ATTACHMENT A

PRINTER'S NO. 3313

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 216 Session of 2022

INTRODUCED BY KAIL, JUNE 27, 2022

REFERRED TO COMMITTEE ON JUDICIARY, JUNE 27, 2022

A RESOLUTION

Establishing, authorizing and empowering the Select Committee on Restoring Law and Order to investigate, review and make findings and recommendations concerning rising rates of crime, law enforcement and the enforcement of crime victim rights.

RESOLVED, That the House of Representatives establish, authorize and empower the Select Committee on Restoring Law and Order to investigate, review and make findings and recommendations concerning:

(1) The rising rates of crime, including, but not limited to, the enforcement and prosecution of violent crime and offenses involving the illegal possession of firearms, in the City of Philadelphia.

(2) The use of public funds intended for the purpose of enforcing the criminal law and prosecuting crime in the City of Philadelphia.

(3) The enforcement of crime victim rights, including, but not limited to, those rights afforded to crime victims by statute or court rule, in the City of Philadelphia.

(4) The use of public funds intended for the purpose of

benefiting crime victims, including, but not limited to, crime victim compensation and crime victim services, in the City of Philadelphia;

and be it further

RESOLVED, That the findings and recommendations of the select committee may include, but are not limited to, any of the following:

(1) Determinations regarding the performance of public officials empowered to enforce the law in the City of Philadelphia, including the district attorney, and recommendations for removal from office or other appropriate discipline, including impeachment.

(2) Legislation or other legislative action relating to policing, prosecution, sentencing and any other aspect of law enforcement.

(3) Legislation or other legislative action relating to ensuring the protection, enforcement and delivery of appropriate services and compensation to crime victims.

(4) Legislation or other legislative action relating to ensuring the appropriate expenditure of public funds intended for the purpose of law enforcement, prosecutions or to benefit crime victims.

(5) Other legislative action as the select committee finds necessary to ensure appropriate enforcement of law and order in the City of Philadelphia;

and be it further

RESOLVED, That the select committee consist of five members of the House of Representatives, including three members from the majority party of the House of Representatives and two members from the minority party of the House of Representatives;

and be it further

RESOLVED, That the Speaker of the House of Representatives appoint the chair of the select committee from among the members of the select committee; and be it further

RESOLVED, That the chair of the select committee, on behalf of the select committee, be authorized and empowered to do all of the following:

(1) send for individuals and papers and subpoena witnesses, documents, including electronically stored information, and any other materials under the hand and seal of the chair;

(2) administer oaths to witnesses;

(3) take testimony;

(4) conduct interviews, take statements and any other investigative steps as determined by the chair;

(5) prepare and file pleadings and other legal documents; and

(6) employ counsel and staff for the use of the chair or the select committee;

and be it further

RESOLVED, That the Sergeant-at-Arms or a deputy, or other competent adult authorized by the chair, serve the process and execute the order of the select committee; and be it further

RESOLVED, That the select committee be authorized to sit during the sessions of the House of Representatives; and be it further

RESOLVED, That the expenses of the select committee investigation be paid by the Chief Clerk from appropriation accounts under the Chief Clerk's exclusive control and jurisdiction upon a written request approved by the Speaker of

the House of Representatives, the Majority Leader of the House of Representatives or the Minority Leader of the House of Representatives; and be it further

RESOLVED, That the Pennsylvania Commission on Sentencing assist the select committee to the extent requested by the chair of the select committee; and be it further

RESOLVED, That the Judiciary Committee of the House of Representatives assist the select committee to the extent requested by the chair of the select committee; and be it further

RESOLVED, That the select committee submit a final report to the House of Representatives with its findings and recommendations, which shall be made available to the public.

ATTACHMENT B

278 A.3d 885
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant
v.
Ryan POWNALL, Appellee

No. 17 EAP 2021
|
Argued: December 7, 2021
|
Decided: July 20, 2022

Synopsis

Background: Defendant was charged with third-degree murder and other crimes arising out of shooting death of victim while defendant was acting in his capacity as police officer. Prosecutor filed motion in limine to preclude standard peace officer justification defense instruction, based on claim that instruction, which largely tracked language of statute, violated Fourth Amendment prohibition against unreasonable search and seizure. The Court of Common Pleas, Philadelphia County, Criminal Division, No. CP-51-CR-0007307-2018, denied motion, and prosecutor appealed. The Superior Court, No. 148 EDA 2020, quashed appeal as unauthorized interlocutory appeal as of right. Supreme Court granted prosecutor's request for allowance of appeal.

Holdings: As matter of first impression, the Supreme Court, No. 17 EAP 2021, Dougherty, J., held that:

[1] order denying motion in limine to preclude trial court from giving standard instruction on peace officer justification as defense to charge did not substantially handicap prosecution, as required for interlocutory appeal from denial of motion as of right, and

[2] whether peace officer justification defense instruction violated Fourth Amendment prohibition against unreasonable search and seizure could not be separated from merits of prosecution, thus precluding prosecutor's interlocutory appeal as of right; and

[3] as-applied challenge to justification defense could not be separated from merits of charge, thus precluding prosecutor's interlocutory appeal as of right from order denying motion, under collateral order doctrine.

Affirmed.

Dougherty, J., filed concurring opinion.

Wecht, J., filed dissenting opinion in which Donohue, J., joined.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (18)

[1] **Attorney General** Powers and Duties
Constitutional Law Notice to Attorney General
District and Prosecuting Attorneys Duties

When a county district attorney prosecutes a case in the name of the Commonwealth, he or she assumes the duty to defend a challenged statute's constitutionality, and no notice to the Attorney General is needed. Pa. R. App. P. 521(a).

[2] **Criminal Law** Form and Language in General

The suggested standard jury instructions are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only.

[3] **Criminal Law** Review De Novo

Pure questions of law are reviewed de novo.

[4] **Criminal Law** Right of Prosecution to Review

The classic case of an interlocutory order appealable by the Commonwealth as of right is one granting a defense motion to suppress evidence; this category covers all types of orders resulting in the suppression or exclusion of Commonwealth evidence, and it includes orders

that have the practical effect of suppressing or excluding evidence. Pa. R. App. P. 311(d).

[5] **Criminal Law** Right of Prosecution to Review

Order denying prosecutor's motion in limine to preclude trial court from giving standard instruction on peace officer justification as defense to charge for third-degree murder, based on Fourth Amendment challenge to standard instruction that authorized officer's use of deadly force when officer reasonably believed such force was necessary to prevent arrest from being defeated by resistance or escape and arrestee had committed or attempted forcible felony, or when arrestee was attempting to escape and possessed deadly weapon, did not substantially handicap prosecution, as required for prosecutor's interlocutory appeal from denial of motion as of right, despite prosecutor's assertion that it forced prosecutor to disprove three elements, two of which were constitutionally invalid, where prosecutor's concern was hypothetical and purely speculative, especially since no evidence had yet been presented for trial court to determine whether evidence warranted instruction. U.S. Const. Amend. 4; 18 Pa. Cons. Stat. Ann. § 508; Pa. R. App. P. 311(d).

[6] **Criminal Law** Preliminary or interlocutory orders in general

The "collateral order doctrine" permits an appeal as of right from a non-final collateral order if the order satisfies the three requirements set forth in rule governing collateral orders: separability, importance, and irreparability. Pa. R. App. P. 313(b).

[7] **Criminal Law** Preliminary or interlocutory orders in general

Appellate courts construe collateral order doctrine narrowly, on interlocutory appeal as of right, and insist that each three prongs, specifically, separability, importance, and irreparability be clearly present before collateral appellate review is allowed; this approach avoids undue corrosion of the final-order rule, prevents delay resulting from piecemeal review of trial court decisions, and it also recognizes that a party may seek allowance of appeal from an interlocutory order by permission. Pa. R. App. P. 312, 313(b).

[8] **Criminal Law** Preliminary or interlocutory orders in general

An order is "separable" from the main cause of action, for purposes of rule governing interlocutory appeal as of right under collateral order doctrine, if it is entirely distinct from the underlying issue in the case. Pa. R. App. P. 313(b).

[9] **Criminal Law** Preliminary or interlocutory orders in general

Although some slight interrelatedness between the merits and the issue to be raised on interlocutory appeal is tolerable, to meet the "separability" prong of the rule governing interlocutory appeal was of right, under the collateral order doctrine, the claim must nevertheless be conceptually distinct from the merits, which, in the criminal context, involves the determination whether the defendant committed the crimes charged. Pa. R. App. P. 313(b).

[10] **Criminal Law** Preliminary or interlocutory orders in general

To assess "separability" prong of rule governing an interlocutory appeal as of right under the collateral order doctrine, the appellate court asks whether resolution of the issue can be achieved independent from an analysis of whether the defendant is guilty. Pa. R. App. P. 313(b).

[11] **Criminal Law** Right of Prosecution to Review

Whether peace officer justification instruction, which authorized officer's use of deadly force when officer reasonably believed such force was necessary to prevent arrest from being defeated by resistance or escape and arrestee had committed or attempted forcible felony, or when arrestee was attempting to escape and possessed deadly weapon, violated Fourth Amendment prohibition against unreasonable search and seizure could not be separated from merits of prosecution on charge for third-degree murder, thus precluding prosecutor's interlocutory appeal as of right from order denying pretrial motion in limine to prevent giving of instruction, where ruling in prosecutor's favor on its constitutional issue would result in after-the-fact judicial alteration of substantive criminal law with which defendant was charged. U.S. Const. Amend. 4; 18 Pa. Cons. Stat. Ann. § 508; Pa. R. App. P. 313(b).

[12] **Constitutional Law** Facial invalidity

A statute is "facially unconstitutional" only where no set of circumstances exists under which the statute would be valid.

1 Cases that cite this headnote

[13] **Statutes** Validity

In determining whether a statute is facially invalid, courts do not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases.

[14] **Constitutional Law** Facial invalidity

Facial challenges to the constitutionality of a statute are generally disfavored and are also the most difficult challenge to mount successfully.

[15] **Criminal Law** Right of Prosecution to Review

Even assuming that prosecutor asserted, in pretrial motion in limine, as-applied Fourth Amendment challenge to constitutionality of peace officer justification defense when officer reasonably believed such force was necessary to prevent arrest from being defeated by resistance or escape and arrestee had committed or attempted forcible felony, or when arrestee was attempting to escape and possessed deadly weapon, as-applied challenge could not be separated from merits of charge for third-degree murder, thus precluding prosecutor's interlocutory appeal as of right from order denying motion under collateral order doctrine, where as-applied challenged necessarily required consideration of facts of case and defendant's particular circumstances. U.S. Const. Amend. 4; 18 Pa. Cons. Stat. Ann. § 508; Pa. R. App. P. 313(b).

[16] **Arrest** Use of force

In cases involving a peace officer's use of deadly force to effect a seizure, the first step in assessing the constitutionality of the officer's actions is to determine the relevant facts, because the Fourth Amendment's reasonableness inquiry is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. U.S. Const. Amend. 4.

[17] **Constitutional Law** Facial invalidity

Constitutional Law Invalidity as applied

Litigant's characterization of a challenge to the constitutionality of a statute as being facial or "as applied" is not controlling.

[18] **Constitutional Law** Invalidity as applied

An as-applied challenge to the constitutionality of a criminal statute necessarily requires consideration of a defendant's particular circumstances.

***887** Appeal from the Judgment of Superior Court entered on 9/4/2020 at No. 148 EDA 2020 Quashing the appeal from the order entered on 12/30/2019 in the Court of Common Pleas, Philadelphia County, Criminal Division at No. CP-51-CR-0007307-2018.

Attorneys and Law Firms

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BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE DOUGHERTY

***888** This case concerns the tragic death of David Jones. Appellee Ryan Pownall, a (former) Philadelphia Police Officer, is charged with killing Jones by gunfire while on duty in his capacity as a police officer. Anticipating Pownall might pursue at trial a peace officer justification defense under 18 Pa.C.S. § 508 (setting forth circumstances in which a peace officer's use of deadly force while making an arrest is not a crime), the Philadelphia District Attorney's Office ("DAO"), on behalf of the Commonwealth, filed a pretrial motion in limine seeking to preclude the trial court from using Suggested Standard Jury Instruction (Crim) § 9.508B, which largely tracks Section 508.[1] The DAO argued that since the justification statute supposedly violates the Fourth Amendment to the United States Constitution as interpreted by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), so too must the standard jury instruction based on the statute. The trial court disagreed. It concluded the DAO's pretrial motion, by itself, was "insufficient to establish the unconstitutionality of Section 508[.]" Trial Court Op., 12/30/2019 at 3. Moreover, the court believed the DAO's suggested remedy — proposing that it rewrite several disjunctive "ors" within the statute to conjunctive "ands" — was an "inappropriate" request for it to "judicially usurp the legislative function of the Pennsylvania General Assembly and rewrite Section 508 out of whole cloth." *Id.* For those reasons it denied the DAO's request to certify the case for interlocutory appeal. When the DAO appealed anyway, the Superior Court quashed, reasoning the trial court's order was not collateral and did not substantially handicap or terminate the DAO's prosecution. We granted review to determine whether the Superior Court erred in quashing the appeal. Because we conclude it did not, we affirm.

I. Background

[1] We begin by emphasizing this is an interlocutory Commonwealth[2] appeal of a ***889 pretrial** order. As such, there are few uncontested facts presently before us regarding the underlying incident, and it would be improper for us to comment on evidence that may or may not eventually be introduced should this matter reach trial. All we can say for certain in this posture is that on June 8, 2017, Jones was killed by gunfire following an incident involving Pownall. At some later point, the DAO submitted the matter to the Twenty-Ninth Philadelphia County Investigating Grand Jury, which eventually issued a presentment recommending Pownall be charged with criminal homicide, possession of an instrument of crime, and recklessly endangering another person.[3] On September 4, 2018, the DAO charged Pownall in a criminal complaint with the latter two crimes; it also charged third-degree murder under 18 Pa.C.S. § 2502(c). It then sought to bypass a preliminary hearing. Over Pownall's objection, which was grounded in the plain text of Section 4551(e) of the Investigating Grand Jury Act,[4] the Honorable Robert J. Coleman granted the DAO's bypass motion on October 11, 2018 and bound the case over for trial on the charges listed in the criminal complaint.

The case was assigned to the Honorable Barbara A. McDermott who scheduled it for a trial date of January 6, 2020. On April 1, 2019, Pownall filed a motion for change of venue or venire, which the DAO opposed. After conducting two mock jury selections over the span of several months to test whether Pownall could receive a fair trial in Philadelphia, the trial court concluded he could. Thus, on November 24, 2019, it denied his motion. *See* N.T. 11/25/2019 at 22.

Also on that date — which was only a little more than a month before trial was set to begin, yet "more than a year and two months after [Pownall]'s arrest ... and more than two years and five months after" Jones's death, Trial Court Op., 1/2/2020 at 2 n.2 — the DAO informed the trial court and Pownall that it intended to file a motion seeking to bar use of the suggested standard jury instruction relative to the peace officer justification defense. According to Assistant District Attorney ***890** Tracy Tripp, the intent behind the DAO's forthcoming motion was

> not to bar [Pownall] from a defense because I don't think that is allowable or appropriate. But I do feel as though — and we, the [DAO], feel as though the law itself is unconstitutional. It is a request for a decision on the constitutionality of certain prongs of 508A1, and also for the jury instructions in light of that. But I don't think it impacts the defense.

N.T. 11/25/2019 at 8. ADA Tripp asserted the DAO's motion would merely provide "two alternatives for possible jury instructions ... [b]ecause, again, I think you get into dicey territory, if the Commonwealth is trying to tell a defendant or defense counsel what they can and can't argue as defenses." *Id.* at 24.

The DAO filed its motion in limine later that day. Therein, it expressed its belief that "justification under section 508(a)(1) will be a trial issue" and submitted that "a pre-trial determination of an issue related to the Pennsylvania Suggested Standard Jury Instruction for section 508 is necessary to prevent protracted mid-trial litigation." Motion in Limine, 11/25/2019 at 2. More precisely, the DAO asked the trial court to

> refrain from giving the Pennsylvania Suggested Standard Criminal Jury Instruction regarding section 508 because it is unconstitutional under the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court, and equally unconstitutional under Article 1, Section 8 of the Pennsylvania Constitution.[5] The [DAO] contends that when section 508 is read in light of controlling and persuasive Fourth Amendment jurisprudence regarding deadly force used in the apprehension of criminal suspects, that section's confusing conjunctive and disjunctive clauses result in clearly untenable justifications for the use of such deadly force.

Id. at 3.

To contextualize the DAO's arguments pertaining to Section 508, we turn briefly to the statute. It states:

> **(a) Peace officer's use of force in making arrest.--**
>
> (1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:
>
> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

> (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. § 508.

This text provides four circumstances in which a police officer's use of deadly force ***891** while making an arrest is justified. First, when the officer reasonably believes "such force is necessary to prevent death or serious bodily injury to himself or such other person[.]" *Id.* at (a)(1).[6] Second, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested has committed or attempted a forcible felony[.]" *Id.* at (a)(1)(i)-(ii). Third, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested ... is attempting to escape and possesses a deadly weapon[.]" *Id.* And fourth, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested ... indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay[.]" *Id.*

Returning to the DAO's motion in limine, it detected no constitutional infirmity with respect to the first or fourth scenarios presented above. But it strongly contested the constitutionality of the other two, which we will refer to as the "forcible felony" and "deadly weapon" justifications. The DAO's grievance with those specific justifications was based on its interpretation of *Garner*'s impact on substantive state criminal laws like Section 508. So, to add still more context, we now examine *Garner*.

Garner was decided nearly twelve years after Section 508 became effective. In that case, Edward Garner's father filed an action in federal district court seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights committed by Memphis Police Officer Elton Hymon. Late in the evening on October 3, 1974, Hymon and another officer responded to a "prowler inside" call. When they arrived, a neighbor gestured toward the house in question and informed the officers she heard glass shatter and believed the house was being burglarized. Hymon approached the rear of the house, where he heard a door slam and saw someone run across the backyard. The suspect, Garner, stopped at a six-foot-high chain link fence at the edge of the yard. Hymon shined his flashlight at Garner — a fifteen-year-old who was 5'4" tall and weighed roughly 100 pounds — and saw no sign of a weapon. Hymon then called out "police, halt" and took a few steps forward, but Garner began to climb the fence. Convinced Garner would elude capture if he made it over, Hymon shot him in the back of the head, killing him. Ten dollars and a purse taken from the house were found on Garner's body.

Hymon's use of deadly force to prevent Garner's escape was authorized by a Tennessee statute and a Memphis Police Department policy. The statute provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-7-108 (former). The Police Department policy, though slightly more restrictive than the statute, still allowed the use of deadly force in cases of burglary. As a result, neither criminal nor administrative action was taken against Hymon for killing Garner.

***892** With respect to Garner's father's civil suit, the district court found Hymon's actions to be authorized by the Tennessee statute. The Sixth Circuit Court of Appeals agreed Hymon had acted in good-faith reliance on the statute and was therefore within the scope of his qualified immunity. However, it reversed the district court's dismissal of claims against the City of Memphis. Relevant here, it reasoned the killing of a fleeing suspect is a seizure under the Fourth Amendment, meaning it is constitutional only if reasonable.[7] In this instance, the Sixth Circuit concluded, the facts as found did not justify the use of deadly force against Garner under the Fourth Amendment.

The State of Tennessee subsequently intervened to defend the statute and sought *certiorari* before the United States Supreme Court, which was granted. On its review, the High Court affirmed. Initially, it held "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7, 105 S.Ct. 1694; *see id.* at 8, 105 S.Ct. 1694 ("it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out"). The Court continued: "To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion

on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (internal quotations, brackets, and citations omitted). It then looked to other situations in which it had conducted a similar balancing and resolved that, even if an officer has "probable cause to seize a suspect, [he] may not always do so by killing him." *Id.* at 9, 105 S.Ct. 1694.

In reaching this conclusion, the Court explained that on one side of the scale is the "interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* Also on that side is a "suspect's fundamental interest in his own life" which, the Court pointedly remarked, "need not be elaborated upon." *Id.* Meanwhile, on the other side of the scale is a range of "governmental interests in effective law enforcement[,]" including a goal of reducing overall violence by encouraging peaceful submission. *Id.* Ultimately, however, the Court concluded that despite the importance of these legitimate objectives, effectuating a seizure by use of deadly force — the intrusiveness of which "is unmatched" — is "a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion." *Id.* at 9-10, 105 S.Ct. 1694. In other words, the Court was not persuaded "that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life." *Id.* at 11, 105 S.Ct. 1694.

Two additional paragraphs from *Garner* warrant discussion. The first because it forms the crux of the DAO's constitutional argument; the second because the DAO mostly ignores it notwithstanding its clear relevance to the DAO's claim. Starting with the DAO's preferred paragraph, it states:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. **Where the suspect poses no immediate *893 threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so**. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. **A police officer may not seize an unarmed, nondangerous suspect by shooting him dead**. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

Id. (emphasis added). The second paragraph, which immediately follows the first, provides:

> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

Id. at 11-12, 105 S.Ct. 1694.

Focusing on the first paragraph above (the bolded parts in particular), and relating it back to Section 508, the DAO argued the forcible felony justification "is unconstitutional because the available definition of 'forcible felony' is too broad, and includes felonies that, under *Garner*, would not warrant deadly use of force." Motion in Limine, 11/25/2019 at 9. The DAO recognized the term "forcible felony" is not defined in the Crimes Code, but it looked to the

subcommittee note for Suggested Standard Jury Instruction (Crim) § 9.508B, which states:

> Subparagraph 3.b(1) of subdivision 3.b is based on the first clause of Crimes Code section 508(a)(1)(ii), which uses the term "forcible felony," a term not defined in the code. The trial judge should specify the particular crime involved, again depending on the evidence. The term "forcible felony" (and thus the applicability of this subparagraph of the instruction) appears to be limited to the felonies involving some element of force that are enumerated in the note to Instruction 9.508E.

Pa. SSJI (Crim) § 9.508B, Subcommittee Note.

Based on the final sentence in this passage, the DAO naturally went searching for the list of "felonies involving some element of force that are enumerated in the note to Instruction 9.508E." *Id.* But, as it turns out, no such list exists there. Nor are there any felonies "enumerated" in Instruction 9.508E itself (as opposed to within its note). So, the DAO instead seized other language from that Instruction referencing crimes involving or threatening "bodily injury," "damage to or loss of property," or a "breach of the peace[.]" Pa. SSJI (Crim) § 9.508E. Assuming those must be the terms that define the bounds of a "forcible felony" as understood by Section 508, the DAO challenged them as "too broad to comport with *Garner*[.]" Motion in Limine, 11/25/2019 at 9.

Turning to the deadly weapon justification, the DAO found it "even more broad than the 'forcible felony' scenario, and even more out of step with constitutional requirements." *Id.* (emphasis omitted). The DAO contended it allows "police officers to kill anyone — regardless of whether they are suspected of committing a felony, misdemeanor, or even an arrestable summary ***894** offense — who attempts to escape from arrest and happens to possess a 'deadly weapon[.]' " *Id.* at 10, 105 S.Ct. 1694. This theoretical possibility, the DAO alleged, "blatantly violates the Fourth Amendment's prohibition against the use of deadly force against misdemeanants." *Id.* at 10-11, 105 S.Ct. 1694 (citation omitted). [8]

More broadly, the DAO asserted its view that "[w]eapon possession does not by itself create a fair inference that a suspect creates the requisite danger demanded by the *Garner* Court." *Id.* at 11, 105 S.Ct. 1694. Rather, it argued *Garner* requires "some indication that the suspect created an objectively reasonable belief that he or she threatens the life or limb of the officer or others unless arrested without delay." *Id.* (citation omitted). If the law was otherwise, the DAO feared the statute could permit the killing of fleeing suspects who merely possess any item recognized as a "deadly weapon" under Pennsylvania case law, which includes "knives, blackjacks, mace, mouse poison, and cars." *Id.* at 10, 105 S.Ct. 1694 (footnoted citations omitted).

Believing it had identified potential ways in which Section 508's forcible felony and deadly weapon justifications could be applied in an unconstitutional manner, the DAO went on to offer a proposed remedy. To that end, it advised that "chang[ing] the offending 'ors' to 'ands' would bring Section 508(a)(1)(ii) within the relevant Fourth Amendment jurisprudence." *Id.* at 13, 105 S.Ct. 1694. Reformulating the statute in that way "would permit officers to only use deadly force against fleeing arrestees who attempted or committed a forcible felony **and** possess a deadly weapon **and** indicate that they would endanger human life or inflict serious bodily injury unless arrested without delay." *Id.* at 16, 105 S.Ct. 1694 (emphasis added). Put differently, the DAO asked the trial court to collapse three of the four independent justifications listed in Section 508 into one.

As for the corresponding suggested standard jury instruction — which, as we noted earlier, tracks Section 508 [9] — the ***895** DAO similarly recommended swapping the so-called offending "ors" with nonoffending "ands." *See id.* at 20-21, 105 S.Ct. 1694. Alternatively, it posited that the trial court could "simply excise the unconstitutional provisions, and squarely focus on the appropriate endangerment requirements[.]" *Id.* at 21, 105 S.Ct. 1694.

Pownall opposed the DAO's motion. He found it "truly unimaginable that the most powerful[ ] elected law enforcement official in Philadelphia County would ignore the law in charging a peace officer, and then try to change the law that the peace officer had relied on in the performance of his duties." Response to Motion in Limine, 12/4/2019 at 3. [10]

On the merits Pownall made several rejoinders. First, he noted the presumption that statutes are constitutional and the high burden for overcoming that presumption. He also criticized the DAO for failing to "cite to a single binding case in support of its position." *Id.* at 4. Concerning *Garner*, Pownall stressed it was "a civil case [in which the High Court] held the [Tennessee statute] unconstitutional only 'as applied.' " *Id.* at 7 (citation omitted). Pownall argued the Supreme Court "has never and would never require the state[s] to criminalize the use of deadly force by a peace officer" in any circumstance — a conclusion reached by at least one state supreme court. *Id.* at 7-8, *citing* *People v. Couch*, 436 Mich. 414, 461 N.W.2d 683, 684 (1990) ("*Garner* was a **civil** case which made no mention of the officer's criminal responsibility for his 'unreasonable' actions. Thus, not only is the [High] Court without authority to require this state to make shooting a nondangerous fleeing felon a **crime**, it has never even expressed an intent to do so.") (emphasis in original). Finally, Pownall raised due process and *ex post facto* concerns based on the DAO's resolve to have applied to his case a judicially altered version of Section 508 that was not in effect at the time of the underlying incident. *See* *id.* at 4, 105 S.Ct. 1694 (asserting the DAO's "attempt to change the law after the incident runs afoul of due process"); *id.* at 7, 105 S.Ct. 1694 (claiming the DAO "seeks an *ex post facto* judicial rule of law to [his] sole detriment").

[2] The trial court, in its opinion, has provided an explanation for what happened next. The court describes how it intended to hold the DAO's motion in limine under advisement because the motion "presented an evidentiary issue which would have to be determined upon hearing the evidence presented at trial." Trial Court Op., 12/30/2019 at 1. [11] Then, on December 23, ***896** 2019 — only days after Pownall sought to quash the presentment and dismiss all charges based on alleged grand jury irregularities, *see supra* n.10 — counsel for the parties "made an unscheduled appearance" in the trial court, at which time the DAO requested a favorable ruling on its motion in limine and asserted its intent to appeal if the motion was denied. *Id.* at 1-2. Faced with that demand, the court "elected to rule on the [DAO's motion] and explain its reasoning[.]" *Id.* at 2.

The trial court determined the DAO's motion, "on its own, is insufficient to establish the unconstitutionality of Section 508[.]" *Id.* at 3. This statement implies the court believed the DAO needed to present something more to substantiate its underlying Fourth Amendment claim — presumably meaning evidence introduced at trial that would permit Pownall to seek an instruction on the allegedly unconstitutional forcible felony or deadly weapon justifications. Along similar lines, the court expressed concern that rather than launch an actual facial challenge to the statute, the DAO had raised only hypothetical problems in the abstract, untethered to Pownall's case. *See id.* ("in lieu of arguing that the statute is plainly unconstitutional, the [DAO] suggests that the conjunctions used in that statute gives rise to an unconstitutional interpretation"). And, the court opined that "[i]rrespective of the constitutionality of the statute," the DAO's proposed remedy was "inappropriate." *Id.*; *see id.* ("This [c]ourt has no authority to summarily rewrite portions of a criminal statute, for doing so would serve only to supersede the will of the people as placed into the hands of the legislature.").

Having rejected the DAO's arguments, the trial court proceeded to suggest that any appeal taken "should be quashed." *Id.* at 4. It first asserted the DAO could not appeal under Pa.R.A.P. 311, which permits the Commonwealth to "appeal as of right from an order that does not end the entire case where [it] certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution." Pa.R.A.P. 311(d). In the trial court's view, its order denying the DAO's motion "in no way handicap[ped] the [DAO]'s ability to present evidence or terminate[d]" its prosecution, because the order was "limited only to the application of a jury instruction pertaining to [Pownall]'s possible affirmative defense." Trial Court Op., 12/30/2019 at 4; *see id.* (explaining the DAO was not prevented "from presenting its case in chief").

The trial court further stated its order did not implicate the collateral order doctrine under Pa.R.A.P. 313. That rule permits an appeal as of right from a collateral order, which is defined as "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the

claim will be irreparably lost." Pa.R.A.P. 313(b). From the court's perspective, the DAO could not demonstrate the order was separable from and collateral to the main cause of action because, "[b]y its very nature, the propriety and necessity of a self-defense instruction, if requested by the [d]efendant, cannot be decided without considering the evidence presented at trial and its relation to the [d]efendant's guilt." Trial Court Op., 12/30/2019 at 5.

***897** The trial court issued its ruling and opinion on December 30, 2019. In the afternoon of the following day (New Year's Eve), the DAO filed a petition asking the court to amend its order by adding a certification permitting it to take an interlocutory appeal. *See* 42 Pa.C.S. § 702(b) (trial court may in its discretion authorize appeal from an interlocutory order where it believes the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter"). Exactly twenty minutes later, before the court conceivably could have given the request serious deliberation, the DAO filed a notice of appeal. In its notice, the DAO certified under Rule 311(d) that the court's order terminated or substantially handicapped its prosecution of Pownall; it also invoked the collateral order doctrine under Rule 313(b).

When the court returned after the holiday it promptly issued an order and opinion denying the DAO's request to certify the case for interlocutory appeal under Section 702. The court described how none of the non-binding cases cited by the DAO in its request for certification — all of which were previously included in the DAO's motion in limine — "suggest that the current construction of Section 508 is unconstitutional, or that the statute may be interpreted to justify a peace officer's use of deadly force against a person who poses no threat to human life or safety." Trial Court Op., 1/2/2020 at 2. Thus, seeing "no basis ... to permit an interlocutory appeal" in the absence of a controlling question of law as to which there is a substantial ground for difference of opinion, the court denied the DAO's request. *Id.* In so doing, it conveyed discontent with the DAO's decision "to wait until weeks before trial to present its motion" challenging Section 508. *Id.* at 2 n.2; *see* N.T. 1/6/2020 at 9 (indicating "frustration that this was last minute").

When the DAO's appeal reached the Superior Court, that tribunal issued a rule to show cause directing the DAO to explain why its appeal should not be quashed as interlocutory, citing Pa.R.A.P. 341(a) ("[A]n appeal may be taken as of right from any final order[.]"). The DAO responded, after which the court discharged its rule and referred the matter to the merits panel.

On September 4, 2020, the panel, through a *per curiam* order, followed the trial court's recommendation and quashed the DAO's appeal. The panel's order explained the appeal was not authorized under Pa.R.A.P. 311(d) or Pa.R.A.P. 313(b). Regarding Rule 311(d), it reasoned the trial court's order did not hinder the DAO's prosecution since it "does not exclude, suppress or preclude" any evidence. *Commonwealth v. Pownall*, 240 A.3d 905, 2020 WL 5269825 at *1 (Pa. Super. 2020) (*per curiam*). As for Rule 313(b), the panel likewise "agree[d] with the trial court's assessment that the necessity and propriety of [Pownall]'s justification defense depends upon consideration of the evidence presented at trial and therefore cannot be severed from the ultimate issue — [Pownall]'s guilt or innocence." *Id.* Consequently, the panel concluded the DAO had "failed to show that the order is a collateral order[.]" *Id.*

One other aspect of the panel's *per curiam* order is notable. Like the trial court, the panel voiced its disapproval of the DAO's request "that th[e c]ourt rewrite the statute, using conjunctive over disjunctive language." *Id.* at *1 n.1. That remedy, the panel insisted, "would infringe on legislative action and violate the doctrine of separation of powers." *Id.*, *citing* ***898** PA. CONST. art. V, § 10. As such, the panel advised the DAO its "[r]ecourse lies with the General Assembly." *Id.*

II. Arguments & Analysis

[3] We granted allowance of appeal to consider whether the Superior Court erred in quashing the DAO's appeal. Although we accepted review of three issues, [12] given our disposition of the first two — which present pure questions of law we review *de novo*, *see* *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648, 652 n.3 (2006) — we do not reach the final issue, in which the DAO argues the merits of its underlying Fourth Amendment claim. [13] As well, we elect to consider the first two issues in the order they were addressed by the courts below, *i.e.*, in reverse.

A. Appealability Under Rule 311(d)

i. Arguments

In its principal brief, the DAO argues its appeal is proper under Rule 311(d) on the basis that the trial court's order denying its motion in limine "enable[s Pownall] to evade conviction through the use of a defense that violates constitutional rights." DAO's Brief at 15. This is enough to satisfy Rule 311(d), says the DAO, because our decisional law in this arena (which we discuss below) supposedly reduces to three principles: (1) Rule 311(d) is "based on the Commonwealth's burden to prove its case beyond a reasonable doubt"; (2) "the exercise of Rule 311(d) jurisdiction is appropriate when the issue would otherwise evade review"; and (3) the rule is not limited to the suppression, exclusion, or preclusion of Commonwealth evidence. *Id.* at 19-20. Under this theory, it is irrelevant that the trial court's order has nothing to do with the evidence the DAO may present as part of its case — what matters, in the DAO's view, is that the order affects its burden of proof and involves an issue that might otherwise evade review. *See id.* at 20 (avowing order affects its burden of proof because "jury instructions based on Section 508(a)(1) would force [it] to disprove three elements, two of which are constitutionally invalid, rather than one constitutional element").

Pownall responds that the language of Rule 311(d) and our decisions interpreting it permit the Commonwealth to take an interlocutory appeal only "where the trial court's order terminates or substantially handicaps its prosecution or has the practical effect of doing so." Pownall's Brief at 29. Here, he submits, the DAO "has failed to explain how the order terminates or substantially handicaps its prosecution[.]" *Id.* at 28; *see id.* at 29 (the DAO "has not and cannot establish how the trial court's order refusing to modify the language of a ***899** jury instruction that may not even be warranted in this case terminates or substantially handicaps its prosecution"). He observes the only hindrance alleged by the DAO is the possibility "that the trial court's order makes it more difficult to satisfy its burden of proof[.]" *Id.* at 28. However, citing another of our cases, Pownall asserts we have "already rejected the claim that the Commonwealth may file an interlocutory appeal any time a trial court issues an order that might potentially affect its ability to meet its burden of proof." *Id.* at 26, *citing* *Commonwealth v. Shearer*, 584 Pa. 134, 882 A.2d 462 (2005).

In its reply brief, the DAO appears to partially retreat from its original position. Confronted with the case cited by Pownall, it now concedes Rule 311(d) "does not permit an appeal in every case where the order implicates the Commonwealth's ability to meet its burden of proof." DAO's Reply Brief at 13. Instead, the DAO argues its "interest in proving its case must be balanced with a defendant's right to present his chosen evidence — a right not at issue here." *Id.* (emphasis omitted). It then reiterates its belief that the trial court's order substantially handicaps its prosecution "by forcing it to disprove multiple justification defenses, two of which unconstitutionally immunize" Pownall. *Id.*

ii. Analysis

We have previously traced the history of Rule 311(d), which emanates from our decision in *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1963). In that case, we "found that a pretrial suppression order which terminates or handicaps the prosecution has 'such an attribute of finality as to justify the grant of the right of appeal to the Commonwealth.' " *Commonwealth v. Cosnek*, 575 Pa. 411, 836 A.2d 871, 874 (2003), *quoting* *Bosurgi*, 190 A.2d at 308; *see* *Commonwealth v. Dugger*, 506 Pa. 537, 486 A.2d 382, 386 (1985) (the Commonwealth may "appeal from a [non-]final order when [it] certifies in good faith that the suppression order terminates or substantially handicaps its prosecution"). In time, this "terminates or substantially handicaps" language made its way into Rule 311 via an amendment that became effective on July 6, 1992. *See* *Cosnek*, 836 A.2d at 874.

[4] Since then, "this Court has taken a fairly categorical approach to the application of Rule 311(d)." *In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 907 A.2d 505, 515 (2006). For example, "[t]he classic case of an interlocutory order appealable by the Commonwealth as of right ... is one granting a defense motion to suppress evidence." *Commonwealth v. Boczkowski*, 577 Pa. 421, 846 A.2d 75, 87 (2004) (citation omitted). This category covers all types of orders resulting in the suppression or exclusion of Commonwealth evidence. *See* *Commonwealth v. Gordon*, 543 Pa. 513, 673 A.2d 866, 868 (1996) (finding "no essential difference between suppression rulings and rulings on motions in limine" that exclude evidence). And it

includes orders that have "the practical effect" of suppressing or excluding evidence. *See* *Commonwealth v. Matis*, 551 Pa. 220, 710 A.2d 12, 18-19 (1998) (pretrial order denying the Commonwealth's motion for a continuance to secure the presence of necessary witness was "sufficiently similar to a suppression order to justify an appeal"). At the same time, we have held as a categorical matter that "the Commonwealth's right to interlocutory appeals does not extend to appealing the admission of **defense** evidence." *Cosnek*, 836 A.2d at 876 (emphasis added); *see* *id.* (allowing Commonwealth to appeal rulings admitting defense evidence would force the accused "to balance his right to a trial without delay with his fundamental right to present evidence"; "[t]he chilling effect of such a ***900** choice would give the Commonwealth an unwarranted and unfettered influence over the defense case").

Although in *Cosnek* we seemed to imply Rule 311(d) is "limit[ed]" to pretrial rulings resulting "in the suppression, preclusion or exclusion of Commonwealth evidence[,]" *id.* at 877, two years later we clarified that statement in *Shearer*, *supra*. There, we explained *Cosnek* simply "made clear that the application of Rule 311(d) **in the suppression context** is limited to circumstances in which a pretrial ruling results in the suppression, preclusion or exclusion of Commonwealth evidence." 882 A.2d at 467 (internal quotations and citation omitted; emphasis added). We expounded there are "other types of orders that *Cosnek* did not address, but which may also be appealable under Rule 311(d)." *Id.* at 466 n.6 (citations omitted). Indeed, this insight was borne out in several decisions where we held appealable other kinds of orders that did not implicate the loss of evidence. *See, e.g.*, *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d at 515 ("disclosure orders concerning the subject of a grand jury investigation are a type of order relating to a potential criminal prosecution that should be appealable as of right"); *White*, 910 A.2d at 659 (order denying Commonwealth's request to invoke its constitutional right to a jury would "hamper the presentation of its case" where the trial court had denied a motion to recuse and the Commonwealth alleged "it will be forced to proceed before a judicial fact-finder who is biased against it"); [14] *Commonwealth v. Karetny*, 583 Pa. 514, 880 A.2d 505, 513 (2005) (order quashing some though not all offenses "quite definitively terminates the prosecution as to the quashed charge" and "imposes a handicap that the prosecution cannot overcome") (internal quotations and citation omitted).

[5] This case concerns a new type of order we have yet to address: one denying a pretrial Commonwealth motion in limine seeking to preclude the trial court's use of a suggested standard jury instruction (or, as the DAO now portrays it, a facial attack to the statute upon which that instruction is based). Because such an order does not concern the suppression of evidence or fit neatly within any of the other discrete categories that we have held are appealable as of right by the Commonwealth, we must rely on the rule's plain language to determine whether the order "terminate[s] or substantially handicap[s]" the DAO's prosecution of Pownall. Pa.R.A.P. 311(d). We conclude it does not.

The DAO rightfully declines to go so far as to say the trial court's order pertaining to jury instructions somehow "terminates" its case, so we can rule that out immediately. What remains is the DAO's sole argument that the order substantially handicaps its prosecution because the order "directly concerns [its] burdens of proof at trial[.]" DAO's Brief at 20; *see id.* ("jury instructions based on Section 508(a)(1) would force the [DAO] to disprove three elements, two of which are constitutionally invalid, rather than one constitutional element"). On this front, however, we agree with Pownall that the ***901** DAO's argument is foreclosed by our decision in *Shearer*.

In *Shearer*, the Commonwealth took an interlocutory appeal from "a pretrial order granting [the defendant's] request to compel the minor complainant to submit to a psychological exam for the purpose of aiding the trial court in determining whether [he] was competent to testify." 882 A.2d at 464. The Commonwealth argued its appeal was proper under Rule 311(d) on the ground its case would be "over if the trauma inflicted on the child results in his being unwilling or unable to cooperate or testify, or otherwise results in or contributes to a defense verdict." *Id.* at 468 (internal quotations, brackets, and citation omitted). We disagreed. Notably, we flatly rejected the Commonwealth's "assertion that it should always be permitted to appeal any pretrial order that has the potential to affect its ability to meet its burden of proof." *Id.* at 467. In our view, the claimed handicap was founded on nothing more than the Commonwealth's "speculation regarding the potential effects of the order[.]"

Id. at 468. That, we held, "simply does not suffice to establish" an order's appealability under Rule 311(d). *Id.*

This appeal faces the same problem. The only complaint the DAO makes about the trial court's order is that it ostensibly "forc[es the DAO] to disprove multiple justification defenses, two of which unconstitutionally immunize [Pownall] from murder charges arising from the killing of any fleeing forcible felon or armed suspect." DAO's Reply Brief at 13. Even assuming for the moment that the DAO is correct about its constitutional claim, it is impossible to know in this pretrial posture whether the DAO will actually be forced to disprove anything. That could only theoretically occur if, at trial, some evidence is produced that would implicate Pownall's ability to invoke the peace officer justification defense in the first place. *See generally* *Commonwealth v. Capitolo*, 508 Pa. 372, 498 A.2d 806, 809 (1985) (defendant entitled to instruction on justification as defense to crime charged only where evidence is offered to support it).

In fact, though, such evidence alone would not be enough. To trigger the DAO's hypothetical concerns, there would also have to be specific evidence that would permit the trial court, if it so chose in its discretion, to use the suggested standard jury instruction on the forcible felony or deadly weapon justifications exactly as written. And, even then, the DAO still might not have to disprove what it calls an "unconstitutional defense" [15] depending on the evidence that is introduced. DAO's Brief at 10. This is because the DAO alleges only that in some factual circumstances the use of the forcible felony or deadly weapon justifications could — though not always, and maybe not even in this case — result in "unconstitutional situations." *Id.* at 21; *see* DAO's Reply Brief at 18 (conceding in some cases "a suspect's prior felony can [ ] be grounds for deadly force"); *id.* at 21 (admitting if a suspect possessed a deadly weapon that could be used to cause death or serious bodily injury "there would be no constitutional problem").

As we see it, the DAO's asserted substantial handicap is constructed on layer after layer of speculation and "what ifs." Rule 311(d) requires more. As discussed, in every case in which we have permitted a Commonwealth appeal as of right, the order appealed from had a tangible or practical effect on the Commonwealth's actual ***902** ability to prosecute its case. [16] In contrast, a challenge to a suggested standard jury instruction — the use of which is left entirely to the discretion of the trial court, and would be appropriate only if supported by evidence adduced at trial in any event — cannot reasonably be said to handicap the prosecution in any way. Indeed, such an issue does not truly ripen until the Commonwealth has already rested its case and the evidentiary record has closed. Thus, we decline to recognize a new categorical Commonwealth appeal as of right under Rule 311(d) whenever the Commonwealth seeks to challenge the use of a jury instruction, even if such attack is constitutional in nature.

B. Appealability Under Rule 313(b)

i. Arguments

[6] We now turn to the collateral order doctrine. The doctrine "permits an appeal as of right from a non-final collateral order if the order satisfies the three requirements set forth in Rule 313(b) — separability, importance, and irreparability." *Shearer v. Hafer*, 644 Pa. 571, 177 A.3d 850, 858 (2018) ("*Hafer*"). Here, the DAO argues it has met all three prongs. Starting with the second, it tersely proclaims that "whether Pennsylvania law permits police officers to take a life in violation of the Fourth Amendment is, without a doubt, an issue too important to be denied review." DAO's Brief at 11. As for the third requirement, the DAO submits its claim would be irreparably lost if review were postponed until final judgment, because if Pownall "is acquitted, the [DAO] may not appeal"; if he "is convicted, the [DAO] likewise could not appeal because it would not be an aggrieved party." *Id.* at 12. It therefore believes "an interlocutory appeal is the only possible way for the constitutionality of Section 508(a)(1) to ever receive appellate review." *Id.*

With respect to separability, the first prong, the DAO forthrightly "acknowledges that the trial court's instructions on [Pownall]'s justification defense will likely impact the outcome of trial." *Id.* at 14. Nevertheless, it insists that just because "the outcome of trial may hinge on these questions does not mean they concern the issue of guilt itself." *Id.* The DAO takes the position that "while [Pownall]'s conviction or acquittal might turn on the outcome of this appeal, the constitutionality of Section 508(a)(1) does not turn on, or ever consider, whether or not [Pownall] is guilty." *Id.*; *see id.* at 14-15 (characterizing its underlying issue as one of mere "statutory construction that is separable from and agnostic to [Pownall]'s guilt or innocence").

For his part, Pownall claims the trial court's order "did not satisfy any of the prongs required by Rule 313(b), let alone all of them[.]" Pownall's Brief at 14 (emphasis omitted). Presenting his answers in the same order the DAO approached the rule's tripartite test, Pownall argues the DAO's "effort to satisfy the second requirement of [Rule] 313(b) by reframing the issue as one involving application of the Fourth Amendment's protections against unlawful seizure must be rejected" because "this was not the issue [it] presented ***903** to the trial court." *Id.* at 19. Instead, Pownall says, the DAO's argument in the trial court was "that the conjunctive language used in [Section] 508 gave rise to an unconstitutional interpretation of the statute that could be remedied by changing the wording of the statute" — not that the statute and its attendant jury instruction are facially unconstitutional under the Fourth Amendment. *Id.* Next, Pownall deems as "simply untrue" the DAO's allegation that an interlocutory appeal is the only possible way for the constitutionality of Section 508 to receive appellate review. *Id.* at 20. He offers two possible alternatives to an interlocutory appeal that he believes would allow for review of Section 508's constitutionality: a mandamus action aimed at the trial court related to its use of the suggested standard jury instruction, and a civil damages action under 42 U.S.C. § 1983, which, he remarks, is "precisely what happened in" *Garner*. *Id.* at 21.

Pertaining to Rule 313(b)'s separability requirement, Pownall stresses the main issue in the case is whether he "committed murder or whether his use of deadly force was legally justified under the circumstances — which would provide a complete defense to the charge of murder." *Id.* at 15. Given that, he believes the trial court's order "thoroughly implicates the merits of the underlying defense." *Id.* In this regard, Pownall agrees with the lower courts that "the question of whether [Section] 508 even applie[s] to" his case cannot "be considered without an analysis of the underlying facts and evidence in the case." *Id.* at 18.

Curiously, the DAO responds that "Section 508's applicability to [Pownall] is not the subject of this appeal." DAO's Reply Brief at 6. It insists no "factual analysis is required here, where only the legality of the justification generally, not whether it can be asserted by [Pownall], is at issue." *Id.* at 7; *see id.* at n.1 ("Neither [Pownall]'s ability to claim self-defense nor the evidence he may present to do so are at issue here."). The DAO also disputes the relevance of the way it presented its claim below. In its view, "an argument that Section 508 gives rise to an unconstitutional interpretation of the statute is one and the same with an assertion that the statute is unconstitutional." *Id.* at 8 (internal quotations omitted). Finally, the DAO disagrees with Pownall that mandamus or a civil suit would "provide an avenue for review of the claim at issue now." *Id.* at 12.

ii. Analysis

[7] We "construe the collateral order doctrine narrowly, and insist that each one of its three prongs be clearly present before collateral appellate review is allowed." *Hafer*, 177 A.3d at 858 (internal quotations and citation omitted). This approach avoids undue corrosion of the final order rule and prevents delay resulting from piecemeal review of trial court decisions. *See id.* It also recognizes a party "may seek allowance of appeal from an interlocutory order by permission" under Pa.R.A.P. 312, and that this "process would be undermined by an overly permissive interpretation of Rule 313." *Id.* [17]

***904** **[8]** **[9]** **[10]** As regards the doctrine's three prongs, we need only address the first concerning separability. We have held an order is separable from the main cause of action in a case only "if it can be resolved without an analysis of the merits of the underlying dispute." *Commonwealth v. Williams*, 624 Pa. 405, 86 A.3d 771, 781 (2014). "Stated differently, an order is separable if it is 'entirely distinct' from the underlying issue in the case.' " *Commonwealth v. Blystone*, 632 Pa. 260, 119 A.3d 306, 312 (2015) (citation omitted). Although some slight interrelatedness between the merits and the issue to be raised on interlocutory appeal is tolerable, "the claim must nevertheless be conceptually distinct from the merits[.]" *Id.* (internal quotations and citation omitted). When it comes to criminal trials, the underlying dispute is whether the defendant "committed the crimes charged[.]" *Shearer*, 882 A.2d at 469. Thus, to assess separability in this context, we ask whether "resolution of th[e] issue can be achieved independent from an analysis of whether [the defendant] is guilty[.]" *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 943 (2005); *see* *Shearer*, 882 A.2d at 469 (relevant inquiry is whether issue can be resolved without considering defendant's "potential guilt or innocence of the crimes charge[d]").

[11] We conclude it is impossible to separate the DAO's claim — whether construed as a challenge to the suggested standard jury instruction, or as a facial or as-applied attack on the statute upon which the instruction is based — from the merits of the criminal case, *i.e.*, Pownall's potential guilt or innocence of the crimes charged. The reason for this is simple: a ruling in the DAO's favor on its constitutional issue would, quite literally, result in an after-the-fact judicial alteration of the substantive criminal law with which Pownall has been charged. As it now stands, it is not a crime when, while making an arrest, a peace officer uses deadly force under any of the four situations presented in Section 508. The DAO seeks to have the judiciary upend this status quo, by eliminating two of the four distinct grounds for justification crafted by the legislature. Doing as the DAO asks, however, would essentially criminalize conduct the General Assembly has deemed non-criminal. The DAO basically recognizes as much, but still insists there is a distinction between the terms "guilt" or "innocence" and the words "conviction" or "acquittal." *See* DAO's Brief at 14 (admitting Pownall's "conviction or acquittal might turn on the outcome of this appeal" but suggesting its issue "does not turn on, or even consider, whether or not [he] is guilty"). The argument is nonsensical, and we reject it.

The waffling nature of the DAO's claim does not alter our conclusion. The DAO's motion in limine was styled as an attack on the trial court's potential use of Suggested Standard Jury Instruction (Crim) § 9.508B. If that was the extent of the DAO's claim, such issue would fail to be separable from the merits because, by its very nature, a jury instruction must be based on evidence introduced at trial. *See supra* n.11.

[12] **[13]** **[14]** Alternatively, if, as the DAO now purports, its issue is "only whether Section 508(a)(1) is facially unconstitutional[,]" DAO's Reply Brief at 1, its claim still would not be separable from the merits. "A statute is facially unconstitutional only where no set of circumstances exist[s] under which the statute would be valid." *Clifton v. Allegheny Cty.*, 600 Pa. 662, 969 A.2d 1197, 1222 (2009) (citation omitted). "In determining whether a statute is facially ***905** invalid, courts do not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases." *Germantown Cab Co. v. Phila. Parking Auth.*, 651 Pa. 604, 206 A.3d 1030, 1041 (2019), *citing* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); *see* *U.S. v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("The delicate power of pronouncing [a statute] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). As these standards plainly reflect, "facial challenges are generally disfavored." *Clifton*, 969 A.2d at 1223 n.37. They are also "the most difficult challenge to mount successfully[.]" *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

As noted, the DAO concedes there are some circumstances under which even the forcible felony and deadly weapon justifications could be applied constitutionally. Not only do these concessions essentially defeat the DAO's claimed facial challenge, *see, e.g.*, *Schall v. Martin*, 467 U.S. 253, 264, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) (a facial challenge fails where "at least some" constitutional applications exist), they highlight the need here — even if we were willing to accept the DAO's most recent characterization of its claim as a facial challenge — to assess the evidence in the underlying case, for it's entirely possible the facts as ultimately developed may not give rise to the type of "unconstitutional situation" feared by the DAO. DAO's Brief at 21. *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 378, 382, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (since "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force[,]' " the "first step in assessing the constitutionality of [an officer]'s actions is to determine the relevant facts"); *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("proper application [of the reasonableness standard applied in *Garner*] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). [18]

***906** **[15]** Finally, if, as we believe, the true nature of the DAO's claim is an as-applied challenge, then its claim fails for precisely the same reason. *See, e.g.*, *Commonwealth v. Hairston*, —— Pa. ——, 249 A.3d 1046, 1054 n.5 (2021), *cert. denied sub nom.*, —— U.S. ——, 142 S.Ct. 598, 211 L.Ed.2d 371 (2021) ("an as-applied challenge to the constitutionality of a statute [asserts] that the statute, even though it may generally operate constitutionally, is unconstitutional in a

defendant's particular circumstances"). We find it appropriate to construe the DAO's claim in this manner for two reasons. First, the DAO did not raise a facial constitutional challenge until it came before this Court. *See* DAO's Reply Brief at 1 (asserting for the first time in this litigation that Section 508 "is facially unconstitutional"). Second, this treatment is most consistent with the High Court's Fourth Amendment jurisprudence in this arena.

[16] Beginning with the latter point, we reiterate the High Court's instruction that in use-of-force cases the "first step in assessing the constitutionality of [an officer]'s actions is to determine the relevant facts." *Scott*, 550 U.S. at 378, 127 S.Ct. 1769. This directive makes sense because "the 'reasonableness' inquiry in [such] case[s] is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397, 109 S.Ct. 1865; *see* *Scott*, 550 U.S. at 383, 127 S.Ct. 1769 ("in the end we must still slosh our way through the factbound morass of 'reasonableness' "). It is also exactly how the Court proceeded in *Garner*: it applied the Fourth Amendment's reasonableness test "to the use of a particular type of force in a particular situation" and held the officer's use of deadly force unjustified under those discrete facts. *Scott*, 550 U.S. at 382, 127 S.Ct. 1769. But, importantly, the Court refused to declare even Tennessee's egregious statute **facially** unconstitutional. Instead, it explained that despite the statute's unconstitutional authorization of the use of deadly force, there remained the possibility that in other cases the facts might reveal the officer nevertheless possessed "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officers or to others[.]" *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. "As applied in such circumstances," the Court held, the "Tennessee statute would pass constitutional muster." *Id.* at 12, 105 S.Ct. 1694.

This is instructive. Although the DAO and the dissent steadfastly maintain the facts are entirely irrelevant to our analysis, *see, e.g.*, DAO's Reply Brief at 7 (arguing no "factual analysis is required here"); Op. at —— (contending this "is not a case where further development of the record would enrich our assessment"), the relevant law suggests the exact opposite. [19] Our ***907** careful review of the High Court's Fourth Amendment jurisprudence — including *Garner*, the decision upon which the DAO's claim is grounded — reveals that the facts matter a great deal when confronting a use-of-force claim. So, in the absence of a clear intent on behalf of the DAO to raise a pure facial challenge from the start, we believe the proper course is to treat the claim in the same way such claims were treated in *Garner* and its progeny. [20]

[17] **[18]** This brings us to the second and final point. As we have said, the first time the DAO expressed an explicit intent to launch a facial challenge to Section 508 was before this Court. This late-in-the-game substitution renders the DAO's current labeling of its claim dubious. Fortunately, "a litigant's characterization of an argument as being facial or 'as applied' is not controlling." *Warner ex rel. Warner v. Lawrence*, 900 A.2d 980, 989 n.10 (Pa. Cmwlth. Ct. 2006) (*en banc*). For the reasons we have discussed at length, we find the DAO's claim is best construed as an as-applied challenge, which necessarily requires consideration of "a defendant's particular circumstances." *Hairston*, 249 A.3d at 1054 n.5. As-applied constitutional challenges of this nature cannot surmount the collateral order doctrine's separability prong.

Because the DAO has failed to clearly prove its issue in this interlocutory appeal is entirely distinct from Pownall's potential guilt or innocence of the crimes charged, and in accordance with our longstanding practice of construing the collateral doctrine order narrowly, we conclude the DAO's appeal is not authorized by Rule 313(b). [21]

*908 III. Conclusion

We recognize the DAO's fervent desire to put the troubling and recurring issue of police shootings in the spotlight. We agree the issue warrants serious examination, by every facet of government as well as those outside of it. But the proper forum for that debate is not an interlocutory appeal of a pretrial motion challenging a suggested jury instruction that might not even be applicable. Accordingly, we affirm the Superior Court's order quashing the DAO's unauthorized interlocutory appeal.

Chief Justice Baer and Justices Todd and Mundy join the opinion

Justice Dougherty files a concurring opinion.

Justice Wecht files a dissenting opinion in which Justice Donohue joins.

Former Justice Saylor did not participate in the consideration or decision of this matter.

JUSTICE DOUGHERTY, concurring

A special concurrence is unusual. [1] But so is the Philadelphia District Attorney's Office's ("DAO") prosecution in this case. That is why I feel compelled to write separately, unconstrained by majority authorship, to pull back the curtain on some of the concerning irregularities that lurk just beneath the surface of this appeal.

First, though, I must comment on an aspect of this case that regrettably is not so unusual: it involves yet another young life lost — again in my own hometown of Philadelphia — following an interaction with the police. Without expressing any view whatsoever about this particular case, I simply remark that what allegedly occurred here has become a far-too-familiar story, in this Commonwealth and beyond it. *See Police Shootings Database*, WASH. POST, https://wapo.st/3495bVY (last visited July 19, 2022) (reporting 156 people shot and killed by police in Pennsylvania since 2015, and more than 7,000 nationally). These tragic recurrences come at a steep and potentially irreversible cost. *See, e.g.*, *Amicus* ACLU of Pennsylvania's Brief at 10-11 ("the continuing use of deadly force by police ... erodes the ability of communities to trust the police and their willingness to work with the police to address crime"); *Amicus* Current and Former Elected Prosecutors' Brief at 3 ("without accountability, there can be no public trust between law enforcement and the community, and especially, communities of color"); *id.* at 16 ("trust in government ... is integral to promoting and preserving public safety"). Frankly, we can no longer afford to turn a blind eye to the problem; it "warrants serious examination, by every facet of government as well as those outside of it." Majority Opinion at 34. [2]

***909** At the same time, we must not lose sight of the fact that "[o]ur communities rely on locally elected prosecutors ... to ensure that their criminal legal system treats everyone fairly and equally, and follows the dictates of the Constitution." *Amicus* Current and Former Elected Prosecutors' Brief at 22. This includes police officers charged with a crime. Yet, here, I cannot say the DAO has treated Pownall fairly and equally. At least three aspects of the DAO's prosecution give me serious pause: (1) its failure to provide the investigating grand jury with all relevant legal definitions; (2) its successful attempt to deny Pownall a preliminary hearing; and (3) its relentless but unsuccessful attempt to change the peace officer justification law prior to Pownall's trial. I examine each in turn.

(1) The Investigating Grand Jury Instructions

County investigating grand juries, like all other investigating grand juries (*i.e.*, multi-county and statewide), are a pure creature of statute. To summon an investigating grand jury a prosecutor must allege in an application to the president judge in the county that convening a grand jury "is necessary because of the existence of criminal activity within the county which can best be fully investigated using the investigative resources of the grand jury." 42 Pa.C.S. § 4543(b). [3] If the application is approved and a grand jury is empaneled, the prosecutor may submit to it an investigation after notifying the supervising judge and alleging "one or more of the investigative resources of the grand jury are required in order to adequately investigate the matter." 42 Pa.C.S. § 4550(a).

Once an investigation is in the grand jury's hands it has "the power to inquire into offenses against the criminal laws of the Commonwealth alleged to have been committed within the county ... in which it is summoned." 42 Pa.C.S. § 4548(a). If it "appears" to the grand jury a criminal offense has been committed, it may "issue a presentment[.]" *Id.* at § 4548(b). A presentment does not initiate a criminal prosecution; it is "[a] written formal recommendation by an investigating grand jury that specific persons be charged with specific crimes." 42 Pa.C.S. § 4542. The process for issuing a presentment is spelled out in Section 4551 of the Investigating Grand Jury Act:

> Should the investigating grand jury determine that upon the basis of evidence presented to it a presentment should be returned against an individual, the grand jury shall direct the attorney for the Commonwealth to prepare a presentment which shall be submitted to the investigating grand jury for a vote. Should a majority of the full grand jury vote approval for the presentment it shall then be submitted to the supervising judge.

> The supervising judge shall examine the presentment, and if it is within the authority of the investigating grand jury and is otherwise in accordance with the provisions of this subchapter, the supervising judge shall issue an order accepting the presentment. ***910** Otherwise, the supervising judge shall refuse to accept the presentment and shall order that the investigating grand jury take further appropriate action.

42 Pa.C.S. § 4551(a).

Significantly, the Act excepts "the power to indict" from the otherwise expansive powers bestowed upon an investigating grand jury. 42 Pa.C.S. § 4548(c). As such, when "the Commonwealth proceeds on the basis of a presentment," it must then file a criminal complaint, after which "the defendant shall be entitled to a preliminary hearing as in other criminal proceedings." 42 Pa.C.S. § 4551(e).

Here, the DAO chose to submit its investigation of Pownall to the Twenty-Ninth Philadelphia County Investigating Grand Jury. I generally discern nothing wrong with that approach, so long as the DAO truly believed one or more of the investigative resources of the grand jury was required to adequately investigate the case. *See* 42 Pa.C.S. § 4550(a). Rather, it is the manner in which the DAO seems to have directed the grand jury's investigation that appears troubling.

On December 11, 2019, the supervising judge directed the DAO to turn over to Pownall the legal instructions given to the grand jury, as well as transcripts of those proceedings. Based on the materials produced, Pownall filed a motion to quash the presentment only days later. His motion alleged the DAO

> intentionally failed to notify the [g]rand [j]ury of the [peace officer justification defense under 18 Pa.C.S. § 508], well knowing that to do so would have prevented the grand jury from recommending criminal charges. However, the misconduct did not end there. The prosecution then asked the grand jury to return a presentment on homicide charges which included murder, voluntary manslaughter, and involuntary manslaughter, without defining any of those charges. This grand jury had no idea that they would have [ ] to have found from the evidence that [ ] Pownall acted with **premeditation** for murder of the first degree, **malice** for any form of murder, a **mistaken belief in self defense** for voluntary manslaughter, or **criminal recklessness** for involuntary manslaughter. This may be [the] first time in the history of Pennsylvania jurisprudence that a District Attorney requested a grand jury to authorize criminal charges without explaining the law that applies to those charges because to do so would have prevented a finding of probable cause.

Memorandum of Law in Support of Motion to Quash Presentment and for Dismissal of All Charges, 12/18/2019 at 6 (emphasis in original); *see id.* at 11 ("The [DAO] had a legal and moral obligation to inform the grand jury of the law so that a fair and just probable cause determination could be made.").

In my view, if these allegations are true, as they appear to be,[4] it implicates a potential ***911** abuse of the grand jury process. Nearly a century ago this Court stated what should be apparent: "The grand jury must know what crimes it is to investigate." *Petition of McNair*, 324 Pa. 48, 187 A. 498, 505 (1936). Yet, the DAO appears to have obtained a presentment in this case without providing the grand jury the definition for the crime that was actually charged in the subsequent complaint (third-degree murder), or the possible justification for that criminal offense. *See generally* *Commonwealth v. French*, 531 Pa. 42, 611 A.2d 175, 178 (1992) ("Whether an arresting officer's use of [deadly] force is unlawful is determined with reference to [Section] 508 of the Crimes Code[.]").[5] Moreover, by failing to provide the grand jury with all relevant legal instructions, it also necessarily raises questions about the completeness of the factual record the

DAO presented to the grand jury. In short, by depriving the grand jury of the full panoply of relevant legal definitions, the DAO has exposed the grand jury's resulting presentment to legitimate attack.

In fact, given the circumstances, the presentment in this case is perhaps best characterized as a "foul blow." We recently took note of the hostility an appellate court in New York expressed towards grand jury presentments, before the advent there of statutory procedural safeguards:

> "A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes — the right to answer and to appeal. It accuses but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged — even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."

In re Fortieth Statewide Investigating Grand Jury, 647 Pa. 489, 190 A.3d 560, 570 (2018), *quoting* *People v. McCabe*, 148 Misc. 330, 266 N.Y.S. 363, 367 (N.Y. Sup. Ct. 1933). Historically, we have not taken the same dim view of grand jury presentments. Despite being "cognizant that the substantial powers exercised by investigating grand juries, as well as the secrecy in which the proceedings are conducted, ***912** yields the potential for abuses[,]" we believed close supervision by the judiciary and "adherence to the statutory framework is adequate to assure regularity in the proceedings." *In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 907 A.2d 505, 512 (2006) (internal footnote omitted). I fear this case indicates otherwise.

The grand jury's presentment epitomizes my concern. As discussed, the grand jury approved it without full knowledge of the pertinent law. That is disconcerting enough. Equally disturbing, though, is the presentment itself. It is thirteen pages long and includes an introduction, closing, and seventy-four purported factual findings. There is no discussion of the law, except for the recommended charges (which, again, do not include third-degree murder) listed on the final page. Also significant is the way the prosecution used the presentment. The DAO successfully moved to unseal it and then, after charging Pownall, directed the press to its purported factual findings. Not surprisingly, multiple news sources reported on the presentment's one-sided account, with some even making the full document available online for anyone and everyone to read. [6]

It is important to recall the Investigating Grand Jury Act defines a presentment merely as "[a] written formal recommendation ... that specific persons be charged with specific crimes." 42 Pa.C.S. § 4542. Nothing in this definition appears to endorse the type of gratuitous narrative provided in this case. Of course, it is anticipated that grand jury presentments will be somewhat biased; this is the unavoidable result of the Act requiring "the attorney for the Commonwealth" to prepare the presentment and submit it to the grand jury for a vote. 42 Pa.C.S. § 4551(a). If a grand jury is inclined to recommend charges against a person, the attorney for the Commonwealth tasked with drafting the presentment naturally will tend to favor those facts and theories most helpful to its future prosecution. Nevertheless, before endorsing the Commonwealth's portrayal of a case, the grand jury must at a minimum be advised of the full breadth of the applicable law. That deficiency here renders the entire presentment suspect.

(2) The Preliminary Hearing Bypass Motion

That the DAO provided the grand jury with a less-than-complete picture of the applicable law is not the most troubling part. Theoretically, that error could have been remedied by adherence to one of the statutory safeguards embedded in the process: the requirement that "the defendant shall be entitled to a preliminary hearing[.]" 42 Pa.C.S. § 4551(e). What is troubling is the DAO's effort to ensure that would not occur.

One week after charging Pownall the DAO filed a "Petition to File Bill of Information Without a Preliminary Hearing," commonly known as a bypass motion. *See* Pa.R.Crim.P. 565(A) ("When the attorney for the Commonwealth certifies ... that a preliminary hearing cannot be held for a defendant for good cause, the court may grant leave to the attorney for the Commonwealth to file an information with the court without a preliminary hearing."). According to the DAO, three factors "compell[ed] ***913** a preliminary hearing bypass ... here: complexity, expense, and the prosecution's offer of discovery to [Pownall]." Bypass Motion, 9/13/2018 at 4.

With respect to complexity, the DAO stated over a dozen witnesses testified before the grand jury and "many" of them would have to testify again if the case proceeded to a preliminary hearing. *See id.* at 1-4. In the DAO's view, "the delay occasioned by [recalling these witnesses] would run afoul of [this] Court's repeatedly expressed concern for superfluous delay." *Id.* at 4 (citations omitted).[7] As for expense, the DAO lamented that "multiple police personnel and a doctor from the Medical Examiner's Office would [have to] be subpoenaed to testify[.]" *Id.* at 5. Lastly, the DAO explained it made an "enormous concession" by agreeing to provide Pownall with all discovery and redacted notes of testimony from those witnesses who testified before the grand jury within sixty days of trial. *Id.* (emphasis omitted).

To support its position Pownall was not entitled to a preliminary hearing, the DAO pointed to *Commonwealth v. Bestwick*, 489 Pa. 603, 414 A.2d 1373 (1980). There, we reaffirmed the principle that " 'an investigating grand jury presentment is a constitutionally permissible and reasonable alternative to a preliminary hearing.' " *Id.* at 1377, *quoting Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764, 776 (1971). Importantly, though, *Bestwick* went on to explain this "controversy has been settled by the legislature" through its adoption of the Investigating Grand Jury Act — in particular, Section 4551(e)'s directive that "the defendant shall be entitled to a preliminary hearing[.]" *Id.* at 1377 n.2 (internal quotations and citation omitted). Thus, while a preliminary hearing may not be required in any type of case as a constitutional matter, *Bestwick* recognized the General Assembly granted a statutory right to such a hearing when the Commonwealth elects to proceed by way of a presentment issued by an investigating grand jury. The DAO's failure to identify this distinction in its motion was inexplicable.

The DAO's reliance on Rule of Criminal Procedure 565 was also misplaced. Our rules contemplate a general defense "right to have a preliminary hearing, except in cases being presented to an **indicting** grand jury[.]" Pa.R.Crim.P. 540(F)(2) (emphasis added). Since 2012, this Court has authorized "the use of an indicting grand jury as an alternative to the preliminary hearing but only in cases in which witness intimidation has occurred, is occurring, or is likely to occur." Pa.R.Crim.P. 556, Comment. Rule 565, in turn, provides that, in non-grand jury cases, "[w]hen the attorney for the Commonwealth certifies to the court ... that a preliminary hearing cannot be held for a defendant for good cause, the court may grant leave to the attorney for the Commonwealth to file an information with the court without a preliminary hearing." Pa.R.Crim.P. 565(A).

That Rule 565 does not apply in this situation is made evident by our decision in *McCloskey*, *supra*. In that case, we held "an **indictment** based upon an investigating grand jury's presentment" was "lawful, even though no preliminary hearing was held." *McCloskey*, 277 A.2d at 766 (emphasis added); *see id.* at 774 ("the omission of a preliminary hearing for a defendant **indicted pursuant to a presentment**" does ***914** not "in any way prejudice[ ] him, or den[y] him a greater degree of protection than is available to a defendant in a criminal proceeding instituted by complaint and preliminary hearing.") (emphasis added). Nothing in our decision in *McCloskey* so much as hinted that a grand jury presentment, in the absence of an indictment, is a proper substitute for a preliminary hearing. Even in *Bestwick*, the defendant "was indicted" after the investigating grand jury issued its presentment. 414 A.2d at 1375.[8] Tellingly, our rules now reflect the limited scenario we endorsed in *McCloskey* and *Bestwick*, but not the broader position staked out by the DAO. *See, e.g.*, Pa.R.Crim.P. 556.11 (permitting indicting grand jury to issue an indictment based "upon a presentment issued by an investigating grand jury," but only "if the grand jury finds the evidence establishes a *prima facie* case that (1) an offense has been committed and (2) the defendant has committed it").[9]

Remarkably, the DAO appears to have known all this at the time it filed its motion. *See* DAO's Bypass Motion, 9/13/2018 at 6 (admitting it "could conceivably present the Investigating Grand Jury presentment to the Indicting Grand Jury, as happened ... in *McCloskey*"). Yet, it pressed forward anyway, curiously arguing a preliminary hearing would somehow "undermine the [g]rand [j]ury's hard work[.]" *Id.* One implication of this statement is that a preliminary hearing would have exposed the DAO's questionable means of obtaining the grand jury's presentment; another is that it might have led to the dismissal of some or all charges. Regardless, it is disturbing that the DAO went to such lengths to deprive Pownall of his statutory right to a preliminary hearing.[10]

(3) The Motion in Limine & Interlocutory Appeal

Finally, I turn to the DAO's motion in limine concerning Suggested Standard Jury Instruction (Crim) § 9.508B. The

majority opinion describes the contents of the DAO's motion at length, so I do not repeat ***915** them here. *See* Majority Opinion at 4-12. Instead, I will focus on two aspects of the motion that warrant further scrutiny: (1) the DAO's lack of candor with respect to its underlying constitutional claim; and (2) the questionable timing of the motion's filing and subsequent appeal.

Regarding the High Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the majority notes the DAO neglected to acknowledge a key paragraph from that decision which seemingly undercuts its argument. *See* Majority Opinion at 8-9, *quoting* *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694 (declaring it constitutionally reasonable under the Fourth Amendment to use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm[,]" including when "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm"). But several other omissions by the DAO also merit discussion.

First is the supremely relevant fact that *Garner* actually references Section 508. In order to evaluate the reasonableness of the conduct at issue in that case, the Supreme Court "looked to prevailing rules in individual jurisdictions." *Garner*, 471 U.S. at 15-16, 105 S.Ct. 1694. Its country-wide survey revealed approximately nineteen states at the time that had "codified the common-law rule," four that "retain[ed] the common-law rule[,]" two that "adopted the Model Penal Code's provision[11] verbatim[,]" and eighteen others that "allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested." *Id.* at 16-17, 105 S.Ct. 1694 (footnoted citations omitted). Section 508 falls within this latter category, as noted in *Garner*. *See* *id.* at 17, 105 S.Ct. 1694 n.18, *citing* 18 Pa.C.S. § 508.

This is important, because it places us among those states that have joined "the long-term movement ... away from the rule that deadly force may be used against any fleeing felon[.]" *Id.* at 18, 105 S.Ct. 1694. In fact, for most of this Commonwealth's history we "followed the common law rule that if the felon flees and his arrest cannot be effected without killing him, the killing is justified." *Commonwealth v. Chermansky*, 430 Pa. 170, 242 A.2d 237, 239-40 (1968). Over time, however, we felt the "[s]tatutory expansion of the class of felonies ha[d] made the common law rule manifestly inadequate for modern law[,]" so we narrowed it. *Id.* at 240. In *Chermansky*, we declared that "from this date forward" the use of deadly force to prevent the escape of a fleeing felon "is justified only if the felony committed is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm." *Id.* Then, four years later, our legislature abandoned the common-law rule altogether by adopting Section 508 of the Crimes Code.

Returning to *Garner*, the Third Circuit has deemed it relevant that the High Court in that case cited Section 508 "in developing [its] constitutional standard." *In re City of Phila. Litig.*, 49 F.3d 945, 953 n.5 (3d Cir. 1995); *see* *id.* at 979 n.2 (Lewis, J., concurring in part) ("the decision in [*Garner*] in significant respects mirrored, ***916** and in fact relied in part upon, [S]ection 508"); *see also* *Estate of Fortunato v. Handler*, 969 F. Supp. 963, 974 (W.D.Pa. 1996) (Section 508 "received the seal of approval" in *Garner*); *Africa v. City of Phila.*, 809 F. Supp. 375, 380 (E.D.Pa. 1992) (Section 508 was "noted with apparent favor" in *Garner*). This position finds support in *Garner* itself. To buttress its decision to pivot away from the harsh common-law rule, the Court observed "[t]here has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today." *Garner*, 471 U.S. at 19, 105 S.Ct. 1694. The Court appears to have been referring to statutes like Section 508, as demonstrated by the next paragraph, which states: "Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, *see* [footnote referencing Section 508], the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing

of police officers' split-second decisions." *Id.* at 20, 105 S.Ct. 1694. In other words, the Court apparently believed Section 508 adheres to "the standard" it ultimately adopted in *Garner*. *Id.*

Notwithstanding the obvious relevance of this aspect of *Garner*, the DAO said nothing about it in its motion. It also failed to mention the *Garner* Court did not hold the Tennessee statute "unconstitutional on its face" — it was merely an as-applied holding. *Id.* at 11, 105 S.Ct. 1694; *see id.* at 11-12, 105 S.Ct. 1694 (explaining the statute "would pass constitutional muster" if applied in certain other situations, such as "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others"). And, the DAO likewise failed to address the import of *Garner* arising in the context of a Section 1983 civil action. That fact has led at least three state supreme courts to reject the position the DAO now asks us to embrace. *See State v. Cooney*, 320 S.C. 107, 463 S.E. 2d 597, 599 (1995) ("the holding in *Garner* ... does not change the State's criminal law"); *People v. Couch*, 436 Mich. 414, 461 N.W.2d 683, 684 (1990) (*Garner* "did not 'automatically' modify this state's criminal law with respect to the use of deadly force to apprehend a fleeing felon"; "the power to define conduct as a state criminal offense lies with the individual states, not with the ... United States Supreme Court") (emphasis omitted); *State v. Clothier*, 243 Kan. 81, 753 P.2d 1267 (1988) (*Garner* "has no application in a criminal case"); *see also* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 110 (2015) ("[D]eciding the constitutional standard for *Garner*'s civil rights suit did not disturb what the standard had to be for state criminal law prosecutions. States still have the authority to dictate under what circumstances police could justifiably use deadly force, and so avoid punishment under state law.") (emphasis and footnotes omitted); *see id.* at 127 ("the Fourth Amendment does not require or mandate any criminal sanction for the officer who has violated" its terms). [12]

***917** I discuss all of this not as an attempt to resolve the DAO's underlying constitutional claim. On that issue I reserve final judgment until such time as it may arise in a proper case. Rather, my point is merely to demonstrate how the DAO's motion in limine — much like the legal instructions it gave to the investigating grand jury — presented only half the relevant picture. This type of advocacy would be worrisome coming from any litigant. *See* Pa.R.P.C. 3.3 (providing that all attorneys have a duty of candor toward a tribunal). That it was the prosecution's doing is even more concerning, particularly in light of the motion's timing, which I now address.

The majority opinion describes the trial court's "discontent with the DAO's decision to wait until weeks before trial to present its motion challenging Section 508." Majority Opinion at 16 (internal quotations and citations omitted). The trial court's frustration was well founded, considering the DAO had "more than a year and two months" after Pownall's arrest to file its motion, yet it chose to wait until only weeks before trial was set to begin. Trial Court Op., 1/2/2020 at 2 n.2. But the timing of the DAO's motion was more than just frustrating: it also raises ethical concerns. Pownall filed his motion to quash the grand jury's presentment on December 18, 2019. Instead of responding to the accusations raised in that motion, five days later, counsel for the DAO "made an unscheduled appearance" in the trial court and demanded the court rule on its motion. Trial Court Op., 12/30/2019 at 1. It further warned the court it would take an immediate interlocutory appeal — with or without the court's permission — should the court deny its motion. *See id.* at 1-2. After the court did precisely that, the DAO followed through on its threat and filed the present improper appeal, thereby forestalling its need to answer Pownall's grand jury allegations by divesting the court of jurisdiction over the case.

When combined with the other tactics highlighted throughout this concurrence, a compelling argument may be made that the DAO's decision to delay Pownall's trial further by taking an unauthorized interlocutory appeal was intended to deprive him of a fair and speedy trial.

Consider the total sum of what occurred below. The DAO secured from the grand jury, which operates under the cover of secrecy, a slanted presentment written by the DAO's own attorneys, based on its preferred facts. Although the grand jury signed on to the DAO's take on the case, it did so without full awareness of the relevant legal definitions for murder or the defense under Section 508. Then,

the DAO had the presentment unsealed so it could be disseminated to the press, which uncritically reported the "grand jury's findings." Meanwhile, the DAO maneuvered to bypass Pownall's statutory right to a preliminary hearing, at which the DAO would have been required to subject its evidence to cross-examination and prove a *prima facie* case for third-degree murder. Having succeeded in that endeavor, the DAO next fought to keep the case in Philadelphia before a Philadelphia jury despite extensive local media coverage; that effort also succeeded.[13] Finally, as trial neared, there ***918** was only one obstacle that remained in the DAO's path to conviction: the legislatively authorized peace officer justification defense. So, the DAO, in the District Attorney's own words, did something "unusual" and "creative" — it challenged Section 508 and its corresponding suggested jury instruction because it believed they are "not fair." Pownall's Brief at 59, *citing* Chris Norris, *Philly DA Reflects on Chauvin Verdict, Where Case Against Former Officer Ryan Pownall Stands*, WHYY (Apr. 4, 2021), https://whyy.org/articles/philly-da-larry-krasner-reflects-on-chauvin-verdict-where-case-against-former-officer-ryan-pownall-stands/ (last visited July 19, 2022). After the trial court refused the DAO's motion — and faced with having to respond to Pownall's pending motion to quash the grand jury's presentment — the DAO took an unauthorized interlocutory appeal, knowing it would (at least temporarily) nullify both of those problems. Now, for the first time before this Court, the DAO finally admits its true intent in all this was simply to use Pownall's case as a vehicle to force a judicial determination on "whether Section 508(a)(1) is facially unconstitutional." DAO's Reply Brief at 1; *see id.* at 6 (asserting "Section 508's applicability to [Pownall] is not the subject of this appeal"). What's more, despite having assured the trial court it was not trying "to bar [Pownall] from a defense[,]" N.T. 11/25/2019 at 8, the DAO now boldly asserts it would be appropriate for this Court to rewrite the law and retroactively apply it to Pownall's case because he supposedly "had fair notice of his inability to rely on this unconstitutional defense[.]" DAO's Brief at 10.

We have explained a prosecutor has a responsibility to "seek justice within the bounds of the law, not merely to convict." *Commonwealth v. Clancy*, 648 Pa. 179, 192 A.3d 44, 52 (2018) (internal quotations and citation omitted). This is because a prosecutor acts as "a minister of justice and not simply that of an advocate." Pa.R.P.C. 3.8, Comment; *see, e.g.*, *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 331 (2011) (a prosecutor, "unlike a private attorney, must exercise independent judgment in prosecuting a case and has the responsibility of a minister of justice and not simply that of an advocate") (internal quotations and citation omitted). As a minister of justice, a prosecutor shoulders a unique responsibility that "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Pa.R.P.C. 3.8, Comment.

Little that has happened in this case up to this point reflects procedural justice. On the contrary, the DAO's prosecution of Pownall appears to be "driven by a win-at-all-cost office culture" that treats police officers differently than other criminal defendants. DAO CONVICTION INTEGRITY UNIT REPORT, OVERTURNING CONVICTIONS — AND AN ERA 2 (June 15, 2021), available at tinyurl.com/CIUreport (last visited July 19, 2022). This is the antithesis of what the law expects of a prosecutor.

JUSTICE WECHT, dissenting

The Commonwealth charged ex-Philadelphia Police Officer Ryan Pownall with ***919** criminal homicide, possession of an instrument of a crime, and recklessly endangering another person in connection with the fatal shooting of David Jones. Anticipating that Pownall would invoke the peace-officer justification defense at trial, the Commonwealth filed a pretrial motion *in limine* seeking to prevent the trial court from issuing to the jury the suggested standard jury instruction for that defense. That suggested instruction mirrors the following statutory language:

> A peace officer ... need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:
>
> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will

> endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. § 508(a)(1).

The Commonwealth argued that Section 508(a)(1)'s justification defense "is unconstitutional under the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court" in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Commonwealth's Mot. *in Limine*, 11/25/2019, at 3. The Commonwealth's alternative instruction proposed to condition a police officer's use of lethal force upon a showing that the force was reasonably necessary to prevent an imminent threat of death or serious bodily harm to either the officer or another person. The trial court declined the Commonwealth's invitation, ruling that "[t]he Commonwealth's *Motion in Limine*, on its own, is insufficient to establish the unconstitutionality of Section 508, and its suggested remedies are inappropriate." Tr. Ct. Op., 12/30/2019, at 3.

After the trial court denied the motion *in limine*, and before the commencement of Pownall's trial, the Commonwealth appealed, claiming that it was entitled to do so pursuant to, *inter alia*, the collateral order doctrine, as embodied in Pa.R.A.P. 313. Under Rule 313(b), an order is collateral and may be appealed before final judgment if it (1) is "separable from and collateral to the main cause of action," (2) involves a right that "is too important to be denied review," and (3) presents a claim that "will be irreparably lost" if appellate "review is postponed until final judgment."

The Superior Court quashed the appeal by a *per curiam* judgment order, concluding that the propriety of Pownall's justification defense failed the separability requirement of Rule 313(b). The Commonwealth now asks this Court to reverse the Superior Court, again asserting that it has met all three requirements of the collateral order doctrine and is entitled to an immediate appeal.

Like the court below, today's Majority concludes that the contested order is not a collateral one, deciding that the issue raised therein is not separable from the main cause of action. The Majority arrives at that determination by noting that separability exists where the issue to be raised in the interlocutory appeal is entirely distinct from the central issue underlying the ***920** case, which, in a criminal prosecution, "is whether the defendant 'committed the crimes charged.' " Op. at —— (quoting *Commonwealth v. Shearer*, 584 Pa. 134, 882 A.2d 462, 469 (2005)). The crux of the Majority's separability analysis is its belief that the Commonwealth's constitutional challenge and Pownall's guilt or innocence are hopelessly entangled. If the challenge is successful, the Majority asserts, it "would essentially criminalize conduct the General Assembly has deemed non-criminal." *Id*. Taken to its logical end, the Majority's reasoning removes from the collateral order doctrine's reach any Commonwealth appeal wherein it questions either the meaning of or the constitutional validity of a statutory defense. This leads to the core infirmity in the Majority's rationale.

As a result of the Majority's overly narrow assessment, the Commonwealth will *never* be able to secure appellate review of a trial court's denial of a challenge implicating a statutory defense. If a defendant is acquitted, double jeopardy principles bar the Commonwealth from seeking review of the challenged defense.[1] On the other hand, if a defendant is convicted despite the denial of a Commonwealth objection to a statutory defense, the Commonwealth would not be an aggrieved party entitled to challenge the denial on appeal.[2] As far as I can tell, the only circumstance in which an appellate court ever could assess a Commonwealth challenge to the meaning or the constitutional validity of a statutory defense would occur if a trial court certifies the order denying relief for immediate pretrial appeal.[3] Surely our appellate rules do not aim to turn trial judges into the sole and final arbiters of vital matters of statewide import, such as the merits question presented here. Yet that is the precise result of today's decision.

What's more, our caselaw on the collateral order doctrine does not mandate the Majority's conclusion. The Court today makes light of the settled principle that an issue is separable from the main cause of action when it is analytically distinct from the central question at trial. We are presented here with a purely legal question that may affect, but cannot be affected by, the answer to the ultimate issue in this case. For that reason, the Supreme Court of the United States has held that constitutional issues nearly identical to the merits question in today's case are reviewable before final judgment under the collateral order doctrine.[4] I would join the Supreme Court's approach in that regard, and I conclude that the collateral order doctrine entitles the Commonwealth to an interlocutory appeal. Because the Majority holds otherwise, I respectfully dissent. I would instead proceed to address the merits of the

Commonwealth's claim that Section 508(a)(1) runs afoul of the Fourth Amendment.

A full account of my reasoning follows.

I. The Commonwealth is entitled to an appeal under Pa.R.A.P. 313.

"Generally speaking, an appellate court's jurisdiction extends only to review of final ***921** orders," *Shearer v. Hafer*, 644 Pa. 571, 177 A.3d 850, 855 (2018). Final orders are those which "(1) dispose of all claims and all parties, (2) are explicitly defined as final orders by statute, or (3) are certified as final orders by the trial court or other reviewing body." *Id.* at 856 (citing Pa.R.A.P. 341). This "final judgment rule" is a principle that aims "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Delaying appellate adjudication until final judgment "maintains distinctions between trial and appellate review, respects the traditional role of the trial judge, and promotes formality, completeness, and efficiency." *Shearer*, 177 A.3d at 855. Thus, the rule bars review where an interlocutory appeal would make "unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision." *Johnson v. Jones*, 515 U.S. 304, 317, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

As an exception to the final judgment rule, the purpose of the collateral order doctrine is to allow an interlocutory appeal in those cases where rigid application of the general rule would prove to be an exercise in empty formalism. *See* *Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 348 A.2d 734, 736 (1975) (defining collateral orders as orders that "possess sufficiently practical aspects of finality to make them appealable"). The exception sets forth a three-pronged test to decide whether an order, while not bringing a technical end of litigation, so closely partakes of the nature of a final order that immediate appellate review is warranted.

One way that the collateral order doctrine does this is by requiring that the order in question jeopardize rights that "will be irreparably lost" absent immediate review. Pa.R.A.P. 313(b); *see* *Cohen*, 337 U.S. at 546, 69 S.Ct. 1221. In other words, "the bell has been rung, and cannot be unrung by a later appeal." *Commonwealth v. Harris*, 612 Pa. 576, 32 A.3d 243, 249 (2011). This irreparable-loss requirement ensures that interlocutory review occurs only in cases of necessity, thereby reflecting a central tenet of the final order rule: Trial proceedings should not be delayed unnecessarily, and appellate courts should not review matters that, "had the trial simply proceeded, would have turned out to be unnecessary." *Johnson*, 515 U.S. at 309, 115 S.Ct. 2151.

The irreparable-loss prong goes a long way in promoting the goals of the final judgment rule, but it does not do all the work. The separability and importance prongs also ensure harmony with the spirit of the final judgment rule. "The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once." *Id.* at 311, 115 S.Ct. 2151 (emphasis in original). Separability also confirms that there is no need for additional information of "record that will permit a better decision." *Id.* at 317, 115 S.Ct. 2151. The final requirement, the importance prong, tasks an appellate court with assessing whether "the interests implicated in any given case" outweigh "the costs of piecemeal litigation." *Geniviva v. Frisk*, 555 Pa. 589, 725 A.2d 1209, 1213 (1999). A trial court's order is weighty enough to warrant interlocutory review where it involves "rights deeply rooted in public policy going beyond the particular litigation at hand." *Id.* at 1214.

***922** This Court has made clear that all three prongs of the collateral order doctrine must be satisfied; otherwise, the final order rule mandates quashal. *Shearer*, 177 A.3d at 858. Here, the Majority finds that the contested order does not raise an issue capable of separation from the main cause of action, and on that basis quashes the Commonwealth's appeal. My colleagues note that, because this is a criminal case, the main cause of action is "Pownall's potential guilt or innocence of the crimes charged." Op. at ——. They observe that the Commonwealth's challenge, if successful, would limit the defenses available to Pownall and broaden his exposure to criminal liability. From that observation, the Majority concludes that "it is impossible to separate" the Commonwealth's constitutional claim from the question of Pownall's culpability. *Id.* The Majority anchors that

assessment in its sweeping and generalized pronouncement that separability exists only if the challenged order is "entirely distinct from Pownall's potential guilt or innocence of the crimes charged." *Id.* at ——.

The Majority's analysis turns upon an oversimplification of our caselaw defining separability. That prong is not nearly as unforgiving as the Majority's condensed account would lead one to believe. Our separability principles aim to prevent an appellate court from needlessly addressing identical issues more than once in a given case. In other words, the separability requirement ensures that an appellate court need not decide an interstitial question unnecessarily and futilely, nor an issue that requires further development in the trial court. *See* *Johnson*, 515 U.S. at 309, 317, 115 S.Ct. 2151. Thus, the crux of the separability inquiry is whether the challenged order raises an issue that is "conceptually and factually distinct from the merits." *Pridgen v. Parker Hannifin Corp.*, 588 Pa. 405, 905 A.2d 422, 433 (2006). The Majority briefly mentions conceptual distinctness but fails to apply that concept in a manner consistent with our precedent on the subject.

Like the Supreme Court of the United States,[5] which at times has taken a narrower view of the collateral order doctrine than has this Court,[6] we have recognized that "a claim is sufficiently separate from the underlying issues for purposes of collateral order review if it 'is conceptually distinct from the merits of plaintiff's claim,' that is, where, even if 'practically intertwined with the merits, it nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits.' " *Id.* (quoting *Johnson*, 515 U.S. at 314, 115 S.Ct. 2151). A claim is "significantly different" from the underlying issue "if it can be resolved without an analysis of the merits of the underlying dispute." *Commonwealth v. Williams*, 624 Pa. 405, 86 A.3d 771, 781 (2014); *see* *id.* (taking a "practical approach" to questions of separability).

As a general rule, no assessment of the merits is needed if the challenged order raises "a purely legal question." ***923** *Brooks*, 259 A.3d at 372; *see* *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (holding that a claim of qualified immunity is separable from the merits of the underlying claim because "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law"). That said, the existence of some factual overlap is not disqualifying. *See* *Mitchell*, 472 U.S. at 528, 105 S.Ct. 2806 (holding that a party was entitled to immediately appeal the trial court's unfavorable resolution of legal issues, notwithstanding that "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief"). The critical question is whether "an appellate court's frame of reference will be centered on the" legal question. *Pridgen*, 905 A.2d at 433.

This case is focused squarely upon a constitutional analysis untethered to any factual development or predicates. Each aspect of that analysis is a pure question of law that can be resolved without resort to or consideration of the question of guilt or innocence. The Commonwealth's merits argument has three core components. First, the Commonwealth claims that "Section 508(a)(1) permits the use of deadly force in situations that violate a person's constitutional rights by allowing law enforcement officers to employ it absent (1) a need to prevent death or serious bodily injury and (2) consideration of whether such use of force is objectively reasonable." Commonwealth's Br. at 23. Addressing this first aspect of the Commonwealth's argument requires an appellate court to interpret Section 508 (whether the statute would provide a justification defense in the situations identified by the Commonwealth). Questions of statutory construction present pure questions of law. *Commonwealth v. Ramos*, 623 Pa. 420, 83 A.3d 86, 90 (2013). If the Commonwealth is correct, the second question is whether that reading necessarily renders Section 508(a)(1) unconstitutional under *Garner*, another legal question. *See* *Commonwealth v. Bell,* 653 Pa. 515, 211 A.3d 761, 765 (2019) (" 'Whether § 1547(e) of the Vehicle Code, 75 Pa.C.S. § 1547(e), is violative of ... the Fourth Amendment to the United States Constitution' ... [is] a question of law."). An appellate court's assessment of those abstract questions will not turn upon, or even benefit from, case-specific factual determinations.

The final component of the Commonwealth's merits argument addresses the remedy for the alleged constitutional defect. According to the Commonwealth, "[t]his Court can correct

the unconstitutional aspects of Section 508(a)(1)" by interpreting it in a way that "would limit the use of deadly force to forcible felons fleeing with a deadly weapon while requiring some additional indicia that they will cause death or serious bodily injury." Commonwealth's Br. at 34, 37. The propriety of this proposed fix turns upon whether it cures the alleged constitutional defect, and, more fundamentally, whether a court is empowered to impose it, given the Commonwealth's view that certain portions of Section 508(a)(1) are unambiguously unconstitutional.[7] The adequacy and feasibility of a remedy also are questions of law. *See* *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286, 293 (2013) (observing that a ***924** question as to the appropriate remedy for a violation of the Eighth Amendment is a matter of law).

Thus, the Commonwealth's claim is analytically distinct from the main questions in this case—that is, whether the Commonwealth's factual allegations are true, and whether those facts support a conviction for third-degree murder, recklessly endangering another person, and/or possession of an instrument of crime. Whether the Commonwealth can prove that Pownall fired the bullet that killed Jones, or that Pownall even possessed a firearm for that matter, has no bearing upon our ability to determine the meaning of Section 508(a)(1), whether it is unconstitutional, and, if it is, how to remedy the constitutional defect.

This view is consistent with our decisions in civil cases holding that pretrial orders implicating the meaning and breadth of a statutory defense are separable from the main cause of action. In one of our foundational separability decisions, *Pridgen*, we held that a challenge concerning the availability of a defense arising under the federal General Aviation Revitalization Act ("GARA"), 49 U.S.C. § 40101, was separable from the main issue, which dealt with a manufacturer's exposure in a products liability suit. GARA contains a statute of repose that precludes tort liability for manufacturers of aircraft components more than eighteen years after installation of the aircraft parts. The issue raised on interlocutory appeal concerned "the scope of an original manufacturer's ongoing liability under GARA ... for the alleged failure of replacement parts that [the appellant] did not physically manufacture." *Pridgen*, 905 A.2d at 432. The appellants contended that the issue was separable from the main cause of action because the facts necessary to determine the general scope of liability "(the age of an aircraft and the date of its first sale) [are] separate from and collateral to the underlying controversy in aviation tort litigation." *Id.* at 429. We agreed, explaining:

> [T]he issue that Appellants seek to raise on appeal concerning the application of the [time bar] to the original manufacturer and type certificate holder is both conceptually and factually distinct from the merits of Appellees' underlying product liability causes of action. Again, to resolve the legal claim presented, an appellate court's frame of reference will be centered on the terms of GARA, not on determinations of fact or the scope of Appellants' liability in the first instance.

Id. at 433.

More recently, in *Brooks*, we considered whether an order rejecting a defendant's invocation of the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521-8527, in a negligence action satisfies all three prongs of the collateral order doctrine. More specifically, the issue was whether the defendant "was a 'Commonwealth party' subject to the Sovereign Immunity Act's waiver of immunity." *Brooks*, 259 A.3d at 372. In finding that the issue was separable from the main cause of action, we explained that the "issue is a purely legal question that can be resolved by focusing on the Act and does not necessitate an examination of the merits of [the plaintiff's] negligence claim." *Id.*

The contested orders in *Pridgen* and *Brooks* also affected the resolution of the ultimate issue in those cases, just as the resolution of the Commonwealth's claim here might affect the outcome of this case. A ruling adverse to the party raising the defense in those cases would have, "quite literally, result[ed] in an after-the-fact judicial alteration" of the scope of that party's potential liability. Op. at ——. Despite that possibility, we held in each case that the claim was separable from the main cause of action. Those rulings should bind

***925** us to the same ruling here. The Majority hardly pays lip service to these important cases, let alone follows in their compelling footsteps. As in *Pridgen* and *Brooks*, the questions raised by the contested order in this case—the meaning of Section 508(a)(1), its constitutionality, and the feasibility of the Commonwealth's proposed remedy—are "purely legal question[s] that can be resolved by focusing on" Section 508(a)(1), and do not "necessitate an examination of" Pownall's guilt or innocence. *Brooks*, 259 A.3d at 372; *see* *Pridgen*, 905 A.2d at 433 ("Again, to resolve the legal claim presented, an appellate court's frame of reference will be centered on the terms of GARA, not on determinations of fact or the scope of Appellants' liability in the first instance.").

The only distinction I discern between the circumstances before us and those in *Pridgen* and *Brooks* is that those cases involved immunity-type defenses, which, unlike justification defenses, aim to exempt the individuals entitled to immunity from the burden of being haled into court and defending themselves in the first place. But that distinction matters only for purposes of the irreparable-loss prong. [8] As far as separability goes, I fail to see how the immunity defenses at issue in *Pridgen* and *Brooks* differ in any meaningful way from the justification defense at issue here. There is no principled distinction between the inquiry in those cases and questions concerning the meaning and constitutionality of a statutory defense in a criminal prosecution. [9]

Notably, the Supreme Court of the United States has addressed the constitutionality of a police-officer's use of force on interlocutory appeal pursuant to the collateral order doctrine. In *Plumhoff v. Rickard*, the Court considered whether police officers' claims of qualified immunity based upon the contention that their "conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law" was separable from the main cause of action in a case brought under 42 U.S.C. § 1983. *Plumhoff*, 572 U.S. at 773, 134 S.Ct. 2012. Holding that the challenged order was collateral, the *Plumhoff* Court explained that the constitutional issues "are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden." *Id.* at 772, 773, 134 S.Ct. 2012. Once again, the Majority does not address this case substantively, nor even acknowledge the patent similarities between it and the instant dispute. I see ***926** no reason why our view of separability should be any different in this case. This appeal poses the abstract question of whether a statute is unconstitutional. Indeed, the issue we face is a question of law entirely unadulterated by facts, more so than the one that the *Plumhoff* Court confronted, which asked whether the alleged facts demonstrated that the police officer's use of force was unconstitutional. [10]

Undoubtedly, the constitutional and interpretive questions raised by the Commonwealth bear directly upon the likelihood that Pownall will be convicted of the crimes charged; however, that is not enough to defeat separability. *See* *Johnson*, 515 U.S. at 314, 115 S.Ct. 2151 ("[A]lthough sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (*i.e.*, in the absence of qualified immunity)."). The salient question is not whether an appellate court's resolution of the issue will affect the ultimate outcome of the case. Rather, it is whether the constitutional claim can be analyzed without considering whether Pownall in fact acted as the Commonwealth alleges. And here it clearly can be so analyzed. Accordingly, the merits of the Commonwealth's appeal are separable from Pownall's potential guilt or innocence.

The remaining prongs of Rule 313's collateral order doctrine are satisfied here as well. The Commonwealth has demonstrated irreparable loss because this appeal is its one and only opportunity to secure appellate review of its challenge to Section 508. If the jury acquits Pownall, double jeopardy precludes the Commonwealth from seeking appellate review of the challenge to Section 508(a)(1). *See* *Gibbons*, 784 A.2d at 778; *Commonwealth v. Blystone*, 632 Pa. 260, 119 A.3d 306, 313 (2015) (Eakin, J., concurring) ("As the Commonwealth cannot appeal once the jury has returned its verdict, appellate review would be foreclosed and the right would indeed be irreparably lost."). Conversely, if the jury convicts Pownall notwithstanding the trial court's denial of the Commonwealth's challenge, then the Commonwealth would not be an aggrieved party entitled to challenge the denial on appeal. *Polo*, 759 A.2d at 373

n.1. Put simply, regardless of how Pownall's bell tolls, on this question that bell "cannot be unrung by a later appeal." *Harris*, 32 A.3d at 249.

I also am convinced that the challenge to Section 508(a)(1) raises an important question of great concern to the public. This appeal asks whether the General Assembly effectively has immunized police officers to commit homicide under circumstances that violate the Fourth Amendment. Our answer to that question reaches far beyond ***927** this case. It lets citizens know whether their conduct during an arrest could place their lives in jeopardy. It also puts law enforcement officers on notice of what conduct is or is not lawful, so that they can perform their duties without fear of criminal or civil liability. Because the Majority leaves these important questions unanswered and potentially *unanswerable*, the status quo remains decisively in favor of a deadly force justification, one as to which serious constitutional questions have been raised.

To be sure, the collateral order doctrine does not lend itself to crystal-clear, brightline standards. The doctrine's inherent flexibility prevents the Majority's approach from appearing unreasonable. Murky standards are not, however, an invitation to disregard first principles. The practical motivations of the final judgment rule must guide us through the turbidity. In my view, the Majority's decision to apply the final judgment rule is untethered to any of the rule's concerns. [11]

This is not a case where further development of the record would enrich our assessment. The Commonwealth presents a purely legal question, the answer to which does not require evidentiary rulings or findings of fact. For that same reason, the Commonwealth's challenge is not a matter within the primary domain or discretion of a trial court. Such matters are the heart of an appellate court's work. And the Majority's analysis of the separability prong is particularly inconsistent with that prong's animating principle, which is to limit the number of times a reviewing court must consider issues that are nearly identical. We are asked to decide a constitutional question that will remain unanswered if we do not assess it here and now. If we were to decide this matter, there would be no need for this Court or the Superior Court to consider it again, here or in any other case. The Majority's insistence upon an overly formalistic application of the final judgment rule leaves the important questions implicated in this case unanswered, not just today but perhaps indefinitely.

This appeal satisfies all three prongs of the collateral order doctrine. To hold otherwise is to elevate formalism over pragmatism. Accordingly, I would proceed to address the merits of the Commonwealth's claim that Section 508(a)(1), as written, is unconstitutional under the United States Supreme Court's decision in *Tennessee v. Garner*.

II. Merits

Garner was the first occasion upon which the Supreme Court considered the constitutional implications of the use of deadly force in effectuating an arrest. That case began when Tennessee police officer Elton Hymon responded to a report of a burglary in a Memphis neighborhood. As Hymon was searching the exterior of the residence where the crime reportedly occurred, he heard a door slam shut in the back of the house. When Hymon entered the backyard, he saw a small individual, fifteen-year-old Edward Garner, darting across the yard and toward a chain link fence, stopping just a few feet away. Hymon ordered him to halt, but Garner proceeded to climb the fence. At that point, Hymon, who was "reasonably sure" that Garner was unarmed, shot Garner in the back of the head. *Garner*, 471 U.S. at 3, 105 S.Ct. 1694. Garner died shortly thereafter.

Tennessee's use-of-force statute codified the then-prevailing common law rule, ***928** which provided that police officers may shoot any fleeing felon to prevent an escape. Thus, Hymon's conduct was statutorily permitted. The Supreme Court addressed whether state laws authorizing the use of deadly force against fleeing, unarmed, and nonviolent felony suspects were unconstitutional.

The *Garner* Court's analysis began with the pronouncement that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." [12] *Id.* at 7, 105 S.Ct. 1694. As such, the Court employed the same basic analytical framework applicable in all Fourth Amendment cases—that is, whether the intrusiveness of the seizure is justified by the governmental interest underlying it. Unlike other encroachments within the domain of the Fourth Amendment, however, "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Id.* at 9, 105 S.Ct. 1694. Only a

comparably unrivaled state interest could justify such an intrusion. For that reason, the Court rejected the contention that the government's interest in effective law enforcement justified killing a suspect. "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion." *Id.* at 10, 105 S.Ct. 1694. The Court held that statutory provisions like Tennessee's are unconstitutional to the extent that they authorize the use of lethal force for the sole purpose of effectuating an arrest. *Id.* at 11, 105 S.Ct. 1694 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

But the *Garner* Court stopped short of declaring the statute facially unconstitutional, because there are circumstances in which it might be reasonable to kill a fleeing felon. The lone governmental interest of sufficient weight, the Court decided, was the need to protect the life of another. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11, 105 S.Ct. 1694. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* From these general principles, the Court articulated the following clear standard:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12, 105 S.Ct. 1694.

The Court laid down what seemed to be a rigid three-part standard for assessing a police officer's use of deadly force. That test asks whether: (1) the suspect poses an immediate threat of death or serious physical harm to the officer or others; (2) the use of deadly force is necessary to prevent the suspect from escaping; and (3) where feasible, the officer has warned the suspect that he intends to use lethal force. Despite the *Garner* Court's manifest distaste for extrajudicial killings by state actors, [13] and ***929** despite its effort to establish a highly limited set of circumstances where such killings were permissible, [14] subsequent Supreme Court decisions blurred the parameters of *Garner*'s clear test. The Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) is the most prominent among these cases.

In *Scott*, the Court rejected any suggestion that *Garner* established "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' " 550 U.S. at 382, 127 S.Ct. 1769. Instead of adhering to the clarity that the *Garner* factors provided to the bench, the bar, and law enforcement, the *Scott* Court favored an amorphous standard bounded only by a particular reviewing court's subjective view as to whether a particular police officer's "actions were reasonable." *Id.* at 383, 127 S.Ct. 1769. The Court added no real content to this "reasonableness" inquiry, aside from reiterating that, as in any Fourth Amendment case, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* (cleaned up). What this really means is that, except in the clearest of cases, courts have to "slosh ... through the factbound morass of 'reasonableness.' " *Id.*

Notwithstanding the *Scott* Court's weakening of *Garner*, the use of lethal force—meaning force that poses a "near *certainty* of death," *id.* at 384, 127 S.Ct. 1769 (emphasis in original)—still can produce an obvious constitutional violation. *Garner*'s general principle that lethal force is justified only when the officer reasonably believes it is necessary to protect himself or others from serious physical harm is still good law. *See* *Brosseau v. Haugen*, 543 U.S. 194, 197-98, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). Categorically, then, the Fourth Amendment prohibits police

conduct that poses a near certainty of killing the suspect where nothing demonstrates that the suspect poses a real and present danger to the life or physical well-being of the officer or others. *See* *Jefferson v. Lias*, 21 F.4th 74, 81 (3d Cir. 2021) (explaining that "[a] passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect") (citation omitted); *cf.* *Scott*, 550 U.S. at 386, 127 S.Ct. 1769 ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent ***930** bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.").

Applying what remains of *Garner*, I agree with the Commonwealth that Section 508(a)(1) is, at least in part, constitutionally defective. The Majority interprets Section 508(a)(1) as providing

> four circumstances in which a police officer's use of deadly force while making an arrest is justified. First, when the officer reasonably believes "such force is necessary to prevent death or serious bodily injury to himself or such other person[.]" 18 Pa.C.S. § 508(a)(1). Second, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested has committed or attempted a forcible felony[.]" *Id.* at (a)(1)(i)-(ii). Third, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested ... is attempting to escape and possesses a deadly weapon[.]" *Id*. And fourth, when the officer reasonably believes "such force is necessary to prevent the arrest from being defeated by resistance or escape" and "the person to be arrested ... indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay[.]" *Id*.

Op. at —— – —— (alterations in original; footnote omitted; and citation modified). The Commonwealth asserts that the second ("forcible felony justification") and third ("deadly weapon justification") of those four scenarios are unconstitutional because they permit an officer to kill a fleeing suspect without any indicia that the suspect will harm the officer or others. [15]

The first and fourth circumstances conform with the requirements of *Garner* and its progeny. The first situation conditions the justification defense upon proof of the officer's reasonable belief that deadly force is necessary to prevent death or serious bodily injury to the officer or another. The fourth situation, which provides a catch-all that covers scenarios not involving either a forcible felony or possession of a deadly weapon, is almost entirely redundant of the first, except that, in addition to the requirement that the suspect will endanger human life or inflict serious bodily injury, the officer must also believe that the force is necessary to prevent the suspect from defeating the arrest. These two are the only situations that adequately accommodate ***931** *Garner*'s core principle: that the use of lethal force is constitutional when there are at least *some* facts reasonably supporting the conclusion that the person to be arrested presents a danger to the life or limb of another. *See* *Garner*, 471 U.S. at 11, 105 S.Ct. 1694 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."); *cf.* *Plumhoff*, 572 U.S. at 777, 134 S.Ct. 2012 (holding that an officer acted reasonably when he fatally shot a fleeing suspect whose conduct while in flight "pose[d] a deadly threat for others").

Conversely, the two challenged portions of Section 508(a)(1)—the forcible felony and deadly weapon justifications—permit an officer to kill a fleeing suspect without any facts demonstrating that the suspect poses an actual threat of death or grave bodily injury to the officer of others. The deadly weapon provision deems a suspect's flight plus the mere possession of a deadly weapon as sufficient in and of themselves to justify lethal force. The forcible felony justification permits an officer to use deadly force based upon the suspicion of a past crime involving violence, regardless of whether the officer has any reason to believe that the fleeing suspect will harm someone if not apprehended immediately. There is no constitutional situation in which the bare fact that the fleeing suspect possesses a weapon or may have committed a violent crime at some point in the past justifies the use of deadly force. *See* *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) (holding that "the mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force"); *Jefferson*, 21 F.4th at 81; *cf.* *Stewart v. City of Euclid*, 970 F.3d 667, 673 (6th Cir. 2020) (holding that the totality of circumstances did not justify police officer's use of deadly force against motorist, even though motorist drove into police car at beginning of encounter).

Rather, the Fourth Amendment requires some further indication that the suspect will harm the officer or another. *Cf.* *Abraham v. Raso*, 183 F.3d 279, 295 (3d Cir. 1999) (explaining that past dangerousness does "not necessarily justify continuing to use lethal force"). And, if the officer possessed such additional indicia of dangerousness, he would be availing himself of either the first or fourth situations contemplated in Section 508(a)(1), not the forcible felony or deadly weapon justification alone. As the Commonwealth argues, the General Assembly's use of the disjunctive "or" to separate Section 508(a)(1)'s four scenarios has created independent exceptions.[16] Section 508(a)(1) declares unambiguously that the presence of a deadly weapon or the reasonable belief that the fleeing suspect committed a forcible felony is enough *per se* to justify a police officer's use of deadly force. However, deadly force is constitutional only if the totality of the circumstances supports a reasonable belief that the fleeing suspect poses a risk of real harm to the officer or others. Because the deadly weapon and forcible felony justifications ***932** permit an officer to use lethal force based upon a single fact, without consideration of whether the force was reasonable under the totality of the circumstances, those provisions are unconstitutional. There is no constitutional situation in which mere possession of a deadly weapon or suspicion of a crime, without more, can permit the use of lethal force. For that reason, I would strike those provisions.

The first and fourth circumstances listed in Section 508(a)(1) comply with the requirements of the Fourth Amendment. They also are entirely severable from the unconstitutional portions. The first and fourth justification defenses are not "so essentially and inseparably connected with, and so dependent upon," the deadly weapon and forcible felony justifications "that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one[s]." 1 Pa.C.S. § 1925. Nor would I conclude that "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* The second and third circumstances in Section 508(a)(1) should be severed from the constitutional portions. *See, e.g.*, *Commonwealth v. Hopkins*, 632 Pa. 36, 117 A.3d 247, 252 (2015) ("[E]ven if certain provisions of a statute are deemed to run afoul of the federal or state Constitution, portions of the statute which are not so offensive may retain their viability through judicial severing of those sections from the sections that are unconstitutional.").

The Commonwealth agrees that "[a] disjunctive interpretation of Section 508(a)(1)(ii) unquestionably infringes on Fourth Amendment rights established by the United States Supreme Court," but it asserts that, instead of removing the two offending justifications, we should reinterpret Section 508(a)(1) by replacing its several uses of "or" with the conjunctive "and." Commonwealth's Br. at 36-37. Under that construction, lethal force would be permitted only when the officer reasonably believes the fleeing suspect has committed or attempted to commit a forcible felony ***and*** possesses a deadly weapon, ***and*** otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

That argument asks us for something that we cannot do. We possess no magic wand that would allow us simply to remake "or" to mean "and." Because "or" is disjunctive, the statute unambiguously entitles a law enforcement officer to use lethal force if he demonstrates any of Section 508(a)(1)'s four circumstances. In certain instances, the use of a disjunctive when describing conditions that would trigger an event does not preclude that same event from occurring when those same conditions occur conjunctively. But a disjunctive set of prerequisites can never mean that all those conditions must occur in order for the event to occur.[17] Consider the following sentence: If Andy takes out the trash ***or*** does the dishes, Brenda will walk the dog. If Andy takes out the trash, then Brenda will walk the dog. If Andy does the dishes, Brenda will walk the dog. If Andy does the dishes ***and*** takes out the trash, then Brenda still must walk the dog. But under no reasonable interpretation is Andy ***required*** both to do the dishes ***and*** to take out the trash before Brenda will walk the dog. The word "or" does not preclude multiple listed conditions from triggering an event, but there is no reasonable construction of "or" that requires multiple conditions. Put simply, three conditions conjoined by an "or" ***933** are alternatives, not three prongs or elements.

Thus, Section 508(a)(1) in no conceivable way conditions its justification defense upon the presence of a gun, suspicion of a dangerous felony, *and* some other indicia of dangerousness. The General Assembly unambiguously has declared that a police officer can kill a fleeing suspect based upon the officer's belief that the suspect possesses a weapon,

or upon the officer's belief that the suspect committed a forcible felony, or if the fleeing suspect otherwise indicates he will seriously harm or take the life of someone. By treating the final scenario—other indicia of dangerousness—as its own distinct exception, Section 508 declares that a fleeing suspect's possession of a weapon or past commission of a dangerous felony are proxies for the reasonable belief that the suspect poses an immediate threat of serious physical harm. But, as the *Scott* Court made clear, there is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' " *Scott*, 550 U.S. at 382, 127 S.Ct. 1769. Thus, Section 508(a)(1)'s forcible felony and deadly weapon justifications are unambiguously unconstitutional. Because we have no license to rewrite them, they must be stricken. *Seila Law LLC*, 140 S. Ct. at 2207 ("Constitutional avoidance is not a license to rewrite [the legislature's] work to say whatever the Constitution needs it to say in a given situation.").

The final question in this case asks whether Pownall can be denied the opportunity to invoke the unconstitutional portions of Section 508(a)(1). Pownall asserts that a judicial ruling that alters Section 508 or that invalidates it in part amounts to an unconstitutional *ex post facto* law. [18] Despite the patent unconstitutionality of the statute, I firmly agree that Pownall cannot be denied its benefit. To deprive Pownall of the opportunity to invoke the deadly weapon or forcible felony justifications at his trial would be to "expand[ ] the scope of a criminal prohibition after the act is done." *Collins v. Youngblood*, 497 U.S. 37, 49, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *see also* *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (a law is *ex post facto* if it "deprives one charged with [a] crime of any defense available according to law at the time when the act was committed"). This is plainly forbidden by our Constitutions. To expose Pownall to a higher probability of criminal sanction than what he faced at the time of the alleged acts would violate the constitutional proscriptions on *ex post facto* laws.

In sum, our Constitutions favor trials over summary executions, and they value the lives of suspects who carry deadly weapons just as much as the lives of the unarmed. By justifying the use of deadly force on suspicions of criminal conduct, regardless of whether the suspect actually poses a threat, Section 508(a)(1) impermissibly grants police officers the power of judge, jury, and executioner. It improperly treats possession of a weapon as a proxy for dangerousness. *Cf.* ***934** *Commonwealth v. Hicks*, 652 Pa. 353, 208 A.3d 916, 947 (2019) (characterizing the lower court's view "that the 'possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous' " as patent error). I agree with the Commonwealth that Section 508(a)(1) is unconstitutional. But the canon of constitutional avoidance is no savior here. We should strike the offending provisions. Nonetheless, if Pownall presents facts that warrant application of any or all of the provisions of Section 508(a)(1), he is entitled to a jury instruction that reflects the language of Section 508(a)(1) as it existed at the time of the alleged offense because the retroactive deprivation of a statutory justification would itself result in a constitutional violation.

All of these issues are separable from Pownall's guilt or innocence. We are presented with purely legal questions that do not hinge upon the veracity or adequacy of the Commonwealth's factual allegations. The result of the Majority's contrary conclusion is that these constitutional issues of statewide significance are likely to evade our review forever. And the Commonwealth certainly will not be able to have them answered during any appeal that follows Pownall's trial. Because the Majority errs in concluding that the collateral order doctrine does not allow us to answer these important questions, I dissent.

Justice Donohue joins this dissenting opinion.

All Citations

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Footnotes

1 We provide the text of these authorities *infra* at —— & n.9, respectively.

2 Throughout this opinion we generally refer to "the DAO" instead of "the Commonwealth." We do this because the DAO's principal argument is that "Section 508(a)(1) is facially unconstitutional." DAO's Reply Brief at 1. Our rules do not contemplate this situation. Ordinarily, when a party in a case "draws in question the constitutionality of any statute" it must "give immediate notice in writing to the Attorney General[.]" Pa.R.A.P. 521(a). This rule recognizes the fact that the Attorney General is "the chief law enforcement officer of the Commonwealth[,]" 71 P.S. § 732-206(a), and is statutorily charged with "uphold[ing] and defend[ing] the constitutionality of all statutes[.]" 71 P.S. § 732-204(a)(3). Significantly, though, Rule 521 requires notice to the Attorney General only when "the Commonwealth or any officer thereof ... is not a party[.]" Pa.R.A.P. 521(a). The obvious implication of the rule is that when a county district attorney prosecutes a case "in the name of the Commonwealth," 16 P.S. § 1402(a), he or she assumes this duty to defend a challenged statute's constitutionality and no notice to the Attorney General is needed. Here, the DAO takes the exact opposite stance: not only does it decline to uphold Section 508's constitutionality, it leads the charge against it. In this unusual circumstance, and in the absence of any indication the Attorney General has been given notice of the DAO's claimed facial attack to Section 508's constitutionality, we find it prudent to refer to the DAO's position as its own rather than attribute it to the Commonwealth.

3 18 Pa.C.S. § 2501, § 907, and § 2705. Parenthetically, we note that although Section 2501 addresses criminal homicide generally, the actual criminal offenses for the various degrees of murder are set forth in 18 Pa.C.S. § 2502, not Section 2501. Likewise, the remaining two species of criminal homicide, voluntary manslaughter and involuntary manslaughter, are provided in 18 Pa.C.S. § 2503 and § 2504, respectively.

4 *See* 42 Pa.C.S. § 4551(e) ("When the attorney for the Commonwealth proceeds on the basis of a presentment, a complaint shall be filed and **the defendant shall be entitled to a preliminary hearing** as in other criminal proceedings.") (emphasis added).

5 The DAO later clarified "the relevant analysis under the Fourth Amendment is coterminous with any analysis under Article I, Section 8 of the Pennsylvania Constitution." Motion in Limine, 11/25/2019 at 10 n.3.

6 The word "reasonable" does not appear in this portion of the statute. But, Section 501 instructs that the words "believes" and "belief" as used in Chapter 5 of the Crimes Code — where the peace officer justification defense resides — mean "reasonably believes" or "reasonable belief." 18 Pa.C.S. § 501. We therefore substitute this definition for clarity.

7 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

8 We observe that on the next page of its motion the DAO undermined, if not plainly contradicted, its own argument in this respect. *See* Motion in Limine, 11/25/2019 at 12 (clarifying it "does not suggest that a misdemeanant cannot ever create a threat that necessitates a police officer's use of deadly force").

9 Suggested Standard Jury Instruction (Crim) § 9.508B provides:

> 1. In this case, evidence was introduced that in preventing an arrestee from escaping, the defendant may have used what is called "deadly force," which is defined as force that was readily capable of causing death or serious bodily injury under the circumstances.
>
> 2. Special rules apply in determining whether the defense of justification is available when deadly force was used to prevent an arrestee from escaping. A person in the defendant's position need not desist from efforts to prevent the escape merely because the arrested person persists in his or her efforts to escape.
>
> 3. Furthermore, the Commonwealth has the burden of disproving the defense of justification. Thus, you cannot find the defendant guilty:
>
> > a. unless the evidence convinces you beyond a reasonable doubt that [he] [she] did not reasonably believe that deadly force was necessary to prevent death or serious bodily injury to [himself] [herself] *[other person]*;
> >
> > [b. and unless the evidence also convinces you beyond a reasonable doubt that [he] [she] did not reasonably believe either that deadly force was necessary to prevent *[name of arrested person]* from escaping or that *[name of arrested person]*:
> >
> > [(1) in attempting to escape had committed or attempted to commit the crime of *[crime]*; [or]
> >
> > (2) possessed a deadly weapon; [or]
> >
> > (3) had indicated that [he] [she] would endanger human life or inflict serious bodily injury unless [his] [her] custody was secured without delay.]]

Pa. SSJI (Crim) § 9.508B (brackets in original).

10 Pownall's accusation about the DAO "ignoring the law" appears to refer to what occurred (or perhaps did not occur) before the Investigating Grand Jury. In a motion he filed two weeks after responding to the DAO's motion in limine, Pownall averred that

> [a] careful review of the legal instructions and definitions provided to the Grand Jury indicates that the [DAO] never gave the grand jurors the definitions of Murder (of any degree), Voluntary Manslaughter, or Involuntary Manslaughter. Furthermore, they never instructed or advised the Grand Jury of [Section] 508 which sets forth the law regarding the use of permissible deadly force by a police officer[.]

Motion to Quash Presentment and for Dismissal of All Charges, 12/18/2019 at 2.

11 The subcommittee note to the relevant suggested standard jury instruction supports the trial court's inclination. *See* Pa. SSJI (Crim) § 9.508B, Subcommittee Note ("the trial judge should select the material for inclusion in the charge depending on the evidence adduced at trial"); *see also* Pa.R.Crim.P. 647(B) (court need not rule on written requests for jury instructions until "[b]efore closing arguments"). Also worth mentioning is the well-settled principle that the suggested standard jury instructions "are not binding and do not alter the discretion afforded trial courts in crafting jury instructions; rather, as their title suggests, the instructions are guides only." *Commonwealth v. Eichinger*, 631 Pa. 138, 108 A.3d 821, 845 (2014).

12 The precise questions we agreed to consider, as framed by the DAO, are:

> (1) Did the Superior Court err when it held that it did not have jurisdiction over the Commonwealth's appeal under the collateral order doctrine where the appeal raised only the facial constitutionality of a broadly applicable statute that in no way implicated the question of [Pownall's] guilt or innocence?

(2) Did the Superior Court improperly depart from this Court's precedent by holding that the Commonwealth may invoke its right to an interlocutory appeal under Pa.R.A.P. 311(d) only where it arises from an order that excludes, suppresses, or precludes the Commonwealth's evidence?

(3) Did the Superior Court improperly depart from this Court's precedent and the General Assembly's Rules of Statutory Construction by stating that it could not properly construe a statute to give effect [to] legislative intent?

Commonwealth v. Pownall, —— Pa. ——, 252 A.3d 1074 (2021) (*per curiam*).

13 *Amicus curiae* briefs have been filed in support of both parties. We do not discuss them because none addresses the dispositive jurisdictional questions.

14 The DAO directs us to parts of *White* that commanded only a plurality of the Court, including a line purporting to overrule *Cosnek*. *See* DAO's Brief at 19. Among other things, those parts sought to resurrect the plurality author's dissenting position in *Cosnek*, which advocated a literal reading of Rule 311(d) that would permit a Commonwealth appeal as of right whenever the Commonwealth certifies in good faith "that a pretrial ruling substantially hampers the case[.]" *Cosnek*, 836 A.2d at 884 (Eakin, J., dissenting). Because this Court has never adopted that literal view of Rule 311(d), the portion of *White* cited by the DAO is of little relevance here.

15 We observe this characterization, among others, from the DAO's brief appears to refute ADA Tripp's assertion that the DAO's motion was not intended "to bar [Pownall] from a defense[.]" N.T. 11/25/2019 at 8; *see id.* ("I don't think it impacts the defense.").

16 As the review of our cases regarding Rule 311(d) makes clear, we have never held the rule is satisfied merely when an order might "enable [a] defendant to evade conviction" or alter the Commonwealth's "burden to prove its case beyond a reasonable doubt." DAO's Brief at 15, 19. Similarly, there is no support for the DAO's position that Rule 311(d) appeals are subject to a balancing test and that a defendant must identify some interest that would weigh against the Commonwealth's claimed need to appeal. *See* DAO's Reply Brief at 13. Nor have we ever said Rule 311(d) jurisdiction is appropriate solely when the issue might "otherwise evade review." DAO's Brief at 20.

17 Earlier, we noted the trial court declined to authorize an immediate permissive appeal. We add that the DAO could have pursued review of that decision, but nothing in the record suggests it did. *See* Pa.R.A.P. 1311, Note (explaining that at the time relevant here, "an order refusing to certify an order as meeting the requirements of 42 Pa.C.S. § 702(b) was reviewed by filing a petition for review under Chapter 15"). This available but neglected procedural avenue refutes the dissent's assertion that "the only circumstance in which an appellate court ever could assess a Commonwealth challenge to the meaning or the constitutional validity of a statutory defense would occur if a trial court certifies the order denying relief for immediate pretrial appeal." Op. at —— – ——.

18 The dissent accepts the DAO's latest framing of its issue as a pure legal question divorced from the facts of Pownall's case. *See, e.g.*, Op. at ——("This appeal poses the abstract question of whether a statute is unconstitutional."). From that vantage point, the dissent argues our decision herein creates tension with other cases from this Court and the United States Supreme Court which supposedly "held that constitutional issues nearly identical to the merits question in today's case are reviewable ... under the collateral order doctrine." *Id.* at ——. We respectfully disagree. The appeals in the civil cases cited by the dissent were taken following motions for summary judgment and, as the dissent admits, involved "immunity-type defenses, which, unlike

justification defenses, aim to exempt the individuals entitled to immunity from the burden of being haled into court and defending themselves in the first place." *Id.* at ——. *See* *Plumhoff v. Rickard*, 572 U.S. 765, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014) (qualified immunity); *Brooks v. Ewing Cole, Inc.*, —— Pa. ——, 259 A.3d 359 (2021) (sovereign immunity); *Pridgen v. Parker Hannifin Corp.*, 588 Pa. 405, 905 A.2d 422 (2006) (applicability of federal statute of repose for product liability claims against aircraft manufacturers under the General Aviation Revitalization Act, 49 U.S.C. § 40101). Such orders are qualitatively different from what we have in this criminal case, in that they "conclusively determine whether the defendant is entitled to immunity from suit[,]" which "is both important and **completely separate** from the merits of the action[.]" *Plumhoff*, 572 U.S. at 772, 134 S.Ct. 2012 (emphasis added). As discussed, the same is not true of the present challenge, rendering these cases easily distinguishable. And, since the dissent directs us to no other authority to support its proposed expansion of "the collateral order doctrine's reach [to] any Commonwealth appeal wherein it questions either the meaning of or the constitutional validity of a statutory defense[,]" Op. at ——, we decline to adopt such a rule, as it would undermine the narrow approach favored by this Court and the United States Supreme Court with respect to collateral orders. *See, e.g.*, *Hafer*, 177 A.3d at 858 ("while our Court has diverged from the federal approach in some regards, we nonetheless construe the collateral order doctrine narrowly"); *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) ("the 'narrow' exception should stay that way and never be allowed to swallow the general rule").

19 Neither the DAO nor the dissent directs us to any case, from any jurisdiction, in which a court entertained a facial Fourth Amendment challenge to a statute authorizing the use of force. Although the High Court has indicated "facial challenges under the Fourth Amendment are not categorically barred" in some respects, *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015), the result in *Garner*, coupled with the Court's repeated admonition in cases like *Graham* and *Scott* that such claims are inherently fact bound, gives us pause and raises a serious question about whether a facial claim is even viable in this context. But we need not resolve this novel and prickly issue today.

20 It is worth noting both the DAO and the dissent fail to identify any case in which a court permitted a claim alleging a statute was facially unconstitutional to proceed on appeal by way of the collateral order doctrine. Our own research has likewise failed to reveal any. This is perhaps unsurprising since the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541, typically serves as the vehicle for making such challenges in the civil context, and in the criminal context, such claims ordinarily are raised by defendants, and thus would not be irreparably lost if postponed until after trial. This again highlights the atypical nature of this case, wherein the DAO is the party that purports to raise a facial challenge to a statute that the Commonwealth typically has a duty to defend. Given the peculiarities of the situation, it may be appropriate for the relevant Rules Committees to study this issue further, and to consider whether this Court should adopt some mechanism that would permit the Commonwealth the ability to contest more easily a statute's constitutionality. *See* *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) ("[R]ulemaking, 'not expansion by court decision,' [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable.") (citation omitted).

21 Contrary to the dissent's view, we do not hold "the Commonwealth will **never** be able to secure appellate review of a trial court's denial of a challenge implicating a statutory defense." Op. at —— (emphasis in original); *see id.* at —— – —— (suggesting the DAO's constitutional question "will remain unanswered" — "perhaps indefinitely" — "if we do not assess it here and now"). We merely resolve the limited jurisdictional question before us by holding the Commonwealth may not take an interlocutory appeal from an order denying

a pre-trial motion regarding the use of potential jury instructions. Although there may be other ways to raise such a constitutional challenge, we have no occasion to consider those methods here given the DAO's chosen litigation strategy.

1 Fortunately, I find myself in good company in this regard. *See* *In re Adoption of M.R.D.*, 636 Pa. 509, 145 A.3d 1117, 1133 n.1 (2016) (Todd, J., specially concurring) ("As members of this Court have previously noted, special concurrences are 'somewhat unusual, but not without precedent.' "), *quoting* *Commonwealth v. King*, 618 Pa. 405, 57 A.3d 607, 633 n.1 (2012) (Saylor, J., specially concurring); *accord* *In re Bruno*, 627 Pa. 505, 101 A.3d 635, 689 n.1 (2014) (Castille, C.J., specially concurring); *see also* *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949) (Jackson, J., specially concurring) ("It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions.").

2 I observe a bill was recently introduced in the legislature that seeks to amend the peace officer justification defense to allow the use of deadly force during an arrest only if the officer reasonably believes such force is necessary to "protect himself or another from imminent death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat." H.B. No. 2556, P.N. 3062 (Apr. 27, 2022).

3 The "investigative resources of the grand jury" are defined as:

> The power to compel the attendance of investigating witnesses; the power to compel the testimony of investigating witnesses under oath; the power to take investigating testimony from witnesses who have been granted immunity; the power to require the production of documents, records and other evidence; the power to obtain the initiation of civil and criminal contempt proceedings; and every investigative power of any grand jury of the Commonwealth.

42 Pa.C.S. § 4542.

4 The record presently before us includes the limited and partially redacted materials the DAO disclosed to Pownall at the supervising judge's direction. Those materials were accompanied by a letter which refers to "[a]ttached [d]efinitions" that were "distributed to [the g]rand [j]urors on August 23, 2018[.]" DAO's Letter, 12/12/2019 at 1. This document says nothing of Section 508; further, it supports Pownall's position the DAO provided a definition only for "criminal homicide" generally under 18 Pa.C.S. § 2501, without defining any of the types of homicide set forth in 18 Pa.C.S. § 2502 (murder), § 2503 (voluntary manslaughter), or § 2504 (involuntary manslaughter). It stated:

> **Criminal Homicide, 18 Pa.C.S. § 2501**
>
> To find that this charge has been established, you must find probable cause that:
>
> Ryan Pownall intentionally, knowingly, recklessly or negligently caused the death of David Jones.
>
> A killing is considered criminal homicide if someone intentionally, knowingly, recklessly or negligently causes the death of another human being. Criminal homicide includes murder, voluntary murder, voluntary manslaughter, or involuntary manslaughter.

Definitions Provided to Grand Jury, 8/23/2018. This contrasts with the crimes alleged by the DAO when it submitted the investigation to the grand jury four months earlier. At that time, the transcripts reveal, the

DAO announced it was specifically recommending murder under Section 2502, without mentioning criminal homicide under Section 2501.

5 We have explained the structure of Chapter 25 of the Crimes Code "create[s] one major homicide offense, that of criminal homicide, and [ ] the several types of homicide ... are constituent subsidiary offenses within the single major offense." *Commonwealth v. Polimeni*, 474 Pa. 430, 378 A.2d 1189, 1194 (1977) (plurality). This arguably undermines Pownall's claim the DAO was required to furnish the grand jury with the definitions for all "lesser included offenses of the overall crime of criminal homicide." *Id.* at 1194-95. Still, there is logical force to Pownall's argument since "[t]he differences between the classifications [of homicide] are largely a function of the state of mind of the perpetrator." *Id.* at 1195. By ultimately seeking a recommendation only for criminal homicide generally, the DAO avoided the need to present any evidence concerning Pownall's mental state. Even if this is legally permissible, when coupled with the other strategies employed by the DAO discussed below, it nevertheless raises genuine fairness concerns.

6 Ordinarily, I would provide these links for the benefit of the reader. I decline to do so here because it would only further erode Pownall's ability to receive a fair trial. In any event, I observe the DAO does not contest this extensive media coverage exists. *See* DAO's Brief on Defense's Motion for Change of Venire, 5/21/2019 at 3 (admitting at least "a dozen articles reference the presentment, DAO press conference, or quote a DAO spokesperson"); *id.* at 5 (tallying "105 local articles" related to Pownall's case).

7 Pownall has yet to go to trial nearly four years after his arrest. Since this is due entirely to the DAO's litigation strategy, its expressed concern for "superfluous delay" is incredible. It's also "logically untenable: bypassing the preliminary hearing would **always** spare the court from delay, and there would be no need to have a preliminary hearing in any case if preventing delay constituted 'good cause.' " Pownall's Objection to DAO's Bypass Motion, 9/14/2018 at 6 (emphasis in original).

8 In its bypass motion, the DAO relied on what appears to be the only reported decision in which the Commonwealth successfully evaded a preliminary hearing based solely on a grand jury presentment — *i.e.*, without an indictment. *See* DAO's Bypass Motion, 9/13/2018 at 3-5, *citing* *Commonwealth v. Cassidy*, 423 Pa.Super. 1, 620 A.2d 9 (1993). That thirty-year-old decision of the Superior Court does not, of course, bind this Court; and, it is dubious at best, because the panel did not so much as cite to Section 4551(e) let alone explain how its plain terms could be avoided.

9 Even if Rule 565 extended to presentments, the DAO clearly did not demonstrate "good cause" here. The comment to the rule explains the use of a preliminary hearing bypass is "limited to exceptional circumstances only." Pa.R.Crim.P. 565, Comment. According to Pownall, Assistant District Attorney Tracy Tripp ("ADA Tripp") informed the assigned preliminary hearing judge (before it was bypassed) that the hearing could be conducted in only "two [to] three hours." Pownall's Supplemental Objection to DAO's Bypass Motion, 9/25/2018 at 3. As Pownall aptly remarked, this "would be the standard length of any [h]omicide preliminary hearing ... on any given day." *Id.* Indeed, given Pownall's willingness "to stipulate to the various physical and forensic evidence," he anticipated the DAO might only need "to present two or three live witnesses and a video." *Id.* That hardly demonstrates good cause.

10 I recognize the supervising judge acceded to the DAO's bypass request. Unfortunately, we have no record of what occurred at the hearing on that motion. *See* Motion in Limine, 11/25/2019 at 2 n.1 (explaining the notes from the bypass hearing are irretrievably lost "because the stenographer transcribing that day has left the jurisdiction and failed to produce either the transcript or the original stenotype, preventing transcription"). For that reason, I do not address the supervising judge's role in this situation.

11 *See* MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

12 Pointing to Ohio as an example, the DAO presently argues in its brief that other courts "have disagreed with" cases like *Couch* and concluded that *Garner* "frame[s] an officer's justification defense in a state criminal law prosecution." DAO's Brief at 49, *citing* *State v. White*, 142 Ohio St.3d 277, 29 N.E.3d 939 (2015). The problem with this argument is that Ohio is one of the four states the *Garner* Court specifically observed was "without a relevant statute" and thus followed "the common-law rule." *Garner*, 471 U.S. at 16, 105 S.Ct. 1694. The DAO's underlying claim here concerns *Garner*'s effect on state criminal law statutes, rendering common-law cases like *White* inapposite.

13 Notably, the DAO argued that although prosecutorial sources "carry authority and may prejudice a venire[,]" the extensive publicity in Pownall's case was "not so reliant on" those sources. DAO's Brief on Defense's Motion for Change of Venire, 5/21/2019 at 3-4. But it turns out the same prosecutor who authored this statement, ADA Tripp, was in fact participating in a documentary focused on the DAO. In 2021, during the pendency of this appeal, that documentary aired on television, including an entire episode dedicated solely to Pownall's case. *See* Pownall's Brief at 60-61, *citing Philly D.A.*, Episode 7, (PBS July 1, 2021). That a prosecutor would think it appropriate to poison the well of public opinion by participating in a documentary concerning an ongoing case is unconscionable to me. *See, e.g.*, Pa.R.P.C. 3.8(e) ("except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused").

1 *See* *Commonwealth v. Gibbons*, 567 Pa. 24, 784 A.2d 776, 778 (2001) (explaining that double jeopardy bars a Commonwealth appeal from a judgment of acquittal).

2 Under Pa.R.A.P. 501, "[o]nly an aggrieved party can appeal from an order entered by a lower court." *Commonwealth v. Polo*, 563 Pa. 218, 759 A.2d 372, 373 n. 1 (2000).

3 *See* Pa.R.A.P. 312 ("An appeal from an interlocutory order may be taken by permission pursuant to Chapter 13 (interlocutory appeals by permission)."); *see also* Pa.R.A.P. 1311(a) (providing that "[a]n appeal may be taken by permission from an interlocutory order" that meets one of three conditions).

4 See the discussion of *Plumhoff v. Rickard*, 572 U.S. 765, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014), *infra*.

5 "Because Pennsylvania adopted the collateral order doctrine from the United States Supreme Court, we continue to look to that Court's decisions for guidance in defining the contours of Rule 313." *Brooks v. Ewing Cole, Inc.*, —— Pa. ——, 259 A.3d 359, 370 (2021).

6 *See* *Shearer*, 177 A.3d at 857 (recognizing that our collateral order doctrine has wider application than its federal counterpart); *Brooks*, 259 A.3d at 370 (explaining that "this Court has not remained in lockstep with the United States Supreme Court's recently imposed limitations on the collateral order doctrine in attorney-client privilege cases grounded in the High Court's determination that privilege claims are not irreparably lost as they are reviewable after a final judgment").

7 *Cf.* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, —— U.S. ——, 140 S.Ct. 2183, 2207, 207 L.Ed.2d 494 (2020) ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation.").

8 *See* *Pridgen*, 905 A.2d at 433 ("[T]he substantial cost that Appellants will incur in defending this complex litigation at a trial on the merits comprises a sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest."); *Brooks*, 259 A.3d at 373 ("Because sovereign immunity protects government entities from a lawsuit itself, we conclude that a sovereign immunity defense is irreparably lost if appellate review of an adverse decision on sovereign immunity is postponed until after final judgment.").

9 In an attempt to deprive *Pridgen* and *Brooks* of their salience here, the Majority clings to the fact that those cases addressed civil appeals involving immunity-type defenses. Op. at —— n.18. But, as to separability, the distinction is without a difference. The fact that immunity defenses aim to prevent a defendant from being haled into court matters only for purposes of irreparable loss. For purposes of separability, there is no meaningful distinction between justification defenses in criminal cases and immunity-type defenses in civil cases. Both types of defenses bear directly upon the likelihood that the defendant will be held liable (whether criminally or civilly) for the alleged conduct.

10 The Majority maintains that further factual development is needed to assess the Commonwealth's constitutional challenge. To that end, my colleagues take note of the Supreme Court's holding that, "in use-of-force cases the 'first step in assessing the constitutionality of [an officer's] actions is to determine the relevant facts.' " Op. at —— – —— (alterations in original) (quoting *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). By characterizing the Commonwealth's position as a challenge to the constitutionality of Pownall's conduct, the Majority assumes (incorrectly) what it seeks to prove. Of course, it would be impossible to assess the constitutionality of Pownall's conduct without factual findings or allegations. But the Commonwealth's constitutional argument has nothing to do with what Pownall did or is alleged to have done. Rather, the constitutional challenge turns upon the terms of Section 508(a)(1). *See* Commonwealth's Br. at 24 ("Section 508(a)(1) does not meet these basic Fourth Amendment requirements, both because (1) it permits the use of deadly force in situations where such force is not necessary to prevent death or serious bodily injury; and (2) it does not require the factfinder to consider the objective reasonableness of the officer's actions.").

11 *See* *Shearer*, 177 A.3d at 855 ("Considering issues only after a final order maintains distinctions between trial and appellate review, respects the traditional role of the trial judge, and promotes formality, completeness, and efficiency.").

12 *See also* *Torres v. Madrid,* —— U.S. ——, 141 S.Ct. 989, 1003, 209 L.Ed.2d 190 (2021) (holding that officers seized fleeing suspect the instant they shot her, although she eluded capture).

13 Capital punishment is the only other context where state-sanctioned killings are constitutional. The federal Constitution imposes much stronger *ex ante* restraints on the imposition of the death penalty than it does on a police officer's use of lethal force. Consider that the Supreme Court has held that murder is the only crime against a person that can warrant imposition of the death penalty. *See* *Kennedy v. Louisiana*, 554 U.S. 407, 437, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) ("As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken."). *Garner*, conversely, allows state actors to kill based upon a much wider range of crimes, so-called dangerous felonies. Moreover, the imposition of capital punishment for murder is constitutional only if the government has adhered to the most rigid and robust procedural constraints, such as bifurcation of the guilt and penalty phases. Capital trials are unparalleled in the protections that they afford to the accused before his or her life is taken. Nonetheless, for whatever reason, the High Court has determined that a fleeing suspect is not entitled to remotely similar

safeguards when a police officer decides to kill the suspect. Indeed, *Garner* and its progeny require only probable cause despite the fact that the penalty even for relatively minor offenses such as criminal trespass, which, if graded as a second-degree felony carries a maximum prison sentence of ten years requires proof beyond a reasonable doubt.

14 *See* *Garner*, 471 U.S. at 14, 105 S.Ct. 1694 (denouncing the notion that all fleeing felons have "already forfeited" their lives).

15 The Majority offers just one reasonable interpretation. Section 508(a)(1) also could be interpreted such that "possesses a deadly weapon" not only modifies "is attempting to escape" but also the phrase "has committed or attempted a forcible felony." If the possession requirement modifies the forcible felony requirement as well, then the "forcible felony" justification would require proof that the person to be arrested both (1) has committed or attempted to commit a forcible felony and (2) possesses a deadly weapon. As a result, the "deadly weapon justification" would be a bit of a misnomer and could be retitled the "attempted escape" justification, which requires an attempted escape and possession of a deadly weapon.

These competing interpretations provide further reason why we should address the merits here and now. If the Majority's reading is incorrect, the suggested jury instruction for Section 508, which is likely used by many courts throughout this Commonwealth, also is incorrect. Alas, my learned colleagues side-step this important question, refusing to provide guidance as to how or when it will be possible to address it.

For purposes of this analysis, I accept the Majority's proffered interpretation. But regardless of which reading is superior, both constructions are unconstitutional because they permit the use of lethal force without any facts indicating the suspect poses an immediate danger.

16 *See* Commonwealth's Br. at 34 ("The two impermissible scenarios of the escape justification contain nothing more than 'rigid preconditions,' a checkmark beside each of which will permit an officer to take the suspect's life, without any consideration of the objective reasonableness of that action. For this reason, too, the statute permits the use of deadly force in situations that violate a person's constitutional rights."); *id.* at 24 ("Section 508(a)(1) does not meet these basic Fourth Amendment requirements, both because (1) it permits the use of deadly force in situations where such force is not necessary to prevent death or serious bodily injury; and (2) it does not require the factfinder to consider the objective reasonableness of the officer's actions.").

17 *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116-25 (2012) (explaining the conjunctive/disjunctive canon).

18 The United States Constitution contains two provisions addressing *ex post facto* laws. The first is found in Article I, Section 9, and serves as a limitation on Congress' authority to pass such laws: "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. The proscription appears for the second time in Article I, Section 10, and, in this usage, constitutes a restriction on the power of the states: "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. art. I, § 10, cl. 1. Article I, Section 17 of the Pennsylvania Constitution similarly limits the General Assembly's power: "No ex post facto law ... shall be passed." PA. CONST. art I, § 17.

ATTACHMENT C

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LAWRENCE S. KRASNER
DISTRICT ATTORNEY

October 21, 2022

Dear Members of the Select Committee on Restoring Law and Order:

I had hoped that I could appear with you in person at a public hearing and answer, under oath, any and all of your questions. Crime in the Commonwealth of Pennsylvania, including in Philadelphia, and policing and prosecution of crime, are matters of great importance to the residents of the Commonwealth, including Philadelphia's residents. Much to my disappointment, you have repeatedly refused to speak with me, whether at a public hearing or even at a private hearing where my only request was to have a record (video/transcript) of what said.[1]

Instead of meeting with me in person, publicly or privately, you asked me to submit a written statement as long as it was submitted within a very short deadline, due today at 5:00p.m. You did not specify the questions I should answer or the topics I should address. You said only that it should be "relevant to the Select Committee's work."

There is no mystery as to why today's deadline is important to you. Today is the last business day before the House convenes on Monday (for its last sessions prior to the midterm election), and you'd like to give the *appearance* of hearing from me before you recommend my impeachment as District Attorney of Philadelphia.

You have never specified what your basis of impeachment is. There has been no suggestion of criminal conduct or corruption of any kind. You have never indicated to me or to anyone why I should be impeached, but there is little doubt that the Select Committee intends to recommend my impeachment. Indeed, this Committee was formed for the express purpose of recommending my impeachment. Rep. Ecker, one of the members of this committee, even publicly called for my impeachment *before* the Committee was formed.

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[1] I asked to testify at the public hearings on September 29-30, 2022. You refused. I asked to testify at a public hearing today. You refused. I even asked to testify in a private Executive Session today, so long as we both had the right to record the meeting. Again, you refused.

The Select Committee has claimed to be focused on curbing crime, but it has refused to investigate any other county in the Commonwealth, even though other counties have experienced greater increases in the homicide rate than that of Philadelphia. Indeed, homicides and violent crimes have increased all over the United States, in jurisdictions that have elected both traditional prosecutors and reform prosecutors. By now you are well aware that the terrible increase in the rate of homicide in Philadelphia over 2020-2021 (the most recent full year data) of 59% is much lower that the rates of increase in the counties home to the sponsors of House Resolution 216. According to state police data, Washington County's increase over the same period is 800% (Rep. O'Neill), Adams County is 300% (Rep. Ecker). Beaver County is 250% (Rep. Kail). And when we average the rate of increase in homicides for the sponsors of HR 216 and the members of this Select Committee over the same time period, we find that their average increase in homicides is still higher than that of Philadelphia. This trend is true nationwide. The states that voted for Donald Trump in 2020 had a 40% higher murder rate than the states that voted for Joe Biden. And, as discussed in the study titled "The Red State Murder Problem," 8 of the 10 cities with the highest murder spikes are in Republican states.

Criminologists know what works to prevent crime. It is not love for the NRA, opposition to reasonable gun regulations, or draconian sentences. It is investment in communities, fully funded public schools, mental health and addiction treatment resources, economic opportunity, trade school and higher education opportunity, keeping parents in the community (not in jail) when they have committed non-violent, non-serious offenses, and modern police reform, among other things. All leading criminological reports show zero correlation between crime and progressive/reform prosecution. One sweeping and very recent study by Brownstein, Jawn, Pffaff, and Asher indicates that reform prosecutor jurisdictions are doing slightly better with public safety than the more traditional and conservative ones.

It is my hope that in the future you will undertake an honest, statewide look at how public safety and criminal justice can be improved throughout the Commonwealth, in every county and city, and in an expansive way that shows the true picture of how we can work together to improve and modernize law enforcement by prosecutors and police, and how we can improve the prevention of crime. I will vigorously assist in such a process, conducted in good faith, at several levels; I have already done so with our criminal justice and governmental partners in Philadelphia, the 100 Shooter Report. I invite such a fair and thoughtful process.

