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UNITED STATES SENTENCING COMMISSION
ALTERNATIVES TO INCARCERATION PANEL
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EVIDENCE-BASED SENTENCING IN THE STATE COURTS

My area of interest and experience is the development of evidence-based sentencing practices in the state courts: sentencing practices that are effective in reducing offender recidivism. I served as a state trial judge in Sacramento, California for twenty years before retiring in 1996 to assume the presidency of the National Center for State Courts headquartered in Williamsburg, Virginia. Since my second retirement, from the NCSC in 2004, I have written and worked regularly with state judiciaries across the country on evidence-based sentencing.

I am an expert on neither federal sentencing, nor the federal Sentencing Reform Act (SRA). Except for a few modest suggestions at the close of this statement, I will therefore resist the temptation to offer specific opinions on how the concept of evidence-based sentencing might apply in the federal courts, or to recommend specific changes to the SRA. I nonetheless hope that my comments might help fuel thinking along those lines among those of you more familiar than I with federal sentencing practices under the SRA.

Initially, let me say that I often wince at the phrases "alternative sentencing" and "alternatives to incarceration." I have the same reaction to the phrase "alternative dispute resolution." The premise in each instance is that there is a traditional or mainstream form of dispute resolution or sentencing or punishment against which the proposed "alternative" is juxtaposed. I prefer the concept of "appropriate dispute resolution" and "appropriate sentencing." The strength of these so-called "alternatives" is that in many instances they are better, not merely an alternative.

For those criminal offenders for whom imprisonment is not required by the circumstances of the crime committed and the offender's criminal history, sentencing in the community ("alternative sentencing") is better and preferred. It is preferred not just because it is an alternative to imprisonment, less invasive of the offender's liberty interest, less disruptive of the offender's family relationships and responsibilities, and less expensive. It is also preferred because if the offender is supervised in the community in a manner consistent with evidence-based practices to reduce recidivism, sentencing in the community will better protect the public and future potential victims from the risk of re-offense.

The principal reason that more offenders are not sentenced in the community today is skepticism on the part of many policy makers that higher risk offenders can be safely and effectively supervised in the community. Historically, some anecdotal and research evidence supported that view. Today, on the other hand, there exists a wealth of rigorous scientific research demonstrating that properly-implemented evidence-based supervision and treatment programs effectively reduce recidivism among properly targeted offenders by at least 10-20%. Today, the

key to expanded use of "alternatives to incarceration" is our ability to sentence and supervise offenders in accord with these evidence-based practices that reduce offender recidivism.

What is evidence-based sentencing?

In 2007 the Conference of Chief Justices (CCJ) adopted a formal resolution supporting "state efforts to adopt sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism." Generally speaking, that is what I mean by evidence–based sentencing: sentencing practices based on the best research evidence of what works to promote public safety by reducing recidivism.

The CCJ resolution was based on the chief justices' findings that:

- "the public desires and deserves criminal justice systems that promote public safety while making effective use of taxpayer dollars;"
- "despite increasing use of incarceration and greater spending on corrections, recidivism rates have continued to escalate;" and
- "the judiciary, consistent with its obligation to provide just and effective punishments for criminal offenders, has a vital role to play in ensuring that criminal justice systems work effectively and efficiently to protect the public by reducing recidivism and holding offenders accountable."

The CCJ resolution also urged:

- "each chief justice and state court administrator to work with members of the executive and legislative branches as appropriate to promote policies and practices that place properly identified offenders in corrections programs and facilities shown to be effective in reducing recidivism;" and
- urged "all members of the judiciary to educate themselves about the effectiveness of community-based corrections programs in their jurisdictions and to advocate and, when appropriate, make use of those programs shown to be effective in reducing recidivism."

The chief justices' resolution was based on a review of trends in state sentencing policy over the past 30 years, which, like federal sentencing policy established by the SRA, has greatly emphasized punishment and imprisonment over public safety and rehabilitation. As a result of these policies the United States is now burdened with the world's highest rates of incarceration, rapidly escalating corrections costs, and unprecedented levels of recidivism.

To a significant extent these policies were fueled by the popular belief and conventional wisdom that "nothing works" to rehabilitate offenders. That belief became self-fulfilling when it naturally led to a failure to adequately fund effective probation supervision and recidivism reduction services. Today, as we have noted, a voluminous body of scientific research describes a set of evidence-based practices in community corrections that *do* work to reduce recidivism among those sentenced in the community.

What are the basic principles underlying these evidence-based practices? How do our current sentencing and corrections practices stack up against these principles?

