

# Progressive Justice

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## The Case for Criminal Justice Reform in Fairfax County



STEVE  
**DESCANO**  
**DEMOCRAT**  
for Commonwealth's Attorney

[SteveDescano.com/ProgressiveJustice](http://SteveDescano.com/ProgressiveJustice)

Paid for & Authorized by Friends of Steve Descano

Dear Friend,

Fairfax County and the City of Fairfax\* have an incredible opportunity on November 5th—the opportunity to build a criminal justice system that seeks justice and keeps us safe. In the first Democratic Primary for Commonwealth's Attorney since 1963, Democrats rejected the argument that we have to choose between our values and safety; instead, they embraced justice as the only true path to community safety. The November 5th election is our opportunity to realize the dual goals of safety and justice for which Democratic Primary voters so clearly called.

I'm running for Commonwealth's Attorney to create a criminal justice system that is guided by our shared community values. I'll create a system in which no one, no matter how powerful, is above the law. I'll work to ensure that systemic discrimination based on race, wealth, and zip code is a thing of the past. I'll discard the tough-on-crime approach that has failed to address the root causes of crime, in favor of a holistic approach that builds up our communities and makes them safe. This approach will allow us to break the cycle of decreased opportunity, increased poverty, and increased crime that is the story of far too many of our neighborhoods.

This is a critically important moment for our community. We have a choice between submitting to the politics of fear or fighting for justice. The decision we make will determine the future of Fairfax for years to come. The pages that follow detail my plan to fight for justice by reforming our criminal justice system, making it fairer and more equal and improving its ability to keep us safe.

I have the right experience to bring these reforms to fruition. I spent six years as a federal prosecutor under the Obama Administration, during which time I traveled around the country prosecuting those that victimized vulnerable populations such as the elderly, the mentally disabled, and recent immigrants. I helped launch the Fairfax County Police Civilian Review Panel and brought the Panel's work out of the boardroom and into the community. I spent years fighting for equal rights for women as a Board Member of NARAL Pro-Choice Virginia and for equal rights for minorities as a member of the County NAACP's Criminal Justice and Legal Redress Committees. I've also demonstrated first-rate leadership, which I learned at the United States Military Academy at West Point. After graduating from West Point, I served as an Army officer and I have run organizations larger than the Commonwealth's Attorney office. I'm a prosecutor, a reformer, and a leader.

I remain incredibly humbled by the confidence placed in me by the voters and am deeply honored to be the Democratic nominee. We've accomplished a lot, but we're not done yet. I hope you'll join the movement to improve Fairfax's criminal justice system. You can visit my website, [www.SteveDescano.com](http://www.SteveDescano.com), to sign up to help build a criminal justice system that both keeps us safe and is guided by our shared community values.

Onward,  
  
Steve Descano



Steve Descano, Democratic nominee for Fairfax County Commonwealth's Attorney.

\*Residents of the City of Fairfax are served by the Fairfax County Commonwealth's Attorney and can vote in the November 5<sup>th</sup> election.

The Commonwealth's Attorney is the elected leader of Fairfax County's criminal justice system. Because our community is intimately intertwined with the county's criminal justice system, it is imperative that the community's values are the guiding force in the criminal justice system—making sure this happens is the Commonwealth's Attorney's responsibility. The Commonwealth's Attorney does this by:

- Creating policies and procedures for the office's prosecutors;
- Leading the office and creating the appropriate office culture;
- Engaging with the community; and
- Creating coalitions to advocate for needed change.

The primary way the Commonwealth's Attorney ensures that the community's values are guiding the criminal justice system is by creating policies and procedures for the office's prosecutors to follow that are consistent with those values. The Commonwealth's Attorney has a great amount of discretion—referred to as “prosecutorial discretion”—when it comes to creating the policies and procedures dictating how the office's prosecutors will address every important issue, including:

- Whether to accept or reject a case;
- The charges to bring in a case the office has accepted;
- Whether to prosecute or seek alternatives to prosecution;
- Bail policies;
- Plea offers; and
- The types of sentences to seek.

Implementing these community-values-based policies and procedures will also guide the culture of the office. As the policies and procedures become entrenched into the office's operations, those prioritized values and goals become the criteria against which all actions and decisions are measured. The result is an office culture that is consistent with the community's values.

The Commonwealth's Attorney stays connected to the community and its values through community engagement. This community engagement is a critical part of the job—it's the reason why the position is an elected one. Community engagement includes actively seeking out community ideas and concerns and incorporating them into the office's operations. Community engagement also includes transparency. The Commonwealth's Attorney has a duty to consistently and publicly explain the office's operations, priorities, and goals and update the community on the progress made towards achieving those goals. To that end, the Commonwealth's Attorney should create and share data in service of those explanations. A Commonwealth's Attorney cannot conduct operations in secret; doing so represents a failure as an elected official.

As an elected official and a leader, the Commonwealth's Attorney has a duty to play a role in creating the community in which you want to live. Issues that the Commonwealth's Attorney must address every day do not exist solely within the county courthouse – these issues exist in our schools, our neighborhoods, and everywhere in between. To holistically approach those issues, the Commonwealth's Attorney must build coalitions with other elected officials and organizations. In some cases, this may include creating a new coalition or lending the expertise and resources of the Commonwealth's Attorney's office to an already existing group. In other cases, it means advocating for change that the community needs. Regardless of what form this part of the job takes, one thing is clear: focusing solely on the office's court cases abdicates a huge part of the Commonwealth's Attorney's duties and decreases the chances of successfully solving the concerns our community expects their elected officials to solve.

## Creating Policies

Smart prosecutors make every decision with the needs of the community and the ultimate outcome in mind. That's why I will get away from tough-on-crime policies: they are short-sighted and hurt our community. They create a community-wide cycle of decreased opportunity, increased poverty, and increased crime. People unnecessarily criminalized and incarcerated lose their jobs. If they are supporting a family, their loved ones will inevitably find it harder to afford their homes and reliably put food on the table. Even after they're released, the unnecessarily jailed will be foreclosed from finding decent work, making it that much more difficult to make an honest living.

The hardships resulting from tough-on-crime policies don't fall solely on the people unnecessarily incarcerated. Tough-on-crime policies feed multiple generations of hardships. Kids who have a parent in jail are worried about where their next meal is going to come from, not their schoolwork, their community, or their future. Due to the increased community poverty caused by these policies, even children and adolescents whose parents are not involved with the criminal justice system will be living in economically depressed areas and attending overburdened schools. The tough-on-crime ethos snuffs out those kids' futures before they can even get started. Those are kids with talent who should be the next generation of leaders in Fairfax County, but they will never have a decent opportunity to reach their potential because short-sighted tough-on-crime policies decimate opportunities in their community.

As Commonwealth's Attorney, I will create office policies that consider community effects and ultimate outcomes from the moment a case arrives in my office. We can no longer afford to ignore the community outcomes of our decisions or only worry about them when someone is about to re-enter their community. Thinking of the needs of the community immediately will ensure that we don't ruin lives or waste talent that could otherwise benefit the community. Taking this approach will keep us safe because it avoids turning someone who has made a mistake, but who doesn't need to be incarcerated, into a repeat offender.

