



# Federal Alternative-to-Incarceration Court Programs

**UNITED STATES SENTENCING COMMISSION**





## **United States Sentencing Commission**

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## I. Introduction

During the three decades that it has been in existence, the United States Sentencing Commission (Commission)<sup>1</sup> repeatedly has considered the important issue of when an alternative to incarceration is an appropriate sentence for certain federal defendants. The original 1987 *Guidelines Manual* provided for alternative sentencing options such as probation for certain low-level federal offenders,<sup>2</sup> and the Commission thereafter amended the guidelines on several occasions to increase the availability of alternative sentences as sentencing options.<sup>3</sup> Despite these amendments, the rate of alternative sentences imposed in cases governed by the sentencing guidelines has fallen steadily during the past three decades,<sup>4</sup> including after *United States v. Booker*,<sup>5</sup> and *Gall v. United States*,<sup>6</sup> which increased federal judges' discretion to impose alternative sentences. In recent years, the Commission has prioritized the study of alternatives to incarceration as a sentencing option.<sup>7</sup>

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Many federal district courts around the country, with the support of the Department of Justice (DOJ), have begun creating specialized court programs to increase the use of alternatives to incarceration for certain types of offenders, most commonly for those with substance use disorders. These programs have developed independently of policy decisions of both the Commission and the Judicial Conference of the United States.<sup>8</sup> Commentators, including judges who have presided over these court programs, have urged the Commission to amend the *Guidelines Manual* to encourage such programs and provide the option of a downward departure to a non-incarceration sentence for defendants who successfully participate in them and who otherwise would face imprisonment based on their guideline sentencing ranges.<sup>9</sup>

As part of its recent priority concerning alternatives to incarceration, the Commission has studied these emerging court

programs. The Commission’s study has been qualitative rather than quantitative at this juncture because of a lack of available empirical data about the programs. In late 2016 and early 2017, Commission staff visited five districts with established programs, interviewed program judges and staff, and observed proceedings. On April 18, 2017, the Commission conducted a public hearing about such specialized federal court programs, at which the Commission received testimony from experts on state “drug courts” and other “problem-solving courts” as well as from federal district judges who have presided over three of the more established alternative-to-incarceration court programs.<sup>10</sup>

This publication summarizes the nature of these emerging federal alternative-to-incarceration court programs and will highlight several legal and social science issues relating to them.<sup>11</sup> Part II defines key terms and concepts, discusses the history of alternative-to-incarceration court programs, which originated in the state courts nearly three decades ago, and then specifically describes the types of specialized federal court programs that have been created in recent years. Part III discusses legal issues related to the federal court programs, including how they fit within the legal framework created by the Sentencing Reform Act of 1984 (SRA) and modified by the Supreme Court in 2005 in *Booker*. Part IV identifies social science issues related to the programs, including issues related to the efficacy and cost-effectiveness of the federal court programs.

Part V concludes by identifying several questions about the federal court programs that policymakers and courts should consider in deciding whether, and if so how, such programs should operate in the federal criminal justice system in the future. Those questions include:

- How do the programs fit within the legal framework created by the Sentencing Reform Act of 1984, which continues to apply in significant ways after *Booker*?
- Do the programs, when not governed by a uniform national policy, result in unwarranted sentencing disparities, including demographic disparities?



- Have programs been designed and implemented to allow for meaningful outcome evaluations and cost evaluations?
- How do the programs compare to regular sentencing options—either imprisonment followed by supervised release or regular supervision by federal probation officers—with respect to promoting rehabilitation and reducing recidivism?
- Will the programs—either in their current small sizes or if taken to scale—result in a cost savings compared to regular sentencing options?

Some of these questions are not capable of being answered at this point due to the nascent nature of the existing federal court programs. Not only are the programs relatively new in the federal system and only have graduated a small number of participants to date, they also have developed in a decentralized manner and differ from each other in significant respects. Thus, they cannot yet be evaluated empirically to determine whether the programs meet their articulated goals as effectively as, or more effectively than, traditional federal sentencing and supervision options. The Commission thus recommends that existing programs and any newly developed programs include input from social scientists so that data may be properly collected to allow for a meaningful evaluation at a later time.



## II. The Development of Alternative-to-Incarceration Court Programs

### Definitions

At the outset, it is important to define certain key terms and concepts. In this report, “alternative-to-incarceration court programs” refer to “drug courts” and other “problem-solving courts” or “therapeutic courts” (e.g., veterans courts, youthful offender courts) that began nearly three decades ago in the state courts and have emerged in the federal judicial system in recent years. Such problem-solving courts are generally based on the “drug-court model” first developed in state court in Miami, Florida, in 1989.<sup>12</sup> That model involves a “collegial” rather than an “adversarial” judicial process, whereby a “team” consisting of one or more judges, prosecutors, defense attorneys, probation or pretrial services officers, a treatment provider, and sometimes others (e.g., a law enforcement officer, community mentors) works together on a regular basis (typically weekly or semi-monthly) with a group of defendants who all have a potentially treatable problem with an apparent nexus to their criminal conduct (e.g., substance use addiction, mental illness, or post-traumatic stress disorder [PTSD] from military service). Although defendants are individually supervised by pretrial services or probation officers outside of court, the program team also interacts with the defendants as a group regularly in the courtroom and seeks to further the defendants’ treatment and rehabilitation.

In most programs, a defendant must enter a guilty plea to a charge before proceeding with treatment and regular court sessions. The typical program lasts for 12 to 24 months and involves regular group court appearances, informal procedures, a focus on treatment (with multiple “phases” of treatment), sanctions and rewards, and an ultimate “graduation” for successful participants—with concomitant reductions in sentences, typically to probation or a short time-served sentence followed by a period of supervision. Defendants who fail to complete the program’s requirements are

returned to the regular adversarial judicial process for disposition of their cases and often receive sentences of incarceration.<sup>13</sup>

### *“Alternative-to-Incarceration” Programs as Distinct From “Diversion” Programs*

It is important to distinguish alternative-to-incarceration court programs from related but distinct programs that “divert” certain defendants who successfully complete treatment and other program requirements from the criminal justice system without a conviction. Defendants’ successful participation in the former type of program (which is the focus of this report) typically results in probation or a short time-served sentence, while defendants’ successful participation in a “diversion” program results in dismissal of charges (including vacating a conviction if a defendant was required to plead guilty in order to participate in the diversion program).<sup>14</sup> Some alternative-to-incarceration court programs refer to themselves as “diversion” programs when in fact some defendants in those programs are never “diverted” insofar as they remain convicted even if they end up avoiding incarceration.<sup>15</sup>

This publication will only address programs, whatever their name, that offer offenders the potential for an alternative to incarceration as a reduced sentence, as programs that result in the outright dismissal of charges—and, thus, no sentence—are not within the province of the Commission.<sup>16</sup> If a federal court program offers both sentence reduction and case dismissal as potential options for defendants who successfully complete treatment, as some do,<sup>17</sup> this report addresses only the sentence reduction component of the program.

### *“Alternative-to-Incarceration” Programs as Distinct From “Reentry” Programs*

It is also important to distinguish between “front-end” alternative-to-incarceration court programs and the more common “back-end” federal reentry court programs. The former programs are for defendants who likely would otherwise face a

sentence of imprisonment but for a reduction in their sentencing guideline ranges resulting from their successful participation in an alternative-to-incarceration program. Conversely, the latter necessarily involve offenders who were imprisoned, typically for a lengthy period, before “reentering” the community.<sup>18</sup> A since-retired federal judge who formerly oversaw a front-end federal alternative-to-incarceration court program referred to it as a “no-entry” program, in contrast to a “re-entry” program.<sup>19</sup> Federal court reentry programs seek to avoid violations of the conditions of supervised release by participating offenders, who could end up back in prison upon revocation of their terms of supervised release.<sup>20</sup> Both alternative-to-incarceration court programs and reentry court programs are similar in that they both use a “collegial” model that seeks to maximize rehabilitation and minimize recidivism, yet reentry courts differ in that they typically involve offenders who likely would have been ineligible to participate in a front-end alternative program because of the serious nature of their offenses or their extensive criminal histories.<sup>21</sup> This publication will only address front-end court programs.

## Alternative-to-Incarceration Programs in the State Courts

Because the emerging federal alternative-to-incarceration programs are modeled on existing state court programs, and further, because proponents rely on favorable evaluations of the state programs in support of the federal programs,<sup>22</sup> this section discusses the state programs.

### *Evolution of State Court Programs*

Over the last three decades, state trial courts throughout the nation have created alternative-to-incarceration or related “diversion” court programs. The first such court program, the Miami-Dade County Drug Court, was established in 1989, and the drug court movement thereafter quickly spread to other state courts,<sup>23</sup> fueled by significant federal funding during the next two

decades.<sup>24</sup> Today, every state and the District of Columbia have several such court programs, and some states now have several dozens of them.<sup>25</sup> Although most of these programs are limited to “low-level defendants”<sup>26</sup> such as defendants charged with simple possession of drugs or misdemeanor DUI, some state programs also admit certain types of more serious, felony offenders, such as defendants who distributed small amounts of drugs or who engaged in felony property offenses.<sup>27</sup>

Drug courts are the longest-running and most prevalent of all state problem-solving courts.<sup>28</sup> Although they have grown steadily during the past three decades, state drug courts have experienced significant growth in recent years. There were at least 1,300 state drug courts operating in the United States in 2012,<sup>29</sup> but that number rapidly grew to at least 2,000 by 2015.<sup>30</sup> The typical state drug court has between 20 and 50 participants at a given time<sup>31</sup> and has roughly an equal number of admitted and exiting participants each year.<sup>32</sup> Most state drug courts have weekly or semi-monthly court hearings.<sup>33</sup> For adult drug courts, the typical program duration is at least 12 months,<sup>34</sup> and typically more than half of participants successfully “graduate” from the programs.<sup>35</sup> In 2014, there were at least 25,000 graduates of state drug court programs throughout the country.<sup>36</sup>

State drug court programs have been strongly supported by several influential national organizations, including the National Association of Drug Court Professionals (NADCP),<sup>37</sup> the National Center for State Courts (NCSC),<sup>38</sup> and the Conference of Chief Justices.<sup>39</sup> Yet there also are a wide variety of critics of state drug courts, who contend that they are not effective in treating addiction and reducing recidivism, wrongly reduce the punishment of culpable offenders for their volitional conduct, or wrongly criminalize drug addicts rather than genuinely treat them.<sup>40</sup>

The drug court model inspired other types of problem-solving courts, such as mental health courts and veterans treatment courts, which offer either alternatives to incarceration or outright diversion to successful participants.<sup>41</sup> In 2012, there were approximately 1,700 such programs in the state courts.<sup>42</sup>

Despite the proliferation of drug courts and other types of problem-solving court programs—together totaling around 4,000 state court programs today,<sup>43</sup> with drug courts constituting half or more of such programs<sup>44</sup>—the state offenders who participate in the programs constitute only a very small percentage of state offenders overall. In 2008, researchers from the Urban Institute estimated that around 55,000 adult state offenders then participated in drug courts annually.<sup>45</sup> That number has grown during the past decade, and could be twice or even three times that amount today. Nevertheless, the percentage of state offenders who participate in drug courts and other state problem-solving court programs is still very small. According to the National Center for State Courts’ Courts Statistics Project, in 2015 there were approximately 18 million state criminal cases filed nationwide (excluding traffic offenses), approximately 20 percent of which were felonies.<sup>46</sup> State drug courts also appear to reach only a small percentage of state offenders with substance use disorders. According to the National Drug Court Institute, nearly half of persons charged with a crime in the United States have a “moderate to severe” substance use disorder,<sup>47</sup> and researchers from the Urban Institute have estimated that around 1.5 million state offenders each year would be candidates for the type of substance abuse treatment offered by state drug courts.<sup>48</sup>

With respect to demographic characteristics of offenders who participate in state drug court programs, White offenders are substantially overrepresented compared to their representation in the regular state probation and prison populations, while Black and Hispanic participants are underrepresented. The National Drug Court Institute has pointed out that state drug court participants are 62 percent White, 17 percent Black, and ten percent Hispanic; by contrast, state prisoners are 32 percent White, 37 percent Black, and 22 percent Hispanic, and state probationers are 54 percent White, 30 percent Black, and 13 percent Hispanic.<sup>49</sup> Female defendants are also overrepresented in state drug court programs compared to their percentages in the traditional probation and prison populations. Of all state drug court participants, 32 percent are female, while 25 percent of state probationers are female and only seven percent of state prisoners are female.<sup>50</sup>

## Description of State Court Programs

With respect to program structure and elements, state problem-solving court programs have many similarities and generally are based on the drug court model developed by the National Association of Drug Court Professionals:<sup>51</sup>

- *Overall Program Structure.* State court programs vary in length, usually lasting between 12 to 24 months.<sup>52</sup> Most adopt a “post-plea” structure in which a defendant is required to plead guilty to a charge in order to participate in the program but is released on bond in order to participate in the court program.<sup>53</sup> Participating defendants typically meet as a group with the program team in a courtroom weekly or semi-monthly.<sup>54</sup>
- *Collegial Nature.* A key component of each state court program is its collegial, non-adversarial approach, through which prosecutors and defense counsel work together under the leadership of a judge to achieve the goals of the program.<sup>55</sup> Typically, each court program features a team responsible for admitting, treating, monitoring, and discharging the participants.<sup>56</sup> A typical team includes a judge, a prosecutor, a defense attorney, a probation officer, and a treatment provider.<sup>57</sup>
- *Eligibility Criteria.* State court programs restrict participation to certain offenders based on established eligibility criteria (*e.g.*, diagnosed substance use or mental health disorder). Typical state court programs categorically exclude individuals whose instant offenses or previous convictions involved violent or sex offenses, or those whose charges are deemed too serious in nature (*e.g.*, drug-trafficking offenses except for cases involving a small drug amount sold by a defendant to support his or her drug addiction).<sup>58</sup>
- *Treatment of Participants.* Almost always, the program team directs participants to engage in treatment (substance use and/or mental health treatment) with treatment providers in the community.<sup>59</sup>



- *Engagement and Monitoring.* To promote participant engagement in the programs, state court programs have used a system of graduated sanctions and rewards. Sanctions for noncompliance may include a return to an earlier phase of the program; inpatient treatment; community service; additional drug/alcohol monitoring; increased self-help meetings; increased number of court appearances; or very short periods of “shock” incarceration.<sup>60</sup> Rewards for program compliance may include reduced drug/alcohol testing; candy, gift cards, or other small tangible items; and verbal recognition or certificates awarded in court.<sup>61</sup> State court programs employ several monitoring methods to ensure engagement and compliance. Participants with substance use histories typically undergo weekly random drug testing and appear at regular court sessions to discuss their progress with the teams.<sup>62</sup>
- *Case Dispositions.* Upon successful completion of treatment and other program requirements, a defendant either has his or her guilty plea vacated and the charges dismissed or receives a non-incarceration sentence. Unsuccessful defendants are prosecuted and sentenced in the traditional manner.<sup>63</sup>

### *Outcome Evaluations of State Court Programs*

During the past two decades, there have been many evaluations of state problem-solving courts—in particular, assessing their efficacy in rehabilitating offenders by reducing illegal drug use and other types of recidivism (referred to as “outcome” or “impact” evaluations). The vast majority of outcome evaluations have examined state drug courts. Professors Edward Latessa and Angela Reiter reviewed studies from 2000 to 2014 and concluded that:

The findings are mixed. Some studies show that drug courts have no effect on recidivism, and at least one study found that participation in the drug court was associated with increased rates of recidivism.

The majority of studies, however, show adult drug courts are effective in reducing the recidivism rate of the group [although with varying degrees of effectiveness].<sup>64</sup>

They also reviewed meta-analytical studies of drug court evaluations, which can provide a better indication of the efficacy of the drug court model than simply reviewing a number of individual studies with a wide range of results.<sup>65</sup> Their meta-analytical review concluded that:

Virtually all of these studies [including one from 2015] have concluded that adult drug courts are effective in reducing recidivism; however, the overall effect is modest [between 8 and 14 percent reductions compared to similar offenders who did not participate in a drug court program].<sup>66</sup>

It is noteworthy that methodological limitations of many state drug court evaluations include small sample sizes, self-selection bias, a lack of meaningful comparison groups, and varying types of eligibility criteria and program implementation that make large-scale studies difficult.<sup>67</sup> In addition, few studies have examined the relationship between reduced recidivism and specific program components,<sup>68</sup> and those that did so have not established the effect of specific components of the drug court model.<sup>69</sup> For example, while certain studies suggest that the special role of a judge as the active leader of a drug court team contributes to lower recidivism rates,<sup>70</sup> no study has directly shown that the participation of a judge as the team leader was the reason for less recidivism.<sup>71</sup> Another methodological limitation is that follow-up periods of study—that is, the time period in which drug court participants were tracked—have usually been relatively short. Most studies only have tracked participants during their treatment in the court program (12 to 24 months) or for an additional year or so thereafter.<sup>72</sup> Long-term follow-up periods (over three years) in the studies are rare.<sup>73</sup>

Finally, an assessment of existing research about state drug courts must take into consideration the type of participating defendants. Many state programs focus on low-level, low-risk

offenders who may not need intensive treatment to prevent further substance use, which has led critics to accuse those court programs of “cherry-picking” in order to show low recidivism rates of their participants.<sup>74</sup> Notably, a leading proponent of drug courts, Douglas Marlowe, Chief of Science, Law & Policy for the National Association of Drug Court Professionals, has contended that drug court programs generally should be limited to high-risk, high-need defendants.<sup>75</sup>

Far fewer studies have evaluated state mental health courts, veterans courts, and other types of problem-solving courts (*e.g.*, youthful offender courts),<sup>76</sup> and many of those that have done so have been criticized as not being methodologically sound.<sup>77</sup> Limited research has suggested that mental health court participants have lower rates of recidivism than mentally ill individuals who proceed through traditional modes of criminal adjudication.<sup>78</sup> The leading meta-analysis on mental health court effectiveness shows that mental health court participants were less likely to be arrested and spent fewer days incarcerated during a one and one-half year follow-up period compared to similarly situated individuals sentenced to jail.<sup>79</sup>

Evidence of the effectiveness of veterans courts is even less robust. Many veterans courts have difficulty with collecting and reporting data. For example, a Department of Veterans Affairs’ (VA) study revealed that only ten of 99 courts surveyed had any kind of formal data reporting, and none had conducted program evaluations.<sup>80</sup>

### *Cost Evaluations of State Court Programs*

A second, related type of evaluation of the state court programs has looked at potential cost savings resulting from the use of such programs in lieu of traditional criminal case dispositions.<sup>81</sup> Such cost evaluations have been done in conjunction with outcome evaluations and, thus, the quality of the cost evaluation is a function in significant part of the quality of the outcome evaluation. Most of the state alternative-to-incarceration court programs that have been evaluated have shown cost savings compared to traditional case dispositions.<sup>82</sup>

## Alternative-to-Incarceration Programs in the Federal Courts

This section of this report discusses the recent emergence of federal alternative-to-incarceration court programs. Because the primary rationale for the new federal alternative-to-incarceration programs is to provide treatment for defendants with substance use and mental health disorders, this section first discusses the prevalence of those disorders among federal offenders.

### *Prevalence of Substance Use and Mental Health Disorders among Federal Offenders and Existing Substance Abuse Treatment Options for Federal Offenders*

Data about the prevalence of substance use and mental health disorders among federal defendants is somewhat limited. The Commission does not routinely collect such data in its regular coding of federal presentence reports (PSRs), in part because PSRs do not always contain such information in a uniform and comprehensive manner. In the past decade or so, both the Federal Bureau of Prisons (BOP) and the Federal Bureau of Justice Statistics (BJS) have offered estimates of the percentage of federal offenders in BOP custody who have a substance use disorder. The BOP has estimated that “40 percent of [its] inmates have a diagnosable substance use disorder.”<sup>83</sup> A BJS survey of federal prisoners in 2004 found that 45 percent of prisoners reported histories of substance use or dependence; 26 percent reported that they were under the influence of illegal drugs or alcohol at the time of the commission of their federal offenses; and 18 percent reported that they committed their offenses in order to feed their addictions.<sup>84</sup> With respect to mental illness, around five percent of the federal prison population receives mental health treatment.<sup>85</sup>

Researchers with the Probation and Pretrial Services Office (PPSO) of the Administrative Office of the United States Courts have published self-reported data from federal offenders on supervision by federal probation officers (typically after being

released from federal prison to begin a term of supervised release).

