

Justice Reinvestment Initiative in Vermont

Presentation to the Justice Reinvestment II Working Group

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Justice Center
THE COUNCIL OF STATE GOVERNMENTS

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Justice Center

THE COUNCIL OF STATE GOVERNMENTS

We are a national nonprofit, nonpartisan organization that combines the power of a membership association, serving state officials in all three branches of government, with policy and research expertise to develop strategies that increase public safety and strengthen communities.

How We Work

- We bring people together
- We drive the criminal justice field forward with original research
- We build momentum for policy change
- We provide expert assistance

Our Goals

- Break the cycle of incarceration
- Advance health, opportunity, and equity
- Use data to improve safety and justice



A data-driven approach to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and reduce recidivism

The Justice Reinvestment Initiative is supported by funding from the U.S. Department of Justice's Bureau of Justice Assistance (BJA) and The Pew Charitable Trusts.

The working group is prioritizing the following tasks prior to its second reporting deadline on **January 15, 2022**.

1. Oversee the Justice Reinvestment Initiative implementation activities and monitor implementation outcomes including the role of the COVID-19 pandemic in prison and supervision population change.
2. Continue the racial equity sentencing analysis and discuss potential policies to address racial disparities.
3. Evaluate the policy of parole eligibility for older adults in prison who are not serving a sentence of life without parole.
4. Develop funding recommendations for the upcoming budget cycle.

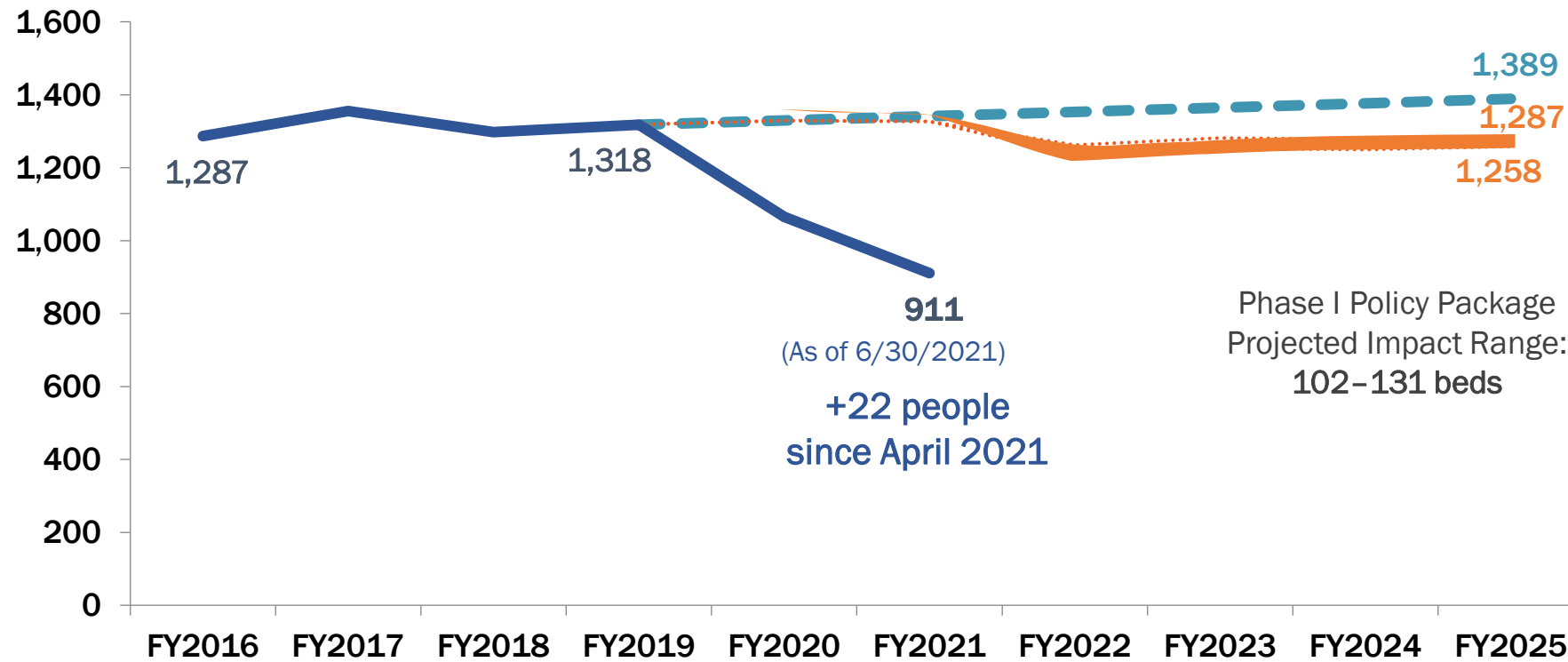


Overview

- 1** Data Monitoring
- 2** Strategies to Reduce Disparities
- 3** Parole for Older Adults
- 4** Sustainability and Next Steps

Since the COVID-19 pandemic, Vermont prison admissions have decreased significantly, resulting in a 31 percent decline in the incarcerated population.

Vermont Sentenced Incarceration Populations at Fiscal Year End and Projected Impacts*

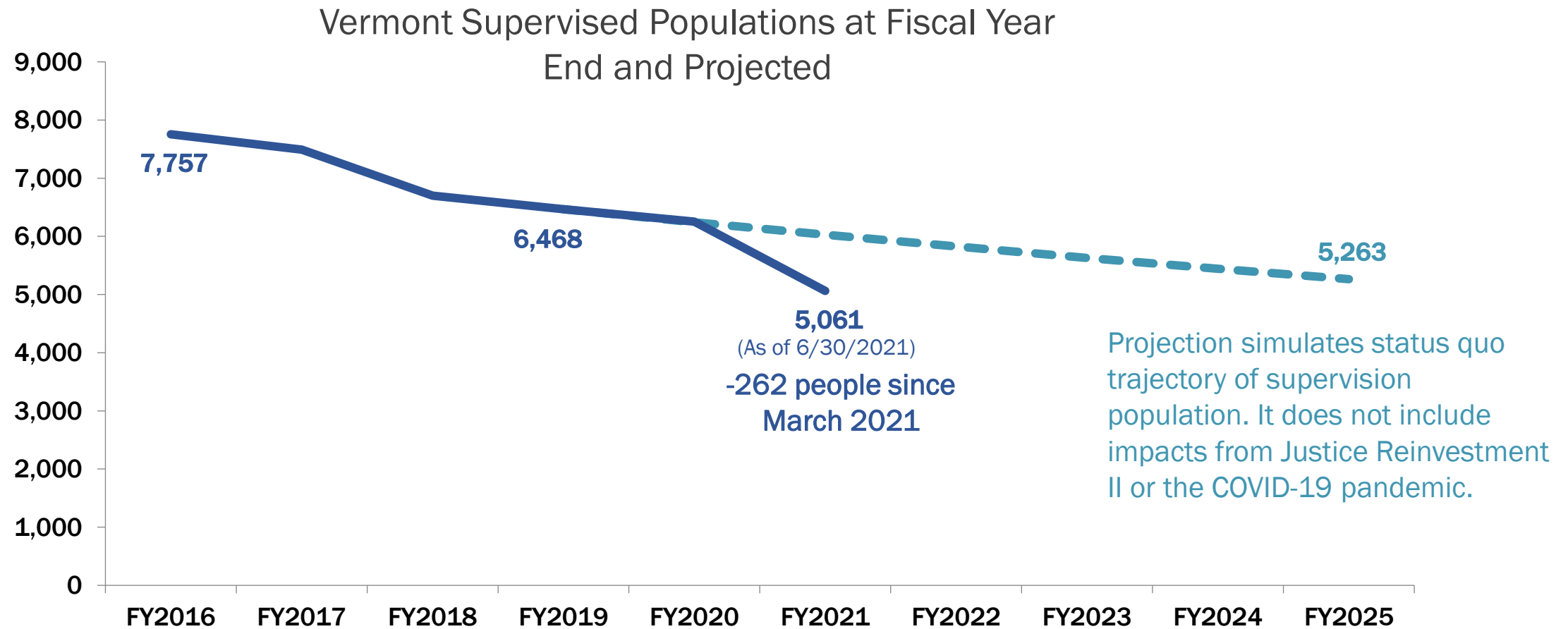


Initial projections models did not account for changes in the prison population since the onset of COVID-19 and so should be considered within a very limited context.

