

Nebraska Criminal Justice Reinvestment Working Group



Final Report

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Executive Summary

Against national trends, Nebraska’s incarceration rate has been increasing over the last decade. Nebraska’s imprisonment rate increased 17 percent since 2011, while the national imprisonment rate steadily decreased over this period. While the state increased corrections spending to account for the growing prison population, arrest rates decreased and crime rates remained relatively steady. Despite these trends and increased spending, recidivism rates increased. In 2020, Nebraska was just one of four states that saw its incarceration rate increase.*

In order to prioritize public safety and effectively reduce recidivism, in April 2021 leaders from all three branches of government came together to request technical assistance through the Justice Reinvestment Initiative (JRI) – a public-private partnership between the Bureau of Justice Assistance (BJA) and Pew Charitable Trusts. Together, Governor Pete Ricketts, Chief Justice Mike Heavican, Speaker Mike Hilgers, and Judiciary Chairman Steve Lathrop established the Nebraska Criminal Justice Reinvestment Working Group (Working Group), and charged the Working Group to use Nebraska’s criminal justice data and criminological research to develop comprehensive recidivism-reduction strategies and shift resources toward more cost effective public safety strategies.

Over a six-month period, the Working Group met multiple times to analyze data from Nebraska’s criminal justice agencies, review the most current research on sentencing, corrections, and supervision practices, and develop policy options. The data showed that:

- While admissions to prison have decreased 21 percent since 2011, pre-COVID-19, admissions had been steadily increasing by 11 percent from 2015 to 2019.
 - More than half of initial prison admissions were for non-person, non-sex offenses in 2020.
- The length of stay for incarcerated individuals in NDCS has increased 38 percent in the last decade, driven largely by increasing sentence lengths and decreasing parole rates.
 - Parole grant rates have decreased in just three years from 78 percent in 2018 to 58 percent in 2020.
- Nebraska is increasingly using probation as a prison alternative, with 75 percent of all probation cases not revoked, and a declining share of technical revocations sent to NDCS. In spite of these successes, technical revocations represent about 40 percent of revocation reasons in 2020, highlighting the importance of sustained investment in community-based alternatives and treatment resources to address the behavioral health needs within the probation population.
 - Similarly, of those supervised on parole, more than 40 percent of revocations were for technical violations in 2020.
- These trends come at a great cost to the state, with corrections expenditures growing over 50 percent since 2011 to more than \$270 million in 2020. Yet, in spite of this investment, recidivism rates have increased over time, with 30 percent of those released in 2018 returning to NDCS custody, up four percentage points from 2008.†

* This source includes analysis of 2020 data. State prison populations have fluctuated depending on responses to the COVID-19 pandemic, and as such incarceration rates have been described as “unstable” since the start of the pandemic.

† Recidivism is defined as a return to NDCS custody as the result of a parole revocation or an admission on a new sentence within three years of a person’s release from prison.

Policy Option Snapshot

Working Group members met as a full group to review the overall data trends before breaking out into three subgroups to meet several times. As a result of these meetings, a total of 21 policy options were developed for the full Working Group to consider. The following is a snapshot summary of those options, to which greater details and corresponding data are provided later in the report. These policy options are rooted in data and the expertise of Working Group members. The majority of the options reached consensus, where the Working Group defined consensus as general agreement by all members that a particular policy option move forward. The entire Working Group did not unanimously support every option, but agreed all of the options listed below should be included in the report for possible further consideration. The options that received unanimous consensus from Working Group members are noted below.

Focus corrections resources on violent and high-risk individuals

Option 1: Establish a streamlined parole process for certain eligible individuals. Consensus option. (Page 24)

Option 2: Increase Investment in Assistant Probation Officer (APO) positions who can provide direct support to Probation Officers supervising high risk caseloads. Consensus option. (Page 25)

Option 3: Establish supportive housing programs for individuals on supervision in the community. Consensus option. (Page 26)

Address regional inconsistency in outcomes across the state

Option 4: Create statewide standards for the use of early probation discharge. Consensus option. (Page 27)

Option 5: Narrow broad sentencing ranges by tailoring punishments to specific levels of seriousness. Consensus reached on burglary and low-level theft charges, but not on drug possession. (Page 28)

Option 6: Reduce “jamming out” releases. Consensus option. (Page 29)

Option 7: Increase education for stakeholders about young adults involved in the criminal justice system. Consensus option. (Page 29)

Option 8: Expand Problem-Solving Courts. Consensus option. (Page 29)

Minimize barriers to successful re-entry

Option 9: Improve reentry practices for those being released from prison. Consensus option. (Page 30)

Option 10: Remove the barrier of criminal conviction for individuals who are successful on supervision. Consensus option. (Page 31)

Option 11: Invest in tangible incentives to motivate compliance while on community supervision. Consensus option. (Page 31)

Option 12: Prioritize Restitution to Victims of Crime. Consensus option. (Page 32)

Improve state-wide behavioral health supports

Option 13: Increase state incentives for students in Nebraska pursuing careers in behavioral health to provide care in designated shortage areas across the state. Consensus option. *(Page 32)*

Option 14: Utilize county and district courts as physical access centers for virtual behavioral health treatment for individuals on community supervision. Consensus option. *(Page 33)*

Option 15: Expand the use of sentencing alternatives. Consensus option. *(Page 34)*

Option 16: Create statewide standards for diversion programs and reinvest funding into judicial districts to administer such programs. Consensus option. *(Page 34)*

Ensure the sustainability of the reforms

Option 17: Appoint the Working Group to reconvene to review the implementation and fidelity of the reforms resulting from this effort. Consensus option. *(Page 35)*

The options that did not receive consensus from the Working Group are noted below:

Option 18: Create a geriatric parole mechanism.

Option 19: Modify Drug Possession penalty.

Option 20: Discourage the use of mandatory minimum sentences for non-violent felonies and allow credit to be earned during a mandatory term toward the non-mandatory portion of the sentence.

Option 21: Ensure consecutive sentences are used consistently and appropriately across the state.

Nebraska’s Prison Growth in the National Context

In the last decade, Nebraska has experienced a surge in its prison population. Since 2011, the number of incarcerated individuals in the state has increased by 21 percent. This rate of incarceration, on its own, is not exceptional nationwide. In fact, only fourteen states have lower state imprisonment rates.¹ However, Nebraska is one of only four states that experienced an *increased* incarceration rate since 2010.^{‡2} Nationally, the number of incarcerated citizens under state or federal jurisdiction across all states and territories declined by 11 percent between 2009 and 2019[§] – while Nebraska’s prison population continued to increase.³

This expanding population has placed great strain on the state’s criminal justice resources. Nearly every Nebraska Department of Correctional Services (NDCS) facility is operating above capacity. In the first quarter of 2021, six out of ten NDCS prisons held more than 120 percent of their operational capacity. In 2019, Nebraska’s prison population of 5,546 incarcerated citizens meant the system as a whole was operating at 115 percent of its operational capacity. Measured by this metric, in all of the United States, only Iowa is struggling with more acute prison overcrowding.⁴ In response to the overcrowding, NDCS declared prison overcrowding an emergency in July 2020.

Separate from overcrowding, NDCS has also experienced recent incidences of violence and tragedy. In 2015, a riot at Tecumseh State Correctional Institution resulted in two deaths, injuries, and hundreds of thousands of dollars in damage. Two years later, in 2017, two incarcerated Nebraskans were killed during a subsequent riot at the same facility.⁵ The stress on the facility is exacerbated by a staffing shortage at NDCS – the agency is currently struggling to fill a historical high of 527 vacancies as of 2021.⁶ This prolonged and acute understaffing has, according to news media reports, left NDCS employees “overworked, feeling unsafe, and has caused some of them to have mental and emotional breakdowns.”⁷

In addition to pushing the capacity of state prisons to their limits, Nebraska’s rising prison population is occupying a sizeable portion of the state’s budget. Corrections expenditures have increased over 51 percent since 2011, from \$179.8M to \$272.3M in 2020, not including the additional \$230 million estimated to cover the cost of a new prison. Nebraska is hardly alone in this regard. Since the early 1970s state prison populations across the country expanded rapidly and state officials have spent an increasing share of taxpayer dollars to keep pace with soaring prison costs. From the mid-1980s to the mid-2000s, spending on corrections was the second-fastest growing state budget category, behind only Medicaid.⁸

Unfortunately, Nebraska’s increased expenditures and expansion of its penal population has not coincided with enhanced public safety. Over the last decade, one third of individuals released from prison are consistently returning within three years and there has not been any significant reduction in crime. Between 2010 and 2020, the state’s violent crime rate rose 17 percent, compared with a 2 percent drop nationally, while the property crime rate fell 28 percent, versus a 34 percent drop nationally.⁹

[‡] This source includes analysis of 2020 data. State prison populations have fluctuated depending on responses to the COVID-19 pandemic, and as such incarceration rates have been described as “unstable” since the start of the pandemic.

[§] While a third of the reduction came from two populous states – California and New York – in total 41 states saw reductions in their total incarcerated population from 2010 to 2020.

Like many states before it, Nebraska finds itself at a crossroads. With the state prison system excessively crowded and housed in an aging infrastructure, state leaders are examining options for moving Nebraska forward. The old approach to criminal justice policy that led to the massive growth in prisons across the country over the last four decades has been replaced by achieving better public safety outcomes for taxpayers by reducing recidivism.

The good news is Nebraska can relieve the pressure on its justice system by adopting policies and practices that have been successfully tested and tempered elsewhere in the nation. Many states have adopted policies to increase the return on investment and rein in the size and cost of their corrections systems through a “justice reinvestment” strategy, including Georgia, Mississippi, North Carolina, Oregon, Texas, and Utah. These states have revised sentencing and corrections policies to focus on reserving state prison beds for those who have committed violent and repeated offenses, and invested in more effective and less costly strategies to reduce recidivism, address gaps in behavioral health services, and improve public safety. Additionally, the momentum created at the state level for data-driven smart-on-crime policies helped create a moment of bipartisanship at the national level when Congress passed and then-President Trump signed the First Step Act in 2018.¹⁰ This legislation reduced mandatory minimum sentences for drug offenses, increased good time credits and authorized elderly and ill incarcerated people to serve the remainder of their sentences on home confinement.

In these states and in the federal system, this data-driven, collaborative process has resulted in wide-ranging innovations to the laws, policies, and practices that reserve costly prison beds for the most serious and violent offenses and shift resources to policies and practices that reduce recidivism and increase the state’s treatment capacity.

