Statement of David Patton
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Before the Charles Colson Task Force on Federal Corrections
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Chairman Watts, Vice-Chairman Mollohan, and Members of the Task Force, thank you for inviting me to discuss challenges facing the federal criminal justice system and opportunities for reform on behalf of the Federal Public and Community Defenders. Our offices serve 91 of the 94 federal judicial districts. Over 80 percent of federal defendants require appointed counsel, and we represent the majority of these defendants.

I. Background on the Road to Mass Incarceration: Federal Drug Sentences

Over the past 30 years, the single biggest driver of the vast increase in the federal prison population has been the proliferation of mandatory minimum sentences and rigid sentencing guidelines, particularly those relating to drug offenses. In 1986, Congress began the war on drugs in earnest. It enacted mandatory minimum sentences of five and 10 years based on certain quantities of drugs chosen in what one congressional staffer at the time called a political "bidding war."[1] According to Congress, the five-year mandatory minimum would apply to "managers of the retail traffic" and the 10-year mandatory minimum would apply to "kingpins."[2] If the defendant had a prior "felony drug offense," no matter how minor or how old, and the prosecutor exercised her sole discretion to charge it, the mandatory minimum would double or increase to mandatory life. The Department of Justice (DOJ) assured Congress that prosecutors would only use a prior conviction enhancement for "hardened professional criminals."[3]

The Sentencing Commission, which was supposed to develop guidelines based on its own independent research and data, insulated from politics,[4] based the drug guidelines instead on politics. It not only matched the guidelines to the mandatory minimums at the quantity levels Congress set, but extrapolated above, between and below those two quantities at 17 different quantity levels.

As it turned out, DOJ did not exercise restraint in its use of mandatory minimums or its strict support for guideline sentences, and those severe sentences were routinely applied to low-level, non-violent offenders. Over the years, only four to seven percent of drug offenders played any kind of aggravated role, and most judges and lawyers would say they never once saw a "kingpin." Only .7% of drug offenders used, threatened to use, or directed the use of violence since the Commission started reporting that statistic. But *all* drug offenders are subject to mandatory minimums, or guidelines that were based on mandatory minimums even though they were meant to apply only to high-level dangerous offenders. Since mandatory minimums were enacted in 1986, and the sentencing guidelines went into effect in 1987, the federal prison population has grown by over 500 percent.[5]

These policies and practices also led to stark racial disparities. As the Commission recently reported, "[m]andatory minimums, and the existing provisions granting relief from them," i.e., safety valve and cooperation, "impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups."[6] In 2010, 63.7%

of White offenders received relief from mandatory minimums, while only 39.4% of Black offenders received relief.[7] In 2012, Black offenders comprised 26.3% of drug offenders, but 35.2% of drug offenders who got no relief.[8] The Commission concluded that the only solution is for Congress to reduce the length of mandatory minimum drug penalties.[9]

II. Legislative Solutions

We oppose mandatory sentencing in any form. Mandatory sentencing does not lead to uniformity as proponents argue; rather, it shifts the power to determine guilt and punishment from judges and juries to prosecutors, and leads inevitably to greater and greater unwarranted severity and unjustified disparity.[10] Like the Judicial Conference, we believe that mandatory minimums should be repealed.[11] Short of that, we join bipartisan members of Congress, the Department of Justice, and the Sentencing Commission in supporting the Smarter Sentencing Act (S. 502 and H.R. 920). The Act would cut most mandatory minimums for drug offenses in half, cut mandatory life to 20 or 25 years, make the Fair Sentencing Act retroactive, expand the safety valve to Criminal History Category II, and direct the Commission to revise the guidelines accordingly. By all accounts, this legislation would result in at least $3 billion in cost savings in the first 10 years.[12]

We also support the Justice Safety Valve Act (S. 353 and H.R. 706), another bipartisan measure, which would provide that "the court may impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of" 18 U.S.C. § 3553(a). This would complement the Smarter Sentencing Act.

We suggest additional statutory changes, set out in detail in Exhibit A:

- Narrow the definition of "felony drug offense" to exclude prior convictions for simple possession, misdemeanors, stale convictions, and dispositions that did not result in a conviction in state court.
- Change the powder-to-crack cocaine ratio from 18:1 to 1:1.
- Fix the safety valve by eliminating the counterproductive cooperation requirement, and by clarifying that it applies to defendants convicted of all federal drug offenses.
- Expand the safety valve to low-level, non-violent offenders subject to non-drug-related mandatory minimums.
- Address disparities and excessive penalties that result from inclusion of the weight of an inactive "mixture or substance."
- Revise mandatory minimums for accidental overdoses.
- Eliminate the "stacking" provision under 18 U.S.C. § 924(c), and reduce the mandatory minimum for a "second or subsequent conviction."
- Revise 18 U.S.C. § 924(e) to require a prior conviction to have been a felony under the law of the convicting jurisdiction, to add a staleness limitation, and to eliminate the residual clause.

Finally, we suggest that, as in many states, a substantial portion of the cost savings be reinvested in drug treatment and other evidence-based strategies that increase public safety.

III. Sentencing Commission Reforms

The mandatory guidelines system contributed even more to over-incarceration than mandatory minimums because the guidelines apply to all cases and are often more severe than mandatory minimums in cases where both apply.

The Commission made the guidelines far more severe than Congress required, and in some ways directly contrary to congressional directives. For example, though not required by statute to do so, the Commission linked guideline ranges for drug offenses to the two mandatory minimum punishment levels specified in the Anti-Drug Abuse Act of 1986, added two severity levels to induce defendants to "plead guilty or otherwise cooperate with authorities," and spread the quantity-based punishment scheme across seventeen levels. The Commission also created a severe guideline for third-time offenders (the "career offender" guideline), as directed by Congress, but much broader in scope than Congress required. The Commission created a radical "relevant conduct" rule that requires judges to calculate the guideline range based on separate uncharged, dismissed, and acquitted crimes at the same rate as if conviction had been obtained. The Commission ignored Congress's directive to recommend probation for first offenders not convicted of a violent or otherwise serious offense, and instead required imprisonment in the vast majority of cases, contrary to Congress's intent that probation and intermediate sanctions be broadly available.

Why did this happen? "[T]he Sentencing Commission was a highly politicized agency from the outset."[13] Many of its actions were based on perceived "signals" from Congress or private requests from the Department of Justice, and as one Commissioner put it, "overtly political and inexpert."[14] Until the Supreme Court gave judges authority to openly disagree with the guidelines, nearly all of the Commission's amendments increased the severity of punishment or restricted judicial departures, many in response to congressional directives, but most initiated by the Commission itself, frequently at the instance of the Department of Justice.[15]

Fortunately, eighteen years after the Guidelines went into effect, the Supreme Court held that they must be treated as advisory only. As a result, the percentage of sentences below the guideline range has increased significantly.[16] And as a result of these public statistics and public judicial feedback, the Commission has slowed down on raising guideline ranges, and has reduced them in some respects, most notably by reducing ranges for drug offenses by two levels and making the amendment retroactive. But efforts to convince the Commission to reverse the choices noted above have been otherwise unsuccessful. This matters because judges still use the guidelines as the "starting point" from which to vary, either because the Supreme Court said they should or because of a psychological "anchoring effect." Thus, average sentences track the average guideline range over time,[17] and average sentence length for all cases is only about 12-13 months below the average guideline range.[18]

We therefore make specific suggestions for sentencing guidelines reform in Exhibit B. While these are framed as congressional directives, the Commission could make these changes without a congressional directive.

IV. Presentence Alternative to Incarceration Programs

State drug courts have been conclusively shown to reduce relapse rates, increase treatment retention rates, lower recidivism rates,[19] and produce cost savings by diverting defendants who successfully complete drug court programs from prison.[20] Alternative to Incarceration courts (ATIs) are relatively new to the federal system. Currently, there are active ATI programs in fifteen districts, and seven other districts have expressed interest or are in the process of implementing an ATI program. These are judge-involved intensive supervision programs that can result in a sentence of probation or a shorter prison sentence, reduction of charges from a felony to a misdemeanor, or dismissal of charges. The report attached as Exhibit C at pp. 45-51 describes about a dozen federal ATI programs.

The federal ATI programs have not yet been comprehensively evaluated because they are too new and the number of defendants in any one district too small. However, preliminary discussions are underway about how to create a national database, and numbers more amenable to study will result as more ATI programs are established around the country.

Federal ATI programs are likely to show even greater benefits than re-entry programs. First, the incentive to modify behavior is greater. While successful completion of re-entry court can reduce a term of supervised release by one year, successful completion of an ATI program allows a person to avoid (or at least shorten) a prison sentence and can result in dismissal of charges altogether. Second, the cost savings are greater. Reducing a term of supervised release by one year saves a little over $3,000.[21] Avoiding one year of prison saves over $30,000.[22] Avoiding a four-year prison term saves over $120,000. Both types of programs save the cost of revocation and re-incarceration, and costs associated with recidivism.

There are two pre-sentence, judicially supervised ATI programs in the Eastern District of New York. The Special Options Services (SOS) program is for defendants under the age of 26 who are charged with non-violent crimes. The Pretrial Opportunity Program (POP) is for defendants of any age who have a documented history of substance abuse. Participants in both programs are intensely supervised and must engage in drug treatment, educational programs, vocational training, life skills management, or any other court-ordered program. Pro bono lawyers, who attend regular meetings, provide assistance, consultation, and legal representation on issues such as housing and child support. Participants meet monthly as a group with a judge, a magistrate judge, a Pretrial Services officer, and a post-sentence Probation officer. The group meetings address each participant's progress and problems during the preceding month and goals for the upcoming month. Participants receive support and motivation from each other and from the judges. Direct and regular judicial involvement is an important feature of the program.

To successfully complete the program, a participant must remain drug-free and participate in monthly meetings for twelve consecutive months, must obtain a GED if s/he does not have a high school diploma or GED, and must seek and obtain employment. While most participants enter guilty pleas before they enter the program, this is not a prerequisite. Further proceedings are adjourned for at least a year by agreement of the participant and the U.S. Attorney's Office. When a participant is nearing successful completion and the sentencing date approaches, defense counsel negotiates with the government. In some cases, the government dismisses the charges completely, or reduces a felony to a misdemeanor. In most cases, participation is taken into account in determining whether the participant

will be sentenced to prison, and if so, for how long. As of April 2014, one graduate had charges dismissed contingent on compliance with conditions for 18 months, six were sentenced to probation, one was sentenced to two months' time served and a term of supervised release, and one was sentenced to 12 months imprisonment and a term of supervised release. Sanctions are imposed for violations of bail conditions or program rules, but not necessarily revocation of release or termination from the program. Only four (of 47 as of April 2014) had had bail revoked or were otherwise unsuccessfully terminated from the program.

For the nine graduates as of April 2014, the cost savings from avoidance of incarceration under a guidelines sentence was estimated to be $704,000-$767,000. The CASA program in the Central District of California, which is analogous to the POP and SOS programs, estimated that the first 34 graduates saved taxpayers $984,232 in the first year, and would save $3.94 million over the course of four years, based on avoidance of incarceration alone. "The costs would hardly have ended there, for each defendant would have emerged from prison jobless and facing all the collateral consequences of a felony conviction."[23] The costs of caring for their families had they been incarcerated rather than employed, lost tax revenues, and the costs of recidivism were also avoided. Estimated cost savings from other ATI programs are noted in Exhibit C at pp. 45-51.

We also have two STAR courts. These are post-sentence drug courts, and one of them constitutes an alternative to incarceration at sentencing. These programs are described in Exhibit C at 52-54. As of mid-February 2014, 101 people had graduated, which saved over $2 million through avoidance of prison terms, shorter prison terms, and shorter supervised release terms.

V. Prison Reform

We have carefully studied bills that have been introduced that would allow certain prisoners to be released early by earning time credits, most notably the CORRECTIONS Act (S. 467). Unfortunately, the system described in that bill would tie the possibility of early release to risk assessment scores. Over half the prison population would not be allowed to earn time credits. Only prisoners classified as "low risk" by a risk assessment instrument could use time credits; those classified as "moderate risk" could use them in a limited way and only if their risk score had declined; prisoners classified as "high risk" could not use time credits at all.

As explained in detail in the Federal Defender Analysis of CORRECTIONS Act (S. 467) attached as Exhibit D,[24] we strongly oppose this approach. In brief, it would amplify the unwarranted racial and socioeconomic inequality that has long afflicted federal sentencing. It would deny early release based on risk assessment instruments that incorrectly classify people as high risk about half the time, and that misclassify racial minorities more often than white people. It is contrary to evidence-based practices and contrary to its stated goal of enhancing public safety. It would be costly and labor-intensive, and any cost savings would not be seen for a decade, if ever. The system described in the bill is not used in any state correctional system, is untested, and is based on assumptions that the available evidence shows to be wrong. And it would be unconstitutional in a variety of ways, including that inmates would have no right to challenge any outcome administratively or in court, while prosecutors would have the right to challenge an outcome favorable to the inmate.

There is a simple, cost-effective, and fair approach that Congress should adopt instead. It should provide support for the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn and use time credits up to a certain percentage of the sentence imposed, so long as they also comply with disciplinary rules. Under this approach, individuals would earn reductions in their prison sentences, taxpayer dollars would be saved, and public safety would be enhanced. This approach has been advanced by DOJ and was reported out of the Senate Judiciary Committee in the 112th Congress. It would award the same number of credits and percentage of the sentence imposed to all prisoners (except those with more than one conviction for an offense involving rape or who have been convicted of a sex offense against a minor) who successfully participate in programs demonstrated to reduce recidivism, and comply with disciplinary regulations.[25]

BOP currently provides programming that has been proven to reduce recidivism,[26] and to be cost-effective.[27] But many of these programs have long waiting lists and cannot accommodate all who need them. For example, even after BOP added new slots from 2009 to 2011, the residential drug abuse treatment program (RDAP) still has long waiting lists, thus constraining BOP's ability to admit participants early enough to allow a full year reduction for completing the program.[28] Likewise, there are long waiting lists for non-residential drug treatment, drug education, literacy programs, the Life Connections and Threshold programs, and perhaps most important, meaningful work.[29] Federal Prison Industries (FPI) jobs reduce recidivism more than any other program, particularly for young minority inmates who are at the greatest risk of recidivism, by giving them marketable job skills.[30] But because FPI must generate operating revenue to remain a self-sustaining program, and has had to compensate for declining revenues and earnings in recent years, as of June 2012, it employed "7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population."[31] Support for the development of meaningful work opportunities, as well as other recidivism-reducing programs, is clearly needed.

My colleague Leigh Skipper is providing other suggestions for prison reform.

Thank you again for the opportunity to appear before you.

[1] Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, Wash. Post, Nov. 4, 1990, at C1, C2 (quoting Eric Sterling, counsel to the House Subcommittee on Crime at the time).

[2] U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002); *see also* 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) ("For the kingpins … the minimum term is 10 years. … [F]or the middle-level dealers … a minimum term of 5 years."); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[3] *Kupa v. United States*, 976 F. Supp. 2d 417, 419 (E.D.N.Y. 2013).

[4] *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

[5] *See* Bureau of Prisons, Statistics (208,859 as of April 30, 2015), http://www.bop.gov/about/statistics/population_statistics.jsp; *id*., Past Inmate Population Totals (40,330 in 1985), http://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.

[6] U.S. Sent'g Comm'n, Statement for the S. Jud. Comm. Hr'g "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," at 3 (Sept. 18, 2013).

[7] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 159.

[8] U.S. Sent'g Comm'n, Statement for the S. Jud. Comm. Hr'g "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences," at 4 (Sept. 18, 2013).

[9] *Id*. at 11.

[10] *See* Statement of David E. Patton, Exec. Dir., Fed. Defenders of New York, House Judiciary Committee's Over-Criminalization Task Force: "Agency Perspectives," at 3-5 (July 11, 2014) (attached as Exhibit E) (describing how prosecutors use mandatory minimums as leverage to coerce low-level drug offenders to plead guilty or punish them if they do not); *see also Kupa v. United States*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013) (describing one scenario in detail).

[11] Testimony of Hon. Irene M. Keeley Presented to the Charles Colson Task Force on Federal Corrections on January 27, 2015 ("For sixty years, the Judicial Conference has opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.").

[12] The Congressional Budget Office estimates that the Smarter Sentencing Act would result in a net savings of $3 billion: $4 billion saved through reduced incarceration less $1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in $3.426 billion in cost savings and another $3.964 billion in cost aversions. *See* Potential Impact & Cost Savings: The Smarter Sentencing Act, http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf. Urban Institute estimates $3.258 billion in cost savings. Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 3-4 (2014), http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf.

[13] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 765 (2005)); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) ("Some

compromises were forced upon the Commission... by the fact that the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a 'political' body."); Michael Tonry, *Federal Sentencing Can Be Made More Just, if the Sentencing Commission Wants to Make It So*, 12 Fed. Sent'g Rep. 83, 83 (1999) (noting that the Commission "chose... to view the Department of Justice and conservative members of Congress as its primary constituency," while "federal judges were not well-integrated into the federal [guideline] development process").

[14] *See* Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989) (Department's ex officio representative convinced four of six Commissioners to increase fraud penalties with a "fallacious" argument "that recent congressional enactments had given oblique 'signals' to the Commission" to do so and "despite the absence of any empirical proof that an increase would improve the effectiveness of sentencing"); Michael K. Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 Fed. Sent'g Rep. 451, 453 (1989) (quoting Commissioner Breyer as warning that "this [Commission] will not last if the answer to the question 'How did you choose that level?' is that what happened was seven people sat around in a room and they decided on the basis of what they thought was somehow appropriately severe" (alteration in original)).

[15] *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005) ("[T]he power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice."). *See also* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 221 (2005); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1025 (2001) (noting that had the Commission "developed a guidelines system based upon coherent principles, then Congress may not have perceived the need to intervene so frequently and in such minute detail"); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 Buff. Crim. L. Rev. 1043, 1044, 1103-04 (2003) (contending that "the Commission's failure to confront sentencing purposes" has rendered it a "weak institution" susceptible to political influence and "Congressional meddling" and without "independent legitimacy").

[16] *Compare* U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.N (30.3% government sponsored, 21.4% non-government sponsored) *to* U.S. Sent'g Comm'n, 2005 Sourcebook of Federal Sentencing Statistics (pre-*Booker*), tbl.27A (24.1% government-sponsored, 4.3% non-government-sponsored).

[17] U.S. Sent'g Comm'n, Preliminary Quarterly Data Report: 1st Quarter Release, figs. C-H (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2015_1st_Quarterly_Report.pdf.

[18] *Id.*, fig. C.

[19] *See, e.g.,* Rossman et al., Urban Institute, The Multi-Site Adult Drug Court Evaluation: Executive Summary 1 (2011) (concluding from a comprehensive study of drug courts around the country that they produce "significant reductions" in drug relapse and criminal behavior); Vera Institute of Justice, Do Drug Courts Save Jail and Prison Beds? 6 (2000) ("[T]he body of literature on recidivism is now strong enough ... to conclude that completing a drug court program reduces the likelihood of future arrest—at least within the first two years."); Steven Belenko, Natl Center on Addiction & Substance Abuse at Columbia Univ., Research on Drug Courts: A Critical Review, 2001 Update 7 (2001) ("Drug courts have ... provided intensive, long-term treatment services to offenders with long histories of drug use and criminal justice contacts, previous treatment failures, and high rates of health and

social problems.... Drug use and criminal activity are relatively reduced while participants are in the program."); West Huddleston & Douglas B. Marlowe, 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 9 (2011) ("Seven meta-analyses conducted by independent scientific teams all concluded that Adult Drug Courts significantly reduce crime, typically measured by fewer arrests for new offenses and technical violations. Recidivism rates for Drug Court participants were determined to be, on average, 8 to 26 percentage points lower than for other justice system responses. The best Drug Courts reduced crime by as much as 45 percent over other dispositions.") (internal citations omitted); Douglas B. Marlowe et al., A Sober Assessment of Drug Courts, 16 Fed. Sent'g Rep. 153, 153 (2003) ("We know that drug courts outperform virtually all other strategies that have been attempted for drug-involved offenders."); Rempel et al., Center for Court Innovation, The New York State Adult Drug Court Evaluation: Policies, Participants and Impacts (2003) (concluding from a study of eleven drug courts in New York that they reduce post-arrest and post-program recidivism).

[20] *See, e.g.,* Huddleston & Marlowe, *supra* note 19, at 10 ("Drug Courts have proven to be highly cost-effective.... These savings reflected direct and measurable cost-offsets to the criminal justice system resulting from reduced re-arrests, law enforcement contacts, court hearings and the use of jail or prison beds. When indirect cost off-sets were also taken into account, such as savings from reduced foster care placements and healthcare service utilization, studies have reported economic benefits ranging from approximately $2 to $27 for every $1 invested. The result has been net economic benefits ranging from approximately $3,000 to $13,000 per Drug Court participant.") (internal citations omitted); Rossman et al., *supra* note 19, at 8 ("Drug courts save money through improved outcomes, primarily savings to victims from significantly fewer crimes, re-arrests, and days incarcerated ...."); Do Drug Courts Save Jail and Prison Beds?, *supra* note 19, at 6 ("The case for savings is compelling.").

[21] The cost of one year of supervision by a probation officer in fiscal year 2013 was $3,162.03. *See* Memorandum from Matthew G. Roland, Admin. Office of the U.S. Courts, to Chief Pretrial Services Officers and Chief Probation Officers on Cost of Incarceration and Supervision (June 24, 2014).

[22] The annual cost of incarceration in fiscal year 2014 was $30,619.85. *See* 80 Fed. Reg. 12523, Bureau of Prisons, Annual Determination of Average Cost of Incarceration (Mar. 9, 2015).

[23] *United States v. Leitch*, 2013 WL 753445 *2 (E.D.N.Y. 2013).

[24] This report is also available at http://www.fd.org/docs/select-topics/rules/federal-defender-analysis-of-corrections-act-(s-467).pdf?sfvrsn=4.

[25] *See* Second Chance Reauthorization Act of 2011, S. 1231, 112th Cong., § 4(g)(1) (2011). We agree with this general approach, but particularly if mandatory minimums are not reduced, would not agree with the limit on the amount of credit. It would limit the maximum total reduction to 33% of the sentence imposed, including credits for program participation, good time credits for compliance with disciplinary regulations, and any reduction for participation in the residential substance abuse treatment program (RDAP). Since good time credit would be 15% under Section (f) of the bill, a prisoner would earn only 18% off the sentence imposed for participating in programs, and less (or in some cases nothing) if he also participated in RDAP.

[26] "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." *See* Statement for the Record of Charles E.

Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, Rising Costs: Restricting Budgets and Crime Prevention Options at 3-4 (Aug. 1, 2012).

[27] The benefit-to-cost ratio for residential drug abuse treatment is as much $2.69 for each dollar invested; $5.65 for adult basic education; $6.23 for correctional industries; and $7.13 for vocational training. *Id.*

[28] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743 at 69-73 (Sept. 2012), http://www.gao.gov/assets/650/648123.pdf.

[29] *Id*. at 73-75.

[30] Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp. Inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release compared to similarly situated inmates who did not participate, and are 14% more likely than non-participants to be employed 12 months following release from prison. "Work programs especially benefit young minorities who are at the greatest risk for recidivism." *See* FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

[31] U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates*, at ii, 1 (2013).

EXHIBIT A
Statutory Reforms

Statutory Reforms

1) Narrow the definition of "felony drug offense"

The drug trafficking statute, 21 U.S.C. § 841(b)(1)(A) & (B) currently doubles the mandatory minimum or requires mandatory life if the prosecutor files an information under 21 U.S.C. § 851 based on one or more "felony drug offenses." The Smarter Sentencing Act would reduce, but not eliminate, these enhancements.

A "felony drug offense," defined as "an offense that is punishable by imprisonment for more than one year … that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," 21 U.S.C. § 802(44), includes:

- simple possession of drugs,[1] which is not a felony under federal law[2]
- misdemeanors in states where misdemeanors are punishable by more than one year, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont
- deferred adjudications and diversionary dispositions where the defendant was not considered to have been "convicted" in state court[3]
- convictions (and other dispositions) no matter how old

The Sentencing Commission has recommended that Congress reduce both "the severity and scope" of "Felony drug offense" enhancements because they apply too broadly and are used in a disparate manner.[4]

Proposed Solution: Amend the definition of "prior conviction for a felony drug offense" to exclude simple possession (as under 18 U.S.C. § 924(e)(2)(A)[5]), offenses that are misdemeanors

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[1] *See Lopez v. Gonzalez*, 549 U.S. 47, 54 & n.4 (2006); U.S. Sent'g Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 353 (2011) [2011 USSC Report].

[2] *See* 21 U.S.C. § 844(a).

[3] *See United States v. Rivera-Rodriguez*, 617 F.3d 581, 609-10 (1st Cir. 2010); *United States v. Meraz*, 998 F.2d 182, 183-84 (3d Cir. 1993); *United States v. Campbell*, 980 F.2d 245, 251 (4th Cir. 1992); *United States v. Cisneros*, 112 F.3d 1272, 1281-82 (5th Cir. 1997); *United States v. Graham*, 315 F.3d 777, 783 (7th Cir. 2003); *United States v. Ortega*, 150 F.3d 937, 948 (8th Cir. 1998); *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007); *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013); *United States v. Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995).

[4] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 111-13, 352-53, 368.

[5] 18 U.S.C. § 924(e)(2)(A) defines a "serious drug offense" as a federal offense under 21 U.S.C. § 801 et seq., 21 U.S.C. § 951 et seq., or chapter 705 of title 46 "for which a maximum term of imprisonment of ten years or more is prescribed by law," or an offense under state law "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in

under state law (as under 21 U.S.C. § 802(13)[6]), and dispositions that did not result in a conviction in state court. Require a limit on remoteness of at most ten years, and require the sentence imposed to have been more than one year.

This could be accomplished by amending 21 U.S.C. § 802(44) as follows:

> The term "prior conviction for a felony drug offense" means a conviction entered within [five][ten] years of the defendant's commencement of the instant offense for a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A), for which a sentence of imprisonment exceeding one year was imposed. A disposition that did not result in a conviction under the law of the jurisdiction in which the proceedings were held, or for any conviction that has been expunged, vacated, set aside or for which the person has been pardoned or has had civil rights restored, is not a conviction under this subsection.

2) Change the powder-to-crack cocaine ratio from 18:1 to 1:1.

Under the Fair Sentence Act of 2010, a 10-year mandatory minimum is required for 5,000 grams of powder and 280 grams of crack; and a 5-year mandatory minimum is required for 500 grams of powder and 28 grams of crack, thus creating a ratio of 18:1.

As Senator Durbin, the chief sponsor of the Act, recently explained, the 18:1 ratio was a political compromise.[7] There also appeared to be some support for 18:1. Congress appears to have chosen 28 grams for the five-year threshold for crack because it read a Commission report as finding that this amount is typical of wholesalers, for whom a five-year minimum seemed appropriate.[8] Unfortunately, Congress misunderstood the Commission's report. The Commission's 2007 cocaine report defined a wholesaler as a person who "[s]ells more than retail/user level quantities (more than one ounce) [the equivalent of 28 grams] *in a single transaction*, or possesses *two ounces or more on a single occasion*." (emphasis added).[9] The report does not classify as a wholesaler a person who sells user level quantities over a period of

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section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law."

[6] 21 U.S.C. § 802(13) defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony."

[7] "I support 1 to 1. I think that is what the science backs. But we reached a political agreement—that is the nature of the Senate and the House." 161 Cong. Rec. S1578 (Mar. 17, 2015) (statement of Senator Durbin).

[8] Letter from The Honorable Richard Durbin, U.S. Senate, to The Honorable William Sessions, Chair, U.S. Sentencing Comm'n 2 (Oct. 8, 2010) ("Congress selected 28 grams as the trigger for five-year mandatory minimums because the Commission and other experts have concluded that less than one ounce is a retail/user quantity, while more than one ounce is the quantity sold by wholesalers). *See, e.g.*, U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007).

[9] *Id*.

time. The guidelines, however, require that courts aggregate drug quantities involved in multiple transactions when they are part of the "same course of conduct or common scheme or plan as the offense of conviction."[10] Hence, the guideline range for a street-level dealer who distributes 1 gram of crack to twenty-eight customers over the course of several days is at or above 5 years. And if a street-level dealer is charged with conspiracy under 21 U.S.C. § 846, as they very often are, all quantities are added together to trigger the mandatory minimum.

