

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Mahari Bailey, et al.,	:	
Plaintiffs	:	C.A. No. 10-5952
	:	
v.	:	
	:	
City of Philadelphia, et al.,	:	
Defendants	:	

**PLAINTIFFS’ TENTH REPORT TO COURT ON STOP AND FRISK
PRACTICES: FOURTH AMENDMENT ISSUES**

This Tenth Report to the Court provides a Fourth Amendment analysis of stop and frisk practices by the Philadelphia Police Department (“PPD”) for the Third and Fourth Quarters of 2019, and sets forth plaintiffs’ recommendations for necessary and enhanced compliance measures by the PPD.

I. History of the Case

On June 21, 2011, the Court approved a Settlement Agreement, Class Certification, and Consent Decree (“Agreement”). On February 6, 2012, plaintiffs submitted their First Report which analyzed stop and frisk data for the first two quarters of 2011. The First Report focused on Fourth Amendment issues, and specifically whether there was sufficient cause for the stops and frisks reported by the Philadelphia Police Department (“PPD”). The audits showed that over 50% of stops and frisks were undertaken without reasonable suspicion.

Plaintiffs’ Second Report, submitted in 2012, showed continued high rates of stops and frisks without reasonable suspicion (over 40% in both categories). On the issue of racial disparities, plaintiffs’ expert, Professor David Abrams, conducted a series of regression analyses and concluded that the racial disparities in stops and frisks were not

fully explainable by non-racial factors. Further, the analysis of marijuana arrests showed even more pronounced disparities, with Blacks and Latinos constituting over 90% of all marijuana arrests.

Plaintiffs' Third Report focused on stop and frisk practices for the first two quarters of 2012. Plaintiffs again found a 40% rate of non-compliance with Fourth Amendment standards, and racial minorities constituted over 90% of arrests for small amounts of marijuana. In response, the City stated that the PPD was providing additional training, issuing revised auditing protocols, and instituting new accountability measures.

The Fourth Report, filed in 2013, analyzed stops and frisks in 2012 and 2013, on both Fourth and Fourteenth Amendment grounds. Pedestrian stops were made without reasonable suspicion in 43% of the cases reviewed, and frisks were conducted without reasonable suspicion in over 50% of the cases. There continued to be very low "hit-rates," with only 3 guns recovered in over 1100 stops (0.27%).

The stops and frisks continued to be racially disproportionate with statistically significant disparities that were not explained by non-racial factors (e.g., crime rates, demographics of police districts, age, and gender). The rate of stops without reasonable suspicion for Blacks was 6.5 percentage points higher than the rate for Whites, demonstrating that police were using a higher threshold of "reasonable suspicion" for stops of White suspects.

The Fifth Report covered the first two Quarters of 2014 and showed a rate of stops without reasonable suspicion of 37%. The rate of frisks without reasonable suspicion, or as fruits of an impermissible stop, was 53%. Hit rates remained very low, with 433 frisks yielding only two firearms. Indeed, where officers stated that a "bulge"

justified a frisk, they seized a gun in only 1 of 78 frisks. On the issue of racial impact, the experts for the City and plaintiffs both found statistically significant evidence of racial bias in stops and frisks.

The Sixth Report covering two Quarters in 2015 showed continuing high rates of stops and frisk without reasonable suspicion, very low “hit-rates” for weapons, and racially biased patterns of stops and frisk practices. In February, 2016, the Court met with the parties, including the Managing Director, the Police Commissioner and Mayor Kenney’s Criminal Justice Advisor (Judge Benjamin Lerner) in response to the Sixth Report which showed continued and serious non-compliance with the Consent Decree on both the Fourth and Fourteenth Amendment issues. The City acknowledged the deficiencies in the stop and frisk practices and set forth a plan for internal accountability, including measures long advocated by plaintiffs, to ensure compliance with the Consent Decree. The parties agreed that the data from the Third and Fourth Quarters, 2016 and from 2017 would provide reliable grounds for assessing whether these measures are effective and what additional steps would be necessary to achieve compliance with the Consent Decree.

The Seventh Report (second half of 2016), showed improvements in the PPD stop and frisk practices, including a 35% decrease in the number of stops for 2016 as compared to 2015, and fewer stops and frisks without reasonable suspicion. Thus, in the second half of 2016, stops were supported by reasonable suspicion in 75% of the cases (as opposed to 67% in 2015) and frisks were supported by reasonable suspicion in 59% of the cases (as opposed to 43% in 2015). Nevertheless, the data also showed non-compliance with both Fourth and Fourteenth Amendment standards, with tens of

thousands of persons being stopped and frisked without reasonable suspicion by the PPD on an annual basis. These improvements were the direct result of newly implemented internal accountability measures. The parties again met with the Court (Padova, J.) and agreed to further implementation of accountability protocols in 2017.

The Eighth Report analyzed data from stops made in the first two quarters, 2017. 79% of all stops were supported by reasonable suspicion; 21% were without legal justification. There continued to be a very high number of frisks without reasonable suspicion, 42% (at the same rate as a year before).

The Ninth Report was filed in 2019, and reviewed data from the first two quarters, 2018. There was continued improvement in stops, with 84% done with reasonable suspicion. With respect to frisks, however, while there was some improvement, there was still a high rate of 30% without reasonable suspicion. By this time, the City had drafted a disciplinary code for stop and frisk violators, including officers and supervisors who engaged in repeat stops or frisks without reasonable suspicion (and for supervisors, those who failed to correct such actions). Following a conference with the parties in June, 2019, Judge Padova approved the discipline protocol as part of the *Bailey* monitoring and review process.

It was expected that the disciplinary system would go into effect in the Third Quarter, 2019, but staffing and administrative problems delayed implementation until the Fourth Quarter. And, since the first round of disciplinary notifications were not made until early 2020, the current report does not reflect the efficacy or impact of these disciplinary measures. We will issue another report based on the data provided from the second and third quarters of 2020 that should provide some basis for evaluating the

disciplinary process. Of course, with the impact of COVID 19, there is likely to be a significant decrease in stops and frisks, due to more limited policing interventions. It is important to note, however, as the data reviewed in this Tenth Report shows, without disciplinary measures in effect, progress in the stop and frisk rates with reasonable suspicion has stalled.

II. Third and Fourth Quarters, 2019: Fourth Amendment Analysis

In this section, plaintiffs set forth their findings for the Third and Fourth Quarters, 2019 on the Fourth Amendment provisions of the Consent Decree. As in previous audits, in assessing whether reasonable suspicion existed for the stop or frisk, we fully credit the narrative information provided by the officer and, in “close” cases, find reasonable suspicion.

The total number of stops for 2019 was 76,937, with approximately one-half of those stops occurring in the third and fourth quarters, reflecting a continuing decline in pedestrian stops. Plaintiffs’ counsel reviewed 3993 randomly selected pedestrian stops made in the second half of 2019.¹ 84% were supported by reasonable suspicion and 16% were made without reasonable suspicion, precisely the same ratio as in 2018. Frisks were reported in 485 of these stops, a significant drop from the 740 frisks for the two quarters in 2018.² Of these, 62% were made with reasonable suspicion, 32% without reasonable suspicion, and 6% followed stops without reasonable suspicion (“fruit of the

¹ A number of “stops” turn out to be arrests based on full probable cause and some stops reflect police activity that is not properly viewed as a stop, as there was no “seizure” of the person (e.g., a “stop” to provide medical assistance or one who turns herself in on an outstanding warrant). Plaintiffs’ analysis excludes those “non-stops.”

