

DECARCERATING COOK COUNTY:

Use of diversion programs for low-level, “non-violent” felonies increased substantially under State’s Attorney Kim Foxx compared to Anita Alvarez

*by Reclaim Chicago, The People’s Lobby,
Chicago Council of Lawyers, and Chicago
Appleseed Center for Fair Courts*

Released March 2021

INTRODUCTION

In November of 2020, Cook County State's Attorney (SA) Kim Foxx was elected to serve her second term. When SA Foxx first took office in 2017, she inherited one of the most punitive State's Attorney's Offices in the country; SA Foxx's administration has made significant progress toward ending some of the most damaging practices of the Cook County State's Attorney's Office (CCSAO). While issues remain with Cook County's approach to prosecution, the CCSAO under Kim Foxx's leadership has reduced overall felony charging; dismissed or diverted more "non-violent," low-

level cases; increased the percentage of cases rejected for prosecution; and limited sentences of incarceration.

The People's Lobby, Chicago Appleseed Center for Fair Courts, the Chicago Council of Lawyers, and Reclaim Chicago have monitored the policies and practices of the State's Attorney's Office since 2017. This report is the eighth in our series and discusses the performance of the Cook County State's Attorney's Office under Kim Foxx, specifically in relation to the CCSAO's use of diversion.¹

DIVERSION PROGRAMS IN COOK COUNTY

Diversion courts are a form of criminal justice that allow defendants to avoid the traditional process of a trial or plea, conviction, sentence, and life-long record of system involvement. Typically, diversion courts are intended to focus on rehabilitation instead of punishment and seek to remedy the circumstances that caused the individual to get arrested in the first place; they require the participant to complete certain programming and/or achieve certain benchmarks before they can, essentially, "graduate" from the program. After graduation, diversion programs offer some less serious consequences than traditional courts. These outcomes can range from outright dismissal of the case to simply avoiding prison and receiving probation instead.

Most diversion programs are targeted at defendants with particular charges or particular needs. Cook County has both pretrial and post-plea diversion programs. Pretrial ("pre-plea") diversion programs allow participants to complete the program requirements without pleading guilty to the charges; "post-plea" programs require that the person plead guilty to allegations but allows them to complete a term of probation, instead of imprisonment,

and allows a judge to vacate the conviction upon successful completion. In the Cook County Circuit Court system, there are diversion programs aimed at people with substance use disorders, veterans, allegedly engaged in sex work, with mental health needs, and more. By separating diversion courts into these categories, programs seek to address specific or unique needs of participants; the hope is that by filling that need, the person can avoid further contact with the criminal legal system.

Diversion courts and programs in Cook County are administered by either the State's Attorney's Office or the Court itself, but in all cases, State's Attorneys determine who is and is not eligible, subject to certain state laws. Not all people charged with low-level drug possession are referred to the drug crime diversion programs, not all veterans to veterans' court, and so on. State's Attorneys have substantial discretion in deciding whose case gets diverted and who must continue through the traditional criminal legal process. As with all discretion, State's Attorneys have a choice: they can use their discretion in a way that makes the criminal justice system more equitable, or they can cement existing inequalities.

BENEFITS OF DIVERSION

Diversion programs have become a popular court reform measure for a number of reasons. First and foremost, diversion can effectively reduce harm caused by permanent felony convictions and incarceration. Upon successful completion of a diversion program, participants' charges are dismissed or vacated. This is a critical step in improving life outcomes of justice-involved people because of the devastating consequences—most notably limiting a person's ability to find housing or employment—that convictions can have on individuals, their families, and whole communities. By vacating convictions after successful completion of the program—or never issuing convictions at all—diversion programs can help avoid saddling people with long-term stigma, criminal justice debt, or with the myriad harms of pretrial incarceration.

Some advocates of diversion programs note that the services provided to defendants make them less likely to be arrested in the future and more likely to live successful, fulfilling lives. Sometimes, these programs give access to and funding for the treatment of substance use disorders and mental health conditions that individuals would be unable to access otherwise.