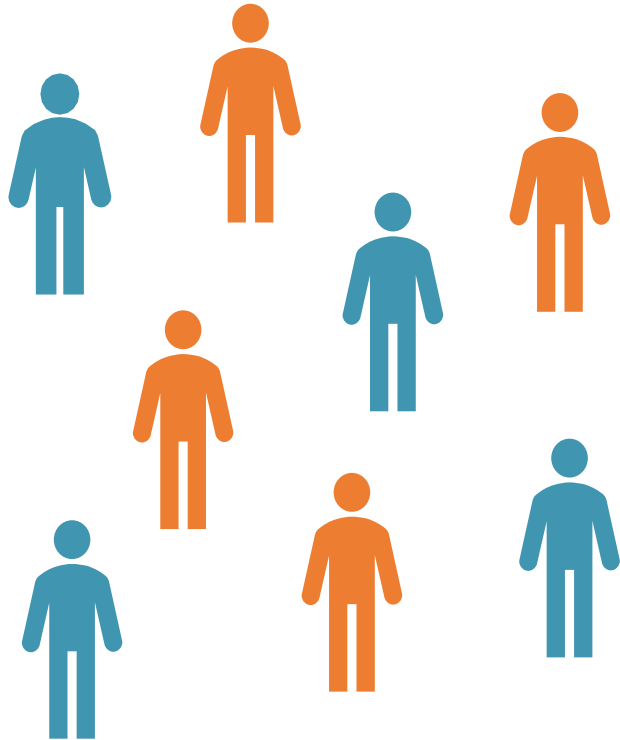
Phase I Policy Package
Projected Impact Range:
102-131 beds

*This chart shows Vermont's original Phase I impact projections and does not include the minimal reduction in savings resulting from carveouts to earned time as enacted in Act 12.

Vermont's community supervision population has also decreased significantly.



Additional measures available in future data monitoring reports will help the working group better understand population trends over time.



New prison admissions including furlough, probation, and parole returns.

New community supervision cases, including placement on furlough, probation, and parole.

Furlough interrupts 90 days or longer.

Final releases from incarceration and supervision, including people released through presumptive parole.



Overview

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- 2 Strategies to Reduce Racial Disparities
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National research indicates that while racial disparities in incarceration have declined since 2000, they remain a persistent feature of the U.S. criminal justice system.

5x

Nationally, Black people are **5 times** more likely to be incarcerated in **state prison** than White people.

7x

Nationally, Black people are **7 times** more likely to be incarcerated in **federal prison** than White people.

Incarceration for drug offenses is one area in which disparities are particularly pronounced nationally.



Though rates of drug use and sales are similar for Black and White people, Black people are arrested **3–4 times** more frequently than White people for drug offenses.



Nationally, Black people are up to **9 times** more likely to be incarcerated in state prison for drug offenses, relative to White people.

Council of State Governments Justice Center, September 22, 2020, Vermont Justice Reinvestment Working Group Racial Disparity Analysis, Presentation to the Racial Disparities in the Criminal and Juvenile Justice System Advisory Panel Subcommittee. Ojmarrh Mitchell, and Michael S. Caudy. "Examining Racial Disparities in Drug Arrests." *Justice Quarterly* 32, no. 2 (2015): 288–313. Jonathan Rothwell, "Drug Offenders in American Prisons: The Critical Difference Between Stock and Flow" (Washington, DC: Brookings Institution, 2015). Jeremy Travis, Bruce Western, and F. Stevens Redburn, "The Growth of Incarceration in the United States: Exploring Causes and Consequences" (Washington, DC: National Research Council, 2014).

Nationally, evidence suggests these disparities are driven by several key factors.



Sentencing policies—including mandatory minimum sentences and three strikes laws—have had a disparate impact on Black people.



For drug offenses, defendant race influences sentencing outcomes, independent of factors such as offense severity and criminal history.



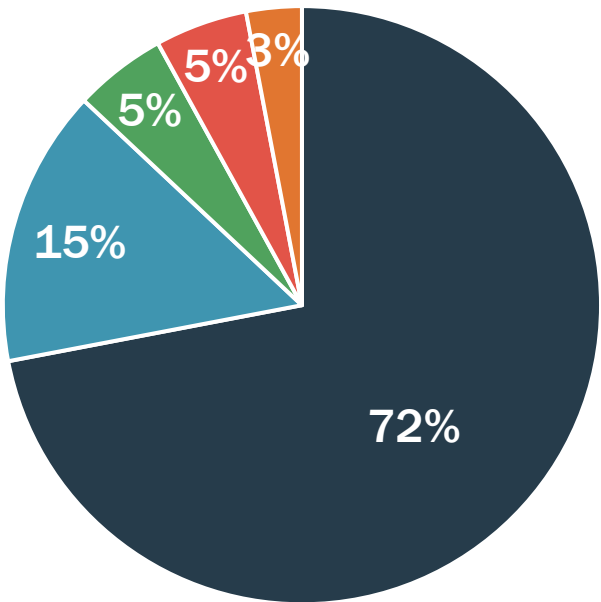
Cumulatively, differential treatment at multiple points in the criminal justice system (e.g., arrest, sentencing) contributes to Black/White disparities in incarceration.

As shown in past CSG Justice Center analysis, Black people are disproportionately incarcerated for drug offenses in Vermont, relative to the total sentenced population.

Vermont DOC Sentenced Incarceration Snapshot Population by Offense Type for Black Vermonters and Non-Vermonters FY2019

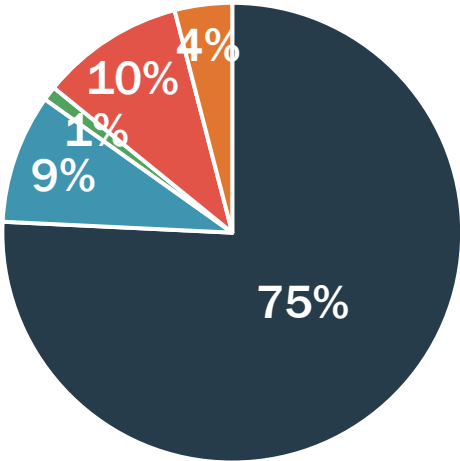
Total Sentenced Population

(1,318)



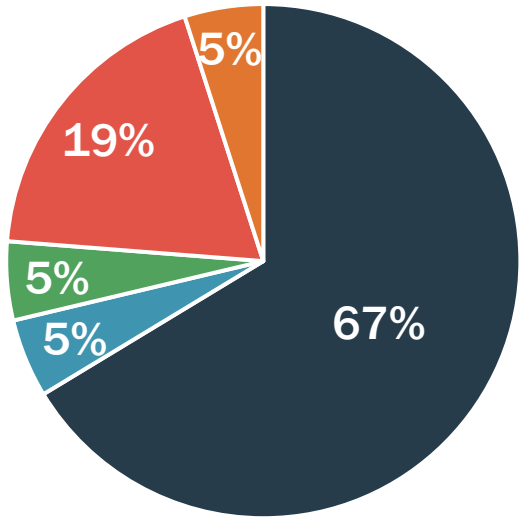
Black Vermont Residents

(89)



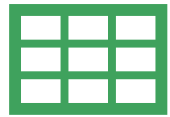
Black Non-Vermont Residents

(21)



■ Violent
 ■ Property
 ■ Motor Vehicle
 ■ Drug
 ■ Other/Unknown

Racial disparities for drug offenses can be addressed via sentencing reform, including the use of sentencing guidelines.



