University of Pittsburgh
Institute of Politics

CRIMINAL JUSTICE TASK FORCE

brief

CRIMINAL JUSTICE IN THE 21ST CENTURY: ALLEGHENY COUNTY PROSECUTION AND DEFENSE

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TABLE OF CONTENTS

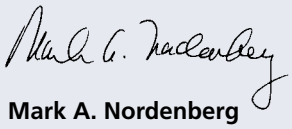
LETTER FROM THE COCHAIRS

In the fall of 2015, the Institute of Politics at the University of Pittsburgh devoted much of its annual retreat for elected officials to the serious and increasingly visible issue of mass incarceration. Following that program, which generated considerable interest, Allegheny County Executive Rich Fitzgerald asked the Institute to assemble a group of distinguished civic leaders to examine what could be done to make our current system of criminal justice "fairer and less costly, without compromising public safety."

In response to the county executive's request, the Institute convened the Criminal Justice Task Force, consisting of 40 regional leaders. The group included criminal justice professionals currently holding positions of leadership within the system; distinguished academics with expertise in such directly relevant areas as criminology, law, and psychiatry; and respected community leaders with a strong interest in the system but generally with no direct links to it. Each task force member was recruited to serve because of the unique contributions that he or she was positioned to make by adding to the group's collective potential to make a real difference in this area.

The members met on a monthly basis for most of a year, with regular presession and postsession reading assignments. Sessions typically began with a best-practices presentation from a respected professional from outside the region followed by an experienced task force member adding a sense of local context. At critical points in the process, we benefited from the help of Nancy La Vigne, director of the Justice Policy Center at the Urban Institute, who served as its outside consultant. Though differing perspectives often surfaced, meetings were characterized by civil discussion and a commitment to consensus building, thoughtful reflection, recognition that Allegheny County already has been a leader in criminal justice reform, and a belief that we should strive to do even more to achieve ever-higher levels of fairness and cost-effectiveness.

We are privileged to lead this distinguished group and are pleased to present this report as the product of its committed efforts. In crafting this document, we deliberately chose to focus on a manageable number of targeted opportunities for reform. It is our hope, shared by the members of the task force, that the ideas advanced herein can make Allegheny County's criminal justice system both more equitable and more cost-effective. As other communities continue to deal with similar challenges, we hope that some of these ideas also will be of help to them, just as we will continue to look for good ideas from other communities.



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DEFENSE AND PROSECUTION IN THE UNITED STATES AND PENNSYLVANIA

People accused of crimes are entitled to defense counsel under the Sixth Amendment of the U.S. Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

For those who cannot afford an attorney, however, the right to counsel was "the exception rather than the rule in the states … Well into the 20th century, most states relied only on the volunteer pro bono efforts of lawyers to provide defense for poor people accused of even the most serious crimes."[1] Then, in 1963, the U.S. Supreme Court ruled in *Gideon v. Wainwright* that people who are indigent should be granted defense counsel so that "every defendant stands equal before the law."[2] Nine years later, the court ruled that an individual experiencing poverty when facing any loss of liberty for any amount of time and for any charge must have a lawyer "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[3] The court further "extended the requirement of free counsel from the felony prosecution involved in *Gideon* to misdemeanor prosecutions and juvenile proceedings; and from the trial itself to all 'critical proceedings' after arrest."[4]

> **"From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."**
>
> – (ASSOCIATE) JUSTICE HUGO L. BLACK
> *Gideon v. Wainwright*

In response to these and other court cases, states began to develop indigent defense systems to represent individuals experiencing poverty in criminal cases. Some of these systems were established as part of state government (as in Alabama), while others became locally elected public defenders (as in San Francisco, Calif.). However, most public defenders are appointed by county or city elected officials (as is the case in Pennsylvania's counties). As of the 2008 fiscal year, Pennsylvania was the only state[A] with no state funding of its public defenders.[5] It does not provide statewide oversight of its indigent defense systems,[6] and "a centralized external location to collect county expenditures does not exist" in Pennsylvania.[7] (Please see Appendix B for a detailed history of the development of public defense for the indigent.)

By contrast, prosecution is a function that dates to the start of the United States, when "most states gave their governors, judges, or legislators the power to appoint prosecutors."[8] This changed in the 1830s, as states began to change their laws so that prosecutors would be elected officials, largely as a way of eliminating governors' use of political patronage. Today, all but four states elect their prosecutors. The United States is unique among countries in electing prosecutors.[9]

In many states, each prosecutor is elected at the district level and is therefore called a district attorney; in Pennsylvania, these districts align with county borders.

