PRIORITIZING REHABILITATION IN THE SENTENCING OF LOW-RISK FELONY OPIOID OFFENDERS SUFFERING FROM ADDICTION: A MODEL FOR PROGRESS EMERGES FROM THE HEART OF AN EPIDEMIC

*Evan C. Clay**

* J.D., University of Mississippi School of Law, Class of 2026.

> "If we reduced our prison population by twenty-five percent, that's twenty billion dollars we could save. And if we invested half of that in treatment, we could really increase people's likelihood of success."
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> – Bryan Stevenson.[1]

INTRODUCTION

An epidemic is defined as "any disease which is widely spread or generally prevailing at a given place and time."[2] For over two decades, a disturbing escalation of opioid addiction has swarmed the United States, leading to a drastic increase in felony opioid crimes across the federal court system.[3] In response, significant portions of the over $1 trillion the United States government has invested in combatting the crisis continue to be allocated towards legislation, incarceration, deterrence-focused initiatives, and rehabilitation programs.[4] Collectively, the criminal justice system is unified on the overall objective of prevention and mitigation. The quest to establish the most effective strategy for accomplishing this, however, has created complex, inconsistent precedents across the judicial system, with deterrence and rehabilitation representing thematic focuses underlying the balancing act of pursuing justice in federal opioid offenses.

The implementation of deterrence or rehabilitation objectives occurs through sentencing, the final phase of a federal opioid crime's trajectory.[5] At the sentencing phase, the primary factor involved in imposing penalties upon the defendant exists within a uniform system of sentencing guidelines for federal offenses, with a minimum level and advisory range of punishment mandated for the vast majority of underlying convictions.[6] Sentencing is not an

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1 BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA 232 (2018) (quoting the author's interview with Bryan Stevenson).

2 *Epidemic*, THE L. DICTIONARY, https://thelawdictionary.org/epidemic/ [https://perma.cc/H767-Q2PV] (last visited Sep. 21, 2025).

3 Ben Feldmeyer, Bryan Holmes & Diana Sun, *Federal Drug Sentencing and the Overdose Epidemic*, 49 AM. J. CRIM. JUST. 814, 814-15 (2024).

4 *Id.* at 817.

5 *See* VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010).

6 *See generally* OFF. OF THE FED. PUB. DEF., W. DIST. OF TEX., AN INTRODUCTION TO FEDERAL SENTENCING 2-3 (15th ed. 2020).

automated process, however, with notable judicial discretion existing alongside the aforementioned offense-based requisite punitive measures. Outside of the statutory requirements, a multitude of factors, varying across the circumstances of each case before the court, are available to judges as they execute their duty of imposing penalties through the sentencing process. Notably, a "past, present, and future" style of analysis is at the forefront of evaluating the most just repercussions for these offenses, with the factors generating primary emphasis experiencing an ever-evolving volatility across the federal court system.

Understanding the historical perspective shaping the sentencing phase's imposition of punitive measures includes a deep-dive on the individual offender, focusing on their criminal history, successes or failures of previous rehabilitation efforts, and the impacts of more personal factors such as the background and upbringing circumstances that shape the offender before the court.[7] A present-oriented approach takes into account the totality of the underlying offense(s) charged to the defendant, including, but not limited to: the harm caused to both established and potential victims by the criminal conduct, i.e. death, injury, opioids introduced to the surrounding community, etc.; the overall nature of the charge(s), i.e. the quantity of drugs; the role of the defendant in a drug trafficking or distribution operation; and any associated criminal conduct, i.e. evidence of the presence of weapons, violent conduct, and substance abuse involved in connection with the offense(s).[8] Finally, the future implications of sentencing federal opioid offenses are portrayed through an analysis of existing motivating policy considerations at both the national and local levels, along with predictive determinations of a defendant's potential for rehabilitation. Additionally, these implications consider repeated criminal conduct, the influence of a sentencing's impact on penalization "standards," trends that mold precedents, and influential references that are pivotal in both the federal and state court systems.[9]

As the compounding harm of the opioid epidemic continues to generate worldwide concern, the criminal justice system,

[7] *See generally* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 26 (2018).
[8] *Id.* at 18-19.
[9] *Id.* at 26.

particularly at the federal level, adheres to the matter by engaging in extensive and evolving debate regarding combative measures, specifically through integrating rehabilitation and deterrent efforts into the process of punishing opioid crimes in federal courts.[10] Uniformity in adopting the perfect solution to this expansive problem seems to be an evasive pipe dream, creating the potential for confusion and inconsistencies in applying legislative and judicial measures to the complexities transpiring from the pursuit of justice. The core of this dispute, achieving progress through rehabilitation or deterrence-based sentencing, remains a peculiar topic, with disproportion and avoidable injustice in the application of the concepts existing historically throughout the federal landscape.[11]

Modern sentencing statistics illustrate the ongoing issue at hand, shedding light on the underlying factors that sentencing courts often fail to allocate appropriate consideration towards and skewing sentencing trends in favor of incarceration for a class of defendants best fit for placement in rehabilitation and reentry programs.[12] A 2024 study conducted by the Department of Justice's Bureau of Justice Statistics portrays the disturbing truths of the prominence of criminal activity involving opioids as well as recent demographics of opioid offenders that reflect the need for a shift in sentencing practices.[13] In 2021, the Drug Enforcement Administration reported 6,405 opioid arrests, a more than 30% increase over the past two decades.[14] Of all federal drug cases, over 22% involved an opioid as the primary drug in the underlying offense.[15]

Sadly, sentencing statistics continue to show that defendants eligible for alternative to incarceration ("ATI") programs are

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[10] *See* VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010).

[11] *See generally* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/QAV2-E6HH].

[12] *Id.*

[13] MARK MOTIVANS, U.S. DEP'T OF JUST., HEROIN, FENTANYL, AND OTHER OPIOID OFFENSES IN FEDERAL COURTS, 2021, at 3, 11 (2024).

[14] *Id.* at 1.

[15] U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2021, STATE OF WEST VIRGINIA 2 (2021).

disproportionately sentenced to terms of imprisonment.[16] In 2021, sentencing statistics for the two most common categorizations of felony drug crimes, drug trafficking and drug possession, conclude that sentencing courts habitually impose imprisonment on drug convictions, despite policy evolutions and advancements in access to rehabilitation-based penalty options supporting a progression away from this trend.[17] In 2021, 89% of individuals convicted of an offense involving opioids were sentenced solely to prison time.[18] Of these sentences, only 53% of sentences carried a mandatory minimum term of imprisonment, supporting the notion that judicial discretion continues to be partial to incarceration for these offenses.[19] Of the felony drug defendants eligible for non-prison sentences, over 38% still received a term of incarceration.[20] Sentencing courts were even harsher on defendants convicted of felony drug trafficking that year, with nearly 59% of cases eligible for non-prison sentences still receiving a prison sentence.[21]

Once the conviction and sentencing are finalized, the true injustice occurs, highlighting the glaring need for reformative measures in sentencing opioid crimes. By entering the prison system rather than rehabilitation and reentry programs, defendants suffering from opioid addiction are essentially punished for their addiction. Despite the majority of prison systems technically offering programs and services for substance abuse treatment of inmates, these measures are severely lacking in resources, structure, and ultimately, effectiveness.[22] Clinical treatment is scarce, medication to mitigate withdrawal and other serious symptoms addicts face are commonly cut off upon entry, and extreme punitive measures often exist for positive drug tests once admitted into the prison system.[23] Further, the prison system lacks the adequate education and mental health services, as well as job placement and vocational training that are essential for this

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[16] *Id.* at 8.
[17] *Id.*
[18] MOTIVANS, *supra* note 13, at 14.
[19] *Id.*
[20] *Id.* at 10.
[21] *Id.*
[22] Sawyer & Wagner, *supra* note 11.
[23] *Id.* at 13-14.

class of defendants' opportunity for successful reentry into society.[24]

In more ways than one, defendants fit for ATI programs that are unfortunately sentenced to prison time instead, are ultimately in a worse condition after serving their term of imprisonment than they were before the sentence. This has created the alarming but avoidable reality where relapses and repeat offenses occur, not to mention the detriment to professional and personal life factors that are unjustly catalyzed through the backward reasoning favoring incarceration for defendants convicted of opioid crimes. The growth of treatment programs and reentry initiatives across the criminal justice system makes this consequential truth an inexcusable one. Progress can only be achieved when judicial discretion shifts and districts across the federal court system embrace the policy of successful rehabilitation and reentry, investing in efforts that reform not only the lives of suffering defendants but also the unjust sentencing practices that hinder the pursuit of true justice.

