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18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "the Most Effective Manner"

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18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "the Most Effective Manner"

Cover Page Footnote

Associate Clinical Professor of Law, The University of Chicago Law School. I am grateful to Isabella Nascimento and Claire Rogerson for excellent research assistance and to Judith Miller, Alison Siegler, and Katie Tinto for thoughtful advice and suggestions.

**18 U.S.C. § 3553(a)’S UNDERVALUED SENTENCING COMMAND:
PROVIDING A FEDERAL CRIMINAL DEFENDANT WITH
REHABILITATION, TRAINING, AND TREATMENT IN “THE MOST
EFFECTIVE MANNER”**

ERICA ZUNKEL*

INTRODUCTION49

I. BACKGROUND.....51

A. *UNITED STATES V. BOOKER GIVES NEW LIFE TO 18 U.S.C. § 3553(a)*51

B. *THE HISTORY OF § 3553(a)(2)(D) AND DISTRICT COURTS’ CONSIDERATION OF REHABILITATION AT SENTENCING*.....55

II. THE PROBLEM57

A. *THE BUREAU OF PRISONS’ OVERCROWDING AND STAFFING SHORTAGES COMPROMISE ITS ABILITY TO PROVIDE THE “MOST EFFECTIVE” MEDICAL AND MENTAL HEALTH CARE AND OTHER TREATMENT AND REHABILITATION*57

B. *FEDERAL COURTS APPROACH § 3553(a)(2)(D)’S MANDATE INCONSISTENTLY AND OFTEN FAIL TO RECOGNIZE THE BOP’S LIMITATIONS ON PROVIDING “THE MOST EFFECTIVE” REHABILITATION AND TREATMENT*64

III. PROPOSED SOLUTION: VIGOROUS DEFENSE ADVOCACY THAT ENCOURAGES SERIOUS CONSIDERATION OF § 3553(a)(2)(D) AND ACKNOWLEDGES THE BOP’S LIMITATIONS ON PROVIDING REHABILITATION AND TREATMENT IN THE “MOST EFFECTIVE” MANNER72

CONCLUSION.....76

INTRODUCTION

Although federal law requires sentencing judges to consider the need to rehabilitate and treat defendants, courts regularly undervalue, ignore, and even violate this directive. In the Sentencing Reform Act of 1984 (SRA), Congress directed federal district court judges to consider, when sentencing a defendant, the need for the sentence “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”¹ Congress has made specific pronouncements about the rehabilitative value of imprisonment, concluding that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”² The federal courts have struggled to implement § 3553(a)(2)(D)’s directive to provide a defendant with rehabilitation in “the most effective manner.” Some courts appear to believe that the Bureau of Prisons (BOP) can provide “adequate” training, medical care, and other correctional treatment and do not analyze

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¹ 18 U.S.C. § 3553(a)(2)(D) (2012).

² 18 U.S.C. § 3582(a) (2012).

what sentence will provide treatment in “the most effective manner” as the statute requires. Other courts barely engage with the issue, thus undervaluing § 3553(a)(2)(D)’s statutory command. A minority of the courts engage in a more robust analysis of § 3553(a)(2)(D) arguments, especially when the arguments are supported by evidence. Regardless of the approach, many courts fail to appreciate the BOP’s severe limitations in providing rehabilitation and treatment in “the most effective manner.” This needs to change. With vigorous defense advocacy, it can.

How the courts engage with § 3553(a)(2)(D)’s statutory command is important because the overwhelming majority of convicted and sentenced federal defendants go to prison. “Probation has played a diminutive role in the federal system,”³ and “imprisonment has become the dominant sanction.”⁴ For fiscal year 2017, only 6.9% of federal criminal defendants across the country received a straight probationary term, while 88% received a sentence of “prison only.”⁵ Federal judges “sentenced 2,300 fewer offenders to probation in 2014 than in 1980, even though their caseload nearly tripled during that span.”⁶ There are likely many reasons for this, including the mandatory Sentencing Guidelines era, an increase in federal statutes that require a mandatory minimum prison term in the 1980s and 1990s, and the abolition of parole.⁷

Moreover, the federal prison system is in crisis. Congress established the bipartisan Charles Colson Task Force on Federal Corrections in 2014 in response to years of “unsustainable prison population and cost increases, high rates of recidivism, and inaction on possible reforms.”⁸ The goal was to conduct an independent assessment of the federal system and recommend reforms. The *Colson Report* paints a stark picture of the federal prison system, noting serious problems such as overcrowding and the lack of non-incarceration sentences.⁹ In its Executive Summary, the *Colson Report* notes:

After decades of unbridled growth in its prison population, the United States faces a defining moment. There is broad, bipartisan agreement that the costs of incarceration have far outweighed the benefits, and that our country has largely failed to meet the goals of a well-functioning justice system: to enhance public safety, to prevent future victimization, and

³ Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT’G REP. 231, 232 (2016).

⁴ *More Prison, Less Probation for Federal Offenses*, PEW CHARITABLE TR. (Jan. 2016), https://www.pewtrusts.org/-/media/assets/2016/01/pspp_fs_moreprisonlessprobation_v1.pdf [hereinafter PEW CHARITABLE TR.].

⁵ U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30 (22nd ed. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

⁶ PEW CHARITABLE TR., *supra* note 4, at 1.

⁷ *See id.*; *see also* CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS, at XI (Jan. 2016) [hereinafter COLSON REPORT] (highlighting mandatory minimum drug penalties as a “primary driver of BOP overcrowding and unsustainable growth” and a prime candidate for reform).

⁸ *Id.* at VII.

⁹ *Id.* at X.

to rehabilitate those who have engaged in criminal acts. Indeed, a growing body of evidence suggests that our over-reliance on incarceration may in fact undermine efforts to keep the public safe.¹⁰

The *Colson Report* encourages increased use of specialty courts, probation, and alternatives to prison¹¹—in other words, rehabilitation.

Thus, in spite of Congress's directive that "imprisonment is not an appropriate means of promoting correction and rehabilitation,"¹² the vast majority of federal criminal defendants serve their sentences in federal prison—away from their families and community service providers—and without meaningful access to needed medical care, rehabilitation, and other treatment. Given the BOP's challenges to providing treatment in an effective, let alone adequate manner, the courts should be taking § 3553(a)(2)(D)'s statutory command much more seriously in deciding whether imprisonment is an appropriate sentence. Likewise, defense counsel should make a clear record at sentencing of the defendant's treatment needs and the BOP's challenges in providing such treatment.

This Article proceeds in three parts. Part I will discuss the federal sentencing revolution post-*United States v. Booker* and how it gave new life to 18 U.S.C. § 3553(a). It will also discuss the Sentencing Reform Act and § 3553(a)(2)(D)'s rehabilitation mandate. Part II will discuss how courts are not consistently adhering to § 3553(a)(2)(D)'s mandate. This is due, at least in part, to the fact that the BOP is not equipped to play the rehabilitative role that courts believe it is playing. Evidence shows that the BOP struggles to provide adequate, let alone "effective," "educational or vocational training, medical care, [and] other correctional treatment."¹³ Part III will discuss how to address these problems and encourage the courts to take § 3553(a)(2)(D)'s statutory command more seriously to ensure that federal sentences are promoting rehabilitation and treatment in "the most effective manner."

I. BACKGROUND

A. *UNITED STATES V. BOOKER GIVES NEW LIFE TO 18 U.S.C. § 3553(a)*

Since 2005, federal sentencing has been governed by 18 U.S.C. § 3553(a). This statute was part of the SRA, which fundamentally altered the federal sentencing scheme. Before the SRA went into effect on November 1, 1987, federal district court judges had "almost unfettered discretion" to select sentences for federal offenders.¹⁴ In an ordinary case, a judge could decline to

¹⁰ *Id.* at IX.

¹¹ *Id.* at XI.

¹² 18 U.S.C. § 3582(a) (2012).

¹³ 18 U.S.C. § 3553(a)(2)(D) (2012).

¹⁴ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223–24 (1993).

impose prison time and instead suspend the sentence. If a prison term was imposed, the defendant would spend a third of his term behind bars before parole officials had discretion to decide whether to release him.¹⁵ This discretion permitted parole officers to determine when “a prisoner had been rehabilitated and should be released from confinement.”¹⁶

In the 1960s and 1970s, prominent judges and academics began to express concern that judicial discretion at sentencing was causing troubling sentencing disparities. Judge Marvin Frankel, whom Senator Edward M. Kennedy called the “father of sentencing reform,” led that charge.¹⁷ In his seminal book, Judge Frankel complained of “law without order.”¹⁸ His goal was “to make criminal sentencing subject to ‘law.’”¹⁹ Judge Frankel believed the best way to do this was to cabin a judge’s sentencing discretion. This, he believed, would promote sentencing uniformity and would drastically reduce disparities.

Around the same time, others expressed the view that the pre-SRA sentencing scheme—“premised on faith in rehabilitation”²⁰—was failing to deliver.²¹ Lawmakers and others became increasingly skeptical that prison could “rehabilitate individuals on a routine basis” or that parole officers could “determine accurately whether or when a particular person ha[d] been rehabilitated.”²² As Professor Michael Vitiello explains:

In less than two decades, almost everyone involved in the criminal justice system ha[d] rejected the rehabilitative ideal, described less than twenty years ago as the predominant justification of punishment. By the mid-1980s, a major criminal law treatise concluded that “retribution . . . ‘is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground . . . upon which to base a system of punishment.’”²³

¹⁵ KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 19–20 (1998).

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 35.

¹⁸ MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

¹⁹ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1427 (2008).

²⁰ *Tapia v. United States*, 564 U.S. 319, 324 (2011) (citing *Mistretta v. United States*, 488 U.S. 361, 366 (1989)).

²¹ *Mistretta*, 488 U.S. at 366 (noting that the Senate Judiciary Committee’s report on the SRA criticized the indeterminate sentencing regime because its attempt to “achieve rehabilitation of offenders had failed.”); COMM. ON THE JUDICIARY UNITED STATES SENATE, REPORT ON SENTENCING REFORM ACT OF 1984, S. REP. 98-225 (1984) [hereinafter S. REP. 98-225].

²² *Tapia v. United States*, 564 U.S. 319, 324–25 (2011) (quoting S. REP. 98-225, *supra* note 21, at 40) (internal quotation marks omitted); see also Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991) (“Critics focused on both the philosophical and the factual failures of rehabilitation. . . . Critics frequently cited studies of rehabilitation programs and urged that rehabilitation did not work.”).