3) Expand the safety valve

In 2014, the safety valve applied in only 33.3% of drug cases.[11] Yet 99.3% of drug offenders did not use or credibly threaten to use violence,[12] 83.8% had no weapon involvement (defined broadly to include weapons that were possessed or used by others, and weapons that were merely present, e.g., in a closet or the trunk of a car),[13] 92.9% were not organizers, leaders, managers, or supervisors,[14] and 99.9% of the offenses did not result in death or serious bodily injury.[15]

According to the Commission, "defendants charged with a mandatory minimum penalty are more likely to plead guilty if they qualify for the safety valve than if they do not. In fiscal year 2013, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.2 percent if they qualified for the safety valve and a plea rate of 94.4 percent if they did not."[16]

One reason the safety valve did not apply to more non-violent low-level drug offenders is that 51.4% had more than 1 criminal history point.[17] The Smarter Sentencing Act of 2015 would

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[10] USSG §1B1.3(a)(2) (Relevant Conduct). The Commission has previously considered, but not adopted, guideline amendments that would limit quantity to amounts involved in a "snapshot" of time or a single transaction. *See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing*, 60 Fed. Reg. 2430, 2451-52 (Jan. 9, 1995). In some cases, like those involving street-level dealers, such "snapshots" would provide a better indicator of functional role and culpability. In other cases, like those involving couriers, such "snapshots" of quantity would need to be combined with the surrounding circumstances to determine functional role.

[11] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl. 44.

[12] U.S. Sent'g Comm'n, Use of Guidelines and Specific Offense Characteristics, at 26 (2013). The percentage for 2014 is not yet available.

[13] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl. 39.

[14] *Id*., tbl. 40.

[15] Only 51 defendants were sentenced to mandatory life based on "death or serious bodily injury results" from 1999-2013. USSC, 1999-2013 Monitoring Datafiles. It is not possible to tell from the data how many were sentenced to a mandatory minimum of 20 years on this basis.

[16] Testimony of Chief Judge Patti B. Saris, Chair, United States Sentencing Commission For the Public Meeting of the Charles Colson Task Force on Federal Corrections at 5, January 27, 2015.

[17] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl. 37.

expand the safety valve to include defendants in Criminal History Category II. But that expansion would reach only 2,180 additional drug defendants. This would not reduce over-incarceration, and would have "little effect" on the disparate impact of drug mandatory minimums on Black offenders.[18]

a) Eliminate or revise the requirement that the defendant provide all information and evidence.

Another reason that safety valve did not apply to more non-violent low-level offenders is that some were not deemed to meet the requirement that they "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."

In some districts, defense counsel provides the government a written description of the defendant's own conduct. In others, the government requires an interview with prosecutors and agents. Anything that is said is used as "relevant conduct," which can increase the guideline range significantly and outweigh any gain. The government uses this requirement to obtain cooperation against others, though it already has 18 U.S.C. § 3553(e) and USSG § 5K1.1 to obtain and reward cooperation without the defendant having to meet any other requirement. If the government deems the defendant not to have given "all" the information and evidence he has, it recommends against safety valve relief. And some clients who are otherwise eligible for safety valve forego the opportunity to receive a lower sentence for fear that the non-mandatory minimum will be interpreted as evidence of cooperation and that retaliation will result.

In sum, this requirement is unnecessary for the government's purposes, and it results in fewer non-violent low-level offenders getting relief.

Solution: We believe that this requirement should be eliminated. At the least, it should be limited to the defendant's own conduct in the offense by amending 18 U.S.C. § 3553(f) as follows: "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning <u>his own conduct in the offense or offenses of conviction</u>."

b) Include defendants convicted of title 46 drug offenses.

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[18] U.S. Sent'g Comm'n, Statement for the S. Jud. Comm. Hr'g "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" 10-11 (Sept. 18, 2013), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20131126-Letter-Senate-Judiciary-Committee.pdf.

18 U.S.C. § 3553(f) applies to a list of offenses, including those "under" 21 U.S.C. § 960. Section 960, in turn, expressly refers to a number of additional offenses and sets forth their applicable penalties. Maritime drug offenses under title 46 are not listed at § 3553(f), but they are expressly punished under § 960. *See* 46 U.S.C. §§ 70503, 70506.

Since its inception, the safety valve applied to defendants convicted of maritime drug offenses under title 46. However, the government convinced the Ninth Circuit in 2007and the Eleventh Circuit in 2012 that safety valve does not apply to title 46 offenses because they are not listed in § 3553(f) or referred to *by* § 960.[19] In other circuits, safety valve applies to an offense under title 46 and sentenced under 21 U.S.C. § 960.[20]

Denying these drug offenders safety valve relief in two circuits is unfair, creates unwarranted disparity, and makes no sense. For example, Pedro Fuenmayor-Arevelo was a mentally retarded 60-year-old man with vascular dementia and no criminal history when he was sentenced in the Middle District of Florida to a mandatory minimum of 10 years. The prosecutor convinced the judge that safety valve did not apply, but the judge stated, "I rather imagine if we had Congress solemnly convened here they would vote pretty much in favor of a 36-48 month sentence." Instead, the taxpayers will spend over $300,000 to incarcerate Mr. Fuenmayor for ten years.

Other statutes expressly list title 46 offenses along with all other drug offenses. *See* 18 U.S.C. § 924(e)(2)(A)(i); 28 U.S.C. § 994(h)(1)(B).

Solution: The most efficient solution would be to add the underlined language to 960(b): "(b)(1) In the case of a violation of subsection (a) of this section, or of subsection (a) of section 70503 of title 46, involving –"

c) Include defendants convicted under 21 U.S.C. § 860.

Any person who happens to violate 21 U.S.C. § 841 within one thousand feet of any school, college, university, playground, or public housing facility can also be charged under 21 U.S.C. § 860. Because 21 U.S.C. § 860 is not listed in 18 U.S.C. § 3553(f), defendants convicted of violating it are ineligible for safety valve relief. In a handful of districts, prosecutors routinely charge 21 U.S.C. § 860 in order to avoid the safety valve.[21]

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[19] *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1329 (11th Cir. 2012) ("Although 46 U.S.C. § 70506(a) references section 960 as the penalty provision for violations of 46 U.S.C. § 70503, section 960 does not incorporate section 70503 by reference as an 'offense under' § 960."); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 496-498 (9th Cir. 2007) (because section 3553(f) does not specifically list 46 App. U.S.C. § 1903, the predecessor statute to 46 U.S.C. § 70503, the "statutory text indicates that the safety valve does not apply").

[20] *See, e.g., United States v. Bravo*, 489 F.3d 1 (1st Cir. 2007); *United States v. Rodriguez-Duran*, 507 F.3d 749 (1st Cir. 2007).

[21] *See* Charles Doyle, Congressional Research Service, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions* 5 n.26 (Oct. 2013).

Va Thi Nguyen, a 50-year-old woman, a refugee from Vietnam where she was imprisoned for her Catholic faith, with a 5th grade education, an 11-year-old son, and no record was convicted in the Northern District of Iowa and sentenced to a mandatory minimum of 10 years. She had been hired by her cousin to water marijuana plants that he said were for medical purposes. The prosecutor blocked the safety valve by charging that the marijuana was grown within 1000 feet of a school. The judge stated, "I wish I had discretion . . . to give a sentence that I felt was more just in light of the congressionally mandated factors in Title 18, 3553(a), but I'm not able to do that."

Solution: Add 21 U.S.C. § 860 to the list of offenses in 18 U.S.C. § 3553(f).

4) Make the safety valve available to low-level, non-violent offenders convicted of offenses subject to non-drug-related mandatory minimums.

In 2012, 3,691 offenders were convicted of non-drug-related offenses subject to mandatory minimums and were subject to the mandatory minimum at sentencing.[22] If each of these 3,691 offenders were imprisoned for even one year less, it would save the taxpayers over $108 million at today's annual cost of incarceration of 29,291.25.[23]

Solution: As recommended by the Sentencing Commission, Congress should extend the safety valve to defendants convicted of offenses other than drug offenses.[24]

5) Address disparities and excessive penalties that result from requiring inclusion of the weight of an inactive "mixture or substance."

Congress should address disparities and excessive penalties that result from including the weight of an inactive "mixture or substance containing a detectable amount" of a drug, particularly when the controlled substance is a small fraction of the total weight.

When statutory penalties were first linked to drug quantities, the weight of the *pure* drug was used.[25] This was consistent with Parole Commission guidelines in effect at the time, which disregarded the weight of adulterants and filler substances to ensure that similar amounts of

[22] Statement of Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, For the Hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" Before the Committee on the Judiciary, U.S. Senate 11 (Sept. 18, 2013).

[23] The annual cost of incarceration in fiscal year 2013 was $29,291.25. *See* 79 Fed. Reg. 26996, Bureau of Prisons, Annual Determination of Average Cost of Incarceration (May 12, 2014).

[24] U.S. Sent'g Comm'n, *Mandatory Minimums in the Federal Criminal Justice System* xxx (Oct. 2011).

[25] *Chapman v. United States*, 500 U.S. 453, 460-61 (1991) (describing how the Controlled Substances Penalties Amendments Act of 1984 "first made punishment dependent upon the quantity of the controlled substance involved" and was based "upon the weight of the pure drug involved").

actual drugs were treated similarly.[26] For reasons that are not clear or unsound, in the ADAA of 1986 Congress based mandatory minimums on the entire weight of any "mixture or substance containing a detectable amount" of a drug.

Counting the weight of inactive ingredients often has perverse effects:

- Defendants selling similar doses of actual drugs are treated differently.

- Defendants selling diluted drugs are punished more than those selling the same dose at higher purity. Punishments are often *increased* for persons *lower* in the distribution chain, where dilution of drugs is more common.[27]

- Sentence lengths depend more on the weight of inert substances than the amount of the illegal drug. These anomalies and disparities are especially dramatic when the mixture or substance typically included with a drug is a large multiple of the weight of the active ingredient, as is typically the case with LSD and some marijuana edibles.

This obvious unfairness led the Commission in 1993 to base guideline ranges for LSD on standardized dosage units.[28] For purposes of determining statutory mandatory minimums, however, penalties continue to be based on the weight of the entire mixture.[29]

Further confusing matters, Congress departed from the mixture approach for certain drugs. Initially for PCP, and then in 1988 for methamphetamine, Congress provided separate quantity thresholds for (1) mixtures containing the drug and (2) the pure drug. We know of no legislative record explaining why Congress chose to treat these drugs differently from other drugs, or why it chose the particular thresholds. Possible rationales--for example, to more harshly punish addictive, smokable forms of a drug, or more potent forms more likely to result in overdose--have been obliterated by the Sentencing Commission. Note B to the Drug Quantity Table instructs courts to weigh the drug mixture, then consider purity to determine the weight of the actual drug contained in the mixture, then use whichever weight results in the longest sentence. The form in which the drug was actually trafficked is thus effectively ignored.

Proposed Solutions:

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[26] Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses,* 26 Crim. Law Bull. 50, 52 (1990).

[27] *See* Institute for Defense Analysis, The Price and Purity of Illicit Drugs: 1981 – 2007 (2008) (reporting purity of seizures involving four quantity ranges of various drugs), available at the website of the National Office of Drug Control Policy, http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf.

[28] USSG §2D1.1(c), Drug Quantity Table Note G (treating each dose on a carrier medium as .4 mg.).

[29] *Neal v. United States*, 516 U.S. 284 (1996).

- Base statutory penalties for all drugs on actual drug amounts instead of including the weights of inactive mixtures and substances.
- If the use of inert ingredients cannot be addressed in the near future, LSD should be removed from the statute (like other drugs that are infrequently prosecuted) and left to the Commission's dosage-based approach.

6) Revise mandatory minimums for accidental overdose.

Under 21 U.S.C. § 841(b)(1)(A), (B) and (C) "if death or serious bodily injury results from the use of the substance," the mandatory minimum increases to 20 years, or to mandatory life if the prosecutor also filed notice of a prior conviction for a "felony drug offense" under § 851. This applies in cases of accidental overdose. In the typical case, the defendant gave or sold a friend, loved one or acquaintance a small quantity of a drug, and the person took it along with a variety of other drugs. *See, e.g.*, *Burrage v. United States*, 134 S. Ct. 881 (2014); *United States v. Krieger*, 628 F.3d 857 (7th Cir. 2010). These are tragic cases, not crimes of violence. Violence is punished by other means.[30]

Only 51 defendants were sentenced to mandatory life based on "death or serious bodily injury results" from 1999-2013.[31] It is not possible to tell from the data how many were sentenced to a mandatory minimum of 20 years on this basis.

Solution: One solution would be a consecutive 5-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A), (B) or (C) if death or serious bodily injury resulted.

6) 18 USC 924(c)

18 U.S.C. § 924(c)(1)(C) requires consecutive "stacking" of 25-year mandatory penalties when multiple counts are charged in the same indictment, resulting in a sentence of at least 30 years for two counts, 55 years for three counts, and up to hundreds of years, even when the defendant has no prior record. The Sentence Commission, as well as judges, prosecutors, and Federal Defenders,[32] have urged reform of this provision because:

- Stacking § 924(c)s "results in excessively severe and unjust sentences" in many cases.[33] The average sentence for offenders subject to multiple § 924(c)s is 351 months.[34]

[30] *See* 21 U.S.C. § 848(e) (killing or directing a killing); 18 U.S.C. § 924(c) ("use" of a firearm); 18 U.S.C. § 3559(c) ("serious violent felony" with two prior convictions); USSG § 2D1.1(b)(1) (dangerous weapon possessed or was present); *id*, § 2D1.1(b)(2) (used, threatened or directed the use of violence); *id.*, § 2D1.1(b)(15)(D) (witness intimidation); *id.*, § 2D1.1(d)(1) (murder).

[31] USSC, 1999-2013 Monitoring Datafiles.

[32] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 360.

[33] *Id*. at 359.

[34] *Id*. at 279.

- There are some cases in which "such a long sentence may be appropriate (e.g., in the eight [of 147] cases … in which the [underlying offense was] first degree murder), but [in other cases, where] the offender received such a long sentence even though the offense did not involve any physical harm or threat of physical harm to a person," the sentences "are excessively severe and disproportionate to the offense committed."[35]
- The "ten districts that reported the highest number of the 147 cases involving multiple convictions of section 924(c) accounted for 62.7 percent of all such cases."[36] But there was no evidence that these offenses occur more frequently in those districts than in others.[37]
- The use of § 924(c)s has a disproportionate impact on Black offenders.[38] Repeated analyses have shown that prosecutors' choices to charge a § 924(c) rather than seek the two-level guideline increase for a firearm has a racially disparate impact.[39]

Proposed Solutions:

- Make the penalty for a "second or subsequent" offense a true recidivist statute by defining "second or subsequent offense" as in 21 U.S.C. § 962(b): "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more convictions of such person for a [violation of 18 U.S.C. § 924(c)] have become final."
- Reduce the penalty for a "second or subsequent conviction."[40]

7) ACCA, 18 USC 924(e)

A defendant convicted of unlawful possession of a firearm is ordinarily subject to a statutory range of 0-10 years. Under the ACCA, the range increases to a minimum of 15 years and a maximum of life if the person has three prior convictions for a "serious drug offense" or a "violent felony." There are three problems with the ACCA. First, there is no remoteness limitation on prior convictions. Second, a "violent felony" can be a misdemeanor if the state in which it occurred makes misdemeanors punishable by more than one year. Third, the so-called "residual clause" ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is so vague that the Supreme Court has repeatedly had to interpret it

[35] *Id*. at 359.

[36] *Id*. at 289.

[37] *Id*. at 361.

[38] *Id*. at 274, tbl. 9-1.

[39] *See* U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing at 90 (2004); Paul J. Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent. Rep. 193, 198 (2012).

[40] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 364.

as applied to particular offenses. The Supreme Court is likely to strike down the residual clause as unconstitutionally vague in *Johnson v. United States*, No. 13-7120.

Solutions: We therefore propose (1) a remoteness limitation of at most ten years, (2) elimination of the residual clause, and (3) replace the phrase "any crime punishable by imprisonment for a term exceeding one year" in § 924(e)(2)(B) with the phrase "any Federal or State offense classified by applicable Federal or State law."

EXHIBIT B
Sentencing Commission Reforms

Sentencing Commission Reforms

We make the following suggestions, framed as congressional directives to the Commission. However, the Commission could do any of these things without a congressional directive, if the task force prefers making recommendations to the Commission.

A. Drug Guidelines

Even if Congress does not enact the Smarter Sentencing Act, it should direct the Commission to reduce the drug guidelines by 50-60%. If a mandatory minimum applies, it would trump a lower guideline range.[1]

Congress did not direct the Commission to track mandatory minimums in the guidelines. The Sentencing Commission, which was directed to develop guidelines based on its own independent research and data, insulated from politics,[2] based the drug guidelines on politics. It not only matched the guidelines to the mandatory minimums at the quantity levels Congress set, but extrapolated above, between and below those two quantity thresholds at 17 different quantity levels, and also added two more levels to induce defendants to "plead guilty or otherwise cooperate with authorities."[3] The length of drug trafficking sentences increased by over two and a half times, and this has been the major cause of federal prison population growth.[4]

The Commission recently eliminated the two extra levels it added, but claims it cannot reduce the drug guidelines any further unless Congress reduces mandatory minimums. The Commission recently stated that it "strongly supports" the Smarter Sentencing Act,[5] which would direct the Commission to reduce the guidelines consistent with the amendments reducing the mandatory minimums from 10 to 5 years and from 5 to 2 years. The Commission thus believes that a 50-60% reduction in the guidelines would satisfy the purposes of sentencing.

B. Career Offender Guideline

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[1] USSG § 5G1.1(b).

[2] *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989).

[3] U.S. Sent'g Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 148 (1995).

[4] U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 47-48, 53-54, 76 (2004) [hereinafter Fifteen Year Review].

[5] U.S. Sent'g Comm'n, Statement for the S. Jud. Comm. Hr'g "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences" 12 (Sept. 18, 2013), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20131126-Letter-Senate-Judiciary-Committee.pdf.

In 2014, 2,269 defendants were sentenced under the "career offender" guideline; 1,656 were drug offenders.[6] While the number is relatively small, "career offender" sentences are extraordinarily long, they have an unwarranted disparate impact on African American offenders, and Congress intended this punishment to apply to far fewer defendants.

Congress directed the Commission in the Sentencing Reform Act to "specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants convicted for the third (or subsequent) time of a "felony" that is a "crime of violence" or that is a federal drug offense described in 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, or chapter 705 of title 46.[7]

The Commission responded with the "career offender" guideline, which ties the offense level to the statutory maximum and automatically places the defendant in the highest Criminal History Category of VI.[8]

The Commission broadened the scope of the guideline by including prior convictions not described in the congressional directive. As a result, the guideline applies to many more defendants than Congress intended, and very frequently to low-level offenders who are more accurately described as addicts than "career offenders."

This contributes to over-incarceration by setting a much higher starting point than the guideline that would apply if the Commission had followed the directive, and by making defendants ineligible for sentence reductions under retroactive amendments to the guideline that would otherwise apply.[9] In 2012, the average career offender guideline minimum was 218 months; 95% would have had a lower guideline range if they were not classified as "career offenders," and 83.3% would have had a guideline range less than half the career offender range. Judges sentenced within the guideline range only 30.2% of the time, but the average sentence was still 160 months.[10]

Prior Convictions for Drug Offenses. Most offenders are subject to the career offender guideline, not because of crimes of violence, but "because of … drug trafficking crimes."[11] The guideline includes as prior conviction predicates many drug offenses that are much less serious than the offenses Congress specified, most notably state drug offenses.[12] As a result, defendants subject to the career offender guideline are typically minor participants in a federal drug conspiracy who have prior

[6] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.22.

[7] 28 U.S.C. § 994(h).

[8] USSG § 4B1.1(b).

[9] USSG § 1B1.10, comment. (n.1(A)).

[10] U.S. Sent'g Comm'n, Quick Facts, Career Offenders.

[11] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 133 (2004) [hereinafter "Fifteen Year Review"].

[12] USSG, § 4B1.2, comment. (n.1).

state convictions for minor drug violations such as possession with intent to sell a very small amount. These defendants are subject to the same severe punishment Congress had in mind for the rare defendant convicted for the third time of federal drug trafficking or importation.

According to the Commission, the career offender guideline has an "unwarranted adverse impact" on African American drug offenders.[13] African Americans "have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of the "relative ease of detecting and prosecuting offenses that take place" on the streets "in impoverished minority neighborhoods."[14] Although Black offenders comprised only 20.4% of all federal offenders in 2012, they were 61.9% of those subject to the career offender guideline.[15] But the recidivism rate of drug offenders subject to the career offender guideline is *half* that of offenders in criminal history category VI under the normal criminal history scoring rules.[16]

Crimes of Violence. The Commission defined "crime of violence" more broadly than that or similar terms are defined in any statute. Eventually, the courts largely fixed this problem by interpreting "crime of violence" to have the same meaning as "violent felony" under § 924(e)(2)(B), but problems remain in some instances.[17]

Felonies that are Misdemeanors. The congressional directive requires the defendant to have "been convicted of two or more prior felonies."[18] When the directive was enacted in 1984 and today, the unadorned term "felony" was and is defined as "any Federal or State offense classified by applicable Federal or State law as a felony."[19] But the guideline defines a "prior felony conviction" as a "federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony."[20] As a result, the career offender guideline applies based on prior convictions that are misdemeanors in states where misdemeanors are punishable by more than one year, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont.

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[13] Fifteen Year Review at 134.

[14] *Id*.

[15] U.S. Sent'g Comm'n, 2012 Sourcebook of Federal Sentencing Statistics, tbl. 4; U.S. Sent'g Comm'n, Quick Facts, Career Offenders.

[16] *Id*. at 133.

[17] *See, e.g.*, *United States v. Martinez*, 602 F.3d 1166, 1173-75 (10th Cir. 2010) (possessing burglary tools is not a violent felony under the ACCA, but is a crime of violence under § 4B1.2 because the guideline includes "attempt").

[18] 28 U.S.C. § 994(h)(2).

[19] 21 U.S.C. § 802(13), § 951(b).

[20] USSG § 4B1.2, comment. (n.1).

We recommend that Congress amend 28 U.S.C. § 994(h) as follows:

"The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--
(A) a violent felony as defined in 18 U.S.C. § 924(e)(2)(B)~~crime of violence~~; or
(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and
(2) has previously been convicted of two or more prior felonies, as defined in 21 U.S.C. § 802(13), each of which is--
(A) a violent felony ~~crime of violence~~as defined in 18 U.S.C. § 924(e)(2)(B); or
(B) a serious drug offense as defined in § 924(e)(2)(A)~~n offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46~~."

This would still include state drug offenses as predicates, but only those that are comparable to the federal drug offenses Congress enumerated.

C. Alternatives to Incarceration

Congress directed the Commission to ensure that the guidelines recommended a "sentence other than imprisonment" for a defendant who is a "first offender who has not been convicted of a crime of violence or otherwise serious offense." 28 U.S.C. § 994(j). At the other end of the spectrum, Congress said that imprisonment would be appropriate for "a person convicted of a crime of violence that results in serious bodily injury." *Id*. There is much in between. Congress also directed the Commission to promulgate a guideline for the use of the courts in determining "*whether* to impose a sentence of probation, a fine, or a term of imprisonment." 28 U.S.C. § 994(a)(1)(A) (emphasis added). At the same time, Congress authorized judges to impose probation for most offenses, *id*. §§ 3559(a), 3561(a), and directed them to consider probation, fines, imprisonment, and any combination thereof, *id*. §§ 3551, 3561(a), 3562-3564, and to consider the "kinds of sentences available" by statute, 18 U.S.C. §3553(a)(3).

The Commission disregarded 28 U.S.C. § 994(j) by classifying all offenses as "serious,"[21] and it disregarded the directive to promulgate a guideline for determining whether to impose prison, probation, or a fine. Instead, it implemented a zone system permitting straight probation only for offenders with a guideline range of 0-6 months, requiring some confinement for offenders with a guideline range greater than 0-6 months and up to 10-16 months, and requiring straight prison for all others.

The Commission wants lawyers and judges to respect the guidelines and touts the fact that judges use the guidelines as an anchor. But the guidelines provide no advice regarding alternatives to incarceration. When asked why not, it says that judges are not imposing alternatives to incarceration now that they can. Indeed, the imposition of alternatives to incarceration has not increased at all since

[21] USSG, Ch. 1, Pt. A(1)(4)(d) (Original Introduction to the Guidelines Manual, Probation and Split Sentences).

the guidelines have been advisory.[22] The reason is that judges are using the Guidelines Manual as an anchor and it says nothing about alternatives.

It may be that the Commission's advice won't matter once more and more districts adopt Alternative to Incarceration programs. However, Congress may want to re-direct the Commission along these lines:

> The Commission shall ~~insure~~ ensure that the guidelines recommend ~~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~~, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury. The Commission shall promulgate a policy statement encouraging the use of an alternative to incarceration upon successful completion of a court-administered pre-sentence alternative to incarceration program.

D. Acquitted Conduct

The Commission's "relevant conduct" guideline directs courts to use acquitted conduct in calculating the guideline range in cases where the guideline relies on quantity, such as fraud and drug cases.[23] This rule, which appears to be contrary to the SRA's most basic instructions,[24] allows prosecutors to obtain enormous sentences based on conduct of which a jury acquitted the defendant, creating disrespect for law and disrespecting the jury's verdict. While most judges ignore this instruction, in a recent case, the jury convicted the defendants of distributing small amounts of crack and acquitted them of conspiracy. When the jury learned that the judge was considering the prosecutor's request to sentence the defendant's based on conduct of which it had acquitted the defendants, the foreperson wrote the judge a letter that was published in the Washington Post:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked

[22] *Compare* U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.12 (87% sentenced to prison only, 3% to prison/community split, 2.8% to probation and confinement, 7.2% to probation only) *to* U.S. Sent'g Comm'n, 2005 Sourcebook of Federal Sentencing Statistics (pre-*Booker*), tbl.12 (87.9% sentenced to prison only, 2.8% to prison/community split, 4% to probation and confinement, 8.1% to probation only).

[23] USSG § 1B1.3, comment. (backg'd.) ("Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing a workable guideline for these offenses.")

[24] The Commission was to take into account "the circumstances under which the offense was committed" and "the nature and degree of the harm caused by the offense." 28 U.S.C. § 994(c)(2)-(3).

> them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case. That is how you instructed your jury in this case to perform and for good reason.

Nonetheless, the judge found by a preponderance of the evidence that they had engaged in the conspiracy and imposed sentences 4, 5 and 7 times longer than their guideline ranges based on the offenses of conviction. The Supreme Court denied certiorari over dissent by Justices Scalia, Thomas and Ginsburg.[25]

We recommend that 18 U.S.C. § 3661 be amended as follows:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence, except that a court shall not consider conduct of which a person has been acquitted.

[25] *Jones v. United States*, 574 U.S. __ (2014).

EXHIBIT C

Alternatives to Incarceration in the Eastern District of New York:
The Pretrial Opportunity Program and the Special Options Services Program

Report to the Board of Judges

April 2014

Alternatives to Incarceration in the Eastern District of New York

The Pretrial Opportunity Program
and
The Special Options Services Program

Report to the Board of Judges
United States District Court
Eastern District of New York
April 2014

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I. Introduction

The United States District Court for the Eastern District of New York has instituted two programs that are designed to provide alternatives to incarceration for certain criminal defendants who are prosecuted in this District. One is the Pretrial Opportunity Program ("POP"), which is a drug court. POP was created in January 2012 under the direction of the Board of Judges. The second is the Special Options Services ("SOS") program, which provides intensive supervision for certain youthful offenders. Though the SOS program was created in 2000, a major structural change was implemented in 2013 – two magistrate judges began regular meetings with the participants in the program. Thus, like POP, SOS is a form of presentence supervision with direct, regular judicial involvement.

This is a report to the Board of Judges about these two programs. It is intended to serve six purposes. First, the Court has received many inquiries about these programs from judges, Pretrial Services and Probation officers, prosecutors, and defense lawyers around the country. While our *ad hoc* efforts to inform them and assist them in deciding whether and how to establish their own alternative to incarceration programs have been worthwhile, we hope this report will be both a more efficient and more effective means of informing and assisting others.

