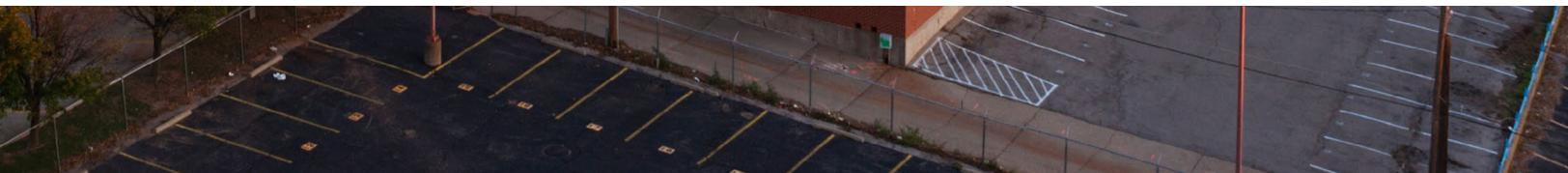# Proposal from AG's Reclassification Council Would Increase Oklahoma's Prison Population and Cost Taxpayer Dollars

Summary

On March 5, and April 5, 2021, the Oklahoma Criminal Justice Reclassification Coordination Council released new felony reclassification proposals (hereinafter collectively referred to as "proposal"). The Council's proposal would separate felony crimes into classes and standardize base and enhanced sentence ranges for each class. In addition, this proposal would establish minimum time served requirements for every felony class based on a person's current conviction and past criminal history. Right now, the state only sets minimum time served requirements for a small number of offenses, including certain serious offenses (commonly referred to as "85% offenses").

The latest proposal, if adopted, would significantly increase the average time many people spend in prison, driven by the new minimum time served requirements. These changes would increase Oklahoma's prison population. Research has consistently shown that longer sentences do not increase public safety and Oklahoma already keeps people in prison far longer than the national average.

The Council is required by statute to only recommend changes that would "reduce or hold neutral the prison population" in Oklahoma.[1] However, their most recent proposal is projected to increase the prison population by almost 1,000 people over the next 10 years. If implemented, the prison population will be well above its rated capacity, impeding the state's ability to close aging prison facilities or significantly cut prison spending, and costing the state between $20 million and $83 million in additional prison expenditures within the next decade.

It is incumbent upon the Council to not only meet but exceed its statutory requirement by developing recommendations that will safely decrease the prison population and free up resources for victim services and mental health and drug treatment. As the Council moves forward, continued analysis of the human and fiscal

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[1] Okla. Stat. tit. 22, § 1701(A)(4).

Background

Oklahoma has one of the highest imprisonment rates in the country and spends more than $500 million on prisons each year. In 2018, the Oklahoma Legislature created the Criminal Justice Reclassification Coordination Council (the "Council") to look at Oklahoma's criminal code and propose a new grouping of felonies and other changes that would improve the criminal justice system while either reducing or holding neutral the prison population. The Council is colloquially referred to as the AG's Reclassification Council because it is chaired by the Oklahoma Attorney General. The Council is made up of 22 members selected according to criteria set forth in the enabling statute. Of the 22 members, nearly half (9) are active members of law enforcement, including prosecutors. As chair, the Attorney General sets the agenda for the meetings.

The enabling statute states that the Council must review and recommend the following:

1. The classification of all felonies under Oklahoma law into appropriate categories;

2. Appropriate sentence lengths for each class of felonies;

3. Appropriate enhanced sentences for crimes committed after offenders have been convicted of other crimes; and

4. Other appropriate changes that will improve the criminal justice system in Oklahoma and ensure the public safety of its citizens.

Additionally, the Council is required to consider the fiscal impact of its recommendations which should "reduce or hold neutral the prison population." At the end of 2019, the Council released its initial proposal. More than a year later, in March and April 2021, the Council publicly shared updated proposals.

PROPOSED FELONY CLASS SYSTEM

The Council's most recent proposal divides felonies into 15 categories. These alphanumeric categories or classes range from "Y," which includes First Degree Murder, to "D3," which includes Trafficking in Food Stamps Over $100 and Injuring Pipes or Wire. Under this framework, offenses are split into categories and are assigned a base range of punishment (minimum and maximum) and enhanced sentence ranges for people with 1 or more prior convictions. Each category also includes a minimum time served requirement for people with 1 or zero priors and an enhanced minimum time served requirement for those with 2 or more priors.