Key Findings

Over the last decade, Nebraska’s prison system has continued to grow despite an overall reduction in admissions and an increased reliance on community supervision. By examining the most recent decade’s criminal justice data, the Working Group sought to understand what is happening in Nebraska’s system via a thorough analysis of Nebraska’s criminal justice agency data, interviews with various criminal justice stakeholders, and roundtable discussions of key groups. Ultimately the data showed the key characteristics and drivers of the recent prison population growth, as well as the gaps in the justice system which have made that growth almost inevitable. These include the following:

- While admissions to prison have decreased 21 percent since 2011, pre-COVID-19, admissions had been steadily increasing by 11 percent from 2015 to 2019.
 - More than half of initial admissions to prison were for non-person, non-sex offenses in 2020.
- The length of stay for incarcerated individuals in NDCS has increased 38 percent in the last decade, driven largely by increasing sentence lengths and decreasing parole rates.
 - Parole grant rates have decreased in just three years from 78 percent in 2018 to 58 percent in 2020.
- Nebraska is increasingly using probation as a prison alternative, with 75 percent of all probation cases not revoked, and a declining share of technical revocations sent to NDCS. In spite of these successes, technical revocations represent about 40 percent of revocation reasons in 2020,

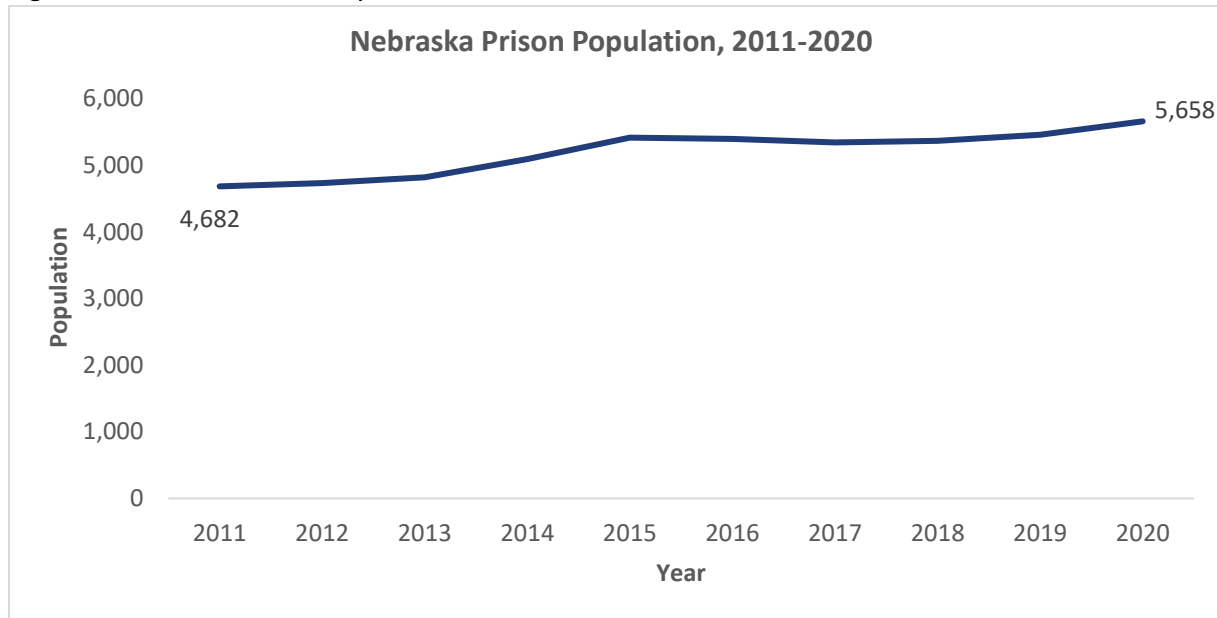
highlighting the importance of sustained investment in community-based alternatives and treatment resources to address the behavioral health needs within the probation population.

- Similarly, of those supervised on parole, more than 40 percent of revocations were for technical violations in 2020.**
- These trends come at a great cost to the state, with corrections expenditures growing over 50 percent since 2011 to more than \$270 million in 2020. Yet, in spite of this investment, recidivism rates have increased over time, with 30 percent of those released in 2018 returning to NDCS custody, up four percentage points from 2008.

Prison Population Growth Driven by Increases in Time Served

Nebraska’s prison population grew 21 percent from 2011 to 2020, with over 5,500 individuals in state custody at the end of 2020. This growth, primarily the result of the increasing length of time individuals spent incarcerated, is an outlier from national trends, which have seen a decline in the overall state prison populations of 11 percent across the country since 2011.

Figure 1. Nebraska’s Prison Population Grows 21 Percent Between 2011 and 2020

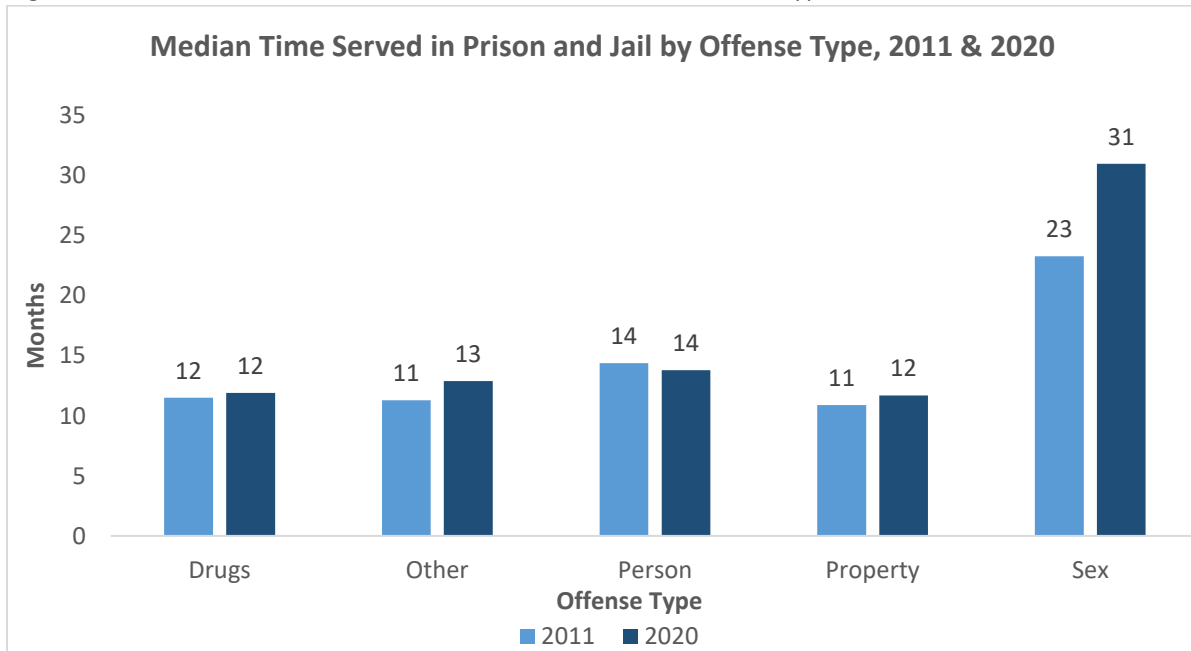


Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

Individuals in custody spent 38 percent longer in prison, or an average of 3 months, in 2020 than they did in 2011. This was driven by steadily increasing sentence terms, particularly the use of mandatory minimum offenses and consecutive sentences, coupled with a decline in parole grant rates. This increasing length of incarceration was consistent among all major types of offenses except property offenses, and was most notable among the offenses categorized by NDCS as “sex offenses,” with median lengths of stay increasing by 35 percent, or 11 months, between 2011 and 2020.

** For the purposes of this report, technical violations mean behavior on probation, parole or PRS that is non-compliant, however does not rise to the level of new law violations or criminal conduct. It is intended to describe the behavior, rather than indicate that a single technical violation led to a revocation.

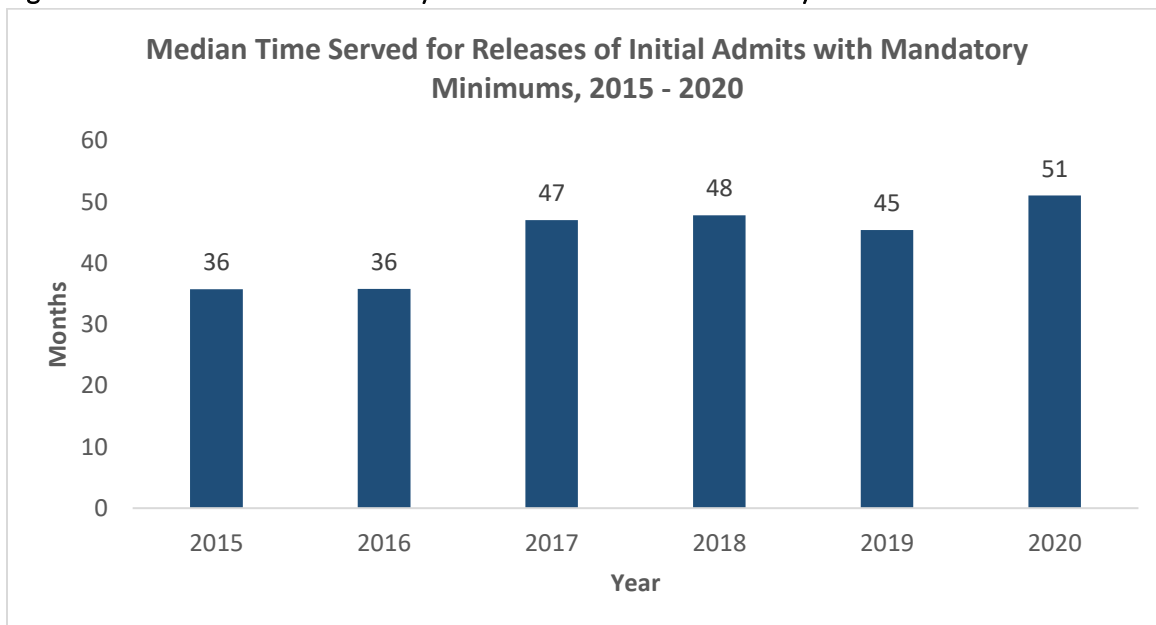
Figure 2. Time Served Increased or Remained Same for All Offense Types



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

Another category where the data revealed a significant increase in the median time served was for those offenses with a mandatory minimum sentence term. Between 2015 and 2020, sentences for offenses requiring a mandatory minimum term – including Class IC and ID felonies along with specific offenses like use of a firearm to commit a felony and the habitual criminal charge – experienced an average length of stay increasing of 42 percent, or over one additional year.

Figure 3. Time Served for Mandatory Minimum Offenses Increased by 42 Percent



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

Nebraska's increasing lengths of stay are the result of two key occurrences: individuals receiving longer sentences and a trend of parole release rates not keeping pace with admissions.

The Sentencing Effect

Nebraska's sentencing structure is unique in that it does not rely on a formulaic grid or matrix like most states across the country, but instead incorporates a considerable amount of judicial discretion within broad sentence ranges. Seven of the state's ten felony classes require a judge to establish an indeterminate sentence range based on a minimum and maximum term. The remaining three classes, the lowest classes of felonies, have a determinate fixed term corresponding to a specific amount of time. Nebraska's indeterminate ranges cover extensive time periods with the smallest range spanning 20 years (no minimum sentence and maximum of 20 years for a Class IIA felony), and the largest range spanning 20 years to life for a Class IB felony. Distinct from other states, Nebraska has no statutory guidance requiring that the minimum term be some percentage of the maximum term, and the amount of time within the broad statutory framework is completely up to the judge.

For those offenses requiring a range, the data showed that the median minimum sentence length increased six months, jumping from 24 months in 2011 to 30 months in 2019. Meanwhile, the median maximum sentence length decreased 9 months from 48 months in 2011 to 39 months in 2019.^{††} The increase in minimum sentences has resulted in individuals overall spending three months longer in prison than they did ten years ago. This three-month increase applied to over 2,500 individuals, meaning those released in 2020 spent a combined 625 years more in prison than those leaving prison in 2011, representing a significant financial cost for the state.

To understand these trends further, the Working Group examined the historical statutory changes that have impacted sentencing during this time. Members found two significant pieces of legislation that addressed sentence length. The first, LB63, which passed in 2009, increased sentences for weapons offenses, and the second, LB605, which passed in 2015, increased the offense class for specific offenses including burglary and possession with intent to distribute a controlled substance. The Working Group noted the potential impacts that such legislative changes may have had on the state's sentencing trends.

