

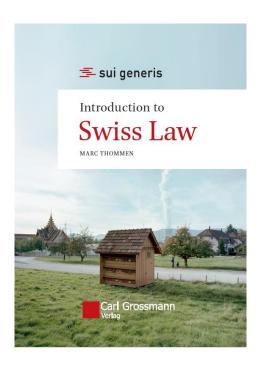
Penal Orders, Prosecutorial Discretion, and Trial Penalty

Prof. Dr. Marc Thommen David Eschle, BLaw



Introduction

- Paper
- Questions
- Introductiontoswisslaw.ch

















Cattle case

Police investigation:

- First examination hearing
- Search of premises
- Seizure of gun



Cantonal Police of St. Gallen



Cattle case

Public Prosecutor, penal order:

- Threatening behaviour
- Violation of Weapons Act
- Monetary penalty (90 units at CHF 360.— = CHF 32.000.—)
- X. objected to penalty order



Untersuchungsamt Gossau



Cattle case

District Court, Toggenburg Court of Appeals, Kantonsgericht St. Gallen

Federal Supreme Court, Bundesgericht Lausanne European Court of Human Rights (ECHR)





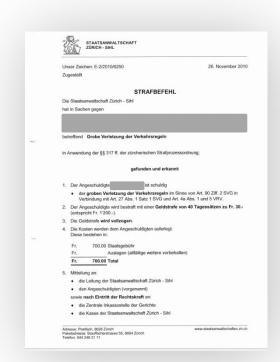






Penal Order

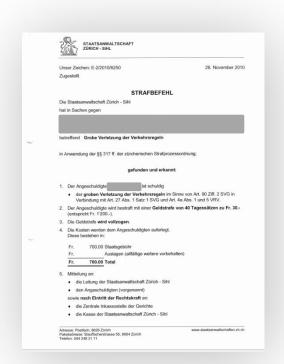
- 1. Introduction
- 2. Penal Order
- 3. Prosecutorial Discretion
- 4. Criticism
- 5. National Science Foundation
- 6. Trial Penalty





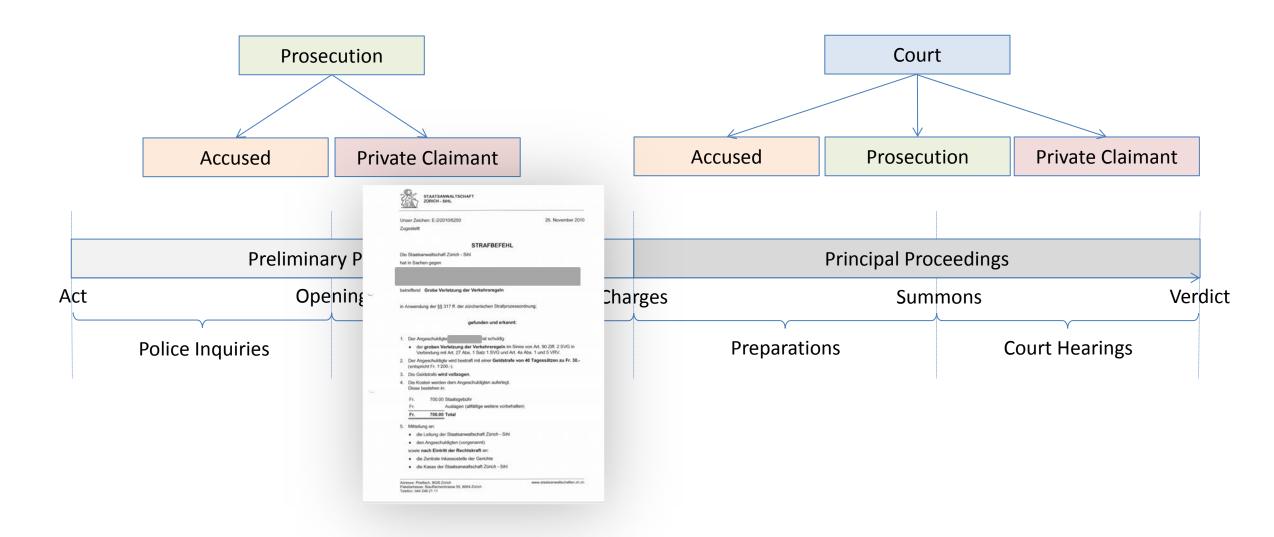
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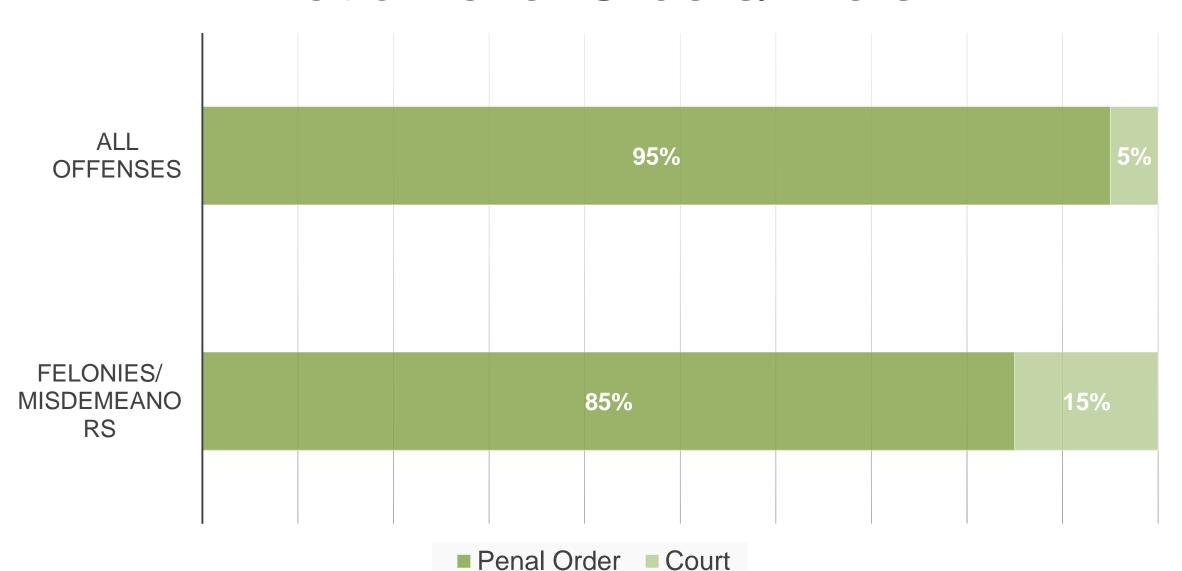