According to their research, 17 percent of supervised federal offenders reported “current” drug problems and 9 percent reported “current” alcohol problems.<sup>86</sup> With respect to past problems, 43 percent reported that drug use had “led to [their] legal problems.”<sup>87</sup> Regarding both percentages—current substance problems (at the time of supervision) and past substance abuse problems (at the time of their offenses)—the rate of offenders with problems was closely associated with the offenders’ overall risk levels (as measured by the Post Conviction Risk Assessment, or PCRA).<sup>88</sup> Offenders posing a “low” risk, according to their PCRA scores, experienced substantially fewer present and past substance abuse problems than offenders with higher levels of risk.<sup>89</sup>

With respect to substance abuse treatment options for federal offenders generally—and not just those in federal drug court programs or other problem-solving court programs—treatment is available throughout the federal criminal justice process. Initially, it is available as a condition of pretrial release on bond.<sup>90</sup> Substance abuse treatment is also offered by the Federal Bureau of Prisons for offenders in its custody,<sup>91</sup> although a 2012 Government Accountability Office (GAO) study of the Federal Bureau of Prisons found that “all of the [BOP] drug treatment and drug education programs had waiting lists from fiscal years 2006 through 2011.”<sup>92</sup> For federal offenders on probation or supervised release, substance abuse treatment is available when the district court has made such treatment a condition of supervision.<sup>93</sup>

### *Recent Emergence of Federal Alternative-to-Incarceration Court Programs*

While alternative-to-incarceration court programs burgeoned in the state courts in the 1990s and 2000s, they were virtually nonexistent in the federal criminal justice system. Only two federal court programs existed before 2010, the Pretrial Alternatives to Detention (PADI) program in the Central District of Illinois, a drug court program discussed further below,<sup>94</sup> and the Special Options Services (SOS) program in the Eastern District of New York, a

youthful adult offender court program.<sup>95</sup> This absence of federal alternative-to-incarceration programs was primarily a function of two factors. First, before the Supreme Court made the sentencing guidelines advisory in 2005 in *Booker*, downward departures based on offender characteristics such as substance use or mental health disorders were limited based on provisions in the *Guidelines Manual* as discussed below. Second, the initial post-*Booker* position of the DOJ in 2006 was that “drug courts are an inappropriate and unnecessary program for the federal criminal system.”<sup>96</sup> The DOJ expressed support for the use of such courts at the state level, but noted differences between typical federal offenders and the nonviolent, low-level addicted defendants that state drug courts were designed to help.<sup>97</sup>

Subsequent changes in the legal landscape—in particular, the Supreme Court’s decisions in *Gall v. United States*<sup>98</sup> and *Pepper v. United States*,<sup>99</sup> which generally approved downward variances based on offenders’ successful efforts at rehabilitation—coupled with a new DOJ policy about federal problem-solving court programs, resulted in an increase in the number of federal court programs. A few new programs appeared by early 2013, but they reflected what one judge described as a small “grassroots” movement more than a product of a centralized, national program.<sup>100</sup> A strong impetus for the growth of such programs thereafter commenced with then-Attorney General Eric Holder’s *Smart on Crime* Initiative announced in August 2013.<sup>101</sup> As part of the initiative, the DOJ specifically endorsed federal alternative-to-incarceration programs as part of a larger, national sentencing reform initiative: “In appropriate instances involving non-violent offenses, [federal] prosecutors ought to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs.”<sup>102</sup> In particular, Holder pointed to the Conviction and Sentence Alternatives (CASA) program in the Central District of California, which had been established in 2012, as a model program for the entire federal court system.<sup>103</sup> The CASA program is discussed below.

These new court programs—referred to as “alternative-to-incarceration” (or “ATI”) programs,<sup>104</sup> “court-involved pretrial

diversion practices,”<sup>105</sup> or “diversion-based court programs”<sup>106</sup>— currently exist in at least 17 districts, which are listed in the Appendix. There are four main types of programs: drug courts, veterans courts, courts for youthful adult defendants (aged 18–25), and generic alternative-to-incarceration courts.<sup>107</sup> This fourth type of court program does not appear to exist in any state system, and, while it appears to be modeled on drug courts and mental health courts, it accepts a variety of defendants who may not have any history of mental illness or substance use disorder.<sup>108</sup>

### *Commission’s Observations of Five Federal Court Programs*

In late 2016 and early 2017, Commission staff visited five districts with alternative-to-incarceration court programs, interviewed program officials (judges, probation and pretrial officers, prosecutors, defense counsel, and treatment providers), and observed both program team meetings and court proceedings (including “graduation” ceremonies for successful participants). In addition, federal district judges from three of those programs testified before the Commission in April 2017 about their court programs. This section of the report describes those five programs.

The five programs, which are described in more detail below, have several features in common. All are collegial rather than adversarial, are informal in nature (*e.g.*, the presiding judge often does not wear a robe and sits at a table with the other team members rather than on the bench), and involve weekly or semi-monthly meetings with multiple participating defendants together in a courtroom. Program teams, led by judges, work to rehabilitate participating defendants and, in a typical defendant’s case, specifically focus on the defendant’s substance use and/or mental health disorder(s). Program teams also work to improve participating defendants’ lives in general (*e.g.*, their relationships with family members, their physical health, and their employment and education).

## 1. BRIDGE Court Program (District of South Carolina)

### *Program overview*

The BRIDGE program is a federal drug court—“a cooperative effort between South Carolina’s U.S. District Court, U.S. Probation Office, Federal Public Defender’s Office, and U.S. Attorney’s Office”—that “provides rehabilitative services to individuals with substance abuse problems who are involved in the criminal justice system.”<sup>109</sup> “The program’s purpose is to promote community safety, reduce recidivism, and assist with offender rehabilitation by implementing a blend of treatment and sanction alternatives.”<sup>110</sup>

The program works in the following manner: “Judges, defense attorneys, probation officers, assistant U.S. attorneys, and members of the BRIDGE Program Team may refer criminal defendants to the program.”<sup>111</sup> Typical participants are described as “low-level” drug offenders or property offenders who distributed drugs or engaged in theft or fraud to support their own addictions.<sup>112</sup> Certain offenders are categorically ineligible to participate: “Criminal defendants with a history of violent crime, sex offenses, or severe mental health conditions are not eligible for the BRIDGE Program.”<sup>113</sup> It does not appear that there is a specific ceiling of drug quantity in drug-trafficking cases or loss amounts in financial crime cases with respect to offenders’ eligibility, although the program literature and program staff repeatedly stressed that the typical participants are “low-level” offenders.

As part of the screening process, a probation officer usually interviews the defendant and discusses the program’s requirements. If the probation officer determines that the criminal defendant would be an appropriate candidate for the BRIDGE Program, he or she presents that candidate to the presiding BRIDGE court judge to consider accepting the defendant into the program. If the presiding judge agrees to accept the criminal defendant into the BRIDGE program, the probation officer also seeks approval from both the Assistant U.S. Attorney assigned to the case and district judge originally assigned to the case.



Assuming they each consent, then the members of BRIDGE Program Team—an Assistant United States Attorney (AUSA), one or more Assistant Federal Public Defenders, one or more United States Probation Officers, and a drug treatment provider—consults with the presiding judge, who decides whether to admit a defendant into the program.<sup>114</sup>

Defendants in the program are released on pre-trial bond with conditions of supervision tailored for the BRIDGE program. In addition to their regular treatment sessions and interactions with pretrial services officers, they attend semi-monthly BRIDGE court meetings—along with other participants in the program—in a “collegial” (as opposed to a traditionally “adversarial”) court setting. The program is designed to last for 12 to 18 months and has three different “phases”:

The phases are designed to allow each participant to establish a sober and law-abiding lifestyle. The phases encourage participants to develop an understanding of their substance abuse or dependence by recognizing patterns of use, factors that influence use, and the impact of use on themselves, their families, and their communities. While each phase has a specific purpose with distinct and achievable goals, the participants work throughout toward the development of a community-based sober support system. Each participant must successfully complete all levels in order to graduate from the program.<sup>115</sup>

Offenders who have entered into a plea agreement and are awaiting sentencing are eligible to participate.<sup>116</sup>

### *Sentencing of participants*

Sentencing can be done by either the original district judge to whom the case was assigned or the BRIDGE program’s presiding judge. If a participant violates the conditions of his or her release or the BRIDGE program’s rules, the presiding judge, after consultation with the Program Team members, decides what sanctions to impose. Typically, for minor violations (*e.g.*, failed drug tests or a failure to appear for a meeting with a treatment

provider), the sanctions would not include incarceration or expulsion from the program. Only major violations (*e.g.*, a new serious offense, multiple failed drug tests, or refusals to undergo drug treatment) would cause a participant to be terminated from the program. Defendants are typically given several chances to overcome their addictions before being terminated (in recognition of addiction as a serious disease that often requires multiple attempts to treat).<sup>117</sup>

“Pretrial defendants who successfully complete the BRIDGE Program can expect the United States Attorney’s Office to, in its own discretion, move for a downward departure, reduce the charges to a lesser offense, recommend a non-guideline sentence, refer the participant to Pretrial Diversion, or dismiss the charges entirely.”<sup>118</sup> Although not promised a downward departure or variance to probation or a short “time-served” sentence followed by a term of supervised release, all successful participants to date have received such results when their charges have not been dismissed.<sup>119</sup> It is common for the conditions of probation or supervised release to require drug treatment “aftercare.” Defendants who voluntarily withdraw from, or are involuntarily terminated from, the BRIDGE program are sentenced in the normal manner and may end up being sentenced to a term of imprisonment.

### *Number of participants*

The BRIDGE program started in 2010 and, as of March 2017, 109 defendants had participated in the program. The program successfully graduated 43 defendants, while 35 defendants in the program did not successfully complete it (because either they voluntarily dropped out or were terminated for non-compliance with their conditions). As of March 2017, there were a total of 30 defendants participating in the program.<sup>120</sup> By comparison, in recent years, there have been around 700 cases per year in the District of South Carolina in which offenders have been sentenced for felonies or Class A misdemeanors.<sup>121</sup>

## 2. Conviction and Sentence Alternatives (CASA) Program (Central District of California)

### *Program overview*

The CASA Program, started in 2012, is a “post-guilty plea” program that is a “collaborative partnership among the United States District Court, United States Pretrial Services Agency, Federal Public Defender’s Office, and the United States Attorney’s Office (USAO) and various community-based treatment providers and organizations.”<sup>122</sup> The program’s mission is to provide an alternative to conviction or imprisonment and to provide “a creative blend of treatment, alternative sanctions, and incentives to effectively address offender behavior, rehabilitation, and the safety of the community.”<sup>123</sup> Although the CASA program was modeled after drug court programs using the key principles and elements of the National Association of Drug Court Professionals, “CASA is not a drug court.”<sup>124</sup>

The CASA program is designed to last 12 to 24 months and has two different “tracks”: Track I results in a dismissal of charges; Track II results in a reduced sentence that does not include imprisonment. “Track [II] individuals typically have a prior criminal record or committed significant offenses.”<sup>125</sup>

Defendants in Track II engaged in federal offenses that appeared to be motivated primarily by substance use, mental illness, or the negative influence of more culpable codefendants. They have Criminal History Categories ranging from I to VI. Examples of criminal offenses of participants include drug trafficking (the most common offense), bank robberies not involving a firearm or violence inflicted on victims, embezzlement, credit card fraud, identity theft, mail theft, and tax fraud. Certain types of offenses “generally preclude participation in CASA—for example, crimes involving child exploitation (including possession or distribution of child pornography offenses)” and an offender’s “more than minor involvement in large scale fraud or narcotics distribution.”<sup>126</sup>

To be accepted into the program, defendants must submit a written submission explaining why they want to be in the program and how the program can benefit them. A team of representatives from the participating federal agencies convenes to discuss the candidates, interviews each candidate with defense counsel, and decides which candidates should be accepted into the program and on which track. Each member has a veto power. Applicants who have consensus support from the team are presented to the CASA judge and the judge presiding over the defendant's criminal case for their approval of transfer to the CASA program; either judge can veto participation or change the designated track.<sup>127</sup>

Once a defendant has been accepted into the program, the defendant enters a guilty plea before the CASA judge pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1), which is determined by the track for which the defendant was selected.<sup>128</sup> Once the guilty plea has been accepted, the case is permanently transferred to the CASA judge for all purposes. For those defendants who are on Track II, the CASA judge will order a "modified" (*i.e.*, abbreviated) PSR, which includes the defendant's criminal history and the advisory guidelines calculation, after the guilty plea and plea agreement are accepted.

Defendants accepted into the CASA program are released on bond with intensive supervision. Supervision includes attending group meetings (usually weekly or bi-weekly) with the CASA judge and other members of the CASA team, and participating in community programs such as substance abuse or mental health treatment, employment or educational programs, and restorative justice programs (such as paying restitution and performing community service). If a defendant violates a condition of the program short of a violation resulting in expulsion from the program, the CASA judge determines an appropriate sanction, which could range from required attendance at additional court meetings or treatment sessions to "flash incarceration" (*i.e.*, the defendant is incarcerated for 48 hours).<sup>129</sup>

### *Sentencing of participants*

Track II Defendants who graduate from the CASA program are sentenced in accordance with their binding plea agreements and given a sentence of probation. Defendants who do not successfully complete the program proceed to sentencing before the CASA judge on the charges to which they pleaded guilty, and the CASA judge reviews a modified PSR in preparation for sentencing. The judge is not bound by the plea agreement in that situation.<sup>130</sup>

### *Number of participants*

As of March 2017, 52 defendants were participating in the program, 18 had been terminated, and 137 had graduated since 2012.<sup>131</sup> By comparison, in recent years, there have been around 1,000 cases per year in the Central District of California in which offenders have been sentenced for felonies or Class A misdemeanors.<sup>132</sup>

## **3. Pretrial Alternatives to Detention Initiative (PADI) (Central District of Illinois)**

### *Program overview*

Established in 2002, PADI is the oldest federal “front-end” drug court program. Pretrial Alternatives to Detention Initiative was modeled on the Peoria County Drug Court. The goals of the PADI program are:

- (1) reducing detention rates through the use of a multi-dimensional approach to pretrial supervision including substance abuse treatment; (2) controlling the danger presented to the community through the use of intensive pretrial supervision techniques; (3) ensuring the appearance of defendants for court obligations through the use of substance abuse treatment and increased supervision; (4) fostering cooperation among the AUSA, defense counsel, Court, USPO, and treatment providers to increase efficiency of the pretrial supervision process for addicted

defendants; and (5) providing defendants with increased opportunities to improve their life situation.<sup>133</sup>

The USAO makes the threshold determination of which defendants are to be referred for consideration as participants in the PADI program. The United States Probation Office (USPO) then screens the potential participants for their eligibility. The USPO determines a defendant's eligibility for the program based on "(1) minimal participation in the offense charged; (2) limited criminal history free of serious violent offenses; (3) verified evidence of current substance abuse and/or addiction; (4) defendant's displayed willingness to voluntarily participate in program; and, (5) the U.S. Attorney's approval of the defendant's selection for program."<sup>134</sup> Defense counsel may ask the USAO to refer a defendant for consideration for the program.<sup>135</sup>

There is no requirement that defendants enter a guilty plea in order to participate in the program. They are released on pretrial bond with conditions of supervision. PADI partners with a local drug treatment organization, and defendants typically begin the program with inpatient drug treatment. Program requirements include regular substance abuse treatment, cognitive behavioral therapy and semi-monthly meetings in the courtroom with the entire PADI team and other team participants. Participation in the program typically lasts about one year. Violations of the conditions of release or program requirements—short of violations resulting in expulsion from the program—can result in a variety of sanctions, including verbal or written reprimands, adding electronic monitoring, or a brief amount of jail time.<sup>136</sup>

### *Sentencing of participants*

When a participant has successfully completed the program, a sentencing date is set. The incentives provided to PADI participants include a potential motion for downward departure based on "extraordinary post-conviction rehabilitation," a reduction in charge to a lesser offense based upon the U.S. Attorney's discretion, a recommendation for a sentence at the low end of the

guideline range by the USAO, or dismissal of all charges.<sup>137</sup> Such potential benefits are not promised in exchange for the defendant's successful participation in the program and, instead, are within the discretion of the USAO.

Full dismissal of charges is rare and the typical sentence is a short time-served sentence with a term of supervised release. A substantial number of PADI graduates faced significant statutory and guideline penalty ranges but for their successful participation in the program. Over one quarter faced "statutory mandatory minimum sentences ranging from 5 to 20 years[] imprisonment." Of the 40 defendants convicted of felony offenses, "the average guideline range was 81 to 98 months" before their downward departure or variance based on their participation in the PADI program.<sup>138</sup>

#### *Number of participants*

According to data from November 2013, 109 participants had participated from 2002 to 2013 (approximately 10 per year).<sup>139</sup> Of those 109 participants, 87 had graduated, 6 had not completed the program, and 16 then were still participating in the program.<sup>140</sup> By comparison, in recent years, there have been around 300 cases per year in the Central District of Illinois in which offenders have been sentenced for felonies or Class A misdemeanors<sup>141</sup>

#### **4. Repair, Invest, Succeed, Emerge (RISE) Program (District of Massachusetts)**

##### *Program overview*

The RISE program started in July 1, 2015, and is currently in the final year of its three-year pilot program. RISE was developed by the district court and its probation office, with cooperation from the USAO, the Federal Public Defender, and members of the Criminal Justice Act panel of defense attorneys.<sup>142</sup> The goals of the programs are to promote rehabilitation and acceptance of responsibility for offenses of conviction; reduce recidivism; and manage taxpayer funds wisely.<sup>143</sup>

On a monthly basis, the USPO identifies defendants who have recently been released on pretrial bond and may be eligible to participate. In addition to being on pre-trial release, eligible defendants must either have a serious history of substance use or have experienced “significant deficiencies in family support, education, employment, decision-making, or pro-social peer networks.” Defendants with sex offense charges are ineligible. Interested defendants complete an application and are administered the Texas Christian University Drug Screen (TCUDS) and also the Post-Conviction Risk Assessment (PCRA). These materials are all considered in the admissions process (and, if a defendant is admitted, are used to create individual treatment plan and goals for the participant). All members of the RISE team participate in the decision of whether to admit a defendant to the program, but the decision ultimately rests with the district judge presiding over the case.<sup>144</sup>

A defendant must enter a guilty plea in order to participate in the program. After accepting the guilty plea, the district court judge reassigns the case to the RISE Magistrate Judge for supervision of the defendant while in the RISE program and schedules a date for sentencing approximately one year in the future.<sup>145</sup> For each participant, the RISE team “will create an individualized list of program requirements, to supplement release conditions, tailored to the needs of the defendant.” These conditions can include, for example, cognitive-behavioral therapy (moral recognition therapy), restorative justice activities, and work or school requirements.<sup>146</sup> Sanctions for not meeting requirements—short of violations that result in expulsion from the program—can range from writing essays, redoing requirements or not receiving credit for a period of time in the program, imposition of curfew or electronic monitoring, or time in custody.<sup>147</sup> Participants attend RISE sessions for approximately one year, at least monthly, to report on their progress. Participants “complete the program by satisfying all identified goals and participating in the program successfully for a period of up to 12 months.”<sup>148</sup>



### *Sentencing of participants*

When a defendant successfully completes the program, the magistrate judge will notify the assigned district court judge. Prior to sentencing, a full PSR is prepared and “the assigned district judge will consider the defendant’s participation in the program giving it the appropriate weight under the applicable law and in light of any factual determinations made by the Court.”<sup>149</sup> “Successful participation in the program may result in a more favorable disposition for the defendant than had the defendant not participated; however, participation entitles the defendant to no particular benefit.”<sup>150</sup> The USAO will consider the defendant’s participation in making a sentencing recommendation, including whether to make a different charging decision.<sup>151</sup> The district judge originally assigned to a successful RISE defendant’s case will ultimately impose sentence, so participants in the program usually are sentenced by different judges.

