Statement of Leigh Skipper
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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, I thank you for providing me the opportunity to provide my insights on the challenges facing our federal corrections system on behalf of Federal Defenders throughout the country. I have been the Chief Federal Defender for the Eastern District of Pennsylvania for the last six and half years. Prior to that, I was both a Trial Unit supervisor in my office and a line Trial Attorney. I have some twenty-four years of federal criminal practice experience as a federal public defender.

I. Reentry Court

I'd like to begin by giving you a little background on reentry court. Nearly 32 percent of supervised release cases (13,623 of 42,984) resulted in revocation during the 12-month period ending September 30, 2014.[1] If some of these revocations had been avoided, prison overcrowding, the criminogenic effects of incarceration on the individual, and the collateral consequences on families and communities would have been reduced.

About 50 re-entry courts are in operation around the country. They differ in some respects. For example, the STAR program in the Eastern District of Pennsylvania focuses on high risk offenders with some history of violence and results in early termination of supervised release. The STAR program in the Eastern District of New York is a drug court which can result in early termination of supervised release, or can provide an alternative to incarceration at sentencing.

The STAR program is a reentry court that was started in our district in 2007 and has been held up as a national model. *See* Exhibit A. Participants are residents of the City of Philadelphia who score moderate or high on a risk assessment. The typical participant is male, has served several years for armed robbery, carjacking, or drug trafficking offenses, and has a significant criminal history including some violence. The Probation Department reaches out to likely candidates before or immediately after release. Participation is voluntary. The court has the capacity for about 40 participants. As people graduate (and some drop out), no one is being turned away.

As of July 2014, only 11% (15 of 131) graduates had had supervision revoked, been arrested without revocation, or were awaiting revocation. Only 18% (39 of 216) participants had had supervision revoked based on new criminal activity or other serious violations, and 38% of revocations were due to chronic substance abuse or addiction, not violent crime. The revocation rate for the same category of high-risk offenders not in the program was 43%. After controlling for other predictors of revocation, participation in the program was found to decrease the likelihood of revocation by 84%. The cost savings were estimated at $1,152,423.

In addition to terminating supervised release one year early, participants and the community benefit from participants being employed and engaged in parenting, mentoring and volunteering in the community, and heightened community awareness of the issues ex-offenders face and the need to

support them. The program reduces incarceration and its effects on the individual, families and communities.

The STAR program is not a drug or mental health court.[2] Its primary strength, in addition to direct and regular supervision by judges, is overcoming barriers to successful reentry through partnerships with other agencies, bar associations, law schools and colleges.

Employment All participants are employed full-time, actively seeking employment, or in an educational or vocational program. One was hired as the Philadelphia director of Operation Ceasefire. Others are employed in film production or with the Philadelphia Housing Authority, and one wrote a novel. Philadelphia's RISE program connects participants with private employers. Community service is used, not as a sanction, but to provide opportunities for participants having difficulty securing employment.

Education All participants are obtaining a GED, attending college classes or vocational training, or working full-time. Philadelphia Community College assists with applications and financial aid.

Housing The Philadelphia Housing Authority provides vouchers for Section 8 housing for free or low-cost rental housing to participants. Applicants must make under a certain amount of money to qualify, and there have been enough vouchers to go around thus far.

Legal Services directly address barriers to re-entry and increase the credibility of the program among participants.

- Third-year law students represent participants in Philadelphia Traffic Court, with a 100% success rate. License suspensions and fines pose a significant barrier to successful re-entry, especially to having a job and getting to work on time.
- As of July 2014, legal services provided by Philadelphia Lawyers for Social Equity resulted in a total of 153 criminal records of participants being expunged. A criminal record is a significant barrier to employment.
- Law students from family law clinics represent participants in Philadelphia's Family Court on matters such as visitation, custody and child support.
- Lawyers with the Philadelphia Bar Association assist participants with other civil matters such as property damage, estate and music copyright disputes.

Cognitive Behavioral Therapy One of the central predictors of recidivism is "criminal thinking patterns." Probation has successfully launched a Cognitive Behavioral Therapy program to change the behaviors of offenders by restructuring their thinking so that their behavior is positively impacted. Trained Probation Officers provide the therapy.

Participants attend bimonthly sessions in open court before a judge for 52 weeks. A team consisting of representatives from the Federal Defender Office, the U.S. Attorney's Office, the Probation Office, and judges meet for 90 minutes before each court session to discuss each participant's progress and plans to help them succeed. Participants then attend court as a group. Each participant discusses his or her accomplishments and any obstacles s/he has been encountering. Goals are set for each participant before the next court session.

If a participant is not complying with the goals of the program or is violating the terms of release, graduated sanctions are imposed and explained to the entire group. The sanctions are uniform and predictable for particular conduct, ranging from loss of weekly credit toward completion of the program, curfew, home confinement, placement in a halfway house, and brief periods of imprisonment. One of the program's strengths is the judge's ability to impose swift sanctions and thereby avoid revocation and incarceration. A sanction of imprisonment is imposed only after other sanctions have failed.

Although we have experienced many successes with re-entry in the Eastern District of Pennsylvania, many of our clients will never have the opportunity to re-enter society due to charging practices in the district.