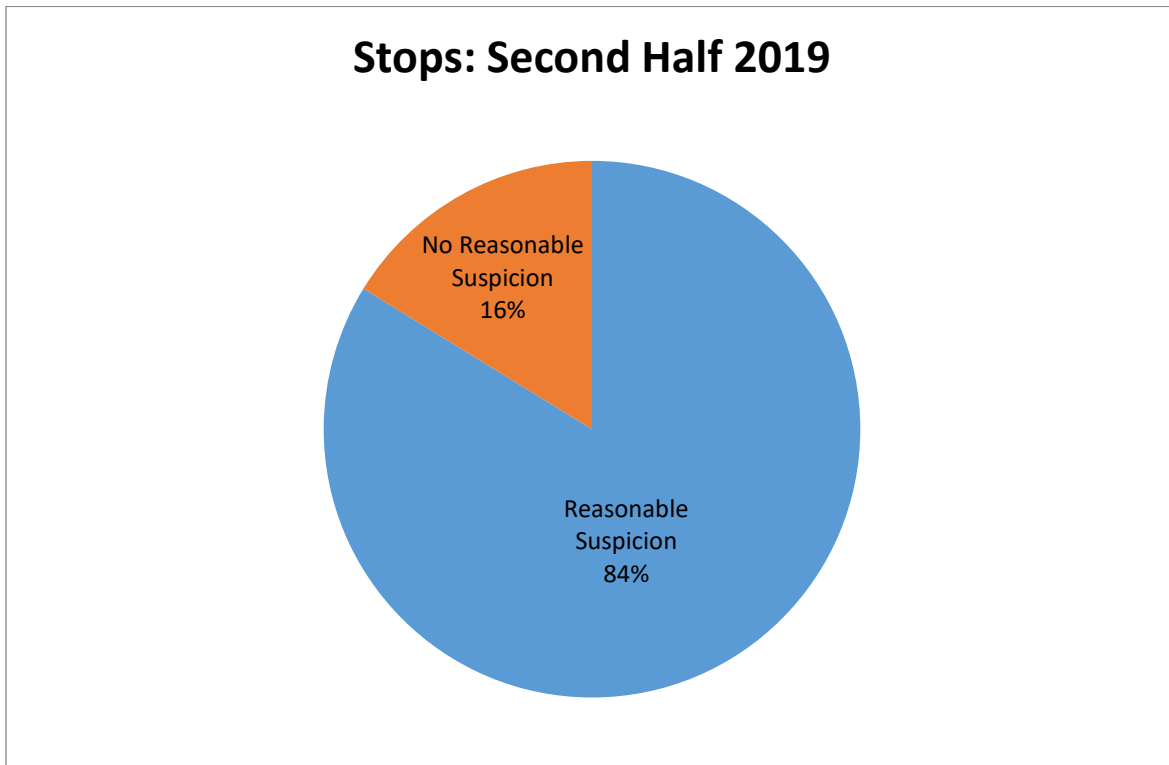
² Plaintiffs have presented data to the City showing cases in which no frisk was noted, but under the circumstances it is almost certain that one was conducted. See *infra*, at 20-21. We continue to discuss that issue with the City to determine what steps should be taken to address this matter.

poisonous tree” category). This is a *higher rate* of illegal frisks than in 2018, where 70% were made with reasonable suspicion, 21% were made without reasonable suspicion, and 9% were preceded by a stop without reasonable suspicion.

The following charts and graphs provide further data and breakdown of the stops and frisks in this database:

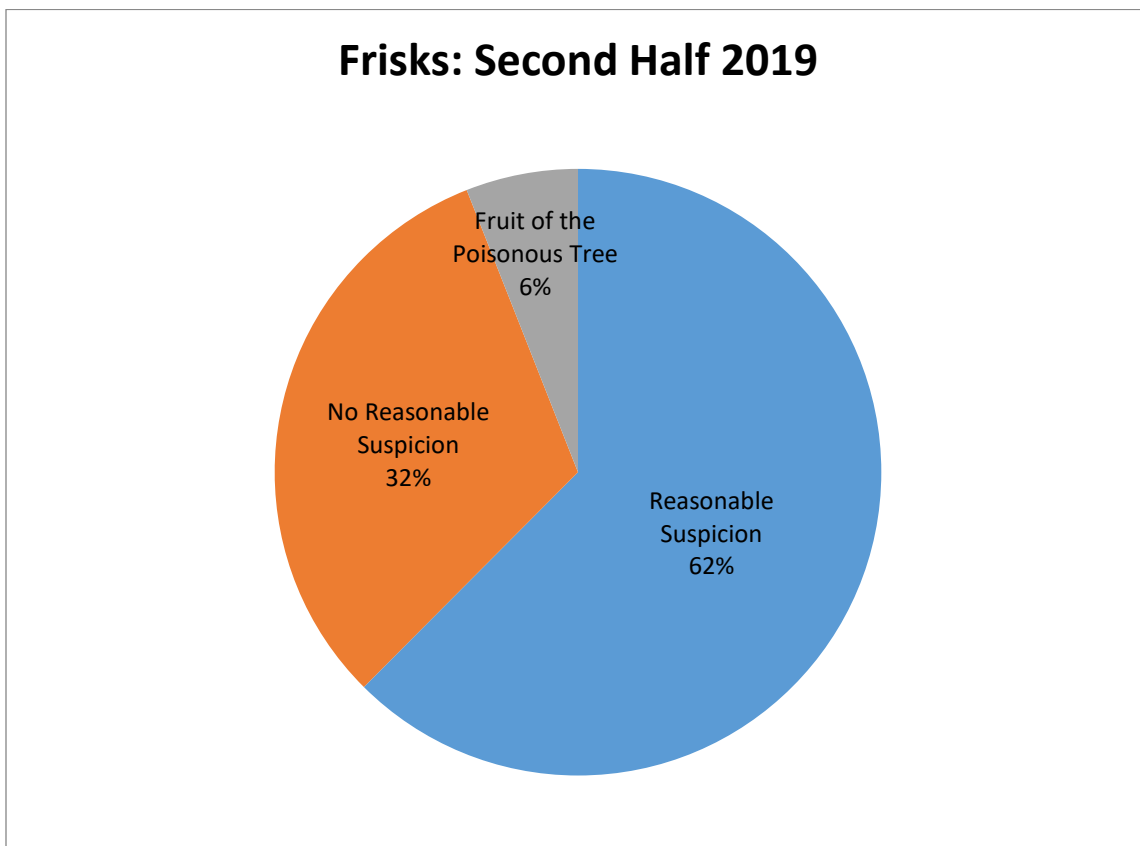
1. Stop Data

Actual Stops	3993	
Reasonable Suspicion	3346	84%
No Reasonable Suspicion	648	16%



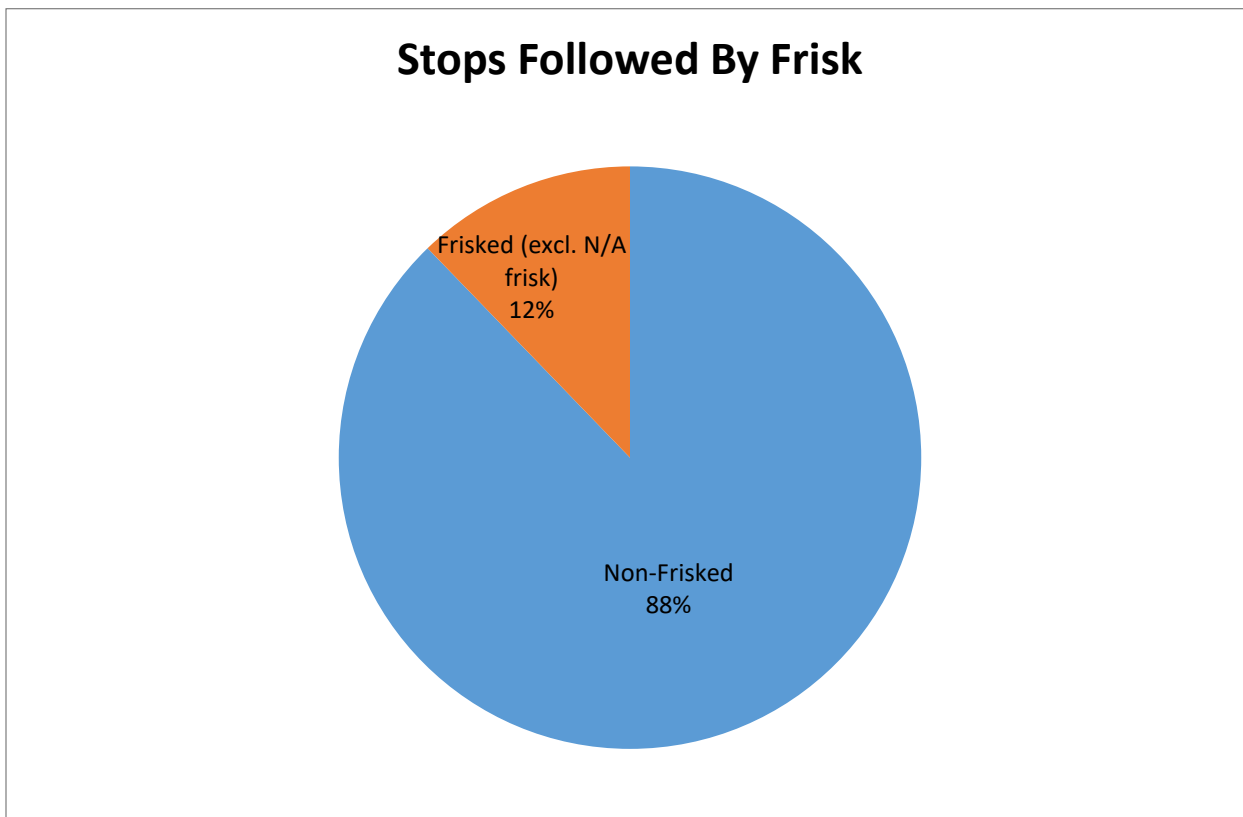
2. Frisk Data

Frisks	485	
Reasonable Suspicion	303	62%
No Reasonable Suspicion	153	32%
Fruit of the Poisonous Tree	29	6%



3. Stop/Frisk Ratio

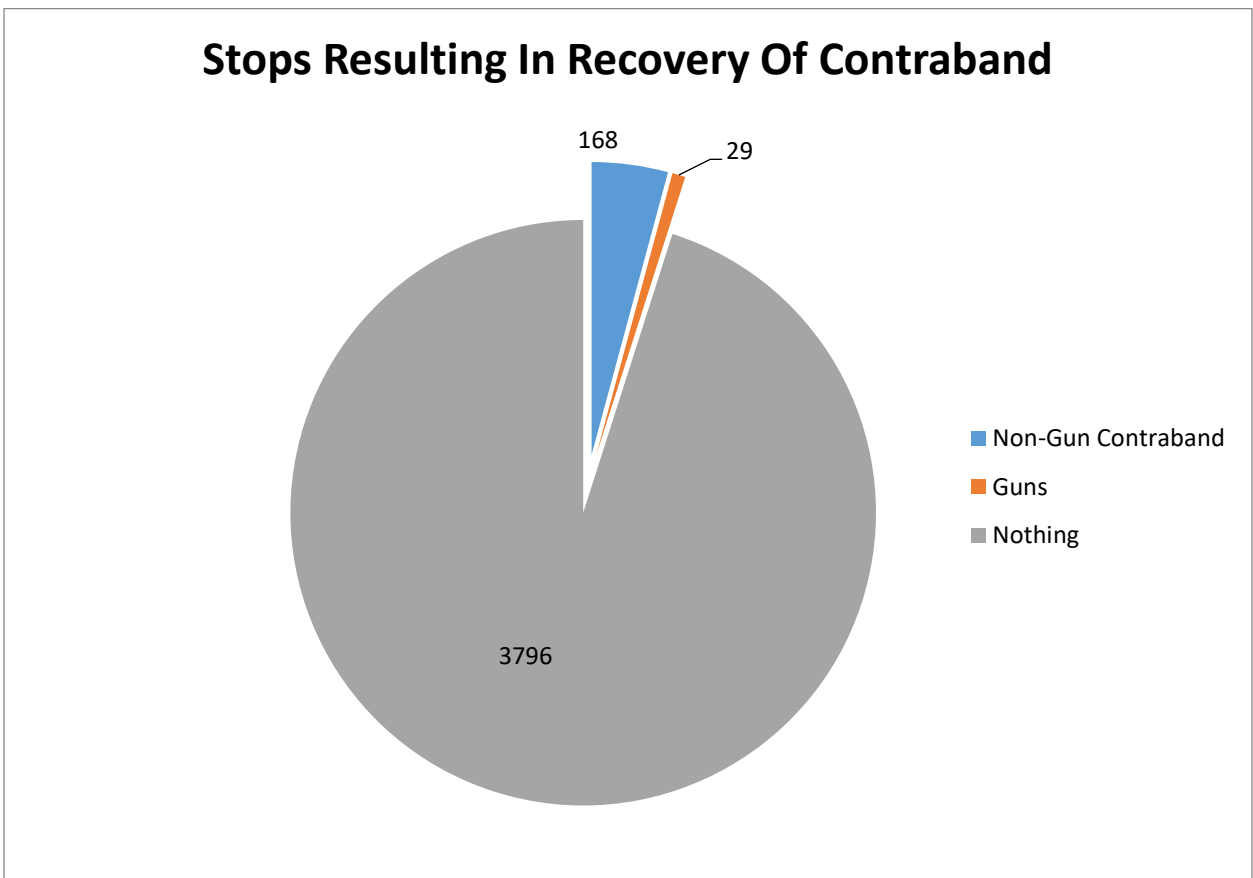
While officers documented frisks in 613 cases, in 128 of these cases, the officers conducted a search, and not a frisk. The 485 frisks are 12% of the 3993 stops.

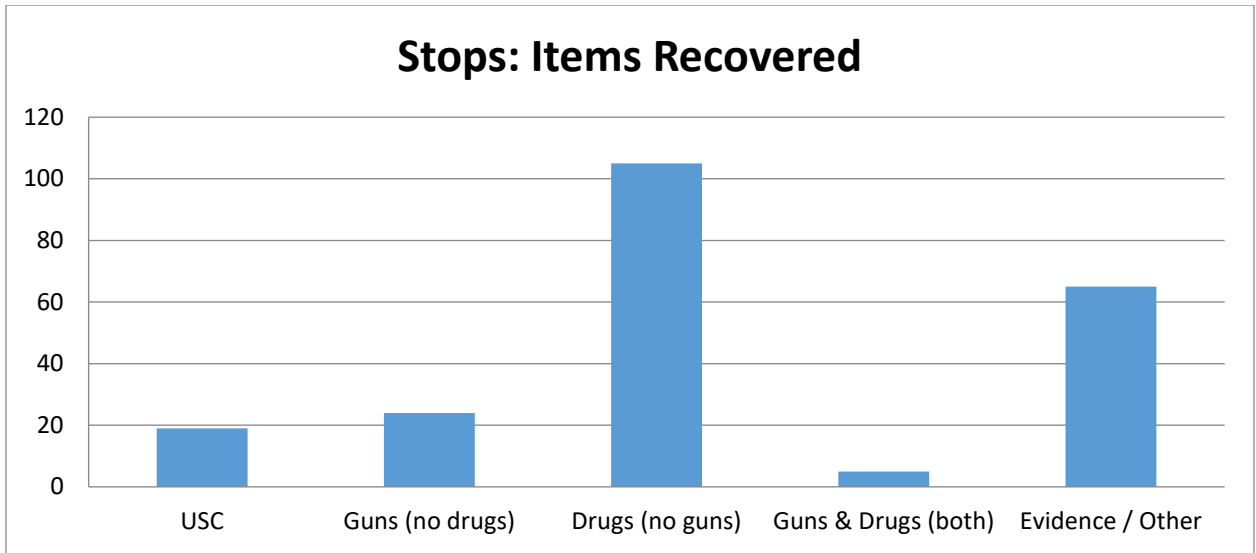


4. Contraband Recovered by Stops

USC	19	0.48%
Guns (no drugs)	24	0.61%
Drugs (no guns)	105	2.65%
Guns & Drugs (both)	5	0.13%
Evidence / Other	65	1.64%