The role of the district attorney/prosecutor is to be the "independent administrator of justice" whose "primary responsibility … is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected."[10]

NATIONAL STANDARDS

National organizations set standards for the defense and prosecution. These standards include the following:

American Bar Association (ABA) Standards for Defense Counsel

Maintain workload that allows for quality representation: "Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality

[A] "Twenty eight states fund the indigent defense system entirely or almost entirely at the state level. In another three states, the majority of the funding is borne by the state. In 18 states, the county bears most but not all of the cost."

representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations… Publicly funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload ... If workload exceeds the appropriate professional capacity of a publicly funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief."[11]

Improve the criminal justice system: "Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action."[12]

Pursue alternatives to prosecution: "Defense counsel should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client."[13]

Represent client in any appearance before judicial officer: "A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance."[14]

Investigate: "Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges … Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them."[15]

Advocate: "Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective."[16]

Workload of public defenders: The 1971 National Advisory Commission on Criminal Justice Standards and Goals commissioned a task force consisting of staff members and National Legal Aid & Defender Association consultants to develop a report on courts, which includes additional standards for the defense that contain workload standards for public defenders: "The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."[17]

ABA Standards for Prosecution

Improve the criminal justice system: "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function. The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict ... The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."[18]

Develop alternatives to prosecution: "The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases."[19]

Serve the public: "The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction."[20]

Investigate: "The prosecutor should be provided with funds for qualified experts as needed for particular matters. When warranted by the responsibilities of the office, funds should be available to the prosecutor's office to employ professional investigators and other necessary support personnel, as well as to secure access to forensic and other experts."[21]

Exercise discretion in filing charges: "In order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support."[22]

Workload: The corollary workload standard for prosecutors, articulated by National Defense Authorization Act (NDAA), says: "Except in extraordinary circumstances, a prosecutor should not maintain, and should not be asked to maintain, a workload that is inconsistent with the prosecutor's duty to ensure that justice is done in each case."[23]

ALLEGHENY COUNTY PROSECUTION AND DEFENSE

DISTRICT ATTORNEY

DUTIES

"The Office of the District Attorney serves as the Chief Law Enforcement Office of [Allegheny] county and accepts referrals from more than 100 active police departments including the City of Pittsburgh Bureau of Police, the Allegheny County Police Department and the Allegheny County Sheriff's Office. The office is also responsible for approving complaints filed by private citizens."[24] Stephen A. Zappala Jr. has served as Allegheny County district attorney since 1998.

LOCATIONS

The main location of the Office of the District Attorney is the Allegheny County Courthouse in downtown Pittsburgh. It has satellite offices in the Dormont Borough Municipal Building, in Homestead (at the Waterfront), at the Pittsburgh Municipal Court building, in McKeesport at the Mitchell Building, and within the Family Division of the Allegheny County Court of Common Pleas.[25]

STAFFING AND BUDGET

The district attorney's office employs "109 attorneys, 29 detectives, and 57 support personnel."[26] The office's 2016 budget is $17,489,729,[B,27] and its inflation-adjusted budget for 1995 was $12,699,267.

STRUCTURE

The office is organized into the following units:[28]

- Animal Cruelty
- Appeals/Post-Conviction
- Asset Forfeiture
- Auto Theft Prevention
- Child Abuse
- Crimes Persons
- Discovery
- Domestic Violence
- Elder Abuse
- Electronic Surveillance
- General Trial
- Grand Jury
- Homicide
- Insurance Fraud
- Investigations
- Juvenile Court
- Mental Health Court
- Narcotics
- Pretrial Screening
- Sentencing Guidelines
- Sexual Assault Response Team of Allegheny County (SARTAC)
- Veterans Court
- Violent Crimes and Firearms

OFFICE OF THE PUBLIC DEFENDER

DUTIES

The Allegheny County Office of the Public Defender is responsible for "furnishing competent and effective legal counsel to any person who lacks sufficient funds to obtain legal counsel in any proceeding where representation is constitutionally required."[29] The office's Web site says that the public defender provides legal counsel:[30]

- when a person is charged with juvenile delinquency;
- for critical pretrial identification procedures;
- at preliminary hearings;
- for state habeas corpus proceedings;
- at state trials, including pretrial and posttrial motions;
- for Superior Court and Pennsylvania Supreme Court appeals;
- for postconviction hearings at the trial and appellate levels;
- during criminal extradition proceedings;

[B] This does not include resources provided during state police cases through the state forensic lab located in Greensburg, which provides the criminal justice system with ballistics testing, controlled substance analysis, latent print examinations, trace evidence analysis, and serology analysis. The majority of forensic testing in Allegheny County cases is provided by the Allegheny County Crime Lab, an independent executive branch agency falling under the supervision of the county executive.

- at probation and parole violation hearings;
- for involuntary commitment under the Mental Health Procedures Act; and
- for any proceeding where personal liberty is in jeopardy.

