

PROGRESSIVE PROMISES:

Results of a Reform Prosecutor in Cook County

Chicago Appleseed Center for Fair Courts,
Chicago Council of Lawyers, The People's Lobby,
& Reclaim Chicago

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INTRODUCTION

Prosecutors are arguably the most powerful officials in the criminal legal system, as they are the ones who make decisions around whether or not someone receives a conviction, prison sentence, and permanent criminal record. For many years, prosecutors measured success by their ability to secure convictions and the harshest allowable punishments possible, as was politically advantageous, giving way to the rise of mass incarceration in the United States. In the mid-2010s, this paradigm began to shift; the idea of “progressive prosecutors,” instead of “tough on crime” prosecutors, began to garner interest and funding.¹

Since 2016, the notion of “progressive prosecutors” (hereafter, “reform” or “reform-minded prosecutors”) has gained significant traction, with prosecutors around the country running on platforms oriented around reducing mass incarceration rather than maximizing convictions and prison. Cook County’s State’s Attorney (SA) Kim Foxx – who took office in December 2016 and

was re-elected in November 2020 – was part of the first wave of self-proclaimed “progressive prosecutors,” followed soon thereafter by Kimberly Gardner in St. Louis and Larry Krasner in Philadelphia.² Successive, similar elections have since brought reform prosecutors to San Francisco, Dallas, Boston, and dozens of smaller jurisdictions across the country.³

Since Kim Foxx took office in Cook County, Chicago Appleseed Center for Fair Courts, the Chicago Council of Lawyers, The People’s Lobby, and Reclaim Chicago have monitored the policies and practices of the Cook County State’s Attorney’s Office (CCSAO) in order to evaluate how State’s Attorney Foxx’s administration has lived up to her campaign promises. This report is the ninth in our series and discusses the current state of the Cook County State’s Attorney’s Office through the lens of these promises and the general understanding of the role of “progressive,” or reform, prosecutors across the country.⁴

DEFINING “PROGRESSIVE” PROSECUTION

Since 2016, many local prosecutors have been elected after candidacies that embraced reform-minded visions for their offices. The idea behind the reform prosecutor movement is, because prosecutors hold so much discretion, the decisions they make can influence the number of people charged, jailed, prosecuted, and imprisoned in order to reduce mass incarceration. The notion of dismantling mass incarceration by using prosecutors’ offices as allies, rather than adversaries, originates from the activism of groups like Color of Change, the research of scholars like John Pfaff, and a multitude of grassroots efforts across the country.⁵ Rashad Robinson, the head of Color of Change, described the rationale of this approach to be because “the biggest problem was that [prosecutors] were prosecuting far too many people. We needed to address the outrageous level of over-incarceration.”⁶

Scholars have defined the “progressive prosecution” vision in a variety of ways. Benjamin Levin, an Associate Professor at University of Colorado Law School, suggests that the term “progressive prosecutor” varies in meaning for different people:

Generally speaking, the progressive prosecutor is presumed to be one powerful antidote to mass incarceration or the problematic institutions of the penal state. Some hail the progressive prosecutor as a new champion of fixing the criminal legal system, while others express skepticism about the transformative potential of even the most progressive DAs.⁷

As Darcy Covert, a Staff Attorney at the King County Department of Public Defense in Seattle wrote for The Atlantic: “It is unrealistic to expect that even reform-minded prosecutors (or anyone, for that matter) can and will dispense justice when they have virtually boundless power and almost unlimited discretion to use it against criminal defendants.”⁸ To this end, Levin suggests a spectrum of “progressive prosecutors,” defining four different types: (1) the “progressive who prosecutes,” which includes those who are left or left-of-center in their personal political beliefs, but do not necessarily bring those views to administer their job; (2) the “proceduralist prosecutor,” who is likewise politically progressive but does, in fact, use those values in practice to bring “a sort-of good government liberalism” to the administration their office; (3) the “prosecutorial progressive,” whose prosecutorial decisions are “rooted in concerns about structural inequality” and is focused on “substantive, not simply procedural, justice”; and (4) the “anti-carceral prosecutor,” who understands that criminal law is fundamentally flawed and cannot nor will ever right social wrongs or balance unequal political and socioeconomic systems, and as such uses their power to shrink carceral institutions “or perhaps do away with them altogether.”⁹

Likewise, several organizations and researchers have outlined specific, tangible objectives for “progressive” or reform-minded prosecutors. Perhaps most well-known is Fair & Just Prosecution’s (FJP)¹⁰ “21 Principles for a 21st Century Prosecutor,” published in 2018, which encourages prosecutors to – among other things – “make diversion the rule,” “charge with restraint,” “move toward ending cash bail,” “encourage the treatment (not criminalization) of mental illness and drug addiction,” “treat kids like kids,” “promote restorative justice,” “address racial disparit[ies],” “hold police accountable,” and “end the poverty trap of fines and fees.”¹¹ Similarly, Public Defenders from San Jose, California, Avanindar Singh and Sajid Khan, in a 2021 article published by the *Stanford Journal of Civil Rights & Civil Liberties*,¹² provide seventeen specific goals,¹³ which together define a “progressive prosecution” as “the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity.”

Taken together, these principles generally include several common themes that unite reform-minded prosecutors’ campaign platforms:

- **Non-Enforcement** – Declining to prosecute certain low-level charges and/or promises to focus prosecutorial resources on more serious, “violent” charges.

- **Diversion** – Allowing more people to avoid traditional criminal processes and convictions in favor of programs focused on rehabilitation.
- **Decarceration** – Focusing efforts on decreasing the overall number of people committed to prisons and jails.
- **Police Accountability** – Actively prosecuting police who commit wrongdoing, are corrupt, or injure and/or murder civilians.
- **Reform of Administrative Practices** – Changing hiring and managerial practices to embrace staff committed to changing the culture of the office, enforcing mandatory disclosure and other legal rules for prosecutors, and increasing transparency.
- **Policy Advocacy for Criminal Legal System Reform** – Active support of policies that reduce the harm of the legal system, such as ending cash bail, increasing the sealing and expungement of criminal records, addressing wrongful convictions, and a host of other priorities.

While these tenets seem like common sense means to reduce mass incarceration for anyone focused on the fair and effective administration of justice and the end of over-prosecution and excessive punishment, the outcomes of such “progressive” approaches have been mixed in efficacy.