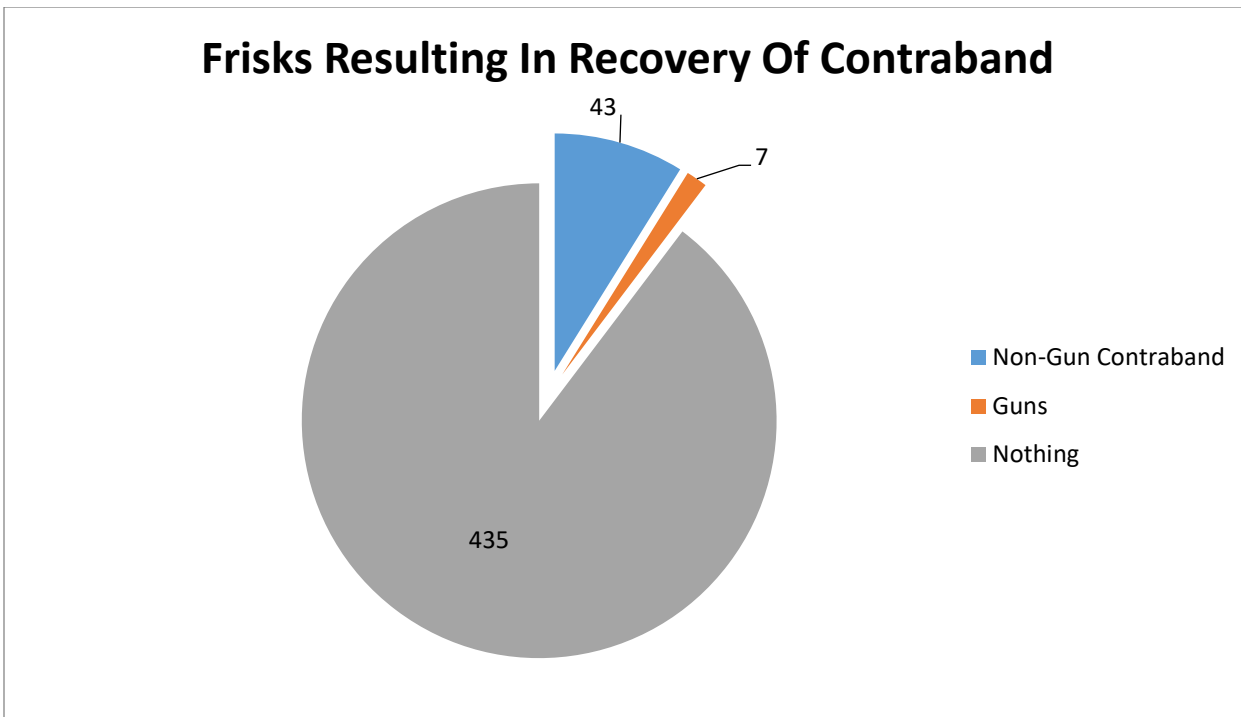
Note: 197 entries noted recovery of contraband, but multiple types of contraband were recovered in 21 of these stops, thus resulting in 218 contraband seizures.





5. Contraband Recovered by Frisks

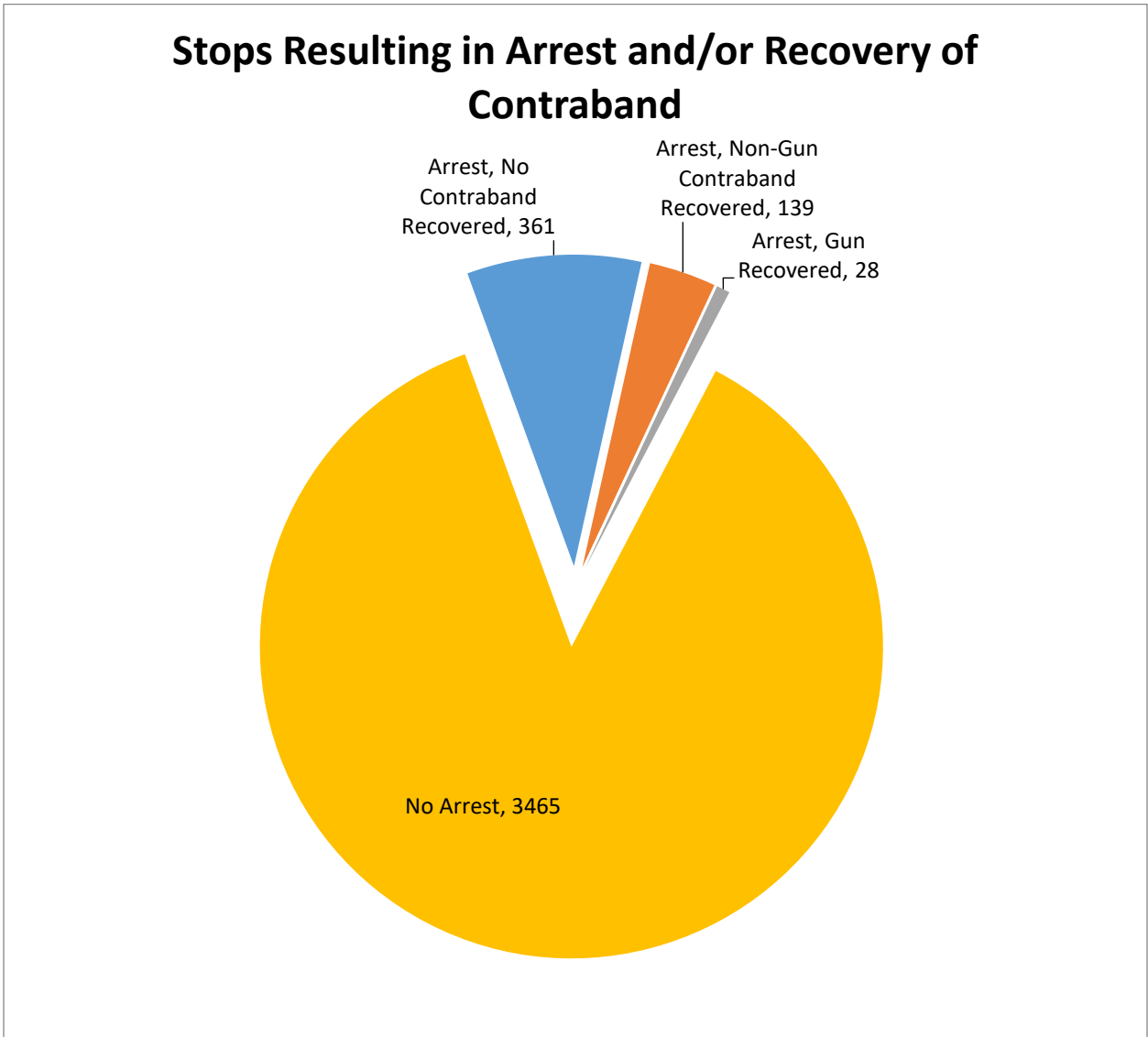
Non-Gun Contraband	43
Guns	7
No contraband	435
Total Frisks	485



