



Department of Justice

**STATEMENT OF
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U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**SENATE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENT AFFAIRS
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS**

**FOR A HEARING ENTITLED
“UNCOUNTED DEATHS IN AMERICA’S PRISONS AND JAILS:
HOW THE DEPARTMENT OF JUSTICE FAILED TO IMPLEMENT THE
DEATH IN CUSTODY REPORTING ACT”**

PRESENTED

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**Before the Senate Committee on Homeland Security & Governmental Affairs
Permanent Subcommittee on Investigations**

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“Uncounted Deaths in America’s Prisons and Jails:
How the Department of Justice Failed to Implement
the Death in Custody in Reporting Act”
September 20, 2022**

Chairman Ossoff, Ranking Member Johnson, and distinguished members of the Committee, thank you for the opportunity to speak with you today about the Department of Justice’s (“Department” or “DOJ”) implementation of the Death in Custody Reporting Act and the mechanisms by which DOJ can improve the conditions of incarceration in state and local prisons and jails. My name is Maureen Henneberg, and I serve as the Deputy Assistant Attorney General for Operations and Management for the Office of Justice Programs at the Department of Justice.

The Death in Custody Reporting Act of 2013 (DCRA of 2013) requires states and territories that receive funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, and all federal law enforcement agencies, to report certain information regarding deaths that occur in prisons, jails, or during the process of arrest to the Attorney General. DCRA reporting requirements apply to all deaths that occur in federal, state, or local custody. DCRA directs the Attorney General to carry out a study to determine the means by which this information can be used to reduce the number of deaths in custody, and more specifically, to examine the relationship, if any, between the number of such deaths and the actions of management of such jails, prisons, and other specified facilities relating to such deaths.

DCRA of 2013 addresses a profoundly important issue, which is of great consequence to the legitimacy and integrity of the criminal and juvenile justice systems, to the lives of the people who come into contact with the justice system, and to the family members and loved ones of those who have died in custody. Growing awareness of deaths in custody has increased demands for criminal and juvenile justice reform. The Department recognizes the importance of collecting complete and accurate data to inform strategies for reducing deaths in custody. Such data are essential for producing appropriate findings and drawing meaningful conclusions about factors that may contribute to unnecessary or premature deaths in custody, and promising practices and policies that may reduce deaths in custody.

The Office of Justice Programs (OJP) has primary responsibility for administering DCRA of 2013, through its subcomponents the Bureau of Justice Statistics (BJS), Bureau of Justice Assistance (BJA), and National Institute of Justice (NIJ).

DCRA of 2000

The first DCRA statute (P.L. 106-297) (hereinafter, DCRA of 2000) was signed into law on October 13, 2000, as an amendment to the Violent Crime Control and Law Enforcement Act of 1994. At that time, DCRA of 2000 required states to provide assurances that they will follow Attorney General guidelines for reporting, on a quarterly basis, information regarding “the death of any person who is in the process of arrest, is en route to be incarcerated, or is incarcerated at a municipal or county jail, State prison, or other local or State correctional facility (including any juvenile facility).” Under the law, covered states were required to report the name, gender, race, ethnicity, and age of the deceased; the date, time, and location of death; and a brief description of the circumstances surrounding the death.

BJS implemented DCRA of 2000, and successfully collected and reported on deaths that occurred in the custody of state prisons and local jails but continued to experience challenges in the collection of complete and accurate data on deaths that occurred in the process of arrest. DCRA of 2000 expired in 2006, but BJS continued to carry out annual data collections despite the law’s expiration. Between 2005 and 2015, BJS published twenty reports on mortality in local jails and state prisons, and on arrest-related deaths (see Appendix A for a full list of BJS publications related to DCRA). These reports provided a wide variety of statistics and tables related to cause of death, decedent characteristics, and facility characteristics.

DCRA of 2013

An update to DCRA was signed into law on December 18, 2014, DCRA of 2013 (P.L. 113-242) (hereinafter “DCRA of 2013”), which was similar to its predecessor in requiring reporting on information on deaths in custody that occur in state prisons and local jails, or during the process of arrest, and information about the decedent and circumstances of the death. The 2013 version of the law also expanded on DCRA of 2000 in important ways, including requirements for reporting by federal law enforcement agencies and a study requirement focused on using DCRA reporting to identify ways to reduce deaths in custody. DCRA of 2013 also provided the Attorney General with the discretion to reduce JAG funding by up to 10% for states that did not comply with reporting requirements.