Elliot Howsie is the chief public defender and director of the Allegheny County public defender's office and was appointed to the position by County Executive Rich Fitzgerald in 2012.[31]

STAFFING AND BUDGET

The office has 89 attorneys, 10 supervisors, and 26 support staff members. Its current budget is $9,572,773,[32] and its inflation-adjusted budget for 1995 is $6,135,905.

STRUCTURE

The Allegheny County Office of the Public Defender is organized as follows:

- Administration
- Trial Division
- Pretrial Division
- Appellate Division
- Juvenile Division
- Training Division
- Investigation

CONFLICT COUNSEL

If the public defender determines that his office cannot represent someone who otherwise qualifies for indigent defense (for example, when two people are accused of being involved in committing a crime and the public defender cannot defend both without a conflict in representation), the public defender can ask the court to request that the Office of Conflict Counsel represent that person. The Office of Conflict Counsel can accept the case or appoint counsel under the authority of the administrative judge.[33] Approximately 500 cases each year are handled by the Office of Conflict Counsel in Allegheny County.[34]

KEY LOCAL DATA

Question 1: What is the volume of cases each year? What is the share of cases in which the district attorney files charges for felonies?

- In 2014, there were 33,981 criminal cases filed at the district judge level.[35]
- Thirty percent of all cases filed have a felony as the highest charge. Cases with the highest grade as a misdemeanor are more likely to be resolved at lower court than those with felonies as their highest grade.[36]

Table 1: All Cases Filed in 2014 at the District Judge Level (Volume of New Cases Per Year)

	Cases	Percent of Cases with Highest Grade as a Felony
Resolved at the District Judge Level	16,397	18%
Held for Court	17,070	42%
Total Cases*	**33,467**	**30%**

* At the close of 2014, there were still 514 cases pending at the district judge level.
Source: Allegheny County Department of Human Services (DHS), using MDJS (court) data; data retrieved March 2, 2016

Question 2: What is the breakdown of felonies and misdemeanors?

Table 2: Distribution of District Judge Cases by Highest Grade, 2014

Highest grade of initial charges	Count of cases	Percent of Total	Average number of initial charges per case
Felony	**10,102**	**30%**	**5**
F1	2,547	7%	5
F2	2,049	6%	5
F3	4,043	12%	4
F	1,463	4%	5
Misdemeanor	**22,753**	**67%**	**3**
M1	5,097	15%	4
M2	5,971	18%	3
M3	2,630	8%	3
M	9,055	27%	3
Summary	**387**	**1%**	**2**
Unknown	**739**	**2%**	**2**
Total	**33,981**	**100%**	**4**

Source: Allegheny County DHS, using MDJS (court) data; data retrieved March 2, 2016

Question 3: What share of cases filed go to trial, are plea bargains, or other?

- Seventy-seven percent of all cases held for court are convicted in Common Pleas.[37]
- Seventy-four percent of all cases that are held for court are resolved with a plea.[38]

Table 3: Disposition Results for All New Cases Held for Court

	Cases	Percent of Total
Convicted in Criminal Court	**12,331**	**77%**
Plea	11,852	74%
Nolo Contendere	126	1%
Jury Trial	53	0%
Non-jury Trial	300	2%
Not Convicted	**1,224**	**8%**
Other	1,036	6%
Jury Trial	37	0%
Non-jury Trial	151	1%
Accelerated Rehabilitative Disposition (ARD); (Deferred Prosecution)	**2,453**	**15%**
Total Disposed Cases*	**16,008**	**100%**

Source: Allegheny County Adult Probation, using MDJS and CPCMS (Court) data
* 1,062 cases are still pending at the Common Pleas level and therefore have no disposition yet.

[C] In Allegheny County, before police can file charges for "certified crimes," they must get authorization from the Office of the District Attorney. If the alleged crime is not one of the certified crimes, the district attorney first involvement with the case will be at the preliminary hearing (Spangler, 2-25-16).

Question 4: How much do charges change (reduced or increased) from the point when prosecutors file charges to conviction?

- Sixty-two percent of the cases had the same highest grade filed as convicted.[39]
  - For felony cases, 47 percent had no change in highest grade level.[40]
    - Fifty-two percent moved down in severity, and 36 percent moved down to a misdemeanor.[41]
  - For misdemeanor cases, 73 percent stayed at the same grade level for highest charge.[42] Eighteen percent moved down, while 9 percent moved up.[43]

(See Table 4 on the opposite page.)

POINTS OF DISCRETION

The Vera Institute of Justice and the Sentencing Project are among the organizations that have examined the pathway that criminal cases often take to identify ways in which police, prosecutors, defense counsel, judges, and jails exercise discretion and where they have opportunities to divert people from the criminal justice process. They have identified areas in which prosecution and defense counsel can impact who is in the jail and within them several points of discretion.