6. Contraband Recovered By Frisks, With and Without Reasonable Suspicion

Reasonable Suspicion	33
No Reasonable Suspicion	14
Fruit of the Poisonous Tree	3

7. Arrests and Contraband Recovered

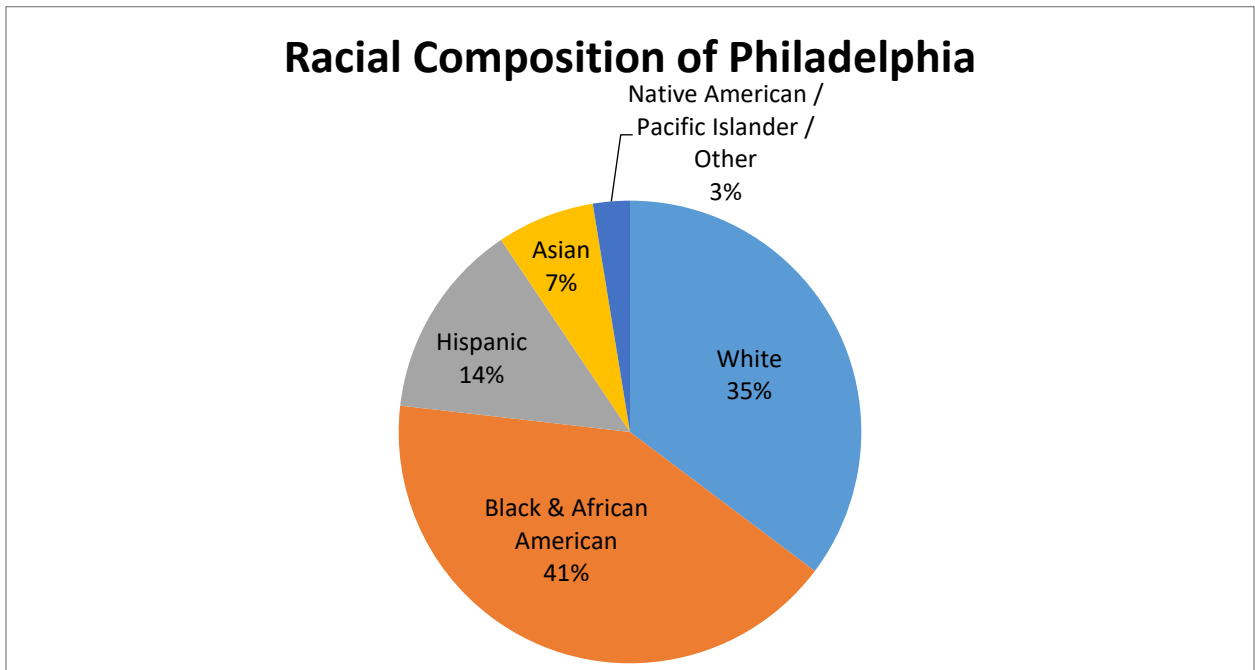


Arrest, No Contraband Recovered	361
Arrest, Non-Gun Contraband Recovered	139
Arrest, Gun Recovered	28
No Arrest	3465
Total Stops	3993

1. Racial Composition of Philadelphia

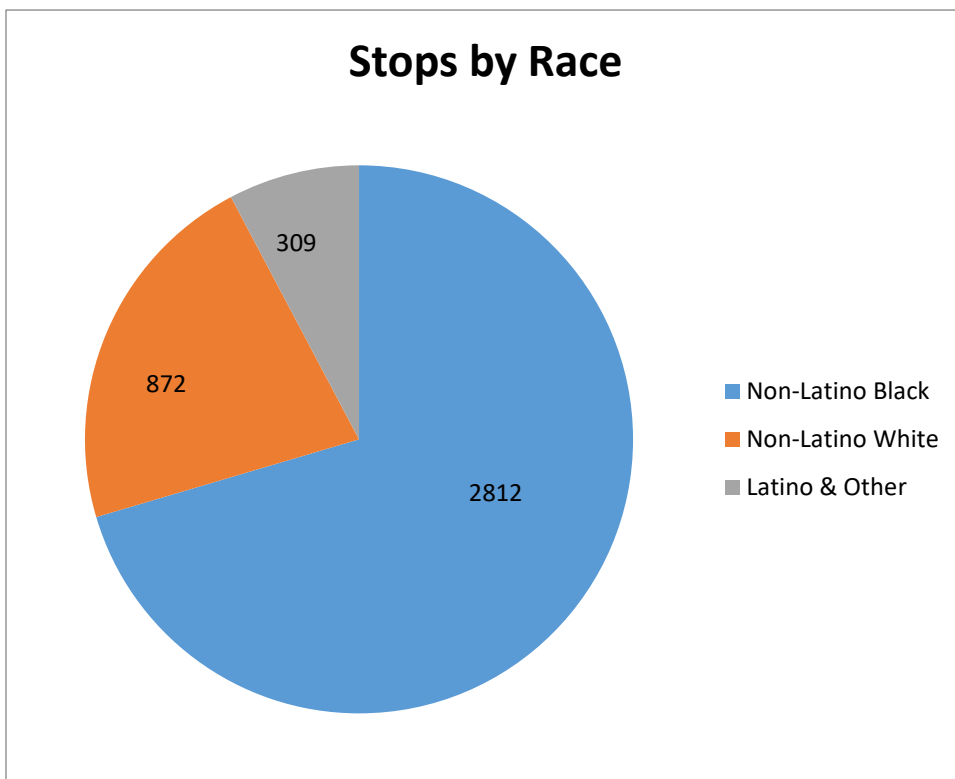
ACS 2016 (5-Year Estimates) 1559938 (total)

White	546979	35.27%
Black & African American	662382	41.55%
Hispanic	233968	13.77%
Asian	121726	6.84%
Native American / Pacific Islander / Other	15808	2.58%



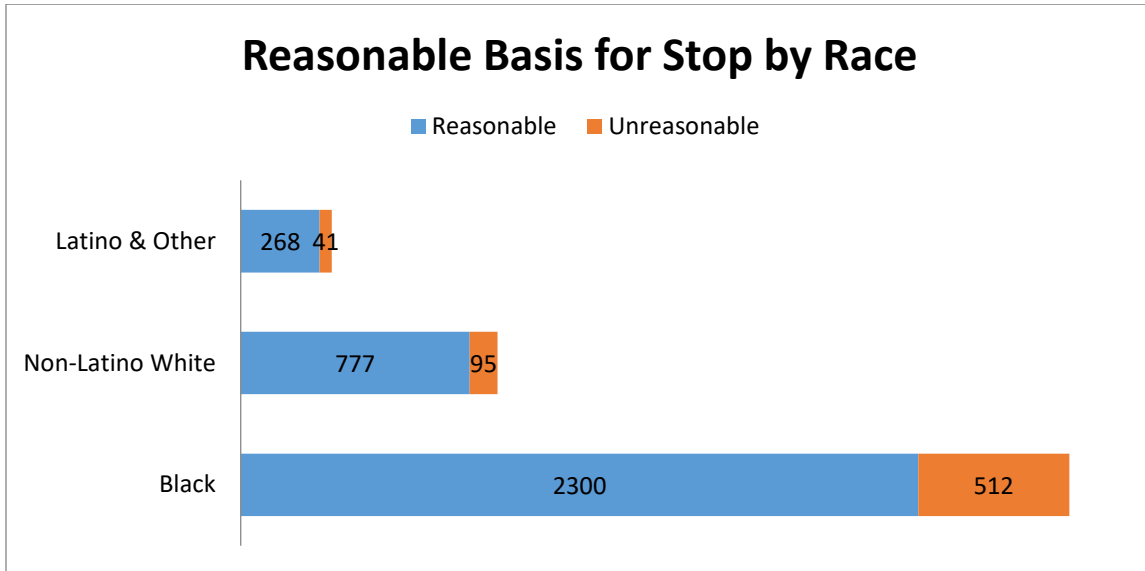
2. Stops by Race

Black	2812	70.42%	78.16% Minorities
Non-Latino White	872	21.84%	
Latino	309	7.74%	
Total	3993		



