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Alternative Sentencing Policies for Drug Offenders: Evaluating the Effectiveness of Kansas Senate Bill 123

Final Report to the National Institute of Justice
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Executive Summary

As state incarceration rates continued to surge through the late 1990s, policymakers encountered growing fiscal constraints and social scrutiny that weakened the systematic use of incarceration as a response to low-level drug offenders. Some states, like Michigan and New York, responded by repealing mandatory prison sentences for drug offenses.¹ Kansas took a markedly different approach, implementing mandatory probation sentences for individuals convicted of simple drug possession.

In 2003, the Kansas Legislature enacted Senate Bill 123 (SB 123), which created mandatory community-based supervision and substance abuse treatment for individuals convicted of a first or second offense of simple drug possession (codified at Kansas Statutes Annotated §21-4729). Under SB 123, judges must sentence nonviolent drug possessors who have no prior convictions for drug sale or manufacture to up to eighteen months of community corrections supervision and drug treatment. SB 123 emerged with the explicit system-level goal of reducing prison populations. This was accomplished, in the first instance, by creating a mandatory non-prison sentence to divert prison-bound drug possessors at sentencing. Reducing prison populations was also dependent on accomplishing an individual-level goal of decreasing recidivism rates for drug possessors by creating comprehensive community-based drug treatment.

Research has shown that intermediate sanctions focused on prison diversion generally have limited diversionary impacts, due to poorly defined eligibility requirements or discretionary decisions of courtroom actors.² Evaluations of diversion programs have also found that such

¹ See, e.g., Wool, J., & Stemen, D. (2004). *Changing fortunes or changing attitudes?: Sentencing and corrections reforms in 2003*. New York: Vera Institute of Justice.

² See, e.g., Petersilia, J. (1998). *Community corrections: Probation, parole, and intermediate sanctions*. New York: Oxford University Press; Petersilia, J., & Turner, S. (1993). Intensive probation and parole. *Crime and Justice*, 17, 281-335; Tonry, M. (1996). *Sentencing matters*. New York: Oxford University Press.

initiatives have limited individual-level impacts, primarily because they increase levels of supervision for participants, increasing the likelihood that supervising officers will observe violations.³ SB 123 has the potential to overcome some of these challenges – it creates mandatory sentencing requirements, which may increase actual diversion, and implements enhanced protocols for treatment and restrictions on revocation practices, which may ensure lower recidivism rates.

A dearth of research exists, however, evaluating simultaneously the system- and individual-level impacts of mandatory diversion/treatment efforts. While programs like SB 123 seek to overcome the net-widening and circumvention problems encountered by other diversion programs, it is unclear whether the narrow eligibility requirements and mandatory provisions SB 123 can effectively ensure diversion at sentencing while reducing the recidivism rates of program participants in the community. Moreover, while compulsory treatment has been shown to reduce recidivism rates for participants, achieving such results on a state-wide basis may be difficult. In the end, it is unclear whether state-wide mandatory diversion/treatment programs can achieve significant system-level and individual-level impacts.

Study Design

This evaluation documents the first five years of operation of SB 123 (November 1, 2003-October 31, 2008). The study examines the individual-level impact of SB 123 on recidivism rates and the system-level impact of SB 123 on prison populations. The study also assesses the impact of SB 123 on the work routines of criminal justice system actors, examining changes in sentencing and supervision practices and interactions across agencies.

³ See, generally, Petersilia, J. (1998). *Community corrections: Probation, parole, and intermediate sanctions*. New York: Oxford University Press;

Individual-level impacts were assessed using sentencing and revocation data collected by the Kansas Sentencing Commission. These data included information on 10,467 “SB 123-eligible” drug possessors sentenced between November 1, 2001 and October 31, 2007. Three different samples based on varying definitions of SB 123 eligibility were used. Sample 1 included the broadest definition of SB 123 eligibility – all individuals convicted of drug possession who had no prior convictions for a violent offense. Sample 2 included a narrower definition of eligibility – all individuals convicted of drug possession who had no prior convictions for a violent offense and no prior arrests for drug sale or manufacture offenses. Sample 3 included the narrowest definition of eligibility – all individuals convicted of drug possession who had no prior convictions for a violent offense, no prior arrests for drug sale or manufacture offenses, and were residents of Kansas. Measures of recidivism included probation revocation, reconviction, and re-arrest and were calculated at various thresholds of risk of failure (6 months, 12 months, 18 months, 24 months). Propensity score matching was used to compare the recidivism rates of SB 123 participants with those of similar individuals sentenced to community corrections or court services (minimal supervision).