II. Prosecutors' Charging Practices

In a series of directives beginning in 1989, the Department of Justice instructed prosecutors to initially charge the offense(s) and enhancements carrying the highest sentence, and to forego, dismiss, or reduce charges only if the defendant entered into a written plea agreement.[3] Prosecutors developed an entrenched habit. "To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty."[4]

A. Drug Cases

On May 19, 2010, in a break with the past, former Attorney General Holder issued a memorandum stating that "[c]harges should not be filed simply to exert leverage to induce a plea," and instead should reflect the seriousness of the offense and the defendant's individual characteristics.[5] On August 12, 2013, he issued a memorandum stating that "severe mandatory minimum penalties [must be] reserved for serious, high-level, or violent drug traffickers," and directing prosecutors to decline to charge drug quantities triggering mandatory minimums unless the defendant met four specific criteria, and to decline to file enhancements based on prior "felony drug offense" convictions "unless the defendant is involved in conduct that makes the case appropriate for severe sanctions" in consideration of six factors.[6] In memoranda dated August 29, 2013 and September 24, 2014, Mr. Holder emphasized that whether a defendant is pleading guilty is *not* among the factors enumerated in the charging policy.[7]

In February 2015, Holder announced that the percentage of drug trafficking offenders charged with mandatory minimums had dropped by 20 percent the previous year as a result of the new charging policy. He acknowledged that "old habits are hard to break," but that a "shift is underway in the mindset of prosecutors" regarding nonviolent drug offenders.[8] He noted that the crime rate had declined at the same time, and called upon Congress to "help us build on this foundation by passing important, bipartisan legislation like the Smarter Sentencing Act, which would give judges more discretion in determining sentences for people convicted of certain federal drug crimes."[9]

We surveyed all Defenders and CJA panel reps in two districts without a Defender regarding compliance with the Holder charging policy.[10] Ninety-two of 94 districts responded. Prosecutors comply with the policy in 40.2% of districts; all or most prosecutors do not comply in 23.9% of districts; a minority of prosecutors do not comply in 35.8% of districts.

According to Commission data, the vast majority of drug offenders in FY 2014 met the criteria not to be charged with a mandatory minimum, but more than half were nonetheless charged with a mandatory minimum. At least 62% had an insignificant criminal history.[11] In 83.8% of cases, the defendant did not possess or use a gun, a confederate did not possess or use a gun, and a gun was not present.[12] Nearly 93% of defendants played no leadership role,[13] and 99.3% did not use, threaten, or direct the use of violence.[14] Yet 50.1% were charged with a mandatory minimum.[15]

Thus, while there has been a shift in the mindset of some prosecutors, many prosecutors will use mandatory minimums in inappropriate cases and for inappropriate purposes as long as they exist. Charging policies are not enforceable by defendants, and they change with administrations. The only solution is to eliminate or substantially reduce mandatory minimums.

B. Section 924(c) Cases

One of the most devastating issues we face in the Eastern District of Pennsylvania is the charging of multiple counts under § 924(c) in the same indictment, commonly known as "stacking." We have the highest number of cases involving stacked § 924(c)s of any district.[16]

What is stacking? Section 924(c) of Title 18 states that "any person who, during and in relation to a crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possess a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years," and if a firearm is brandished, not less than 7 years, and if a firearm is discharged, not less than 10 years. These penalties must be imposed consecutively to the penalty for the underlying offense and any other penalty. In addition, the statute mandates 25 consecutive years for each "second or subsequent conviction." As interpreted by the Supreme Court, this is not limited to a recidivist who was previously convicted, sentenced, and served prison time, but also applies to a person charged with multiple counts in the same indictment.[17] The latter, called "stacking," is how the statute is almost always used.

Stacking results 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, and even when s/he not use a gun.[18] The Sentence Commission, as well as judges, prosecutors, and Federal Defenders, have urged reform of this provision.[19] It requires sentences that are disproportionate to the seriousness of the offense, creates unwarranted racial and regional disparity, and results in unjustified costs.

Stacking "results in excessively severe and unjust sentences" in many cases.[20] The average sentence for offenders subject to multiple § 924(c)s is 351 months.[21] According to the Commission, 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."[22]

We frequently have clients who commit a string of robberies, often of the same pizza shop or convenience store, to get minimal amounts of money to support a drug habit. Some are very young, and some are relatively old. All will spend most or all of their lives in prison. For example, Juwan Shaw, age 20, with a drug habit since age 15, committed three robberies, from which he obtained a total of $52, over a period of six months. He was charged with three § 924(c)s, went to trial, and was acquitted of one count. At age 24, he was sentenced to 34 years. He will not be released until his late fifties, with little education and little or no prospect of employment.

The availability of these extreme penalties often results in a plea agreement to a stipulated sentence, effectively compelling defendants to waive their right to a jury trial and agree to a sentence that is still excessive. For example, over a two-month period, Brandon Brunson robbed a mini-mart once and the same pizza store three times, obtaining a total of $737 to support a significant drug habit. At age 27 and with no criminal record, Brandon faced a mandatory sentence of 95 years. He accepted a negotiated sentence of 20 years.

The length of these sentences, without regard to whether the individual is a first-time offender or a recidivist, an addict in need of treatment or a truly bad actor, presents great challenges. Of note, these cases typically are adopted from state arrests and investigations, and need have only a "potential" effect on interstate commerce under Third Circuit law. For example, defendants were charged and held in state custody for stealing two cell phones, a wallet, and $121 from guests at a private home whose owner sold alcohol without a license. Three years later, the federal government charged them with robbery affecting interstate commerce and brandishing a firearm during that offense in violation of § 924(c) (with an 84-month consecutive sentence). The Third Circuit upheld the robbery charge against a commerce clause challenge, acknowledging that its precedent sets "a rather low hurdle" for the government.[23]

The use of § 924(c)s creates unwarranted disparity, most notably racial disparity. The use of § 924(c)s has a disproportionate impact on Black offenders.[24] 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.[25] In addition, the "ten districts that reported the highest number of the 147 cases involving multiple convictions of section 924(c)," including my district, "accounted for 62.7 percent of all such cases."[26] But there is no evidence that these offenses occur more frequently in those districts than in others.[27]

