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## MISDEMEANOR APPEALS

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### ABSTRACT

*Misdemeanor cases affect far more people than felony cases, outnumbering felony cases by more than three to one. Yet little empirical information exists on many aspects of misdemeanor prosecutions. This Article provides the first quantitative look at appellate review in misdemeanor cases nationwide. It uses data drawn from a random sample of direct criminal appeals decided by every state appellate court in the nation, unpublished aggregate data on misdemeanor trial court cases provided by the Court Statistics Project, and published state court statistics.*

*We provide the first estimate of the rate of appellate review for misdemeanors, concluding that appellate courts review no more than eight in ten thousand misdemeanor convictions and disturb only one conviction or sentence out of every ten thousand misdemeanor judgments. This level of oversight is much lower than that for felony cases, for reasons we explain. To develop law and regulate error in misdemeanor cases, particularly in prosecutions for the lowest-level offenses, courts may need to provide mechanisms for judicial scrutiny outside the direct appeal process.*

*Additional findings include new information about the rate of felony trial court review of lower court misdemeanor cases; ratios of appeals to convictions for various misdemeanor-crime categories; detailed descriptive information about misdemeanor cases that reach state appellate courts; the results of a complete statistical analysis examining which features are significantly associated with a greater or lesser likelihood of success, including crime type, claim raised, judicial-selection method, and type of representation; and the first quantitative look at how misdemeanor appeals differ from felony appeals.*

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## INTRODUCTION

Misdemeanor cases dominate the criminal caseloads of state trial courts. Each year, state prosecutors charge an estimated 13.2 million defendants with assault; DUI; vagrancy; gambling; drunkenness; liquor-law violations; disorderly conduct; prostitution; vandalism; theft; drug possession; and a range of traffic offenses, such as reckless driving, speeding, eluding police, and driving with a suspended license.<sup>1</sup> Those convicted are fined, sentenced to terms of probation, or, less frequently, sentenced to short terms of incarceration—often the “time served” waiting in jail for their cases to be resolved.<sup>2</sup>

For defendants charged with misdemeanors and their families, the hardship of fulfilling a misdemeanor sentence pales in comparison to the consequences of the process itself.<sup>3</sup> For defendants who are not convicted, missed work from detention and multiple court appearances while the charge is pending can lead to job loss and eviction, for example, and the arrest alone marks the defendant

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<sup>1</sup> See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 39-54, 251-63 (2018) (estimating that 13,240,034 misdemeanor cases are filed each year after collecting data from state court administrative offices, National Center for State Courts, and other publicly available reports); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 736-37 (2018) (estimating that 13.2 million misdemeanor cases are filed each year based on data from the National Center for State Courts); see also 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.8(c), at 557-62 (4th ed. 2015) (providing detailed breakdown of how states define misdemeanors).

<sup>2</sup> See *infra* text accompanying note 48 (discussing research showing that many convicted misdemeanants are sentenced to “time served” and released upon sentencing).

<sup>3</sup> See generally MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (providing classic evaluation of lower criminal court process and its hardships for defendants); NATAPOFF, *supra* note 1 (providing brilliant contemporary analysis of misdemeanor process).

On collateral consequences, see generally MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE chs. 5-6 (2018); Natapoff, *supra* note 1, at 19-38. See also Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 958 (2018) (explaining how criminal-record information is now widely shared but unreliable, often containing incomplete information about whether charges were dismissed); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 172-73 (2017) (noting that “often life-long effects of even a minor criminal charge have become particularly pernicious over the past decade” because of easier access to criminal history information and new laws creating “barriers to employment, licensing, and other areas based on a person’s criminal history”).

For a searchable database of collateral consequences in every state for each crime, see *National Inventory of Collateral Consequences of Conviction*, JUSTICE CTR., COUNCIL STATE GOV’TS, <https://niccc.csgjusticecenter.org/> [<https://perma.cc/62RJ-UYTW>] (last visited Sept. 21, 2019).

for harsher treatment should there be future criminal justice encounters.<sup>4</sup> For those convicted, that criminal record has an impact that lasts much longer than the time it takes to satisfy the sentence itself. It can cost defendants their driver's licenses<sup>5</sup> and voting rights;<sup>6</sup> cripple employment opportunities;<sup>7</sup> and end essential government benefits for housing, nutrition, and education.<sup>8</sup> Some misdemeanor convictions lead to deportation<sup>9</sup> or to registration and residency restrictions as a sex offender.<sup>10</sup> And when a defendant is unable to pay fines, fees, and costs, even one of these "minor" convictions can lead to debilitating debt.<sup>11</sup>

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<sup>4</sup> See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 183-220 (2018); NATAPOFF, *supra* note 1, at 20-23, 34-35.

<sup>5</sup> See LOVE, ROBERTS & LOGAN, *supra* note 3, § 2:23.

<sup>6</sup> See Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 74 (2019).

<sup>7</sup> See NATAPOFF, *supra* note 1, at 29. Moreover, a conviction may render a person legally ineligible to work in certain industries or positions. In Ohio, for example, a misdemeanor can eliminate the ability to obtain or maintain licenses for dozens of professional activities, including teaching, practicing law, auctioneering, embalming, and practicing cosmetology. See *City of Cleveland Heights v. Lewis*, 129 Ohio St. 3d 389, 2011-Ohio-2673, 953 N.E.2d 278, at ¶ 29 (Lundberg Stratton, J., concurring).

<sup>8</sup> See LOVE, ROBERTS & LOGAN, *supra* note 3, §§ 2:16, :17, :22 (discussing debarment from federal food and drug programs, public housing and rental subsidies, and student financial aid). Government employees may lose their pensions. See, e.g., *Commonwealth v. Abraham*, 62 A.3d 343, 344 (Pa. 2012) (reviewing teacher's guilty plea to offense leading to forfeiture of his public-employee pension); LOVE, ROBERTS & LOGAN, *supra* note 3, § 2:21 n.7.

<sup>9</sup> See NATAPOFF, *supra* note 1, at 50 (stating that driving without license was top charge triggering deportation in Davidson County, Tennessee, in 2012).

<sup>10</sup> See LOVE, ROBERTS & LOGAN, *supra* note 3, §§ 2:39, :51 (discussing sex-offender registration and deportability, respectively); see also *United States v. Ross*, 848 F.3d 1129, 1130-31 (D.C. Cir. 2017) (reviewing conditional guilty plea of defendant, previously convicted of misdemeanor sex offense, for failing to register in new state of residence); *Commonwealth v. Muniz*, 164 A.3d 1189, 1215 n.20 (Pa. 2017) (listing Sex Offender Registration and Notification Act predicate offenses that may be graded as misdemeanors under Pennsylvania law, including interference with custody of children, luring of child into motor vehicle or structure, indecent assault, invasion of privacy, and various conduct with obscene and other sexual materials and performances).

<sup>11</sup> See, e.g., NATAPOFF, *supra* note 1, at 128-32 (detailing how defendants are incarcerated because they cannot afford to pay criminal debt); Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027-30 (2016); see also Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 820 (2018) ("[W]hile driving with a suspended license charges can make up a significant part of the caseload in many jurisdictions, the suspensions often 'result from failure to pay fines or fees, such as tickets for a broken tail light . . . parking tickets, or even failure to pay child support.'" (omission in original) (quoting ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF*

A resurgence of interest in misdemeanor enforcement's huge impact on society, particularly on poor and minority communities, has fueled an explosion in new empirical research about misdemeanor arrests,<sup>12</sup> charging,<sup>13</sup> bail,<sup>14</sup> counsel,<sup>15</sup> sentencing,<sup>16</sup> and collateral consequences.<sup>17</sup> Yet what we know about

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AMERICA'S BROKEN MISDEMEANOR COURTS 26 (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/284V-MYLS>]).

<sup>12</sup> See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820-25 (2015) (summarizing empirical and anecdotal data on direct and indirect costs to arrestees).

<sup>13</sup> See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 636-37 (2014) (explaining misdemeanor charging in New York City).

<sup>14</sup> See, e.g., Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 842-44, 873 (2018) (showing that pretrial detention of misdemeanor defendants correlates with higher guilty-plea rates, increased likelihood of incarceration, longer sentences, and higher recidivism rates, even though most misdemeanor charges are dismissed before trial); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 729 (2017) (reaching similar results in study of misdemeanor cases in Harris County, Texas); see also SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 87-88 (2018) (detailing data on earned income for individuals in pretrial detention); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 236 (2018) (evaluating data that included about 228,000 misdemeanor cases and finding that detained defendants are more likely to plead guilty, to be rearrested after disposition, and to experience poor labor outcomes even years later); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, B.C. L. REV. (forthcoming 2020) (manuscript at 7), <https://ssrn.com/abstract=3374571> [<https://perma.cc/K9ZN-DTRM>] (studying eight jurisdictions and finding that 43% of defendants with bail set at \$500 were detained pretrial); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511 (2018) (finding that pretrial detention leads to increases in likelihood of conviction, length of sentence, and amount of nonbail fees owed).

<sup>15</sup> See, e.g., Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1033 (2013) (summarizing aggregate data and site observations regarding notice to misdemeanor defendants of right to counsel); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 21-22 (2013) (noting that "mass processing of low-level charges without significant regard for either substantive or procedural justice").

<sup>16</sup> See, e.g., LOVE, ROBERTS & LOGAN, *supra* note 3, § 2.67.

<sup>17</sup> One example of this renewed attention is a recent symposium on misdemeanor justice. See generally Symposium, *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System*, 98 B.U. L. REV. 669 (2018). For two handy collections of recent research, see generally NATAPOFF, *supra* note 1; Alexandra Natapoff, *Misdemeanors*, in 1 ACAD. FOR JUSTICE, *REFORMING CRIMINAL JUSTICE* 71 (Erik Luna ed., 2017), [http://academyforjustice.org/wp-content/uploads/2017/10/5\\_Reforming-Criminal-Justice\\_Vol\\_1\\_Misdemeanors.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/5_Reforming-Criminal-Justice_Vol_1_Misdemeanors.pdf) [<https://perma.cc/52FL-D9W4>]. New data collections include Mayson & Stevenson, *supra* note 14, and the county-by-county data sets collected at

contemporary misdemeanor-case processing remains incomplete, with gaping holes.

This Article contributes new information to help fill an important void. It provides the first quantitative look at *appellate review* in misdemeanor cases, using data collected by the National Center for State Courts in its Survey of State Court Criminal Appeals (“NCSC Appeals Study”)—data drawn from a random sample of direct criminal appeals decided by every state appellate court in the nation.<sup>18</sup> To provide additional context, we also reference unpublished aggregate data on misdemeanor cases in state trial courts provided to us by the Court Statistics Project (“CSP”)<sup>19</sup> and published state court statistics on trial court review of lower court misdemeanor adjudication.<sup>20</sup> We examine how misdemeanor prosecutions in trial courts compare to the cases that reach appellate courts; what claims of error state appellate courts actually review; and which factors associate with the likelihood of success for defendants who appeal from misdemeanor judgments, including crime type, claim raised, judicial-selection method, and type of representation.<sup>21</sup> We also provide the first quantitative look at how misdemeanor appeals differ from felony appeals.<sup>22</sup>

This Article unfolds as follows. Part I reviews the legal framework for misdemeanor appeals and summarizes existing empirical scholarship on these appeals. We estimate that, at most, approximately eight in ten thousand misdemeanor judgments are appealed. We then lay out the reasons why the level of review is so much less than in felony cases, and include the first empirical examination of appeals to trial courts in two-tier trial court systems in multiple states.

Part II explains our primary research questions: First, which misdemeanor cases reach appellate courts (and which do not)? Second, what factors correspond with a higher likelihood of success for the appeals that are filed? And

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MEASURES FOR JUST., <https://measuresforjustice.org/> [<https://perma.cc/R28V-43P4>] (last visited Sept. 21, 2019).

<sup>18</sup> See NICOLE L. WATERS ET AL., U.S. DOJ, BUREAU OF JUSTICE STATISTICS, CRIMINAL APPEALS IN STATE COURTS 4-5 (2015) [hereinafter NCSC APPEALS STUDY], <https://www.bjs.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/56XX-DSRZ>] (examining direct appeals but excluding interlocutory appeals, appeals involving writs, appeals in proceedings for post-conviction relief, and appeals of probation and parole revocation decisions). For other articles based on the NCSC Appeals Study, see generally Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939 (2017) [hereinafter Heise, King & Heise, *State Criminal Appeals*]; Nancy J. King & Michael Heise, *Appeals by the Prosecution*, 15 J. EMPIRICAL LEGAL STUD. 482 (2018) [hereinafter King & Heise, *Appeals by the Prosecution*].

<sup>19</sup> See *infra* note 58 (discussing data from CSP studies).

<sup>20</sup> See *infra* note 43 (discussing appeal-to-conviction ratio for misdemeanors in state courts).

<sup>21</sup> See *infra* Sections II.B, IV.A & B.

<sup>22</sup> See *infra* Sections II.C, IV.C.

third, how do misdemeanor appeals differ from felony appeals? Part III describes our data and the empirical strategy we used to investigate these questions.

Part IV presents our findings for all three research questions. Based on data from about one-third of the states, appellate courts reviewed cases from all general misdemeanor crime categories, but the case mix was skewed compared to the mix in trial courts. Compared to trial courts, most of those appellate judges saw a higher percentage of violent and DUI offenses and a much lower percentage of non-DUI driving offenses. As for factors associated with success on appeal, appeals by prosecutors and appeals in sex crime and non-DUI driving offenses were more likely to succeed. But other factors—such as the presence of oral argument or a reply brief, judicial-selection method, claim type, or type of legal representation—made no significant difference in the likelihood of a favorable outcome. Compared to felony appellants, misdemeanor appellants had similar success rates, but a larger proportion had retained counsel or no legal representation at all. Part V concludes with potential policy implications.

## I. MISDEMEANOR APPEALS:

### RATE OF APPEAL, LEGAL FRAMEWORK, AND EXISTING RESEARCH

This Part provides a foundation for the research questions we investigate by summarizing the law regulating misdemeanor appeals, relevant aspects of misdemeanor-case processing, and pertinent existing research. It begins with a look at the ratio of misdemeanor appeals to misdemeanor convictions in trial courts, a ratio much lower than that for felonies, and a review of explanations for that difference. The Part concludes with a summary of the meager empirical research on misdemeanor appeals and the contributions of this study.

#### A. *How Many of the Misdemeanor Cases Processed in State Trial Courts Reach Appellate Courts?*

Although misdemeanor cases constitute roughly three quarters of all criminal cases filed in state trial courts,<sup>23</sup> the amount of judicial review of final judgments in these cases is vanishingly small. The actual rate at which misdemeanor defendants appeal requires estimation because statewide statistics on the conviction rate for misdemeanor cases are available for only sixteen states and the District of Columbia. Only five of those jurisdictions report conviction or

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<sup>23</sup> Stevenson & Mayson, *supra* note 1, at 746 & n.81; see also NATAPOFF, *supra* note 1, at 2 (estimating that misdemeanors comprise closer to 80% of criminal dockets). States vary greatly in defining what crimes count as misdemeanors, complicating even the most basic attempt to count the number of misdemeanor cases charged or filed. See NATAPOFF, *supra* note 1, at 45-48, 254-55; Stevenson & Mayson, *supra* note 1, at 738-40 (discussing variation in state definitions of misdemeanors). The key difficulty is in how states classify various traffic offenses. For example, an infraction or violation in one state may be a misdemeanor in another. Stevenson & Mayson, *supra* note 1, at 738-40. Because the number of traffic cases filed in state courts each year is so large, dwarfing other misdemeanor-offense categories, this classification decision can significantly affect misdemeanor research. See *id.*



guilty plea rates under 50%.<sup>24</sup> Guilty pleas roughly approximate convictions in most states, since only 1-2% of misdemeanor convictions follow a trial, with 98-99% of convictions coming after a guilty plea.<sup>25</sup> With so much missing information, estimating an accurate national misdemeanor conviction rate is perilous. However, to place misdemeanor appeals into some perspective, a conservative estimate will do. Multiplying a conviction rate of only 40% by the estimated 13.2 million misdemeanor cases filed in 2016,<sup>26</sup> and adding an estimated 528,000 additional misdemeanor convictions resulting from felony charges,<sup>27</sup> generates a conservative estimate of approximately 5.8 million misdemeanor convictions entered by state courts nationwide in 2016.

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<sup>24</sup> See *infra* Appendix B (listing estimated rates as follows: Alaska, 57%; California, 70%; District of Columbia, 37%; Florida, 59%; Hawai'i, 55%; Indiana, 54%; Kansas, 54%; Michigan, 39%; Missouri, 65%; New Mexico, 50%; New York, 54%; North Carolina, 31%; Ohio, 45%; Texas, 65%; Vermont, 55%; Washington, 42%; Wisconsin, 72%).

In addition, misdemeanor conviction rates were available for the following local jurisdictions: Cook County, Illinois 56%; Hennepin County, Minnesota 56%; and Miami, Florida, averaged with Philadelphia, Pennsylvania 54%. See *infra* Appendix B. Local jurisdictions may vary substantially from statewide rates. See, e.g., KOHLER-HAUSMANN, *supra* note 4, at 69 (finding 19.5% conviction rate in New York City).

<sup>25</sup> E.g., 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.11(c-1), at 158 (4th ed. Supp. 2018-2019) (noting *trial* rates almost uniformly below 2% in more than a dozen states reporting disposition information for at least some misdemeanors); see also BRIAN A. REAVES, U.S. DOJ, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/W6PY-F7NM>] (reporting that more than 99% of felony charges that ended in misdemeanor convictions were by plea, not trial); Mayson & Stevenson, *supra* note 14 (manuscript at 7).

The CSP lists 2017 bench- and jury-trial rates—but not whether those trials ended in conviction or acquittal—for misdemeanor dispositions in nineteen states. Combining these states—except North Carolina, which reported an anomalous 32.46% bench-trial rate, and Iowa, which reported bench- but not jury-trial rates—only 2.23% of misdemeanor cases ended in acquittal or conviction after trial. See Nat'l Ctr. for State Courts & Conference of State Court Adm'rs, *2017 Statewide Misdemeanor Jury Trials and Rates*, CT. STAT. PROJECT: CSP DATAVIEWER (last updated Jan. 11, 2017), <http://data2.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa-1&name=Temp/ab22dfe5d1284b58b6e79d29be519db6.html> [<https://perma.cc/BF26-UTZJ>] (open "Criminal" tab; then select "2017" in data year field and select "Statewide Misdemeanor Jury Trials and Rates" in chart/table field); Nat'l Ctr. for State Courts & Conference of State Court Adm'rs, *2017 Statewide Misdemeanor Bench Trials and Rates*, CT. STAT. PROJECT: CSP DATAVIEWER (last updated Jan. 11, 2017), <http://data2.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa-1&name=Temp/04f2dd0f31cc4e8686b316c0879771c5.html> [<https://perma.cc/XZK5-8UVN>] (open "Criminal" tab; then select "2017" in data year field and select "Statewide Misdemeanor Bench Trials and Rates" in chart/table field).

<sup>26</sup> See *supra* text accompanying note 1.

