

AMERICAN BAR ASSOCIATION

COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS CRIMINAL JUSTICE SECTION NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES [ON ALTERNATIVES TO INCARCERATION AND CONVICTION]

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, implement, and fund programs that prosecutors and other criminal justice professionals can utilize to enable an offender to be placed under community supervision in appropriate cases. While the qualifications for entry into the programs will vary among jurisdictions, generally the programs should be available when the offender:

- i) poses no substantial threat to the community;
- ii) is not charged with a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity;
- iii) has no prior criminal history that makes community supervision an inappropriate sanction; and
- iv) is not currently on parole or probation, unless the supervising authority specifically consents.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision pursuant to the criteria set forth above.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, support and fund programs that offer community-based treatment alternatives to incarceration, including inpatient treatment, to those offenders whose crimes are associated with substance abuse and/or mental illness; and for whom diversion has been deemed appropriate pursuant to the criteria set forth above.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop, support and fund prosecutors and other criminal justice professionals seeking to develop programs to train law enforcement officers to recognize the signs and symptoms of mental illness in order to facilitate the appropriate resolution by the police in those situations.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to encourage prosecutors and defenders, in close cooperation with the courts, to create working groups that include other stakeholders in the justice system to develop, review, monitor, and improve deferred adjudication/ deferred sentencing/diversion options.

REPORT

I. Background

In the late 1970s, pessimism about the possibility of rehabilitating criminals ushered in an era of harsh prison sentences.¹ Politicians on both the right and left embraced the work of social scientists like Robert Martinson, who concluded that correctional programming had little appreciable effect on recidivism rates.² The gloomy conclusion that “nothing works” to steer people away from crime both supported and advanced the “tough on crime” political agenda that dominated the 1980s and 90s, with its reliance on long mandatory prison sentences.

The War on Drugs that began in the mid-1980s, and the deinstitutionalization of the mentally ill that was already well underway, ensured that a large percentage of the people who were sentenced to prison were substance abusers, mentally ill, or both. The burden of these incarceration policies has fallen primarily on the minority community: of the 2.2 million people now in our prisons and jails, almost half are African-American, and another 20% are Hispanic. One of the most painful costs of incarceration is that one and a half million children in the United States under the age of eighteen have at least one parent in state or federal prison.³

In the past ten years there have been increasing doubts about the efficacy of increased incarceration as a general crime control measure, at least when unaccompanied by serious efforts to treat substance abuse and mental illness in the prison population.⁴ During this period, much

¹ See, e.g., Marc Mauer, *RACE TO INCARCERATE* at 40-54 (revised and updated, 2006).

² See, e.g., Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Praeger Press, 1975). A series of articles in the popular press by Professor Martinson popularized the idea that “nothing works” to reform criminals, and that society’s only hope of reducing crime lies in the deterrent value of harsh prison sentences (or death). See, e.g., Robert Martinson, “The Paradox of Prison Reform,” *The New Republic*, 166, April 1, 6, 15 and 29, 1972; Martinson, “What Works? - Questions and Answers About Prison Reform,” *The Public Interest*, Spring 1974, at 22-54. In 1984, the United States Supreme Court noted that “Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases the trend.” See *Mistretta v. United States*, 488 U.S. 361, 363 (1989), citing Norval Morris, *The Future of Imprisonment* 24-43 (1974), and Frederick Allen, *The Decline of the Rehabilitative Ideal* (1981).”) In upholding the federal sentencing guidelines, which gave little weight to such factors as amenability to treatment, personal and family history, previous efforts to rehabilitate oneself, or possible alternatives to prison, the Supreme Court cited a Senate Report that “recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.” 488 U.S. at 366.

³“In 1999 an estimated 721,500 State and Federal prisoners were parents to 1,498,800 children under age 18.” U.S. Department of Justice, Bureau of Justice Statistics, August 2000, NCJ 182335.

⁴ The Justice Kennedy Commission analyzed data from a number of state jurisdictions and concluded that “It is not even clear that the increased use of incarceration has enhanced public safety, although lawmakers for twenty years have acted in reliance on the claimed crime-preventive effect of harsh and certain punishments. . . . The numbers do suggest . . . that there may well be an over-reliance on incarceration in some criminal justice systems, and there is reason to doubt whether constantly increasing the use of incarceration is cost effective.” Report of the ABA Justice Kennedy Commission at 20, 21.
http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf. See also *Incarceration and Crime: A Complex Relationship* by Ryan S. King, Marc Mauer, and Malcolm C. Young, available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>. A report of the Washington State Institute for Public Policy noted that, at least as to incarceration in that state, “Diminishing returns means that locking up the fifth person per 1,000 did not, on average, reduce as many crimes as did incarcerating the

data has been gathered concerning the economic and social costs of “mass imprisonment.”⁵ Two years ago, the Justice Kennedy Commission reported that “many prosecutors, judges, defense counsel and legislators who have differing attitudes toward crime and punishment share a feeling that more incarceration and longer sentences are not always in the public interest.”⁶

With more than two-thirds of those being released from prison rearrested within three years of release,⁷ and 42% of parolees returning to prison or jail within 24 months of their release,⁸ policy makers and law enforcement practitioners alike are re-thinking the practice of incarceration divorced from efforts to rehabilitate. The realization that 650,000 prisoners are returning each year to the communities they left, unimproved by their experience in the penitentiary, has inspired even some elected officials to take a new look at the old issue of rehabilitation.⁹ At the same time, social scientists and law enforcement practitioners are discovering that some things do “work” to turn an individual away from crime, under the right conditions.¹⁰

second, third, or fourth person per 1,000.” Steven Aos, *The Criminal Justice System in Washington State: Incarceration Rates, Taxpayer Costs, Crime Rates and Prison Economics*, <http://www.wsipp.wa.gov/rptfiles/SentReport2002.pdf> (January 2003).