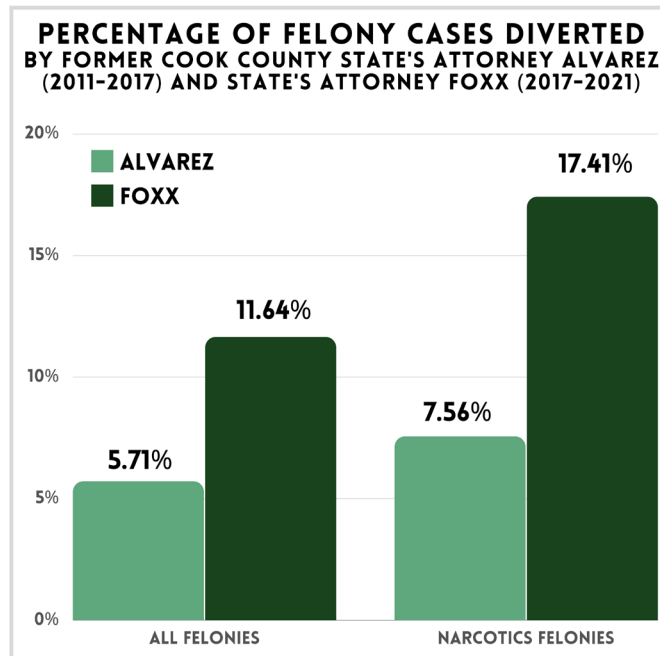
Diversion courts often save jurisdictions money. In 2010, findings by Chicago Appleseed Center for Fair Courts (formerly Fund for Justice) and the Chicago Council of Lawyers showed that, specifically in Cook County, taxpayers could save \$4,750 per diversion court participant over a five-year period as a direct result of the costs associated with recidivism in traditional courtrooms; with 4,000 participants per year for five years, the projected savings is \$20 million.²

INCREASED USE OF FELONY DIVERSION PROGRAMS IN COOK COUNTY

Since SA Foxx was elected in 2016, the State's Attorney's Office has increased the total number of people sent to diversion programs.

Though the majority of felony charges remain ineligible for diversion, the CCSAO under SA Foxx has increased the percentage of felony charges sent to diversion programs by 30% compared to her predecessor, Anita Alvarez. The change is even more dramatic among narcotics charges, where SA Foxx's Office has more than doubled the percentage of narcotics cases sent to diversion programs.

The variety of charges eligible for diversion has also expanded. The State's Attorney's Office has allowed more than 50 people charged with more serious crimes, such as burglary and gun possession, into Veterans' Court and Mental Health Court, two of the longest-standing, most highly structured post-



plea diversion programs in Cook County. Under the Alvarez administration, there were strict rules, set by both law and internal policy, that prevented people charged with serious offenses from accessing these diversion programs. State laws have expanded diversion eligibility, and SA Foxx has quickly implemented those new rules to make diversion programs more accessible.

Mental health treatment in prisons is often inadequate, when it exists

at all, and prison itself tends to worsen mental illness and substantially increases the likelihood of a person being arrested in the future.³ Allowing people charged with serious crimes into diversion programs, where they can get services and help, prevents them from serving long prison sentences that only exacerbate mental health conditions. Mental health diversion courts can provide access to support and care, reducing risk factors for re-arrest.⁴

A. ADDRESSING RACIAL DISPARITIES IN DIVERSION PROGRAMS

Black people are disproportionately denied access to diversion programs. White defendants, by contrast, are over-represented in diversion programs. When looking at the State's Attorney's data for the one hundred most commonly diverted charges from 2011 to 2020, Black people represented 66% of people charged with those offenses, but only 54% of the people diverted from those charges. Conversely, white people only comprised 15% of the total people charged with those offenses, but 28% of the diverted population.

This racial disparity happens for a number of reasons. The first is simple: our criminal legal system has proven time and again that it targets and overly punishes Black, Indigenous, and Latinx people. Judges and other court players are more often lenient with white defendants than with Black people.⁵ Another less obvious, institutional source of the racial bias in diversion programs are the stringent criminal background rules that act as a gatekeeper. Even if a person's current arrest is for the lowest level of felony (i.e., "Possession of a Controlled Substance" or "Delivery of Cannabis"), if they have been convicted of any crime in the past, they are ineligible for certain diversion programs including Drug School, the Deferred Drug Prosecution Program, and "Branch 9," which deals

mostly with retail theft cases; if the conviction was for a "violent offense" in the last ten years, they are ineligible for even more. In Cook County, Black people account for 66% of the felony convictions in the last ten years, even though Black people make up only 23.8%⁶ of the Cook County population. When criminal history is enough to deny individuals even a chance to participate in diversion programs, the negative impact falls disproportionately on Black Chicagoans.

Kim Foxx has made significant progress in making sure her State's Attorney's Office improves access to diversion programs for Black people, but there is more work to be done. Since taking office, the Cook County State's Attorney has increased the proportion of Black participants in diversion programs from 48% to 56%, but that percentage is still below the percentage of Black people charged with and convicted of felonies in Cook County.