Research consistently indicates that **sentencing guidelines increase uniformity** and proportionality of sentences.



At the same time, sentencing guidelines have been shown to **reduce racial and ethnic disparities** in sentencing.



Presumptive sentencing guidelines are more effective than voluntary guidelines.

Richard S. Frase, "Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?" 2015, Retrieved from <https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>. Kelly Lyn Mitchell, "State Sentencing Guidelines: A Garden Full of Variety," *Federal Probation*, 81 (2017), 28. Dale Parent, et al., *The Impact of Sentencing Guidelines* (Washington, DC: National Institute of Justice, 1996). Michael Tonry, "Fifty Years of American Sentencing Reform: Nine Lessons" *Crime and Justice*, 48 (2019).

Research offers several key lessons for states interested in improving sentencing practices to reduce racial disparities.



Sentencing guidelines are most effective at reducing racial disparities when paired with legislation to ensure that guidelines are adhered to.



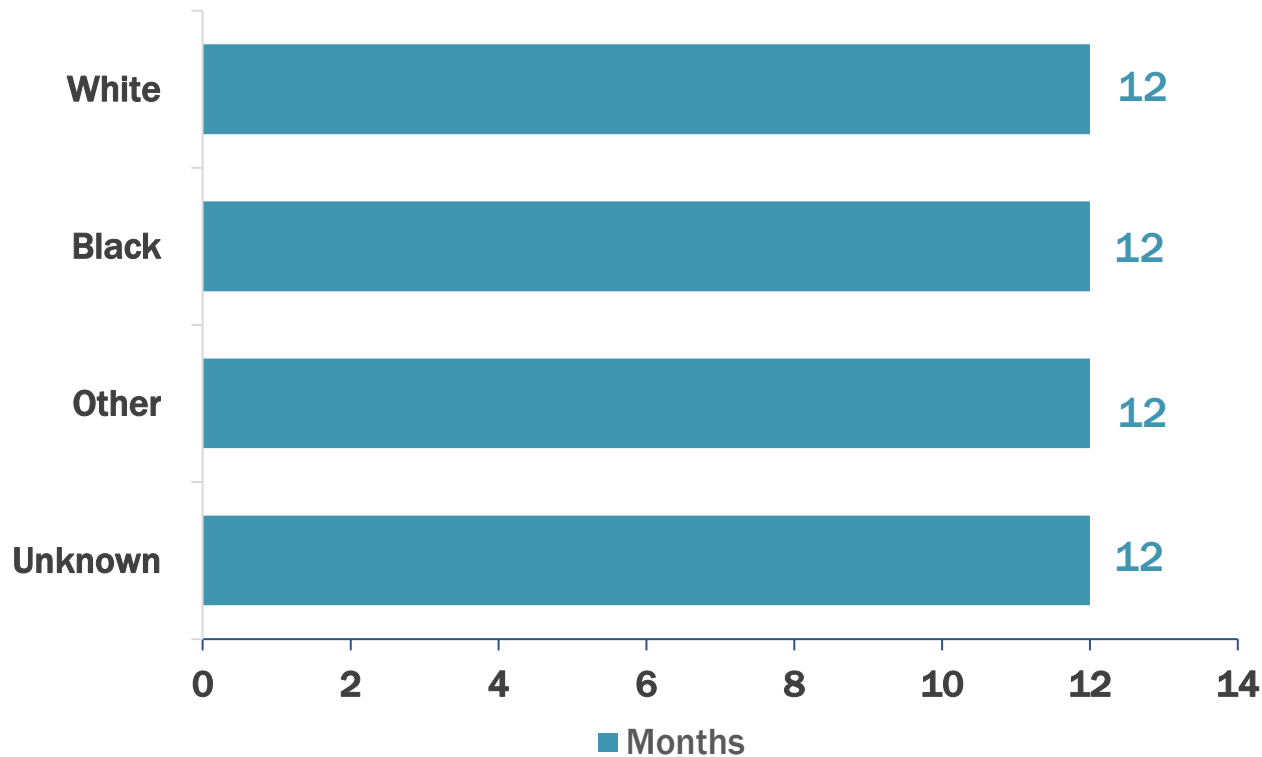
Although sentencing reforms focus on judicial decision-making, over time, they *may* influence prosecutorial decision-making as well by adjusting the “going rate” (i.e., expected sentence) for particular offenses.



Reforms do not need to be focused explicitly on racial disparities in order to reduce them.

In Vermont, statutory sentencing guidance seems to have ensured that there are no racial disparities in **misdemeanor probation** term lengths.

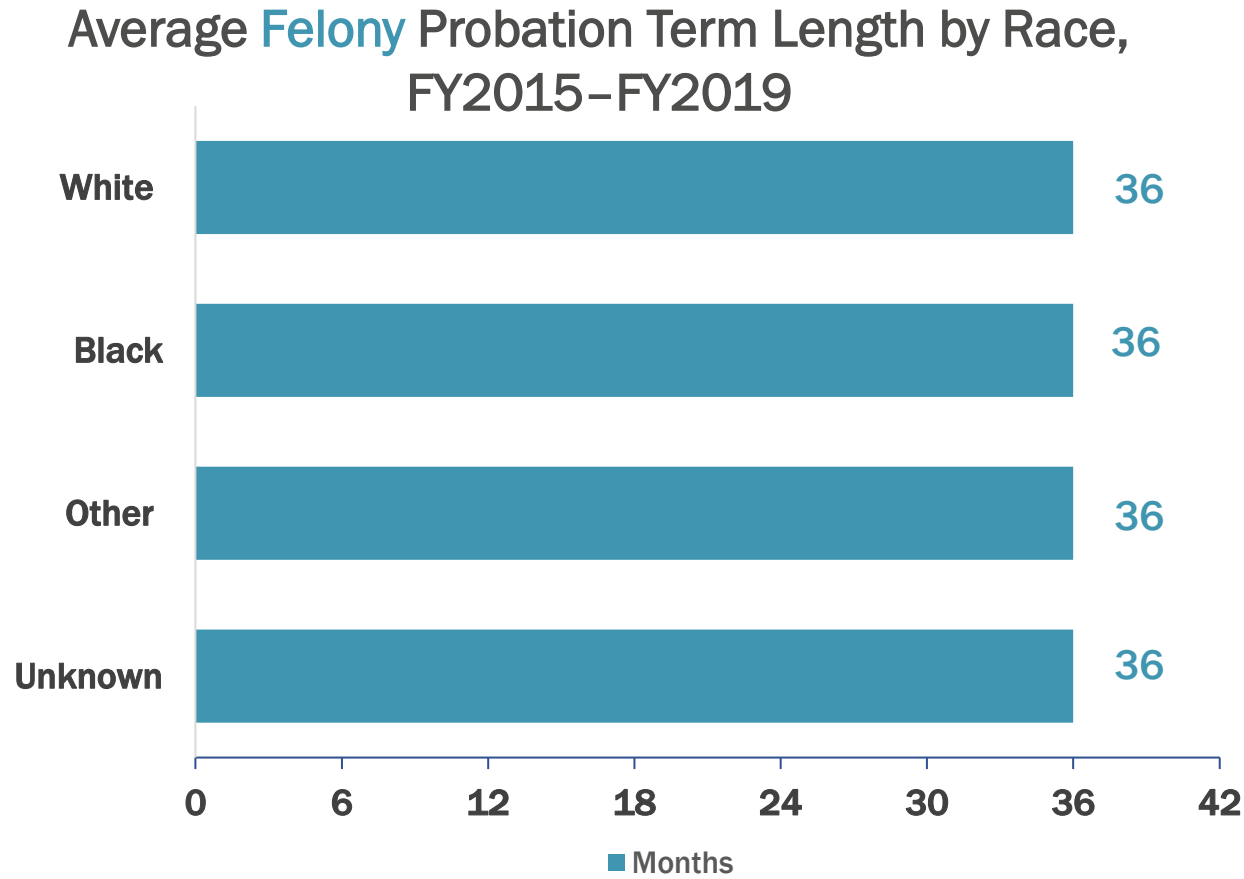
Average **Misdemeanor** Probation Term Length by Race, FY2015–FY2019



