

CREATING A CULTURE OF FAIRNESS AND ACCOUNTABILITY:

Defense attorneys report on Kim
Foxx's progress towards transforming
the priorities of her office

A Report from Community Partners

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

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EXECUTIVE SUMMARY

This report focuses on the most critical factor in effectively achieving criminal justice reform: prosecutorial policy and behavior. This is the fifth in a series of reports on State's Attorney Kim Foxx's Administration published by the partnership of The People's Lobby, Reclaim Chicago, and Chicago Appleseed Fund for Justice. Previous reports can be found at www.thepeopleslobbyusa.org.

In this report, we focus on interviews from defense attorneys who practice in Cook County Courts and their observations with regards to State's Attorney Foxx's staff's implementation of her policy initiatives. Twenty-eight attorneys with experience between 3 years and 50 years defending clients in the Cook County criminal court system were interviewed for this report.

Overall, most of the defense attorneys interviewed noticed substantial changes in the practices of the State's Attorney's Office in the years that Kim Foxx has been State's Attorney, as opposed to the pre-Foxx years. Major areas of change that defense attorneys noted were: (1) Increased use of alternatives to incarceration, both through the increased use of probation and diversion programs, and by an increased willingness to reduce or dismiss low-level charges; (2) Increased support for pretrial release and less reliance on money

bond, and (3) A moderate increase in the level of discretion given to line Assistant State's Attorneys.

Our interviewees noted, however, that some Assistant State's Attorneys, particularly those in supervisory positions and those with long histories in the office, still staunchly maintained former State's Attorney Anita Alvarez's tough-on-crime policies and callousness towards people facing charges and their attorneys.

Overall, our interviews revealed that State's Attorney Foxx has made substantial progress in increasing discretion and reforming the policies of her predecessors that had led to so much incarceration. But Foxx continues to face challenges in undoing decades of a culture entrenched with a win-at-all-costs mentality and a heavy reliance on bringing high charges to force plea deals that require incarceration.

While there has been substantial progress since she took office, our primary recommendation is that - to more fully achieve her mission and fulfill her promises regarding prosecutorial policy - State's Attorney Foxx will need to engage in additional culture change work and internal office discipline with a focus on ensuring that holdover Assistant State's Attorneys from previous administrations are acting in accordance with her reform agenda.

THE BIG PICTURE: MASS INCARCERATION AND ROOT CAUSES

The United States incarcerates 2.2-million people, more people than any nation on earth—both in sheer numbers and per capita. The US holds 25% of the world's imprisoned, despite comprising only 5% of the world's population. One in every 100 Americans is incarcerated.¹

The causes of this astronomical level of incarceration have been attributed to a variety of factors, including:

- The War on Drugs and a legal system that criminalizes drug use instead of treating substance abuse as a public health issue;
- The increased practice of incarcerating people suffering from mental illness, rather than directing resources towards mental health treatment and services;
- "Tough-on-crime" legislation that created mandatory minimum sentences, repeat offender sentencing, and "three strikes" laws, especially for drug-related and petty crimes;
- Aggressive over-policing and racially discriminatory practices by prosecutors that disproportionately harm people in low-income communities and communities of color, often leading to unnecessary charges and wrongful arrests;
- A culture that is fixated on punishment rather than rehabilitation;
- Insufficient funding for services for people who are incarcerated or formerly incarcerated, including education and job training and placement;
- A bail system that jails people who have not been convicted of a crime, but are awaiting trial in jail because they are too poor to pay cash bail; and
- Structural racism at every stage of the system, from underinvestment in communities of color to arrests, trials, and sentencing.

THE BIG PICTURE: MASS INCARCERATION AND ROOT CAUSES CONTINUED

Prosecutors have played a central role in implementing and escalating many of these draconian “tough-on-crime” policies and practices. This inherently racist system has led to America’s massive and unprecedented level of incarceration. “The effects of mass incarceration in the US, and especially in poor communities, is devastating,” says Craig Haney, PhD, a professor of psychology at the University of California at Santa Cruz and co-author of the National Research Council’s report on incarceration.² He notes that many enter prison without mental illness but develop serious mental health related issues while incarcerated. Further, the difficulty of obtaining employment and housing after incarceration, especially for people with felony records, ensures high rates of unemployment and homelessness and contributes to recidivism. Due to the race and class dimensions of mass incarceration, a preponderance of the formerly-incarcerated are concentrated in low-income communities and communities of color, with little to no prospects for employment or legal means for sustaining themselves and their families. In addition, there are few resources available to address substance abuse or mental health issues that they may face as a result of the trauma of life before, during, and after incarceration.