⁵ See, e.g., INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Dina R. Rose, Todd Clear and Judith A. Ryder, *Drugs, Incarcerations and Neighborhood Life: The Impact of Reintegrating Offenders in the Community* (Washington, DC: National Institute of Justice 2000); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in PRISONS (Michael Tonry & Joan Petersilia eds., 1999).

⁶ Justice Kennedy Commission Report, *supra* note 4 at 22. This apparent change in attitude by policy-makers notwithstanding, the most recent Justice Department data shows prison and jail populations continuing to increase, by 2.7% overall between December 2004 and December 2005. See Paige M. Harrison and Alan J. Beck, Bureau of Justice Statistics, *Prisoners in 2005* available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf> During 2005, the number of inmates in State prisons increased 1.3%; in Federal prisons 5.1%; and in local jails, 4.7%. Overall, the state incarceration rate rose about 14% between yearend 1995 and yearend 2005, from 379 to 491 prisoners per 100,000 U.S. residents. At the same time the federal incarceration rate rose 72%, from 32 to 55 prisoners per 100,000 U.S. residents. The rate of incarceration in prison and jail in 2005 was 738 inmates per 100,000 U.S. residents, up from 725 the year before. At yearend 2005, one in every 136 U.S. residents were in prison or jail. An estimated 12% of black males, 3.7% of Hispanic males, and 1.7% of white males in their late twenties were in prison or jail. A total of seven million people in the United States – one in every 32 adults -- were currently serving time in prison or jail, or on probation or parole. See Lauren E. Glaze and Thomas P. Bonczar, Bureau of Justice Statistics, *Probation and Parole in the United States, 2005*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus05.pdf>.

⁷ Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, June 2002, NCJ 193427

⁸ *Reentry Trends in the U.S.: Success rates for State Parolees*, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/reentry/success.htm>. See also Amy Solomon, Does Parole Supervision Work? at 27 (Urban Institute 2005), citing Glaze, L.E. and S. Palla, Probation and Parole in the United States, 2004., Bureau of Justice Statistics Bulletin 2005 (46% of parolees do not complete term successfully)

⁹ See Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (THE URBAN INSTITUTE, 2005); Joan Petersilia, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (Oxford University Press, 2004).

¹⁰ See Joan Petersilia, J. *What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*. Federal Probation. Volume 68, Number 2 (2004), Available at

The Commission's name reflects the growing public appreciation of the need to develop cost-effective sentencing strategies that take into account not just the short term goal of protecting the public by imprisoning people who break the law and threaten the safety of the community, but also the longer term goal of helping offenders avoid future criminal behavior, thereby reducing the number of future victims of crime. Social service and public health agencies will play a role in developing and implementing these sentencing strategies, as will law enforcement agencies. But lawyers have the primary responsibility for crafting and administering an effective sanctioning policy, whether it be at the legislative level or in a county prosecutor's office. The overall goal is to produce sanctions that are more effective for the families and children of criminal offenders, more effective for their communities and for their victims, more effective for the criminal law practitioners who are committed to making the justice system work fairly and efficiently, and more effective in changing the lives of the people we label "criminals."

II. Policy Recommendations

In exploring what constitutes an effective sanction, we began with the principles enunciated by the Justice Kennedy Commission that:

- (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses.
- (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.¹¹

In order to develop a broader perspective on the different "alternatives to incarceration" that might be recommended, the Commission decided to find out what was actually being tried in the field. At hearings in Washington, D.C., and Chicago in the Spring of 2006, we heard from officials from a number of different state jurisdictions¹² that are experimenting with programs that offer less serious offenders a chance to avoid prison and a conviction record, and with innovative community-based interventions for drug-related crimes. We learned that prosecutors have been particularly effective in many jurisdictions in advocating for diversion and deferred adjudication programs, which enable offenders to avoid incarceration and to be placed under community supervision. Often these programs are focused on individuals with substance abuse problems or mental illness, or both, who need treatment. (A number of these programs are described in the third section of this report.)

http://www.uscourts.gov/fedprob/September_2004/whatworks.html; Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-based Adult Corrections Programs: What Works and What Does Not* (2006).

¹¹ Justice Kennedy Commission Report, *supra* note 4 at 9.

¹² Witnesses from Arkansas, Connecticut, Maryland and New York (Brooklyn) testified in Washington, D.C. on March 3, 2006. Witnesses from Illinois (Chicago), Kansas, Michigan, and Oregon testified in Chicago on March 31, 2006. Notes from both hearings and a list of witnesses are posted at <http://www.abanet.org/cecs>. Every state delegation included at least one prosecutor (though Arkansas DA H.G. Foster was unable at the last minute to attend the hearing in Washington, and so did not testify in person).

