PROSECUTORIAL DISCRETION IN A TUMULTUOUS YEAR

A report on the impact of prosecutorial discretion on incarceration rates in Cook County

by Reclaim Chicago, The People’s Lobby, Chicago Council of Lawyers, and Chicago Appleseed Fund for Justice

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INTRODUCTION

When Cook County State’s Attorney (SA) Kim Foxx took office in 2017, she inherited one of the most punitive State’s Attorney’s Offices in the country. Over the last three-and-a-half years, SA Foxx’s administration has made significant progress toward ending the most damaging practices of the Cook County State’s Attorney’s Office. She has directed decreases in overall felony charging; dismissed or diverted more “non-violent,” low-level drug cases; increased the percentage of cases her felony review department rejects for prosecution; and reduced the total number of sentences of incarceration.

There is a growing movement of public interest organizations and community activists working to end mass incarceration by identifying ameliorative policies that can be enforced by police, courts, and--especially--prosecutors. In recent years, a wave of justice-focused prosecutors who are committed to implementing these policies have been elected across the country.

Since SA Foxx took office, The People’s Lobby, Chicago Appleseed, the Chicago Council of Lawyers, and Reclaim Chicago have produced reports monitoring how or if the policies and practices of the State’s Attorney’s Office (SAO) have produced a continual reduction in incarceration in Cook County. This report is the seventh in our series. You can find all reports at ThePeoplesLobbyUSA.org and ChicagoAppleseed.org. This report, like the others, discusses the performance of the Cook County State’s Attorney’s Office under Kim Foxx with regard to policies that can ameliorate mass incarceration. Unless otherwise noted, the data in this report derives from analysis conducted by Chicago Appleseed of the public, case-level data provided by SA Foxx, available at https://datacatalog.cookcountyil.gov/.

CONTINUED PROGRESS REDUCING THE NEGATIVE IMPACT OF MASS INCARCERATION AND THE CRIMINAL LEGAL PROCESS

Since our last report in February 2020 – just before the explosion of the COVID-19 pandemic – Kim Foxx has largely continued her office’s progress toward decarceration. The following graphs show trends in several key metrics that track the use of prosecutorial discretion by the Cook County State’s Attorney’s Office from the time before the Foxx’s administration took office through the present.

Overall, the number of felony charges filed has continued to fall during SA Foxx’s time in office, with a massive drop in felony charges recently due to the COVID-19 pandemic.¹
One of the main ways that Cook County prosecutors can regulate excessive felony charging is through the Felony Review process. During Felony Review, a prosecutor from the State’s Attorney’s Office reviews the evidence gathered by law enforcement and decides whether the evidence is sufficient to charge the case at that time. Felony Review attorneys can decide to approve charges, reject charges, or refer charges back to the police for continued investigation. Rigorous felony review is an essential check on law enforcement to make absolutely sure that cases only proceed if there is enough evidence of guilt that a person is reasonably likely to be found guilty at trial.

The State’s Attorney’s combined rate of “rejection” and “referral for continued investigation” has steadily increased during Foxx’s time in office, reaching an all-time high of 20% in April 2020.
State’s Attorney Foxx has made substantial progress in limiting one the most damaging aspects of the criminal justice system: incarceration. Since her tenure, the SAO has helped steadily decrease the number of people per month who are sentenced to terms of incarceration, which, in February 2020 reached the lowest number of prison sentences in a month.

Felony review rejects a substantial percentage of felony charges (14% in 2019) sought by officers for “non-violent” gun possession. Overall, though, the case type that SA Foxx’s office most commonly rejects for felony prosecution is retail theft, reflecting her announcement early in her tenure that the Cook County State’s Attorney’s Office would no longer prosecute low-level retail theft as a felony. (The SAO still prosecutes these thefts as misdemeanors.) Over time, however, law enforcement has learned that retail theft charges will often be rejected if they try to pursue them as felonies, and so the overall number of retail theft cases even brought for felony review has dropped by over 30%, from a high of 3,886 charges in 2016 to 2,629 in 2019—55% of which were rejected for felony prosecution.