²³ Vitiello, *supra* note 22, at 1012–13; see also Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, ASPE 1, 3 (Dec. 1, 2002), <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf> (“The nation moved abruptly in the mid-1970s from a society that justified putting people in prison on the basis of the belief that incarceration would somehow facilitate productive re-entry into the freeworld to one that used imprisonment merely to inflict pain on wrongdoers (‘just deserts’), disable criminal offenders (‘incapacitation’), or to keep them far away from the rest of society (‘containment’).”).

Congress heeded the concerns Judge Frankel and others voiced about judicial discretion and the failures of the parole system in enacting the SRA. Congress also adopted the view that sentencing with rehabilitation as its primary goal had failed, even though this assertion was not supported by evidence.²⁴ The SRA “abandoned indeterminate sentencing and parole” and drastically changed federal judges’ role in the sentencing process by “establishing a framework to govern their consideration and imposition of sentences.”²⁵ The centerpiece of the SRA was the creation of the United States Sentencing Commission, which in turn was responsible for crafting the Federal Sentencing Guidelines.

The Guidelines are a complex set of sentencing factors based around the seriousness of the offense and the defendant’s criminal history. Each federal crime “is assigned a base offense level, which is the starting point for determining the seriousness of a particular offense.”²⁶ In addition to the base offense level, “each offense typically carries with it a number of specific offense characteristics . . . that can increase or decrease the base offense level.”²⁷ There are also adjustments and departures, which can similarly increase or decrease the base offense level. The result of these calculations results in the total offense level.²⁸ The total offense level is then coupled with a defendant’s criminal history category—ranging from one to six based on prior criminal history—to produce a Guidelines range in months.

Before *United States v. Booker* rendered the Guidelines advisory, judges were required to sentence defendants within the applicable Guidelines range absent extraordinary circumstances. If a sentencing judge misapplied the Guidelines or departed from the range for any reason other than those allowed for by the Guidelines, appellate judges were on hand to “police” them.²⁹ “Accordingly, from their inception, the Sentencing Commission’s proclamations were not merely ‘guidelines’ or recommendations, but enforceable rules that sentencing judges were legally obliged to follow.”³⁰

Consequently, sentencing during the mandatory Guidelines era amounted to a “sterile” proceeding, wherein “the lawyers’ arguments and defendant’s allocution [were] largely irrelevant, and the sentence preordained.”³¹ The judge and counsel

²⁴ See S. REP. 98-225, *supra* note 21, at 38 (“In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. . . . Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”).

²⁵ *Tapia*, 564 U.S. at 325.

²⁶ U.S. SENTENCING COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1, http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ See Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENT’G REP. 14, 16 (1996) (noting the responsibility of courts of appeals to “police” sentencing Guidelines departures).

³⁰ *The Arc of the Pendulum*, *supra* note 19, at 1429.

³¹ Lynn Adelman & Jon Deitrich, *Fulfilling Booker’s Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 522 (2006).

did not discuss the defendant's moral culpability, the reason that he offended, his character and background, the likelihood that he would re-offend, the effect on the victim, or the need to protect the public. Rather, the judge and lawyers talked about offense levels and criminal history scores; about "intended" versus "actual" loss amounts; about the weight of drugs that it was reasonably foreseeable the defendant's confederates would possess; about whether the scheme was "sophisticated" or merely involved "more than minimal planning."³²

Although the Guidelines contained "departure" provisions that authorized judges to impose a reduced sentence if certain requirements were met, such departures were rare, cabined, and "reserved for unusual cases."³³ The Guidelines reflected this explicitly in § 5K2.0: Where a particular aspect of an offense is incorporated in the underlying offense guideline, departure from the applicable guideline range is warranted only if the factor is present to a degree "substantially in excess of . . . that which is ordinarily involved in" the offense.³⁴

While federal public defenders and other criminal defense attorneys challenged the Guidelines as unconstitutional from their inception, the courts repeatedly upheld them until *Booker*. *Booker* radically changed federal sentencing law by deeming the mandatory Guidelines regime unconstitutional and rendering the Guidelines merely advisory.³⁵

Booker suddenly gave new life to the sentencing statute, § 3553(a), which had been rendered all but irrelevant during the mandatory Guidelines regime. Post-*Booker*, § 3553(a) has become the federal sentencing touchstone.³⁶ The overriding mandate of § 3553(a) is that federal district judges impose a sentence "sufficient, but not greater than necessary" to comply with the four purposes of sentencing set out in § 3553(a)(2): retribution, deterrence, incapacitation, and rehabilitation.³⁷ This is known as the "parsimony provision," which the Supreme Court has observed is the "overarching provision" of federal sentencing.³⁸ A judge must consider the § 3553(a)(2) factors "when determining *both* whether to imprison an offender *and* what length of term to give him."³⁹ The sentencing statute also directs judges to

³² *Id.*

³³ See, e.g., *United States v. Williams*, 65 F.3d 301, 305 (2d Cir. 1995) ("[A]lthough the Guidelines afford the district court flexibility in sentencing, the power to depart is to be used sparingly and is reserved for unusual cases.") (citations and quotations omitted); *United States v. Omar*, 16 F.3d 1168, 1171 (11th Cir. 1994) ("The guidelines provide the sentencing court with power to depart where a strict guideline sentence would not adequately reflect the particular nature of the defendant's conduct, but they caution that courts should use this power sparingly where offense conduct is already reflected in the applicable guideline and adjustments.")

³⁴ Grounds for Departure (Policy Statement), 18 U.S.C. app. § 5K2.0 (2003).

³⁵ *United States v. Booker*, 543 U.S. 220 (2005).

³⁶ See *Pepper v. United States*, 562 U.S. 476 (2011).

³⁷ 18 U.S.C. § 3553(a)(1) (2012).

³⁸ *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

³⁹ *Tapia v. United States*, 564 U.S. 319, 328 (2011) (emphasis in original).

consider factors such as the nature and circumstances of the offense and the defendant's history and characteristics.⁴⁰

By returning such traditional factors to prominence in sentencing, *Booker* enables judges and lawyers to engage in a dialogue that will not frustrate the participants or the public but rather satisfy their deepest intuitions about what sentencing should involve. Equally important, after *Booker*, a lawyer's arguments and a defendant's allocution are no longer a charade because they may actually have an impact on a judge's sentence.⁴¹

Post-*Booker*, defense counsel have a critical role to play at sentencing. They must explain to judges why § 3553(a) compels a sentence below the applicable Guidelines range. The judge must address all of counsel's nonfrivolous arguments for a non-Guidelines sentence under § 3553(a).⁴² If the judge rejects those arguments, he must "go further and explain why he has rejected those arguments."⁴³ This puts the burden on the defense counsel to raise nonfrivolous sentencing arguments on a client's behalf. Defense counsel should use § 3553(a)'s entire arsenal to do so.

B. THE HISTORY OF § 3553(a)(2)(D) AND DISTRICT COURTS' CONSIDERATION OF REHABILITATION AT SENTENCING

The plain language of the sentencing statute makes clear that Congress intended district court judges to take a defendant's rehabilitation needs seriously at sentencing. Section 3553(a)(2)(D) requires a district judge to "consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."⁴⁴

A key Senate report demonstrated that including rehabilitation as a sentencing consideration in the SRA was met with some resistance and was not

⁴⁰ See 18 U.S.C. § 3553(a)(1). Section 3553(a) directs courts to consider seven factors:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the [advisory guideline] range . . . ;
- (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . ;
- (6) the need to avoid unwarranted sentence disparities . . . ; and
- (7) the need to provide restitution to any victims of the offense.

⁴¹ Adelman & Deitrich, *supra* note 31, at 523.

⁴² See *Rita v. United States*, 551 U.S. 338, 356–57 (2007).

⁴³ *Id.* at 339.

⁴⁴ 18 U.S.C. § 3553(a)(2)(D) (2012).

a foregone conclusion. In fact, “arguments were advanced that rehabilitation should be eliminated completely as a purpose of sentencing.”⁴⁵ However, this view was “rejected,”⁴⁶ and Congress instead granted the principle of rehabilitation equal status with three other purposes of punishment: retribution, general deterrence, and specific deterrence.⁴⁷

Some, who advocated to remove rehabilitation from the calculus, were driven by a concern that prison sentences did not advance the goal of rehabilitation. “According to Senate Report 98-225, decades of experience with indeterminate sentencing, resulting in the release of many inmates after they completed correctional programs, had left Congress skeptical that ‘rehabilitation can be induced reliably in a prison setting.’”⁴⁸

In response to this concern, in the SRA, “Congress barred courts from considering rehabilitation in imposing prison terms, but not in ordering other kinds of sentences.”⁴⁹ As the Senate Report explained, rather than rejecting rehabilitation entirely, “the committee . . . retained rehabilitation and corrections as an appropriate purpose of a sentence, while recognizing, in light of current knowledge, that imprisonment is not an appropriate means of promoting correction and rehabilitation.”⁵⁰ Congress codified the point that incarceration does not promote rehabilitation at 18 U.S.C. § 3582, which states that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”⁵¹

Two key principles regarding rehabilitation are thus enshrined in the SRA. First, rehabilitation is a legitimate aim of sentencing, and judges are required to consider a defendant’s need for rehabilitation in imposing sentence and fashioning sentences that provide rehabilitation “in the most effective manner.”⁵² Second, prison does not advance the goal of rehabilitation. As the Third Circuit has explained, § 3553(a)(2)(D) and § 3582 operate in harmony: “[C]ourts must consider a defendant’s need for rehabilitation when devising an appropriate *sentence* (pursuant to § 3553(a)(2)(D)), but may not carry out that goal by *imprisonment* (pursuant to § 3582(a)).”⁵³

The Supreme Court reaffirmed these core principles in *Tapia v. United States*, which holds that § 3582(a) statutorily prohibits a federal judge from imposing or lengthening a prison sentence in order to foster a defendant’s rehabilitation.⁵⁴ The Court reached this holding in part because Congress did not enact “any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs.”⁵⁵ Rather, once a defendant is sentenced to a prison term, the BOP has “plenary control” over such things as place of imprisonment and treatment programs.⁵⁶ In contrast, a judge can

⁴⁵ S. REP. 98-225, *supra* note 21, at 76.