State Reporting and The Role of BJS and BJA

In December 2016, the Department determined that the connection between reporting requirements under DCRA of 2013 and administration of grant funding under the JAG program, and specifically the possible imposition of the penalty provision, precluded the involvement of BJS in data collection from states and local agencies. One reason was that the additional JAG enforcement and reporting compliance requirements under DCRA of 2013 were and are incompatible with BJS’s authorizing statute as a federal statistical agency. Specifically, 34

U.S.C. § 10134 states that “data collected by the Bureau shall be used only for statistical or research purposes and shall be gathered in a manner that precludes their use for law enforcement or any purpose relating to a private person or public agency other than statistical or research purposes.” The JAG enforcement and reporting compliance requirements under DCRA of 2013 also conflict with statistical directives stating that BJS “must function in an environment that is clearly separate and autonomous from the other administrative, regulatory, law enforcement, or policy-making activities” of the Department.¹ As a result, the Department announced that states would report DCRA data to BJA,² the agency that administers the JAG program. On December 16, 2016, the Department issued the *Report of the Attorney General to Congress* pursuant to the Death in Custody Reporting Act, which described plans for implementing DCRA of 2013 and some of the challenges involved, including the need to transfer the administration of DCRA state reporting requirements from BJS to BJA (2016 plan).³

The Plan to Implement DCRA of 2013 State Reporting

In 2017, the Department determined not to implement the 2016 plan out of concerns that it would overly burden state respondents and require them to submit information beyond what DCRA of 2013 explicitly requires. Similarly, it was determined that data would not be collected from local agencies because DCRA specifically requires states to submit data, and there is no requirement for local agencies to report. On June 11, 2018, the Department proposed a new plan⁴ for implementing the DCRA of 2013 which focused on “provisions specifically required by the statute.” As with the 2016 plan, it required state-level reporting only and transitioned the collection of data from BJS to BJA, but it also limited the incident-level reporting to those fields explicitly described in the statute and excluded any efforts related to open-source data confirmation or provision of state data collection plans.

The new plan went into effect in the first quarter of FY 2020, and JAG program state grantees started mandatory DCRA reporting for the October 2019-December 2019 reporting period, to align with their FY 2020 JAG progress reports. Under the new plan, DCRA reporting is considered a performance measure for the JAG awards, and State Administering Agencies that receive JAG awards were required to submit quarterly reports to BJA (rather than BJS) that respond to questions based on the requirements of the DCRA statute. To assist states with this transition, BJA and the JAG Training and Technical Assistance (TTA) provider, the National Criminal Justice Association, have provided, and continues to provide, DCRA-related TTA to

¹ Office of Management and Budget, *Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units*, 79 Fed. Reg. 71,610, 71,615 (Dec. 2, 2014).

² BJA’s mission is to provide leadership and services in grant administration and criminal justice policy development to support state, local, and tribal justice strategies to achieve safer communities. BJA focuses its programmatic and policy efforts on providing a wide range of resources, including training and technical assistance, to law enforcement, courts, corrections, treatment, reentry, justice information sharing, and community-based partners to address chronic and emerging criminal justice challenges nationwide.

³ <https://www.justice.gov/archives/page/file/918846/download>.

⁴ Death in Custody Reporting Act Collection, Notice for Proposed eCollection and eComments, 83 Fed. Reg. 27,023 (Jun. 11, 2018).

all 56 states and territories. TTA takes various forms including virtual trainings, assistance through the BJA Performance Measurement Tool Helpdesk, and one-on-one coaching. BJA has developed and continues to update reporting guidance and answers to frequently asked questions.⁵ This guidance aligns with the information requirements set forth in DCRA of 2013, including for example, the requirement to report data regarding deaths that occur in juvenile facilities.

