

Statement Submitted by Judge Leo T. Sorokin, District of Massachusetts
to United States Sentencing Commission in Advance of Testimony on March 15, 2017

Thank you, Commissioners, for the opportunity to testify today, and for the Commission's ongoing interest in alternatives to incarceration.¹ Having reviewed Judge Hendricks's comprehensive and thoughtful statement, I agree with her points. My comments will explain the particular implementation in the District of Massachusetts of our presentence intensive supervision program called Repair, Invest, Succeed, Emerge, or "RISE" – a program which is fully consistent with the Guidelines. For each RISE defendant, no promises are made and no benefit accorded for successful completion of the RISE program. Participants do obtain a twelve-month delay in sentencing, during which they participate in RISE. Thereafter, Probation and then the Court, after consideration of any objections from the parties, calculate the Guidelines in the ordinary course, determine the application of any departures, and finally apply the § 3553 factors.

Before answering the specific questions posed regarding RISE, I wish to make three suggestions for the Commission's consideration. These suggestions relate to the broader topic of alternatives of incarceration and, like the RISE program, are fully consistent with the Guidelines. First, a thoughtful approach to selecting a defendant's sentencing date is a powerful tool courts can use to develop better information for our sentencing decisions and thereby promote public safety. In one form or another, RISE, BRIDGE, and CASA use that tool by delaying sentencing for a year, when appropriate, during which time Probation closely monitors the defendant's behavior. The impending, rather than immediate, sentencing operates both as a powerful

¹ This statement represents my own views and is not a statement on behalf of my colleagues or the District of Massachusetts.

motivator and a difficult test for the defendant, because the weight of the consequences of his past and present actions are vividly in front of him. I believe Judges should use this tool, not in every case, but in appropriate cases. During this extended presentencing period, some defendants will demonstrate that probation or time served is the proper sentence under the law. Others will not. Public safety is best served when we use every tool available to us to do the best job we can do in determining the proper sentence for each individual defendant's circumstances. The more we know about the defendant, the better we are able to serve that function. Our experience with RISE to date also has shown us that participants in RISE are extremely motivated to make amends for their wrongs and to rehabilitate themselves by becoming sober, employed, educated, and law-abiding. This is itself a valuable aspect of sentencing. The Commission could promote this aim by permitting Courts to assess in sentencing, with a Guideline adjustment, the significance of participation in a presentencing supervision program.

Second, the phrase "*alternatives to incarceration*" implies two separate universes. I suggest to you that we can promote public safety most effectively by taking a more holistic view. Under such a view, what happens in the Bureau of Prisons should relate seamlessly to what happened during the pretrial and sentencing phases, and also to what will happen during post-prison supervision by Probation. Sentencing is the appropriate, and probably ideal, time to identify treatment needs that bear on public safety. In Massachusetts, we have taken a major step toward working with the Bureau of Prisons to achieve this sort of holistic approach. We prescreen defendants for the BOP's Residential Drug Abuse Program, or "RDAP." As part of a pilot program with the BOP, RDAP-eligible defendants may, upon completion of RDAP, transition to a residential working treatment program in Boston (subject to electronic monitoring), rather than to the BOP Residential Reentry Center ("RRC") in Boston. Once the

defendant concludes his BOP sentence, he commences supervised release and the Court Assisted Recovery Effort, or “CARE,” our reentry drug court.

This treatment continuum maximizes the value of BOP’s investment in a defendant. As a general matter, the benefits of in-patient drug treatment – which is what RDAP is – are promoted and maximized when an individual is stepped down to a working drug treatment home (rather than removed from a treatment environment completely). Placement of these defendants in a residential treatment home costs about the same per day as placement in the RRC – in other words, this approach carries with it no additional cost, while providing enhanced treatment and rehabilitative benefits. These residential treatment stays are then followed by intensive supervision coupled with outpatient treatment, i.e., CARE. A similar continuum ought to provide cognitive behavioral therapy (“CBT”) in a similar manner for offenders without substance abuse problems, but who otherwise present a high risk of recidivism. The value of a CBT program for these offenders has been shown by Judge Casey Rodgers’s work in the Northern District of Florida. The Commission could promote this collaboration by permitting Courts to assess in sentencing, with a Guideline adjustment, the significance of participation in a combined BOP-Court program.