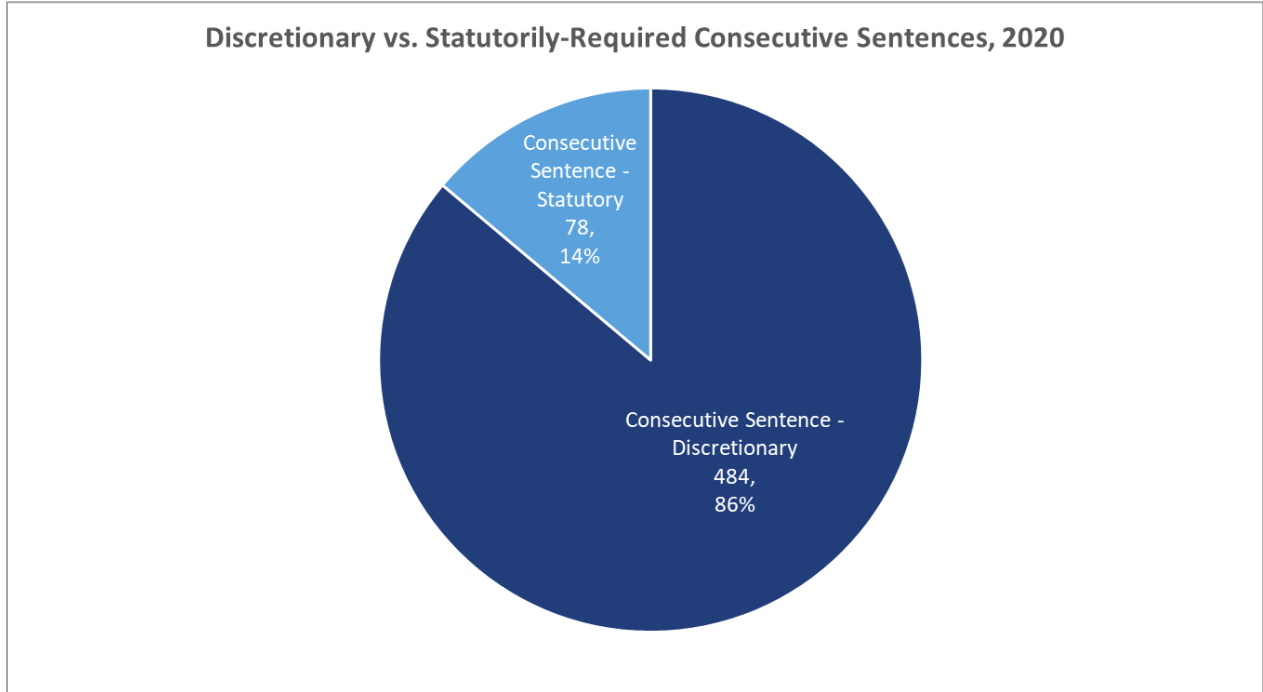
In addition to sentences getting longer for individual convictions, the state has also experienced an overall increase in the number of consecutive sentences being imposed for cases with multiple charges. Over the past decade, there has been a 21 percent growth in the proportion of sentences receiving a consecutive sentence – however the average number of charges underlying sentences with multiple convictions has not changed drastically during this time.

In Nebraska, judges must impose sentences consecutively if the offense involved a deadly weapon. Beyond that, judges have full discretion to issue sentences consecutively for multiple convictions. Since 2011, the number of prison admissions receiving a consecutive sentence has increased five percentage points. Looking further into the use of consecutive sentences, the data showed that 86 percent of the consecutive sentences imposed, or 484 sentences, were discretionary and not required by law in 2020.

^{††} Both the minimum and maximum sentence terms dropped in 2020, however, for the purposes of trends analysis over time, we are looking at trends through 2019 to account for any 2020 changed practices due to COVID-19.

The data show that consecutive sentences are most widely used among felony IV offenses, the lowest offense class, and among property and drug offenses (one in four consecutive sentences were connected to an underlying drug or property offense).

Figure 4. 86 Percent of Consecutive Sentences in 2020 Were Discretionary



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

Identifying the underlying reasons to sentence length increase, including statutory changes and increased use of both mandatory minimums and consecutive sentence, is critical to understanding time served and overall what is driving Nebraska’s prison population growth.

The Release Effect

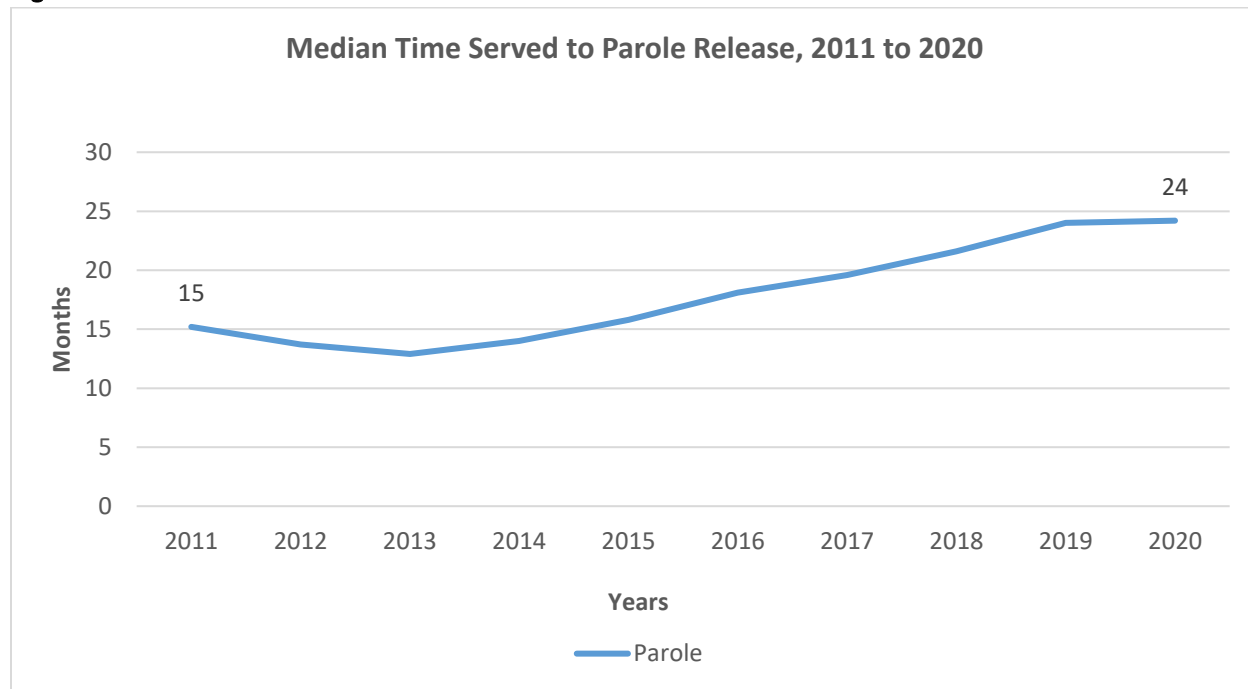
As sentence lengths increased on the front-end of the criminal justice system, releases remained constant on the back-end, further exacerbating the growth in time served. In 2020, 2,833 individuals were released through the three release mechanisms: sentence expiration, release to post-release supervision (PRS), and release to parole, an increase of just five percent since 2011. It is important to note that prior to 2016, PRS was not a release option. Legislation passed in 2015 required that Class IV, IIIA and III Felonies include a period of PRS in the sentence imposed, following the period of incarceration. An amendment in 2019 modified the sentencing requirements related to PRS, allowing its imposition to be discretionary for the judge for Class IV Felonies, while still requiring it for Class IIIA and III Felonies. The implementation of this policy caused shifts in releases, as those with a PRS sentence were no longer eligible for parole release, but did not remain incarcerated until the end of their sentence. As such, there were changes in

releases over time, with a large increase in releases to PRS and a significant decline in those released at the end of the sentence, known as ‘jamming out’, from 2011 to 2020.

Looking specifically at parole release in Nebraska, it is important to note that it is a distinct process in relation to other states. In many other jurisdictions, a Board typically grants or denies parole after a single hearing. In Nebraska, however, the parole process requires multiple formal and informal meetings between applicants and the Parole Board. Nebraska also vests the Board with a considerable amount of authority over a parolee’s eligibility. The Board may, for example, require individuals to complete different programs or arrange for certain post-release circumstances prior to granting release. One of the most significant factors for the Board in determining if someone should be granted parole is whether or not they completed institutional programming and/or treatment. In 2020, “Continued Correctional Treatment is Needed” was the top review deferral and denial factor.¹¹ Yet, difficulty accessing programming was identified as a barrier preventing individuals from being released to parole during stakeholder interviews and the Directly Impacted Persons & Reentry Service Provider Roundtable discussions.

As a result of the Board’s review and hearing process and broad condition-setting discretion, the data showed that the median time served in prison for those who were ultimately granted parole grew 60 percent from 15 months in 2011 to 24 months in 2020.

Figure 5. Amount of Time Served Prior to Parole Grows 60 Percent over Past Decade



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

In addition to a longer period of incarceration prior to parole release over the ten-year period, the data also show that fewer individuals are being granted parole. In 2020, 447 fewer individuals were released to parole than the high in 2012, a decline of 27 percent. Considering grant rates, of the nearly 2,000

hearings that took place in 2020, the Board granted parole for 58 percent of the applications, down from a grant rate of 78 percent in 2018.

The combination of increasing sentence lengths, the Board's process, and reductions in parole grant rates has materially impacted time served across the state. This increase is significant because prior to the pandemic, admissions were consistently outpacing releases, with more people coming into prison than are being released. This dynamic is exacerbated by the fact that those coming into prison have longer sentences and are serving more time on these sentences, producing a "stacking effect" resulting in Nebraska's continued prison population growth despite decreases in admissions.

Admissions to Prison and Inconsistent Access to Alternatives to Incarceration

In contrast to people spending more time in prison over the past ten years, data show fewer individuals entering Nebraska's prisons over this same time period. Admissions declined by 21 percent between 2011 and 2020 due in large part to a significant drop in admissions between 2013 and 2015, coinciding with increases in probation admissions. However, from 2015 to the start of the COVID-19 pandemic, the state's prisons saw a steady increase in the number of people being admitted to prison.

In reviewing the NDCS population over the last decade, with overall admissions to NDCS down 21 percent since 2011, a more detailed look at demographic variations was revealed by examining admissions by gender, age and race.

Admissions by gender indicated that males and females were sentenced to NDCS at expected rates. That is, while males comprised 87 percent of total admissions to NDCS in 2020, male admissions declined 22 percent since 2011 while female admissions dropped by 18 percent during this same period. These decreases are consistent with the declines in the total admissions population.

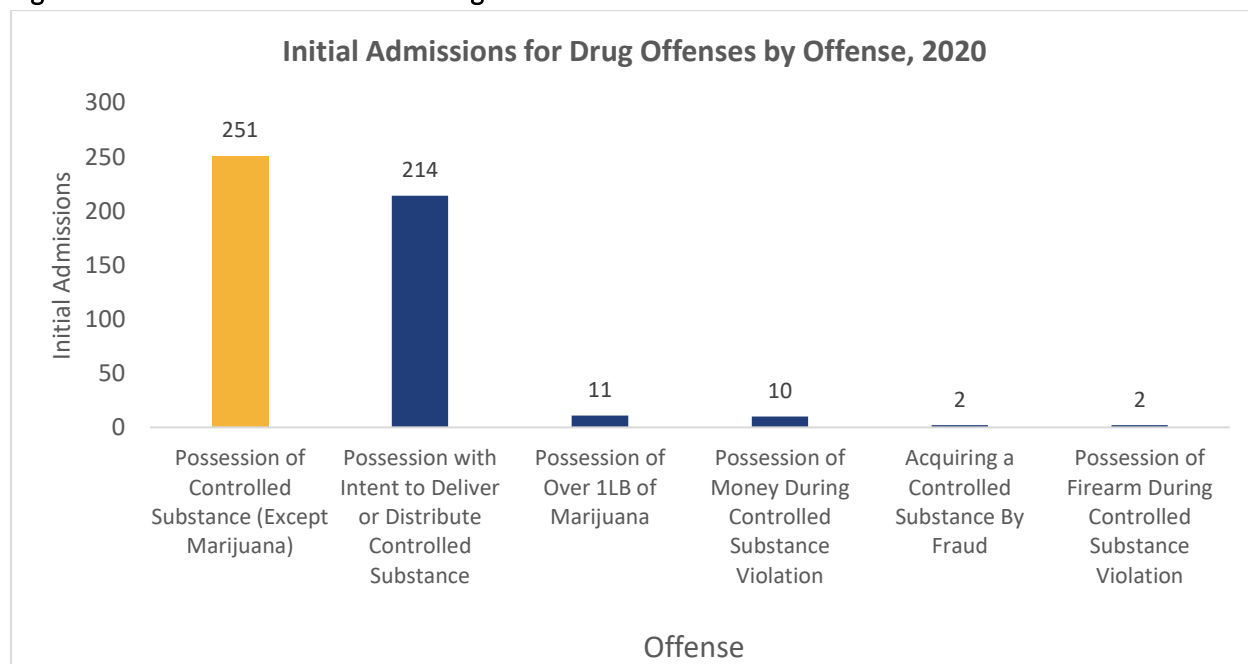
Conversely, admissions by age indicated that while the majority of the prison population included individuals aged 35 years and under, older individuals represent a growing share of admissions. In 2011, 3 percent of NDCS admissions were for persons 55 years and up, but by 2020, that percentage increased to 6 percent. However, the largest shift occurred among individuals aged 19 to 25, who in 2011 constituted 29 percent of all admissions but fell nine percentage points to just 20 percent of all admissions by the end of the decade.