One district, in particular, has adopted an effective approach to addressing this issue while qualifying the concepts of justice underlying sentencing objectives. The Southern District of West Virginia, a territory suffering the heights of the opioid crisis, has constructed a promising model for effective sentencing through individualistic analyses of each case by attributing appropriate weight to the past, present, and future-oriented factors discussed above. In the relatively early stages of this adoption of punitive-based combative efforts, the district has experienced encouraging developments in the successful operation of its unique model of an ATI program. The United States Attorney's Office, United States Probation Office, district and magistrate judges, Federal Public Defenders Office, and various community service and healthcare representatives have teamed up to launch the Alternative Treatment Court ("ATC"), an expansive rehabilitation program encompassing addiction and mental health treatment, with a carefully extensive vetting process shaping the selection of

[24] *Id.*

candidates and placement within the program.[25] As the criminal justice system is flooded with opioid-related cases and searches for the ideal pathway to progress, courts should take an extensive look at the Southern District of West Virginia's approach to pursuing justice through the sentencing of opioid cases. This district has formulated an admirable model for progress that refrains from punishing addiction and invests in recovery while continuing to prioritize accomplishing deterrence objectives through the heightened penalization of large-scale, large-impact offenses.

As concepts of criminal justice reform continue to evolve and create prominent pressure on legislative bodies and judicial representatives, districts across the federal landscape should also consider adopting the Southern District of West Virginia's methodology. Doing so addresses a category of defendants that has remained a constant on criminal dockets in federal courts. Prioritizing rehabilitation for this select group aligns with the policy considerations that represent the most effective motivating factors in adhering to the criminal justice system's duty of implementing measures of justice and meaningful impact that shy away from outdated trends to provide for a stronger contribution to the well-being of the nation as a whole. This unique pursuit of just punitive measures for qualifying defendants convicted in a realm of criminal activity that carries an ongoing perception submerged in controversy extends an umbrella of restoration and preservation over those who need it the most. By encompassing the widespread suffering of addiction and other hindering conditions, this approach modernizes the concept of criminal rehabilitation at the federal level, all while executing standards that vet the risk of recurring conduct. The scope, standards, and objectives foundational within the ATC approach, if adopted nationally, are likely to accomplish the policy goals that should undoubtedly pillar the federal criminal justice system: saving lives, halting generational suffering and criminality, and restoring community well-being.

[25] Memorandum from the S. Dist. of W. Va. on Alternative Treatment Court (ATC) 1-3 (Aug. 31, 2021), https://www.wvsd.uscourts.gov/sites/wvsd/files/ATC-MOU%20with%20Exhibits-8-31-2021.pdf [https://perma.cc/RNV8-2YGV].

I. THE FIRST STAGE OF SENTENCING: AN OVERVIEW OF THE NON-NEGOTIABLES

The vast majority of federal opioid offenses are prosecuted under statutes prohibiting the manufacture, distribution, importation, and exportation of controlled substances[26]—along with the conspiracies in connection with these actions,[27] attempts to commit the aforementioned offenses,[28] and possession with the intent to distribute.[29]

Once a federal opioid case enters the federal court system through one of these prosecutorial channels and a guilty plea or trial decision results in the conviction of a defendant, the severity of the statutory penalty imposed will be determined by the judge presiding over the case.[30] Finalizing the penalty for the conviction is a tiered process that takes a variety of factors into consideration at each interval of the sentencing.[31] First and foremost, the type and quantity of drugs involved in the case, the defendant's prior commission of specific federal offenses, and any death or serious injury that may have resulted from the use of the drug associated with the underlying conviction stand as the three prominent factors that begin the sentencing process.[32] These factors are evaluated pursuant to the mandatory minimum penalties associated with the violation of the aforementioned statutes.

Quantity thresholds for the type of drug involved in the case trigger mandatory minimum penalties under 21 U.S.C. §§ 841(b)(1) and 960(b).[33] When a certain volume of drugs is determined, statutory obligations require the application of a minimum of five years of incarceration and a maximum of forty years of incarceration.[34] Higher volumes of the substance elevate

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[26] 21 U.S.C. §§ 841, 960.

[27] Attempt and conspiracy offenses are subject to the same penalties as completed offenses. *See id.*
§§ 846, 963.

[28] *Id.*

[29] *Id.* § 841(a).

[30] *See id.* §§ 841(b)(1), 960(b).

[31] *See id.*

[32] *See* OFF. OF THE GEN. COUNS., U.S. SENT'G COMM'N, PRIMER ON DRUG OFFENSES 1 (2024).

[33] 21 U.S.C. §§ 841(b)(1), 960(b).

[34] *Id.* §§ 841(b)(1)(B), 960(b)(2).

the minimum period of incarceration to ten years, with the maximum being life in prison.[35] When multiple drugs are involved in a case, separate charges will be brought on the defendant pursuant to each specific drug present in the crime. However, the charges must be in accordance with a Second Circuit ruling that the amounts cannot be summed together to meet a higher threshold and more punitive mandatory minimum sentence.[36] Quantity thresholds for opioid substances commonly involved in federal offenses are reflected in the chart below.[37]

Quantity Thresholds Triggering Mandatory Minimum Penalties for Common Opioid Substances under 21 U.S.C. §§ 841(b)(1), 952, and 960(b)		
Opioid	**5 Year Minimum**	**10 Year Minimum**
Heroin	100 grams	1 kilogram
Methamphetamine (actual)	5 grams	50 grams
Methamphetamine (mixture)	50 grams	500 grams
Fentanyl	40 grams	400 grams
Fentanyl analogue	10 grams	100 grams

Aggregation of opioid sentences can, however, be accomplished when the defendant has met the lower, five-year minimum, forty-year maximum threshold and they have a criminal history that includes a “serious drug” or “serious violent” felony.[38] A prior conviction meeting the standards of these aggregators incorporates an increase of five years on each of the previously mentioned minimums and an elevation of the maximum to life in prison for both thresholds.[39] The minimum sentence is heightened even further to twenty-five years of incarceration for defendants with multiple prior convictions

[35] *Id.* §§ 841(b)(1)(A), 960(b)(1).
[36] *See, e.g.*, United States v. Harrison, 241 F.3d 289, 292 (2d Cir. 2001).
[37] OFF. OF THE GEN. COUNS., U.S. SENT’G COMM’N, *supra* note 32, at 2.
[38] 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2).
[39] *Id.* §§ 841(b)(1)(A), 960(b)(1).

meeting the criteria of "serious drug" or "violent" felonies.[40] Another form of sentencing enhancement exists when death or serious bodily injury occurs as a result of the use of the drugs connected with the underlying charge(s).[41] In this scenario, the mandatory minimum term of imprisonment is twenty years, with life again being the maximum.[42] When this scenario occurs and a previous conviction that resulted in death or serious bodily injury exists, the defendant will receive a mandatory minimum sentence of life in prison.[43]

In 2021, 53% of individuals sentenced for a federal offense involving opioids received a mandatory minimum term of incarceration.[44] Meanwhile, 27% received the five-year minimum, 24% received the ten-year minimum, and 2% received the aggregated twenty-year minimum.[45]

II. EQUITABLE ESCAPE ROUTES: QUALIFIED RELIEF FROM MANDATORY MINIMUMS

As part of the criminal justice reform movements of the 1990s, judges were provided means to avoid imposing mandatory minimum sentences in unique situations.[46] In 1994, Congress created the first "safety valve" through the Violent Crime Control and Law Enforcement Act of 1994, providing an alternate route to sentencing drug-related offenses based on a set of qualifications.[47] Criteria for applying the safety valve include the existence of a mandatory minimum term of imprisonment, as well as the

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[40] *See* 18 U.S.C. § 924(e)(2)(A) (definition of "serious drug offense"); 18 U.S.C. § 924(e)(2)(B) (definition of "violent felony").