Third, the recent rapid rise in deaths from opiate overdoses highlights an important point about controlled substances, especially heroin, cocaine, and methamphetamine. Unfortunately, despite sustained law enforcement efforts, large amounts of these drugs are purchased and consumed every day by individuals in the United States. A drug treatment provider in Boston once told me about a day when her clinic experienced a large spike in both new admissions to treatment and overdoses. This spike, she said, arose the same day as a large joint task force sweep resulted in the arrest of many drug dealers. According to this provider, the mere fact of

the arrests caused some users to seek treatment, and led others to overdose after obtaining drugs from a new dealer. Identifying information for some of these users was within the evidence gathered during the criminal investigation. Best practices suggest that when law enforcement has information that a person is using or abusing controlled substances, as occurs in some federal cases, the officers privy to such information should do something with it. For example, law enforcement officers aware of the identity of a drug abuser could provide the information to a treatment provider, or knock on the person's door to provide treatment information. In a recent federal case in Massachusetts, law enforcement did exactly that. And in at least one community outside of Boston, such action occurs at the end of every drug investigation. See <http://www.arlingtonma.gov/departments/police/opiate-outreach-initiative>; see also <http://www.paariususa.org>.

Presently, the Guidelines acknowledge the possible importance of a defendant assisting in the prosecution of another, but not the possible importance of a defendant assisting in the saving of the life of another by assisting the government in arranging treatment for a person abusing controlled substances. Therefore, I suggest you amend U.S.S.G. § 5K1.1 with the italicized language shown below:

Upon motion of the government stating that the defendant has provided substantial assistance *in (1) the investigation or prosecution of another person who has committed an offense or (2) identifying and/or assisting into treatment one or more persons addicted to or regularly abusing controlled substances*

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Turning to the District of Massachusetts's RISE program, below are my answers to each of the various issues your staff suggested I address.

(1) Why Massachusetts Created RISE

In 2006, our District created one of the first federal reentry drug courts, called CARE. This is a public safety program. It combines intensive supervision (e.g., more frequent drug testing, more frequent meetings between the offender and the Probation Officer, and closer oversight) with swift, certain sanctions for all failures to comply with any requirements of supervision. These sanctions include, depending upon the violation, immediate incarceration. The program is overseen by a federal magistrate judge, and participants appear for frequent judicial status conferences. The US Attorney's Office supported the creation of CARE in 2006, continues to support the program, and participates in all aspects of it. This program is only appropriate for, and available to, offenders with serious histories of abuse of drugs or alcohol. Offenders without sufficiently serious drug problems are not accepted into CARE.

We have been very pleased with the results of more than a decade of our efforts. Offenders generally do better during their supervision in CARE than on regular supervision; they are more likely to remain sober, employed, and law-abiding in CARE than on regular supervision; and they appear to recidivate at lower levels than offenders on regular supervision. These effects were documented in a study conducted by an outside researcher from Northeastern University. The results of that study are unsurprising. Numerous research studies have shown that drug courts save money, reduce recidivism, and create many collateral benefits, such as improved employment and renewed family relationships.

Three further points bear mention with respect to CARE. First, like the BRIDGE Program in South Carolina, we built our program upon – and continually strive to comply with – the key components of drug courts established by the National Association of Drug Court Professionals (“NADCP”) and based upon years of research. Second, the drug court approach

works with federal offenders. I initiated CARE and presided over it every week for eight years. I witnessed it working firsthand. So, both the research and my experience show it works. I am unaware of any study showing that there is something about federal court or federal offenders that makes this approach inapplicable or improper.² Third, neither CARE nor RISE are social work.³ At court sessions, the presiding judicial officer imposes sanctions, identifies compliance with prior court directions, issues orders and less formal directives as to how the offender ought achieve compliance, and reprimands actions not warranting formal sanctions. In other words, the court functions as a court. In some cases, closer involvement of a judicial officer promotes the objectives of the governing rules and statutes. This is a regular feature of federal court. Cf. Fed. R. Civ. P. 16 (empowering courts to hold multiple conferences to establish and maintain control of proceedings).