A vibrant movement has developed in recent years to fight for policies that will reverse mass incarceration. Among its core demands are ending over-policing; ending cash bail; repealing harsh and mandatory sentencing laws; treating drug use as a public health rather than criminal issue; providing mental health services for the mentally ill; offering more options for rehabilitation services; and focusing on restorative justice rather than simply punishment. Many of these solutions come within the purview of local prosecutors.

Historically, criminal sentences have ranged in severity to allow for the unique and extenuating circumstances of each particular violation. Weighing particular circumstances is, in fact, at the heart of the centuries-long development of our justice system. The shift in recent decades toward a “tough-on-crime” approach with mandatory, minimum sentencing and much more aggressive, harsh prosecution has actually been a breach of our justice system’s intent and a retreat from the reasonable and prudent weighing of circumstances, conditions, and extenuating factors. This shift has cast the ideas of discretion and leniency as dirty words instead of core concepts of justice. The result has been levels of incarceration previously unseen anywhere in the world. The recent movement against mass incarceration is, in large part, a movement to regain reason, prudence, and fairness in criminal justice.

Fordham Law Professor John Pfaff, PhD, has done extensive research that has isolated the role of prosecutors and the practice of pursuing felony charges as a central factor in the astronomical rise in incarceration in recent decades.³ Prosecutorial behavior, therefore, is a key to reversing the trend of mass incarceration and dealing effectively with crime.

As part of this national movement, several reform candidates have won States’ or District Attorney’s Offices on a platform of a more just, humane, and progressive approach, including Kim Foxx in Cook County, Larry Krasner in Philadelphia, and Scott Colom in Columbus, Mississippi. Their efforts unfold in a context of great opposition from right-wing conservatives and law-and-order hardliners, like the Fraternal Order of Police, and impatience from mass incarceration opponents eager to see all these reforms enacted completely and immediately. These periodic reports are meant to monitor, through data and interviews with practitioners, the progress Foxx and the Cook County State’s Attorney’s office are making towards a more just and reasonable approach to prosecution that will counteract mass incarceration.

As Pfaff also points out,⁴ it would be remiss to omit the broader and deeper root causes of mass incarceration beyond even these specific draconian policing and prosecutorial policies which must be eliminated. That analysis must examine the broader decline of opportunity for large segments of the population and America’s exploding levels of economic inequality. The decimation of the middle class over the past four decades and the complete exclusion of entire communities from the mainstream economy (often referred to as “sacrifice zones”) creates high levels of despair, desperation, and alienation that are almost universally linked to higher levels of crime and violence.



THE BIG PICTURE: MASS INCARCERATION AND ROOT CAUSES CONTINUED

- 50% of American workers earn less than \$30,000 per year⁵ and two-thirds of American workers earn less than \$42,000 per year.⁶
- Nearly two-thirds of American families cannot afford a \$500 emergency.⁷
- A minimum wage job will not pay for a 2-bedroom apartment in any city in America.⁸ Cook County alone has a shortage of affordable rental units, affecting at least 182,000 low-income residents.⁹
- 13% of all Americans and 21% of all children live below the official (and absurdly low) poverty threshold of \$19,749 annually for a parent and two children.¹⁰ Many poor people live in disinvested neighborhoods of concentrated poverty without amenities, economic opportunities, or ladders of success.
- 9% of Americans are still without health insurance due to high costs.¹¹
- More than half of adults requiring mental health services are not receiving any. As many as 1.2-million incarcerated people require mental health care.¹²
- Black unemployment (18.5%) was more than triple that of white unemployment (5.6%) in Chicago in 2017.¹³
- 31.4% of African-Americans and 23.4% of Latinx residents of Cook County live below the official poverty level.¹⁴

Sacrifice zone communities suffer much worse and concentrated levels of poverty, unemployment, and underemployment and are bereft of opportunity structures, webs of viable economic relationships, and any meaningful private or public investment. Until we address massive and historic levels of racial and economic inequality, create greater economic security and opportunity, and restore these divested sacrifice zones to viable communities, crime and violence will continue to be an endemic problem. This will require a recommitment to the notion of the public good and of government as the provider of basic social necessities like education, health care, living wage employment, adequate affordable housing, transportation, and infrastructure—and to do so in a way that ensures racial equity. Large corporations and the wealthy, many of whom currently pay little or no taxes, must begin contributing their fair share to the social safety net, as well as pay living wages, provide adequate benefits to their workers, and end multiple forms of racial redlining in their investment practices.

Effectively addressing mass incarceration will require a substantial change to our economic structure and the aforementioned policy framework as it relates to policing, prosecution, sentencing, and incarceration.



