IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DANIEL BINDERUP,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Case No. 5:13-cv-06750-JKG**
ERIC H. HOLDER, JR., Attorney General of the United States et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' CONSENT MOTION FOR
LEAVE TO FILE ATTACHED COMBINED BRIEF

Defendants Eric H. Holder, Jr., and B. Todd Jones ("Defendants") hereby move the Court for an order granting leave to Defendants to file the attached Combined Opposition to Plaintiff's Motion for Summary Judgment and Reply in Support of Defendants' Motion to Dismiss or for Summary Judgment ("Combined Brief") in this matter. Plaintiff has consented to the relief sought in this motion.

Defendants' opposition to Plaintiff's motion for summary judgment is due April 10, 2014. The Combined Brief combines Defendants' opposition with a reply brief in support of Defendants' motion to dismiss.

Plaintiff's complaint raises both a statutory issue (whether 18 U.S.C. 922(g)(1), which prohibits the possession of firearms by persons convicted of a "crime punishable by imprisonment for a term exceeding one year" applies to Plaintiff), and a constitutional issue (whether Section 922(g)(1), as applied to Plaintiff, is consistent with the Second Amendment). Though Plaintiff's motion for summary judgment [ECF No. 13-1] primarily discusses the

statutory issue, Plaintiff's opposition to Defendant's motion to dismiss [ECF No. 14] mainly discusses the constitutional issue. Because the Combined Brief responds to both discussions, Defendants believe it may assist the Court in scrutinizing both the statutory and the constitutional issue raised by Plaintiff. The Combined Brief does not exceed 25 pages.

For these reasons, Defendants respectfully request leave of Court to file the attached Combined Brief (Exhibit A hereto), and Exhibit 1 to the Combined Brief (Exhibit B hereto).

Dated: April 10, 2014

Respectfully submitted,

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DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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INTRODUCTION

Enacted in 1968, the Gun Control Act prohibits individuals convicted of crimes punishable by imprisonment for a term of more than one year from possessing firearms. 18 U.S.C. § 922(g)(1). Forty-five years have passed since the Act was enacted, and nearly six years have passed since the Supreme Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," Dist. of Columbia v. Heller, 554 U.S. 570, 635, 128 S.Ct. 2783, 2821, 171 L.Ed.2d 637 (2008), a decision that prompted numerous constitutional challenges to Section 922(g)(1). Despite this passage of time, Plaintiff cites no federal decision finding this statute to be unconstitutional, either on its face or as applied. Plaintiff thus invites this Court to be the first to invalidate Section 922(g)(1) in the context of its application to an individual convicted of engaging in predatory sexual conduct with a teenaged employee – a crime punishable by up to 5 years imprisonment under Pennsylvania law. The Court should decline Plaintiff's invitation and dismiss the Complaint.

ARGUMENT

I. 18 U.S.C. § 922(g)(1) Prohibits Plaintiff From Possessing Firearms.

A. Because Plaintiff Was Convicted of a Crime Punishable By Up to Five Years' Imprisonment, the Statutory Exclusion in 18 U.S.C. § 921(a)(20) Does Not Apply Here.

Plaintiff was convicted of corruption of minors, a first-degree misdemeanor punishable by up to five years' imprisonment. See 18 Pa.C.S.A. §§ 1104(1), 6301. He was thus "convicted . . . of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Excluded from this definition are "State offense[s] classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." Id. § 921(a)(20)(B). As explained in Defendants' opening brief, because Plaintiff's offense was

punishable by a term of up to five years' imprisonment, that offense does not fall within the scope of this statutory exclusion. See United States v. Essig, 10 F.3d 968, 971 (3d Cir. 1993) (offender convicted of corruption of a minor did not fall within terms of Section 921(a)(20)(B)'s exclusion "because his state conviction is punishable by imprisonment for up to five years"), *superseded on other grounds*; Def. Mot. to Dismiss or for Summ. J. [ECF No. 11] ("Def. Mot.") at 3-5.

Plaintiff contends that the statute is ambiguous and urges the Court to use various tools of interpretation to adopt a reading favorable to him. See Mem. Supp. Pl. Mot. for Summ. J. [ECF No. 13-1] at 7-15 ("Pl. MSJ"). But the most logical reading of the statute produces no such ambiguity. The D.C. Circuit has explained that "the commonsense meaning of the term 'punishable'" refers to "any punishment capable of being imposed." Schrader v. Holder, 704 F.3d 980, 986 (D.C. Cir. 2013) (citing Webster's Third New Int'l Dictionary 1843 (1993)), cert. denied, 134 S.Ct. 512, 187 L.Ed.2d 365 (2013). Relying on this "commonsense" understanding, the D.C. Circuit, like every other court to consider the issue, has held that an offense "capable of being punished by more than two years' imprisonment" is "ineligible for section 921(a)(20)(B)'s misdemeanor exception." Id. That Court explained that Congress intended that "certain State misdemeanors – those punishable by more than two years' imprisonment – fall within the scope of section 922(g)(1)." Id. at 987; accord United States v. Coleman, 158 F.3d 199, 203-04 (4th Cir. 1998) (en banc) ("[T]he statutory language of § 921(a)(20)(B) unambiguously indicates that the critical inquiry in determining whether a state offense fits within the misdemeanor exception

is whether the offense is 'punishable' by a term of imprisonment greater than two years – not whether the offense 'was punished' by such a term of imprisonment.") (citations omitted).[1]

While expressly disagreeing with the holdings and analysis of the D.C. Circuit and Fourth Circuit, Plaintiff seizes on this "capable of being punished" language to advocate a strained reading that would place him within the scope of Section 921(a)(20)(B)'s exception. Thus, Plaintiff contends that his "offense comes within the meaning of the exclusion, because it was 'capable of being punished' by a sentence of two years or less, as demonstrated by [the] actual sentence." Pl. MSJ at 9 (internal punctuation omitted). But this argument proves too much. While Plaintiff's offense may have been technically "capable of being punished" by *less* than two years, it was also "capable of being punished" by *more* than two years because the penal statute at issue authorized imprisonment for a term of five years. See 18 Pa.C.S.A. § 1104(1). Until a court actually imposes sentence, a crime is always "capable of being punished by" any term within the statutory maximum. Under Plaintiff's interpretation, a conviction punishable by 25 years would not fall within the scope of 18 U.S.C. § 922(g)(1) because a judge *could* impose a sentence of less than one year, thus rendering the conviction "capable of being

[1] The legislative history of the statute also confirms this "commonsense meaning." As the House of Representatives Conference Report explained:

> A difference between the House bill and the Senate amendment . . . is that the crime referred to in the House bill is one punishable by imprisonment for more than 1 year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony . . . . The conference substitute adopts the crime referred to in the House bill (one *punishable* by imprisonment *for more than 1 year*) but excludes from that crime any State offense not involving a firearm or explosive, classified by the laws of the State as a misdemeanor, and *punishable* by a term of imprisonment *of not more than 2 years*.

H.R. Rep. No. 90-1956 at 28-29 (1968) (emphasis added). This provision makes clear that Congress intended the firearms prohibition to include convictions for crimes capable of being punished for more than one year, and to exclude only misdemeanor crimes that are *not* capable of being punished by more than two years.

punished" by a term not exceeding one year. Such an interpretation would also exclude any conviction for a State misdemeanor with no mandatory minimum penalty. In addition to turning the common-sense reading of the statutory language on its head, Plaintiff's reading conflicts with Supreme Court and Third Circuit holdings that the actual prison term imposed is "irrelevant" for purposes of Section 922(g)(1)'s prohibition – what matters is the *potential* sentence. See Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 113, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983); Essig, 10 F.3d at 973 ("The Supreme Court [in Dickerson] has clearly established that it is the potential sentence that controls and not the one actually imposed[.]").[2]

B. The Third Circuit's Holding in Essig Controls This Case.

In any event, this issue is directly controlled by Essig. There, the Third Circuit held that Section 922(g)(1) prohibited firearms possession by an offender who had been convicted of the

[2] Plaintiff provides no support for his contention that the term "punishable" must be construed identically in Sections 922(g)(1) and 921(a)(20)(B), regardless of context. See Pl. MSJ at 11. As courts and commentators alike have observed, the presumption that a word that appears in different places in a document was intended to have the very same meaning at each appearance "assumes a perfection of drafting that, as an empirical matter, is not often achieved. Though one might wish it were otherwise, drafters more than rarely use the same word to denote different concepts . . . ." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012); see also 2A Sutherland Statutes and Statutory Construction ("Sutherland") § 46:5 (7th ed. 2013); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.).

Considering the different contexts in which the term "punishable" is used here, it is far more plausible that Congress intended to be consistent by making the maximum potential sentence applicable to a particular crime the operative factor in determining both the applicability of the prohibition in Section 922(g)(1) and the qualification for the exclusion in Section 921(a)(20)(B). It is worth noting in this regard that in the Firearms Owners Protection Act, 100 Stat. 449 (1986), Congress amended Section 921(a)(20)(B) just a few years after the Supreme Court decided Dickerson, which found only the maximum potential applicable sentence to be relevant. See Logan v. United States, 552 U.S. 23, 27-28, 128 S.Ct. 475, 479-80, 169 L.Ed.2d 432 (2007) (noting 1986 amendment). If, as Plaintiff suggests, Congress had intended to include State misdemeanors within Section 922(g)(1)'s prohibition "only if a mandatory minimum provision requires a sentence exceeding two years," Pl. MSJ at 9, notwithstanding the Supreme Court's emphasis on potential sentences, it is puzzling that Congress did not make this point more explicit in the statute. See 1A Sutherland § 22:29 ("When a legislature undertakes to amend a statute which has been the subject of judicial construction, courts presume the legislature was fully cognizant of such construction.") (collecting cases).

very same corruption of minors statute and had also been sentenced to probation, notwithstanding Section 921(a)(20), because the offense was punishable by imprisonment of up to five years. 10 F.3d at 972-73. Plaintiff concedes that Essig forecloses his statutory argument, but urges the Court to depart from this precedent in light of Heller. The Court should decline to do so.

"It is, of course, patent that a district court does not have the discretion to disregard controlling precedent simply because it disagrees with the reasoning behind such precedent." Vujosevic v. Rafferty, 844 F.2d 1023, 1030 n.4 (3d Cir. 1988). Even the Court of Appeals is bound by precedential opinions of earlier panels absent an en banc decision. In re Grossman's Inc., 607 F.3d 114, 116-17 (3d Cir. 2010) (en banc). This Court is thus "obliged to follow Third Circuit precedent" unless that precedent has been "squarely overruled" by a decision of the Supreme Court or the Third Circuit sitting en banc. Loftus v. S.E. Pa. Transp. Auth., 843 F. Supp. 981, 984 (E.D. Pa. 1994). And even where a conflict between decisions of the Supreme Court and the Third Circuit may exist, this Court "must attempt to reconcile" any such conflict, rather than disregarding Third Circuit or Supreme Court precedent. Id. (citations omitted).

Here, there is no direct or indirect "conflict" to reconcile between Heller's holding that "the District [of Columbia]'s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," 554 U.S. at 635, 128 S.Ct. at 2821-22, and Essig's holding that a conviction for corruption of minors, punishable by five years' imprisonment, disqualifies an individual from firearms possession under Section 922(g)(1). And contrary to Plaintiff's suggestion, Pl. MSJ at 14-15, Essig did not base its holding, explicitly or implicitly, on a "collective rights" reading of the Second Amendment, and Heller thus did not overrule Essig.

Rather, Essig decided a pure question of statutory interpretation, aided by the Supreme Court's decision in Dickerson, which remains good law after Heller for the point for which it was cited in Essig. See, e.g., Schrader, 704 F.3d at 990 (relying on Dickerson); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (per curiam) (same). Moreover, as detailed in Defendants' opening brief, near-uniform case law has upheld the constitutionality of Section 922(g)(1), even after Heller, and even as applied to non-violent offenders. See Def. Mot. at 16-18. There is thus no "sound reason" for believing, as Plaintiff contends, that the Essig panel would "change its collective mind" in light of Heller. Pl. MSJ at 14.[3]

C. Plaintiff's Citations to Various Canons of Construction Are Unavailing.

As explained above, courts that have interpreted Section 921(g)(20) have not found its language ambiguous, and the Third Circuit has found that an identically-positioned individual fell within Section 922(g)(1)'s proscription. Nonetheless, Plaintiff invites this Court to use various canons of statutory construction to adopt his preferred reading over that adopted by these courts. None of Plaintiffs' tools of interpretation are availing, however. First, Plaintiff invokes the rule of lenity. Pl. MSJ at 7-8. However, the Third Circuit has made clear that the "rule of lenity is reserved for statutes with grievous ambiguity." United States v. Diaz, 592 F.3d 467, 474-75 (3d Cir. 2010). The "simple existence of some statutory ambiguity . . . is not sufficient to

[3] Moreover, Plaintiff is not correct that Essig only considered arguments not advanced here. Pl. MSJ at 10. While Plaintiff here may have articulated his argument slightly differently, the essence of that argument is the same as that advanced by the defendant in Essig, namely, that his crime is insufficiently serious to warrant Section's 922(g)(1) prohibition. Compare Essig, 10 F.3d at 972 (contending that Essig did not fall within the prohibition in Section 922(g) because he was "only a technical violator within the terms of §[] 921(a)(20)," not the type of "dangerous offender[]" that "Congress intended to sanction") with Pl. MSJ at 9 (arguing that "'felon' treatment applies" only if a misdemeanor "*cannot* be punished by two years or less, e.g., because it is extremely serious and warrants a higher mandatory minimum sentence") (emphasis in original). In any event, nothing requires a court decision to consider and reject every potential argument for that decision to be binding.

warrant application of the rule of lenity, for most statutes are ambiguous to some degree." United States v. Kouevi, 698 F.3d 126, 138 (3d Cir. 2012) (quoting Dean v. United States, 556 U.S. 568, 577, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009)) (internal quotation marks omitted), *superseded on other grounds.* "Rather, the rule only applies in those cases in which a reasonable doubt persists about a statute's intended scope after consulting everything from which aid can be derived." United States v. Brown, 740 F.3d 145, 151 (3d Cir. 2014) (internal citation omitted). Because the rule represents an "interpretive method of last resort," id., it does not apply here, where the Third Circuit has already interpreted this statutory text in a controlling decision.

Nor is Plaintiff aided by the "constitutional avoidance" doctrine. Pl. MSJ at 13-14. As explained below, see infra part II, this case does not involve "serious constitutional questions." Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204, 129 S. Ct. 2504, 2513, 174 L. Ed. 2d 140 (2009). See Schrader, 704 F.3d at 988 (applying Section 922(g)(1) to common-law misdemeanants "creates no constitutional problem that we need to avoid"). "The 'constitutional doubts' argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional." Reno v. Flores, 507 U.S. 292, 314 n.9, 113 S.Ct. 1439, 1453 (1993) (internal citation omitted) (emphasis in original).

In sum, because Plaintiff was convicted of a crime punishable by up to five years' imprisonment, he falls squarely within Section 922(g)(1)'s prohibition.

II. As Applied to Plaintiff, Section 922(g)(1) Does Not Violate the Second Amendment.

A. Because This Case Involves a Second Amendment Challenge, the Two-Prong Test from United States v. Marzzarella Applies Here.

In United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010), the Third Circuit explained: "As we read Heller, it suggests a two-pronged approach to Second Amendment challenges." Id.

at 89. "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." Id. (citation omitted). "If it does not, our inquiry is complete." Id. "If it does, we evaluate the law under some form of means-end scrutiny" and "[i]f the law passes muster under that standard, it is constitutional," but "[i]f it fails, it is invalid." Id. Though Plaintiff contends that Marzzarella only applies "in some facial challenges," nothing in the decision so limits its holding. Pl. Opp. to Def. Mot. [ECF No. 14] at 4 ("Pl. Opp."). Rather, the Third Circuit held that this "two-pronged approach" would apply "to Second Amendment challenges," without drawing any distinction between facial and as-applied challenges. 614 F.3d at 89. This case involves a Second Amendment challenge, and the framework established by Marzzarella thus controls here. In any event, as explained below, even if a different standard were to apply here, Plaintiff's challenge still would not succeed. See infra part II.B.

1. Disarming Plaintiff Is Consistent With the Scope of the Second Amendment As Understood at the Adoption of the Bill of Rights.

"[E]xclusions [from the right to bear arms] need not mirror limits that were on the books in 1791," the year the Second Amendment was enacted. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Nonetheless, as demonstrated in Defendants' opening brief, the Supreme Court's acknowledgment in Heller that Congress has the authority to disarm persons convicted of serious crimes is consistent with the history of the right to arms as it developed in England and in early America. See Def. Mot. at 7-11. Heller's holding was narrow, addressing only the "core" right of "*law-abiding, responsible* citizens to use arms in defense of hearth and home." 554 U.S. at 635, 128 S.Ct. at 2821-22 (emphasis added). Thus, as applied to Plaintiff, 18 U.S.C. § 922(g)(1) does not burden conduct falling within the scope of the Second Amendment's protection.

In response, Plaintiff interprets Heller as expressly contrasting "felons and the mentally ill" with "law-abiding, responsible citizens," apparently implying that the latter phrase includes all persons not encompassed by the former. Pl. Opp. at 5-6. But the only support Plaintiff cites for construing Heller in this manner is a single-judge concurrence from the Ninth Circuit. See United States v. Chovan, 735 F.3d 1127, 1142-52 (9th Cir. 2013) (Bea, J., concurring). Notably, the Chovan majority opinion (and at least one other Court of Appeals) did not accept this interpretation. See id. at 1138 ("'Although [Chovan] asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in Heller – the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense – by virtue of [Chovan]'s criminal history as a domestic violence misdemeanant.'") (quoting United States v. Chester, 628 F.3d 673, 682-83 (4th Cir. 2010)) (emphasis in Chester).

Moreover, this interpretation does not withstand scrutiny. To begin with, Heller used these phrases in different sections analyzing distinct issues. Contrast 554 U.S. at 626-27, 128 S.Ct. 2816-17 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.") with id. at 635, 128 S.Ct. at 2821 ("And whatever else it leaves to future evaluation, [the Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). Heller thus used the phrase "felons and the mentally ill" in a non-exhaustive list of "presumptively lawful regulatory measures," id. at 627 n.26, 128 S.Ct. at 2817 n.26, beyond the scope of the Second Amendment's protection, and employed the phrase "law-abiding, responsible citizens" in discussing the nature of the core right. Most importantly,

Heller did not draw any express or implicit connection between these two phrases. And drawing such a connection would be at odds with Heller's express statement that the specifically-identified "presumptively lawful regulatory measures," including prohibitions on firearms possession by felons and mentally-ill persons, were only "examples" rather than an exhaustive list. Id. Plaintiff's suggested interpretation of Heller thus does not withstand close scrutiny.

Additionally, Plaintiff's reliance on United States v. Barton, 633 F.3d 168, 172 n.2 (3d Cir. 2011), is misplaced. See Pl. Opp. at 6. If anything, Barton actually shows that because Plaintiff falls within the scope of Section 922(g)(1)'s prohibition, he is categorically excluded from the Second Amendment's protection. The Barton footnote cited by Plaintiff was addressing the defendant's proposition that "courts may not rely exclusively on Heller's list of 'presumptively lawful' regulations to justify categorical exclusions to the Second Amendment," a proposition for which the defendant had cited two cases. Barton, 633 F.3d at 172 n.2. The Third Circuit explained that the defendant's "reliance on these cases [was] misplaced" because the statute they had construed – 18 U.S.C. § 922(g)(9), prohibiting gun possession by domestic-violence misdemeanants – "was not included in Heller's list of permissible regulations," and these cases thus "look[ed] beyond [that] language in Heller to find that domestic violence offenders were not protected by the Second Amendment." Id. By contrast, the Third Circuit stated, "[h]ere, no such inquiry is necessary, because § 922(g)(1) is one of Heller's enumerated exceptions." Id. Here, because Plaintiff falls within the scope of the prohibition of Section 922(g)(1), "one of Heller's enumerated exceptions," this Court may "rely exclusively" on Heller "to justify categorical exclusions to the Second Amendment." Id.[4]

[4] Plaintiff's reliance on Chovan and Chester, Pl. Opp. at 6, is similarly misplaced because those cases also involved Section 922(g)(9), a statute "not included in Heller's list of permissible regulations." Barton, 633 F.3d at 172 n.2. By contrast, this case involves Section 922(g)(1),

Moreover, Plaintiff cites no authority for his assertion that courts have rejected applying Heller's statement regarding felons to apply to persons like Plaintiff, who was convicted of a crime classified by the State of conviction as a misdemeanor, but punishable by imprisonment of two years or more. Pl. Opp. at 6. True, the D.C. Circuit in Schrader declined to reach the specific issue of whether persons convicted of common-law misdemeanors fell outside the scope of the Second Amendment's protection. Schrader, 704 F.3d at 989. But it was unnecessary for the D.C. Circuit to reach that issue because it concluded that, in any event, Section 922(g)(1) satisfied intermediate scrutiny as applied to such misdemeanants. Id. at 989-91.[5]

Finally, Plaintiff provides no support for his claim that contemporary courts recognize a difference in degree between a first- and second-degree misdemeanor, but a difference in kind

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which "is one of Heller's enumerated exceptions." Id. Nor does the truncated sentence Plaintiff quotes from Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), avail him here. The full sentence reads: "As the Seventh Circuit itself had earlier stated in [Skoien], Heller's language 'warns readers not to treat Heller as containing broader holdings than the Court set out to establish: that the Second Amendment created individual rights, one of which is keeping operable handguns *at home* for self-defense.'" Id. at 431 (quoting Skoien, 614 F.3d at 640) (emphasis in Drake). And as relevant here, Skoien noted shortly after this quoted sentence: "That *some* categorical limits [on the possession of weapons by some persons] are proper is part of the [Amendment's] original meaning, leaving to the people's elected representatives the filling in of details." 614 F.3d at 640 (emphasis in original).