### Ending Mass Incarceration

Mass incarceration has been created, in large part, by prosecutors who overcharge crimes.<sup>1</sup> I will tackle mass incarceration by ending the practices of charging felonies where misdemeanors are sufficient and charging misdemeanors where a dismissal or diversion would be more appropriate.

Felony charges have serious secondary consequences that can far outweigh the crimes committed. Although felony charges are warranted for serious crime, unnecessarily creating felons needlessly creates a class of people who face herculean hurdles to

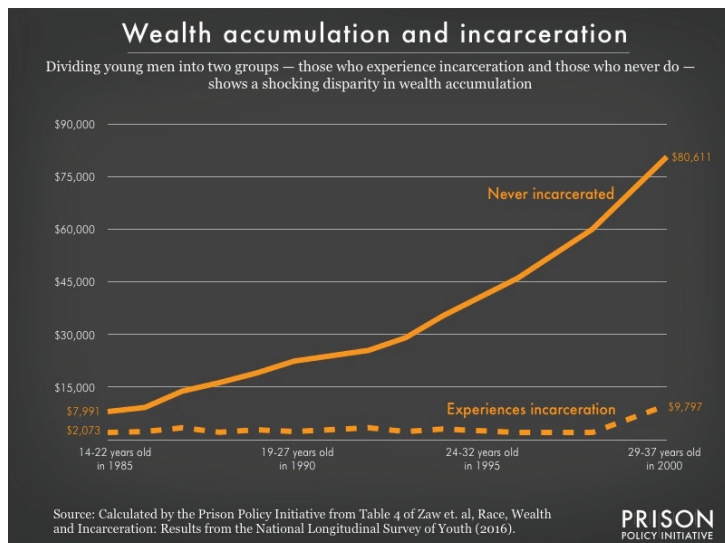
<sup>1</sup>Pfaff, John F., *The Causes of Growth in Prison Admissions and Populations* (January 23, 2012), available at <https://ssrn.com/abstract=1990508> or <http://dx.doi.org/10.2139/ssrn.1990508>

pursuing education,<sup>2</sup> are barred from many decent jobs,<sup>3</sup> and lose their right to vote.<sup>4</sup> Our criminal justice system's unnecessary creation of felons creates a vicious cycle of decreased opportunity, increased poverty, and increased crime that becomes the dominant force in communities where the cycle takes hold. The result is that people living in vulnerable communities end up incarcerated at disproportionate rates.<sup>5</sup> Because the cycle disproportionately affects people of color and people without wealth, over-criminalization of our neighbors also drives wealth inequality<sup>6</sup> and the racial opportunity gap.<sup>7</sup>

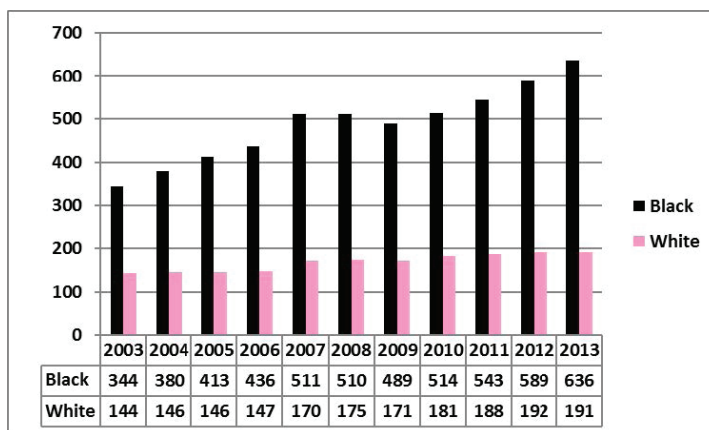
I will create detailed policies that will stop my prosecutors from overcharging crimes. Two examples (marijuana possession and larceny), explained below, exemplify how I will work to stop overcharging and thus end mass incarceration.

## Marijuana

I will not use my office's limited resources to prosecute simple possession of marijuana. These prosecutions saddle people with a criminal record and all the attendant life-altering collateral consequences<sup>9</sup> for something that doesn't present a serious danger to the community. These prosecutions also have a disparate impact on people of color<sup>8</sup> and carry serious immigration consequences.<sup>9</sup> These disparate outcomes negatively affect entire communities and create distrust between prosecutors and the community. The resources wasted by these



**Racial Disparities in Arrest Rates\* for Marijuana Possession in Virginia (2003 – 2013, \*per 100,000 in population)**



SOURCE: Drug Policy Alliance

<sup>2</sup>Judith Scott-Clayton, Thinking Beyond the Box: The Use of Criminal Records in College Admissions, BROOKINGS, Sept. 28, 2017, <https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/>.

<sup>3</sup>See, e.g., Va. Dep't. of Correctional Education, Restrictions to Employment for Individuals with Criminal Histories (July 2006), available at <http://dls.virginia.gov/GROUPS/reentry/meetings/072706/BarrierCrimes.pdf>.

<sup>4</sup>Va. Const. art. II, § 1.

<sup>5</sup>Adam Looney & Nicholas Turner, WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION (March 2018).

<sup>6</sup>Meredith Booker, The Crippling Effect of Incarceration on Wealth, Prison Policy Initiative (Apr. 26, 2016) <https://www.prisonpolicy.org/blog/2016/04/26/wealth/>; BRUCE WESTERN, ET. AL., ECONOMIC INEQUALITY AND THE RISE IN U.S. IMPRISONMENT (Apr. 2004).

<sup>7</sup>See Leila Morsy and Richard Rothstein, MASS INCARCERATION AND CHILDREN'S OUTCOMES (Dec. 15, 2016).

<sup>8</sup>Jon Gettman, RACIAL DISPARITIES IN MARIJUANA ARRESTS IN VIRGINIA (2003-2013), at 11-12, available at [https://www.drugpolicy.org/sites/default/files/Racial\\_Disparities\\_in\\_Marijuana\\_Arrests\\_in\\_Virginia\\_2003-2013.pdf](https://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf).

<sup>9</sup>KATHY BRADY, ET. AL., PRACTICE ADVISORY IMMIGRATION RISKS OF LEGALIZED MARIJUANA (Jan. 2018), available at [https://www.ilrc.org/sites/default/files/resources/marijuana\\_advisory\\_jan\\_2018\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf).

prosecutions could be better utilized to improve community safety. I will direct the prosecutors in my office to dismiss<sup>10</sup> marijuana possession charges that come within the office's purview.