Currently, sentence ranges are outlined in individual statutes and felony offenses are not classified into categories outside of "violent" or "85% offenses," which is a list of 22 serious or violent offenses that carry an 85% minimum time served requirement. For the vast majority of other offenses, there are no minimum time served requirements.

The proposed recommendations from the Council would:

- Reduce the minimum time served requirement for all first-time "85% offenses" with the exception of first-degree murder. Also reduce the enhanced minimum time served requirements for several "85% offenses."

- Establish new minimum time served requirements for all other offenses.

- Replace the current habitual sentence enhancement with a new sentence enhancement structure that increases base sentence ranges for people with 1 or more felony priors (of any kind), *and* increase the minimum time served requirements for those with 2 or more felony priors (of any kind).[2]

- Add new minimum and maximum sentence lengths for several offenses.

Although it is not explicitly stated in the Council's proposal, our assumption is that these recommendations would be implemented prospectively and would not impact any current felony sentences.

The Council's proposal is projected to increase the prison population by almost 1,000 people and cost Oklahoma taxpayers up to $83 million.

Data from the Oklahoma Department of Corrections (DOC) allows us to predict the effects of the Council's proposal on Oklahoma's prison population. These projections are based on individual-level DOC data from FY 2019 and FY 2020 before March of 2020. See the Methodology section for full information on the data used and how these impacts were calculated.

FINDINGS

Our projections show that the Council's proposal would increase Oklahoma's prison population by almost 1,000 beds over the next 10 years. While the Council's proposal would reduce minimum time served requirements for some crimes currently required to serve 85%, the new minimum time served requirements for all other crimes would increase time spent behind bars for many individuals, especially people in prison for nonviolent offenses. Under this proposal, nearly half (48%) of all people who serve time in prison for a nonviolent offense with 2 or more priors would spend more time in prison, with an average prison time increase of 39%. Almost a quarter (21%) of people sentenced to prison with no priors would spend an average of 43% longer in prison.

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[2]Although the Council's proposal does not explicitly state that the proposed habitual sentence enhancement structure would repeal and replace the current sentence enhancement statute (§21-51.1), our projection assumes it will.

OKLAHOMA'S PRISON POPULATION WILL INCREASE BY NEARLY 1,000 OVER THE NEXT 10 YEARS UNDER THE COUNCIL'S PROPOSAL

Difference between the prison population with the Council's proposal and without
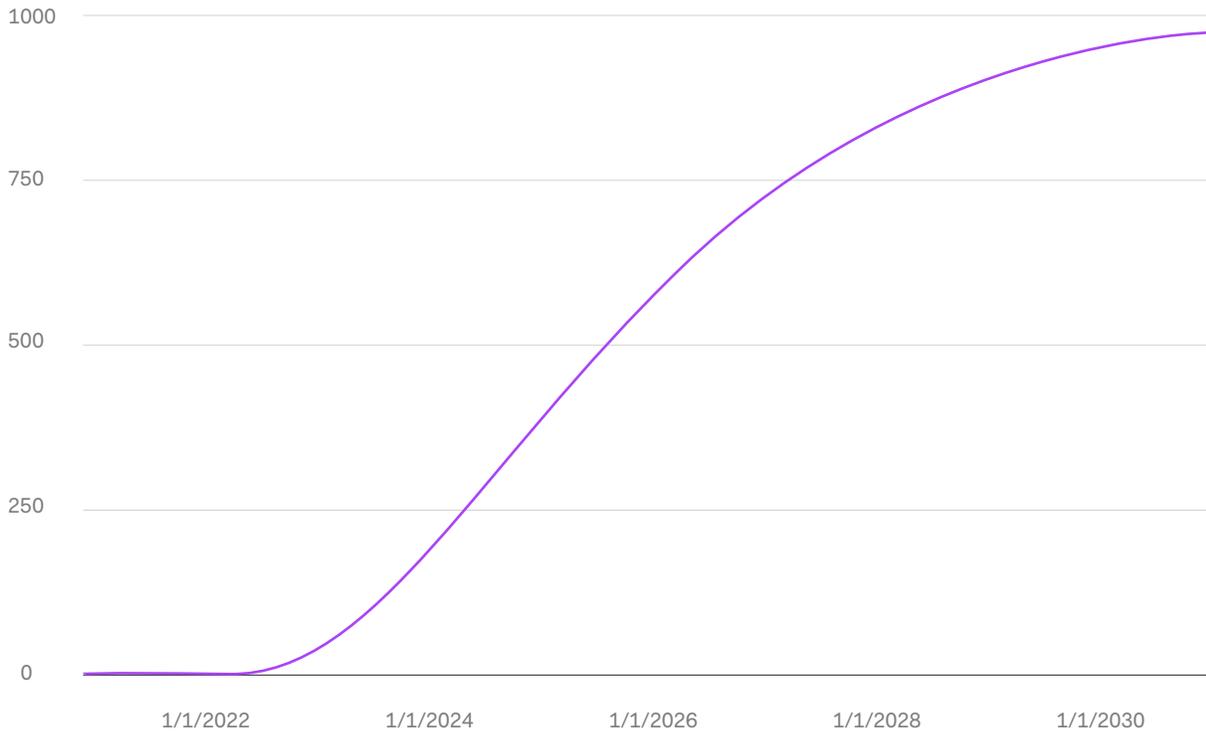
Note: This graph assumes an enactment date of November 2021.