Second, although a substantial body of data has been gathered as a result of programs similar to POP and SOS in the states, such programs are in their infancy in the federal system. There are only a handful, and they are briefly identified and described in Section Five of this report. Communication among the districts with such programs (and other districts that will establish them in the future) is essential to determining which practices are most effective in judge-involved supervision programs. And data collection is critical to an objective, long-term analysis of whether programs that seem to offer better, more cost-effective ways of handling

certain defendants are in fact better and more cost-effective. This report therefore provides our initial set of data on these two programs. It includes the characteristics of the participants, the nature of the charges against them and violations they have committed, the types of services available to them, and an estimate of the cost savings achieved by the programs.

From left: Chief Judge Carol B. Amon, Chief Pretrial Services Officer Roberto Cordeiro, and Chief Probation Officer Eileen Kelly

Third, even though the "jury is still out" on the long-term merits of alternative to incarceration programs in the federal system, behind the data are real people, and a number of defendants in this district have taken full advantage of our programs to turn their lives and the lives of their families around. Their stories are inspiring, and so some of them are set forth here. But our report would be incomplete if it left out those who have failed, so some of their stories are also included.

Fourth, other districts have also created alternative to incarceration programs. Taken together with the two programs in this district, they constitute a series of laboratories. For example, the Central District of California has a two-track program that closely resembles the POP and SOS programs in terms of the types of defendants who become participants, but the structure is fundamentally different. In our district, Pretrial Services determines whether a defendant is appropriate for the POP or SOS programs. In the Central District of California, the Conviction and Sentence Alternatives ("CASA") interagency agreement establishes an intake

committee consisting of a judge, a Pretrial Services officer, an Assistant United States Attorney and an Assistant Federal Defender. In SOS and POP the participants do not know what effect, if any, their successful participation will have on their sentence until the time for sentencing; in CASA the outcome of the case (assuming successful completion) is set forth in writing upon entry into the program. And unlike those in POP, SOS and CASA, the participants in the Central District of Illinois' Pretrial Alternatives to Detention Initiative ("PADI") all cooperate with the government and receive "substantial assistance" motions.

This report contains brief descriptions of the eight presentence alternative to incarceration programs we are aware of. It also describes two intensive pretrial supervision programs for high-risk offenders that are closely related in structure and purpose to alternative to incarceration programs. The information has been provided by the districts themselves, and we are grateful for their cooperation. To the extent they have shared with us estimated cost savings, we set forth that information as well.

Fifth, although the principal focus of this report is on *presentence* programs – POP and SOS – those programs are closely related in spirit, purpose and effort to our Court's STAR (Supervision to Aid Re-entry) Courts, which are reentry drug courts. One section of this report is therefore devoted to briefly describing our STAR Courts, and another describes the joint efforts we have made to educate ourselves so our presentence and reentry courts can be as effective as possible.

Finally, the report sets forth some preliminary conclusions regarding these programs and makes some recommendations.

II. The Alternative to Incarceration Programs in the Eastern District of New York

A. *The Pretrial Opportunity Program*

The Pretrial Opportunity Program ("POP") was established under the direction of the Board of Judges in January 2012. The program description and consent form are set forth in the Appendix. 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. They have enhanced the efficacy of treatment and lowered recidivism rates. They have also produced cost savings, because defendants who successfully complete drug court programs are diverted from prison. Indeed, in many places defendants are diverted from the criminal justice system entirely because the charges against them are dismissed upon successful completion of the drug court program.

Another source of inspiration for POP was the large number of reentry drug courts in the federal system. Our late colleague in this district, Chief Judge Charles P. Sifton, created the first federal reentry drug court in 2002. Participation in these courts, which now operate throughout much of the federal system, occurs post-sentence, after a defendant has served his or her prison term or has been sentenced to probation. The benefit offered to a defendant participating in a reentry drug court (apart from the rehabilitative program itself) is early termination of the supervised release term. The direct cost savings to the system accrue from the shortened length of supervision and any reduction in recidivism rates among the participants. Though this report focuses principally on the Court's presentence alternative to incarceration programs, our reentry courts today – known as STAR (Supervision to Aid Re-entry) Courts – are discussed further in Section Six.

We concluded that if the drug court model produces benefits in the reentry context, it has the potential to produce even greater benefits if it is moved up into the *presentence* phase. The incentive to the participants at that stage is much stronger: they can avoid (or at least shorten) a prison term, and perhaps avoid a conviction altogether. And the cost savings are potentially much greater because expensive prison terms may be avoided or significantly shortened. Participants instead return to their families and communities with the ability to contribute to both, and with their addictions under control.

POP, like other drug courts, is founded on the premise that many substance abusers are arrested for behavior that is grounded in their drug or alcohol addictions and, but for those addictions, they might lead law-abiding lives. POP provides a framework for more intensive supervision of these defendants, combining judicial involvement with the efforts of Pretrial Services officers and treatment providers throughout a defendant's term of pretrial supervision. Drug courts have demonstrated that judicial involvement in the rehabilitative process can greatly influence a defendant's success in treatment.

In addition to their more frequent sessions with their drug counselors and Pretrial Services officers, all of the participants meet monthly with the judges and Pretrial Services officers assigned to the program. In our Brooklyn courthouse, they meet with District Judge John Gleeson, Chief Magistrate Judge Steven M. Gold, and Pretrial Services Officer Laura Fahmy-Tranchina. In our Central Islip courthouse, they meet with District Judge Joanna Seybert, Magistrate Judge Gary Brown, and Pretrial Services Officer Arthur Bobyak. These group meetings address each participant's progress and problems during the preceding month and goals for the upcoming month. The participants support and strengthen each other in these

meetings, and the hands-on involvement of the judges is an important additional source of support and motivation.

Although most participants have entered pleas of guilty by the time they enter the program, a guilty plea is not a prerequisite to participation. All participants do agree, however, to adjourn all further proceedings (that is, trial and/or sentencing) for at least a year while they participate in the program. All such adjournments have occurred with the consent of the United States Attorney's Office, which fully supports both the POP and SOS programs. In order to complete the POP program successfully, a participant must remain drug-free and participate in the monthly meetings for twelve consecutive months. In addition, if the participant does not have a high school diploma or a GED, he or she is required to get a GED, and all participants are expected to seek and obtain appropriate employment.

The Brooklyn POP Team: (*from left)* Judge John Gleeson, Probation Officer Clare Kennedy, Pretrial Services Officer Laura Fahmy-Tranchina, and Chief Magistrate Judge Steven M. Gold

POP participants in our Brooklyn courthouse have had their cases reassigned to Judges Gleeson and Gold. Studies of drug courts in the states have shown that there is value in having drug court participants meet monthly with the same judge who will ultimately decide their cases. On the other hand, not all the POP participants in our Central Islip courthouse have had their cases reassigned to Judges Seybert and Brown. When the case is assigned to a judge other than Judge Seybert, Officer Bobyak prepares a report to the sentencing judge about the defendant's participation in POP.

When a participant's rehabilitative program is nearing successful completion and the sentencing date approaches, defense counsel negotiate with the government. Consistent with Rule 11(c)(1) of the Federal Rules of Criminal Procedure, these negotiations occur only between defense counsel and the government. The program description explicitly contemplates the possibility that the rehabilitation of the participating defendant might be sufficiently extraordinary that outright dismissal of the charges on the motion of the United States Attorney would be appropriate. That has occurred in one case thus far. Two other participants have had felony charges reduced to misdemeanors. In most cases, however, the benefit to the participants (apart from the significant benefits that flow from successful drug treatment, education and employment opportunities) has been the consideration of POP participation in determining whether (and, if so, for how long) the participant will be sentenced to prison.

The Central Islip POP Team: (*from left)* Magistrate Judge Gary Brown, Judge Joanna Seybert, and Pretrial Services Officer Arthur Bobyak

As the initial POP participants neared their successful completion of the program, the judges and Pretrial Services officer involved in the program became concerned about the lack of continuity in supervision after these participants were sentenced, particularly if the sentence does not include a term of incarceration. This district has separate Pretrial Services and Probation Departments, and the concern was that the handoff of an intensively-supervised POP program graduate to an unknown Probation officer might disrupt the rehabilitation of the participant.

In response to that concern, the Probation Department, in consultation with Pretrial Services, created a post-sentence supervision program for POP program graduates. Called the

Relapse Accountability and Prevention ("REAP") program, it provides post-sentence supervision that is coordinated with the POP program. Indeed, though not all successful POP participants are required to attend the monthly meetings of the REAP program, some are (and all are welcome), and those meetings occur together with the monthly POP program meetings. As a result, POP participants get to know their post-sentence supervising Probation officer long before they are sentenced, and the transition to supervision by that officer is seamless. Probation Officer Clare Kennedy is assigned to the post-conviction supervision of POP participants.

B. *The Special Options Services Program*

In January of 2000, this Court established the Special Options Services ("SOS") program. The program was the brainchild of Judge Jack B. Weinstein, who, along with several Pretrial Services officers, believed that instead of pretrial detention, many youthful offenders might benefit more from intensive supervision and access to education, job training, and counseling. SOS targets juvenile and young adult defendants between the ages of 18 and 25 who are charged with nonviolent crimes and who may benefit from the structure and direction of intensive supervision. Through a wide variety of community, educational, vocational, and volunteer resources, Pretrial Services officers are able to help SOS participants obtain a GED or admission to college, enroll in technical schools or job training programs, and obtain mental health or drug treatment counseling that may have been unavailable to them prior to their arrest. The guidance and services offered as part of the SOS program are designed to serve as the foundation for these youthful offenders to lead law-abiding lives in the future.

For many years, SOS operated solely under the auspices of the Pretrial Services Department. Participants were directed to participate in the program's intensive supervision as a condition of pretrial release, and they reported to and worked closely with Pretrial Services

officers who developed individualized programs and goals. In recent years, a single officer, Amina Adossa-Ali, has supervised all of the defendants in the SOS program, up to 25 at a time. She provided periodic status reports to the assigned district judge and attended scheduled court hearings involving the SOS participant; there was no other judicial interaction with the SOS Program.

Inspired by the success of the district's POP and STAR programs, the SOS program was modified in 2013 to include the participation of two judicial officers, Magistrate Judges Joan M. Azrack and Cheryl L. Pollak. The judges now hold monthly meetings with the SOS participants, at which each participant's progress and problems during the preceding month are addressed. The judicial involvement is designed to enhance participants' support system and to provide additional encouragement not just to comply with the conditions of the program, but to effect real change in their lives.

The SOS Team: (*from left*) Probation Officer Yara Suarez, Magistrate Judge Joan M. Azrack, Magistrate Judge Cheryl Pollak, and Pretrial Services Officer Amina Adossa-Ali

Unlike POP, SOS as originally conceived did not contemplate negotiations between defense counsel and the government following a defendant's participation in the program. Instead, at sentencing, defense counsel typically would argue for leniency based on the defendant's success in the program, and the Pretrial Services officer responsible for supervising the defendant would advise the sentencing judge of the defendant's progress. In the newly restructured SOS program, Magistrate Judges Azrack and Pollak provide additional insight regarding the defendants' efforts and accomplishments to the assigned district judges during the course of supervision and at the

time of sentencing. Given the added supervision and input of the magistrate judges, the United States Attorney's Office has assured the Court that it will consider, on a case-by-case basis, requests by defense counsel for reduced charges or outright dismissal where exceptional SOS candidates have demonstrated by their participation and growth in the program that they have turned their lives around and become productive members of the community. Like their POP counterparts, SOS participants who are sentenced to a term of probation may also be ordered to continue post-conviction participation in the SOS program under the supervision of the Probation Department. Probation Officer Yara Suarez is assigned to the SOS program for that purpose. Officer Suarez also works in one of our STAR courts, and on occasion she also supervises former SOS participants in that context.

The SOS program description is set forth in the Appendix.

III. The Data

This section sets forth information our Pretrial Services office has gathered about the POP and SOS program participants. We acknowledge the limitations on the usefulness of any data set based on a sample of 47 defendants. However, we also believe that any broader-based analysis or evaluation of alternative to incarceration programs will need to take into account such factors as the demographic characteristics of the participants, their substance abuse histories, the current charges against them and their criminal histories, their degree of compliance with program requirements, the ultimate dispositions of their cases and the cost savings achieved by employing alternatives to incarceration. Over time, additional information will also be necessary, including data regarding the long-term effectiveness of treatment, and recidivism rates. In short, what follows is our initial effort to collect and report the kinds of information that, in our view, all programs like POP and SOS ought to be collecting and reporting. We fully expect to improve and refine our data-collection efforts, perhaps in consultation with other courts that have such programs, in the years ahead.

The evaluation period for the POP program began in January 2012, when that program was instituted. It began for the SOS program in March 2013, when the program was restructured to provide for monthly meetings presided over by judicial officers. The evaluation period for both programs ended, for purposes of this report, on January 31, 2014.

A. *Demographic Characteristics and Educational Levels*

Table One below sets forth the demographic characteristics of the participants in the two programs and the educational levels they have achieved. A total of 47 defendants actively participated in either the POP program (19) or the SOS program (28) during the relevant periods.

The POP participants were 52.6% male; the SOS participants were 82.1% male. The POP participants were 73.7% non-Hispanic White, 15.7% Hispanic, and 10.5% Black; the SOS participants were 3.5% non-Hispanic White, 71.4% Hispanic, and 25% Black. Nearly 80% of POP participants were 26 years old or older, with 63.2% falling within the 26-40 range. Pursuant to the program requirements, all of the SOS participants were under 26. More than three-quarters of all participants in the combined programs were unmarried and without a partner. The POP participants were better educated than their younger SOS counterparts; only 26.3% did not have a high school diploma or a GED, as compared to 64.2% of SOS participants.

Table 1: Demographic Characteristics of SOS and POP Participants						
	SOS (since March 2013)		**POP (since January 2012)**		**Totals**	
	N	%	*N*	%	*N*	%
Number of Program Participants	28	59.5%	19	40.5%	47	100%
Gender						
Male	23	82.1%	10	52.6%	33	70.2%
Female	5	17.9%	9	47.4%	14	29.8%
Race / Ethnicity						
White, Non-Hispanic	1	3.5%	14	73.7%	15	31.9%
Hispanic	20	71.4%	3	15.7%	23	48.9%
Black	7	25%	2	10.5%	9	19.2%
Age						
Ages 18 – 25	28	100%	4	21%	32	68.1%
Ages 26 – 40	-	-	12	63.2%	12	25.6%
Ages 41 – 55	-	-	2	10.5%	2	4.2%
Ages 56 +	-	-	1	5.2%	1	2.1%
Marital Status						
Cohabitating	4	14.3%	2	10.5%	6	12.7%
Divorced	-	-	2	10.5%	2	4.3%
Married	-	-	5	26.3%	5	10.6%
Single	24	85.7%	10	52.7%	34	72.4%
Education (Highest Level Attained)						
Less than a GED	18	64.2%	5	26.3%	23	48.9%
GED	2	7.1%	1	5.2%	3	6.4%
High School Diploma	8	28.5%	9	47.3%	17	36.3 %
Some Vocational	-	-	-	-	-	-
Vocational	-	-	-	-	-	-
Some College	-	-	3	15.7%	3	6.3%
College Graduate	-	-	1	5.2%	1	2.1%
Post Graduate	-	-	-	-	-	-

B. *Substance Abuse and Mental Health History*

Table Two sets forth the substance abuse and mental health histories of the program participants. In POP, which is a drug court, the participants' principal drugs of choice were cocaine (15.8%), heroin (31.6%), and prescription opiates (36.9%). Their drug treatment histories included inpatient detoxification (31.6%), inpatient treatment (42.1%), and outpatient treatment (31.6%).[1]

Table 2: Substance Abuse and Mental Health History						
	SOS		**POP**		**Totals**	
	N	%	*N*	%	*N*	%
Number of Program Participants	28	59.5%	19	40.5%	47	100%
Primary Drug of Choice						
Alcohol	3	10.7%	2	10.5%	5	10.6%
Cannabinoids	17	60.7%	1	5.2%	18	38.3%
Cocaine	-	-	3	15.8%	3	6.3%
Heroin	-	-	6	31.6%	6	12.7%
Prescription Opiates	-	-	7	36.9%	7	14.9%
Drug Treatment History						
Detox Inpatient	-	-	6	31.6%	6	12.7%
Inpatient	1	3.6%	8	42.1%	9	19.1%
Outpatient	3	10.7%	6	31.6%	6	12.7%
Mental Health Factors						
Co-Occurring Disorders	2	7.1%	3	15.7%	5	10.6%
Psychotropic Medications	1	3.5%	2	10.5%	3	6.3%
Mental Health Services (only)	7	25%	0	-	7	14.8%
Other Family Factors						
Current Drug Use in Family	4	14.2%	3	15.7%	7	14.8%
Family Drug History	6	21.4%	9	47.3%	15	31.9%

A family history of drug use was more prevalent among POP participants (31.9%) than SOS participants (21.4%). However, current drug use by immediate family members was almost identical, and averaged 14.8%. Approximately ten percent of all program participants (three

[1] Although 71.4% of SOS participants reported having experimented with or used recreational drugs and alcohol, none reported cocaine, heroin, or prescription opiates as the primary drug of choice. Instead, most (60.7%) reported using marijuana, and 10.7% reported alcohol use. The drug treatment histories of the SOS participants were dramatically different from the POP participants; none of the SOS participants reported inpatient detoxification. Only 3.6% reported inpatient treatment and 10.7% had received outpatient treatment.

POP participants and two SOS participants[2]) were diagnosed with a mental health disorder and a substance abuse problem, often referred to as dual diagnoses or co-occurring disorders. Twenty-five percent of SOS participants attended mental health counseling services but were not diagnosed with substance dependence.

C. *Charges, Criminal History, and Risk Assessment*

Table Three relates to the criminal histories of the program participants, their current charges, and their pretrial risk assessments. All of the participants in both programs were charged with drug trafficking offenses which were relatively minor or in which they played minor roles (or both). The offenses involved cocaine (48.9%), heroin (21.3%), and prescription opiates (27.7%). Twelve percent had a prior felony conviction and more than 23% had previously been arrested and charged with a felony offense. The Pretrial Services Risk Assessment ("PTRA")[3] tool placed 48.9% of the combined program participants in category three (moderate risk), while 34.1% were in categories four and five.

[2] One of these participants was only in the SOS Program for a few weeks.

[3] The PTRA is an actuarial risk assessment instrument that predicts the risk of failure to appear, new criminal arrests, and technical violations of defendants while on pretrial release. The PTRA's final score assessment falls into one of five categories of risk (1 being lowest). There are several factors that influence the final score: felony convictions; pending felonies or misdemeanors; prior failures to appear; seriousness of current charge; employment; substance abuse; age; citizenship; education level; and home ownership. There are other data factors related to a defendant's foreign ties and alcohol problems that are collected but not scored.

Table 3: Prior Criminal History, Offense Charged, and Pretrial Risk Assessment Category						
	SOS		**POP**		**Totals**	
	N	%	*N*	%	*N*	%
Number of Program Participants	28	59.5%	19	40.5%	47	100%
Felonies						
Arrests	7	25%	4	21%	11	23.4%
Convictions	4	14.2%	2	10.5%	6	12.7%
Misdemeanors						
Arrests	3	10.7%	7	36.8%	10	21.2%
Convictions	2	7.1%	3	15.7%	5	10.6%
Current Charge (all participants were charged with drug offenses)						
Cocaine	18	64.3%	5	26.3%	23	48.9%
Heroin	10	35.7%	-	-	10	21.3%
Cannabinoids	-	-	1	5.2%	1	2.1%
Opiates (prescription)	-	-	13	68.5%	13	27.7%
Pretrial Risk Assessment						
Category 1	-	-	3	15.7%	3	6.4%
Category 2	2	7.1%	3	15.7%	5	10.6%
Category 3	15	53.5%	8	42.1%	23	48.9%
Category 4	6	21.4%	5	26.3%	11	23.5%
Category 5	5	17.8%	-	-	5	10.6%

D. *Program Violations and Dispositions*

Though sanctions are imposed in both POP and SOS for violations of bail conditions or program rules, a violation does not necessarily result in revocation of release or termination from the program. Table Four summarizes the program violations and dispositions. The most frequent reason for technical violations in both programs was new illicit drug use. The rate of technical violations was higher among SOS participants (39.2%) than POP participants (26.3%). Three of the SOS participants were re-arrested for felony offenses, while one was charged with a misdemeanor. Two of the POP participants were rearrested; the charge was a misdemeanor in one case and a felony in the other. No participant in either program has fled.

Thus far, four participants have had their bail revoked or were otherwise unsuccessfully terminated from the programs.

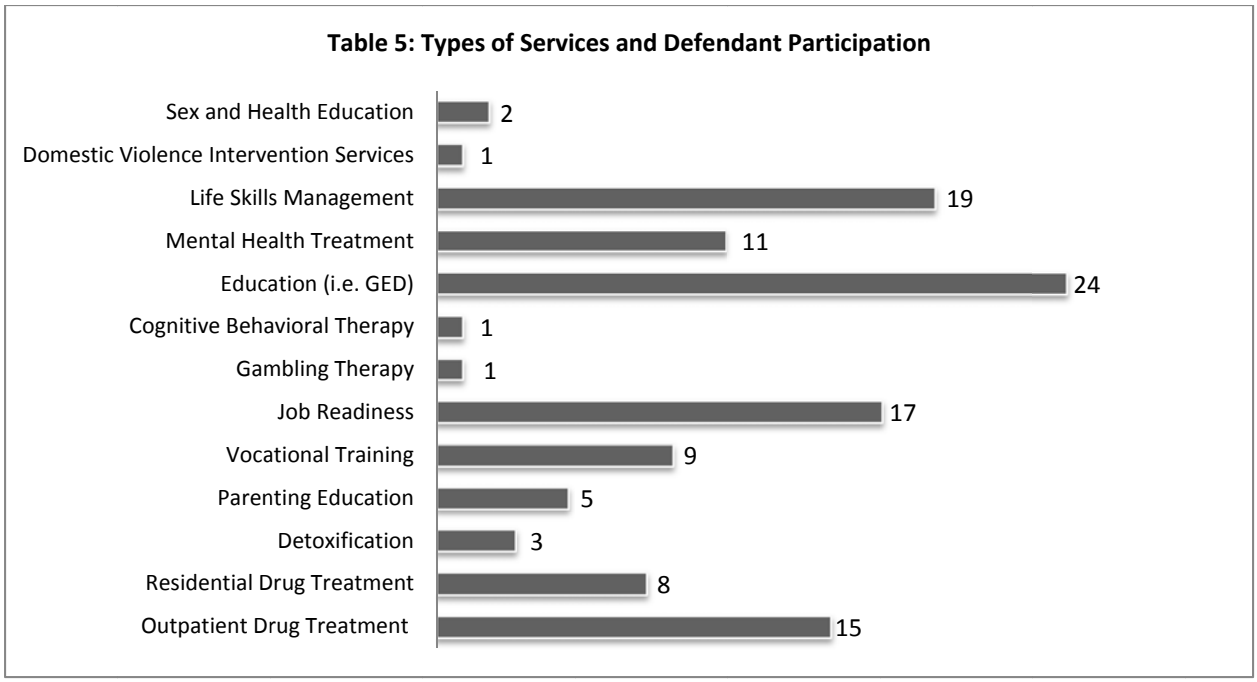
It is too early to measure the rate of recidivism among program graduates. However, none of the nine POP or SOS defendants who successfully completed the programs has been arrested for a new offense.

Table 4: Program Violations and Dispositions Summary						
	SOS		**POP**		**Totals**	
	N	%	N	%	N	%
Number of Program Participants	28	59.5%	19	40.5%	47	100%
Case Dispositions	3	10.7%	7	36.8%	10	21.2%
Program Terminations						
Successful	3	10.7%	6	31.5%	9	19.1%
Unsuccessful and/or Bail Revoked	1	3.5%	3	15.7%	4	8.5%
Types of Violations						
Re-Arrest(s)	4	14.2%	2	10.5%	6	12.8%
Technical Violations	11	39.2%	5	26.3%	16	34%

E. *Support Services Available to Program Participants*

1. Through Pretrial Services

All program participants take part in at least one of various types of available support services. Apart from drug and mental health treatment, the most frequently used services include GED preparation classes, life skills management, and job readiness training. The goal is to engage participants in a lifestyle that supports their sobriety and produces a steady reintegration into society. Officers are continuously assessing the risk and needs of defendants, applying an individualized and evolving supervision plan with attainable goals. Table Five depicts the types of available support services and the number of POP and SOS participants who have received them.



2. Through Pro Bono *Counsel*

The participants in the POP and SOS programs face an array of challenges in addition to their criminal cases and (particularly for POP participants) their addictions. Some of those challenges are legal in nature but unrelated to their criminal cases, and on occasion they pose barriers to successful rehabilitation.

In January 2014, the New York office of a large national law firm, which had been providing *pro bono* legal services for clients outside the criminal justice system, began providing the same services to participants in the POP, SOS, and STAR programs. Lawyers from the firm attend the regular meetings of the program participants (which are held in courtrooms and open to the public) and are available for consultation and assistance as needed. The Federal Defender serves as the conduit between and among the participants, their criminal defense attorneys, and *pro bono* counsel.

Though this dimension of the programs is new, it has already produced benefits. A STAR Court participant was recently in arrears on her rent and was facing eviction. *Pro bono* counsel met with her the day before the eviction hearing was to take place, obtained a postponement of the hearing, and has since been able to arrange for a reduction in the participant's monthly rent based on her circumstances. Counsel is also helping the participant secure a grant from the New York City Department of Homeless Services to help reduce the remaining rent obligation.

Recently, the Youth Represent organization has begun to provide additional legal services to the SOS program participants. It has been instrumental in helping an SOS participant to adjust his child support obligations so the payments more accurately reflect his limited income. Youth Represent is also trying to obtain assistance to help the SOS participant resolve past child support arrears and eventually allow his driver's license restrictions to be lifted.

F. *Cost-Benefit Analysis*

The data set forth in Table Six includes the defendants who successfully completed the POP program since its inception in January 2012. It also includes SOS participants who participated with the program judges, joined SOS in March 2013, and remained on pretrial release until sentencing. In all, eight participants have been sentenced and one has had her charges dismissed (contingent on her compliance with certain conditions for 18 months). Of the eight defendants sentenced, six received probation, one was sentenced to two months of time already served and a term of supervised release, and the remaining defendant was sentenced to 12 months of imprisonment and a term of supervised release. If those defendants had received prison terms at the mid-point of their advisory Guidelines ranges, the total cost of their

incarceration would have been $800,893. The monthly cost of supervision by pretrial services officers is $220.29, and the cost of probation supervision is $278.95. Thus, assuming they would otherwise have been sentenced at the mid-point of their applicable ranges, the significantly reduced sentences after their successful participation in the POP program immediately saved the government $767,120. Even if their sentences would otherwise have been at the bottom of the ranges, the cost savings would have been $704,400. Each time a defendant avoids a thirty-six month prison sentence and instead receives probation for a period of three years, the savings is approximately $77,000 (or 89%).[4]

Table 6: Case Disposition and Cost Savings of Cases Who Successfully Completed the POP and SOS Programs

Participant	Disposition						Mandatory Minimum or MedIAN Sentence Guideline Range (# Months)	Imprisonment Cost if Recommended Sentence Imposed (# of months x $2,412.33)*	Actual Prison Cost	Cost Savings	Offense Type
	Prison (# Months)	TSR (# Months)	Probation (# Months)	Pretrial Diversion	Dismissed	Acquitted					
SOS Cases											
R.D.	-	-	60	-	-	-	27	$65,132.91	$0	$65,132.91	Drugs
A.P.	-	-	36	-	-	-	27	$65,132.91	$0	$65,132.91	Drugs
W.B.	-	-	48	-	-	-	78	$188,161.74	$0	$188,161.74	Drugs
POP Cases											
P.C.	-	-	36	-	-	-	42	$101,317.86	$0	$101,317.86	Drugs
L.D.	12	36	0	-	-	-	52	$125,441.16	$28,947.96	$96,493.20	Drugs
E.L.	-	-	-	Yes	-	-	42	$101,317.86	$0	$101,317.86	Drugs
I.M.	-	-	24	-	-	-	3	$7,236.99	$0	$7,236.99	Drugs
S.P	-	-	60	-	-	-	37	$89,256.21	$0	$89,256.21	Drugs
A.S.	2	36	-	-	-	-	24	$57,895.92	$4,824.66	$53,071.26	Drugs
Total								**$800,893.56**	**$33,772.62**	**$767,120.94**	

*Administrative Office of the U.S. Courts, Cost of Incarceration and Supervision (May 17, 2013)

Our efforts to quantify the cost savings produced by these alternative to incarceration programs are admittedly incomplete, and a more precise calculation will require both greater

[4] As noted, the SOS Program has been in existence since 2000, but most of that time it operated without the participation of judicial officers. Before that change, there were over 100 program participants. Statistics were not kept in the same manner during that period, so it is not possible to provide the same data for those participants. However, we do know that of the 85 SOS participants for whom statistics were kept prior to March 2013, 58.8% were male, with 12% non-Hispanic White, 58% Hispanic, and 30% Black. There were 35 females, of whom 45.7% were Hispanic and 54.3% were Black. The vast majority – 88.2% – were charged with narcotics offenses, and 67% received a sentence of time served or probation. Many of those who did receive sentences of imprisonment were sentenced below their applicable Guidelines ranges based on their progress in the program. We have not attempted to set forth here the cost savings resulting from the SOS program during that period, but it is obvious from the foregoing that they were substantial.

expertise and information that is not yet available. For example, our cost savings calculation does not include the costs that the government would have incurred caring for participants' families had they been incarcerated, or the loss of tax revenue resulting from the fact that they would have been imprisoned rather than employed. Similarly, assuming that our judge-involved alternatives to incarceration reduce recidivism rates (as they have been proven to do in the states), significant savings will accrue as a result of that as well.

