Plea Tracking in the Berkshire County District Attorney's Office
PART TWO

December 7, 2022

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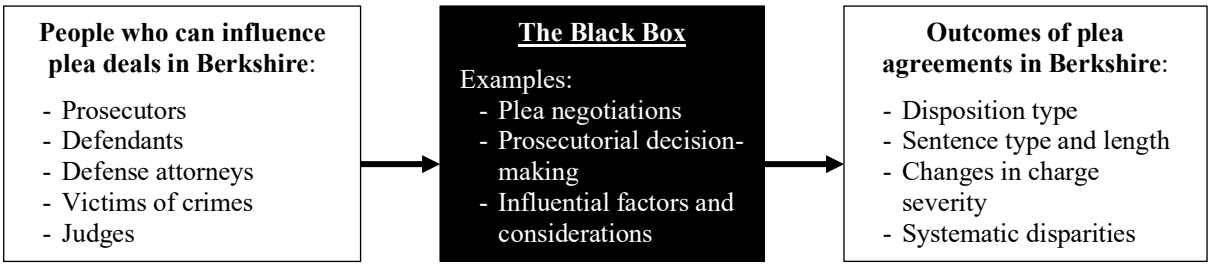
Acknowledgements: Thanks to the other researchers at the Wilson Center for Science and Justice for their help putting together this report—Dr. Beth Gifford, Dr. William Crozier, Dr. Jennifer Teitcher, Dr. Kevin Dahaghi, and Catherine Grodensky. In addition, thanks to our research assistants Sarai Chaidez, Tina Xia, Brianna Joyce, Morgan Kelleher, Alex Kumar, and Jenna Smith for their help with this report and the associated data. Finally, we are eternally grateful to Andrea Harrington and the prosecutors in the Berkshire DA's Office for committing their time and effort to this project.

OVERVIEW: The Plea Tracker Project

The Wilson Center for Science and Justice at Duke University School of Law (WCSJ) began a collaboration with the Berkshire County District Attorney's Office in 2020 to study the plea-bargaining process and plea outcomes in Berkshire, Massachusetts. The WCSJ is an interdisciplinary, non-partisan group of researchers at who conduct research and policy work relevant to the criminal legal system. Most criminal cases are resolved through settlements, or plea bargains, but that process occurs outside of court and is typically not documented. As a result, very little is known nationally, or even in any particular jurisdiction, about the process. The WCSJ plea tracking work aims to shed light on plea bargaining processes and how prosecutors use their discretion to resolve cases without a trial.

The goal of the Plea Tracker Project is to collect and analyze case-level data on plea negotiations and associated outcomes for one year in the Berkshire DA's Office. This project represents the first look at how the people important in the plea-bargaining process (to the left of the black box) may influence plea outcomes (to the right of the black box).



The Berkshire DA's Office aimed to better understand its own role by documenting the plea process and identifying aspects that can be improved. The Office is committed to increasing transparency and public trust, demonstrating the efficacy and implementation of their central policies, and identifying areas of the system that can be improved.

The WCSJ agreed to collect data to study the use of prosecutorial discretion during plea bargaining. Between August 2020 and December 2020, the Berkshire DA's Office worked directly with Dr. Quigley-McBride, a researcher at the WCSJ, to create a Plea Tracker which was pilot tested in January and February of 2021. Final revisions were made in February and March of 2021. The Office was trained on April 1, 2021.

This report reflects one year of data collection, from April 1, 2021, through April 30, 2022. These data do not include cases for which all charges were dismissed, that resulted in a trial, or that the Office declined to prosecute.

EXECUTIVE SUMMARY

Background. Given that the vast majority of cases are resolved through plea bargains, one cannot fully understand the criminal legal system without understanding the plea process. Until the Berkshire District Attorney's Office (DA's Office) began the plea tracking project, however, that process was not documented. In Massachusetts, even court-level data can be lacking. In particular, the volume of cases that come through District Court has made it particularly hard to study those cases. These data presented in this report reflect over 1,000 District Court cases. We also examine 81 Superior Court cases, shedding new light on the most serious cases resolved by plea by the Berkshire DA's Office. The focus of Part Two of this report is to examine factors that influence plea outcomes. While plea offers are communicated to the defense and may be accepted in court, prosecutors do not typically document or report what factors explain plea bargaining decisions.

Aggravating factors. What factors did prosecutors rely on to seek the most serious sentences? The top five aggravating factors were actually very similar in District and Superior Court. The nature and circumstances of the crime, public safety, criminal history, and deterrence were among the top five aggravating factors. Aggravating factors were reported more frequently in Superior Court cases, unsurprisingly, than District Court cases.

Mitigating factors. In District Court, a good criminal records, age, potential for rehabilitation, expressing remorse, and cooperating with law enforcement and the prosecutor were the top five mitigating factors. What is particularly noteworthy, though, is that in Superior Court, a higher proportion of cases reported mitigating factors. The demographic background and mental or physical health of the person charged were among the top five mitigating factors along with a good criminal record, cooperation, and playing a minor role in the crime they were charged with. More work should be done to explore how to appropriately consider mitigating evidence, given the important role it can and should play.

Race. In general, an approximately equal number of aggravating and mitigating factors were reported for Black and white people charged in both District and Superior Court. However, prosecutors reported fewer mitigating factors in cases with Black people charged in District Court. Recall from Part I, that white persons were less likely to be convicted in District Court. They were also more likely to retain a private attorney. These racial disparities will be important subjects of future study.

Charging and Sentencing Considerations. In District Court, rehabilitation and treatment (29% of the 585 District Court cases) and sentence length (28%) were most important. In contrast, in Superior Court, rehabilitative options were far less likely, and sentence length and jail time were the most important considerations (rated important in approximately two-third of cases each).

Violence, Prison, and Aggravating Factors. In both courts, people who commit violent offenses attract more aggravating sentencing factors and fewer mitigating factors, but this pattern was particularly strong in Superior Court. Prosecutors also reported considering more aggravating factors and fewer mitigating factors in cases with a prison sentence in both courts. We note that use of firearms often played and important aggravating role.

Delays and Sentencing. Both courts experienced some significant delays in cases and in many of these cases the cause was the COVID-19 pandemic. Delay influenced the leniency of 8% of District Court (49 of 585) and 34% of Superior Court cases (24 of 71).

Collateral Consequences. In District Court, the most common collateral consequence considered by prosecutors was the person losing their driver's license (19% of 585 cases). This rarely a concern in Superior Court. Other collateral consequences considered often in both courts were the ability of the person charged to contribute positively to society, obtain and maintain employment, and return to their life after serving their pled sentence. Prosecutors considered whether the plea terms would exacerbate hardship for them or their family fairly often in Superior Court (20% of 71 cases), but this was reported less often in District Court (7% of 585 cases).

Role of Judges. Judges influenced plea outcomes quite a bit. Judges disagreed with the prosecutor's recommendation in both courts—in 24% of cases in District Court and 17% of cases in Superior Court. Most of the time judges imposed a more lenient sentence that the prosecutor recommended.

Defense Attorneys. The type of defense attorney affected how much communication occurred between parties in both courts. However, the amount of communication was only weakly associated with the number of mitigating factors the prosecutor reported considering and the amount the sentence changed over the course of the plea negotiation process.

Victims. At least one victim was reported in half of cases in District Court and 38% of cases in Superior Court. A minority of these victims in each court were from vulnerable populations. In both District and Superior Court, it was rare for prosecutors to report no communication at all with a victim. The amount of communication was related to the perceived severity of the impact on the victim. Victims were frequently involved, most commonly by coming to court or a hearing. Victim involvement was reported more frequently in Superior Court. In addition, victims' opinions about the sentence were considered. In District Court, the victim believed a more lenient sentence was appropriate most of these situations. In Superior Court, there were equal numbers of cases in which the victim felt a more severe or a more lenient sentence was appropriate.

Part Two - Contents

A. What considerations did prosecutors think were most important when negotiating pleas?

Berkshire prosecutors were asked to report which charging and sentencing considerations were the most important during the plea-bargaining process in a case. They rated 12 different features of plea bargains from "very unimportant" to "very important" (e.g., sentence length, jail time, community service, restorative justice, and probation options). These considerations can affect severity of the plea outcome, and prosecutors have discretion as to which are included. This section assesses the relative importance of these considerations by court and crime type.

1. What considerations did prosecutors think were important when negotiating District Court pleas and Superior Court pleas?

Prosecutors rated the importance of several possible charging and sentencing considerations in 71 Superior Court cases (top panel in Figure 1, which can be found on the next page) and 585 District Court cases (bottom panel in Figure 1). [1]

In **District Court**, the considerations most commonly reported as "important" were rehabilitation and treatment options (rated "important" in 29% of the 585 District Court cases), sentence length (28% of cases), probation options (17% of cases), and jail time (17%). Restorative justice (13% of cases), the fines and fees (11% of cases), training and education (10% of cases), and dismissing some charges (10% of cases) were considered "very important" or "important" during negotiations occasionally. The remaining considerations were rated "important" or "very important" in fewer than 6% of District Court cases.

In **Superior Court**, sentence length and jail time[2] were the considerations most commonly reported by prosecutors as "important" (in approximately two thirds of cases in which these data were reported). Unlike other considerations, there were very few cases for which sentence length and jail time were considered "unimportant" or "very unimportant" during plea negotiations (only 4% for sentence length and 10% for jail time). Reducing charge severity was often important (42% of cases) to plea negotiations in Superior Court. Probation options, dismissing some of the charges[3], and rehabilitation and treatment options were important in Superior Court too, with prosecutors reporting they were important considerations in approximately one third of cases.

There were fewer District Court cases in which prosecutors reported *any* considerations to be "important" when compared with Superior Court cases. In fact, most considerations were "unimportant" (in at least 44% of 585 cases;). These differences are clearly demonstrated by comparing the top (Superior Court) and bottom (District Court) panels in Figure 1.