Finally, when considering admissions by race, NDCS admissions in 2020 reflected the following breakouts: 57 percent of admissions were White, 22 percent were Black, 13 percent were Hispanic, 6 percent were Native American and 1 percent were categorized as other. Relative to the greater Nebraska state population, Black, Hispanic, and Native individuals are overrepresented in NDCS admissions. In particular, admissions for Native persons increased 9 percent over the last decade, compared to declining admissions for all remaining racial groups.

Given the increased use of probation, which is typically a sentence used for nonviolent offenses, one might expect that prison admissions would largely be composed of individuals who have committed serious and violent offenses, yet the data show 56 percent of individuals admitted to custody on a felony

offense in 2020 were sentenced for a nonviolent offense (categorized by NDCS as a non-person/non-sex offense)^{**}. Twenty-six percent of prison admissions were the result of non-violent drug offenses, including possession (13 percent of admissions in 2020) and possession with intent to deliver (11 percent of admissions). As depicted in Figure 6 below, possession and possession with intent were the most common types of drug offenses at admission. Moreover, these offenses were the two most frequent among all offenses admitted to NDCS in 2020.^{§§}

Figure 6. Possession Most Common Drug Offense at Admission in 2020



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

In addition to looking at offense type, the Working Group also examined what felony class constituted the majority of admissions. The data showed that one in four individuals were admitted to prison in 2020 for a Class IV Felony offense, the lowest felony class in Nebraska. Looking at Class IV Felonies in the 2020 admissions cohort, possession of a controlled substance (except marijuana) was the most common Class IV Felony, comprising more than 50 percent of all Felony IV admissions in 2020. The use of incarceration for this group is notable because research shows that compared to non-custodial alternatives, imprisonment has not been shown to reduce recidivism. In fact, some studies have concluded imprisonment of an individual for this type of offense can lead to higher recidivism rates.¹²

Some of the reasons drug offense cases may continue to drive prison admissions are the inconsistent availability of options across the state that divert a person from the system. Nebraska law does not prioritize access to treatment and services for individuals with behavioral health needs over incarceration, and this has led to a patchwork of programs with disparate outcomes across the state. For instance, diversion programs are administered on a county-by-county basis, with the county attorney solely responsible for establishing a pretrial diversion program. As such, the availability of these programs

^{**} When considering the most serious offense at admission, as classified by NDCS

^{§§} When considering the most serious offense at admission, as classified by NDCS

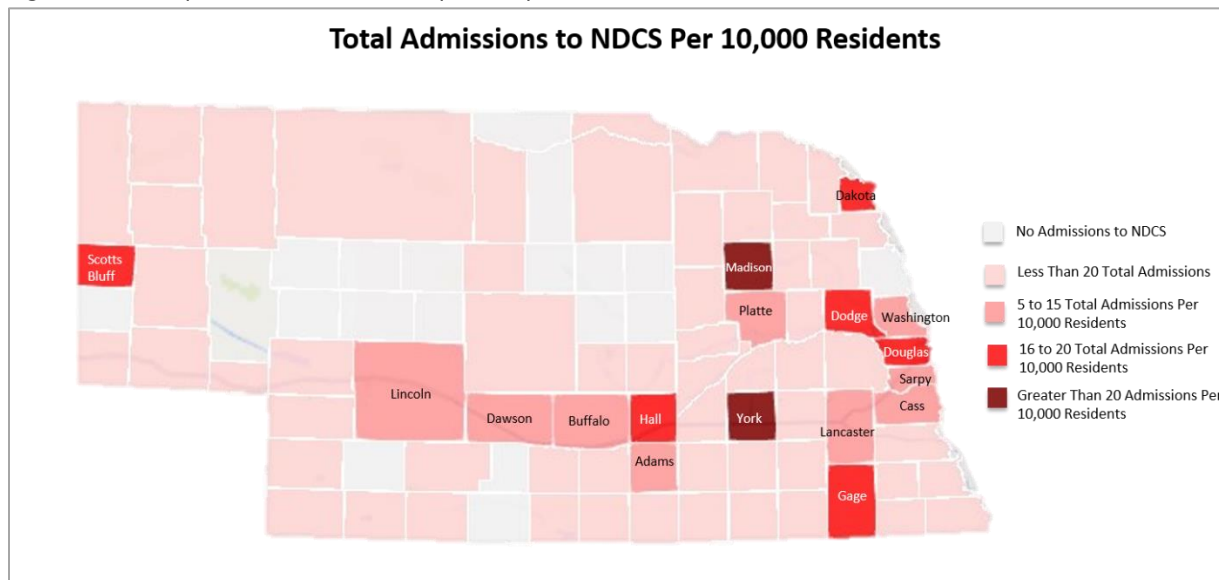
across the state varies widely, depending entirely upon the county attorney’s willingness to establish and oversee a diversion program.

Similarly, a lack of uniform admissions standards hinders access to Problem-Solving Courts (PSCs). While the Supreme Court outlines eligibility standards for each the different types of PSC, in practice individuals hoping to be accepted into a PSC program must, in many counties, be approved by the prosecutor. Using recidivism as a measure of success, Nebraska’s PSCs have had positive outcomes. The use of PSCs has increased 31 percent between 2014 and 2019, and compared to a similar group of individuals that did not participate in a PSC, recidivism rates are 27 percent lower. In spite of these successes, there are areas in the state where access to PSCs is unavailable, due to prosecutor discretion as well as geographic challenges. In interviews with stakeholders, it is evident that expansion of PSCs is a common agreed-upon priority, however judicial resources are often cited as a barrier.

Significant Regional Variation Impacts Time Served

Discussed earlier in the report, one of the key findings was the effect of judicial discretion with such broad sentencing ranges. Examining sentencing data across the state, the data showed significant regional and county-based disparities in sentencing decisions. This analysis found that rates of prison admission by county of conviction were highest outside the metro areas. When stakeholders in a behavioral health roundtable examined these county-level trends, variation in the availability and accessibility of behavioral health treatment resources were described as a cause of the regional variation as well. With fewer treatment options for substance use disorder or mental health diagnoses, the parts of the state outside of the larger cities have limited options to address the underlying behavioral health challenges that contribute to criminal behavior. The result of this is the use of prison for individuals with drug and/or mental health challenges.

Figure 7. County Admission Rates Vary Widely

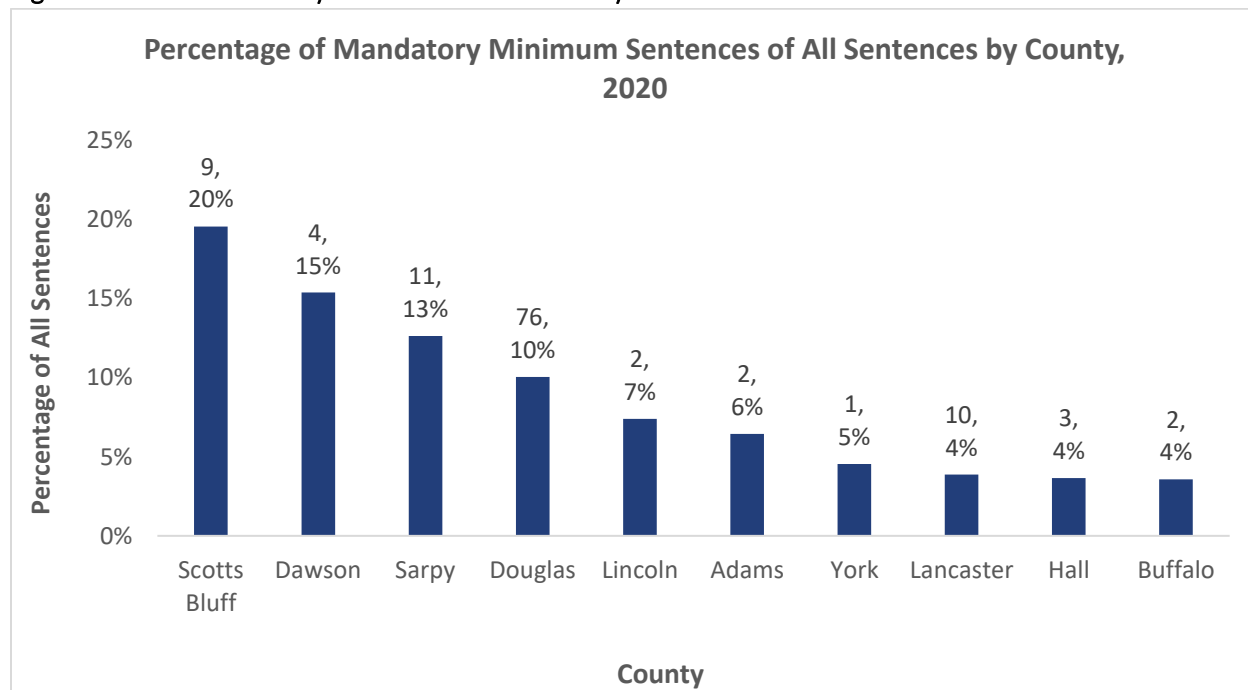


Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

An examination of sentencing data revealed that people with similar criminal histories and similar current charges receive very different sentences depending on the geographic location in which they are sentenced. The Working Group examined release types by county to identify geographic trends and found inconsistent results. For example, when looking at what county sentences resulted in a parole release, the data show parole sentences were most common in Scotts Bluff, Lincoln, Buffalo, and York counties, whereas the use of sentences with a PRS term were most common in Washington County. When looking at time served, the data showed sentences from Buffalo County yielded the longest median time served extending over 24 months, followed by Lincoln, Scotts Bluffs, and Lancaster, with median time served ranging from 12-24 months. These stark fluctuations across the state illustrate that a person’s release type and length of time served is dictated largely by where they are sentenced as opposed to the specific circumstances of their case.

Seeking further clarity on regional differences and their impact on time served, the Working Group looked at the use of mandatory minimums and consecutive sentences by county. Examining mandatory minimums first, the data showed that not only had admissions for these sentences doubled in the past decade, jumping from 4 percent to 11 percent of admissions, but their use varied greatly across the state. The top three counties that used the largest proportion of mandatory minimum sentences in 2020— Scotts Bluff, Dawson, and Sarpy, respectively--accounted for less than ten percent of all NDCS admissions in 2020. The data showed regional reliance on this sentencing structure significant to the state’s prison population growth, given the 42 percent increase in the median time served for these offense types since 2011.

Figure 8. Use of Mandatory Minimums Varies Greatly Across the State



Source: Data from the Nebraska Department of Correctional Services, Analysis by CJI

Similar to mandatory minimums, there is wide variation among the counties that use consecutive sentences. As noted previously, the use of consecutive sentences in Nebraska is overwhelmingly

discretionary. Looking at which counties whose proportion of individuals sentenced in 2020 had the most consecutive sentences, the data show nearly half of all cases out of Lancaster and Madison Counties resulted in a consecutive sentence while Douglas County, the county with the largest number of admissions, utilized consecutive sentences in just 19 percent of their cases.

These regional differences demonstrate that where a person is sentenced impacts if they will get sent to prison, how long they will stay in custody, and how they will be released. The Working Group acknowledged outcomes of the justice system should be driven by the circumstances of the case and not geography.

Community Supervision

In addition to examining who was going to prison, the community supervision data was also analyzed, showing the state experienced a large shift toward using probation, parole and post-release supervision over the past decade. The probation population increased by 70 percent since 2011, largely driven by admissions to probation from Douglas County and the establishment of PRS as a probation-overseen release mechanism. Since 2016, an average of over 1,000 individuals were released to PRS annually, overwhelmingly from Lancaster and Douglas counties.

Acknowledging the challenges that a larger population may bring, the data on outcomes from supervision were examined more closely. Looking first at probation and PRS, the data showed that, overall, individuals on probation and PRS have higher success rates than national averages.¹³ In 2020, 82 percent of district probation terminations were successful and 77 percent of PRS terminations were successful. Of those unsuccessful terminations, approximately 40 percent were due to technical violations^{***}, including absconding, and 60 percent were due to a new law violation. The rates are similar for the parole population with an average success rate of 65 percent in 2020, with 15 percent of prison admissions returning due to a parole violation.