<sup>27</sup> REAVES, *supra* note 25, at 24 tbl.21 (stating that, in 2009, approximately 12% of felony case filings in seventy-five largest counties in United States ended in misdemeanor convictions); see also 1 LAFAVE ET AL., *supra* note 25, § 1.11(c-1), at 154 n.40.460 (reporting

Estimating the number of misdemeanor direct appeals filed in state appellate courts requires less conjecture, thanks to the primary data source we examine in this Article. Collected by researchers at the NCSC from a random sample of 2010 decisions by state appellate courts nationwide and released to the public in 2016, the NCSC Appeals Study is the only existing systematic nationwide source of empirical information about direct appeals in state criminal cases that includes misdemeanors. The only published information about the sample of misdemeanor appeals in the NCSC Appeals Study appears in a Bureau of Justice Statistics (“BJS”) Bulletin.<sup>28</sup> The Bulletin summarizes a handful of aggregate statistics and estimates the number of direct appeals decided in misdemeanor cases nationwide in 2010 to be about 5300, which represents about 7.0% of all direct criminal appeals decided by intermediate appellate courts and 9.4% of all direct criminal appeals decided by courts of last resort.<sup>29</sup> Comparing this appeals rate with a conservative estimate of the number of convictions from misdemeanor filings in 2010<sup>30</sup> produces a ratio of about eight appeals for every ten thousand misdemeanor convictions in state trial courts, or *one in 1250*.<sup>31</sup> This rate of activity at the appeals court level in state misdemeanor cases is substantially lower than the rate in state felony cases. Available information suggests that one in every seventeen to forty-five defendants convicted of a felony files an appeal.<sup>32</sup>

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multiple states’ rates at which felony charges are reduced to misdemeanor convictions as percentage of their total convictions for felony charges, ranging from 8-23%). Twelve percent of roughly 4.4 million annual felony filings in state court equals an estimated 528,000 misdemeanor convictions resulting from felony charges.

<sup>28</sup> NCSC APPEALS STUDY, *supra* note 18, at 10.

<sup>29</sup> *See id.* at 4 tbl.1, 5 tbl.2. A study of federal court cases from 1999 suggested a rate of appeal for misdemeanor convictions closer to 5%. *See* JOHN SCALIA, U.S. DOJ, BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985-1999, at 2-3 (2001), <https://www.bjs.gov/content/pub/pdf/fca99.pdf> [<https://perma.cc/Z5NH-BV6E>] (finding that “[d]efendants convicted of property, immigration, and misdemeanor offenses were among the least likely to file an appeal,” and that defendants filed five appeals for every one hundred convictions in misdemeanor cases).

<sup>30</sup> Misdemeanor filings have been trending downward. In 2010, approximately 15.3 million misdemeanor cases were filed in state trial courts. *See* Stevenson & Mayson, *supra* note 1, at 747 fig.1. Assuming that 40% (6,120,000) of these misdemeanor filings resulted in convictions, and adding an estimated 528,000 additional misdemeanor convictions from felony charges, *see supra* note 27, produces an estimated 6,648,000 misdemeanor convictions in 2010.

<sup>31</sup> A less conservative estimated conviction rate of 60% would instead produce a ratio of only 5.8 appeals for every 10,000 convictions.

<sup>32</sup> NCSC APPEALS STUDY, *supra* note 18, at 4 tbl.1, 5 tbl.2 (estimating that state appellate courts decided roughly 55,600 felony direct appeals in 2010). Somewhere between 1.1 million and 2.38 million state felony convictions are entered each year. *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DOJ, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 3 tbl.1.1 (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/PJQ6-ZJNF>] (estimating

### B. *Why So Few Misdemeanor Appeals?*

One partial explanation for the much lower appeals-to-convictions ratio in misdemeanor cases as compared to felony cases is that some states specially restrict misdemeanor appeals. For example, some states that provide felony defendants the right to appellate review deny that same right to misdemeanor defendants; instead, these states only provide appeal at the discretion of the court.<sup>33</sup> Or a state may reserve high-court review for felony cases and limit judicial review in misdemeanor cases to intermediate appellate courts.<sup>34</sup>

Another legal constraint depressing the number of misdemeanor appeals is the two-tier trial court structure in many states. Unlike states with a single trial court from which misdemeanor and felony defendants alike may appeal directly to an appellate court,<sup>35</sup> states with a two- or multiple-tier trial court structure adjudicate at least some misdemeanors in a trial court of limited jurisdiction, while felonies are handled by the state's trial court of general jurisdiction or "felony trial court."<sup>36</sup> In most of these states, defendants must challenge

that state courts convicted and sentenced 1.13 million people for felony offenses in 2006). The higher 2.38 million estimate is derived by dividing 13.2 million annual state misdemeanor filings, *see supra* note 1, by three—the consistent felony-to-misdemeanor caseload ratio in state courts nationwide over several years, *see* Stevenson & Mayson, *supra* note 1, at 746-47, 746 n.81, 764—and then multiplying those 4.4 million annual felony filings by a conviction rate of 54%. *See* NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2016 DATA 11-12 (2016), [http://www.courtstatistics.org/~media/microsites/files/csp/national-overview-2016/sccd\\_2016.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/national-overview-2016/sccd_2016.ashx) [<https://perma.cc/FG44-AU4R>]; REAVES, *supra* note 25, at 24 tbl.21 (reporting 54% felony conviction rate in the seventy-five largest counties in 2009).

<sup>33</sup> *See* Bundy v. Wilson, 815 F.2d 125, 136-42 (1st Cir. 1987) (providing fifty-state summary).

<sup>34</sup> *See, e.g.,* McMonagle v. Meyer, 802 F.3d 1093, 1096 (9th Cir. 2015) (en banc) (holding that misdemeanants may not appeal to California Supreme Court); Batey v. Dare, 742 So. 2d 194, 196 (Ala. Civ. App. 1999) (per curiam) (explaining that Alabama Court of Criminal Appeals has "exclusive appellate jurisdiction of all misdemeanors" (quoting ALA. CODE § 12-3-9 (1999))).

<sup>35</sup> *See, e.g.,* D.C. CODE § 11-721 (2018) (requiring all criminal judgments of state-equivalent trial court to be appealed to D.C. Court of Appeals). Illinois and Minnesota also have unified trial courts. *See* ILL. SUP. CT. R. 603; MINN. R. CRIM. P. 28.

<sup>36</sup> For a state-by-state listing of the jurisdiction of courts of limited jurisdiction, *see* Nat'l Ctr. for State Courts & Conference of State Court Adm'rs, *State Court Structure Charts*, CT. STAT. PROJECT, [http://www.courtstatistics.org/Other-Pages/State\\_Court\\_Structure\\_Charts.aspx](http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx) [<https://perma.cc/LX6N-EGE2>] (last visited Sept. 21, 2019). *See also* U.S. DOJ, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, at 265-319 (2006), <https://www.bjs.gov/content/pub/pdf/sco04.pdf> [<https://perma.cc/H5ZF-N4LE>] (listing state court structures). For a listing of the appellate jurisdiction of state trial courts as of 2010, *see* Nat'l Ctr. for State Courts & Conference of State Court Adm'rs, *State Trial Courts with Incidental Appellate Jurisdiction, 2010*, CT. STAT. PROJECT (2012), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/State\\_Trial\\_Courts\\_with\\_Incidental\\_Appellate\\_%20Jurisdiction.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/State_Trial_Courts_with_Incidental_Appellate_%20Jurisdiction.ashx) [<https://perma.cc/5C8P-NQS3>]. *See generally* David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in the Criminal Courts*,

misdemeanor judgments from the lower courts in the felony trial court, at least initially, instead of appealing directly to the appellate courts. In some states, the appeal to the felony trial court is *de novo*; that is, the prosecution begins again with the opportunity for new plea negotiations or trial.<sup>37</sup> In others, the felony trial court conducts ordinary appellate review based solely on the lower court record so that an appeal to the state's appellate courts would be a *second* review of that record.<sup>38</sup>

These two-tier trial court structures reduce the rate at which misdemeanor cases reach appellate courts. In at least three states with a two-tier system, a misdemeanor defendant is barred from further appealing the felony trial court's decision to an appellate court.<sup>39</sup> In others, a defendant may seek review of the felony trial court's decision regarding a misdemeanor judgment, but only by permission.<sup>40</sup> Even where appeal from the felony trial court to the state appellate court is by right, reaching the appellate court requires an extra appeal, twice the effort a felony defendant must expend.<sup>41</sup>

Based on estimates from the very limited statistics available, few misdemeanor defendants seek even one appeal to the next-level trial court in these two-tier states. Of the thirteen states that separate misdemeanor appeals

24 CONN. L. REV. 381 (1992); Binny Miller, *Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems*, 63 ST. LOUIS U. L.J. 191 (2019).

<sup>37</sup> See 1 LAFAYETTE ET AL., *supra* note 25, § 1.4(j), at 45-46; 6 *id.* § 22.1(f), at 1287. This is commonly required if the lower court proceeding was not on the record or the lower court judge was not a lawyer. See 1 *id.* § 1.4(j), at 45-46.

<sup>38</sup> 1 *id.* § 1.4(j), at 46 n.183.240.

<sup>39</sup> See ALASKA STAT. § 22.07.020(d)(1) (2018) (“[T]he right of appeal to the court of appeals is waived if an appellant chooses to appeal the final decision of the district court to the superior court . . . .”); *State v. Eby*, 244 P.3d 1177, 1178-79 (Ariz. Ct. App. 2011) (confirming right to appeal judgment of justice court to superior court but no right to subsequent appeal to Arizona Court of Appeals even when superior court appeal is *de novo* trial); *State v. Thompson*, 83 A.3d 388, 391 (N.H. 2013) (holding that statute “does not allow a defendant to pursue both avenues of appeal, either simultaneously or consecutively”).

<sup>40</sup> See, e.g., MICH. CT. R. 7.203(B)(2) (allowing Michigan Court of Appeals to grant leave for party to appeal judgment of circuit court in case on appeal from another court); *Commonwealth v. Hurd*, 612 S.W.2d 766, 768 (Ky. Ct. App. 1981) (“There is no appeal as a matter of right to the Court of Appeals from an appellate decision of the circuit court. Such review can only be had by a motion for discretionary review . . . .”).

<sup>41</sup> See, e.g., *State v. Morel*, 95-0926, p. 2 (La. App. 4 Cir. 5/1/96); 673 So. 2d 1291, 1292 (per curiam) (remanding appeal of misdemeanor convictions to felony trial court because there is no direct appeal to courts of appeal); *Parks v. State*, 2014-KM-01675-COA (¶ 5) (Miss. 2015); 194 So. 3d 179, 180-81 (observing court rule that requires notice of appeal and both appearance bond and cost bond to be filed with circuit clerk within thirty days of date of conviction in either justice court or municipal court); *Sparks v. Bare*, 373 P.3d 864, 868 (Nev. 2016) (holding that felony trial court may require nonindigent misdemeanor appellant to obtain and pay for transcripts for misdemeanor appeal); *cf.* *Roberts*, *supra* note 11, at 828-29 (“[T]he process costs of fighting a misdemeanor case are high, prohibitively so for many people.”).

from original criminal filings in the trial court statistics they report, in all but one, the estimated<sup>42</sup> ratio of appeals to lower court convictions was less than one in one hundred.<sup>43</sup> Most of these appeals probably were not successful. Only two states reported dispositions of these appeals in a form that identified how many succeeded or failed. Of *de novo* misdemeanor appeals filed in Missouri trial courts in 2017, 81% resulted in guilty pleas; in New Mexico, 74% of misdemeanor appeals resulted in conviction.

In addition to the circumstances reviewed above, which combine to reduce generally the number of misdemeanor appeals filed in appellate courts, it is important to recognize factors that depress appellate activity in the segment of misdemeanor cases that carry the lowest penalties, variously categorized as “criminal infractions,” “fine-only misdemeanors,” “nonindictable

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<sup>42</sup> Because most of these states’ reports did not identify the number of convictions, determining what proportion of these appellate dispositions were from lower court convictions required an estimation. When necessary, we estimated that 50% of total misdemeanor dispositions in the lower trial court were convictions. *See supra* note 24. Information on the sources for these estimates is available by request.

<sup>43</sup> By state, for the latest year available, these ratios were as follows: Arizona, 0.27% (578 appeals to superior courts compared to 211,521 convictions in justice and municipal courts in 2017); California, 0.12% (3117 appeals to appellate division of superior courts compared to 2,697,705 convictions in limited jurisdiction division of superior courts in 2017); Florida, 0.27% (455 appeals to circuit courts compared to 170,420 convictions in county courts in FY 2017); Kentucky, 0.09% (175 appeals to circuit courts compared to 187,597 convictions in district court in 2017); Maryland, 6.87% (2611 appeals to circuit courts compared to 38,033 convictions in district courts in 2017); Michigan, 0.09% (236 appeals to circuit courts compared to 256,317 convictions in district courts in 2017); Missouri, 0.47% (1645 appeals to circuit courts compared to 349,408 convictions in municipal courts in 2017); Nevada, 0.27% (159 appeals to district courts compared to 58,483 convictions in justice and municipal courts in 2017); New Jersey, 0.13% (547 appeals to superior courts compared to 426,230 nontraffic convictions in municipal courts in 2017-2018); New Mexico, 0.84% (532 appeals compared to 63,339 convictions in magistrate courts in 2017); Texas, 0.87% (28,666 appeals to county courts compared to 3,313,590 convictions in justice and municipal courts in FY 2016-2017); West Virginia, 0.67% (158 appeals filed in circuit courts compared to an estimated 23,659 nontraffic convictions in magistrate courts in 2017); Wyoming, 0.61% (58 appeals filed in district courts compared to an estimated 9550 convictions in circuit courts in 2017). Data sources are available by request.

Available information from Utah reports a slightly different data point but reaches a similar outcome as the states above. *See* SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES*, at v (2015), [https://sixthamendment.org/6ac/6AC\\_utahreport.pdf](https://sixthamendment.org/6ac/6AC_utahreport.pdf) [<https://perma.cc/RM7X-LBFB>] (reporting that of “79,730 total misdemeanors and misdemeanor DUI cases heard in all justice courts statewide” in 2013, “[o]nly 711 of such cases were reviewed *de novo* in all district courts combined (an appellate rate of 0.89%)”).

A recent study of one metropolitan county in Florida found that in 2015, the appeal rate to circuit court was 0.3%, consistent with the statewide figure above. *See* Alisa Smith, *Misdemeanors Lack Appeal*, 45 AM. J. CRIM. L. 305, 338 (2019) (noting that of 9578 misdemeanor convictions in county court, defendants appealed thirty to circuit court).

“Class C misdemeanors.” These factors include (1) express legal restrictions on appeal in these specific cases, (2) weaker incentives for defendants convicted of these crimes to appeal, (3) the absence of counsel, and (4) higher rates of guilty pleas.

The law in several jurisdictions offers fewer opportunities for defendants to appeal these less serious misdemeanors. A state may deny the right to appeal lower-level misdemeanors entirely,<sup>44</sup> provide appeal to a trial court of general jurisdiction but not to an appellate court,<sup>45</sup> or require leave to appeal instead of providing a right to appeal.<sup>46</sup> In such states, the misdemeanor appeals that reach appellate courts are less likely to include the least serious crimes.

Sentencing practices can also affect appeal rates in misdemeanor cases, both overall appellate activity and the mix of cases that reach appellate courts. Defendants serving probation and incarceration terms would be more likely to appeal, while defendants convicted and sentenced for less serious misdemeanors and those released upon conviction or sanctioned with fines alone may have little immediate incentive to appeal their convictions before filing deadlines expire.<sup>47</sup>

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<sup>44</sup> See, e.g., DEL. CODE ANN. tit. 11, § 5301 (2018) (granting appeal of right only for cases, as required by state constitution, involving sentences of more than one month in jail or fines greater than \$100); *Peters v. State*, 943 P.2d 418, 420-21 (Alaska Ct. App. 1997) (holding that defendant may appeal misdemeanor sentence when aggregate unsuspended terms imposed on all counts exceed 120 days).

<sup>45</sup> See, e.g., *McDonald v. State*, 257 S.W. 889, 889 (Tex. Crim. App. 1924) (allowing defendant to appeal misdemeanor conviction to county court, but dismissing second appeal from county court to Court of Criminal Appeals because fine did not exceed \$100).

<sup>46</sup> See, e.g., IOWA CODE § 814.6 (2018) (denying right to appeal simple misdemeanor and ordinance-violation convictions, leaving discretionary review as only option); *Vance v. Iowa Dist. Court*, 907 N.W.2d 473, 479-80 (Iowa 2018) (confirming no right to appeal from magistrate’s extension of no-contact order and requiring petition for writ of certiorari from district court instead); see also D.C. CODE § 11-721(c) (2018) (allowing review only by application for judgments in Criminal Division of Superior Court where penalty is fine of less than fifty dollars for offense punishable by imprisonment of one year or less, or by fine of not more than one thousand dollars, or both); *State v. Castillo*, 2009-1358, p. 3 (La. 1/28/11); 57 So. 3d 1012, 1013-14 (confirming no right of direct appeal from convictions for misdemeanors punishable by six months or less).

<sup>47</sup> See *Miller*, *supra* note 36, at 201 (“The defendants who are most likely to file appeals are those who receive jail time, face collateral consequences, or have strong personal reasons for filing an appeal,” while cases involving “more minor consequences languish in the lower tier court.”); *Roberts*, *supra* note 3, at 189 (stating that jail sentences are likely completed before any appeal would be decided, and that many learn “their seemingly minor misdemeanor conviction is actually a significant barrier to essentials of daily life such as securing housing or employment, [but] by that point the time to file a direct appeal has long expired” (footnote omitted)); *Roberts*, *supra* note 11, at 812 (discussing low likelihood that undocumented person convicted of drug possession misdemeanor would know, in time to file direct appeal, that such conviction leads to mandatory deportation under federal immigration law); see also *State v. Parnell*, 905 N.W.2d 895, 898 (Minn. Ct. App. 2017) (dismissing misdemeanor appeal because defense counsel missed thirty-day appeal deadline).

Although no nationwide statistics on misdemeanor sentences in state courts exist, research reported for individual jurisdictions suggests that only a minority of those convicted of misdemeanors receive incarceration terms, and of them, a large portion are sentenced to “time served” and are released upon sentencing.<sup>48</sup>

A third factor suggesting that the misdemeanor cases that do reach appellate courts probably underrepresent lower-level crimes is a lack of access to counsel in trial court proceedings. Many indigent misdemeanor defendants do not have attorneys to advise them that they have a right to appeal or to help them comply with the requirements for filing an appeal, and in some jurisdictions, judges reportedly fail to inform many misdemeanor offenders that they may appeal.<sup>49</sup>

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<sup>48</sup> See REBECCA DIAL, JOHN KING & JENNIFER WESOLOSKI, N.C. SENTENCING & POLICY ADVISORY COMM’N, STRUCTURED SENTENCING STATISTICAL REPORT: FISCAL YEAR 2017, at 33 (2018), [https://www.nccourts.gov/assets/documents/publications/statisticalrpt\\_fy16-17.pdf](https://www.nccourts.gov/assets/documents/publications/statisticalrpt_fy16-17.pdf) [<https://perma.cc/6QAE-6PKU>]. For example, North Carolina’s Sentencing Commission reports sentences for a segment of the most serious misdemeanor convictions. *Id.* In fiscal year 2017, only 32% of this set of defendants received incarceration sentences, which averaged thirty-four days, nineteen of which were already served, leaving fifteen days left to serve. *Id.* at 38, 42 tbl.18. Roughly 18% of these misdemeanants received monetary sanctions with no probation. *Id.* at 41 tbl.17, 48.

The BJS provides more information about misdemeanor sentences in its research on felony defendants in the nation’s seventy-five largest counties. See generally REAVES, *supra* note 25. Among defendants charged with a felony but ultimately convicted of a misdemeanor, only about half (56%) received any sort of incarceration (including time served), one-third of whom (34%) received a sentence of one month or less, with a median sentence of three months. *Id.* at 29 tbl.24, 31 tbl.26. Of these misdemeanants, 31% received probation (with a median term of one year), and 13% were sentenced with financial sanctions alone. *Id.* at 29 tbl.24, 31 tbl.27. The sentences for a more representative pool of misdemeanor convictions originally charged as misdemeanors would undoubtedly be less severe, with an even smaller percentage receiving incarceration sentences.