But we also learned that neither researchers nor practitioners have reached any firm conclusions about which sanctions or programs reduce recidivism in the most cost-effective manner. The Urban Institute's Nancy LaVigne testified before the Commission in Chicago about the types of programs that have been shown to result in reduced re-arrest rates, but she cautioned against extrapolating from these results because researchers have found that the effectiveness of particular programs can depend upon unquantifiable variables relating to the administration of the program. In other words, from Ms. LaVigne we learned that some programs have worked in some places, but that the experts are still undecided as to what kinds of programs are most likely to work in all places.¹³

Because of continuing uncertainty about what works to reduce recidivism and what does not, the Commission's recommendations on alternative sentencing strategies deal as much with process as with the actual content of programs. Our first recommendation is couched in general terms, but is actually aimed at encouraging prosecutors and other criminal justice professionals to take a leading role in developing programs to enable offenders to avoid incarceration and to be placed under community supervision.¹⁴ Our recommendation recognizes that prosecutor-developed programs, which will find widespread community support, are likely to exclude from consideration people charged with certain very serious offenses ("a predatory crime, a crime involving substantial violence, a crime involving large scale drug trafficking, or a crime of equivalent gravity") as well as those who pose a risk to public safety or whose record makes them otherwise inappropriate for community placement. Offenders who are not charged with one of the excluded crimes, and who are not excluded under one of the other two rubrics, should be eligible for community placement, and for community-based treatment programs, diversion and deferred adjudication.

¹³ For example, while boot camps and other "shock" incarceration programs have generally not been successful in reducing recidivism, the boot camp administered by the Cook County Sheriff's Office (which several commissioners visited) has a solid record of accomplishment, possibly because of the continuity of services after "graduation" and sustained aftercare in the community. According to Ms. LaVigne, long-term residential drug treatment programs that are based on a therapeutic model (such as the Brooklyn DTAP program and the Arkansas Community Correction Centers described *infra*) have been shown to be quite successful in dissuading individuals from criminal activity. Most diversion programs, including drug courts, have not been subjected to rigorous social science analysis because of the difficulty of collecting data on participants. Faith-based programs have been particularly difficult to study because of the absence of data.

¹⁴ We use the term "incarceration" to refer to a secure jail or penitentiary-like environment, in contrast to "community supervision," which refers to a range of community-based custodial options (including half-way houses, community corrections centers, drug treatment facilities, and even home detention), which permit sentenced defendants (or defendants who have been deferred to probationary status) to remain connected to their own communities and families, even if they are not entirely free to come and go at will. The term "imprisonment" is often used more broadly to refer to both incarcerative and community-based custodial placements. *See, e.g.,* Todd Bussert, Peter Goldberger, and Mary Price, "New Time Limits on Federal Halfway Houses: Why and how lawyers challenge the Bureau of Prisons shift in correctional policy and the courts' response," *Criminal Justice Magazine* (Spring 2006)(describing litigation over efforts by the federal correctional authorities to limit their own ability to designate sentenced offenders to community corrections centers as "places of imprisonment" under 18 U.S.C. 33621(b)). The ABA has found "troubling" BOP's efforts to impose regulatory limits on its own ability to designate sentenced offenders to community corrections centers, in light of contrary judicial holdings, and in light of the government's stated commitment to facilitate offender reentry. *See* Letter to the Bureau of Prisons Rules United, dated October 15, 2004, from James Felman and Todd A. Bussert, co-chairs of the ABA Criminal Justice Section's Corrections & Sentencing Committee.

One of the factors that prosecutors, judges and others involved in making community supervision decisions may take into account is the impact of incarceration on families. The increase in the female prison population in particular poses an increasing risk to family stability, since women are typically the caretakers of children.¹⁵ In some cases, incarceration of a parent will have a deleterious effect on children and family relationships, and thus on the community as a whole. Although some children live with a relative during their parent's incarceration, many enter the foster care system because no family member is available to care for them. In many cases it would be better for the children if they could stay in close touch with their caretaker parent in their own community. And, regaining custody of their children and re-establishing family relationships is a major task for women offenders coming home from prison. On the other hand, there may be cases where children would benefit from being separated from an abusive or addicted caretaker parent.

The fact that a community sanction program developed in a particular jurisdiction might be generally designed to exclude those charged with certain kinds of offenses does not mean that a prosecutor could not occasionally choose to seek, or a court choose to impose, a community-based sanction notwithstanding a particular individual's ineligibility for the general program. ABA sentencing policy provides that a prison sentence should be mandated by law for a particular offense only in the narrow circumstances where "the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction." ABA Standards for Criminal Justice on Sentencing, Standard 18-3.11(c).

Similarly, the provision that generally an offender should be ineligible for community supervision when he/she is not currently on parole or probation, unless the supervising authority specifically consents to community supervision recognizes the practical reality that community supervision is not likely to be available if a parole board or a judge with authority over probation has decided to return an offender to prison or jail. The provision encourages judges to consult with probation and parole officials to determine what sanction for a new offense will best serve the offender while protecting the safety of the community, and recognizes that judges may impose a community supervision sentence when doing so does not result in any conflict between an existing probation or parole status.

