

**REPORT TO CONGRESS ON THE FEASIBILITY
OF
FEDERAL DRUG COURTS**



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Report to Congress on the Feasibility of Federal Drug Courts

Introduction

In Section 753 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress tasked the Department of Justice to “conduct a feasibility study on the desirability of a drug court program for Federal offenders who are addicted to controlled substances.”¹ This feasibility study responds to that request and examines the purpose of drug courts, reviews drug treatment programs presently available within the federal system that address the needs of substance abusing offenders, and assesses whether the types of offenders and offenses prosecuted in federal court create a demand for drug court.

Traditionally, drug courts are specialized court dockets at the state level designed to assist nonviolent, substance abusing defendants in overcoming their addictions. In sharp contrast, the federal system deals overwhelmingly with drug trafficking defendants who have committed more serious drug trafficking offenses, are often violent, and are not eligible for, or amenable to, drug-court-type programs. Because the federal system does not generally deal with the types of offenders for which drug courts are designed, there would be very little demand for drug-court-type treatment in the federal system. Moreover, the implementation of a drug court program would divert scarce prosecutorial resources from more pressing needs. Finally, state drug court programs as well as federal programs during pretrial release, incarceration, and supervised release, are already available as an alternative to a new federal drug court program. Therefore, while the Department continues to support strongly state drug court programs, it is the Department’s conclusion that drug courts are an inappropriate and unnecessary program for the federal criminal system.

I. What are Drug Courts?

Drug courts are specialized court dockets designed to handle cases involving nonviolent, substance abusing offenders through a comprehensive program of supervision, drug testing, treatment services, and immediate sanctions and incentives.² The purpose of drug courts is to reduce the recidivism rates of these particular offenders by helping them overcome their substance abuse problems, which are the primary cause of their criminal activities. In general, drug courts coordinate the “efforts of the judiciary, prosecution, defense bar, probation, law enforcement, treatment, mental health, social services, and child protection services to actively and forcefully intervene and break the cycle of substance abuse, addiction, and crime.”³

1 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 753, 120 Stat. 192, 274 (2006).

2 C. WEST HUDDLESTON ET AL., U.S. DEP’T OF JUSTICE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 2, 10 (available at <http://www.ndej.org/>); see also National Association of Drug Court Professionals, *Facts on Drug Courts* (2006), available at <http://www.nadcp.org/whatis/>.

3 HUDDLESTON, *supra* note 2, at 2.

Drug courts represent an alternative to prison for nonviolent, substance abusing offenders.⁴ In the traditional diversion model, drug court personnel identify substance abusing offenders after arrest and charging and offer the offender the option of entering a drug court program instead of proceeding through the normal trial process. Once in the drug court program, the offender is immediately placed under “strict court monitoring and community supervision, coupled with effective long-term treatment services.”⁵ Drug court participants undergo “an intense regimen of substance abuse and mental health treatment, case management, drug testing, and probation supervision while reporting to regularly scheduled status hearings before a judge with specialized expertise in the drug court model.”⁶ In addition, some drug courts provide job skills training, family or group counseling, and other “life-skill enhancement services.”⁷

Presently, there are an estimated 1,600 drug courts in existence at the state and local level.⁸ Drug courts are part of a larger movement of problem solving courts that started in the late 1980s to address critical problems facing courts at the local level. Because these problem solving courts were designed and implemented at the local level, they vary widely and include adult drug courts, family dependency courts, DUI drug courts, juvenile drug courts, reentry courts, and mental health courts.⁹ These problem solving approaches have been employed along the continuum of points in the criminal justice system, including diversionary or pre-plea programs for less serious offenders in simple drug possession and “under the influence” cases; post adjudication programs for probationers; and reentry programs for offenders who have already served a prison sentence.¹⁰ All of these programs employ some of the following approaches:

- Integration of drug treatment services with the processing of cases through the court system;
- Use of a nonadversarial approach to promote public safety while protecting the defendant’s due process rights;
- Early identification of participants and prompt placement in the program;
- Access to a continuum of treatment and rehabilitation services;
- Frequent monitoring of abstinence by drug testing;
- A coordinated effort to monitor and develop responses to participants’ compliance;

4 See 42 U.S.C. §§ 3797u, 3797u-1 (2006) (prohibiting expenditure of federal drug court grant funds for programs that allow participation by violent offenders in the program).

5 HUDDLESTON, *supra* note 2, at 2.

6 *Id.*

7 *Id.*

8 *Id.* at 1.

9 See *Facts on Drug Courts*, *supra* note 2. DOJ’s Office of Justice Programs, Bureau of Justice Assistance has issued *DEFINING DRUG COURTS: THE KEY COMPONENTS* (Reissued 2004), which establishes ten components that any drug court program should have.

10 *Facts on Drug Courts*, *supra* note 2; HUDDLESTON, *supra* note 2, at 3, 10–11, 13.

- Ongoing judicial interaction with each participant;
- Monitoring and evaluation to gauge effectiveness;
- Interdisciplinary education of all participating partners in the drug court system; and
- A collaborative approach with criminal justice service providers and community-based organizations.

In the classic state drug court program, eligibility is determined by the type of offense and by evidence of a substance abuse problem. Most state drug courts bar offenders with past or pending charges involving violence or drug production or distribution. Substance abuse problems are identified through the screening of post-arrest drug testing results, self-reporting by defendants, and a review of the defendant's criminal history by drug court professionals. Those potentially eligible then undergo an assessment of the degree of addiction using a scientifically-validated testing and assessment protocol. The eligible nonviolent, substance abusing offender is notified either at or shortly after his first appearance that he is eligible for drug court. Participation is voluntary. If the offender accepts the invitation to participate in drug court, his case will be transferred from the regular criminal calendar to a drug court calendar. Usually, the offender must sign a contract agreeing to participate in the program and agreeing to follow the terms and conditions of his treatment. In some programs, the offender pleads guilty and is sentenced to a term of probation, during which he must successfully complete the drug court program. In other programs, the plea is held in abeyance or the prosecution is continued while the offender participates in drug court. In these presentencing programs, if the offender successfully completes the drug court program, his case will be dismissed, or he will be eligible for a substantially reduced sentence.