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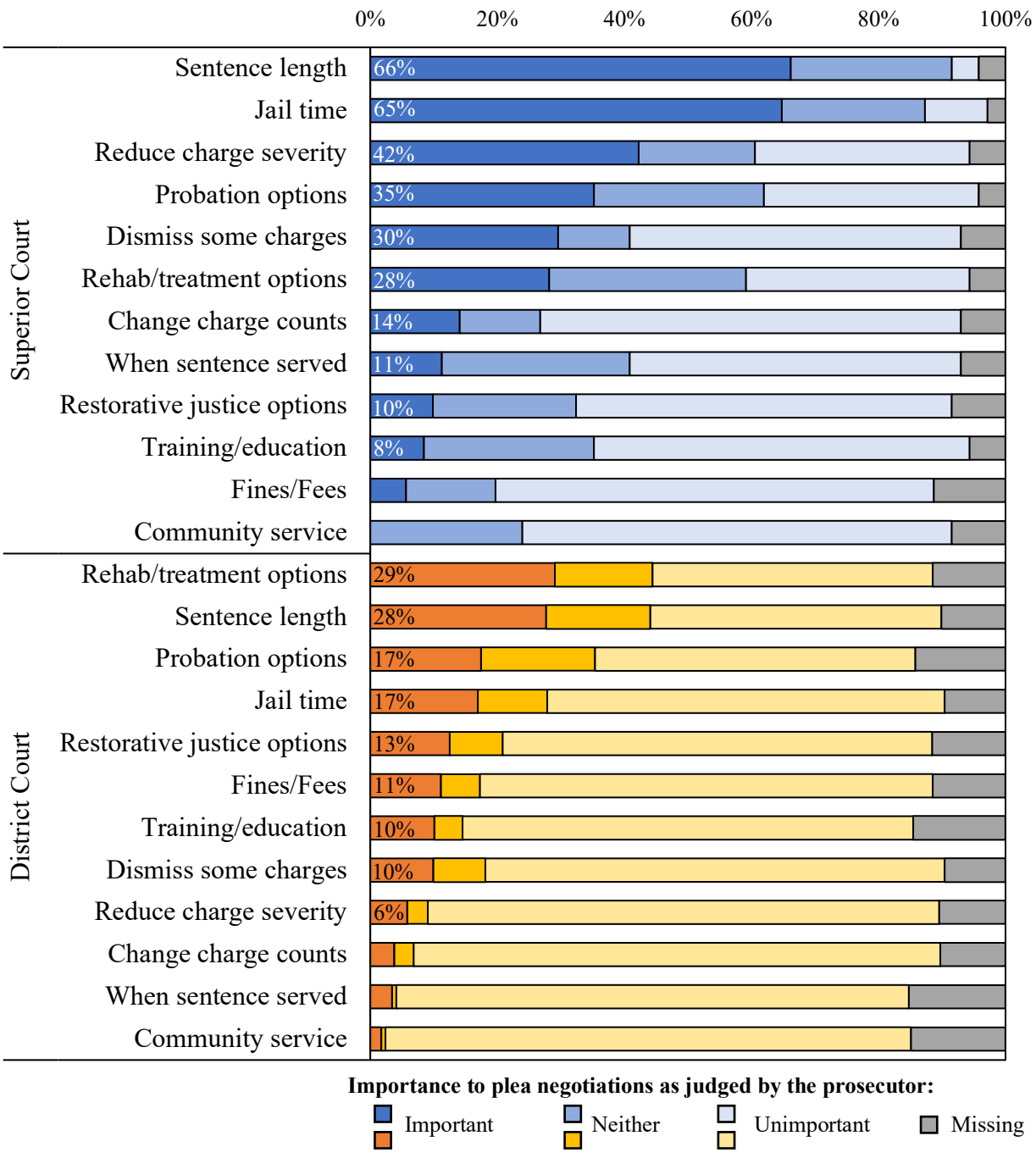
[1] Prosecutors sometimes chose not to respond, which is represented by the "Missing" category (the grey sections).

[2] Sentence length refers to the amount of time the person charged must spend in prison or on probation if they accept the plea. Jail time is the amount of time spent in prison pretrial.

[3] Dismissing some charges was rarely considered "very important" (6% of cases), but was often "important" (24% of cases), hence it was ranked high on the list in Figure 1.

Figure 1.

*The Importance of Considerations in Plea Negotiations in **Superior** and **District** Court Cases.*



Notes. Total number of cases in each bar for Superior Court is 71 and for District Court is 585. These denominators were used to calculate percentages. Bars are ordered so that the category with the highest number of "important" reports is at the top, and categories with lowest number at the bottom. "Important" includes cases in which the factor was rated "very important" or "important", "neither" includes "somewhat important" or "somewhat unimportant" ratings, and "unimportant" includes "unimportant" or "very unimportant" ratings. Percent of cases with each factor rated as "Important" on this chart are displayed in the relevant bar.

There were clear differences prosecution priorities when plea bargaining in each court. In Superior Court, a larger portion of cases result in Guilty pleas (81% of Superior Court cases versus 25% District Court cases; see Section B of Part 1), and more frequently result in prison sentences (81% of Superior Court cases versus 26% of District Court cases). Pretrial detention is both more common in Superior Court than District Court and tends to be longer because the cases in Superior Court are slower to resolve. Thus, the amount of jail and prison time is a key focus in plea negotiations. In addition, reducing charge severity is a relatively common practice in Superior Court because serious cases often involve charges that trigger mandatory minimums (e.g., trafficking drugs, violent offenses, and firearms offenses; refer to Section D.4 of Part One). Thus, it is common to offer a charge reduction to avoid a mandatory minimum so that the sentencing recommendations can also be adjusted for the plea. In contrast, charges that trigger mandatory minimums are not common in District Court cases.

In District Court cases, there are more instances where the person charged avoids a Guilty conviction (e.g., 29% of cases had at least one "Continuance without a Finding"[4] and 5% were resolved with a 276/87 disposition[5]). People charged in District Court are also more likely to avoid any prison time and, instead, receive a probation sentence (probation occurred in 75% of District Court cases compared with 52% of Superior Court cases). These data on the relative importance of considerations in District Court are consistent with the sentencing patterns found in Part One. For instance, it is more common for prosecutors to consider probation options and dismissing charges as important in District Court, but this was less common in Superior Court. Similarly, there was more focus on alternative sentencing options (e.g., rehabilitation and restorative justice) in District Court than in Superior Court.

2. What considerations did prosecutors think were important when negotiating pleas in cases with different types of crimes?

Plea practices in District Attorney's offices often vary by crime type. For instance, in Berkshire, prosecutors are focused on reducing violent crime with person victims, serious drug offenses (e.g., trafficking), and the use of firearms. Many of their office policies and practices center around the idea that serious crimes within these categories should receive the most resources and the most serious penalties. Therefore, it stands to reason that the prosecution priorities in the plea-bargaining process might vary between crime types to reflect these policies. We focused on violent crimes, drug crimes, and crimes involving firearms in District and Superior Court for this analysis. In addition, we focus on priorities that we hypothesized might vary in importance by crime type: sentence length, jail time, reducing charge severity, probation options, and rehabilitation or treatment options.

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[4] *CWOF:* The defendant admits to the facts of the charge; however, a Guilty disposition is not entered, and the case is "continued without a finding". The person charged completes a probation sentence with conditions and, if they do so without incident, the case is ultimately dismissed (Chapter 278, Section 18 of the MA General Laws). If the defendant does not comply with the terms of the probation, a guilty finding is entered, and a sentence is imposed.

[5] *276/87 Disposition:* If the crime qualifies under Chapter 276, Section 87 of the MA General Laws, the person charged is place on predisposition probation. Upon successful completion of the probation sentence, the charge is dismissed, and no disposition appears on their record. If they do not comply with the terms of the disposition, the charges are returned to the docket for adjudication.

In **District Court**, prosecutors more commonly indicated that sentence length was an important consideration in cases including violent offenses and in cases with crimes involving firearms as compared to cases involving drug crimes (30%) or the average proportions of all cases (28% of all 585 cases). Similarly, jail time was often important to negotiations in cases involving violent crimes or crimes involving firearms, but less often in cases involving drug offenses (10%) or across all cases (17% of 585 cases).

In **District Court**...	**Crime type:**	Violent	Drug	Firearms	**All cases**
Sentence length	important in...	**43%**	**30%**	**40%**	**28%**
Jail time	important in...	**41%**	**10%**	**40%**	**17%**
Reducing charge severity	important in...	**4%**	**5%**	**33%**	**6%**
Probation options	important in...	**21%**	**55%**	**33%**	**17%**
Rehab/treatment options	important in...	**33%**	**45%**	**20%**	**29%**

In general, reducing the severity of charges was not common as an important consideration for pleas resolved in District Court overall (or for cases involving violent crimes or drug crimes) but, in contrast, prosecutors reported reducing charge severity was frequently important when negotiating cases involving firearm offenses. Probation options were considered important in a similar number of cases overall and when just cases examining cases with violent crimes, but more often in cases involving drug crimes or firearms offenses. Rehabilitation and treatment options were considered important generally in District Court cases and when focusing on violent crimes. In comparison, rehabilitation and treatment were considered important more often in cases involving drug crimes and less often in cases dealing with firearms offenses.

These results suggest that prosecutors have different priorities for negotiating pleas in District Court differ based on the alleged crime type. In cases involving violent offenses, jail time and sentence length tend to be the primary focus of negotiations—more so than for cases involving other types of crimes. In contrast, sentence length and jail time were comparatively less important in cases involving drug crimes. Instead, probation options as well as rehabilitation and treatment were the main considerations reported. Finally, when evaluating the considerations reported in cases with crimes involving firearms, sentence length, jail time, reducing charge severity, and probation options were all considered more important than in the average District Court cases, not rehabilitation and treatment.

When examining all **Superior Court** cases, sentence length was considered important more often than other considerations, followed closely by jail time. Moreover, these considerations were judged to be important to negotiations by prosecutors more often when dealing with cases involving violent crimes, drug crimes, and firearms offenses. The only exception was reports about the importance of jail time in cases with firearms charges—this consideration was judged as important less often than in the average Superior Court case. Probation options were

considered important somewhat often across all cases and for cases involving drug crimes, but less often when and when considering cases with drug offenses or violent crimes.

In Superior Court...	Crime type:	Violent	Drug	Firearms	All cases
Sentence length	important in...	**76%**	**78%**	**73%**	**66%**
Jail time	important in...	**72%**	**71%**	**51%**	**65%**
Reducing charge severity	important in...	**56%**	**49%**	**52%**	**42%**
Probation options	important in...	**21%**	**38%**	**26%**	**35%**
Rehab/treatment options	important in...	**29%**	**31%**	**33%**	**28%**

Reducing charge severity is much more common in Superior Court than in District Court. One reason is that crimes charged in Superior Court trigger "mandatory minimum" sentences at a higher rate than typically seen in District Court. To negotiate where a mandatory minimum applies, prosecutors often must "charge bargain" to a lesser offense to reduce the sentence length associated with that charge. For example, the prosecutor might offer to reduce a drug trafficking charge, which has a mandatory minimum sentence, to "possession with intent to distribute", which does not. Charge bargaining can serve to avoid other consequences, which are also more common in Superior Court, such as felony convictions or crimes that require a person to register as a sex offender.

Reducing charge severity is common among cases with violent offenses, drug offenses, and crimes involving forearms, all charges with consequences in Superior Court (see Part One for a more detailed analysis). Thus, compared with average Superior Court cases, reducing charge severity was considered important somewhat more often cases involving drug, violent, and firearms offenses. The patterns were similar for rehabilitation and treatment options—overall, this was reported as important slightly more often in cases involving violent offenses, drug offenses, and firearms offenses.