⁴⁶ *Id.*

⁴⁷ See 18 U.S.C. § 3553(a)(2) (2012).

⁴⁸ *Tapia v. United States*, 564 U.S. 319, 331–32 (2011) (citing S. REP. 98-225, *supra* note 21, at 38).

⁴⁹ *Id.* at 332 (citations omitted).

⁵⁰ S. REP. 98-225, *supra* note 21, at 76 (citations omitted).

⁵¹ 18 U.S.C. § 3582(a) (2012).

⁵² § 3553(a)(2)(D).

⁵³ *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007) (emphasis in original).

⁵⁴ *Tapia*, 564 U.S. at 319.

⁵⁵ *Id.* at 330.

⁵⁶ *Id.* at 331.

impose conditions of probation or supervised release that *require* mental health treatment, drug and alcohol treatment, or other rehabilitative programming.⁵⁷

Moreover, the SRA instructed the Sentencing Commission to write Sentencing Guidelines that advance the second core principle. Specifically, the SRA directed the Commission to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”⁵⁸ As the *Tapia* Court noted, these three statutory provisions—§ 3553(a)(2)(D), § 3582(a), and 28 U.S.C. § 994(k)—all work together to send “each actor at each stage in the sentencing process . . . the same message: Do not think about prison as a way to rehabilitate an offender.”⁵⁹

II. THE PROBLEM

A. THE BUREAU OF PRISONS' OVERCROWDING AND STAFFING SHORTAGES COMPROMISE ITS ABILITY TO PROVIDE THE “MOST EFFECTIVE” MEDICAL AND MENTAL HEALTH CARE AND OTHER TREATMENT AND REHABILITATION

The on-the-ground evidence from the federal prison system illustrates that the SRA's drafters were prudent to eliminate prison as a locus of rehabilitation and treatment. It has become clear that the BOP is not equipped to provide inmates with some of the most basic treatment and rehabilitative services, including effective medical care and mental health care. Not only are judges statutorily prohibited from sentencing a defendant to prison to effectuate § 3553(a)(2)(D)'s directive to provide “care . . . in the most effective manner,”⁶⁰ but the evidence shows that the care within the BOP system falls woefully below that standard.

As of 2018, there are approximately 181,000 inmates in federal custody.⁶¹ Although this is a decrease from past years, the DOJ's Inspector General warned in 2014 of a “persistent” BOP crisis, fueled by costs that “will continue to increase in the years ahead, consuming a large share of the Department's budget,” and “significant[] overcrowd[ing],” which raises “a number of

⁵⁷ See 18 U.S.C. § 3563(b) (2012) (noting that a judge may impose as a discretionary condition of probation that the defendant “undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency” as long as the condition is “reasonably related to the factors set forth in sections 3553(a)(1) and (a)(2) . . . and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2)"); 18 U.S.C. § 3583(d) (2012) (permitting a judge to order as a condition of supervised release “any condition set forth as a discretionary condition of probation in section 3563(b) . . . and any other condition it considers to be appropriate” as long as it complies with the factors set out in § 3583(d)(1)–(3), and does not otherwise run afoul of § 3583(d)).

⁵⁸ 28 U.S.C. § 994(k) (2012).

⁵⁹ *Tapia v. United States*, 564 U.S. 319, 330 (2011).

⁶⁰ 18 U.S.C. § 3553(a)(2)(D) (2012).

⁶¹ See Federal Bureau of Prisons, *Statistics*, BOP, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Nov. 1, 2018).

important safety and security issues.”⁶² In particular, the Inspector General noted the high costs spent on healthcare services; in fiscal year 2013, the BOP spent over \$1 billion on inmate healthcare services.⁶³ He also highlighted prison overcrowding as “the most significant threat to the safety and security of Bureau of Prisons staff and inmates.”⁶⁴ The *Colson Report* concurred:

Despite the increase in spending and recent population reductions, the BOP continues to struggle under the weight of overcrowding and its harmful impacts. Staffing is insufficient to maintain a safe and secure environment, resulting in dangerous conditions for corrections officers and the men and women they oversee.⁶⁵

In particular, the report noted that overcrowding compromises the BOP’s ability to provide even “adequate programming, treatment, and case management.”⁶⁶

The BOP is required to provide “necessary” medical and mental health care for the inmates in its custody. Its most recent Program Statement on Health Services Administration states that the “purpose and scope” is to “deliver medically necessary health care to inmates effectively in accordance with proven standards of care without compromising public safety concerns, inherent to the Bureau’s overall mission.”⁶⁷ However, nowhere does the BOP define the standard of care to which it adheres or explain what it considers to be best practices.

Prior to June 20, 2013, consulting physicians and dentists working within the BOP system were required to hold a current license “in the state where services are provided.”⁶⁸ Now, in order to recruit more doctors, the BOP requires a “current and valid professional license from any state.”⁶⁹ The Program Statement notes the tension in providing medical care in a correctional setting: “[T]here may be an incompatibility between medical and correctional guidelines; conflicts related to medical care should be resolved, as far as practical, in favor of medicine. At the same time the medical staff must

⁶² Andrew Cohen, *Obama’s Prison Crisis*, MARSHALL PROJECT (Nov. 17, 2014), <https://www.themarshallproject.org/2014/11/17/a-crisis-at-the-bureau-of-prisons-persists-says-doj-watchdog>; see also COLSON REPORT, *supra* note 7, at 1 (“Federal prison costs have spiked as well, growing at almost twice the rate of the rest of the US Department of Justice (DOJ) budget and threatening to undermine other funding priorities.”).

⁶³ Cohen, *supra* note 62.

⁶⁴ *Id.* The Inspector General explained that the DOJ “would have to achieve a net reduction of about 23,400 federal prisoners from the June 2014 prison population” in order to bring the ratio of inmate to space available to appropriate levels and eliminate overcrowding. *Id.* The population in 2014 was approximately 213,461 inmates; in light of the 2018 numbers, it appears that the DOJ has met its goal.

⁶⁵ COLSON REPORT, *supra* note 7, at 1.

⁶⁶ *Id.*

⁶⁷ U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 6010.05, HEALTH SERVICES ADMINISTRATION, at 1 (June 26, 2014), [hereinafter STATEMENT NO. 6010.05] https://www.bop.gov/policy/progstat/6010_005.pdf.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.*

be part of the institution's correctional team."⁷⁰ The BOP is also clear that "[m]edical services . . . will be obtained at the lowest possible cost."⁷¹

The BOP faces numerous challenges in providing adequate, let alone effective, medical care to inmates.⁷² A 2016 report from the Office of the Inspector General highlighted staffing shortages as one of the biggest problems: "[R]ecruitment of medical professionals is one of the BOP's greatest challenges and staffing shortages limit inmate access to medical care, result[ing] in an increased need to send inmates outside the institution for medical care, and [contributing] to increases in medical costs."⁷³ As a result, "from fiscal year (FY) 2010 to FY 2014, the BOP's total medical staff was approximately 17 percent less than what the BOP projected was necessary to provide what it considers to be 'ideal' care."⁷⁴ Again it is unclear what the BOP's definition of "ideal" care is; that term is not defined. Regardless, the Inspector General's report is troubling.

The BOP's structure for providing medical treatment to inmates poses challenges for delivering the "most effective" care to all inmates. The BOP defines five levels of care for inmates.⁷⁵ Inmates who are sentenced to fewer than twelve months in custody are completely ineligible for three of the five levels of care.⁷⁶ Thus, inmates who are sentenced to fewer than twelve months in custody are only eligible for treatment for medical conditions that the BOP considers "of an immediate, acute, or emergent nature, which without care would cause rapid deterioration of the inmate's health" or those that are "not immediately life-threatening but which without care the inmate could not be maintained without significant risk of: Serious deterioration leading to premature death . . . [s]ignificant reduction in the possibility of repair later without present treatment . . . or [s]ignificant pain or discomfort which impairs the inmate's participation in activities of daily living."⁷⁷

The BOP's difficulties in meeting its inmates' medical needs are exacerbated because the age of the federal prison population is increasing,

⁷⁰ *Id.* at 2; accord Samantha Hoke, *Mental Illness and Prisoners: Concerns for Communities and Healthcare Providers*, 20 ONLINE J. ISSUES NURSING 1, 7 (Jan. 31, 2015) ("Perhaps the most obvious hurdle to providing mental health treatment is the mission of corrections: to maintain security within the institution, providing a safe environment for both staff and inmates. For instance, a core value of the Federal Bureau of Prisons is correctional excellence. This means all employees, even healthcare providers are correctional workers first. . . . However, healthcare providers within corrections also have their own mission of providing the best possible care to their patients. Balancing this dual mission is often a challenge for healthcare providers.").

⁷¹ STATEMENT NO. 6010.05, *supra* note 67, at 3.

⁷² See COLSON REPORT, *supra* note 7, at 1.

⁷³ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MEDICAL STAFFING CHALLENGES, at i (Mar. 2016) [hereinafter BOP MEDICAL STAFFING CHALLENGES]; see also *id.* at 15 ("The BOP's inability to recruit and retain medical professionals has led to institutions operating at unfavorable staffing levels."); U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS, at 17 (revised Feb. 2016) [hereinafter BOP AGING PRISON POPULATION] (explaining the difficulties of hiring medical staff in urban and rural areas).

⁷⁴ BOP MEDICAL STAFFING CHALLENGES, *supra* note 73, at 1.

⁷⁵ See U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 6031.04, PATIENT CARE, at 5-7 (June 3, 2014), https://www.bop.gov/policy/progstat/6031_004.pdf.