Once in the drug court program, the offender must adhere to strict conditions that vary depending on the specific drug court program and the offender's needs, but will always include regular drug testing, participation in inpatient or outpatient drug treatment, and regular court appearances to monitor offender's circumstances. The drug court professionals will endeavor to place the offender in the appropriate treatment program, which may involve anything from extensive inpatient care, to periodic outpatient counseling or group therapy sessions. One of the unique aspects of drug courts and other problem-solving courts has been the use of collaboration among drug court partner agencies to leverage access to critical services such as treatment and other wraparound services that address the underlying factors that can make offenders more at-risk for criminal behaviors.

When the offender is successfully working through his treatment regimen and testing negative, his regular court appearances serve to provide continued encouragement. On the other hand, when the offender violates his conditions there is a system of graduated sanctions ranging from additional testing requirements and curfews to imprisonment for short periods of time. The judge, prosecutor, defense attorney, and probation officer work jointly in a non-adversarial manner to assist the offender and, when necessary, to determine appropriate sanctions. An offender who repeatedly violates his conditions can either be extended in the program or

terminated. If terminated, he can be sentenced (if he has already entered a plea) or sent back to regular criminal court for trial on his underlying offense.

Presently, there are also two federal drug programs in existence in the Districts of Oregon and Massachusetts. They are reentry programs that deal with substance abusing offenders during their post-release term of supervised release, as opposed to being traditional “drug courts.” In essence, these programs are really modified forms of federal supervised release. They employ techniques developed in state drug court programs, such as more frequent drug testing, more frequent court appearances, and graduated sanctions, in an attempt to enhance the treatment of drug abusing offenders. Both district court programs were recently initiated and are operating on a trial basis. It is far too soon to tell whether they will add any value to the management of federal offenders on supervised release.

The vast majority of drug courts are specifically designed to help nonviolent substance abusers whose criminal behavior is directly tied to their drug abuse problem. In other words, these programs are for offenders who use, and are often dependent upon, drugs. Their offenses are either for simple possession of drugs, or for petty crimes that were committed either to get money to support their habit (*e.g.*, theft), or because their drug use made them unwilling to conform their behavior to the requirements of the law (*e.g.*, destruction of property or DUI). Offenders who engage in drug trafficking, or who commit violent offenses, however, are not eligible for drug court programs.

It is important to make this distinction because there is a dramatic difference between the behavior and motivations of a simple substance abuser and a drug trafficker, whether violent or nonviolent. The abuser commits crimes in support of, or because of, his or her drug habit. The trafficker, on the other hand, is motivated by the desire for financial gain or the desire for power.¹¹ Drug court programs are only designed to change the attitudes and behavior of the substance abuser. They are not designed or equipped to change the quite different attitudes and behavior of the drug trafficker or violent felon. Although there is some evidence that drug court models have some short term effectiveness in reducing the recidivism of nonviolent drug abusers,¹² there is presently no evidence that the drug court model would have any such effect with drug *traffickers*, whether violent or nonviolent. Given the completely different motivations and behaviors of drug traffickers it is highly unlikely that a drug-court-type program would have any success in reducing recidivism.

On the other hand, at the state and local level, there has been significant use of post-

11 See THE FEDERAL BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS FISCAL YEAR 2005: REPORT TO CONGRESS (2006).

12 A study by the National Center on Addiction and Substance Abuse at Columbia University found that the average recidivism rate for those who complete a state drug court program is between four and 29% as compared to 48% for those who do not participate in a drug court program. Steven Belenko, *Research on Drug Courts: A Critical Review*, 2001 Update (2001). A NIJ study found that recidivism rates for drug court participants one year after graduation is 16.5%, and 27.5% after two years. John Roman, et al., *Recidivism Rates For Drug Court Graduates: National Based Estimates* (2003). The NIJ report also found that participants from 38 drug courts throughout the country have recidivism rates lower than 10% one year after graduation. See also UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: ADULT DRUG COURTS (2005).

release reentry programs, which aim to help *all* substance abusing offenders after they are released from prison. As noted above, reentry programs use approaches that are similar to drug court programs, including early identification, assessments, coordination of services both pre- and post-release, use of graduated sanctions, and collaboration with community groups. These reentry programs have focused on serious and violent offenders after their release from prison. But these programs are not drug courts. And as will be demonstrated in the following section, the Bureau of Prisons already operates a successful reentry program for substance abusing federal offenders.

II. Existing Federal Programs

There are already significant drug treatment programs available in the federal system as part of pretrial release, incarceration, and supervised release. These programs provide an approach that is appropriate for this target population and has proven successful in reducing recidivism.

Pretrial programs include both inpatient and outpatient treatment programs. Assessment and placement of defendants is coordinated through the local United States Probation Office and ordered by the supervising judge or magistrate. Even where defendants are not placed in a drug treatment program, most courts require as a condition of pretrial release that defendants undergo regular drug testing. And when defendants test positive for the use of drugs, courts may then order them into drug treatment programs or incarcerate those who do not appear amenable to treatment.

After defendants are sentenced, they are eligible for programs in the Bureau of Prisons (BOP).¹³ Consistent with the research and literature on drugs and crime, BOP has identified two types of incarcerated drug offenders based on their respective treatment needs:

(1) “Drug Defined Offenders” are those individuals who violate the law due to their involvement with drugs as a business venture and tend to be motivated solely by financial gain. These individuals may or may not need drug abuse treatment. These inmates often benefit from other interventions (*e.g.*, drug abuse education, values development, or anger management).

(2) “Drug Related Offenders” are those individuals who violate the law as a direct result of their drug use. Their illegal activities may be a direct result of their drug use (such as possession or sale of illegal substances), or to support continued drug use (such as robbery). These individuals are more likely to need drug abuse treatment.

In an effort to identify the population with intensive (residential) drug abuse treatment needs, BOP uses the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* to diagnose the extent and nature of an inmate’s drug use. Inmates who do not

¹³ THE FEDERAL BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS FISCAL YEAR 2005: REPORT TO CONGRESS (2006).

meet the level of use or criteria for a drug use disorder are not appropriate for the residential drug abuse treatment program. These inmates have other drug abuse treatment opportunities available to them (*e.g.*, drug abuse education and non-residential drug abuse treatment).