Obviously, there is not sufficient time in this setting to discuss these principles of evidence-based practice and their implications for sentencing practice and policy in great detail, but I can at least outline four of the basic principles here.

First, the "Risk Principle" prescribes that the level of offender supervision and services should be matched to the risk level of the offender: i.e., higher risk offenders should receive more intensive supervision and services. Although this may appear obvious on its surface, the fact is that today we often target low risk offenders rather than the medium and high risk offenders where substantially greater recidivism reduction can be achieved. In fact, providing criminal justice services to low risk offenders tends to actually increase recidivism rates.

Second, the "Needs Principle" prescribes that interventions should target the "dynamic" (changeable) characteristics of offenders: those characteristics that, if changed, are most likely to reduce the risk of re-offending. Again, this may seem obvious, but the research demonstrates that the most highly "criminogenic factors" (factors most likely to affect the risk of further criminal behavior) are an offender's anti-social attitudes, associates, and personality pattern whereas, in fact, we tend today to focus our current interventions on less criminogenic factors such as substance abuse, educational deficiencies, and unemployment.

Furthermore, in order to accurately determine an offender's level of risk and dynamic needs it is essential that professional judgment be informed through use of an actuarial risk/needs assessment tool. In practice today, risk assessment is too often based on static risk factors like criminal history which—because they cannot be changed—offer no guidance on how to reduce an offender's risk of recidivism. Static risk assessment tools also cannot be used to measure the impact of supervision services on an offender's risk level, or to predict the changes in level of risk that would result from various potential interventions. In addition, accurate risk/needs assessment information is today rarely shared with the court, so the judge typically does not have the benefit of that information in considering the defendant's amenability to probation, or the appropriate conditions of probation to be imposed to control or treat the relevant offender risk factors.

Third, the "Treatment Principle" is based on the best research evidence demonstrating that the most effective services in reducing recidivism are cognitive behavioral interventions based on social learning principles.

Social learning principles teach us that over time people tend to behave in ways for which they are rewarded, and not behave in ways for which they are sanctioned, and that carrots (rewards, incentives) are more effective than sticks (sanctions)—especially for criminal offenders—in changing human behavior. Social learning also prescribes that sanctions should be swift, certain, proportionate, and graduated—but need not be severe. Although an evidence-based probation supervision program should be grounded, for example, in application of social learning principles and use of accurate risk/needs assessment information, in seeking to change offender behavior today we under-utilize incentives and assessments, and over–rely on the uncertain possibility of delayed imposition of overly severe sanctions.

Most medium and high risk offenders respond best to cognitive behavioral interventions. Cognitive programs address an offender's underlying anti-social attitudes and restructure anti-social thinking patterns. Anti-social attitudes lead to anti-social behaviors. (If an offender believes, for example, that many people commit crime but only some get caught, the offender is likely to focus more on not getting caught than changing his or her behavior.)

In cognitive behavioral interventions, anti-social attitudes are first challenged and then new cognitive skills and pro-social behaviors are introduced and practiced, resulting in more pro-social offender behaviors. Cognitive skills consist of a set of thinking skills that help an offender cope with challenges and problems without engaging in anti-social behavior. They include, for example, conflict resolution, anger management, problem solving, asking for help, and general life skills. Cognitive behavioral programs also teach offenders new behaviors through role modeling, role play, feedback, and skill practice.

In practice today, however, we make wide use of corrections programs that do not consist of the above elements and that therefore are ineffective in reducing recidivism. In the absence of an effective treatment component, for example, most common sanctioning programs including prisons, jails, boot camps, and intensive probation supervision are ineffective in reducing recidivism. In fact most sanctioning programs actually increase recidivism slightly. In addition, treatment programs that lack cognitive and behavioral elements, such as general education programs, and programs based on emotional appeal, shaming, building self-esteem, or physical challenge, are also ineffective.

Fourth, the "Responsivity Principle" prescribes that both the specific intervention and the specific personnel delivering the intervention should be appropriately matched to the unique characteristics of the individual offender, such as the offender's age, gender, culture, learning style, and intelligence. Two other particularly important responsivity characteristics are the offender's readiness to change and level of motivation. Like all of us who have attempted to change our behaviors with regard to smoking cessation or weight loss, for example, offenders go through well-researched "stages of change" and must ultimately develop intrinsic motivation (in contrast to extrinsic motivation) in order to sustain the change process. There are prescribed strategies to deal with offenders in the various stages of change, and to help offenders develop intrinsic motivation.