Member of The People's Lobby demonstrate outside the office of former Cook County State's Attorney Anita Alvarez after she refused multiple requests to meet with leadership about reforms to her office. Photo by Kristi Sanford.

KIM FOXX'S REFORM AGENDA

Kim Foxx ran for State's Attorney in 2016 as part of a national wave of progressive prosecutors across the nation. These candidates shared a vision of using the immense power that prosecutors hold in the criminal justice system to change the harsh "tough-on-crime" policies that dominated their offices and to work as partners with community advocates to dismantle mass incarceration.

Foxx's own campaign focused heavily on reducing the prosecution of low-level nonviolent felonies, dismantling the school-to-prison pipeline, increasing transparency, and reducing racial disparities in Cook County's criminal justice system. These policies led her to a historic win against long-time prosecutor Anita Alvarez, with Foxx defeating Alvarez in the democratic primary by 30 points.¹⁵ Still, Foxx began her term at the helm of Alvarez's own office, with more than 800 attorneys who had been hired, promoted, and trained by Alvarez and her predecessors. As a result, despite popular and community support for her agenda, Foxx has met resistance from the Fraternal Order of Police and, sometimes, from within her own office.

To provide context for this report, we analyzed thirty-five public statements, interviews, and articles where Kim Foxx made statements regarding her agenda to change practices in the State's Attorney's Office. These sources are dated during and after her campaign. Foxx's most commonly mentioned plans included an increase in transparency for her office, support for alternatives to incarceration and diversion programs, and giving discretion to prosecutors to make individualized decisions on the charging and prosecution of each case, based on the evidence and aggravating and mitigating factors. At an NAACP Candidates Forum on February 11, 2016, Foxx noted:

[Under the Alvarez administration], there is no distinction between a first-time offender and a career criminal. There's no ability to individually discern what [sentence] is necessary for the crime... Justice is doing the right thing at the right time, for the right reasons... When you have leadership that promotes and has hanging on walls the sentences of people like trophies, that's the mentality that gets driven down to our frontline assistants.¹⁶

Foxx promised to have her prosecutors use their discretion to look at the unique circumstances of every case to determine a just result.

METHODOLOGY

Examining the impact of a new State's Attorney on a criminal justice system as large and complex as Cook County's is challenging. Although Foxx has released a large amount of case-level data on her office's handling of felony cases, many of the levers that control the outcomes of individual cases happen in stages of the criminal justice process that cannot be captured by even the most detailed data collection. For example, guilty plea deals, which resolve over 90% of felony cases in Cook County Courts, are usually verbally negotiated between an individual prosecutor and an individual defense attorney, without any record kept of how that negotiation occurred. Similarly, no quantitative data capturing can effectively assess how Foxx has changed the culture of her office, both in terms of the demeanor of her attorneys and the level of direction she exercises to confine line attorneys to a certain set of outcomes.

In order to assess some of qualitative changes Foxx has made, Chicago Appleseed Fund for Justice, with the help of pro bono attorneys from Foley & Lardner LLP, conducted detailed interviews with 28 defense attorneys, including public defenders, private attorneys, and other defense attorneys who work for non-profits representing

indigent clients. These lawyers were promised anonymity in exchange for their opinions. Our interviewees had between 3 and 50 years of experience practicing criminal law in the Cook County Courts. The questions included basic information about the practitioner's background in criminal defense work and with the State's Attorney's Office. We then asked them about their most recent negotiation with the State's Attorney's Office. We also inquired into the behavior of the office more generally and if they had seen any changes in the conduct of rank and file prosecutors since Foxx's election on issues like discretion, bond and pretrial release, demeanor and courtroom conduct, and gradation of change based on several variables. These variables included how change was different across courthouses and courtrooms, types of charges, and demographic characteristics of their clients. The interviews were then analyzed and aggregated to identify common themes in the defense attorneys' experience's with Foxx's State's Attorney's Office.

SUMMARY OF CONCLUSIONS

Overall, most of the defense attorneys we interviewed have noticed substantial changes in the practices of the State's Attorney's Office under Kim Foxx, compared to the pre-Foxx years. Major areas of change that defense attorneys noted were: (1) increased use of alternatives to incarceration, both through the increased use of probation and diversion programs, and an increased willingness to reduce or dismiss low-level charges; (2) increased openness to pretrial release and fewer requests for high money bond amounts; and (3) a moderate increase in the level of discretion given to line Assistant State's Attorneys (ASAs).¹⁷ Our interviewees noted, however, that many ASAs, particularly those in supervisory positions and those with long histories in

the office, still staunchly maintained Alvarez's tough-on-crime policies. Many also still demonstrate callousness towards people facing charges and their attorneys. Overall, our interviews revealed that State's Attorney (SA) Foxx has made substantial progress in improving the policies of her predecessors, which had led to so much incarceration. But she continues to face challenges in undoing decades of culture with a win-at-all-costs mentality and a heavy reliance on charging felonies with hefty penalties in order to force plea deals, leading to incarceration. This means that there is still progress to be made to ensure that Foxx's policy changes are fully implemented within the office.