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* at 5-6.

even as the overall population is decreasing.⁷⁸ Predictably, aging inmates are “more costly to incarcerate [than their younger counterparts], primarily due to their increased medical needs.”⁷⁹ They incur more medical costs due to “chronic health problems,” which require “increased visits to medical clinics inside the institution and medical trips outside the institution.”⁸⁰ Because of staffing shortages and BOP overcrowding, “aging inmates experience delays in receiving medical care.”⁸¹

Unfortunately, the BOP’s compassionate release program does not provide a sufficient backstop for inmates whose medical needs outstrip the BOP’s demonstrably limited treatment capabilities. Compassionate release, which Congress authorized in the SRA, allows federal inmates to petition the BOP for early release if they present “extraordinary and compelling” reasons.⁸² If the request is approved, the BOP then asks a federal judge for a sentencing reduction. The BOP’s grants of compassionate release are extremely rare. In response to the inquiry of a bipartisan group of senators regarding the BOP’s use of compassionate release,⁸³ the BOP revealed that it had granted only 306 compassionate release requests and denied 2,405 since 2014.⁸⁴ A broad spectrum of people recently urged the Sentencing Commission, which is responsible for setting the criteria for what qualifies as “extraordinary and compelling,” to study the compassionate release program. The Sentencing Commission declined to do so.⁸⁵ On December 21, 2018, President Donald

⁷⁸ See Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TR. (Feb. 20, 2018), <http://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

⁷⁹ BOP AGING PRISON POPULATION, *supra* note 73, at i. The Inspector General defines inmates age fifty and older as “aging.” *Id.* at 1. According to the BOP’s Assistant Director for Health Services and Medical Director, “inmates in their fifties and sixties place the greatest burden on the BOP because their numbers are increasing and many of them have significant health problems stemming from years of substance abuse.” *Id.* at 11.

⁸⁰ *Id.* at 14. Overtime costs paid to correctional officers who escort inmates to such appointments “is a significant budget item.” *Id.* at 15.

⁸¹ *Id.* at ii. Using the BOP data from one institution, the Inspector General found the average wait time for inmates to be seen by an outside medical specialist for cardiology, neurosurgery, pulmonology, and urology was 114 days. *Id.* at 18. The wait time at this institution increased to 265 days “for those inmates waiting to see outside specialists for additional or routine appointments.” *Id.* Interviews with BOP staff in relation to the Inspector General’s report on the aging inmate population revealed troubling information about the BOP’s ability to provide care in the “most effective manner”: “A Case Manager at a nonmedical institution told us that the institution was ‘over a thousand inmates behind’ in servicing those enrolled in chronic care clinics. An aging inmate told us that the health services staff at his institution is ‘inundated’ with requests for care and that, while they work hard, they can only do so much.” *Id.* at 17.

⁸² *Id.* at 43.

⁸³ Letter from Senators to Acting BOP Director Dr. Thomas R. Kane, and The Hon. J. Rod Rosenstein (Aug. 3, 2017), [https://www.schatz.senate.gov/imo/media/doc/2017.08.03 Letter to BOP and DAG re. Compassionate Release FINAL.pdf](https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and%20DAG%20re.%20Compassionate%20Release%20FINAL.pdf).

⁸⁴ Letter from Stephen E. Boyd, Assistant Att’y Gen., to The Hon. Brian Schatz, Sen. (Jan. 16, 2018), <https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf>.

⁸⁵ Proposed Priorities for Amendment Cycle, 83 Fed. Reg. 30477 (June 28, 2018) (proposing to study whether the compassionate release guideline, § 1B1.13, “effectively encourages the Director of the Bureau of Prisons to file a motion for compassionate release when ‘extraordinary and compelling reasons’ exist”); U.S. SENTENCING COMM’N, FEDERAL REGISTER NOTICE OF FINAL 2018–2019 PRIORITIES, <https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-final-2018-2019-priorities> (last visited Oct. 28, 2018) (excluding proposed compassionate release study from final list of priorities).

Trump signed the First Step Act of 2018 into law. The First Step Act aims to increase “the use and transparency of compassionate release” by broadening eligibility and removing sole discretion for determining who is eligible for compassionate release from the BOP.⁸⁶ It remains to be seen how these changes will be implemented and whether the use of compassionate release will increase.

The BOP is also unable to provide mental health treatment in “the most effective manner.” Mental health problems are rampant in the federal prison population. A 2006 Department of Justice (DOJ) study⁸⁷ found that approximately 44.8% of all federal inmates have some mental health problem.⁸⁸ According to the study, female inmates had a higher rate of mental health problems than male inmates: 61% compared to 44%.⁸⁹ Prisons are extremely ill-suited to treat mental illness. They are premised on “social control” and “are not remotely compatible with the kind of supportive therapeutic milieus that the mentally ill require. They are austere and intimidating environments that are painful and difficult for even the strongest and most resilient prisoners to withstand.”⁹⁰

The BOP Psychology Services Department is structured in a way that makes providing “the most effective” care impossible. According to the BOP’s Psychology Services Manual, the responsibilities of the BOP psychologists are ranked by priority. The psychologists are directed to give first priority to crisis intervention, suicide prevention, treatment of severely mentally ill inmates, treatment of BOP employees, and the initial screening of inmates.⁹¹ Brief counseling, individual psychotherapy, and group therapy—the treatment options that an inmate can request by self-referral—are all prioritized after these more emergent mental health issues.⁹² Even in the second tier, whether an inmate can even get individual and group therapy is contingent upon five factors: (1) the type of psychological program(s) diagnosed; (2) limits on professional expertise; (3) the inmate’s motivation to participate in treatment; (4) departmental staffing levels; and (5) departmental priorities.⁹³ Ultimately, “[m]ental health providers in Psychology Services make the final determination regarding who will receive psychological care, and the nature of

⁸⁶ First Step Act of 2018, s. 756, 115th Cong. (Dec. 21, 2018) (enacted).

⁸⁷ This report appears to be the only report that the DOJ has prepared on the number of people in federal prison that have a mental health problem, in spite of the importance of the issue.

⁸⁸ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 213600, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, at 4 (tbl. 3) (Sept. 2006). In this study, mental health problems “were defined by two measures: a recent history or symptoms of a mental health problem. They must have occurred in the 12 months prior to the interview. A recent history of mental health problems included a clinical diagnosis or treatment by a mental health professional. Symptoms of a mental disorder were based on criteria specified in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV).” *Id.* at 1.

⁸⁹ *Id.* at 4 (tbl. 3).

⁹⁰ STAN. LAW SCH. THREE STRIKES PROJECT, DARRELL STEINBERG, DAVID MILLS & MICHAEL ROMANO, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? 7, https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report_v12.pdf (last visited Oct. 28, 2018).

⁹¹ See U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5310.17, PSYCHOLOGY SERVICES MANUAL, at 4–5 (Aug. 25, 2016), https://www.bop.gov/policy/progstat/5310_017.pdf.

⁹² *Id.* at 5.

⁹³ *Id.* at 19.

the care they will receive.”⁹⁴ This means that for inmates with mental health issues, there is simply no guarantee that they will receive *any* treatment, which is directly at odds with § 3553(a)(2)(D)’s mandate.

The Office of the Inspector General recently criticized the BOP’s provision of mental health treatment. A 2017 report on the BOP’s use of restrictive housing for inmates with mental illness noted that as of 2015, BOP data showed that only “3 percent of the . . . inmate population was being treated regularly for mental illness.”⁹⁵ The report also highlighted an odd development. The BOP adopted a new mental health policy in 2014, which increased the standards of care for treating inmates with mental illness. Yet, after the policy, “the total number of inmates who receive regular mental health treatment decreased by approximately 30 percent, including 56 percent for inmates in [special management units] SMUs, and about 20 percent overall for inmates in [restricted housing units] RHUs during the scope of our review.”⁹⁶ The Inspector General’s report stated:

Based on our review, it appears that mental health staff may have reduced the number of inmates, including those in RHUs, who must receive regular mental health treatment because they did not have the necessary staffing resources to meet the policy’s increased treatment standards. Indeed, we found that, as of October 2015, the BOP had filled only 57 percent of its authorized full-time Psychiatrist positions nationwide and that it had significant staffing issues with regard to Psychologist positions as well.⁹⁷

Moreover, the BOP’s mental health staff members do not invariably document inmates’ mental illnesses. Therefore, the BOP cannot accurately assess the number of inmates with mental illness and ensure that such inmates receive appropriate care.⁹⁸

In addition, the BOP’s ability to provide rehabilitative programming to inmates in need has been seriously compromised by long waiting lists and restrictions on program eligibility. These challenges greatly impact whether the BOP can provide other rehabilitative services in the “most effective manner.”⁹⁹ The BOP’s 500-Hour Residential Drug Abuse Program (RDAP)—one of the BOP’s more well-reputed programs—has restrictions on eligibility, including the inmate’s having at least twenty-four months of his or her sentence

⁹⁴ *Id.* at 12.

⁹⁵ U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS, at ii (July 2017), <https://oig.justice.gov/reports/2017/e1705.pdf> - page= [hereinafter RESTRICTIVE HOUSING FOR INMATES].

⁹⁶ *Id.* at iii.

⁹⁷ *Id.*; see also Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, MARSHALL PROJECT (Nov. 21, 2018), <https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons> (quoting a former BOP psychologist who said that after the 2014 policy change “staff members scrutinized inmates to see if they could safely lower care levels to decrease their caseloads.”).

⁹⁸ RESTRICTIVE HOUSING FOR INMATES, *supra* note 95, at 34.

⁹⁹ See 18 U.S.C. § 3553(a)(2)(D) (2012).

remaining in an ordinary case.¹⁰⁰ Moreover, not all BOP facilities offer RDAP.¹⁰¹ Other vocational programs have waiting lists. For example, the waiting list for the BOP's literacy program is approximately 16,000.¹⁰² The *Colson Report* recommended that the BOP “immediately expand educational and occupational opportunities in response to demonstrated need across its facilities.”¹⁰³ While the recently-enacted First Step Act of 2018 authorizes funding for rehabilitative programming,¹⁰⁴ it remains to be seen whether (and when) Congress will appropriate the funding. “According to multiple Inspector General and Government Accounting Office reports, the [BOP] has a long track record of failing to follow Congress’ intent on reform[.]”¹⁰⁵

Finally, DOJ priorities influence and shape the BOP's direction. Under Attorney General Jeff Sessions, the DOJ cut budgets and staff, and closed at least nineteen halfway houses,¹⁰⁶ even though BOP facilities are 16% overcrowded.¹⁰⁷ The Department also changed its charging priorities. Previously, under Attorney General Eric Holder, the DOJ launched the *Smart on Crime Initiative*, which directed federal prosecutors to, among other things, avoid overcharging low-level drug arrestees with offenses that carry mandatory

¹⁰⁰ *Frequently Asked Questions about the Residential Drug Abuse Program (RDAP)*, FAMM (May 3, 2012), <https://famm.org/wp-content/uploads/FAQ-Residential-Drug-Abuse-Program-5.3.pdf>. In practice, this means that people who are sentenced to less than twenty-four months in prison are not able to participate in RDAP. This was an issue that vexed the district court judge in *Tapia*. The judge strongly believed the defendant needed drug treatment and imposed a high-end Guidelines sentence in part so that the prison term was “long enough to qualify for and complete” the RDAP program. *Tapia v. United States*, 564 U.S. 319, 321 (2011). The BOP's program statement on RDAP and drug treatment is available at U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., EARLY RELEASE PROCEDURES UNDER 18 U.S.C. § 3621(E) (Mar. 16, 2009), https://www.bop.gov/policy/progstat/5331_002.pdf.