Since misdemeanor incarceration sentences tend to end at or shortly after conviction, some defendants who manage to challenge their convictions before the filing deadline may find their appeals dismissed as moot if they fail to seek or are denied a stay of sentence. See, e.g., *State v. Briggs*, 2017-Ohio-686, 86 N.E.3d 9, at ¶ 23; cf. *Nelson v. Colorado*, 137 S. Ct. 1249, 1257 n.13 (2017) (noting state’s admission at oral argument that few defendants can meet requirements for stay pending appeal). This rule has been changed only recently in some states. See, e.g., *State v. Kiese*, 273 P.3d 1180, 1195 (Haw. 2012) (applying public-interest exception to mootness doctrine and reviewing denial of stay of misdemeanor sentence of six months of probation pending appeal).

<sup>49</sup> See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337 (2011) (“[I]ndividuals who plead guilty in the fast-paced, high-volume lower criminal courts may not even be aware of the right to appeal, or of the need to file a notice of appeal within a short time period after conviction.”). Indeed, a report on indigent defense in Florida’s lower courts found that “[a]fter sentencing at arraignment, only 23.7% of defendants were advised of their right to an appeal, and only 23.2% the right to an attorney for that appeal,” despite the Florida Rules of Criminal Procedure requiring trial judges to inform defendants of their right to appeal. *Id.* at 337 n.257 (alteration in original); see also Roberts, *supra* note 3, at 189 (proposing that appellate activity

The U.S. Constitution does not guarantee counsel for an indigent criminal defendant charged with a misdemeanor if the sentencing includes financial sanctions but not probation or incarceration.<sup>50</sup> A right to appointed counsel in at least some of these cases is nevertheless provided by some states, such as California, where there is a right to counsel for defendants punished by fines over five hundred dollars.<sup>51</sup> Yet even when a defendant has a legal right to counsel, he may not actually receive counsel. Research suggests that in many lower courts handling misdemeanors, appointment and waiver of counsel practices discourage representation.<sup>52</sup> Nationwide in 2002, 30% of defendants serving misdemeanor sentences in jail (all of whom were constitutionally entitled to counsel) said they were not represented by counsel before conviction.<sup>53</sup> Presumably, the representation rate was even lower for defendants sentenced to fines alone and thus not constitutionally entitled to counsel. With

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in misdemeanor cases is lessened by lack of counsel and failure of judges to inform defendant of right to appeal, among other things).

<sup>50</sup> *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002); 3 LAFAVE ET AL., *supra* note 1, § 11.2(a), at 687-89.

<sup>51</sup> *Request for Court-Appointed Lawyer in Misdemeanor Appeal*, CAL. CTS., [www.courts.ca.gov/documents/cr133.pdf](http://www.courts.ca.gov/documents/cr133.pdf) [<https://perma.cc/Y82K-4V79>] (last visited Sept. 21, 2019); *see also Shelton*, 535 U.S. at 668-70 (“Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution.”); 3 LAFAVE ET AL., *supra* note 1, § 11.2(a), at 697 n.35 (listing five additional states providing counsel for cases involving certain fine amounts).

<sup>52</sup> *See Hashimoto*, *supra* note 15, at 1033-34, 1038 (terming practices “perhaps unconstitutional” and noting jurisdictions where courts accept waivers without sufficiently advising defendants of right to counsel, tell defendants that their case will be delayed if they request counsel, or insist defendants pay fee before they can apply for court-appointed representation); Jain, *supra* note 3, at 959-60 (explaining that defendants waive counsel and plead quickly to avoid repeated postponements in overcrowded dockets). Moreover, laws authorizing courts to order reimbursement of indigent-counsel costs from those convicted may impact misdemeanor defendants more than felony defendants, adding to criminal debt burdens. *See Beth A. Colgan, Paying for Gideon*, 99 IOWA L. REV. 1929, 1931-39 (2014) (describing practice of charging indigent defendants for cost of counsel, with interest, and incarcerating them if they remain too poor to pay); *see also BORUCHOWITZ, BRINK & DIMINO*, *supra* note 11, at 18-20 (advocating for “default in favor of the appointment of counsel” without delay or application fee).

<sup>53</sup> *See Hashimoto*, *supra* note 15, at 1024-26 (citing BJS survey sampling local-jail inmates incarcerated for misdemeanors in 2002, in which 30% of inmates reported they were not represented); *see also CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DOJ, DEFENSE COUNSEL IN CRIMINAL CASES* 3 tbl.2, 6 tbl.13 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/B2DA-96DT>] (reporting that in 1996, more than 28% of state misdemeanor defendants serving jail sentence lacked counsel before conviction, as did more than 38% of federal misdemeanor defendants; and that in 1996, 15% of state-jail inmates hired private counsel; and in 1998, 19% of federal defendants reported doing so).



no lawyers to assist, the lowest-level misdemeanor defendants are less likely to file an appeal.<sup>54</sup>

Finally, for many reasons, defendants convicted by guilty plea seek judicial review at a lower rate than those convicted after trial and defendants convicted of the lowest-level misdemeanors may be even more likely to plead guilty than defendants facing more serious charges. By pleading guilty, defendants inherently waive many challenges to their conviction and often expressly agree to waive other claims, including challenges to sentence.<sup>55</sup> A plea agreement may include a favorable charge or sentencing concession that a defendant would forfeit by filing an appeal. State law may also expressly require misdemeanor defendants who plead guilty, but not those who are convicted after trial, to obtain permission to appeal.<sup>56</sup> All of these factors—limitations on the right to appeal, weaker incentives, lack of counsel, and fewer trials—depress appeal rates in the largest and least serious category of misdemeanor convictions, which suggests that far fewer of these cases will ever be reviewed.

### C. *Empirical Information About Misdemeanor Appeals Beyond Volume*

Beyond the total number of misdemeanor appeals, available empirical information drops off precipitously. The BJS Bulletin reports just three descriptive statistics concerning misdemeanor appeals filed in state appellate courts: (1) the rate of merits review (37.9% in last-resort courts and 87.8% in intermediate appellate courts), (2) the rate of reversal (8.3% in courts of last resort and 14.8% in intermediate appellate courts), and (3) duration (median misdemeanor appeal lasted 1.0 years and 95th percentile lasted 2.3 years).<sup>57</sup>

Other than these basic statistics, which aggregate prosecutor and defense misdemeanor appeals, published sources provide hardly any information at all about the nature, processing, or success of misdemeanor appeals in state appellate courts. The CSP of the National Center for State Courts provides helpful data on all criminal appeals in state appellate courts but does not report

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<sup>54</sup> See Smith, *supra* note 43, at 338 (noting that although “few” misdemeanor defendants had representation in county court, of those who appealed to circuit court, 81% had lawyers in county court and 88% of appellants with counsel had same lawyer from county court); cf. Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROCESS 183, 247 tbls.15 & 16, 248 tbls.17 & 18 (2015) (finding that, of 275 appeals by defendants who were represented, only nine were “simple”—as opposed to “serious” or “aggravated”—misdemeanors).

<sup>55</sup> Class v. United States, 138 S. Ct. 798, 803 (2018) (listing claims waived by guilty plea); 7 LAFAVE ET AL., *supra* note 1, § 27.5(c), at 84-85.

<sup>56</sup> See, e.g., Russell v. State, 74 S.W.3d 887, 890 (Tex. Ct. App. 2002) (confirming Texas law allowing appeal from plea-bargained misdemeanor conviction only if trial court grants permission or appeal is based on issue raised by written pretrial motion); 7 LAFAVE ET AL., *supra* note 1, § 27.5(c), at 85 nn.53-54 (collecting authority).

<sup>57</sup> NCSC APPEALS STUDY, *supra* note 18, at 4 tbl.1, 5 tbl.2, 9 fig.8.

information on misdemeanor appeals separately from felony appeals.<sup>58</sup> Individual states may report the number, duration, and limited disposition information about criminal appeals, but few separate misdemeanor appeals from felony appeals.<sup>59</sup> Those that do report the number of misdemeanor appeals filed in appellate courts do not provide disposition information separately for misdemeanor appeals or report whether it is the defense or the prosecution who appeals.<sup>60</sup> Even federal courts do not collect information about which criminal appeals filed in their courts of appeal are from misdemeanor judgments.<sup>61</sup>

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<sup>58</sup> See CT. STAT. PROJECT, <http://www.courtstatistics.org/> [<https://perma.cc/9XK4-NX7V>] (last visited Sept. 21, 2019). Although separate information on misdemeanor appeals is not published by the CSP online, the reporting guide instructed states to report it separately. See NAT'L CTR. FOR STATE COURTS & CONFERENCE OF STATE COURT ADM'RS, CT. STAT. PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 42, 46 <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting.a.shx> [<https://perma.cc/KVN3-GKZM>] (last updated Feb. 4, 2019) (including separate categories for states to report death penalty, felony, misdemeanor, and other criminal appeals). Upon request, the CSP provided us aggregate data on misdemeanor appeals that it had collected from a small number of states. These data did not indicate how many of the misdemeanor appeals were interlocutory rather than direct appeals or how many were brought by prosecutors rather than defendants. Six to eight states reported *disposition* information for 2015-2016 showing reversal rates under 4%—much lower than the 8.3% and 14.8% rates for courts of last resort and intermediate appellate courts, respectively—reported from the NCSC Appeals Study, which used a random, nationwide sample of direct appeals decided in 2010. See NCSC APPEALS STUDY, *supra* note 18, at 4 tbl.1, 5 tbl.2. Between five and ten states reported rates of *merits* review for misdemeanor appeals during the years 2014-2016. The average rate over that period for intermediate and last resort cases combined ranged from 58-70%. This is not far off from the rates in the NCSC Appeals Study, which examined direct appeals only (37.9% for courts of last resort and 87.8% for intermediate appellate courts). As state reporting practices improve, the CSP should eventually become an ongoing source of additional information about misdemeanor-case processing.

<sup>59</sup> See CT. STAT. PROJECT, *supra* note 58.

<sup>60</sup> See, e.g., ALA. UNIFIED JUDICIAL SYSTEM, FISCAL YEAR 2017 ANNUAL REPORT AND STATISTICS 25-26 (2017), <http://www.alacourt.gov/Annual%20Reports/2017AOCAnnualReport.pdf> [<https://perma.cc/RTW6-7JC9>] (reporting separately the number of appeals filed from “municipal convictions” and the number of appeals filed from “other convictions,” but not providing information about disposition or whether any were filed by state).

<sup>61</sup> See U.S. SENTENCING COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 175-90 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/5E49-RUQH>]; King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 486-87 (discussing limitations of U.S. Sentencing Commission's data); see also MARK MOTIVANS, U.S. DOJ, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2013—STATISTICAL TABLES 26-28 (2017), <https://www.bjs.gov/content/pub/pdf/fjs13st.pdf> [<https://perma.cc/3L6Q-9BHW>] (discussing federal criminal appeals data but not addressing misdemeanor and felony appeals separately). See generally FED. JUDICIAL CTR., CRIMINAL INTEGRATED DATABASE (IDB): 1996 TO PRESENT: CODEBOOK (2016),

Additionally, prior scholarship addressing criminal appeals has not discussed misdemeanor appeals separately,<sup>62</sup> with four exceptions. One study reported that, of almost one thousand interlocutory, postconviction, and direct appeals filed in one Tennessee appellate court during the mid-1990s, 13% of those appeals *receiving relief* on appeal were misdemeanors.<sup>63</sup> A study of all decisions from the Iowa Court of Appeals in criminal cases from 2012 to 2013 *in which the defendant was represented by counsel* found that less than 4% involved the lowest-level misdemeanors, that about half the criminal appeals handled by retained counsel were misdemeanors, and that one in four criminal appeals were handled by publicly appointed counsel.<sup>64</sup> A study of misdemeanor appeals to circuit trial courts in one metropolitan county in Florida found that 81% of those defendants who appealed were represented before conviction, the rate at which prosecutors appealed dismissals was three times the rate that defendants appealed convictions, and prosecutor-appellants were three times more likely than defendant-appellants to win their appeals.<sup>65</sup> Finally, in our own recent study of prosecutor appeals from a nationwide random sample of criminal appeals, we found, contrary to our expectations, that the likelihood a prosecutor would win an appeal was unrelated to whether it was a misdemeanor or a felony.<sup>66</sup>

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<https://www.fjc.gov/sites/default/files/idb/codebooks/Criminal%20Code%20Book%201996%20Forward.pdf> [<https://perma.cc/V8TA-3XL2>].

<sup>62</sup> See generally JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS (1989), <https://cdm16501.contentdm.oclc.org/digital/collection/criminal/id/1> [<https://perma.cc/6N5W-AA3M>]; DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL 87-109 (1990) (investigating criminal appeals in New York State Appellate Division and effects of defense representation); Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543; Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451 (2009); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191 (1978) (evaluating how state supreme courts supervise lower state courts); Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, 33 STAN. L. REV. 951, 957 tbl.1 (1981); Project Overview, ST. SUP. CT. DATA PROJECT, <http://www.ruf.rice.edu/~pbrace/statecourt/> [<https://perma.cc/V9AJ-6KXQ>] (last visited Sept. 21, 2019) (studying high state court decisions without separating misdemeanors).

<sup>63</sup> Daniel J. Foley, *The Tennessee Court of Criminal Appeals: A Study and Analysis*, 66 TENN. L. REV. 427, 431, 454 tbl.6 (1999) (reporting data without distinguishing what percentage of criminal appeals filed were misdemeanors or what proportion received relief).

<sup>64</sup> Buller, *supra* note 54, at 246 tbl.10, 247 tbl.15; see also *id.* at 247 tbl.16, 248 tbls.17 & 18.

<sup>65</sup> See Smith, *supra* note 43, at 338, 341 (reporting that prosecutors appealed to felony trial court twenty-eight of 2531 dismissals, while defendants appealed thirty of 9578 convictions, and that six of twenty-eight state appeals succeeded compared to two of thirty defense appeals).

<sup>66</sup> King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 499, 508 ("Perhaps prosecutors were particularly selective when appealing in misdemeanor cases, choosing to

This Article goes far beyond the skeletal and incomplete information summarized above and focuses on questions helpful to policymakers, practitioners, judges, and scholars interested in misdemeanors and judicial review generally. In addition to the new information about two-tier trial court appeals and appeal-to-conviction ratios presented above, we exploit data from the NCSC Appeals Study to provide the first detailed description of misdemeanor cases that reach state appellate courts, compare misdemeanor appeals with misdemeanor cases in state trial courts to explore if and how the case mix changes on appeal, report descriptive information as well as the results of a detailed statistical analysis examining which of many features are significantly associated with a greater likelihood of success, and compare misdemeanor appeals with felony appeals.

## II. RESEARCH QUESTIONS

We investigate three broad research questions: First, which misdemeanor cases reach appellate courts (and which do not)? Second, for the cases that are reviewed, what factors correspond with a higher likelihood of success? And third, do misdemeanor appeals systematically differ from felony appeals? These questions and our hypotheses about possible answers given available data are presented in more detail below.

### A. *Do Appellate Courts See the Same Misdemeanor Cases that Trial Courts Do?*

With such a small percentage of the misdemeanor cases decided by trial courts even reaching appellate courts, it seems plausible that certain segments of the misdemeanor caseload in state trial courts so rarely reach appellate courts that judicial review could not correct error or develop law unique to those types of cases.<sup>67</sup> If there are entire categories of misdemeanor cases with little to no judicial oversight, identifying such a gap could be helpful for policymakers. Although very little information about misdemeanor cases at the trial court level exists to investigate this question, we were able to obtain some information about the mix of crime types from sixteen states,<sup>68</sup> allowing a limited comparison of trial and appellate case mix by crime type.

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devote appellate resources to these relatively minor cases only when a court's ruling was especially egregious.”).

<sup>67</sup> Cf. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 252-54 (2005) (discussing “law distortion” from use of appeal waivers in plea agreements). Although some degree of error correction could occur on appeal to another trial court in two-tier systems, this Article focuses on the work and influence of appellate courts. Existing information suggests that the rate of appeal in two-tier systems, and the rate at which defendant-appellants secure relief, is extremely small. See *supra* notes 43 and 65.

<sup>68</sup> See *infra* text accompanying notes 120-121 (interpreting limited trial court data).

Crime type can serve as a rough proxy for sentence severity, information which is not available for either trial-level or appellate cases.<sup>69</sup> As noted in Part I, there are several reasons to expect that, on average nationwide, the misdemeanor cases that reach appellate courts include a lower percentage of less serious misdemeanor cases than the proportion of less serious cases handled by trial courts, and a higher percentage of the most serious misdemeanors.<sup>70</sup> Unlike many other misdemeanors, DUI offenses carry a mandatory minimum jail sentence in a significant number of states.<sup>71</sup> As a result, we expected that DUI cases may produce, on average, more serious sentences than other misdemeanors and be overrepresented on appeal. Assault and other violent crime cases may also carry more serious sentences than other types of misdemeanors and be overrepresented on appeal for that reason.<sup>72</sup> At the other end of the spectrum, non-DUI driving or traffic offenses—in many jurisdictions the largest category of misdemeanor filings<sup>73</sup>—are likely to be treated as less serious than other misdemeanors and underrepresented on appeal. These driving-related crimes include failing to report or leaving the scene of an accident; moving violations such as speeding, driving the wrong way, or reckless driving; and driving without a valid license, tag, or insurance.<sup>74</sup>

We note here three other related hypotheses abandoned because of data constraints—hypotheses that might be examined later as better information emerges. First, although we expected that the set of misdemeanor appeals that actually reached appellate courts would include many more first-level appeal

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<sup>69</sup> On the lack of information on misdemeanor sentences, see *supra* notes 47-48 and accompanying text.

<sup>70</sup> See *supra* Section I.B.

<sup>71</sup> 1 LAFAYE ET AL., *supra* note 25, § 1.11(c-1), at 160 (explaining that DUI offense “carries a mandatory minimum jail sentence in a significant group of states,” that several states that track misdemeanor dispositions track DUI offenses separately, and that data indicates that “these traffic charges [were addressed] as serious crimes rather than as charges akin to infractions”).

<sup>72</sup> NATAPOFF, *supra* note 1, at 48-49 (noting several ways in which DUI and domestic violence charges are more “serious” than other misdemeanors); Smith, *supra* note 43, at 340 (finding in study of misdemeanor appeals to trial court in one Florida county that of defense appeals, 29% were DUI cases and 23% were violent crimes). Convictions for DUI and violent offenses may also be more likely than other misdemeanors to trigger life-changing collateral consequences, which may prompt appeal. See *supra* text accompanying notes 5-8 (discussing collateral consequences); cf. Roberts, *supra* note 11, at 812 (“Perhaps the greatest incentive to seek review of a misdemeanor conviction is the realization, after the case has ended, that a seemingly low-level misdemeanor conviction can lead to permanent severe collateral consequences.” (first citing *Commonwealth v. Abraham*, 62 A.3d 343, 344 (Pa. 2012); then citing *Jain*, *supra* note 3, at 958)).

<sup>73</sup> See 1 LAFAYE ET AL., *supra* note 25, § 1.11(c-1), at 159-60; see also NATAPOFF, *supra* note 1, at 50 (addressing cases of driving with suspended license and noting that these cases alone make up 30-60% of some local dockets).