REFORM-MINDED PROSECUTION IN CHICAGO & COOK COUNTY

In December 2016, State’s Attorney Kim Foxx took office as head prosecutor in Cook County. During Foxx’s campaign, she committed to make serious structural changes to the criminal legal system. As explained above, the six tenets that generally connect the campaign promises of reform-minded prosecutors include non-enforcement, diversion, decarceration, police accountability, reform of administrative practices, and policy advocacy for criminal legal system reform. In both 2016 and her subsequent successful re-election campaign in 2020, State’s Attorney Foxx focused on a number of promises that positioned and reaffirmed her within the reform prosecutor movement. In a February 2020 profile, the *Chicago Tribune* listed SA Foxx’s three key positions as: (1) “reform the criminal justice system that has marginalized residents that are low-income and communities of color”; (2) “treat low-level offenders differently from violent criminals”; and (3) “right the wrongs from the war on drugs by expunging the records of low-level offenders.”¹⁴

Below, we provide background on the campaign promises¹⁵ made by State’s Attorney Kim Foxx during 2016 and in 2020,¹⁶ and go into detail on the status of three areas specifically: non-enforcement of Retail Theft and Driving on Suspended License charges, the expansion of diversion, and her focus toward decarceration.

“PROGRESSIVE” CAMPAIGN PROMISES

Police Accountability:

During Kim Foxx’s 2016 and 2020 campaigns, she focused primarily on two areas of police accountability: conviction integrity¹⁷ and holding law enforcement accountable for police-involved shootings and deaths.¹⁸ During SA Foxx’s first term, the CCSAO’s Conviction Integrity Unit grew by at least ten new positions, which resulted in the overturning of 95 wrongful convictions tied to Chicago Police Department (CPD) corruption under Sergeant Ronald Watts, specifically.¹⁹ In 2017, the Cook County State’s Attorney’s Office’s report on Foxx’s first one-hundred days stated: “The issue of police-involved shootings unfortunately remains at the forefront of the public discourse, with several officer-involved shootings occurring in the first weeks of 2017.”²⁰ In an attempt to improve accountability, State’s Attorney Foxx supported the Special Prosecutor Act in 2017, which requires that the Illinois Office of the State’s Attorney Appellate Prosecutor (ILSAAP) to review any cases wherein the State’s Attorney’s Office rejects charging a police officer in a shooting case²¹—a huge departure from the previous administrations that tended to resist oversight in terms of holding police accountable.

Reform of Administrative Practices:

Cook County State's Attorney Foxx has emphasized a variety of administrative reforms during her tenure—some of which Chicago Appleseed Center for Fair Courts, The People's Lobby, the Chicago Council of Lawyers, and Reclaim Chicago have reported on in the past.²² Per the *Chicago Sun-Times*, SA Foxx has “hired more women and people of color, and she has advocated for sexual harassment awareness and training,”²³ and, according to the CCSAO in 2017: “The Office has hired its first-ever Chief Diversity Officer as well as a Chief Ethics Officer...which...will be instrumental in implementing the professional and accountable culture that the State's Attorney is committed to creating throughout the Office.”²⁴

During her tenure, SA Foxx has also committed to “right the wrongs of the past” by “expunging the records of low-level offenders”²⁵ and “[holding] the Cook County State's Attorney Office to an unprecedented level of transparency.”²⁶ Her office has also promised, per *NBC News*, to ensure prosecutors “undergo training to present facts in court” and add office policies and procedures that “ensure that ‘checks and balances’ operate as intended,”²⁷ to “shorten the delays...between charges and trial length,” and to “empower line [Assistant State's Attorneys] to be decision-makers and to craft the best, fairest outcomes in their cases” through use of a “discretion chart.”²⁸

Policy Advocacy for Criminal Legal System Reform:

Importantly, State's Attorney Foxx has actively supported a number of policies focused on reducing the harms of the criminal legal system in Cook County and throughout Illinois. One of the most well known being her adamant support of bail reform in Cook County and statewide. In 2020, SA Foxx explained:

*We have also worked to reform the bail system, which has long penalized people of color simply for being poor. We have done this, along with other reforms, alongside a decrease in both violent crime and incarceration (the Cook County Jail population is now at a historic low), demonstrating that public safety and reform need not be a choice, but in fact, we must do both.*²⁹

During hearings on the criminal justice omnibus bill (now known as the SAFE-T Act³⁰) in 2019, Foxx spoke in support of the Pretrial Fairness Act, which will end money bond across the state starting in 2023. According to *South Side Weekly*: “Foxx testified in Springfield in support of bail reform legislation...[and] stated that her office is once again working with the state legislature and governor to support additional bail reform legislation.”³¹ State's Attorney Foxx has continued to defend the policy in the face of tough-on-crime attacks structured to roll back the legislation.³²

Non-Enforcement, Diversion & Decarceration:

The themes of non-enforcement, diversion, and decarceration have been a consistent focus of the CCSAO's stated priorities. During SA Foxx's 2020 re-election campaign, she repeatedly emphasized her dedication to “[prosecute] violent crimes instead of low-level offenses,”³³ “[improve] and [expand] diversion programs and gun crime strategies,”³⁴ “search for alternatives to prosecuting people for non-violent misdemeanors,”³⁵ limit the school-to-prison pipeline by ensuring that cases are not filed against children for minor offenses that occur at school,³⁶ and “make sure that people with substance disorder or mental health issues have resources they need...to [attack]...the cycles of violence.”³⁷

The remainder of this report focuses on how the Cook County State's Attorney's Office under Kim Foxx has used its discretion to promote the reform principles of non-enforcement, diversion, and decarceration.