The first-time diversion program touted by prosecutors afraid of real reform fails to prevent the aforementioned life-altering consequences. The diversion program does not dismiss the case.<sup>11</sup> Entering the diversion program means pleading guilty (or agreeing that the facts justify a finding of guilt) and going on probation.<sup>12</sup> Program participants must endure, and pay the costs associated with, unnecessary drug testing and treatment.<sup>13</sup> They also are likely to have their license suspended while on probation,<sup>14</sup> making it more difficult for them to drive to work or school and fulfill family obligations. If the program participant fails to comply with all the conditions of their probation, the court finds them guilty of the original offense and they are subject to incarceration.<sup>15</sup> Even if the participant completes the program, the arrest can never be expunged from their record<sup>16</sup>—employers, renters, and creditors can forever see that this person was arrested. The diversion program also has serious immigration consequences.<sup>17</sup> If someone with non-citizen status, such as a Legal Permanent Resident (“green card” holder), enters into the diversion program and had slightly more than one ounce of marijuana, they are considered “automatically deportable” and will be placed in deportation proceedings.<sup>18</sup> If that person did not possess enough marijuana to be considered “automatically deportable,” they will not be allowed to re-enter the United States if they leave (“inadmissibility”).<sup>19</sup>

Dismissing these types of cases is the only just way to deal with them. Doing so avoids creating criminal records for no reason, wasting huge amounts of money and time, disrupting lives, risking jail time, and creating devastating immigration consequences.

### Felony Larceny Threshold

Virginia's felony larceny threshold of \$500<sup>20</sup>—the value of stolen goods that gives rise to felony charges instead of misdemeanor charges—is much too low. The collateral consequences are vastly different for felonies and misdemeanors. Felony charges make it much more likely that people will be denied higher education,<sup>21</sup> rejected for housing,<sup>22</sup> and barred from a wide variety of jobs.<sup>23</sup> As such, felony charges have devastating long-term

<sup>10</sup>Via a nolle prosequi.

<sup>11</sup>Va. Code § 18.2-251.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Commonwealth v. Dotson*, 661 S.E.2d 473, 476 (Va. 2008).

<sup>17</sup>Hillary Blout, et. al., *The Prosecutor's Role in the Current Immigration Landscape*, Criminal Justice 35, 38 (Winter 2018); BRADY *supra* note 10 *passim*.

<sup>18</sup>BRADY *supra* note 10 at 3.

<sup>19</sup>*Id.* at 4.

<sup>20</sup>Va. Code § 18.2-95.

<sup>21</sup>Clayton *supra* note 3.

<sup>22</sup>REBECCA VALLAS & SHARON DIETRICH, *ONE STRIKE AND YOU'RE OUT* 16-17 (Dec. 2014).

<sup>23</sup>*See, e.g.*, Va. Dep't. of Correctional Education *supra* note 4.

effects on a person's future and the future of their family. I will not ruin someone's life because of an impulsive decision to steal an iPhone. Felony charges should be reserved for those who planned to steal something of significant value. I will direct my prosecutors to bring misdemeanor charges for thefts that do not exceed \$1500 in value.

A felony larceny threshold of \$1500 is within the mainstream of thresholds nationwide and is a threshold that has been proven to not increase the rate of theft.<sup>24</sup> Fifteen states have felony larceny thresholds of \$1500 or higher, with two states—Texas and Wisconsin—having thresholds of \$2500.<sup>25</sup> Recent studies have shown that lower thresholds are outdated and do not deter crime better than a threshold of \$1500.<sup>26</sup>

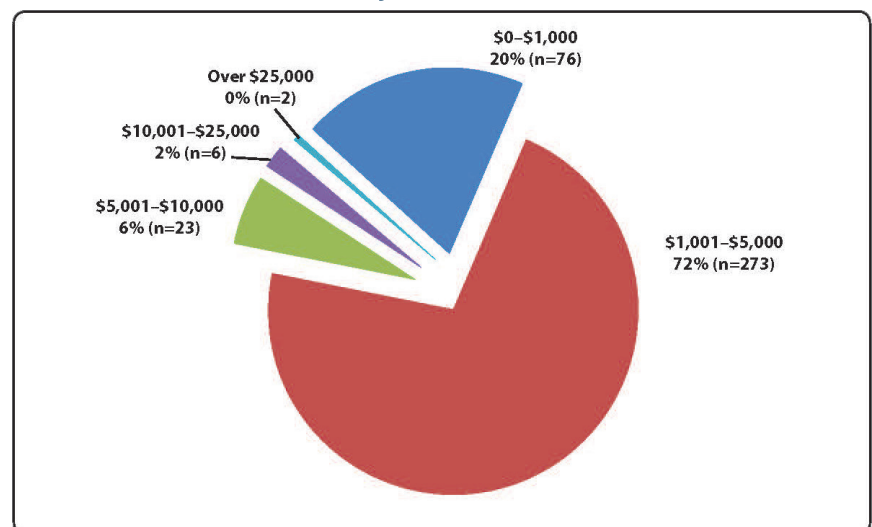
Without a deterrent effect associated with a threshold lower than \$1500, there is no real justification for subjecting someone to the life-altering collateral consequences of a felony charge. I will not continue to follow failed policies that have no empirical backing simply because that's how it's been done in the past. I will take every opportunity to take a holistic approach that keeps us safe but stops us from over criminalizing and overincarcerating our neighbors. That is why I will direct my prosecutors to bring misdemeanor charges instead of felony charges for thefts that do not exceed \$1500 in value.

### Cash Bail

Cash bail undercuts one of the most critical pillars of our criminal justice system: the idea that rich and poor should get the same access to justice. Under a cash bail system, whether a person sleeps at home or in a cell can be determined solely by how much money they have. Even a small cash bail amount has the potential to wreak havoc: in Virginia, 92% of the people who are in jail because they cannot afford cash bail have bail amounts of less than \$5,000.<sup>27</sup>

Fairfax County is not immune to this injustice: in Fiscal Year 2018, 45.9% of the cases ordered to pretrial supervision by the Fairfax Judiciary included cash bail.<sup>28</sup>

**Bond Set, Remained in Jail by Risk Level**



SOURCE: Virginia Dep't of Criminal Justice Services, A "New Norm" for Pretrial Justice in the Commonwealth of Virginia—Pretrial Risk-based Decision Making 19 (2013)

<sup>24</sup>THE PEW CHARITABLE TRUSTS, THE EFFECTS OF CHANGING FELONY THEFT THRESHOLDS 1 (Apr. 2017).

<sup>25</sup>Wis. Code § 943.20(3)(bf); THE PEW CHARITABLE TRUSTS, THE EFFECTS OF CHANGING FELONY THEFT THRESHOLDS 2-4 (Apr. 2017); Marella Gayla, *What's the Punishment for Theft? Depends on What State You're In*, The Marshall Project (Aug. 9, 2017) <https://www.themarshallproject.org/2017/08/09/what-s-the-punishment-for-theft-depends-on-what-state-you-re-in>.

<sup>26</sup>THE PEW CHARITABLE TRUSTS, THE EFFECTS OF CHANGING FELONY THEFT THRESHOLDS 8 (Apr. 2017).