***

Every decision I make as District Attorney is with the goal of seeking justice and improving public safety. That is my oath. Public safety has always been my primary goal, and I have never deviated from more intensely focusing on the most serious and violent offenses. My office has been especially focused on prosecuting violent and serious crimes. That is a

collaboration with other law enforcement since we cannot charge cases that are not solved by police. While the last full year of data available indicates only 17% of non-fatal shootings were solved in Philadelphia and only 28% of gun homicides were solved, our current conviction rate for the homicides and gun violence cases that are solved is much higher--- nearly 90% at the trial level. This rate compares very favorably to our predecessors and other large cities. We have achieved it while strictly following the constitutional and legal requirements that protect us all from wrongful convictions that incarcerate the innocent and allow the guilty to escape. Sadly, many traditional prosecutors in Philadelphia and elsewhere have not maintained that high legal and ethical standard. It's harder to win when you don't cheat, but we are winning.

Because federal and state law enforcement as well as the Philadelphia Police Department are our partners, we have shouldered together with them, supporting and advocating necessary reforms in investigation and policing that can greatly improve their success in solving cases. For four years, I have been the loudest and most public voice in Philadelphia advocating for a state-of-the-art, $50 Million investment in police forensic capacity that has a jaw-dropping capacity to solve gun violence cases that are currently unsolved. My efforts have included multiple meetings with every law enforcement entity (federal, state, local) and several legislators aimed at getting the Philadelphia Police Department's forensic unit additional resources that exceed my office's entire budget. My efforts have included countless media interviews to stir up public support for this investment. Years later, we are starting to see progress in that direction thanks in part to grant opportunities now available and additional governmental investment from the City of Philadelphia and the Commonwealth. Despite the delay, I am excited to see that progress.

There are several other collaborations begun by law enforcement during our administration and solo efforts that I applaud and we intend to continue. They include: Gun Violence Intervention Initiative (GVI)---a focused program on the Kennedy model aimed at deterring people at risk of shooting or being shot, very frequent meetings between senior personnel at the PPD and the DAO to improve the quality of new gun violence and gun possession arrests and prosecutions shortly after arrest, deeper investigative and forensic word by the Gun Violence Task Force (GVTF), placement of DAO personnel inside the DVIC intelligence center to assist law enforcement partners in all legal and intelligence aspects of their important investigations, the creation of an Intelligence Unit in the DAO, unification of the DAO Homicide and Non-fatal Shooting Units into a single unit prior the PPD's excellent and similar decision to create the SIG (Shooting Investigation Group), which is showing improvements in the solve rate for non-fatal shootings already. And there are many others that show promise. I'd be more than happy to share details about these initiatives with you.

There are many ways to pursue public safety. In the past, The Philadelphia District Attorney's Office (DAO) has relied almost exclusively on the blunt instrument of jail and prison, without recognizing that this approach is often ineffective and, in the long term, may make our

communities more dangerous. In my office, we recognize we have numerous tools in our arsenal, and we use each one to build up our community. We are proud of our work. So are Philadelphians. It is why they overwhelmingly re-elected me less than a year ago.

Supporting victims, witness and survivors is a key part of preventing and successfully prosecuting crime. For this reason, our administration started the CARES program, which focuses intensely on the needs of homicide victims' families during the first 45 days after their loved one's death. We are re-locating more endangered witnesses, immediately and vigorously and at greater total expense, with resources from multiple funding sources. We have improved accountability for the very challenging process of communications between our victim-witness coordinators, our lawyers, and witnesses, victims and survivors. We offer limited restorative justice approaches for victims who want it in appropriate cases, and we are seeing excellent results. And we remain in close contact and collaboration with the regional Victim-Witness services agencies in Philadelphia that we fund.

Not only is providing robust support the moral thing to do, it is also important for long-term public safety. We know that victims of violent crime and witnesses exposed to it are significantly more likely to commit crimes of violence in the future. We know that being the victim of violent crime increases the likelihood that someone will carry a weapon in order to feel safe. It is, therefore, absolutely critical that we help all victims who come through our office. That is one of the most effective ways to keep us safe.

Our work with juveniles and young adults has drawn lessons from the best practices around the country, thanks in part to our employment of the former chief of the US Government's Office of Juvenile Justice and Delinquency Prevention. There is much about juvenile justice to discuss. Unfortunately, there is an acute lack of state facilities appropriate for the handling of violent juvenile offenders in the Commonwealth. Abusive, snakepit facilities that were failing to rehabilitate or educate them were closed, but they were not replaced. Re-investment in humane and constructive facilities that are effective for violent offenders are essential to public safety. Here, as in many other issues, the legislature can make an important difference so long as the massive amounts of money being saved from closing the snakepits is re-invested properly, rather than aimed at tax breaks for the wealthy.

Holding people accountable for violent crime also requires us to improve the public trust that has been broken after decades where our policing and legal system failed people, especially people of color. Often, witnesses and victims did not, and sometimes still do not, come forward because of that broken relationship between the police and residents. Let me be clear, I fully support police officers. But I also believe that no one is above the law, and when an officer commits a crime or willfully abuses his or her power, that officer will be held accountable. We have also ended abusive civil asset forfeiture practices, and put prosecutors in neighborhoods so

that people have direct access to them. That's how you restore trust in a system that has too long been broken.

We also divert low-level offenders in appropriate situations. Numerous studies have shown that there is no connection between diverting non-violent crimes of poverty and addiction and violent crime. Meanwhile, there is evidence that prosecuting those crimes makes us less safe because people ended up with criminal records that prevented them from getting jobs and housing. It drove them toward crime, not away from it. Over-prosecuting minor offenses also takes away resources from the prosecution of the most serious cases, both in our office and in the police department.

We cannot end violent crime simply by punishing it after the fact – we must also try to prevent it from ever happening, something we have failed to do in this city for too long. That is why every month, I give away asset forfeiture money (mostly taken from drug dealers) to vetted community based organizations that are engaged in critical violence prevention work, and why we work closely with those organizations, along with the City Council, to put in place the programming that we know will decrease crime. We invest forfeiture money in neighborhoods suffering from criminal (mostly drug) activity in the form of micro-grants. I also push for blight remediation, for better schools, and for job training for our communities, because I know that in the end, we can only stop crime by improving the conditions in which people learn, live, and work. I am tired of telling families that I am so sorry they have lost a loved one. Instead, I try to do everything within my power to prevent violence and stop crime before it happens.

I have discussed some of the things we have done to help combat violent crime. We must always ask what actually causes violent crime. Poor schools, rundown neighborhoods, blight and extreme pollution, and a failure to provide shelter, medical care, and psychological care all lead to an increase in crime. If you look at a map of where violent crime occurs, it happens in our most neglected communities. The maps align perfectly. If the legislature wants to reduce crime, it should be serious about providing needed funding to our most neglected communities.

The legislature should also enact common-sense gun reform. In the wake of Uvalde, where 19 children died, it is almost unfathomable that our legislature would fail to do this, and yet we continue to allow guns to flood our streets. You will recall that on the same week, even the same day, the Pennsylvania legislature rejected several forms of commonsense gun regulation, the Select Committee was formed. The legislature must limit easy access to guns.

***

I am utterly disappointed in the Select Committee's approach during its investigation.

It subpoenaed files from my office, including prosecution case files and secret grand jury records that I legally cannot provide, and then rushed to hold me in contempt while I challenged, in a court, the lawfulness of the subpoena. It is pushing this process forward, at a blistering pace, before the courts can even address it. It refused to allow me to testify before it in a transparent way, insisting that it could only be done behind closed doors, and then, before negotiations of my appearance had ended, said that it that it no longer had time for my testimony.

I won an election one year ago with nearly 72% of the vote. My support was even higher (over 80%) in the areas most victimized by gun violence. You cannot claim to care for them and also refuse to listen to their support for innovation, for change, for reform. It is astounding that this Committee thinks it is appropriate to undo the will of Philadelphians, especially those who are Black and Brown and poor and young, because it believes it knows better what they need. The mere suggestion is paternalistic, offensive, and racist.

I hope that one day we can have a real conversation about the prosecution of crime and public safety. We have much work to do. But we can only do it when you are not seeking political points right before an election.

Sincerely,

Lawrence K. Krasner
District Attorney

ATTACHMENT D

REPORT TO THE
HOUSE OF REPRESENTATIVES

Pennsylvania Commission on Sentencing

A Comprehensive Study of Violations of Pennsylvania's Uniform Firearms Act

HR 111, Session of 2021

June 2022

Rep. Todd Stephens
Chair

Hon. Tamara R. Bernstein
Vice Chair

Mark H. Bergstrom
Executive Director

Report to the Pennsylvania House of Representatives

A Comprehensive Study of Violations of Pennsylvania's Uniform Firearms Act

HR 111, Session of 2021

June 2022

Pennsylvania Commission on Sentencing

Pennsylvania Commission on Sentencing

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Administrative Office of the Pennsylvania Courts

County Chief Adult Probation and Parole Officers Association of Pennsylvania

Pennsylvania Commission on Crime and Delinquency

Pennsylvania Department of Corrections

Pennsylvania Justice Network

Pennsylvania Parole Board

A Comprehensive Study of
Violations of Pennsylvania's Uniform Firearms Act

Report to the Pennsylvania House of Representatives

Table of Contents

Executive Summary and Recommendations

House Resolution 111 of Session 2021 directs the Pennsylvania Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution, and sentencing of violations of the Pennsylvania Uniform Firearms Act of 1995 (VUFA), and to report its findings and recommendations to the House no later than June 30, 2022. The purpose of the study is to inform the House about the procedure and process of handling VUFA offense cases across the Commonwealth, so that the House may determine if these cases are being handled adequately under the law and if changes are needed.

Consistent with other studies, the Commission found that serious gun violence is typically concentrated in more densely populated areas, meaning that patterns of arrests, filings, prosecution, and sentencing may vary based on the urban or rural characteristics of a county. Other factors may impact the processing of cases, including police coverage (e.g., part-time vs. full-time officers, single vs. multiple departments, coverage area) and local court rules (e.g., approval of changes by the district attorney). HR 111 provided six directives to guide this study. Key findings associated with these directives include:

Directive 1: ***Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA offense under 18 Pa.C.S. Ch. 61 Subchapter A.***

- 51,618 dockets with VUFA charges were filed in the lower courts; 43.3% of the VUFA dockets (22,360) included a Felony 1 or Felony 2 VUFA charge and 15.6% (8,033) included a VUFA charge that was co-charged with a violent offense.
- VUFA dockets account for 3.8% of all dockets filed in the lower courts, 1.6% for F1/F2 VUFA dockets, and less than 1% for VUFA dockets co-charged with a violent offense.

Directive 2: ***Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.***

- 81% of non-pending VUFA dockets were bound over to Common Pleas Court; 8% were withdrawn, and 5% were dismissed. A higher proportion of dockets were withdrawn and dismissed in lower courts in counties of the First Class (17%) and Second Class (19%).
- 83% of non-pending VUFA dockets bound over to Common Pleas result in a guilty disposition; 1% of non-pending VUFA dockets were withdrawn, 1% were dismissed, 3% were found not guilty, and 10% were nolle prossed. A higher proportion of dockets were withdrawn, dismissed, or nolle prossed in Common Pleas Court, with annual increases documented, in counties of the First Class (14%; 7% in 2015, 21% in 2020) and Second Class (13%; 10% in 2015, 19% in 2020).

Directive 3: ***Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.***

- The most common sentence imposed for VUFA offenses was total confinement, found in: 38% of all VUFA dockets; 50% of F1/F2 VUFA dockets when VUFA is the primary offense; 67% of F1/F2 VUFA dockets when VUFA is the lessor offense; and 71% of VUFA dockets when co-charged with a violent offense.

Directive 4: ***Outline the sentencing guidelines for defendants who were originally charged with a VUFA offense from 2015 to 2020.***

- For F1 or F2 VUFA offenses, the most common offense gravity scores were OGS 9 and OGS 10 (state prison recommendation); for misdemeanor VUFA offenses, the most common was OGS 4 (probation or county jail recommendation).

- 43% of all VUFA offenses were sentenced in the standard range of the guidelines; 73% conformed to the sentencing guidelines (e.g., mitigated, standard, or aggravated ranges); 52% were below the standard range of the sentencing guidelines (e.g., mitigated, departure below).

Directive 5: ***For an individual charged with a VUFA offense from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense.***

- Pre-trial failure rates: 5% for all VUFA dockets; 6% for F1/F2 VUFA dockets; 7% co-charged with a violent offense.
- 20% of the individuals initially charged with any VUFA offense were charged with another VUFA offense within three years. Rates were substantially higher in counties of the First Class (29.5%) and Second Class (24.8%)
- Cases that were withdrawn or dismissed in the lower courts had higher 3-year recidivism rates; cases nolle prossed in Common Pleas Court had substantially higher 1-year recidivism rates (8%) as compared to convictions (5%).
- Sentences imposed within the standard range of the sentencing guidelines were associated with lower 3-year recidivism rates (12%) than those below the standard range (22% mitigated, 21% departures below).

Directive 6: ***For individuals sentenced to probation or granted parole following a VUFA conviction, determine if any individuals subsequently violated the terms of supervision.***

- Probation revocations: 15% of cases, twice as often for technical violations than new offenses.
- State parole violations: 71% of cases, slightly higher than the general violation rate (68%).

As required by HR 111, the Commission offers the following recommendations, intended to assist the House in becoming more knowledgeable about the procedure and process of handling VUFA offenses:

***Recommendation 1*:**

Authorize county-level qualitative studies of procedures and processes, including interviews with and/or surveys of key stakeholders, to explain county-specific variations.

***Recommendation 2*:**

Authorize county-level quantitative studies of procedures and processes, and expand the scope of these studies to analyze the impact of factors such as age, gender, race/ethnicity, education, employment, and poverty.

***Recommendation 3*:**

Promote efforts across state agencies to enhance the collection of complete and accurate data, and to require the use of common identifiers. The ability to consistently track individuals, charges, and cases, across stages and decision points, and to accurately follow individuals from first contact with the system through release, will improve the quality of data and research to support evidence-based practices.

Recommendation 4:

Authorize a comprehensive study of programs and practices that improve outcomes for those under supervision for VUFA offenses, to include a review of: bail decisions; pretrial supervision and services; pretrial diversion; problem solving courts (gun courts); presumptive sentencing guidelines; risk-needs-responsivity pre-sentence investigation reports (RNR PSI); and duration and intensity of probation and parole supervision.

Preface: HR 111

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THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 111 Session of 2021

INTRODUCED BY STEPHENS, DEASY, NEILSON, WHITE, C. WILLIAMS AND THOMAS, JUNE 8, 2021

AS AMENDED, HOUSE OF REPRESENTATIVES, NOVEMBER 17, 2021

A RESOLUTION

Directing the Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of violations of Pennsylvania Uniform Firearms Act of 1995 in this Commonwealth.

WHEREAS, In 2020, there were 499 homicides in Philadelphia, which was an increase of more than 40% from 2019, and just one shy of the record for homicides in the city set in 1990; and

WHEREAS, In 2020, there were 434 fatal shootings in Philadelphia; and

WHEREAS, In 2020, Philadelphia suffered the highest rate of fatal shootings, 27.39 per 100,000 residents, among the 10 cities with populations greater than 1 million in the country; and

WHEREAS, In 2020, there were more than 2,240 people shot in the city, 40% more than police had previously recorded; and

WHEREAS, In 2020, more than 100 juveniles were shot in Philadelphia; and

WHEREAS, As of May 3, 2021, Philadelphia homicides numbered 176, which represents a 39% increase from the same time last

year; and

WHEREAS, As of May 3, 2021, there were 676 shootings in the city of Philadelphia, which is a 37.4% increase from the same time last year; and

WHEREAS, With 24.99 per 100,000 residents, Philadelphia suffered the highest rate of fatal shootings among the 10 cities with populations greater than 1 million in the country from January 2021 through March 2021; and

WHEREAS, As of May 3, 2021, there have been 150 fatal shootings in Philadelphia, and 65 juveniles have been shot in Philadelphia this year; and

WHEREAS, In 1995, the Pennsylvania Uniform Firearms Act of 1995 was signed into law with the stated purpose of giving support to law enforcement in the area of crime prevention and control; and

WHEREAS, Violations of the Pennsylvania Uniform Firearms Act of 1995 (VUFA offense) involve individuals who have been convicted previously of an enumerated list of serious crimes and then subsequently found to be in possession of a firearm despite being statutorily prohibited from doing so; and

WHEREAS, The House of Representatives should be knowledgeable about the procedure and process of handling VUFA offense cases across this Commonwealth; and

WHEREAS, A review of the handling of VUFA offense cases in the Commonwealth is necessary to determine if these cases are being adequately handled under Pennsylvania law and if changes are needed; therefore be it

RESOLVED, That the House of Representatives direct the Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of

violations of the Pennsylvania Uniform Firearms Act of 1995 in this Commonwealth to:

(1) Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A.

(2) Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.

(3) Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.

(4) Outline the sentencing guidelines for all of the charges in the cases for defendants who were originally charged with an VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020.

(5) For an individual charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A or a violent offense within the last 5 years. A violent offense includes an act, conspiracy or solicitation to commit any of the following offenses under 18 Pa.C.S.:

(i) Section 2501 (relating to criminal homicide).

(ii) Section 2702 (relating to aggravated assault).

(iii) Section 2702.1 (relating to assault of law enforcement officer).

(iv) Section 2703 (relating to assault by prisoner).

(v) Section 2703.1 (relating to aggravated harassment by prisoner).

(vi) Section 2718 (relating to strangulation).

(vii) Section 3121 (relating to rape).

(viii) Section 3123 (relating to involuntary deviate sexual intercourse).

(ix) Section 3124.1 (relating to sexual assault).

(x) Section 3124.2 (relating to institutional sexual assault).

(xi) Section 3125 (relating to aggravated indecent assault).

(xii) Section 3126 (relating to indecent assault).

(xiii) Section 3301 (relating to arson and related offenses).

(xiv) Section 5501 (relating to riot).

(6) For individuals sentenced to probation or granted parole following a VUFA conviction under 18 Pa.C.S. Ch. 61 Subch. A, determine if any individuals subsequently violated the terms of supervision for any reason in the last five years following sentencing or parole;

and be it further

RESOLVED, That the Commission on Sentencing report to the House of Representatives on its activities, findings and recommendations no later than ~~December 31, 2021~~ JUNE 30, 2022; <-- and be it further

RESOLVED, That, following the House of Representatives receipt of this report, the Judiciary Committee of the House of Representatives shall have the power to conduct hearings to elicit testimony, documents and other evidence related to the findings of the report.

Introduction

House Resolution 111 of Session 2021 (HR 111) directed the "Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of violations of Pennsylvania's Uniform Firearms Act of 1995 in this Commonwealth." The timing of this report corresponds with an increase in homicides involving firearms across the United States and in the Commonwealth of Pennsylvania (Centers for Disease Control and Prevention 2022). Between 2015 and 2019, the number of homicides involving firearms in Pennsylvania ranged from a low of 522 (4.1 per 100,000 persons) in 2015 to a high of 602 (4.7 per 100,000) in 2017. In 2020, the number of homicides involving a firearm increased to 788, or 6.2 per 100,000.[1] In 2020, there were 447 fatal shootings in Philadelphia alone; a 93 percent increase from 2015 (Office of the Controller 2022).[2] The increase in gun violence and homicides involving firearms corresponds with the onset of the COVID-19 pandemic (Kegler et al. 2022; Kim and Phillips 2021; Rosenfeld and Lopez 2022; Rowlands and Love 2022; Ssentongo et al. 2021).

The Commission takes note of earlier investigations in Pennsylvania that have informed this study, including: *Philadelphia's Gun Court: Process and Outcome Evaluation* (Philadelphia Adult Probation and Parole Department, 2007); *Report to the House of Representatives: A Study of the Use and Impact of Mandatory Minimum Sentences* (House Resolution 12 of 2007) (Pennsylvania Commission on Sentencing, 2009); and *Special Council on Gun Violence – Report of Findings, Recommendations & Action Steps* (Executive Order 2019-06) (Pennsylvania Commission on Crime & Delinquency, 2020). Findings and recommendations from these studies include suggestions for processing firearms-related offenses and offer strategies for more effective intervention and community supervision of individuals on pre-trial release, sentenced to probation, or released on parole. In fact, this study is a response in part to an earlier recommendation contained in the HR 12-2007 Report: *Authorize a study of the processing of mandatory-eligible firearms cases from arrest through sentencing in order to determine and document reasons for attrition, particularly related to charge reductions and to the 'visibly possessed' requirement; such a study will necessarily require the cooperation of law enforcement, prosecution and defense.*

HR 111 was adopted on November 17, 2021 in response to a recent increase in gun violence. HR 111 specified six directives to guide the Commission's efforts:

(1) Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA (Violations of the Uniform Firearms Act) offense under 18 Pa.C.S. Ch. 61 Subch. A.

(2) Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.

(3) Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.

[1] Data were retrieved from the Web-based Injury Statistics Query and Reporting System (WISQARS), Centers for Disease Control and Prevention (CDC 2022).

[2] In 2015 there were 1,200 shooting victims in Philadelphia. By 2020, the number increased by 83 percent to 2,266 shooting victims in Philadelphia (Office of the Controller 2022).

(4) Outline the sentencing guidelines for all of the charges in the cases for defendants who were originally charged with an VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020.

(5) For an individual charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A or a violent offense within the last 5 years.

(6) For individuals sentenced to probation or granted parole following a VUFA conviction under 18 Pa.C.S. Ch. 61 Subch. A, determine if any individuals subsequently violated the terms of supervision for any reason in the last five years following sentencing or parole.

This report provides a statewide, comprehensive, and data-driven view of the prosecution and sentencing of VUFA offenses. It is intended to provide the House of Representatives with information about "the procedure and process of handling VUFA offense cases across the Commonwealth." The report is organized around the six directives of HR 111. To address each of the directives, Commission staff leveraged administrative data from multiple sources. For directives 1 through 3, the Commission relied upon filing and disposition data from the Administrative Office of Pennsylvania Courts (AOPC). For directive 4, conformity analyses were conducted using data reported to the Pennsylvania Commission on Sentencing (PCS). The first four directives focus on the analysis of cases containing VUFA offenses, following these dockets from filing to disposition to sentencing. Included in the report is an overview and description of VUFA cases; an attrition analysis of *cases* that summarizes the way VUFA cases exit the system (e.g., withdrawn, dismissed, transferred, guilty disposition) at the Municipal Court, Magisterial District Court, or at the Court of Common Pleas; an examination of the types and duration of sentences received following conviction; and a conformity analysis of sentences imposed.

Directives 5 and 6 move from an analysis of cases to an analysis of *individuals* who have cases filed at the lower courts that involve VUFA offenses. The assessment includes analyses of recidivism and pretrial failure in addition to analyses of violations by individuals who were under parole or probation supervision. Data for directive 5 came from the AOPC, the Pennsylvania Department of Corrections (DOC), and PCS and data needed to address directive 6 was provided by the Pennsylvania Parole Board (PBB) and from the Electronic Reporting Probation and Parole (ER2P) system via Pennsylvania's Justice Network (JNET) application. As an organizing principle, analyses in each of the sections of the report are conducted for VUFA cases involving different types of charges (e.g., Felony 1 or Felony 2 VUFA charges included in the case), by county class, and where appropriate, by year.

Statewide Study

The focus of this current study is a statewide investigation of the prosecution and sentencing of VUFA cases. A statewide review of VUFA offenses required using sources of information that provided comparable, statewide data (e.g., AOPC, DOC, PCS) with common data elements and data definitions. Given a longer timeframe for collecting data and reporting results to the House of Representatives, this report could have been expanded to include additional data and qualitative information collected at the county level. This type of information would provide additional context and a potential set of grounded explanations or reasons (e.g., differences in local policies, practices, and procedures) to explain variation found in the empirical results.

Exhibit 1 presents a listing of all 67 counties, arranged by county class, and the population, the square mileage, and the population density for each county. It is notable that two of the counties (Philadelphia County and Allegheny County) are their own county classes (First Class and Second Class, respectively). While the focus of the current study is statewide, with analyses conducted both at the state and county class level, it is worth highlighting some fundamental differences between the counties and county classes, particularly between the First and the Second Class counties. The First Class County has over 1.5 million residents and roughly 12 percent of the population of the entire Commonwealth. Philadelphia County is roughly 134 square miles and is densely populated with close to 12,000 individuals per square mile. In contrast, Allegheny has the second highest population with roughly 1.25 million residents (9.6 percent of the population in the Commonwealth) spread over an area five times the size of Philadelphia County (730 square miles). This equates to a population density of 1,713 people per square mile in the Second Class County; a population density that is the fourth highest in the Commonwealth and roughly one seventh of that found in the First Class County. And unlike Philadelphia County, the population density of Allegheny County is concentrated in the City of Pittsburgh and a handful of other municipalities, while many other areas of the county are characterized as suburban or rural. Counties with higher population densities than Allegheny include Delaware County (Second Class A; density of 3,138 people per square mile) and Montgomery County (Second Class A; density of 1,774 per square mile). The fifth most densely populated county in the Commonwealth is Lehigh County (Third Class), with a population density of 1,085 per square mile.

Exhibit 1: County Class by Population and Population Density (2020)

	2020 Population	Square miles	Population Density (Population by square mile)
First Class [Philadelphia]	**1,603,797**	**134**	**11,937**
Second Class [Allegheny]	**1,250,578**	**730**	**1,713**
Second Class A	**2,079,921**	**1,271**	**1,636**
Bucks	646,538	604	1,070
Delaware	576,830	184	3,138
Montgomery	856,553	483	1,774
Third Class	**4,373,091**	**8,416**	**520**
Berks	428,849	856	501
Chester	534,413	751	712
Cumberland	259,469	545	476
Dauphin	286,401	525	546
Erie	270,876	799	339
Lackawanna	215,896	459	470
Lancaster	552,984	944	586
Lehigh	374,557	345	1,085
Luzerne	325,594	890	366
Northampton	312,951	370	846
Westmoreland	354,663	1,028	345
York	456,438	904	505
Fourth Class	**1,459,083**	**6,827**	**214**
Beaver	168,215	435	387
Butler	193,763	789	245
Cambria	133,472	688	194
Centre	158,172	1,109	143
Fayette	128,804	791	163
Franklin	155,932	772	202
Monroe	168,327	608	277
Schuylkill	143,049	779	184
Washington	209,349	857	244
Fifth Class	**772,488**	**4,122**	**187**
Adams	103,852	519	200
Blair	122,822	525	234
Lawrence	86,070	357	241
Lebanon	143,257	362	396
Lycoming	114,188	1,229	93
Mercer	110,652	673	165
Northumberland	91,647	458	200
Sixth Class	**1,265,299**	**18,885**	**67**
Armstrong	65,558	653	100
Bedford	47,577	1,012	47
Bradford	59,967	1,147	52
Carbon	64,749	381	170
Clarion	37,241	601	62
Clearfield	80,562	1,145	70
Clinton	37,450	888	42
Columbia	64,727	483	134
Crawford	83,938	1,012	83
Elk	30,990	827	37
Greene	35,954	576	62
Huntingdon	44,092	875	50
Indiana	83,246	827	101
Jefferson	44,492	652	68
McKean	40,432	980	41
Mifflin	46,143	411	112
Perry	45,842	551	83
Pike	58,535	545	107
Somerset	74,129	1,075	69
Susquehanna	38,434	824	47
Tioga	41,045	1,134	36
Venango	50,454	674	75
Warren	38,587	884	44
Wayne	51,155	726	70
Seventh Class	**131,995**	**1,433**	**92**
Juniata	23,509	391	60
Snyder	39,736	329	121
Union	42,681	316	135
Wyoming	26,069	397	66
Eighth Class	**66,448**	**2,923**	**24**
Cameron	4,547	396	11
Forest	6,973	427	16
Fulton	14,556	438	33
Montour	18,136	130	139
Potter	16,396	1,082	15
Sullivan	5,840	450	13
Statewide	13,002,700		291

Source: US Census Bureau

At the other end of the spectrum, Sixth Class counties average 67 individuals per square mile, Seventh Class counties average 92, and the Eighth Class counties have 24 individuals per square mile. The lowest population density can be found in Cameron County (11) and Sullivan County (13), both Eighth Class counties. In this context, population density serves as a proxy for the level of urbanness – a factor shown to be highly correlated with gun violence and with the types of VUFA offenses committed. For example, Felony 1 or Felony 2 offenses (e.g., persons not to possess, use, manufacture, control, sell, or transfer firearms) are more common in urban settings and Felony 3 offenses (e.g., firearms not to be carried without a license; illegal sale or transfer of firearms) in more rural settings.

While both the First and Second Class counties are single county classes, their differences extend beyond county size and population density. In Philadelphia County, the city and county are both the same geographic unit and there is a single-jurisdiction police department. In contrast, Allegheny County has 130 municipalities and 109 police departments. Some departments, particularly those in urban and suburban areas, are served by full-time, professional police departments, while some rural areas rely on part-time officers and coverage by the Pennsylvania State Police (PSP). As a result, the police departments within Allegheny County vary in levels of officer training, resources, and experience.

The Philadelphia District Attorney's Office reviews all misdemeanor and felony charges before they are submitted to a judicial officer.[3] This includes the filing of charges for Pa.C.S.§6108 (relating to carrying firearms in public streets or public property in Philadelphia), an offense that only applies in Philadelphia. In Allegheny County, the DA's Office does not specifically screen VUFA cases. The office only screens homicide and sex offenses, and VUFA offenses when they are a part of the charges associated with a homicide or sex offense case.[4] All of these factors have the potential to impact which charges are filed with the court and the rate of certain outcomes (e.g., withdrawing charges).

Overall, local court rules in 27 counties in the Commonwealth allow police to directly file criminal charges with the court without approval or review by the district attorney's office. Seven counties, including the First Class County, require DA approval of all criminal charges prior to filing. An additional 33 counties require the DA authorization of a subset of criminal charges prior to filing (see Exhibit 2 for a summary of local rules related to charging and filing practices). The current study utilizes data from the Administrative Office of Pennsylvania Courts to identify dockets that contain VUFA charges at the time of filing at the Municipal Court or Magisterial District Court. The filing of these charges represents the starting point for this study's examination of VUFA offenses. Unfortunately, Commission staff were unable to obtain statewide arrest data for VUFA offenses in a criminal incident from the PSP.[5] As such, this report is unable to examine the impact of variation in local rules regarding the role that prosecutors play in reviewing VUFA charges prior to filing with the lower court.

[3] *Phila. Cnty. R. Rule Pa. 507*

[4] *All. C.R. Crim P. Rules 507.1, 507.2*

[5] PSP does not currently have the capacity to identify offenses within a criminal incident by offense title or chapter. As such, Commission staff were unable to obtain data about VUFA arrests, in particular those that did not lead to charges being filed in the lower courts. Additionally, the current process for requesting and receiving rap sheets from the PSP is currently inefficient. Given time constraints associated with this current study, arrest data and rap sheets for understanding prior criminal history and recidivistic events were not obtained. PSP is currently working on improving the way that criminal history data is requested and provided. These improvements should make for a more efficient process.

Exhibit 2: Charging Practices by County and County Class

	DA Approval		
	Not Required	Required All	Required for subset of offenses
First Class [Philadelphia]		●	
Second Class [Allegheny]			●
Second Class A			
Bucks			●
Delaware			●
Montgomery			●
Third Class			
Berks			●
Chester			●
Cumberland			●
Dauphin			●
Erie	●		
Lackawanna			●
Lancaster			●
Lehigh			●
Luzerne		●	
Northampton		●	
Westmoreland	●		
York	●		
Fourth Class			
Beaver			●
Butler			●
Cambria	●		
Centre	●		
Fayette		●	
Franklin	●		
Monroe			●
Schuylkill			●
Washington		●	
Fifth Class			
Adams			●
Blair			●
Lawrence			●
Lebanon			●
Lycoming			●
Mercer	●		
Northumberland	●		

	DA Approval		
	Not Required	Required All	Required for subset of offenses
Sixth Class			
Armstrong			●
Bedford			●
Bradford			●
Carbon		●	
Clarion			●
Clearfield		●	
Clinton			●
Columbia	●		
Crawford	●		
Elk	●		
Greene	●		
Huntingdon	●		
Indiana			●
Jefferson	●		
McKean	●		
Mifflin	●		
Perry			●
Pike			●
Somerset			●
Susquehanna	●		
Tioga			●
Venango	●		
Warren	●		
Wayne			●
Seventh Class			
Juniata	●		
Snyder	●		
Union	●		
Wyoming			●
Eighth Class			
Cameron	●		
Forest	●		
Fulton	●		
Montour	●		
Potter	●		
Sullivan			●
Total (count)	*27*	*7*	*33*

The remainder of this report is organized around six chapters that address the directives of HR 111. Each chapter contains a separate set of analyses and their own set of appendices. Throughout the report perceived data limitations, assumptions made to remedy these limitations, and any resultant threats to the reliability and validity of findings are documented. The report concludes with a summary of findings and recommendations.

Directive 1

Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A.

House Resolution 111 of Session 2021 (HR 111) directed the "Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of violations of Pennsylvania's Uniform Firearms Act of 1995 in this Commonwealth." Specific statutes related to Pennsylvania's Uniform Firearms Act are found in 18 Pa.C.S. Chapter 61, Subchapter A, and include 17 sections defining violations of the Uniform Firearms Act of 1995 (VUFA) (see Exhibit 1.1). These offenses range from summary offenses to felonies of the first degree. The most common offenses reported include:

(1) 18 Pa.C.S.§6105 (relating to person not to possess, use, manufacture, control, sell or transfer firearms)

(2) 18 Pa.C.S.§6106 (relating to firearms not to be carried without a license)

(3) 18 Pa.C.S.§6108 (relating to carrying firearms on public streets or public property in Philadelphia)

(4) 18 Pa.C.S.§6111 (relating to sale or transfer of firearms)

In the section that follows, a descriptive profile is provided of cases that included a VUFA offense and were filed in the Philadelphia Municipal Court or a Magisterial District Court between 2015 and 2020. Data for this section comes directly from the Common Pleas Case Management System (CPCMS) of the Administrative Office of Pennsylvania's Courts. The descriptive analysis is organized around three types of VUFA dockets:

(1) *All VUFA dockets* – dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A. These dockets may contain multiple VUFA charges and/or may contain a mix of other charges in addition to the VUFA offenses;

(2) *F1/F2 VUFA dockets* – dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A that is an F1 or F2 (see Exhibit 1.1). Dockets containing F1/F2 charges from other chapters, if they do not also contain an F1/F2 VUFA offense, are excluded; and

(3) *VUFA dockets co-charged with a violent offense* – dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A and also at least one charge from the following: 18 Pa.C.S. §2501 (relating to criminal homicide, including §§2501-2504); 18 Pa.C.S. §2702 (relating to aggravated assault); 18 Pa.C.S. §2702.1 (relating to assault of law enforcement officer); 18 Pa.C.S. §2703 (relating to assault by prisoner); 18 Pa.C.S. §2703.1 (relating to aggravated harassment by prisoner); 18 Pa.C.S. §2718 (relating to strangulation); 18 Pa.C.S. §3121 (relating to rape); 18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse); 18 Pa.C.S. §3124.1 (relating to sexual assault); 18 Pa.C.S. §3124.2 (relating to institutional sexual assault); 18 Pa.C.S. §3125 (relating to aggravated indecent assault); 18 Pa.C.S. §3126 (relating to indecent assault); 18 Pa.C.S. §3301 (relating to arson and related offenses); 18 Pa.C.S. §5501 (relating to riot).[6]

The three groupings are not mutually exclusive; for example, offenses included the *F1/F2 VUFA dockets* will be included in the *All VUFA dockets* category. A focus on three distinct groupings of VUFA dockets allows for a more nuanced investigation of case processing, especially given that counties vary in the frequency of these more serious dockets; failure to account for these differences may lead to inaccurate

[6] The list of offenses considered violent offenses is provided for in directive 5 of HR 111.

comparisons across county classes. The outcomes of dockets with F1/F2 VUFA offenses[7] and those involving violent offenses are also of particular interest given the severity of behavior involved.

Exhibit 1.1: 18 Pa.C.S. Ch. 61 Subch. A. by Grade of Offense

		Offense grade						
Section	Description	Summary	M3	M2	M1	F3	F2	F1
§ 6105	Person not to possess, use, manufacture, control, sell or transfer firearms		●	●	●		●	●
§ 6105.2	Relinquishment of firearms and firearm licenses by convicted persons			●				
§ 6106	Firearms not to be carried without a license	●			●	●		
§ 6106.1	Carrying loaded weapons other than firearms	●						
§ 6107	Prohibited conduct during emergency				●			
§ 6108	Carrying firearms on public streets or public property in Philadelphia				●			
§ 6109	Licenses	●						
§ 6110.1	Possession of firearm by minor				●	●		
§ 6110.2	Posession of firearm with altered manufacturer's number						●	
§ 6111	Sale or transfer of firearms			●		●	●	
§ 6112	Retail dealer required to be licensed				●			
§ 6113	Licensing of dealers				●			
§ 6115	Loans on, or lending or giving firearms prohibited				●			
§ 6116	False evidence of identity				●			
§ 6117	Altering or obliterating marks of identification						●	
§ 6121	Certain bullets prohibited					●		
§ 6122	Proof of license and exception				●			

[7] In later chapters of this report, analyses will be extended to include F1/F2 dockets where VUFA is the top charge.

Filings in Lower Court

Between 2015 and 2020 there were 51,618 dockets with VUFA charges filed in Municipal Court and in the Magisterial District Courts. Of these, 22,360 dockets (43.3 percent) included a Felony 1 or Felony 2 VUFA charge, and 8,033 dockets (15.6 percent) included a VUFA charge that was co-charged with a violent offense. Roughly 35 percent (n=18,026) of the 51,618 VUFA dockets were filed in the First Class county (Philadelphia) and another 22.6 percent (n=11,642) were filed in Third Class Counties. The First Class county accounted for a relatively greater share of dockets with a Felony 1 or Felony 2 VUFA charge (39.8 percent) and a majority of all VUFA dockets that also included a violent offense (51.4 percent) (see Exhibit 1.2). In contrast, rural jurisdictions had significantly lower proportions of F1/F2 VUFA dockets and VUFA dockets co-charged with a violent offense. For example, in the Fifth to Eighth Class counties 37 percent of all VUFA dockets included an F1/F2 VUFA charge and only 7 percent (399 out of 5,642) of all VUFA dockets were co-charged with a violent offense.

Exhibit 1.2: VUFA Dockets by County Class

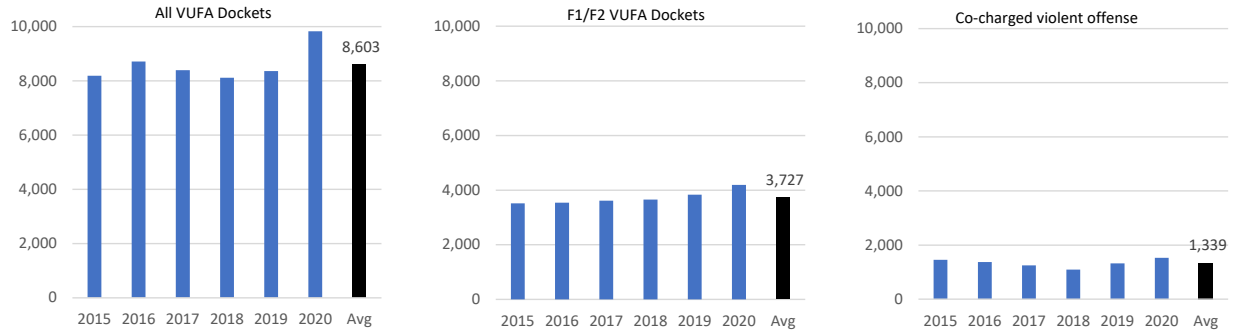
	All VUFA Dockets		F1/F2 VUFA Dockets		VUFA Dockets Co-Charged w/ Violent Offenses	
First Class	18,026	34.9%	8,901	39.8%	4,131	51.4%
Second Class	7,365	14.3%	3,195	14.3%	1,031	12.8%
Second Class A	4,566	8.8%	1,643	7.3%	749	9.3%
Third Class	11,642	22.6%	4,952	22.1%	1,329	16.5%
Fourth Class	4,377	8.5%	1,581	7.1%	394	4.9%
Fifth-Eighth Class	5,642	10.9%	2,088	9.3%	399	5.0%
Statewide	**51,618**		**22,360**		**8,033**	

On average, there were 8,603 dockets filed containing any VUFA charges, 3,727 dockets with Felony 1 or Felony 2 VUFA charges, and 1,339 dockets where VUFA offenses were co-charged with violent offenses filed each year. When viewed over time (see Exhibit 1.3), there was roughly a 15 percent increase in the number of VUFA dockets filed in the lower courts in 2020. For example, between 2015 and 2019 there were between 8,119 and 8,719 VUFA dockets filed each year. Yet in 2020, counties filed roughly 9,800 dockets with VUFA charges in the lower court. A similar pattern exists for filings of F1/F2 VUFA dockets and VUFA dockets co-charged with a violent offense.

Despite this increase, overall, VUFA dockets made up a small proportion of all dockets filed in the lower courts. Excluding summary offenses, dockets containing any VUFA charges made up 3.8 percent of all dockets filed in the lower courts, 1.6 percent for F1/F2 VUFA dockets, and less than 1 percent for VUFA dockets co-charged with a violent offense. However, VUFA dockets made up a much larger share of overall case volume in the First Class County; dockets containing any VUFA charges accounted for 9.4 percent of all non-summary dockets filed in the Municipal Court. Similarly, dockets with serious VUFA offenses and co-charged with a violent offense were also over-represented, at 4.7 percent and 2.2 percent of all non-summary dockets (compared to 1.5 percent and 0.6 percent statewide, respectively).

Second Class Counties had filing rates that were slightly higher than the statewide average for all VUFA dockets (4.3 percent) and for F1/F2 dockets (1.8 percent) filed in the lower court. All other county classes fell below the statewide average for all three types of VUFA dockets.[8]

Exhibit 1.3: VUFA Dockets Filed, 2015 to 2020



However, not all counties experienced this increase equally. As shown in Exhibit 1.4, an increase in firearm-related filings was found in the First Class County beginning in 2019. Firearm filings did not increase as dramatically, or even show marginal decreases, in other county classes. The increase in Felony 1 and Felony 2 VUFA filings was less pronounced and found in other county classes, as shown in Exhibit 1.5. Between 2015 and 2018 there was a steady decline in VUFA dockets co-charged with a violent offense in the First Class County, followed by a sharp increase in 2019 before an apparent stabilization in 2020, notably lower than its peak in 2015. In contrast, Third Class counties and Fifth through Eighth Class counties demonstrated a slight increase in filings of VUFA dockets co-charged with a violent offense over the study period (see Exhibit 1.6).

[8] The current study relies on counts of filings of dockets containing VUFA charges in the Philadelphia Municipal Court and Magisterial District Courts. Counts of filings do not reflect the possibility of the screening of charges by district attorneys prior to filing, and how these practices may impact the way cases are disposed of in the lower and upper courts (see the report's introduction for a more in-depth discussion).

Exhibit 1.4: ALL VUFA dockets filed in lower courts, by County Class

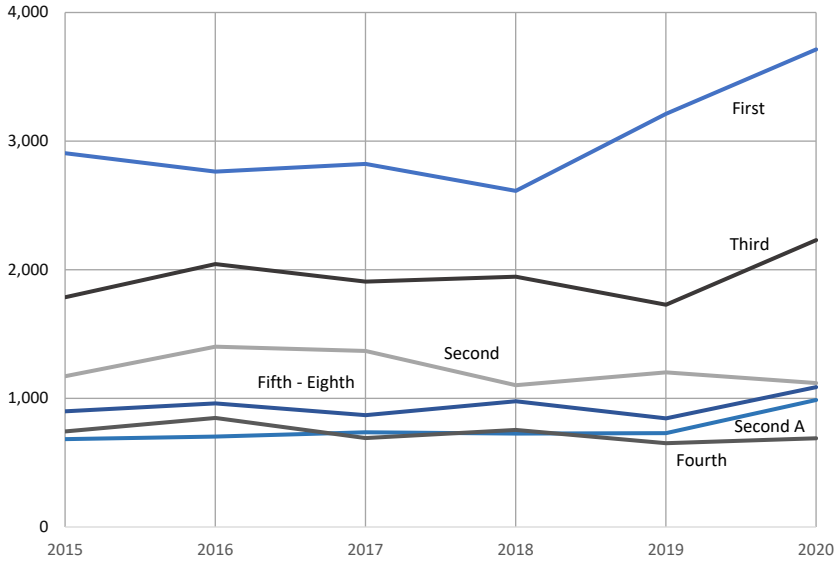


Exhibit 1.5: F1/F2 VUFA dockets filed in lower courts, by County Class

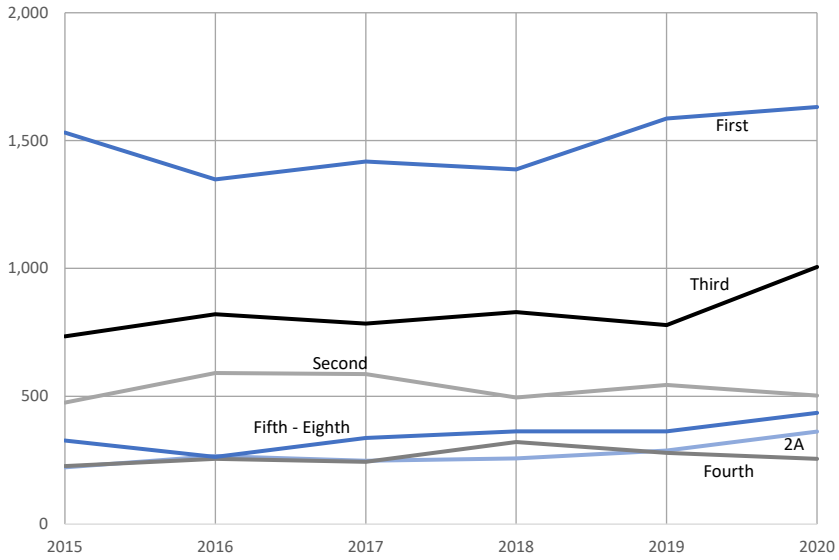


Exhibit 1.6: VUFA dockets co-charged with a violent offense filed in lower courts, by County Class

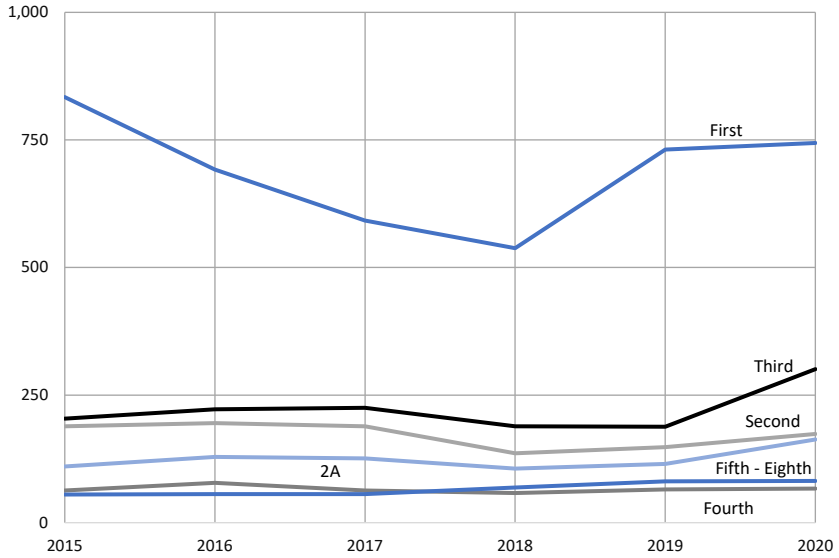
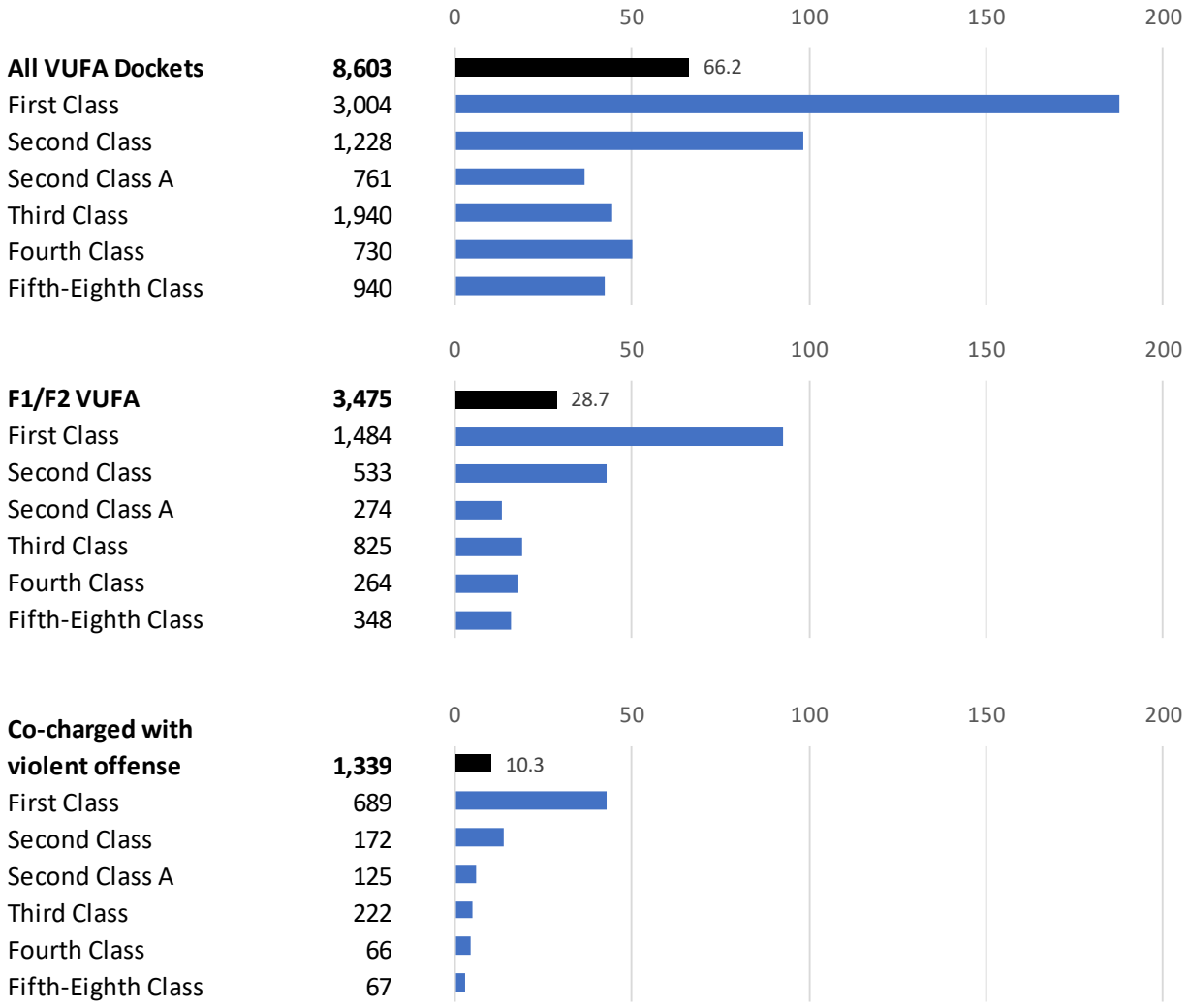


Exhibit 1.7 presents the average annual rate of VUFA dockets filed per 100,000 persons for each of the county class groupings. From 2015-2020, an average of 66.2 VUFA dockets were filed in the lower court per 100,000 persons in the Commonwealth.[9] The statewide rate for dockets containing Felony 1 or Felony 2 VUFA charges was 28.7 per 100,000 and 10.3 per 100,000 for VUFA dockets co-charged with violent offenses. The filing rates for each subgroup of filings were substantially higher for the First Class County (e.g., 187.3 VUFA dockets per 100,000 individuals) and slightly higher for the Second Class County (e.g., 98.2 VUFA dockets per 100,000 individuals).

[9] Population data comes from the Preliminary 2020 US Census County Population Estimates. The annual rate per 100,000 is determined by dividing 8,603 annual filings by 13,002,700 individuals, and then multiplying by 100,000.

Exhibit 1.7: Average of VUFA dockets filed per 100,000 population, by county class



Demographics

Over 90 percent of individuals charged with a VUFA offense were male, which is significantly higher than the rate for all non-summary offenses (73.8 percent) filed in the lower courts during the same period. Over one half of all VUFA dockets and three-fourths of dockets co-charged with a violent offense involved defendants who are Black; both being significantly greater than the proportion of all non-summary lower court dockets (30 percent). Like all non-summary offenses filed, the majority of dockets involve individuals under 35 years of age. However, the average age of those charged with VUFA offenses is lower than for all non-summary offenses. This is driven by substantially higher rates in every VUFA category for those <18 and 18-24, and for those 25-35 in the F1/F2 VUFA category. And those 35 and older have substantially lower rates in all categories as compared to all non-summary offenses.

Exhibit 1.8: Demographic Characteristics of Defendants charged with VUFA offenses

		Any VUFA	F1/F2 VUFA	Co-charged with violent offense	Overall Lower Court
Sex	Male	92.7%	96.2%	95.6%	73.8%
	Female	7.0%	3.6%	4.2%	25.4%
Race	Black	59.8%	69.2%	76.1%	30.3%
	White	38.2%	29.5%	22.5%	66.4%
	Other/Unknown	2.0%	1.3%	1.5%	3.3%
Age	<18	2.1%	.5%	7.3%	.2%
	18-24	35.1%	28.1%	39.9%	24.6%
	25-34	34.7%	41.2%	34.4%	34.6%
	35-49	19.9%	23.6%	14.5%	27.3%
	50+	8.3%	6.7%	4.5%	13.4%
	Average Age	30.8	31.4	28.1	34.5
	# Dockets	51,618	22,360	8,020	1,355,687

Charges per VUFA Docket - Lower Court

Overall, there were 101,383 VUFA charges in the 51,618 dockets with any VUFA charge, corresponding to an average of 2.0 VUFA charges per docket and 6.2 total charges per docket. These averages increased to 7.4 total charges per case and 2.5 VUFA charges per case for F1/F2 VUFA dockets and to 10.3 total charges and 2.1 VUFA charges per case for VUFA dockets co-charged with a violent offense. In the First Class county the average number of VUFA charges per case was roughly .5 charges higher than the statewide average for all three VUFA dockets (see Exhibit 1.9). The higher rate may be attributable to the fact that roughly 90 percent of VUFA dockets in the First Class county included the charge of 18 Pa.C.S. §6108—a charge specific to Philadelphia. Finally, the average of the total charges per case was substantially higher in the Second Class A counties. For example, there was an average of 17.6 total charges in VUFA dockets co-charged with a violent offense. Despite this high rate, the average of VUFA charges per dockets co-charged with a violent offense (1.9) in the Second Class A counties was below the statewide average (2.1).

Exhibit 1.9: Total VUFA charges per VUFA dockets, by County Class

	All VUFA Dockets			F1/F2 VUFA Dockets			Co-charged with violent offense		
	Avg charges/ case	Total VUFA charges	Avg VUFA charges/ case	Avg charges/ case	Total VUFA charges	Avg VUFA charges/ case	Avg charges/ case	Total VUFA charges	Avg VUFA charges/ case
Statewide	**6.2**	**101,383**	**2.0**	**7.4**	**55,311**	**2.5**	**10.3**	**17,070**	**2.1**
First Class	6.2	46,982	2.6	7.4	55,311	2.9	8.7	10,747	2.6
Second Class	5.6	12,306	1.7	6.8	6,694	2.1	7.9	1,700	1.6
Second Class A	9.8	10,105	2.2	14.1	5,591	3.4	17.6	1,426	1.9
Third Class	5.7	17,561	1.5	7.0	9,572	1.9	12.1	2,075	1.6
Fourth Class	5.3	6,313	1.4	7.4	3,089	2.0	10.5	545	1.4
Fifth-Eighth Class	5.3	8,116	1.4	7.5	4,116	2.0	12.6	577	1.4

Four offense types account for approximately 95 percent of the VUFA charges. Roughly one-third of all VUFA charges were charges for 18 Pa.C.S. §6105 (Persons not to possess, use, manufacture, control, sell, or transfer firearms) and another third were charges for 18 Pa.C.S. §6106 (Firearms not to be carried without a license). Charges for 18 Pa.C.S. §6108 (Carrying firearms on public streets or public property in Philadelphia) and 18 Pa.C.S. §6111 (Sale or transfer of firearms) each represented 15 percent of the VUFA charges. Of the VUFA charges, 24 percent were Misdemeanor 1, 40 percent were Felony 3 offenses, 22 percent Felony 2 offenses, and 7 percent Felony 1 offenses.

The next chapter of this report will document the attrition analysis of dockets containing VUFA offenses and how these dockets move from filing through disposition in both the lower courts and the Court of Common Pleas. A particular focus will be on the manner of disposition for non-pending cases.

Directive 1 – Summary of Findings

This chapter provided a descriptive profile of cases that included a VUFA offense and were filed in the Philadelphia Municipal Court or a Magisterial District Court between 2015 and 2020. Data for this section came directly from the Common Pleas Case Management System (CPCMS) of the Administrative Office of Pennsylvania's Courts. VUFA offenses range from summary offenses to felonies of the first degree. Roughly one third of all VUFA charges were for 18 Pa.C.S.§6105 (relating to person not to possess, use, manufacture, control, sell or transfer firearms), another third for 18 Pa.C.S.§6106 (relating to firearms not to be carried without a license), 15 percent for 18 Pa.C.S.§6108 (relating to carrying firearms on public streets or public property in Philadelphia), and 15 percent for 18 Pa.C.S.§6111 (relating to sale or transfer of firearms). Of the VUFA charges, fewer than a third were for Felony 1 or Felony 2 offenses.

VUFA dockets made up a small proportion of all non-summary dockets filed in the lower courts: 3.8 percent of all dockets filed in the lower courts, 1.6 percent for F1/F2 VUFA dockets, and less than 1 percent for VUFA dockets co-charged with a violent offense. Between 2105 and 2020 there were 51,618 dockets with VUFA charges filed in the lower courts; 43.3 percent of the VUFA dockets (22,360) included a Felony 1 or Felony 2 VUFA charge and 15.6 percent (8,033) included a VUFA charge that was co-charged with a violent offense. Over one third of all VUFA dockets, roughly 40 percent, and over one-

half of all VUFA dockets co-charged with violence were filed in the First Class County. Rural jurisdictions had significantly lower proportions of F1/F2 VUFA dockets and VUFA dockets co-charged with violent offenses. On average, VUFA dockets included 6.2 average charges per case, with two of these charges being VUFA charges. For F1/F2 dockets this increases to 7.4 overall charges and 2.5 VUFA charges per case, and to 10.3 overall charges and 2.1 VUFA charges for cases co-charged with a violent offense. The analysis revealed that charging practices varied across the county classes.

The average annual rate of VUFA dockets filed (2015 to 2020) per 100,000 population was highest for the First and Second Class Counties. For all VUFA dockets the rate in the First Class County was more than double the rate in the Second Class County and 4.5 times the rate in the Fifth through Eighth Class counties. This difference is even more pronounced for dockets co-charged with violence with the First Class County having an annual rate that is three times that of the Second Class County and over ten times that of the Fifth through Eighth Class counties. Individuals charged with VUFA offenses are predominantly male, Black, and 34 years of age or younger.

Directive 2

Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.

This chapter focuses on the attrition of cases after they have been filed in the lower courts, either at the Philadelphia Municipal Court or a Magisterial District Court. This attrition analysis tracks each docket over time, starting with VUFA dockets filed in the lower court in 2015 through 2020. At the end of 2020, a number of these dockets remain pending in the lower courts or at the Court of Common Pleas. Others have been removed through non-judgment dispositions (e.g., withdrawal, dismissal, nolle prossed, transfer). The remaining dockets were disposed of with a guilty or non-guilty verdict. As such, the number of non-pending dockets that are disposed of by judgment (guilty or non-guilty) will be lower than those originally filed in the lower courts.

This report uses administrative data to document the attrition of cases in the lower and upper courts. The proportion of dockets that are disposed without judgment may reflect the exercise of discretion by prosecutors and judges or consistent with local policies and practices. For example, prosecutors may withdraw or decline to pursue a charge ("nolle prosequi") due to circumstances that make it unlikely to succeed at trial (e.g., illegal search, witness failure to appear) or a change of jurisdiction (e.g., de-certification to Juvenile Court, federal adoption of firearms cases). Or judges may dismiss a charge or case based on speedy trial/due process claims from the defense.

The Pennsylvania Rules of Criminal Procedure (Pa.R.Crim.P.), adopted by the Supreme Court, govern criminal proceedings in all courts, including the withdrawal, dismissal, and decisions to not prosecute cases (nolle prosequi or nolle pros), as described below:

Pa.R.Crim.P. Rule 551. Withdrawal of Charges Pending Before Issuing Authority

> In any court case pending before an issuing authority, the attorney for the Commonwealth, or his or her designee, may withdraw one or more of the charges. The withdrawal shall be in writing.

Pa.R.Crim.P Rule 561. Withdrawal of Charges by Attorney for the Commonwealth

> After a case is held for court, at any time before the information is filed, the attorney for the Commonwealth may withdraw one or more charges by filing notice with the clerk of courts. Upon the filing of the information, any charge not listed on the information shall be deemed withdrawn by the attorney for the Commonwealth.

Pa.R.Crim.P Rule 587. Motion for Dismissal

> Upon motion and a showing that an information has not been filed within a reasonable time, the court may order dismissal of the prosecution, or in lieu thereof, make such other order as shall be appropriate in the interests of justice. The attorney for the Commonwealth shall be afforded an opportunity to respond. A motion to dismiss on double jeopardy grounds shall state specifically and with particularity the basis for the claim of double jeopardy and the facts that support the claim. A hearing on the motion shall be scheduled in accordance with Rule 577. The hearing shall be conducted on the record in open court. At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law and shall issue an order granting or denying the motion. In a case in which the judge denies the motion, the findings of fact shall include a specific finding as to frivolousness. If the judge makes a finding that the motion is frivolous, the judge shall advise the defendant on the record that a defendant has a right to file a petition for review of that determination pursuant to Rule of Appellate Procedure 1573 within 30 days of the order denying the motion. If the judge denies

> the motion but does not find it frivolous, the judge shall advise the defendant on the record that the denial is immediately appealable as a collateral order.

Pa.R.Crim.P 585. Nolle Prosequi

> Upon motion of the attorney for the Commonwealth, the court may, in open court, order a nolle prosequi of one or more charges notwithstanding the objection of any person. Section 8932 of the Judicial Code, 42 Pa.C.S. §8932, prohibits the district attorney from entering a nolle prosequi without court approval at any time after the filing of an information.

Given the time constraints in preparing this report, Commission staff did not have the ability to interview or survey stakeholders to provide context for variations in attrition rates within and between county classes. Regardless of the reasons for attrition, past research suggests numerous contributing factors. Among the most common of these factors are: (1) evidentiary concerns (e.g., contradictory or inconclusive lab results, destroyed or missing evidence, incomplete or missing witness statements, a lack of evidence or corroboration) (Johnson 2018; Frederick and Stemen 2012); (2) constitutionality concerns (e.g., warrantless search, warrantless arrest, arrest without probable cause, defendants who are incompetent to stand trial) (Gershowitz 2018; Frederick and Stemen 2012); (3) a lack of prosecutorial resources (Johnson 2018; O'Neill 2004); (4) "trial-worthiness" and "convictability" (e.g., moral gravity of offense/harm to society, criminal intent, public interest, conviction rates) (Albonetti 1987, 1986; Boylan and Long 2005; Frohmann 1997; Johnson 2018; Miller and Wright 2011; Spears and Spohn 1997); (5) the transfer of cases between counties, or to the Federal system (Johnson 2018); and (6) case processing norms and goals (e.g., tailoring punishments to individual/collective views of justice, circumventing sentence enhancements, maintaining parity with courtroom workgroup and organizational efficiency, securing substantial assistance) (Baker and Mezzetti 2001; Hartley, Maddan, and Spohn 2007; Johnson 2018; Rosset and Cressey 1976).

Two recent decisions by the Pennsylvania Supreme Court may explain the withdrawal or dismissal of certain VUFA charges, including during traffic stops. In *Commonwealth v. Hicks* (208 A.3d 916) (Pa., 2019), the Court held that a police officer may not infer criminal activity, of the kind supporting a *Terry* stop, merely from an individual's possession of a concealed firearm in public. Unless the officer has prior knowledge that a specific individual is not permitted to carry a concealed firearm, and absent articulable facts supporting a reasonable suspicion that firearm is being used or intended to be used in criminal manner, there is no justification to conclude that mere possession of firearm, where it lawfully may be carried, is alone suggestive of criminal activity, as required to support *Terry* stop. In *Commonwealth v. Alexander* (243 A.3d 177) (Pa., 2020), the Court held that warrantless vehicle searches require both probable cause and exigent circumstances under the state constitution.

Lower Court

Between 2015 and 2020, 51,618 VUFA dockets were filed in Pennsylvania's lower courts. Of these, 18,026 were filed in Municipal Court and 33,592 were filed in Magisterial District Court. As of December 31, 2020, 17 percent (3,073) of the Municipal Court VUFA dockets and 6.3 percent of the Magisterial District Court dockets were pending. Exhibit 2.1 displays the number and percent of pending cases by county class for the different VUFA dockets. The percentage of pending cases was highest in the First Class county and the Second Class A counties and lowest in the rural counties. The higher proportion of

pending cases may reflect the differential impact of the COVID-19 pandemic on case processing in 2020 across the Commonwealth.

Exhibit 2.1: Pending VUFA dockets in the Lower Courts

	All VUFA Dockets			F1/F2 VUFA Dockets			Co-charged w/ a violent offense		
	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending
Statewide	**51,618**	**5,183**	**10.0%**	**22,360**	**2,124**	**9.5%**	**8,033**	**840**	**10.5%**
First Class	18,026	3,073	17.0%	8,901	1,311	14.7%	4,131	541	13.1%
Second Class	7,365	466	6.3%	3,195	202	6.3%	1,031	64	6.2%
Second Class A	4,566	482	10.6%	1,643	162	9.9%	749	101	13.5%
Third Class	11,642	665	5.7%	4,952	286	5.8%	1,329	97	7.3%
Fourth Class	4,377	238	5.4%	1,581	79	5.0%	394	19	4.8%
Fifth-Eighth Class	5,642	259	4.6%	2,088	84	4.0%	399	18	4.5%

The data used in this section were extracted from case management software used by the Administrative Office of Pennsylvania Courts (AOPC). While dispositions were available at the charge level, the software was not designed to track individual charges across the stages of case processing. For example, the data lack stable charge identifiers; sequence numbers are sanitized when charges are dismissed or otherwise terminated. Further, even when charges do not result in a justice sanction, the individual may nevertheless experience substantial punishment related to other charges disposed of in the same docket. Thus, disposition outcomes are examined at the case (docket) level, rather than the charge level.

Eight percent of all non-pending VUFA dockets were withdrawn and an additional 5 percent were dismissed in the lower courts, with 81 percent of non-pending VUFA dockets bound over to the Court of Common Pleas.[10] The First and Second Class counties had the highest proportion of non-pending dockets that were withdrawn or dismissed during the 6-year period of study.[11] The Third through Eighth Class counties had the highest proportion of VUFA dockets resolved in the lower courts (ranging from 6 to 11 percent). Statewide, dockets with F1/F2 VUFA charges and those co-charged with a violent offense had a higher bind over rate than All VUFA dockets (see Exhibit 2.2). However, these dockets also evidenced slightly higher rates of withdrawal, with the highest rates among First (12 percent) and Second Class (17 percent).

[10] In this context, dispositions reflect *total case dispositions*. That is to say, dispositions without judgment, such as "dismissed," "withdrawn," etc., reflect the percent of cases in which *all charges* met these dispositions. In contrast, lower court resolution is indicative of at least one charge resolving at lower court, regardless of whether other charges in the docket received non-judgment resolutions. Bind-over similarly reflects any charge bind-over and supersedes lower court resolution to produce mutually exclusive outcomes.

[11] As a total case disposition, "other" reflects case outcomes in which all charges received a non-judgment disposition (e.g., transferred, diverted to problem solving court, accelerated rehabilitative disposition, dismissal, withdrawn) that are not otherwise indicated by total case withdrawal or dismissal.

Exhibit 2.2: Disposition of Lower Court VUFA dockets as proportion of non-pending dockets

		Dockets not Pending	Withdrawn	Dismissed	Other	Resolved in Lower Court	Bound Over
All VUFA	**Statewide**	**46,435**	**8%**	**5%**	**2%**	**4%**	**81%**
	First Class	14,953	10%	7%	1%	2%	80%
	Second Class	6,899	11%	8%	2%	<1%	79%
	Second Class A	4,084	6%	6%	<1%	<1%	88%
	Third Class	10,977	5%	3%	2%	6%	84%
	Fourth Class	4,139	7%	5%	5%	7%	77%
	Fifth-Eighth Class	5,383	6%	1%	3%	11%	79%
F1/F2 VUFA	**Statewide**	**20,236**	**8%**	**5%**	**1%**	**1%**	**86%**
	First Class	7,590	10%	7%	1%	1%	82%
	Second Class	2,993	10%	6%	1%	<1%	83%
	Second Class A	1,481	6%	4%	<1%	<1%	90%
	Third Class	4,666	4%	2%	0%	1%	92%
	Fourth Class	1,502	6%	5%	<1%	1%	88%
	Fifth-Eighth Class	2,004	6%	1%	<1%	1%	91%
Co-Charged with a Violent Offense	**Statewide**	**7,193**	**10%**	**5%**	**<1%**	**<1%**	**84%**
	First Class	3,590	12%	5%	1%	<1%	82%
	Second Class	967	17%	6%	<1%	<1%	77%
	Second Class A	648	4%	9%	<1%	<1%	87%
	Third Class	1,232	6%	3%	<1%	<1%	91%
	Fourth Class	375	6%	8%	<1%	<1%	86%
	Fifth-Eighth Class	381	6%	2%	<1%	1%	91%

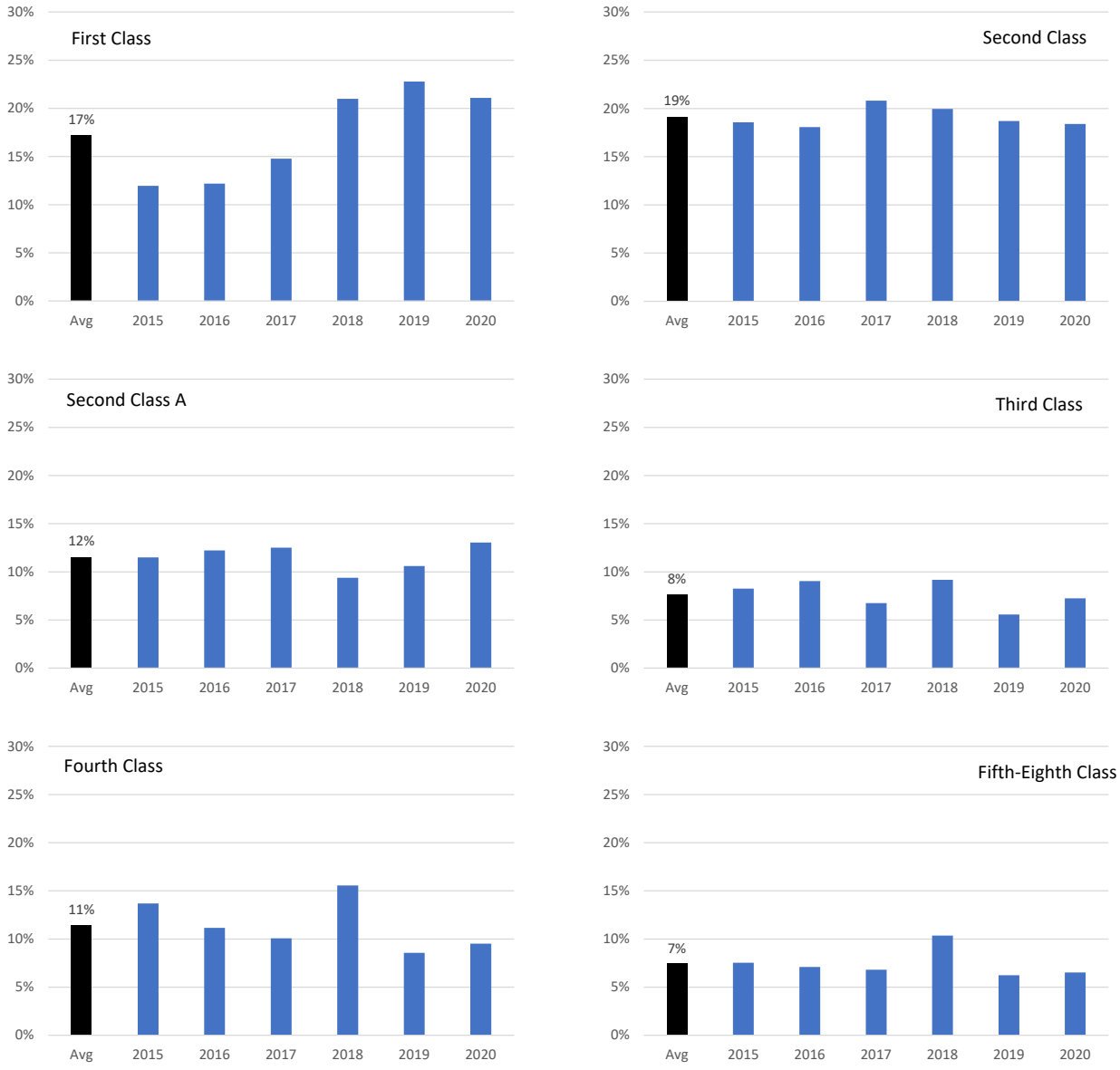
Exhibit 2.3 displays the proportion of non-pending VUFA dockets that are withdrawn or dismissed in the lower courts by county class over time. In the Second Class County, the proportion of dockets withdrawn or dismissed in the lower court was higher than in the other county classes (19 percent) and remained fairly constant over the time under study. The rate in the Second Class was more than double the rate in the Third and the Fifth through Eighth Class counties. In contrast, the percentage of non-pending VUFA dockets withdrawn or dismissed significantly increased in the First Class County in 2018 and 2019 to over 20 percent of all dockets. During these two years, there was an increase in both the percentage of cases withdrawn (e.g., from 9 percent in 2017 to 15 percent in 2018) and dismissed (e.g., from 5 percent in 2017 to 9 percent in 2018) when compared to 2017. In 2019 and 2020 there was a slight decline in the percentage of dockets withdrawn or dismissed in the First Class County, but the rate in 2020 still outpaced the rates in 2015 through 2017.

There was a similar pattern evident in county class-year patterns of F1/F2 docket lower court dispositions. Specifically, the rates of total case withdrawal or dismissal in First Class County rose from 12 percent in 2016 to 15 percent in 2017 to 19 percent in 2018 and 23 percent in 2019 and 2020; this pattern was driven by increases in both withdrawals and dismissals. The proportion of lower court

dockets fully withdrawn or dismissed in the Second Class and Second Class A counties was fairly stable between 2015 to 2019. In both county classes, there was an increase in 2020 that was primarily attributable to the number of cases withdrawn (e.g., the percentage of F1/F2 VUA dockets withdrawn in Second Class A rose from 4 percent in 2019 to 11 percent in 2020).

While there was notable variation by year, there was less of a clear pattern in lower court dispositions for dockets co-charged with a violent offense. Rates of withdrawals and dismissals peaked in 2018 (19 percent statewide), though this peak was largely driven by the First Class County, where withdrawals and dismissals accounted for 26 percent of lower court dispositions for VUFA dockets co-charged with a violent offense in 2018. There was little evidence of this uptick in the Second Class County, where average combined withdrawals and dismissals accounted for more than one-fifth of lower court outcomes for VUFA dockets co-charged with a violent offense in any given year. Smaller counties exhibited fewer clear trends; in Fourth Class counties, withdrawals and dismissals accounted for 17 percent of lower court outcomes for dockets co-charged with a violent offense in 2015, 7 percent in 2018, and 22 percent in 2020.

Exhibit 2.3: Percentage of all VUFA Dockets withdrawn or dismissed, by county class and by year



Court of Common Pleas

During the study period, 34,799 dockets containing VUFA charges were bound over to the Court of Common Pleas.[12] Of these, 8,242 dockets (24 percent of bound over dockets) remained pending as of December 31, 2020. The percentage of pending cases for all VUFA dockets ranged from a low of 19.4 percent in the Second Class County to a high of 36.2 percent in the Fourth Class Counties. Additionally, more serious dockets, including those with F1/F2 VUFA charges filed[13] or co-charged with violent offenses, were more likely to be pending (25 percent and 29.3 percent, respectively; see Exhibit 2.4). The non-pending dockets are the focus of the remainder of the case attrition analysis.[14]

[12] 2,876 dockets were bound over that no longer include a VUFA charge in the docket, the lower court docket does not match a docket in the Court of Common Pleas, or the docket was condensed. These cases are not included in the analyses of case outcomes for the Court of Common Pleas. They were considered in the analyses of dockets in the lower court.

[13] F1/F2 VUFA charge filed in the Court of Common Pleas, regardless of status

[14] A summary of the attrition of VUFA cases in both the lower and upper courts is included in Appendices 2.1 - 2.3.

Exhibit 2.4: Pending VUFA Dockets at the Court of Common Pleas, by County Class

	All VUFA			F1/F2 VUFA			Co-Charged with a Violent Offense		
	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending
Statewide	**34,799**	**26,557**	**23.7%**	**17,154**	**12,847**	**25.1%**	**5,424**	**3,834**	**29.3%**
First Class	10,974	8,474	22.8%	5,881	4,593	21.9%	2,642	1,884	28.7%
Second Class	5,091	4,103	19.4%	2,330	1,786	23.3%	665	495	25.6%
Second Class A	3,100	2,359	23.9%	1,592	1,203	24.4%	487	350	28.1%
Third Class	8,692	6,860	21.1%	4,294	3,261	24.1%	1,013	728	28.1%
Fourth Class	2,887	1,842	36.2%	1,296	820	36.7%	296	184	37.8%
Fifth-Eighth Class	4,055	2,919	28.0%	1,761	1,184	32.8%	321	193	39.9%

Statewide, 10 percent of non-pending VUFA dockets were nolle prossed,[15] with rates higher in the First and Second Class counties (see Exhibit 2.5). The statewide nolle pros rate (12 percent) was slightly higher for VUFA dockets with F1/F2 VUFA charges. In the First Class, Second Class, and Fourth Class counties, approximately 15 percent of F1/F2 VUFA dockets were disposed via all charges being nolle pros. The rates of nolle pros were much lower for VUFA dockets in which there is also a violent offense, only 6 percent on average in the Commonwealth.

Exhibit 2.5: Court of Common Pleas Dispositions (2015-2020), by County Class and Type of VUFA Docket

		Dockets not Pending	Guilty	Not Guilty	Withdrawn	Nolle Prossed	Dismissed	Other
All VUFA	**Statewide**	**26,557**	**83%**	**3%**	**1%**	**10%**	**1%**	**2%**
	First Class	8,474	77%	5%	0%	13%	1%	3%
	Second Class	4,103	78%	6%	1%	12%	0%	2%
	Second Class A	2,359	92%	2%	1%	4%	1%	1%
	Third Class	6,860	88%	1%	1%	6%	1%	2%
	Fourth Class	1,842	82%	1%	1%	10%	1%	4%
	Fifth-Eighth Class	2,919	86%	1%	1%	8%	2%	3%
F1/F2 VUFA	**Statewide**	**12,847**	**81%**	**4%**	**1%**	**12%**	**1%**	**1%**
	First Class	4,593	75%	6%	0%	15%	1%	2%
	Second Class	1,786	73%	6%	2%	16%	1%	3%
	Second Class A	1,203	91%	3%	0%	5%	0%	0%
	Third Class	3,261	87%	2%	1%	9%	1%	1%
	Fourth Class	820	81%	2%	1%	14%	2%	1%
	Fifth-Eighth Class	1,184	86%	1%	1%	9%	2%	1%
Co-Charged with a Violent Offense	**Statewide**	**3,834**	**86%**	**5%**	**0%**	**6%**	**1%**	**2%**
	First Class	1,884	83%	6%	0%	7%	1%	3%
	Second Class	495	83%	5%	0%	10%	0%	2%
	Second Class A	350	91%	5%	1%	2%	1%	1%
	Third Class	728	93%	3%	0%	2%	1%	1%
	Fourth Class	184	85%	3%	0%	11%	1%	1%
	Fifth-Eighth Class	193	90%	2%	0%	4%	2%	2%

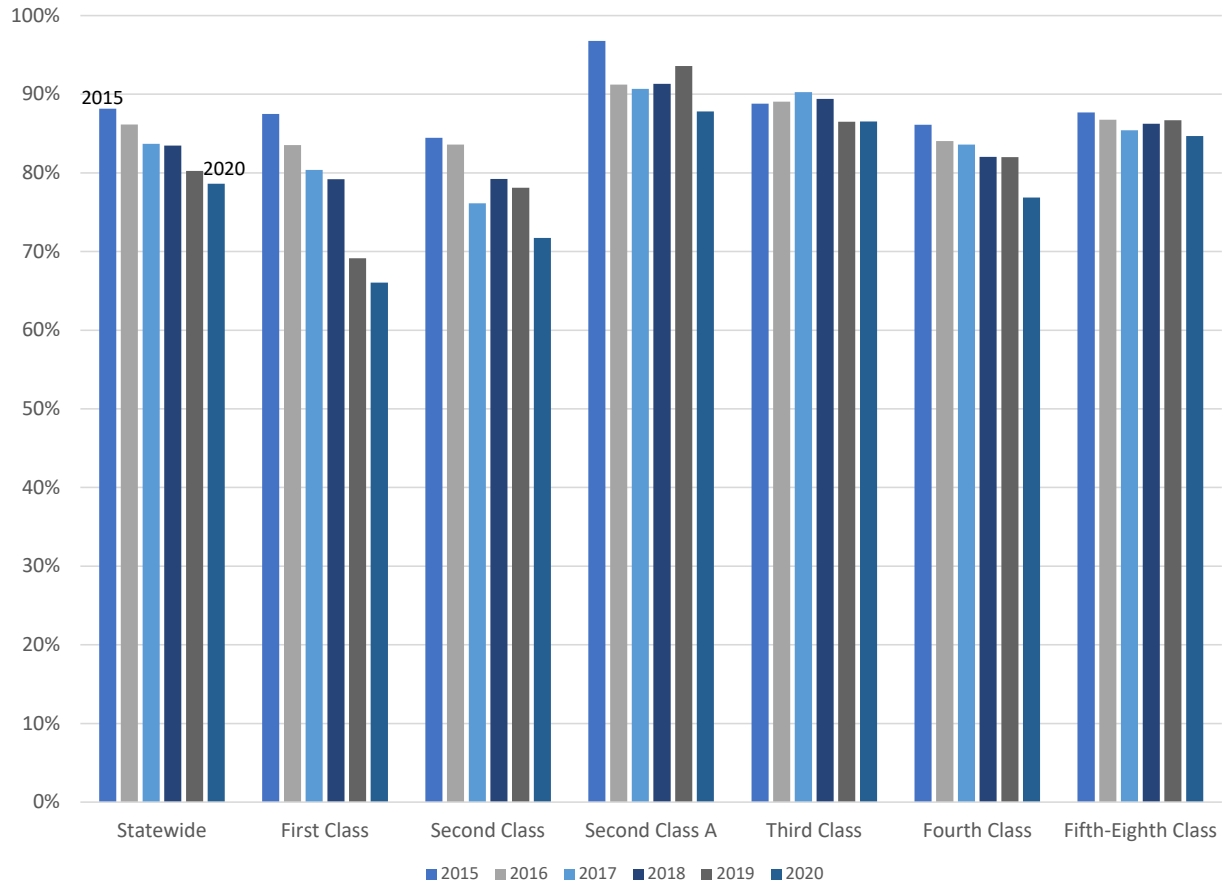
Exhibit 2.6 displays the percentage of guilty dispositions for non-pending VUFA dockets in the Court of Common Pleas by year. Statewide, the average rate of disposition of guilty was 83 percent. However, over time the rate declines from a high of 88 percent in 2015 to a low of 79 percent in 2020. This decline occurred in both the First Class County (decline from 88 percent in 2015 to 66 percent in 2020) and the Second Class County (decline from 84 percent to 72 percent). The apparent driver of this decline is the increase in the percentage with nolle pros dispositions. In the First Class County, the proportion of nolle pros dispositions increased from 7 percent in 2015 to 13 percent in 2018 to 18 percent in 2019 to 21 percent in 2020. Similarly, the proportion in the Second Class County increased from 9 percent in 2015 to twelve percent in 2019 to 18 percent in 2020. In the Second Class A, Third

[15] Nolle prossed or nolle pros is used throughout the report to refer to cases that are nolle prosequi—cases that are not "pursued," or discontinued, by the prosecution.

Class, and Fifth-Eighth Class counties the guilty rate remains fairly stable and above 85 percent for each of the years (see Appendix 2.4).

A similar pattern is found when examining dockets with F1/F2 VUFA charges. The guilty rate in the First Class County drops from a high of 84 percent in 2015 to 64 percent in 2020 and the rate in the Second Class County drops from a high of 79 percent in 2016 to a low of 64 percent in 2020. Again, this change over time is primarily attributable to an increase in nolle pros dispositions.

Exhibit 2.6: Court of Common Pleas, Guilty Dispositions for non-pending All VUFA dockets by Year and County Class



Statewide, 83 percent of non-pending VUFA dockets ended with a guilty disposition in the Court of Common Pleas. For All VUFA dockets the percentage of guilty dispositions in the Court of Common Pleas (22,028), out of initial filings in the lower court (51,618), was 43 percent. 47 percent of non-pending lower court filings (46,435) end up with a guilty disposition at the upper court. And, 58 percent of dockets bound over (37,675) end up with a guilty plea at the Court of Common Pleas.

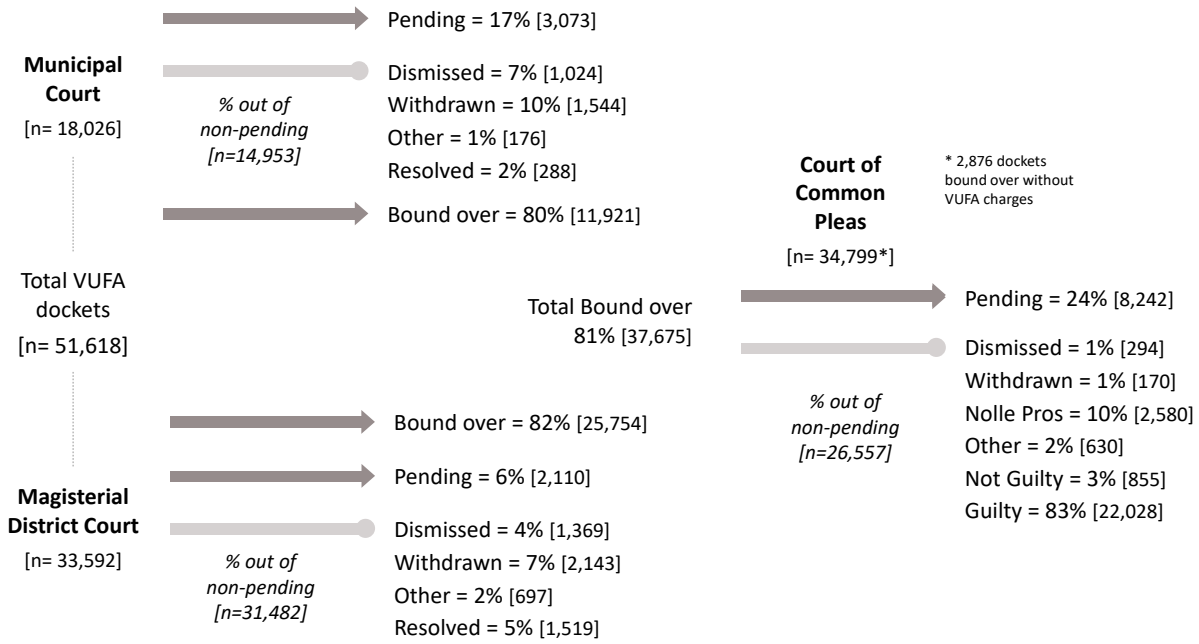
Directive 2 – Summary of Findings

This chapter focused on the attrition of cases after they were filed in the lower courts. Statewide, 10 percent of VUFA dockets, filed between 2015 and 2020, were pending in the lower courts. The percentage of pending was highest in the First and Second Class counties and lowest in the rural jurisdictions. Of non-pending cases, 81 percent of VUFA dockets were bound over to the Court of Common Pleas. 8 percent were withdrawn and 5 percent were dismissed. The highest rates of withdrawals and dismissals were in the First and Second Class Counties. The rate of withdrawals and dismissals remained relatively constant in the Second Class County between 2015 and 2020 and increased significantly in the First Class County in 2018 and 2019.

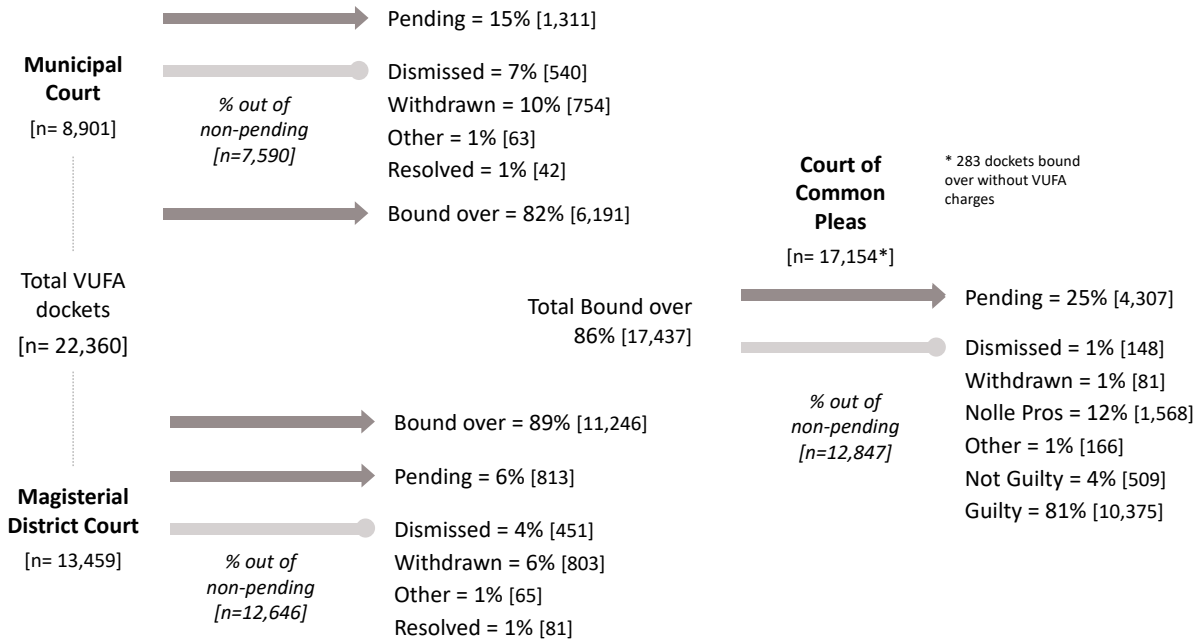
During the study period (2015-2020) roughly one quarter of the VUFA dockets, bound over to the Court of Common Pleas were pending as of December 31, 2020. The highest rate of pending cases was in the Fourth Class and Fifth through Eighth Class counties. Statewide 10 percent of non-pending VUFA dockets were nolle prossed. The nolle pros rate drops to 6 percent for VUFA dockets co-charged with a violent offense. The First Class, Second Class, and Fourth Class counties had nolle pros rates that were higher than other county classes.

Statewide the percentage of guilty dispositions for non-pending VUFA dockets in the Court of Common Pleas was 83 percent. Over time, this rate dropped from a high of 88 percent in 2015 to a low of 79 percent in 2020. The statewide decline is attributable to increases in the proportion of VUFA dockets with a disposition of nolle pros in the First and Second Class Counties. Guilty rates remain high, and relatively constant for the more rural jurisdictions. These patterns repeat themselves for F1/F2 dockets (81 percent guilty) and VUFA dockets co-charged with violent offenses (86 percent guilty).

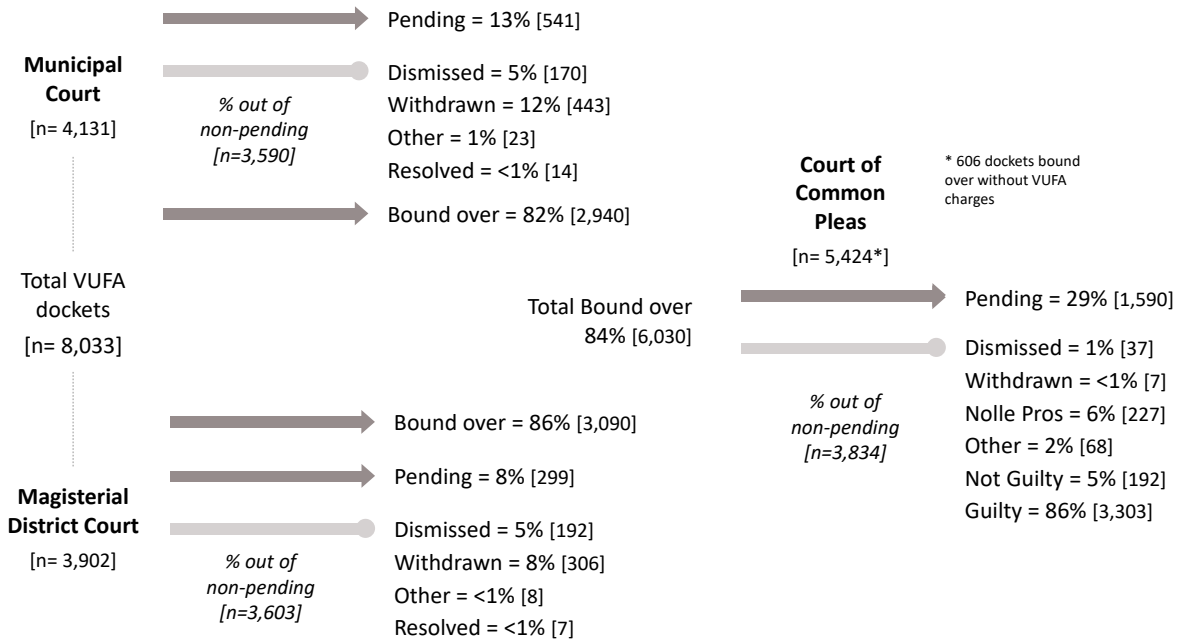
Appendix 2.1: Attrition of All VUFA Dockets



Appendix 2.2: Attrition of F1/F2 Dockets



Appendix 2.3: Attrition of VUFA dockets co-charged with violent offense



Appendix 2.4: Court of Common Pleas Dispositions, by Type of VUFA Docket, County Class, and Year

		All VUFA					F1/F2 VUFA					VUFA co-charge with violent offense				
		Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed	Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed	Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed
First Class	2015	344	88%	4%	0%	7%	155	84%	6%	0%	8%	43	86%	9%	0%	5%
	2016	1,439	84%	5%	0%	10%	782	81%	6%	0%	11%	304	87%	6%	0%	6%
	2017	2,053	80%	5%	0%	12%	1,065	76%	7%	0%	14%	545	86%	5%	0%	6%
	2018	2,216	79%	4%	0%	13%	1,225	79%	5%	0%	14%	486	85%	5%	0%	6%
	2019	1,653	69%	7%	0%	18%	938	69%	9%	0%	20%	345	76%	9%	0%	10%
	2020	769	66%	5%	0%	21%	428	64%	6%	0%	24%	161	76%	9%	0%	7%
Second Class	2015	206	84%	4%	1%	9%	72	75%	4%	4%	15%	20	80%	10%	0%	10%
	2016	744	84%	5%	0%	9%	301	79%	5%	1%	11%	96	84%	4%	0%	10%
	2017	854	76%	9%	1%	13%	367	74%	6%	2%	17%	107	86%	5%	1%	7%
	2018	861	79%	7%	2%	10%	399	71%	7%	4%	15%	116	84%	3%	1%	9%
	2019	886	78%	7%	1%	12%	398	73%	7%	1%	15%	90	79%	9%	0%	10%
	2020	552	72%	6%	1%	18%	249	64%	7%	2%	22%	66	80%	2%	0%	12%
Second Class A	2015	124	97%	2%	0%	2%	55	96%	2%	0%	2%	13	100%	0%	0%	0%
	2016	455	91%	3%	0%	4%	221	89%	4%	0%	6%	75	83%	11%	0%	7%
	2017	537	91%	2%	1%	4%	271	89%	3%	0%	7%	79	96%	1%	1%	1%
	2018	449	91%	2%	1%	4%	239	92%	2%	0%	5%	59	92%	7%	0%	0%
	2019	515	94%	2%	1%	3%	270	92%	3%	0%	4%	88	94%	2%	1%	0%
	2020	279	88%	1%	1%	5%	147	90%	1%	1%	7%	36	86%	3%	0%	6%
Third Class	2015	419	89%	2%	0%	6%	164	88%	2%	1%	9%	27	93%	7%	0%	0%
	2016	1,251	89%	1%	0%	7%	572	88%	1%	0%	9%	129	93%	2%	0%	3%
	2017	1,316	90%	1%	1%	5%	642	90%	2%	0%	7%	158	94%	4%	0%	2%
	2018	1,442	89%	1%	1%	5%	698	89%	1%	1%	7%	161	93%	4%	1%	1%
	2019	1,393	87%	1%	1%	8%	691	85%	2%	1%	11%	143	92%	2%	1%	3%
	2020	1,039	87%	1%	1%	8%	494	83%	2%	1%	12%	110	95%	3%	0%	0%
Fourth Class	2015	108	86%	0%	1%	8%	34	82%	0%	0%	15%	3	100%	0%	0%	0%
	2016	313	84%	2%	2%	8%	116	87%	0%	1%	9%	29	76%	0%	0%	21%
	2017	384	84%	1%	1%	11%	174	80%	2%	1%	16%	47	89%	6%	0%	4%
	2018	384	82%	2%	1%	11%	181	78%	3%	1%	15%	39	92%	3%	0%	3%
	2019	372	82%	1%	1%	8%	184	85%	2%	1%	11%	33	88%	0%	0%	12%
	2020	281	77%	1%	1%	11%	131	77%	2%	1%	15%	33	73%	3%	0%	24%
Fifth-Eighth Class	2015	227	88%	0%	1%	9%	77	86%	1%	1%	10%	4	100%	0%	0%	0%
	2016	513	87%	1%	1%	9%	176	86%	1%	1%	10%	28	79%	0%	0%	14%
	2017	487	85%	1%	1%	8%	187	89%	1%	1%	7%	35	89%	3%	0%	3%
	2018	552	86%	1%	1%	8%	246	83%	1%	0%	12%	34	94%	3%	0%	0%
	2019	624	87%	0%	1%	7%	263	87%	0%	1%	8%	48	92%	0%	0%	4%
	2020	516	85%	1%	2%	8%	235	87%	1%	1%	10%	44	93%	2%	0%	2%
Statewide	2015	1,428	88%	2%	1%	7%	557	85%	3%	1%	9%	110	89%	7%	0%	4%
	2016	4,715	86%	3%	0%	8%	2,168	84%	4%	0%	10%	661	86%	5%	0%	7%
	2017	5,631	84%	4%	1%	9%	2,706	81%	4%	1%	12%	971	88%	5%	0%	5%
	2018	5,904	83%	3%	1%	9%	2,988	82%	4%	1%	12%	895	88%	5%	0%	5%
	2019	5,443	80%	4%	1%	11%	2,744	78%	5%	1%	14%	747	83%	6%	0%	7%
	2020	3,436	79%	3%	1%	12%	1,684	76%	3%	1%	16%	450	83%	5%	0%	7%

Directive 3

Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.

The following chapter speaks to sentences received by the 22,028 VUFA dockets filed in the Court of Common Pleas resulting in at least one guilty disposition. It is important to note that because of the case-level approach taken in Directives 1-4, the sentences reported in this section reflect the sentences for the most serious offense, not necessarily the sentence for a specific VUFA charge. Indeed, it is possible that all VUFA charges filed in the Court of Common Pleas are either withdrawn, dismissed, or nolle prossed. We address such cases specifically in this chapter.

Of all cases resulting in at least one guilty disposition, most resulted in a confinement sentence. Exhibit 3.1 shows the most serious sanction for dockets for those containing any VUFA offense, those with at least one F1/F2 VUFA offense, and VUFA dockets that also included a violent offense. In addition, sentences for F1/F2 VUFA dockets are distinguished by whether the F1/F2 VUFA charge is the most serious offense in the docket at filing or whether another charge is the most serious offense. Statewide, slightly less than 40 percent of VUFA dockets resulted in a prison sentence, 27 percent resulted in a jail sentence, and 29 percent resulted in a probation sentence; the remainder (6 percent) resulted in a sentence not requiring supervision (e.g., restorative sanctions, including guilty without further penalty). As expected, sentence severity increases with the seriousness of offenses within a docket; 50-67 percent of F1/F2 dockets result in a prison sentence, along with 71 percent of those also involving a violent offense charge. The difference is primarily accounted for by a reduction of individuals receiving sentences of probation or non-supervision sentences. Dockets where F1/F2 VUFA charges are the most serious charge at filing receive slightly less serious sentences than those where F1/F2 VUFA charges are not the most serious offense at filing. Often, these cases involve a violent offense or other serious crimes that drive overall sentencing patterns. Sentence length for those incarcerated in state facilities also increases with docket seriousness; the average sentence length (minimum term for confinement) for those sentenced to prison is 44.7 months in the total VUFA sample, compared to 36-55 months for those with F1/F2 VUFA charges and 66.9 months for those involving a violent offense.

Exhibit 3.1: Most Serious Sanction for Dockets Resolved by Guilty Plea in Court of Common Pleas

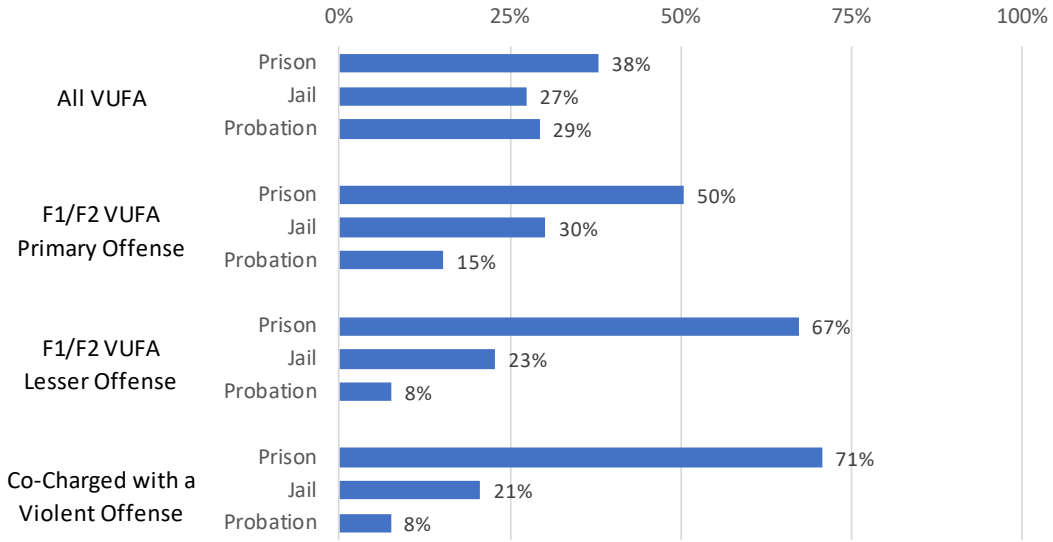


Exhibit 3.2 displays the most serious sanction and length by county class by docket type. While counties are largely similar in sentence length, the vary in their use of different sanctions. For example, VUFA dockets are nearly half as likely to receive a prison sentence in the Second Class County (22.7 percent) compared to the First Class County or Second Class A counties (43 and 43.9 percent, respectively). This difference persists to a lesser extent even in serious dockets involving either F1/F2 VUFAs or violent offenses. The lower use of imprisonment in the Second Class County is not accounted for by drastically higher use of county confinement. Instead, the dockets in the Second Class County are far more likely to result in community supervision sentences (50.3 percent) compared to other counties (15.9 percent to 37.1 percent).

Exhibit 3.2: Most Serious Sanction and Length (months), By County Class

		First Class		Second Class		Second Class A		Third Class		Fourth Class		Fifth-Eighth Class	
		Percent	Length	Percent	Length	Percent	Length	Percent	Length	Percent	Length	Percent	Length
All VUFA	Prison	43.0%	48.8	22.7%	45.4	43.9%	46.7	41.7%	42.7	33.4%	40.7	32.2%	36.7
	Jail	38.9%	9.7	22.5%	8.1	26.5%	7.1	22.2%	7.0	18.9%	7.6	21.4%	6.2
	Probation	15.9%	16.1	50.3%	23.3	26.2%	16.2	28.7%	12.7	36.4%	17.0	37.1%	12.5
	Other	2.2%	-	4.5%	-	3.4%	-	7.5%	-	11.3%	-	9.4%	-
F1/F2 VUFA Primary Charge	Prison	42.3%	36.2	33.1%	34.9	61.0%	38.9	61.0%	37.2	55.7%	36.0	55.6%	33.5
	Jail	46.0%	10.4	28.6%	9.5	24.1%	8.4	21.7%	7.5	19.1%	7.8	24.1%	7.6
	Probation	9.4%	10.5	34.5%	34.2	12.4%	22.5	12.0%	15.8	16.1%	29.3	14.2%	17.9
	Other	2.4%	-	3.8%	-	2.5%	-	5.3%	-	9.0%		6.1%	-
F1/F2 VUFA Lesser Charge	Prison	65.0%	59.5	47.9%	62.1	72.9%	58.9	73.4%	51.4	65.5%	48.6	71.6%	46.4
	Jail	27.5%	10.4	26.8%	8.7	19.1%	7.7	17.3%	8.5	21.9%	9.6	19.2%	9.2
	Probation	6.0%	13.6	22.1%	29.7	5.7%	14.8	6.5%	20.8	10.0%	29.7	5.1%	20.3
	Other	1.5%	-	3.3%	-	2.3%	-	2.9%	-	2.6%	-	4.2%	-
Co-Charged with a Violent Offense	Prison	70.7%	63.0	59.4%	72.2	74.6%	69.7	75.9%	69.9	64.7%	69.7	73.6%	70.2
	Jail	22.3%	10.6	19.7%	9.5	18.8%	8.0	19.0%	9.8	19.2%	10.0	19.0%	11.0
	Probation	6.1%	33.8	19.5%	29.8	4.1%	15.9	4.4%	14.4	12.8%	27.0	6.3%	15.3
	Other	1.0%	-	1.5%	-	2.5%	-	0.7%	-	3.2%	-	1.2%	-

Note: The First Class County does not report probation length for the majority of probation sentences. Average probation length reported is among cases for which length was reported. Generally, the total number of remaining cases is few and should be interpreted with caution

As with other outcomes, there is also variation in the use of particular sanctions over time. For example, several county classes evidence a decrease in the use of prison in 2020 (see Appendices 3.1 - 3.6).[16] There is greater consistency in outcomes across time for more serious dockets (F1/F2 VUFA and those dockets also involving a violent offense charge) than for all VUFA dockets. However, the decrease in sanction severity in 2020 is still evident in several county classes.[17]

It is important to note that these sentences reflect *case*-level outcomes, meaning that the sentences we observe may not result from convictions on any VUFA charges. Exhibit 3.3 displays the extent to which this occurred by case type and county class. Overall, all VUFA charges were dismissed, withdrawn, or nolle prossed, in approximately one-quarter of all dockets resulting in a guilty verdict. This is more often the case in suburban and rural counties than in urban areas. Only 12 percent of all VUFA dockets resulting in a guilty plea involving the dropping of all VUFA charges in the First Class County, compared to 51 percent of dockets in Fifth-Eighth Class counties. These differences are also evident in more serious dockets, though to a lesser extent. The loss of all F1/F2 VUFA charges is more common than the loss of all VUFA charges overall, approximately 30 percent of all F1/F2 and F1/F2 dockets co-charged with a violent offense, though differences across county remain (see Appendix 3.7). Sanctions for these cases are largely similar to sanctions overall (Appendix 3.8).

In these cases where all VUFA charges are dropped, it is common to find the most serious charge of conviction includes a firearms provision. As examples, 18 Pa.C.S. §2701(a)(2) (relating to simple assault) addresses bodily injury with a deadly weapon; 18 Pa.C.S. §2702(a)(4) (relating to aggravated assault) addresses serious bodily injury with a deadly weapon; and 18 Pa.C.S. §3701(a)(1)(i),(ii), and (iii) (relating to robbery) are felonies of the first degree previously subject to the firearms mandatory (42 Pa.C.S. §9712). In the case of 18 Pa.C.S. §4904 (relating to unsworn false statement to authority), the most common VUFA charge dropped is 18 Pa.C.S. §6111 (relating to sale or transfer of firearms) when also an M-2 offense (Appendix 3.8).

[16] Lower number of cases in 2020 (see Appendices 3.1 - 3.6) may be due to the impact of COVID on both case processing and the mix of cases that were handled by courts during the pandemic.

[17] We suggest caution in interpreting county-year patterns for smaller county classes (Fourth, Fifth-Eighth), especially for more serious docket types. We include counts of cases included in each county-year cell and encourage readers to be mindful of small sample sizes (N).

Exhibit 3.3: Disposition of VUFA Charges in Dockets Resulting in Findings of Guilty

		Guilty Dockets	All VUFA Dismissed	All VUFA Withdrawn	All VUFA Nolle Prossed	Total All VUFA Dropped
All VUFA	**Statewide**	**22,028**	**8%**	**7%**	**12%**	**26%**
	First Class	6,559	0%	0%	12%	12%
	Second Class	3,216	15%	0%	0%	16%
	Second Class A	2,159	1%	11%	11%	24%
	Third Class	6,067	14%	10%	8%	34%
	Fourth Class	1,513	3%	9%	30%	43%
	Fifth-Eighth Class	2,514	10%	17%	23%	51%
F1/F2 VUFA	**Statewide**	**10,375**	**5%**	**4%**	**9%**	**19%**
	First Class	3,458	0%	0%	10%	11%
	Second Class	1,300	9%	0%	0%	10%
	Second Class A	1,089	1%	7%	9%	18%
	Third Class	2,838	11%	6%	6%	24%
	Fourth Class	667	2%	6%	17%	27%
	Fifth-Eighth Class	1,023	6%	11%	17%	35%
Co-Charged with Violent Offense	**Statewide**	**3,303**	**6%**	**4%**	**14%**	**25%**
	First Class	1,564	0%	0%	18%	19%
	Second Class	411	15%	0%	0%	16%
	Second Class A	319	3%	17%	18%	38%
	Third Class	679	16%	8%	8%	32%
	Fourth Class	156	3%	6%	21%	35%
	Fifth-Eighth Class	174	6%	14%	20%	41%

Note: Total may be larger than the sum of All VUFA dismised, withdrawn, and nolle prossed due to a small number of cases included in the total which have a combination of these dispostions.

Additionally, any county differences in sentencing identified in this chapter may reflect real differences in cases across time and place, such as differences in prior record score or offense gravity scores, the primary influences in recommended sentencing. For example, if the average prior record score for defendants in VUFA dockets decreases from one year to the next, the average sentence length and use of prison sentences might also decline. For further analyses on the issue, we turn to Directive Four.

Directive 3 – Summary of Findings

Confinement sentences (jail or prison) were the most common sentence for VUFA dockets. The proportion of sentences that receive prison increases from 38 percent for all VUFA dockets, to 50 percent for F1/F2 VUFA dockets (when VUFA is the primary offense), to 67 percent for F1/F2 dockets (when VUFA is the lessor offense), and to 71 percent for VUFA dockets co-charged with a violent offense. Similarly, the average sentence length increases as the seriousness of the docket increases. These lengths remain relatively constant across county classes. However, variation existed in the types of sentences imposed. The analysis revealed that Second Class Counties are far more likely to impose community supervision sentences than the other jurisdictions.

At the time of sentencing in the Court of Common Pleas, roughly three-quarters of dockets still contain VUFA charges. The other 25 percent of cases had all of the VUFA charges withdrawn, dismissed, or nolle prossed). The proportion of dockets where all VUFA charges have been removed from the docket at sentencing is significantly higher in suburban and rural jurisdictions. Overall, the type and duration of sentences for dockets with and without VUFA charges at the time of sentencing are largely similar.

Appendix 3.1: Sanction Type by County Class and Year, Any VUFA

		Any VUFA at Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	40.2%	49.4%	51.2%	37.8%	38.9%	30.5%
	Jail	47.2%	38.0%	35.2%	41.0%	37.3%	44.9%
	Probation	11.6%	11.7%	12.7%	19.7%	20.0%	16.5%
	Other	1.0%	0.9%	1.0%	1.5%	3.9%	8.1%
	N	*301*	*1,202*	*1,650*	*1,755*	*1,143*	*508*
Second Class	Prison	21.3%	22.4%	20.8%	26.3%	23.3%	20.0%
	Jail	18.4%	22.8%	23.9%	22.3%	21.4%	24.0%
	Probation	57.5%	51.5%	50.9%	45.9%	50.7%	50.8%
	Other	2.9%	3.4%	4.5%	5.6%	4.6%	5.3%
	N	*174*	*622*	*650*	*682*	*692*	*396*
Second Class A	Prison	36.7%	43.6%	43.5%	44.2%	49.6%	36.7%
	Jail	29.2%	27.2%	24.4%	29.0%	22.8%	31.4%
	Probation	32.5%	25.8%	29.4%	22.7%	23.2%	29.0%
	Other	1.7%	3.4%	2.7%	4.2%	4.4%	2.9%
	N	*120*	*415*	*487*	*410*	*482*	*245*
Third Class	Prison	35.8%	39.8%	43.8%	44.1%	42.6%	39.3%
	Jail	17.5%	23.0%	23.4%	22.7%	20.0%	23.8%
	Probation	38.2%	29.8%	25.4%	26.0%	30.4%	29.1%
	Other	8.6%	7.5%	7.4%	7.3%	7.1%	7.8%
	N	*372*	*1,114*	*1,188*	*1,289*	*1,205*	*899*
Fourth Class	Prison	25.8%	31.6%	36.8%	31.8%	37.1%	31.0%
	Jail	15.1%	19.4%	21.5%	21.3%	17.1%	15.3%
	Probation	51.6%	41.8%	29.9%	38.1%	30.8%	38.4%
	Other	7.5%	7.2%	11.8%	8.9%	15.1%	15.3%
	N	*93*	*263*	*321*	*315*	*305*	*216*
Fifth-Eighth Class	Prison	20.1%	26.7%	33.7%	32.8%	37.5%	34.6%
	Jail	14.6%	19.3%	19.7%	23.5%	21.4%	25.6%
	Probation	54.8%	42.7%	37.7%	32.8%	32.4%	33.2%
	Other	10.6%	11.2%	8.9%	10.9%	8.7%	6.6%
	N	*199*	*445*	*416*	*476*	*541*	*437*

Appendix 3.2: Sanction Type by County Class and Year, F1/F2 VUFA

		F1/F2 VUFA At Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	52.3%	62.8%	63.1%	47.4%	49.9%	37.1%
	Jail	41.5%	31.3%	30.0%	41.1%	38.4%	46.0%
	Probation	4.6%	5.5%	6.3%	10.1%	8.1%	8.5%
	Other	1.5%	0.3%	0.6%	1.3%	3.6%	8.5%
	N	*130*	*632*	*813*	*968*	*643*	*272*
Second Class	Prison	38.9%	39.3%	33.0%	42.1%	38.4%	33.1%
	Jail	27.8%	31.8%	28.9%	26.3%	24.3%	31.3%
	Probation	29.6%	25.9%	34.8%	27.7%	32.9%	32.5%
	Other	3.7%	2.9%	3.3%	3.9%	4.4%	3.1%
	N	*54*	*239*	*270*	*285*	*292*	*160*
Second Class A	Prison	58.5%	66.8%	67.9%	69.0%	69.9%	55.3%
	Jail	34.0%	24.5%	21.3%	18.3%	17.3%	28.8%
	Probation	5.7%	6.6%	9.6%	10.1%	9.2%	13.6%
	Other	1.9%	2.0%	1.3%	2.7%	3.6%	2.3%
	N	*53*	*196*	*240*	*219*	*249*	*132*
Third Class	Prison	66.2%	67.1%	67.1%	66.1%	65.4%	63.8%
	Jail	23.5%	19.7%	19.3%	19.9%	17.6%	23.0%
	Probation	6.9%	9.4%	8.9%	8.8%	12.0%	10.8%
	Other	3.4%	3.8%	4.7%	5.1%	5.0%	2.5%
	N	*145*	*502*	*575*	*623*	*584*	*409*
Fourth Class	Prison	67.9%	58.4%	60.4%	57.8%	62.2%	59.4%
	Jail	25.0%	17.8%	23.7%	23.9%	15.4%	19.8%
	Probation	3.6%	16.8%	10.1%	15.5%	12.8%	14.9%
	Other	3.6%	6.9%	5.8%	2.8%	9.6%	5.9%
	N	*28*	*101*	*139*	*142*	*156*	*101*
Fifth-Eighth Class	Prison	48.5%	59.9%	63.9%	62.3%	68.3%	61.0%
	Jail	19.7%	25.0%	24.7%	22.1%	17.0%	23.9%
	Probation	18.2%	7.9%	9.0%	8.8%	12.2%	10.2%
	Other	13.6%	7.2%	2.4%	6.9%	2.6%	4.9%
	N	*66*	*152*	*166*	*204*	*230*	*205*

Appendix 3.3: Sanction Type by County Class and Year, co-charged with a violent offense

		VUFA Co-Charged with Violent Offense At Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	64.9%	70.7%	77.9%	65.7%	69.9%	63.9%
	Jail	21.6%	23.6%	14.8%	29.7%	20.2%	27.1%
	Probation	13.5%	5.7%	7.1%	3.9%	7.3%	5.7%
	Other	0.0%	0.0%	0.2%	0.7%	2.7%	3.3%
	N	*37*	*263*	*466*	*414*	*262*	*122*
Second Class	Prison	50.0%	55.6%	60.9%	62.2%	71.8%	43.4%
	Jail	18.8%	16.1%	19.6%	22.5%	14.1%	28.3%
	Probation	31.3%	27.2%	18.5%	14.3%	14.1%	22.6%
	Other	0.0%	1.2%	1.1%	1.0%	0.0%	5.7%
	N	*16*	*81*	*92*	*98*	*71*	*53*
Second Class A	Prison	46.2%	75.8%	75.0%	74.1%	84.3%	58.1%
	Jail	38.5%	21.0%	22.4%	20.4%	8.4%	22.6%
	Probation	15.4%	3.2%	1.3%	0.0%	4.8%	12.9%
	Other	0.0%	0.0%	1.3%	5.6%	2.4%	6.5%
	N	*13*	*62*	*76*	*54*	*83*	*31*
Third Class	Prison	72.0%	70.8%	83.8%	76.0%	73.5%	74.0%
	Jail	12.0%	26.7%	12.8%	19.3%	17.4%	22.1%
	Probation	8.0%	2.5%	2.7%	4.0%	8.3%	3.9%
	Other	8.0%	0.0%	0.7%	0.7%	0.8%	0.0%
	N	*25*	*120*	*148*	*150*	*132*	*104*
Fourth Class	Prison	100.0%	59.1%	61.9%	52.8%	75.9%	75.0%
	Jail	0.0%	27.3%	23.8%	27.8%	3.5%	12.5%
	Probation	0.0%	13.6%	11.9%	16.7%	10.3%	12.5%
	Other	0.0%	0.0%	2.4%	2.8%	10.4%	0.0%
	N	*3*	*22*	*42*	*36*	*29*	*24*
Fifth-Eighth Class	Prison	50.0%	77.3%	80.7%	71.9%	72.7%	70.7%
	Jail	0.0%	18.2%	16.1%	12.5%	22.7%	24.4%
	Probation	50.0%	4.6%	0.0%	15.6%	2.3%	4.9%
	Other	0.0%	0.0%	3.2%	0.0%	2.3%	0.0%
	N	*4*	*22*	*31*	*32*	*44*	*41*

Appendix 3.4: Average Sanction Length (months) by County Class and Year, Any VUFA

		Any VUFA at Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	39.3	46.1	48.8	48.6	53.1	55.0
	Jail	9.4	10.0	9.3	9.6	9.8	10.8
	Probation	-	9.7	17.0	15.2	13.8	12.0
	Other	-	-	-	-	-	-
	N	*301*	*1,202*	*1,650*	*1,755*	*1,143*	*508*
Second Class	Prison	31.7	42.3	47.9	41.9	55.3	40.4
	Jail	7.4	8.5	8.7	8.0	7.4	8.1
	Probation	25.0	23.5	24.6	23.1	22.1	22.6
	Other	-	-	-	-	-	-
	N	*174*	*622*	*650*	*682*	*692*	*396*
Second Class A	Prison	32.7	47.5	46.6	49.6	49.4	39.1
	Jail	6.8	6.9	8.3	7.1	6.5	6.6
	Probation	9.9	13.8	18.7	13.0	20.2	16.0
	Other	-	-	-	-	-	-
	N	*120*	*415*	*487*	*410*	*482*	*245*
Third Class	Prison	34.0	38.9	44.0	44.5	43.3	44.8
	Jail	7.4	7.0	7.2	7.2	6.8	6.6
	Probation	11.6	13.5	13.7	10.3	12.6	14.2
	Other	-	-	-	-	-	-
	N	*372*	*1,114*	*1,188*	*1,289*	*1,205*	*899*
Fourth Class	Prison	32.8	38.6	41.6	35.1	47.3	42.1
	Jail	6.9	8.4	7.2	8.8	6.9	6.1
	Probation	17.1	19.3	17.4	17.5	14.7	15.3
	Other	-	-	-	-	-	-
	N	*93*	*263*	*321*	*315*	*305*	*216*
Fifth-Eighth Class	Prison	27.7	33.4	37.1	42.1	37.1	35.1
	Jail	6.2	5.6	7.9	5.7	6.0	6.3
	Probation	12.0	11.7	10.7	12.0	12.4	16.6
	Other	-	-	-	-	-	-
	N	*199*	*445*	*416*	*476*	*541*	*437*

Note: The First Class County does not report probation length for the majority of probation sentences. Average probation length reported is among cases for which length was reported. Generally, the total number of remaining cases is few and should be interpreted with caution.

Appendix 3.5: Average Sanction Length (months) by County Class and Year, F1/F2 VUFA

		F1/F2 VUFA At Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	40.0	48.9	50.1	50.1	53.5	56.3
	Jail	10.3	9.9	10.0	10.5	10.5	11.5
	Probation	-	6.0	12.0	14.0	12.0	12.0
	Other	-	-	-	-	-	-
	N	*130*	*632*	*813*	*968*	*643*	*272*
Second Class	Prison	33.0	41.0	41.9	43.7	56.0	46.4
	Jail	9.2	9.4	10.5	9.6	8.6	7.7
	Probation	41.6	33.5	32.9	30.8	34.2	32.5
	Other	-	-	-	-	-	-
	N	*54*	*239*	*270*	*285*	*292*	*160*
Second Class A	Prison	37.8	47.2	50.1	51.3	51.6	41.9
	Jail	7.9	8.1	8.6	8.7	8.5	6.4
	Probation	24.0	18.7	20.7	16.9	20.7	24.2
	Other	-	-	-	-	-	-
	N	*53*	*196*	*240*	*219*	*249*	*132*
Third Class	Prison	38.3	40.0	44.7	45.0	45.2	43.9
	Jail	8.5	7.1	8.2	8.5	7.2	7.8
	Probation	15.6	18.0	18.9	17.4	15.8	16.3
	Other	-	-	-	-	-	-
	N	*145*	*502*	*575*	*623*	*584*	*409*
Fourth Class	Prison	36.1	37.6	42.4	36.9	48.8	44.9
	Jail	9.0	12.5	8.2	9.0	7.8	6.3
	Probation	60.0	36.6	33.9	30.0	22.9	23.0
	Other	-	-	-	-	-	-
	N	*28*	*101*	*139*	*142*	*156*	*101*
Fifth-Eighth Class	Prison	31.5	37.4	40.3	44.3	40.0	38.3
	Jail	7.8	7.0	9.7	7.1	9.0	8.4
	Probation	21.0	18.3	19.1	14.0	16.2	23.1
	Other	-	-	-	-	-	-
	N	*66*	*152*	*166*	*204*	*230*	*205*

Note: The First Class County does not report probation length for the majority of probation sentences. Average probation length reported is among cases for which length was reported. Generally, the total number of remaining cases is few and should be interpreted with caution.

Appendix 3.6: Average Sanction Length (months) by County Class and Year, co-charged with a violent offense

		VUFA Co-Charged with Violent Offense At Filing in Court of Common Pleas					
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
First Class	Prison	47.5	62.9	59.6	61.3	72.3	68.6
	Jail	8.5	11.9	9.4	9.9	10.5	13.9
	Probation	-	12.0	12.0	27.0	12.0	-
	Other	-	-	-	-	-	-
	N	*37*	*263*	*466*	*414*	*262*	*122*
Second Class	Prison	40.9	65.4	74.9	63.8	95.1	62.1
	Jail	8.2	9.1	8.4	9.0	9.5	12.5
	Probation	32.4	28.5	26.5	25.8	30.3	40.9
	Other	-	-	-	-	-	-
	N	*16*	*81*	*92*	*98*	*71*	*53*
Second Class A	Prison	43.0	75.1	66.0	84.1	71.4	37.5
	Jail	5.8	9.2	7.8	8.4	9.1	6.4
	Probation	<1	42.0	24.0	-	<1	24.0
	Other	-	-	-	-	-	-
	N	*13*	*62*	*76*	*54*	*83*	*31*
Third Class	Prison	40.2	62.0	69.4	76.1	75.3	70.5
	Jail	10.8	11.4	9.1	9.4	8.9	9.3
	Probation	24.0	6.0	18.0	16.0	13.6	12.0
	Other	-	-	-	-	-	-
	N	*25*	*120*	*148*	*150*	*132*	*104*
Fourth Class	Prison	56.0	50.1	70.5	68.1	93.3	57.7
	Jail	-	12.3	10.1	9.9	<1	8.8
	Probation	-	11.7	28.8	26.0	32.0	36.0
	Other	-	-	-	-	-	-
	N	*3*	*22*	*42*	*36*	*29*	*24*
Fifth-Eighth Class	Prison	16.5	62.2	71.4	91.6	69.6	61.0
	Jail	-	6.0	20.8	4.6	13.7	7.8
	Probation	24.0	6.0	-	13.2	<1	24.0
	Other	-	-	-	-	-	-
	N	*4*	*22*	*31*	*32*	*44*	*41*

Note: The First Class County does not report probation length for the majority of probation sentences. Average probation length reported is among cases for which length was reported. Generally, the total number of remaining cases is few and should be interpreted with caution.

Appendix 3.7: Percent of Guilty Dockets with all F1/F2 VUFA Dropped

		Guilty Dockets	All F1/F2 VUFA Withdrawn	All F1/F2 VUFA Dismissed	All F1/F2 VUFA Nolle Prossed	Tptal All F1/F2 Dropped
Case Includes F1/F2 VUFA	**Statewide**	**10,375**	**9%**	**6%**	**15%**	**31%**
	First Class	3,458	0%	0%	19%	19%
	Second Class	1,300	20%	1%	1%	22%
	Second Class A	1,089	2%	13%	13%	28%
	Third Class	2,838	20%	10%	11%	42%
	Fourth Class	667	5%	8%	25%	40%
	Fifth-Eighth Class	1,023	9%	13%	25%	49%
Case Includes Both F1/F2 VUFA and Co-Charge with Violent Offense	**Statewide**	**1,765**	**8%**	**5%**	**19%**	**33%**
	First Class	804	0%	0%	27%	27%
	Second Class	184	23%	0%	1%	23%
	Second Class A	177	2%	19%	19%	41%
	Third Class	396	22%	10%	11%	43%
	Fourth Class	96	5%	9%	19%	41%
	Fifth-Eighth Class	108	7%	13%	20%	41%

Note: Total may be larger than the sum of All VUFA dismised, withdrawn, and nolle prossed due to a small number of cases included in the total which have a combination of these dispostions.

Appendix 3.8: Most Serious Sanction for Guilty Dockets with All VUFA charges dropped and Most Common Charges of Conviction.

		Dockets	Confinement	Probation	Other	Most Common Charge of Conviction	Charge Description
All VUFA	**Statewide**	**5,799**	**44%**	**48%**	**8%**	**18 Pa.C.S. §4904**	**Unsworn False Statement to Authority**
	First Class	808	81%	17%	2%	18 Pa.C.S. §3701	Robbery
	Second Class	524	23%	69%	9%	35 Pa.C.S. §780-113	Controlled Substances
	Second Class A	512	55%	41%	4%	18 Pa.C.S. §3701 18 Pa.C.S. §4904 35 Pa.C.S. §780-113	Robbery Unsworn False Statement to Authority Controlled Substances
	Third Class	2,033	42%	48%	10%	18 Pa.C.S. §4904	Unsworn False Statement to Authority
	Fourth Class	648	30%	60%	10%	18 Pa.C.S. §4904	Unsworn False Statement to Authority
	Fifth-Eighth Class	1,274	34%	56%	10%	18 Pa.C.S. §4904	Unsworn False Statement to Authority
F1/F2 VUFA	**Statewide**	**1,923**	**73%**	**23%**	**4%**	**35 Pa.C.S. §780-113**	**Controlled Substances**
	First Class	374	82%	16%	2%	18 Pa.C.S. §3701	Robbery
	Second Class	134	40%	52%	8%	35 Pa.C.S. §780-113	Controlled Substances
	Second Class A	196	76%	21%	3%	18 Pa.C.S. §3701 35 Pa.C.S. §780-113	Robbery Controlled Substances
	Third Class	676	75%	21%	4%	35 Pa.C.S. §780-113	Controlled Substances
	Fourth Class	181	70%	26%	4%	35 Pa.C.S. §780-113	Controlled Substances
	Fifth-Eighth Class	362	74%	22%	4%	35 Pa.C.S. §780-113	Controlled Substances
Co-Charged with Violent Offense	**Statewide**	**827**	**87%**	**12%**	**1%**	**18 Pa.C.S. §2702** **18 Pa.C.S. §3701**	**Aggravated Assault** **Robbery**
	First Class	292	88%	11%	1%	18 Pa.C.S. §2702 18 Pa.C.S. §3701	Aggravated Assault Robbery
	Second Class	66	64%	36%	0%	18 Pa.C.S. §2701 18 Pa.C.S. §2702	Simple Assault Aggravated Assault
	Second Class A	122	91%	7%	2%	18 Pa.C.S. §3701	Robbery
	Third Class	220	92%	7%	1%	18 Pa.C.S. §2702	Aggravated Assault
	Fourth Class	55	78%	22%	0%	18 Pa.C.S. §2702	Aggravated Assault
	Fifth-Eighth Class	72	89%	10%	1%	18 Pa.C.S. §2702	Aggravated Assault

Directive 4

Outline the sentencing guidelines for all of the charges in the cases for defendants who were originally charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020.

The Commission on Sentencing provides guidance on appropriate sentences for all misdemeanors and felonies sentenced in the Court of Common Pleas in the form of sentencing guidelines (42 Pa.C.S. §2154). The guidelines recommend the disposition and duration of sentences based on two factors: the severity of the offense (indicated by the Offense Gravity Score; OGS) and the criminal history (Prior Record Score; PRS) of the individual.[18] For each combination of OGS and PRS scores, the guidelines prescribe three ranges: (1) a standard range, for use under normal circumstances; (2) an aggravated range, for use when the judge determines that there are aggravating circumstances present; and (3) a mitigated range for use when the judge determines that there are mitigating circumstances present. Sentences imposed within the mitigated, standard, or aggravated range recommendations are considered within the guidelines and therefore as conforming to the guidelines, whereas sentences imposed below the mitigated range recommendation or above the aggravated range recommendation are considered departures from the guidelines and non-conforming.[19] Guideline conformity is traditionally assessed in relation to the most serious offense (MSO) in a judicial proceeding (JP) (i.e., sentencing hearing). The MSO is based on the offense within the JP with the highest (most serious) OGS assignments.[20] This chapter focuses directly on sentences imposed for judicial proceedings that contain a VUFA conviction, in 2015 through 2020.

Recommended sentences increase as both the offense severity and the number and seriousness of prior convictions increase. For example, a conviction for 18 Pa.C.S. §6110.2 (sale or transfer of a firearm with an altered manufacturer number) in which the weapon was also loaded is a Felony 2 offense with an Offense Gravity Score of 10 (OGS 10). The sentencing guidelines recommendation for this offense for a person with no prior record score (PRS = 0) is a minimum term of confinement of 22-36 months. If the individual instead had two prior convictions for crimes of violence (PRS = REVOC), the minimum sentence recommendation would 120 months, the longest minimum term permitted by statute for an F2 conviction.[21]

As identified in Directive 1, four Chapter 61-A sections account for the vast majority of VUFA offenses charged and filed at the lower courts.[22] The following discussion of the sentencing guidelines as they

[18] Appendix 4.1 shows the current basic sentencing matrix, comprised of 14 Offense Gravity Scores and eight Prior Record Scores

[19] Pennsylvania's guidelines are advisory, only requiring that the sentencing judge consider the guidelines at the time of sentencing. In cases where a court of record imposes a sentence outside the sentencing guidelines, the reason or reasons for the deviation from the guidelines shall be reported to the Commission (204 Pa. Code §307.3.1(d)).

[20] In JPs where there are multiple offenses with the same OGS value, additional elements of the offense (grade, statutory max, etc.) are used to determine the offense that is the most serious.

[21] The sentencing guidelines include a deadly weapon enhancement (DWE) (42 Pa.C.S. §303.10(a)), which increases the sentence recommendation when a weapon is possessed or used during the commission of a crime. However, this enhancement does not apply to offenses for which a deadly weapon is an element of the offense; excluded offenses include all violations of the Uniform Firearm Act, as well as specific subsections of the simple and aggravated assault statutes.

[22] 18 Pa.C.S. §6105 (Persons not to possess, use, manufacture, control, sell, or transfer firearm
18 Pa.C.S. §6106 (Firearms not to be carried without a license)
18 Pa.C.S. §6108 (Carrying firearms on public streets or public property in Philadelphia)
18 Pa.C.S. §6111 (Sale or transfer of firearms)

relate to offenses from these four VUFA sections will focus on the typical offense grade(s) within each section.

Of significant public concern are charges of §6105, the section that includes illegal possession of a firearm. The majority of §6105 charges in Directive 1 carried an offense grade of F1 or F2, corresponding to an OGS of 9 or above depending on the reason the person was barred from possessing a firearm and whether the weapon was loaded. The guidelines recommend a state confinement sentence regardless of prior record score for all offenses of OGS 9 or higher.

Violations of §6106 reflect unlicensed possession by individuals not otherwise barred and includes both M1 and F3 charges; the overwhelming majority of charges in our sample were Felony 3s. These offenses have an associated OGS value of either 7 or 9, depending on whether the weapon was loaded. For individuals convicted of §6106, and having a prior record score of zero, the guidelines recommend confinement; OGS 7 recommends a minimum 6-14 months confinement sentence, while OGS 9 recommends a minimum one-year state confinement sentence.

Also common in our sample were charges for violating §6111, pertaining to the illegal sale or transfer of firearms. These offenses range in statutory grade from M2 to F2, with F3 offenses accounting for the majority of charges within this section as previously identified in Directive 1. The F3 offenses from §6111 carry OGS values of 5 and 8 depending on the specific provision of sale/transfer laws violated (e.g., selling to a person ineligible for criminal history reasons, false statements related to sales without the required 48 hour waiting period). Depending on the prior record score of the defendant, recommended sentences can range from community supervision to local confinement.

Lastly, the offenses from §6108 relate to the illegal carrying of firearms in the city of Philadelphia. There are two offenses in §6108; an M1 offense with an OGS 5 for a loaded firearm, and an M1 offense with an OGS of 4 for an unloaded firearm. The minimum standard sentencing guideline recommendation for both offenses is a non-confinement sentence, though confinement in local facilities may be recommended depending on the defendant's prior record score.

Data from the Administrative Office of Pennsylvania Courts (AOPC) was used to address Directives 1 through 3 in this report. While these data contain information on sentences imposed, that information does not include the specific guidelines criteria used to inform sentencing recommendations (e.g., prior record score). Absent prior record score, it was not possible to locate recommended sentences on the sentencing matrix, and thus the AOPC data could not be used for an analysis of conformity to the guidelines. Instead, these analyses are based on sentences imposed for convictions within the Court of Common Pleas that were reported to the Pennsylvania Commission on Sentencing (PCS). As illustrated below, data from AOPC and PCS are comparable in terms of the proportions and types of VUFA cases in the samples, as well as their demographic characteristics.[23]

[23] The PCS sample is smaller than the AOPC sample because of some under-reporting of sentences by courts of common pleas. While most counties reported 90 percent or more of sentences, seven counties had reporting rates below that, with Philadelphia reporting only 46 percent of its Court of Common Pleas sentences to the commission in 2019. Act 114-2019 authorized a new certification of compliance which links full reporting of data to funding of counties. Minor courts (e.g., Philadelphia Municipal Court and Magisterial District Courts) sentences are not required to be reported (as these courts are not a 'court of record'). Another reason for a difference in sample size is that PCS cases are based on judicial proceedings while AOPC cases are based on dockets. A judicial proceeding may include multiple dockets.

Cases Sentenced

Between January 1, 2015 and December 31, 2020, 13,993 sentenced cases were reported to the Pennsylvania Commission on Sentencing that included *at least one* VUFA offense.[24,25] Among these, 5,552 cases (39.7 percent) included at least one Felony 1 or Felony 2 ("F1/F2") VUFA offense, and 1,430 cases (10.2 percent) included a VUFA offense of any grade accompanied by a violent offense charge, as defined in HR 111. Though they are unique data sets, the proportion of cases with F1/F2 VUFA offenses and VUFA offenses co-charged a violent offense in PCS data are comparable to those from the AOPC data used to address Directives 1 through 3, at 40.7 percent and 15.6 percent, respectively.

Offense Seriousness

The current guidelines rank offenses across 14 offense gravity scores (OGS), and each represents the "severity" associated with the current offense at sentencing (OGS 15 is included on a separate matrix, and is reserved for Murder 1 and Murder 2 sentence recommendations). Exhibit 4.1 displays the distribution of OGS for cases involving VUFA. We limit this table to the most serious offense (MSO) per case, rather than including all charges, as the MSO exerts the strongest influence on sentencing outcomes. It is important to note that the MSO in a VUFA case may not be a VUFA offense. VUFA cases involve more serious offenses than is typical for all sentenced cases—that is, all cases that received a sentence in the Court of Common Pleas that were then reported to PCS.[26] While some VUFA cases involve less serious offenses, those with a Felony 1 or Felony 2 VUFA charge or that are co-charged with a violent offense rarely have OGS values below 9, meaning that the recommended sentences typically involved state confinement.[27] Generally, the most serious cases were found in urban and surrounding counties, with VUFA cases in the First Class County having an average OGS of 9.7, and this average decreasing with the reduction in county class size. The lowest average OGS (7.4) was in the Fifth through Eighth county classes (i.e., the least populous communities in the sample).

[24] AOPC filings and sentenced cases used to address directives 1 through 3 do not necessarily correspond to the sentences reported to PCS that are used to address directive 4. For example, sentences reported to PCS during the 2015 to 2020 period may have been filed in the lower courts prior to this window.

[25] 182 VUFA cases reported to PCS between 2015-2020 had Homicide 1 or Homicide 2 (§§2501-2504) listed as the most serious offense in a judicial proceeding. These cases were removed from all samples in this analysis (including the VUFA/co-charged with a violent offense sample) as the sentencing guidelines apply differently to these cases, negating the utility of a conformity analysis.

[26] 481,544 cases were reported to PCS that received a sentence between 2015 and 2020. These cases included all offense types (e.g., those with and without a VUFA offense, DUI offenses, etc.), with the exception of those with Homicide 1 or Homicide 2 offense grades (§§2501-2504).

[27] OGS 9-14 are considered Level V sentences, for which even individuals with a prior record score of "0" are recommended to receive a sentence to state confinement.

Exhibit 4.1: Distribution of Offense Gravity Scores (OGS), 2015 – 2020

Offense Gravity Score (OGS)	All VUFA Cases	F1/F2 VUFA Cases	Co-charged with Violent Offense	All Sentenced Cases
14	3.0%	3.2%	29.2%	0.4%
13	0.6%	0.9%	3.2%	0.1%
12	0.6%	0.7%	3.9%	0.3%
11	6.0%	11.1%	23.9%	0.7%
10	31.0%	68.6%	29.0%	2.0%
9	29.3%	14.9%	7.6%	1.7%
8	4.7%	0.1%	1.9%	2.0%
7	4.8%	0.5%	0.5%	3.0%
6	2.3%	-	1.0%	4.4%
5	3.1%	-	-	15.0%
4	9.6%	-	-	3.2%
3	4.6%	-	-	27.5%
2	0.5%	-	-	9.8%
1	<0.1%	-	-	29.9%
Avg. OGS	8.5	10.1	11.4	3.4
# Cases	13,993	5,552	1,430	481,544

Prior Criminal History

Sentencing recommendations depend not only on the seriousness of the offense of conviction, but also the extent of an individual's prior involvement with the criminal justice system. Exhibit 4.2 reports the distribution of prior record scores (PRS) for the three cohorts of sentenced VUFA cases as well as for all cases reported in the PCS data. As with offense seriousness, individuals charged with a VUFA offense had more extensive criminal involvement prior to their current case – 36 percent of all VUFA cases had a PRS score of 0, compared to 46 percent of cases sentenced overall. Nearly one-fourth of all VUFA cases had a PRS of 5 or higher (Repeat Felony Offenders [RFEL]/Repeat Violent Offender [REVOC]), compared to approximately 17 percent of PCS cases overall. Cases with F1/F2 VUFA charges generally had more serious prior records, with only about 10 percent having no prior serious criminal involvement and nearly 45 percent having a PRS of 5 or higher. Those individuals charged with both VUFA and a violent offense are similar to the overall VUFA population in terms of their prior criminal involvement.[28]

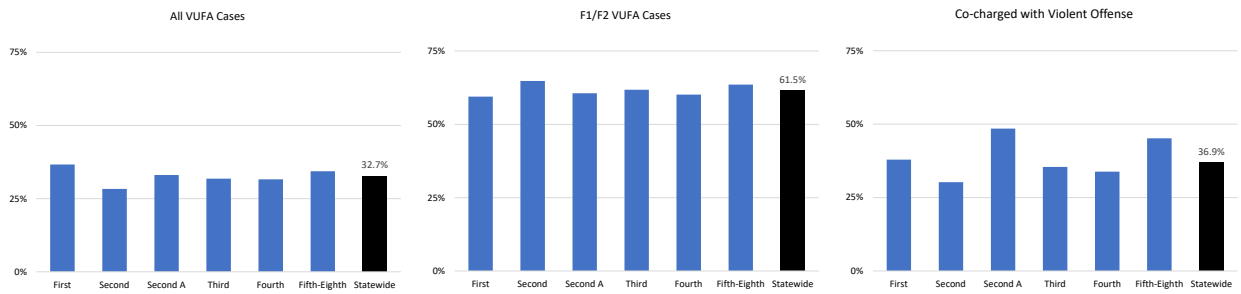
[28] PCS data on prior convictions indicates that 1.5 percent (205 cases) of the VUFA sample had one or more prior VUFA-related convictions. Because of issues relating to the attrition of charges (as outlined under Directive 2) as well as the potential underreporting sentences to PCS (see footnote 6 of this chapter), this rate might be higher if triangulated with data from the Pennsylvania State Police (PSP), which were unavailable to Commission staff at the time of writing.

Exhibit 4.2: Distribution of Prior Record Scores (PRS), 2015 - 2020

Prior Record Score (PRS)	All VUFA Cases	F1/F2 VUFA Cases	Co-charged with Violent Offense	All Sentenced Cases
0	35.6%	9.7%	32.0%	46.2%
1	11.1%	3.9%	11.4%	13.2%
2	12.6%	14.0%	12.1%	10.6%
3	8.1%	10.9%	7.7%	7.2%
4	9.4%	15.5%	11.1%	6.1%
5	18.7%	36.4%	19.7%	13.5%
RFEL	3.6%	7.2%	4.3%	3.1%
REVOC	1.0%	2.4%	1.9%	0.1%
# Cases	13,993	5,552	1,430	481,544

Exhibit 4.3 displays the distribution of serious prior record scores (4, 5, RFEL, and REVOC categories combined) by county class for the three VUFA cohorts. A serious PRS was slightly more common for the all VUFA cases category in the First Class County (37 percent); this shifted to the Second Class County (65 percent) when considering the F1/F2 VUFA cases category, and to the Class 2A counties (49 percent) when considering the co-charged with violent offense category.

Exhibit 4.3: Distribution of Serious PRS by County Class, 2015 - 2020



VUFA Offenses and the Basic Sentencing Matrix

Exhibit 4.4 displays where VUFA cases are located on the Basic Sentencing Matrix (§303.16(a)) based on the intersections of OGS and PRS of the most serious offense in a judicial proceeding, even if not a VUFA offense. Cells which contained 5 percent or more of the sample are in bold font. The most common cell (12 percent of the sample) fell within Level 5 (OGS 9, PRS 0), which includes with a recommended minimum term of confinement of 12-24 months; OGS 9 is typically assigned to a F2 or F3 VUFA conviction. The next most common cell (10 percent of the sample), also at Level 5 (OGS 10, PRS 5), includes a recommended minimum term of confinement of 60-72 months; OGS 10 is typically assigned to a F1 or F2 Section 6105 conviction. The third highlighted cell (7.5 percent of the sample) is found at Level 2 (OGS 4, PRS 0), with a range of recommendations that could include any restorative sanction

(e.g., probation, fine/community service, guilt without further penalty) up to a minimum term of confinement of three months; OGS 4 is typically assigned to a M1 VUFA conviction. Most sentences from the full sample fell within level 5 (70.6 percent), followed by level 2 (14.8 percent). Appendix 4.2 and Appendix 4.3 contain the Basic Sentencing Matrices for the F1/F2 VUFA and VUFA co-charged with a violent offense. To understand how sentences imposed correspond to recommended sentences, we next consider conformity with the guidelines.

Exhibit 4.4: Basic Sentencing Matrix for Cases Containing Any VUFA Charge (*n* = 13,993)

	Prior Record Score (PRS)								
	0	1	2	3	4	5	RFEL	REVOC	Total
14	137 1.0%	47 .3%	51 .4%	31 .2%	51 .4%	86 .6%	12 .1%	3 .0%	418 3.0%
13	16 .1%	10 .1%	8 .1%	5 .0%	11 .1%	22 .2%	6 .0%	5 .0%	83 .6%
12	32 .2%	5 .0%	12 .1%	8 .1%	3 .0%	21 .2%	4 .0%	3 .0%	88 .6%
11	133 1.0%	56 .4%	95 .7%	74 .5%	114 .8%	288 2.1%	57 .4%	18 .1%	835 6.0%
10	651 4.7%	229 1.6%	621 4.4%	436 3.1%	637 4.6%	**1,392** **9.9%**	281 2.0%	92 .7%	4,339 31.0%
9	**1,677** **12.0%**	601 4.3%	541 3.9%	333 2.4%	313 2.2%	516 3.7%	90 .6%	23 .2%	4,094 29.3%
8	278 2.0%	113 .8%	98 .7%	61 .4%	45 .3%	61 .4%	7 .1%		663 4.7%
7	276 2.0%	121 .9%	85 .6%	58 .4%	41 .3%	70 .5%	22 .2%		673 4.8%
6	83 .6%	58 .4%	52 .4%	39 .3%	29 .2%	47 .3%	8 .1%		316 2.3%
5	233 1.7%	54 .4%	58 .4%	24 .2%	16 .1%	38 .3%	4 .0%		427 3.1%
4	**1,047** **7.5%**	145 1.0%	77 .6%	28 .2%	19 .1%	23 .2%	4 .0%		1,343 9.6%
3	361 2.6%	100 .7%	57 .4%	37 .3%	31 .2%	50 .4%	4 .0%		640 4.6%
2	52 .4%	8 .1%	5 .0%	2 .0%	2 .0%	3 .0%			72 .5%
1	2 .0%								2 .0%
	4,978 35.6%	1,547 11.1%	1,760 12.6%	1,136 8.1%	1,312 9.4%	2,617 18.7%	499 3.6%	144 1.0%	13,993

Level 5	
9,886	
70.6%	
Level 4	
805	
5.8%	
Level 3	
1,174	
8.4%	
Level 2	
2,074	
14.8%	
Level 1	
54	
0.4%	

Sentencing Guideline Conformity

In the introduction to this chapter the general structure of Pennsylvania's sentencing guidelines was outlined. The following section considers to what degree the sentences imposed in VUFA cases conformed to the sentencing guidelines in practice.