The testimony also suggested to the Commission that community-based sanctioning programs will be most effective if they hold out the prospect of the offender's ending up with no

¹⁵ Ann Jacobs, Director of the Women's Prison Association, comments in her introduction to a new study of women in prison that "The cycling of women through the criminal justice system has a destabilizing effect not only on the women's immediate families, but on the social networks of their communities. They are, more often than not, primary caretakers of young children and other family members." Introduction to Natasha Frost, Judith Greene and Kevin Pranis, *The Punitiveness Report - Hard Hit: The Growth in Imprisonment of Women, 1977-2004* (2006), available at <http://www.wpaonline.org/institute/hardhit/foreword.htm>. This recent study tracks changes in the incarceration rate of women between 1977 and 2004, a period in which the number of women serving sentences of more than a year grew by 757% -- nearly twice the 388 percent increase in the male prison population. Most of the increase can be accounted for by the drug war: the percentage of women serving time for drug offenses grew from 11% in 1979 to 32% in 2004. In most cases. Women arrested for involvement in the drug trade tend to play peripheral or minimal roles, selling small amounts to support a habit, or simply living with intimates who engage in drug sales. Lenora Lapidus, Namita Luthra & Anjuli Verma; Deborah Small; Patricia Allard & Kirsten Levingston. "Caught in the Net: the Impact of Drug Policies on Women and Families." Available at <http://www.fairlaws4families.org/> A second volume of the study will look more deeply at factors that increased the risk of imprisonment for women arrested for felony offenses and increased the amount of time spent behind bars.

criminal record. The collateral consequences triggered by a conviction record make it very difficult for offenders to get a job or housing and, generally, to put their lives back on track after their court-imposed sentence has been served. Sometimes the collateral consequences of conviction are far more severe than the direct ones, and it is therefore of considerable concern to defenders, in assessing whether to recommend a guilty plea to their clients, whether their client will end up with a felony conviction on their record.

Therefore, when a deferred adjudication/deferred sentencing/diversion option requires a defendant to enter a guilty plea as a condition of participation, such programs should also offer the incentive to defendants and their counsel of having the charges dismissed and the record expunged if the terms of probation are successfully completed, so that collateral consequences will not be triggered. Defenders are often placed in a difficult position in counseling their clients about whether to participate in a treatment program. Frequently the terms of probation are quite strenuous, and may include extended periods of time in in-patient drug treatment, and the possibility of failure or drop-out is very real.¹⁶ On the other hand, the possibility that their client could end up with no record of conviction – and in some jurisdictions no publicly accessible record at all – may make defenders see their way clear to encouraging their clients to enter a plea and get the treatment they need.¹⁷

The Commission urges jurisdictions not to exclude people from consideration for community-based treatment programs solely because they may have more than one conviction, or some history of minor violence. In too many cases, treatment programs are limited, by statute or by policy, to the so-called “non-violent first offender.” Anyone who has dealt with addiction and mental illness understands that relapse is a predictable part of getting well, and that slips are to be expected and should be tolerated to some degree. Restricting recovery programs to people who have had no prior run-ins with the law, or who have never gotten into a bar fight or street altercation, is to rule out a large population that could benefit from a second chance. The resolution adopts no exclusionary criteria, but provides instead that a person should be ineligible for community supervision only when his/her offense conduct and/or criminal history makes such a sanction inappropriate. This permits flexibility and individualized considerations of offenders and the charges brought against them, not ruling out of consideration categorically anyone because of the nature of the offense or the extent of the person’s criminal record.

The Commission also heard testimony about the beneficial effects of having law enforcement personnel trained to recognize the signs and symptoms of mental illness in order to facilitate appropriate handling of their cases and, in some instances, to avoid unnecessary arrests. Police are generally the first on the scene when a person with mental illness creates a disturbance

¹⁶ Lisa Schreibersdorf, Executive Director of the Brooklyn Defenders Office, reminded the Commission that constitutional safeguards must always be observed when an alternative therapeutic program is being developed. Confidentiality must be protected in these programs when clients are provided counseling and other services, and attorney consent should be received before a client is interviewed. Also, the constitutional right against cruel and unusual punishment must be monitored by courts, because the practices of some programs could amount to violation of defendants’ constitutional rights.

¹⁷ Some defenders are reluctant to counsel their clients to plead guilty if there is a reasonable chance they can win an acquittal, even if it is evident that the clients are in need of drug treatment or other intervention to help them from coming back into the justice system. A program that offers the possibility of complete expungement at the end may present to a conscientious defender an offer that tips the balance in favor of treatment.

or commits a crime; they have the discretion to determine whether to arrest, refer the person to community based treatment services, take other action as might be appropriate. We recommend that all jurisdictions provide this training.¹⁸

The Commission recommends that prosecutors and defenders, in close cooperation with the courts, create working groups that include other stakeholders in the justice system to review, monitor, and improve systemic alternatives to incarceration and conviction. The Commission heard from many witnesses that systemic change is necessary, both in the law and in attitudes, and that change comes fastest when all key stakeholders within the criminal justice system work together. Edwin Burnett, Public Defender for Cook County (IL), emphasized the importance of all stakeholders' being at the table in developing the policies in order for them to succeed.¹⁹ This theme was also echoed by District Attorneys Michael Schrunk, Multnomah County (OR), and Charles "Joe" Hynes, Kings County (Brooklyn, NY), and others who stated that prosecutors, defenders, and the court system must work collaboratively to reduce recidivism. A good example of such a partnership is the Brooklyn District Attorney's ComALERT (Community and Law Enforcement Resources Together) program, which provides substance abuse treatment and transitional employment and counseling to approximately 1,000 formerly incarcerated inmates each year. When such collaborative working groups meet on a regular basis, they can foster continuous evaluation and improvement of programs, account for a variety of viewpoints, and provide an opportunity to create better working relationships among all participants in the justice system.