[5] Furthermore, to counter any notion that laws punishing the specific type of criminal conduct at issue here – sexual activity with a minor – are of recent vintage, Defendants' opening brief cited the example of a 1576 statute that formed part of the common law originally brought to the United States. Def. Mot. at 10. This statute punished as a felony sexual activity with a female person under ten years of age. While Plaintiff correctly points out that the minor with whom he had sexual intercourse was not less than 10 years old, that is a distinction without a difference for historical purposes. The point is that English and American law have long recognized that persons under a legislatively-prescribed age lack the capacity to consent meaningfully to sexual activity. Given the significant discretion afforded legislatures in selecting this age, contemporary laws (such as the one under which Plaintiff was convicted) represent a difference in degree, not in kind, from common law. See Nider v. Commonwealth, 131 S.W. 1024, 1026, 140 Ky. 684 (Ky. 1910) ("It will thus be seen that our statute upon the subject is merely a recognition of the common law of offense, which it has modified by changing the age of consent from 10 to 16, and fixing the penalty at confinement in the penitentiary in place of death.").

between a misdemeanor and a felony. Pl. Opp. at 8. Though the distinction between a misdemeanor and a felony may once have been significant, today the difference is "minor and often arbitrary," given that "numerous misdemeanors involve conduct more dangerous than many felonies." Tennessee v. Garner, 471 U.S. 1, 14, 105 S.Ct. 1694, 1703, 85 L.Ed.2d 1 (1985). Legislatures frequently do not draw any sharp distinction in terms of punishment, as evidenced by the fact that the maximum statutory penalty imposed by Pennsylvania for a first-degree misdemeanor (such as Plaintiff's crime) of 5 years is comparable to the 7-year maximum penalty for a third-degree felony. See 18 Pa.C.S.A. §§ 1103, 1104.

In short, because 18 U.S.C. § 922(g)(1) does not implicate a right protected by the Second Amendment, the Court's analysis should end at the first step of Marzzarella's two-step analysis.

2. In the Alternative, as Applied to Plaintiff, Section 922(g)(1) Relates Substantially to the Important Governmental Interest in Protecting Public Safety and Combating Violent Crime.

Alternatively, as explained in Defendants' opening brief, if the Court proceeds to the second step of Marzzarella to apply means-end scrutiny, it should still uphold Section 922(g)(1) as applied to Plaintiff because the statute relates substantially to the important governmental interest in protecting public safety and combating violent crime. Def. Mot. at 11-16.

As an initial matter, Plaintiff fails to support his assertion that if means-end scrutiny is appropriate here, strict scrutiny, rather than intermediate scrutiny, should provide the standard. Pl. Opp. at 7. Plaintiff cites no decision that has analyzed Section 922(g)(1) under strict scrutiny, and courts that have used an independent means-end analysis in examining this statute have applied no more than intermediate scrutiny. See Schrader, 704 F.3d at 989 ("Although section 922(g)(1)'s burden is certainly severe, it falls on individuals who cannot be said to be exercising

the core of the Second Amendment right identified in Heller, i.e., 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.' 554 U.S. at 635, 128 S.Ct. 2783. Because common-law misdemeanants as a class cannot be considered law-abiding and responsible, we follow those 'courts of appeals [that] have generally applied intermediate scrutiny' in considering challenges to 'Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections.'") (quoting United States v. Mahin, 668 F.3d 119, 123 (4th Cir. 2012) (collecting cases)). Thus, if the Court decides to utilize means-end scrutiny here, it should apply no more than intermediate scrutiny.

Under that standard, Plaintiff's constitutional challenge fails because there is at least a "reasonable fit" between applying Section 922(g)(1) to a person convicted of a corruption-of-minors crime punishable by a term of imprisonment of more than two years, see 18 U.S.C. § 921(a)(20)(B), and the government's interest in protecting public safety and preventing violent crime. Drake, 724 F.3d at 436. "When reviewing the constitutionality of statutes, courts 'accord substantial deference to the [legislature's] predictive judgments.'" Id. (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195, 117 S.Ct. 1174, 1189, 137 L.Ed.2d 369 (1997)). Those predictive judgments demonstrate the reasonableness of Section 922(g)(1)'s application here.

"[T]he Government's general interest in preventing crime is compelling," United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 2095 (1987), and the Supreme Court's cases have "recognized and given weight" to Congress's "broad prophylactic purpose" in enacting the provisions at Section 922(g). Dickerson, 460 U.S. at 118, 103 S.Ct. at 995. As the Supreme Court has explained, "[t]he history of the 1968 Act reflects" Congress's "concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including

convicted felons." Barrett v. United States, 423 U.S. 212, 220, 96 S.Ct. 498, 503, 46 L.Ed.2d 450 (1976).[6] "[P]ersons with records of misdemeanor arrests" were among those whose access to firearms concerned Congress. S. Rep. No. 88-1340, at 4 (1964).

Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." Dickerson, 460 U.S. at 118, 103 S.Ct. at 995 (quoting Huddleston v. United States, 415 U.S. 814, 824, 94 S.Ct. 1262, 1268, 39 L.Ed.2d 782 (1974) (quotation marks omitted)). "The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." Id. (citations and internal punctuation omitted). The Supreme Court has further observed that "[i]n order to accomplish this goal, Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." Id. at 119, 103 S.Ct. at 995.

To that end, Section 922(g)(1) provides that "it shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The statute does not apply where the offense of conviction is a

[6] See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 901(a)(2), 82 Stat. 197, 225 ("Omnibus Act") (finding that "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[,] is a significant factor in the prevalence of lawlessness and violent crime in the United States"); S. Rep. No. 89-1866, at 3, 53 (1966) (Congress's investigations revealed "a serious problem of firearms misuse in the United States," and a "relationship between the apparent easy availability of firearms and criminal behavior"); id. at 1 (Congress aimed to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them"); S. Rep. No. 88-1340, at 12, 18 (law enforcement officials testified to the "tragic results" of firearm misuse by persons with prior criminal convictions).

State misdemeanor offense "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), or an "offense[] pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offense[] relating to the regulation of business practices," id. § 921(a)(20)(A). Nor does it apply to "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Id. § 921(a)(20).

To demonstrate that Congress's predictive judgments underlying Section 922(g)(1) justify the statute's application to Plaintiff, Defendants' opening brief cited the conclusions of several empirical studies. Def. Mot. at 13-15. Though Plaintiff tries to discount the findings of those studies, Pl. Opp. at 9-11, his efforts are not persuasive.

Initially, Defendants presented two studies showing that convicted offenders as a group, including those convicted of crimes that did not involve violence, present a significant risk of recidivism for violent crime. Def. Mot. at 14. The first study showed that, of 210,886 nonviolent offenders released in 1994 from prison in 15 States, approximately 1 in 5 offenders was rearrested for violent offenses within three years. Def. Mot., Ex. 3. And though Plaintiff speculates that the study's results might have differed had it studied non-incarcerated persons, Pl. Opp. at 9, Plaintiff presents no evidence to support that speculation. See also Kaemmerling v. Lappin, 553 F.3d 669, 683 (D.C. Cir. 2008) ("Other courts . . . have observed that nonviolent offenders not only have a higher recidivism rate than the general population, but certain groups – such as property offenders – have an even higher recidivism rate than violent offenders, and a large percentage of the crimes nonviolent recidivists later commit are violent.") (citing cases). The second study concluded, based on a study of handgun purchases denied as a result of a prior

conviction or arrest for a crime punishable by imprisonment or death, that "denial of handgun purchase is associated with a reduction in risk for later criminal activity of approximately 20% to 30%." Def. Mot., Ex. 4, at 3. Though, as Plaintiff notes, the study stated that the "modest benefit" shown "may reflect the fact that members of both study groups had extensive prior criminal records and therefore were at high risk for later criminal activity," the study also noted that "[t]he size of this effect is comparable to that seen in other crime prevention measures." Id.

Defendants also introduced five empirical studies showing that individuals convicted of sexual-misconduct crimes, as a class, are also much more likely than the general population to commit future crimes. See Def. Mot. at 14-15.[7] Plaintiff's attempt to downplay the significance of these studies, Pl. Opp. at 10, is not persuasive. Courts that rely on empirical studies (or simply on findings by other courts) in conducting constitutional means-ends analyses in response to Second Amendment claims have examined whether those studies or findings link persons convicted of a generic category of crime (such as "domestic violence crimes") to a likelihood of re-offending. See Skoien, 614 F.3d at 644 (examining recidivism rates for "people convicted of domestic violence"); Barton, 633 F.3d at 174 (examining findings by courts that "offenses relating to drug trafficking and receiving stolen weapons" were linked to violent crime); Chovan, 735 F.3d at 1140-41 (examining studies of "domestic violence recidivism"); United States v. Miller, 604 F. Supp. 2d 1162, 1171-73 (W.D. Tenn. 2009) (relying on nexus between felons in general and violent crime in concluding that Section 922(g)(1) satisfied intermediate scrutiny with respect to offender convicted of possession and manufacture of controlled substances); United States v. Schultz, No. 08-75, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009) (upholding

[7] Though the hyperlink to the first study, a recidivism study by the Pennsylvania Department of Corrections, was functional at the time Defendants filed their opening brief, the hyperlink no longer appears to be functioning. Defendants are thus attaching that study as Exhibit 1.

Section 922(g)(1) as applied to offender convicted of failure to pay child support based on finding that "[p]ersons who have committed felonies are more likely to commit crimes than those who have not"). It is thus sufficient to show that studies have linked the generic category of crime of which Plaintiff was convicted – sexual misconduct – with a propensity to commit future crimes. While Plaintiff concedes that his crime "involved bad judgment," he also incorrectly insists that it did not involve "coercion of any kind." Pl. MSJ at 18. Plaintiff fundamentally fails to understand the nature of the crime of which he was convicted. As Pennsylvania courts have recognized, the corruption of minors statute recognizes that "an immature female can easily be seduced or mentally overpowered by an adult to engage in a large range of activity[.]" Commonwealth v. Decker, 698 A.2d 99, 102 (Pa. Super. Ct. 1997). Congress's "predictive judgment" that keeping firearms out of the hands of persons who exercised such "poor judgment" that can "seduce" or "mentally overpower" a minor into committing "corrupting [sexual] activity," id. at 100-02, furthers its legislative goals and is certainly entitled to deference. See Drake, 724 F.3d at 436.

And Plaintiff's contention that "he is not a 'statutory rapist'" is not persuasive. Pl. Opp. at 10; see also id. at 2 (claiming that "Plaintiff is not a rapist, statutory or otherwise"). It is correct that the title of the crime for which Plaintiff was convicted is "corruption of minors." However, the criminal activity for which Plaintiff was punished consisted of sexual activity with a minor. Such activity falls within the well-understood generic legal and layperson's definition of "statutory rape."[8] And the studies Defendants submitted include this generic crime. See Def. Mot. at 14-15.[9]

[8] See Black's Law Dictionary 1412 (6th ed. 1990) ("The unlawful sexual intercourse with a female under the age of consent which may be 16, 17 or 18 years of age, depending upon the state statute. The government is not required to prove that intercourse was without the consent

Moreover, Plaintiff is also incorrect, Pl. Opp. at 11, that he can prevail without rebutting Defendants' evidence linking persons convicted of sexual misconduct crimes with a higher rate of recidivism than the general population. See Chovan, 735 F.3d at 1142 (even "assum[ing] that Chovan has had no history of domestic violence since 1996, Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again. In the absence of such evidence, we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.").

In sum, especially in light of the "substantial deference" afforded to "predictive judgments" made by Congress when reviewing the constitutionality of statutes, Drake, 724 F.3d at 436-37, applying Section 922(g)(1) to Plaintiff satisfies intermediate scrutiny.

B. In Any Event, Plaintiff Has Not Presented Facts That Distinguish His Circumstances From Those of Persons Historically Barred from Second Amendment Protections, or Shown That His Circumstances Place Him Outside the Intended Scope of Section 922(g)(1).

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of the female because she is conclusively presumed to be incapable of consent by reason of her tender age."); Am. Heritage Dictionary of the English Language 1708 (5th ed. 2011) ("Sexual relations with a person who has not reached the statutory age of consent."); Random House Webster's Unabridged Dictionary 1862 (2d ed. 2001) ("*U.S. Law*. [S]exual intercourse with a girl under the age of consent, which age varies in different states."); New Oxford Am. Dictionary 1665 (2001) ("*Law*. [S]exual intercourse with a minor."); Merriam-Webster's Collegiate Dictionary 1220 (11th ed. 2003) ("[S]exual intercourse with a person who is below the statutory age of consent[.]")

[9] Plaintiff also incorrectly contends that these studies only examined "people released from state prison." Pl. Opp. at 10. Not so. See Lisa L. Sample & Timothy L. Bray, Are Sex Offenders Different? An Examination of Rearrest Patterns, 17 Crim. Just. Pol'y Rev. 83, 93 (2006), a*vailable at* http://cjp.sagepub.com/content/17/1/83.full.pdf (37.4% of sex offender arrestees – including but not limited to individuals arrested for statutory rape – in Illinois between 1990 and 1997 whose victims were between 13 and 18 years of age were rearrested within 5 years); see also id. at 92 ("Rearrest, one of the most common measures found in recidivism research, serves as our measure for reoffending.").

Even if the standard applicable to Plaintiff's as-applied challenge were derived from Barton, and not Marzzarella, Plaintiff's challenge would still fail. See Def. Mot. at 16-24. In Barton, the Third Circuit observed that Heller did not "catalogue the facts [courts] must consider when reviewing a felon's as-applied challenge," but instead only "noted that [the Supreme Court] will 'expound upon the historical justifications for exceptions it mentioned if and when those exceptions come before it.'" 633 F.3d at 173 (quoting Heller, 554 U.S. at 635, 128 S.Ct. 2783) (internal punctuation omitted). Thus, the Third Circuit explained that it would "evaluate Barton's as-applied challenge" by "look[ing] to the historical pedigree of 18 U.S.C. § 922(g) to determine whether the traditional justifications underlying the statute support a finding of permanent disability in this case." Id. After examining relevant statutory history and debates from State conventions ratifying the Constitution, the Third Circuit stated: "To raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." Id. at 174. "For instance," it explained, "a felon convicted of a minor, non-violent crime *might* show that he is no more dangerous than a typical law-abiding citizen." Id. (emphasis added). It also stated that a court "*might* find that a felon whose crime of conviction is decades-old poses no continuing threat to society." Id. (emphasis added).

As explained in Defendants' opening brief, Def. Mot. at 16-24, given the seriousness of Plaintiff's offense, there is no basis for distinguishing Plaintiff from "persons historically barred from Second Amendment protections." Barton, 633 F.3d at 174. Plaintiff's belief that his particular conviction should somehow be viewed differently "flows not from any insight gleaned from [Section 922(g)(1)], but rather from plaintiff['s] flawed belief that [his] offense[is] trivial." Schrader, 704 F.3d at 988. This flawed belief is demonstrated by Plaintiff's repeated attempts to

minimize his criminal offense as involving mere "admittedly bad behavior," Pl. Opp. at 8, "regrettable conduct," id., or a "consensual if illicit affair[]," Pl. MSJ at 18. Plaintiff did not just behave badly or conduct himself in a regrettable manner. He engaged in predatory sexual behavior with a teenage employee, 24 years younger than him. Pennsylvania punishes such criminal conduct by a maximum penalty of five years' imprisonment, and the mere fact that the Commonwealth characterizes this offense as a first-degree "misdemeanor" does not suggest that it is a minor crime. See Garner, 471 U.S. at 14, 105 S.Ct. at 1703 (explaining that the distinction between misdemeanors and felonies is "minor and often arbitrary," given that "numerous misdemeanors involve conduct more dangerous than many felonies"). In fact, Pennsylvania also classifies crimes such as involuntary manslaughter, negligent homicide while hunting, assault on a child younger than 12, making terroristic threats, throwing a fire bomb into an occupied vehicle, and stalking as first-degree misdemeanors.[10] Thus, Plaintiff cannot plausibly contend that he was convicted of a "minor" crime simply because the Commonwealth classifies it as a first-degree misdemeanor. See Decker, 698 A.2d at 100, 101 (explaining the seriousness of corruption-of-minors offense, even if the sexual conduct is purportedly consensual in nature).

Moreover, the Third Circuit recently upheld a determination by this Court that a Second Amendment challenge to Section 922(g)(1) would fail as applied to an offender convicted of first-degree misdemeanors under Pennsylvania law whose crimes were allegedly non-violent in nature. Dutton v. Commonwealth, 2012 WL 3020651 (E.D. Pa. July 23, 2012), aff'd, 503 F. App'x 125 (3d Cir. 2012) (per curiam). Though Plaintiff attempts to distinguish Dutton, his attempts are not successful. Pl. Opp. at 12. While it is correct that Dutton's complaint alleged a

[10] See 18 Pa.C.S.A. §§ 2504 (involuntary manslaughter), 2701(b)(2) (assault on child under 12), 2706(d) (terroristic threats), 2707(a) (propelling any "deadly or dangerous missile, or fire bomb" into an occupied vehicle); 2709(a), (c)(1) (stalking); 34 Pa.C.S.A. § 2522(a), (b)(3) (killing a human being, through carelessness or negligence, while hunting).

violation of his statutory rights under Section 922(g), both this Court and the Third Circuit "construe[d] [the] complaint liberally." See 2012 WL 3020651, at *2 n.3; 503 F. App'x at 127. This Court thus determined that "had Plaintiff asserted a constitutional challenge" to Section 922(g)(1), it "would have found the claim lacked merit." 2012 WL 3020651, at *2 n.3. Though Plaintiff characterizes Defendants' description of Dutton as "badly misconstru[ing]" the case's holding and "at best, misleading," Pl. Opp. at 12, this characterization is groundless, as reflected in the full text of the relevant footnote from Dutton:

> While the Court will construe a pro se plaintiff's complaint liberally, Dutton does not allege a challenge to 18 U.S.C. § 922 under the Second Amendment. Nevertheless, had Plaintiff asserted a constitutional challenge, the Court would have found the claim lacked merit. The Third Circuit has analyzed the provision at issue in this case – 18 U.S.C. § 922(g)(1) – and held it to be facially constitutional. United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011) (citing District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and McDonald v. City of Chi., —– U.S. ——–, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)). Furthermore, the Third Circuit has also found that Section 922(g)(1) is constitutional as applied to individuals who have presented no facts distinguishing their "circumstances from those of other felons who are categorically unprotected by the Second Amendment." Id.; see also United States v. Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) (noting that "although the Second Amendment protects the individual right to possess firearms for defense of hearth and home, Heller suggests . . . a felony conviction disqualifies an individual from asserting that interest").

Dutton, 2012 WL 3020651, at *2 n.3.

In other words, this Court determined that a constitutional challenge to Section 922(g)(1) as applied to Dutton would be meritless for two reasons. First, as held in Barton, the statute is facially constitutional. Second, an as-applied challenge would fail because, like the defendant in Barton, Dutton was an "individual[] who ha[s] presented no facts distinguishing [his] circumstances from those of other felons who are categorically unprotected by the Second Amendment." 2012 WL 3020651, at *2 n.3 (citation and internal punctuation omitted). In short, this Court determined that the facts presented by the plaintiff – that he had been convicted on April 6, 1995 of carrying firearms on a public street and carrying firearms without a license, and

that his convictions were for first-degree misdemeanors – did not distinguish his circumstances from those of other offenders who are categorically unprotected by the Second Amendment. Similar to Plaintiff here, it was undisputed in Dutton that the plaintiff had not been convicted of any other crime since the 1990s. Regardless, the fact that the plaintiff in Dutton had been convicted of two first-degree misdemeanors was sufficient for the Court to determine that no facts had been presented distinguishing the plaintiff's circumstances "from those of other felons who are categorically unprotected by the Second Amendment." Id.

Moreover, this determination was not dicta because it was necessary to the Court's determination that granting Dutton leave to amend his complaint would be futile. Id. at *3 ("Having determined that any constitutional challenge of 18 U.S.C. 922(g)(1) would lack merit, the Court concludes that any amendment by Plaintiff would be futile and will dismiss the claim with prejudice"). And the Third Circuit upheld this determination, stating that although "both of Dutton's previous convictions are classified as first degree misdemeanors in Pennsylvania," those convictions "*classify him as a felon* under 18 U.S.C. § 922(g)(1)." 503 F. App'x at 127 n.1 (emphasis added). Like this Court, the Third Circuit found that any constitutional challenge to Section 922(g)(1) as applied to Dutton would fail because Barton had "determined that § 922(g)(1) is constitutional as applied to an individual, like Dutton, who has presented no facts distinguishing his circumstances from those of other felons who are categorically unprotected by the Second Amendment." Id. (citation and internal punctuation omitted). And that finding was not dicta because it was necessary to the Third Circuit's "conclu[sion] that the District Court did not err in declining to allow Dutton an opportunity to amend" his complaint." Id. at 127 n.2.

Dutton controls this case. The plaintiff in Dutton had been convicted of two first-degree misdemeanors (carrying a firearm on a public street and carrying a firearm without a license).

Notably, Plaintiff here does not contend that either misdemeanor is inherently violent in nature. Regardless, construing the plaintiff's complaint liberally, the Third Circuit upheld this Court's determination that any constitutional challenge to Section 922(g)(1) as applied to a first-degree misdemeanant would fail because Dutton's convictions "classif[ied] him as a felon under 18 U.S.C. § 922(g)(1)," and his factual circumstances did not distinguish him from "other felons who are categorically unprotected by the Second Amendment." Dutton, 503 F. App'x at 127 n.1. Plaintiff's constitutional challenge fails for the same reason.