Exhibit 4.5 displays the degree of sentencing guideline conformity for the sentence imposed for the MSO in a JP including any VUFA offense. To reiterate, the MSO drives the sentence recommendation in each case and is therefore the focus of this discussion. The MSO may or may not be a VUFA offense; for example, 81 percent of the full VUFA sample and 82 percent of F1/F2 VUFA sample have a VUFA offense as the MSO.[29, 30]

Statewide, the largest portion of VUFA cases were sentenced within the standard range. Consistent with broader patterns for all cases sentenced in Pennsylvania (see Appendix 4.4), cases sentenced outside the standard range generally were given either mitigated or downward departing sentences. There is some variation by county class, with larger county classes (i.e., First, Second, Second A) more commonly imposing sentences that were below the standard range compared to the smaller county classes (Third, Fourth, and Fifth through Eighth). This difference was most evident for Second Class Counties, in which 40 percent of VUFA cases received a minimum confinement sentence below the mitigated range (i.e., a downward departure). When considering the all VUFA cases category, urban counties have a larger portion of Level 5 VUFA offenses, which could impact a comparison of sentences imposed by county class; the mitigated range is up to 12 months less than the bottom on the standard range.

Smaller county classes (i.e., Third through Eighth) were far more likely to impose sentences within the standard range, from 57 to 70 percent of all VUFA cases. When considering the all VUFA cases category, rural counties have a larger portion of less serious VUFA offenses, including many that are Level 2 VUFA offenses, which could impact a comparison of sentences imposed by county class; the standard range at Level 2 includes RS (restorative sanctions, including probation and guilt without further punishment), which eliminates the possibility of a sentence in the mitigated range or a departure below the guidelines.

Statewide, 73 percent of sentences for VUFA cases fell within the guideline recommendation, including mitigated (27 percent), standard range (43 percent), and aggravated sentences (3 percent). County class-specific patterns of guideline conformity for generally followed those for all sentenced cases (see Appendix 4.4), which may reflect that there are informal local guideposts for sentencing. For example, the Second County class imposed a higher rate of downward departing sentences for all F1/F2 cases when compared to other county classes. This was also apparent when considering the F1/F2 VUFA sample in Exhibit 4.5.[31]

[29] Subsequent analyses isolate conformity rates for when VUFA offenses are the MSO (see Exhibit 4.6).
[30] In contrast, only 14 percent of VUFA cases with a co-charged with a violent offense have a VUFA offense as the MSO.
[31] Statewide guideline conformity rates were generally stable over time, though standard range sentences were imposed in a higher percentage of cases each year, particularly in 2019 and 2020 (see Appendix 4.5). Appendix 4.6 displays how patterns of conformity over time may have been different according to county class. For example, the First Class County imposed a notably higher rate of downward departing sentences for F1/F2 VUFA cases in 2018, 2019, and 2020 (though it should be noted that this reflects a small subset of cases, as only 1,742 F1/F2 VUFA cases were sentenced in total from 2015 to 2020).

Exhibit 4.5: Sentencing Guideline Conformity, 2015 - 2020

			Conformity Level				
		# Cases	Below	Mitigated	Standard	Aggravated	Above
All VUFA Cases	**Statewide**	**13,993**	**25%**	**27%**	**43%**	**3%**	**2%**
	First Class	3,369	34%	28%	28%	5%	5%
	Second Class	2,814	40%	35%	24%	1%	1%
	Second Class A	1,607	25%	34%	37%	3%	2%
	Third Class	3,854	15%	24%	57%	3%	2%
	Fourth Class	1,044	12%	18%	65%	4%	2%
	Fifth-Eighth Class	1,305	12%	15%	70%	2%	1%
F1/F2 VUFA Cases	**Statewide**	**5,552**	**42%**	**20%**	**34%**	**2%**	**2%**
	First Class	1,742	51%	19%	23%	4%	4%
	Second Class	940	70%	20%	9%	%	1%
	Second Class A	668	36%	27%	31%	3%	3%
	Third Class	1,348	25%	21%	51%	2%	1%
	Fourth Class	374	23%	17%	57%	2%	1%
	Fifth-Eighth Class	480	23%	12%	63%	2%	%
Co-Charged with Violent Offense	**Statewide**	**1,430**	**21%**	**14%**	**51%**	**6%**	**7%**
	First Class	657	21%	11%	50%	8%	11%
	Second Class	271	39%	20%	35%	2%	3%
	Second Class A	101	23%	21%	44%	5%	8%
	Third Class	271	11%	13%	62%	6%	7%
	Fourth Class	68	7%	15%	71%	4%	3%
	Fifth-Eighth Class	62	5%	15%	76%	3%	2%

Cases with F1/F2 VUFA charges were more likely to be sentenced below the guidelines on the MSO (which was a VUFA offense in 82 percent of these cases) (see Exhibit 4.5). Statewide, only about one-third of sentences imposed for cases with F1/F2 VUFA offenses fell within the standard range (34 percent), while 42 percent received a downward departure. Second Class counties again emerged as an outlier, departing downward in 70 percent of sentences, and imposing only 9 percent of sentences within the standard range. The First Class County was also more likely to sentence below the recommended range (51 percent), though less so than the Second Class County. Smaller counties were more likely to conform to the standard range and less likely to impose mitigated range sentences than larger counties. In general, conformity to the guidelines was lower for the F1/F2 VUFA sample, with only 55 percent of sentences falling within the recommended range (compared to 73 percent in the samples including all VUFA cases).

Conforming sentences were more common when VUFA offenses co-occurred with violent offenses, with more than half of all such cases being sentenced in the standard range statewide (see Exhibit 4.5). However, Second Class and Second Class A counties were less likely to sentence within the standard range. Second Class counties were more likely to impose downward departed sentences while Second Class A counties were more likely to sentence within the mitigated range. The First Class County was

most likely to impose sentences both in the aggravated range (8 percent) and as a departure above the aggregated guidelines (11 percent). Overall, 71 percent of cases with a VUFA offense co-charged with a violent offense were given a sentence within the recommended range. As with the other two VUFA types (all and F1/F2), when sentences fell outside of the recommended range, it was more common that they received a downward departure instead of an upward departure.

Exhibit 4.6 summarizes the guideline conformity rates for sentences with a VUFA offense as the MSO in a judicial proceeding. For these, the VUFA offense specifically may be considered the "driving factor" of the sentence imposed. Note that in this analysis the sample for VUFA cases co-charged with a violent offense was particularly small as VUFA charges were rarely the most serious offense when a violent offense was also present (n = 201 cases statewide over the six-year study period).[32] The results in Exhibit 4.6 closely mirror the main findings reported in Exhibit 4.5, with the largest portion of VUFA cases receiving a sentence within the standard range sentence recommendation (72 percent, including mitigated and aggravated sentences), and the next most common being sentences below the standard range sentence recommendation (26 percent). Patterns for the other two samples (i.e., those with an F1/F2 VUFA offense as the MSO, and those with VUFA as the MSO co-charged with a violent offense) were also markedly similar to the main analyses. Overall, patterns in sentencing guideline conformity appeared stable whether or not the VUFA offense was the MSO.

[32] Common violent offenses that accompanied a VUFA offense were aggravated assault (causing serious bodily injury [SBI] (§2702(a)(1)) (graded F1, OGS 11), homicide/murder 3 (§2505(a)) (graded F1, OGS 14), and attempt/solicitation/conspiracy to murder (causing SBI) (§2502) (graded 18 Pa.C.S. §1102(c), OGS 14).

Exhibit 4.6: Sentencing Guideline Conformity (VUFA as Most Serious Offense), 2015 – 2020

			Conformity Level				
		# Cases	Below	Mitigated	Standard	Aggravated	Above
All VUFA Cases	**Statewide**	**11,317**	**26%**	**29%**	**41%**	**2%**	**1%**
	First Class	2,281	40%	34%	22%	3%	2%
	Second Class	2,384	40%	36%	23%	%	%
	Second Class A	1,394	26%	36%	35%	2%	2%
	Third Class	3,244	15%	26%	56%	2%	1%
	Fourth Class	887	13%	19%	64%	3%	1%
	Fifth-Eighth Class	1,127	13%	16%	68%	2%	1%
F1/F2 VUFA Cases	**Statewide**	**4,558**	**45%**	**21%**	**31%**	**1%**	**1%**
	First Class	1,258	59%	21%	17%	2%	2%
	Second Class	835	74%	20%	5%	%	%
	Second Class A	575	38%	28%	29%	3%	2%
	Third Class	1,144	26%	23%	50%	1%	1%
	Fourth Class	322	24%	18%	55%	2%	1%
	Fifth-Eighth Class	424	24%	12%	62%	2%	%
Co-Charged with Violent Offense	**Statewide**	**201**	**28%**	**25%**	**42%**	**2%**	**2%**
	First Class	41	46%	20%	29%	2%	2%
	Second Class	36	64%	25%	11%	%	%
	Second Class A	27	30%	33%	33%	%	4%
	Third Class	67	6%	25%	60%	6%	3%
	Fourth Class	20	5%	20%	70%	%	5%
	Fifth-Eighth Class	10	10%	30%	60%	%	%

Deadly Weapon Enhancement

In Pennsylvania, a sentence enhancement applies to crimes committed while possessing or using a weapon, including any loaded or unloaded firearm. "Possession" is defined as a firearm being on one's person or within their immediate physical control, and "use" is defined as a firearm being employed in a way that threatened or injured another individual. In either circumstance, a sentencing court has no discretion to refuse to apply the enhancement (*Commonwealth v. Peer*, 684 A.2d 1077 (Pa. Super. 1996)).

The court is required to consider the DWE/Possessed Matrix (§303.17(a)) in place of the Basic Sentencing Matrix (§303.16(a)) when it determines that the offender possessed a deadly weapon during the commission of the current conviction offense.[33] Similarly, the court is required to consider the DWE/Used Matrix (§303.17(b)) when it determines that the offender used a deadly weapon during the commission of the current conviction offense. For example, someone convicted of a robbery who

[33] Except for those sentenced pursuant to 18 Pa.C.S. §1102.1 (relating to sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer).

threatened serious bodily injury (§3701(a)(1)(ii)) but did not possess or use a weapon during the commission of the crime would have an OGS of 10. Under the Basic Sentencing Matrix, if this individual had no meaningful criminal history (PRS 0), the standard range sentence recommendation would be minimum term of confinement of 22-36 months. If instead the court determined that the offender possessed a deadly weapon during the commission of the offense, the sentence recommendation would increase to a minimum term of confinement of 31-45 months. And if the court determined a deadly weapon was used during the commission of the offense, the sentence recommendation would increase to a minimum term of confinement of 40-54 months.

The DWE is not applied when the possession or use of a deadly weapon is an element of the crime or a sentencing factor considered in its OGS assignment. As such, while these enhancements cannot be applied to a VUFA offense, it is not uncommon that cases with a VUFA offense have an accompanying offense that did receive the DWE enhancement, such as the given example above.

Exhibit 4.7 below considers conformity rates for the MSO in cases where a weapons enhancement was applied to the MSO. These cases were included in the main conformity analyses but not isolated to assess whether they had unique patterns of sentence conformity from the larger sample. While all cases in Exhibit 4.7 do contain at least one VUFA offense, the level of conformity is specific to the MSO, which would not be a VUFA offense given the weapons enhancement eligibility criteria described above. For all cases in Exhibit 4.7, a non-VUFA offense is the MSO.

It is important to note that weapons enhancements were somewhat rare in VUFA cases. Only 3 percent of the full VUFA sample (and the same proportion of the F1/F2 VUFA sample) contained a weapons enhancement that was applied to the MSO. A larger portion of the VUFA sample co-charged with a violent offense received a weapons enhancement (21 percent) because the MSO was more often a violent offense rather than a VUFA offense, meaning it was more often eligible for a weapons enhancement.

The failure by prosecutors to pursue the deadly weapon enhancement or for courts to consider the enhancement as required has been a persistent problem, documented in 2009 in the Commission's HR 12 Study. At that time, the Commission committed to increasing educational efforts and adding features to the Commission's SGS Web sentencing application to promote compliance. These efforts resulted in modest improvements. A next step, as part of a rebuilding of the web-based application, is to include as a design feature a default application of the DWE to non-VUFA offenses when a firearm is present in a criminal incident.

Exhibit 4.7 shows that, statewide, the vast majority of VUFA cases with a weapons enhancement received a conforming sentence (i.e., within the mitigated, standard, or aggravated ranges) (74 percent). Differences in the proportions of cases that fell within each conformity level by county class are at times greater than in the main analyses due to the smaller samples. For example, the Fourth Class county only had 20 such cases over the study period, and the Fifth through Eighth Class counties had 33 cases combined. Over half of all VUFA cases with an accompanying weapons enhancement (61 percent) came from the First, Second, or Second Class A counties.

Second Class A counties appeared to be somewhat of an outlier in Exhibit 4.7, issuing upward departures (i.e., an outside 'above' range sentence) in 8 to 10 percent of cases, depending on the sample of interest. This exceeded the statewide average in this analysis and was higher than the proportions for this same county class in other previous conformity analyses. This result should be tempered, however, based on the sample size ranging from only 40 (co-charged with a violent offense) to 86 cases (all VUFA).

Exhibit 4.7: Sentencing Guideline Conformity for VUFA Cases with a Weapons Enhancement Applied, 2015 - 2020

			Conformity Level				
		# Cases	Below	Mitigated	Standard	Aggravated	Above
All VUFA Cases	**Statewide**	**463**	**22%**	**17%**	**53%**	**4%**	**4%**
	First Class	125	22%	15%	55%	4%	4%
	Second Class	71	44%	25%	27%	1%	3%
	Second Class A	86	20%	27%	41%	5%	8%
	Third Class	128	17%	12%	64%	5%	2%
	Fourth Class	20	%	10%	80%	10%	%
	Fifth-Eighth Class	33	12%	9%	73%	3%	3%
F1/F2 VUFA Cases	**Statewide**	**183**	**25%**	**15%**	**51%**	**4%**	**5%**
	First Class	41	24%	10%	59%	5%	2%
	Second Class	29	48%	21%	24%	3%	3%
	Second Class A	48	21%	25%	38%	6%	10%
	Third Class	41	27%	5%	63%	2%	2%
	Fourth Class	8	%	13%	88%	%	%
	Fifth-Eighth Class	16	6%	19%	69%	%	6%
Co-Charged with Violent Offense	**Statewide**	**295**	**21%**	**14%**	**59%**	**3%**	**3%**
	First Class	95	20%	9%	64%	4%	2%
	Second Class	57	40%	26%	30%	2%	2%
	Second Class A	40	25%	18%	45%	3%	10%
	Third Class	70	11%	11%	73%	1%	3%
	Fourth Class	12	%	8%	83%	8%	%
	Fifth-Eighth Class	21	5%	10%	81%	5%	%

Pa.C.S. 18 §6105

There were 6,442 cases reported to the Pennsylvania Commission on Sentencing in the study period that contained a charge relating to persons not to possess, use, manufacture, control, or sell firearms.

There was a high degree of overlap between these cases and cases involving F1/F2 VUFA charges: 91 percent of the F1/F2 sample involved a §6105 charge. However, 20 percent sentenced for a violation of §6105 did not include a Felony 1 or Felony 2 charge.

Individuals sentenced for §6105 violations had more serious prior record scores than the overall VUFA sample: 58 percent had PRS of 4, 5, RFEL, or REVOC and only 9 percent had a PRS of 0. The current conviction offenses were also more serious than the overall VUFA cohort, with 56 percent having an OGS of 10.

Most cases resulted in a term of state incarceration (66 percent; average minimum 51 months). Slightly less than one-fifth of individuals charged with §6105 received a jail sentence (19 percent; average minimum 10 months). Community supervision sentences were less common (9 percent), and averaged 42 months.

Consistent with main conformity analyses, most cases involving a §6105 VUFA offense received a sentence within the recommended standard range (59 percent). The Second Class County remained an outlier, imposing a downward departure sentence in 59 percent of these cases. Statewide conformity was similar when considering only §6105 violations that were F1/F2 offense grades (*n* = 5,070 cases), at 55 percent. Downward departures in the Second Class County increased to 71 percent for this sample, similar to their downward departure rate for F1/F2 VUFA cases in general. Sentence conformity rates were the most comparable between the §6105 VUFA sample and the F1/F2 VUFA sample.

Directive 4 – Summary of Findings

In directive 4, the Commission examined the sentencing guidelines recommendations for VUFA charges from 2015 to 2020 as well as the actual sentences imposed for these dockets. There were 13,993 sentences reported to the Commission for dockets containing at least one VUFA charge. The most common offense gravity scores associated with these dockets were OGS 10, OGS 9, and OGS 4. These dockets tended to come from the most densely populated county classifications and defendants were predominantly young males. When looking at the most serious offense within the docket, the average offense gravity score was 9.7 across all VUFA dockets. For VUFA dockets involving a F1 or F2 VUFA or violent offense, the OGS scores were almost exclusively 9 or above, corresponding to a guideline recommended sanction of state incarceration.

An evaluation of prior record scores showed that individuals sentenced in VUFA cases have a more substantial criminal record than individuals sentenced for all other cases. VUFA offenders were less likely to have a prior record score of 0 or 1 and were more likely to have prior record scores of 2 or greater. In cases involving a F1 or F2 VUFA charge, 45 percent of individuals had a prior record score of 5 or greater. When combining the OGS and PRS scores, more than 70 percent of cases involving a VUFA

offense fall within Level 5 of the sentencing guidelines matrix, corresponding to a recommended sanction of state incarceration.

The sentences imposed for these VUFA cases fell within the guidelines' standard recommended range in 43 percent of cases. When including the mitigated and aggravated ranges, 73 percent of cases fell within guideline recommendations. Sentences that fell outside of the standard range were most likely to be mitigated or downward departure sentences, which combined accounted for 52 percent of cases. The sentences from the most densely populated county classifications were more likely to fall within the mitigated and downward departure ranges as compared to the less densely populated counties. This is seen most clearly in the Second Class County where 40 percent of sentences imposed were below the mitigated range. Sentences for VUFA cases involving a violent offense were the most likely to fall within the standard range (51 percent statewide); the combined mitigated and downward departure sentences accounted for 35 percent of cases. Sentencing conformity was slightly lower for cases where the most serious offense was a VUFA offense as compared to when the most serious offense was a non-VUFA offense.

The Commission also examined sentences imposed for cases in which the deadly weapon enhancement (DWE) was applied. As noted previously, the deadly weapon enhancement cannot be applied directly to a VUFA offense; however, it can have an impact on VUFA cases when it is applied to any non-VUFA charges within the same case. The deadly weapon enhancement was applied in only 3 percent of all VUFA cases in this sample, but it was applied more often in cases that included a violent offense (21 percent). In cases where the deadly weapon enhancement was applied, the sentence was conforming (within the mitigated, standard, or aggravated ranges) in 74 percent of cases.

When looking more broadly at the sentencing trends for all VUFA cases, we see that these cases tended to fall within the standard, mitigated, or aggravated ranges in the vast majority of cases (73 percent). VUFA cases were generally more serious than the typical sentenced case, with a recommended sanction of state incarceration in 70 percent of all VUFA cases. Sentences that fell outside of the standard recommended range were more likely to fall below the standard range rather than above, especially in the largest county classifications.

Appendix 4.1: Basic Sentencing Matrix (§303.16(a))

§ 303.16(a). Basic Sentencing Matrix.

Level	OGS	Prior Record Score								AGG/MIT
		0	1	2	3	4	5	RFEL	REVOC	
LEVEL 5	14	72-SL	84-SL	96-SL	120-SL	168-SL	192-SL	204-SL	SL	~/-12
	13	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	36-54	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	22-36	30-42	36-48	42-54	48-60	60-72	72-84	120	+/- 12
	9	12-24	18-30	24-36	30-42	36-48	48-60	60-72	120	+/- 12
LEVEL 4	8	9-16	12-18	15-21	18-24	21-27	27-33	40-52	NA	+/- 9
LEVEL 3	7	6-14	9-16	12-18	15-21	18-24	24-30	35-45	NA	+/- 6
	6	3-12	6-14	9-16	12-18	15-21	21-27	27-40	NA	+/- 6
LEVEL 2	5	RS-9 P2 (225-250)	1-12	3-14	6-16	9-16	12-18	24-36	NA	+/- 3
	4	RS-3 P1 (100-125)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	9-16	21-30	NA	+/- 3
	3	RS-1 P1 (50-75)	RS-6 P1 (150-175)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	12-18	NA	+/- 3
LEVEL 1	2	RS (25-50)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	1-9	6- <12	NA	+/- 3
	1	RS (25-50)	RS-1 P1 (50-75)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	3-6	NA	+/- 3

Restorative Sanctions (RS) are non-confinement sentence recommendation (204 Pa.Code §303.9(f))

Guilt without further penalty (42 Pa.C.S. § 9723)

Fines (18 Pa.C.S. § 1101) including Fines/Community Service Guidelines (204 Pa.Code § 303.14(a)(4))

Communtiy Service (range of hours), including Fines/Community Service Guidelines (204 Pa.Code § 303.14(a)(4))

Restitution (18 Pa.C.S. § 1106)

Probation (42 Pa.C.S. §§ 9722, 9763(b)), including recommendations for duration of probation

P1: 1 year P2: 2 years **Probation as Restorative Sanction = Recommended aggregate term not to exceed 5 years.**

Confinement sentence recommendations (204 Pa.Code § 303.9(e)) are ranges of minimum terms in months

Confinement in state faciilty (§ 303.9(e)(1))

Confinement in county faciilty (§ 303.9(e)(2), (3))

Probation with restrictive conditions (§ 303.9(e)(2), (3)) are CIP programs (42 Pa.C.S. Chapter 98), subject to the following recommendations:

Sentencing guidelines. Duration of restrictive conditions and confinement recommended not to exceed sentence range.

DUI mandatory minimum requirement. Duration of restrictive conditions and confinement equivalent to mandatory minimum requirement.

Clinical evaluation. Diagnostic evaluation of dependency on alcohol and other drugs consistent with clinically prescribed treatment.

RNR assessment. Validated assessment of risk, needs, and responsivity may guide decisions related to: intensity of intervention, use of restricive conditions, and duration of community supervision.

Probation supervision period = Recommended aggregate term not to exceed 10 years.

Omnibus Offense Gravity Score (OGS) assignments. See Omnibus policy (§ 303.3(f)) and OGS assignments (§ 303.15):

M3 = OGS 1 M2 = OGS 2 M1 = OGS 3

F3 = OGS 5 F2 = OGS 7 F1 = OGS 8 F1 (maximum>20 years) = OGS 10

Appendix 4.2: Basic Sentencing Matrix for Cases Containing an F1/F2 VUFA Charge (*n* = 5,552)

Prior Record Score (PRS)

	0	1	2	3	4	5	RFEL	REVOC	Total
14	14 .3%	3 .1%	24 .4%	19 .3%	38 .7%	70 1.3%	8 .1%	3 .1%	179 3.2%
13	4 .1%	1 .0%	4 .1%	3 .1%	9 .2%	17 .3%	5 .1%	5 .1%	48 .9%
12	5 .1%	 .0%	5 .1%	4 .1%	 .0%	15 .3%	4 .1%	3 .1%	36 .6%
11	30 .5%	16 .3%	64 1.2%	59 1.1%	105 1.9%	272 4.9%	54 1.0%	18 .3%	618 11.1%
10	**366** **6.6%**	148 2.7%	**552** **9.9%**	**403** **7.3%**	**605** **10.9%**	**1371** **24.7%**	270 4.9%	91 1.6%	3,806 68.6%
9	106 1.9%	41 .7%	123 2.2%	112 2.0%	105 1.9%	272 4.9%	56 1.0%	14 .3%	829 14.9%
8	2 .0%		2 .0%	2 .0%		1 .0%			7 .1%
7	14 .3%	5 .1%	5 .1%	3 .1%		1 .0%	1 .0%		29 .5%
6									
5									
4									
3									
2									
1									
	541 9.7%	214 3.9%	779 14.0%	605 10.9%	862 15.5%	2,019 36.4%	398 7.2%	134 2.4%	5,552

Level 5	Level 4	Level 3	Level 2	Level 1
5,517 99.4%	14 .3%	21 .4%	0 .0%	0 .0%

Appendix 4.3: Basic Sentencing Matrix for Cases Containing a VUFA Offense Co-charged with a Violent Offense (*n* = 1,430)

	Prior Record Score (PRS)								
	0	1	2	3	4	5	RFEL	REVOC	Total
14	**137** **9.6%**	47 3.3%	51 3.6%	31 2.2%	51 3.6%	**85** **5.9%**	12 .8%	3 .2%	417 29.2%
13	9 .6%	6 .4%	5 .3%	3 .2%	7 .5%	8 .6%	3 .2%	4 .3%	45 3.1%
12	21 1.5%	2 .1%	10 .7%	5 .3%	1 .1%	11 .8%	2 .1%	3 .2%	55 3.8%
11	**95** **6.6%**	40 2.8%	43 3.0%	22 1.5%	36 2.5%	**79** **5.5%**	21 1.5%	6 .4%	342 23.9%
10	**123** **8.6%**	40 2.8%	51 3.6%	36 2.5%	48 3.4%	**86** **6.0%**	21 1.5%	10 .7%	415 29.0%
9	48 3.4%	20 1.4%	10 .7%	9 .6%	11 .8%	8 .6%	1 .1%	1 .1%	108 7.6%
8	13 .9%	5 .3%	2 .1%	3 .2%	1 .1%	2 .1%	1 .1%		27 1.9%
7	4 .3%	2 .1%		1 .1%					7 .5%
6	7 .5%	1 .1%	1 .1%		3 .2%	2 .1%			14 1.0%
5									
4									
3									
2									
1									
	457 32.0%	163 11.4%	173 12.1%	110 7.7%	158 11.0%	281 19.7%	61 4.3%	27 1.9%	1,430

Level 5	Level 4	Level 3	Level 2	Level 1
1,383 96.7%	**19** 1.3%	28 2.0%	0 .0%	0 .0%

Appendix 4.4: Sentencing Guideline Conformity (All Sentenced Cases), 2015 – 2020

			Conformity Level				
		# Cases	Below	Mitigated	Standard	Aggravated	Above
All Cases	**Statewide**	**481,541**	**7%**	**9%**	**75%**	**5%**	**2%**
	First Class	20,011	27%	22%	42%	4%	4%
	Second Class	54,117	19%	15%	60%	3%	3%
	Second Class A	80,406	7%	9%	73%	7%	4%
	Third Class	165,333	5%	8%	78%	6%	2%
	Fourth Class	62,190	4%	6%	79%	6%	2%
	Fifth-Eighth Class	99,484	3%	5%	84%	5%	1%
F1/F2 Cases	**Statewide**	**40,652**	**20%**	**21%**	**51%**	**4%**	**4%**
	First Class	6,324	35%	23%	30%	5%	7%
	Second Class	4,733	45%	31%	19%	2%	3%
	Second Class A	5,813	21%	26%	44%	4%	5%
	Third Class	12,185	13%	20%	59%	5%	3%
	Fourth Class	4,269	12%	15%	65%	6%	2%
	Fifth-Eighth Class	7,328	8%	14%	72%	4%	2%

Appendix 4.5: Sentencing Guideline Conformity by Year, 2015 – 2020

			Conformity Level				
	Year	N	Below	Mitigated	Standard	Aggravated	Above
All VUFA Cases *n* = 13,993	2015	2,412	25%	29%	40%	3%	3%
	2016	2,516	24%	29%	41%	4%	2%
	2017	2,471	25%	27%	42%	3%	3%
	2018	2,559	28%	25%	42%	3%	2%
	2019	2,448	24%	25%	46%	3%	2%
	2020	1,547	24%	26%	47%	2%	2%
F1/F2 VUFA Cases *n* = 5,552	2015	973	42%	21%	32%	3%	3%
	2016	1,008	38%	22%	34%	3%	2%
	2017	1,000	42%	19%	33%	3%	3%
	2018	1,026	46%	18%	34%	2%	1%
	2019	976	42%	19%	36%	2%	2%
	2020	569	40%	20%	38%	1%	1%
Co-charged with Violent Offense *n* = 1,430	2015	285	18%	11%	54%	7%	10%
	2016	278	22%	16%	49%	5%	8%
	2017	286	16%	14%	56%	6%	8%
	2018	246	25%	14%	49%	7%	6%
	2019	203	24%	15%	51%	3%	6%
	2020	132	27%	17%	46%	5%	5%

Appendix 4.6: Sentencing Guideline Conformity by Year and County Class, 2015 – 2020

		All VUFA Cases							F1/F2 VUFA Cases							Co-charged with Violent Offense						
Conformity Level	Class	Total # Cases	2015	2016	2017	2018	2019	2020	Total # Cases	2015	2016	2017	2018	2019	2020	Total # Cases	2015	2016	2017	2018	2019	2020
	Statewide	**13,993**	**25%**	**24%**	**25%**	**28%**	**24%**	**24%**	**5,552**	**42%**	**38%**	**42%**	**46%**	**42%**	**40%**	**1,430**	**18%**	**22%**	**16%**	**25%**	**24%**	**27%**
	First	3,369	28%	29%	30%	43%	43%	49%	1,742	45%	41%	45%	63%	61%	77%	657	14%	20%	20%	26%	26%	31%
	Second	2,814	40%	37%	43%	42%	35%	42%	940	71%	62%	80%	73%	64%	75%	271	39%	35%	18%	49%	43%	57%
Below	Second A	1,607	25%	24%	23%	23%	27%	27%	668	38%	33%	34%	34%	38%	39%	101	38%	13%	23%	20%	22%	25%
	Third	3,854	16%	14%	13%	16%	15%	15%	1,348	25%	23%	23%	29%	26%	22%	271	14%	16%	5%	17%	6%	9%
	Fourth	1,044	11%	14%	12%	13%	12%	12%	374	20%	18%	25%	18%	29%	24%	68	0%	0%	13%	0%	0%	20%
	Fifth - Eighth	1,305	13%	19%	13%	13%	10%	8%	480	24%	35%	23%	21%	21%	16%	62	0%	14%	11%	0%	0%	8%
	Statewide	**13,993**	**29%**	**29%**	**27%**	**25%**	**25%**	**26%**	**5,552**	**21%**	**22%**	**19%**	**18%**	**19%**	**20%**	**1,430**	**11%**	**16%**	**14%**	**14%**	**15%**	**17%**
	First	3,369	32%	32%	29%	25%	21%	19%	1,742	22%	21%	21%	16%	13%	8%	657	8%	13%	13%	12%	9%	7%
	Second	2,814	36%	34%	35%	31%	36%	37%	940	19%	28%	13%	18%	25%	14%	271	17%	19%	30%	15%	21%	21%
Mitigated	Second A	1,607	39%	33%	34%	39%	29%	31%	668	33%	22%	32%	28%	22%	25%	101	15%	31%	9%	20%	26%	25%
	Third	3,854	21%	25%	21%	24%	24%	25%	1,348	15%	24%	18%	20%	23%	27%	271	11%	16%	11%	12%	10%	20%
	Fourth	1,044	22%	20%	19%	16%	17%	13%	374	25%	18%	16%	15%	13%	19%	68	15%	20%	7%	25%	13%	13%
	Fifth - Eighth	1,305	16%	12%	13%	12%	15%	19%	480	17%	11%	10%	8%	9%	19%	62	13%	14%	%	18%	14%	23%
	Statewide	**13,993**	**40%**	**41%**	**42%**	**42%**	**46%**	**47%**	**5,552**	**32%**	**34%**	**33%**	**34%**	**36%**	**38%**	**1,430**	**54%**	**49%**	**56%**	**49%**	**51%**	**46%**
	First	3,369	29%	28%	29%	24%	30%	23%	1,742	24%	28%	25%	17%	21%	12%	657	55%	50%	49%	47%	54%	41%
	Second	2,814	23%	27%	22%	26%	27%	20%	940	10%	8%	8%	8%	9%	12%	271	39%	39%	50%	30%	32%	14%
Standard	Second A	1,607	31%	39%	38%	33%	40%	35%	668	20%	39%	27%	32%	33%	31%	101	38%	44%	59%	40%	39%	33%
	Third	3,854	58%	56%	61%	56%	56%	54%	1,348	54%	51%	54%	50%	49%	48%	271	59%	57%	67%	60%	71%	63%
	Fourth	1,044	63%	60%	63%	68%	64%	71%	374	51%	58%	56%	68%	54%	56%	68	77%	60%	73%	75%	63%	67%
	Fifth - Eighth	1,305	68%	65%	71%	73%	71%	70%	480	60%	52%	63%	66%	67%	64%	62	75%	71%	89%	73%	79%	69%
	Statewide	**13,993**	**3%**	**4%**	**3%**	**3%**	**3%**	**2%**	**5,552**	**3%**	**3%**	**3%**	**2%**	**2%**	**1%**	**1,430**	**7%**	**5%**	**6%**	**7%**	**3%**	**5%**
	First	3,369	5%	6%	6%	5%	2%	5%	1,742	4%	5%	5%	2%	2%	1%	657	9%	5%	8%	10%	3%	17%
	Second	2,814	%	1%	%	1%	1%	%	940	1%	1%	%	1%	%	%	271	%	5%	%	2%	2%	4%
Aggravated	Second A	1,607	4%	2%	1%	3%	2%	4%	668	5%	4%	%	3%	4%	3%	101	%	6%	5%	7%	4%	8%
	Third	3,854	4%	3%	3%	2%	3%	2%	1,348	4%	1%	3%	%	2%	1%	271	11%	5%	9%	5%	6%	%
	Fourth	1,044	2%	4%	4%	3%	6%	3%	374	2%	7%	3%	%	1%	2%	68	%	20%	7%	%	13%	%
	Fifth - Eighth	1,305	2%	3%	2%	3%	2%	1%	480	%	1%	3%	4%	2%	1%	62	13%	%	%	9%	%	%
	Statewide	**13,993**	**3%**	**2%**	**3%**	**2%**	**2%**	**2%**	**5,552**	**3%**	**2%**	**3%**	**1%**	**2%**	**1%**	**1,430**	**10%**	**8%**	**8%**	**6%**	**6%**	**5%**
	First	3,369	6%	5%	5%	3%	4%	3%	1,742	6%	5%	5%	2%	3%	3%	657	14%	12%	10%	6%	8%	3%
	Second	2,814	1%	1%	%	%	2%	1%	940	%	1%	%	1%	1%	%	271	4%	2%	3%	4%	2%	4%
Above	Second A	1,607	2%	2%	4%	2%	2%	2%	668	4%	2%	6%	3%	3%	3%	101	8%	6%	5%	13%	9%	8%
	Third	3,854	1%	2%	2%	2%	2%	3%	1,348	1%	%	3%	1%	%	2%	271	5%	7%	9%	7%	6%	9%
	Fourth	1,044	3%	2%	2%	1%	2%	1%	374	2%	%	%	%	4%	%	68	8%	%	%	%	13%	%
	Fifth - Eighth	1,305	2%	%	2%	%	1%	1%	480	%	%	2%	%	1%	%	62	%	%	%	%	7%	%

Directive 5

For an individual charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A or a violent offense within the last 5 years.

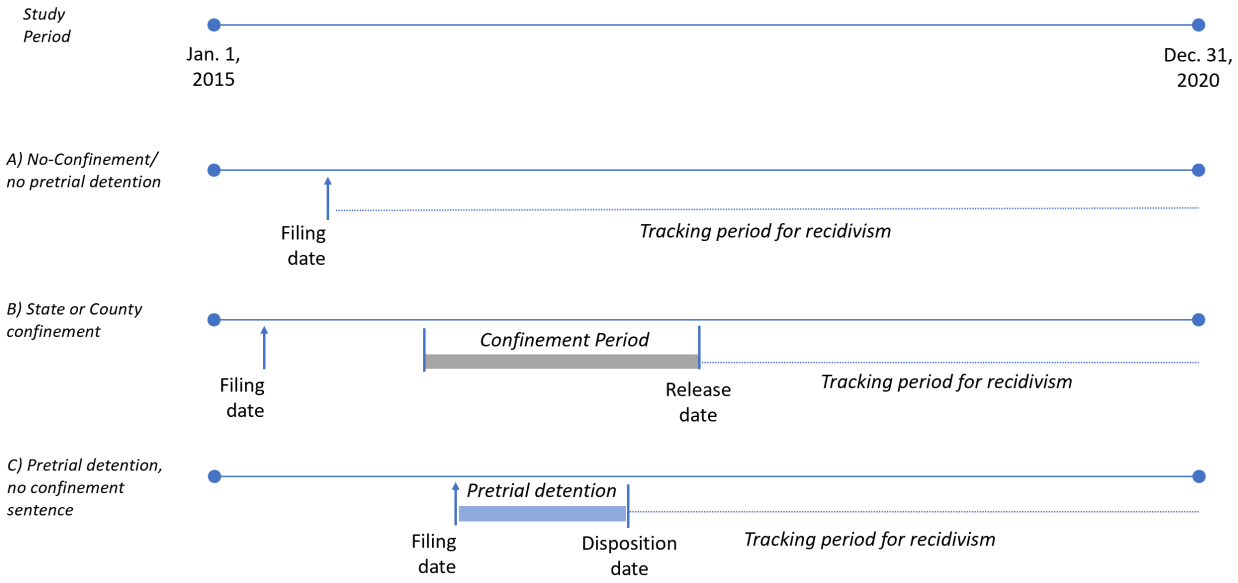
Directive 5 tasks the Commission with studying what happens *after* an individual's initial docket has been filed. Specifically, do individuals continue to commit additional offenses from Chapter 61 or violent offenses (as defined in HR 111)? To address this directive, both recidivism and pretrial failure rates are presented. This section of the report begins with an overview of key concepts, definitions, and associated data limitations and then presents results from the recidivism and pretrial failure analyses.

Central to any study of recidivism is the operational definition that is employed. Prior studies typically rely on measures of arrest, conviction, or recommitment to define recidivism (Antenangeli and Durose 2021; Berg and Huebner 2011; Clark 2016; Hickert et al. 2021; Turanovic and Tasca 2021). In this report recidivism is defined as a new docket filed against an individual that includes *either* a violent offense and/or a VUFA offense. Dockets are considered new if the following three conditions are met: (1) the docket has a distinct docket number relative to the initial docket filed against the individual, (2) the docket was filed at least one day after the initial docket, and (3) the offense date associated with the docket is different than the date associated with the initial docket.

Dockets classified as recidivistic also must be filed after the start of an individual's tracking period. Tracking periods capture durations of time when individuals are able to commit additional offenses, and account for periods of confinement and pretrial detention. Three scenarios are presented in Exhibit 5.1 that outline the three different potential times at which the tracking period will start for individuals in this report. "A" outlines an individual whose initial docket did not result in a confinement sentence (i.e., probation, withdrawn, dismissed, etc.) and who was also not confined pretrial. For these individuals, tracking starts at the filing date of the initial docket and proceeds through the end of the study (December 31, 2020). "B" represents an individual that received a confinement (county or state) sentence for their initial docket but was not confined pretrial. Tracking starts for these confined individuals at the expiration of their confinement sanction.[34] "C" presents a scenario in which an individual received a non-confinement sentence on their initial docket, but they were confined pretrial. For those individuals, tracking will start on the date of the final disposition associated with the initial docket.

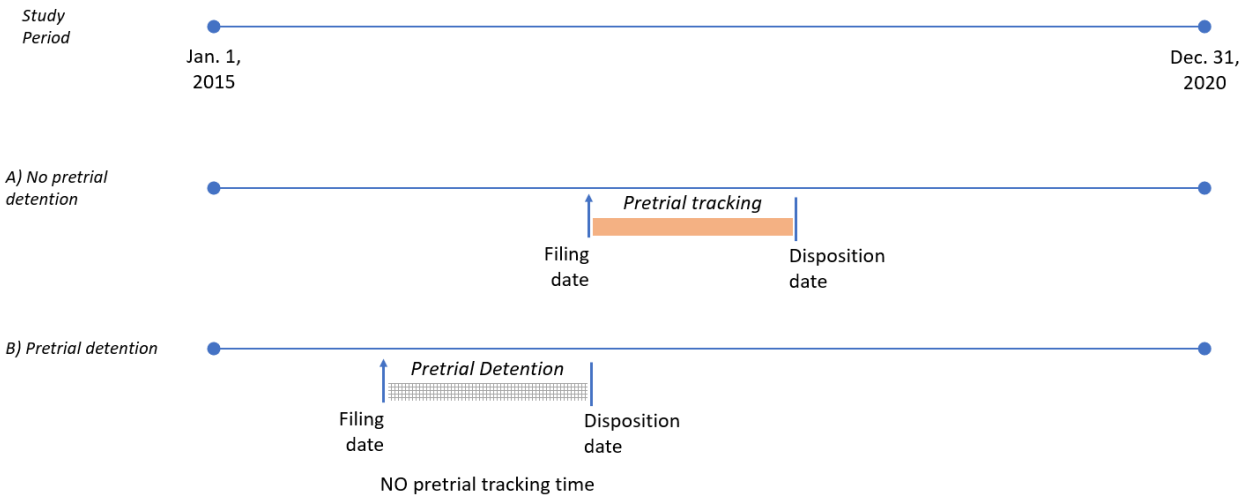
[34] Recidivistic events that occur between filing and confinement will be captured in the pretrial failure analysis that follows.

Exhibit 5.1: Tracking Period Example



In addition to investigating recidivism rates, as spelled out in directive 5, the Commission thought it would be useful to consider pretrial failures. Pretrial failures are evaluated to capture the subset of individuals that "recidivate" prior to disposition and sentencing. In this report, pretrial failure is defined as a new docket (same definitions as recidivism) that is filed against an individual during their pretrial tracking period. Presented below in Exhibit 5.2 is an overview of the pretrial tracking period. Pretrial tracking periods are defined as the period of time between the filing of, and the disposition associatied with the initial docket. Individuals that are not granted bail are excluded from the pretrial failure analysis.

Exhibit 5.2: Pretrial Tracking Period



There are two notable limitations to this section of the study that must be considered. First, the study is focused solely on offenses from Chapter 61; individuals are tracked from their initial docket containing a VUFA offense, and future filings are considered recidivistic only if they also contain another VUFA or violent offense. Restricting the sample and definition of recidivism in this way presents at least three issues: (1) considering only the VUFA/violent offenses in the initial and recidivistic dockets may combine individuals that have very different docket compositions outside the VUFA/violent offense(s); (2) we do not account for sanctions in dockets that fit our definition of recidivism, but do not contain one of these offenses[35]; and (3) it is difficult to compare recidivism rates to other studies that include significantly different populations of individuals and definitions of recidivism.

The second notable limitation also relates to the specificity of the sample. Prior studies of recidivism have used release cohorts as the starting point and then limit their samples to only individuals that they are able to track post-release for their desired amount of time. This approach allows for a relatively homogenous sample of individuals to track for recidivism analyses. The approach that is employed in this study was to start with VUFA dockets filed between January 1, 2015 and December 31, 2020. This leads to a significant number of pending dockets[36], differential tracking times, and short, or no, tracking periods for some individuals who have cases filed in 2019 and 2020 and for individuals who received a confinement sentence. Within this design, we do not track all individuals for the same amount of time, we make comparisons between individuals with varying disposition types, and we define acts as recidivistic that many other studies would not (e.g., a future filing after a dismissal or acquittal on the initial docket). For a full discussion of the limitations, assumptions, data sources, and definitions used see Appendix 5.1.

[35] This may bias period specific recidivism rates if individuals are confined for non-VUFA/violent dockets and we include them in our sample of individuals that are tracked (able to recidivate).
[36] Pending dockets are included in the recidivism and pretrial failure analyses if bail was not denied.

The starting point for the sample used in the recidivism and pretrial failure analyses is the AOPC dataset of 51,618 dockets filed between 2015-2020 containing a VUFA charge. From these dockets, *individuals* are uniquely identified by name and date of birth.

Recidivism

Consistent with the analytic strategy used in earlier directives, cumulative recidivism rates are calculated for each of the three types of VUFA dockets. Rates are presented for the entire Commonwealth and by county class, as well as rates that are specific to the disposition and sanction types from the docket analyses (see directive 2). In line with prior studies of recidivism, statistics are calculated at six-month, one-year, and three-year follow-up periods. Recidivism rates by county class and docket type are displayed in Exhibit 5.3 below.

Exhibit 5.3: Six-month, one-year, and three-year VUFA and/or violent recidivism rates

		Six Month		One Year		Three Year	
		N	%	N	%	N	%
All VUFA	**Statewide**	**32,781**	**3.8%**	**29,034**	**6.7%**	**16,779**	**20.3%**
	First Class	10,529	3.8%	9,184	7.6%	4,917	29.5%
	Second Class	4,893	5.9%	4,527	9.5%	2,952	24.8%
	Second Class A	2,725	4.4%	2,379	6.8%	1,335	16.9%
	Third Class	7,406	3.1%	6,461	5.4%	3,628	14.5%
	Fourth Class	3,225	3.2%	2,944	5.4%	1,804	13.0%
	Fifth-Eighth Class	4,003	2.4%	3,539	4.2%	2,143	10.6%
F1/F2 VUFA	**Statewide**	**11,506**	**4.3%**	**9,905**	**7.6%**	**5,108**	**26.4%**
	First Class	4,593	3.6%	3,990	6.5%	1,953	29.4%
	Second Class	1,698	6.5%	1,537	10.3%	942	30.3%
	Second Class A	757	6.5%	641	9.4%	328	24.4%
	Third Class	2,414	3.6%	1,982	7.2%	964	21.6%
	Fourth Class	929	4.3%	819	7.1%	410	21.7%
	Fifth-Eighth Class	1,115	4.4%	936	8.0%	511	22.1%
Co-charged with Violent Offense	**Statewide**	**3,682**	**5.4%**	**3,185**	**9.3%**	**1,770**	**28.6%**
	First Class	1,897	3.3%	1,634	6.8%	846	28.3%
	Second Class	503	7.6%	448	12.5%	316	31.0%
	Second Class A	330	7.9%	284	12.0%	162	24.7%
	Third Class	565	7.1%	467	11.1%	236	28.8%
	Fourth Class	206	7.3%	192	10.9%	118	26.3%
	Fifth-Eighth Class	181	8.8%	160	13.8%	92	32.6%

Statewide recidivism rates, for all VUFA dockets, increase from 3.8 percent within six months, to 6.7 percent within one year, and to 20.3 percent within three years. The recidivism rate nearly doubles as the time doubles from six months to one year. Additionally, the rate is approximately tripled as the time

triples from one year to three years. This proportionality of rates over time suggests that the relative risk of recidivism is stable across each time period.

There appears to be a small relationship between VUFA docket type and the rate of recidivism. The statewide three-year recidivism rate for F1/F2 VUFA dockets is 26.4 percent statewide, as compared to 20.3 percent for all VUFA dockets. VUFA dockets that are co-charged with a violent offense have the highest rate of recidivism, with a rate of 28.6 percent within three years. This relationship between docket type and recidivism appears to hold across all time periods.

There also appears to be an association between county classification and recidivism. In general, the highest rates of recidivism are found in the most populous county classes. The exception to this finding is that the First Class County has lower than average rates of recidivism during the first year of observation with a substantial increase from one year to three years. However, this pattern is not present for dockets including a co-charge of a violent offense; recidivism is generally similar across counties at each time period.

Offense Type

During the period of 2015 to 2020, the most charged VUFA offenses were 18 Pa.C.S. §6105 (Persons not to possess, use, manufacture, control, sell, or transfer firearms), 18 Pa.C.S. §6106 (Firearms not to be carried without a license), and 18 Pa.C.S. §6108 (Carrying firearms on public streets or public property in Philadelphia). As shown in Exhibit 5.4, dockets that contained these specific charges evidenced higher rates of three-year recidivism, though only modest differences for the six months and one year follow-up periods.

Exhibit 5.4: Recidivism by VUFA citation

	Recidivism by VUFA Charge					
	Six Month		OneYear		Three Year	
Statewide	**32,781**	**3.8%**	**29,034**	**6.7%**	**16,779**	**20.3%**
18 Pa.C.S.A. § 6105 (Persons not to possess)	13,655	4.6%	11,764	8.1%	6,174	27.4%
18 Pa.C.S.A. § 6106 (Carried without license)	19,574	4.7%	17,052	8.7%	9,373	27.5%
18 Pa.C.S.A. § 6108 (Public carry in Philadelphia)	8,990	3.9%	7,823	8.1%	4,208	31.2%

However, there is important variation in recidivism rates for §6105 depending on the grade of the charge. 18 Pa.C.S. §6105 can be charged either as a misdemeanor or a felony, depending on whether the individual lacked authorization generally (e.g., under age, no permit) versus was specifically prohibited because of a prior felony conviction (as defined in 18 Pa.C.S. §6105(b)). There are substantial differences in the rates of recidivism between these varying grades of the charge (see Exhibit 5.5 below). While the recidivism rate for individuals who had a second-degree felony is similar to the statewide rate for all VUFA offenses, the rates for misdemeanor and first-degree felony 6105 charges are significantly higher; individuals whose initial docket includes a first-degree felony charge of 18 Pa.C.S. §6105 have a three-year recidivism rate of 52 percent (n=664).

Exhibit 5.5: Recidivism by 6105 Offense Grade

	Recidivism by 6105 Grade					
	Six Month		OneYear		Three Year	
Statewide	**32,781**	**3.8%**	**29,034**	**6.7%**	**16,779**	**20.3%**
F1	2,991	4.9%	2,354	8.8%	664	52.4%
F2	8,249	4.1%	7,308	7.2%	4,286	22.4%
M (M1, M2, M3)	1,910	6.2%	1,658	11.6%	952	34.5%

Lower court disposition

Over 80 percent of non-pending dockets that were filed in the lower court were bound over to the Court of Common Pleas. The remainder of dockets that were not bound over were resolved in lower court or exited without a disposition (withdrawn by the prosecution, dismissed by the court, etc.). Recidivism rates for the four most common dispositions in lower court are shown in Exhibit 5.6.

Exhibit 5.6: Recidivism by lower court disposition type

		Six Month		One Year		Three Year	
		N	%	N	%	N	%
All VUFA	**Statewide**	**32,781**	**3.8%**	**29,034**	**6.7%**	**16,779**	**20.3%**
	Case Bound Over	24,502	3.4%	21,864	6.3%	12,091	20.2%
	Resolved in LC	1,643	1.3%	1,537	2.0%	1,030	6.4%
	Dismissed	1,919	4.7%	1,827	8.2%	1,141	23.1%
	Withdrawn	2,887	6.1%	2,752	9.3%	1,790	24.7%
F1/F2 VUFA	**Statewide**	**11,506**	**4.3%**	**9,905**	**7.6%**	**5,108**	**26.4%**
	Case Bound Over	9,175	3.7%	7,908	6.6%	3,830	24.8%
	Resolved in LC	105	3.8%	100	4.0%	68	20.6%
	Dismissed	697	5.2%	658	9.7%	414	29.0%
	Withdrawn	1,077	8.1%	1,025	11.4%	668	31.4%
Co-charged with Violent Offense	**Statewide**	**3,682**	**5.4%**	**3,185**	**9.3%**	**1,770**	**28.6%**
	Case Bound Over	2,673	4.8%	2,327	7.9%	1,204	26.4%
	Resolved in LC	-	-	-	-	-	-
	Dismissed	265	7.9%	248	12.1%	172	27.9%
	Withdrawn	560	7.3%	534	12.9%	349	34.7%

Cases bound over show a very similar recidivistic pattern to the overall rate of all VUFA dockets in the sample. Cases that were resolved at the lower court (regardless of outcome) showed a much lower rate of recidivism as compared to all other dispositions. These dockets tended to be less serious and represent only 4 percent of all dockets filed. F1/F2 VUFA dockets that were resolved at the lower court also show a reduced rate of recidivism; however, the gap is less substantial than for the 'all VUFA dockets' category. The population of VUFA dockets co-charged with a violent offense that were resolved in the lower courts was too small to measure rates of recidivism.

Dockets that were dismissed by the lower court tended to have slightly elevated rates of recidivism across all docket types. Withdrawn dockets at the lower court resulted in rates of recidivism that were higher than dismissed cases and were substantially higher than the baseline rate for all dockets.

Upper court dispositions

The recidivism sample included 31,349 dockets filed at Common Pleas Courts. Over 80 percent of non-pending upper court filings resulted in convictions with another 12 percent of cases receiving dispositions of nolle prossed or dismissed. Only 3 percent of all VUFA dockets were acquitted at the upper court.

Cases that are nolle prossed by the prosecution are associated with substantially higher recidivism rates within the first year of tracking for all VUFA dockets. However, the three-year recidivism rate for nolle prossed dockets is similar to those of convictions and acquittals. The recidivism rates for nolle prossed dockets co-charged with violent offenses are lower than those for convictions and acquittals across each time period, although there are fewer cases in this category. The recidivism outcomes by upper court disposition are shown in Exhibit 5.7.

Exhibit 5.7: Recidivism by upper court disposition type

		Six Month		One Year		Three Year	
		N	%	N	%	N	%
All VUFA	**Statewide**	**17,425**	**2.9%**	**16,090**	**6.7%**	**9,313**	**20.3%**
	Conviction	13,992	2.5%	12,701	5.1%	6,851	17.6%
	Acquittal	728	2.7%	726	4.3%	558	19.0%
	Nolle Prossed	2,043	5.0%	2,015	7.6%	1,463	21.7%
F1/F2 VUFA	**Statewide**	**6,281**	**3.0%**	**5,576**	**5.6%**	**2,924**	**22.4%**
	Conviction	4,472	2.5%	3,788	5.4%	1,651	23.6%
	Acquittal	384	2.9%	384	4.4%	302	21.5%
	Nolle Prossed	1,126	5.1%	1,112	7.4%	782	22.1%
Co-charged with Violent Offense	**Statewide**	**1,619**	**3.3%**	**1,432**	**6.1%**	**789**	**22.6%**
	Conviction	1,173	3.0%	991	5.8%	435	23.7%
	Acquittal	168	4.2%	166	7.8%	130	26.2%
	Nolle Prossed	204	3.4%	202	4.5%	164	16.5%

Upper court sanctions

Of the 19,024 dockets convicted at the upper court, more than half received confinement sentences. Probation sentences were imposed for approximately 30 percent of all dockets in the cohort. As cases become more serious, state confinement becomes more common with county confinement and probation sentences less common.

The six-month and one-year recidivism rates are similar for individuals who received sentences of state confinement, county confinement, and probation (see Exhibit 5.8). The three-year recidivism rate among all convicted individuals in the cohort is 17.7 percent, which is comparable to the rate for

individuals that reach the upper court. However, the three-year rate is substantially higher for those individuals receiving confinement sentences, at 43.8 percent for state confinement and 26.0 percent for county confinement dockets. Individuals who received a sentence of probation had a three-year recidivism rate less than half that of those who received any confinement sentence.

There were 6,659 individuals in the sample who received state confinement sentences. Only 320 of these individuals could be observed for three years, owing to the longer durations of these sentences. The study encompassed six years of VUFA docket filings, from 2015 to 2020, while state confinement sentences are typically at least two years in duration. This means that any individuals sentenced to state confinement in 2016 or later would be unlikely to have a three-year recidivism follow-up period in this study.

Exhibit 5.8: Recidivism by upper court sanction type

		Six Month		One Year		Three Year	
		N	%	N	%	N	%
All VUFA	**Statewide**	**14,720**	**2.5%**	**13,427**	**5.0%**	**7,409**	**17.7%**
	State Confinement	2,399	2.3%	1,738	5.4%	320	43.8%
	County Confinement	4,546	3.0%	4,132	6.5%	2,005	26.0%
	Probation	5,775	2.3%	5,609	4.3%	3,744	12.5%
F1/F2 VUFA	**Statewide**	**4,856**	**2.6%**	**4,172**	**5.3%**	**1,953**	**23.3%**
	State Confinement	1,464	1.6%	1,010	4.2%	143	44.8%
	County Confinement	1,807	3.2%	1,604	6.6%	704	29.5%
	Probation	867	3.0%	851	4.8%	589	15.4%
Co-charged with Violent Offense	**Statewide**	**1,341**	**3.1%**	**1,157**	**6.1%**	**565**	**24.2%**
	State Confinement	400	1.3%	273	2.9%	37	32.4%
	County Confinement	505	4.8%	456	7.9%	202	30.7%
	Probation	223	2.2%	218	5.5%	168	16.1%

Sentencing guideline factors

Data from the Pennsylvania Commission on Sentencing was used to examine the influence of sentencing guideline factors on recidivism. Sentencing guideline information was not available for all individuals in the sample due to incomplete reporting of sentences to the Commission. Guideline information was available for 12,686 of the 19,752 individuals in the recidivism sample that received a terminal disposition in the Courts of Common Pleas.

The sentencing guidelines prior record score is meant to be an indicator of the level of prior criminal history of an individual at the time of sentencing. The lowest prior record score category is '0' is indicative of very little to no prior criminal record. The highest prior record score category is 'REVOC' which refers to an individual with multiple prior convictions for crimes of violence (42 Pa.C.S. §9714(g)).

The recidivism rates associated with each prior record score category are shown in Exhibit 5.9. There was not a substantial difference in the rates of recidivism across prior record score categories. This

finding holds for all time periods and is consistent with previous studies of prior record scores conducted by the Commission and others (Hester 2019).

Exhibit 5.9: Recidivism by sentencing guidelines prior record score

	All VUFA Dockets					
	Six Month		One Year		Three Year	
	N	%	N	%	N	%
Statewide	**9,561**	**2.4%**	**8,742**	**4.7%**	**4,874**	**15.2%**
PRS 0	4,303	2.4%	4,066	4.8%	2,367	14.9%
PRS 1	1,466	2.9%	1,381	4.8%	849	13.3%
PRS 2	1,254	2.2%	1,131	4.6%	601	17.3%
PRS 3	740	1.8%	648	5.1%	339	17.4%
PRS 4	623	3.4%	545	5.5%	274	17.2%
PRS 5	977	1.8%	812	3.4%	377	14.6%
RFEL	167	1.8%	137	2.2%	58	15.5%
REVOC	31	-	22	-	9	-

Also of interest is the extent to which guideline conformity is associated with future criminal behavior. A standard range sentence was imposed in 58 percent of cases for all VUFA dockets. Of all sentences imposed outside of the standard range, 88 percent fell within the mitigated or below sentence categories.

The lowest recidivism rates were associated with sentences that fell within the standard guideline range, with a three-year rate of 11.6 percent. The three-year recidivism rates for downward departure sentences were nearly twice those of standard range sentences, as are those for above range sentences. The recidivism rates associated with various sentencing conformity categories are shown in Exhibit 5.10.

Exhibit 5.10: Recidivism by sentence conformity

	All VUFA Dockets					
	Six Month		One Year		Three Year	
Statewide	**9,544**	**2.4%**	**8,731**	**4.7%**	**4,870**	**15.2%**
Below	1,609	2.7%	1,418	5.6%	696	21.4%
Mitigated	1,904	3.6%	1,701	6.4%	899	22.4%
Standard	5,700	1.9%	5,309	3.8%	3,121	11.6%
Aggravated	221	2.3%	201	4.5%	103	15.5%
Above	110	3.6%	102	6.9%	51	23.5%

Pre-trial Failure

Pre-trial supervision success was evaluated for individuals who were granted pre-trial release, accounting for 89 percent of all individuals (n=38,654). We defined the pretrial period as spanning the initial filing date until the final disposition of their case, which was approximately one year for all VUFA

docket types. For those individuals with a pre-trial failure (filing of a new VUFA or violent docket), the average time to failure was approximately 200 days.

Exhibit 5.11: Pre-trial failure rates by county classification

	All VUFA Dockets		F1/F2 VUFA Dockets		Co-charged with Violent Offense	
	N	Failure Rate	N	Failure Rate	N	Failure Rate
Statewide	**38,654**	**5.5%**	**15,484**	**6.1%**	**4,811**	**6.9%**
First Class	12,989	5.0%	5,941	4.3%	2,439	4.5%
Second Class	5,105	9.2%	1,981	10.0%	558	10.9%
Second Class A	3,575	5.2%	1,161	7.4%	486	9.1%
Third Class	9,232	4.9%	3,652	6.0%	836	8.0%
Fourth Class	3,346	5.5%	1,164	7.1%	243	8.2%
Fifth-Eighth Class	4,407	4.3%	1,585	6.8%	249	11.6%

The overall pre-trial failure rate for all VUFA dockets was 5.5 percent. The failure rate increased slightly for F1/F2 VUFA dockets (6.1 percent) and VUFA dockets co-charged with a violent offense (6.9 percent).

Pre-trial release and supervision procedures vary substantially across jurisdictions, so variation in failure rates is difficult to interpret. The First Class County had the highest number of individuals granted pre-trial release while also recording some of the lowest failure rates across each VUFA docket type. Meanwhile, the Second Class County experienced some of the highest pre-trial failure rates for each VUFA docket type.

Pretrial failure rates may be reflective of jurisdictionally specific practices. Across the Commonwealth, and within individual counties, substantial variation likely exists in the information that is available to and considered by judges when making pretrial release decisions. Jurisdictions with robust pretrial services may employ and adhere closer to actuarial tools that predict risk, whereas judges in other jurisdictions may rely more on intuition. Even within jurisdictions that utilize validated pretrial risk tools it is possible that some judges will pay little attention to the risk recommendation. As such, understanding these aggregate pretrial failures rates would benefit from a more detailed examination of local pretrial decisions and approaches to pretrial supervision.

Directive 5 – Summary of Findings

In directive 5, the Commission evaluated the recidivistic outcomes of individuals charged with a VUFA offense from 2015 to 2020. Recidivistic events in this study were narrowly defined to include any subsequent charge for a VUFA offense or for a violent offense (as defined in the resolution). Any new charges for other offense types were not considered recidivistic and therefore were not included in the analysis. This nuanced definition of recidivism is important to note when attempting to contextualize the findings of this analysis. The recidivism sample included 43,279 individuals who were initially charged with a VUFA offense. These individuals were tracked for any recidivistic event for time periods of six

months, one year, and three years. The statewide, three-year recidivism rate for the sample in this study was 20 percent for all VUFA docket types. The recidivism risk level appeared to be uniform across time periods; however, there were differences in risk level related to the individual's initial VUFA docket type. Individuals whose initial docket contained an F1 or F2 graded VUFA offense had higher three-year recidivism rates (26 percent), while those whose initial docket contained a violent offense had the highest rates of recidivism (29 percent at three years). Another key finding is that recidivism rates vary substantially across county classifications. Specifically, there seems to be a relationship between the population density of the county classification and its corresponding recidivism rate. The analysis in directive 1 showed that the highest proportion of VUFA charges and the largest proportion of the most serious charges occur in the First and Second Class Counties, where population densities are the highest. Likewise, these counties also see the highest rates of recidivism for VUFA offenses, while the less densely populated county classifications see lower rates of initial charges and recidivism.

Additionally, the Commission attempted to identify any relationships between recidivism and decisions made by the courts related to case dispositions and sanction types. First, in the lower courts, cases that were withdrawn by the prosecution (25 percent) or dismissed by the court (23 percent) tended to have higher three-year rates of recidivism as compared to all other cases. In the upper court, cases that received a disposition of nolle prossed had a substantially higher rate of recidivism within the first year (8 percent) as compared to cases resulting in conviction (5 percent). The three-year recidivism rate for convicted individuals who received a confinement sentence (44 percent for state confinement and 26 percent for county confinement) was much higher than for those who received a sentence of probation (12 percent).

The analysis for directive 5 also included an evaluation of the relationship between recidivism rates and elements of the sentencing guidelines. The Commission found that VUFA recidivism rates do not vary substantially across categories of the guidelines' prior record score. There was a relationship between recidivism rates and the conformity of sentences to the guideline recommendations. Sentences that were imposed within the standard range of the guideline recommendation tended to be associated with the lowest rates of recidivism (12 percent over three years). The majority of sentences for VUFA offenses that were outside of the standard range tended to fall within the 'mitigated' or 'below' categories. These sentences were associated with higher three-year recidivism rates (22 percent for mitigated and 21 percent for below).

Lastly, the Commission evaluated pre-trial failure rates for those individuals granted pre-trial release after being charged with a VUFA offense. Pre-trial failures were defined as any new filing for a VUFA or violent offense in the period between the filing and disposition of the initial offense. Pre-trial failure rates tended to increase with the seriousness of VUFA dockets with a failure rate of approximately 5 percent for all VUFA dockets, 6 percent for F1/F2 VUFA dockets, and 7 percent for VUFA dockets co-charged with a violent offense. Pre-trial failure rates also varied among county classifications with the lowest rates in the First Class County and the highest rates in the Second Class County. As discussed in the results, the discrepancies in pre-trial failure rates across county classifications are likely related to substantial jurisdictional variation in pre-trial release practices, including the availability of risk assessments, pre-trial services, and other factors.

Appendix 5.1: Data Technical Appendix, Recidivism and Pretrial Failure

Datasets and Sources

The dataset used to address Directive 5 in HR 111 leverages data from several administrative sources including: The Administrative Office of Pennsylvania Courts (AOPC), The Department of Corrections (DOC), and The Pennsylvania Commission on Sentencing (PCS). Primarily, AOPC data is relied upon to identify individuals, pretrial failures, and recidivistic dockets.

To begin there are 51,618 dockets from analyses in earlier Directives. Starting from this universe of dockets, individuals are uniquely identified by name and date of birth to create a person-level dataset containing information related to the initial filing[37]. This dataset is then deduplicated using additional identifier variables and manual data verification efforts[38] to arrive at a final sample of 43,279 individuals who had a docket filed against them between 2015-2020 in either the Magisterial or Municipal Courts that contained a VUFA offense.

The DOC "Move Record Dataset", which tracks all movement within and outside of DOC for confined individuals, and the "Search Inmate Dataset", which allows the Move Record dataset to be linked with necessary additional identifying variables (SID), are merged together and limited to only entries that represent a release[39] from DOC custody for the start of parole or the expiration of the sentence. An expected release date variable is constructed in the individual AOPC filings dataset based on the date of the final disposition for an individual's initial docket and the minimum length of longest associated confinement sanction within the docket. This date is then used as the minimum date for which we will consider a release with a sentence status code of "parole" or "sentence complete". The AOPC dataset is then merged into the DOC dataset using an individual's SID[40] number as the identifier and release dates are captured.

The individual level AOPC dataset of initial filings and associated sanctions and dispositions, with DOC release date information for a subsample of individuals, is then merged into another offense-level 2015-2020 AOPC dataset of filings at the Municipal and Magisterial courts using name and date of birth as identifying variables. The larger filings dataset contains only dockets with at least one VUFA offense or an offense identified as violent[41] in HR 111. All individuals match at least one docket after merging. Extraneous records (those that did not match an individual from the initial AOPC dataset, and filings that

[37]When an individual, as identified by name and date of birth, appeared more than once in the original dataset their docket with the earliest filing date is kept and this is considered the initial docket.

[38] Individuals with combinations of similar but not identical names, dates of birth, and SIDs were reviewed and referenced using JNET's federated search to determine if suspect dockets were filed against the same or different individuals.

[39] The DOC Move Record dataset contains information on all moves within and outside of DOC facilities for individuals that are confined in DOC facilities. Not all entries represent intake or release, for example there are also records for when individuals are transferred to another jurisdiction, or to and from Parole Board hearings.

[40] State Identification Number is the only identifying variable that is common between the AOPC database and the DOC datasets. However, using SID comes with tradeoffs as there is missingness on this variable in the AOPC dataset, and for a limited number of the entries in the DOC dataset as well. We are unable to obtain release dates from the DOC data for these individuals. See *Variables* section for a discussion of the procedure used when release dates were not able to be identified in the DOC dataset.

[41] HR 111 species that these are the only offenses to consider if an individual was subsequently re-arrested for. A discussion of potential limitations to this approach can be found in Directive 5.

did match but predated the initial docket) were removed. The resulting dataset is an offense-level dataset, where all individuals have at least one docket that contains at least one VUFA offense (the initial docket from the original AOPC individual dataset). Information about recidivistic dockets and pretrial failures are captured in several variables (see Variables section) before this dataset is collapsed back to an individual level dataset using an identifying variable.

The final data source, Pennsylvania Commission on Sentencing data, is merged to this collapsed individual level dataset for a subset of individuals that can be matched to PCS records[42]. The individual's prior record score (PRS) and the conformity of the sentence to the guideline recommendation is captured for the most serious offense in the judicial proceeding. Recidivism and pretrial failure statistics and analyses are then calculated and performed using this dataset of 43,279 individuals.

Key Variables

Recidivism. The recidivism variable is coded 1 for those filings that match our definition of recidivism and 0 otherwise. Records are ordered by filing date and docket number, such that the earliest filing (the initial docket) will be listed first, and any subsequent filings will be arranged based on the date of the filing after the initial. It is possible that individuals have no additional filings, these individuals are retained and are the sample of individuals that do not recidivate. Each filing is considered separately; as such it is also possible for several dockets to not match the definition of recidivism and still have a recidivistic docket. Only information about the first recidivistic docket is retained.

Tracking Periods. The tracking period variable is constructed to accurately measure the periods of time during which individuals were able to recidivate, as such the start date for each individual is dependent on the sanction and bail decisions that are related to their initial docket. For individuals that receive a state confinement sentence, the start of their tracking period is either their actual or expected release date. The subset of individuals that were able to be matched to a release date record in the DOC dataset use that date. The remaining state confinement sentences, and all county confinement sentences, use an expected release date. The expected minimum release date is calculated as the date of the disposition[43] plus the length of the longest minimum incarceration sentence for the docket[44]. Non-confinement dockets begin tracking on either the filing date or the disposition date associated with initial filing. Individuals denied bail start tracking on the disposition date of their initial docket in order to avoid biasing calculations by including confined individuals. Non-confinement dockets where an individual was granted bail (ROR, monetary, monetary ltd.) begin tracking on the filing date of their initial docket.

[42] Not all individuals are able to be matched to a PCS record. PCS does not receive information on terminal dispositions at either the Magisterial or Municipal Courts. To link the initial docket from the Magisterial or Municipal Courts to a docket from The Courts of Common Pleas (the only convictions that PCS receives) an additional AOPC dataset is used that contains information about initial docket filing numbers and terminal docket numbers. The terminal docket number from The Courts of Common Pleas is used as the identifier variable to merge with an annual PCS dataset of convictions from 2015-2020.

[43] Sentence start date was preferred, however it was missing for too many individuals in the sample.

[44] Using AOPC data, it is not possible to determine the relationship of sentences for purposes of consecutive vs. concurrent terms of confinement.

Pretrial Failure. We define a pretrial tracking period similar to the tracking period for the recidivism analysis. The pretrial tracking period begins on the date that the initial docket was filed and ends on the date of the final disposition associated with that docket. Additional filings that occur between the start and end of a pretrial tracking period are considered pretrial failures if they match the definition previously outlined. Individuals that are denied bail are excluded from the pretrial failure analysis.

Assumptions

Relying on such a diverse set of data sources with varying levels of missing data presents challenges for analysis. Traditional listwise deletion techniques would significantly reduce the sample size of this analysis, and as such are not feasible. The key assumptions of the analysis are those that are related to data challenges and those that are related to definitions.

Data limitations presented several challenges that required researchers to make assumptions. Directive 5 in HR 111 addresses The Commission on Sentencing to determine if an individual charged with a VUFA offense was subsequently re-arrested for another VUFA offense or a violent offense. It was not possible to obtain and create a recidivistic dataset of arrests due to data availability and time constraints. We assume that a new docket filed is an appropriate analogue for re-arrest. The accuracy of this assumption rests on the logic that most arrests are going to lead to new filings, and that arrests that do not lead to new filings are randomly distributed across the Commonwealth as opposed to generated by jurisdictional specific practices.

It is common in other recidivism studies to start with a cohort of individuals released from confinement in a year and then analyze only the individuals that were able to be tracked for as long as desired. By necessity, this study is designed very differently. One of the drawbacks of not having a consistent tracking period and relatively consistent sample of individuals (individuals released from confinement sentences in a year), is the necessity of sanction-type-specific tracking start dates for individuals. We assume that the expected minimum release date that we calculate for confinement sentences will be an appropriate substitute for the actual release date (see *Variables* section for calculation). The expected minimum release date assumption is necessary to treat confined individuals as similarly as possible in terms of their tracking start. Release date information was only available for a small subset of individuals that received a state confinement sentence (19 percent of state confinement sentences). The remaining state, and all county confinement, dockets are assigned the minimum expected release date as the start of the tracking period for recidivism analyses. Distributions of values and missingness for the variables that were used in the calculation of the minimum expected release date were analyzed to investigate potential issues[45].

[45] There were a small number of individuals who received a state confinement sentence that had a zero value or missing value for the length of their minimum incarceration sentence. If the length of the maximum incarceration sentences was not missing one half of this value was used. In instances where both values were missing or zero, a minimum value of 24 months is used for the calculation of the minimum expected release date. There are a number of individuals with county confinement sentences who also have a missing or zero value for their length variables. These values are left untransformed; we cannot rely on a constant minimum value (24) like the state confinement sentences, and because 0's may be close to accurate lengths for relatively minor county confinement sentences. The effect of this that for these individuals the date of disposition is used as the start of tracking period (disposition + incmin(0) = disposition date).

Limitations

In addition to the limitation outlined in Directive 5, there are further limitations to this study that must be considered. Combining several administrative data sources allows for analysis on a wider range of covariates, however the differences in data structure and content between the sources presents unique challenges. Identifying individuals, dockets, and sentences requires common identifying variables that are consistently populated within each data source. The only common identifying variable between AOPC and DOC datasets is SID. While an SID number was able to be collected for a majority (86 percent of the 43,279) of individuals in the sample, it is difficult to assess the accuracy of those numbers. This caution is given after observing that there are individuals with multiple SID numbers (both within and across dockets)[46], as well as SID numbers that are assigned to multiple individuals. Missing SID records are eliminated from potential merges that bring in important additional covariates[47].

It was previously noted in the assumptions section that there are complications that result from analysis on such a heterogenous sample of individuals. Another limitation that results from this approach, and other unique aspects of this study and the data sources, is the difficulty in building an accurate multivariate model that captures the relationships and processes at hand. Including individuals with lower court dispositions, pending cases, and several different sanction types at the upper courts led to violations of modeling assumptions. In additional model diagnostic testing it was confirmed that several variables presented challenges for model assumptions. Despite efforts, it was not possible to find a modeling strategy that was appropriate given the dataset that would allow for substantively meaningful conclusions to be drawn.

[46] In this study the first non-missing SID value in the initial docket is collected.

[47] We use name and date of birth as identifying variables when merging the AOPC individual dataset into the filings dataset in an effort to preserve data.

Appendix 5.2: LC Dispositions by VUFA Docket Type 2015-2020

	All VUFA cases		All VUFA cases		Co-Charged Violent Offense	
	Total	Percent	Total	Percent	Total	Percent
Case Pending	3,930	9.1%	1,311	9.1%	555	9.1%
Case Bound Over	31,792	73.5%	13,345	73.5%	4,749	73.5%
Resolved	1,732	4.0%	112	4.0%	16	4.0%
Dismissed	1,997	4.6%	733	4.6%	286	4.6%
Withdrawn	3,008	7.0%	1,129	7.0%	582	7.0%
Other	820	1.9%	106	0.6%	26	0.4%
Total	43,279	100.0%	16,736	100.0%	6,214	100.0%

Appendix 5.3: UC Dispositions by VUFA Docket Type

	All VUFA cases		All VUFA cases		Co-Charged Violent Offense	
	Total	Percent	Total	Percent	Total	Percent
Case Pending	8,455	26.6%	3,575	26.8%	1,382	29.1%
Dismissed	226	0.7%	105	0.8%	33	0.7%
Withdrawn	85	0.3%	41	0.3%	1	0.0%
Nolle Pros	2,048	6.4%	1,131	8.5%	204	4.3%
Other	1,226	3.9%	269	2.0%	233	4.9%
Not Guilty	728	2.3%	384	2.9%	168	3.5%
Guilty	19,024	59.8%	7,840	58.7%	2,728	57.4%
Total	31,792	100.0%	13,345	100.0%	4,749	100.0%

Appendix 5.4: UC Sanction Type by VUFA Docket Type

	All VUFA cases		F1/F2 VUFA Cases		Co-Charged Violent Offense	
	Total	Percent	Total	Percent	Total	Percent
State Confinement	6,659	35.0%	4,468	57.0%	1,868	68.5%
County Confinement	5,260	27.6%	2,163	27.6%	590	21.6%
Intermediate Punishment	524	2.8%	172	2.2%	20	0.7%
Probation	5,821	30.6%	873	11.1%	224	8.2%
Other	760	4.0%	164	2.1%	26	1.0%
Total	19,024	100.0%	7,840	100.0%	2,728	100.0%

Directive 6

For individuals sentenced to probation or granted parole following a VUFA conviction, determine if any individuals subsequently violated the terms of supervision for any reason following sentencing or parole.

Directive 6 asks the Commission to examine the probation and parole supervision outcomes for individuals who have been convicted of a VUFA offense and to compare these results with individuals convicted of other offense types. As discussed in Directive 3, probation sentences are imposed in nearly one third of all VUFA cases across the Commonwealth. The use of probation sanctions for VUFA offenses varies across county classes. In the Second Class County probation sentences are imposed in over 50 percent of all VUFA cases. Meanwhile probation is used as the primary sanction in only 16 percent of VUFA cases in the First County Class. Probation is less likely in more serious VUFA cases, with only 3 percent of VUFA cases co-charged with a violent offense receiving a probation sanction. Probation supervision procedures vary from county to county, and likewise, violation and revocation rates vary as well.

Data related to county probation supervision and case management are typically maintained at the county level; however, there has been an effort in recent years to gather this county level supervision data and combine it into a statewide database for the use of criminal justice stakeholders in the Commonwealth. This database, called the Electronic Reporting of Probation and Parole (ER2P) system, continues to gain participation from more counties and is supported by the Pennsylvania Commission on Crime and Delinquency (PCCD) and the Pennsylvania Justice Network (JNET). The ER2P database holds great promise for providing detailed county probation and parole supervision data that was previously unavailable to researchers and criminal justice stakeholders beyond the individual county level. However, as discussed below, the ER2P does not currently have the participation of all counties, and data for the current evaluation were available from only 58 of Pennsylvania's 67 counties.

State incarceration sentences are the most likely sanction across all VUFA case types (38 percent), especially for those involving a violent offense co-charge (71 percent). The length of minimum state incarceration sentence for VUFA cases ranges from approximately 3 years (for cases where the VUFA offense was not the lead charge) to approximately 6 years (for VUFA cases co-charged with a violent offense). Individuals sentenced to state incarceration are eligible for parole release at their minimum sentence dates, with parole granted in approximately 55-60 percent of parole interviews, according to the Pennsylvania Parole Board. This chapter includes an examination of state parole violation rates for individuals released on parole from state sentences by the Pennsylvania Parole Board for both VUFA and non-VUFA convictions, from 2015 to 2020. It is important to note that, due to the length of state incarceration sentences, many of the parolees included in this study were originally charged and convicted prior to January 1, 2015 - the start date for all analyses in this study related to the charging, prosecution, and sentencing of VUFA cases. Data for the evaluation of parole supervision violations was provided by the Department of Corrections and the Pennsylvania Parole Board.

County Probation Supervision

As stated above, the Pennsylvania Commission on Crime and Delinquency has supported efforts by the Pennsylvania Justice Network (JNET) to collect supervision data from the county level and make it available for use by the Commonwealth's criminal justice community. The Electronic Reporting Probation and Parole (ER2P) system that combines county supervision data into a single database, with participating counties sharing supervision data through regular uploads to the ER2P system. Several summary reports and dashboards are available to criminal justice professionals through JNET.

ER2P data was made available to assist with the evaluation of probation supervision for those individuals convicted of a VUFA offense and sentenced to probation. County probation data was provided to the Commission for 919 individuals on probation for a VUFA offense at any point from 2015 through 2020.

The ER2P database is continuously adding new participant counties and staff are working to improve the robustness and quality of the data reported. However, it must be stated that the supervision data provided for this study suffered from significant gaps in data related to supervision dispositions, violations, sentence details, and individual details. To reiterate, the sample contained data from only 58 of the 67 counties in the Commonwealth. Other counties reported data to ER2P, but they did not report any cases involving supervision for a VUFA conviction. As a result, the sample does not include VUFA supervision data from Allegheny, Bedford, Bucks, Cameron, Clearfield, Delaware, Elk, Huntingdon, Indiana, Luzerne, Lehigh, Mercer, Montgomery, and Philadelphia counties. These counties account for large shares of individuals involved in VUFA dockets (see Exhibit 1.1).

To gauge the level of reporting of VUFA cases in the ER2P database, the supervision sample from ER2P was compared to the Commission's data on sentences reported for VUFA convictions from 2015 to 2020. 1,317 VUFA sentences are recorded in the ER2P data set from 2015 to 2020. Meanwhile, there were 4,894 VUFA offenses with probation sanctions reported to the Sentencing Commission between 2015 and 2020. Some of these may have been within dockets that also included lengthy confinement sentences for other charges, which may have excluded them from being reported under supervision in ER2P during this period. Barring lengthy confinement, there is a 27 percent reporting rate in ER2P as compared to the VUFA probation sentences reported to the Commission.

Out of 919 individuals in the sample, supervision outcome information was available for only 456 individuals (about 50 percent). Of these, 70 percent were reported as having completed their supervision terms successfully. Another 16 percent had their supervision terminated for other reasons – including transfers to other jurisdictions, death while under supervision, or absconding. Probation was revoked in 15 percent of cases (9 percent due to technical probation violations and 6 percent due to revocations related to new criminal charges). Importantly, these data do not capture the occurrence of probation violations that did not lead to a revocation (see Exhibit 6.1).

Exhibit 6.1: VUFA probation outcomes

	Probation Outcomes	
	N	Rate
Successful Completion	317	70%
Revocation - Technical	40	9%
Revocation - New Charge	27	6%
Other	72	16%
	456	

Generally, these completion and failure rates are comparable to those from non-VUFA cases during this same period, with a completion rate for all offenses of 68 percent. The probation revocation rates for all offenses are 7 percent for technical revocations and 8 percent for revocations due to a new charge.

State parole supervision

State parole supervision data was provided by the Department of Corrections and the Parole Board for all individuals under parole supervision during the period from 2015 through 2020. The parole sample contains supervision data for 81,269 individuals for all offense types and 5,147 individuals with a VUFA as the lead offense. A limitation of the sample is that only the most serious offense is identified for each individual (presumably the most serious charge of the sentencing proceeding). This means that we are only able to identify those who had a VUFA charge as their most serious offense. As a result, individuals with a VUFA docket containing a violent offense are likely not well represented in this sample.

The sample of individuals on parole is almost exclusively male (98.6 percent). Those on parole for VUFA offenses are predominantly Black (70 percent; compared to 22 percent White and 8 percent all other). In comparison, Black individuals make up only 42 percent of the overall parole population. County classification information was available for 64,017 parolees. More than a third of individuals on parole for VUFA offenses come from the First Class County, consistent with patterns in the charging of VUFA dockets as discussed in directive 1.

In order to measure the performance under parole supervision, parole violation rates were calculated for the entire parole population as well as for individuals on parole for VUFA offenses. Parole violations are categorized into two groups - convicted parole violations and technical parole violations. Convicted parole violations refer to a conviction for a new offense committed while under parole supervision. Conviction violations typically result in the revocation of parole and recommitment to a state correctional facility. Technical parole violations occur when a parolee violates one of the conditions of parole assigned by the Parole Board at the time of parole release. Examples of technical parole violations may include non-participation in prescribed treatment programs or failed drug/alcohol tests. A single technical violation typically does not result in revocation of parole; however, repeated technical violations may result in revocation of parole and recommitment to state incarceration. In the data provided for this analysis, it was not possible to distinguish technical violations from conviction violations for new offenses; therefore, results refer to any parole violation.

The statewide parole violation rates are relatively similar for those on parole for VUFA offenses (71 percent) as compared to all individuals on parole (68 percent). We did not observe meaningful differences in parole violation rates across county classes. The lowest violation rates were recorded in the Second Class A counties (65 percent for all, 65 percent for VUFA). The highest rates of violations were seen in the Second Class County (73 percent for all, 77 percent for VUFA).

Exhibit 6.2: Parole violation rates by county classification

	All Parolees		VUFA Instant Offense	
	N	Violation Rate	N	Violation Rate
Statewide	**64,017**	**68%**	**5,130**	**71%**
First Class	12,416	67%	1,670	69%
Second Class	4,107	73%	580	77%
Second Class A	8,017	65%	562	65%
Third Class	20,442	69%	1,507	73%
Fourth Class	6,274	67%	330	70%
Fifth-Eighth Class	12,761	69%	481	72%

Directive 6 – Summary of Findings

In directive 6 the Commission examined the outcomes for individuals under community supervision, either for a sentence of probation or after being released on parole following a state incarceration sentence. The directive also asked the Commission to compare the performance under supervision for individuals convicted of VUFA offenses to those under supervision for all other offenses. Obtaining detailed probation supervision information proved to be challenging; however, the Commission was able to utilize the ER2P database to gather probation revocation records from many counties. Although the ER2P database is incomplete with only 58 counties reporting, the Commission was able to draw some broad conclusions from the analysis. First, probation sentences were successfully completed in approximately 70 percent of cases. Probation was revoked in 15 percent of cases. Revocations were 50 percent more likely to be due to technical violations of the terms of probation than for an individual committing a new offense. The Commission is supportive of the continued development of the ER2P database for county supervision data. With the full participation and reporting from all counties in the Commonwealth, the ER2P system can be a powerful tool for administering and evaluating county supervision throughout the Commonwealth.

In addition, state parole supervision data was analyzed for all individuals released on state parole from 2015 to 2020. The Commission identified all violations of the terms of parole release, whether technical violations or for committing a new offense. The violation rates were calculated for all parolees and for those parolees whose most serious conviction offense was a VUFA offense. The violation rate among all parolees was 68 percent, while the violation rate among VUFA parolees was slightly higher, at 71 percent. State parole violation rates were very consistent across county classifications, with the rates of violation slightly higher for VUFA parolees in each county classification. The analyses conducted for directive 6 seem to show that, despite jurisdictional differences in supervision practices, the outcomes for individuals under community supervision tend to be relatively consistent across county classifications and conviction offense types.

Findings and Recommendations

FINDINGS

HR 111 was adopted by the Pennsylvania House of Representatives on November 17, 2021. It requires the Pennsylvania Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of violations of the Pennsylvania Uniform Firearms Act of 1995 (VUFA), and to report its findings and recommendations to the House no later than June 30, 2022. The purpose of the study is to inform the House about the procedure and process of handling VUFA offense cases across the Commonwealth, so that the House may determine if these cases are being handled adequately under Pennsylvania law and if changes are need.

HR 111 specified six directives to guide the Commission's efforts, for which the findings are summarized below.

Directive 1 Findings

Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA (Violations of the Uniform Firearms Act) offense under 18 Pa.C.S. Ch. 61 Subch. A.

VUFA offenses

- Roughly one third of all VUFA charges were for 18 Pa.C.S.§6105 (relating to person not to possess, use, manufacture, control, sell or transfer firearms), another third for 18 Pa.C.S.§6106 (relating to firearms not to be carried without a license), 15 percent for 18 Pa.C.S.§6108 (relating to carrying firearms on public streets or public property in Philadelphia), and 15 percent for 18 Pa.C.S.§6111 (relating to sale or transfer of firearms). Of the VUFA charges, fewer than a third were for Felony 1 or Felony 2 offenses.

Number of VUFA offenses

- VUFA dockets made up a small proportion of all non-summary dockets filed in the lower courts: 3.8 percent of all dockets filed in the lower courts, 1.6 percent for F1/F2 VUFA dockets, and less than 1 percent for VUFA dockets co-charged with a violent offense.
- Between 2105 and 2020 there were 51,618 dockets with VUFA charges filed in the lower courts; 43.3 percent of the VUFA dockets (22,360) included a Felony 1 or Felony 2 VUFA charge and 15.6 percent (8,033) included a VUFA charge that was co-charged with a violent offense.
- Over one third of all VUFA dockets, roughly 40 percent, and over one-half of all VUFA dockets co-charged with violence were filed in the First Class County.
- Rural jurisdictions had significantly lower proportions of F1/F2 VUFA dockets and VUFA dockets co-charged with violent offenses.
- On average, VUFA dockets included 6.2 average charges per case, with two of these charges being VUFA charges. For F1/F2 dockets this increases to 7.4 overall charges and 2.5 VUFA charges per case, and to 10.3 overall charges and 2.1 VUFA charges for cases co-charged with a violent offense.

Other characteristics

- The analysis revealed that charging practices varied across the county classes.
- The average annual rate of VUFA dockets filed (2015 to 2020) per 100,000 population was highest for the First and Second Class Counties. For all VUFA dockets the rate in the First Class County was more than double the rate in the Second Class County and 4.5 times the rate in the Fifth through Eighth Class counties. This difference is even more pronounced for dockets co-charged with violence with the First Class County having an annual rate that is three times that of the Second Class County and over ten times that of the Fifth through Eighth Class counties.
- Individuals charged with VUFA offenses are predominantly male, Black, and 34 years of age or younger.

Directive 2 Findings

Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.

Lower Court attrition

- 81 percent of non-pending VUFA dockets were bound over to the Court of Common Pleas, 8 percent were withdrawn, and 5 percent were dismissed. The highest rates of withdrawals and dismissals were in the First and Second Class counties. The rate of withdrawals and dismissals remained relatively constant in the Second Class County between 2015 and 2020 and increased significantly in the First Class County in 2018 and 2019.

Common Pleas Court attrition

- 83 percent of non-pending VUFA dockets bound over to the Court of Common Pleas result in a guilty disposition. Over time, this rate dropped from a high of 88 percent in 2015 to a low of 79 percent in 2020. The statewide decline is attributable to increases in the proportion of VUFA dockets with a disposition of nolle pros in the First and Second Class Counties. Guilty rates remain high, and relatively constant for the more rural jurisdictions. These patterns repeat themselves for F1/F2 dockets (81 percent guilty) and VUFA dockets co-charged with violent offenses (86 percent guilty).
- 1 percent of non-pending VUFA dockets were withdrawn, 1 percent were dismissed, 3 percent were found not guilty, and 10 percent were nolle prossed. The nolle pros rate drops to 6 percent for VUFA dockets co-charged with a violent offense. The First Class, Second Class, and Fourth Class county had nolle pros rates that were higher than other county classes.

Directive 3 Findings

Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.

Disposition of VUFA cases

- Confinement sentences (jail or prison) were the most common sentence for VUFA dockets. The proportion of sentences that receive prison increases from 38 percent for all VUFA dockets, to 50 percent for F1/F2 VUFA dockets (when VUFA is the primary offense), to 67 percent for F1/F2 dockets (when VUFA is the lessor offense), and to 71 percent for VUFA dockets co-charged with a violent offense.

Duration of VUFA sentences

- The average sentence length increases as the seriousness of the docket increases. These lengths remain relatively constant across county classes. However, variation existed in the types of sentences imposed. The analysis revealed that Second Class Counties are far more likely to impose community supervision sentences than the other jurisdictions.

Removal of VUFA charges

- At the time of sentencing in the Court of Common Pleas, roughly three-quarters of dockets initially filed in the lower courts still contain VUFA charges. The other 25 percent of cases had all VUFA charges withdrawn, dismissed, or nolle prossed.
- The proportion of dockets where all VUFA charges have been removed from the docket at sentencing is significantly higher in suburban and rural jurisdictions. Overall, the type and duration of sentences for dockets with and without VUFA charges at the time of sentencing are largely similar.

Directive 4 Findings

Outline the sentencing guidelines for all of the charges in the cases for defendants who were originally charged with an VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020.

Sentencing guidelines recommendations

- For VUFA dockets involving a F1 or F2 VUFA or violent offense, the most common offense gravity scores were OGS 9 and OGS 10. For misdemeanor VUFA offenses, the most common offense gravity score was OGS 4.
- Individuals sentenced in VUFA cases have a more substantial criminal record than individuals sentenced for all other cases. VUFA offenders were less likely to have a prior record score of PRS 0 or PRS 1 and were more likely to have prior record scores of OGS 2 or greater. In cases involving a F1 or F2 VUFA charge, 45 percent of individuals had a prior record score of OGS 5 or greater.
- When combining the OGS and PRS scores, more than 70 percent of cases involving a VUFA offense fall within Level 5 of the sentencing guidelines matrix, corresponding to a recommended sanction of state confinement.

Sentencing guidelines conformity

- The sentences imposed for VUFA cases fell within the standard range of the sentencing guidelines in 43 percent of cases. When including the mitigated and aggravated ranges, 73 percent of cases fell within guidelines recommendations. Sentences that fell outside of the standard range were most likely to be mitigated or downward departure sentences, which combined accounted for 52 percent of cases.
- The sentences from the most densely populated county classifications were more likely to fall within the mitigated and downward departure ranges as compared to the less densely populated counties (see Exhibit 4.5 on page 67).
- Sentences for VUFA cases involving a violent offense were the most likely to fall within the standard range (51 percent statewide); the combined mitigated and downward departure sentences accounted for 35 percent of cases. Sentencing conformity was slightly lower for cases where the most serious offense was a VUFA offense as compared to when the most serious offense was a non-VUFA offense.
- The deadly weapon enhancement was applied in only 3 percent of all VUFA cases in this sample, but it was applied more often in cases that included a violent offense (21 percent). In cases where the deadly weapon enhancement was applied, the sentence was conforming (within the mitigated, standard, or aggravated ranges) in 74 percent of cases.

Directive 5 Findings

For an individual charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subchapter A from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A or a violent offense within the last 5 years.

Recidivism for a new VUFA charge

- The recidivism sample included 43,279 individuals who were initially charged with a VUFA offense. The statewide, three-year recidivism rate for the sample in this study was 20 percent for all VUFA docket types.
- Recidivism risk level appeared to be uniform across time periods; however, there were differences in risk level related to the individual's initial VUFA docket type. Individuals whose initial docket contained an F1 or F2 graded VUFA offense had higher three-year recidivism rates (26 percent), while those whose initial docket contained a violent offense had the highest rates of recidivism (29 percent at three years).
- Recidivism rates vary substantially across county classifications. There appears to be a relationship between the population density of the county classification and its corresponding recidivism rate. The highest proportion of VUFA charges and the largest proportion of the most serious charges occur in the First- and Second-Class Counties, where population densities are the highest. These counties see the highest rates of recidivism for VUFA offenses, while the less densely populated county classifications see lower rates of initial charges and recidivism (see Exhibit 5.4 on page 86).

Relationship between recidivism and disposition

- In the lower courts, cases that were withdrawn by the prosecution (25 percent) or dismissed by the court (23 percent) tended to have higher three-year rates of recidivism as compared to all other cases.
- In the Court of Common Pleas, nolle prossed cases had a substantially higher rate of recidivism within the first year (8 percent) as compared to cases resulting in conviction (5 percent). The three-year recidivism rate for convicted individuals who received a confinement sentence (44 percent for state confinement and 26 percent for county confinement) was much higher than for those who received a sentence of probation (12 percent).

Relationship between recidivism and sentencing guidelines

- The Commission found that VUFA recidivism rates do not vary substantially across categories of the guidelines' prior record score.
- The Commission found a relationship between recidivism rates and the conformity of sentences to the guideline recommendations. Sentences that were imposed within the standard range of the guideline recommendation tended to be associated with the lowest rates of recidivism (12 percent over three years).
- The majority of sentences for VUFA offenses that were outside of the standard range tended to fall within the 'mitigated' or 'below' categories. These sentences were associated with higher three-year recidivism rates (22 percent for mitigated and 21 percent for below).

Pretrial release failures

- Pre-trial failure rates tended to increase with the seriousness of VUFA dockets with a failure rate of approximately 5 percent for all VUFA dockets, 6 percent for F1/F2 VUFA dockets, and 7 percent for VUFA dockets co-charged with a violent offense.
- Pre-trial failure rates also varied among county classifications with the lowest rates in the First Class County and the highest rates in the Second Class County.

Directive 6 Findings

For individuals sentenced to probation or granted parole following a VUFA conviction under 18 Pa.C.S. Ch. 61 Subch. A, determine if any individuals subsequently violated the terms of supervision for any reason in the last five years following sentencing or parole.

County Probation

- Although the ER2P database used for this analysis is incomplete with only 58 counties reporting, the Commission was able to draw some broad conclusions from the analysis.
- Probation sentences were successfully completed in approximately 70 percent of cases. This rate of success remains consistent regardless of offense type or county classification.

- Probation was revoked in 15 percent of cases. Revocations were 50 percent more likely to be due to technical violations of the terms of probation than for an individual committing a new offense.

State Parole

- The violation rate among all parolees was 68 percent, while the violation rate among VUFA parolees was slightly higher, at 71 percent. State parole violation rates were very consistent across county classifications, with the rates of violation slightly higher for VUFA parolees in each county classification.

RECOMMENDATIONS

The Commission offers the following recommendations, intended to assist the House in becoming more knowledgeable about the procedure and process of handling VUFA offenses cases across the Commonwealth, and in determining if VUFA cases are being adequately handled under Pennsylvania law and if changes are needed.

The first three recommendations provide strategies for overcoming data limitations in the current report and for providing additional context and interpretation to the statewide findings. The fourth recommendation addresses programs and practices that may be explored to improve outcomes for those under supervision.

Recommendation 1:

This study represents an initial analysis of a complex issue. Given additional time and resources the Commission recommends an extension of the current project to include a qualitative component that would bring additional context to findings in this report. Through interviews with, and/or surveys of, key justice stakeholders in individual jurisdictions, qualitative data may help explain county-specific variations in rates of non-judgment dispositions (e.g., nolle pros), types of sentences imposed, conformity rates, pretrial failures, and recidivism rates.

Recommendation 2:

In addition to qualitative contextual information, the Commission recommends partnering with local jurisdictions to collect and analyze locally-owned quantitative data. Analysis of county-level data may provide richer explanations that go beyond the analyses of state-level data required for this study, and take into account factors outside the scope of this study, including the role of age, gender, race/ethnicity, education, employment, and poverty.

Recommendation 3:

Throughout this report, Commission staff identified data challenges including missing data, an inability to merge and match data across datasets, and inefficient processes for requesting and obtaining system-level data. These limitations threaten the ability of the Commonwealth to build sound evidence-based criminal justice policies and respond to critical issues such as gun violence. Greater effort should be directed towards collecting more complete and accurate data that includes common identifiers across agencies. The ability to consistently track individuals, charges, and cases, across stages and decision points, and an ability to accurately "follow" individuals from first contact with the system through release, will vastly improve the quality of data and research used to promote better outcomes.

Recommendation 4:

Although the scope of this study is limited to providing information on the procedure and process of handling VUFA offense cases across the Commonwealth, the House may also benefit from a deeper understanding of programs and practices that improve outcomes for those under supervision for VUFA offense cases. A comprehensive study would include a review of bail decisions; pretrial supervision and services; pretrial diversion; problem solving courts (gun courts); presumptive sentencing guidelines; RNR PSI (risk-needs-responsivity pre-sentence investigation reports); duration and intensity of probation, and parole supervision.

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ATTACHMENT E

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TESTIMONY

House Select Committee on Restoring Law and Order

Public Hearing on Testimony Related to House Resolution 216 of 2022

Penn State at the Navy Yard
Building 661 – Symposium Room
Philadelphia, PA

September 30, 2022

Mark H. Bergstrom
Executive Director

The Commission is an agency of the General Assembly affiliated with The Pennsylvania State University.

Good morning, Chairman Lawrence and members of the House Select Committee on Restoring Law and Order. I am Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing. The Commission is an agency of the General Assembly, created to promote an effective, humane, and rational sentencing policy. The Commission achieves this through the adoption and implementation of sentencing and parole guidelines, and through the establishment of a research and development program which serves as a clearinghouse and information center to support data collection and analysis, to conduct studies and evaluations, and to provide education and technical assistance.

Thank you for providing this opportunity to offer testimony related to House Resolution 216 of 2022, and to discuss the findings and recommendations related to House Resolution 111 of 2021, which required the Commission to conduct a thorough and comprehensive study on the investigation, prosecution, and sentencing of violations of Pennsylvania's Uniform Firearms Act. HR 111 directed the Commission to investigate six areas:

(1) Cases in Pennsylvania that included firearms offenses.
(2) Instances where firearms offenses were withdrawn or dismissed.
(3) Sentences imposed for those convicted of firearms offenses.
(4) Sentence recommendations for those charged with firearms offenses.
(5) Rearrests for a firearms offense or violent offense for those previously charged with firearms offenses.
(6) Violations of probation or parole for those convicted of firearms offenses.

I have been asked to provide a brief overview of the Commission's HR 111 Report, submitted to the House of Representatives on June 30, 2022, and to specifically address the attrition of firearms cases, which is the part of the study that tracks the processing of firearms charges from initial filing through final disposition. And because both HR 111 and HR 216 specifically address firearms offenses in Philadelphia, I will highlight the attrition of firearms cases in the County of the First Class as compared to other classes of counties. As I hope is clear from the HR 111 Report, attrition occur at various stages of the criminal justice system, and may involve a reduction or elimination of charges, and/or a conviction or plea to lesser offenses, and/or acquittal of charges, and/or mitigation of sentences. Attrition may

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Phone: 717.772.2150 Email: mbergstrom@legis.state.pa.us

result from an exercise of discretion by various decision-makers or it may reflect initial charges that could not be proven at trial.

As context for discussion of attrition, I have provided a case flow of the criminal justice system prepared by the Bureau of Justice Statistics (Attachment A). This graphic identifies key phases and decision points as a case moves from initial contact with police through release from the system. The first phase (Entry into the system) focuses on the role of law enforcement and decisions related to arrest; the second phase (Prosecution and pretrial) involves decisions related to the filing of charges and dispositions before the minor courts (i.e., Philadelphia Municipal Court, Magisterial District Judge Courts); the third phase (Adjudication) applies to cases bound over to the Court of Common Pleas for trial or formal disposition; and the final phases (Sentencing and sanctions, Corrections) address post-conviction options and procedures.

The first directive of HR 111, to identify all cases that included a firearms offense, also provides useful context. Chapter 61A of the Crimes Code (Title 18), referred to as the Uniform Firearms Act, includes 17 specific offenses that range from a felony of the first degree (statutory maximum of 20 years) to summary offenses (maximum penalty of not more than 90 days), and includes one offense specific to Philadelphia (Section 6108[1], relating to carrying firearms on public streets or public property in Philadelphia, a misdemeanor of the first degree). In the report, charges for firearms offenses are often referred to as VUFA (Violations of the Uniform Firearms Act). The analysis of firearms offenses by the Commission considers three groupings of offenses: All VUFA dockets (cases that include at least one firearms offense); F1/F2 VUFA dockets (cases that include at least one F1/F2 firearms offense); and VUFA dockets co-charged with violent offense (cases that include at least one firearms offense and one violent offense). HR 111 provided a definition of violent offense.

[1] 18 Pa.C.S.§6108. Carrying firearms on public streets or public property in Philadelphia – No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless: (1) such person is licensed to carry a firearm; or (2) such person is exempt from licensing under section 6106(b) of this title(relating to firearms not to be carried without a license).

Firearms offenses are included in 3.8% of all non-summary dockets filed statewide in the lower courts during the study period (2015-2020), with 1.6% for F1/F2 VUFA dockets and less than 1% for VUFA dockets co-charged with a violent offense. In Philadelphia, dockets containing VUFA charges accounted for 9.4% of all non-summary dockets filed in Municipal Court, with 4.7% for F1/F2 VUFA dockets and 2.2% for VUFA dockets co-charged with a violent offense.

As discussed in detail in the report, and as highlighted in the PowerPoint presentation that follows, the Commission found that serious gun violence is typically concentrated in more densely populated areas, meaning that patterns of arrests, court filings, prosecution policies, and sentencing practices may vary based on urban or rural characteristics of a county. Other factors may impact the processing of cases, including police coverage (e.g., part-time vs. full-time officers, single vs. multiple departments, coverage area) and local rules (e.g., approval of charges by the district attorney).

In the HR 111 Report, the Commission uses county class to document and compare practices related to processing of firearms offenses. While population density may vary among counties in each class, the average population density of the class groupings used in the study increases with class size (Attachment B). And since Philadelphia County (Class 1) and Allegheny County (Class 2) have unique county class assignments, it is possible to compare these counties with each other and more generally with other classes of counties. In some cases, Philadelphia and Allegheny counties share common features that separate them from all other counties, while at other times their practices differ from each other. Some explanations may be found in the structure of law enforcement (single-jurisdiction police department vs. 130 municipalities and 109 police departments), or local rules (DA review of all misdemeanor and felony charges before filing vs. screening limited to homicides and sex offenses) (Attachment C).

Before turning to the PowerPoint slides which provide greater detail, here are several general findings from the HR 111 Report:

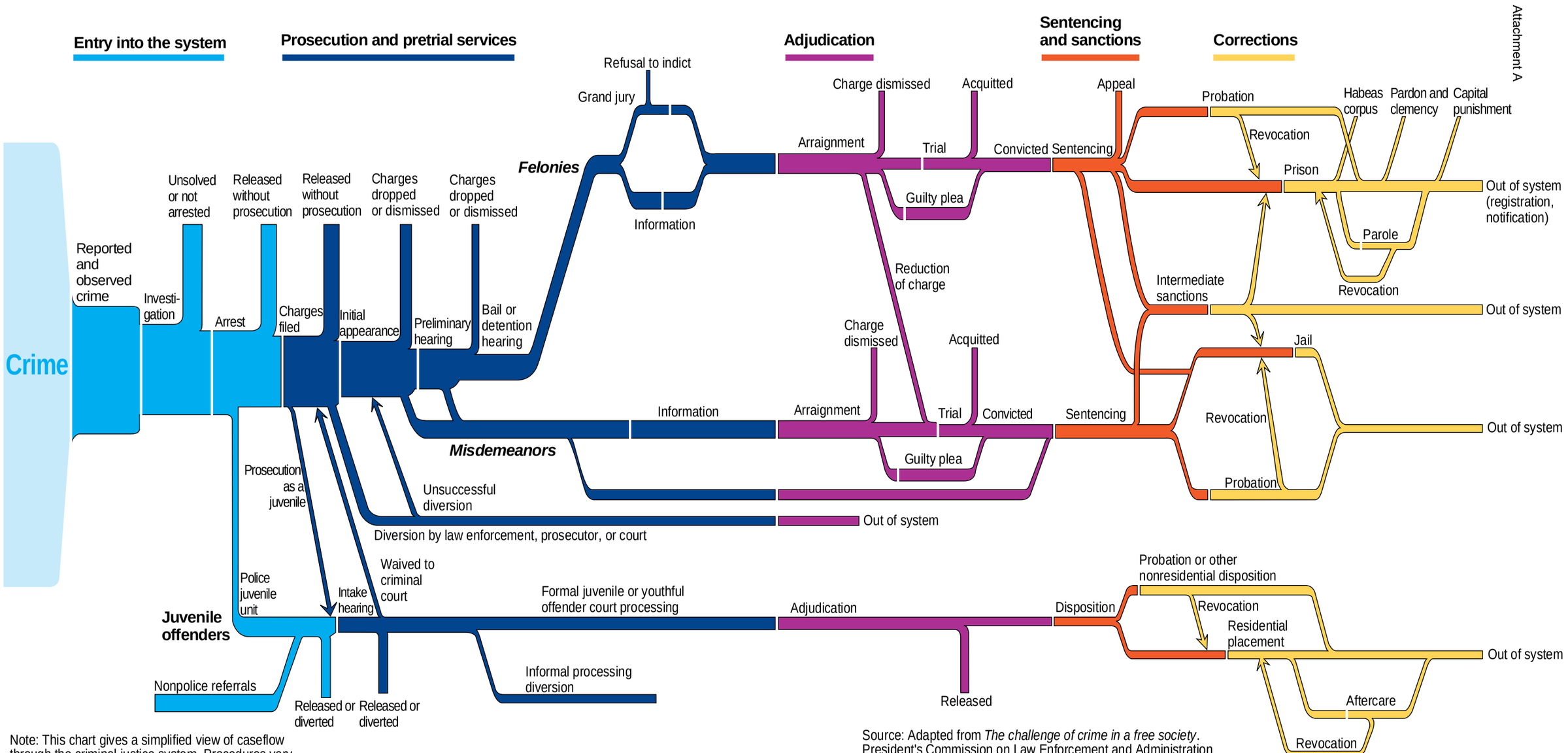
- A higher proportion of VUFA dockets were withdrawn or dismissed in lower courts in the counties of the First Class (17%) and Second Class (19%) as compared to statewide (12%).

- An increasing proportion of VUFA dockets were withdrawn, dismissed, or nolle prossed in Common Pleas Court in recent years in the counties of the First Class (increase from 7% to 21%) and Second Class (increase from 10% to 19%) as compared to other county classes.
- Individuals initially charged with a VUFA offense were charged with another VUFA offense within three years at a higher rate in the counties of the First Class (29.5%) and Second Class (24.8%) as compared to the statewide average (20%).

The Commission offered four recommendations as part of the HR 111 Report. Three of the recommendations address data limitations and the need for more detailed county-level analysis to better understand the procedure and process for handling VUFA offenses. The fourth recommendation addresses the need to identify programs and practices that improve outcomes for those under supervision for VUFA offenses. I hope that gaining a better understanding of whether VUFA cases are being adequately handled under Pennsylvania law, and identifying best practices for the investigation, prosecution, and sentencing of those charged with VUFA offenses, is an important part of the House Select Committee's efforts to restore law and order.

Thank you again for providing this opportunity to testify.

What is the sequence of events in the criminal justice system?



Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

Source: Adapted from *The challenge of crime in a free society*. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.

Exhibit 1: County Class by Population and Population Density (2020)

	2020 Population	Square miles	Population Density (Population by square mile)
First Class [Philadelphia]	**1,603,797**	**134**	**11,937**
Second Class [Allegheny]	**1,250,578**	**730**	**1,713**
Second Class A	**2,079,921**	**1,271**	**1,636**
Bucks	646,538	604	1,070
Delaware	576,830	184	3,138
Montgomery	856,553	483	1,774
Third Class	**4,373,091**	**8,416**	**520**
Berks	428,849	856	501
Chester	534,413	751	712
Cumberland	259,469	545	476
Dauphin	286,401	525	546
Erie	270,876	799	339
Lackawanna	215,896	459	470
Lancaster	552,984	944	586
Lehigh	374,557	345	1,085
Luzerne	325,594	890	366
Northampton	312,951	370	846
Westmoreland	354,663	1,028	345
York	456,438	904	505
Fourth Class	**1,459,083**	**6,827**	**214**
Beaver	168,215	435	387
Butler	193,763	789	245
Cambria	133,472	688	194
Centre	158,172	1,109	143
Fayette	128,804	791	163
Franklin	155,932	772	202
Monroe	168,327	608	277
Schuylkill	143,049	779	184
Washington	209,349	857	244
Fifth Class	**772,488**	**4,122**	**187**
Adams	103,852	519	200
Blair	122,822	525	234
Lawrence	86,070	357	241
Lebanon	143,257	362	396
Lycoming	114,188	1,229	93
Mercer	110,652	673	165
Northumberland	91,647	458	200

	2020 Population	Square miles	Population Density (Population by square mile)
Sixth Class	**1,265,299**	**18,885**	**67**
Armstrong	65,558	653	100
Bedford	47,577	1,012	47
Bradford	59,967	1,147	52
Carbon	64,749	381	170
Clarion	37,241	601	62
Clearfield	80,562	1,145	70
Clinton	37,450	888	42
Columbia	64,727	483	134
Crawford	83,938	1,012	83
Elk	30,990	827	37
Greene	35,954	576	62
Huntingdon	44,092	875	50
Indiana	83,246	827	101
Jefferson	44,492	652	68
McKean	40,432	980	41
Mifflin	46,143	411	112
Perry	45,842	551	83
Pike	58,535	545	107
Somerset	74,129	1,075	69
Susquehanna	38,434	824	47
Tioga	41,045	1,134	36
Venango	50,454	674	75
Warren	38,587	884	44
Wayne	51,155	726	70
Seventh Class	**131,995**	**1,433**	**92**
Juniata	23,509	391	60
Snyder	39,736	329	121
Union	42,681	316	135
Wyoming	26,069	397	66
Eighth Class	**66,448**	**2,923**	**24**
Cameron	4,547	396	11
Forest	6,973	427	16
Fulton	14,556	438	33
Montour	18,136	130	139
Potter	16,396	1,082	15
Sullivan	5,840	450	13
Statewide	13,002,700		291

Source: US Census Bureau

Exhibit 2: Charging Practices by County and County Class

	DA Approval		
	Not Required	Required All	Required for subset of offenses
First Class [Philadelphia]		●	
Second Class [Allegheny]			●
Second Class A			
Bucks			●
Delaware			●
Montgomery			●
Third Class			
Berks			●
Chester			●
Cumberland			●
Dauphin			●
Erie	●		
Lackawanna			●
Lancaster			●
Lehigh			●
Luzerne		●	
Northampton		●	
Westmoreland	●		
York	●		
Fourth Class			
Beaver			●
Butler			●
Cambria	●		
Centre	●		
Fayette		●	
Franklin	●		
Monroe			●
Schuylkill			●
Washington		●	
Fifth Class			
Adams			●
Blair			●
Lawrence			●
Lebanon			●
Lycoming			●
Mercer	●		
Northumberland	●		

	DA Approval		
	Not Required	Required All	Required for subset of offenses
Sixth Class			
Armstrong			●
Bedford			●
Bradford			●
Carbon		●	
Clarion			●
Clearfield		●	
Clinton			●
Columbia	●		
Crawford	●		
Elk	●		
Greene	●		
Huntingdon	●		
Indiana			●
Jefferson	●		
McKean	●		
Mifflin	●		
Perry			●
Pike			●
Somerset			●
Susquehanna	●		
Tioga			●
Venango	●		
Warren	●		
Wayne			●
Seventh Class			
Juniata	●		
Snyder	●		
Union	●		
Wyoming			●
Eighth Class			
Cameron	●		
Forest	●		
Fulton	●		
Montour	●		
Potter	●		
Sullivan			●
Total (count)	*27*	*7*	*33*

ATTACHMENT F

House Select Committee on Restoring Law and Order

Public Hearing on Testimony Related to House Resolution 216 of 2022

September 30, 2022

Mark H. Bergstrom
Executive Director

House Resolution 111 (November 17, 2021)

Directing the Commission on Sentencing to conduct a thorough and comprehensive study on the investigation, prosecution and sentencing of violations of Pennsylvania's Uniform Firearms Act of 1995 in this Commonwealth.

HR 111 Directives

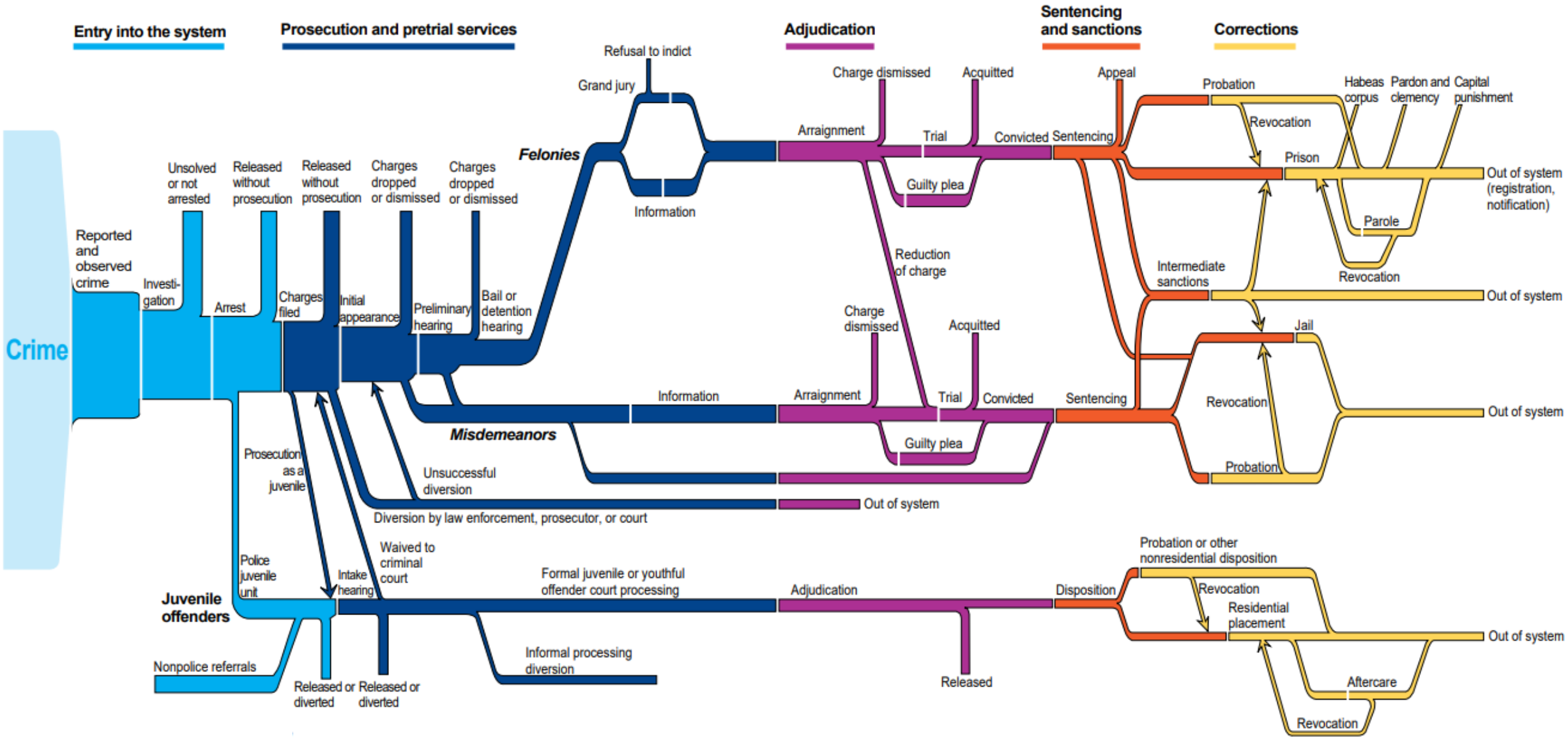
1) Ascertain all cases in the Commonwealth from 2015 to 2020 that included a VUFA offense under 18 Pa.C.S. Ch. 61 Subch.
2) Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.
3) Determine the sentence received for defendants convicted on a VUFA-related charge in the last five years.
4) Outline the sentencing guidelines for all of the charges in the cases for defendants who were originally charged with an VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020.

HR 111 Directives [cont.]

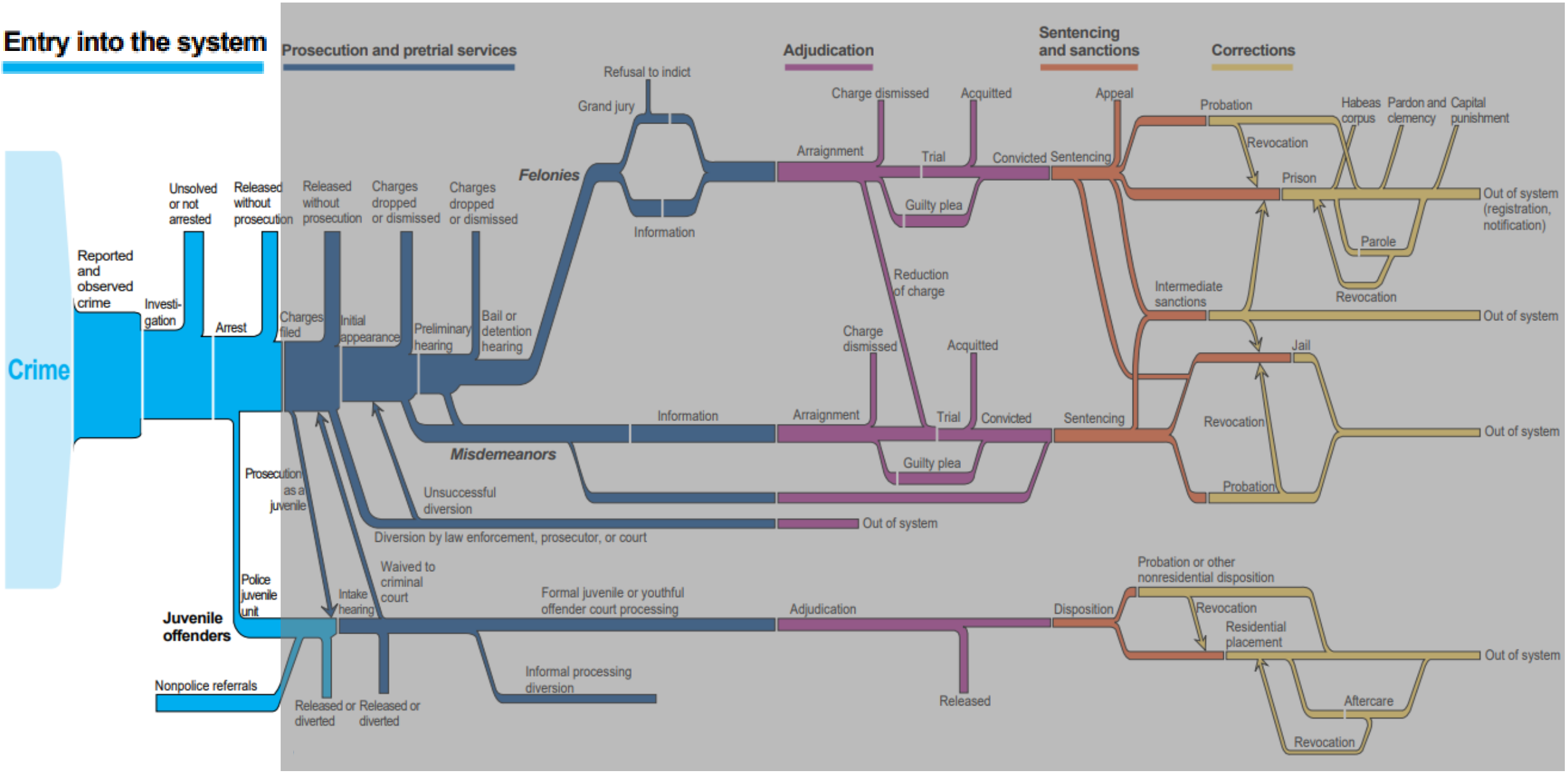
5) For an individual charged with a VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A from 2015 to 2020, determine if that individual was subsequently arrested for another VUFA offense under 18 Pa.C.S. Ch. 61 Subch. A or a violent offense within the last 5 years.

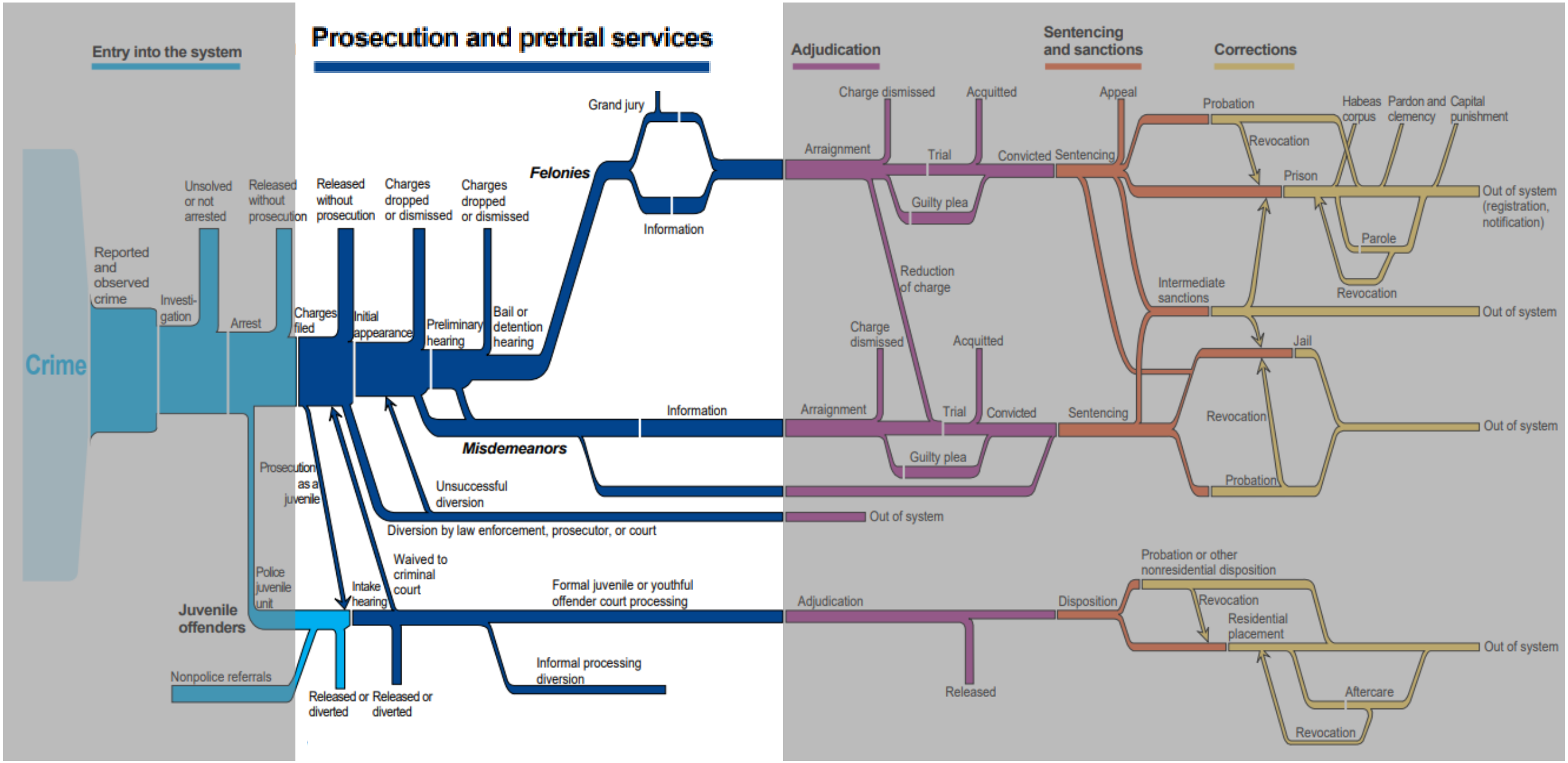
(6) For individuals sentenced to probation or granted parole following a VUFA conviction under 18 Pa.C.S. Ch. 61 Subch. A, determine if any individuals subsequently violated the terms of supervision for any reason in the last five years following sentencing or parole.

Resolved, that the Commission on Sentencing report to the House of Representatives no later than June 30, 2022.


Entry into the system
Prosecution and pretrial services
Adjudication
Sentencing and sanctions
Corrections
Crime
Reported and observed crime
Unsolved or not arrested
Investi-gation
Released without prosecution
Arrest
Released without prosecution
Charges filed
Charges dropped or dismissed
Initial appearance
Charges dropped or dismissed
Preliminary hearing
Bail or detention hearing
Felonies
Refusal to indict
Grand jury
Information
Arraignment
Charge dismissed
Acquitted
Trial
Convicted
Guilty plea
Reduction of charge
Sentencing
Appeal
Probation
Habeas corpus
Pardon and clemency
Capital punishment
Revocation
Prison
Parole
Revocation
Out of system (registration, notification)
Intermediate sanctions
Out of system
Misdemeanors
Information
Arraignment
Charge dismissed
Acquitted
Trial
Convicted
Guilty plea
Sentencing
Jail
Revocation
Out of system
Probation
Revocation
Prosecution as a juvenile
Unsuccessful diversion
Out of system
Diversion by law enforcement, prosecutor, or court
Juvenile offenders
Police juvenile unit
Intake hearing
Waived to criminal court
Formal juvenile or youthful offender court processing
Adjudication
Disposition
Probation or other nonresidential disposition
Revocation
Residential placement
Out of system
Aftercare
Revocation
Nonpolice referrals
Released or diverted
Released or diverted
Informal processing diversion
Released

Entry into the system

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Felonies
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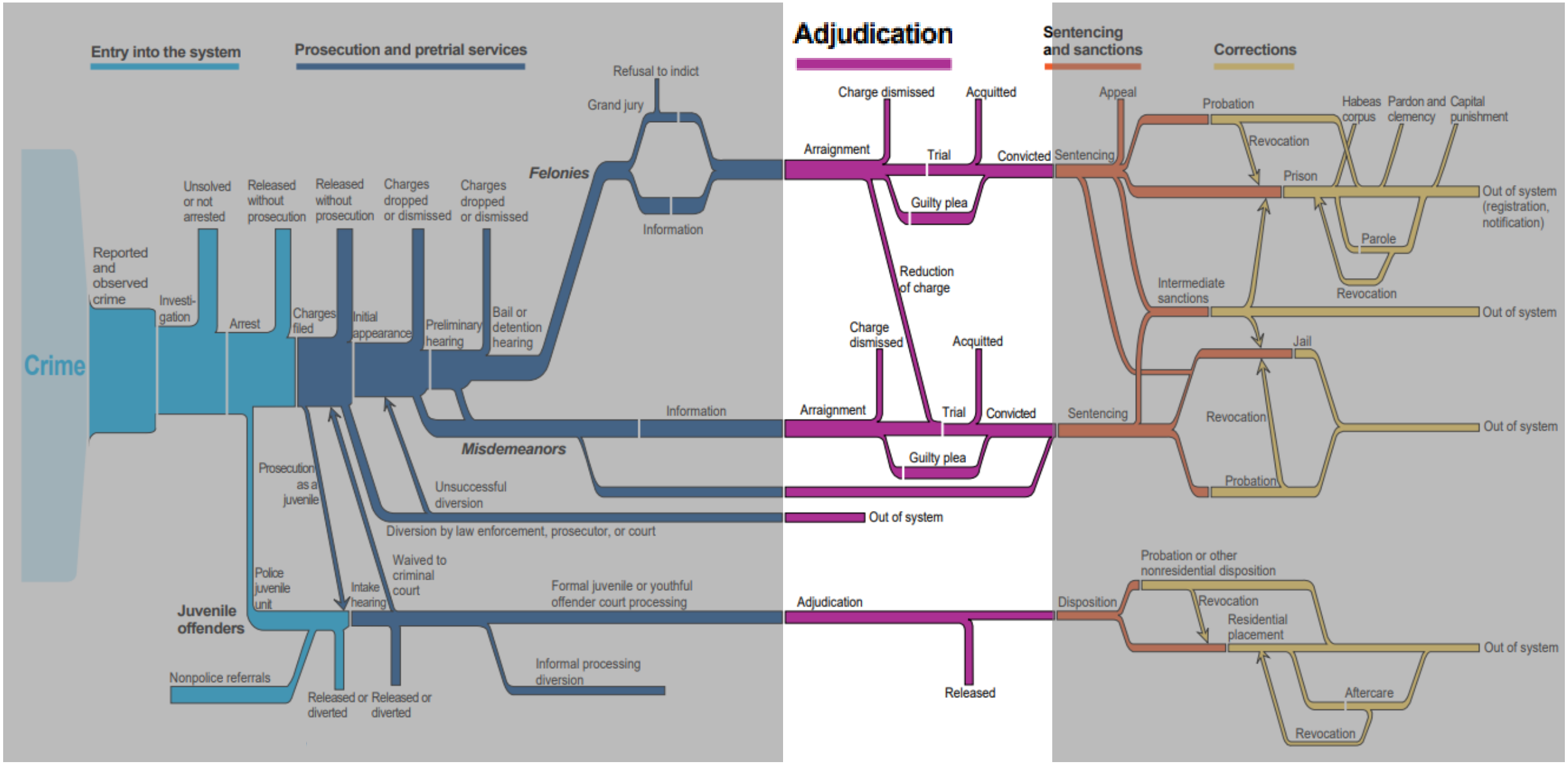
Revocation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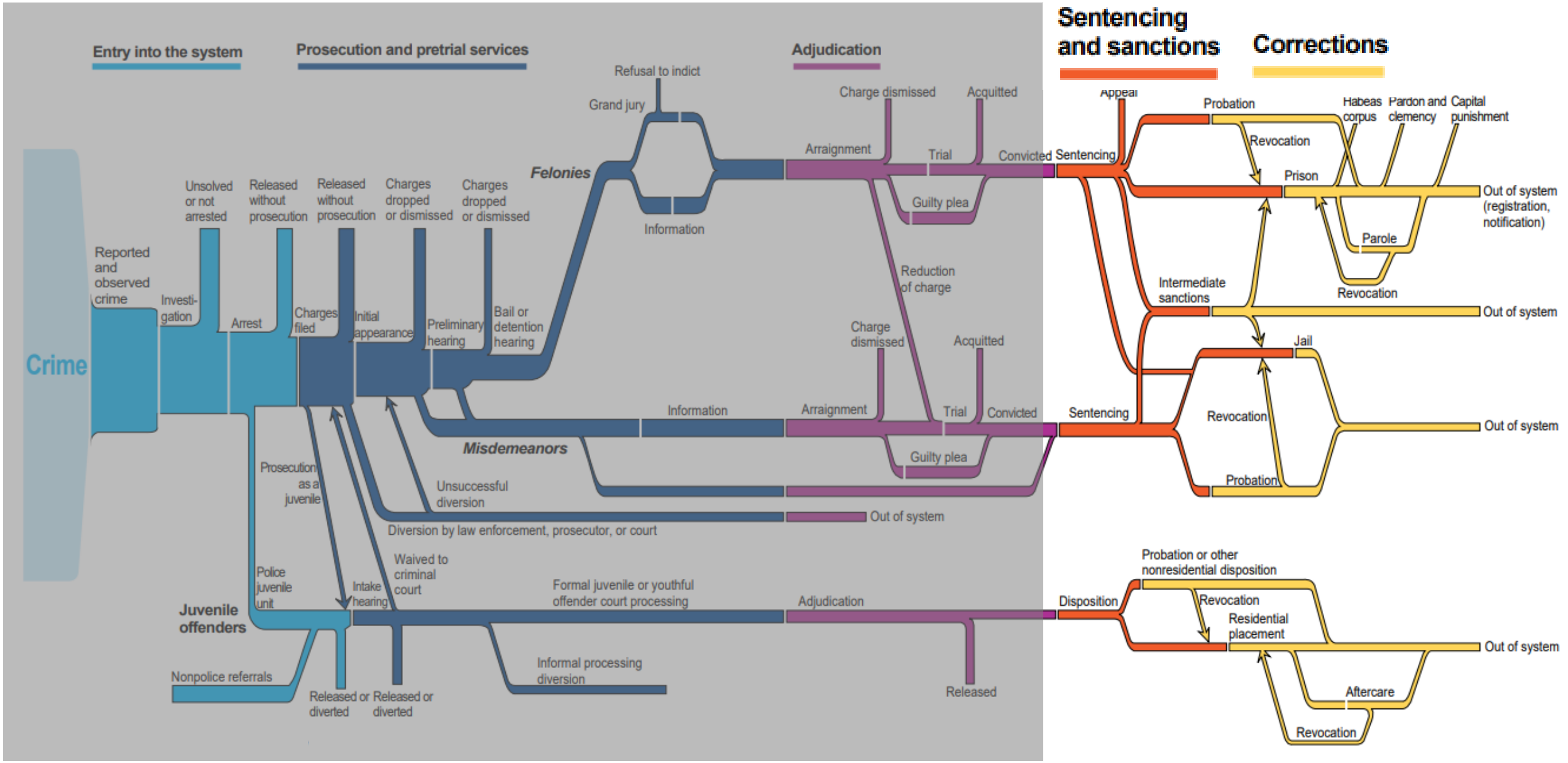
Revocation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Released or diverted
Informal processing diversion
Released

Section	Description	Offense grade						
		Summary	M3	M2	M1	F3	F2	F1
§ 6105	Person not to possess, use, manufacture, control, sell or transfer firearms		●	●	●		●	●
§ 6105.2	Relinquishment of firearms and firearm licenses by convicted persons			●				
§ 6106	Firearms not to be carried without a license	●			●	●		
§ 6106.1	Carrying loaded weapons other than firearms	●						
§ 6107	Prohibited conduct during emergency				●			
§ 6108	Carrying firearms on public streets or public property in Philadelphia				●			
§ 6109	Licenses	●						
§ 6110.1	Possession of firearm by minor				●	●		
§ 6110.2	Posession of firearm with altered manufacturer's number						●	
§ 6111	Sale or transfer of firearms			●		●	●	
§ 6112	Retail dealer required to be licensed				●			
§ 6113	Licensing of dealers				●			
§ 6115	Loans on, or lending or giving firearms prohibited				●			
§ 6116	False evidence of identity				●			
§ 6117	Altering or obliterating marks of identification						●	
§ 6121	Certain bullets prohibited					●		
§ 6122	Proof of license and exception				●			

18 Pa.C.S. Ch. 61 Subch. A. by grade of offense

See Exhibit 1.1

VUFA Definitions

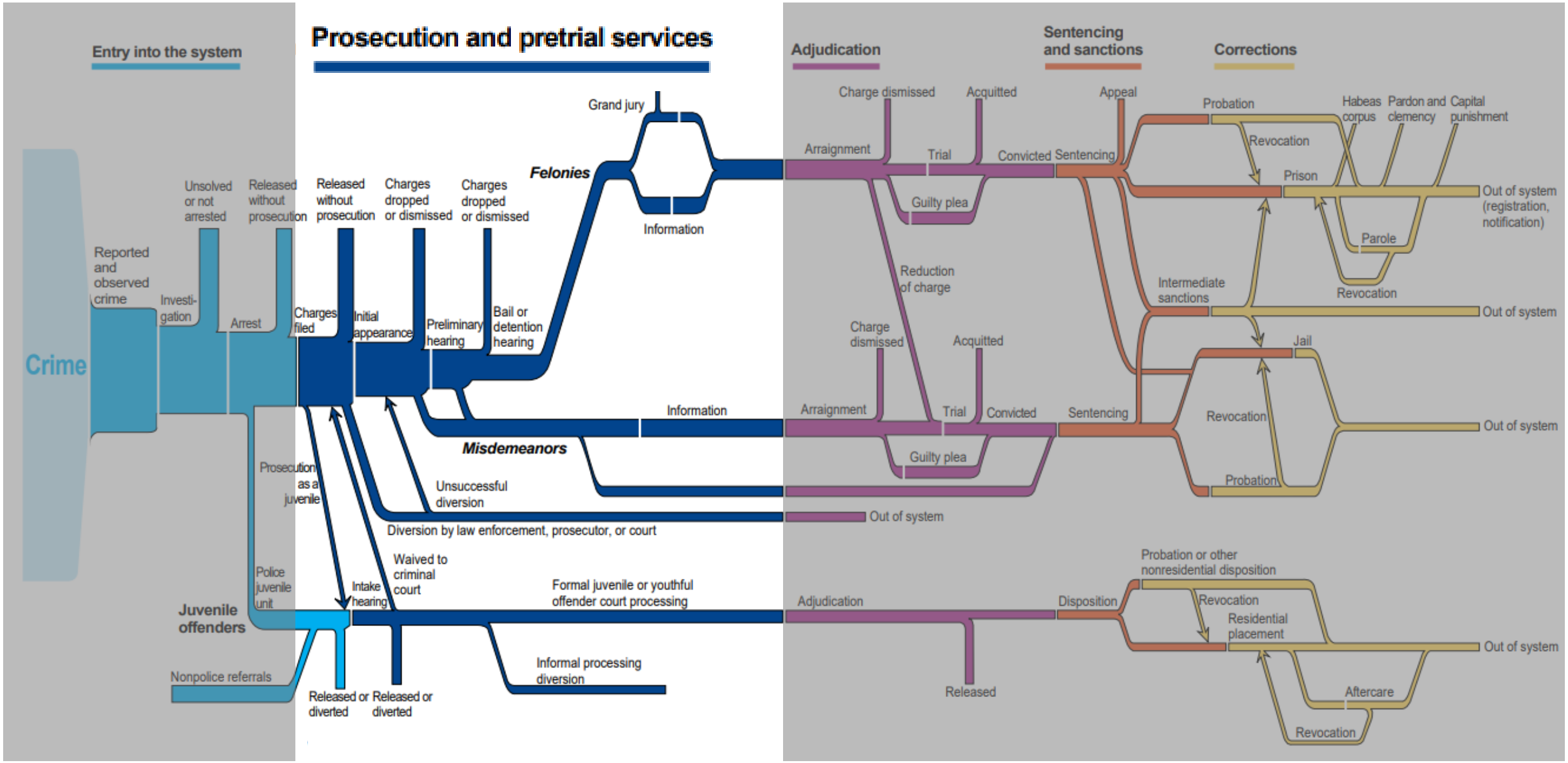
(1) All VUFA dockets – dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A. These dockets may contain multiple VUFA charges and/or may contain a mix of other charges in addition to the VUFA offenses;

(2) F1/F2 VUFA dockets– dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A that is an F1 or F2 (see Exhibit 1.1). Dockets containing F1/F2 charges from other chapters, if they do not also contain an F1/F2 VUFA offense, are excluded; and

(3) VUFA dockets co-charged with a violent offense – dockets that contain at least one charged offense from 18 Pa.C.S. Chapter 61-A and also at least one charge of a violent offense, as defined in HR 111.