The annual cost of incarceration in fiscal year 2014 was $30,619.85.[28] A defendant subject to § 924(c) stacking receives an average sentence of 351 months,[29] at a cost of nearly $1.3 million at today's rate. Young defendants subject to stacking will remain in federal prison well into their senior years, and in many cases, until death. The Inspector General just reported that inmates age 50 and older are the fastest growing segment of the BOP population, it costs 8% more per inmate to incarcerate them than younger inmates primarily due to increased medical needs, and BOP lacks adequate staff, housing and programming to meet their needs.[30]

Congress can begin to address these problems by making the penalty for a "second or subsequent" offense a true recidivist provision. It could do so 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." Congress should also reduce the penalty for a "second or subsequent conviction."[31]

C. Fake Stash House Robberies

In cases across the country in which the facts are nearly identical, ATF or DEA agents use a cooperating witness or confidential informant to induce targets to commit a crime invented out of whole cloth: fake stash house robberies promised to render tens or hundreds of thousands of dollars' worth of drugs. If convicted, the sentence is based on the quantity of drugs the informant invented, as well as any guns he brought or told the targets to bring to the scene. We believe that Congress should hold a hearing to investigate this practice.

In a case in which Judge Posner called this a "disreputable tactic" and a senseless waste of taxpayer dollars, defendant Mayfield's only other major crime was an armed robbery, not of a stash house, in the early 1990s. He earned his GED, an associate's degree, and three vocational certificates in prison, got out of prison in 2005, moved to a new city away from his criminal associates, got a job, and devoted personal time to volunteer activities. The informant, who was Mayfield's co-worker and also worked on commission for the ATF, badgered him to help sell cocaine then offered him tens of thousands of dollars to participate in a fake stash house robbery, all of which Mayfield refused. Mayfield's car was then damaged in an accident, and he could not afford to have it fixed because he made so little money. The informant loaned him the money, and let him know that he had connections with a dangerous gang. "It was only when his need for money became acute and he feared that a failure to pay his debt to the informant would place his life in danger that the lure of participating in a robbery that would net him a large amount of money became irresistible."[32] The Seventh Circuit vacated Mayfield's conviction and ordered a new trial in which the jury must be instructed on entrapment.[33]

Not only are federal agents fabricating crimes with long and expensive sentences that would not otherwise have been committed, but they are targeting people of color to do the time. For example, all 95 defendants prosecuted in fake stash house cases in the Southern District of New York since 2013 are people of color. In a recorded conversation, the CW, who may have been used in other cases, repeatedly emphasized the need to recruit Black people for the job. A Yale law professor found that the probability of randomly selecting 95 black and/or Hispanic defendants from the relevant pool was .0003%.[34]

An investigation by USA Today found that over 91% of the defendants convicted in such cases are people of color.[35] Federal prosecutors in Chicago recently dismissed drug-conspiracy charges against 27 defendants in phony-stash cases, likely because such cases have been "highly criticized for targeting mostly minority suspects, many of whom were drawn into the bogus rip-offs by informants who promised easy money at vulnerable points in their lives."[36]

III. Prison Reforms

A. Authorize Courts to Reduce Sentences of More Than 15 Years

As of December 2014, half of all offenders in the federal prison population (105,283 people) were sentenced to more than ten years in prison; 4.9% (10,318 people) were sentenced to 30 years or longer; and 2.5% (5,264 people) were sentenced to life.[37] Thousands of these people were sentenced

under a regime that has already undergone some ameliorating changes, but these changes are not retroactive.[38] If Congress enacts significant sentencing reforms in the near future, those reforms are unfortunately likely to be prospective only. As explained in the report attached as Exhibit D to David Patton's testimony, the bill that would allow early release of prisoners classified as "low risk" and would exclude over half the prison population, if enacted, would be entirely insufficient to address past over-incarceration.

Congress should enact a law providing that for any inmate who was sentenced to more than 15 years in prison, who has served at least 15 years in prison, and who was not convicted of an offense that caused serious bodily injury or death, the court, upon motion of the inmate, the Bureau of Prisons, or on its own motion, may reduce the sentence to no less than 15 years if the court finds that it is necessary to do so in order to effectuate the requirements of 18 U.S.C. § 3553(a).

We note that the average sentence length in 2009 for all violent offenses in the states (consisting of homicide, kidnapping, rape, "other sexual assault," robbery, assault, and "other violent") was 97 months,[39] and the average time served for such offenses until first release was 52 months.[40]

B. Clarify that the amount of good conduct time credit is 54 days per year of the term of imprisonment imposed by the judge

Title 18 U.S.C. § 3624(b) provides for a maximum of 54 days of good time for each year of the sentence imposed. But BOP's formula for calculating good time credits results in a maximum of only 47 days of good time credit earned per year of sentence imposed.[41] While BOP's formula has been upheld by the Supreme Court,[42] DOJ and BOP have supported amending 18 U.S.C. § 3624(b) "such that 54 days would be provided for each year of the term of imprisonment originally imposed by the judge, which would result in inmates serving 85 percent of their sentence."[43] If good time credits were increased by seven days, 3,900 incarcerated inmates would be released in the first fiscal year after the change, saving approximately $40 million in that year alone.[44] FAMM projected doing so would save $914 million every 9.5 years. Several bills have been introduced in Congress to change the award of good time credits so that inmates earn 54 days of good time for each year of the sentence imposed.[45]

C. Revise 18 U.S.C. § 3582(c)(1)(A) to allow the prisoner or the court on its own motion to reduce a sentence, and broaden the criteria in § 3582(c)(1)(A)(ii).