And the mere fact that Plaintiff has not been convicted of another crime in the years since his 1998 conviction no more distinguishes him than it did the plaintiff in Dutton or the defendant in Barton. The defendant in Barton had been convicted in 1995 of possession with intent to deliver a controlled substance, and in 1993 of receiving stolen property, in the Court of Common Pleas of Washington County, Pennsylvania. See Br. of United States, United States v. Barton, No. 09-2211 (3d Cir.), 2010 WL 2962436, at *6 (July 2, 2010); App. Br., 2010 WL 2504123, at *6 (Apr. 28, 2010). But despite the fact that the defendant's offenses had been committed over a decade earlier, and that the Third Circuit did not determine these offenses to be violent in nature, it nevertheless rejected the defendant's as-applied challenge to Section 922(g)(1). Barton, 633 F.3d at 174. It held that the defendant had "failed to demonstrate that his circumstances place him outside the intended scope of § 922(g)(1)." Id.[11]

Furthermore, Defendants' opening brief explained that Congress had specifically considered, and rejected, applying Section 922(g)(1)'s prohibition only to certain crimes labeled by States as felonies. Def. Mot. at 22-23. And as explained above, see supra part II.A.2, in

[11] Additionally, regardless of Barton's passing reference to "a felon whose crime of conviction is decades-old," 633 F.3d at 173, Plaintiff's conviction is *not* decades-old.

enacting that statute, Congress found that the misuse of firearms by persons convicted of serious crimes – whether labeled misdemeanors or felonies by the State in which the crime occurred – is a serious problem and that restricting firearms possession of persons already conceited of such offenses would help reduce violent crime. Omnibus Act, 82 Stat. 225; S. Rep. No. 89-1866, at 1, 53; S. Rep. No. 88-1340, at 4. That "predictive judgment" receives "substantial deference" where, as here, the Court is reviewing the constitutionality of an act of Congress. Drake, 724 F.3d at 436-37. And Plaintiff is simply incorrect that the Supreme Court has characterized the legislative history of that Act as "fairly sparse." Pl. Opp. at 13. Rather, what the Supreme Court stated was that the legislative history for one title of that Act – Title VII – was only "added by way of a floor amendment to the Act and thus was not a subject of discussion in the legislative reports." Lewis v. United States, 445 U.S. 55, 62, 100 S.Ct. 915, 919, 63 L.Ed.2d 198 (1980); accord United States v. Batchelder, 442 U.S. 114, 120, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); Scarborough v. United States, 431 U.S. 563, 569-70, 97 S.Ct. 1963, 1966, 52 L.Ed.2d 582 (1977); United States v. Bass, 404 U.S. 336, 344 & n.11, 92 S.Ct. 515, 520-21 & n.11, 30 L.Ed.2d 488 (1971). However, Section 922(g)(1) was enacted as part of Title IV, not Title VII. See 82 Stat. 225-35 (Title IV), id. at 230-31 (prohibiting "any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from possessing firearms). [12] And unlike Title VII, Title IV was the product of extensive legislative history. See, e.g., S. Rep. No. 90-1097; S. Rep. No. 89-1866; S. Rep. No. 88-1340. Moreover, the Supreme Court has noted that, by contrast to Title VII, Title IV represents "a carefully

[12] "Four months after enacting the Omnibus Act, the same Congress amended and re-enacted Titles IV and VII as part of the Gun Control Act of 1968." Batchelder, 442 U.S. at 121 n.6, 99 S.Ct. at 2202 n.6 (citing 82 Stat. 1213).

constructed package of gun control legislation," Scarborough, 431 U.S. at 570, 97 S.Ct. at 1966. Plaintiff thus misplaces his reliance on the legislative history of Title VII, Pl. Opp. at 13-14.[13]

In sum, Plaintiff's conviction for a crime punishable by up to five years' imprisonment – and the predatory nature of his crime – demonstrate that he is neither law-abiding nor responsible. See Schrader, 704 F.3d at 989 ("Although section 922(g)(1)'s burden is certainly severe, it falls on individuals who cannot be said to be exercising the core of the Second Amendment right identified in Heller, i.e., 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'") (quoting Heller, 554 U.S. at 635, 128 S.Ct. 2783). Applying 18 U.S.C. § 922(g)(1) to offenders like Plaintiff whose crimes were not necessarily violent in nature is consistent with near-uniform case law applying the Second Amendment. Def. Mem. at 17-18 & n.15. There is no basis for this Court to reach a different conclusion.

CONCLUSION

For the foregoing reasons, and the reasons stated in Defendant's motion to dismiss or for summary judgment, the Court should dismiss this case and deny Plaintiff's motion for summary judgment.

[13] As Plaintiff notes, see Pl. MSJ at 16-17, though 18 U.S.C. § 925 permits the Attorney General, in his or her discretion, to grant individual relief from federal firearms prohibitions, since 1992, Congress has barred the use of appropriated funds to take action on any applications for relief under that section. See United States v. Bean, 537 U.S. 71, 74, 123 S.Ct. 586-87, 154 L.Ed.2d 483 (2002). As noted above, however, Section 922(g)(1)'s prohibition does not apply with respect to a conviction "which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). Plaintiff does not allege that any of these restorative events have occurred. As to whether "a person . . . has had civil rights restored," the Third Circuit has defined "civil rights" as including the right to vote, to sit on a jury, and to hold public office. United States v. Leuschen, 395 F.3d 155, 159 (3d Cir. 2005). Pennsylvania bars a person "convicted of a crime punishable by imprisonment for more than one year [who] has not been granted a pardon or amnesty therefor" from jury service. 42 Pa.C.S.A § 4502(3)(a)(3); see also Essig, 10 F.3d at 975. Plaintiff does not allege that the Commonwealth has restored his right to jury service nor that he has received (or even attempted to obtain) a pardon for his crime.

Dated: April 10, 2014

Respectfully submitted,

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EXHIBIT
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PENNSYLVANIA

DEPARTMENT OF CORRECTIONS

RECIDIVISM REPORT

2013

Tom Corbett

Governor

John E. Wetzel

Secretary

PRS Overview

The Bureau of Planning, Research and Statistics (PRS) directs the maintenance of historical data records for the Department and conducts ongoing planning, research, and evaluation activities designed to provide key decision-makers with quantitative data analysis for use in formulating and evaluating departmental policies and practices. Specific functions performed by the Office include planning, program evaluation, corrections research, data analysis, statistical repository, policy development and analysis.

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RECIDIVISM REPORT

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

February 8, 2013

I am pleased to present the Pennsylvania Department of Corrections' 2013 Recidivism Report, which we believe to be a landmark state recidivism study. This groundbreaking and comprehensive study represents the keystone of the Corbett Corrections Reform initiative, establishing a **"new normal"** in our criminal justice system by focusing on reducing crime. This report was produced by staff from the department's Bureau of Planning, Research, and Statistics. They are to be commended for their work on this comprehensive report. The scope of this report is impressive, and sets the bar high for future analysis of state recidivism rates.

The report presents a mixed picture of recidivism rates in Pennsylvania. While on the one hand reincarceration rates are going down, rearrest rates have been flat or slightly rising. For the most part, recidivism rates have remained virtually unchanged over at least the past decade in Pennsylvania. While this is disappointing, it also presents an opportunity. Over the past year, under the leadership of Governor Corbett, fundamental transformations to Pennsylvania's criminal justice system have been enacted into law as a part of the administration's Justice Reinvestment Initiative (JRI). In the Corbett Corrections Reform initiative, population and cost, although both remain essential measurements, will not be the sole numbers. The **"new normal"** is to expect and require quantifiable results. Citizens of the Commonwealth should have every expectation of a corrections system that actually helps people correct themselves; one that is based on research, not on anecdotal stories and innuendo. Changes resulting from JRI are expected to significantly improve public safety, reduce recidivism, and lower correctional costs for the citizens of the Commonwealth in the years to come. I view this report as the first step towards measuring our progress in reaching these goals. Make no mistake; crime reduction will always be the benchmark for performance measurement when we talk about recidivism reduction efforts. As such, this report is our baseline for going forward.

The details of this report are worth exploring. Some truly innovative measures of recidivism are provided, such as the fraction of total arrests in Pennsylvania that are attributable to ex-offenders released from state prison, an analysis of the degree to which ex-offenders specialize in certain crime types when they reoffend, and an analysis of recidivism rates by geographic location. A section is also included which provides estimates of the potential cost savings for various recidivism reduction scenarios.

Continued...

A special section of this report also examines recidivism rates for our Community Corrections Center (CCC) system. This section is really an update to a previous analysis of the CCC system provided in a study conducted by Dr. Edward Latessa at the University of Cincinnati in 2009. The findings here are largely consistent with Dr. Latessa's previous findings. We know from this updated analysis that we have a lot of work to do to improve outcomes in our CCC system. Fortunately, many of the legislative changes accomplished through JRI are specifically targeted towards improving the CCC system. Again, this report sets the baseline for going forward, as we focus our CCC system around performance-based recidivism reduction outcomes.

At the Pennsylvania Department of Corrections we believe that one of the most fundamental methods for accomplishing our goals of less crime, less prison population, and less taxpayer costs, is to utilize timely, accurate, and reliable data to guide policy. A scientific, data-driven approach offers similar benefits to the field of corrections as it does to other fields of practice such as medicine, for improving lives and saving money. I believe we also have an obligation to provide data and evaluation in a public and transparent manner. This report reflects such an approach.

The report also benefited tremendously from our partnership with Dr. Kiminori Nakamura, a professor in the Criminology & Criminal Justice department at the University of Maryland. Dr. Nakamura was a co-author on this report, and also served as a technical advisor. We have been working with Dr. Nakamura over the past year, under a researcher-practitioner partnership grant through the National Institute of Justice. Under this grant, Dr. Nakamura is on loan from his university on a part-time basis, as an "embedded criminologist" in our department. He serves as a partner and a general scientific advisor, not just with this study but with all of our research efforts. I thank him for his role in this report.

We trust that you find this report useful and informative. We also hope that this report will generate some significant discussions surrounding the implications of its findings for recidivism reduction policy.

Lastly, I want to thank the entire staff at the Pennsylvania Department of Corrections, for their ongoing work and dedication towards improving the safety of the citizens of the Commonwealth of Pennsylvania.

Sincerely,

John E. Wetzel
Secretary of Corrections

JEW/KBB/dls

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Recidivism in Pennsylvania

Introduction

One in 200 adult Pennsylvanians is currently incarcerated in a Pennsylvania State Correctional Institution. Ninety percent of the inmates currently in a Pennsylvania state prison will eventually be released. According to findings in this report, a large proportion of those released will return to some sort of offending behavior. This report presents recidivism statistics for offenders released from the custody of the Pennsylvania Department of Corrections. Recidivism is measured by three different methods in this report: rearrest, reincarceration, and overall recidivism (see box below for a description of each measure).

Recidivism Defined:

Rearrest is measured as the first instance of arrest after inmates are released from state prison.

Reincarceration is measured as the first instance of returning to state prison after inmates are released from state prison.

Overall Recidivism is measured as the first instance of any type of rearrest or reincarceration after inmates are released from state prison.

Highlights:

- Approximately 6 in 10 released inmates recidivate (are rearrested or reincarcerated) within three years of release from prison.
- Overall recidivism rates have been stable over the last ten years.
- Rearrest rates have been slowly increasing over the last ten years.
- Reincarceration rates peaked around 2005 and began to decline in the most recent years.
- Despite a drop starting in 2005, reincarceration rates were slightly higher in the most recent years than they were in 1990.
- Offenders returning to urban areas are more likely to be rearrested, however those returning to rural areas are more likely to be reincarcerated.
- Dauphin County reports the highest overall recidivism rates.
- Released inmates do not appear to heavily specialize in the same crime type when they reoffend. The most specialized type of recidivist is the property offender. The least specialized type of recidivist is the violent offender.
- Released inmates are more likely to be reincarcerated (mostly for technical parole violations) than rearrested during the first 18 months after release from prison, and thereafter are significantly more likely to be rearrested.

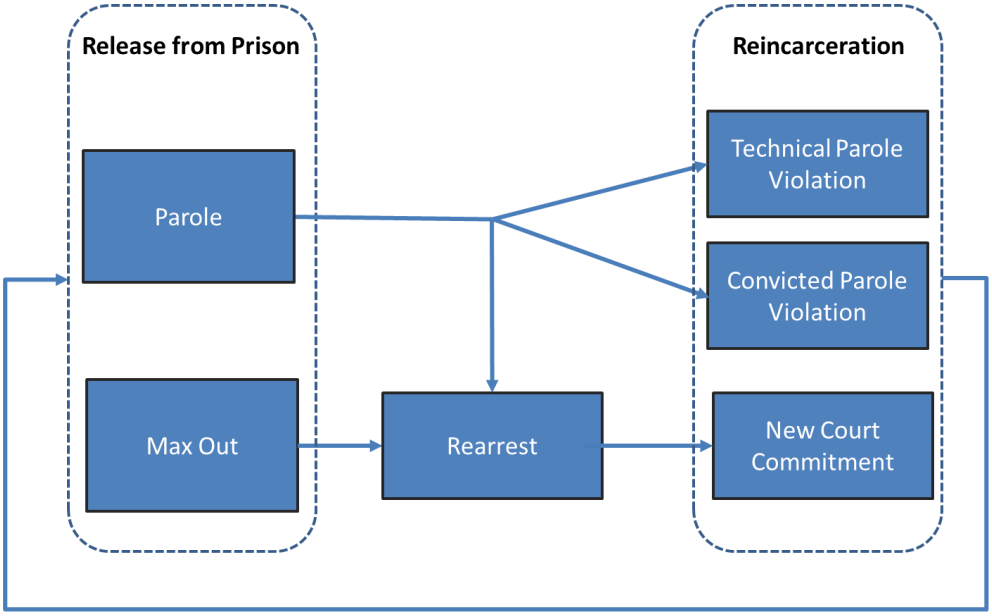
Highlights (Continued):

- More than half of those who return to prison within three years after release will do so within the first year of release. The first year is by far the most risky period for recidivism.
- Younger released inmates are more likely to recidivate than older inmates. A released inmate who is under 21 at the time of release from prison is more than twice as likely to recidivate within three years than a released inmate who is over age 50 at the time of release from prison.
- Those with prior prison stays are more likely to recidivate than those who have never been in state prison. A released inmate who has already served one or more times in a state prison has around a 25 percentage point higher recidivism rate than one who is released from state prison for the first time.
- Those with more prior arrests are more likely to recidivate than those with fewer prior arrests. A released inmate who has 10 or more prior arrests is greater than 6 times more likely to recidivate than a released inmate who has no prior arrest history other than the arrest for the current incarceration.
- Property offenders are significantly more likely to recidivate than other types of offenders.
- DUI, rape, and arson offenders have the lowest recidivism rates. While the 3-year overall recidivism rate for all offenders is 59.9%, the overall rate for DUI is 38.4%, for rape is 49.3%, and for arson is 46.3%. The highest overall recidivism rates are for stolen property (79.6%), burglary (72.5%), and kidnapping (73.2%).
- Nearly three-fourths of the rearrest offenses committed by released inmates within three years after their release from prison are for less serious (Part II) offenses. Half (51%) are for a drug or property offense. Only 17% of all rearrests are for violent offenses (1.3% for murder).
- Approximately 10% of all arrests in Pennsylvania during 2010 were arrests involving released inmates who had previously (in the last 10 years) served time in state prison.
- Per capita arrest rates for violent crimes are 14 times higher among released inmates than among the general public.
- Inmates who are released under parole supervision are more likely to be reincarcerated, however, less likely to be rearrested for a new offense than their counterparts who complete their maximum sentence (max outs).
- Nearly two-thirds of all reincarcerations within three years of release from prison are for technical parole violations.
- Those released inmates who are paroled after failing parole at least once in the past have a recidivism rate of about 12 percentage points higher than those who are released onto parole for the first time.
- PA DOC can save approximately $44.7 million annually by reducing its 1-year reincarceration rate by 10 percentage points.
- PA DOC can save approximately $16.5 million annually by reducing admissions to state prison who are recidivists by 10 percentage points.

Highlights (Continued):

- Overall recidivism rates for released inmates who transition through a Community Corrections Center (CCC) have generally declined since 2005.
- In most recent years, the rearrest rates for released offenders who are paroled to a Center are lower than for those who are paroled directly home ("to the street"), whereas reincarceration rates and overall recidivism rates are higher for those who are paroled to a Center compared to those who are paroled directly home ("to the street").
- After accounting for other important differences which may affect whether a released inmate is paroled to a Center versus paroled directly home, those paroled to a Center still demonstrate a higher overall recidivism rate than those paroled directly home (65.7% vs. 61.2% respectively, for the most recent 3-year overall recidivism rates).
- Among those released offenders who survived at least six months in the community without recidivating, those who spent their first 3 to 6 months in a Center had a significantly lower 1-year overall recidivism rate than those who were paroled directly home (15% vs. 18%).

Figure 1: Pennsylvania's Recidivism Flow



Release Types:

Parole: Inmates released from state prison to serve the rest of their sentence on parole.

Max Out: Inmates released from state prison after serving their maximum sentence.

Reincarceration Types:

Technical Parole Violation (TPV): A TPV occurs when a parolee violates a condition of his/her parole that is not necessarily an illegal act (i.e., entering a bar or not reporting to an agent).

Convicted Parole Violation (CPV): A CPV occurs when a parolee violates a condition of parole that is also against the law (i.e., using drugs).

New Court Commitment: A new court commitment occurs when a released inmate is arrested, convicted in court, and is sentenced to prison for a new criminal charge.

Figure 1 depicts a typical recidivism flow for Pennsylvania's state correctional system. PA DOC can release inmates through two mechanisms: parole and max out. Released inmates can return to PA DOC through a technical parole violation (TPV), a convicted parole violation (CPV), or as a new court commitment (see box on the left for the explanations of different release and reincarceration types).

Those who are paroled can return to prison through a TPV, a CPV, or a new court commitment. A parolee can be rearrested without being reincarcerated, and conversely can be reincarcerated without being rearrested.

Those who are released from prison by maxing out their sentence can only return to prison after they are arrested for a new crime, convicted, and sentenced to prison through a court. Note that a released inmate who is rearrested is not always reincarcerated. But if reincarceration in state prison is the given sentence for the arrest, the recidivist will then be reincarcerated with PA DOC and will be paroled or max out again after serving new time.

SECTION 1: Recidivism Rate Trends

Figure 2: 2000-2008 3-Year Recidivism Rates

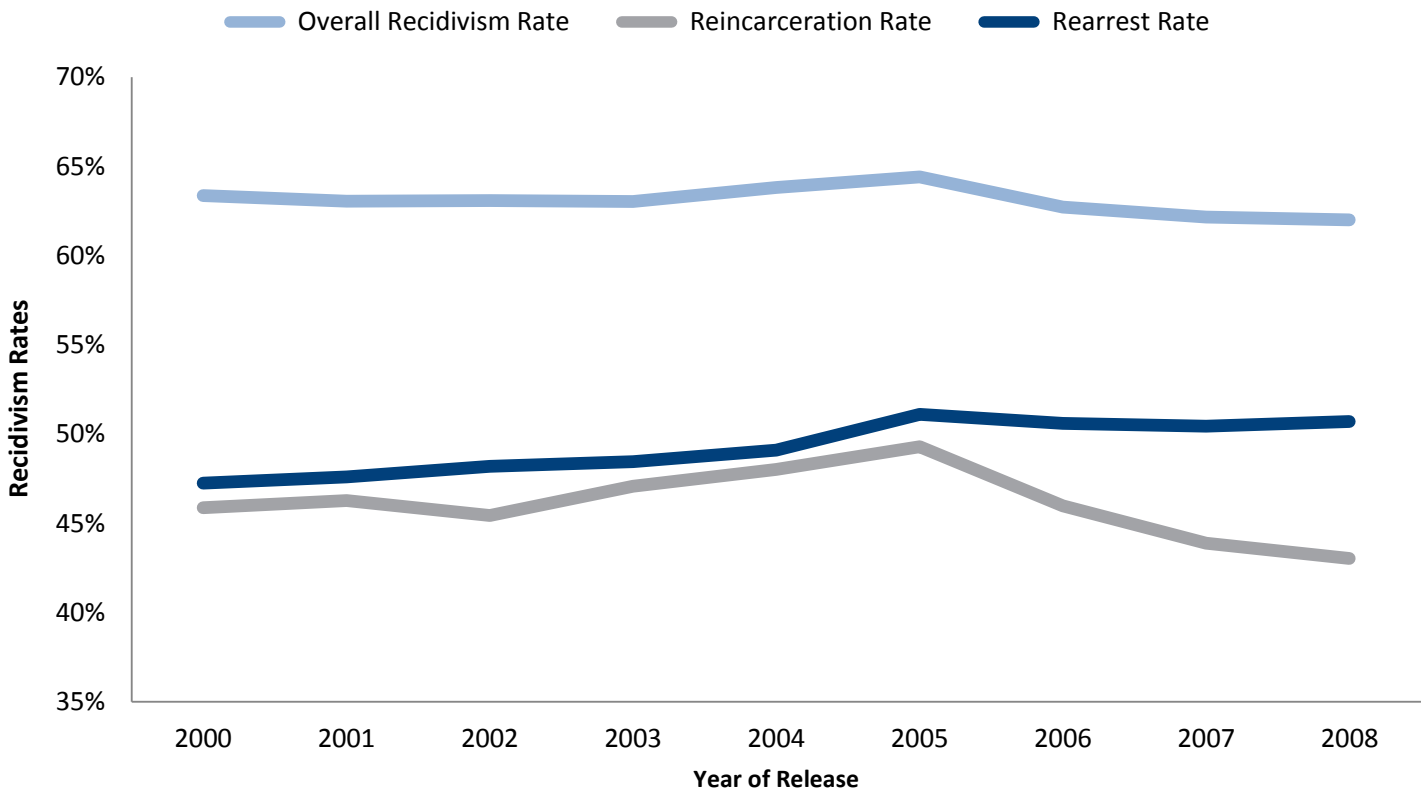


Figure 2 shows a comparison of 3-year recidivism rates for inmates released between 2000 and 2008. Those released from prison who were reincarcerated or rearrested within three years of their release date were included in these measures. The 3-year reincarceration rate peaked at 49.3% in 2005 and declined to 43.0% in 2008. The 3-year rearrest rates have been consistently higher than the reincarceration rates. The 3-year rearrest rate has grown from 47.2% in 2000 to 50.7% in 2008.

