

S.58

REBECCA TURNER, OFFICE OF THE DEFENDER GENERAL


APRIL 24, 2024, HOUSE JUDICIARY COMMITTEE



S.58 – As passed by the Senate

1. Redefines “intent” requirement
2. Creates a completely new definition of “knowingly” that DOES NOT exist in Vermont or federal law.
3. Impacts *ALL* drug offenses in ch. 84, title 18

S.58 – Sec. 13, page 10, lines 9-14 *General Definitions*

1. Complete section of the relevant statute omitted
 2. Proposes to amend 13 V.S.A. § 4201, a general definition section applicable to the entirety of Chapter 84 drug offenses
 3. Adds new definition of “knowingly” not used in Vermont or the Second Circuit
 4. Definitions section does not currently include any mens rea because this has been long defined in Vermont caselaw
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Chapter 84, title 18 drug offenses impacted by S.58

1. All offenses, including misdemeanors
2. All offenses, including possession
3. All offenses, including drug offenses not involving selling or trafficking of fentanyl

S. 58: “knowingly” defined

“Knowingly means actual knowledge that one or more preparations, compounds, mixtures, or substances contain the regulated drug identified in the applicable section of this chapter, **or consciously ignoring a substantial risk that one or more preparations, compounds, mixtures, or substances contain the regulated drug identified in the applicable section of this chapter.**”

Mens rea as defined in Vermont Law

1. Knowingly
 2. Recklessly
 3. Criminal Negligence
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| S.58 “Knowingly” | VT: Recklessly | VT: Criminal Negligence | Federal law: Second Circuit |
|---|---|---|---|
| | <i>State v. Brooks</i> , 163 Vt. 245, 251 (1995) | <i>State v. Viens</i> , 2009 VT 64, ¶ 17 | <i>U.S. v. Goffer</i> , 721 F.3d 113, 128(2d Cir. 2013) (citing <i>Glob.-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011)) |
| (1) Consciously ignores a substantial risk that one or more preparations...contain the regulated drug.... | (1) Consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the actor’s conduct | (1) Consciously disregards a risk or death or injury of such a nature and degree that | (1) Subjectively believes that there is a high probability that a fact exists and |
| | (2) The risk must be of such a nature and degree that considering the nature and purpose of the actor’s conduct and circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation. | (2) Failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to the actor, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation. | (2) The actor must take deliberate actions to avoid learning of that fact. |

Permissive Inference – p. 12, lines 12-14

“There shall be a permissive inference that the proximate cause of death is the person’s use of the regulated drug if the regulated drug contains fentanyl.”


S.58 permissive Inference – unconstitutional on its face

A permissive inference “may serve to support a jury's finding of guilt beyond a reasonable doubt only if there is a logical and convincing connection between the facts established and the conclusion inferred.”

State v. Bleau, 139 Vt. 305, 309 (1981)



Permissive Inference – p. 12, lines 12-14

- ✓ Under S.58, any trace amount of fentanyl detected in the system is enough in all death resulting cases
 - ✓ Presumes death caused by fentanyl
 - ✓ But cause of death is necessarily an individualized analysis
 - ✓ S.58 ignores underlying health of the person
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*S.58 – Captures “dispensing” not just “selling”
p. 12, lines 4, 9, 11*

Title 18 V.S.A. § 4201(7) defines “Dispense” broadly:

To “distribute, leave with, give away, dispose of, or deliver.”




Justice Reinvestment in Vermont –
Results of Racial Equity in Sentencing Analysis
Council of State Governments,

April 2022 Report available at:

<https://csgjusticecenter.org/publications/justice-reinvestment-in-vermont-results-of-racial-equity-in-sentencing-analysis/>