<sup>74</sup> 1 LAFAYE ET AL., *supra* note 25, § 1.11(c-1), at 159-60.

cases than cases where the defendant had prior access to review by a felony trial court, the information needed to test this was not available for many of the appeals in the sample. Nor were we able to confirm whether a disproportionate number of appeals had gone to trial, as is the case with felonies, because we could not reliably identify in our appeals data which appeals had followed a trial.<sup>75</sup> Finally, although the CSP has started to collect information on *representation* in misdemeanor cases at the trial level, that information could not be released. Had we gained access, we would have investigated whether the percentage of appellants without counsel<sup>76</sup> is smaller than the percentage of misdemeanor defendants convicted in trial courts without counsel.<sup>77</sup> If that were the case, it would suggest that appellate oversight of issues that arise in pro se cases is even scarcer than oversight of counseled cases.<sup>78</sup>

#### B. *Which Misdemeanor Appeals Succeed?*

We examined why some misdemeanor appeals failed and others succeeded by determining what features correspond with a greater likelihood of success. We investigated both whether an appeal was reviewed on the merits and whether relief was granted<sup>79</sup> both for appeals of right and appeals by permission. Based in part on our earlier work with the NCSC Appeals Study, we expected that three general categories of factors tracked by the data set might correspond with a

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<sup>75</sup> See *supra* text accompanying notes 55-56 (discussing reasons that appeal rates are higher for defendants convicted at trial than for those convicted by guilty plea); see also Smith, *supra* note 43, at 340 (finding in study of misdemeanor appeals to trial court in one Florida county that of thirty defendants who appealed, twenty-four had been convicted by juries). Claim information in some cases and coding notes on relief ordered for many of the *successful* appeals did allow determination of whether the case had gone to trial, see *infra* note 125, but this information was not available for most cases.

<sup>76</sup> See discussion *infra* Section IV.C.2 (comparing percentage of misdemeanor appellants without counsel to percentage of felony appellants without counsel by crime type).

<sup>77</sup> See *supra* notes 49-51 and accompanying text (discussing reasons why misdemeanor defendants lack counsel).

<sup>78</sup> For another hypothesis about misdemeanor appeals that our data cannot test, consider the claim Justice Brennan made nearly fifty years ago when he warned that restrictions on misdemeanor appeals could corrode public support for courts generally. He wrote, for a unanimous Court, that:

‘Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts.’ Arbitrary denial of appellate review of proceedings of the State’s lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.

Mayer v. City of Chicago, 404 U.S. 189, 197-98 (1971) (footnote omitted) (quoting Patrick V. Murphy, *The Role of the Police in Our Modern Society*, 26 REC. ASS’N B. CITY N.Y. 292, 293 (1971)).

<sup>79</sup> A third stage is required for success in some cases—harmless error review. The data included variables about harmless error findings, but only for those appeals that produced a reasoned decision. See King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 514 fig.8.

higher rate of merits review and ultimate success: state- and court-specific factors, the type of crime and type of claim raised, and advocacy-related factors.<sup>80</sup> Presented below are our hypotheses about the relationships between each of these factors and merits review or success.

### 1. State- and Court-Specific Factors

We predicted that, as compared to mandatory appeals, when appellate review requires permission from the court, the appellant is less likely to obtain review on the merits and thus less likely to win.<sup>81</sup> We were also curious to find out if misdemeanor appeals filed in state courts of last resort were less likely to win than appeals in intermediate courts, even controlling for whether the review is discretionary, as we previously found with prosecutor appeals.<sup>82</sup>

An appellant's prospects for success might also correspond with whether the appeal reviewed the record for the first time or instead reviewed an appellate decision that itself had reviewed the record. Appellate courts may provide greater deference to trial court fact-finding and exercises of discretion than they provide to decisions of another appellate court, for example. Alternatively, they could apply closer scrutiny to a trial court's decision than they would to a reviewing court's second look at the issue.<sup>83</sup>

Because busier courts have less time and fewer resources to spend on resolving their cases, and because it takes much longer to reverse a decision than to affirm one, we expected, as some prior research has found, that busier courts overturn fewer decisions.<sup>84</sup> We did not find any significant relationship between workload and appellate success in our study of felony appeals, so we doubted it would impact the even smaller group of misdemeanor appeals.<sup>85</sup> To find out, we included a variable for workload in our analyses.

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<sup>80</sup> Recent scholarship about misdemeanor prosecutions has documented racial disparity, particularly in policing and pretrial detention. See NATAPOFF, *supra* note 1, at 152-57; Kohler-Hausmann, *supra* note 13, at 635, 690. However, we were unable to examine whether success rates correlate with race, ethnicity, or any other demographic variable, as our data lacked such information.

<sup>81</sup> We found this pattern in felony appeals. Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1952-53 (finding 2.8% success rate for defendants who filed discretionary appeals in courts of last resort, compared to 14.9% success rate for first appeals of right); King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 506-07 (finding slightly higher rate of success for mandatory appeals than for discretionary appeals, but showing no significant difference in likelihood of success when other factors were taken into account).

<sup>82</sup> King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 506.

<sup>83</sup> See *id.* at 508 (finding that high courts were less—not more—likely to reverse decision from intermediate court than from trial court).

<sup>84</sup> See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1145 (2011) (finding fewer reversals associated with caseload increases in federal courts).

<sup>85</sup> See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1941.

Finally, we were interested in learning if elected appellate judges were less likely than appointed judges to side with criminal defendants,<sup>86</sup> even though that hypothesis was not supported by either our study of felony appeals by defendants<sup>87</sup> or our study of prosecutor appeals.<sup>88</sup> We decided to investigate this factor anyway in misdemeanor appeals because of the possibility that those misdemeanor cases that make it as far as an appellate court might be cases in which the electorate or the judiciary is particularly interested.

## 2. Type of Crime and Type of Claim Raised

The likelihood that a reviewing court will decide to review or overturn a conviction or sentence may, like a defendant's ability and willingness to file an appeal, vary with the type and seriousness of the crime. A court with the discretion to deny review may allocate its limited error-correcting resources to cases with higher stakes or to the supervision of certain types of crimes. For example, in our study of felony appeals by state defendants, found that among discretionary appeals to courts of last resort, drug-trafficking cases were significantly associated with a higher likelihood of being granted review than other types of cases.<sup>89</sup> Crime type may also relate to outcome if error rates or a court's concern about correcting error differ by crime. Among appeals by defendants in felony cases that state high courts agreed to review, for example, appeals in sex-offense cases were significantly associated with a greater likelihood of relief.<sup>90</sup> At least one past study found that defense appeals in violent-crime cases were less likely to succeed,<sup>91</sup> which would be expected if a larger percentage of meritless appeals were filed in these cases with the longest sentences or if media coverage or the presence of victims makes granting relief to defendants convicted of violent crimes more difficult than granting relief to

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<sup>86</sup> See generally Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929 (2016) (reviewing MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015)) (presenting study findings showing that judicial decisions become more hostile to criminal defendants as attack advertising in judicial elections increases).

<sup>87</sup> See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1968.

<sup>88</sup> See King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 515.

<sup>89</sup> Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1968.

<sup>90</sup> *Id.* at 1963. A much earlier study of state high courts found that, of all criminal appeals, sex offenses and public-order offenses had the highest reversal rates. Note, *supra* note 62, at 1210 (characterizing such offenses as "crimes against public order or morality" and offering as explanation that these prosecutions are often emotionally charged and "such laws are enforced unevenly," creating divisions in lower courts). *But see* King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 512 fig.3 (finding no significant relationship between offense type and success for prosecution appeals when controlling for three crime categories: violence; drug-trafficking, DUI, and weapons; and everything else).

<sup>91</sup> See CHAPPER & HANSON, *supra* note 62, at 36; Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1949, 1968 (citing Chapper and Hanson's study and testing likelihood of felony appeals' success by type of offense).



defendants in other cases. We hoped to learn what crime-specific relationships emerged in the misdemeanor appeals context, although we suspected that the reasons for variation may differ from felony cases. For example, reversal rates for appeals of *felony* sex crimes might be higher because of difficult evidentiary issues, while higher reversal rates for appeals of *misdemeanor* sex crimes might be related to judicial concern about requiring sex-offender registration for very minor offenses.

The likelihood of success may also vary with the type of claim raised by misdemeanor appellants. In felony appeals, defendants who raised claims involving certain trial issues—e.g., competency, interpreters, mistrial, joinder—were significantly more likely to succeed than defendants who raised other issues.<sup>92</sup> In misdemeanor appeals, we explored five specific types of claims. First, we expected a sizeable portion of cases securing relief would be cases in which the defendant was convicted after trial but claimed innocence on appeal—i.e., insufficient evidence to convict. By going to trial, these particular defendants already demonstrated an extraordinary determination to fight, which may carry over to the appellate process. And despite the difficulty of overturning credibility determinations of juries and judges that convict,<sup>93</sup> some of these cases will lack sufficient basis if the investigation and adjudication is as slapdash and inaccurate as critics claim.<sup>94</sup> Finally, to the extent that insufficient evidence claims are raised by many of those contesting trial convictions, the claim might stand in as a proxy for a key piece of information missing from our data—which appeals followed trial rather than guilty plea, allowing some insight about whether appeals after trial are more successful than appeals after guilty plea.<sup>95</sup>

Second, and also linked to poor policing and prosecutorial screening, we wanted to find out whether suppression claims fared better or worse than other claims. In felony appeals, the presence of a suppression claim significantly increased the likelihood of merits review by state high courts but made no difference when it came to success among granted cases. If compliance with the law is looser in misdemeanor cases generally, and if error rates are higher, appellate courts might reverse cases raising such claims at a higher rate than other claims.

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<sup>92</sup> See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1960-63 (reporting results for first appeals of right and discretionary appeals to courts of last resort).

<sup>93</sup> See Roberts, *supra* note 11, at 813 (“Appellate courts defer to the trial court’s credibility judgments, making appeals . . . in these common misdemeanor scenarios quite difficult.”).

<sup>94</sup> See, e.g., BORUCHOWITZ, BRINK & DIMINO, *supra* note 11, at 14 (“[T]he operation of misdemeanor courts in this country is grossly inadequate and frequently unjust.”); NATAPOFF, *supra* note 1, at 55-86 (describing “sloppy” process throughout arrest, prosecution, and conviction).

<sup>95</sup> See Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1011 (2018) (arguing that going to trial helps secure exoneration and finding, in study of eighteen misdemeanor exonerees, that fifteen went to trial, eleven of whom had convictions reversed on appeal).

Third, as we found with felony appeals of right by state defendants,<sup>96</sup> we expected that sentencing challenges when raised in misdemeanor appeals might be particularly likely to succeed compared to appeals challenging only conviction, since correcting sentencing errors may be easier and cheaper for both appellate and trial courts than relitigating guilt.

Fourth, our data identified cases raising issues of statutory interpretation. We thought that because of the statewide impact of rulings on statutory interpretation questions, such issues would be more likely than case-specific errors to receive merits review. Also, questions of statutory interpretation raised on appeal are likely to be unsettled and could succeed at a higher rate than other, more settled issues.

Finally, we tracked constitutional challenges to statutes for similar reasons.<sup>97</sup> Not only do these have systemwide impact, but defendants are more likely to raise them, as they are not waived by plea.<sup>98</sup> Compared to other claims, however, fewer of these challenges may have merit if defendants raise them routinely for preservation, in anticipation of future doctrinal change or for other reasons, suggesting that fewer of them will be granted review or receive relief.

### 3. Advocacy-Related Variables

We expected that prosecutor-appellants would be more likely to win than defendants who appeal.<sup>99</sup> In felony cases, the rate of merits review and success when prosecutors appeal is much higher than the rate of merits review and success when defendants appeal.<sup>100</sup> The probable explanations for this should apply to felonies and misdemeanors alike: compared to defense appeals, challenges to pro-defendant rulings subject to appeal by the prosecution may involve error that is easier for courts to identify and claims less likely to be forfeited or subjected to harmless error. More importantly, prosecutor appeals are often coordinated by a statewide office, carefully screened and selected for success, and litigated by experienced appellate counsel.<sup>101</sup>

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<sup>96</sup> See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1960-61, 1965-66 (reporting results for first appeals of right and discussing findings). Although defendants' first appeals of right from the sentence saw a higher likelihood of success than conviction appeals, it was conviction-only appeals—not sentence appeals—that proved significantly related to the success of appeals by defendants to courts of last resort. *Id.* at 1962-63, 1966.

<sup>97</sup> One experienced staff attorney has suggested that constitutional issues are an important category of misdemeanor appeals. See Stan Keillor, *Should Minnesota Recognize a State Constitutional Right to a Criminal Appeal?*, 36 *HAMLIN L. REV.* 399, 425 (2013) (“Removing the right to appeal misdemeanor convictions or convictions based on guilty pleas would shield from appellate review . . . many First Amendment issues that arise in disorderly conduct, obstructing legal process, and indecent exposure cases, as well as the due process and Sixth Amendment issues posed by guilty plea-based convictions.”).

<sup>98</sup> See *Class v. United States*, 138 S. Ct. 798, 803 (2018).

<sup>99</sup> See King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 485.

<sup>100</sup> *Id.* at 509-14.

<sup>101</sup> *Id.* at 485.

Type of legal representation, too, may matter. If retained counsel enjoy more resources or expertise than publicly appointed counsel, or if appellants who must finance their own appeals have more incentive than those with publicly appointed counsel to avoid appealing losing claims, then it follows that the presence of retained counsel would correspond with greater success.<sup>102</sup> We did not find support for this hypothesis in our prior studies of felony appeals and prosecution appeals.<sup>103</sup> Alternatively, experienced publicly funded counsel may outperform retained counsel who represent misdemeanor appellants less frequently.<sup>104</sup> When publicly appointed counsel filed an *Anders*-type statement that no meritorious issues existed for appeal,<sup>105</sup> we expected that appellants would be less likely to succeed than in cases without such concessions.<sup>106</sup>

We also expected that, like felony appellants, misdemeanor appellants representing themselves would fare worse than those with representation.<sup>107</sup> This would comport with the Court's rationale for interpreting the Constitution to guarantee a right to appointed counsel on appeal for at least some misdemeanors<sup>108</sup> but be inconsistent with some evidence that misdemeanor

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<sup>102</sup> In Tyler J. Buller's study of Iowa appeals, he found that privately retained counsel obtained favorable outcomes in 22% of their cases, compared to 19% for appellate defenders, but defenders won dismissal or acquittal of at least one count of conviction in 3.7% of cases, compared to retained counsel's 2.4%. Buller, *supra* note 54, at 210-11, 220. For sentencing issues, defenders succeeded in 9.5% of cases, compared to retained attorneys' 7.3%. *See id.* at 220. Court-appointed counsel were consistently worse than defenders and retained counsel in all categories. *See id.* at 210-11, 220; *see also* WASSERMAN, *supra* note 62, at 97 (finding that appellants represented by lawyers from Criminal Appeals Bureau of Legal Aid Society obtained favorable actions more often than appellants with assigned counsel, but less often than appellants with retained counsel).

<sup>103</sup> *See* Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1960-61 (finding that presence of private attorney had same favorable association with outcome as did presence of public attorney when each was compared to appeals with all other forms of representation); King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 516 (finding that representation by retained attorney had no significant association with variation in likelihood of relief in either prosecution or defense appeals).

<sup>104</sup> *See* King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 521 (finding that in federal appeals by government, federal defenders were associated with more success for their clients than were panel attorneys or retained counsel). One additional small, one-county study of misdemeanor appeals from lower trial court to felony court found greater success by public defenders. *See* Smith, *supra* note 43, at 352 tbl.8 (reporting that of thirty defense appeals to trial court, the twelve pro se and six privately represented appellants all lost, while two of twelve appellants represented by public defender received favorable outcome).

<sup>105</sup> On *Anders* rules generally, see 3 LAFAYE ET AL., *supra* note 1, § 11.2(c), at 720-30.

<sup>106</sup> *See* Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1960-61 (finding that presence of *Anders* brief correlated with lower likelihood of success).

<sup>107</sup> *See id.* (finding that pro se defense correlated with lower likelihood of success).

<sup>108</sup> *See* *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972) ("Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting prosecution's

defendants representing themselves in federal trial court fared no worse than those who had counsel.<sup>109</sup>

Based on prior studies, we expected that the presence of oral argument and the filing of a reply brief by the appellant would correspond with a higher rate of success,<sup>110</sup> as each provides an additional opportunity to persuade and may generally indicate more zealous advocacy. Granting oral argument could also signal the court's perception of the appeal's importance or merit. We recognized that there may be reverse causal relationships here—for example, if courts authorize oral argument or reply only after agreeing to review the appeal, or if the decision to issue a full opinion is made after the decision to grant relief—so we designed our analyses with this possibility in mind.

### C. *Comparing Misdemeanor and Felony Appeals*

In exploring differences between misdemeanor and felony appeals, we expected that misdemeanor appeals would include fewer indigents with publicly funded counsel and a correspondingly greater proportion of defendants with either retained counsel or no counsel at all.<sup>111</sup>

As for win rates, predictions conflicted. Some differences suggest that misdemeanor appeals would be less successful than felony appeals. The defenders appointed in these cases may be less experienced,<sup>112</sup> and with lower penalties at stake, reviewing courts may take these cases less seriously than felonies.<sup>113</sup> Also, if a smaller proportion of misdemeanor appellants—as

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resource and expertise advantages relative to defendant's); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (discussing difficulty of “[e]ven the intelligent and educated layman” to prepare effective defense).

<sup>109</sup> See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 466, 490-91 (2007) (reporting, from aggregate data on federal misdemeanor cases in 2000-2005, that pro se misdemeanor defendants had better outcomes than represented misdemeanor defendants in determinations both of guilt and sentencing).

<sup>110</sup> See King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 529-30 (noting that for appeals in state court, oral argument increases chances of favorable outcome for appellant, but that in federal appeals by prosecutors, oral argument is associated with lower likelihood of success); see also Foley, *supra* note 63, at 444 (finding, in study of Tennessee Court of Criminal Appeals decisions in defense appeals, that state prevailed in 83% of cases submitted solely on briefs but in only 61% of cases with oral argument).

<sup>111</sup> See Buller, *supra* note 54, at 254 tbls.31 & 33 (reporting that in Iowa in 2012-2013, larger proportion of represented appellants in misdemeanor direct appeals had retained counsel than did represented appellants in felony appeals).

<sup>112</sup> Irene Oritseyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 750 (2017) (“Some public defender agencies . . . allocate attorney experience in a manner such that it is disproportionately dedicated to clients charged with felony offenses.”).

<sup>113</sup> See, e.g., John T. Wold & Greg A. Caldeira, *Perceptions of “Routine” Decision-Making in Five California Courts of Appeal*, 13 POLITY 334, 344 (1980) (interviewing California court of appeal justices, one of whom described monotony and boredom of dealing with routine cases, calling them “these rotten little cases”).

compared to felony appellants—have appellate defenders as lawyers, and defenders generally secure better results for their clients than retained or appointed counsel,<sup>114</sup> then as a group, misdemeanor defendants may have less effective advocacy than felony defendants.

Other factors, however, might *increase* the likelihood of success compared to felony appeals. A larger proportion of retained counsel among misdemeanor appellants may translate to an overall pool of appeals more carefully selected for success than felony appeals.<sup>115</sup> It is also possible that a larger percentage of the misdemeanor convictions or certain categories of misdemeanors appealed, compared to felony convictions appealed, are appellants' very first criminal convictions. For a first offender, the ruling on appeal is the difference between having a clean record and having a criminal history; both appellants and courts could be particularly keen to correct error in such cases.<sup>116</sup> While data limitations hampered our ability to investigate some of these hypotheses, we pursued those that we could.

### III. DATA AND RESEARCH DESIGN

#### A. Data

Our primary data were drawn from a nationally representative probability sample of the decisions entered in 2010 in direct criminal appeals by every state

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<sup>114</sup> The appointment of the appellate defender is limited to felony appellants in some states. *See, e.g.*, 725 ILL. COMP. STAT. 5/121-13 (2018); ILL. SUP. CT. R. 607(a) (providing for court to appoint counsel on appeal only to defendant found guilty of felony or Class A misdemeanor or sentenced to prison). In Michigan, the State Appellate Defender Office services only felony defendants. *See* STATE APPELLATE DEF. OFFICE & MICH. APPELLATE ASSIGNED COUNSEL SYS., 2017 ANNUAL REPORT 6 (2017), [http://www.sado.org/content/commission/annual\\_report/11037\\_2017-Annual-Report.pdf](http://www.sado.org/content/commission/annual_report/11037_2017-Annual-Report.pdf) [<https://perma.cc/HT65-53KN>] (describing mission statement in part as “seeking the best possible outcomes for indigent clients who appeal their felony convictions”). In New Hampshire, appellate defenders represent only clients convicted of felonies and the most serious misdemeanors. *See* Christopher M. Johnson, *The New Hampshire Appellate Defender Program: An Apprenticeship Clinic*, 75 MISS. L.J. 825, 830 (2006).