18 U.S.C. 3582(c)(1)(A) provides that "upon motion of the Director of the Bureau of Prisons," the court may reduce the term of imprisonment (i) if it finds that "extraordinary and compelling reasons warrant such a reduction," or (ii) if the inmate is at least 70 years old, has served at least 30 years pursuant to a sentence under section 3559(c), and BOP determines he is not a danger to the safety of another person or the community.

In February 2012, the GAO reported that BOP "has authority to motion the court to reduce an inmates' sentence in certain statutorily authorized circumstances, but that authority is implemented infrequently, if at all."[46] Indeed, BOP made a motion only when the prisoner was near death. In 14.9% of cases from 2000 to 2008, the prisoner died before receiving a ruling from the court.[47] In April 2013, the Inspector General reported that "the existing BOP compassionate release program has been poorly managed . . ., likely resulting in eligible inmates not being considered for release and in terminally ill

inmates dying before their requests were decided."[48] On August 12, 2013, the BOP for the first time issued a program statement for implementation of 18 U.S.C. § 3582(c)(1)(A), somewhat broadening its early release criteria.[49]

Just last week, the Inspector General reported that incarcerating the growing over-50 population is costly, that BOP is failing to provide proper staffing, housing or programming to meet their needs, and that the rate of prison misconduct and recidivism among aging inmates is low compared to younger inmates. The IG reported that BOP's revised eligibility criteria for early release have "not been effective," and that only two aging inmates have been released under the revised policy. The IG recommended that BOP lower its age requirement from 65 to 50, and eliminate its 10-year time served requirement. The IG found that this would save millions of dollars.[50]

Assuming BOP follows these recommendations, the problem remains that BOP has sole authority to file a motion, and has proven itself unwilling to do so. Congress should therefore amend the statute to make sentence reductions available "upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion," like sentence reductions under 18 U.S.C. § 3582(c)(2), rather than only "upon motion of the Director of the Bureau of Prisons." In addition, Congress should revise § 3582(c)(1)(A)(ii) to lower the age to 50, eliminate the 30-year time served requirement, and remove the requirement that the inmate is serving a sentence pursuant to § 3559(c) as that provision has been applied to only 33 people since it was enacted.[51]

Thank you again for the opportunity to appear before you. Do not hesitate to contact me if further information is needed.

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[1] U.S. District Courts—Post-Conviction Supervision Cases Closed With and Without Revocation, by Type, During the 12-Month Period Ending September 30, 2014, tbl.E-7A, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/E7ASep14.pdf.

[2] People with serious drug problems are referred to a specialist in the Probation Office; those with mental health problems are referred to a mental health court.

[3] Memorandum from Dick Thornburgh, Att'y Gen. of the United States, to Fed. Prosecutors Re: Plea Bargaining Under the Sentencing Reform Act 2 (Mar. 13, 1989); Memorandum from George J. Terwilliger, III, Acting Deputy Att'y Gen. of the United States, Re: Indictment and Plea Procedures Under Guideline Sentencing (Feb. 7, 1992); Memorandum from John Ashcroft, Att'y Gen. of the United States, to All Federal Prosecutors Re: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003).

[4] *Kupa v. United States*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013).

[5] Memorandum to all Federal Prosecutors from Eric H. Holder, Jr., Attorney General, Department Policy on Charging and Sentencing (May 19, 2010).

[6] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 2 (Aug. 12, 2013) [Holder Memo, Aug. 12, 2013].

[7] Memorandum to Department of Justice Attorneys from the Attorney General, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014); Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases at 1 (Aug. 29, 2013) [Holder Memo, Aug. 29, 2013].

[8] Dept. of Justice, Press Release, Attorney General Holder Delivers Remarks at the National Press Club (Feb. 17, 2015), http://www.justice.gov/opa/pr/attorney-general-holder-delivers-remarks-national-press-club.

[9] *Id*.

[10] The survey asked whether prosecutors charge or threaten to charge quantity and/or § 851 enhancements in cases that meet the criteria.

[11] Sixty-two percent had 3 or fewer criminal history points. U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.37. The charging policy explains that "significant criminal history" is "normally evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions," Holder Memo, Aug. 12, 2013, and that a conviction "for conduct that itself represents non-violent low-level drug activity" is not considered "significant." Holder Memo, Aug. 29, 2013. Most prior drug convictions are low-level and non-violent.

[12] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.39. Weapon "involvement" is defined broadly to include a weapon that "was possessed" by anyone and mere presence of a weapon. *See* USSG § 2D1.1(b)(1) & comment. (n.11(A)).

[13] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.40.

[14] U.S. Sent'g Comm'n, FY2014 Monitoring Datafile; U.S. Sent'g Comm'n, Use of Guidelines and Specific Offense Characteristics, p. 26, 2013.

[15] U.S. Sent'g Comm'n, 2014 Sourcebook of Federal Sentencing Statistics, tbl.43.

[16] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 277.

[17] *United States v. Deal*, 508 U.S. 129 (1993).