SA Foxx has done this, primarily, by diverting "Possession of a Controlled Substance" (PCS) charges. Black people, particularly young Black men, are disproportionately arrested for PCS—even though national data shows that people of all races use drugs at approximately equal rates and white people are most likely to sell them.⁷

B. SHORTER DIVERSION PROGRAMS WITH HIGHER SUCCESS RATES

Not all diversion programs are created equal, and any given diversion program—if not implemented carefully—can exacerbate some of the very problems it purports to solve.

State's Attorney Foxx's diversion team has helped reduce the permanence of some felony convictions and limit total time of involvement with the justice system by implementing shorter programs with higher success rates.

In Cook County, there are two fundamental kinds of diversion programs: pretrial and post-plea. Pretrial, or pre-plea, diversion programs allow people to complete the program instead of the traditional pretrial process—and without ever officially pleading guilty to the charges of which they are accused. Post-plea programs, on the other hand, require that the person plead guilty to crime(s), but also gives them the ability to complete the program to either (a) avoid prison when they

may have otherwise been incarcerated, or (b) complete a term of probation that allows a judge to vacate their original conviction upon successful completion of the diversion program terms.

Post-Plea Diversion Programs can help people avoid prison time, but at a cost. These often require a significant amount of total contact with and surveillance by the legal system. During the period of time that participants are in the program, they have a felony conviction on their record and can be reincarcerated for a violation of the program's rules at any time. Usually, there are monthly court progress dates in addition to the required programming, which can cause significant hardship for people in terms of employment, schooling, or taking care of children. There are currently four post-plea diversion programs in Cook County based on the needs of participants:

B. SHORTER DIVERSION PROGRAMS WITH HIGHER SUCCESS RATES, CONT...

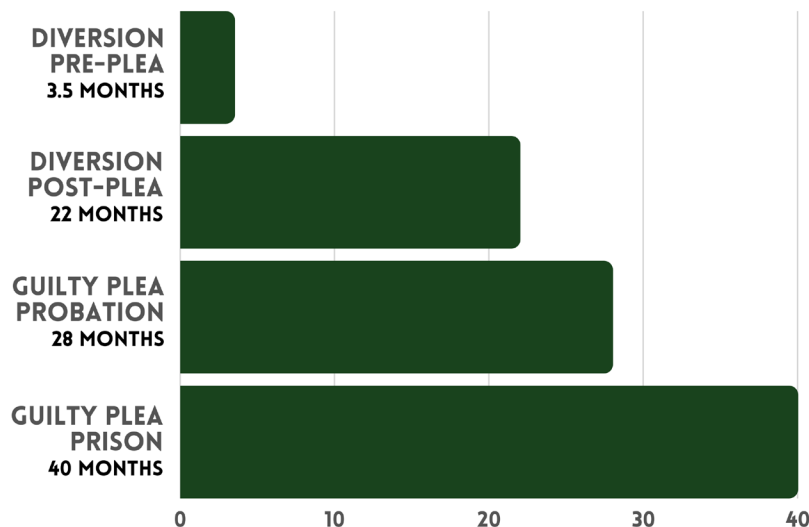
- *Drug Treatment Courts* are 18-to-24-month programs that accept individuals with substance use disorders charged with “non-violent” felonies. These courts require participants to engage in alcohol and drug treatment—and often require that some period of that treatment is completed either inside the Cook County Jail or at an inpatient facility before the person is released on probation into their community. Participants must also be regularly drug tested and refrain from using any unprescribed substances during their time involved with the court.
- *Mental Health Courts* are 24-month programs open to individuals with “non-violent” felony charges and a psychiatric diagnosis. These programs require people to comply with mental health treatment and medication prescribed by their doctors.
- *Veterans’ Courts* are 24-month programs open to people charged with “non-violent” felonies who have served in the military and have not been dishonorably discharged.

Pre-Plea Diversion Programs, on the other hand, never create a felony conviction record and people generally do not risk reincarceration during the term of the program.