System-level impacts were then estimated using basic algorithms for modeling prison populations, based on changes in admissions at sentencing and due to revocations. Supervision and program participation data provided by the Kansas Department of Corrections were used to assess the use of drug treatment services, education and employment services, and sanctions for 6,794 individuals sentenced to SB 123 or standard community corrections between November 1, 2003 and October 31, 2008.

These quantitative data were complemented by qualitative data derived from interviews with SB 123-eligible offenders, community corrections managers, judges, prosecutors, and public

defenders. These interviews were used to further explore the impact of SB 123 on supervision and sentencing practices, intra-state variation in implementation processes, and obstacles to implementing SB 123.

The Context of SB 123

Like many states, Kansas has faced rising prison populations and corrections costs since the 1980s. Following rapid increases in prison populations in the late-1980s, the Kansas Legislature created the Kansas Sentencing Commission (KSC) in 1989 with the explicit mandate to develop sentencing guidelines that would take into account correctional capacities.⁴ In 1993, based on the KSC's recommendations, Kansas abolished discretionary parole and enacted presumptive sentencing guidelines designed to moderate prison growth and control correctional resources.⁵ The sentencing guidelines ultimately developed consist of two separate, two-dimensional grids—one for drug offenses and one for non-drug offenses—that provide both dispositional and durational sentence recommendations based on the offense of conviction and the defendant's criminal history (see Appendix B of final report for the drug sentencing grid). As a presumptive sentencing guidelines system, judges are required to impose the presumptive disposition and duration of sentence but may “depart” from the recommended sentence (i.e. impose a sentence of a different disposition or duration) based on “substantial and compelling” reasons.

In the short-term, sentencing guidelines mitigated Kansas' prison expansion.⁶ In the long-term, however, guidelines could not counteract other drivers of prison expansion. Between 1993 and 2000, Kansas' prison population increased 41 percent, from 6,240 inmates to 8,784 inmates.⁷

The Kansas Department of Corrections (KDOC) responded, increasing prison capacity by 13

⁴ See L. 1989, Ch. 225, Sec. 1

⁵ Codified at K.S.A. §21-4701 et seq.

⁶ Fabelo, T. (2004). Site visit observations. The big picture as seen by an outsider. Paper presented to the Kansas Criminal Recodification, Rehabilitation, and Restoration Legislative Committee, December 8, 2004. On file with author.

⁷ Kansas Department of Corrections. (2001). *Annual report 2001*. Topeka: Author.

percent between 1996 and 2000. The influx of new court commitments and conditional-release violators, however, continued to rise. By the end of 2000, the state's prison population had reached 98 percent of capacity and the KSC was required by statute to explore alternatives for reducing the rate of prison population growth.⁸

KSC analyses showed that prison population growth was driven partially by growth in the number of incarcerated drug possessors. By the end of 2000, 1,018 drug possessors were incarcerated in Kansas prisons, representing roughly 19 percent of the population and a 70 percent increase since 1993.⁹ In response, the KSC proposed legislation that would revise guidelines sentences for drug possession, divert nonviolent drug possessors from prison, and institute a comprehensive regimen of community-based drug treatment to increase the likelihood of offender success on probation. In 2003, the legislature enacted these recommendations as Senate Bill 123 (SB 123).¹⁰

The Content of SB 123

SB 123 created mandatory community-based supervision and drug treatment for eligible individuals convicted of simple drug possession. Under SB 123, judges must sentence first- or second-time drug possessors who have no prior convictions for a violent offense or for drug sale or manufacture offenses to up to eighteen months of community corrections supervision and drug treatment. As a result of SB 123, the presumptive sentence for a first offense of drug possession increased from up to twelve months of probation to up to eighteen months of probation; but the presumptive sentence for a second offense of drug possession decreased from forty-nine months in prison to up to eighteen months of probation. SB 123 also changed the

⁸ See, KSA §74-9101(15)

⁹ Kansas Department of Corrections. (2001). *Annual report 2001*. Topeka: Author.