Violent Offense Definition (act, conspiracy, solicitation)

(1) Section 2501 (relating to criminal homicide)
(2) Section 2702 (relating to aggravated assault)
(3) Section 2702.1 (relating to assault of a law enforcement officer)
(4) Section 2703 (relating to assault by prisoner)
(5) Section 2703.1 (relating to aggravated harassment by prisoner)
(6) Section 2718 (relating to strangulation)
(7) Section 3121 (relating to rape)
(8) Section 3123 (relating to involuntary deviate sexual intercourse)
(9) Section 3124.1 (relating to sexual assault)
(10) Section 3124.2 (relating to institutional sexual assault)
(11) Section 3125 (relating to aggravated indecent assault)
(12) Section 3126 (relating to indecent assault)
(13) Section 3301 (relating to arson and related offenses)
(14) Section 5501 (relating to riot)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Acquitted
Arraignment
Trial
Convicted
Guilty plea
Adjudication
Released
Appeal
Sentencing
Sentencing
Disposition
Probation
Habeas corpus
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Parole
Revocation
Intermediate sanctions
Out of system
Jail
Revocation
Out of system
Probation
Probation or other nonresidential disposition
Revocation
Residential placement
Out of system
Aftercare
Revocation

Municipal Court

[n= 18,026]

Total VUFA dockets

[n= 51,618]

Magisterial District Court

[n= 33,592]

All cases that include a VUFA offense under Title 18 Pa.C.S. Chapter 61; 2015-2020

Data Source: Common Pleas Case Management System of the Administrative Office of Pennsylvania Courts

VUFA dockets by County Class, filings 2015 - 2020

	All VUFA Dockets		F1/F2 VUFA Dockets		VUFA Dockets Co-Charged w/ Violent Offenses	
First Class	18,026	34.9%	8,901	39.8%	4,131	51.4%
Second Class	7,365	14.3%	3,195	14.3%	1,031	12.8%
Second Class A	4,566	8.8%	1,643	7.3%	749	9.3%
Third Class	11,642	22.6%	4,952	22.1%	1,329	16.5%
Fourth Class	4,377	8.5%	1,581	7.1%	394	4.9%
Fifth-Eighth Class	5,642	10.9%	2,088	9.3%	399	5.0%
Statewide	**51,618**		**22,360**		**8,033**	

See Exhibit 1.2

Municipal Court

[n= 18,026]

Total VUFA dockets

[n= 51,618]

Magisterial District Court

[n= 33,592]

4 offense types account for roughly 95% of all VUFA charges

- §6105 - persons not to possess, use, manufacture, control, sell, or transfer firearms
- §6106 - firearms not to be carried without a license
- §6108 - carrying firearms on public street or public property in Philadelphia
- §6111 - sale or transfer of firearms

Of the VUFA charges

- 24 percent Misdemeanor 1 offenses
- 40 percent Felony 3 offenses
- 22 percent Felony 2 offenses
- 7 percent Felony 1 offenses

Municipal Court

[n= 18,026]

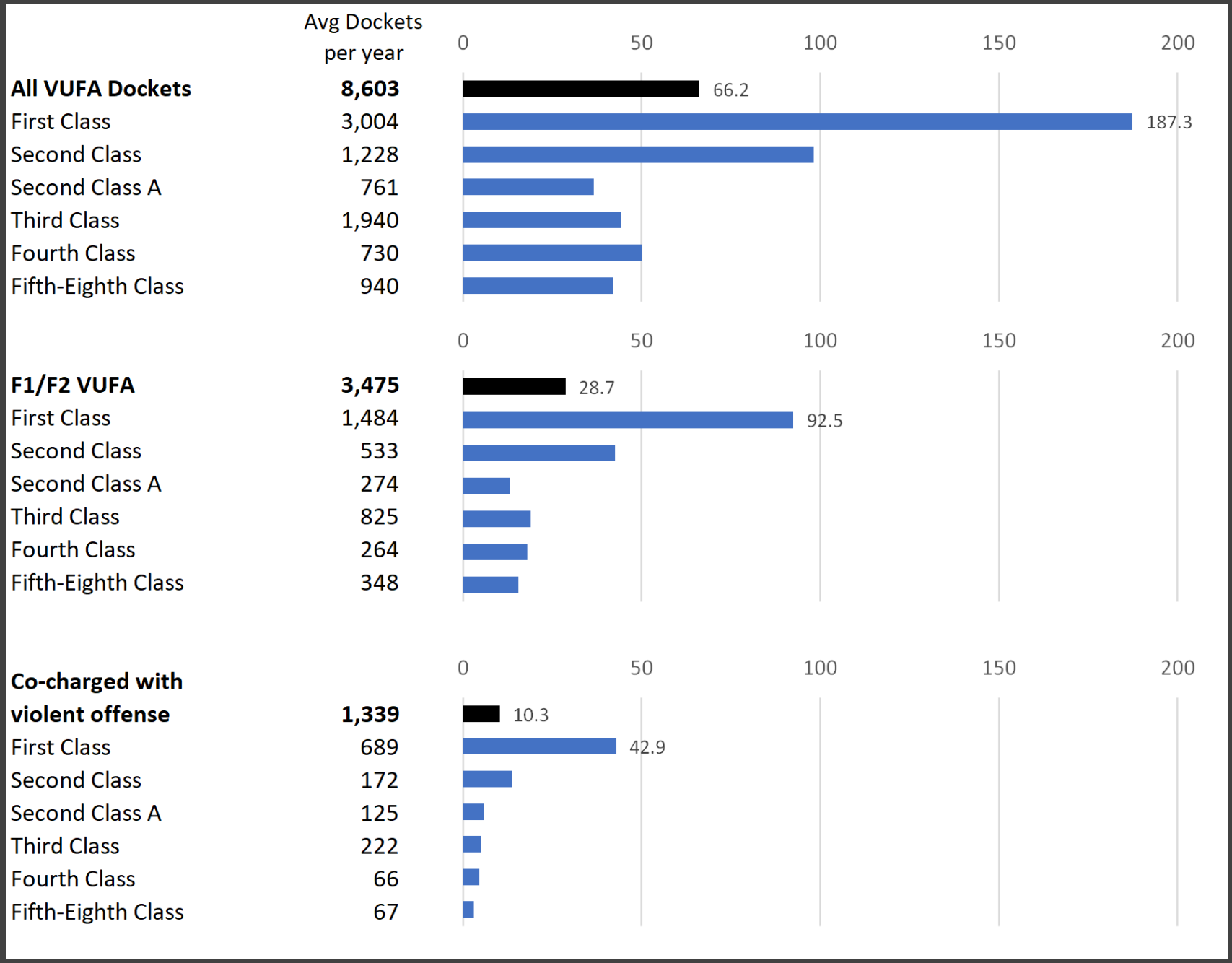
Total VUFA dockets

[n= 51,618]

Magisterial District Court

[n= 33,592]

VUFA Dockets per 100,000 population



See Exhibit 1.7

Municipal Court

[n= 18,026]

Total VUFA dockets

[n= 51,618]

Magisterial District Court

[n= 33,592]

Municipal Court

[n= 18,026]

Total VUFA dockets

[n= 51,618]

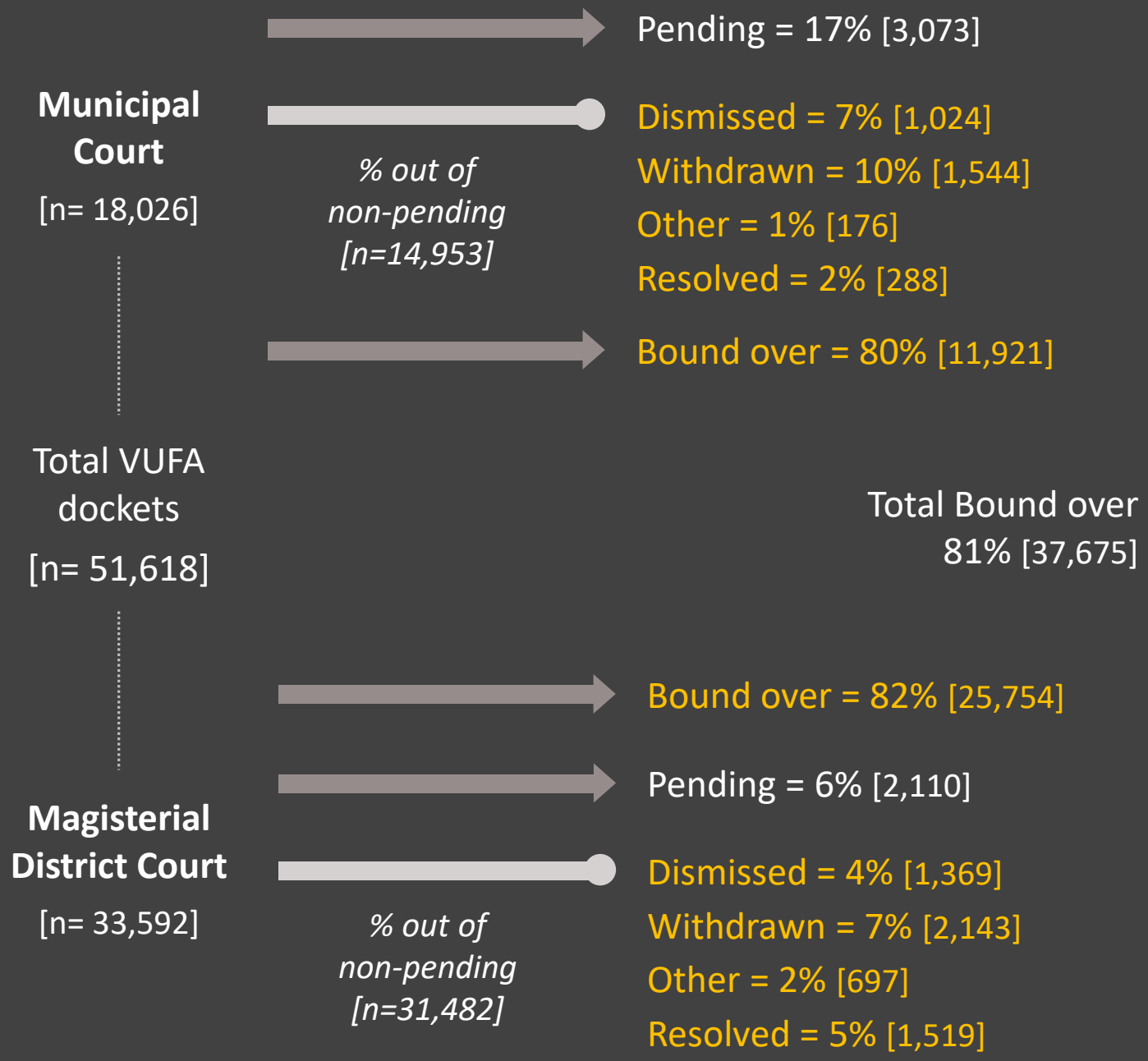
Magisterial District Court

[n= 33,592]

Pending VUFA dockets in the Lower Courts

	All VUFA Dockets			F1/F2 VUFA Dockets			Co-charged w/ a violent offense		
	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending
Statewide	**51,618**	**5,183**	**10.0%**	**22,360**	**2,124**	**9.5%**	**8,033**	**840**	**10.5%**
First Class	18,026	3,073	17.0%	8,901	1,311	14.7%	4,131	541	13.1%
Second Class	7,365	466	6.3%	3,195	202	6.3%	1,031	64	6.2%
Second Class A	4,566	482	10.6%	1,643	162	9.9%	749	101	13.5%
Third Class	11,642	665	5.7%	4,952	286	5.8%	1,329	97	7.3%
Fourth Class	4,377	238	5.4%	1,581	79	5.0%	394	19	4.8%
Fifth-Eighth Class	5,642	259	4.6%	2,088	84	4.0%	399	18	4.5%

See Exhibit 2.1


Municipal Court
[n= 18,026]
Pending = 17% [3,073]
Dismissed = 7% [1,024]
Withdrawn = 10% [1,544]
Other = 1% [176]
Resolved = 2% [288]
% out of non-pending [n=14,953]
Bound over = 80% [11,921]
Total VUFA dockets
[n= 51,618]
Total Bound over
81% [37,675]
Bound over = 82% [25,754]
Pending = 6% [2,110]
Magisterial District Court
[n= 33,592]
Dismissed = 4% [1,369]
Withdrawn = 7% [2,143]
Other = 2% [697]
Resolved = 5% [1,519]
% out of non-pending [n=31,482]

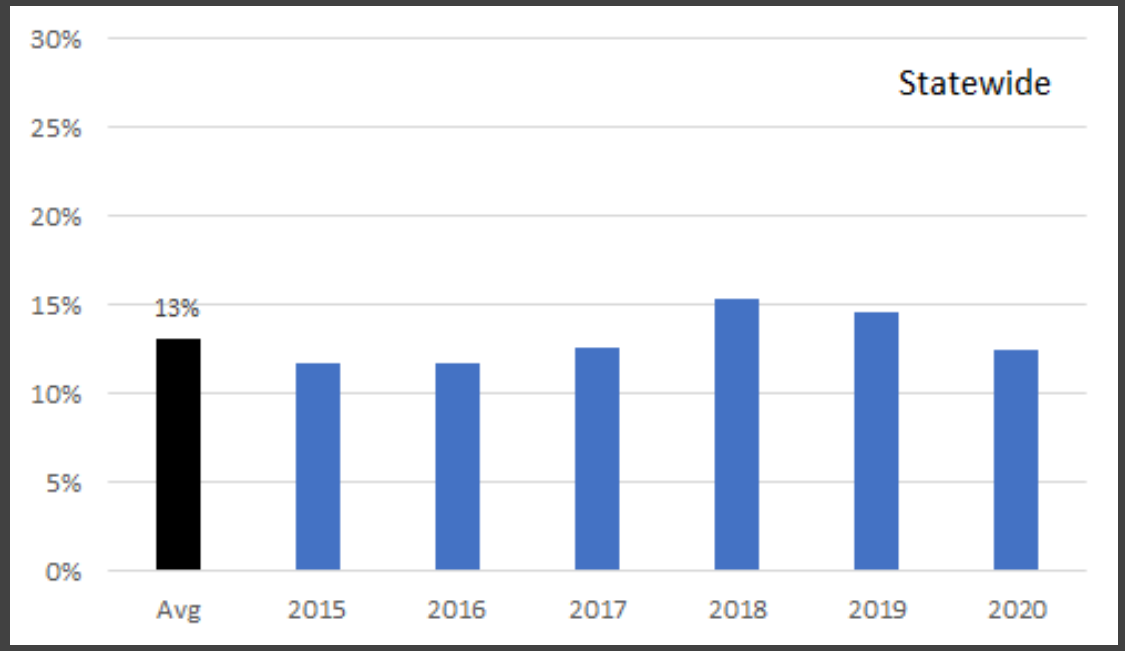
		Dockets not Pending	Withdrawn	Dismissed	Other	Resolved in Lower Court	Bound Over
All VUFA	**Statewide**	**46,435**	**8%**	**5%**	**2%**	**4%**	**81%**
	First Class	14,953	10%	7%	1%	2%	80%
	Second Class	6,899	11%	8%	2%	<1%	79%
	Second Class A	4,084	6%	6%	<1%	<1%	88%
	Third Class	10,977	5%	3%	2%	6%	84%
	Fourth Class	4,139	7%	5%	5%	7%	77%
	Fifth-Eighth Class	5,383	6%	1%	3%	11%	79%
F1/F2 VUFA	**Statewide**	**20,236**	**8%**	**5%**	**1%**	**1%**	**86%**
	First Class	7,590	10%	7%	1%	1%	82%
	Second Class	2,993	10%	6%	1%	<1%	83%
	Second Class A	1,481	6%	4%	<1%	<1%	90%
	Third Class	4,666	4%	2%	0%	1%	92%
	Fourth Class	1,502	6%	5%	<1%	1%	88%
	Fifth-Eighth Class	2,004	6%	1%	<1%	1%	91%
Co-Charged with a Violent Offense	**Statewide**	**7,193**	**10%**	**5%**	**<1%**	**<1%**	**84%**
	First Class	3,590	12%	5%	1%	<1%	82%
	Second Class	967	17%	6%	<1%	<1%	77%
	Second Class A	648	4%	9%	<1%	<1%	87%
	Third Class	1,232	6%	3%	<1%	<1%	91%
	Fourth Class	375	6%	8%	<1%	<1%	86%
	Fifth-Eighth Class	381	6%	2%	<1%	1%	91%

Disposition of Lower Court VUFA dockets as proportion of non-pending dockets

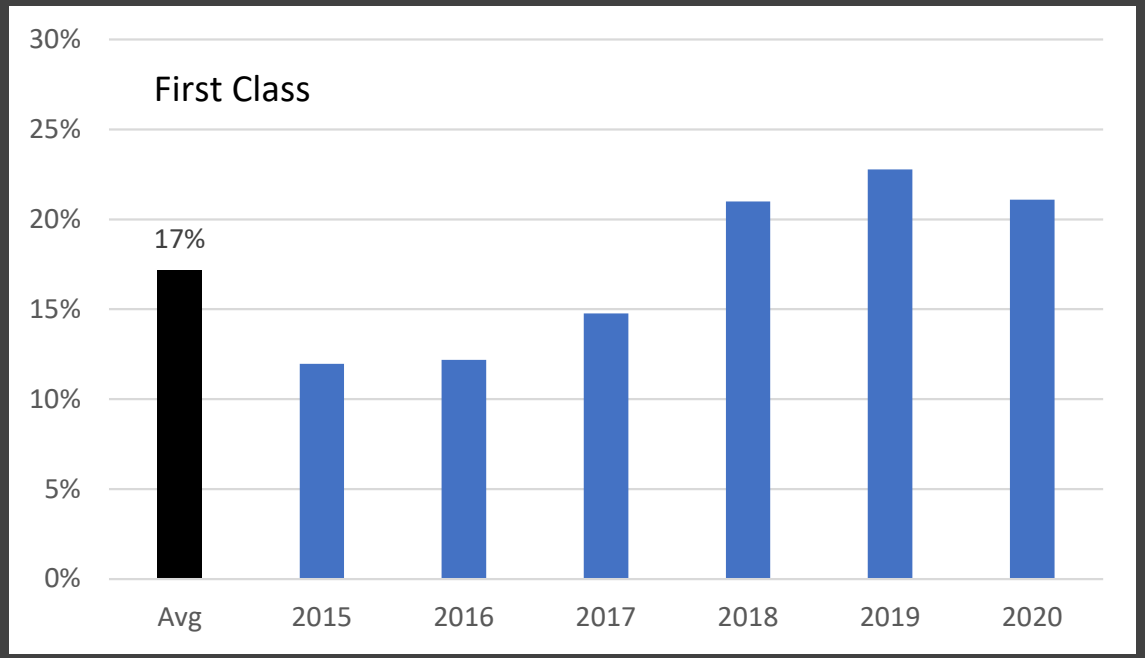
See Exhibit 2.2

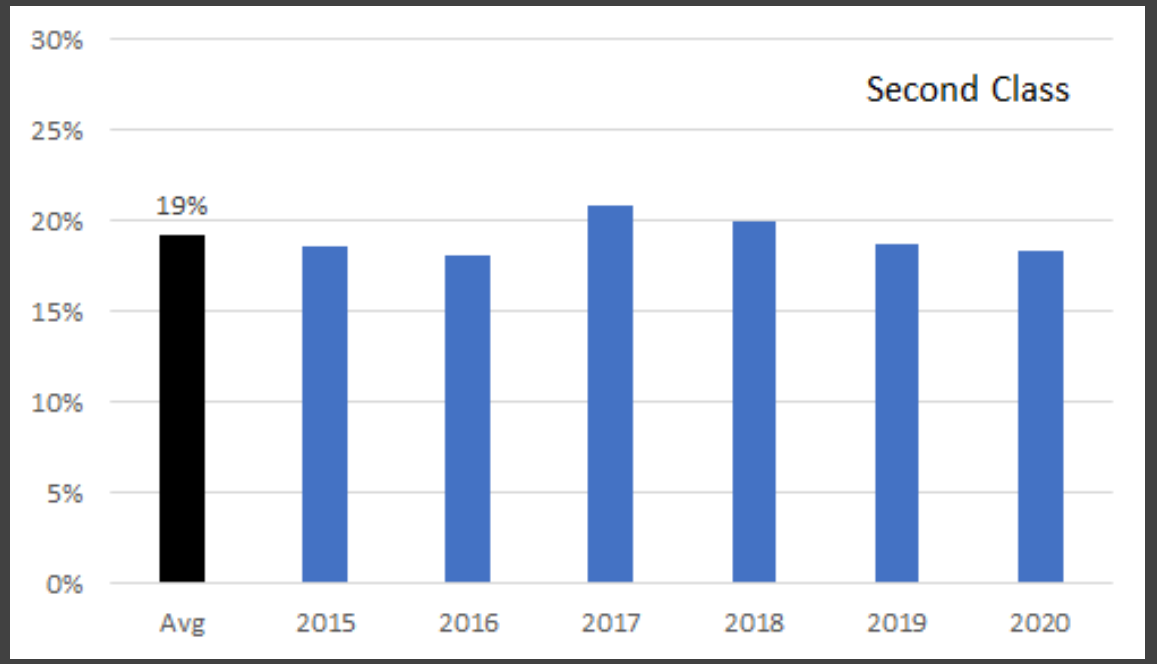
Percentage of Dismissed and Withdrawn non-pending Dockets

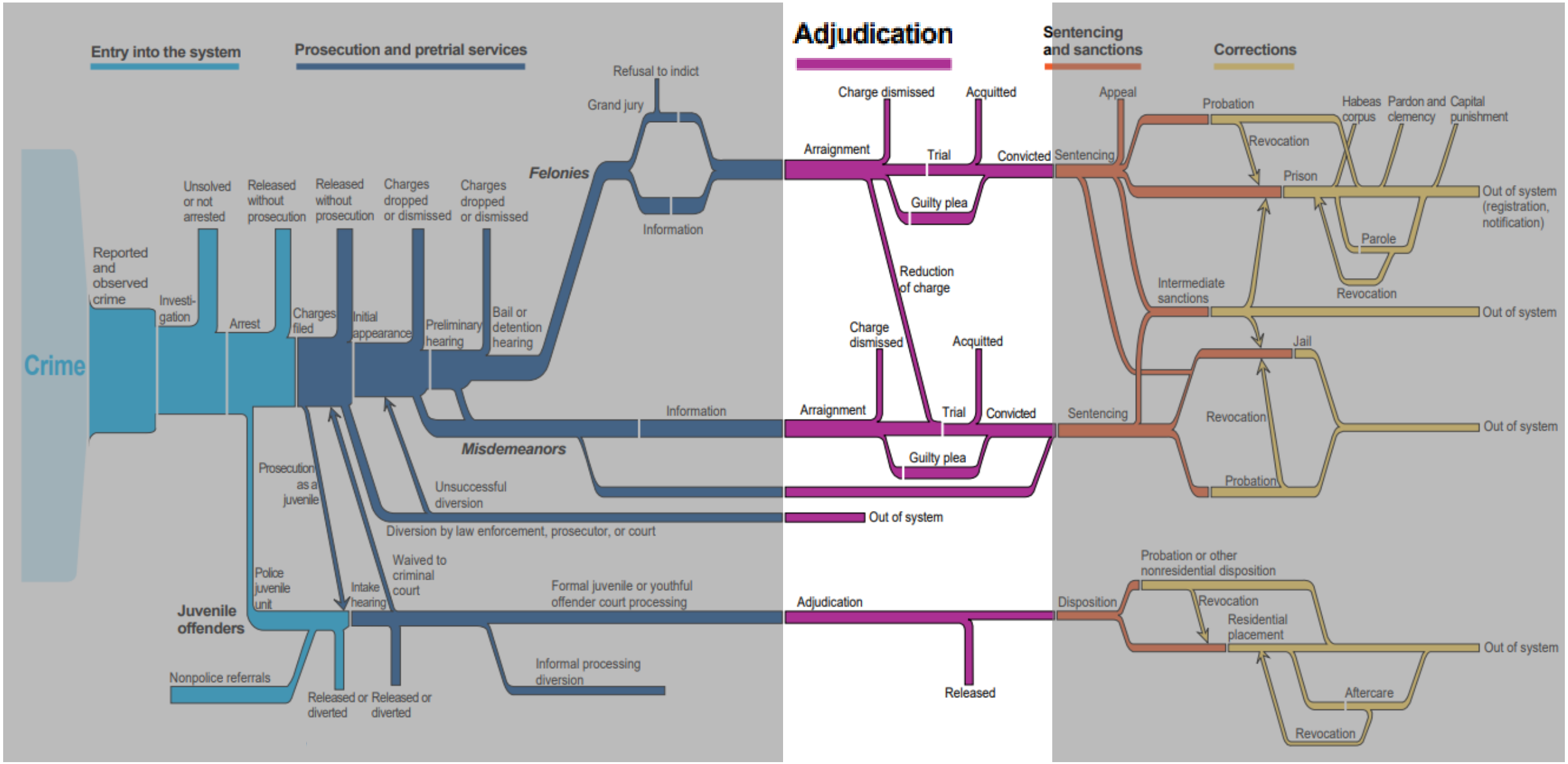
Lower Court All VUFA dockets

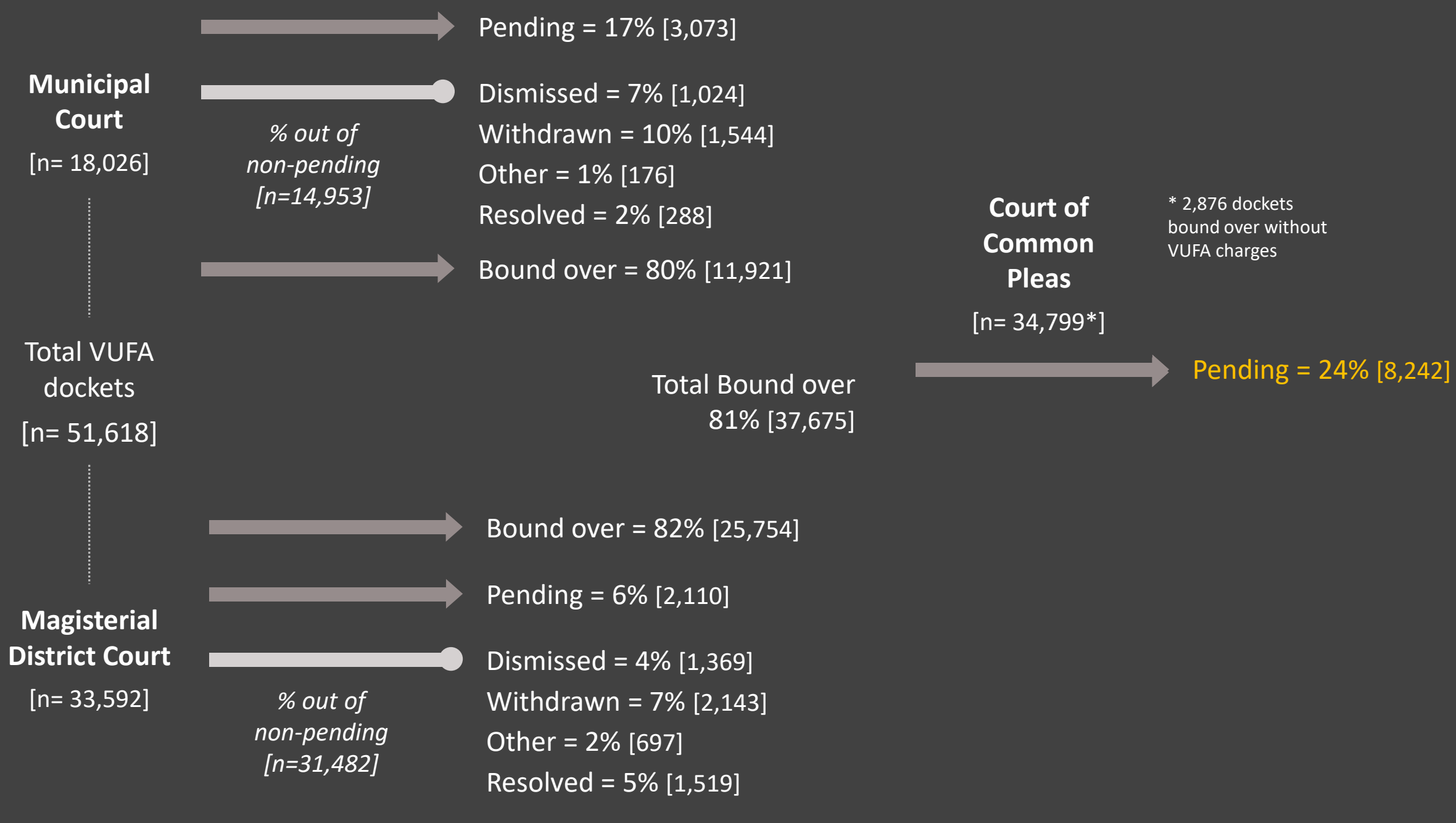


See Exhibit 2.3





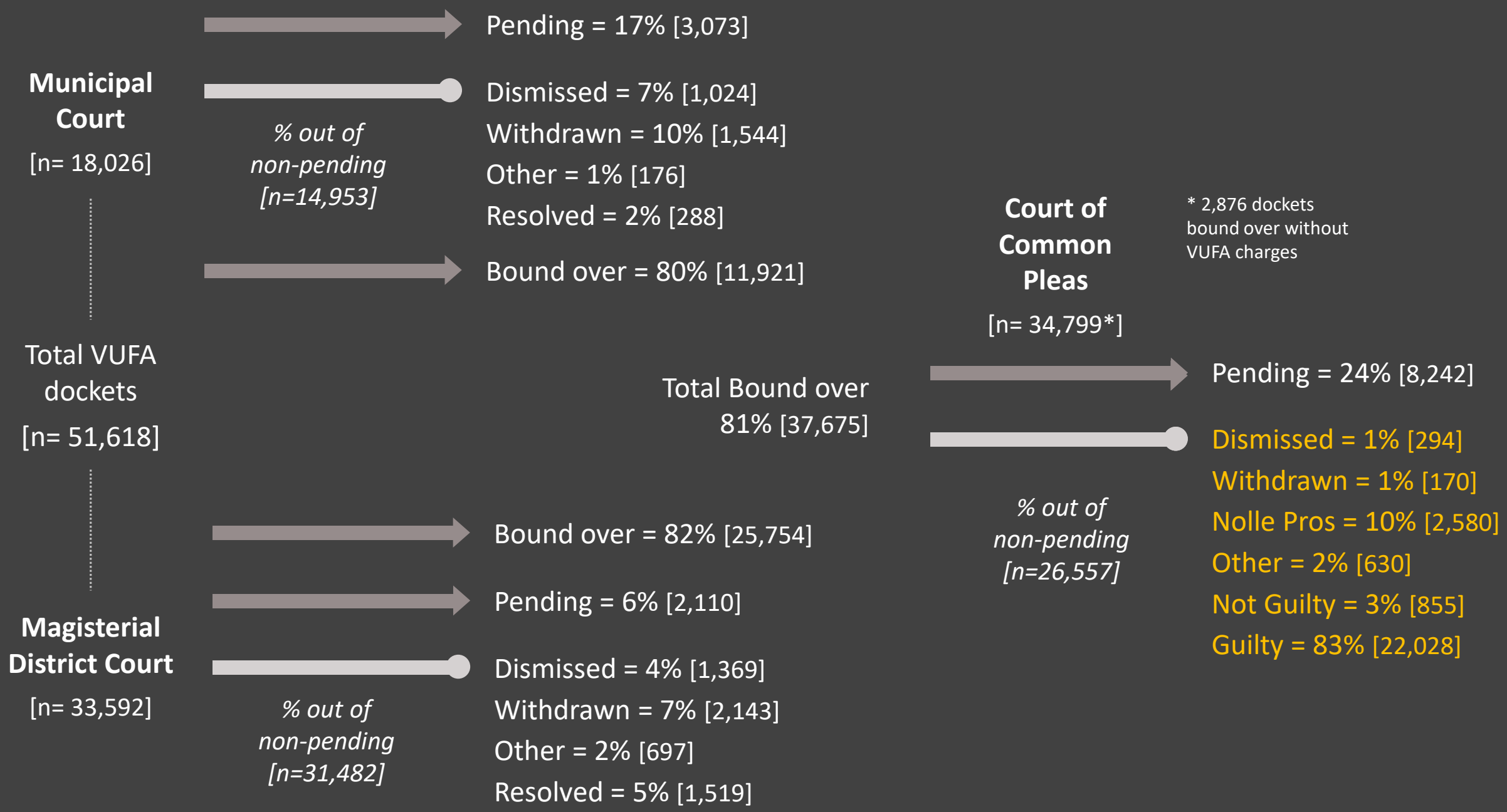

Entry into the system
Prosecution and pretrial services
Adjudication
Sentencing and sanctions
Corrections
Crime
Reported and observed crime
Unsolved or not arrested
Released without prosecution
Released without prosecution
Charges dropped or dismissed
Charges dropped or dismissed
Investi-gation
Arrest
Charges filed
Initial appearance
Preliminary hearing
Bail or detention hearing
Refusal to indict
Grand jury
Information
Felonies
Information
Misdemeanors
Prosecution as a juvenile
Unsuccessful diversion
Diversion by law enforcement, prosecutor, or court
Out of system
Juvenile offenders
Police juvenile unit
Intake hearing
Waived to criminal court
Formal juvenile or youthful offender court processing
Informal processing diversion
Nonpolice referrals
Released or diverted
Released or diverted
Charge dismissed
Acquitted
Arraignment
Trial
Convicted
Guilty plea
Reduction of charge
Charge dismissed
Acquitted
Arraignment
Trial
Convicted
Guilty plea
Adjudication
Released
Appeal
Probation
Habeas corpus
Pardon and clemency
Capital punishment
Revocation
Sentencing
Prison
Out of system (registration, notification)
Parole
Revocation
Intermediate sanctions
Out of system
Jail
Sentencing
Revocation
Out of system
Probation
Probation or other nonresidential disposition
Disposition
Revocation
Residential placement
Out of system
Aftercare
Revocation


Municipal Court
[n= 18,026]
% out of non-pending [n=14,953]
Pending = 17% [3,073]
Dismissed = 7% [1,024]
Withdrawn = 10% [1,544]
Other = 1% [176]
Resolved = 2% [288]
Bound over = 80% [11,921]
Total VUFA dockets
[n= 51,618]
Total Bound over
81% [37,675]
Court of Common Pleas
[n= 34,799*]
* 2,876 dockets bound over without VUFA charges
Pending = 24% [8,242]
Magisterial District Court
[n= 33,592]
% out of non-pending [n=31,482]
Bound over = 82% [25,754]
Pending = 6% [2,110]
Dismissed = 4% [1,369]
Withdrawn = 7% [2,143]
Other = 2% [697]
Resolved = 5% [1,519]

Pending VUFA dockets at the Court of Common Pleas

	All VUFA			F1/F2 VUFA			Co-Charged with a Violent Offense		
	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending
Statewide	**34,799**	**26,557**	**23.7%**	**17,154**	**12,847**	**25.1%**	**5,424**	**3,834**	**29.3%**
First Class	10,974	8,474	22.8%	5,881	4,593	21.9%	2,642	1,884	28.7%
Second Class	5,091	4,103	19.4%	2,330	1,786	23.3%	665	495	25.6%
Second Class A	3,100	2,359	23.9%	1,592	1,203	24.4%	487	350	28.1%
Third Class	8,692	6,860	21.1%	4,294	3,261	24.1%	1,013	728	28.1%
Fourth Class	2,887	1,842	36.2%	1,296	820	36.7%	296	184	37.8%
Fifth-Eighth Class	4,055	2,919	28.0%	1,761	1,184	32.8%	321	193	39.9%

See Exhibit 2.4


Municipal Court
[n= 18,026]
Pending = 17% [3,073]
Dismissed = 7% [1,024]
Withdrawn = 10% [1,544]
Other = 1% [176]
Resolved = 2% [288]
% out of non-pending [n=14,953]
Bound over = 80% [11,921]
Total VUFA dockets
[n= 51,618]
Total Bound over
81% [37,675]
Court of Common Pleas
[n= 34,799*]
* 2,876 dockets bound over without VUFA charges
Pending = 24% [8,242]
Dismissed = 1% [294]
Withdrawn = 1% [170]
Nolle Pros = 10% [2,580]
Other = 2% [630]
Not Guilty = 3% [855]
Guilty = 83% [22,028]
% out of non-pending [n=26,557]
Bound over = 82% [25,754]
Pending = 6% [2,110]
Magisterial District Court
[n= 33,592]
Dismissed = 4% [1,369]
Withdrawn = 7% [2,143]
Other = 2% [697]
Resolved = 5% [1,519]
% out of non-pending [n=31,482]

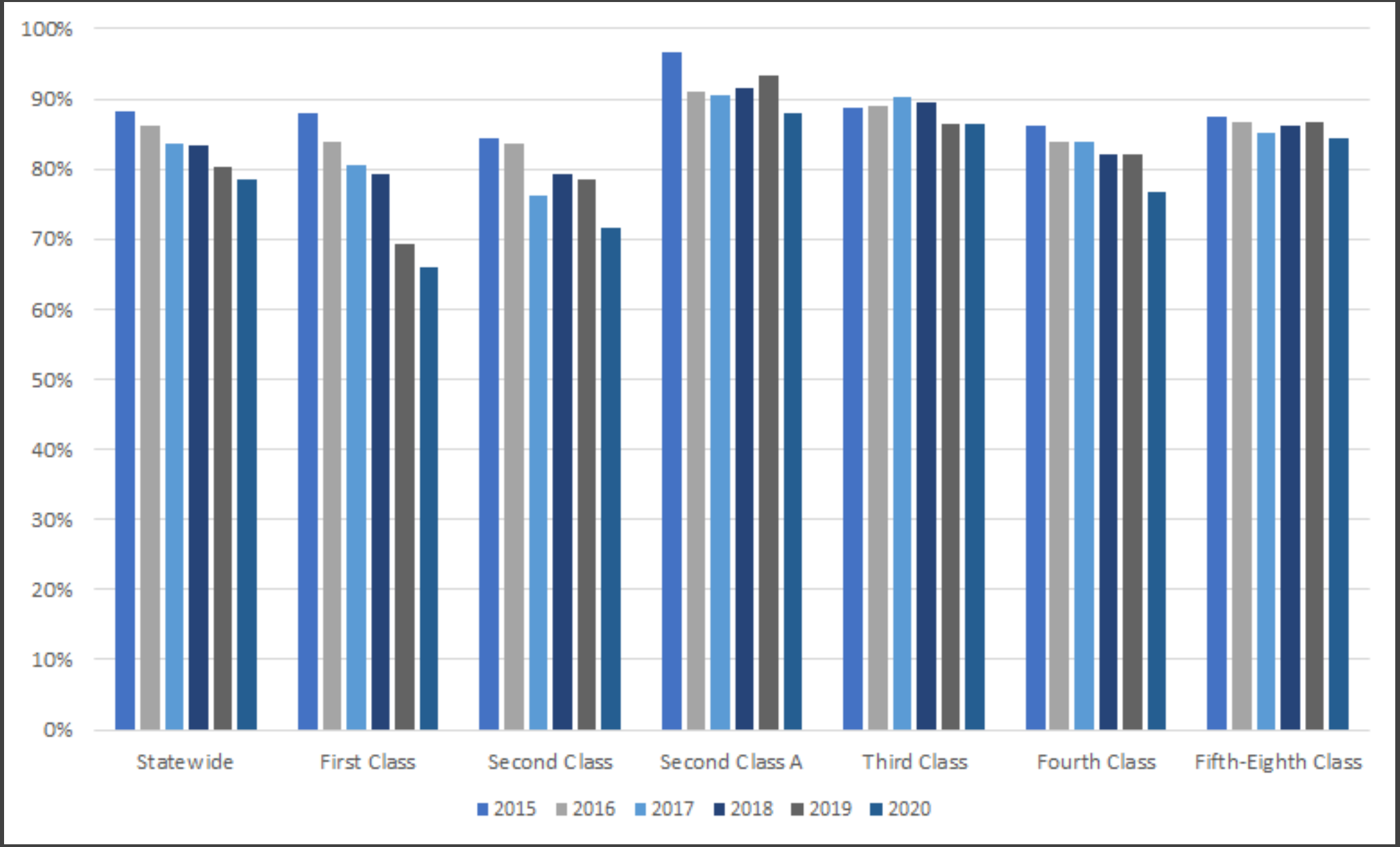
Court of Common Pleas Dispositions [2015-2020]

Other includes: transfer, ARD, held, etc.

		Dockets not Pending	Guilty	Not Guilty	Withdrawn	Nolle Prossed	Dismissed	Other
All VUFA	**Statewide**	**26,557**	**83%**	**3%**	**1%**	**10%**	**1%**	**2%**
	First Class	8,474	77%	5%	0%	13%	1%	3%
	Second Class	4,103	78%	6%	1%	12%	0%	2%
	Second Class A	2,359	92%	2%	1%	4%	1%	1%
	Third Class	6,860	88%	1%	1%	6%	1%	2%
	Fourth Class	1,842	82%	1%	1%	10%	1%	4%
	Fifth-Eighth Class	2,919	86%	1%	1%	8%	2%	3%
F1/F2 VUFA	**Statewide**	**12,847**	**81%**	**4%**	**1%**	**12%**	**1%**	**1%**
	First Class	4,593	75%	6%	0%	15%	1%	2%
	Second Class	1,786	73%	6%	2%	16%	1%	3%
	Second Class A	1,203	91%	3%	0%	5%	0%	0%
	Third Class	3,261	87%	2%	1%	9%	1%	1%
	Fourth Class	820	81%	2%	1%	14%	2%	1%
	Fifth-Eighth Class	1,184	86%	1%	1%	9%	2%	1%
Co-Charged with a Violent Offense	**Statewide**	**3,834**	**86%**	**5%**	**0%**	**6%**	**1%**	**2%**
	First Class	1,884	83%	6%	0%	7%	1%	3%
	Second Class	495	83%	5%	0%	10%	0%	2%
	Second Class A	350	91%	5%	1%	2%	1%	1%
	Third Class	728	93%	3%	0%	2%	1%	1%
	Fourth Class	184	85%	3%	0%	11%	1%	1%
	Fifth-Eighth Class	193	90%	2%	0%	4%	2%	2%

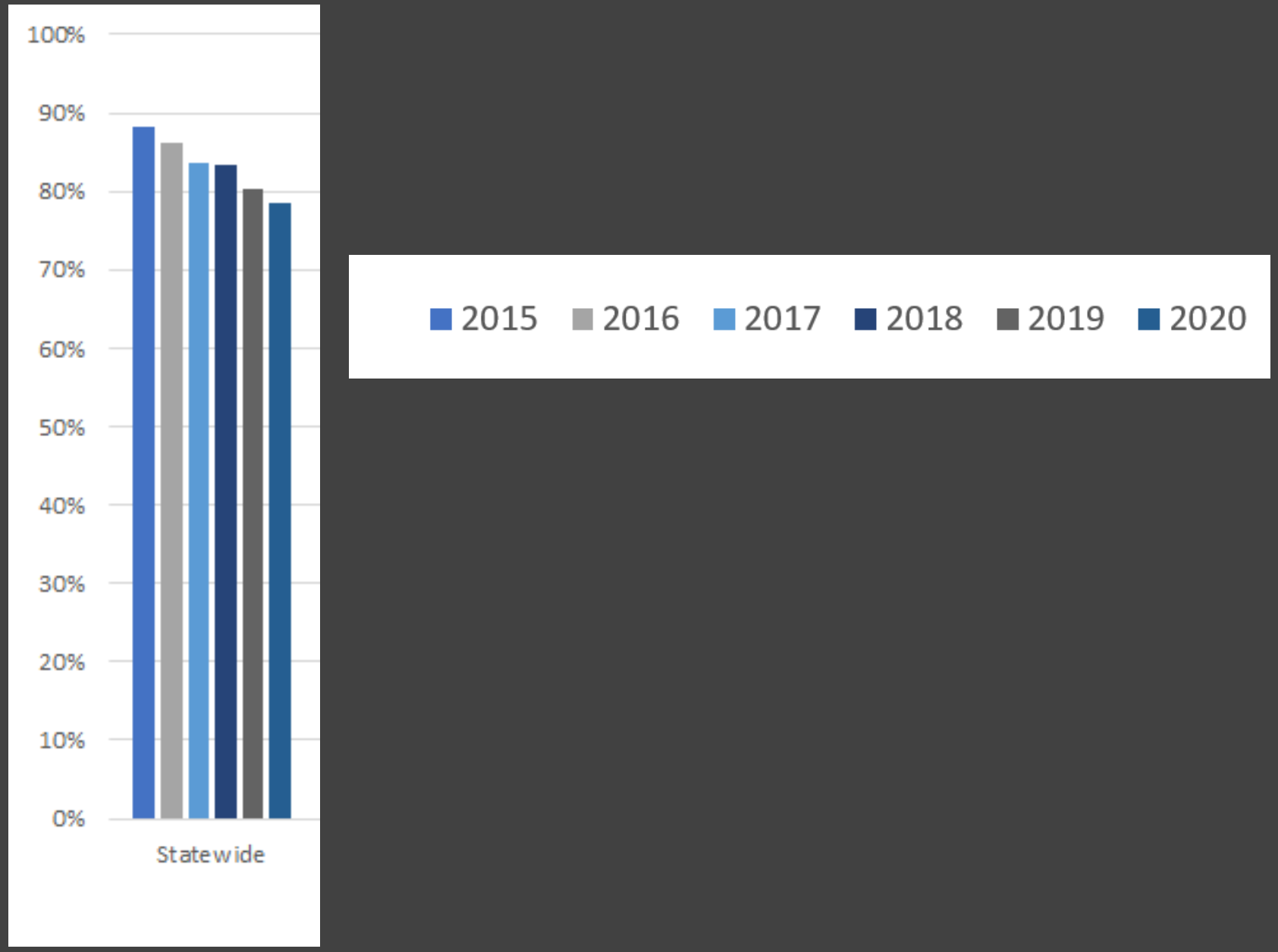
See Exhibit 2.5

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]

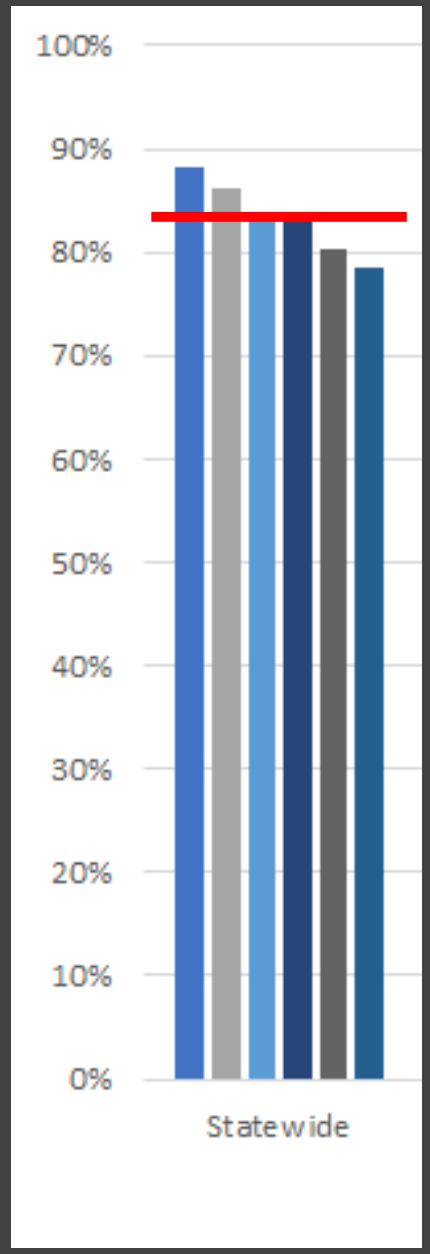


All non-pending VUFA dockets

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



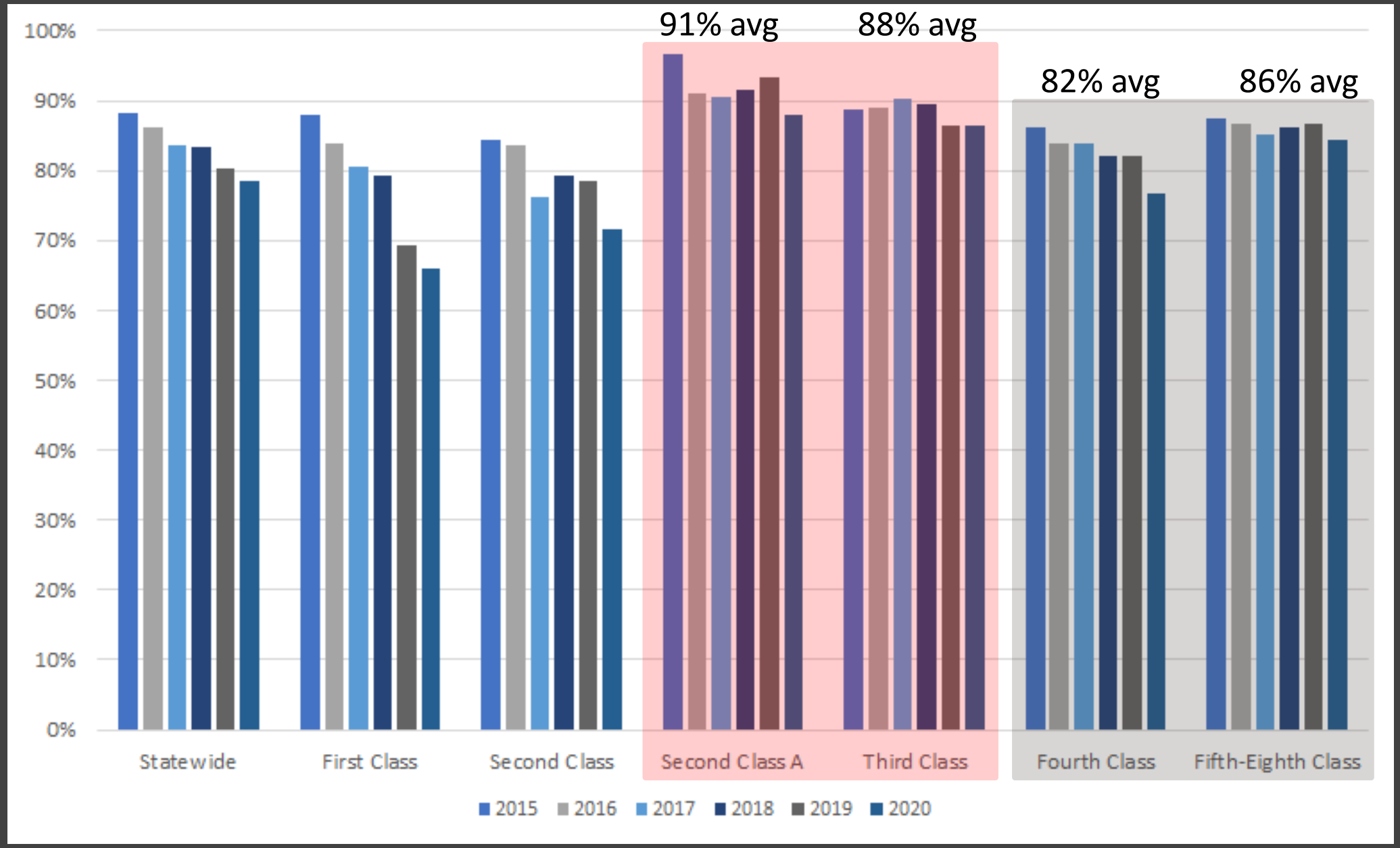
Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



83% guilty

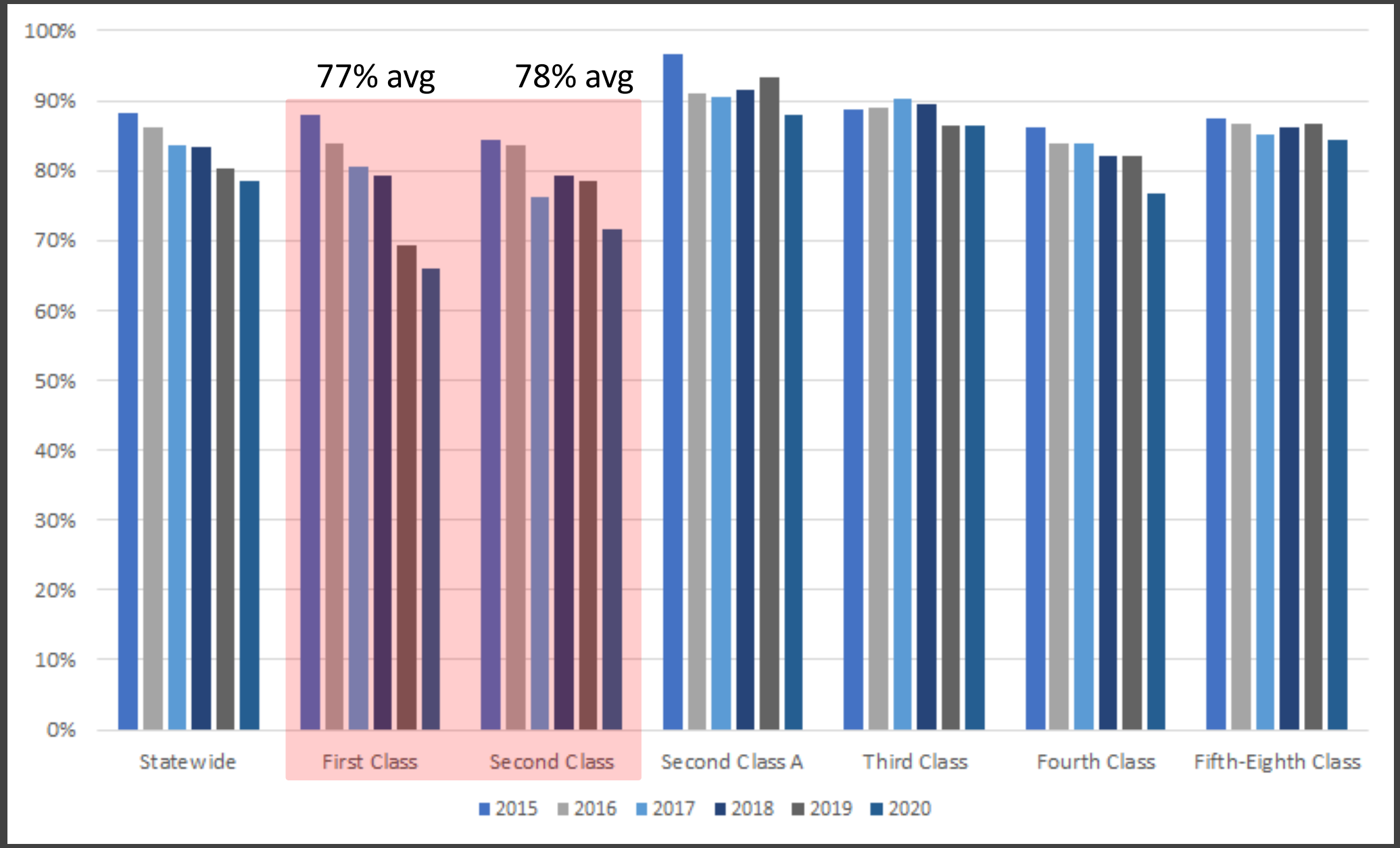
2015-2020, Statewide

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



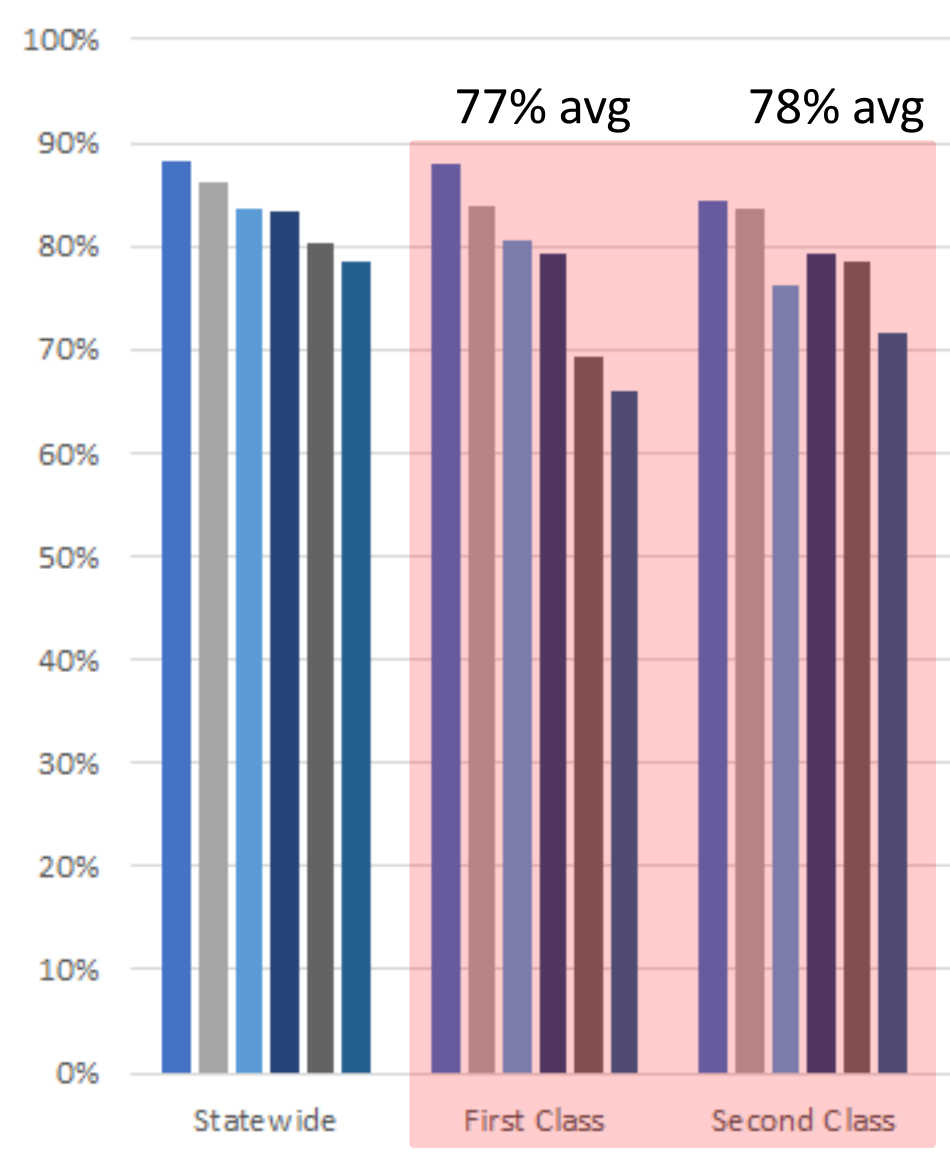
All non-pending VUFA dockets

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



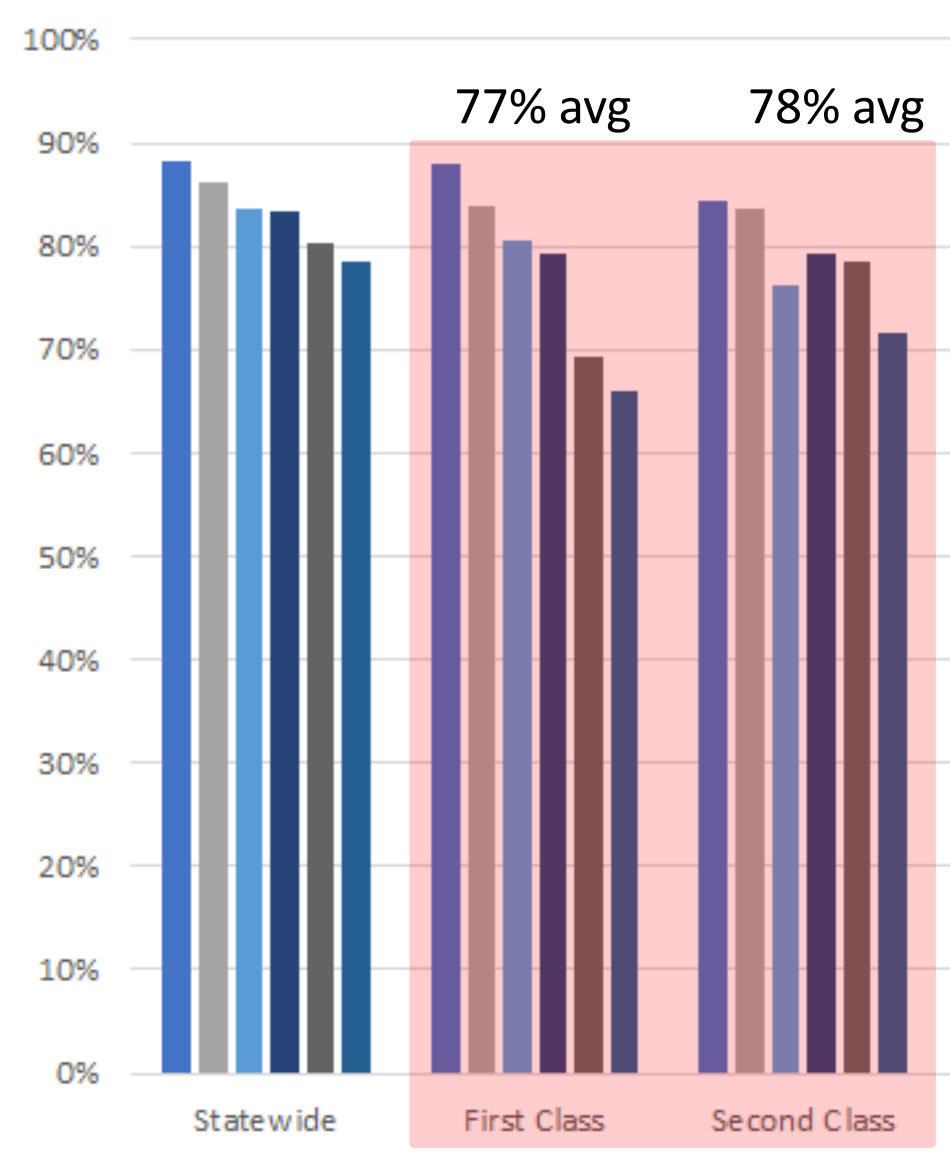
All non-pending VUFA dockets

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



		Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed	Percent Dismissed	Other
First Class	2015	339	88%	4%	0%	7%	0%	1%
	2016	1,428	84%	4%	0%	10%	1%	1%
	2017	2,042	80%	5%	0%	12%	1%	2%
	2018	2,202	79%	4%	0%	13%	1%	3%
	2019	1,646	69%	7%	0%	18%	2%	4%
	2020	767	66%	5%	0%	21%	4%	4%
Second Class	2015	206	84%	4%	1%	9%	0%	1%
	2016	731	84%	5%	0%	9%	0%	2%
	2017	847	76%	9%	1%	13%	0%	1%
	2018	848	79%	6%	2%	10%	1%	1%
	2019	876	78%	7%	1%	12%	0%	2%
	2020	549	72%	6%	1%	18%	0%	3%
Statewide	2015	1,414	88%	2%	1%	7%	1%	1%
	2016	4,653	86%	3%	0%	8%	1%	2%
	2017	5,595	84%	4%	1%	9%	1%	2%
	2018	5,839	83%	3%	1%	9%	1%	3%
	2019	5,393	80%	4%	1%	11%	1%	3%
	2020	3,412	78%	3%	1%	12%	2%	3%

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



		Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed	Percent Dismissed	Other
First Class	2015	339	88%	4%	0%	7%	0%	1%
	2016	1,428	84%	4%	0%	10%	1%	1%
	2017	2,042	80%	5%	0%	12%	1%	2%
	2018	2,202	79%	4%	0%	13%	1%	3%
	2019	1,646	69%	7%	0%	18%	2%	4%
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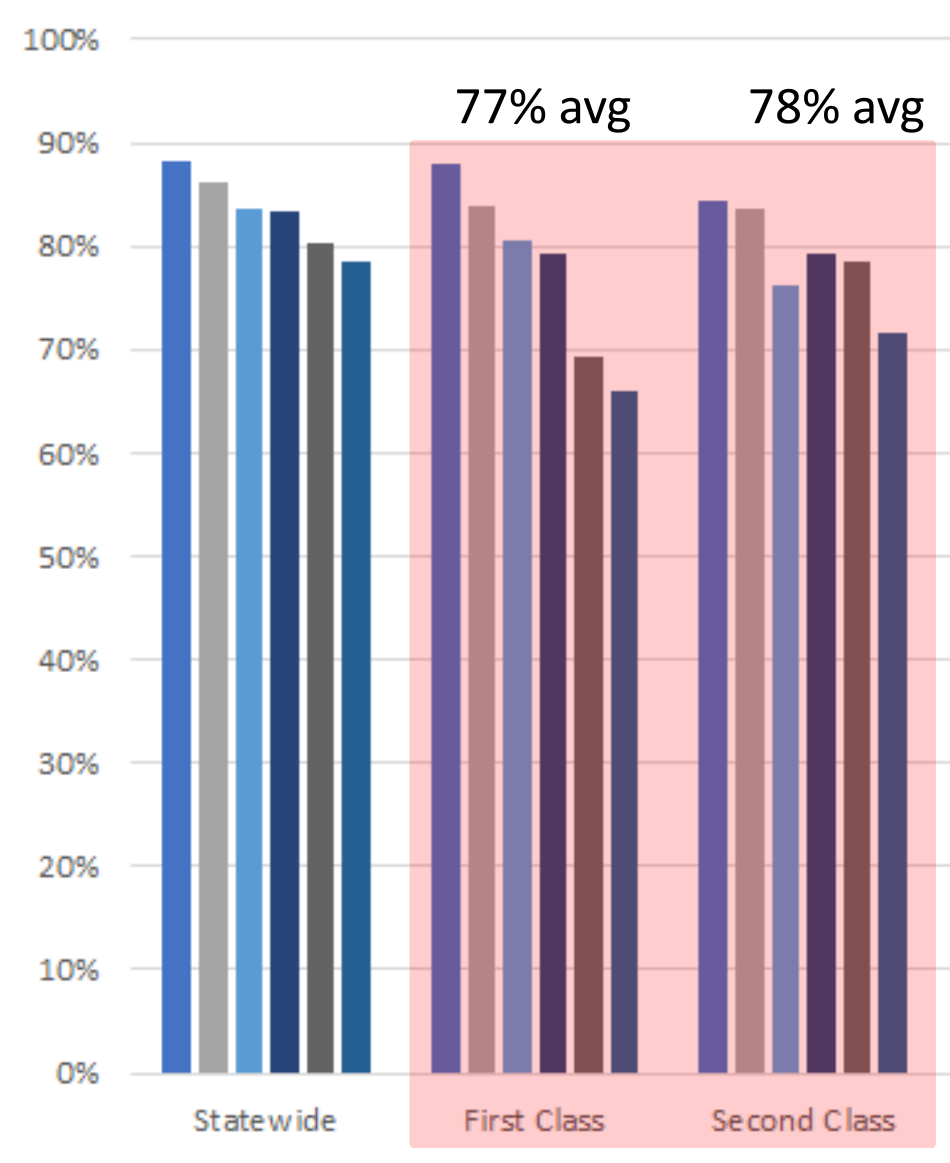
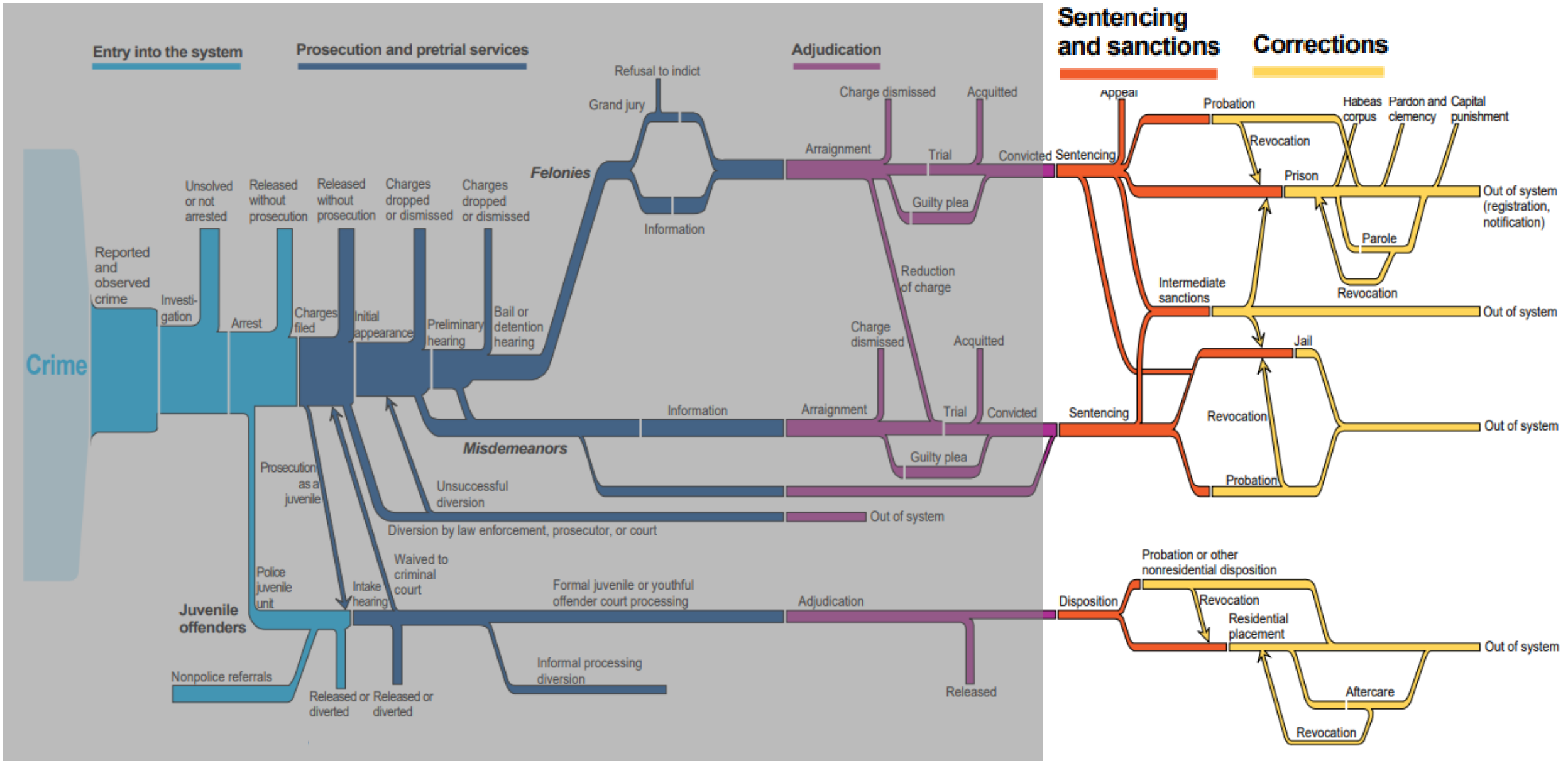
Second Class	2015	206	84%	4%	1%	9%	0%	1%
	2016	731	84%	5%	0%	9%	0%	2%
	2017	847	76%	9%	1%	13%	0%	1%
	2018	848	79%	6%	2%	10%	1%	1%
	2019	876	78%	7%	1%	12%	0%	2%
	2020	549	72%	6%	1%	18%	0%	3%
Statewide	2015	1,414	88%	2%	1%	7%	1%	1%
	2016	4,653	86%	3%	0%	8%	1%	2%
	2017	5,595	84%	4%	1%	9%	1%	2%
	2018	5,839	83%	3%	1%	9%	1%	3%
	2019	5,393	80%	4%	1%	11%	1%	3%
	2020	3,412	78%	3%	1%	12%	2%	3%

Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]



		Non-Pending Cases	Percent Guilty	Percent Not Guilty	Percent Withdrawn	Percent Nolle Prossed	Percent Dismissed	Other
First Class	2015	339	88%	4%	0%	7%	0%	1%
	2016	1,428	84%	4%	0%	10%	1%	1%
	2017	2,042	80%	5%	0%	12%	1%	2%
	2018	2,202	79%	4%	0%	13%	1%	3%
	2019	1,646	69%	7%	0%	18%	2%	4%
	2020	767	66%	5%	0%	21%	4%	4%
Second Class	2015	206	84%	4%	1%	9%	0%	1%
	2016	731	84%	5%	0%	9%	0%	2%
	2017	847	76%	9%	1%	13%	0%	1%
	2018	848	79%	6%	2%	10%	1%	1%
	2019	876	78%	7%	1%	12%	0%	2%
	2020	549	72%	6%	1%	18%	0%	3%
Statewide	2015	1,414	88%	2%	1%	7%	1%	1%
	2016	4,653	86%	3%	0%	8%	1%	2%
	2017	5,595	84%	4%	1%	9%	1%	2%
	2018	5,839	83%	3%	1%	9%	1%	3%
	2019	5,393	80%	4%	1%	11%	1%	3%
	2020	3,412	78%	3%	1%	12%	2%	3%


Entry into the system
Prosecution and pretrial services
Adjudication
Sentencing and sanctions
Corrections
Crime
Reported and observed crime
Unsolved or not arrested
Investi-gation
Released without prosecution
Arrest
Released without prosecution
Charges filed
Charges dropped or dismissed
Initial appearance
Charges dropped or dismissed
Preliminary hearing
Bail or detention hearing
Felonies
Refusal to indict
Grand jury
Information
Charge dismissed
Acquitted
Arraignment
Trial
Convicted
Guilty plea
Reduction of charge
Sentencing
Appeal
Probation
Habeas corpus
Pardon and clemency
Capital punishment
Revocation
Prison
Out of system (registration, notification)
Parole
Revocation
Intermediate sanctions
Out of system
Misdemeanors
Information
Charge dismissed
Acquitted
Arraignment
Trial
Convicted
Guilty plea
Sentencing
Jail
Revocation
Out of system
Probation
Prosecution as a juvenile
Unsuccessful diversion
Out of system
Diversion by law enforcement, prosecutor, or court
Juvenile offenders
Police juvenile unit
Intake hearing
Waived to criminal court
Formal juvenile or youthful offender court processing
Adjudication
Disposition
Probation or other nonresidential disposition
Revocation
Residential placement
Out of system
Aftercare
Revocation
Nonpolice referrals
Released or diverted
Released or diverted
Informal processing diversion
Released

Basic Sentencing Matrix
7th Edition, Amendment 6

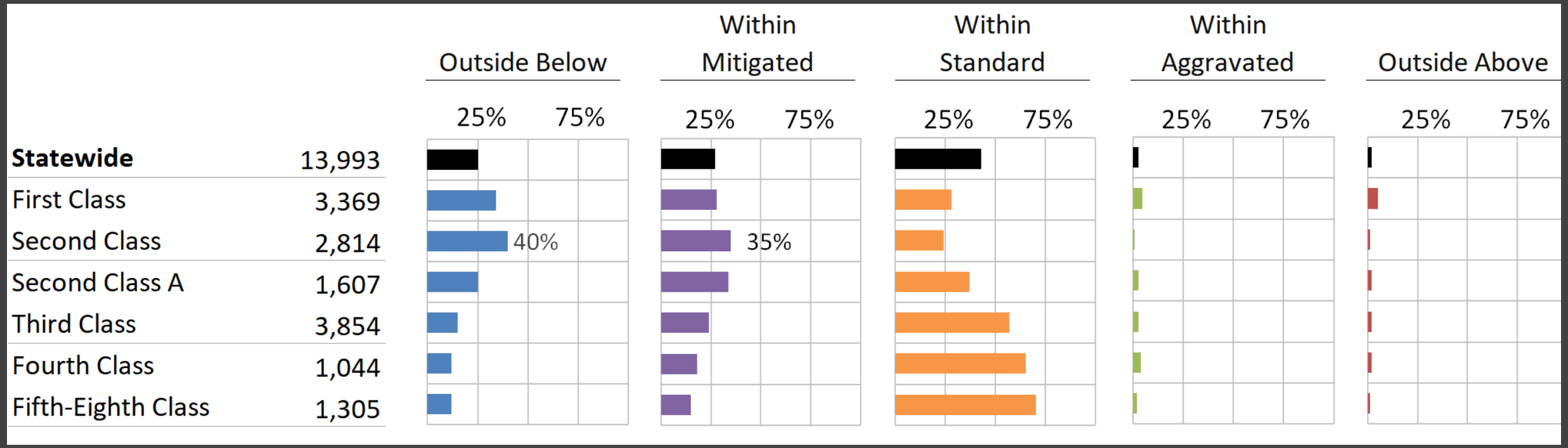
Recommendations
- OGS
- PRS
- Enhancement

Conformity
- Standard
- Aggravated/Mitigated
- Departure (above/below)

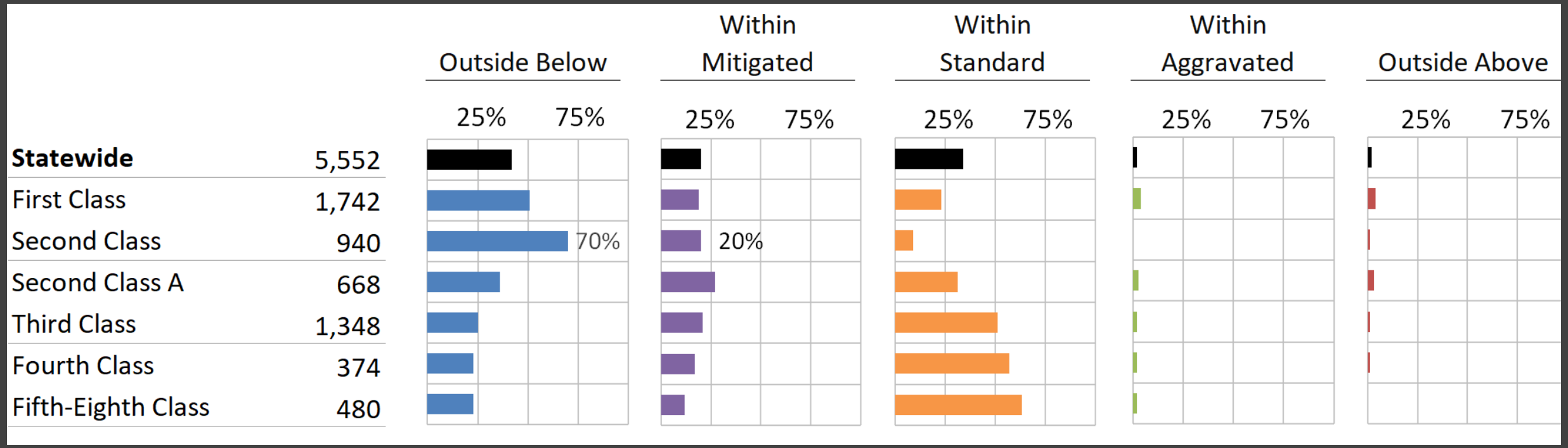
18 Pa.C.S.§6105 (F1)
- OGS 11 (possess/loaded)
- Standard (36-54)
- Aggravated (>54-66)
- Mitigated (24-<36)

Level	OGS	Prior Record Score								AGG/MIT
		0	1	2	3	4	5	RFEL	REVOC	
LEVEL 5	14	72-SL	84-SL	96-SL	120-SL	168-SL	192-SL	204-SL	SL	~/-12
	13	60-78	66-84	72-90	78-96	84-102	96-114	108-126	240	+/- 12
	12	48-66	54-72	60-78	66-84	72-90	84-102	96-114	120	+/- 12
	11	36-54	42-60	48-66	54-72	60-78	72-90	84-102	120	+/- 12
	10	22-36	30-42	36-48	42-54	48-60	60-72	72-84	120	+/- 12
	9	12-24	18-30	24-36	30-42	36-48	48-60	60-72	120	+/- 12
LEVEL 4	8	9-16	12-18	15-21	18-24	21-27	27-33	40-52	NA	+/- 9
LEVEL 3	7	6-14	9-16	12-18	15-21	18-24	24-30	35-45	NA	+/- 6
	6	3-12	6-14	9-16	12-18	15-21	21-27	27-40	NA	+/- 6
LEVEL 2	5	RS-9 P2 (225-250)	1-12	3-14	6-16	9-16	12-18	24-36	NA	+/- 3
	4	RS-3 P1 (100-125)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	9-16	21-30	NA	+/- 3
	3	RS-1 P1 (50-75)	RS-6 P1 (150-175)	RS-9 P2 (225-250)	RS-<12 P2 (300-325)	3-14	6-16	12-18	NA	+/- 3
LEVEL 1	2	RS (25-50)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	1-9	6- <12	NA	+/- 3
	1	RS (25-50)	RS-1 P1 (50-75)	RS-2 P1 (75-100)	RS-3 P1 (100-125)	RS-4 P1 (125-150)	RS-6 P1 (150-175)	3-6	NA	+/- 3

Judicial Proceedings with All VUFA offense
Conformity: Sentences *Reported to PCS* [n=13,993]



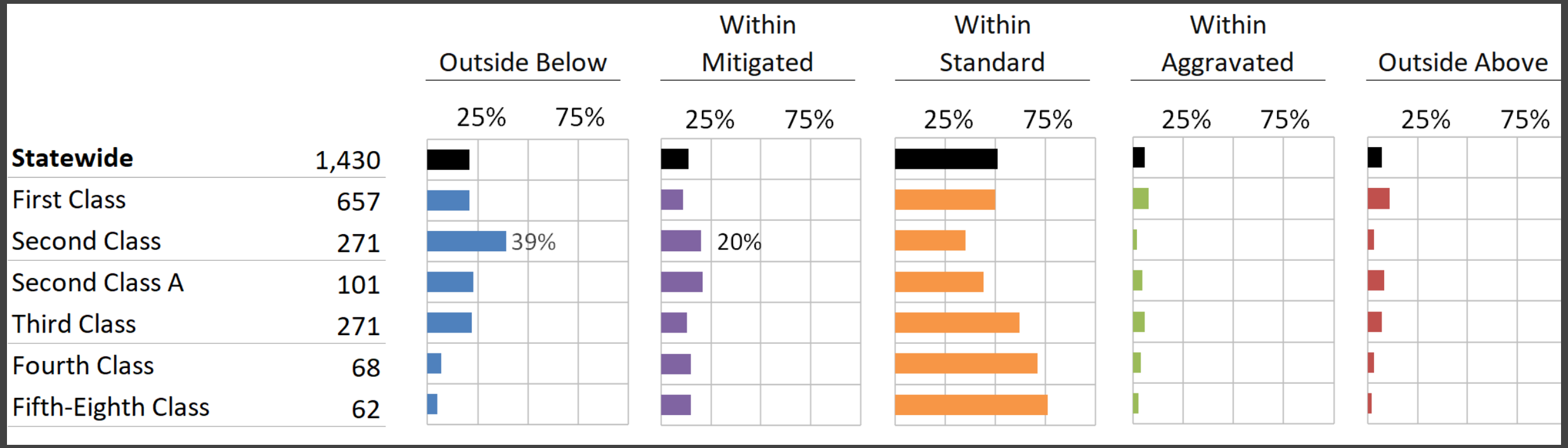
Judicial Proceedings with F1/F2 VUFA offense
Conformity: Sentences *Reported to PCS* [n=5,552]



Statewide	5,552
First Class	1,742
Second Class	940
Second Class A	668
Third Class	1,348
Fourth Class	374
Fifth-Eighth Class	480

Judicial Proceedings with VUFA offense co-charged with violence

Conformity: Sentences *Reported to PCS* [n=1,430]



Potential explanations for variation

This report uses administrative data to document the attrition of cases in the lower and upper courts. The proportion of dockets that are disposed without judgment may reflect the exercise of discretion by prosecutors and judges or consistent with local policies and practices. For example:

- prosecutors may withdraw or decline to pursue a charge ("nolle prosequi") due to circumstances that make it unlikely to succeed at trial (e.g., illegal search, witness failure to appear) or a change of jurisdiction (e.g., decertification to Juvenile Court, federal adoption of firearms cases).
- judges may dismiss a charge or case based on speedy trial/due process claims from the defense.

Recommendations

1) This study represents an initial analysis of a complex issue. Given additional time and resources the Commission recommends an extension of the current project to include a qualitative component that would bring additional context to findings in this report. Through interviews with, and/or surveys of, key justice stakeholders in individual jurisdictions, qualitative data may help explain county-specific variations in rates of non-judgment dispositions (e.g., nolle pros), types of sentences imposed, conformity rates, pretrial failures, and recidivism rates. Identify how many VUFA offenses were later withdrawn or dismissed, including at what procedural stage the case was withdrawn or dismissed.

Recommendations

2) In addition to qualitative contextual information, the Commission recommends partnering with local jurisdictions to collect and analyze locally-owned quantitative data. Analysis of county-level data may provide richer explanations that go beyond the analyses of state-level data required for this study, and take into account factors outside the scope of this study, including the role of age, gender, race/ethnicity, education, employment, and poverty.

Recommendations

3) Throughout this report, Commission staff identified data challenges including missing data, an inability to merge and match data across datasets, and inefficient processes for requesting and obtaining system-level data. These limitations threaten the ability of the Commonwealth to build sound evidence-based criminal justice policies and respond to critical issues such as gun violence. Greater effort should be directed towards collecting more complete and accurate data that includes common identifiers across agencies. The ability to consistently track individuals, charges, and cases, across stages and decision points, and an ability to accurately "follow" individuals from first contact with the system through release, will vastly improve the quality of data and research used to promote better outcomes.

Recommendations

4) Although the scope of this study is limited to providing information on the procedure and process of handling VUFA offense cases across the Commonwealth, the House may also benefit from a deeper understanding of programs and practices that improve outcomes for those under supervision for VUFA offense cases. A comprehensive study would include a review of bail decisions; pretrial supervision and services; pretrial diversion; problem solving courts (gun courts); presumptive sentencing guidelines; RNR PSI (risk-needs-responsivity pre-sentence investigation reports); duration and intensity of probation, and parole supervision.

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ATTACHMENT G

Exhibit 2.1: Pending VUFA dockets in the Lower Courts

	All VUFA Dockets			F1/F2 VUFA Dockets			Co-charged w/ a violent offense		
	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending	Total Dockets	Pending Dockets	Percent Pending
Statewide	**51,618**	**5,183**	**10.0%**	**22,360**	**2,124**	**9.5%**	**8,033**	**840**	**10.5%**
First Class	18,026	3,073	17.0%	8,901	1,311	14.7%	4,131	541	13.1%
Second Class	7,365	466	6.3%	3,195	202	6.3%	1,031	64	6.2%
Second Class A	4,566	482	10.6%	1,643	162	9.9%	749	101	13.5%
Third Class	11,642	665	5.7%	4,952	286	5.8%	1,329	97	7.3%
Fourth Class	4,377	238	5.4%	1,581	79	5.0%	394	19	4.8%
Fifth-Eighth Class	5,642	259	4.6%	2,088	84	4.0%	399	18	4.5%
Statewide (no First Class)	**33,592**	**2,110**	**6.3%**	**13,459**	**813**	**6.0%**	**3,902**	**299**	**7.7%**

Exhibit 2.2: Disposition of Lower Court VUFA dockets as proportion of non-pending dockets

		Dockets not Pending	Withdrawn	Dismissed	Other	Resolved in Lower Court	Bound Over
All VUFA	**Statewide**	**46,435**	**8%**	**5%**	**2%**	**4%**	**81%**
	First Class	14,953	10%	7%	1%	2%	80%
	Second Class	6,899	11%	8%	2%	<1%	79%
	Second Class A	4,084	6%	6%	<1%	<1%	88%
	Third Class	10,977	5%	3%	2%	6%	84%
	Fourth Class	4,139	7%	5%	5%	7%	77%
	Fifth-Eighth Class	5,383	6%	1%	3%	11%	79%
	Statewide (no First Class)	31,482	7%	4%	2%	5%	82%
F1/F2 VUFA	**Statewide**	**20,236**	**8%**	**5%**	**1%**	**1%**	**86%**
	First Class	7,590	10%	7%	1%	1%	82%
	Second Class	2,993	10%	6%	1%	<1%	83%
	Second Class A	1,481	6%	4%	<1%	<1%	90%
	Third Class	4,666	4%	2%	0%	1%	92%
	Fourth Class	1,502	6%	5%	<1%	1%	88%
	Fifth-Eighth Class	2,004	6%	1%	<1%	1%	91%
	Statewide (no First Class)	12,646	6%	4%	1%	1%	89%
Co-Charged with a Violent Offense	**Statewide**	**7,193**	**10%**	**5%**	**<1%**	**<1%**	**84%**
	First Class	3,590	12%	5%	1%	<1%	82%
	Second Class	967	17%	6%	<1%	<1%	77%
	Second Class A	648	4%	9%	<1%	<1%	87%
	Third Class	1,232	6%	3%	<1%	<1%	91%
	Fourth Class	375	6%	8%	<1%	<1%	86%
	Fifth-Eighth Class	381	6%	2%	<1%	1%	91%
	Statewide (no First Class)	3,603	8%	5%	0%	0%	86%

Exhibit 2.4: Pending VUFA Dockets at the Court of Common Pleas, by County Clas

	All VUFA			F1/F2 VUFA			Co-Charged with a Violent Offense		
	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending	Bound Over Dockets	Dockets Not Pending	Percent Pending
Statewide	**34,799**	**26,557**	**23.7%**	**17,154**	**12,847**	**25.1%**	**5,424**	**3,834**	**29.3%**
First Class	10,974	8,474	22.8%	5,881	4,593	21.9%	2,642	1,884	28.7%
Second Class	5,091	4,103	19.4%	2,330	1,786	23.3%	665	495	25.6%
Second Class A	3,100	2,359	23.9%	1,592	1,203	24.4%	487	350	28.1%
Third Class	8,692	6,860	21.1%	4,294	3,261	24.1%	1,013	728	28.1%
Fourth Class	2,887	1,842	36.2%	1,296	820	36.7%	296	184	37.8%
Fifth-Eighth Class	4,055	2,919	28.0%	1,761	1,184	32.8%	321	193	39.9%
Statewide (no First Class)	**23,825**	**18,083**	**24.1%**	**11,273**	**8,254**	**26.8%**	**2,782**	**1,950**	**29.9%**

Exhibit 2.5: Court of Common Pleas Dispositions (2015-2020), by County Class and Type of VUFA Docket

		Dockets not Pending	Guilty	Not Guilty	Withdrawn	Nolle Prossed	Dismissed	Other
All VUFA	**Statewide**	**26,557**	**83%**	**3%**	**1%**	**10%**	**1%**	**2%**
	First Class	8,474	77%	5%	0%	13%	1%	3%
	Second Class	4,103	78%	6%	1%	12%	0%	2%
	Second Class A	2,359	92%	2%	1%	4%	1%	1%
	Third Class	6,860	88%	1%	1%	6%	1%	2%
	Fourth Class	1,842	82%	1%	1%	10%	1%	4%
	Fifth-Eighth Class	2,919	86%	1%	1%	8%	2%	3%
	Statewide (no First Class)	**18,083**	**86%**	**2%**	**1%**	**8%**	**1%**	**2%**
F1/F2 VUFA	**Statewide**	**12,847**	**81%**	**4%**	**1%**	**12%**	**1%**	**1%**
	First Class	4,593	75%	6%	0%	15%	1%	2%
	Second Class	1,786	73%	6%	2%	16%	1%	3%
	Second Class A	1,203	91%	3%	0%	5%	0%	0%
	Third Class	3,261	87%	2%	1%	9%	1%	1%
	Fourth Class	820	81%	2%	1%	14%	2%	1%
	Fifth-Eighth Class	1,184	86%	1%	1%	9%	2%	1%
	Statewide (no First Class)	**8,254**	**84%**	**3%**	**1%**	**10%**	**1%**	**1%**
Co-Charged with a Violent Offense	**Statewide**	**3,834**	**86%**	**5%**	**0%**	**6%**	**1%**	**2%**
	First Class	1,884	83%	6%	0%	7%	1%	3%
	Second Class	495	83%	5%	0%	10%	0%	2%
	Second Class A	350	91%	5%	1%	2%	1%	1%
	Third Class	728	93%	3%	0%	2%	1%	1%
	Fourth Class	184	85%	3%	0%	11%	1%	1%
	Fifth-Eighth Class	193	90%	2%	0%	4%	2%	2%
	Statewide (no First Class)	**1,950**	**89%**	**4%**	**0%**	**5%**	**1%**	**1%**

Slides 33-35 data -- Court of Common Pleas, Percent Guilty out of non-pending cases [2015-2020]

	Statewide	First Class	Second Class	Second Class A	Third Class	Fourth Class	Fifth-Eighth Class	Statewide (no First Class)
2015	88%	88%	84%	97%	89%	86%	88%	88%
2016	86%	84%	84%	91%	89%	84%	87%	87%
2017	84%	80%	76%	91%	90%	84%	85%	86%
2018	83%	79%	79%	91%	89%	82%	86%	86%
2019	80%	69%	78%	94%	87%	82%	87%	85%
2020	79%	66%	72%	88%	87%	77%	85%	82%
Total	83%	77%	78%	92%	88%	82%	86%	86%

Court of Common Pleas, Percent Nolle Prossed out of non-pending cases [2015-2020]

	Statewide	First Class	Second Class	Second Class A	Third Class	Fourth Class	Fifth-Eighth Class	Statewide (no First Class)
2015	7%	7%	9%	2%	6%	8%	9%	7%
2016	8%	10%	9%	4%	7%	8%	9%	7%
2017	9%	12%	13%	4%	5%	11%	8%	8%
2018	9%	13%	10%	4%	5%	11%	8%	7%
2019	11%	18%	12%	3%	8%	8%	7%	8%
2020	12%	21%	18%	5%	8%	11%	8%	10%
Total	10%	13%	12%	4%	6%	10%	8%	8%

ATTACHMENT H

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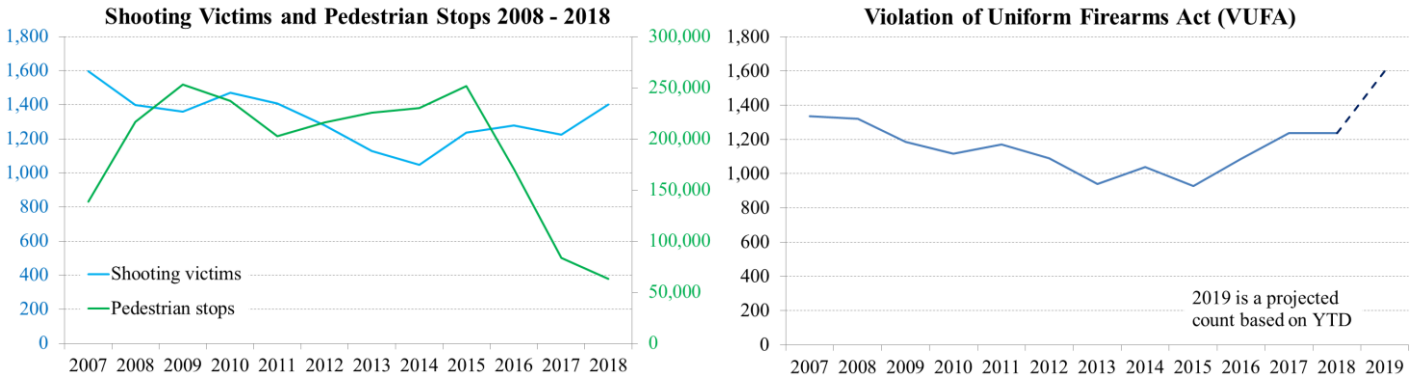
Explaining the Increase in Shootings

This report aims at providing an explanation for the increase in homicides and shootings in an effort to begin a conversation to address the challenge at a strategic level. A current paradox in Philadelphia is that the number of shootings is increasing, despite an increase in gun arrests and a reduction in overall violent crime counts. Social justice reforms since 2015 have resulted in drastic reduction of vehicle and pedestrian stops, as well as changes in prosecutorial policies and court case dispositions. While many of these reforms are warranted, potential offenders of gun crimes may be more willing today to carry firearms publically than they were historically, resulting in the increased likelihood that firearms may be used to settle disputes. This is substantiated further by recent increases in firearm seizures. Simply stated, since more individuals are carrying firearms in public, both shootings and firearm arrests are increasing. The analysis below is in no way comprehensive enough to prove this hypothesis, however it does explain the paradox of Philadelphia's annual homicide and shooting increases, and warrants further examination by both the Philadelphia Police Department and District Attorney's Office.

The turning point to understand the above paradox is 2016; the number of stops started declining, while the trend of shooting counts shows the opposite pattern (Figure 1). In fact, the number of stops has declined over 50% from 2007 to 2018. Potential offenders likely know that police officers are stopping them less often than in the past. This in turn may also imply that the potential offenders may have become more comfortable with carrying a gun on the street, increasing the likelihood that the gun is used. As several studies have indicated, including internal analysis of stops, only a very small fraction of stops actually results in finding contraband including guns. However, the key point here is the perception among criminals that they "may" be stopped on the street while carrying a gun. Hence, the below Hypothesis 1 is proposed.

Hypothesis 1: There are more individuals carrying guns on the street than in the past.

Estimating the number of guns on the street is obviously not an easy task. However, this hypothesis may be indirectly substantiated by using the number of gun arrests as a proxy.

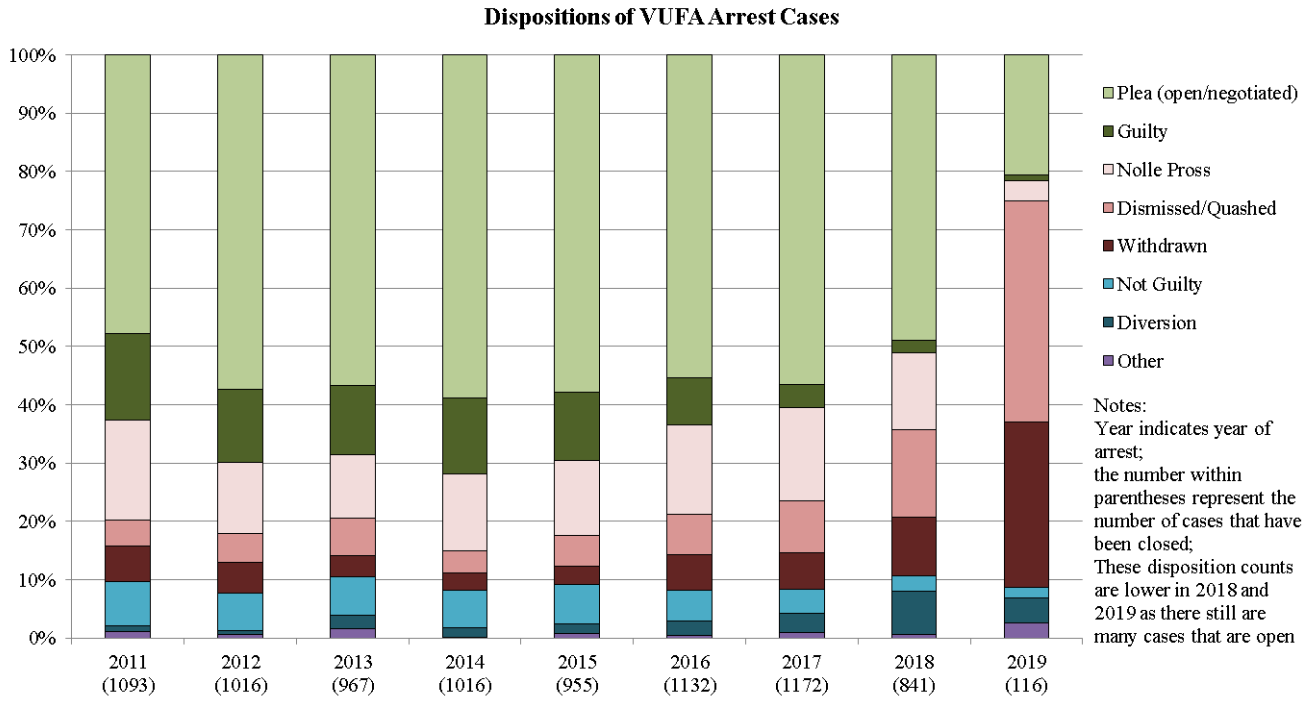


The increase in gun arrests may also be a reflection of efficient policing, where the police officers are attempting to focusing on prolific offenders who likely are carrying guns, rather than stopping many people in a haphazard manner. Regardless of the mechanism, the fact is that the police are removing more guns off streets than in the past, as reflected by the increase in gun arrests. This in turn leads to an additional paradox; despite the removal of more guns than in the past, shootings continue to increase. To explain this paradox, the second hypothesis is proposed.

Hypothesis 2: Criminals are not charged for illegal possession of firearms.

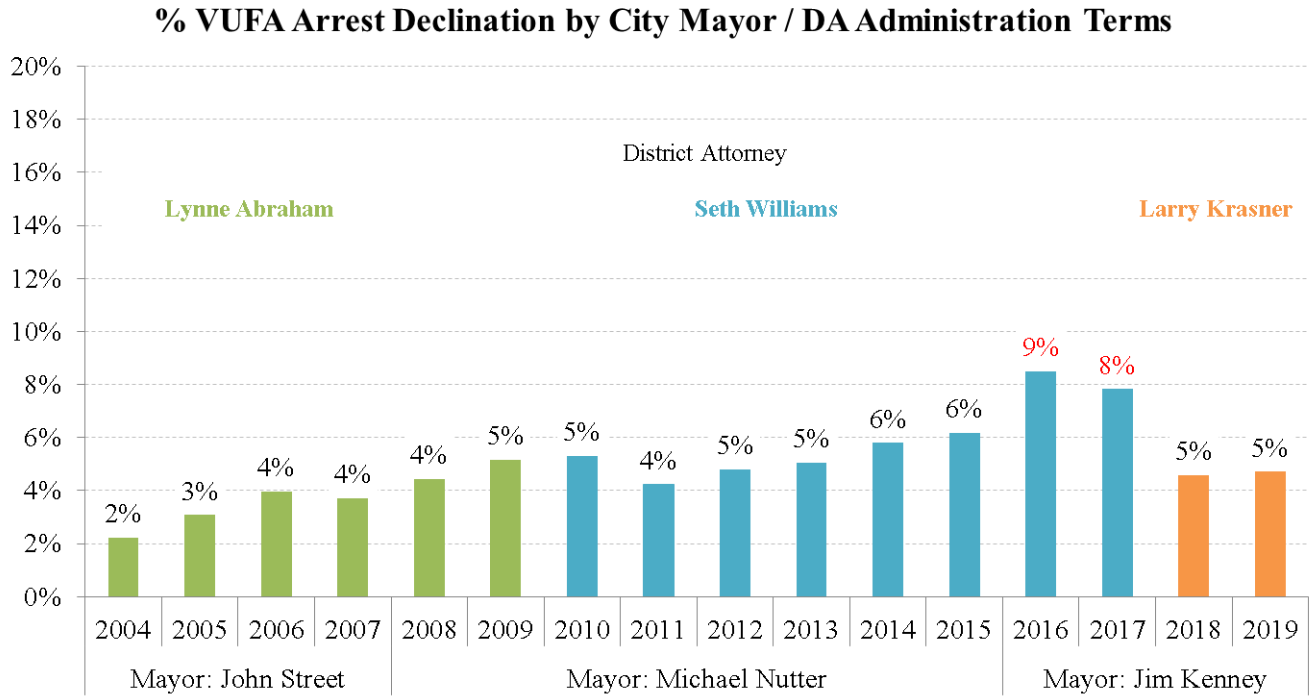
Lenient criminal justice responses may be occurring, as a result of recent criminal justice reforms overall. Alternatively, new prosecutorial policies and decision-makings under a new DA may also play a significant role. A recent analysis of prosecution and court dispositions provides supporting evidence for this hypothesis, but also shows this trend prior to DA Krasner.

The rate of prosecution dismissal and withdrawal[1] has been increasing substantially since 2015 under DA Williams, and has continued to increase after DA Krasner took the office. Furthermore, a closer examination of these dropped cases indicates that more cases are dismissed/withdrawn at the preliminary hearing stage (Municipal Courts) under DA Krasner than the actual trial stage (Commons Please courts). This implies that, even when criminals are caught with a gun, they are swiftly finding out they may not receive as significant a consequence as they had historically. Notably, the likelihood of being arrested is low to begin with. This means that, criminals know that their likelihood of getting caught with a gun is slim and, even if they get caught, they feel that they can leave without severe (or any) consequences.



[1] For the purpose of this analysis, prosecution dismissal and withdrawal included such dispositions as dismissed (lack of evidence), dismissed (lack of prosecution), dismissed (other reasons), withdrawal, and Nolle Pross.

Notably, some of the changes in prosecutorial decision makings pre-date DA Krasner. An analysis of VUFA arrest charge declinations by the Charging Unit indicates that the proportion of declination was the highest in 2016/2017, the first two years of Kenny administration. The proportion of VUFA arrest charge declination under DA Krasner is about 5%, meaning the vast majority of VUFA cases are still being charged. However, as noted previously on the analysis of dispositions, dismissal/withdrawal appears to be occurring more frequently at the preliminary hearing stage (Municipal Courts).



Hypothesis 3: Criminals are not facing severe consequences for illegal possession of firearms.

While not all cases have been examined because of database access limits, an analysis of a sample of cases in 2016 and 2019 by the Detective Bureau indicates that the proportion of VUFA arrests that results in incarceration is declining under DA Krasner. A future analysis should examine this issue not only as a dichotomy of incarceration vs probation but also sentence length, if incarcerated, for a larger number of cases to further substantiate this hypothesis.

Hypothesis 4: A lack of prosecution and severe sanctions reinforces criminal behavior and increases the future likelihood of being involved in serious violence.

Confirmation of this hypothesis will require a relatively complex statistical analysis. However, a cursory examination of dismissed/withdrawn cases in 2018/2019 has found 6 offenders whose cases were dismissed (VUFA former convict charge) and got later involved in shootings. Notably, 2 of these shootings were fatal shootings and 4 out of these 6 offenders were gang members.

Hypothesis 5: Police lost an accountability tool to ensure concentrated hot spot policing.

While the above set of hypotheses may appear that the blame is on the criminal justice system other than the police, the police certainly is not immune from its responsibility in the City's crime fighting mission. The reduction in stops as noted above certainly had a significant implication in policing in Philadelphia.

While pedestrian and vehicle stops can be used as a crime-fighting tool, they were an equally important accountability tool in policing. Because of the reduction in stops, and hesitation to discuss stops during CompStat, the Executive team lost a powerful tool to objectively measure if cops are in the right spot at the right time. This may have led police to diluting its hot spot policing effort. Recently, discussion of stops and other proactive policing activity increased more at CompStat, and AVL data and dashboard has recently been developed and made available to command staff. This has led to recent increases in stops overall, and if the previous hypotheses are true regarding the increasing likelihood that potential offenders carry their guns in public, it explains the increases in VUFAs as well.

Conclusion

This report attempts to outline a narrative to explain our increase in homicides and shootings, with supporting data and analysis, through a combination of changes in policing strategies and social justice reforms. If it is true that potential offenders are more willing today to carry firearms than they were historically, then strategic conversations may be needed between the Police Department and the District Attorney's Office to establish a strategic approach to address the problem. Criminal justice reforms are needed, but it must be balanced with sufficient law enforcement in neighborhoods plagued with increasing gun violence. This leads to several important questions that require collaborative discussion.

- How many stops in a gun crime hotspot are enough to discourage the carrying of illegal firearms, but not so much as to over-police a neighborhood?
- What alternatives do police have to objectively monitor police presence in a hotspot, without mistakenly encouraging inappropriate vehicle and pedestrian stops?
- What consequence is needed after a VUFA arrest to discourage the offender to repeat the same behavior, without resulting in over-incarceration of Philadelphia residents?

The answers to these questions may be complex, but there is ample research in the law enforcement community to provide potential answers through the narrow but critically important scope of gun arrests. Proper application of a joint strategy regarding gun arrests could discourage the willingness of potential offenders to carry firearms openly, resulting in decreased homicides and shootings. The City of Philadelphia and District Attorney's Office capacity for evidence-based research is higher than at any point historically. Once agency executives define the scope and objectives cooperatively, a joint examination of possible alternatives may lead to positive results.

ATTACHMENT I

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Analysis of Prosecution Declination

Scope

The pattern of prosecution declination was examined. In particular, besides an overall trend, the analysis focused on declinations of narcotics, retail theft, and prostitution arrests from 2016 to 2018 (Jan 1st and Aug 31st in each year).

Key findings:

Declinations on all arrests

- The percentage of declinations has increased especially in 2018. Between 2007 and 2015, the percentage of declinations was about 2% or less, while it jumped to over 7% in 2018
- The number of Part 1 crime declinations did not substantially change from 2016 to 2018
    - In fact, contrary to commonly held perceptions, the number of violent crime declinations was the lowest in 2018 among the three years examined in detail
- The proportion of warrant affidavits declined has been going up slightly over the past 5 years; the increase did not start in 2018. In 2018, 93% of the affidavits were approved and resulted in warrants being issued.

Declinations of narcotics, prostitution, and retail theft arrests

- The number of declination of main three crime types requested to analyze (narcotics, prostitution, and retail theft) increased significantly (about 100 declinations in 2016 and 2017 each, while it jumped to about 800 in 2018; time period is Jan - Aug 31)
- About 75 % of the declinations among the three crime types analyzed were narcotics; about 25% were prostitution; there were only a few declinations on retail theft (they may still be subject to downgrade)
- 75% of the narcotics declinations were possession
- "Insufficient evidence" was the most common declination reasons in 2016 and 2017 among the three crime types analyzed, while the vast majority of declinations in 2018 were "interest of justice"
- The charge-declined group had a lower recidivism rate than the offenders who were charged (15% vs 25% within 221 days of initial arrests).
    - The number of Part 1 crime reoffenders is relatively small; there were 20 Part 1 reoffending incidents out of all 95 reoffending incidents among the charge-declined group (n=1621 offenders in total) in 2018.

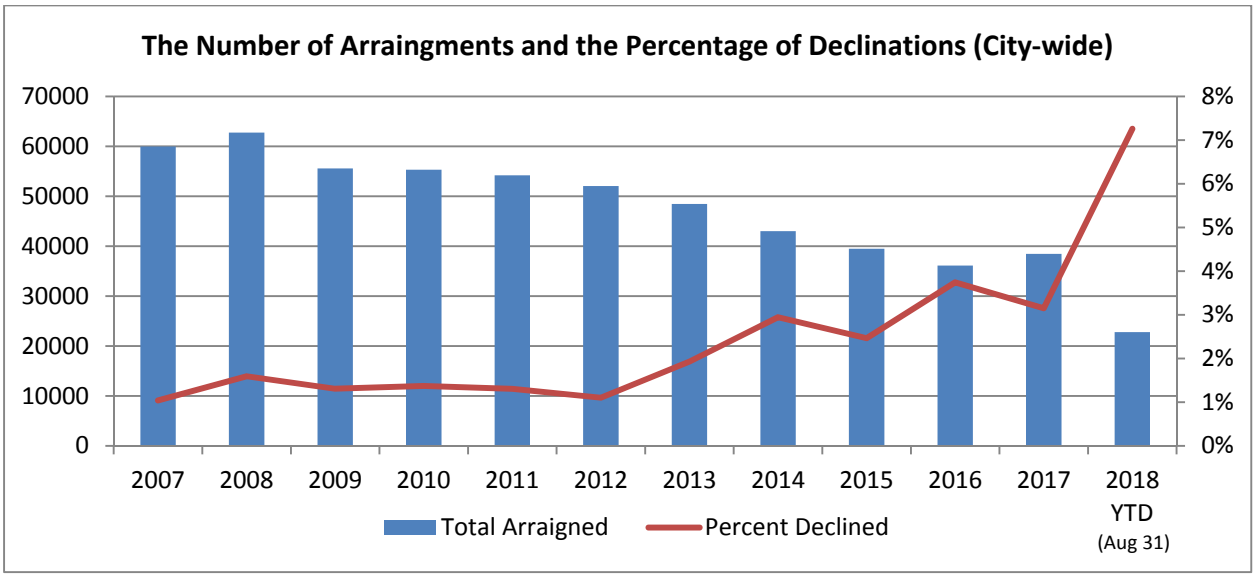
Directions of future analysis:

- This report focused on statistical analysis; qualitative analysis of specific circumstances and contexts of declinations may provide additional insight.
- Data are limited to crime reported to Police and Police-initiated activities. To overcome this large-scale longitudinal survey would be required to assess unreported incidents, community sentiment, sense of safety, and trust in the criminal justice system.
- This analysis did not examine the application of bail and bail amounts.
- This analysis did not examine post-charging prosecutorial decisions or outcomes (e.g., requests for continued investigation, withdrawn, nolle prossed, dismissal, etc.).It is notable that some crimes are police-driven (e.g., narcotics and prostitution); observing repetitive declinations of arrests may discourage police officers to make further arrests, which in turn may affect the outcome of reoffending rate analysis.

Analysis Results: City-wide Trend of Declinations for <u>any Crimes</u>

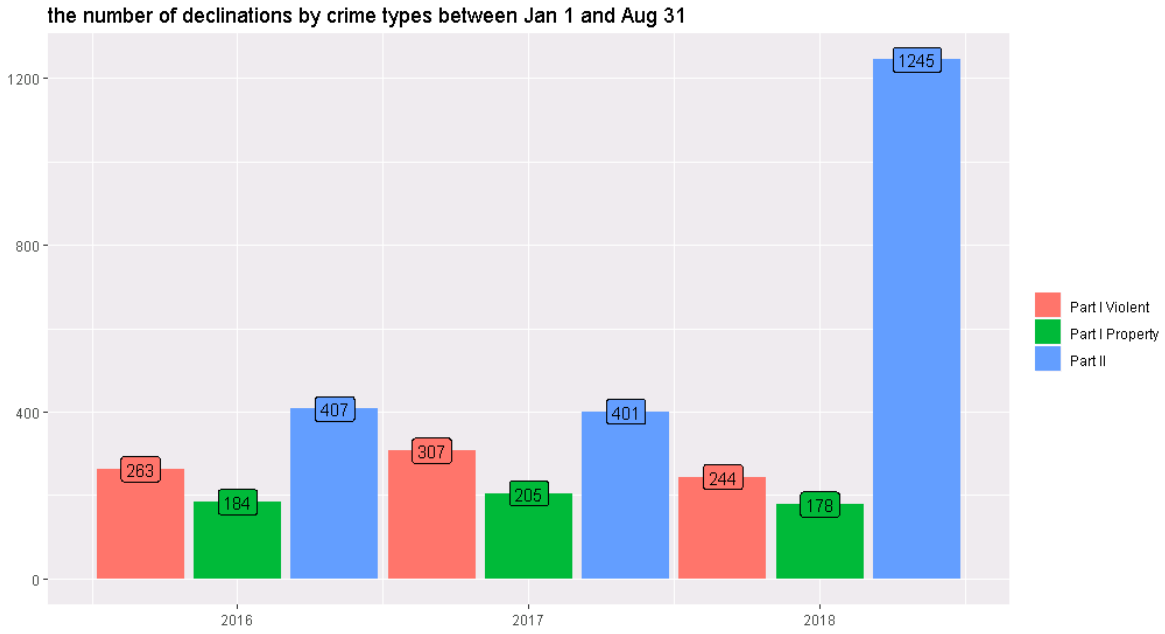
Common Hypothesis: The DA's office is declining too many charges.

Partially True: The percentage of declinations has increased especially in 2018. Between 2007 and 2015, the percentage of declinations was about 2% or less, while it jumped to over 7% in 2018. It is still notable that the vast majority of arrests continue to be prosecuted (92%).

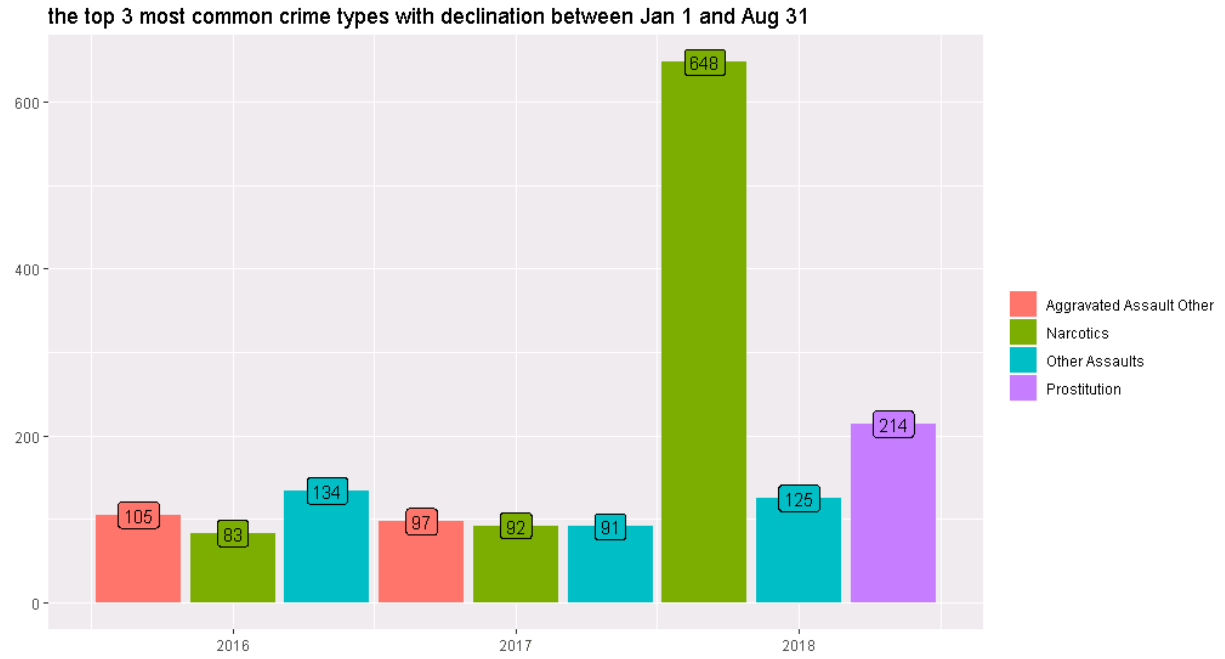


Common Hypothesis: The DA's office is declining arrests of serious in nature.

Mostly Untrue: The number of Part 1 crime declinations (both violent and property crimes) remained relatively steady (about 240-300 violent crime declinations and 180-200 property crime declinations in each year). In fact, contrary to commonly held perceptions, the number of violent crime declinations was the lowest in 2018 among the three years examined in detail.

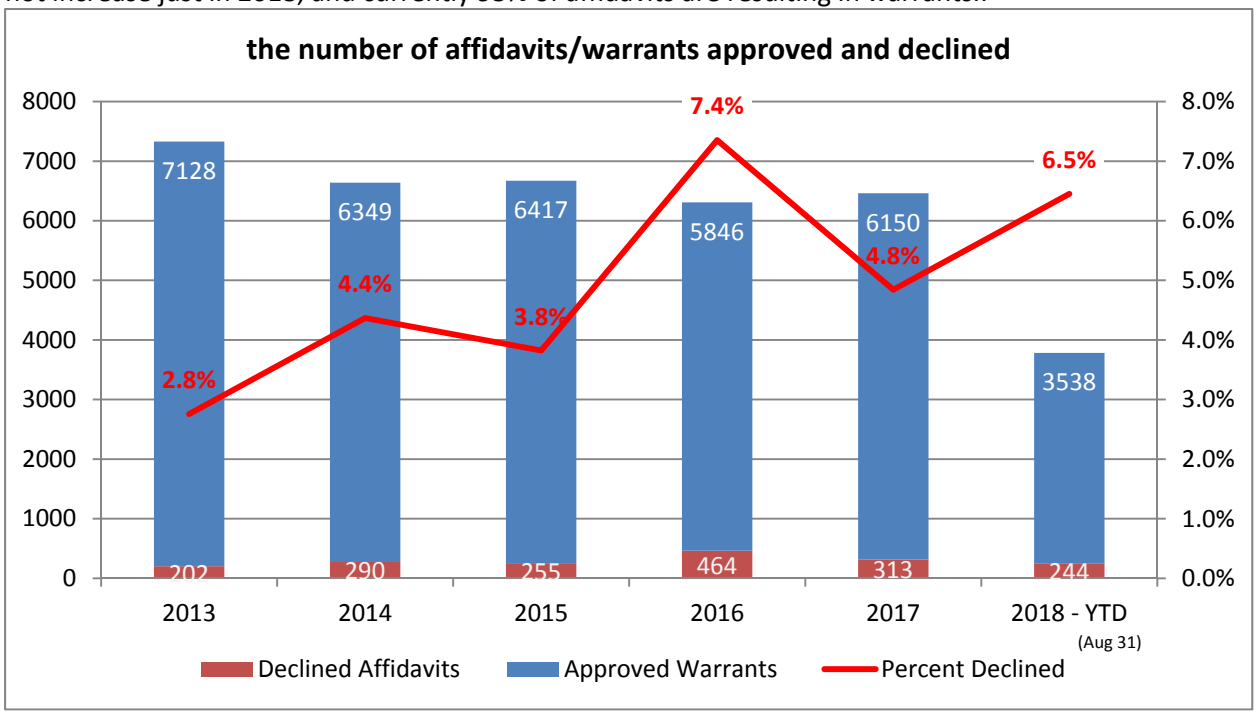


In 2016 and 2017, the top 3 most common crime types where declinations occurred were Other Assaults (Simple Assaults), Aggravated Assault Others (no-gun), and Narcotics. These crime types accounted for 38% and 30% of the declinations in each year. In 2018, the top 3 most common crime types were Narcotics (648 cases; 39%), Prostitution (214 cases; 13%), and Other (Simple) Assaults (125 cases; 7%).



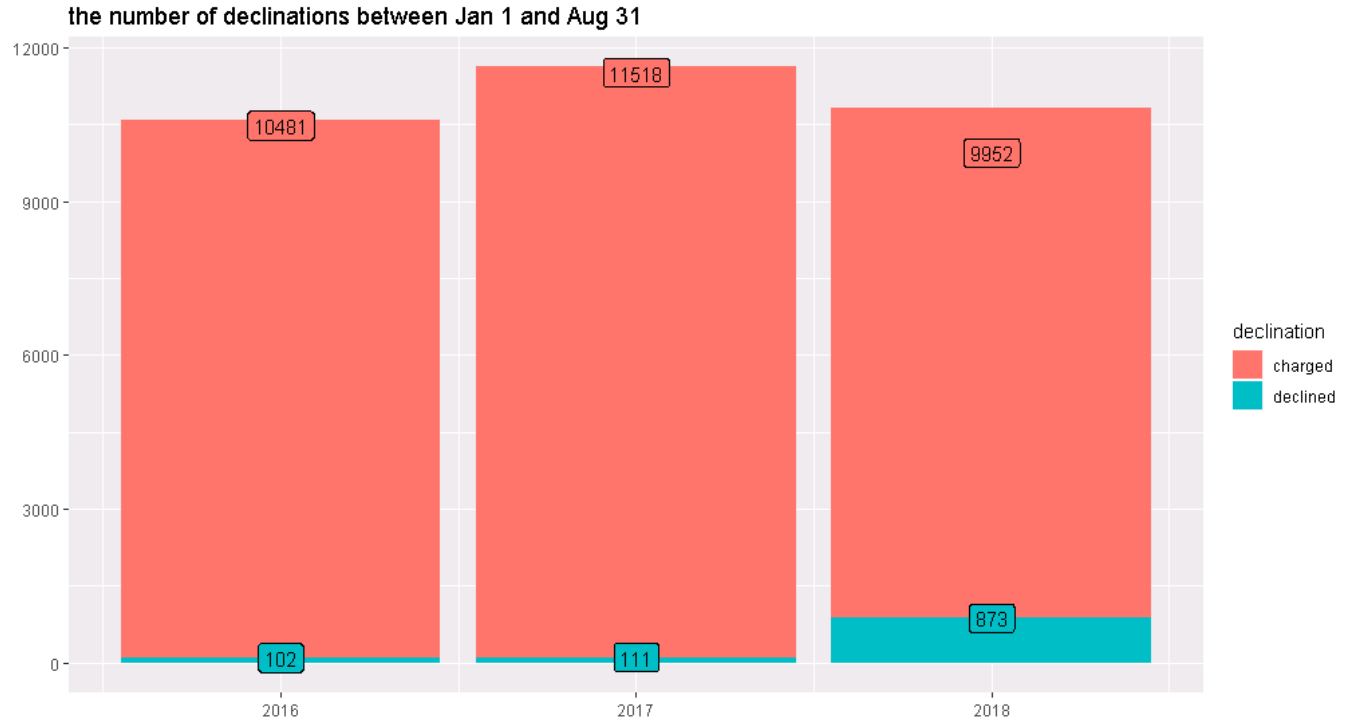
Common Hypothesis: We cannot get affidavits approved and warrants issued.

Not necessarily true. The percentage of affidavits declination has slightly been increasing over the past 5 years; it did not increase just in 2018, and currently 93% of affidavits are resulting in warrants..

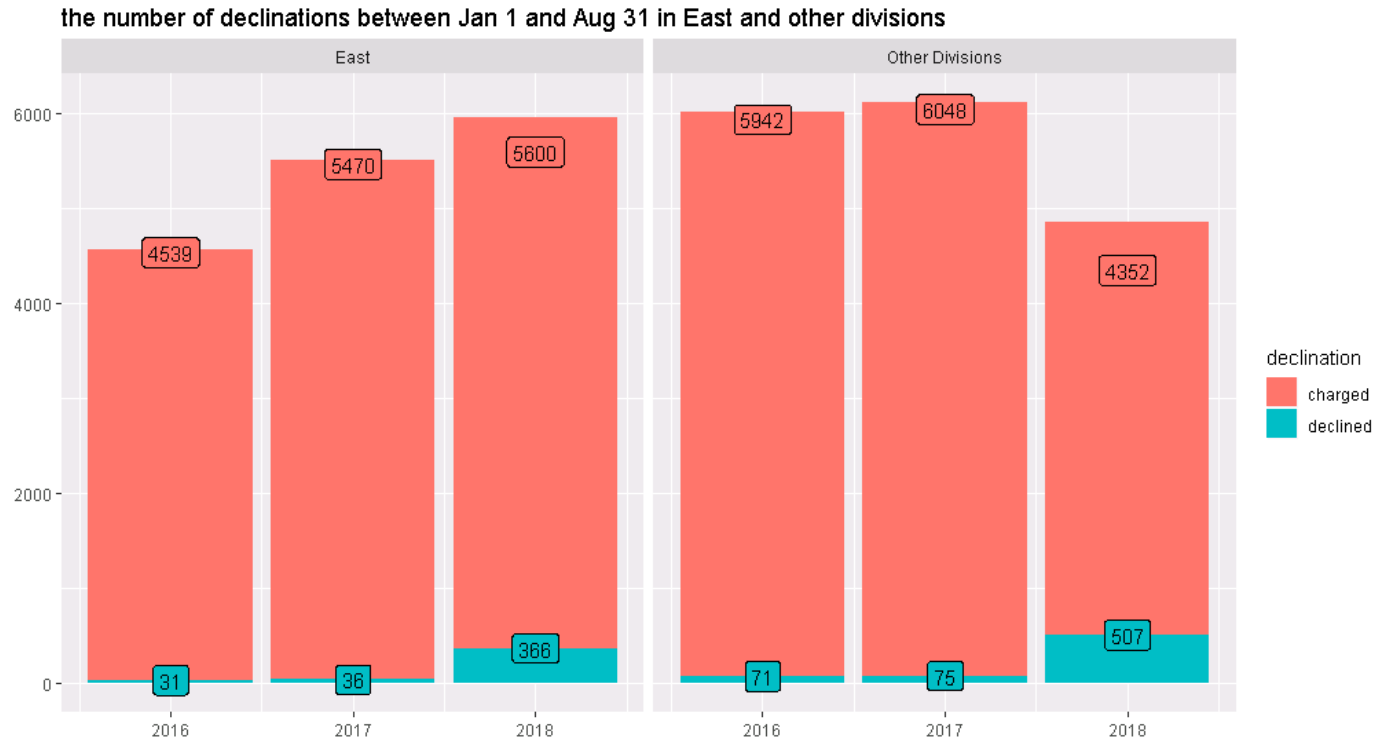


Analysis Results: City-wide Trend of Declinations for Narcotics, Retail Theft and Prostitution.

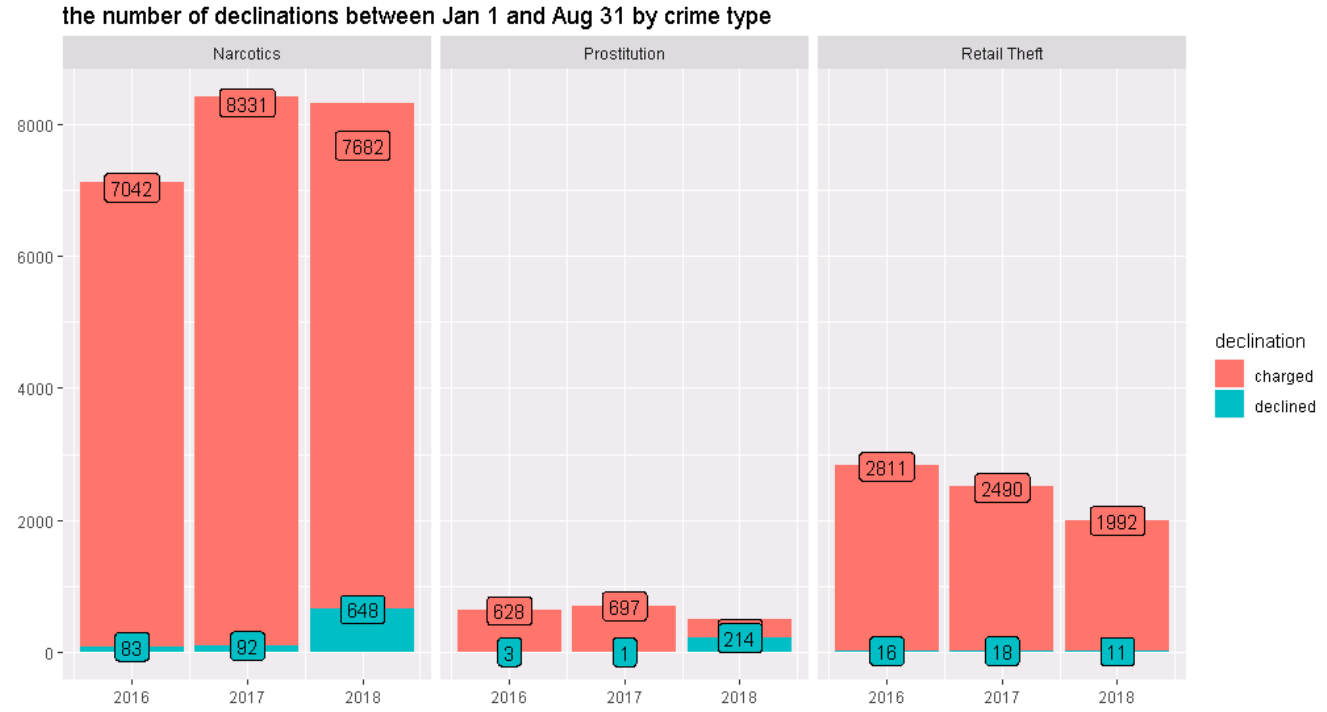
The below chart shows the number of declinations for these three crime types.



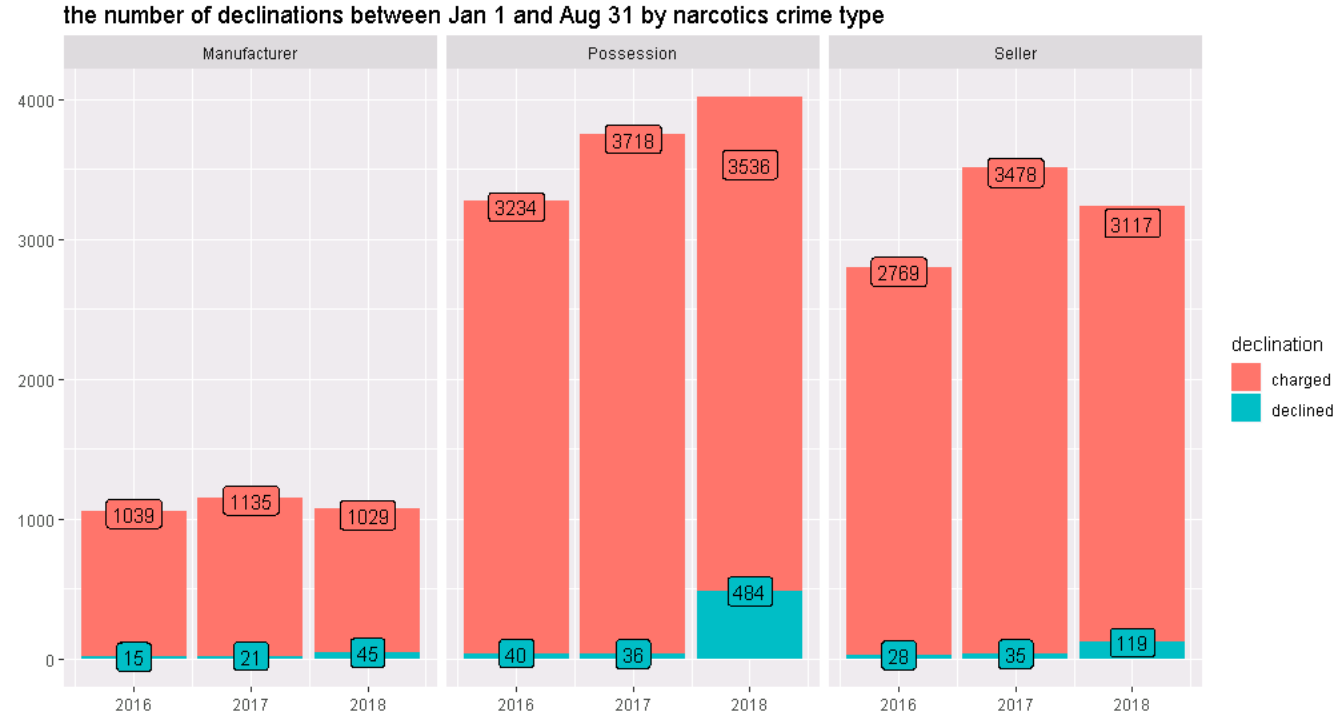
East Division accounts for 42% of declined cases, likely due to the large proportion of declined cases involving narcotics.



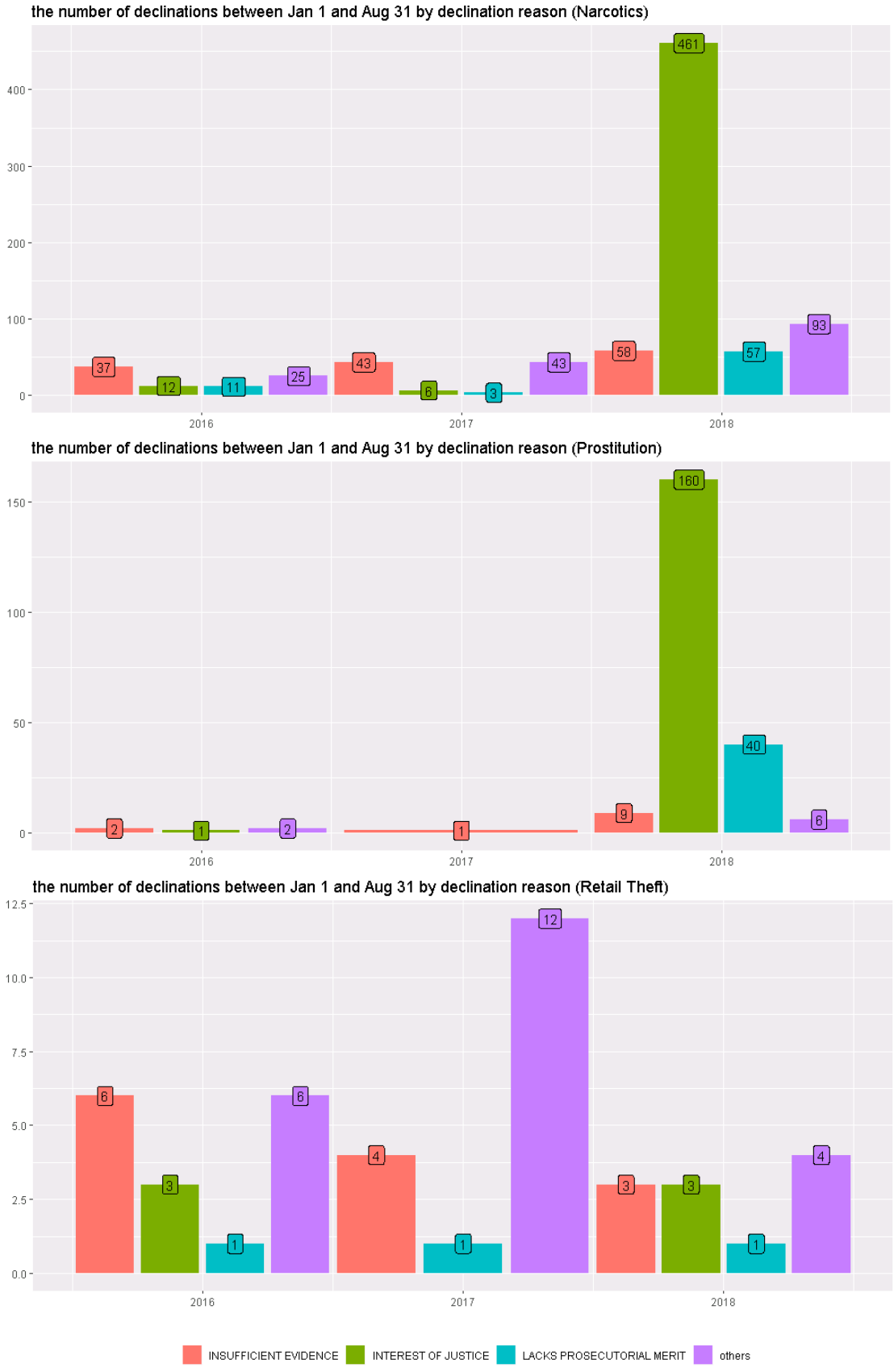
As noted in the previous city-wide/all crime analysis, the most of the declined cases involved narcotics and prostitution. A very small percentage of retail thefts was declined (they may still be subject to charge downgrade).



Given the significant proportion of declination among narcotics, a further analysis examined the type of narcotics arrests. Much of increases in declinations in 2018 occurred for possession charges.



"Insufficient evidence" was the most common declination reasons in 2016 and 2017 among the three crime types analyzed, while the vast majority of declinations in 2018 were "interest of justice"



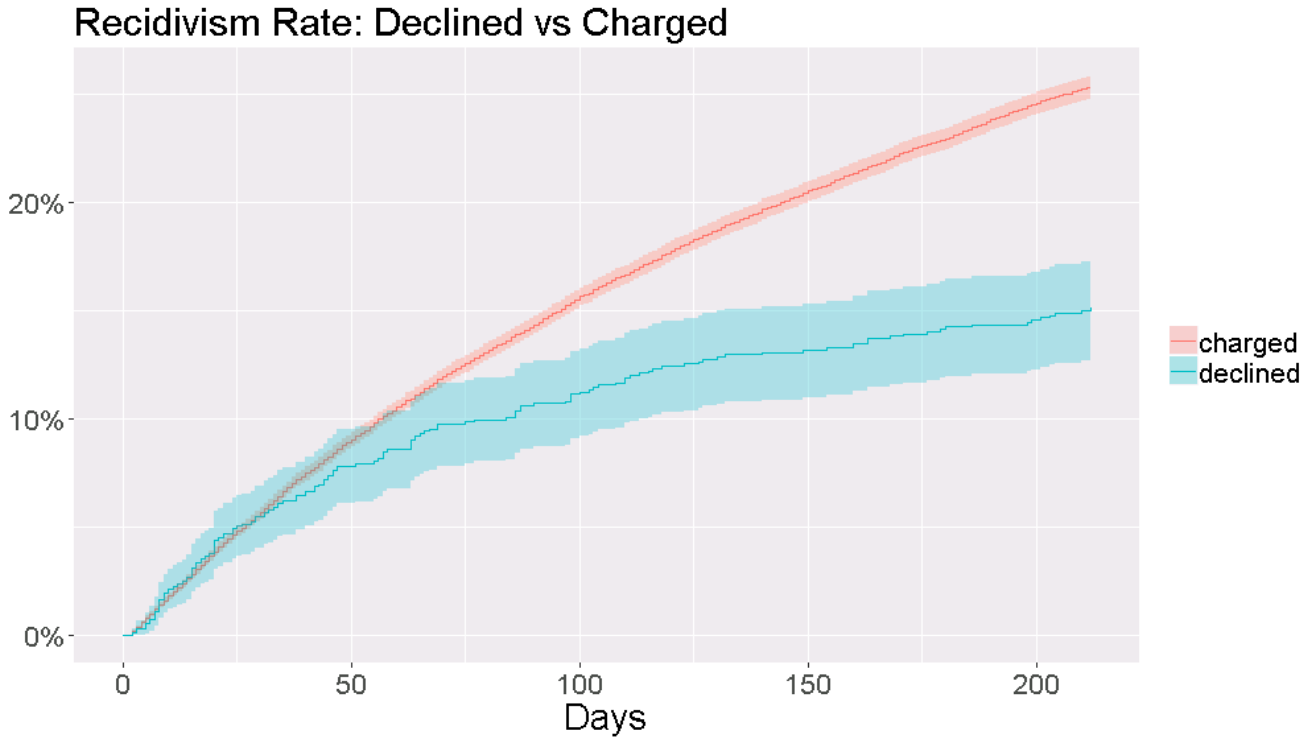
Common Hypothesis: Offenders whose charges were declined are committing crimes again.

Mostly Untrue: When recidivisms rates were compared between "charged" and "declined", the declined group exhibited a *lower recidivism rate* than the charged group. Within 200 days of an initial arrest, about 25% of the offenders who were charged committed another crime, while the recidivism rate was 15% for those whose charges were declined.

Note: a supplementary analysis on recidivism rates among retail theft offenders has found that:

- dropping charges may lower recidivism rates for those without priors
- dropping charges or downgrading charges among those with priors increase their future reoffending risk
- these patterns clearly indicate that criminal history should be taken into account in prosecutorial decision making

(see Appendix 1 for more detailed result explanations)



Some offenders are certainly habitual offenders. Prostitutes, for example, may continue their criminal lifestyle regardless of criminal sanctions. There were 196 unique PIDs whose prostitution charges were dropped in 2018. Out of these, 35 offenders reoffended (for a total of 57 offenses). Most common crime types for reoffending among prostitutes were Prostitution and Narcotics.

Prostitution	27
Narcotics	11
All Other Offenses	10
Theft	6
Aggravated Assault Other	1
Counterfeiting	1
Robbery Other	1

Common Assumptions: Offenders whose charges were declined are committing serious crimes.

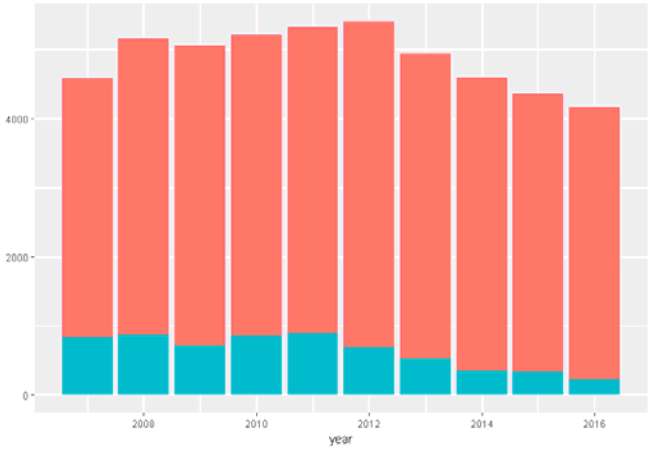
Untrue: While the general recidivism rate is lower among the charge-declined group than the charged-group, there are offenders in the declined group that end up committing relatively serious crimes. Out of the charge-declined group who recidivated, the proportion of Part-1 recidivisms was about 10% in 2016 and 2017, while it was 21% in 2018. It should be noted, however, that the *number* of Part-1 crime reoffenders is still relatively small (20 Part-1 reoffending out of all 95 reoffending incidents among the charge-declined group in 2018).

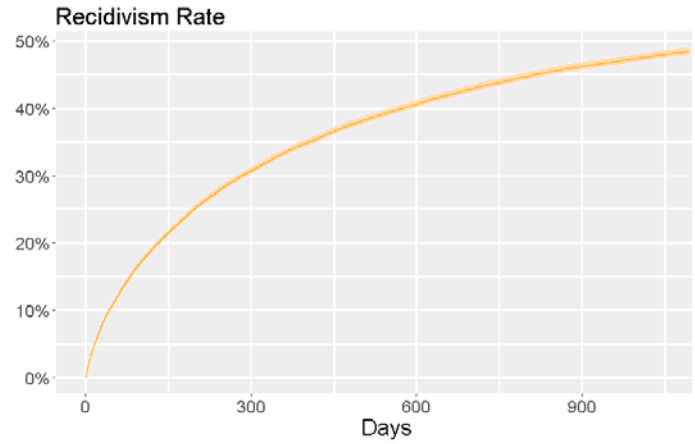
Specifically, these Part 1 reoffending incidents in 2018 were:

Robbery Other	2
Agg Gun	1
Agg Other	2
Residential Burglary	1
Auto Theft	2
Theft	12

Appendix 1: Supplementary Analysis of Recidivism Patterns among Shoplifters

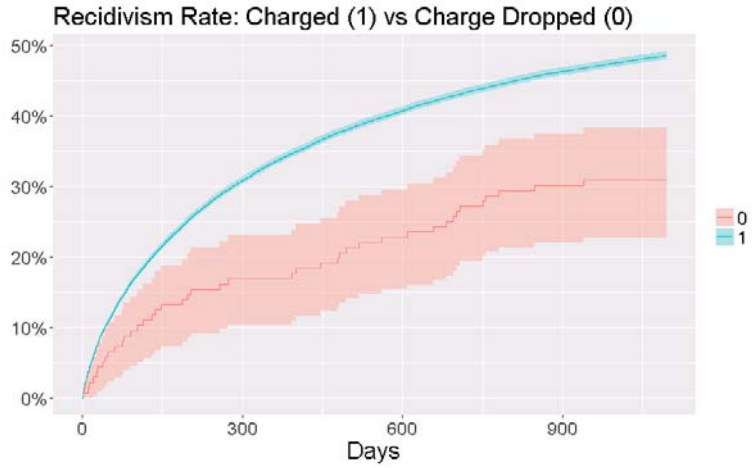
- Re-offending patterns of those arrested for retail theft (UCR 612, 622, 632) between 2007 and 2016 were examined; in particular, their re-arrests within 3 years of the original retail theft arrests were analyzed
- Individual characteristics examined include criminal history (any prior arrests and prior retail theft arrests specifically), demographic characteristics (age, sex, race/ethnicity), the value of a stolen item, charges
- On average, there are 4500 to 5300 arrests per year
- The general recidivism rate within 3 years is about 48%.





- When examined individually, adult, male, having a prior, and those charged with a felony/misdemeanor exhibited a higher likelihood of reoffending.
    - Adult (50%) vs. Juvenile (40%)
    - Male (59%) vs. Female (37%)
    - Prior (65%) vs. No-prior (29%)
    - Felony (57%), Misdemeanor (50%), Summary (45%)
        - Among those with priors, the re-offending risk was over 60% regardless of their charge levels
        - Among those without priors, the re-offending risk was the highest for those charged with Felony (35%), followed by Misdemeanor (31%) and Summary (27%).
    - Reoffending risk did not appear to vary by race/ethnicity nor by the value of stolen item
- When these characteristics are examined simultaneously, what matters in predicting recidivisms is having a prior (especially a retail theft prior).
    - General reoffending risk is 48%
    - Among those with priors, the reoffending risk increases to 65%
    - Furthermore, if an offender has a retail theft prior, the risk of re-offending risk increases to 82% (about 24% of the offenders who were arrested for shop-lifting fits this category)
- **Among these offenders with a prior retail theft, their re-offending risk was the highest if their subsequent retail theft arrest resulted in a summary charge**
    - It is highly recommended to take into account offenders' priors when changing a charge policy

- Interestingly, when individuals' charges had been dropped, these individuals showed a lower reoffending risk (31% vs 49%) than those who were charged; these dropped charges can be interpreted as a proxy of diversion (i.e., diverting an offender reduces their future re-offending risk, as consistent with the labeling theory)
    - However, note that the sample size for charge-dropped group was very small (only 136 cases)



- So, by taking all of the above analysis together, it can be interpreted that …
    - Dropping charges (i.e., giving an offender a second chance) can reduce their future re-offending risk
    - However, pursuing a summary charge on an offender with a retail theft prior can actually increase their re-offending risk, perhaps as offenders learn consequences are minor. It is notable that, given low clearance rate, offenders likely think that their risk of apprehension is low to begin with.

Appendix 2: a list of Murder Charges that were declined between January 2016 and Aug 2018

There were 16 incidents involving 12 PIDs where murder charges were pursued by the police and subsequently declined between 2016 and 2018. Examining the context and specific circumstances of these declinations is beyond the scope of this quantitative report. However, it should be noted that these declinations of serious crimes accounted for a very small percentage of all declinations.

DC number	Most serious charge	Arrest date	pid	Last name	First name	reason
1725000068	CC2502 AH MURDER	1/2/2017	1074280	STRONG	SHAWN	INSUFFICIENT EVIDENCE
1725000069	CC2502 AH MURDER	1/2/2017	1074280	STRONG	SHAWN	INSUFFICIENT EVIDENCE
1725000070	CC2502 H MURDER	1/2/2017	1074280	STRONG	SHAWN	INSUFFICIENT EVIDENCE
1725000071	CC2502 H MURDER	1/2/2017	1074280	STRONG	SHAWN	INSUFFICIENT EVIDENCE
1715112520	CC2502 AH MURDER	11/26/2017	1192993	HARRIS	EMMANUEL	INSUFFICIENT EVIDENCE
1715112520	CC2502 AH MURDER	11/26/2017	1192993	HARRIS	EMMANUEL	IDENTIFICATION INCONCLUSIVE
1715112520	CC2502 AH MURDER	11/26/2017	1192993	HARRIS	EMMANUEL	INSUFFICIENT PROBABLE CAUSE
1715112520	CC2502 AH MURDER	11/26/2017	1192993	HARRIS	EMMANUEL	UNAVAILABLE/UNCOOPERATIVE VICTIM
1617048756	CC2502 AH MURDER	11/6/2016	0964981	PAYNE	KEITH	INTEREST OF JUSTICE
1625106216	CC2502 AH MURDER	2/14/2017	1155949	BRIAN	FERNANDEZ	INSUFFICIENT EVIDENCE
1625106217	CC2502 AH MURDER	2/14/2017	1155949	BRIAN	FERNANDEZ	INSUFFICIENT EVIDENCE
1824018220	CC2502 AF MURDER	3/4/2018	1101638	SAUNDERS	PAUL	INTEREST OF JUSTICE
1812011163	CC2502 AH MURDER	3/9/2018	1199076	KELLY	MALIK	INSUFFICIENT EVIDENCE
1719039922	CC2502 H MURDER	5/12/2017	1168624	WILSON	HESHAN	INSUFFICIENT CORROBORATION
1815052431	CC2502A H MURDER	6/15/2018	1145627	SHANCHEZ	PAUL	INSUFFICIENT CORROBORATION
1624061590	CC2502 AH MURDER	7/21/2016	0912455	COLON	EDWIN G	INSUFFICIENT EVIDENCE
1724049994	CC2502 H MURDER	8/3/2017	1019432	FINNEY	LEONARD	INTEREST OF JUSTICE
1612055663	CC2502 AH MURDER	8/8/2016	0765789	SMITH	LARRY	INTEREST OF JUSTICE
1603052888	CC2502 AH MURDER	9/17/2016	1113061	SMITH	DOMAIR	INSUFFICIENT CORROBORATION

ATTACHMENT J

100 Shooting Review Committee Report

PHL
DAO
Philadelphia District Attorney's Office

Department of Public Health

Managing Director's Office

DEFENDER ASSOCIATION of PHILADELPHIA

The City of Philadelphia has been plagued by a wave of senseless gun violence. In 2021 alone, there were over 2,300 victims of shootings in our city. That is roughly six shootings per day. That is unacceptable. As Desmond Tutu stated, "there comes a point where we need to stop just pulling people out of the river. We need to go upstream and find out why they're falling in." As Chair of the Council's Committee on Public Safety, it was imperative to me that we understand what is happening. We created the 100 Shooting Review Committee to examine the root causes of gun violence and make recommendations for how to proceed in addressing them. Due to the increasing rates of crime, we expanded the Committee's purview to examine 2,000+ shootings. This Committee came together as a synergy. A synergy is defined as the interaction or cooperation of two or more organizations, substances, or other agents to produce a combined effect greater than the sum of their separate effects. This Committee is just that. We wish to acknowledge the resources and commitments contributed by each of the individual agencies, departments and staff in the creation of this report. I would like to thank the Police Commissioner, District Attorney, Chief Defender, City Controller, Managing Director, First Judicial District, and the Department of Public Health, along with their staff members, for their dedication to this project. At the end of the day, it is important to remember what this report is: a view of the same issue through a variety of different lenses; and what it is not: a solution to the problem, but a redefining of the question. I would like to offer my sincere thank you to everyone who contributed to this project… now let's get to work!

Sincerely,

Curtis Jones, Jr.

Councilmember – 4th District

Majority Whip

100 Shooting Review Committee Report

1. Executive Summary

On September 10, 2020, City Council passed Resolution #200436, authorizing the Committee on Public Safety and the Special Committee on Gun Violence Prevention to hold hearings on the current state of gun violence in Philadelphia and to receive actionable recommendations to address the gun violence crisis. Specifically, the resolution along with subsequent Resolution #210703 and committee discussions sought information on and examination of (1) the circumstances shared by those accused of committing the last 100 shootings, (2) the source of firearms used to commit violent crime in the city, (3) any prior contacts the arrestee had with the criminal justice system, and (4) the trend of gun case disposition, bail and recidivism.

This report reflects joint efforts by numerous city agencies to respond to the resolution, specifically by reviewing available data, studies, and evidence-based practices throughout the United States. The inter-agency collaboration has been collectively referred to as the Philadelphia Interagency Research and Public Safety Collaborative (PIRPSC) and includes the following organizations (those with a * were directly responsible for this report):

- Controller's Office
- Defender Association of Philadelphia ("Defender Association") *
- Department of Public Health ("DPH" or "PDPH") *
- District Attorney's Office ("DAO") *
- First Judicial District ("FJD")
- Managing Director's Office ("MDO") *
- PA Attorney General
- Police Department ("PPD") *

Firearm violence in Philadelphia is a public health crisis. In 2021, Philadelphia suffered a record number of fatal criminal shooting victims (501) and non-fatal criminal shooting victims (1,850).[1] Philadelphia has also experienced extraordinary recent increases in arrests for illegal firearm possession and crime guns recovered, while the Commonwealth has recorded record gun sales in 2020. Despite this crisis in gun violence, shooting arrest rates remain low, conviction rates in illegal gun possession cases have been declining since 2015, and conviction rates in shooting cases declined between 2015 and 2019 and increased modestly in 2020 and 2021.

[1] Criminal shootings exclude such incidents as accidental shootings, self-inflicted shootings, and justifiable (e.g., self-defense) shootings. Some of the shootings involve multiple victims being struck in a single incident; this count is victim counts, not incident counts.

Firearm violence in Philadelphia is a racial justice crisis. Shootings disproportionately impact Black communities: in Philadelphia over 80% of shooting victims and 79% of arrestees have been Black since 2015. Both victims and arrestees overwhelmingly come from disadvantaged neighborhoods that are majority non-white, have high rates of poverty and unemployment, and less likely to have a high school degree or diploma. Endemic violence in these communities means that the vast majority of those arrested for gun violence have themselves been previously traumatized, often as a witness to previous violent acts; over 80% have previously accessed or been screened for behavioral health services through the City.

Because the causes of gun violence are complex and varied, so are the solutions. Addressing the gun violence crisis requires a comprehensive strategy with elements of enforcement, intervention, and prevention to achieve both short-term and long-term reductions in gun crimes. Collaboration among city agencies, including law enforcement and non-law enforcement agencies is critical to successfully implement such a comprehensive strategy.

Reviews of evidence-based practices, along with data analysis of local data, have helped us to come to key findings related to gun violence in Philadelphia and have informed recommendations to stem that violence. Readers are encouraged to read both the summary, below, as well as the report in its entirety to understand the context of our recommendations as well as the limitations in both our data and data analyses.

Key Findings

General Findings on Shootings

- Victims and arrestees for shootings tend to be male, people of color, 18-35 years old, and have a prior criminal history. Most arrestees have used non-criminal city services, with the most common being behavioral health services, and have previously witnessed violence.
- Arrestee contacts with city agencies (both criminal and non-criminal) often occur several years prior to being arrested in a shooting incident, with many contacts happening before the age of 18.
- Arguments were the most commonly identified shooting motive (50% of shootings). Drug trafficking/transactions was the second most common motivation (18%).
- When crime-guns are recovered, they tend to be semi-automatic pistols that were first purchased in Pennsylvania more than 3 years ago. Because guns may change

ownership both legally and illegally, it is not possible to know where the most recent sale was made. Approximately 1 in 4 crime guns were originally purchased outside of Pennsylvania.
- Gun sales have skyrocketed in Pennsylvania in recent years. In 2000, fewer than 400,000 guns were sold in Pennsylvania; in 2020, over 1 million were sold.

Arrest

- Clearance rates in shooting cases are low. For example, only 37% of fatal shootings and 18% of non-fatal shootings in 2020 have been cleared[2]. Out of 9,042 shooting victims between 2015 and 2020 in Philadelphia, 6,910 have not been cleared.
- Arrests for non-fatal and fatal shootings tend to happen within the first few months. 75% of non-fatal shooting arrests occur within 61 days; 75% of fatal shooting arrests occur within 125 days of the shooting.
- Non-fatal shootings are more likely to be solved in months with fewer shootings, when the investigation is done by a PPD unit with more detectives, and where PPD's Special Investigations Unit (SIU) investigated the incident.
- There has been a marked increase in the number of people arrested in Philadelphia for illegal gun possession (without the accusation of any additional offense).[3] That increase is largely due to a doubling in arrests for illegal possession of a firearm without a license since 2018. Arrests for possession of a firearm by a prohibited person have also increased during that time period, but more modestly.
- There is a large disparate impact in illegal gun possession arrests: approximately 4 in 5 people arrested for both primary types of illegal gun possession are Black. Additionally, much of the increase in illegal gun possession arrests have been of young people carrying firearms without a license.