INCREASED USE OF ALTERNATIVES TO INCARCERATION

Nearly all the defense attorneys interviewed by Chicago Appleseed noted that SA Foxx has increased her office's use of alternatives to incarceration, both by expanding diversion programs and by more regularly offering probation and supervision as ways to resolve felony cases.¹⁸ Practitioners noted an increase in the number of diversion programs and also that they are available to more arrestees. Standard probation has been around for a long time and is still only largely available for first time offenders on lesser, nonviolent felonies. Currently, Kim Foxx's Office of Specialty Courts participates in a number of specialty probation courts, including Veterans Court, Mental Health Courts, and Drug Treatment Courts. They also have numerous diversion programs, both formal and informal, for misdemeanor and low-level felony offenses.

The reach of these programs is limited; many of these diversion programs are limited to nonviolent, non-weapons related charges. Still, defense attorneys have seen an increased willingness from prosecutors to allow arrestees with qualifying charges to actually access these programs. For most diversion programs, the State's Attorney's office maintains full control of who does and does not get access to programs. Some defense attorneys described that in the Alvarez era, accused persons who wanted to join these programs were held to an almost absurd standard of perfect behavior, perfect background, and a set of case facts the individual prosecutor in charge felt were "deserving." Now, defense attorneys say that diversion programs are more readily available to anyone who meets the program requirements.

According to her most recently released data, Kim Foxx has dismissed more than 3,100 cases through deferred prosecution. Unfortunately, Foxx's publicly released data almost certainly vastly undercounts the work her office does to dismiss cases through deferred prosecution – her data only lists the dismissal reason in less than half of dismissed cases.

Notably, of the deferred prosecution cases that are recorded, 81% are drug cases.¹⁹ About two-thirds of interviewees reported that more and more drug cases are being dismissed altogether early in the case, particularly in cases with small quantities of drugs. Illinois has no minimum quantity of hard drugs necessary to charge a felony. Possession of any amount of a drug other than cannabis, even a minuscule amount, must be charged as a felony, since there is no misdemeanor statute on the books that a prosecutor could use instead. This makes it harder for a progressive State's Attorney like Foxx to decrease penalties for low-level drug possession offenses than it has been for her to, for example, decrease penalties for retail theft by charging more retail thefts as misdemeanors instead of felonies.

However, defense attorneys have seen Foxx's attorneys be more lenient with possession cases involving small amounts of drugs. About half of the interviewees reported cases being dismissed entirely, sometimes without full explanation, and sometimes with prosecutors explaining that these cases are not an office priority. About two-thirds of interviewees reported almost immediate deferral for small amount cases to diversion programs that required only a few low-cost or free education classes on drug use before a case could be dismissed. Practitioners report that this is an excellent change towards increasing the fairness and the efficiency

INCREASED USE OF ALTERNATIVES TO INCARCERATION CONTINUED

of the justice system; instead of placing long felony records and incarceration terms on nonviolent, low-level offenders, prosecutors are successfully getting more individuals out of the criminal justice system quickly and fairly and focusing their attention on more serious cases.

While practitioners almost unanimously noted that the office had decreased prosecution of drug possession cases, they gave a wide range of responses to another common low-level felony – felony gun possession, which is called Aggravated Unlawful Use of a Weapon (UUW) in Illinois.²⁰ Defense attorneys noted that under the Alvarez administration, prosecutors took a rigid line on gun possession offenses. Three-quarters (75%) of our interviewees reported that in the previous administration, line prosecutors were not allowed to offer any sentence other than a felony conviction with substantial incarceration for these crimes, no matter what the arrestee's personal circumstances were or how weak the evidence. During plea negotiations on gun possession during the Alvarez administration, some defense attorneys reported that line prosecutors told them they would be immediately fired if they allowed a gun felony to be reduced to a misdemeanor or plead to probation.

Overall, it seems that this rigid line has softened somewhat, and Kim Foxx has allowed her prosecutors more flexibility to look at cases individually, rather than holding to an unwavering policy of incarceration. About one-third of our interviewees report an increased willingness on the part of the prosecutor to reduce gun possession charges to misdemeanors when appropriate and agree to a proposition other than incarceration, particularly in cases where it is a client's first arrest or where they have possession of a Firearm Owner's Identification (FOID) card (which allows them to legally own a firearm) but not a Concealed Carry License (which allows them to carry it in public).