1. CHARGING DECISION

Background: Prosecutors screen new arrests[C] by police, "looking at whether the elements of the alleged crime are present in the arrest complaint and whether the quality of evidence seems sufficient to support charges against the person."[44] Prosecutors may dismiss, reduce, or increase charges, "depending on the information provided to them by the police, or they may request additional information before making a decision. Prosecutors decide whether to accept or decline the case; if they choose to accept the case they determine what charge(s) to file, which usually occurs during the arraignment."[45]

Discretion

- Prosecutors may decline to prosecute. "A reasonably careful review of the charges and the evidence by the police could result in a decision to void the arrest by declining to bring charges."[46]
- Prosecutors make choices in the severity of charges they file.
  - Nationally, at least one researcher contends that prosecutors have chosen to file felony charges more often in recent years than historically for the same type of crime.

Table 4: Mapping of Highest Grade of Initial Charges to Highest Grade of Convicted Charges for District Judge Cases Filed in 2014 That Are Convicted (Guilty or ARD)

	Count of cases	Percent stayed the same grading**	Percent moved down**	Percent moved down to a lower grade of felony	Percent moved down to a lower grade of misdemeanor	Percent moved down to summary
Felony	**5,932**	**47%**	**52%**	**12%**	**36%**	**3%**
F1	1,276	44%	56%	24%	28%	4%
F2	1,121	38%	59%	16%	39%	4%
F3	2,446	55%	44%	10%	31%	3%
F	1,089	42%	57%	NA	54%	3%
Misdemeanor	**8,627**	**73%**	**18%**	**NA**	**11%**	**7%**
M1	2,051	62%	33%	NA	25%	8%
M2	1,231	51%	39%	NA	24%	15%
M3	580	50%	34%	NA	19%	15%
M	4,765	86%	4%	NA	NA	4%
Total	**14,591***	**62%**	**32%**	**5%**	**21%**	**6%**

Source: Allegheny County DHS, 2016, using MDJS and CPCMS (Court) data

* 193 out of all 14,784 convicted district judge cases (guilty or ARD) do not have grading information and were excluded from Table 4. There are only 32 summary cases, of which 10 percent stayed at the same grading and 90 percent moved up.

** The remaining percentage from 'Percent stayed at the same grading' and 'Percent moved down' are those that moved up in grading.

A study by Fordham University School of Law professor John Pfaff found that prosecutors have dramatically increased the share of arrests in which they charge people with felonies.[47] Pfaff said in an interview, "The probability that a district attorney files a felony charge against an arrestee goes from about 1 in 3, to 2 in 3. So over the course of the '90s and 2000s, district attorneys just got much more aggressive in how they filed charges."[48] Pfaff writes, "Arrests are not driving the growth in incarceration, and by extension neither are trends in crime levels, since their effect is wholly mediated by these arrest rates"—but because felony filing data grew by 129 percent across that period, "the decision to file charges thus appears to be at the heart of prison growth."[49]

Because most criminal convictions are reached through a negotiated plea, "much of the decision-making power in disposition remains with the prosecutor, who can leverage the initial charge decision and the amount of money bail requested to bring a case more quickly to a close with a plea deal. Particularly for defendants on low-level charges—who have been detained pretrial due to an inability to pay bail, a lack of pretrial diversion options, or an inability to qualify for those options that are available—a guilty plea may, paradoxically, be the fastest way to get out of jail."

–VERA INSTITUTE OF JUSTICE, 2015

- By contrast, in Allegheny County, the district attorney is not usually present at the preliminary arraignment where initial charging occurs and, as a result, is not filing the initial charging decisions.[50] The Allegheny County district attorney only reviews "certified" crimes, which are almost exclusively felony crimes of violence such as homicide, sexual assault, robbery, child abuse, and certain crimes against the elderly. Further, during the preliminary hearing, assistant district attorneys often work to reduce or withdraw initial charges.

- Prosecutors can divert defendants to alternative programs, but "because the initial charge is used as a baseline from which the prosecutor will pivot later in the case through plea negotiations, few legally sufficient cases are dismissed or diverted at this early point in the process [arraignment], even though the prosecutor has wide discretion to do both. When a person is formally charged, the type and severity of the initial charge(s), as well as any charge enhancements invoked, will influence bail amounts and eligibility for non-financial pretrial release as well as diversion programs or community-based sanctions designed to address underlying problems. In turn, these charge decisions influence whether the person will be detained pretrial (and for how long) and, if convicted, be given a custodial sentence."[51]

2. BAIL REQUESTS

Background: When police have arrested someone or there is a warrant, the defendant must go before a judge for the preliminary arraignment, where he or she receives a copy of the complaint against him or her and where the court schedules his or her preliminary hearing. In Allegheny County, both the arraignment and preliminary hearing are before a district judge.[52] The preliminary arraignment also is when a district judge sets bond.[53] The district attorney and public defender[D] are usually not present at the preliminary arraignment.