<sup>115</sup> *See* Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1951 (explaining that retained counsel could perform better than publicly funded counsel if losing cases are less likely to be pursued when defendant is paying). We found that, among prosecutor appeals, the likelihood of success for felonies and misdemeanors did not differ significantly, which we speculated might be the result of greater selectivity by prosecutors in choosing only the most egregious misdemeanor rulings to appeal. *See* King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 508.

<sup>116</sup> Because of the scant available information on misdemeanor convictions and sentences, this hypothesis is not realistically testable, although it is consistent with available data from at least one jurisdiction. *See* DIAL, KING & WESOLOSKI, *supra* note 48, at 2-3, 33-34 (finding that 29.0% of selected misdemeanor defendants and 27.7% of felony defendants in North Carolina were in lowest criminal history category).

appellate court with criminal jurisdiction.<sup>117</sup> From an initial universe of 4650 criminal appeals, we excluded appeals in felony and death penalty cases, then further excluded seven appeals from the Iowa Supreme Court that were not actually completed but instead transferred to the state's intermediate court; this left 403 misdemeanor appeals for our analyses.

### 1. Outcome Measures

We focused on two outcome measures: (1) "merits review," defined as whether the appeal was reviewed on its merits rather than terminated for a reason unrelated to the merits; and (2) "favorable decision," defined as whether an appeal's outcome involved anything *other than* an affirmance, dismissal, denial of review, or withdrawal.<sup>118</sup> As Table 1 illustrates, among our 403 misdemeanor appeals, 260 (or 64.5%) were reviewed on the merits. The remaining 143 appeals were denied review by the appellate court, dismissed for a procedural problem unrelated to the merits, or withdrawn by the appellant. Among all 403 misdemeanor appeals, 11.2% succeeded. Of those reviewed on the merits, 17.3% succeeded.

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<sup>117</sup> For a general description of the appeals data set, see *Survey of State Court Criminal Appeals, 2010*, INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES. (2016) [hereinafter *Survey of State Court Criminal Appeals, 2010*], <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36465#> [<https://perma.cc/XP9B-28DH>]. The data for this study are from the main data set of NCSC APPEALS STUDY, *supra* note 18. For a table breaking down the misdemeanor sample by state, with success rates by states, see *infra* Table A1.

<sup>118</sup> In addition to full and partial reversals, remands and modifications to sentences were considered favorable outcomes for the appellant, as the data offer no reliable method to distinguish significant modifications or remands from less meaningful ones. This approach comports with prior empirical work examining appeals. See, e.g., CHAPPER & HANSON, *supra* note 62, at 5; Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100, 115 n.72 (2015).

**Table 1.** Merits Review and Favorable Decision, by Appeal Type.

Appeal Type	(N)	Total	Merits Review (%)
Discretionary, of all cases filed	22	128	17.2
Appeal of right, of all cases filed	238	275	86.6
Appeal Type	(N)	Total	Favorable Decision (%)
Appeal of right, of all cases filed	36	275	13.1
Discretionary, of all cases filed	9	128	7.0
Discretionary, of all cases granted review	9	24	37.5

Source: Survey of State Court Criminal Appeals, 2010.

## 2. Independent Variables

Our other tables and models include the three groups of other factors that we thought might inform the likelihood of merits review or success: (1) state- and court-specific factors, (2) crime of conviction and claims raised on appeal, and (3) factors related to advocacy.<sup>119</sup> Each of these independent variables is defined in Appendix A. Information about individual defendants—such as race, gender, age, or criminal history—was not available.

### B. *Statistical Analyses*

In addition to descriptive information, our analyses report each variable's independent influence on (1) whether an appeal was reviewed on the merits and, (2) if the appeal received a merits review, whether the appellant succeeded on appeal. Our data set's structure and size allow us to specify selection regression models that better capture the inherent underlying two-stage structure of the criminal appellate process. Specifically, of the 403 misdemeanor appeals, 260 (or 64.5%) received merits review. Among the 143 appeals that did *not* receive merits review, *none* prevailed. Among the 260 appeals that *did* receive merits review, forty-five (or 17.3%) succeeded.

From a research-design perspective, what is important is that merits review was a necessary, but alone insufficient, condition for an appeal's success. This first stage—the decision about whether an appeal was heard on the merits—results in data censoring. We therefore assumed that the subpool of 143 appeals that did not receive merits review systematically varied from the subpool of 260 appeals that did. Our Heckman selection model specifications permit us to

<sup>119</sup> See *supra* Section II.B (discussing factors). The variables were formulated to facilitate answers to the research questions as well as comparisons with our prior criminal appeals studies. See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1949-52; King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 490-92.

explore an appeal's prospect for success conditioned on that appeal receiving a merits review and facilitates an empirical check on our assumption about whether the subpool of appeals that did not receive merits review systematically varied from those appeals that did receive merits review.

#### IV. RESULTS AND DISCUSSION

##### A. *Do Appellate Courts Review Every Type of Misdemeanor Case That Trial Courts Process?*

To examine the differences between appellate and trial level case mix (our first research question), we first present, in Table 2, descriptive information about the random sample of appeals examined in this study.

**Table 2.** Summary of Variables, as Percentage of Sample.

<b>Independent Variables</b>	<b>(N)</b>	<b>%</b>
Court of last resort	198	49.1
Mandatory review appeal	275	68.2
1st appellate review	185	45.9
2nd appellate review	26	6.5
(unknown layer appellate review)	192	47.6
<i>Appeal from:</i>		
Conviction (alone)	239	59.3
Sentence (included)	90	22.3
(unknown)	74	18.4
<i>Crime type:</i>		
Drug trafficking, weapons	21	5.2
Violence (homicide, robbery, assault)	98	24.3
Sex crime	10	2.5
DUI	87	21.6
Drug possession	52	12.9
Other driving-related	31	7.7
Property	34	8.4
Court order violation	11	2.7
(other and unknown)	59	14.6
<i>Claim included in brief:</i>		
Evidence suppression	54	13.4
Insufficient evidence	115	28.5
Sentence	29	7.2
Statutory interpretation	20	5.0
Statute constitutionality challenge	10	2.5
Claims other than above	62	15.4
(claim raised unknown)	148	36.7



Independent Variables	(N)	%
<i>Court factors:</i>		
Elected judges	212	52.6
PA state	74	18.4
<i>Process &amp; advocacy factors:</i>		
Prosecutor-initiated appeal	13	3.2
Anders/Wende	17	4.2
Reply brief filed	60	14.9
Oral argument held	49	12.2
Full judicial opinion	127	31.5
Private defense attorney	69	17.1
Public defense attorney	228	56.6
Pro se defendant	23	5.7
(unknown representation)	83	20.6
<i>N</i>	403	

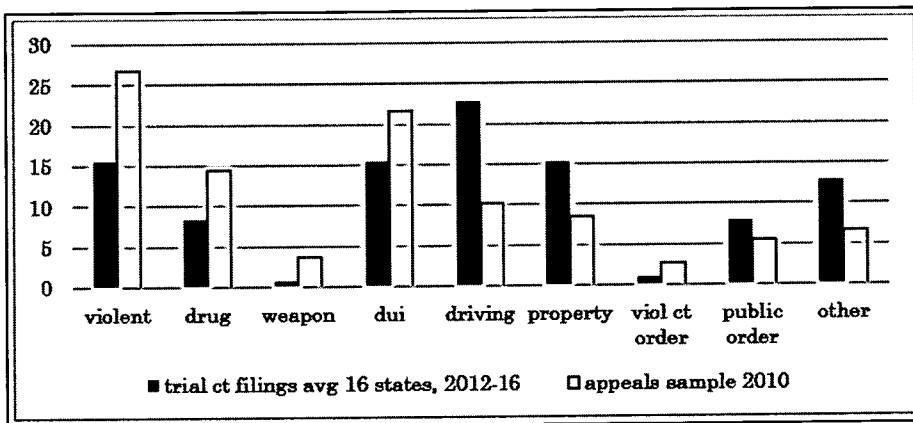
Source: Survey of State Court Criminal Appeals, 2010.

As noted earlier, published information on *trial* court processing of misdemeanor cases includes virtually none of the details in Table 2. However, data we obtained by request from the CSP do allow for an admittedly limited examination of how the *crime-type* mix in the pool of misdemeanor appeals differs from that in the pool of misdemeanor cases processed by trial courts.<sup>120</sup>

<sup>120</sup> Charge types in arrest data could serve as imperfect proxies for crime types in misdemeanor filings. See *Misdemeanor Arrests vs. Misdemeanor Filings*, CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts, Williamsburg, VA), Sept. 2000, at 1, 5 (stating that arrest and filing rates “generally track each other” and estimating misdemeanor filings based on Uniform Crime Reporting (“UCR”) arrest data). But many misdemeanor cases begin with summonses, not arrests, and arrest data are not separated by misdemeanor or felony. So, evaluation must rely on available offense categories that are *likely* misdemeanors and may contain some felony charges. See Stevenson & Mayson, *supra* note 1, at 750. Even with these problems, the most frequent categories of nontraffic crimes are fairly consistent. See *id.* at 758 fig.12 (showing that offenses with highest arrest rates are drug possession, theft, DUI, and assault). We also considered comparing caseload mix by using the National Incident-Based Reporting System (“NIBRS”). See U.S. DOJ, FBI, NATIONAL INCIDENT-BASED REPORTING SYSTEM VOLUME 1: DATA COLLECTION GUIDELINES 21-37 (2000), [https://ucr.fbi.gov/nibrs/nibrs\\_dcguides.pdf](https://ucr.fbi.gov/nibrs/nibrs_dcguides.pdf) [<https://perma.cc/WT2K-FDYC>] (showing categories of NIBRS offenses). However, reporting for the NIBRS database is not yet as complete as the UCR’s. See U.S. DOJ, FBI, UNIFORM CRIME REPORTING PROGRAM, METHODOLOGY 4 (2017), [https://ucr.fbi.gov/nibrs/2016/resource-pages/methodology-2016\\_final\\_.pdf](https://ucr.fbi.gov/nibrs/2016/resource-pages/methodology-2016_final_.pdf) [<https://perma.cc/ZG4Y-4QMR>] (noting that some law enforcement agencies do not report NIBRS data for every month); Press Release, FBI, FBI Releases 2016 NIBRS Crime Statistics in Report and CDE, Promotes Transition of Agencies (Dec. 11, 2017), [https://ucr.fbi.gov/nibrs/2016/resource-pages/nibrs-2016\\_summary.pdf](https://ucr.fbi.gov/nibrs/2016/resource-pages/nibrs-2016_summary.pdf) [<https://perma.cc/L623-PLUS>] (“Currently, the FBI does not estimate for agencies that do not submit NIBRS data.”).

We compared the average crime-type percentages for misdemeanor cases decided by appellate courts nationwide in 2010 with the average crime-type mix for misdemeanor cases filed in sixteen states' trial courts for various years from 2012-2016.<sup>121</sup> The results, presented in Figure 1, suggest that, on average, (1) the percentage of appeals from DUI and violent-crime convictions exceeds the percentage of cases processed in trial courts for these crimes, and (2) the percentage of appeals from non-DUI driving convictions is smaller than the proportion of such cases in trial courts.

**Figure 1.** Crime Type as Percentage of Misdemeanor Cases, Trial Court Filings and Appeals Compared.



Source: Survey of State Court Criminal Appeals, 2010; Trial data from CSP by request.

In addition, we made a similar comparison of trial and appellate crime-type case mix for each of the two jurisdictions with the largest volume of appeals in our data: the District of Columbia and Pennsylvania.<sup>122</sup> These particular jurisdictions also included a proportion of violent-crime cases on appeal that exceeded the proportion of violent-crime cases in trial courts. But unlike the fourteen other states, the District of Columbia and Pennsylvania experienced a

<sup>121</sup> Misdemeanor crime type data provided to us by the CSP were quite limited—available from a total of sixteen states, with four states reporting only one year between 2012 and 2016, seven states reporting data for all five years, and the remaining five states having some amount of data in between. A forthcoming study of eight varied jurisdictions also finds a case mix that is consistent with the limited sample available from CSP. See Mayson & Stevenson, *supra* note 14 (manuscript at 7) (reporting that, excluding traffic offenses, “DUI, simple assault, petty theft and possession of marijuana - constituted the majority of [misdemeanor] cases in most jurisdictions”).

<sup>122</sup> See *infra* Table A1 (illustrating that D.C. comprised 15.1% and Pennsylvania comprised 18.4% of random nationwide sample of 2010 direct criminal appeals).

lower percentage of DUI cases on appeal compared to trial courts and a higher percentage of other driving cases on appeal compared to trial courts.

Overall, judging from the limited information about trial courts available from about a third of the states, all basic crime categories appear to be represented among the misdemeanor cases that reach state appellate courts. There appears to be no category that escapes appellate review entirely, meaning no obvious blind spots for appellate courts, at least among general crime types, when averaging states with available information together. But the *mix* of misdemeanor crimes in appellate courts differed from that experienced by trial courts. In most of the jurisdictions with available data, appellate judges review a greater percentage of misdemeanor cases that involve violent and DUI offenses than the percentage that trial judges handle, but a much-reduced proportion of the category of misdemeanor crime that inundates the nation's trial courts—i.e., traffic crime.

### B. *Which Cases Succeed on Appeal?*

This Section examines which of the misdemeanor appeals in the nationwide sample succeeded and why. It begins with a look at the winning defense appeals in the national sample, then turns to descriptive statistical comparisons, and finally to more sophisticated analyses.

Coding in the NCSC Appeals Study includes more information for the appeals that succeeded than for those that failed, including the claim or claims that won and an explanation of what sort of relief was ordered.<sup>123</sup> These additional data reveal at least two patterns consistent with expectations. First, providing additional evidence that appellate review is more accessible and successful for those who contest guilt compared to those who pled guilty,<sup>124</sup> at least 40% of the successful misdemeanor appeals were from trials—a stark contrast to the small sliver of misdemeanor dispositions following trial rather than plea.<sup>125</sup> Second, about 75% of winning appeals secured relief from conviction, suggesting that when it comes to misdemeanors, appellate judges, like appellants, may be more concerned with errors underlying convictions than they are with sentencing error.<sup>126</sup>

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<sup>123</sup> These text fields explained the effects of reversals, remands, and modifications.

<sup>124</sup> See *supra* notes 55-56 and accompanying text (summarizing why guilty plea defendants have less access to appeal).

<sup>125</sup> See *supra* note 25 and accompanying text (noting that only 1-2% of misdemeanor convictions follow trial). As noted earlier, no variable identified whether the judgment appealed was a trial or plea conviction, but in these cases, trials could be identified from the nature of the claim and the coders' notes.

<sup>126</sup> For example, of the six driving-related appeals that succeeded, five received relief from conviction, not the sentence, including three finding insufficient evidence of guilt and another being remanded for a plausible claim of ineffective assistance of counsel. All four successful drug or weapons appeals won on a suppression issue. All four winning sex-offense appeals overturned convictions—three for trial error and one for competency. DUI cases were reversed for denial of self-representation, indictment problems, other evidence issues, and sentencing errors.

### 1. Descriptive Findings Regarding Variation in Win Rates

As predicted, in simple comparisons reported in Table 3,<sup>127</sup> several factors correspond with *higher* win rates: mandatory (versus discretionary) review; intermediate (versus last-resort) courts; appointed (versus elected) judges; first (versus second and unknown) layer of appellate review; sex-crime appeals (versus all other) crime types; prosecutor (versus defense) appellants; appeals that include oral argument, reply briefs, or full opinions (versus those that do not); and appeals raising claims challenging sentence, sufficient evidence, or statutory interpretation (versus appeals raising other claims). Non-DUI, driving-related appeals also had a higher win rate than other crime types, which we did not predict.

**Table 3.** Summary of Variables, by Decision Favoring Appellant.

<b>Independent Variables</b>	<b>% cases with variable receiving decision favoring appellant</b>	<b>% cases without variable receiving decision favoring appellant</b>
Court of last resort [n=198]	7.6	14.6
Mandatory review appeal [n=275]	13.1	7.0
1st appellate review [n=185]	14.6	8.3
2nd appellate review [n=26]	3.9	11.7
(unknown layer appellate review) [n=192]	8.9	13.3
<i>Appeal from:</i>		
Conviction (alone) [n=239]	13.0	8.5
Sentence (included) [n=90]	14.4	10.2
(unknown) [n=74]	1.4	13.4
<i>Crime type:</i>		
Drug trafficking, weapons [n=21]	9.5	11.3
Violence (homicide, robbery, assault) [n=98]	10.2	11.5
Sex crime [n=10]	40.0	10.4
DUI [n=87]	11.5	11.1
Drug possession [n=52]	5.8	12.0
Other driving-related [n=31]	19.4	10.5
Property [n=34]	14.7	10.8
Court order violation [n=11]	0.0	11.5
Other and unknown [n=59]	8.5	11.6

<sup>127</sup> A similar set of findings on success rates for misdemeanor appeals, but without the thirteen prosecutor appeals and separated by whether the appeal was mandatory or discretionary, appears *infra* Table 5, columns 1 and 3. For predictions, see *supra* Section II.B.

<b>Independent Variables</b>	<b>% cases with variable receiving decision favoring appellant</b>	<b>% cases without variable receiving decision favoring appellant</b>
<i>Claim included in brief:</i>		
Evidence suppression [n=54]	11.1	11.2
Insufficient evidence [n=115]	16.5	9.0
Sentence [n=29]	27.6	9.9
Statutory interpretation [n=20]	15.0	11.0
Statute constitutionality challenge [n=10]	10.0	11.2
Claims other than above [n=62]	16.1	10.3
(claim raised unknown) [n=148]	3.4	15.7
<i>Court factors:</i>		
Elected judges [n=212]	9.0	13.6
Workload	—	—
PA state [n=74]	2.7	13.1
<i>Process &amp; advocacy factors:</i>		
Prosecutor-initiated appeal [n=13]	38.5	10.3
Anders/Wende [n=17]	0.0	11.7
Reply brief filed [n=60]	20.0	9.6
Oral argument held [n=49]	24.5	9.3
Full judicial opinion [n=127]	22.8	5.8
Private defense attorney [n=69]	13.0	10.8
Public defense attorney [n=228]	12.3	9.7
Pro se defendant [n=23]	13.0	11.1
(unknown representation) [n=83]	6.0	12.5
<i>N</i>	403	403

Source: Survey of State Court Criminal Appeals, 2010.

Most surprising was that these simple comparisons revealed that the overall win rate for pro se appellants (13%) was equal to that for retained attorneys but slightly *higher* than the win rate for publicly funded counsel (12.3%).<sup>128</sup>

<sup>128</sup> See *infra* Table 5 (comparing misdemeanor to felony appeals). In comparing only appeals of right, the difference was even more pronounced, with pro se appellants winning 17.7% of the time—better than both appellants with public counsel (13.5%) and those with retained counsel (12.5%).

## 2. Regression Results

To investigate whether the relationships revealed in simple comparisons survived more sophisticated analyses, we estimated Heckman selection models.<sup>129</sup> Comparing the descriptive findings (Table 3) with the regression results (Table 4) illustrates the dangers of relying on simple comparisons to estimate the importance of case features for complex case outcomes. For example, Table 3 suggests that misdemeanor appellants in Pennsylvania, the state with the most cases in the random sample, fared far worse than appellants in other states. After controlling for other factors, however, the results in Table 4 imply that Pennsylvania appeals did not systematically vary from appeals in other states. We review the most interesting regression findings below, offering tentative explanations for each.