The imposition of minimum time served requirements for nonviolent offenses *far outweighs* the proposed reduction in minimum time served requirements for "85% offenses" and the proposed decrease in some maximum sentence lengths. If the Council's recommendations went into effect as is, Oklahoma's projected prison population increase will cost Oklahoma taxpayers an additional $83 million over the next 10 years.

THE COUNCIL'S PROPOSAL IS PROJECTED TO COST $83 MILLION OVER 10 YEARS

Difference between state prison expenditures with the Council's proposal and without
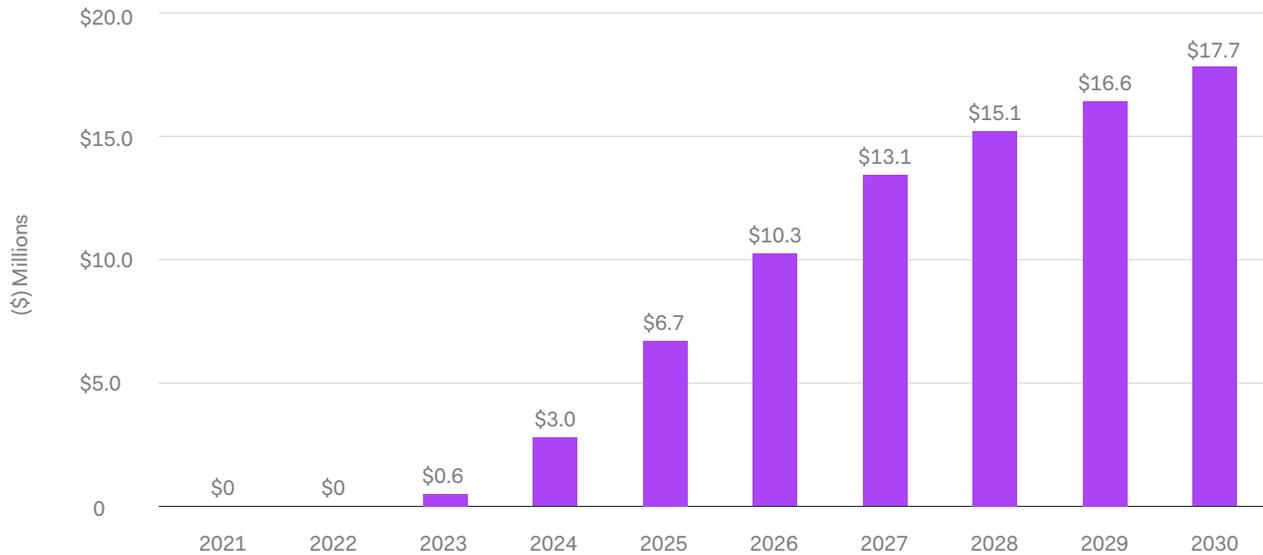
Note: This graph assumes an enactment date of November 2021.