### *Number of participants*

As of March 2017, six defendants had been sentenced after graduating from the RISE program, two were terminated, and 11 were still participating. Since the pilot began in August 2015, 46 individuals applied and 19 became participants.<sup>152</sup> By comparison, in recent years, there have been around 500 cases per year in the District of Massachusetts in which offenders have been sentenced for felonies or Class A misdemeanors.<sup>153</sup>

## **5. Sentencing Alternatives Improving Lives (SAIL) Program (Eastern District of Missouri)**

### *Program overview*

The SAIL program was developed by the district court and the Pretrial Services Office, with the cooperation of the USAO and the Federal Defenders’ Office. The goal of the program is to “hold Participants accountable for their actions and provide them with access to a diverse range of necessary services, in order to be equipped with the necessary tools to lead productive and crime-free lives.”<sup>154</sup>

The SAIL program is open to defendants who are on pre-trial release. The program is aimed at defendants whose “criminal conduct . . . appears to be motivated by substance abuse issues or other underlying causes that appear amenable to treatment through programs available as part of the SAIL program.”<sup>155</sup> Defendants charged with certain offenses, including crimes of violence and child pornography offenses (including possession of child pornography), are barred from participating in SAIL, as are defendants charged with other types of offenses who had a leadership role in the offense or who have an extensive criminal history. Most defendants accepted into the program have been charged with drug-trafficking offenses or economic offenses.<sup>156</sup>

Referrals to the program can come from any source, including judges, defense attorneys, and Pretrial Services Officers. When a defendant is referred to the program, SAIL team members—including Pretrial Services Officers, prosecutors, and defense attorneys—will decide if the referred defendant is suitable to participate in SAIL. The district judges overseeing the SAIL program do not take part in the selection process. Ultimately, the Pretrial Services Office selects the participants for SAIL, “based on their professional assessment that the candidate meets program criteria and is well suited to the program.”<sup>157</sup> Any participant also must be approved by the United States Attorney’s Office, in the proper exercise of their prosecutorial discretion.<sup>158</sup>

Once a defendant has been admitted to the SAIL program, the district judge to whom the defendant was originally assigned will execute an order referring the prospective participant’s case to the SAIL program presiding judge (a district judge). All SAIL participants must enter into a guilty plea pursuant to a SAIL plea agreement, which includes a sentencing guidelines calculation and specifies the benefits for successful completion of SAIL. If the SAIL judge accepts the guilty plea, the defendant will formally become a participant of the SAIL program and all future court proceedings will take place before the SAIL judge.<sup>159</sup>

Currently, SAIL has two different plea agreements: Track 1 and Track 2. In Track 1, a defendant enters into a guilty plea that states that upon the successful completion of the program, the

defendant will be entitled to withdraw his or her guilty plea and the government will dismiss all charges against the defendant. In Track 2, the guilty plea states that if the defendant successfully completes the program, he or she will be entitled to a reduction in his sentence but will not have the charges dismissed. Track 1 and Track 2 defendants participate in the program together and regularly meet together for SAIL court sessions along with the SAIL team.<sup>160</sup>

The SAIL program lasts 12 to 18 months and includes three phases. In Phase I, the participants meet weekly with the SAIL team and begin moral reconnection therapy (MRT). During Phase I, the participants will identify problems and obstacles and set personal goals. As a condition of participation in SAIL, the participant must be employed, seeking employment, or in school. As the participant moves from Phase I to Phases II and III, he or she will meet less frequently with the SAIL team and continue to work on sobriety as well obtaining or maintaining a job or continuing education. The SAIL team continuously evaluates a participant's progress to determine when the participant will move to the next phase.<sup>161</sup>

### *Sentencing of participants*

After a Track 1 participant successfully completes the SAIL program he or she will be entitled to withdraw the guilty plea and the government will dismiss all charges against the defendant. For a Track 2 participant, a PSR will be ordered at the end of the SAIL program and sentencing will take place within three months of completion. At sentencing for a Track 2 participant, the parties will make a joint recommendation for a "reduction in a sentence based on the performance of the defendant in the SAIL program, but in no event to a sentence less than some term of probation."<sup>162</sup> If a participant does not successfully complete the program, he or she will be terminated from SAIL and will proceed to sentencing in the regular course.<sup>163</sup>

### *Number of participants*

As of March 2017, there were six defendants in the SAIL program, two in Track I and four in Track II. Nine participants had successfully completed the program in the prior two years, and four participants had been unsuccessfully terminated from the program during that time. By comparison, in recent years, there have been around 700 cases per year in the Eastern District of Missouri in which offenders have been sentenced for felonies or Class A misdemeanors.<sup>164</sup>

### *Future Development of Federal Alternative-to-Incarceration Programs in View of New Charging and Sentencing Policies of the Department of Justice*

It is uncertain whether the proliferation of new federal alternative-to-incarceration programs will continue in light of the recent shift in policy by the Department of Justice concerning charging practices and sentencing advocacy. On May 10, 2017, Attorney General Jefferson Sessions directed that:

[Federal] prosecutors should charge and pursue the most serious, readily provable offense. . . . By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences. . . . Second, prosecutors must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences, and should in all cases seek a reasonable sentence under the factors in 18 U.S.C. § 3553. In most cases, recommending a sentence within the advisory guideline range will be appropriate.<sup>165</sup>

Particularly for federal defendants charged with drug-trafficking offenses that potentially carry mandatory minimum penalties, but also for defendants with guidelines ranges well into Zone D of the Sentencing Table (where imprisonment is the only sentencing option absent a downward departure or variance, as

discussed below),<sup>166</sup> this DOJ charging and sentencing policy may have the effect of limiting the number of participants in the federal alternative-to-incarceration programs. Without the support of the government, some of these federal alternative-to-incarceration court programs may cease to exist, at least in their current forms.<sup>167</sup>

### *Limited Empirical Data about the Federal Court Programs*

The Commission cannot identify in its regular datasets all defendants who have participated in federal alternative-to-incarceration court programs because the sentencing documentation sent to the Commission<sup>168</sup> does not necessarily include any reference to the fact that defendants participated in the programs (successfully or unsuccessfully). However, two other federal agencies, the GAO and DOJ's Office of the Inspector General (OIG), each recently have examined certain federal alternative-to-incarceration court programs using both quantitative and qualitative data that they each collected for their reports.<sup>169</sup> The GAO and OIG each examined three districts with well-established federal alternative-to-incarceration programs: the Pretrial Alternatives to Detention Initiative (PADI) program in the Central District of Illinois (established in November 2002); the Pretrial Opportunity Program (POP, established in January 2012) and Special Options Services program (SOS, established in 2000 and modified in 2013) in the Eastern District of New York; and the Convictions and Sentence Alternatives (CASA) program in the Central District of California (established in April 2012).

As of August 2015, the date of the GAO study, each of these three court programs had matriculated a relatively small number of participants since their respective inceptions: 126 in PADI (in 13 years); 97 in CASA (in 3 1/3 years); and 57 in POP/SOS (in 3 1/2 years in the case of POP and 15 years in the case of SOS).<sup>170</sup> According to the OIG report, typical offenders in these alternative-to-incarceration programs who successfully completed the programs (and thus avoided incarceration) had faced relatively high sentencing guidelines ranges based on their offense conduct and/or criminal histories. A majority of offenders in each of the programs

had guideline minimums in excess of 36 months, and several had guideline minimums well above 60 months.<sup>171</sup> A substantial percentage of these offenders in two of the programs had extensive criminal records. One-third, 17 of the 49, of sampled offenders from the PADI program had Criminal History Categories (CHCs) of III or higher under the guidelines, and four of the ten sampled offenders from the CASA program, for whom their criminal history was known, had CHCs of III or higher; two of the four were in CHC VI.<sup>172</sup>

By comparison, the average guideline minimum for all federal offenders, the vast majority of whom receive sentences of imprisonment,<sup>173</sup> is 59 months.<sup>174</sup> In addition, the average reduction in sentence imposed by a federal district court in all cases in which a below-range sentence has been imposed has been around 40 percent below the guideline minimum when courts have granted a motion for downward departure or variance not requested by the government, and around 50 percent below the guideline minimum when courts have granted such a motion filed by the government.<sup>175</sup> In other words, the defendants who were sentenced to below-range, non-incarceration sentences based on their successful participation in the above-mentioned federal court programs received significantly greater downward departures or variances than defendants as a whole who received downward departures or variances.

### III. The Operation of Alternative-to-Incarceration Court Programs Within the Current Legal Framework of Federal Sentencing

Consideration of the new federal alternative-to-incarceration court programs raises several legal questions, particularly with respect to how the programs fit within the framework of the Sentencing Reform Act of 1984 (SRA), the *Guidelines Manual*, and relevant Supreme Court case law.

#### Overview of Sentencing Reform Act of 1984

Congress’s “major premise” in enacting the SRA was to reduce unwarranted sentencing disparities among federal offenders who committed similar offenses and who have similar criminal records.<sup>176</sup> Recognizing that sentencing courts’ standardless consideration of offense and offender characteristics in the pre-guidelines era resulted in unwarranted sentencing disparities, Congress directed the Commission to create sentencing guidelines that guided courts’ consideration of both offense and offender characteristics.<sup>177</sup>

Regarding offense characteristics, Congress intended the Commission to account for a wide variety of such characteristics in the sentencing guidelines.<sup>178</sup> Congress specifically intended for the guidelines to treat certain types of offense conduct as particularly aggravating in nature, including violent offenses, offenses involving a “substantial quantity” of a controlled substance, and significant economic crimes.<sup>179</sup>

Regarding offender characteristics, several parts of the SRA demonstrate that Congress intended the Commission to treat the extent of a defendant’s criminal record, as a general matter, as the most relevant offender characteristic in the guidelines.<sup>180</sup> The SRA also directed the Commission to consider a variety of offender characteristics other than criminal history, including a defendant’s “mental and emotional condition” and his or her “drug dependence,”

and to address such factors in the *Guidelines Manual* to the extent that the Commission considered them relevant to the issues of the type and duration of sentence that federal courts should impose.<sup>181</sup>

With respect to substance abuse, the legislative history indicates Congress's belief that "[d]rug dependence . . . generally should not play a role the decision whether or not to incarcerate the offender."<sup>182</sup> Congress, however, recognized that "[i]n an unusual case . . . it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for 'drying out' as a condition of probation."<sup>183</sup> In addition, the SRA repealed the Narcotic Addict Rehabilitation Act of 1966,<sup>184</sup> which had provided for a form of deferred adjudication for addicted non-violent federal offenders who had agreed to undergo extensive drug treatment.<sup>185</sup>

Regarding a defendant's mental condition, the legislative history stated that: "The Commission might conclude that a particular set of offense and offender characteristics [in the case of a defendant with mental illness] called for probation with a condition of psychiatric treatment, rather than imprisonment."<sup>186</sup>

In enacting the SRA, Congress also intended the Commission to promulgate guidelines that reduced the incidence of alternatives to incarceration for certain types of offenses.<sup>187</sup> During the pre-guidelines era, federal district courts had imposed alternatives—typically probation—in around half of all non-petty federal criminal cases.<sup>188</sup> Congress was particularly concerned that alternatives were being imposed too frequently for certain types of federal offenders, such as those who committed violent offenses, drug-trafficking offenses involving a "substantial quantity" of drugs, or substantial economic crimes, as well as for those offenders with significant criminal records.<sup>189</sup> Congress intended, however, for alternatives to incarceration to remain as available sentencing options for other kinds of offenders,<sup>190</sup> particularly for low-level first offenders.<sup>191</sup>



## Federal Alternative-to-Incarceration Court Programs in Light of *Booker* and its Progeny

### *The Booker Three-Step Process*

Although the Supreme Court in *Booker* rendered the guidelines “effectively advisory,”<sup>192</sup> the Court still requires sentencing courts to apply and consider the guidelines as “the starting point and initial benchmark” in the federal sentencing process in order to “secure nationwide consistency.”<sup>193</sup> The *Guidelines Manual* thus provides the “framework . . . for the judge’s exercise of discretion.”<sup>194</sup>

The Court mandated what has come to be known as the *Booker* three-step process—whereby the first step requires the court to properly calculate the guideline range; the second step requires the court to consider any provisions in the *Guidelines Manual* authorizing, limiting, or prohibiting departures; and the third step requires the court to consider all of the factors in § 3553(a), including the Commission’s guidelines and policy statements, the statutory purposes of punishment,<sup>195</sup> as well as the “circumstances of the offense and the history and characteristics of the defendant,”<sup>196</sup> in ultimately deciding whether to “vary” from the guideline range.<sup>197</sup> In engaging in this three-step process, a court must give “respectful” and “serious” consideration to the *Guidelines Manual*.<sup>198</sup>

### **The guidelines’ accounting for the degrees of seriousness of the offense and offender’s record**

The three-step *Booker* process requires a sentencing court to give respectful and serious consideration to how the Commission views the seriousness of the defendant’s offense and criminal record, through both the Commission’s determination of the applicable guideline sentencing range and any limitations on departures. As noted, Congress directed the Commission, in promulgating guidelines, primarily to focus on a defendant’s offense conduct and the extent of his or her criminal record.

The *Guidelines Manual* has four “zones”<sup>199</sup> in the Sentencing Table. The Commission made non-incarceration sentences available as sentencing options for guideline sentencing ranges in Zones A and B and made “split sentences” available for ranges in Zone C, while the Commission made imprisonment the sole sentencing option in Zone D. The Commission generally intended the sentencing ranges in Zones A, B, and C to be for relatively low-level offenders and those without significant criminal records, as measured by their offense levels and CHCs on the Sentencing Table.<sup>200</sup>

With respect to the severity of the offense, the Commission’s views are reflected in the final offense level after application of the provisions of Chapters Two and Three of the *Guidelines Manual*. With respect to the gravity of an offender’s criminal record, the Commission’s views are reflected in the CHC determined through application of the provisions in Chapter Four. At the intersection of the final offense level and the CHC is a defendant’s guideline sentencing range, as provided in the Sentencing Table. As noted, the Sentencing Table has four zones, which provide different sentencing options. Also relevant to the Commission’s views on the seriousness of the offense and offender’s record are the Commission’s policy statements concerning grounds for departures from the applicable guideline range.<sup>201</sup>

### *Tension between the Guidelines Manual and Alternative-to-Incarceration Court Programs*

It is arguable that federal alternative-to-incarceration programs—to different degrees depending on the particular program and types of defendants participating in a program—are in tension with the Commission’s implementation of the congressional directives in the SRA. That tension results from two main policy differences between the *Guidelines Manual* and the programs—one related to different approaches to assessing offense severity and the second related to different approaches to considering offender characteristics.

## Offense severity

First, the *Guidelines Manual* assigns offense levels on the vertical axis of the Sentencing Table as a reflection of offense severity. A defendant's final offense level is a reflection of the Commission's determination of the severity of the defendant's total offense conduct.<sup>202</sup> The Commission's determination of a defendant's offense level is primarily a reflection of the defendant's culpability, a retributivist concern, together with utilitarian "crime control" considerations (*i.e.*, deterrence and the need for incapacitation).<sup>203</sup> Typical federal alternative-to-incarceration court programs focus on reducing substance abuse or improving mental health, with the ultimate goals of promoting rehabilitation and preventing recidivism.<sup>204</sup> Although these articulated goals align with two of the purposes of sentencing identified in the SRA (*i.e.*, incapacitation<sup>205</sup> and rehabilitation), the alternative sentences imposed on some offenders in the court programs may not serve a sufficient deterrent function<sup>206</sup> or reflect "just punishment for the offense."<sup>207</sup> In particular, some defendants given alternative sentences committed serious offenses, such as trafficking in substantial quantities of controlled substances or robberies.<sup>208</sup> By contrast, the state alternative-to-incarceration court programs on which the federal court programs are modeled rarely deal with the gravity of offenses often at issue in federal court alternative programs. State court programs typically deal with truly "low-level" offenders, such as those convicted of simple possession of drugs, DWI, or drug distribution involving very small amounts done to support a defendant's addiction.<sup>209</sup>

This is not to say that, in cases with federal defendants who committed serious offenses, courts are prohibited from "varying" from guideline ranges in Zone D of the Sentencing Table based on offender characteristics such as a willingness to treat addiction or mental illness.<sup>210</sup> Yet the Supreme Court has stated that there must be a "sufficiently compelling" justification supporting a "major" variance from a guideline range<sup>211</sup>—such as from Zone D ranges calling for several years of imprisonment to a sentence of probation or time-served—and has also recognized the "legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law."<sup>212</sup>

## Offender characteristics

Alternative-to-incarceration programs and the *Guidelines Manual* differ with respect to the relevance of certain offender characteristics to the decision of what type of sentence to impose. Consistent with the SRA, the Commission has generally limited consideration of offender characteristics (other than criminal history) in the *Guidelines Manual*,<sup>213</sup> including a defendant's substance use or mental health disorder—the two main offender characteristics addressed in the new alternative-to-incarceration court programs. As noted, in the SRA, Congress directed the Commission to consider whether several offender characteristics should be accounted for in the sentencing guidelines (including as a reason for departing below the otherwise applicable guideline range to an alternative to incarceration)—among them, an offender's substance abuse history and mental illness.<sup>214</sup>

The guidelines as originally promulgated by the Commission in 1987 provided that “[d]rug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines” because “[s]ubstance abuse is highly correlated to an increased propensity to commit crime.”<sup>215</sup> In 2010, the Commission amended this provision (together with an amendment to Application Note 6 following USSG §5C1.1) to provide for a limited downward departure—for offenders with a sentencing range in Zone C of the Sentencing Table to a sentencing range in Zone B (which allows for probation with a condition of home detention or community confinement)—where such a departure would allow a defendant's substance abuse to be treated while in such detention or confinement.<sup>216</sup>

The original Commission took a somewhat different approach to a defendant's mental illness as a basis for a departure. Although it provided that a defendant's mental or emotional condition was not “ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions [governing departures] in Chapter Five,”<sup>217</sup> Chapter Five provided for a specific downward departure for a defendant's “diminished capacity”: “If the defendant committed a non-violent offense while suffering from a significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a

lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided the defendant's criminal history does not indicate the need for incarceration to protect the public."<sup>218</sup> In 2010, the Commission expanded the basis for a downward departure for a defendant's mental or emotion condition that did not rise to the level of "diminished capacity" by amending §5H1.3:<sup>219</sup> "Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."<sup>220</sup> The Commission also provided that, just as with a defendant's substance abuse problem, a court could depart from Zone C to Zone B in order to impose a sentence of probation with the condition that a defendant receive mental health treatment while in home detention or community confinement.<sup>221</sup> The amended guidelines do not envision downward departures from Zone D (prison) sentences to probation or very short sentences of incarceration based upon a defendant's participation in a treatment program. Rather, while the guidelines authorize downward departures to allow certain offenders to participate in substance abuse treatment or mental health treatment programs,<sup>222</sup> such departures are limited to offenders whose pre-departure guideline range is in Zone C.<sup>223</sup>

Tension between the *Guidelines Manual* and certain federal court programs also exists regarding the issue of criminal history. Some offenders in the federal court alternative-to-incarceration programs have extensive criminal histories.<sup>224</sup> A defendant's extensive criminal history not only is a strong predictor of future recidivism (justifying the need for incapacitation) but also generally warrants a more severe sentence from a retributivist perspective.<sup>225</sup> In the SRA, Congress made clear its intent that offenders with serious criminal records—defined as two or more prior felony convictions for offenses committed on different occasions—generally warrant "substantial" terms of imprisonment.<sup>226</sup>

### *Use of Binding Plea Agreements Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C)*

There is also a question of whether some federal alternative-to-incarceration programs' use of binding plea agreements comports with the *Booker* three-step process.<sup>227</sup> In particular, a program that employs a binding plea agreement pursuant to Rule 11(c)(1)(C), which the court accepts at the guilty plea hearing before a presentence investigation has been conducted, envisions a variance from Zone D before a federal probation officer has prepared a presentence report (PSR) and before the court has had a meaningful opportunity to calculate a defendant's guideline range. By comparison, a program that explicitly informs participants entering the program that they are not being promised a non-incarceration sentence in exchange for their successful participation in the program and also requires the preparation of a full PSR before sentencing ultimately occurs appears to comply with *Booker*.