To estimate the demand for treatment for a substance use disorder, BOP analyzed a portion of data that were collected as part of a study of the prevalence of mental health conditions in the inmate population. These data characterize samples of inmates from admissions cohorts during fiscal years 2002 and 2003. Over 2,500 presentence investigation reports were screened to ascertain the frequency of inmates with a drug use disorder (a reference to a medical diagnosis of a drug use disorder or an offender's self report of drug use that met the criteria for a drug use disorder). The findings extrapolated from these data indicate that approximately 40 percent of inmates entering BOP custody during fiscal years 2002 and 2003 met the APA criteria for a substance use disorder.

Upon entry into a BOP facility, an inmate's records are assessed against specific criteria to determine if the offender needs drug abuse education. The criteria used for this determination include: evidence in the presentence investigation report that alcohol or other drug use contributed to the commission of the instant offense, a judicial recommendation for treatment, and/or a violation of community supervision as a result of alcohol or drug use.

Participants in the drug abuse education course learn the connection between drugs and crime; are taught to distinguish drug use, abuse, and addiction; review their personal drug use histories; and acquire the information needed to help them overcome criminal thinking errors. In fiscal year 2005, 22,776 inmates participated in drug abuse education.

Inmates who meet the level of use or criteria for a drug use disorder can enroll in the BOP's Residential Drug Abuse Treatment Program (RDAP). At present, about half (54) of BOP's institutions operate a RDAP. Residential drug abuse treatment programs provide intensive drug treatment to inmates diagnosed with a drug use disorder. The programs are staffed by a doctoral-level psychologist who supervises the treatment staff. The drug treatment staff-to-inmate ratio is 1-to-24. Inmates are housed together in a treatment unit that is set apart from the general population. Treatment is provided for a minimum of 500 hours over nine months.

Prior to acceptance into a RDAP, inmates are interviewed to determine if they meet the diagnostic criteria for a substance use disorder. Inmates must then sign an agreement to participate in RDAP. Inmates enter the program as they near their release date to ensure all inmates who are eligible and volunteer for the RDAP are able to receive treatment prior to leaving BOP custody. Inmates must have enough time left in their sentence to complete the unit-based component and the community transition phase of the RDAP.

BOP's RDAP adheres to a cognitive-behavioral treatment model. Treatment targets major criminal/drug-using risk factors, especially anti-social/ pro-criminal attitudes, values, beliefs, and behaviors. Using evidence-based practices, the BOP targets these anti-social/pro-criminal behaviors by reducing anti-social peer associations; promoting positive family

relationships; increasing self-control, self-management, and problem-solving skills; ending drug use; and replacing lying, stealing, and aggression with pro-social alternatives. Treatment includes the development of a specific re-entry plan.

BOP revised its treatment protocol in 2005 to ensure it included recent treatment practices that have proven to be effective. A refocusing on treatment programs for female inmates was included in the revised protocol. In fiscal year 2005, 18,027 male and female inmates participated in BOP's residential drug abuse treatment programs.

All BOP institutions follow this standardized treatment protocol to ensure consistency of treatment goals and objectives within BOP's residential treatment programs. The BOP RDAP treatment modules are available through the National Institute of Corrections Information Center. Evidence of the program's effectiveness is the fact that to date, the modules have been requested by all 50 states and seven foreign countries, as well as a number of local correctional agencies and community-based treatment providers.

A rigorous three-year outcome study of the BOP RDAP was conducted in coordination with the National Institute on Drug Abuse and was published in September 2000.¹⁴ Findings from this analysis indicate that inmates who completed RDAP were less likely to be rearrested when compared to similar offenders who did not participate in the residential treatment program (18 percent for females and 15 percent for males). The analysis also indicated that inmates who completed the RDAP were less likely to use drugs (18 percent for females and 16 percent for males) when compared to similar offenders who did not participate in the residential treatment program. This study demonstrates that RDAP makes a positive difference in the lives of inmates and improves community safety following the inmates' release from custody.

In addition to the intensive residential treatment program, non-residential drug abuse counseling is available in every BOP institution. Non-residential drug abuse treatment services are provided through the Psychology Services Department at each facility and are designed with a significant degree of flexibility to meet the treatment needs of inmates with a history of drug abuse problems.

Specific populations targeted for non-residential treatment services include:

- inmates with a relatively minor or low-level substance abuse impairment;
- inmates with a drug use disorder who do not have sufficient time to complete the intensive RDAP;
- inmates with longer sentences who are in need of treatment and/or awaiting placement in the RDAP;
- inmates identified with a drug use history who did not participate in RDAP and are preparing for community transition; and
- inmates who completed the unit-based component of the RDAP and are required

¹⁴ *Treating Inmates Addicted to Drugs (TRIAD) Study* (2000).

to continue treatment upon their transfer to the general inmate population.

In fiscal year 2005, BOP developed two new treatment modules for non-residential drug abuse treatment, one as aftercare treatment for offenders completing the RDAP and one for inmates entering a community corrections center.

Non-residential drug abuse treatment mirrors the RDAP approach through the use of a cognitive-behavioral treatment protocol. Treatment concentrates on changing inmate behaviors by applying the treatment practices described in the above section on Residential Drug Abuse Treatment.

A drug abuse treatment specialist, under the supervision of a psychologist, develops individual treatment plans based on an assessment of each inmate's treatment needs. Support groups, such as Alcoholics Anonymous and Narcotics Anonymous, are also available to support the BOP's treatment services. In fiscal year 2005, there were 14,224 inmates who participated in the non-residential drug abuse treatment program.

BOP includes community transition treatment as a component of the residential drug abuse treatment program. To help ensure a seamless transition from the institution to the community, BOP provides a treatment summary to the community corrections center (halfway house) where the inmate will reside, to the community treatment provider who will treat the inmate, and to the appropriate U.S. Probation Office before the inmate's arrival at the community corrections center.

To further this seamless transition, participants in community transition drug abuse treatment typically continue treatment during their period of supervised release. These inmates frequently remain with the same treatment provider, ensuring continuity in treatment and accountability during this critical community reentry period. Inmates with a moderate-to-severe drug history who did not participate in the residential drug abuse treatment program may be required to participate in Community Transition Drug Abuse Treatment during this high-risk period of transition. In fiscal year 2005, 16,603 inmates participated in community transition drug abuse treatment.