All of our interviewees pointed out that winning non-incarceration sentences for individuals without a Firearm Owner's Identification Card is still an uphill battle. However, more than half of them noted one particular program that has allowed their clients to avoid unnecessarily harsh sentences. The First Time Gun Offender Probation Program was passed and signed in Springfield in 2017 and was implemented on January 1, 2018.²¹ Designed for first time gun offenders under the age of 21, practitioners have reported that this is a fairly popular sentencing reduction, which many ASAs are willing

to give if the defense lawyer requests it and the client does not have a juvenile delinquency record. Instead of serving time in prison, the participants in the program undergo a battery of intensive programming, including education, community service, and drug treatment requirements, while abstaining from marijuana and any narcotics. The program is statutorily required to last between 18 and 24 months. Some of the defense attorneys pointed out that this program is really an initiative of the Illinois legislature, not of Foxx's office, but others suggested that Foxx has been more willing than her predecessors likely would have been to embrace the program and allow it to be fully implemented and used for a large number of arrested young adults.

Interviewees described an increased willingness to listen to the circumstances of gun possession charges and determine whether sentences of incarceration were really warranted, particularly for younger clients who have been traumatized by gun violence in their own communities. One practitioner described a UUW case he defended in 2018. The client was a 19-year-old male teenager living on the South Side of Chicago. Within the span of three weeks, he and his family were victims of an armed robbery, a home invasion, and a shooting. Terrified for the safety of his family, this young man bought a handgun on the street to protect them. He did not have a Concealed Carry License or a Firearm Owner's Identification card. Within a few weeks, this teenager was arrested by the Chicago Police while the handgun was in his possession and was charged with a Class 4 felony, Unlawful Use of a Weapon. Without the mitigating factors that were taken seriously by the State, he would likely have been convicted and sentenced to two years in prison. Instead, he benefited from prosecutorial discretion by Kim Foxx's office and received probation.



Rev. Dwayne Grant, a leader with The People's Lobby, speaks at a rally outside the Cook County Jail for the abolition of money bonds. Photo by Deana Rutherford.

BOND REFORM

Many of the practitioners we interviewed said that the State's Attorney's change in policy on bond and pretrial incarceration issues was the single biggest change in policy since the Alvarez administration. Prior to 2017, defense attorneys noted that pretrial detention was the norm in Cook County because money bonds were continuously set so high that clients could not afford to post them. This meant that most felony arrestees – who are in theory presumed innocent – awaited their trials behind bars. Pretrial incarceration can amplify the substantial leverage State's Attorneys already have in plea negotiations by squeezing the accused person of their will to fight the charges. Criminal proceedings can take months, if not years, to resolve and research shows that people accused of crimes are more likely to take plea deals if they are incarcerated pretrial, especially if the deal would get them out of custody - whether they are actually guilty of the crime or not.²² This is especially common when arrestees have spent close to (or even more than) the maximum sentence statutorily allowable for the crime they are charged with in jail while waiting for their case be resolved. Furthermore, pretrial incarceration has negative outcomes that extend beyond forcing guilty pleas. People incarcerated pretrial are more likely to lose their jobs, more likely to lose their housing, and more likely to recidivate in the long term than those who are free while they await trial.²³

Kim Foxx's campaign included a promise to reduce the use of cash bond to detain people pretrial and to stop unjustly incarcerating arrestees simply because they were poor. At one State's Attorney Candidate's Forum, Foxx noted:

We have to move from a cash bond system in Cook County. A number of people who are in our jail are there because they cannot afford their bonds. When we're talking about bond court and making sure we're holding people who are a threat to the public and need to be separated, that's who should be in our jails. Being in our jails because you're poor and can't get out is inhumane.²⁴

Kim Foxx has made excellent progress delivering on her goal to reduce the use of cash bail. Almost all of the defense attorneys that we interviewed stated that attaining reasonable bond and pretrial release has become easier under Foxx. The general understanding among practitioners is that this is the result of a combination of factors, several of which occurred outside of SA Foxx's office. In 2017, activists pushed Cook County Chief Judge Timothy Evans to issue a general order requiring Chicago judges to stop using unaffordable money bonds to detain people pretrial. Foxx's landslide election against a "tough-on-crime" incumbent on a platform that included bail reform helped build the political will for this change. Most

attorneys mentioned that this general order, 18.8A, which took effect on September 18, 2017, has had a dramatic impact on how bond is set in Cook County.²⁵ As a result, bond and pretrial release has been easier to secure for defendants. Defense attorneys noted that this policy change would have had much less impact without the cooperation of the State's Attorney's Office.

