

10.4 Charging Decisions

Conducting a broad study of prosecutors' exercise of charging discretion is a complex and potentially costly undertaking. More targeted analyses of charging decisions can be conducted, however. An attorney representing an indigent client may apply to the court for expert funds to hire a law clerk or statistician to perform a targeted analysis. Attorneys also have enlisted the assistance of doctoral students at no charge to conduct data analyses.

A. Court Records

Attorneys may obtain data from a variety of sources, including the ACIS computer system maintained by the Administrative Office of the Courts, which includes the race of defendants; and the superior court docket sheets maintained by the Clerk of Court. *See* Habitual Felon Motion and Affidavit (using such sources in a motion to dismiss based on selective enforcement and selective prosecution) in the Race Materials Bank at www.ncids.org (select "Training & Resources").

In one case, an attorney enlisted the help of a law student as well as a doctoral student in statistics to examine court records on local prosecutors' exercise of discretion to charge people as habitual felons, and to determine whether the decision to "habitualize" was based on extralegal factors such as race. *See id.* The law student examined every superior court docket sheet in the relevant Superior Court Clerk's office and recorded every pending habitual felon indictment shown on those docket sheets. These were then compared to a District Attorney's Screening List, which listed the defendants' names, charges, and prosecutors assigned to the cases, and to computer records generated from ACIS. Based on the study, the attorney moved to dismiss and for further discovery. *See id.*

B. Defense Attorney Records

When analyzing charging patterns, information contained in client records may provide a good starting point. Internal data reflecting (1) the racial and ethnic makeup of clients facing drug charges or habitual felon sentencing enhancements, and (2) which clients receive favorable and unfavorable pleas, may be useful in litigating selective prosecution claims. *See supra* § 5.3G, Gathering Evidence to Support Selective Prosecution Claims. For example, one public defender's office maintained a "too good to be true" file of favorable plea arrangements that could be consulted by attorneys engaged in plea negotiations to ensure full awareness of the range of plea arrangements that might be possible in a certain type of case. This sort of information could be collected by an administrative assistant, or included within the case management system (CMS) used by public defender offices. The version of CMS currently under development will capture data reflecting the race of defendants but will not collect (1) data reflecting defendants' ethnicity; or (2) witness/victim race or ethnicity. Nevertheless, individual public defender offices could choose to populate a field in CMS with this data. Additionally, existing data on prosecutions for similar crimes in state and federal court, broken down by race, may

provide evidence of differential treatment by state or federal prosecutors of similarly situated offenders. *See* Bureau of Justice Statistics, [Federal Criminal Case Processing Statistics](#), BJS.GOV (last visited Sept. 22, 2014) (a searchable database maintained by the U.S. Department of Justice); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999). Coordination with regional federal defender offices may facilitate gathering and analysis of such data.

C. Task Force Reports

The North Carolina Advocates for Justice's Racial and Ethnic Bias in the Criminal Justice System Task Force (Task Force) conducted a comparison of habitual felons and drug offenders incarcerated within North Carolina prisons to determine whether racial disparities were reflected in such populations. Their findings are broken down by county and available online. *See* North Carolina Advocates for Justice, [NC-CRED Publications](#), NCAJ.COM (last visited Sept. 22, 2014). The data collected for these reports was obtained from the North Carolina Department of Correction Office of Research and Planning, which is now the [North Carolina Department of Public Safety Office of Rehabilitative Programs and Services](#).