DCRA Data Quality and Completeness

Though well intentioned, DCRA of 2013 produced unintended consequences that adversely affected the Department's ability to produce complete and accurate information on deaths in custody. Prior to the enactment of DCRA of 2013, BJS achieved nearly a 100% response rate and was producing accurate and complete statistical information regarding deaths in local jails and state prisons. BJS collected arrest-related deaths, was transparent about shortcomings in this area (which related to completeness) and proposed mixed-methods solutions for improvements and produced many statistical reports on deaths in custody (see Appendix A). However, due to the JAG-related penalty requirements under DCRA of 2013, the Department can no longer engage BJS to collect information on state and local prison, jail, and arrest-related deaths. The Department also is unable to collect data directly from local agencies that possess this information because any such collection beyond the state reporting required by DCRA of 2013 would be duplicative. That is, if the Department implemented a separate collection of deaths in custody directly from state prisons, local jails, and law enforcement agencies in addition to the DCRA of 2013 requirement that the Department collect reports from state JAG grantees who seek the same information from agencies in their states, the responding agencies would be asked to report the same information twice in order to comply with the one statutory purpose.

DCRA of 2013 requires the Department to rely on the reports from 56 state- and territory-JAG-grant recipients that collect data using varied strategies and collectively have proven to be ineffective in producing complete and accurate information. As the Department reported in its 2016 Report to Congress, "[a]mong the more significant challenges, the Act requires states to report information that the states do not necessarily possess." The Department has determined that the enforcement mechanism under DCRA of 2013, should the Department use its discretion to apply JAG-grant penalties, would unfairly penalize state and territorial agencies, as well as units of local government, that are properly reporting DCRA data.

Analyses of state reporting under the requirements of DCRA of 2013 demonstrate data anomalies that indicate significant underreporting of deaths in custody in all three categories (*i.e.*, during arrest, in local jails, and in state prisons). This underreporting is widespread, and not the result of a small number of lagging or uncooperative states. The pattern of underreporting is more pronounced in some areas (*e.g.*, arrest-related deaths) than others (*e.g.*, prison deaths), but even where it is less pronounced, the degradation of data quality and completeness, as compared to previously available data collection methods, is considerable.

⁵ <https://bja.ojp.gov/funding/performance-measures/DCRA-Reporting-Guidance-FAQs.pdf>.

The JAG Penalty

DCRA of 2013 provided the authority for the Department, at the discretion of the Attorney General, to impose a 10% penalty on JAG program funding on states that do not comply with reporting requirements. The Department, however, is concerned that implementing the JAG penalty may have unintended, negative consequences and has not implemented the penalty to date.

DCRA of 2013 would require the penalty to be applied to an entire state even when that state may be fully reporting to BJA what it has received from local agencies and that state is attempting to diligently collect the required data from its units of local government. In general, most states do not have laws requiring local agencies to report deaths in custody to state governments. Without such laws, state governments cannot compel local governmental agencies to report to them. State Administering Agencies have identified this lack of enforcement power over local jails and law enforcement agencies as one of their top concerns and challenges regarding compliance with DCRA reporting requirements. Such a state, if penalized under DCRA, would have a reduced JAG award, and thus have smaller amounts available for its own law enforcement activities and for its subawards to units of local government within the state who may be in full compliance with the DCRA reporting requirements. Notably, reducing the JAG award as a penalty for incomplete reporting may actually lead to an unintended consequence of lowering the amount of funds available and necessary to improve statewide DCRA reporting. Meanwhile, the reduction in JAG funding would have no effect on non-compliant units of government of that state that do not receive passthrough JAG funding. It is also important to note that the amount of JAG funding that reaches many agencies (*e.g.*, smaller agencies) is relatively small and may be viewed as an insufficient incentive or deterrent to compel compliance from those local agencies.

Next Steps for Implementing DCRA of 2013

Despite these challenges, DOJ's top priority for continuing to implement DCRA of 2013 is to improve the quality and completeness of state reporting, including improving the reporting from state and local agencies to State Administering Agencies. To achieve these objectives, BJA—

- is developing and will implement a plan to determine state compliance with DCRA requirements, including necessary documentation and metrics, and establish procedures for taking corrective action when states are out of compliance.
- will continue to provide TTA to states and provide a variety of online, virtual, and in-person resources and opportunities to improve reporting. This will include a convening in fall of 2022 with DCRA stakeholders, including State Administering Agencies and professional organizations, to continue to build awareness and support for DCRA and to share best practices regarding state-level data collection strategies.

- will continue to assess the quality and completeness of DCRA reporting, including by comparisons with open-source data (*e.g.*, media reports), and communicate these findings to State Administering Agencies in a manner that may contribute to improved reporting.
- will require FY 2022 JAG award recipients to submit state data collection plans, and BJA will assess these plans to identify opportunities for strengthening data collection practices within the states.

