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COMMENTS ON 11 S-350, RELATING TO DRUG COURT March 17, 2011

The use of “drug courts,” to divert small-time drug offenders from incarceration and punishment and into treatment instead, is an extremely positive one. And while there are positive aspects to this bill strengthening the use of the state’s drug court, there are also some problematic provisions. The punitive effects codified in this bill, in effect encouraging prison sentences for individuals in the program who relapse, could have the net effect of sending *more* people to prison, not fewer.

On the positive side, we applaud the bill’s effort to encourage drug court referrals to come from a variety of sources, including the public defender’s office. We also strongly support the bill’s attempt to limit the types of “violent offenses” that would disqualify a person from being eligible for participation. Unfortunately, this step is significantly tempered by the restriction contained on Page 2 of the bill, barring anybody with a charge or past conviction for delivery of a controlled substance from participation in the program, even if the person is acknowledged to have a drug addiction. It is no secret that many addicts also engage in drug dealing in order to make money to feed their habit. We believe it is counter-productive to disqualify these individuals from the treatment modality underlying the drug court concept. Even though they are just the sort of defendants that would seem to be the ideal candidates for a drug court, they would be ineligible to participate under this bill.

Another big concern is the bill’s premise on the drug court’s continued operation in a post-plea context. That is, instead of serving as a diversionary tool that puts a criminal charge on hold pending the defendant’s successful participation in the program (a model used by a number of drug courts around the country), the defendant here is first required to plead to the offense and essentially waive all of his or her rights in order to participate in the court. This has potentially significant consequences, codified in the bill on Page 3, where the court is explicitly authorized – as it “deems appropriate” – to sentence a person to prison for not abiding by the “drug court contract.”

This is of great concern to us. First, it fails to recognize that relapse is a common occurrence in the treatment of a person with a drug addiction. Under this bill, however, any violation of the contract can lead to immediate imposition of a criminal sentence and incarceration of the addict. Second, in order to “violate” a defendant for not abiding by the contract, a court need only rely on a preponderance of the evidence standard, rather than proof beyond a reasonable doubt. By entering the program post-plea, the defendant – who may have entered the program desperately eager to seek help and turn his or her life around – ends up with

no opportunity to contest the underlying charge when he or she relapses, and very little opportunity to contest the violation, which may lead to his or her incarceration.

Because nothing in the legislation guarantees adequate funding or availability of appropriate drug treatment programs, the proper treatment options for individuals may be severely limited, thus further undermining the whole point of expanding the drug court's reach.

The net effect of these restrictions is, most likely, to subject drug addicted persons to a *greater* risk of incarceration than they currently face. That is because failure to abide by any of the numerous conditions set on drug court defendants -- including successful completion of various drug program requirements -- can lead to incarceration. Yet the ones likely to be deemed eligible for the court are individuals who likely would not be sentenced to prison for the offense in the first place.

We therefore believe an important factor should be added to the list in determining a person's eligibility, or in proceeding with a referral once a determination of eligibility has been made. We believe the bill should require that some determination be made that, absent referral to the drug court, the defendant is likely to face incarceration if convicted of the offense for which or she has been charged. After all, a major purpose of the drug court is to divert offenders from prison.

These concerns are not fanciful. A recent report by the Sentencing Project cited concerns that the use of sanctions has resulted in participants spending more time in jail than they would have had they never enrolled in the drug court program. Because most individuals who enter drug court are convicted of non-violent offenses, many would have experienced short, if any, periods in jail. Participants who are punished with sanctions sometimes end up with multiple stays in jail. One study cited in the report found that persons who failed drug court were sentenced to terms two to five times longer than persons sentenced in traditional criminal court. (See *Drug Courts: A Review of the Evidence*, by Ryan S. King and Jill Pasquarella, April 2009, The Sentencing Project)

For all these reasons, we urge that this bill be amended to address these critical issues and ensure that the program truly serves a diversionary purpose. Amendments to consider would include making the program operate in a pre-plea context so failure to abide by the contract leads to the reinstatement of charges, rather than initiation of sentencing. Otherwise, we believe the bill should make explicit the recognition of relapse, and provide appropriate and strong procedural safeguards before sentence can be imposed on a defendant for failing to live up to all the terms of the drug court contract.

Thank you in advance for consideration of our views.