Public Institutions and Corrections § 205. Probation

*The term of probation for misdemeanors shall be for a specific term **not to exceed two years (24 months)** unless the court, in its sole discretion, specifically finds that the interests of justice require a longer or an indefinite period of probation.*

Similarly, there are no racial disparities in **felony probation** term lengths, likely also driven by statutory guidance.



Public Institutions and Corrections § 205. Probation

*The term of probation for nonviolent felonies shall **not exceed four years (48 months)** or the statutory maximum term of imprisonment for the offense, whichever is less, unless the court, in its sole discretion, specifically finds that the interests of justice require a longer or an indefinite period of probation.*

Another sentencing reform option that can address racial disparities for drug offenses is the **reclassification of drug laws**.



Between 2014 and 2018, five states—**Alaska, California, Connecticut, Oklahoma, and Utah**—reclassified drug possession from felony to misdemeanor offenses.*



These states barred people convicted of drug possession from state prison sentences.

*Alaska later repealed this reclassification

In **Connecticut and Oklahoma**, policy changes reduced possession to a misdemeanor offense.



Connecticut's **House Bill 7104 (2015)** reduced the penalty for possession of drugs from a felony with a seven-year maximum sentence to a misdemeanor with a maximum of one year in jail and no mandatory jail sentence.



Oklahoma passed ballot initiatives **Senate Question (SQ) 780 and SQ 781 (2016)**, which reclassified simple drug possession as a misdemeanor removing the possibility of prison time for people whose most serious crime was having a controlled substance for personal use.

The reclassification of drug laws in **California and Oregon** have led to a decrease in racial disparities.



In California, **Proposition 47 (2014)** implemented changes to felony sentencing laws, which included the reclassification of drug offenses. It has contributed to substantial reductions in racial disparities in arrests, jail bookings, and incarceration.



Oregon reclassified drug possession from a felony to misdemeanor in **House Bill 2355 (2017)**. Since this law's implementation, there has been a 61 percent decrease in racial and ethnic disparities in felony convictions.

Magnus Lofstrom, Brandon Martin, and Steven Raphael, "Effect of Sentencing Reform on Racial and Ethnic Disparities in Involvement with the Criminal Justice System: The Case of California's Proposition 47," *Criminology and Public Policy*, 19 (2020): 1165–1208.

Oregon Criminal Justice Commission, "Update to Possession of Controlled Substances Report" 2019, Retrieved from <https://www.oregon.gov/cjc/CJC%20Document%20Library/2019PCSReport.pdf>.

Icon Credit: California by Kelsey Chisamore from the Noun Project

Icon Credit: Oregon by Linseed Studio from the Noun Project

There are several policy initiatives that states have enacted which resulted in reduced racial disparities.



Create system-wide sentencing guidelines to improve the consistency of how penalties are applied across cases and offense types.

- Establish a sentencing structure in statute to increase the uniformity and proportionality of sentences.
- Revise statutory language that may allow for differences in sentences across similar cases.



Reclassify offenses that are shown to have disparate sentencing outcomes.

- Use assessment results to target offenses with large disparities in order to improve outcomes through reclassification.
- In particular, reclassify specific felony drug possession offenses to misdemeanors.

Other policy initiatives could target racial disparities by addressing areas that impact equity in the criminal justice system.



Reduce penalties for drug offenses.

- Increase thresholds for levels of possession. This would reflect evolving understanding of substance use disorders and address a policy area that historically greatly increased the number of Black people in the criminal justice system and expanded lengths of incarceration.
- Encourage use of alternatives to incarceration (e.g., probation, diversion programs) for certain offenses for which Black, Indigenous, and People of Color (BIPOC) groups are typically overincarcerated.
- Set standards for use of maximum sentence lengths to ensure consistency.

Other policy initiatives could target racial disparities by addressing areas that impact equity in the criminal justice system.



Establish guidance for use of criminal history in sentencing decisions.

- Create a process to identify and reduce bias in how past convictions are considered in current sentencing decisions.
- Calibrate weight of past convictions in sentencing decisions to consider recency, relevancy, and severity. This would adjust for potential overpolicing and other compounding unequal treatment, which often leads to long criminal histories for certain populations.



Establish transparency in the plea-bargaining process.

- Record and monitor plea bargain offers and negotiations to analyze for racial equity.
- Examine the role of judges to provide oversight for plea deals and their ability to determine that equitable agreements are reached.

Discussion questions for working group members

- In Vermont, 99 percent of criminal cases are resolved through a plea bargain. How might this either minimize or exacerbate racial disparities? Are judges willing to modify plea deals if they disagree with the outcome or suspect it is misaligned with deals other defendants have received?
- Research shows that sentencing guidance reduces sentencing disparities. What are some benefits of establishing guidelines for judges on drug offenses? What are some obstacles in establishing more robust guidance?
- Vermonters have recently engaged in discussion about reclassification of drug offenses. What are some of the reasons that people support this policy? What are some of the anticipated barriers?



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Act 148 tasks the working group with evaluating the policy of allowing parole eligibility for older adults who have served a portion of their minimum term.

Medical Parole

Parole eligibility based on a person's medical condition.

Geriatric Parole or Parole for Older Adults

Parole eligibility based on a person's age and/or age-related illness or infirmity, including incapacity and the need for long-term care.

Compassionate Release

Can refer to both medical parole and/or parole for older adults.

Vermont law currently provides for medical parole and medical furlough.

	Medical Parole	Medical Furlough
Person must be diagnosed with a terminal or serious medical condition that makes them unlikely to physically present a danger to society	✓	✓
Allows for release to a hospital, hospice, licensed inpatient facility, or other suitable housing accommodation	✓	✓
Requires recommendation by the Department of Corrections (DOC) based on a range of factors including offense, time served, risk level, victim concerns, age, and release plan.	✓	✓
Entity responsible for final release determination.	Parole Board	DOC

Parole for older adults has similar policy goals as medical parole but with a more explicit focus on the aging prison population.