Prosecutors' goals when engaging in plea bargaining appear to differ in Superior and District Court. In both courts, prosecutors considered incarceration (jail or prison) and charge severity to be important overall, but incarceration was frequently reported as important in Superior Court cases with violent offenses, drug offenses, and crimes involving firearms. In contrast, probation options were less commonly reported as important considerations. This is consistent findings in Part One which showed that prison sentences and pretrial detention were more common in Superior Court, but probation was less common in Superior Court than in District Court.

B. What aggravating and mitigating factors did prosecutors consider?

After entering case details into the Plea Tracker, prosecutors were asked to indicate the factors they consciously considered when developing their plea recommendations and negotiating with the defense. Prosecutors were presented with lists of aggravating and mitigating factors reflecting those in the advisory Massachusetts Sentencing Guidelines and supplemented by factors suggested by the office and the WCSJ Research Team. This section of the One-Year Report analyzes both the type and number of these aggravating and mitigating factors, within each Court and as a function of different case factors or factors associated with the person charged.

1. What aggravating factors did prosecutors report considering most often in District and Superior Court?

Table 1 lists the aggravating factors reported by prosecutors in District and Superior Court, ranked in order from those most to least often reported, within each Court. In **District Court**, prosecutors reported at least one aggravating factor in 57% of cases (331 of 585 total cases), with an average of less than one aggravating factor reported per case.[6] In any one District Court case, there were never more than eight aggravating factors reported. The five most common aggravating factors considered by prosecutors in District Court were:

1. the nature and circumstances of the crime committed (28% of cases)
2. the criminal history of the person charged (18% of cases)
3. deterring future criminal activity (17% of cases)
4. public safety concerns (16% of cases)
5. the risk that the person charged will commit future crimes (recidivism; 10% of cases)

In **Superior Court**, prosecutors reported at least one aggravating factors in 76% of cases (54 of 71 total cases). The average number of aggravating factors reported per case was approximately three,[7] and a maximum number of eight was reported in any one case. The five most common aggravating factors considered by prosecutors in Superior Court were:

1. the nature and circumstances of the crime committed (45% of cases)
2. deterring future criminal activity (37% of cases)
3. public safety concerns (35% of cases)
4. the criminal history of the person charged (27% of cases)
5. the crime committed involved a firearm or firearms (23% of cases)

Thus, although the ranked order differed slightly, the aggravating factors reported most often by prosecutors were similar in both courts. Notably, it seems that the criminal history of the person charged was often considered in both courts. So, although criminal history can be useful for justifying a more lenient Tender of Plea in District Court (discussed below), criminal records also justify harsher sentences.

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[6] The average number of aggravating factors reported per District Court case was 1.24. The standard deviation (*SD*) is 1.53, which indicates how spread out the range of values for this variable were. Here, the small *SD* indicates that there are many cases with no, one, two, or three aggravating factors, but very few with more than three.

[7] Average number of aggravating factors reported per Superior Court case was 2.82 (*SD* = 2.29).

Table 1.

*Summary of the Prevalence of **Aggravating** Factors in District and Superior Court Case, Ranked within Each Court from Most to Least Common.*

	Aggravating Factors in…			
Rank	**District Court** (*n* = 585)		**Superior Court** (*n* = 71)	
1	Nature of crime committed	163 (28%)	Nature of crime committed	32 (45%)
2	Criminal history	108 (18%)	Deterrence	26 (37%)
3	Deterrence	102 (17%)	Public safety	25 (35%)
4	Public safety	95 (16%)	Criminal history	19 (27%)
5	Risk of recidivism	60 (10%)	Crime involved firearms	16 (23%)
6	Multiple past offenses against this victim	45 (8%)	Risk of recidivism	12 (17%)
7	Particular violence/cruelty	30 (5%)	Vulnerable victim	10 (14%)
8	The person confessed	21 (4%)	Major role or leader	10 (14%)
9	Vulnerable victim	18 (3%)	Particular violence/cruelty	9 (13%)
11	Number of people affected	15 (3%)	The person confessed	8 (11%)
12	Major role or leader	12 (2%)	Number of people affected	6 (8%)
13	On probation at the time	10 (2%)	Multiple past offenses against this victim	5 (7%)
14	Crime involved firearms	9 (2%)	On probation at the time	2 (3%)
15	Victim-related factors	6 (1%)		

One difference observed in the aggravating factors between Courts is that, in Superior Court, the presence of a firearm during offenses is often considered. Firearms are more frequently involved in the types of crimes that are charged in Superior Court (e.g., charges for drug trafficking and violence are more common in Superior Court *and* frequently accompanied by firearms related charges). These data suggest prosecutors take involvement of firearms in any offense very seriously and consider it an important aggravating factor.

Many commonly reported aggravating factors do not necessarily represent specific, individual-level factors relevant to a particular case. For instance, the "nature of the crime committed" was already captured by the charge. Or, stating that a more severe sentence serves a "deterrence" function may reflect general deterrence, or broader policy goals. It would be more useful to focus on factors that are specific to a cases or person charged in a case to permit an analysis of cases specific aggravating factors rather than broader criminal legal concepts that are built into the system more broadly.

2. What <u>mitigating</u> factors did prosecutors report considering most often in District and Superior Court?

Table 2 lists the mitigating factors reported by prosecutors in District and Superior Court, with the list ordered from most to least commonly reported. In **District Court**, prosecutors reported having considered at least one mitigating factor in 59% of cases (344 of 585 total cases in which these data were reported), with an average of less than one mitigating factor per case[8] and a maximum of seven factors reported in any one case. The five most common mitigating factors considered by prosecutors in District Court were:

1. the person charged had a good past record (24% of cases)
2. the person charged was very young or very old (13% of cases)
3. the person charged had the potential to be rehabilitated (13% of cases)
4. the person charged displayed remorse (12% of cases)
5. the person charged cooperated with law enforcement and the prosecution (10% of cases)

The **Superior Court** cases with these data (71 cases total) had a higher proportion of cases with mitigating factors reported, with 68% of cases reporting at least one mitigating factor. The average number of mitigating factors reported per case was two,[9] and there were no more than eight in any single case. This larger proportion of cases with reported mitigating factors might be due to the more complex nature of the cases and, consequently, defense attorneys interacted more with their clients and shared more information with the prosecution. The five most common mitigating factors considered by prosecutors in Superior Court were:

1. the demographic background (i.e., the socioeconomic status, personal history, and race) of the person charged (23% of cases)
2. the person charged cooperated with law enforcement and the prosecution (20% of cases)
3. the person charged had mental or physical health concerns (20% of cases)
4. the person charged had a good record (17% of cases)
5. the person charged played a minor role in the offense (17% of cases)

In both courts, the criminal history of the person charged and whether they cooperated were both important mitigating factors. However, what mitigating factors were reported most often differed. In District Court, the most common mitigating factors seemed to emphasize the demeanor of the person charged, as well as their potential to rectify their behavior moving forward. Furthermore, the office indicated that the goal in most District Court cases is to prevent the person charged from entering the criminal legal system again. District Court Tenders of Plea incorporated rehabilitation or treatment options more often (alternative sentences reported in 29% of cases) and were less likely to result in Guilty convictions (25% Guilty convictions and 29% CWOFs in District Court) or prison sentences (26% of cases, only).[10] In contrast, mitigating considerations in Superior Court revolved around culpability (e.g., mental or physical health).

[8] Average number of mitigating factors reported per District Court case was 1.20 (*SD* = 1.37).
[9] Average number of mitigating factors reported per Superior Court case was 2.00 (*SD* = 2.04).
[10] Refer to the findings in Part One for most details on these aspects of plea bargains.

Table 2.

*Summary of the Prevalence of **Mitigating** Factors in District and Superior Court Case, Ranked within Each Court from Most to Least Common.*

	Mitigating Factors in…			
Rank	**District Court** (*n* = 585)		**Superior Court** (*n* = 71)	
1	Good record	138 (24%)	Demographic background	16 (23%)
2	Age of person charged	76 (13%)	Person cooperated	14 (20%)
3	Potential for rehabilitation	75 (13%)	Mental/physical health	14 (20%)
4	Person shows remorse	69 (12%)	Good record	12 (17%)
5	Person cooperated	58 (10%)	Minor role in the offense	12 (17%)
6	Weak prosecution case	53 (9%)	Potential for rehabilitation	11 (15%)
7	Mental/physical health	48 (8%)	Age of person charged	10 (14%)
8	Enrolled in rehabilitation	38 (6%)	Person is a caretaker	6 (8%)
9	Demographic background	16 (3%)	Enrolled in rehabilitation	5 (7%)
11	Victim-related factors	14 (2%)	Person was provoked	3 (4%)
12	Person was provoked	12 (2%)		
13	Drug/alcohol abuse	12 (2%)		
14	Person is a caretaker	11 (2%)		
15	Minor role in the offense	9 (2%)		

3. How did the number of aggravating and mitigating factors vary between courts?

The number of aggravating and mitigating factors reported reflect the information that the prosecutor had access to and explicitly considered during the plea-bargaining process. In **District Court**, the average number of mitigating and aggravating factors were approximately equal (see Figure 2). There was approximately 1 aggravating factor reported and 1 mitigating factor reported per District Court case, on average[11]. In **Superior Court**, both aggravating and mitigating factors were reported more often than in District Court—three times more aggravating factors and twice as many mitigating factors, on average. In addition, aggravating factors were reported more often than mitigating factors.[12]

We examined whether there was a link between the number of aggravating factors and mitigating factors reported in any particular case. For instance, if a case had many aggravating factors reported, was it also likely that many mitigating factors were reported? In **District Court**,

[11] $M = 1.24$ aggravating factors ($SD = 1.53$); $M = 1.20$ mitigating factors reported ($SD = 1.37$).
[12] $M = 2.82$ aggravating factors ($SD = 2.29$); $M = 2.00$ mitigating factors reported ($SD = 2.04$).

the number of aggravating factors reported by prosecutors appeared unrelated to the number of mitigating factors.[13] In **Superior Court**, the association between the number of aggravating and mitigating factors was a little stronger,[14] suggesting that cases with more aggravating factors also had more mitigating factors reported, and vice versa.

These findings suggest that, overall, prosecutors reported considering more mitigating and aggravating factors in Superior Court than in District Court. In addition, the more aggravating factors reported in Superior Court, the more mitigating factors were reported too (or vice versa). This pattern was not found in District Court. Aggravating factors tend to be considered more often than mitigating factors in Superior Court cases, but these factors are considered approximately equally in District Court.