A PSR that sets forth the defendant's full offense conduct and criminal history is ordinarily required by Federal Rule of Criminal Procedure 32(d), recommended by the Commission, and also was envisioned by Congress when it enacted the SRA.<sup>228</sup> The PSR should identify "all applicable guidelines and policy statements" as well as "calculate the defendant's offense level and criminal history category" and "state the resulting sentencing range and kinds of sentences available."<sup>229</sup> Such a guidelines calculation must not only consider the offense or offenses of conviction, but also consider the defendant's "relevant conduct" (which, after a full presentence investigation, may result in a higher guideline range than the range based solely on the offense of conviction).<sup>230</sup>

### *Consideration of Factors Prohibited or Discouraged by the SRA*

Some federal alternative-to-incarceration programs use actuarial risk assessments or otherwise consider socio-economic characteristics in their screening of potential participants for their programs<sup>231</sup>—either to focus on high-risk defendants or, conversely, to focus on low-risk defendants.<sup>232</sup> The SRA directed that the

Commission, when promulgating sentencing guidelines, “shall assure that the guidelines and policy statements are entirely neutral as to the . . . socio-economic status of offenders” and, in a related manner, stated that a defendant’s “education,” “employment record,” “family ties,” and “community ties,” among other factors, are “generally inappropriate[]” as sentencing factors. To the extent that such actuarial assessments or program eligibility criteria consider socioeconomic factors such as defendant’s education, employment, or home ownership, they would appear in tension with the SRA.

### *Potential for Unwarranted Sentencing Disparities*

As noted above, a primary reason for the SRA was to avoid “unwarranted sentencing disparities” that were rampant in the pre-guidelines era.<sup>233</sup> The SRA repeatedly directs both the Commission and sentencing courts to avoid such disparities.<sup>234</sup> The federal alternative-to-incarceration court programs that have emerged in recent years have the potential of causing sentencing disparities in three ways, as discussed below.

#### **Inter-district disparities**

Inter-district disparities could result from the simple fact that the majority of federal districts do not have such alternative-to-incarceration programs, while only a minority do. Although all sentencing judges possess discretion to vary to non-incarceration sentences based on post-offense rehabilitation, a lack of a district-wide program in a majority of districts likely means that fewer defendants in those districts will receive a non-incarceration sentence for successfully participating in a drug abuse or mental health treatment program, particularly when provisions in the *Guidelines Manual* militate against such reduced sentences in many cases.

Furthermore, because the federal court programs described above have primarily resulted from what one judge has aptly described as a decentralized “grassroots movement,”<sup>235</sup> there is a significant amount of diversity among the different programs in

terms of their eligibility criteria and the manner in which their programs are implemented. For instance, some programs require participants to have pre-existing drug use or mental health disorders, while others do not require such conditions.<sup>236</sup> Some programs exclude all offenders charged with or previously convicted of violent offenses, while others do not.<sup>237</sup> In terms of program implementation, there appears to be significant differences in the various programs in terms of the percentage of participants who graduate and receive an alternative to incarceration.<sup>238</sup>

### **Intra-district disparities**

Even within districts that have alternative-to-incarceration programs, unwarranted sentencing disparities may arise depending on the eligibility criteria used and also depending on the extent to which all potentially eligible offenders are permitted to participate in the programs. Although most programs focus on defendants with diagnosable substance use or mental health disorders, which potentially provides some level of objective assessment of defendants' eligibility, other programs also consider non-medical criteria.<sup>239</sup> Certain programs also intentionally employ "flexible" criteria.<sup>240</sup> In addition, several programs have employed a "consensus" approach to deciding which defendants are admitted into the programs. In those districts, a single team member can "veto" a defendant's participation into the program.<sup>241</sup> Such an approach, which can be influenced by team members' intuitions in addition to objective factors such as a professional treatment provider's assessments of participants' disorders, may inject a degree of subjectivity into admissions decisions, which in turn may result in unwarranted sentencing disparities. More fundamentally, if a particular district's program is not "scalable" to reach all potentially eligible offenders, the operation of federal alternative-to-incarceration court programs in a manner that benefits only some of eligible offenders could result in unwarranted sentencing disparities.



### Potential demographic disparities

It is also appropriate to consider the extent to which demographic disparities may result from the operation of the federal court programs. Although there is little empirical data upon which to analyze the existing federal alternative-to-incarceration programs with respect to the demographic characteristics of their participants,<sup>242</sup> there is more robust data from state drug courts that indicates that demographic disparities have occurred in those programs, with white defendants and female defendants overrepresented.<sup>243</sup>



## IV. Social Science Questions Concerning Federal Alternative-to-Incarceration Court Programs

In accordance with the Commission’s statutory duty to “serv[e] in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices,”<sup>244</sup> this section discusses several social science issues related to the design, implementation, and evaluation of the federal alternative-to-incarceration programs. As explained below, these questions warrant careful additional study after the development of meaningful data about the programs.

Two government reports recently noted that the existing federal alternative-to-incarceration programs have not been evaluated by social scientists. In 2016, OIG conducted an audit of the DOJ’s use of both pretrial diversion and “diversion-based court programs.” It concluded that the Executive Office for United States Attorneys “did not keep sufficient data to permit a comprehensive evaluation of the effectiveness of the USAOs’ participation . . . in diversion-based court programs.”<sup>245</sup> Also, in 2016, the GAO examined the use of alternatives to incarceration in the federal criminal justice system. It concluded that the DOJ did not consistently track the use of pretrial alternatives, and recommended that the Attorney General “identify, obtain, and track data on the outcomes and costs of pretrial diversion programs [a term used to include alternative-to-incarceration court programs]; and develop performance measures by which to help assess program outcomes.”<sup>246</sup>

## Use of Social Science in Designing and Evaluating Federal Alternative-to-Incarceration Court Programs

Because a primary goal of alternative-to-incarceration court programs is to rehabilitate defendants and thereby reduce recidivism and promote prosocial behavior, it may be possible to empirically evaluate them to determine whether they accomplish their stated goals. As discussed above, state problem-solving courts, particularly state drug courts, have been evaluated in myriad empirical studies.<sup>247</sup> In addition, during the past decade, “evidence based” programming used by federal probation and pretrial services officers throughout the country has been subject to numerous empirical evaluations of the efficacy of those crime-control and rehabilitative programs.<sup>248</sup> Similar outcome evaluations of the emerging federal alternative-to-incarceration court programs would be appropriate.

Government Accountability Office officials with an expertise in program evaluations have summarized the manner in which an evaluation of a problem-solving court program—in particular, a drug court—should occur:

To demonstrate their effectiveness, drug courts must build methodologically sound impact evaluations. To be methodologically sound, impact evaluations should include certain critical elements, including: a comparison group similar to that of the participants; the collection and analysis of critical data at several points during and post program; and the involvement of an experienced evaluator.

The best method for building a similarly situated comparison group is to randomly assign qualified drug court participants to this group. If that is not possible, the individuals in the comparison group should match the participants in the drug court as closely as possible.

Data should be collected from participants at intake, during program participation, upon graduation, and after program completion or termination. Data should be collected from all participants and comparison group members, and should include, among other information, data on relapse and recidivism. Data should be maintained in an automated data management system.

The involvement of a qualified evaluator is critical to the evaluation process, especially during the design phase. Evaluators will assist the team in all aspects of evaluation design, and will ensure that, among other things, the comparison group can withstand scrutiny.<sup>249</sup>

To date, none of the federal court programs has completed an outcome evaluation. At least two programs—the CASA program in the Central District of California, and the BRIDGE program in the District of South Carolina—are in the early stages of evaluations.<sup>250</sup> Although some programs have reported limited data about the recidivism rates of their programs' graduates,<sup>251</sup> such information is not the equivalent of a formal outcome evaluation in which the program participants are assessed along with a comparison group.

## Evaluations of Federal Alternative-to-Incarceration Court Programs

This section briefly discusses several issues related to possible future evaluations of federal alternative-to-incarceration court programs. At the outset, however, it should be noted that at least five evaluations have been conducted of federal “reentry” court programs (including one multi-site study using a randomized experimental design)<sup>252</sup>—with findings that are “mixed at best”<sup>253</sup> concerning whether such programs are more effective in reducing recidivism than federal supervision-as-usual. As discussed above in Part II.A.2, federal “front-end” and “back-end” programs differ in important ways, but they do share certain common features—in particular, the collegial, judge-led “team” model, as opposed to the

traditional model of supervision by a federal probation officer with limited judicial involvement until an indication that an offender has violated the conditions of his or her supervision. It may be that evaluations of front-end programs yield different results from the evaluations of back-end programs based on the different nature of the offenders or for other reasons (*e.g.*, the participants in the front-end programs arguably have a greater incentive to succeed in treatment than participants in back-end programs).

### *Comparison Group of Offenders*

Proponents of federal alternative-to-incarceration court programs have pointed to limited data showing low recidivism rates of graduates of certain programs.<sup>254</sup> Although important, such data needs to be supplemented with data showing both the long-term recidivism rate of participants who did not successfully complete the programs and the long-term recidivism rate of a meaningful comparison group of similarly situated offenders who received traditional dispositions of their cases (either sentences of imprisonment followed by a term of supervised release or probation).<sup>255</sup> Because a random-assignment experimental design is difficult to implement in the criminal justice context, an evaluator may need to use historical data for offenders sentenced before the advent of the alternative-to-incarceration program or some other manner of matching program participants with non-program participants. At the very least, the comparison group should resemble the study group with respect to offense types, criminal history, educational and vocational skills, demographic characteristics (including race, gender, and age), risk assessment scores, and other relevant factors (*e.g.*, substance use and mental health history). Without a random-assignment experimental study, however, any comparison of the study group and control group will be subject to selection-bias problems.<sup>256</sup>

## *Fidelity in Implementing the Program During the Study Period*

Critical to any program evaluation is maintaining sufficient fidelity to the program design during the study period.<sup>257</sup> Modifications of eligibility criteria, program rules and requirements, sanctions, and rewards during the study period may render the evaluation results unreliable.

## *Evaluation of the Role of the Judge as a Key Component of Federal Court Programs*

A specific component of a federal alternative-to-incarceration court model that should be evaluated is the federal judge's role as the leader of the collegial "team" who presides over regular meetings with groups of program participants. After all, alternative-to-incarceration programs, such as drug court programs, "are virtually defined by the fact that they are managed by the judge and require clients to attend frequent status hearings in court."<sup>258</sup> The National Association of Drug Court Professionals has stated that, for problem-solving court programs such as drug courts to be successful, they ordinarily require "dynamic judicial leadership" from the presiding judge.<sup>259</sup> The pivotal role of the presiding judge in the federal programs warrants careful study.

As discussed above, there is no definitive social science evidence about the effect of the role of judges in state problem-solving court programs. A recent empirical study of federal "reentry" court programs conducted by the Federal Judicial Center (FJC) suggests that the role of the judge in a collegial reentry court program did not reduce recidivism or lower revocation rates when compared to supervision as usual by federal probation officers (and in fact was associated with higher rearrest and revocation rates).<sup>260</sup> Although that study has been criticized,<sup>261</sup> it nevertheless underscores the importance of evaluating the single most important component of a collegial alternative-to-incarceration court program. Such "personality-driven"<sup>262</sup> programs may be difficult to evaluate because the presiding judges are not fungible and, thus, particular programs' efficacy may turn in substantial part on individual judges.

## Cost-Benefit Analysis

Proponents of federal alternative-to-incarceration court programs have contended that the existing programs are cost-effective compared to sentencing as usual.<sup>263</sup> Some proponents also assert that, if the programs were increased in size, they could help reduce overcrowding in the BOP's facilities.<sup>264</sup>

As an initial matter, it should be noted that the Sentencing Reform Act of 1984 does not appear to permit a sentencing court<sup>265</sup> to consider the costs of incarceration—or the cost savings resulting from imposing an alternative to incarceration—as a factor in departing or varying below the applicable sentencing guidelines range in a particular case.<sup>266</sup> Some of the existing federal alternative-to-incarceration programs appear to factor in cost-savings as one rationale in support of their programs.<sup>267</sup>

Cost-effectiveness or cost-savings is, however, a relevant consideration for policymakers. For that reason, a proper cost evaluation of federal alternative-to-incarceration programs is important.

A cost evaluation of a program has two components: a cost-effectiveness analysis and a cost-benefit analysis.<sup>268</sup> Ultimately, a cost evaluation of an alternative-to-incarceration court program seeks to answer these questions:

- (1) What does the alternative-to-incarceration court program cost?
- (2) What is the cost of the program as compared to the cost of traditional criminal case processing with respect to the criminal justice system and society generally?
- (3) Is there a monetary or resource savings benefit due to participation in the program?<sup>269</sup>

Despite these relatively simple-sounding questions, “the process of conducting a [cost evaluation] is much more complicated”<sup>270</sup> and requires sophisticated analyses by a qualified expert.



The cost evaluations of state alternative-to-incarceration programs generally have focused on two primary types of cost savings—(1) savings to the taxpayers in terms of the costs of administering alternative programs compared to costs of traditional case processing (*e.g.*, traditional probation or a sentence of incarceration in a jail or prison); and (2) savings to future victims of crimes resulting from reduced rates of recidivism for successful program participants.<sup>271</sup> More complex evaluations also have considered other cost savings as well, such as economic benefits to society resulting from successful participants who maintain gainful employment (as opposed to returning to a life of crime).<sup>272</sup>

A cost analysis of the new alternative-to-incarceration programs should not only compare the benefits of the programs (increased rehabilitation, leading to reduced recidivism and reduced costs to victims; reduced costs of incarceration; and indirect benefits like increased economic productivity) as measured against traditional case dispositions, but also assess the actual costs of the programs as well the costs of traditional imprisonment and federal supervision. Regarding the cost of alternative-to-incarceration programs, any assessment should consider the *opportunity costs* of the program, *i.e.*, what the various “team” members (including the judge or judges) otherwise would have been doing but for their work on the cases in the program in addition to the actual expenditures of the program. If possible, a cost assessment also would factor in the costs of sentences of imprisonment imposed on unsuccessful participants who were terminated from the program and who did not thus receive an alternative to incarceration, at least when such participants likely would have received a lower term of imprisonment (or an alternative) had they not participated in the alternative-to-incarceration program to begin with.<sup>273</sup>

Regarding the costs of imprisonment, it is important not simply to consider the *average* costs of incarceration but instead consider *marginal* costs.<sup>274</sup> This is particularly true if federal alternative-to-incarceration court programs continue to graduate only a small number of participants each year—and, thus, are unlikely to significantly affect the current number of federal prison facilities.<sup>275</sup>

Furthermore, any estimate of the saved costs of imprisonment should not simply compare to the cost of a prison term recommended by the guidelines, as the existing cost-effectiveness analyses have done.<sup>276</sup> Rather, because a sentencing court in the post-*Booker* era generally has discretion to vary downward to a lower sentence (including a sentence of probation or a short time-served sentence followed by a term of supervised release), the cost-benefit analysis should not invariably assume that a guidelines sentence would be imposed but for a defendant's successful participation in the alternative-to-incarceration court program. The characteristics of the many defendants participating in the programs—a history of drug use or mental health problems, coupled with successful treatment while on bond before sentencing—might lead a sentencing court to vary downward below the applicable guideline range, regardless of a defendant's participation in a formal problem-solving court program.<sup>277</sup>

With respect to benefits in a cost-benefit analysis, researchers not only should analyze recidivism rates of the study group compared to a comparison group, but also should analyze other measures of rehabilitation such as long-term substance use rates and employment rates.<sup>278</sup>

## Relevance of State Problem-Solving Court Evaluations

Some proponents of the federal alternative-to-incarceration programs have pointed to favorable evaluations of state problem-solving courts (in particular, evaluations of state drug courts) showing that those programs lowered recidivism rates and saved costs compared to regular case dispositions, as offering support for federal court programs.<sup>279</sup> Considering the significant differences between the state and federal criminal justice systems,<sup>280</sup> those state court evaluations may be inapposite. Moreover, even if those state court evaluations offer some level of support for federal drug court programs, they do not necessarily offer support for other types of federal court programs. In particular, federal programs that admit offenders with “significant deficiencies in full-time productive activity”<sup>281</sup> or those whose criminal conduct appeared related to “lack of education or employment training, or unhealthy

associations”<sup>282</sup> do not appear sufficiently analogous to any of the state court programs that have been evaluated and proved to be effective in reducing recidivism.

In addition, the state court studies showing recidivism reductions generally have compared state defendants who participated in drug courts with state defendants who received traditional state court dispositions for the same kinds of low-level offenses handled by state drug courts (typically traditional probation or short sentences of incarceration).<sup>283</sup> Conversely, in the federal criminal justice system, the appropriate comparison would be of defendants who successfully participated in the alternative-to-incarceration programs with defendants who were sentenced in the traditional manner post-*Booker*—either to a term of imprisonment (assuming their sentencing ranges were in Zone D of the Sentencing Table and they did not receive a downward departure or variance below Zone C) or, in the event of departure or variance below Zone C, to probation or a short time-served sentence followed by term of supervised release. Such sentencing-as-usual typically will include rehabilitative (including treatment) programs operated by federal probation officers for offenders on probation or supervised release and by the Federal Bureau of Prisons for offenders sentenced to significant terms of imprisonment.

Although in late 2016 the Federal Bureau of Prisons stated that it was in the process of evaluating and reforming its own rehabilitative programs,<sup>284</sup> the federal probation system has demonstrated that its “evidence based” supervision practices are reducing recidivism by federal offenders under supervision.<sup>285</sup> “[F]ederal Probation and Pretrial Officers are widely considered among the best in the field.”<sup>286</sup> State probation and parole departments often lack the same resources as their federal counterparts and also may have less training and expertise as federal probation officers; as a result, state supervision may be less effective in reducing recidivism than federal supervision.<sup>287</sup> Those differences may in part explain the lower recidivism rates of federal offenders generally (44.9% re-arrest rate after five years from release from federal prison) compared to state offenders generally (76.6% re-arrest rate after five years from release from state prison).<sup>288</sup>



## V. Conclusion

The recent emergence of federal alternative-to-incarceration court programs has raised several legal and social-science issues that must be carefully considered and informed by meaningful data before they can be answered by courts and policymakers. The key issues are:

- How do the programs fit within the legal framework created by the Sentencing Reform Act of 1984, which continues to apply in significant ways after *Booker*? To the extent that a particular program does not fit within the legal framework, how should the program be modified to better comport with the SRA and *Booker*?
- Do the programs give sufficient consideration to the retributivist and deterrent purposes of sentencing in addition to the utilitarian purposes related to rehabilitation and incapacitation?
- Do the programs give respectful and serious consideration to the sentencing guidelines in imposing alternatives to incarceration?
- Do the programs consider offender characteristics that the SRA deems improper or generally inappropriate in federal sentencing?
- Do the programs, when not governed by a uniform national policy, result in unwarranted sentencing disparities, including demographic disparities? If so, are there ways a national policy could reduce unwarranted disparities?
- Have programs been designed and implemented to allow for meaningful outcome evaluations and cost evaluations?
- How do the programs compare to regular sentencing options—either imprisonment followed by supervised release

or regular supervision by federal probation officers—with respect to promoting rehabilitation and reducing recidivism?

- Will the programs—either in their current small sizes or if taken to scale—result in a cost savings compared to regular sentencing options?

## VI. Endnotes

1 The Commission is an independent agency in the judicial branch of government. Established by the Sentencing Reform Act of 1984 (SRA), Pub. L. 98–473, Ch. II, 98 Stat. 1987 (1984), the Commission’s principal purposes are (1) to establish sentencing policies and practices for the federal courts, including guidelines regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues.

2 See U.S. SENTENCING COMM’N, *Guidelines Manual* §5B1.1 (Nov. 1987) (Imposition of a Term of Probation).

3 See, e.g., USSG App. C, amend. 738 (effective Nov. 1, 2010) (expanding Zone B and Zone C of the Sentencing Table by one level each); *id.*, amend. 462 (effective Nov. 1, 1992) (expanding the number of cells of the Sentencing Table in which straight probationary sentences were permissible sentencing options).