Reduce correctional **health care costs** related to treating older adults.



Reduce the **rising number** of incarcerated older adults in the prison population.



Increase access to a **higher level of day-to-day care** than what may be available in an institution.



Provide a **humane alternative** to continued incarceration for people suffering from age-related issues.

There have been several efforts to create a parole policy for older adults in Vermont that were not enacted.



H.29 (2013)

→ Eligibility included people 55–65 who have served at least 10 years and people 65 or older who have served at least 5 years.

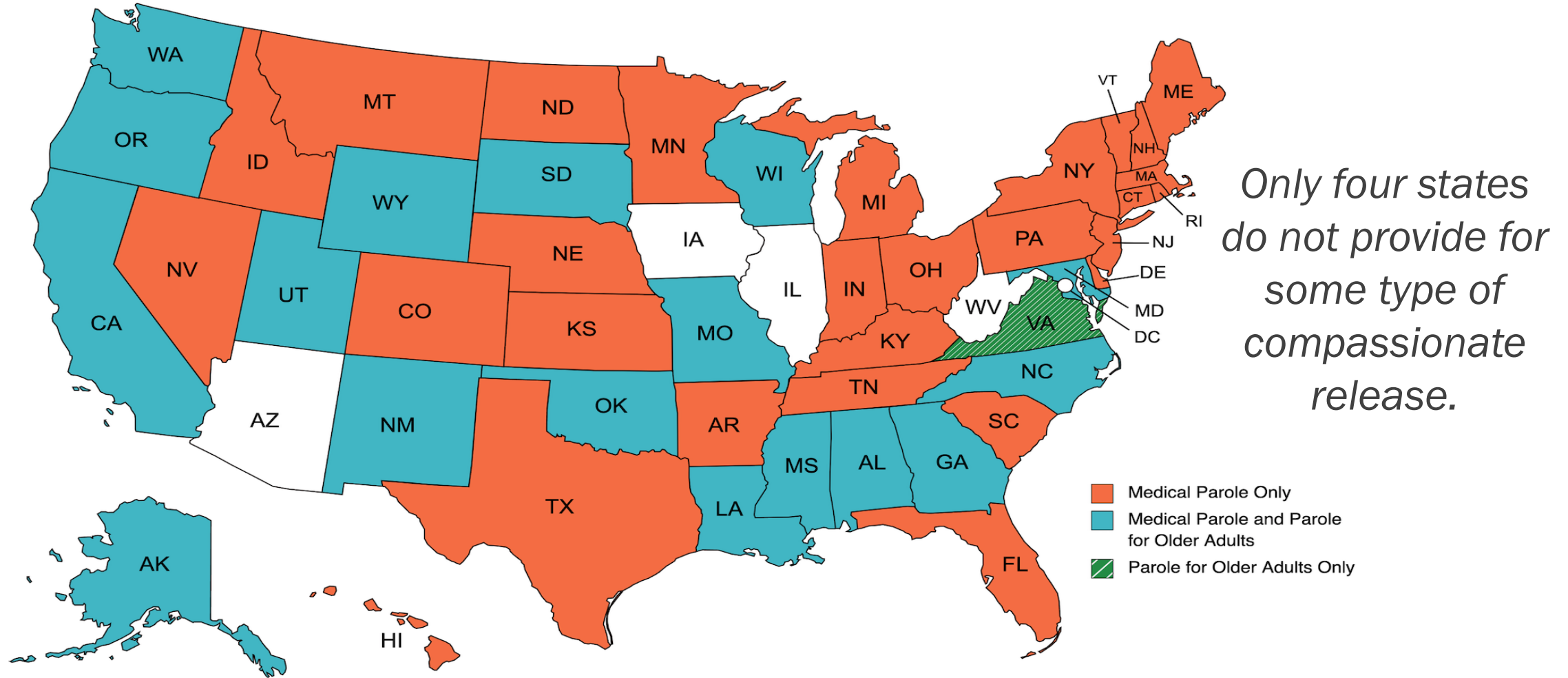
S.167 (2019)

→ Proposed a judicial process for people 65 or older who suffer from a chronic or serious medical condition or are experiencing deteriorating mental or physical health.

S.338 (2020) and S.18 (2021)

→ Eligibility included people 65 or older who have served 5 years, fulfilled programming requirements, and have not received a major disciplinary rule violation within the previous 12 months.

Seventeen states currently have a parole policy for older adults, with all but one also having medical parole.



Most states limit eligibility to people **60 or older** and do not require a person to have served any set duration of their sentence.

7 Require a person be at least 60.

8 Do not require a person to have served **any** set duration of their sentence.

3 Require a person be at least 65

2 Require a person 60+ to have served at least 10 years and a person 65+ to have served at least 15 years.

4 Do not have an age requirement and base eligibility on physical incapacitation and/or reduced risk to public safety due to age.

In addition to age, some states require that a person must also have some type of qualifying age-related infirmity or illness.



In Missouri, an incarcerated person must be incapacitated by age to the extent that they **require long-term nursing home care.**



In North Carolina, in addition to being 65 or older, an incarcerated person must also **suffer from chronic infirmity, illness, or disease related to aging** that has incapacitated the person to the extent they do not pose a public safety risk.



In Oregon, along with being elderly, an incarcerated person must also be **permanently incapacitated.**

Many state policies also include other components such as victim notification and carve-outs for certain offenses.

Additional components include:

- **Offense carveouts** for a range of violent and/or sexual offenses
- Requirements that a person **serve a defined portion of their minimum sentence** prior to parole consideration
- **Victim notification** when a person is identified or approved for early release, as well as an opportunity for victim input prior to decision-making
- Eligibility exclusions for people **serving life without parole**
- Additional **criteria for release** including significantly reduced risk to public safety and risk to recidivate

In nearly all states, the final release decision is made by the paroling authority or the corrections department.

Data from the Department of Corrections can provide some insight into the eligible population should Vermont adopt a parole policy for older adults.

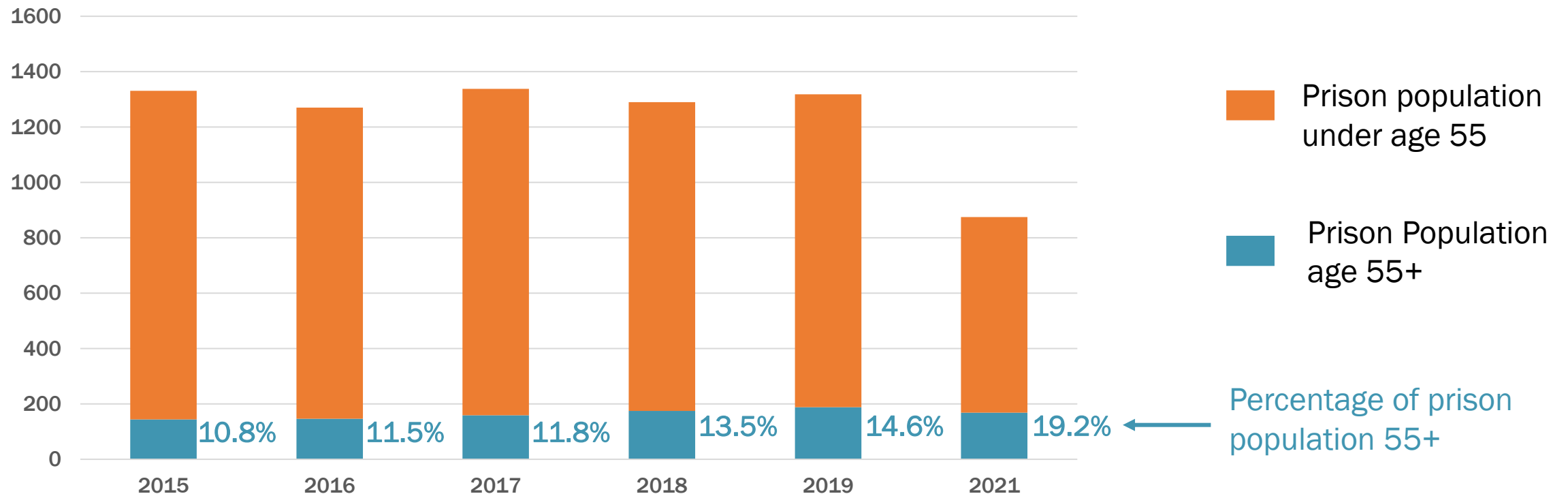
CSG Justice Center staff were able to do a **limited population profile** for people who could potentially be considered for release under a parole policy for older adults with criteria that the person:

- Be at least 60 years of age or older
- Have served at least 5 years
- Have not yet served their minimum sentence and are therefore ineligible for release through the standard parole process

It is important to note that due to data analysis limitations, this profile was unable to account for re-admissions over time when calculating total time served. As a result, it should be considered a strong estimate.

The number of people over the age of 55 who are incarcerated in Vermont has increased almost 10 percent since 2015 despite a recent decrease in the total prison population.

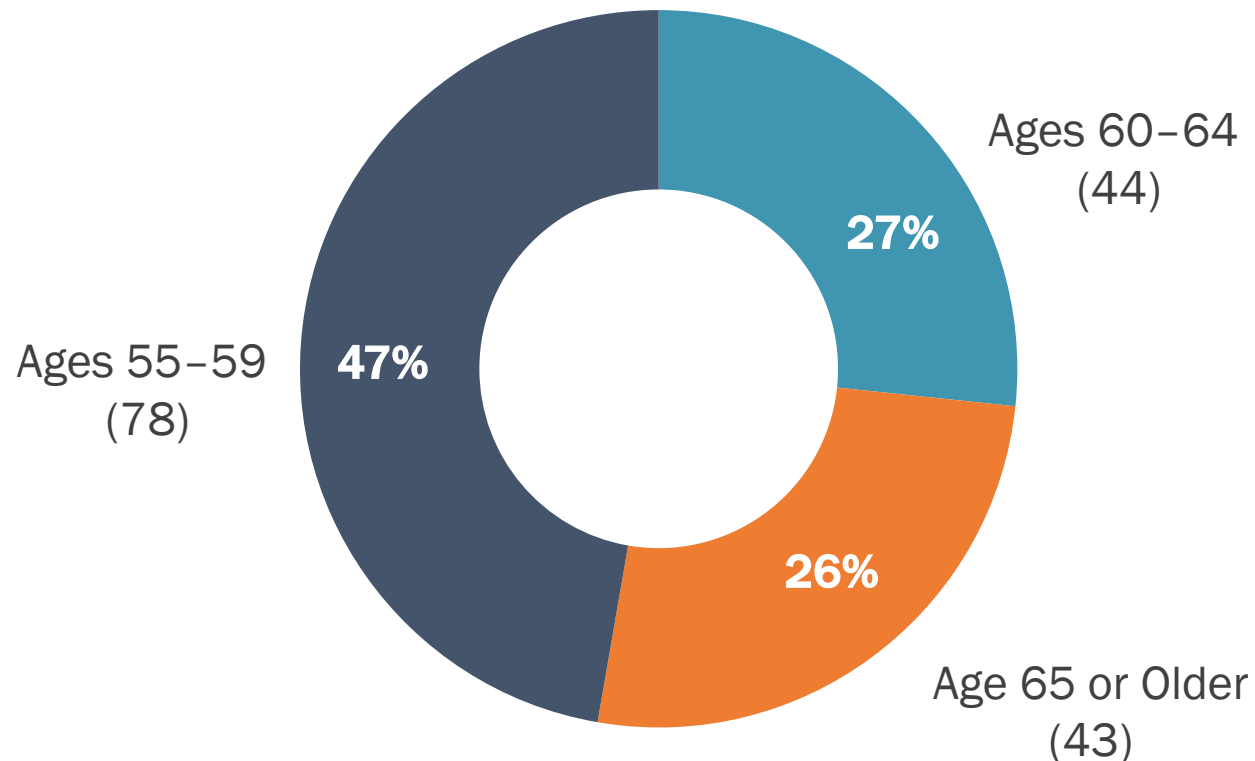
Snapshot Sentenced Incarcerated Prison Population by Age, June 2015–2019 and April 2021*



*Due to data set limitations, specific age categories were not available for 2020.

Over half of Vermont's older incarcerated population are 60 years or older.

Snapshot Sentenced Incarcerated Population
Over 55 Years of Age, April 2021



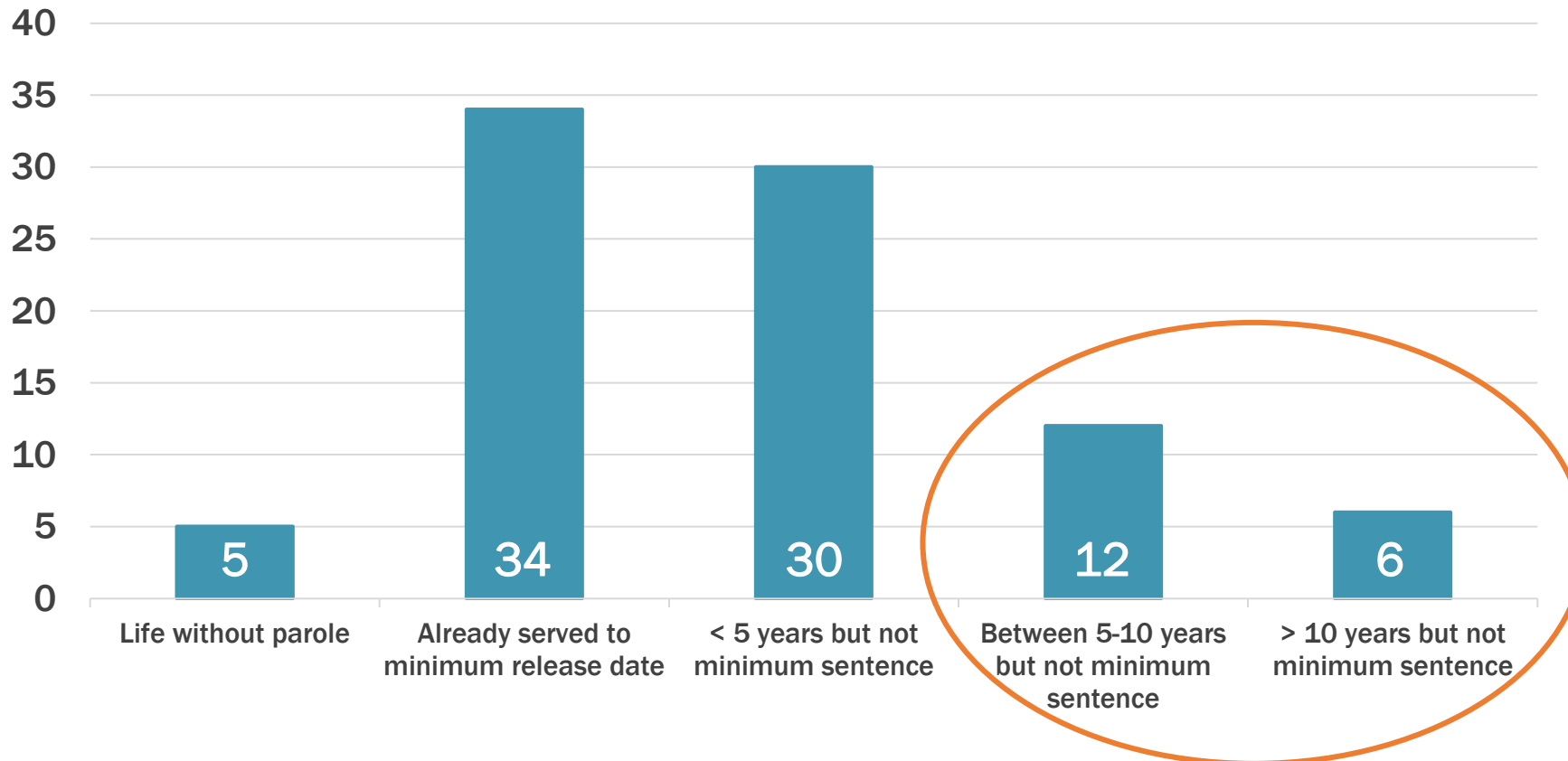
60+ population demographics:

Male 84 (96%)
Female 3 (4%)

White 79 (91%)
Black 5 (6%)
*American Indian/
Alaskan Native* 2 (2%)
Unknown 1 (1%)

Of the 87 incarcerated people aged 60 or older, only 18 have served at least 5 years but not yet reached their minimum.

Portion of Minimum Sentence Served for Vermont Prison Population 60 Years of Age or Older, April 2021

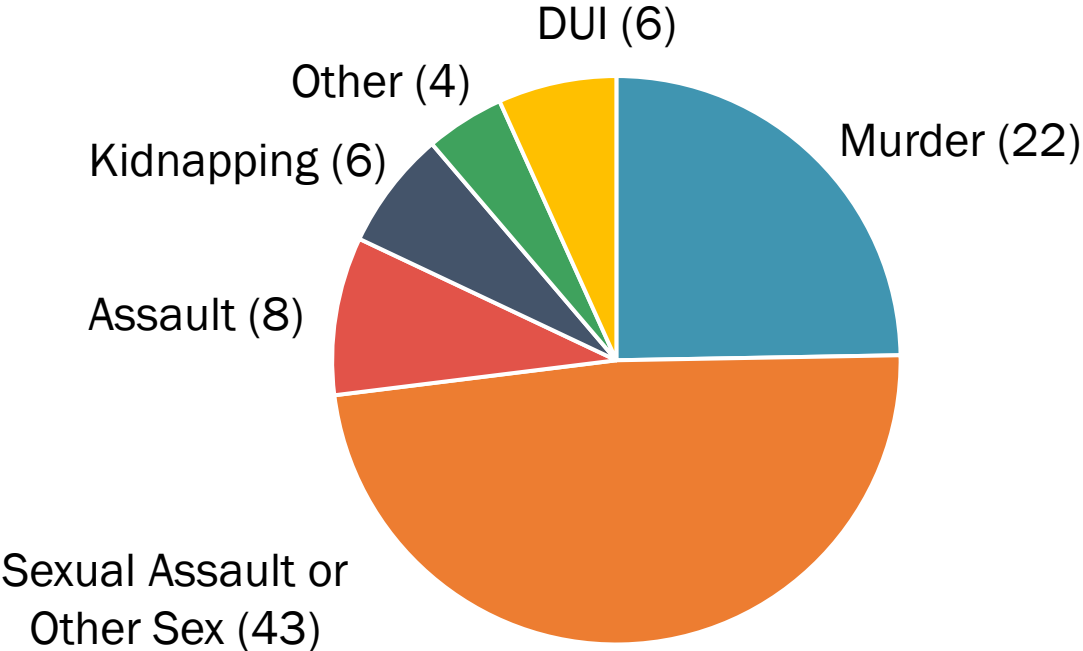


Of the 18 people 60 years or older who have served at least 5 years, 9 have served over half of their minimum sentence.

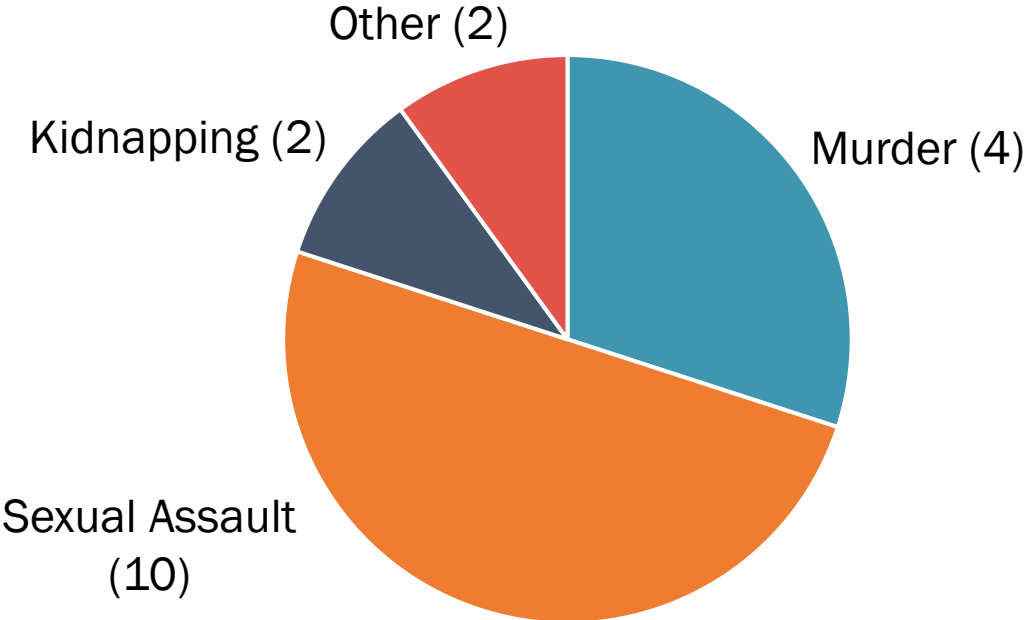
Due to data analysis limitations, this profile was unable to account for re-admissions over time when calculating total time served. As a result, it should be considered a strong estimate.

77 percent of people 60 and older who have not met their minimum but served at least 5 years are incarcerated for sexual assault or murder.

Vermont Incarcerated Population At Least 60 or Older by Offense Type, April 2021



Vermont Incarcerated Population At Least 60 or Older That Have Served At Least 5 Years But Not Their Minimum by Offense Type, April 2021



The Council of State Governments Justice Center analysis of a Vermont Department of Corrections publicly available prison population file downloaded from the DOC website in April 2021.

While most of the 18 people included in Vermont's population profile have been assessed as higher risk, research does show that future criminality is inversely correlated with age.

As a result, some older incarcerated people may be released without an increased risk to public safety.