However, half of the practitioners we interviewed reported that setting, lowering, or changing conditions of bond with the trial court judges and ASAs is as difficult, if not more difficult, than it has ever been. While initial bond decisions are made in bond court, the judge who sets an arrestee's bond does not remain their judge for the rest of their criminal case. After a finding of probable cause, criminal cases are assigned to trial court judges who oversee criminal cases from arraignment through sentencing. These judges have the power to raise or lower the amount of money bail a person is required to pay, or, in certain circumstances, revoke bail altogether. Defense attorneys report that trial judges are much less willing to follow the mandates of Chief Judge Evans through General Order 18.8A than the judges in bond court. Soon after the general order took effect, Judge Evans transferred a number of judges out of bond court, replacing them with judges who were supporters of ending money bond. No such change, however, happened among the trial judges. As a result, even individuals who have had affordable money bonds set at their bond hearings and have returned for their subsequent hearings are sometimes being taken into custody later in their cases when they are assigned to a trial court judge - for no other apparent reason than the judge is hostile to bond reform. The defense attorneys who have encountered this problem noted that there was a similar problem among ASAs. Although bond court ASAs had been thoroughly trained on the law and the implications of General Order 18.8A, line prosecutors in trial courts sometimes still held to older, more punitive conceptions of how bond should be set. Several practitioners reported experiences with ASAs pressuring defense attorneys not to file motions for reductions or modifications of bond conditions by threatening to ask for a bond increase if such a motion was filed.²⁶ The reluctance of trial courtroom judges and ASAs to implement bond reform may contribute to the fact that 21% of individuals who have been issued money bonds since order 18.8A took effect remain in custody because they are still unable to afford them.²⁷

DISCRETION, MITIGATION, AND OTHER CHANGES IN PLEA NEGOTIATIONS

The defense practitioners we interviewed also noted that line ASAs seem to be allowed greater decision-making authority on their own cases since Kim Foxx took office. While the defense attorneys that we spoke to could not comment directly on whether policy changes had been made by leadership in regard to individual ASA discretion, they universally agreed that there has been some change in the way that line prosecutors describe their freedom to drop charges and work with defense attorneys to find creative sentencing solutions in certain circumstances.

Under the Alvarez administration, line ASAs often expressed to defense attorneys that they were severely limited by office policy when negotiating plea deals. About two-thirds of our interviewees described the ASAs they interacted with under the Alvarez administration as being under a constant fear of reprimand, punishment, or termination as a result of making charging reductions, sentencing reductions, or other lenient decisions. One attorney described the ASAs as always being on “pins and needles” about any resolution to a case that did not result in the maximum possible sentence. As a result, ASAs would consistently check with supervisors, sometimes up several tiers, for relatively common cases. One lawyer reported that a common joke among defense attorneys during the Alvarez administration was that you could not ask an ASA “the time of day without them having to ask their supervisor if they could give it to you.” Defense attorneys reported that the line ASAs they worked with in the Alvarez administration were consistently anxious about giving probation sentences rather than incarceration and regularly brought up fears that they would lose their jobs if they deviated from the punitive culture of the office.

In contrast, these defense attorneys now perceive line ASAs as having more discretion to treat their cases individually and make plea offers that reflect the facts of each individual case, rather than relying solely on the charge and their supervisors’ policies. This is especially true in certain types of nonviolent cases, especially drug and low-level theft cases. Most of the attorneys we interviewed spoke about how many ASAs are now willing and able to negotiate without having to ask a supervisor for permission halfway through. As a result, defense attorneys can secure reasonable plea offers for their clients more often in some types of cases, compared to the Alvarez administration. All in all, defense attorneys report that this has made plea deals more individualized and, therefore, more just. When line ASAs, rather than their supervisors, make plea offer decisions, it means those decisions are being made by the prosecutors with the most information about the facts of each individual

case. Line prosecutors are the SAs who review case files and other evidence, talk to police officers and complaining witnesses, and ultimately prepare cases for trial. They also are in the courtroom for each court date and are able to get detailed information from defense attorneys about each accused person’s unique circumstances. Overall, line prosecutors have higher levels of knowledge about the facts of individual cases and are therefore in the best position to make decisions as to what sentences are fair and just.