Case Processing

- Both the initial and final bail amount set by courts in illegal possession of firearms cases declined between 2015 and 2019, but increased in 2020 and 2021. As bail decreased along with the increase in the use of unsecured bail, the proportion of

[2] Here, clearance refers to the number of shootings in a given year that have either led to an arrest or where a suspect has been identified but cannot be arrested (i.e., exceptional clearances) (e.g. due to death or fleeing the country).

[3] There are two main categories of illegal gun possession cases in Philadelphia: Possession of a firearm by a person who has been prohibited from carrying gun due to a past serious conviction or other prohibition (18 Pa.C.S. § 6105), and possession of a firearm without a license (18 Pa.C.S. § 6106). The former is generally viewed as the most serious illegal gun possession statute, while the latter is generally viewed as less serious than possession by a prohibited person. Both are non-violent offenses only related to illegal possession of a gun.

cases where bail was posted increased for both types of illegal firearm possession. In 2021, the median initial bail for illegal gun possession by a prohibited person was $150,000 and was $50,000 for illegal possession without a license[4].

- The rearrest rate for a new gun crime after being released from jail during the pendency of their original illegal possession of firearm case is relatively small, but rearrests may nonetheless be concerning. At the time of September 2021 when the analysis was conducted, the rearrest rate increased slightly from 8% in 2015 to 11% in 2019, but returned to 8% in 2020. The rearrest rate for a new violent gun crime remained steady at around 2-4% during the study period, while the rearrest rate for a new illegal gun possession offense rose from 3-4% in 2015-2018 to 6% in 2019-2020. 1% or fewer of the re-arrests were for shootings during the pendency of their original case.
- Conviction rates in shooting cases have fallen steadily since 2015, although had begun to rebound just before the pandemic. Between 2016 and 2020, the fatal shooting conviction rate dropped from 96% to 80%. It dropped less sharply, from 69% to 64%, in non-fatal shootings.
- Conviction rates in both types of illegal gun possession cases have fallen steadily since 2015 (from about 65% in 2015 to about 45% in 2020); notably, this declining trend is a long-term trend predating the pandemic, and the court closure alone will not explain this.
- The courts have had very limited capacity to try cases during the COVID-19 pandemic, especially cases needing civilian witnesses and juries. This has resulted in a large backlog of open cases in 2020 and 2021. For example, at the end of 2019 there were 1,685 pending cases involving fatal or non-fatal shootings or possession of a firearm by a prohibited person or without a license. In mid-December 2021, there were 4,571 open cases for those offenses, an increase of 171%.
- A review of nearly 400 dismissed and withdrawn illegal gun possession cases conducted by the DAO showed an increase in “constructive possession” cases among dismissed and withdrawn illegal gun possession cases in recent years. Constructive possession cases arise when no one physically possesses a gun illegally (e.g. the gun may be under a seat in a car full of people), making the cases harder to prove.
- Approximately half of illegal gun possession cases were dismissed because of the failure of the victim, witness, or police officer to appear for court proceedings. Improving victim, witness, and police officer court appearances is within the control of system actors.

[4] Note that the defendant is required to post only 10% of the bail amount set.

- The DAO and PPD instituted a project to collaboratively review each new non-fatal shooting and gun possession by a prohibited person case in December 2020. Of the cases involved in that collaboration that received a preliminary hearing in its first year, 81% successfully passed the preliminary hearing stage, a significant improvement over rates prior to the collaboration.[5]

Recommendations

Based on the key findings, additional data analyses, and reviews of evidence-based practices, the agencies make the following recommendations. We note at the outset that all of these recommendations are not unanimous. Even among those with broader support, they will require continued collaboration between system and community stakeholders to ensure implementation in a manner that promotes public safety and fairness. Agencies outline their specific positions on how best to implement these recommendations in the full report. We encourage readers to review each agencies' sections as there is diversity of opinion between stakeholders as to implementation strategies. Note that endorsement and support are different from prioritization. Many of the recommendations will require funding, and discussions on prioritization under budgetary constraints also need to be held.

Enforcement[6]

1. Incorporate the voices of people with lived experience in developing effective enforcement strategies tailored to their neighborhoods.
2. Improve arrest rates in shooting cases by creating a centralized non-fatal shooting investigation team within the PPD and further investing in better forensic technology (e.g., expanding the staffing and space available to PPD's office of forensic services, investments in technology to test ballistic evidence for DNA, and investment in equipment to conduct forensic cell phone analysis).

[5] To pass the preliminary hearing, a judge must determine that there is enough evidence available to bring a case against the defendant.

[6] While Defender Association supports the recommendation to involve community voices in the development and implementation of local law enforcement strategies, the agency did not participate in and does not endorse any other specific recommendations for enforcement. Defender notes that effective strategies should promote both public safety and racial equity. These values are mutually dependent not exclusive. We write separately to call for transparency in implementation and outcomes to support continued community engagement and accountability.

3. Continue the weekly collaborative review of non-fatal and illegal firearm possession cases by the PPD and DAO; consider expanding it and including other local, state, and federal justice system actors to monitor the trend of gun violence and case dispositions throughout the lifecycle of the cases. Continuous monitoring along with collaborative reviews help address investigative shortcomings and improve the overall law enforcement practices
4. Establish dedicated courtrooms for illegal gun possession cases at the Common Pleas Courts so as to streamline the overall process, minimize the risk of re-arrests, improve case processing time, increase education on gun safety, and strengthen individualized case assessment. Having dedicated resources among stakeholders (courts, defenses, and prosecution) will help thoroughly assess individual cases and their risk to determine the best treatment that may range from diversion to incarceration, while simultaneously reducing the time from arrest to disposition. Notably, dedicated courtrooms for illegal gun possession cases already exist at the Municipal Court level.
5. Reduce failures of victims and witnesses to appear in criminal cases by providing more support to victims and witnesses (transportation, better follow up), investing in technology to allow for both court-reminder texting to victims and witnesses and provision of transportation vouchers, establishing stronger accountability for police officer failures to appear, and striving to build trust in the overall criminal justice system.
6. Invest in victim and witness relocation, by providing more funds for relocation, expanding eligibility for relocation, and improving relocation outcomes by allowing people to be moved further from their homes and into neighborhoods with less violence.
7. Advocate for legislation to increase the amount of information that needs to be collected from gun purchasers, to further deter “straw purchasing.”. And request state and federal law enforcement partners increase inspections of federally licensed gun dealers who have been found to be the original source of guns ultimately used in crimes.
8. Implement Data-Driven Approaches to Crime and Traffic Safety (DDACTS) that can reduce not only violent crimes but also traffic crashes, when/where these two types of hotspots overlap, through data analysis, high visibility patrols, and publicity strategies. Operational guides of DDACTS emphasize its preventive focus and community partnerships, and DDACTS can support the city’s Vision Zero project.

Intervention

1. Include community voices in continued collaboration between city and community stakeholders to develop and implement strategies that build trust and public confidence in local government.
2. Prioritize 311 responses and other city services in crime hot spots. Research suggests that addressing environmental factors (e.g., cleaning up trash, fixing and improving street lighting) will result in a significant reduction in violent crimes. City departments' efforts can be tied to performance-based budgeting for environmental improvements.
3. Invest in interventions focused on those of highest vulnerability, such as Cure Violence, the READI model, or Advance Peace. Although each program is different, they all hold the potential to lift those most vulnerable from the cycle of violence and connect them to necessary trauma healing, employment, and support. Collectively, they actively engage at-risk communities and individuals through credible messengers, provision of support services such as cognitive behavioral therapy and job training/placement, paid mentoring, and healing of trauma.
4. Develop more victim-centered systems and invest in robust, community-based, culturally competent victim services.
5. Advocate on the state level to expand availability of state and federal funding for Hospital-Based Violence Intervention Programs (HVIP), which have been proven to significantly lower the risk of violent reinjury or future violence perpetration after hospital discharge.
6. Invest in technologies that can help to coordinate services for victims and witnesses through community-based organizations, help victims to fill out paperwork to receive victim compensation money.

Prevention

1. Incorporate the voices of those with lived experience in any prevention efforts.
2. Increase positive interactions between community members and police officers; this may range from positive interactions during officers' day-to-day patrols (e.g., mere encounters and business checks) to formalized home visits as well as community outreach/meetings.
3. Dedicate investment of resources in neighborhoods where chronic disinvestment has crippled community supports, health, and public safety, such as in historically "red-lined" communities and those facing the most violence. These investments should be focused on improving neighborhoods and can include such

evidence-based strategies as greening vacant lots, improving street lighting, planting trees, better street cleaning and trash pickup, repairing occupied homes, and remediating abandoned houses. It should also include prioritization of 311 responses to these neighborhoods.

4. Expand foot patrols with emphasis on community engagement and positive interactions, correct the current officer shortage through increased hiring, and invest in cell phones for police officers. Research in Philadelphia found that the foot patrols resulted in a significant reduction in violent crimes, when implemented properly with the right amount of resources.
5. Prioritize justice system involved people residing in communities with high levels of violence for directed city support services such as eviction protection, homeownership supports (repairs, improvements, purchasing), housing, substance abuse or mental health treatment, and workforce development.
6. Create a fund modeled on the Chicago Fund for Safe and Peaceful Communities, to increase private and institutional funding supporting Philadelphia-based community organizations that work to prevent and intervene in gun violence.
7. Commit resources to transparently evaluate all violence prevention and intervention efforts and outline plans to expand and scale those that work and end those that do not.
8. Increase trust between law enforcement and community members by increasing non-enforcement interactions with police (perhaps through increased community-based policing and foot patrols), reducing law enforcement responses to minor events that currently lead to misdemeanor arrests/charges, and reducing traffic stops for minor code enforcement (e.g., broken tail lights).
9. Invest in and expand the DAO's collaborative intelligence, investigative, community-centered, and victim-centered efforts, all of which are aimed at effective prosecution of gun violence, intervention in communities that suffer from gun violence, and prevention in underserved and traumatized communities.
10. Continue commitment to interagency collaboration bridging law enforcement, public health, and other key stakeholders to identify innovative opportunities for intervention and prevention**.**
11. Direct all relevant city and court-related agencies to collaborate with PIRPSC both by participating in meetings and sharing data. The ability to identify at-risk individuals and neighborhoods to provide supportive services in order to prevent future violence is greatly enhanced with additional relevant data.
12. Support PIRPSC in expanding its review of gun violence information to include a large-scale longitudinal study, with expanded data sources including qualitative

interviews, comparing victims and perpetrators of gun violence and their interaction with city services to other similarly situated residents of Philadelphia.

13. Prioritize evidence-based strategies and tactics that reduce gun-violence. Pilot and rigorously evaluate innovative programs, expanding those that work and ending those that do not.

2. Establishment of Committee

In September 2020, Councilmember Jones, joined by Council President Clarke, and Councilmembers Johnson and Gauthier, sponsored Resolution #200436 to address increased gun violence, homicide, and access to firearms in the city of Philadelphia. The resolution, along with subsequent Resolution #210703 authorized the Committee on Public Safety and the Special Committee on Gun Violence to hold hearings to (1) review and examine the circumstances shared by those accused of committing the last 100 shootings, (2) explore the source of firearms used to commit violent crime in the city, (3) evaluate any prior contacts the arrestee had with the criminal justice system, and (4) the trend of gun case disposition, bail and recidivism. The resolutions also recognized the need for criminal justice system stakeholders and community stakeholders to collaborate closely to stem the increases in gun violence.

In response to Council's call for increased collaboration, a group composed of the Mayor's Managing Director's, Controller's and District Attorney's Offices, the Department of Public Health, Philadelphia Police Department, First Judicial District, and the Defender Association of Philadelphia was created. We now work together as the Philadelphia Interagency Research and Public Safety Collaborative (PIRPSC), helping our agencies share data, emergent research, and associated ideas. PIRPSC would like to thank the Controller's Office and First Judicial District for their analysis and discussion during the preparation of this report.

The working group met consistently since September 2020 to explore and report its findings related to the research questions initially posed by City Council. Following initial reports, team members expanded the research agenda to investigate gun case outcomes, shooting incident clearance rates, and witness appearance rates. While focusing on criminal case process improvement, the working group also analyzed arrestees' prior contacts with city services to identify missed intervention opportunities, researched national best practices and potential partnerships with academics, and worked closely with those with lived experience to recommend short and long term strategies to reduce gun violence in the city.

The group prepared and presented materials to City Council at several special hearings and worked collaboratively to summarize the findings and recommendations from the last two years in December 2021.

Appendix 3: Committee Meeting Agendas includes a list of agendas for these meetings.

3. Last 100 Shooting Data Analysis

Analysis Result by PPD

Research Questions

The committee posed a set of questions regarding the pattern of gun violence; these questions (included in Appendix 4 in their original format) covered such topics as examining the overall trend of gun violence, analyzing the characteristics of the most recent 100 shooters (e.g., background, motivating factors), characteristics of guns used in Philadelphia, factors affecting the likelihood of shooting case clearances, and VUFA case dispositions (Violations of Uniform Firearm Act).

Key Findings

In response to the questions, the PPD analysis team established the following findings:

- The number of homicides, shooting victims, VUFA arrests, gun recoveries, and gun purchases increased significantly since 2015, particularly during the Covid-19 pandemic and civil unrest.
    - The increase in VUFA arrests cannot simply be attributed to an increase in gun purchases and fewer individuals obtaining concealed carry permits; there was a notable increase in VUFA arrests of previous felons prohibited from carrying firearms (CC6105).
    - The pandemic and civil unrest created significant challenges in policing (e.g., limited social interaction and strained resources); many major cities saw a similar increase in gun violence.
- Most of the guns recovered were semi-automatic, 9mm pistols, that were originally purchased within Pennsylvania; the time-to-crime since original purchases was oftentimes a very long time (> 3 years).
    - “Ghost gun” recoveries have increased by at least 410% from 2019 to 2021.
- An analysis of the most recent 100 shooting arrestees (as of August 2020) indicated that:
    - Common motives for shootings were argument (50%) and drug-related (18%).
    - Offender and victim demographics resembled each other: male, people of color, those in late adolescence and young adulthood (18-35 years old).

    - Previous shooting victimizations were fairly common among both shooters (7%) and victims (5%), despite the fact that shootings are statistically rare events (2,246 shooting victims in 2020 out of 1.5 million Philadelphians, or 0.1%).
    - Previous arrests for gun possession, narcotics and/or violent felony were very common among both shooters and victims.
        - It should be noted that prior criminal history is not the sole determinant of future involvement in shootings; however, it is certainly one of the important risk factors, as a willingness to carry a firearm is a necessary precursor to shooting someone.
- An analysis of VUFA case dispositions indicated that:
    - VUFA cases withdrawn/dismissed went up, while guilty convictions went down since 2015.
    - Although court closures during the pandemic affected how cases were processed (e.g., only weak cases were disposed of, while other cases remained open without final dispositions), the reduction in conviction rates has been a long-term trend that pre-dates the pandemic.
        - A recent initiative, such as PPD/DAO VUFA reviews, has improved the rate of VUFA cases passing preliminary hearings.
    - Bail amount went down between 2015 and 2019; it increased in 2020/2021.
        - The reduction in bail amount was more evident among those with prior gun arrests.
    - Bail posting percentage went up.
    - Sentences became shorter for 18 PaCS 6105 (firearm prohibition); incarceration became less frequent for 18 PaCS 6105 (without license) than earlier years.
    - Reoffending rate for another gun offense during a VUFA open case was about 8% in 2015/16; it went up slightly to 11 % in 2019.
    - Individuals rearrested for VUFA, with a previous gun crime arrest (within 3 years), have increased from 10% in 2015 to 17% in 2020.

Implications

The number of homicides, shootings, and VUFA arrests track alongside each other, suggesting that more guns on the street mean more shooting victims; this in turn lowers the clearance rate of shootings due to strained resources. Clearing shooting cases certainly should be focused on; but there should also be an equal focus on addressing illegal guns on the street, as carrying an illegal firearm is a precursor to using it to commit a crime.

Addressing the supply-side of guns has limited impact due to several reasons. First, Pennsylvania is a source state of guns, self-supplying most guns used in Philadelphia. Second, most guns used and/or recovered are those purchased a long time ago, indicating that attempts to limit the future supply of guns now will not impact the current gun violence crisis. Therefore, we should focus on the demand to carry/use a firearm by focusing on enforcement, intervention, and prevention of carrying illegal firearms and using them.

There appears to be a trend in the criminal justice system where gun cases are treated more leniently than in earlier years. It is particularly concerning that the reoffending rate for another gun offense during a VUFA open case has increased, when the bail posting percentages have increased and overall sentences have become lighter. The current analysis was limited to arrested offenders; it is important to also take into account the network of criminals; they communicate. Criminals see and hear from their peers. Additionally, while it is not within the scope of the current analysis, it may be prudent to examine the VUFA sentence patterns in Philadelphia against the Pennsylvania state sentencing guidelines, as the Sentencing Commission is currently researching[7].

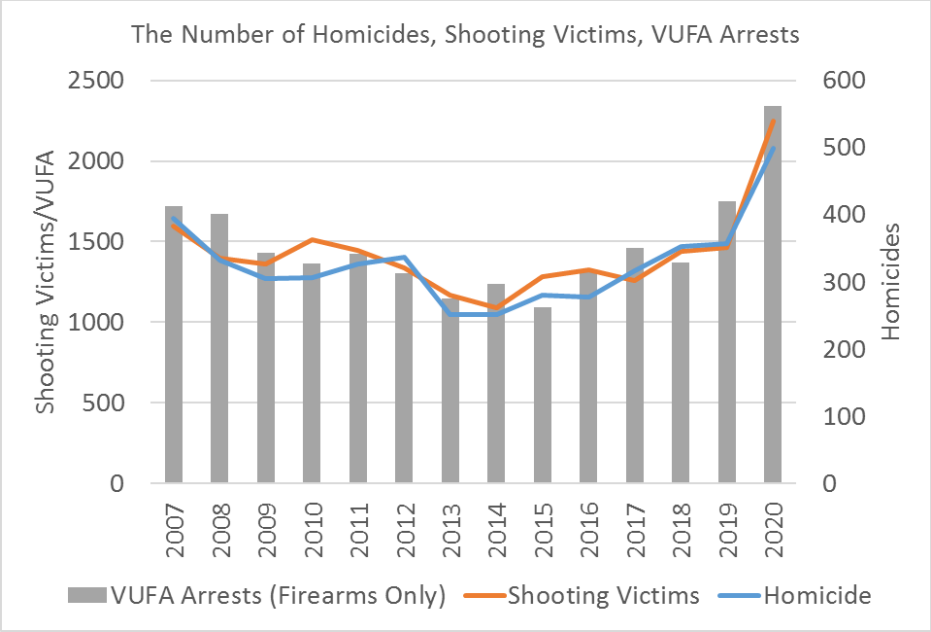
If more "guns on the street" mean more shooting victims, how do we deter illegal firearm possession? Comprehensive gun violence strategies should have equally balanced elements of enforcement, intervention, and prevention. As for enforcement, classical deterrence theory suggests three elements for deterrence: severity, swiftness, and certainty. Enhanced sentencing will not be the sole solution; however, being lenient against gun crimes at the time of the gun violence crisis should perhaps be scrutinized. Swiftness of the criminal justice system has always been a limitation to deterrence, but court closures during the pandemic as well as increasing number of gun cases coming in (an average of 7 VUFA arrests per day in 2021) will only aggravate this, unless dedicated and increased resources are allocated. Simply increasing the frequency of stops in hopes for strengthening the (perceived) certainly of arrests is not the solution either. Deterring illegal firearm possessions should be holistically addressed by implementing changes in policing, prosecution, and courts, as discussed in the recommendation section of this report.

[7] House Resolution 111. https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=R&bn=0111

Detailed Analysis Results

Overall gun violence

Despite the overall reduction in Part 1 violent and property crimes over more than 10 years, homicides and shootings have gone up, particularly during the Covid-19 pandemic and civil unrest, since 2015; simultaneous to the increase in gun violence has been the increase in VUFA arrests. In fact, the number of homicides, shootings, and VUFA arrests track alongside each other, suggesting that more guns on the street mean more shooting victims. The significant increase in shootings and homicides during the pandemic is not unique to Philadelphia; many major cities have also experienced a similar, drastic increase.[8]



Characteristics of gun usage, recovery and transaction in Philadelphia

There has been a significant increase in crime gun recoveries (+59% from 2017), privately made firearms (aka. ghost gun) recoveries (+410% from 2019) and handgun sales (+140% from 2017 to 2020). The majority of crime guns recovered have been traced to original purchases within Pennsylvania (73%). The most common crime gun in Philadelphia has continued to be a semi-automatic pistol. In 2020, 77% of crime guns recovered were pistols, and 46% of crime guns were 9mm. There has not been any significant difference in

[8] abcNEWS. "'It's just crazy': 12 major cities hit all-time homicide records" https://abcnews.go.com/US/12-major-us-cities-top-annual-homicide-records/story?id=81466453

the trends of type and caliber of weapon for the last several years. The time-to-crime was often a very long time (60% of the recovered and traced guns showed more than 3 years between the original purchase and recovery). When the time from purchase to the use of the gun in a crime is a long period of time, there is less investigative value in the original source of the gun (first sale) that is obtained from tracing. The gun may have changed hands multiple times (legally or not).

Statistics on Crime Gun Recoveries and Gun Sales in Philadelphia

	Crime gun recoveries	Ghost gun recoveries	handgun sales	long gun sales
2017	3,552		10,736	2,671
2018	3,662		10,386	2,379
2019	4,258	95	11,487	2,263
2020	4,989	250	25,841	5,527
2021	5,920	571		
% change	66.7% (2021 vs 2017)	501.1% (2021 vs 2019)	140.7% (2020 vs 2017)	106.9%

Source: Office of Forensic Science; PA State Police

100-shooter sample

An analysis of 100 most recent arrestees (at the time of the September 2020 committee presentation) may not be a representative sample; however, basic background characteristics resembled those of an additional 100 shooter random sample as well as all shooting arrestees in the past 5 years, as subsequent analysis indicated. Thus, the current section focuses on the first analysis sample of 100 most recent shooting arrestees and their victims.

Motive	Count	%
ARGUMENT	50	50%
DRUG*	18	18%
ROBBERY	8	8%
DOMESTIC	15	15%
RETALIATION	8	8%
OTHER	8	8%
UNKNOWN	7	7%

Note: * Drug motive includes both primary and secondary motives; thus % do not add up to 100%

gun source	Count	%
Firearm Recovered (but not murder weapon)	10	10%
Illegal transaction	8	8%
Stolen guns	7	7%
Ghost Guns	3	3%
Ilegally purcahsed / own / borrowed	12	12%
No ownership records for recovered firearm	2	2%
Firearm Not Recovered	31	31%
Unknown/No Serial Number	28	28%

The most common motives for shootings with arrests were argument (50%) and drugs (18%). When examining the origin of the firearms, it is notable that the firearms were often not recovered (31%) or only limited information was available (e.g., lack of cooperation, obliterated serial numbers (28%)).

Offender and victim demographics resemble each other: for the arrested shooters, 94% were male, 95% were people of color (74% Black Male), and the peak age was in late adolescence and young adulthood (18-30 years old). Similarly, for victims, 86.5% were male, 88.5% were people of color (61.5% Black Male), and the peak age was in young adulthood to mid-thirties (21-35 years old).

Mirroring characteristics between offenders and victims go beyond demographics. Previous shooting victimizations are fairly common among both victims and offenders. Of the 100 shooting arrestees, 11 have been shooting victims (7 were shot prior to the shooting they were arrested for), and 3 of the 11 were shot previously in the relatively short time between January – August 2020 (this is notable, as the analysis was for recent arrestees as of August 2020). Similarly for victims, 5 had been shot previously out of the 96 shooting victims (1 was shot twice in the past, with his third and final shooting represented in the current analysis sample and that resulted in his death). While the percentages may appear low, it is important to contextualize such numbers: shootings are statistically rare events (there were 2,246 shooting victims in 2020 out of 1.5 million Philadelphians, or 0.1%).

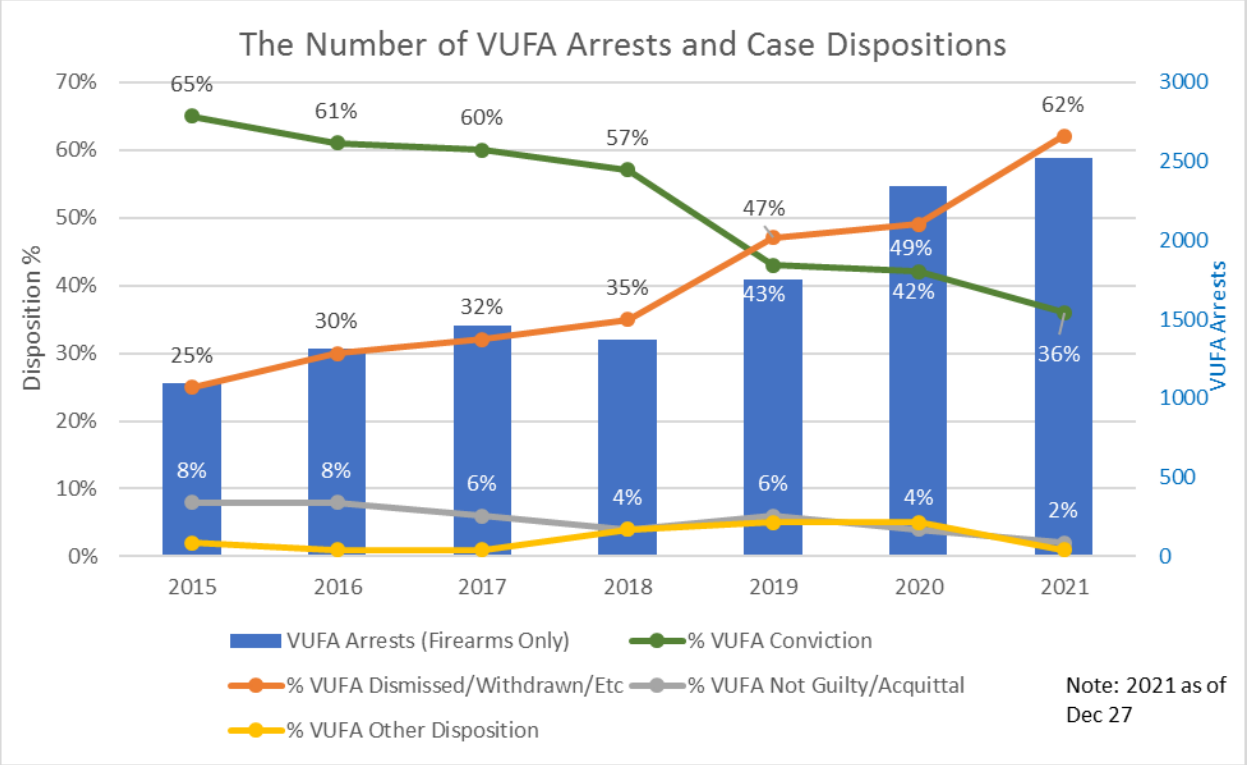
Arrest Background (Historical Charge Counts)	Arrestees who have previous charge	Avg # of charges per person		Shooting Victims who have previous charge	Avg # of charges per person
Violent misdemeanor/summary	60	3.3		38	2.5
Other misdemeanor/summary	56	1.5		45	1.4
Violent felony	50	1.6		32	1.1
Narcotics possession	50	1.9		43	1.7
Property misdemeanor/summary	46	1.6		40	1.7
Other felony	44	1.1		38	0.8
VUFA	**38**	**1.6**		**28**	**1.4**
Narcotics PWID	**37**	**0.9**		**29**	**0.6**
Property crime felony	**32**	**1.4**		**29**	**1.4**
No prior	24	NA		37	NA
VUFA / Violent felony	**57**	**3.2**		**40**	**2.5**
VUFA / Violent felony / PWID	**68**	**4.1**		**44**	**3.2**

Note: charges were used; DA declined charges were excluded; arrest history limited to year 2000 and onward

Previous involvement in crimes is also common among both offenders and victims. 50% of the arrestees had a Violent Felony charge in their criminal history, as did 33% of the shooting victims. 38% of the arrestees had a "Violation of Uniform Firearms Act" (VUFA) charge, as did 29% of the shooting victims. 37% of the arrestees had a "Narcotics Possession with Intent to Distribute" (PWID) charge, as did 30% of the shooting victims. 57% of the arrestees had either VUFA or Violent Felony charges in their criminal history, as did 42% of the shooting victims. 68% of the arrestees had either VUFA, PWID or Violent Felony charges, as did 42% of the shooting victims. It should be noted that a prior criminal history is not the sole determinant or predictor of future involvement in shootings; however, it is certainly one of the important risk factors.

VUFA case disposition analysis:

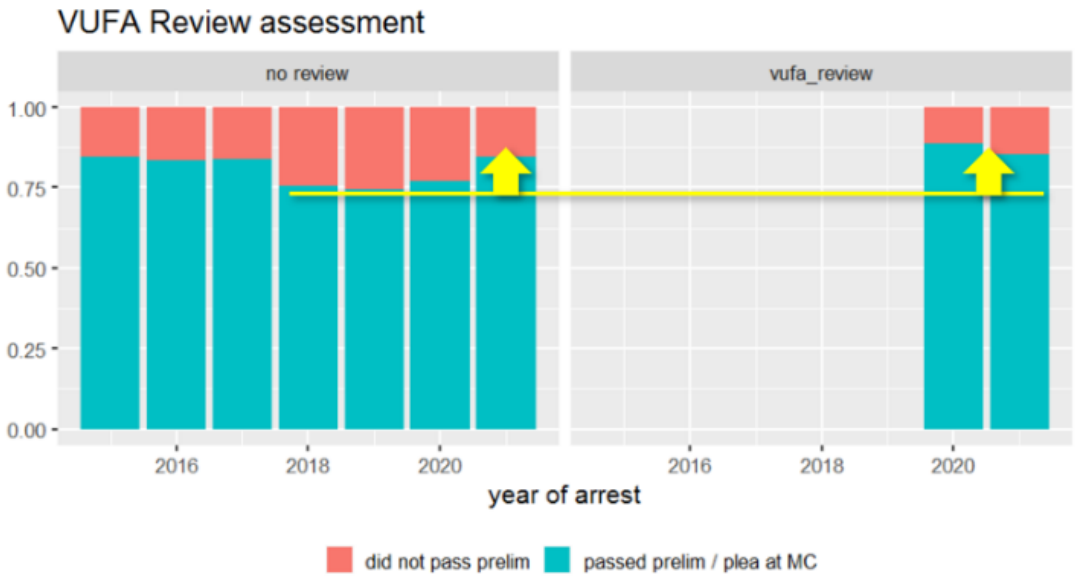
While the number of VUFA arrests (blue bars) has been increasing, the percentage of VUFA convictions (green line) has been steadily decreasing from 65% in 2015 to 42% in 2020. Simultaneously, the percentage of VUFA cases withdrawn/dismissed (orange line) has steadily increased from 25% in 2015 to 49% in 2019/2020.



It should be noted that the sudden jump in the dismissal rate in 2021 certainly is a side-effect of the court closures during the pandemic where cases that were disposed of likely were weak cases; strong cases that have passed preliminary hearings continue to

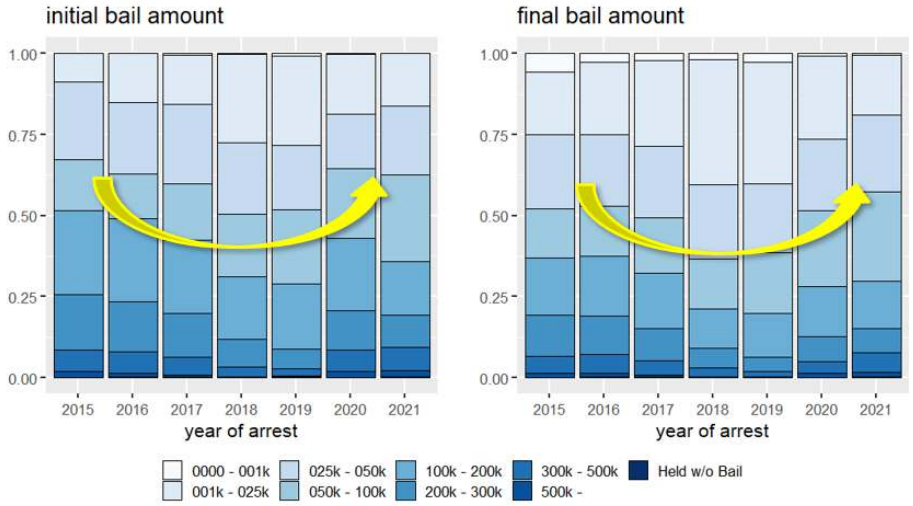
remain open without final dispositions, which may have artificially inflated the rate of dismissal in 2021. In fact, as of September 2021, there were more than 3,000 open VUFA cases (and the number continues to have increased with the current rate of 7 VUFA arrests per day). However, it is important to note that the decreasing rate of VUFA convictions is a long-term trend that pre-dates the pandemic; thus, special circumstances surrounding the pandemic alone will not explain this trend of VUFA case dispositions.

Nonetheless, there also is a positive indication from a recent initiative. An example is the weekly review of gun cases (started in December 2020) with DAO supervisors and PPD command staff to address investigative shortcomings prior to preliminary hearings. An exploratory analysis of reviewed cases showed an improved likelihood of passing preliminary hearings (as indicated by the green bars in the chart). Interestingly, even those cases that did not go through the review showed a higher percentage of passing preliminary hearings than previous years; this perhaps may be conceptualized as "diffusion of benefits" where issues identified through the reviews may be improving the overall investigative practice.



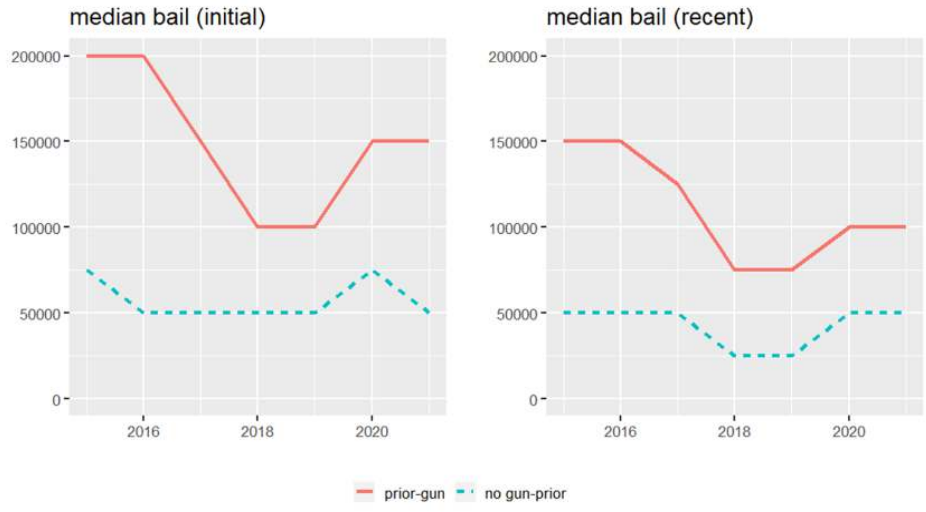
A more detailed analysis of VUFA case dispositions was conducted by utilizing case-level data that included offender information as well as bail and case outcomes; the data were provided by the District Attorney's office, while the analysis was led by the PPD team. In particular, the data focused on arrests with VUFA as the lead charge between 2015 and August 2021; specific charges included CC6105 Firearm prohibition (prior conviction); CC6106 Carrying firearms without licenses; and CC6108 Carrying firearms in the City of Philadelphia. It should be noted that the data and analysis results are as of Aug 14th, 2021;

this cut-off date should be taken into account when interpreting some of the analysis results (especially reoffending rates when recent arrestees had not had time to reoffend by the time of the analysis).

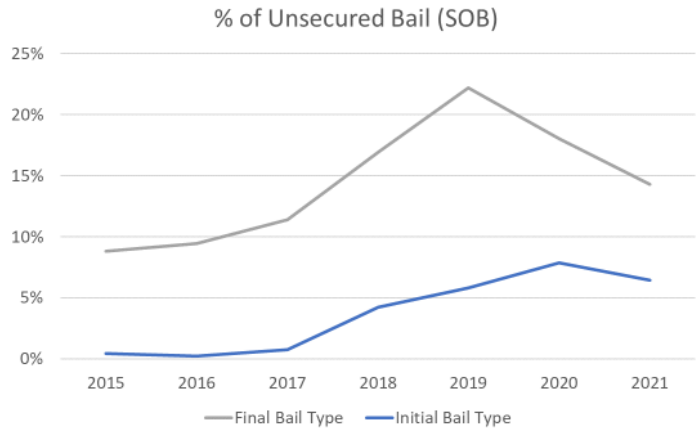


First, an analysis of bail amount indicated that bail amount went down between 2015 and 2019; it subsequently increased in 2020 and 2021. The chart on the far left is the trend of the bail amount that was initially set and the chart on the right is the final bail amount. The lighter color represents the share of a lower bail amount, and the darker color reflects a higher bail amount.

Notably, the reduction in bail amount was more evident among those with prior gun arrests. These charts compare the median bail amount over time; the two lines distinguish VUFA arrest offenders with (red) and without (green) prior gun crime arrests. The median bail amount among the no-prior gun crime arrests group barely changed, while a significant decrease was evident in the median bail amount for those VUFA offenders who already had such prior arrests.

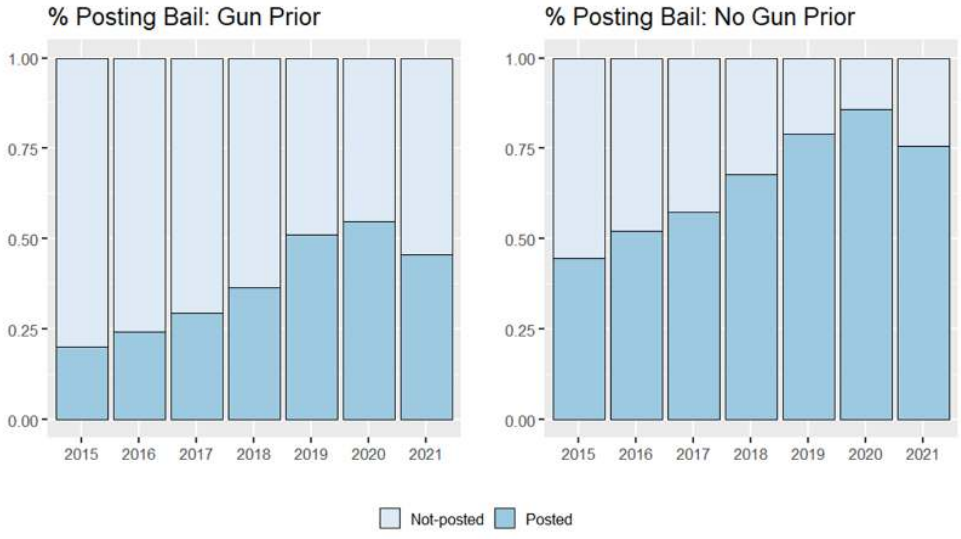


In addition to bail amount, the type of bail has also changed. In particular, the use of unsecured bail has increased, most notably between 2015 and 2019 when its usage exceeded 20% for the final bail type.

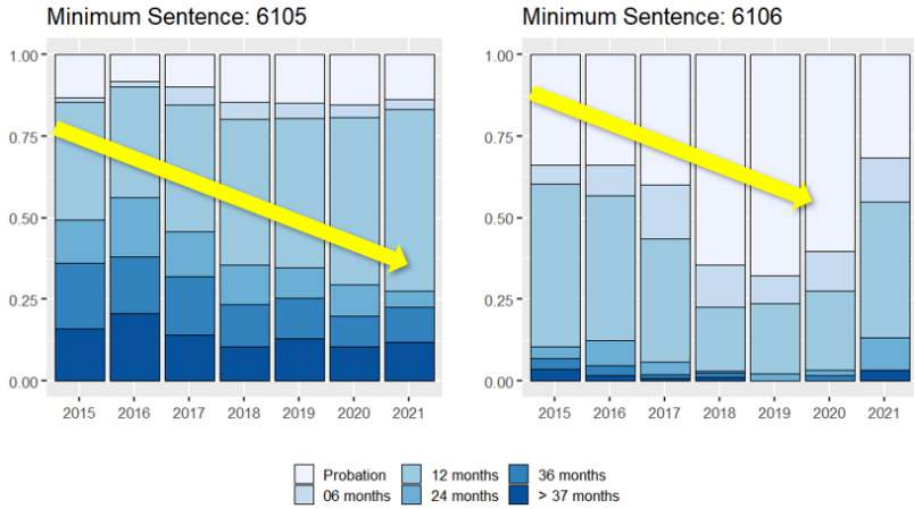


An unsurprising result from the reduction in the bail amount and the increased use of unsecured bail is the increase in the percentage of the defendants who posted bail. The increasing trend of bail posting was present for both those with and without gun crime arrests (gun priors). In 2019-2021, nearly 50% of the defendants with gun priors posted bail.

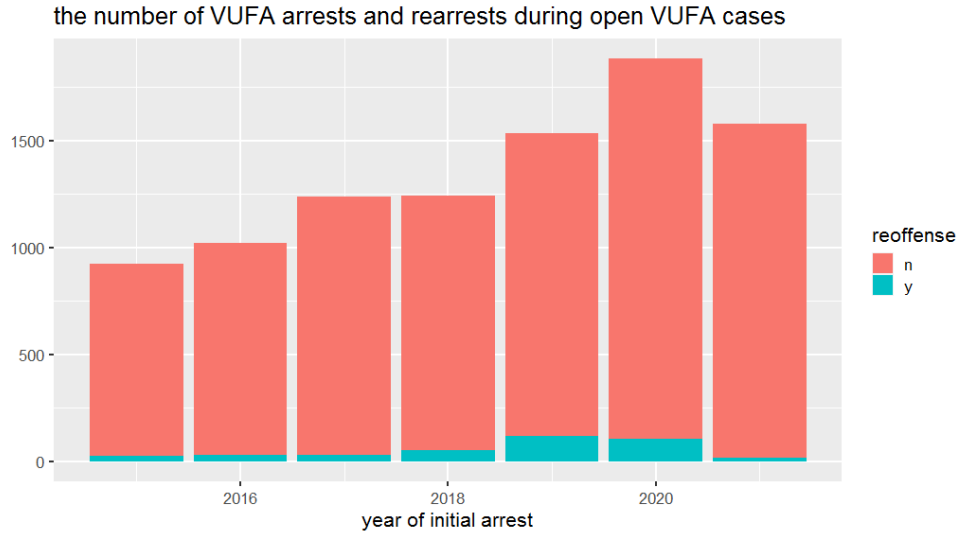
When looking at convicted cases, it appears that there is an overall trend to setting lighter sanctions. In this chart, the lighter color represents a shorter sentence. Sentences became shorter for CC6105 (firearm prohibition) cases, as indicated by an increasing share of light blue bars. Notably, the rate of incarceration did not change for the CC6105 cases. For CC6106 (no license) cases, the use of probation became more common.



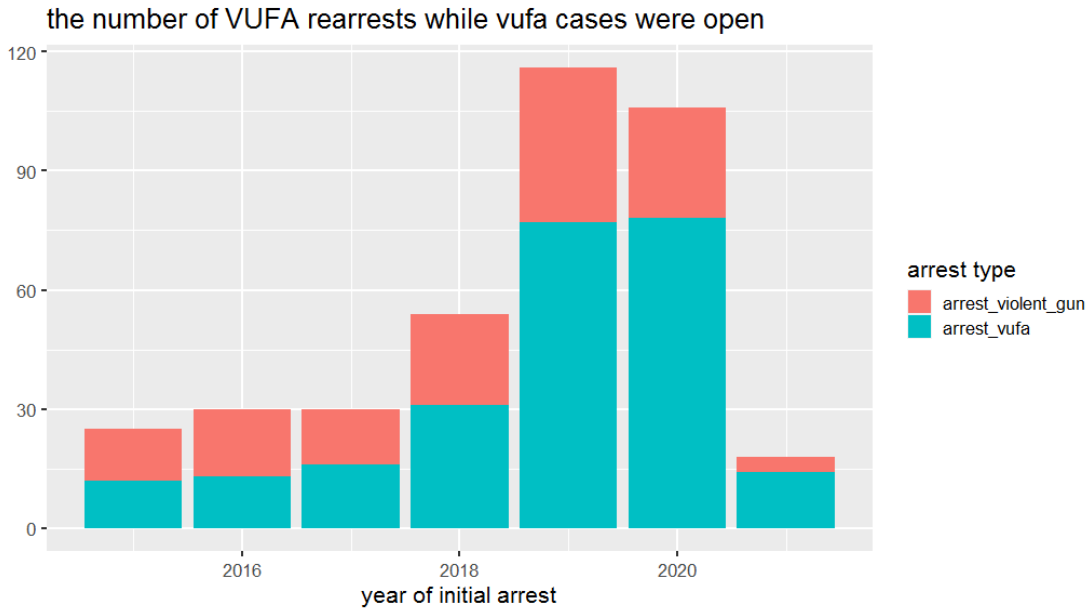
It should be reiterated that these trends including bail amount, bail posting, and sentence outcomes reflect long-term trends that pre-date the pandemic. A supplementary analysis of VUFA offender backgrounds did not support the idea that changing offender populations are the cause of such a change; for example, the average age of the offenders or the average number of prior arrests did not change over the study period (that is, the trend toward lighter sentences is not likely because offender populations have changed).



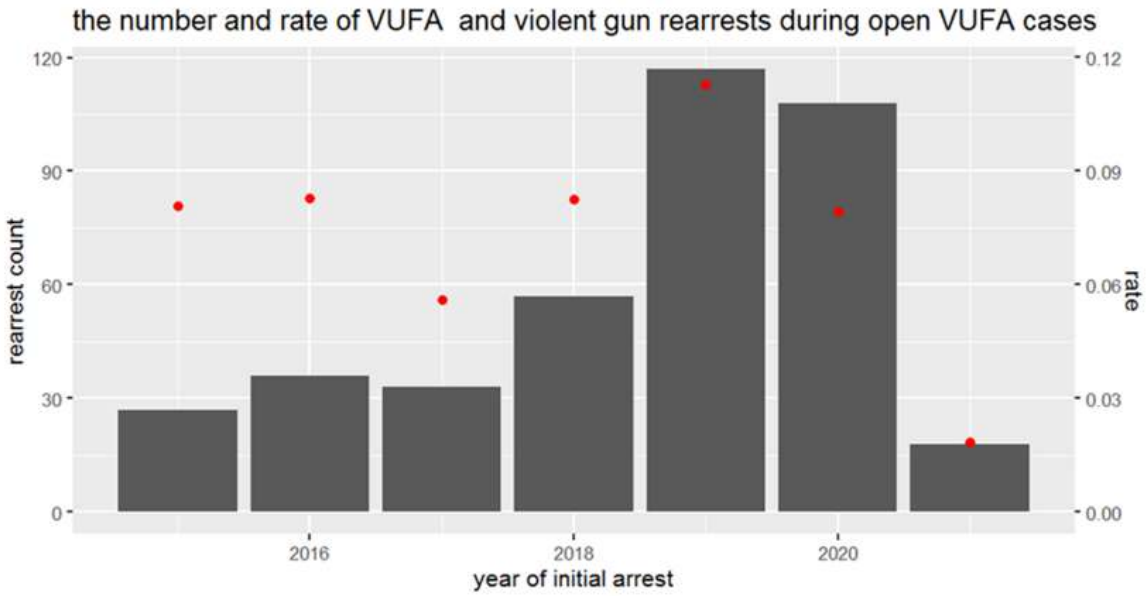
Finally, an analysis on recidivism was conducted. Recidivism in this analysis was defined as re-arrest for gun crimes (including VUFA/violence) during the time a defendant was having a VUFA open case. The number of reoffenders for another gun offense during VUFA open cases may be relatively small (green bar), compared to the overall number of cases.



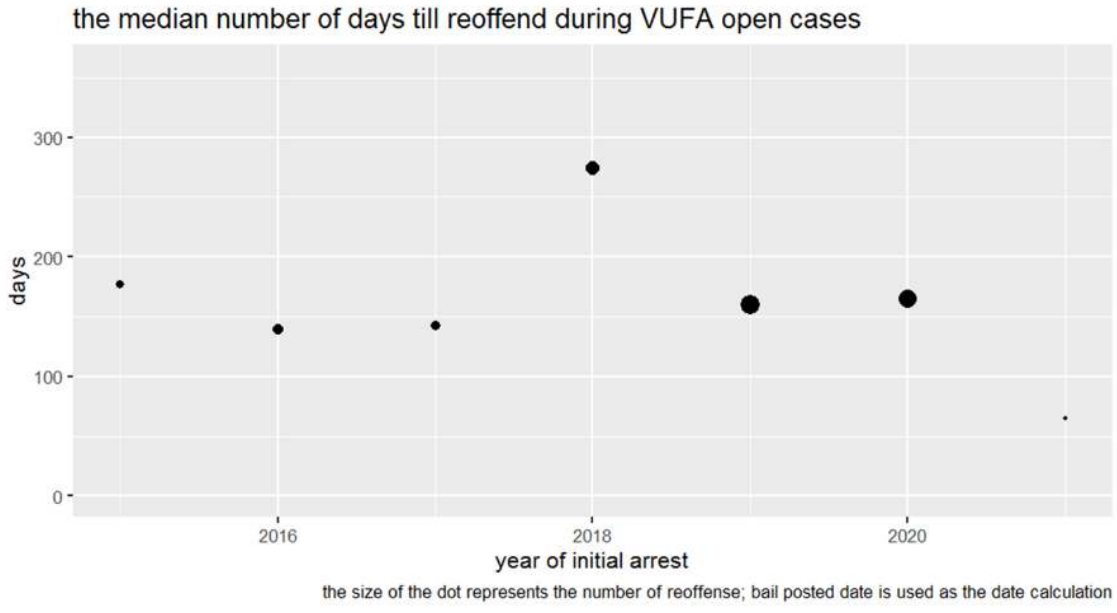
Nonetheless, there was an increase in the number of re-offenders in 2019 and 2020. There were less than 50 re-offenses in 2017 and earlier; the number went up to more than 100 in the 2019 - 2020 period. Most of these re-arrests were for another VUFA, but there was a sizable number of re-offenses that were violent gun crimes which included aggravated assault and robbery with guns. It should be noted that the low number for the 2021 cohort may simply be due to not having enough time to reoffend yet (the analysis cut-off date was August 2021, and no updated data were provided).



Given the change in the overall increase in VUFA cases, reoffending should be examined in terms of rates. In particular, the denominator of such a rate calculation should be the number of defendants who posted bail. Based on this calculation, the reoffending rate was about 8% in 2015 - 2016, which went up slightly to 11% in 2019 (red dots in the chart with the right-y-axis). This means that the increasing number of reoffending counts shown earlier is not the simple reflection of the overall increase in VUFA arrests. Furthermore, it is noteworthy to highlight the earlier analysis that showed that 2019 was when the median bail was the lowest and the use of unsecured bail was the highest.



It may be hypothesized that the increase in re-offending may be due to a longer period for cases to remain open during the pandemic and its accompanying court closures. In order to examine this, an analysis of the median number of days till re-offense during VUFA open cases was conducted (x-axis in the chart shows the median number of days for arrest cohorts in each year). The results showed that the median number of days till re-offense remained relatively steady between 150 to 200 days. That is, regardless of the court closures and cases remaining open longer, the VUFA offenders were arrested in 2019 and later committed another gun offense in about 6 months; such a trend did not change before or after the pandemic.



These patterns of increasing re-offending among VUFA arrestees was also found in a separate, supplementary analysis that did not limit re-offenses to during open cases. Such an analysis indicated that individuals rearrested for VUFA, with a previous gun crime arrest (within 3 years), had increased from 10% in 2015, to 17% in 2020.

Finally, in addition to the quantitative analysis and statistics indicating the increase in re-offending rates, there have been a number of instances where offenders have committed another crime while they were on bail or shortly after their VUFA cases were dismissed/withdrawn, as reported by various news stories. Recent notable examples may include:

- a series of robbery cases in Center City that were allegedly committed by a group of offenders who were on bail (The Inquirer, 2021)[9].
- a shooting near Temple University where the shooter had recently been arrested for a carjacking (robbery/VUFA) but his case was withdrawn due to a victim's failure to appear (The Inquirer, 2021)[10].
- In the Somerton area a shooter shot his ex-girlfriend while on bail for a pistol whipping incident weeks earlier (CBS Local News, 2021)[11].
- In Portland, Maine, a Philadelphia man randomly fired multiple gunshots near Maine Medical Center. Facing charges of reckless conduct with a dangerous weapon, possession of a firearm by a felon and violating the conditions of his bail in Philadelphia (Press Herald, 2021)[12].
- A man was fatally shot at the Philadelphia Mills mall by a shooter who was out on bail in several cases in Bucks, Montgomery and Philadelphia counties (Bucks Courier Times, 2021)[13].

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[9] The Inquirer (2021). Two Center City robbery suspects were out on bail. Philly DA Larry Krasner said the case demonstrates flaws in the system.
https://www.inquirer.com/news/center-city-robberies-bail-reform-larry-krasner-20211220.html

[10] The Inquirer (2021). Suspect in killing of Temple student Samuel Collington — who had been arrested and released after a July carjacking — surrenders to police.
https://www.inquirer.com/news/philadelphia-homicide-temple-suspect-latif-williams-20211201.html

[11] CBS Local News (2021). Philadelphia DA Larry Krasner Calls Out Those Who Set Bail After Man Accused Of Shooting Ex-Girlfriend.
https://philadelphia.cbslocal.com/2021/11/15/philadelphia-shooting-somerton-gun-violence-james-white-bail-larry-krasner/

[12] Press Herald (2021). Philadelphia man charged with firing shots near Maine Medical Center.
https://www.pressherald.com/2021/10/06/philadelphia-man-charged-with-firing-shots-near-maine-medical-center/

[13] Bucks County Courier Times (2021). Man charged in fatal shooting at Philadelphia Mills mall.
https://www.buckscountycouriertimes.com/story/news/2021/04/29/philadelphia-mills-mall-murder-arrest-dominic-billa/4888242001/

Additionally, there have also been numerous examples of VUFA offenders being involved in violent crimes or arrested for another VUFA while on bail, as a handful of cases listed below from a district illustrate:

- An offender (25/M) was arrested for VUFA in 2000 while on probation for a previous VUFA; the offender was convicted and sentenced 11 ½-23 months; he was released (paroled) as soon as serving the minimum sentence.
- An offender (22/M) who had a 2019 robbery/VUFA case dismissed got involved in at least 1 homicide in 2020. The complainant witness for the 2019 robbery did not appear, although the VUFA case with the police witness also was thrown out altogether. He currently has an active warrant for the homicide.
- An offender's (18/M) 2019 VUFA case was dropped; he has been involved in multiple homicides and shootings in 2020. He initially shot 2 victims, killing one victim; his apparent intended target survived in the incident, but he subsequently shot the intended target again on a later date.
- An offender (19/M) was arrested for 2 VUFAs in the span of 3 weeks in 2020; his initial VUFA arrest had a $100,000 bail and he posted 10%. He was subsequently arrested again in 3 weeks; the initial bail was $200,000 but it was subsequently reduced to $75,000, and he posted it again.

Analysis Result by DAO

The urgency of Philadelphia's crisis of fatal and non-fatal shootings will not be met by looking away from shootings. As noted above, City Council has led a valuable "100 Shooter Review," a title that makes clear what we already know: that shootings are the primary issue. Our efforts must be focused on preventing shootings and holding people who commit shootings accountable, and we should not accept arrests for gun possession as a substitute.[14]

Above all else, real solutions require that prevention be addressed. The pandemic itself proves, both locally and nationally, that when society shuts down and the moderate prevention that currently exists is stripped away from young people–e.g., no organized sports, closed classrooms, closed houses of faith and associated youth programming, closed recreation centers and swimming pools, closed summer camps and job programs, all leading to increased isolation and disrespectful use of social media–gun violence can increase. The pandemic also proves that when law enforcement and courts are significantly curtailed, intelligent enforcement may suffer and gun violence can increase. Intelligent, modern enforcement primarily directed at fatal and non-fatal shootings and secondarily directed at illegal gun possession by people who appear to be driving gun violence is also essential.

Technology can lighten the burden of investigating and prosecuting fatal and non-fatal shootings. All of government must work together to meaningfully invest in the preventative pro-social resources that atrophied during the pandemic, and in forensic science (both DNA and cell phone forensics) capable of solving massive numbers of new and old cases that remain unsolved. Other improvements in investigation and collaboration among governmental actors are also essential, as the recommendations below indicate.

Gun possession arrests that involve no violent acts present a secondary and important frontier in curbing gun violence, but must be targeted to distinguish between drivers of gun violence who possess firearms illegally and otherwise law-abiding people who are not involved in gun violence. On the one hand, the cases of people charged with

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[14] The DAO's analysis and recommendations reflect the collaboration of many people within the Philadelphia District Attorney's Office. Contributors include: Oren M. Gur, Michael Hollander, CJ Arayata, Yasmin Ayala-Johnson, Keziah Cameron, William Curtain, Mariel Delacruz, William Fritze, Gregory Holston, Sebastian Hoyos-Torres, Chance Lee, Sean Mason, Myra Maxwell, Christion Smith, Tyler Tran, Wes Weaver. The District Attorney's Transparency Analytics (DATA) Lab was the primary, regular collaborator with PIRPSC.

6105 (prohibited person in possession of a firearm) are carefully scrutinized to do individual justice, which will usually look like vigorous prosecution. On the other hand, another criminal charge that applies to people who have no felony conviction (carrying a gun in Philadelphia without having obtained a permit in Philadelphia) is only a felony in Philadelphia. The exact same offense in every other county in Pennsylvania (carrying a firearm without a permit to carry) is only a misdemeanor offense. In an equitable system, a permit to carry would be required everywhere in the Commonwealth of Pennsylvania or would be required nowhere. But the legislature's decision to more punitively criminalize and subject to more collateral consequences only the residents of its most diverse city is inequitable and obviously racist. That kind of selective prosecution against Pennsylvania's most diverse city has its purpose—the money and power upstate legislatures' jurisdictions obtain from incarcerating Philadelphians in their prisons (Remster and Kramer, 2019).[15] Justice and common sense gun regulation do not look like a commerce in the bodies of Philadelphians held in upstate prisons for doing what is not even a crime in the jurisdictions where they are held.

The role of the District Attorney's Office is to vigorously, justly, and accurately prosecute people who commit serious and violent crimes. Gun violence has been the most urgent public safety crisis in Philadelphia for decades; as such, the DAO considers the most serious, violent offenses such as homicides, rape, and gun violence our top prosecutorial priority. However, local law enforcement faces numerous challenges in our efforts to reduce shootings: namely, a lack of success in identifying shooters and removing them from communities and decades-long lack of sufficient PPD crime scene personnel and the capacity for widespread use of forensic science to solve crimes.

As part of our role in the 100 Shooting Review Committee, we identify a need to more intensely focus law enforcement efforts on accurately identifying and removing shooters from the streets, and conclude that the current intense focus on illegal gun possession without a license is having no effect on the gun violence crisis and distracts from successfully investigating shootings.[16] To reduce and solve shootings we must invest heavily in areas that have historically been neglected in Philadelphia, including through

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[15] Remster, B., & Kramer, R. (2019). Shifting power: The impact of incarceration on political representation. *Du Bois Review: Social Science Research on Race, 15*(2), 417-439. doi:10.1017/S1742058X18000206

[16] There are two main categories of illegal gun possession cases in Philadelphia: Possession of a firearm by a person who has been prohibited from carrying gun due to a past serious conviction (18 Pa.C.S. § 6105), and possession of a firearm without a license (18 Pa.C.S. § 6106). The former is generally viewed as the most serious illegal gun possession statute, while the latter is generally viewed as less serious than possession by a prohibited person.

preventative pro-social programming; for shootings that are not prevented, we must invest in forensic science so we have more evidence that can be used to solve shootings and to build overwhelming cases that will result in successful prosecutions; more effective alternatives to criminogenic jails for people who come into contact with the system; and scaling up resources and amenities in communities that have experienced disinvestment for so long, and in community-based organizations working in the places and with the people most impacted by gun violence and our systemic failure to address it adequately or holistically.

The DAO conducted a range of analyses and research to answer the central question posed by City Council's Special Committee on Gun Violence Prevention: "How can we use the data available to the city to reduce shootings?" Below we present findings relevant to improving shooting incident clearance rates and improving the strength of cases when a shooting results in arrest; improving gun case outcomes; deterrence of illegal firearm possession; and improving witness appearance rates. These results are used to inform the Goals and Policy Considerations and Recommendations in subsequent sections. In addition, the DAO makes recommendations regarding short-term investments in community-driven solutions for prevention, and upstream, long-term investments in communities most impacted by gun violence for sustainable reduction. Please see Appendix 7: DAO 2 for an overview of Data Sharing and Limitations, and we encourage reviewing the supplemental material referenced throughout the DAO analysis.

Improving shooting clearance rates

When there is a shooting, we must find those responsible and hold them accountable. If we are unable to do this, we will be unable to stem the tide of gun violence. Unfortunately, the arrest rate in shootings has been very low in recent years in Philadelphia, with a marked drop as the number of shootings has increased. This focus on

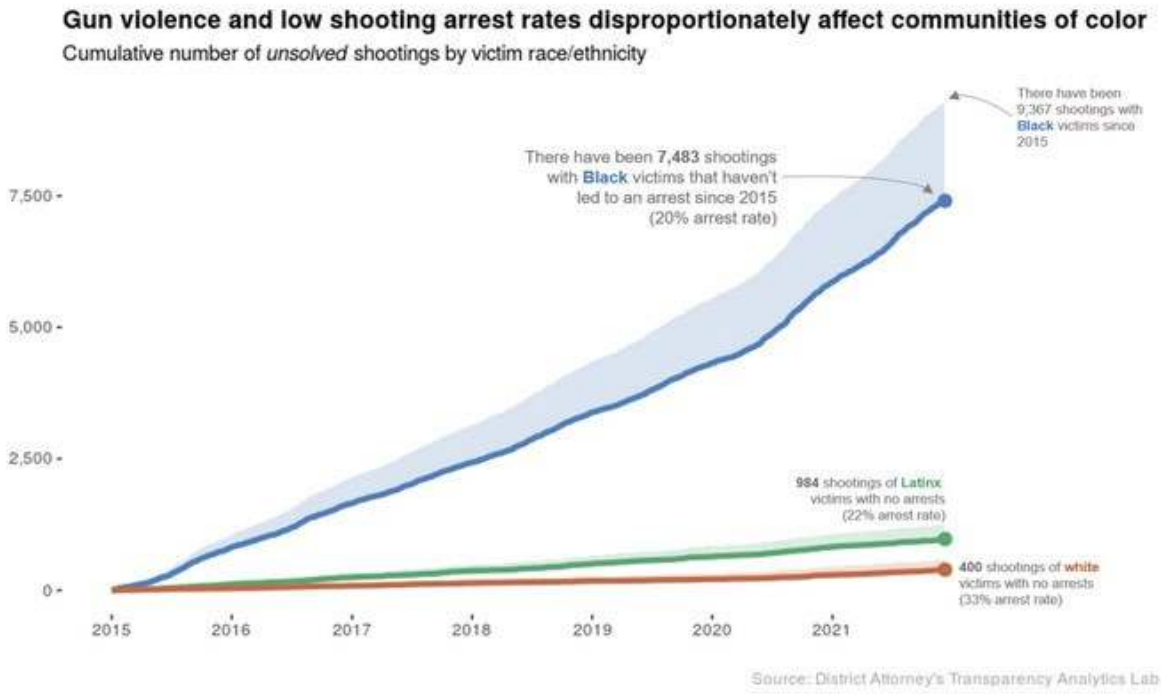
arrest clearance rates in homicide and non-fatal shootings is both local[17] and national.[18] Briefly, clearance rates are defined by the Federal Bureau of Investigations (FBI) as the number of resolved cases in a year divided by the number of incidents in the same year (or month, quarter, etc). In this analysis the DAO uses arrest rates: the proportion of incidents where an arrest has been made, regardless of when the arrest was made (See DATA Story on "Clearing up clearance rates" for more details).[19]

In recent years, four out of five non-fatal shootings in Philadelphia went unsolved (see Appendix 7: DAO 3). Out of 11,306 shootings in Philadelphia since 2015, 8,918 did not result in arrest, including 7,483 shootings in which the victim or survivor was Black (see graphic below). Police make arrests more frequently in fatal shootings, but improvement in fatal shooting investigations is needed as well: two thirds of fatal shootings in Philadelphia are not followed by an arrest (see Appendix 7: DAO 3). It is imperative that we improve the clearance rate in both fatal and non-fatal shootings; this should be our first priority as a city. As 2021 draws to a close, there have been arrests made in only 17% of non-fatal shootings and 28% of fatal shootings that occurred this year.

[17] Holden, Joe (December 20, 2021). "Sources: Philadelphia Police Department Close To Announcing New Non-Fatal Shooting Unit Amid Gun Violence Epidemic." *CBS Philly,* https://philadelphia.cbslocal.com/2021/12/20/sources-philadelphia-police-department-non-fatal-shooting-unit-gun-violence-larry-krasner/

[18] The Violent Incident Clearance and Technological Investigative Methods (VICTIM) Act (H.R. 5768) was recently sponsored seeking Congressional funding "to solve shooting cases [and] make neighborhoods safer." Evans, Dwight. (November 1, 2021). "Evans Co-Leads Bill to Provide $1 Billion to Solve Shooting Cases, Make Neighborhoods Safer" https://evans.house.gov/media-center/press-releases/evans-co-leads-bill-provide-1-billion-solve-shooting-cases-make, https://demings.house.gov/sites/demings.house.gov/files/VICTIM%20Act%20-%2010-26-21.pdf

[19] Tran, T. (December 29, 2021). "Clearing up clearance rates." Data Story, The Philadelphia DAO Justice Wire. https://medium.com/philadelphia-justice/clearing-up-clearance-rates-ff87cc33a31a



Throughout this collaboration the PPD and DAO have jointly reviewed information about shootings and arrests to consider factors that impact clearance rates in Philadelphia. We began by systematically reviewing the criminal histories of 100 people most recently arrested for shootings in Philadelphia, as of September 2020. We later expanded our review to all shooting arrestees since 2015. We found the groups were comparable across basic demographic and criminal legal factors, so we focused much of our analysis on the larger group. As of December 4, 2021, 2,249 people had been arrested for shootings in Philadelphia since 2015: 93% were male, 70% were under the age of 30, 76% had prior arrests, 51% had 3 or more prior arrests, 52% had a prior felony charge, 40% had a prior felony conviction, and 20% had pending court cases at the time of arrest. The most frequent prior charges include drug sales and drug possession, assaults, theft, robbery, and firearm possession without a license (see Appendix 7: DAO 4). For context, the prior charge histories of the 2,249 people arrested for shootings in Philadelphia since 2015 reflect the most common offenses people are arrested for in Philadelphia more broadly, including those never arrested for a shooting.

Although it may be appealing to consider building a predictive model to forecast future shooters and using it to incapacitate people who fit that model, the evidence does not support the idea that prior arrest patterns of people arrested for shootings in Philadelphia can be used to accurately forecast future shooters. There are several problems with such a model. First, due to very low arrest rates, any model would be based

only on the small number of people who are actually arrested for shootings. This means that the model reflects on a small subset of people who may be completely different from the majority of shooting perpetrators. For example, it may be that law enforcement can more easily clear a case against a shooter who has a prior criminal record due to the availability of arrest photographs, contact information, and knowledge of specific prior crimes. If so, shooters who have no prior criminal record are likely under-represented among this group. Second, it would cast a very broad net: thousands of people arrested each year for a number of crimes match the most common characteristics of shooting arrestees (see Appendix 7: DAO 5). Although we could potentially prevent dozens of future shootings by jailing thousands of people, holding so many people who would never engage in a shooting to prevent the actions of a few raises grave moral and constitutional concerns. It would also require funding a massive increase in mass incarceration that would drain funding for prevention or smart enforcement (e.g., forensics) that is likely far more effective in reducing future gun violence than additional incarceration, but has never been attempted in Philadelphia. By contrast, such models could help identify a broad group of people who might benefit from additional support that would help prevent future system contact. Third, recent high-quality Gun Violence Task Force (GVTF) investigations have produced strong cases against individuals who had no prior record or had not been arrested for several years—highlighting the limitations of a predictive model based on who is arrested and reinforcing the importance of robust investigative work and investment in forensics to improve clearance rates and strengthen cases when there is an arrest.

We also researched the social and system factors that impact shooting clearance rates. Using logistic regression, we considered how victim, incident, and police characteristics relate to clearance rates in fatal and non-fatal shootings. For non-fatal shootings, we found that investigations by units with more detectives were significantly more likely ($\alpha = 0.05$) to be cleared than shootings investigated by units with fewer detectives; that shootings where the PPD Special Investigations Unit (SIU) responded were significantly more likely to be cleared than shootings where line detectives responded; and shootings with female victims were significantly more likely to be cleared than shootings with male victims. For fatal shootings, we found that shootings with white victims were significantly more likely to be cleared than shootings with Black or Latinx victims; that shootings with child victims (13 or younger) were significantly more likely to be cleared than shootings with older victims; and that shootings that occurred when it was light outside were significantly more likely to be cleared than shootings that occurred when it was dark outside (see Appendix 7: DAO 6).

We also found that the number of non-fatal shootings that lead to arrest remained relatively flat regardless of the number of shootings in a month: in months with fewer shootings, the arrest rate was higher, and in months with high numbers of shootings, the arrest rate was lower (see Appendix 7: DAO 7). This suggests that capacity constraints in investigating non-fatal shootings hinder arrests: if there is a maximum number of shooting cases that can be investigated by the PPD at any point in time, as shootings rise, the arrest rate falls.

Finally, we used Philadelphia data to replicate an analysis done in Boston on how long it takes to solve shooting cases (Cook, Braga, Turchan, Barao, 2019).[20] We found that the majority of arrests happen within the first few months following a shooting; for non-fatal shootings, 75% of arrests occur within 61 days, while for fatal shootings, 75% of arrests occur within 125 days (see Appendix 7: DAO 8). In Boston, researchers found that the difference in clearance rates between fatal and non-fatal shootings to be "primarily a result of sustained investigative effort in homicide cases made after the first 2 days" (Cook, Braga, Turchan, Barao, 2019).

Together, these findings suggest organizational changes within the PPD could improve clearance rates. By increasing the number of specialized investigators available to handle non-fatal shooting cases and equipping them with greater crime scene and modern forensic capacity, the police will be able to solve more shootings (see Recommendations).

Improving gun case outcomes

After an arrest is made, DAO prosecutors fully vet incident information about defendants, victims, witnesses, and evidence from police, and seek a conviction where the evidence is sufficient to show beyond a reasonable doubt that the individual arrested perpetrated a specific shooting. Although the DAO has consistently charged nearly every individual arrested by the police for a shooting,[21] in recent years, the withdrawal and dismissal rates in a broad range of gun cases has increased while the conviction rate has decreased (Amaral, Loeffler, Ridgeway, 2021; see Appendix 7: DAO 9).[22] In response, the

[20] Cook, P.J., Braga, A.A., Turchan, B.S., & Barao, L.M. (2019). Why do gun murders have a higher clearance rate than gunshot assaults? *Criminology & Public Policy, 18*(3), 525-551.

[21] For example, see "DATA Snapshot: Incidents, Arrests, and Charges -- November 2021" (December 6, 2021). By the Numbers, The Philadelphia DAO Justice Wire. https://medium.com/philadelphia-justice/data-snapshot-incidents-arrests-and-charges-november-2021-6d4d24cc1c96

[22] Amaral et al. (2021) analyzed 35,194 adult gun arrests and case outcomes between January 2010-March 2020 in Philadelphia. Preliminary results were presented at the 2021 American Society of Criminology Conference. Researchers at the University of Pennsylvania Department of

DAO undertook a number of efforts to improve outcomes in gun and shooting cases, including combining the Homicide and Non-Fatal Shootings Units[23] and working with the courts to prioritize prosecutions for non-fatal shootings.[24] By the first quarter of 2020, which was immediately before the COVID pandemic effectively shut down the Philadelphia courts, the DAO's conviction rate improved to 87% for fatal shooting cases and 78% for non-fatal shooting cases.

Following a DAO preliminary data analysis document the increase in withdrawals and dismissals in cases involving gun possession (but excluding shooting cases), the DAO undertook an intensive case file review of 400 randomly selected dismissed and withdrawn gun possession cases in summer 2020 to identify common reasons for those outcomes, and to find ways to improve gun possession cases. One of our main findings was an increase in "constructive possession" cases among dismissed and withdrawn cases. These are cases in which a recovered firearm was not actually physically possessed by the defendant at time of arrest (see Appendix 7: DAO 10). A constructive possession case might involve a gun found in the trunk of a car occupied by multiple passengers or a gun found under a car seat within reach of multiple passengers, none of whom own the car. It is the prosecutor's burden to prove beyond a reasonable doubt that anyone charged both knew where the gun was and intended to exercise control over it. Merely proximity to a gun or knowing of its existence is legally insufficient to obtain a conviction. Constructive possession cases are far more challenging to prosecute than cases where a firearm is recovered from someone's body.

Criminology are working closely with the DAO and DATA Lab to research the impact of policy changes at the DAO. Amaral, M.F.A., Loeffler, C., & Ridgeway, G. (2021). Progressive prosecution and gun cases: Evidence from Philadelphia. *Poster presented at the American Society of Criminology, Chicago, Ill., November 18.*

[23] Philadelphia District Attorney's Office (September 18, 2018). "Krasner Announces Big Shakeup in Homicide Unit of DA's Office." *The Justice Wire.* *https://medium.com/philadelphia-justice/krasner-announces-big-shakeup-in-homicide-unit-of-das-office-3581160b8a51*

[24] Palmer, C. (September 9, 2019). "Philly courts, DA Larry Krasner try to speed up prosecutions of nonfatal shooting cases." *Philadelphia Inquirer*. https://www.inquirer.com/news/philadelphia-court-system-da-larry-krasner-non-fatal-shooting-prosecutions-20190909.html.

Philadelphia District Attorney's Office (September 9, 2019). "RELEASE: Philadelphia Courts, Justice Partners, to Implement Non-Fatal Shooting Program." *The Justice Wire.* https://medium.com/philadelphia-justice/release-philadelphia-courts-justice-partners-to-implement-non-fatal-shooting-program-539f3c07f657

Such evidentiary issues present challenges in the legal system, and cases often stem from car stops—where legal standards for searches of private property apply. If police illegally search a person or place for a gun, the gun recovered will be excluded at trial, rendering a conviction for the gun impossible in nearly every case. It is much easier to prove who possessed a gun when that gun is found on someone's person during a pedestrian stop, as compared to a gun recovered from the trunk of a car stopped with multiple occupants. The increase in car stops, where the person connected to the recovered gun is less clear, can be seen in data released as part of the city's "stop and frisk" litigation (*Bailey, et al. v. City of Philadelphia, et al.,* 2011).[25] That data shows that while the number of pedestrian stops conducted by police has steadily decreased from 175,000 in 2014 to 75,000 in 2019 (i.e.,pre-COVID), the number of vehicle stops has sharply increased, from 193,000 in 2014 to 389,000 in 2019. Overall, since 2014, Philadelphia Police have conducted 791,000 pedestrian stops and 1,929,000 vehicle stops (see Appendix 7: DAO 11).

Three recent court rulings have also changed both the policing and prosecution of gun possession cases, making them more challenging: *Commonwealth v. Hicks* (2019)[26] found that the police were not allowed to stop individuals merely because they possessed a concealed firearm and showed it to another person while police watched; *Commonwealth v. Perfetto* (2019)[27] required that traffic cases and criminal cases stemming from those traffic cases must be tried together or risk the criminal case being dismissed; and *Alexander v. Commonwealth* (2020)[28] required that the police seek a warrant to search a car during a car stop, rather than be allowed to search with mere suspicion of contraband. All three of these opinions apply retroactively and impact the growing backlog of active cases, and have resulted in a higher proportion of cases that have not resolved with a conviction. Responsive changes in police and prosecutor practice are needed and are being implemented in order to ensure cases are opened with evidence that will be admissible at trial.

In addition, unavoidable court closures due to COVID have very significantly hampered our ability to prosecute cases in a timely fashion. As a result, few cases have been resolved overall, and only cases that could be resolved quickly and without need for

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[25] Settlement Agreement, Class Certification, and Consent Decree, Bailey v. City of Philadelphia (E.D. Pa. June 21, 2011) (No. 10-cv-05952). See American Civil Liberties Union (n.d.). BAILEY, ET AL. V. CITY OF PHILADELPHIA, ET AL. https://www.aclupa.org/en/cases/bailey-et-al-v-city-philadelphia-et-al

[26] *Comm. v. Hicks*, 208 A.3d 916 (Pa. 2019)

[27] *Comm. v. Perfetto*, 207 A.3d 812 (Pa. 2019)

[28] *Alexander v. Comm.*, 243 A.3d 177 (Pa. 2020)

witnesses were resolved—leading to an unusually high number of dismissals as compared to convictions. To illustrate this, at the end of 2019, there were 182 pending fatal shooting cases and 261 non-fatal shooting cases open in the courts. As of mid-December 2021, there were 460 fatal shooting and 650 non-fatal shooting cases open. Firearm possession by a prohibited person increased from 615 to 1,177 over the same time period, while firearm possession without a license cases more than tripled, from 628 to 2,284 (see Appendix 7: DAO 12). With these limitations, less serious firearm possession cases are disposed of more quickly and efficiently, while more serious cases awaiting trial or plea negotiation with defense counsel take longer to complete. As courts resume, the percentage of cases resolved with a conviction should return to pre-COVID levels as the case backlog is addressed. Perhaps most importantly, the unavoidable reduction in available trial rooms for jury trials and bench trials have disincentivized defendants, especially those who are out of custody or face potentially lengthy sentences, to resolve their cases in the near future.

In Summer 2020 the DAO established a DAO Intelligence Unit to improve the collection and dissemination of information with DAO Investigative and Trial Units, the PPD, and other local, state, and federal law enforcement partners. The Intelligence Unit expanded in January 2021, and now has an Intelligence Analyst stationed at the Delaware Valley Information Center (DVIC), helping the Intelligence Unit function as a centralized point-of-contact for receiving intelligence from the PPD, improving collaboration and communication. The Intelligence Unit maintains, organizes, and disseminates intelligence information collected by the DAO and law enforcement partners to ADAs, and also works closely with the PPD to identify drivers of violence crime and to prioritize these drivers of violence crime for arrest, charging, and prosecution.

To strengthen cases in light of the increase in firearms recovered from vehicle stops and higher legal standards to search, in December 2020 the DAO and PPD began meeting weekly to review VUFA (or gun possession) and non-fatal shooting arrests made the previous week. Led by the Deputy Commissioner of Investigations in the PPD and the Director of Intelligence in the DAO, this collaboration includes PPD Detectives, Assistant District Attorneys (ADAs) who have reviewed the cases, ADAs from the Law Division who provide guidance on changing legal standards, and data personnel to track progress. The weekly VUFA and non-fatal shooting case review proactively focuses on improving cases at an early stage by creating a dialogue among members of the DAO and PPD, helping to identify evidentiary issues sooner to bring the strongest cases possible. Individual cases as well as case trends are improved through systematizing discussions of evidentiary needs and by offering guidance on the implications of changes in the law for police practice,

training, and policy. Over 2,300 cases were reviewed between December 2020 and 2021, and the proportion of cases that passed the preliminary hearing improved following the implementation of the collaborative review process: of the 1615 cases that received a preliminary hearing, 81% were successfully held for trial and are awaiting final disposition (see Appendix 7: DAO 13). We reduce harm to the community and enhance system efficiency by identifying and correcting evidentiary issues early and strengthening the cases we do bring so they are more likely to result in conviction.

Just as the weekly VUFA/non-fatal shooting review shows that outcomes are improved through collaboration, the Gun Violence Task Force (GVTF) in the Philadelphia DAO shows the importance of conducting high-quality, often longer-term and collaborative investigations that generate strong cases. One strategy the GVTF uses is to identify group conflicts, and then find cold cases associated with those conflicts. Utilizing social media, electronic forensic evidence, and the Grand Jury process to facilitate witness participation, the GVTF engages in targeted prosecution of people who are driving gun violence, often seeking high bail or no bail eligibility following an arrest. See, for example, recent investigations that produced strong cases, including against individuals who had no prior record or had not been arrested for several years (see Appendix 7: DAO 14).

Taken together, a range of factors have produced a long-term trend where more gun cases, particularly those involving charges of gun possession, are being withdrawn or dismissed. We have been working to address this by implementing institutional changes in the DAO and developing collaborative processes and practices with our partners, especially the PPD. These include combining the DAO's Homicide Unit with Non-Fatal Shootings, creating the DAO Intelligence Unit, expanding the GVTF in the DAO, and developing the non-fatal shooting track in partnership with the courts and the VUFA/NFS review process with the PPD, among other initiatives.

Deterrence of illegal firearm possession

One frequently cited way to reduce shootings is to enhance enforcement against illegal possession of firearms[29]—in spite of little research supporting the approach (Peterson and Bushway, 2020).[30] Because of the ease in accessing guns and the relative threat that some feel if they do not carry a gun, we do not believe that arresting people and convicting them for illegal gun possession is a viable strategy to reduce shootings. Some people who illegally possess firearms in Philadelphia present a real danger to the community and merit vigorous prosecution to conviction and incarceration. Others are basically law-abiding people who have not obtained a license. There is a huge difference between these two groups and public safety requires that they be held accountable in different ways. It is at best ineffective and at worst counterproductive for the police to treat these groups the same and focus on enforcement of firearm possession laws rather than focus on shootings. More resources are needed to deter shootings through police presence in communities, through a higher capacity in forensics, and more detectives to investigate and solve shootings when they occur. Our analysis of the data also finds that—contrary to recent statements from some city officials and in spite of the obvious point that guns are used in shootings—very few people arrested for illegal gun possession are later arrested for committing a shooting (see Appendix 7: DAO 15).

To deter someone from an act through enforcement, one has to ensure that the punishment for that act is 1) certain and 2) swift. Our experience in Pennsylvania and the U.S.—a state that has outpaced national incarceration rates and has among the most severe sentences in a country with the highest incarceration rate and longest sentences in the world—is that severe punishment has not been successful in deterring people from carrying guns or shooting people. With respect to gun possession, deterrence requires that the state sanctions for illegal gun possession are more certain and swift than the risk of not

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[29] Palmer, C., Purcell., D., Newall, M., & Dean, M.M. (March 30, 2021). "Philly gun arrests are on a record pace, but convictions drop under DA Krasner." Philadelphia Inquirer. https://www.inquirer.com/news/philadelphia-gun-arrests-2021-convictions-vufa-20210330.html; CBS3 Staff (December 14, 2021). "Pennsylvania AG Josh Shapiro says Philadelphia making progress in reducing gun violence." CBS 3 Philly. https://philadelphia.cbslocal.com/2021/12/14/josh-shapiro-danielle-outlaw-west-philadelphia-shootings-gun-violence/; PA Attorney General Josh Shapiro (December 14, 2021). "AG Shapiro Shares Results of New Law Enforcement Partnership." YouTube.com. https://youtu.be/Oh0y2aYmUME

[30] Peterson, S., & Bushway, S. (2020). Law enforcement approaches for reducing gun violence. RAND. https://www.rand.org/research/gun-policy/analysis/essays/law-enforcement-approaches-for-reducing-gun-violence.html

carrying a gun.[31] In Philadelphia, this presents a challenge: we are a City and Commonwealth awash in guns[32] and with a high number of shootings and low clearance rates, people do not feel protected by the police or other government agencies or local resources. These two factors create a situation where some people view the risk of being caught by police with an illegal gun as outweighed by the risk of being caught on the street without one (Sierra-Arévalo, 2016; Fontaine, La Vigne, Leitson, Erondu, Okeke, Dwivedi, 2018).[33]

The number of guns in the U.S., Pennsylvania, and Philadelphia is overwhelming, in great part because of weak state and federal regulations that make it impossible to know exactly how many guns are in a community and who is in possession of them. There were more than 12.9 million guns legally sold or transferred in Pennsylvania between 1999 and 2020, an average of over 1,600 per day; 266,186 were sold in Philadelphia (33 per day), and 1,824,614 in Philadelphia, Bucks, Montgomery, Chester, and Delaware counties combined

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[31] Deterrence theory also suggests severity of punishment is important, but research has not found support for this aspect of the theory (National Institute of Justice, 2016). National Institute of Justice (2016). "Five Things About Deterrence." National Institute of Justice., NCJ No. 247350. https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[32] Of the nearly 13 million guns sold in Pennsylvania during this time, 266,186 were sold in Philadelphia, and 1,543,112 in Philadelphia, Bucks, Montgomery, and Delaware counties combined (Pennsylvania State Police, n.d.). There were an estimated 393,000,000 guns in circulation in the United States six years ago (Small Arms Survey, 2015), with 408,477,515 National Instant Criminal Background Firearm Backgrounds Checks between November 1998 through November 2021 (Federal Bureau of Investigations, 2021). Furthermore, a national survey found that 22% of recent gun purchasers reported buying their gun without a background check (Miller, Hepburn, Azrael, 2017). (See Appendix 7: DAO 16).

- Small Arms Survey (2015). Annual Report. https://smallarmssurvey.org/sites/default/files/resources/SAS-Annual-Report-2015.pdf.
- Federal Bureau of Investigations (2021). NICS Firearm Background Checks: Month/Year November 30, 1998-December 31, 2021. FBI. https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year.pdf
- Miller, M., Hepburn, L., & Azrael, D. (2017). Firearm acquisition without background checks: Results of a national survey. *Annals of Internal Medicine, 166*, 233-239. doi:10.7326/M16-1590

[33] Sierra-Arévalo, M. (2016). Legal cynicism and protective gun ownership among active offenders in Chicago. *Cogent Social Sciences, 2*. https://isps.yale.edu/sites/default/files/publication/2016/09/cogentsocialsciences_2016_sierra-arevalo_legal_cynicism_and_protective_gun_ownership_among_active_offenders_in_chicago.pdf
Fontaine, J., La Vigne, N.G., Leitson, D., Erondu, N., Okeke, C., & Dwivedi, A. (2018). "We Carry Guns to Stay Safe": Perspectives on Guns and Gun Violence from Young Adults Living in Chicago's West and South Sides. *Urban Institute Justice Policy Center*, https://www.urban.org/sites/default/files/publication/99091/we_carry_guns_to_stay_safe_1.pdf

(227 per day) (Pennsylvania State Police, n.d.).[34] From 1999 through 2019, only 165,717 guns were seized by law enforcement in Pennsylvania, fewer than 22 per day, with the PPD accounting for more than half (97,905, or 12 per day) (Attorney General's Office, n.d.).[35] That means that, each day in Philadelphia over the last 20 years, for every 3 guns legally bought or sold (i.e., in circulation that we know about), roughly 1 "crime gun" was seized (i.e., removed from circulation). Compounding the problem, in Philadelphia, only 1 in 4 recovered "crime guns" were purchased in Philadelphia (Attorney General's Office, n.d.), and only half of crime guns seized by law enforcement statewide were purchased in Pennsylvania; the rest were purchased out of state or have no known origin (see Appendix 7: DAO 16).

With so many guns available, a law enforcement strategy prioritizing seizing guns locally does little to reduce the supply of guns, and, if it entails increasing numbers of car and pedestrian stops, has the potential to be counterproductive by alienating the very communities that it is designed to help. People of color are disproportionately stopped in Philadelphia and arrested for illegal gun possession in Philadelphia and statewide. As the use of vehicle stops has increased, the proportion of PPD vehicle stops where a person of color was driving increased sharply during the same time period, regularly approaching 80% in recent years (see Appendix 7: DAO 11). In Philadelphia, approximately 80% of people arrested for illegal gun possession are Black; statewide, approximately 66% are Black (see Appendix 7: DAO 17). Focusing so many resources on removing guns from the street while a constant supply of new guns is available is unlikely to stop gun violence, but it does erode trust and the perceived legitimacy of the system. This in turn decreases the likelihood that people will cooperate and participate in the criminal legal system and associated processes, reducing clearance, conviction, and witness appearance rates.

It is again worth noting the inequity perpetuated by our state legislature, which made it a felony to carry a firearm without a license in only one county, Philadelphia, which is also its most diverse county. All state prisons in Pennsylvania are located in counties other than Philadelphia.[36] And many of those counties have lost their steel and coal

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[34] Publicly available Pennsylvania State Police data was organized and shared by Dr. David Johnson. See, e.g., Pennsylvania State Police (n.d.). Firearms Annual Reports. Pennsylvania State Police. https://www.psp.pa.gov/firearms-information/Pages/Firearms-Annual-Reports.aspx

[35] Few agencies have been submitting data since 1999, and currently not all law enforcement agencies report gun seizure information (Attorney General's Office, n.d.).
Attorney General's Office (n.d.). Pennsylvania Gun Tracing Analytics Platform. https://www.attorneygeneral.gov/gunviolence/pennsylvania-gun-tracing-analytics-platform/

[36] Pennsylvania Department of Corrections (n.d.). State Prisons. https://www.cor.pa.gov/Facilities/StatePrisons/Pages/default.aspx

industries, only to replace them with a state prison industry that brings tremendous financial and political benefit to those counties (Remster and Kramer, 2019). Those financial and political benefits only flow fully if those state prisons cells are occupied. It does not appear that our state legislature's primary interest is incarcerating people who carry firearms without a license. Our legislature's primary interest is incarcerating Philadelphians, most of them Black and brown, in their far less diverse counties for the money and the power it brings them. Philadelphia should recognize this commerce in Philadelphians' bodies for what it is—referred to in scholarship as "prison gerrymandering" (see Remster and Kramer, 2019 for a study of prison gerrymandering in Pennsylvania).

Improving victim and witness appearance rates

Prosecution in the criminal legal system relies on the participation of civilian witnesses and other actors, such as arresting officers, to present and authenticate evidence necessary to prove every element of a crime beyond a reasonable doubt. A DAO analysis found that victim and witness Failure to Appear (FTA) in court is the cause of approximately half of all gun possession cases being dismissed or withdrawn in Municipal Court (see Appendix 7: DAO 18). This is an obvious problem that needs to be remedied.

While there is often attention placed on defendants failing to appear, a preliminary analysis of misdemeanor cases in Philadelphia found that it is more likely that at least one non-defendant will fail to appear for at least one hearing (e.g., victim, witness, law enforcement officer, or attorney) than it is for a defendant to fail to appear (Graef and Ouss, 2021). When witnesses or court actors (e.g., law enforcement, attorneys) do not appear, at best cases require multiple listings to resolve, and in some instances cases may be dismissed due to a lack of key testimonial evidence.

In a study of Philadelphia misdemeanor cases, witnesses and victims were most likely to miss at least one hearing in cases involving violent crime. Police, by contrast, were likelier to miss appearing to testify in less serious incidents (e.g., traffic, drug, public order, property); defense attorneys also sometimes did not appear in these less serious cases. Reasons given for law enforcement failing to appear included being sick (30%), injured on duty (IOD) (12%), on vacation/out of town (10%), or no reason given (26%) (Graef and Ouss, 2021, see Appendix 7: DAO 18).

The DAO has received grant funding and continues to seek additional funding to develop the technological capabilities necessary to maintain communications with victims and manage the Victim Witness Services (VWS) Unit caseload.

- The $4.6M grant the DAO received to create the District Attorney's Transparency Analytics (DATA) Lab also supported the hiring of developers for the DAO's Information Technology (IT) Unit to create a custom-built case management system, "DA-Work Station" (DAWS). This will help us to better manage our cases, including allowing VWS to better track their contacts with victims and witnesses.
- The DAO has applied for grant funding to offer text messaging services that the DAO IT Unit would integrate with DAWS. Well-crafted text message reminders help increase witness appearance rates in court (Cooke et al, 2018).[37]

New technologies will be critical going forward, including DAWS and solutions like text messaging that help DAO Victim Witness Coordinators communicate with victims and witnesses. These technologies and tools will be especially needed as arrest clearance rates improve, allowing the DAO VWS Unit to provide support to more victims and witnesses (state funding only allows the DAO VWS to work with victims after an arrest is made).

Beyond improving technological systems, the analysis by Graef and Ouss (2021) also suggests that systemic change could improve witness appearance rates: reducing the volume of non-violent misdemeanor arrests would reduce the number of cases where police are required to but often do not appear. This would improve both system efficiency, and perhaps the experiences of victims and witnesses in misdemeanor cases. When a court case fails to advance because of a court actor's FTA, causing further hardship in terms of travel, missed work or school, or with childcare or other logistical issues among those who do appear to testify, public confidence and trust in the system erodes. Improving officer appearance rates in misdemeanor cases is not a viable strategy, as that would remove officers from the streets of the communities where they are needed to deter gun violence with their physical presence. Furthermore, for many cases misdemeanor enforcement has been shown to be criminogenic (Agan, Doleac, Harvey, 2021). Notable progress has been made in Philadelphia since 2015 and during COVID to reduce arrests for property and drug offenses; there were over 20,000 property and drug arrests in 2017, and fewer than 10,000 property and drug arrests in 2021 (Palmer & Orso, 2021).[38] Therefore, criminal justice partners must continue to collaborate to reduce prioritizations of arrests and prosecutions for low-level offenses, particularly against people who are in crisis due to poverty,

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[37] Cooke, B., Diop, B.Z., Fishbane, A., Ouss, A., Hayes, J., & Shah, A. (2018). Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court. UChicago Crime Lab. https://www.povertyactionlab.org/evaluation/text-message-reminders-decreased-failure-appear-court-new-york-city

[38] Palmer, C., & Orso, A. (December 31, 2021). "Philly's homicide crisis in 2021 featured more guns, more retaliatory shootings, and a decline in arrests and convictions." Philadelphia Inquirer. https://www.inquirer.com/news/philadelphia-murders-shootings-gun-violence-2021-20211231.html

homelessness, mental illness, or substance use disorder (Shefner, Sloan, Sandler, & Anderson, 2018).[39]

[39] Shefner, R.T., Sloan, J.S., Sandler, K.R., Anderson, E.D. (2018). Missed opportunities: Arrest and court touchpoints for individuals who fatally overdosed in Philadelphia in 2016. *International Journal of Drug Policy, 78*, https://doi.org/10.1016/j.drugpo.2020.102724

Analysis Result by PDPH

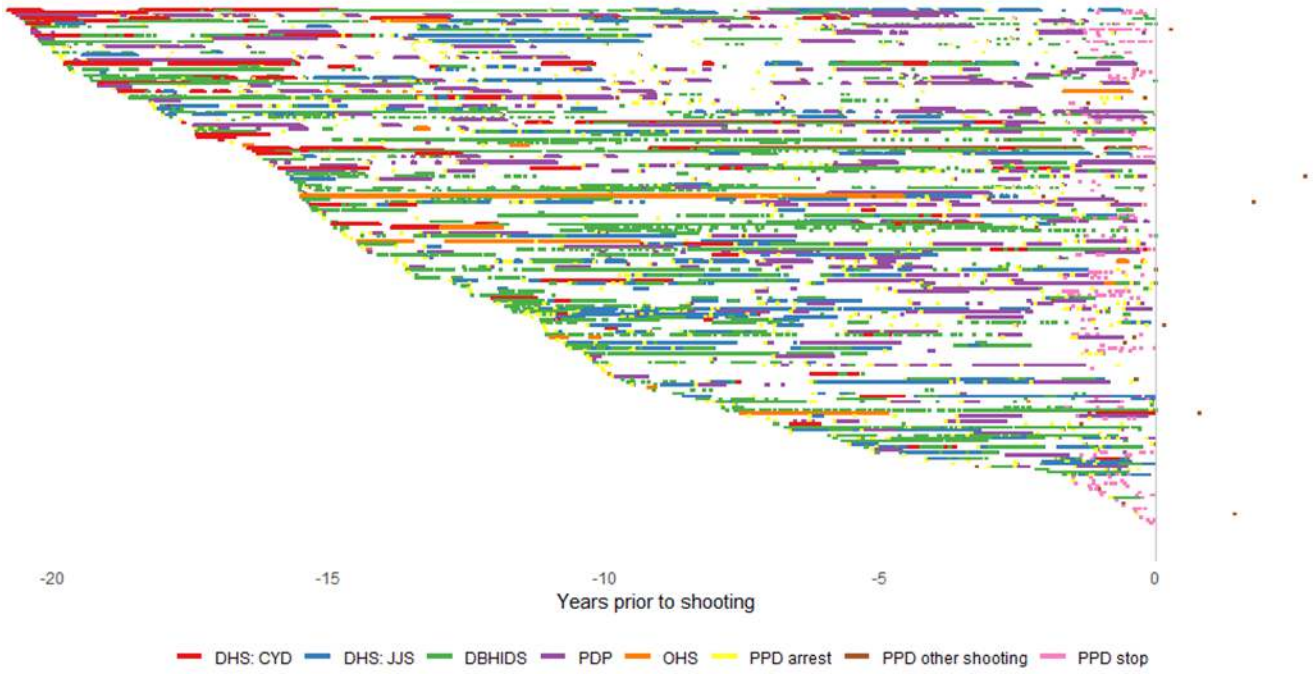
Although individuals with arrests for shooting related crimes have prior contacts with the criminal justice system, a true public health approach takes into account a much broader view of their prior experiences and exposures, which provides an opportunity to consider preventative approaches. To this end, the Philadelphia Department of Public Health[40] conducted an analysis of where individuals with prior arrests for shooting incidents were seen in the CARES integrated data system.

The CARES integrated data system is managed by the data management office within the department of health and human services. This database provides administrative data from multiple city agencies. To better understand the life course and experiences of those arrested for shootings, the Philadelphia Department of Public Health performed an analysis investigating where individuals with arrests for shootings between May and October of 2020 had previously encountered city services. These included contacts with the department of human services including contacts with the children and youth division (CYD) or juvenile justice services (JJS), the division of behavioral health and intellectual disabilities, the Philadelphia police department, the Philadelphia department of prisons, and the office of homeless services. When evaluating 196 individuals arrested for shootings in this time frame, a few key conclusions emerged:

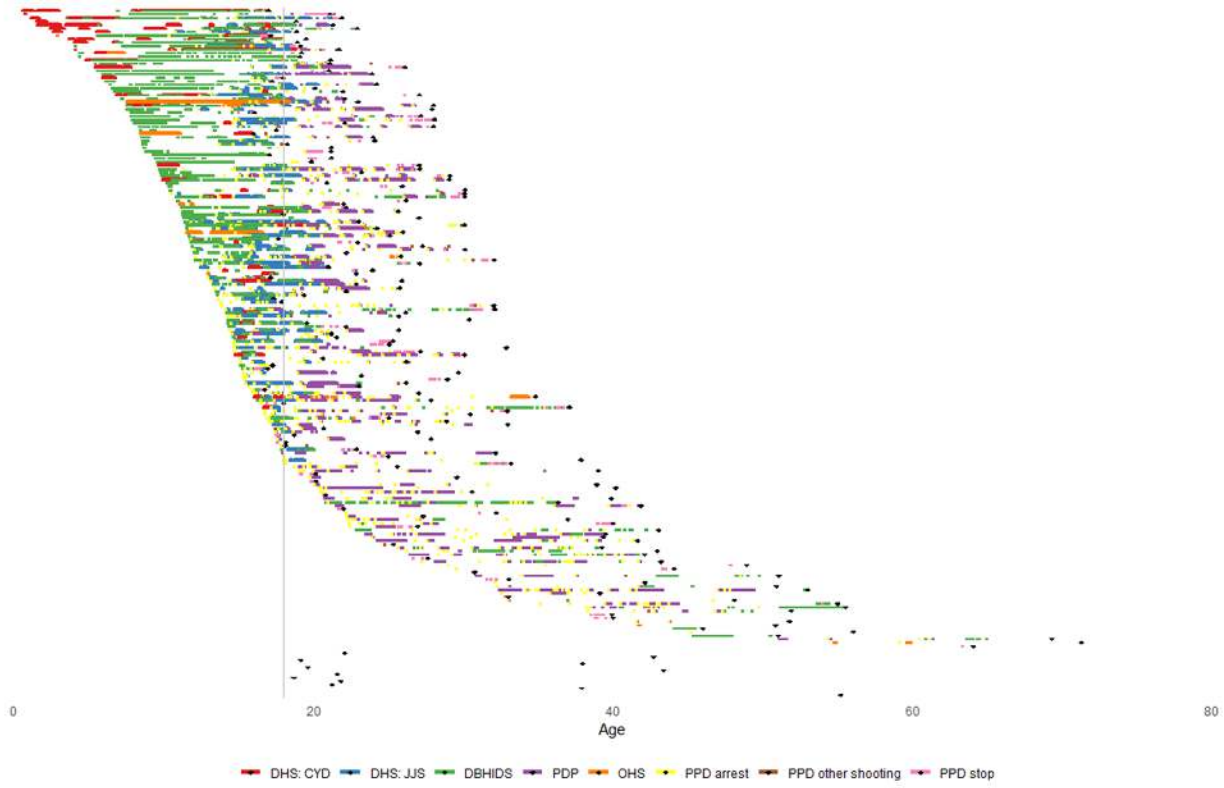
- Most individuals with arrests for shootings have had contact with city agencies in the past,,
- These points of contact extend for years before their arrests,
- The most common service types are variable and include:
    - Behavioral health services(DBHIDS)
    - Incarceration in the Philadelphia prison system
    - Arrests by the Philadelphia Police Department for narcotics-related charges

Our analysis identified many touch points between individuals in our cohort prior to the sentinel event (the shooting arrest). Specifically, 93% of our cohort had touch points with either a criminal justice or a Health and Human Services (HHS) agency. On average, the first touch point was 11.5 years prior to the shooting incident, but some individuals had touch points with city services that occurred 20 years or more before their arrest (figure 1).

[40] Contributions to this section were from the Injury Prevention Program and the Chronic Disease and Injury Prevention (CDIP) data lab. We are thankful to the City of Philadelphia Data Management Office for their assistance.



We don't currently know about touchpoints that occurred prior to approximately the year 2000. This means that we have the most information about the youngest people in our cohort, and we have incomplete information for older individuals (specifically, those who were born before 1980-1985 have little or no information for the time prior to their 18th birthday). Despite this limitation, a notable number of touchpoints are occurring when people are juveniles (figure 2).



This is important in noting what programs and supports individuals might be eligible for as juveniles and how their interactions with the criminal justice system might differ, potentially providing more opportunities for resource provision and diversion.

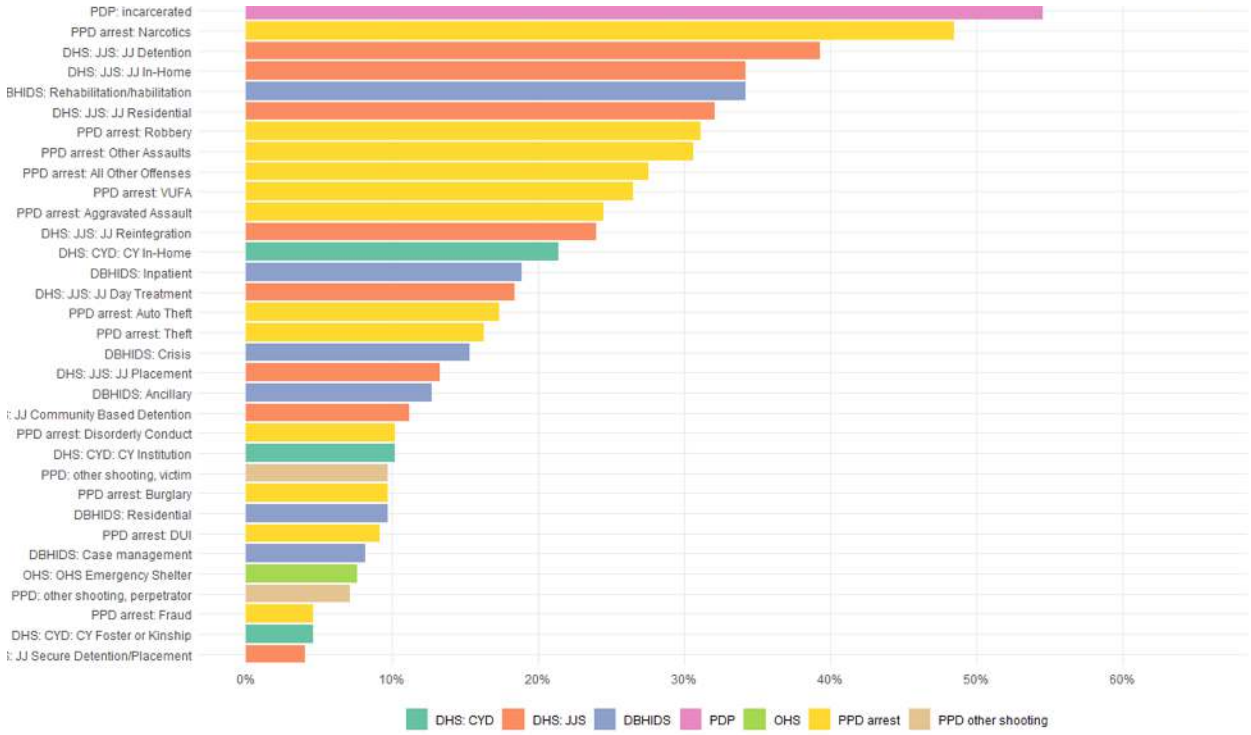
Our analysis is likely an underestimate of touchpoints. For certain data types, information is only available for a limited period (for example, for police stops we only have information in the two years prior to the shooting incident). This means we are interacting with individuals even more often than we are able to capture with this analysis. This might suggest even more opportunities for thoughtful intervention than are represented by these images.

In general, analyses such as this should focus on a few key outcomes, namely, the earliest touchpoints, touchpoints that happen when individuals are youths (for the reasons noted above) which may or may not be the same as the earliest touchpoints, and finally, the most frequent touchpoints .

We need a comparison group to draw further conclusions. Because 80% of shootings aren't associated with an arrest, and because individuals with similar exposures may not have similar outcomes, this analysis only begins to suggest opportunities for effective interventions. We also don't know about interactions people may have with

services that are not provided by the city. We don't yet know if outcomes differ depending on what the earliest and most frequent points of contact. In addition, we don't know if we are more likely to have data on individuals who are likely to be arrested for their shooting, or if people are more likely to be arrested for their shooting if they are frequently in city systems. An ideal comparison group would look at these points of contact for peers without the same arrest history—ideally individuals with similar demographic characteristics, from similar regions of the city. Determining common points of contact for a broader cohort will help us know how typical or atypical the patterns of contact we have identified here are, and how that informs prevention efforts.

What we do know about the most common touchpoints is that over 60% of individuals had some sort of outpatient contact with the Department of Behavioral Health and Intellectual Disabilities (DBHIDS), the most common contact found (figure 3).



It's important to note that the administrative data cannot specify the nature of this contact. This contact could be a screening, or bundled services with other agencies such as the Department of Human Services (DHS). While this doesn't necessarily signify a behavioral health diagnosis or treatment, it does signify an opportunity for a need to be named and identified.

The second most common point of contact is with the Philadelphia Department of Prisons (PDP). Over 50% of this cohort made contact with PDP. Nearly 50% also had a prior arrest specifically for narcotics related charges. This raises a question as to whether diversion and resource provision for narcotics related charges should be coupled with preventative violence intervention strategies. Many evidence based models involve a warm handoff between people in various systems, such as hospital systems or probation and parole, and preventative case management that extends to the individual's home life. This includes hospital-based violence intervention programs (HVIPs) and Cure Violence models, both of which are active in Philadelphia. The health department has convened city-wide collaboratives, beginning with all city HVIPs. Cure Violence programs are working to develop a collaboration under a similar model. A key question for those efforts will be identifying where there are opportunities for warm handoffs. People can be engaged from prisons, probation and parole, courts, and schools, in addition to hospitals and through community contacts. This could build on existing resources, provide opportunities for engaging those at highest risk, and increase coordination between agencies, all key objectives of PIRPSC and its partners.

Another key conclusion from our work is that integrated data sets such as CARES hold great promise for the ability of a city to work collaboratively towards more public-health oriented, preventative action. Ensuring that these efforts are supported and that critical interagency partnerships can occur using shared data increases our ability to find solutions that cross sectors. Currently, there are critical data elements such as education and employment data that are not available in this data set. In addition, enrollment in violence prevention programming is not part of the CARES data set. In the future, streamlining the ability to expand this data set can decrease the silos between violence prevention efforts in different agencies.

Analysis Result by Defender Association

National Landscape and Root Causes of Community Violence

With 2,332 criminal shooting victims this year - 501 of which resulted in death - [41] Philadelphia is unquestionably facing a crisis of gun violence, the likes of which have not been seen in recent years. As 93% of shooting victims in the city this year were Black and/or Hispanic, this epidemic not only presents a public health emergency but an unconscionable racial injustice. This level of community violence, while shocking, is not entirely unique to Philadelphia. While COVID-19 is consistently cited as a factor contributing to recent increases in violence, community violence in Philadelphia[42] and cities across the nation, is a persistent problem that predates the pandemic.

It is a problem that we can, and must, solve. But traditional criminal justice system solutions alone are insufficient to stem increased community violence.[43] These responses simply cannot adequately address perceived threats to personal safety, particularly in communities with high rates of community violence, and often exacerbate destabilizing factors that place communities and individuals at increased risk of violence.[44]

We cannot arrest or incarcerate our way out of this problem. We must remain mindful that the enforcement of laws throughout our city is not a race-neutral process. "Tough on crime" approaches, particularly to non-violent behavior, greatly contribute to the crisis of mass incarceration and its harmful impact on urban communities of color. This does not mean we abandon law enforcement and criminal justice strategies. Rather, we should implement policies and practices that strategically and sustainably address root causes of individual and community level violence.

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[41] Source: Philadelphia Police Department

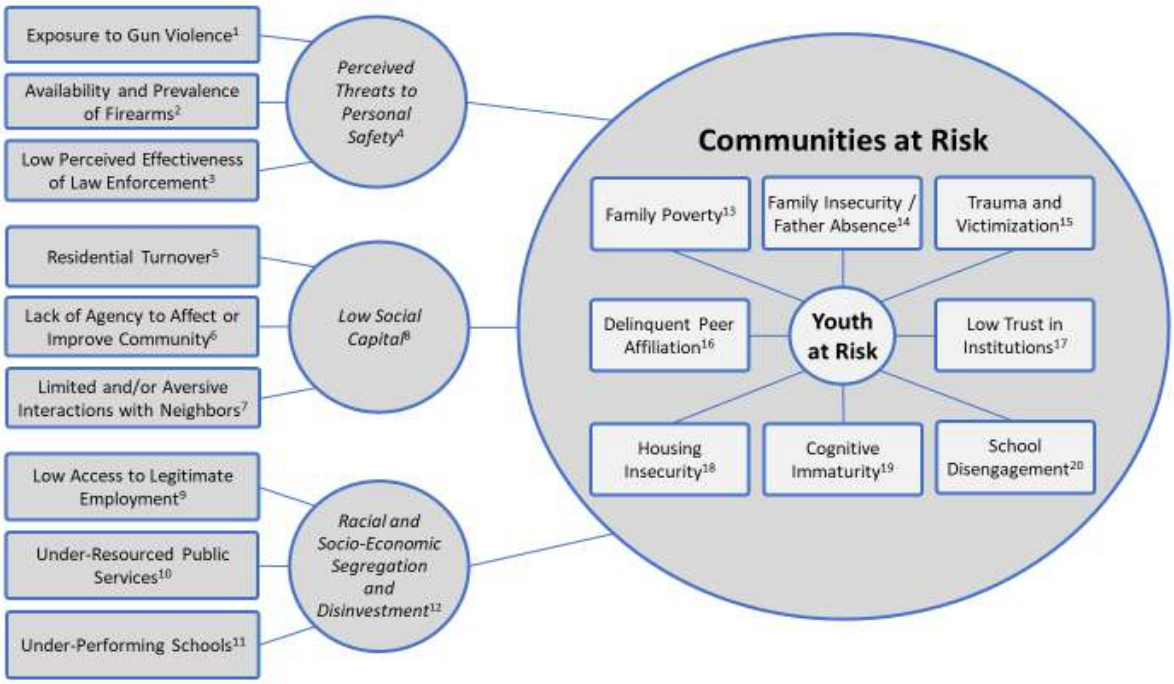
[42] https://www.phila.gov/Newsletters/Youth_Violence_Strategic_Plan_%20FINAL%20September%202013.pdf reporting that Philadelphia had the 4th highest homicide rate among the 50 largest US cities, with African American men disproportionately represented as victims of and arrestees for homicide.

[43] Giffords Law Center, A Second Chance: The Case for Gun Diversion Programs , citing the Vera Institutes conclusion that incarceration is "neither the most effective way to change people nor the most effective way to keep people safe." And establishing that "most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration."

[44] Clear, T.R., & Montagnet, C.L. (2020). Impact of Incarceration on Community Public Safety and Public Health" in Robert Greifinger, ed. Improving Public Health Through Correctional Health Care. 2nd ed. (NY: Springer, 2020). A growing body of research suggests that high rates of incarceration in areas experiencing high rates of crime actually make the community less safe by decreasing social cohesion and economic health

Factors that consistently place communities and individuals within those communities at elevated risk to experience violence include the following:

Figure 1: The Ecology of Community Violence[45]
Model developed by Dr. William Barta, PhD - Defender Association of Philadelphia



Exposure to violence is dependably reported as a risk factor for future involvement in community violence, either as a victim or participant, a cycle Defender staff regularly observes in the clients we serve. In a recent survey, 82% of Defender clients pending 1st degree felony charges[46] reported witnessing violence prior to the age of 18, with 56% of them reporting witnessing multiple incidents of violence. Because our clients are indigent, their access to culturally competent, timely, affordable mental healthcare is limited. Many have never received any support to address the trauma they've experienced.

Furthermore, periods of incarceration, the tool most commonly available to criminal justice system partners to address prohibited behaviors, exacerbate the very factors that contribute to community and individual violence. Jails themselves are dangerous places and detainees report that they experience fear for their personal safety, sleep deprivation,

[45] Refer to Appendix 9 to review complete annotated footnotes used to develop this model

[46] First degree felonies represent the most serious charges in Pennsylvania.

and other stressors.[47] The current conditions of our local jail, where 18 incarcerated people died in 2021, expose detained people to additional trauma.[48] The harmful impact of incarceration is not limited to post-adjudicatory sentencing. Incarcerated people, detained pretrial for even relatively brief periods, experience higher rates of pretrial re-arrest following their release than similarly situated peers.[49] This higher rate of re-arrest is observed not only in the immediate time following release but up to two years later.[50]

While the criminogenic impact incarceration has on people who return home from jail is well-documented, perhaps less discussed is the impact pretrial detention has on case outcomes and the collateral consequence even relatively brief periods of incarceration has on families and communities.

Case Outcomes

Even relatively brief periods of pretrial detention have short- and long-term consequences for arrestees and their families. Detained people plead guilty, regardless of their actual culpability, if it allows them to leave jail.[51] If detainees take their cases to trial, they are more likely than non-detained persons to be found guilty, serve longer prison sentences[52] and face larger financial penalties in the form of fines and fees.[53]

Employment Outlook

But this period of pretrial detention has a long-lasting impact. Harvard researchers studied pretrial detention outcomes in Miami and Philadelphia between 2007 and 2014 to examine economic effects. Between 3 and 4 years later, defendants who had experienced pretrial detention still had greater difficulty finding employment as compared to non-detained defendants. They were 9.4% less likely to be employed. On average, they had

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[47] Blevins, K.R., Johnson Listwan, S., Cullen, F.T., & Lero Jonson, C. (2010). A General Strain Theory of prison violence and misconduct: An integrated model of inmate behavior. *Journal of Contemporary Criminal Justice*, *26* (2), 148–166.
[48] https://www.inquirer.com/news/philadelphia-jail-deaths-lawsuit-prison-conditions-20211227.html
[49] Lowenkamp, C.T., VanNostrand, M., & Holsinger, A.M. (2013). The hidden costs of pretrial detention. New York: Laura & John Arnold Foundation
[50] Lowenkamp, C.T., VanNostrand, M., & Holsinger, A.M. (2013). The hidden costs of pretrial detention. New York: Laura & John Arnold Foundation
[51] Petersen, N. (2020). Do detainees plead guilty faster? A survival analysis of pretrial detention and the timing of guilty pleas. *Criminal Justice Policy Review*, *31* (7), 1015-1035.
[52] Leslie, E. & Pope, N.G. (2017). The unintended impact of pretrial detention on case outcomes: Evidence from New York City arraignments. *Journal of Law and Economics*, *60*, 529-557.
[53] Op cit Stevenson, 2016

lost $29,000 in income as compared to other defendants.[54] Among persons who are later convicted, the unemployment rate one year after release from prison is 50%.[55]

Housing Instability

The economic impact of incarceration is not limited to incarcerated people. Sociologist Matthew Desmond has drawn attention to the relationship between the incarceration of men and eviction rates of their marital or domestic partners. The loss of the male partner's income makes it more difficult for their partners to afford rent. This has led to an epidemic of evictions, disproportionately impacting low-income, Black women. Desmond notes that, "In high-poverty Black neighborhoods, one male renter in 33 and one woman in 17 is evicted. In high-poverty White neighborhoods, by contrast, the ratio is 134:1 for men and 150:1 for women." In Philadelphia, we observe racial disproportionality in evictions with 56% of the 112,449 evictions filed between 2015 and 2020 occur in communities where the majority of residents are Black and an overwhelming 81% in communities of color.[56] And an estimated three quarters of people represented by The Philadelphia Eviction Prevention project are Black women.[57]

When men have a history of incarceration, their partners often sign the lease for the couple. So when there is an eviction, it is a mark against the partner. This eviction carries a stigma and is a matter of public record. People who have a record of eviction face greater difficulty securing an apartment, are more likely to be denied housing services, have poorer credit, and are at increased risk of homelessness.[58] This is especially true in places like Philadelphia, where the public court record of the eviction case is not sealable and is available to prospective landlords regardless of case outcome.[59] Desmond has identified eviction as a key contributor to severe downward economic mobility in urban communities – concluding that while Black men get locked up, Black women get locked out.[60]

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[54] Dobbie, W. & Yang, C.S. (2021). The economic costs of pretrial detention. Brookings Institution, www.brookings.edu/bpea-articles/the-economic-costs-of-pretrial-detention/

[55] Western, B. & Sirois (2018). Racialized re-entry: Labor market inequality after incarceration. *Social Forces*, 1-29.

[56] Breaking the Record Report, Community Legal Services, November 2020.

[57] Breaking the Record Report, Community Legal Services, November 2020.

[58] Desmond, M. (2014). Poor Black women are evicted at alarming rates, setting off a chain of hardship. MacArthur Foundation Policy Brief. See also Desmond, M. (2012). Eviction and the reproduction of urban poverty. *American Journal of Sociology*, *118* (1), 88-133.

[59] Breaking the Record Report, Community Legal Services, November 2020.

[60] Desmond, M. (2014). Poor Black women are evicted at alarming rates, setting off a chain of hardship. MacArthur Foundation Policy Brief. See also Desmond, M. (2012). Eviction and the reproduction of urban poverty. *American Journal of Sociology*, *118* (1), 88-133.

Intergenerational Harm

This "epidemic of eviction" has consequences for the dependent children of incarcerated persons. Children who change homes and change schools are at significantly greater risk of dropping out of school and are more likely to associate with peers who engage in problematic behaviors.[61] These high rates of school mobility also adversely impact children who remain in the same school without their friends and peers. Children of incarcerated parents are at even greater risk for disengaging from school, as they tend to experience a higher rate of truancy than peers.

Parental incarceration results in temporary separation from a parent, but it may also mean that the parent permanently loses custody.[62] Children face the trauma of separation from a parent and decreased parental supervision. This leads to psychological challenges that often manifest as reduced engagement in classroom activities and increased involvement in troublesome behaviors.[63]

Impact on Neighborhoods

The impact of incarceration extends beyond the people who experience it and their families. When we use the term "mass incarceration," it implies that the sheer number of people being incarcerated is such that it can alter the fabric of entire neighborhoods. For example, when researchers look at neighborhoods in which a relatively large proportion of residents are incarcerated, they find that eviction rates are significantly higher than in other economically disadvantaged neighborhoods.[64] Communities with high levels of incarceration have consistently been hollowed by the collective impact of individual incarceration. A study of neighborhoods in Baltimore found that 'high incarceration' "communities experience higher unemployment, greater reliance on public assistance, higher rates of school absence, higher rates of vacant and abandoned housing, and more addiction challenges than the city as a whole."[65]

Researchers say that these conditions give rise to "social disorganization." Because people are continually moving into and out of these neighborhoods, there are fewer

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[61] S. Baughman (2017). Costs of pretrial detention. *Boston University Law Review*, *97* (1), 1-29.
[62] Ortiz, N.R. (2015). County Jails at a Crossroads. An Examination of the Jail Population and Pretrial Release. Why Counties Matter paper series, 2. Washington, DC: National Association of Counties.
[63] Nichols, E. B., Loper, A. B., & Meyer, J. P. (2015). Promoting educational resiliency in youth with incarcerated parents: The impact of parental incarceration, school characteristics, and connectedness on school outcomes. *Journal of Youth and Adolescence*, *45* (6), 1090–1109.
[64] Desmond, M. & Gershenson, C. (2016). Who gets evicted? Assessing individual, neighborhood, and network factors. Social Science Research, http://dx.doi.org/10.1016/j.ssresearch.2016.08.017
[65] Justice Policy Institute (February 2015). *The Right Investment? Corrections Spending in Baltimore City*.

long-term residents, neighbors are less likely to form relationships with one another, and are less able to identify suspicious "out of place" persons in the neighborhood. Residents of these neighborhoods also tend to be mistrustful of police; therefore, police are hampered in their ability to find witnesses and solve crimes.[66] Over time, high neighborhood-level incarceration rates may lead to an increase in crime.[67]

Many researchers who study social disorganization theory have suggested that, in neighborhoods affected by high residential turnover and joblessness, residents experience low "collective efficacy." Where collective efficacy is low, residents do not believe that they can influence crime or quality-of-life issues in their own neighborhood, feel helpless to make constructive changes, and therefore lack motivation to attempt changes. If this theory were valid, then one would predict that an increase in collective efficacy would lead to a reduction in crime. A recent study put this to the test locally. Low-income homeowners living in disadvantaged Philadelphia neighborhoods were given small grants ($20,000 each) to make structural repairs to their homes. Following this intervention, the researchers found that, on improved blocks, there was a significant decrease in police-reported homicide, assault, burglary, theft, robbery, disorderly conduct, and public drunkenness. Overall, crime was reduced by nearly 22%.[68]

Public opinion in recent years reflects an increasing awareness that a "tough on crime" approach to nonviolent behaviors does not actually increase public safety or reduce crime. Yet tens of thousands of Americans are arrested and incarcerated each year for nonviolent weapon possession charges.[69] A public health lens and commitment to alleviate conditions that contribute to community violence suggests we rethink traditional criminal justice system approaches to nonviolent, but unlawful, gun possession – particularly in neighborhoods where firearms are carried as a shield not a sword.

The Tipping Point

Several criminologists believe that a theoretical "tipping point" is reached when increases in a neighborhood's incarceration rate no longer yields a measurable benefit in terms of public safety (refer to Figure 2, below). A growing body of research suggests that this is

[66] Lerman, A.E. & Weaver, V. (2014). Staying out of sight? Concentrated policing and local political action. *The ANNALs of the American Academy of Political and Social Science*, *651*, 202-219.
[67] Clear, T.R., Rose, D.R., Waring, E., & Scully, K. (2003). Coercive mobility and crime: A preliminary examination of concentrated incarceration and social disorganization. *Justice Quarterly*, *20* (1), 33-63.
[68] South, E.C., MacDonald, J. & Reina, V. (2021). Association between structural housing repairs for low-income homeowners and neighborhood crime. *JAMA Network Open*, 4(7):e2117067. doi:10.1001/jamanetworkopen.2021.17067
[69] Giffords Law Center (December 2021). A Second Chance: The Case for Gun Diversion Programs

likely the case. Once truly dangerous individuals are removed from the community, additional removals do not produce measurable crime reductions. Instead, it becomes increasingly likely that the sheer number of people who are removed from the community will have a disruptive effect. This can be measured in terms of a high prevalence of families in which a parent has been forcibly removed, number of evictions, and other metrics.[70] Hannon and DeFina (2012) have shown that "revolving door" incarceration contributes to a significant increase in juvenile delinquency and perpetuates an intergenerational cycle of criminal justice involvement.[71]

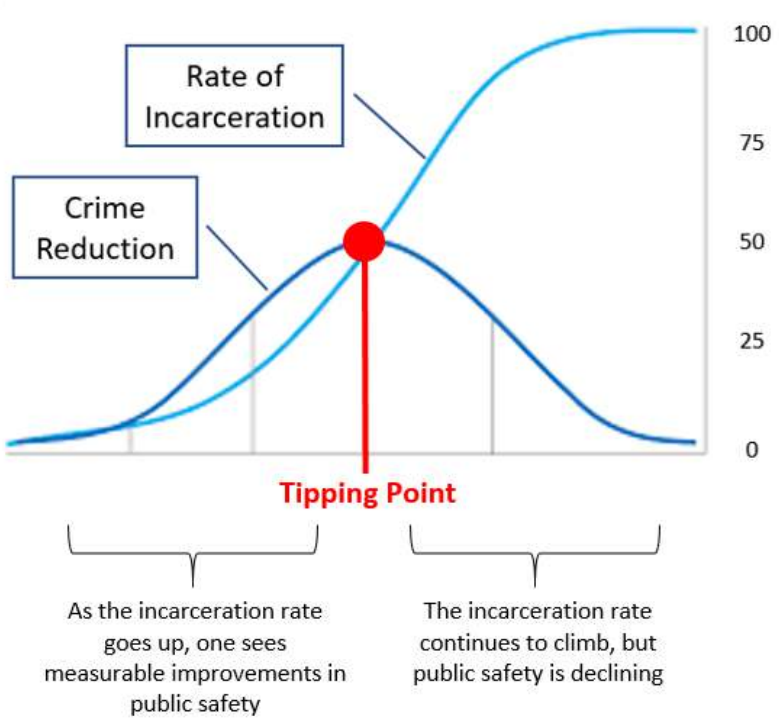

Figure 2: The Tipping Point.

[70] Clear, T.R., Frost, N.A., Carr, M. et al. (2017). *Predicting Crime through Incarceration: The Impact of Rates of Prison Cycling on Rates of Crime in Communities in Boston, Massachusetts, Newark, New Jersey, Trenton, New Jersey, and Rural New Jersey, 2000-2010*. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor]. doi:10.3886/ICPSR35014.v1.
Clear, T.R., Rose, D., Waring, E. & Scully, K. (2003). Coercive mobility and crime: A Preliminary examination of concentrated incarceration and social disorganization. *Justice Quarterly*, *20* (1): 33–64.
Gross, L.A. & Frost, N.A. (2012). Coercive mobility and the impact of prison-cycling on communities. *Crime, Law, and Social Change*, *57*, 459-474.
Kirk, E.M. (2021). Community consequences of mass incarceration: Sparking neighborhood social problems and violent crime. Journal of Crime and Justice, DOI:10.1080/0735648X.2021.1887751
[71] Hannon, L., & DeFina, R. (2012). Sowing the seeds: how adult incarceration promotes juvenile delinquency. Crime, Law and Social Change, 57 (5), 475–491. doi:10.1007/s10611-012-9374-1

Trends in the Prosecution of Possessory Firearm Offenses

The idea that increasing the number of convictions for illegal gun possession in high-crime areas will improve public safety has driven national and local criminal justice policy initiatives for two decades.[72] Project Safe Neighborhoods, (PSN) launched in 2001 during the Bush Administration, is a national initiative to reduce serious community violence. It is credited with shifting national policy to streamline arrests for nonviolent possession of firearms and the initiative resulted in dramatic increases in the number of federal prosecutions for possessory firearm offenses.[73] But, while there were severe consequences for communities of color there were no corresponding reduction in firearm related homicides reported.[74]

More recently, researchers from Loyola found that people who are convicted of nonviolent possessory firearm offenses do not contribute significantly to violent crime in Chicago. However, devoting police resources to arresting persons for possessory offenses did result in fewer arrests for all other crimes including crimes of violence.[75]

Findings like these do not suggest system partners should abandon enforcement of laws regulating nonviolent possession of firearms. However, we do need to commit to strategies to reduce community violence that do not contribute to mass incarceration. Programs that effectively divert nonviolent possessory offenses away from traditional criminal justice solutions, discussed below, demonstrate that we can safely balance the need to address nonviolent possessory offenses without saddling young men of color with felony level criminal convictions or further destabilizing families and communities.

Local Analysis

In November of 2021, Defender Association of Philadelphia reviewed pretrial outcomes for all Philadelphia cases alleging nonviolent possession of a firearm, from 2015 through the first half of 2021. Our analysis confirmed what many people in neighborhoods across the city already know:

- charges alleging non-violent possessory firearm offenses have increased dramatically since 2015,

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[72] Giffords Law Center (December 2020). America at a Crossroads: Reimagining Federal Funding to End Community Violence.
[73] Ibid, Giffords Law Center (December 2020).
[74] Ibid, Giffords Law Center (December 2020).
[75] Where 93% of people convicted of unlawful possession offenses remained violent crime free, even 3 years following their conviction.

- criminal justice policies related to the enforcement of these laws,
- the reliance on the use of monetary bail to detain or secure release for people pending these charges, and
- the imposition of default periods of incarceration following conviction for these offenses

almost exclusively impact young men of color and their families.

Trends in Non-Violent Possession Cases

In Philadelphia, non-violent possessory firearm offenses have been consistently rising – with twice as many cases in 2020 as there were in 2015. The overwhelming majority (95%) of arrestees facing non-violent possessory firearm charges are men of color.[76]

Similarly, the proportion of cases alleging the possession of a firearm without a license,[77] as opposed to possession of a firearm by a person prohibited by law to possess a firearm[78] have also increased dramatically. In 2015, 47% of non-violent possessory cases involved the possession of a firearm without first obtaining the proper license. But by the first half of 2021, arrests for unlicensed possession represented 61% of the non-violent possessory firearm cases. Increasingly, arrests of young people are driving both the overall increase in non-violent possessory firearm cases and the shift in the proportion of cases alleging possession without a license. While possession by persons prohibited cases have remained relatively stable, arrests for unlicensed possession have consistently increased with significantly more young people charged with unlicensed possession cases each year.

[76] Demographic information is collected by law enforcement at the time of the arrest and does not always reflect the client's self-identified race or ethnicity. The fields are insufficient to capture people identify as bi-racial or multiple mixed racial background, or non-binary genders. We use the terminology 'Hispanic' or 'Non-Hispanic' throughout to be consistent with the labels used in the data fields.

[77] Carrying a firearm in a vehicle, concealed on one's person or in the open in Philadelphia without first obtaining a license to do so is criminalized pursuant to the provisions of 18 PA CS 6106 and 6108.

[78] A person who was previously convicted of a qualifying offense or series of offenses or adjudicated incompetent or involuntarily to a mental institution for inpatient care or treatment, or is the subject of an active final protection from abuse order, fugitive of justice, undocumented resident, is prohibited from lawfully possessing a firearm pursuant to the provisions of 18 PA CS 6105.

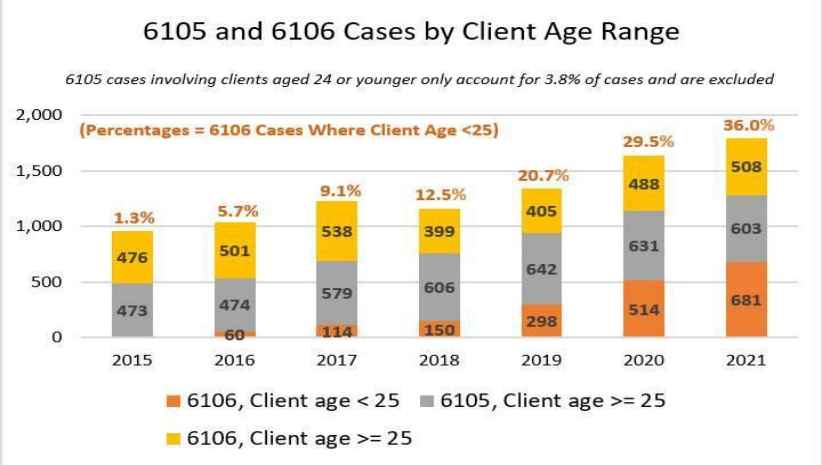
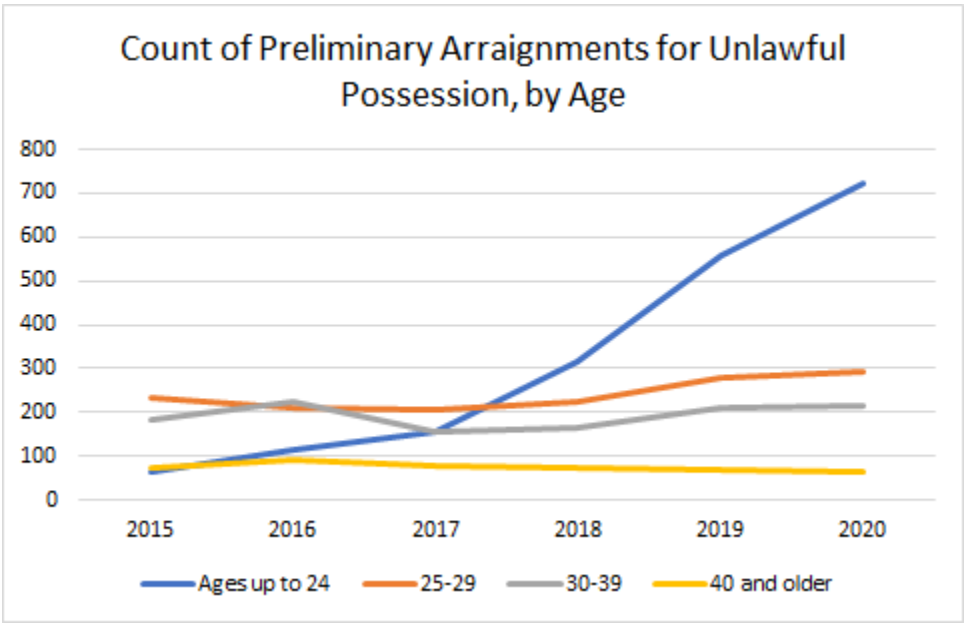


Figure 3: Non-Violent Possessory Firearm Cases by Type and Age over Time

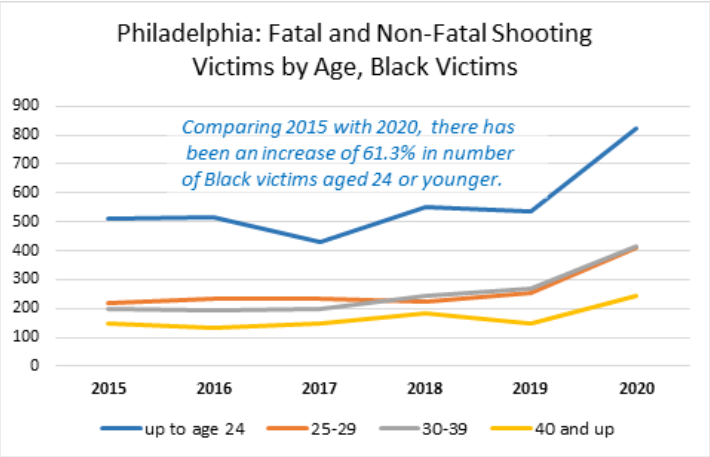
Beginning in 2017, we see a sharp increase in youthful arrestees pending charges for unlicensed possession of a firearm.

Figure 4: Age of all arrestees pending a lead charge alleging unlawful possession of firearm



This is particularly true for Black arrestees with unlicensed possession of a firearm charges. In 2015, arrestees aged 18-24 comprised less than 3% of the unlicensed possession cases against Black arrestees. But by the first half of 2021, that percentage jumped to 56%. The increase in unlicensed possession cases with young arrestees coincided with increased victimization of young Black Philadelphians.

Figure 5: Age of Black Victims of Fatal and Non-Fatal Shootings.

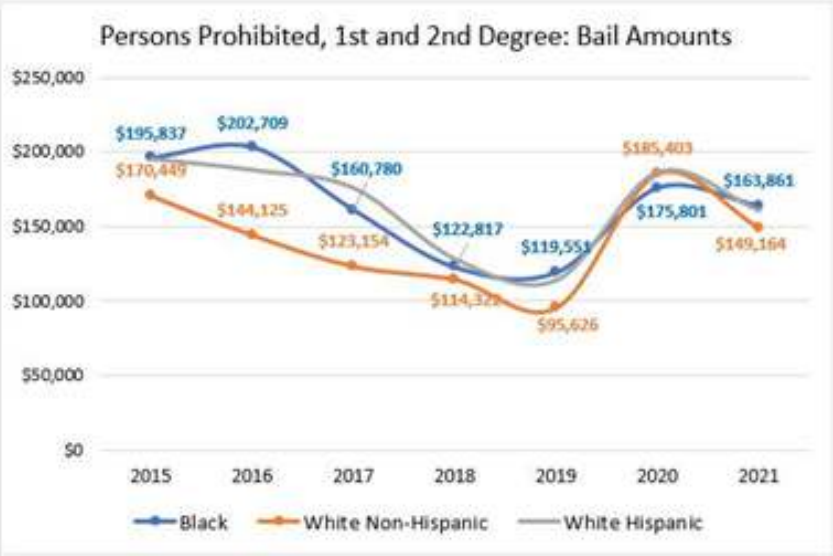


Trends in Bail

In the overwhelming majority (96%) of cases alleging a non-violent possessory firearm offense secured bail is set when the arrestee is first presented for preliminary arraignment.[79] While average bail amounts have fluctuated over the years, higher average bail is consistently set in cases alleging persons prohibited charges than for those against arrestees, otherwise eligible to carry a firearm, who fail to obtain the proper license. We typically see differences in the adjusted average amount of bail set for these charges by race and ethnicity. **But the significant underrepresentation of white arrestees limits conclusions as to racial disparities in initial bail amounts set.**

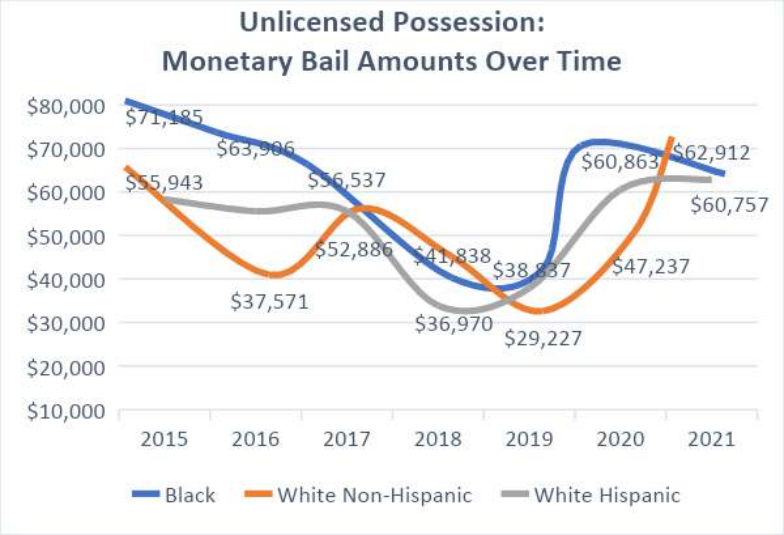
Figure 6: Average Bail Amounts for Persons Charged with Poss. by Prohibited Person

[79] Arrestees are brought before magistrates often at or near the time of their arrest for an initial determination of the amount and type of bail and appointment, if financially eligible, of counsel.



NOTE: 2021 is a partial year (ending 6/12/2021)

Figure 7: Average Bail Amount for Persons charged with Unlicensed Possession (3rd Degree)



The average bail initially set is often well outside the typical indigent arrestees' ability to pay and the use of financial conditions to secure release often places additional economic burdens on individuals and communities already at the greatest risk for violence. Following the initial decision to set bail, the court may review and modify the amount and type of bail set in light of individual factors unique to the arrestee, his circumstances, or the likelihood of conviction. This review typically takes place after both the District Attorney's Office and defense counsel are able to gather more information relevant to the individualized factors courts must consider when setting bail.

Trends in Pretrial Outcomes

Concerns that people released while pending resolution of nonviolent possessory firearm offenses are driving the increases in community violence in Philadelphia are not supported by the data. When reviewing nonviolent possessory firearm cases initiated and resolved since 2015, we found the following:[80]

- The arrestee was not subsequently rearrested during the pretrial period for any new offense in 89% of the cases.

[80] Because Defender did not have access to jail population data, we could not determine which arrestees pending possessory firearm offenses achieved pretrial release and instead reviewed the entire universe of cases. Increased data sharing with the Philadelphia Police Department as to admissions and releases, if only for Defender clients, would greatly improve our analysis capacity and ability to connect clients with pretrial supports.

- The arrestee was not subsequently rearrested during the pretrial period for a possessory firearm offense in 98% of the cases.
- The arrestee was not subsequently rearrested during the pretrial period for a subsequent crime of violence, as defined by the Uniform Crime Report, in 97% of the cases.
- The arrestee was not subsequently rearrested during the pretrial period for a subsequent crime of violence, as defined by the Uniform Crime Report, or a subsequent possessory firearm offense in 95% of the cases.

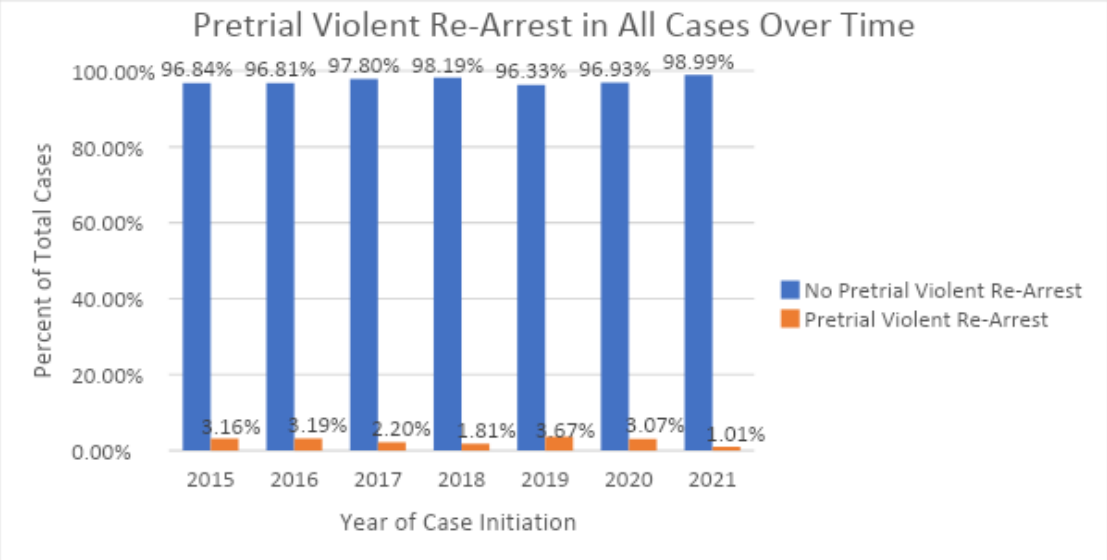


Figure 8: Pretrial Re-Arrest for Non- Violent Possessory Firearm Cases Over Time

Improving gun case outcomes

Improving outcomes for possessory firearm cases must expand beyond securing convictions and imposing default periods of incarceration. They must also include an assessment as to whether these traditional responses are effective in reducing violent crime in the short– and long term.

In Philadelphia, enforcement of non-violent firearm laws is directed almost exclusively at communities of color, and in recent years, men under the age of 25. That the number of shootings continues to rise despite dramatic increases in arrests for nonviolent possessory offenses suggests that simply increasing arrests for gun possession is not the most effective strategy to reduce community violence.

In some ways, strategies designed to enforce possessory firearm laws place a heavy burden on relationships with the very communities the strategies are designed to protect.

For example, pedestrian and vehicle stops in neighborhoods that are primarily Black, brown, and poor to enforce motor vehicle code violations are one tactic sometimes relied upon to investigate and enforce violations of possessory firearm laws. Unfortunately, these tactics sometimes breed significant mistrust in communities of color without improving public safety or efficiently recovering firearms. For example, 74% of the 196,651 motor vehicle stops conducted from January of 2020 through July of 2021 involved Black drivers. But less than ½ of 1 percent of the stops from January of 2020 through March of 2021, resulted in the recovery of a firearm.

The mistrust is compounded when some policing of this nature has been done in violation of the Constitution and laws as residents of the affected neighborhoods who are not involved in criminal activity are humiliated and embarrassed by unjustified searches. Such interactions make it difficult for residents of communities impacted by gun violence to view police as agents of public safety with whom they want to engage as victims, survivors, or witnesses of various types.

Similarly, securing convictions and the most severe sanction permitted by law for nonviolent possession of firearms has not yielded the reductions in gun violence that we need to see. This may be attributable to the criminogenic effect of prison, meaning the effects of prison place many individuals at risk for re-arrest upon exiting the system[81] and the aggregate consequences this approach has on communities at risk of experiencing violence.

There are a handful of jurisdictions that balance the need to hold people accountable for unlawfully possessing firearms without exacerbating conditions that lead to community violence by permitting people with nonviolent possessory charges who appear to be uninvolved in driving gun violence to enter diversion programs. Outcomes from Minneapolis and Brooklyn lead the Giffords Law Center to recommend that jurisdictions partner with community-based efforts to divert some of the individuals facing these charges.[82] Minneapolis' diversion program for example, provides a model. Despite a high conviction rate for non-violent possession of firearms, the city's attorney noted that individuals' life outcomes remained poor. So in 2016, the city sought competitive bids from community based organizations to develop a highly structured trauma-informed program for people pending non-violent possessory firearm offenses.

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[81] David Roodman, "The Impacts of Incarceration on Crime," *Open Philanthropy Project*, September 25, 2017, http://dx.doi.org/10.2139/ssrn.3635864; Francis T. Cullen, et al., "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," *The Prison Journal* 91, no. 3 (2011), DOI: 10.1177/0032885511415224, https://doi.org/10.1177%2F0032885511415224.

[82] Giffords Law Center (December 2021). A Second Chance: The Case for Gun Diversion Programs

While the program is still small, the initial results are encouraging. At the time of their last report, 126 of the 214 eligible arrestees agreed to participate in the program where participants can avoid a conviction while receiving intensive case management, trauma centered care, and life skills. 59 participants graduated, 46 were still actively engaged and 21 either dropped out or were terminated. Of the graduates, only 6 (10%) were subsequently reconvicted for any offense with only one crime of violence, a misdemeanor offense of domestic violence.[83]

Diversionary programs hold people accountable with a period of supervision and other requirements with an eye toward avoiding a conviction if they are fully compliant; this often includes supportive programming. People admitted to the program who do not meet its demands are sent back to court to face trial and conviction. People who are accountable by meeting the program's requirements avoid a conviction that would likely stigmatize and preclude them from fully participating in everything that is preventative of future criminal activity—jobs that pay well, housing, loans for education, real estate and vehicles (Pager, 2003; Pager et.al, 2009; Decker et.al 2014).[84]

[83] Giffords Law Center (December 2021). A Second Chance: The Case for Gun Diversion.

[84] Decker, Scott & Ortiz, Natalie & Spohn, Cassia & Hedberg, Eric. (2015). Criminal stigma, race, and ethnicity: The consequences of imprisonment for employment. Journal of Criminal Justice. 43. 10.1016/j.jcrimjus.2015.02.002.

Pager, D. (2003). The mark of a criminal record. American Journal of Sociology, 108(5), 937-975.

Pager, D., Bonikowski, B., & Western, B. (2009). Discrimination in a low-wage labor market: A field experiment. American Sociological Review, 74(5), 777-799.

5. Goals and Policy Considerations

In order to guide the analysis and to support the development of policy recommendations, the Committee has set the below policy-oriented goals that go beyond the original resolution's descriptive goal of analyzing 100 shooter characteristics.

- Reducing gun violence through Deterrence of illegal firearm possession; Improving gun case outcomes; Improving shooting incident clearance rates; Improving witness appearance rates.

Additionally, given the importance of the long-term, sustainable solution to prevent gun violence, the data-sub committee took the liberty of adding the below two goals:

- Reducing gun violence through short term investments in community driven solutions for prevention
- Reducing gun violence through upstream, long-term investments in communities most impacted by gun violence for sustainable reduction

The next section, 6. Recommendation, discusses specific, actionable programs and practices to accomplish these goals.

6. Recommendations

Specific, actionable recommendations are organized by policy goals as set forth by the committee. It should be noted that some recommended initiatives/programs are inter-related to each other, cutting across multiple goals.