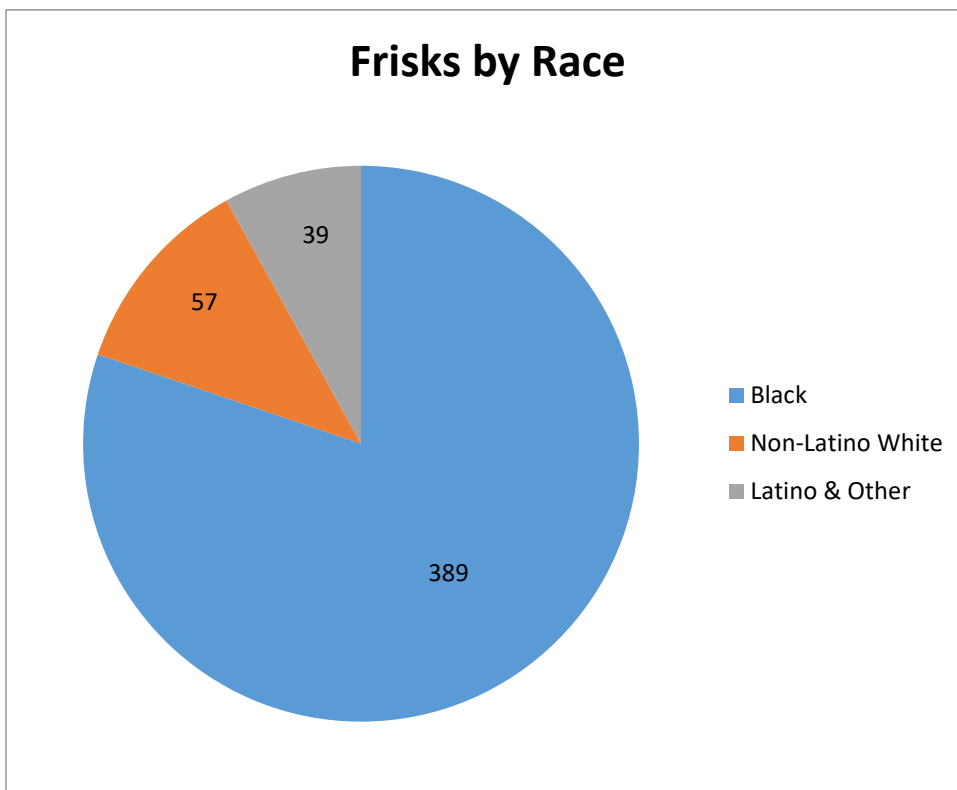
10. Stops by Race and Reasonable Suspicion

	Reasonable	Unreasonable	Reasonable %
Black	2300	512	81.79%
Non-Latino White	777	95	89.11%
Latino & Other	268	41	86.73%
Total	3345	648	3993
	83.77%	16.23%	



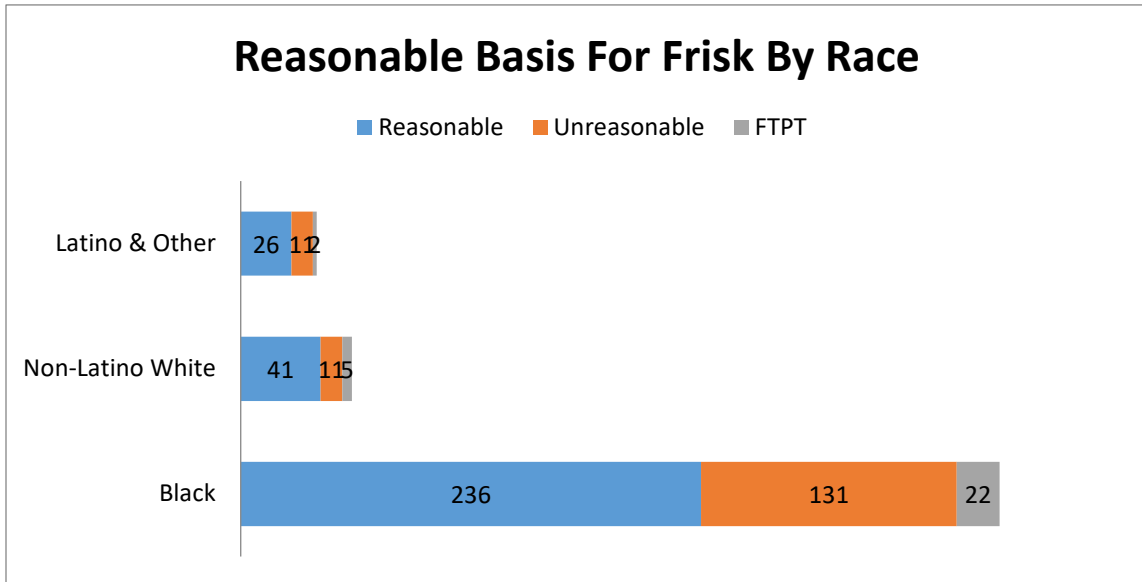
11. Frisks by Race

Black	389	80.21%	89.05% Minorities
Non-Latino White	57	11.75%	
Latino	39	8.74%	
Total	485		



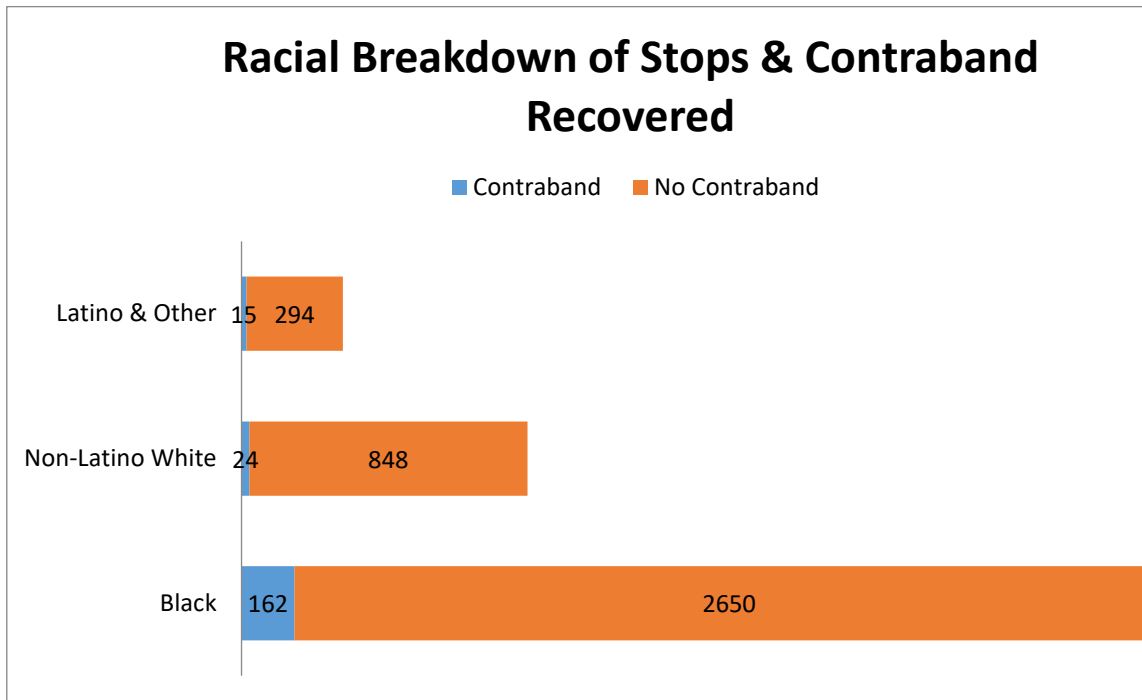
12. Frisks by Race and Reasonable Suspicion