In particular, about half of our interviewees noted that line ASAs are more open to mitigation packets than ever before. Mitigation packets are packets of information accumulated and prepared by a defense attorney or their staff which lay out aspects of their client’s life that weigh against a harsh punishment. For example, if a 19-year-old is arrested for stealing clothing and electronics from a store and charged with felony retail theft, it would be mitigating information that he comes from a poor single parent household and is largely responsible for providing financially for his two younger siblings. During the Alvarez years, defense attorneys reported that they would sometimes put together these mitigation packets to persuade the ASA or judge that their client should receive a sentence of probation or a shorter incarceration term. However, because mitigation packets were generally perceived as having little or no effect in run-of-the-mill cases, they were often used only in very serious cases.

Under the Foxx administration, defense attorneys we interviewed reported that they are providing mitigation materials much more regularly and see their colleagues in the defense bar - both public defenders and private attorneys - doing the same. In fact, several attorneys reported instances where ASAs actually asked for the mitigation materials from the defense before they were offered. During their conversations with ASAs, interviewees reported two different stated motivations for being more accepting of mitigation material. Some ASAs seemed to be genuinely interested in knowing a client’s full life circumstances before making a plea offer. However, other line attorneys who requested mitigation materials told defense attorneys that they needed them to help defend their decision to forgo a hardline approach in a particular case when they were questioned about it by their more punitive-minded supervisors.

Defense Attorneys still reported encountering some line ASAs who are reluctant to deviate from the Alvarez administration’s tough-on-crime approach. In negotiations, many of these line ASAs attributed this reluctance to their fear of how their decisions would be viewed by their supervisors. Some prosecutors

DISCRETION, MITIGATION, AND OTHER CHANGES IN PLEA NEGOTIATIONS CONTINUED

told defense attorneys outright that they feared consequences from supervisors if they deviated downwards from the normal sentencing for a given offense. Some interviewees noted that they had witnessed supervisors criticizing their subordinates' more lenient decisions, sometimes in front of defense counsel or judges, which led to public embarrassment for the line ASA, and sometimes, more direct supervision and a loss of discretion in the courtroom going forward.

These same interviewees noted that ASAs they worked with seemed not to worry about discipline from their supervisors if they were too harsh in a case. One interviewee described a few cases where she received an unreasonably punitive offer from a line ASA and had contacted supervisors higher in the office to seek a more just outcome. Sometimes, she was able to find a supervisor willing to take the uniquely mitigating circumstances of a particular case into account and overrule the line ASA to offer a less punitive plea deal. However, she never saw or heard of the original line attorney who offered the highly punitive sentence receive negative feedback from their supervisor. In short, some interviewees perceived that the line ASAs they

worked with only seemed to worry about the impact of a particular plea offer on their own professional standing in the office when they were giving a more lenient sentence than the typical, punitive sentence for the charge, and not when they were pursuing the hardline approaches that Foxx publicly rejects.

Our interviewees noted that while they did feel that their clients' cases were being looked at more fairly and individually than they were during Alvarez's tenure, these positive changes are not entirely consistent across the office. Many practitioners noted that the degree of discretion State's Attorneys offered was the "luck of the draw" of which State's Attorney you happened to be negotiating with. Importantly, the defense attorneys nearly universally noted that even when less senior line ASAs are open to fairer deals or sentences and accepting of mitigation, more senior state's attorneys - many of whom were hired during the Alvarez administration or before - are sometimes not supportive of Foxx's move towards increased discretion and continue to impose hardline, inflexible sentencing rules on the courtrooms they supervise.

CONCLUSION & RECOMMENDATIONS

Defense attorneys report a definite shift in the State's Attorney Office under Kim Foxx, away from the hardline and inflexible prosecutorial policies that led to mass incarceration under Anita Alvarez. This shift is evident in the increased use of alternatives to incarceration, both through the increased use of probation and diversion programs, and by an increased willingness to reduce or dismiss low-level charges. In addition, practices in the areas of pretrial release and bond have become fairer and more reasonable. To some extent, there is more discretion being exercised by Assistant State's Attorneys, but it is very uneven. There is a substantial problem with some Alvarez holdovers continuing a punitive hardline approach and not acting in ways that are consistent with SA Foxx's policies.

In order to overcome this obstacle and more fully implement her program, we recommend that State's Attorney Foxx:

- Conduct a thorough review of her staff to identify ASAs and supervisors who are not acting in accordance with her policies;
- Give some form of instruction on these policies and their intent to ensure they are completely and properly understood, as well as name the consequences to those attorneys who violate them, including warnings, suspensions, and termination; and
- Explore a revision of evaluation and promotion policies to ensure that attorneys are recognized and promoted based on their effectiveness in emphasizing restoration, justice, and overall community health and safety.