TURNING PROMISES INTO ACTION

The themes discussed above of non-enforcement, diversion, and decarceration are interrelated and, therefore, much of the research that Chicago Appleseed Center for Fair Courts, the Chicago Council of Lawyers, The People's Lobby, and Reclaim Chicago have done since SA Foxx was first elected revolve around these principles.³⁸ Generally, we have found that State's Attorney Foxx's Office has used discretionary powers in ways that have limited the prosecution of low-level charges and reduced rates of incarceration: in our February 2020 analysis, we found a 34% drop in the number of Black and Latinx people sent to prison each month between State's Attorney Foxx's administration (in 2019) and former State's Attorney Alvarez's administration (in 2012).³⁹

Prosecuting Driving on a Suspended License & Retail Theft as Misdemeanors Instead of Felonies:

State's Attorney Foxx has clearly shown dedication to treating lower-level and nonviolent crimes with greater leniency than her predecessors. Notably, in a questionnaire given by the ACLU of Illinois in 2020, Foxx recommitted to spending less time on pursuing minor charges, such as small-scale Retail Theft and Driving on a Suspended License (including as a way to save money). While SA Foxx has pursued these charges as misdemeanors rather than as felonies, so people charged with them are facing shorter sentences and less long-term criminalization, it is important to understand that the CCSAO is still enforcing these laws. This section examines the CCSAO's treatment of those felony charges specifically.

DRIVING ON A SUSPENDED LICENSE

The charge of Driving on a Suspended License (DSL) occurs when someone is accused of driving when their license has been suspended or revoked. This charge is not usually accompanied by another serious traffic infraction; instead, people are charged this way when they are pulled over for minor traffic violations and police check the status of their license. While this can be charged as either a misdemeanor or felony, it most commonly becomes a felony when the underlying reason for the license suspension or revocation is because someone has been accused or convicted of Driving Under the Influence (DUI). If someone either refuses to take a field sobriety test or tests positive for alcohol or drugs on a breath or blood test administered by law enforcement, their license is immediately summarily suspended for at least 6 months. Upon conviction for Driving Under the Influence, a person's driving privileges are immediately revoked; once these suspensions and revocations are in place, it is very difficult and expensive for someone to get their license back, with each summary suspension requiring a \$250 fee (and a \$500 fee for a second or subsequent suspensions) in order to have their driving privileges restored. Along with the \$500 reinstatement fee, an administrative hearing is required in order to reinstate someone's driving privileges after a revocation.⁴¹

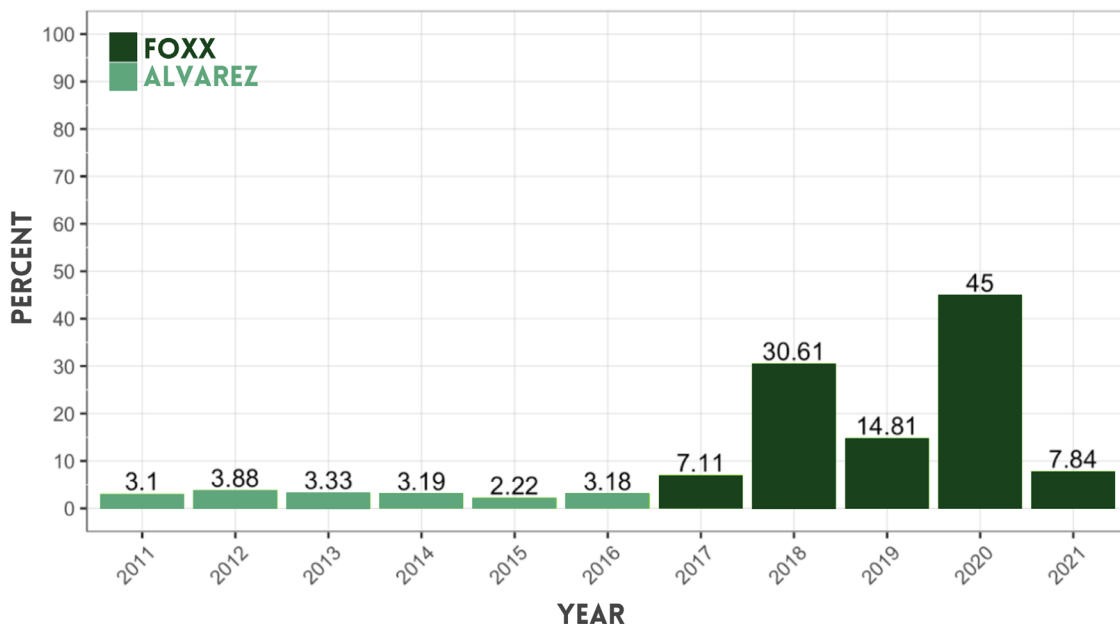
The cumulative effects of these laws make it difficult or nearly impossible for people to get them reinstated after driving privileges have been suspended. This leaves many drivers in a catch-22: many people affected by these laws need a car to get to work (over 80% of Illinoisans need to drive to get to or do their jobs⁴²) but are not allowed

to legally. Researchers estimate that as many as 75% of drivers with suspended licenses continue to drive;⁴³ if someone is convicted of Driving on a Suspended License, the Secretary of State is required to extend the suspension for an additional year. Illinois' driver's license suspension laws also impose draconian imprisonment and community service requirements that can further cause additional disruptions to people's lives.

These facts can create a cascade of cyclical punishments, which result in repeated arrests of people for Driving on a Suspended License while the underlying causes of that behavior – the fact that people often need a car to go about their lives but are unable to obtain the legal right to do so – persist. People arrested for driving on an invalid license spend an average of 14 days in jail, costing \$5.5 million in incarceration costs for the county.⁴⁴ These harms primarily fall on Black drivers, who are more likely to be stopped in traffic by police than White drivers.⁴⁵ Pursuing these convictions and continuing the cascading penalties that come with drivers' license suspensions is counterproductive, especially when these charges are pursued as felonies.

During her time in office, Kim Foxx increased the number of Driving on Suspended License cases her office has rejected for felony prosecution.⁴⁶ The rate of rejection has varied over time; during the pandemic, it has soared as high as 45%.⁴⁷ Even in the years when CCSAO's rates of rejection of DSL cases were the lowest – 2017 and 2021 – Foxx's office still declined felony charges over twice as often as the former Cook County State's Attorney Anita Alvarez did during an average year in office, between 2011 and 2016.