¹⁰¹ FAMM, *supra* note 100.

¹⁰² U.S. DEP'T OF JUSTICE, FED. PRISON SYSTEM, FY 2019 PERFORMANCE BUDGET, CONG. SUBMISSION 12 at 27, <https://www.justice.gov/jmd/page/file/1034421/download> (last visited Oct. 28, 2018) [hereinafter BOP PERFORMANCE BUDGET].

¹⁰³ COLSON REPORT, *supra* note 7, at 34.

¹⁰⁴ First Step Act of 2018, s. 756, 115th Cong. (Dec. 21, 2018) (enacted).

¹⁰⁵ Justin George, *Okay, What's the Second Step?* MARSHALL PROJECT (Dec. 19, 2008), https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step?utm_medium=social&utm_campaign=share-tools&utm_source=twitter&utm_content=post-top.

¹⁰⁶ In January 2017, BOP hiring was frozen, and the freeze became permanent a year later. During that time, the BOP eliminated 6,000 positions nationwide, a 14% staffing decrease. See Taylor Dolven, *Trump's Cuts to Federal Prison "Decimates" Jobs*, VICE NEWS (Feb. 13, 2018), https://news.vice.com/en_ca/article/wj4jbm/trumps-cuts-to-federal-prison-system-decimates-jobs. Paula Chavez, who teaches educational courses at Federal Correctional Institution-Big Spring (Texas) has been “asked to do unfamiliar jobs such as medical and guard duty. She said she's often pulled out of the classroom to work alone in a housing unit monitoring 300 inmates.” *Id.* This is known as “augmentation”—shuffling education, kitchen, and medical staff around to cover essential guard positions.” *Id.*; see also BOP PERFORMANCE BUDGET, *supra* note 102 (“The BOP's operational maxim also allows non-custody staff to assume the duties of Correctional Officers during inmate disturbances, or because of long or short-term custody staff shortages.”); Kevin Johnson, *Exclusive: As Federal Prisons Run Low on Guards, Nurses and Cooks are Filling In*, USA TODAY (Feb. 13, 2018), <https://www.usatoday.com/story/news/politics/2018/02/13/ill-equipped-and-inexperienced-hundreds-civilian-staffers-assigned-guard-duties-federal-prison-secur/316616002/>; Thompson & Elizabeth Eldridge, *supra* note 97 (noting that “[s]taffing shortages elsewhere in the federal prison system have forced the bureau to require some counselors to serve as corrections officers, a situation that worsened under the Trump administration after a lengthy hiring freeze designed to cut spending”).

¹⁰⁷ BOP PERFORMANCE BUDGET, *supra* note 102, at 7.

minimum sentences.¹⁰⁸ On May 10, 2017, Sessions rescinded Holder's directive regarding drug mandatory minimums and ordered federal prosecutors to "charge and pursue the most serious, readily provable offense . . . By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences."¹⁰⁹ Under this new charging policy, the average sentence for federal drug offenders grew by 6%, after falling by 15% between 2009 and 2016.¹¹⁰ Drug offenses remain the most common inmate offense, at 46%.¹¹¹ These recent changes only add to the BOP's challenges in providing rehabilitation and treatment to federal inmates.

B. FEDERAL COURTS APPROACH § 3553(a)(2)(D)'S MANDATE INCONSISTENTLY AND OFTEN FAIL TO RECOGNIZE THE BOP'S LIMITATIONS ON PROVIDING "THE MOST EFFECTIVE" REHABILITATION AND TREATMENT

It is clear that the BOP faces serious challenges in attempting to deliver adequate, let alone effective, physical and mental health care and other correctional treatment. Even for other programs that are well-established, like RDAP, there are barriers, such as limits on eligibility. These challenges directly relate to § 3553(a)(2)(D)'s mandate that district courts consider, as one of the sentencing factors, what sentence will "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."¹¹²

Some district courts and courts of appeals take § 3553(a)(2)(D)'s rehabilitation mandate seriously. But many courts undervalue § 3553(a)(2)(D) and discount the BOP's limitations in providing rehabilitation and treatment in the sentencing analysis rather than faithfully abiding by the statutory mandate. Even more troubling, some courts ignore the statutory command altogether, thus violating the law. Other courts use their discretion to balance the § 3553(a) factors, such that even defendants who present strong evidence of the need for a non-prison sentence to effectuate rehabilitation will receive prison time for other reasons.¹¹³

1. Courts of Appeals' Approach 1: Taking § 3553(a)(2)(D) Seriously

¹⁰⁸ Memorandum from Eric Holder, Att'y Gen., to United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf>.

¹⁰⁹ Memorandum from Jeff Sessions, Att'y Gen., to All Federal Prosecutors (May 10, 2017) [hereinafter Sessions Memo], <https://www.justice.gov/opa/press-release/file/965896/download>.

¹¹⁰ See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 13 (2009–2017) (demonstrating that average sentences were 77.9 months in 2009, sixty-six months in 2016, and seventy months in 2017).

¹¹¹ BOP PERFORMANCE BUDGET, *supra* note 102, at 6.

¹¹² 18 U.S.C. § 3553(a)(2)(D) (2012).

¹¹³ In some federal districts, sentencing filings are not public. Thus, for the cases discussed below, it is not always possible to know how and to what extent defense counsel raised the § 3553(a)(2)(D) issue beyond what is in the appellate record.

A minority of courts of appeals value § 3553(a)(2)(D)'s mandate and show a willingness to uphold non-incarceration sentences that permit defendants to receive rehabilitation and treatment in the community.

The Third Circuit has strongly endorsed a district court's obligation to consider rehabilitation pursuant to § 3553(a)(2)(D). For example, in *United States v. Manzella*, the Third Circuit confirmed that § 3553(a)(2)(D)'s statutory demand is not permissive; rather that "courts must consider a defendant's need for rehabilitation when devising an appropriate *sentence* . . . but may not carry out that goal by *imprisonment*."¹¹⁴

The Third Circuit has also endorsed a robust review of the district courts' § 3553(a)(2)(D) analysis on appeal. In *United States v. Olhovsky*, the defendant was sentenced to six years in prison for possessing child pornography, in part because the district court found that "at a minimum, both incarceration and custodial treatment are required."¹¹⁵ Defense counsel argued for probation based on, among other things, the defendant's successful out-of-custody mental health treatment and the problems with BOP's psychiatric treatment. In support of these arguments, defense counsel submitted two reports from the defendant's treating therapists, who attested to the success of the defendant's out-of-custody treatment. The district court rejected defense counsel's sentencing request and opined, contrary to the reports, that "*it appears that prior [treatment] efforts have largely failed*."¹¹⁶ The Third Circuit noted that:

It is not at all clear what (if any) basis the court had for making the italicized statement. We have discussed the only evidence of treatment that appears on this record, and nothing suggests that "prior efforts have largely failed." In fact, the entire record is to the contrary. The only mental health professionals who actually interviewed, tested or treated Olhovsky concluded that he was quite responsive to treatment. Indeed, not even the government's expert concluded that Olhovsky's treatment has "failed."¹¹⁷

Ultimately, the court remanded the case for resentencing because it was "not at all apparent that the court actually considered the lengthy, very specific and highly positive reports of any of the three defense experts. Rather, the court focused on incapacitation, deterrence and punishment to the exclusion of other sentencing factors."¹¹⁸ Moreover, the court criticized the district court's approach to § 3553(a)(2)(D) because there was "no indication that the district court considered the [defense psychiatrist's] opinion that" the defendant would "regress terribly" if incarcerated.¹¹⁹ The court explained that pursuant to § 3553(a)(2)(D), "the record must reflect the reason for believing that treatment

¹¹⁴ *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007) (emphasis in original).

¹¹⁵ *United States v. Olhovsky*, 562 F.3d 530, 542 (3d Cir. 2009).

¹¹⁶ *Id.* (emphasis in original).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 547.

¹¹⁹ *Id.* at 549.

in prison would ‘provide . . . correctional treatment in the most effective manner’ despite [the defense psychiatrist’s] opinion to the contrary.”¹²⁰

The Ninth Circuit follows a similar pattern. In *United States v. Autery*, the court made clear that district courts have ample discretion to consider and weigh rehabilitation and § 3553(a)(2)(D)’s mandate to impose a sentence that will provide “the most effective” treatment.¹²¹ The defendant in *Autery* was sentenced to five years’ probation in part because the district court concluded that incarceration would “undermine” the defendant’s rehabilitation.¹²² The Ninth Circuit concluded that “rehabilitation was one of the factors most carefully considered by the district court . . . and its conclusion that [the defendant’s] prospects for rehabilitation are greater out of prison than in is not unreasonable.”¹²³ The court specifically rejected the dissent’s argument that the district court “failed to articulate exactly why effective outpatient treatment cannot be provided in a federal prison.”¹²⁴ In other words, under Ninth Circuit precedent, the district court need not make a finding that the BOP cannot provide adequate or effective treatment, but instead need only make a finding that the defendant can receive “the most effective” treatment out of custody.

In this way, the Ninth Circuit is quite deferential to a district court’s finding that the defendant will receive “the most effective” treatment out of custody, as *United States v. Edwards* illustrates.¹²⁵ The defendant in *Edwards* was sixty-three years old and living with diabetes and other related medical conditions.¹²⁶ Although the district court found that the BOP was *capable* of providing medical care, it concluded that a sentence of probation would provide the needed care in the most effective manner in accordance with § 3553(a)(2)(D).¹²⁷ The Ninth Circuit upheld the district court’s sentence as substantively reasonable.¹²⁸

Similarly, in *United States v. Maier*—a Second Circuit case—the district court granted a downward departure and sentenced the defendant to probation, in part because the court determined that if the defendant were incarcerated, she would not receive drug treatment “in an effective manner.”¹²⁹ The district judge had emphasized his statutory authority to depart from the Guidelines as well as § 3553(a)(2)(D)’s statutory command to consider the provision of

¹²⁰ *Id.*; see also *United States v. Brown*, 429 F. App’x 82 (3d Cir. 2011). In *Brown*, the Third Circuit remanded the case for resentencing where the district court did not “sufficiently explain” why it believed the BOP could provide specialized cardiology treatment that the defendant’s doctor “testified he needed but that the prison appears not to be able to deliver.” *Id.* at 86. Accordingly, it was “unclear” how the custodial sentence would satisfy § 3553(a)(2)(D). *Id.*

¹²¹ *United States v. Autery*, 555 F.3d 864, 876–77 (9th Cir. 2009).

