, e.g.*, Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration.

111 *Id.*

112 Tom MacDonald, *Philly's top prosecutor calls for end of death penalty in Pennsylvania*, WHYY (JULY 16, 2019)., https://whyy.org/articles/phillys-top-prosecutor-calls-for-end-of-death-penalty-in-pennsylvania/; Julie Shaw, *35 years after her parents' murders, city and state prosecutors fight over death-row inmate's appeal*, THE PHILADELPHIA INQUIRER (Sept. 7, 2019), https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-death-penalty-robert-wharton-murders-bradley-ferne-hart-20190907.html.

113 Jeffery M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP (Oct. 26, 2017), https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx.

114 U.S. CONST. art. II, § 1, cl. 1.

115 U.S. CONST. art. III, §1, cl. 1.

a prosecutor to try to lessen a capital sentence after it has already been imposed, the Pennsylvania Supreme Court was understandably hesitant to embrace the changing definitions of executive versus judicial power. Instead, the Pennsylvania Supreme Court decided the case on an issue expressly for judicial review: Whether or not Mr. Brown had ineffective assistance of counsel throughout his trial. In light of recent precedent, courts are split on whether it is appropriate for a prosecutor to reduce a sentence after it has already been imposed. However, if District Attorneys in jurisdictions where courts are concerned about the separation of powers argue that they have different legal interpretations from their predecessors, more prosecutors could play a persuasive role in sentencing without infringing on judicial review.

Especially if prosecutors are successful in making arguments of changed legal interpretations, legislatures may even enact statutes that allow for a prosecutor to lessen imposed sentences when both the prosecution and defense agree on this reduction. Despite contemporary fears that this will give an undue benefit to the executive branch and supplant power from the judiciary, just as prosecutorial power has slowly expanded to the realm it is today, eventually, this may just be the next natural progression.

As Akhil Amar notes in *America's Unwritten Constitution*, the Constitution is a living, ever-changing document.[116] Despite the physical text rarely changing, the Constitution always shifts to include and take into account the needs and aims of modern-day society. The changes "support[] and supplement[] the written Constitution without supplanting it."[117] Expanding prosecutorial influence in sentencing will not "supplant" the court's role as noted in Article III. Rather, this determination will simply "supplement" judicial decisions and help assure appropriate sentences in all cases.

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116 AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION xi (2012).

117 *Id.*