4. **How did the number of aggravating and mitigating factors in each court vary as a function of the race of the person charged?**

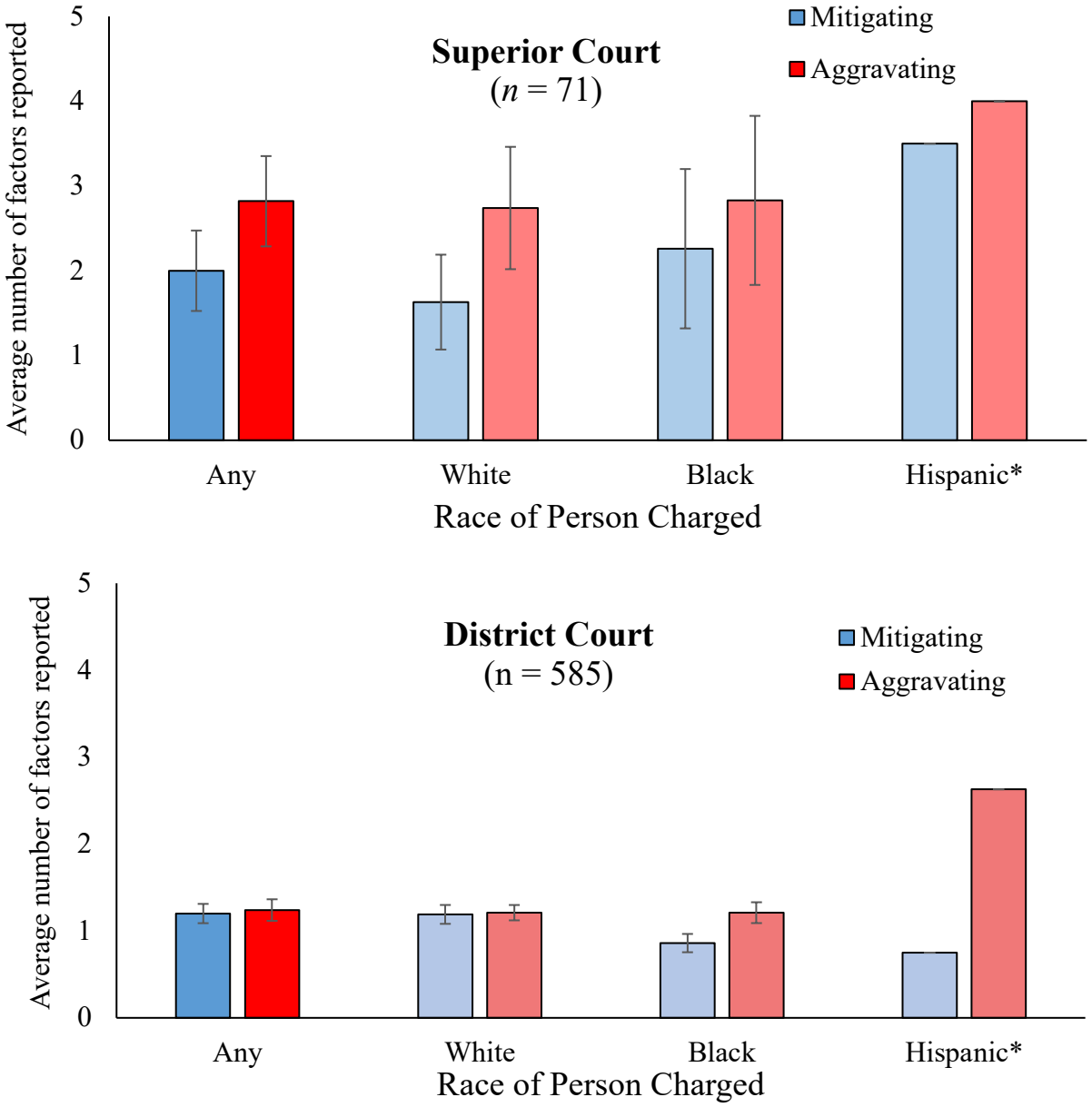
We assessed the number of aggravating and mitigating factors reported by prosecutors as a function of the race of the person charged. We found that race was linked to different average numbers of aggravating and mitigating factors, and a different ratio of aggravating to mitigating factors. In **District Court**, we observed prosecutors reported approximately one mitigating factor and one aggravating factor on average for white people charged with crimes.[15] However, for Black people charged in District Court, prosecutors reported fewer mitigating factors–less than one mitigating factor on average per case—than white people charges in District Court. However, a similar number of aggravating factors (just over one per case, on average) was report for both black and white people charged in District Court.[16]

In **Superior Court**, we did not see the same difference between white and Black people charged with crimes. Prosecutors reported a similar number of aggravating factors in cases with white people charged to cases with Black people charged in Superior Court.[17] When assessing the number of mitigating factors reported, though, white people charged in Superior Court tended to be associated with fewer mitigating factors than Black people.[18] In contrast, the average numbers of aggravating factors are approximately equal among white and Black people charged in Superior Court. Thus, Superior Court prosecutors consider mitigating evidence in all cases but reported considering more mitigating factors for Black defendants. Refer to Figure 2 for a graph of these data.

[13] Correlation - r = -0.05, 95% CI [-0.13, 0.04].
[14] Correlation - r = 0.16, 95% CI [-0.09, 0.38].
[15] Mitigating: M = 1.19, SD = 1.34; Aggravating: M = 1.21, SD = 1.48.
[16] Mitigating: M = 0.86, SD = 1.30; Aggravating: M = 1.21, SD = 1.58.
[17] White: M = 2.74, SD = 2.27; Black: M = 2.83, SD = 2.44.
[18] White: M = 1.63, SD = 1.76; Black: M = 2.26, SD = 2.30

Figure 4.

Average Number of Mitigating and Aggravating Factors in Superior and District Court as a Function of the Race of the Person Charged.



Notes. *There were only 2 Hispanic people charged in Superior Court and 19 in District Court so those data do not have error bars. Error bars represent 95% Confidence Intervals, which means we would expect that 95% of cases to fall with this interval (between the two arms). Superior Court sample sizes: white = 23, Black = 23, Hispanic = 2. District Court sample sizes: white = 746, Black = 110, Hispanic = 19.

5. **How did the number of mitigating and aggravating factors in each court vary a function of the types of crimes charged in each case?**

For this section of our evaluation, we focused on the three main types of crime in the most serious cases—violent crimes, drug crimes, and crimes involving firearms. In **District Court**, prosecutors indicated they considered aggravating factors and mitigating factors equally often overall. There were only a small number of cases involving these particular crime types. At least one aggravating factor was reported in very frequently in violent crimes and crimes involving firearms, but only about half of the time for drug crimes, and when looking at all District Court cases regardless of crime type (57% or 331 cases out of the 585 District Court cases). In addition, at least one mitigating factor was reported by the prosecutor in in just over half of the violent crimes and drug crimes (and overall; 59% or 334 cases of the 585 cases with these data), but much more often for crimes involving firearms.

District Court cases involving...

Violent crimes (n = 83)	**69%** at least one aggravating factor	**54%** at least one mitigating factor
Drug crimes (n = 21)	**48%** at least one aggravating factor	**57%** at least one mitigating factor
Crimes involving firearms (n = 18)	**61%** at least one aggravating factor	**83%** at least one mitigating factor

District Court cases involving...

Violent crimes	**1.75** aggravating factors **1.02** mitigating factors	on average
Drug crimes	**1.05** aggravating factors **1.57** mitigating factors	on average
Crimes involving firearms	**1.39** aggravating factors **2.00** mitigating factors	on average

The average number of aggravating and mitigating factors in different types of cases was also analyzed (as compared to the averages across all 585 District Court cases, which is just over 1 aggravating factor and just over one mitigating factor per District Court cases. In violent offenses, prosecutors reported more aggravating factors and fewer mitigating factors than seen in the average District Court case. Yet, there were more mitigating factors and fewer aggravating factors reported in cases involving drug crimes when compared to the overall average. In contrast, crimes involving firearms tended to have higher numbers of both sentencing factors reported when compared to the average across all cases.

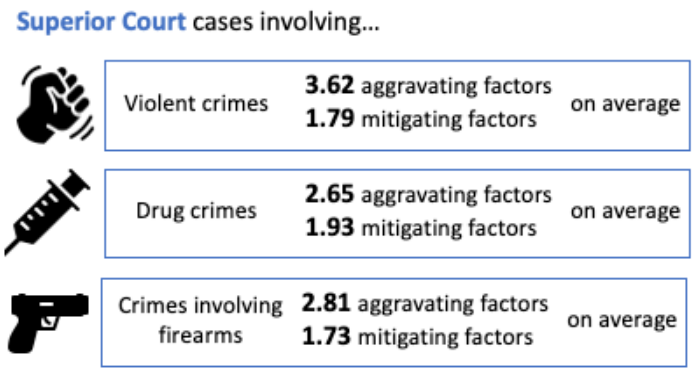
In **Superior Court**, prosecutors tended to report more aggravating factors than mitigating factors. At least one aggravating factor was reported in most cases involving violent crimes, drug crimes, and crimes involving firearms. That said, at least one aggravating factor was very common in most Superior Court cases (82% of the 71 cases with these data). At least one mitigating factor was reported by the prosecutor in few violent crimes, but

Superior Court cases involving...

Violent crimes (n = 29)	**90%** at least one aggravating factor	**10%** at least one mitigating factor
Drug crimes (n = 40)	**80%** at least one aggravating factor	**65%** at least one mitigating factor
Crimes involving firearms (n = 26)	**85%** at least one aggravating factor	**69%** at least one mitigating factor

in over half of drug crimes and crimes involving firearms. These were all low when compared to the overall number of cases with at least one mitigating factor (73% of 71 cases with these data), especially for violent crimes. Thus, mitigating factors tend to be reported much less frequently in Superior Court cases involving violent offences when compared with other types of crimes.

The average number of aggravating and mitigating factors in different types of cases was also analyzed and compared with the average across all Superior Court cases, which was approximately three for aggravating factors and approximately two for mitigating factors. In violent offenses, prosecutors reported more aggravating factors and fewer mitigating factors than the average Superior Court case. When prosecuting drug crimes, prosecutors reported mitigating factors and aggravating factors slightly less often than seen in the average Superior Court case. In contrast, crimes involving firearms tended to have a similar number of aggravating factors reported to the average Superior Court case, but fewer mitigating factors.



Thus, it seems that people who commit violent offenses attract more aggravating sentencing factors and fewer mitigating factors, especially in Superior Court.

6. To what extent was the number of aggravating and mitigating factors associated with the rates of prison or probation sentences in each court?

One way to determine whether prosecutors were considering the number of aggravating and mitigating factors when making sentencing recommendations is to examine the average number of each type of factor reported in cases with different sentencing outcomes. Superior Court and District Court cases were examined separately (Table 3).

On average, prosecutors reported considering more aggravating factors and fewer mitigating factors were reported when the pled sentence involved incarceration, in both District and Superior Court. When people were sentenced to probation, though, the inverse was true generally—the prosecutor reported more mitigating factors and fewer aggravating factors. The only exception was that prosecutors tended to report more mitigating factors in cases where the person received a prison sentence relative to cases where the person did not receive a prison sentence.

Table 3.
Average Number of Aggravating and Mitigating Factors per Superior Court or District Court Case, as a Function of Sentence Type.