On the other side of the ledger, we have not refined our effort to capture the true costs (public and private) of the intensive supervision and assistance the participants in these programs receive. Pretrial and Probation officers assigned to the programs cannot carry the same caseloads as other officers due to the intensive supervision they are called upon to provide, for example. The cost of the judges' additional time spent with the participants has also not been included.

As discussed below in our Conclusions and Recommendations section, these and other issues bearing on the cost and effectiveness of presentence drug courts and intensive supervision courts in the federal system create a need for systemic support and study.

IV. Profiles of Selected Participants

Our alternative to incarceration programs are based squarely on the best available practices, and we will continue to rigorously examine those programs over time to ensure that they in fact constitute a better way of handling the criminal cases of the participating defendants. However, we also never lose sight of the fact that each participant in the POP and SOS programs is an individual, and the overarching goal of both programs is to establish a more constructive way of handling individual cases than sending the defendant off to serve needless and expensive prison terms. We acknowledge that policy should not be driven by anecdotes, but the success stories in the POP and SOS programs are both inspirational and tangible reminders of why we established these programs. We therefore set forth a few of them here alongside a few less successful examples that we might also learn from.

A. *Pretrial Opportunity Program*

1. E.L.

E.L. is now 30 years old. She has lived in Brooklyn her entire life. Her parents separated when she was four years old due to her father's addiction to alcohol, marijuana, and crack cocaine. After the separation, her father returned to his native Guyana. He did not visit E.L. or financially provide for her. Her mother, who suffered from alcoholism and died in 2002 from cirrhosis, raised E.L. in poor economic circumstances.

E.L. has been in a relationship with her fiancé since 2001; they have three children together. At the time of E.L.'s offense in 2011 the children were ages 10, 7, and 3.

E.L. has an extensive history of substance abuse. She began smoking marijuana daily at age 11. Following her mother's death in 2002, she became addicted to cocaine as well. She snorted it daily, spending approximately $200 per week on the drug. She stole from her fiancé to

support her habit. In 2007 and again in 2008, E.L. underwent outpatient treatment for her addictions at her fiancé's request, but both times the treatment was unsuccessful.

In 2011 E.L. went to Guyana with her children in an attempt to reconcile with her father, who continues to abuse crack. While there, her youngest child fell ill, requiring E.L. to change the date of their return flight. She could not afford to pay the fees associated with changing the flight. A man who learned of her situation offered to pay those fees and an additional amount if E.L. agreed to transport luggage back to the United States. E.L. agreed, knowing that the luggage would contain drugs.

On July 27, 2011, E.L. arrived at John F. Kennedy ("JFK") International Airport. Customs and Border Protection officers discovered cocaine embedded in the sides of the luggage and in rum bottles and food cans inside the luggage. The net weight of the seized cocaine was 13.2 kilograms.

E.L. was arrested and charged with importing cocaine. She was released that day on conditions that included returning to court two days later with sureties to sign her bond. She returned to court on July 29, 2011 under the influence of drugs. Chief Magistrate Judge Steven M. Gold remanded her. On February 3, 2012 she pled guilty to importing cocaine.

E.L. was released on August 12, 2011 on the condition that she report directly to long-term residential drug treatment at Samaritan Village in Queens, New York. In January 2012 she became one of the charter members of the POP program. She remained at Samaritan Village until July 2012, when she commenced outpatient drug treatment at the same facility. While in treatment, E.L. participated in individual and group counseling. She also completed an intensive treatment course, which uses cognitive behavioral therapy to promote positive change while in treatment. E.L. was discharged from treatment on November 14, 2012.

As she was getting her drug problem under control, E.L. proceeded to get the rest of her life on track as well. Determined not to go home until she was ready to care for her three children, she took a parenting course in September 2011. She studied for her GED test in December 2011, but failed. She studied harder, took the test again in March 2012, and passed.

E.L. studied for and passed the four-part written test for a Commercial Driver's License in March 2012. In May 2012 she took the road test and passed that as well. She got a job in June 2012 driving a bus, only to get fired a month later. She took the setback in stride, and looked for and found another job driving a bus. For about a year, while she saved to buy a car, she commuted by subway and bus two hours each way to her job on the border of Queens and Nassau County. In February of 2014 she purchased a car, and now has considerably more time for her family.

E.L. was a critical member of her monthly POP meetings. She still attends almost all the meetings more than a year after completing the program. She encourages her colleagues in the program, offers them advice, and sometimes chastises them. She has taught them by example how to deal with disappointments without relapsing. Though her drug problem is under control, she regularly attends Narcotics Anonymous and Alcoholics Anonymous meetings.

E.L. was the first graduate of the POP program, after which her case was called for sentencing on February 14, 2013. Her advisory range under the United States Sentencing Guidelines was 37-46 months. However, instead of proceeding to sentencing, the government informed the sentencing judge that, in light of E.L.'s extraordinary rehabilitation, she would be permitted to withdraw her plea of guilty, and the charges against her would be dismissed entirely if she complied with the terms of a deferred prosecution agreement for 18 months. The charges are expected to be dismissed this summer.

2. I.M.

I.M., who is now 36 years old, grew up in a stable, loving, two-parent home in Staten Island. He attended parochial schools and then graduated from college with a degree in computer science. He got married and has two healthy young children. He succeeded professionally, eventually becoming a Senior Vice President in the technology department of a major bank, where he supervised 80 employees and various outside consultants.

Despite these outward signs of success, in his mid-20s I.M. developed a corrosive drug habit. Following back injuries in 2004 and again in 2007, he turned to opiate painkillers, and by 2008 he was taking multiple Vicodin or Percocet pills on a daily basis. In late 2009, he moved on to oxycodone, which he began taking daily, purchasing the drug on the street. I.M. attempted to wean himself off of oxycodone on several occasions, receiving prescriptions for Suboxone, but he relapsed each time.

In 2011 I.M. became involved with a group of individuals who obtained oxycodone prescriptions from physicians by either duping or corrupting them. I.M. purchased oxycodone pills from one of these individuals, typically purchasing 15 pills at a time on a bi-weekly basis.

I.M. was arrested on June 23, 2011 for conspiring to distribute oxycodone. He was released on the day of his arrest and entered outpatient drug treatment shortly thereafter. He completed that treatment successfully in February 2012, one month after joining the newly-created POP program.

I.M. faced significant obstacles on his road to recovery. His arrest cost him his job and his marriage. But he worked in construction with his father, remained active in the lives of his children during a turbulent period for them, and fought for months to get his job back. To the extent he felt comfortable discussing these personal issues in the monthly POP meetings, I.M.

did so. He found support in fellow POP participants, and the maturity and determination he demonstrated throughout the program was an example for them.

Five months into I.M.'s participation in the POP program, the United States Attorney agreed to dismiss the felony charge in exchange for I.M.'s plea of guilty to a misdemeanor possession charge. With the assistance of his attorney, I.M. was then able to resume his position at the bank. He was subsequently sentenced to a term of probation. If I.M. had been convicted on the conspiracy charge he pled guilty to, his advisory Guidelines range would have been 18-24 months.

3. A.S.

A.S. was arrested on August 16, 2011 and charged with conspiracy to import marijuana. A.S. was released on a bond and directed, among other things, to submit to random drug testing and treatment for substance abuse. A.S., 45 years old at the time of his arrest, was raised in a two-parent, middle-income household in Brooklyn and enjoyed a good relationship with his parents and siblings. However, A.S. dropped out of high school after repeated suspensions for fighting, and in short order he acquired a significant criminal record. At age 15, A.S. was convicted on his plea of guilty to first degree robbery. Burglary and larceny charges followed at ages 17 and 23, respectively. At age 27, A.S. had his first conviction for dealing narcotics; at 35, he entered a plea of guilty to a possession charge. Additional burglary charges, brought when A.S. was 38 and 40, were apparently reduced to misdemeanors in exchange for guilty pleas.

At the time of his arrest, A.S. reported an 18-year history of daily marijuana and cocaine abuse, but he also claimed eight years of sobriety. He was released on a bond secured in part by his wife's signature, but a few months later he relapsed by using cocaine. A.S.'s wife reported the drug use to the Court on November 9, 2011, and asked to be removed from A.S.'s bond.

A.S. voluntarily surrendered the next day and was remanded for two months pending placement in a residential drug treatment program. A.S. was released to such a program on January 11, 2012 and completed it three weeks later, shortly before entering the POP program. He was then referred by Pretrial Services for outpatient counseling, which he successfully completed on August 9, 2012.

A.S. is married and has a young daughter. He has been a devoted father not only to his daughter but to his wife's 11-year-old son. A.S. also has two adult children from a prior relationship, and he maintains a good relationship with both.

While in POP, A.S., who had already earned a GED, obtained his Commercial Driver's License. He failed the test the first few times he took it, but with the encouragement and support of his fellow POP program participants and his supervising officer he kept at it and finally passed the test on December 12, 2012. Finding steady employment has been A.S.'s greatest challenge. He has found temporary construction work from time to time, but despite his participation in various vocational programs, he continues to endure periods of unemployment. A.S. has remained drug-free, however, and when he is not working he is directly involved in the care of his daughter and stepson.

A.S.'s involvement in the monthly POP meetings was particularly impressive. He is older than most of the other participants. Although fairly quiet at first, A.S. spoke up regularly in the monthly discussions once he became more comfortable speaking in front of the group. As others in the program discussed the challenges they faced over the previous month, A.S. offered helpful and insightful words of encouragement and, when warranted, warnings. After a year without relapsing or violating any of the program rules, A.S. graduated from POP on February

28, 2013. When he was sentenced on August 16, 2013, the court determined A.S.'s Guidelines range to be 21 to 27 months and sentenced A.S. to time served and three years of supervised release.

Having been sentenced and thus no longer subject to pretrial supervision, A.S. was directed to participate in REAP (the post-sentence supervision program for POP members who have received non-custodial sentences). A.S. remains drug free and frequently attends NA meetings to help himself stay that way. His family remains intact. A.S. continues to participate actively and thoughtfully in our monthly meetings and provides guidance to younger, less mature program participants.

4. W.B.

W.B. has been plagued not only by an extensive and serious history of substance abuse, but also by anxiety, a gambling compulsion, and obsessive-compulsive disorder. Despite this, and despite financial and other stresses he experienced during his participation in POP, he successfully completed the program without a violation of the program's rules.

W.B. was arrested on June 6, 2012, and charged in a complaint with conspiring to distribute oxycodone. At the time of his arrest, W.B. was 31 years old, married, and operating a small painting business. He was raised by financially stable parents and had a happy childhood, but he reported at the time that he was estranged from them and his siblings.

When interviewed by Pretrial Services, W.B. exhibited tremors, which he attributed to substance abuse. He related a history of abusing LSD, heroin, cocaine, ecstasy and oxycodone going back to his teenage years. W.B. stated that he had participated in a methadone

maintenance program for four years. He further reported that he had been under the care of a psychiatrist and was receiving treatment for bipolar and panic disorders.

Approximately 10 days after his arrest, W.B. was released on bond. He then entered a hospital-based detoxification program, and he began outpatient treatment after his release from the hospital. He joined the POP program on October 18, 2012.

Almost immediately upon joining the program, W.B. became one of its most vocal and outgoing participants. At every monthly meeting he added levity and insight. He repeatedly reminded the other program participants to be grateful to be in the POP program; as W.B. frequently put it, "it is better to be on the outside looking in than on the inside looking out." He has also shared, with deep sadness, the fact that one of his sisters died as a result of a drug overdose in 2003. W.B. has re-established a close relationship with his parents, who attended his graduation from the POP program.

During his time in the program, W.B. faced serious additional challenges. Among other things, W.B.'s wife lost her job and his father became seriously ill. Despite the stresses caused by these events, W.B. remained drug-free. During one of the monthly POP meetings, he acknowledged a gambling problem. He immediately began treatment for it (at his own expense), and he also continued sessions with his psychiatrist. W.B. also returned to work as a painter, and found less expensive housing after his wife lost her job.

After a full year of participation in POP, and with almost 18 months of sobriety, W.B. graduated from the program in November of 2013. Although he is under no obligation to do so, W.B. continues to attend the monthly POP meetings and offers his encouragement to the current participants. The government has informed W.B. that it has decided, in light of his exemplary

efforts at rehabilitation, to allow him to plead guilty to a misdemeanor in exchange for the dismissal of the felony charge on which he was arrested.

5. R.P.

R.P. was arrested on March 3, 2012. According to the complaint filed in her case, R.P. was arrested in a hotel room where agents also seized hundreds of prescriptions filled out in various names and more than 20 fraudulent identification and Medicaid cards. R.P. was subsequently indicted and charged with conspiracy to distribute oxycodone and acquiring oxycodone by fraud.

R.P. was 28 years old at the time of her arrest. She had been in a relationship for four years with one of her co-defendants. She had no employment history and was being supported by her boyfriend and his mother (and likely by the criminal activity described in the charges). R.P. was estranged from her father, but she was in contact with her mother and siblings. When a Pretrial Services officer reached R.P.'s sister, the sister advised that R.P. had struggled with drug use for several years and that it would be better for R.P. to "detox in custody."

R.P. herself reported a substantial history of oxycodone and marijuana abuse as well as periodic abuse of heroin, cocaine, ecstasy and other substances. She described smoking marijuana on a daily basis from age 15 and ingesting at least four oxycodone pills per day. R.P. also revealed that she had been seeing a psychiatrist, sporadically, since age 15, when she tried to commit suicide by slitting her wrists.

R.P. was detained for about eight weeks and released directly to a long-term residential drug treatment program at Samaritan Village. She entered POP on July 19, 2012. Though her treatment started well, during the fall of 2012 R.P. was found in possession of an unauthorized

cell phone provided to her by a codefendant's family member. On another occasion during the same time period, R.P. was assigned to escort another resident but left her unattended; the other resident then used drugs and required psychiatric care as a result. Finally, R.P. engaged in an inappropriate relationship with another resident of the program. Despite these violations of program rules, her drug tests were all negative.

Rather than ask the Court to impose a sanction, R.P.'s Pretrial Services officer arranged for her to be transferred on January 15, 2013 to another Samaritan Village facility, one that has stricter supervision of its residents. On February 13, 2013, R.P. was tested and found to have used suboxone. Confronted with the test results, she admitted her drug use.

In light of R.P.'s repeated violations of program rules and her substance abuse, her Pretrial Services officer requested a bail violation hearing, which was held on February 22, 2013.

The court found that R.P. had violated a condition of her release and was unlikely to abide by her conditions of release, and thus remand was warranted under 18 U.S.C. § 3148(b). In addition, the POP judges agreed that R.P. would likely benefit from a brief period in custody. R.P. herself consented to such sanctions upon entry into the program. Her consent form provided in pertinent part as follows:

> The judges will hold you accountable. If a violation of the conditions of the program (or of your pretrial release generally) is admitted or proven at a hearing with your attorney present, you may be reprimanded and/or subjected to one or more of the following sanctions, among others: more frequent court appearances; increased treatment services; a stricter treatment modality; restrictions on where you can go and with whom you may associate; a curfew; a community service obligation; a weekend jail term or even the revocation of your release.

R.P. was remanded at the hearing on February 22, 2013. On February 28, 2013, after expressing through counsel a renewed desire to participate in the POP program, R.P. was released for

continued residential treatment directly to the Samaritan Village facility she had been residing in when she was remanded.

R.P. was thereafter involved in yet another series of infractions involving a cell phone and another resident. (As noted below, it would later be revealed that R.P. became pregnant due to her relationship with the other resident.) Rather than remand her again, the Court and her Pretrial Services officer conditioned R.P.'s continued participation in POP on starting her year over, deferring her anticipated graduation date to March 2014. R.P. agreed, and since that moment she has made excellent progress. By August of 2013, R.P. was described by the treatment professionals at Samaritan Village as actively engaged in all clinical functions and a peer leader. R.P.'s change in attitude was apparent from her participation in the monthly POP sessions; she changed from a surly, reluctant participant to one who is proud of her own accomplishments, hopeful about her future and genuinely concerned about the progress and well-being of the other program participants.

R.P. became pregnant in the spring of 2013 and was transferred to a residential treatment facility for young mothers on July 10, 2013. She has remained drug free and her attitude has consistently been excellent. While still in residential treatment, she availed herself of parenting and stress management classes. R.P. was discharged from residential drug treatment on December 16, 2013. Her son was born in January of 2014, and R.P. is now living in an apartment with him and the baby's father, and she has the support of her mother and sister.

R.P. entered pleas of not guilty to the charges in the indictment at arraignment. A decision by the United States Attorney about whether she will be offered the opportunity to plead to reduced charges or obtain a deferred prosecution remains pending.

B. *Special Options Services*

1. A.P.

On July 2, 2012, A.P., a lifelong resident of the Bronx, was arrested at the age of 21, after returning to the United States from the Dominican Republic. He was charged with the importation of 70 pellets of cocaine, which he had ingested. At the time of his arrest, he lived with his mother, brother, aunt and his two-year-old daughter, of whom he had voluntary custody. He had dropped out of high school, and prior to his arrest he had been earning approximately $2,000 a month as a self-employed driver of an unlicensed cab. At the time of his arrest, A.P. was smoking marijuana twice a week.

A.P. was initially released on a bond and placed under the supervision of Pretrial Services, which placed him into the SOS program. During his first few months in the program, he violated several of his conditions of supervision with a positive drug test, a new arrest for driving with a suspended license, and a violation of his curfew. He was also dismissed from his GED program for poor attendance. Following a bail revocation hearing and warnings from the district judge, A.P. was continued in the SOS program.

A.P. was referred to the HOPE program for job readiness training, and he began classes on January 14, 2013. He learned how to appear more professional for job interviews. He also attended GED classes, eventually obtaining his GED in April 2013. He was able to secure an internship through the HOPE program, working at a Key Foods grocery store. He successfully completed the HOPE program's eight-week Grocery Works intensive job training and ultimately became an ambassador for the HOPE program, advising new or potential students about the resources and expectations of the program.

Through HOPE, A.P. obtained a job with the Indiana Marketing and Catering Company, working full time and overtime, and was granted an extension of his curfew when the manager of the company contacted Pretrial Services to report that A.P. was a trusted and valued member of the team. He was subsequently promoted to Production Supervisor at the company. He continued to work with the HOPE program to obtain his food preparation license. He is now working more than 40 hours a week and oversees two employees.

After some drug counseling, A.P. has remained drug free since August 2012. He continues to have primary custody of his daughter, making arrangements for her to attend school and assuming responsibility for her care whenever he is not at work. He has opened a bank account and is now pursuing an associate's degree in hospitality management, taking courses online.

Since he began his participation in the SOS program, A.P. has demonstrated that he is serious about accomplishing the long-term goal of being a good role model for his daughter. He now appreciates how his poor decisions could have a detrimental effect on her, and he has matured a great deal since his initial arrest. On June 20, 2013, he was sentenced to a three-year term of probation and required to continue his participation in the SOS Program. He continues to make great strides in improving his education and employment opportunities.

2. R.V.

R.V. was arrested on drug trafficking charges on February 24, 2009. At the time of his arrest, R.V., who lived his entire life on Staten Island, was 20 years old, living with his mother and several siblings in his mother's home. He was unemployed, had dropped out of high school in the 10th grade, and admitted to smoking marijuana several times a day and taking

ecstasy on occasion. He had a prior arrest for possession of narcotics when he was 18 and he had received mental health treatment when he experienced problems in school.

R.V. was released on a bond co-signed by his girlfriend, who at the time was three months pregnant with R.V.'s child. He was initially placed in the SOS program, put on electronic monitoring, and given a curfew.

Like many other youthful offenders, R.V.'s initial adjustment to supervision was difficult. He violated his location monitoring condition and tested positive for the use of drugs. After an admonition from the district judge, R.V. became compliant with his conditions of release, and the location monitoring condition was eventually replaced by a voice verification requirement.

After prodding and encouragement from his Pretrial Services officer, R.V. took GED classes and passed all the subjects except math on his first try. In December 2011, he finally obtained his GED. Thereafter, he enrolled in vocational training, studying Heating, Ventilation, Air Conditioning and Refrigeration Technology. R.V. began part-time work at Kohl's Department Store while searching for more permanent employment.

On July 18, 2013, R.V. was sentenced to a four-year term of probation, with a condition that he continue his participation in the SOS program. He remains dedicated to his fiancée (to whom he proposed only after obtaining her father's permission) and their daughter. He opened a bank account and is currently attempting to get his driver's license to enhance his job opportunities. He remains employed by Kohl's and he continues to attend vocational training five days a week.

3. R.D.

R.D. was arrested in July 2012 at John F. Kennedy Airport. He had just arrived from the Dominican Republic and a search revealed cocaine pellets in his stomach. Prior to his arrest, R.D. had been renting a basement room, but upon his release on a bond he moved in with his sister. While he is not legally married to his girlfriend, he has taken on the role of stepfather of her seven-year-old son.

R.D.'s supervision had a rocky start. On September 1, 2012, he was arrested with an open container of alcohol in the presence of his younger brother, and he failed to disclose the arrest to his Pretrial Services officer for two weeks. Then R.D. was arrested again, this time for assault based on events arising out of an argument with his sister (who was also arrested). At a bail revocation hearing on November 20, 2012, R.D. was informed by the district judge that he would have one final opportunity to get his life in order. The judge modified R.D.'s conditions of release to require that he participate in the SOS Program, reside with his mother, be subject to location monitoring, and participate in substance abuse treatment, as there was reason to believe his noncompliance stemmed from increased use of alcohol. R.D. also began receiving mental health treatment in conjunction with his drug treatment in order to deal with his anger management issues.

The bail hearing proved to be the wake-up call R.D. needed, as he then made an exceptional adjustment to the requirements of the SOS Program. He completed a 12-week job readiness training program, began dealing with his anger issues in meetings with mental health professionals, and began an internship performing clean-up duties and minor repairs for Brooklyn Community Services. He also successfully completed drug treatment therapy, and

cognitive behavioral therapy resulted in an increased level of motivation. In May 2013, R.D. secured employment as a porter/dishwasher.

On June 3, 2013, R.D. was sentenced to a five-year term of probation, with conditions that he continue under strict supervision in a STAR program, be subject to six months of location monitoring, continue with substance abuse treatment, and maintain full-time employment or education/vocational training. Location monitoring was removed in August 2013 based on R.D.'s compliance with the STAR program requirements. He currently works full time at Brooklyn Community Services, where he interned while at the HOPE Program, and he is working towards an Associate's Degree at Bronx Community College. He resides with his parents and remains involved in his stepson's life.

4. J.L.

J.L. is a lifelong resident of New York City, residing primarily in Queens. She was arrested on June 11, 2012, at the age of 18, after she returned from the Dominican Republic with 2,294 grams of cocaine in her suitcase. With her was her boyfriend/co-defendant, who had over 2,600 grams of cocaine in his suitcase.

At the time of her arrest, J.L. resided with her mother, her younger brother and her boyfriend. She had her high school diploma but she was essentially unemployed. She abused alcohol, marijuana, and ecstasy, and she had previously seen a therapist for anger management issues following an assault on her mother.

At the arraignment, J.L. was released on a bond signed by her mother; her boyfriend was detained. As a condition of her release, J.L. was ordered to attend drug treatment and mental health counseling. Violations occurred in July 2012, December 2012, and February 2013, after

J.L. tested positive for marijuana, cocaine and benzodiazepines, respectively. After a hearing in January 2013, she was placed on electronic monitoring and given a curfew. J.L. was placed in the SOS program in February 2013.

Pretrial Services determined that J.L.'s problems stemmed in large part from the absence of any structure at home. Her mother allowed transient individuals, who were suspected of engaging in illegal behavior, to take shelter in the home. In numerous therapy sessions and office visits, J.L. expressed the desire to have her mother act more like a parent and less like a friend, and she also expressed concern regarding the care of her younger brother.

After being placed in the SOS program, J.L. continued to struggle with drug use and the need to sever her connection with her boyfriend/co-defendant. She made great progress in other areas of her life, completing job training with the HOPE program and obtaining an internship at a dog spa. Shortly thereafter, J.L. obtained part-time employment at a retail pet care store and was offered the opportunity to attend grooming school. She has expressed a long term goal of becoming a veterinarian.

J.L. enrolled in classes at LaGuardia Community College and obtained good grades in the five classes that she attended during her first semester, while continuing to work part time. Her increased maturity was tested in the summer of 2013. Her mother was hospitalized for several weeks after experiencing a psychotic episode in which she hit J.L.'s younger brother, and after her release from the hospital the mother left for a vacation. The main responsibility for the day-to-day care of her brother fell on J.L. Despite the absence of any adult supervision, she stayed out of trouble during that summer and did not return to drug use.

During her time in the SOS program, J.L., who is a current participant, has blossomed into a responsible, mature young woman with hopes and dreams for a productive future.

5. E.H.

E.H. was 22 years old when he was charged on August 13, 2012, along with three co-defendants, with transporting drugs from the Dominican Republic. Born in Queens, E.H. resided with his mother at the time of the arrest and he was released on the condition that he participate in the SOS program.

E.H. was initially resistant to the intense supervision offered by the SOS Program. He complained that the curfew "would not work for him" and made statements that prompted his suretor to threaten to remove himself from the bond.

Although E.H. was working as a sales representative at a major corporation at the time of his arrest, he had not finished high school or gotten his GED. As part of his supervision, he took the GED exam and passed it in March 2013. Beginning in September 2013, E.H. enrolled in part-time classes at DeVry University, having been awarded a Career Catalyst Scholarship that provides $20,000 toward his overall tuition.

E.H. continues to work full time at his sales job and attend classes at DeVry. His self-confidence has increased, along with his motivation and his desire to plan for the future. At the same time, there has been a marked change in his attitude; he is less cynical and less arrogant and more willing to take suggestions and accept constructive criticism. Given his work and school schedule, his reporting requirements have been reduced.

* * * * * *

As the data set forth in Section Two illustrate, not all of our program participants are success stories. Two examples are described below.

G.P. was arrested at John F. Kennedy International Airport on April 19, 2011, attempting to smuggle 1.8 kilograms of heroin into the United States from Bogota, Colombia. G.P. was 28 years old at the time of his arrest, and it was his first offense. He was raised in New Rochelle, New York, and his parents divorced when he was three years old. G.P. has two children: a daughter living with her mother, G.P.'s wife, in Mexico, and a son born to another woman, living in New Mexico, with whom he has had no contact.