Subtitle T of Title III of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), titled Substance Abuse Treatment in Federal Prisons, requires BOP (subject to the availability of funds) to provide appropriate substance abuse treatment to 100 percent of eligible inmates. In fiscal year 2005, BOP met this requirement. As of September 30, 2005, there were over 33,300 inmates in BOP institutions who had participated in a residential drug abuse treatment program (about 18% of the BOP population); 18,027 of these inmates participated in the program during fiscal year 2005. The remaining 15,336 inmates participated in the program prior to fiscal year 2005 and remain in BOP custody. Contingent upon receiving the necessary resources, BOP is planning to expand the residential drug abuse treatment program in the future based on the anticipated growth in the inmate population and the concomitant growth in the number of inmates with a substance use disorder.

VCCLEA also allows BOP to grant inmates convicted of a nonviolent offense a reduction of up to one year off their term of imprisonment for successful completion of the residential substance abuse treatment program.¹⁵ In the interest of protecting the public, BOP will not consider early release for inmates with a current conviction for a violent offense, or those with a criminal history that includes a violent offense. Because of the early release provision and other incentives to participate in residential drug abuse treatment, the BOP continues to have a significant number of inmates (over 7,700) waiting to enter the residential drug abuse treatment program. In fiscal year 2005, 4,230 inmates received a reduction in their term of imprisonment pursuant to 18 U.S.C. § 3621(e)(2). Since the implementation of this provision in June 1995, a total of 24,363 inmates have received such a reduction. In fiscal year 2005, eligible offenders received an average reduction in their term of imprisonment of 8.76 months.

In fiscal year 2005, BOP worked closely with both the Substance Abuse and Mental Health Services Administration (SAMHSA) and the National Institute on Drug Abuse (NIDA) in the development of protocols to facilitate treatment for the substance abusing offenders throughout their movement through the criminal justice system (from arrest to parole). The *Federal Consortium to Address the Substance Abusing Offender* was established and funded by the Department of Justice Bureau of Justice Assistance (BJA). The consortium includes representatives from many parts of the federal criminal justice system, as well as representatives from the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Education, the National Highway Traffic Safety Administration, and the Centers for Disease Control and Prevention. The consortium works to develop information for State and local officials to assist with effective treatment protocols, cross-training, communication strategies, and research.

BOP has also worked closely with NIDA's Criminal Justice-Drug Abuse Treatment grantees and is a pilot site in the development of an assessment protocol. Working with the Texas Christian University's Institute for Behavioral Research, this pilot is designed to monitor individual inmate treatment improvements, program quality, and staff training needs.

BOP also coordinates with NIDA, BJA, and SAMHSA to develop systems to improve the management and treatment of offenders with substance abuse and mental health disorders, to continue the development of gender-specific treatment protocols, to improve clinical case management systems in the reentry process, to enhance quality assurance measures and methods, and to foster the use of technologies that facilitate communication among the various criminal justice agencies involved.

When defendants are released from prison, they begin a term of supervised release, which is a part of every federal sentence.¹⁶ While on supervised release, defendants may be ordered to participate in inpatient and outpatient drug treatment and are regularly subjected to drug testing to ensure they remain substance free. As with pretrial release, the United States Probation

¹⁵ See 18 U.S.C. § 3621(e)(2) (2006).

¹⁶ See, e.g., 18 U.S.C. § 3583 (2006) (general terms of supervised release); 21 U.S.C. § 841 (2006) (supervised release terms for drug traffickers).

Offices assess defendants for treatment programs, monitor their compliance, and report progress and violations to the district courts. Courts can then act on any violations – substance abuse related or otherwise – through revocation proceedings. This system of treatment and monitoring ensures that the federal system provides continuing assistance to offenders with substance abuse problems.

III. Is There a Need for Federal Drug Courts?

To determine whether there is a need for federal drug courts, it must first be determined whether there is a sufficient supply of potential participants. As noted above, eligible drug court participants must be nonviolent, substance abusing offenders who have committed less serious offenses.

An examination of defendants convicted and sentenced in federal court shows that the 93 U.S. Attorney's Offices and the Department of Justice trial divisions primarily prosecute offenders who commit serious offenses and who generally have significant criminal histories.

The seriousness of the offenders and their offenses is well-illustrated by the types of sentences they received. From October 1, 2004 through January 11, 2005, 85.1% of all offenders prosecuted in federal court received prison-only sentences; only 8.1% received less serious, probation-only sentences.¹⁷ The remaining offenders received probation and confinement (4.0%) or prison and community confinement split (2.8%) sentences (fig.1).¹⁸ After the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory only, 85.0% of all offenders prosecuted in federal court received prison-only sentences; only 7.9% received less serious, probation-only sentences.¹⁹ The remaining offenders in the post-*Booker* time period received probation and confinement (4.0%) or prison and community confinement split (3.2%) sentences (fig.2).²⁰

17 U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS § 2, fig.D (2005).

18 *Id.*

19 *Id.* § 3, fig.D.

20 *Id.*

FIGURE 1

**DISTRIBUTION OF OFFENDERS RECEIVING
SENTENCING OPTIONS
FISCAL YEAR 2005 (October 1, 2004 through January 11, 2005)**

(Reproduced from U.S. Sentencing Commission,
2005 Sourcebook of Federal Sentencing Statistics § 2, fig.D (2005))