Type of factor	Sentence		Court: District Court (*n* = 585) *N*	*M*	*SD*	Court: Superior Court (*n* = 71) *n*	*M*	*SD*
Aggravating	Prison	Yes	148	2.40	1.86	53	3.28	2.27
		No	437	0.85	1.16	14	1.07	1.33
	Probation	Yes	448	1.01	1.33	39	2.13	2.05
		No	137	1.99	1.86	28	3.79	2.28
Mitigating	Prison	Yes	148	1.39	1.17	53	1.81	1.95
		No	437	0.64	1.37	14	2.71	2.30
	Probation	Yes	448	1.32	1.40	39	2.23	2.30
		No	137	0.82	1.16	28	1.68	1.61

Notes. These data include only cases in which the prosecutor contributed data. *n* = sample size for that category/subcategory. *M* = average number of factors per cases. *SD* = standard deviation of the number of factors per case (indicates how much variance or spread in the number of factors there is in the relevant category).

7. Were there inconsistencies between cases in terms of when aggravating factors were considered?

Similarly, for aggravating factors, prosecutors were not required report every possible aggravating factor relevant in a case, but only report the ones they were considering. So, it is important to note that not reporting a factor does not mean it did not matter to the prosecutor's decision—it simply means they were not highlighting it as most important.

i. Was "presence of a firearm" consistently reported as an aggravating factor in cases where the person was charged with crimes involving firearms?

One aggravating factor frequently considered by prosecutors in Berkshire, MA, was the presence of a firearm during a crime. In **District Court**, prosecutors indicated there was at least one crime involving a firearm in 18 cases (3% of 585), but for only 50% of those 18 cases was the use of a firearm flagged as an aggravating factor. So, in only half of the cases in which the person was charges with a crime involving a firearm was the use of the firearm considered as an aggravating factor by the prosecutor.

In **Superior Court**, there was variation in whether or not the prosecutor reported a firearm as an aggravating factors in the case of a firearm charge. There were 31 cases (38% of 81 cases) where the person was charged with at least one firearm offense, and in 16 cases (23% of 71 cases with these data reported), the prosecutor reported that the use of a firearm was an aggravating factor. However, in only 14 of these 71 cases was there both a firearm charge and the prosecutor reported that the use of the firearm was an aggravating factor. In 12 cases, there was a firearm charge, but this was not reported as an aggravating factor, and in 2 cases there was no evidence of a firearm offense in the case, but the use of a firearm was reported as an aggravating factor.

ii. Was "criminal history" consistently reported as an aggravating factor in cases where the person charged had a serious criminal history?

Another common aggravating factor is the criminal history of the person charged. In **District Court**, 164 people charged with crimes had at least one past felony conviction (28% of the 585 cases with these data, with an average number of 1.46 past felonies per case), and 108 were flagged with the criminal history aggravating factor (18%). Eighty-two cases featured people charged with both past felonies *and* the aggravating criminal history flag (76% of 108 cases). The other 24% of people for which this aggravating factor was reported by the prosecutor had past misdemeanor convictions. Most people who were considered by prosecutors to have an aggravating criminal history had committed this type of crime before (81% of 108 cases) or had been previously incarcerated (76% of 108 cases). Thus, this aggravating factor is applied relatively consistently in District Court and considered in appropriate cases.

In **Superior Court** cases, there were 39 people charged who had prior felony convictions (55% of 71 cases in which these data were available). So, past felonies were more common among those charged in Superior Court, with an average number of 2.93 past felonies per case. Of these, only 19 were flagged by the prosecutor as having an aggravating criminal history. Thus, in 18 cases, the person charged had past felonies and the prosecutor did not consider this aggravating. However, in 16 of these cases, the number of felonies was 4 or less, so compared with other Superior Court defendants, their criminal history was average or less serious. The two remaining defendants had seven and 12 felonies each, respectively. Finally, 74% of the cases in which this aggravating factor was reported involved a person charged that had been convicted of this crime before, and all 19 had been incarcerated in the past. This suggests that prosecutors are approaching this aggravating factor consistently across Superior Court cases.

8. Were there inconsistencies between cases in terms of when <u>mitigating</u> factors were considered?

The age of the person charged can be considered a mitigating factor. People charged with crimes who are very young have more potential for rehabilitation. Conversely, older people are on average a lower risk to society and can have health concerns associated with their potential incarceration. While prosecutors in Berkshire were not required to consider and report every possible mitigating factor relevant to every case, we can examine the extent to which prosecutors classified people who could fall into mitigating categories accordingly.

i. Was the age of the person charged consistently reported as a mitigating factor in cases where the person charged was very young (younger than 25 years old) or older (over 60 years of age)?

In **District Court**, age was reported as a mitigating factor in 76 cases (13% of the 585 District Court cases with these data) and, in general, the people charged with crimes in those cases were younger than those in cases in which age was not flagged as a mitigating factor.[19]

[19] When age is reported as a mitigating factor: $M = 28$, $SD = 15.25$; When age wasn't reported as a mitigating factor: $M = 38$, SD = 12.06 ($F(1, 461) = 35.37$, $p<.001$.

However, there were also 42 cases in District Court (7%) where the defendant was 25 years old or younger and age was *not* reported as a mitigating factor.

The pattern in **Superior Court** was quite different. When age was reported as a mitigating factor, the people charged were generally older than those without this factor flagged in their case.[20] Of the nine cases (13% of 71 Superior Court cases with these data) in which the prosecutor reported considering this mitigating factor, none of the people charged were younger than 25 years of age. However, there were 16 cases (23%) in which the person charged was under 25 years and this factor was not flagged. In addition, there was a 63-year-old and a 75-year-old (3% of cases) charged in Superior Court who did not have this mitigating factor flagged. Thus, prosecutors in Superior Court cases did not consistently report considering this factor.

ii. Was "criminal history" consistently reported as a mitigating factor in cases where the person charged had no criminal history?

The criminal history of the person charged was often considered when developing plea recommendations. Prosecutor's offices tended to be more lenient when the people charged with crimes who did not have a criminal history, or only a very minor criminal history.

In **District Court**, there were 191 people charged (33% of the 585 District Court cases) who had no prior criminal history—no felony or misdemeanor convictions, and no CWOFs. There were also 138 people (24%) for which the "good record" mitigating factor was reported by the prosecutor. Upon further inspection, in 28 cases (5%) where "good record" was selected as a mitigating factor, the person charged *did* have a minor criminal record (in fact, one had a prior felony conviction). Yet, there were 84 cases (14%) in which the person charged had no criminal history but the prosecutor did not check the "good record" mitigating factor. Thus, again, prosecutors did not consistently report considering this factor.

Of those with no criminal record in District Court cases, 18 were Black (3%) and 125 were white (21%). Prosecutors in District Court reported this mitigating factors for only one third of Black people with no criminal record compared with 60% of white people with no criminal record. The sample sizes were quite different, with a relatively small number of cases involving Black people charged with crimes, so it was difficult to meaningfully compare the groups. Nevertheless, prosecutors may wish to introduce polices or procedures that ensure they explicitly consider criminal history for *all* people charged with crimes, regardless of their demographic background.

In **Superior Court**, 18 cases (25% of the 71 cases with these data) in which the person charged had no criminal history, and 12 cases (17%) in which the prosecutor indicated that they considered the "good record" of the person charged. Of the 12 cases in which this mitigating factor was flagged, the majority had no criminal record (11 of the 12 cases, or 92%) and one person had a minor record. Yet, there were seven cases (10% of the 71 Superior Court cases) where the person had no criminal history, but the prosecutor did not report considering "good record" when developing the plea recommendation.

[20] When age is reported as a mitigating factor: $M = 39$, $SD = 13.12$; When age wasn't reported as a mitigating factor: $M = 34$, SD = 11.50 ($F(1, 63) = 1.50$, $p = 0.226$.

C. What other sentencing factors did prosecutors report considering?

There were other system-related factors that prosecutors sometimes considered which do not originate from the person charged in the case (Table 4). Prosecutors reported the dates of the person's arrest, the date the first plea offer was made, and the date that the Tender of Plea was entered into court. If there was a procedural event that coincided with the final Tender of Plea, prosecutors reported that too. We compared difference between cases in which a delay was and was not reported. These findings, again, reflect some of the differences between District and Superior Court cases.

1. What was the most commonly reported other sentencing factor and was this supported by other data reported in those cases?

In both District and Superior Court, "delay" as a reason for leniency was the most commonly reported "other" sentencing factor. These cases all occurred in the wake of the first COVID-19 pandemic wave, which caused backlogs in trials and hearings across the USA. Thus, the likely cause of the delay for many of these cases was backlogs resulting from the COVID-19 pandemic.

Table 4.

*Summary of the Prevalence of **Other Sentencing** Factors in District and Superior Court Case, Ranked within Each Court from Most to Least Common.*

	Other Sentencing Factors in…			
Rank	**District Court** (*n* = 585)		**Superior Court** (*n* = 71)	
1	Delay	49 (8%)	Delay	24 (34%)
2	Victim's opinion - should get a lenient sentence	40 (7%)	Collateral consequences	7 (10%)
3	Victim's opinion - should get a severe sentence	19 (3%)	Victim's opinion - should get a lenient sentence	3 (4%)
4	Collateral consequences	18 (3%)	Victim's opinion - should get a severe sentence	3 (4%)
5	Other	0 (0%)	Other	0 (0%)

In **District Court**, cases tended to be resolved fairly quickly, with the first plea offered to the defense nine months after arrest[21], on average, and the Tender of Plea finalized approximately 1 month after that[22]. Even so, delay was the most common factor considered by prosecutors when

[21] *SD* = 24 months.
[22] *SD* = 3 months.

developing and negotiating plea agreements (in 8% of the 585 cases in which these data were available). Cases in which delay was flagged as a sentencing factor were resolved more slowly than other cases—an average of 35 months between arrest and first plea offer (versus six months for non-delayed cases), and two months before the final Tender of Plea was entered (versus one months for non-delayed cases. Many more cases were resolved on the day of trial in the cases where the prosecutor noted the delay. Thus, when prosecutors reported considering delay when developing sentencing recommendations, they were referring to substantial delays.

Table 5.

Summary of Variables Related to "Delay" as a Sentencing Factor.

Court	**District Court (*n* = 585)**		**Superior Court (*n* = 71)**	
Delay reported by prosecutor	Delay	No Delay	Delay	No Delay
n	49 (8%)	536 (92%)	24 (34%)	47 (66%)
Average months (*SD*)				
Arrest -1st plea offer	35.44 (71.16)^	6.08 (9.41)	29.49 (45.53)*	16.89 (10.60)
1st offer - Tender	2.16 (4.99)	1.09 (2.31)	10.84 (9.23)	5.79 (8.10)
Procedural event when plea accepted (out of n)				
Arraignment	1 (2%)	97 (18%)	0 (0%)	0 (0%)
Pre-trial hearing (1st)	2 (4%)	75 (14%)	0 (0%)	2 (4%)
Pre-trial hearing (later)	19 (39%)	206 (38%)	2 (8%)	1 (2%)
Day of trial	12 (24%)	36 (7%)	5 (21%)	4 (9%)
Other	12 (24%)	69 (13%)	5 (21%)	10 (21%)
None	3 (6%)	49 (9%)	12 (50%)	26 (55%)

Notes. * One Superior Court case involved someone who had evaded the authorities for 10 years, so the mean is skewed upwards. ^ One District Court case involved removal of an old (1980) warrant, so the mean is skewed upwards. Prosecutors did not provide information about the procedural event for four cases (>1% of 536 cases) in District Court—those cases did not have "delay" as a sentencing factor, so those do not total to 100%.