Proposals to Strengthen DCRA of 2013

As noted above, Congress sought to address the profoundly important issue of deaths in custody through DCRA of 2013, and the Department recognizes the importance of collecting complete and accurate data to inform strategies for reducing deaths in custody. We would like to work with Congress to improve the collection of this data. Some examples where death in custody reporting could be improved would be to—

- Permit BJS to design and implement effective methods to collect and report on comprehensive and accurate data on deaths that occur in custody.
- Eliminate the requirement for centralized state reporting, thus permitting the Department to collect information directly from state and local correctional and law enforcement agencies, open sources, and other public sources.
- Continue the current requirements for reporting by federal law enforcement agencies.
- Eliminate the requirement for quarterly reporting, allowing state and local respondents to report deaths when they have substantially all of the information on the decedent.
- Replace the current discretionary JAG grant penalty that would affect an entire state with a narrower requirement to prohibit JAG recipients from making subawards to any entity that does not certify that it will provide accurate information regarding deaths in custody that occur in its jurisdiction.
- Authorize the Department to issue additional grants and provide training or technical assistance to states, units of local government, territories, Indian Tribes, or other public or private entities to assist in the building of infrastructure or capacity for the collection and reporting of information on deaths in custody.
- Authorize NIJ to expand its research portfolio on subjects relating to deaths in custody.
- Require that BJS regularly publish comprehensive reports on deaths in custody.
- Appropriate funding for BJS and NIJ to carry out statistical collections, analysis, reporting, and research on deaths in custody.

Lastly, we wish to bring to your attention grant funding, training, and technical assistance designed to improve conditions of incarceration in state prisons, local jails, and juvenile detention facilities that OJP supports through various other programs. A list of those programs is found in Appendix C.

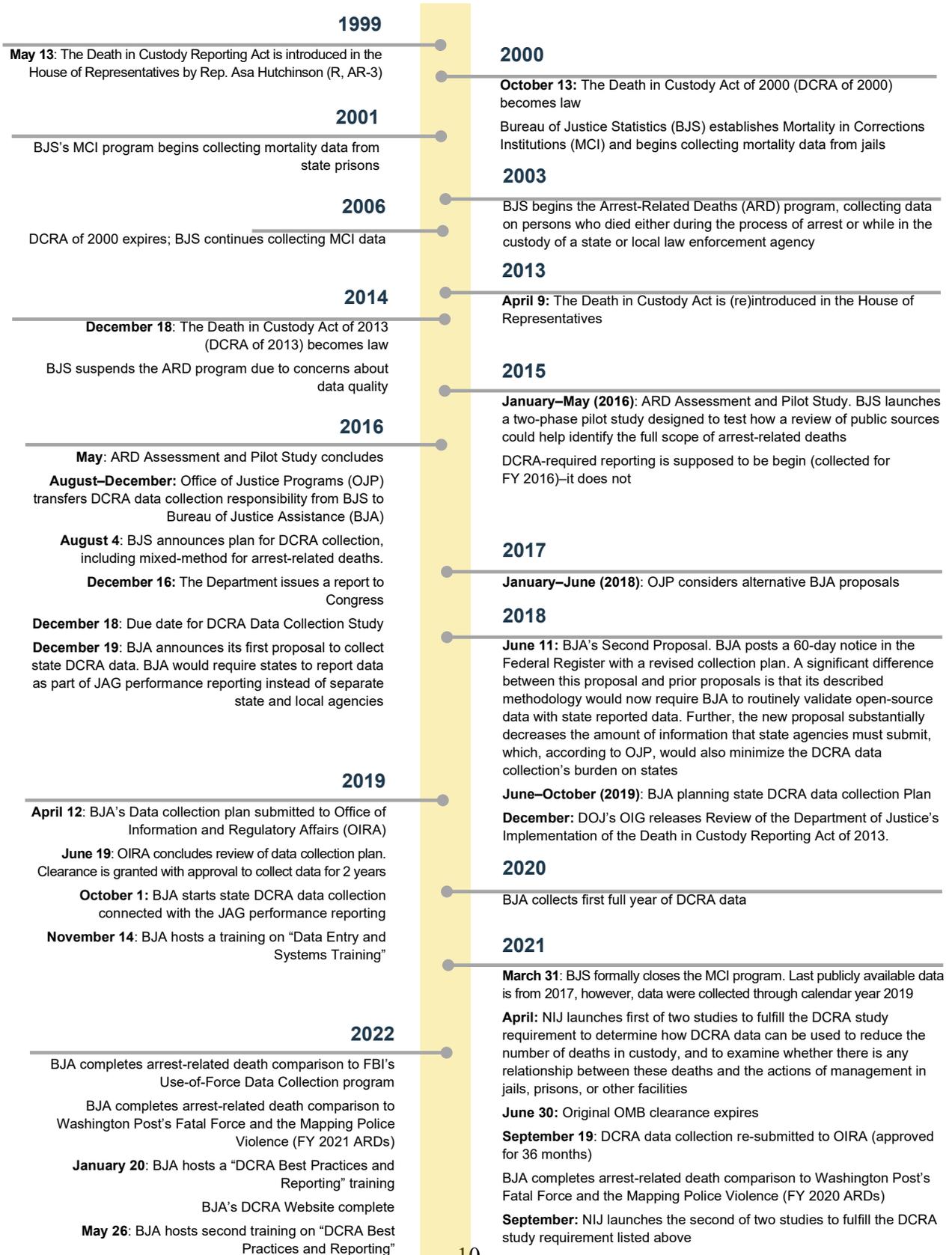
Thank you, again, for the opportunity to discuss this important issue, and I look forward to your questions.