The most commonly charged felony type in Cook County, however, is never subject to the Felony Review process. Felony narcotics allegations are allowed to be directly filed by law enforcement, though the number of these charges filed has also been falling throughout SA Foxx’s tenure in office.
Although Kim Foxx’s reforms continue to push Cook County in the right direction, there are additional steps her office should take to more fully and fairly implement the changes she has made in the office.

As noted above, police -- not prosecutors -- make the initial decisions about how to charge drug cases in Cook County. When non-lawyers (law enforcement officers) make the initial legal decisions about how to charge alleged offenses, the charging does not always reflect the actual seriousness of the case. This is particularly problematic in Illinois, because our state’s felony narcotics charges can easily be enhanced from low-level possession cases to serious narcotics delivery cases if police allege that the person they arrested had the intent to deliver drugs. Possession with intent to deliver is treated exactly the same as the actual delivery of drugs under Illinois law.

Determining whether someone had a specific intent is a complicated and subjective process that lawyers and courts often disagree on. Indeed, there are over 1,000 Illinois Appellate Court cases interpreting the phrase “intent to deliver a controlled substance.”

When police unilaterally determine whether to charge a case as possession or as “intent to deliver,” many people are charged with a much more serious crime than the ones they will ultimately be convicted of or plead guilty to.

Once Assistant State’s Attorneys (the prosecutors in individual courtrooms) review cases, they routinely reduce “Possession with Intent to Deliver” and “Delivery” cases to simple possession cases. During SA Foxx’s tenure, her Assistant State’s Attorneys have reduced the majority (61%) of Class X, 1, and 2 “Delivery” or “Possession with Intent to Deliver” to Class 4 possession charges.

However, eligibility for the most successful diversion programs—pre-plea diversion programs—is determined at the time of charging, not when a person pleads guilty. By relying on their own charging decisions, law enforcement is effectively allowed to gate-keep the State’s Attorney’s diversion programs. Class X and Class 1 “Delivery of a Controlled Substance” charges are almost never eligible for pre-plea diversion programs—they represented only 4% of the narcotics charges diverted to pre-plea diversion programs in 2019.

Even if Assistant State’s Attorneys ultimately determine that a person initially charged with “Delivery” should plead guilty to a simple possession charge, people with higher-level delivery charges by law enforcement are substantially more likely to go to prison than people who were charged with possession at the beginning of their cases.

SAO data shows that in 2019, people whose cases started as higher-level delivery charges and plead guilty to Class 4 drug possession charges were more than twice as likely to go to prison for a possession offense.

In 2016, Illinois decriminalized the possession of small amounts of marijuana before fully legalizing it on January 1, 2020. But the legalization of marijuana did not make any changes to the delivery—or the possession with intent to deliver—portions of the Cannabis Control Act. By allowing law enforcement to overcharge when they file drug cases, the unequal treatment of people of color in marijuana offenses goes unchecked—even now, after marijuana possession has been legal in Illinois for almost a year. By charging an individual with “Delivery” or “Intent to Deliver” cannabis, law enforcement can still charge a person with a felony.

Police in Chicago are well aware of this distinction; since 2017, law enforcement in Cook County has referred 2,614 felony “Delivery” or possession with “Intent to Deliver” cannabis cases to the State’s Attorney’s Office. Given the well-documented racism in marijuana arrests, it is unsurprising that 90% of the people arrested for this charge are Black or Latinx; 45% of them are 25 years of age or younger.

Marijuana possession is legal, and because of State’s Attorney Foxx’s stated prosecutorial policies, it is concerning that the Cook County SAO is still either prosecuting or diverting at least 45% of these cases. Of the cases not dismissed outright, 35% were sent to diversion programs—almost all to pre-plea programs. The other 65% went to felony sentencing, with 51% of people ending up on some form of community supervision and 49% given some sentence of incarceration, which was, on average, an excessive sentence of 5.4 months in jail.
These felony marijuana charges represent only a tiny percentage of the charges that move through SA Foxx’s Office each year, making up only about 2% of the cases initiated by the office since 2017. That fact makes it all the easier to institute and enforce an office-wide policy to fully stop prosecuting marijuana possession and to institute meaningful review of “possession with intent to deliver” charges early in prosecution, so that they can be considered for diversion or dismissal.