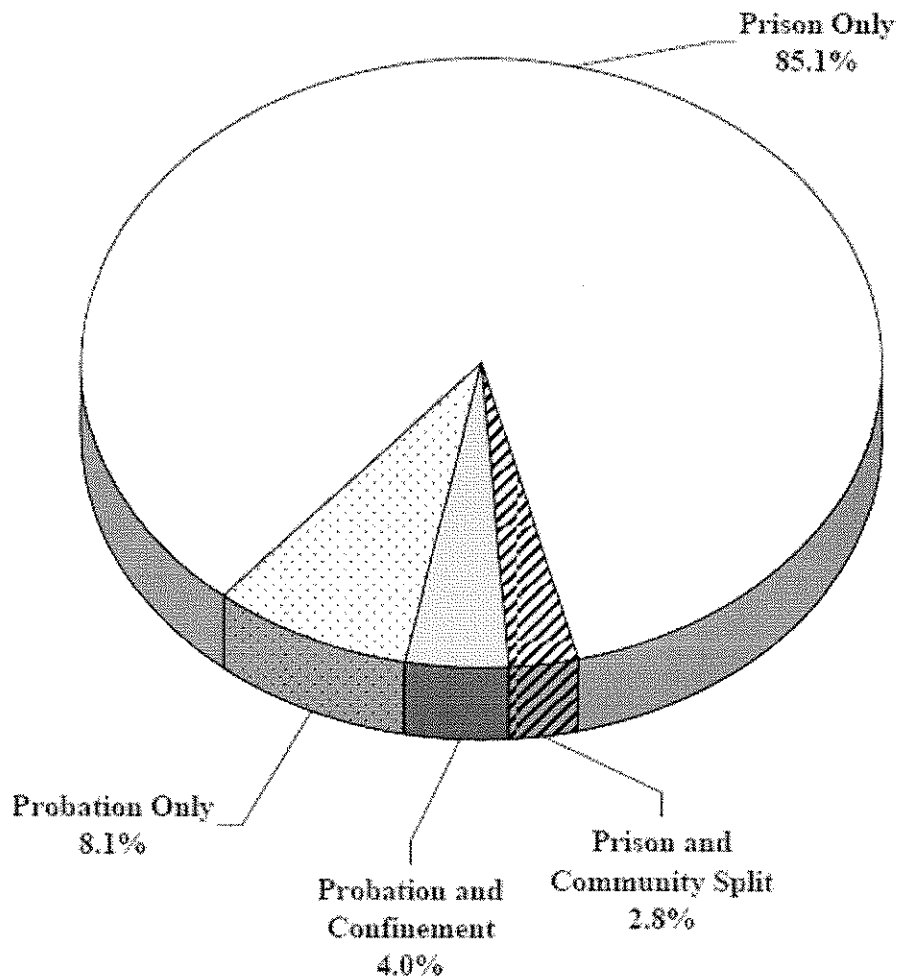
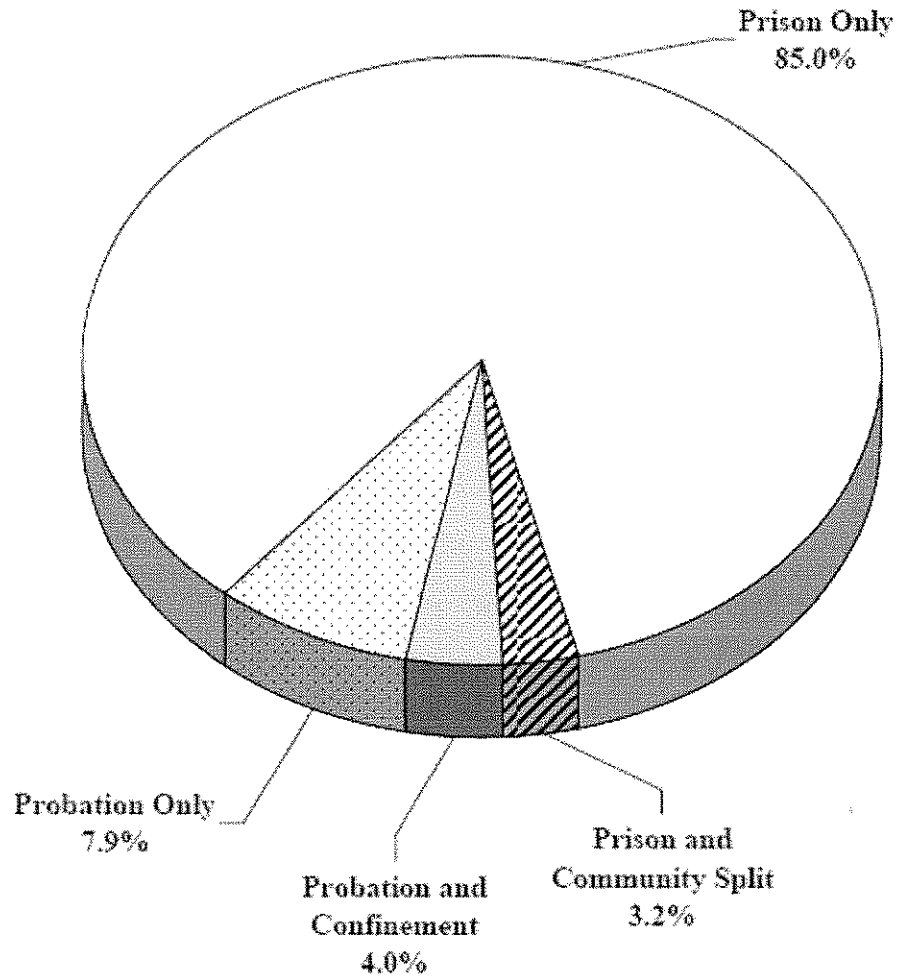


FIGURE 2

**DISTRIBUTION OF OFFENDERS RECEIVING
SENTENCING OPTIONS
FISCAL YEAR 2005 (January 12, 2005 through September 30, 2005)**

(Reproduced from U.S. Sentencing Commission,
2005 Sourcebook of Federal Sentencing Statistics, § 3, fig.D (2005))