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- 3 John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, Basic Books, 2017
- 4 Ibid
- 5 How Much Americans Make In Wages, Social Security Administration (<https://howmuch.net/articles/how-much-americans-make-in-wages>)
- 6 The American Middle Class is Losing Ground, Pew Research Center Social and Demographic Trends December 9, 2015
- 7 63% of Americans Don't have Enough Savings to Cover a \$500 Emergency, Maggie McGrath, *Forbes Magazine*, Jan. 6 2016
- 8 Out of Reach 2019, Low Income Housing Coalition
- 9 Chicago's Affordable Housing Shortage Needs Neighborhood Solutions, Institute for Housing Studies, Depaul University, April 2018
- 10 The Population of Poverty, <https://www.povertyusa.org/facts>
- 11 Health Insurance Coverage in the United States, 2017, US Census, Sept 12, 2018
- 12 Mental Health America as reported by Fox News, <https://www.foxnews.com/health/more-than-half-of-us-adults-with-mental-illness-dont-get-needed-care>, Oct., 2016
- 13 American Factfinder, US Census, 2013-2017 American Community Survey
- 14 U.S Census Factfinder, Poverty Status in the Past 12 Months, 2013-2017, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>
- 15 See <https://results316.cookcountyclerk.com/Summary.aspx?eid=31516>
- 16 NAACP Candidates Forum Hosted by the Chicago Westside Chapter of the NAACP. Video available at : <https://www.youtube.com/watch?v=6lTrQwCNcU>
- 17 In Cook County, most court personnel use the term "line ASA" to refer to the lower seniority Assistant State's Attorney who is directly assigned to a given case, in contrast to their supervisor.
- 18 In this report, diversion programs refer to programs that allow defendants to avoid being found guilty of an offense by allowing them to complete treatment, community service, or other requirements in exchange for their case being dismissed by the State's Attorney's Office. Probation and supervision are both programs that act as alternatives to incarceration at sentencing. Probation still requires a conviction for an offense but allows a defendant to live in the community and meet certain requirements (usually, reporting to an officer, avoiding re-arrest, and refraining from drug use) rather than be incarcerated. Ordinarily, whether a person completes probation successfully or not, a conviction remains on their criminal record. However, some specialized forms of probation in Illinois allow a finding of guilty to be vacated after the successful completion of probation; these programs usually require the defendant to complete drug treatment or mental health treatment during their probation. In Illinois, supervision is a form of sentencing that has similar conditions to probation. However, it is only available for misdemeanor convictions, and does not begin with a finding of guilt. Instead, a person's case is held open during the term of court supervision, and dismissed if it is successfully completed, leaving no conviction on a person's record.
- 19 Data drawn from the July 2019 release of State's Attorneys Office case-level data, available at: https://datacatalog.cookcountyclerk.gov/browse?tags=state%27s+attorney+case-level&sortBy=most_ accessed. Cases counted as "deferred" were those that were dismissed where the reason for dismissal was listed as "Drug Court Graduate", "Deferred Prosecution Program Completed", "DDPP Graduate", "DGS Graduation", "RAP", "Mental Health Graduate" and "Veterans Court Graduate".
- 20 Aggravated Unlawful Use of a Weapon (Uuw) is a misleading title for the Class 4 felony that practitioners were referring to. The elements of a Uuw charge are simply that a person possessed a weapon without carrying a firearm owners identification card. It does not require that the firearm be fired, brandished, or used in any way.
- 21 First Time Weapon Offender Program, 730 Ill. Comp. Stat. 5/5-6-3.6. Available at: <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=073000050K5-6-3.6> (last visited Jul. 7, 2019).
- 22 See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* available at http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Distortion-of-Justice_Stevenson.pdf (last accessed 10/10/18)
- 23 Paul Heaton, Sandra Mayson, Megan Stevenson. "The Downstream Consequences of Misdemeanor Pretrial Detention", 69 Stan. L. Rev. 711 (March 2017).
- 24 State's Attorney's Candidate Forum at Chicago State University, February 15, 2016. Video available at: <https://www.youtube.com/watch?v=us4-8dnUQUc>
- 25 Circuit Court of Cook County, "Chief Judge Evans releases bail reform report" (May, 2019), available at <http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2664/Chief-Judge-Evans-releases-bail-reform-report.aspx> (last visited Jul. 11, 2019).
- 26 Under Illinois law, any time a motion to reduce bail is filed, the judge has the ability to lower the bond, raise it, or keep it the same. However, state's attorneys make the decision as to what position their office will take on a request to reduce bond.
- 27 Between October 1, 2017 and December 31, 2018; Data drawn from The Chief Judge's Bond Data Portal, available at <http://www.cookcountycourt.org/HOME/BailReform.aspx>;

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