When interviewed by Pretrial Services after his arrest, G.P. acknowledged a history of cocaine and alcohol abuse, and admitted as well that he snorted cocaine and had several drinks on the day before his arrest. G.P.'s alcohol abuse dates back to when he was 13 years old. Despite his lengthy history of substance abuse, G.P. had not participated in any treatment prior to his arrest.

G.P. was released on bail so he could participate in the POP program. He is one of three participants who have been terminated from the program.

While on bail, G.P. lived with his mother and brother and found work delivering pizza. Problems soon developed, however. He failed to provide verification of employment, missed outpatient treatment sessions, and failed to enroll in GED classes. Although his attitude and conduct improved the following month – he enrolled in GED classes, produced verification of his employment, and attended treatment more regularly – the improvement was short-lived. G.P. missed eight treatment sessions and at least two appointments with his Pretrial Services officer

between May and June of 2012. When he did finally appear, he revealed that he had stopped attending GED classes. A drug test administered on June 20, 2012 revealed that G.P. had used cocaine.

As a result of these failures to comply with the conditions of his participation in POP, G.P. was remanded on June 29, 2012. On August 10, 2012, he was released from detention after his request for a second chance to participate in POP was granted. Once again, however, G.P. failed to follow through. On August 19, 2012, he got drunk in a restaurant and was arrested for punching someone in the face. On September 11, 2012, G.P. was both removed from POP and remanded, and a sentencing date was set.

G.P's advisory Guidelines range was 30 to 37 months. He was sentenced on October 10, 2012 to a 22-month term of incarceration and three years of supervised release.

SOS participants also stumble. E.N. is 21 years old. He was born and raised in modest circumstances in the Bronx until age 15, when he and his parents moved to the Dominican Republic. His mother has been collecting disability benefits since being hit by a car in 2005; his father developed blood poisoning in 2007 from working in a factory and has worked only sporadically since that time. E.N. has three older maternal half-siblings with whom he is close.

E.N.'s mother suspects he has a learning disability. He has a documented history of depression and anger management problems; even before the move to the Dominican Republic, E.N. received counseling for a year while in junior high school.

E.N. began smoking marijuana daily at age 13. Prior to his arrest, he would spend approximately $400 every two weeks purchasing one to two ounces of marijuana. He would buy it with money provided to him by his mother for other purposes. E.N. was smoking up to ten

times per day in the months prior to his arrest. He attempted to stop on multiple occasions, without the benefit of drug treatment, and failed each time.

In December 2010, when E.N. was 18 and a high school student in the Dominican Republic, he wanted to return to New York to visit family and friends. His mother refused to grant him permission to go or to pay for the trip. E.N. decided he would go anyway, and he arranged alternate financing: he agreed to transport a drug trafficker's suitcase to New York. The suitcase contained two and one-half kilograms of cocaine. E.N. was arrested at the airport and released on a secured bond six days later. On April 5, 2011 he pled guilty to importing cocaine.

E.N.'s early participation in the SOS Program was rocky. He enrolled in GED classes and vocational training. He also began receiving mental health treatment to address his depressive symptoms and anger management issues. At the same time, E.N. tested positive for marijuana on two occasions and exhibited difficulty complying with restrictions on his travel. His attitude was combative and defensive.

By the time of his sentencing two years later, E.N. had turned his life around. He completed his GED studies and sat for the GED test in July 2012. He failed, but, undeterred, he re-enrolled in GED classes. He sat for the test again in November 2012 and passed. He obtained several vocational certifications, including in solar paneling and electrical trouble shooting. At his sentencing on January 25, 2013, E.N.'s advisory Guidelines range was 30-37 months. In lieu of incarceration, E.N. was sentenced to a term of probation.

Following sentencing, E.N.'s supervision was transferred to the Southern District of New York based on his residence, and he failed to build on the progress he had made in the SOS

program. Over the course of the next ten months of supervision, E.N. violated several of the mandated conditions of supervision imposed at sentence. While on supervision, he tested positive for marijuana on six occasions, and failed to report to the Probation Department on seven occasions. E.N. also failed to attend four of his scheduled appointments for mental health treatment, and, finally, he failed to pay the balance of his Special Assessment even though he was employed at the time.

On December 13, 2013, a Violation of Supervised Release Report ("VOSR") was filed with the court and a conference was held before the sentencing judge on February 19, 2014. At that time, it was agreed that E.N.'s supervision would be transferred back to the Eastern District of New York where he would resume his participation in the post-sentence component of the SOS Program; in the meantime the VOSR will be held in abeyance.

V. Alternative to Incarceration Programs in Other Districts

Our programs are not alone. As set forth below, eight other districts have presentence alternative to incarceration programs. Two have intensive pretrial supervision programs for high-risk offenders that are closely related in structure and purpose to such programs. We describe these various initiatives below, with thanks to the various courts for providing us with the information.

A. *Conviction and Sentence Alternatives ("CASA") – the Central District of California*

The Central District of California's Conviction and Sentence Alternatives ("CASA") is a presentence diversion program. It diverts some participants from the criminal justice system entirely by dismissal of the charges, and others from prison through probationary sentences (agreed-upon under Federal Rule of Criminal Procedure 11(c)(1)(C)) upon successful completion of the program. CASA is jointly administered by the court, Pretrial Services, the United States Attorney's Office, and the Federal Defender's Office.

CASA has two tracks. Track One includes defendants with minimal criminal histories charged with relatively minor crimes. It is not limited to youthful offenders, but otherwise Track One participants resemble those in our SOS program. Track Two consists of defendants (even those with serious criminal histories) whose criminal conduct appears to be motivated primarily by substance abuse or similar issues, and who may be deterred from future criminal activity by treatment under court supervision. Thus, Track Two defendants are virtually identical to the population of defendants in our POP program.

Upon successful completion of the CASA program, Track One participants have their charges dismissed; Track Two participants obtain an agreed-upon sentence of probation.

Since June 25, 2012, 97 defendants have been selected to participate in the CASA program – 73 in Track One and 24 in Track Two. Thirty-four have graduated – 26 from Track One and 8 from Track Two. Only four have been unsuccessfully terminated from the program.

The court estimates that in just the first year following their graduation, CASA will have saved taxpayers $984,232 on those 34 graduates alone; the savings on those same 34 graduates over four years is estimated to be $3.94 million.

B. *Pretrial Alternatives to Detention Initiative ("PADI") – the Central District of Illinois*

The Central District of Illinois has been operating the Pretrial Alternatives to Detention Initiative ("PADI") for more than ten years. PADI defendants are referred by the United States Attorney's Office and are evaluated by a substance abuse treatment provider and Pretrial Services. Pretrial Services and the treatment provider make a joint recommendation to the United States Attorney on whether the defendant is appropriate for the program, and the United States Attorney then decides if the defendant should be allowed entry into the program. As of November 6, 2013, 87 participants (out of a total of 93) had successfully completed the program, and 16 more were currently in it. Of the 87 successful participants, 28 received sentences of diversion (dismissal of the charges pending completion of a diversion supervision term), 40 received "time-served" sentences, and four had their cases dismissed outright. In November 2013 the Court estimated that the program cost savings attributable solely to the 40 time-served sentences was $7,929,709, and that an additional estimated $736,512 was saved as a result of the other 28 cases. These savings, the court observed, pale in comparison to the value of the positive changes in the participating defendants' lives.

C. *The BRIDGE Program – the District of South Carolina*

The BRIDGE program is a pilot drug court that officially began on November 29, 2010.This presentence program created a unique way of dealing with defendants whose criminal histories suggest prolonged substance abuse. As of late August 2013, 37 participants had entered the BRIDGE program; nine had graduated and 16 remained in the program at that time. Twelve participants have either voluntarily withdrawn from the program or have been terminated. The court's estimated savings for those nine participants alone is $691,105.52. None of the nine graduates had been rearrested as of August 2013.

D. *The Support Court – the District of Connecticut*

In early 2013 the District of Connecticut expanded its reentry drug court into the presentence phase. The Support Court is jointly administered by the court, the United States Marshal, the United States Attorney's Office, and the Federal Defender's Office. Since the program was expanded, 15 pretrial participants have been accepted into the Support Court. Two of the 15 have graduated and are awaiting sentencing.

E. *The DREAM Program – the Western District of Washington*

In late 2012 the Western District of Washington established, in collaboration with the United States Attorney's Office and the Federal Defender, the DREAM Program, a presentence drug court. The program contemplates the vacatur of participants' convictions upon successful completion. It produced its first two graduates in December 2013 and two more since then. The court reports that, assuming the four graduates would have been sentenced at the bottom of their applicable Guidelines ranges, over 130 total months of incarceration have been avoided, not to mention the savings associated with the social costs to those four graduates and their families had they gone to prison.

F. *Alternative to Prison Sentence ("APS") Diversion Program – the Southern District of California*

The Southern District of California's Alternative to Prison Sentence ("APS") program consists of a twelve-month intensive period of supervision that focuses on youthful offenders charged with immigration or drug trafficking offenses. The United States Attorney's Office is responsible for selecting the program participants and requires them to accept responsibility for their actions. The program is one of the largest diversion programs in the federal system with more than 397 participants since its inception in November 2010. The success rate of the APS program is higher than 90% and it is estimated to have saved more than $5.5 million dollars in incarceration expenses.

G. *The LASER Court – the District of New Hampshire*

On April 9, 2010, the District of New Hampshire authorized the creation of the LASER program, a rehabilitative program for the defendants whose qualifying crimes and criminal histories are attributable to drug abuse or addiction. A collaborative effort by the court, the United States Attorney's Office, the Probation Department, and the criminal defense bar, the program requires that participants adapt to law-abiding, sober, employed and responsible lifestyles ("L-A-S-E-R").

Successful participants require a minimum of 12 months to complete the four-phase program. Each phase entails specific goals with a number of distinct, achievable expectations consistent with each stage of recovery. Participants gain an understanding of the process of addiction, recognize triggers and patterns of use and abuse, and appreciate the impact of their addictions on themselves, their families, and their communities. They accept responsibility for

their conduct and acquire the necessary tools to achieve a sober, law-abiding, and employed lifestyle. Participants are required to develop a community-based sober support network and a comprehensive relapse prevention plan as a condition of LASER graduation.

While graduates of the program cannot normally expect dismissal of their criminal charges, they may be eligible to receive (a) a downward departure (or a variance) from the applicable Guidelines range based on their post-conviction rehabilitation; (b) a reduction in charge to a lesser offense, at the United States Attorney's Office's discretion; or (c) a reduction in the term of supervised release or probation.

Since its inception, 21 defendants have participated in LASER. Fifteen have been pretrial participants; the remaining six have been on post-conviction supervision. Of the 15 pretrial participants, seven (54%) have successfully graduated, six (46%) have been terminated, and two are actively participating.

The potential period of incarceration to which the LASER pretrial graduates were exposed (measured by reference to the low end of the applicable Guidelines range) varied between 8 and 57 months, with the average being 33 months. The court estimates cost savings associated with the program graduates at $492,810.78.

H. *The Pre-Start Program – the District of Massachusetts*

This presentence program was established in the Springfield courthouse in 2013, and it is modeled on our court's POP program. It currently has only two participants.

I. *Intensive Supervision Programs for High-Risk Offenders*

The programs described above are judge-involved, presentence initiatives created to provide alternatives to incarceration for certain defendants. Two additional programs that have come to our attention involve judicial participation in intensive pretrial supervision. We describe them here for that reason, although our understanding of the programs is that they were designed not as alternatives to incarceration but rather as initiatives to help high-risk defendants succeed while on pretrial supervision in federal court.

1. Court Assisted Pretrial Supervision ("CAPS") - the District of Oregon

Based on the success of its own and other districts' re-entry courts, the District of Oregon asked its Pretrial Services Office to explore options to incorporate the principles of a reentry court into the pretrial supervision of defendants. After reviewing several presentence programs from other districts, the court concluded, based on concerns such as confidentiality, the presumption of innocence, and the need for the prosecuting attorney and defense counsel to shed their traditional roles and work together as a team, that the traditional team approach model appropriate for pretrial diversions was not a viable option in most pending federal cases.

Instead, the court created the Court Assisted Pretrial Supervision ("CAPS") program, a special condition of release for certain high-risk defendants. It provides them with intensive and individualized supervision. Although any defendant can be ordered to participate in the program, the objective is to select participants who are more likely to be detained or those who were released but violated the terms of traditional pretrial supervision. All defendants are required to participate in monthly meetings with the program judge, Pretrial Services, and defense counsel. The Assistant U.S. Attorney also participates when appropriate and when requested by the court.

Since the start of the program in 2011, twenty-four defendants have been ordered into the CAPS program, and eight have successfully transitioned to post-conviction or traditional pretrial supervision.

2. Better Choices Court ("BCC") – the Eastern District of California

The Better Choices Court ("BCC") program in the Eastern District of California selects high-risk defendants who are considered less likely to comply with traditional supervision. These include youthful offenders, offenders with lengthy criminal histories and/or histories of poor adjustment to supervision, and offenders with addiction problems. The program includes the cooperation of the Court, Pretrial Services, the Federal Defender, and the United States Attorney's office, and its primary goal is to address behavior and rehabilitation through program meetings, including monthly meetings with an assigned magistrate judge, and intensive supervision. The program has been in existence for four years and currently has nine participants. Thus far, a total of ten participants have graduated from the program.

VI. The Eastern District STAR Courts

This district has long been committed to post-sentence drug courts, now known as STAR (Supervision to Aid Re-entry) Courts. The late Chief Judge Charles P. Sifton established the first such court a dozen years ago, and several judges have continued to preside over them in the interim. Presently, Judge Dora Irizarry has a STAR Court, assisted by Probation Officers Christopher Wodzinski and Yara Suarez, as does Magistrate Judge Robert Levy, who is assisted by Probation Officer Robert Anton.

Although our two STAR Courts have some differences, both are committed to assisting supervisees with documented histories of substance abuse in reentering their communities at the conclusion of a prison term. In addition, many STAR Court participants receive probation or other sentences that do not require terms of incarceration, and those defendants are provided with a form of supervision designed to better their chances of leading drug-free, productive lives. Finally, for various defendants whose cases have been assigned to Judge Irizarry (who has conducted her STAR Court for almost a decade), the STAR program constitutes an alternative to incarceration at sentencing.

STAR Courts offer persons with drug or alcohol problems more assistance, stricter accountability and greater rewards for completing their supervision successfully. The program was founded on the belief that too often substance abusers are jailed for behavior directly related to the abuse, and they are not given sufficient help in controlling their addictions while incarcerated and after their release. As a result, they repeatedly commit similar offenses.

EDNY STAR Court Team: Judge Dora Irizarry and Probation Officer Christopher Wodzinski

By participating in a STAR Court, defendants place themselves under the intensive supervision of the Court. If they are able to complete the program, they benefit from better treatment, health and welfare services, educational and vocational placement services, family counseling and, at the court's discretion, a reduction in the length of their terms of supervision.

STAR Court participation is more intense than regular supervised release. Participants meet with the judge, probation officer, and defense attorney every month and are required to attend a weekly group counseling session with fellow program participants for one hour on Saturday mornings. Participants also report to their assigned probation officer as often as necessary and are tested for drugs and alcohol frequently.

At the court meetings, the probation officer, judge, defense attorney, and participants discuss their problems and progress. If the participant violates the conditions of supervision, the judge may require the participant to appear in court more often, observe a curfew, perform community service, spend a weekend(s) in jail, be placed in a residential re-entry center or otherwise be held accountable for his or her actions. These orders are designed to help the participants by encouraging them to reflect on their behavior, stay away from people and places that get them into trouble and instead become involved in their communities in positive ways.

In order to graduate from the program, a participant must remain alcohol and drug free and observe all the conditions of supervision for twelve months. If the participant tests positive for drugs or alcohol or misses a scheduled test without an acceptable excuse, the twelve-month clock begins anew. The participant must also, if practicable, be employed, enrolled in school or otherwise be productively involved in his or her community for six months and have a stable residence and finances.

The other EDNY STAR Court Team: Magistrate Judge Robert Levy and Probation Officer Robert Anton

If the participant completes the program, the probation officer recommends that the term of supervision be terminated. Normally, such terminations occur earlier than the initial supervision termination date. That recommendation is given great weight, but the judge ultimately decides whether supervision should terminate early.

As of mid-February 2014, 101 defendants had graduated from our STAR Courts. The Probation Department has estimated that they have produced a total savings (based solely prison terms that were shortened or avoided and on supervised release terms that were shortened) of more than $2,000,000.

A STAR Court consent form is set forth in the Appendix.

VII. Educating Ourselves

A. *The Eastern District Drug Court/SOS Summit Meetings*

We have learned that it's one thing to create alternative to incarceration programs and reentry courts and another thing to conduct them effectively. There is ample evidence that judge-involved courts like our POP, SOS, and STAR programs are effective in reducing recidivism, but judges receive no training for the task of presiding over the regular meetings with the participants. In part for that reason, and also to promote better communication generally among the programs and throughout the Court, it was decided more than a year ago that there be regular meetings of the various judicial, Pretrial Services and Probation Department participants in the POP, SOS, and STAR programs.

That led to our monthly "Eastern District Drug Court/SOS Summit Meetings." All courthouse employees are invited, as are the lawyers in the United States Attorney's office and the lawyers and the social worker in the Federal Defender's office. The typical summit meeting includes approximately 20-30 people, including judges, Pretrial Services and Probation officers, law clerks, prosecutors and defenders.

Most of the summit meetings involve guest speakers. They have included drug treatment experts (including one who focused solely on cognitive behavioral therapy), representatives of job training programs, programs for workforce development and fatherhood training, and the judge and staff of an innovative state court program that combines family court, criminal court and housing court in a Brooklyn neighborhood. Meetings without guests have consisted of discussions about the practices used in our various programs. For example, the topic of one

meeting was the different approaches we take in responding to relatively minor or technical violations.

B. *Road Trips*

Unlike the summit meetings, which occur at the lunch hour on the last Wednesday of each month, trips to visit other courts or programs are more time-consuming and therefore more difficult to arrange. However, the summit participants arranged for a visit to the Red Hook Community Justice Center, the innovative state court initiative referred to above. More than two dozen people attended, including several judges, court personnel, prosecutors and defenders, and they were able to observe a successful, ten-year-old, judicially supervised alternative to incarceration model in action. They learned first-hand about treatment modalities, strategies for dealing with violations, the approach to the punishment of those who "fail out," and efforts to make the court more responsive to the needs of the community. Subject to time constraints imposed by attending to the work of the Court, similar visits will be arranged this year.

In addition, the judges involved in the POP program in Brooklyn visited one of the inpatient drug treatment facilities in upstate New York that a number of program participants have lived in. The Central Islip POP judges made a similar visit to a Phoenix House facility. The monthly meetings of the POP participants often involve discussions of the various stages and difficulties of long-term residential treatment away from families and loved ones. These visits enhanced the judges' understanding of that environment and made them better able to contribute to those discussions.

VIII. Conclusions and Recommendations

Even at this early juncture, we are confident that our presentence alternative to incarceration courts – the POP and SOS programs – have been successful. The same is true with regard to our STAR courts. The eight judges directly involved in the programs are firm in their belief that the programs provide a better way to deal with the defendants in them. The programs not only save substantial financial resources, but – on a human level – help the defendants and their families without endangering the community or undermining the purposes of punishment. The full support of the United States Attorney suggests that the judges' belief is well-founded.

However, much more work is required before alternative to incarceration programs like POP and SOS, and the other programs in our sister districts around the country, can be fully and properly evaluated. These programs raise many questions that individual districts are hard-pressed to answer by themselves. What types of alternative to incarceration programs should federal courts have? What defendants should be eligible for such programs? What are the best practices with respect to support services, intensity of supervision, dealing with violations, and conducting the monthly meetings? Will the federal defendants who successfully complete these programs have lower recidivism rates over time? Do the ways the participating judges interact with the participants affect the efficacy of the programs? Can judges be trained to be more effective?

The criminal caseload in the federal courts is different from that in the state courts, and as a result the proportion of defendants who should be considered for alternative to incarceration programs is certainly lower in the federal system. Nonetheless, the Department of Justice has explicitly acknowledged that there are meaningful numbers of low-level offenders in the federal system for whom sanctions other than incarceration may be appropriate. It has also recognized

that the potential for system-wide federal cost savings is great. Our programs and the closely analogous CASA program in the Central District of California include approximately five percent of the combined caseload of the districts. If programs like these can responsibly avoid the need to incarcerate just five percent of the national defendant population that otherwise would receive prison terms, the savings achieved in prison expenditures alone would be enormous. The social costs avoided would be harder to measure but no doubt be even more important. For those and other reasons, the Attorney General has repeatedly spoken in support of presentence drug courts, including during his November 2013 visit to the PADI program in the Central District of Illinois.

It remains true, however, that any particular federal alternative to incarceration program will not likely include large numbers of defendants, even in the more populous districts like ours and the Central District of California. The numbers of participants discussed above make that clear. As a result, if there is to be a serious, scientific assessment of such programs, there needs to be more centralized encouragement, support, and study of them.

Finally, we have not lost sight of the fact that our alternative to incarceration programs provide support services and attention that are largely unavailable to law-abiding members of the same communities our participants are from. There is at least probable cause to believe every participant in the POP and SOS programs has committed a federal felony, and most have admitted to doing so, yet they receive drug treatment, educational assistance, job training and hands-on supervision of which many others outside our system are more deserving. We acknowledge this unfairness. As a Court, we also recognize the limitations on our authority, and our views regarding social problems and social services outside the criminal justice system are insufficiently relevant to set forth here. However, once defendants enter our system, we feel an

obligation to dispose of their cases pursuant to policies that, to borrow from the Sentencing Reform Act of 1984, "assure the meeting of the purposes of sentencing as set forth in" 18 U.S.C. § 3553(a)(2), "avoid[] unwarranted disparities among" similarly situated defendants "while maintaining sufficient flexibility to permit individualized sentences," and "reflect, to the extent possible, advancement in knowledge of human behavior as it relates to the criminal justice process." 18 U.S.C. § 991(b). In addition, in an environment in which the rising costs of incarceration are an ever-present topic of discussion, we are persuaded that fiscal considerations alone warrant the careful consideration and evaluation of alternative to incarceration programs. The fact that the participants in such programs receive advantages that some law-abiding members of the community need but cannot obtain does not, in our view, justify walking away from the programs.

In sum, we are optimistic about our presentence alternative to incarceration programs. But we are keenly aware of the difference between policies and programs that feel right, as POP and SOS do, and ones that have been proven right. POP, SOS, and other similar programs in the federal system will only be proven right, in our view, if more districts are encouraged to create and attempt to perfect such programs, generating sufficient data for reliable evaluation.

EXHIBIT D
Federal Defender Analysis of the CORRECTIONS Act (S. 467)

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

EXECUTIVE SUMMARY

I. The CORRECTIONS Act Would Mandate an Untested Experiment that is Unlikely to Work.

A. The Basics of Risk Assessment

When risk assessment tools are used in criminal justice systems, they are typically used to determine the appropriate kind and level of programming or supervision corresponding to an offender's needs. We are unaware of any criminal justice system that uses risk assessment scores to determine the amount of time credits inmates can earn for participating in programming, or to deny them the ability to use such credits.

Broadly speaking, risk assessment tools rely on two categories of information: static and dynamic factors. Static factors are those that do not change over time, including such things as criminal history and age at the time of the offense. Dynamic factors are those susceptible to change, such as work history, educational achievement, and strength of social networks, or the lack thereof.

Even for the limited purpose for which risk assessments are used, they are controversial. These tools do not measure the risk of recidivism of any individual, often classify individuals inaccurately, and tend to mis-classify individuals who are low risk as moderate or high risk. Further, static factors often favor white and well-off defendants. Dynamic factors are slow changing, and highly challenging to address for people with difficult home environments, a background of poverty, lack of education or work opportunities, or cognitive or mental health deficits.

As discussed further below, the problems with risk assessment become insurmountable when applied to the prison setting for the purpose of determining time credits and the ability to use them. None of the states cited by the CORRECTIONS Act sponsors use risk assessment scores or categories for such a purpose – and with good reason.

B. The CORRECTIONS Act and the Misuse of Risk Assessment

The CORRECTIONS Act ("S. 467") would require the development and implementation of a complex "Post-Sentencing Risk and Needs Assessment System" ("Assessment System") that would require "consideration of dynamic risk factors" such that all prisoners not initially classified as "low risk have a meaningful opportunity to progress to a lower risk classification during the period of the incarceration . . . through changes in dynamic factors." § 3621A(b)(1)(B); *see also* § 3621A(h)(1). It would direct the Bureau of Prisons to assess and periodically reassess every inmate within its custody, § 3621A(a) & (c), and would give maximum incentives for completion of programs to those classified as low risk (10 days per month) and fewer incentives for all others (5 days per month), § 3621(h)(6)(A)(i). Over half the prison population would not be permitted to earn time credits, § 3621(h)(6)(A)(iii), and others

would be deemed ineligible to participate by the BOP, § 3621(h)(8)(A)(ii)(I)-(II). Among those left, only those classified as low risk could use time credits to eventually transfer to community confinement, § 3624(c)(2)-(5); those classified as moderate risk could only transfer to a residential reentry center or home confinement, § 3624(c)(4)-(5)), and only if their risk scores "declined during the period of the prisoner's incarceration," § 3624(c)(2)(B). Those classified as high risk could not use credits at all.

The system described in the bill is novel and untested. State correctional systems, including those cited in press releases announcing the legislation, award time credits for participating in programs based on performance and/or disciplinary record, not risk assessment scores. The system described in the bill is not in use in the states, and there is no evidence from the states that it would work as described (*i.e.*, classifying inmates accurately, and reducing risk levels through changes in dynamic factors), reduce recidivism, or save taxpayer dollars. The lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

The core assumption—that all inmates can progress to a lower risk category through changes in dynamic factors while incarcerated—is untested and likely incorrect. Every extant risk assessment instrument uses static factors and gives them significant weight based on their statistical correlation with recidivism. That weight cannot be overcome by legislative decree while maintaining any semblance of statistical accuracy. There is no question that many programs and activities reduce the overall *rate* of recidivism.[1] However, as discussed below, an individual's risk *category* is unlikely to change as the result of programs and activities in prison. No research supports this assumption.

Further, relying on this unfounded assumption, the bill would give the maximum incentive to those who are classified as low risk when they enter prison. It is well-established that practices aimed at reducing recidivism should focus scarce resources on the highest risk individuals. S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most intensive programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk.

The bill also assumes that the Assessment System will predict "the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted," § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2). Risk

[1] "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 3-4 (Aug. 1, 2012), http://www.justice.gov/ola/testimony/112-2/08-01-12-bop-samuels.pdf. The benefit-to-cost ratio for residential drug abuse treatment is as much $2.69 for each dollar invested; $5.65 for adult basic education; $6.23 for correctional industries; and $7.13 for vocational training. *Id.*

assessments cannot predict whether any individual will reoffend. They merely predict the statistical risk of a group with certain characteristics in common, and they often do so inaccurately. A recent meta-analysis showed that only 52% of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half of all persons were classified as moderate or high risk when they were actually low risk.[2] Current research questions whether risk assessment tools are too inaccurate even for the purpose of identifying criminogenic needs and appropriate programming.[3] It would be wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreliable and unreviewable risk assessments, as under S. 467.

II. The Development and Implementation of the new "Assessment System" Would Be Costly and Labor-Intensive, and Any Cost Savings Would Not Be Seen for a Decade, If Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of a new "Assessment System." Assessment instruments "are expensive to construct and validate,"[4] and "can take several years to complete."[5] Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and used for a different population or stage of the criminal justice process. The tool must be validated for the particular population and specific to the particular stage in the criminal justice process. The bill would require development, validation, training, and implementation within six years.[6] As explained below, we believe that this time frame is overly optimistic, given the need to collect and analyze data on actual recidivism of prisoners released over several years, and the time it would take to train and certify BOP staff to use the tool. Moreover, the bill provides that the tool need only be validated "as soon as is practicable," § 3621A(b)(4), but a tool must be validated *before* it is implemented. Whether a valid tool can be developed for the

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[2] Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 British Medical J. 1, 4 (2012), http://www.bmj.com/content/345/bmj.e4692.

[3] *See, e.g., id.* at 4-5; Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 Crim. Just. & Behav. 286, 296-300 (2015); James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 15-16 (2013), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf; Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* v-vi (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf.

[4] Edward Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report* 8-9 (2009).