PERCENTAGE OF DRIVING ON AN INVALID LICENSE CASES REJECTED BY FELONY REVIEW, 2011-2021



GRAPH 1: Percentage of Driving on an Invalid License Cases Rejected by Felony Review, 2011-2021

RETAIL THEFT

Retail Theft is charged when someone allegedly steals property from a store (rather than from another individual), without force, while the store is open for business.⁴⁸ Illinois has one of the lowest felony Retail Theft thresholds in the country – a felony can be charged if over \$300 of merchandise is allegedly stolen – with only two states having a lower threshold and 29 states having thresholds at \$1,000 or more.⁴⁹ During her first term, SA Foxx raised the felony threshold for Retail Theft in Cook County from \$300 to \$1,000.⁵⁰ Kim Foxx has long touted her policy of declining to prosecute felony Retail Theft unless the amount stolen is over \$1,000 or the person charged has ten or more prior felony convictions, because, in her words:

In 2016...when I looked at how we were using our prosecutorial resources, I found out the cases most referred to us from police for prosecution outside of drug cases that they directly file... [were] low-level retail theft. Shoplifting. How do I justify to a city that is weeping from the deaths of hundreds of our residents that we've been using our resources on nonviolent shoplifting cases?⁵¹

By voluntarily increasing Cook County's felony Retail Theft threshold, State's Attorney Foxx brings Cook County into line with the majority of the country. Still, it is vital to note that Retail Theft under \$1,000 is still charged, prosecuted, and punished as a misdemeanor—just not a felony (which can cause more long-term disenfranchisement).

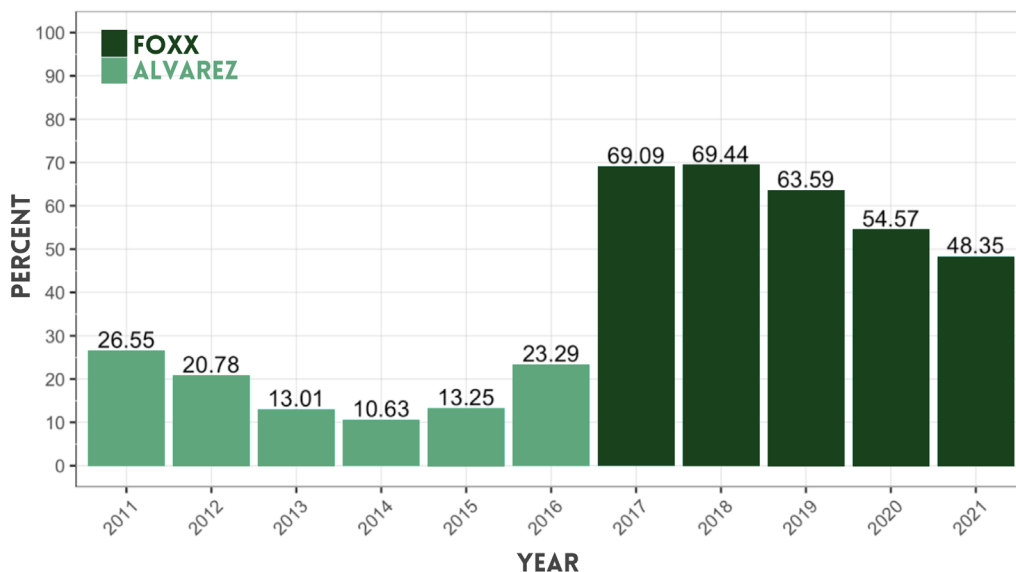
Throughout her tenure, SA Foxx has successfully continued to reduce the number of people charged with felony Retail Theft. Felony review rejection rates for the Cook County State's Attorney's Office show they have consistently continued to turn away Retail Theft cases for felony prosecution. The decreasing rates of rejection from

2018 through 2021 likely reflect the fact that police may have stopped referring cases that are below the threshold for felony review in the first place, since they know it is likely that the CCSAO will reject prosecution. Because these people are largely charged with misdemeanor Retail Theft, instead of felonies, the total number of Retail Theft charges has not decreased substantially. Foxx's policy changes the level of punishment for Retail Theft charges, not whether they are charged or prosecuted at all.

Notably, the total number of prosecutions – felony and misdemeanor – for Retail Theft seems to have remained relatively steady, at least during 2017, the first year of the policy's enactment. This means that Retail Theft cases below the threshold were still prosecuted as misdemeanors. Data from *The Circuit* shows that in 2017, the total number of prosecutions for Retail Theft fell by only 7% compared to 2016 - but the proportion of felonies to misdemeanors between the two years changed dramatically; in 2016, under Alvarez's administration, 29% of the charged retail thefts were felonies; in 2017, under Foxx, only 10% were.⁵²

For years, legislators and State's Attorneys in Illinois have followed research that recognizes that retail theft is a symptom⁵³ of "financial deprivation" (poverty), substance use, and/or mental health issues—which has been a generally successful public policy approach. Contrary to some recent media narratives, instances of retail theft have continued to be on the decline in Chicago during the COVID-19 pandemic, and are currently at some of their lowest levels in decades. After plummeting in frequency during the pandemic, the incidences of retail thefts in Chicago rebounded in 2021 but remain at one of the lowest levels this century – 43% lower than in 2019.⁵⁴ By raising the threshold, State's Attorney Foxx's policy has not caused any increase in retail theft; on the contrary, retail theft is at one of its lowest levels in 20 years.

PERCENTAGE OF RETAIL THEFT CASES REJECTED BY FELONY REVIEW, 2011-2021



GRAPH 2: Percentage of Retail Theft Cases Rejected by Felony Review, 2011-2021

Diversion & Decarceration:

According to a 2019 analysis by *The Marshall Project*, State’s Attorney Foxx’s use of discretionary non-enforcement and diversion resulted in nonprosecution of “more than 5,000 cases that would have been pursued by previous State’s Attorney Anita Alvarez,” mostly due to “declining to prosecute low-level shoplifting and drug offenses and...diverting more cases to alternative treatment programs.”⁵⁵ Similarly, as explained above, our research has shown that State’s Attorney Foxx’s use of diversion and discretionary non-enforcement of certain felony charges have helped lower rates of incarceration in Cook County Jail and state prisons.