By contrast, at the preliminary hearing, both the district attorney and public defender or other defense counsel usually are present. This is when the district attorney, representing the commonwealth, presents "evidence that a crime was committed and that the defendant is probably the perpetrator of that crime … If a prima facie case is presented, the case will be held for court. If a prima facie case is not presented, the defendant should be discharged."[54] Either the defense or prosecution can ask the judge to change bail arrangements during the hearing, or they may do this during Motions Court.

[D] The public defender, district attorney, and Allegheny County Pretrial Services office review the bail set by a district judge and may file a motion to change the bond requirements during motions court, which the president judge holds each weekday.

Discretion:
Prosecutors can use evidence-based tools for bail recommendations. These tools use flight risk and risk of pretrial offending rather than any other reason to make the recommendation.[55]

Defense counsel can participate in the bail hearing at arraignment. "Early involvement of defense counsel facilitates an attorney's understanding of the case, counseling the client, and initiating appropriate plea negotiations with the prosecution as soon as possible. A careful review of options at this point can result in a decision to defer prosecution on the condition that the defendant successfully completes a program of supervision and treatment."[56]

3. DECIDING WHETHER OR NOT TO PROSECUTE A CASE

Background: "Some district attorney offices are re-evaluating their handling of certain cases, declining to prosecute some types or relying more on alternatives to prosecution, which do not require filing formal charges, such as problem-solving courts and other pre-charge diversion programs. This shift in course, while hardly widespread … does reflect a belief among some prosecutors that jails are not always the best option for ensuring public safety, and a growing desire among them to reduce the number of people exposed to the collateral consequences that accrue to people who are charged with a criminal offense and spend time in jail."[57]

Discretion:

Deferred prosecution: A deferred prosecution is an agreement between the prosecutor and the individual charged with a crime during the pretrial process. If the individual fulfills a series of requirements set by the agreement, such as restitution or community service, the prosecutor will dismiss the charges against the individual. If the individual fails to meet the requirements of the agreement, prosecution can resume.

One example of a deferred prosecution program in Allegheny County is the Accelerated Rehabilitative Disposition (ARD) probation program for first-time nonviolent offenders.[58] Similar to other deferred prosecution programs, defendants under the ARD program can have charges removed from their record by successfully meeting a set of requirements, which includes conditional supervision and may include other requirements such as community service, restitution, DUI/anger management/retail theft classes, and substance abuse or mental health treatment. If a defendant fails to meet the requirements of ARD, he or she will stand trial for his or her original charges.[59]

Deferred adjudication: Following a plea of guilty or no contest, the court can decide to not enter a judgement of guilt and instead move forward with a deferred adjudication. In this process, similar to deferred prosecution, if the defendant meets a series of conditions set out by the court, the charges are dismissed and the defendant will not have a conviction on his or her record. Failure to meet the conditions of the agreement results in the court's entering a judgment against the defendant and determining a punishment.

4. REQUESTING CONTINUANCES

Background: "Cases can be postponed or continued for any number of reasons, and literally everyone involved in the adjudication of a case … can either initiate or indirectly cause a postponement."[60] Not being ready for court and requesting postponements for tactical purposes can significantly increase the time it takes to dispose of a case, which can mean a defendant remains in jail weeks longer. "Lack of readiness on both sides of a case … may be in part a result of an overburdened court system flooded by huge misdemeanor caseloads."[62] "Prosecutors might delay a case in an attempt to pressure a defendant to plead guilty, especially if the person is held in jail and prolonging the case will extend his or her time behind bars. On their part, defenders believe that some delays may benefit their clients, since the quality of the prosecution's evidence usually degrades with time. In particular, delays can make it harder for prosecutors to maintain contact with key witnesses and may also have a negative effect on the credibility of witness testimony because memories fade over time."[62]

Discretion:

Continuances are only granted when a valid reason exists to postpone action. The granting of a continuance is at the sole discretion of the judge. In making its determination, the court will look at the applicant's good faith, the necessity of the postponement, any advantage that might be gained by the parties, and the possibility of prejudice against either party. Some reasons for which a court will grant continuances are either side's not having enough time to sufficiently prepare, illness, missing witnesses, or at the agreement of the parties.

5. SENTENCE REQUESTS

Background: "Even at the point of disposition, there are options that allow for the release of people from custody without their having to accept a permanent guilty plea."[63] There is some evidence that sentencing outcomes are dependent on type of counsel (i.e., no counsel, public counsel, or private counsel) even when relevant factors are controlled.[64]

Discretion:

Among the "alternative resolutions" that prosecutors can seek are:

- conditional discharge,
- deferred prosecution, and
- adjournment in contemplation of dismissal.