<sup>27</sup>Va. Dep't. of Criminal Justice Services, A "New Norm" for Pretrial Justice in the Commonwealth of Virginia—Pretrial Risk-based Decision Making 10 (2013).

<sup>28</sup>Data from Fairfax County Court Services Division, available via FOIA.

The inability to afford bail, even for a relatively short time, wreaks havoc on the still-legally-innocent individual's life.<sup>29</sup> Those awaiting trial often lose their jobs,<sup>30</sup> and by extension, their means of providing housing to themselves and their children.<sup>31</sup> The consequences of being poor and in the criminal justice system are dire and the pressure associated with those consequences is immense. In fact, the pressure on these individuals is what decides many cases. In their desperation to get out of jail and keep their lives and their families' lives intact, people will often take ill-advised plea deals simply so they can return home.<sup>32</sup> Even if these individuals are released immediately upon pleading guilty, they will have a criminal record that negatively affects their ability to find employment,<sup>33</sup> further their education,<sup>34</sup> and find housing.<sup>35</sup>

Ending cash bail not only ends an injustice, it promotes a social good. Communities are better when people are working and supporting their families. Keeping families together as long as possible helps avoid a situation where increased poverty and familial instability leads to decreased opportunity and more crime. In fact, it has been proven that pre-trial detention due to the inability to pay cash bail increases recidivism rates.<sup>36</sup> Ending cash bail also allows us to better spend taxpayer dollars. Cash bail does not increase community safety<sup>37</sup> or affect court appearance rates;<sup>38</sup> we spend \$225.20 per day<sup>39</sup> to incarcerate someone for no good reason. We should use that money to pay for programs—such as diversion, mental health services, and drug treatment programs—that actually keep our community safe.

I will direct my prosecutors to not seek cash bail. Because people are not entitled to bail under the Virginia constitution, only those who are deemed by the court not to be dangers to the community are eligible for pretrial release.<sup>40</sup> Therefore, my policy of not seeking cash bail does not create a safety issue; it solves a fairness issue. In fact, because cash bail is associated with increased recidivism, ending cash bail will lower crime and make our communities safer.<sup>41</sup> Nor will this policy make it less likely that a defendant will appear to their court hearings.<sup>42</sup> There are effective ways of getting people to appear at

<sup>29</sup>CATHERINE S. KIMBRELL AND DAVID B. WILSON, MONEY BOND PROCESS EXPERIENCES AND PERCEPTIONS 1 (Sept. 9, 2016).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 13.

<sup>32</sup>MEGAN STEVENSON, DISTORTION OF JUSTICE: HOW THE INABILITY TO PAY BAIL AFFECTS CASE OUTCOMES 16-17 (Nov. 8, 2016).

<sup>33</sup>*See, e.g.*, Va. Dep't. of Correctional Education *supra* note 4.

<sup>34</sup>Clayton *supra* note 3.

<sup>35</sup>VALLAS *supra* note 23, at 16-17.

<sup>36</sup>ARPIT GUPTA, ET. AL., THE HEAVY COSTS OF HIGH BAIL: EVIDENCE FROM JUDGE RANDOMIZATION 1 (Aug. 18, 2016).

<sup>37</sup>*See* Va. Code § 19.2-120(A) (judicial officer will not admit person to bail who is a flight risk or "an unreasonable danger to himself or the public"); AURELIE OUSS & MEGAN STEVENSON, EVALUATING THE IMPACTS OF ELIMINATING PROSECUTORIAL REQUESTS FOR CASH BAIL 1 (Feb. 17, 2019); Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, FACULTY SCHOLARSHIP 1745, at 7 (Mar. 13, 2017) (noting the findings in jurisdiction with pre-trial services departments of the type found in Fairfax County).

<sup>38</sup>*See* AURELIE OUSS & MEGAN STEVENSON, EVALUATING THE IMPACTS OF ELIMINATING PROSECUTORIAL REQUESTS FOR CASH BAIL 1 (Feb. 17, 2019); Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, FACULTY SCHOLARSHIP 1745, at 7 (Mar. 13, 2017) (noting the findings in jurisdiction with pre-trial services departments of the type found in Fairfax County).

<sup>39</sup>Commonwealth of Va. Compensation Board, *Annual Jail Revenues and Expenditures Report (Including Canteen & Other Auxiliary Funds)* 13 (Nov. 1, 2018).

<sup>40</sup>Va. Code § 19.2-120.

<sup>41</sup>*See* GUPTA *supra* note 37, at 1.

<sup>42</sup>AURELIE OUSS & MEGAN STEVENSON, EVALUATING THE IMPACTS OF ELIMINATING PROSECUTORIAL REQUESTS FOR CASH BAIL 1 (Feb. 17, 2019).

their scheduled court hearings without using cash bail<sup>43</sup> and I will direct my prosecutors to seek those conditions of release instead of cash bail. This is the smart, cost-effective, and humane thing to do.

### Protecting Immigrant Communities

All our neighbors—regardless of their immigration status—deserve equal protection of, and equal access to, the law. As a federal prosecutor, I protected immigrants from criminals who targeted them due to their immigration status. I'll continue to protect our community's immigrant members as your Commonwealth's Attorney because it's the right thing to do and it makes everyone safer. The fear of law enforcement that Donald Trump has fostered in immigrant communities does nothing but lead to increased crime.<sup>44</sup> When communities are reluctant to seek out law enforcement help, those communities become high-value, low-risk targets for criminals. When entire communities are afraid to testify, dangerous criminals who should be incarcerated get put back on the street.<sup>45</sup> I will do everything in my power to make my office a safe place for everyone, regardless of their immigration status. My office will not cooperate with ICE, nor will it notify or alert immigration officials or agencies regarding witnesses, victims, or defendants with whom the office comes into contact.

In addition to protecting our immigrant neighbors by providing a safe place, I will create written policies directing prosecutors to consider immigration consequences when making charging and plea decisions. Although prosecutors typically refer to the immigration consequences of cases as "collateral consequences," avoiding the destruction of families and communities will be a top priority for me. The values-driven reason for favoring charging and plea decisions that limit or avoid immigration consequences is simple: if two people commit the same act, but only one's punishment includes deportation, the result is inequality. Implementing such a directive will keep our communities united and strong and demonstrate our county's commitment to equal justice for all.

### Fighting Gun Violence

Gun violence is a plague on our community. I will take a three-pronged approach to combatting gun violence. First, I will ensure that gun crimes are prioritized in the office and dealt with severely. Second, whenever someone with a felony record petitions the court to own and carry a gun, it is my office's job to screen that petition and argue for the community's interests.<sup>46</sup> I won't let this be a duty of secondary importance that is tasked to

<sup>43</sup>Megan Stevenson & Sandra G. Mayson, Bail Reform: New Directions for Pretrial Detention and Release, FACULTY SCHOLARSHIP 1745, at 12 (Mar. 13, 2017).