The 3-year overall recidivism rate has remained relatively stable over the eight years shown. In the latest year (2008), 70.6% of the overall recidivism measure consisted of rearrest events, while reincarceration events accounted for the other 29.4%.

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From 2000 to 2008, the rearrest rates for released inmates in Pennsylvania grew slightly. However, according to Table 1, in 2010, the 6-month and 1-year rearrest rates declined (12.3% and 23.7%, respectively). The 2008 3-year rearrest rate was 50.7%. The 6-month rearrest rate peaked in 2009 (14.5%), the 1-year rearrest rate peaked in 2007/2008 (25.9%), and the 3-year rearrest rate peaked in 2005 (51.1%).

Figure 3 depicts the 6-month, 1-year, and 3-year rearrest rates for inmates released from Pennsylvania state prisons from 2000 to 2010. The 3-year rearrest rate has been more than double the 1-year rate in most years.

Table 1: 2000 - 2010 Rearrest Rates

Year of Release	Rearrest Rates		
	6-Month	1-Year	3-Year
2000	12.4%	23.0%	47.2%
2001	12.9%	23.8%	47.6%
2002	12.7%	23.3%	48.2%
2003	12.0%	23.0%	48.4%
2004	12.7%	23.6%	49.1%
2005	13.8%	25.1%	51.1%
2006	13.2%	25.1%	50.6%
2007	13.9%	25.9%	50.4%
2008	14.2%	25.9%	50.7%
2009	14.5%	25.4%	N/A
2010	12.3%	23.7%	N/A

Figure 3: 2000-2010 Rearrest Rates

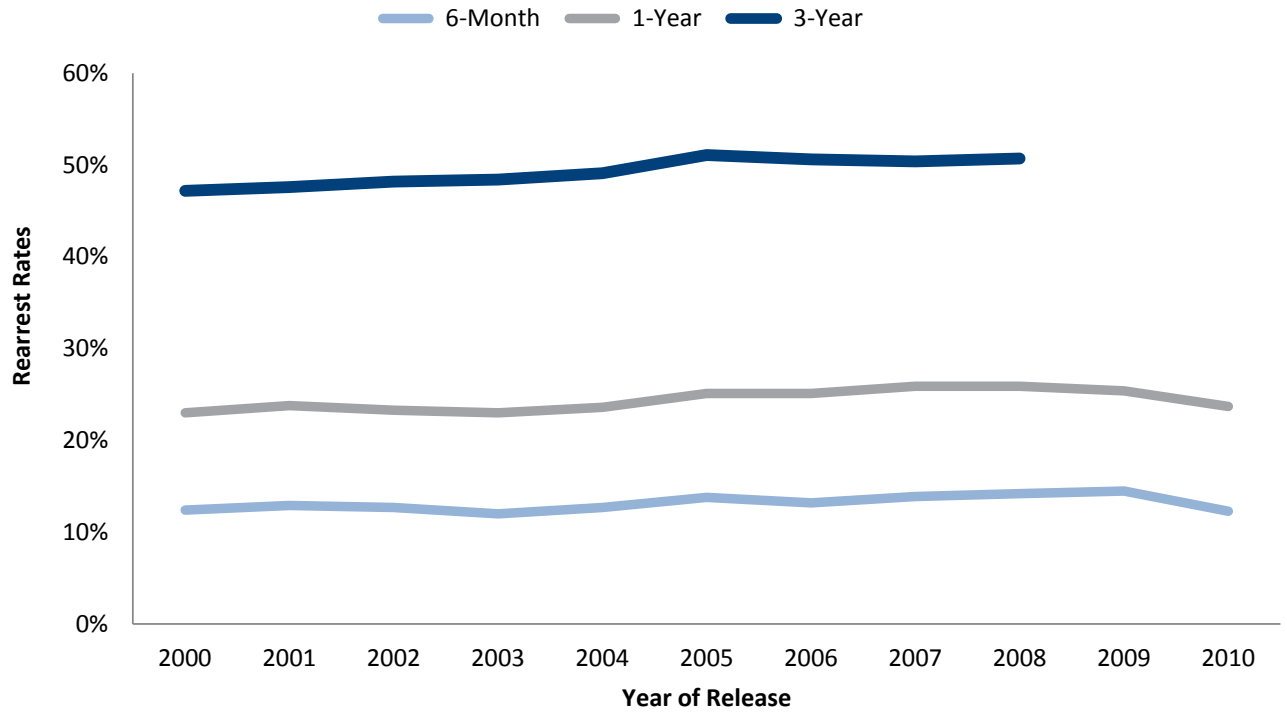


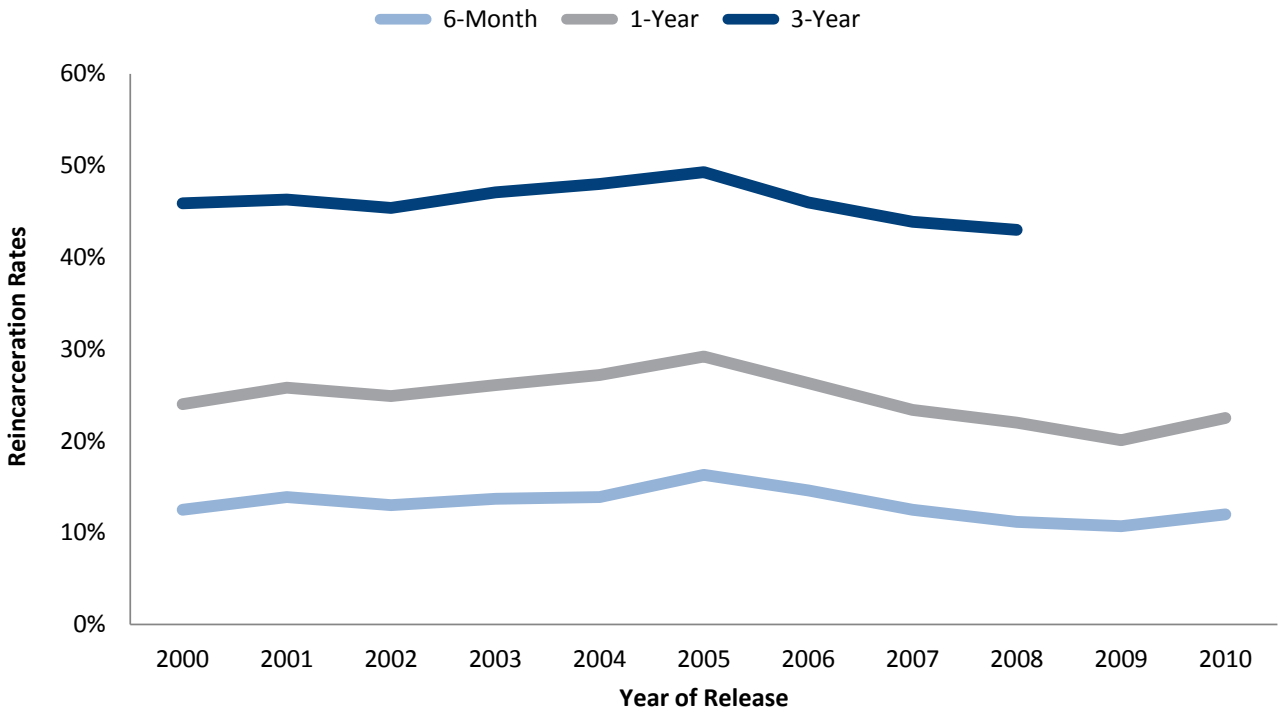
Table 2 shows the reincarceration rates of Pennsylvania inmates released between 2000 and 2010. The reincarceration rates rose during the first half of the decade and declined slightly in the second half, although, the 6-month (12.0%) and 1-year (22.5%) reincarceration rates in 2010 increased slightly. The 2008 3-year reincarceration rate was 43.0%, the lowest in the previous eight years. Given that the 3-year reincarceration rates have generally tracked the 6-month and 1-year reincarceration rates, it is likely that the 3-year reincarceration rate may increase for those released in 2009 and 2010.

The 6-month, 1-year, and 3-year reincarceration rates are depicted in Figure 4. The reincarceration rates usually doubled from six months to one year. After one year, the reincarceration rates seemed to slow down, given that the 3-year reincarceration rates typically are not quite double the 1-year rates of the same year.

Table 2: 2000—2010 Reincarceration Rates

Year of Release	Reincarceration Rates		
	6-Month	1-Year	3-Year
2000	12.5%	24.0%	45.9%
2001	13.9%	25.8%	46.3%
2002	13.0%	24.9%	45.4%
2003	13.7%	26.1%	47.1%
2004	13.9%	27.2%	48.0%
2005	16.3%	29.2%	49.3%
2006	14.6%	26.3%	46.0%
2007	12.5%	23.4%	43.9%
2008	11.2%	22.0%	43.0%
2009	10.7%	20.1%	N/A
2010	12.0%	22.5%	N/A

Figure 4: 2000-2010 Reincarceration Rates



According to Figure 5, the overall recidivism rates for inmates released from state prison in Pennsylvania between 2000 and 2010 appear strikingly steady. In 2010, the 6-month overall recidivism rate declined slightly (20.0%) while the 1-year overall recidivism rate was also slightly down at 35.0%. The 2008 3-year overall recidivism rate was 62.0%. The 6-month overall recidivism rate peaked in 2001 (22.6%), the 1-year overall recidivism rate peaked in 2001 and again in 2005 (38.6%), and the 3-year overall recidivism rate peaked in 2005 (64.4%). See Table 3 for the full breakdown of the overall recidivism rates.

Over the ten-year span, approximately 64% of the first recidivism events have been a rearrest while only 36% have been a reincarceration.

Table 3: 2000 - 2010 Overall Recidivism Rates

Year of Release	Overall Recidivism Rates		
	6-Month	1-Year	3-Year
2000	21.4%	37.2%	63.4%
2001	22.6%	38.6%	63.1%
2002	21.7%	37.7%	63.1%
2003	21.0%	37.6%	63.0%
2004	20.7%	37.5%	63.8%
2005	22.2%	38.6%	64.4%
2006	20.2%	36.4%	62.7%
2007	19.9%	35.8%	62.2%
2008	20.6%	37.0%	62.0%
2009	20.8%	35.5%	N/A
2010	20.0%	35.0%	N/A

Figure 5: 2000-2010 Overall Recidivism Rates

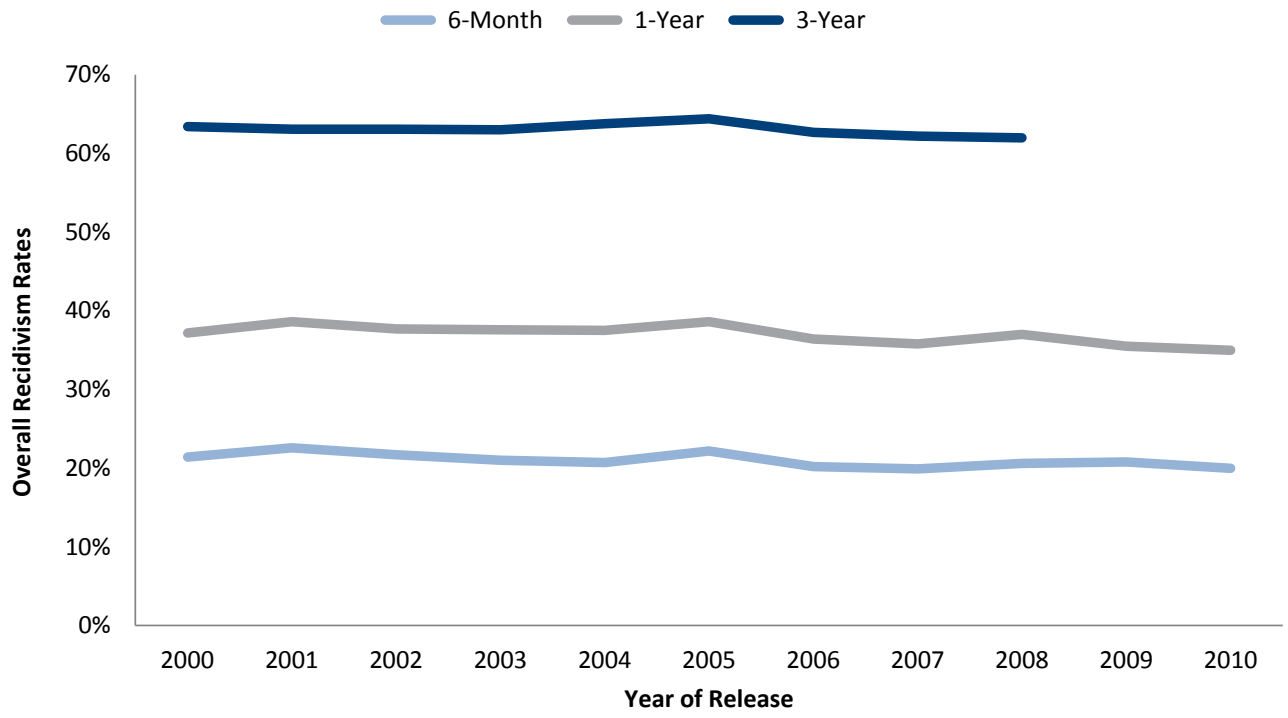


Figure 6: 3-Year Reincarceration Rates by Time To Reincarceration (2008 Releases)

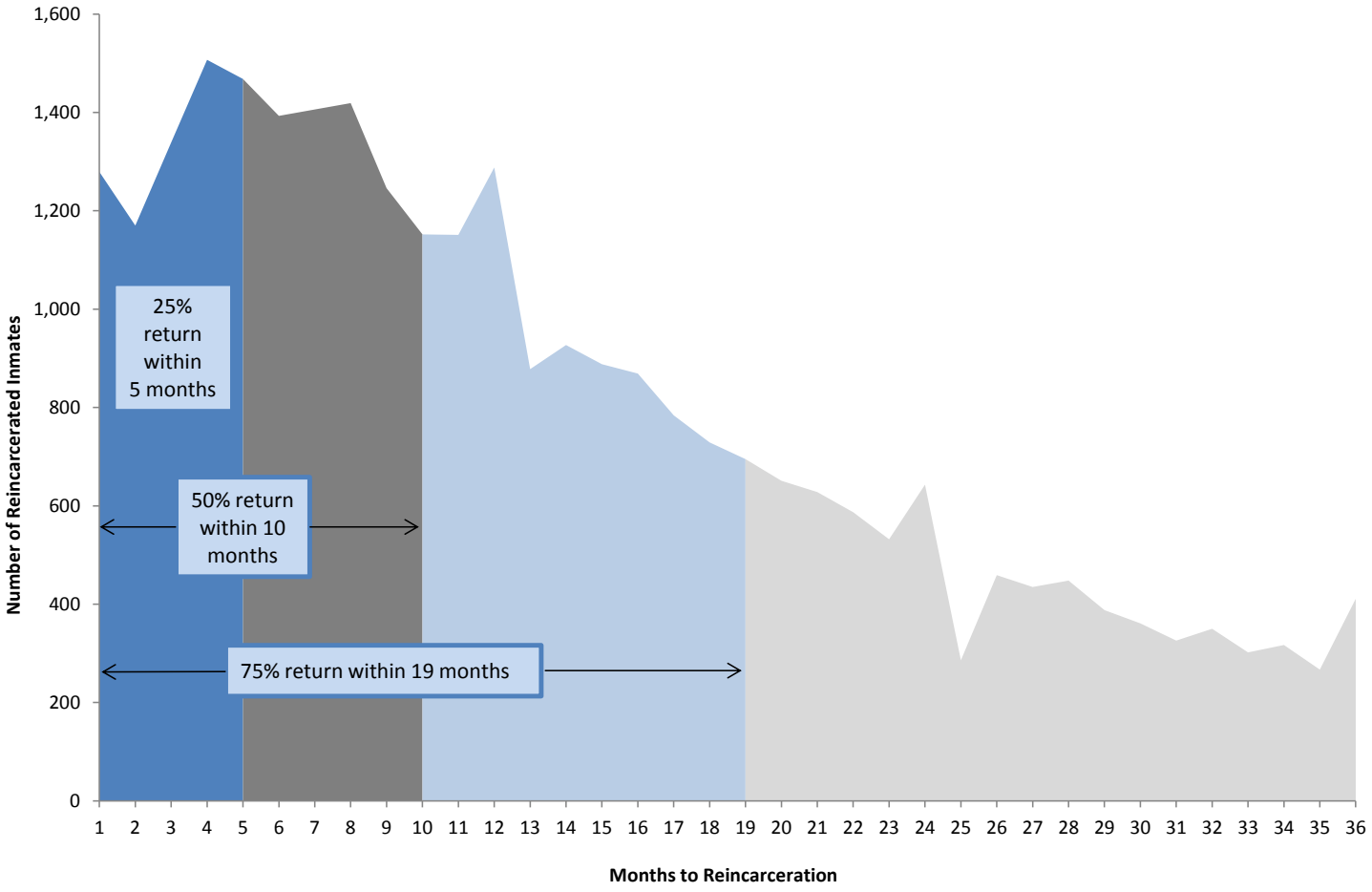


Figure 6 displays the number and proportion of recidivism events among those who are reincarcerated within 3 years from release. The overall declining curve suggests that those who return to prison tend to do so relatively soon after their release. According to Figure 6, over half of the inmates released in 2008 who were reincarcerated within three years were reincarcerated within 12 months of their release. In fact, more than 1,000 inmates were reincarcerated per month during each month, through month 12 after release. Three quarters of the inmates released in 2008 who were reincarcerated within three years were returned to prison in approximately 19 months.

Figure 7: 5-Year Recidivism Rates in Pennsylvania (2006 Releases)

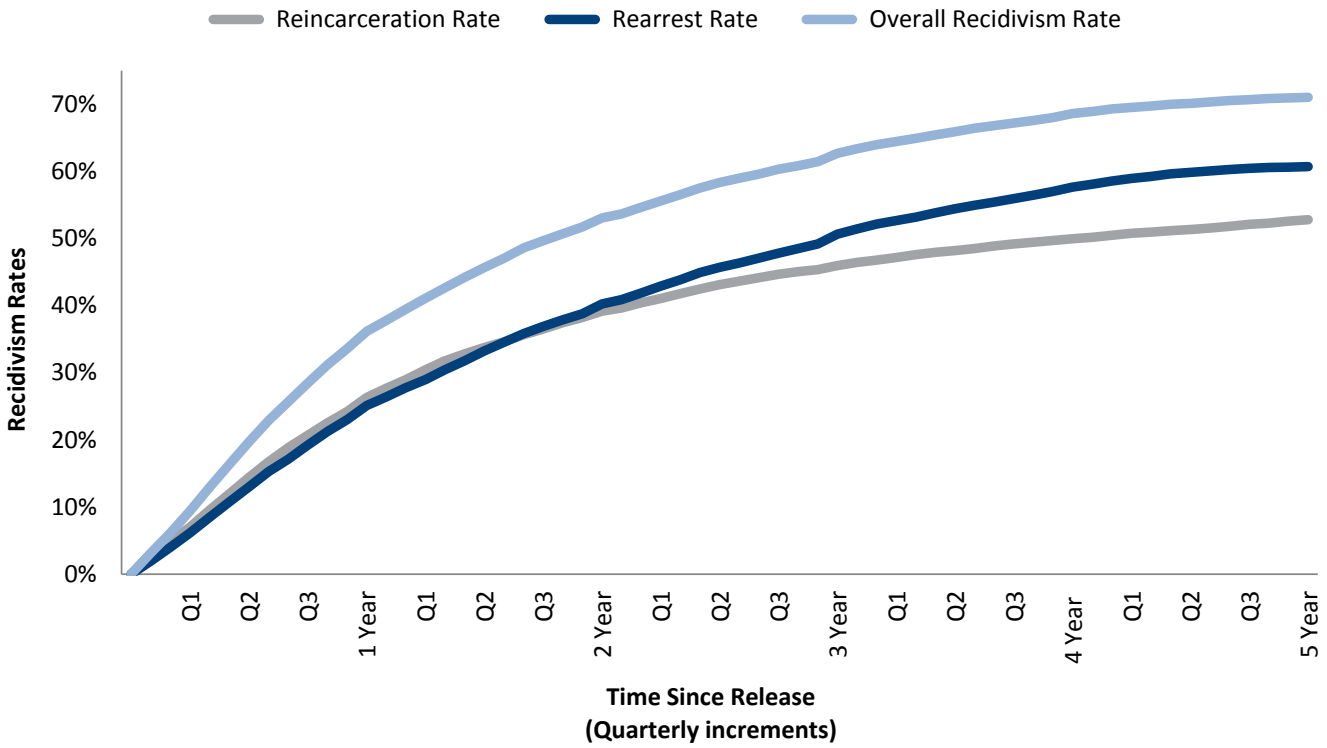


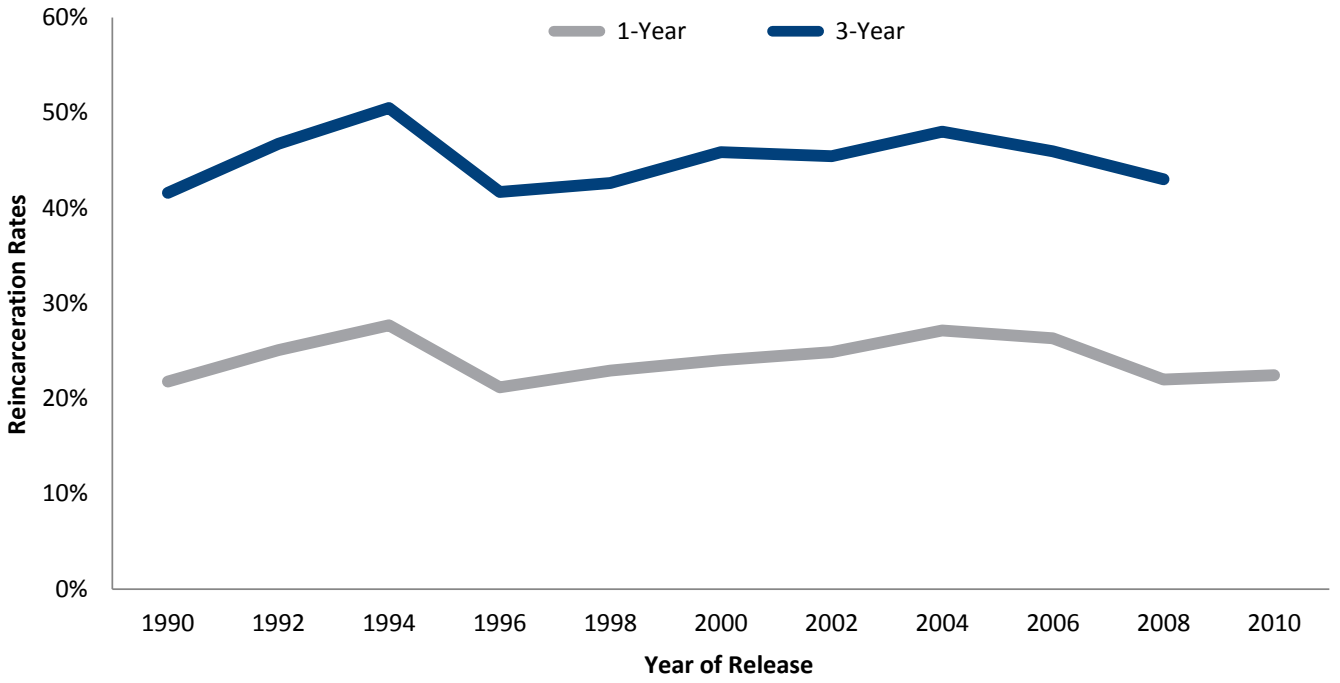
Figure 7 shows the cumulative recidivism rates for inmates released in 2006, over a five year period of time since release. The reincarceration rates are slightly higher than the rearrest rates in the first year and a half after release. At the second year mark, the rearrest rates surpass and remain higher than the reincarceration rates.