[41] 21 U.S.C. §§ 841(b)(1)(C), 960(b)(1)-(3). "Serious bodily injury" is defined as a "bodily injury which involves—(A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 21 U.S.C. § 802(25); *see also* Burrage v. United States, 571 U.S. 204, 210-11, 219 (2014) (clarifying that death or serious bodily injury results from the use of the substance if the use was a but-for cause of the death or injury).

[42] *Id.*

[43] *Id.*

[44] MOTIVANS, *supra* note 13, at 14.

[45] *Id.*

[46] DAVE S. SIDHU, CONG. RSCH. SERV., LSB11145, SUPREME COURT CLARIFIES SCOPE OF DRUG OFFENSE SENTENCING RELIEF UNDER THE FIRST STEP ACT 2-3 (2024).

[47] *Id.*

defendant having no more than one criminal history point pursuant to the Sentencing Guidelines ("the Guidelines").[48] If a defendant satisfies this, the judge may sentence them to a penalty below the otherwise requisite minimums determined under the federal sentencing guidelines.[49] In creating the safety valve alternative, Congress sought to solve the historical disproportion existing in many cases where equally severe punitive measures were imposed on defendants who were situated differently, creating an inequity in the criminal justice system and a consequential flaw in the sentencing process that jeopardized public concepts of fairness and justice within the federal court system.[50]

The application of the safety valve was altered in 2018 through the First Step Act, which amended the imposition of a sentencing statute.[51] The change allowed for defendants with a lower criminal history who have been convicted of a federal drug offense to receive a sentence below the mandatory minimum if they met certain requirements based on their criminal history point calculation.[52] To qualify, the court must find that the defendant, pursuant to the Guidelines, does not have more than four criminal history points (excluding any criminal history points resulting from a one-point offense); a prior three-point offense; or a prior two-point violent offense. This action was motivated by the overpopulation of federal prisons and the corresponding detriment to societal and economic well-being.[53] By providing this form of sentencing relief, Congress expanded the scope of the safety valve, addressing the growing concern regarding the necessity and harshness of drug offenders with lower criminal history records receiving significant mandatory minimum sentences.[54] In the years following the dawn of the First Step Act, United States Courts of Appeals were split on its application, with eligibility

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[48] *Id.* at 3 (explaining that with criminal history points, "the computation of these points depends on the nature and number of prior offenses").

[49] *Id.*

[50] *Id.* at 2.

[51] First Step Act of 2018, Pub. L. No. 115–391 § 402, 132 Stat. 5194, 5221 (codified at 18 U.S.C. §§ 3553(f)(1)).

[52] *Id.*

[53] SIDHU, *supra* note 46, at 2-3.

[54] *Id.*

requirements and the scope of disqualifiers in controversy.[55] In 2024, the Supreme Court addressed the matter, adopting a more textual approach under the statute's criteria that ultimately favored the Government's preferred assessment of safety valve qualifications.[56]

As it stands today, a defendant may qualify for safety valve relief if they do not exceed the criminal history point limits set forth in the statute; no actual or credible threats of violence were involved in the offense; no firearms or dangerous weapons were used in the offense; the defendant did not have a role involving the management, supervising, or organization of others in connection with the crime; and the defendant truthfully provided the government all information and evidence they have related to the offense or offenses contributing to the same course of criminal conduct.[57] Of all defendants sentenced for felony opioid offenses in 2021, 33% achieved the safety valve.[58] Even if a defendant does not qualify for the safety valve, they may obtain sentencing relief through Section 3553(e) if they cooperate with the process of investigating and prosecuting another offender.[59]

Another recent development allows for post-conviction relief for first-time offenders. In November of 2023, the United States Sentencing Commission adopted a critical amendment to the Guidelines, making sentencing reduction measures available for defendants with no criminal history who did not commit an aggravated offense.[60] The amendment, codified in Section 4C1.1 of the Guidelines, provides for a reduction in the advisory sentencing range if the defendant meets the following eligibility criteria: defendant did not receive any criminal history points; terrorism or aggravating role adjustments; or charges involving sex offenses,

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[55] *Id.* at 3-4.

[56] Pulsifer v. United States, 601 U.S. 124, 131-32 (2024).

[57] 18 U.S.C. § 3553(f)(1)-(5).

[58] MOTIVANS, *supra* note 13, at 14.

[59] *See, e.g.*, 18 U.S.C. § 3553(e). For cooperating defendants, sentencing courts can impose a sentence less than the statute's mandatory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Id.*

[60] Russell Babcock, *Probable Reduction in Sentences for Federal Drug Offenses After November 1, 2023*, L. FIRM OF RUSSEL S. BABCOCK (June 17, 2023), https://www.lawbabcock.com/probable-reduction-in-sentences-for-federal-drug-offenses-after-november-1-2023 [https://perma.cc/6BET-RSX2].

death or serious bodily injury, actual or credible threats of violence, dangerous weapons, individual rights, hate crime or vulnerable victim considerations, or involvement in an ongoing criminal enterprise.[61] The most likely scenario for many qualifying opioid offenders will be a six-month to one-year reduction in the duration of their incarceration.[62] This relief measure combines with an additional guideline revision centered on advising judges to consider non-prison penalties for offenders eligible for the first-time offender relief, promoting pathways to ATI programs.[63] These encouraging guideline revisions, along with the safety valve alternative, build a trend in the long overdue reformative process addressing the historically automated harshness of punishing federal offenders whose conduct and history rests on the lower end of criminality.

III. FINALIZING THE SENTENCE: THE IMPACT AND EVOLUTION OF JUDICIAL DISCRETION

The modern criminal justice system provides sentencing judges with substantially more discretion in imposing punishments on defendants than in previous eras. Originally, federal district judges had limited discretion in imposing sentences, as the restrictive nature of the Guidelines presented a narrow window of flexibility in applying a range that complied with the mandatory provisions of the Guidelines.[64] The Sentencing Reform Act of 1984 provided that the sentencing ranges reflected in the Guidelines must fit within the statutory parameters established by Congress, binding federal judges to impose sentences accordingly unless aggravating or mitigating factors discussed previously applied to the case.[65] Nearly two decades ago, the landmark United States Supreme Court decision in *United States v. Booker* reduced the authority of the sentencing guidelines

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[61] SIDHU, *supra* note 46, at 2-3.

[62] Babcock, *supra* note 60.

[63] *Synopsis of USSG 4C1.1 – Zero Point Offender Adjustment*, L. OFFS. OF JOHN D. ROGERS (Dec. 22, 2023), https://johndrogerslaw.com/synopsis-of-ussg-4c1-1-zero-point-offender-adjustment [https://perma.cc/H9A8-KSE8].

[64] *See generally* William W. Berry III, *The Sixth and Eighth Amendment Nexus and the Future of Mandatory Sentences*, 99 N.C. L. REV. 1311 (2021).