Changes with Substantial Impact

The Council's proposed minimum time served requirements for the most common offenses, both unenhanced and enhanced, would dramatically increase the average time a person spends in prison. This remains true even when taking into account the proposal's reduction in minimum time served requirements for some "85% offenses." In FY 2019, people convicted of these crimes made up only 15% of people sentencd to prison, so reductions in minimum time served requirements for this group do not offset the impact of adding requirements for all other crimes.

People serving time for the most common non-violent offenses currently spend an average of 35-45% of their sentence in prison,[3] a lower percentage than would be required under this new proposal. For example, 55% of people convicted of distribution/possession with intent to distribute a controlled substance with 2 or more priors would spend, on average, 32% longer in prison — equivalent to approximately 8 additional months. People convicted of distribution of a controlled substance in Oklahoma already serve 59% longer than the national average for this crime.

See Table A for an overview of the impact these new minimum time served requirements would have on some of the most common offenses for which people are admitted to prison in Oklahoma.

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[3]The current time served percentage was calculated using Oklahoma Department of Corrections data for individuals with only one current offense since those with multiple offenses might have consecutive or concurrent sentences making the total time served percentage impossible to calculate accurately.

TABLE A. IMPACT OF MINIMUM TIME SERVED REQUIREMENTS

Top 20 Most Common Offenses, Prison Releases

Offense	% who would be impacted by the proposed first-time requirement	% with 2 or more priors who would be impacted by the proposed enhanced requirement	Average increase in sentence for those impacted by unenhanced time served requirement	Average increase in sentence for those impacted by enhanced time served requirement
Distribution of Controlled Substance/Possession with Intent to Distribute	5%	55%	N/A	32%
Burglary (Second Degree)	5%	37%	N/A	31%
Assault &/or Battery w/ Dangerous Weapon	29%	68%	43%	35%
Possession of a Firearm (After Prior Felony Conviction)	45%	76%	28%	40%
Receive/Possess/Conceal Stolen Property	1%	2%	N/A	N/A
Unauthorized Use of a Vehicle	1%	3%	N/A	N/A
DUI- Liquor or Drugs (After Prior Felony Conviction)	4%	49%	N/A	27%
Domestic Assault & Battery	48%	79%	24%	38%
Receive/Possess/Coneceal Stolen Vehicle	1%	2%	N/A	N/A
Trafficking in Illegal Drugs	52%	65%	30%	54%
Assault & Battery on a Police Officer	30%	63%	31%	34%
Using Offensive Weapon in Felony	40%	73%	24%	9%
False Personation	4%	38%	N/A	44%
Child Abuse (85 Percent)	100%	0%	-15%	N/A
Robbery or Attempted Robbery w/Dangerous Weapon (85 Percent)	100%	0%	-16%	N/A
Larceny - Auto Aircraft or Other Motor Vehicle	4%	12%	N/A	31%
Domestic Abuse	23%	59%	22%	29%
Lewd/Indecent Proposition/Acts to Child (85 Percent)	100%	0%	-15%	N/A
Uttering Forged Instruments	1%	1%	N/A	N/A
Manufacture of Controlled Substances	63%	86%	41%	49%

*N/A - Not enough data to accurately calculate (<5% impacted).

Changes with Minimal Impact

Several of the Council's recommendations are projected to have minimal impact on Oklahoma's prison population.

The Council's recommended sentence ranges are very similar to current sentence ranges. Looking at the top 50 most common crimes for which people are admitted to prison shows that, on average, people are already sentenced within these proposed ranges. Therefore, the Council's proposal would not significantly impact sentence lengths. See Table B for an overview of the current, proposed, and average sentences for the top 10 most common offenses for which people are admitted to prison in Oklahoma.

The recommendations also include sentence enhancements based on prior convictions. Under current Oklahoma law, most sentences are enhanceable up to life in prison after 1 or 2 felony priors. The Council's proposal reduces this maximum depending on the proposed felony class. However, very few people receive life sentences under the current enhancement structure. It is much more common for individuals with prior felonies to receive enhanced sentences of 10 or 15 years — sentences that will still be allowable under the Council's proposal. This change is projected to have a small positive impact on Oklahoma's projected prison population, reducing sentences for a few people who would otherwise receive extremely long sentences for crimes reclassified into lower felony classes.