Table 4: 5-Year Recidivism Rates

	Reincarceration Rate	Rearrest Rate	Overall Recidivism Rate
1 Year	26.3%	25.1%	36.2%
2 Year	39.2%	40.2%	53.1%
3 Year	46.0%	50.7%	62.7%
4 Year	50.0%	57.7%	68.6%
5 Year	52.8%	60.7%	71.1%

According to Table 4, after the first year period, the reincarceration rate is 26.3%, the rearrest rate is 25.1% and the overall recidivism rate is 36.2% for the inmates released in 2006. After three years, the reincarceration rate is 46.0%, the rearrest rate is 50.7%, and the overall recidivism rate is 62.7%. Slightly more than half of those who recidivated (rearrested or reincarcerated) within three years actually recidivated within the first year. This shows the slowing rate of recidivism as time since release elapses. Finally, the 5-year reincarceration rate is 52.8%, rearrest rate is 60.7%, and the overall recidivism rate is 71.1%. The 5-year recidivism rates increased from the 3-year rates by only a small increment, indicating a further slow-down of recidivism rates as the time since release grows longer. This slow down can be seen in Figure 7 as the slopes of the recidivism lines increasingly flatten over time.

Figure 8: 20-Year Long View of Reincarceration Rates



Taking a longer view, from 1990 to 2010, reincarceration rates have remained fairly stable in Pennsylvania, ranging from 20% to 29% for inmates reincarcerated within one year, and 41% to 50% for those reincarcerated within three years of their release from state prison (see Figure 8).[1] Both 1-year and 3-year rates had a peak in 1994 and trough in 1996. After another peak in 2005, reincarceration rates began to decline from 2005 to 2009, reaching a low in 2009 with a 1-year rate of 20.1%. However, in 2010, the 1-year rate increased by almost 10%, suggesting that an upward trend in reincarceration rates may be occuring, given that the 3-year rates appear to follow the trends of the 1-year rates historically.

Table 5: 20-Year Long View of Reincarceration

Year of Release	Inmates Released	Inmates Reincarcerated			
		1-Year		3-Year	
		Number	Rate	Number	Rate
1990	6,702	1,461	21.8%	2,788	41.6%
1992	8,057	2,023	25.1%	3,766	46.7%
1994	8,523	2,360	27.7%	4,306	50.5%
1996	7,049	1,493	21.2%	2,939	41.7%
1998	8,927	2,048	22.9%	3,807	42.6%
2000	10,934	2,628	24.0%	5,015	45.9%
2002	11,030	2,744	24.9%	5,012	45.4%
2004	13,913	3,780	27.2%	6,680	48.0%
2006	13,762	3,625	26.3%	6,328	46.0%
2008	13,814	3,042	22.0%	5,944	43.0%
2010	16,764	3,767	22.5%	N/A	N/A

SECTION 2: Recidivism Rates By Geographic Areas

Table 6 shows the ten counties with the highest 3-year rearrest rates. The county designation represents where the released inmate was originally convicted before commitment to state prison. Between 2006 and 2008, the average statewide 3-year rearrest rate was 50.7%. The counties with the larger populations such as Philadelphia, Allegheny, Dauphin, Delaware, and Montgomery have some of the highest rearrest rates, and drive up the 3-year rearrest rate for Pennsylvania as a whole. In fact, the median 3-year rearrest rate for Pennsylvania counties was only 43%. The overall median rearrest rate can be used as a benchmark to compare counties in Pennsylvania (see Figure 9 for the 3-year rearrest rates for all 67 Pennsylvania counties).

Table 6: Top 10 Counties with Highest Rearrest Rates

County	2006-2008 Releases	3–Year Rearrests	
		Number	Rate
Philadelphia	10,394	6,249	60.1%
Carbon	61	36	59.0%
Dauphin	1,739	1,005	57.8%
Blair	349	196	56.2%
Montgomery	1,211	648	53.5%
Allegheny	2,826	1,482	52.4%
Delaware	1,363	701	51.4%
Perry	67	34	50.7%
York	1,297	641	49.4%
Beaver	276	135	48.9%

Figure 9: 3-Year Rearrest Rates by County in Pennsylvania

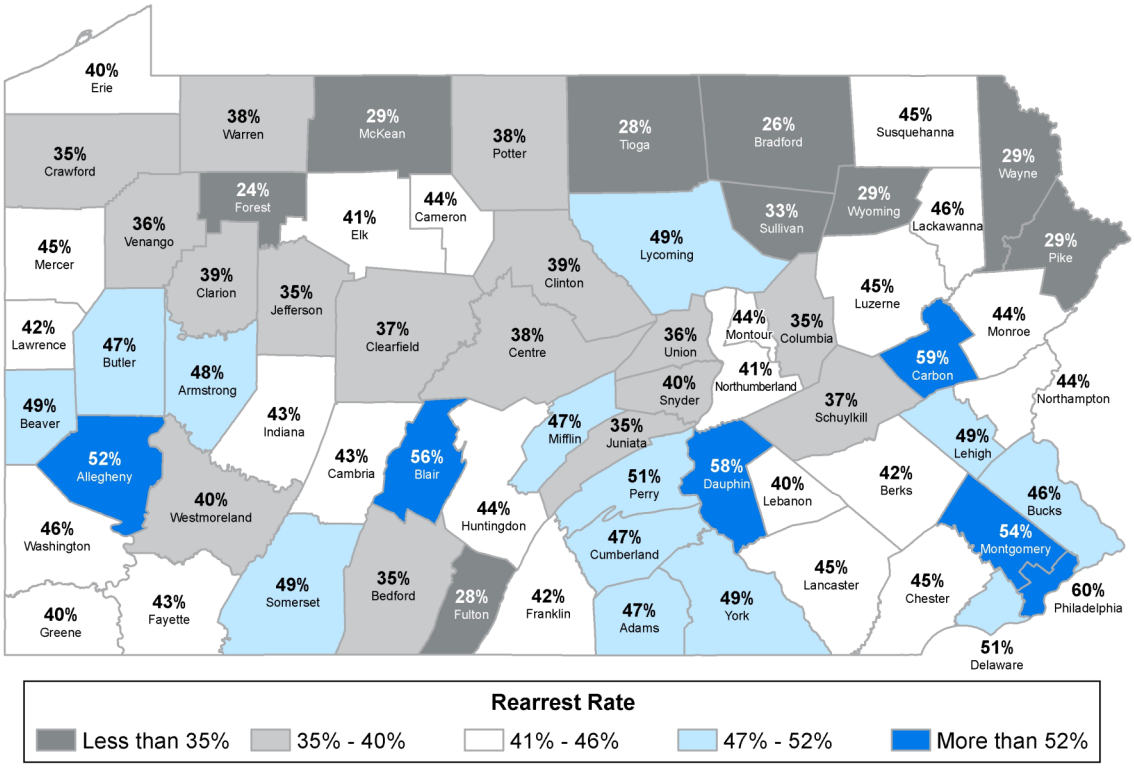


Table 7 shows the ten counties with the highest 3-year reincarceration rates. Similar to Table 6, the county designation represents the county where the released inmate was originally convicted before commitment to state prison. The average statewide 3-year reincarceration rate in Pennsylvania between 2006 and 2008 was 43%. The median reincarceration rate for all counties was 41%. In contrast to the rearrest rates, which tended to show higher rates for more populous counties, the counties with the highest reincarceration rates are mostly rural and relatively less populous. Figure 10 shows the 3-year reincarceration rates of all 67 Pennsylvania counties.

Table 7: Top 10 Counties with Highest Reincarceration Rates

County	2006-2008 Releases	3–Year Reincarcerations	
		Number	Rate
Montour	30	16	53.3%
Clinton	79	42	53.2%
Lackawanna	809	421	52.0%
Bedford	80	41	51.3%
Lycoming	578	281	48.6%
Union	103	50	48.5%
Huntingdon	52	25	48.1%
Dauphin	1,748	827	47.3%
Franklin	450	210	46.7%
Lehigh	958	444	46.3%

Figure 10: 3-Year Reincarceration Rates by County in Pennsylvania

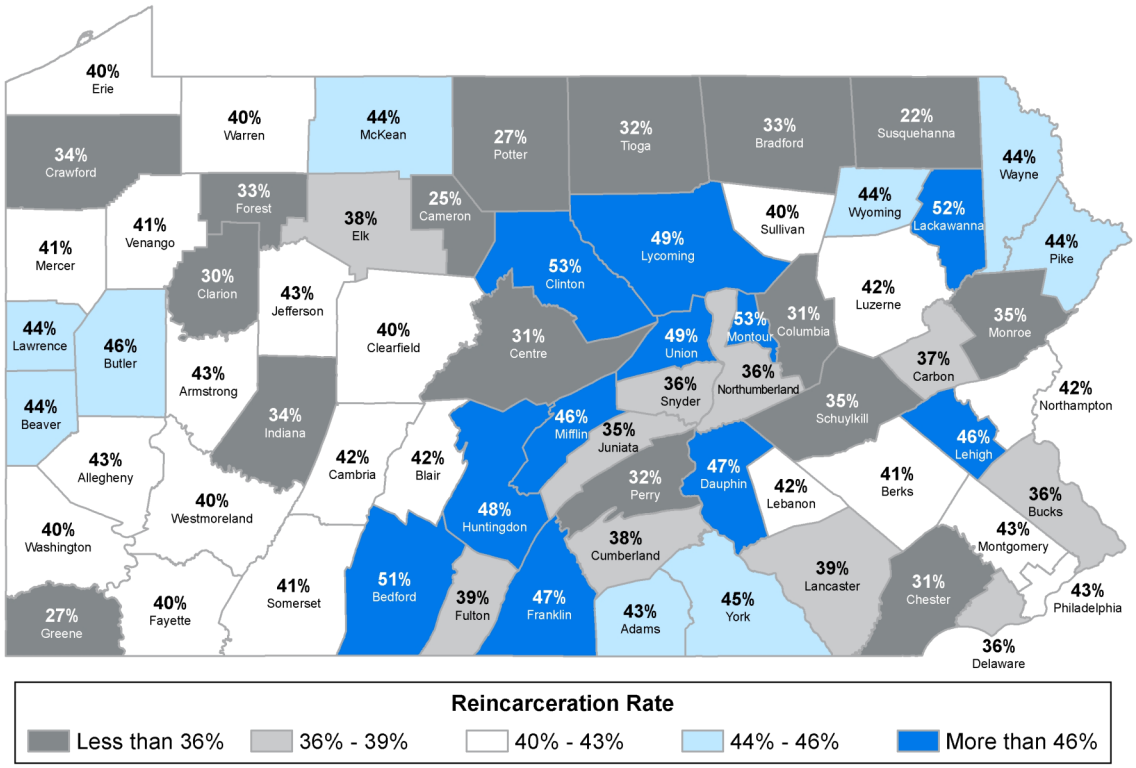


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Table 8 shows the ten counties with the highest 3-year overall recidivism rates. The statewide average overall recidivism rate for Pennsylvania between 2006 and 2008 is 62%, while the median overall recidivism rate of Pennsylvania's 67 counties is 54%. This discrepancy between the statewide recidivism rates and the median county rate suggests that more populous counties, such as Dauphin, Philadelphia, and Allegheny tend to have higher overall recidivism rates which drive up the statewide rate. Figure 11 shows the 3-year overall recidivism rates for all 67 counties.

Table 8: Top 10 Counties with Highest Overall Recidivism Rate

County	2006-2008 Releases	3–Year Overall Recidivism	
		Number	Rate
Dauphin	1,739	1,171	67.3%
Philadelphia	10,394	6,811	65.5%
Allegheny	2,826	1,748	61.9%
Montgomery	1,211	747	61.7%
Blair	349	215	61.6%
Cambria	205	125	61.0%
Lycoming	607	369	60.8%
Lackawanna	896	543	60.6%
York	1,297	780	60.1%
Huntingdon	55	33	60.0%

Figure 11: 3-Year Overall Recidivism Rates by County in Pennsylvania

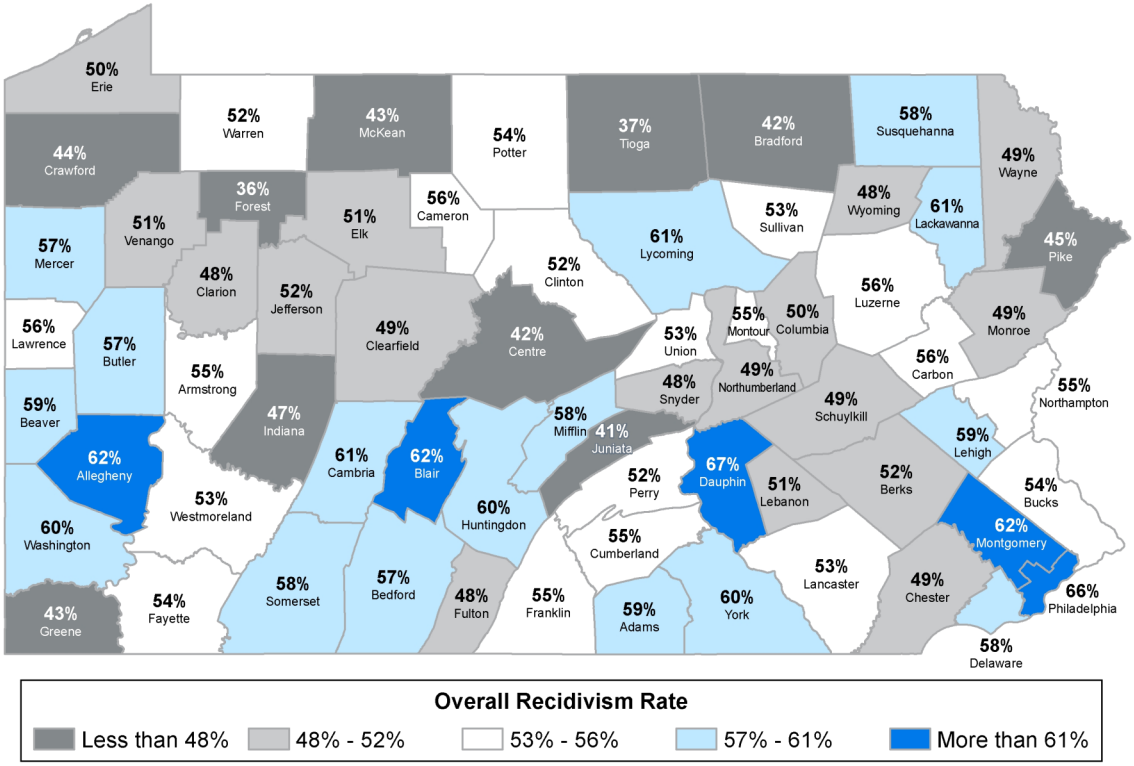


Table 9 shows the 3-year rearrest rates by Pennsylvania metropolitan area[2] for inmates released in 2006 to 2008. Consistent with the rearrest rates by county, the Philadelphia metropolitan area had the highest 3-year rearrest rate of the 2006-2008 released inmates. The Harrisburg-Carlisle metropolitan area rate was second. Rounding out the top five metropolitan areas with the highest rearrest rates are Altoona, York-Hanover, and Pittsburgh. The top five metropolitan areas contain large Pennsylvania cities.

Table 10 shows that Williamsport had the highest 3-year reincarceration rate for the 2006-2008 released inmates. Scranton-Wilkes-Barre, Harrisburg-Carlisle, York-Hanover, and Allentown are also included in the five highest metropolitan areas according to their 3-year reincarceration rates. As shown on the previous map of incarceration rates by county, these less populous metropolitan areas tend to have higher reincarceration rates.

Table 9: 3-Year Rearrest Rates by Metropolitan Areas

Metropolitan Area	2006-2008 Releases	3-Year Rearrests	
		Number	Rate
Philadelphia	14,398	8,248	57.3%
Harrisburg-Carlisle	2,059	1,159	56.3%
Altoona	349	196	56.2%
York-Hanover	1,297	641	49.4%
Pittsburgh	4,916	2,408	49.0%
Williamsport	607	295	48.6%
Allentown	1,806	852	47.2%
Lancaster	856	389	45.4%
Scranton-Wilkes Barre	1,658	737	44.5%
Johnstown	205	88	42.9%
Reading	1,667	701	42.1%
Erie	1,424	573	40.2%
Lebanon	419	168	40.1%
State College	158	60	38.0%

Table 10: 3-Year Reincarceration Rates by Metropolitan Areas

Metropolitan Area	2006-2008 Releases	3-Year Reincarcerations	
		Number	Rate
Williamsport	578	281	48.6%
Scranton-Wilkes Barre	1,517	721	47.5%
Harrisburg-Carlisle	2070	945	45.7%
York-Hanover	1,278	577	45.1%
Allentown	1,755	776	44.2%
Johnstown	194	82	42.3%
Lebanon	400	169	42.3%
Pittsburgh	4808	2026	42.1%
Altoona	339	141	41.6%
Philadelphia	14084	5791	41.1%
Reading	1,629	669	41.1%
Erie	1,357	546	40.2%
Lancaster	868	335	38.6%
State College	159	49	30.8%

Table 11: 3-Year Overall Recidivism Rate by Metropolitan Area

Metropolitan Area	2006-2008 Releases	3-Year Overall Recidivism	
		Number	Rate
Harrisburg-Carlisle	2,059	1,344	65.3%
Philadelphia	14,398	9,082	63.1%
Altoona	349	215	61.6%
Johnstown	205	125	61.0%
Williamsport	607	369	60.8%
York-Hanover	1,297	780	60.1%
Pittsburgh	4,916	2,912	59.2%
Scranton-Wilkes Barre	1,658	962	58.0%
Allentown	1,806	1,037	57.4%
Lancaster	856	457	53.4%
Reading	1,667	865	51.9%
Lebanon	419	212	50.6%
Erie	1,424	715	50.2%
State College	158	66	41.8%

Table 11 shows the 3-year overall recidivism rates of the 2006-2008 releases ranked by metropolitan areas. The Harrisburg-Carlisle metropolitan area had the highest average 3-year overall recidivism rate based on inmates released between 2006 and 2008, followed by Philadelphia, Altoona, Johnstown, and Williamsport.

SECTION 3: Recidivism Rates By Demographics

Figure 12: 3-Year Recidivism Rates by Gender

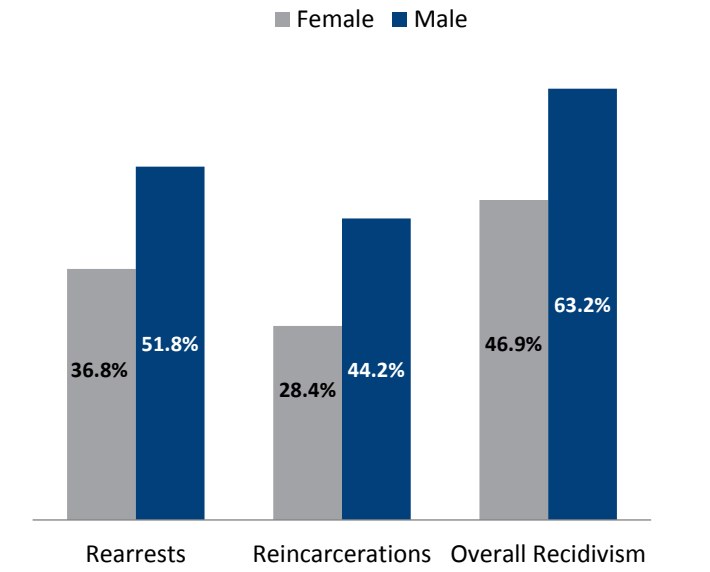


Figure 12 shows 3-year recidivism rates by gender, suggesting that men are at a higher risk of being both rearrested and reincarcerated within three years of their release from Pennsylvania state prison when compared to women.