[65] *Id.* at 1321.

from mandatory to advisory, opening the door for the expanded sentencing discretion that federal judges bear today.[66] In the post-*Booker* landscape, the applicable sentencing statute (3553(a)) mandates that judges consider seven critical factors in imposing a punishment on defendants.[67] These factors include: the nature and circumstances of the offense; the history and characteristics of the defendant; the types of sentences available through the applicable guidelines in accordance with any mandatory minimum term of imprisonment and potential prohibition of probation; relevant policy statements promulgated by the Sentencing Commission; the need to avoid unwarranted sentencing disparity among defendants with similar criminal records and underlying convictions; and the necessity of the sentence to satisfy the four primary purposes of sentencing.[68]

While these factors are required to be taken under consideration in the judge's ultimate determination, the only mandatory implementation created through the *Booker* precedent is the satisfaction of specific sentencing purposes.[69] These purposes, now the sole restriction of the sentencing statute, require the sentencing court to "impose a sentence sufficient, but not greater than necessary," to achieve the following objectives: reflect the seriousness of the offense, promote respect for the law, and provide a punishment that is considered just for the offense; afford adequate deterrence to the criminal conduct; protect the public from further crimes committed by the defendant; and provide the defendant with the most effective means of vocational training, medical treatment, or other correctional treatment as necessary.[70]

The collection of standards discussed to this point creates a "playbook" for federal judges presiding over the sentencing of defendants convicted of opioid crimes. This "playbook" is rooted in the federal sentencing statute as well as the *Booker* precedent, consisting of a required and orderly step-by-step process that

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[66] *See generally* United States v. Booker, 543 U.S. 220 (2005).

[67] U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 35-39 (2017).

[68] *Id.*

[69] *See generally* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS (2018).

[70] 18 U.S.C. § 3553(a)(2).

eventually leads to the final stages of the sentencing, where the judge may apply their discretion and impose the ultimate penalty. For opioid offenses, the court begins by analyzing the statute of conviction and referring to the applicable sentencing guidelines for the conviction.[71] Next, based on the manuals set forth in the Guidelines, the court calculates the base offense level, taking into account any existing specific offense characteristics that may constitute aggravating or mitigating factors.[72] Additional adjustments in the form of general aggravating or mitigating factors common for any type of offense will then be evaluated and may be appropriate based on the defendant's conduct and previous conviction record.[73] Once the base offense level is set, the court will calculate the defendant's criminal history points and place them in the proper criminal history category.[74] Finally, the base offense level and criminal history categories combine to determine the applicable sentencing range in accordance with the Guidelines.[75] This range is reflected in the Guidelines' sentencing table and is subject to mandatory minimum and maximum terms of imprisonment standards, as well as any sentencing enhancement qualifiers.[76]

Once this prerequisite checklist has been completed, judicial discretion takes center stage, as the sentencing court considers an abundance of factors in deciding whether a variance or departure from the applicable guideline range is warranted for the case at hand.[77] The post-*Booker* decision in *Rita v. United States* created an incentive for judges to continue to adhere to the Guidelines, despite their modern status as merely advisory, by holding that a judge's imposition of sentences falling within the guideline range is presumed to be reasonable, satisfying the reasonableness review standard for sentencing established in *Booker*.[78] That being said, the Supreme Court has opened the door for sentencing courts to operate with comfort and confidence in deciding to depart from

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[71] U.S. SENT'G COMM'N, *supra* note 67, at 3.
[72] *Id.* at 3-4.
[73] *Id.* at 18-19.
[74] *Id.* at 17.
[75] *Id.* at 17-18.
[76] *Id.*
[77] *Id.*
[78] *See* Rita v. United States, 551 U.S. 338 (2007).

the Guidelines. *United States v. Gall* held that reviewing courts will not automatically presume that a sentence outside of the applicable guideline range is unreasonable.[79] Additionally, in *Kimbrough v. United States*, SCOTUS granted district judges the ability to impose a sentence lower than the applicable guideline range when the judge has a policy-based disagreement with the Guidelines.[80] While modern district judges possess expanded discretion compared to previous eras of the federal criminal justice system, the Guidelines still represent the token of reasonableness in sentencing volatility across the Courts of Appeals and are considered the definitive device of achieving uniformity in the judicial system.[81] If a sentencing court ultimately decides to depart from the Guidelines, whether it be upward or downward, it must communicate the reasoning for the departure pursuant to 3553(a).[82]

A handful of drug-specific circumstances commonly warrant departures in the sentencing of felony opioid cases. First, if the defendant's case involves a quantity of drugs that constitutes an "extraordinary case," far above the maximum volume reflected in the quantity threshold table analyzed previously, then an upward departure is likely appropriate.[83] For example, if a defendant is convicted of trafficking an amount of methamphetamine that exceeds ten times the quantity triggering the maximum base level, they are likely to receive an upward departure in their sentence. Additionally, an upward departure may be imposed when the opioid involved in the offense is of an "unusually high purity" or if the product involved in the crime was a combination of opioids and other additive substances, formulating a mixture deemed to be "used in an unusually sophisticated manner to avoid detection."[84]

Offense-specific departures are also frequently utilized in the sentencing of felony opioid crimes. For example, upward departures have been imposed when the defendant's conduct was

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[79] *See* Gall v. United States, 552 U.S. 38 (2007).

[80] *See* Kimbrough v. United States, 552 U.S. 85 (2007).

[81] Berry, *supra* note 64, at 1329.

[82] William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and its Progeny*, 40 CONN. L. REV. 631, 651 (2008).

[83] OFF. OF THE GEN. COUNS., U.S. SENT'G COMM'N, *supra* note 32, at 7.

[84] *Id.* at 13.

deemed to be extreme, cruel, brutal, degrading, or unusually heinous toward a victim.[85] Furthermore, defendant-specific departures are increasingly prevalent in sentencing federal opioid offenders. Downward departures have been imposed based on the defendant's age, mental, or emotional condition.[86] Substantial-assistance downward departures may be imposed as well. One scenario where this could occur would be a defendant involved in a drug trafficking scheme providing significant and resourceful information through their cooperation with investigative and prosecutorial personnel.[87] Early disposition program departures are also prevalent. This occurs when the prosecution seeks a sentence below the applicable guideline range after the defendant's participation in a government program promoted an expedited resolution of the case.[88] Most notably, a defendant's criminal history is often a factor generating a departure in either direction.[89]

Due to the increasingly recognized unjust nature of historical sentencing practices, some sentencing courts will impose downward departures based on the determination that the defendant's criminal history is overrepresented when considering the overall severity of prior offenses, taking into account the potential disproportionately harsh punitive measures already experienced.[90] A defendant's background and upbringing may also lead to grounds for a downward departure, for example, in extraordinarily devastating family circumstances.[91]

The utilization of downward departures for qualifying opioid offenses has become more prominent throughout the federal court system, as these offenses contribute to the decades-long trend of drug offenses being one of the offense types that receives the most

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[85] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 5K2.8 (U.S. SENT'G COMM'N 2009).

[86] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL §§ 5H1.1, 5H1.3 (U.S. SENT'G COMM'N 2024).

[87] 18 U.S.C. § 3553(e) (2012).

[88] MOTIVANS, *supra* note 13, at 14.

[89] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (IN RESPONSE TO SECTION 401(M) OF PUBLIC LAW 108-21), at 47-48 (2003).

[90] *See* United States v. Smith, 278 F.3d 605, 609 (6th Cir. 2002).

[91] *See* OFF. OF THE GEN. COUNS., U.S. SENT'G COMM'N, PRIMER ON DRUG OFFENSES 1 (2024).

downward variances in sentencing, overall.[92] In 2021, 67% of individuals sentenced for a felony offense involving opioids received a downward departure from the applicable guideline range.[93] This was most frequently the result of a motion by the prosecution, giving the promising inference that United States Attorney's Offices are willing to support and facilitate reformative efforts in the pursuit of ideal policy and justice objectives when a qualifying opioid case arises.[94]

IV. A FLAWED FOCUS ON DETERRENCE AND THE NEED FOR REFORMATIVE MEASURES

In the past four decades, federal court systems have prioritized achieving deterrence objectives when sentencing defendants, especially in the realm of drug offenses. These objectives are put into practice through one or both of the core channels of deterrence: general deterrence and specific deterrence.[95] General deterrence is pursued by "sending a message" to the surrounding community in an effort to threaten would-be criminals by making an example of the defendant, discouraging the criminal conduct, and striking fear into potential offenders in the process.[96] On the other hand, specific deterrence remains individualized, with the goal of imposing a similar threat and fear on the defendant to avoid repeat offenses.[97] This "get tough" on crime policy, implemented through sentencing defendants to substantial terms of imprisonment, has resulted in the United States leading the world in incarceration rates.[98] The historical trends of judicial discretion's deterrent theme in federal opioid crime prosecution have failed to accomplish the intended effects of minimizing the harm of the opioid epidemic.[99] This is especially apparent in lower-risk opioid offenders who suffer from

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92 *See* U.S. SENT'G COMM'N, *supra* note 89, at 38, 47.