4 See COURTNEY SEMISCH, U.S. SENTENCING COMM’N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (2015), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617\\_Alternatives.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf); see also Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 320–21 (2016).

5 543 U.S. 220 (2005).

6 552 U.S. 38 (2007).

7 See, e.g., 81 FR 58004-01 (Aug. 24, 2016) (among the Commission’s priorities for the 2016–17 amendment cycle was the “[c]ontinuation of its study of approaches to encourage the use of alternatives to incarceration”).

8 See Matthew G. Rowland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, FED. PROB., Dec. 2016, at 3, 3. Rowland notes that “there is . . . concern that [such] court[] [programs] are inconsistent with the judiciary’s longstanding position against specialized courts and the direct assignment of cases to judges. . . . The [Judicial] Conference seeks to avoid balkanization of judicial operations while upholding the broad jurisdictional capacity of district courts and enhance procedural fairness through random assignment of cases.” *Id.* at n.8 (citing U.S. Judicial Conference, Report

of the Proceedings of the Judicial Conference of the United States 82 (Sept. 12, 1990) and U.S. Judicial Conference, Report of the Proceedings of the Judicial Conference of the United States 12–13 (Mar. 16, 1999)).

9        *See, e.g.*, Written Statement of Hon. Leo Sorokin Submitted to the U.S. Sentencing Commission, at 2 (Mar. 15, 2017) (recommending that the Commission amend the guidelines by permitting an adjustment in sentence for defendants who participate in a presentencing supervision program such as the RISE program in the District of Massachusetts), <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Sorokin.pdf>; SECOND REPORT TO THE BOARD OF JUDGES: ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK (THE PRETRIAL OPPORTUNITY PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM) 6, 58–59 (2015), *available at* [https://img.nyed.uscourts.gov/files/local\\_rules/ATI.EDNY\\_SecondReport\\_Aug2015.pdf](https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport_Aug2015.pdf) [hereinafter REPORT TO THE BOARD OF JUDGES] (“[W]e call upon the Sentencing Commission to amend the Guidelines to encourage such programs and to take steps to inform the federal courts around the country about them.”). Others have requested Congress to create federal drug courts by statute. *See, e.g.*, *United States v. Baccam*, 414 F.3d 885, 887 (8th Cir. 2005) (Lay, J., concurring) (“Evidence shows that the flexible and pro-active approach of [state] drug courts reduces recidivism rates to less than half of the recidivism rate of those offenders who are simply imprisoned for their drug crimes. Unfortunately, the federal criminal justice system offers no such alternatives for nonviolent, substance-abusing offenders. Given the tremendous economic and human costs of imprisoning nonviolent drug offenders, Congress should seriously consider creating federal drug courts. Federal drug courts would save a significant amount of money for taxpayers.”).

10        *See* U.S. Sentencing Comm’n, Public Hearing on Alternatives to Incarceration Court Programs and Synthetic Drugs, Washington, D.C., <http://www.uscc.gov/policymaking/meetings-hearings/public-hearing-april-18-2017>.

11        Problem-solving courts, such as drug court programs, raise “a variety of ethical, policy, and practical questions.” Rowland, *supra* note 8, at 4; *id.* at 5–6 (discussing different issues); *see also* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Federal Courts*, 22(2) BERKELEY J. CRIM. L. (forthcoming 2017) (same) (pre-publication draft available at <https://ssrn.com/abstract=2956021>). This report does not address all of those issues and, instead, focuses on two primary sets of issues: (1) legal issues related to the Sentencing Reform Act of 1984; and (2) social science issues related to the proper design and evaluation of such programs. *See* Parts II & III, *infra*.

12        Scott-Hayward, *supra* note 11.

13        *See, for example*, the court programs discussed *infra* at pp. 12–21.



14 See Scott-Hayward, *supra* note 11.

15 *Id.* These “diversion” court programs should be distinguished from traditional federal “pre-trial diversion,” a program whereby the U.S. Attorney’s Office agrees to dismiss charges if a defendant successfully completes a period of supervision by the Pretrial Services Agency. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-22.000 (2016). Such pretrial diversion is not administered by a federal judge in the same manner that “diversion” court programs are administered.

16 The Commission’s organic statute vests the Commission with authority only over matters related to “sentencing.” 28 U.S.C. §§ 991(b), 994(a) & 995(a)(12). Programs that “divert” offenders from the criminal justice system by dismissing their charges or vacating their convictions without imposition of a sentence thus do not fall within the Commission’s statutory authority. Such diversion programs instead relate to federal prosecutors’ charging authority and federal courts’ related authority to dismiss charges. See FED. R. CRIM. P. 48(a) (providing for the prosecution’s dismissal of charges with leave of the court).

17 See, e.g., U.S. Attorney’s Office, C.D. Cal., Conviction and Sentence Alternatives Program (CASA), <https://www.justice.gov/usao-cdca/conviction-and-sentence-alternatives-program-casa>.

18 See Rowland, *supra* note 8, at 7.

19 United States v. Dokmeci, Nos. 13-CR-00455, 13-CR-00565, 2016 WL 915185, at \*3 (E.D.N.Y. Mar. 9, 2016) (Gleason, J.).

20 See Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. FOR SOC. JUST. 31, 38–40 (2011) (discussing the evolution of federal reentry courts). Federal reentry court programs began in 2002; by 2011, when only two front-end alternative-to-incarceration court programs were in operation, there were 45 federal reentry court programs. *Id.* at 40.

21 See Rowland, *supra* note 8, at 7; Caitlin Taylor, *The Supervision to Aid Reentry (STAR) Program: An Outcome Evaluation*, 24 CRIM. JUST. POL’Y REV. 49 (2013), available at <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1028&context=jsj>.

22 See *infra* note 267.

23 Scott-Hayward, *supra* note 11; SUZANNE M. STRONG, RAMONA R. RANTALA & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF PROBLEM-SOLVING COURTS, 2012, at 1 (2016) [hereinafter CENSUS OF PROBLEM-SOLVING COURTS, 2012].

24 CELINA FRANCO, CONG. RESEARCH SERV., RL7-5700, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 19 (2010) (noting that, between 1995 and 2010, Congress provided over \$530 million in federal appropriations for state drug court grants, mostly administered by the Bureau of Justice Assistance).

25 DOUGLAS B. MARLOWE ET AL., NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 37 (2016); JULIE M. BALDWIN, EXECUTIVE SUMMARY: NATIONAL SURVEY OF VETERANS TREATMENT COURTS 4–5 (2013); RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTIONS TRENDS 19–21 (2014).

26 See RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 2 (2009).

27 See MARLOWE ET AL., *supra* note 25, at 41–42; Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. OF CRIM. JUST. 60, 61 (2012) (noting that “[m]any [state drug] courts . . . exclude arrestees charged with drug trafficking offenses”); KING & PASQUARELLA, *supra* note 26, at 3 (“Though eligibility requirements differ by court, generally defendants must be charged with drug possession or a non-violent offense . . .”). Some drug courts accept defendants who sold small amounts of drugs to support their own addictions. See, e.g., FLA. STATE COURTS, SIXTH JUDICIAL CIRCUIT, PINNELLAS COUNTY ADULT DRUG COURT: 2004 ANNUAL REPORT 3 (excluding defendants convicted of “drug trafficking,” except for cases involving “small sales of drugs where the facts indicate that the seller [was] supporting his or her own habit”), available at <http://www.jud6.org/contactinformation/AdultDrugCourt/2004PCDCAnnualReport.pdf>.

28 NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (2009).

29 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note, 23, at 10 (Figure 3) (counting 981 adult drug courts and 349 juvenile drug courts).

30 See Nat'l Inst. of Justice (NIJ), Drug Courts, <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> (last visited July 21, 2017) (counting 1,558 adult drug courts and 409 juvenile drug courts). The National Drug Court Institute (a component of the National Association of Drug Court Professionals) has reported that, as of December 31, 2014, there were 1,540 state adult drug courts and 420 state juvenile drug courts. MARLOWE ET AL., *supra* note 25, at 35 (Table 4). That report also lists additional court programs that it deems “drug courts,” such as DUI courts, tribal wellness courts, and veterans treatment courts. *Id.* Those types of courts are not deemed to be problem-solving courts.

31 See CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 16–17 app, tbls.3 & 4.

32 *See id.* at 19 app., tbl.7.

33 *See id.* at tbl.8.

34 *Id.* at 10; *see also* MARLOWE ET AL., *supra* note 25, at 11.

35 *Id.* at 12 (reporting that 52.5% of state drug courts reported that more than half of their “exits” in 2012 were “successful completions,” with the remainder reporting half or less of participants successfully completed the programs) (Tab. 11); MARLOWE ET AL., *supra* note 25, at 45 (finding the average graduation rate in respondents’ drug courts was 59% in 2014).

36 MARLOWE ET AL., *supra* note 25, at 45.

37 *See* Nat’l Ass’n of Drug Court Professionals, Drug Courts Work, <http://www.nadcp.org/learn/facts-and-figures> (last visited July 21, 2017).

38 *See* Nat’l Center for State Courts, Problem-Solving Courts, <http://www.ncsc.org/services-and-experts/areas-of-expertise/problem-solving-courts.aspx> (last visited July 21, 2017).

39 Conference of Chief Justices, Resolution 22, In Support of Problem-Solving Courts Principles and Methods (adopted July 29, 2004), *available at* <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Resolution-Nat1%20Agenda-Final-Aug-04.ashx>.

40 *See e.g.*, PHYSICIANS FOR HUMAN RIGHTS, NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES (2017), *available at* [http://physiciansforhumanrights.org/assets/misc/phr\\_drugcourts\\_report\\_singlepages.pdf](http://physiciansforhumanrights.org/assets/misc/phr_drugcourts_report_singlepages.pdf); Morris B. Hoffman, *Drug Courts and the Myth of the Addict’s Diseased Brain*, 29 FED. SENT’G RPTR. 206 (2017); JOANNE CSETE & DENISE TOMASINI-JOSHI, OPEN SOCIETY FOUNDATIONS, DRUG COURTS: EQUIVOCAL EVIDENCE ON A POPULAR INNOVATION (2015), *available at* <https://www.opensocietyfoundations.org/sites/default/files/drug-courts-equivocal-evidence-popular-intervention-20150518.pdf>; NASTASSIA WALSH, JUSTICE POLICY INST., ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES (2011), *available at* [http://www.justicepolicy.org/research/2217?utm\\_source=%2fdrugcourts&utm\\_medium=web&utm\\_campaign=redirect](http://www.justicepolicy.org/research/2217?utm_source=%2fdrugcourts&utm_medium=web&utm_campaign=redirect); DRUG POLICY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE (2011), *available at* [http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](http://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf).

41 Scott-Hayward, *supra* note 11; *see also* Office of Nat’l Drug Control Policy, *Fact Sheet: Veterans Treatment Courts*, at 1 (2010), [https://obamawhitehouse.archives.gov/sites/default/files/ondcp/Fact\\_Sheets/veterans\\_treatment\\_courts\\_fact\\_sheet\\_12-13-10.pdf](https://obamawhitehouse.archives.gov/sites/default/files/ondcp/Fact_Sheets/veterans_treatment_courts_fact_sheet_12-13-10.pdf).

42 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 1.

43 MARLOWE ET AL., *supra* note 25, at 7, 9.

44 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 1; MARLOWE ET AL., *supra* note 25, at 7, 9, 35.

45 See AVINASH SINGH BHATI ET AL., URBAN INST., TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 32 (2008).

46 See NAT'L CTR. FOR STATE COURTS, COURT STATISTICS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 11–13 (2016), *available at* <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC%202015.ashx>. The actual number of felony convictions appears to be substantially lower than the number of felony case filings—at a little over one million state felony convictions per year. See U.S. Dep't of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 - Statistical Tables Felony Sentences in State Court*, <https://www.bjs.gov/content/pub/html/scscf04/tables/scs04101tab.cfm> (showing that there were 1,078,920 felony convictions in state courts in 2004, the last year reported by BJS).

47 See MARLOWE ET AL., *supra* note 25, at 14.

48 See BHATI ET AL., *supra* note 45, at 47.

49 MARLOWE ET AL., *supra* note 25, at 47 tbl.7.

50 *Id.*

51 According to the National Association of Drug Court Professionals, the key components of state drug court programs are as follows:

- incorporating drug testing into case processing;
- creating a non-adversarial relationship between the defendant and the court;
- identifying defendants in need of treatment and referring them to treatment as soon as possible after arrest;
- providing access to a continuum of treatment and rehabilitation services;
- monitoring abstinence through frequent, mandatory drug testing;
- establishing a coordinated strategy to govern drug court responses to participants' compliance;
- maintaining judicial interaction with each drug court participant;
- monitoring and evaluating program goals and gauging their effectiveness;

- continuing interdisciplinary education to promote effective drug court planning and implementation; and
- forging partnerships among drug courts, public agencies, and community-based organizations to generate local support and enhance drug court effectiveness.

FRANCO, *supra* 24, at 10–11.

52 MARLOWE ET AL., *supra* note 25, at 11; JIM MCGUIRE, ET AL., AN INVENTORY OF VA INVOLVEMENT IN VETERANS COURTS, DOCKETS AND TRACKS 2 (2013); MATTHEW J. D’EMIC, THE PROMISE OF MENTAL HEALTH COURTS: BROOKLYN CRIMINAL JUSTICE SYSTEM EXPERIMENTS WITH TREATMENT AS AN ALTERNATIVE TO PRISON 2 (2007) (citing the Brooklyn Mental Health Court, which mandated initial treatment for 12–18 months); Eileen C. Moore, *A Mentor in Combat Veterans Court: Observations and Challenges*, in FUTURE TRENDS IN STATE COURTS 39 (2012) (citing Orange County Veterans Court, which lasts 18 months).

53 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 6 (noting 64% of state problem-solving courts required participants to enter a guilty plea in order to participate in the program).

54 *See id.*, at 8 tbl.7.

55 U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 11–12, 27 (1997), *available at* <http://www.ndci.org/sites/default/files/ndci/KeyComponents.pdf>; SHANNON CAREY ET AL., EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS 5–7 (2008), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>.

56 DEFINING DRUG COURTS: THE KEY COMPONENTS, *supra* note 55, at 7–8.

57 MARLOWE ET AL., *supra* note 25, at 11; LAUREN ALMQUIST & ELIZABETH DODD, MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 14 (2009).

58 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 6 (finding that, as of 2012, 57% of state problem-solving courts excluded offenders with a history of violent offenses and 65% excluded offenders with a history of sex offenses); Mitchell et al., *supra* note 27, at 61 (“Many [drug] courts . . . exclude arrestees charged with drug-trafficking offenses[.]”); *see also* San Francisco Public Defender’s Office, San Francisco’s Drug Court, [http://sfpublicdefender.org/news/2007/08/drug\\_court/](http://sfpublicdefender.org/news/2007/08/drug_court/) (“San Francisco’s Drug Court . . . permits persons charged with sales offenses involving small amounts of narcotics or those charged with ‘possession for sale’ to participate. Many courts have limited participation to those charged with possession offenses only, arguing that those who sell drugs

should not be allowed to benefit from Drug Court’s rehabilitative programs. San Francisco’s approach recognizes that there are often persons who sell drugs in order to feed their habits, and that society has an interest in offering treatment to sellers who are addicted to drugs.”).

59 ALMQUIST & DODD, *supra* note 57, at 16; MARLOWE ET AL., *supra* note 25, at 11.

60 ALMQUIST & DODD, *supra* note 57, at 17; MARLOWE ET AL., *supra* note 25, at 11.

61 ALMQUIST & DODD, *supra* note 57, at 17; MARLOWE ET AL., *supra* note 25, at 11.

62 MARLOWE ET AL., *supra* note 25, at 11.

63 CENSUS OF PROBLEM-SOLVING COURTS, 2012, *supra* note 23, at 6; MARLOWE ET AL., *supra* note 25, at 7, 11; D’EMIC, *supra* note 52, at 2.

64 Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does It Relate to Drug Courts*, 41 OHIO N. U. L. REV. 757, 767–68 (2015) (table 2 summarizes the studies); *see also* SHELLI B. ROSSMAN ET AL., URBAN INSTITUTE, THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 5 (2011) (finding that drug court participants in the study group had lower recidivism rates than a comparison group of offenders, according to both self-reports and official arrest records; at 24-months, 52% of drug court participants had been re-arrested, while 62% of offenders in the comparison group had been re-arrested).

65 Latessa & Reitler, *supra* note 64, at 778 (“[M]eta-analyses are useful in producing an overall estimate of how much recidivism reduction can be expected with drug courts. . . . From a policy perspective, meta-analysis can provide more definitive conclusions than typical narrative or subjective reviews of the primary evaluations.”); *see also* Estaban Walker et al., *Meta-Analysis: Its Strengths and Limitations*, 75 CLEVELAND CLINIC J. OF MED. 431 (2008) (“A well-designed meta-analysis can provide valuable information for researchers [and] policymakers[.]”); Keith O’Rourke, *An Historical Perspective on Meta-Analysis: Dealing Quantitatively with Varying Study Results*, 100 J. ROYAL SOC’Y MED. 579 (2007) (noting meta-analyses are used in both medical and social science research).

66 Latessa & Reitler, *supra* note 64, at 779–80. Table 3 summarizes the studies.

67 *See, e.g.*, ALMQUIST & DODD, *supra* note 57, at 27–28; FRANCO, *supra* note 24, at 2, 21 (“Program data limitations . . . have prevented researchers from making conclusive, across-the-board findings about the effectiveness of drug courts. . . . Drug courts have been difficult to evaluate because, among other things, they are so varied. As previously discussed, while drug courts generally adhere to certain key program components, drug courts can differ in factors including admission criteria, type and duration of drug treatment, degree of judicial monitoring and

intervention, and application of sanctions for noncompliance. As a result, it has often been difficult to compare drug courts and to determine which interventions are effective.”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), GAO-12-53, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 8–9 (2011) (“Several syntheses of multiple drug court program evaluations, conducted in 2005 and 2006, also concluded that drug courts are associated with reduced recidivism rates, compared to traditional correctional options. However, the studies included in these syntheses often had methodological limitations, such as the lack of equivalent comparison groups and the lack of appropriate statistical controls.”); DRUG POLICY ALLIANCE, *supra* note 40, at 10 (2011) (“The use of non-equivalent treatment and comparison groups may be the most prevalent and serious flaw in drug court research.”).

68 *See* CAREY ET AL., *supra* note 55, at 93–94; *see also* CTR. FOR STATE COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH 2 (2005) (observing that, while studies show that “drug courts reduce recidivism, . . . [] [m]ore helpful at this point would be research telling us which specific drug courts made the greatest difference in producing successful outcomes, and which, if any, made no difference”).

69 U.S. GOV’T ACCOUNTABILITY OFFICE, EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 5 (2005) (“[W]e were unable to find conclusive evidence that specific drug court program components, such as the behavior of the judge, the amount of treatment received, the level of supervision provided, and the sanctions for not complying with program requirements, affect participants’ within-program recidivism.”).

70 *See, e.g.*, Douglas B. Marlowe et al., *The Judge Is a Key Component of Drug Court*, DRUG CT. REV., no. 2, 2004 at 1.

71 *See* NAT’L INST. OF JUSTICE, DRUG COURTS: THE SECOND DECADE 9 (2005) (observing that “[t]he drug court model identifies the judge’s role as key to program success” but then notes that this assumption had not been “tested” by social scientists).

72 FRANCO, *supra* note 24, at 12 (“Because most drug courts do not typically monitor the abstinence of participants beyond completion of the program, it is difficult to determine the long-term impact of drug court participation on recidivism, substance abuse, criminal victimization, and other factors that underlie criminal offending.”); Christopher P. Krebs et al., *Assessing the Long-Term Impact of Drug Court Participation on Recidivism with Generalized Estimating Equations*, 91 DRUG & ALCOHOL DEPENDENCE 57, 59 (2007) (“Many drug court evaluations are characterized by short follow-up periods, which in many cases do not extend beyond treatment participation.”).