Figure 13: 3-Year Recidivism Rates by Race/Ethnicity

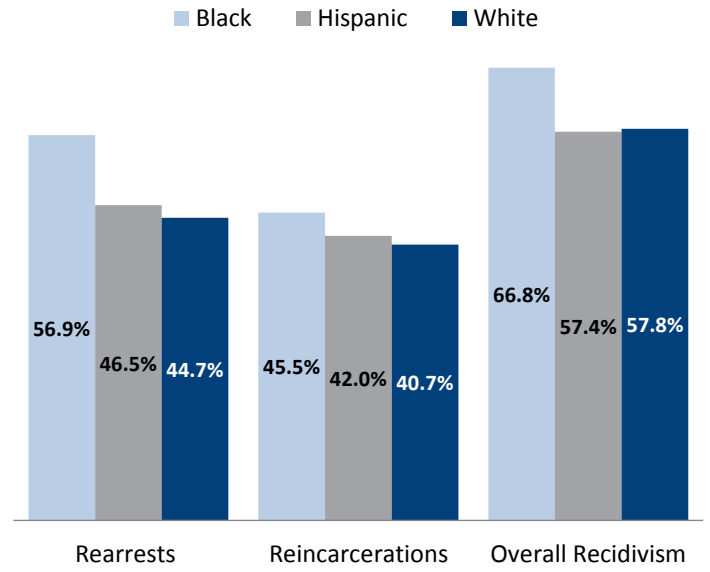


Figure 13 shows 3-year recidivism rates broken down by race/ethnicity[3], suggesting that Blacks report the highest rates of rearrest rates and overall recidivism, followed by Hispanics, and non-Hispanic Whites[4]. On the other hand, reincarceration rates by race are much more similar.

Figure 14: 3-Year Rearrest Rates By Age Group

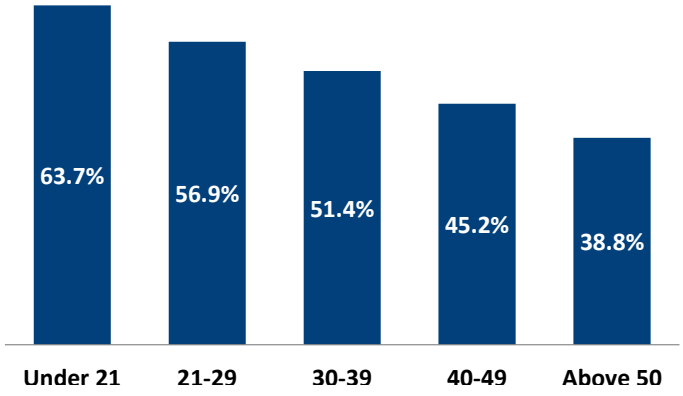


Figure 15: 3-Year Reincarceration Rates by Age Group

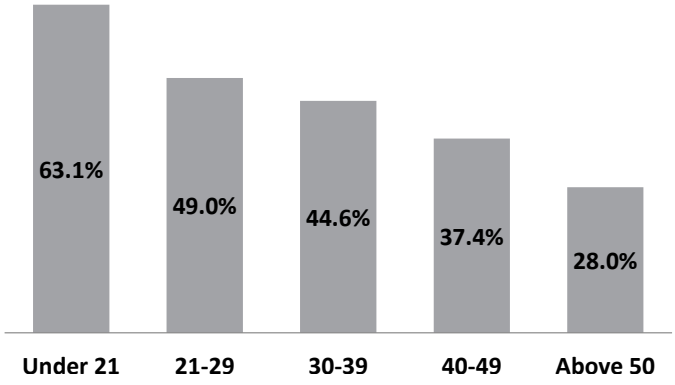
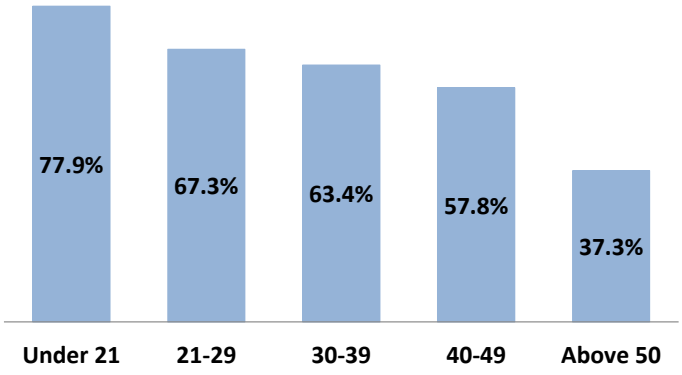


Figure 14 shows the 3-year rearrest rates by age at time of release, suggesting that younger age groups[5] are at the highest risk for recidivating. A 21 year old released inmate's risk of being rearrested is almost 25 percentage points higher than an over 50 year old inmate.

Figure 16: 3-Year Overall Recidivism Rates by Age Group

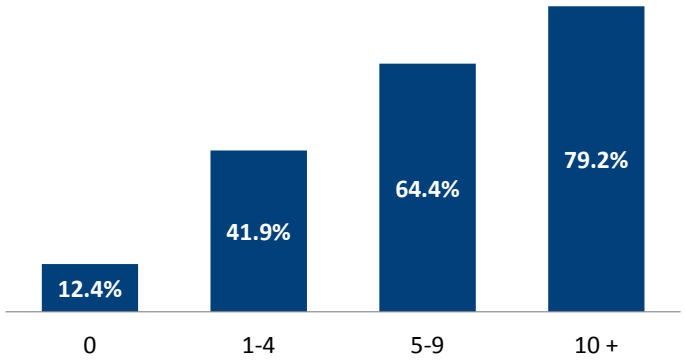


The 3-year reincarceration rates of inmates released in 2008 show a similar declining reincarceration rate pattern with age, according to Figure 15.

The 3-year overall recidivism rates by age group follow the same declining pattern as with the rearrest and reincarceration rates, according to Figure 16.

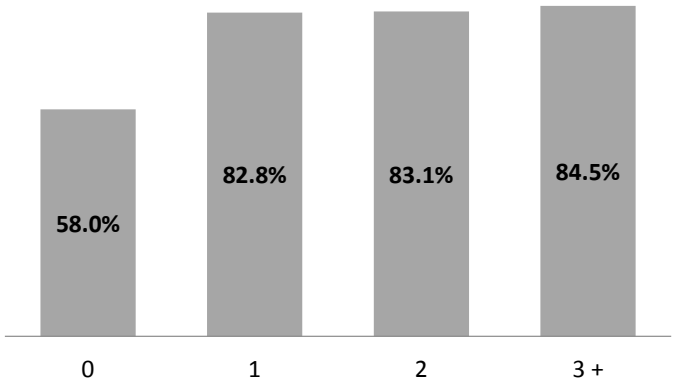
These age group findings suggest that age has a strong negative correlation with recidivism. In other words, the older an inmate is at the time of his/her release, the less likely he/she is to recidivate.

Figure 17: 3-Year Overall Recidivism Rates by Prior Arrests



NOTE: The number of priors does not include the current arrest.

Figure 18: 3-Year Overall Recidivism Rates by Prior Incarcerations



NOTE: The number of priors does not include the current incarceration.

Prior criminal history appears to also be highly associated with whether an inmate will continue to commit crimes after being released from state prison. Figures 17 and 18 show the overall recidivism rates of inmates released in 2008 by the number of prior arrests or incarcerations[6], respectively. As depicted, the general trend is that the risk of recidivating increases with higher numbers of priors.

According to Figure 17, the risk of recidivating within three years, by either rearrests or reincarcerations, increases as the number of prior arrests increases.

Figure 18 depicts a large jump in the 3-year overall recidivism rate between inmates released from Pennsylvania state prison for the first time (zero prior incarcerations) and those released inmates who had been incarcerated before (more than one prior incarcerations). After an inmate is released from Pennsylvania state prison with at least one prior, he/she is more than 80% likely to be rearrested or reincarcerated within three years of release.

SECTION 4: Recidivism Rates By Crime Types

Table 12 depicts the 3-year recidivism rates for inmates released in 2008, by the type of crime committed that led to their original incarceration in a Pennsylvania state prison. It is important to note that inmates who recidivated were not necessarily rearrested or reincarcerated for the same crime as the original commitment crime.

The 3-year rearrest, reincarceration, and overall recidivism rates for Part I crime are 48.6%, 44.1%, and 62.6%, respectively.

The Part I offenses with higher 3-year rearrest and reincarceration rates were: Robbery, Aggravated Assault, Burglary, and Theft/Larceny. The Part I offenses that had higher 3-year overall recidivism rates were: Robbery, Burglary, and Theft/Larceny.

The 3-year rearrest rate for Part II crime is 48.5%, very close to the 3-year rearrest rate for Part I crime. The 3-year reincarceration rate for Part II crime is 39.6%, which is 4.5 percentage points below the 3-year reincarceration rate for Part I crime. The Part II 3-year overall recidivism rate is 58.1%, which is 4.5 percentage points lower than the overall recidivism rate for Part I crimes. The Part II offenses that had higher 3-year rearrest rates were: Other Assault, Stolen Property, Forgery, Drug Offenses, Weapons, and Prison Breach. The Part II offenses that had higher 3-year reincarceration rates were: Stolen Property, Forgery, Drug Offenses, Weapons, Prison Breach, and Part II Other. The Part II offenses that had higher 3-year overall recidivism rates were: Other Assault, Fraud, Stolen Property, Forgery, Other Sexual Offenses, Weapons, Prison Breach, and Kidnapping.

Table 13 depicts the 3-year recidivism rates by aggregate crime categories for inmates released in 2008. Property crimes had the highest 3-year recidivism rates for all three measures of recidivism.

Table 12: 3-Year Recidivism Rates by Commitment Crime Type for 2008 Releases

	3-Year Rearrests		3-Year Reincarcerations		3-Year Overall Recidivism	
Offense Category	**Number**	**Rate**	**Number**	**Rate**	**Number**	**Rate**
Part I						
Murder/ Manslaughter	144	33.0%	145	33.3%	227	52.1%
Forcible Rape	78	25.8%	71	23.5%	149	49.3%
Robbery	881	52.8%	806	48.4%	1050	63.0%
Aggravated Assault	567	48.8%	516	44.4%	700	60.2%
Burglary	504	52.6%	457	47.7%	695	72.5%
Theft/Larceny	526	53.7%	449	45.9%	639	65.3%
Arson	17	21.3%	21	26.3%	37	46.3%
Total: Part I	**2,717**	**48.6%**	**2,465**	**44.1%**	**3,497**	**62.6%**
Part II						
Other Assault	103	51.8%	59	29.6%	123	61.8%
Fraud	20	47.6%	15	35.7%	38	90.5%
Stolen Property	148	63.0%	116	49.4%	187	79.6%
Forgery	100	49.5%	85	42.1%	131	64.9%
Statutory Rape	5	41.7%	3	25.0%	6	50.0%
Other Sexual Offenses	120	31.8%	99	26.3%	227	60.2%
Drug Offenses	2,143	50.6%	1,695	40.0%	2,427	57.3%
Weapons	279	60.0%	206	44.3%	333	71.6%
DUI	184	27.6%	169	25.4%	256	38.4%
Prison Breach	126	62.4%	103	51.0%	144	71.3%
Kidnapping	16	39.0%	16	39.0%	30	73.2%
Part II Other	670	48.4%	625	45.2%	783	56.6%
Total: Part II	**3,914**	**48.5%**	**3,191**	**39.6%**	**4,685**	**58.1%**
Grand Total	**6,631**	**48.6%**	**5,656**	**41.4%**	**8,182**	**59.9%**

NOTE: The total 3-year reincarceration, rearrest, and overall recidivism rates do not match the 3-year rates presented at the beginning of the report due to missing offense category data. Also, rearrest totals are missing 30 of the original incarceration offenses.

Table 13: 3-Year Recidivism Rates by Aggregate Crime Category for 2008 Releases

Crime Category	Rearrest Rate	Reincarceration Rate	Overall Recidivism Rate
Violent	45.6%	40.9%	59.9%
Property	52.7%	45.8%	69.2%
Drugs	50.6%	40.0%	57.3%
Public Order/Other	46.3%	40.6%	55.8%

Table 14: Breakdown of 3-Year Rearrests by Rearrest Crime Type for 2008 Releases

Offense Category	Rearrests	% of Total
Part I		
Murder/ Manslaughter	84	1.3%
Forcible Rape	40	0.6%
Robbery	281	4.2%
Aggravated Assault	287	4.3%
Burglary	278	4.2%
Theft/Larceny	804	12.1%
Arson	5	0.1%
Total: Part I	**1,779**	**26.7%**
Part II		
Other Assault	230	3.5%
Fraud	107	1.6%
Stolen Property	290	4.4%
Forgery	8	0.1%
Statutory Rape	0	0.0%
Other Sexual Offenses	165	2.5%
Drug Offenses	1,931	29.0%
Weapons	299	4.5%
DUI	585	8.8%
Prison Breach	166	2.5%
Kidnapping	6	0.1%
Part II Other	1,095	16.4%
Total: Part II	**4,882**	**73.3%**
Grand Total	**6,661**	**100.0%**

Table 14 displays the crime type of the most serious rearrest charge for inmates released in 2008 who were rearrested within three years. Part I crimes accounted for 26.7% of the rearrests within 3 years of release. Almost half of the crimes that released inmates were rearrested for were in the theft/larceny category. Other common Part I crimes that released inmates were arrested for were: Aggravated Assault, Burglary, and Robbery. Part II crimes accounted for the other 73.3% of the crimes for which released inmates were rearrested for within three years of their 2008 release from a Pennsylvania state prison. Four out of 10 of the Part II rearrests were drug offenses. Other significant Part II offenses that released inmates were rearrested for DUIs and a variety of other minor offenses (i.e., "Part II Other").

Figure 19: 3-Year Rearrest Rates as a Percent of Total Rearrests

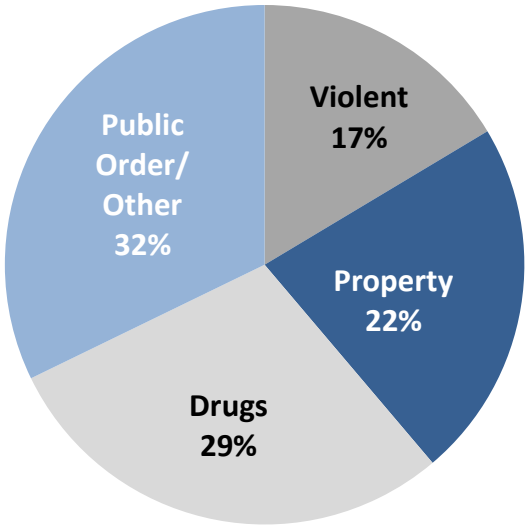


Figure 19 depicts the percentage breakdown of rearrest into aggregate crime categories: violent, property, drugs, and public order/other[8]. The highest percentage of rearrests occurred for Public Order/ Other (32.3%), followed by Drug offenses (29.0%), Property crimes (22.4%), and Violent crimes (16.3%). As mentioned previously, the types of crime that a released inmate was rearrested for is not necessarily the same type of crime that he/she was originally incarcerated for.

SECTION 5: Recidivism Rates By Crime Type Specialization

Table 15: 3-Year Rearrest by Commitment and Rearrest Crime Types (2008 Releases)

Crime Type for Original Commitment	Rearrest Crime Type				
	Violent	*Property*	*Drugs*	*Public Order/ Other*	*No Rearrest*
Violent	**13.1%**	9.0%	10.4%	12.7%	54.8%
Property	7.1%	**24.7%**	9.0%	11.9%	47.3%
Drugs	7.3%	8.0%	**22.4%**	12.8%	49.4%
Public Order/Other	7.7%	11.2%	12.3%	**16.8%**	52.1%

In this report, crime type specialization is defined as the propensity for released inmates to be rearrested for a crime type that is the same as the crime type for the original commitment. Table 15 displays the combination of commitment crime types (the rows) and the percentage of different rearrest crime types (including the possibility of no rearrest within three years). This allows us to examine what proportion of those who were initially committed for each of the four crime categories were rearrested for the same crime category, or for a different category. The values in the diagonals of the table (highlighted in yellow) represent the proportion recidivating for the same crime type as their commitment offense (i.e., specialists). The values in the off-diagonals represent the proportion committing different crime types than their commitment offense (i.e., non-specialists).

According to Table 15, some degree of specialization seems to exist among the inmates released in 2008. The tendency of specialization is particularly stronger for property and drug crimes. Released inmates who were originally incarcerated for property crimes returned to property crimes at a 24.7% rearrest rate, while rearrests for violent (7.1%), drugs (9.0%), and public order/other (11.9%) crimes were at lower rates. Released inmates who were incarcerated for drug crimes returned to drug crimes at a 22.4% rate, while violent (7.3%), property (8.0%), and public order/other (12.8%) crimes were at significantly lower rates.

Specialization is less evident in violent and public order crimes. Those who were originally incarcerated for violent crimes were rearrested for a violent crime 13.1% of the time, a slightly higher rate than the rates for public order/other (12.7%), drugs (10.4%), and property (9.0%). Finally, inmates originally incarcerated for public order/other crimes returned to public order/other rearrests at 16.8%, which is higher than the rates for drugs (12.3%), property (11.2%), and violent (7.7%). Overall, this specialization pattern of property and drug offenders tend to have higher propensity to repeat similar crimes is consistent with what has been found in national recidivism studies. In general, released inmates tend to generalize rather than specialize in their recidivism crime types.

SECTION 6: Recidivism Rates By Type of Release

Table 16: 3-Year Recidivism Rates by Type of Release for 2008 Releases

Type of Release	Reincarceration Rate	Rearrest Rate
Parole	50.5%	47.1%
Max Out	20.4%	62.0%

Table 17: 3-Year Recidivism Rates by Type of Parole Release for 2008 Releases

Type of Parole	Reincarceration Rate	Rearrest Rate
Initial Parole	46.9%	43.7%
Reparole	58.6%	55.1%

Table 18: 3-Year Breakdown of Reincarceration by Type of Return for 2008 Parole Releases

Type of Return	% of Total Returns
Technical Parole Violator	61.5%
Convicted Parole Violator	33.4%
New Court Commitment	5.0%

NOTE: Does not include 2008 Releases who maxed out their sentences. All Max Out releases should return as new court commits in the event that they return to prison.

For an in-depth description of the recidivism flow in the Pennsylvania state correctional system, refer to Figure 1 on page 6. According to Table 16, 50.5% of the inmates released on parole in 2008 were reincarcerated within three years, while only 20.4% of the released inmates who maxed out in 2008 were reincarcerated within three years. The higher reincarceration rate for paroled inmates is likely due to violating the conditions of their parole, since prisoners who max-out are not subject to such conditions. Of the inmates released in 2008 who were paroled, 47.1% were rearrested within three years while 62.0% of those who maxed out were rearrested within three years.

According to Table 17, 46.9% of the inmates paroled in 2008 for the first time (initial parole) were reincarcerated within three years of their release, while 59.8% of the inmates paroled in 2008 for the second or more time (reparole) were reincarcerated within three years of their release. Of those paroled in 2008, 43.7% paroled for the first time were rearrested within three years, while 55.1% of those paroled for the second or more time were rearrested within three years.

Of the parolees who were reincarcerated within three years of their 2008 release date, 61.5% were returned as TPVs (see Table 18). Another 33.4% of reincarcerated parolees were returned as CPVs. The remaining 5.0% were reincarcerated through the court system as a new court commitment.

SECTION 7: Recidivism as a Fraction of Total Arrests

Table 19: 2010 Pennsylvania Crime Types by Released Offenders

	Violent	Property	Drugs	TOTAL
Arrests of Released Inmates in 2010	2,506	4,661	5,087	12,254
Total Arrests in 2010[9]	20,275	48,739	51,443	120,457
% of Arrests Attributable to Released Inmates	**12.4%**	**9.6%**	**9.9%**	**10.2%**

Table 19 depicts the most serious crimes per arrest by released inmates in Pennsylvania as a percentage of the total Part I[10] arrests in Pennsylvania in 2010. Inmates released from a Pennsylvania state prison between 2000 and 2010 were included in this analysis.

In Table 19, the 2010 crimes committed by released inmates are broken down into Violent (12.4%), Property (9.6%), and Drugs (9.9%) categories. These three crime categories were used to produce an average of 10.2%, the best estimate for the *total serious crime* in a year attributable to released inmates in Pennsylvania. The serious crimes included in the Violent category were murder, manslaughter, forcible rape, robbery, and aggravated assault. The serious crimes included in the Property category were burglary, larceny/theft, motor vehicle theft, and arson. All drug offenses were included in the Drugs category.

Table 20 shows the arrest rates of inmates released from a Pennsylvania state prison between 2000 and 2010 as a ratio of the arrest rates for the general civilian population at risk for arrest in the time frame. For example, the violent crime arrest rate for released inmates in 2010 was 2,905 per 100,000 released inmates. Conversely, the violent crime arrest rate for the general population in Pennsylvania was 205 per 100,000 individuals in 2010. These rates indicate that released inmates were 14 times more likely to be arrested for a violent crime in Pennsylvania in 2010 than individuals in the general population. Following this logic, inmates released from a Pennsylvania prison between 2000 and 2010 were 11 times more likely to be arrested for property and drug crimes in 2010. Overall, inmates released from a Pennsylvania state prison between 2000 and 2010 were 12 times more likely to be arrested for a crime in 2010 than the general population.