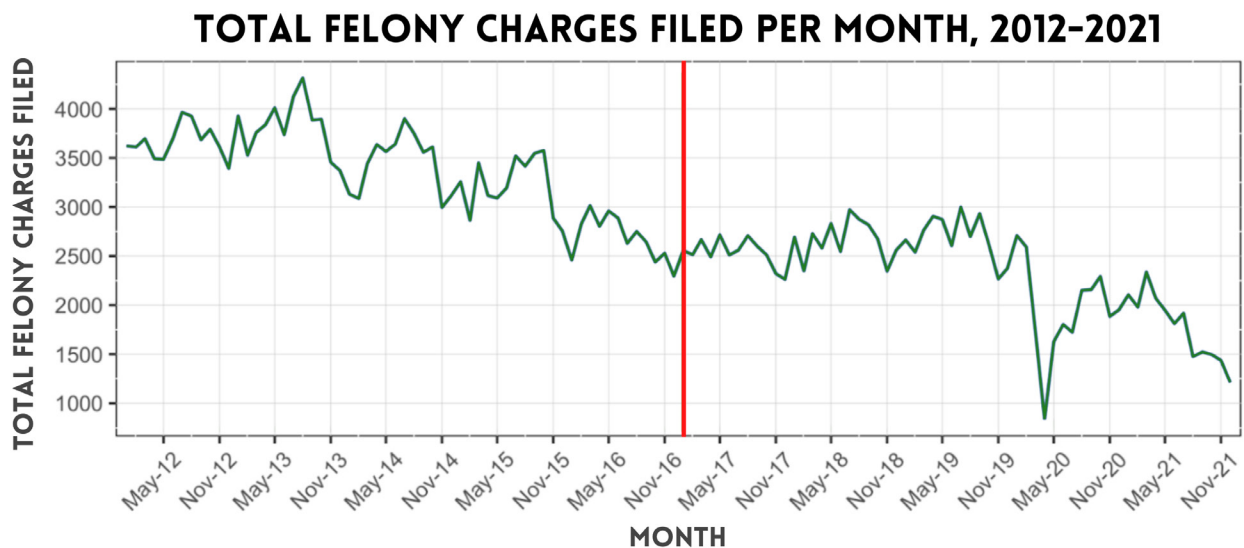
REDUCTIONS IN FELONY CHARGING

Kim Foxx’s commitment to reducing the impact of mass incarceration seems to be present when looking at the overall trends of felony charging. While SA Foxx claims⁵⁶ that the CCSAO still approves charges in 86% of the felony cases brought to her by Chicago and suburban police, there has been a modest downward trend in the number of felony cases filed since SA Foxx took office in 2017.⁵⁷

This decrease has accelerated during the COVID-19 pandemic, likely due to a number of factors. For one, the rates of crime reports and arrests in Chicago have decreased throughout the pandemic: Compared to 2019, Chicago Police Department data showed 10% fewer total crime reports in 2020 and 21% fewer in 2021; arrests in the city have fallen even more sharply, down 43% in 2020 and 57% in 2021. Additionally, State’s Attorney Foxx announced a policy early on in the pandemic to decline prosecution of low-level drug charges, stating in March 2020 that “out of an abundance of caution for the health of law enforcement and the community at large, the State’s Attorney’s Office will not be pursuing cases which pose little-to-no risk to public safety at this time.”⁵⁸ As a result, Class 4 narcotics charges, which made up 28.5% of felony charge initiations in 2019, accounted for only 16.5% of initiations in 2021.

The Cook County State’s Attorney’s Office has also increased the number of people charged with felonies that are sent to diversion programs under Foxx compared to her predecessor.⁵⁹ In our March 2021 report, which focused solely on the CCSAO’s use of diversion, we found that SA Foxx has increased the percentage of felony charges sent to diversion programs by 30% compared to her predecessor. Of the two kinds of diversion programs Cook County employs – pre-plea diversion, which allows people to avoid the traditional pretrial process without officially pleading guilty and post-plea programs, which require that the person plead guilty to charges but gives them the ability to avoid prison or complete probation to vacate their original conviction – pre-plea programs offer a more effective option. All diversion programs minimize the total time a person must be under the supervision of the criminal legal system, but 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.⁶⁰ At the time of publication, the use of pre-plea diversion programs as a proportion of all diversions had increased from 58% during Anita Alvarez’s administration to 66% under SA Foxx’s administration.⁶¹

By declining to prosecute more felonies and allowing more people access pre-plea diversion, the State’s Attorney has helped more people avoid lengthy involvement with the criminal system. Nonetheless, certain policies could use some improvement to make them less carceral. For instance, from 2017 to 2021, police referred 5,540 felony “delivery” or “possession with intent to deliver” cannabis cases to the State’s Attorney; the CCSAO chose to prosecute or divert at least 44% of these cases (instead of dismissing them outright).⁶² Of the cases not dismissed, 47% went to felony sentencing, with about half of those 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).⁶³



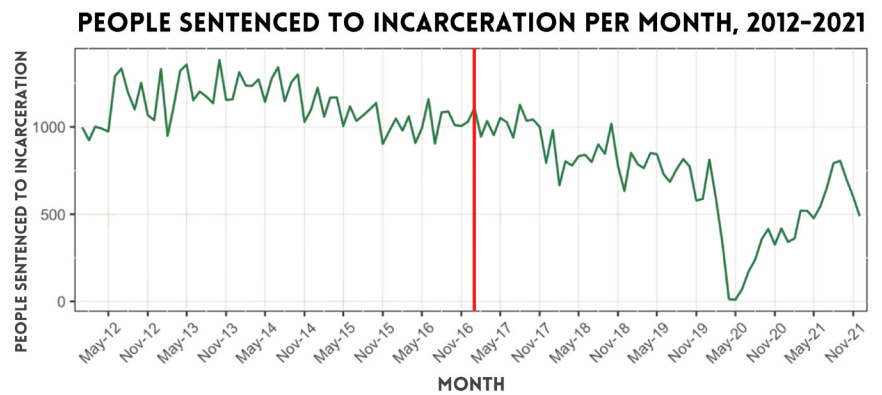
GRAPH 3: Total Felony Charges Filed per Month, 2012-2021

REDUCTIONS IN INCARCERATION

Since taking office, Kim Foxx has continued her commitment to decreasing the number of people sent to prisons each year.⁶⁴ This rate began decreasing soon after SA Foxx took over from Anita Alvarez (from 2017 to 2018, the number of people sentenced to incarceration in Cook County decreased by 19%).⁶⁵ While the numbers may be artificially inflated because the pandemic caused a backlog of cases, which were cleared in late 2020 and into 2021,⁶⁶ the number of people sentenced to incarceration in November of 2021 was about half the monthly rate (500) of the number of people sentenced five years prior (1,000), in November of 2016.