[18] For example, Marion Hungerford, a mentally ill 52-year-old woman, with no prior convictions, who had raised four children, led a law-abiding life until her husband of 26 years left her because of her deteriorating mental condition. With no money or employment prospects, she began living with another man. To obtain money for basic living expenses, he robbed several stores. No one was hurt and the total loss was less than $10,000. Ms. Hungerford never touched a gun and took no active part in the robberies. Due to her mental illness, she held a fixed belief that she was innocent, and therefore declined the prosecutor's offer of a plea bargain in exchange for

her testimony against the actual robber. She was sentenced to over 159 years in prison: 155 years based on the prosecutor's choice to stack seven § 924(c) counts, and 57 months for the underlying robberies under the guidelines. The robber received a sentence of 32 years in exchange for his testimony against Ms. Hungerford. Ninth Circuit Judge Reinhardt described Ms. Hungerford's sentence as "irrational, inhumane, and absurd," and "immensely cruel, if not barbaric." *United States v. Hungerford*, 465 F.3d 1113, 1118-23 (9th Cir. 2006). Mary Beth Looney was a 53-year-old woman with serious health problems and no prior convictions or arrests. She was sentenced to 45 years, 40 of which were mandatory, for selling drugs with her husband and having guns in the house. The prosecutor offered 15 years for a guilty plea, but "stacked" the gun charges, adding 25 mandatory years, when she opted for trial. The Fifth Circuit said: "Although . . . there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house," "the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence." Ms. Looney's co-defendant prosecuted in an adjoining district received a 37-month guideline sentence. *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008). A judge was required to sentence Weldon Angelos, a twenty-four-year-old first offender, marijuana dealer, and music executive with two young children, to a consecutive mandatory minimum term of 55 years based on the prosecutor's choice to "stack" § 924(c) charges. The charges were based on Angelos' possession (not display or use) of a gun during two small marijuana deals, and his possession of guns in his home. The prosecutor offered to recommend a sentence of 15 years if Angelos would plead guilty to one § 924(c) count. When Angelos "had the temerity to decline," the prosecutor filed superseding indictments adding four additional § 924(c) counts. Angelos went to trial, and was convicted of three § 924(c) counts. The judge found the sentence to be "unjust, cruel, and even irrational," but had no choice but to impose it. *United States v. Angelos*, 345 F.Supp.2d 1227 (D.Utah 2004).

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

[20] *Id*. at 359.

[21] *Id*. at 279.

[22] *Id*. at 359.

[23] *See United States v. Shavers*, 693 F.3d 363 (3d Cir. 2012).

[24] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 274, tbl. 9-1.

[25] *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).

[26] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 289.

[27] *Id*. at 361.

[28] *See* 80 Fed. Reg. 12523, Bureau of Prisons, Annual Determination of Average Cost of Incarceration (Mar. 9, 2015).

[29] U.S. Sent'g Comm'n, *2011 Mandatory Minimum Report*, at 292.

[30] U.S. Dept. of Justice, Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (May 2015), https://oig.justice.gov/reports/2015/e1505.pdf.

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

[32] *United States v. Kindle*, 698 F.3d 401, 414-15 (7th Cir. 2012) (Posner, J., dissenting).

[33] *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014).

[34] *See United States v. Nakai Lamar et al*., 14 Cr. 726, Declaration of Jonathan Marvinny, Esq. (Mar. 16, 2015); Defendants' Reply Memorandum of Law in Support of Their Motion to Compel Discovery (Apr. 20, 2015), available on PACER.

[35] *See* Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA Today, July 20, 2014, http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/.

[36] Annie Sweeney & Jason Meisner, Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings, Chi. Trib., Jan. 29, 2015, http://www.chicagotribune.com/news/local/breaking/ct-stash-houses-charges-dropped-met-20150129-story.html#page=1.

[37] U.S. Sent'g Comm'n, Quick Facts, Federal Offenders in Prison – January 2015, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP.pdf.

[38] These include the Fair Sentencing Act, which increased the quantity of crack necessary to trigger mandatory minimums in drug trafficking cases; the Supreme Court's decisions requiring the courts to treat the guidelines as advisory only; and the Department of Justice's new charging policies directing prosecutors that they should decline to charge quantity or prior convictions except under certain circumstances.

[39] Bureau of Justice Statistics, Nat'l Corrections Reporting Program, *State Prison Admissions, 2009*, tbl.6, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056.

[40] Bureau of Justice Statistics, Nat'l Corrections Reporting Program, *State Prison Releases: Time Served in Prison, by Offense and Release Type*, 2009, tb.6, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2045.

[41] Government Accountability Office, *Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison* 23 (Feb. 2012) (*GAO BOP Report*).

[42] *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

[43] *GAO BOP Report*, at 24. *See also* Statement of Harley Lappin, Director of the Federal Bureau of Prisons, Before the U.S. Sentencing Comm'n, at 3-4 (Mar. 17, 2011).

[44] *GAO BOP Report*, at 25.

[45] *See*, *e.g*., S. 1231, 112th Cong. (2011); H.R. 2344, 112th Cong. (2011).

[46] Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison 25 (Feb. 2012).

[47] Judy Garret, Deputy Dir., Office of Information, Policy & Public Affairs, Federal Bureau of Prisons (May 2008), available at http://or.fd.org/ReferenceFiles/3582cStats.pdf.

[48] U.S. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at i (April 2013).

[49] Program Statement 5050.49.

[50] U.S. Dept. of Justice, Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 52-54 (May 2015), https://oig.justice.gov/reports/2015/e1505.pdf.

[51] U.S. Sent'g Comm'n, Monitoring Datafiles.

EXHIBIT A
Eastern District of Pennsylvania
Annual Report on Supervision to Aid Re-Entry ("STAR")
2014

MEMORANDUM

To: Honorable Petrese B. Tucker
Chief Judge

From: Honorable L. Felipe Restrepo
U.S. District Judge

Honorable Timothy R. Rice
U.S. Magistrate Judge

DATE: July 7, 2014

RE: **Annual Report - Reentry Court Program**

This year featured unprecedented growth for the district's Reentry Court, also known as the Supervision to Aid Re-entry ("STAR") program, which targets ex-offenders with a serious risk of recidivism for violent crime.