Studies have found that people 55 or older are significantly less likely to recidivate following release when compared to people under 30 years old.*

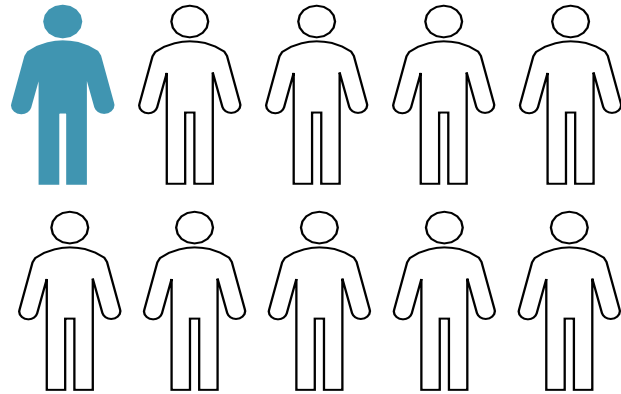


*It is important to note that the degree to which risk decreases with age can vary by recency and offense type. Specifically, people convicted of recent sexual offenses involving children do not show reduced risk to reoffend just because they are older.

Brie Williams and Rita Abraides, "Growing Older: Challenges of Prison and Reentry for the Aging Population," in *Public Health Behind Bars: From Prisons to Communities*, edited Robert B. Greifinger (New York, NY: Springer, 2007).

Barry Holman, "Nursing homes behind bars: The elderly in prison," *Coalition for Federal Sentencing Reform*, 2(1), 1-2 (1998).

Compassionate release policies are generally applied on a case-by-case basis, so eligibility does not always guarantee release.



Nationally, only a little more than one out of 10 people eligible for medical or age-related parole were ultimately granted release from 2013 to 2015.

Data on the use of medical parole and furlough is not available for Vermont; however, anecdotal information indicates that these policies are used infrequently.

There are several factors that contribute to the underutilization of parole policies for older adults nationally.

These challenges significantly limit a state's ability to achieve intended policy goals despite the enactment of a statute on parole for older adults:

- Extensive statutory exclusions that overly restrict the number of people eligible for case-by-case consideration
- A complicated or unclear identification and assessment process, including vague definitions or eligibility criteria
- Lengthy release determination processes
- Lack of post-release housing, health care, and other services in the community

Should Vermont adopt a parole policy for older adults, it would be important to track several key measures to monitor implementation.

Measures include:

- Total eligible population based on statute
- Number of people identified for review and how they were identified
- Number of people reviewed and the resulting recommendation
- Number of people released
- Reason for rejecting review, recommendation, or release

Discussion questions for the working group members

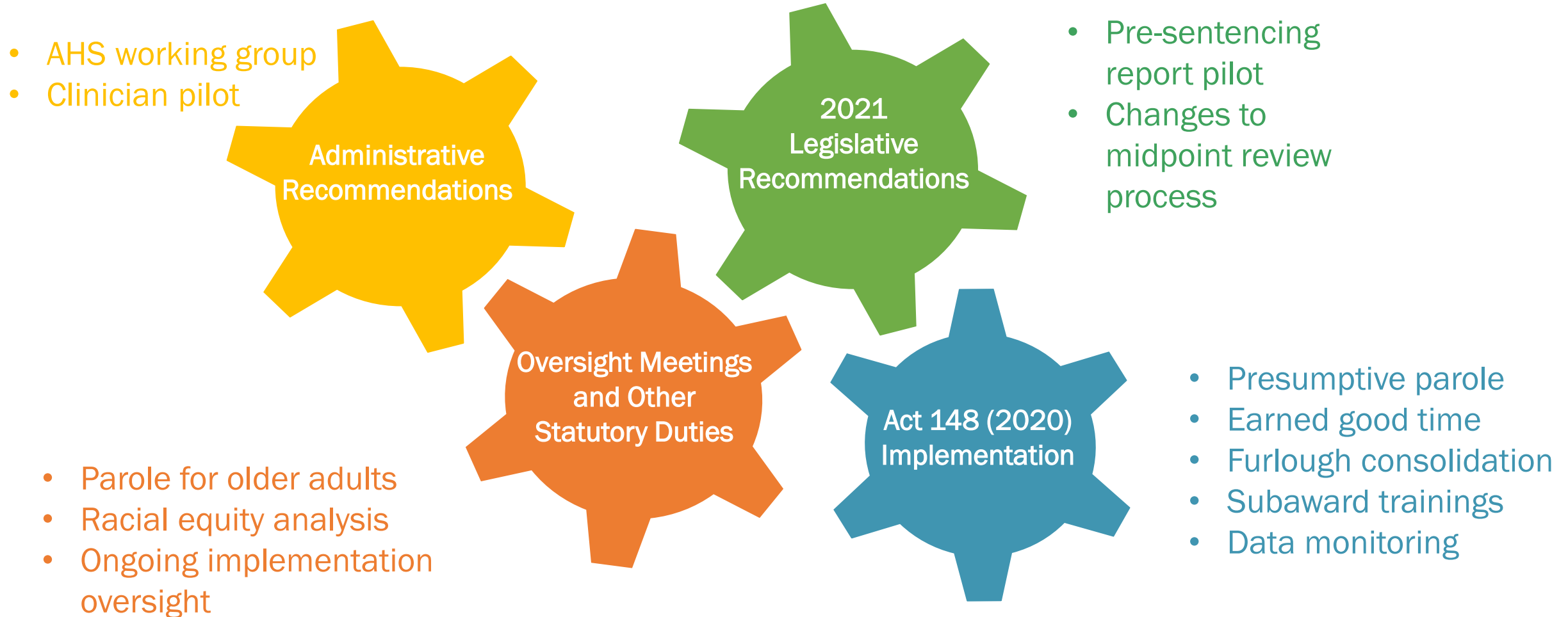
- What are the policy goals Vermont would like to achieve with a parole policy for older adults? How should these goals guide policy development and implementation, especially considering underutilization of similar policies nationally?
- What eligibility requirements would the working group like to consider?
 - Age
 - Offense
 - Age-related infirmity or illness
 - Portion of sentence served
- What notification and engagement processes should be put in place to ensure the rights of victims?



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Vermont is engaged in several interconnected Justice Reinvestment Initiative II efforts.



There are several key strategies that can help Vermont ensure the different components of the Justice Reinvestment Initiative II result in sustainable change.

De-silo individual efforts

- Connect individual program/policy development and implementation with broader system reform goals and coordinate across projects to ensure efforts are aligned.

Establish and track outcome measures

- Identify clear program-level outcome measures to assess progress toward intended policy goals and regularly review data to understand ongoing successes and challenges.

Coordinate oversight

- Continue to use the working group to monitor, discuss, and coordinate cross-system efforts and connect them to the broader goals of Justice Reinvestment II.

The working group has scheduled two additional meetings; CSG Justice Center staff have identified the need for a November meeting.

October 15



- Consider policy options/recommendations for parole for older adults.
- Examine the findings of the racial equity analysis and potential policy options to address those findings.
- Discuss appropriation recommendations.
- Continue oversight of Justice Reinvestment II implementation.

December 14



- Conclude the discussion on parole for older adults, racial disparities, and appropriations.
- Review implementation progress data analysis and JRI sustainability recommendations.
- Discuss the January 15, 2022, reporting deadline.
- Wrap up the CSG Justice Center's role in the state of Vermont.

Thank You!

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For more information, please contact Madeleine Dardeau mdardeau@csg.org or Lorretta Sackey at lsackey@csg.org

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