MEMORANDUM
TO: The Pennsylvania House Judiciary Committee
FROM: Veronica Miller, Deputy Legislative Director, ACLU of Pennsylvania
DATE: November 10, 2025
RE: OPPOSITION TO HB 1909 P.N. 2387 (Davidson)

Bill summary: HB 1909 (PN 2387) mandates that if someone commits a criminal offense during the performance of a violation of a protection from abuse order, then the criminal offense will be graded one degree higher, up to and including a felony of the third degree.

While the intention of the legislation is laudable, HB 1909 moves the system in the opposite direction of fairness, proportionality, and decarceration. It replaces nuanced, individualized sentencing with a one-size-fits-all grading increase. It introduces mandatory minimum-style consequences under the guise of grading enhancements, disrupts established sentencing conventions, threatens to swell the incarcerated population, places additional strain on the public defense system, and injects constitutional and practical problems where none currently exist.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 1909.

HB 1909 Creates a De Facto Mandatory Minimum.

The bill mandates that if someone commits a criminal offense during the performance of a violation of a protection from abuse order, then the criminal offense will be graded one degree higher—up to and including a felony of the third degree. Although described as a grading enhancement rather than a traditional mandatory minimum term, its effect is to automatically increase severity of sentencing beyond what the original conviction would carry. This functions like a de facto mandatory minimum because the higher grade triggers higher sentencing ranges (even if the minimum term is not spelled out here), reducing judicial discretion and increasing risk of disproportionate punishment.

HB 1909 Disrupts Sentencing Conventions and Creates Proportionality Concerns.

Sentencing frameworks and guidelines are built on calibrating punishment to the seriousness of the offense, offender history, and mitigating/aggravating factors. A blanket upward-grading of offenses tied to a protective order violation ignores those nuances. Many offenses might be relatively minor in their underlying conduct but become subject to the higher grade simply because of the context (during a protection order violation). That elevates punishment in a way that may be disproportionate to the conduct. By modifying the grade rather than focusing on individualized assessment (risk, harm, culpability), the bill undermines the carefully developed sentencing conventions that aim to promote fairness, predictability and proportionality.

HB 1909 Places Additional Burdens on the Public Defense System.

Every time the General Assembly expands criminal or quasi-criminal penalties, it increases the workload of public defender offices, often without any corresponding increase in resources. Our public defense system must absorb the increased complexity, higher-stakes sentencing exposure, and heavier caseloads that result from such legislative expansions. More serious offense grades mean more resources required for effective defense (investigation, mitigation, plea negotiation, appearance in court, potential appeals). Without accompanying funding and structural support for public defenders, the risk is that counsel cannot adequately represent clients caught up in these more punitive regimes—especially indigent defendants. This threatens fairness, increases risk of constitutional challenges, and may lead to poorer outcomes.

HB 1909 Raises Constitutional Concerns under *Apprendi*[1] and *Alleyne*[2].

HB 1909 would increase the grading of a criminal offense by one degree if the defendant commits the offense while subject to a valid protection from abuse (PFA) order. This grading enhancement creates an *element-like* fact—the existence of an active PFA—that increases the maximum and minimum penalties. Under *Apprendi* and *Alleyne*, such facts must be treated as elements of the offense and proved to a jury beyond a reasonable doubt. By requiring courts to "grade the offense one degree higher" upon proof that a PFA was in effect, HB 1909 effectively raises the *maximum authorized punishment* for the same conduct. This makes the existence of an active PFA a *functional element* of the offense rather than a mere sentencing factor. **Accordingly, due process and Sixth Amendment rights require that juries, not judges, make that determination under the higher standard of proof.**

Proving the existence of an active PFA presents significant evidentiary and trial-management problems. Introducing evidence that a PFA existed risks inflaming the jury by suggesting prior misconduct, domestic violence, or abuse, even if unrelated to the current charge. To avoid mistrial or undue prejudice, the prosecution would likely need to bifurcate proceedings—one phase for guilt on the underlying offense and a second to determine whether the PFA was in effect. Any failure to properly bifurcate or instruct the jury could trigger *Apprendi*-based challenges, mistrials, or reversals on appeal, generating unnecessary burden on courts and counsel.

For these reasons, we urge you to oppose House Bill 1909.

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under *Apprendi*, any fact (other than a prior conviction) that increases the statutory maximum penalty must be submitted to a jury and proved beyond a reasonable doubt.

[2] *Alleyne v. United States*, 570 U.S. 99 (2013). *Alleyne* extended the *Apprendi* ruling to facts that increase the *mandatory minimum* sentence.