Overall comparisons are misleading though. Inmates released in 2000 were far less likely to be arrested in 2010 than inmates released in 2009. In fact, inmates released in 2000 were only three times more likely to be arrested in 2010 than the general population. Conversely, inmates released in 2009 were 17 times more likely to be arrested in 2010 than the general population (18 times more likely for violent crimes, 16 times for property crimes, and 17 times for drug crimes). This suggests that recidivism is mostly attributable to recently released inmates, and the longer that released inmates remain arrest free, the less likely that they are to be rearrested.

Table 20: 2010 Pennsylvania Crime Types by Released Offenders As a Ratio of General Population[11]

	Violent	Property	Drugs	TOTAL
Arrest Rate for Released Inmates in 2010	2,905	5,403	5,896	14,203
Arrest Rate for General Population in 2010	205	492	519	1,216
Ratio (Released Inmate/General Public)	**14-to-1**	**11-to-1**	**11-to-1**	**12-to-1**

SECTION 8: Cost of Recidivism

Table 21: Cost Savings by Reduction in 1-Year Reincarceration Rate

1-Year Reincarceration Rate	Annual Bed Days	Annual Cost Savings (in millions)
Reduced by 1 Percentage Points	48,768	$0.8
Reduced by 5 Percentage Points	234,930	$15.0
Reduced by 10 Percentage Points	475,035	$44.7

Figure 20: Percent of Admissions In PA DOC Attributable to Recidivists

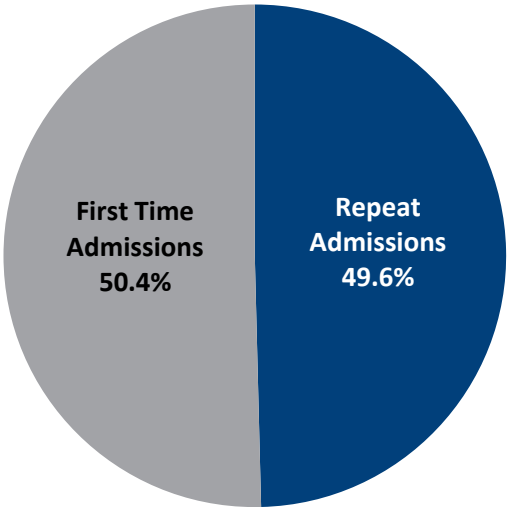


Table 22: Cost Savings by Reduction in Admissions of Previously Released Inmates

Admissions of Released Inmates	Annual Bed Days	Annual Cost Savings (in millions)
Reduced by 1 Percentage Points	25,024	$0.4
Reduced by 5 Percentage Points	126,626	$3.9
Reduced by 10 Percentage Points	257,573	$16.5

Table 21 shows the estimated annual cost savings by reducing the 1-year reincarceration rate by one, five, and 10 percentage points. The cost savings were calculated by taking the released inmates who were reincarcerated in 2010, from the 2009 and 2010 releases, and reducing their numbers to attain a reincarceration rate of one, five, and 10 percentage points lower. Based on a 10 percentage point reduction in the 1-yr recidivism rate, the PA DOC would save approximately 475,035 bed-days, or approximately $44.7 million annual cost savings.

Further, a second calculation was performed to estimate the annual cost savings that the PA DOC could achieve by reducing the number of admissions of inmates who had been previously released from a Pennsylvania state prison (i.e., repeat offenders, or recidivists). This is another useful way of looking at population reduction and cost savings from recidivism reduction. As depicted in Figure 20, approximately 49.6% of the total annual state prison admissions in 2010 were offenders who had previously served time in a Pennsylvania state prison. Just slightly more than half (50.4%) of the admissions in 2010 were first time inmates.

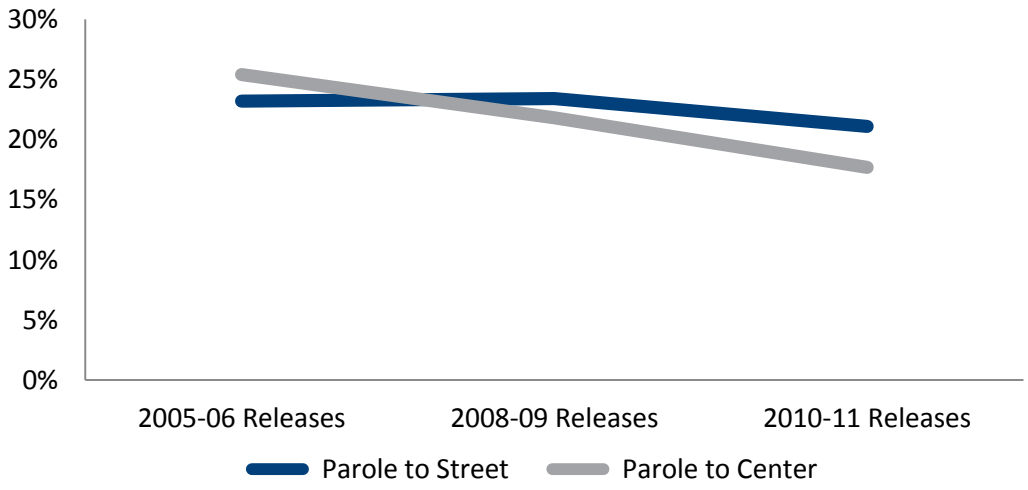
Recidivists who are admitted to state prison take up approximately 1.3 million bed-days in a given year, at a cost of $121.2 million per year. If the percentage of DOC admissions who had at least one prior state prison admission was reduced by 10 percentage points (39.6% of admissions rather than 49.6%), this reduction in annual recidivist admissions would result in an annual bed-day reduction of approximately 257,573 beds, or an annual cost savings of $16.5 million.

Section 9: Community Corrections Recidivism

Table 23: Rearrest Rates by Parole Release Type

Release Year	6-Month Rearrests		1-Year Rearrests		3-Year Rearrests	
	Parole to Street	Parole to Center	Parole to Street	Parole to Center	Parole to Street	Parole to Center
2005-06 Releases	12.0%	11.7%	23.2%	25.4%	49.2%	52.5%
2008-09 Releases	12.2%	10.0%	23.4%	21.8%	48.1%	47.1%
2010-11 Releases	11.8%	8.9%	21.1%	17.7%	N/A	N/A

Figure 21: 1-Year Rearrest Rates by Parole Release Type



Community Corrections Centers (CCCs), also known as halfway houses, provide a transitional process by allowing residents monitored contact with jobs and reentry services. The CCCs house inmates granted parole by the Pennsylvania Board of Probation and Parole. The PA DOC also contracts with private vendors (CCFs) to provide specialized treatment and transitional supervision services, many in the area of substance abuse programming.

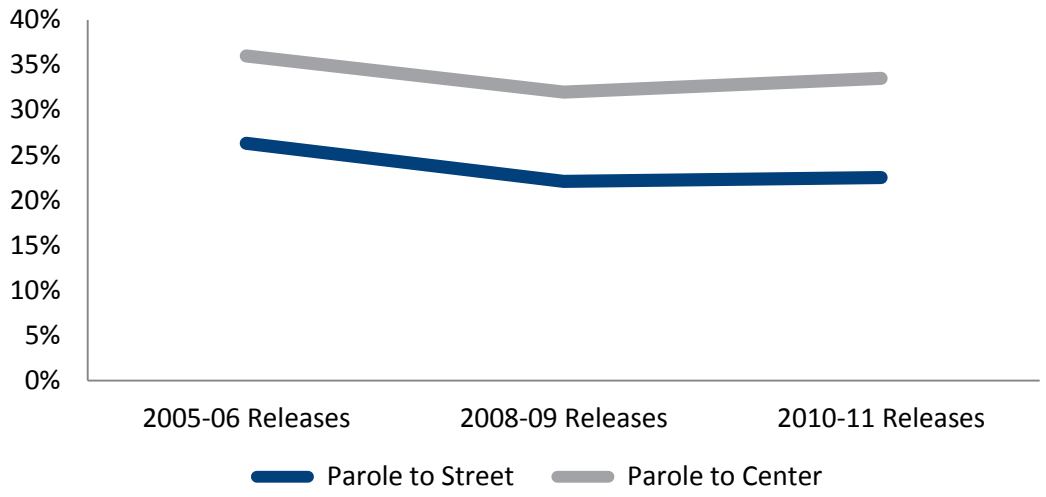
According to Figure 21, the 1-year rearrest rates of releases who were paroled directly home (i.e., "to the street") were lower than for those paroled to a Community Corrections Center (CCC) in 2005 and 2006. From 2008 to 2011, the 1-year rearrest rates were higher for those paroled to the street.

Table 23 shows that the 1-year rearrest rates of those paroled to a CCC have declined over time. The 1-year rearrest rate of 2005-06 releases paroled to a CCC was 25.4%, while the 1-year rearrest rate was 17.7% for the 2010-11 releases. This trend did not hold for those paroled to the street, whose 1-year rearrest rates held steady and then declined for the 2010-11 releases.

Table 24: Reincarceration Rates by Parole Release Type

Release Year	6-Month Reincarcerations		1-Year Reincarcerations		3-Year Reincarcerations	
	Parole to Street	Parole to Center	Parole to Street	Parole to Center	Parole to Street	Parole to Center
2005-06 Releases	11.8%	18.1%	26.3%	36.0%	47.5%	58.7%
2008-09 Releases	9.3%	16.1%	22.1%	32.0%	44.0%	53.3%
2010-11 Releases	9.8%	19.3%	22.5%	33.5%	N/A	N/A

Figure 22: 1-Year Reincarceration Rates by Parole Release Type



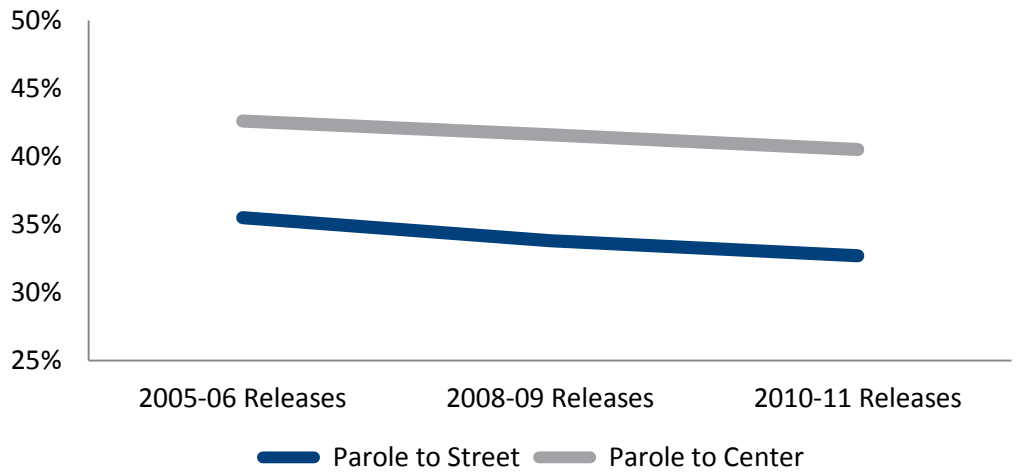
According to Figure 22, the 1-year reincarceration rates of releases from 2005 to 2011 for those who were paroled to the street were consistently lower than for hose paroled to a CCC.

Also, the 1-year reincarceration rates seemed to be declining over time, despite a slight increase for the most recent releases. The 1-year reincarceration rate of 2005-06 releases who were paroled to a CCC was 36.0%, whereas the 1-year reincarceration rate dropped to 33.5% for the 2010-11 releases to a CCC. Mirroring this trend, the 1-year reincarceration rate of 2005-06 releases paroled to the street was 26.3%, whereas the 1-year rate dropped to 22.5% for the 2010-11 releases. Table 24 shows the 6-month and 3-year reincarceration rates for the same release years. In each case, the reincarceration rates are higher for those paroled to a CCC than for those paroled to the street.

Table 25: Overall Recidivism Rates By Parole Release Type

Release Year	6-Month Overall Recidivism		1-Year Overall Recidivism		3-Year Overall Recidivism	
	Parole to Street	Parole to Center	Parole to Street	Parole to Center	Parole to Street	Parole to Center
2005-06 Releases	18.6%	22.8%	35.5%	42.6%	61.5%	68.6%
2008-09 Releases	17.4%	22.1%	33.8%	41.6%	59.7%	66.7%
2010-11 Releases	18.1%	24.0%	32.7%	40.5%	N/A	N/A

Figure 23: 1-Year Overall Recidivism Rates By Parole Release Type



According to Figure 23, the 1-year overall recidivism rates of releases from 2005 to 2011 who were paroled to the street were consistently lower than for those who were paroled to a CCC.

Also, the overall recidivism rates seem to be decline over time. The 1-year overall recidivism rate for 2005-06 releases to a CCC was 42.6%. For 2010-11 releases to a CCC, the 1-year overall recidivism rate decreased to 40.5%. Mirroring this trend, the 1-year overall recidivism rate for 2005-06 releases to the street was 35.5%, but for 2010-11 releases to the street the 1-year rate dropped to 32.7%. Table 25 also shows the 6-month and 3-year overall recidivism rates for the same release groups. In each case, the overall recidivism rates have been higher for those paroled to a CCC than for those paroled to the street.

The descriptive comparison of recidivism rates by parole release type in the previous pages is informative, but the observed differences in the recidivism rates may not represent statistically significant differences and may be due to chance variation or the influence of factors that vary between those who are paroled to the street and those who are paroled to a center which are not yet accounted for. Table 26 shows the overall recidivism rates by parole release type while controlling for various important predictors of recidivism such as age, race, prior criminal history, and risk score (LSI-R)[12]. The differences in modeled recidivism rates by parole release type essentially mirror the descriptive differences in Table 25. Across the various release years (2005-2006, 2008-2009, 2010-2011), the recidivism rates of those who are paroled to a center are about 5 percentage points higher than the rates of those who are paroled to the street, despite the differences being narrower than the descriptive differences in Table 25 as a result of statistically accounting for the other factors mentioned above (e.g., age, race, prior criminal history, etc.).

Table 26: Modeled Overall Recidivism Rates by Parole Release Type

Release Year	6-Month Overall Recidivism		1-Year Overall Recidivism		3-Year Overall Recidivism	
	Parole to Street	Parole to Center	Parole to Street	Parole to Center	Parole to Street	Parole to Center
2005-06 Releases	17.0%	20.2%	34.1%	39.5%	63.2%	67.9%
2008-09 Releases	16.4%	19.7%	33.1%	38.8%	61.2%	65.7%
2010-11 Releases	17.6%	22.6%	32.3%	38.1%	N/A	N/A

Pittsburgh CCC

The higher recidivism rates of those who are paroled to a center do not necessarily indicate that the parolee's chance of recidivating increases as a result of being sent to a center. It could indicate that close monitoring provided by the centers (and to some degree Parole staff) help detect violating behaviors of parolees (criminal or otherwise) that would remain undetected if parolees did not live in centers. If this is true and centers essentially better detect violating behaviors and remove high-risk parolees from centers through arrests and reincarcerations, then we might expect that those parolees who are discharged from centers without recidivism have lower recidivism rates. Also, those who are successfully discharged from a center may benefit from the programs and treatments they receive while at the center. In order to examine this possibility further, we compared the recidivism rates of those who were discharged from a center and stayed recidivism-free for at least six months after their release from prison with those who were paroled to the street and stayed recidivism-free for at least 6 months.

The results in Table 27 show that among those who remained recidivism-free for at least six months, there was no statistically significant difference in overall recidivism rates between parolees who were assigned to a center and discharged successfully and parolees who were paroled to the street, both at one year after their release from prison (19.0% vs. 18.0% respectively) and three years after their release from prison (53.0% vs. 52.0% respectively).[13] We also looked at whether the length of stay at a center matters to the recidivism rates of parolees who were discharged from a center and stayed recidivism-free for at least six months. Again, the recidivism rates of those who were assigned to a center were statistically no higher than the rates of those who were paroled to the street, but those who stayed at a center for three to six months actually had statistically lower recidivism rates than those paroled to the street. The fact that a longer stay at a center is associated with lower recidivism rates than the rates of those paroled to the street is consistent with the possibility that centers efficiently detect and help sanction violations and remove high-risk parolees so that those who are successfully discharged from a center consist of relatively low-risk parolees. Regardless of the explanation, we were able to substantiate in this analysis at least one comparison where those who were paroled to a center had a lower recidivism rate than those who were paroled directly to the street.

Table 27: Modeled Overall Recidivism Rates by Six Month Survival Time

Parole Type	Overall Recidivism Rates	
	1-Year	3-Year
Parole To Center	19.0%	53.0%
< 1 Month	17.0%	60.0%
1 to <3 Months	19.0%	54.0%
3 to <6 Months	15.0%*	50.0%
Parole To Street	18.0%	52.0%

NOTE: Parole To Center 3 to <6 Months 1-Year Overall Recidivism rate is significantly different from Parole To Street at $p < .05$

Figure 24: 1-Year Overall Recidivism Rate Percentage point Difference Compared to Parole To Street

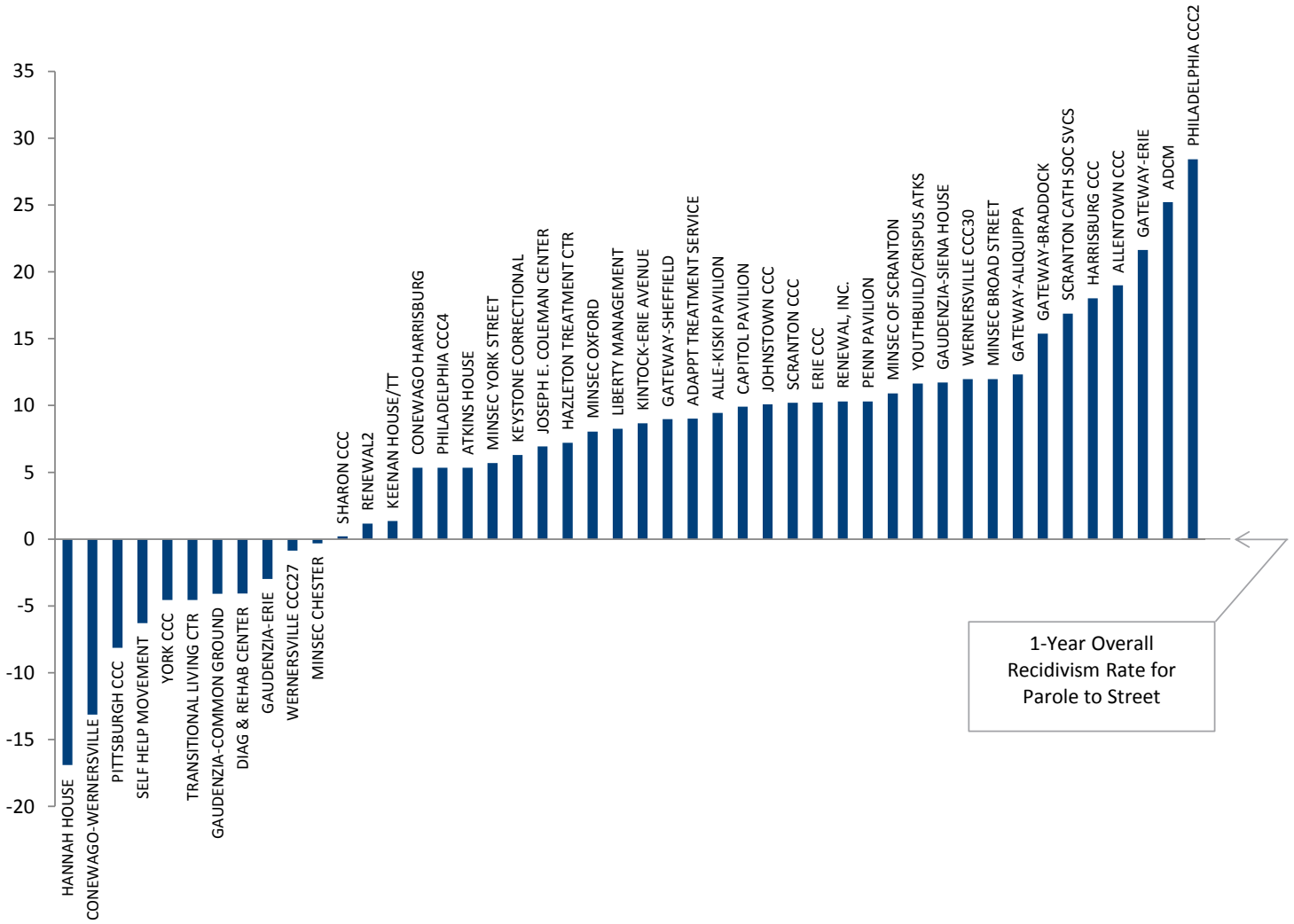


Figure 24 shows the overall recidivism rates for all the individual Community Corrections Centers (CCCs) and contracted facilities (CCFs) with more than 10 parolees, in comparison to the recidivism rate of those who are paroled to the street. By setting the recidivism rate of the "parole to the street" group at zero, the recidivism rates for the centers are shown as the percentage points higher or lower than the recidivism rates of parole to the street, ordered from lowest to highest. Reflecting the overall patterns in Table 25, only about a quarter of the centers have lower recidivism rates than those paroled to the street, and the majority of centers have much higher recidivism rates than those paroled to the street.

The next three tables and figures (tables 28-30, figures 25-27) show the recidivism rates for some of the major contractors of community corrections facilities in Pennsylvania, along with the recidivism rate of state-run community corrections centers. The recidivism rates are displayed by the type of recidivism measure (rearrest, reincarceration, overall recidivism), by the release year (2005-2006, 2008-2009, 2010-2011), and by the length of follow-up period (6 months, 1 year, 2 years). Aside from several contractors and the state-run centers showing lower rearrest rates than those parole to the street across different release years and follow-up times, the contract facilities and the state-run centers almost always show higher overall recidivism rates.