¹⁰ Codified at KSA §21-4729)

presumptive sentence for third and subsequent convictions of drug possession, reducing the presumptive sentences from 146 months in prison to 20 months in prison.

SB 123 also significantly altered the nature and conditions of supervision. SB 123 mandated a particular form of probation – community corrections supervision. Prior to SB 123, judges had discretion to sentence probationers to court services supervision (few conditions and minimal supervision) or community corrections supervision (multiple conditions and more intense supervision). Under SB 123, the use of court services for SB 123 eligible offenders is prohibited. SB 123 also altered revocation practices for SB 123 participants, introducing graduated sanctions and creating a presumptive non-revocation sanction for violations of supervision conditions. Positive drug tests or even subsequent convictions for possession were not automatic triggers for termination of treatment or probation revocation.

As a community corrections sentence, SB 123 requires participants to abide by the same supervision conditions as any community corrections probationer. In most jurisdictions, SB 123 participants and standard community corrections probationers are supervised by the same community corrections officers. As such, the content of supervision under SB 123 is comparable if not identical to standard community corrections. The primary difference is the provision of mandatory drug treatment under SB 123. SB 123 called for the expenditure of additional funds for treatment provision, with the legislature appropriating roughly \$5.7 million per year for treatment services.¹¹

SB 123 was designed to rely on existing networks of primarily private community-based treatment providers, which offered any combination of detoxification, drug education, outpatient treatment, in-patient treatment, and relapse prevention, among other treatment modalities. Following conviction, SB 123 offenders are placed under the supervision of a community

¹¹ Kansas Sentencing Commission (2004). *Kansas Sentencing Commission 2004 annual report*. Topeka: Author
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corrections officer who chooses a local treatment provider to conduct a drug abuse assessment guided by the American Society of Addiction Management (ASAM) criteria. Based on the assessment, the provider recommends a particular treatment modality. The supervising officer chooses an appropriate drug treatment provider that offers the recommended treatment modality and meets with a counselor at the chosen provider agency to discuss the supervision plan and treatment regimen. SB 123 recommended routine “team meetings” to ensure that officers and counselors quickly addressed problems offenders encountered in meeting treatment or supervision conditions.

In addition to new lines of communication between officers and counselors, SB 123 also created new state-level oversight and involved new agencies in the provision of drug treatment to probationers. Under SB 123, providers must incorporate cognitive behavioral therapy into all drug treatment programming for offenders. The KDOC trains and certifies counselors in providing treatment to offenders, approves and audits providers’ service plans for delivering treatment under SB 123, and verifies the licenses of individual counselors treating SB 123 offenders. Community corrections officers certify invoices from treatment providers for services provided and the KSC oversees funds appropriated by the state for SB 123 drug treatment, administers all payments to treatment providers for services delivered, and is responsible for monitoring and reporting on admissions to and discharges from SB 123.

