

**Federal Public and Community Defenders
Comment on Alternatives-to-Incarceration
Programs (Proposal 10)**

March 14, 2023

The Commission seeks comment on whether (and, if so, how) it should study court-sponsored, community-based correctional programs, such as diversion and other alternatives-to-incarceration programs. It also invites comment on whether participation in such programs should be a basis for a departure.¹ Defenders appreciate the opportunity to comment.

First, Defenders strongly endorse a departure to a non-custodial sanction for people who have demonstrated presentence rehabilitation, including (but not limited to) people who have successfully participated in diversion or alternatives-to-incarceration programs—whether court-sponsored or otherwise. Such a departure would bring the Guidelines into conformity with evidence-based sentencing practices and 18 U.S.C. § 3553(a).

Second, if the Commission undertakes any study of court-sponsored diversion or alternatives-to-incarceration programs, we strongly encourage it to include Defenders in the development and study process. Doing so would be consistent with the fundamental approach of these programs, in which courts, probation officers, pretrial services officers, treatment providers, prosecutors, and defenders work collaboratively.

I. The Commission should amend the Guidelines to include a departure to a non-custodial sanction for people who demonstrate presentence rehabilitation.

A. The Commission should drive a significant shift toward the use of community-based corrections in the federal criminal legal system.

Defenders strongly support increased use of community-based corrections in lieu of prison. Community-based corrections should be a centerpiece of any parsimonious sentencing scheme.² “The case for use of community punishments in a rational society is a no-brainer.”³ Community-based corrections are more effective than prison at rehabilitating people.⁴

¹ Proposed Amendments, 88 Fed. Reg. 7180, 7227 (Feb. 2, 2023).

² See 18 U.S.C. § 3553(a) (requiring courts to impose sentences “not greater than necessary” to accomplish federal sentencing purposes).

³ Michael Tonry, *Community Punishments*, in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 187 (2017), <https://bit.ly/co/HTae>.

⁴ See *id.* at 189-190 (collecting studies showing that “people sentenced to imprisonment are more, not less, likely to reoffend than are comparable people sentenced to community punishments”); Marsha Weissman, *Aspiring to the*

They are also more effective at reducing recidivism because they avoid the criminogenic effects of removing people from their family, community, and livelihood, and placing them into an environment that inculcates “maladaptive [and] dysfunctional” traits.⁵ They avoid the catastrophic collateral consequences that prison inflicts on incarcerated people’s families—consequences that generate and intensify a cycle of poverty and crime, and which disproportionately harm communities of color.⁶ Indeed, until the unconstitutional mandatory-guideline regime distorted federal sentencing

Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration, 33 N.Y.U. Rev. L. & Soc. Change 235, 243 (2009) (“[Alternatives-to-incarceration] participants and probationers were significantly less likely to be rearrested than people who received jail sentences—forty-one percent of ATI participants and forty-two percent of probationers were rearrested, compared to fifty-three percent of people released from jail.”); Just. Pol’y Inst., *Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety* 16 (2009), <https://bitly.co/HSBM> (“Community-based alternatives, which do not necessarily include probation or parole, are a cost-effective means of redirecting people away from prison while protecting public safety and maintaining accountability.”); see also Damon M. Petrich, et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just. 353, 357 (2021) (“[C]ustodial sanctions have a null or criminogenic effect on reoffending when compared with noncustodial sanctions such as probation.”).

⁵ See Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 194 (2014), <https://bitly.co/HS4X>; see also The Charles Colson Task Force on Fed. Corrs., *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* 20 (2016), <https://bitly.co/HRyj> (“Incarceration is a highly punitive, costly, and potentially harmful intervention that should be used sparingly and judiciously.”).