III. Field Program Notes and Findings

The Commission's overall impression from the prosecutors, defenders, judges, and corrections officials who appeared before it, is that in most state jurisdictions stakeholders in the criminal justice system are working hard and resourcefully to manage what amounts to a public health crisis. Substance abuse and mental illness eat up the lion's share of criminal justice budgets and skew the priorities of the criminal justice system. Officials from every jurisdiction admitted that an overwhelming portion of their cases involved elements of substance abuse and mental illness. While only 20% of state prison and jail populations are charged or convicted of a drug offense, a much higher percentage of crimes are related to substance abuse. Cook County (IL) Public Defender Edwin Burnett reported that almost 70% of crimes in the county are drug-related, and 82% of those arrested tested positive for drugs. Moreover, jails and prisons have become the institution most likely to house the mentally ill. The Cook County jail holds the largest number of institutionalized mentally ill people in Illinois: 1,000 of the 11,000 people

¹⁸ Judith Rossi, Connecticut Executive Assistant States Attorney, highlighted in her testimony before the Commission the Memphis Police Crisis Intervention Team ("CIT") as an example of a law enforcement agency that has specially trained officers to provide an immediate response to a crisis involving mentally ill people. The officers in this unit are trained to interact with the mentally ill, defuse potentially volatile situations, assess medical information, and evaluate the individual's social support system. The CIT program transformed the traditional enforcement-oriented police response to the mentally ill to one that is both more effective and more humane. As a result, arrests and use of force in dealing with mentally ill offenders has decreased dramatically. See <http://www.memphispolice.org/Crisis%20Intervention.htm>.

¹⁹ March 31 Hearing Notes available at <http://www.abanet.org/cecs>.

confined there have been diagnosed as mentally ill.²⁰ At the March 31 Commission hearing, Judge Paul Biebel, Presiding Judge of the Criminal Division in Circuit Court of Cook County, testified that 16% to 20% of the Illinois prison population have mental health problems. The Women's Program at the Cook County jail reported that 80% of its clientele have mental health issues, often resulting from abusive family relationships.

While the Commission was impressed and encouraged by the energy and ingenuity of the criminal justice professionals on the front lines, it observed that in some states the legislature has been more helpful than in others in creating a structure conducive to developing community-based treatment programs, and has funded those programs comparatively generously. Arkansas and Connecticut stand out in this category.

Since 1993, Arkansas has had a separate Department of Community Correction that is independent of the state system. In cooperation with the courts, the DCC is responsible for the administration of several statutory diversion programs that allow certain less serious offenders to avoid a conviction record if they successfully complete a community-based treatment program in one of five Community Correction Centers located around the state.²¹ Any person who is eligible to be placed on probation, or who is given a "judicial transfer" sentence to DCC for a "target offense,"²² may upon completion of probation have the charges dismissed and the record expunged. DCC Director David Guntharpe testified that offenders may be placed in one of several different programs, including community-based residential treatment centers, whose goal is to encourage offenders to change the way they relate to the world around them.²³ Still in its early stages, the residential treatment center program has already resulted in a drop in the recidivism rate among participants from 38% to 31%, and its administrators expect much greater

²⁰ *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, The Sentencing Project (2002), <http://www.sentencingproject.org/pdfs/9089.pdf>.

²¹ See, e.g., the legislative findings of the Community Punishment Act of 1993, Ark. Code Ann. §16-93-1201 et seq.: "The State of Arkansas hereby finds that the cost of incarcerating the ever-increasing numbers of offenders in traditional penitentiaries is skyrocketing, bringing added fiscal pressures on state government, and that some inmates can be effectively punished, with little risk to the public, in a more affordable manner through the use of community correction programs and nontraditional facilities." Ark. Code Ann. §16-93-1201(a).

²² Ark. Code Ann. §16-93-1207(b)(1)(A)-(C). Under Ark. Code Ann. §16-93-1202(j)(1)(A), "target group" means a group of offenders and offenses determined to be, but not limited to, theft, theft by receiving, hot checks, residential burglary, commercial burglary, failure to appear, fraudulent use of credit cards, criminal mischief, breaking or entering, drug paraphernalia, driving while intoxicated, fourth or subsequent offense, all other Class C or Class D felonies which are not either violent or sexual and which meet the eligibility criteria determined by the General Assembly to have significant impact on the use of correctional resources, Class A and Class B controlled substance felonies, and all other unclassified felonies for which the prescribed limitations on a sentence do not exceed the prescribed limitations for a Class C felony and that are not either violent or sexual.