Nationally, people on probation or parole have elevated rates of substance use disorders and significant unmet treatment needs.¹⁴ While supervision outcomes in Nebraska in recent years have become more successful, a file review of cases involving technical violations leading to revocation found that much of the misconduct was associated with behavioral health challenges, especially substance use disorder. In qualitative interviews with probation and parole staff across the state, barriers to successful reintegration included a lack of providers in rural regions of the state, limited access to medication management providers, and need for greater trauma-informed care. This information mirrors the assessment conducted by the Nebraska Department of Health and Human Services Division of Behavioral Health in 2016. The Nebraska Behavioral Health Needs Assessment found shortages at all levels in the behavioral health workforce, and found this scarcity especially in rural areas. The report describes a decrease in the number of psychiatrists and notes that most Nebraska counties have been identified as “shortage areas” for mental health practitioners. While these shortages undoubtedly impact the general population, there is an even stronger effect for those who have been incarcerated or are on supervision. Research shows

^{***} For the purposes of this report, technical violations mean behavior on probation, parole or PRS that is non-compliant, however does not rise to the level of new law violations or criminal conduct. It is intended to describe the behavior, rather than indicate that a single technical violation led to a revocation.

that the behavioral health needs for this population are significantly higher than the general public and are often a barrier to successful transition back into communities.

For this growing population on community supervision, research indicates several key strategies for reducing recidivism and changing behavior. These strategies include: identifying and focusing resources on higher risk individuals; using swift, certain, and proportionate responses; incorporating rewards and incentives; frontloading resources in the first weeks and months on supervision and integrating treatment into supervision, rather than relying on surveillance alone. The research supporting each principle and how Nebraska's practices align will be discussed in detail below, describing the practices of the Administrative Office of the Courts & Probation (AOCP) for individuals on district probation and PRS, and of the Division of Parole Supervision (DPS) for individuals on parole.

Focus supervision and treatment resources on higher-risk individuals

Research consistently shows a person's likelihood of committing another offense can be accurately predicted through the use of a validated risk and needs assessment.¹⁵ As a result, a growing number of states have adopted this type of actuarial tool to identify an individual's likelihood to recidivate while on supervision, and to then allocate resources accordingly. Using a risk assessment, parole and probation officers can focus their limited resources on those who pose the highest risk of reoffending.

In Nebraska, both supervising agencies use a risk and needs assessment to guide supervision. AOCP uses the Level of Service/Case Management Inventory (LS/CMI) tool to assess an individual's risk to recidivate by targeting the eight identified domains that represent the top criminogenic risk factors for recidivism. Furthermore, AOCP policy requires the risk assessment tool be validated and used to determine both the focus and the goals of the success plan, through individualized case management that targets interventions to develop skills. Risk is incorporated into supervision levels for individuals on probation, including AOCP's tailored supervision option for high risk clients with substance use disorder through Specialized Substance Abuse Supervision (SSAS). Additionally, probation officers are statutorily required to be trained in the proper use of a risk and needs assessment, risk-based supervision strategies, relationship skills, cognitive behavioral interventions, community-based resources, using criminal risk factors to reduce recidivism, and the proper use of a matrix of administrative sanctions, custodial sanctions, and rewards.¹⁶ Lastly, the results of an individual's risk and needs assessment are not statutorily required to be utilized for the setting of general or specialized conditions of probation or PRS. However, in practice AOCP makes recommendations to the court for specialized conditions that are based in the results of the LS/CMI assessment, which may be included at the judge's discretion.

Parole supervision also uses the results of a risk and needs assessment, however DPS utilizes a different tool – the Ohio Risk Assessment System (ORAS). Statute requires the risk and needs assessment not only be used by DPS, but also be validated every 5 years. DPS uses the ORAS to guide programming referrals and create case plans that focus on risk, need, and responsivity – in accordance with best practice. While responsivity factors, like housing, transportation, and mental health issues, are identified during case planning at an individual's first meeting with their parole officer as part of the ORAS assessment, they are not considered when setting conditions of supervision. Statute requires that parole officers are trained on the use of a risk and needs assessment, risk-based supervision strategies, relationship skills, cognitive

behavioral interventions, community-based resources, criminal risk factors, targeting criminal risk factors to reduce recidivism, and proper use of a matrix of administrative sanctions, custodial sanctions, and rewards.¹⁷

Use swift, certain, and proportionate sanctions

Research demonstrates people are more responsive to sanctions that are swift, certain, and proportionate as opposed to sanctions that are delayed, inconsistently applied, and severe.¹⁸ In order to effectively change behavior, consequences for violations must be communicated in advance to create a clear deterrent for non-compliant behavior; responses to violations must occur as soon as the violation is identified so the individual can link the sanction to the behavior; all violations must receive a response, even if that response is an informal conversation with the individual, rather than waiting for violations accumulate before addressing the behavior; and the response must be proportionate to the behavior. In response to this research, many states have begun to incorporate these principles by requiring parole and probation agencies to use administrative or graduated sanctions in the community to proactively change behavior. These include establishing time limits on how long a person can be incarcerated for a technical violation, allowing short-term jail sentences for certain conduct, and requiring an individual be seen for a revocation hearing in a timely manner.

Both supervision agencies in Nebraska have made significant strides in this principle. Both AOC and DPS have implemented swift, certain, and proportionate sanctions through the use of graduated sanctions. Additionally, beginning in 2016, both agencies were authorized to use custodial sanctions in response to violations of supervision for between one and 30 days in jail. For people on district probation specifically, who have a substance abuse or noncriminal violation, revocation can only be pursued if the person has served 90 cumulative days of custodial sanctions during the current probation term. Since the law was implemented, over 5,000 custodial sanctions have been served as of June 2020. However, the most common type of revocation for district probation and PRS in 2020 was a technical violation. Meanwhile, more than 40 percent of parole revocations in 2020 were due to technical violations only.

Incorporate rewards and incentives

Research shows encouraging positive behavior change through the use of incentives and rewards can have an even greater effect on motivating and sustaining change than using sanctions alone. Research finds to effectively change behavior, rewards and incentives for prosocial behavior should be utilized four to five times more often than sanctions.¹⁹ At least 15 states have implemented earned discharge policies over the past decade that allow individuals to earn time off their supervision term for good conduct, resulting in reduced caseloads while encouraging positive behavior.

In Nebraska, prosocial behavior is incentivized through the use of good time credits for individuals on parole, with ten days earned for each full month of compliance. However, the way individuals on parole receive credits does not appear to function as an incentive. People receive credits in advance of earning them on the assumption they will comply with restitution and supervision fee requirements throughout their term of parole. If the person is not in compliance with those conditions, then credits are forfeited. As such, the system of credits functions more as a sanction than an incentive, when they would more

effectively encourage prosocial behavior if they were to be awarded each month. DPS has also developed an incentives matrix as a part of their graduated response system, yet interviews with stakeholders indicate that greater incentive options are needed to motivate compliance and reward behavior.

While this same good time credit incentive is not offered to those on probation, individuals on probation can be approved for early discharge. State law authorizes probation officers to submit an application for early discharge at any time during the supervision period. Officers are required to submit an early discharge application when an individual has served 75 percent of the imposed sentence, has no major violations in the preceding six months, and is in full compliance with all conditions. AOCB protocol informs probation officers of the application and practice of administering both incentives and sanctions.

Frontload resources in the first weeks and months following release

When an individual is returning to a community after a period of incarceration, research has demonstrated that long-term success is closely tied to accountability and support during the period immediately following release. Studies show that people on community supervision are most likely to violate the terms of their supervision or commit a new offense in the initial days, weeks, and months after release.²⁰ Meanwhile, the likelihood of noncompliant behavior and the value of ongoing supervision diminish as those under supervision gain stability in the community.

In Nebraska, for those who are released from prison to parole supervision, the reentry plan is largely concentrated on the person's housing plan. Meanwhile, because the release date for those who will be released to PRS is pre-determined, AOCB has established a Probation Navigator (Navigator) position to help facilitate a smooth transition from prison to the community. Navigators assist individuals with getting IDs, connecting a person with a food bank, and enrolling in Medicaid. Individuals released on PRS have a reentry plan utilizing a risk and needs assessment and expectations for programming and behavior are discussed prior to release. When all individuals are preparing for release from prison, statute requires NDCS to provide the opportunity for individuals to receive a state-issued ID. It is similarly required by statute that NDCS notify the Department of Health and Human Services of an individual's release from custody, in order to reinstate the individual's Medicaid coverage after it was suspended due to their incarceration. However, it is optional for NDCS to assist an individual in obtaining transportation, financial support at departure, or assistance in obtaining social security applications.

Integrate treatment into surveillance

Research shows a combination of surveillance and treatment focused on an individual's criminogenic needs, meaning the characteristics directly related to the individual's likelihood to re-offend, is more effective at reducing recidivism than surveillance alone.²¹ Officers should be trained to use cognitive behavioral techniques to support rehabilitation through prosocial reinforcement, rather than simply monitoring the individual until they fail.

Both probation and parole officers in Nebraska currently use a risk and needs assessment to determine individuals' supervision levels, and the results are incorporated into the creation of individualized case plans. As a result, programming and treatment referrals are based on the individual's specific needs.

However, conditions can be set prior to the completion of each supervising agency's risk and needs assessment. Therefore, programming and treatment required as a condition may not align with the results of the assessment that are incorporated into someone's case plan. Stakeholders across the state noted the lack of treatment beds in their jurisdictions and found regional disparities in accessing community-based treatment and programming. While this finding was raised across geographic regions of the state, it was noted to be particularly stark in the rural areas.

Policy Options

Based on the evaluation of Nebraska’s current practices in the areas of sentencing, release, reentry, and supervision, 21 potential policy options were developed for consideration and discussion by the full Working Group. The options are responsive to the data findings, provide an avenue for Nebraska to avoid additional spending over the next decade, and establish the ability to invest a portion of what would have been spent on new prison beds on measures to strengthen public safety and address behavioral health issues across the state.

The following 17 consensus policy options and 4 non-consensus policy options are designed to:

- Focus correction resources on violent and high-risk individuals;
- Address significant regional differences across the state;
- Minimize barriers to successful reentry;
- Expand community-based services to increase treatment placement options and support law enforcement collaboration; and
- Ensure the sustainability of criminal justice reforms.

The following options were developed through the subgroup process, where the Working Group members broke out into three groups to brainstorm ideas and review practices in other states. The full Working Group then reviewed these 21 options to determine which to include in the final report and submit for further consideration. In some cases, where noted, the options below did not receive unanimous support from the non-judicial members of the Working Group. Each of these non-consensus options received support from some and concern from others, and often disagreement was around the specifics of implementation. As all the policies were identified as data-driven policies responsive to the data findings, the Working Group opted to keep them in the report, noting the lack of consensus.

The role of Working Group members and their representation was vital to understanding the data and system operations and in developing these options. Having the necessary expertise, each member provided context to the challenges that exist in the current system as well as insight into how policy changes might function in practice. This report does not reflect an endorsement of every policy by every member, but an agreement of ideas generated by the group for further consideration of what is the best future path for Nebraska’s criminal justice system. In particular, the three members of the judiciary who took part in the Working Group, while vital to the conversation, refrained from supporting or opposing any policies given the nature of their positions and the expectations of the code of their professional conduct.

Focus corrections resources on violent and high-risk individuals

Option 1: Establish a streamlined parole process for certain eligible individuals

While the percentage of releases to parole has remained relatively consistent over the last decade, this metric has seen a steady decline recently. Since 2016, parole releases have decline 26 percent, with a total of 447 fewer people released to parole in 2020. And yet, the median length of stay in custody for those who are ultimately released on parole has increased 60 percent since 2011. A variety of factors have contributed to this increase including longer sentences, the establishment and expansion of PRS, a

parole process with multiple meetings and reviews, and a number of criteria the Board must evaluate, many of which are not directly related to public safety and are subjective. Participants of the directly impacted persons' roundtable were also supportive of efforts to streamline parole release procedures as a means of reducing the overcrowding in Nebraska's prisons.