Swiss Criminal Proceedings





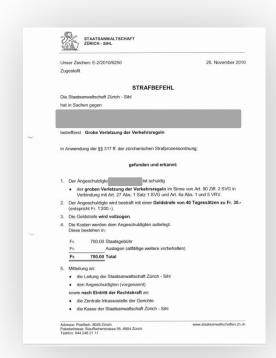
Ratio Penal Orders/Trials





If the accused person has ... confessed to the facts of the case or if the circumstances have been otherwise sufficiently resolved, then the prosecution shall issue a penal order if it considers... that one of the following sentences suffices:

- a. a fine;
- b. a financial penalty
- C. ...
- d. up to 6 months of imprisonment.





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	STAATSANWALTSCHAFT ZÜRICH - SIHL		
	Unser Zeichen: E-2/2010/6250	26. November 2010	
	Zugestellt		
	STRAFBEFEHL		
	Die Staatsanwaltschaft Zürich - Sihl hat in Sachen gegen		
	betreffend Grobe Verletzung der Verkehrsregeln		
	in Anwendung der §§ 317 ff. der zürcherischen Strafprozessorde	nung;	
	gefunden und erkannt:		
	Der Angeschuldigte st schuldig		
	 der groben Verletzung der Verkehrsregeln im Sinne v Verbindung mit Art. 27 Abs. 1 Satz 1 SVG und Art. 4a A 		
	 Der Angeschuldigte wird bestraft mit einer Geldstrafe von 4 (entspricht Fr. 1'200). 	40 Tagessätzen zu Fr. 30	
	Die Geldstrafe wird vollzogen.		
	 Die Kosten werden dem Angeschuldigten auferlegt. Diese bestehen in: 		
	Fr. 700.00 Staatsgebühr		
	Fr. Auslagen (allfällige weitere vorbehalten)		
	Fr. 700.00 Total		
	5. Mitteilung an:		
	die Leitung der Staatsanwaltschaft Zürich - Sihl		
	den Angeschuldigten (vorgenannt)		
	sowie nach Eintritt der Rechtskraft an:		
	 die Zentrale Inkassostelle der Gerichte 		
	die Kasse der Staatsanwaltschaft Zürich - Sihl		



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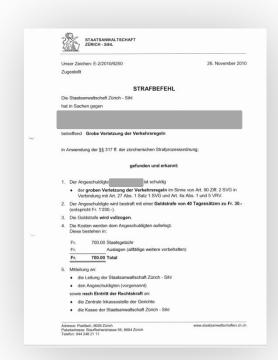
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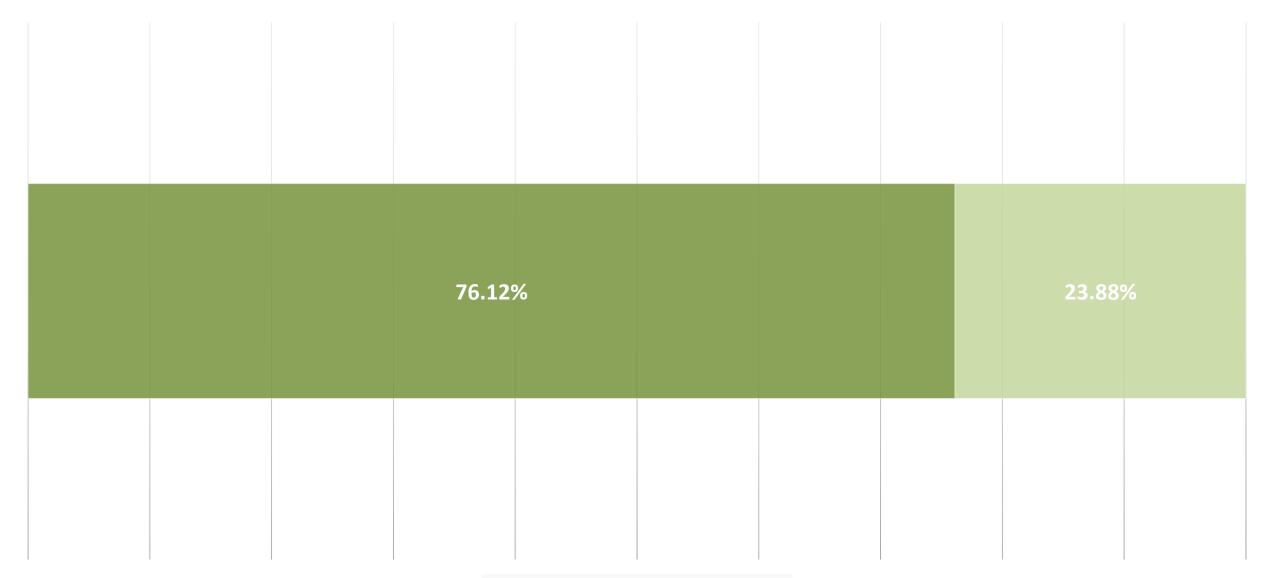
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Custodial Sentences (n=2090)

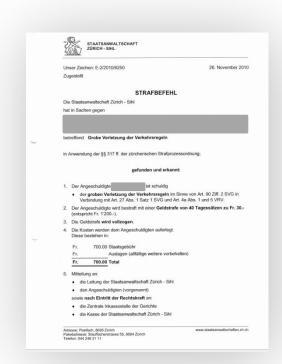


■ Penal Order ■ Trial



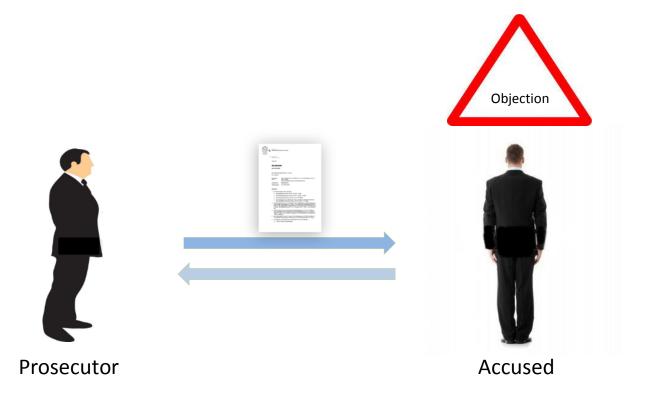
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Course of Penal Order Proceedings