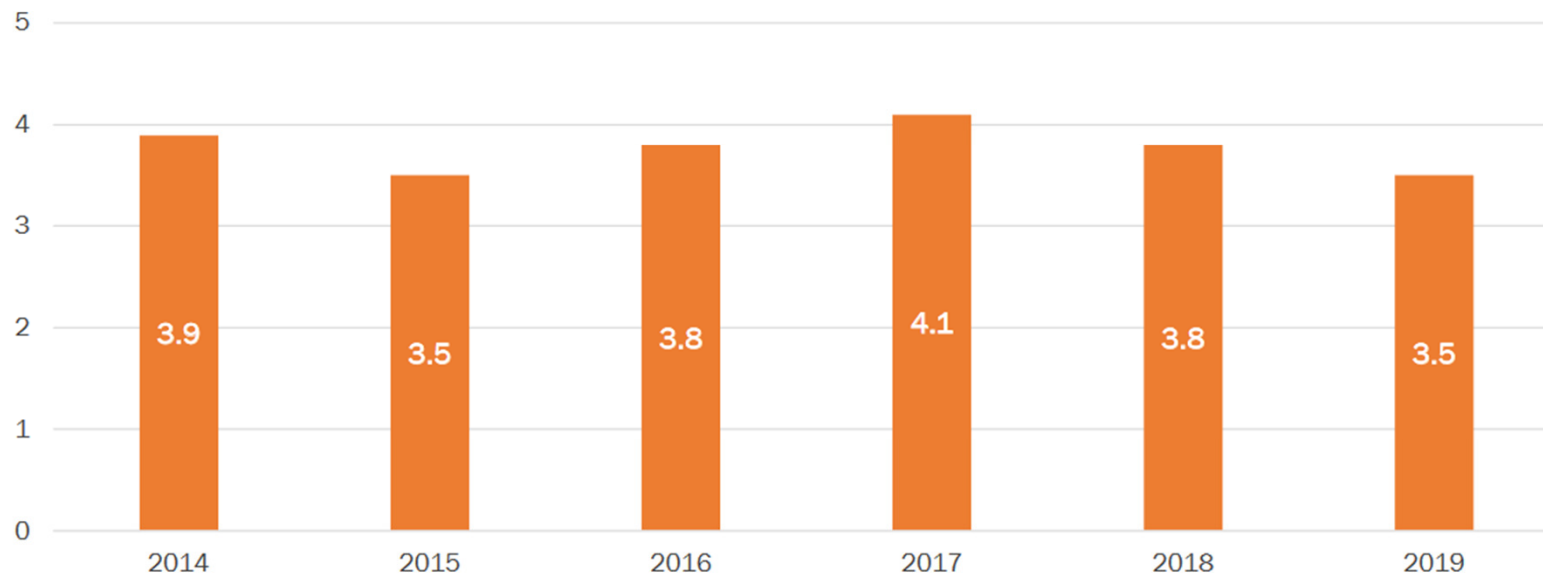
November 17, 2021 slide presentation available at:

<https://www.vermontjudiciary.org/sites/default/files/documents/VT%20JRII%20WG%20November%2017%20Presentation.pdf>



In Vermont, Black people are disproportionately represented as defendants in misdemeanor cases relative to White people.

Black-White Relative Rate Index
Misdemeanor Cases 2014–2019



*In 2019, Black people were **3.5 times** more likely than White people to be defendants in a misdemeanor case.*