The Working Group reached consensus that the Legislature should consider:

- a) Establishing a streamlined parole process where non-violent individuals are released at their parole eligibility date without a hearing if they meet both of the following criteria: (1) there is no outstanding residential treatment programming requirement or (2) any Class I misconduct in the last 24 months.
 - o An eligible individual will have the opportunity to enter into a contract for streamlined parole with the Parole Board at the Key Review 2 years prior to his or her parole eligibility dates.

- b) Modifying the factors considered by the Parole Board in making a parole decision, authorizing the Parole Board to consider the following factors:
 1. The adequacy of the individual's parole plan, including sufficiency of residence and employment history;
 2. The individual's prior criminal record, including the nature and circumstances, dates, and frequency of previous offenses;
 3. The individual's institutional behavior;
 4. The individual's previous experience of parole and how recent such experience is;
 5. Whether an individual has completed a risk and needs assessment pursuant to section 83-192; and
 6. Perspective of victim or victim's representative on parole application.

Option 2: Increase investment in Assistant Probation Officer (APO) positions who can provide direct support to Probation Officers supervising high risk caseloads

A central goal of the JRI legislation that passed in Nebraska in 2015 was to increase the reliance on alternatives to incarceration, such as probation, in lieu of prison time. As such, admissions to probation since the passage and implementation of LB605 have increased significantly—compared to 2011, probation admissions in 2020 grew by 70 percent. The increase in the probation population has also been mirrored by an increase in risk level (as determined by the LS/CMI risk tool) for individuals who are on probation—an outcome, in part, caused by the creation of PRS. While an increasing population coupled with higher risk scores has presented new challenges for probation staff across the state, the success rates of those on probation remain high. In 2020, 70 percent of district probation terminations were successful and 56 percent of PRS terminations were successful.

While the increasing use of probation as an alternative to prison has led to promising outcomes across the state, the Working Group acknowledged the increasing level of risk for the population on probation, combined with factors such as the staffing shortage in the state, can place an extreme burden on community supervision officers—especially those with high caseload numbers or a greater portion of high risk clients on their caseload. To mediate the pressure placed on probation officers, the Judicial Branch

has added paraprofessionals to the AOCPS staff known as Assistant Probation Officers (APOs) who report directly to a Chief Probation Officer or designee, and provide support to probation officers. Qualitative findings indicate increasing supportive staff has improved caseload management for the probation officers receiving support, and has been a more cost-effective solution compared to hiring additional probation officers. The Working Group discussed the benefits of increasing APO staff and pairing those paraprofessionals with officers supervising high-risk caseloads.

The Working Group reached consensus that the Legislature should consider:

- a) Increasing the number of Assistant Probation Officers (APOs) in the state, and pairing those individuals with probation officers who manage high risk caseloads to ensure that officers are able to follow evidence-based practices and to ultimately maintain and improve the high success rates of probation supervision.
- b) First piloting this increase in one county or probation district in order to assess the impact of increasing the number of supportive personnel within the probation workforce. By tracking the outcomes of this change and planning for the budgetary increase in one location, the state can determine the funding necessary to implement a state-wide increase in APO personnel.

Option 3: Establish supportive housing programs for individuals on supervision in the community

While statewide prison admissions are decreasing for new admits, they are increasing for individuals returning to prison for a parole revocation. Admissions to NDCS due to parole violations have increased from 2011 to 2020, and one in six admissions to NDCS comes from either parole or PRS failures. Additionally, data findings indicate individuals who were revoked from parole and returned to NDCS custody in 2020 served significantly longer stays within prison than those revoked from parole in 2011 (a 78 percent increase in time served). Although both probation and parole agencies in Nebraska have established matrices of graduated responses, including a variety of sanction options to impose in response to certain behaviors, it is notable that a large proportion of the revocations back to prison that took place in 2020 for both probation and parole were not a result of new criminal charges, but rather technical violations of supervision. With more than 40 percent of parole revocations resulting in technical violations only, and noncriminal violations leading for the most common revocation reason for district probation and PRS in 2020, the Working Group determined a need for improving both accountability measures for individuals who violate the terms of their supervision, as well as intentional, proportional responses to effectively address the conduct that resulted in the violation.

The Working Group reached consensus that the Legislature should consider:

- a) Developing a supportive housing program to provide accountability and intensive support for individuals on parole who commit technical violations, without revoking them fully back to prison.
- b) Investing in transitional housing to increase capacity to support those being released from custody who show potential for success on supervision if their needs were addressed.

- c) Establishing reporting requirements for these programs to evaluate recidivism reduction outcomes for the purpose of expansion, as well as modeling a similar alternative to a full prison revocation for individuals on probation.

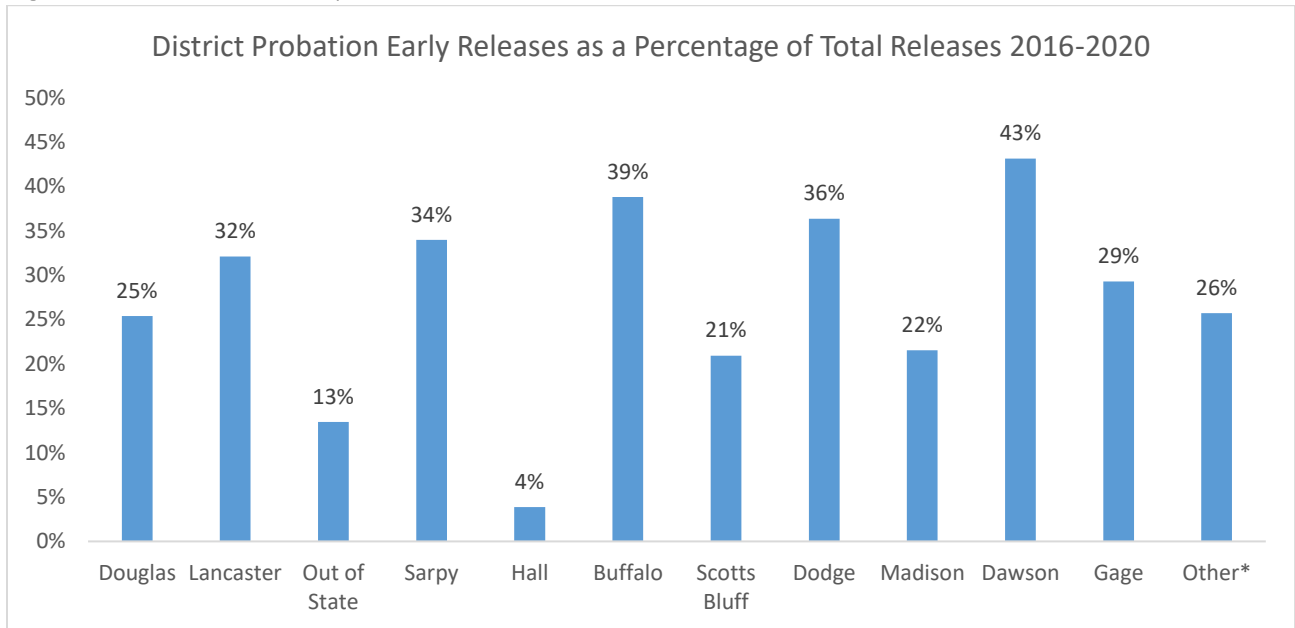
Address regional inconsistency in outcomes across the state

Option 4: Create statewide standards for the use of early probation discharge

Research indicates allowing individuals to reduce their sentence terms for complying with supervision conditions provides incentives for positive behavior and can shift supervision resources to those individuals at a higher risk to reoffend.²² Nebraska’s policy for early discharge from probation aligns with this research. Under state law, a probation officer is *authorized* to submit an application for early discharge at any time during the supervision period, and *required* to submit for discharge when an individual on probation is in compliance with all conditions, has not had a major violation in six months, is at a reduced risk of recidivating, and has served three quarters (3/4) of the imposed sentence.

While the policy is supported by current research in the field, data from 2016 to 2020 indicate a disparate application of the early probation discharge across counties in the state (see figure 1). The data also show that despite the high (and increasing) rates of success on district probation and post-release supervision (PRS) in recent years, time served on both district probation and PRS has increased since 2018—meaning that while individuals are succeeding at higher rates on probation in recent years compared to before 2018, they are spending a longer amount of time on supervision. The Working Group recognized the incentive value in offering opportunities for individuals on community supervision to earn time off of their supervision terms, and agreed the use of this policy as a release option should be regulated across probation districts and counties in the state.

Figure A: Distribution of early release across the state.



The Working Group reached consensus that:

- a) The Administrative Office of the Courts and Probation (AOCP) should develop internal guidance and establish trainings for probation officers across the state regarding the use of the early discharge policy and the criteria which must be met by the individual on probation prior to the officer's submission for early discharge, as well as the key components to include in the discharge summary report.

Option 5: Narrow broad sentencing ranges by tailoring punishments to specific levels of seriousness

Burglary

Distinct from other states, Nebraska's burglary statute covers a broad range of conduct and provides a wide sentence range, which has been used inconsistently across the state. Burglary includes breaking into an occupied home to commit a crime as well as breaking into an abandoned building to use drugs. In most states, these two very different types of conduct with significantly different levels of severity are different crimes. Additionally, burglary is the leading property offense admitted to prison in 2020. In 2015, pursuant to LB605, the penalty for burglary was increased from a class III felony to a class IIA felony.

The Working Group reached consensus that the Legislature should consider:

- a) Creating degrees of conduct within burglary statute to differentiate between different levels of conduct, severity and harm by separating types of burglary based on building types – for instance, separating home invasion from the burglary of other commercial or non-residential structures.

Low-level Theft

While the amount required to constitute a felony theft in Nebraska is \$1500 dollars, nearly 30 percent of prison admissions for theft in 2020 were for felony shoplifting with no prescribed minimum amount. This is the result of the habitual theft statute²³ which allows for theft of any amount to be punished at the felony level after two prior offenses. The majority of other states do not have a similar statute that elevates repeated low-level theft to the felony level. Among those that do, there is a higher bar for felony punishment either because a greater number of prior offenses are required, there is a higher dollar amount threshold, or there is a certain timeframe in which those prior offenses must have taken place.

The Working Group reached consensus that the Legislature should consider:

- a) Modifying the habitual theft statute to avoid lengthy incarceration for low-level conduct by establishing that theft of any amount may be charged as a felony after two prior convictions occurring within ten years of the new offense.

Option 6: Reduce “jamming out” releases

While the implementation of PRS reduced the proportion of individuals being released to supervision rather than ‘jamming out,’ 27 percent of those released in 2020 served their entire sentence and had no supervision following their release from custody. Nebraska’s sentencing structure allows for the imposition of ‘flat sentences,’ where the maximum and minimum are exactly the same, preventing any parole review. This requires the individual to be released from custody without parole or post-release supervision to follow. Over the past ten years, half the people who have ‘jammed out’ have done so because they had a ‘flat sentence.’

There are three significant consequences to these types of sentences. First, they give no incentive to the person serving them to take active steps to become a good parole candidate by participating in treatment and other recidivism reduction programs. Second, these sentences do not account for the possibility that a person can significantly change during the period of incarceration and become rehabilitated and not likely to return to criminal conduct. Third, a person is released with no support or supervision at the conclusion of a flat sentence.

The Working Group reached consensus that the Legislature should consider:

- a) Exploring the modification of the sentencing structure to create more opportunities for parole eligibility, based on the agreement that parole supervision is usually the preferred release mechanism to an individual jamming out.

Option 7: Increase education for stakeholders about young adults involved in the criminal justice system

Research has demonstrated a young person’s brain does not fully develop or resemble an adult brain until a person enters their early- to mid-20s. During brain development, younger individuals typically are prone to exhibit impulsive behavior. However, research indicates that for most individuals, this period does not extend as someone enters full adulthood.²⁴ The Working Group recognized this science in brain development as an important component of the criminal justice system, from arrest to sentencing, through incarceration to supervision.

The Working Group reached consensus that the following should be considered:

- a) Increasing education for criminal justice stakeholders on changes in brain development due to age so that it can be considered during decisions on arrest, sentencing and release of emerging adults.