⁶ See Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Issue Brief* (Sept. 2014), <https://bitly.co/HS4l> (“Incarceration is strongly correlated with negative social and economic consequences for prisoners’ families.”); Hedwig Lee, et al., *Assessing mass incarceration’s effects on families* 374 Science 227–281 (2021), <https://bitly.co/HS51>; Exec. Office of the President of the U.S., *Economic Perspectives on Incarceration and the Criminal Justice System* 5 (2016), <https://bitly.co/HSBN> (“Parental incarceration is a strong risk factor for a number of adverse outcomes, including antisocial and violent behavior, mental health problems, school dropout, and unemployment.”); see also Michelle Alexander, *The New Jim Crow* 7 (rev. ed. 2012) (“The racial dimension of mass incarceration is its most striking feature.”).

practice, community-based corrections were widely understood to be the just sentence in nearly half of all federal criminal cases.⁷

While community-based corrections are generally preferable to prison, they also need to be implemented carefully. The United States doesn't just have a mass incarceration problem, it also has a mass supervision problem.⁸ In designing community-based sentencing regimes, therefore, we must be careful to ensure that the community-based sentence represents the most cost-effective and proven intervention that promotes public safety while involving the lightest and shortest possible intrusion onto a person's liberty, privacy, and dignity.

B. The Guidelines should be amended to strongly encourage the use of community-based corrections in lieu of prison.

Courts should be encouraged to depart from prison to community-based corrections for people who have demonstrated presentence rehabilitation, such as by maintaining exemplary compliance with pretrial release conditions or through other strides toward rehabilitation. The Guidelines should, for example, call for such a departure for people who successfully complete—or make sustained progress in—a diversionary or alternative-to-incarceration program. But they should also go further and encourage judges to depart from any otherwise applicable guideline range to a community-based sentence (such as probation) for anyone who has

⁷ Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1222 (2004) (Until the Guidelines were enacted, “almost 50 [percent] of federal sentences were to straight probation.”).

⁸ See Evangeline Lopoo, et al., *How Little Supervision Can We Have?*, 6 Ann. Rev. Criminology 23, 29 (2023) (finding that “mass supervision” has “expand[ed] . . . even as crime rates fluctuate”); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 216–17 (2013) (noting that even though “supervising low-risk individuals can sometimes be a mistake” supervised release is virtually always imposed in federal criminal cases); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 1015 (2013), (“The broad application of supervised release has meant that indeterminacy has taken a firm hold of the federal sentencing system.”); see also Kate Weisburd, *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System* 6 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296 (“Monitoring and its attendant rules significantly burden basic rights, liberty and dignity”).

demonstrated presentence rehabilitation, regardless of their participation in a diversionary or alternative-to-incarceration program.

As they currently stand, the Guidelines fail to adequately account for what the Supreme Court has called a “critical” factor in sentencing: post-conviction rehabilitation.⁹ The Guidelines currently “discourage” rehabilitation-based departures,¹⁰ a position that is out of step with considered judicial practice, which views postconviction rehabilitation as an enormously important factor.¹¹ This stark divergence between sentencing practice and the Guidelines has contributed to the growth in the rate of downward variances over time.¹² Guideline ranges continue to have a strong anchoring effect at sentencing, though, so this divergence has also driven sentences artificially higher, causing people who are fit candidates for community sentences to be placed in prison, which helps to drive mass incarceration in the United States.¹³

⁹ *Pepper v. United States*, 562 U.S. 476, 492 (2011).

¹⁰ *Koon v. United States*, 518 U.S. 81, 95–96 (1996).