Similarly, the proposal's minimum time served requirements for Class D offenses would have an insignificant impact on Oklahoma's prison population. Nearly 99% of people admitted to prison for these offenses serve above 20% — the new required minimum for this class — of their prison sentences behind bars. This is also true for people admitted to prison for C2 offenses under the unenhanced mandatory time served requirement, where approximately 99% already serve greater than 25% of their prison sentence.

TABLE B. CURRENT AND PROPOSED SENTENCE RANGES

Top 10 Most Common Offenses, Prison Admissions*

Offense	Current sentence range for first-time offense	Proposed sentence range for first-time offense	Current average sentence length
Distribution of Controlled Substance/Possession with Intent to Distribute	0-7, 0-5	0-7, 0-5	6.29
Burglary (Second Degree)	0-7	0-7	4.44
Assault &/or Battery w/ Dangerous Weapon	0-10	1-10	5.73
Possession of a Firearm (After Prior Felony Conviction)	0-10	1-10	4.77
Receive/Possess/Conceal Stolen Property	0-8, 0-5, 0-2	0-7, 0-5, 0-2	3.63
Unauthorized Use of a Vehicle[4]	0-2	0-2	3.01
DUI- Liquor or Drugs (After Prior Felony Conviction)	1-5	0-7	3.84
Domestic Assault & Battery	0-4	1-5	3.96
Receive/Possess/Conceneal Stolen Vehicle	1-5 or 0-2	0-5 or 0-2	3.17
Trafficking in Illegal Drugs	0-20	1-15	10.16
Assault & Battery on a Police Officer	0-5	1-5	3.36

*An admissions cohort from March 2019 through February 2020 was used to account for changes to admissions during the COVID-19 pandemic.

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[4]The current average sentence length for Unauthorized Use of a Vehicle is likely longer than the current maximum because some people in prison for this offense were sentenced before a 2018 law reform took effect that reduced the maximum sentence to 2 years. In addition, some people may have been sentenced under a longer, habitual sentence.

Research shows that increasing prison sentences and length of stay is costly, grows the prison population, and does not improve public safety.

Research has consistently demonstrated that long sentences do not improve public safety. More severe sentences do not deter individuals from committing crime in the future, nor reduce recidivism for those who serve them. In fact the "certainty" of punishment (that is, the certainty that an individual committing a crime will be caught and punished) is much more important to preventing future crime than the severity (the intensity of the punishment, including the length of time someone spends in prison).[5]

Research has also found that locking people up for drug offenses for longer periods of time does not reduce drug availability in the community. People sentenced to prison for distribution are easily replaced in drug markets, and many are users themselves who only sell to support their own addiction. Several United States Sentencing Commission reports have found that releasing individuals convicted of drug crimes from prison early led to no difference in their recidivism rates.

On the other hand, increasing time served requirements has been linked to reductions in participation in programs in prison and an increase in recidivism, in addition to increases in the prison population.

Some proponents of minimum time served requirements argue that the prison population impact will be offset by prosecutor's seeking shorter sentences. However, research and case studies of states that enacted time served requirements have consistently shown substantial growth in their prison populations, while sentence lengths largely remain the same. These states that enacted "truth-in-sentencing" statutes, requiring some or all people in prison to serve a certain minimum percentage of their sentence behind bars, had prison populations 13% larger than other states. No other policy change contributed more to prison growth. This is especially true for states, such as Mississippi, Ohio, and Arizona, that enacted minimum time served requirements for all felonies as the Council's proposal recommends.

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[5]On the other hand, minimum time served requirements, which proponents claim provide "certainty," have no academically proven benefit.

MINIMUM TIME SERVED REQUIREMENTS IN OTHER STATES

In 1995, Mississippi passed a law establishing minimum time served requirements for all felony offenses. The new requirements led to a 52% growth in the prison population by 2001 and a 24% increase in the average length of stay for people with nonviolent offenses, even as average sentence lengths decreased. By 2000, Mississippi's prison population was 37% larger than was originally projected before implementing mandatory time served requirements.

In 1994, Arizona passed truth-in-sentencing laws that established minimum time served requirements for all offenses. From 2000 to 2018, Arizona's prison population grew by 60%, despite falling crime rates. The state now has the 5th highest imprisonment rate in the U.S and currently spends over $1 billion dollars on corrections each year, an increase of $280 million annually from 2000.