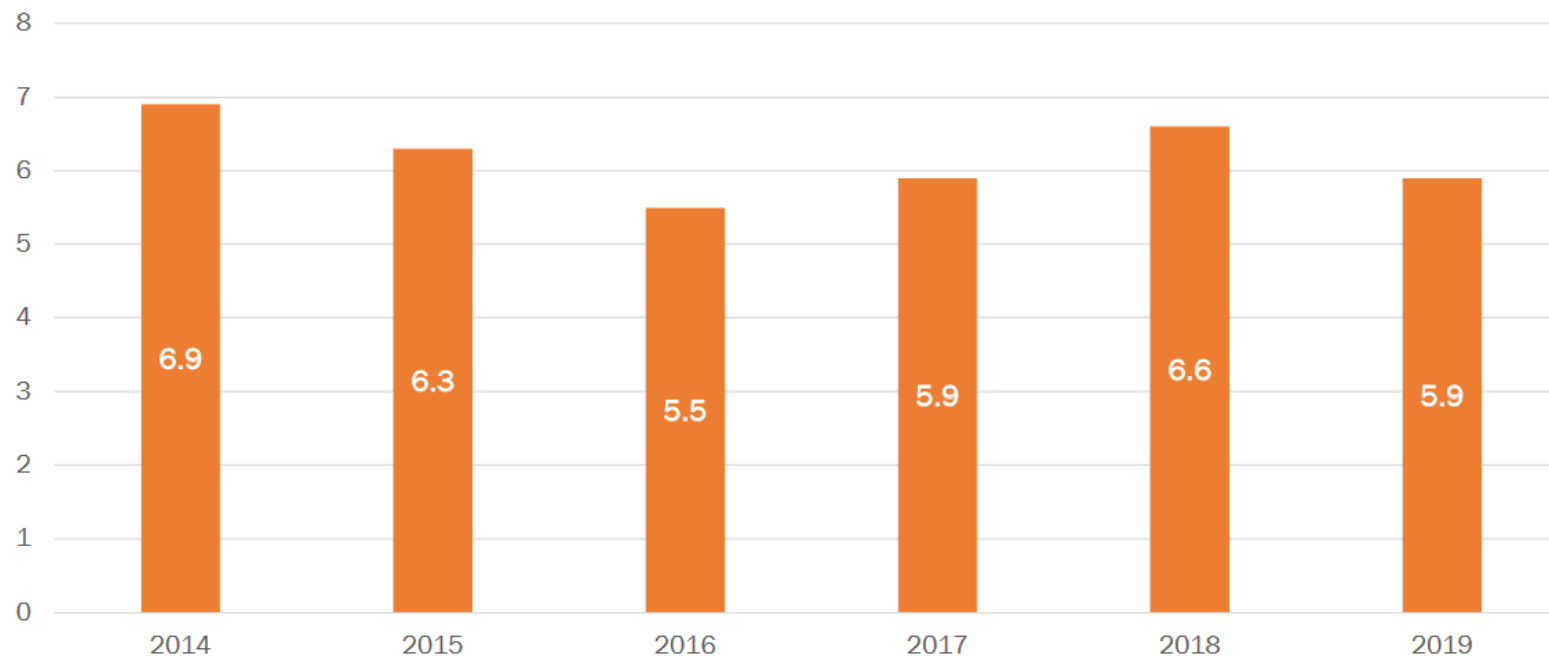
These results are not adjusted for additional case or defendant characteristics.

N=62,610

CSG Justice Center analysis of Vermont's Judiciary disposition data

Similarly, Black people are disproportionately represented as defendants in felony cases relative to White people.

Black-White Relative Rate Index
Felony Cases 2014–2019



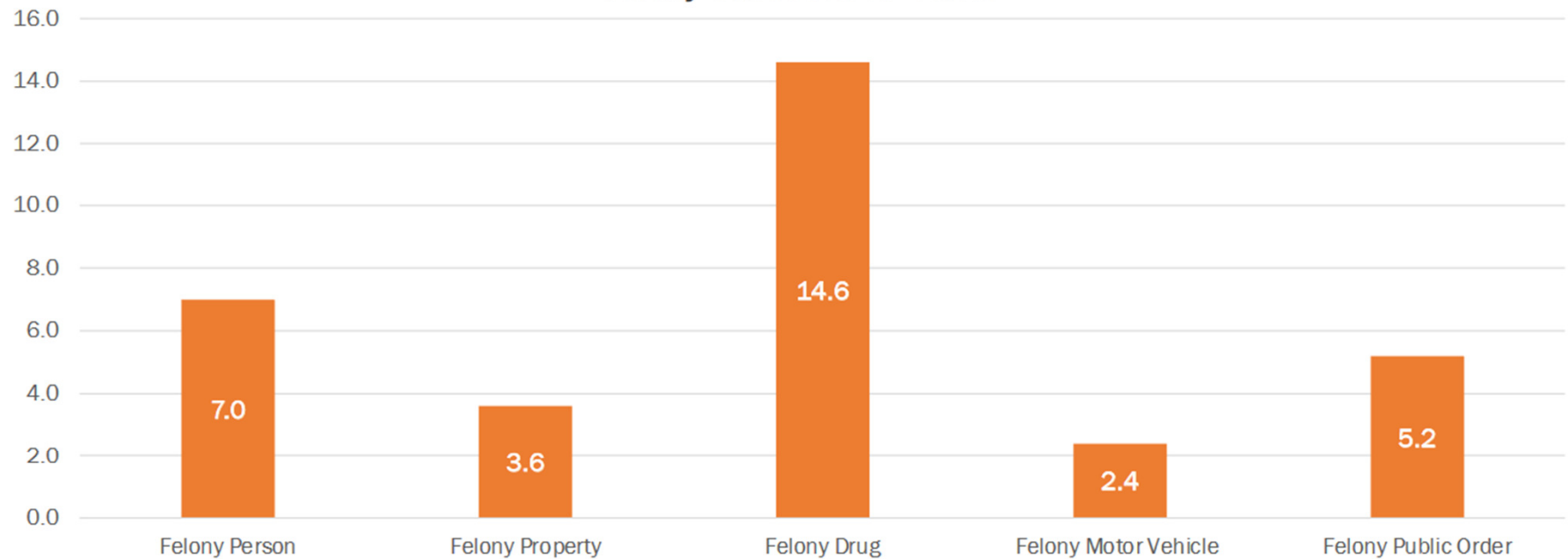
*In 2019, Black people were **5.9** times more likely than White people to be defendants in a felony case.*