Findings

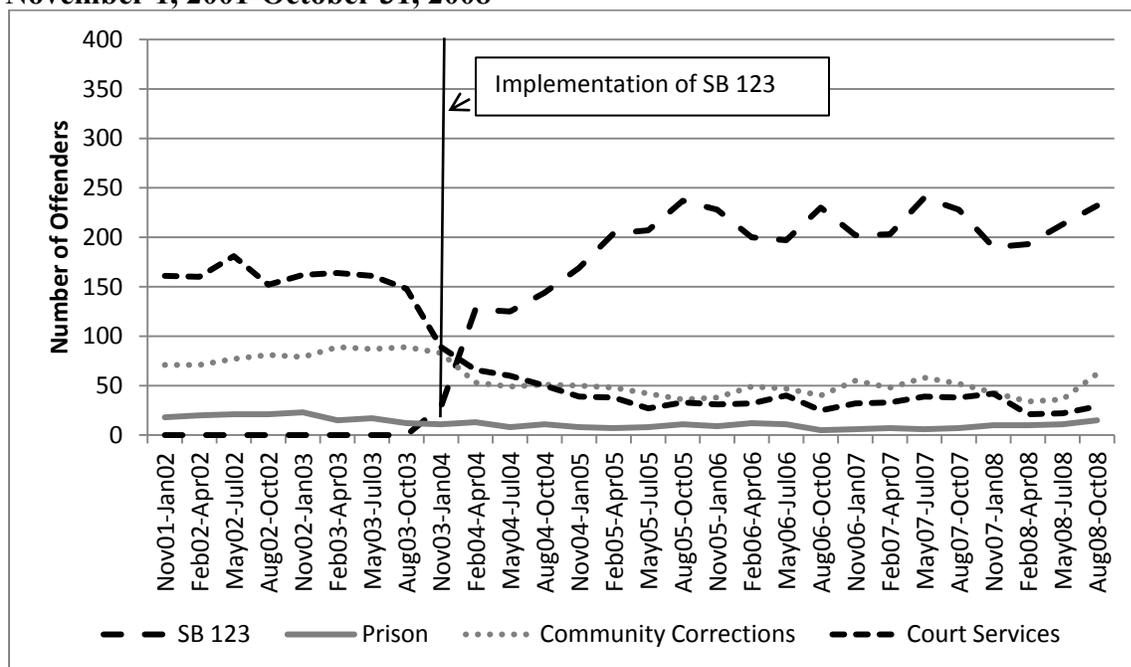
System-Level Impacts

SB 123 achieved its system-level goal of reducing admissions to prison for drug possession. We estimate that SB 123 diverted between 122 and 214 prison-bound individuals at sentencing and saved the state between 158 and 374 prison beds over the first three years of the program

(November 1, 2003-October 31, 2006). These are conservative estimates based on the narrowest definition of program eligibility and the most conservative estimates of changes in recidivism rates. SB 123 may have had a wider impact on the sentencing of all drug possessors. Courtroom actors noted that they often worked to get ineligible individuals sentenced under the program. SB 123 may have also resulted in a general shift in the perception of drug possession and substance abuse among criminal justice system actors, which may have resulted in greater use of community-based sanctions for other drug offenders.

Although it achieved its system-level goal, SB 123 also created significant front-end net-widening. SB 123 drew offenders primarily from court services (probation with minimal conditions) rather than prison (see Figure 1). These drug possessors are now supervised by community corrections, subjecting them to stricter conditions and greater surveillance than they would have received prior to SB 123 implementation. This front-end net-widening was the result of poor targeting of offenders with narrow eligibility requirements, mandatory sentencing provisions, and a disconnect between pre-implementation sentencing patterns and post-implementation sentence requirements. By design, SB 123 targeted an already small population of prison-bound drug possessors, severely limiting SB 123's ability to divert offenders at sentencing.

Figure 1. Sentences Imposed for SB 123-eligible Offenders Pre- and Post-Implementation, November 1, 2001-October 31, 2008