We continue to maintain a low revocation rate for graduates (11%) and all participants (18%), while also forging new partnerships to assist reentry participants. This year, we added a criminal record expungement program, a housing initiative for ex-offenders with the Philadelphia Housing Authority ("PHA"), and soon will begin providing legal representation in Philadelphia's Family Court. In addition, one of our graduates was named as Philadelphia director of Operation CeaseFire, a DOJ program to halt firearm violence, and another published a novel while in reentry court. Our program's success was recognized this year by United States Attorney General Eric Holder, who visited a reentry court session, met privately with 10 graduates, and touted our program as a national model for the criminal justice system.

This memorandum is submitted for review by the Board of Judges, and outlines the progress of the program since its inception in September 2007. Copies have been sent to all District Court Judges and Magistrate Judges.

Highlights include:

- Only 15 of our 131 graduates (11%) have had supervision revoked, been arrested without revocation, or are awaiting revocation.

- Only 39 participants (18%) have had, or likely will have, supervision revoked based on new criminal activity or other serious violations.[1] The revocation rate remains significantly below the Probation Department's revocation rate for similarly situated ex-offenders not participating in the program. For example, over a five-year period from 2009-2013, the revocation rate for the same category of high-risk ex-offenders was 43% – more than double our court's 18% overall revocation rate.

- 164 of our 216 total participants (76%) have either graduated or are currently participating in the program. An additional 13 participants (6%) left the program without completing it for reasons unrelated to revocation or criminal conduct.[2]

- The reduced revocations for reentry participants also has contributed to a 19% reduction in our district's total revocation proceedings, which dropped from 321 in 2007 to 260 in 2013

- Our success rates were validated in a May 2011 study by the Temple University Criminal Justice Department, which conducted an independent evaluation of the program's first 60 participants between September 2007 and July 2010.[3] Compared to similar ex-offenders who did not participate in the program, reentry court participation reduced "the odds of supervision revocation by an impressive 82 percent." Although nearly 25% of the comparison group had supervision revoked, only 8% of the STAR participants were revoked.

The second phase of this outside evaluation will be completed in 2014, and third

[1] Of those participants who had supervision revoked, 38% of that total was due to chronic drug abuse/addiction, and not violent crime.

[2] For example, participants moved from the Philadelphia area, died, or obtained employment that precluded regular attendance at Reentry Court sessions.

[3] Dr. Caitlin J. Taylor, Assistant Professor, Department of Sociology and Criminal Justice at LaSalle University. Dr. Taylor began studying our program in 2007, while she was a Ph.D student at Temple University. She continues to evaluate Reentry Court's results and methodology in her current position at Lasalle.

phase is slated for 2015. The second phase has examined the progress of 120 participants over an 18-month period, and preliminary results appear consistent with the 2011 study. Even after controlling for other known predictors of supervision revocation, the 2014 study found that participation in the reentry program was associated with an 84% reduction in the likelihood of revocation.

- Developing two innovative programs that use law students and attorneys from three Philadelphia law firms to represent reentry participants in traffic court and family court.

- Partnering with PHA to unveil a national pilot program to provide ex-offenders with vouchers for free or low-cost rental housing over the next two years.

- Enlisting the Philadelphia Lawyers for Social Equity to obtain 153 criminal record expungements for dismissed or acquitted criminal charges in state courts.

- Sending reentry team members and graduates to speak at ten public forums throughout the country, including a feature presentation at the Third Circuit Judicial Conference in Hershey, Pa., and the U.S. Attorney General's "Smart on Crime" summit meeting in Washington, D.C.

- Generating significant savings to the taxpayers based on the 2013 annual rate of $29,291 for incarcerating a person in federal prison, $3,162 for supervised release, and $26,612 for halfway house confinement. Applying these costs to incarcerate 43% of our participants (92 individuals at an annual total of $2,694,772), as opposed to incarcerating 18% of our participants (39 individuals at an annual total of $1,142,349),[4] the savings are substantial – even after accounting for the cost of occasional confinement in a halfway house, and the daily cost of supervised release.

- Realizing substantial intangible sociological benefits by having participants employed and engaged in other positive aspects of community life, such as mentoring, volunteering, and parenting. The program also has heightened community awareness of issues faced by ex-offenders and the need to give them support upon release from prison.[5] Moreover, the program has solidified the

[4] As mentioned, 43% is the five-year revocation rate for high-risk ex-offenders, such as our Reentry Court participants, and 18% is the revocation rate for our participants. Since 2007, our revocation rate has remained consistently below 20%.

[5] For example, the U.S. Attorney's Office has produced a documentary film, "The Pull of Gravity," produced by ex-offender El Sawyer and Jon Kaufmann. It depicts the obstacles faced by individuals returning from prison. The film has been shown

positive working relationships among the judiciary, the U.S. Attorney's Office, the criminal defense bar, the legal community, area law schools, the Bureau of Prisons, the Marshals Service, and the Probation Office.

I. Background

On June 3, 2007, the Board of Judges authorized a reentry program focusing on individuals in the City of Philadelphia with a significant risk of recidivism and history of violent crime. The Probation Department identifies pre-release offenders with a Risk Prediction Index ("RPI") of 5, 6, or 7 (on a 0 to 9 scale) and seeks their consent to participate in the program.[6] Participants have a significant criminal background (most often involving violent crime), need employment training/assistance, or are likely to benefit from the program's resources in some other way.[7]

The program features myriad objectives, including preventing recidivism, reducing the high rate of violent crime in the City of Philadelphia, and assisting high-risk ex-offenders with the multiple social, family, and logistical issues they must confront upon their return to society after years in prison. Intensive judicial oversight supplements the Probation Office's supervisory regime, with ongoing input from the Federal Public Defender and the U.S. Attorney.