CARE's success caused many judges, including me, to believe that the same approach would benefit some offenders on pretrial release and improve the quality of our sentencing decisions, and so we created RISE. In particular, we thought that, in certain cases, both the court and the offender might benefit from a period of time during which the offender's behavior and compliance could be observed, after a plea but before imposition of sentence. We believed that allowing such a period of time would provide us with the information necessary in some close cases to determine whether non-incarcerative sentences might be appropriate, or to discern how

² The FJC Reentry Study is not such a study. It does not purport to examine whether something about federal court or federal offenders affects the application of research data acquired in studying programs in other settings. Indeed, it does not ever discuss, address, or consider such studies. It suffers from other methodological and conceptual problems which are beyond the scope of this statement, but which I explained in a letter to the Criminal Law Committee.

³ Of course, if this activity, which is lawful and within the scope of our responsibilities, helps prevent a felon from victimizing another person or transforms a male into a responsible father, then I, for one, think we should perform it even if it is deemed "social work," given our obligations as public servants.

long a sentence of imprisonment need be. The same underlying principles driving the creation of the BRIDGE program in South Carolina drove our creation of RISE: to provide an alternative sentencing tool and promote public safety through parsimonious use of scarce public funds. RISE also requires more meaningful and significant acceptance of responsibility than the Guidelines require. In this way, it differs from most federal front-end programs.

(2) How Massachusetts Developed RISE

In 2014, we formed a committee consisting of several district and magistrate judges, several United States Probation Officers including our Chief, a representative of the United States Attorney's Office, a representative of the Federal Public Defender's Office, and the Chair of our Criminal Justice Act Panel. This "RISE Committee" reviewed the documents regarding most of the other so-called front-end or alternative court programs operating in the federal system at the time, and spoke with our counterparts in other districts. The Committee also observed both Judge Laplante's "LASER" Docket in the District of New Hampshire and then-Judge Gleeson's "Alternatives to Incarceration" program in the Eastern District of New York. We drew upon our experience and research with CARE and our reentry court program for high risk offenders. Finally, to guide us in data collection and related study considerations, we consulted with a former high-ranking official from the Office of Management and Budget who has had years of experience conducting program evaluations.

Ultimately, the RISE Committee developed a proposal supported by all of its members and their constituent organizations, and the Court adopted the proposal as a three-year pilot. RISE expires at the end of the three years unless expressly renewed by the Court. We selected three years to provide sufficient time to evaluate all aspects of the program.

(3) What is RISE and How Does it Operate

A defendant may participate in RISE only if: (a) he is eligible, pursuant to criteria I will explain below; (b) his district judge approves his participation after considering a non-binding recommendation from the RISE Committee; and (c) he enters an early plea of guilty. Neither participation nor successful completion of RISE confers any sentencing benefit on a defendant beyond the sentencing judge's consideration at sentencing of the defendant's conduct (good or bad) during RISE. Participation typically lasts twelve months.

A focus on accepting responsibility distinguishes RISE from most other alternative programs and, frankly, from the Guidelines as well. Everyone in RISE must participate in our restorative justice program, which requires: (a) an informational meeting with our restorative-justice-trained Probation Officer; and (b) a two-day workshop with other RISE participants, several Probation Officer facilitators, and several community members, including two mothers whose sons were killed in, or as a result of, the drug trade. In addition, we invite each defendant to conduct an individual restorative justice project after the workshop. We want the defendants in RISE to appreciate the real human harm caused by the criminal acts they committed and, ideally, to engage in some activity to repair at least some of that harm. To date, we have held two restorative justice workshops, with a third scheduled later this month. Although our pilot program is new and small, we are extremely pleased with the early results. In developing this aspect of RISE, we have drawn upon restorative justice programs operating in the Massachusetts and California state prisons, and Bridges to Life, a faith-based restorative justice program in which, I understand, more than 25,000 inmates in the Texas Department of Corrections have participated.

RISE is a voluntary program. Eligibility is determined as follows. Only defendants on pretrial release may apply for participation in RISE. It is not available to detained defendants, and it is not a basis for obtaining release. Among released defendants, two types of offenders may participate: (a) those defendants with a “serious history of substance abuse or addiction” which “substantially contributed to the commission of the charged offense,” or (b) those defendants whose history reflects “significant deficiencies in full-time productive activity, decision making, or pro-social peer networks, as a result of which the defendant would benefit substantially from a structured pretrial program.”