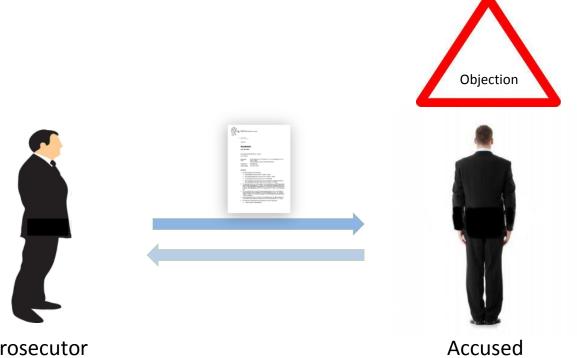




First Instance Court



Course of Penal Order Proceedings



Prosecutor
355 I CPP1 If an objection is filed, the public prosecutor shall gather the additional evidence



First Instance Court



Art. 355 CPP – Procedure after Objection

Prosecutor decides to

- a. Uphold penal order
- b. Abandon proceedings
- c. Issue new penal order
- d. Bring charges at court



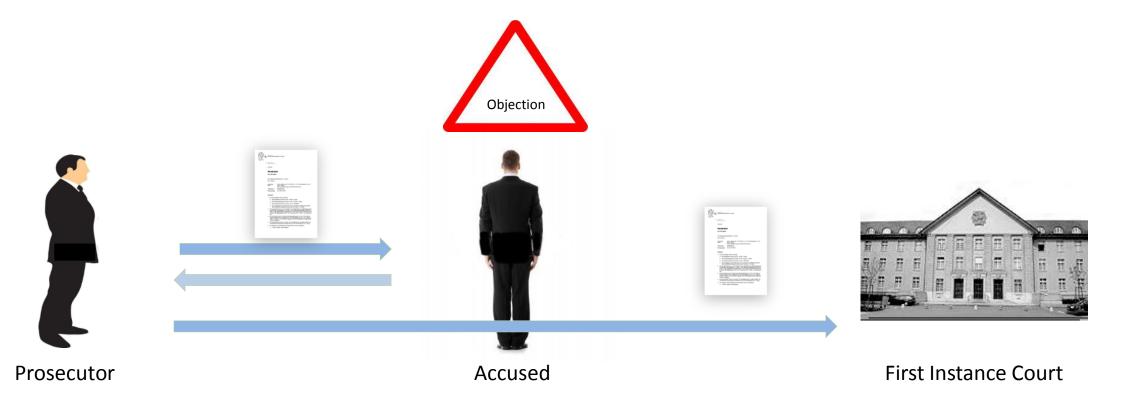
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a. Uphold Penal Order





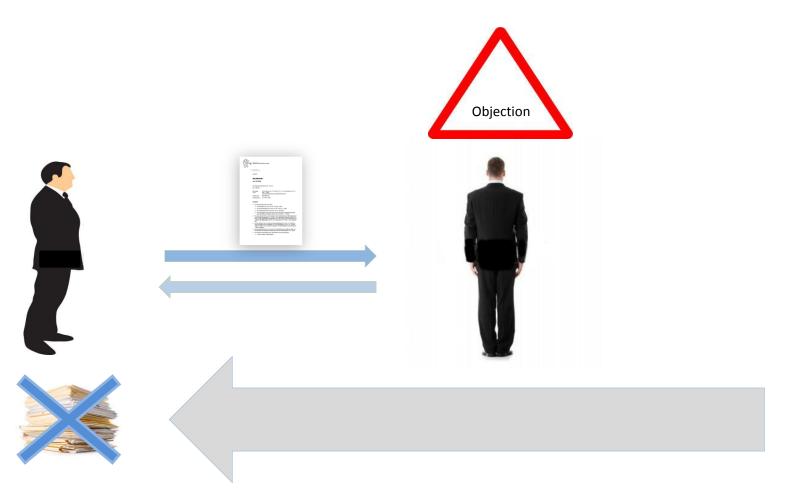
Art. 355 CPP – Procedure after Objection

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b. Abandon Proceedings







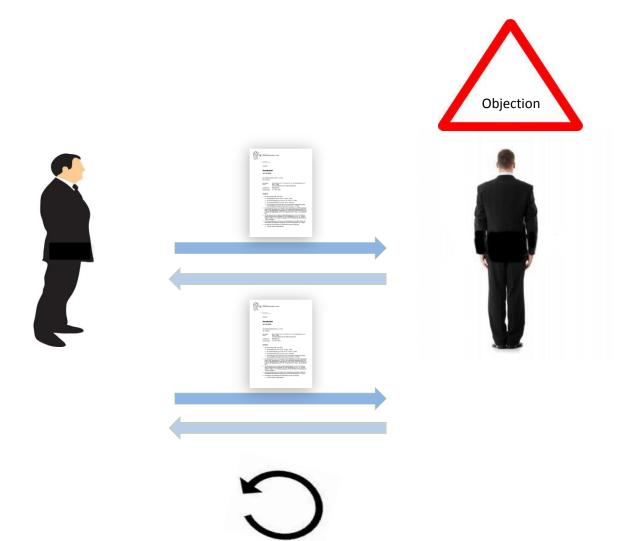
Art. 355 CPP – Procedure after Objection