93 MOTIVANS, *supra* note 13, at 14.

94 *Id.*

95 *See generally* VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010).

96 *Id.*

97 *Id.*; *see also* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, FED. PROB., Dec. 2016, at 33.

98 WRIGHT, *supra* note 95, at 1, 6.

99 *Id.*

addiction.[100] The traditional focus on deterrence-based sentencing for this category of defendants maintains a negative societal impact, diminishing the prospects of successful rehabilitation and community reentry by punishing addiction with no remorse for individual and circumstantial factors that define the story of the case at hand.

Incarceration statistics attributed to the federal prison system highlight the prolonged notion that the federal criminal justice system has historically operated as partial to the concept of deterrence. As of March 2024, 208,000 individuals were serving terms of imprisonment in the federal prison system.[101] 89,000 of these prisoners were convicted of drug offenses, making up nearly 43% of federal incarceration.[102]

While the concept of deterrence is forward-thinking in nature, its application has had a backward effect. This is best exemplified through the economic impact of the underlying rationale of sentencing that takes the deterrent approach of heavy prison time compared to the rehabilitation approach of treatment, re-entry and vocational programs, and education.[103] Taxpayer dollars funding the incarceration of individuals who are likely to exit the prison system in worse condition than when they entered is undoubtedly a puzzling and frustrating reality, especially with the successful emergence of ATI programs. A more worthwhile investment in a mechanism of justice that actually contributes to the reduction of recurring criminal activity and facilitates an escape from addiction and the widespread burdens of the disease is far more helpful for the well-being of society.

"Criminals are like weeds, Alfred. Pull one up, another grows in its place." - Bruce Wayne / Batman.[104] This quote, from one of the more beloved, justice-oriented characters in entertainment history, paints the picture of the inefficiency of prioritizing deterrence in sentencing defendants who are ill-positioned to contribute to achieving the desired objectives of deterrence. A

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[100] *Id.*

[101] Sawyer & Wagner, *supra* note 11.

[102] *Id.*

[103] *See generally* Laura Baber et al., *A Viable Alternative? Alternatives to Incarceration Across Seven Federal Districts*, FED. PROB., June 2019, at 8.

[104] BATMAN V SUPERMAN: DAWN OF JUSTICE, HBO Max (Warner Bros. 2016).

multitude of federal courts across the criminal justice system have recognized this notion as it relates to drug-related offenses. For example, the Southern District of Illinois referenced the U.S. Sentencing Commission in a 2018 decision, articulating that criminologists and law enforcement officials have emphasized that, given the turnover in drug trafficking operations, harsh sentencing of retail-level dealers creates only a futile impact on the criminal enterprise and industry as a whole. These defendants, regardless of the outcome of their sentencing, will just be replaced, as demand for the drug and existing general deterrence remain relatively unchanged.[105]

Pivoting to rehabilitation advocacy, the need for opioid-related addiction treatment has never been greater than it is today. A recent publication from the National Institute on Drug Abuse reports that approximately two and a half million adults suffered from an opioid use disorder in 2021.[106] Despite the growth of awareness, education, and treatment resources since the dawn of the epidemic, roughly 20% of these individuals actually receive treatment for their condition.[107] The number of individuals receiving treatment has experienced a drastic decrease of over 45% from 2018 to 2021.[108] Adults living in impoverished areas and unemployed individuals are substantially less likely to receive treatment.[109]

The federal prison population provides a disheartening illustration of the addiction crisis and represents a demographic suffering exponentially from the burdens of drug addiction.[110] A 2021 publication portrays a Bureau of Justice Statistics' 2016 survey of the nation's prison population, shedding light on the prevalence of substance abuse disorders faced by inmates.[111] The survey found that 81% of federal prisoners reported ever using

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105 *Id.*

106 *The Opioid Crisis in Data* (June 21, 2024), https://usafacts.org/articles/opioid-addiction-deaths-and-treatment-latest-analysis-data/ [https://perma.cc/C7E6-PF79].

107 *Id.*

108 *Id.*

109 *Id.*

110 *See generally* LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP'T OF JUST., SURVEY OF PRISON INMATES, 2016: ALCOHOL AND DRUG USE AND TREATMENT REPORTED BY PRISONERS (2021).

111 *Id.*

drugs, with 31% using at the time they committed the criminal conduct underlying their conviction.[112] At the time of the survey, 32% of federal prisoners qualified as having a substance abuse disorder prior to their term of imprisonment.[113] The Bureau of Prisons reports an even more concerning estimate, asserting that 40% of inmates have a diagnosable substance use disorder.[114] Furthermore, nearly 12% of federal prisoners had used methamphetamine, and almost 4% had used heroin within thirty days of their arrest.[115] The study concluded that drug offenders were 56% more likely than violent offenders to meet the criteria for having a substance abuse disorder within a year of being admitted into prison.[116] Finally, less than half of federal inmates who met the criteria for having a substance abuse disorder had participated in some form of treatment program prior to their term of imprisonment, with only 28% entering a treatment program while incarcerated.[117]

Perhaps the strongest evidence against deferring to incarceration in the sentencing of low-risk felony opioid convicts is reflected in the prison system's approach to the treatment of inmates' underlying conditions. Collectively speaking, access and availability needs are being neglected or otherwise unmet across the prison system. A 2019 study concluded that only 64% of prisoners were screened for an opioid use disorder upon admittance.[118] In the same year, 15% of inmates who died while in prison died of an overdose, an 8% increase from a decade prior.[119] Only 54% of prisons offer medications for withdrawal-related systems, and a mere 29% provide overdose education services.[120] Inmates suffering from opioid addiction, especially, have inadequate access to treatment options. For example, only 24% of prisons nationwide provided for continued pre-admission

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112 *Id.* at 2.

113 *Id.* at 1.

114 U.S. SENT'G COMM'N, *supra* note 67, at 14.

115 MARUSCHAK, BRONSON & ALPER, *supra* note 110, at 12.

116 *Id.* at 2.

117 *Id.* at 3, 10.

118 LAURA M. MARUSCHAK, TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUST., OPIOID USE DISORDER SCREENING AND TREATMENT IN LOCAL JAILS 2 (2019).

119 *Id.*

120 *Id.* at 9.

medication-assisted treatment of opioid disorders, a service that is both prominent and effective in the realm of substance abuse care.[121] The lack of accessible treatment that effectively addresses the condition(s) of inmates suffering from opioid addiction is further emphasized by examining the collective prison landscape's brand of substance abuse treatment. In 2019, 81% of state and federal prisons provided some sort of drug or alcohol dependency or awareness program, however, only 10% of prisoners received clinical treatment that year, suggesting the available programming is merely self-help or peer-based services.[122] Additionally, services addressing mental health are especially inadequate, with the Bureau of Justice Statistics reporting that merely 5% of federal prisoners receive mental health treatment within the facility.[123] In totality, this formulation of treatment represents the bare minimum, failing to provide inmates suffering from addiction with the most effective resources such as residential treatment programs, professional counseling, or detox units.[124]

The unfortunate reality is that terms of imprisonment interrupt the treatment of underlying conditions, and, ultimately, the rehabilitation of inmates by interrupting their medication, education, and other necessary care. This emphasizes the true nature of incarceration, which serves to punish, rather than provide care for its inhabitants, furthering the notion that low-risk defendants suffering from opioid addiction would be misplaced, neglected, and incapable of meeting the correctional objectives of incarceration. In the past ten to fifteen years, progressive solutions on this front have finally gained momentum, with the emergence of sound and sufficient ATI programs at the federal level.[125]

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[121] *Id.* at 10.