Clearly, Kim Foxx has made strides toward decarceration; still, some of the CCSAO's policies are creating unnecessary circumstances where people – primarily Black people – are being imprisoned for low-level convictions. Drug laws, for instance, allow prosecutors some discretion; in Cook County, police make charging decisions directly in drug cases, but prosecutors make ultimate decisions on whether to proceed with the initial charge and how, or whether, to reduce the charge during a plea bargain.⁶⁷ Charges for drug possession are extremely disproportionately levied against Black Cook County residents, with 63.7% of charges for possession and a shocking 91.6% of charges for delivery/possession with intent to deliver being against Black residents (which make up only 23.8% of the overall Cook County population).

About 43% of people in Cook County who are arrested for Class 1 or 2 delivery/possession with intent to deliver charges where small amounts of drugs are found eventually plead to reduced charges of Class 4 simple possession. Only 4.05% of people in this group are offered diversion and only 28.77% are offered probation when they enter that plea; compared to people who are originally charged with simple possession, they are 2.6 times more likely to face more than a year in prison. Moreover, no matter why someone is sentenced to incarceration, the racial inequities in prison sentences persist. In the above-stated situation (when someone takes a plea for Class 4 possession after originally being charged with Class 1 or 2 delivery/possession with intent to deliver), White people are sent to prison 44% of the time whereas Black people are sent to prison 71.47% of the time.⁶⁸



GRAPH 4: People Sentenced to Incarceration per Month, 2012-2021

CONCLUSION

Overall, State's Attorney Foxx has made substantial progress on many of the goals she set for the CCSAO during her campaign—but more can be done to reduce the harm caused by the criminal legal system, especially for those in Cook County's Black communities. Even though Foxx has de-emphasized prosecution of certain charges, 285 people were sentenced to incarceration for Retail Theft and 986 people sentenced to incarceration for Driving on a Suspended License in 2021. These numbers are, or course, a fraction of the number of people incarcerated annually before SA Foxx's tenure for these convictions, but they show that there is additional work to be done to make sure that non-enforcement, diversion, and decarceration policies are applied equally to all cases that the Cook County State's Attorney's Office prosecutes.

While it is hard to measure the status of a "progressive prosecutor" without a commonly agreed upon definition, it is incumbent on advocates and organizers to decide how we want our elected reform prosecutor to engage. While Chicago Appleseed Center for Fair Courts, The People's Lobby, the Chicago Council of Lawyers, and Reclaim Chicago do not pretend to have the answer to this question, we lean in favor of the principles

of an "anti-carceral prosecutor," who, according to Levine (2021):

[Understands] the problem isn't that the wrong people are incarcerated, it's that people are incarcerated [at all]. To the anti-carceral prosecutor, resolving the injustice and inequality in the administration of criminal law wouldn't mean finding avenues to punish more privileged defendants more harshly; it would mean treating all defendants with the lenience, mercy, and humanity often reserved for the most powerful.⁶⁹

Generally, State's Attorney Foxx's actions in office have lived up to her campaign promises and reflect many of the ideals of the "anti-carceral prosecutor" – notably in terms of the themes of non-enforcement, diversion, and decarceration have been initiated in a variety of ways. Although more can still be done to mitigate the harm that prosecution has on the residents of Cook County, Kim Foxx's administration appears to have minimized the prosecution of low-level charges, and in so doing, has helped reduce the overall number of people sent to jail or prison in Cook County.