<sup>44</sup>See ACLU, FREEZING OUT JUSTICE, *passim* (2018); Rachel Kleinfeld, Want to Fight Crime? Increase Immigration and Save DACA, Carnegie Endowment for International Peace (Sept. 7, 2017) <https://carnegieendowment.org/2017/09/07/want-to-fight-crime-increase-immigration-and-save-daca-pub-73035>.

<sup>45</sup>ACLU, FREEZING OUT JUSTICE 1-3 (2018).

<sup>46</sup>See Va. Code § 18.2-308.2(C).

whichever prosecutor happens to be available; I will dedicate a prosecutor to fighting tooth and nail to make sure those who should never touch a gun again don't. Third, I'll advocate for commonsense gun-control legislation in Richmond, particularly legislation like "Red Flag" laws that allow Commonwealth's Attorneys to seek court orders to take guns from those who pose an imminent danger to our community.

### Ending the Death Penalty in Fairfax County

I will not seek the death penalty — period, full stop. The death penalty does not deter crime and is no more effective than life sentences at keeping the most dangerous individuals out of our communities. Furthermore, the death penalty is racially discriminatory: the race of the perpetrator and the race of the victim have an outsized influence on how the death penalty is applied.<sup>47</sup> Securing and defending death-penalty sentences are also a prohibitive waste of money.<sup>48</sup> Use of the death penalty is simply an old-school prosecutor's way to signal to voters that they're tough-on-crime. The money wasted on securing and defending death-penalty sentences would be better used on things that actually keep us safe. Instead of useless signaling, I'll focus on increasing community safety.

### Juvenile Justice

The juvenile justice system is one of the most important arenas for the Commonwealth's Attorney to invest. The juvenile justice system is where the state has the best opportunity to keep a young person from falling into the cycle of recidivism and repeated incarceration.

I will dedicate prosecutors to the juvenile court system on a long-term basis instead of cycling different prosecutors through the juvenile court on a weekly basis, as is currently the case. This will allow prosecutors to get a better understanding of the kids and their cases. The same prosecutor will be with a case from beginning to end and therefore increase the chances that the case gets the appropriate disposition. This change will also make the juvenile system more efficient: prosecutors won't have to ask for as many continuances because they're unfamiliar with a case file and the communication between the prosecutors and court staff will improve. This makes life better for the families involved in the juvenile system too—less unnecessary continuances mean less wasted hours in court.

Dedicating prosecutors to the juvenile system on a long-term basis will also lead to a change in culture that currently sees this important part of our justice system as simply a "kiddie court" that is less consequential than other parts of our system. The juvenile justice

<sup>47</sup>Matt Ford, Racism and the Execution Chamber, The Atlantic (June 23, 2014) <https://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081/>.

<sup>48</sup>Torin McFarland, The Death Penalty vs. Life Incarceration: A Financial Analysis, 7 Susquehanna University Political Review 46, 72-77 (2016).

system is not a task for prosecutors to endure on a short-term basis. It is an opportunity to improve lives and communities.

Part of seeing the juvenile justice system as a valuable tool for improving outcomes is getting away from charging a juvenile as an adult or threatening do so simply to secure a plea deal. Children as young as 14 are eligible to be charged as an adult.<sup>49</sup> The juvenile justice system offers programs and opportunities for minors, not available in the adult system, to get their lives back on track.<sup>50</sup> Putting a minor into the adult system greatly increases the likelihood that their future will consist of recidivism and repeated incarceration.<sup>51</sup>

In many instances where the Commonwealth's Attorney determines whether to charge a minor as an adult, the Commonwealth's Attorney has more power than the judge and can charge a minor as an adult regardless of the court's desire.<sup>52</sup> As Commonwealth's Attorney, I would direct the prosecutors in my office to keep juveniles in the juvenile system except in extreme circumstances, enumerated in written policies and procedures. I also would use the bully pulpit of being the leader of the Commonwealth's largest criminal justice system to advocate for policies that would end the school-to-prison pipeline.

<sup>49</sup>Va. Code § 16.1-269.1.

<sup>50</sup>See Va. Dep't. of Juvenile Justice, [Data Resource Guide Fiscal Year 2017](#) 30-31 (2017); Va. Dep't. of Juvenile Justice, Transformation Plan 2017 Update, *passim* (2017).

<sup>51</sup>DAVID GOTTESMAN & SUSAN WILE SCHWARZ, JUVENILE JUSTICE IN THE U.S. FACTS FOR POLICYMAKERS 3 (July 2011); MALCOLM C. YOUNG & JENNI GAINSBOROUGH, PROSECUTING JUVENILES IN ADULT COURT AN ASSESSMENT OF TRENDS AND CONSEQUENCES 9 (Jan. 2000).

<sup>52</sup>Va. Code § 16.1-269.1(C).

## Leading the Office and Creating Office Culture

### Central Control and Standardization

Cases should be handled consistently throughout a Commonwealth's Attorney's office. The personality of the assigned prosecutor should not be the determining factor in a case's outcome.

I will standardize outcomes in my office by creating detailed written policies that address charging, diversion, plea offers, and sentencing. Because I will ensure that the prosecutors in my office adhere to these policies, case outcomes won't swing dramatically based simply on which prosecutor is assigned to the case. Too often, I hear attorneys and court personnel describe some prosecutors as "one of the reasonable ones who is trying to do the right thing" and others as "completely unreasonable and always seeking the maximum." I will make sure that all the prosecutors in my office act justly and in the best interest of our community by creating policies and procedures informed by our community's values.

A new focus on central control and standardization will also benefit new attorneys in the office. The focus on written policies and procedures will decrease opportunities for new attorneys to form bad habits and outdated views of justice. They'll be following the office's policies and procedures from day one. Furthermore, I'll create a training and mentoring program for new attorneys to ensure that they're not merely handed a book of policies and left to their own devices. I'll invest in training new attorneys in the policies and procedures of the office so that we create a consistent office culture and better standardize treatment of cases.

### Seek Justice, Not Statistics

Unlike other lawyers, a prosecutor's goal isn't merely to win cases. Prosecutors have a higher calling: to seek justice. I won't allow my prosecutors to use the power of the office to gain unfair advantages.

Prosecutorial discretion in plea bargaining is one of the Commonwealth's Attorney's greatest powers. I won't wield that power like a cudgel. I will not allow prosecutors to overcharge simply so that they're starting at a high point for plea negotiations. For example, if someone committed a crime that should be handled as a misdemeanor, I won't allow my prosecutors to charge it as a felony simply so that they'll have bargaining power. Not only would this policy avoid spinning up unnecessary court procedures, it will make it possible in many cases for individuals to enter diversion programs that could keep a mistake from ruining their life. My office will be focused on doing justice, not squeezing out every possible advantage in negotiations.

Another area in which my office won't merely seek statistics is in sentencing. I don't want to waste resources and go beyond what is necessary for justice simply to look tough. I'll direct my prosecutors to determine the cost of the sentences sought and disclose this calculation on the record as a way to prime my office to ask for sentences that are not wasteful.