[5] Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 Victims & Offenders: Int'l J. Evidence-Based Res., Pol'y, & Prac. 203 (2010).

[6] It would allow 30 months for the new Assessment System to be developed, and another 30 months for BOP to determine the risk level of each prisoner under the new Assessment System, for a total of five years, and six years for BOP to make programming and activities available to all eligible prisoners. *See* § 3621A(a) & (c); § 3621(h)(2).

massive and heterogeneous federal prison system is highly doubtful.

Any savings from transferring individuals from prison to prerelease custody would not be seen for a decade, if ever. After at least six years for development and implementation, it would take a low-risk prisoner three years, and a moderate-risk prisoner six years, to earn one year of credit.[7] As noted above, only a small portion of the prison population would be able to earn and use time credits, and all or some of the prerelease custody they could earn would be spent in a residential reentry center or home confinement, *see* § 3624(c)(2)-(5), which cost more than incarceration in the low and medium security facilities from which they would be transferred. Meanwhile, during the years it would take to implement the proposal, absent front-end sentencing reform, the BOP population would grow from 32% to 55% over rated capacity. Medium and high security facilities will be hit the hardest by future growth, but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.

It would be a significant mistake to require the Bureau of Prisons to spend years developing and implementing a costly and labor-intensive system without solid evidence that it would benefit the taxpayers. There is no such evidence.

III. The Bill Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

The categorical exclusion of over half the prison population is unwarranted, and would have a disparate impact on African American and Native American inmates. Risk factors correlate with socioeconomic class and race, and studies show that African Americans are more likely to be *mis*classified as high risk than White or Hispanic offenders.

The exclusion is also contrary to the goal of increasing public safety. Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. With or without time credits, they will serve lengthy sentences and then be released. By failing to encourage them to participate in programs shown to reduce recidivism before releasing them to the community, S. 467 fails to promote the stated goal of enhancing public safety.

IV. The Bill Would Be Unconstitutional.

The bill would violate the Separation of Powers, the Due Process Clause, and the Sixth Amendment by making all determinations and assessments against the inmate unreviewable in any forum; giving the government the right to judicial review of a decision to transfer, with no right to counsel and no clear right to a hearing for the inmate; denying inmates any right to judicial review of decisions to deny transfer; providing for revocation of prelease custody with no procedural mechanism, due process protections, or right to counsel; giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody; and

[7] Only after participating in 30 days of these programs or activities would individuals start to accrue time credits of 5 days or 10 days (only for low risk prisoners) for each 30-day period of successful completion of programming or activity. *See* § 3621(h)(6)(A)(i).

giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison. In addition, giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate's offense of conviction excludes him from earning time credits would lead to error, unfairness, and impracticalities.

V. There is a Simple, Cost-effective, and Fair Alternative to this Bill.

There is an alternative, straightforward approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparities or violate the Constitution. Congress should expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equitable basis.

Congress should provide support for the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn and use time credits up to a certain percentage of the sentence imposed, so long as they also comply with disciplinary rules. Under this approach, individuals would earn reductions in their prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

Furthermore, and perhaps most significantly, Congress should reduce unnecessarily severe sentences on the front end. "[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options . . . would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums."[8] By all accounts, the Smarter Sentencing Act would result in at least $3 billion in cost savings in the first 10 years.[9]

[8] Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

[9] The Congressional Budget Office estimates that the Smarter Sentencing Act would result in a net savings of $3 billion: $4 billion saved through reduced incarceration less $1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in $3.426 billion in cost savings and another $3.964 billion in cost aversions. *See* Potential Impact & Cost Savings: The Smarter Sentencing Act, http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf. Urban Institute estimates $3.258 billion in cost savings. Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 3-4 (2014), http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf.

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

I. The Assessment System Is an Untested Experiment, and Is Unlikely to Work as Described.

A. State correctional systems award time credits for participating in programs based on performance and disciplinary record, not risk assessment scores.

The press releases announcing S. 467 and similar legislation introduced in the House claim that "similar programs have found success" in Texas, Rhode Island, Oklahoma, Ohio, and North Carolina,[1] thus suggesting that the system described in these bills is already in use, works as described (*i.e.*, the tool classifies prisoners accurately, and risk levels are reduced through changes in dynamic risk factors), reduces recidivism, and saves taxpayer dollars.

In fact, while some state correctional systems use risk/needs assessments to identify offenders' needs and the appropriate kind and level of programming, no state gives or denies the use of time credits for participating in programs based on risk scores. Rather, the states award time credits based on performance and/or institutional conduct. The real lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

In Texas, the Department of Criminal Justice conducts a risk and needs assessment at intake only to identify the inmate's needs.[2] Inmates can earn "good conduct" time credits both for "actively engaging" in work and programs[3] and for "diligently participating" in work and programs.[4] The number of days inmates can earn ranges from zero to 45 days per month, and is set by the inmate's "time earning class," which is based on the inmate's "conduct, obedience, and industry."[5] New inmates are placed in the time earning class that earns 35 days per month, and are automatically promoted after six months to the class that earns 40 days per month as long as they have no "major disciplinary cases."[6] Further promotions or demotions to a higher or

[1] Press Release from Senator John Cornyn (R-TX), Feb. 10, 2015, http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=f6840b81-c2dd-4393-8ff9-f7861e79436d; Press Release of Jason Chaffetz (R-UT), Feb. 5, 2015, http://chaffetz.house.gov/press-release/lawmakers-introduce-bipartisan-bill-reform-federal-prison-system.

[2] *See* Tex. Gov't Code § 508.152(b-1); Texas Dep't of Criminal Justice, *Offender Orientation Handbook* 3 (2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf.

[3] Tex. Gov. Code § 498.003(a).

[4] *Id.* § 498.003(d).

[5] *Id.* § 498.002.

[6] *See* Tex. Dep't of Criminal Justice, *Good Conduct Time*, AD-04.80 (rev. 9), at 1, 4 (2010); Tex. Dep't of Criminal Justice, *Review Process for Promotion in Time Earning Class*, AD-04.81 (rev. 8), at 2 (2010); Texas Dep't of Criminal Justice, *Offender Orientation Handbook* 8 (2015); *see also* William T. Habern, David P. O'Neil & Debra Bone, *Going to Prison in Texas in 2014*, at 14 (2014), www.paroletexas.com/articles/GTP2008.pdf.

lower time earning class, or to a non-time earning class, also depend on whether the inmate has a major disciplinary case.[7]

In Rhode Island, the Department of Corrections conducts risk and needs assessments at intake only to assess inmates' needs.[8] The number of days of credit an inmate can earn for participating in programs is not set by the risk assessment score, and varies based only on offense of conviction. Most inmates can earn 2 days per month for working at a prison job, an additional 5 days per month for participating in programs to address the inmate's individual needs,[9] and an additional 30 days whenever they complete a program.[10] Inmates convicted of certain more serious offenses (*e.g.*, sexual assault) can earn the same 2 days per month for working at a prison job, but only 3 additional days per month, with a maximum of 36 days per year for their performance while participating in and completing programs.[11]

In Oklahoma, the department of corrections conducts a risk and needs assessment at intake only to identify an inmate's programming needs.[12] Inmates earn a specific number of days of "achievement" time credit for completing programs,[13] such as 200 days for earning a bachelor's degree, 70 days for successfully completing an alcohol abuse treatment program, or 30 days for completing an anger management program.[14] Inmates can also earn monthly time credits for participating in assigned work, education, or programs.[15] The number of days that an

[7] *Ibid*.; *see also* Texas Dep't of Criminal Justice, *Disciplinary Rules and Procedures for Offenders* 21 (2012), http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf. Our understanding of the practice and procedure of earning good conduct time in Texas was confirmed in a telephone conversation with David P. O'Neil, of Habern, O'Neil & Associates, on February 3, 2015. Mr. O'Neil has co-written several articles on the operation of the Texas prison system, and is currently Co-Chairman of the Corrections and Parole Law Committee of the Texas Criminal Defense Lawyers Association.

[8] R.I. Dep't of Corrections, *Policy & Procedure – Classification Process*, Policy No. 15.01-6 DOC, pt. III(H) (2014).

[9] R.I. Gen. Laws § 42-56-24(a), (f), (g). These earned credits are in addition to up to 10 days per month for "good behavior." *See id.* § 42-56-24(c), (g), (f).

[10] *Id.* § 42-56-24(a)-(b), (g).

[11] *Id.* § 42-56-24(f); *id.* § 42-56-26.

[12] Okla. Dep't of Corrections, *Policy & Operations Manual – Male Initial Custody Assessment Procedures*, OP-060102, pt. I.C.6 (2014).

[13] Okla. Stat. tit. 57, § 138; *see* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 17-18 (2013). An inmate is not eligible for earning credits if sentenced for "a criminal act which resulted in the death of a police officer, a law enforcement officer, an employee of the Department of Corrections, or an employee of a private prison contractor and the death occurred while the police officer, law enforcement officer, employee of the Department of Corrections, or employee of a private prison contractor as acting within the scope of their employment." *Id.* § 138(A).

[14] *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Programs*, OP-09101 (2014).

[15] Okla. Stat. tit. 57, § 138.

inmate can earn per month ranges from zero to 60 days, and is set by the inmate's assigned "class level," which is based on the inmate's performance in work, education, or programs.[16] Inmates are initially placed in the class that earns 22 days per month.[17] After 3 months, an inmate can be promoted to earn 33 days per month, and after 8 months can be promoted to earn 44 days per month.[18] For inmates in the top two class levels who have never been convicted of certain offenses, the number of days that can be earned is "enhanced" to 45 days and 60 days per month, respectively. [19] Promotions and demotions are based on performance evaluations and institutional conduct.[20]

In Ohio, the department of rehabilitation and correction conducts a risk and needs assessment at intake only to determine an inmate's needs.[21] An inmate can earn either 1 day or 5 days of time credit per month for participating in work and programs, and an additional 1 day or 5 days for completing programs.[22] Whether an inmate earns 1 day or 5 days depends on the offense of conviction and date of conviction, not a risk assessment score.[23]

Ohio also has a procedure for release after service of 80% of the sentence, initiated by the director of rehabilitation and correction by submitting a notice to the sentencing court recommending that the court consider release and including information about the inmate's "participation while confined in a state correctional institution in school, training, work, treatment, and other rehabilitative activities and any disciplinary action."[24] Before granting release, the court must hold a hearing where the offender has an attorney and both prosecutor and offender have a right to be heard.[25] Eligibility depends on the offense of conviction.[26]

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[16] *Id.* There are some exclusions and restrictions based on offense of conviction. For example, inmates convicted of certain offenses must serve a certain percentage of their sentence regardless of earned credits. *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060211, at 10-16 (2014).

[17] Okla. Stat. tit. 57, § 138(D)(1).

[18] *Id.*

[19] *Id.* § 138(D)(1), (D)(2)(b)-(c), (E).

[20] *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 2 (2013).

[21] *See* Ohio Dep't of Rehab. & Correction, *Prison Reentry Assessment and Planning*, Policy No. 02-REN-01 (2014).

[22] Ohio Rev. Code Ann. § 2967.193.

[23] *Id.* § 2967.193(C), (D).

[24] *Id.* § 2967.19(B), (C), (D).

[25] *Id.* § 2967.19(F) & (H).

[26] *Id.* § 2967.19(B), (A), (C).

Ohio also has a front-end mechanism for some offenders to reduce the amount of time served by participating in programs, available at sentencing at the discretion of the sentencing judge.[27] Under this mechanism, a risk and needs assessment is used only to identify appropriate programs and treatment. An offender may be sentenced to a "risk-reduction sentence" if he agrees to the assessment and to participate in programming and treatment, and must be released upon successful completion of the prescribed programs and treatment after serving 80% of the non-mandatory prison term.[28] Eligibility for a "risk-reduction sentence" and the amount of time that can be earned is not determined by a risk score. Rather, it depends on the offense of conviction, the discretion of the judge, the sentence imposed, and whether and when the offender completes the prescribed programs.[29]

In North Carolina, the number of days of credit an inmate can earn per month for working and participating in programs ranges from 3 to 9 days and is set by the "level" of the inmate's job or program assignment, which depends on the number of hours per day, skill level, and days per week required by the job or program.[30] An inmate who increases skills through vocational training can be assigned to a higher level job and thus earn more credit.[31] Inmates can earn additional time for achievements in apprenticeship training or for successfully completing job and educational training. The number of days of credit depends on the activity (*e.g.*, 30 days for completing on-the-job training, 20 days for an associate's degree).[32] Earned credit reduces the time that must be served, but cannot reduce it below the minimum sentence imposed by the court.[33]

North Carolina also has a front-end mechanism for some offenders to earn a term of imprisonment less than the minimum term imposed by the court by participating in programs. "Advanced supervised release," or ASR, is available to those convicted of less serious classes of offenses, and may be ordered by the court in its discretion at sentencing.[34] For an inmate sentenced to the ASR track, prison officials conduct a risk and needs assessment, but only to

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[27] *See id.* § 2929.143.

[28] *Id.* §§ 2929.143, 5120.036(A)-(C). A person serving a "risk reduction" sentence is not entitled to earn time credits for participating in risk reduction programming. *Id.* § 2929.143(B).

[29] *See id.* § 2929.143.

[30] N.C. Dep't of Public Safety, *Prison Policy & Procedure Manual – Sentence Credits*, ch. B.0113 (2013); *see* N.C. Gen. Stat. § 148-13(a1). Inmates sentenced for DWI are not eligible for earned time credits.

[31] N.C. Dep't of Public Safety, *Rules & Procedures – Inmate Booklet*, at 17 (2010), https://www.ncdps.gov/div/AC/inmate_rule_book2010.pdf.

[32] *Id.* ch. B.0114.

[33] N.C. Gen. Stat. § 15A-1340.18(d). Under North Carolina's structured sentencing system, the judge imposes a minimum and maximum term of imprisonment within ranges based on class of offense and criminal history. *See* N.C. Gen. Stat. § 15A-1340.17.

[34] N.C. Gen. Stat. § 15A-1340.18(c).

identify and assign appropriate programming.[35] If the inmate successfully completes the programming, the inmate is released on the specific earlier date determined at the time of sentencing.[36]

In sum, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use credits based on actuarial risk assessment scores. Instead, the states award time credits based on individual performance and conduct.

It has been brought to our attention, however, that some states consider an inmate's risk assessment score in connection with parole. But no state uses risk assessment scores to determine when inmates are eligible for parole, and while some state parole agencies consider parole risk assessment scores as one of many factors in exercising their discretion whether to grant parole, those scores are not determinative or even very weighty.

For example, in Pennsylvania, the Parole Board considers an inmate's risk score as one of four weighted and fifteen non-weighted "decisional factors," such as the inmate's motivation for success, his release plan, and acceptance of responsibility.[37] Of the four weighted factors, the inmate's risk score carries the least number of possible points.[38] Thus, an inmate assessed 2 points for being scored as high risk, 3 points for violence, 1 point because he has participated in but not completed risk-reduction programming, and 0 points because he has engaged in no institutional misconduct in the past year will have a total of 6 points, which "suggests" parole. The Parole Board considers this suggestion along with the other decisional factors and retains ultimate discretion whether to grant parole.[39]

In Kentucky, the parole board must review the results of an inmate's risk and needs

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[35] *Id.* § 15A-1340.18(b). N.C. Dep't of Public Safety, *Prison Policy and Procedures Manual – Advanced Supervised Release (ASR)*, ch. C.2601, C.2606 (2012).

[36] *Id.* § 15A-1340.18(c), (e).

[37] *See* Pa. Parole Decisional Instrument, http://www.pbpp.pa.gov/Understanding%20Parole/Documents/PDI%20361%2009-2014.pdf.

[38] *Id.* The other three factors are offense violence and/or likelihood of violence, whether a high or medium risk inmate has participated or completed risk-reduction programming, and institutional behavior. Each factor has a maximum score, and the cumulative score either "suggests parole" (1 to 6 points) or "suggests parole refusal" (7 or more points). An inmate's risk assessment score adds 0 to 2 points; the violence indicator adds 1 to 4 points; the institutional programming factor adds 0 to 3 points; and the institutional behavior factor adds 5 points if the inmate has committed a new crime or other institutional misconducts or has a pattern of misconduct.

[39] 61 Pa. Cons. Stat. § 6137(a)(3). For a nonviolent offender sentenced under Pennsylvania's recidivism risk reduction incentive (RRI) program, the inmate is entitled to "rebuttable parole" after she has served 75% or 83% of the sentence imposed (depending on the length of the sentence), if the Parole Board has certified, among other things, that the inmate has successfully completed the treatment program designed to address her needs as determined by a risk and needs assessment. *Id.* §§ 4505, 4506. The Parole Board retains the discretion to deny parole based on the inmate's conduct or for public safety reasons, but the inmate's risk score does not determine when or whether she can be released. *Id.* § 4506. Indeed, 76% of inmates in this program are assessed as medium or high risk. Pa. Dep't of Corrections, *Recidivism Risk Reduction Incentive 2014 Report*, at 4 (2014).

assessment before the parole hearing, but the risk score is not one of the 16 factors, one or more of which the parole board "shall apply to an inmate" in making the parole decision.[40] At the same time, an inmate's institutional conduct and adjustment, "particularly evidence-based program involvement," is such a factor, and whether parole is granted ultimately lies in the discretion of the parole board.[41] The risk and needs assessment is used primarily to determine the terms and intensity of parole supervision and the inmate's need for treatment while on supervision.[42]

In Michigan, the Parole Board considers an inmate's statistical risk of committing assaultive and property crimes.[43] These two risk scores carry differing weights in the parole guidelines depending on the length of the sentence, and their combined score is only one of eight scored categories: (1) offense characteristics and sentence; (2) prior criminal record; (3) institutional conduct; (4) statistical risk; (5) age; (6) program performance; (7) mental health; and (8) institutional housing level.[44] The total preliminary score for all eight categories is subject to adjustment depending on whether the inmate is serving a sentence for criminal sexual conduct and the inmate's criminal record score, institutional conduct, and age, and provides only the inmate's probability of parole.[45] Whether parole will be granted remains in the discretion of the Parole Board.[46]

In Texas, the Parole Division uses a parole-specific risk assessment tool indicating the likelihood of success on parole and combines the parole risk score with a separate measure of offense severity, resulting in a parole guideline score.[47] The parole guideline score is not a "precise recommendation to either deny or grant parole" and is not presumptive.[48] The board

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[40] Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 3-4 (2012). The parole board is directed by statute to consider the results of an inmate's validated risk and needs assessment before granting parole, and is authorized to adopt regulations that "utilize in part objective, performance-based criteria and risk and needs assessment information." Ky. Rev. Stat. § 439.340(3)(b).

[41] Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 4 (2012); Ky. Rev. Stat. § 439.340(1), (2); *see Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky. Ct. App. 1996).

[42] The parole board must "use the results" from the risk and needs assessment "to define the level or intensity of supervision for parole, and to establish any terms or condition of supervision." *Id.* § 439.335(2) ("The terms and intensity of supervision shall be based on an individual's level of risk to public safety, criminal risk factors, and the need for treatment and other interventions.").

[43] Mich. Dep't of Corrections, Policy Directive 06.05.100, *Parole Guidelines* (2008); Mich. Dep't of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010). The Parole Board "may" but is not required to include in the parole guidelines as a factor "the prisoner's statistical risk screening." Mich. Comp. Laws § 791.233e.

[44] Mich. Dep't of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010).

[45] *Id.* at 9.

[46] *Id.* at 1; *see In re Parole of Michelle Elias*, 811 N.W.2d 54, 522-23 (Ct. App. Mich. 2011).

[47] Texas Board of Pardon & Paroles, *Parole Guidelines Annual Report – FY 2014*, at 4 (2015).

[48] *Id.*

considers many other factors, such as institutional adjustment and participation in programming, and parole is granted in the Parole Division's discretion to inmates at all guideline levels, and to thousands of inmates classified as highest, high, and moderate risk.[49] For inmates releasing to parole supervision, the Parole Division then uses a different risk and needs assessment tool to determine and address inmates' needs before reentry.[50]

As in Texas, Rhode Island's parole guidelines combine the inmate's parole-specific risk score with a separate score for offense severity, but the guidelines "are not automatic nor is the parole risk score presumptive."[51] In addition to the guidelines, the parole board considers twelve "major criteria," including institutional adjustment and participation in rehabilitative programs.[52]

To summarize, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use time credits based on risk assessment scores. Thus, no experience or research shows that prisoners can change risk scores or levels through changes in dynamic factors, or that any such change would reduce recidivism.[53] There is an "absence of evidence" at this point that even the use of risk/needs tools to identify criminogenic needs "add[s] value to risk reduction efforts."[54] Likewise, states do not determine *when* prisoners are eligible for parole based on risk scores, or *whether* to grant parole on the sole or predominant basis of risk assessment scores.

The lesson to be learned from the states is clear: Time credits for participating in programming should be awarded on a fair and equitable basis such as individual performance and conduct, not risk scores.

B. The idea that a person's "risk classification" can be lowered in prison has not been tested and is most likely incorrect.

S. 467 would direct the Attorney General to ensure that all prisoners other than those classified as low risk have a "meaningful opportunity" to progress to a "lower risk classification" during incarceration "through changes in dynamic factors," § 3621A(b)(1)(B)(i), which it defines

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[49] *Id.* at 8-9.

[50] *See* Texas Dept. of Crim. Just., Parole Div., *Policy & Operating Procedure – Case Assessment*, PD/POP-3.2.5 (2015).

[51] Rhode Island Parole Board, *2014 Guidelines*, at 2-3.

[52] *Id.* at 4-5.

[53] *See* Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 Crim. Just. & Behav. 286, 300 (2015).

[54] "There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates." Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* 130 (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf; *id.* at 121 (comments by Skeem, Latessa and others acknowledging the "absence of evidence" that risk assessment tools "add value to risk reduction efforts").

as a "characteristic or attribute" that "has been shown to be relevant to assessing risk of recidivism," and that "can be modified based on a prisoner's actions, behaviors, or attitudes, including through appropriate programming or other means, in a prison setting," § 3621A(h)(1).

As an initial matter, even instruments that attempt to incorporate more dynamic factors (in order to identify criminogenic needs) necessarily include and give significant weight to static factors. Static factors are included and given a certain weight based on their statistical correlation with recidivism.[55] That weight cannot be overcome by simply deciding to give overriding weight to dynamic factors. Indeed, "the exchange of dynamic factors for more predictive static factors is ill-advised."[56] Moreover, as discussed below, risk assessment instruments are already too rough a measure for setting the length of prison sentences, and adding too many dynamic factors would make the instrument even less reliable.[57]

Many programs and jobs have been shown to reduce the *rate* of recidivism,[58] but the assumption that risk *categories* can change in the prison setting, through programming or otherwise, is untested and most likely incorrect. For example, the PCRA (which is used to provide guidance on the kind and level of services for people on probation and supervised release) includes static factors and dynamic factors, with a maximum possible score of eighteen.[59] Factors related to criminal history and age at intake to supervision, none of which can change, account for nine of those eighteen points.[60] Marital status, family stressors, and lack of pro-social support, which might be changed in the community but are unlikely to change during incarceration, account for three more points. Another example is Ohio's Prison Intake Tool (which is used only to establish treatment priorities). It includes 30 items with a maximum possible score of 37. Twenty-three points are for factors that could not possibly change in prison because they occurred in the past.[61]

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[55] Christopher T. Lowenkamp *et al.*, *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 Psych. Services 87, 89 (2013).

[56] Baird *et al.*, *supra* note 54, at 105.

[57] *See* Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 Victims & Offenders: Int'l J. Evidence-Based Res., Pol'y, & Prac. 203, 212 (2010) ("Reliability is more of an issue with instruments that include dynamic factors (such as gauging the attitudes or values of the offender).").

[58] *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, Rising Costs: Restricting Budgets and Crime Prevention Options at 3-4 (Aug. 1, 2012).

[59] The factors on the PCRA are number of prior misdemeanors and felony arrests; violent offense; prior offending pattern (different offense types); revocation of supervision or new crime while on supervision; institutional adjustment in state or federal prison; age at intake to supervision; education; current employment status; work history over 12 months (stability and performance); current alcohol problem; current drug problem; marital status; family stressors; current lack of pro-social support; attitude toward supervision and change. Each has complicated and subjective scoring rules.

[60] Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Release Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, 78 Fed. Probation 41, 42 (2014).

[61] Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report*, Appendix A, 56-59

Moreover, dynamic factors are "slow changing,"[62] and the dynamic factors most prevalent among individuals classified as moderate or high risk would be difficult or impossible to change in prison. A study of the PCRA showed that the most commonly occurring dynamic factors for people on federal probation and supervised release were deficits in education/employment and social networks.[63] Those who were able to lower their risk levels typically did so by becoming employed and having a more stable work history.[64] While vocational training is an important part of correctional programming, the ultimate success of that training and whether it truly reduces the risk of recidivism depends on whether the individual is able to obtain a job that provides a legitimate means of support over a period of time. This cannot be done in a prison setting. There was very little change in education deficits over time, and education had almost no impact on changing risk scores.[65] Under the PCRA, a person with a GED receives the same number of points as a person with any level of education less than a high school diploma. Assuming the same scoring under the "Assessment System," obtaining a GED in prison could not reduce a person's risk classification. There was relatively little change over time in social networks factors (*i.e.*, single, divorced or separated, unstable family situation, lack of prosocial support).[66] If these factors are slow to change in the community, it would be nearly impossible to change them from behind bars.

Even if the raw risk score could change through programming or otherwise in prison, it would be difficult, if not impossible, for inmates to move down a risk category. Unlike some instruments, like the SPIn which has up to six categories of risk "for greater sensitivity in detecting change after reassessment,"[67] or even the PCRA which has four categories, S. 467 directs only three categories. Thus, a greater change in the raw score would be necessary for an inmate to move to a lower risk category.

If prisoners participated in recidivism reduction programs, but did not see their risk categories declining, many—and particularly those in the high risk category who could not use time credits—would come to correctly believe that the incentives were illusory. And when they reached this conclusion, they may opt out of recidivism reduction programming, even though they would have participated in programming if there was no credits system at all (because the program would appear to be a sham). If so, those most in need of recidivism reduction

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(2009).

[62] David Robinson, *The Service Planning Instrument (SPIn); A New Assessment and Case Planning Model for Adult Offenders* 18 (2007), http://www.ohhaonline.ca/SPIN_Overview.pdf.

[63] Cohen & VanBenschoten, *supra* note 60 at 47 fig.3.

[64] *Id*. at 49 tbl.4, 50.

[65] *Id*.

[66] *Id*.

[67] Robinson, *supra* note 62.

programming would return to the streets without the benefit of programming.

In addition, treating inmates differently on the basis of risk classifications that are not easily understood may appear arbitrary and unfair to the inmates and could create significant prison management issues.

C. Actuarial risk assessments are an inappropriate basis for determining the length of prison sentences because they cannot determine any individual's risk of recidivism, and often misclassify individuals as higher risk.

The bill assumes that the Assessment System will predict the "the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted," § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2).

This reflects a misunderstanding of the information that actuarial risk assessments are able, and not able, to provide. These tools roughly predict the statistical risk of a group with certain characteristics in common, but they do not and cannot identify whether any individual in a group will reoffend. Actuarial risk assessments tend to over-predict recidivism.[68] An important meta-analysis showed that only 52% of those judged to be at moderate or high risk by generic risk assessment tools went on to commit any offense, meaning that almost half (48%) of all persons who were actually low risk were mis-classified as moderate or high risk.[69] The researchers concluded that "risk assessment tools in their current form can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case," and that "even after 30 years of development, the view that . . . criminal risk can be predicted in most cases is *not evidence based*."[70]

Researchers have warned that "even for well-validated tools, implementation efforts can fall breathtakingly short" and that more research is needed "to evaluate the extent to which these tools are implemented in 'real world' settings faithfully enough to bridge the usual divide between science and practice."[71] A recent study concluded that the power of risk assessment tools to "accurately classify offenders by risk level may have been overestimated."[72]

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[68] Seena Fazel *et al., Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 British Medical J. 1, 4 (2012), http://www.bmj.com/content/345/bmj.e4692.

[69] *Id.*; *see also* BMJ Group, *Concerns Over Accuracy of Tools to Predict Risk of Repeat Offending* (2012), http://group.bmj.com/group/media/latest-news/concerns-over-accuracy-of-tools-to-predict-risk-of-repeat-offending.