REFERENCES

- ¹ See e.g., <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>
- ² Larry Krasner took office as the Philadelphia District Attorney on January 1, 2018, and was re-elected for a second term in November of 2021. Kimberly Gardner took office as the Circuit Attorney for St. Louis, Missouri on January 6, 2017, and was re-elected in November of 2020.
- ³ Recently, Detroit, Michigan, Los Angeles, California, Orlando, Florida, Austin, Texas, and the San Luis Valley in Colorado have also elected reform-minded prosecutors (see e.g., <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322>). Jurisdictions including Little Rock, Arkansas, Portland, Oregon, and Omaha, Nebraska currently have reform candidates running in prosecutorial elections (see e.g., <https://www.city-journal.org/another-wave-of-progressive-prosecutors-may-be-coming>).
- ⁴ You can find all prior reports from Chicago Applesseed, The People's Lobby, the Chicago Council of Lawyers, and Reclaim Chicago at <https://www.chicagoapplesseed.org/criminal-justice/#CJAC-prosecutors>. Unless otherwise noted, the data in this report derives from analyses conducted by Chicago Applesseed 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/>.
- ⁵ Bazelon, Emily. (2019). *Charged: The New Movement to Transform American Prosecution and Mass Incarceration* (pg. 77).
- ⁶ *Id.* at 1.
- ⁷ Levin, Benjamin. (2021). *Imagining the Progressive Prosecutor*, 105 *Minn. L. Rev.* 1415, available at <https://scholar.law.colorado.edu/articles/1313>
- ⁸ See e.g., <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> and *Transforming the Progressive Prosecutor Movement* (2021 *Wis. L. Rev.* 187) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708985.
- ⁹ *Id.*
- ¹⁰ Fair & Just Prosecution is an organization that "brings together elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility." More information at <https://www.fairandjustprosecution.org>
- ¹¹ See Fair and Just Prosecution (FJP), The Justice Collaborative, & Brennan Center (2018), "21 Principles for the 21st Century Prosecutor" at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf
- ¹² See Singh, A. & Khan, S. (2021), *A Public Defender Definition of Progressive Prosecution*, 16 *Stan. J. C.R. & C.L.* 475. Accessible via <https://law.stanford.edu/publications/a-public-defender-definition-of-progressive-prosecution/>
- ¹³ Singh & Khan's (2021) seventeen objectives for "progressive prosecutors" are to (1) end coercive plea bargaining, (2) stop prosecuting children as adults, (3) stop seeking or threatening the use of the death penalty, (4) end gang enhancements, (5) stop pursuing mandatory life without the possibility of parole sentences, (6) hold the police accountable, (7) expand diversion and promote treatment alternatives to address root causes of crime, (8) whenever possible, prosecute certain offenses as misdemeanors instead of felonies, (9) "stop fighting laws that humanize, repair, and decarcerate our system," (10) "seek input from people who have experienced harm," (11) end three strikes policies, (12) support parole and resentencing, (13) "stop locking people up for technical, non-criminal probation violations," (14) stop introducing "prejudicial, irrelevant character evidence" against the accused at trial, (15) "stop using junk science and scrutinize eyewitness identifications, informant testimony, and confessions," (16) "practice proactive and open discovery," and (17) "exercise greater discretion in limiting impeachment of prosecution witnesses."
- ¹⁴ See e.g., <https://www.chicagotribune.com/politics/ct-cb-who-is-kim-foxx-cook-county-states-attorney-candidate-20200229-c7os6jkh4fda3jufldujkbctxm-story.html>
- ¹⁵ The analysis of campaign promises herein was conducted by a pro bono team at Foley & Lardner LLP.
- ¹⁶ Our subsequent papers will review the status of Foxx's campaign promises around "police accountability," "reform of administrative practices," and "policy advocacy for criminal legal system reform."
- ¹⁷ See e.g., <https://chicagocrusader.com/kim-foxx-wins-re-election-after-tough-battle-with-obrien/>
- ¹⁸ See e.g., <https://chicago.suntimes.com/2020/1/22/21075956/kim-foxx-cook-county-states-attorney-democratic-nominee-incumbent-candidate-2020-election-profile> and <https://abc7chicago.com/kim-foxx-fraternal-order-of-police-chicago-department/8590415/>
- ¹⁹ See e.g., <https://southsideweekly.com/keeping-tabs-kim-foxx-2016-promises/> and <https://www.chicagotribune.com/opinion/editorials/ct-illinois-primary-meet-the-candidates-for-cook-county-states-attorne-20200226-ms4754lheneednp66x3ynbrzh4.htmlstory.html#ccsad>
- ²⁰ See e.g., <https://www.cookcountystatesattorney.org/about/cook-county-states-attorney-kim-foxxs-first-100-days-office-report-community>
- ²¹ See e.g., <https://southsideweekly.com/keeping-tabs-kim-foxx-2016-promises/> and <https://www.aclu-il.org/en/cook-county-states-attorney-candidate-questionnaire-kim-foxx>
- ²² See "Creating a Culture of Fairness and Accountability: Defense Attorneys Report of Kim Foxx's Progress toward Transforming the Priorities of Her Office" (2019) at www.chicagoapplesseed.org/wp-content/uploads/2019/10/2019-10-Report-Kim-Foxx_ForPrint_FINAL.pdf
- ²³ See e.g., <https://chicago.suntimes.com/2019/4/15/18443004/venom-directed-at-kim-foxx-is-about-taking-down-an-african-american-reformer>
- ²⁴ *Id.* at 20.
- ²⁵ See e.g., <https://www.wbez.org/stories/progressive-states-attorney-kim-foxx-faces-a-challenge-from-law-and-order-candidate-pat-obrien/cb4623cd-367f-4a3b-8173-ef6ea17e5587>
- ²⁶ See e.g., <https://chicago.suntimes.com/2020/1/22/21075956/kim-foxx-cook-county-states-attorney-democratic-nominee-incumbent-candidate-2020-election-profile>
- ²⁷ See e.g., <https://www.nbcnews.com/news/us-news/top-illinois-prosecutor-kim-foxx-admits-breakdown-communication-adam-toledo-n1266395>
- ²⁸ *Id.* at 25.
- ²⁹ *Id.*
- ³⁰ See <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0652>
- ³¹ See e.g., <https://southsideweekly.com/keeping-tabs-kim-foxx-2016-promises/> and <https://www.inquirer.com/opinion/commentary/criminal-justice-reform-public-safety-kim-foxx-larry-krasner-chicago-philadelphia-20200115.html>
- ³² See e.g., chicagotribune.com/politics/ct-kim-foxx-criminal-justice-20210630-cw7ynyi475aw7lzhp4fxxwag24-story.html
- ³³ See e.g., <https://chicago.suntimes.com/2020/1/22/21075956/kim-foxx-cook-county-states-attorney-democratic-nominee-incumbent-candidate-2020-election-profile> and <https://chicago.suntimes.com/2019/4/15/18443004/venom-directed-at-kim-foxx-is-about-taking-down-an-african-american-reformer>
- ³⁴ See e.g., news.wttw.com/2020/12/07/kim-foxx-sworn-in-second-term-cook-county-states-attorney
- ³⁵ See e.g., chicago.suntimes.com/crime/2021/3/28/22355204/foxx-says-new-study-backs-her-stance-too-many-misdemeanors-case-brought-court, foxnews.com/us/kim-foxx-election-state-attorney-jussie-smollett, and southsideweekly.com/meet-candidates-kim-foxx-2020/
- ³⁶ See e.g., <https://www.cookcountystatesattorney.org/news/cook-county-state-s-attorney-kim-foxx-hosts-critical-stakeholders-discuss-alternatives-school>

REFERENCES CONT.