Recommendations
1. Create a plan to phase in felony review for all drug charges.
2. Create a system to automatically review any cannabis arrests before felony or misdemeanor charges are initiated, and dismiss all marijuana “possession with intent to deliver” cases.
3. Make all narcotics charges - including Class X narcotics charges - eligible for the same pretrial diversion program, so that CPD’s choice of charge does not limit participation in States Attorney’s Office programs designed to keep people charged with narcotics offenses out of jail and prison.

As noted, the Cook County State’s Attorney’s Office under Kim Foxx has maintained a downward trend in overall felony charging and has accelerated its efforts during the COVID-19 pandemic. Between April and June 2020, there was a huge decrease in felony charging, which coincided with a decrease in reported crime. There was a large decline in both reported crimes and the number of arrests in Cook County between April and June 2020. However, it was not only fewer arrests that sharply slowed the rate of felony cases. The SAO’s Felony Review Unit also increased the number of cases they rejected and declined to prosecute, reaching the highest rejection rate since 2011 in April 2020—during the height of the pandemic.

The three most common categories of charges that felony review rejected between April and June 2020 were non-violent charges: simple gun possession, non-residential burglary, and “Escape” from an Electronic Monitoring (EM) (which arises when a person previously released on EM allegedly violates the conditions of the program or is not in their residence when they are expected to be, but does not commit any other crime).
The use of felony review to stop almost 1,000 people from cycling through the Cook County Jail at a time when it was a major Coronavirus hotspot likely saved many people from becoming sick or worse. The State’s Attorney’s Felony Review team usually decides to prosecute approximately 80% of Escape charges that are brought to them by law enforcement, but between April and June of 2020, they prosecuted 47%.

Jail–community cycling was a significant predictor of cases of coronavirus disease 2019 (COVID-19), accounting for 55 percent of the variance in case rates across ZIP codes in Chicago and 37 percent of the variance in all of Illinois. Jail–community cycling far exceeds race, poverty, public transit use, and population density as a predictor of variance.

Throughout April, both detained individuals and jail staff alike reported insufficient access to soap, hand sanitizer, and face masks; in addition, improvised cloth face masks made by people in jail were confiscated. People were made to sleep in beds that were just two-to-four feet apart, many in dormitory-style housing where dozens shared a single room. At intake, individuals were held in “bullpens,” where multiple people are detained together for extended periods in a single cell. By April 27, Sheriff Dart had been ordered by a federal court to improve conditions in the jail and implement social distancing. By early May, there had been 7 deaths and over 500 diagnosed cases of coronavirus at Cook County Jail. At the time of publication, the Jail remains under Federal Court supervision for its inadequate response to the pandemic.

Between the lower number of cases Foxx’s State’s Attorney’s Office decided to prosecute through Felony Review and the quickly-dismissed drug charges, the SAO prevented hundreds of people from spending time in intake bullpens and the general population of the Jail, which helped keep the jail population low enough to allow social distancing measures that eventually slowed the spread of the epidemic behind bars.
SA Foxx’s response to the protests that erupted after the murder of George Floyd by police in May alleviated some of the consequences of the excessive crackdown by Chicago police. Despite consistent calls from the Mayor of Chicago, police, and the press to get “tough on crime” after thefts and burglaries in the Loop, the SAO refused to join in the blanket condemnation of protesters. Instead, the office issued a clear policy that allowed prosecution of property-related felonies – mostly burglary and retail theft charges – while still refusing to prosecute the huge number of protesters that Chicago Police arrested for lower level offenses during the weeks of protest.

Between May 29th and June 16th, Chicago Police made approximately 2,300 arrests that were related to protest activity. Although the Chicago Police claimed that a large number of those arrests were for looting, in fact, over 80% of the arrests were for what the CPD called “civil unrest”. The arrests were for low-level city ordinance and Class C misdemeanor cases of disorderly conduct, described in CPD reports as “assembly of greater than three persons and/or breach of peace.” Nearly 80% of the arrests in the first weekend were of Black protesters. These arrests were, reportedly, often made after the actions of city government and the CPD made it nearly impossible for some protesters to avoid breaking laws and curfews: on May 30th, the curfew order was announced just twenty minutes before it took effect and much of the CTA was closed - it was simply impossible to avoid breaking the law.