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c. Issue new penal order







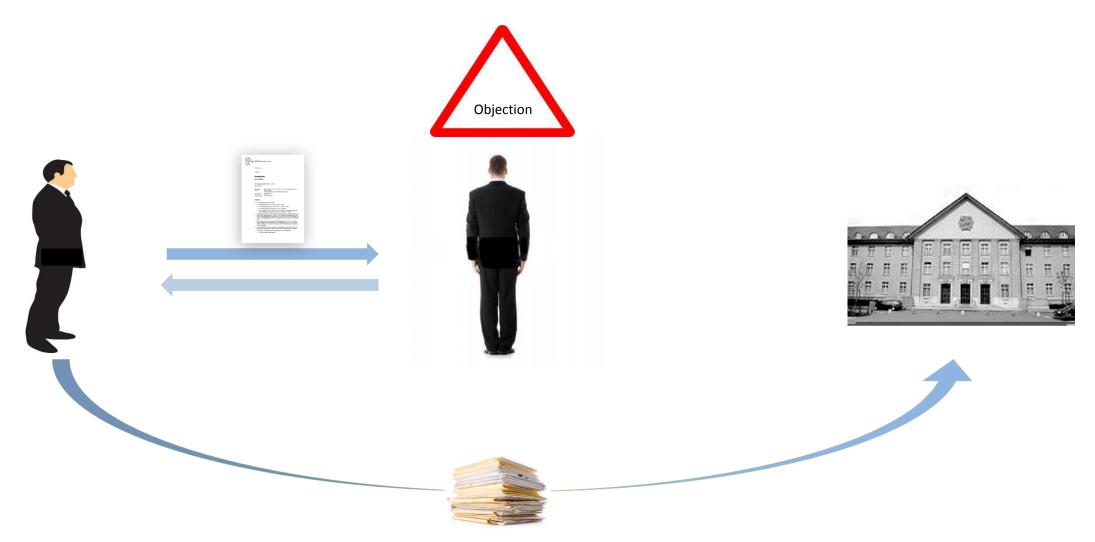
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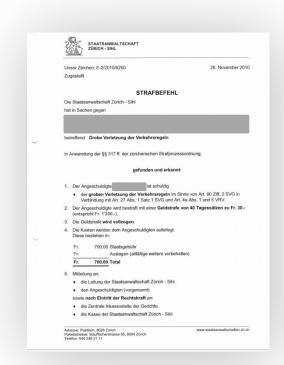
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Penal Orders – Criticism

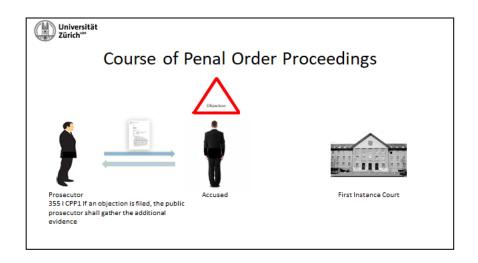
- 1. Right to be heard
- 2. Right to counsel
- 3. Separation of powers
- 4. Right to translation
- 5. Material truth
- 6. «Test balloon» dilemma





Penal Orders – Criticism

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Penal Orders – Criticism

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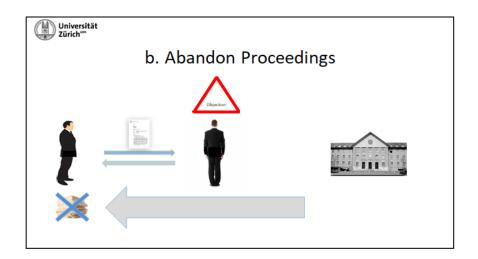


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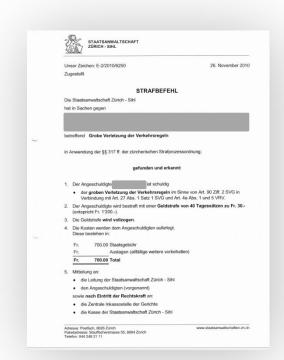
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Penal Order

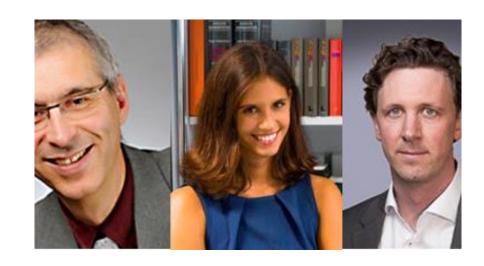
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Swiss National Science Foundation (SNF)

 April 1, 2017: Swiss National Science Foundation awarded 0,4 Mio. CHF for empirical analysis of penal orders in Switzerland