²³ The residential programs are organized on a therapeutic model, and offer structure, supervision, drug/alcohol treatment, educational and vocational programs, employment counseling, socialization and life skills programs, and other forms of treatment and programs. When an offender is assigned to a community-based correctional center the treatment focus is a multi-level approach designed to re-socialize the pattern of thinking and behavior, and the goal is for pro-social choice and actions to become automatic and reflexive for the offender. To achieve the desired re-socialization, the residents are taught new concepts, new values, and rules of expected conduct. The program also provides substance abuse treatment. Another key aspect of the program is peer mentoring. Through peer mentoring, offenders are able to see another person with similar circumstances living a new way of life.

reductions as more personnel are trained.²⁴ DCC also offers non-residential probation services, including community-based substance abuse and mental health treatment services, day reporting centers, intensive supervision, and drug courts.²⁵ Once participants successfully complete their required program, DCC issues a certificate of completion and in addition a draft order to submit to the court to have the charges dismissed. Once the charges are dismissed offenders are eligible to have the record expunged (“sealed”), as long as they have no more than one prior felony, and that prior felony is not a serious violent offense.²⁶ The Arkansas Department of Community Corrections also has a Special Needs Unit for dually-diagnosed offenders who have records of substance abuse, mental health, and/or medical issues. The Arkansas program operates within a therapeutic community model, and it has seen the recidivism rate drop to 25%.

The Arkansas DCC has committed itself to reducing recidivism rates among the population that comes through its programs. Its efforts extend to assisting “graduating” probationers in obtaining an expungement of their criminal record.²⁷ The DCC has evidently been successful in persuading the Arkansas legislature that its efforts to facilitate offender reentry are cost-effective, because it has been generously funded and otherwise supported in its efforts to approach the problem of recidivism in a comprehensive manner. The governor has also been supportive of its efforts, according to Milton Fine, Legal Counsel to Governor Huckabee, who testified to the governor’s interest in offender reentry.

²⁴ Prior to DCC moving to the therapeutic community concept, the DCC conducted a 3-year recidivism study of 322 residents released from community corrections centers between March 1995 and March 1998. Results indicate a composite recidivism rate of 38% for the 3 year period. Another study was conducted of 900 randomly selected male and female offenders released from the CCC which operated in the therapeutic community environment prior to March 1, 2000 and yield a 38% recidivism rate.

²⁵ Arkansas Department of Community Corrections supervises 28 drug courts, which are usually post-adjudication courts that handle probation cases involving drug addicted offenders through intense supervision, monitoring, and treatment programs. Successful completion of the drug court can result in the dismissal of charges, reduced or set aside sentences, lesser penalties, or a combination of these. Generally, a post-adjudication drug court program lasts for an average of twelve months with a 2 year strictly supervised probation aftercare program.

²⁶ See Ark. Code Ann. §§ 16-90-901 through 16-90-905. One reported shortcoming of the Arkansas diversion programs is that the state police and other record-retention agencies are not properly updating the records to reflect the dismissals and expungements, so that offenders are facing challenges in explaining arrest record to employers even if no conviction is listed in the system. Public Defender Commission Director Didi Sallings told the Commission that many offenders are in need of legal assistance in expunging criminal records, and that the state public defender commission is seeking additional resources to provide these services.

²⁷ David Guntharpe testified that his legal staff had recently discovered a little-known Arkansas statute that allows probationers who have successfully completed all of the terms of their probation to petition the court to dismiss the charges against them and expunge the record. Under Ark. Code Ann. § 5-4-311(a) and (b), probationers for whom a judgment of conviction was not entered, including those who went to trial, are entitled to apply to the sentencing court upon completion of supervision for an order dismissing the charges, and “expunging” the record. Understanding that many of the people supervised by his agency do not have the means to hire a lawyer and go to court, Mr. Guntharpe directed his staff to prepare a model petition form to give to each probationer as he or she “graduates,” so that they can easily file the form with the court and obtain expungement. A person whose record is expunged “shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law.” § 16-90-902(a). Upon the entry of the order to seal, the underlying conduct “shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist,” including in response to questions. § 16-90-902(b).

Connecticut is another state that has given high priority to the development of community-based alternatives to incarceration. William Carbone, Executive Director of Court Support Services Division in the State of Connecticut Judicial Branch, told the Commission that since the 1980s Connecticut has implemented community-based alternatives so that prison, the most costly punishment option, becomes the option of last resort. The Office of Alternative Sanctions in the Judicial Branch now serves more than 6,000 offenders daily in a statewide continuum of treatment, services and community-based monitoring for both pre-trial and sentenced offenders placed on probation with an annual operating budget of over \$41 million. At each Connecticut court location, offenders are screened to determine if they are appropriate for alternative programming, and the Office of Alternative Sanctions provides recommendations to the sentencing judge. Programs are designed for first-time offenders, for chronic offenders who would otherwise be faced with a prison term, for substance abusers and those with mental health issues, domestic violence, school violence, and hate crimes. Every court location in the state has access to mental health and substance abuse evaluations and outpatient treatment through a specialized network of advanced behavioral health services.