These options provide for release on the condition of "continuing lawful behavior with ongoing supervision and, in some cases, other requirements like participation in a treatment program or community service. If the conditions of the discharge or adjournment are met, the case will be dismissed."[65]

NEW APPROACHES FOR PROSECUTION AND DEFENSE THAT IMPACT THE JAIL

These are among the steps that states, elected prosecutors, and public defenders have taken to keep certain people out of jail, reduce the disproportionate impact of the criminal justice system on racial minorities, and reduce costs.

Legislative

- Reclassify certain felony offenses as misdemeanors, as Connecticut, Maine, North Dakota, and Utah did.[66] Also, in 2014, California voters passed Proposition 47, which reclassified "six low-level property and drug offenses from felonies to misdemeanors."[67]
- "Raise the age for certain felony offenses for juvenile defendants" or the age of automatic transfer to criminal court for certain offenses (Connecticut and Illinois, respectively).[68]
- Identify ways to reduce racial disparities within the system. The Wisconsin governor's office created the Commission on Reducing Racial Disparities in the Wisconsin Justice System that identified a specific set of recommendations for reducing the system's disproportionate impact on racial minorities. The commission's recommendations were: "adopting model prosecutorial guidelines designed to reduce disparity; establishing community justice councils to develop community-based solutions to low-level offenses; and establishing a review process for discretionary decisions related to revocations" of postprison probation and parole.[69]
- Expand postcharge diversion programs so that more defendants can participate.
    - New Jersey's "conditional dismissal program" in the state's misdemeanor court expanded to include

defendants charged with nondrug misdemeanor crimes, such as trespassing and shoplifting.[70]

- The Alabama legislature authorized district attorneys to establish pretrial diversion programs in their jurisdictions that are open to defendants charged with misdemeanors, traffic offenses, property crimes, most drug crimes, and other offenses within prescribed limits.[71]
- Colorado passed a law in 2013 allowing judges to impose additional conditions rather than pull individuals out of the state's deferred judgment program following any violation of program terms in order to enhance the likelihood of eventual success by program participants.

Prosecution

- Assign experienced prosecutors to screen arrests. "A number of jurisdictions assign experienced assistant prosecutors to review all new arrests shortly after booking. This early prosecutorial review of police charges can result in the elimination or downgrading of weak cases on a timely basis. Charges that are difficult to prove may be eliminated altogether, resulting in a decreased average length of stay through early release. Early case review may result in the reduction of charges to a level that citation release (for misdemeanors) can be utilized or bail reduced to an amount that can be posted. In Sacramento County, [Calif.] a senior prosecutor screens new felony arrests. Of an average of 1,200 felony arrests per month, 600 were filed as felonies, 400 were reduced to misdemeanors (and cited), and 200 were released."[72]
- Decline to prosecute low-level offenses (Kings County, N.Y.).[73]
- Use risk assessment tools for charging decisions.[74]
- Establish precharge diversion as an alternative to prosecution for individuals with no felony history. In one such program, individuals work with case managers to repay their debt to society through restitution and community service (Hennepin County, Minn.).[75]
- Analyze the current jail population. "Systematic efforts to move away from a reliance on prosecution and jail detention will require district attorneys to participate in an analysis of their current jail populations and the longer-term outcomes for specific categories of people, charges, and dispositions."[76]
- Provide leadership in finding nonjail solutions. "In communities from Denver, Colo. to Milwaukee, Wis., assistant district attorneys are assigned to work in specific neighborhoods, often co-locating in police stations, to develop partnerships with neighborhood organizations and learn the issues that make places less safe."[77]
- Retain an independent organization to study disproportionate racial impacts of decisions at each point of discretion.

Defense

- Engage in early case review. "In a study of three jurisdictions … it was found that persons in custody were released more quickly if the first interview with the defense attorney occurred prior to or at arraignment. In this way, the defense attorney can make motions for recognizance release or bail reduction, and the judge can make pretrial release decisions at that time (assuming criminal history and community tie information are also available)."[78]
- Reduce postponements. In Bernalillo County, N. Mex., any postponement requires the president judge to issue a written finding of good cause. Both sides in the case are subject to sanctions for failing to meet deadlines for case disposition, and the state's supreme court tracks judges' adherence to deadlines.[79]
- Retain an independent organization to study disproportionate racial impacts of decisions at each point of discretion. ■