	Reasonable	Unreasonable	FTPT	Reasonable %
Black	236	131	22	60.67%
Non-Latino White	41	11	5	71.93%
Latino	26	11	2	66.67%
Total	303	153	29	485
	62.47%	31.55%	5.98%	



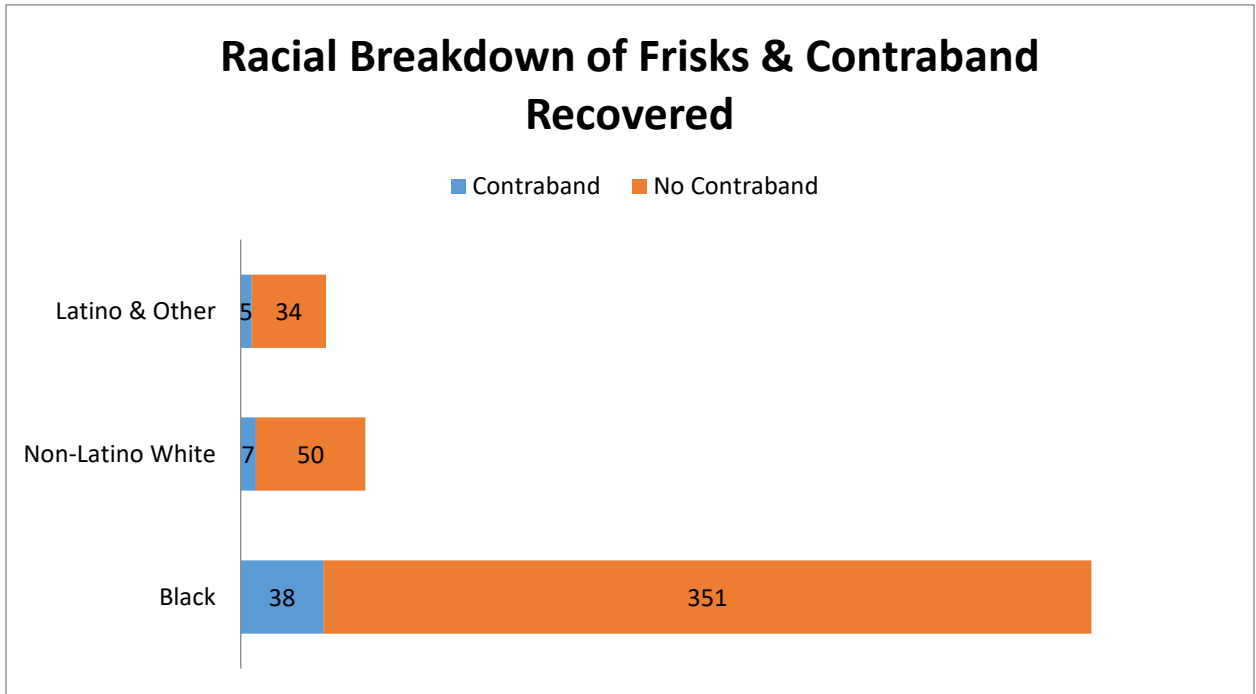
13. Stops by Race and Contraband Recovery

	Contraband	No Contraband	Total	Contraband %
Black	162	2650	2812	5.76%
Non-Latino White	24	848	872	2.75%
Latino & Other	15	294	309	4.85%
	201	3792	3993	
	5.03%	94.97%		



14. Frisks by Race and Contraband Recovery

	Contraband	No Contraband	Total	Contraband %
Black	38	351	389	9.77%
Non-Latino White	7	50	57	12.28%
Latino	5	34	39	12.85%
	50	435	485	
	10.31%	89.64%		



III. Commentary on Fourth Amendment Issues

1. 16% of all stops were made without the requisite reasonable suspicion. The Police Department audits for this period (total of 1037 stops, as opposed to 3993 reviewed by plaintiffs), found a rate of 87% with reasonable suspicion, which is almost identical to plaintiffs' findings. While this rate is significantly improved as compared to earlier years, these numbers are the same as for stops made in 2018, and in light of the fact that approximately 40,000 pedestrians were stopped in the second half of 2019, over 5,000 were stopped in violation of the Fourth Amendment.

2. 32% of all frisks were made without reasonable suspicion, and an additional 6% of frisks were made in cases where the stop itself was not supported by reasonable suspicion ("fruit of the poisonous tree"). Thus, 38% of all frisks were conducted in violation of the Fourth Amendment, a number significantly higher than we reported for 2018. The Police Department audits for the second half of 2019 report a rate of frisks without reasonable suspicion of approximately 28% (and a rate of 20% of searches without the requisite probable cause). But even the City's data on frisks is troubling, as this case is now in its *tenth* year of monitoring. And, if we split the difference between the two audits, *a full third of all frisks continue to be conducted without reasonable suspicion*. These data demand far more robust measures by the City to ensure that frisks are made only with reasonable suspicion that the suspect is armed and dangerous.

3. The number of reported frisks, 485, or 12.5 % of all stops, continues to be very low (down from 16% in 2018). As before, there is reason to believe that officers have not been reporting all frisks. In stops based on suspicion of gun possession or a

violent crime, the police frequently report no frisk of the suspect. And while frisks in some of these cases would be justified, in many they would be “fruits” of stops without reasonable suspicion.

The City disputed similar data in previous Reports, claiming that officers did not engage in frisks in robbery and gun investigations due to factors indicating no weapon possession. To the degree that officers are refraining from frisks without reasonable suspicion, the *Bailey* process is working, but non-reporting is not acceptable.

4. There continues to be a very low “hit-rate” for stops and frisks. Only 30 firearms were seized in the 3993 stops (a rate of less than 1%) and several of these seizures were the result of searches incident to a probable cause arrest, not frisks. Moreover, several of these were of licensed firearms. Drugs were found in 110 stops, though in many cases the “frisk” for drugs was not legal. Overall, this was a contraband seizure rate of less than 4%. We recognize that legitimate stops, especially for quality of life violations, are less likely to disclose contraband than in stops for violent offenses or weapon possession, but such low hit-rates remain troubling.