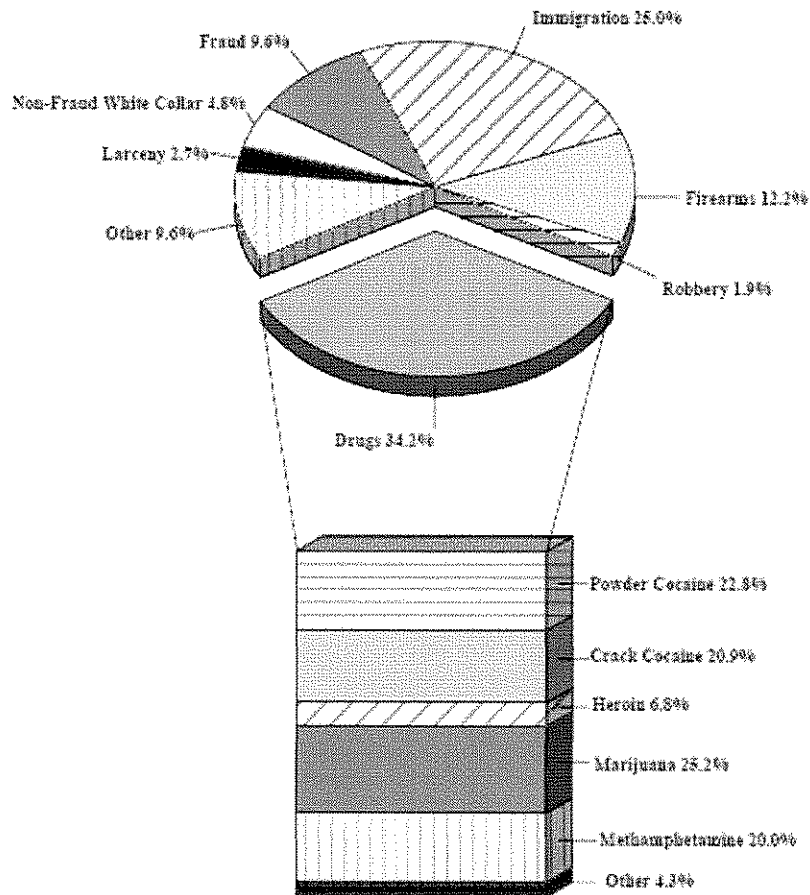


Of the serious offenses prosecuted in federal court, a substantial percentage of offenses are drug-related. In 2005, for example, 34.2% of all federal offenders were sentenced for drug offenses (fig.3).²¹ Prior to *Booker*, 96.4% of these drug-related offenders were sentenced for drug trafficking offenses, while only 2.1% were sentenced for simple possession.²² After *Booker*, 97.0% were sentenced for drug trafficking offenses, while only 1.5% were sentenced for simple possession (fig.4).²³

FIGURE 3

**DISTRIBUTION OF OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY
FISCAL YEAR 2005**

(Reproduced from U.S. Sentencing Commission's
2005 Sourcebook of Federal Sentencing Statistics § 1, fig.A (2005))



21 *Id.* § 1, fig.A.

22 *Id.* § 2, tbl.33 (counting CCE and Managing a Drug Establishment as drug trafficking offenses).

23 *Id.* § 3, tbl.33 (counting CCE and Managing a Drug Establishment as drug trafficking offenses).

FIGURE 4

**PRIMARY DRUG TYPE OF OFFENDERS SENTENCED
UNDER EACH DRUG GUIDELINE**

FISCAL YEAR 2005 (October 1, 2004 through January 11, 2005)

(Reproduced from U.S. Sentencing Commission,
2005 Sourcebook of Federal Sentencing Statistics § 2, tbl.33 (2005))

DRUG TYPE	TOTAL	§2D1.1 Drug Trafficking		§2D1.2 Protected Locations		§2D1.5 Continuing Criminal Enterprise		§2D1.6 Communication Facility		§2D1.8 Rent/Manage Drug Establishment		§2D2.1 Simple Possession	
		n	%	n	%	n	%	n	%	n	%	n	%
TOTAL	6,951	5,811	96.0	85	1.4	11	0.2	6	0.1	12	0.2	126	2.1
Powder Cocaine	1,314	1,250	99.2	5	0.4	2	0.2	2	0.0	1	0.1	14	1.1
Crack Cocaine	1,205	1,147	95.2	30	3.2	4	0.5	0	0.0	6	0.5	10	0.8
Heroin	391	361	92.4	2	0.5	0	0.0	1	0.3	0	0.0	7	1.8
Marijuana	1,777	1,656	94.9	11	0.6	1	0.1	0	0.0	1	0.1	73	4.4
Methamphetamine	1,136	1,059	95.9	24	2.1	4	0.4	3	0.3	4	0.4	12	1.1
Other	218	218	95.6	5	2.2	0	0.0	0	0.0	0	0.0	5	2.2

FISCAL YEAR 2005 (January 12, 2005 through September 30, 2005)

(Reproduced from U.S. Sentencing Commission,
2005 Sourcebook of Federal Sentencing Statistics § 3, tbl.33 (2005))

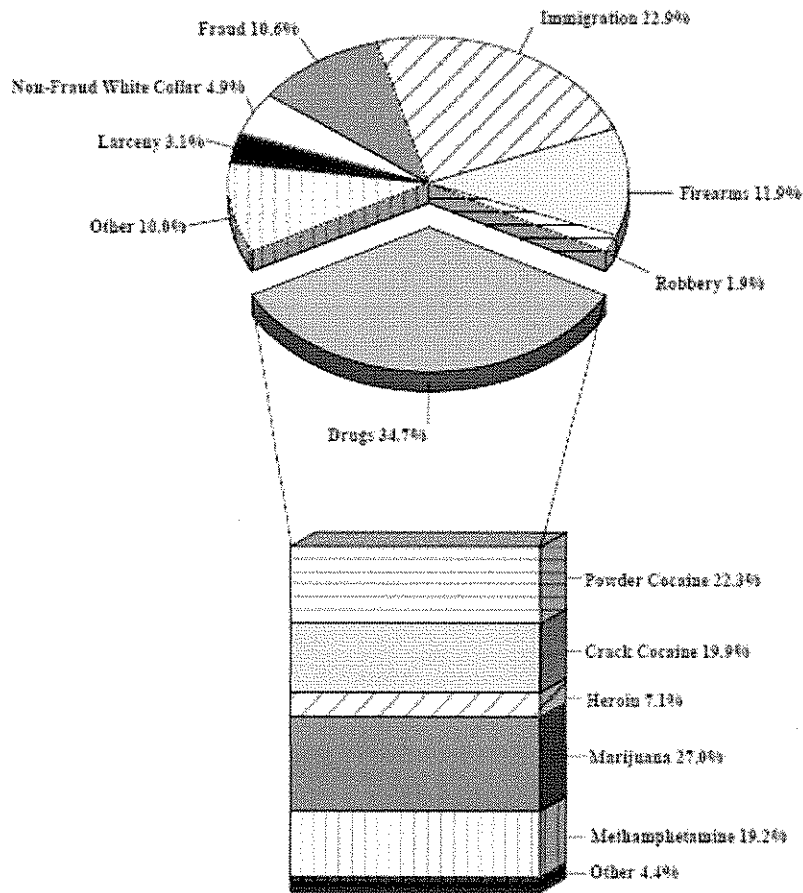
DRUG TYPE	TOTAL	§2D1.1 Drug Trafficking		§2D1.2 Protected Locations		§2D1.5 Continuing Criminal Enterprise		§2D1.6 Communication Facility		§2D1.8 Rent/Manage Drug Establishment		§2D2.1 Simple Possession	
		n	%	n	%	n	%	n	%	n	%	n	%
TOTAL	18,510	17,892	96.7	251	1.4	14	0.1	24	0.1	43	0.2	296	1.6
Powder Cocaine	4,242	4,174	98.4	21	0.5	4	0.1	10	0.2	1	0.0	32	0.8
Crack Cocaine	4,077	3,886	95.3	120	3.2	3	0.1	3	0.1	12	0.3	44	1.1
Heroin	1,279	1,231	97.8	15	1.2	0	0.0	2	0.2	1	0.1	9	0.7
Marijuana	4,396	4,211	95.8	21	0.5	5	0.1	3	0.1	11	0.3	145	3.3
Methamphetamine	3,703	3,610	97.5	50	1.4	0	0.0	6	0.2	16	0.4	21	0.6
Other	813	760	93.5	15	1.8	2	0.2	0	0.0	1	0.1	35	4.3