Recommendations by the PPD

Improving gun case outcomes

Dedicated Court for illegal gun possession cases and vertical prosecution

Establishing a dedicated courtroom(s) for illegal firearm possession cases is an example of a problem-solving court with multiple evaluation studies finding improved case outcomes and lowered recidivism rates for participants, including studies that focused on Philadelphia's implementation in the early 2000s. Although study findings show little evidence of such courts' effect on lowered gun crimes across the city, evaluation studies have found improved process outcomes and reduced reoffending among specialized court case participants. Dedicated resources among stakeholders (courts, defenses, and prosecution) also help strengthen individualized attention to each case to determine the best criminal justice response, which may range from diversion with supervision and support for minimum risk individuals to incarceration for those driving gun violence. The current increasing trends of gun arrests, open cases, and the presence of a sizable proportion of gun arrestees who commit another gun crime during open cases (the analysis section of the current report) certainly indicate that establishing a dedicated court for gun cases is a promising strategy to consider.

Typical aims of a problem-solving court for gun cases are to decrease the time from arrest to disposition, increase guilty pleas for gun cases, reduce recidivism for participants, increase education on gun safety, and in some cases provide alternatives to incarceration (OJJDP, 2010, Makarios, M. D., & Pratt, T. C., 2012)[85]. The Adult Probation and Parole Department (APPD) for Philadelphia (Kurtz,et al., 2007)[86] released an 18-month evaluation of the previous Philadelphia Gun Court. They found an increase in convictions for VUFA

[85] OJJDP (Office of Juvenile Justice and Delinquency Prevention). (2010, September). *Gun court literature review*. https://ojjdp.ojp.gov/mpg/literature-review/gun-court.pdf

[86] Kurtz, E., Malvestuto, R., Snyder, F. Reynolds, K., McHale, J & Johnson, F. (2007) *Philadelphia's gun court: Process and outcome evaluation executive summary*. https://www.courts.phila.gov/pdf/criminal-reports/Gun-Court-Evaluation-report-executive-summary.pdf.

cases from 51% in 2001 to 57% in 2003. When limiting to Gun Court cases, the conviction rate rose to 65% in 2005. Additionally, the APPD found an increase in guilty pleas and reduction in waiver trials. Lastly, the APPD evaluated re-offending for pre- and post-implementation. The results were a lower rate of re-arrest (20% v 12%) and a zero rate of reoffending for lead cause of VUFA in the year after probation started (Kurtz,et al., 2007). An additional evaluation showed that the Philadelphia model effectively reduced disposition days (the time between arrest and disposition) as compared to similar cases before its implementation (Hill, G.D., 2008)[87].

Notably, Philadelphia has already created dedicated preliminary hearings for gun cases amid the pandemic; given the increasing rate of VUFA arrests and gun recoveries (an average of 7 VUFA arrests and 16 gun recoveries per day), an increased and dedicated resource to process not only preliminary hearings but also Common Pleas court trials is a practical consideration. The creation of dedicated courts for gun cases also has side-benefits to establish a unified front across the criminal justice system to address the gun violence crisis, sending a clear and solidified message to the community.

Furthermore, dedicated courts for gun cases also help develop such a prosecution model as vertical prosecution, which is an approach where the same prosecutor is assigned to a case from beginning to end. While rigorous evaluations may be sparse, various agency experiences indicate that vertical prosecution has shown to improve conviction rates, reduce victim trauma, and provide more consistent, appropriate sentencing.

For example, the City of Seattle implemented a crime plan which included vertical prosecution (Scales and Baker 2000)[88]. Seattle's effective strategy for prosecuting juvenile firearm offenders highlights benefits in vertical prosecution. Utilizing this approach led to greater continuity and consistency in prosecution. The average days to file cases went down and filing backlogs were eliminated. An increase in guilty trial convictions occurred. Pretrial dismissal rates were reduced as well as an increase in juveniles detained at their first appearance hearings occurred. Communications improved between the prosecutor, police, judges, and probation officers.

Vertical prosecution is already in place for shooting/homicide cases with successes, as indicated by a high conviction rate. It is recommended to expand its scope to serious, illegal gun possession cases (e.g., CC6105 prohibited possession of firearms by felons); as

[87] Hill, G.D. (2008) The new Philadelphia gun court: Is it working? (1459465) [master's thesis, University of Nevada, Reno]. ProQuest LLC.
[88] Scales, B and Baker, J. (2000) OJJDP, Seattle's Effective Strategy for Prosecuting Juvenile Firearm Offenders. OJJDP Juvenile Justice Bulletin. March 2000.

the current analysis has shown correlation among shootings/homicides/VUFA, and existing literature suggests the importance of addressing gun possession cases to achieve violence reductions (Koper & Mayo-Wilson, 2012; McGarrell et. al. 2010)[89] [90].

It is important to note that vertical prosecution can address multiple and specific problems that the current analysis has identified: for example, witness failure to appear (FTA) can be addressed by having consistent ADAs assigned to each case and by building rapport with victims. However, vertical prosecution cannot be implemented without the establishment of dedicated courtrooms, because of physical and logistical reasons (physical, dedicated court rooms will be essential in ADAs' operations).

Collaborative review of gun cases

A collaborative review of gun cases is not necessarily a crime prevention measure, instead it is a vehicle to facilitate inter agency relationships. It can also facilitate the identification of emerging new trends in order to swiftly address them through multi-agency coordination. Both the PPD and DAO are learning organizations; a formalized review process allows us to more deeply understand why there are an increasing number of adverse case dispositions and to adjust training and improve policing/investigations in a timely manner. This collaborative review process can also engage other stakeholders as well, such as ATF. Some aspects of this collaboration can also be made public (e.g., statistical dashboards on gun crime trends and case outcomes), increasing the transparency in the City's gun violence strategies.

While rigorous evaluations may not be available or may only provide mixed findings regarding the impact on crimes in the community,a collaborative review of gun cases can benefit us in multiple ways while organizing and aligning existing programs/initiatives:

- The PPD already has a weekly shooting review with a variety of law enforcement partners. Additionally, the PPD also has a separate, weekly VUFA case review with the DAO.
- The PPD has already been selected for the U.S. Department of Justice's National Public Safety Partnership (PSP); GunStat (a similar collaborative model) is one of the "menu" options that the PSP provides both technical and subject matter expertise support for.

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[89] Koper CS, Mayo-Wilson E. Police strategies to reduce illegal possession and carrying of firearms: effects on gun crime. Campbell Systematic Reviews 2012:11 DOI: 10.4073/csr.2012.11

[90] McGarrell, E.F., Corsaro, N., Kroovand Hipple, N., & Bynum, T.S. (2010) Project safe neighborhoods and violent crime trends in US cities: Assessing violent crime impact. Journal of Quantitative Criminology 26, 165-190.

Anecdotal evidence also suggests that gun crimes were at a historical low when Philadelphia implemented GunStat in 2012. While this may not be a rigorous evaluation, prior experiences along with existing initiatives and PSP's support can ensure that this review process gets implemented properly.

Improving shooting clearance rates

Creating a centralized non-fatal shooting investigation team

Improving shooting clearance rates is a crucial matter. It affects the public's confidence in policing, provides justice to victims and can prevent future violence through the disruption of cycles of violence. A multitude of factors affect the likelihood of shooting case clearances, but recent studies argue that allocation of dedicated resources as well as establishment of standardized investigative processes for non-fatal shootings will result in substantial increase in clearance rates (Braga, 2021)[91]. The current report's analysis of Philadelphia shooting data also has indicated that organizational structure and investigative capacity are the key factors affecting clearance rates.

The non-fatal shooting investigation team, which will be centrally located and will work in concert with the homicide unit, will align the PPD's organizational structure of the shooting investigation detective unit to that of DAO's Homicide/Non-Fatal Shootings Unit in a central manner. The team should be staffed with the combination of experienced detectives and civilian analysts who can search electronic databases quickly and develop investigative leads through systematic/innovative analyses.

The creation and proper staffing of the team should also be followed by the development and implementation of an investigative training curriculum focusing on shooting cases, with the establishment of uniform operating procedures that will cover standardized, best practice in relentless follow-ups of open cases. Currently, detectives only go through generalized training at the time of promotion, and they will practically learn as they go, while the reality is that shooting case investigations are more complex than ever; a variety of techniques need to be mastered, including the facilitation of witness collaboration, collection/interpretation of forensic evidence, and innovative use of technology (e.g., cell-phone records). The PPD should leverage existing partnerships and external resources, such as the U.S. Department of Justice's National Public Safety Partnership and local academic partners to develop the "detective master class." Successes

[91] Braga, A. (2021). Improving Police Clearance Rates of Shootings: A Review of the Evidence. Manhattan Institute.
https://www.manhattan-institute.org/improving-police-clearance-rates-shootings-review-evidence

accomplished by the Boston PD and Baltimore PD in improving shooting case clearances through organizational and procedural changes are just a few examples to follow.

Improving victim and witness appearance rates

Improving witness appearances will require multiple initiatives, both for civilian and sworn witnesses. For civilian witnesses, these may include police-provided witness transportation, as was provided in the past for serious cases, with follow-up calls before court dates by victim service officers/DAO personnel. Additionally, the implementation of policing models that enhance the community outreach, such as the home visits for non-law enforcement matters (nj.com, 2019)[92] and foot patrols can also build general trust in policing among community members, which in turn can facilitate witness collaboration and appearances.

For sworn witness appearances, stronger accountability around police witness failure to appear (FTA) may be needed. While the vast majority of police witnesses for gun cases are properly appearing, the percentage of police witness FTA appeared to have increased, based on a preliminary analysis. Technological investment should also be considered for faster and accurate monitoring. During the pandemic, automated court notice generation processes in the preliminary arraignment/booking system (PARS) have been terminated. A standard operating procedure should be reviewed and revised, as needed (e.g., elimination of the same day court notices to ensure officer appearances). Technological integration with OnePhilly should also be considered for a long-term initiative to ensure that ADAs will have officer availability information at their fingertips in the courtroom.

Preventing gun violence in the community

Expand foot patrols

Foot patrols are evidence-based policing tactics against violent crimes that can lead to much needed immediate results. Rigorous evaluations utilizing a randomized control experiment design found that foot patrol resulted in a 23% reduction in violent crimes

[92] Sierra-Arévalo, Michael. (2019). Opinion: 1 single good encounter with a cop engenders a lot of trust, study finds. NJ.com https://www.nj.com/opinion/2019/09/1-single-good-encounter-with-a-cop-engenders-a-lot-of-trust-study-finds.html

around hot spots in Philadelphia (Ratcliffe et al., 2011)[93]. Furthermore, foot patrols can lead to multitudes of additional benefits, including boosting the confidence in policing, reducing fear of crimes, improving the quality of life, and engaging the community. As officers develop intimate knowledge of their assigned beats, in addition to deterring and preventing crimes, the officers can also act as a problem-solver of neighborhoods, identifying and addressing environmental risk factors of crimes (e.g., abandoned vehicles, broken streetlights). Foot patrols can also be implemented with other tactics in concert, such as home visits for non-law enforcement matters that resulted in a significant increase in perceived police legitimacy (nj.com, 2019)[94] as well as the PPD's mobility projects where cellphones are issued to officers. It is notable that the improvement in the community perception and trust in policing was the strongest among residents of color.

The benefit of expanding foot patrols in Philadelphia is that we know how it works, when it works, and why it works based on prior implementation and evaluations. It should go without saying that foot patrols (or any policing tactics) need to be implemented thoughtfully; for example, a subsequent evaluation of foot patrols found that foot beats need to be sufficiently small and the right type of officers needs to be assigned (Groff, et al., 2015; Ratcliffe and Sorg, 2020)[95] [96]. The selection of foot beats also needs to be data-driven in order to gain the biggest bang out of a buck.

Doing this right requires appropriate resources. During the initial foot patrol evaluation, 240 officers fresh out of the academy were assigned to small beats for 3 months in the summer, which resulted in significant violent crime reductions. The police academy has graduated only 126 recruits in a total of 3 classes in the past 2 years (the current class size is 41 recruits). Given that 24% of the officers are currently at the retirement age (more than 25 years on the job) and that the department is already facing officer shortages (in addition to an increase in officers in IOD (injured on duty) and

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[93] Ratcliffe, J.H., Taniguchi, T., Groff, E.R. & Wood, J.D. (2011) The Philadelphia Foot Patrol Experiment: A randomized controlled trial of police patrol effectiveness in violent crime hotspots, Criminology, 49 (3): 795-831.

[94] Sierra-Arévalo, Michael. (2019). Opinion: 1 single good encounter with a cop engenders a lot of trust, study finds. NJ.com https://www.nj.com/opinion/2019/09/1-single-good-encounter-with-a-cop-engenders-a-lot-of-trust-study-finds.html

[95] Groff, E.R., Ratcliffe, J.H., Haberman, C.P., Sorg, E.T., Joyce, N. and Taylor, R.B. (2015) Does what police do at hot spots matter? The Philadelphia Policing Tactics Experiment, Criminology, 53(1): 23-53.

[96] Ratcliffe, J. and Sorg, E. (2020). More Foot Patrol. Violence Reduction Project. https://qualitypolicing.com/violencereduction/ratcliffe_sorg/

limited/restricted status), more hiring is needed anyway. Stronger recruitment efforts may also be needed to enhance the diversity of the PPD personnel. [97]

It is interesting to note that there apparently was some skepticism regarding the effectiveness of foot patrols among commanders prior to the Philadelphia Foot Patrol Experiment (Center for Security and Crime Science, 2015)[98], but the evaluation found immediate and significant success. The PPD's recently implemented special district initiative that heavily uses foot patrols, the Kensington District, has also shown reductions in violence. The initiative is also coupled with the mobility project where cellphones are issued to the officers that facilitate community-oriented policing and information sharing. Finally, Ratcliffe and Sorg (2020)[99] also highlight that the success of the foot patrols in violent crime reductions in Philadelphia was accomplished at the time of social/economic climate that is similar to now, including economic hardship and low confidence in policing.

Prioritized 311 response

While the committee's original request focused on people (i.e., shooters), it is equally important, if not more, to examine places where violent crimes cluster and address such hot spots. In addition to foot patrols, crime hot spots can be tackled by carefully coordinating non-law enforcement resources. In particular, abundant evidence exists that addressing underlying environmental risk factors of crimes can lead to immediate and sustainable success (Caplan et a., 2018; Kennedy et al, 2015)[100] [101].

The Philadelphia Roadmap for Safer Community (PRSC), where multiple city departments participate in the city's efforts to tackle gun violence, is a perfect vehicle to accomplish that task. In particular, it is recommended to incorporate in its framework the

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[97] Oftentimes, bicycle patrols may be suggested as a substitute for foot patrols, as bikes can cover larger areas and may still be able to connect with the community more effectively than squad car patrols. However, there has not been a rigorous evaluation of bicycle patrols; if bike patrols are to be pursued as an alternative to foot patrols, the PPD should also invest in properly and comprehensively evaluating the tactics.

[98] Center for Security and Crime Science. (2015). Philadelphia Foot Patrol Experiment. https://www.youtube.com/watch?v=0NUQsK0vnnM

[99] Ratcliffe, J. and Sorg, E. (2020). More Foot Patrol. Violence Reduction Project. https://qualitypolicing.com/violencereduction/ratcliffe_sorg/

[100] Caplan, Joel, Leslie Kennedy, and Grant Drawve. 2018. "Risk-Based Policing in Atlantic City: 2017 Report." http://www.rutgerscps.org/publications.html .

[101] Kennedy, Leslie W., Caplan, Joel M., and Piza, Eric L. (2015). A Multi-Jurisdictional Test of Risk Terrain Modeling and a Place-Based Evaluation of Environmental Risk-Based Patrol Deployment Strategies, 6 U.S. States, 2012-2014. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2018-05-29. https://doi.org/10.3886/ICPSR36369.v1

standardized operation procedures among all participating departments to prioritize 311 requests around crime hot spots and risky places as identified by the PPD. For example, this may entail faster, prioritized response in removing abandoned vehicles, fixing street lights, investigating nuisance bars, and addressing littering and short-dumping. Such actions can be monitored and tracked in a CompStat-like style, where managers in each department will be held accountable for progress on a regular basis. The number of actions taken, personnel assigned, and even financial resources spent in these hot spots by each department can also be reported out to achieve both strong accountability and transparency. Such a framework can also go along with performance-based budgeting for environmental improvements. It will be ideal to have budgets for non-law enforcement departments that are focused on designated high crime areas to ensure funding is reaching the communities that need it most. Finally, existing research partnerships with academic researchers should also be leveraged to rigorously evaluate such efforts (e.g., randomized control evaluation of rapid/prioritized response).

Support the "Policing Reform Efforts through Data Analytics and Modernization"

The foundation of this report is research and data analysis; analytics can support not only crime prevention and intervention efforts, but it can also support policing reforms. As stated previously, the city has surpassed the historical high count of homicides and shootings. Concurrently, the department is faced with numerous challenges, such as the covid pandemic, civil unrest, diminishing trust in law enforcement, and declining staffing levels. In order to respond to such challenges, the department has proposed a multi-faceted budget request for policing reforms through data analytics, modernization, and innovation. It attempts to modernize the Philadelphia Police Department practices and technologies to streamline operations to do "more with less" with strong accountability in place. Specifically relevant for the current report are:

- Data analytics and rigorous statistical modeling around investigatory stops
- Mobility project (cell phones)

The first initiative builds upon the audit of investigatory stops with the Bailey agreement plaintiff, and takes it to the next level through data analytics and sophisticated statistical modeling. While recognizing the utility of proactive policing in crime prevention (ref), the department also realizes that we need a strong accountability process around investigatory stops. The order puts in place a data-driven, quarterly CompStat-style, or "PedStat", process to remediate both 4th and 14th Amendment procedural justice issues with investigative stops. Already in development is the activation of a prototype "Digital Dashboard" that provides data on a real-time basis to PPD Commanders and other

high-level supervisors regarding investigative stops and post-stop actions, including frisks, searches, and arrests. Understanding that not all racial disparities in stop demographics are police-driven, the dashboard will include results from specific analyses and benchmarks designed by statisticians and criminologists intended to scientifically detect potential racial bias issues, and evaluate intervention measures to mitigate them. Especially with today's gun violence crisis, Police Reform must be balanced with the need for public safety. Proper monitoring of operations with transparency, and acting when necessary with interventions grounded in evidence, is how 21st Century Police Departments will be successful in keeping our citizens safe from gun violence while preserving legitimacy with the community.

The second initiative, the mobility project, expands a currently piloted cell phone project to the city-wide so that officers will have department-issued cell phones. This will have multitudes of benefits, including officer safety, reduced city liability (officers without department issued phones will be forced to use personal phone), resource allocation analysis of foot beats and bikes who do not have mobile data terminals (MDT; a computer in a car), increased community engagement, investigative support (direct line to assigned detectives / beat officers), and better information sharing (pushing crime patterns, pulling street knowledge). Increased community contact can also be more formalized through such research efforts as no-law enforcement matter home visit, as noted previously[102].

Recommendations by the DAO

Improving shooting clearance rates

Support the PPD's Creation of a Non-Fatal Shooting Investigation Unit

As our analysis shows, the PPD is most effective at solving shootings when the investigation is undertaken by a unit trained in and dedicated to solving shootings. (see Appendix 7: DAO 6, DAO 8). We support the PPD's research-informed decision to create a dedicated Non-Fatal Shooting Investigation Unit (Cook, Braga, Turchan, Barao, 2019).

Invest in Forensic Technology

One of the clear lessons of the DAO's Conviction Integrity Unit work—which has, to date, exonerated over 20 people nearly all of whom were innocent and spent decades in

[102] Sierra-Arévalo, Michael. (2019). Opinion: 1 single good encounter with a cop engenders a lot of trust, study finds. NJ.com https://www.nj.com/opinion/2019/09/1-single-good-encounter-with-a-cop-engenders-a-lot-of-trust-study-finds.html

jail)[103]—is that Philadelphia has long lagged peer cities in investing in forensic DNA technologies to improve fatal and non-fatal shooting clearance rates and gun case outcomes. This technical forensic obsolescence leads to weak investigations, cases that fail in court for want of strong evidence, and, at worst, wrongful convictions of innocent people. This is no reflection upon Police Commissioner Outlaw or the excellent director of the PPD's Office of Forensic Science (OFS), Dr. Michael Garvey, both of whom inherited a PPD culture in Philadelphia that they did not make.

Enhancing the capabilities and capacity of the OFS to test certain kinds of ballistic evidence taken from all or nearly all gun violence crime scenes for DNA could massively increase clearance rates for these crimes, and the addition of robust DNA evidence would strengthen cases, improving just outcomes and helping prevent wrongful convictions. In addition to improving cases going forward, forensic technologies could help bring accountability and closure in some of the nearly 9,000 shootings since 2015 for which there have been no arrests by identifying incidents with the same DNA to provide new leads and spur additional investigations. Serious investment in forensic cell phone analysis technology is also necessary, as cell phones provide many kinds of compelling evidence to solve and prosecute gun violence. The DAO's Gun Violence Task Force has invested in a small amount of cell phone forensic technology that, in collaboration with PPD, has proven very successful as an investigative tool. That success should be expanded.

Ideally, a great city like Philadelphia would not only have a great director of the PPD's OFS and a Police Commissioner increasingly supportive of forensics as an investigative tool (as Philadelphia does now), but it would have the space, staffing and funding necessary to make a huge difference in gun violence. OFS space would triple to about 150,000 square feet. Staffing would increase significantly after a period of hiring and training. Capacity to process evidence would massively increase with an increase in staffing for PPD crime scene personnel. The one-time price tag for this massive improvement would be approximately 5% of the PPD's annual budget, which is quickly approaching $1 Billion. Serious improvement in forensics could be made for less than 5% in one-time expense. Either way, some annual expenses would also increase. However, every dollar invested would come back to the city, with dividends, in avoiding future litigation brought by innocent and wrongfully convicted people, in saving the cost of incarcerating the innocent, and in all the economic improvements and tax base improvements that accompany effective reduction of violent crime. Improving gun case outcomes

[103] Philadelphia District Attorney's Office (n.d.). Exonerations. Public Data Dashboard. https://data.philadao.com/Exonerations.html

Improving gun case outcomes

Institutionalize Interagency Collaborations and Processes

Changes in gun case outcomes are part of a long-term trend reflecting shifts in the law and law enforcement practices, among other factors. We have been working to address this trend by implementing institutional changes in the DAO and developing collaborative processes and practices with our partners. These include combining the Homicide and Non-Fatal Shooting Units, creating the Intelligence Unit, and expanding the work of the GVTF in the DAO (including to handle preliminary hearings in gun cases), and developing the non-fatal shooting track in partnership with the courts and the VUFA/NFS review process with the PPD. The DAO recommends continuing to support these new initiatives, and looks forward to incorporating the PPD's new Non-Fatal Investigations Unit into these collaborations and processes.

Invest in and Expand DAO Collaborative Intelligence, Investigations, Community-Centered, and Victim-Centered Efforts

Invest in the DAO's recent expansion of its collaborative intelligence, investigative, community-centered, and victim-centered efforts, all of which are aimed at effective prosecution of gun violence, intervention in communities that suffer from gun violence, and prevention in underserved and traumatized communities. These investments would support competitive salaries, new positions (e.g., analysts in the Delaware Valley Information Center (DVIC), social media analysts, personnel to support 57 Blocks Initiative), and new initiatives (e.g., Intelligence Unit; Gun Crime Strategies; expanding Crisis Assistance, Response, and Engagement for Survivors (CARES); diversion expansion; 57 Blocks Initiative), including new efforts undertaken in the last few years without additional funding that were supported by both the PPD and DAO.

Improving victim and witness appearance rates

Prioritize Building Trust Between Communities and Law Enforcement

Building trust should improve clearance rates, witness appearance rates, and gun case outcomes, and therefore should be a top priority of all agencies. Trust can be developed in many ways, including by increasing positive interactions with law enforcement and elevating community engagement. Research in New Haven, Conn., found that "a single non-enforcement interaction can, in fact, improve the public's attitudes toward police" (Sierra-Arévalo, 2019). In the study, half the residents who received a

baseline survey were then randomly selected to receive a "non-enforcement interaction with a uniformed officer in which the officer introduced themselves, asked about neighborhood issues, and then gave the resident a business card with the officer's hand-written work phone number" (Sierra-Arévalo, 2019). Results found "that one non-enforcement community policing interaction markedly increased residents' perceptions of police legitimacy and willingness to cooperate with police [… and] the results were strongest among Black residents and those with more negative attitudes about police" (Sierra-Arévalo, 2019).

Reduce Counterproductive Misdemeanor Arrests and Cases

Meanwhile, police should engage in less misdemeanor enforcement to build trust, improve appearance rates, and so that they can spend a higher proportion of their time deterring or working on more serious cases. This would require additional support for non-law enforcement responses to many events police are currently called to respond to (Ratcliffe, 2021),[104] but would also reduce the burden to other system actors from prosecuting and processing these cases in the court system. According to August Vollmer, the "Father of American Policing," the enforcement for crimes of morality, such as substance use and sex work, should "not [be] a police problem; [drug addiction] never has been and never can be solved by policemen" (Vollmer, 1936, 117-8).[105] Involvement in such enforcement "engenders disrespect both for law and for the agents of law enforcement" (Vollmer, 1936, 237). Problems with misdemeanor enforcement—which research has found to be criminogenic (Agan, Doleac, Harvey, 2021)[106]—are exacerbated when witnesses, including law enforcement, do not appear in court to testify in those misdemeanor cases. When a court case fails to advance because of a court actor's FTA, causing further hardship in terms of travel, missed work or school, or with childcare or other logistical issues among those who do appear to testify, public confidence and trust in the system erodes. Improving officer appearance rates in misdemeanor cases is not a viable strategy, as that would remove officers from the streets of the communities where they are needed to deter gun violence with their physical presence, e.g., on foot patrols. More low-level offenses and misdemeanors could be handled with citations, like the city did with cannabis (PPD

[104] Ratcliffe, J.H. (2021). Policing and public health calls for service in Philadelphia. *Crime Science, 10(*5): 1-6.
[105] Vollmer. A. (1936). The police and modern society. Berkeley, Calif., University of California Press.
[106] Agan, A.Y., Doleac, J.L., & Harvey, A. (2021). Misdemeanor Prosecution. National Bureau of Economic Research. https://www.nber.org/papers/w28600

Directive 3.23, 2021).[10727] Therefore, criminal justice partners must continue to collaborate to reduce arrests and prosecutions for low-level offenses, particularly of people who are in crisis due to poverty, homelessness, mental illness, or substance use disorder.

Invest in Communication Technology, Transportation, Relocation, and Trauma Support for Victims and Witnesses

The DAO has been investing and continues to seek funding to improve its technological infrastructure, which has not kept pace with advancements and changes in how people communicate, among other issues. Correspondence sent through the mail is slow and ineffective, and busy schedules can make it hard to find time to connect on the phone, so communicating via text messages and cell phone applications offers a promising way to improve victim and witness experiences with the criminal legal system and appearance rates. To begin to improve its technological infrastructure, the DAO received funding to build a new custom case management system in-house, including a new module for the Victim Witness Services (VWS) Unit. In addition, the DAO is seeking external partnerships and funding to utilize text messaging tools to quicken and improve our ability to communicate with victims and witnesses via text messages and phone apps.

- Text messaging services are used by the Defender Association of Philadelphia, and in hundreds of jurisdictions across the U.S.
- In addition to facilitating communication, text messaging can be used to coordinate services for victims and witnesses with community-based organizations, make it easier for victims to file paperwork to receive compensation and send Victim Impact Statements, and provide transportation vouchers (see below)
- Since 2010, there have been over 2,500 cases where either intimidation or retaliation were charged in Philadelphia, and there would likely be more but for the lack of additional technologically-mediated reporting mechanisms.

Therefore, the DAO recommends increasing local investment in technology to facilitate communication with victims and witnesses.

Due to funding limitations, the DAO is only able to offer free transportation to court in the form of van rides or ride-share vouchers to people who are elderly and/or disabled. Among low-income clients, reasons frequently cited for not appearing in court include a lack of transportation or a lack of childcare. Expanding our free court transportation

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[107] Philadelphia Police Department (2021). Directive 3.23: POSSESSION OF SMALL AMOUNTS OF MARIJUANA (30 GRAMS OR LESS) CITY CODE CHAPTER §10-2100. http://www.phillypolice.com/assets/directives/D3.23-PossessionOfSmallAmountsOfMarijuana.pdf

program would allow us to also send ride vouchers to those who simply lack transportation or live in areas of the city where public transit is not as easily accessible. We also supply a discounted parking voucher to aid victims willing to drive to court. However, the discount is so small that many victims on low or fixed incomes are still unable to afford the parking cost. This is also a problem for victims dealing with mobility issues, as the only parking garage that supplies vouchers is several blocks away from both courthouses. Transportation logistics could be organized through a mobile app, which would allow people to sign up for transportation vouchers and let the DAO send ride-share vouchers through messaging on the app. Therefore, the DAO recommends vastly increasing its capacity beyond only providing transportation to those who are elderly and/or disabled to instead provide free rides to court for every victim or witness who has a need.

Beyond staying in touch and helping with transportation to court, sometimes people need to relocate from their home and community to feel safe participating in the criminal legal process. The Witness Relocation Program is intended to quickly assist in the relocation of witnesses from areas where they are victims of real or potential intimidation, harassment, or harm because of their witness status. Assistance may include, but is not limited to, reasonable moving expenses, security deposits, rental expenses, storage unit rental, P.O. Box fees, and utility startup costs. The aim is to help victims and witnesses relocate without financial loss or reduction in their standard of living. This assistance includes facilitating moves within Philadelphia Housing Authority (PHA), which can take time; the DAO advocates on behalf of victims/witnesses to substantially reduce the PHA waitlist timeline and to assist with relocation costs.

Relocation may include multiple family members. Currently, victim service staff regularly shift families from one impoverished neighborhood to another with similar crime rates, neighborhoods that may only be blocks away from the location where the underlying crime occurred. The need to relocate families is extremely high and, as a result of the crime oftentimes occurring within feet of the family residence or victim's home, there is an enormous amount of trauma and fear for family members (especially children). Most families are unable to move from the area of danger due to financial barriers. Furthermore, some victims/witnesses may not qualify for certain relocation assistance programs (such as the PAAG's Witness Relocation Program) due to criminal history, lack of cooperation with law enforcement, or other factors.

Depending on the family size, financial barriers to relocation, and the need to utilize temporary lodging accommodations, relocation expenses can be substantial; current funding levels do not meet the level of need, which is certainly substantial, with over 550 homicides and numerous shootings. Given that the DAO has seen an increase in the

amount relocation referrals not qualified for State assistance (50% of relocation referrals received in 2021 do not qualify for the PAAG program, compared to only 15% in 2018), it will be necessary to increase our office's relocation budget in order to assist community members who may not meet State requirements. Currently, the budget for 2022 is $260,000, though the allocation tends to vary year-to-year; e.g., it was $165,000 in 2018. The DAO recommends increasing the budget of the Witness Relocation Program to at least $1 million dollars to improve the ability of the legal system to achieve justice by relocating more people so they can feel safe and participate as witnesses. Combined with strong safety planning, hard work by victim advocates on a case-by-case basis, and other relocation dollars, more resources would create a greater impact for those in most need of this type of support, and improve witness appearance rates. This is, in effect, an effort to be more inclusive when it comes to assisting community members who are directly and indirectly affected by violent crime.

Preventing gun violence in the community

Invest in Community- and Place-Based Non-Law Enforcement Solutions in Historically Traumatized and Under-Resourced Communities at Risk of Gun Violence

Structural racism has caused disinvestment and poverty in specific areas of Philadelphia, which has, in turn, created the conditions in which shootings occur (see Appendix 7: DAO 1). Law enforcement cannot solve systemic divestment. Philadelphia needs to proactively work to end the de facto redlining of poor Black communities, expand new investment and living-wage jobs in Black communities through monies from the American Relief Act and the recent Infrastructure legislation, use new techniques like the proposed Philadelphia public bank to invest in Black communities, and sanction or prosecute institutions that discriminate. We must see the availability of affordable housing throughout Philadelphia and the fair and full funding of our schools as central to our crime prevention strategy.

The DAO recommends making coordinated and targeted investments of money and resources in parts of Philadelphia harmed by structural racism, including financial investments in community-based violence prevention efforts and city services that do not involve law enforcement. Some of the most rigorous evidence we have that non-law enforcement strategies can reduce violence is based on research conducted in Philadelphia (South, 2021).[36] There is evidence that the following strategies lead to reductions in violence in Philadelphia, while improving other positive outcomes:

- Greening vacant lots (Branas et al, 2018)[108]
- Planting trees (Branas et al, 2018)
- Picking up trash (Branas et al, 2018)
- Structurally repairing occupied homes (South, MacDonald, Reina, 2021)[109]
- Remediating abandoned houses (MacDonald, n.d.)[110]

In addition to the above Philadelphia-based research, there is evidence from Chicago that improving street lighting can reduce crime (Chalfin, Hansen, Lerner, Parker, 2021).[111] Recent reporting on issues with repairing lighting in Philadelphia underscore the need to include such non-law enforcement responses in any broader violence prevention strategy (Marin and Briggs, 2021).[112] In addition to prioritizing responding to 311 calls in areas most impacted by gun violence, the DAO recommends developing and implementing a place-based non-law enforcement violence-prevention plan that proactively targets areas most impacted by gun violence, redlining, and mass incarceration and supervision for positive improvements, such as greening vacant lots, planting trees, picking up trash, repairing occupied and abandoned homes, and improving lighting. The DAO is working to create such a plan: the "57 Blocks Initiative."

Create Fund Modeled on The Chicago Fund for Safe and Peaceful Communities to Increase Private and Institutional Funding for Philadelphia-Based Community Gun Violence Prevention Organizations

Philadelphia should create a fund for prevention and intervention modeled on the Chicago Fund for Safe and Peaceful Communities[113] to help increase funding of grassroots

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[108] Branas, C.C., South, E., Kondo, M.C., Hohl, B.C., Bourgeois, P., Wiebe, D.J., & MacDonald, J.M. (2018). Citywide cluster randomized trial to restore blighted vacant land and its effects on violence, crime, and fear. *Proceedings of the National Academy of Sciences, 115*(12), 2946-2951. https://www.pnas.org/content/115/12/2946

[109] South, E.C., MacDonald, J.M., & Reina, V. (2021). *JAMA Netw Open., 4*(7): e2117067. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2782142

[110] MacDonald, J.M. (2019). A randomized trial of abandoned housing remediation, substance abuse, safety, and violence. ISRCTN Registry. https://www.isrctn.com/ISRCTN14973997

[111] Chalfin, A., Hansen, B., Lerner, J., & Parker, L. Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City. *Journal of Quantitative Criminology*, 10.1007/s10940-020-09490-6; http://achalfin.weebly.com/uploads/8/5/4/8/8548116/lights_04242016.pdf

[112] Marin, M., & Briggs, R.W. (November 30, 2021). Broken streetlight complaints in Philly triple due to botched city contract. Philadelphia Inquirer. https://www.inquirer.com/news/street-light-outages-philadelphia-crime-rates-20211130.html

[113] The Chicago Fund for Safe and Peaceful Communities (n.d.). Home page. www.safeandpeacefulchi.com

community-based organizations in Philadelphia. "The Chicago Fund for Safe and Peaceful Communities seeks to work with individuals, organizations and institutions to empower communities, strengthen relationships and build trust across Chicago." It is "supported by institutional and individual donors" -- including academic and private contributors -- and "offers rapid-response grant opportunities designed to support community-based actions and activities that make neighborhoods safer." The strategies pursued through the funding align with those recommended in this report: Street Outreach, Support Services and Jobs; Police Reform and Community Relations; Gun Policy; Community Safety & Peace.[114] Accordingly, committing to this recommendation would support the long-term success of the other recommendations, such as investing in historically redlined communities, Cure Violence models, and community-based organizations. Research shows that "every ten additional organizations formed to address violence and build stronger communities led to a 9% drop in the murder rate."[115]

Request that State and Federal Law Enforcement Partners Collaborate to Increase Random Inspections of Federally Licensed Gun Sellers

Given that relatively few guns are seized by local law enforcement compared to the number of guns legally bought and sold each day, and that enforcement efforts to date have produced racial disparities in gun possession offenses, the DAO recommends going further upstream to increase inspections of federally licensed gun sellers. This is in some ways analogous to efforts to use data to identify potentially problematic opioid prescribing practices.

Information presented in Appendix 7: DAO 16 supports this recommendation to expand collaborations around inspections and investigations of gun sellers. Specifically, a preliminary analysis of national data found that as the percentage of gun dealers that are inspected increased, the number of gun dealers decreased (David Johnson, personal correspondence). Extrapolating these findings to Philadelphia and Pennsylvania, increasing inspections of gun dealers in and around Philadelphia would reduce the number of gun dealers, and hence the flow of guns into Philadelphia. While Philadelphia has relatively few gun sellers compared to neighboring counties, many guns sold in other guns are recovered

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[114] Partnerships for Safe and Peaceful Communities (n.d.). Our Strategies. https://safeandpeaceful.org/our-strategies/

[115] Sharkey, P. (January 25, 2018). "Op-Ed. Community investment, not punishment, is key to reducing violence." Los Angeles Times. https://www.latimes.com/opinion/op-ed/la-oe-sharkey-violence-community-investment-20180125-story.html; Sharkey, P. (2018). *Uneasy peace: The great crime decline, the renewal of city life, and the next war on violence.* WW Norton & Company Inc.

by law enforcement in Philadelphia, requiring cross-county collaborations to address. However, 4 gun sellers in Philadelphia are among the top 10 in the state in terms of selling guns later recovered by law enforcement, suggesting local efforts would also be beneficial. In addition to proactive policing strategies and inspections, other efforts could be made to collect more information at the point of sale that could deter straw purchases and make them easier to investigate. For example, legislation could require that more information be collected from buyers, such as vehicle information, and missing information could trigger a suspension of operations until an inspection has been completed. We recommend beginning with random inspections of the highest-volume dealers and those with the most guns recovered by law enforcement in parts of the city and state with the highest concentrations of gun violence. Historically, such strategies have been supported and often led by community and religious groups, and law enforcement can use data available from the local, state, and federal partners to support these efforts. To date, the DAO negotiated with the Pennsylvania Attorney General's Office to more than double funding for the Philadelphia GVTF to support increased staffing and expand capacity for investigation and prosecution of cases involving guns.

Convene All Stakeholders Who Play a Role in Gun Violence Prevention at the PIRPSC Data Table

The DAO recommends expanding PIRPSC to include representatives and data from additional agencies involved in preventing gun violence, including the Philadelphia Sheriff's Office, the Philadelphia Adult Probation and Parole Department (APPD), and the Philadelphia Department of Prisons (PDP). Sharing data will promote transparency and accountability in Philadelphia.

For example, the Philadelphia Sheriff's Office is responsible for working with the PPD to remove guns from homes following a Protection From Abuse (PFA) order,[116] a stated priority of Sheriff Bilal.[117] Based on research conducted in Philadelphia on domestic calls for assistance in 2013 (Sorenson, 2017),[118] we recommend more regular efforts to

[116] Philadelphia Police Department (2021). Directive 3.9: DOMESTIC ABUSE AND VIOLENCE. http://www.phillypolice.com/assets/directives/D3.9-DomesticAbuseAndViolence.pdf

[117] The Editorial Board (December 9, 2019). "What's the point in having gun control if Philadelphia doesn't enforce it?" Philadelphia Inquirer. https://www.inquirer.com/opinion/editorials/gun-control-philadelphia-violence-domestic-abusers-law-sheriff-20191209.html

[118] Sorenson, S.B. (2017). Guns in intimate partner violence: Comparing incidents by type of weapon. *Journal of Women's Health, 26*(3), 249-258. www.liebertpub.com/doi/pdf/10.1089/jwh.2016.5832

- ensure guns are taken from homes of abusers as the law allows (Sorenson, 2017),
- document enforcement of this state law (Sorenson, 2017)

Enforcing the state law to seize guns in such cases should help mitigate fear of retaliation following arrest and trauma associated with being threatened with a gun (Sorenson, 2018),[119] but we do not have data available to us on that process. In addition, we recommend having our law enforcement partners conduct regular welfare checks on homes where guns were seized following a PFA; engaging in less low-level misdemeanor enforcement would make it possible to instead spend time performing regular welfare checks on survivors of domestic violence, among other preventative law enforcement.

APPD, meanwhile, is responsible for supervising and providing services to people during the pretrial period between arrest and adjudication, and often as part of a sentence. An analysis of homicides in Philadelphia between 1996-1999 found that 25% of people arrested for committing a murder were on probation or parole at the time of the murder, while 29% were awaiting trial or sentencing (Tierney, McClanahan, Hangley Jr., 2001).[120] While these findings should be considered in light of what we know of wrongful convictions during that era (e.g., 3 of the people exonerated by the DAO in the last 4 years were originally convicted between 1996-1999),[121] without incorporating APPD data and work into our analysis, we are not able to replicate the 2001 analysis 20 years later. More generally, without regular access to APPD data, we do not have an efficient data-driven way of knowing who is being supervised, their level of supervision, whether they violated their probation or parole, and whether and when they may have had a detainer issued to hold them in jail. We include this recommendation in the hopes that the APPD, which has previously hesitated to share data, will join PIRPSC (see Appendix 7: DAO 2).

Lastly, the PDP would be a valuable addition to PIRPSC. Historically, the PDP has refused requests by the DAO to share data that would improve our ability to identify who is in custody each day, including people arrested for gun crimes (see Appendix 7: DAO 2). This information is critical as, based on the analysis by DPH, we know that over half of those

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[119] Sorenson, S.B. (November 12, 2018). A woman terrorized with a gun is a woman harmed by one. The Trace. www.thetrace.org/2018/11/coercive-control-domestic-violence-guns-public-health

[120] Tierney, J.P., McClanahan, W.S., & Hangley Jr., B. (2001). Murder is no mystery: An analysis of Philadelphia homicide, 1996-1999. Public/Private venture. https://www.ojp.gov/ncjrs/virtual-library/abstracts/murder-no-mystery-analysis-philadelphia-homicide-1996-1999

[121] Philadelphia District Attorney's Office (n.d.). Exonerations. Public Data Dashboard. https://data.philadao.com/Exonerations.html

arrested for shootings had previously been in PDP custody (see DPH Analysis). Access to PDP data would also help the DATA Lab improve our analyses and research by more precisely accounting for incapacitation while incarcerated.

Recommendations by PDPH

Targeted strategies to address the drivers of violence

Beyond enforcement, identifying the upstream drivers of firearm violence that predispose certain individuals and communities to being exposed to violence and its effects is the best way to orient ourselves around a public health approach. Although there is often concern that transformative interventions that address root causes fail to have an immediate effect, it is encouraging to note that many of the interventions that have demonstrated potential to reduce shooting and homicides demonstrate these effects within a couple of years of implementation. This means that careful, rigorous implementation of some of these strategies in 2018-2019 as violence was increasingly could translate to significant returns for communities now. As an example, some of the original research on greening done here in Philadelphia demonstrated significant reductions in violence as well as other key outcomes within the first couple of years in the study period (Branas et al 2018)[122].

Below, we lift up a few violence intervention program models that have shown promise in Philadelphia and elsewhere and are particularly well suited to address individuals arrested for shootings or at risk for such arrests. **We recommend identifying effective upstream interventions, concentrated in neighborhoods with the highest rates of firearm violence, that have three key features: addressing trauma, providing opportunity, and reducing entry into the criminal justice system for those most vulnerable to firearm violence.**

There are a few key strategies that are particularly relevant to those most vulnerable to being drawn into the cycle of violence. For example, the Cure Violence model attempts to stop the spread of violence in communities by using the methods associated with infectious disease control–detecting and interrupting conflict, identifying and treating those

[122] Citywide cluster randomized trial to restore blighted vacant land and its effects on violence, crime, and fear Charles C. Branas, Eugenia South, Michelle C. Kondo, Bernadette C. Hohl, Philippe Bourgois, Douglas J. Wiebe, John M. MacDonald Proceedings of the National Academy of Sciences Mar 2018, 115 (12) 2946-2951; DOI: 10.1073/pnas.1718503115

most vulnerable, and changing community norms. This is accomplished by engaging affected communities and credible messengers from within those communities. Prior analyses of this model in Philadelphia showed a 30% reduction in shootings in treatment areas (Roman et al, 2017)[123]. These results were within 2 years of implementation. It's also important to note additional outcomes of interest for some of these strategies. For example, connection to critical resources and addressing social norms are in themselves worthy outcomes to pursue.

The READI Chicago model is another model that connects specifically to men at high risk of exposure to violence with a combination of cognitive behavioral therapy, paid transitional jobs, and support services. This is achieved through a strategy of relentless engagement over a 24 month period. Although this model, unlike the Cure Violence model, has been implemented and studied predominantly in one city thus far, it has demonstrated that it indeed finds the right participants (those most vulnerable to exposure to violence and its effects). The model reports identifying individuals over ten times more likely to be shot and killed than their neighbors. In addition, 35% of the population in early analyses had been previously shot, and the average number of prior arrests was seventeen. This demonstrates the critical overlap between victimization and perpetration, underscoring why trauma healing and a trauma-informed response is needed. The early analysis also suggested that participants are also more likely to remain engaged and may have reductions in shooting and homicide involvement (Heartland Alliance, May 2021)[124].

As a final example, Advance Peace is another model that centers on those acutely impacted by cyclical and retaliatory gun violence, focuses on healing the individual and supporting change in the community. This program helps participants develop a map of their future and assists in providing tangible steps to achieve those goals. The program also makes the need for trauma healing central. Importantly, the program tracks future

123 https://cvg.org/wp-content/uploads/2020/03/SummaryofPhilaCeaseFireFindingsFormatted_Jan2017.pdf

124 https://www.heartlandalliance.org/wp-content/uploads/2021/07/READI-Chicago-Mid-Study-Analysis-May-2021-FV.pdf

involvement in crime, future gun-related injuries and deaths, employment, and receipt of social services among participants annually (Corburn et al, 2021; advancepeace.org)[125],[126]

The common thread in these programs is that they hold potential to lift those most vulnerable from the cycle of violence and connect them to necessary trauma healing, employment, and support. This has the potential to keep people out of the cycle of violence once and for all. Further research and longitudinal follow up is needed to evaluate the impact of these programs over time.

The CARES analysis suggests that there might be many opportunities to identify those in need of trauma healing and resource provision. The city's firearm homicide review team, modeled after the Milwaukee Homicide Review Commission (MHRC), is aimed at mapping those points of contact for those on the other side of the gun–a cohort of individuals killed and injured by firearms– to identify opportunities for prevention. Our early findings suggest multiple points of contact, with health care and law enforcement being the most common, for individuals who later are victims of firearm violence. The MHRC takes a multidisciplinary, multi-agency approach, making recommendations that range from "micro-level strategies and tactics to macro-level policy change" (Milwaukee Homicide Review Commission)[127]. Implementation of MHRC recommendations in treatment districts of Milwaukee was reportedly associated with a 52% reduction in homicide in those districts (Azrael et al, 2013)[128]. This shows how building on the data-sharing and collective impact of multi agency efforts can lead to actionable recommendations, with a focus on critical, highly vulnerable people and places. **We recommend continued commitment to interagency collaboration bridging law enforcement, public health, and other key stakeholders to identify innovative opportunities for prevention.**

Philadelphia has, or is exploring, many of the interventions cited above. However, the final stage of a public health approach is to implement and scale effective programs. This can't be done without rigorous evaluation. **We recommend committing resources to**

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[125] Corburn, J., Boggan, D., Muttaqi, K. et al. A healing-centered approach to preventing urban gun violence: The Advance Peace Model. Humanit Soc Sci Commun 8, 142 (2021). https://doi.org/10.1057/s41599-021-00820-y

[126] https://www.advancepeace.org/wp-content/uploads/2021/10/Advance-Peace-Stockton-2020-Summary-Rev.pdf

[127] https://www.mcw.edu/departments/epidemiology/research/milwaukee-homicide-review-commission

[128] https://www.ojp.gov/pdffiles1/nij/grants/240814.pdf

evaluating violence prevention efforts and programs and outlining plans to expand and scale those that show promise.

Finally, to understand and prevent firearm related crime and injury, we need to engage the voices of those with lived experience. PIRPSC conducted a handful of informal interviews with individuals with prior experience with arrests for firearm related crimes, and has been approved to conduct a formal qualitative study of recent (<10 years) arrestees. Stories from early interviews describe a narrative supported by the CARES analysis and others above—early involvement in the criminal justice system (often for drug-related charges), unaddressed trauma, and challenges engaging trusted role models. **We recommend continued engagement with those with lived experiences in enacting the programs and policies noted above.**

Recommendations by Defender Association

The root causes of violence are tightly intertwined and historically efforts to focus on them individually have been ineffective. The primary findings of our analysis suggest that all city agencies must align their work to principally focus on violence prevention and interventions. All city services play a role in contributing to or alleviating the root causes of violence. This requires that city agencies realign its individual case management data systems to identify and connect victims or witnesses of violent crime with supports; to partner with community led interventions designed to reduce community violence, particularly in communities of high need; and guide decision makers in how the city directs its time, city resources and investments.

1. Build public trust and confidence by Incorporating residents with lived experience into continued city and community stakeholders collaborative efforts to reduce community violence.

Criminal justice stakeholders must demonstrate that we can improve public safety without exacerbating racial inequities in the criminal justice system through partnership with community stakeholders. Our collaborative efforts in the Driving Equality Act provide a model. In response to the racial disparities observed in the enforcement of the motor vehicle code, community and city stakeholders, including law enforcement, worked together to become the first major U.S. city to develop a plan to reduce racial disparities in motor vehicle stops without compromising public or pedestrian safety. Similarly, city stakeholders in this working group (PIRPSC) collaborated to analyze and understand data,

develop high level agreements as to the causes of community violence, and where possible, make shared recommendations as to proposed solutions.

This collaboration has demonstrated the value in engaging city agencies outside the criminal justice system in the fight against gun violence. But future efforts must also include members of the community who have experienced gun violence - either as a victim or participant. People impacted by violence, as victim, witness, and /or participant must continue to be directly involved in designing, implementing, and making decisions related to funding anti-violence programming at every stage.

Similarly a transparent budget process, with city agencies reporting as to the specific actions they are taking, and their impact, to reduce factors that contribute to community or individual violence would build more trust between city stakeholders and residents.

2. Prioritize justice-system involved people residing in communities with high levels of violence for supports and explore community based alternatives to traditional justice system responses to prohibited behaviors.

We must rethink policies that exacerbate conditions that contribute to violence by prioritizing justice system involved people, their families, and 'high incarceration' communities for programming. For example, priority could be given to justice-system involved people and their families to participate in programs that already exist to stabilize housing, protect against eviction, or assist with home ownership, repairs and maintenance. The arrest itself could trigger eligibility for workforce development programs.

For people with unlawful possession offenses, otherwise unlikely to engage in future violent behavior, structured diversionary opportunities may be a better long-term investment in safety.

Similarly, investments in expanding and evaluating innovative community based pretrial supports, like those offered by Defender's Pre-entry Partnership model, may improve pretrial re-arrest rates without burdening government services. Increased funding to support Defender's pretrial advocates will increase our capacity to connect people with the supports they need to address root causes of behaviors that lead to criminal justice system involvement. This network of local community based supports, of which the Defender is a part, offers neighborhood based individual support in lieu of supervision. But frequently, Defender staff is unable to provide individual and sustained case management to support our clients during length periods of pretrial release.

3. Expand meaningful community partnerships that support civilian responders and credible messengers in the community.

We must invest in and partner with community leaders, including formerly justice system involved people, in their work to interrupt and end violence. Increased reliance in civilian responders to identify and mediate conflict before it escalates to violence is a promising national practice and particularly promising for Philadelphia since 'arguments' are reportedly one of the main drivers of shootings. Cure Violence, for example, is a public health model that relies on trusted community mediators, who learn about conflicts that have the potential to turn violent and mediate them to a peaceful resolution. The violence interrupters partner with outreach workers who connect people to services to support more positive life outcomes. And both work with trusted leaders to mobilize community social networks to change norms surrounding the use of violence.[129] The model itself relies on workers who are credible messengers in the communities they serve, which in practice typically means justice system involved people who are long-term residents in the neighborhoods where they work. Similar to the Cure Violence Model, stakeholders in Richmond, VA implemented a community mediator program as part of a package of interventions designed to reduce violence. Neighborhood Change Agents, as they are called in Richmond, build relationships with clients most at risk to engage in or be the victim of violence, direct them to supports, and intervene as necessary to defuse potentially violent situations as they arise. In conjunction with this model, the city also developed an intensive paid mentoring program, called Operation Peacemaker Fellowship, for people most at risk of violence. We too must consider developing programming that connects people most at risk to be impacted by gun violence, who are not quite ready to engage with workforce development with paid mentorship opportunities. While many of these types of programs already exist throughout the city, the programs themselves need sustainable streams of funding so they are able to recruit and retain dedicated qualified staff and provide a continuity of support that survives changes in leadership in city agencies. Additionally, while implementing evidence-based practices is important, we cannot exclude innovative local efforts simply because they are too novel to be a tried and true practice. For example, the developers of the Philly Truce efforts to harness technology as a tool for young people to turn to community mediators to help resolve conflict is an exciting twist to traditional community mediation programs[130]

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[129] Giffords Law Center (December 2020). American at a Crossroads: Reimagining federal funding to end community violence.

[130] https://6abc.com/philadelphia-gun-violence-philly-truce-app-youth-mentorship-power-up/11286188/

4. Develop more victim centered systems and invest in robust, culturally competent victim services.

National trends direct the lion's share of federal and statewide victims' crime compensation funds to law enforcement, prosecuting attorney's offices and agencies that support survivors of domestic violence and sexual assault. But our city needs us to continue to expand funding opportunities for community-based victims' services and advocacy led by people of color in neighborhoods most impacted by violence.[131]

Similarly, victims' crime compensation funds and services must reach victims and their families in traditionally underserved communities. In practice this means even people with criminal justice system entanglement must still be eligible for support. Restrictions on eligibility for direct financial compensation adversely impact victims, particularly those who reside in communities where violent crime rates are high, from obtaining funds specifically earmarked to support them. Local legislators can leverage their relationships for statewide changes to eligibility criteria while ensuring that city funds do not contain harmful eligibility criteria.

Similarly, investments that support every city agency's capacity to identify victims and witnesses of violent crime will increase opportunities to connect them with supports they need and bring a trauma centered lens to the delivery of all services. Focused interventions that direct supports to youth who have witnessed or been the victims of violence are a sound investment. And prioritizing funding that supports treatment providers in communities most at risk for violence will ensure that victims have access to culturally competent support in the communities where they reside. Investments in Increased resources for Defender's Social Services Unit will enable our office to connect our clients, especially our youth in both the dependency and delinquency systems, who may be reluctant to report their victimization to law enforcement, with the supports they need.

5. Take statewide action to leverage federal and statewide funding to expand hospital-based violence intervention programs and join in efforts to strengthen legislation regulating the sale of firearms.

Hospital Based Violence Intervention Programs (HVIPs) are an effective strategy to break the cycle of violence. Studies from around the nation show how HVIPs improve public safety by significantly lowering the risk that participants will be violently reinjured, perpetrate violence, or otherwise become ensnared in the criminal justice system in the

[131] https://www.inquirer.com/news/anti-violence-grant-shootings-philadelphia-20211014.html

years following hospital discharge."[132] Neighboring states, such as New Jersey, have directed Byrne JAG funds to expand and sustainably fund hospital-based violence intervention programs.

Finally, Philadelphia residents require solutions to stem the flow of firearms to the neighborhoods most at risk for community violence. Local legislators and city agencies have an important role in working leverage data, relationships, and advocacy for more responsible gun laws aimed at reducing gun trafficking and limiting bulk purchases of handguns

[132] Giffords Law Center (December 2020). American at a Crossroads: Reimagining federal funding to end community violence.

Appendices

Appendix 1: Resolution #200436

RESOLUTION

Authorizing the City Council Committee on Public Safety and the Special Committee on Gun Violence Prevention to hold hearings to review and examine the perpetrators of the last 100 shootings in Philadelphia, as well exploring the source of the guns used to commit violent crimes and the role of the criminal justice system in the offender's life.

WHEREAS, From the period of January 1, 2020 to present, there have been over 1,100 acts of gun violence in Philadelphia, with more than 301 gun-related homicides. To date, homicides in the City of Philadelphia are up 34% when compared year-to-date with 2019, and over 100 children have been victims of gun violence. In August 2020, 275 Philadelphians were victims of gun violence, the highest monthly total since 2007. In the past week alone, there have been 50 Philadelphians falling victim to gun violence; and

WHEREAS, Homicides in the city have been steadily rising over the past few years, with 2019 seeing 356 homicides compared to 246 in 2013. Gun violence is the main source of these homicides. The City has experienced a 24% increase in gun usage rates in homicides in 2020 when compared to 2019. During these same periods of time, overall crime rates in the city have fallen; and

WHEREAS, The need to investigate the source of guns that are used to carry out the slaying of Philadelphians, and also what role the criminal justice system has played in the shooters past, has never been more pressing. A study published by Jerry Ratcliffe from Temple University and George Kikuchi from the Delaware Valley Intelligence Center (DVIC), shows that just 1.5% of all known criminals are responsible for 80 percent of all detected gun crimes in Philadelphia. Also, as for the sheer number of guns in our city, in 2019 alone, the ATF recovered 4,462 guns used in Philadelphia crimes.

WHEREAS, This past Labor Day weekend, Philadelphia was struck by another wave of gun violence, where a barrage of bullets rang through Southwest Philadelphia, injuring three, while a 17 year-old was shot twice in Kensington, among other shootings; and

WHEREAS, To quell the concerning increase of both incidents of gun violence and homicides in Philadelphia, we must see continued collaboration from the District Attorney's

Office, The Philadelphia Police Department, The Philadelphia Adult Probation and Parole Department, The Defender Association of Philadelphia, community stakeholders and the First Judicial District of Pennsylvania; now, therefore, be it

RESOLVED, That the Council of the City of Philadelphia, Authorizes the Committee on Public Safety and the Special Committee on Gun Violence Prevention to hold hearings to review and examine the perpetrators of the last 100 acts of shooting in Philadelphia, as well exploring the source of the guns used to commit violent crimes and the role of the criminal justice system in the offenders life.

Curtis Jones, Jr.
Councilman, 4th District

Darrell Clarke
City Council President

Kenyatta Johnson
Councilmember-2nd District

Jamie Gauthier
Councilmember-3rd District

September 10, 2020

Appendix 2: Resolution #210703

RESOLUTION

Authorizing the City Council Committee on Public Safety to hold public hearings on an interim report issued by the 100 Shooting Review Committee.

WHEREAS, On September 20, 2020, Philadelphia City Council passed Resolution No. 200436, authorizing the City Council Committee on Public Safety and the Special Committee on Gun Violence Prevention to hold hearings to review and examine the perpetrators of the last 100 shootings in Philadelphia, as well exploring the source of the guns used to commit violent crimes and the role of the criminal justice system in the offender's life; and

WHEREAS, After the passage of Resolution No. 200436, a 100 Shooting Review Committee was formed. The Committee is made up of leadership from the Philadelphia Police Department, Philadelphia District Attorney's Office, Defender Association of Philadelphia, Department of Public Health, City Controller's Office, the First Judicial District of Pennsylvania, Adult Probation and Parole, Councilmember Curtis Jones, Jr. and Councilmember Kenyatta Johnson. The Committee held its first meeting on September 30, 2020; and

WHEREAS, The original goal of the 100 Shooting Review Committee was to examine the past 100 shootings at the time of the resolution's passage to determine any trends that could be useful in curbing future gun violence, specifically focusing on identifying motivating factors for the shootings, compiling profiles and backgrounds of the shooters and an analysis of the firearms used to commit these crimes; and

WHEREAS, After an initial assessment, the group expanded its data to focus on a larger subset of over 2,000 shootings that have occurred in Philadelphia, with an expanded goal of determining how to improve gun case outcomes, shooting incident clearance rates and witness appearance rates, as well as evaluating bail trends in shooting cases; and

WHEREAS, The 100 Shooting Review Committee has convened numerous times over the course of a year to present and share data, discuss and analyze trends, and collaborate on potential solutions for reducing shootings in Philadelphia; and

WHEREAS, The 100 Shooting Review Committee will move forward with compiling its data into a report for presentation to the public. Such report should be presented before and evaluated by the City Council Committee on Public Safety; now, therefore, be it

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That it hereby authorizes the City Council Committee on Public Safety to hold public hearings on an interim report issued by the 100 Shooting Review Committee.

Curtis Jones, Jr.
Councilmember, 4th District

Katherine Gilmore Richardson
Councilmember, at-large

Cherelle Parker
Councilmember, 9th District

Helen Gym
Councilmember, at-large

Jamie Gauthier
Councilmember, 3rd District

Mark Squilla
Councilmember, 1st District

Isaiah Thomas
Councilmember, at-large

Kenyatta Johnson
Councilmember, 2nd District

September 17, 2020

Appendix 3: Committee Meeting Agendas

Wednesday, September 30th, 2020 – 1pm – 3pm

I. Introductions
   A. Philadelphia City Council
   B. Philadelphia Police Department
   C. Philadelphia District Attorney's Office
   D. Defender Association of Philadelphia
   E. Office of Criminal Justice and Public Safety
   F. Pennsylvania Attorney General's Office

II. Primary Area of Focus
   A. Compile data from participating agencies concerning the past 100 arrests for shootings in Philadelphia:
      1. Identify Motivating Factors for the Shootings
      2. Profiles and Backgrounds of the Shooters
         a) Previous contacts with the system?
         b) Outcome of previous contacts?
         c) Descriptive profile of the last 100 arrests for shootings, above and beyond arrest/charging history.
      3. Analysis of Firearms Utilized
         a) Legal firearm vs. illegal firearm?
         b) How did the offender come into possession of the firearm?
         c) Include analysis of firearms utilized in non-fatal shootings.
      4. What trends are present within this data?
         a) Which, if any, attributes of a shooting incident make it more or less likely to be cleared by police?
         b) What is the trend of shooting, violent felony, VUFA, and PWID case disposition?
         c) How have changes in the functioning of the criminal justice system, in particular with gun crimes, correlated with changing shooting trends?

III. Additional Areas of Focus
   A. How can we work collectively to improve investigations and clearance rates?
   B. How can we work collectively to prevent shootings?
   C. How can we work collectively to stop the illegal possession of guns?

IV. Next Steps
   A. Incorporation of local universities to assist in future reports.

B. Scheduling of next meeting.

Tuesday, October 28, 2020 – 11am – 12:30pm

I. Introductions of New Participants
   A. City Controller Rebecca Rhyhart
   B. Chief Darlene Miller from Adult Probation and Parole
   C. Dr. Ruth Abaya from the Health Department
   D. Rich McSorely from the First Judicial District
   E. Judge Tucker

II. Review of Last Meeting (Wednesday, September 30th)

III. Updated Areas of Focus
   A. Compile data from participating agencies concerning the past 100 arrests for shootings in Philadelphia:
      1. Identify Motivating Factors for the Shootings
      2. Profiles and Backgrounds of the Shooters
         a) Previous contacts with the system?
         b) Outcome of previous contacts?
         c) Descriptive profile of the last 100 arrests for shootings, above and beyond arrest/charging history.
      3. Analysis of Firearms Utilized
         a) Legal firearm vs. illegal firearm?
         b) How did the offender come into possession of the firearm?
         c) Include analysis of firearms utilized in non-fatal shootings.
      4. What trends are present within this data?
         a) Which, if any, attributes of a shooting incident make it more or less likely to be cleared by police?
         b) What is the trend of shooting, violent felony, VUFA, and PWID case disposition?
         c) How have changes in the functioning of the criminal justice system, in particular with gun crimes, correlated with changing shooting trends?

IV. Presentation Order
   A. Attorney General's Office
   B. District Attorney's Office
   C. Department of Public Health

Thursday, January 21, 2021 – 2pm – 4pm

I. Updates on Progress
   A. Initial Findings from Expansion of Data Set - George from the PPD
   B. CARES Update - *Dr. Ruth Abaya - Department of Public Health*

II. Future Research Agenda
   A. Joint Presentation – *Research Teams from PPD, DA's Office, & Department of Public Health*

III. Academic Partnership Subcommittee
   A. Discussion on Current Academic Partnerships - *Dr. Ruth Abaya - Department of Public Health*
   B. Introduction of Dr. Jeffrey Butts - *Research Professor and Director, Research and Evaluation Center – John Jay College of Criminal Justice*
   C. Recent report – Reducing Violence without Police

Tuesday, April 6, 2021 1pm – 3pm

I. Presentations
   A. City Controller's Office - *The City Controller will present an overview of an analysis of gun-involved crimes from 2015 to 2019 that used a combination of police and court data. The analysis, which began prior to the City Controller's inclusion in the working group, identifies similar trends to those discussed previously for conviction and clearance rates and includes findings on prior criminal history, bail usage, and diversion.*

II. Review of Revised Goals
   A. *How can the group collectively work to improve the following?*
      1. Gun Case Outcomes
      2. Shooting Incident Clearance Rates
      3. Witness Appearance Rates

III. Discussion Regarding Future Public Hearings

Thursday, September 23, 2021 – 2pm – 4pm

I. Review of Last Meeting –
   A. Revised Goals: Reducing shootings through deterrence of illegal firearm possession, Improving Gun Case Outcomes, Improving Shooting Incident Clearance Rates and Witness Appearance Rates
   B. Questions Related to Bail Trends:

1. Verifying and understanding the causes for the trends related to bail for lead VUFA charges:
    a) Increasing use of unsecured bail as a final bail type
    b) Decreasing median bail amounts
    c) Increasing percent of defendants with bail posted
2. Have these trends continued in 2020/2021 as VUFA arrests have increased significantly?
3. What is the re-arrest rate for defendants out on bail for lead VUFA arrests and how has that changed over time?

II. Bail and Recidivism Presentation - *Philadelphia Police Department*

III. Discussion of Future Report and Public Hearing

Appendix 4: Original Questions posed by the Committee

- A descriptive statistics on 100 shooter, with particular focus on
    - Motivating Factors for the Shootings
    - Profiles and Backgrounds of the Shooters
    - Analysis of Firearms Utilized
        - Legal firearm vs. illegal firearm?
        - How did the offender come into possession of the firearm?
        - Include analysis of firearms utilized in non-fatal shootings.
- Factors affecting the likelihood of shooting clearances
    - Which, if any, attributes of a shooting incident make it more or less likely to be cleared by police?
- The trend of case disposition with particular focus on
    - What is the trend of shooting, violent felony, VUFA, and PWID case disposition?
    - How have changes in the functioning of the criminal justice system, in particular with gun crimes, correlated with changing in shooting trends?
    - Verifying and understanding the causes for the trends related to bail for lead VUFA charges:
        - Increasing use of unsecured bail as a final bail type; Decreasing median bail amounts; Increasing percent of defendants with bail posted
        - Have these trends continued in 2020/2021 as VUFA arrests have increased significantly?
        - What is the re-arrest rate for defendants out on bail for lead VUFA arrests and how has that changed over time?

Appendix 5: PPD Presentation Slides

PPD Presentation on 09/30/2020

Preliminary Analysis of 100 Arrests of the Most Recent Shooting Victims

Special Committee on Gun Violence

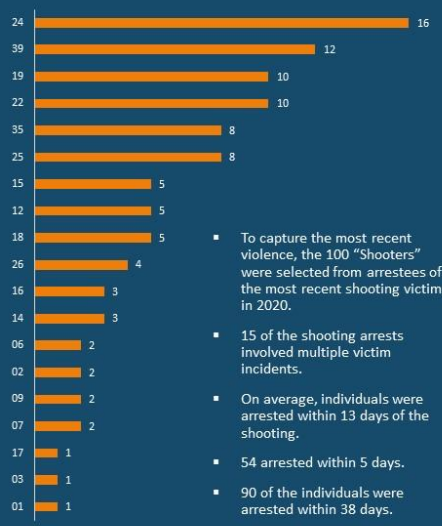
Philadelphia Police Department

September 30, 2020

The Philadelphia Roadmap to Safer Communities

Arrest Population Description

Shooting Arrests by District



- To capture the most recent violence, the 100 "Shooters" were selected from arrestees of the most recent shooting victims in 2020.
- 15 of the shooting arrests involved multiple victim incidents.
- On average, individuals were arrested within 13 days of the shooting.
- 54 arrested within 5 days.
- 90 of the individuals were arrested within 38 days.

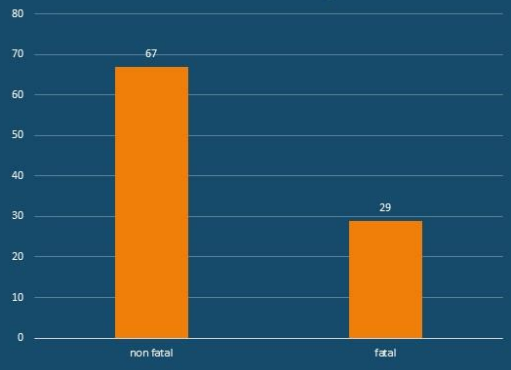
Month Shootings Occurred

Notable Analytical Assumptions and Limitations

- Shooting arrests do not assume the "guilt" of the individual.
- At this time, this considers only preliminary data from arrest and shooting victim history, and not a firearm analysis or factors leading up to criminal behavior. The next version will include a more complete analysis including the source of firearms, and other factors leading up to criminal behavior.
- During the period of time these 100 arrests, 5/16 to 9/19, over 948 fatal and non-fatal shootings occurred in the City of Philadelphia.
- The statistics regarding "speed" of these sample arrests may be skewed since the sample is only the most recent arrests made.
- A larger sample size may yield different results, and focusing only on shootings with arrests may not describe the overall characteristics of all shootings, solved or unsolved. (e.g. criminal group-related shootings have low solvability factors).

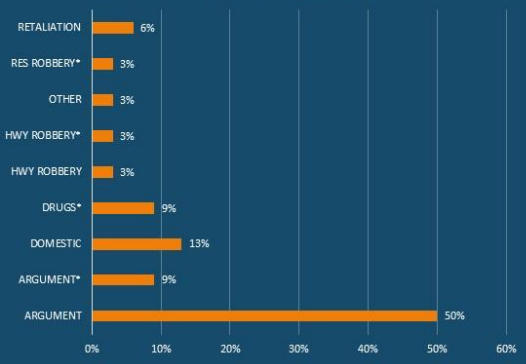
Shooting Population Description (From Arrests Only)

Fatal vs Non-Fatal Shooting Victims



- The 100 arrests span 93 shooting occurrences, with 96 shooting victims in total.
- 29 of the 96 shooting arrests (27%) were homicides.
  - NOTE: The high number of homicides in the 100-arrest sample is likely over weighted due the increased clearance rate of firearm homicides in comparison to non-fatal shootings.

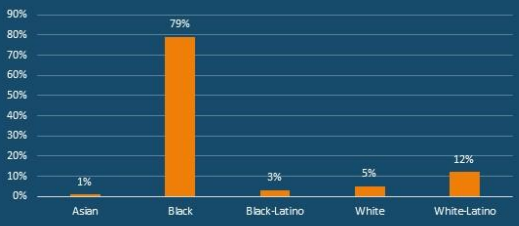
Fatal Shooting Motive



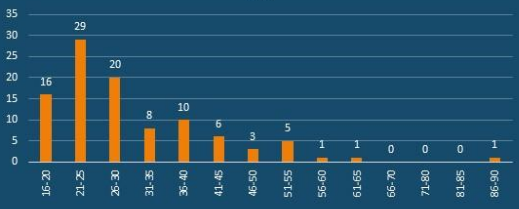
- Outside an in-depth case review, motive data is only available in homicide data
- An asterisk (*) indicates a secondary drug-related motive.
- 59% of the homicides were due to "Argument".
- 24% of the homicides were "drug related" or listed "drug related as a secondary motive.
- 13% of the homicides were "domestic".

Demographics & Group Membership of Arrestees

Race & Ethnicity



Age



7 arrests under 18 years of age

- 94% of arrestees were male, 95% of the offenders were people of color (74% Black Male), and the peak age is in late adolescence and young adulthood (18-30 years old).

Criminal Group Membership

NOTE: *Group-related shootings have lower solvability factors, often due to lack of victim participation. A City-wide group-related shooting audit is underway, with current estimates indicating that 25-35% or higher of all fatal and non-fatal shootings are "group violence" related.*

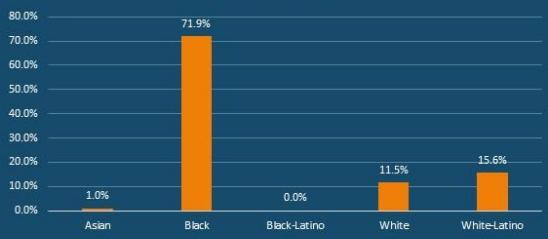
Shooting Arrests	Male	Female	Total
Asian	0%	1%	1%
Black	74%	5%	79%
Black-Latino	3%	0%	3%
White	5%	0%	5%
White-Latino	12%	0%	12%
Total	**94%**	**6%**	**100%**

Of the 100 Shooting Arrestees:

- 11 have been shooting victims
- 7 were shot prior to the shooting they were arrested for
- 3 were shot previously this year
- 1 was previously shot more than once

Demographics & Group Membership of Victims

Race & Ethnicity

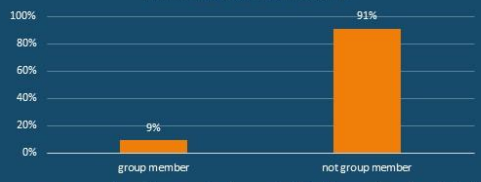


Age

4 victims under 18 years of age

- A total of 96 individuals were shot by the 100 shooting arrestees
- 86.5% of victims were male, 88.5% of the victims were people of color (61.5% Black Male), and the peak age is in young adulthood to mid-thirties (21-35 years old).

Criminal Group Membership



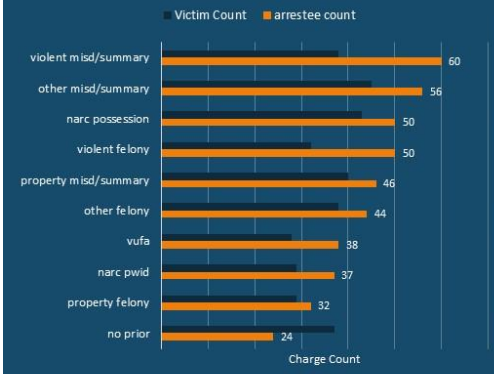
NOTE: *Group-related shootings have lower solvability factors, often due to lack of victim participation. A City-wide group-related shooting audit is underway, with current estimates indicating that 25-35% or higher of all fatal and non-fatal shootings are "group violence" related.*

Shooting Victims	Male	Female	Total
Asian	1.0%	0.0%	1.0%
Black	61.5%	10.4%	71.9%
Black-Latino	0.0%	0.0%	0.0%
White	9.4%	2.1%	11.5%
White-Latino	14.6%	1.0%	15.6%
Total	86.5%	13.5%	100.0%

Of the 96 Shooting Victims

- 5 had been shot previously
- 1 was shot twice in the past, with their third and final shooting represented here, resulting in his death

Arrest Charging History of Last 100 Shooting Arrestees & Victims



Arrest Background (Historical Charge Counts)	Arrestees who have previous charge	Avg # of charges per person	Shooting Victims who have previous charge	Avg # of charges per person
Violent misdemeanor/summary	60	3.3	38	2.5
Other misdemeanor/summary	56	1.5	45	1.4
Violent felony	50	1.6	32	1.1
Narcotics possession	50	1.9	43	1.7
Property misdemeanor/summary	46	1.6	40	1.7
Other felony	44	1.1	38	0.8
VUFA	**38**	**1.6**	**28**	**1.4**
Narcotics PWID	**37**	**0.9**	**29**	**0.6**
Property crime felony	**32**	**1.4**	**29**	**1.4**
No prior	24	NA	37	NA
VUFA / Violent felony	**57**	**3.2**	**40**	**2.5**
VUFA / Violent felony / PWID	**68**	**4.1**	**44**	**3.2**

Note: charges were used; DA declined charges were excluded; arrest history limited to year 2000 and onward

- 50% of the arrestees had a Violent Felony charge in their criminal history, as did 33% of the shooting victims
- 38% of the arrestees had a "Violation of Uniform Firearms Act" (VUFA) charge, as did 29% of the shooting victims
- 37% of the arrestees had a "Narcotics Possession with Intent to Distribute" (PWID) charge, as did 30% of the shooting victims
- 57% of the arrestees had either VUFA or Violent Felony charges in their criminal history, as did 42% of the shooting victims
- 68% of the arrestees had either VUFA, PWID or Violent Felony charges, as did 42% of the shooting victims

What will the analysis of the last 100 shooters tell us?

- Characteristics of recent violence that has resulted in arrests
- Small sample size helps conducting in-depth qualitative analysis (e.g., case review)

What will this analysis not tell us?

- The last 100 shooter sample likely is a biased sample representing "easier-to-solve" cases
  - e.g., this sample may miss retaliatory shootings between criminal groups where parties involved are not cooperating
- Any characteristics identified need a comparison for interpretations
  - e.g., comparing over time or against the citywide trend will help identify what is "unusual"

Collaborative Data Analysis Group to Expand Research Scope

- Data analysts from the Philadelphia Police, District Attorney's Office, Dept. of Public Health, and Managing Director's Office have established a data analysis working group to explore such questions as:
  - Include analysis of firearms utilized in fatal and non-fatal shootings, including type, "time to crime", and sourcing.
  - What is the descriptive profile of the last 100 arrests for shootings, above and beyond arrest/charging history?
  - Which, if any, attributes of a shooting incident make it more or less likely to be cleared by the police?
  - What is the trend of shooting, violent felony, VUFA and PWID case disposition (e.g. guilty/not guilty/dismissed, withdrawn, etc)?
  - How have changes in functioning of the criminal justice system, in particular with gun crimes, correlated with changes in shooting trends?
- *When possible, a larger sample size will be used for quantitative analysis with appropriate comparisons for contextualization.*

PPD Presentation on 10/28/2020

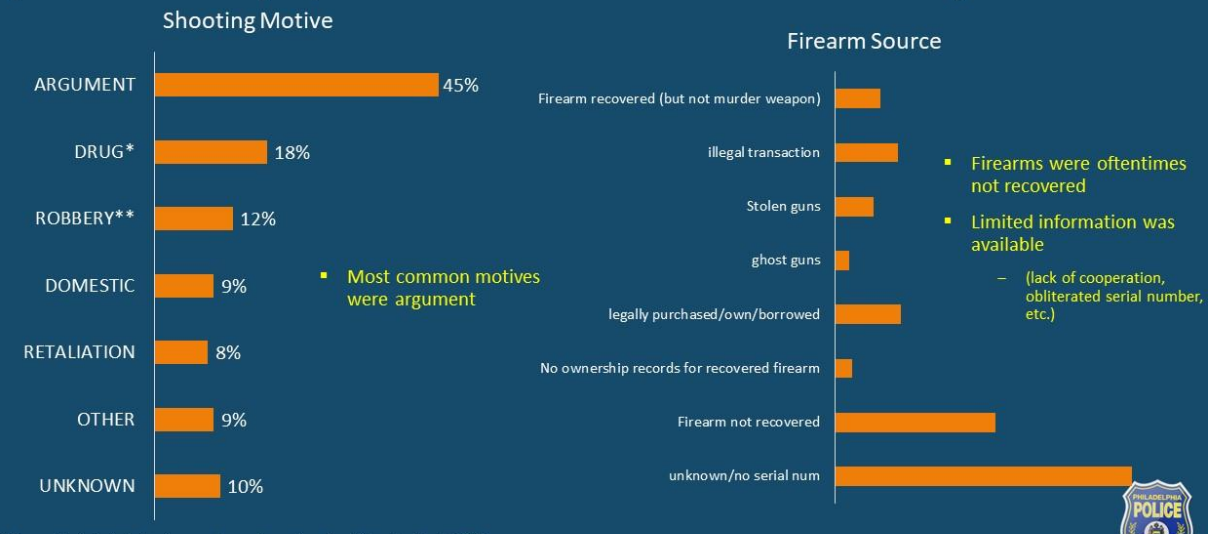
Motive and Firearm Source on a 200 Shooter Sample

Special Committee on Gun Violence
Philadelphia Police Department
October 28, 2020

The Philadelphia Roadmap to Safer Communities

Motive and Firearm Source

(200 Shooter Sample (last 100 and random 100 between 2015-2020)



Note: * Drug motive includes both primary and secondary motives; thus % do not add up to 100%
Note: ** Robbery includes street robbery, commercial robbery, and residential robbery

Appendix: Motive and Firearm Source

(200 Shooter Sample comparison)

Motive	count			%		
	last 100	random 100	total	last 100	random 100	total
ARGUMENT	50	41	91	50%	41%	45%
DRUG*	18	18	36	18%	18%	18%
ROBBERY**	8	17	25	8%	17%	12%
DOMESTIC	15	4	19	15%	4%	9%
RETALIATION	8	9	17	8%	9%	8%
OTHER	8	11	19	8%	11%	9%
UNKNOWN	7	14	21	7%	14%	10%
total	101	100	201	100%	100%	100%

Note: * Drug motive includes both primary and secondary motives; thus % do not add up to 100%
Note: ** Robbery includes street robbery, commercial robbery, and residential robbery

gun source	count			%		
	last 100	random 100	total	last 100	random 100	total
Firearm recovered (but not murder weapon)	10	3	13	10%	3%	6%
illegal transaction	8	10	18	8%	10%	9%
Stolen guns	7	4	11	7%	4%	5%
ghost guns	3	1	4	3%	1%	2%
legally purchased / own / borrowed	12	7	19	12%	7%	9%
No ownership records for recovered firearm	2	3	5	2%	3%	2%
Firearm not recovered	31	15	46	31%	15%	23%
unknown/no serial num	28	57	85	28%	57%	42%
Grand Total	**101**	100	201	100%	100%	100%

What is the trend in number of crime guns recovered?

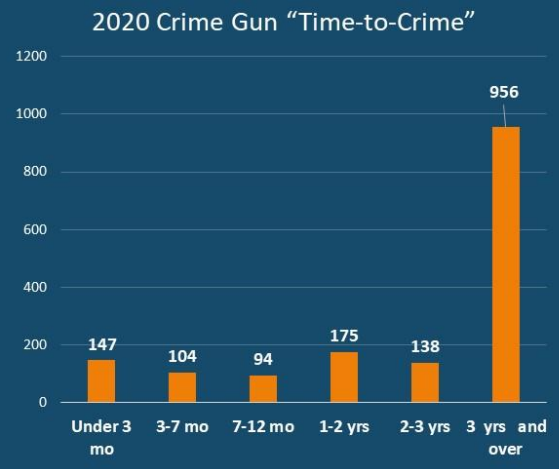
- Crime Guns recovered each year has been steadily increasing.
- Between 2015 and 2019, Crime Gun recoveries have increased 33%.
- Simultaneously, Pedestrian Stops have decreased drastically since 2015 (-74%)
- Vehicle stops remained steady, but drastically declined during 2020 while continuing to recover crime guns

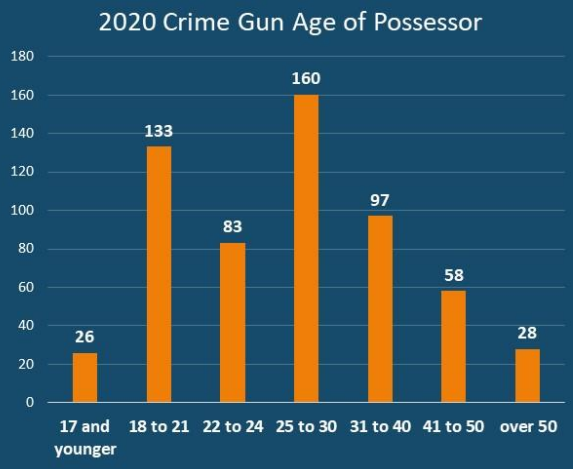
Sources: PPD Office of Forensic Science Firearms System

DEFINITION OF "CRIME GUN"

- ANY gun recovered by the police as part of a criminal investigation
- **Does not include guns from buybacks, turn ins, etc.** ***Guns surrendered to PPD for safe keeping are not crime guns.***

Crime guns recovered: Traced Crime Guns





Firearms "Tracing" is a process by which a law enforcement agency discovers a firearm at a crime scene and seeks to learn the origin or background of that firearm in order to develop investigative leads.

Sources: PPD Office of Forensic Science Firearms System

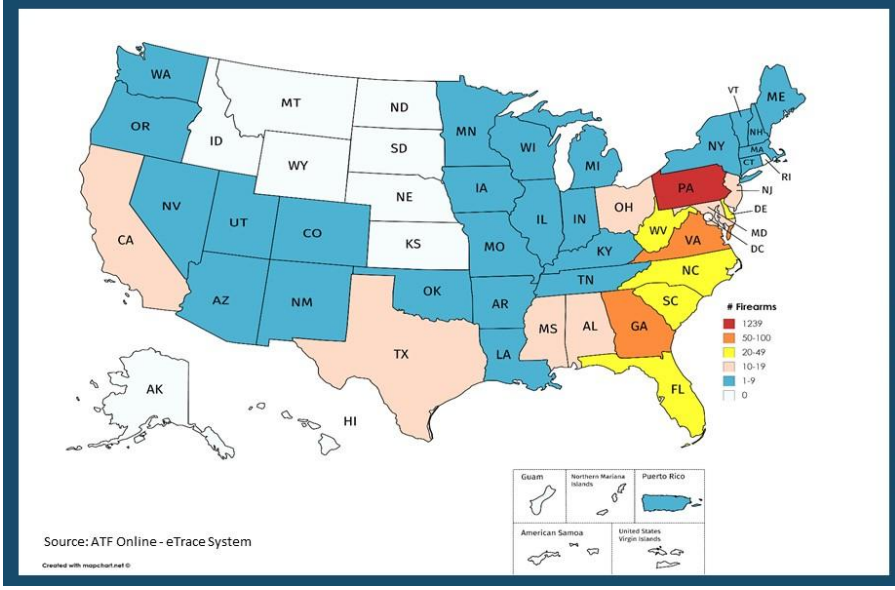
Crime guns recovered: NIBIN Entries & Leads (Hits)

The National Integrated Ballistic Information Network (NIBIN) is a national database from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) containing digital images of spent bullets and cartridge cases that were found at crime scenes.

- NIBIN Entry: a recovered fired cartridge case or a test-fired cartridge case that has been entered into NIBIN
- NIBIN Lead/hit: - an association between fired cartridge cases from different locations with each other or to a test-fired cartridge case from a known firearm that indicates the same firearm was used at each of the related scenes.
- Due to the NIBIN lead program, a joint operation with the US Attorney's Office, ATF, and PPD resulted in the arrest of a violent member of a notable street gang in North Philadelphia. Through the ballistics matching, the crime gun was identified to be affiliated with on-going gang-related retaliatory shootings, and responsible for two homicides and two non-fatal shootings. The arrest resulted in collection of the 9mm Glock that was previously reported stolen. The individual is currently being detained on 1 million dollars bail on state firearms charges and probation violations.

Sources: PPD Office of Forensic Science Firearms System

What is the geographic distribution of recovered crime guns' point of origin?



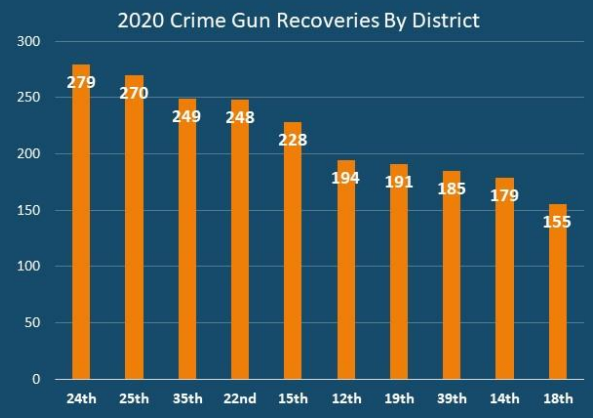
1700 Traced firearms (2020 Year-to-Date) had information on source.

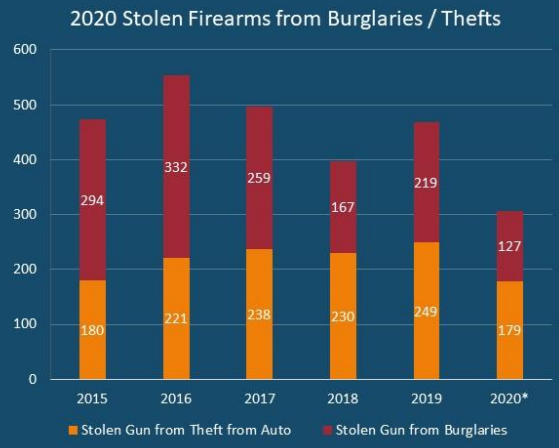
Majority of crime guns are traced to original purchases within Pennsylvania (1239/1700): 73%

- Philadelphia (633/1700): 37%
- Other PA (609/1700): 36%

The most common non-PA source states include Virginia (65), Georgia (55), South Carolina (39), North Carolina (35), Delaware (29), Florida (27), and West Virginia (21) – combined (271/1700): 16%

Crime Gun geographic distribution: Recovery By Police District (Top Ten)

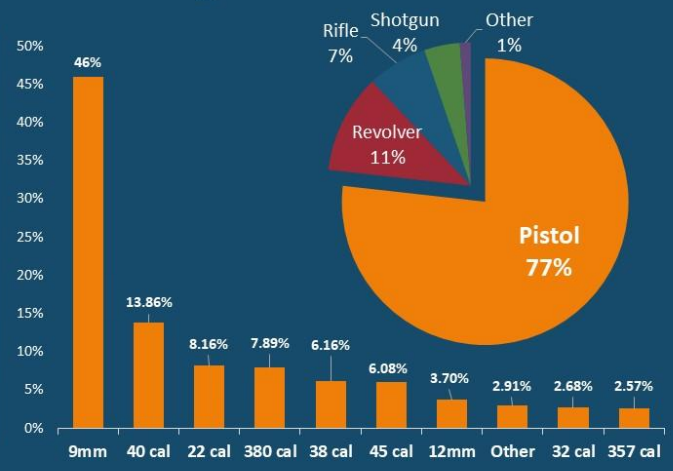




- The most violent districts across the City produce the greatest amount of gun recoveries.
- Each year hundreds of firearms are reported stolen from burglaries and thefts in Philadelphia and redistributed into the illegal gun market.

Sources: PPD Office of Forensic Science Firearms System

What is the trend in type of crime guns recovered?



- Semi-automatic, 9mm pistols continue to be the vast majority of crime guns traced year after year
- **In 2020, 77% of crime guns recovered were pistols, and 46% of crime guns were 9mm**

Sources: PPD Office of Forensic Science Firearms System

Crime Gun Trends by Type (continued)

- Semi-automatic rifles make up only 7% of crime guns recovered.
- Fully automatic rifles, or "machine guns" make up only 0.1% of crime guns recovered (3 so far this year)
- Data on extended magazines is not captured in any system, however FIU notes that extended magazines are submitted in a large number of cases. They are a *common* submission.

FAS Analysis Report (8/31/2020)

Trace Requests: Firearm Types For 1/1/2020 - 8/31/2020

Total Trace Count: 2884

Top Firearm Types

	Type	Count	Percentage
1	PISTOL	2214	76.77
2	REVOLVER	322	11.17
3	RIFLE	196	6.8
4	SHOTGUN	116	4.02
5	RECEIVER/FRAME	11	0.38
6	UNKNOWN TYPE	9	0.31
7	DERRINGER	6	0.21
8	ANY OTHER WEAPON	5	0.17
9	MACHINE GUN	3	0.1
10	COMBINATION GUN	2	0.07
	Total	2884	100

Top 10 Manufacturers

	Manufacturer	Count	Percentage
1	SMITH & WESSON (SW)	422	14.63
2	GLOCK INC. (GLD)	406	14.08
3	TAURUS INTERNATIONAL (TAS)	236	8.18
4	RUGER (SR)	226	7.84
5	UNKNOWN MANUFACTURER (ZZZ)	156	5.41
6	TAURUS (TAS)	149	5.17
7	SPRINGFIELD ARMORY,GENESEO,IL (SGD)	93	3.22
8	GLOCK GMBH (GLC)	65	2.25
9	BERETTA USA CORP (FII)	61	2.12
10	SIG SAUER (SIG-ARMS) (SIG)	56	1.94
	Total	1870	64.84

Top 10 Models

	Model	Count	Percentage
1	UNKNOWN	556	19.28
2	19	85	2.95
3	PT24/7 G2 C	64	2.22
4	PT111 G2	63	2.18
5	17	46	1.6
6	22	40	1.39
7	23	40	1.39
8	SD9VE	38	1.32
9	43	36	1.25
10	PT111 MILLENNIUM G2	34	1.18
	Total	1002	34.74

Top 10 Importers

	Importer	Count	Percentage

Sources: PPD Office of Forensic Science Firearms System

What is the trend in number and proportion of crime guns that are either "ghost guns" or 3-D printed?

- "Ghost Guns" are unserialized, unregulated, and untraceable firearms that are assembled by the consumer.
  - Polymer-80: example of "ghost gun" sold 80% complete
- PPD Stats "ghost guns" recovered (Oct 15)
  - 2019: 95
  - 2020 YTD: 122
- No 3-D printed firearms have been recovered

Sources: PPD Office of Forensic Science Firearms System

PPD Presentation on 12/14/2020

Violent Crime Update to the City Council Special Committee on Gun Violence

Philadelphia Police Department

December 14, 2020

The Philadelphia Roadmap to Safer Communities

Current State of Gun Violence

Homicides and Shooting Victims

- Since 2014, Homicides and Shooting Victims have continued to increase.
- Currently in 2020, homicides and shooting victims are **up** 39% and 53% respectively.

Overall Part One Crime (Violent and Property Crime)

- Since 2017, overall Part One crime has been increasing, following a 30-year downward trend since 1989.
- Currently in 2020, Part One crimes are **down** 2%.

What is the trend in number of crime guns recovered?

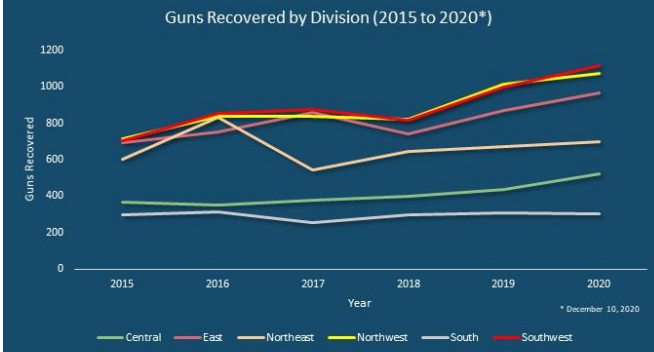
- Crime Guns recovered each year has been steadily increasing.
- Between 2015 and 2019, Crime Gun recoveries have increased 33%.
- Simultaneously, Pedestrian Stops have decreased drastically since 2015 (-65%)
- Vehicle stops remained steady, but drastically declined during 2020 while continuing to recover crime guns

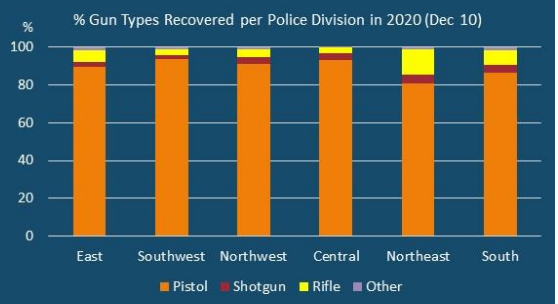
Sources: PPD Office of Forensic Science Firearms System

DEFINITION OF "CRIME GUN"

- ANY gun recovered by the police as part of a criminal investigation
- **Does not include guns from buybacks, turn ins, etc.** ***Guns surrendered to PPD for safe keeping are not crime guns.***

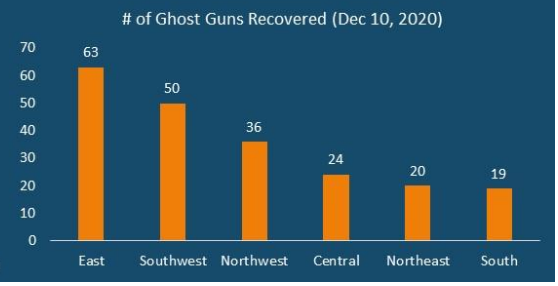
What is the trend in number of crime guns recovered?



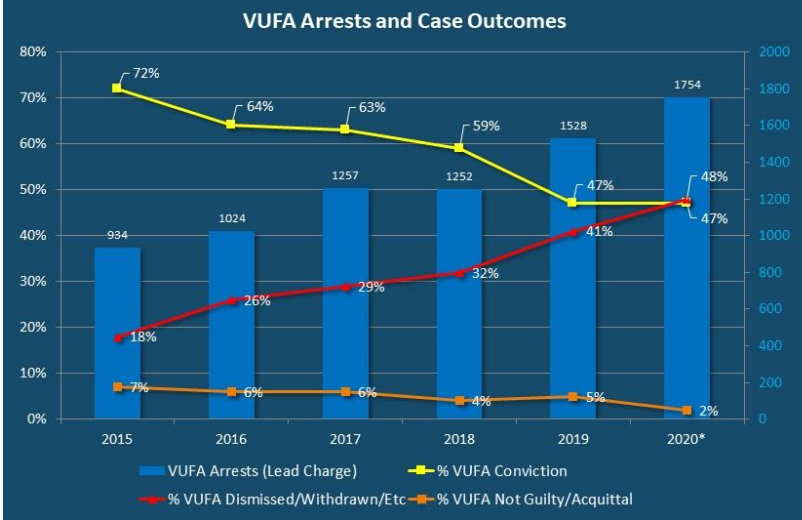


- **Significant increases in gun seizures in Northwest, Southwest and East Divisions.**
- **2020 YTD has already reached the 5-year record high number in many divisions**
- **About 90% guns recovered are pistols/revolvers/handguns**
- **120% increase in ghost gun seizures so far**
  - **(95 in 2019 full-year vs. 212 in 2020 as of Dec 10)**
- Data on extended magazines is **not** captured in any system, however **FIU notes that extended magazines are submitted in a large number of cases.** They are a *common* submission.

Note: 2020 data as of Dec 10th



What is the trend in proportion of VUFA arrests that result in a conviction?



- Note: Conviction Information comes from the District Attorney's Office Open Data Dashboard.
- While VUFA Arrest (Lead Charge) has been increasing, % VUFA convictions have been steadily **decreasing** from 73% in 2015 to 47% in 2020. Simultaneously, % VUFA cases withdrawn/dismissed steadily increasing from 18% in 2015 to 48% in 2020.*
- Through enhanced data sharing with the District Attorney's Office (DAO), the PPD and DAO expect to balance fairness and the need to deter the carrying of the crime guns driving gun violence.

Sources: PPD Police GIS System for shooting incident, homicide, shooting victim and arrests.
DAO Open Data Lab Dashboard for VUFA case outcomes.
2020 as of Dec 9th

Overview of Agenda for "100 Shooter" Research

Managing Director's Office

Department Of Public Health

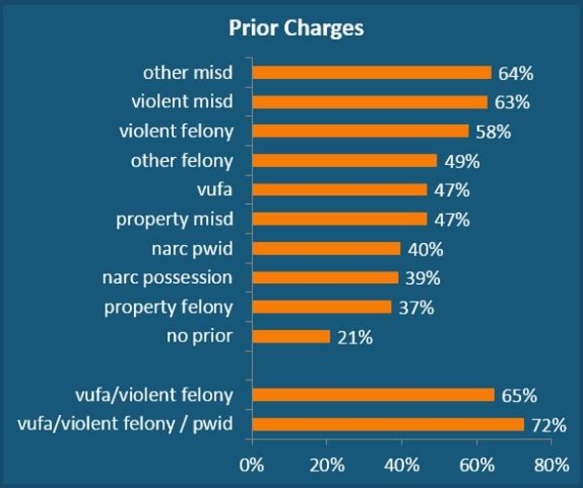
Philadelphia Police

PHL DAO

Defender Association of Philadelphia

- Extend the original review to all arrestees for shooting incidents from 2015 to the present
- Analyze shooting victim clearance
- Analyze gun case outcomes
- Analyze witness appearance rates
- Interview community-based violence prevention advocates
- Interviews/study of recent gun violence perpetrators
- Summarize current research; make policy recommendations based on particulars of Philadelphia
- To be presented by the collaborative research team

Preview: Shooting Arrestees from 2015 to present



- Criminal justice involvement shows similar characteristics as a 100 shooter sample
- Misdemeanor charges are most common
- 47% with at least one VUFA (weapon offense) prior charge
- 21% without prior arrests

- Note: % was calculated as whether or not a shooter had at least one prior arrest for given charge type (repeat offending was not taken into account); prior charges were queried using PARS that covers year 2000 and later

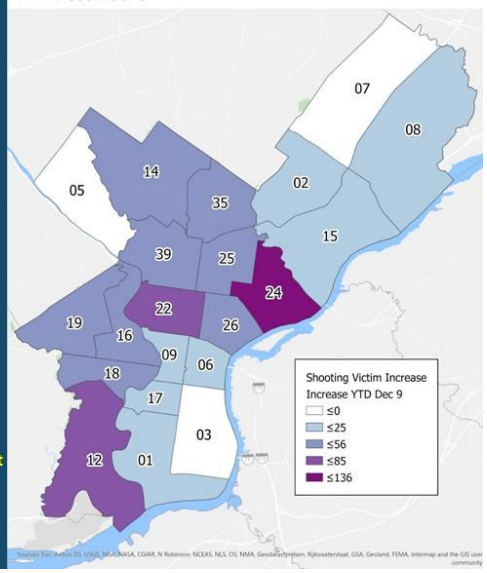
Monthly 2020 Homicide and Shooting Victim Trends

2020 Homicides and Shooting Victims by Month

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
homicide	39	22	36	29	35	43	51	49	46	64	37
shooting victim	113	88	142	132	183	204	215	281	228	256	220

- With the exception of October, **homicides and shooting victims are trending down since July/August, dropping 42% and 14% between October and November.**
- Comparing the beginning of November and December thus far, shooting victims dropped 34%.
- Almost all Districts show increases in homicides and shooting victims. By count, **the 24th District ranks highest in shooting increases (111%), followed by 12th District (68%) and 22nd District (59%)**

2020 vs 2019 Shooting Victim Increases per Police District
YTD December 9



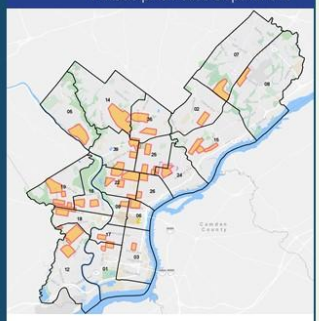
Operation Pinpoint

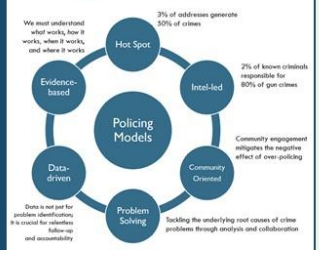
Operation Pinpoint provides the long-term, place-based, operational framework to enable PPD and our partners to focus resources and create a **"unity of effort" in neighborhoods** within the City that have been significantly impacted by gun violence.

- Integrates all policing models (community policing, hotspot, offender-focused, and problem solving) into a planning framework that includes law enforcement and non-law enforcement partners.
- Incorporates by nationally proven, data-driven evidence-based strategies inside targeted areas.
- **Goals 1 and 2 of the PPD Crime Prevention & Violence Prevention Action Plan regarding the "operating model" for future violence reduction have been accomplished.**

Crime Prevention & Violence Reduction Action Plan

Philadelphia Police Department





Goal 1. ✓

Accomplish a new operating model that incorporates Daily District Priorities, District Weekly Priorities, Weekly Shooting Reviews, Bi-Weekly Compstat, and Quarterly District Strategies by the end of 2020

Goal 2. ✓

Realign Operation Pinpoint to address the most violent hotspots in the City, expanding to 40 or more by the end of 2020

Goal 3.

Reduce Homicides in Operation Pinpoint Areas 25% by the end of 2021

Goal 4.

Reduce the number of Shooting Victims in Operation Pinpoint Areas 25% by the end of 2021

Goal 5.

Increase the homicide clearance rate to 65% by the end of 2021

Goal 6.

Increase non-fatal shooting victim clearance rate to 30% by the end of 2021

Goal 7. ✓

Establish a high-risk individual referral notification from PPD to the PRSC Tactical Team, and increase the monthly referral count to 75 per month (50% increase)

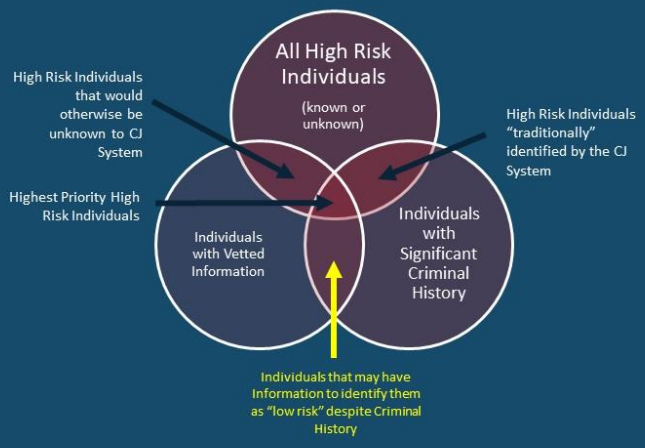
By addressing our most violent hotspots and high-risk individuals, we will exceed the Mayor's second term priority for Citywide Homicide and Shooting Victim reduction.

PPD/DAO Gun Case Working Group Collaboration

- Started on 12/7, the PPD/DAO Gun Case Working Group is a weekly collaboration to examine Non-Fatal-Shooting (NFS) arrests and all Felon in Possession of a gun (VUFA 6105) cases from the previous week.
- Goal is to review and enhance criminal proceedings moving forward, with the purpose of identifying any issues that may interfere with successful prosecution at an early stage. Topics include:
  - **constructive possession issues (e.g. expediting DNA analysis)**
  - **issues that may result in evidence suppression BEFORE they occur**
  - **follow up on investigative gaps, such as cell phone analysis, video recovery;**
  - **Intelligence & crime analysis support**
  - **social media inquires that may improve cases**

Additional PPD/DAO Collaboration

- Beginning in August, PPD Intel Analysts and DAO have collaborated over **enhanced "high bail requests"** for high risk individuals arrested in the community.
- Goal is for **PPD's analysts provide critical, timely analysis to DAO of individuals who present 1) a high-risk to the community, and 2) potential flight risk** PRIOR to arraignment.
- Early results are positive, frequently resulting in higher bail and Nebbia hearing to disclose sources of bail funds.
- May also be used to identify individuals who may be "low risk" despite criminal history.



East Division Narcotics Enforcement Strategy (NES)

- Particularly in East Division, there is a direct connection between the illegal drug market and gun violence.
  - 24th District leads the city increase, with 136 additional shooting victims in 2020 (111% from 2019) and 31 additional homicides (124%).

The NES Strategy for East Division includes:

- A hand-selected, enhanced Narcotics Field Unit (investigatory) Squad (East 4K)
  - 1 lieutenant
  - 2 sergeants
  - 2 corporals (Need to be transferred / detailed in [No street supervisory duties] to work the Operations Room)
  - 20 police officers (6 NFU officers and 14 officers detailed in from EPD)

Creation of new Kensington District to focus all federal, state and local resources:

- Coordinate Patrol Resources to HOLD areas after investigative "take-downs", and coordinate city resources.
  - Neighborhood Services
  - City-wide Vice
  - Police-Assisted Diversion Program
  - Licenses & Inspection
  - Streets Department
  - Community Life Improvement Project (CLIP)
  - And many more

Intel-Driven Taskforce Operations

THE MISSION

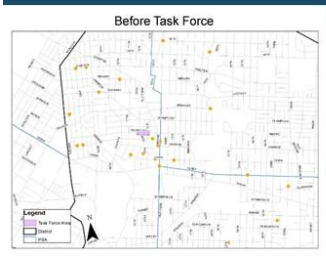
- Use Intelligence-Led Policing to develop a "plan of action" to reduce violence in selected targeted areas.
- Identify which organizations are driving the violence.
- Identify which members/associates are the most prolific offenders.

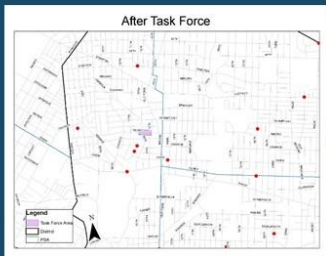
South Taskforce: 12/2/2019 (operational 10/22/19) to Present

- **Total Overall Arrests = 179**
- Firearms recovered = 65, and 1 imitation firearm
- Marijuana (2735 Grams = $25,716)
- Cocaine including Crack (908 Grams = $155,373)
- Heroin (231 Grams = $74,981) and Barbiturates (pills) (66 Grams = $1901)
- $47,538 US Currency, $2300 counterfeit currency seized

Southwest Taskforce: 12/2/2019 (operational 10/22/19) to Present

- **Total Overall Arrests = 22**
- Firearms recovered =25
- Crack Cocaine: 60.55 grams (Worth: $6,055)
- Pills: 62g Xanax (Alprazolam) (Worth: $310)
- Marijuana: 2238.3 grams (Worth: $2,223)
- Methamphetamine: 1.08 lbs. (Worth: $13,000/approx)
- $10,400 US Currency





Evaluation of Previous Northwest Division Taskforce

- 40% reduction in shooting victims in the 35th District during the Task Force operation

The Office of Violence Prevention Joint Warrant Initiative

Comprised of:

- VPP Probation Dept
- JET Probation
- Adult Probation
- Sheriff's Office
- Gun Violence Task Force
- AG's Office as well as uniformed officers from the police districts

Warrant services completion:

- 24th District
- 25th District
- 22nd District
- 39th District
- Southwest Division

Challenges

Numerous examples of individuals with numerous open cases shot, killed, or assaulted others

- **Shooting victim 3/6/2019** Arrested 1/23/2020 for VUFA while his **case was still open he was arrested 3/3/2020 for Narcotics 3/16/2020 for probation violation and 6/8/2020 for Aggravated Assault**
- Arrested 1/25/2020 for robbery handgun - **killed 12/1/2020**
- Arrested 2/20/2020 for VUFA - **Shooting Victim 6/30/2020** while his **case was still open he was arrested 7/21/2020 for VUFA**
- Arrested 4/9/2020 for VUFA - **Shooting Victim 11/24/2020**
- Arrested 4/19/2019 for VUFA **Arrested 3/10/2020 for Homicide**
- Arrested 4/20/2020 for VUFA - **Killed 10/24/2020**
- Arrested 5/24/2019 for VUFA while his **case was still open he was arrested 8/19/2019 for VUFA** - **Shooting Victim 9/8/2020**

Numerous examples of individuals with multiple open gun cases

- Arrested 1/5/2020 for VUFA while his **case was still open he was arrested 9/11/2020 for VUFA**
- Arrest 3/28/2017 for VUFA. **Arrested again on 11/7/2019 for VUFA**, while his **case was still open he was arrested 5/8/2020 for VUFA**
- Arrested 4/19/2019 for VUFA while his **case was still open he was arrested 5/10/2019 for VUFA**
- Shooting Victim on 4/27/2020, Arrested 6/9/2020 for VUFA while his **case was still open he was arrested 10/27/2020 for Burglary and Stolen Auto**
- Arrested 6/19/19 for VUFA; **arrested again 9/27/2019 for VUFA and again 12/1/2020 for VUFA while the case was open**
- Arrested 10/13/2015 for VUFA and **was arrested again on 2/3/2017 for VUFA. While on probation was arrested 9/14/2020 for VUFA**

Challenges

- Achieving the "Unity of Effort" with Operation Pinpoint with non-law enforcement agencies and services they provide (as seen in 2019) due to COVID restrictions.
- COVID Court Closure – Impacts all Strategies
  - Lack of In-Person Engagement by Probation
  - Trial Delays
- Impact of Future Civil Unrest on Police Resources
- Resource Availability for Critical Partner Agencies

PPD Presentation on 09/22/2021

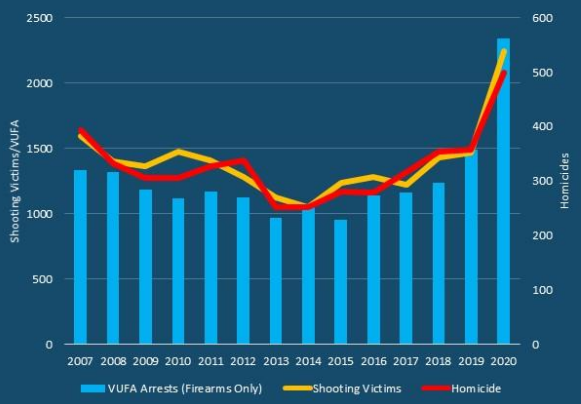
Bail/Recidivism Analysis on VUFA Cases

Update to the City Council Special Committee on Gun Violence

Philadelphia Police Department
September 22, 2021

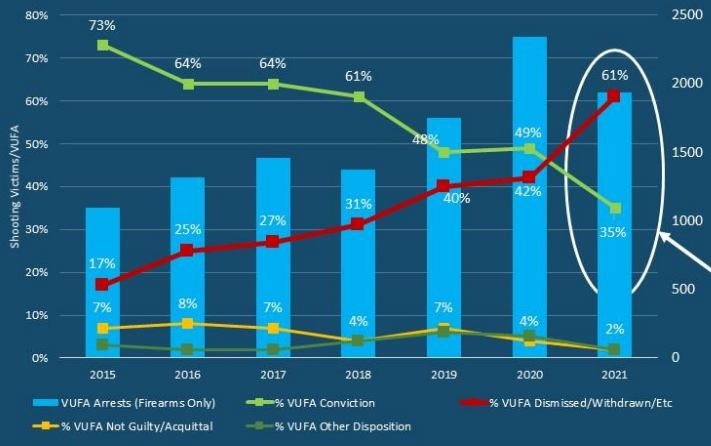
The Philadelphia Roadmap to Safer Communities

Homicides, Shooting Victims, and VUFA Arrests – 2007 to Present



- Since 2014, Homicides and Shooting Victims have continued to increase.
- As of the end of 2020, homicides and shooting victims were **up** 39% and 53% respectively when compared to 2019.
- YTD 2021, this trend is continuing, as homicides are **up** 16% and shooting victims are up 10%.
- Firearm possession arrests track alongside our homicides and shooting victims, leading us to believe guns on the street mean more victims.

What is the trend in proportion of VUFA arrests that result in a conviction?



- Note: Conviction Information comes from the District Attorney's Office Open Data Dashboard.
- While VUFA Arrest (Lead Charge) has been increasing, % VUFA convictions have been steadily **decreasing** from 73% in 2015 to 49% in 2020. Simultaneously, % VUFA cases withdrawn/dismissed steadily increasing from 17% in 2015 to 42% in 2020.

Note: The current 2021 figures indicate a continuance of this trend.

Sources: PPD Police GIS System for shooting incident, homicide, shooting victim and arrests.
DAO Open Data Lab Dashboard for VUFA case outcomes.

Outline

- Background
- Key Findings
- Detailed findings
  - Case disposition
  - Bail
  - Sentence
  - Recidivism
- Policy Implications

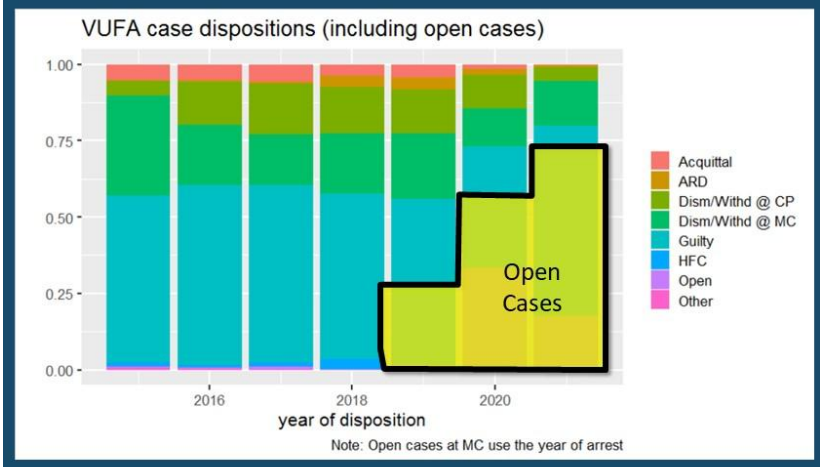
Backgrounds and Contexts

- Data provided by the DAO
  - Arrests with VUFA as the lead charge between 2015 and Aug 2021
    - 6105 Firearm prohibition (prior conviction)
    - 6106 Carrying firearms without licenses
    - 6108 Carrying firearms in the City of Philadelphia
  - Data included offender information, bail and case outcomes
- Analysis / Interpretation led by the PPD
  - Focus is on the depiction of trends
  - The pandemic certainly has created special circumstances; however, some trends/changes predate the pandemic
- All stakeholders including the DAO may not agree with the interpretations

Key Findings

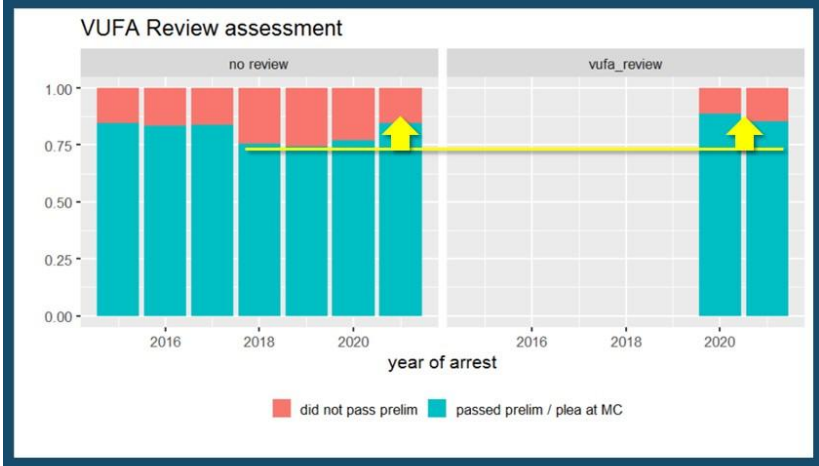
- Shootings, Homicides and VUFA arrests continue to go up
- VUFA cases dismissed/withdrawn went up, while guilty convictions went down
  - Special circumstances around the pandemic
  - Positive outlook with recent initiatives
- Bail amount went down between 2015 and 2019; it increased in 2020/2021
  - reduction in bail amount was more evident among those with prior gun arrests
- % posting bail went up
- Sentence became shorter for 6105 (firearm prohibition))
- Incarceration became less frequent for 6106 (without license) than earlier years
- Reoffending rate for another gun offense during VUFA open case was about 8% in 2015/16; it slightly went up to 11 % in 2019

Special circumstances during the pandemic



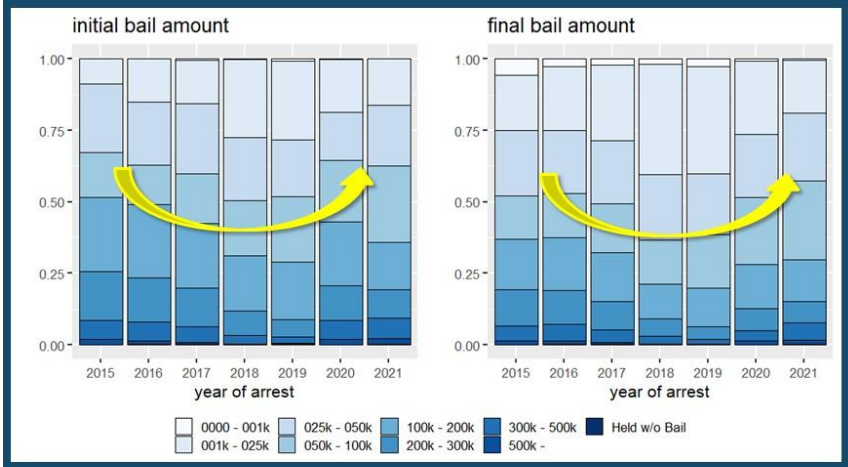
- The pandemic certainly created special circumstances in the way cases are processed
- Many cases continue to remain open (more than 3,000 cases), while those that are dismissed may represent "weak" cases
- A different picture may emerge for the case dismissal rate if we include open cases

Positive Outlook through PPD-DAO Collaboration



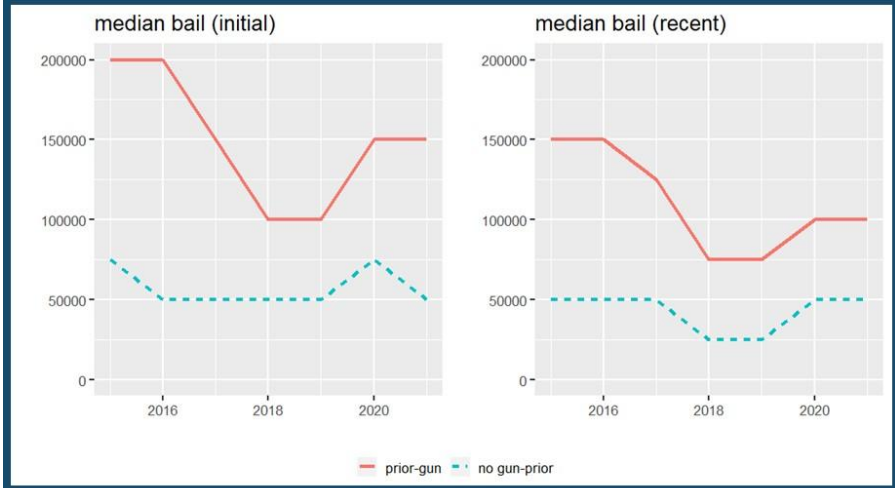
- Weekly review of gun cases with the DAO supervisors and PPD command staff
- Addressing investigative shortcomings
- Reviewed cases show an improved likelihood of passing preliminary hearings
- Even those cases that did not go through the review show a higher % of passing preliminary hearings than previous years ("diffusion of benefits") where issues identified through the reviews may be improving the overall investigative practice

Bail amount



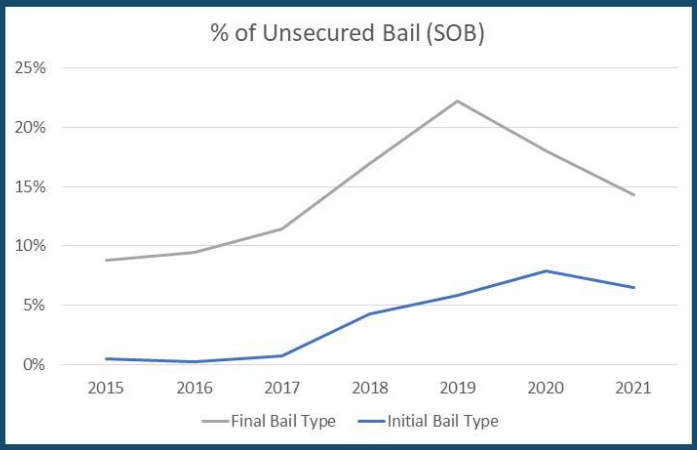
- The lighter color represents the share of a lower bail amount, and the darker color reflects a higher bail mount.
- Bail amount went down between 2015 and 2019; subsequently it went up in 2020 and later.

Bail amount



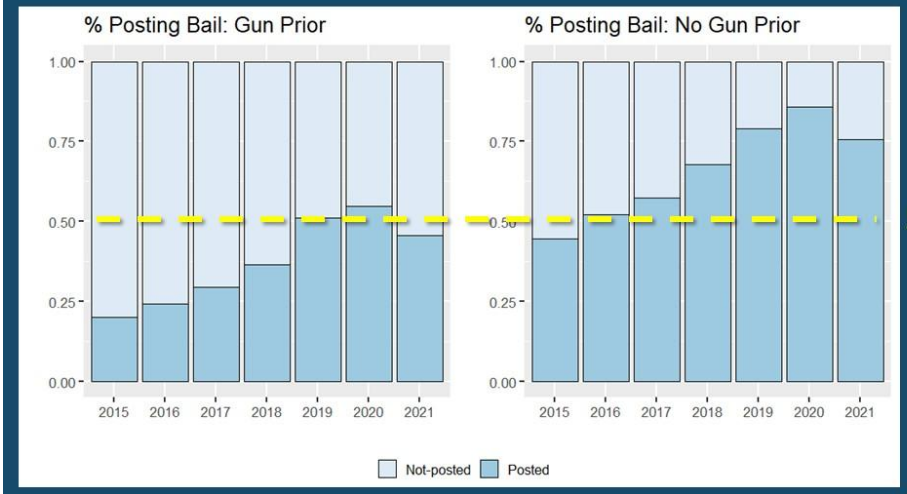
- The reduction in the median bail amount from 2015 to 2019 were more evident for those individuals with prior arrest(s) for gun offenses (including both VUFA and violent gun crimes).

Bail type



- The use of unsecured bail increased

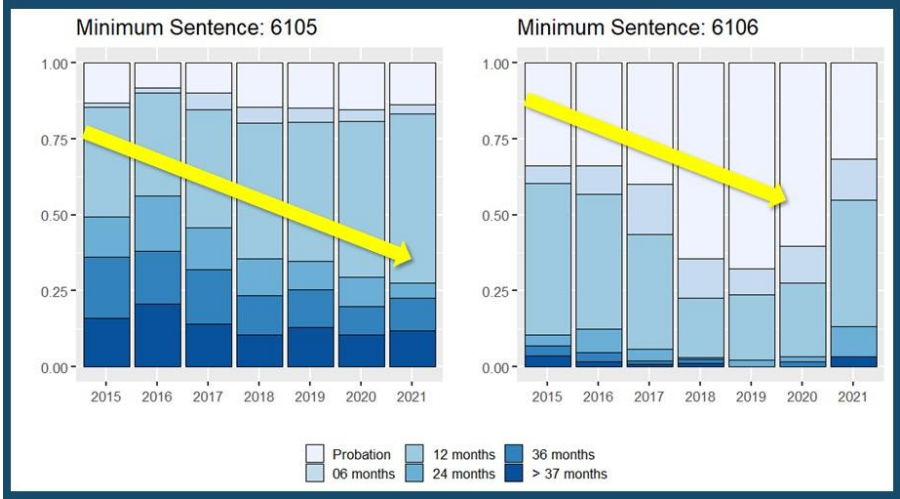
Bail posting



50%

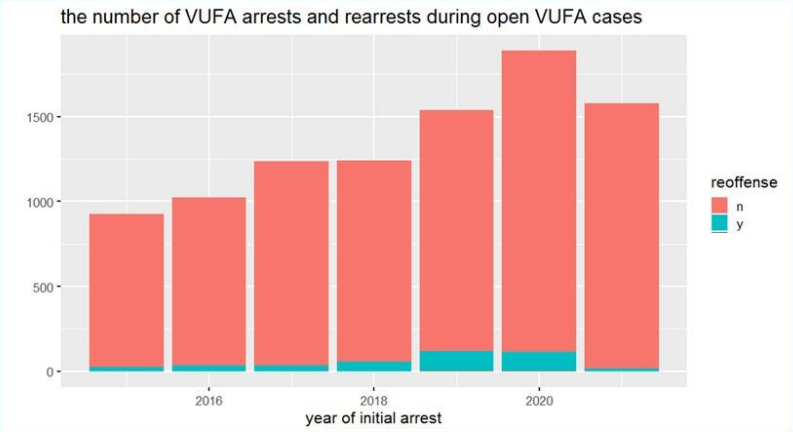
- The proportion of defendants who posted bail went up substantially over time.
- Increasing trend of bail posting was present for both those with and without gun priors

Sentencing



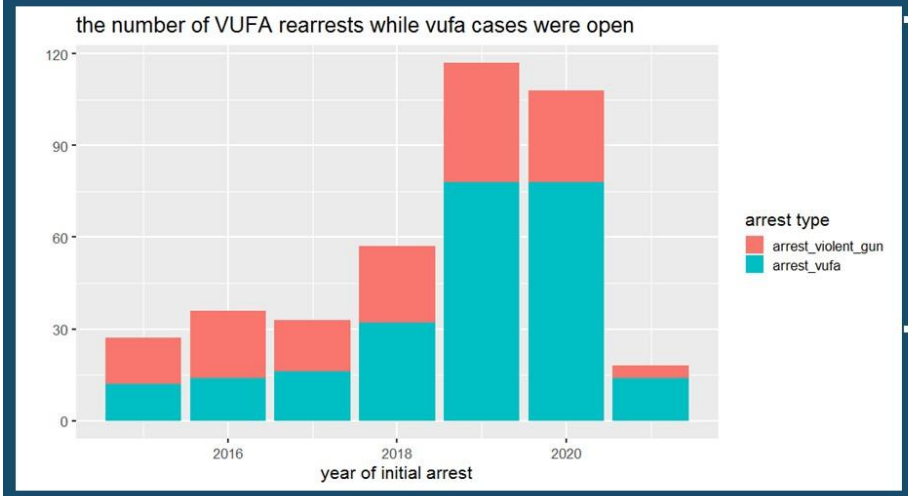
- The lighter color represents a shorter sentence
- Sentence became shorter for the 6105 cases (firearm prohibition); the rate of incarceration did not change
- For the 6106 cases (no license), the use of probation became more common

Recidivism for gun offenses during VUFA open cases



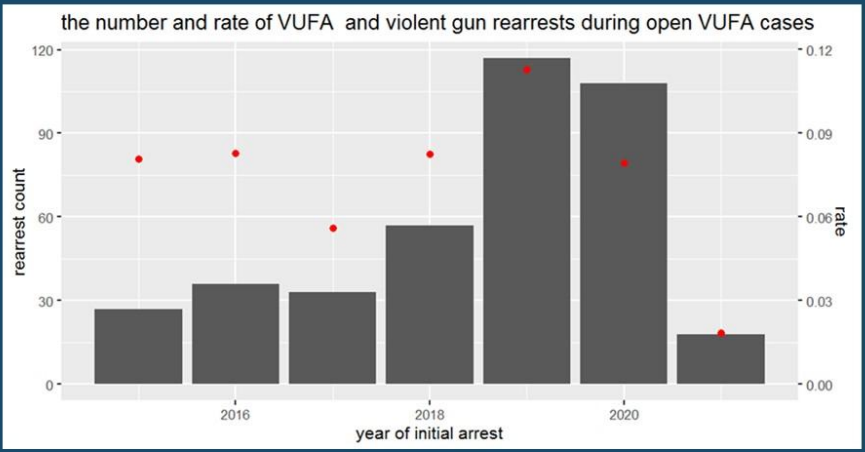
- Recidivism in this analysis was defined as re-arrest for gun crimes (including VUFA/violence) during a VUFA open case
- The number of reoffenders for another gun offense during VUFA open cases may be relatively small, compared to the overall number of cases

Recidivism for gun offenses during VUFA open cases



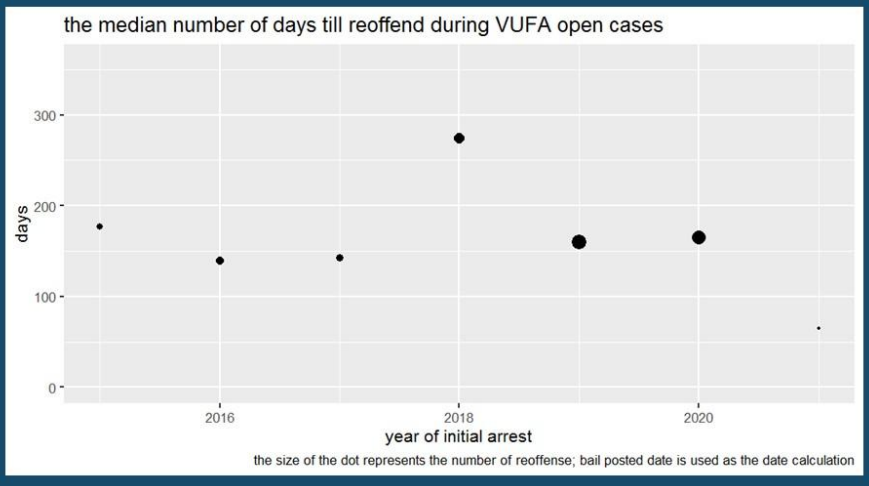
- Nonetheless, there was an increase in the # of reoffenders in 2019 and 2020
  - Less than 50 reoffenses in 2017 and earlier; the number went up to more than 100 in 2019/20
- Note that the low number for the 2021 cohort may simply be due to not having enough time to reoffend yet

Recidivism for gun offenses during VUFA open cases



- The rate of reoffending out of those who posted bail shows that the reoffending rate was about 8% in 2015/2016 and it slightly went up to 11% in 2019
- Thus, the increasing number of reoffending count shown earlier is not the simple reflection of the overall increase in VUFA arrests
- Earlier analysis showed that 2019 was when the median bail was the lowest and the use of unsecured bail was the highest

Recidivism for gun offenses during VUFA open cases



- The number of days till reoffending did not change
- The longer time for case processing (i.e., open cases during the pandemic) does not explain the increasing reoffending rate

Key Findings (recap)

- Shootings, Homicides and VUFA arrests continue to go up
- VUFA cases dismissed / withdrawn went up, while guilty convictions went down
  - Special circumstances around the pandemic
  - Positive outlook with recent initiatives (case review)
- Bail amount went down between 2015 and 2019; it increased in 2020/2021
  - reduction in bail amount was more evident among those with prior gun arrests
- % posting bail went up
- Sentence became shorter for 6105 (firearm prohibition)
- Incarceration became less frequent for 6106 (without license) than earlier years
- Reoffending rate for another gun offense during VUFA open case was about 8% in 2015/16; it slightly went up to 11 % in 2019

Appendix 6: PPD Discussion on Community Contacts with Police

Summary

Frequent contact and positive interactions with community members at the street-level inside of crime hotspots is a crucial component to any proactive policing strategy. These individual community interactions can come in a variety of forms, most of which are not effectively tracked by police organizations. Traditionally tracked proactive policing activity include investigative or "Terry" stops, warrant attempts, curfew violations, truancy, and quality of life offense enforcement. Meanwhile, the more informal, "community policing" interactions remain largely untracked, including voluntary encounters (mere encounters), business checks, environmental reporting (311 requests by police), home visits, victim supports, community meetings, and others.

While hotspot policing through traditional (enforcement-based) proactive policing activity has been well researched for its crime deterrent effect, little is known about these other more "positive" community policing activities. In the past, Philadelphia has focused most exclusively on the former category, which has in fact, dropped approximately 69% since 2015, resulting in over 40,000 fewer of these enforcement-based interactions per year.

Additionally, despite the reduction in overall investigative stops and Quality of Life enforcement in Philadelphia, the hit rate for weapon recoveries has increased substantially in 2020/2021, and a sizable portion of illegal gun recoveries are a direct result of investigative stops. Investigative stops as a policing tool, however, need to be used thoughtfully and tracked carefully to ensure fairness and constitutionality. Additionally, because Police have not actively tracked voluntary, positive community encounters historically, these activities had never been systematized or encouraged.

The PPD has a proposal for an increased focus on encouraging and tracking officers' positive interactions or "community policing" with community members, while simultaneously adding an accountability mechanism (with an associated budget request) that takes the existing accountability model on investigative stops to the next level. This revised model can address both racial disparity and legal basis (i.e., 4th and 14th Amendment issues) in a data-driven manner, while not sacrificing, but in fact enhancing public safety. This will be accomplished by expanding the 14th District pilot that has been tracking "mere encounters" to systematize their use as an alternative to investigative stops and quality of life enforcement. If collectively, all of these types of community contacts with

police can increase in the right place and time, it is hypothesized that sustainable, short-term gun violence reduction can be achieved[133].

Detailed discussion

While PPD proposes to expand more positive community encounters, investigative stops remain an integral and effective form of proactive policing. Several studies supported that, with the correct time, place and instruction, investigatory stops could lead to a significant reduction in violent crime (Koper, 1995; McGarrell et al., 2001; Koper, 2006, MacDonald et al., 2016). A review of multiple quality studies on proactive policing found the effectiveness of investigatory stops in high crime areas (The National Academies of Sciences Engineering Medicine, 2018). The result of this review found many studies to be in agreement as to how investigative stops should be successfully implemented. As a generalized citywide program, the efficacy of investigative stops was found to be of mixed result. However, in a combination with hotspots (proper place) and offender focus (proper instructions), investigative stops were found to be of benefit to crime reduction[134].

Internal studies conducted by the Philadelphia Police Department show that, on average, 29% of all illegal guns (roughly 1200 firearms) are seized as a direct result of an investigatory stop. This number has been as high as 36% in recent years. A great portion of stops with illegal guns (62%) were those of a vehicle stop. These confiscations are thousands of illegal firearms that would otherwise be utilized by a criminal element to victimize the community.

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[133] Due to lack of data, there has been little research on the crime reduction effectiveness of mere encounters and other positive community encounters. With academic partners, PPD intends to evaluate the expansion of the pilot program to discover if any crime reduction benefit can be measured.

[134] One such study found that localized foot patrols, many of which included a heavy element of police stops in combination with other forms of proactive policing, reduced violent crime by 23% (Ratcliffe, 2011). Subsequent studies showed more beneficial results when police were given specialized tasks and performed stops to accomplish said tasks. Offender focus, which involves identifying specific violent offenders and focusing extra police attention towards them, showed the greatest promise in a 2015 study with a 50 percent reduction in violent felonies. (Groff, 2015) Similarly, a program known as DDACTS (Data Driven Approaches to Crime and Traffic Safety), which entails enforcing specific traffic laws in areas with high crime and high traffic accidents using extremely visible car stops, reduced robberies by 70% and vehicle collisions by 24% (Bryant, 2014). These studies reinforce the idea that stops are highly effective not when conducted haphazardly, but when performed in the proper place and time for specific crimes and offenders.

As can be seen in the chart below, the number of investigative stops has gone down in Philadelphia, while the hit rate of recovering weapons has increased significantly in 2020 and 2021. Such a pattern is true for both pedestrian investigations (left) and vehicle investigation stops (right). Given that not all investigative stops are conducted for weapon violations and that not all of them involve frisking subjects for officer safety reasons, the hit rate for guns should be calculated as the number of investigative stops with gun recoveries divided by the number of investigative stops with frisks. It is notable that such a hit rate for weapons increased and exceeded 5% in 2021. While this may be the result of the PPD's intelligence-led, surgical policing efforts, it may also be the simple reflection of an increased number of illegal guns on the street. Perhaps, the reduction in investigative stops along with perceived leniency in the criminal justice system (e.g., lowered bail, increased use of unsecured bail, and lighter sentences) all increased bad actors' willingness to carry firearms illegally.

It may be worth clearing some misconceptions around investigative stops:

- The PPD has never had a stop and frisk policy
    - Investigative stops are conducted by officers, as legally allowed to do so, with an articulable reasonable suspicion
- The PPD has implemented a rigorous accountability process around investigative stops since 2011, where the Bailey agreement plaintiffs also review investigative stop data independently
    - Officers who fail to articulate and record their stops face the possibility of progressive disciplinary action

- Not all stops result in frisks
    - In fact, less than 10% of investigative stops involved frisks in 2021
- The vast majority of stops have legal basis that is articulated
    - The rate of investigative stops with proper legal justifications is currently over 90%, based on quarterly audits; in the past, the rate was lower, but the PPD has improved it via training and discipline when appropriate. It is notable that the PPD's audits for legal basis for the most part are in line with the Bailey plaintiff's independent assessment.

It is also important to highlight a new pilot program on this topic in the 14th District, where the department has been tracking "mere encounters" to systematize their use as an alternative to investigative stops and Quality of Life enforcement. By utilizing "mere encounters", the goal is not only to reduce formal criminal justice involvement for these types of crimes but also to increase positive interactions between community members and police. Furthermore, the pilot also includes a systematic review of body-worn camera footage during these community encounters. The program started in summer 2021, and its data are currently being analyzed to assess its impact.

There is a proposed accountability approach that will strengthen the existing process further through data analytics and rigorous statistical models to detect possible bias at both the individual and organizational levels. Data analytics will be supported by a dashboard of investigative stop patterns across numerous dimensions (districts, PSA, organizational units, time periods, legal basis, etc.). In addition to making the dashboard available for command staff and supervisors, the approach will accompany a data scientist and analyst to conduct a deeper analysis. Furthermore, the statistical model that the PPD will employ has been tested and implemented in various departments, including the Cincinnati PD. Such a comprehensive strategy can address both racial/ethnic disparities and the legality of investigative stops (i.e., both 4 and 14th Amendment issues) without risking public safety.

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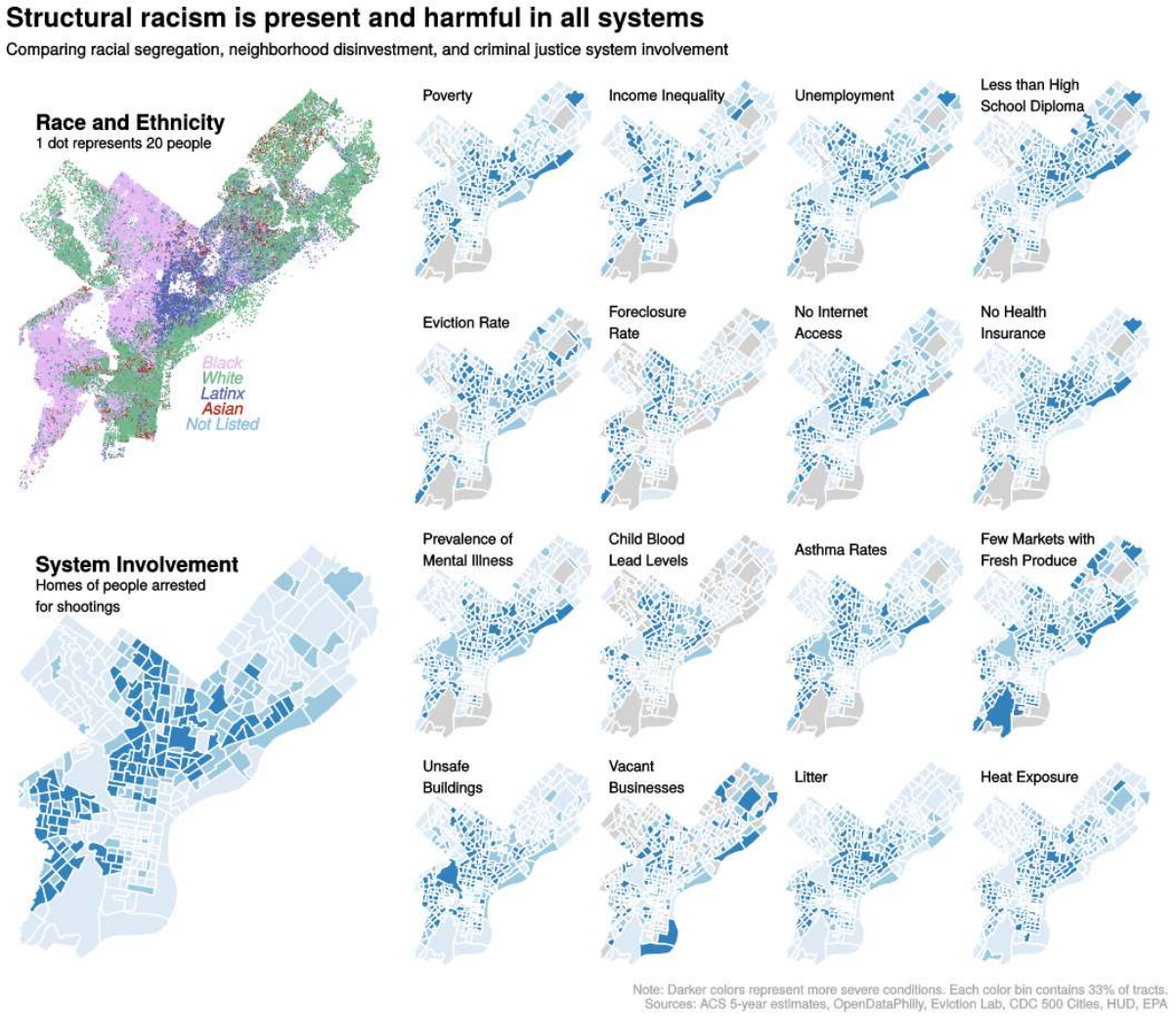
Appendix 7: DAO Supplemental Materials

DAO 1. Maps of Structural Racism in Philadelphia

As the maps below demonstrate, shootings are far more associated with systemic racism and the disinvestment and poverty that it has caused in Philadelphia than they are any particular criminal profile of a person. Each of the smaller maps towards the right illuminates the concentration of different measures of disinvestment and poverty in Philadelphia. This is compared to broad racial segregation in Philadelphia (top left) and the homes of people arrested for shootings (bottom left). What is striking about these maps is how similar they look: structural racism has caused disinvestment and poverty, which has, in turn, created the conditions in which shootings happen. Positive investment in the communities harmed by structural racism is the best long-term solution to ending gun violence.



DAO 2. Data Sharing and Data Limitations

Data Sharing

Much of the analyses contained herein were only possible due to data sharing among agencies. In particular, the PPD and courts have always been good data partners. The PPD and DAO have increasingly been sharing data and information to support research and analytics, both in the context of the "100 Shooter Review" that led to the creation of the Philadelphia Interagency Research and Public Safety Collaborative (PIRPSC), and more broadly.

In contrast to the PPD and courts, the Philadelphia Department of Prisons (PDP), Pennsylvania Department of Corrections (DOC), and Philadelphia Adult Probation and Parole Department (APPD) have not been as willing to share data. In particular, we have made numerous requests to both the PDP and DOC to receive daily rosters of all incarcerated individuals as well as historic information on the same topic. The PDP has outright denied us this data; the DOC has promised us data but has not given it to us. Because of this, we are unable to accurately account for who is incarcerated at any given time. Similarly, without regular access to APPD data, we do not have an easy data-driven way of knowing who is being supervised, their level of supervision, whether they violated their probation or parole, and whether and when they may have had a detainer issued to hold them in jail. We believe such data sharing could save lives, allowing the DATA Lab to do better analytical work and research while helping the DAO Intelligence Unit better monitor the incarceration status of those known to be involved in group violence who may be released to the community.[135] We hope to be able to incorporate such data soon.

Data Limitations

Analyses are always limited by the data upon which they are based. The analyses below are no different. In general, there are two types of problems that our data may have:

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[135] When the COVID-19 pandemic first started in March 2020, the PDP was an excellent partner in providing a daily spreadsheet of people in custody to the DAO, which helped the DAO, Defender Association, and First Judicial District to implement an emergency review process to consider who could potentially be released from jail. That data sharing was a critical part of the process to help release over 1,300 people over 6 weeks, and very likely saved lives given the high risk of COVID-19 spreading in the jails. (Moselle, A. (May 20, 2020). "Fewer people being released from Philly ails as pool of eligible cases shrinks." *WHYY PBS NPR*, https://whyy.org/articles/fewer-people-being-released-from-philly-jails-as-pool-of-eligible-cases-shrinks/)

- **Data accuracy.** Not all data is recorded accurately. On one end of the spectrum, typos or poor record keeping can create inaccurate records. An example of this would be a court clerk incorrectly recording the disposition of a case. On the other end of the spectrum, data collection practices can systematically create inaccurate data. An example of this is that the race of individuals in police and court data is determined by police and court personnel, not self-reported by the individual. This can be seen in our data in that the same individual is frequently reported to have one race by the police and a different race by the court. Other individuals rearrested by the police on multiple occasions have different races assigned to them.

- **Data completeness**. We know that data is rarely complete. For example, only about one in five shootings results in an arrest and not all of those cases result in a conviction. That means that as a city, we have data about fewer than 20% of individuals who have shot someone in Philadelphia since 2015. This sample is not only incomplete, but it is biased: there are likely certain characteristics that made it easier for the police to arrest these 20% of individuals, which means that any analysis of associated data will outweigh those characteristics. For example, the police may be better at solving shootings involving individuals with prior arrest histories, because the police already have a lot of information about this particular group. Any analysis of people arrested for shootings, then, will make it appear that most shooters have a prior arrest history. The 80% of people who have not been arrested, however, may have no arrest history or different system contacts, which could help explain why their shooting was not solved. Those who are arrested for shootings may have different characteristics and practices than those who are not, meaning the available data may do little to help identify people who are better able to avoid being arrested for their involvement in shootings.[136]

  Similarly, any data about the criminal justice system in general is incomplete and systematically biased. “Crime data” measures how the police choose to enforce the laws rather than who is actually violating the law (Kitsuse and Cirourel, 1963; 132).[137] This is not to say that crime data does not reflect crime that is occurring, rather that it systematically excludes some criminal behavior (e.g., drug use, possession, and

[136] Even if arrest rates were high, trying to predict who may shoot someone in the future based on government data about Philadelphians is ethically fraught and technologically difficult. Models that do forecast future behavior often reflect, reinforce, and exacerbate systemic bias because they are based on administrative data that tends to track poor people and communities of color. Robinson, D., & Koepke, L. (2016). Stuck in a pattern: Early evidence on ‘predictive policing’ and civil rights. Upturn. https://www.upturn.org/static/reports/2016/stuck-in-a-pattern/files/Upturn_-_Stuck_In_a_Pattern_v.1.01.pdf

[137] Kitsuse, J.I., & Cicourel, A.V. (1963). A note on the use of official statistics. *Social Problems, 11(*2), 131-9.

sales by students and faculty on college and university campuses, where there is little to no enforcement) (Gur, 2015)[138] and over-includes other behavior (e.g., drug possession by Black drivers, who the police systematically stop and search more frequently than other drivers) (Davis, Whyde, Langton, 2018).[139] This means that any use of past criminal history in an analysis will reflect the problems caused by lack of completeness. Similar to the problem of drawing conclusions about 100% of shooters from a biased sample of the 20% arrested, we need to be equally careful about our use of prior criminal history to draw conclusions about the population at large.