In all things, my office will be directed by the chief principle I learned during my time as a federal prosecutor in President Obama's Department of Justice: the prosecution "wins its point whenever justice is done its citizens in the courts."<sup>53</sup>

### No One is Above the Law

Fairfax County is fortunate to have great first responders who take their role as public servants seriously. However, this fact does not obviate the need to thoroughly review police use-of-force cases. When use-of-force cases arise, the public should be able to trust that the Commonwealth's Attorney's office is handling matters efficiently, transparently, and effectively. The day a use-of-force incident occurs is too late to build that trust: the Commonwealth's Attorney's office must build it on the days there isn't an immediate crisis. As the Commonwealth's Attorney, I will focus on building trust so that the community has confidence that I will resolve use-of-force matters in a transparent and unbiased manner.

I will leave no doubt that I'll retain my independence when reviewing these matters. My track record as a member of the county's Police Civilian Review Panel—which was created to conduct police oversight—proves my ability to remain independent. Furthermore, because many people doubt that a Commonwealth's Attorney who takes campaign contributions from law enforcement PACs can maintain their independence, I will neither seek endorsements nor accept contributions from law enforcement PACs. Although I respect the job our law enforcement professionals do and am grateful for their service, showing the community in every way possible that I will be independent in these matters is the most effective way to build the trust the community needs to have in its Commonwealth's Attorney.

### Support Victims

Processes in the Commonwealth's Attorney's office often leave victims disillusioned with the system. Currently, the office waits until too close to trial to assign cases to individual prosecutors. As a result, victims are not afforded a real opportunity to discuss their cases with prosecutors and give their opinion on what would help them heal until very close to trial, if they have the opportunity to do so at all. Cases sit for weeks or months without being worked on, and this lack of communication between prosecutors and victims leaves victims feeling as if the system isn't working for them. Furthermore, the late assignments don't give prosecutors adequate time to prepare cases, which leads to

<sup>54</sup>Brady v. Maryland, 373 U.S. 83, 87 (1963).

prosecutors regularly seeking to push back cases by weeks or months. The combination of these factors results in many victims simply giving up on the system. Too many cases are dismissed because victims become too disillusioned to continue seeking help through the system. In fact, many crimes are unreported because victims don't have faith in prosecutors to see their cases through.<sup>54</sup>

I will create processes in the Commonwealth's Attorney's office that quickly assign cases to prosecutors. They will have the opportunity to learn the cases and hear from victims. In addition to involving victims early and giving them the feeling that the system is working for them, this change will lead to cases being resolved without unnecessary delays. Case resolutions can be important milestones for victims' healing, and we should be working to get to that milestone as expeditiously as possible.

I will also change the narrow view within the office that victims always require the most punitive approach available to heal. Contrary to this narrow view, the overwhelming majority of crime victims prefer investments in rehabilitation and treatment instead of mass-incarceration policies.<sup>55</sup> This includes a 7-to-1 margin in favor of mental health treatment and a 4-to-1 margin in favor of drug treatment.<sup>56</sup> Seventy percent of victims want prosecutors to focus on solving neighborhood problems instead of just seeking convictions and prison sentences.<sup>57</sup> Victims are acutely aware that incarceration doesn't necessarily address the root causes leading to a person's crimes and that unnecessarily relying on incarceration when other options are sufficient pushes people into a cycle that results in more crime and less community safety. Perpetuating this cycle instead of addressing the root causes of crime is why victims are often victimized more than once.<sup>58</sup>

Supporting victims means engaging with them while their case is being handled by the office and proactively addressing issues so that they won't be victimized again in the future. It's easy to say you want to be a voice for victims, but actually being that voice requires changing the office's culture. I'll make those changes so the office can be that voice.

### Focus on Creating Fair Trials

As a former federal prosecutor, I take a prosecutor's duty to turn over potentially exculpatory evidence seriously. I will not tolerate dubious or unethical prosecution strategies in my office.

My office will reflect the idea laid out by the Supreme Court more than 50 years ago in Brady v. Maryland: "Society wins not only when the guilty are convicted, but when

<sup>54</sup>Alliance for Safety and Justice, Crime Survivors Speak 11 (2016).

<sup>55</sup>*Id.* at 13.

<sup>56</sup>*Id.* at 19.

<sup>57</sup>*Id.* at 5.

<sup>58</sup>*Id.* at 7-8.

criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”<sup>59</sup> Part of a prosecutor’s obligation is to make trials fair by providing defense counsel with potentially exculpatory evidence. I will not tolerate prosecutors who fail to fulfill this obligation. Nor will I tolerate a subtly pervasive practice that is almost as harmful as not providing exculpatory evidence: prosecutors failing to chase down leads or avoiding witnesses in an effort to avoid discovering potentially exculpatory evidence. A prosecutor who plays games with potentially exculpatory evidence—evidence that could keep a guilty person from being wrongly imprisoned—does not deserve the honor and privilege of being a prosecutor.

In addition to ensuring my office’s prosecutors appropriately handle exculpatory evidence, I’ll ensure the office doesn’t move forward with charges that are dubious or the product of unconstitutional investigatory acts. Nor will I bring cases that rely on law-enforcement witnesses who have been proven to be untrustworthy. My office will create and abide by a “Brady” or “Do Not Call” list that will exclude testimony from individuals on the list.

### Ending “Trial by Ambush”—Discovery Reform

Virginia’s criminal trial system is accurately described as “trial by ambush.” Defendants are not entitled to know who the witnesses against them at trial will be.<sup>60</sup> They’re not entitled to know what the police investigation has uncovered.<sup>61</sup> Virginia’s rules force defendants to try to craft a defense without most of the information one would need to do so. The result is a power imbalance that greatly increases the chances of an innocent person being falsely convicted. That’s not justice.

I reject the discovery practices that create “trial by ambush.” My office will have an office-wide policy of open file discovery—individual prosecutors will not be granted discretion as to what information is provided to the defense. This will stop prosecutors from accidentally violating constitutional law,<sup>62</sup> expedite plea negotiations,<sup>63</sup> and greatly decrease the likelihood that innocent people are convicted.<sup>64</sup>

### Combatting Systemic Racial Discrimination

Justice is meant to be blind, but the numbers don’t lie. Far too often race and ethnicity are determining factors in the outcome of one’s experience with the criminal justice system.<sup>65</sup> Systemic discrimination and implicit bias will continue to flourish without

<sup>59</sup>*Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>60</sup>Rules of the Supreme Court of Virginia, Rule 3A:11.

<sup>61</sup>*Id.*

<sup>62</sup>Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison* 73 Wash. & Lee L. Rev. 285, 295-96, 306 (2016).

<sup>63</sup>*Id.* at 382.

<sup>64</sup>*Id.* at 289-90.