73 See, e.g., DAVE CRUMPTON ET AL., NPC RESEARCH, COST ANALYSIS OF ANNE ARUNDEL COUNTY, MARYLAND DRUG COURT 19 (2004) (using a 48-month follow-up period), *available at* <http://npresearch.com/wp-content/uploads/AA-DC-Final-Report-01-29-041.pdf>; MICHAEL W. FINIGAN ET AL., NPC RESEARCH, IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS (FINAL REPORT) (2007) (using a 10-year follow up period), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>. By way of comparison, the Commission’s recent study of federal offenders had an eight-year follow-up period. See KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016), *available at* <http://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>.

74 See, e.g., DRUG POLICY ALLIANCE, *supra* note 40, at 10.

75 See Marlowe et al., *supra* note 70, at 1, 4 (“[I]ntensive interventions such as drug court are believed to be best suited for ‘high-risk’ offenders who have more severe criminal propensities and drug-use histories, but may be ineffective or contraindicated for ‘low-risk’ offenders.”); see also Douglas B. Marlowe, Nat’l Drug Ct. Inst., *Targeting the Right Participants for Adult Drug Courts*, Nat’l Drug Court Practitioner Fact Sheet, Feb. 2012, at 2 (“A substantial body of research now indicates which drug-involved offenders are most in need of [drug courts]. These are the offenders who are (1) substance dependent and (2) at risk of failing in less intensive rehabilitation programs. Drug courts that focus their efforts on these individuals—referred to as high-risk/high-need offenders—reduce crime approximately twice as much as those serving less serious offenders.”) (internal citations omitted), *available at* [https://www.ndci.org/wp-content/uploads/Targeting\\_Part\\_I.pdf](https://www.ndci.org/wp-content/uploads/Targeting_Part_I.pdf).

76 CENTER FOR HEALTH CARE EVALUATION, A STRUCTURED EVIDENCE REVIEW TO IDENTIFY TREATMENT NEEDS OF JUSTICE-INVOLVED VETERANS AND ASSOCIATED PSYCHOLOGICAL INTERVENTIONS (2013); ALMQUIST & DODD, *supra* note 57, at 21 (mental health courts).

77 NICOLE L. WATERS ET AL., NAT’L CTR. FOR STATE COURTS, MENTAL HEALTH COURT CULTURE: LEAVING YOUR HAT AT THE DOOR 42 (2009) (“[T]he research on mental health courts has not identified whether the problem-solving approach, as a whole, is effective at addressing the needs of the community and defendants with mental illness, much less which specific techniques are adaptable to the mainstream dockets and which are the driving force behind the effectiveness of this innovation.”); U.S. DEPT’ OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 78 (2005), *available at* <https://www.bja.gov/Programs/Guide-MHC-Design.pdf>.

78 ALMQUIST & DODD, *supra* note 57, at 25.



79 See generally Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIM. JUSTICE 12 (2011), available at [http://ac.els-cdn.com/S0047235210002138/1-s2.0-S0047235210002138-main.pdf?\\_tid=e1ca44aa-720e-11e7-bfaf-00000aab0f6b&acdnat=1501079571\\_22d839641607c7efc9d247889fc10c4e](http://ac.els-cdn.com/S0047235210002138/1-s2.0-S0047235210002138-main.pdf?_tid=e1ca44aa-720e-11e7-bfaf-00000aab0f6b&acdnat=1501079571_22d839641607c7efc9d247889fc10c4e).

80 See MCGUIRE ET AL., *supra* note 52, at 4, 7.

81 See, e.g., NAT'L CTR. FOR STATE COURTS, VIRGINIA ADULT DRUG TREATMENT COURTS: COST BENEFIT ANALYSIS (2012), available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/dtc/resources/virginiadtccostbenefit.pdf>.

82 According to Professors Latessa and Reitler, “There are a limited number of cost-benefit studies, many of which take different approaches. However, the majority of these studies show that drug courts are cost effective.” Latessa & Reitler, *supra* note 64, at 776. See, e.g., NAT'L CTR. FOR STATE COURTS, *supra* note 81, at 59 (“Virginia’s Drug Courts save \$19,234 per person as compared to traditional case processing.”); WASH. STATE INST. FOR PUBLIC POLICY, WASHINGTON STATE DRUG COURTS FOR ADULT DEFENDANTS: OUTCOME EVALUATION AND COST BENEFIT ANALYSIS 1, 10–11 (2003) (finding that, although the state’s drug courts cost more than traditional criminal case processing, the increased benefits resulting from the drug court programs compared to the benefits resulting from traditional case processing outweighed the increased costs), available at [http://www.wsipp.wa.gov/ReportFile/827/Wsipp\\_Washington-States-Drug-Courts-for-Adult-Defendants-Outcome-Evaluation-and-Cost-Benefit-Analysis\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/827/Wsipp_Washington-States-Drug-Courts-for-Adult-Defendants-Outcome-Evaluation-and-Cost-Benefit-Analysis_Full-Report.pdf).

83 See Beth Weinman, National Drug Abuse Coordinator, Fed. Bureau of Prisons, Statement at the U.S. Sentencing Commission’s Symposium of Alternatives to Incarceration: Prison Programs Resulting in Reduced Sentences (July 14, 2008), available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/05\\_FINAL\\_PrisonPrograms.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/05_FINAL_PrisonPrograms.pdf); see also FED. BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS, FISCAL YEAR 2012: REPORT TO THE JUDICIARY COMMITTEE, UNITED STATES CONGRESS, at 3 (Dec. 2012) (providing the same 40% figure), available at <http://docplayer.net/docview/20/478887/#file=/storage/20/478887/478887.pdf>. As of May 2017, approximately 28,000 federal prisoners were participating in residential or non-residential substance use programs in BOP (out of approximately 185,000 total offenders in BOP custody). See Fed. Bureau of Prisons, *Program Fact Sheet* (May 2017), [https://www.bop.gov/about/statistics/docs/program\\_fact\\_sheet\\_20170530.pdf](https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170530.pdf).

84 CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 1–2, 6 (Oct. 2006; revised Jan. 2007), available at <https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>. The BJS report does not indicate the extent to which these three figures overlap.

85 As of May 2017, approximately 9,000 federal prisoners were receiving some type of mental health treatment for a mental disorder while in BOP (out of approximately 185,000 total offenders in BOP custody). See Fed. Bureau of Prisons, Program Fact Sheet (May 2017), [https://www.bop.gov/about/statistics/docs/program\\_fact\\_sheet\\_20170530.pdf](https://www.bop.gov/about/statistics/docs/program_fact_sheet_20170530.pdf).

86 Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, FED. PROB., Sept. 2014, at 41, 45 tbl.1. Their article does not indicate the extent to which these two figures overlap.

87 *Id.* at 46 tbl.2.

88 In addition to substance use, the primary factors in the PCRA are criminal history, antisocial thinking patterns and values, criminal and antisocial peers, dysfunctional family, and lack of gainful employment or education. ADMIN. OFFICE OF U.S. COURTS, OFFICE OF PROBATION AND PRETRIAL SERVS., AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 10 (2011), available at [https://www.uscc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/PCRA\\_2011.pdf](https://www.uscc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/PCRA_2011.pdf).

89 See Cohen & VanBenschoten, *supra* note 86, at 45–46. For instance, 4% of low-risk offenders reported “current drug problems, while 67% of “high” risk offenders reported “current drug problems.” *Id.* at 45. Similarly, 22% of low-risk offenders reported that drug use led to their legal problems, while 80% of high-risk offenders reported that drug use led to their legal problems. *Id.* at 46.

90 See 28 U.S.C. § 3142(c)(1)(B)(x) (condition of release that a defendant “undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose”).

91 See Fed. Bureau of Prisons, Substance Abuse Treatment, [https://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) (discussing BOP’s 12-week non-residential drug abuse treatment program and its nine-monthlong residential drug abuse treatment program, RDAP) (last visited July 26, 2017).

92 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 20 (2012), available at <http://www.gao.gov/assets/650/648123.pdf>.

93 See ADMIN. OFFICE OF THE U.S. COURTS, PROBATION AND PRETRIAL SERVICES OFFICE, OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 42 (2016), available at [http://www.uscourts.gov/sites/default/files/overview\\_of\\_probation\\_and\\_supervised\\_release\\_conditions\\_0.pdf](http://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf).

94        *See infra* notes 133–141 and accompanying text.

95        *See, e.g.*, United States v. K, 160 F. Supp. 2d 421, 426–27 (E.D.N.Y. 2001) (describing the SOS program (referred to as the Special Options Rehabilitation Services (SORS) program)). Until 2013, the original version of the SOS program did not involve a judge-involved “team” approach and, instead, was primarily administered by the Pretrial Services Agency in the district. *Dokmeci*, 2016 WL 915185, at \*5 n.29.

96        U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE FEASIBILITY OF FEDERAL DRUG COURTS 1 (2006), *available at* [https://www.justice.gov/archive/olp/pdf/drug\\_court\\_study.pdf](https://www.justice.gov/archive/olp/pdf/drug_court_study.pdf).

97        *Id.*

98        552 U.S. 38 (2007) (concluding that the district court’s downward variance from a guideline range of 30–37 months imprisonment to a 3-year term of probation was reasonable because of the evidence that the defendant had rehabilitated himself since voluntarily ceasing his involvement in a drug-trafficking conspiracy, including by stopping his use of illegal drugs, obtaining a college degree, and becoming a productive full-time employee).

99        562 U.S. 476 (2011) (affirming as reasonable the district court’s downward variance to 24 months of imprisonment based on the defendant’s successful drug treatment, college education, and employment from 58 months, the point in the Sentencing Table at which the district court would otherwise have sentenced the defendant based solely on his substantial assistance to the government).

100       United States v. Leitch, No. 11-00609, 2013 WL 753445, at \*14 (E.D.N.Y. Fed. 28, 2013).

101       U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

102       *Id.* at 4.

103       *Id.* at 3–4.

104       *See* SECOND REPORT TO THE BOARD OF JUDGES, *supra* note 9, at 4.

105       *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-516, FEDERAL PRISON SYSTEM: JUSTICE HAS USED ALTERNATIVES TO INCARCERATION, BUT COULD BETTER MEASURE PROGRAM OUTCOMES 22 [hereinafter GAO REPORT], *available at* <http://www.gao.gov/assets/680/677983.pdf>.

106 OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, AUDIT OF THE DEPARTMENT'S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION 15 (2016) [hereinafter OIG AUDIT], *available at* <https://oig.justice.gov/reports/2016/a1619.pdf>.

107 Scott-Hayward, *supra* note 11.

108 *Id.* at 8.

109 U.S. DIST. COURT FOR THE DIST. OF S.C., THE BRIDGE PROGRAM: MISSION STATEMENT AND POLICIES 1 (2016) [hereinafter BRIDGE PROGRAM], <http://www.scp.uscourts.gov/Downloads/BRIDGEProgramMissionPolicies.pdf>. The program generally follows the policies and procedures recommended by the National Drug Court Institute of the National Association of Drug Court Professionals. *Id.* at 2.

110 *Id.* at 1.

111 *Id.* at 5.

112 According to Judge Bruce Hendricks, who presides over the BRIDGE program, to be eligible, participants “must have a documented substance abuse addiction problem *that motivated the criminal conduct in question*. If there is any doubt regarding the validity of the drug dependency at issue, the defendant will be referred for a thorough evaluation in order to confirm this requirement—a nexus between drug addiction and the offense of conviction.” Written Statement of Hon. Bruce Hendricks Submitted to the U.S. Sentencing Commission, at 6 (Mar. 2, 2017), <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Hendricks.pdf>.

113 BRIDGE PROGRAM, *supra* note 109, at 4.

114 *Id.*

115 *Id.* at 6, 1, 5.

116 *Id.* at 1; Written Statement of Hon. Bruce Hendricks, *supra* note 112, at 2.

117 BRIDGE PROGRAM, *supra* note 109, at 6–7.

118 *Id.* at 9.

119 *See* Written Statement of Hon. Bruce Hendricks, *supra* note 112, at 13 (“To this point, all BRIDGE graduates have received a noncustodial outcome—probation, a time-served sentence, or, less commonly, full dismissal of their charges.”).

120 *Id.* at 9. One participant died during his or her participation in the program.

121 *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2014) (Tab. 2) (752 cases in FY2014); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2015) (Tab. 2) (642 cases in FY2015); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2016) (Tab. 2) (627 cases in FY2016).

122 *See* U.S. Attorney's Office, C.D. Cal., Conviction and Sentence Alternatives Program (CASA) (updated Jan. 12 2017), <http://www.justice.gov/usao-cdca/conviction-and-sentence-alternatives-program-casa>.

123 U.S. Dist. Court for C.D. Cal., Conviction and Sentence Alternatives (CASA) Program Overview, <https://www.cacd.uscourts.gov/judges-requirements/court-programs/casa> (last visited Aug. 2, 2107).

124 Written Statement of Hon. Dolly Gee to U.S. Sentencing Comm'n, at 2 (Mar. 7, 2017), <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Gee.pdf>.

125 *Id.* at 5.

126 *Id.* at 3.

127 *Id.*

128 *See id.* at 4–5 (“Many CASA participants face considerable prison sentences under the relevant guidelines for their offenses . . . . The plea agreements uniformly include a calculation of the base offense level, but the precise guideline range is contingent on a number of variables, including the calculation of the defendant’s Criminal History Category . . . . Our successful Track 2 participants have a sentencing hearing at which the judge calculates and announces the guidelines range, but imposes the probationary sentence . . . that the parties have agreed upon in their binding plea agreement. The end result of all successful CASA cases is no prison term . . . .”); *see also* Fed. R. Crim. P. 11(c)(1)(A) (providing that charges will not be brought or will be dismissed); Fed. R. Crim. P. 11(c)(1)(C) (agreeing that a specific sentence or sentencing range is the appropriate disposition in the case and binding the court once the court accepts the plea agreement).

129 Written Statement of Hon. Dolly Gee *supra* note 124, at 4–5.

130 *Id.* at 5–6.

131 *Id.* at 6.

132 See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-7 (2014) (Tab. 2) (1,263 cases in FY2014); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-7 (2015) (Tab. 2) (1,078 cases in FY2015); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-7 (2016) (Tab. 2) (964 cases in FY2016).

133 U.S. DIST. COURT FOR THE CENTRAL DIST. OF ILL., PRETRIAL ALTERNATIVES TO DETENTION INITIATIVE...SAVE MONEY, SAVE LIVES 3–4 (n.d.) [hereinafter PRETRIAL ALTERNATIVES DETENTION INITIATIVE] (on file with the Commission).

134 *Id.* at 3.

135 Memorandum of Understanding Between the United States Probation Office and United States Attorney's Office Regarding the Pretrial Alternatives to Detention Initiative, Ch.I Pretrial Services, at I-11 (Oct. 2008) (on file with the Commission).

136 PRETRIAL ALTERNATIVES DETENTION INITIATIVE, *supra* note 133, at 2–6.

137 *Id.* at 4.

138 *Id.* at 4–5.

139 *Id.* at 4.

140 *Id.*

141 See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2014) (Tab. 2) (419 cases in FY2014); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2015) (Tab. 2) (329 cases in FY2015); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2016) (Tab. 2) (259 cases in FY2016).

142 U.S. DIST. COURT (D. MASS.) AND U.S. PROBATION & PRETRIAL SERVICES, RISE PROGRAM PACKET, at 1 (2015) [hereinafter RISE PROGRAM PACKET], *available at* [http://www.map.uscourts.gov/sites/map/files/2017 RISE Program Statement.pdf](http://www.map.uscourts.gov/sites/map/files/2017%20RISE%20Program%20Statement.pdf).

143 U.S. Probation & Pretrial Services Office for D. Mass., R.I.S.E., <http://www.map.uscourts.gov/rise> (last visited Aug. 2, 2017).

144 RISE PROGRAM PACKET, *supra* note 142, at 1–3; Written Statement Hon. Leo Sorokin, *supra* note 9, at 9 (Mar. 15, 2017) (program administers the PCRA and TCUDS), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Sorokin.pdf>.

145 RISE PROGRAM PACKET, *supra* note 142, at 3.

146 *Id.* at 1, 3.

- 147 *Id.* at 4.
- 148 *Id.* at i.
- 149 *Id.* at 6.
- 150 *Id.*
- 151 *Id.*
- 152 Written Statement of Hon. Leo Sorokin, *supra* note 9, at 10.
- 153 *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2014) (Tab. 2) (451 cases in FY2014); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2015) (Tab. 2) (524 cases in FY2015); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-6 (2016) (Tab. 2) (496 cases in FY2016).
- 154 U.S. DIST. COURT FOR E.D. MO., SAIL SENTENCING ALTERNATIVES IMPROVING LIVES PROGRAM PARTICIPANT HANDBOOK 1 (n.d.) [hereinafter SAIL HANDBOOK].
- 155 United States District Court for the District of Missouri Interagency Agreement Sentencing Alternatives Improving Lives (“SAIL”) Program for Oversight of Post-Guilty Plea Diversion Interagency Agreement (SAIL), at 3 (n.d.).
- 156 *Id.* at 2–3.
- 157 *Id.* at 3.
- 158 *Id.*
- 159 *Id.* at 4.
- 160 U.S. Dist. Court for E.D. Mo., Guilty Plea Agreement (Track 1); U.S. Dist. Court for E.D. Mo., Guilty Plea Agreement (Track 2) (on file with the Commission).
- 161 SAIL HANDBOOK *supra* note 154, at 4–6.
- 162 U.S. Dist. Court for E.D. Mo., Guilty Plea Agreement (Track 2), at 3.
- 163 *Id.*
- 164 *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-7 (2014) (Tab. 2) (697 cases in FY2014); SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at S-7 (2015) (Tab. 2) (554 cases in FY2015); SOURCEBOOK

OF FEDERAL SENTENCING STATISTICS, at S-7 (2016) (Tab. 2) (740 cases in FY2016).

165 Memorandum from Attorney General Jefferson Sessions to All Federal Prosecutors regarding Department Charging and Sentencing Policy, May 10, 2017, available at <https://www.justice.gov/opa/press-release/file/965896/download>.

166 See *infra* notes 199–200 and accompanying text.

167 See *Leitch*, 2013 WL 753445, at \*3 (stating, in 2013, that federal alternative court programs such as the POP and SOS programs in the Eastern District of New York were “possible only because” the federal prosecutors in the district were willing to support the programs).

168 Pursuant to 28 U.S.C. § 994(w), federal district courts must send to the Commission the following five documents in all felony and Class A misdemeanor cases: the indictment or other charging instrument, the judgment, the statement of reasons form, the presentence report, and the plea agreement (if applicable).

169 GAO REPORT, *supra* note 105, at 18–19, 35–41 (analysis of certain federal alternative-to-incarceration court programs based on stakeholder interviews and data provided by federal probation offices); OIG AUDIT, *supra* note 106, at 8, 14, 19–30 (analysis of certain federal alternative-to-incarceration court programs based on stakeholder interviews and data provided by district courts).

170 GAO REPORT, *supra* note 105, at 39. By comparison, the total numbers of felony and Class A misdemeanor cases in which offenders were sentenced in 2015 in those three districts were as follows: C.D. Ill. – 329 cases; E.D.N.Y. – 795 cases; C.D. Cal. – 1,078 cases. See U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-3–S-5 (2015).

171 See OIG AUDIT, *supra* note 106, at 25–26 tbl.4 (36 of the sample of 49 participants in PADI had guideline minimums in excess of 36 months; highest guideline minimum in the sample was 210 months); *id.* at 27 tbl.5) 7 of the sample of 13 participants in CASA had guideline minimums in excess of 36 months; highest guideline minimum in the sample was 120 months); *id.* at 28–29 (12 of the 19 participants in the POP/SOS programs had “a median guideline range or mandatory minimum faced” in excess of 36 months; highest sentence faced was 97 months).

172 See *id.* at 25–26 (PADI); *id.* at 27 (CASA).

173 Nearly 9 in 10 federal offenders today receive sentences of imprisonment, and the average sentence of imprisonment is 52 months. See U.S. Sentencing Comm’n, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-28 (Fig. D) & S-31 (Tab. 14).