Appendix A

Bureau of Justice Statistics Publications Using DCRA Data	Publication Date
Federal Deaths in Custody and During Arrest, 2020 – Statistical Tables	7/26/2022
HIV in Prisons, 2020 - Statistical Tables	5/26/2022
Mortality in State and Federal Prisons, 2001–2019 – Statistical Tables	12/1/2021
Mortality in Local Jails, 2000–2019 – Statistical Tables	12/1/2021
Suicide in Local Jails, State and Federal Prisons, 2000–2019 – Statistical Tables	10/7/2021
Federal Deaths in Custody and During Arrest, 2018–2019 - Statistical Tables	9/16/2021
Correctional Populations in the United States, 2019 - Statistical Tables	7/22/2021
Mortality In Local Jails, 2000-2018 - Statistical Tables	4/29/2021
Mortality In state And Federal Prisons, 2001-2018 - Statistical Tables	4/29/2021
Federal Deaths In Custody And During Arrest, 2016-2017 - Statistical Tables	12/29/2020
Correctional Populations In The United States, 2017-2018	8/27/2020
Mortality In Local Jails, 2000-2016 - Statistical Tables	2/12/2020
Mortality In State And Federal Prisons, 2001-2016 - Statistical Tables	2/12/2020
Arrest-Related Deaths Program: Pilot Study of Redesigned Survey Methodology	7/30/2019
Correctional Populations in the United States, 2016	4/26/2018
HIV in Prisons, 2015 - Statistical Tables	8/24/2017
Correctional Populations in the United States, 2015	12/29/2016
Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings	12/15/2016
Mortality in Local Jails, 2000-2014 - Statistical Tables	12/15/2016
Mortality in state Prisons, 2001-2014 - Statistical Tables	12/15/2016
Assessing Inmate Cause of Death: Deaths in Custody Reporting Program and National Death Index	4/21/2016
Correctional Populations in the United States, 2014	12/29/2015
Assessment of Coverage in the Arrest-Related Deaths Program	10/8/2015
Mortality in Local Jails and State Prisons, 2000-2013 - Statistical Tables	8/4/2015
Arrest-Related Deaths Program: Data Quality Profile	3/3/2015
Correctional Populations in the United States, 2013	12/19/2014
Mortality in Local Jails and State Prisons, 2000-2012 - Statistical Tables	10/9/2014
Correctional Populations in the United States, 2012	12/19/2013
Mortality in Local Jails and State Prisons, 2000-2011 - Statistical Tables	8/13/2013
Mortality in Local Jails and State Prisons, 2000-2010 - Statistical Tables	12/13/2012
Correctional Populations in the United States, 2011	11/29/2012
HIV in Prisons, 2001-2010 - Revised	9/13/2012
Correctional Populations in the United States, 2010	12/15/2011
Prison and Jail Deaths in Custody, 2000-2009 - Statistical Tables	12/14/2011
Correctional Populations in the United States, 2009	12/21/2010