¹²² *Id.* at 877. The defendant’s Guidelines range was forty-one to fifty-one months. *Id.* at 867. The government recommended a fifty-one month sentence and defense counsel “urged the court to impose a sentence at the bottom of the Guidelines range.” *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *United States v. Edwards*, 595 F.3d 1004, 1011 (9th Cir. 2010).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1018. The Ninth Circuit made clear it was giving “due deference” to the district court’s application of § 3553(a) and noted that the district court sufficiently addressed the history and characteristics of the defendant, specific and general deterrence, protection of the public, and the need to avoid unwarranted sentencing disparities. *Id.* at 1015–18.

¹²⁹ *United States v. Maier*, 975 F.2d 944, 946 (2d Cir. 1992).

treatment in the most effective manner.¹³⁰ In an important holding, the *Maier* court concluded that such a rehabilitation-based departure was permissible. It noted that because “rehabilitation may not be a basis for incarceration but must be considered as a basis for a sentence, Congress must have anticipated that sentencing judges would use their authority, in appropriate cases, to place a defendant on probation in order to enable him to obtain ‘needed . . . medical care, or other correctional treatment in the most effective manner.’”¹³¹

The Seventh Circuit has affirmed that § 3553(a)(2)(D) can be an important sentencing consideration, but it expects such arguments to be documented with ample evidence that the BOP is unable to effectively treat the defendant. For example, in *United States v. Tapes*, the defendant argued for a below-Guidelines sentence because of serious medical issues, including blindness in one eye, losing vision in his other eye, glaucoma, and the need for multiple surgeries while in pre-trial custody.¹³² The district court did not grant the defendant’s request for a lower sentence, in light of the seriousness of the offense and the defendant’s extensive criminal history. The district court specifically acknowledged that it had taken into account the defendant’s age, physical ailments, and physical condition.¹³³

The Seventh Circuit rejected the defendant’s claim that the sentence was procedurally unreasonable because the district court had not properly considered his medical problems. In particular, the court faulted the defendant for not offering “a cogent argument as to why that characteristic should be deemed a mitigating rather than aggravating factor.”¹³⁴ As to the argument that the sentence was substantively unreasonable, the court faulted the defendant for failing to “show[] some [special] link between his eyesight and either the length of his sentence or some special hardship, such as an inability to receive medical care while in prison.”¹³⁵ In fact, defense counsel’s representation that the defendant had received multiple surgeries while in custody worked against the argument that the defendant could not receive effective medical care in prison.¹³⁶ The result might have been different had defense counsel presented evidence about why the defendant’s condition could not be effectively treated in prison.

Some circuits have shown a willingness to seriously engage with § 3553(a)(2)(D) arguments, but they have done so inconsistently. The Eighth and First Circuits are examples. In *United States v. Whitehorse*, an Eighth

¹³⁰ *Id.* at 945.

¹³¹ *Id.* at 947; *see also* *United States v. Williams*, 65 F.3d 301, 305 (2d Cir. 1995) (relying on *Maier* and affirming a downward departure so that the defendant would be eligible for acceptance into a “special and selective” treatment program); *United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997) (*superseded by* *Quesada Mosquera v. United States*, 243 F.3d 685 (2d Cir. 2001)) (“The successful rehabilitation of a criminal . . . is a valuable achievement of the criminal process. The Act recognizes this by requiring sentencing courts to consider ‘the need for the sentence imposed . . . to provide the defendant with needed education and vocational training.’”). At the time the *Maier* case was decided, there was a circuit split about whether a downward departure to account for rehabilitation needs was permissible under the mandatory Guidelines regime. *See Maier*, 975 F.2d at 946.

¹³² *United States v. Tapes*, 570 F. App’x 614, 615 (7th Cir. 2014).

¹³³ *Id.*

¹³⁴ *Id.* at 616 (citing *United States v. Donelli*, 747 F.3d 936, 940 (7th Cir. 2014)).

¹³⁵ *Id.*

¹³⁶ *Id.*

Circuit case, the district court granted the defendant's request for a downward departure and the government appealed.¹³⁷ The district court was clear that it did "not want the Bureau of Prisons to control" the defendant's alcohol treatment because prior treatment efforts in prison had failed.¹³⁸ The district court opined that the defendant would be better served by alcohol treatment in the community, "where she can be exposed to some daily risk, some daily temptation, some daily danger, and overcome that."¹³⁹ The Eighth Circuit found that this was not an abuse of discretion and was, in fact, "especially appropriate" in light of § 3553(a)(2)(D)'s statutory command.¹⁴⁰ Similarly, in *United States v. Wadena*, the Eighth Circuit made clear that the district court has ample discretion to decide how a defendant will receive treatment in the most "efficient and effective" manner.¹⁴¹ The court also concluded that the district court need not make a finding that the defendant cannot receive treatment in the BOP in order to impose a non-prison sentence.¹⁴² In *United States v. Mollignaro*, the First Circuit affirmed the importance of § 3553(a)(2)(D) and § 3583(a), holding that *Tapia's* prohibition against imposing or lengthening sentences to promote rehabilitation extended to resentencing following revocation of supervised release.¹⁴³

2. Courts of Appeals' Approach 2: Discounting § 3553(a)(2)(D)'s Mandate and Overvaluing the BOP's Capacity to Provide Treatment and Rehabilitation

In contrast to the cases discussed above, the Eighth Circuit and other courts of appeals often discounted § 3553(a)(2)(D)'s mandate and do not acknowledge that the BOP is not equipped to provide adequate, let alone effective, rehabilitation and treatment.

The Eighth Circuit, while taking § 3553(a)(2)(D) arguments seriously in some cases, has also treated the argument dismissively, with little discussion in others. *United States v. Callahan* is one example. There, the defendant argued that his sentence was unreasonable because the district court failed to consider "the need to provide [him] with medical care" pursuant to § 3553(a)(2)(D).¹⁴⁴ The Eighth Circuit concluded that the district court "adequately considered the need to provide [the defendant] with medical care" because the district court reviewed medical reports, heard testimony about the defendant's illnesses, and considered the presentence investigation report.¹⁴⁵ Nowhere in its one-paragraph discussion of the issue does the court mention § 3553(a)(2)(D)'s mandate that the district court's sentence provide medical care in "the most effective" manner. Likewise, in *United States v. McFarlin*, the Eighth Circuit misstated § 3553(a)(2)(D)'s command, while affirming the district court's

¹³⁷ *United States v. Whitehorse*, 909 F.2d 316, 317 (8th Cir. 1990).

¹³⁸ *Id.* at 319.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 319–20.

¹⁴¹ *United States v. Wadena*, 470 F.3d 735, 739 (8th Cir. 2006).

¹⁴² *Id.*

¹⁴³ *United States v. Mollignaro*, 649 F.3d 1, 2–3 (1st Cir. 2011).

¹⁴⁴ *United States v. Callahan*, 800 F.3d 422, 426 (8th Cir. 2015).

¹⁴⁵ *Id.*

sentence of probation.¹⁴⁶ The defendant had a documented history of serious medical conditions, including severe coronary artery disease, severe peripheral vascular disease, and asthma that required numerous prescription medications.¹⁴⁷ The Eighth Circuit concluded the district court's sentence was appropriate because "a court *may* consider the need for medical care when determining a sentence."¹⁴⁸ But § 3553(a)(2)(D) is not permissive; it *requires* the district court to consider a defendant's treatment needs.¹⁴⁹

The First Circuit has made clear that § 3553(a)(2)(D) is but one "consideration among many, and does not require the court to grant certain requests."¹⁵⁰ In *United States v. Washington*, the court reviewed the district court's sentencing decision for reasonableness.¹⁵¹ The court concluded that the district court properly considered the sentencing factors and the defendant's "need for educational and vocational training and substance abuse treatment . . . by encouraging him 'to take advantage of every program in prison' and recommending that he be enrolled in the comprehensive drug treatment program."¹⁵² The defense counsel raised the § 3553(a)(2)(D) issue in a cursory, one-paragraph argument in his sentencing filing that began by assuming, without evidence, that "the Federal facilities will provide . . . education and training."¹⁵³ Defense counsel then posited that a "large amount of incarceration will hinder not help his future education and vocational training."¹⁵⁴ Putting defense counsel's deficient argument aside, the district court's underlying analysis—encouraging the defendant to take advantage of programming in prison—does not satisfy the statutory command that the district court determine what sentence will provide "the most effective" treatment, keeping in mind Congress's directive that imprisonment is not an appropriate way to promote rehabilitation.¹⁵⁵

Similarly, in *United States v. Dixon*, a pre-*Tapia* case, the First Circuit upheld the district court's sentence as reasonable, where the district court had "cleared [the defendant] to participate in the correctional facility's 500-hour drug treatment program, suggested that the Bureau of Prisons consider . . . psychological evaluations . . . and noted that the correctional facility would be well-equipped to deal with [the defendant's] mental health needs."¹⁵⁶ It is not clear on what evidence the district court based its conclusion.¹⁵⁷

¹⁴⁶ *United States v. McFarlin*, 535 F.3d 808, 810 (8th Cir. 2008).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 811 (emphasis added).

¹⁴⁹ 18 U.S.C. § 3553(a)(2)(D) (2012).

¹⁵⁰ *United States v. Butler-Acevedo*, 656 F.3d 97, 101 (1st Cir. 2011) ("[T]he fact that the district court chose not to sentence Butler according to his counsel's recommendation does not establish that it failed to consider the relevant factors.>").

¹⁵¹ *United States v. Washington*, 187 F. App'x 3 (1st Cir. 2006).

¹⁵² *Id.* at 5.

¹⁵³ Def.'s Mot. for Downward Departure, at 7 (in *United States v. Washington*, No. 05-12-P-H (D. Me. 2006)).