The statistics for 2004 are similar. In 2004, drug offenders comprised 34.7% of all offenders (fig.5).²⁴

FIGURE 5

**DISTRIBUTION OF OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY
FISCAL YEAR 2004 (October 1, 2003 through June 24, 2004)**

(Reproduced from U.S. Sentencing Commission,
2004 Sourcebook of Federal Sentencing Statistics § 1, fig.A (2004))



24 U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS § 1, fig.A (2004). June 24, 2004 was the date of the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which called into question the continuing viability of the Sentencing Guidelines. From June 24, 2004 through September 30, 2004, 38.5% of all federal offenses were drug related cases.

Of the 2004 drug offenders, 96.0% were sentenced for drug trafficking offenses, while only 2.3% were sentenced for simple possession (fig.6).²⁵

FIGURE 6

**PRIMARY DRUG TYPE OF OFFENDERS SENTENCED
UNDER EACH DRUG GUIDELINE
FISCAL YEAR 2004 (October 1, 2003 through June 24, 2004))**

(Reproduced from U.S. Sentencing Commission,
2004 Sourcebook of Federal Sentencing Statistics § 2, tbl.33 (2004))

DRUG TYPE	TOTAL	2D1.1 Drug Trafficking		2D1.2 Protected Locations		2D1.5 Continuing Criminal Enterprise		2D1.6 Communication Facility		2D1.8 Rent/Manage Drug Establishment		2D2.1 Simple Possession	
		n	%	n	%	n	%	n	%	n	%	n	%
TOTAL	18,185	17,403	95.7	283	1.6	15	0.1	18	0.1	44	0.2	422	2.3
Powder Cocaine	4,023	3,938	97.9	37	0.9	4	0.1	2	0.0	4	0.1	38	0.9
Crack Cocaine	3,700	3,511	94.9	137	3.7	3	0.1	4	0.1	11	0.3	34	0.9
Heroin	1,285	1,238	96.3	15	1.2	4	0.3	1	0.1	4	0.3	23	1.8
Marijuana	4,800	4,537	94.5	18	0.4	2	0.0	0	0.0	4	0.1	239	5.0
Methamphetamine	3,541	3,410	96.3	67	1.9	1	0.0	9	0.3	19	0.5	35	1.0
Other	836	769	92.0	9	1.1	1	0.1	2	0.2	3	0.2	32	6.3

For several reasons, it would not be feasible to use the number of drug offenders convicted of simple possession as a short-hand way of estimating the number of nonviolent, substance abusing offenders who would be eligible for a federal drug-court-type program.

First, such an estimate likely would overstate the number of eligible participants. Of the offenders sentenced for simple possession in 2004 and 2005, it is impossible to determine what percentage were nonviolent substance abusers, and what percentage were traffickers who simply got caught in possession of a less-than-distribution quantity of drugs. In the federal system, it is quite possible, for example, that many of those convicted of simple possession were in fact drug traffickers against whom no other charges could be brought at the time of their arrest. Rather than not charging these traffickers with any offense, U.S. Attorney's Offices often choose to charge them with simple possession. This situation regularly arises when drug traffickers are arrested by local police, outside of large-scale federal investigations (*e.g.*, in routine traffic stops). Moreover, even in larger investigations, simple possession is sometimes the only readily provable offense with which drug traffickers can be charged, even though there is other evidence that they are engaged in trafficking and not merely simple use.

²⁵ *Id.* § 2, tbl.33 (counting CCE and Managing a Drug Establishment as drug trafficking offenses). From June 24, 2004 through September 30, 2004, 98.0% of drug related offenders were sentenced for drug trafficking offenses, while only 2.0% were sentenced for simple possession.

Second, there is no data available regarding the other offenses, if any, for which these offenders were sentenced when they were sentenced for simple possession. For example, it is often the case that offenders charged with firearms offenses (*e.g.*, felon in possession of a firearm) are in possession of small amounts of drugs at the time of arrest, which do not rise to the level of possession with the intent to distribute. Such offenders would appear in the simple possession category for statistical purposes, but would have other disqualifying offenses that would render them ineligible for a drug-court-type program.

Third, while there is data on the criminal history categories for offenders based upon drug type, there is no data breakdown of the criminal histories by type of offense committed (*i.e.*, drug trafficking versus simple possession) (fig.7).²⁶ Thus, it is possible that a number of offenders sentenced for simple possession would have criminal histories – either numerous offenses or violent offenses – that would make them ineligible for a drug-court-type program.