These programs can last anywhere from 2 months to over a year. Individuals are eligible for them solely at the discretion of the State’s Attorney’s Office. There are three main pre-plea diversion programs operating in Cook County:

- *Drug Deferred Prosecution Program (DDPP)* for Class 4 “Narcotics Possession” and Class 4 “Cannabis Distribution” charges that provides that charges are dismissed after a participant undergoes a substance use assessment and receives recommendations for community treatment.
- *Branch 9 (also called the Felony Deferred Prosecution Program)* is a 12-month program for people who are charged with their first felony. The program focuses primarily on “non-violent” theft and retail theft charges.
- *Restorative Justice Community Court*, the newest diversion program established by State’s Attorney Foxx and the Circuit Court of Cook County, targets 18-to-26-year-olds in specific “high-need” areas to pursue community-led peace circles in lieu of prosecution in order to determine how to address harm caused by crime. Once a participant completes the requirements set out by the peace circle process they participated in, charges are dismissed.

AVERAGE LENGTH OF TIME FROM ARREST TO END OF DIVERSION OR SENTENCE CLASS 4 POSSESSION OF CONTROLLED SUBSTANCE CASES IN COOK COUNTY FROM 2013-2020



Compared to the typical legal process for the same charges, all diversion programs minimize the total time a person must be under the supervision of the criminal legal system. Pre-plea programs, though, offer a more effective option than post-plea programs in terms of minimizing the amount of time someone must remain involved with the system and mitigating the consequences of that involvement.

Keeping felony charges off a person’s record is an important benefit of post-plea diversion programs, but on average, these programs in Cook County are only 6 months shorter (22 months total) than the average length of a PCS case that ends in a plea of guilty for regular probation (28 months). Pre-plea diversion programs, on the other hand, can limit the total length of time someone is involved in the criminal system for a PCS case to only 3.5-months.

B. SHORTER DIVERSION PROGRAMS WITH HIGHER SUCCESS RATES, CONT...

Pre-plea diversion programs also have substantially higher success rates than post-plea diversion programs. Since 2011, 82% of pre-plea diversion participants (for whom either graduation or failure was recorded) graduated successfully from the program, whereas only 49% of post-plea diversion participants did.

During her tenure as State's Attorney, Kim Foxx has improved the use of pre-plea diversion programs, allowing more people to avoid felony

charges in efficient programs that minimize the impact of the criminal legal process on their lives. The use of pre-plea diversion programs increased from 58% during Anita Alvarez's administration to 66% under SA Foxx's administration. By allowing more people access to this more efficient and more successful form of diversion, the current CCSAO has helped more people avoid lengthy involvement with the criminal system.

NEXT STEPS & RECOMMENDATIONS

The State's Attorney's Office has been successful in utilizing diversion programs, particularly for low-level narcotics cases. Still, the Office could do more to ensure that all people arrested have equitable access to these programs—particularly those people charged with possessing narcotics or cannabis.

1. END NARCOTICS OVERCHARGING

In Cook County, police – not prosecutors – make the initial charging decisions for narcotics cases. When law enforcement officials (rather than lawyers) make legal decisions about how to charge people after they have made an arrest, the charges often do not reflect the actual seriousness of the case.⁸ This is particularly problematic in Illinois, because our state's felony narcotics charges can be easily 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 given intent is a complicated and subjective process on which lawyers and courts often disagree. Indeed, there are over 1,000 Illinois Appellate Court cases interpreting the phrase "intent to deliver a controlled substance."⁹ When police unilaterally determine whether to charge a case as possession or as "Intent to Deliver," many people end up facing much more serious charges than the ones they may ultimately be convicted of or plead guilty to.

2. MORE CHARGES ELIGIBLE FOR DIVERSION

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. Once State’s Attorneys in Cook County review cases, they routinely reduce “Possession with Intent to Deliver” and “Delivery” cases to simple possession cases. During SA Foxx’s tenure, her State’s Attorneys have reduced 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—is determined at the time of charging, not when a person pleads guilty. Law enforcement is effectively allowed to gatekeep the State’s Attorney’s diversion programs when charging decisions are made by police.

Class X and Class 1 “Delivery of a Controlled Substance” charges should be eligible for pre-plea diversion programs. This will allow more people to benefit from pre-plea diversion and will make it easier for the State’s Attorney’s Office to reduce the continuing racial disparity in diversion. Even if State’s Attorneys ultimately determine that a person charged with “Delivery” may 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 those charged with possession from the beginning. Cook County State’s Attorney data shows that in 2019, people whose cases started with 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.

3. STOP PROSECUTING MARIJUANA ALLEGATIONS

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 legalized. By charging someone with “Delivery” or “Intent to Deliver” cannabis, law enforcement can still bring felony charges against a person. 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.