[122] Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More Than They Treat It*, PRISON POL'Y INITIATIVE (Jan. 30, 2024), https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/ [https://perma.cc/38AC-64DY].

[123] U.S. SENT'G COMM'N, *supra* note 67, at 14.

[124] *See generally* LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP'T OF JUST., SURVEY OF PRISON INMATES, 2016: ALCOHOL AND DRUG USE AND TREATMENT REPORTED BY PRISONERS (2021).

[125] U.S. SENT'G COMM'N, *supra* note 67, at 15-16.

Authority to implement and conduct ATI programs in the federal criminal justice system is codified via statute and has grown in scope by the progression of SCOTUS precedent and justice initiatives.[126] Prior to 2010, only two federal ATI programs existed, creating a systematic disservice to low risk defendants suffering from addiction.[127] This deficiency is attributed to pre-*Booker* sentencing precedents, with the Guidelines dictating the process and handcuffing judicial discretion to the generational deference towards incarcerating opioid offenders.[128] Additionally, initial reactionary trends after the *Booker* decision opposed the expansion of rehabilitation court resources in the federal system, with a flawed DOJ policy deeming them "unnecessary" and "inappropriate," asserting their functionality was better reserved for the state system.[129] The previously mentioned landmark decision in *Gall*, as well as the *Pepper v. United States* ruling, changed this, however, granting general approval of judges imposing lower sentences when they deem the defendants earned a downward variance in their sentencing through successful rehabilitation efforts.[130] The prominence of ATI programs was further catalyzed through the Smart on Crime Initiative of 2013 when the DOJ endorsed these programs as pivotal to national reformative efforts regarding sentencing.[131] This has generated promising momentum, with over twenty districts offering some form of an alternative treatment court.[132]

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[126] 18 U.S.C. § 3154.

[127] U.S. SENT'G COMM'N, *supra* note 67, at 15.

[128] *Id.* at 16.

[129] *Id.*

[130] *Id.*

[131] U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 3-4 (2013).

[132] *Problem-Solving Courts Toolkit*, U.S. SENT'G COMM'N (May 2024), https://www.ussc.gov/education/problem-solving-court-resources [https://perma.cc/ZA7K-QVUW].

V. A MODEL FOR PROGRESS: THE SOUTHERN DISTRICT OF WEST VIRGINIA'S APPROACH TO REHABILITATION

As the territory experiencing the height of the opioid epidemic,[133] the Southern District of West Virginia has constructed a unique approach to accomplishing rehabilitation objectives. Successful rehabilitation efforts are foundational to the district's quest to combat the decades-long suffering that has tarnished its communities. In recent years, the United States Attorney's Office within the district has implemented an ATC program that focuses on addiction recovery, substance abuse, and mental health treatment—as well as re-entry measures such as education and labor force training.[134] The ATC's model for treatment accounts for the whole defendant in addressing addiction, mental health, and other behavioral challenges on a case-by-case basis, carefully evaluating the circumstances surrounding the defendant's background, criminal history, and the short and long-term goals connected to their successful rehabilitation and return to their professional and personal lives.[135] This program, by encompassing a variety of addictions and disorders among defendants of all demographics, is more inclusive than the relatively universal drug and therapeutic courts that are limited to a certain category of defendants or focused exclusively on substance abuse rehabilitation.[136] The core focus of the ATC's evaluation of candidates is the connection between the underlying offense and the underlying condition.[137] For example, a defendant with a gambling addiction facing federal charges for white-collar offenses such as wire fraud, embezzlement, or money laundering may qualify as a candidate for ATC.[138]

The ATC, as a modified formulation of modern front-end ATI programs, operates through a two-track system, with track one

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[133] *See generally* W. VA. DEP'T OF HEALTH AND HUM. SERVS., OFF. OF DRUG CONTROL POL'Y, WEST VIRGINIA 2020-2022 SUBSTANCE USE RESPONSE PLAN (2020).

[134] Memorandum from the S. Dist. of W. Va., *supra* note 25, at 1.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *See generally Three More Participants Graduate from U.S. District Court's Alternative Treatment Court*, U.S. ATT'Y'S OFF.: S. DIST. OF W. VA. (Nov. 14, 2024), https://www.justice.gov/usao-sdwv/pr/three-more-participants-graduate-us-district-courts-alternative-treatment-court [https://perma.cc/AC7R-HR2L].

participants achieving dismissal of their felony conviction(s) with prejudice and track two participants achieving a term of supervised release upon successful completion of the program.[139] Candidates will be placed on track one or track two at the time of their acceptance into the program.[140] The nature of the underlying offense, the amount of controlled substance(s) involved in the underlying offense, the candidate's role in the underlying offense, and their criminal history and record of prior participation in rehabilitation programs, make up the deciding factors in selecting the appropriate track.[141] The application process begins with the United States Attorney's Office's evaluation of the defendant's referral to the program by formal written advocacy presented by the Federal Public Defender representing the defendant.[142]

To qualify for acceptance into the ATC program, a candidate must be facing at least one federal charge brought by the United States Attorney's Office for the district that involves a maximum sentence exceeding one year of incarceration in federal prison.[143] The criminal conduct involved must be deemed to be motivated by the defendant's substance abuse or addiction, mental health condition, or other underlying conditions that can be mitigated via treatment measures available through the ATC program.[144] Additionally, candidates must be in good standing with the United States Probation Office in the district.[145] The United States Attorney's Office, in their evaluation of potential candidates for ATC, places decisive weight on factors[146] that will likely exclude a defendant from admittance into the ATC program, which include the following:

> (1) The defendant has a criminal history of violent offenses;
> (2) The defendant is subject to being removed from the United States by immigration authorities;

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[139] Memorandum from the S. Dist. of W. Va., *supra* note 25, at 2.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 2-3.
[143] *Id.* at 1.
[144] *Id.* at 1-2.
[145] *Id.* at 2.
[146] *Id.*

> (3) The defendant has been involved in child-exploitation offense(s);
> (4) The underlying offense involves the defendant's beyond-minor role in a large-scale fraud or narcotics distribution operation(s);
> (5) The underlying offense involves acts and/or threats of violence against another individual; or
> (6) The underlying offense has a statutory mandatory minimum sentence that is not safety-valve eligible.

If selected, the defendant will be required to execute a plea agreement with the Assistant United States Attorney prosecuting the case, who will file a motion on behalf of the United States to set forth a plea hearing.[147] At the plea hearing, the ATC team will formally refer the defendant to the ATC program before the originating district judge, who possesses the discretion to approve or deny the referral.[148] If the judge approves, they will execute an order referring the case to the aforementioned ATC team and the treatment program will commence, with the defendant reporting to the United States Probation Office and participating in monthly meetings with the United States Magistrate Judge, United States Probation Officer, Assistant United States Attorney, Assistant Federal Public Defender, and community service personnel serving on the ATC team.[149] The duration of the program varies, with candidates participating for at least twelve months, but usually no longer than twenty-four months.[150]

VI. THE FUNNEL TO RESTORATION: SUCCESS RATES ANCHORED IN THE VETTING PROCESS

On the surface, the strict and comprehensive disqualifying factors adopted by the ATC's model may create the presumption that very few opioid defendants across the country would even be eligible for rehabilitation and re-entry programs utilizing the criteria. A quick look at the statistics illustrating defendant characteristics actually supports the opposite position.[151] Of

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[147] *Id.* at 3.
[148] *Id.* at 2-3.
[149] *Id.* at 3.
[150] *Id.* at 1.
[151] MOTIVANS, *supra* note 13, at 13.

offenders sentenced for an opioid offense in 2021, almost 95% did not receive an aggravating adjustment for an organizing or leadership role pursuant to the underlying offense.[152] Additionally, over 94% of defendants did not carry a career offender status.[153] Notably, the overwhelming majority of defendants did not brandish a weapon in the commission of the crime, with 81% falling into the "no weapon involved" category.[154] Finally, and possibly most importantly, 508 defendants sentenced for an opioid crime had no prior criminal history.[155] These indicators prove that a compelling number of federal convictions are within the parameters of the ATC's qualification criteria, creating an opportunity and perhaps, a responsibility, for districts within the federal landscape to adopt similar standards.