[70] Fazel *et al.*, *supra* note 68, at 5 (emphasis added).

[71] Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils (Commentary on Hannah-Moffat, 2011)*, 30 Justice Q. 297, Abstract & 302 (2013), http://www.albany.edu/scj/documents/RiskAssessment Skeem.pdf.

[72] Baird *et al.*, *supra* note 54, at v. While this study focuses on risk assessment instruments used in juvenile justice, the general theory and actuarial science behind the instruments are the same, so the concerns about juvenile

Significantly, a group of experts funded by the Department of Justice concluded that "simple, actuarial approaches to risk assessment can produce the strongest results. Adding factors with relatively weak statistical relationships to recidivism – including dynamic factors and criminogenic needs – can result in reduced capacity to accurately identify high-, moderate-, and low-risk offenders."[73] The more "dynamic" factors that require subjective judgment are included in the assessment, "the greater the potential for classification error."[74]

Other researchers are even more "wary of over-promising unattainable results" with risk assessments.[75] Researchers at the Center for Evidence-Based Corrections, Department of Criminology, Law & Society, University of California Irvine, found that the "overall predictive ability" of risk assessment instruments for criminal justice systems "is relatively modest" and "often falls short of the levels found in other domains."[76] Explanations for this "comparative weakness" include: (1) "tools employed in risk assessment [that] fail to cope with complex relationships between risk factors and outcomes," (2) "unmeasured heterogeneity across offenders and jurisdictions," (3) inadequate assessment of "the impact of communities and the criminal justice system" on recidivism, and (4) the impact on risk assessment of factors such as neighborhood inequality, segregation, social disorder, and access to service providers.[77] Aside from those factors, "the complexity of human agency may present a challenge of irreducible heterogeneity," which cannot be captured by a risk assessment instrument.[78]

It is bad enough that inaccuracies in risk/needs assessments may misidentify appropriate services.[79] It is wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreviewable and unreliable BOP-determined risk assessments, as under S. 467.

D. There is no evidence that risk assessment tools that rely on dynamic factors actually reduce recidivism.

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assessments hold true for adult assessments.

[73] *Id.* at vi.

[74] Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* 7 (2009), http://nccdglobal.org/sites/default/files/publication_pdf/special-report-evidence.pdf.

[75] James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 16 (2013), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf.

[76] *Id*. at 15.

[77] *Id*. at 15-16.

[78] *Id*. at 16.

[79] Chenane *et al.*, *supra* note 53, at 287.

There is no evidence that targeting "dynamic factors" statistically correlated with recidivism (known as "criminogenic needs") can actually reduce recidivism. The term "'criminogenic' implies causation, yet needs that are considered criminogenic are simply those with a statistical relationship with recidivism."[80] "While correlation is an adequate requirement for inclusion in risk assessment, the simple fact that a particular need exhibits a general relationship to recidivism does not mean it contributed to an individual's offending behavior."[81] For example, a person with an alcohol disorder may have committed a fraud because he wanted to buy an expensive car to improve his status among colleagues. Treating the alcohol disorder would remove a risk factor for recidivism and lower his risk score, but would do nothing to treat the underlying cause of the criminal behavior, i.e., a need for status driven by psychological factors apart from the alcohol disorder.[82]

Until researchers can affirmatively show that a variable is not just correlated with recidivism but that the "variable reduces [] risk when successfully changed by treatment (i.e., is a *causal* risk factor)," public policy should not be made "on the promise" that actuarial tools can "inform[] risk reduction."[83] "There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates."[84]

E. The Assessment System is contrary to evidence-based practices aimed at reducing recidivism.

It is well established that practices aimed at reducing recidivism should focus scarce resources on individuals classified as the highest risk.[85] S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk when those resources should be focused on inmates with the greatest needs. And by requiring individuals classified as low risk and without a need for programming to participate in activities including prison jobs, § 3621(h)(4)(B), it would appear to require BOP to give the

[80] Winnie Ore & Chris Baird, National Council on Crime & Delinquency, *Beyond Risk and Needs Assessments* 2 (2014), http://nccdglobal.org/sites/default/files/publication_pdf/beyond-risk-needs-assessments.pdf.

[81] *Id*. That correlation does not equate with cause is not a controversial proposition. Other researchers acknowledge that a risk factor is nothing more than a "correlate that precedes the outcome in time, with no implication that the risk factor and outcome are causally related." Jennifer Skeem & John Monahan, *Current Directions in Violence Risk Assessment* 4 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793193.

[82] *See generally* Muel Kaptein, *Why Do Good People Sometimes Do Bad Things?: 52 Reflections on Ethics at Work* (2012).

[83] Skeem & Monahan, *supra* note 81, at 11.

[84] Baird *et al.*, *supra* note 54, at 130.

[85] *See, e.g.*, The Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* 4 (2011), http://www.ovsom.texas.gov/docs/Risk-Needs-Assessment-101-New-Tools-to-Manage-Offenders-2011.pdf; Chenane *et al.*, *supra* note 53, at 287; Latessa *et al.*, *supra* note 61, at 6-7.

limited number of Federal Prison Industries (FPI) (also known by its trade name, UNICOR) jobs,[86] to individuals classified as low risk even though FPI has been proven to reduce recidivism more than any other program (inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release), by giving them marketable job skills (they are 14% more likely to be employed 12 months after release), particularly for "young minorities who are at the greatest risk for recidivism."[87]

By not ensuring that individuals classified as high risk get the fullest attention and have maximum opportunity and incentive to participate in meaningful programs aimed at the true causative factors of their criminal behavior (as opposed to factors that bear nothing more than a statistical correlation with recidivism), S. 467 does not promote recidivism reduction.[88] This approach is particularly unwise since prisoners classified as high risk are housed in the most crowded and expensive federal institutions.[89]

II. The Development and Implementation of the Complex "Assessment System" Would Be Costly and Labor-Intensive, and May Not Be Possible.

The development of a scientifically valid risk tool is not a simple undertaking. "[A]ssessment instruments are expensive to construct and validate,"[90] and "can take several years to complete."[91] Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and put to use for a different population or stage of the criminal justice process.[92] The tool must be validated for the particular population and specific to the

[86] "[P]rimarily [as a] result of efforts to compensate for declining revenues and earnings," the program has had a drop in the number of inmates it has been able to employ in recent years. U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates* ii (2013), http://www.justice.gov/oig/reports/2013/a1335.pdf. "[A]s of June 2012, FPI employed 12,394 inmates, or 7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population." *Id*. at 1.

[87] FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf; *see also* Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

[88] The Pew Center on the States, *Risk/Needs Assessment 101*, *supra* note 85, at 4.

[89] U.S. Dep't of Justice, *FY 2015 Performance Budget, Congressional Submission Federal Prison System: Buildings and Facilities* 1 (2014) (high security institutions are 51 percent overcrowded; medium security facilities are 41 percent overcrowded), http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/21/bop-bf-justification.pdf.

[90] Latessa *et al.*, *supra* note 61, at 8-9.

[91] Latessa & Lovins, *supra* note 57, at 217.

[92] Unfortunately, "increasingly complex and poorly validated risk assessment tools are being sold to criminal justice agencies." Skeem, *supra* note 71, at 302.

particular stage in the criminal justice process.[93] A new tool had to be developed and validated with data specific to the federal probation and supervised release population,[94] and a new tool would have to be developed and validated with data specific to the federal prison population.[95]

To construct, validate, and implement an instrument that could identify dynamic factors for the federal prison population would require extensive data collection and statistical analyses over a period of years, including collecting data on outcomes after release from prison for three to five years, then a lengthy period to train BOP staff to use the tool.[96] For example, the PCRA was developed and validated based on data collected on offenders who started a term of probation or supervised release between October 1, 2005 and August 13, 2009.[97] It was then implemented in stages beginning in 2010 while probation officers were trained to use it, and was finally being implemented on 95% of offenders placed on probation or supervised release by September 2014.[98]

Perhaps reflecting how difficult and time-consuming this undertaking would be, S. 467 delivers an ambiguous message: The Attorney General "may use existing risk and needs assessment tools, as appropriate," § 3621A(b)(3), but "must statistically validate" the tool "on the Federal prison population," but if this "validation cannot be completed" within the 30 months

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[93] While criminal justice agencies "often use empirically derived tools developed on samples from a different population" because of resource constraints, this "assumes that the instrument is a valid predictor of recidivism for each agency's specific population," but because "it is unlikely for a single instrument to have universal applicability across various offending populations, validating risk assessment instruments on specific target populations is important. . . . For example, the population of defendants on pretrial supervision is likely different from the population of individuals who are released from prison." Edward Latessa *et al.*, *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 Fed. Probation 16, 17 (2010); *see also* National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, at 31 (to have predictive validity, a risk assessment tool must have been developed and tested for use at the same decision point in the criminal justice system), http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx.

[94] James L. Johnson *et al.*, *The Construction and Validation of the Post Conviction Risk Assessment (PCRA)*, 75 Fed. Probation 16, 18 (2011).

[95] The PCRA could not be used for the federal prison population. The distribution of risk categories for the PCRA is heavily skewed toward lower risk offenders due in part to the fact that it includes people sentenced to probation. *See* Cohen & VanBenschoten, *supra* note 60, at 44.

[96] *See* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416918; Latessa *et al.*, *supra* note 61, at 10-17.

[97] Johnson *et al.*, *supra* note 94, at 17. The PCRA was constructed and validated based primarily on archival data on people already on probation or supervised release to whom the PCRA was not administered when they were first placed on supervision, which allowed a follow-up period of up to 60 months, and a small prospective study (of 356 people) that tracked people from the time they were placed on supervision for over one year. Lowenkamp *et al.*, *supra* note 55, at 92-93. The only outcome tracked was whether the subjects were arrested. The authors identified their use of archival data as a limitation, and recommended "future (larger) validation in a prospective fashion," and that "future prospective validation research should use varied measures of outcome," including reconviction, reincarceration, and severity of offense. *Id*. at 94.

[98] Cohen & VanBenschoten, *supra* note 60, at 41.

allowed for development of the tool, it need only be completed "as soon as is practicable." *See* § 3621A(b)(4). But a tool must be "well-validated before it is disseminated."[99] Otherwise, use of the instrument is highly suspect.[100]

Whether a valid tool can even be developed for the massive and heterogeneous federal prison system is doubtful. The districts to which federal inmates return vary widely in their availability of services and supervision practices, but "[v]ariables that predict recidivism in a jurisdiction with ample services for offenders may not predict recidivism in a resource-poor jurisdiction."[101] The racial composition and types and severity of crimes also vary widely among districts, but to have predictive validity, a tool must have been tested on a population with a "representative gender [and] racial composition," and with "the same types [and] severity of offenses."[102] The higher the at-risk environment into which a person is released (as one researcher puts it, Dangertown versus Peacetown), the more likely the person will recidivate and vice versa.[103] Indeed, there is a "statistically significant variation in arrest and revocation rates across the 90 federal districts, after taking risk and protective factors into account."[104] An actuarial risk assessment instrument that did not take into account these variations among districts would be inaccurate.

Even assuming that a scientifically valid instrument could be developed for the federal prison system, implementing a new assessment system for a prison population larger than any state prison population[105] is a "significant challenge," which "requires the development of new

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[99] Baird *et al.*, *supra* note 54, at 111 (emphasis in original).

[100] *See* Mike Eisenberg *et al.*, Justice Center, The Council of State Governments, *Validation of the Wisconsin Department of Corrections Risk Assessment Instruments* 2 (2009) ("Validity of risk assessment instruments is the most important supportive principle behind the proper utilization of these instruments."), http://csgjusticecenter.org/wp-content/uploads/2012/12/WIRiskValidationFinalJuly2009.pdf.

[101] John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sentencing* 14 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332165.

[102] National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, *supra* note 93, at 30-31.

[103] National Institute of Justice, Office of Justice Programs, *Measuring Recidivism* (2008). *See also* Jay P. Singh *et al.*, *Rates of violence in patients classified as high risk by structured risk assessment instruments*, 204 British J. of Psych. 180, 184 (2014) (finding substantial variation in actual rates of violence among individuals judged to be high risk and that different rates depended on local factors).

[104] For example, districts with large populations had lower arrest and revocation rates; districts with a larger proportion of Native Americans had higher revocation rates. William Rhodes *et al.*, *Recidivism of Offenders on Federal Community Supervision* 3, 16 (2013). Household income also had an effect on revocation rates such that persons with higher average family income had fewer revocations than those with lower income. "Offenders who return to neighborhoods that are seen as impoverished and transient have higher failure rates." *Id*. at 18.

[105] Bureau of Justice Statistics, *Corrections Statistical l Analysis Tool (CSAT) – Prisoners* (in 2013, 214,989 inmates were in the custody of federal correctional facilities, including private prison facilities; Texas and California followed with 155,377 and 134,330), available at http://www.bjs.gov/index.cfm?ty=nps.

staff skills, (re)certification and quality assurance policies, performance metrics, and the establishment of a system for providing coaching and feedback for assessors in the field."[106] The training that would be necessary would be extensive. Each staff using the Assessment System would have to be certified via standardized training, and retrained (along with testing and recertification) every two years "to guard against rater drift and knowledge decay."[107] To train one person would require three to four days, and recertification every two years in a one-to-two day workshop.[108] In addition, a "[q]uality assessment generally requires an hour with the individual being assessed."[109] As the National Institute of Corrections observes, "[t]he staff time necessary to do this may be the scarcest resource in a jurisdiction."[110]

To expect BOP staff to undertake the training necessary to reliably implement a risk assessment and to administer the assessments to every inmate, multiple times, is unrealistic. As of April 2014, BOP was operating at 32 percent over its rated capacity.[111] The inmate-to-staff ratio is so high that staff cannot "effectively supervise prisoners and provide inmate programs."[112] Instead of working with inmates and formulating programs, unit staff is often called upon to perform the function of correctional officers in maintaining security.[113]

III. Any Savings from Reduced Incarceration Would Not Be Seen for a Decade, if Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of the "Assessment System," but it would be at least a decade before anyone was released. The bill directs that the "Assessment System" be developed within 30 months (which is likely not enough), that BOP train staff to use it and determine each prisoner's risk level within another 30 months (also likely not enough), and that BOP make programming and activities available to all eligible prisoners within six years. *See* § 3621A(a), (c)(1) & (e); § 3621(h)(2). Thereafter, it would take three years for a low-risk prisoner, and six

[106] Justice Research and Statistics Association, *Ensuring the Fidelity of Offender Risk-Assessment in Large-Scale Correctional Settings: The Quality Assurance-Treatment Intervention Programs and Supervision Initiative (QA-TIPS)*, http://jrsa.org/webinars/index.html#qa.

[107] Lowenkamp *et al.*, *supra* note 55, at 95.

[108] *See* Justice Research and Statistics Association, *supra* note 106.

[109] National Institute of Corrections and Urban Institute, *The Role of Screening and Assessment in Jail* Reentry 6 (2012).

[110] *Id*.; *see also* Hess & Turner, *supra* note 75, at 9 (noting that assessment places demands on staff time), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf.

[111] Statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies, Federal Bureau of Prisons FY 2015 Budget Request 2 (April 10, 2014).

[112] *Id.* at 3.

[113] *Id*.

years for a moderate-risk prisoner, to earn one year of credit. *See* § 3621(h)(6)(A)(i). And because prisoners could not receive time credits for successfully completing recidivism reduction programs before the date of enactment or during official detention before the sentence commenced, § 3621(h)(6)(A)(ii), they would have to repeat programs they had already completed.[114]

The savings, if any, would be small. First, well over half the prison population would be unable to earn time credits. The proposal would categorically exclude inmates convicted of "a second or subsequent conviction for a Federal offense"; anyone in criminal history category VI at the time of sentencing; and anyone serving a sentence for specified offenses. *See* § 3621(h)(6)(A)(iii). The percentage of inmates in the categories for which data is available is 52.9%: 23.3% who were in Criminal History Category VI at the time of sentencing[115] (there should be very little overlap between this and other excluded categories because most in Criminal History Category VI are drug offenders[116]), 22.6% who were convicted of federal crimes of violence (which may be less or more depending on how the term is defined[117]), 6.8% who were convicted of sex offenses,[118] and .2% who were convicted of violating 21 U.S.C. § 848 (CCE).[119] No data are available on the percentage who have a second or subsequent federal offense, or were convicted of a federal crime of terrorism, of violating 18 U.S.C. § 1962 (RICO), or of a federal fraud offense who were sentenced to more than 15 years, in part because the numbers are so small, but they may add up to one or two percentage points.

Inmates serving life without parole, another 2.5%,[120] would be unable to use time credits

[114] Further, apparently referring to the residential drug treatment program (RDAP), "a prisoner shall not be eligible for the time credits described in [§ 3621(h)(6)(A)] if the prisoner has accrued time credits under another provision of law based solely upon participation in, or successful completion of, such program," § 3621(h)(6)(D). Yet, confusingly, BOP "may, in the Director's discretion, reduce the credit awarded under subsection (h)(6)(A) to a prisoner who receives a reduction under" § 3621(e)(2)(B) for participating in RDAP, "not [to] exceed one-half the amount of the reduction awarded to the prisoner under [§3621(e)(2)(B)]." *See* Section 7(b).

[115] U.S. Sent'g Comm'n, Quick Facts – Federal Offenders in Prison – January 2015.

[116] In 2013, 1,685 people sentenced for drug offenses were in criminal history category VI, compared to 464 violent or firearms offenders, 6 sex offenders, 2 fraud offenders, and 72 RICO offenders. *See* U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.14.

[117] Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014. This includes homicide, aggravated assault, kidnapping, weapons, explosives, arson, and robbery. It does not include burglary, though burglary of a dwelling is considered a crime of violence. *See* USSG § 4B1.2(a)(2). It includes unlawful possession of a firearm (as distinct from use); this offense is not a crime of violence under the guidelines, USSG § 4B1.2, comment. (n.1), but is treated as violent by BOP, 74 Fed. Reg. 1892, 1895 (2009). All robbery and arson offenses are included, but do not necessarily have to be included. *See* 18 U.S.C. § 3559(c)(3)(excluding unarmed robbery and arson that did not pose a threat to human life from the definition of "serious violent felony").

[118] Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014.

[119] *Id.*

[120] U.S. Sent'g Comm'n, Quick Facts – Federal Offenders in Prison – January 2015.

by operation of existing statutes and the act.[121] Each life sentence costs over $1.1 million today.[122]

Those classified as high risk, § 3624(c)(2)(A), and those classified as moderate risk unless their "risk of recidivism has declined" during incarceration, § 3624(c)(2)(B), could not use their time credits. Those deemed by BOP to be ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), could not earn or use time credits.

Second, for those who could use time credits, moderate risk prisoners would spend all of their prerelease custody, and low risk prisoners would spend part of it, in a residential reentry center (RRC), which costs more or the same as imprisonment in the minimum, low, or medium security facilities from which they would be transferred,[123] or home confinement, which costs more under current contract arrangements than the marginal average cost of imprisonment.[124] *See* § 3624(c)(3)-(5). Only low risk prisoners would spend even part of prerelease custody in community supervision. *See* § 3624(c)(5).

Third, during the years it would take to develop and implement the system, absent sentencing reform or construction of new facilities, the BOP population would grow from 32% to 55% over rated capacity by 2023.[125] Medium and high security facilities will be most hard hit

[121] Prisoners serving life sentences could not be transferred to prerelease custody because they have no "release date." A prisoner "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624." 18 U.S.C. § 3621(a). Under § 3624(a), which would not be changed, a prisoner "shall be released" by BOP "on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b)." Subsection (b), which also would not be changed, governs "[c]redit toward service of sentence for satisfactory behavior." Prisoners serving a "term of imprisonment for the duration of the prisoner's life" are expressly excluded from earning credit for satisfactory behavior. *Id*. § 3634(b). They have no "release date" based on "expiration of the term imposed," or earlier "for satisfactory behavior." Earning time credits does not affect the prisoner's "release date," but only the "portion of the final months" s/he can spend in some form of "pre-release custody" under § 3624(c)(2)-(5). For persons serving life, there is no "release date," and thus no "final months."

[122] The annual cost of incarceration in fiscal year 2013 was $29,291.25. *See* Bureau of Prisons, *Annual Determination of Average Cost of Incarceration*, 79 Fed. Reg. 26,996 (May 12, 2014). The Sentencing Commission reports life sentences as 470 months (39.16 years) "consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders." U.S. Sent'g. Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, Appendix A.

[123] "Annual costs per inmate are $21,694 for minimum security, $27,166 for low security, $26,686 for medium security, and $34,046 for high security. . . . Average annual cost per inmate housed in a [RRC] for the BOP is $27,003." Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 313 (2014), http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf.

[124] Because "much of the average costs of housing an inmate are fixed . . . the average marginal cost of increasing or decreasing the population by one inmate is $10,363." BOP reimburses contractors for each inmate in home confinement at a rate of "over $13,500 annually." *Id.* The rate BOP pays its contractors for home confinement is not necessarily the actual cost of home confinement. *Id.* at 13-14 & n.45 (estimating that "traditional probation with electronic monitoring to verify home confinement would cost a total of $5,890 annually").

[125] *See* U.S. Dep't of Justice, *FY 2015 Performance Budget*, *supra* note 89, at 1, 5 (system-wide crowding in FY

by future population growth,[126] but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.[127]

We recognize that the bill allows the Bureau of Prisons to "use the existing Inmate Classification System," which is not an actuarial risk assessment tool, "[b]efore the development of the Assessment System." *See* § 3621A(b)(5). Thus, inmates with a low security classification at intake could be released immediately, and others could be released if and when their security classifications declined to low. But the facts remain that during this interim period, over half the prison population could not earn time credits, and those who could earn and use credits would be transferring from less expensive and less crowded BOP facilities to as or more expensive RRCs or home confinement. Meanwhile, the Attorney General and BOP would still be required to develop and eventually implement an expensive actuarial risk assessment tool, which is highly unlikely to work as described in the bill.

IV. S. 467 Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

A. Risk assessments have an adverse impact on the poor and racial minorities.

Risk factors correlate with socioeconomic class and race.[128] The factors with the heaviest weight – arrests and convictions – are more prevalent for African Americans than for any other race.[129] Other factors, such as negative attitudes toward law enforcement, are more prevalent in the lower socioeconomic population, as are lack of steady employment and lower educational levels.[130]

2014 was at 32 percent over rated capacity, projecting net increase of 2,500 inmates in FY 2015 and more for years to come); Urban Institute, *Stemming the Tide*, *supra* note 123, at 1 (absent sentencing reforms or construction of new facilities, overcrowding is expected to rise to 55 percent by 2023).

[126] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743, Appendix II (Sept. 2012), http://www.gao.gov/assets/650/648123.pdf.

[127] *See* Urban Institute, *Stemming the Tide*, *supra* note 123, at 13; U.S. Dep't of Justice, *FY 2015 Performance Budget*, *supra* note 89, at 1 (system-wide crowding in FY 2014 was at 32 percent over rated capacity with 51 percent and 41 percent at high and medium security institutions respectively).

[128] *See generally* Glenn D. Walters, *Relationships Among Race, Education, Criminal Thinking, and Recidivism: Moderator and Mediator Effects*, Assessment (2012) (online version) (discussing relationships among three variables commonly associated with recidivism and the difficulty of measuring their effects).

[129] *See* ACLU, *School to Prison Pipeline: Talking Points* (2008) (discussing how people of color are disproportionately represented at every stage of the school to prison pipeline).

[130] *See* NACCP, Legal Defense Fund, *Bad Times in Tulia, Texas* (2000) (discussing an African-American community in Texas that was victimized by the "war on drugs" and how that "war" disproportionately targets minorities), http://www.naacpldf.org/case-issue/bad-times-tulia-texas; Testimony of Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, for the Public Meeting of the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015) ("Risk assessment tools may use factors that some believe are inappropriate such as education, marital status, and even geographical area of residence.").

Further, as discussed above, risk assessments often classify people incorrectly.[131] Studies show that there are "more classification errors for African Americans,"[132] and that Black offenders are more likely to be misclassified as high risk than White or Hispanic offenders.[133] This is particularly problematic if such classifications are used to determine the length of incarceration.

B. The exclusions would have a disparate impact on racial minorities, and are contrary to the stated goal of promoting public safety.

Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. Thus, S. 467 would not promote the stated goal of increasing public safety. At the same time, the exclusions that would apply to any significant number of inmates would have a disparate impact on racial minorities.[134] "[I]f a rule has a significant adverse impact, and there is insufficient evidence that the rule is needed to achieve a [legitimate goal], then the rule [is] considered unfair toward the affected group."[135]

Criminal History Category VI. Forty-six percent of defendants sentenced from 2006 to 2013 who were in criminal history category VI were Black; 26% Hispanic; 26% White; and 2% other race.[136] Thirty-two percent of defendants in criminal history category VI were in that category not based on their number of criminal history points, but by operation of the "career offender" guideline,"[137] which artificially places a defendant who is in a lower criminal history category into category VI if s/he has two prior convictions for either a "controlled substance

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[131] *See* Latessa & Lovins, *supra* note 57, at 212 ("actuarial risk assessment . . . is not a perfect science").

[132] Kevin Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 Crim. Just. Pol'y Rev. 330 (2006); *see also* Matthew Fennessy & Matthew T. Huss, *Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity*, 40 Crim. Just. & Behav. 40, 53 (Jan. 2013) ("It is arguable that indiscriminate screening of all ethnic groups as opposed to each ethnic group as unique from one another can lead to misrepresentation and inaccurate decision making" as "bolster[ed]" by "[t]he fact that certain variables were pertinent for Black defendants but not Whites and vice versa.").

[133] Tracy L. Fass *et al.*, *The LSI-R and the COMPAS Validation Data on Two Risk-Needs Tools*, 35 Crim. Just. & Behav. 1095 (2008); *see also* Chenane *et al.*, *supra* note 53, at 299 ("Consistent with previous research, our findings generally indicate that the LSI-R and its subcomponents do a better job at predicting institutional misconduct for White inmates than for non-Whites.").

[134] While 66.9% of defendants convicted of fraud and sentenced to more than fifteen years from 1999 through 2013 were white, there were only 301 such defendants and they comprised only .03% of all 941,794 defendants sentenced in those fourteen years. USSC, Monitoring Datafiles FY 1999-2013.

[135] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113-14 (2004).

[136] USSC, Monitoring Datafiles FY 2006-2013.

[137] USSC, Monitoring Datafiles FY 2006-2013.

offense" or a "crime of violence."

Although Black offenders comprised only 20.4% of all federal offenders in 2012, they were 61.9% of those subject to the career offender guideline.[138] Most offenders are subject to the career offender guideline," not because of crimes of violence, but "because of … drug trafficking crimes."[139] African Americans "have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of the "relative ease of detecting and prosecuting offenses that take place" on the streets "in impoverished minority neighborhoods."[140] The recidivism rate of offenders who are subject to the career offender guideline based on drug convictions is *half* that of offenders in criminal history category VI under the normal criminal history rules.[141] Thus, the career offender guideline has an "unwarranted adverse impact" on Black offenders.[142] Likewise, denying career offenders the opportunity to earn time credits would have an unwarranted adverse impact on Black offenders.

Moreover, prisoners in Criminal History Category VI are serving sentences double or triple the sentences of others because their guideline ranges were increased based on criminal history points or the career offender guideline.[143] With or without time credits, they will serve lengthy sentences and will then be released. It does not promote public safety to refuse to incentivize them for participating in programs shown to reduce recidivism before releasing them to the community.

Federal Crime of Violence. Because of federal jurisdiction over tribal territories, Native Americans are prosecuted in federal court for ordinary crimes of violence, while people of other races are prosecuted for such crimes in state court.[144] Thus, Native Americans comprised only 4.1% of federal defendants sentenced in 2013, but were 36.8% of those sentenced for murder; 85.7% of those sentenced for manslaughter; 34.5% of those sentenced for sexual abuse; 46.3% of those sentenced for assault; and 64.9% of those sentenced for burglary.[145]

If all kinds of robbery and firearms offenses are considered crimes of violence, this exclusion would also have an adverse impact on Black offenders. Black offenders comprised

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[138] *See* U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 4; U.S. Sent'g Comm'n, Quick Facts, Career Offenders.