These results are not adjusted for additional case or defendant characteristics.

N = 16,960

Specifically, Black people were over **14 times** more likely than White people to be defendants in a felony drug case each year.

Average Annual Black-White Relative Rate Index
Felony Cases 2014–2019



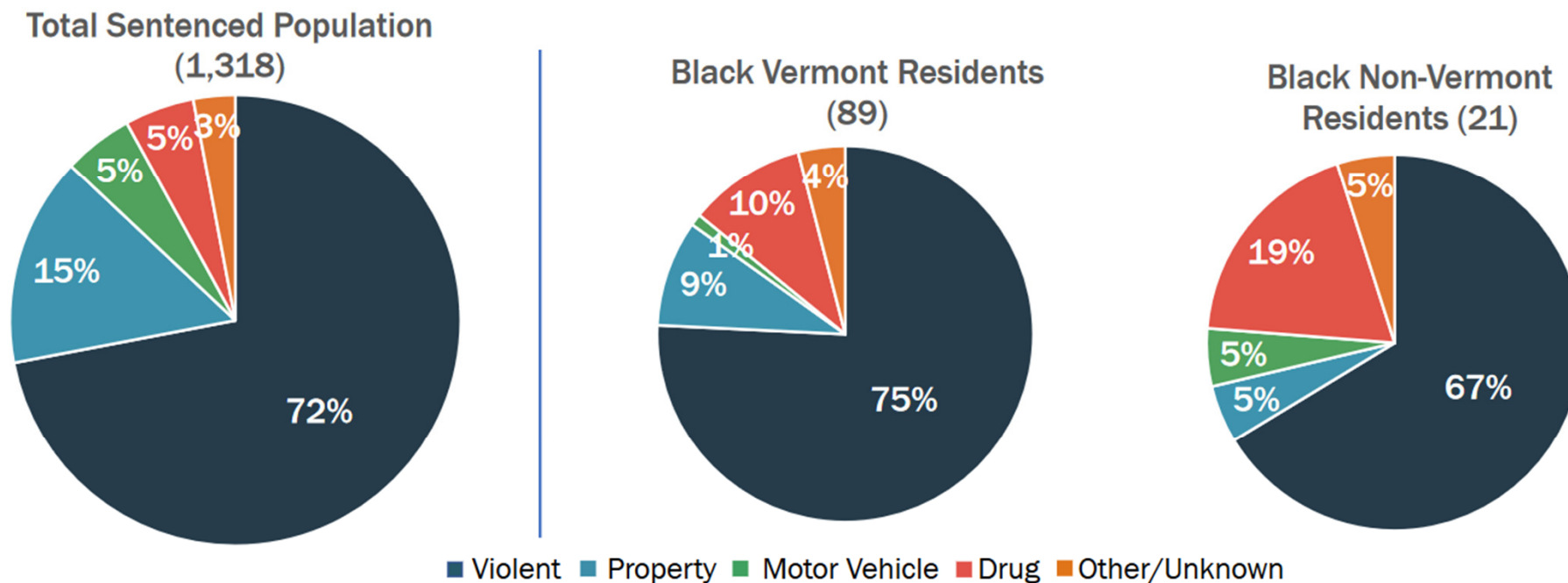
These results are not adjusted for additional case or defendant characteristics.