Defendants fitting within the parameters also clearly align with the "low risk" classification determined through the Post Conviction Risk Assessment process, which is a foundational aspect of the evaluation process involved in assessing the prospects of rehabilitation for federal offenders. Additionally, the Probation and Pretrial Services Office recently published a survey of federal offenders currently supervised through the federal probation system that refutes any notion that the ATC requirement that the underlying offense and underlying addiction be so connected creates a far too narrow criteria for candidacy.[156] In the survey, 17% of the group reported that they suffer from ongoing drug problems, with an astounding 43% reporting that their drug use led to their legal problems.[157] These findings prove that a "market" for ATC-like programs exists, as a significant number of federal offenders are likely to fit within the parameters of qualification.

While significant progress has been made since the establishment of ATI courts in the federal system, the structure

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] U.S. SENT'G COMM'N, *supra* note 67, at 14-15.
[157] Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, FED. PROB., Sep. 2014, at 41, 44, 45 tbl. 1, 46 tbl. 2.

and functionality of these programs are hindered by the absence of one or more key attributes foundational to the ATC, and ultimately, the success and prominence of treatment courts. Similar programs that implement some, but not all, of the pillars of the ATC experience mixed results. On the other hand, two districts, in particular, have adopted structurally similar programs built on the same pillars as the ATC.[158] These programs, while early in their existence, have experienced encouraging success.

Before diving into the two ideal programs parallel to the ATC, it is important to recognize, in contrast, an example of a program that is similar in nature, but nonetheless has deficiencies in its design, process, and ultimately, its results. The District of South Carolina provides the BRIDGE program, specifically for defendants with substance abuse problems who qualify as "low-level" drug offenders or property offenders who supported their addiction through fraud, theft, or drug distribution.[159] Notably, the program excludes defendants suffering from "severe" mental health conditions and has not established a limit on the scale of fraud or theft or the drug quantity involved in the underlying offense.[160] While all graduates of the program have achieved either a downward variance to probation, a brief "time served" sentence attached to a term of supervised release, or a complete dismissal of the charges, only forty-three defendants graduated from the program in the first seven years of its existence, with thirty-five failing to complete the program due to voluntary departure or termination for failing to abide by the conditions of the program.[161]

It is quite plausible that the program's disappointing ratio of success to failure among its participants is due to the lack of concreteness in its disqualifiers. Failing to enforce strict standards regarding factors central to the magnitude of the offense, such as the quantity of drugs involved and the defendant's role in a large-

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[158] Laura Baber et al., *A Viable Alternative? Alternatives to Incarceration Across Seven Federal Districts*, FED. PROB., June 2019, at 8.

[159] U.S. DIST. CT. FOR THE DIST. OF S.C., BRIDGE PROGRAM: MISSION STATEMENT AND POLICIES 1 (2016).

[160] *Id.* at 4.

[161] U.S. SENT'G COMM'N, *supra* note 67, at 20.

scale criminal enterprise or scheme could perhaps hinder the vetting process and lead to the admittance of individuals likely to contaminate the pool of candidates and overall success rate of the program. Additionally, the exclusion of defendants suffering from "severe" mental health conditions and the limiting of addiction to substance abuse only deprives many otherwise deserving individuals of the opportunity to reap the benefits of the program's treatment resources.

On the other hand, the Eastern District of Missouri (Sentencing Alternatives Improving Lives) and the Central District of California (Conviction and Sentence Alternatives) have developed successful programs incredibly similar in foundation to the ATC.[162] Both programs adopt the two-track approach and limit participation to defendants whose underlying conviction appears to be motivated by their addiction.[163] Each program upholds fundamental exclusionary factors, with defendants convicted of child sex crimes and violent crimes, as well as those with substantial roles in criminal enterprises and/or extensive criminal records being ineligible for the program.[164] Both provide the opportunity for track one graduates to receive a full dismissal of their charges, with track two graduates receiving a reduction in their sentence resulting in a period of probation rather than a term of imprisonment.[165] In Central California's program's first five years of operation, 137 individuals graduated,[166] with only eighteen terminated for non-compliance.[167] While data obtained for the Eastern Missouri program is limited, a 2018 report indicates that the program experienced a 60% success rate during its early years of existence.[168] Most notably, former Attorney General Eric Holder, through the DOJ's Smart on Crime Initiative

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[162] *See Conviction and Sentence Alternatives Program (CASA)*, U.S. DEP'T OF JUST., C.D. CAL. (Dec. 4, 2024), http://www.justice.gov/usao-cdca/conviction-and-sentence-alternatives-program-casa.; *see also* U.S. SENT'G COMM'N, *supra* note 67, at 27.

[163] *Conviction and Sentence Alternatives Program (CASA)*, *supra* note 162.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] Written Statement from Dolly M. Gee, U.S. Dist. Judge, C.D. of Cal., W.D., to the United States Sentencing Commission, at 6 (Mar. 7, 2017) (on file with the United States Sentencing Commission).

[168] Laura Baber et al., *A Viable Alternative? Alternatives to Incarceration Across Seven Federal Districts*, FED. PROB., June 2019, at 8.

discussed previously, advocated for the federal court system's collective adoption of programs modeling the Central California program.[169] The similarities in structure, process, and success rates among these three noble programs in the Fourth (West Virginia), Ninth (California), and Eighth (Missouri) Circuits, respectively, will hopefully generate admiration and enthusiasm within the federal system, contribute to momentum in sentencing reform efforts, and influentially grasp the attention of sentencing courts throughout the United States.

VII. THE BIG PICTURE BENEFITS OF AN EXPANSIVE, FRONT-END INITIATIVE FOR REHABILITATION

The majority of ATI court programs were established within the past three decades, with a noticeable growth in popularity experienced over the past ten years, in particular.[170] While the team-oriented approach to supervising and implementing the program, as well as the timeframe of the program reflected in the ATC, are, for the most part, uniform across federal ATI programs, these programs are typically more narrow in scope than the ATC model, focusing on a niche condition. These programs find their origin in the state court system and generally cover a specific category of defendants, such as drug addicts, veterans, or troubled youths.[171]

Expanding the scope of ATI programs to form an umbrella of rehabilitation and reentry would propel the federal criminal justice system past outdated, exclusively drug-based rehabilitation efforts to a revolutionary, more impactful process that addresses the modern, rapidly increasing epidemics of addiction and mental health sufferings. The need for this level of inclusivity is portrayed through a Bureau of Justice Statistics survey conducted within the last decade.[172] The publication collects data examining the deeper demographics of those serving sentences of imprisonment, emphasizing the prevalence of traumatic, life-altering events and circumstances faced by inmates

[169] U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013).

[170] U.S. SENT'G COMM'N, *supra* note 67, at 15-16.

[171] *Id.*

[172] Sawyer & Wagner, *supra* note 11.

before age eighteen.[173] The data reflects the often overlooked, but especially disturbing reality, that an alarming amount of prisoners suffered through family disruption, poverty, and lack of education.[174] Additionally, the survey concludes that the overwhelming majority of prisoners were arrested before age nineteen.[175] The chart below illustrates the findings of the survey and the need for reformative measures that encompass prominent root causes of criminality through rehabilitative and reentry-focused resources.[176]

Prisoners Who Faced Devasting Family, Housing, Economic, Educational, and Criminal Hardships During Their Formative Years	
Hardship Faced	Percentage of Prison Population
Family Disruption	
One or Both Parents Were Incarcerated at Some Point	**33%**
Enrolled in Foster Care Before Age 18	**18%**
Poverty	
Homeless at Any Point Before Age 18	**12%**
Family Participated in Subsidized or Public Housing at Any Point Before Age 18	**19%**
Family Received Some Form of Public Assistance Before Age 18	**42%**
Education	
Failed to Complete High School	**62%**
Early Criminal History	
Arrested Before Age 19	**68%**
Arrested Before Age 16	**38%**

[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*

The lack of support characterized through the summarization of the prison population's upbringing-based circumstances exemplifies the need for access to treatment and other reentry-focused resources to progress towards meeting appropriate policy considerations.[177] This "better late than never" type of approach is the most viable option for halting the generational offender crisis and overpopulation of the federal prison system, which in turn promotes community stability, restoration of the livelihoods of offenders and those close to them, and the potential for a decrease in opioid-based addiction and crime metrics.