The RISE Committee reviews an applicant’s relevant paperwork (e.g., bail report, Indictment, criminal record, release conditions, supervision information, and sometimes a letter from defense counsel) as well as the results of two screening tools administered to all RISE applicants (the Texas Christian University Drug Screen, or “TCUDS,” and the Post Conviction Risk Assessment, or “PCRA”) and makes a consensus recommendation to the district judge presiding over the case. The Committee’s recommendation is based upon whether the defendant satisfies one of the foregoing two categories, and whether there is anything known to the Committee that suggests the defendant should not participate.⁴

Probation, working with the RISE Committee, prepares an individualized list of goals or objectives for each participant. Every participant appears monthly before the magistrate judge presiding over RISE. These hearings follow the CARE model described above. We now have two RISE sessions – one in Boston, and another in Worcester.

⁴ Although consensus is not required by the document creating RISE, the RISE Committee has operated by consensus in each case it has considered to date. Similarly, the final decision for CARE participation rests with the Court, but the program operates on a consensus basis, and every acceptance since 2006 has been a consensus decision.

Attached to this statement is the description of RISE, as approved by the Court, along with a sample set of objectives for a participant.

(4) RISE Program Participant Data

Below is the relevant data as of February 28, 2017:

- 46 individuals have applied to RISE since the pilot began in August 2015.
- 19 individuals became participants.
- To date, 2 participants were terminated, 6 completed RISE and have been sentenced, and 11 remain active participants.
- 9 participants are female and 10 male.
- 2 individuals are pending acceptance by their assigned district judge.
- 4 applications are pending before the Committee.
- Most of the participants (15) faced drug distribution charges.

(5) How We Measure Success and Sentencing RISE Defendants

We are tracking and evaluating RISE on an operational basis; that is, we evaluate it to determine whether it is meeting the goals we have established, whether it is a wise use of resources, and whether we can improve it. Although we are still early in the program, and most participants have not yet completed it, we are looking at the following types of measures. First, we evaluate how the defendants are doing in RISE – i.e., compliance with supervision, accomplishment of the initial objectives, and general demonstration of sober, employed, law-abiding, and responsible behavior.

Second, we are evaluating whether the program is making a meaningful difference at sentencing. At sentencing, the Court considers the defendant's performance in RISE to the extent relevant to the selection of the Guideline sentence, including any departures (most likely for extraordinary acceptance of responsibility or post-offense rehabilitation) or a variance under § 3553(a). We promise no benefit to the defendant. As I said at the start, RISE is fully consistent with the Sentencing Guidelines. Sentencing of a RISE defendant is no different than the sentencing of any other defendant, except, perhaps, in the sense that the sentencing judge has more information about the defendant than she otherwise would. All relevant facts are considered, the Guidelines calculated, departures considered, § 3553 factors evaluated, and then a sentence imposed.

As a practical matter, we do anticipate that most defendants accepted into RISE, if fully successful, likely (but not always) will receive a non-incarcerative sentence as a permissible application of the Guidelines and/or § 3553. Of the six defendants sentenced after successful completion of RISE five have received either probation or a time-served sentence, and one received an additional month of custody beyond time already served. This is so because most of the defendants selected for RISE either are eligible for such a sentence under the Guidelines, or do not face a lengthy Guideline sentence. For the latter group, successful performance in RISE may warrant departures or variances as noted above resulting in sentences of probation, time served, or a brief further period of incarceration.

We do consider accepting defendants into RISE who, even with success, are likely to receive a sentence of incarceration. No such defendant has completed RISE yet. While there are good reasons to accept such persons into RISE – e.g., treatment is best begun immediately, it will promote better behavior in prison, and successful participation may result in an appropriately

shorter prison sentence – some are concerned by the prospect of the Court encouraging such a defendant over an extended period of time to develop a sober, employed, law-abiding life, only to then have the Court interrupt progress in those areas by sending the defendant to prison. We continue to examine this issue.

We also intend to track post-RISE recidivism data. However, to date, only a handful of defendants have completed the program, so we have no such data to report at this time.

(6) Tracking Defendants After RISE

The defendants that have completed RISE to date all remain under supervision of the Probation Office. Each is tracked.

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I would be happy to provide further information on any matter of interest to the Commission. Thank you again for your consideration of my submission.