N = 16,960

CSG Justice Center analysis of Vermont's Judiciary disposition data

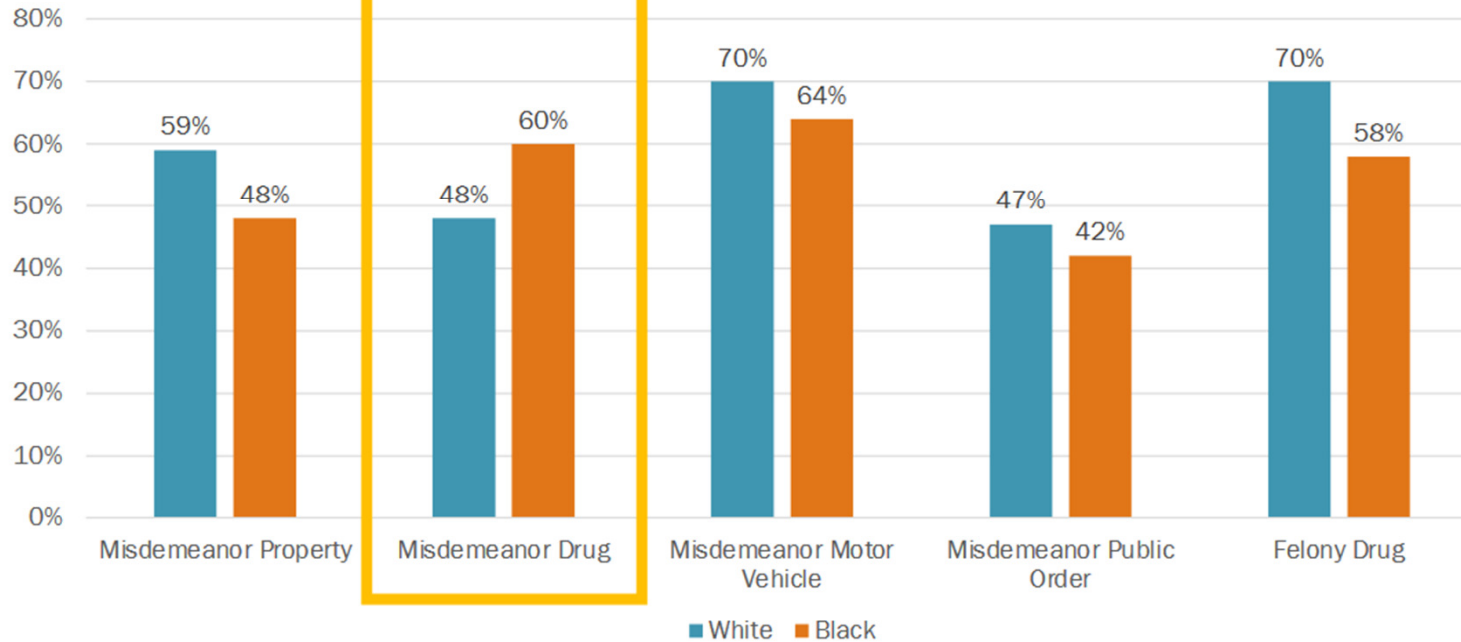
Black people are also disproportionately incarcerated for drug offenses relative to Vermont's total sentenced population.

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



Results of conviction analysis indicate that this particular decision-making point is *not* a major driver of Black-White incarceration disparities.

Probability of Conviction by Offense Type and Race
2014–2019



Results here are mixed: Black people are *more likely* to face conviction for misdemeanor drug offenses, but *less likely* to face conviction for four other offense categories.

These results do not substantively change when the analysis is restricted to Vermont residents only and accounts for criminal history.