In **Superior Court**, the patterns were similar to District Court, though Superior Court cases took much longer to be resolved—overall, the average time between arrest and the first plea offer was 22 months and then eight months between the first plea offer and the Tender of Plea (refer to Table 5).[23] Given that the cases were already more complex and required more time, delay was a more prominent concern, with prosecutors reporting this as a consideration in 34% of cases (out of 71 cases with these data). In cases with versus without delay as a sentencing factor, the plea was more commonly finalized on the day of trial (21% vs. 9%). For cases where delay was considered, the time between arrest and first plea offer averaged 29 months, and then another 11 months before the Tender of Plea, for a total of 40 months on average. This means that cases with a delay reported as a sentencing consideration took approximately 17 months longer than those without delay

[23] *SD* = 30 months and *SD* = 9 months, respectively.

reported. This suggests that Superior Court prosecutors might have been more aware of or their cases were more affected by delay than the District Court prosecutors.

2. Apart from "delay", what other sentencing factors did prosecutors think influenced the leniency or severity of their sentencing recommendations?

Although delay was the most common of these sentencing factors, prosecutors also commonly reported the victim's opinion about the appropriate punishment and a general reference to "collateral consequences". In **District Court**, prosecutors considered the victim's request for leniency in 7% of cases and the victim's request for a harsher sentence in 3% of cases. Victims' opinions were considered less often by prosecutors in **Superior Court** than in District Court. Many reasons may account for these differences. For instances, the charges in Superior Court were more severe and tended to fall within the "incarceration zone" of the Massachusetts Sentencing Grid where some prison time is recommended rather than the "discretionary zone" where the prosecutor has more leeway regarding the nature and length of the sentence). Refer to Section G for a full discussion of the role of victims in the plea-bargaining process in Berkshire, MA.

Finally, collateral consequences were specifically mentioned as a consideration that influenced the sentencing recommendation in 8% of in **District Court** cases and 7% of **Superior Court** cases. Prosecutors were asked to reported collateral consequences in more detail, as described in Section D of this report.

D. What collateral consequences did prosecutors report considering?

Prosecutors were also asked to indicate which collateral consequences they considered when developing their plea recommendations (Table 6). In **District Court**, the most commonly considered collateral consequence was the person losing their driver's license (19% of 585 cases with these data). Motor vehicle offenses were common in District Court, and the loss of one's license was commonly a consequence of those (in fact, it is often mandated by statute e.g., a 24D disposition). Other important collateral consequences seem to revolve around the person's ability to live a normal life and to support themselves after the case is resolved. Examples include whether the person charged can contribute positively to society (16%), get and keep a job (12%), and their ability to return to their life after serving out any sentence imposed (12%).

In **Superior Court**, the patterns were similar, but loss of driver's license was no longer a common consequence (1%). The consequences of Superior Court cases tend to be more severe and more likely to gravely affect the charged person's life. So, the charged person's ability to lead a productive life after serving their sentence is more often considered than in District Court. Of the 71 Superior Court cases, whether they can contribute positively to society was considered in 28% of cases, the person's ability to get and keep a job was considered in 24% of cases, their ability to return to their life after serving out any sentence imposed considered in 20% of cases, and avoiding hardship for them and their family also considered in 20% of cases.

Table 6.

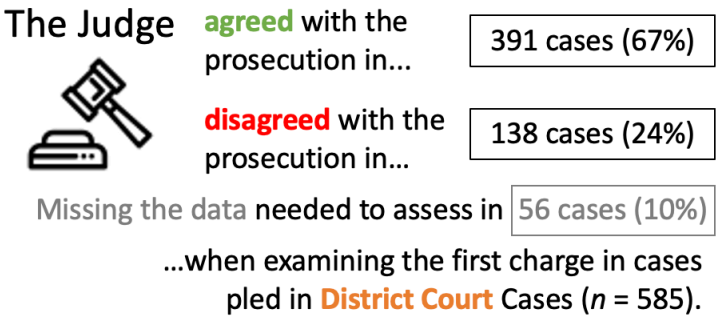
*Ranked Summary of **Collateral Consequences** Considered in District and Superior Court Cases.*

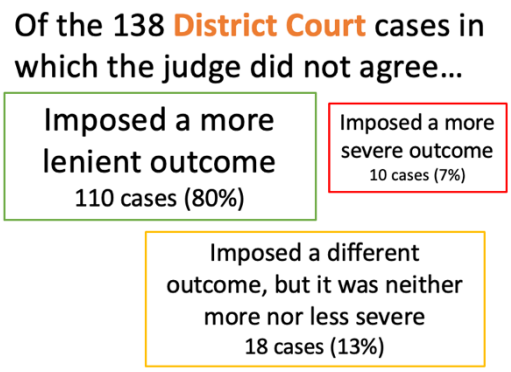
Rank	District Court (n = 585)		Superior Court (n = 71)	
1	Impact of losing driver's license	109 (19%)	Ability to positively contribute to society	20 (28%)
2	Ability to positively contribute to society	94 (16%)	Ability to find employment	17 (24%)
3	Ability to find employment	73 (12%)	Ability to return to their life after case resolved	14 (20%)
4	Ability to return to their life after case resolved	69 (12%)	Avoid causing hardship to defendant and their family	14 (20%)
5	Avoid contributing to the defendant's existing debt	51 (9%)	Avoid contributing to the defendant's existing debt	9 (13%)
6	Avoid causing hardship to defendant and their family	40 (7%)	Impact of losing driver's license	1 (1%)
7	Impact of losing another license	5 (1%)	Impact of losing another license	0 (0%)

E. How did the judges influence plea outcomes?

Judges can alter plea agreements before they are finalized under some circumstances in Massachusetts, in both Superior and District Court. In District Court, the judge can change the sentence and dispositions associated with charges in cases resolved by a plea. However, if the sentence the judge plans to impose exceeds what the *defense* requested, the judge must give the defendant an opportunity to withdraw their plea.[24] In contrast, Superior Court judges can also impose different sentences or change dispositions associated with charges, but if the judge plans to impose a sentence that is longer than that recommended in the *prosecution's* Tender of Plea, the defendant must be given a chance to withdraw.[25] Finally, if the judge is rejecting a Tender of Plea which both the prosecution and defense agreed upon, both parties must be told what the judge plans to change the plea to and be given an opportunities withdraw.[26] Judge involvement in plea agreements typically resulted in more lenient outcomes than the prosecution recommended.

Prosecutors were asked to indicate when the judge imposed a sentence or disagreed with the prosecution's recommendation in the Plea Tracker. In **District Court**, there were 138 cases (24% of 585 cases in which these data were reported) in which the prosecutor reported that the Judge disagreed with the recommendation the prosecution submitted in their Tender of Plea or imposed a sentence. The most common way in which judges altered the plea outcome was to make the pled sentence, terms of probation, or disposition more lenient (110 cases, or 80% of the 138 cases in which the judge changed District Court plea outcomes). In most of these cases (103 cases or 75%), the defense had submitted a counter Tender of Plea in which a more lenient sentence was requested. In these cases, the judge typically settled on a final set of conditions that fell somewhere in between what was requested by the defense and prosecution.



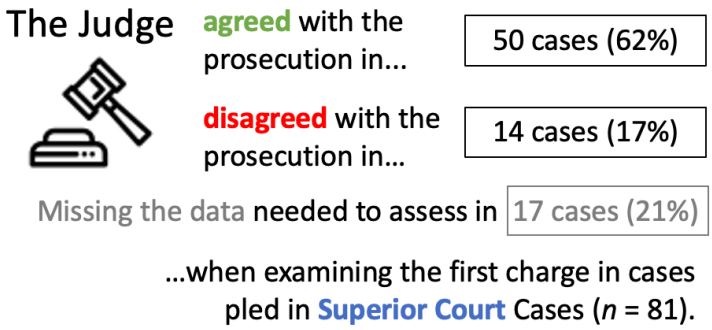


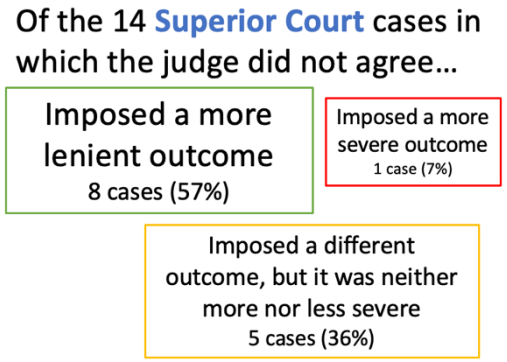
The most common form of judge-driven leniency was reducing the length of the probation period (or, occasionally, removing probation from the requirements). This was reported in 49 cases (45% of 110 cases). Relatedly, the judges sometimes changed the terms and conditions associated with a probation sentence (16% or 18 cases). However, it was not always clear if the changes resulted in a more lenient plea agreement. The judge sometimes waived completing the Intimate Partner Abuse Education Program (IPAEP) as a condition of Probation. This program is required by statute in domestic violence cases but requires an onerous 18 month commitment to successfully complete. Thus, judges will waive this requirement in cases where

[24] Massachusetts Rules of Criminal Procedure, 12(d).
[25] Massachusetts Rules of Criminal Procedure, 12 (c)(6)(b).
[26] Massachusetts Rules of Criminal Procedure, 12(d)(4)(B)(i).

it does not seem necessary or helpful. Other examples include reducing the amount of restitution that must be paid by the end of the probation period and removing some probation conditions (e.g., remaining alcohol and drug free). Another frequent form of judge-driven leniency was observed in 47 cases (43%)—imposing a Continuance Without a Finding (CWOF)[27] dispositions rather than the Guilty disposition recommended for that charge by the prosecution. Finally, in 31 cases (28%) the judge recommended a reduced prison sentence.

In **Superior Court**, the judge altered the final plea outcome in 14 cases (17% of 81 cases). In most of these cases, the changed resulted in a more lenient outcome (8 cases or 57% of the 14 cases). In all of these instances, the defense had presented a different recommendation to the prosecution, though the judge did not always change the plea when the defense disagreed—in 12 cases the judge agreed with the prosecution, but the defense did not (15% of 81 cases). Occasionally, the judge changed the plea so that there was a more severe outcome (1 case or 7%), and somewhat often the outcome was different to the prosecutors' recommendations, but it was not clearly more or less lenient (5 cases or 36%).