¹⁵⁴ *Id.*

¹⁵⁵ 18 U.S.C. § 3553(a)(2)(D) (2012); 18 U.S.C. § 3582(a) (2012).

¹⁵⁶ *United States v. Dixon*, 449 F.3d 194, 205 (1st Cir. 2006).

¹⁵⁷ *Id.*

3. *Courts of Appeals' Approach 3: Cursory Engagement with § 3553(a)(2)(D) and Deference to District Courts*

Some circuits engage with § 3553(a)(2)(D) only cursorily, and with deference to district courts. One example is in the Second Circuit's decision in *United States v. Chase*. There, the court rejected the defendant's claims that his fifty-year sentence for sexual exploitation of a child through the production of child pornography was substantively unreasonable because it failed to account for his need for mental health and sex offender treatment, which he argued would be provided most effectively "outside of prison."¹⁵⁸ The court defended the district court, explaining that the judge had "explicitly recognized" the need for appropriate treatment, but had ultimately concluded that other § 3553(a) considerations—such as the seriousness of the offense, the need for significant incapacitation, and deterrence—necessitated a long sentence.¹⁵⁹ The *Chase* case illustrates one of the hurdles to making a successful § 3553(a)(2)(D) argument: Ultimately, it is just one factor for the district court to consider and it is unlikely to carry the day in a particularly serious case in which the Guidelines call for a lengthy sentence. Moreover, as long as the district court does not entirely ignore § 3553(a)(2)(D), the appellate court is unlikely to reverse.

A similar pattern emerges in the Fourth Circuit.¹⁶⁰ In *United States v. Dailey*, the defendant challenged the reasonableness of his within-Guidelines sentence on the basis of his need for medical care.¹⁶¹ The court found no error where the district court "properly weighed each of the factors" and as a result "sentenced [the defendant] at the bottom of the Guidelines range and recommended that [he] be assigned to a facility which would be able to treat his medical condition."¹⁶² In another case, the Fourth Circuit overturned the district court's time-served sentence because the district court "focuse[d] so heavily" on § 3553(a)(2)(D) to the exclusion of other sentencing factors.¹⁶³ The district court had stated on the record that a time-served sentence would serve "the treatment goals . . . under 18 U.S. Code 3553(a)(2)(D) [so that they] would not be defeated."¹⁶⁴

4. *Courts of Appeals' Approach 4: Violating or Misapprehending § 3553(a)(2)(D)'s Statutory Command*

Several courts of appeals outright violate § 3553(a)(2)(D)'s statutory command by conflating the language of the statute—the need for the sentence to provide rehabilitation "in the most effective manner"—with the need to

¹⁵⁸ *United States v. Chase*, 695 F. App'x 601, 604 (2d Cir. 2017).

¹⁵⁹ *Id.* at 604–05.

¹⁶⁰ It is notable that the Fourth Circuit ascribes a presumption of reasonableness to a within-Guidelines sentence on appeal. *See, e.g., United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006). This presumption makes it much more difficult for defendants to challenge a within-Guidelines sentence on reasonableness grounds, even if the issue is well-preserved below.

¹⁶¹ *United States v. Dailey*, 189 F. App'x 212 (4th Cir. 2006).

¹⁶² *Id.* at 217.

¹⁶³ *United States v. Zuk*, 874 F.3d 398, 410 (4th Cir. 2017).

¹⁶⁴ *Id.*

provide rehabilitation in an “adequate” manner, thus significantly diminishing the statute’s force. For example, in *United States v. Carpenter*, the Sixth Circuit rejected the defendant’s argument that the district court had erred by not granting a downward variance under § 3553(a)(2)(D), noting that “while [the defendant] does have health problems, he has offered no evidence that the BOP is unable to provide *adequate* medical care.”¹⁶⁵ Similarly, in *United States v. Carthen*, the court, in stating what § 3553(a)(2)(D) required, simply omitted the word “effective” with an ellipsis: “Section 3553(a)(2)(D) provides that a district court must consider ‘the need for the sentence imposed—to provide the defendant with needed . . . medical care.’”¹⁶⁶ The omission of the word “effective,” of course, drastically changes and devalues the statutory command.

The Second Circuit has also violated § 3553(a)(2)(D)’s statutory command at times. In *United States v. Jones*, the defendant argued that his sentence for a supervised release violation was substantively unreasonable because the district court did not adequately consider the need for treatment and rehabilitation.¹⁶⁷ The court, in a cursory analysis, explained that the district court’s refusal to impose “another sentence of drug treatment” was not unreasonable because the district court stated on the record that it had previously sentenced the defendant to a halfway house for a previous violation, but that within a day, the defendant had left and violated the conditions of his supervised release.¹⁶⁸ Although the opinion was short, the Second Circuit went out of its way to assert that “[w]hile a district court has discretion to consider a defendant’s medical or treatment needs in determining a sentence, it is not required to do so.”¹⁶⁹ This finding is a clear violation of the statute, which *requires* the district court to consider the defendant’s rehabilitation needs.

The Tenth and Eleventh Circuits have downplayed and/or misapprehended § 3553(a)(2)(D)’s statutory command. In *United States v. Pielsticker*, the Tenth Circuit affirmed the district court’s sentence, which considered the need “to provide the defendant . . . with medical care.”¹⁷⁰ Nowhere does the court mention that the sentence must provide such treatment in “the most effective” manner. Similarly, in *United States v. Vente*, the Eleventh Circuit affirmed the district court’s sentence, explaining that the district court specifically noted the defendant’s “educational and vocational aspirations,” which showed “consideration of the need of the sentence imposed to provide [the defendant] with needed education or vocational training.”¹⁷¹ That, of course, misapprehends what the statute requires.

¹⁶⁵ *United States v. Carpenter*, 359 F. App’x 553, 558 (6th Cir. 2009) (emphasis added).

¹⁶⁶ *United States v. Carthen*, 458 F. App’x 428, 433 (6th Cir. 2012).

¹⁶⁷ *United States v. Jones*, 369 F. App’x 171 (2d Cir. 2010).

¹⁶⁸ *Id.* at 173.

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Pielsticker*, 678 F. App’x 737, 750 (10th Cir. 2017) (citing 18 U.S.C. 3553(a)(2)(D) (2012)); *see also* *United States v. Adams*, 751 F.3d 1175, 1182–83 (10th Cir. 2014) (“[T]he district court expressly noted most of the factors under 18 U.S.C. § 3553(a) . . . [including] the need to provide Defendant with educational or vocational training and medical care to promote a lawful lifestyle.”); *United States v. Haley*, 241 F. App’x 579, 586 (10th Cir. 2007) (“[A]lthough one of the § 3553(a) factors requires the court to consider the need for the sentence imposed to provide the defendant with needed correctional treatment . . . it is but one factor.”).

¹⁷¹ *United States v. Vente*, 179 F. App’x 681, 683–84 (11th Cir. 2006).

III. PROPOSED SOLUTION: VIGOROUS DEFENSE ADVOCACY THAT
ENCOURAGES SERIOUS CONSIDERATION OF § 3553(a)(2)(D) AND
ACKNOWLEDGES THE BOP'S LIMITATIONS ON PROVIDING
REHABILITATION AND TREATMENT IN THE "MOST EFFECTIVE"
MANNER

It is clear from a review of the cases that it will be ineffective in most courts for defense counsel to simply invoke § 3553(a)(2)(D)'s language without tying it to a particular rehabilitation or treatment concern *and* to evidence that the BOP cannot effectively provide care. For example, in *Tapes*, the Seventh Circuit offered a pointed critique of defense counsel's argument in the district court: "Tapes would have a stronger argument if he had shown some link between his eyesight and either the appropriate length of his sentence or some special hardship, such as an inability to receive adequate medical care while in prison."¹⁷² In *Carpenter*, the Sixth Circuit rejected the defendant's § 3553(a)(2)(D) argument because although defense counsel noted the defendant's health problems, he "offered no evidence" that the BOP was unable to provide "adequate medical care."¹⁷³

One solution to courts' failures to abide by § 3553(a)(2)(D) and acknowledge the BOP's serious limitations to providing adequate rehabilitation and treatment is vigorous defense advocacy. Defense counsel should raise the arguments clearly at sentencing—orally and in writing—and support them with evidence. By the same token, federal prosecutors should acknowledge what studies and even the DOJ's Inspector General have found: the BOP faces numerous hurdles to providing "the most effective" care for defendants due to overcrowding, staffing shortages, high medical costs, and budget cuts.

As a starting point, defense counsel should make clear to district court judges that the statute requires that the sentence provide rehabilitation and treatment in "the most effective manner." Too many courts have watered down § 3553(a)(2)(D)'s statutory command by reframing it as the need to provide "adequate" care and describing the directive as discretionary. To the contrary, § 3553(a)(2)(D)'s language leaves no room for these erroneous interpretations—the statute directs that courts "shall" consider the need for the sentence to provide rehabilitation and treatment in "the most effective manner."¹⁷⁴ That the BOP often cannot meet this high bar does not change § 3553(a)(2)(D)'s plain language or diminish its force.

The argument that a sentence of incarceration violates § 3553(a)(2)(D)'s mandate will be most compelling if defense counsel presents specific evidence that an out-of-custody alternative will provide "the most effective" care and that the BOP cannot do so. In making this argument, defense counsel can rely

¹⁷² United States v. *Tapes*, 570 F. App'x 614, 616 (7th Cir. 2014).

¹⁷³ United States v. *Carpenter*, 359 F. App'x 553, 558 (6th Cir. 2009).

¹⁷⁴ 18 U.S.C. § 3553(a) (2012); *id.* § 3553(a)(2)(D).

heavily on Congress's pronouncement that "imprisonment is not an appropriate means of promoting correction and rehabilitation."¹⁷⁵ This is about as clear a statement as Congress could make that prison does not rehabilitate people. Counsel can also rely on *Tapia*'s clear prohibition that "a court may not impose or lengthen a prison sentence to . . . promote rehabilitation."¹⁷⁶ *Tapia*'s holding was based, in part, on the fact that judges have no mechanism for requiring defendants to participate in BOP programs, nor for guaranteeing that such programs will be available to defendants in BOP custody.¹⁷⁷ To the contrary, judges can require participation in rehabilitative programs as a condition of probation or supervised release, which supports the argument for a non-incarceration sentence.