174 U.S. Sentencing Comm’n, 2016 Datafile, USSCFY16.



175 U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 91, 94 (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

176 See S. REP. NO. 98-225, at 78 (1983), reprinted in U.S.C.C.A.N. 3182 [hereinafter SENATE REPORT]; *id.* at 39–56, 159–81; see also 28 U.S.C. §§ 991(b)(1)(B) & 994(f). The Senate Report is the primary source of legislative history of the SRA. See *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

177 See 28 U.S.C. § 994(c)–(f); see also SENATE REPORT, *supra* note 176, at 75 (“[Without guidelines] [e]ach judge is left to formulate his own ideas about the factors to be considered in imposing sentence and the effect that each factor should have on the sentence imposed. The result is unwarranted sentencing disparities among sentences imposed by different judges.”).

178 28 U.S.C. § 994(c)(2) (directing the Commission to account for the “circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense”); *id.* at § 994(c)(3) (directing the Commission to promulgate guidelines that accounted for “the nature and degree of the harm caused by the offense”); see also SENATE REPORT, *supra* note 176, at 168 (directing that the guidelines should “reflect every important factor relevant to sentencing” and account for “all important variations that commonly may be expected in criminal cases, and that reliably break[] cases into their relevant components and assure[] consistent and fair results”).

179 See 28 U.S.C. § 994(c)(2); *id.* at 994(i); see also SENATE REPORT, *supra* note 176, at 76–77, 78, 91–92, 116, 177–78.

180 See 28 U.S.C. § 991(b)(1)(B) (directing the Commission to avoid unwarranted disparities among “defendants with *similar records* who have been found guilty of similar conduct”) (emphasis added); see also *id.* at § 994(d)(10) (directing the Commission to consider an offender’s “criminal history” in formulating the guidelines); § 994(h)(2) (directing the Commission to require a sentence at or near the statutory maximum for offenders who have been previously convicted “of two or more prior felonies” that were crimes of violence or drug-trafficking offenses); § 994(i)(1) (directing the Commission to “assure that the guidelines specify a sentence to a substantial term of imprisonment for [a defendant who] . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions”); § 994(j) (directing the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense”).

181 28 U.S.C. § 994(d). The Senate Report provided that the “Commission

may conclude, with respect to any of the listed factors, that . . . the factor should not play a role at all in sentencing for a particular purpose . . . [*i.e.*, that such factor] is not relevant to the question of whether [the defendant] should be sentenced to a term of imprisonment, probation, or a fine.” SENATE REPORT, *supra* note 176, at 170–01.

182 SENATE REPORT, *supra* note 176, at 173.

183 *Id.*

184 *See id.* at 40 & n.14. The Narcotic Addict Rehabilitation Act of 1966 appeared in 18 U.S.C. § 4251 et seq., which was repealed by Pub. L. 98–473, title II, § 218(a)(6), 98 Stat. 2027 (1984).

185 The Act provided that most drug addicts charged with committing non-violent federal offenses (other than drug-trafficking offenses not committed to support the defendant’s own addiction) could opt for care under the treatment of the U.S. Surgeon General, with charges held in abeyance, to be dropped if an offender was able to overcome his or her addiction through treatment within three years. *See* 18 U.S.C. § 4251 (repealed). The Act was an example of the “medical model” of criminal justice rehabilitation that prevailed in the pre-SRA federal system. Steven B. Friedman et al., *The Narcotic Addict Rehabilitation Act: Its Impact on Federal Prisons*, 11 CONTEMP. DRUG PROBS. 101, 102 (1982).

186 SENATE REPORT, *supra* note 176, at 173.

187 *See* U.S. SENTENCING COMM’N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 365 (1991) (“Congress ensured incarceration rates would increase under the guidelines as a result of specific and general directives to the Commission in the [SRA] to increase the use of imprisonment for certain classes of offenses and offenders.”); *id.* at 384 (“Congress sent a strong message that sentences for certain types of offenses and offenders would be increased”).

188 *See* Newton, *supra* note 4, at 314–15 (noting that, “in a consistent manner, for several decades before the guidelines went into effect, only around half of federal defendants [in non-petty cases] received sentences of imprisonment”) (citing *Annual Reports* of the Director of the Administration Office of the United States Courts).

189 SENATE REPORT, *supra* note 176, at 76–77, 78, 91–92, 116, 177–78.

190 *Id.* at 59.

191 *See* 28 U.S.C. § 994(j) (“The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than

imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .”).

192      *See Booker*, 543 U.S. at 245.

193      *See Gall*, 552 U.S. at 49.

194      *Freeman v. United States*, 564 U.S. 522, 529 (2011) (“Federal sentencing law requires the district judge in every case to impose ‘a sentence sufficient, but not greater than necessary, to comply with’ the purposes of federal sentencing, in light of the Guidelines and other § 3553(a) factors. . . . The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge’s exercise of discretion.”) (citation omitted).

195      18 U.S.C. § 3553(a)(2) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection [including] the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]”). The Supreme Court has summarized these four primary purposes of sentencing as “retribution, deterrence, incapacitation, and rehabilitation.” *Tapia v. United States*, 564 U.S. 319, 325 (2011).

196      18 U.S.C. § 3553(a)(1).

197      *See* USSG §1B1.1, comment. (backg’d).

198      *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (after *Booker*, the Sentencing Reform Act requires courts “to give respectful consideration to the Guidelines” in deciding what sentence to impose); *see also Gall*, 552 U.S. at 46 (“It is also clear that a district judge must give serious consideration to the extent of any departure [or variance] from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).

199      The original Sentencing Table did not use the term “zones” to describe the sentencing options available in the various cells in the Sentencing Table. The Commission amended the Sentencing Table to add the four “zones” in 1990. USSG, App. C, amend. 462 (effective Nov. 1, 1992).

- 200 *See, e.g.*, USSG, Ch.1, Pt.A.4(d); *see also* USSG §§5B1.1 & 5C1.1.
- 201 *See generally* U.S. SENTENCING COMM’N, FEDERAL SENTENCING: THE BASICS, at 11–19 (2015).
- 202 *See* USSG §1B1.3 (discussing the defendant’s offense conduct, including any “relevant conduct”).
- 203 *See* USSG, Ch.1, Pt.A.3.
- 204 *See, e.g.*, U.S. Probation & Pretrial Servs. Offices for the Dist. of Mass., R.I.S.E., <http://www.map.uscourts.gov/rise> (“Goals of the program include: [p]romoting rehabilitation[;] [p]romoting productive behavior[;] [p]articipants’ accepting responsibility for offense(s) of conviction and their consequence[s;] [r]educing recidivism[;] [m]anaging taxpayer funds/resources wisely[.]”); U.S. Dist. Court for the Dist. of Utah, Utah Alternatives to Conviction Track (U-ACT), <http://www.utd.uscourts.gov/utah-alternatives-conviction-track-u-act> (“The U-ACT program offers participating defendants a creative blend of treatment, sanction alternatives, judicial involvement, and unique incentives to effectively address offender behavior for the purposes of promoting rehabilitation, reducing recidivism, and promoting the safety of our community.”).
- 205 Although ordinarily incapacitation is achieved through incarceration, courts have recognized that probation with certain conditions also can effectively incapacitate some offenders. *See, e.g.*, *United States v. Brewer*, 978 F. Supp. 2d 710, 716 (W.D. Tex. 2013) (“The Court finds the goal of incapacitation is sufficiently achieved by the conditions of probation in this case.”).
- 206 *See United States v. Hayes*, 762 F.3d 1300, 1311 (11th Cir. 2014) (concluding that “[t]he threat of spending time on probation simply does not, and cannot, provide the same level of deterrence as can the threat of incarceration in a federal penitentiary for a meaningful period of time.”) (citation and internal quotation marks omitted).
- 207 18 U.S.C. § 3553(a)(2). In enacting the SRA, Congress intended that “just punishment for the offense—essentially the ‘just deserts’ concept—should be reflected clearly in all sentences; it is another way of saying the sentence should reflect the gravity of the defendant’s conduct.” SENATE REPORT, *supra* note 176, at 75.
- 208 *See supra* note 171 (discussing the offense severity, as measured by guideline ranges, of defendants participating in some of the alternative-to-incarceration court programs); *see also* Written Statement of Hon. Dolly Gee, *supra* note 124, at 3 (noting the defendants convicted of robbery offenses are eligible to participate in the CASA program so long as their robberies did not involve a firearm or infliction of violence); PRETRIAL ALTERNATIVES DETENTION INITIATIVE, *supra* note 133, at 6 (noting over one quarter of PADI participants had faced “statutory mandatory minimum

sentences ranging from 5 to 20 years['] imprisonment,” meaning their offenses necessarily involved a substantial quantity of controlled substances).

209 *See supra* notes 26–27 and accompanying text.

210 *Gall*, 552 U.S. at 59 (“[T]he Guidelines are only one of the factors to consider when imposing sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment.”).

211 *Id.* at 50.

212 *Id.* at 54. In enacting the SRA, Congress recognized that, in appropriate cases, a sentence of probation could satisfy the retributivist purposes of sentencing. *See SENATE REPORT, supra* note 176, at 92.

213 *See* USSG, Ch.5, Pt.H, intro. comment. (“Although the court must consider ‘the history and characteristics of the defendant’ among other factors, *see* 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities, the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.”).

214 *See supra* notes 180–191 and accompanying text.

215 USSG §5H1.4 (Nov. 1987).

216 *See* USSG, App. C, amends. 738 & 739 (effective Nov. 1, 2010). In addition, the word “ordinarily” was removed from section 5H1.4, yet the Commission intended a departure for a treatment purpose to apply only to defendants whose pre-departure sentencing ranges were in Zone C. *See id.*, amend. 739.

217 USSG §5H1.3 (Nov. 1987).

218 USSG §5K2.13 (Nov. 1987).

219 USSG, App. C, amend. 739 (effective Nov. 1, 2010). The policy statement for a “diminished capacity” departure also has been amended to provide:

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the

significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

220 USSG §5K2.13 (Nov. 2016). USSG §5H1.3 (Nov. 2010).

221 USSG §5C1.1, comment. (n.6) (Nov. 2010).

222 See USSG §5C1.1, comment. (n.6). Application Note 6 in §5C1.1 is an exception to the general rule that “[d]rug or alcohol dependence or abuse is not ordinarily a reason for a downward departure” insofar as “[s]ubstance abuse is highly correlated to an increased propensity to commit crime.” USSG §5H1.4 (“Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)”); see also *id.* (“In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose.”). Before Application Note 6 was promulgated, the Courts of Appeals were divided over whether a district court could depart on the ground that a defendant engaged in “extraordinary rehabilitation” by successfully completing a substance abuse program before sentencing. Compare, e.g., *United States v. Normanear*, 63 F. App'x 573 (2d Cir. 2003) (affirming such a downward departure), with *United States v. Holmes*, 112 F. App'x 72, 74 (1st Cir. 2004) (“Based on our precedents, a departure in Holmes’ case for extraordinary pre-sentence rehabilitation would not be warranted. Essentially, the departure was sought on the basis that Holmes has successfully participated for several months in the drug treatment program that the court ordered him to enter. Although he had been a cooperative and enthusiastic participant and had voluntarily participated in addiction recovery groups and obtained employment, those factors do not [permit a downward departure].”).

223 See USSG §5C1.1, comment. (n.6).

224 See *supra* notes 126 & 172 and accompanying text.

225 See USSG, Ch.4, Pt.A intro. comment.

226 28 U.S.C. § 994(i)(1).

227 The Supreme Court has discussed how binding plea agreements fit within the *Booker* process:

Rule 11(c)(1)(C) permits the defendant and the prosecutor to agree that a specific sentence is appropriate, but that agreement does not discharge the district court's independent obligation to exercise its discretion. In the usual sentencing, whether following trial or plea, the judge's reliance on the Guidelines will be apparent, for the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range. . . . Even where the judge varies from the recommended range[,] . . . if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.

Rule 11(c)(1)(C) makes the parties' recommended sentence binding on the court "once the court accepts the plea agreement," but the governing policy statement confirms that the court's acceptance is itself based on the Guidelines. *See* USSG § 6B1.2. That policy statement forbids the district judge to accept an 11(c)(1)(C) agreement without first evaluating the recommended sentence in light of the defendant's applicable sentencing range.

*Freeman*, 564 U.S. at 529 (internal citation omitted).

228 *See* USSG §6A1.1, comment. ("A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing."); *see also* USSG §6B1.1, comment. (recommending that, if a court is willing to consider accepting a plea agreement, "the court defer acceptance of the plea agreement until the court has reviewed the presentence report"); SENATE REPORT, *supra* note 176, at 53 ("Under a sentencing guidelines system, the judge is directed to impose a sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristic. This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.").

229 FED. R. CRIM. P. 32(d)(1)(A)–(C).

230 *See* USSG §1B1.3; *see also* *United States v. Hawkins*, 995 F.2d 221 (5th Cir. 1993) (noting that the PSR revealed relevant conduct which was unknown to the parties at the time of the defendant's guilty plea and which significantly increased the defendant's guideline range).

231 *See, e.g.*, DEFERRED SENTENCING PROGRAM OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, at 1 <http://www.rid.uscourts>.

gov/menu/generalinformation/alternativecriminalcaseprograms/DeferredSentencingProgram10.16.pdf (“The Court will place defendants in the program on a case-by-case basis after a careful analysis to determine suitability for the program. . . . There are no absolute requirements for entry into the Program. The typical candidate, however, will possess the following qualities: little or no prior criminal history; *supportive family, strong community connections*, or other positive influences; and motivated to effect change in his or her life.”) (emphasis added).

232     *See, e.g.*, Written Statement of Hon. Leo Sorokin, *supra* note 9, at 9 (explaining that the screening process for potential participants in the RISE program includes administering the Post Conviction Risk Assessment (PCRA)); U.S. Dist. Court for the N. Dist. of Cal., Conviction Alternatives Program FAQs, <http://www.cand.uscourts.gov/CAP/FAQs>, at 3.4 (“Pretrial Services assesses each candidate’s actuarial risk for noncompliance [in the CAP program] utilizing the Pretrial Risk Assessment (PTRA) tool, which is a twice-validated actuarial tool developed for the Federal Pretrial Services and Probation system. . . . In addition, Pretrial Services utilizes a screening tool which helps identify the presence of Prognostic Risk and Criminogenic Need factors.”). The PCRA includes consideration of risk factors related to education, employment, and offender’s “social networks” (in particular, his marital status, whether he lives with dependents, whether he has “family support,” whether he has “level of home stability,” “financial situation,” whether he belongs to any “pro-social activities”). *See* PCRA Overview, *supra* note 88, at 10–11. The PTRA considers, among other factors, “employment, substance abuse, age, citizenship, education level, and home ownership.” Timothy P. Cadigan et al., *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, FED. PROB., Sept. 2012, at 3, 6.

233     *See* SENATE REPORT, *supra* note 176, at 39–56, 159–81.

234     18 U.S.C. § 3553(a)(6); 28 U.S.C. §§ 991(b)(1)(B) & 994(f).

235     *Leitch*, 2013 WL 753445, at \*14.

236     *Compare, e.g.*, BRIDGE PROGRAM, *supra* note 109, at 1 (“The District of South Carolina’s BRIDGE Program is South Carolina’s federal drug court. It is a voluntary program of at least one year that is designed for criminal defendants who suffer from substance abuse or addiction.”), *with* Written Statement of Hon. Dolly Gee, *supra* note 124, at 3 (noting that certain CASA participants need not have a substance abuse or mental health disorder and, instead, may be admitted to the program if their criminal conduct was “aberrational” or if their criminal conduct appeared related to “lack of education or employment training, or unhealthy associations”); Written Statement of Hon. Leo Sorokin, *supra* note 9, at 9 (explaining that defendants are eligible to participate in the RISE program if they have a “serious history of substance abuse or addiction” or if their 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.”).

237 *Compare, e.g.,* BRIDGE PROGRAM, *supra* note 109, at 4 (“Criminal defendants with a history of violent crime [or] sex offenses . . . are not eligible for the BRIDGE Program.”), *with* Written Statement of Hon. Dolly Gee, *supra* note 124, at 3 (noting that defendants charged with robberies not involving violence or a firearm may participate in the CASA program).

238 *See, e.g., supra* notes 120 & 131 and accompanying text (noting significantly different graduation rates of BRIDGE and CASA programs).

239 *See, e.g.,* U.S. Dist. Court for the N. Dist. of Cal., Conviction Alternatives Program (CAP) for the Northern District of California Operating Agreement Among Agencies, Attachment B, at 1–2 (“The CAP program is focused on individuals whose criminal conduct appears motivated by substance abuse issues *or other underlying causes that may be amenable to treatment through available programs* . . . . Certain defendants have risk factors present that increase the likelihood of recidivism . . . [such as] youth, early onset of substance abuse or delinquency, prior felony convictions, and previous unsuccessful attempts at treatment or rehabilitation. . . . The risk factors can be addressed through effective intervention that seeks to remedy the underlying conditions. The target participants for the Diversion/Deferred Sentencing Court are defendants with these factors who would benefit from effective intervention to address their risk factors and challenges.”), *available at* <http://www.cand.uscourts.gov/CAP> (emphasis added); RISE PROGRAM PACKET, *supra* note 142, at 2 (noting that defendants are eligible to participate in the RISE program if they have a “serious history of substance abuse” or have a “[h]istory [that] reflects significant deficiencies in family support, education, employment, decision-making, or prosocial peer networks, as a result of which the defendant would benefit from a structured program under the close supervision of Probation [Department]”).

240 *See, e.g.,* Deferred Sentencing Program of the United States District Court for the District of Rhode Island, at 1 <http://www.rid.uscourts.gov/menu/generalinformation/alternativecriminalcaseprograms/DeferredSentencingProgram10.16.pdf> (“The Court will place defendants in the program on a case-by-case basis after a careful analysis to determine suitability for the program. The Court has intentionally left the eligibility criteria flexible. There are no absolute requirements for entry into the Program. The typical candidate, however, will possess the following qualities: little or no prior criminal history; supportive family, strong community connections, or other positive influences; and motivated to effect change in his or her life.”).

241 *See, e.g.,* Written Statement of Hon. Dolly Gee, *supra* note 124, at 3–4 (“Each CASA team member has the ability to veto participation.”).

242 The POP and SOS programs in the Eastern District of New York have reported demographic data about its programs' participants as of April 2015. *See* REPORT TO THE BOARD OF JUDGES, *supra* note 9, 16. Notably, of the small number of participants in its POP program as of April 2015, 41.7% were female and 70.8% were White. *See id.* By comparison, looking at all offenders in the Eastern District of New York in 2015, 12.1% were female; 26.3% were White, 31.1% were Black, 36.6% were Hispanic, and 6.0% were other races. (Source: U.S. Sentencing Commission, 2015 Datafile, USSCFY15). SOS demographics were different than POP demographics: 21.2% were female, 3% were White; 66.7% were Hispanic, and 30.3% were Black.

Similarly, the CASA program in the Central District of California has reported its participants' demographic data as of March 2017: 28.4% of participants were White, 15.2% were Black, 10.7% were Asian, and 45.7% were Hispanic, and 50.25% of all participants were female. *See, e.g.*, Written Statement of Hon. Dolly Gee, *supra* note 124, at 12–13 (Attachment). The racial percentages of CASA participants closely resemble the racial percentages of all offenders in the Central District of California (26.2% White, 17.3% Black, 46.6% Hispanic, and 9.8% other races, *see* U.S. Sentencing Comm'n, 2015 Datafile, USSCFY15), yet the percentage of female offenders in the program is significantly higher than the percentage of female offenders in the total population of federal offenders in the district (which is only 17.9%, *see id.*).

243 *See supra* notes 49–50 and accompanying text.

244 *See* 28 U.S.C. § 995(a)(12)(B).

245 OIG AUDIT, *supra* note 106, at 16.

246 GAO REPORT, *supra* note 105, at 49.

247 *See supra* notes 64–82 & accompanying text.

248 *See, e.g.*, Tammatha A. Clodfelter et al., *A Case Study of the Implementation of Staff Training Aimed at Reducing Rearrest (STARR)*, FED. PROB., June 2016, at 30; Laura M. Baber, *Inroads to Reducing Federal Recidivism*, FED. PROB., Dec. 2015, at 3.

249 Charles Michael Johnson & Shana Wallace, *Critical Elements to Consider for Methodologically Sound Impact Evaluations of Drug Court Programs*, DRUG CT. REV., no. 2, 2004 at 35, 35.