¹¹ See *Pepper*, 562 U.S. at 492; see also Carolin E. Guentert & Ryan H. Gerber, *A Judge’s Attempt at Sentencing Consistency After Booker: Judge Jack B. Weinstein’s Guidelines for Sentencing*, 41 Cardozo L. Rev. 1, 77–78 (2019) (“A judge taking account of *all* the § 3553(a) factors may often reach a different result than the one recommended by the Guidelines, because the Guideline ranges do not account for the many factors in a person’s history and their capacity for rehabilitation.” (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 19–20 (1998))). Notwithstanding the Guidelines’ approach to rehabilitation, circuit courts of appeals have even reversed district courts for not considering remarkable rehabilitation. See, e.g., *United States v. Robertson*, 662 F.3d 871, 878 (7th Cir. 2011) (reversing low-end-guideline sentences because the district court failed to adequately consider “strong evidence of rehabilitation in imposing its sentence”); *United States v. Preacely*, 628 F.3d 72, 81 (2d Cir. 2010) (reversing a below-guideline sentence in face of “compelling evidence that Preacely embarked on a three-year course of rehabilitation”).

¹² See U.S. Sentencing Comm’n, *The Influence of the Guidelines on Federal Sentencing* 22 (2020), <https://bit.ly.co/HSBm> (noting that rate of downward variances grew from 13.4 percent in 2008 to 24.3 percent in 2014, before narrowing to 21.9 percent in 2017).

¹³ See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 491 (2014) (explaining how the “anchoring effect” of the Guidelines “impact[s] the length of sentences . . . impose[d] by

To remedy these problems, the Guidelines should be amended to include a departure to a community-based sentence for anyone who has demonstrated presentence rehabilitation. This departure should apply to people who have successfully completed a diversionary or alternative-to-incarceration program—or who, in the judgment of the sentencing court, otherwise deserve credit for participation in similar programming. And it should equally apply to people who demonstrate compliance with pretrial release conditions or other rehabilitative efforts. Regardless of participation in a court-sponsored diversion or alternatives-to-incarceration program, a person who does well on pretrial release—or otherwise shows rehabilitation—should presumptively receive a community-based sentence unless strong reasons exist to believe that such punishment is insufficient and that greater punishment is necessary.

C. Defenders should be full partners in any study of court-sponsored diversion or alternatives-to-incarceration programs that the Commission undertakes.

Defenders strongly encourage the Commission to act now to amend the Guidelines to provide for a departure to non-custodial sanctions for individuals who demonstrate presentence rehabilitation. If the Commission also elects to study court-sponsored diversion and alternatives-to-incarceration programs, Defenders stand ready to partner in the construction and implementation of that study; the analysis of its results; and the development of recommendations, policy statements, or guidelines.¹⁴

Defenders would bring an invaluable perspective to this project. Court-sponsored diversion and alternatives-to-incarceration programs are necessarily designed to be partnerships between the court, probation officers, pretrial services officers, treatment providers, defenders, and prosecutors.¹⁵

subconsciously influencing judges to give greater weight to the now-advisory Federal Sentencing Guidelines than to other important sentencing factors.”).

¹⁴ Defenders also urge the Commission to include the perspectives of people who have moved through the criminal legal system and who have participated in court-sponsored diversion and alternatives-to-incarceration programs. These individuals have invaluable perspectives to share about how these programs should be designed.

¹⁵ See, e.g., Vanita Gupta, Assoc. Att’y Gen., *Remarks at the American Bar Association Criminal Justice Section Awards Luncheon* (Nov. 18, 2022), <https://bit.ly/co/HRv8> (explaining that with diversionary and alternatives-to-

Defenders have a unique perspective and would be able to highlight important obstacles to successful diversionary and alternatives-to-incarceration programs that—absent our participation—would otherwise risk being overlooked or deemphasized. Defenders’ perspectives could inform:

- How to ensure that people who participate in these programs nonetheless receive zealous representation from defense counsel—and how to design the programs to reduce ethical dilemmas for defenders;¹⁶
- How to mitigate the risk that these programs “unnecessarily expand[] criminal surveillance, diminish[] procedural protections, and potentially even increas[e] incarceration”;¹⁷
- How to promote equity by ensuring that access to diversionary and alternative-to-incarceration programs is controlled by fair, evidence-based, and objective criteria;¹⁸ and

incarceration programs, partnerships among courts, prosecutors, and defenders are “necessary for equal justice”); *see also* 2 Nat’l Ass’n. of Drug Ct. Profs., *Adult Drug Court: Best Practice Standards* 38 (2015), <https://bit.ly/3YEu4Z> (best practices for diversionary or alternative-to-incarceration program to be staffed by a “multidisciplinary team” of “partner agencies” which includes defenders and others). Additionally, Defenders play a critical role in advising clients whether to participate in these programs; for these programs to work, they need to satisfy fairness, ethical, and evidentiary standards such that Defenders can in good faith counsel our clients to enroll.