- ³⁷ See e.g., <https://www.injusticewatch.org/news/2020/kim-foxx-re-election-2020/>, <https://news.wttw.com/2020/12/07/kim-foxx-sworn-in-second-term-cook-county-states-attorney>, and <https://www.wbez.org/stories/kim-foxx-office-says-cpd-is-arresting-the-wrong-people-to-curb-gun-violence/5f78bab4-584e-4188-afc9-9dedfb0565c5>
- ³⁸ See e.g., “In Pursuit of Justice for All: An Evaluation of Kim Foxx’s First Year in Office” (December 2017), “A Step in the Right Direction: An Analysis of Felony Prosecution Data in Cook County” (May 2018), “Exercising Full Powers: Recommendations to Kim Foxx on Addressing Systemic Racism in the Cook County Criminal Justice System” (January 2019), “Sentences of Incarceration Decline Sharply, Public Safety Improves during Kim Foxx’s Second Year in Office” (July 2019), and “Prosecutorial Discretion in a Tumultuous Year: A Report on the Impact of Prosecutorial Discretion on Incarceration Rates in Cook County” (September 2020) at <https://www.chicagoappleseed.org/criminal-justice/#CJAC-prosecutors>
- ³⁹ See “Data Show Major Decreases in Felony Charges, Incarceration Rates for Black and Latinx Residents in Cook County since 2017” (February 2020) at <http://www.chicagoappleseed.org/wp-content/uploads/2020/02/2020-02-SA-Report.pdf>
- ⁴⁰ See e.g., <https://www.aclu-il.org/en/cook-county-states-attorney-candidate-questionnaire-kim-foxx>
- ⁴¹ See e.g., https://www.ilsos.gov/departments/drivers/drivers_license/d reinstatement.html and <https://www.dailykos.com/stories/2019/12/17/1906244/-What-criminal-justice-reform-looks-like-under-Cook-County-IL-state-s-attorney-Kim-Foxx>
- ⁴² See e.g., <https://cjc.net/policy-advocacy/transit-table/#issues>
- ⁴³ See e.g., <https://www.aamva.org/getmedia/b92cc79d-560f-4def-879c-6d6e430e4f4d/Reducing-Suspended-Drivers-and-Alternative-Reinstatement-Best-Practices-Edition-3.pdf>
- ⁴⁴ *Id.* at 42.
- ⁴⁵ *Id.*
- ⁴⁶ When a person is arrested in Cook County, their case is reviewed by a division of the States Attorney’s Office called the “Felony Review Unit.” This unit decides whether or not the evidence against a person warrants a felony charge. When Felony Review rejects a case, it can be dropped entirely, or, in certain circumstances, it can be prosecuted as a misdemeanor instead of a felony.
- ⁴⁷ Notably, DSL is less commonly presented by police to the CCSAO for approval during the COVID-19 pandemic; 791 cases were referred in 2020 and 474 in 2021, compared to over 1,000 referred cases in 2019.
- ⁴⁸ If it is alleged that force is used to enter a store, the charge will also include a burglary charge; if it is alleged that force is used or threatened, a retail theft becomes a robbery.
- ⁴⁹ See e.g., <https://www.chicagoappleseed.org/2022/03/30/organized-retail-theft-bill-is-an-extreme-approach-to-an-imaginary-problem>
- ⁵⁰ See e.g., <https://chicagocrusader.com/kim-foxx-wins-re-election-after-tough-battle-with-obrien/>
- ⁵¹ See e.g., <https://www.inquirer.com/opinion/commentary/criminal-justice-reform-public-safety-kim-foxx-larry-krasner-chicago-philadelphia-20200115.html> and <https://www.propublica.org/article/as-trump-calls-for-law-and-order-can-chicagos-top-prosecutor-beat-the-charge-that-shes-soft-on-crime>
- ⁵² See e.g., <https://charges.thecircuit.cc/en/theft/?charge=54-retail-theft>
- ⁵³ See e.g., www.forbes.com/sites/daviddisalvo/2013/10/27/whether-rich-or-poor-feeling-deprived-makes-us-steal-more/?sh=6559749c2aff, <https://journals.sagepub.com/doi/abs/10.1177/0734016814568012?journalCode=cjra>, and www.psychologytoday.com/us/blog/what-the-wild-things-are/201110/shopping-theres-more-the-story
- ⁵⁴ See e.g., <https://www.chicagoappleseed.org/2022/03/30/organized-retail-theft-bill-is-an-extreme-approach-to-an-imaginary-problem/>
- ⁵⁵ See e.g., themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county
- ⁵⁶ See e.g., www.fox32chicago.com/news/kim-foxx-links-cook-countys-explosion-of-violence-to-covid-19-in-address
- ⁵⁷ See prior reports by Chicago Appleseed Center for Fair Courts, The People’s Lobby, the Chicago Council of Lawyers, and Reclaim Chicago, such as: “Decarcerating Cook County: Use of Diversion Programs for Low-Level, ‘Non-Violent’ Felonies Increased Substantially Under Kim Foxx Compared to Anita Alvarez” (March 2021), “Data Show Major Decreases in Felony Charges, Incarceration Rates for Black and Latinx Residents in Cook County since 2017” (February 2020), and “A Step in the Right Direction: An Analysis of Felony Prosecution Data in Cook County” (May 2018), accessible at <http://www.chicagoappleseed.org/criminal-justice/#CJAC-prosecutors>.
- ⁵⁸ See e.g., <https://news.wttw.com/2020/03/20/kim-foxx-s-office-won-t-prosecute-low-level-drug-offenses-during-covid-19-pandemic>
- ⁵⁹ See “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” (March 2021) at www.chicagoappleseed.org/wp-content/uploads/2021/03/2021-03-CCSAO-Diversion-Report-FINAL.pdf
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ See prior reports by Chicago Appleseed Center for Fair Courts, The People’s Lobby, the Chicago Council of Lawyers, and Reclaim Chicago, such as: “Prosecutorial Discretion in a Tumultuous Year: A Report on the Impact of Prosecutorial Discretion on Incarceration Rates in Cook County” (September 2020) and “Sentences of Incarceration Decline Sharply, Public Safety Improves during Kim Foxx’s Second Year in Office: New Data Portal Demonstrates Benefit of Criminal Justice Reform, Transparency” (July 2019), accessible at <http://www.chicagoappleseed.org/criminal-justice/#CJAC-prosecutors>.
- ⁶⁵ See e.g., www.thepeopleslobbyusa.org/wp-content/uploads/2019/07/2019-07-Final-Report-Kim-Foxx-ForPrint.pdf
- ⁶⁶ See “Cook County Courts Massively Behind Schedule on Criminal Cases” (September 2020) at <https://www.chicagoappleseed.org/2020/09/24/cook-county-courts-massively-behind-schedule-on-criminal-cases/>; “Waiting for Justice: An examination of the Cook County Criminal Court backlog in the age of COVID-19” (January 2021) at <https://www.chicagoappleseed.org/2021/01/28/long-waits-for-justice-cook-county-criminal-court-backlog/>; “Checking on the Cook County Criminal Court’s Case Backlog” (July 2021) at <https://www.chicagoappleseed.org/2021/07/30/checking-on-the-cook-county-criminal-court-case-backlog/>; and “Slowly Returning to Normal: A Look at the Cook County Court Case Backlog in Autumn 2021” (November 2021) at <https://www.chicagoappleseed.org/2021/11/08/slowly-returning-to-normal-backlog-autumn-2021/>.
- ⁶⁷ See e.g., <https://www.chicagoappleseed.org/2022/06/15/dynamics-of-drug-possession-charges-in-illinois/>
- ⁶⁸ *Id.*
- ⁶⁹ *Id.* at 7.

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