Finally, our data is limited. In general, we have data about the criminal legal system in Philadelphia. We lack other data that would be useful in any larger scale analysis: data about poverty, employment, schooling, past victimization and co-victimization, prior trauma, and physical and mental health are not accessible to the District Attorney's Office. Because of this, our analysis provides a small window into the lives of people already involved in the criminal legal system.

We are able to conduct valid data analysis using the data at our disposal, but need to be thoughtful and careful about the conclusions that we draw and the actions that we take based on that data. In particular, looking at a limited set of data about a limited number of shooting arrestees means that we cannot make a meaningful "profile" of shooters that could be used to identify future shooters. Such a profile, which would use biased data to further penalize people, would double down on past systematic bias. On the other hand, we could use the conclusions from that same data to uplift people and communities in need could help to heal past harms that have disproportionately impacted Philadelphians of color, which would in turn reduce shootings.

Several specific limitations also appear in our data:

- We are only able to identify shooting incidents from January 1, 2015, forward. The police make this data available on OpenDataPhilly; they do not identify incidents before then.
- We categorize an arrest as a "shooting" arrest and a case as a "shooting case" if:

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[138] Gur, O.M. (2015). Degrees of separation: Drug use by graduate and professional school students. *Dissertation*, University of Illinois at Chicago. https://indigo.uic.edu/articles/thesis/Degrees_of_Separation_Drug_Use_by_Graduate_and_Professional_School_Students/10784270

[139] Davis, E., & Whyde, A. (2018). Contacts between police and the public, 2015. US. Dept. of Justice Bureau of Justice Statistics. https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf

    - the arrestee/defendant was arrested in an incident with a DC Number that matches one of shooting incidents in the Philadelphia Police Department's OpenDataPhilly shooting victims dataset,
    - and that person was charged with—or in the case of arrests, that the police recommended that they be charged with—either a homicide, an aggravated assault, or a robbery.
- Any information relating to arrests only relates to arrests from 1/1/2008 forward. Any information relating to cases charged only relates to cases charged since 1/1/2010.
- All arrest and case information are for Philadelphia only, unless indicated otherwise.
- We are unable to accurately account for incarceration (either pre- or post-trial) because we do not receive regularly data updates from the PDP or DOC. Where relevant, we account for pre-trial incarceration by evaluating when a person may have posted bail; we account for post-trial incarceration by evaluating court sentences and making assumptions about when parole may start. Both methods are reasonable proxies, but are not always correct.

DAO 3. Arrest Rates in Shooting Cases

Arrest rates in shooting cases are low, particularly in non-fatal shootings. As the tables below show, since 2015, Philly's arrest rate for fatal shootings *peaked* in 2019 at 38%; the current arrest rate for 2021 fatal shootings is 26% as of December 6, 2021. The trend in non-fatal shootings is similar: the arrest rate peaked in 2017 at 22%; the current arrest rate for 2021 non-fatal shootings is just 14% as of December 6, 2021.

Annual Fatal Shooting Arrest Rate and Shooting Trends

	Fatal Shootings		Arrest Rate	
Year	# Shootings^^^	% Change from 2015 Shootings	Arrest Rate[1]	% Change from 2015
2015	**233**	-	**37%**	-
2016	249	7%	33%	-12%
2017	229	-2%	34%	-8%
2018	281	21%	30%	-20%
2019	285	22%	38%	1%
2020	414	78%	31%	-18%
2021	446	91%	26%	-29%

^^^Yellow cells indicate baseline values.
A shooting is considered cleared if at least one arrest occurred related to the shooting incident.
A shooting is considered to have an arrest if at least one arrest occurred related to the shooting incident. This table includes shootings from January 1, 2015 through September 07, 2021 but includes arrests through December 06, 2021.

Annual Non-Fatal Shooting Arrest Rate and Shooting Trends

	Non-Fatal Shootings		Arrest Rate	
Year	# Shootings^^^	% Change from 2015 Shootings	Arrest Rate[1]	% Change from 2015
2015	**1047**	-	**21%**	-
2016	1074	3%	20%	-1%
2017	1028	-2%	22%	5%
2018	1161	11%	19%	-8%
2019	1178	13%	21%	3%
2020	1831	75%	17%	-19%
2021	1693	62%	14%	-30%

^^^Yellow cells indicate baseline values.

A shooting is considered cleared if at least one arrest occurred related to the shooting incident.

A shooting is considered to have an arrest if at least one arrest occurred related to the shooting incident. This table includes shootings from January 1, 2015 through September 07, 2021 but includes arrests through December 06, 2021.

DAO 4. Review of 100 People Most Recently Arrested for Shootings and All Shooting Arrestees Since 2015

The first goal set out by City Council was to systematically review the criminal histories of the 100 most recently arrested shooters at that time (September 2020). We reviewed those arrestees as well as all shooting arrestees since 2015 and found that the groups were very similar. The table below summarizes "Basic Attributes of Shooting Arrestees," including demographic and criminal legal information. To avoid double counting, we have removed duplicate defendants, keeping only the most recent incident they were arrested for.

Basic Attributes of Shooting Arrestees

Arrests from 1/1/2015 - 12/04/2021

Attribute	Individuals
Total Arrestees	2,249 (100%)
Male	2,102 (93%)
Under 30	1,569 (70%)
Any Past Arrests	1,706 (76%)
3+ Past Arrests	1,146 (51%)
Prior Felony Charge	1,178 (52%)
Prior Felony Conviction	903 (40%)
3+ Prior Felony Convictions	307 (14%)
Pending Court Cases at Arrest	460 (20%)
Pending Misdemeanor Cases at Arrest	150 (7%)
Pending Felony Cases at Arrest	364 (16%)

Shootings include all Philadelphia shooting cases from January 1, 2015 through December 4, 2021 where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For an arrest or case to be considered a shooting arrest/case, the individual must have been charged with (or police suggested a charge of) homicide, assault, or robbery associated with a shooting incident. Prior case information includes all cases that were started or adjudicated since 2010.

The next table summarizes the Philadelphia-based criminal histories of individuals arrested for shootings. The charges below are among those most commonly charged in Philadelphia, so this table largely reflects charging patterns in Philadelphia more generally:

All Shooting Arrestees: Detailed Past Charging Info

Arrests from 1/1/2015 - 12/04/2021

Attribute	Individuals
Drug Sales	683 (30%)
Drug Possession	667 (30%)
Aggravated Assault	436 (19%)
Other Assaults	312 (14%)
Theft	241 (11%)
Auto Theft	227 (10%)
Robbery	227 (10%)
Uncategorized Offenses	225 (10%)
Firearm Possession without a License	221 (10%)
Robbery with a Deadly Weapon	192 (9%)

Shootings include all Philadelphia shooting cases from January 1, 2015 through present where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For an arrest or case to be considered a shooting arrest/case, the individual must have been charged with (or police suggested a charge of) homicide, assault, or robbery associated with a shooting incident. Prior case information includes all cases that were started or adjudicated since 2010.

We also identified the most recent charge the shooting arrestee had on their record, to understand whether there was a strong connection between an arrest for one event and then a later arrest for a shooting. Overall, we found that there is no single charge that is commonly the most recent charge among people arrested for shootings. We also found that the most recent criminal offense prior to the shooting arrest tends to have happened several years prior to the shooting, with important implications for incapacitation further investigated in the next section:

All Shooting Arrestees: Most Recent Charge Information

Arrests from 1/1/2015 - 12/04/2021

Charge	Individuals	Median Months Between Prior Charge and Shooting Arrest
Any Prior Charge	1,632 (73%)	22
Drug Sales	370 (16%)	16
Drug Possession	220 (10%)	25
Aggravated Assault	142 (6%)	30
Firearm Possession without a License	92 (4%)	16
Firearm Possession by a Prohibited Person	80 (4%)	29
Auto Theft	74 (3%)	14
Robbery with a Deadly Weapon	70 (3%)	33
DUI	66 (3%)	21
Other Assaults	64 (3%)	25
Theft	61 (3%)	25

Shootings include all Philadelphia shooting cases from January 1, 2015 through present where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For an arrest or case to be considered a shooting arrest/case, the individual must have been charged with (or police suggested a charge of) homicide, assault, or robbery associated with a shooting incident. Prior case information includes all cases that were started or adjudicated since 2010.

DAO 5. The (un)Predictive Nature of Prior Arrests and Demographics on Future Shootings

The District Attorney's Office does not believe that prior arrest patterns can be used to predict future shootings. If such predictions were possible, we could prevent future shootings by matching new arrestees to a profile, incapacitating those who are certain to commit a shooting by holding them in jail. The grave moral and constitutional danger of this path is that we would jail large numbers of people who would never engage in a shooting in an effort to stop a small number of people who may engage in a shooting. This is anathema to both our constitution and our values as an office. Based on the data we analyzed, focusing on prior arrest histories to predict who will commit future shootings is not a solution to gun violence.

The table below shows why it is not possible to create a "predictive" model which captures a reasonable proportion of future perpetrators of gun violence but that also does not unnecessarily incapacitate innocent people. The first two columns of table 4 shows a series of attributes that are common among people arrested for shootings and the proportion of shooting arrestees who had that attribute. For example, 37% (839) of shooting arrestees since 2015 were male, under 30, and had at least one past felony charge on their record. The idea in a predictive model is that one could apply that model to any new arrestees (for any offense) to hopefully predict which ones would later engage in a shooting and then intervene in their lives. In the criminal legal system, we tend to have one tool (especially when we are talking about serious crime): incarceration.

The third column shows what would happen if we had applied the "model" from the first column to arrestees in 2017: of 31,416 arrestees, we would have identified 5,078 who were male, under 30, and had at least one prior felony charge. If we used our model to assume that these people *might* engage in a shooting in the future, we would have to use the tools of the legal system to incarcerate them. By doing so, we *may* have prevented 138 shootings over the next 4 years (2018-21), but we would have also incarcerated 4,940 people who would likely never have engaged in a shooting. Stated another way, 97% of the people we incarcerated to prevent a shooting were incarcerated unnecessarily. This analysis also assumes that incarcerating 4,940 people unnecessarily would create more distrust of the legal system and potentially spawn more shootings because of our legal system's perceived lack of legitimacy.

We can create a model that identifies fewer people: male, under 30, at least one prior felony charge, at least three past arrests, a prior drug sales arrest, and a conviction in their most recent case (which is necessary for incarceration). This identifies only 1,383

people from 2017, 38 of whom would have later been arrested for a shooting. But the tradeoff is unfathomable: in order to incapacitate these 38 people, we still unnecessarily incarcerate 1,345 people. As well, this model only matches about one in five people arrested for a shooting (who are in turn about one in five people who perpetrate shootings). Unnecessarily incapacitating 1,345 young men in order to *attempt* to prevent 38 shootings over 4 years would cause immense harm to those individuals, their families, and communities.

Of 31,416 individuals charged in Philadelphia in 2017, since then, 31,101 (99.0%) have not been arrested in a shooting and 315 have (1.0%); those 315 arrests comprise 14% of all shooting arrests in Philadelphia since 2015. Identifying that 1.0% before they commit a shooting is challenging, and our chances might improve with a more focused approach.

A Comparison of Attributes of Shooting Arrestees to their Prevalence Among All Arrestees in 2017

Attribute(s)	Shooting Arrestees Since 2015	Individuals Charged in 2017	Number Later Arrested in a Shooting	Number Never Arrested in a Shooting
All	2,249 (100%)	31,416 (100%)	315 (1.0%)	31101 (99.0%)
Male	2,102 (93%)	25,040 (80%)	305 (1.2%)	24735 (98.8%)
Male, Under 30 at Arrest	1,482 (66%)	11,900 (38%)	260 (2.2%)	11640 (97.8%)
Male, Under 30 at Arrest, 1+ past felony charge	839 (37%)	5,078 (16%)	138 (2.7%)	4940 (97.3%)
Male, Under 30 at Arrest, 1+ past felony charge, 3+ past arrests	720 (32%)	3,948 (13%)	115 (2.9%)	3833 (97.1%)
Male, Under 30 at Arrest, 1+ past felony charge, 3+ past arrests, Prior Drug Sales Arrest	474 (21%)	2,591 (8%)	84 (3.2%)	2507 (96.8%)
Male, Under 30 at Arrest, 1+ past felony charge, 3+ past arrests, Prior Drug Sales Arrest, Convicted in 2017 Case	474 (21%)	1,383 (4%)	38 (2.7%)	1345 (97.3%)

Shootings include all Philadelphia shooting cases from January 1, 2015 through present where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For an arrest or case to be considered a shooting arrest/case, the individual must have been charged with (or police suggested a charge of) homicide, assault, or robbery associated with a shooting incident. Prior case information includes all cases that were started or adjudicated since 2010.

DAO 6. Analysis of Factors Influencing Fatal and Non-Fatal Shooting Clearance Rates

Methods

- Modeled binary outcomes (cleared/not cleared) for shooting incidents that occurred from January 2015 to February 2020 using logistic regression. Independent variables included:
    - Victim characteristics: race, sex, age, previous arrests
    - Motive (fatal shootings only): commercial robbery, domestic, drugs, highway robbery, residential robbery, retaliation, other, unknown
    - Characteristics of incident: occurring indoors/outdoors, day of week, time of day (and light/dark), month-year
    - Police characteristics (non-fatal shootings only):
        - Capacity: number of shootings in the previous 30 (and 3) days, detective capacity of unit, squad type (line detectives vs Special Investigations Unit)
        - Experience level: squad type (line detectives vs Special Investigations Unit), number of violent crime arrests detective had prior to incident, length of time employed by PPD
    - Non-fatal shootings and fatal shootings were modeled separately. This separation was due to differences in data availability and the fact that fatal shootings are investigated by the homicide unit while non-fatal shootings are investigated by detectives in each police division

Findings

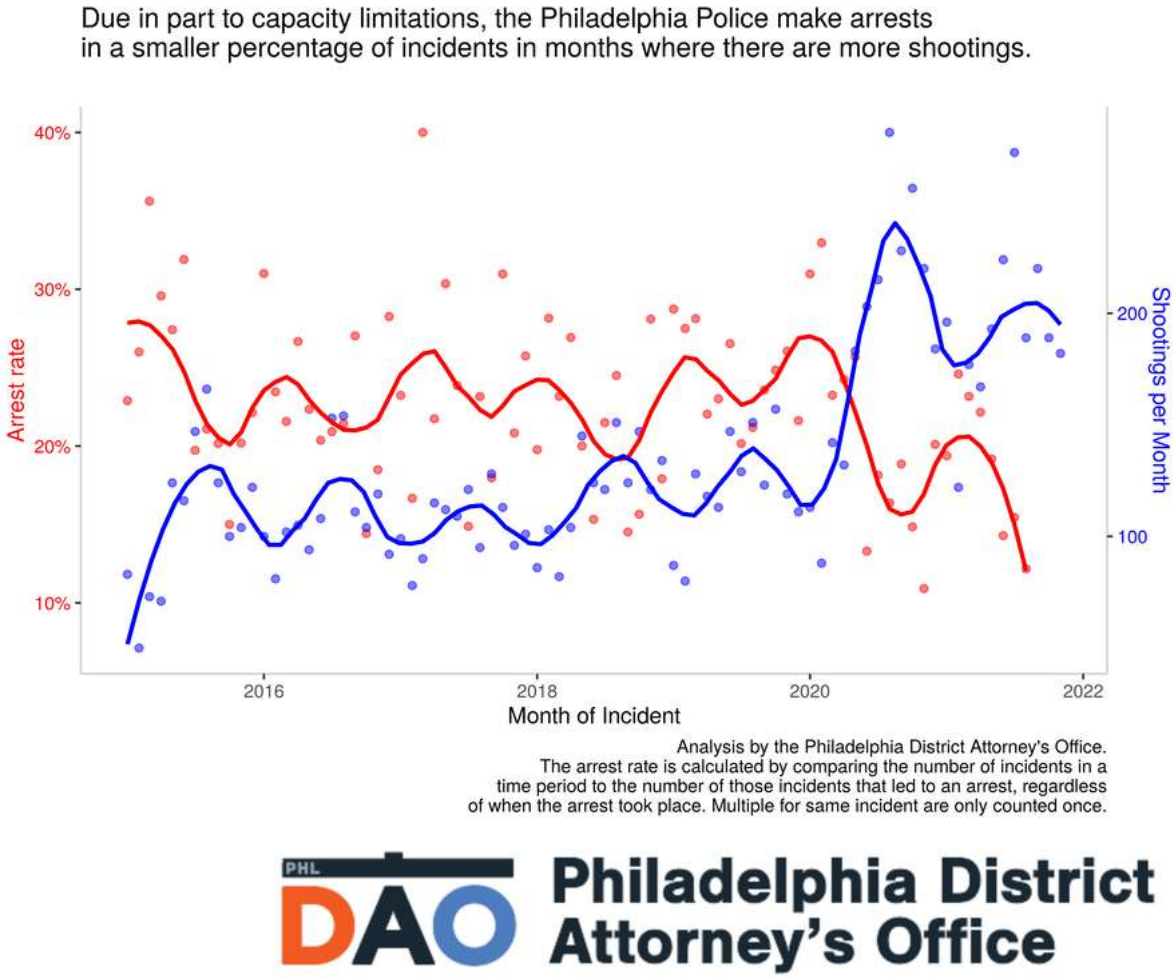
Below are statistically significant ($\alpha = 0.05$) factors that our models found relevant to shooting clearance rates. The variables are ordered from most influential to clearance to least influential to clearance: Neither the fatal shooting logistic regression nor the non-fatal shooting logistic regression predicted clearance particularly well. The McFadden pseudo-R^2 was 0.32 for the fatal shooting model and 0.14 for the non-fatal shooting model.

- Non-Fatal Shootings:
    - Indoor/outdoor shootings: Shootings that occurred indoors were more likely to be cleared
    - Police squad type: Shootings where the Special Investigations Unit (SIU) responded were more likely to be cleared than shootings where line detectives responded

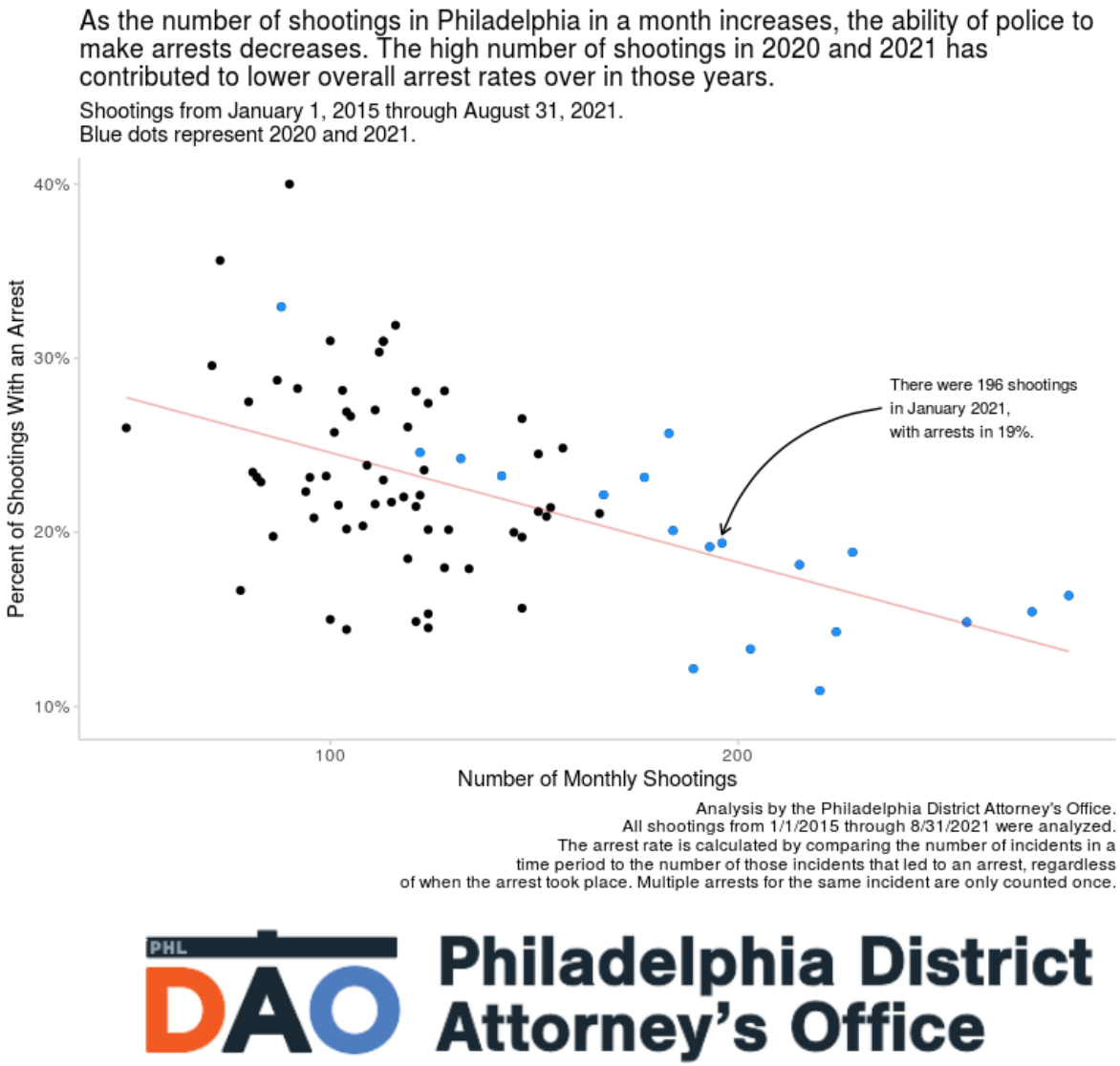
    - Victim sex: Shootings with female victims were more likely to be cleared than shootings with male victims.
    - Light/dark outside: Shootings that occurred when it was light outside were more likely to be cleared than shootings that occurred when it was dark outside (this is related to police squad type, as squad schedules are night/day dependent)
    - Day of week: Shootings that occurred on Mondays were more likely to be cleared than shootings that occurred on other days
    - Number of detectives: When units with more detectives investigated shootings, they were more likely to be cleared than shootings when units with fewer detectives investigated.
- Fatal Shootings:
    - Race: Shootings with white victims were more likely to be cleared than shootings with Black or Latinx victims.
    - Motive: Shootings with unknown motive were much less likely to be cleared than shootings with known motive. Shootings with drugs, retaliation, and "other" as suspected motives were less likely to be cleared, and shootings with "domestic" as the suspected motive were more likely to be cleared than shootings with "argument" as the motive.
    - Victim age: Shootings with child victims (13 or younger) were more likely to be cleared than shootings with older victims.
    - Light/dark outside: Shootings that occurred when it was light outside were more likely to be cleared than shootings that occurred when it was dark outside.
- Additionally, we used a subset of data (cleared cases only) to explore how the same factors might influence "time-to-arrest." The only statistically significant variable was "number of shootings in a police division during the past 30 days," which was negatively correlated with time-to-arrest.
- Most of the findings from our analysis are in line with trends seen in the literature, e.g.:
    - Clearing Up Homicide Clearance Rates: Wellford and Cronin, 2000
    - Why do gun murders have a higher clearance rate than gunshot assaults? Cook et al. 2019
    - An Analysis of Variables Affecting the Clearance of Homicides: A Multistate Study, 1999

DAO 7. Arrest Rates and Shootings Per Month

One trend that we noticed was that the arrest rate tends to increase as shootings decrease; as shootings increase, the arrest rate decreases. This suggests that the police have observable resource constraints that prevent them from solving more shootings as more shootings occur. The below graphic overlays the number of shootings per month since 2015 (blue) and the percent of those shootings that led to an arrest (red). A potential solution to this problem is for the police to focus resources on shooting cases rather than other, less important cases. There may also be other ways that the police can improve arrest rates, including better training and improved availability of modern forensic tools.

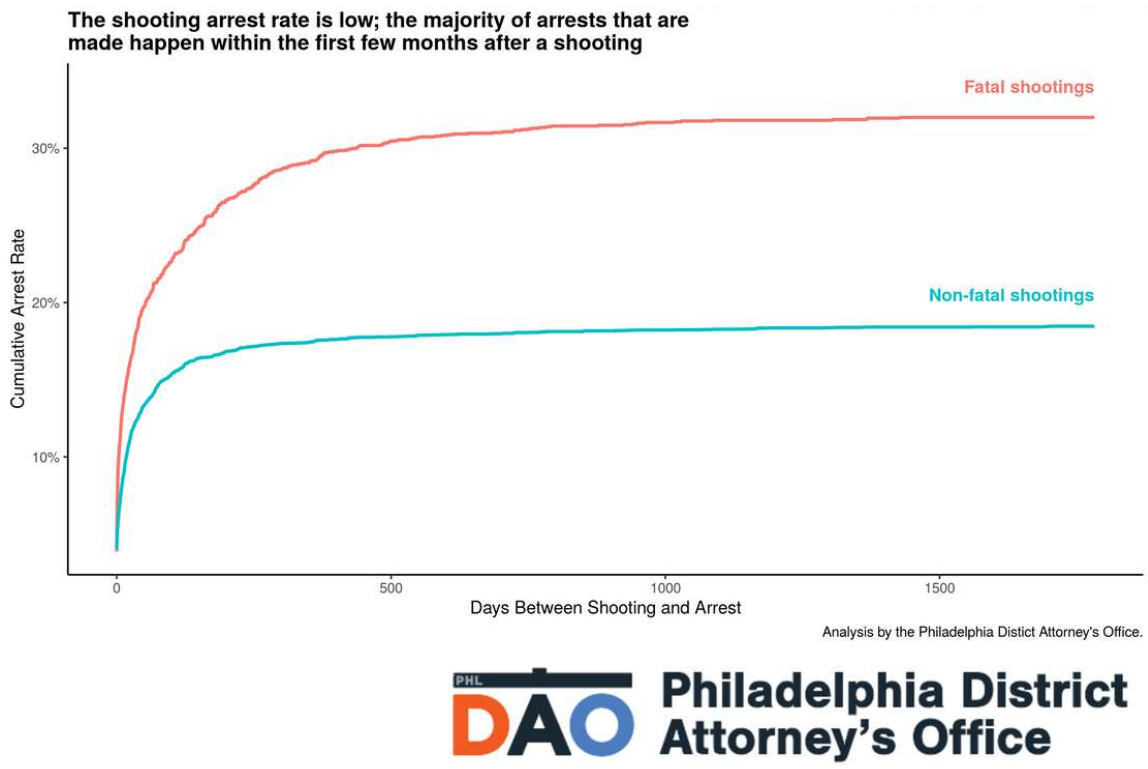


The next figure is similar to the previous graphic above, but instead of showing each month on a timeline, it compares arrest rates to the number of shootings in a month. Seeing the data in this way shows two things very clearly: 1. that the police's ability to make arrests in shootings is directly related to the number of shootings that occur in a month; and 2. Almost every month in 2020 and 2021 has had more shootings than any month between 2015 and 2019.

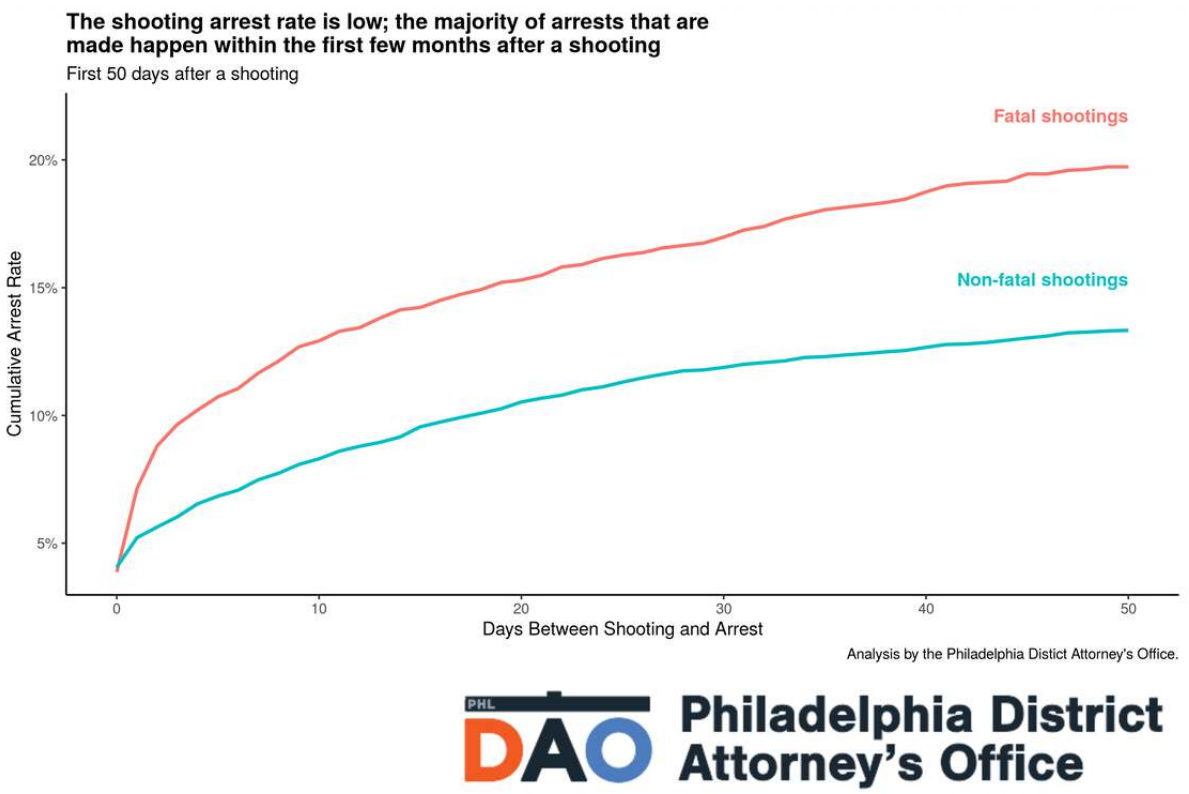


DAO 8. Time-to-Arrest in Cleared Fatal and Non-Fatal Shootings and Replication of Cook et al. (2019)

Looking at the time to make an arrest, we can see that more fatal shootings are solved quickly, as compared to non-fatal shootings, and that fatal shootings continue to be solved over a long period of time. In contrast, non-fatal shootings tend to be solved quickly or not at all, as illustrated in these supplemental materials. Of particular note is how quickly most fatal and non-fatal shootings are solved: within the first two months, most shooting arrests that will take place have already taken place. For non-fatal shootings, 75% of arrests occur within 61 days. After that time, few additional arrests are made in non-fatal shootings, while a small but noticeable percentage of fatal shootings continue to be solved for several years. Still, for fatal shootings, 75% of arrests occur within 125 days.

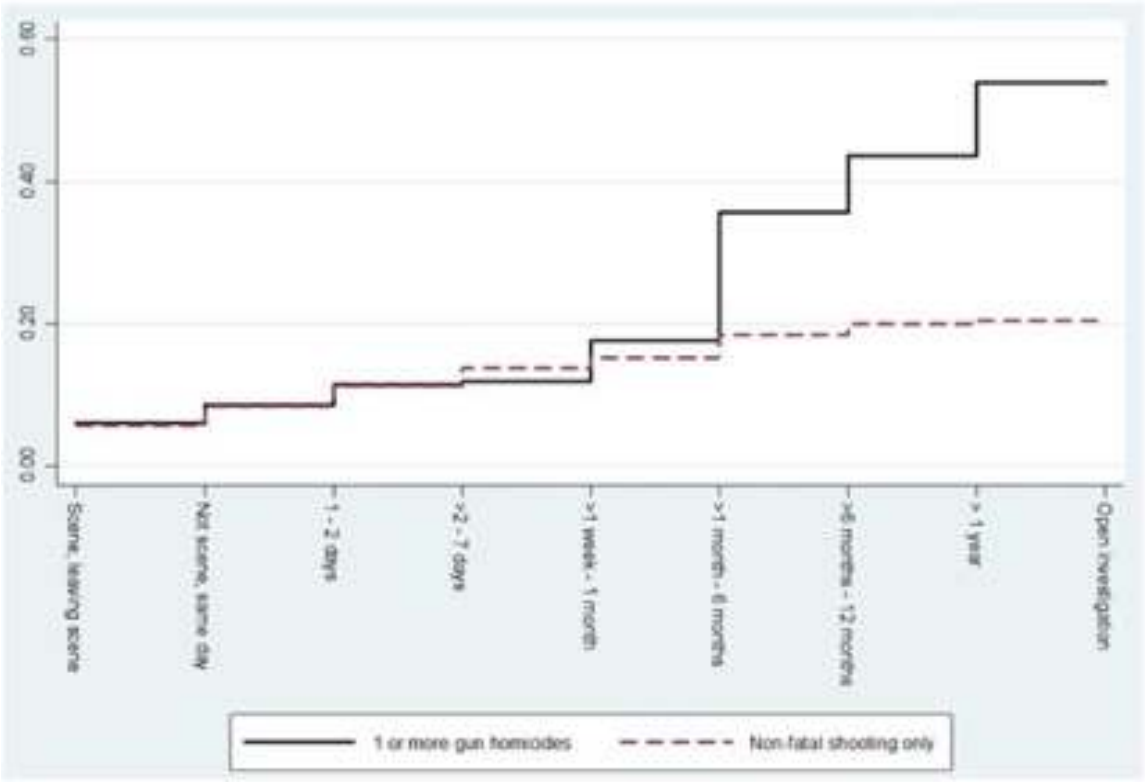


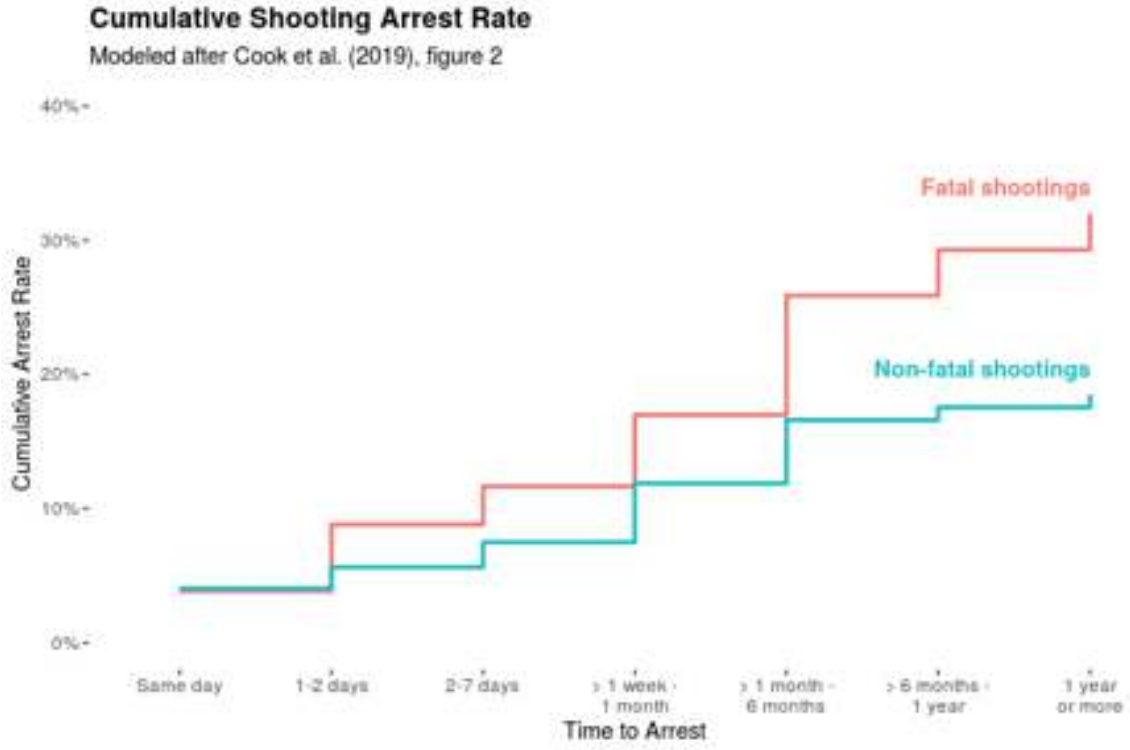
Zooming in on the first 50 days after a shooting, it is more apparent how quickly the arrest rate for non-fatal shootings level offs as compared to fatal shootings:



The next graphic is Figure 2 from Cook et al. (2019), which used data from Boston, which is followed by a graphic that uses Philadelphia data to replicate the methods used by Cook et al. (2019). Compared to Boston, the non-fatal shooting clearance rate in Philadelphia is lower than the fatal shooting clearance rate at each step.

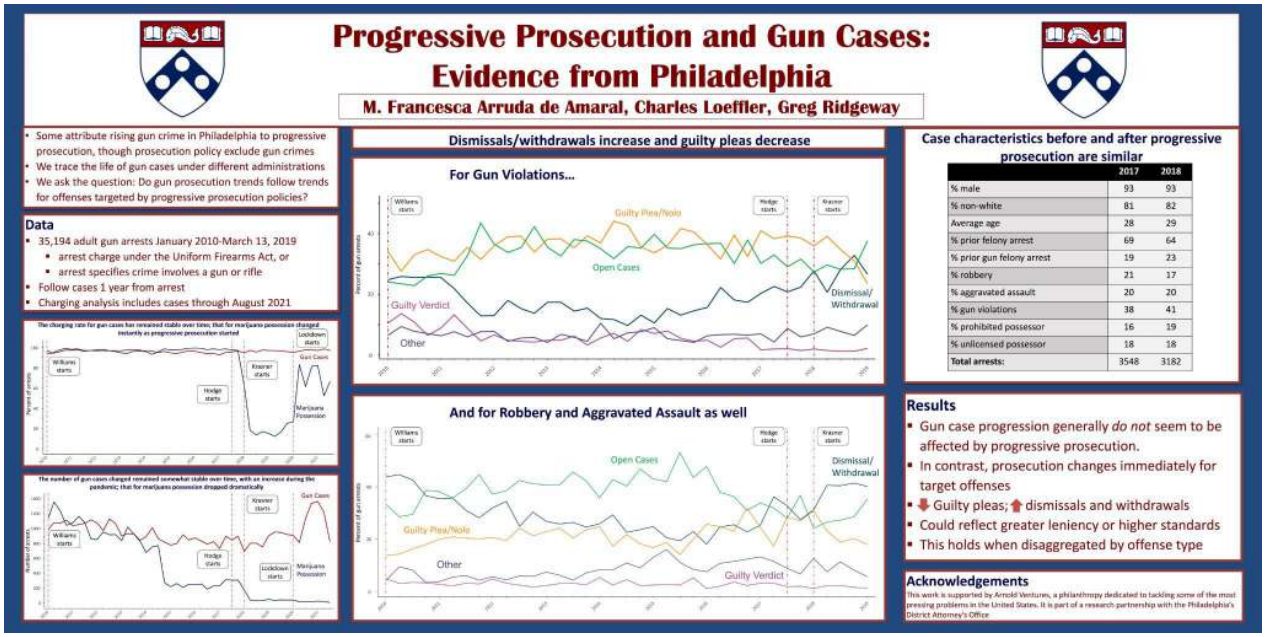
Figure 2 from Cook et al. (2019) (top) and replication using Philadelphia data (bottom).





DAO 9. Poster on Gun Cases by Amaral, Loeffler, Ridgeway (2021)

This poster was presented at the 2021 American Society of Criminology Conference.



DAO 10. DAO Analysis of 388 Dismissed or Withdrawn Illegal Gun Possession Cases

Methods

- This study attempts to understand the reasons gun cases were dismissed or withdrawn, by reviewing physical case files. ADA reviewers considered only cases that were dismissed or withdrawn in municipal court (MC), either before or at a preliminary hearing.
- **"Gun cases"** are cases with a lead charge of illegal possession (18 PaCS 6106, 6016, or 6108), robbery (3701) plus illegal possession, or aggravated assault (2702) plus illegal possession. This does not include homicide cases.
- Extracting data from physical case files added details that our administrative data lacks. This includes facts such as who observed the defendant with the gun and opinions such as why an experienced ADA believes the case to have been dismissed or withdrawn.
- Senior ADAs reviewed 388 case files using a form developed by the DATA Lab created in consultation with experienced ADAs. It consisted of multi-choice questions and also freeform questions that allowed the ADAs to describe all relevant details of the case.

Findings

- People not appearing in court, especially victims and witnesses, are the cause of approximately half of all gun possession cases dismissed or withdrawn in Municipal Court.
    - Failure to appear (FTA) is the most common reason for a case being dismissed or withdrawn, with 52% of all analyzed cases dismissed or withdrawn due to FTA.
    - The high frequency of FTA's among dismissals and withdrawals suggests that improving FTA rates has the greatest potential to impact the overall dismissal and withdrawal rate.
- People not appearing in court is not the only reason for the rise in proportion of cases that were dismissed or withdrawn from 2016-17 to 2018-19.
    - Although FTAs are important, the rate at which cases with FTAs and without FTA were dismissed or withdrawn increased by about the same amount from 2016-17 to Era 2018-19.

    - This means there is something else going on that is also driving the increase in dismissed and withdrawn cases.
- Findings indicate that higher rates of constructive possession cases can partially explain the increase in dismissals and withdrawals.
    - These are cases that rely on a witness to link the defendant to the gun rather than other forms of evidence like DNA or camera footage.
    - These types of cases are generally harder to hold for court than others.
    - In 2016-17, the defendant was not seen with a gun in 28% of dismissals and withdrawals. In 2018-19 that rate was 35%.
- The rise in constructive possession cases could be driven by an increase in PPD vehicle stops.
    - There has been a documented several year increase in PPD vehicle stops (see next section, Appendix 7: DAO 11).
    - Constructive possession cases are more common in cases where a gun is recovered from a vehicle, since it is difficult to argue possession when the gun is found in a spot in the vehicle that is neutral to the occupants.
    - In 2016-17, the gun was recovered from a vehicle in 55% of dismissals and withdrawals. In 2018-19 that rate was 67%.

DAO 11. Police Vehicle and Pedestrian Stops

Since 2014, the Philadelphia Police have kept and reported data on the number of stops that they have made, both of pedestrians and vehicles. Since they started reporting, the police have shifted from an equal number of stops of each type to heavy reliance on vehicle stops. In 2019, the last full year before the pandemic, the police recorded their most stops ever: almost half a million stops.

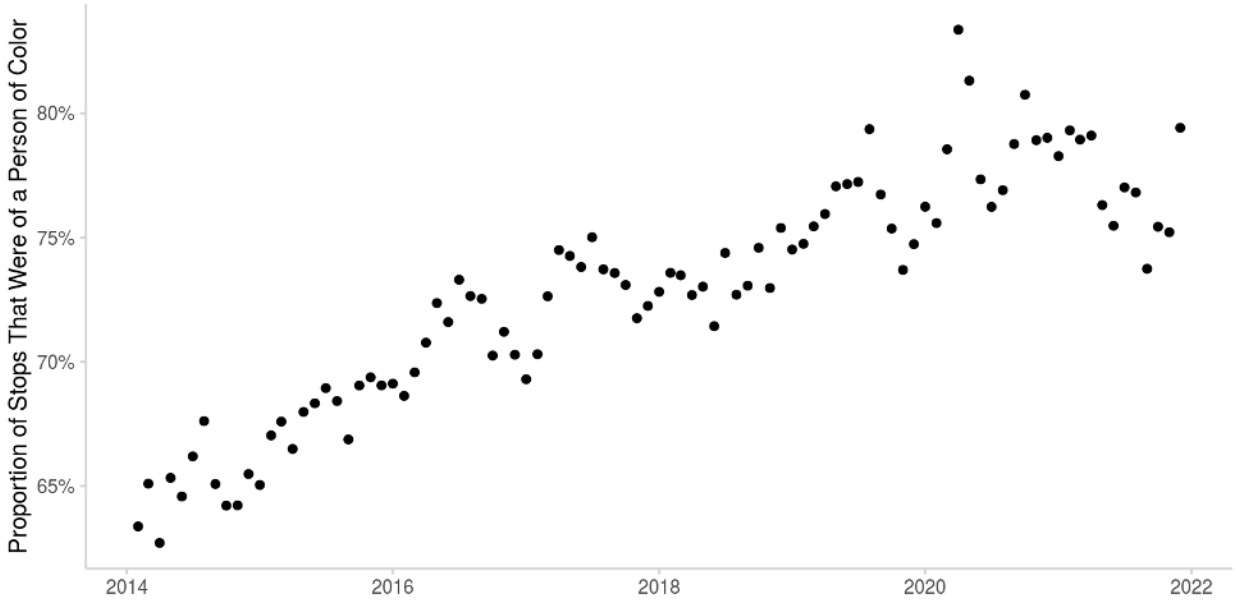
Annual Stops by the Philadelphia Police

Year	Pedestrian	Vehicle	Total Stops
2014	180,414	195,409	375,823
2015	203,421	251,823	455,244
2016	138,659	277,595	416,254
2017	102,826	293,895	396,721
2018	70,942	282,539	353,481
2019	77,368	394,756	472,124
2020	27,607	148,760	176,367
2021	12,521	121,440	133,961

Source: OpenDataPhilly. Data current as of December 21, 2021.

People of color have become a higher proportion of those stopped by the PPD. While the source of this trend is unclear, it is worth considering the implications of this increasing disparity.

The proportion of PPD vehicle stops where a person of color was driving has increased sharply over the past 8 years.



Source: DAO analysis of police stop data posted on OpenDataPhilly. Produced 12/21/2021.

PHL DAO Philadelphia District Attorney's Office

DAO 12. Conviction Rates and Open Shooting, Non-Fatal Shooting, and Illegal Gun Possession Cases During COVID-19

Conviction rates in fatal and non-fatal shooting cases have dropped in recent years. Although they were increasing at the end of 2019 and in early 2020, the COVID-19 pandemic has created factors that have distorted case outcomes. A similar trend can be seen in non-fatal shootings. In particular, the courts shut down completely and then reopened very slowly during the pandemic. During this time, hearings that required non-police witnesses were halted, as were jury trials. The outcome of this was two-fold: first, only cases that could be resolved quickly and without need for witnesses were resolved—this led to an unusually high number of dismissals as compared to convictions. Second, few cases have been resolved overall. Whereas at the end of 2018, there were 112 pending fatal shooting cases open in the courts, there were 460 open cases as of December 8, 2021.

Philadelphia Fatal Shooting Case Outcomes

By Year of Case Disposition

Disposition	2016	2017	2018	2019	2020	2021
Dismissed/Withdrawn/Etc At or Prior to Preliminary Hearing	1% (1)	1% (1)	1% (2)	4% (9)	0% (1)	3% (18)
Dismissed/Withdrawn/Etc After Preliminary Hearing	0% (0)	1% (1)	0% (1)	2% (6)	1% (2)	1% (4)
Not Guilty/Acquittal	0% (0)	0% (0)	5% (11)	2% (6)	2% (5)	1% (8)
Guilty/Guilty Plea	18% (25)	37% (72)	38% (77)	20% (52)	11% (36)	12% (67)
Open at end of Period	82% (116)	62% (122)	55% (112)	71% (182)	86% (271)	83% (460)

Shootings include all Philadelphia shooting cases from January 1, 2015 through present where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For a case to be considered, the defendant must have been charged with a homicide, assault, or robbery associated with the incident. The year column is the year of the disposition, not the year of shooting or arrest. There are fewer cases from 2016 because the data only includes shootings since 2015, of which only some were resolved in 2016.

Philadelphia Outcomes of Non-Fatal Shootings

By Year of Case Disposition

Disposition	2016	2017	2018	2019	2020	2021
Dismissed/Withdrawn/Etc at or Prior to Preliminary Hearing	5% (20)	6% (29)	9% (41)	9% (43)	3% (13)	8% (73)
Dismissed/Withdrawn/Etc After Preliminary Hearing	1% (4)	5% (22)	6% (27)	3% (15)	2% (8)	2% (20)
Not Guilty/Acquittal	2% (6)	2% (10)	3% (15)	8% (36)	1% (6)	1% (6)
Guilty/Guilty Plea	26% (98)	33% (155)	30% (137)	23% (109)	12% (51)	15% (129)
Open at end of Period	66% (248)	54% (251)	52% (239)	56% (261)	82% (357)	74% (650)

Shootings include all Philadelphia shooting cases from January 1, 2015 through present where there was an arrest and a case charged. Data on shooting cases can be found at OpenDataPhilly https://www.opendataphilly.org/dataset/shooting-victims. For a case to be considered, the defendant must have been charged with a homicide, assault, or robbery associated with the incident. The year column is the year of the disposition, not the year of shooting or arrest. There are fewer cases from 2016 because the data only includes shootings since 2015, of which only some were resolved in 2016.

A similar trend can be seen in illegal gun possession cases. In cases of gun possession by a prohibited person, in December 2021 there were 1,177 cases pending, whereas there were fewer than half that amount, 504, at the end of 2018. This reflects a more modest increase in the number of new 6106 cases that were started in that time period, relative to the more than quadrupling of pending 6106 cases from 2018 (466) to 2021 (2,284); in fact, the number of open 6106 cases doubled from 2020 to 2021. More than 2,000 people currently have open cases for possessing a firearm without a license.

Philadelphia Firearm Possession by a Prohibited Person (6105) Case Outcomes

By Year of Case Disposition

Disposition	2015	2016	2017	2018	2019	2020	2021
Dismissed/Withdrawn/Etc At or Prior to Preliminary Hearing	6% (55)	7% (70)	8% (82)	12% (147)	14% (171)	7% (78)	15% (283)
Dismissed/Withdrawn/Etc After Preliminary Hearing	7% (65)	7% (71)	10% (105)	9% (113)	10% (122)	7% (78)	9% (177)
Not Guilty/Acquittal	3% (24)	4% (37)	4% (41)	2% (30)	4% (46)	1% (12)	1% (18)
Guilty/Guilty Plea/Diversion	31% (291)	31% (296)	27% (291)	35% (428)	24% (305)	13% (136)	14% (266)
Exonerated/Won on Appeal	0% (1)	0% (2)	0% (2)	0% (2)	0% (1)	0% (3)	0% (3)
Open at end of Period	54% (508)	51% (493)	52% (566)	41% (504)	49% (615)	71% (752)	61% (1177)

The year column is the year of the disposition, not the year of arrest.

Philadelphia Firearm Possession Without a License (6106) Case Outcomes

By Year of Case Disposition

Disposition	2015	2016	2017	2018	2019	2020	2021
Dismissed/Withdrawn/Etc At or Prior to Preliminary Hearing	7% (73)	8% (85)	8% (97)	11% (133)	14% (176)	6% (74)	13% (395)
Dismissed/Withdrawn/Etc After Preliminary Hearing	8% (88)	10% (116)	8% (99)	11% (129)	12% (146)	6% (77)	5% (162)
Not Guilty/Acquittal	4% (45)	3% (35)	3% (32)	2% (24)	2% (25)	1% (9)	0% (14)
Guilty/Guilty Plea/Diversion	32% (361)	30% (335)	32% (381)	36% (421)	23% (289)	9% (123)	9% (270)
Exonerated/Won on Appeal	1% (6)	0% (5)	0% (1)	0% (1)	0% (4)	0% (2)	0% (2)
Open at end of Period	49% (546)	48% (540)	49% (581)	40% (466)	49% (627)	78% (1019)	73% (2284)

The year column is the year of the disposition, not the year of arrest.

DAO 13. Preliminary Hearing and Case Outcomes for Weekly VUFA/NFS Case Review

Weekly VUFA/NFS Case Reviews

from December 16, 2020 to December 1, 2021

MC Level Disposition	Total	Percent of MC Disposition
Held for Court	1302	81%
Transferred to Juvenile	10	1%
Guilty Plea/Nolo	4	0%
Not Guilty	1	0%
Dismissed/Withdrawn/Etc	298	18%
Total (past prelim)	**1615**	
Open Cases (awaiting Prelim)	751	
Total Reviewed	**2366**	

Outcomes of Cases Held for Court

Closure Type	Total	Percent of Closed Cases
Administrative Closure	1	0%
Dismissed/Withdrawn/Etc	74	30%
Guilty	9	4%
Guilty Plea/Nolo	164	66%
Not Guilty	2	1%
Total	250	100%

Status of Cases Held for Court

Case Status	Total	Percent of Cases in CP
Total Closed Cases	250	17%
Transferred to Juvenile	9	1%
Open Cases	1,214	82%
Total	1,473	100%

DAO 14. Examples of Recent Gun Violence Task Force (GVTF) Investigations

- In 2017, 9 people were arrested as a result of a Grand Jury Investigation into an on-going group conflict in South Philadelphia; 7 entered into guilty pleas on the lead charges, and 2 are awaiting trial for their role in a connected but separate homicide. All received $1,000,000 bail. Two of the arrestees had no prior record, one had a 2013 possession of marijuana arrest, another a misdemeanor theft, and four had juvenile system contact 3-4 years prior.
- Following a Grand Jury investigation in 2019, four individuals were arrested for nine shooting incidents in West/Southwest Philadelphia. The cases are currently open.
    - Defendant #1 prior record: 2012 Robbery (adjudicated delinquent), 2015 Theft
    - Defendant #2 prior record: No record
    - Defendant #3 prior record: 2016 Aggravated Assault (adjudicated delinquent)
    - Defendant #4 prior record: 2013 Robbery (adjudicated delinquent), 2016 Fleeing (adjudicated delinquent).
- A 2020 Grand Jury investigation into shootings in South Philadelphia led to the arrests of 15 individuals, including 11 for shootings and homicides, for 19 separate shootings, including 2 homicides. Of the 15 people arrested, all appeared either on social media or in music videos with the individuals arrested in the 2017 Grand Jury Investigation, and two were defendants in 2017 GJ cases. Two of the individuals arrested for shootings had no prior arrest records; some had been arrested as kids or adults for firearm possession up to 6 years prior.

DAO 15. Gun Possession Arrests and Re-arrests for a Future Shooting

Despite the intuitive connection between gun possession and shootings (people who shoot people have guns), there is not strong evidence to suggest that arresting and detaining people for illegal gun possession will reduce shootings. As the tables below show, it is exceedingly uncommon for a person arrested for gun possession to be arrested for a shooting within two years of their arrest or an ultimate conviction. It is equally rare for a person charged with illegal gun possession to be arrested for a shooting while out on bail awaiting trial. This is true whether the person was charged with Possession Without a License (6106) or Possession by a Prohibited Person (6106).

Frequency of Rearrest for a Shooting by Gun Possession by a Prohibited Person (6105) Arrestees

Cases charged from 1/1/2015-12/31/2021

	During the Pretrial Period	Within Two Years of Arrest	Within Two Years of Conviction
Total	701	1,778	895
Not Arrested for Future Shooting	694	1,768	886
Arrested for Future Shooting	7	10	9
% Rearrested for a Shooting	1%	0.6%	1%

The pretrial measure only counts people who were released from jail in the pretrial period. The disposition-based measures do not account for post-trial detention. Depending on the lead charge, post-trial detention will be more or less common. Incarceration is common for 18 PaCS 6105, but not for 18 PaCS 6106.

Frequency of Rearrest for a Shooting by Gun Possession Without a License (6106) Arrestees

Cases charged from 1/1/2015-12/31/2021

	During the Pretrial Period	Within Two Years of Arrest	Within Two Years of Conviction
Total	2,434	2,898	1,124
Not Arrested for Future Shooting	2,414	2,860	1,108
Arrested for Future Shooting	20	38	16
% Rearrested for a Shooting	0.8%	1.3%	1.4%

The pretrial measure only counts people who were released from jail in the pretrial period. The disposition-based measures do not account for post-trial detention. Depending on the lead charge, post-trial detention will be more or less common. Incarceration is common for 18 Pa.C.S. 6105, but not for 18 Pa.C.S. 6106.

A common argument made to support arrests for gun possession is to get guns off the street. Unfortunately, there are so many guns legally bought and sold in this country—in addition to guns that are purchased illegally or "ghost guns" which are bought in pieces and assembled—that several thousand gun possession arrests per year hardly impacts the volume of available guns (see Appendix 7: DAO 16).

DAO 16. Data on Gun Sales and "Crime Guns" Seized

Most of the data points presented below were generated using public data from data.philadao.com, OpenDataPhilly (via the Philadelphia Police Department), the Pennsylvania State Police (PSP), and the Office of the Pennsylvania Attorney General (OAG). These data were supplemented with local arrest and statewide court data, and analysis provided by Dr. David Johnson, Associate Professor of Economics, Central Missouri University.

- There were 12,948,979 guns legally sold or transferred in Pennsylvania over a 22-year period (1999-2020), an average of over 1,600 each day across the Commonwealth (Pennsylvania State Police, organized by Dr. David Johnson, personal correspondence).
- There were 165,717 guns seized by law enforcement statewide in Pennsylvania over a 21-year period (1999-2019), an average of fewer than 22 each day across the state (Attorney General's Office, n.d.). During this time period the Philadelphia Police Department reported seizing 97,905 "crime guns," an average of 12 each day (Attorney General's Office, n.d.)[140].
- While half the guns recovered in Philadelphia originated in Pennsylvania, more than a quarter originated outside of the Commonwealth (Attorney General's Office). Philadelphia is the primary county where guns legally sold in 13 Pennsylvania counties were recovered by law enforcement (Johnson, personal correspondence).
- Over the last 5 years (January 1, 2017-October 10, 2021), the Philadelphia Police Department conducted over 1,500,000 pedestrian and vehicle stops,[141] while recovering 21,178 "crime guns."[142]
    - Of the 1.5M stops, 19% were of pedestrians, 81% were of vehicles. Pedestrian stops had a hit rate of 4.6%, vehicle stops had a hit rate of 0.8%.
    - This equates to an average of over 700 vehicle stops, 166 pedestrian stops, and 12 guns recovered each day (Philadelphia Police Department PPT).

[140] Few agencies have been submitting data since 1999, and currently not all law enforcement agencies report gun seizure information (Attorney General's Office, n.d.).
[141] The Driving Equality Bill passed by Philadelphia City Council in October 2021 aims to reduce the use of pretextual car stops in Philadelphia; it will go into effect in early 2022 (https://phlcouncil.com/city-council-approves-councilmember-thomas-driving-equality-bills/).
[142] Not all crime guns are recovered from vehicle and pedestrian stops. For example, the Philadelphia Sheriff's Office removes guns from homes when a protection from abuse order is served.

- In spite of the 11,757 arrests for gun possession in Philadelphia over the last 8 years, people continue to carry guns. In spite of decades of such enforcement -- and an increase in arrests for gun possession starting in mid-2019, with massive increases during COVID -- evidence from Philadelphia and other large jurisdictions suggests that a higher proportion of arrests have been for offenses where weapons were recovered since the onset of COVID19 and protests for racial justice (Arthur and Asher, 2021; Ludwig, 2021).
- Despite the intuitive connection between gun possession and shootings (people who shoot people have guns), we do not find strong evidence to suggest that arresting and detaining people for illegal gun possession will reduce shootings (see Appendix 7: DAO 15). It is rare for a person charged with illegal gun possession to be arrested for a shooting while out on bail, awaiting trial; This is true whether the person was arrested for carrying a firearm while prohibited from doing so (1%) or carrying a firearm without a license (0.8%).
- There is not clear research suggesting that illegal firearm possession is a precursor to committing a future shooting; that is, many people carry guns and do not shoot other people. There is evidence people who carry guns in Philadelphia are more likely to be shot in an assault than those not in possession of guns (Branas et al., 2009).

The table below shows the number of guns legally sold and reported in Pennsylvania and the Philadelphia region (Philadelphia, Montgomery, Bucks, Chester, and Delaware counties) from 1999-2020. There were more guns sold in this period than there are residents of Pennsylvania.

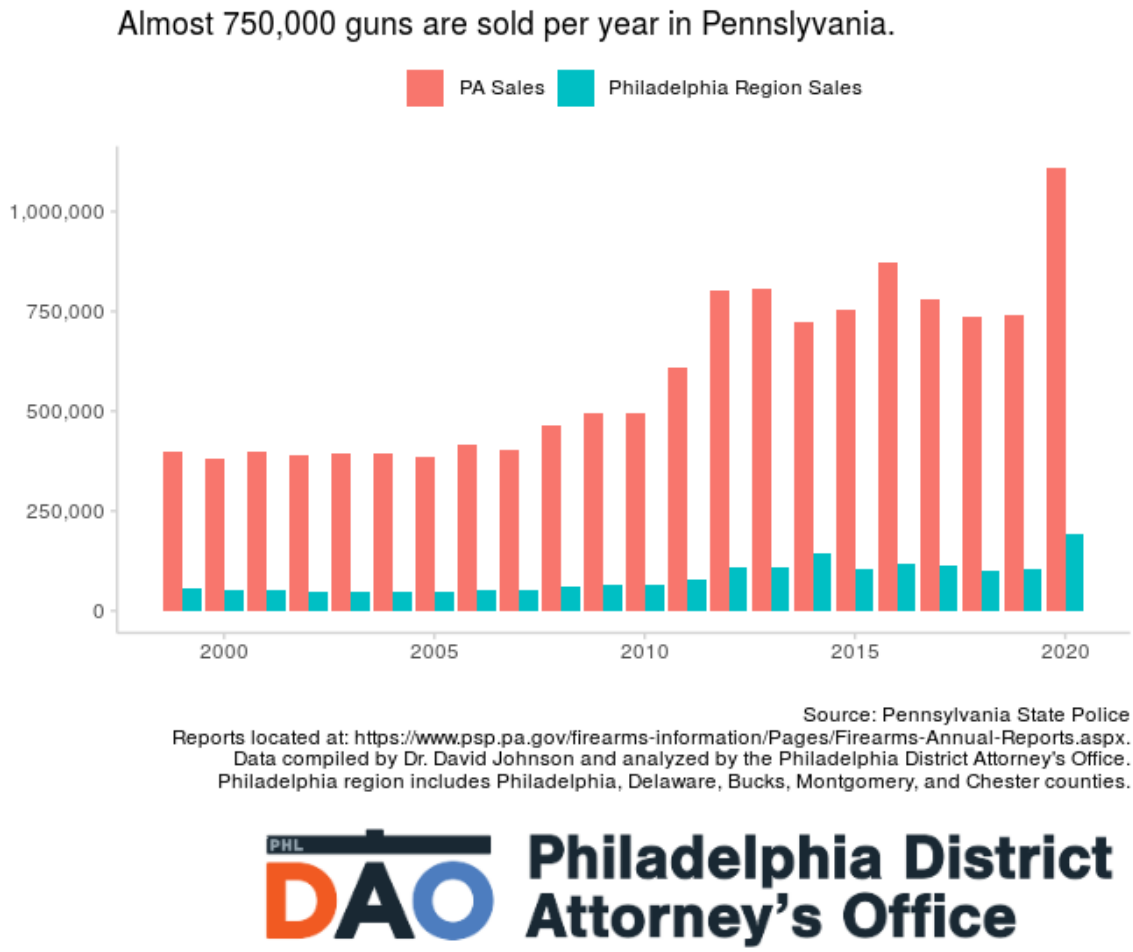
Total Guns Legally Sold in Pennsylvania, 1999-2020

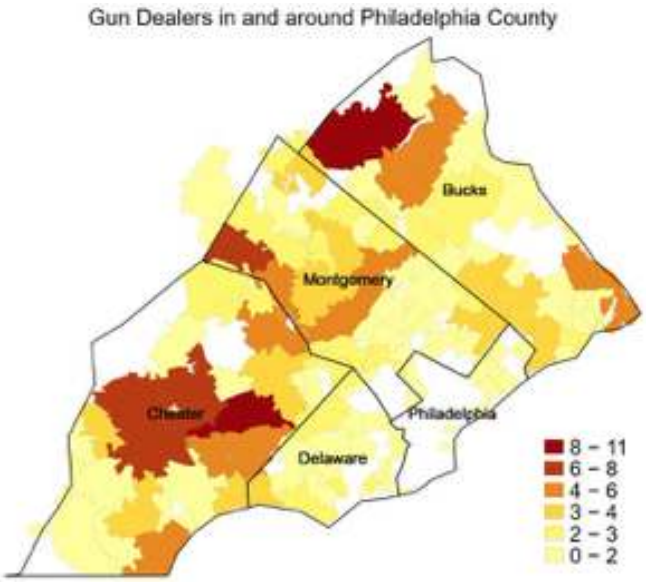
PA	Philadelphia Region
12,948,979	1,824,614 (14%)

Source: Pennsylvania State Police
Reports located at:
https://www.psp.pa.gov/firearms-information/Pages/Firearms-Annual-Reports.aspx
Data compiled by Dr. David Johnson, University of Central Missouri,
and analyzed by the Philadelphia District Attorney's Office.

The next figure shows that the rate of gun sales has been increasing rapidly, with more than 1 million guns sold in Pennsylvania in 2020. There were 12,948,979 guns legally

sold or transferred in Pennsylvania over this 22-year period (1999-2020), an average of over 1,600 each day across the Commonwealth.





The map by Dr. David Johnson, Associate Professor, University of Central Missouri, shows the number of gun dealers in and around Philadelphia county, by ZIP code. Since 2003, there have been between 11 and 23 Federally licensed gun sellers operating in Philadelphia County. However, 310 were open across Bucks, Chester, Delaware, and Montgomery counties in 2019 (see map), with more in New Jersey and other proximate counties and states.

However, in spite of the relatively few gun dealers in Philadelphia county, several of them have legally sold guns later recovered by law enforcement. A preliminary analysis by David Johnson, PhD, Associate Professor of Economics at the University of Central Missouri, found that, since 2003, law enforcement across the Commonwealth have recovered:

- Over 2,500 guns sold at Philadelphia Archery and Gun Club Inc. (831 Ellsworth St, Philadelphia, PA 19147), making it the seller with the second-most guns recovered by law enforcement since 2003.
- Over 1,500 guns sold at Lock's Philadelphia Gun Exchange (6700 Rowland Ave, Philadelphia, PA 19149) were later recovered by law enforcement, the 4th-highest total statewide since 2003.
- Over 1,000 guns sold at Mike and Kates Sport Shoppe (7492 Oxford Ave, Philadelphia, PA 19111) were later recovered by law enforcement, the 9th-highest total statewide.
- Colosimo's Gun Center (933 Spring Garden St #35, Philadelphia, PA 19123) – which closed in 2009[143]– still ranks 10th in the state in producing guns recovered by law enforcement since 2003.

143

https://www.inquirer.com/philly/news/breaking/20090930_At_a_notorious_gun_shop__the_end_of_an_era.html

There has been broad community support for targeting negligent gun-sellers, including efforts to close Colosimo's.[144] Identifying gun dealers whose guns are later recovered by police can help inform targeted enforcement strategies to reduce straw purchases. A preliminary analysis of national data indicates that as the percent of gun dealers that are inspected increases, the number of gun dealers decreases (David Johnson, personal correspondence), suggesting that increasing inspections of dealers in Philadelphia and surrounding counties might reduce straw sales and purchases and the flow of guns into Philadelphia.

In contrast to the 12,948,979 guns legally sold or transferred in Pennsylvania from 1999-2020, only 85,071 "crime guns" were recovered in Philadelphia during this time period. Only half of those clearly originated through legal transactions in Pennsylvania; the rest were brought into Pennsylvania from other states or were unable to be traced to a legal sale. It is impossible to arrest our way out of illegal gun possession in Philadelphia: the supply and availability of guns are just too great.

Reported Crime Guns Recovered in PA, 1999-2019

And the origin of the gun, by prior sale

	Total	PA Origin	Outside PA Origin	Origin Unknown
Philadelphia	85,071	43,202(51%)	23,819(28%)	18,050(21%)
PA	165,717	91,646(55%)	47,085(28%)	26,986(16%)

Source: Pennsylvania Attorney General's Office
https://www.attorneygeneral.gov/gunviolence/pennsylvania-gun-tracing-analytics-platform/
Note that not all counties report gun recoveries.

144 https://nvdatabase.swarthmore.edu/content/faith-based-philadelphians-campaign-close-gun-shop-2009

In Philadelphia, only 1 in 4 “crime guns” recovered by the police were clearly last legally sold in Philadelphia. Most guns were imported from another county or another state

Most crime guns recovered in Philadelphia were not purchased in Philadelphia.

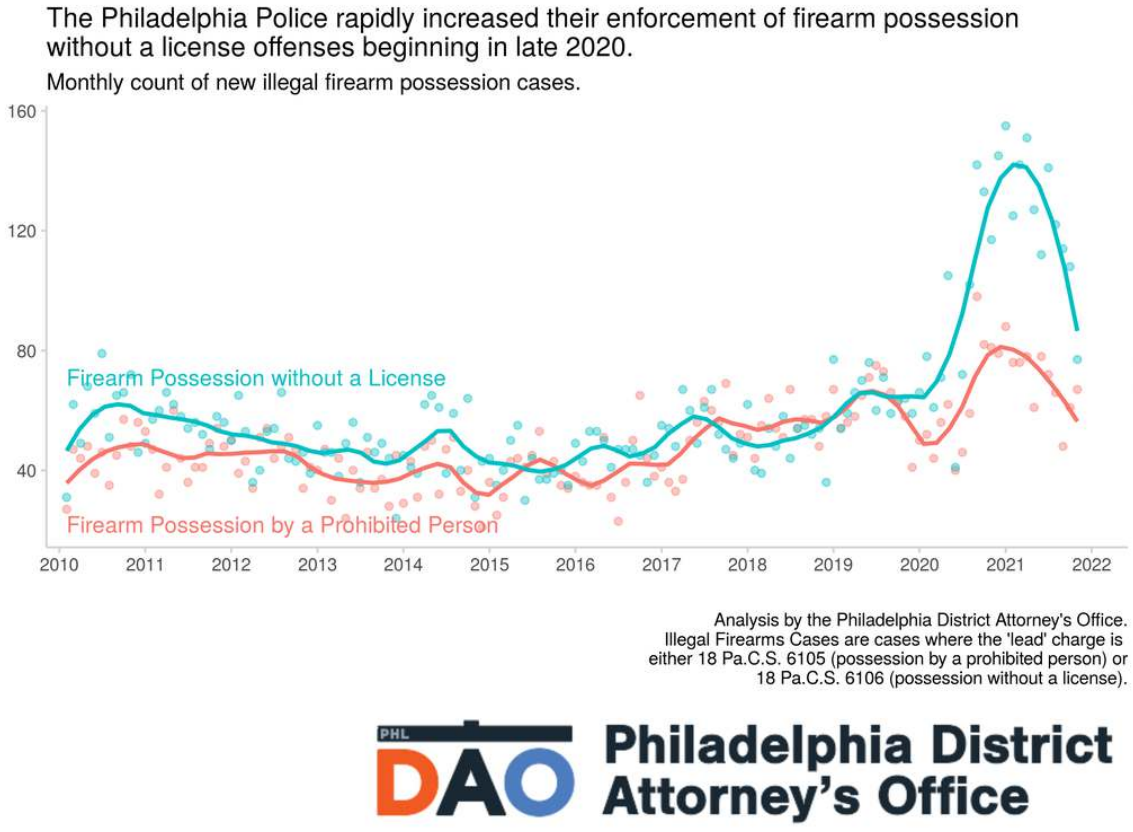
Guns Recovered 2015-2020

Purchase Location	Crime Guns Recovered in Philly
Philadelphia County	12,810 (25%)
Unknown Origin	11,809 (23%)
Delaware County	3,568 (7%)
Montgomery County	2,695 (5%)
Bucks County	2,181 (4%)
Massachusetts	2,002 (4%)
Florida	1,246 (2%)
Connecticut	1,221 (2%)
Virginia	1,143 (2%)
Georgia	996 (2%)
North Carolina	726 (1%)
South Carolina	719 (1%)
New York	614 (1%)
California	555 (1%)
All other locations	8,382 (17%)

Source: Pennsylvania Attorney General's Office
https://www.attorneygeneral.gov/gunviolence/pennsylvania-gun-tracing-analytics-platform/

DAO 17. Enforcement of Illegal Gun Possession

A primary police strategy to deal with gun violence has been to increase enforcement of gun possession laws. The number of "crime guns" seized is regularly reported. Although there has been an increase in arrests for gun possession for the past several years, enforcement of gun possession laws increased starting in mid-2019, with massive increases in 2020 and 2021. In particular, the police have increased enforcement of firearm possession without a license—an offense charged when a person is not legally prohibited from owning a firearm because of a past conviction, but the person does not have a license to carry a firearm.

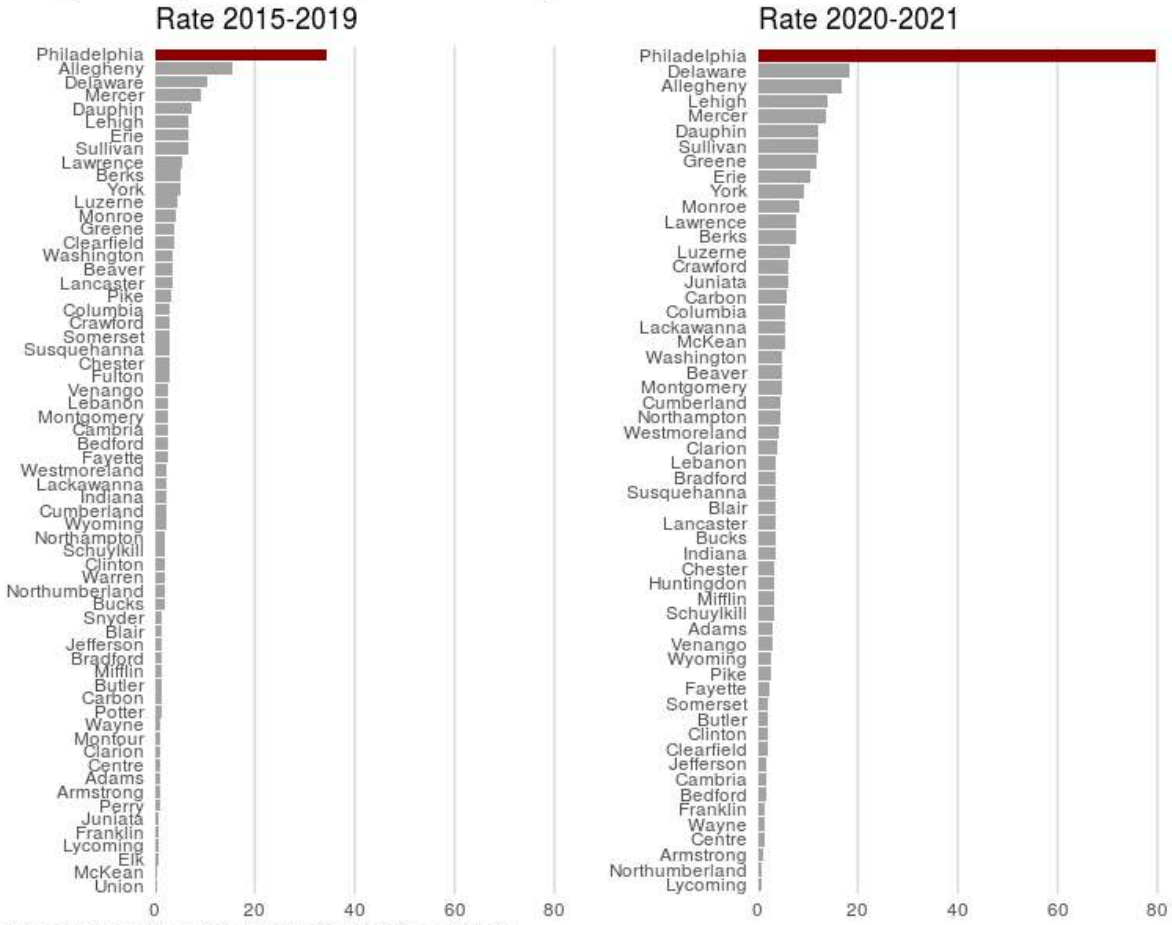


Enforcement of possession without a license is unique to Philadelphia as compared to the rest of the state, as is the massive increase in enforcement since the start of the pandemic. The chart on the next page shows the rate at which Firearm Possession Without a License cases have been brought in each county, annually, from 2015-2019 and then in 2020 and 2021, controlling for population size. Prior to the pandemic, Philadelphia already charged twice as many of these cases annually, per capita, than any other Pennsylvania county. During the pandemic, Philadelphia more than doubled its prior charging rate, and

now charges more than four times the number of Firearm Possession Without a License cases as other counties

From 2015-2019, Philadelphia charged cases of Gun Possession Without a License at a rate more than double any other county in Pennsylvania.

In 2020-2021, it more than doubled its previous rate charging cases at a pace far beyond any other Pennsylvania county.



Source: Philadelphia DAO analysis of statewide court data.
Gun Possession Without a License cases counted are those where the most serious charge brought against a person was 18 Pa.C.S. 6106 and no other felonies were charged at the same time.
Rate is the number of cases brought per 100,000 residents, per year, during the time period. Data through May 16, 2021.

PHL DAO Philadelphia District Attorney's Office

Enforcement of gun possession laws has not been equal across racial groups. Despite Philadelphia's population being only approximately 44% Black, almost 80% of arrestees for gun possession in Philadelphia were Black between 2007 and mid-2021.

Race Breakdown of Individuals Arrested for Gun Possession Offenses, Philadelphia

Cases charged between 01/01/2007 and 05/16/2021

Case Type	Black	White	Other Non-White
Possession by a Prohibited Person	80%	17%	3%
Possession Without a License	77%	16%	7%

Race is as reported by the courts based on police/court observation of each defendant. The courts only provide limited race information. They do not provide reliable Latinx information.

A similar disparity exists statewide. Despite a state population that is only 12% Black (including Philadelphia), 65% of those arrested for illegal firearm possession statewide were Black between 2007 and mid-2021.

Race Breakdown of Individuals Arrested for Gun Possession Offenses, PA (excluding Philadelphia)

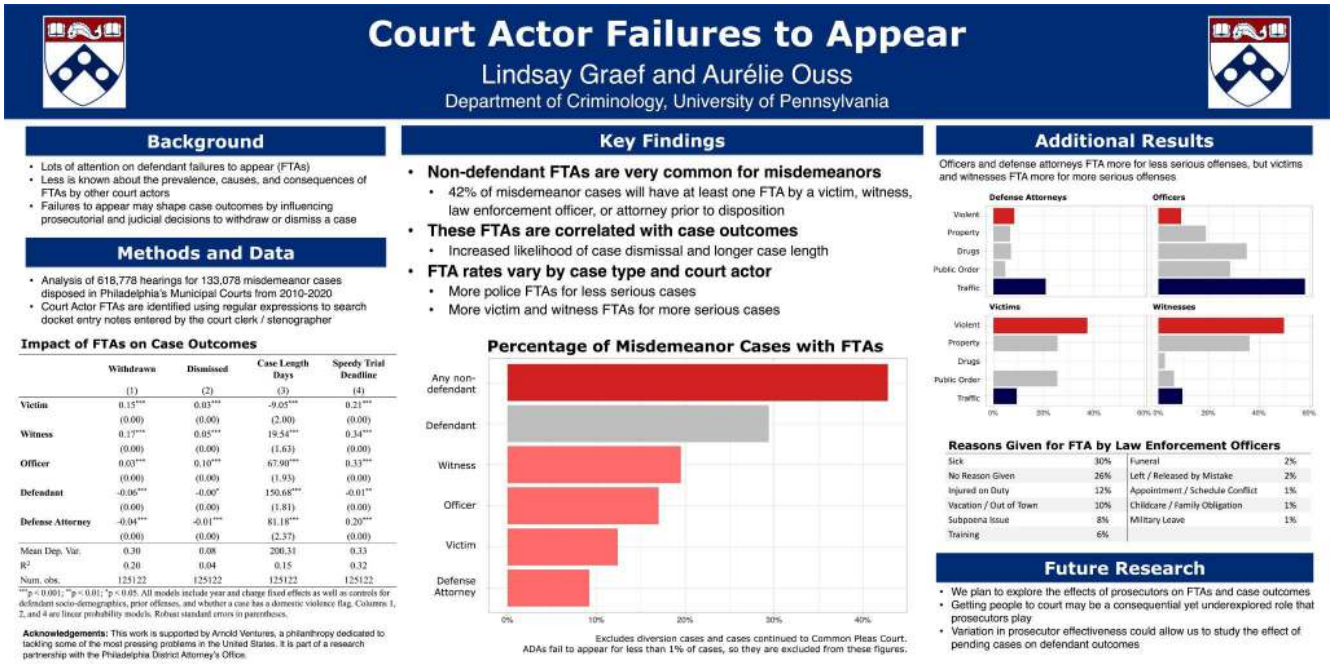
Cases charged between 01/01/2007 and 05/16/2021

Case Type	Black	White	Other Non-White
Possession by a Prohibited Person	65%	33%	2%
Possession Without a License	66%	31%	3%

Race is as reported by the courts based on police/court observation of each defendant. The courts only provide limited race information. They do not provide reliable Latinx information.

DAO 18. Poster on Court Actor Failures to Appear by Graef and Ouss (2021)

This poster was presented at the 2021 American Society of Criminology Conference.



Court Actor Failures to Appear

Lindsay Graef and Aurélie Ouss
Department of Criminology, University of Pennsylvania

Background

- Lots of attention on defendant failures to appear (FTAs)
- Less is known about the prevalence, causes, and consequences of FTAs by other court actors
- Failures to appear may shape case outcomes by influencing prosecutorial and judicial decisions to withdraw or dismiss a case

Methods and Data

- Analysis of 618,778 hearings for 133,078 misdemeanor cases disposed in Philadelphia's Municipal Courts from 2010-2020
- Court Actor FTAs are identified using regular expressions to search docket entry notes entered by the court clerk / stenographer

Impact of FTAs on Case Outcomes

	Withdrawn	Dismissed	Case Length Days	Speedy Trial Deadline
	(1)	(2)	(3)	(4)
Victim	0.15***	0.03***	-9.05***	0.21***
	(0.00)	(0.00)	(2.00)	(0.00)
Witness	0.17***	0.05***	19.54***	0.34***
	(0.00)	(0.00)	(1.63)	(0.00)
Officer	0.03***	0.10***	67.90***	0.33***
	(0.00)	(0.00)	(1.93)	(0.00)
Defendant	-0.06***	-0.00*	150.68***	-0.01**
	(0.00)	(0.00)	(1.81)	(0.00)
Defense Attorney	-0.04***	-0.01***	81.18***	0.20***
	(0.00)	(0.00)	(2.37)	(0.00)
Mean Dep. Var.	0.30	0.08	200.31	0.33
R^2	0.20	0.04	0.15	0.32
Num. obs.	125122	125122	125122	125122

***p < 0.001; **p < 0.01; *p < 0.05. All models include year and charge fixed effects as well as controls for defendant socio-demographics, prior offenses, and whether a case has a domestic violence flag. Columns 1, 2, and 4 are linear probability models. Robust standard errors in parentheses.

Acknowledgements: This work is supported by Arnold Ventures, a philanthropy dedicated to tackling some of the most pressing problems in the United States. It is part of a research partnership with the Philadelphia District Attorney's Office.

Key Findings

- **Non-defendant FTAs are very common for misdemeanors**
  - 42% of misdemeanor cases will have at least one FTA by a victim, witness, law enforcement officer, or attorney prior to disposition
- **These FTAs are correlated with case outcomes**
  - Increased likelihood of case dismissal and longer case length
- **FTA rates vary by case type and court actor**
  - More police FTAs for less serious cases
  - More victim and witness FTAs for more serious cases

Percentage of Misdemeanor Cases with FTAs

Excludes diversion cases and cases continued to Common Pleas Court.
ADAs fail to appear for less than 1% of cases, so they are excluded from these figures.

Additional Results

Officers and defense attorneys FTA more for less serious offenses, but victims and witnesses FTA more for more serious offenses

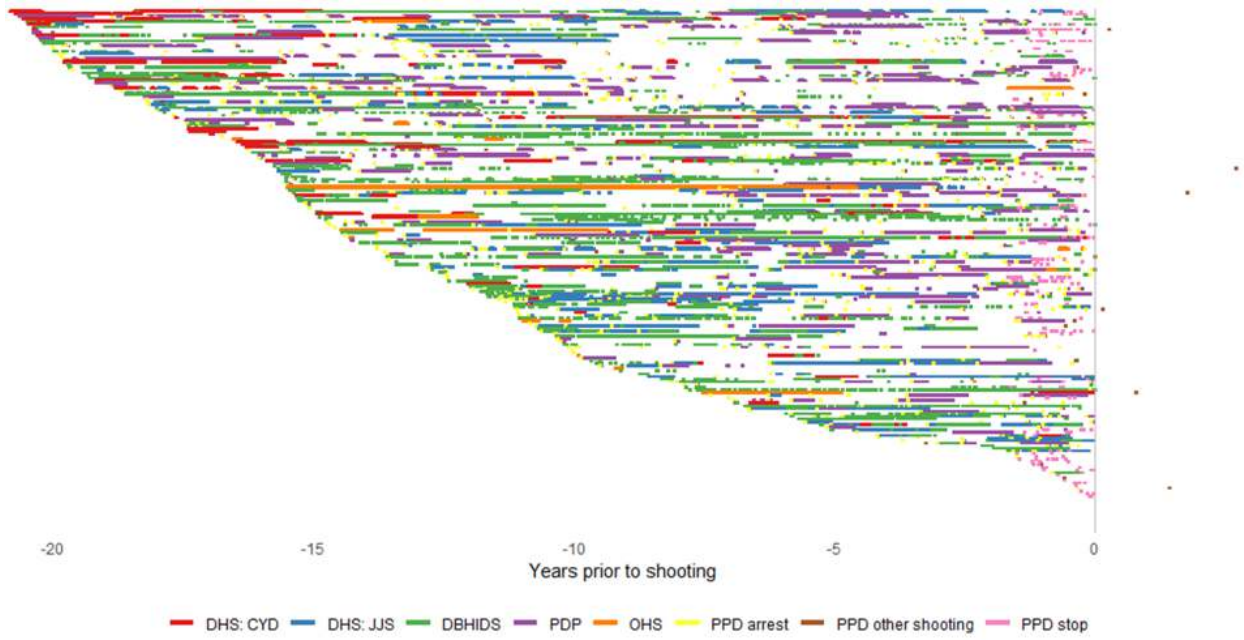
Reasons Given for FTA by Law Enforcement Officers

Sick	30%	Funeral	2%
No Reason Given	26%	Left / Released by Mistake	2%
Injured on Duty	12%	Appointment / Schedule Conflict	1%
Vacation / Out of Town	10%	Childcare / Family Obligation	1%
Subpoena Issue	8%	Military Leave	1%
Training	6%		

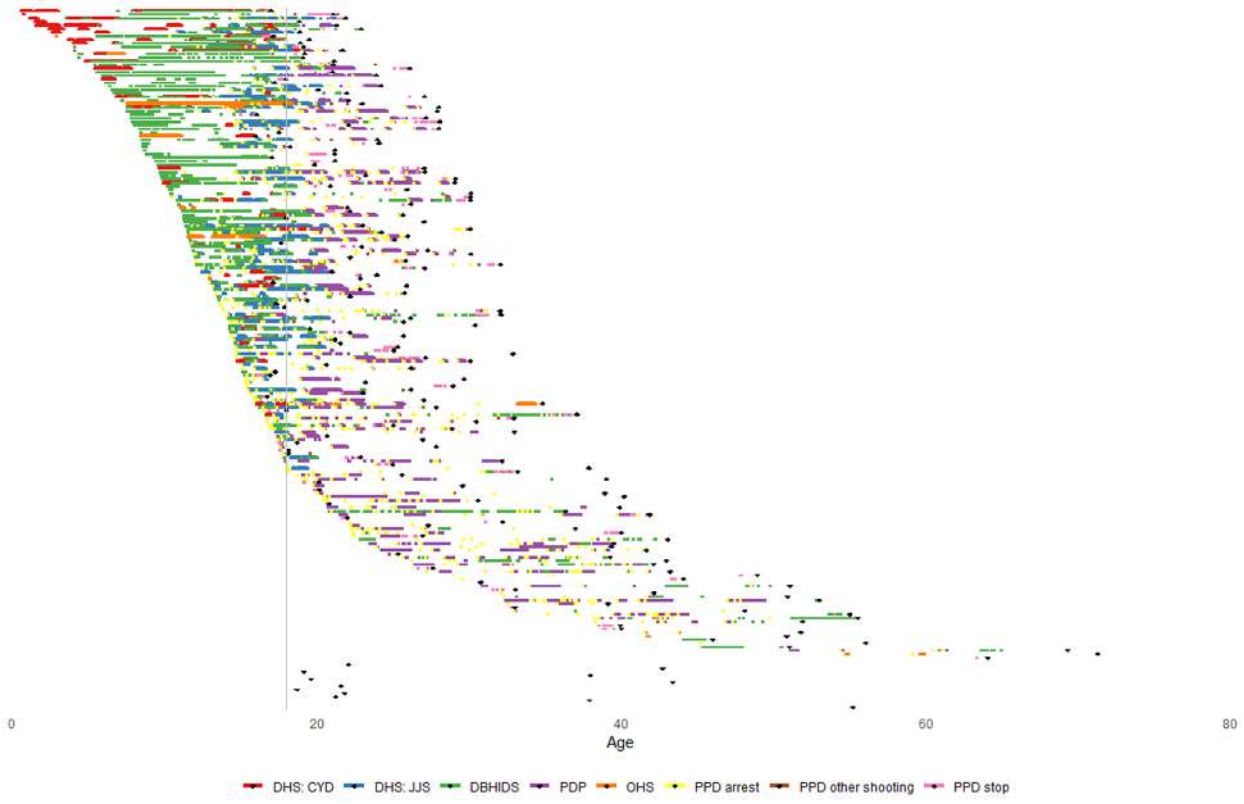
Future Research

- We plan to explore the effects of prosecutors on FTAs and case outcomes
- Getting people to court may be a consequential yet underexplored role that prosecutors play
- Variation in prosecutor effectiveness could allow us to study the effect of pending cases on defendant outcomes

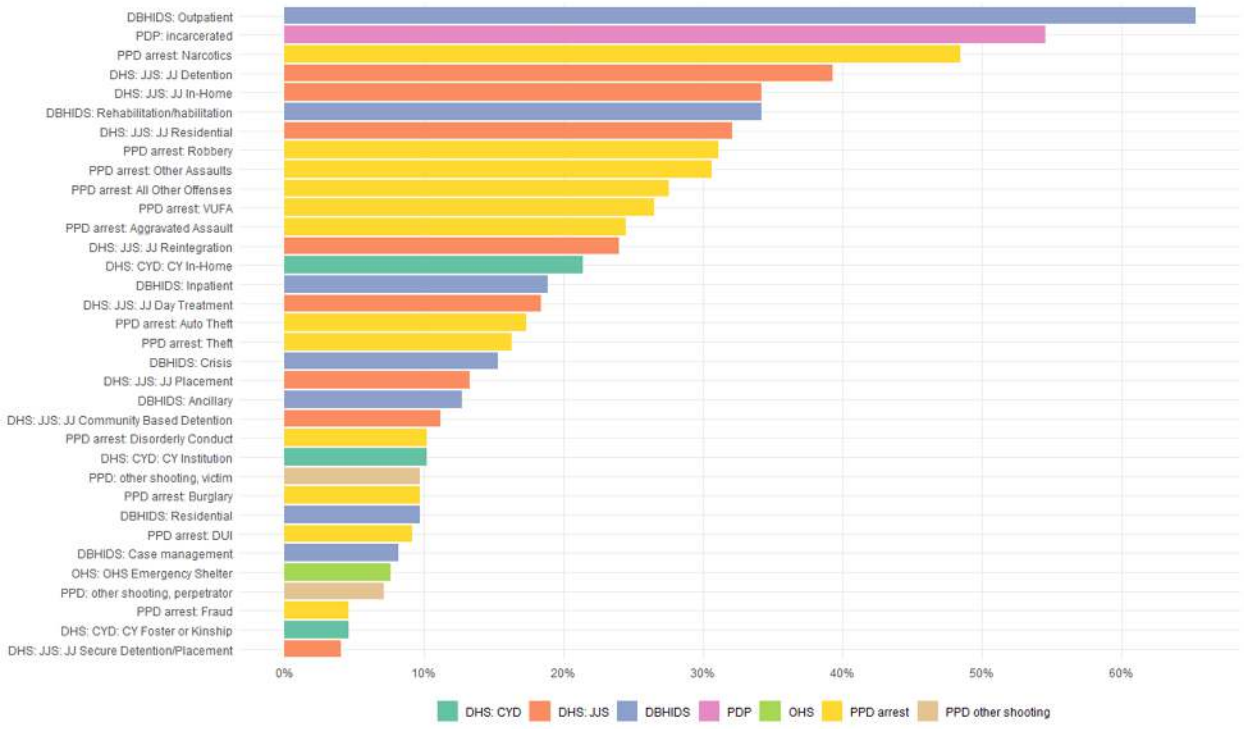
Appendix 8: PDPH



This figure shows the shooting incident as time 0, on the right side of the image. Each horizontal line is one of the 196 people in the cohort. For each individual there is a black dot signifying when that person turned 18. For PPD stops, data is only available for stops in the two years prior to the shooting incident. What is apparent here is that the vast majority of individuals were seen in various city systems prior to the time of their shooting incident arrest. As noted previously, this is an underestimate of points of contact, given limitations in the data set for information that precedes the year 2000. In addition, various sectors do not have data represented in CARES. Some of these contacts occurred many years prior to the shooting arrest, and some contacts extended for years. Trauma-informed case management from all sectors, streamlined and facile referrals to and adequate follow up with violence prevention programs, peer mentorship, and behavioral health supports or referrals to behavioral health supports within all agencies is a critical point of exploration when considering a preventative public health approach to firearm violence.



This figure also demonstrates points of contact with city agencies for 196 individuals. The gray vertical line represents the age of 18. On each horizontal line, the black triangle is the shooting incident used in this analysis. It is important to recognize that for those born prior to the early 1980s, CARES has little data about their points of contact. Therefore, this is again an under-representation of points of contact. What this does depict is the number and nature of contacts when people are juveniles, within the noted limitations. What is apparent is that DHS and DBHIDS contacts are prominent in the years preceding 18 years of age, and PPD and PDP contacts become more prominent as individuals come of age. Future work assessing how these patterns might differ for individuals without this arrest history will help identify how this might outline areas where there is potential for prevention.



This figure demonstrates the most frequent contacts seen in our cohort. What is demonstrated here is that over 60% of those in this cohort had an outpatient DBHIDS contact, and over 50% were previously incarcerated. Further work in this area needs to be focused on better defining these data elements. In developing this data, PDPH met with representatives from all the agencies who contributed data to this report. Those conversations outlined the importance of understanding the nature of these contacts to better outline what opportunities they might provide. What is the duration of the contact, who is the individual making contact and to what degree is that interaction trauma-informed, what resources is that individual given access to so that necessary referrals can be made, and what additional data do individuals have about the life experiences of those they interact with–these are all critical questions if these are to be seen as opportunities for intervention.

Appendix 9: Defender

Annotated Footnotes: Ecology of Violence Model (full citations at end of document)

A. Factors Influencing Neighborhood-Level Perceived Risk and Safety

1: *Exposure to gun violence*. Exposure to community violence is directly linked to perceived personal threat and increases motivation to carry a gun (Loughran et al, 2016). Direct and indirect exposure to gun violence contributes to increased fear and perceived risk (Mitchell et al., 2019).

2: *Availability and prevalence of firearms*. Increased neighborhood-level availability of illegal firearms predicts a higher frequency of shooting incidents (Yu et al., 2017). Also refer to footnote 1.

3: *Perceptions of law enforcement*. As one might expect, perceived effectiveness of law enforcement is lower in communities where frequent shootings occur (Payne & Gainey, 2007; Yu et al., 2017). Negative perceptions of law enforcement will also result in reduced cooperation with law enforcement, as shown by a significant reduction in 911 calls following a publicized incident in which a Black person was killed during an encounter with police (Desmond et al., 2016).

4: *Perceived threats to personal safety*. In summary, neighborhood exposure to gun violence is exacerbated by the high availability of illegal firearms. Where exposure to gun violence is high, residents fear for their personal safety even when there is a visible law enforcement presence. Negative perceptions of law enforcement contribute to reduced cooperation with law enforcement.

B. Social Capital

In simple terms, “social capital” may be defined as resources that are obtained through interpersonal networks – for example, whether a neighborhood resident can call upon a next-door neighbor to provide child care, whether residents monitor suspicious activity, or jointly contribute to the maintenance and improvement of their block. In this review, we equate “low social capital” with a very similar construct known as “social disorganization.” Both refer to variations in neighborhood-level social cohesion, a shared interest in and commitment to neighborhood improvement, and mutual support.

Criminologists have noted that, when comparing neighborhoods that are equally socio-economically disadvantaged, crime rates may differ markedly. They have found that "social disorganization" (or low social capital) is a predictor of criminal activity and helps explain why similar communities experience dissimilar levels of criminal activity. In the 1990s, advocates of "broken windows theory" noticed that quality of life offenses such as loitering and vandalism are associated with more serious crimes, and opted to prosecute these offenses more aggressively; an alternative explanation is that loitering and vandalism are indicators of social disorganization and may be ameliorated by strengthening social capital within these communities (Binik et al., 2019).

Tree-planting campaigns and related neighborhood improvement strategies are effective crime-reduction strategies insofar as they increase social capital. They may also have unintended deleterious effects if they result in rising property values. Rising property values may result in increased *residential turnover* as disadvantaged residents are pushed out (see footnote #5, below; also, Schwarz et al., 2015; Wachter & Wong, 2008).

Socio-economically disadvantaged communities receive large numbers of parolees returning from correctional institutions. Researchers sought to understand the impact on returning parolees on local increases in crime rates. They found that violent parolees do contribute to increased neighborhood-level crime. However, in communities exhibiting a high level of social capital, the impact of parolees on crime is significantly reduced (Hipp & Yates, 2009).

5: *Residential turnover*. It is a well-supported finding in criminological research that residential turnover is a contributing factor to social disorganization and neighborhood-level crime (Bellair & Browning, 2010). This may be most easily understood by considering neighborhoods where there is low turnover. Where there is low turnover, the following **protective factors** are often observed:

> *Familiarity*: Neighborhood residents easily recognize strangers on the block,
>
> *Neighboring*: Residents engage in mutual assistance and social interactions,
>
> *Participation*: Residents attend block activities and engage in crime prevention programs such as neighborhood crime watches,
>
> *Informal Surveillance*: Residents watch over one another's property.

6: *Lack of agency to impact community*. Referring to the previous footnote (#5), in neighborhoods where there is high residential turnover, residents cannot easily identify

strangers on the block, do not receive support from neighbors, and so on. These each contribute to feelings of powerlessness, social isolation, and mistrust (Booth et al., 2012).

7: *Limited and/or aversive interactions with neighbors*. Infrequent and/or aversive interactions with neighbors contributes to increased neighborhood dissatisfaction, fewer and weaker ties to neighbors, the desire to move out of a neighborhood, and lower involvement in activities aimed at improving the neighborhood (Booth et al., 2012; Sampson & Graif, 2009).

8: *Social Capital*. In summary, residential stability predictably fosters closer interpersonal ties among neighborhood residents. Where these ties are weak or absent, residents are more likely to feel powerless to improve neighborhood conditions.

C. Racial and Socio-Economic Segregation and Disinvestment

9: *Low access to legitimate employment*. An extensive body of research shows that long-term unemployment is directly associated with increased risk of criminal activity, and stable employment is associated with reduced recidivism among formerly incarcerated persons (Lageson & Uggen, 2013). Rather than review this large literature, a couple of key points will be made in connection with youth and the relationship between access to employment and neighborhood-level outcomes.

Summer Youth Employment Programs (SYEPs) have been shown to reduce justice-system involvement among youth. SYEPS provide employment opportunities for young people. It is theorized that structured employment provides youth with occupational skills, optimism regarding future employment, and serves as an alternative to the kinds of "unstructured activities," which, research has shown, may lead to criminal activity (Kessler et al, 2021).

Where there are few opportunities for legitimate employment, individuals may generate income by selling illegal drugs. On average, youth who sell illegal drugs earn an hourly wage that is no greater than the federal minimum wage. Research shows that even small increases in the availability of legitimate employment opportunities can produce a large reduction in drug-selling activity (Ihlanfeldt, 2007).

Where employment opportunities are very scarce, sellers who are incarcerated will be quickly replaced by other individuals; in this situation, the incarceration of a single individual predicts a subsequent *increase* in the number of first-time arrests for sales (Torres et al., 2020). Where a reduction in the number of visible drug transactions can be achieved, it will positively impact residents' level of satisfaction with both their neighborhood and the quality of local policing (MacDonald et al., 2007).

10: *Under-resourced public services*. A non-exhaustive list of public services related to neighborhood-level resilience includes churches, commercial resources, and needs-based government services. Each of these will be briefly discussed.

Churches. Local churches can contribute meaningfully to reductions in neighborhood-level crime. This is particularly true of churches which participate in building neighborhood-level social capital. The role of churches in crime reduction is most clearly evident in disadvantaged neighborhoods (Warner, 2019).

Commercial resources. Neighborhood availability of grocery stores, pharmacies, and fitness centers contribute to improved physical and mental health of residents. In high-crime, distressed neighborhoods, there are fewer of these resources. Increased fear of crime encourages residents to bypass local facilities and purchase these health-promoting goods and services in other neighborhoods (Tung, Boyd, Lindau, & Peek, 2018). In contrast, in neighborhoods with heavily-trafficked local shops and restaurants, social capital increases and crime is reduced (Cabrera & Najarian, 2013).

Needs-based government services. A geospatial analysis of Brooklyn reveals a very high degree of overlap, at the level of census blocks, between concentrations of formerly incarcerated persons and demand for TANF and public housing. These include so-called "million-dollar blocks," where amounts in excess of $1 million per year are spent incarcerating and returning residents to these blocks (Cadora, 2002). Thus, a greater unmet need for services is observed in high incarceration neighborhoods.

11: *Under-performing schools*. In a controlled study, at-risk high school students were randomly assigned to better-performing schools. Students who moved from lowest-ranking schools to average schools subsequently committed 50% fewer crimes than students who had not moved, and were involved in less severe crimes (Deming, 2011). As Deming points out, this finding is consistent with a large body of literature. Students are more likely to become disengaged from schooling if they attend under-performing schools (refer to footnote #20, below).

12: *Summary*. Based on converging empirical data cited above, it is theorized that low access to legitimate employment, under-resourced public services, and under-performing schools each uniquely contribute to neighborhood-level risk for gun violence and criminal activity.

At Risk Youth

13: *Family poverty*. Family poverty and community-level poverty each predict youth involvement in delinquent behavior. Where both are evident, the relationship to delinquency is even stronger (Hay, Forston, Hollist et al., 2007). Across the lifespan, poverty and mental illness exhibit a bi-directional relationship. Poverty contributes to symptoms of depression and anxiety; these mental illnesses contribute, in turn, to greater difficulty finding and maintaining legitimate employment (Ridley, Rao, Schilbach et al, 2020).

14: *Family insecurity / father absence*. In the 1990s, discourse surrounding absent fathers tended to stigmatize single-parent families (Haney, 2018); here, the focus is on incarceration-related, unplanned and involuntary separations of fathers from their children. After controlling for other sources of disadvantage, youth experiencing periods of father absence are at significantly greater lifetime risk of involvement with the criminal justice system (Chetty, 2018). Absence of a parent results in reduced parental monitoring of their children's behavior (Markowitz & Ryan, 2016). This sets the stage for delinquent peer affiliation (refer to footnote 16, below). As noted in the body of this report, paternal incarceration adversely impacts a family's financial resources and is a strong contributing factor to womens' risk of eviction.

15: *Trauma and victimization*. Researchers identified males who were both a witness to and a victim of violent crime, as documented in police reports. These youths were shown to be 49.2% more likely to become involved in violent incidents later in life (Ross & Arsenault, 2017). In a longitudinal sample of 1,829 juvenile justice-involved urban youth, over three-quarters had been threatened with a weapon before reaching age 18. Those who had been threatened by a weapon were 2.6 times more likely to obtain a gun later in life and were 3.1 times more likely to perpetrate a gun crime. Men who had received a gunshot injury before age 18 were 2.4 times more likely to be perpetrators of gun violence as adults (Teplin et al., 2021). Compared to the general population, people who receive a gunshot injury are 177 times more likely to be shot again (Bonne et al., 2020). Also, refer to footnote #16, below.

16: *Delinquent peer affiliation*. Youth who exhibit symptoms of trauma are, compared to other youth, more likely to socialize with delinquent peers. They are also more likely to exhibit externalizing symptoms (i.e., "acting out" emotionally in stressful situations) and bully other youth (Lee et al., 2019). Youth with a history of trauma learn from delinquent peers that aggressive behavior is an outlet for emotional distress (Maschi et al., 2008). Youth who routinely socialize with delinquent peers are more likely to engage in delinquent acts and are more likely to become victims of crime (Walters, 2020).

17: *Low trust in institutions*. Individuals who have been victimized by crime or report a heightened fear of crime are less likely to perceive the court system as fair, are less trusting of law enforcement, and distrust the criminal justice system as a whole (Singer et al., 2019). Other research shows that youth who are exposed to neighborhood crime, poverty, racism, and educational disadvantage report reduced trust in institutions (Twenge et al., 2014). This distrust extends to schools and is a factor in school disengagement (see footnote 20, below).

18: *Housing insecurity*. Housing insecurity is defined as an affirmative response to the following questions: ever having "missed a rent or mortgage payment due to inability to pay; moved in with others due to housing costs; been evicted; or spent at least one night in a shelter, on the streets, in a vehicle, or someplace else not meant for human habitation in the past year." Youth raised in insecure homes are significantly more likely to come into contact with the criminal justice system, more likely to interact with child welfare services, and are more likely to report symptoms of depression (Marçal & Maguire-Jack, 2021).

19: *Cognitive immaturity*. The frontal lobe of the human brain, which is associated with understanding the consequences of one's behavior and inhibiting impulses, is not fully mature until the mid to late 20s (Sowell et al., 1999). This is relevant to policies directed at youth in general but is particularly salient in connection with youth who socialize with delinquent peers (c.f. footnote 16). Among youth aged 12-14, consuming alcohol and cannabis slows the development of the frontal cortex (Infante et al., 2018). Precocious substance use is one of the defining elements of delinquency and a consequence of delinquent peer association (Hoeben et al, 2016). Early initiation of cannabis use contributes to poorer performance in school and increased risk of academic disengagement and drop-out (Lynskey & Hall, 2000). These are, in turn, risk factors for criminal involvement (c.f. footnote 20, below).

Legal scholars have grappled with the implications of brain development in terms of criminal culpability (Caulum, 2007). As a practical matter, cognitively immature individuals are less responsive than older adults to the threat of criminal justice sanctions. Interventions aimed at reducing youth involvement with guns and gun violence will be more effective if these cognitive limitations are considered.

20: *School disengagement*. A trajectory leading from school disengagement to criminal justice system involvement, known as the "school-to-prison pipeline," has received increasing attention in recent years. School suspension is a robust predictor of later

incarceration and has been identified as a key “negative turning point” in terms of lifespan development (Hemez et al., 2020).

School disengagement is more likely when students must adapt to difficult transitions between schools. Matthew Steinberg of the *Philadelphia Education Research Consortium* found that high school students who change schools are twice as likely to later drop out. In Philadelphia neighborhoods experiencing high rates of poverty, segregation, and incarceration, high school students are far less likely than students in other neighborhoods to remain in the same school until graduation. This creates a challenging environment for teachers, and contributes to high teacher turnover. In disadvantaged neighborhoods, only half of Philadelphia high school students remain in the same school for 4 years, and one quarter of all students make two separate transitions between schools. Of these "mobile" students, 70% are Black (Hangley, 2019).

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ATTACHMENT K

Philadelphia DAO February 2019 CLE:
Selected Topics in 21st Century Prosecution

Thursday, February 21, 2019
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Evidence Refresher** **Professor Jules Epstein,** Director of Advocacy Programs, Temple University Beasley School of Law *This presentation will survey legal issues identified by members of the Philadelphia DAO as needing review as well as a series of recent appellate decisions that touch upon recurring or important evidence topics.*
10:00 – 11:00	**Bail Reform** **Oren Gur, Ph.D.,** Director of Research and Policy Advisor, Philadelphia DAO **ADA Michael Hollander,** Philadelphia DAO *Description TBD*
11:00 – 11:15	**BREAK**
11:15 – 12:15	**Clearing the Record: PA Expands the Sealing of Convictions** **ADA Michael Hollander,** Philadelphia DAO **Jamie Gullen,** Supervising Attorney, Employment Unit, Community Legal Services *In June 2018, Gov. Wolf signed into law bipartisan legislation (co-sponsored by Sen. Williams and Sen. Wagner) that transformed the criminal record clearing landscape in Pennsylvania. Clean Slate gave petitioners the ability to seal (hide from public view) almost all M3 and M2 and many M1 convictions after at least 10 years without a conviction. It also created a first-of-its-kind system to automatically seal very minor conviction records and all arrest records. Jamie Gullen and Michael Hollander were heavily involved in passing the Clean Slate legislation and will explain the nuances of the law as well as the DAO's role in implementing it.*
12:15 – 1:30	**LUNCH**

1:30 – 2:30	**Assessing Regulatory Impacts of Marijuana in New Jersey and Pennsylvania** **Mike Lee,** Director of Government Affairs, Philadelphia DAO **Roseanne Scotti,** Drug Policy Alliance, State Director, New Jersey **Lenny Ward,** Former Director, New Jersey State Parole Board **J. Desmond McKinson Jr.,** Legislative Aide, Office of PA State Senator Sharif Street *This session will focus on marijuana use and its policy implications through a panel discussion. This includes, and is not limited to, highlighting how states such as New Jersey have been successful in adopting policies to reduce parole revocations for technical violations and the impacts of decriminalizing marijuana in Philadelphia.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Prosecuting Sexual and Domestic Violence Crimes (Including *Commonwealth v. Cosby*)*** **Kristen M. Gibbons Feden,** Litigation Associate, Stradley Ronon Stevens & Young and Former Domestic Violence and Elder Abuse Captain and Member of the Sex Crimes Unit, Montgomery County DAO *This session will review how to prosecute sexual assault and domestic violence, and the unique issues that come with these violent crimes, including rape shield, prior bad acts, and victim expert testimony. Using Commonwealth v. Cosby as an example, this session will illustrate how prosecutors must know and use these laws to protect the victim(s).*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Gun Violence Task Force** **ADA John Tartikoff,** Assistant Supervisor, Gun Violence Task Force **Richard Peffall,** Special Agent, Gun Violence Task Force *Description TBD*

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2019 CLE:
Selected Topics in 21st Century Prosecution

Friday, February 22, 2019
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Prosecution and the Media*** **Dave Davies,** Senior Reporter, WHYY Philadelphia **ADA Branwen McNabb,** Supervisor, Family Violence and Sexual Assault Unit **ADA Lyandra Retacco,** Supervisor, Charging Unit **ADA Joanne Pescatore,** Homicide Unit *Description TBD*
10:00 – 11:00	**Investigations under the CPSL: How the Department of Human Services and the DA's Office Can Work Together*** **Meghan Goddard,** Divisional Deputy City Solicitor, Juvenile Justice Services Division, Child Welfare Unit, City of Philadelphia Law Department **Meagan Mirtenbaum,** Divisional Deputy City Solicitor, Child Welfare Unit, City of Philadelphia Law Department **Michelle Ludwig,** Social Work Supervisor, Department of Human Services **Detective Kimberly Boston,** Philadelphia Police Department *The training will be an overview of the Department of Human Services' (DHS) investigations as governed by the Child Protective Services Law (CPSL). It will focus on how to conduct a DHS investigation and how the District Attorney's Office can work together with DHS in protecting the safety and welfare of children and families.*
11:00 – 11:15	**BREAK**
11:15 – 12:15	**Firearms Identification Unit** *Description TBD*
12:15 – 1:30	**LUNCH**

1:30 – 2:30	**Youth Sentencing & Reentry Project:** **Reimagining Youth Advocacy & Reentry** **Joanna Visser Adjoian,** Co-Director, Youth Sentencing & Reentry Project **Emily Robb,** Supervising Attorney, Youth Sentencing & Reentry Project **Cameron Holmes,** Reentry Supervisor, Youth Sentencing & Reentry Project *This session will provide an overview of the Youth Sentencing & Reentry Project's (YSRP's) mission, available resources, and feature a discussion of YSRP's approach to mitigation and reentry advocacy on behalf of youth and former juvenile lifers in Philadelphia.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	***U.S. v. Kaboni Savage, et al.:*** **Prosecuting One of Philadelphia's Most Notorious Cases (2 hrs.)** **ADA Paul George,** Assistant Supervisor, Law Division **Kevin M. Lewis,** Special Agent, Federal Bureau of Investigation and Philadelphia Safe Streets Violent Drug Gang Task Force **David E. Troyer,** Assistant US Attorney, US Department of Justice, Eastern District of Pennsylvania **Chris Hoey,** Criminal Defense Attorney *A case study of one of the most notorious cases in Philadelphia history, the twelve-murder federal capital racketeering prosecution of the Kaboni Savage organization, including the 2004 six-murder firebombing of a federal witness' home. The discussion will center upon the investigation and prosecution, including charging decisions, legal issues, the Federal Death Penalty Act, and case presentation and trial strategies, in the only case in the 230-year history of the Eastern District of Pennsylvania to result in a death penalty sentence.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	***U.S. v. Kaboni Savage, et al.:*** **Prosecuting One of Philadelphia's Most Notorious Cases (2 hrs.)** **ADA Paul George,** Assistant Supervisor, Law Division **Kevin M. Lewis,** Special Agent, Federal Bureau of Investigation and Philadelphia Safe Streets Violent Drug Gang Task Force **David E. Troyer,** Assistant US Attorney, US Department of Justice, Eastern District of Pennsylvania **Chris Hoey,** Criminal Defense Attorney *A case study of one of the most notorious cases in Philadelphia history, the twelve-murder federal capital racketeering prosecution of the Kaboni Savage organization, including the 2004 six-murder firebombing of a federal witness' home. The discussion will center upon the investigation and prosecution, including charging decisions, legal issues, the Federal Death Penalty Act, and case presentation and trial strategies, in the only case in the 230-year history of the Eastern District of Pennsylvania to result in a death penalty sentence.*

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2020 CLE:
Selected Topics in 21st Century Prosecution

Thursday, February 27, 2020
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Search and Seizure Law Update** **Professor David Rudovsky,** Senior Fellow, University of Pennsylvania Law School
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Inside Out Prison Exchange Program***
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Dangerous Drug Offenders Unit (DDOU)** **ADA Ryan Slaven,** Assistant Supervisor, Dangerous Drug Offenders Unit
12:20 – 1:45	**LUNCH**

1:45 – 3:15	**Connecting the Dots in Criminal Justice: The LINK Between Animal Abuse and Other Family Violence** **Phil Arkow,** Coordinator, The National LINK Coalition
3:15 – 3:30	**BREAK**
3:30 – 5:00	**Police Body Cameras: Best Practices and Use at Trial** **Sergeant Jay Bowen,** Office of Forensic Science Digital Media Unit, Philadelphia Police Department **ADA Rebekah Lederer,** Homicide Unit **ADA Shuaiyb Newton,** Homicide Unit

*****Indicates 1 Ethics credit

Philadelphia DAO February 2020 CLE:
Selected Topics in 21st Century Prosecution

Friday, February 28, 2020
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Crossing Expert Witnesses** **ADA Chesley Lightsey,** Assistant Supervisor, Homicide Unit
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Opioid Deaths*** **Dr. Lindsay Simon,** Associate Medical Examiner, Philadelphia Medical Examiner's Office
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Deed Fraud** **ADA Kimberly Esack,** Assistant Supervisor, Economic Crimes Unit **Sergeant Jerry Rocks,** Investigations Division, Philadelphia Police Department **Commissioner James Leonard,** City of Philadelphia Department of Records
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Evidence Refresher** **Professor Jules Epstein,** Director of Advocacy Programs, Temple University Beasley School of Law
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Eliminating the Impossible: Investigating the JonBenet Ramsey Homicide** **Michael J. Kane,** Executive Director, Pennsylvania House Government Oversight Committee
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Eliminating the Impossible: Investigating the JonBenet Ramsey Homicide** **Michael J. Kane,** Executive Director, Pennsylvania House Government Oversight Committee

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2021 CLE:
Selected Topics in 21st Century Prosecution

Thursday, February 25, 2021
Day 1

8:45 – 9:00	**LOG-IN**
9:00 – 10:00	**Special Education Litigation in the Public Interest for Public Schools and Students: A View from DAO Alumni** **John W. Goldsborough,** Federal Litigation and Appellate Counsel, McAndrews, Mehalick, Connolly, Hulse & Ryan, PC **Alaina (Lainey) Sullivan,** Assistant General Counsel, School District of Philadelphia *These DAO alumni will discuss the complicated law of special education and related matters, how their current work in this disability discrimination and civil rights area of practice relates to their previous positions at the DAO as well as to their prior teaching careers, and serving the public interest representing public schools and public school students.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**An Evolution of Forensic Science** **Ryan Gallagher,** Laboratory Manager, Office of Forensic Science, Philadelphia Police Department *Forensic science continues to evolve, providing powerful results to help exonerate the innocent, establish linkages between crimes, and identify true perpetrators of crime. This presentation will provide an overview of the Philadelphia Police Department's Office of Forensic Science, covering current capabilities, recent advancements, resource capacity, and technological limitations.*
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Economic Crime 101** **ADA Anthony Gil,** Economic and Cyber Crimes Unit **ADA Marcos Long,** Economic and Cyber Crimes Unit **ADA Kimberly Esack,** Assistant Supervisor, Economic and Cyber Crimes Unit *This session serves as an overview of economic crime trends, applicable statutes, and practice tips for prosecutors and practitioners.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Appellate Advocacy: Perspectives from the Bench*** **Judge Alice Beck Dubow,** Judge, Pennsylvania Superior Court **Justice Sallie Updyke Mundy,** Associate Justice, Pennsylvania Supreme Court **Justice David N. Wecht,** Associate Justice, Pennsylvania Supreme Court *Judge Dubow, Justice Mundy, and Justice Wecht will convene for a conversation chronicling their insight into appellate best practices, including, but not limited to, professionalism, oral advocacy, brief writing, and argument preparation, as well as the COVID-19 pandemic's impact on the Pennsylvania Superior and Supreme Courts.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Regulatory and Public Health Impacts of New Jersey's Cannabis Legalization on Pennsylvania** **Justin Torres,** Paralegal, Diversion Unit **ADA Mike Lee,** Supervisor, Diversion Unit **Leo Beletsky,** Professor of Law and Health Sciences and Faculty Director, Health in Justice Action Lab, Northeastern University **Chris Goldstein,** Regional NORML Organizer and Columnist at *The Philadelphia Inquirer* *This discussion will provide an analytical review of provisions in the newly passed New Jersey cannabis legalization bill and its regulatory and public health implications on the Commonwealth of Pennsylvania.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Car Stops After *Commonwealth v. Alexander*** **ADA Michael Erlich,** Appeals Unit **Professor David Rudovsky,** Senior Fellow, University of Pennsylvania Law School

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2021 CLE:
Selected Topics in 21st Century Prosecution

Friday, February 26, 2021
Day 2

8:45 – 9:00	**LOG-IN**
9:00 – 10:30	**Sentencing – The Post Trial Perspective: Common Issues and How to Avoid Them** **ADA Laurie Williamson,** PCRA Unit **ADA Mark Burgmann,** Gun Violence Task Force *In the post-trial context, the DAO's Appeals, PCRA, and Federal Litigation Units are constantly dealing with sentencing claims. Approximately 50% of direct appeals and PCRA petitions involves a sentencing claim. This presentation will cover some of the most prevalent issues involved with such sentencing claims, the laws governing these issues, and best practices on how to avoid errors. In addition, this session will provide tools for practitioners to create a complete record, which should ensure that all parties both understand and consider all relevant factors at the time of sentencing, including, but not limited to, the defendant's representation and awareness of the proceedings, the victims' awareness, and a voice that assures fairness and finality in sentencing.*
10:30 – 10:45	**BREAK**
10:45 – 12:15	**Jury Instructions: A Practical Guide for Criminal Trial Attorneys** **ADA Samuel Ritterman,** Federal Litigation Unit *Jury instructions are the way otherwise untrained jurors learn the law so they can fulfill their constitutional duty. They also have become one of the most consistently discussed matters in criminal appellate cases. The absence or misstatement of a jury instruction has sometimes been held as a reason to reverse a conviction. Conversely, the presence of the proper jury instruction is sometimes held as an important factor in upholding a conviction. This presentation will address jury instructions to assist criminal trial attorneys on both sides on how to use the instructions to ensure the integrity of the trial, avoid unnecessary reversals, and prevent issues of ineffective assistance of counsel from arising.*
12:15 – 1:30	**LUNCH**

1:30 – 2:30	**Legal Writing Refresher** **ADA Paul George,** Assistant Supervisor, Law Division **ADA Zachary Mattioni,** PCRA Unit *Facing an imminent deadline to answer an unexpected defense argument can be a stressful situation for ADAs, but writing a brief does not have to be a daunting task. This session will demonstrate how to efficiently utilize Westlaw and the DAO's brief bank to quickly research legal issues as they arise, avoiding the frustration of unproductive searches. From there, the session will shift focus to the actual writing process, explaining the style choices and ways to present one's argument that produce clear, concise briefs.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Professionalism in the COVID-19 Courtroom*** **ADA Cheryl Yankolonis,** Supervisor, Family Violence and Sexual Assault Unit **ADA Robert Wainwright,** Homicide/Non-Fatal Shooting Unit **Stephanie A. Fennell,** Supervising Attorney, Special Defense Unit, Defender Association of Philadelphia **Judge Diana L. Anhalt,** Pennsylvania Court of Common Pleas Judge *The COVID-19 pandemic has brought about many changes in the way the criminal justice system functions. This panel will explore the challenging aspects of daily courtroom operations, as well as safety considerations from the perspectives of various criminal justice partners.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Instagram: For Foodies and Law Enforcement** **ADA William Fritze,** Gun Violence Task Force **ADA Sarah Lichter,** Assistant Supervisor, Gun Violence Task Force *Instagram is not exclusive to cultivating influencers in style, food, and the arts. This session will provide valuable recommendations for utilization in your criminal case, including a primer on authentication.*

*****Indicates 1 Ethics Credit

CLE for Prosecutors XCI—Strategies for Addressing Crime & Enhancing Public Safety in the 21st Century—Day 1, February 22, 2018

8:30 – 9:00	Registration
9:00 – 10:00	**A New Vision for Criminal Justice in Philadelphia** **Larry Krasner,** Philadelphia District Attorney **Arun Prabhakaran,** Chief of Staff
10:00 – 11:00	**Analytics and the Modern Prosecutor** **The Honorable Carolyn Temin,** First Assistant to the Philadelphia District Attorney **Zach Tumin,** Deputy Commissioner for Strategic Initiatives at the New York Police Department
11:00 – 11:15	Break
11:15 – 12:15	**Deportation: The Unforeseen Consequences of Prosecution in our Immigrant Communities** **ADA Caleb Arnold,** Immigration Counsel to the Philadelphia District Attorney's Office
12:15 – 1:30	**Lunch**
1:30 – 2:30	**Beyond Conviction: The Long Term Impact of a Criminal Record** **ADA Mike Lee**, Director of Legislation and Governmental Affairs
2:30 – 2:45	Break
2:45 – 3:45	**Where the Rubber Meets the Road: Restorative Justice and the Community*** **ADA Leigh Owens,** Supervisor of Community Engagement **Movita Johnson-Harrell,** Supervisor, Victim Witness Services and Restorative Justice **Jody Dodd,** Restorative Justice Coordinator
3:45 – 4:00	Break
4:00 – 5:00	**Towards a New View of *Brady*** **ADA Anthony Vocci**, Supervisor, Homicide Unit **ADA Paul George,** Assistant Supervisor, Law Division

*****Indicates 1 Ethics Credit

CLE for Prosecutors XCI— Strategies for Addressing Crime & Enhancing Public Safety in the 21st Century—Day 2, February 23, 2018

8:30 – 9:00	Registration
9:00 – 10:00	**Appellate Update: Everything You Wanted to Know About Recent Developments In the Law (But Were Afraid To Ask)** **ADA Robert Petrone,** Appeals Unit **ADA Michael Erlich,** Appeals Unit
10:00 – 11:00	**Sniff and Seizure: Nosework and the Fourth Amendment** **Stacy Barnett and Judd** **Alexa Karaoulis and Caeli** **ADA Jennifer Andress,** Federal Litigation Unit
11:00 – 11:15	Break
11:15 – 12:15	**Above and Below the Bench: Observations On the Art of Advocacy*** **Geoffrey Moulton**, General Counsel to the Supreme Court of Pennsylvania
12:15 – 1:30	**Lunch**
1:30 – 2:30	**The Development of the Office of the Philadelphia Inspector General: From Obscurity to Relevance** **Amy Kurland,** Philadelphia Inspector General
2:30 – 2:45	Break
2:45 – 3:45	**Criminalizing Pregnancy: Barriers to Health and Justice for Pregnant Substance-Abusing Women*** **Rebecca Stone,** Assistant Professor of Sociology, Suffolk University
3:45 – 4:00	Break
4:00 – 5:00	**Philadelphia and Safe Injection: Harm Reduction as Public Policy** **Jose Benitez,** Executive Director, Prevention Point Philadelphia **Jeffrey Hom,** Policy Advisor, Philadelphia Department of Public Health

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2022 CLE:
Selected Topics in 21st Century Prosecution

Thursday, February 24, 2022
Day 1

8:45 – 9:00	**LOG-IN**
9:00 – 10:30	**Protecting Your Conviction** **ADA Laurie Williamson**, PCRA Unit **ADA Shayna Gannone**, PCRA Unit **ADA Cole Stevens**, PCRA Unit *The Post-Conviction Relief Act (PCRA) allows defendants who are serving a sentence to collaterally challenge their convictions in the trial court on the basis of certain limited constitutional and statutory grounds. This presentation will begin with a brief overview of the post-trial process, followed by an explanation of some of the most commonly raised PCRA claims, and the steps that can be taken at the trial level to avoid these claims and protect the integrity of the conviction and sentence.*
10:30 – 10:45	**BREAK**
10:45 – 11:45	**U and T (Non-Immigrant) Visa Petitions** **Mark Silver, Esquire**, New York State Licensed Clinical Social Worker, with a doctorate in psychology and a post-graduate certificate in family therapy **Caleb Arnold, Esquire**, Assistant District Attorney and Immigration Counsel, Philadelphia District Attorney's Office *Non-immigrant U-Visas are intended for individuals who have been the victim of a crime, have assisted the police and/or District Attorney's Office with the prosecution of the criminal, and have suffered physical and/or psychological harm as a result of the crime. In this program, Mark Silver outlines the major criteria of the U-Visa category, and explains the various relevant psychosocial factors in this brand of visa application. ADA Caleb Arnold will explain the internal process of how U and T-Visas are applied in context of prosecution at the Philadelphia DA's Office.*
11:45 – 1:00	**LUNCH**

1:00 – 2:30	**STAR – Supervision to Aid Reentry in the Eastern District of Pennsylvania** **The Honorable L. Felipe Restrepo**, U.S. Court of Appeals for the Third Circuit **Anthony Carissimi**, Assistant United States Attorney, Eastern District of Pennsylvania **Catherine C. Henry**, Senior Litigator, Federal Defender, Eastern District of Pennsylvania **Mia M. Lamb**, Reentry Coordinator US. Department of Justice, Eastern District of Pennsylvania **Kyle Watts**, United States Probation Officer, Eastern District of Pennsylvania *The Re-entry Court in the Eastern District of Pennsylvania is one of the first of its kind in the United States. Learn about this model from those on the inside and explore the lessons learned from the last 14 years of this incredibly successful program.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Updates in Pennsylvania's Sentencing Laws** **Stuart Suss, Esquire**, former Deputy District Attorney, Chester County, PA; Senior Deputy Attorney General for the Commonwealth of Pennsylvania *Mr. Suss will discuss recent updates in the case law and statutory changes as they pertain to the substantive law of sentencing in Pennsylvania.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Free to Tell the Truth: Preventing and Combatting Intimidation in Court*** **Stuart Suss, Esquire**, former Deputy District Attorney, Chester County, PA; Senior Deputy Attorney General for the Commonwealth of Pennsylvania *"Free to Tell the Truth: Preventing and Combating Intimidation in Court" is a benchbook currently used by Common Pleas Court Judges in Philadelphia, and throughout the Commonwealth of Pennsylvania. The principal author of the benchbook, Stuart Suss, Esquire, will present the legal remedies available to judges and attorneys, as well as highlight the moral obligations of parties, either to prevent or to respond to the attempted intimidation of victims or witnesses.*

*****Indicates 1 Ethics Credit

Philadelphia DAO February 2022 CLE:
Selected Topics in 21st Century Prosecution

Friday, February 25, 2022
Day 2

8:45 – 9:00	**LOG-IN**
9:00 – 10:30	**Appellate Update** **ADA Joanna Kunz,** Assistant Supervisor, Appeals Unit **ADA Michael Erlich**, Appeals Unit *Review the most up to date criminal case law holdings relevant for Pennsylvania Criminal Practice including, but not limited to, search and seizure and preliminary hearing evidence.*
10:30 – 10:45	**BREAK**
10:45-11:45	**Federal Habeas: variances between state and federal proceedings** **ADA David Napiorski,** Federal Litigation Unit *An introduction to the Federal Corpus Habeas law including selected case reviews highlighting the differences between prosecuting state law cases in the State Court and the contrast with how those same cases are reviewed in Federal Court on a habeas petition.*
11:45-1:00	**LUNCH**
1:00 – 2:30	**Creating Safe Schools** **Djung Tran, Esquire**, Moderator; Principal, Tran Law Associates; President (2020), Asian Pacific American Bar Association of Pennsylvania **Randy Duque**, **M.A.**, Deputy Director, Philadelphia Commission on Human Relations **Alonzo Johnson**, Student Climate Manager, Central High School **Joshua Smith**, **MBA, M.A.**; Educator and Coach, School District of Philadelphia *As our nation faces multiple crises, school communities are grappling with questions around how to provide a safe learning environment. In this CLE webinar, presenters will address how school communities can respond to incidents of discrimination, harassment, and bullying, and strategies to promote safety within school communities. In addition, participants will learn about school districts' obligations to protect the rights of students experiencing harm, as well as the rights of other stakeholders including those being disciplined.*
2:30 – 2:45	**BREAK**

2:45 – 3:45	**In Our Backyard*** **Jordana Greenwald,** Associate General Counsel, City of Philadelphia Board of Ethics **Reynelle Brown Staley**, Senior Attorney, City of Philadelphia Law Department **Krystle Baker**, Deputy Chief Integrity Officer for the City of Philadelphia **Dani Gardner Wright,** Staff Attorney, City of Philadelphia Board of Ethics *This panel will highlight ethics headlines from various jurisdictions and discuss the application of relevant City law, State Law, and City policy.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**The Burned Out Lawyer: Recognition and Prevention Strategies in the Post-COVID World*** **Brian S. Quinn, Esq.**, Education and Outreach Coordinator, Lawyers Concerned for Lawyers *Mr. Quinn will share his insights and experience in assisting attorney's with making strategies to combat the stress and burnout commonly suffered by lawyers, particularly in light of the life-changing effects brought on by the COVID-19 pandemic.*

*****Indicates 1 Ethics Credit

Philadelphia DAO JULY 2018 CLE:
SELECTED TOPICS IN 21st CENTURY PROSECUTION

Thursday, July 26, 2018
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:30	**Police-Worn Body Cameras: Best Practices and Use at Trial** **Sergeant Jay Bowen,** Office of Forensic Science Digital Media Unit, Philadelphia Police Department **ADA Damoun Delaviz,** Charging Unit **ADA Gregory Lederman,** South Unit **ADA Rebekah Lederer,** Central Unit *In today's ever-evolving world of law enforcement, digital evidence has taken center stage. This presentation will focus on the role of police-worn body cameras in prosecution. The panel will discuss the many challenges and benefits of using this footage in criminal prosecution. This includes the technology of the cameras and the composition of the video footage, to the use of the videos in charging, motions, and at trial.*
10:30 – 10:45	**BREAK**
10:45 – 12:15	**The Dark Web** **Bryan Ressler,** Special Agent, Homeland Security Investigations (HSI) *This presentation is meant to provide an introduction into cryptocurrencies and the darknet. Additionally, it will assist attendees to understand the basic concepts of cryptocurrency and the darknet and recognize indicators of possible darknet usage in the commission of a crime.*
12:15 – 1:30	**LUNCH**
1:30 – 2:30	**Libre's Law: Animal Protection in Pennsylvania*** **Kristen Tullo**, Pennsylvania State Director, Humane Society of the United States **Amy Kaunas,** Executive Director, Humane Society of Harrisburg Area **Sergeant Nicole Wilson,** Director of Humane Law Enforcement, Pennsylvania Society for the Prevention of Cruelty to Animals *After nearly 35 years and a number of amendments, Pennsylvania's animal cruelty code was finally overhauled. Libre's Law (Act 10 of 2017; formerly HB 1238) was signed into law by Governor Tom Wolf last June and went into effect in August. The newly constituted law updates and clarifies existing statutes and increases penalties for those convicted of abusing animals. Our presenters will discuss the new law and its application to criminal prosecution of animal cruelty.*
2:30 – 2:45	**BREAK**

2:45 – 3:45	**Diversion Programs and Drug Courts** **ADA Chip Junod,** Supervisor, Diversion Unit **ADA Lance Lindeen,** Diversion Unit *In Philadelphia, as in all major cities across the United States, our criminal justice system is managing record numbers of non-violent and first-time offenders with high rates of substance abuse, mental health issues, and other disorders. In recent years, advances in the science of drug use intervention and recovery, as well as a preponderance of research on the effectiveness and cost efficiency of alternatives to incarceration, have given rise to a wide variety of diversion programs. Our presenters will explore the varied and rich landscape of diversion programs offered by the DAO that present alternatives to traditional punishment.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Serving Those Who Served Us: Veterans Court** **Honorable Patrick Dugan**, Judge, Philadelphia Veterans Court *Officially established in 2010, the Philadelphia Veterans Court is a voluntary specialty court that offers programs, treatment, and support for former service members who have been arrested and charged with a crime. The court was established through the joint efforts of the Philadelphia Municipal Court, the Philadelphia District Attorney's Office, the Defender Association of Philadelphia, and the Philadelphia Veterans Affairs Medical Center. This court seeks to ensure that veterans obtain appropriate treatment for the lingering effects of their service, such as substance abuse and mental health issues, and provides veterans with an alternative path to rehabilitation.*

*****Indicates 1 Ethics Credit

Philadelphia DAO JULY 2018 CLE:
SELECTED TOPICS IN 21st CENTURY PROSECUTION

Friday, July 27, 2018
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Appellate Update** **ADA Robert Petrone,** Appeals Unit **ADA Michael Erlich,** Appeals Unit *Once again, we welcome back our accomplished and dynamic presenters from the Appeals Unit to review with us recent decisions handed down by Pennsylvania and federal appellate courts and discuss developments in the law that impact our prosecution of criminal defendants.*
10:00 – 11:00	**Victim Assistance: Understanding The Victims' Bill of Rights*** **Jennifer R. Storm,** Commonwealth Victim Advocate, Office of Victim Advocate **Teakia Brown,** Victim Assistance Coordinator, Office of Victim Advocate *All crime victims in Philadelphia have rights under the Pennsylvania Crime Victims Act (18 P.S. § 11.101). The standards set forth in the Act are designed to ensure that victims receive practical and emotional support, and are able to participate fully in their cases. Our presenters, experts in the field of victim assistance, will discuss with us the challenges they face as they help crime victims navigate the often complicated criminal justice system.*
11:00 – 11:15	**BREAK**
11:15 – 12:15	**Protecting Your Conviction** **ADA Laurie Williamson,** PCRA Unit **ADA Shayna Gannone,** PCRA Unit *The Post-Conviction Relief Act (PCRA) allows defendants who are serving a sentence to collaterally challenge their convictions in the trial court on the basis of certain limited constitutional and statutory grounds. This presentation will begin with a brief overview of the post-trial process, including some of the most commonly raised PCRA claims, and explain the steps that can be taken at the trial level to make a complete record and protect the integrity of the conviction.*
12:15 – 1:30	**LUNCH**

1:30 – 2:30	**An Ex-Prosecutor's and Scholar's Perspective on Criminal Justice Reform** **Honorable Stephanos Bibas,** United States Court of Appeals for the Third Circuit *The newest Judge on the Third Circuit Court of Appeals will present remarks on his views about criminal justice reform. In his 2015 book The Machinery of Criminal Justice, Judge Bibas writes that he is concerned that victims rarely hear defendants express remorse, and that for the sake of efficiency in moving cases along, we have sacrificed "softer values, such as reforming defendants and healing wounded victims and relationships." Judge Bibas has examined reform-minded ideas such as shifting power from prosecutors to restorative sentencing juries. He believes that criminal justice reform might cost more, but in the end would better serve society's interests in denouncing crime, vindicating victims, reforming wrongdoers, and healing the relationships torn by crime.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Language Access Programs** **Orlando Almonte,** Language Access Program Manager, Philadelphia Office of Immigrant Affairs **Lisette McCormick,** Executive Director of the Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness *The Home Rule Charter of the City of Philadelphia requires all City agencies and offices to provide language access services to improve communication between Philadelphians and their City government. The Mayor's Office of Immigrant Affairs manages the various programs that provide these services. The presenters of this course will explore the Home Rule Charter's language access requirements and discuss areas where we can improve.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Eyewitness Identification: The Path Forward to Certainty** **Anthony Carissimi,** Law Clerk for the Honorable Theodore A. McKee **Abigail Horn,** Assistant Federal Defender (former Law Clerk for the Hon.Felipe Restrepo) **Adam Zurbriggen,** Law Clerk for the Honorable Mitchell S. Goldberg *Many scholars and stakeholders in the criminal justice system assert that in recent years, the expanded use of DNA evidence has proven that eyewitness misidentification is the single greatest contributing cause of wrongful convictions in the U.S. The human consequences of wrongful convictions are tragic on many levels. Wrongful convictions make our communities less safe, cause victims to live with the guilt of knowing that they were part of a process that imprisoned an innocent person, and force the wrongfully convicted defendant to lose years of their life in jail. The presenters of this course have conducted a comprehensive study of this topic for the United States Court of Appeals for the Third Circuit. They will discuss the science of eyewitness identification, trends in the judicial treatment of identification evidence, and promising models of reform in police policies and procedures.*

*****Indicates 1 Ethics Credit

Philadelphia DAO July 2019 CLE:
Selected Topics in 21st Century Prosecution

Thursday, July 25, 2019
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**LGBTQ (2 hrs.)**
10:00 – 11:00	**LGBTQ (2 hrs.)**
11:00 – 11:15	**BREAK**
11:15 – 12:15	**Pennsylvania Department of State Prosecution Process and Opportunities for Collaboration**
12:15 – 1:30	**LUNCH**

1:30 – 2:30	**Juvenile Brain Science (2 hrs.)***
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Juvenile Brain Science (2 hrs.)***
3:45 – 4:00	**BREAK**
4:00 – 5:00	**DIVRT (Digital Imaging and Video Recovery Team)**

***Indicates 1 Ethics Credit

Philadelphia DAO July 2019 CLE:
Selected Topics in 21st Century Prosecution

Friday, July 26, 2019
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Professionalism in the Courtroom***
10:00 – 10:15	**BREAK**
10:15 – 11:45	**The Real Story Behind the Prosecution of Bobby Shmurda's Crips Gang**
11:45 – 1:00	**LUNCH**
1:00 – 2:30	**Appellate Update**
2:30 – 2:45	**BREAK**

2:45 – 3:45	**Witness Intimidation (2 hrs.)**
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Witness Intimidation (2 hrs.)** .