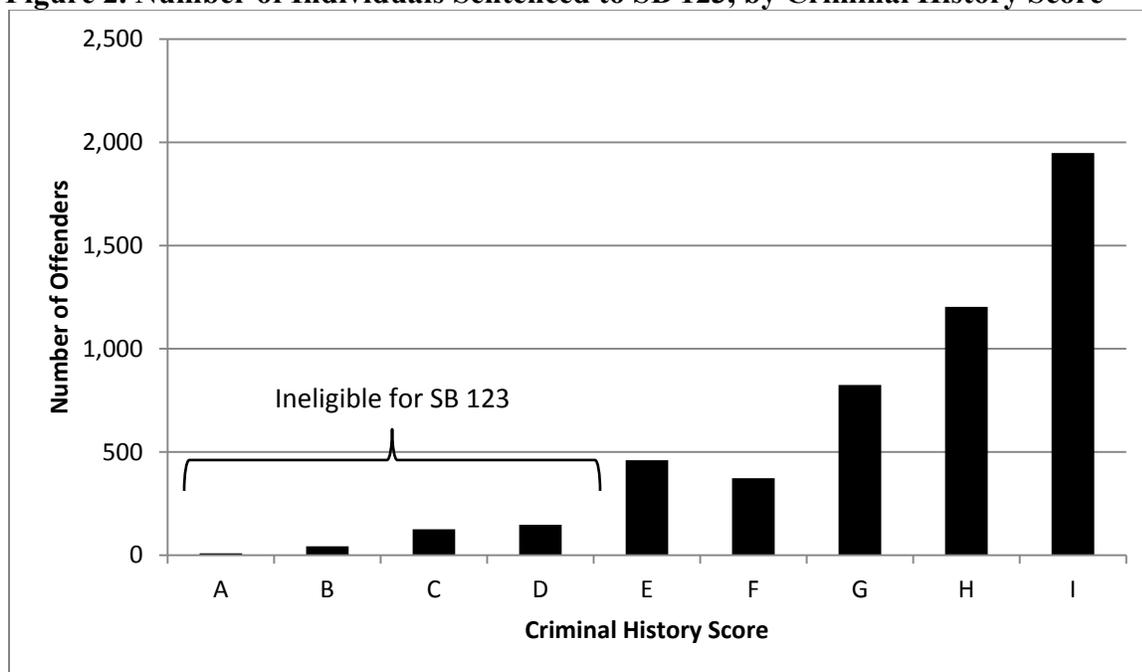


As intended, SB 123 changed supervision and revocation practices. Community corrections officers rely less on restrictive supervision interventions (e.g. sanctions, increased surveillance) and more on supportive supervision interventions (e.g. increased employment services, counseling) when supervising SB 123 participants relative to other probationers. SB 123 has fostered a team approach between officers, providers, and offenders, balancing treatment with accountability by allowing offenders to help develop their own service plans. Supervising officers have become more familiar with new tools and protocols such as the LSI-R, Motivational Interviewing, and cognitive approaches and perceive these as being useful and relevant to their work. Supervising officers and community corrections managers also report new strategies to better handle condition violators, including staffing cases and not revoking after a single condition violation. Officers are innovating, trying new cognitive strategies to deal with SB 123 and non-SB 123 offenders (e.g., thinking reports, group sessions) as well as new strategies to improve interventions (e.g., mobilizing community resources, using vouchers). In

this sense, supervision and referral practices created for SB 123 caseloads have migrated to non-SB 123 caseloads, broadening SB 123's impact.

By fostering new lines of communication, SB 123 has facilitated a more open, purposive conversation among criminal justice stakeholders. Judges, prosecutors, and defense attorneys understand and generally support the goals of SB 123; and their actions tend to contribute to effective program operation. Yet, some courtroom actors actively circumvent the statute; as Figure 1 shows, eligible offenders continue to be sentenced to non-SB 123 sentences. Moreover, many ineligible offenders receive SB 123 sentences (Figure 2). This circumvention appears to be the result of disagreements with eligibility requirements and the mandatory nature of the program and has led to additional front-end net-widening, poor opinions of program success among some stakeholders, resentment by community corrections officers, and negative impacts on both system- and individual-level outcomes.