Approximately 40 participants, divided in two separate courts, attend bimonthly sessions in open court before a judge for 52 weeks. The sessions are monitored by U.S. Marshals and recorded by a court reporter. Representatives of the U.S. Attorney's Office, the Federal Public Defender's Office, the Probation Office, the Department of Justice Reentry Coordinator, and judges meet for about 90 minutes before each court session to discuss each participant's progress and develop plans to help the participants succeed.[8]

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throughout the country and reentry graduates are regular panelists.

[6] Although the Probation Office will review reentry candidates recommended by sentencing judges or by counsel, the reentry team and Dr. Taylor believe it is critical to the program's integrity that the Probation Office select only those participants who meet the program's eligibility requirements. For example, our program is not equipped to deal with individuals who have serious drug addiction or mental health problems and are better suited for specialists within the Probation Office. Similarly, research shows that low-risk offenders do not benefit from the intensive oversight of a reentry court.

[7] In 2011-12, Probation began converting from the RPI score and identifying participants based on the Post-Conviction Risk Assessment (PCRA), which research has established may be a more accurate predictor of risks faced by ex-offenders. This is one example of Probation's commitment to fully adopt and support the use of "Evidence-Based Practices" to design a more effective supervision model.

[8] Our team consists of Assistant U.S. Attorneys Jason Bologna, Jennifer

The most unique aspect of the program is the group dynamic. All participants attend court as a group and are required individually to discuss their accomplishments and identify any obstacles they are encountering in the reentry process. This dialogue leads to the establishment of goals for the participant to achieve before the next court session. If the participant is not complying with the goals of the program or is violating the terms of release, graduated sanctions are imposed and explained to the entire group. Uniform sanctions are employed to foster positive changes in behavior and thereby avoid revocation proceedings.

Before participants meet the judge, a guest speaker sometimes addresses the group for about 10 minutes on an issue of interest to the participants. Topics have included college education, career/employment counseling, parenting, health insurance, and motivational topics.

Recent Accomplishments

1. We launched a national pilot housing program with PHA in 2014 to address the issue of affordable housing for ex-offenders. This initiative provides ten vouchers for Section 8 affordable housing, thereby allowing reentry participants to secure free or low-cost rental housing in Philadelphia's private housing market. The program was spearheaded by PHA's executive director, Kelvin Jeremiah, and vice president, Erik Solivan, who previously volunteered with reentry court while he was attending Rutgers-Camden Law School.

Applicants for the housing vouchers are selected by a subcommittee of our reentry team consisting of: AUSA Jennifer Williams, Assistant Federal Defender Rossman Thompson, DOJ Reentry Coordinator Cyndi Zuidema, Supervisory Probation Officer Jana Law, and William Hart, director of RISE, the city's reentry services agency.

Williams, and Jacqueline Romero; Assistant Federal Public Defenders Rossman Thompson and Elizabeth Toplin; Probation Officers George Reid, Robert Henderson, Supervisory Probation Officer Jana Law, Administrative Assistant Dee Delany, DOJ Reentry Coordinator Cyndi Zuidema, and Temple Law Professor Robin Nilon.

2. We doubled the size of our traffic court program in which third-year law students represent reentry participants in Philadelphia Traffic Court.[9] Traffic court fines and license suspensions historically have posed a significant obstacle to employment and successful reentry into the community. In addition to Temple Law School and the law firm of Montgomery, McCracken, Walker and Rhoads, we added Rutgers-Camden Law School, Villanova Law School and the law firm of Pepper Hamilton LLC. Law students are mentored by firm attorneys and supervised by law school faculty. Our law students have achieved a positive outcome in every contested traffic court proceeding they handled, and earned the praise of Common Pleas Court Judge Gary Glazer, who is serving as the Administrative Judge for Traffic Court. At Judge Glazer's request, we also expanded the initiative to serve federal ex-offenders outside of reentry court.

3. Building on the traffic court program, we are launching a similar initiative in Philadelphia's Family Court to represent participants in child visitation and support cases. We have identified family court issues as another impediment to successful reentry. This fall, a team of students from the family law clinicals at Temple Law School, Penn Law School, Villanova Law School, and Drexel Law School will be supervised by attorneys from Montgomery McCracken and Fox Rothschild to appear in court on behalf of reentry participants to handle family law matters such as custody and child support hearings.

4. A new service from the Philadelphia Lawyers for Social Equity yielded more than 153 criminal record expungements for reentry participants. Attorneys Ryan Hancock and Mike Lee met with reentry participants throughout the year to identify acquittals and dismissed cases that can be removed from the participant's state criminal record. The attorneys then filed petitions on behalf of the reentry participants and a state judge ordered the expungement pursuant to Pennsylvania law. Removal of non-convictions significantly reduces the participant's criminal history and removes a significant barrier to employment.

5. Employment initiatives continued to develop in 2013. Our efforts were highlighted by PHA's decision to hire four graduates to full-time, salaried, jobs with fringe benefits, i.e., health insurance and pensions. In addition, we formed a partnership with the Neighborhood Film Co. in Philadelphia to employ and train two reentry participants in film production. Neighborhood Film produces national television commercials and works to help ex-offenders, the homeless, and addicts reenter our community. Nearly all reentry participants are employed, and we continued our partnership with the city's RISE program to connect reentry participants with private employers.