Deaths in Custody: Local Jail Deaths, 2000-2007- Statistical tables	10/28/2010
Deaths in Custody: State Prison Deaths, 2001-2007 - Statistical Tables	10/28/2010
Mortality in Local Jails, 2000-2007 (Revised)	7/7/2010
Deaths in Custody: State and Local Law Enforcement Arrest-Related Deaths, 2003-2006 - Statistical Tables	6/16/2009
Deaths in Custody: State Prison Deaths, 2001-2007 - Statistical Tables	10/31/2007
Medical Causes of Death in State Prisons, 2001-2004	1/21/2007
HIV in Prisons, 2004	11/19/2006
HIV in Prisons, 2003	9/1/2005
Suicide and Homicide in State Prisons and Local Jails	8/21/2005

Appendix B – DCRA Timeline



Appendix C
Mechanisms to Improve the Conditions of Incarceration

Please find a list of examples and links to their website here:

- Prison Rape Elimination Act— <https://bja.ojp.gov/program/prison-rape-elimination-act-prea/overview>
- Child-friendly Visiting Spaces— <https://bja.ojp.gov/funding/opportunities/o-bja-2021-127001>
- Corrections Training Academy Initiative— <https://bja.ojp.gov/funding/awards/2019-ry-bx-k002>
- COVID Detection and Mitigation in Confinement— <https://bja.ojp.gov/news/now-available-guidance-detection-mitigation-covid-19-confinement-facilities>
- Restrictive Housing— <https://bja.ojp.gov/funding/opportunities/o-bja-2021-144001>
- Body Worn Camera Program— <https://bja.ojp.gov/funding/opportunities/o-bja-2022-171093>
- Comprehensive Opioid, Stimulant, and Substance Abuse Program— <https://bja.ojp.gov/program/cossap/overview>
- Residential Substance Abuse Treatment for State Prisoners Program— <https://bja.ojp.gov/program/residential-substance-abuse-treatment-state-prisoners-rsat-program/overview>
- Justice and Mental Health Collaboration Program— <https://bja.ojp.gov/program/justice-and-mental-health-collaboration-program-jmhcp/overview>
- Crisis Stabilization and Reentry Program & Improving Adult Reentry Education and Employment Outcomes— <https://bja.ojp.gov/funding/opportunities/o-bja-2022-171361>
- Title II Formula Grants Program— <https://ojjdp.ojp.gov/programs/formula-grants-program>
- Center for Coordinated Assistance with States— <https://ojjdp.ojp.gov/tta-provider/center-coordinated-assistance-states-ccas>
- Juvenile Justice Emergency Planning Demonstration Program— <https://ojjdp.ojp.gov/funding/opportunities/o-ojjdp-2022-171261>

- Council of Juvenile Justice Administrators— <https://juvenilecouncil.ojp.gov/>
- Performance-based Standards— <https://ojjdp.ojp.gov/tta-provider/performance-based-standards-juvenile-programs-initiative>
- Initiative to Develop Juvenile Reentry Measurement Standards— <https://ojjdp.ojp.gov/research-and-statistics/research-projects/initiative-develop-juvenile-reentry-measurement-standards/overview>
- Second Chance Act Addressing the Needs of Incarcerated Parents and Their Minor Children— <https://ojjdp.ojp.gov/funding/opportunities/o-ojdp-2022-171233#:~:text=This%20program%20will%20provide%20funding,children%20younger%20than%20age%2018.>
- Second Chance Act Youth Reentry Program— <https://ojjdp.ojp.gov/funding/opportunities/o-ojdp-2022-171233#:~:text=This%20program%20will%20provide%20funding,children%20younger%20than%20age%2018.>
- Juvenile Justice System Reform Initiative— <https://ojjdp.ojp.gov/funding/opportunities/o-ojdp-2022-171358>
- Reducing Risk for Girls in the Juvenile Justice System— <https://ojjdp.ojp.gov/funding/opportunities/o-ojdp-2022-171217>
- National Resource Center for Justice-Involved LGBTQ+ and Two-Spirit Youth— <https://ojjdp.ojp.gov/events/ojdp-fy-2022-national-resource-center-justice-involved-lgbtq-and-two-spirit-youth>
- Reducing the Use of Isolation in Juvenile Facilities— <https://ojjdp.ojp.gov/funding/opportunities/ojdp-2020-18133>
- Safety, Support, and Services for Survivors of Sexual Abuse in Youth Detention— <https://ovc.ojp.gov/funding/opportunities/o-ovc-2022-171240>