250 *See* Written Statement of Hon. Bruce Hendricks, *supra* note 112, at 12; Written Statement of Hon. Dolly Gee, *supra* note 124, at 8.

251 *See, e.g.*, Written Statement of Hon. Bruce Hendricks, *supra* note 112, at 11 (“With respect to recidivism reduction, we have knowledge of the following

subsequent criminal conduct by BRIDGE graduates. Out of 43 graduates: 2 have incurred state DUI charges; 1 committed a series of supervised release violations (having received a time-served sentence) involving drug possession and use, DUI, and failure to notify Probation of police contact regarding a hit and run incident, and her supervised release was revoked for 9 months with no term of supervised release to follow; 1 reoffended by selling illegal drugs, was readmitted to the Program, and successfully completed it for a second time; and 1 tested positive during supervision, admitted to use, was readmitted to the Program, and is a current participant.”); Written Statement of Hon. Dolly Gee, *supra* note 124, at 7 (“With regard to recidivism among CASA graduates, there is currently only anecdotal information. To date, the anecdotal evidence has been very positive as there have been few reports of recidivism among CASA graduates during the past five years.”).

252 See DAVID RAUMA, FED. JUDICIAL CTR., EVALUATION OF A FEDERAL REENTRY PROGRAM MODEL (2016) (randomized control study of five federal districts found that participants in judge-led reentry court programs had higher revocation and rearrest rates than those subject to traditional supervision by federal probation officers); Caitlin J. Taylor, Program Evaluation of the Federal Reentry Court in the Eastern District of Pennsylvania: Report on Program Effectiveness for the First 200 Reentry Court Participants 8 (Jan. 2016) (unpublished report prepared for Federal Probation Department and on file with the U.S. Sentencing Commission) (evaluation of STAR reentry court in E.D. Pa.; finding that 5.5% of reentry court group offenders had supervised release revoked during 18-month study period, while 15.5% of comparison group were revoked; 28.5% of reentry court group were arrested for a criminal offense during the 18-month study period, while 31.0% of the comparison group were arrested; and 64.5% of the reentry court group were employed at end of the 18-month period, while 48.5% of the comparison group were employed at the end of the period); Christopher Lowenkamp & Kristin Bechtel, *An Evaluation of the Accelerated Community Entry Court Program* (2010) (unpublished) (evaluation of reentry court in W. D. Mich.; finding, among other things, that the rearrest rate for the A.C.E. participants after 12 months was 40% compared to a rearrest rate of 58% for the comparison group); Amy Farrell & Kristin Wunderlich, *Evaluation of the Court Assisted Recovery Effort (C.A.R.E.) Program – United States District Court for the District of Massachusetts* (2009) (unpublished) (finding that 6.8% of C.A.R.E. participants were rearrested in a 24-month period compared to 10.8% of a comparison group; 43.2% of C.A.R.E. participants were employed during the study period, while 47.1% of the comparison group; and 51.1% of C.A.R.E. participants had a positive drug test during the study period compared to 40.3% of the comparison group); DANIEL W. CLOSE ET AL., THE DISTRICT OF OREGON REENTRY COURT: EVALUATION, POLICY RECOMMENDATIONS, AND REPLICATION STRATEGIES 94–95 (2008) (“Based on the quantitative analysis of the data from this project, it appears that the comparison group outperformed the treatment groups on multiple, important dimensions. For example, the comparison group underwent less monitoring and supervision and had fewer drug and mental health services

and yet had more employment and fewer sanctions.”), *available at* <http://www.orp.uscourts.gov/documents/ReentryCourtDoc.pdf>.

253 Rowland, *supra* note 8, at 3. Rowland also has observed that “all the federal studies to date, according to the researchers who conducted them, have had significant methodological limitations.” *Id.* at 7.

254 *See, e.g.*, Written Statement of Hon. Bruce Hendricks, *supra* note 112, at 11; Written Statement of Hon. Dolly Gee, *supra* note 124, at 7.

255 A meaningful comparison also would match offenders with traditional dispositions who received treatment for substance use or mental illness while in prison (*e.g.*, BOP’s Residential Drug Abuse Program) or on traditional supervision (as a condition of supervision).

256 ALEHANDRO R. JADAD & MURRAY W. ENKIN, *RANDOMIZED CONTROLLED TRIALS: QUESTIONS, ANSWERS AND MUSINGS* 29 (2d ed. 2007) (“The main appeal of the randomized controlled trial (RCT) . . . comes from its potential to reduce selection bias. Randomization, if done properly, can keep study groups as similar as possible at the outset, so that the investigators can isolate and quantify the effect of the interventions they are studying.”).

257 *See* RAUMA, *supra* note 252, at 17 (noting the need for a randomized control study to main fidelity in program design during the study period).

258 Marlowe et al., *supra* note 70, at 1; *see also* Written Statement of Shannon Carey to U.S. Sentencing Comm’n at 7 (Mar. 15, 2017), *available at* <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Carey.pdf>.

259 *See* NAT’L DRUG COURT INST., NAT’L ASS’N OF DRUG Ct. PROF’LS, *THE DRUG COURT JUDICIAL BENCHBOOK* 14 (2011) (“Clearly, dynamic judicial leadership at the inception of a drug court is desirable, even critical, to the program’s initial success. However, while a powerful judicial presence sustains most drug courts for an initial period, when that innovator judge moves on, the drug court may have great difficulty maintaining its focus, structure, and viability.”), *available at* [https://www.ndci.org/wp-content/uploads/14146\\_NDCI\\_Benchbook\\_v6.pdf](https://www.ndci.org/wp-content/uploads/14146_NDCI_Benchbook_v6.pdf).

260 *See* RAUMA, *supra* note 252 (randomized control study of five federal districts found that participants in judge-led reentry court programs had higher revocation and rearrest rates than those subject to traditional supervision by federal probation officers).

261 *See* Rowland, *supra* note 8, at 8 (discussing criticisms of FJC study).

262 NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *AMERICA’S PROBLEM-SOLVING*

COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 27 (2009) (“Drug courts are highly personality-driven, relying on the active involvement of judges.”), <https://static.prisonpolicy.org/scans/2710.pdf>; *As Specialty Courts Spread, the Jury Stays Out*, CORRECTIONAL NEWS (Feb. 28, 2007) (“The specialty courts tend to be ‘personality-driven’ by aggressive judges . . . . When they get burned out with ‘compassion fatigue,’ their successors may not be able to sustain the momentum.”), <http://correctionalnews.com/2007/02/28/specialty-courts-spread-the-jury-stays-out/>.

263 Written Statement of Hon. Dolly Gee, *supra* note 124, at 6–7.

264 See, e.g., Written Statement of Hon. Bruce Hendricks, *supra* note 112, (Attachment, *Interim Report on the Bridge Drug Court Program*, Aug. 2016, at 17–19).

265 Conversely, the SRA directs the Sentencing Commission to consider the effect of particular sentencing guidelines on prison capacity, an issue which implicates fiscal policy. See 28 U.S.C. § 994(g).

266 See *United States v. Park*, 758 F.3d 193, 198–99 (2d Cir. 2014) (“We agree with the Eighth Circuit that, based on the plain language of § 3553(a), no sentencing factor can reasonably be read to encompass the cost of incarceration. Nor does the statute permit the sentencing court to balance the cost of incarceration against the sentencing goals enumerated in § 3553(a). . . . [T]he cost of imprisonment is not a sentencing factor enumerated in § 3553(a), nor is it an additional factor upon which district courts may rely in deciding whether to impose a term of incarceration under 18 U.S.C. § 3582(a).”) (citing *United States v. Molina*, 563 F.3d 676, 678 (8th Cir. 2009)).

267 See, e.g., Written Statement of Hon. Dolly Gee, *supra* note 124, at 6 (“In the short term, CASA measures success by graduation. . . . In the long term, success will be gauged mainly by cost savings and recidivism rates.”); SECOND REPORT TO THE BOARD OF JUDGES, *supra* note 9, at 7 (“The Pretrial Opportunity Program . . . was inspired by sentencing reforms in the states, which have turned to drug courts to help cope with the rising tide of substance-abusing offenders in their criminal justice systems over the last few decades. The use of drug courts to divert such defendants from prison has produced positive results in the states. They have enhanced the efficacy of treatment and lowered recidivism rates. Drug courts have also produced cost savings, in part because defendants who successfully complete drug court programs are diverted from prison.”); *Leitch*, 2013 WL 753445, at \*11 (“Despite the small scale of existing federal alternatives to incarceration, they already involve defendants in substantial enough numbers to demonstrate their need and their potential for enormous cost savings. In the aggregate, these programs have involved roughly 380 participants. Several of the programs have demonstrated success. The PADI program in the Central District of Illinois, which has been in existence since 2002, has had 67 defendants

graduate successfully from the program, resulting in a successful completion rate of roughly 87%. As of May 2012, the program had helped the government save nearly \$5.5 million. As noted above, the participation of Leitch, McDaniel, and Nunez in POP and the SOS Program in this district has not only turned their lives around, but also avoided a combined \$205,000 in imprisonment expenditures.”).

268 According to Shannon Carey:

*A cost-effectiveness analysis calculates the cost of a program and then examines whether the program led to its intended positive outcomes. For example, a cost-effectiveness analysis of drug courts would determine the investment cost of the drug court program and then look at whether the number of re-arrests were reduced by the amount the program intended (e.g., a 50% reduction in re-arrests compared to those who did not participate in the program).*

*A cost-benefit evaluation calculates the cost of the program and also the cost of the outcomes, resulting in a cost-benefit ratio. For example, the cost of the program is compared to the cost-savings due to the reduction in re-arrests. . . . A cost-benefit analysis provides a greater detail of cost information.*

Written Statement of Dr. Shannon Carey, *supra* note 258, at 5; *see also* Stephanie Riegg Cellini & James Edwin Kee, *Cost Effectiveness and Cost-Benefit Analysis* in HANDBOOK OF PRACTICAL PROGRAM EVALUATION 493–530 (3d ed., 2010; Joseph S. Wholey et al., eds.).

269 Written Statement of Dr. Shannon Carey, *supra* note 258, at 5.

270 Cellini & Kee, *supra* note 268, at 493.

271 *See, e.g.,* Marc Schabses, N.Y. Div. of Crim. Justice Servs., *Cost Benefit Analysis for Criminal Justice: Deployment and Initial Application of the Results First Benefit Model*, App. A, at 1 (2013), [http://www.criminaljustice.ny.gov/crimnet/ojsa/resultsfirst/rf-technical\\_report\\_cba1\\_oct2013.pdf](http://www.criminaljustice.ny.gov/crimnet/ojsa/resultsfirst/rf-technical_report_cba1_oct2013.pdf).

272 *See, e.g.,* Wash. State Inst. for Pub. Policy, *Drug Courts: Adult Criminal Justice: Courts*, at 2 & n.2 (2017), <http://www.wsipp.wa.gov/BenefitCost/ProgramPdf/14/Drug-courts>; *see also* John Roman, *Cost-Benefit Analysis of Criminal Justice Reforms*, NAT'L INST. OF JUST. J., Sept. 2013, at 30, (noting the direct and indirect costs that can be saved by drug courts), <https://nij.gov/journals/272/Pages/cost-benefit.aspx>; Written Statement of Dr. Shannon Carey, *supra* note 258, at 1 (“Drug courts are designed to guide defendants identified as drug- or alcohol-addicted into treatment that will reduce substance dependence

and improve the quality of life for the defendants and their families. Benefits to society take the form of reductions in crime, decreased use of emergency health care services, decreased child welfare involvement, and increased employment, resulting in reduced costs to taxpayers and increased public safety.”).

273 *Cf.* KING & PASQUARELLA, *supra* note 26, at 16 (“The Vera Institute of Justice is . . . concerned that the use of sanctions [on unsuccessful participants] has resulted in participants spending more time in jail than they would have had they never enrolled in the drug court program.”) (citing REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUSTICE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 5 (2000)).

274 *See, e.g.*, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS (May 2013), *available at* [http://www.ncdsv.org/images/Vera\\_a-guide-to-calculating-justice-system-marginal-costs\\_fact-sheet\\_5-2013.pdf](http://www.ncdsv.org/images/Vera_a-guide-to-calculating-justice-system-marginal-costs_fact-sheet_5-2013.pdf).

275 *See* FRANCO, *supra* note 24, at 24 (“Taking drug courts ‘to scale’ refers to the idea of increasing the capacity of drug court programs to provide services to as many eligible substance-abusing defendants as possible.”). Questions of scalability exist in even in the state court systems, where problem-solving courts currently involve only a tiny fraction of potentially eligible offenders, and certainly appear to exist in the federal system as well. THE DRUG COURT JUDICIAL BENCHMARK, *supra* note 259, at 14–15 (“Inherent in the process of institutionalization is the necessity of taking drug courts to scale. Only by treating sufficient numbers of offenders can drug courts take advantage of the economies of scale that will make their programs not only effective, but cost-effective. Small programs cannot help but spend resources inefficiently because they must spread their initial development costs over a small number of cases, thus increasing the average cost per case. Many drug courts have been able to successfully work with a small percentage of offenders with serious substance abuse problems. However, because of the limited number of participants, those programs have not had a substantial or meaningful impact on their community’s substance abuse problem. We are all aware of the resource limitations that impair a drug court program’s ability to reach a large percentage of the eligible population in its community.”); *see also* Rowland, *supra* note 8, at 3 (“[F]ederal problem-solving courts face issues with scalability . . .”).

276 *See, e.g.*, SECOND REPORT TO THE BOARD OF JUDGES, *supra* note 9, at 20 (calculating cost savings based on the the successful participants in the POP and SOS programs’ “median guideline range” prison sentence but for the variance that they in fact received); Written Statement of Hon. Bruce Hendricks, *supra* note 112, Attachment, at 18 (calculating saved costs of imprisonment based on successful BRIDGE program participants’ guideline ranges of imprisonment).

277 Rather than assume a guideline sentence, it may be more accurate

to assume a sentence that is the average sentence imposed for offenders with similar offense characteristics and the same Criminal History Score or sentence that reflects the average extent of departure or variance below the guideline minimum for offenders with similar offense characteristics and the same Criminal History Score.

278 For such an evaluation of benefits, see the reentry court studies cited in note 252, *supra*.

279 See, e.g., *Leitch*, 2013 WL 753445, at \*6 (“The Board of Judges of this district established POP in January 2012. POP was inspired by sentencing reforms in the states, which have turned to drug courts to help cope with the rising tide of drug offenders in their criminal justice systems over the last few decades. The use of drug courts to divert substance-abusing defendants from prison has produced positive results in the states. Drug courts have raised treatment retention rates and lowered recidivism rates among participants. They have also produced cost savings because defendants who successfully complete drug court programs are diverted from prison.”) (citing state drug-court evaluations); *United States v. Baccam*, 414 F.3d 885, 887 (8th Cir. 2005) (Lay, J., concurring) (“Evidence shows that the flexible and pro-active approach of [state] drug courts reduces recidivism rates to less than half of the recidivism rate of those offenders who are simply imprisoned for their drug crimes. Unfortunately, the federal criminal justice system offers no such alternatives for nonviolent, substance-abusing offenders. Given the tremendous economic and human costs of imprisoning nonviolent drug offenders, Congress should seriously consider creating federal drug courts. Federal drug courts would save a significant amount of money for taxpayers.”).

280 See, e.g., Frank O. Bowman, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 739 (1996) (“As a rule, the federal courts do not deal with drunk drivers, petty thieves, barroom brawlers, and similar candidates for probationary intervention. The expression, ‘Don’t make a federal case out of it,’ embodies a truth about federal criminal courts—they are, and should be, largely reserved for serious offenses which, in the event of conviction, merit serious punishment.”).

281 RISE PROGRAM PACKET, *supra* note 142, at *i*.

282 Written Statement of Hon. Dolly Gee, *supra* note 124, at 3 (noting that certain CASA participants may be admitted to the program if their criminal conduct was “aberrational” or if their criminal conduct appeared related to “lack of education or employment training, or unhealthy associations”).

283 See, e.g., AMANDA B. CISSNER ET AL., A STATEWIDE EVALUATION OF NEW YORK’S ADULT DRUG COURTS 45 tbl.5.2 (2013) (comparing sentences imposed on drug court study group and comparison group; vast majority of both groups received non-prison sentences, *i.e.*, probation or short jail sentences), *available at*



<http://www.urban.org/sites/default/files/publication/23826/412867-A-Statewide-Evaluation-of-New-York-s-Adult-Drug-Courts.PDF>.

284 See Fed. Bureau of Prisons, *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, <https://www.justice.gov/archives/prison-reform> (last visited July 31, 2017) (“The Federal Bureau of Prisons is undertaking sweeping reforms designed to reduce recidivism and strengthen public safety. By focusing on evidence-based rehabilitation strategies, these reforms touch virtually every aspect of the federal prison system, from an inmate’s initial intake to his or her return to the community. The reforms are targeted to address the core behavioral issues that result in criminality, with the goal of reducing the likelihood that inmates re-offend either while incarcerated or after their release.”); see also BRONNER GROUP, LLC, *FEDERAL BUREAU OF PRISONS EDUCATION PROGRAM ASSESSMENT: FINAL REPORT* (2016), available at <https://www.justice.gov/archives/dag/page/file/914026/download>; BOSTON CONSULTING GRP., *REDUCING RECIDIVISM THROUGH PROGRAMMING IN THE FEDERAL PRISON POPULATION* (2016), available at <https://www.justice.gov/archives/dag/page/file/914031/download>.

285 Rowland, *supra* note 8, at 11–12; see also Laura M. Baber, *Inroads to Reducing Federal Recidivism*, FED. PROB., Dec. 2015, at 3.

286 Scott-Hayward, *supra* note 8. Certain proponents of federal alternative-to-incarceration court programs have contended that such programs can “do a better job than traditional supervision of treating their participants’ dependence on drugs.” *Dokmeci*, 2016 WL 915185, at \*3. That proposition has not been empirically tested to date.

287 See Rowland, *supra* note 8, at 4 (“An important point to be made in the analysis is that the federal programs are modeled after those developed in the state and local courts. The probation and parole systems in those jurisdictions historically have been underfunded and associated with recidivism rates two or three times those of the federal system.”). Rowland further observes that, “[t]he lower recidivism baseline makes it difficult for federal problem-solving courts to produce significant reductions.” *Id.* at 12.

288 See KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENTENCING COMM’N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 15 (2016).



## VII. Appendix

### *Known Existing Federal Alternative-to-Incarceration Court Programs\**

<b>District</b>	<b>Court Program</b>	<b>Court Program Type</b>
Central District of California	Conviction and Sentencing Alternatives Program (CASA)	Generic Alternative to Incarceration
Northern District of California	Diversion/Deferred Sentencing Court	Generic Alternative to Incarceration
Southern District of California	Alternative to Prison Sentence Program (APS)	Youthful Defendant Program
District of Connecticut	Support Court	Drug Court
Central District of Illinois	Pretrial Alternatives to Detention Initiative (PADI)	Drug Court
Northern District of Illinois	Sentencing Options that Achieve Results (SOAR)	Generic Alternative to Incarceration
District of Massachusetts	RISE	Generic Alternative to Incarceration
Eastern District of Missouri	SAIL Program	Generic Alternative to Incarceration
District of New Hampshire	LASER Docket	Drug Court
District of New Jersey	Pretrial Opportunity Program (POP)	Drug Court
Eastern District of New York	Special Options Service Program (SOS)	Youthful Defendant Program
	Pretrial Opportunity Program (POP)	Drug Court
Southern District of New York	Young Adult Opportunity Program	Youthful Defendant Program
Southern District of Ohio	Special Options Addressing Rehabilitation (SOAR)	Youthful Defendant Program
District of Rhode Island	Deferred Sentencing Program	Generic Alternative to Incarceration
District of South Carolina	BRIDGE Program	Drug Court
District of Utah	Utah Alternatives to Conviction Track (U-ACT)	Generic Alternative to Incarceration
	Veterans Court	Veterans
District of Vermont	Rutland Drug Court	Drug Court

\*Modified from the Appendix in Scott-Hayward, *supra* note 11.