FIGURE 7

CRIMINAL HISTORY CATEGORY OF DRUG OFFENDERS FOR EACH DRUG TYPE FISCAL YEAR 2005 (January 12, 2005 through September 30, 2005)

(Reproduced from U.S. Sentencing Commission,
2005 Sourcebook of Federal Sentencing Statistics § 3, tbl.37 (2005))

DRUG TYPE	TOTAL	CRIMINAL HISTORY CATEGORY											
		I		II		III		IV		V		VI	
		n	%	n	%	n	%	n	%	n	%	n	%
TOTAL	17,446	8,906	51.0	2,099	12.0	1,674	15.3	1,271	7.3	664	3.8	1,844	10.6
Powder Cocaine	3,982	2,454	61.6	497	12.2	506	12.7	202	5.1	97	2.4	318	7.9
Crack Cocaine	3,881	876	22.6	479	12.3	818	21.1	485	12.5	307	7.9	913	23.5
Heroin	1,179	723	61.3	118	10.0	130	11.0	67	5.7	33	2.8	108	9.2
Marijuana	4,162	2,622	63.0	491	11.8	553	13.3	320	7.7	64	1.5	102	2.4
Methamphetamine	3,481	1,748	50.2	494	14.2	583	16.7	256	7.4	126	3.6	374	10.8
Other	763	480	62.9	100	13.1	84	11.0	41	5.4	17	2.2	41	5.4

Some state drug courts are open to all offenders, regardless of whether they are charged with drug-related offenses. With regard to federal offenders sentenced to non-drug-related, nonviolent offenses, there is no precise data available on what percentage of these offenders have substance abuse issues that would make them eligible for a drug court program. While such offenders might add to the size of the pool of offenders eligible for a drug court program, it is simply impossible to determine how significant any increase might be. Such offenders would be eligible, however, for BOP's treatment programs.²⁷

26 U.S. SENTENCING COMM'N, *supra* note 17, § 3, tbl.37.

27 See *supra* Section II.

Using the existing data, approximately 2.0% of federal drug offenders between 2004 and 2005 were sentenced for simple possession offenses. Thus, putting aside unknown factors such as violent criminal history, and assuming that all offenders sentenced for simple possession offenses are nonviolent, substance abusers, at the most only a very small number of federal drug offenders – 412 out of 24,561 in FY 2005 – would even be eligible for a traditional drug-court-type program.²⁸ Plainly, this small and uncertain number of offenders does not warrant the creation of a new federal drug court program, particularly when there are existing drug treatment programs available in the federal system.

IV. The Diversion of Resources and Existing State Programs

Beyond the very small number of potentially eligible offenders, the implementation of a federal drug court system would result in the diversion of resources within U.S. Attorneys' Offices. This would include shifting prosecutors away from prosecuting drug trafficking crimes and other serious offenses so that they may participate in the drug court program. In 2004 and 2005 (through September 2005), criminal division Assistant United States Attorneys (AUSAs) spent approximately 49.2 % of their time prosecuting drug, organized crime, firearms, and other violent crime cases.²⁹ Presently, because of limited resources, as well as the availability of state court prosecution for the vast number of low-level drug offenders, most U.S. Attorneys' Offices have screening guidelines in place to ensure that they only take the most serious drug and violent crime cases generated by federal law enforcement agencies and local task forces. The imposition of a drug court program would plainly mean that less time could be spent on all other criminal cases, or that fewer cases could be accepted for prosecution, or both.

A federal drug court program would also be duplicative of the existing state court programs, which the Department of Justice strongly supports. State courts already handle the vast majority of nonviolent, substance abusing offenders. It is estimated that existing state drug court programs serve more than 70,000 defendants at a time.³⁰ As noted above, these state programs have enjoyed success for the specific offender population targeted – nonviolent, substance abusing offenders. For example, a February 2005 GAO Report that examined 23 programs concluded, among other things, that drug court participants had lower rearrest and conviction rates than comparison group members who did not participate in a state drug court program.³¹ Thus, the alternative exists for the relatively infrequent occasion where a nonviolent, substance abusing offender ends up as a defendant in a federal prosecution to transfer that offender to the state court system to be prosecuted. For example, it is often the case in large criminal conspiracy investigations using Title III interceptions that a few drug customers who work for the conspirators are arrested as part of the takedown of the conspiracy. When evidence

28 U.S. SENTENCING COMM'N, *supra* note 17, § 2, tbl.33, § 3, tbl.33.

29 Statistics from the Executive Office for United States Attorneys. AUSAs spent 32.1% of their time on economic, immigration, and official corruption cases; 1.5% on asset forfeiture; and 16.9% on "other criminal" cases and criminal appeals.

30 HUDDLESTON, *supra* note 2, at 7. The report notes that the 70,000 plus figure is based upon reporting from two-thirds of the existing drug courts. Thus, the number of defendants in drug court programs is likely much higher.

31 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: ADULT DRUG COURTS (2005).

subsequently shows that these individuals are nothing more than addicts who are doing simple tasks for the conspirators in order to support their addictions, their cases are often transferred to state district attorneys' offices for prosecution. Once in the state system, these offenders can participate in drug court programs if they are eligible. The reality of scarce resources, along with substantial anecdotal evidence from AUSAs, indicates that it is already an extremely common practice to refer low-level, nonviolent offenders to the states for prosecution.

Presently, the Office of Justice Programs provides substantial funding and assistance for the state drug court programs through the Department of Justice Bureau of Justice Assistance (BJA). BJA had received approximately \$40 million in funds annually to support grants, planning, training, and technical assistance. In FY 2006, however, this funding was cut to \$10 million.³² It is logical to assume that the diversion of funding that would be required to establish federal drug court programs would further impact the present DOJ funding levels for state programs. This would be most unfortunate given that state drug court programs are existing, proven entities and already face significant financial obstacles to expanding their capacity to serve their targeted offender populations.³³

Conclusion

Drug court programs are a potentially effective means of addressing substance abuse by low-level, nonviolent offenders, and thereby reducing recidivism. The drug court model has worked well in state court systems because state courts deal with the vast majority of defendants amenable to such programs. But such programs are not well-suited to the federal system. First, there are already substantial programs that help all federal offenders overcome their substance abuse problems. These programs are available during the pretrial, incarceration, and supervised release phases of their cases. Moreover, BOP already operates a successful reentry-type program that treats all substance abusing federal offenders. Second, the vast majority of drug offenders in the federal criminal system has committed serious drug trafficking offenses and is not amenable to, or eligible for, drug-court-type programs. Finally, the diversion of prosecutorial and financial resources that would be necessary to create and maintain a federal drug court program would harm efforts to target drug traffickers and other serious offenders and reduce funds available to existing state drug court programs.

For all these reasons, the Department of Justice does not support establishing a federal drug court system at this time.

32 The President has requested nearly \$70 million to support state drug court programs in the FY 2007 budget request.

33 HUDDLESTON, *supra* note 2 at 7. 72% of state drug courts reported that lack of funding was their biggest issue.