Police in Chicago are well aware of this distinction; since 2017, law enforcement in Cook County have referred 5,540 felony “Delivery” or “Possession with Intent to Deliver” cannabis cases to the State’s Attorney’s Office. Given the well-documented racist bias of marijuana arrests, it is unsurprising that 87% of the people arrested for this charge are Black or Latinx, and 40% of them are 25-years of age or younger.

Marijuana possession is legal, and because of State’s Attorney Foxx’s stated prosecutorial priorities, it was surprising to find that the CCSAO is only dismissing 56% of these cases and is still either prosecuting or diverting at least 44%. Diversion is a better outcome than prosecution but is still more burdensome than the full dismissal of charges, and thus is not an appropriate outcome for the possession of a substance that has been legalized. Of the cases not dismissed outright, 53% were sent to diversion programs—almost all to pre-plea programs. The other 47% went to felony sentencing, with about half of the people ending up on some form of community supervision and the other half being 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 1.5% of the cases that have been initiated by the Office between 2017 and 2020. 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 more can be dismissed.

4. GROW DIVERSION DURING THE COVID-19 PANDEMIC

State's Attorney Kim Foxx has made diversion programs in Cook County more available and equitable during her tenure, but COVID-19 has seriously disrupted the operation of these programs. Since the beginning of the pandemic, a substantial number of people who may likely be eligible for diversion have been left subject to pretrial conditions and in limbo, with their cases still pending in the courts. Because the cases are low-level and the people charged are mostly out of custody (not in jail), these cases are lowest on the priority list for resolution as the courts start up again. However, it is precisely because these cases are low-level that the CCSAO can find a way to quickly identify and expeditiously dismiss those that would have been diverted in a normal year.

COVID-19 disrupted the diversion process primarily because of practical obstacles. The CCSAO's pre-plea diversion programs have traditionally required an in-person meeting between the potential participant and the coordinator of the program, sometimes between the person's appearance in Bond Court and their Arraignment about 30 days later. But because bond hearings have mostly moved to Zoom (the virtual teleconference platform), these in-person meetings have not been possible and referrals for diversion programs have essentially ground to a halt. This was understandable in the early days of the pandemic, but as the year continued, diversion referrals did not rebound as quickly as arrests for divertible cases.

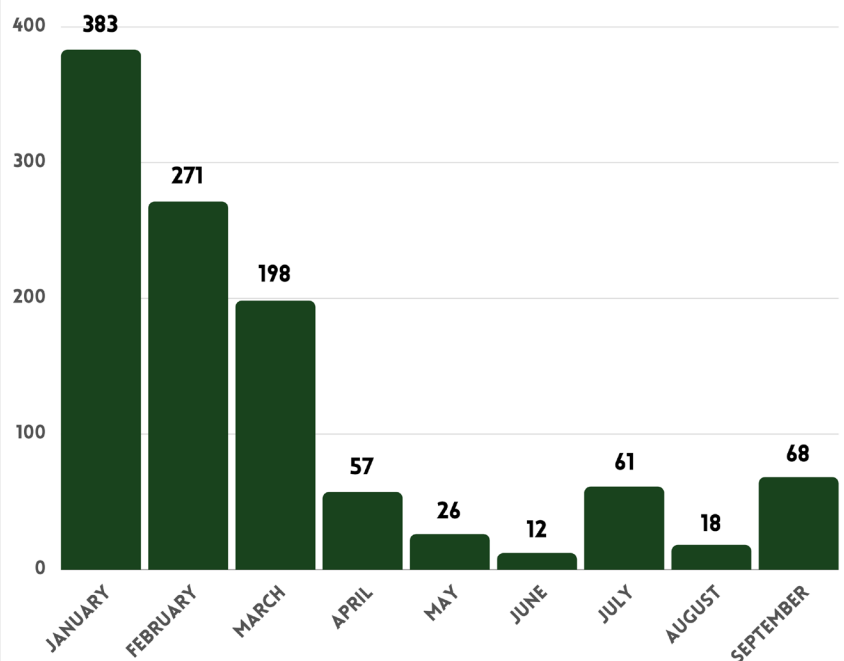
Overall, the SA's Office diverted only 8% of commonly diverted cases in 2020, as opposed to 19% in 2019.

Although the number of cases the CCSAO outright dismissed within 30 days of arrest rose slightly during that period (from 17% to 19%), there remain many people almost certainly eligible for diversion who are instead still waiting to resolve pending low-level cases.