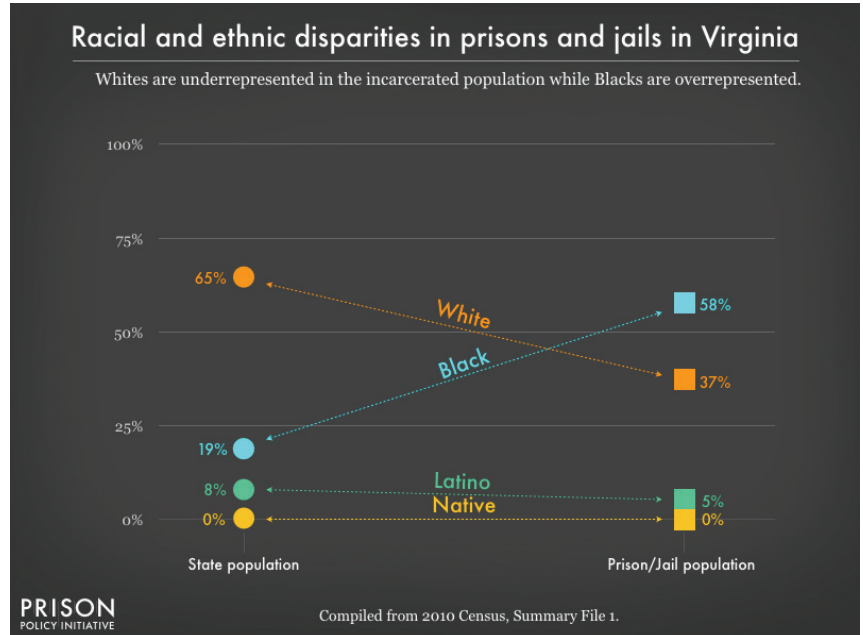
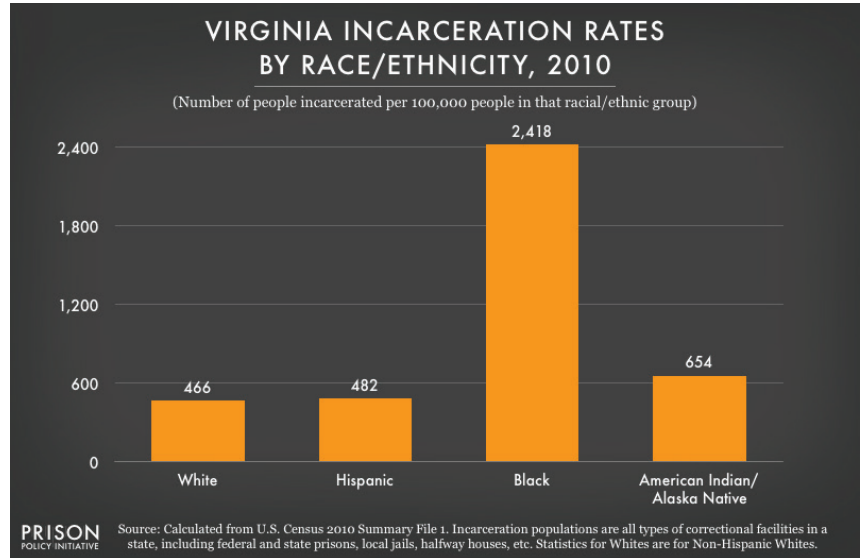
<sup>65</sup>*See, e.g.*, Gettman *supra* note 9 at 12; State by State Data, The Sentencing Project <https://www.sentencingproject.org/the-facts/#detail?state1Option=Virginia&state2Option=0> (last visited Mar. 12, 2019).

a focused approach to rooting it out.

To fix systemic discrimination, we need to first get data on the drivers of the discrimination. Independent organizations are ready, willing, and able to collect data on the office's actions at every key decision-making point—all at no cost. I will invite such an organization into my office and ask the organization to sort the data by race, gender, income, and location to determine exactly where disparities appear. In response to the data, I will create policies aimed at fixing the disparities. I will publicly release the data, my office's plans to address the disparities, and subsequent data showing the office's progress. I want to be judged based on the progress my office makes in ending systemic discrimination.

### Office Diversity

Fairfax county is wonderfully diverse community. It seems cliché to argue that “our diversity is our strength,” but it's true. Truly serving a diverse county requires a Commonwealth's Attorney's office that has prosecutors who understand and can build in-roads to our county's diverse communities. The need to understand and connect with those communities is why token diversity simply doesn't make the grade. Every person's view of the world is limited to some degree by their backgrounds and lived experiences. Therefore, to best serve our community, the office needs to include individuals that share our community members' backgrounds and lived experiences. To that end, I will recruit attorneys from various backgrounds who can bring a different perspective to the office. I will rely on those different viewpoints and experiences to help inform and shape the office's policies and procedures so that they truly reflect the values of our diverse community.



## Community Engagement

### Creating a Community-Focused Justice System

The decisions made by the Commonwealth's Attorney often have a direct and substantive impact on the lives of those that call Fairfax home—that is why this is an elected position. As Commonwealth's Attorney, I will have a responsibility to be a visible and accessible fixture in the community. It is incumbent upon me to explain the office's actions and to listen to the community to ensure that the office is properly serving it. This is a responsibility I take seriously. I will hold town halls in every corner of the county and electronic town halls for those unable to attend. That's part of my commitment to engaging honestly with everyone regardless of their skin color, zip code, or income level.

The Commonwealth's Attorney isn't just another legal job. The job of the Commonwealth's Attorney is to represent the community and ensure the criminal justice system reflects the community's values. I will do that by seeking you out and listening to your ideas. I don't want to be just a Commonwealth's Attorney; I want to be your Commonwealth's Attorney.

### Increasing Transparency

Too few people know what happens in our criminal justice system. That needs to change. Our criminal justice system affects too many lives to be shrouded in mystery. Part of inviting an outside organization to probe for areas where the office can eliminate systemic discrimination and make other improvements is releasing that information publicly in an easy-to-find and easy-to-use way. I will do that. On my office's website, I'll post my plans and priorities and regularly update you on the progress we've made. My goal is for everyone to know exactly what the office is trying to achieve and how close it is to meeting its goals.

## Creating Coalitions to Advocate for Change

### Advocating for Change at the State Legislature

Although the Commonwealth's Attorney is the most powerful actor in our county's criminal justice system, the state legislature has a big impact too. When considering criminal justice bills, the state legislature is lobbied by tough-on-crime prosecutors, red-district law-enforcement officials, and reactionary groups. Those groups and their lobbyists hold too much sway in Richmond, and the result is regressive criminal justice laws and impediments to much-needed reform.

I believe the state legislature needs to hear from advocates of a smarter, more progressive system of justice. I will build coalitions with other forward-thinking prosecutors and attorneys so that the reform movement amplifies its power in Richmond. I will work with legislators to craft bills to improve our criminal justice system. I will use my platform as the leader of the criminal justice system in Virginia's most populous and powerful jurisdiction to push reform ideas throughout Virginia and to stand up to those who continue to block smart reform. Members of our Fairfax County delegation have told me that they need a partner in the Commonwealth's Attorney's office to help them push criminal-justice-reform legislation. I will be that partner.