State’s Attorney Foxx announced a plan on June 30th to not prosecute these cases, and has drawn criticism from police and the Mayor for her policy to only prosecute felonies and misdemeanors that related to theft or substantial property damage. Prosecutors are charged with finding the truth in order to do justice, not with prosecuting every person the police feel entitled to arrest, regardless of cause. Final disposition of a large portion of protest-related cases is still pending, but State’s Attorney Foxx should be commended for pushing back publicly on the worst excesses of CPD’s crackdown on protests.

As 2020 has continued to bring upheaval to Chicago, the criminal courts have ground to a halt. After an aggressive effort to decrease the jail population in late April or early May, during the height of the COVID-19 outbreak, decarceration efforts have largely stalled. As a result, the jail population is steadily rising. One cause is a backlog in case processing. The criminal courts are massively behind schedule in resolving cases as a consequence of the delays and shifts in how courts have been able to proceed in the midst of COVID-19. This is unsurprising given that the courts were restricted to emergency motions for the majority of April, May, and June, but it still causes serious issues, particularly when it comes to reducing jail and EM populations. It is important to note the scale of the problem.

Looking at the State’s Attorney public data, in a “normal” year (2018-2019), the Cook County Criminal Courts enter an average of 6,966 case dispositions between April 1 and June 30. These include dismissals, guilty pleas, and trials. In 2020, the courts resolved only 477 cases – about 7% of their usual total. The courts have been closed for jury trials since the COVID pandemic began, and in April, May, and June, most courtrooms heard only emergency matters that did not involve calling witnesses.

Still, it is not only the lack of trials that has caused this drastic drop in case resolutions. Throughout the court’s closure, judges have been ordered to accept guilty pleas and case dismissals, which can easily happen in short court proceedings over zoom. Guilty pleas usually constitute about 63% of case resolutions. Between April-June 2020, there have been only 138 guilty pleas - only 29% of the total dispositions in those months, and 96% fewer pleas than were completed on average in April, May, and June in previous years.

There are, of course, fewer cases starting in the courts as well during the pandemic, but the
This many people locked up in the jail creates an incredibly dangerous situation for people inside. As of September 14, the jail population was 5,360 people — as high as it was during the height of the outbreak. If and when COVID is reintroduced to the jail, the higher population will make social distancing much harder and accelerate the spread of the virus.

SA Foxx’s office did not cause the problem of courts closing or limiting proceedings in response to COVID, but the SA’s office has the ability to ameliorate this situation by identifying cases where individuals need to be released from custody or have their cases resolved, getting people out of the jail as quickly as possible to avoid another catastrophic outbreak.

This failure to resolve cases is also an issue of justice. American courts must provide accused people with a speedy trial — a reasonably prompt resolution of the charges against them - according to the Constitution. Normally, that right is safeguarded by a set of speedy trial laws that put strict time limits on prosecutors and require them to take cases to trial within 4-6 months if the defendant requests it. At the beginning of the pandemic, the Illinois Supreme Court suspended these laws, citing the dangers

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OPPORTUNITIES FOR ADDITIONAL STEPS TO ADDRESS THE CRISSES CAUSED BY COVID-19, CONT...

of holding trials – and particularly jury trials – in the height of a global pandemic. But the right to a speedy trial cannot simply be discarded forever. It is an important procedural safeguard: it helps make sure that people are not left jailed for too much time while awaiting trial, and it also makes sure that cases are decided while evidence is still relatively fresh, and particularly when witnesses, both police officers and civilians, have fresh memories of what happened. Jurisdictions around the country are slowly experimenting with safe ways to conduct criminal trials, and Cook County needs to seriously consider safe, just options to preserve the rights of accused people.

Whether or not trials can proceed, however, the vast majority of cases in the system can still be finalized. Only 9% of cases that end in a conviction or acquittal actually go to trial. The vast majority of people plead guilty and almost half of them (44%) plead to probation sentences, not incarceration. The courts have been open for plea negotiations since July 1. All stakeholders need to come together to quickly catch up on the backlog of cases detaining the people currently languishing in jail pretrial.