For Connecticut's more risky and chronic offenders, an Alternative Incarceration Center offers daily group programming for more than 1,200 pre-trial and sentenced offenders in the areas of drug abuse, anger management, employment, and community service. In addition, the Office of Alternative Sanctions has 450 residential treatment beds for offenders in need of in-patient care. The inpatient programs can range from 30 days to over one year, providing services ranging from substance abuse to halfway houses for the youthful offender programs. About two-thirds of offenders successfully completed the programs offered by the Office of Alternative Sanctions, and the programs have been shown to produce lower recidivism rates among their participants.²⁸

In New York and Oregon, prosecutors have taken the lead in developing drug treatment and community corrections programs. The Kings County (Brooklyn, NY) District Attorney's office offers a wide range of rehabilitative and educational programs designed to reduce recidivism and provide the defendant with rehabilitative, educational and service opportunities that will result in a dismissal of the new arrests. District Attorney Joe Hynes has developed numerous programs aimed addressing the underlying issues behind the criminal behavior, such as substance abuse, mental health issues, and lack of job opportunities. Kings County offers felony diversionary programs through the Brooklyn Treatment Court and the Mental Health Court, and many of the programs are available to offenders with prior convictions. The DTAP program (described in the Justice Kennedy Commission Report) specifically targets repeat felony drug offenders who are facing lengthy prison term, and makes exceptions for some

²⁸ A 1990 University of Connecticut study compared offenders placed in alternative programs with a control group of incarcerated offenders, and concluded that offenders placed in alternatives had substantially lower rearrest rates; the best rates involved the youngest offenders where the rate differentials were 3 to 1. An investigation by the Connecticut General Assembly's Legislative Program Review and Investigations Committee found in 2005 that two-thirds of the offenders in the Alternative to Incarceration network had not recidivated at the one-year follow-up point. Another study of Connecticut alternative programs, conducted by Justice System Assessment and Training consulting firm from Boulder, Colorado, found that 72% of program participants had not recidivated during the 14 month follow-up period. Domestic Violence ("DV") offenders have even promising figures with 90% not being rearrested for a DV offense and 75% not rearrested at all for any offense, according to a 2005 National Institute of Justice funded study.

violent offenders with the victim's consent.²⁹ The District Attorney's TADD Program (Treatment Alternatives for Dually Diagnosed Defendants) diverts mentally ill persons charged with felonies and misdemeanors from incarceration in all of Brooklyn's criminal courtrooms. Kings County also offers ten diversionary programs and two specialty courts for misdemeanor charges.³⁰ Brooklyn has seen serious crime drop overall by 75% from 1990 to 2005.

The prosecutor's office in Multnomah County (OR) offers the Sanction Treatment Options Progress (STOP) Program to persons charged with criminal possession of relatively small (personal use) quantities of a controlled substance the opportunity to successfully complete drug treatment and avoid prosecution. Multnomah County District Attorney Mike Schrunk testified that the offender must plead guilty or no contest and meet other eligibility requirements in order to be admitted into the program. The STOP program is typically 12 to 15 months in duration and provides treatment, random drug testing, and regular court appearances before the STOP judge. Upon satisfactory completion of the program, the court will dismiss the charges with prejudice.

The District Attorney's office also sponsors Project Clean Slate, through which offenders who have served their sentence are given an opportunity to have their records expunged by the court. In Multnomah County, expungement requests are brought to the court by the DA's office, and the court generally grants any request upon the prosecutor's recommendation. Mr. Schrunk testified that he regards expungement as a critical service for former offenders, since a conviction record can hinder them in getting jobs and housing.³¹ He recommended that the Commission advocate for a national standard on record-clearing.

In all of the states that the Commission heard from, prosecutors take advantage of laws that authorize diversion of offenders into probation programs, with the promise of a clear record upon successful completion. In Maryland, prosecutors may allow a defender to obtain "probation before judgment" ("PBJ") to avoid a criminal conviction. The court may defer judgment and place a defendant on probation subject to reasonable conditions, if (i) the court

²⁹ The National Center on Addiction and Substance Abuse at Columbia University (CASA) conducted an extensive study of the DTAP program, and concluded that the average cost of placing a participant in DTAP, including drug treatment, vocational training and support services was \$32,975 as compared to an average cost of \$64,338 if the participant had been placed in prison. *See Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program* (March 2003).

³⁰ Misdemeanor diversionary programs include: TIP (2 day drug awareness program); STOP LIFT (shoplifting awareness program); TASC (inpatient/outpatient drug treatment); KCDA AA (10 week alcohol program); Driver Improvement (Driver Safety Course); Community Service (defendants sentenced to perform work in the community); Mental Health Diversion (immediate treatment offered at night arraignments to non-violent minor offenders with mental illness); Project Respect (provides education for those arrested for patronizing prostitutes); STARS/EPIC- Intensive multidiscipline treatment/assistance/counseling for prostitutes; YCP (Faith-based youth mentoring) YCP and TASC are also available to felons. In addition, misdemeanor drug court, domestic violence court and a community court also provide diversionary programs.

³¹ Or. Rev. Stat. § 137.225(1) through (12) authorizes sentencing court to "set aside" misdemeanors and minor felonies (Class C, except sex and traffic offenses, and some other minor crimes). Upon application, order must issue unless the court makes written findings by clear and convincing evidence that granting the motion would not be in the best interests of justice. § 137.225(11). A set-aside restores all rights and relieves all disabilities – conviction deemed not to have occurred. "Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence." Or. Rev. Stat. § 137.225(4).

finds that the best interests of the defendant and the public welfare would be served; and (ii) if the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea.³² If probation is successfully completed, the court discharges the defendant from probation without judgment of conviction, and such discharge “is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime.”³³ The person discharged from probation may also petition the court for expungement of police or court records relating to the charges after a three-year waiting period, as long as the petitioner has no subsequent offense that involved a possible sentence of imprisonment.³⁴ In addition, under Maryland law, judges have sentence revision authority for five years after imposition of sentence, and may reduce the sentence to “probation before judgment” in order to accomplish expungement of the criminal record. Baltimore States Attorney Patricia Jessamy testified she has available several community corrections programs, including a drug court.