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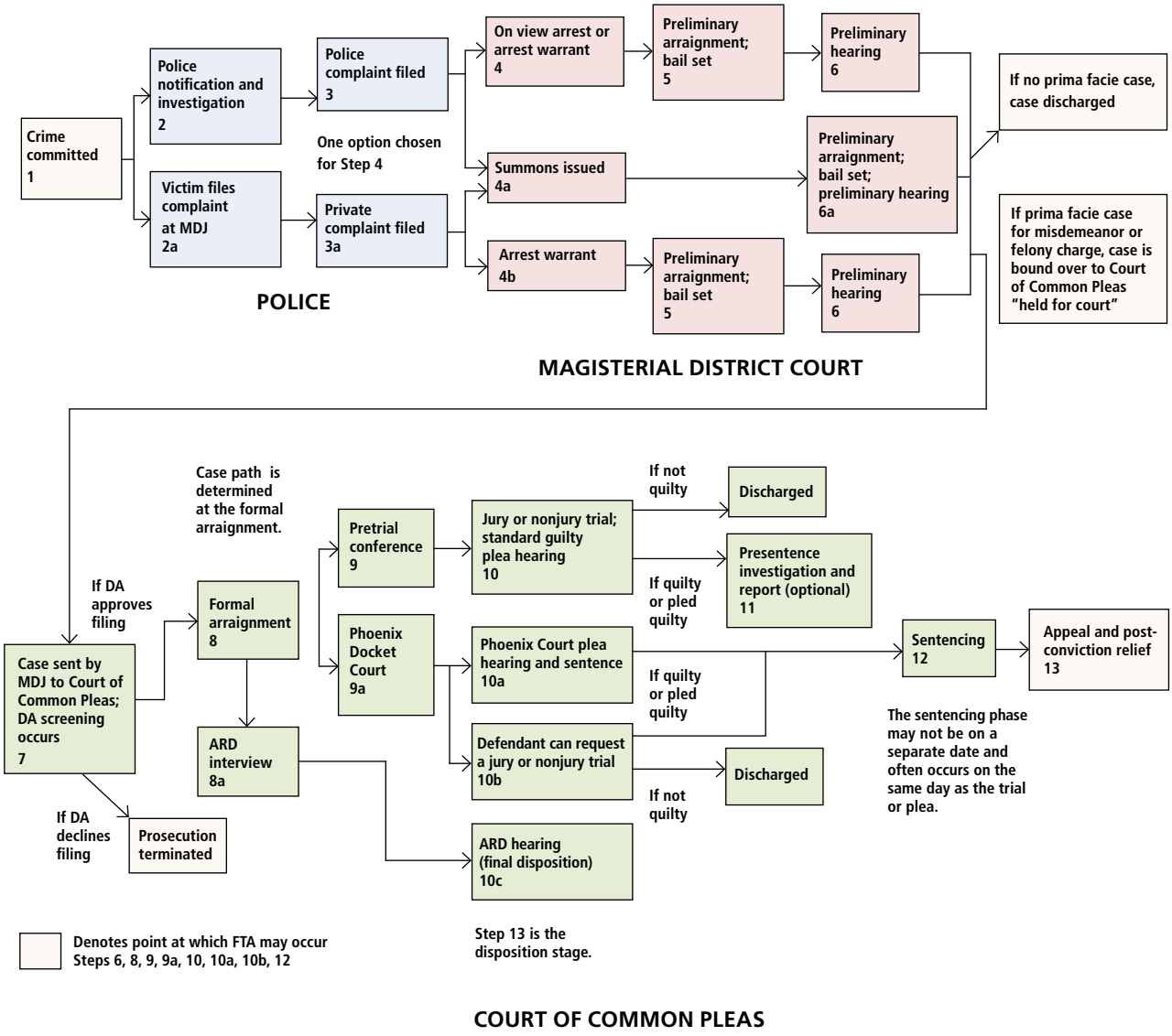
APPENDIXES

APPENDIX A: CRIMINAL PROCESS IN ALLEGHENY COUNTY



Procedural note: The case may be terminated via Nolle Prosse or withdrawal by the DA at any level of proceedings.

APPENDIX B: HISTORY OF RIGHT TO COUNSEL

BY THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION

(http://www.nlada.org/About/About_HistoryDefender?printable=yes, dated 2011)

Roots of the modern right to counsel for the indigent defendant can be found more than a century ago. In *Webb v. Baird*, (6 Ind. 13), the Indiana Supreme Court in 1853 recognized a right to an attorney at public expense for an indigent person accused of crime, grounded in "the principles of a civilized society," not in constitutional or statutory law.

"It is not to be thought of in a civilized community for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he is too poor to employ such aid," the Indiana court wrote. "No court could be expected to respect itself to sit and hear such a trial. The defense of the poor in such cases is a duty which will at once be conceded as essential to the accused, to the court and to the public."

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The right to counsel in federal proceedings was well-established by statute early in the country's history, and was reaffirmed by the U.S. Supreme Court in 1938 in *Johnson v. Zerbst*. The *Webb v. Baird* decision, however, was the exception rather than the rule in the states. Well into the 20th century, most states relied only on the volunteer pro bono efforts of lawyers to provide defense for poor people accused of even the most serious crimes. While some private programs, such as the New York Legal Aid Society, were active as early as 1896 in providing counsel to needy immigrants, and the first public defender office began operations in Los Angeles in 1914, such services were non-existent outside of the largest cities.