### a. *Merits Review*

Analyses of merits review generated five notable findings. First, even after controlling for whether the appeal was of right or permissive, courts of last resort were significantly less likely to review misdemeanor appeals than intermediate courts, reflecting higher rates of dismissal for procedural error by high courts than by intermediate courts. Several jurisdictions limit appeals to high courts more strictly than intermediate courts,<sup>130</sup> and perhaps these restrictions tripped up appellants.

Second, the relationship with a greater likelihood of merits review was much stronger for appeals that challenged convictions alone than for appeals that included challenges to sentences when compared to appeals where the type of challenge was unknown. This finding comports with our expectation that appellate judges, like appellants, may be more concerned with errors underlying misdemeanor convictions than they are with misdemeanor sentencing.<sup>131</sup>

Third, as predicted,<sup>132</sup> appeals with identifiable claims were significantly more likely to receive merits review than the reference set of appeals in which

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<sup>129</sup> A few variables from Tables 2 and 3 do not appear in the model because they lacked the variation needed for inclusion, including “court order violation” and “full judicial opinion.” The “reply brief filed” and “oral argument held” variables were excluded from the merits model (first stage) but included in the succeeded model (second stage).

As Table 4 illustrates, a highly significant *rho* test statistic provides evidence of a selection effect, conditioned on an appeal receiving a full merits review. The *rho* test statistic achieved significance at the  $p < 0.01$  level. Additionally, unreported results from various alternatives to our models presented in Table 4, including modeling merits and appellate success in separate probit specifications, yield results that, while not identical to those reported in Table 4, do not meaningfully vary from them.

<sup>130</sup> See, e.g., sources cited *supra* note 36 (collecting states providing misdemeanor defendants only discretionary right to appellate review).

<sup>131</sup> See *supra* text accompanying note 126.

<sup>132</sup> See *supra* Section II.B.2.

claims could not be identified,<sup>133</sup> with a single exception. Appeals including a constitutional challenge to a statute were significantly *less* likely to be reviewed on the merits compared to even those cases in which the claim could not be determined. This is consistent with the hypothesis that such claims are often perceived to be clear losers not worth reviewing, raised only for preservation purposes in the hope that the constitutional rule might later be revised and applied retroactively to the defendant's case.<sup>134</sup> Also, cases with insufficiency claims were not reviewed more than other claims; instead, cases raising suppression and statutory interpretation were among the most likely to receive merits review.

**Table 4.** Selection Model: Appeal Succeeded, Conditioned on Merits Review.

Independent Variables	Merits	(s.e.)	Succeeded	(s.e.)
<i>Case-specific variables:</i>				
Court of last resort	-0.98**	(0.34)	-0.42*	(0.16)
Mandatory review appeal	1.17**	(0.38)	-0.51	(0.38)
<i>Appeal from:</i>				
Conviction (alone)	2.15**	(0.41)	0.83	(0.42)
Sentence (included)	1.18**	(0.35)	1.42**	(0.53)
(unknown/missing) [ref.]	—		—	
<i>Crime type:</i>				
Drug trafficking, weapons	-1.21*	(0.54)	0.23	(0.56)
Violence (homicide, robbery, assault)	0.04	(0.38)	0.34	(0.34)
Sex crime	0.17	(0.45)	1.52**	(0.46)
DUI [ref.]	—		—	
Drug possession	-0.86	(0.50)	-0.10	(0.45)
Other driving-related	0.29	(0.42)	0.81**	(0.30)
Property	-0.20	(0.42)	0.42	(0.35)
Other, missing	-0.22	(0.27)	-0.08	(0.32)
<i>Claim included in brief:</i>				
Evidence suppression	2.87**	(0.65)	-0.09	(0.33)
Insufficient evidence	1.42**	(0.38)	0.28	(0.37)
Sentence	2.02**	(0.52)	0.42	(0.35)
Statutory interpretation	2.65**	(0.41)	-0.05	(0.32)
Statute constitutional challenge	-1.47*	(0.61)	-0.27	(0.68)
Claims other than above	0.81*	(0.34)	0.08	(0.44)
(claim unknown) [ref.]	—		—	

<sup>133</sup> Claims were coded from briefs and were unavailable in many cases that were dismissed or denied review that were not briefed. Eighty-eight percent of unknown-claim cases were denied review, dismissed, or withdrawn without review on the merits.

<sup>134</sup> See *supra* text accompanying notes 97-98 (discussing constitutional challenges to statutes).

Independent Variables	Merits	(s.e.)	Succeeded	(s.e.)
<i>Court factors:</i>				
Elected judges	-0.78*	(0.36)	-0.28	(0.24)
Workload	-0.00	(0.00)	-0.00	(0.00)
PA state	0.73	(0.63)	-0.38	(0.47)
<i>Process and advocacy factors:</i>				
Prosecutor-initiated appeal	0.80	(0.50)	1.49*	(0.60)
Anders/Wende	0.98	(0.67)	-6.05**	(0.39)
Reply brief filed	—		0.03	(0.14)
Oral argument held	—		0.52	(0.37)
Private defense attorney	0.01	(0.34)	0.16	(0.40)
Public defense attorney	0.21	(0.35)	0.25	(0.43)
Pro se defendant	0.04	(0.40)	0.50	(0.41)
(unknown representation) [ref.]	—		—	
Constant	-1.49*	(0.61)	-1.79**	(0.61)
<i>Rho</i> (Wald test)			425.8**	
Log likelihood			-154.8	
<i>N</i>	403		260	

Source: Survey of State Court Criminal Appeals, 2010.

Notes: We report results from our selection model of an appeal's success and selection for full merits review. The dependent variable in the succeeded equation is whether the appellate court outcome favored the appellant—success is construed as something less than a full affirmance or dismissal and involved upsetting, to some degree, the lower court decision; the dependent variable in the merits equation is whether the appeal received a full merits review. Robust standard errors (clustered on the state level) are in parentheses. \*  $p < 0.05$ ; \*\*  $p < 0.01$ . We estimated the selection model using the “heckprob” command in Stata (v.15.1).

Fourth, misdemeanor appeals to courts with elected benches were significantly less likely to be heard on the merits than appeals to courts with appointed judges. This comports with the prediction that elected appellate judges may be less likely to disturb criminal convictions and sentences than judges selected by appointment.<sup>135</sup>

Fifth, surprisingly, courts were no more likely to review on the merits misdemeanor appeals filed by the prosecution than to review appeals by defendants, once other factors were controlled. Although simple comparisons revealed a pattern similar to felony appeals,<sup>136</sup> with merits review provided in

<sup>135</sup> See *supra* text accompanying notes 86-88.

<sup>136</sup> In our earlier examination of prosecutor appeals, which combined noncapital felony and misdemeanor appeals from the same NCSC dataset, we found that prosecutors enjoyed almost 50:50 odds of securing merits review for a discretionary felony appeal filed in a state high court (45.3% were reviewed on the merits). See King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 510. This was much higher than the 20:1 odds facing defendants who were seeking review of their felony cases in state high courts (4.6% reviewed



43% of the prosecutor appeals but only in 12% of the defense appeals, regression results uncover no significant difference based on who appeals. This finding implies that who seeks review actually may not matter in whether merits review is provided in misdemeanor cases and that other features may explain the differences in rates of review.

b. *Success Among Appeals Reviewed on the Merits*

Turning to which factors emerged as important to whether appeals reviewed on the merits succeeded in obtaining some form of relief, we discuss below the most interesting findings reported in Table 4.

When it comes to differences in success once a court considers a case on the merits, who appealed mattered. Among cases that received merits review, prosecutors were significantly more likely to succeed than defendants, as predicted.<sup>137</sup>

Similarly, sentencing challenges that were reviewed on the merits were significantly more likely to succeed. Perhaps this is because sentencing error is easier to identify or less burdensome to correct, requiring only resentencing rather than the possibility of trial.

Crime type also mattered to an appeal's outcome. Sex-crime appeals accepted for merits review were associated with a higher likelihood of success than other crime types, consistent with a potentially higher error rate or possibly more judicial concern about collateral consequences of conviction in these cases. Driving-related cases (other than DUIs) were also significantly associated with a higher likelihood of success, a result we had not predicted. These cases make up the largest category of misdemeanor prosecutions in many state trial courts but are underrepresented in the pool of cases that reach appellate courts. It is possible that selection decisions by appellants, counsel, and courts are particularly pronounced for the tiny proportion of these cases that reach appellate courts. Those that manage to reach the merits stage of review may raise more compelling claims of error than appeals of other crime types.

Although elected benches were less likely to grant review, ultimately the judicial-selection method was not significantly related to an appeal's success. The extent of a court's workload appeared unrelated to the likelihood of success in these misdemeanor cases as well, as we suspected, given their small number compared to other types of appeals. Except for the presence of an *Anders*-type statement, advocacy-related factors, including the presence of oral argument or a reply brief, did not achieve statistical significance. While these variables appear important in descriptive analyses, any independent statistical importance eroded once other factors were controlled.

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on the merits). See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1948 tbl.2; King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 510. For more detailed comparison of misdemeanor and felony appeals, see *infra* Section IV.C.

<sup>137</sup> See *supra* text accompanying notes 99-100.

As for type of representation, recall that simple descriptive comparisons suggested that misdemeanor appellants without counsel did better than those with counsel, particularly in mandatory appeals. Our regression analyses, which controlled for, among other factors, whether the appeal was mandatory or discretionary, did *not* find that representing oneself on appeal was significantly associated with greater success.<sup>138</sup> To examine further whether pro se appellants enjoyed an advantage over represented defendants, our supplemental analyses substituted for the four different representation variables a single dummy variable comparing pro se appeals to all other types of representation. The absence of counsel remained insignificant. It appears that other characteristics of these pro se appeals may be responsible for their higher win rate.

### C. *How Misdemeanor and Felony Appeals Differ*

This Section discusses the comparison of misdemeanor appeals findings with those from our earlier research on defendants' felony appeals from the same NCSC Appeals Study. Because both sets of appeals were part of the same random sample of direct appeal decisions in criminal cases from appellate courts nationwide, this comparison provides—for the first time—quantitative insights into how defendants' appeals in misdemeanor and felony cases differ.

#### 1. Differences in Rates of Success

As to outcome, we did not anticipate whether misdemeanor appellants would lose or win more often than felony appellants because hypotheses supporting both findings were plausible. As results in Table 5 illustrate, comparing the simple rates of success between felonies and misdemeanors, the rates appear almost identical. The misdemeanor success rate at the intermediate court of appeals level is 14.8%, which is very close to the 15.1% figure for felonies.<sup>139</sup> At the high-court level, the 8.3% win rate is close to the 7.7% win rate for felonies.<sup>140</sup> Comparing win rates for cases with particular features—at least for comparisons involving more than ten misdemeanor cases—reveals that the association of most factors with a greater or lesser win rate is very similar for felony and misdemeanor appeals.

This consistency in success rates between misdemeanor and felony appeals is quite remarkable. But a few interesting differences surfaced as well, regarding insufficient evidence claims, advocacy efforts, and type of representation. For discretionary appeals but not appeals of right, felony appeals that included a

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<sup>138</sup> The regression, unlike column 1 in Table 3, included appeals filed by prosecutors and discretionary appeals, but it controlled for both. A sizeable portion (15-16%) of both misdemeanor and felony appeals were coded “unknown representation”; more cases were coded unknown than were coded pro se. Most of the “unknown representation” appeals were probably not pro se appeals but instead counseled appeals where it could not be determined from available documents if the attorney listed was retained or appointed.

<sup>139</sup> See NCSC APPEALS STUDY, *supra* note 18, at 5 tbl.2.

<sup>140</sup> See *id.* at 4 tbl.1.

claim challenging the sufficiency of evidence were twice as likely to win as misdemeanor appeals that included the same claim. This is somewhat inconsistent with the hypothesis that policing, prosecutorial screening, and judicial adherence to law are comparatively worse in misdemeanor cases.<sup>141</sup> But for reasons detailed earlier, fewer wrongfully convicted defendants in misdemeanor cases may reach the appellate courts, especially if such defendants are more likely than wrongfully charged defendants in felony cases to plead guilty rather than take their cases to trial.<sup>142</sup>

Reply briefs appeared to assist appellants in mandatory appeals to a greater extent than in felony cases. They were associated with a 26% win rate for felony appellants, compared to misdemeanor cases, where appellants who filed reply briefs won only 19% of the time. For discretionary appeals, the presence of oral argument showed a similar difference benefiting felony appellants more than misdemeanor appellants. Additional opportunities for advocacy may be less influential in misdemeanor appellate litigation if that advocacy is, on average, less effective than the advocacy in felony litigation.<sup>143</sup>

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<sup>141</sup> See *supra* text accompanying note 94.

<sup>142</sup> See *supra* Section I.B.

<sup>143</sup> Another difference we found was that, among mandatory appeals, drug possession cases succeeded at a rate not far from the average for all crime types when the crime was a felony, but when the crime was a misdemeanor, such appeals succeeded at less than half the average rate. The reverse was true for property cases in discretionary appeals: appeals in felony property cases won at about the average rate, but appeals in misdemeanor property cases succeeded at twice the average rate.

**Table 5.** Summary of Variables, by Decision Favoring Appellant, Comparing Misdemeanor and Felony Appeals (Without Supplemental or Prosecutor Appeals).

<b>Independent Variables</b>	<b>(1) Mandatory appeals with variable, % with decision favoring appellant [Misdem.]</b>	<b>(2) Mandatory appeals with variable, % with decision favoring appellant [Felony]</b>	<b>(3) Disc. appeals with variable, % with decision favoring appellant [Misdem.]</b>	<b>(4) COLR disc. appeals with variable, % with decision favoring appellant [Felony]</b>
Court of last resort	9.6	14.3	4.7	—
<i>Appeal from:</i>				
Conviction (alone)	11.2	12.3	11.4	10.7
Sentence (included)	27.5	20.5	4.2	6.8
(unknown)	2.9	1.6	0.0	0.3
<i>Crime type:</i>				
Drug trafficking, weapons	15.4	16.6	<b>0.0</b>	6.2
Violence (homicide, robbery, assault)	13.5	13.3	0.0	3.2
Sex crime	<b>50.0</b>	16.7	<b>0.0</b>	7.1
Drug possession	4.6	12.8	3.6	6.8
Property	15.4	17.5	12.5	6.3
Court-order violation	<b>0.0</b>	28.6	<b>0.0</b>	0.0
Other, missing	12.2	0.0	0.0	0.0
<i>Claim included in brief:</i>				
Evidence suppression	10.2	15.8	<b>0.0</b>	27.8
Insufficient evidence	16.0	16.9	12.5	25.9
Sentence	25.0	21.7	<b>100.0</b>	11.8
Claims other than above	13.2	14.4	20.0	39.4

Independent Variables	(1) Mandatory appeals with variable, % with decision favoring appellant [Misdem.]	(2) Mandatory appeals with variable, % with decision favoring appellant [Felony]	(3) Disc. appeals with variable, % with decision favoring appellant [Misdem.]	(4) COLR disc. appeals with variable, % with decision favoring appellant [Felony]
(claim unknown)	4.8	4.0	2.0	0.5
<i>Court factors:</i>				
Elected judges	10.3	15.3	3.9	3.6
<i>Process &amp; advocacy factors:</i>				
Anders/Wende	0.0	4.0	—	—
Reply brief filed	19.0	26.1	<b>0.0</b>	—
Oral argument held	20.5	24.4	25.0	51.4
Full judicial opinion	19.8	21.5	33.3	59.1
Private defense attorney	12.5	18.8	0.0	2.6
Public defense attorney	13.5	16.9	9.1	10.0
Pro se defendant	17.7	2.9	<b>0.0</b>	0.0
(unknown represent.)	7.0	7.1	2.6	1.0
<i>N</i>	270	2080	120	1153

Source: Survey of State Court Criminal Appeals, 2010.

Notes: Bolded percentages indicate  $N < 10$ ; interpret with increased caution.

Perhaps the most interesting difference revealed in Table 5 concerns the relative success of mandatory appeals litigated pro se. The win rate for misdemeanor appellants in appeals of right *without* an attorney was 17.7%, a rate higher than the success rate for misdemeanor appellants in appeals of right with counsel. Among felony pro se appellants in appeals of right, by contrast,

only 2.9% succeeded—far less than the rate for represented appellants.<sup>144</sup> This does not necessarily mean that unrepresented misdemeanor appellants were better advocates than unrepresented felony appellants. Recall that the higher rate of success for pro se misdemeanor appeals did not survive more sophisticated analysis and that other factors related to these pro se appeals were apparently responsible for their higher win rate.<sup>145</sup>

## 2. Differences in Representation Mix

We predicted that, as compared to felony appeals, misdemeanor appeals would include a higher percentage of defendant-appellants represented by retained counsel and representing themselves, i.e., that the proportion of appeals with publicly funded lawyers would be larger for felonies than for misdemeanors.<sup>146</sup> What we find in Figure 2 comports with this expectation when comparing mandatory appeals (too many discretionary appeals were missing this information to permit testing).<sup>147</sup>

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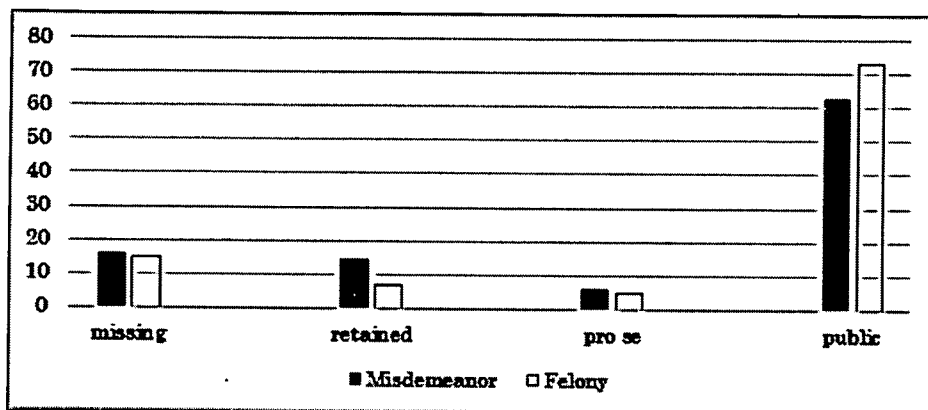
<sup>144</sup> Unlike the impressive success rate of pro se misdemeanor of-right appellants, among felony appellants, “[i]n no context did pro se defendants achieve a comparative advantage over defendants represented by legal counsel.” Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1966.

<sup>145</sup> See *supra* text accompanying note 138.

<sup>146</sup> See *supra* text accompanying notes 49-54 (discussing why so many misdemeanor defendants are convicted without counsel). Courts have rejected a federal constitutional right to publicly funded counsel *on appeal* for indigent misdemeanor defendants who lack a Sixth Amendment right to publicly funded counsel *in the trial court*. See, e.g., *People v. Batiste*, 167 Cal. Rptr. 171, 173 (Ct. App. 1980) (“[A]utomatically providing counsel on appeal to indigent misdemeanants whose punishment consisted of a fine, but entailed no collateral consequences, would flood the appellate departments of our superior courts with frivolous appeals . . . .”); *State v. Vives*, 50 Conn. L. Rptr. 309, 310 (Super. Ct. 2010) (“[T]he defendant was found guilty of a misdemeanor, and was issued a fine in lieu of any term of immediate incarceration. He is not, therefore, entitled to a public defender at this juncture.”); *State v. Castillo*, 2009-1358 (La. 1/28/11); 57 So. 3d 1012, 1012 (finding that, under Louisiana and U.S. Constitutions, indigent defendants convicted of petty misdemeanors are not entitled to counsel to assist with preparation of application for discretionary review).