The most common ways in which Superior Court judges altered the outcomes of plea agreements to be more lenient was by reducing the length of incarceration (4 cases or 50% of 8 cases) or the length of the probationary period (3 cases or 38%). The judges also sometimes altered Guilty dispositions to CWOFs (2 cases or 25%). Similar to what was observed in District Court, Superior Court judges also sometimes removed probation terms and conditions from the agreement, and very occasionally (only 1 case) lengthened the prison sentence.

Thus, judges appear to play an important role in the plea-bargaining process in Berkshire, Massachusetts, in both District and Superior Court. In particular, judges seem to act as "gatekeepers" who generally seek more lenient sentences. This means, though, that judges in Berkshire could benefit from data concerning in plea outcomes (refer to Part One) and support efforts to apply their gatekeeping power equitably.

[27] *CWOF:* The defendant admits to the facts of the charge; however, a Guilty disposition is not entered, and the case is "continued without a finding". The person charged completes a probation sentence with conditions and, if they do so without incident, the case is ultimately dismissed (Chapter 278, Section 18 of the MA General Laws). If the defendant does not comply with the terms of the probation, a guilty finding is entered, and a sentence is imposed.

F. How did the defense attorney influence plea negotiations?

Prosecutors were asked to report how often they used different modes of communication to discuss the case with the defense attorney. They could respond "not at all" (code as "0"), "a little" (coded as "1", "a moderate amount" (coded as "2"), or "a lot" (coded as "4") for each of five different methods of communication: 1) formal, 2) informal, 3) via email, 4) in person, telephone, via Zoom/Skype, or equivalent, and 5) in writing (e.g., letters). We created a composite score by adding up the number associated with each response to obtain a "overall communication score" for each case. Thus, higher communication scores mean that the prosecutor reported more communication and/or communication using many different methods.

The type of defense attorney made a difference for how much communication occurred between parties in **District Court** and **Superior Court** (Table 7). In general, court-appointed defense attorneys tended to be associated with cases in which lower amounts of communication were reported by the prosecution as compared to private attorneys. This pattern occurred in both District and Superior Court. These differences in the amount of communication were important because, in Part One of the One-Year Report, we found disparities in representation in both courts—white people were much more likely to have a private attorney, and private attorneys were much more likely to secure a probation sentence rather than a prison sentence, or a low (or no) prison sentence. This could be attributable to the pattern of lower communication between court-appointed attorneys and the prosecution in both District and Superior Court.

Table. 7

Amount of Communication Between Parties as a Function of the Type of Defense Attorney.

Court	Type of Defense Attorney	Communication Score		
		M	***SD***	***n***
District Court	Private Attorney	3.21	1.98	58
	Court-Appointed Attorney	2.57	1.94	270
	CPCS Attorney	2.37	1.93	129
	Unknown	1.64	1.03	11
Superior Court	Private Attorney	6.75	3.08	12
	Court-Appointed Attorney	5.98	2.28	46
	CPCS Attorney	8.08	2.81	12
	Unknown	2.00	-	1

Notes. Values are calculated using the total communication score composite measure described at the start of Section F. *M* = average composite communication score, *SD* = the standard deviation of the communication score (the spread or variation in scores for that category), and *n* = the number of cases in that category. CPCS = Committee for Public Counsel Services.

In **District Court**, the total communication score was only very weakly associated with the number of mitigating factors.[28] This suggests that more communication probably did not lead to much more consideration of mitigating factors in District Court cases. This pattern was similar regardless of the type of defense attorney—the total communication score was associated with only a very small average increase in the number of mitigating factors prosecutors reported considering.[29] In **Superior Court**, there was a similar pattern overall—the total communication score was associated with only a small increase in the average number of mitigating factors reported.[30] However, when the cases were categorized by the type of defense attorney, we observed some differences. When more communication with court-appointed attorneys was reported in Superior Court, more mitigating factors also tended to be reported.[31] There was no association between the amount of communication and the number of mitigating factors reported when the defense attorney was a private attorney or from CPCS.[32] Unfortunately, the sample sizes for these groups was too small to draw any firm conclusions from these findings.

In Superior Court, we were also able to calculate "distance travelled"[33], for which higher values indicate more change in the length of the sentence from indictment through to the pled sentence. We thought that more "distance travelled" might be observed in cases with more communication between parties as that would mean the defense had opportunities to provide mitigating information to the prosecutor. However, we found that the amount of communication with the defense did not significantly influence distance travelled in Superior Court.[34] To further investigate, we examined the link between "distance travelled", the number of mitigating factors reported by the prosecutor, the amount of communication between parties reported by the prosecutor, and the type of defense attorney. A summary can be found in Table 8, with stronger associations in darker colors. Associations where we observed both variables increase appear in the green cells (e.g., if more communication was associated with more mitigating factors) and the associations where one variable increased and the other decreased appear in red cells (e.g., more communication was associated with fewer mitigating factors).

Most associations between these variables were weak—distance travelled was slightly higher (i.e., the "discount" was larger) when more mitigating factors were reported and when more communication was reported. More mitigating factors also tended to be linked with slightly higher levels of communication between parties. When considering the type of defense attorney, though, some different patterns emerge. However, it is important to note that some of the sample sizes were small (i.e., only 8 cases with a defense attorney from CPCS and only 12 cases with a private attorney had the data to run these analyses). The number of mitigating

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[28] Correlation - r (583) =0.08, 95% CI [0.001, 0.162].
[29] Correlations - Private attorney: r (56) = 0.08, 95% CI [-0.18, 0.33]; Court-appointed lawyer: r (268) = 0.06, 95% CI [-0.06, 0.17]; CPCS lawyer: r (127) = 0.11, 95% CI [-0.06, 0.28].
[30] Correlation - r (65) =0.10, 95% CI [-0.14, 0.33].
[31] Correlation - Court-appointed lawyer: r (41) = 0.26, 95% CI [-0.04, 0.52] .
[32] Correlations - Private attorney: r (9) = 0.05, 95% CI [-0.56, 0.63]; CPCS: r (10) = -0.02, 95% CI [-0.59, 0.56].
[33] The "*Distance Travelled*" variables refer to the difference between the sentence that the person charged could have received prior to any negotiations or amendments by the prosecutor, and the sentence they ultimately pled to. The distance travelled for the "maximum" refers to the top of the sentencing range (the maximum they could have received versus the maximum that they could serve according to the plea agreement), and the "minimum" refers to the bottom of the range (the minimum they could have received versus the maximum that they could serve according to the plea agreement). Refer to Section D.6 of Part 1 of the One-Year Report.
[34] Total communication as a predictor of distance travelled (min): $\beta = 0.68$, $p = 0.851$; Total communication as a predictor of distance travelled (max): $\beta = 0.12$, $p = 0.983$.

factors reported in cases with private defense attorneys was negatively associated with the distance travelled—when there were more mitigating factors reported, there appeared to be less of a "discount" observed. Similarly, in cases with CPCS lawyers, more mitigating factors were associated with a somewhat lower "discount" or no change in the "discount". That said, high levels of communication reported in cases with CPCS lawyers resulted in the largest average increase in "distance travelled".

Table 8.

Summary of Associations between "Distance Travelled", the Number of Mitigating Factors, and the Total Communication between Parties reported by Prosecutors in ***Superior Court.***

		Variable 2		
Variable 1	**Defense Attorney Type**	Distance travelled – max. sentence	Distance travelled – min. sentence	# of Mitigating Factors Reported
# of Mitigating Factors Reported	Any	$r = 0.07$	$r = 0.17$	-
	Private	$r = -0.20$	$r = -0.27$	-
	Court-Appointed	$r = 0.22$	$r = 0.14$	-
	CPCS	$r = -0.21$	$r = 0.03$	-
Communication Score	Any	$r = 0.14$	$r = 0.16$	$r = 0.10$
	Private	$r = -0.10$	$r = 0.10$	$r = 0.16$
	Court-Appointed	$r = 0.17$	$r = 0.18$	$r = 0.19$
	CPCS	$r = 0.30$	$r = 0.18$	$r = -0.50$

Notes. The "# of mitigating factors reported" is the sum of the different mitigating factors that the prosecution reported considering in each case. The "communication score" is a composite score that indicates the amount of communication with the defense. The *r* value indicates the strength of the correlation between two variables. Numbers closer to zero indicate that there is little association. Numbers above zero (green cells) indicate that as one variable increases, so does the other. Numbers below zero (red cells) indicate that as one variable increases the other decreases. Darker colors indicate stronger associations. CPCS = Committee for Public Counsel Services.

G. How were victims of crimes involved in cases resolved with a plea agreement?

The amount of involvement that victims of crimes can have throughout the criminal legal process varies between jurisdictions. In addition, the amount of involvement or influence victims should have on plea recommendations, sentencing, and charging is a contentious issue among scholars and lawmakers. Some offices, like the Berkshire Office, emphasize victims' rights and, if a victim wishes, they involve victims of crimes in the plea-bargaining process. This can be achieved by regular communication between the victim and the prosecutor, working with a Victim Witness Advocate (VWA), and taking advantage of the formal ways the legal system permits victim involvement in a case (e.g., testifying at trial and sentencing).

1. How often was an individual (or individuals) the victim of a crime in pled cases?

In **District Court**, prosecutors reported at least one person victim in 504 pled cases (50% of all 1012 cases) and a business was listed as the "victim" in 59 District Court cases (6%). In **Superior Court**, 39 cases reported a person victim (38% of 81 cases), and in one case a business was the reported victim (1%).

2. What was the demographic makeup of victims in pled cases?

Demographic information about the victim was reported by support staff, who were sometimes unable to answer all of the questions. Hence, there is some missing data[35] and "unknown" responses.

In **District Court** cases, most of the reported victims were women (66% of 499 cases with these data available) who were white (76%) and an average age of 37 (*SD* = 17.09). Some of these victims (52 cases, or 10%) were identified as vulnerable by the prosecutor (e.g., elderly, a minor, lives with a disability).

Superior Court cases tended to feature slightly different demographics among their victims. Most of the reported victims were women, but a lower percentage than in District Court (54% of 39 cases with these data available). Most were also white (62%), but again this was a lower percentage than in District Court. Finally, the average age of victims in Superior Court was younger than in District Court—30 years of age (*SD* = 17.91). In 14 of these cases, the victim were identified as vulnerable in some way (36%; e.g., elderly, a minor, lives with a disability).

Thus, it seems that victims in Superior Court tend to be more racially diverse, younger, and less likely to be female than was in District Court. Table 5 summarizes the demographic details of the victims in these cases.

[35] In District Court, the denominator is 499, which is the number of cases for which at least one demographic variable was provided. In Superior Court, the denominator is 39, which is the number of cases for which at least one demographic variable was provided.

Table 5.

Demographic Factors and Prosecutor's Perceptions of the Primary Victim in Superior Court and District Court Cases with Reported Victims.