By contrast, as we have noted in previous reports, hit-rates for weapons on frisks are a highly reliable metric as officers must have *reasonable suspicion that the suspect is armed and dangerous* before a frisk can be conducted. Thus, it is fair to expect that seizure of weapons would be made in a significant number of these cases if the officers are accurately reporting facts that establish reasonable suspicion. Reasonable suspicion is less than probable cause (itself a standard that is somewhat less than a preponderance of evidence), and must be based on more than a hunch or speculation. Accordingly, among courts and commentators, there is general agreement that for stops, there must be at least

a 15-20% rate of underlying criminal conduct, and for frisks that same rate for seizure of weapons. Yet, the rate of recovery of weapons is vanishingly small. *Of 485 frisks reviewed, only 7 firearms were seized*, which means that almost 99% of frisks yielded no weapons. Moreover, some of these seizures were made as a result of frisks without reasonable suspicion, and it is likely that the hit-rates for weapons are even lower given the fact that police reported no frisks (and no seizures of weapons) in many stops involving violent crimes or reports of weapons.³

The following data, drawn from all frisks in the database for the 4th Quarter, 2019, shows the miniscule rate of seizures of firearms:

Reason	Frisks	Firearms
Bulge	88	2
Furtive movements	55	2
High crime/high drug area	7	0
Incident to arrest	102	0
Lack of cooperation	111	1
Narcotics investigation	44	0
Officer protection/safety	81	0
Other	74	0
Suspected weapon in plain view or admitted by subject	20	0
Violent crime or other reason for stop that creates weapon suspicion	164	1
Totals	746	7⁴

These data raise serious questions as to (1) whether the justifications that were

³ Our Tenth Report on Fourteenth Amendment issues will address the racially disparate impact of frisks without reasonable suspicion.

⁴ This data is separate from the randomly drawn stops from the 3^d and 4th Quarters and analyzed in this Report and is drawn from all stops that resulted in a reported frisk for the 4th Quarter. It is noteworthy, that of the 7 firearms seized, 5 were seized without reasonable suspicion.

provided for the frisks are fair predictors of weapon possession and (2) whether the police are accurately reporting their reasons for frisks.

It is also noteworthy that a substantial number of stops are for low level offenses such as carrying an open liquor container, curfew violations, minor disturbances, and panhandling. In the stop data for the last half of 2019, there were 717 stops for persons with “open liquor containers” and 438 stops for small (and often infinitesimal) amount of marijuana. And, in a random sample of approximately 700 stops, we determined that over 40% were “quality of life” detentions (marijuana, open containers, minor disturbances, after-hours in parks, curfew, truancy, littering, sleeping or opioid related stops (e.g., person with drug related items)). In light of the very low hit rate for weapons and the fact that stops and frisks generate strong negative community relations (and continue to be highly racially disparate), the Police Department should as a matter of policy to re-assess the cost/benefit of this policing program.

5. Analyzing improper stops and frisks by category, there continue to be a significant number of cases in which the officer fails to state reasonable suspicion under established legal standards. These include:

- Stops made on “flash” information, but no such information provided;
- Stops of single person “obstructing” sidewalk;
- Stops and frisks made on anonymous information (e.g., man with gun or with drugs);
- Stops of persons involved in a “disturbance,” “verbal dispute” or for panhandling;⁵
- Stops and frisks based on “suspicion” of narcotics activity, but without a factual basis;
- Stops based on an open container (not alcohol);

⁵ We credit reports of “domestic” disputes.

- Stops based on smell of marijuana; tobacco only being smoked
- Frisks made for narcotics; and
- Frisks made for weapons in violation of *Commonwealth v. Hicks*, 208 A.3d 196 (Pa. 2019) (impermissible to stop for firearm possession without cause to believe that suspect does not have a license to carry or is using firearm in connection with criminal activity).

That officers continue to make stops and frisks in these circumstances, many years after courts and the Consent Decree prohibited such conduct, is beyond any possible justification. The U.S. Supreme Court and Pennsylvania Supreme Court have held that stops based on an anonymous call of “person with a weapon” are unconstitutional, *Florida v. J.L.*, 529 U.S. 266 (2000); *Commonwealth v. Hawkins*, 692 A.2d 1068 (Pa. 1997), and as noted above, in *Commonwealth v. Hicks*, the Court prohibited stops for firearm possession without cause to believe that suspect does not have a license to carry or is using firearm in connection with criminal activity. Yet, hundreds of persons each year continue to be stopped and frisked on this basis. Similarly, the Courts and the Consent Decree prohibit stops based on “flash” information corroborated where the flash information is not by the reporting officer. Here, too, notwithstanding PPD training and counseling of officers there are hundreds of stops each year where officers fail to state the alleged “flash information.”

6. The parties agree that internal accountability is the key to compliance with the terms of the Consent Decree. The Police Department must impose sanctions against the officer who disregards explicit training, and the Sergeant (or other supervisor) who reviews and approves these stops. The Police Department delayed implementation of the accountability process until 2019, notwithstanding Police Department Directives on stop

and frisk practices (currently Directive 12.11, Appendix B), that include:

1. Under Section 7, patrol supervisors must review each 75-48a, send incomplete forms back to the officer, and note what actions were taken where the officer did not have reasonable suspicion for the stop or frisk.
2. Under Section 8, Commanding Officers must take necessary actions to correct errors in stop and frisk practices including the identification of officers who fail to state reasonable suspicion, and they are accountable for officers and their supervisors who repeatedly engage in impermissible stops or frisks. The Commanding Officers must submit memorandum on a periodic basis detailing corrective actions taken.
3. Under Section 9, Special Unit Inspectors must complete audits of randomly selected stop and frisk reports, provide Commanding Officers under their supervision and command with memorandum detailing errors and deficiencies in these reports, review responses by the Commanding Officers as to remedial actions taken by the Commanding Officers, and to forward all findings and actions taken to the Chief Inspector, Office of Standards and Accountability.
4. Under Section 9, the Office of Standards and Accountability must ensure departmental compliance with stop and frisk procedures under the Directive (including reports on any racially biased or other discriminatory patterns), and provide quarterly audits of stop and frisk reports to various officials and offices within the Police Department, including the Police Commissioner, Deputy Police Commissioner and all Inspectors.

For many years, the only measures taken with respect to officers who engaged in repeated stops or frisks without reasonable suspicion was re-training or counseling. No sanctions were imposed. As noted, this Court has approved a new disciplinary protocol and we have provided the City a statement of every stop and frisk conducted without reasonable suspicion (in cases where there could be no plausible claim of good faith by the officer) for the Fourth Quarter, 2019, as well as data reflecting the failure of supervisors to correct these actions.⁶ In turn, we expect that the parties and the Court will be provided with the Police Department's disciplinary actions in these cases.

⁶ The parties will provide the Court with the format for tracking these cases before the next conference.

A review of stops and frisks in categories in which there have been repeated violations of the Consent Decree (what are the most egregious stop and frisk patterns) disclose numerous cases in which the supervising sergeant failed to recognize the lack of reasonable suspicion and took no corrective action. Putting aside the very low hit rate for these stops, the fact that officers continue to believe that such stops and frisks are permissible, and that their supervisors regularly fail to correct these practices demonstrates the need for comprehensive accountability measures. Without comprehensive and consistent supervisory review, and discipline where merited, the pattern of illegal stops and frisks will continue. To ensure accountability, Sergeants are now subject to discipline for failure to advise officers in each case where the stop and frisk was without reasonable suspicion. The data review for 2020 will show whether these disciplinary measures have a positive impact on stop and frisk practices.

IV. Conclusion

The rate of stops without reasonable suspicion has remained constant for the past two years, and the rate of frisks without reasonable suspicion increased in 2019, compared to 2018. And, while a comparative analysis with prior years shows improvement in the quality of stops and frisk, this analysis must take into account the very high rates of illegal stops that continued for many years over the course of this litigation. On an absolute level, there are still far too many stops and frisks without reasonable suspicion, and there is not substantial compliance with the Consent Decree. We urge the City to consider the hit-rate data and categories of stops in assessing the overall costs and benefits of stop and frisk practices. Plaintiffs will provide more detailed proposals at the conference with the Court.

Respectfully submitted,

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/s/ Susan Lin, Esquire

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