Having a pending case – even a “low-level” one – can be incredibly disruptive and stressful. Even though most people in Cook County with low-level, commonly diverted cases have been released without having to pay a money bond, many have still had to pay hundreds or even thousands of dollars for their release—which will be held until the case is resolved. More concerning, there are still many people in the Cook County Jail and under house arrest that are facing charges that would have likely been eligible for diversion in a different year, but now are likely headed to probation.

On December 31, 2020, there were 663 people on electronic monitoring in Cook County charged only with a combination of drug and non-violent “Theft” or “Retail Theft” cases. Fully confined to their homes, these people have been unable to conduct basic tasks of daily living for an average of 9 months. At the same time, an additional 169 people in Cook County Jail were in the same situation, having served an average of 4 months inside. These cases can and must be immediately reviewed and resolved.

**NUMBER OF STATE'S ATTORNEY
DIVERSION PROGRAM REFERRALS (2020)**



CONCLUSION

Diversion for lower-level, less serious cases is an important way Cook County reduces some harms of prosecution and incarceration, administers justice more fairly, and keeps court caseloads reasonable and manageable. Unfortunately, it is not the case that no one in the jail or on electronic monitoring is charged with a low-level, divertible case: today there are still over 200 people in the jail and on electronic monitoring held on only narcotics charges.

Cook County State's Attorney Kim Foxx has made important and necessary changes to prosecution in Cook County since her election in 2016. As the State's Attorney's Office moves forward – especially through the second year of COVID-19 – they should carefully review cases eligible for diversion that were initiated before or during the pandemic and provide safe, efficient ways for these people to complete the diversion process.

REFERENCES

- ¹ You can find all reports at ThePeoplesLobbyUSA.org and ChicagoAppleseed.org. Unless otherwise noted, the data in this report derives from analyses conducted by Chicago Appleseed Center for Fair Courts of the public, case-level data provided by the Cook County State's Attorney's Office, available at <https://datacatalog.cookcountyil.gov/>.
- ² Chicago Appleseed & Chicago Council of Lawyers. (October 2010). Cook County Diversion Court: Proposal and Implementation. Accessible at http://chicagoappleseed.org/wp-content/uploads/2012/08/diversion_court_proposal_and_implementation_plan.pdf.
- ³ US Department of Health and Human Services. (December 2001). The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment. Available at: <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment#11>.
- ⁴ American Psychiatry Association. (August 2007). Mental Health Courts Reduce Recidivism Among Adults with Mental Illness. Available at: <https://www.psychiatry.org/newsroom/news-releases/mental-health-courts-reduce-recidivism-among-adults-with-mental-illness>.
- ⁵ Reinhart, E. & Chen, D. (2020). Incarceration and Its Disseminations: COVID-19 Pandemic Lessons from Chicago's Cook County Jail. In Health Affairs 39(8). Accessible: <https://doi.org/10.1377/hlthaff.2020.00652>
- ⁶ United States Census Bureau. (2019). Cook County, Illinois - Quick Facts. Accessible at <https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST120219>
- ⁷ Centers for Disease Control. (2018). Table 20: Use of Selected Substances in the Past Month Among Persons Aged 12 Years and Over, by Age, Sex, Race, and Hispanic origin: United States, Selected Years 2002–2017. Accessible at <https://www.cdc.gov/nchs/data/hus/2018/020.pdf> and Ingraham, C. (September 2014). "White People are More Likely to Deal Drugs, but Black People are More Likely to get Arrested for It" for Washington Post. Accessible at <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/>.
- ⁸ Chicago Appleseed, Chicago Council of Lawyers, The People's Lobby, & Reclaim Chicago. (January 2019). Exercising Full Powers: Recommendations to Kim Foxx on Addressing Systemic Racism in the Cook County Criminal Justice System. Available at http://www.chicagoappleseed.org/wp-content/uploads/2019/01/2019-Report-Kim-Foxx_ForWeb-2.pdf.
- ⁹ See LexisNexis: "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." Accessible via <https://www.lexisnexis.com>.
- ¹⁰ Staudt, Sarah. (January 2021). Waiting for Justice: An Examination of the Cook County Criminal Court Backlog in the Age of COVID-19 for Chicago Appleseed Center for Fair Courts. Accessible at <https://www.chicagoappleseed.org/long-waits-for-justice-cook-county-criminal-court-backlog/>.

THE PEOPLE'S LOBBY



Reclaim Chicago



Chicago Council
OF LAWYERS
Chicago's public interest bar association



CHICAGO
APPLESEED
CENTER FOR FAIR COURTS

Collaboration for Justice