### Working with Local Leaders to Improve Outcomes for Veterans

In recognition of the toll military service has on veterans, Fairfax County created a Veterans Treatment Docket to serve veterans with PTSD, mental health issues, and substance use issues when those issues lead to encounters with the criminal justice system.<sup>66</sup> The Veterans Treatment Docket program has a proven track record of helping individuals address the root causes of their issues instead of simply falling into a cycle of recidivism and repeated contact with the criminal justice system.<sup>67</sup> Because Fairfax County and the City of Fairfax are home to almost 72,000 veterans,<sup>68</sup> we have a real opportunity to improve our criminal justice system's outcomes by fully utilizing this program.



Steve Descano, West Point year book photo.\*

I will use the Veterans Treatment Docket to its full advantage. The program is voluntary, and the Commonwealth's Attorney has the authority to accept or reject

<sup>66</sup>See FAIRFAX COUNTY, FAIRFAX COUNTY VETERANS TREATMENT DOCKET BROCHURE (May 2016), available at <https://www.fairfaxcounty.gov/generaldistrict/sites/generaldistrict/files/assets/documents/pdf/vet-docket-information.pdf>.

<sup>67</sup>See e.g., Veterans Treatment Docket Turns Lives Around, FAIRFAX COUNTY (Apr. 2, 2018) <https://www.fairfaxcounty.gov/news2/veterans-treatment-docket-turning-lives-around/>.

<sup>68</sup>Population Tables: Counties, U.S. DEP'T. OF VETERANS AFFAIRS (Nov. 12, 2018) [https://www.va.gov/vetdata/docs/Demographics/New\\_Vetpop\\_Model/9L\\_VetPop2016\\_County.xlsx](https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/9L_VetPop2016_County.xlsx).

\*Use of military rank, titles, or photographs in uniform do not imply endorsement by the Department of the Army or the Department of Defense.

applicants.<sup>69</sup> Because the Treatment Docket program is more rigorous than simply accepting a plea deal,<sup>70</sup> people need to be incentivized to enter the program and do the hard work of addressing their root-cause issues. As the program's gatekeeper, the Commonwealth's Attorney is responsible for providing adequate incentives. The current Commonwealth's Attorney refuses to offer better plea deals to those who enter the program than he offers to those who don't enter the program. Failing to offer adequate incentives has resulted in the program having less than 15 participants.<sup>71</sup> This failure will continue to result in underuse of a proven program that should not only be used widely but should be expanded.

I will work to expand the use of the Veterans Treatment Docket. I will expand participation in the program by properly incentivizing veterans to enter it. Instead of making a participant take the same plea deal as a non-participant, I will offer more generous pleas and work towards a system that allows individuals to enter the program on a deferred disposition, which would result in charges being dismissed upon completion of the program. I will also look to expand the types of offenses for which my office offers entrance into the Veterans Treatment Program. My hope is that the Veterans Treatment Docket grows and helps as many veterans as possible avoid the cycle of recidivism and repeated contact with the criminal justice system. As a veteran, this issue is near and dear to my heart.

### Working with Local Leaders to Improve Outcomes for Those with Substance Abuse Issues

The War on Drugs has been a resounding failure. It has ruined lives, ruined communities, and disproportionately hurt people of color—all while failing to keep us safe. This failure isn't a surprise to anyone who recognizes that addiction is an illness, not a crime. We can't prosecute our way out of a mental health crisis. Instead, we must seek out alternatives to criminalizing those who simply need help. People in the grips of an illness are not disposable; they continue to be our neighbors even though they're sick. We should be helping them so they can make the most of their talents and help move Fairfax forward, not ruining their futures by locking them into a cycle of drug abuse and incarceration.

This is an issue Fairfax County needs to address with bold steps. Since 2010, drug arrests by Fairfax County Police have increased by 70%,<sup>72</sup> yet drug addiction is still a problem in our community.<sup>73</sup> Tough-on-crime approaches have failed.

<sup>69</sup>See FAIRFAX COUNTY, FAIRFAX COUNTY VETERANS TREATMENT DOCKET BROCHURE *supra* note 62; FAIRFAX COUNTY, FAIRFAX COUNTY GENERAL DISTRICT COURT VETERANS TREATMENT DOCKET PARTICIPANT HANDBOOK 19 (Mar. 2015), available at <https://www.fairfaxcounty.gov/generaldistrict/sites/generaldistrict/files/assets/documents/pdf/vet-docket-participant-handbook.pdf>.

<sup>70</sup>See FAIRFAX COUNTY, FAIRFAX COUNTY GENERAL DISTRICT COURT VETERANS TREATMENT DOCKET PARTICIPANT HANDBOOK 2 (Mar. 2015), available at <https://www.fairfaxcounty.gov/generaldistrict/sites/generaldistrict/files/assets/documents/pdf/vet-docket-participant-handbook.pdf>.

<sup>71</sup>Veterans Treatment Docket Turns Lives Around *supra* note 63.

<sup>72</sup>Compare FAIRFAX COUNTY POLICE DEPARTMENT, STATISTICAL REPORT CALENDAR YEARS 2010-2012 (Feb. 2014) with Fairfax County Police Department, Statistical Report 2016-2017 41 (Feb. 2018).

<sup>73</sup>See FAIRFAX COUNTY, HEROIN & OPIOIDS UPDATE A COMMUNITY PUBLIC HEALTH AND SAFETY CRISIS (Jan. 2019), available at <https://www.slideshare.net/fairfaxcounty/heroin-and-opioids-update-a-community-public-health-and-safety-crisis-january-2019-129997883>.

To better address this issue, I will work with local leaders to improve our drug court. Fairfax County's drug court is limited to serving only those who have already been convicted of a crime, are on probation, and have committed a probation violation related to substance dependency.<sup>74</sup> I will work to expand this program so that it includes deferred prosecutions, i.e., making this program available to individuals prior to their being prosecuted. This change would increase motivation for those in the program to successfully complete the program. It would also result in those that finish the program avoiding a felony conviction, thus allowing them to not only beat their drug addiction, but also to avoid having their future work and schooling options severely limited. Expanding specialty programs in such a way that allows people to avoid devastating repercussions from a long-past addiction is a crucial step in ending the cycle of decreased opportunity, increased poverty, and increased crime that drives recidivism and breaks down communities. Ending that cycle will result in long-term cost savings to taxpayers and increased safety in our communities.

<sup>74</sup>Drug Court Offers Alternative to Jail for Defendants with Substance Use Disorders, FAIRFAX COUNTY (Oct. 11, 2018)  
<https://www.fairfaxcounty.gov/news2/drug-court-offers-jail-alternative-for-defendants-with-substance-use-disorders/>.

**Thank you for reading.**

**Fairfax County has an important decision to make  
on election day this November 5<sup>th</sup>.**

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and make a contribution, please visit:**

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**Together, we can bring real criminal justice reform  
to Fairfax County.**

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**ELECTION DAY:**  
**NOVEMBER**  
**5<sup>TH</sup>**

**STEVE**  
**DESCANO**

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