[139] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing*, *supra* note 135, at 133.

[140] *Id*. at 134.

[141] *Id*.

[142] *Id*.

[143] U.S. Sent'g. Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.14.

[144] *See* 18 U.S.C. § 1153.

[145] U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.4. The "other" race category includes Native Americans, Alaskan natives, Asians and Pacific Islanders, but the vast majority are Native Americans.

only 20.6% of federal defendants in 2013, but 35.5% of robbery offenders and 47.3% of firearms offenders.[146] Notably, repeated analyses have shown that prosecutors' choices to charge a § 924(c) firearm count in addition to a drug trafficking count rather than rely on a two-level increase in the guideline range for a firearm has a racially disparate impact on Black offenders.[147] Again, it is difficult to see how it promotes public safety not to incentivize these offenders to participate in programs shown to reduce recidivism before releasing them to the community.

Second or Subsequent Conviction for a Federal Offense. This exclusion would have an adverse impact on Native Americans. While there is no available data on who has prior federal convictions, in our experience, few federal defendants have prior federal convictions, *except* for Native Americans, because they are prosecuted in federal court for crimes for which people of other races are prosecuted in state court, as noted above.

Continuing Criminal Enterprise. A person who violated the drug laws as part of a series of such violations undertaken in concert with five or more others with respect to whom the defendant was an organizer, supervisor or manager, and from which s/he obtained substantial income or resources, can be charged under 21 U.S.C. § 848, or s/he can be charged under 21 U.S.C. § 841 and receive an enhancement under the guidelines for a leadership role and any other applicable guideline enhancements. Seventy-seven percent of the 239 defendants charged and convicted of violating 21 U.S.C. § 848 from 2006 to 2013 were Black or Hispanic.[148]

Inmates Serving Life Without Parole. Over 73% of federal prisoners serving life are African American.[149] Studies show that lifers are half as likely to commit disciplinary violations as other inmates, and that when they are released early, and indeed when any inmate is released at age 50 or older, they have recidivism rates as low as 0 to 1%.[150]

V. Giving BOP Unreviewable Discretion to Decide that Certain Inmates Are Ineligible to Participate in Programming is Likely to Result in Unintended Exclusions.

The proposal would give BOP broad discretion, with no right to any kind of review, to exclude inmates from participating in programs if BOP decides they are "medically unable to

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[146] *Id.*

[147] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing*, *supra* note 135, at 90; Paul J. Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent. Rep. 193, 198 (2012).

[148] USSC, Monitoring Datafiles FY 2006-2013.

[149] Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Fed. Sent'g. Rep. 27, 28 (2010).

[150] *Id.* at 28-29 (discussing studies showing that individuals released from a life sentence were less than one third as likely to be rearrested as all released individuals; that 21 people released at age 50 or older and had served 25 or more years committed no new crimes three years after release; that 1.4% of offenders released at 50 or older were convicted of new crimes in the first 22 months; and that 1% of 285 offenders whose life sentences were commuted were convicted of a new crime).

successful complete recidivism reduction programming or productive activities" or "would present a security risk if permitted to participate in recidivism reduction programming." § 3621(h)(8)(A)(I)-(II); § 3621A(g).

This is likely to exclude more inmates than intended, given BOP's historical tendency to construe its early release authority more narrowly than required. For example, though Congress authorized sentence reductions for persons convicted of "nonviolent offenses" who participate in the Residential Drug Abuse Program, 18 U.S.C. § 3621(e)(2)(B), and unlawful possession of a firearm is not a "crime of violence,"[151] BOP categorically denies early release to those convicted of that offense, and those who did not themselves possess, carry, or use a firearm but were convicted for the conduct of others on a conspiracy or aiding and abetting theory.[152] Accordingly, it is reasonable to expect that BOP would exercise its discretion to deny programming to inmates who do not actually present a "security risk." Similarly, BOP may rely on its authority to deny programming to those who are "medically unable to successfully complete recidivism reduction programming" to exclude individuals with mental illness that may interfere with their ability to participate in programs. People with serious mental illness "may have difficulties with activities of daily living, including maintaining their hygiene, complying and rules and adhering to routines, and concentrating and learning."[153] It would be counter-productive, illogical, and contrary to evidence-based practices to deem them ineligible to participate in recidivism reduction programming,[154] yet that is the likely result of S. 467.

VI. S. 467 Would Be Unconstitutional.

A. Making all determinations and assessments "while implementing or administering" the Assessment System unreviewable in any forum, § 3621A(g), would be unconstitutional.

Subsection (g) of § 3621A would state that "[s]ubject to any constitutional limitations, there shall be no right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing or administering the Assessment System, or any rules or regulations promulgated under this section."

"[I]mplementing or administering the Assessment System" under § 3621A would include the initial assessment and assignment of the risk level for an inmate, as well as reassessments and

[151] *See* USSG § 4B1.2. comment. (n.1).

[152] While BOP originally failed to provide any rationale for this decision, *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), it later asserted without statistical support that such persons present a significant potential for violence. 74 Fed. Reg. 1892, 1895 (2009).

[153] Fred Osher *et al.*, Council of States Governments Justice Center, *Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery* 15 (2012), https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf.

[154] *Id*. at 16 (individuals with the highest impairment should be given priority in treatment).

any changes in risk level. *See* § 3621A(a)(1), (a)(3), (a)(4). The assigned risk level, in turn, would determine whether the inmate is eligible for time credits under § 3621(h)(6), how many days of time credit he may receive, and whether and when an inmate may be transferred to prerelease custody under § 3624(c)(2). Yet, § 3621A(g) would explicitly deny administrative and judicial review of these determinations and deny judicial review of any rules or regulations governing them.

Subsection (g) would also appear to deny any administrative or judicial review of determinations made under other sections "while implementing or administering the Assessment System," including, *inter alia*, a determination that an inmate is excluded from earning time credits, § 3621(h)(6)(A)(iii), that an inmate is ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), to reduce time credits for a disciplinary violation, § 3621(h)(6)(C), to deny an inmate transfer to prerelease custody or place him in a more restrictive type of prerelease custody, § 3624(c)(2), and that an inmate has violated a condition of community supervision such that he will be returned to prison, § 3624(c)(6).

Because these decisions directly affect an inmate's liberty interests, they must be subject to administrative and judicial review under rules already in place, which are based on the Due Process Clause and the historic purpose of the writ of habeas corpus (which may not be suspended, U.S. Const. art. I, § 9, cl. 2).[155] Under the BOP's "Administrative Remedy Program," inmates may "seek formal review" of grievances relating to "any aspect" of their confinement.[156] Inmates may seek review of their grievances at the institutional, regional, and national levels.[157] Inmates are afforded a hearing when charged with misconduct that could lead to sanctions, including disallowance of good time credit,[158] and may appeal the determination and sanction imposed within the agency through its administrative review process.[159] They may seek review of the final administrative decision in the district court by filing a writ of habeas

[155] *See Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985) (due process requires, where a prison disciplinary hearing may result in the loss of good time credits, that the inmate receive notice, an opportunity to be heard, call witnesses, and present evidence, a written statement of evidence relied on and reasons for the action, and the findings must be supported by some evidence); *id.* at 450 (suggesting that the Constitution precludes granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights"); *see also Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (in order to avoid "serious constitutional concerns," construing statute regarding detention of alien to contain an "implicit 'reasonable time' limitation, the application of which is subject to federal court review"); *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) ("When [] a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication – and federal courts will review the application of those constitutionally required procedures."); *cf. INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001) ("[A] serious Suspension Clause issue would be presented if we were to accept [that statutes limiting judicial review of removal orders] have withdrawn [the power to issue a writ of habeas corpus under § 2241] from federal judges and provided no adequate substitute for its exercise.").

[156] 28 C.F.R. § 542.10(a).

[157] 28 C.F.R. § 542.14-15.

[158] *See* 28 C.F.R. §§ 541.7, 541.8.

[159] *See* 28 C.F.R. §§ 541.7(i), 541.8(i).

corpus under 28 U.S.C. § 2241.[160] And inmates may challenge BOP's rulemaking to ensure that it is not arbitrary or capricious, or otherwise unlawful.[161]

The serious problems with subsection (g) are not solved because it is "subject to any constitutional limitations." Indeed, this phrase suggests that it would be unconstitutional to deny any and all "right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing the Assessment System, or any rules or regulations promulgated under [section 3]." With a statute that expressly states that "there shall be no right" to administrative or judicial remedy of any sort, it is most unlikely that inmates would attempt to test the constitutional limits of the denial of review. Even if some attempted to test the limits by filing a habeas corpus action under 28 U.S.C. § 2241, there would be no record below for the district court to act upon. Presumably, the Judicial Conference would object to a procedure that would so obviously hinder judicial review.[162] And it would be entirely unnecessary. The already constitutional approach would be to permit ordinary administrative review of decisions made "while implementing or administering the Assessment System" under BOP's established administrative and disciplinary review systems, subject to judicial review under 28 US.C. § 2241,[163] or if the decision involves rulemaking, review under the APA.[164]

B. Providing the government the right to judicial review of a decision to transfer—with no right to counsel and no clear right to a hearing for the inmate—while denying inmates any right to judicial review of decisions to deny transfers, § 3624(c)(14)(D), would be unconstitutional.

Under § 3624(c)(14)(A), BOP would be required to provide prior notice of a decision to transfer a prisoner to prelease custody to the U.S. Attorney's Office for the district in which the prisoner was sentenced. Under § 3624(c)(14)(D), the government would have a right to file a motion "seeking a hearing" to "request that the prisoner's transfer be denied or modified," which

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[160] *See, e.g.*, *Howard v. Bureau of Prisons*, 487 F.3d 808, 811 (10th Cir. 2007); *see also Setser v. United States*, 132 S. Ct. 1463, 1473 (2012).

[161] *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 240 (2001); *Barber v. Thomas*, 560 U.S. 474 (2010).

[162] *See McKart v. United States*, 395 U.S. 185, 194 (1969) ("[J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise."); *see also Woodford v. Ngo*, 548 U.S. 81, 89 (2006) ("[Administrative] [e]xhaustion gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court'" and "promotes efficiency" because administrative claims "generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court"); *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (administrative remedies "aid[] judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding [and] promote[] judicial economy by avoiding needless repetition of administrative and judicial factfinding").

[163] *Setser*, 132 S. Ct. at 1473.

[164] *See, e.g.*, *Gatewood v. Outlaw*, 560 F.3d 843, 846-47 & n.2 (8th Cir. 2009) (conducting APA review of BOP rulemaking).

"shall not require the Court to conduct a hearing," and makes no mention of any right to counsel, or any notice to the prisoner's counsel. The inmate would have no right to any form of review of a BOP decision to deny a transfer.

This would be unconstitutional for two reasons. First, if the government has the right to judicial review of a decision by BOP to transfer an inmate to prerelease custody, inmates must have the right to judicial review of decisions by BOP officials not to transfer inmates to prerelease custody. Once an appeal right is established by Congress, it "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[165] There is no conceivable reason the government would have an immediate right to review of a decision to transfer, while the inmate would never have the right to review of a decision not to transfer.

Second, inmates are entitled to the fundamentals of due process in proceedings involving review of a decision about whether they should be released or remain in prison.[166] It is entirely unclear whether or not a hearing is required when the government seeks denial or modification of a transfer. While subparagraph E states that the court may deny the transfer "if, after conducting a hearing . . . pursuant to subparagraph D," subparagraph D states that the government's motion "shall not require the Court to conduct a hearing." These provisions are in conflict. Moreover, prosecutors cannot be permitted to argue and provide information in support of requests that inmates' transfers be denied or modified without inmates having "the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the [inmate] to present his case."[167] Other statutes clearly state that counsel must be provided at hearings where liberty is at stake.[168]

C. Providing no procedural mechanism or due process protections for the revocation of prerelease custody, § 3624(c)(6), would be unconstitutional.

Under § 3624(c)(4) and (c)(5)(C), an inmate released to home confinement or community supervision based on earned time credits would be subject to such "conditions as the Director of the Bureau of Prisons deems appropriate." Under § 3624(c)(5)(C)(ii), an inmate may remain on community supervision only if he "remains current on any financial obligations imposed as part

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[165] *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); s*ee also Johnson v. Avery*, 393 U.S. 483 (1969). *Cf. Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("[A] State may not 'bolt the door to equal justice' to indigent defendants.").

[166] *See Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

[167] *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).

[168] *See* 18 U.S. C. § 3565(a) (hearing must be conducted "pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure," under which the person is "entitled to" "to request that counsel be appointed if the person cannot obtain counsel"); *id.* § 3583(e) (hearing must be conducted "pursuant to" Rule 32.1); 18 U.S.C. § 3006A(a)(1)(C), (E) ("Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation" or "a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release").

of the prisoner's sentence," such as fines and restitution. Under § 3624(c)(6), the Director of BOP "may revoke the inmate's prerelease custody and require the inmate to serve the remainder of the prisoner's term of incarceration, or any portion thereof, in prison, or impose additional conditions" on the inmate's prerelease custody. If the violation is "non-technical," the Director of BOP "shall revoke the prisoner's prerelease custody." *Id.*

Taken together, these provisions mean that the Director of BOP "may revoke" an inmate's prerelease custody (halfway house, home confinement, or community supervision) if he violates any condition of prerelease custody and "shall revoke" an inmate's prerelease custody if the violation is "non-technical." Thus, for example, for an inmate on community supervision, prerelease custody could automatically be revoked, and the inmate returned to prison, if he was not "current" on payments toward a fine or restitution ordered as part of the sentence. Yet, there is no mechanism for notifying the inmate of the alleged violation, for a hearing to establish the violation, or for providing counsel to the inmate. And it requires automatic revocation if the inmate fails to "remain[] current" on court-ordered financial obligations, regardless of the inmate's efforts or ability to pay. As such, § 3624(c)(6) fails to provide the fundamental due process protections required by the Constitution.

The loss of liberty associated with revocation of prerelease custody, just like the revocation of parole, probation, or supervised release, is a "serious deprivation requiring that the [person] be accorded due process."[169] The Supreme Court long ago established minimum due process standards for the revocation of parole, including:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[170]

An indigent person on parole, supervised release, or probation also has a due process right to counsel when she has a legitimate claim that she did not commit the violation or the violation can be justified or mitigated.[171] And because federal parolees, just like those on supervised release and probation, have a statutory right to counsel when facing a loss of their liberty for a violation of release conditions,[172] it would be a violation of equal protection to

[169] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[170] *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

[171] *Scarpelli*, 411 U.S. at 790.

[172] *See* 18 U.S. C. § 3565(a) (probation); *id.* § 3583(e) (supervised release); *id.* § 3006A(a)(1)(C), (E) ("Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation" or "a violation of supervised release or faces modification, reduction, or enlargement of a condition, or

deprive a person in prerelease custody of the same protections. Finally, a decision to modify or revoke probation or supervised release is subject to appellate review on both procedural and substantive grounds.[173]

Because a person may not be constitutionally imprisoned solely because of a lack of financial resources, special procedures must be followed before a person may be incarcerated for failing to pay financial obligations.[174] "[A] sentencing court must inquire into the reasons for the failure to pay."[175] If a person "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment."[176] If, however, the "probationer could not pay despite sufficient bona fide efforts . . . the court must consider alternate measures of punishment other than imprisonment," and if those alternatives are not adequate, only then may the court imprison a probationer for non-payment.[177]

Revoking prerelease custody under § 3624(c)(6) would be constitutionally indistinguishable from revoking parole, probation or supervised release. Each results in the "immediate disaster" that the inmate will not be free but in prison, requiring all of the due process protections described above.[178]

BOP recognizes these constitutional requirements for inmates released to home confinement who have allegedly violated program rules. *See* BOP Program Statement 7320.01(9) (requiring providers of home detention services to use a system for handling program violations that meets the requirements of due process).

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extension or revocation of a term of supervised release"); Fed. R. Crim. P. 32.1; *see also* 18 U.S.C. § 3006A (1986) (providing for right to counsel at parole proceedings; provision remains in effect under the saving clause of the U.S. Parole Commission Extension Act of 2008) (Pub. L. No. 110-312, 122 Stat. 3013 (Aug. 12, 2008)). *See generally* Guide to Judiciary Policy, Vol. 7A 4 (2015).

[173] *See* 18 U.S.C. § 3742(a)(4); *United States v. Clark*, 726 F.3d 496 (3d Cir. 2013).

[174] *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983).

[175] *Id.* at 672.

[176] *Id.*

[177] *Id.*; *see, e.g., United States v. Holt*, 664 F.3d 1147 (8th Cir. 2011) (applying these principles); *see also* 18 U.S.C. § 3613A (a defendant found to be in default on a payment of fine or restitution may not be revoked and returned to prison without the due process protections set forth in Fed. Rule Crim. P. 32.1); *id.* § 3614 ("In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payment because the defendant is indigent.").

[178] *Cf. Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

D. Giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody, § 3624(c)(4)(B)-(C), (5)(C), (8), (12), would be unconstitutional.

Section 3624(c)(8) provides that the BOP "shall, to the extent practicable, enter into agreements with" probation "to supervise prisoners placed in home confinement or community supervision." These agreements "may authorize" probation "to exercise the authority granted" to BOP to determine the "appropriate" conditions of home confinement and community supervision, § 3624(c)(4)(A)(iii), (c)(5)(C), to "modify" the conditions of home confinement for "compelling reasons," § 3624(c)(4)(C), and to decide when an inmate's prerelease custody will be subject to "less restrictive conditions" due to "demonstrate[d] continued compliance with the requirements" of prerelease custody, § 3624(c)(12).

Probation officers, thus, would be responsible for imposing conditions of home confinement and community supervision, for supervising inmates, and for making decisions about when an inmate may be transferred from home confinement to community supervision. They also would be responsible for reporting violations to the BOP for purposes of revocation. This means that probation officers would be making executive decisions while inmates are in custody, and that probation officers would be deciding that an inmate in custody will remain subject to more onerous conditions, all without administrative or judicial review.

This would be unconstitutional. Probation officers cannot make executive branch decisions. Probation officers are administrative units of Article III courts, appointed by the court and removable by the court.[179] Congress may not enlist an administrative arm of the Judicial Branch, subject to removal by the Judicial Branch, to do the work of the Executive.[180]

E. The constitutionality of giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison, § 3624(c)(6), is questionable.

If BOP were to revoke an inmate's prerelease custody under § 3624(c)(6) and return him to prison, it would be deciding how long an inmate actually spends in prison. In this context, and in light of the legislative history of the Sentencing Reform Act and Supreme Court law, putting such power in the hands of the Executive may violate the separation of powers.

It is "indisputable" that the "right to impose the punishment provided by law is judicial"

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[179] *See* 18 U.S.C. § 3602; *United States v. Bernardine*, 237 F.3d 1279, 1282-83 (11th Cir. 2001) (the probation officer "is appointed by the district court and acts. . . under the discretion of the appointing court," is an "arm of the court," is "a liaison between the [district] court . . . and the defendant," and though "statutorily mandated to perform any other duty that the court may designate," that authority is limited by Article III of the Constitution which prohibits the delegation of judicial functions).

[180] *Cf. Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers violated by placing responsibility for the performance of an executive function in the hands of the Comptroller General, an officer controlled by Congress through its power of removal).

and that "the right to relieve from the punishment" imposed belongs to the Executive Branch.[181] *Ex Parte United States*, 242 U.S. 27, 41-42 (1916). While granting earned time credits and releasing an inmate to the community would "relieve [an inmate] from the punishment" imposed, sending him *back* to prison after he has been released to the community (regardless of whether he remains in the "custody" of the BOP), based on the BOP's determination that the inmate has violated a condition of release, would not be any sort of relief from punishment. It would be the "immediate disaster" of no longer being free, but in prison.[182] And it would be based on the BOP's unreviewable determination that the inmate violated release conditions imposed and supervised by a probation officer, *see* § 3624(c)(4), (5), whose function is entirely judicial. Such power is properly exercised by a court.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that by putting in the hands of the Executive the determination of how long an inmate actually spends in prison, the federal parole system "arguably usurped a function of the judiciary," and that "the better view is that sentencing should be within the province of the judiciary."[183] In *United States v. Setser*, the Supreme Court considered whether the court has the authority to decide whether, under 18 U.S.C. § 3584(a), a federal sentence is to run concurrently with, or consecutively to, a state sentence that has not yet been imposed, or whether that authority is exclusively committed to the BOP.[184] Relying on "our tradition of judicial sentencing" and the requirement "that sentencing not be left to employees of the same Department of Justice that conducts the prosecution,"[185] the Court held that the decision belongs with the court. This was true even though a decision by BOP to run the federal sentence consecutive to a state sentence does not alter the term of imprisonment imposed by the federal court for the federal offense, because it increases the amount of time the federal prisoner physically remains in prison. Noting that one of the principle purposes of the Sentencing Reform Act of 1984 was to eliminate the Executive's power, through parole, to decide the actual length of a term of imprisonment, the Court declined to interpret the statute in a manner that would "giv[e] to the Bureau of Prisons what amounts to sentencing authority."[186]

Because § 3624(c)(6) would permit BOP to send an inmate back to prison, it would give BOP what amounts to sentencing power. This is a matter for a court to decide.

F. Giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate's offense of conviction

[181] *Ex Parte United States*, 242 U.S. 27, 41-42 (1916).

[182] *McDonnell*, 418 U.S. at 561 (internal quotation marks omitted).

[183] S. Rep. No. 98-225, at 54 (1983).

[184] 132 S. Ct. 1463, 1467 (2012).

[185] *Id.* at 1472.

[186] *Id.* at 1471 & n.5.

excludes him from earning time credits, § 3621(h)(6)(A), would lead to error, unfairness, and impracticalities.

Section 3621(h)(6)(A)(iii) would exclude an inmate from earning time credits if he was convicted of a "crime of violence, as defined under section 16." Section 16 defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The determination whether an offense is a "crime of violence" under § 16 requires application of the elements-based "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and recently clarified in *Descamps v. United States*, 133 S. Ct. 2276 (2013). If the statute of conviction is "divisible," i.e., sets forth elements in the alternative, some of which describe a "crime of violence" and some of which do not, application of the "modified categorical approach" may be required to determine which was the offense of conviction. This may require consideration of a limited set of case-specific documentation—i.e., the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial,[187], or the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant pled guilty[188]—to determine the elements of the offense of which the defendant was convicted.[189] If the elements of the offense of conviction cannot be determined from these documents, it must be assumed that the conviction was for the least culpable crime, i.e., the non-qualifying offense.[190] The Supreme Court adopted the categorical approach to avoid practical difficulties, unfairness to defendants, and Sixth Amendment violations.[191]

The categorical approach may require extensive legal analysis of issues without clear precedent. Further complicating matters, the "force" clause under § 16(a) and the "residual clause" under § 16(b) each require additional analysis implicating yet another line of Supreme Court cases.[192] Even that law is uncertain and may be changed, which will trigger yet another

[187] *Taylor*, 495 U. S. at 602.

[188] *Shepard*, 544 U. S. at 25-26.

[189] *Descamps*, 133 S. Ct. at 2283-84.

[190] *Johnson v. United States*, 559 U.S. 133, 137 (2010).

[191] *See Descamps*, 133 S. Ct. at 2287-89.

[192] *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson*, 559 U.S. at 140.

wave of interpretive caselaw, as the Supreme Court is now considering whether the "residual clause" is unconstitutionally vague.[193]

In any event, the categorical approach must be applied at sentencing as well as in administrative settings, such as when deciding whether a conviction is an "aggravated felony" for purposes of deportation, where it is subject to both administrative and judicial review.[194] Yet, under § 3621(h)(6)(A)(iv), the U.S. Sentencing Commission, not a court, would identify all "Federal crime[s] of violence" (as well as other offenses not specified by statute, such as "Federal fraud offenses"), and its decisions are not subject to any review. It is unclear what would happen if the inmate was convicted under a "divisible" statute, which requires examination of case-specific documents.

It is up to courts "to say what the law is,"[195] and the Sentencing Commission is not a court.[196] It has no experience applying the categorical approach. Moreover, its decisions would not even be subject to judicial review. By delegating these decisions to the Commission, § 3621(h)(6)(A) would invite legally erroneous exclusions that could unfairly affect entire classes of inmates with no recourse. Practical difficulties would also arise in cases requiring examination of case-specific documents. This is a determination for a court.

VII. There Is a Simple, Cost-Effective, Practical and Fair Approach.

The approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparity or violate the Constitution would be to expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equal basis.

Congress should support the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn time credits up to a certain percentage of the sentence imposed, so long as they comply with disciplinary regulations.[197] Under this approach, individuals would earn reductions in their

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[193] *See* Order, *United States v. Johnson*, No. 13-7120 (Jan. 9, 2015).

[194] *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[195] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[196] *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

[197] The proposal advanced by DOJ and reported out of the Senate Judiciary Committee in the 112th Congress, would award the same number of credits and percentage of the sentence imposed to all prisoners (except those with more than one conviction for an offense involving rape or who have been convicted of a sex offense against a minor) who successfully participate in programs demonstrated to reduce recidivism, and comply with disciplinary regulations. *See* S. 1231, § 4(g)(1). We agree with this general approach. However, particularly if mandatory minimums are not reduced, we do not agree with the limit on the amount of credit in the DOJ bill. It would limit the maximum total reduction to 33% of the sentence imposed, including credits for program participation, good time credits for compliance with disciplinary regulations, and any reduction for participation in the residential substance abuse treatment program (RDAP). Since good time credit would be 15% under Section (f) of the DOJ bill, this would mean that a prisoner would earn only 18% off the sentence imposed for participating in programs, and less (or in

prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

BOP currently provides programming that has been proven to reduce recidivism.[198] These programs do not require the costly and time-consuming development and implementation of a complex Assessment System, and have been proven to be cost-effective.[199] But many of these programs have long waiting lists and cannot accommodate all who need them. For example, even after BOP added new slots from 2009 to 2011, the residential drug abuse treatment program (RDAP) still has long waiting lists, thus constraining BOP's ability to admit participants early enough to allow a full year reduction for completing the program.[200] Likewise, there are long waiting lists for non-residential drug treatment, drug education, literacy programs, the Life Connections and Threshold programs, and perhaps most important, meaningful work.[201] As noted above, FPI jobs are proven to reduce recidivism more than any other program, particularly for young minority inmates who are at the greatest risk of recidivism, by giving them marketable job skills.[202] But because FPI must generate operating revenue to remain a self-sustaining program, and has had to compensate for declining revenues and earnings in recent years, as of June 2012, it employed "7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population."[203] Support for the development of meaningful work opportunities, as well as other recidivism-reducing programs, is clearly needed.

Lastly, and perhaps most significantly, to truly address the historically unprecedented

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some cases nothing) if he also participated in RDAP.

[198] "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." *See* Statement for the Record of Charles E. Samuels, Jr., *supra* note 58, at 3-4.

[199] The benefit-to-cost ratio for residential drug abuse treatment is as much $2.69 for each dollar invested; $5.65 for adult basic education; $6.23 for correctional industries; and $7.13 for vocational training. *Id.*

[200] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, *supra* note 126, at 69-73.

[201] *Id*. at 73-75.

[202] Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp. Inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release compared to similarly situated inmates who did not participate, and are 14% more likely than non-participants to be employed 12 months following release from prison. "Work programs especially benefit young minorities who are at the greatest risk for recidivism." *See* FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

[203] U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates*, *supra* note 86, at ii, 1.

high levels of incarceration, Congress should reduce unnecessarily severe sentences on the front end. "[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options … would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums."[204] By all accounts, the savings under the Smarter Sentencing Act would be large, direct, and swift. The Congressional Budget Office estimates that it would result in a net savings of $3 billion in the first ten years: $4 billion saved through reduced incarceration less $1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in $3.426 billion in cost savings and another $3.964 billion in cost aversions in the first 10 years.[205] The Urban Institute estimates that it would result in $3.258 billion in cost savings in the first 10 years.[206]

The need for reform in the federal corrections system is real and urgent. Congress should pass legislation that would meaningfully and equitably achieve significant reductions in the prison population. Unfortunately, in its present form, the Corrections Act does not do so.

[204] Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

[205] Potential Impact & Cost Savings: The Smarter Sentencing Act, http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf.

[206] Urban Institute, *Stemming the Tide, supra* note 123, at 3-4.