There are several ways to display comparisons between contractors and state-run centers in terms of recidivism rates. One way is to look at the rank order of contractors and state-run centers by recidivism rates across different recidivism measures. For the 3-year follow-up, Gateway and Minsec facilities tend to have the highest recidivism rates for rearrest, reincarceration, and overall recidivism based on the 2008-09 releases, as shown in figures 25-27.

Interestingly, CEC is one of the contractors with the highest 3-year rearrest rates, but had the lowest reincarceration rate among contractors and state-run centers, although still higher than those who were paroled to the street. Firetree and Renewal consistently demonstrated fairly low recidivism rates across recidivism measures, according to figures 25-27. Another way to evaluate comparisons between contractors and state-run centers in terms of recidivism is to look at the relative change of recidivism rates over time (across release years). For the 6-month and 1-year overall recidivism rates, Gateway demonstrated the largest increase in recidivism over time, whereas Renewal demonstrated the largest decrease in recidivism over time. Firetree also demonstrated a large increase in overall recidivism over time, at least for the 1-year rate. Kintock showed highly fluctuating rates, with a large drop from 2005-06 to 2008-09, but then an increase from 2008-09 to 2010-11. Yet another way to assess comparisons in recidivism rates is to examine rates across the three follow-up periods (6-months, 1-year, and 3-year). Gateway and the state run centers are both again among the top highest overall recidivism rates across the three different follow-up periods.

Johnstown CCC

Table 28: Rearrest Rates By Vendor

Vendor (# of Centers)	2005-06 Release Cohort			2008-09 Release Cohort			2010-11 Release Cohort		
	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year
CEC (4)	14.8%	31.5%	54.9%	12.4%	21.6%	51.6%	9.0%	19.1%	N/A
Firetree (4)	6.5%	15.2%	47.8%	9.8%	19.7%	39.3%	9.2%	16.9%	N/A
Gaudenzia (9)	6.7%	13.5%	50.0%	9.2%	20.2%	46.8%	6.6%	11.6%	N/A
Gateway (4)	7.1%	19.0%	38.1%	9.1%	25.8%	51.5%	10.3%	21.8%	N/A
Kintock (2)	14.9%	31.0%	63.2%	9.6%	22.8%	47.1%	13.3%	26.7%	N/A
Minsec (7)	15.2%	30.3%	59.3%	10.8%	22.9%	50.7%	6.4%	12.3%	N/A
Renewal (2)	3.4%	24.1%	48.3%	3.6%	16.4%	29.1%	2.8%	9.7%	N/A
Parole To Street	12.0%	23.2%	49.2%	12.2%	23.4%	48.1%	11.8%	21.1%	N/A
Parole To CCC	9.2%	24.6%	48.6%	10.4%	20.4%	42.5%	13.2%	23.9%	N/A
Parole To CCF	12.1%	25.5%	53.2%	9.8%	22.1%	48.1%	8.3%	16.8%	N/A

Figure 25: 3-Year Rearrest Rate Percentage Point Difference Compared to Parole to the Street (2008-2009 Releases)

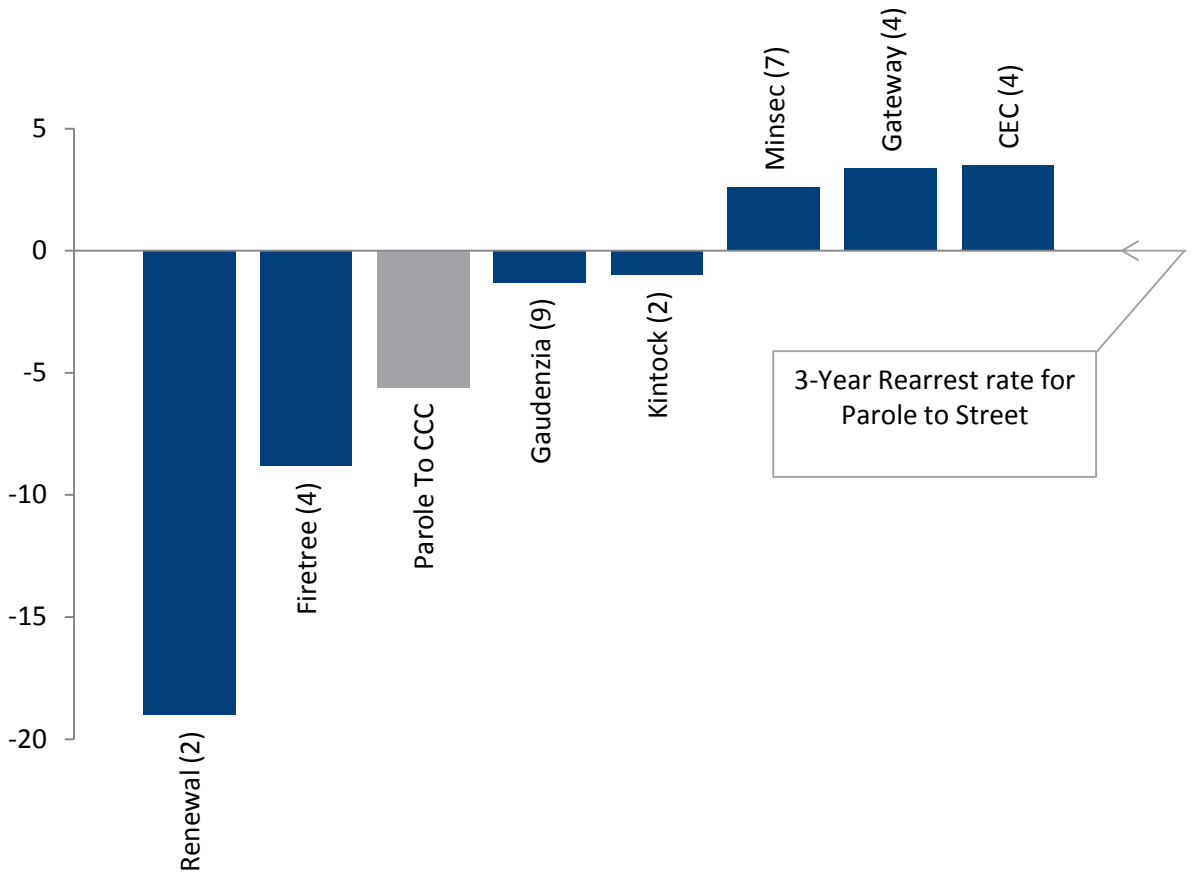


Table 29: Reincarceration Rates by Vendor

Vendor (# of Centers)	2005-06 Release Cohort			2008-09 Release Cohort			2010-11 Release Cohort		
	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year
CEC (4)	17.3%	40.7%	61.7%	16.0%	33.2%	51.6%	21.1%	36.0%	N/A
Firetree (4)	15.2%	27.2%	56.5%	19.7%	24.6%	55.7%	13.8%	38.5%	N/A
Gaudenzia (9)	17.3%	33.7%	52.9%	12.8%	37.6%	56.0%	17.2%	26.8%	N/A
Gateway (4)	19.0%	35.7%	54.8%	18.2%	36.4%	56.1%	27.6%	54.0%	N/A
Kintock (2)	21.8%	47.1%	69.0%	14.0%	27.2%	52.9%	16.7%	36.7%	N/A
Minsec (7)	17.2%	35.2%	57.2%	17.9%	33.2%	56.5%	22.8%	34.2%	N/A
Renewal (2)	27.6%	48.3%	72.4%	12.7%	30.9%	54.5%	16.7%	34.7%	N/A
Parole To Street	11.8%	26.3%	47.5%	9.3%	22.1%	44.0%	9.8%	22.5%	N/A
Parole To CCC	26.1%	40.1%	62.0%	20.4%	34.6%	53.3%	17.6%	30.2%	N/A
Parole To CCF	16.7%	35.3%	58.1%	15.1%	31.4%	53.2%	19.5%	34.0%	N/A

Figure 26: 3-Year Reincarceration Rate Percentage Point Difference Compared to Parole to the Street (2008-2009 Releases)

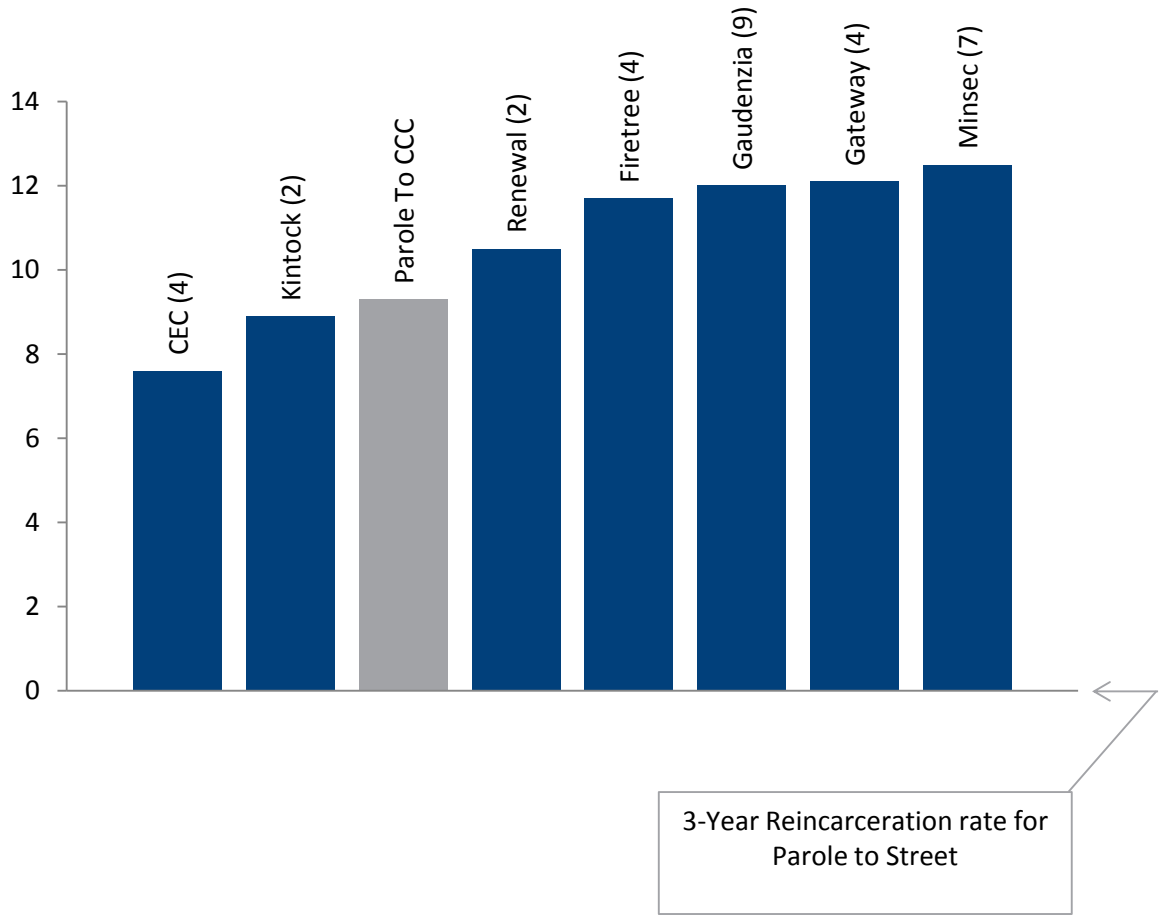
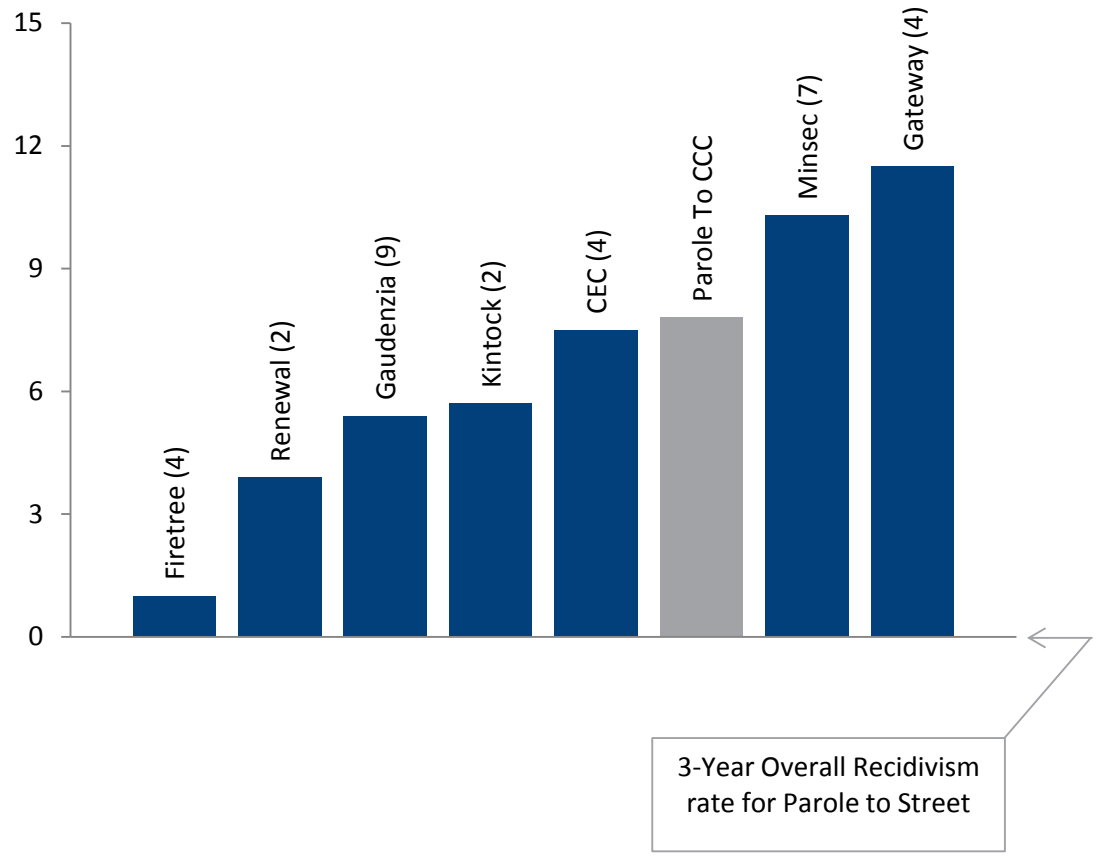


Table 30: Overall Recidivism Rates By Vendor

Vendor (# of Centers)	2005-06 Releases			2008-09 Releases			2010-11 Releases		
	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year	6-Month	1-Year	3-Year
CEC (4)	22.2%	45.1%	71.0%	24.0%	41.2%	67.2%	24.4%	42.1%	N/A
Firetree (4)	18.5%	31.5%	64.1%	26.2%	39.3%	60.7%	18.5%	43.1%	N/A
Gaudenzia (9)	18.3%	36.5%	65.4%	18.3%	43.1%	65.1%	22.2%	33.3%	N/A
Gateway (4)	26.2%	45.2%	64.3%	21.2%	43.9%	71.2%	32.2%	59.8%	N/A
Kintock (2)	25.3%	48.3%	78.2%	19.1%	37.5%	65.4%	21.7%	41.7%	N/A
Minsec (7)	22.8%	42.1%	69.7%	23.8%	41.3%	70.0%	24.7%	38.8%	N/A
Renewal (2)	31.0%	62.1%	75.9%	14.5%	41.8%	63.6%	18.1%	40.3%	N/A
Parole To Street	18.6%	35.5%	61.5%	17.4%	33.8%	59.7%	18.1%	32.7%	N/A
Parole To CCC	30.3%	47.9%	70.4%	27.9%	45.4%	67.5%	27.3%	42.0%	N/A
Parole To CCF	21.5%	41.6%	68.3%	20.8%	40.7%	66.5%	23.5%	40.3%	N/A

Figure 27: 3-Year Overall Recidivism Rate Percentage Point Difference Compared to Parole to the Street (2008-2009 Releases)



Appendix A—Technical Definition of Recidivism/Data Sources

Definition of Recidivism

The PA DOC identifies a recidivist as an inmate who, after release from prison, commits a new offense or violates parole, resulting in an arrest, an incarceration, or both. It is important to note that this report only captures recidivism events that occurred in Pennsylvania, and does not include recidivism events that may have occurred in another state. The recidivism rate for rearrests, reincarcerations, and overall recidivism is calculated using:

$$Recidivism\ Rate\ (t, y) = \frac{\#\ \text{of released inmates who recidivated within time period t}}{\#\ \text{of total releases in calendar year y}}$$

where *t* is length of recidivism follow-up time and *y* is the release year.

The PA DOC has generally defined its benchmark recidivism follow-up period as three years after prison release. This follow-up period is generally recognized as an optimal follow-up period for capturing recidivism as a stable and reliable measure. In addition to three-year rates, this report also examines six-month and one-year rates, as well as at least one comparison of five-year rates.

In order to provide maximum insight into recidivism of inmates released from the PA DOC, data on arrests have been collected in addition to standard reincarceration data. Arrest data was used to calculate rearrest rates for released inmates. Many recidivism studies use multiple measures of recidivism, including rearrest and reincarceration rates.

Recidivism rates for Community Corrections Centers (CCCs) and Contract Facilities (CCFs) were only calculated for those who were paroled from prison to a Center. This report did not examine recidivism rates for Center residents who were in a Center for a technical parole violation (e.g., "halfway back" cases and TPV Center cases). Recidivism rates for pre-release offenders in Centers were not included either. To maximize comparability between those paroled to a Center and those paroled "to the street", this report further only examined the sub-set of parole release cases who received a "parole to an approved home plan" Parole Board action, some who transitioned through a Center (i.e., the "Parole to Center" group) and others who were paroled directly home (i.e, the "Parole to Street" group). We think this is an important methodological improvement over previous attempts to evaluate recidivism rates for Pennsylvania's CCCs and CCFs.

Data Sources: Releases and Reincarceration Data

Reincarceration data for this report was extracted from PA DOC internal databases by the Bureau of Planning, Research and Statistics. The data used represents released inmates by release year. Demographic information (e.g., age, sex, race) and commitment data (e.g., primary offense type) was collected from release records. Only inmates released permanently were included- that is, the releases included all inmates whose incarceration sentence had been satisfied. This includes some inmates whose sentence involves a period of post-prison supervision.

Data Sources: Rearrest Data

The Pennsylvania State Police (PSP) provided arrest data for this report. The PSP receives arrest reports from local police agencies within the state. Since arrest reports from local agencies are not mandated by law, this data may underreport actual arrests of released inmates. Computerized criminal history files drawn from this statewide database were used to provide arrest data to the PA DOC.

Appendix B—End Notes

1. Rearrest and Overall Recidivism rates were not available for the 20-year time period
2. Metropolitan Areas as defined by the PA Department of Labor (www.paworkstats.state.pa.us).
   Allentown : Carbon, Lehigh, Northampton
   Altoona: Blair
   Erie: Erie
   Harrisburg-Carlisle: Cumberland, Dauphin, Perry
   Johnstown: Cambria
   Lancaster: Lancaster
   Lebanon: Lebanon
   Philadelphia: Philadelphia, Delaware, Chester, Bucks, Montgomery
   Pittsburgh: Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, Westmoreland
   Reading: Berks
   Scranton-Wilkes-Barre: Lackawanna, Luzerne, Wyoming
   State College: Centre
   Williamsport: Lycoming
   York-Hanover: York
3. Race/ethnicity categories are measured as mutually exclusive, according to the inmate's response upon entry into state prison.
4. Other race/ethnicity categories are not used in this report because they make up less than 1% of the releases in any given year.
5. Age groups are determined based on equal sizes of the inmates released in 2008.
6. The number of prior arrests and incarcerations were determined based on equal groupings of the inmates released in 2008.
7. Risk score based on the LSI-R assessment given upon entry into state prison. The **LSI-R™** assessment is a quantitative survey of offender attributes and offender situations relevant for assessing criminal risk of re-offending, and making decisions about levels of supervision and treatment. The instrument's applications include assisting in the allocation of resources, helping to make probation and placement decisions, making appropriate security level classifications, and assessing treatment progress. The 54 LSI–R items include relevant factors for making decisions about risk level and treatment.
8. Breakdown of Broad Crime Categories:
   - Violent—Murder/Manslaughter, Forcible Rape, Robbery, Aggravated Assault, Other Assault, Statutory Rape, Other Sexual Offenses, Kidnapping
   - Property—Burglary, Theft/Larceny, Arson, Fraud, Stolen Property, Forgery
   - Drugs—Drug Offenses
   - Public Order/Other—Weapons, DUI, Prison Breach, Part II Other
9. Arrests according to 2010 Pennsylvania State Uniform Crime Report (PA State Police, 2012).
10. Part I crimes were only included in this analysis because some Part II crime, such as simple assaults, may not be fully reported to the Pennsylvania State Police.
11. Rates in Table 20 are per 100,000 population in Pennsylvania.
12. The complete set of controlled predictors consists of age at release, race, marital status, count of prior institutional misconducts, count of prior incarcerations, LSI-R score, violent commitment offense indicator committing county, sex offender indicator, status of completing prescribed institutional treatment, and time served in prison. The controlled predictors are set at their mean values.
13. The follow-up time of 1 year and 3 years includes the 6 months of recidivism-free time assumed for this analysis.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DANIEL BINDERUP,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Case No. 5:13-cv-06750-JKG**
ERIC H. HOLDER, JR.,	)	
Attorney General of the	)	
United States et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

NOW, this ___ day of April, 2014, upon consideration of Defendants' Consent Motion for Leave to File Combined Brief, which motion is unopposed,

IT IS ORDERED that the motion is granted. The Clerk shall mark the docket to show the filing of Defendants' Combined Brief (Exhibit A to Defendants' motion) and Exhibit 1 thereto (Exhibit B to Defendants' motion) as of April 10, 2014, the date Defendants filed their motion for leave.

BY THE COURT:

_____
James Knoll Gardner
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2014, I caused the foregoing documents to be served via e-mail and via electronic case filing, as follows:

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/s/ Daniel Riess
Daniel Riess