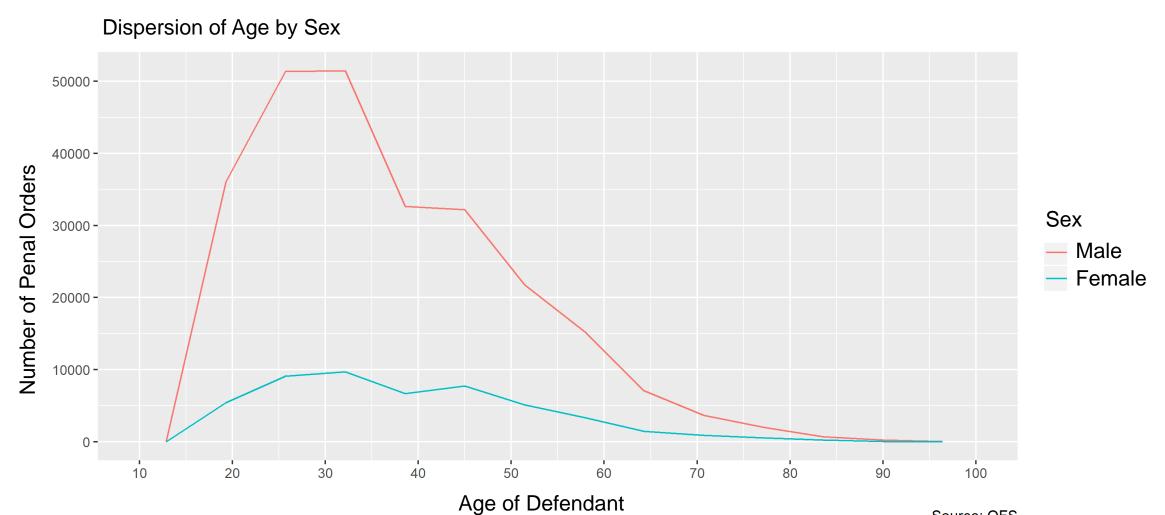
SNF – Project

1. Analysis of all penal orders 2014–2016 (ca. 300'000) in Switzerland based on data of National Statistics Office.





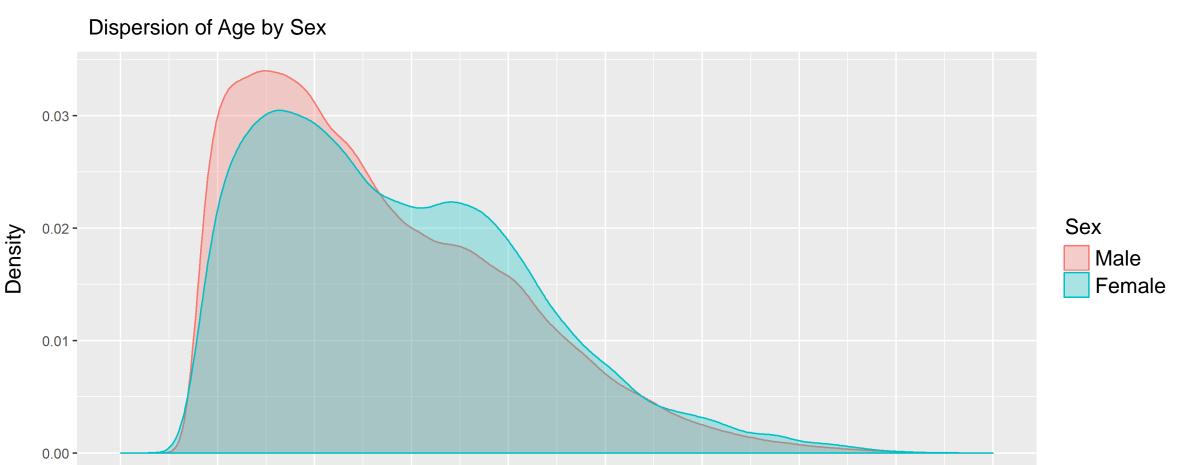
Penal order convictions by age and sex



Source: OFS



Density of PO-Convictions by age and sex

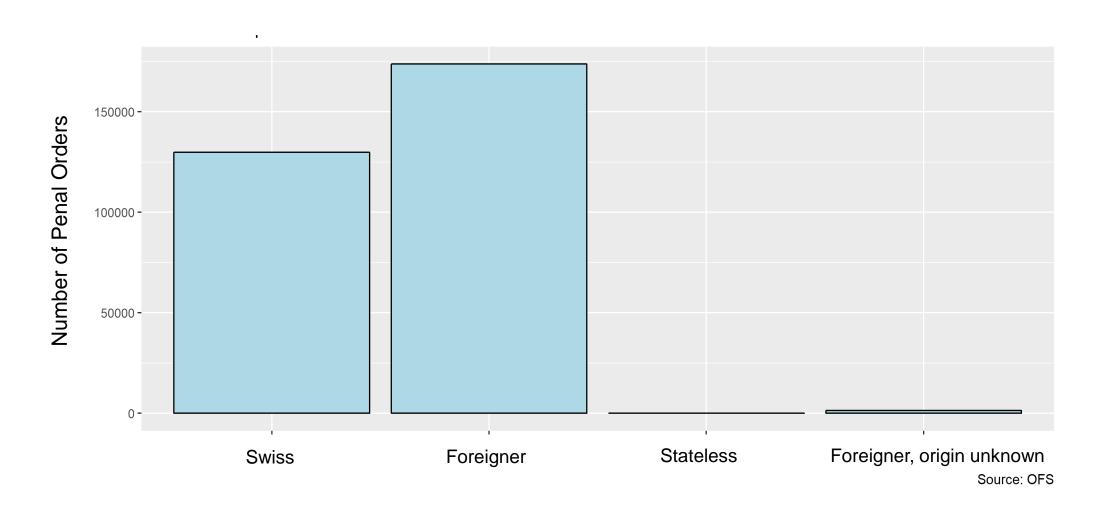


Age of Defendant

Source: OFS



Penal Orders by Nationality of Defendants





SNF – Project

2. In-depth analysis of penal orders 2014–2016 in selected cantons (Total: ca. 7000 cases)





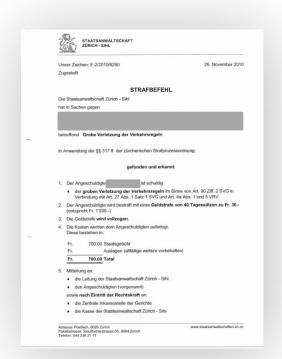
SNF – Project

llgemeines dressat	Beweislage
anktion	
osten	Beweislage 🥏
Ausgestaltung des SB	
Privatklägerschaft	oja onein Atemalkoholmessung
/erfahren	◯ ja
Beweislage	ja en in Tests von (und auf) Drogen, Medikamente, Alkohol
invernahmen	◯ja
Delikte	
	○ ja ● nein andere Gutachten (psychiatrische, physikalische etc.)
Einsprache	○ja nein eigene Wahrnehmung
Optionale Anmerkungen	○ ja ● nein andere eindeutige Beweise (spezifizieren)
Timeline	



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Trial Penalty

 A defendant ends up with a harsher sentence when he takes a case to trial.



Albert Alschuler



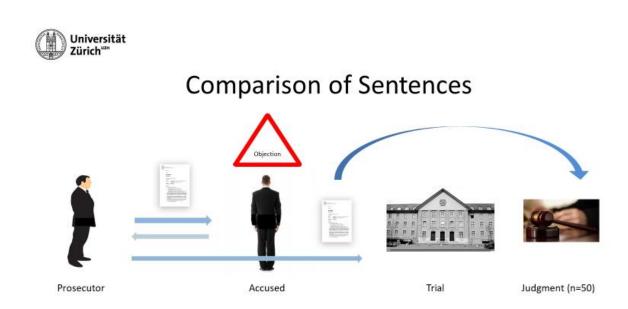
Trial Penalty





Trial Penalty in Switzerland

To test the trial penalty hypothesis, we looked at what happened to penal orders with prison sentences after they had been taken to court (n=50).