Skeptics of a reformative movement prioritizing extensive rehabilitation efforts often point to the plausibility of successful rehabilitation and reentry, generalizing defendants as unfit for or incapable of succeeding in rehabilitation and reentry focused programs due to the dangers and tragedy that inevitably come with the presence of opioids, as well as the ongoing stigmatisms surrounding the disease of addiction. A multitude of statistics regarding opioid crimes ultimately refute this notion. First, age demographics indicate that the youthful nature of overall arrestees matches the ideal timeframe inherent in the rehabilitation and reentry process; it is no secret that treatment, counseling, education, job placement and training, and other aspects of the rehabilitation and reentry process take time for the most effective results. In 2021, 57% of the individuals arrested for opioid-related crimes were under the age of thirty-four, with only 11% being over the age of fifty.[178] Studies conducted throughout the federal ATI landscape also report that the average age of program participants is thirty-two, which is younger than the mean age of thirty-six for the general population.[179] With time being of the essence, the fact that the vast majority of opioid offenders are well below what is considered "middle-aged" should be encouraging for districts weighing reformative measures for embracing a sentencing methodology geared more towards rehabilitation. The earlier a qualifying defendant receives treatment, the sooner the potential for habit-breaking, lifestyle

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[177] *Id.*

[178] MOTIVANS, *supra* note 13, at 5.

[179] Laura Baber et al., *Expanding the Analysis: Alternatives to Incarceration Across 13 Federal Districts*, FED. PROB., Dec. 2021, at 3, 6-7.

changes, and quality of life progression will enter the equation for the defendant and those close to them. A collective concentration on the timing structure of treatment program participation serves the ultimate goal of eliminating the collateral damage of the underlying addiction attributed to the penalized offense.

Additional support for a more widespread adoption of expansive and inclusive rehabilitation programs for federal opioid defendants exists in recent statistics emphasizing the life-long lack of resources accessible to this class of defendants.[180] For starters, almost 36% of opioid offenders did not complete high school, and only 5.1% are college graduates, reflecting their need for education resources, which cannot necessarily be adhered to in an ideal or plausible fashion while incarcerated.[181] Programs modeling the ATC are the most capable of providing reformative impact for these individuals and their families by shying away from the typical, narrow rehab-only attributes of drug court programs common throughout the United States, instead focusing on the totality of the rehabilitation and re-entry process to provide education services to candidates. In doing so, the candidates grow to become more marketable for employment post-graduation, and otherwise less likely to relapse and/or return to criminal activity in overcoming the burdens of their upbringings and reaping the benefits of a resource previously absent from their lives.

As a front-end program, the ATC pivots from back-end federal reentry court programs that are far more common in the federal court system. The primary difference between the two formats is the timing of the program. Reentry programs take place post-incarceration, after the defendant has suffered the consequences of serving an unusually lengthy prison sentence.[182] For the class of defendants representing the focus of this work of advocacy, these burdens are undeserved and, oftentimes, devastating to the potential for their successful rehabilitation and return to their outside lives. Statistical analysis addressed previously elevates the notion that the impact of the timing of front-end programs like the ATC is perhaps the most consequential aspect of this approach to criminal rehabilitation,

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[180] MOTIVANS, *supra* note 13, at 11-13.
[181] *Id.* at 11.
[182] U.S. SENT'G COMM'N, *supra* note 67, at 6-7.

representing a key indicator of success rates for treatment programs across the board.

Front-end ATI court programs, while relatively young in existence, have been a mechanism of promising solution to the crisis of over-incarceration in the United States. As of August of 2021, fifty-two front-end ATI programs operated across the federal districts.[183] Studies conducted by the Probation and Pretrial Services Case Tracking System in collaboration with several districts that had adopted similar ATI models conclude that front end ATI programs at the federal level, while relatively young in their existence, are experiencing encouraging graduation rates.[184] Data indicates that candidates within the federal programs have a much higher graduation rate than those in parallel programs at the state and local levels.[185] To no surprise, the encouraging graduation statistics reflect the overall impact of completing ATI programs, with more favorable outcomes in a variety of aspects occurring for graduates when compared to their counterparts who do not participate in ATI programs.[186] Graduates are much less likely to be arrested after completing the program and are employed at a much greater percentage.[187] Perhaps most importantly, graduates are far less likely to fail drug tests conducted during their supervised release periods than those who do not participate in ATI programs.[188]

CONCLUSION

Front-end alternatives to incarceration programs represent an effective and progressing tool for combatting the ongoing opioid epidemic and achieving justice in reforming federal sentencing precedent. Recent data suggests that offenders who complete these programs experience far greater outcomes than similarly situated, nonparticipant offenders.[189] These graduates are increasingly likely to restore their livelihoods, overcoming their

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[183] Baber et al., *supra* note 179, at 3-4.
[184] *Id.* at 6.
[185] *Id.*
[186] *Id.* at 12.
[187] *Id.*
[188] *Id.*
[189] *Id.*

previous criminal endeavors through effective rehabilitation and reentry procedures. This creates a substantial reduction in recurring criminal activity, relapses in opioid abuse, and unemployment among offenders post-release. These programs mitigate the domino effect of opioid addiction and generational burdens collateral to the disease through their own domino effect, ultimately leading to the restoration of opportunity in education, access to healthcare, employment prospects, financial independence, and more that touch the lives of the individual and those close to them. Furthermore, compiling studies find that successful completion of ATI programs is strongly correlated with favorable outcomes in the eventual case disposition imposed on the offender, with a strong likelihood of less severe sentences or even the dismissal of charges.

The impact of growing the prominence of ATI programs across the federal landscape only goes so far, however, with the core of the potential for reform resting in the realm of judicial discretion that has historically favored incarceration in sentencing opioid offenses. Program success rates represent the definitive variable that will influence a shift to rehabilitation-focused sentencing for this class of defendants. Achieving the desired and impactful heights in this statistic requires participating districts to adopt the standards and processes required to set both the program and its participants on the path to success. Qualification factors, the appropriate scope of treatment, and collective investment in providing the resources necessary to achieve effective rehabilitation and reentry make up the most pivotal pillars of this objective, with the ATC serving as a sufficient model for success. Nearing national uniformity in the candidate criteria, exclusionary factors, and outcome-oriented resources implemented in the ATC will undoubtedly pay dividends in the lives of defendants and those close to them and create the level of momentum desired to move the needle regarding judicial discretion.

Modern legal devices such as the *Gall*, *Rita*, and *Kimbrough* SCOTUS precedents, as well as the pretrial rehabilitation services, safety valve statutes, and first-time offender guideline amendments, represent capable avenues for judges to utilize their discretion to promote the rehabilitation of defendants eligible for programs modeling the ATC. As judges adhere to their duty of imposing "a sentence sufficient, but not greater than necessary, to comply with the purposes" codified in the sentencing statute,[190] the trust and comfort that can be established through the demonstration of successful paths facilitating rehabilitation is certain to stand out among the multitude of circumstances and considerations weighing into the ultimate decision. A federal criminal rehabilitation scene concentrated on implementing the pillars of success anchoring the ATC model will create the result-based domino effect necessary to refine the policy and discretionary framework of sentencing this class of defendants going forward, blazing the trail to both the achievement of justice in federal sentencing practices, as well as progress in halting the widespread suffering of the opioid epidemic.

190 18 U.S.C. § 3553(a)(2).