Because there was a circuit split before *Tapia* about whether a district court could impose or lengthen a prison sentence to promote rehabilitation and because "[a]s a practical matter . . . district courts . . . relied on section § 3553(a)(2)(D) to impose a lengthier sentence in order for a defendant to meet the eligibility requirements for an institutional program that he or she would otherwise be ineligible for under a shorter sentence,"¹⁷⁸ defense counsel should be wary of pre-*Tapia* case law. For example, the Fifth Circuit's pre-*Tapia* case law now violates the case's holding that the district court may not impose or lengthen a prison term to promote rehabilitation. In *United States v. Domingue*, the defendant challenged the reasonableness of his sentence and pointed to the district court's imposition of a prison term in part so that the defendant would receive drug treatment in the BOP.¹⁷⁹ The court explained: "[W]e have affirmed many sentences, including above-guidelines sentences, based, in part, on a defendant's need for treatment."¹⁸⁰ This is no longer good law.

Defense counsel should also present evidence and data to support the argument that a non-incarceration sentence will provide rehabilitation and treatment in "the most effective manner." First, defense counsel should elaborate on the treatment the defendant would receive in the community and why that treatment would be superior to what the defendant would receive in BOP custody. To do that, counsel should diligently investigate rehabilitation and treatment options in the community and retain experts to explain why such treatment would be "the most effective" for the defendant.¹⁸¹ Counsel should also rely on the evidence and data¹⁸² to explain to the courts why the BOP often cannot provide adequate, let alone effective, rehabilitation and treatment. Counsel can ascertain the most up-to-date information by calling BOP facilities to inquire about, for example, their treatment programs and psychologist staffing ratios or request this information through the Freedom of

¹⁷⁵ 18 U.S.C. § 3582(a) (2012).

¹⁷⁶ *Tapia v. United States*, 564 U.S. 319, 335 (2011).

¹⁷⁷ *Id.* at 331.

¹⁷⁸ *United States v. Censke*, 449 F. App'x 456, 470 (6th Cir. 2011).

¹⁷⁹ *United States v. Domingue*, 413 F. App'x 680, 682 (5th Cir. 2010).

¹⁸⁰ *Id.*

¹⁸¹ Attorneys appointed to a criminal case under the Criminal Justice Act can request "[i]nvestigative, expert, or other services necessary to adequate representation" that are paid by the courts. See U.S. COURTS, GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT, ch. 3, §§ 310.10.10, 310.20.10.

¹⁸² See discussion *supra* Part II.A.

Information Act.¹⁸³ Counsel can also review publicly-available BOP program statements related to medical and mental health care and other treatment.¹⁸⁴

Finally, defense counsel should address how compliance with § 3553(a)(2)(D)'s directive promotes other § 3553(a) sentencing goals. For example, the government might argue that even if § 3553(a)(2)(D) weighs in favor of a non-incarceration sentence, such a sentence will not provide “just punishment.”¹⁸⁵ The Supreme Court, however, has made clear that a non-incarceration sentence is, indeed, punishment because probationers are “subject to several standard conditions that substantially restrict their liberty.”¹⁸⁶ In addition, a sentence of probation means that the defendant “will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests,” without the permission of his probation officer or the court.¹⁸⁷ At the same time, a non-incarceration sentence allows a defendant to rehabilitate in the community. As the Federal Probation Department has aptly explained, a non-incarceration sentence “holds people accountable for breaking the law” while “cost[ing] less than incarceration and giv[ing] people charged with or convicted of federal crimes the opportunity to live with their families, hold jobs, and be productive members of society.”¹⁸⁸ To ensure that a non-incarceration sentence has teeth, Congress has directed that if a defendant violates the conditions of his probation or supervised release, he can be sentenced to “any . . . sentence that initially could have been imposed” in the case of probation and an additional prison term in the case of supervised release.¹⁸⁹ On top of all of that, a federal felony conviction carries significant collateral consequences regardless of whether an incarceration sentence is imposed.¹⁹⁰

The government might also argue that a non-incarceration sentence will not “afford adequate deterrence to criminal conduct” or “protect the public from further crimes of the defendant.”¹⁹¹ However, studies show rehabilitation and treatment reduce recidivism.¹⁹² Moreover, prison can exacerbate a

¹⁸³ See *Freedom of Information Act*, BOP, <https://www.bop.gov/foia/> - tabs-0 (last visited Dec. 16, 2018).

¹⁸⁴ See FED. BUREAU OF PRISONS, DIRECTORY OF NATIONAL PROGRAMS (2017), https://www.bop.gov/inmates/custody_and_care/docs/20170914_BOP_National_Program_Catalog.pdf; PROGRAM STATEMENT NO. P6031.04, *supra* note 75; PROGRAM STATEMENT NO. P5310.17, *supra* note 91.

¹⁸⁵ 18 U.S.C. § 3553(a)(2)(A) (2012).

¹⁸⁶ *Gall v. United States*, 552 U.S. 38, 48 (2007).

¹⁸⁷ *Id.* at 44 (citing United States District Judge Robert Pratt's statement of reasons in *Gall* for imposing probation, rather than several years in prison).

¹⁸⁸ See *United States Probation and Pretrial Services System-Supervision*, U.S. CTS., <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-supervision> (last visited Dec. 16, 2018).

¹⁸⁹ See 18 U.S.C. § 3565(a)(2) (2018); 18 U.S.C. § 3583(e)(3) (2012).

¹⁹⁰ Margaret Colgate Love, *Federal Sentencing & Collateral Consequences*, COLLATERAL CONSEQUENCES RESOURCE CTR. (April 15, 2016), <http://ccresourcecenter.org/wp-content/uploads/2016/05/CCRC-Federal-Sentencing-Collateral-Consequences-4-2016.pdf>; see also Nora V. Demleitner, “Collateral Damage”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027 (2002); *Welcome to the NICCC*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.csgjusticecenter.org/> (last visited Dec. 16, 2018).

¹⁹¹ 18 U.S.C. § 3553(a)(2)(B)–(C) (2012).

¹⁹² See NATIONAL INSTITUTE ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT (1999), http://www.drugabuse.gov/sites/default/files/podat_1.pdf; see also Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 518 (1999) (stating that “a growing body

defendant's recidivism risk by interfering with mental and physical health, ongoing treatment, job prospects, and family bonds.¹⁹³ In *United States v. Autery*, the Ninth Circuit affirmed a sentence of probation where the district court found that "incarceration would undermine [the defendant's] rehabilitation."¹⁹⁴ Likewise, in *United States v. Maier*, the Second Circuit affirmed a sentence of probation, where the district court concluded that the defendant, if incarcerated, "would be unable to continue [drug] treatment in an effective manner."¹⁹⁵

The next solution to the undervaluing of § 3553(a)(2)(D) is for courts to faithfully abide by the statutory directive and impose non-incarceration sentences when the defendant will receive rehabilitation and treatment in "the most effective manner" in the community, provided that such a sentence complies with the other § 3553(a) considerations. To ensure compliance with the statutory directive, courts should be wary of "boilerplate assurances" from the BOP that "its facilities adequately provide for a defendant's medical care."¹⁹⁶ Even non-boilerplate assurances of "adequate" care do not satisfy the statutory mandate. The focus must always be on what sentence will provide rehabilitation and treatment in "the most effective manner."

In August 2018, United States District Court Judge Myron Thompson began requiring defense counsel to file a statement, in advance of sentencing, that discusses (1) whether defense counsel wants the court to recommend BOP programming, what kind, and why; and (2) whether defense counsel wants the court to recommend mental health treatment and if so, what kind and the defendant's diagnosis.¹⁹⁷ Judge Thompson then incorporates those recommendations into the judgment and commitment form. While Judge Thompson's efforts are laudable, they do not substantively address BOP's serious challenges to providing adequate, let alone "the most effective," rehabilitation and treatment, nor do they square with Congress's clear directive that imprisonment is not an appropriate means of promoting "correction and rehabilitation."¹⁹⁸ Even with a judge's order, the BOP is not required to provide non-essential programming and treatment.¹⁹⁹ Nonetheless, if more district courts begin recommending specific programming and treatment and documenting their requests, it may stave off future cuts to such programs.²⁰⁰

of research' shows that voluntary or mandatory drug treatment can reduce recidivism, *especially when treatment is matched to offender needs*") (emphasis added).

¹⁹³ See Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 FUTURE CHILDREN 157 (2010), http://futureofchildren.org/futureofchildren/publications/docs/20_02_08.pdf (discussing the destabilizing effects of prison on a man's mental and physical health, job prospects, earning potential, and family bonds).

¹⁹⁴ *United States v. Autery*, 555 F.3d 864, 877 (9th Cir. 2009).

¹⁹⁵ *United States v. Maier*, 975 F.2d 944, 946 (2d Cir. 1992).

¹⁹⁶ *United States v. Poetz*, 582 F.3d 835, 838 (7th Cir. 2009). In *Poetz*, the Seventh Circuit remarked that "nothing prevents a judge from accepting the BOP's *nonboilerplate* assurances of adequate care." *Id.* (emphasis added); see also *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000). As discussed in Part II.B, *supra*, this observation misstates the thrust of § 3553(a)(2)(D)'s command to provide treatment in the "most effective" manner, not just adequately. 18 U.S.C. § 3553(a)(2)(D).

¹⁹⁷ See e.g., Suppl. Sentencing Order Regarding BOP Programs and Treatments, at 3-4, Aug. 29, 2018 (in *United States v. Coleman*, No. 2:18-CR-93-MHT(WO) (M.D. Ala.)).

¹⁹⁸ 18 U.S.C. § 3582(a) (2012).

¹⁹⁹ See *Tapia v. United States*, 564 U.S. 319, 331 (2011).

²⁰⁰ If the district judge has rejected a defendant's request for a non-incarceration sentence in spite of evidence that the BOP cannot provide "needed educational or vocational training, medical care, or other

CONCLUSION

In spite of the SRA's clear statutory command, courts routinely undervalue, ignore, or even violate § 3553(a)(2)(D), when imposing a sentence. This must change. Courts should account for the BOP's significant challenges to providing treatment and rehabilitation to inmates in "the most effective manner" when sentencing defendants and defense counsel should make these realities clear to the courts with evidence.

correctional treatment in the most effective manner," defense counsel should request that the district judge document the defendant's rehabilitation and treatment needs in an order.