¹⁶ *See generally* Tamar M. Meekins, *Risky Business: Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 Berkeley J. Crim. L. 75 (2007); *see also* Nat’l Drug Ct. Inst., *Critical Issues for Defense Attorneys in Drug Court* 1 (2003), <https://bit.ly/420r5Hw> (“Defense attorneys sometime walk a delicate, ethical tightrope, if they are to advance the therapeutic ideal that informs drug court, without doing damage to their obligations as zealous advocates for their client.”).

¹⁷ Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587, 1591 (2012); *see* Am. Bar Ass’n Criminal Justice Standards Nos. 1.2(h), 5.3(a) (2022), <https://bit.ly/HXUe> (“Jurisdictions should exercise special care to avoid a program’s net-widening potential”—i.e., its potential to “cause[] criminal legal system interventions to increase in number and intensity [more] than would have occurred in the absence of the program”).

¹⁸ *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 Berkeley J. Crim. L. 47, 81–82 (2017) (describing the need for evidence-based criteria to ensure equal access to diversionary and alternatives-to-incarceration programs); *see also* Leah Wang, Prison Pol’y Initiative,

- How to design court-sponsored diversionary and alternatives-to-incarceration programs to recognize that setbacks and struggles are a natural part of recovery and, more generally, to mitigate the risks that attend any program that merges treatment and punishment.

Diversionary and alternatives-to-incarceration programs have proliferated at the same time as pretrial-detention rates have skyrocketed,¹⁹ judges—influenced by the Guidelines—have continued defaulting to prison sentences,²⁰ and federal prosecutors have offered diversion less and less often.²¹ Any Commission study must examine these structural issues, and Defenders are well-positioned to provide input and expertise on them.

Court-sponsored diversion and alternatives-to-incarceration programs cannot work properly unless they are fair, evidence-based, and objective. Defenders are necessary partners in these programs when they are up and running; they must also be partners in their study and design.

II. Conclusion

The Commission should amend the Guidelines to provide for a departure to a community-based sentence for anybody who demonstrates presentence rehabilitation. If the Commission elects to study court-sponsored diversion and alternatives-to-incarceration programs, it should include Defenders as equal partners in design, implementation, and analysis of that study, to ensure that the unique perspective of those who represent the accused is properly accounted for.

Racial disparities in diversion: A research roundup (Mar. 7, 2023), <https://bityl.co/HXUo> (collecting studies “suggest[ing] diversion is routinely denied to people of color, sending them deeper into the criminal legal system”).

¹⁹ See Alison Siegler, et al., *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis* 16 (2022), <https://bityl.co/HRwc> (“Federal pretrial jailing rates have been skyrocketing for decades.”); see also Fed. Jud. Ctr., *The Bail Reform Act of 1984: Fourth Edition* ix (2022), <https://bit.ly/3Zf9rOu> (noting the “growing concern that the pretrial detention rate is too high”).

²⁰ See, e.g., Courtney R. Semisch, U.S. Sentencing Comm’n, *Alternative Sentencing in the Federal Criminal Justice System* 1 (2015), <https://bityl.co/HRwn> (noting the “continued decreasing trend in the imposition of alternative sentences” due in significant part to the Guidelines).

²¹ See Scott-Hayward, *supra* note 18 at 66 fig. 1 (showing a steady decrease in number of pretrial diversion cases activated between 2001 and 2015).