<sup>147</sup> The data in Figures 2-5 are different than what appear in Table 4, which includes, in addition to defense appeals of right, prosecution appeals and discretionary appeals. Simple comparisons of representation-type proportions for discretionary appeals were complicated by the large number of discretionary appeals by defendants in both misdemeanor and felony cases that were coded “unknown representation”—31.7% of the misdemeanor appeals and 63.6% of the felony appeals. Documentation in cases that were denied review tended to reveal less information than documentation in cases decided on their merits.

**Figure 2.** Type of Representation in Mandatory Appeals, Misdemeanor and Felony Compared.

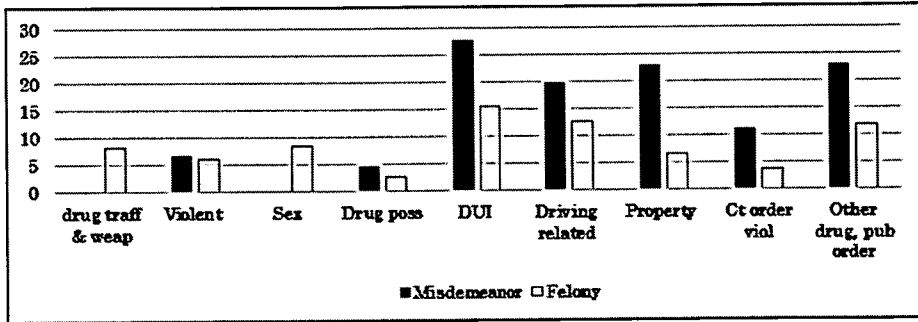


Source: Survey of State Court Criminal Appeals, 2010.

But the pattern differs across crime types, as Figures 3-5 make clear. Among misdemeanor appeals, DUI cases had the highest percentage of retained counsel and the lowest percentage of publicly funded counsel among all crime type categories.<sup>148</sup> By contrast, drug, weapons, and sex-offense appeals involved almost entirely publicly funded counsel. The category with the most pro se appellants, as expected, involved driving-related crimes, traffic offenses that constitute much of what are presumably the lowest-level misdemeanor offenses. More than one in four of these appeals were pro se, and among mandatory appeals, one in five appealed pro se.

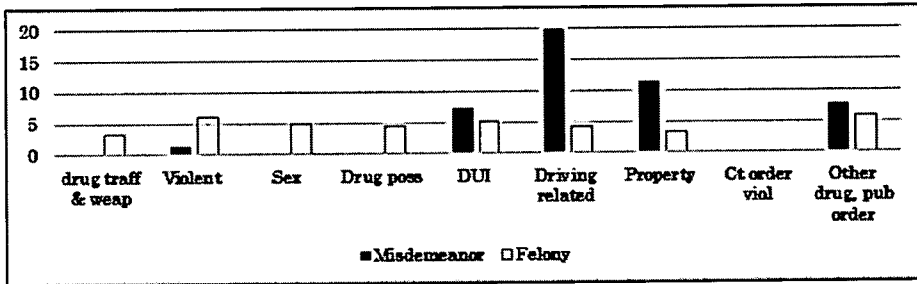
<sup>148</sup> This finding is consistent with the only other published source reporting misdemeanor representation by offense type. See HARLOW, *supra* note 53, at 7 (reporting rate of retained attorneys by jail inmates and charge, both felony and misdemeanor: assault, 16.2%; larceny, 9.6%; drug possession, 15.7%; weapons, 25.0%; and DWI, 28.1%).

**Figure 3.** Percentage Retained Counsel, Mandatory Appeals, Misdemeanor and Felony Compared, by Crime Type.



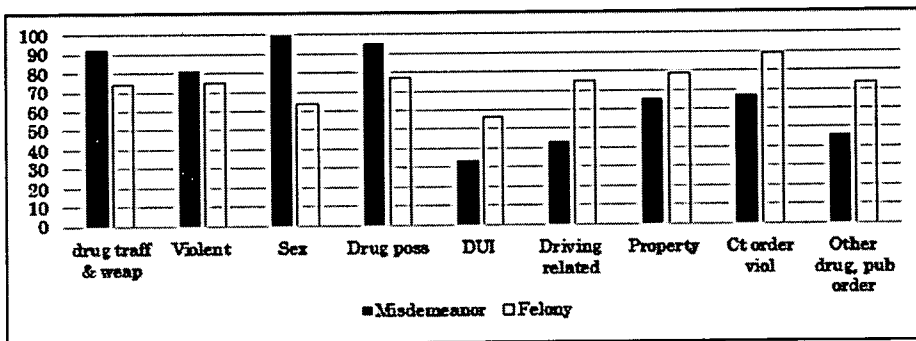
Source: Survey of State Court Criminal Appeals, 2010.

**Figure 4.** Percentage Pro Se, Mandatory Appeals, Misdemeanor and Felony Compared, by Crime Type.



Source: Survey of State Court Criminal Appeals, 2010.

**Figure 5.** Percentage Publicly Funded Counsel, Mandatory Appeals, Misdemeanor and Felony Compared, by Crime Type.



Source: Survey of State Court Criminal Appeals, 2010.



## V. IMPLICATIONS FOR POLICY

Professor Eve Primus reported that when she worked as a public defender, “I routinely had misdemeanor court judges refuse to address legal issues and tell me to save my legal arguments for appeal.”<sup>149</sup> These trial judges knew that appellate review was such an exceptional event for misdemeanor cases that it was safe to ignore. Commentators have argued that any hope that appeal will provide judicial oversight and correction of error in these cases is wishful thinking.<sup>150</sup> This study provides, for the first time, initial empirical testing of this claim. With an estimated average review rate of no more than eight in ten thousand convictions, and only one conviction or sentence out of every ten thousand misdemeanor judgments actually disturbed on appeal, it is no wonder that judges, prosecutors, and defense counsel can be confident that their conduct in trial court proceedings in misdemeanor cases will not be reviewed. At this rate, appellate review of misdemeanor-case processing cannot function as a serious remedy or deterrent for error.<sup>151</sup>

Appellate judges themselves might not share this impression of misdemeanor appeals. From their standpoint, review of misdemeanor cases may appear routine, not rare. After all, an estimated one in thirteen direct criminal appeals filed in state appellate courts nationwide is a misdemeanor case.<sup>152</sup> The findings here suggest, however, that those cases represent only a miniscule and systematically skewed sample of the millions of misdemeanors prosecutions churning through state trial courts.

One might argue that this level of review would be sufficient to correct error if error rates in misdemeanor cases are extremely low. However, error rates in misdemeanor cases are likely *worse* than in felony cases, not better. The sources of potential error begin with policing. Research has illustrated, for example, how innocent people have been charged with drug and weapons misdemeanors based on inaccurate information from faulty forensic field tests and criminal

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<sup>149</sup> Eve Brensike Primus, Response, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012).

<sup>150</sup> See, e.g., *id.* (“[M]isdemeanor court judges are relatively insulated from higher court feedback and do not learn of their mistakes in the same way that felony trial court judges do.”); Roberts, *supra* note 49, at 337-40 (explaining why ineffective assistance challenges in misdemeanor cases are rarely appealed).

<sup>151</sup> See, e.g., Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 709 (2018) (“I do not dispute the value of appellate courts clarifying constitutional criminal procedure—this is one of their important jobs. But to view this as a meaningful form of administrative oversight of the criminal [misdemeanor] process is, in my view, laughable and naïve in the extreme.”). Examining a misdemeanor procedural statute recently for the first time, one court stated, “Not surprisingly, there is little appellate activity interpreting this statute as it applies only to the prosecutions of violations and misdemeanors in local criminal courts.” *People v. Bollu*, 83 N.Y.S.3d 794, 796 (Ct. Ct. 2018).

<sup>152</sup> See NCSC APPEALS STUDY, *supra* note 18, at 5 tbl.2 (estimating that 7% of direct criminal appeals in 2010 were misdemeanors).

records;<sup>153</sup> how arrest quotas have systematically produced baseless arrests for “order maintenance” misdemeanors, such as trespassing, loitering, failing to obey an officer, or “being a rogue and vagabond”;<sup>154</sup> and how courts, prosecutors, and police use misdemeanor charges and sentences to raise revenue.<sup>155</sup> The processing of these charges compounds the problem. For those who are innocent, too often the burdens of getting to trial far exceed the expected costs of pleading guilty. Defendants often anticipate being found guilty at trial when it is the police officer’s word versus their own.<sup>156</sup> When harsh detention policies mandate bail that they cannot afford to pay and insisting on trial would mean waiting weeks or months more in jail, pleading guilty and accepting a sentence of “time served” appears to many defendants to be their only option to get out of jail.<sup>157</sup> As Professor Eisha Jain has summarized, “Defendants systematically make the rational decision to minimize the length of their experiences with the process, rather than attempt to seek adjudication.”<sup>158</sup> Compared to felonies, misdemeanors are resolved by judges and prosecutors with less experience and less time; with no counsel for the defense or overworked counsel at best; with fewer procedural protections; and with less transparency, record-keeping, and accountability.<sup>159</sup> In her thoughtful evaluation of misdemeanor crime’s “innocence problem,” Professor Alexandra Natapoff admits that we do not know how many of those convicted of misdemeanors are

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<sup>153</sup> See NATAPOFF, *supra* note 1, at 91-98; Roberts, *supra* note 11, at 799-802.

<sup>154</sup> See NATAPOFF, *supra* note 1, at 59.

<sup>155</sup> E.g., U.S. DOJ, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9-15 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/7XML-L7ZN>]. See generally Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018) (explaining how municipalities benefit financially from various criminal justice policies).

<sup>156</sup> Roberts, *supra* note 11, at 812-13.

<sup>157</sup> E.g., KOHLER-HAUSMANN, *supra* note 4, at 135 (“[T]he time a defendant would wait [in jail] to push a case to trial is usually much longer than the jail term being offered if he or she agrees to take a plea.”); NATAPOFF, *supra* note 1, at 87-89; Roberts, *supra* note 11, at 799-802, 833 (discussing fifty-six misdemeanor drug possession exonerations in Harris County, Texas).

<sup>158</sup> Jain, *supra* note 3, at 959-60; see also KOHLER-HAUSMANN, *supra* note 4, at 263 (“[M]isdemeanor courts . . . are functionally administrative systems, where trials are rarely viable routes to dispute legal issues or establish factual innocence.”); Heaton, Mason & Stephenson, *supra* note 14, at 717 (reporting results of study finding that in Harris County, Texas, defendants who are detained on misdemeanor charges are 25% more likely to be convicted and 43% more likely to be sentenced to jail than similarly situated releasees); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 536 tbl.1 (2017) (reporting that misdemeanor defendants who are detained are more likely to plead guilty, be convicted, and be sentenced to incarceration than similarly situated defendants who are not detained).

<sup>159</sup> See NATAPOFF, *supra* note 1, at 68-70, 87-90, 108-11; Alexandra Natapoff, *Misdemeanors*, ANN. REV. L. & SOC. SCI., 2015, at 255, 256.

innocent.<sup>160</sup> But there is mounting evidence that undercuts an assumption that there is substantially less error for appellate review to correct and deter in these cases than there is in felony cases.

The findings here suggest that the greatest need for more judicial attention is in cases involving charges for the lowest-level crimes ending in guilty plea or dismissal. Appellate review is least effective as a mechanism for correcting error and developing the law in such cases. Appeal is not authorized or is drastically limited for the lowest-level misdemeanor crimes and, when available, is often restricted for defendants who plead guilty. Defendants who are arrested and detained, but never convicted, have no recourse at all to direct appeal.

Although it is in these cases, where appeal is least likely, that the problems plaguing misdemeanor enforcement are most pernicious, direct appeal is an ill-suited mechanism for addressing those problems. Direct appeal of individual convictions is unlikely to end policies and practices by police and lower courts designed to generate revenue rather than to improve public safety;<sup>161</sup> realign bail practices so that nondangerous, indigent defendants are not detained pretrial when they cannot afford money bail;<sup>162</sup> direct resources to overworked appointed counsel and prosecutors who barely have enough time to negotiate a plea, much less investigate the facts; manage cases to reduce the number of times that lawyers and clients must be present in court, only to have a proceeding adjourned;<sup>163</sup> or curb the counterproductive collateral consequences that follow a misdemeanor arrest or charge, even when ultimately dismissed.<sup>164</sup> These systemwide problems do not present claims a convicted defendant could raise on appeal, and they afflict the innocent and guilty alike. Given the volume of misdemeanor-case processing and the nature of problems in need of oversight, even marginally increased access to appeal is unlikely to make an impact on what actually happens to those charged with misdemeanors in the nation's busiest trial courts.<sup>165</sup>

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<sup>160</sup> See NATAPOFF, *supra* note 1, at 89; see also *State v. Yung*, 863 N.W.2d 249, 253 (Iowa 2015) (explaining why risk of inaccurate verdicts in uncounseled misdemeanor case is higher than in most felony prosecutions).

<sup>161</sup> Cf. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 65-69 (2017) (addressing concerns that system of graduated economic sanctions would decrease revenue generation).

<sup>162</sup> See e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1472-76 (2017).

<sup>163</sup> See e.g., KOHLER-HAUSMANN, *supra* note 4, at 122-23, 137-38.

<sup>164</sup> See, e.g., *id.* at 150-51; Beth A. Colgan, *Fines, Fees, and Forfeiture*, in 4 ACAD. FOR JUSTICE, REFORMING CRIMINAL JUSTICE 205, 225 (Erik Luna ed., 2017), [http://academyforjustice.org/wp-content/uploads/2017/10/11\\_Criminal\\_Justice\\_Reform\\_Vol\\_4\\_Fines-Fees-and-Forfeitures.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/11_Criminal_Justice_Reform_Vol_4_Fines-Fees-and-Forfeitures.pdf) [<https://perma.cc/ZTN7-JQUM>] (“[C]ases resulting in the imposition of fines, fees, and forfeitures may be riddled with factual and constitutional issues which lay people are ill-suited to raise . . .”).

<sup>165</sup> For similar reasons, expanding the right to counsel for those convicted misdemeanants who do appeal is not a likely priority for reform. Already those rare misdemeanor defendants

Instead, a better alternative for judicial regulation of state misdemeanor cases may be providing opportunities to challenge the legality of misdemeanor procedures through means other than direct appeal. Lawsuits and class actions seeking injunctive relief and targeting oppressive sanctioning, fee, and detention policies have seen some success.<sup>166</sup> These strategies, along with evidence-based, administrative and legislative reforms tailored to local circumstances, appear to be more promising avenues for change than expanding direct appeal could ever be. Findings like those in this Article, and hopefully in future studies, can help ensure that more than guesswork guides law and policy in the nation's most common criminal cases.

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who do reach appellate courts win as often as felony appellants, even though comparatively more of them are pro se. And our findings suggest that whether they represented themselves, hired a lawyer, or had a publicly provided lawyer made little difference in the outcome of their appeals.

<sup>166</sup> See, e.g., *Cain v. White*, No. 18-30955, 2019 WL 3982560, at \*6 (5th Cir. Aug. 23, 2019) (upholding district court finding that state judges were not impartial when fines and fees they imposed upon defendants “make up a significant portion of their annual budget” and they “have exclusive authority over how the [fines and fee income] is spent”); *Robinson v. Purkey*, No. 3:17-cv-01263, 2018 WL 5023330, at \*2, \*18 (M.D. Tenn. Oct. 16, 2018) (granting preliminary injunction for class action plaintiffs challenging Tennessee’s policy of suspending driver’s licenses of those who fail to pay traffic tickets), *appeal docketed*, No. 18-6121 (6th Cir. Oct. 24, 2018); *Schultz v. State*, 330 F. Supp. 3d 1344, 1344 (N.D. Ala. 2018) (granting preliminary injunction in equal protection challenge to detention policy), *appeal docketed*, No. 18-13898 (11th Cir. Sept. 26, 2018); Colgan, *supra* note 164, at 216-17 (discussing increase in successful litigation of constitutional issues involving fines, fees, and forfeiture).

APPENDIX A:  
INDEPENDENT VARIABLESa. *State- and Court-Specific Variables*

*Mandatory/Discretionary Review; Court of Last Resort/Intermediate Appellate Court.* Our data indicate for each appeal whether it was “of-right” (mandatory) or “by permission” (discretionary). We included a dummy variable signaling whether the appeal was mandatory and another dummy variable identifying those appeals decided by state courts of last resort.<sup>167</sup>

*State.* Table A1 presents general information on the national sample of 403 misdemeanor appellate decisions from forty-six different states. Because 18.4% of those decisions are from Pennsylvania, we include a dummy variable for Pennsylvania appeals to test whether they systematically varied from appeals in other states.<sup>168</sup>

*Layer of Appeal.* To identify which appeals were reviewing the trial court record for the first time or were instead reviewing another decision that had itself reviewed that record, we attempted to determine, for each court in each state, whether review would have been on the record without new fact-finding or would have been de novo with new fact-finding.<sup>169</sup>

*Judicial-Selection Method.* To test the possible significance of judicial-selection method, we coded a specific appellate court as “elected” if the initial judicial-selection method for the relevant court involved any form of election rather than appointment.<sup>170</sup>

*Court Workload.* To investigate whether higher caseloads might depress reversal rates,<sup>171</sup> we constructed a continuous “workload” variable by dividing the total appellate filings in each court<sup>172</sup> by the number of judges or justices on that particular court.<sup>173</sup>

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<sup>167</sup> See *supra* notes 81-82 and accompanying text (discussing likely correlation between success and these two factors).

<sup>168</sup> In addition, insofar as a state’s law informs appellate decisions within that state, we cannot plausibly assume that appellate decisions within a state are independent of one another. As such, our selection models, discussed *infra* Table A1, cluster by state.

<sup>169</sup> This coding is available with the authors and was based on each state’s law.

<sup>170</sup> See Heise, King & Heise, *State Criminal Appeals*, *supra* note 18, at 1950; King & Heise, *Appeals by the Prosecution*, *supra* note 18, at 494; *supra* notes 86-88 and accompanying text. We also used an alternative measure of election: retention instead of initial selection. The results, not reported here, did not materially differ.

<sup>171</sup> See *supra* note 84 and accompanying text.

<sup>172</sup> We used 2012 caseloads from the CSP, because 2010 caseload data were not available for every state. See Nat’l Ctr. for State Courts & Conference of State Court Adm’rs, *State Court Caseload Statistics*, CT. STAT. PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> [<https://perma.cc/RB22-NKRP>] (last visited Sept. 21, 2019).

<sup>173</sup> For judges per court, see Nat’l Ctr. for State Courts, *List of Tables*, <https://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx> [<https://perma.cc/EXR8->

**Table A1.** Appeals and Success, by State.

State	(N)	(%)	Success (%)
AK	3	0.7	0.0
AL	4	1.0	0.0
AR	3	0.7	0.0
AZ	1	0.3	0.0
CA	11	2.7	18.2
DC	61	15.1	11.5
DE	1	0.3	0.0
FL	2	0.5	0.0
GA	2	0.5	0.0
HI	8	2.0	62.5
IA	19	4.7	21.1
ID	1	0.3	0.0
IL	5	1.2	20.0
IN	12	3.0	8.3
KS	3	0.7	33.3
KY	1	0.3	0.0
LA	3	0.7	33.3
MA	2	0.5	0.0
ME	2	0.5	0.0
MI	2	0.5	0.0
MN	4	1.0	0.0
MO	3	0.7	0.0
MS	1	0.3	0.0
MT	1	0.3	0.0
NC	3	0.7	33.3
ND	3	0.7	0.0
NE	2	0.5	0.0
NH	7	1.7	0.0
NJ	10	2.5	10.0
NM	8	2.0	37.5
NV	1	0.3	0.0
NY	16	4.0	25.0
OH	33	8.2	15.2
OK	2	0.5	50.0
OR	24	6.0	16.7
PA	74	18.4	2.7
RI	1	0.3	0.0

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DDS7] (last visited Sept. 21, 2019) (follow “Number of Appellate Court Judges” hyperlink, numbered 2.2.a).