Figure 2. Number of Individuals Sentenced to SB 123, by Criminal History Score

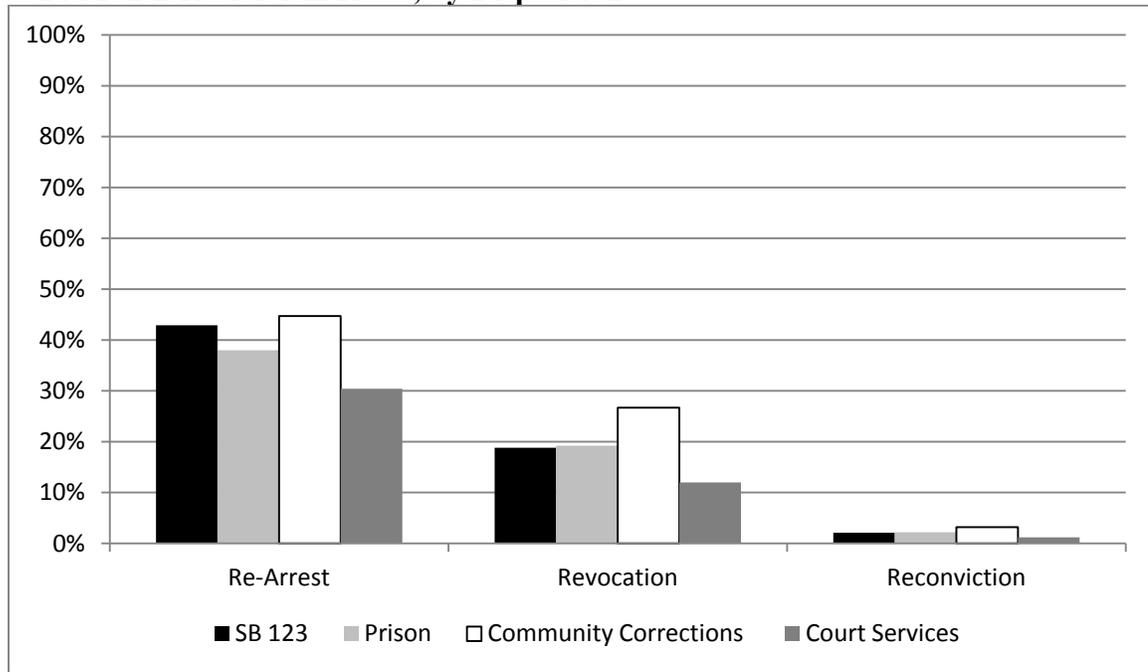


Finally, SB 123 increased the availability of drug treatment by providing adequate funding for treatment services. Funding for SB 123 remains robust and providers have largely adapted to the flow of offenders and program reporting requirements. In some urban jurisdictions, providers have increased treatment capacity; although in more rural areas such patterns have not been replicated. Providers are more attentive to evidence based practices, tailor drug treatment to probationers by incorporating cognitive therapies into existing treatment modalities, are aligning treatment with supervision, and are acting as referral sources for other community-based services.

Individual-Level Impacts

SB 123 had a limited individual-level impact on recidivism rates. Within 24 months of risk in the community (i.e. within 24 months after sentencing for individuals sentenced to SB 123, court services, or community corrections and within 24 months after release for individuals sentenced to prison), roughly 19 percent of SB 123 participants were revoked from supervision and incarcerated – compared to 12 percent of individuals sentenced to court services, 27 percent sentenced to community corrections, and 19 percent sentenced to prison (Figure 3). Roughly 43 percent of SB 123 participants were re-arrested within 24 months – compared to 30 percent of individuals sentenced to court services, 45 percent sentenced to community corrections, and 38 percent sentenced to prison. Reconviction rates were nearly identical across all four groups, at roughly 2 percent within 24 months in the community.

Figure 3. 24 Month Recidivism Rates, by Disposition



After controlling for a series of individual and legal factors, analyses showed that SB 123 increased the likelihood of recidivism compared to court services and had no significant impact on recidivism compared to community corrections or prison. This pattern remained stable at different follow-up periods (e.g. 12 months, 24 months) and different measures of recidivism. The impact relative to court services may not be surprising; most failures on probation result from revocations and SB 123 increased the level of surveillance and control that drug possessors were subjected to in the community, increasing the likelihood of revocation. The impact relative to community corrections may not be surprising either; while SB 123 offenders receive more treatment than those on community corrections and nearly identical supervision, as indicated by administrative data and interviews with supervising officers. The impact relative to prison is more problematic; yet, with so few individuals sentenced to prison prior to implementation and significant dissimilarities between them and SB 123 participants (in terms of demographics and criminal history), it was impossible to accurately assess the impact of SB 123 relative to prison.

While SB 123 did not reduce recidivism rates relative to other sanctions, it, nonetheless, improved offender performance in a number of domains. SB 123 was associated with more positive attitudes of program participants, particularly regarding offender involvement in treatment planning and interactions with supervising officers. Analyses of administrative data showed that SB 123 offenders received more treatment interventions per person than non-SB 123 offenders and there was a high degree of consistency between assessments of initial treatment needed and the modality of treatment received. This was confirmed by offenders who noted that they got the treatment they needed, received the proper amount of treatment, and were ultimately helped by treatment received.

Challenges and Recommendations

A primary challenge facing mandatory diversion/treatment programs is the proper definition of eligibility. Eligibility under SB 123 is defined bluntly using only offense of conviction and prior criminal history. As such, the initiative is easy to implement in a fragmented system and is easy to track by state administrators. This definition, however, led to significant net-widening, circumvention, and poor evaluations of the program by some stakeholders. Programs must develop mechanisms to reduce these problems by incorporating evaluations of treatment need and amenability into definitions of eligibility and sentencing provisions. The narrow eligibility criteria of conviction offense and criminal history would function as a low bar for program entry – judges would be required to impose a probation sentence for all offenders meeting these minimal eligibility requirements, preserving the diversion function of the program. However, risk assessments and treatment needs assessments would determine the imposition of SB 123 treatment and a community corrections sentence, allowing SB 123 treatment to be tied to either court services or community corrections. In this way, judges would be required to impose an SB

123 sentence for all offenders who meet the treatment needs threshold, but the risk assessment would determine if offenders were sentenced to court services (low risk) or community corrections (high risk); moreover, offenders who did not meet the treatment needs threshold would receive court services or community corrections without treatment. In this way, the program would preserve the system-level goal (diversion from prison based on conviction offense and criminal history) while potentially improving individual-level outcomes (reserving SB 123 treatment for those needing it and community corrections supervision for those posing higher risk).