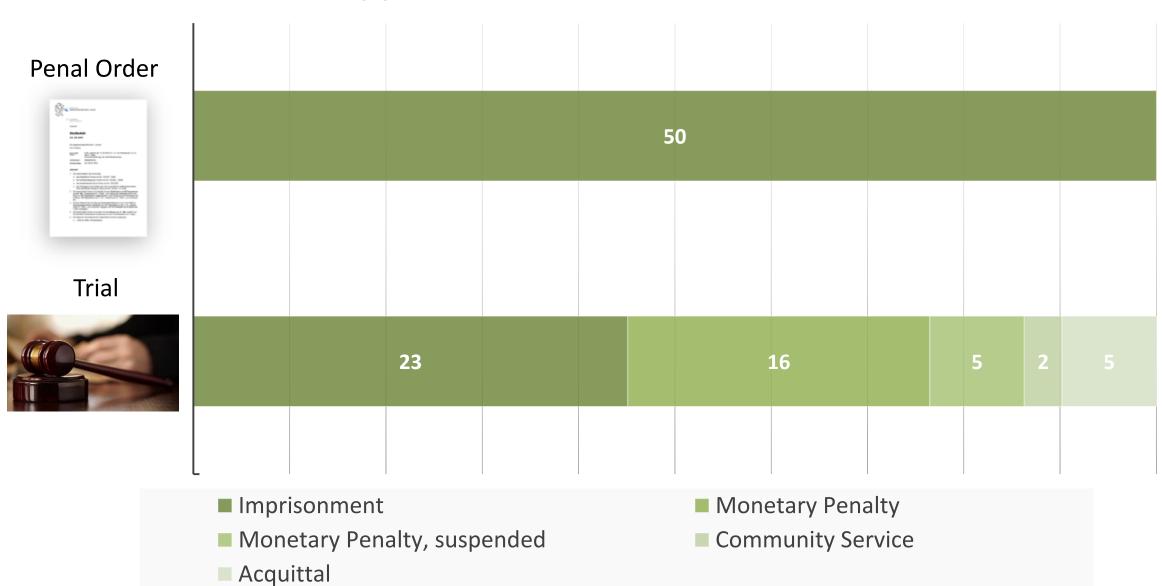


Why only 50 cases?

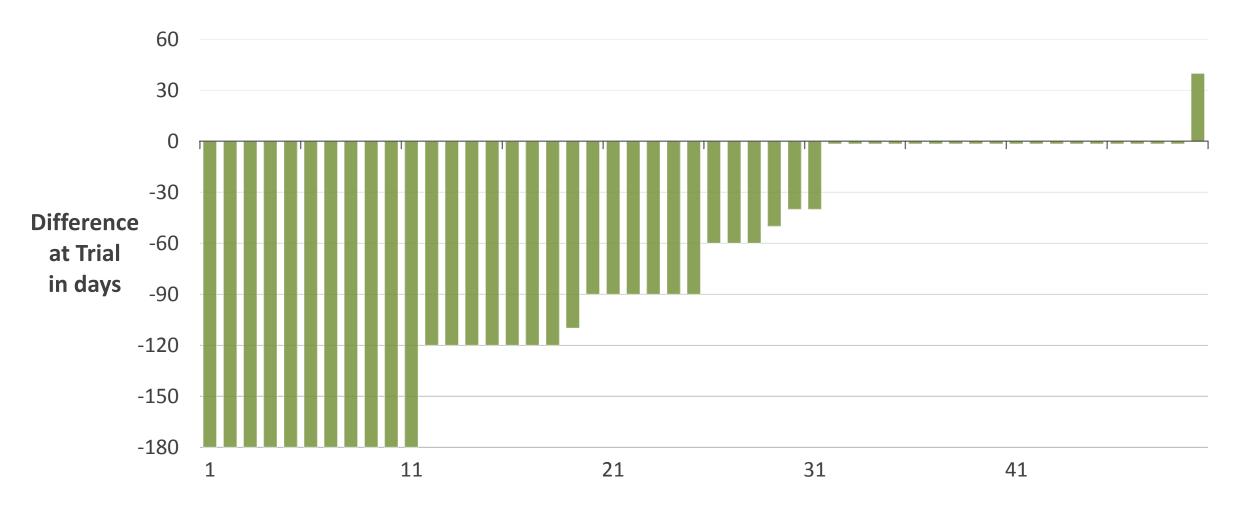
Penal orders	157'916
Felonies/Misdemeanors	29'485
Imprisonment	1954
Objections	209
Trials	103
Judgments	50



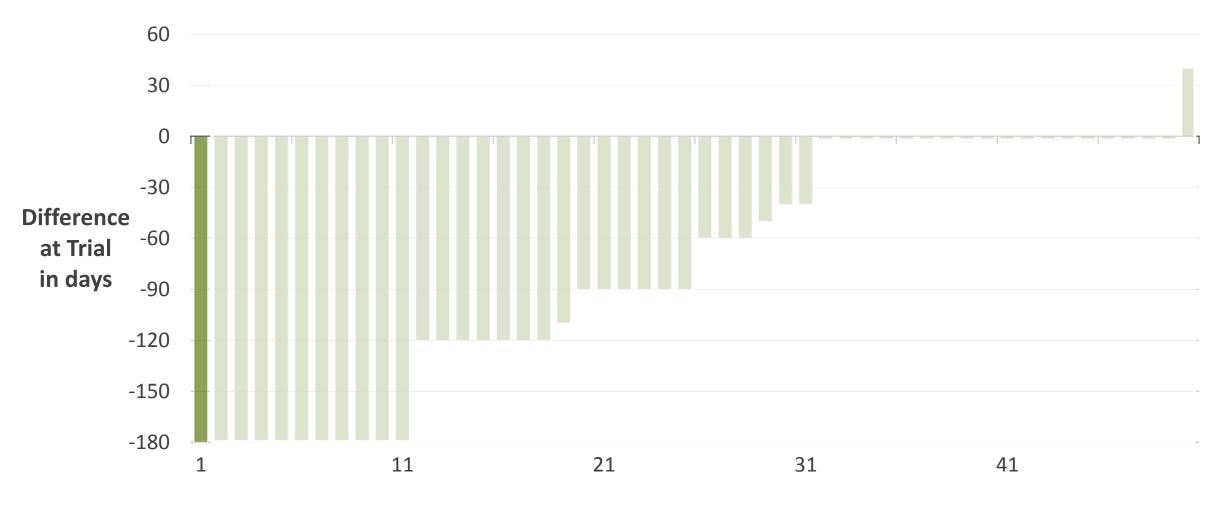
Type of Sanction (n=50)