State	(N)	(%)	Success (%)
SD	1	0.3	0.0
TN	6	1.5	0.0
TX	23	5.7	4.4
UT	1	0.3	0.0
VA	15	3.7	0.0
VT	2	0.5	0.0
WA	6	1.5	0.0
WI	9	2.2	0.0
WV	1	.03	100.0
%		100.0	
N	403		45/403

Source: Survey of State Court Criminal Appeals, 2010.

b. *Crime Type and Claims Raised*

*Crime Type and Appeal Type.* To investigate our various hypotheses about the relationship between crime of conviction and appellate success,<sup>174</sup> we collapsed the twenty-four different crime types available in the data into nine categories: (1) drug trafficking and weapons, (2) violence, (3) sex, (4) DUI, (5) other driving-related, (6) drug possession, (7) property, (8) court-order violations, and (9) all other crimes combined with cases missing this information.<sup>175</sup> To assess whether sentence appeals correspond with a greater likelihood of success than appeals from conviction alone, we include a dummy variable indicating whether the appeal included a challenge to the sentence and another that tracked whether the appeal challenged only the conviction.<sup>176</sup>

*Claim(s) Included in Brief.* To examine the significance of claim type,<sup>177</sup> we condensed the claim categories in the data into seven categories: (1) insufficient evidence, (2) evidence suppression, (3) sentence related,<sup>178</sup> (4) statutory

<sup>174</sup> See *supra* notes 89-91 and accompanying text.

<sup>175</sup> Both DUI and drug-possession convictions made up a very large percentage of appeals and warranted study for that reason alone. In addition, drug-possession and court-order violations had particularly low rates of success in simple comparisons. We settled on DUI appeals as our reference category for our statistical models because their success rate is close to average for the entire sample and thus provides a helpful benchmark for interpretive and comparative purposes.

<sup>176</sup> The references for these two dummy variables are cases in which the part of the judgment appealed from was unknown or missing.

<sup>177</sup> See *supra* text accompanying notes 92-96.

<sup>178</sup> See NCSC APPEALS STUDY, *supra* note 18, at 5-6 (including both variable for “appeal from sentence” and several sentence-related claim variables). Because the claim variables were coded only in cases that were briefed, the number of cases missing information about claim type exceeds the number of cases missing information about whether the appeal is from sentence, conviction, or both. See *id.* at 11.

interpretation, (5) statute challenged on constitutional grounds, (6) other claims (including, most prominently, claims relating to jury instructions, prosecutorial misconduct, and ineffective counsel), and (7) unknown claims. Cases in which the claims are unknown serve as the interpretative reference category, which we expected to have a lower rate of relief than other categories because claims information was coded only for cases in which that information was available in briefs, and many cases terminated before merits review had been briefed.

c. *Advocacy-Related Variables*

*Prosecutor-Initiated Appeal.* To detect how prosecutor appeals may have differed from defense appeals,<sup>179</sup> we included a dummy variable identifying those misdemeanor appeals initiated by a prosecutor.<sup>180</sup>

*Type of Defense Representation.* We anticipated that (1) pro se defendants would fare worse than represented defendants and (2) retained counsel would perform better than publicly funded counsel (assuming that losing cases are less likely to be pursued when the defendant is paying) or worse (if publicly funded attorneys have more experience and expertise).<sup>181</sup> To investigate this possibility, we created three dummy variables that signal the presence of pro se, publicly funded,<sup>182</sup> and retained representation, respectively.<sup>183</sup>

*Anders Statements.* To assess whether appeals were more likely to lose when publicly funded counsel filed an *Anders*-type statement that no meritorious issues existed,<sup>184</sup> we created a dummy variable signaling the presence of an *Anders* brief or statement in an appeal.

*Reply Briefs and Oral Arguments.* To examine whether appellants who filed replies or had the chance to argue their case before the court were more likely to succeed on appeal than those who did not,<sup>185</sup> we included a dummy variable indicating the filing of a reply brief and another indicating the presence of oral argument.

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<sup>179</sup> See *supra* text accompanying notes 99-101.

<sup>180</sup> Among our 403 misdemeanor appeals, thirteen (3.2%) were initiated by prosecutors.

<sup>181</sup> See *supra* notes 107-109 and accompanying text.

<sup>182</sup> Information distinguishing defenders from appointed private attorneys was not available.

<sup>183</sup> The reference for each variable is the category of cases missing information on the type of representation for the defendant. Most of the discretionary appeals to courts of last resort that were denied review lacked any representation information. NCSC researchers suggested to us that these missing values likely reflect the inability to determine whether the attorney listed for the appellant was retained or publicly funded.

<sup>184</sup> See *supra* text accompanying notes 105-106.

<sup>185</sup> See *supra* text accompanying note 110.



APPENDIX B:  
ESTIMATED MISDEMEANOR CONVICTION RATE DERIVATION

**Table B1.** Estimated Misdemeanor Conviction Rate Derivation.

State	Juris-dictional Scope	Calculation	Scope of Misdems.	%
AK <sup>186</sup>	State-wide	Sum of guilty pleas (10,855) and guilty verdicts at trial (100), divided by total disposed (19,217).	All (including traffic violations)	57
CA <sup>187</sup>	State-wide	Sum of pretrial guilty pleas (195,415 nontraffic, 163,197 traffic) and bail forfeitures (1346 nontraffic, 5764 traffic), divided by total pretrial dispositions (310,936 nontraffic, 211,937 traffic). California does not report whether trial dispositions (only 1% of all cases) are convictions or acquittals.	All (nontraffic and traffic)	70
DC <sup>188</sup>	District-wide	Sum of guilty pleas (2689 U.S., 232 D.C., 2111 traffic), guilty jury verdicts (3 U.S., 0 D.C., 4 traffic), and guilty bench judgments (367 U.S., 9 D.C., 44 traffic), divided by total dispositions (9260 U.S., 1230 D.C., 4184 traffic).	All (U.S., D.C., and traffic)	37
FL <sup>189</sup>	State-wide	Sum of pretrial pleas (149,791), posttrial pleas (213 nonjury, 81 jury), and posttrial convictions (271 nonjury, 518 jury), divided by total dispositions (256,865).	Excludes DUI and other traffic	59

<sup>186</sup> ALASKA COURT SYS., ANNUAL REPORT FY 2018, at 137 (2018), <https://public.courts.alaska.gov/web/admin/docs/fy18.pdf> [<https://perma.cc/TED4-KXFP>].

<sup>187</sup> JUDICIAL COUNCIL OF CAL., 2018 COURT STATISTICS REPORT 70, 100 (2018), <http://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf> [<https://perma.cc/Z8RB-D3GV>].

<sup>188</sup> D.C. COURTS, STATISTICAL SUMMARY 12 (2017), <https://www.dccourts.gov/sites/default/files/DC%20Courts%20Statistical%20Summary%20CY%202017%20-%20Final.pdf> [<https://perma.cc/W26S-7TEJ>].

<sup>189</sup> OFFICE OF THE STATE COURTS ADM'R, FLA. COURTS, FLORIDA'S TRIAL COURTS FY 2016-17 STATISTICAL REFERENCE GUIDE: COUNTY CRIMINAL STATISTICS 7-16 (2018), [http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-7\\_County-Criminal.pdf](http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-7_County-Criminal.pdf) [<https://perma.cc/9SUB-CXN5>].

State	Jurisdictional Scope	Calculation	Scope of Misdems.	%
HI <sup>190</sup>	State-wide	Convictions (15,413) (likely includes pleas, but unclear), divided by total misdemeanors terminated (27,914).	Excludes traffic	55
IL <sup>191</sup>	Cook Cty.	Data for the years 2011-2015, provided to Injustice Watch by the Illinois Office of the State's Attorney. Data reported as "no more than 56 percent" during time period.	Not specified	56
IN <sup>192</sup>	State-wide	Total guilty pleas (74,956), divided by total dispositions (138,378) (trial outcomes are unknown but still counted in total dispositions).	All	54
KS <sup>193</sup>	State-wide	Sum of pretrial guilty pleas (7632) and guilty verdicts (188), divided by total dispositions (14,365).	All	54

<sup>190</sup> HAW. STATE JUDICIARY, 2018 ANNUAL REPORT STATISTICAL SUPPLEMENT tbl.22 (2018), [https://www.courts.state.hi.us/wp-content/uploads/2019/01/2018\\_Annual\\_Report\\_Stats\\_Supplement.pdf](https://www.courts.state.hi.us/wp-content/uploads/2019/01/2018_Annual_Report_Stats_Supplement.pdf) [<https://perma.cc/JN37-K9K7>].

<sup>191</sup> KOHLER-HAUSMANN, *supra* note 4, at 270 n.6.

<sup>192</sup> IND. OFFICE OF COURT SERVS., IND. JUDICIAL BRANCH, 2017 METHODS OF DISPOSITIONS 160 (2017), <https://www.in.gov/judiciary/iocs/files/rpts-ijs-2017-methods-of-disposition.pdf> [<https://perma.cc/3ULS-U53D>].

<sup>193</sup> KAN. JUDICIAL BRANCH, ANNUAL REPORT OF THE COURTS OF KANSAS: SUMMARY OF MISDEMEANOR CASELOAD FOR THE STATE 1 (2018), <http://web.kscourts.org/stats/18/2018%20MisdemeanorCrimPending.pdf> [<https://perma.cc/9FBQ-S6VW>].

State	Juris- dictional Scope	Calculation	Scope of Misdems.	%
KY <sup>194</sup>	State- wide	Sum of guilty dispositions in district courts (17,587 first offense, 4044 second offense, 1161 third offense) and circuit courts (1698 first offense, 416 second offense, 178 third offense), divided by sum of total dispositions in district courts (30,128 first offense, 6664 second offense, 2211 third offense) and circuit courts (2053 first offense, 504 second offense, 219 third offense). Kentucky tracks DUIs by number of offenses in last ten years, each of which carries different sentences; the first three are misdemeanors.	DUI only	60
MD <sup>195</sup>	State- wide	Total guilty (4995), divided by total dispositions (20,715).	DWI only	24
MI <sup>196</sup>	State- wide	Sum of guilty pleas in district court (108,427) and municipal court (183), divided by sum of total dispositions in district court (275,336) and municipal court (455).	Nontraffic	39
MN <sup>197</sup>	Hen- nepin Cty.	Sum of total convictions (712 "person," 12,626 other), divided by sum of total dispositions (1902 "person," 22,051 other).	All (non- felonies)	56

<sup>194</sup> ADMIN. OFFICE OF THE COURTS, KY. COURT OF JUSTICE, CIRCUIT COURT—DUI REPORT 121-23 (2018), <https://courts.ky.gov/aoc/statisticalreports/Documents/INSDUI524.pdf> [<https://perma.cc/A2HZ-6ADB>]; ADMIN. OFFICE OF THE COURTS, KY. COURT OF JUSTICE, DISTRICT COURT—DUI REPORT 122-23 (2018), <https://courts.ky.gov/aoc/statisticalreports/Documents/INSDUI511.pdf> [<https://perma.cc/XXM9-KRSV>].

<sup>195</sup> COURT OPERATIONS DEP'T, MD. JUDICIARY, STATISTICAL ABSTRACT 2017, at 42 (2018), <https://www.courts.state.md.us/sites/default/files/import/publications/annualreport/reports/2017/fy2017statisticalabstract.pdf> [<https://perma.cc/U6ZE-EQ3K>].

<sup>196</sup> MICH. COURTS, 2017 COURT CASELOAD REPORT 11, 14 (2017), <https://courts.michigan.gov/education/stats/Caseload/2017/Statewide.pdf> [<https://perma.cc/QC9W-J3TE>].

<sup>197</sup> MATTHEW A. JOHNSON, MINN. JUDICIAL BRANCH, FOURTH JUDICIAL DISTRICT OF MINNESOTA ADULT DISPOSITION STUDY 45 tbl.A1 (2015), [http://www.mncourts.gov/mncourtsgov/media/fourth\\_district/documents/Research/Adult-Level-Dispositional-Analysis.pdf](http://www.mncourts.gov/mncourtsgov/media/fourth_district/documents/Research/Adult-Level-Dispositional-Analysis.pdf) [<https://perma.cc/HJR6-C88N>].

State	Jurisdictional Scope	Calculation	Scope of Misdems.	%
MO <sup>198</sup>	State-wide	Data reports the guilty plea rate. Both “bench trial” (0.4%) and “other” categories were excluded from this calculation.	Excludes traffic violations, reviews of ordinance, and municipal dispositions	65
NM <sup>199</sup>	State-wide	Sum of district court misdemeanor convictions (20 trial, 8 plea at trial, 394 plea before trial) and magistrate court misdemeanor convictions (3446 trial, 1641 plea at trial, 59,893 plea before trial), divided by sum of total misdemeanor dispositions (879 district court, 128,698 magistrate court).	District court (DWI/DUI and other) and magistrate court (domestic violence, DWI, traffic, and other)	50
NY <sup>200</sup>	State-wide	Sum of convictions 2013-2017 (915,748), divided by sum of total dispositions 2013-2017 (1,694,958).	All	54
NC <sup>201</sup>	State-wide	Sum of convictions in superior court (223 verdict, 12 plea before verdict, 133 plea no contest to lesser, 5947 plea no contest) and district court (9941 verdict, 336 guilty plea, 124,252 plea no contest), divided by sum of total dispositions (20,478 superior court, 434,092 district court).	Nontraffic and DWI	31

<sup>198</sup> MO. COURTS, MISSOURI JUDICIAL REPORT SUPPLEMENT 23 (2017), <https://www.courts.mo.gov/file.jsp?id=122404> [<https://perma.cc/9P4R-U6VY>].

<sup>199</sup> ADMIN. OFFICE OF THE COURTS, N.M. JUDICIARY, STATISTICAL ADDENDUM TO THE 2017 ANNUAL REPORT 19, 71 (2017), <https://www.nmcourts.gov/uploads/files/2017%20Statistical%20Addendum%20Final.pdf> [<https://perma.cc/B7EQ-NSXC>].

<sup>200</sup> N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE ADULT ARRESTS DISPOSED 5 (2018), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> [<https://perma.cc/3HLQ-MMBJ>].

<sup>201</sup> N.C. ADMIN. OFFICE OF THE COURTS, N.C. JUDICIAL BRANCH, STATISTICAL AND OPERATIONAL REPORT OF THE NORTH CAROLINA TRIAL COURTS: 2017-18, at 5, 7 (2019), [https://www.nccourts.gov/assets/documents/publications/2017-18\\_trial\\_courts\\_statistical\\_and\\_operational\\_report.pdf](https://www.nccourts.gov/assets/documents/publications/2017-18_trial_courts_statistical_and_operational_report.pdf) [<https://perma.cc/6GJT-MA2E>].

State	Juris-dictional Scope	Calculation	Scope of Misdems.	%
OH <sup>202</sup>	State-wide	Sum of guilty pleas in municipal court (108,239) and county court (6148), divided by sum of total dispositions in municipal court (242,316) and county court (10,942).	All (guilty pleas to original and reduced charges)	45
PA <sup>203</sup>	Philadelphia and Miami-Dade, trial courts	Conviction rates for misdemeanor-only charges, averaged (and weighted by total observations in each category).	Not specified	54
SD <sup>204</sup>	State-wide	Sum of guilty pleas (5395) and trial convictions (57), divided by total dispositions (10,841).	First and second offense DUI	50
TX <sup>205</sup>	State-wide	Sum of convictions in district court (1342), county court (187,988), and justice and municipal court (743,142), divided by sum of total dispositions in district court (3485, excluding motions to revoke), county court (420,637, excluding motions to revoke), and justice and municipal court (1,009,589, court appearance or trial).	All district and county court misdemeanors; for justice and municipal courts, only nonparking traffic, nontraffic penal code, and state nontraffic other	65

<sup>202</sup> SUPREME COURT OF OHIO, OHIO COURTS STATISTICAL REPORT 176, 236 (2017), <http://www.supremecourt.ohio.gov/Publications/annrep/17OCSR/2017OCSR.pdf> [<https://perma.cc/QHW6-RVLP>].

<sup>203</sup> Dobbie, Goldin & Yang, *supra* note 14, online app. at 1 (online appendix available at <https://assets.aceaaca.org/asset-server/files/6277.pdf> [<https://perma.cc/Q2DA-8RPP>]).

<sup>204</sup> S.D. UNIFIED JUDICIAL SYS., DUI FILINGS AND DISPOSITIONS 15 (2017), <http://ujs.sd.gov/uploads/annual/fy2017/2017DUIFilingsDispositionsStatewideByCounty.pdf> [<https://perma.cc/K2BT-DTHP>].

<sup>205</sup> OFFICE OF COURT ADMIN., TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2018 app. at 9, 45, 48 (2018), <http://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> [<https://perma.cc/4KZU-JPYU>].

State	Juris- dictional Scope	Calculation	Scope of Misdems.	%
VT <sup>206</sup>	State- wide	Guilty pleas (6003), divided by total (10,838, excluding unknown trial outcomes and “invalid or missing” category).	All	55
WA <sup>207</sup>	State- wide	Sum of convictions and guilty pleas in superior court (4086) and lower courts (54,078 guilty, 20 bail forfeit), divided by total dispositions (14,524 superior court, 124,405 lower courts).	All misdemeanors in superior court, nontraffic misdemeanors in lower courts	42
WI <sup>208</sup>	State- wide	Total pretrial guilty plea (51,374), divided by total dispositions (71,630) (trial outcomes are unknown but still counted in total dispositions).	All	72
US <sup>209</sup>	Nation- wide	Data reports a conviction rate of 72.6% of 8206 dispositions.	All	73

Notes: For more information about variation in classification of traffic offenses as misdemeanors, see Stevenson & Mayson, *supra* note 1, at 738-40.

Misdemeanor convictions, particularly those involving DUI and traffic laws, can be by trial, guilty plea, no contest plea, or “bail forfeiture” (also “bond forfeiture”). A few states reporting disposition information for misdemeanors include a disposition category termed “bail” or “bond forfeiture.” When authority indicated this term was treated as a conviction in the state, we included these dispositions.

<sup>206</sup> VT. JUDICIARY, ANNUAL STATISTICAL REPORT FOR FY18, at 33 (2018), <https://www.vermontjudiciary.org/sites/default/files/documents/FY18%20Annual%20Statistical%20Report%20010719.pdf> [<https://perma.cc/MX7B-SCAP>].

<sup>207</sup> WASH. COURTS, COURTS OF LIMITED JURISDICTION 2017 ANNUAL CASELOAD REPORT 141, 231 (2017), <http://www.courts.wa.gov/caseload/content/archive/clj/Annual/2017.pdf> [<https://perma.cc/3FY8-WZYY>]; WASH. COURTS, SUPERIOR COURT 2017 ANNUAL CASELOAD REPORT 55, 58 (2017), <http://www.courts.wa.gov/caseload/content/archive/superior/Annual/2017.pdf> [<https://perma.cc/5ZJG-QMJ9>].

<sup>208</sup> WIS. COURT SYS., MISDEMEANOR DISPOSITION SUMMARY BY DISPOSING COURT: OFFICIAL STATEWIDE REPORT (2018), <https://www.wicourts.gov/publications/statistics/circuit/docs/misdemeanorstate17.pdf> [<https://perma.cc/Z4U5-4QYA>].

<sup>209</sup> MARK MOTIVANS, U.S. DOJ, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2013—STATISTICAL TABLES 17 tbl.4.2 (2017), <https://www.bjs.gov/content/pub/pdf/fjs13st.pdf> [<https://perma.cc/4MUG-TUNC>].

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