Under this revised model, SB 123 would be implemented by both court services and community corrections agencies. Such a model would be improved with enhanced coordination of state-level agencies including current stakeholders such as the KDOC and the KSC and new actors such as the Kansas Office of Judicial Administration. Further, these reforms may be possible in Kansas as prison expansion has slowed and the goals of SB 123 can be re-centered on offender performance rather than prison-bed savings.

Recommendation 1: Use narrow eligibility requirements to define the population targeted for mandatory diversion.

Recommendation 2: Incorporate assessments of treatment need and amenability into definitions of eligibility and require mandatory treatment only for those individuals evaluated to be in need of treatment.

Recommendation 3: Provide mandatory treatment at both standard and intensive levels of probation.

Recommendation 4: Incorporate assessments of risk into definitions of eligibility for intensive supervision and allow judges the discretion to sentence individuals to either standard probation or intensive probation based risk.

A second challenge facing SB 123 is high revocation rates. Revocation rates for SB 123 offenders are not statistically different than similar offenders on community corrections. Community corrections officers supervise SB 123 offenders and non-SB 123 offenders in the same way and respond to technical violations by both groups in the same way. Yet, SB 123 calls for a different approach to supervision and a different response to technical violations. Policymakers should examine the revocation procedures for SB 123 participants, building upon the strengths of SB 123's team approach. Perhaps the standards for probation revocation should be re-examined to more closely reflect the different nature of SB 123 service delivery – strategies to increase the use of supportive interventions, enhanced communication between providers and supervising officers.

Recommendation 5: Revise revocation practices for those in mandatory treatment to reflect the possibilities of relapse.

A third challenge is the alignment of SB 123 service providers across jurisdictions and the consistency of their therapeutic approach with the central tenets of SB 123. Our research

suggests that the implementation of SB 123 may have amplified regional differences in the nature and scope of supervision/treatment interventions. This is likely due to the lack of services in rural areas and the relative absence of oversight of drug treatment programs. While KDOC has improved the oversight of providers, it is important to monitor the alignment of SB 123 providers with the vision and practice of the KDOC.

Recommendation 6: Ensure consistency in therapeutic approaches across providers by incorporating greater oversight of treatment provision through regular audits.

The final challenge facing any state-wide initiative is ensuring program fidelity across a diverse and fragmented system. On the one hand, this presented a problem in Kansas given the obstacles faced by many rural jurisdictions; the structure of SB 123 called for particular processes that were not conducive to rural experiences. On the other hand, the semi-autonomy of community corrections offices allowed for adaptation and innovation; rural agencies were able to rely on informal networks and familial ties to meet the expectations of SB 123. This, however, produced variation in the program across the state. In the end, the state could seek to control some of this variation with greater oversight by state-level agencies. But, this can only occur if local differences in resources can be overcome. As such, a limited amount of flexibility is necessary to ensure that the program works across diverse jurisdictions.

Recommendation 7: Balance flexibility and fidelity by allowing local supervising agencies the freedom to adapt the initiative to local levels of treatment availability but maintain oversight by state-level agencies.

Conclusion

Whether prompted by continued fiscal crises, prison capacity constraints, or public pressure, statewide efforts at mandating community-based sanctions for drug possessors will likely continue. In turn, policymakers will surely confront questions about the effectiveness of such programs at reducing prison populations and deterring future criminal activity. Programs like SB 123 have the potential to overcome noted deficiencies in other intermediate sanctions and to achieve both system level and individual level goals. How policymakers balance the importance of these twin goals, however, will ultimately determine the expansion of such programs.

Future policy efforts aimed at reducing the pressure on correctional resources should carefully develop a baseline assessment of the structural feeders of prison growth before considering specific policy strategies and programs. Such assessment will not only inform the scope and nature of these initiatives but also will structure a broader conversation about ultimate goals and objectives. Kansas' experience with SB 123 demonstrates that it is difficult for a single program to address all of these expected returns in the same way.