Feature	Categories	Superior Court	District Court
Race	White	24 (62%)	378 (76%)
	Black	6 (15%)	28 (6%)
	Hispanic	-	3 (<1%)
	Other	-	5 (1%)
	Unknown	9 (23%)	85 (17%)
Gender	Male	17 (44%)	160 (32%)
	Female	21 (54%)	328 (66%)
	Other	-	9 (2%)
	Unknown	-	-
Vulnerable	Cases with a vulnerable victim	14 (34%)	52 (10%)
	Elderly	2 (5%)	31 (6%)
	Minor	10 (26%)	14 (3%)
	Physical/Intellectual Disability	2 (5%)	2 (<1%)
	Other	-	5 (1%)
Communication	None/Not at all	2 (5%)	11 (2%)
	A little	7 (18%)	95 (19%)
	A moderate amount	7 (18%)	118 (24%)
	A lot	19 (49%)	66 (13%)
	Contacted but no response	1 (3%)	18 (4%)
Involvement (Note: Victims may be counted in more than one category)	Exercised right to be heard	15 (38%)	49 (10%)
	Produced an impact statement	15 (38%)	60 (12%)
	Came to court/at least 1 hearing	17 (44%)	79 (16%)
	Testified (or agreed to)	13 (33%)	57 (11%)
	Involved in some other way	15 (38%)	106 (21%)

Notes: The denominator used to calculate percentages with for Superior Court counts was 39, and for District Court it was 499. These are the cases in which there was person victim reported and the prosecutor provide information about that victim/those victims in their data entry.

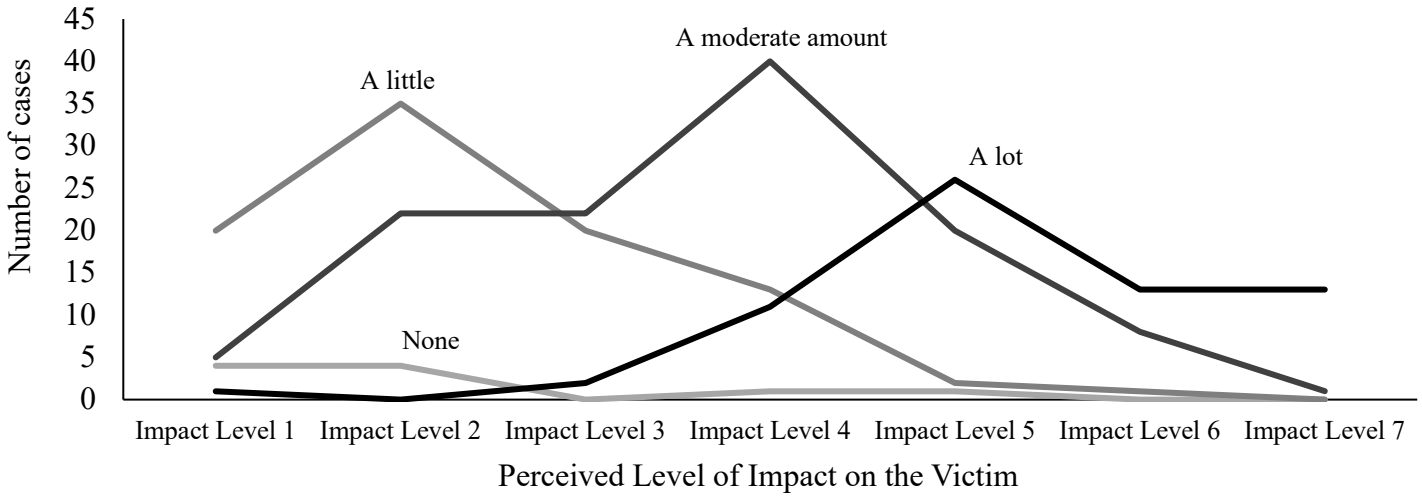
3. **How often did prosecutors communicate with the victims in pled cases?**

Prosecutors reported whether there was communication with the victim. In 337 **District Court** cases, the prosecutor responded to the questions relevant to victim communication (58% of cases with prosecutor data) and in only 20 of these cases (6% of 337) did the prosecutor indicate that there was no communication with the victim. Six of these 20 cases involved violent crimes (e.g., Violations of an Abuse/Harassment Prevention Order, Assault and Battery), but most were non-violent crimes against people (11 cases), motor vehicle offenses (3 cases), or property crimes (3 cases). In addition, among prosecutors who did attempt to communicate with the victim, 18 never received a response (6% of 317 cases) or responded "not at all" to the question of how much communication with the victim occurred (11 cases or 3%).

Among District Court prosecutors who successfully contacted the victim (288 cases or 85% of cases in which the prosecutor provided these data), most reported a moderate amount of communication (118 cases, or 41%). In 33% of these cases, a little communication between the prosecutor and victim was reported (95 cases). Finally, in 23% of these cases, a lot of communication with the victim was reported (66 cases; Table 5). In cases where a lot of communication occurred, the prosecutor reported that the case involved **violent offenses** 24% of the time (16 cases), non-violent crimes against people 55% of the time (36 cases), and property crimes 21% of the time (14 cases).[36] In addition, cases in which the prosecutor reported a more serious **impact on the victim** (on a scale from 1 to 7, with 7 indicating the highest level of negative impact on the victim), the prosecutors also tended to report more communication (Figure 3).

Figure 5.

*Number of Cases within Each Perceived Impact Category and Communication Level Category for Primary Victims in **District Court** Cases*



Whether communication with the victims of crimes was initiated in **Superior Court** cases was reported in 36 cases. In one case, no communication was initiated. The victim did not respond in one case, and in another case, the prosecutor reported that communication occurred "not at all". Thus, for 34 cases (94% of 36 cases in which these data were reported), there was at least some communication with the victim. Further analyses showed that a majority of Superior Court cases involved "a lot" of communication with the victim (19 cases, or 56% of these 34 cases), and "a moderate amount" or "a little" communication were each reported 21% of the time (in 7 cases).

Of the 19 cases in which "a lot" of communication with the victim was reported, the prosecutor reported that the crimes had a very serious **impact on the victim**. In 10 of these cases (53%), the victim impact was perceived to be at the highest level (7 out of 7). There was no perceived impact on the victim lower than 3 (out of 7) in this communication category. In contrast,

[36] Some cases involved more than one crime type, so these categories overlap somewhat.

for 6 cases (86% of 7 cases) in which "a little" communication with the victim occurred, the prosecutor reported an impact level of only 1 (out of 7).

In **Superior Court**, the three main **types of crimes** were violent crimes (24 cases with reported victims), crimes involving firearms (16 cases with reported victims), and drug crimes (17 cases with reported victims).[37] In cases involving **violent offenses**, the prosecutor most often communicated with the victim a lot (12 cases, or 50%), followed by either a moderate amount (3 cases, or 13%) or a little (3 cases, or 13%), but rarely not at all (1 case, or 4%). **Crimes involving firearms** sometimes involved a lot of victim communication (5 cases, or 31%), but a moderate amount (2 cases, or 13%) or a little communication (5 cases, or 31%) was also common. Again, no communication at all was rare in cases involving firearms (1 case, or 6%). In cases involving **drug crimes**, a lot of communication occurred in 4 cases (24%), a moderate amount of communication occurred sometimes (3 cases, or 18%). A little communication (3 cases, or 18%) was also common, but no communication was rare (1 case, or 6%).

Table 6.

Demographic Factors and Prosecutor's Perceptions of the Primary Victim in Superior Court and District Court Cases with Reported Victims.

		Victim Demographics			
Court	**Communication**	White	Black	Female	Male
District Court	A lot	39 (21%)	2 (40%)	35 (22%)	15 (23%)
	A moderate amount	70 (38%)	1 (20%)	69 (43%)	17 (26%)
	A little	60 (33%)	1 (20%)	43 (27%)	28 (42%)
	None	6 (3%)	-	6 (4%)	2 (3%)
	No response	8 (4%)	1 (20%)	6 (4%)	4 (6%)
	Total	183	5	159	66
Superior Court	A lot	8 (66%)	3 (75%)	9 (75%)	5 (50%)
	A moderate amount	2 (17%)	-	1 (8%)	2 (20%)
	A little	2 (17%)	1 (25%)	2 (17%)	2 (20%)
	None	-	-	-	1 (10%)
	No response	-	-	-	-
	Total	12	4	12	10

There were not enough cases with non-white victims to meaningfully assess the influence of **victim race** on communication, but there was some evidence of **gender differences**. Prosecutors reported less communication with the victim in **District Court** cases where the primary victim was male (Table 6). Thus, it appears that communication with victims was standard practice in the Berkshire DA's office whether the case was in District or Superior Court, and regardless of the race or gender of the victim. In cases where the prosecutor judged the victim to be more severely impacted, though, there was more communication between the prosecutor and the victim, particularly for violent crimes.

[37] Some cases involved multiple types of crime, so some cases appear in multiple categories—see Part 1 for more details on crime types on Superior Court.

4. How were victims involved in the cases against the person charged in pled cases?

Most victims were actively involved in the cases, particularly in Superior Court (Table 5). In **District Court**, the most common form of victim involvement was coming to court or to hearings (79 cases, or 16% of 499 cases with at least one reported victim). This was followed by producing an impact statement (60 cases, or 12%), testifying or agreeing to do so (57 cases, or 11%), and exercising their right to be heard (49 cases, or 10%). A significant portion of victim involvement in District Court did not fall within these categories though, with 106 cases (21%) indicating another reported form of involvement.

For instance, in 14 District Court cases (3% of 499 cases), the prosecutor reported that a Victim Witness Advocate (VWA) was involved. In 3 cases (<1%), complications associated with the COVID-19 pandemic prevented the prosecutor establishing a good level of communication with the victim. In 7 cases (1%), the victim was a police officer and, thus, was not involved in the same way that civilian victim would be. Often, though, these other circumstances described a personal relationship between the victim and the person charged (e.g., spouse, parent, sister/brother), which meant that the victim was interested in getting the person help and/or a more lenient sentence. In other cases, the prosecutor communicated with the victim, but they did not want to be involved in the case or thought the person charged should receive a harsh sentence.

In contrast, in **Superior Court**, it was common for victims to come to court or attend hearings (17 cases, or 44% of 39 cases with at least one reported victim). Exercising their right to be heard and producing a victim impact statement was also common (each reported in 15 cases, or 38%). Testifying, or agreeing to do so, was the least common form of involvement but was still reported (13 cases, or 33%). In 15 cases (38%), the prosecutor reported the victim was involved in the case in some other way. Sometimes, the victim of a crime was also charged with a different crime or was in custody at the time. Some of the cases in Superior Court were also serious enough that the victim died, so family was involved. In other cases, prosecutors reported that, although they communicated with the victim, they were not cooperative or did not want to be involved.

Thus, victim involvement is more common in Superior Court, which makes sense given the crimes are more complex and more serious. In both courts, attending hearings or coming to court was the most common form of involvement.