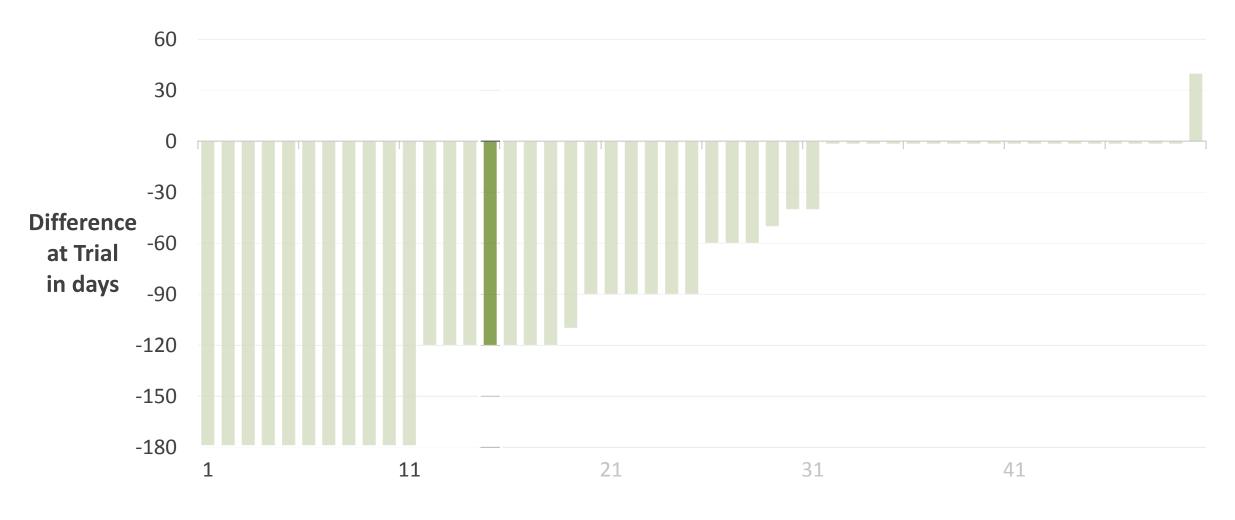




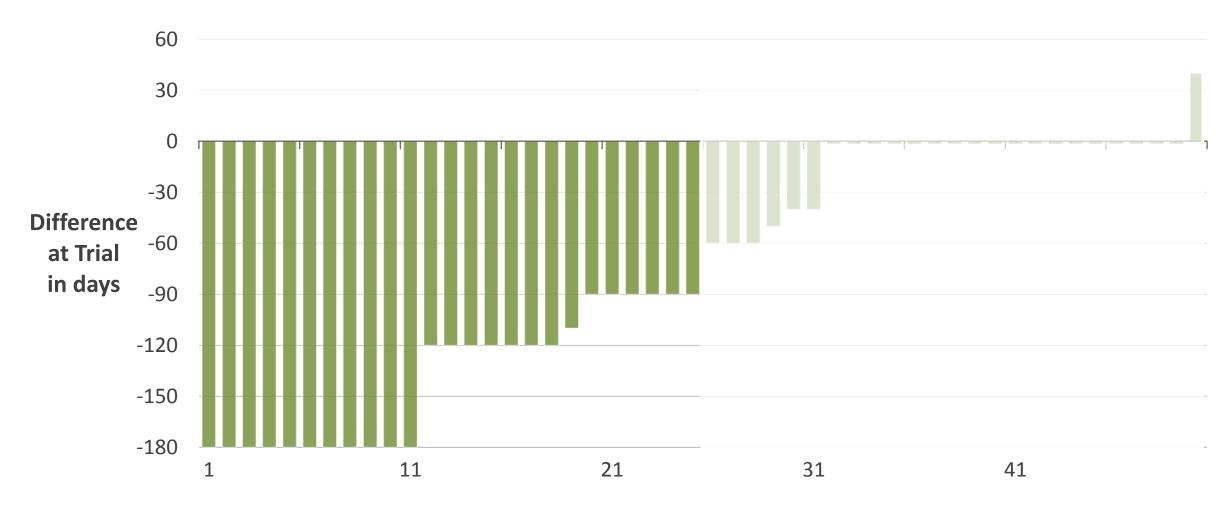








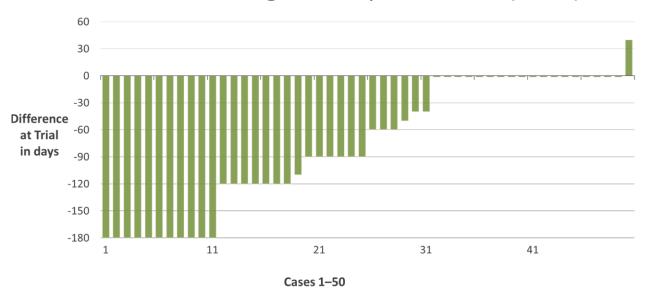






Summary

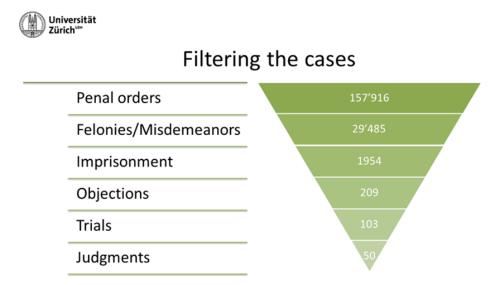
- Ø sentence reduction over *all 50* cases:
 - 75 days (± 10 days)
 - 63 percent (± 9 percent)





Methodological Remarks

- Selection bias: 90% of penal orders are accepted
- Problematic cases are more likely to be challenged
- N is small, but highly significant
- Sample only from one canton





Conclusions

- Trial Discount
- Should Prosecutors no longer be allowed to impose imprisonment in penal orders?
- ECHR: No landmark cases deal with imprisonment in penal orders







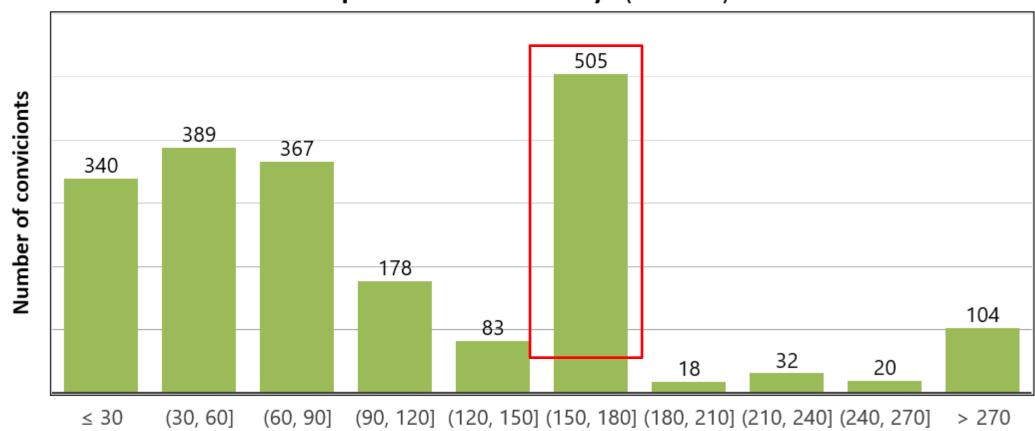
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Bargaining in Penal Orders?