In Michigan, according to Saginaw County DA Michael Thomas, prosecutors are beginning to recognize the importance from a public safety perspective of keeping less serious offenders from going to prison through diversion programs, and of helping those who have gone to prison reenter the community. Yet reentry concepts are relatively new ones. Mr. Thomas, who co-chairs the Reentry Committee of the National District Attorneys Association with Ms. Jessamy, noted ruefully that “You have to explain reentry to most prosecutors.”

Kansas recently enacted a drug treatment program for non-violent offenders charged with drug possession, called Senate Bill 123.³⁵ The program provides up to 18 months of drug treatment through state-approved community providers, and subsequent intensive supervision by a probation officer who assists with job training, housing, and other social services. An innovative aspect of Senate Bill 123 is that it recognizes that relapse is a part of recovery, and a person is eligible for the program more than once so long as he or she is charged with a non-violent drug possession offense. One shortcoming of the program is that the offender still ends up with a criminal conviction upon completion of the program. (Kansas does, however, offer judicial expungement to most felony offenders after a waiting period.)

Many jurisdictions have developed diversion programs for mentally ill offenders. The Commission heard from three jurisdictions that have established Mental Health or Community Courts to meet the special needs of mentally ill offenders, Kings County (NY), Cook County (IL), and Multnomah County (OR). The creation of diversion programs is very important to this population because a conviction may render them ineligible for much-needed government assistance programs, such as Medicaid, which compromises their mental health treatment programs.

³² Md. Code Ann., Crim. Proc. §6-220(b)(1).

³³ Md. Code Ann., §6-220(g).

³⁴ Md. Code Ann., §§10-105(a)(c)(2)(ii). A PBJ record that has been expunged may be opened only upon court order, with notice to person concerned and a hearing, or upon ex parte application by the states attorney and a showing of good cause. § 10-108(a) through (c). PBJ conviction that has been expunged need not be reported, § 10-108, and an expunged conviction may not be used to deny employment or licensure. § 10-109. A PBJ sentence, if expunged, may not be used to enhance subsequent sentence. *See U.S. v. Bagheri*, 999 F. 2d 80 (4th Cir. 1993).

³⁵ March 31 Hearing Notes, available at <http://www.abanet.org/cecs>.

Community Courts are also being used in many jurisdictions. Multnomah County (OR) established the first Community Court in 1998 to target offenders charged with quality-of-life crimes that diminish citizens' pride and sense of safety in their neighborhoods. The goal of this court was to provide the offender with underlying services to address the issues that led them into the criminal justice system.³⁶ When a person is arrested for a non-violent, non-traffic misdemeanor or violation, he or she is cited for arraignment in Community Court by the arresting officer. At arraignment, the person may decide to enter the Community Court program or the traditional trial docket. If the person chooses Community Court, a member of the social services team interviews and assesses him or her for social services needs. During assessment, the social services staff may make referrals to social services such as Oregon Health Plan, state public assistance, mental health or drug and alcohol counseling. The Community Court judge receives the social service assessment and may assign the person to social services, community service, or a combination of both as a part of the Community Court sanction. Once the person completes the assignment, the case is closed, and the charges are dismissed.

The Red Hook Community Court in Brooklyn, New York is a shining example of an innovative community based program. Red Hook Judge Alex Calabrese told the Commission how the court was born in response to a community tragedy, the death of a popular school principal in the cross-fire of a drug gang fight. Red Hook is a multi-jurisdictional court where one judge has jurisdiction over all of the issues facing a criminal defendant, including housing and domestic matters. More importantly, the court seeks to address the problems that led to the defendant's criminal behavior, which may include addiction, homelessness, lack of education, or mental health issues. A typical sentence may include mandatory drug treatment, job training, adult education classes, community service, or a combination of these services.

One of the pioneering aspects of Red Hook is that it offers people in the community the opportunity to obtain social services even if they are not charged with a crime. Because the court has a single focus, it is able to focus on prevention, by providing social services in order to help troubled young people avoid continued interaction with the criminal justice system. The Red Hook court participates in community outreach, even sponsoring a local youth baseball league. The Kings County District Attorney and the Legal Aid Society both sponsor and coach local teams. Red Hook's idea of engaging the community to assist with crime prevention and to solve local problems before they end up in court is quite impressive and has made a dramatic change in the attitudes of the community of Red Hook toward the justice system.

Conclusion

The testimony taken by the Commission, and its field findings, establishes the beneficial effects, in terms of reducing recidivism, of programs providing alternatives to incarceration and a conviction record. These programs seem to be particularly effective when they are initiated by a prosecutor's office, or when they are the product of working groups composed of prosecutors as well as defenders. The Commission believes that these programs, whether they are denominated diversion or deferred adjudication or some other name, should be open to all but the most serious offenders. The Commission also believes that if these programs become more widely known they can be emulated to good effect across the country, and that this will not only reduce the

³⁶ <http://www.co.multnomah.or.us/da/cc/faq.php#30>

prison population but will also reduce the incidence of criminal behavior and enhance public safety.

Respectfully submitted,

Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair

February 2007