The United States Supreme Court developed the Sixth Amendment right to counsel in state proceedings gradually and somewhat haltingly in the 20th century. In *Powell v. Alabama*, the famous "Scottsboro Case" from the Depression era, the Court held that counsel was required in all state capital proceedings. (Read the Court's key reasoning.)

Only a decade later, however, in *Betts v. Brady*, the Court declined to extend the Sixth Amendment right to counsel to state felony proceedings. It was not until 1963, twenty-one years after *Betts*, that the Court again addressed the issue of the right to counsel in state proceedings involving serious non-capital crimes. In a dramatic series of decisions, the Supreme Court firmly established the right to counsel in virtually all aspects of state criminal proceedings.

The most significant decision on the right to counsel in Supreme Court history was *Gideon v. Wainwright*, which overruled *Betts v. Brady*. The Court held that an indigent person accused of a serious crime was entitled to the appointment of defense counsel at state expense. (Read the Court's key reasoning.)

Twenty-two state attorneys general joined petitioner Clarence Earl Gideon in arguing that Sixth Amendment protection be extended to all defendants charged with felonies in state courts.

Four years later, with its decision in *In re Gault*, the Supreme Court built on the *Gideon* decision to extend to children the same rights as adults by providing counsel to the indigent child charged in juvenile delinquency proceedings. The right to counsel in trial courts was significantly expanded again when the Court, in *Argersinger v. Hamlin*, extended the right to counsel to all misdemeanor state proceedings where there is a potential loss of liberty.

The decisions in *Gideon*, *Gault* and *Argersinger* are the best known of the right-to-counsel cases in the Supreme Court, but they were part of a broader array of decisions rendered by the Court in the past three decades, all of which protect the right to counsel for; poor persons. The Court recognized the indigent defendant's right to counsel at such critical stages of criminal proceedings as:

- post-arrest interrogation, in *Miranda v. Arizona* in 1966, and *Brewer v. Williams* in 1977;
- line-ups, in *United States v. Wade* in 1967;
- other identification procedures, in *Moore v. Illinois* in 1977 (one-person showups);
- preliminary hearings, in *Coleman v. Alabama* in 1970;
- arraignments, in *Hamilton v. Alabama* in 1961; and
- plea negotiations, in *Brady v. United States* and *McMann v. Richardson*, both in 1970.

After conviction, the indigent defendant is constitutionally guaranteed the right to counsel in:

- Sentencing proceedings, per *Townsend v. Burke* in 1948, and *United States v. Tucker* in 1972;
- Appeals of right, per *Douglas v. California* in 1963; and
- In some cases, probation and parole proceedings, per *Mempa v. Rhay* in 1967.

In addition, the right to counsel for indigent defendants often extends, under state or federal law or practice, to collateral attacks on a conviction as well as a range of what might be called "quasi-criminal" proceedings involving loss of liberty, such as mental competency and commitment proceedings, extradition, prison disciplinary proceedings, status hearings for juveniles, some family matters such as non-payment of court-ordered support or contempt proceedings, as well as child dependency, abuse and neglect situations.

Finally, in any criminal proceeding in which counsel appears, the defendant is entitled to counsel's effective assistance, under *Strickland v. Washington*, decided in 1984.

These diverse requirements under the federal Constitution, often supplemented by more stringent state standards, created enormous pressures on the lawyers who provided indigent defense. The mandate of the *Gideon, Gault* and *Argersinger* decisions, as well as the Supreme Court's requirement to provide counsel at all critical stages of a prosecution, meant that government would have to assume vastly increased costs for providing counsel to the poor. Policymakers began to think about more systematic ways to deliver constitutionally required defense services.

The first significant efforts to systematize and standardize the provision of indigent defense services occurred in the early 1970's. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) wrote a basic set of standards governing indigent defense systems. The next year, the U.S. Justice Department convened the National Study Commission on Defense Services, which issued its comprehensive *Guidelines for Legal Defense Systems in the United States* in 1976. Today, a comprehensive web of standards at the national, state and local levels governs the provision of indigent defense across the country. In 2000, the U.S. Justice Department compiled all these standards in a single compendium.

But serious problems remain. As the Justice Department found, in its 2000 report (in pdf format), *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations*: [Standards are frequently not implemented, contracts are often awarded to the lowest bidder without regard to the scope or quality of services, organizational structures are weak, workloads are high, and funding has not kept pace with other components of the criminal justice system. The effects can be severe, including legal representation of such low quality to amount to no representation at all, delays, overturned convictions, and convictions of the innocent. Ultimately, as Attorney General Janet Reno states, the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole.]

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