*****Indicates 1 Ethics Credit

Philadelphia DAO July 2020 CLE:
Selected Topics in 21st Century Prosecution

Thursday, July 23, 2020
Day 1

8:30 – 9:00	**CHECK-IN**
9:00 – 10:00	**Breaking the Ten Commandments of Cross Examination** **ADA Anthony Voci,** Supervisor, Homicide Unit *Irving Younger's masterful methodology for cross has withstood the test of time. However, all good lawyers know there are 2 sides to every coin. Keep an open mind as we explore some ideas that would cause Irv to roll over in his grave.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Reviewing the Prosecutor's Obligations Under *Brady v. Maryland**** *When prosecutors fail to disclose material evidence helpful to the defense that is a violation of the Constitution. In this hour, we will review the Brady rule and talk about recent developments in its interpretation.* **Professor Tom Dolgenos,** Lecturer, University of Pennsylvania
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Courtroom Procedures During the COVID-19 Pandemic** **Judge Jeffrey Schmehl,** United States District Judge, United States District Court for the Eastern District of Pennsylvania **Judge Richard Lloret,** United States Magistrate Judge, United States District Court for the Eastern District of Pennsylvania
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Virtual Preliminary Hearings** **ADA Teresa Benavides-Sexton,** Municipal Court Unit **ADA Madelyn Koppany,** Municipal Court Unit **ADA Sergio Glajar,** Municipal Court Unit **ADA Trey Flynn,** Municipal Court Unit **ADA Angela Brennan,** Municipal Court Unit
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Demonstrative Aids and Evidence** **ADA Christopher Lynett,** Major Trials Unit
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Changes in Double Jeopardy Law in Pennsylvania** **ADA Paul George,** Assistant Supervisor, Law Division

*****Indicates 1 Ethics Credit

Philadelphia DAO July 2020 CLE:
Selected Topics in 21st Century Prosecution

Friday, July 24, 2020
Day 2

8:30 – 9:00	**CHECK-IN**
9:00 – 10:00	**Handling Media in a Crisis: The Cosmo DiNardo Case** **Matthew Weintraub,** Bucks County District Attorney
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Charging During COVID-19** **ADA Lyandra Retacco,** Supervisor, Charging Unit **ADA Amanda Hedrick,** Assistant Supervisor, Charging Unit
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Choose Your Own Ethics Adventure*** **Jordana Greenwald,** Associate General Counsel, City of Philadelphia Board of Ethics **Tom Klemm,** Staff Attorney, City of Philadelphia Board of Ethics **Bryan McHale,** Public Integrity Compliance Services Supervisor, City of Philadelphia Board of Ethics *It is your first day at your new job as a City attorney. You hang your diploma, pick up your files, and head to court. Before you can even make it out of the lobby, you meet a mysterious stranger who asks for your help. Something about the stranger and their request feels off, but you can't quite put your finger on it. Wasn't there something in orientation about ethics rules? Maybe you should check the manual or call your supervisor…but the stranger seems earnest and you don't want to be late for court on your first day. Can you help the stranger, avoid violating the ethics rules, and still get to court on time? It all depends on the choices you make…* *Let Board of Ethics staff be your guide on an adventure in government ethics designed for lawyers who represent or interact with the City.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Appellate Update** **ADA Nina Datlof,** Appeals Unit **ADA Matthew Davis,** Appeals Unit *This session will review recent decisions handed down by appellate courts and discuss developments in the law that impact our prosecution of criminal defendants.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Analyzing Cell Phone Dumps and GPS** **ADA William Fritze,** Gun Violence Task Force
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Jury Instructions: A Practical Guide for Criminal Trial Attorneys** **ADA Samuel Ritterman,** Federal Litigation Unit *Jury instructions are the way otherwise untrained jurors learn the law so they can fulfill their constitutional duty. They also have become one of the most consistently discussed matters in criminal appellate cases. The absence or misstatement of a jury instruction has sometimes been held as a reason to reverse a conviction. Conversely, the presence of the proper jury instruction is sometimes held as an important factor in upholding a conviction. This presentation will address jury instructions to assist criminal trial attorneys on both sides on how to use the instructions to ensure the integrity of the trial, avoid unnecessary reversals, and prevent issues of ineffective assistance of counsel from arising.*

*****Indicates 1 Ethics Credit

Philadelphia DAO July 2021 CLE:
Selected Topics in 21st Century Prosecution

Thursday, July 22, 2021
Day 1

8:45 – 9:00	**LOG-IN**
9:00 – 10:00	**Commonwealth v. Hugo Selenski** **Sam Sanguedolce,** Luzerne County District Attorney *DA Sanguedolce, who was the lead prosecutor in the infamous case of* Commonwealth v. Hugo Selenski, *will discuss the decade-long prosecution where a double homicide conviction was obtained of Luzerne County's most famous serial killer.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Litigating Rule 600 Motions** **ADA Nina Datlof,** Appeals Unit *Pa.R.Crim.Pa. 600, which requires defendants to be brought to trial within 365 days of the filing of a criminal complaint, is an ever-changing area of law. This presentation will provide an overview of Rule 600 case law, file maintenance, motion preparation, and the appellate process.*
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Prior Bad Acts: A Survey of Caselaw** **ADA Samuel Ritterman,** Homicide/Non-Fatal Shooting Unit *One of the most frequent issues arising in criminal trials is the admissibility of prior bad acts. This presentation is a guided tour of the caselaw interpreting the governing rule of evidence to examine its contours and provide practical advice to trial attorneys.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Serving Those Who Served Us: Veterans Court** **President Judge Patrick Dugan,** Judge, Philadelphia Municipal Court **ADA Joshua Barnett,** Diversion Unit **Lesha Sanders,** Court Coordinator, First Judicial District of Philadelphia **Frank Romeo,** Adult Probation Officer, Philadelphia Veterans Court **Kevin Carr-Lemke,** Veterans Justice Officer, Corporal Michael J. Crescenz VA Medical Center **Greg Nini,** Veterans Court Mentor **Donte Green,** Senior Paralegal, Public Defender Association of Philadelphia *Officially established in 2010, the Philadelphia Veterans Court is a voluntary specialty court that offers programs, treatment, and support for former service members who have been arrested and charged with a crime. Our presenters will explain their role in how Veterans Court specifically focuses on treatment for criminally-involved veterans.*
2:30 – 2:45	**BREAK**
2:45 – 3:15	**How a Criminal Justice Bill Becomes Law (.5 credits)** **ADA Shawn Baldwin,** Appeals Unit *This presentation will overview the role of a prosecutor in legislative lobbying.*
3:15 – 3:30	**BREAK**
3:30 – 5:00	**Critical Race Theory 101*** **Professor David T. Goldberg,** Director, University of California Humanities Research Institute **Professor Anjali Vats,** Associate Professor of Law, University of Pittsburgh School of Law **Professor India Thusi,** Professor of Law, Indiana University-Bloomington Maurer School of Law **Judge Donald Hahn,** Pennsylvania Magisterial District Court 49-1-01 **Barbara E. Ransom,** Esquire *Former President Donald J. Trump's September 2020 Executive Order 13950 that eliminated federal funding from all training and education against conscious and unconscious bias based on critical race theory (CRT). Fortunately, E.O.13950's false narrative started a national conversation about CRT and the need to address racism in the American jurisprudence. Unfortunately, few in the legal profession know much about or understand CRT.* *This session will provide a working definition of CRT with some background on CRT's genesis and how it can bring some insights into American jurisprudence and litigation. We will explore the current mania that is the war on CRT. Seeking to leave the audience with some positive skills, we also will discuss the management of racial feelings in tense situations and models for progressive prosecution. Lastly, we hope to add your voices to the discussion with some Q&A time.*

*****Indicates 1.5 Ethics Credit

Philadelphia DAO July 2021 CLE:
Selected Topics in 21st Century Prosecution

Friday, July 23, 2021
Day 2

8:45 – 9:00	**LOG-IN**
9:00 – 10:00	**The Myth of the Model Minority** **Janice Arellano,** Counsel at Cleary Giacobbe Alfieri Jacobs, LLC **Tsiwen Law,** Attorney at Law, Law & Associates, LLC **Melissa Pang,** Assistant General Counsel, School District of Philadelphia *The panelists will detail the history surrounding the origin of the "model minority" term, explore existing contemporary impact on APA communities, on the law, and on other POC communities, and discuss ways to mitigate its impact.*
10:00 – 10:10	**BREAK**
10:10 – 12:20 (10 min. break at 11:10)	**Trauma-Informed Decision Making in the Justice System (2 hrs.)** **ADA Branwen McNabb,** Supervisor, Family Violence and Sexual Assault Unit **Tony DeVincenzo,** Northeast Regional Children's Advocacy Center **Colleen Getz,** Philadelphia Children's Alliance *This discussion will provide a basic overview of trauma and how it impacts those involved in the justice system. During the discussion, we will examine how trauma affects witnesses, survivors, and individuals accused of crimes and how prosecutors and practitioners can make decisions from a more trauma-informed lens.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Using Human-Centered Design to Improve Legal Services** **Jennifer Leonard,** University of Pennsylvania Law School Chief Innovation Officer and Executive Director of the Future of the Profession Initiative *Lawyers have designed legal systems for lawyers to use. As a result, those who interact with legal systems and lawyers often feel afraid, outmatched, confused, and unclear about the status and likely outcome of their matter. By deploying human-centered design, or "design thinking," an approach from fields like architecture, engineering, and business that puts the user at the heart of every product or service, lawyers can begin to create a better experience for clients, victims, and others the legal system serves.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**1-900-Ethics**** **Jordana Greenwald,** Associate General Counsel, City of Philadelphia Board of Ethics **Dani Gardner Wright,** Staff Attorney, City of Philadelphia Board of Ethics **Bryan McHale,** Public Integrity Compliance Services Supervisor, City of Philadelphia Board of Ethics *"Thank you for calling 1-900-Ethics, how may we assist you?" Follow the Board of Ethics for an interactive experience as we address questions from City attorneys who are weighing pivotal decisions with ethical considerations. This course will discuss ethics topics such as conflicts of interest, gifts, and post-employment.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Suppression Law Update** **ADA Michael Erlich,** Appeals Unit

******Indicates 1 Ethics Credit

Philadelphia DAO November 2018 CLE:
Selected Topics in 21st Century Prosecution

Thursday, November 8, 2018
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:30	**An Evolution of Forensic Science** **Michael Garvey,** Director, Office of Forensic Science, Philadelphia Police Department *Forensic science continues to evolve, providing powerful results to help exonerate the innocent, establish linkages between crimes, and identify true perpetrators of crime. This presentation will provide an overview of the Philadelphia Police Department's Office of Forensic Science, covering current capabilities, recent advancements, resource capacity, and technological limitations.*
10:30 – 10:45	**BREAK**
10:45 – 11:45	**Crime Scene Processing in the Era of the "CSI Effect"** **Officer Jacqueline Davis,** Office of Forensic Science Crime Scene Unit, Philadelphia Police Department *With multiple CSI shows on television currently, Crime Scene Units are constantly under scrutiny by the public and even some law enforcement. It can become difficult to decipher what a forensic crime scene investigation can accomplish and what are merely television theatrics. This presentation will focus on how an accredited Crime Scene Unit applies sound scientific principles and modern technology in the investigation of a crime scene.*
11:45 – 1:00	**LUNCH**
1:00 – 2:00	**Don't Give Up 5 Minutes Before the Miracle*** **Laurie Besden,** Executive Director, Lawyers Concerned for Lawyers (LCL) of Pennsylvania **J. David Farrell,** LCL Volunteer, Former Board Member of LCL *Through an in-depth telling of her recovery journey (including her eventual reinstatement to the practice of law), Ms. Besden will provide information on how to identify and help attorneys in distress due to substance use and mental health disorders, as well as outline resources for help available, including an overview of LCL services. In addition, Mr. Farrell will share his personal journey of recovery, including being the LCL volunteer who brought the message of recovery to Ms. Besden in 2004; forever changing the trajectory of her life. Lastly, this session will overview shocking statistics regarding the prevalence of substance use and mental health disorders in the US legal industry.*

2:00 – 3:30	**Search and Seizure Law Update** **Professor David Rudovsky,** Senior Fellow, University of Pennsylvania Law School
3:30 – 4:00	**BREAK**
4:00 – 5:00	**Post-Conviction DNA Testing** **ADA Patricia Cummings,** Supervisor, Conviction Integrity Unit **ADA Carrie Wood,** Conviction Integrity Unit

*****Indicates 1 Ethics Credit

Philadelphia DAO November 2018 CLE:
Selected Topics in 21st Century Prosecution

Friday, November 9, 2018
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:30	**Appellate Update** **ADA Robert Petrone,** Appeals Unit **ADA Michael Erlich,** Appeals Unit **ADA Emily Daly,** Appeals Unit *Once again, we welcome back our accomplished presenters from the Appeals Unit to review recent decisions handed down by appellate courts and discuss developments in the law that impact our prosecution of criminal defendants.*
10:30 – 10:45	**BREAK**
10:45 – 12:15	**Navigating the Criminal Justice System for LGBTQ Individuals**** **Amber Hikes,** Executive Director, Office of LGBT Affairs for the City of Philadelphia **Sergeant Nicholas Tees,** LGBTQ Police Liaison, Philadelphia Police Department **Barrett Marshall,** Co-Chair, Philadelphia Mayor's Commission on LGBTQ Affairs **Kae Greenberg,** Secretary, Philadelphia Mayor's Commission on LGBTQ Affairs **Naiymah Sanchez,** Organizer, Transgender Education and Advocacy Program, American Civil Liberties Union (ACLU) of Pennsylvania **ADA Caleb Arnold,** Immigration Counsel to the Philadelphia DAO **ADA Ashley Toczylowski,** Major Trials Unit **Kelly Burkhardt,** Victim/Witness Coordinator, Major Trials Unit *LGBTQ individuals are part of every facet of the criminal justice system. Join our diverse panel of attorneys, key members of the City of Philadelphia's Office of LGBT Affairs, and dedicated advocates as they provide a deeper understanding of the LGBTQ experience that affects people personally, professionally, and legally.*
12:15 – 1:30	**LUNCH**
1:30 – 2:30	**Charging a Stranger Robbery** **ADA Lyandra Retacco,** Supervisor, Charging Unit **ADA Amanda Hedrick,** Assistant Supervisor, Charging Unit *In recent years, eyewitness identification testimony has evolved as science explores the malleable nature of human memory and visual perception. This course will review the science of eyewitness identification and changes in the courts' treatment of identification evidence. The presenters of this course, who supervise the District Attorney's Office's Charging Unit, will examine how the ever-changing scientific and legal landscapes of eyewitness identification impact the decisions to charge cases involving stranger identifications.*

2:30 – 2:45	**BREAK**
2:45 – 3:45	**Historical Cell Site Analysis: The New DNA (2 hrs.)** **ADA Cydney Pope,** Homicide Unit **Detective Anthony Vega,** Task Force Officer | CAST Agent, Federal Bureau of Investigation | Philadelphia Police Department **Detective James Dunlap,** Task Force Officer | CAST Agent, Federal Bureau of Investigation | Philadelphia Police Department **Detective Robert H. Daly,** Special Investigations Unit, Philadelphia Police Department, Southwest Division
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Historical Cell Site Analysis: The New DNA (2 hrs.)** **ADA Cydney Pope,** Homicide Unit **Detective Anthony Vega,** Task Force Officer | CAST Agent, Federal Bureau of Investigation | Philadelphia Police Department **Detective James Dunlap,** Task Force Officer | CAST Agent, Federal Bureau of Investigation | Philadelphia Police Department **Detective Robert H. Daly,** Special Investigations Unit, Philadelphia Police Department, Southwest Division

******Indicates 1.5 Ethics Credit

Philadelphia DAO November 2019 CLE:
Selected Topics in 21st Century Prosecution

Thursday, November 7, 2019
Day 1

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**We Want You! Military Justice: An Overview of Active Duty and Reserve Component Military Justice and Common Ethical Issues That Arise*** **ADA Colleen Osborne,** PCRA Unit **ADA Jeffrey Palmer,** Family Violence and Sexual Assault Unit *Jeffrey Palmer, who is a Major in the United States Marine Corp Reserve, and Colleen Osborne, who is a Captain in the United States Army Reserve, will go through the military justice process, contemporary issues in military justice, and ethical issues that arise in both active duty and reserve duty status.*
10:00 – 11:00	**Legal Writing Refresher** **ADA Paul George,** Assistant Supervisor, Law Division **ADA Zachary Mattioni,** PCRA Unit *Facing an imminent deadline to answer an unexpected defense argument can be a stressful situation for ADAs, but writing a brief does not have to be a daunting task. This session will demonstrate how to efficiently utilize Westlaw and the DAO's brief bank to quickly research legal issues as they arise, avoiding the frustration of unproductive searches. From there, the session will shift focus to the actual writing process, explaining the style choices and ways to present one's argument that produce clear, concise briefs.*
11:00 – 11:15	**BREAK**
11:15 – 12:15	**SORNA Update** **ADA Bill Burrows,** Family Violence and Sexual Assault Unit *From the very first Megan's Law to the ongoing litigation challenging the constitutionality of SORNA, this presentation is designed to look at the past, present, and future of the sex offender registration laws in Pennsylvania.*
12:15 – 1:45	**LUNCH**

1:45 – 3:15	**Perspectives from the Law Division** **ADA Samuel Ritterman,** Federal Litigation Unit *ADA Samuel Ritterman will present on various lessons he has learned over his fifteen years in the Law Division, emphasizing practical applications to those litigating criminal trials and appeals. Topics will include an overview of the appellate process, avoiding ineffective assistance of counsel claims, how not to commit prosecutorial misconduct, evidentiary matters, jury instructions, legal research, and making a good record.*
3:15 – 3:30	**BREAK**
3:30 – 5:00	**Gunshot Wounds and Blunt Trauma** **Dr. Lindsay Simon,** Associate Medical Examiner, Philadelphia Medical Examiner's Office *Gunshot wounds and blunt trauma are injuries commonly encountered in the course of criminal proceedings. This presentation is intended to explain the mechanisms and appearances of these injuries, both in general and in the context of specific scenarios.*

*****Indicates 1 Ethics Credit

Philadelphia DAO November 2019 CLE:
Selected Topics in 21st Century Prosecution

Friday, November 8, 2019
Day 2

8:30 – 9:00	**REGISTRATION**
9:00 – 10:00	**Jury Trials: Soup to Nuts (2 hrs.)** **ADA Anthony Voci,** Supervisor, Homicide Unit **ADA Cydney Pope,** PCRA Unit **ADA Jude Conroy,** Supervisor, Gun Violence Task Force *From file preparation to closing arguments, this session will focus on effectively preparing cases for presentation to a jury. It will discuss pre-trial preparation, locating witnesses, jury selection, trial strategy & witness order, utilization of technology, crime scene & physical evidence, and more.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Jury Trials: Soup to Nuts (2 hrs.)** **ADA Anthony Voci,** Supervisor, Homicide Unit **ADA Cydney Pope,** PCRA Unit **ADA Jude Conroy,** Supervisor, Gun Violence Task Force *From file preparation to closing arguments, this session will focus on effectively preparing cases for presentation to a jury. It will discuss pre-trial preparation, locating witnesses, jury selection, trial strategy & witness order, utilization of technology, crime scene & physical evidence, and more.*
11:10 – 11:20	**BREAK**
11:20 – 12:20	**The History and Implementation of Article 10 of the Philadelphia Home Rule Charter*** **Michael Cooke,** General Counsel, City of Philadelphia Board of Ethics **Jordana Greenwald,** Associate General Counsel, City of Philadelphia Board of Ethics *The first half of the 20th century in Philadelphia was marked by scandals and fitful reform efforts that culminated in the early 1950's in city/council consolidation and a new Home Rule Charter. Article 10 of the charter includes rules and restrictions aimed at ensuring that the power of city government is exercised without political interference or for personal financial motivation. We will explore the people and events that shaped this important piece of the City's ethics rules as well as efforts to fully implement – or resist – the rules in the decades following their adoption.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Sentencing – The Post Trial Perspective: Common Issues and How to Avoid Them** **ADA Laurie Williamson,** PCRA Unit **ADA Mark Burgmann,** Gun Violence Task Force *In the post-trial context, the DAO's Appeals, PCRA, and Federal Litigation Units are constantly dealing with sentencing claims. Approximately 50% of direct appeals and PCRA petitions involves a sentencing claim. This presentation will cover some of the most prevalent issues involved with such sentencing claims, the laws governing these issues, and best practices on how to avoid errors. In addition, this session will provide tools for practitioners to create a complete record, which should ensure that all parties both understand and consider all relevant factors at the time of sentencing, including, but not limited to, the defendant's representation and awareness of the proceedings, the victims' awareness, and a voice that assures fairness and finality in sentencing.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Kermit Gosnell and His House of Horrors (2 hrs.)** **ADA Joanne Pescatore,** Homicide Unit **Officer John Taggart,** Crime Scene Investigator, Philadelphia Police Department **Officer Robert Flade,** Crime Scene Investigator, Philadelphia Police Department *This presentation will discuss the lengthy grand jury investigation and 2013 prosecution of Kermit Gosnell, a doctor who illegally performed late-term abortions in West Philadelphia. During a routine narcotics investigation, officers discovered the bodies of 47 aborted babies, and learned that Gosnell had been performing illegal abortions and killing babies born alive. Following a six week-trial, Gosnell was convicted of three counts of first-degree murder and one count of involuntary manslaughter for the death of a female patient.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Kermit Gosnell and His House of Horrors (2 hrs.)** **ADA Joanne Pescatore,** Homicide Unit **Officer John Taggart,** Crime Scene Investigator, Philadelphia Police Department **Officer Robert Flade,** Crime Scene Investigator, Philadelphia Police Department *This presentation will discuss the lengthy grand jury investigation and 2013 prosecution of Kermit Gosnell, a doctor who illegally performed late-term abortions in West Philadelphia. During a routine narcotics investigation, officers discovered the bodies of 47 aborted babies, and learned that Gosnell had been performing illegal abortions and killing babies born alive. Following a six week-trial, Gosnell was convicted of three counts of first-degree murder and one count of involuntary manslaughter for the death of a female patient.*

*****Indicates 1 Ethics Credit

Philadelphia DAO November 2020 CLE:
Selected Topics in 21st Century Prosecution

Thursday, November 5, 2020
Day 1

8:30 – 9:00	**CHECK-IN**
9:00 – 10:00	**Protecting Your Conviction** **ADA Shayna Gannone,** Post Conviction Review Act (PCRA) Unit **ADA Laurie Williamson,** Post Conviction Review Act (PCRA) Unit *The Post-Conviction Relief Act (PCRA) allows defendants who are serving a sentence to collaterally challenge their convictions in the trial court on the basis of certain limited constitutional and statutory grounds. This presentation will begin with a brief overview of the post-trial process, including some of the most commonly raised PCRA claims, and explain the steps that can be taken at the trial level to make a complete record and protect the integrity of the conviction.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**The Resilient Lawyer: Mental Health and Well-Being in this Uncertain Time*** **Ingrid Dale Ali,** Licensed Clinical Social Worker and Certified Clinical Trauma Professional *This session serves as a discussion identifying the stressors and vulnerabilities of legal professionals. Learn practical and actionable information you can utilize to preserve your mental health during the COVID-19 pandemic*.
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Eyewitness Identification** **Judge Theodore A. McKee,** United States Circuit Judge, United States Court of Appeals for the Third Circuit **Judge Mitchell S. Goldberg,** United States District Judge, United States District Court for the Eastern District of Pennsylvania *The Third Circuit Task Force on Eyewitness Identifications (Task Force) was created, in part, in response to the scientific developments in the field of eyewitness identification and the recognition that courts had begun to apply these developments in criminal cases. At the time the Task Force formed, no other federal court had undertaken such a project on eyewitness identification. This session will review the Task Force's recommendations that "promote reliable practices for eyewitness investigation and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of wrongful conviction."*
12:20 – 1:30	**LUNCH**

1:30 – 2:00	**Dissecting Ricker in a Post-McClelland World (30 min.)** **ADA Rebekah Lederer,** Homicide/Non-Fatal Shooting Unit **ADA Paul George,** Assistant Supervisor, Law Division *The most recent PA Supreme Court decision on the application of hearsay at a preliminary hearing, McClelland (233 A.3d 717), has left many questions and differing interpretations. McClelland held that hearsay alone cannot be used to establish all the elements of the crime charged. So what does that mean? By examining differing cases that culminated in this summer's McClelland decision, Paul and Rebekah explore the historical and future use of hearsay at a preliminary hearing as well as the lingering ambiguities.*
2:00 – 2:05	**BREAK**
2:05 – 2:35	**SORNA Update (30 min.)** **ADA Bill Burrows,** Family Violence and Sexual Assault Unit *From the very first Megan's Law to the ongoing litigation challenging the constitutionality of SORNA, this presentation is designed to look at the past, present, and future of the sex offender registration laws in Pennsylvania.*
2:35 – 2:45	**BREAK**
2:45 – 3:45	**Evidence Refresher** **Dennis W. Morrow,** Visiting Practice Professor of Law, Temple University Beasley School of Law *The more removed from law school a trial attorney becomes, the easier it can be to lose sight of the fundamental principles underlying evidence law. Focusing on relevance, unfair prejudice, impeachment, and hearsay, this presentation will return to the basics and, ultimately, strengthen the ability to make clear, understandable evidentiary arguments.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**The Changing Tide of Juvenile Justice and the Impacts of the COVID-19 Pandemic** **ADA Adara Combs,** Assistant Supervisor, Juvenile Unit **ADA Lakeisha R. Fields,** Juvenile Unit

*****Indicates 1 Ethics Credit

Philadelphia DAO November 6 2020 CLE:
Selected Topics in 21st Century Prosecution

Friday, November 6, 2020
Day 2

8:30 – 9:00	**CHECK-IN**
9:00 – 10:00	**Forensic Pathology in the Courtroom: Gunshot Wounds** **Dr. Lindsay Simon,** Associate Medical Examiner, Philadelphia Medical Examiner's Office *A number of criminal cases involve injuries to the body from gunshot wounds. This session will explain how forensic pathologists identify and document these injuries, provide photographic examples of the injuries for review, and explain how different firearms can cause different types of injuries.*
10:00 – 10:10	**BREAK**
10:10 – 11:10	**Federal Habeas Corpus: An Overview and Update** **Professor Tom Dolgenos,** Lecturer, University of Pennsylvania *This presentation will overview the basics of federal habeas corpus law, and highlight a few areas that are currently controversial or of special interest.*
11:10 – 11:20	**BREAK**
11:20 – 12:20	**Procedural Justice in the Courtroom** **Tom Tyler,** Macklin Fleming Professor of Law, Yale Law School **Caroline Sarnoff,** Executive Director, Justice Collaboratory, Yale Law School *Legal authorities are increasingly interested in how they can build public trust in the criminal justice system. This session presents the results of research on the importance of having and ways of obtaining that trust. It details a set of steps that prosecutors can take to build and maintain public support for their role and for the overall criminal justice system.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**Supporting Transgender and Gender-Nonconforming Individuals in the Criminal Justice System*** **Kelly Burkhardt,** LGBTQ Liaison, Victim Services and Victim/Witness Coordinator, Homicide/Non-Fatal Shooting Unit **ADA Caleb Arnold,** Immigration Counsel, Philadelphia DAO **Deja Lynn Alvarez,** LGBTQ Care Coordinator, Department of Public Health, City of Philadelphia, Core Trainer for the Transgender Training Institute, and Co-Chair of Philadelphia Police Liaison Committee *Transgender and non-binary individuals make up many participants involved in the criminal justice system. For this marginalized community, anti-transgender violence has disproportionally continued on the rise for several years now, and 2020 is no different with at least 34 trans and non-binary individuals being murdered including two black trans women from Philadelphia. Here to discuss, provide cultural competency, and dissect the continual epidemic is award-winning advocate and activist Deja Lynn Alvarez and ADA Caleb Arnold.*
2:30 – 2:45	**BREAK**
2:45 – 3:45	**Gun Crimes Strategies and Prevention Program** **G. Lamar Stewart,** Supervisor, Community Engagement Unit
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Quehanna Boot Camp Program** **James Stover,** Justice Reinvestment Initiative 2 Coordinator, Pennsylvania Department of Corrections **Frazer Blake,** Superintendent, Quehanna Boot Camp **Scott Carter,** Major/Deputy Commander, Quehanna Boot Camp *The Quehanna Boot Camp Program offers an alternative to traditional incarceration within the Pennsylvania Department of Corrections. The program's leaders will provide a behind-the-scenes look into its history, as well as detail the eligibility requirements, and overview statistics from the program.*

*****Indicates 1 Ethics Credit

Philadelphia DAO November 2021 CLE Schedule:
Selected Topics in 21st Century Prosecution

Thursday, November 4, 2021
Day 1

8:45 – 9:00	**LOG-IN**
9:00 – 10:30	**Oral Advocacy** **Cheryl Yankolonis**, Supervisor, Family Violence and Sexual Assault Unit **Tony Pomeranz,** Assistant District Attorney, Appeals Unit *Drawing on science, psychology, and theatre, a trial prosecutor and appellate prosecutor explain how to control anxiety and present memorable, persuasive oral advocacy at all stages of the criminal process.*
10:30 – 10:45	**BREAK**
10:45 – 11:45	**Jury Trial Survival** **Jan McDermott,** Supervisor, Auto Theft Unit *A veteran prosecutor shares her insight into trying jury trials. Discussion will include preparedness at every stage of the game from jury selection to verdict and beyond.*
11:45 – 1:00	**LUNCH BREAK**
1:00 – 2:30	**Juvenile Justice: Updates on Juvenile Life Without Parole and Direct File Juvenile Case Processing** **Robert Listenbee**, First Assistant District Attorney, Philadelphia DA's Office **Chesley Lightsey**, Supervisor, Homicide/Non-Fatal Shooting Unit **William Inden**, Assistant District Attorney, Direct File Juvenile Unit *An overview of homicide cases involving juvenile defendants, as well as the rules and practices for prosecuting Direct File Juveniles and certifying juvenile violent offenders to adult court.*
2:30 - 2:45	**BREAK**

2:45 – 3:45	**Professionalism in the Courtroom** * **Deborah Watson-Stokes,** Supervisor, Municipal Court Unit *This CLE course will discuss professionalism in the courtroom for new ADAs from the perspective of judges, prosecutors and defense counsel.*
3:45 – 4:00	**BREAK**
4:00 – 5:00	**Admissibility of Digital Evidence** **Sherrell Dandy**, Assistant Supervisor, Homicide/Non-Fatal Shooting Unit **Samuel Ritterman**, Assistant District Attorney, Homicide/Non-Fatal Shooting Unit *As Judge Bender of the Superior Court recently wrote, "It does not require much imagination to believe a phone [found in a vehicle linked to a homicide] might contain either inculpatory or exculpatory evidence…." Com. v. Thomas, 239 A.3d 103 (Pa. Super. 2020) (memorandum opinion). However, it takes more than mere imagination to legally and effectively present such evidence in court. ADA Samuel Ritterman will present developments in the law relating to the admission of digital evidence, including matters of authentication and suppression. ADA Sherrell Dandy will present the practical aspects of using such evidence effectively in the courtroom.*

*Indicates 1 Ethics Credit

Philadelphia DAO November 2021 CLE Schedule:
Selected Topics in 21st Century Prosecution

Friday, November 5, 2021
Day 2

8:45 – 9:00	**LOG-IN**
9:00 – 11:10 (10 min. break at 10:00)	**Emerging Adults in the Criminal System: Using research and resources to improve outcomes** **Sangeeta Prasad, Esq**., Stoneleigh Fellow, Philadelphia DA's Office **Caleb Arnold, Esq**., Immigration Counsel, Philadelphia DA's Office **Nicole Elmurr**, Assistant District Attorney, Emerging Adult Initiative **Suzanne Gallen**, Paralegal, Emerging Adult Initiative and Project GO *Young adults between ages 18 and 25 are over-represented in Philadelphia's criminal justice system. This presentation will provide an overview of adolescent brain development and an individualized approach to prosecution and sentencing. The presenters will highlight collateral consequences and youth-focused service providers along the way.*
11:10 – 11:20	**BREAK**
11:20 –12:20	**Appellate Update** **Joanna Kunz,** Assistant Supervisor, Appeals Unit **A.J. Greer,** Assistant District Attorney, Appeals Unit *This presentation explores a selection of the Pennsylvania appellate courts' recent, precedential decisions in various areas of criminal law, including preliminary hearings, motions litigation, sentencing, and post-conviction proceedings.*
12:20 – 1:30	**LUNCH**

1:30 – 2:30	**20 Years After 9/11 and the Work Ahead*** **Jasmeet Kaur Ahuja, Esq**., Senior Associate, Hogan Lovells; President, South Asian Bar Association of Philadelphia **Tonny Ahmed, Esq.**, Litigation Associate, McDonnell & Associates; Former Assistant District Attorney, Philadelphia District Attorney's Office; Board Member, South Asian Bar Association of Philadelphia **Fariha Khan**, PhD, Co-Director of Asian American Studies, University of Pennsylvania **Ahmet Selim Tekelioglu, PhD,** Outreach and Education Director, CAIR Philadelphia *This panel will review the continuing impact of 9/11 on the South Asian and Arab American communities, 20 years after the attacks. Panelists will also discuss the difficulty of prosecuting hate crimes and the challenge of bias in the system.*
2:30 – 2:45	**BREAK**
2:45 – 5:00 (15 min. break at 3:45)	**Forensic Science: The Anatomy of Gun Violence Investigations** **William Fritze**, Supervisor, Gun Violence Task Force, DAO **Helen Park**, Assistant Supervisor, Gun Violence Task Force, DAO **Amanda McCourtie**, Forensic Analyst, Gun Violence Task Force, DAO **Lieutenant Joseph Walsh**, Commanding Officer of Pattern Evidence, PPD **Ryan Gallagher**, Forensics Lab Manager, Criminalistics Unit, PPD *Forensic science has evolved from a trial tool to a more powerful investigative tool that allows for greater transparency in policing through intelligence-led and data-driven methodologies. This discussion will focus on the role of forensic science in gun violence investigations. A brief overview of the various units of the PPD Office of Forensic Science, as well as the Gun Violence Task Force at the Philadelphia DAO, will be followed by a deeper discussion on the most critical forensic aspects of investigating gun violence to include capabilities and challenges.*

*Indicates 1 Ethics Credit

ATTACHMENT L

Philadelphia DAO New Policies**

Effective Date: 2/15/2018

These policies are an effort to end mass incarceration and bring balance back to sentencing. All policies are presumptive, not mandatory requirements. Where extraordinary circumstances suggest that an exception is appropriate, specific supervisory approval must be obtained. Wherever the term "supervisory approval" is used, it means that:

(1) An Assistant District Attorney must obtain approval of the unit's supervisor, and

(2) The supervisor must then obtain approval from the District Attorney, or in his absence, the approval of First Assistant Carolyn Temin or Robert Listenbee

(3) Bona fide verbal approvals and disapprovals are sufficient and must be noted in the case file, including the date of approval and identity of the requesting Assistant District Attorney and the supervisor who obtained approval or disapproval from the District Attorney.

DECLINE CERTAIN CHARGES

1. Do not charge possession of marijuana (cannabis) regardless of weight.

2. Do not charge any of the offenses relating to paraphernalia or buying from a person (BFP) where the drug involved is marijuana.

3. Do not charge prostitution cases against sex workers.

4. Do not charge or prosecute cases involving the possession of Buprenorphine.

CHARGE LOWER GRADATIONS FOR CERTAIN OFFENSES

Rationale: summary gradation greatly reduces pre-trial incarceration rates as no bail is required and the shorter time required for hearings expedites Municipal Court and Common Pleas dockets.

** These policies, which relate to various subjects, are included here together because they are the very first policies announced by District Attorney Larry Krasner within forty-five days after assuming office. They were a historic first step in the re-shaping of the Philadelphia Criminal Justice System.

1. Charge and dispose of Retail Theft cases as summary offenses unless the value of the item(s) stolen in a particular case exceeds $500.00 or where the defendant has a very long history of theft and retail theft convictions.

2. You must seek supervisory approval to charge and dispose of retail theft cases at misdemeanor or felony levels.

3. Remember, that a summary conviction permits a sentence of 90 days incarceration, fines of up to $250, and full restitution. These penalties are sufficient to hold a retail thief accountable.

4. In all cases, seek full restitution.

DIVERT MORE

All attorneys are directed to approach diversion and re-entry with greater flexibility and an eye toward achieving accountability and justice while avoiding convictions where appropriate. For example:

1. An otherwise law-abiding, responsible gun owner who is arrested because he does not have a permit to carry a firearm may apply for individualized consideration for diversion.

2. An otherwise law-abiding, first DUI (driving under the influence) defendant who has no driver's license (regardless of whether or not that defendant's immigration status interferes with obtaining a license under Pa. law) may apply for individualized consideration for diversion with a requirement of efforts to overcome license impediments where possible as an aspect of any diversionary program.

3. A defendant charged with marijuana (cannabis) delivery or PWID (Possession with the Intent to Deliver) may apply for diversion.

   This is not a comprehensive list.

INCREASE PARTICIPATION IN RE-ENTRY PROGRAMS

In general, some effective re-entry programs have failed to attract more candidates due to rewards and incentives of the program that are minor compared with the major effort required of re-entering Philadelphians. Effective re-entry programs prevent crime and should apply to more re-entering Philadelphians. ADAs and staff involved in re-entry are directed to discuss and formulate suggestions to improve this situation by May 1, 2018.

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PLEA OFFERS

Note: This policy does not apply to Homicides, Violent Crimes, Sexual Assault Crimes, Felon in Possession of a Weapon (6105), and Economic Crimes with a loss of $50,000 dollars or more or cases involving attacks on the integrity of the judicial process (e.g. false reports to police, perjury, obstruction of the administration of justice, witness intimidation, etc. All of these cases require supervisor approval as stated above.

1. Make plea offers below the bottom end of the mitigated range of the PA Sentencing Guidelines for most crimes.

2. Where an Individual ADA believes an offer below the bottom end of the mitigated range is too low due to specific factors, that ADA must seek supervisory approval of a higher offer.

3. Where the applicable sentencing guidelines range is between 0 and 24 months, ADAs should seek more house arrest, probationary, and alternative sentences in appropriate cases.

AT SENTENCING, STATE ON THE RECORD THE BENEFITS AND COSTS OF THE SENTENCE YOU ARE RECOMMENDING

The United States has the highest rate of incarceration in the world. It has increased 500% over a few decades. Pennsylvania and Philadelphia have been incarcerating at an even higher rate than comparable U.S. states and cities for decades--a 700% increase over the same few decades in Pennsylvania; and Philadelphia in recent years has been the most incarcerated of the 10 largest cities. Yet Pennsylvania and Philadelphia are not safer as a result, due to wasting resources in corrections rather than investing in other measures that reduce crime. Pennsylvania's and Philadelphia's over-incarceration have bankrupted investment in policing, public education, medical treatment of addiction, job training and economic development---which prevent crime more effectively than money invested in corrections. Over-incarceration also tears the fabric of defendants' familial and work relationships that tend to rehabilitate defendants who are open to rehabilitation and thereby prevent crime. As a result, a return to lower rates of incarceration for those defendants who do not require lengthy sentences is necessary in order to shift resources to crime prevention. Ultimately, the highest goal of sentencing must be to seek justice for society as a whole (the Commonwealth includes victims, witnesses, defendants, and those not directly involved in an individual case) while effectively preventing crimes in the future via methods that work. Each case, each defendant, and each sentence is unique and requires your careful consideration.

At sentencing, ADAs must state on the record their reasoning for requesting a particular sentence, and must state the unique benefits and costs of the sentence (e.g. consider where applicable the safety benefits, impact on victims, interruption of defendants' connections to family, employment, needed public benefits, and the actual financial cost of incarceration). In

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each case, place the financial cost of incarceration on the record as part of your explanation of the sentence recommended.

In talking about the financial cost to the taxpayer, use the following, arguably low, but much-repeated cost of:

$42,000.00 per year to incarcerate one person ($3,500 per month or $115.00 per day).

The actual cost (including pension and other benefits to correctional employees, health care for incarcerated individuals, etc.) arguably is close to $60,000.00 per year to incarcerate one person in the Philadelphia County prison system.

FACTS YOU SHOULD KNOW AND CONSIDER IN MAKING YOUR RECOMMENDATION

1. The actual cost (including pension and other benefits to correctional employees, health care for incarcerated individuals, etc.) arguably is close to $60,000 now to incarcerate one person for a year in Philadelphia County prison system. ($5,000 per month at $164.00 per day).

2. As of March 1, 2022, Philadelphia County incarcerates approximately 4,600 people at any given time with a total annual cost of around $360 Million per year.

3. The cost of one year of unnecessary incarceration (at $42,000.00 - $60,000.00) is in the range of the cost of one year's salary for a beginning teacher, police officer, fire fighter, social worker, Assistant District Attorney, or addiction counselor. You may use these comparisons on the record.

4. The average family's total income in Philadelphia in 2022 is approximately $46,000.00---which paid their housing, food, utilities, transportation, clothing, educational expense and taxes.

EXAMPLES OF HOW THIS INFORMATION CAN BE USED AT SENTENCING

1. If you are seeking a sentence of 3 years incarceration, state on the record that the cost to the taxpayer will be $126,000.00 (3 x $42,000.00) if not more and explain why you believe that cost is justified.

2. In a very serious matter, where for example, 25 years incarceration are sought and is appropriate, state on the record that the cost to the taxpayer is $1,050,000.00 (25 x $42,000.00) if not more and explain why you believe that cost is justified.

3. When recommending a sentence of probation, compare the cost of incarceration to the cost of probation.

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Emphasize the positive rehabilitative factors of a probationary sentence such as permitting the defendant to continue working and paying taxes, permitting the continuation of family life, education and community inclusion.

REQUEST SHORTER PROBATION TAILS (I.E. CONSECUTIVE PERIOD OF PROBATION) OR NO PROBATION TAIL AFTER A SENTENCE OF INCARCERATION.

Criminological studies show that most violations of probation occur within the first 12 months. Assuming that a defendant is violation free for 12 months, any remaining probation is simply excess baggage requiring unnecessary expenditure of funds for supervision. Working with our justice partners and through the policies of this office, we have reduced the number of people on supervision in Philadelphia from 42000 in 2018 to fewer than 26000 in 2022. There is no reason to assume a probationary tail must be two years or more in every single case. Carefully evaluate what, if any, probationary tail is appropriate upon completion of a sentence of incarceration. For more information, please see the office policy on probation tails, which limits the length of probation for felonies to 3 years and misdemeanors to 1 year.

REQUEST SHORTER PROBATIONARY SENTENCES WHERE NO SENTENCE OF INCARCERATION IS SOUGHT.

Criminological studies confirm that longer probationary periods often result in more failures than shorter ones where those studies have controlled for offense and criminal record.

REQUEST NO MORE THAN A 6-MONTH VOP SENTENCE FOR A TECHNICAL VIOLATION WITHOUT SUPERVISORY APPROVAL

In many technical violation cases, no additional incarceration should be sought and no revocation is necessary. However, where the technical violation(s) calls for a more serious consequence, do not seek more than 30 to 60 days of incarceration unless you have approval from the District Attorney via your supervisor. For most technical violations, you should not recommend a custodial sentence.

SUPERVISORY REQUEST NO MORE THAN A 1-2 YEAR VOP SENTENCE FOR A DIRECT VIOLATION WITHOUT APPROVAL

Every direct violation presents the opportunity for two sentencings (one on the old matter and one on the new matter) that take into account the fact of the defendant's commission of a new crime while under supervision. Obviously, commission of a new crime while under supervision is a factor tending to increase the sentence on the new matter. Therefore, ordinarily it is not necessary to seek a sentence of longer than 1-2 years for a direct VOP. However,

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where special factors arise, you may seek approval from the District Attorney via your supervisor to seek a lengthier direct VOP sentence.

REQUEST THAT THERE BE NO VIOLATION OF PROBATION OR PAROLE DUE TO A POSITIVE DRUG TEST FOR USE OF MARIJUANA (CANNABIS) OR DUE TO POSSESSION OF CANNABIS WITHOUT SUPERVISORY APPROVAL

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Philadelphia DAO Policy on Bail

Effective Date: 2/21/2018

Effective February 21, 2018, the District Attorney will ordinarily no longer ask for cash bail for the following misdemeanors and felonies. All representatives of the District Attorney will be expected to abide by this presumption. Where justice requires, there is discretion to go against this presumption.

The cash ball system is rife with injustice and exacerbates socio-economic and racial inequalities, disproportionately penalizing the poor and people of color. The reforms laid out below represent a decisive step toward ending the use of cash ball and making the pretrial system more just.

All representatives of the District Attorney should presume that they will no longer seek cash bail on the following charges:

35-780-113-A16	Intentional Possession of a Controlled Substance
75-3802	DUI
18-3929	Retail Theft
35-780-113-A19	Unlawful Purchase of a Controlled Substance (BFP)
35-780-113-A31	Possession of Marijuana
18-3921	Theft by Unlawful Taking (not graded as F2)
18-5902	Prostitution
18-3925	Receiving Stolen Property (not graded as F2)
18-3304	Criminal Mischief
184101	Forgery
18-3502	Burglary F2- Not for Overnight Accommodation, No Person Present
18-3503	Trespass (non-residential)
18-3934	Theft from Motor Vehicle (not graded as F2)
18-3922	Theft by Deception or False Impression
18-5104	Resisting Arrest
18-3928	Unauthorized Use of a Motor Vehicle
35-780-113-A32	Paraphernalia
18-5123	Contraband
18-4914	Providing False Identification to Law Enforcement
62-62- 481	Fraud in Obtaining Foodstamps/Pubic Assistance
18-4120-	Identity Theft
18-4119	Trademark Counterfeiting
18-4106	Access Device Fraud
35-780-113-A30	PWID-Marijuana (51bs or under)

Special Conditions for PWID Cases (Other than Marijuana)

Where a defendant is charged with possession with the intent to deliver a substance other than marijuana, the presumption against monetary bail applies, except in any of the following circumstances:

- The weight of drugs possessed is greater than:
  - Heroin: 2.5g
  - Cocaine/Crack: 5g
  - Methamphetamine/PCP/Amphetamine: 12.5g
  - Other schedule 1/11 narcotic: 5g
- There is evidence of the presence of fentanyl
- The defendant has received two or more bench warrants in the past five years
- The defendant has one or more open cases of:
  - PWID
  - A violent felony or
  - VUFA/PIC (gun)
- A defendant has finished serving a sentence for:
  - PWID in the last 2 years
  - A violent felony in the past 5 years
  - VUFA or PIC (gun) in the past 5 years

Discretion:

In the above cases where the presumption applies, representatives of the District Attorney should generally recommend R.O.R.

While a presumption against cash bail applies in the above cases, representatives will continue to have discretion to ask for monetary bail where justice requires. For example, cases where a defendant is charged with a string of crimes, such as burglaries or thefts, or who have multiple DUIS in a short period of time, may be given cash bail despite the presumption against it. A significant history of recent flight may also suggest detention.

For all cases not subject to the above policy, representatives of the District Attorney should continue to evaluate bail requests on a case by case basis.

This policy will also apply to bail reduction motions in preliminary hearing and trial rooms, and in Motions Court.

Philadelphia DAO Policy on Avoiding Unjust Immigration Outcomes

Effective Date: 11/27/2018

It is essential that immigrants participate—as victims, witnesses and defendants—in the criminal justice system, in order to ensure the safety of our communities and residents, including both citizens and noncitizens. Creating barriers to participation in the criminal justice system due to the harsh deportation policies carried out by the federal government creates vulnerability in our communities where immigrants can be preyed upon with impunity by criminals and is completely unacceptable.

Where disproportionate immigration consequences may result from a criminal conviction and/or sentence, the case will be reviewed by immigration counsel to see what, if any, changes could be made to neutralize or reduce those consequences.

Deportation following a criminal conviction has significant and often devastating impacts on the emotional and financial well-being of innocent community members, including victims of crimes. Such impacts can include separation of families; significantly increased risks of involvement of children in criminal behavior; victims left without marital or child support; and families facing economic crises (common financial repercussions of deportation include food instability, loss of housing, and greater reliance on government assistance programs).

This office accepts the guidance offered by the Supreme Court of the United States in *Padilla v. Kentucky*, which held that adverse immigration consequences, especially deportation, are an *additional* punishment – not shared by a citizen defendant – which often inexorably follows from a conviction and sentence. As such, immigration consequences are so intimately tied to the criminal process that they are "uniquely difficult to classify as either a direct or a collateral consequence." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

A citizen and noncitizen – each with the same culpability – can be convicted of the same crime and receive the same sentence. The citizen will walk out of jail and return to his family, while the noncitizen, even with a valid visa or permanent resident status, can face the serious and long lasting additional penalty of deportation and/or other immigration related consequences (these can include: mandatory detention; inability to travel internationally; or preclusion from future immigration benefits such as applying for a green card or U.S. citizenship).

Due to the close relationship between criminal convictions and immigration consequences, and the severity of these consequences, this office further accepts the U.S. Supreme Courts'

statement that "informed consideration of possible [immigration consequences] can only benefit both the State and noncitizen defendants during the [trial process]," and that, "by bringing deportation consequences into this process, the defense and prosecution may well be able to reach [resolutions] that better satisfy the interest of both parties" *Padilla v. Kentucky* at 373. Considering alternative plea offers or sentencing recommendations serves the prosecution by avoiding unjust outcomes, which are most likely to arise when the charged offense and corresponding sentence are less serious and are disproportionate to the immigration risks. Therefore, this office believes that, to the extent possible, alternative dispositions which are immigration neutral can and should be considered in all appropriate cases.

THE POLICY

1. If you become aware that a defendant is not a U.S. citizen, through notification by the defense, information in the file, or by some other means, you must contact the District Attorney's Immigration Counsel.

2. **DO NOT** inquire directly of a defendant about a defendant's immigration status.

3. **DO NOT** disclose a defendant's status to anyone outside the office, including witnesses or victims.

4. **DO NOT, under any circumstances,** contact or communicate with ICE (Immigration and Customs Enforcement). If ICE is able to reach you, state that you are not authorized to speak to them and refer them to Immigration Counsel.

5. All contact with ICE must be discussed with and authorized by Immigration Counsel first, with final approval from the District Attorney.

6. Where an immigration consequence has been detected at the pre-trial stage, Immigration Counsel will advise what offer or offers can be made that will avoid the immigration consequence. If trial counsel disagrees with the advice of Immigration Counsel, the Unit Supervisor must be consulted. If the Unit Supervisor disagrees with Immigration Counsel, the District Attorney must be consulted and will make the final determination.

7. If the offer is refused and the case proceeds to trial, Immigration Counsel must be consulted to determine if a sentencing recommendation can be made that will avoid the immigration consequence. If the trial attorney disagrees with Immigration Counsel, the matter must be discussed, as indicated above, with the Unit Supervisor and, if necessary, with the District Attorney.

8. After Immigration Counsel's initial review, if changes in the case warrant a change in the offer or sentence recommendation (either lower or higher as evidence comes

together or does not), or if defense presents additional information, such as a mitigation packet or immigration memo, relating to why the offer or sentence recommendation should be altered, Immigration Counsel must be notified to determine whether additional changes are warranted.

PRESUMPTIONS

PLEASE NOTE: *You must notify Immigration Counsel, regardless of the presumption.* Cases will be reviewed on a case-by-case basis. However, the following presumptions will guide the decision. The presumptions, which are based upon detailed input from the relevant units, are as follows:

MC Cases

There are no presumptions for MC cases and each will be reviewed on a case-by-case basis.

Felony Cases

In general, offers for cases that include felony charges will not be evaluated or considered until after the preliminary hearing. For cases that should be considered prior to the preliminary hearing, they will be considered through the Pretrial Unit. Any offer will be conveyed by the Pretrial Unit supervisor and shared with the MC Unit supervisors as well.

Cases where there is a presumption that an immigration neutral solution will not be sought

Crimes perpetuated by adults against minors
Crimes where the offer includes SORNA registration
Crimes involving human trafficking
Most crimes involving child pornography
Most DV cases where the initial offer remains a felony
Shootings
F1 and F2 Robbery
Cases involving the use of a deadly weapon
Cases involving serious bodily injury
VUFA with a record of violence or prior gun possession/use
Homicides

Diversion

In general, there will be a presumption that offers will be modified to take into account immigration consequences. However, in the following cases, there is a presumption the offer will not change:

VUFA
Robbery with a gun
Defendants with disqualifying prior convictions (in line with existing diversion policies)

Family Violence and Sexual Assault

In general, there will be no presumption and cases will be looked at on a case-by-case basis. In cases where a misdemeanor is the only charge, immigration neutral changes are more likely.

CONCLUSION

In all cases, in order to arrive at the appropriate charge or disposition, for a criminal case, prosecutors routinely review and consider all relevant factors relating to the crime itself as well as all relevant factors relating to the defendant. In some cases, the factors relating to the defendant include adverse consequences that the defendant will suffer as a result of the conviction in addition to the direct consequences of the conviction. Immigration consequences often have a greater adverse impact on a defendant than the conviction alone. Most often, when considering immigration consequences, the immigration considered offer or sentencing recommendation will be commensurate with the original offer or recommendation and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required for immigration consequences and our pursuit of justice.

ATTACHMENT M

REPORT TO SELECT COMMITTEE ON RESTORING LAW & ORDER, PENNSYLVANIA HOUSE OF REPRESENTATIVES, PURSUANT TO H R 216

This report is presented in response to a request from counsel to the Select Committee of the Pennsylvania House of Representatives organized pursuant House Resolution Number 216. The report is to address the following issues:

1. The propriety of the use of the Grand Jury process of Philadelphia's District Attorney's office in the prosecution of Ryan Pownall, as that matter is referenced in the concurring opinion of Justice Kevin M. Dougherty in the case of Commonwealth v. Pownall, 278 A3d 885 (Pa. 2022).
2. The policies and practices of the District Attorney's Office of Philadelphia County as within or outside the bounds of permissible prosecutorial discretion in the enforcement of the criminal laws promulgated by the Pennsylvania Legislature.

The findings of this report are set forth in detail and are summarized in the Executive Summary set forth below.

I. EXECUTIVE SUMMARY

At the conclusion of Justice Dougherty's special concurring opinion, he details six concerns regarding the actions of the District Attorney in the prosecution of this case. Within the body of his special concurrence, Justice Dougherty collapses

those into three broad considerations, specifically, the legal instructions given to the Grand Jury before the return of its presentment, the bypassing of the preliminary hearing urged by the District Attorney's office, and the filing of a Motion In Limine to preclude a jury instruction pursuant to Title 18, PACS Section 508 and the subsequent attempt by the District Attorney's office to take a collateral appeal of the denial of that motion.

Regarding the six specific matters listed by Justice Dougherty in the special concurrence, Id. at *72 to *73, the following summary conclusions can be drawn:

1. The Justice's most significant concern was that the Grand Jury presentment became a slanted presentation of the facts, in substantial part because the Grand Jury was not instructed on the applicability of Section 508 and the impact it could have had on the determination as to whether an officer-involved shooting was justified. Both ethically and legally, a prosecutor is obligated, in dealing with a Grand Jury, to ensure that the grand jurors are presented with an accurate statement of the law from which they can assess the facts presented and reach the conclusion the Grand Jury has been empowered to reach by the Pennsylvania Legislature. The failure to properly instruct the Grand Jury on the law is a serious concern that could undermine the integrity of the presentment if a finding of specific prejudice to the Defendant was reached.
2. The unsealing and dissemination to the press of a Grand Jury presentment is part of the normal process that occurs in the issuance of many such presentments and, by itself, does not suggest any impropriety by a

prosecutor. Pursuant to Rule 3.8 of the Pennsylvania Rules of Professional Conduct, prosecutors are admonished to refrain from making public comments about a case:

> "**(e)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule."[1]

If a more surreptitious motive existed for that release in dissemination, or it was accompanied by inflammatory comments in violation of these Rules, an additional conclusion regarding its propriety could be reached. However, the mere releasing of the presentment, particularly in a high-profile case such as this, does not appear to be outside the norm for prosecutorial actions.

3. With regard to the bypassing of the right of the Defendant to a preliminary hearing, Justice Dougherty is certainly correct that the Legislature, in its enactment of Section 4551(e) of Title 42 PACS, has dictated that a person against whom a presentment has been filed "shall" have the right to a preliminary hearing.[2] This supersedes the general provisions of Rule 565

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[1] Rule 3.6 limits all attorneys from making public comments about cases which "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

[2] "**(e)** ***Procedure following presentment.*** **—** When the attorney for the Commonwealth proceeds on the basis of a presentment, a complaint shall be filed and the defendant **shall** be entitled to a preliminary hearing as in other criminal proceedings." [emphasis added]

of Pennsylvania Rules of Criminal Procedure which, in very limited circumstances, permits a prosecutor to have a Court order that the preliminary hearing be bypassed.[3] The prosecutor's office should have been aware of the provisions of Section 4551(e), and it is not clear whether or not they brought that provision to the attention of the Trial Court. However, to the extent that defense counsel did bring that section to the attention of the Court, the difficulty in bypassing the preliminary hearing lies equally upon the Trial Court, which ordered the bypass despite the mandatory language of that section of the statute.

A preliminary hearing in a grand jury presentment case such as the *Pownall* matter is to proceed to a preliminary hearing except if the case was then to be presented to an indicting grand jury pursuant to Pa. Rule of Criminal Procedure 556.2.[4] Rule 556.2 requires a showing by the prosecutor of probable cause to believe that witness intimidation has or is occurring. It does not appear from the record that such a showing was made.

4. The prosecutor's opposition to the change of venue is not an uncommon posture for a prosecutors' office to take. "A change in venue becomes necessary when the trial court concludes that a fair and impartial jury

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[3] "Rule 565**(A)** When the attorney for the Commonwealth certifies to the Court of common pleas that a preliminary hearing cannot be held for a defendant for good cause, the Court may grant leave to the attorney for the Commonwealth to file an information with the Court without a preliminary hearing." The Official Commentary to that Rule states: "It is intended that use of the bypass procedure as set forth in paragraph (A) will be limited to exceptional circumstances only.

[4] See, Pa. Rule Criminal Procedure 540 (F)(2).

cannot be selected in the county in which the crime occurred." *Commonwealth v. Robinson,* 864 A.460, 484 (Pa. 2004). Courts presume to try a case with a local jury unless evidence demonstrates that a fair jury cannot be drawn from that locale. Here, Justice Dougherty's opinion indicates that the trial Court made a careful effort to determine whether a jury could be selected from Philadelphia County without the need to change venue or veneer.[5] There is no superficial impropriety in a prosecutor opposing such a change of venue and the Court's ruling on it was a matter the defense could have later challenged on appeal. Indeed, since the effort to select a trial jury awaits, it still may prove to be impossible to draw a fair and impartial jury from the local population. Unless further evidence develops of some surreptitious motive on the part of the District Attorney to oppose of change of venue, there is simply nothing unusual about a prosecutor's office seeking to have the prosecution remain within the local jurisdiction.

5-6. Points 5 and 6 of Justice Dougherty's summary involves the action of the District Attorney in waiting until the trial neared before filing a Motion in Limine to bar the use of Section 508 via application by the Pennsylvania Suggested Standard Jury Instructions in the case. Upon the filing of the Motion in Limine, the trial Court did what many trial Courts would do in such a circumstance, that is, indicate that it would withhold ruling on that motion until the evidence was developed at trial. It is a fundamental principle of trial management that jury instructions can only be given where a factual

[5] The trial Court conducted two mock jury selections over the course of several months and concluded that a fair jury could be drawn from the Philadelphia area. Id, at *3-4.

basis exists in the record to support them, and the trial judge properly indicated that until the evidence was developed, the applicability of any part of Section 508 would have to await that factual basis. Nonetheless, the District Attorney pressed the matter, arguing that Section 508 (in most of its particulars) violated the Federal and Commonwealth Constitutions and asked for a pre-trial ruling on matter. When an adverse ruling was obtained, the District Attorney sought a collateral appeal.

Again, while additional evidence may indicate an improper motive for this appeal, it must be pointed out that while the Superior Court agreed with the trial Court that the matter was not an appealable order, two Justices of the Pennsylvania Supreme Court disagreed. Though a majority of four justices (Justice Saylor did not participate in the decision in the Pownall case), decided that the issue did not fit any established rubric for an immediate pre-trial appeal by the Commonwealth, Justices Wecht and Donahue disagreed. Id. at *86-87. They concluded that the matter was properly before the Court and agreed with the Commonwealth that Section 508 is unconstitutional in part. Id. at *100-108. An intriguing aspect of that dissenting opinion, however, is that the two Justices observed that even if Section 508 was declared unconstitutional in part, the impact of that ruling would not be felt by the Defendant in this case. Assuming the facts supported it, Pownall could still have used Section 508 as a trial defense, as a change in the law at this point would constitute an Ex Post Facto application in violation of the Defendant's constitutional rights. Id. at *110 *and following.*

Thus, given the support of one third of the deciding members of the Supreme Court that the decision to seek a pre-trial appeal was viable and that the grounds for the appeal were not frivolous, the decision to seek a pre-trial

appeal does not, by itself, demonstrate any impropriety on the part of the District Attorney's office.

Overall, there are certainly grounds for concern regarding the actions of the District Attorney in this case, most particularly with respect to the advice to the Grand Jury on the applicable law. Other actions were, on the surface, far more mainstream in terms of prosecutorial conduct, and a further development of facts would be necessary to draw conclusions with more ominous tones.

As to the second question posed by the Committee, Pennsylvania embraces a broad scope of discretion for District Attorneys. While individual decisions in certain matters are constrained by Legislative enactments, the major check of the exercise of discretion is the electoral process. Short of that, resorting to the exhaustive process of impeachment is available. And in specific cases, the Attorney General may seek to intervene and supersede the District Attorney in a given prosecution. Beyond that, little is available as a legal avenue to check a prosecutor's executive power.

II. ANALYSIS: COMMITTEE'S QUESTION #1

Before delving into the two particulars of the concerns raised by Justice Dougherty concerning this entire prosecution, a synopsis of the Pownall opinion is appropriate to place these issues into proper context.

A. The Pownall Opinion

The majority opinion in Pownall, written by Justice Dougherty, addresses the fundamental procedural issue of whether the appeal perfected by the Commonwealth was properly before the Court.

The majority outlined the salient facts leading up to the present posture of the case as follows:

The Defendant, a Philadelphia police officer, was charged with shooting a suspect after a Philadelphia County Investigating Grand Jury filed a presentment recommending the filing of homicide charges. The District Attorney's office preferred a criminal information charging third degree murder and other offenses.

The District Attorney then sought to bypass the preliminary hearing and the lower Court agreed, seemingly disregarding the express language of Title 42 Section 4551(e), which states that when a charge arises out of a Grand Jury presentment, a defendant "shall" be entitled to a preliminary hearing. Id. at *3 to *4. The Court appears to have proceeded on the general application of Rule 565 of the Criminal

Rules[6], which permits a preliminary hearing bypass for "good cause." In cases involving a Grand Jury presentment, Section 4551(e) must be seen to supersede that Rule and itself only admits of an exception under Rule 556.2, which permits a prosecutor to seek a bypass of a preliminary hearing where a probable cause showing is made to the Court that witness intimidation has or is occurring.[7] No attempt was

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[6] Rule 565: "**(A)** When the attorney for the Commonwealth certifies to the court of common pleas that a preliminary hearing cannot be held for a defendant for good cause, the court may grant leave to the attorney for the Commonwealth to file an information with the court without a preliminary hearing."

[7] **Rule 556.2. Proceeding by Indicting Grand Jury Without Preliminary Hearing.**

(A) After a person is arrested or otherwise proceeded against with a criminal complaint, the attorney for the Commonwealth may move to present the matter to an indicting grand jury instead of proceeding to a preliminary hearing.

(1) The motion shall allege facts asserting that witness intimidation has occurred, is occurring, or is likely to occur.

(2) The motion shall be presented *ex parte* to the president judge, or the president judge's designee.

(3) Upon receipt of the motion, the president judge, or the president judge's designee, shall review the motion. If the judge determines the allegations establish probable cause that witness intimidation has occurred, is occurring, or is likely to occur, the judge shall grant the motion, and shall notify the proper issuing authority.

(a) Upon receipt of the notice from the judge that the case will be presented to the indicting grand jury, the issuing authority shall cancel the preliminary hearing, close out the case before the issuing authority, and forward the case to the court of common pleas as provided in Rule 547 for all further proceedings.

made to make that showing here; rather, the District Attorney relied upon a showing that a plethora of witnesses would be needed for a preliminary hearing and that this would unduly slow the process. Id. at *61-65.

The District Attorney further opposed a change of venue in the case. The trial Court conducted two mock jury selections over the course of months and, as a result, concluded that a fair and impartial jury could be drawn from the Philadelphia Jury pool. Thus, the change of venue motion filed by the Defendant was denied, at least pending the attempt to actually empanel a jury prior to the start of trial. Id. at *4 to *5.

The circumstances leading to the appeal began approximately a month before trial when the District Attorney's office filed a motion to bar the Trial Court from using a Pennsylvania Suggested Standard Jury Instruction based upon Section 508 of the Crimes Code. That section set forth the circumstances under which a police officer is justified in using deadly force during the arrest of a suspect. The District Attorney essentially contended that pursuant to Tennessee v. Gardner, 471 U.S. 1 (1985), two of the subsections of §508 were unconstitutional. Specifically, the District Attorney's office contended that the section which permitted deadly force to be used when necessary to prevent the defeat of an arrest by a defendant who had committed "a forcible felony" or when the defendant was in possession of "deadly weapon" exceeded the authorization of the Gardner decision. Id. at *7-14.

In response to the motion, the Trial Court indicated that it would hold the matter under advisement, as it presented an evidentiary issue that required the Court to assess the factual basis for the giving of any instruction in this matter and that the ultimate decision on the Commonwealth's Motion in Limine would be reached after that factual basis was assessed at trial.

The District Attorney's office, unsatisfied with that resolution, evidently appeared at the Trial Court's chambers on December 23, 2019, and asked the Court to rule immediately on the matter. The District Attorney asserted that if the motion was denied, an immediate appeal would be taken under either rule of Rule 311(d) or 313 of the Pennsylvania Rules of Appellate Procedure. Rule 311 allows the Commonwealth to appeal wherein an issue is decided pre-trial adversely to it which would either terminate the prosecution or substantially handicap the prosecution's case.[8] The Trial Court denied the application of Rule 311. It also held that the order it was entering was not collateral order. According to §313:

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[8] Rule 311 states: "d) *Commonwealth appeals in criminal cases* -In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution."
By making that assertion with respect to the application of Section 508, it must be concluded that the Commonwealth was aware that the trial jury's awareness of §508 might have a very severe impact on whether or not a conviction could properly be obtained in the case. This is a significant matter when again considering the impact

> **(b)***Definition* -A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

*22. The Trial Court's consideration of this matter was primarily based upon its continued assertion that the application of any subsection of Section 508 would be dependent upon the facts that were ultimately developed at trial. At the conclusion of these proceedings, the Trial Court also denied an application by the Commonwealth to certify the issue for an immediate appeal. *24.

Nonetheless, the Commonwealth filed a Notice of Appeal.

The Superior Court dismissed the appeal as one improperly brought. 240 A. 3d. 905 (Pa. Super Unpub. 2020).

The Supreme Court, per Justice Dougherty and three other Justices, affirmed that dismissal. The Court held that Rule 311 was not applicable in a circumstance such as here, where the issue was the admissibility of defense evidence or argument as opposed to where Commonwealth evidence has been suppressed. Id. at *31. In essence, the majority held that the Commonwealth could not rely on Section 311 to speculate on what impact on Commonwealth's case something that the defense might be able to argue, depending upon whether the facts would support that

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of the Commonwealth's failure to advise the Grand Jury of the possible application of that section prior to the Grand Jury's deliberation on the presentment it returned.

argument. Id. at *34. In this connection, the majority reminded that a defendant is only able to rely upon a justification defense if the facts support it. Id. at *36, *citing authority*. See also, Commonwealth v. Browdie, 671 A. 2d 668 (Pa. 1998) (A trial court can only instruct on matters upon which a verdict could reasonably be based given the evidence).

As to Rule 313, the majority held that the issue raised was not separable from the main cause of action (whether the Defendant was guilty or not) and that, since Section 508 was not unconstitutional on its face, the only attack that could properly be mounted was an "as-applied" argument which, of course, would rely upon the development of a trial record. Accordingly, the appeal of the Commonwealth was quashed. Id at *48-50.

Justices Wecht and Donahue dissented from this majority ruling. Those Justices concluded that the issue raised was a collateral order which should properly be considered immediately by the Supreme Court. The dissenters argued that these were legal issues capable of a decision without a trial record and that, in fact, sub-sections of Section 508 were unconstitutional for the reasons suggested by the Commonwealth. Id. at *86 to *87, *100 to *108. The dissenters reasoned, however, that even if the full Court found parts of Section 508 unconstitutional at this point, the Defendant would nonetheless be able to invoke those provisions; to do otherwise would be to impose an Ex Post Facto provision upon him in violation of his

fundamental Constitutional rights. Overall, the dissenters did support the position of the Commonwealth that the matter was ripe for immediate appeal and that the Commonwealth was correct that portions of Section 508 do not pass Constitutional muster. Id. at *110.[9]

A special concurrence by a member of the Supreme Court is, in fact, unusual. Justice Dougherty indicated that he was moved by certain unique and troubling aspects of this case to take this generally untraveled path. Overall, he concluded that the District Attorney had not treated the Defendant fairly and equally in the

[9] An oddity of the dissenting opinion is that it would have permitted a determination by the Supreme Court of Pennsylvania on an issue which would not have affected the substantive rights of the parties before them. It could be argued that such a decision is an advisory opinion and not one that should be properly rendered by the Court.

One of the central problems in this case articulated in a number of the opinions is how the Commonwealth could possibly raise the issue of the constitutionality of this statute other than pressing of a collateral order appeal. Certainly, an appeal would have properly been pressed if the trial Court had certified the issue for an appeal. See, Tile 42 Pa.C.S. 702 (b). Moreover, if the trial Court had overseen this case and decided that Section 508 was inapplicable based upon the facts, and the Defendant had been convicted, a Defendant's appeal would have raised the question of the applicability of Rule 508. Under accepted appellate practice, the Court could have considered any lawful grounds to uphold the conviction, including the fact that Section 508 was unconstitutional in its application in any event. This is an application of the so-called "right for any reason" doctrine. See, In re AJR, 188 A. 3d 1157 Pa. 2018); Commonwealth v. Tighe, 224 A.3d 1268 (Pa. 2020).

Moreover, the District Attorney's office was always free to seek a legislative remedy by amendment of Section 508, arguing that under constitutional authority, Sections of that statute do not accord with constitutional principles.

To be sure, none of these options have the efficacy of a direct, interlocutory appeal but they are paths available when the direct option fails.

prosecution of the case and identified three circumstances which particularly caused him concern. Id. at *52.

First, he identified the failure of the prosecutor to give the Grand Jury all relevant legal definitions before its deliberations on whether a presentment should be returned. Second, he noted the successful "attempt" by the District Attorney to deny the defendant a preliminary hearing. And third, he was disturbed by the "relentless but unsuccessful" attempt to change the law of Pennsylvania in the form of Section 508 by an appeal prior to the trial of the matter. Id. at *52-53.

With respect to the Grand Jury, Justice Dougherty noted that the Trial Court had ordered the release of the Grand Jury instructions to the Defendant, who then alleged that no definition of any of the degrees of homicide nor any indication of the content of Section 508 were presented to the Grand Jury. Id. at *55. In footnote 4 of his concurrence, Justice Dougherty noted that the allegation was evidently true. He thus decried the fact that the Commonwealth had obtained a presentment without giving the Grand Jury a definition of the crime and, thereby, wholly undermining the factual determination the Grand Jury had made. Id. at *56. This was underscored by the fact that the presentment itself, which was prepared by the prosecutor, contained no discussion of the law whatsoever, resulting in a deeply troubling

circumstance, given the complexity of the law regarding officer-involved shootings. Id. *60. [10]

With respect to the preliminary hearing bypass, Justice Dougherty pointed out that Section 4551(e) of Title 42 PACS definitively states that once a presentment is utilized, a defendant "shall be entitled" to a preliminary hearing. Rule 565(A) of the Pennsylvania Rules of Criminal Procedure is thus bypassed in Justice Dougherty's view, particularly upon consideration of Commonwealth v. Bestwick, 414 A.2d 1373 (Pa. 1980), a case heavily relied upon by the Commonwealth. There, a preliminary hearing bypass was permitted in a case involving a Grand Jury presentment, but in footnote 2 of that same opinion, the Court pointed out that the issue of whether a bypass in such a case was possible "has been settled by the legislature" by enacting Section 4551(e). That section was not applicable in the Bestwick case but going forward it would supersede any general notation permitting a bypass that other rules might present. Justice Dougherty found it "inexplicable" that the District Attorney did not realize and cite to this important distinction. *63.[11]

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[10] An independent review of the published presentment confirms this. Over 13 pages, it summarizes the various testimonies presented. No discussion of Section 508 or any legal principles is set forth. At the very end, citations to the statutes involving Criminal Homicide, Possession of an Instrument of Crime, and Recklessly Endangering Another Person are set forth without any discussion.

[11] Rule 556.2 would still permit the Commonwealth in a presentment case to petition the Court to bypass the preliminary hearing via the submission of the case to an *indicting* Grand Jury which would understand that it was not only

With respect to the Commonwealth's Motion in Limine to preclude a jury instruction on Section 508, Justice Dougherty chided the Commonwealth for a lack of candor in their underlying Constitutional claim, the questionable timing of their motion, and their insistence on a pre-trial appeal. As to the first point, he indicated that the Commonwealth neglected a key paragraph of Tennessee v. Garner that appeared to affirm the validity of Section 508. Id. at 67.[12] Also, Garner did not hold that the statute before it was unconstitutional on its face but only as applied, a concept that the trial Court was repeatedly seeking to assert with respect to its belief that the only way the Commonwealth's motion could properly be assessed is when a factual development occurred at trial. Id.

With respect to the timing, Justice Dougherty noted that the Commonwealth had waited 14 months to file the motion and that it did so two weeks before the trial at a time when it would have been called upon to file an answer to the motion to quash the presentment filed by the Defendant. Overall, Justice Dougherty said the maneuvering by the Commonwealth denied the Defendant a speedy and fair trial. Id. at *70 to *71.

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recommending a charge but actually, by its vote, bringing one about. That rule is only available where witness intimidation is afoot and, in the present case, there was no showing of that here.

[12] The dissenting Justices did not share the view that the omitted paragraph had such an impact.

Concluding his special concurrence, Justice Dougherty listed the six points referenced previously, which he felt, in sum, demonstrated that the Commonwealth had adopted a "win at all cost" attitude with respect to this case and that this Defendant had been treated markedly differently than others similarly situated.

The following analysis explores the three major areas Justice Dougherty identified as well as the six sub-points therein.

B. CONDUCT OF THE PROSECUTOR REGARDING THE GRAND JURY

No discussion of the potential of prosecutorial abuse with respect to the Grand Jury would be complete without recalling the comment made by a former Judge of the New York Court of Appeals, the Honorable Sol Wachtler, that if a prosecutor wanted to, he could get a Grand Jury to indict a "ham sandwich."[13]

To be sure, a significant possible restraint on Grand Jury conduct was removed by the U.S. Supreme Court in United States v. Williams, 504 U.S. 36 (1992), where the Court held that a prosecutor is under no obligation to present exculpatory information into a Grand Jury since the Grand Jury is an accusatory and not an adjudicatory body. Id. at 1742 to 1744. The Grand Jury, the Court held, does not have an obligation to hear all of the evidence, but it is supposed to operate as a

[13] An excellent review of the history of Grand Jury can be found in Christopher Winkler, The Grand Jury Under Fire, 58 Duquesne Law Review 301 (2020).

buffer between the government and the people as an independent body, part of neither the legislative, judicial, or executive branch. Id.

The Court's pronouncement in Williams occasioned Justice Stevens to lament in dissent that the Court had done little there to deal with the "Hydra" of prosecutorial misconduct he perceived by prosecutors, one head of which was the misconduct with respect to the presentation of evidence in the Grand Jury. Id., at 1749 to 1750. Citing numerous cases in which prosecutors presented perjured testimony, failed to inform the Grand Jury about exculpatory information, failed to inform them of their power to subpoena witnesses, and operated under a conflict of interest, Justice Stevens noted that the *ex parte* character of a Grand Jury makes even more poignant the famous admonition of Justice Sutherland in Berger v. United States, 295 U.S. 78, 88 (1935), who stated that "the interest of the United States in a criminal prosecution is not that it shall win the case but that justice be done." Id.

As a general matter, Courts in the system are well aware that the prosecutors must keep their ethical and legal obligations firmly in mind when they appear in a Grand Jury, outside the supervision of a judge and outside the probing and objecting eye of defense counsel. As the authors of the passage in Section 126 of Corpus Juris Secundum *Grand Juries* have said:

> "The prosecutor should not unduly influence, invade the province of, exercise dominion over, or impinge on the autonomy of the grand jury. He

> or she must insure that the grand jury retains its independent role. A grand jury's independent judgment is compromised when the prosecutor's misconduct invades the grand jury's independent deliberative process and substantially affects its decision to indict. Even unintentional behavior can cause improper influence and usurpation of the grand jury's role. However, it has been said that the prosecutor need not limit his or her participation to an innocuous presentation.
>
> High ethical standards are required of prosecutors, and there is a need for the court to exercise some control over the prosecutor's conduct before the grand jury. The court may intervene to ensure that the purpose of the grand jury is not imperiled by prosecutorial misconduct."

Indeed, a number of cases have held that a supervising judge maintains a considerable degree of supervisory of the Grand Jury, assuming, of course, that the judge is made aware of potential improprieties occurring there. See, 1979 Allegheny County Investigating Grand Jury, 415 PA 73 (Pa. 1980), In Re 24th Statewide Grand Jury, 907 A2d 205 (PA 2006); In Re 35th Statewide Grand Jury, 112 A3d 624 (Pa. 2015); Investigative Grand Jury of Chester County, 544 A2d 924 (Pa. 1988). The Legislature has even empowered a supervising judge to discharge a Grand Jury if it is not conducting itself in line with its proper investigative authority. Title 42, PACS Section 4546(c). The obligation to toe that line is shared by the government official who works with the Grand Jury in the exercise of each of its duties, the prosecutor.

A clear direction to counsel operating within the Grand Jury is contained in the United States Department of Justice United States Attorney Manual. In section 9-11.010, Federal prosecutors are admonished as follows:

> "In dealing with the Grand Jury, the prosecutor must always conduct himself or herself as an officer of the Court whose function is to ensure that justice is done, and that guilt shall not escape, nor innocence suffer. The prosecutor must recognize that the Grand Jury is an independent body, whose functions include not only investigation of crime and the initiation of criminal prosecution, but also the protection of citizenry from unfounded criminal charges. **The prosecutor's responsibility is to advise the Grand Jury of the law** and to present evidence for its consideration. In discharging these responsibilities, the prosecutor scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the Grand Jurors." [emphasis added]

Given the *ex parte* nature of Grand Jury proceedings and the fact that Grand Jurors are presumably lay people unskilled in the intricacies of the law, a particular obligation placed on the prosecutors is to make certain that the Grand Jury is properly advised of the applicable law. The Grand Jury's function is not simply to return a factual summary. It is to make a presentment recommending the filing of a criminal charge. That determination cannot be made blind of the applicable laws under which the recommendation is made. If, in fact, a prosecutor has not given the Grand Jury a basic understanding of the law that is charged against a defendant, a serious question about the efficacy of the Grand Jury process arises. To the extent such a deficiency of process operates to prejudice an individual, that is, to create a circumstance in which it is likely that the Grand Jury's decision would have been other than what it was had the prejudicial act not occurred, relief in the form of judicial intervention with the Grand Jury process may well be required. Generally, see Bank of Nova Scotia v. United States, 487 U.S. 50 (1988).

The duty of a prosecutor to fairly advise the Grand Jury of the law derives from both ethical demands placed by the profession upon prosecutors and by the very law which establishes Grand Jury in the first place.

The Pennsylvania Investigating Grand Jury is a creature of the Legislature. Various Pennsylvania statutes enacted to bring the Grand Jury system about also indicate the importance the Grand Jurors receiving accurate information regarding the law they are to consider in their deliberations.

Title 42 PACS Section 4543 discusses how County Grand Juries are to be convened. Normally, the attorney for the Commonwealth is to make application to the President Judge for an order that directs an investigative Grand Jury to be constituted and, in that application, the attorney must state that the convening of such a Grand Jury is necessary because of the existence of "criminal activity" in the County, which can best be fully investigated using the investigative resources of the Grand Jury. Section 4543(b). The focus of Grand Jury from the outset, therefore, is regarding specific *criminal activity*, and the Grand Jury convened must get an accurate rendering of the meaning of the criminal activity which is to be investigated.[14]

[14] Section 4550 of Title 42 PACS further indicates that before any investigation is submitted to the Grand Jury, the attorney for the Commonwealth "shall submit a notice to the supervising judge," which alleges that the matter in question should be

A key section in understanding the importance of defining the crimes under investigation is Section 4548 of Title 42 PACS, entitled "Powers of Investigating Grand Jury." The section is direct and compelling.

> ***"(a) General rule.* —** The investigating grand jury shall have the power to inquire into offenses against **the criminal laws** of the Commonwealth alleged to have been committed within the county or counties in which it is summoned. . . Such alleged **offenses** may be brought to the attention of such grand jury by the court or by the attorney for the Commonwealth, but in no case shall the investigating grand jury inquire into alleged **offenses** on its own motion." [emphasis added].

The powers of the Grand Jury relate solely to the investigation of violations of **criminal laws** of the Commonwealth, laws which the ordinary lay person in the Grand Jury does not know in the detail necessary to sustain a proper assessment of whether facts exist to support the occurrence of such **offenses**. Instruction on the meaning of those offenses must come from the prosecutor, and a prosecutor's obligation, therefore, to be accurate in such a description becomes paramount.

That obligation is reinforced by the following sub-section of Section 4548.

> "(b) **Presentments -** the investigating grand jury shall have the power to issue a presentment with regard to any person who appears to have committed within the county or counties in which such investigating

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brought before the Grand Jury so that the investigated resources of that body can be utilized for a proper investigation. Again, the orientation of that investigation is on *criminal activity* as defined by the Crimes Code of Pennsylvania, and a necessary adjunct of that process is that the Grand Jury have some particular idea as to what the Legislature has defined to be a crime in the particular case.

> Grand Jury is summoned an **offense against the criminal laws** of the Commonwealth." [emphasis added]

A Grand Jury presentment alleges a violation of the criminal laws of the Commonwealth and, to properly exercise the powers the Legislature has given it, the Grand Jury has to have a fundamentally proper understanding of what those criminal laws mean in the context of the case before it. As Section 4548(a) states, the Grand Jury is not permitted to go on its own to inquire into whatever offenses it wishes to investigate. This is a quite sensible provision since, once again, Grand Jurors cannot be presumed to have an independent and proper understanding of the criminal laws around which their investigation is focused. That focus comes from the laws passed by the Legislature, and the entity in the position to advise the Grand Jury of the impact and meaning of those laws on the facts the Grand Jury will hear is most clearly the attorney for the Commonwealth.

Section 4551 of Title 42 PACS speaks of the presentments to be made by an Investigating Grand Jury. That section states that where the Grand Jury determines that a presentment "should be returned against an individual," the Grand Jury is to direct the attorney for the Commonwealth to prepare a presentment to be submitted to them for a vote. A majority vote approving that presentment is then to be placed before the supervising judge to determine it was in the authority of the Grand Jury and was otherwise accomplished in accordance with the provisions of the statute. If

it was, the presentment will be accepted and can ultimately be unsealed. Section 4551(a).

Once again, for a Grand Jury to properly determine if a presentment should be returned against an individual, the Grand Jury can only fulfill its obligation by having a proper understanding of the laws in question. The attorney for the Commonwealth prepares the draft presentment report in order to properly focus the evidence on the applicable law in preparation for the Grand Jury vote. In the present case, if the Grand Jury did not receive any instructions on Section 508 of the Crimes Code or other definitions of the intricacies of the various forms of homicide under the law, it is difficult to see how this Grand Jury could have properly exercised the powers it was given in rendering presentment which was made.[15] As noted earlier, the presentment itself contains no reference to the application of the facts to the relevant law.

One final note about the applicable rules and statutes that concern the obligation of a prosecutor to give a Grand Jury a proper understanding of the applicable law may be gleaned from consideration of the oath each Grand Juror is required to take before serving as a member of that body. Pursuant to Rule 225 of

[15] It is unclear from the Special Concurrence whether the supervising judge of this Grand Jury was aware that the Grand Jury was not advised of the underlying criminal statutes or whether there was any further inquiry by the supervising judge before the Grand Jury presentment was accepted.

Pennsylvania Rules of Criminal Procedure, Grand Jurors are asked to take an oath in which they solemnly swear as follows:

> "You, as grand jurors, do solemnly swear that you will make diligent inquiry with regard to all matters brought before you as well as such things as may come to your knowledge in the course of your duties; that you will keep secret all that transpires in the jury room, except as authorized by law; that you will not present any person for hatred, envy, or malice, or refuse to present any person for love, fear, favor, or any reward or hope thereof; and that you will present all things truly to the court as they come to your knowledge and understanding." Rule 225(B).

For a Grand Jury to carry out its oath, its presentation must represent a proper reflection of their knowledge and understanding of all aspects of their duty. Certainly, scrupulous attention to the facts gathered are an integral part of that duty but so is their appreciation of the applicable law. Theirs is not simply a factual report to be then absorbed by some future determining body for the purpose of drawing an ultimate legal conclusion as to the propriety of the filing of a criminal charge. Rather, it is a holistic statement that, based upon the facts as found and the applicable law, it is proper for this important body to publicly recommend the prosecution of a fellow citizen for a serious violation of the Pennsylvania Crimes Code. Without a proper understanding of that law, it is difficult but not impossible for the average Grand Juror to properly exercise the duties of their oath.

Case law regarding this area is sparse, as it has seldom been brought to the attention of the Court that a prosecutor may have improperly advised the Grand

Jury regarding the applicable law they are to consider. Nonetheless, such issues have been dealt with consistent with the general Grand Jury jurisprudence that any time prosecutorial misconduct occurs which may prejudice a defendant, the Grand Jury action may be superseded by a Court.

As the Second Circuit observed in United States v. Ciambrone, 601 F2d 616, 622 (2nd Cir. 1979), the Grand Jury possesses broad and investigatory functions and powers. Nonetheless, "[a]s a practical matter, however, it must lean heavily upon the United States Attorney as its investigator and legal advisor to present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles." No relief was warranted in Ciambrone as the prosecutor was found not to have misled the Grand Jury. Id.

In United States v. Stevens, 771 F. Supp 2d. 556 (Dist. of Maryland, 2007), the Court held that when erroneous advice is given to a Grand Jury which prejudices a defendant, dismissal of the indictment is minimally required. Prejudice is defined as the creation of grave doubts about whether the indictment would have been returned had the advice been proper. While the Court in Stevens found no specific evidence of such prejudice there, it further observed that if the erroneous instructions were rendered as part of a willful act on the prosecutor's part, the remedy might well transcend mere dismissal of the indictment and require a dismissal of the case with prejudice. Id. at 567-568.

Furthermore, in United States v. Mix, 213 U.S. District LEXIS 79679 (Eastern Dist. Louisiana, 2013), the District Court conducted an *in camera* review to determine if the Grand Jury had been improperly instructed on the law. Id. at *10. The Court observed that a prosecutor's obligation to the Grand Jury with respect to the law does necessarily require the prosecutor to give a full and detailed law-school-type explanation of the law, and that reading the relevant statutes was arguably sufficient in that regard. Id. at *15 to *16. But if a failure to give adequate instructions prejudices the defendant, that is, substantially influences Grand Jury decision, relief may well be needed. Id. at *16 (citing cases).

Beyond the clear legal framework, which requires a prosecutor to properly advise the Grand Jury of the applicable law, the ethical demands of the legal profession provide an additional basis for an attorney for the Commonwealth to fulfill this duty.

The Pennsylvania Supreme Court has often embraced the principles of the American Bar Association Criminal Justice Standards for the Prosecution Function (2017) as applicable when considering whether prosecutors have properly exercised their ethical function in a variety of circumstances. See Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018); Commonwealth v. Cullins, 341 A.2d 492 (Pa. 1975); Commonwealth v. Revty, 295 A.2d 300 (Pa. 1972). Those standards make it clear that a prosecutor is "an administrator of justice, a zealous advocate, and an officer

of the Court" whose primary duty is to seek "justice within the bounds of the law, not merely to convict." Standard 3-1.2(a-b). Prosecutors must be aware of ethical standards applicable in his or her jurisdiction and they have, given the broad authority and discretion invested in their office, "a heightened duty of candor" in fulfilling their professional obligations. Standard 3-1.4 (a).

In this regard, the prosecutor should not make any statement of fact or law that the prosecutor "does not reasonably believe to be true" and should disclose any legal authority in the controlling jurisdiction "known to the prosecutor to be directly averse to the prosecution's position and not disclosed by others." Standard 3-1.4 (b-c). While a District Attorney may hold a sincere and honest belief that any given statute does not meet a proper Constitutional standard, the obligation remains to ensure that those who must adjudicate or make a determination on a matter by necessarily applying an applicable legal standard, know what that standard is so that their assessment of the facts may be properly considered in conjunction with the applicable law.

The ABA standard speaks specifically to a prosecutor's relationship with the Grand Jury, noting that, "in light of its *ex parte* character, the prosecutor should respect the independence of the Grand Jury and should not preempt the function of the Grand Jury, **mislead the Grand Jury**, or abuse the processes of the Grand Jury." Standard 3.4-5. This particular section also states plainly as follows:

> (b) "Where the prosecutor is authorized to act as a legal advisor to the Grand Jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on legal significance of the evidence, but should give due deference to the Grand Jury as an independent legal body."

Moreover, at no point is a prosecutor to make statements or arguments to the Grand Jury in a way that would be an impermissible effort at trial. Section 3-4.5(c). In the present case, it is clear that the prosecutors were deeply concerned about the application of Section 508 to this case, but they would certainly never have been able to argue at trial that the jury should disregard that section in their deliberations if the Court had determined otherwise. A prosecutor's invalid assertion about the applicability about the law at trial may result in a reversal of a conviction. See, Caldwell v. Mississippi, 472 U.S. 320, 336 (1985).

The ABA standards with respect to the Grand Jury function also admonish that the prosecutor "should be familiar with the law of the jurisdiction regarding Grand Juries and "ensure that the Grand Jurors are properly instructed consistent with the law of the jurisdiction on the Grand Jury's right and ability to seek evidence, ask questions, and hear directly any available witnesses, including eye-witnesses." Standard 3-4.6 (c-d).

Overall, these standards would not countenance a prosecutor's decision to withhold from the Grand Jury the law that is applicable or even arguably applicable

to their consideration of a critical factual matter. Grand Jurors are not presumed to be conversant in the intricacies of the law and if they not hear a proper explanation of law from the prosecutors, they will hear it from no one.

The Pennsylvania Rules of Professional Conduct also speak to these issues. To be sure, a prosecutor, like any advocate, shall not "assert or controvert an issue… unless there is a basis of law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.1 (1) Pa. R. P. C. There is thus nothing improper about a prosecutor setting forth a concern that a given statute may be unconstitutional, but that statute continues to be applicable in the case before the Grand Jury, that statute simply has to be brought to the attention of the Grand Jury considering the case.

As the comment to Pennsylvania Rules of Professional Conduct Rule 3.1 indicates, a lawyer has "a duty to not to abuse legal procedure," and the law "establishes the limits within which an advocate may proceed." Rule 3.3 of the Rules of Professional Conduct also clearly demands that lawyers not knowingly make false statements of material fact or law to any tribunal or fail to correct the false statement that may have previously been made. The lawyer must also not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse" to their position and not disclosed by opposing counsel. Rule 3.3(2) Pa. R.P.C.

In a Grand Jury setting, the defense has no voice and thus the only law the Grand Jury will hear will come from the prosecutor. While the prosecutor may disagree with the law, if it is controlling at that time of the presentation, there is simply no basis to avoid informing the Grand Jury of it. Rule 3.3 makes this even more explicit by stating that in "an ex parte proceeding,"[16] a lawyer "shall inform the tribunal[17] of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." 3.3(4). This also implies a duty of concern for the accurate presentation of the law, given that a fact must have legal significance to be "material." Thus, the failure to identify the legal standards by which facts are to be assessed may itself be a circumstance in which the prosecutor has failed to perform their proper duty in presenting a position in an ex parte setting like the Grand Jury.[18]

While a lawyer is not required "to make a disinterested exposition of the law," they must "recognize the existence of pertinent legal authority." Rule 3-3, P.R.P.C., Comment 4. Moreover, an advocate "has a duty to disclose directly adverse authority

[16] Section 3.3(14) notes that, in an ex parte proceeding, the object "is nevertheless to yield a substantially just result."

[17] The Pennsylvania Rules of Professional Conduct define "tribunal" in a broad way. See, Rule 1.0(m). Rule 3.1 admonishes prosecutors about to limit the issuance of a subpoena to a lawyer in connection with a "Grand Jury or other tribunal investing criminal activity."

[18] The Comment to this section also states clearly that lawyers must not allow a tribunal "to be misled by false statements of law or fact." Comment 2.

controlling jurisdiction that has not been disclosed by the opposing party." 3.3(4). That requirement mandates that the lawyer who has the only legal voice in the room be scrupulously fair in presenting material that permits the conclusion that the result reached by the determining body was fundamentally fair.

Rule 3.8 of the Pennsylvania Rules of Professional Conduct also speaks to the special responsibility of a prosecutor. Comment One to that section reiterates the position taken throughout the federal system that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Such responsibility "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Taken in conjunction with the other rules, the obligation to give complete legal advice to a Grand Jury is obvious.

Reflecting on all relevant authority, there is simply no basis to justify a prosecutor's failure to give the Grand Jury a proper rendering of the applicable law. The Grand Jury process, particularly given its *ex parte* quality, puts upon the prosecutor a special obligation to ensure that a fair rendering of the law was given so that the important work of the Grand Jury can be done effectively as the statutes establishing the Grand Jury and empowering it anticipate.

If that did not occur here, a potentially serious violation of the Grand Jury process has indeed occurred.

C. UNSEALING THE PRESENTMENT

The other criticisms of Justice Dougherty regarding the actions of the District Attorney's Office in this case will be touched upon briefly. Insofar as the Grand Jury presentment was unsealed, Section 4551 of Title 42 PACS permits the supervising judge to seal the presentment until the time the defendant is in custody or has been released pending trial. Section 4551(b). Unsealing the presentment itself does not give any indication of bad faith on the prosecutor's office. A presentment in the high-profile matter is a going to be intimately scrutinized by the local media.

Of course, prosecutors do operate under a special restriction regarding statements to the media. Rule 3-8(e) of the Pennsylvania Rules of Professional Conduct states:

> **(e)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Statements made in connection with the release of a presentment could violate this Rule but the Special Concurrence does not cite specific examples in this regard.

D. THE PRELIMINARY HEARING BYPASS

With respect to the bypass of the preliminary hearing, it is clear that Section 4551(e) of Title 42 directs that a preliminary hearing be afforded to a defendant who has been charged by way of presentment.

The Bestwick case makes it clear that this Legislative enactment alters prior law, which, per Rule 565 of the Pennsylvania Rules of Criminal Procedure, would allow a Court generally to permit a bypass of a preliminary hearing where exceptional circumstances were presented even in a presentment case. See Commonwealth v. Bestwick, 414 A2d 1373, n. 2 (Pa. 1980). To the extent that the District Attorney's office did not cite that section of the statute in effort to have the preliminary hearing bypassed, a potential ethical issue is raised pursuant to Pennsylvania Rule of Professional Conduct 3.3(a)(2), which states that a lawyer shall not knowingly "fail[ed] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." To the extent that the Defendant's lawyer cited Section 4551(e), the District Attorney is technically excused from a failure to bring this matter to the attention to the Court.

In any event, it was the Trial Court that ruled that the preliminary hearing could be bypassed, and the error in disregarding Section 4551(e) is primarily focused on that order.

E. OPPOSITION TO THE CHANGE OF VENUE

As noted previously, a District Attorney's opposition to a change in venue is certainly not unusual. The law has a reasonably heavy presumption of wanting trials to take place in the district in which the offense allegedly occurred. Common Pleas Courts are uniquely aware of the expense incurred in either trying the case in another County or even in drawing another jury from a remote location to sit in judgment of the matter. The Supreme Court has most commonly rejected claims that a trial judge has failed to properly assess the capacity to empanel a fair jury. See, Commonwealth v. Flor, 259 A.3d 891, 936 (Pa. 2021); Commonwealth v.Clemons 200 A.3d 141 (Pa. 2019).

It is simply not unusual that the Commonwealth would have opposed a change of venue and it must be noted that the trial judge evidently made a careful effort to determine whether a change of venue was necessary by conducting two mock jury selections and determining if it was possible to attempt to draw a jury from Philadelphia. Commonwealth v. Pownall, Supra. at *4 to *5. It is difficult to infer bad faith from the District Attorney's office insofar as their opposition to a change of venue is concerned.

F. THE MOTION IN LIMINE AND APPEAL

Finally, Justice Dougherty criticizes the District Attorney for waiting until the last minute to file their challenge to the use of jury instruction based on Section 508 of the Crimes Code. As noted previously, however, at least two Justices of the Pennsylvania Supreme Court have agreed with the Commonwealth that a pre-trial appeal of this matter was permissible and that the Commonwealth's legal analysis of the constitutionality of Section 508 was valid. While the Commonwealth's position did not prevail, the opinions of those Justices make it very difficult to deem the actions of the District Attorney's office frivolous in seeking an appeal and in challenging the validity of that statue.

Clearly, other means could have been used to try to challenge the applicability of the statute, particularly in light of the sound rulings of the trial Court, which reflected that any instructions based on Section 508, including any jury instruction particularly in a homicide case that bears upon possible offenses, must wait until the evidence at trial is developed since no such instruction is warranted where evidence it not offered that would support its impact on a verdict. See Commonwealth v. Pierce, 786 A.2d 203, 218 (PA 2001); Commonwealth v. DeMarco, 809 A.2d 256, 260, note 6 (PA 2002); Commonwealth v. Browdie, 671 A.2d 668 (Pa 1996); and Hooper v. Evans, 456 US 605 (1982).

But finding bad faith in the effort to appeal and in the Commonwealth's analysis of the statute is difficult to support.

II. ANALYSIS: COMMITTEE'S QUESTION #2

The second question posed by the Committee is the permissible scope of prosecutorial discretion.

Perhaps in a respectful acknowledgement to the foundational principle of separation of powers, the law has always been given significant deference to the ability of prosecutors to decide how to deploy the resources of their office in the decision on what sorts of crime should be prosecuted and to what extent.

The Superior Court explored the importance of the separation of powers doctrine in Commonwealth v. Hill, 239 A.3d. 175 (Pa. Super. 2020). There, a Huntingdon County Common Pleas Court *sua sponte* dismissed charges of possession of marijuana filed against a prisoner serving a life sentence, frustrated that the Court system would be used for the litigation of a case which would add a meaningless additional term of years to the existing sentence. Id. at 176. The Superior Court reversed, finding that the lower court failed to respect the doctrine of separation of powers, the "roots" of which, the Court said, "run deep" in the Commonwealth. Id. at 179. While the lower Court's actions effectively usurped the power of the Legislature, Department of Corrections, defense counsel and the jury,

a particularly egregious failure occurred with respect to the failure to recognize the role of the prosecutor:

> The trial court ignored the well-settled principle that the Commonwealth retains discretion regarding the prosecution of criminal matters. ***See Commonwealth v. Brown***, 550 Pa. 580, 708 A.2d 81, 84 (Pa. 1998) ("[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.").

Id. at 180.

This discretion affords prosecutors tremendous power.

As former US Supreme Court Justice and Nuremburg Prosecutor Robert H. Jackson once wrote, the power to charge is "the most dangerous power of the prosecutor;" that is, it is a power virtually un-reviewable and one existing in multiple dimensions. *Robert Jackson,* quoted in Prosecutorial Decision Making and Discretion in the Charging Function 62 Hastings Law Journal 1259 (2011). While prosecutors may never consider invidious factors such as the politics of the individuals being prosecuted, their race or other such factors, beyond that basic due process level, the system affords them tremendous leeway in the decision on whom to prosecute and for what offenses. Id. at 1276.

To be sure, some states have embedded in their Constitutions principles that seek to limit the ability of a local District Attorney to decline to prosecute certain

statutes otherwise placed in the Crimes Code by the Legislatures. The North Carolina Constitution, for example, states that "[a]ll powers of suspending laws or the execution of laws by any authority, without the consent of representatives of the people, is injurious to their rights and shall not be exercised." Constitution of North Carolina, Article 1, Section 7. The Commonwealth of Massachusetts has a similar provision: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Constitution of the Commonwealth of Massachusetts Article XX.

The California Constitution grants broad powers to the Attorney General to supersede a local District Attorney. Article V, Section 13 of the California Constitution states:

> It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.

This is a significant override authority the Constitution of Pennsylvania does not afford its Attorney General. Rather, as the Pennsylvania Supreme Court held recently, the discretion of prosecutors in Pennsylvania is extremely wide.

In Commonwealth v. Cosby, 253 A.3d 1092 (Pa. 2021), the Court dismissed a prosecution against a defendant who had been promised by a former District Attorney that no charges would be filed against him on condition that he gave a deposition in a civil case. In discussing the authority afforded to a District Attorney to make such a decision, the Court discussed at length the powers normally afforded to a local prosecutor in this Commonwealth. A prosecutor:

> "has the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate, and ultimately, to prosecute or dismiss charges at trial. [citations omitted] The extent of the powers enjoyed by the prosecutor was discussed most elegantly by the United States Attorney General (and later Supreme Court Justice) Robert H. Jackson. In his historic address to the nation's Unites States Attorneys, gathered in 1940 at the Department of Justice in Washington DC, Jackson observed that in 'the prosecutor has more control over life, liberty and reputation then any other person in America. His discretion is tremendous. In fact, the prosecutor is afforded such deference that this Court and Supreme Court of United States seldom interfere with the prosecutor's charging decision." Id. at 1131.

Later in the Cosby opinion, the Pennsylvania Supreme Court held that a charging decision is "generally beyond the reach of judicial interference" as long as the discretion is not patently abused." Id. at 1134. The limits on the discretion

exercised by a prosecutor, according to the Cosby Court, arise from the "basic principles of fundamental fairness" and discretion certainly cannot be exercised in a manner that violates a defendant's fundamental Constitutional rights. Id. But, the Court cautioned, not every exercise of prosecutorial discretion "invites a due process challenge". Id. The Court reiterated that:

> "the charging decisions inhere within the vast discretion afforded the prosecutor and are generally subject to review only for arbitrary abuse. A prosecutor can choose to prosecute or not. The prosecutor can select the charges to pursue and omit from a complaint or bill of information those charges that he or she does not believe is warranted or viable on the facts of the case. The prosecutor can also condition his or her decision not to prosecute a defendant… [and] generally, no due process violation arises from these species of discretionary decision making and a defendant is without recourse to seek the enforcement of any assurances under such circumstances." Id. at 1135. See also Commonwealth v. Slick, 639 A2d 482 (PA Super. 1994).

In certain kinds of situations, various forms of limits seem to exist with respect to prosecutorial discretion, but none of those limits are inherently significant.

In Commonwealth v. Buck, 109 A.2d (Pa. 1998), the question posed to the Supreme Court was whether a trial Court could make a pre-trial determination of whether the filing of an aggravating circumstance to elevate a homicide case to one involving the death penalty was justifiable. The Court noted that, under the statute, it is the jury that must weigh the aggravating circumstance (assuming they have found it to exist), and the Court is not empowered to do a similar weighing process. Id. at 895. Older cases held that a trial Court did not have the capacity to interfere

with the Commonwealth's determination to seek the death penalty, and "the prosecutor possesses the initial discretion regarding whether to seek the death penalty… that discretion, however, is not unfettered." Id. To overcome the deference given to a prosecutor who has chosen to seek the death penalty in a given case, however, a defendant must make a showing "purposeful abuse." Id. at 896. The filing of a notice of aggravated circumstances requires the Trial Court to presume that evidence supports it, and unless the Court has reason to believe that the Commonwealth is seeking the death penalty for some improper reason, that filing alone is generally sufficient to permit the case to go forward as a capital prosecution. Prior to trial, a defendant seeking to challenge the filing of an aggravating circumstance has the burden of proof to show that no evidence supports such a circumstance. If and only if the defendant is able to make that initial showing, may the Commonwealth be required to make a minimal disclosure to permit the Court to rule that indeed the case can go forward with the death qualification process of the jury and a trial anticipated to involve both a guilt and penalty phase. Id.

A most unusual death penalty case which occasioned considerable discussion of prosecutorial discretion was Commonwealth v. Brown, 196 A. 3d. 130 (Pa. 2018). In this appeal to the Pennsylvania Supreme Court, the District Attorney of Philadelphia joined with the defense in arguing that the death sentence should be reversed and insisted that the discretion of the prosecutor required the Court to

overturn the death verdict. The Pennsylvania Attorney General, asked to file an amicus brief, disagreed and provided the Court with an analysis of how a prosecutor's discretion evolves during the course of a case:

> As cogently explained by the Attorney General, the scope of prosecutorial discretion changes as a criminal case proceeds, narrowing as the case nears completion. At the outset, a prosecutor has almost unfettered power to charge, or not charge, as he or she sees fit. Once charges are filed, the prosecutor may withdraw them by nolle prosequi, subject to judicial oversight. Pa.R.Crim.P. 585. A prosecutor may also choose to enter into a plea agreement, again subject to appropriate judicial oversight. Pa.R.Crim.P. 590. The decision whether the Commonwealth will seek the death penalty is also left to the prosecutor, though this decision, which is made at the time of arraignment, is also potentially subject to some pre-trial judicial review. *See* Commonwealth v. Buck, 551 Pa. 184, 709 A.2d 892, 896 (Pa. 1998) ("If no evidence is presented in support of any aggravating circumstance, the trial court may rule that the case shall proceed non-capital."). After trial and the entry of a capital verdict, however, a district attorney's prosecutorial discretion narrows significantly. There is an automatic appeal to this Court from a death sentence, 42 Pa.C.S. § 9711(h), over which the prosecutor has no statutory power to interfere. A representative cross section of the community has issued its decision, and the prosecutor, having sought and obtained the death sentence, may not thereafter unilaterally alter that decision. The community now has an interest in the verdict, which may thereafter be disrupted only if a court finds legal error. Contrary to the Commonwealth's representation that a district attorney remains free at "all stages of capital criminal litigation" to make a "reasoned fact and policy-based decision" as to what he or she believes the appropriate sentence should be, after seeking and obtaining a death sentence, the prosecutor's discretion at this point is limited to attempts, through the exercise of effective advocacy, to persuade the courts to agree that error occurred as a matter of law. Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review.

Id. at 146. Beginning at a point of largely unfettered discretion, a District Attorney seeking to have an appellate court overturn a lawful judgment becomes an advocate,

lacking the authority heretofore enjoyed to dictate the course of a case without oversight by a coordinate branch of government.

With respect to a diversion of a case into the Accelerated Rehabilitative Disposition (ARD) program, again the Pennsylvania Supreme Court has held that the District Attorney has the initial discretion to refer a case for possible inclusion into the ARD program. As the Court held in Commonwealth v. Lutz 495 A.2d 928 (Pa. 1985), "the decision rests in the sound discretion of the district attorney. Such discretion, of course, is not without limitation." Id. at 934. But:

> [a]bsent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is most beneficial for society and the offender. Id. at 935.

While the trial court must ultimately admit a person into the ARD program and can arguably refuse to do so, the decision to move the admission of that person must be initiated by the District Attorney. See, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure* 52 University of Pittsburgh Law Review 269 (1990).

A recent and fascinating case concerning both the relative powers of a District Attorney and capacity of a frustrated Court to deal with the District Attorney's exercise of discretion is Commonwealth v. Mayfield, 247 A.3d 1002 (Pa. 2021). In Mayfield, a judge of the Court of Common Pleas of Philadelphia County had

sentenced an individual to a period of county probation. When the individual was rearrested, the Court called in the parties and directed that a detainer be filed in anticipation of a violation of probation hearing. The District Attorney's office advised the Court that under their office policy, no such detainers were to be issued prior to the conviction on the new charge except by expressed direction of a higher official within their office. When the Court directed that matter be further explored with the prosecutor's office and was later advised that the office would decline to file a violation of probation in the case before it, the Court ordered that the next defense attorney on the list to be Court-appointed for a defense case be designated a special prosecutor in the Mayfield case and authorized to file the motion to violate the Defendant's probation forthwith. Id. 1003 to 1004.

This occasioned the Pennsylvania Superior Court to examine the Commonwealth's Attorneys Act, 71 PS 732-101 et. seq. as to whether this method of replacing a District Attorney with someone else to prosecute the case was authorized. The Court held that the Attorney General can petition the Court to enter and supersede the District Attorney in any given case, or the President Judge of the District may request the Attorney General to do so. Alternatively, the District Attorney can refer a case for prosecution to the Attorney General, indicating a lack of resources or a conflict of interest in their own proceeding with it. Id. at 1006. But

as this case did not fit any one of those scenarios, the actions of the Trial Court here were deemed *ultra vires*.[19]

Insofar as who has the discretion to file a petition to violate parole, the Court held that whether the District Attorney held that discretion or whether it lies in the Trial Court was not clear. Id. at 107.[20] The Court indicated that it has always preferred waiting for a violation of probation/parole to be prosecuted after adjudication on the new charge has occurred, but whether or not the ultimate decision about the filing lies with District Attorney or the Court is not a matter that was precisely addressed in this opinion. What the Court did note parenthetically was that in a case where the District Attorney had been ordered to proceed in a given matter by the Court and declined to do so, the District Attorney may be held in contempt, ripening the issue for an appeal to the Superior or Supreme Court to determine whether the refusal is properly within the discretion of the prosecution. Id. at note 23.

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[19] The Court specifically noted that a supervising judge of a Grand Jury can, however, act to a point an independent counsel if there is a question as to whether the Attorney for Commonwealth has violated Grand Jury secrecy. This is a power stemming from the Grand Jury and it is not applicable anytime a trial judge wishes to replace a District Attorney. See In re: 35th Statewide Grand Jury, 112 A.3d 624 (Pa. 2015).

[20] To be sure, any court has an interest in seeing that Its orders are properly carried out and could, at least in theory, avail itself of the device of a rule to show cause why a person who violated a probationary order should not be violated.

And where a Humane Society Officer sought a writ of mandamus to compel the District Attorney of Berks County to act on citations she filed against a Sportsmen's Club for holding a pigeon shoot, the Commonwealth Court upheld the lower court's refusal to issue the writ, holding that mandamus may issue to compel ministerial acts but not ones which results from the exercise of discretion by a public official. Setton v. Adams, 50 A.3d. 268, 273 (Pa. Cmwlth. 2010). The Court explained the breadth of discretion afforded a prosecutor in this circumstance:

> District attorneys are responsible for "all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which [they are] elected ..." Section 1402 of the County Code, Act of August 9, 1955, P.L. 323, *as amended*, 16 P.S. §1402. It has been observed that a "'prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous....'" 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §9:1, at 216 (2d ed. 1979) (quoting Justice Robert H. Jackson of the United States Supreme Court). Davis explains that a prosecutor's duty to enforce a statute is usually presented in the strongest terms, but the legislature assumes that, nevertheless, there is a power not to enforce. Further, a prosecutor's decision *not* to enforce a law is beyond judicial review. Davis explained these precepts as follows:
>
> > An outstanding fact of major importance about the American system of law and government is that nearly all statutes which provide in absolute terms for enforcement are nullified in some degree by an assumed discretionary power not to enforce. The usual discretionary power [**21] not to enforce is almost never delegated by the legislative body. It is not subject to a statutory standard. It is not checked by an independent reviewer. It is not insulated from ulterior influence the way that judicial action is customarily insulated.... *And discretionary power not to enforce is almost always immune to judicial review, even for abuse of discretion*.
> >
> > *Id*. §9:1 at 217-18 (emphasis added).

> The Supreme Court of the United States will not interfere with a prosecutor's discretion. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Neither will the Pennsylvania Supreme Court. *See, e.g.,* Commonwealth v. Stipetich, 539 Pa. 428, 430, 652 A.2d 1294, 1295 (1995) ("discretion to file criminal charges lies in district attorney.").

Id. at 275 -276. Putting it bluntly, the Court observed: "In short, the district attorney has the final word on a decision to prosecute or not to prosecute." Id. at 277.

There are a very few and discrete ways in which a District Attorney may be displaced from handling a prosecution on behalf of the Commonwealth. One way which the Court has struck down was litigated in Birdeye v. Driscoll, 534 A.2d 548 (PA Commonwealth 1987). In that case, under an obscure provision of the Pennsylvania Wiretap Act, an individual who had been subject of a wire interception brought an action which invoked a provision of the Act, which on its face indicated that if a District Attorney had violated the Act in authorizing or administering a wiretap he or she could be removed from office. The Commonwealth Court struck this position down saying that under the Pennsylvania Constitution, Article VI, Section 7, a District Attorney can only be removed by conviction of misbehavior or

infamous crime or by the governor after the statement of reasonable cause and consent of two-thirds of the Senate.[21]

Under Section 71 PS Section 732-205, the Attorney General of Pennsylvania is permitted to petition a Court to permit the Attorney General's office to supersede a District Attorney in the prosecution on the initiation of a prosecution if by a preponderance of evidence, the Attorney General can show that the District Attorney has failed or refused to prosecute in a matter that constitutes an abuse of discretion. This power of supersession can also be invoked where a Judge of the Court of Common Pleas requests the Attorney General to enter the case and seek to displace the District Attorney. [22]

An overall view of Pennsylvania law demonstrates that broad discretion is given to a District Attorney in the exercise of his or her powers to enforce the law and allocate the resources of his or her office with respect to the spectrum of offenses and defendants who will be prosecuted in their jurisdiction. Unlike some other jurisdictions, which have, by Constitutional enactment, placed limits and potential

[21] Section 16 PS Section 1405 of the Pennsylvania Code states that if the District Attorney is guilty of willful and negligence in the execution of his or her duties, a criminal offense could be charged with a consequence being the office would become vacant.

[22] Generally, the Attorney General of Pennsylvania has such jurisdiction as the statute establishing that office permits. See Commonwealth v. Carsia 517 A.2d 956 (Pa. 1956).

limits on the discretionary authority of a District Attorney, Pennsylvania remains a jurisdiction in which a broad discretion is afforded to a local prosecutor.

This certainly creates the potential for the administration of justice in a checkerboard fashion in the Commonwealth where cases of a similar nature will receive very disparate treatment depending on whether they occur in one county or a few miles away in another. But until and unless structural change is effectuated at a basic level in how the system operates, the instinct of the entities set in conflict by our adherence to the importance of separation of powers principles will cause the Legislature, Courts, and the Executive to jealously guard their distinct realms of authority from incursion by the other branches.

The checks and balances system the framers of our government chose was believed to be effective to limit arbitrary abuse by any individual branch. In such a scheme, the primary check on the discretionary authority of a District Attorney lies with the same authority upon which the system relies to be the ultimate corrective authority for abuses in the other branches. That ultimate authority is the people who, with respect to local prosecutors, exercise that authority most directly and effectively by the electoral process every four years when a District Attorney stands before the public to account for his or her discretionary judgments.

Respectfully Submitted,

s/s/ Bruce A. Antkowiak

Bruce A. Antkowiak

ATTACHMENT N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT WHARTON, ***Petitioner*,** ***v.*** **DONALD T. VAUGHN,** ***Respondent.***	**Civil Action** **No. 01-cv-6049**

MEMORANDUM OPINION

GOLDBERG, J. **September 12, 2022**

Trial courts and lawyers take direction from appellate judges. This is such a basic legal principle that no precedential or statutory citation is needed. As it relates to the federal habeas death penalty case before this Court, clear directives were issued by the United States Court of Appeals for the Third Circuit.

Approximately three years ago, the Third Circuit directed that a hearing be held to determine whether Petitioner Robert Wharton's trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984). Wharton alleged, with the District Attorney's Office now in agreement, that his Sixth Amendment rights were violated by his trial counsel's failure to investigate and present evidence of Wharton's positive adjustment to prison at the penalty phase of his homicide trial. Wharton v. Vaughn, 722 F. App'x 268, 280 (3d Cir. 2018). The Third Circuit directed that analysis of this Strickland claim should entail reconstructing the record to consider mitigation evidence not presented by trial counsel and that this hearing "must also take account of the anti-

mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony." Id. at 283 (emphasis added). That court also ordered that the Strickland analysis be conducted "consistent with [its] opinion." Id. at 284.

In siding with Wharton that his requested relief was warranted, the District Attorney's Office has continually asserted that, despite specific guidance from the Third Circuit as to how Wharton's Sixth Amendment claim should be analyzed, it was free to concede relief and that a full exploration by the Court of all relevant facts was unnecessary.[1] But this position flatly contradicts unambiguous directives issued by the Pennsylvania Supreme Court regarding the handling of death penalty matters on collateral review. In Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018), the Supreme Court spelled out its rejection, "in the strongest terms," of the District Attorney's position that it maintained authority, via a concession and stipulation, to undo a penalty of death on collateral review. Id. at 321. Brown's reasoning is easily understood and mandates that after a jury has imposed a sentence of death, affirmed on appellate review, the only way to vacate that verdict is through "appropriate" and "independent" judicial review—with the District Attorney's role in that process being limited to that of an "advoca[te]." Id. at 319-20. The Supreme Court admonished that if the District Attorney's concession were allowed to serve as the sole basis for undoing a verdict, "the power of a court [would] amount[] to nothing more than the power 'to do exactly

[1] See, e.g., ECF No. 278 at 22 ("[B]oth the federal and state courts regularly accepted the Commonwealth's concessions of death penalty relief, without conducting evidentiary hearings and without appointing a substitute prosecutor [i.e., the Attorney General's Office] to aggressively argue for death."); ECF No. 312 at 12 ("[P]arties often concede issues or arguments that narrow or preclude an evidentiary hearing."); N.T. 6/23/22 at 17 ("What the District Attorney's Office did was file a Notice that, after having reviewed the case, they agreed there was merit to the Defendant's Claim, having reviewed whatever evidence they had at that time, therefore consistent with what they'd been doing for years, before Larry Krasner was District Attorney, and while he was. They simply filed a Notice saying that's our position."); N.T. 6/23/22 at 19 ("That was their position. They did what Lawyers do all the time and said, under those circumstances, we agree with our Opponent. Lawyers do it in civil cases. They do it in criminal cases. It goes on all the time.").

what the parties tell it to do, simply because they [the District Attorney] said so and without any actual merits review[.]'" Id. at 325 (emphasis added). In short, Brown plainly holds that a jury's death sentence verdict cannot be undone until all facts are placed on the table so that a fully-informed judge, not the District Attorney, can make the decision as to whether a decades-old verdict should be set aside. Any suggestion that the Pennsylvania Supreme Court said anything different would be disingenuous.

Yet, in asking this Court to approve its concession in this matter, supervisors at the District Attorney's Office, following procedures implemented by the District Attorney, either ignored these precedential directives or, perhaps worse, intentionally chose not to follow them. And despite a clear order from the Third Circuit directing consideration of "anti-mitigation evidence" and an equally clear admonition from the Pennsylvania Supreme Court that unexplained concessions were frowned upon and that a "merits review" must occur, the District Attorney's Office failed to advise this Court that prison adjustment evidence in this case included significant anti-mitigation evidence involving Wharton's violent escape from a City Hall courtroom. Moreover, and according to its own (former) supervisor, the District Attorney's Office communicated to this Court in "vague" and unclear terms, "amenable" to misinterpretation, that the victim's family, including the only surviving victim, had approved of its concession, when in fact that was not the case. (ECF No. 287-1 ¶ 12.)

For these reasons, I am obligated to conclude that the Philadelphia District Attorney's Office and two of its supervisors violated Federal Rule of Civil Procedure 11(b)(3) based upon that Office's representations to this Court that lacked evidentiary support and were not in any way formed after "an inquiry reasonable under the circumstances."

I. BACKGROUND

The sole remaining question in this case was fairly straightforward: Was Wharton's trial counsel's conduct in not investigating prison adjustment evidence at the penalty phase of Wharton's trial so deficient that, under Strickland v. Washington, 466 U.S. 688 (1984), there was a reasonable probability that at least one juror would have voted against imposing the death penalty. The District Attorney's litigation tactics in addressing this question are the subject of this opinion.

A full explanation of this Court's reasons for questioning the District Attorney's conduct is set out in my May 11, 2022 opinion and need not be repeated here. Briefly summarized, those concerns involved statements made by the District Attorney's Office regarding that Office's decision to concede relief on Wharton's last remaining habeas claim. The first representation was filed on February 6, 2019 through a "Notice of Concession of Penalty Phase Relief." This submission was signed by the Supervisor of the Federal Litigation Unit. There it was represented that the District Attorney's Office had decided to concede relief "[f]ollowing review of [the] case by" the Office's "Capital Case Review Committee" and "communication with the victims' family." (ECF No. 155.) The second representation was a proposed order submitted jointly by Wharton and the District Attorney's Office that stated that this Court had performed "a careful and independent review of all of the parties' submissions and all prior proceedings in this matter." (ECF No. 156-1.) Subsequently, in a brief filed April 3, 2019, the Office stated it had "carefully reviewed the facts and law and determined that Wharton's ineffectiveness claim fulfills the criteria articulated in Strickland v. Washington, 466 U.S. 668 (1984)." (ECF No. 162.)[2] (This brief was filed by the

[2] In the first two pages of this filing, the District Attorney's Office outlines its obligation to "pursue justice" and to "change" course in death penalty collateral review matters (e.g., concede) at its own discretion. (ECF No. 162 at 1-2.) But as noted above, just a few months prior to this filing, the Pennsylvania Supreme Court in Brown rejected this discretion.

Supervisor of the Federal Litigation Unit and also named the Supervisor and Assistant Supervisor of the Law Division below the signature line.) That submission went on to recite "facts" that supported the Office's view that if prison adjustment evidence had been presented at the original sentencing hearing, a death sentence would not have been reached. (ECF No. 162 at 4.) Omitted from these facts, and indeed absent from any of these submissions, was any mention of Wharton's escape.

The present question is whether the District Attorney's Office, or any of its attorneys, should be sanctioned under Federal Rule of Civil Procedure 11(c) for making assertions in these submissions that lacked "evidentiary support" and which were not formed based on an "inquiry reasonable under the circumstances." See Fed. R. Civ. P. 11(b)(3). This issue overlaps with a lawyer's duty under the Rules of Professional Conduct to refrain from making assertions to the court on the lawyer's "own knowledge" unless the lawyer "knows the assertion[s] [are] true or believes [them] to be true on the basis of a reasonably diligent inquiry." Pa. Rule of Professional Conduct 3.3 cmt. 3; In re Price, 732 A.2d 599, 603 (Pa. 1999).

II. SUMMARY OF THE SHOW-CAUSE HEARING TESTIMONY

After raising concerns regarding the District Attorney's candor in the attempted concession process, a hearing was held to allow the District Attorney's Office, if it so chose, to offer explanations. Generally, the Office's outside counsel continually took the position that the District Attorney's Office was not obligated to explain its concession. (See, e.g., N.T. 6/23/22 at 11-12 ("[W]e don't think any explanation is necessary. … [W]e are not bringing [the attorneys] in to explain anything.").) Counsel also took the position that neither the Court, the victims, nor the public had a right to know why that Office decided to concede a decades-old verdict. (N.T. 6/23/22 at 37 (Q: "Don't you think the public has a right to know the deliberative process that the office made when

conceding a death penalty?" A: "Absolutely not.").) The Office relied, by analogy, to an exemption in the federal Freedom of Information Act for "deliberative" materials, which protects federal government agencies from having to "operate in a fishbowl." Assembly of the State of California v. Dep't of Commerce, 968 F.2d 916, 921 (9th Cir. 1992). Counsel also referenced, without specific citations, cases stating that a criminal defendant is not entitled to know the workings of a prosecutor's death penalty committee. Long speaking objections by counsel often preceded answers to the Court's questions. What little information the hearing did produce is summarized below.

The recommendation to concede Wharton's Strickland claim came from the District Attorney's Office's Capital Case Review Committee, which consisted of department supervisors. The Law Division Supervisor and Assistant Supervisor, both lawyers who litigated the remand hearings, were on this Committee, but the Supervisor of the Federal Litigation Unit, who actually signed and filed the Notice of Concession and follow-up documents relating to the concession, was not. The Committee delivered its recommendation to the District Attorney, who made the decision to concede. (N.T. 6/23/22 at 24, 42, 60.)

The Law Division Supervisor and Assistant Supervisor, both experienced attorneys, testified that they recommended conceding Wharton's habeas petition without knowing or attempting to know that Wharton had escaped from a City Hall courtroom. (N.T. 6/23/22 at 27, 34, 40, 61.) The Law Division Supervisor did not know whether any other member of the Committee was aware of Wharton's escape while discussing the concession. (N.T. 6/23/22 at 41-42) The Assistant Supervisor's memory was that no one on the Committee was aware of the escape before the concession recommendation was relayed to the District Attorney. (N.T. 6/23/22 at 61-62 (Q: "Was anyone on the Committee aware?" A: "I don't believe so.").) When the Law Division Supervisor was asked whether it would have been appropriate for a judge to sign the order proposed by the

District Attorney stating that the Court had performed a "careful and independent review" while not knowing of Wharton's escape, she responded that she could not "answer that question for the Court." (N.T. 6/23/22 at 59.) As noted above, counsel for the Office continually objected to any questioning into "deliberative" matters, and thus the show-cause hearing shed little light as to why the Office either did not consider Wharton's escape or, if it was considered, how that Office concluded that Wharton's adjustment to prison was sufficiently positive to merit relief under Strickland.

The District Attorney's supervisors' testimony that they were unaware of the escape before recommending concession was curiously contrary to what had previously been communicated to this Court. On May 11, 2021, at the remand hearing on Wharton's habeas petition, this Court directly asked the Assistant Supervisor whether the District Attorney's Office was aware of Wharton's escape conviction before making the decision to concede Wharton's Strickland claim. Without any explanation or elaboration, he responded "yes." (N.T. 5/11/21 at 66.) That same attorney was asked at the June 23, 2022 show-cause hearing to reconcile this answer with his newfound position that no one on the Committee was aware of Wharton's escape before recommending concession. The Assistant Supervisor responded that his prior affirmative answer was only meant to convey that the District Attorney's Office "as an entity" (e.g., the Office as configured thirty years ago) was aware of the escape but that no one on the Committee that recommended the concession in question was aware of it. (N.T. 6/23/22 at 75-77.)

An affidavit submitted before the show-cause hearing by the Supervisor of the Federal Litigation Unit who submitted the concession sheds considerable light on the District Attorney's litigation conduct in this case. (ECF No. 287-1.) That Supervisor stated that he signed the Notice of Concession despite having no knowledge of the basis for the concession and despite having

undertaken no investigation. (ECF No. 287-1 ¶¶ 5, 8, 10-11.) When asked why the task of signing the Notice of Concession on behalf of the Office was given to a lawyer with no knowledge of why the concession was being submitted, the Law Division Supervisor responded only that this was the Office's "normal practice" and that other administrations had followed the same procedure. (N.T. 6/23/22 at 24, 51-53.) When pressed to explain why the Court was not advised of the escape, the Law Division Supervisor stated, "[W]e didn't tell you anything. And it isn't a question of withholding. This is a question of our practice, our practice." (N.T. 6/23/22 at 25.)

Regarding the District Attorney's Office's statement that its concession was made "[f]ollowing … communication with the victims' family," the Federal Litigation Supervisor who signed the concession explained in his affidavit that he did not mean to imply that the family had been consulted prior to the Office's decision or that all members of the family had been contacted. Rather, he intended only to convey that the family had been informed of the outcome of the Office's decision—that is, they had been told the Office would concede. This supervisor acknowledged that his statement regarding "communication with the victims' family" was "vague," "lack[ed] … clarity," and was "amenable to the interpretation that the victims' family agreed with the concession of penalty phase relief." He also apologized for his lack of clarity. (ECF No. 281-1 ¶ 12.) The Supervisor of the Law Division also recognized the Office's misstep in not notifying the only surviving victim of Wharton's crimes that the District Attorney would be seeking a concession. She stated that victim communication was not her responsibility and acknowledged that contacting that victim was "something we should have done. We recognize our mistake." (N.T. 6/23/22 at 48.)

III. LEGAL STANDARD: FEDERAL RULE OF CIVIL PROCEDURE 11

Rule 11(b) imposes three duties relevant here: the duty to conduct an "inquiry reasonable under the circumstances" before filing a paper with the Court, 11(b); the duty not to make filings for "any improper purpose," 11(b)(1); and the duty to refrain from asserting "factual contentions" that lack "evidentiary support," 11(b)(3). Although Rule 11 does not include all aspects of the ethical duty of candor to the Court, that obligation informs Rule 11's prohibition on making unsupported factual contentions. See Notes of the Advisory Committee on the 1993 Amendment (Rule 11 "emphasizes the duty of candor … ."); Presidential Lake Fire & Rescue Squad, Inc. v. Doherty, No. 12-cv-5621, 2014 WL 318330, at *5-6 (D.N.J. Jan. 29, 2014) (using Rule of Professional Conduct 3.3(a) to inform the Rule 11 analysis).

"The legal standard to be applied when evaluating conduct allegedly violative of Rule 11 is reasonableness under the circumstances … ." Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 289 (3d Cir. 1991).[3] Regarding the duty to refrain from making factual assertions that lack "evidentiary support," the question is whether the filer had "an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact." Ford Motor Co., 930 F.2d at 289 (quotation marks omitted). "A court should test the signer's conduct by inquiring what was reasonable for the signer to believe at the time the pleading was submitted." New Life Homecare, Inc. v. Blue Cross of Northeastern Pa., No. 06-cv-2485, 2008 WL 534472, at *2 (M.D. Pa. Feb. 20, 2008). Rule 11 "does not recognize a 'pure heart and empty

[3] With respect to the duty to conduct a pre-filing inquiry, four factors typically relevant in assessing whether the signer's inquiry was adequate are: "the amount of time available to the signer for conducting the factual and legal investigation; the necessity for reliance on a client for the underlying factual information; the plausibility of the legal position advocated; and whether the case was referred to the signer by another member of the Bar." Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir. 1988). Of these factors, reliance on the client and referral by another member of the bar are not applicable here.

head' defense." In re Cendant Corp. Derivative Action Litig., 96 F. Supp. 2d 403, 405 (D.N.J. 2000).

"If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). "Generally, sanctions are prescribed only in the exceptional circumstance where a claim or motion is patently unmeritorious or frivolous," and even a "tenuous[] factual basis" may suffice to comply with the Rule. Ford Motor Co., 930 F.2d at 289-90. "[W]here such exceptional circumstances exist, the court is merely authorized, not required, to impose sanctions." Pet Gifts USA, LLC v. Imagine This Company, LLC, No. 14-cv-3884, 2019 WL 3208512, at *2 (D.N.J. July 15, 2019). Sua sponte sanctions are ordinarily reserved for "only the most egregious cases." Kovarik v. South Annville Township, No. 17-cv-97, 2018 WL 1428293, at *17 (M.D. Pa. March 22, 2018).

IV. DISCUSSION OF REPRESENTATIONS IN THE DISTRICT ATTORNEY'S OFFICE'S FILINGS

A. Was a "reasonable inquiry" undertaken before the District Attorney's Office represented that it had conducted a careful review of the facts pertaining to Wharton's Strickland Claim?

As noted previously, the District Attorney's Office submitted the following filings that qualify as "other paper[s]" under Rule 11(b): (1) the "NOTICE OF CONCESSION OF PENALTY PHASE RELIEF," filed on February 6, 2019, stating:

> Following review of this case by the Capital Case Review Committee of the Philadelphia District Attorney's Office, communication with the victim's family, and notice to petitioner's counsel, respondent hereby reports to the Court that it concedes relief on petitioner's remaining claim of ineffective assistance at the second penalty hearing, and does not contest the grant of a conditional writ of habeas corpus with respect to petitioner's death sentences.

(ECF No. 155,) (2) a Proposed Order, filed on February 8, 2019 and submitted by counsel for Wharton and the District Attorney's Office indicating the Court had undertaken "a careful and independent review" (ECF No. 156); and (3) a brief, filed on April 3, 2019 which stated that the Office had "carefully reviewed the facts and law and determined that Wharton's ineffectiveness claim fulfill[ed] the criteria articulated in Strickland v. Washington, 466 U.S. 668 (1984)." (ECF No. 162 (emphasis added).) This last submission also stated that the Office "determined that Wharton's remaining habeas claim—that his counsel was ineffective at his second penalty hearing for not investigating and presenting evidence of his adjustment to prison—is not lacking in merit." (Id.)[4]

Despite clear instructions from the Third Circuit that anti-mitigation evidence must be considered and the Pennsylvania Supreme Court's edict that a death penalty verdict on collateral review can only be vacated after appropriate judicial review of the merits of the claim, none of these filings contained any mention of possibly the worst type of prison adjustment—a violent escape from City Hall in 1986 and subsequent escape conviction. Under these particular circumstances, the Court concludes that the District Attorney's Office's representation that they had "carefully reviewed the facts" was unreasonable, as was its request that the Court sign an order indicating that a "careful review" had occurred. In short, in light of the Sixth Amendment issue before the Court, not identifying Wharton's escape cannot, under any circumstances, constitute a "reasonable

[4] The District Attorney's Office argues that representations in this brief should be ignored because it was filed in response to an order calling for a legal analysis of the weight to be afforded the Office's concession. The Court disagrees. Even assuming the Office could somehow have responded to this Court's order without citing facts, the District Attorney's Office not only volunteered facts but used them to argue that its concession reflected "considered judgment" and was entitled to "great weight" such that a court "may … accept" it. (ECF No. 162 at 5.) Having offered its "careful[] review[]" finding "merit" to Wharton's Strickland claim as a basis for its requested relief, the District Attorney's Office cannot now claim that these representations were irrelevant.

inquiry," nor do these factual representations have any evidentiary support. Ironically, the District Attorney's Office advocates that Wharton's death sentence be vacated because trial counsel failed to investigate prison adjustment, yet the District Attorney's Office failed to do the same.

The District Attorney's Office offers numerous and wide-ranging explanations for its conduct. The first is that its statement that Wharton's Strickland claim was meritorious was a legal position, not a factual representation. But the language of its concession, proposed order, and brief says otherwise: That Office represented that it had performed a "careful[] review[]," which was a factual statement. Any "careful[] review[]" must, as the Third Circuit directed, have included examination of possible negative prison adjustment evidence, and discovery of Wharton's escape could have easily been undertaken.[5] In fact, according to the logic of the Assistant Supervisor, that Office, "as an entity" was aware of the escape. But no matter which version is accepted, the fact remains that the District Attorney's Office failed to alert the Court to such powerful anti-mitigation evidence.

The Office's statement that it had "carefully reviewed" this matter and found that Wharton's Strickland claim was meritorious unmistakably represented that the Office had found no facts that would lead any reasonable judge to reject the claim. In particular, the Office's citation in its brief to two specific facts supporting Strickland's prejudice prong implied that those facts were significant in the context of its "careful[] review[]"—or, at least, not overwhelmed by other undisclosed facts. The American Bar Association has recognized that "[i]n light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor

[5] The Attorney General's Office became aware of Wharton's escape through a simple review of Wharton's criminal history, which included a conviction for escape. (See ECF No. 311.)

to the courts … .” American Bar Association, Standards for the Prosecution Function § 3-1.4. Accordingly, when a prosecutor concedes relief and supplies certain facts “to [a] court[],” there is an implied representation that the prosecutor’s basis for its position was made after a “reasonable inquiry,” is fully informed, and is not misleading.

The District Attorney’s Office continues to press that although it is a public, prosecuting office, a heightened duty of candor does not apply to its communications with the Court. The Office asserts that this heightened duty only applies to disclosures to the defense of exculpatory facts under Brady v. Maryland, 373 U.S. 83 (1963), and Pennsylvania Rule of Professional Conduct 3.8(d). (ECF No. 300-1 at 16.) The Court disagrees.

Not surprisingly, authority is sparse on the ethical duties of prosecutors who advocate, as the District Attorney did here, for death penalty relief on behalf of a defendant on habeas review. But an analogous situation occurs when a prosecutor and defense counsel jointly recommend a sentence that is favorable to a defendant. Under those circumstances, the prosecutor may not withhold relevant information from the sentencing court even where a favorable agreement has been reached with a defendant, and even if such information is adverse to the defendant. See United States v. Casillas, 853 F.3d 215, 218 (5th Cir. 2017); Bruce A. Green, Candor in Criminal Advocacy?, 44 Hofstra L. Rev. 1105, 1124 (2016). The Fifth Circuit’s reasoning squarely applies here: “[I]f an attorney for the Government is aware that the court lacks certain relevant factual information or that the court is laboring under mistaken premises, the attorney, as a prosecutor and officer of the court, … has the duty to bring the correct state of affairs to the attention of the court.” United States v. Block, 660 F.2d 1086, 1091 (5th Cir. 1981). Failing to disclose these facts lacks candor because “the public has an interest in the decision being informed by knowledge of the

provable facts that are likely to matter," Green, supra, at 1124, and because nondisclosure "improperly undercut[s] the sentencing court's role." United States v. Aragon, 922 F.3d 1102, 1116 (10th Cir. 2019) (Holmes, J., concurring). A private concession by a prosecutor that produces no public record justifying relief is "reminiscent of the Star-Chamber." Brown, 196 A.3d at 146.

Even after the highest Pennsylvania court, which the District Attorney routinely appears before, spelled out in clear terms the proper process in collateral death penalty matters, the District Attorney's Office continues to misunderstand its role. As the Pennsylvania Supreme Court explained in Brown, when a habeas petitioner and a prosecutor jointly request that a sentence be overturned, they are asking the Court to use its power to bring about a change neither party itself, nor both acting together, can accomplish. If the District Attorney's Office files its concession on a misleading presentation of the facts, it attempts to misuse the Court's power, which is an "improper purpose" under Rule 11(b)(1).

In a further attempt to justify its conduct, the District Attorney's Office also disagrees with the suggestion that the agreement it reached with Wharton's counsel, and the lack of adversity it thereby created, heightened their duty to be candid (and "careful[]") about facts that might preclude relief. The District Attorney's Office makes the perplexing argument that even after its concession, the proceeding remained adversarial because Wharton was also a party to it. (ECF No. 300-1 at 19.)

While the facts and posture of this case are unique, courts have recognized analogous situations in which a joint or unopposed request carries a similar affirmative duty to inform the court of adverse facts as exists in ex parte proceedings: (1) when a prosecutor and defense attorney jointly recommend a sentence, United States v. Block, 660 F.2d 1086, 1091 (5th Cir. 1981); (2) when a prosecutor asks a judge to dismiss a case, In re Kress, 608 A.2d 328, 337 (N.J. 1992); (3)

when a class action named plaintiff and a defendant jointly propose a settlement, Arkansas Teachers Retirement System v. State Street Bank & Trust Co., 512 F. Supp. 3d 196, 208 (D. Mass. 2020); and (4) when a court-appointed agent requests fees. Eagan ex rel. Eagan v. Jackson, 855 F. Supp. 765, 790 (E.D. Pa. 1994). These situations have the following attributes in common: (1) the parties seek relief they cannot achieve through private agreement; (2) failing to disclose adverse facts results in a transfer of decision-making authority from the court to the parties, see Aragon, 922 F.3d at 1115-16 (Holmes, J., concurring); and (3) the adversarial system is inadequate to prevent abuse. All of those attributes are present here. As a consequence, the District Attorney's Office's statement that its careful review found merit to Wharton's Strickland claim contained an implied representation, subject to Rule 11(b)(3), that the District Attorney's Office was not aware of any significant, contrary facts that would lead any reasonable judge to deny the requested relief.

While Wharton's habeas proceeding had only two formal parties, the Court also disagrees with the District Attorney's outside counsel that there were no other interests at play in understanding why relief was conceded. The public had an "interest that a result be reached which promotes a well-ordered society," which "is foremost in every criminal proceeding." Young v. United States, 315 U.S. 257, 259 (1942). The victim and the victim's family had a right to clear communication and had an interest in being heard and treated with fairness and respect. 18 U.S.C. § 3771(b)(2)(A). And the state had an interest in having its judgments set aside only "upon proper constitutional grounds" rather than the concession of an "elected legal officer of one political subdivision within the State." Sibron v. New York 392 U.S. 40, 58 (1968); see also Carter v. City of Philadelphia, 181 F.3d 339, 349 (3d Cir. 1999) ("Pennsylvania's case law defines district attorneys—Philadelphia

District Attorneys in particular—as local, and expressly not state, officials."); United States v. Bendolph, 409 F.3d 155, 166 (3d Cir. 2005) (Congress did not "intend[] to relegate the efficacy of its reforms [in 18 U.S.C. § 2254] to the vagaries of a prosecutor's decisions or mistakes.").

The last of those three interests—deference to final state court judgments—deserves special consideration. While there are no specific ethical rules in habeas corpus proceedings, there are unique opportunities for abuse that have come to light here. The state of Pennsylvania does not afford the Philadelphia District Attorney's Office discretion to set aside a death sentence once imposed. Brown, 196 A.3d at 149. The state's justifications for that rule are numerous and include that past sentences cannot be left to "the changing tides of the election cycles." Id. Pennsylvania is entitled to limit the District Attorney's discretion in this manner because "States retain autonomy to establish their own governmental processes," Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 816 (2015), and "State[s] … ha[ve] … flexibility in deciding what procedures are needed in the context of postconviction relief." Dist. Attorney's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 69 (2009).

As it relates to Rule 11, a prosecutor may not avoid those restrictions by submitting only selected facts to a federal court. This is because federal habeas jurisdiction is premised on the existence of a federal question. Mason v. Myers, 208 F.3d 414, 417 n.6 (3d Cir. 2000). If the federal court is unaware that the presentation is misleading, it cannot enforce the limits of its own jurisdiction, which is particularly important when the court has been asked to issue the "extraordinary remedy" of habeas corpus. See Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

Here, were it not for the assistance of the Attorney General, there was a risk that this Court may have ordered habeas relief that, under the law, it had no power to grant—a risk that heightened the District Attorney's Office's duty to conduct a reasonable inquiry before requesting relief. Put

another way, had this Court simply accepted the concession, and the public and victims later learned of the escape, the Court's statement that it had "carefully" reviewed the matter could rightfully be called into question, as would the public's trust in the legal process. Apparently in its zeal to overturn a jury's death sentence, the District Attorney's Office did not bother to take this factor into account.

The District Attorney's Office offers yet another justification for its conduct by noting that judges in this District have frequently granted its requests to concede habeas relief. The routine use of concessions in federal court to modify state sentences without a merits review might be tolerable if it were a permissible exercise of discretion. But where it is a discretion forbidden in the "strongest terms," Brown, 196 A.3d at 146, a concern emerges that these concessions serve an improper purpose. Cf. Lambrix v. Singletary, 520 U.S. 518, 525 (1997) ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.").

The District Attorney's Office lastly claims that it never opposed the development of facts regarding Wharton's habeas petition. (ECF No. 300-1 at 5-6; N.T., 6/23/22, 17-18.) That response is not credible. The Office had an opportunity to develop the facts when remand was ordered but chose to only put before the Court a concession based upon limited selected facts. The District Attorney's Office may have also forgotten that it objected to the Attorney General's Office's conducting a "factual investigation," "calling witnesses," "introducing evidence," and "develop[ing]

a factual record." (ECF No. 226 at 5, 7-8.) And in post-hearing briefing, in objecting to the Attorney General's participation, the District Attorney's Office called the use of the Attorney General's Office as an amicus to complete the record "unprecedented."[6]

Given all of the above, the Court concludes that the District Attorney's Office's representation that it had conducted a careful factual review and found merit to Wharton's Strickland claim lacked an "evidentiary basis" as required by Rule 11. Two key members of the Committee that conducted the purported review claimed that they were unaware that Wharton's "prison adjustment evidence" included evidence of an escape attempt. This information was available in Wharton's criminal history as a conviction for "escape." Whatever review the Committee performed, it was either not of the merits or was not "careful."

The Court also finds that the District Attorney's Office represented that Wharton's Strickland claim was meritorious without conducting an "inquiry reasonable under the circumstances." Wharton's escape attempt resulted in a conviction that appears on his criminal history, which can be found simply by typing Wharton's name into Pennsylvania's Unified Judicial System Web Portal to reveal a conviction for "ESCAPE." Yet two supervisors on the Committee that recommended conceding Wharton's habeas petition testified that they were unaware of the escape attempt at the time and did not know whether the District Attorney, who approved the concession, was aware of it. That two experienced attorneys recommended taking the extraordinary step of attempting to vacate a decades-old death penalty sentence without examining Wharton's criminal history is a matter of inter-office process. But to then ask a court to approve such extraordinary relief based

[6] The Attorney General's Office was also invited by the Pennsylvania Supreme Court to participate as an amicus in Brown. See 196 A.3d at 142).

on such a patently deficient inquiry is not "reasonable under the circumstances" and implicates the submission requirements of the Federal Rules of Civil Procedure.

Rule 11 also instructs that the "circumstances" at play be considered. Under the circumstances of this case, it cannot be ignored that the underlying facts involved the brutal murder of two parents and an infant left by Wharton to freeze to death who miraculously survived. Under these circumstances, and given the death sentences that followed, the District Attorney's Office's failure to more carefully review this matter before involving the Court further implicates Rule 11. In failing to conduct the required "inquiry reasonable under the circumstances," the supervisors on the Committee and District Attorney's Office violated Rule 11.

B. Communication with the Victims' Family

The District Attorney's Office also represented that its concession was made "[f]ollowing … communication with the victims' family." The supervising attorney who signed this statement explained that he did not mean to say that the victims' family had been consulted prior to the decision or that they agreed with that concession. Rather, he meant only that the decision to concede had been communicated to the victims' family after it was made. (ECF No. 287-1 ¶ 12.) But that same supervising attorney acknowledged that this submission to the Court made on behalf of the District Attorney's Office was susceptible to the interpretation that the victims' family had been consulted and that they concurred in the outcome, which was not true. The supervising attorney also admitted that his communication lacked clarity and was vague.

As to the intended assertion—that the victims' family had been notified of the planned concession—the Supervisor of the Federal Litigation Unit who was the signing attorney arrived at this understanding through conversations with the Office's Victim Witness Coordinator. But somehow this conversation failed to convey to him that only one family member had been contacted,

and that the sole surviving victim, Lisa Hart-Newman, had never been contacted. Both he and the Victim Witness Coordinator were therefore unaware that several family members, including Lisa Hart-Newman, would have been vehemently opposed to the concession had they been informed of it.

This Court (which only learned of the family's opposition through the Attorney General's Office) is not the only one who considered the District Attorney's representations misleading. Lisa Hart-Newman, the infant, now age thirty-seven, who was left to die by Wharton after her parents were murdered, stated she was "extremely disappointed to learn of the District Attorney's stance and very troubled that he implied that the family approved of his viewpoint." (ECF No. 171-5 at 16.) Michael Allen, one of the brothers of the deceased, also noted, "[I]t would appear that there was a substantially deficient briefing by the DA's office regarding the significance and implications for vacating Wharton's death penalty." (Id. at 17.)

Accordingly, the Court finds that the District Attorney's Office's statement regarding its communication with the victims' family was false and yet another representation to the Court made after an inquiry that was not reasonable under the circumstances. The supervising attorney who made this representation did so at the direction of his supervisors, was not personally aware of the error, and has apologized for this miscommunication.

V. VIOLATION AND SANCTIONS

The Supervisor of Federal Litigation filed the Notice of Concession and signed the other submitted documents in question. With respect to his statement that the Office had "carefully reviewed the facts" in determining that Wharton's ineffectiveness claim fulfilled the Strickland standard, I credit his explanation that he relied solely on communications from supervisors that a careful review had actually been conducted. He also explained that he had no input regarding the

decision to concede and no authority to ask the Capital Case Review Committee to reconsider its decision. In filing the Notice of Concession, he followed the directive of the Assistant Supervisor of the Law Division and the Office's procedures.

Rule 11 does not preclude the signer from relying on information from other persons. See Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1278-79 (3d Cir. 1994). Comment 1 to Pennsylvania Rule of Professional Conduct 5.2 is informative and instructs that "if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character." See also Pa. RPC 5.2 cmt. 2 (when reasonable to do so, a lawyer may take direction from a supervisor so that the office can follow a "consistent course of action").

While a deeper inquiry on the part of Federal Litigation Supervisor would have been preferable, it was not "patently … frivolous" for this lawyer to assume that the highly experienced attorneys on the Capital Case Review Committee and the District Attorney himself had performed a sufficient investigation before directing that a concession in a death penalty case be filed. This same attorney also acted with candor and contrition in acknowledging that his statement regarding communication with the victims' family was unclear and susceptible to a misleading interpretation and has apologized for this mistake. Compare Dr. Pepper Bottling Co. of Texas v. Del Monte Corp., No. 88-cv-3012, 1992 WL 438013, at *1 (N.D. Tex. Jan. 7, 1993) (declining to issue further sanctions based on "the forthright contrition and recognition of error expressed by [the attorney] in his affidavit"), with Milani v. International Business Machines Corp., No. 02-cv-3346, 2004 WL 3068451, at *2 (S.D.N.Y. Dec. 30, 2004) (imposing sanctions in part based on the attorney's "utter lack of contrition[] or even regret"). For these reasons, the Court does not find that the Federal Litigation Supervisor violated Rule 11.

The Court reluctantly concludes that a different view must be taken regarding the Law Division Supervisor and Assistant Supervisor, both of whom were on the Capital Case Review Committee. The Assistant Supervisor directed the Federal Litigation Supervisor to file the Notice of Concession, and both the Law Division Supervisor and Assistant Supervisor had their names included on the brief representing that the Committee had "carefully" reviewed Wharton's Strickland claim. The District Attorney's Office's conduct as a whole must also be considered, as Rule 11 directs that sanctions may be imposed on parties and law firms when these entities are "responsible for [a] violation" of the Rule. See Fed. R. Civ. P. 11(c)(1).

As leaders of the Office's Division that oversees the "Law," and who presumably provide advice and analysis on controlling precedent to the District Attorney, the Supervisor and Assistant Supervisor must have been aware that Strickland's prejudice prong required an assessment of mitigation evidence not presented by trial counsel in conjunction with possible anti-mitigation evidence. See Wharton, 722 F. App'x at 283 ("[W]e must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony."). They were also well aware that recent Pennsylvania Supreme Court precedent mandated that a full development of the facts be undertaken before relief could be granted. Yet the District Attorney's Office, through these supervisors, directed representations to the Court that the Office had "carefully reviewed the facts" when in fact that did not occur. The assertion that a careful review had been conducted by the committee is irreconcilable with the testimony of two supervisors involved in the review that they were ignorant of Wharton's escape attempt. And it is worth repeating that the Court afforded these supervisors the opportunity to explain how their review of

the facts was "careful[]," yet at that hearing, their counsel referred to a deliberative process privilege and engaged in long speaking objections, which at times suggested answers, such that little information was obtained.

The close timing between the Pennsylvania Supreme Court's ruling in Brown that the District Attorney's Office does not have discretion to concede a death penalty sentence on collateral review absent a full exploration of facts and the Office's strategy of doing exactly that in this case only exacerbates this situation. The Brown decision was issued just four months before the Office's concession here, and counsel of record in Brown was the Assistant Supervisor who was also on the Committee that recommended conceding Wharton's federal habeas petition. In Brown, The District Attorney's Office attempted to reverse years of support for a jury's verdict through a "new-found agreement" with no substantive factual reasons. The same tactic was attempted in this federal case. In both cases, the Office sought to use prosecutorial discretion as a "substitute for independent judicial review." These parallels suggest an "improper purpose" for the District Attorney's Office's concession in this case, namely an attempt to circumvent Brown in a forum that may be unfamiliar with its strictures. A reasonable response to these concerns would have been to follow Brown and present all necessary facts to this Court, or at the very least, to acknowledge missteps made and provide assurances that the Office would not misuse federal jurisdiction to evade state law. Instead, the Office's supervisors were reluctant to explain their actions and offered little acknowledgment of Brown or that their failure to advise of Wharton's escape should have been handled with more candor.

As to the assertion that the Office had decided to concede following "communication with the victims' family," this statement gave the impression that the Office had conferred with the family before making the decision to concede and that the family either agreed with the decision

or did not object to it. In fact, the only communication was to inform a single family member that the Office was considering conceding. None of the family members supported the Office's decision to concede, and several expressed shock and indignation that the District Attorney's Office had suggested otherwise. While the Court declines to sanction the signing attorney, no similar justifications excuse the District Attorney's Office as a whole for so carelessly invoking its communications with the victims' family as support for its concession while, at the same time, making only a cursory effort to contact them and no effort to consider their views. The Law Division Supervisor could give no justification for why communication with the surviving victim and her family was handled in this manner other than to say that victim communication was not her responsibility and the Office made a "mistake." (N.T. 6/23/22 at 48.)

In contrast to the regret demonstrated by the (now former) Supervisor of the Federal Litigation Unit, the District Attorney's Office has steadfastly insisted that it has done nothing wrong, owes no explanation, and will provide none. (N.T. 6/23/22 at 11-12.) Cf. Ivy v. Kimbrough, 115 F.3d 550, 553 (8th Cir. 1997) (affirming sanctions where the "response to the court's order to show cause regarding sanctions was so superficial as to be insulting to the court and to the policies underlying Rule 11"). A glaring example of this continued tactic is the Assistant Supervisor's attempt to rationalize his present position that he and others on the Committee were unaware of the escape with his prior statement to the Court, made during the remand hearings, that the Office was aware of it. His explanation that he originally meant only to convey that the Office as it existed decades ago knew of the escape was clearly designed to obfuscate rather than clarify. The Court finds this explanation incredible. When I originally asked that lawyer whether the Office was aware of the escape when it filed its concession, there is no logical reason why I would need to know if the Office "as an entity" and as it existed decades ago was aware of the escape. It would have taken

little effort for the Assistant Supervisor to clarify his answer with candor, stating, for instance, "Your Honor, I do not know whether the current Administration considered the escape when we decided to concede the death penalty, but, because an Assistant District Attorney was in the court-room when the escape occurred in 1986, and Wharton pled guilty to escape, the Office was aware of it at that time." The Assistant Supervisor's rationalization is yet another example of a litigation practice on the part of the District Attorney's Office designed to provide the Court with only limited information that suits the Office's purposes.

Based on the foregoing, I find that the Law Division Supervisor, Assistant Supervisor and the District Attorney's Office violated Rule 11(b)(1) by asserting without "evidentiary support" or an "inquiry reasonable under the circumstances" that it had "carefully reviewed the facts and law and determined that Wharton's ineffectiveness claim fulfills the criteria articulated in Strickland v. Washington, 466 U.S. 668 (1984)" and that it had done so "[f]ollowing … communication with the victims' family." I also find that the violation was sufficiently "egregious" and "exceptional" under the circumstances of this case to warrant sanctions under Rule 11.

Rule 11 sanctions "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). "In determining the appropriate sanctions, the Court seeks the least significant sanction that will correct or deter similar conduct … in the future." Taggart v. Deutsche Bank Nat'l Trust Co., No. 20-cv-5503, 2021 WL 2255875, at *18 (E.D. Pa. June 3, 2021). "The sanction may include nonmonetary directives," Fed. R. Civ. P. 11(c)(4), and the Federal Judicial Conference has "expressed a preference … for non-monetary sanctions" over monetary ones. Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 421 (6th Cir. 1992). A wide variety of nonmonetary sanctions may be utilized. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) (listing examples).

Had the District Attorney's Office simply advised the Court of facts that would have allowed a merits review, significant judicial resources and the time and effort expended by the lawyers from the Attorney General's Office would not have been necessary.[7] The enormous cost required to uncover crucial facts that the District Attorney's Office so carelessly disregarded could suggest that monetary sanctions are necessary to deter similar conduct in the future. But the Court ultimately decides not to impose monetary sanctions here as they would fall on the taxpayers of Philadelphia and thus may not suffice to deter repetition of the conduct at issue.

In determining an appropriate nonmonetary sanction, I am guided by federal crime victims' rights legislation. "In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded" certain rights, including the right not to be excluded from the proceedings, the right to be heard, and the right to be treated with dignity and respect. 18 U.S.C. § 3771(b)(2)(A). While the law directs those obligations to courts rather than prosecutors, § 3771(b)(2)(C), "courts … make decisions based on information supplied by the parties" and "must depend on the parties to provide accurate information." Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital, 185 F.3d 154, 176 (3d Cir. 1999). The District Attorney's Office's conduct in this case impeded my ability to ensure that the victims were provided their statutory rights—as well as their broader right, shared with the public generally, to have courts issue decisions "informed by knowledge of the provable facts that are likely to matter." Green, supra, at 1124.

Other than the admonition contained in this Opinion, the Court declines to impose any monetary or non-monetary sanctions on the Law Division Supervisor and Assistant Supervisor.

[7] The Court greatly appreciates the resources and input provided by the Attorney General's Office.

Both are public servants who were following the policies and procedures of the Office that employed them. I will however impose the following nonmonetary sanction on the District Attorney's Office under Federal Rule of Civil Procedure 11(c)(4):

First, within thirty (30) days of the filing of this opinion, the District Attorney's Office shall send separate written apologies to victim family members Tony Hart, Michael Allen, Patrice Carr, and to victim Lisa Hart-Newman for representing that it engaged in "communication with the victims' family[.]" As the testimony of the two Law Division supervisors was that the District Attorney approved and implemented internal procedures that created the need for this sanction, and that the District Attorney had the sole, ultimate authority to direct that the misleading Notice of Concession be filed, the apologies shall come from the District Attorney, Lawrence Krasner, personally. Copies of the apologies shall be filed with the Court.

Second, while I have no authority to control the conduct of the District Attorney in litigation before other judges, in cases where I am assigned, all concessions by the Philadelphia District Attorney's Office in proceedings under 28 U.S.C. § 2254 must be accompanied by a full, balanced explanation of facts that could affect my decision to accept or reject the concession. For instance, and by way of suggestion, the concession in this case could have stated:

> **"As directed by the United States Court of Appeals for the Third Circuit, and as it relates to the Sixth Amendment issue before the Court, the Capital Case Review Committee of the Philadelphia District Attorney's Office has reviewed and considered both positive and negative prison adjustment evidence. Consistent with our duty of candor and the Third Circuit's directive that anti-mitigation evidence be considered, we also advise that this evidence includes an incident in 1986 in which Mr. Wharton escaped from a City Hall courtroom. Having carefully reviewed all of the facts and law, including anti-mitigation evidence, we advise that the District Attorney's Office believes that Wharton's positive prison adjustment evidence is sufficiently mitigating to satisfy the prejudice prong of Strickland. The District Attorney's Office also advises that it has contacted the victims' immediate family (including the only surviving victim), and all family members are opposed to this concession."**

An appropriate order will follow.[8]

[8] Local Civil Rule 83.6(V)(A) states the following:

> When the misconduct or other basis for action against an attorney (other than as set forth in Rule II) or allegations of the same which, if substantiated, would warrant discipline or other action against an attorney admitted to practice before this court shall come to the attention of a Judge of this court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the judge shall refer the matter to the Chief Judge who shall issue an order to show cause.

For the reasons set forth above, this matter will be referred to the Chief Judge of this Court.