SA Foxx’s office is in the best position to accelerate the resolution of these cases. Her office has access to the best case information of any system actor, and her deputies wield the majority of the negotiation power in plea discussions. Allowing Assistant State’s Attorneys to simply proceed slowly, case-by-case, has been and will continue to be ineffective with the backlog of thousands of cases. A top-down approach is needed to identify cases ready for resolution, have the necessary discussions with lawyers and individuals charged with crimes, and bring the cases into court. If thousands of cases are allowed to languish for too long, when the long-hoped-for end of the COVID-19 crisis does come and court resumes in-person, the courts will face a flood of trials and resolutions to complete on top of the new cases that will continue to enter the system. SA Foxx has the opportunity to lead the way in planning ahead for this eventuality and organize her office to quickly and justly resolve as many cases as possible.

Additionally, although SA Foxx’s efforts to charge fewer low-level cases and avoid jailing newly arrested people have led to real improvements in criminal justice outcomes, SA Foxx’s office has had a mixed record in implementing decarceration efforts for people already in jail when the pandemic started. Although the SAO cooperated with other stakeholders in attempting to identify people who should receive bond reductions and be released from jail during the pandemic, it seems there was some inconsistency in how, or if, the SAO followed through on their commitment to free people from the jail during the outbreak.

Over the first month of emergency release hearings, according to data kept by the Public Defender’s Office (though disputed by the State’s Attorney12), the SAO agreed to only about 20% of the requests for release made by public defenders.13 Defense attorneys reported to advocates that many States’ Attorneys in the courtrooms opposed the release of their clients even after officials in SA Foxx’s executive office had agreed that the person should be released. Although SA Foxx expressed a desire to agree to release anyone who did not pose a serious threat to public safety, her office appears to have fallen short in delivering on that promise.
Recommendations

1. SA Foxx should consider proposing solutions to fast-track open cases to reduce the court's backlog of dispositions. Some strategies could include:
   a. Identifying cases ready for plea negotiations and placing them in the hands of a team of ASAs charged with expediting those resolutions;
   b. Reviewing ASA caseloads for low-level charges that would be eligible for dismissal or diversion programs;
   c. Calling on judges to conduct bench trials, motion hearings, and other court business now that it can be made safe to do so, and calling for any additional resources needed from the county to make trials, pleas, and dismissals possible.

2. SA Foxx should re-review the bond status of everyone in the Jail and coordinate with defense counsel to bring agreed motions for release on any person who does not pose a serious risk to someone else’s safety if released.

3. SA Foxx should take steps to ensure that future decarceration initiatives are clearly and fully communicated to and expected from front-line staff.

REFERENCES

1. In all the graphs in this section, the red line represents January 2017, when Kim Foxx took office.
2. Because a referral for continued investigation still constitutes a judgment that evidence is not sufficient to charge, we treat it as analogous to a rejection. Some cases that are referred back for consideration are eventually re-submitted to felony review and charged; these graphs only show the initial decision of the States’ Attorney’s Office.
3. See Lexis Nexis results for the headnote that reads: “Intent of delivery is rarely subject to direct proof. Consequently, such intent must usually be proven circumstantially. This issue, therefore, necessarily involves an examination of the nature and quantity of circumstantial evidence needed to support an inference of intent to deliver…Whether an inference of intent is sufficiently raised is a determination that must be made on a case-by-case basis after a careful review of the circumstances surrounding the defendant’s arrest.
6. Injustice Watch Cook County Jail Coronavirus Tracker, updated September 11, 2020. Available at: https://datastudio.google.com/u/1/reporting/1AI4THiXJ_6Nt-9NXwE0MfO_DUaa1Koxi/page/hcyJB
8. It should be noted that in a large number of the arrests were for breaking city ordinance violations like curfews, not for breaking Illinois Law. The SA’s office doesn’t prosecute ordinance violation cases, and the city has not adopted a office-wide policy of dropping these cases. The city should follow SA Foxx’s example.
10. These data were calculated from monthly spreadsheets of all people leaving the Sheriff’s custody, obtained by FOIA request by Injustice Watch, who provided them to Chicago Appleseed for this analysis.
11. The Jail population was 5,355 on March 24, 2020. https://datastudio.google.com/u/1/reporting/1AI4THiXJ_6Nt-9NXwE0MfO_DUaa1Koxi/page/hcyJB