Options 8: Expand Problem-Solving Courts

PSCs have proven to be an effective model for reducing risk level and recidivism, and providing access to tailored treatment and programming to individuals with specific needs. In Nebraska, PSCs have greater options for incentivizing compliance, including the ability to clear charges upon the completion of the PSC supervision term and tailoring supervision to specific needs. In 2016, the state Legislature expanded the

definition of “problem solving court” to include reentry courts designed specifically to protect public safety and reduce recidivism by offering comprehensive support to certain high-risk and high-need individuals reentering the community. The reentry court model hinges on the collaboration of stakeholders across a returning individual’s support and accountability network, including a judge, prosecutor, defense counsel, PSC coordinator, community supervision officer, law enforcement official, treatment provider(s) and others.

While reentry courts are newer to Nebraska the Working Group recognized the success and potential of PSCs across the state. Therefore, the Working Group is interested in expanding PSCs-including, especially, reentry courts -for the purpose of supporting individuals who commit technical violations.

This option is further supported by sentiments expressed from individuals directly impacted by the system in Nebraska, who want the expansion of services to bolster supports within the community and diversion options for those who could benefit from tailored treatment, services, and opportunities not available in custodial settings.

The Working Group reached consensus that the Legislature should consider:

- a) Expanding PSCs based on the needs of the community, using a cost-benefit analysis to determine where to expand PSCs and how to fund them appropriately.
- b) Tracking and evaluating outcomes of reentry courts to determine what the future impact could be on state recidivism rates if this PSC model were to be further expanded across judicial districts, and what services would need additional funding in order to execute this expansion.

Minimize barriers to successful re-entry

Option 9: Improve reentry practices for those being released from prison

When individuals released from prison return to their communities after a period of incarceration, they typically face barriers that make this transition back to society a difficult process. The Working Group recognized the need to reduce the barriers to facilitate more successful reentry to communities from incarceration. For individuals who are seeking to be productive members of society, there may be additional challenges when appropriate and necessary resources in the rehabilitation process are unavailable or hard to access. Participants of the directly impacted persons’ roundtable noted that accessing healthcare is a common barrier to individuals reentering from prison, and at the behavioral health roundtable, experts shared that while sources like Medicaid are effective in theory, they are often unreliable because people’s status following release from prison does not update in a timely manner to allow them prompt access to affordable medical care.

Currently the reentry plan for those released to parole focuses mainly on finding appropriate housing. While the initial interview with a parole officer includes the identification of responsivity factors and barriers to successful reentry, it doesn’t necessarily include steps to address other reentry barriers facing

an individual upon release including employment, treatment, childcare, transportation, medical care and education.

The Working Group reached consensus that the following should be considered:

- a) Requiring the Parole reentry process to assess for and establish a plan to address an individual's responsibility factors.
- b) Establishing a Parole Supervision position similar to the PRS Navigators.
- c) Requiring NDCS track Medicaid enrollment forms filled out prior to release for all individuals leaving NDCS custody.

Option 10: Remove the barrier of a criminal conviction for individuals who are successful on supervision

The collateral consequences of a felony conviction are significant, often slow the transition to stability once a person leaves the system and greatly limits career options. In Nebraska, there is a need to include as many capable and employable people as possible in the workforce. Under current statute (NRS 29-2264), a person who is successful on probation can petition to have their conviction set aside. When the court issues an order setting aside the conviction, the conviction becomes void and any civil disabilities and disqualifications that were imposed as a result of the conviction are also nullified. While the set-aside does not erase a criminal record, the order setting aside the conviction is added to the criminal record. This provides both an incentive for successful completion of supervision and a path for deserving people to make their way back into the workforce. However, the Working Group has concerns that the option is underused because of a lack of knowledge about the petition process.

This option aligns with a policy priority expressed by Nebraskans with previous system involvement, who encouraged the Working Group to consider opportunities for the state to decrease the barriers that returning individuals face specifically related to rejoining Nebraska's workforce.

The Working Group reached consensus that the following should be considered:

- a) At the successful completion of probation, specific notice should be given to the individual that they may be eligible to have their conviction set aside pursuant to NRS 29-2264, what the outcomes of having their conviction set aside are and are not, and that they should contact their attorney or the public defender's office for further information.

Option 11: Invest in tangible incentives to motivate compliance while on community supervision

Research has found that changing behavior is most effective when rewards are utilized at a higher rate than sanctions. Specifically, applying incentives at a rate of 4 rewards to 1 sanction can increase the chances of successful supervision completion. The AOCPS and DPS have both developed incentive matrices to reward positive behaviors exhibited by individuals on probation and parole. That said, line staff from both agencies were interviewed as a part of the qualitative analysis conducted for the state's Justice

Reinvestment Initiative, and representatives from both agencies expressed a need for additional incentive options to be able to reward prosocial behaviors and motivate continued compliance on supervision.

The Working Group reached consensus that the Legislature should consider:

- a) Appropriating state funds to expand the menu of individualized incentives that can be offered to individuals on probation as a reward for positive behavior and compliance with terms of supervision. The Working Group envisions first piloting these incentives in one probation district or county to measure the outcomes of increasing incentives for individuals on probation, and to ultimately determine the funding that would be necessary to implement this change across the state and expand its use for individuals on parole supervision as well.

Option 12: Prioritize Restitution to Victims of Crime

The working group recognizes how crucial restitution is for victims of crime. Too often victims receive little if any restitution toward their losses. People who are on probation and parole often have supervision fees, fines, and court costs. While paying fines and fees can at times be a challenge for individuals on supervision, the collection of these fees is important to funding the system. However, the priority should be ensuring that victims receive restitution whenever possible.

Victim service providers and victim survivors who participated in roundtable discussions are concerned about the lack of prioritization, funding, and focus on the needs of victim survivors at the local and state government level. According to participants, the Crime Victims Reparation Fund takes a long time for processing and payment of claims, and there is often not enough money to cover claims. The payment of such claims was identified as a barrier experienced by Nebraska’s victim service community.

The Working Group reached consensus that the Legislature should consider:

- a) Prioritizing the payment of restitution above other court-imposed financial obligations.

Improve state-wide behavioral health supports

Option 13: Increase state incentives for students in Nebraska pursuing careers in behavioral health to provide care in designated shortage areas across the state

The Working Group heard from stakeholder groups across the system, including behavioral health professionals, previously incarcerated individuals, reentry service providers, victim/survivors and representatives of their support networks, as well as law enforcement officials—who all emphasized the gaps that exist across the state between treatment need and access to behavioral health resources. To address the limited availability of behavioral health services, the Working Group explored solutions first to the absence of working professionals with specialized training in behavioral health care in various parts of the state. Nebraska has two robust programs in place for incentivizing workforce development of health professionals, including licensed mental health practitioners, clinical psychologists, drug and alcohol counselors, child and adolescent psychiatrists, and general psychiatrists. These programs, The Nebraska Loan Repayment Program and the Nebraska Rural Health Student Loan Program, respectively

offer loan repayment opportunities or loan forgiveness for eligible professionals willing to practice in state-designated shortage areas. These programs report high rates of success and the Working Group seeks to expand on these successes by expanding them to those professionals who provide services to individuals with behavioral health needs.

The Working Group reached consensus that the following should be considered:

- a) Amending criteria for the Nebraska Loan Repayment Program and the Nebraska Rural Health Student Loan Program to specifically include professionals trained in providing care to community supervision populations, as well as individuals with training in methamphetamine treatment and care and trauma-informed approaches.
- b) Coupling student scholarships with future service requirements to encourage individuals from rural areas to enter behavioral health professions.
- c) Implementing rural rotations for behavioral health students that includes stipends for travel/housing allowances during the rotation and clinical supervision pay differential for the existing behavioral health workforce in those areas to mentor and teach students.
- d) Connecting high school students to entry-level jobs in behavioral health provider organizations that provide exposure to a comprehensive array of behavioral health professionals.
- e) Providing behavioral health professional or psychiatric nurse residency or internship opportunities where students are provided a preceptor at a wage that can support expenses.

Option 14: Utilize county and district courts as physical access centers for virtual behavioral health treatment for individuals on community supervision

During the COVID-19 pandemic, the state expanded efforts to implement telehealth services to mainstream connections to virtual care for individuals who were no longer able to access vital care in-person. This expansion in telehealth has helped connect more Nebraskans to critical services, however barriers to accessing care virtually remain prevalent across the state. Participants of the roundtables for behavioral health professionals and individuals directly impacted by the criminal justice system emphasized the need for addressing gaps in telehealth services and further developing the infrastructure of statewide teleservice to increase accessibility for all Nebraskans.

The Working Group reached consensus that the Legislature should consider:

- a) Utilizing the technological advances, expansions in connectivity, and overall virtual service capacity that has been established in the county and district courts across the state to offer a physical location for individuals on community supervision to access virtual behavioral health services.

- b) Piloting this effort first in one probation district in the state to then determine the funding and any additional measures necessary to implement this change across the state.

Option 15: Expand the use of sentencing alternatives

There have been significant successes with alternatives to incarceration in Nebraska over the past ten years. In particular, PSCs have reduced recidivism, promoted treatment and provided a path to dismissal of charges for successful individuals. Still, over half of initial prison admissions are still for class IIIA or IV felonies. The data shows a majority of these admissions are people who have not been in prison before; however, when that history was expanded to show jail stays, the data shows fewer people without a history of incarceration. Nearly 60 percent of new prison admissions have no prior NDCS history, and roughly 38 percent of the individuals being admitted to NDCS for the first time in 2020 had no jail history for an offense within the prior 3 years. While Problem solving courts have seen widespread success, the eligibility criteria vary from court to court and sometimes lack objective standards. There is also decision-making inconsistency resulting in different applications of similar criteria. In some counties, County Attorney's offices are the sole decision makers of who is admitted to problem solving court while in others the decision is made in collaboration with the courts.

Roundtable participants emphasized the need to bolster and standardize use of diversion across the state, especially for adults with mental health needs or substance use disorder. Regardless of age, participants believe that many Nebraskans with behavioral health needs may be better candidates for treatment and tailored programming in lieu of incarceration, and reinvestments can be directed to such programs.

The Working Group reached consensus that the Legislature should consider:

- a) Creating standard, objective criteria for who is able to access and participate in problem solving courts.
- b) Ensuring that decisions on who will be admitted to problem solving courts are developed as a team, wherein the court considers all available input and then decides if the individual fits the criteria for admission.

Option 16: Create statewide standards for diversion programs and reinvest funding into judicial districts to administer such programs

Diversion programs are administered on a county by county basis with no statewide guidelines or rules. The quality of diversion programs and the resources available for them vary widely across jurisdictions. Some counties lack diversion programs altogether because they lack expertise or funding or both. Creating statewide standards for diversion programs would ensure basic best practices are being upheld while also allowing for local variation. If local diversion programs can be created or expanded with additional funding, the results could produce significant savings at the state level.

The Working Group reached consensus that the Legislature should consider:

- a) Creating a standardized statewide structure for diversion programs, while reserving some flexibility to account for varying resources across the state.
- b) Ensuring counties have resources to administer diversion programs that, in turn, save State resources. Organize and fund this effort by judicial district.

Ensure the sustainability of the reforms

Option 17: Appoint the Working Group to reconvene to review the implementation and fidelity of the reforms resulting from this effort

Any significant modifications to Nebraska’s corrections and community supervision systems will require careful implementation, collaboration and oversight. Additional legislative and administrative changes may be required after the implementation of the policies outlined in this report, in order to enable the state to realize the goals of this process. Several states that have enacted similar comprehensive reform policies have required the collection of data to track key performance outcomes and have established oversight bodies to oversee implementation, report on outcomes, and recommend additional reforms if necessary. Research has shown that in order for evidence-based practices to be effective at changing offender behavior and reducing recidivism, they must rely on accurate data and be successfully implemented with ongoing oversight and tracking.

The Working Group reached consensus that the Legislature should consider:

- a) Appointing the existing Working Group to reconvene once a year or more to review the collection, organization and analysis of data relevant to implementation and outcomes of performance measures of this policy package and the reinvestment of averted costs and funds saved.