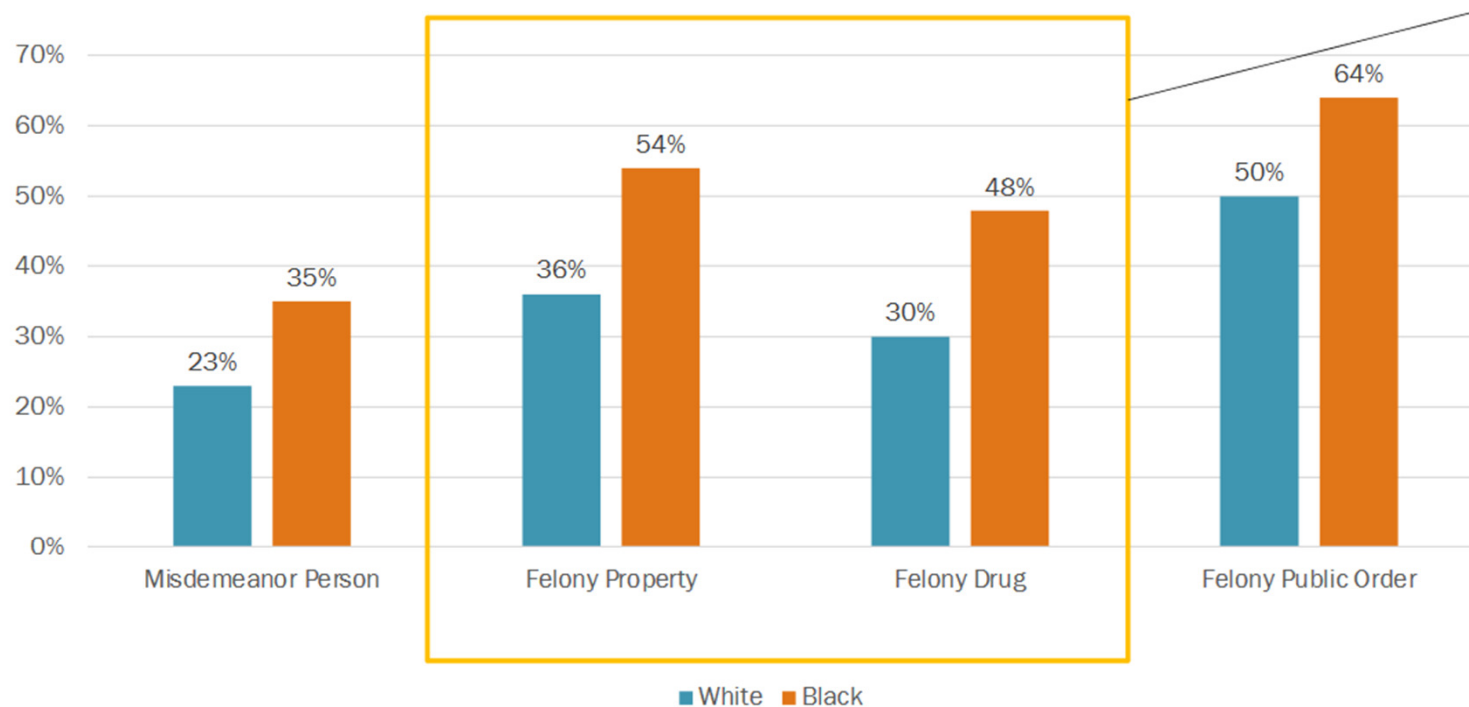
*These results are adjusted for the case and defendant characteristics summarized earlier and are statistically significant.

N=79,514

CSG Justice Center analysis of VT Judiciary disposition data.

In particular, Black people are more likely to be incarcerated for felony drug and property offenses.

Probability of Incarceration by Offense Type and Race
2014–2019



Black people are **18 percentage points** more likely to be incarcerated for felony drug and property offenses.

These results do not substantively change when the analysis is restricted to Vermont residents only and accounts for criminal history.

N=49,594
CSG Justice Center analysis of VT Judiciary disposition data.

For felony drug cases in which a Black defendant is sentenced to incarceration, the most common top filed charge is cocaine possession or sales.

Most Common Felony Drug Offenses, by Defendant Race

For Cases Resulting in Incarceration (N=565)

| White Defendants (N=436) | Freq. (Pct.) |
|---|--------------|
| Heroin—possession 200 mgm or more | 63 (15%) |
| Heroin—sale less than 200 mgm | 52 (12%) |
| Heroin—sale or delivery 200 mgm or more | 46 (11%) |
| Cocaine—possession 2.5 gm or more | 31 (7%) |
| Cocaine—sale less than 2.5 gm | 30 (7%) |

| Black Defendants (N=129) | Freq. (Pct.) |
|-----------------------------------|--------------|
| Cocaine—possession 2.5 gm or more | 30 (24%) |
| Cocaine—sale less than 2.5 gm | 21 (16%) |
| Heroin—trafficking | 17 (13%) |
| Heroin—sale less than 200 mgm | 16 (12%) |
| Heroin—possession 1 gm or more | 7 (5%) |