In 1997, Ohio enacted SB 2, which established determinate sentencing ranges that created minimum time served requirements for all offenses. Initially, Ohio's prison population decreased, likely due to SB 2's enactment of sentencing guidelines that required a judicial fact-finding process before a harsher sentence could be imposed. However, these guidelines were made merely advisory following state court decisions in 2006. Soon after, Ohio's prison population shot up. By 2008, Ohio's prison population was rapidly growing, largely driven by increased average lengths of stay. From 2005 and 2015, Ohio had the 7th fastest growing prison population in the nation.

Conclusion

Data shows that Oklahomans currently serve substantially longer prison terms than people in other states, particularly for nonviolent drug and property offenses. The Council's latest proposal would increase Oklahoma's prison terms, leading to almost 1,000 more beds and additional prison expenditures between $20 million and $83 million over a 10-year period. This increase in Oklahoma's prison population is driven by the imposition of minimum time served requirements across felony classes.

There is substantial research showing a strong relationship between minimum time served requirements and longer prison terms and larger prison populations. Our findings suggest Oklahoma is no different.

Future recommendations by the Council must be consistent with its statutory mandate to "reduce or hold neutral the prison population" in the state. True criminal justice reform can and should go further: safely and smartly reducing the prison population and saving taxpayer dollars that can be reinvested into priorities that will make Oklahoma a safer and stronger state, such as victim services and mental health and drug treatment.

Methodology

The data used in this report was individual-level data from the Oklahoma Department of Corrections in FY 2019 and FY 2020. Admissions data after March of 2020 was not included due to the effects of the COVID-19 pandemic on prison admissions. Our sample analysis draws from the top 50 most common offenses in Oklahoma's prison system, equivalent to approximately 90% of all prison admissions per year. We used this data to individually calculate the number of people per offense who would have longer or shorter stays in prison if these recommendations were adopted and the degree to which their time served in prison would increase or decrease. Our analysis adjusted for the number of counts an individual is serving in prison.

BASELINE

To predict Oklahoma's prison population under the Council's 2021 proposal, we first created a "baseline" prison population projection. This is an estimate of how the prison population would grow over the next 10 years with no changes in the law. The baseline projection accounts for recent trends in Oklahoma prison admissions, sentence lengths, and length of stay in prison. Because of recent changes in criminal justice policies, as well as a reduction in prison admissions during the COVID-19 pandemic, this projection relies mostly on prison admissions in Oklahoma from March 2019-February 2020 and prison releases from FY 2019 and FY 2020, with adjustments for recent reforms that have not yet been fully implemented. It also looks at the remaining sentence lengths for people currently in prison, as well as their age, to estimate how long they will remain behind bars. This baseline assumes that after the COVID-19 pandemic ends, prison admissions will return to their pre-pandemic levels and there will not be a surge in admissions because of a backlog of cases. If there is a surge of prison admissions, prison population growth may be significantly higher than projected in the next few years, absent further reform. The baseline provides a counterfactual to compare to the projected prison population under the current sentencing structure.

IMPACT OF THE COUNCIL'S PROPOSAL

We then calculated the impact the Council's new penalties would have on the 50 most common crimes in Oklahoma's prison system, accounting for approximately 90% of all people admitted to prison. People who are newly sentenced to prison (on a month-to-month basis) would be in prison longer, on average, if the state adopted the Council's proposal. These calculations factor in the following changes:

- Newly added minimum time served requirements for all non-"85% offenses," based on the number of priors.

- A decrease in time served requirements for some "85% offenses."

- A decrease in sentence maximums for certain offenses currently eligible for life under the habitual offender statute where the enhanced maximum was significantly decreased.

These changes are assumed to be applied prospectively, meaning only to individuals who have not yet been committed or sentenced for their crimes. If the Council's recommendations were to be applied retroactively (to everyone currently in prison), the impact could be substantially different. For instance, 50.2% of people currently in prison were sentenced for an 85% crime, a much larger group than when looking at new admissions. However, retroactive application of these requirements would entail a complicated recalculation of every individual's eligibility for release, and thus would be difficult to implement.

This model assumes that the changes go into effect in November 2021, although significant impact on the prison population is not seen in the first year after enactment because the primary driver of the change is adding on additional months at the end of the time each person spends in prison. If the proposal was put into effect at a later date, the overall impact would stay the same, but would just be shifted backward in time.