Non-Consensus Policy Options

The following policy options below did not receive unanimous support from the Working Group. These options were developed during the subgroup meetings and discussed at length by the Working Group members, and received support from some but not all Working Group members.

Option 18: Create a geriatric parole mechanism

Across studies, researchers have found age is one of the most significant predictors of criminality and criminal behavior decreases as people get older.²⁵ Studies on recidivism for individuals on parole found the likelihood of violations of their supervision conditions also decreases with age. In these studies, older individuals on parole were less likely to be re-incarcerated.²⁶ In 2015, ten percent of Nebraska’s prison population was made up of people 55 or older, an increase of 63.5 percent from just five years earlier. Unlike many states across the country, Nebraska does not have a geriatric parole option where individuals would be released at a certain age.

Furthermore, incarcerated individuals who are older are more likely to have serious health conditions compared to those who are younger, leading to much higher medical costs. Due to these increased needs, prisons across the nation spend roughly two to three times more to incarcerate older individuals.²⁷ While Nebraska has a medical parole policy, the data show it has been underutilized in the last five years. As such, in 2015, Nebraska spent an average of \$8,582 per incarcerated individual on prison health care, a 13 percent increase from 2010.

The Working Group did not reach consensus on the specifics of how such a policy implemented, but discussed the following policy option:

- a) Creating a geriatric parole mechanism with a specific age, exclusion offenses, and certain timer period that was served.

Option 19: Modify Drug Possession penalty

Drug possession was the leading offense at admission to Nebraska prisons in 2020. As such, the Working Group discussed potential policy options to address this. Some members suggested that possession of a certain amount of drugs other than marijuana be created as a misdemeanor offense to distinguish individuals who have a substance use disorder and who are possessing drugs for personal use from those who possess high quantities of drugs indicating such possession is for selling rather than personal use. Others expressed concerns that making drug possession a misdemeanor offense would undermine the effectiveness of Problem-Solving Courts and other diversion options for substance abuse.

The Working Group did not reach consensus, but discussed the following policy option:

- a) Establishing weight-based thresholds for misdemeanor possession of substances other than marijuana.

Option 20: Ensure consecutive sentences are used consistently and appropriately across the state

In the past ten years, the use of consecutive sentences has grown significantly across the state. Looking at where consecutive sentences are used most often, the data shows them being used disproportionately in counties that had few prison admissions and for offenses that were not serious or violent. Moreover, the majority of consecutive sentences used were discretionary decisions by the court and not those mandated by statute.

While some Working Group members supported the requirement that consecutive sentences be reserved only for certain types of violent offenses, others felt that this tool would erode judge's discretion to determine what sentences were appropriate for the circumstances.

The Working Group did not reach consensus, but discussed the following policy option:

- a) Providing guidance to judges that consecutive sentences should be reserved for more serious and harmful offenses.

Option 21: Discourage the use of mandatory minimums sentences for non-violent felonies and allow credit to be earned during a mandatory term toward the non-mandatory portion of the sentence.

The use of mandatory minimums in Nebraska has more than doubled since 2011. While the length of mandatory minimum sentences is unchanged in this time, time served for mandatory minimum sentences has increased by 42 percent. Mandatory minimums in Nebraska apply several types of offenses in Nebraska including sex offenses as well, as all class IC and ID felonies.

In exploring the impact of mandatory minimum sentences, the Working Group examined the way in which credits apply to mandatory minimums. The credit system authorizes sentencing credits be afforded to those who are incarcerated at a day-for-day rate, facilitating parole eligibility halfway through someone's minimum sentence. However, credits cannot be earned during a mandatory minimum sentence, and a person may only begin accumulating credits after they have served the entire mandatory minimum. This credit rule for mandatory minimum sentences means that in many circumstances the actual mandatory term is longer than the stated mandatory minimum. For example, under the current law, a person serving a ten to 20- year sentence with a mandatory minimum of five years, would not be parole eligible until they served 7.5 years. Without the mandatory minimum term, the person would be eligible for parole after serving five years. The goal of earning credits to lower parole eligibility is to incentivize good behavior and participation in education and treatment programs.

Some Working Group members suggested eliminating minimum sentences altogether and give judges the discretion to determine what sentences were appropriate for the circumstances. Others believed they were a tool necessary to address serious crimes, including the distribution and manufacture of harmful drugs.

The Working Group did not reach consensus, but discussed the following policy option:

- a) Limiting the use of mandatory minimums sentences for non-violent felonies and allowing credit to be earned during a mandatory term toward the non-mandatory portion of the sentence.

Expectations After Justice Reinvestment

This report clearly illustrates the commitment to improving Nebraska's criminal justice system by the dozens of stakeholders who participated in this Justice Reinvestment Initiative process. This first phase has resulted in many meaningful policy options toward achieving impactful policy and practice changes to address the most complicated criminal justice challenges. We believe these and other measures will lead to achieving better outcomes for individuals, our communities and for Nebraska.

Going forward from this report, it will be necessary to set realistic expectations for what comes next. This report, and the work that went into developing it, should be viewed as an important step toward achieving a more-just, equitable and fair system to address problems of crime, behavioral health, incarceration, community supervision and recidivism. Adopting these policy options would be a clear signal of Nebraska's commitment toward research-supported, data-driven decision making to improve public safety and the administration of justice.

Still, more steps will be needed. It will be important not to rush results. Cost savings, declines in prison population, lower recidivism and better behavioral health outcomes do not happen overnight. Nebraskans must be ready to invest the time required to fully and effectively implement these policy options.

Once implemented, it will take some time to see results. This process has been based in data and must continue to rely on data moving forward. It is often tempting to take individual circumstances and use them as examples of why a policy is or isn't working as intended. However, this process has shown the value of making data-driven decisions and that should be the path forward.

The work will need to continue. Some states, including Oklahoma and Nevada, have undertaken the Justice Reinvestment process multiple times to continue reform efforts. Several states have returned to the work to further build on successful reforms, to pursue reforms that did not get addressed earlier or to make progress in other areas of the system.

Challenges will remain. Crime won't be eradicated because of these policy options. But research done by Pew's Public Safety Performance Project in 2019 showed that on average, states which adopted policies through the JRI process did not see worse crime trends than those that didn't. And in 2018, Pew found that states that had passed policies through JRI prior to 2015 slightly outperformed all states in terms of average percent changes in violent crime and property crime. While many cities have experienced an increase in homicides over the last year, there are many factors contributing to that trend and no research has shown that policy changes due to JRI or any other data-driven process have negatively impacted crime rates.²⁸

Substance Use Disorder (SUD) will continue to be a significant issue driving criminal behavior. But as has been seen in Utah, significant advancements can be made toward getting those impacted by SUD into treatment. In Utah, total admissions of justice-involved people to treatment increased 34 percent between FY2015 and FY2019. Additionally, Utah saw a reduction in people held in prison solely for drug possession, going from 5 percent in FY 2015 to 2 percent in FY 2019.²⁹

Funding and resources will continue to be a challenge. States around the nation continue to spend billions of dollars on incarceration, a fact that won't change overnight as aging prison buildings need repair and an aging incarcerated population requires costly medical care. Fortunately significant costs can be averted, as they were in Georgia, where the Georgia Council on Criminal Justice Reforms estimated in 2018 that the expansion of alternative courts for people with substance use disorders and mental illness had averted \$212 million in additional incarceration costs.³⁰

Prison populations may remain high, but significant reductions can be achieved. In Louisiana, officials put an emphasis on prioritizing prison beds for those incarcerated for the most serious and violent offenses. As a result, the number of people incarcerated for nonviolent offenses dropped 35 percent from 2016 to 2019.³¹

Clearly, no one policy or set of policies can totally address all the systemic issues of the complex criminal justice system. However, states across the nation have made measurable progress, just as Nebraska is undertaking now, through the Justice Reinvestment Initiative.

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- ¹ U.S. Bureau of Justice Statistics data for 2019 as cited by <https://www.sentencingproject.org/the-facts/#rankings>
- ² Li, W. Eads, D., and Laferty, J. (September 20, 2021). *There are fewer people behind bars now than 10 years ago, will it last?* The Sentencing Project. <https://www.themarshallproject.org/2021/09/20/there-are-fewer-people-behind-bars-now-than-10-years-ago-will-it-last>
- ³ Carson, Ann. (October 2020). *Prisoners in 2019*. U.S. Bureau of Justice Statistics. <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>
- ⁴ Kiper, Melanie. (May 3, 2020). *State Prison and Overcrowding Capacity Data*. University of Nebraska. <https://www.unomaha.edu/college-of-public-affairs-and-community-service/governing/stories/state-prison-overcrowding-and-capacity-data.php>
- ⁵ *Incident Review of Disturbance and Death of Two TSCI Inmates*. National Institute of Corrections. (March 2, 2017) <https://d1vmz9r13e2j4x.cloudfront.net/NET/misc/2017TecomsehNicIncidentReport-3411.pdf>.
- ⁶ Office of the Inspector General of Nebraska Correctional System. Annual Report 2021.
- ⁷ Lundak, Marlo. (September 15, 2021). *Nebraska corrections employees share concerns about staffing shortages with lawmakers*. WOWT. <https://www.wowt.com/2021/09/16/nebraska-corrections-employees-share-concerns-about-staffing-shortages-with-lawmakers/>.
- ⁸ National Association of State Budget Officers. State Expenditure Report FY 2006, 2007. <http://www.nasbo.org/Publications/PDFs/fy2006er.pdf>.
- ⁹ Federal Bureau of Investigation Crime Statistics
- ¹⁰ <https://crsreports.congress.gov/product/pdf/R/R45558>
- ¹¹ Nebraska Board of Parole (July 2020). *Parole Reviews: Fiscal Year 2020*. <https://parole.nebraska.gov/sites/parole.nebraska.gov/files/doc/Parole%20Case%20and%20Key%20Reviews%20Datasheet%20FY%202020.pdf>
- ¹² Spohn, C., & Holleran, D. (2002). The effect of imprisonment on recidivism rates of felony offenders: A focus on drug offenders. *Criminology*, 40(2), 329-358. <https://doi.org/10.1111/j.1745-9125.2002.tb00959.x>; Bales, W. D., & Piquero, A. R. (2012). Assessing the impact of imprisonment on recidivism. *Journal of Experimental Criminology*, 8(1), 71–101. <https://doi.org/10.1007/s11292-011-9139-3>.
- ¹³ U.S. Department of Justice. (July 2021). Probation and Parole in the United States, 2019. <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus19.pdf>
- ¹⁴ Center for Behavioral Health Statistics and Quality. (2018). 2009 National Survey on Drug Use and Health Public Use Data File Codebook, Substance Abuse and Mental Health Services Administration, Rockville, MD. <https://www.datafiles.samhsa.gov/sites/default/files/field-uploads-protected/studies/NSDUH-2009/NSDUH-2009-datasets/NSDUH-2009-DS0001/NSDUH-2009-DS0001-info/NSDUH-2009-DS0001-info-codebook.pdf>. In the data set that indicated that 46% percent of adult males on probation needed treatment while only 18% received it, and only 26.3% of the 42.2% of males on parole in need of treatment received it, “unmet need” was defined as feeling a perceived need for mental health treatment/counseling that was not received.
- ¹⁵ Bonta, James and D. A. Andrews. 2007. *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*. Ottawa: Public Safety Canada, June. Available at: <https://www.pbpp.pa.gov/Information/Documents/Research/EBP7.pdf>
- ¹⁶ R.R.S. Neb. § 29-2252
- ¹⁷ R.R.S. Neb §83-1,100.02
- ¹⁸ Nagin & Pogarsky (2001), *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence*, *Criminology*, 39 (4), 865-892.
- ¹⁹ Petersilia (2007), *Employ Behavioral Contracting for “Earned Discharge” Parole*, *Criminology & Public Policy*, 4(6),807-814 ; Wodahl, Garland, Culhane & McCarty (2011), *Utilizing Behavioral Interventions to Improve Supervision Outcomes in Community-Based Corrections*, *Criminal Justice and Behavior*, 38 (4), 386-405.
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- ²¹ Washington State Institute for Public Policy. The Offender Reentry Community Safety (ORCS) Program in Washington State. <https://www.wsipp.wa.gov/BenefitCost/Program/8>.
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