Based on his work as a panelist during showings of the film "A Pull of Gravity," reentry graduate Robert Warner was hired as the Philadelphia director of Operation Ceasefire, a

[9] All students are certified to practice law under supervision by the Pennsylvania Supreme Court.

DOJ gun violence reduction program. Executive Assistant U.S. Attorney Robert Reed, who prosecuted Mr. Warner nearly 20 years ago, was instrumental in helping Mr. Warner obtain that position. Another participant, Imir Reaves (Sanchez) published a novel while participating in reentry court and used some of the proceeds to satisfy a portion of his fine.

6. Chief Judge Theodore McKee of the U.S. Court of Appeals for the Third Circuit continued to promote our program and the goals of reentry. Reentry team members and graduates were featured speakers at the Third Circuit conference following the showing of the film "A Pull of Gravity." Team members made ten presentations throughout the nation, including at federal prisons, DOJ conferences, state reentry conferences, and community groups. We were featured in DOJ's "Smart on Crime" workshop in Washington, D.C., and will be featured this fall at the national conference of Probation/Pretrial Services Chiefs in Tampa, Florida. Reentry court graduates often volunteer to make public appearances with our team and discuss the impact of reentry services on their transformation from criminal activity to returning citizens.

7. Support from the Philadelphia Bar Association and local law schools continues to increase. Reentry participants benefit from free legal assistance for numerous civil issues. Such tangible assistance enhances the program's credibility with the participants and helps remove impediments to employment. When a participant identifies the need for legal assistance in court, students from local law schools conduct an intake interview to establish eligibility for pro bono legal assistance. The Bar Association's Volunteers for the Indigent Program (VIP) then recruits attorney volunteers to handle the matter.[10] In addition, attorneys from the Young Lawyers Division (YLD) have volunteered to assist several reentry participants with legal issues ranging from estate disputes, property damage disputes, and music copyright law.

8. The reentry working group continues to exemplify cooperation. The process has worked flawlessly and has become a national model. The working group considers a wide range of issues, from program policy to potential sanctions, and has uniformly achieved consensus on all issues. This cooperative spirit has been the hallmark of the reentry program since its planning stages in 2006 and is a prime reason for its success. Observers from visiting districts consistently note the positive relationships within the working group.

9. All reentry participants have either a high school degree, are obtaining a GED,[11] are attending college classes and vocational training, or are employed full-time. Officials of

[10] Participating law schools are Rutgers-Camden, Temple, Drexel, Penn, and Villanova.

[11] Temple Law Professor Robin Nilon volunteers to provide weekly GED tutoring and college counseling to reentry participants. Several reentry participants have earned a GED or enrolled in college through her efforts.

Philadelphia Community College continue to assist participants with college applications and financial aid. College officials have visited the reentry program several times, and several reentry participants are availing themselves of the opportunity to obtain advanced degrees or vocational training.

10. Sanctions have been graduated and highly successful. This year, we adopted uniform sanctions for various conduct as part of our effort to employ evidence-based practices and improve our results. One of the program's strengths is the reentry judge's ability to impose swift sanctions for any deviation from the conditions of supervised release, or to encourage positive reentry behavior. The working group has strived for consistency and predictability in sanctions to ensure the participants are treated fairly. Sanctions have included the loss of weekly credit toward completion of the program, curfews, home confinement, placement in a halfway house, and brief periods of imprisonment. A sanction of imprisonment is imposed only after other sanctions have failed, or in combination with the need to arrest a participant for failing to appear for court sessions or while awaiting placement in an in-patient drug treatment program. Some participants also have benefitted from in-patient or out-patient drug/alcohol treatment. Community service is not employed as a sanction; rather, it is used to provide opportunities for participants having difficulty securing employment.

11. Research has identified that one of the central predictors of recidivism is "criminal thinking patterns." Probation has successfully launched a Cognitive Behavioral Therapy program called "Thinking for a Change" to address such barriers to successful reentry. Its purpose is to change the behaviors of offenders by restructuring their thinking so that their behavior is positively impacted. Topics include: active listening, cognitive self-change, recognizing risk, and problem solving. Reentry Court was used as a pilot test for this initiative, which proved so successful that it is being expanded district-wide. This program is another of the evidence-based practices recommended as an effective way of ensuring successful reentry and reducing recidivism.

This year we plan to expand the behavioral therapy program with the University of Pennsylvania. Reentry court volunteer Rebecca Livengood, law clerk to Judge Dalzell, has met with the Penn social work faculty to develop the another program in behavioral therapy.[12]

III. Conclusion

After seven years, the reentry court program continues to unite all players in the federal criminal justice system. Our program has now become a successful joint venture

[12] Our reentry team benefits from the volunteer assistance of several judicial law clerks each year. Last year, Ms. Livengood, along with Jules Torti (Judge Schiller), and Maya Sosnov (Judge Brody) provided significant assistance by supervising law students and locating community resources to assist reentry participants.

with the bench/bar and has evolved into a critical component to help ex-offenders rebuild their lives while also reducing recidivism and saving taxpayer funds.

cc: Honorable Theodore McKee, Chief Judge, U.S. Court of Appeals
Ronald DeCastro, Chief, U.S. Probation
David B. Webb, United States Marshal
Michael Kunz, Clerk of Court
Zane Memeger, United States Attorney
Leigh Skipper, Chief Federal Defender
Cyndi Zuidema, Esquire, DOJ Reentry Coordinator
Joseph Norwood, Regional Administrator, U.S. Bureau of Prisons
Mark Sherman, Federal Judicial Center
Dr. Caitlin Taylor, LaSalle University
Tara Timberman, Community College of Philadelphia
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