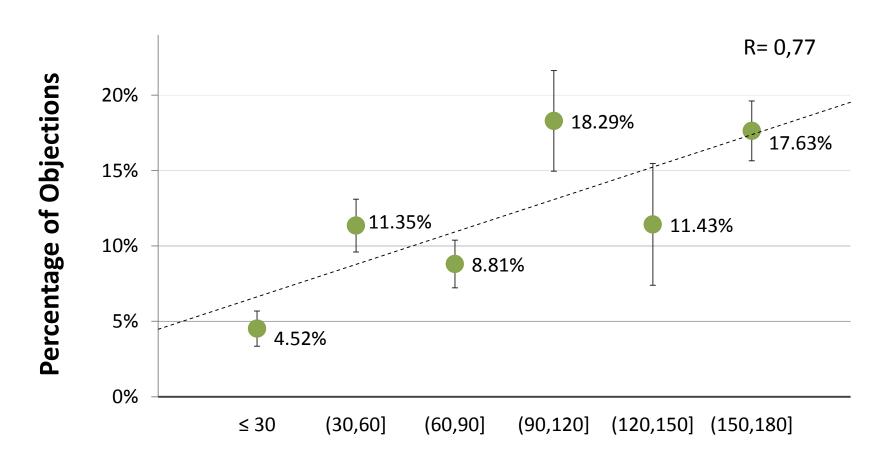
Imprisonment ≤ 360 days (n=2036)



Length of sentence in days



Objections ←→ Sentence Length

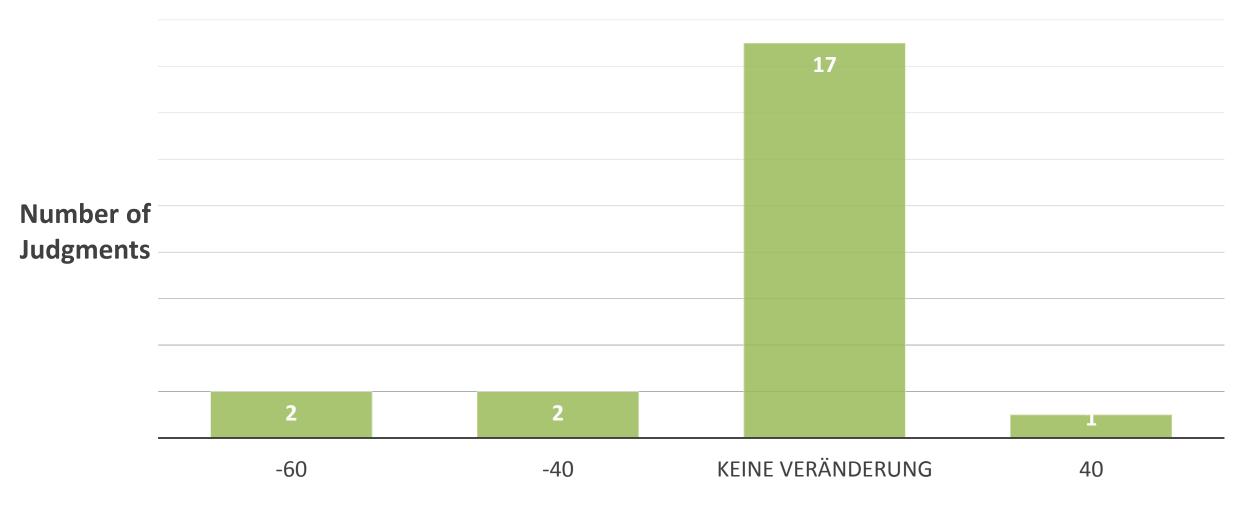


Overall Ø
Objections =
10,70 %

Length of imprisonment in days



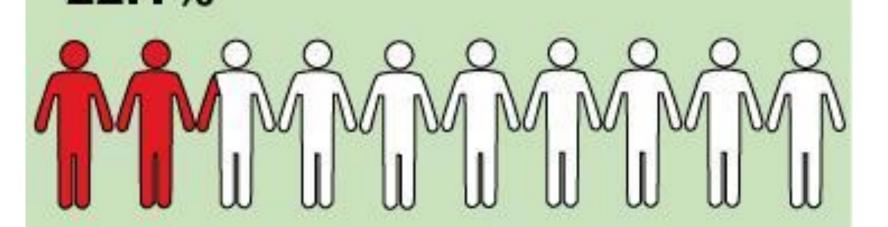
Imprisonment at Trial (n=22)



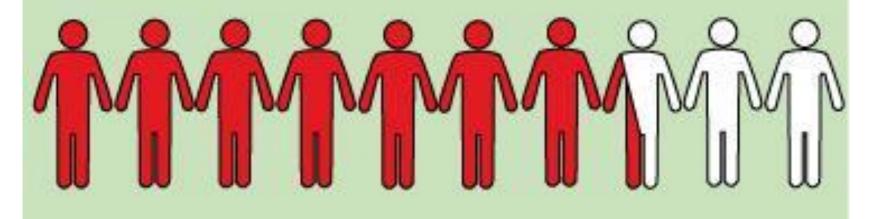
Difference in Length of Sentence compared to Penal Order



Percentage of Foreigners in Swiss Population 22.1%



Percentage of Foreigners in Swiss Prison Population 71.6%



http://www.immigration-massive.ch/



«Sanction-Strainer»

Crimes committed (10.000)

Crimes perceived: 10% (1000)

Crimes reported: 50% (500)

Crimes solved by police: 30% (150)

Crimes charged: 33% (50)

Convictions: 80% (40)

Prison: 66% (26)

Served: 23% (6)