In practice today, we do not match offenders with specifically appropriate treatment options, we unrealistically expect offenders to totally and completely change their chronic anti-social behaviors overnight, and we rely not on techniques to enhance intrinsic motivation but on extrinsic motivation in the form of severe sanctions, threats, lecturing, and shaming to change offender behavior—all of which actually tend to undermine intrinsic motivation.

An offender's intrinsic motivation is strongly influenced by the offender's interpersonal relationships, especially with probation officers, judges, and other authority figures. The judge is an important role model. Studies in the field of procedural justice show that when criminal defendants view court processes as fair and feel as though they have been treated with respect by fair-minded and well-intentioned judges, they are more likely to cooperate with legal

authorities and voluntarily engage in law-abiding behaviors. Judges can also provide incentives and positive reinforcement for an offender's pro-social behaviors.

The goal of evidence-based sentencing, as the CCJ resolution indicates, is not only to reduce recidivism, but also to better hold offenders accountable. In many states, the popular belief that nothing works to reduce recidivism, coupled with lack of adequate funding for probation services, resulted in an inability on the part of many state and local probation agencies to provide truly effective supervision services. That fact quite understandably created the perception that, in contrast to prisons, probation did not sufficiently hold offenders accountable for their wrongful behaviors. In all too many instances, indeed, probation officers seemed to lose track of probationers, and let technical violations slide, until—perhaps to better manage their burgeoning caseloads—probationers were revoked to prison for multiple technical violations or a new criminal offense.

Evidence-based supervision services are a totally different story. Offenders are supervised in caseloads that are sized according to the risk level of the probationers involved, risk factors are diligently managed through monitoring, controls, and appropriate interventions, and offenders are held strictly accountable for compliance with all terms and conditions of probation. By contrast, in reality prisons often demand very little of prisoners—who are typically confined without opportunity for any independent, real-world decision making. Indeed, for this reason it is not uncommon in jurisdictions with evidence-based probation supervision programs that offenders will reject a suspended probation sentence and prefer to do the prison time.

As also noted in the chief justices' resolution, evidence-based sentencing is fully consistent with the judiciary's obligation to provide just and effective punishments for criminal offenders. Recidivism reduction is not "soft" on crime. It is not an alternative to punishment. Every offender ought to be fairly punished. At the same time, every sentence should also seek to reduce the risk of the offender's re-offense and further victimizations. In those cases where the circumstances do not require a prison sentence, punishment and incapacitation can and should take the form of an "intermediate sanction" less severe than incarceration but stricter than standard probation (such as, for example, day or evening reporting centers, work-release facilities, half way houses, home detention, electronic monitoring, and intensive supervision) and appropriate behavioral controls.

In sentencing an offender in the community, sentencing provisions intended to reduce recidivism must be successfully integrated with appropriate intermediate sanctions and behavioral controls to achieve these other sentencing objectives. In the absence of either effective evidence-based supervision and treatment programs or appropriate intermediate sanctions and behavioral controls, judges will be reluctant to place offenders on probation.
Judges and other criminal justice officials should review the effectiveness of the sanctioning and treatment programs in their communities. Information about available corrections programs should also describe the types of offenders, levels of risk, and specific criminal risk factors that the programs are intended to address. Courts should also have performance data describing the programs' levels of success in reducing recidivism for various categories of offenders.

In conclusion, I offer several suggestions for the Commission's consideration. In order to promote the effectiveness of federal "alternatives to incarceration" in promoting public safety by reducing offender recidivism, the Commission might consider actions to give greater weight to recidivism reduction as an explicit and important goal of federal sentencing. Commission publications describe "rehabilitation" as a lower priority under the SRA and Guidelines than other sentencing goals. The "rehabilitation" terminology also appears to be a holdover from the medical model of corrections which was a prominent feature of the earlier era of indeterminate sentencing. The word does not squarely focus on crime reduction as the primary goal of the criminal justice system's rehabilitation efforts. The Commission could seek statutory or other changes that establish the promotion of public safety through "recidivism reduction" as an explicit and equally important purpose of sentencing. Like the Oregon Judicial Conference, the Commission could also consider requiring sentencing judges, at least in certain Guideline situations, to consider the likely impact of potential sentences on reducing the offender's future criminal conduct.

At least in comparison with most state courts, the range of offenders eligible for and actually sentenced to federal probation, with or without confinement, appears quite restricted. Acknowledging that any comparison of federal and state felony offenders is precarious at best, 60-80% of state felony offenders are sentenced in the community (not sentenced to prison), whereas only about 14% of US citizens convicted in federal courts of a felony or class A misdemeanor in FY 2007 were apparently sentenced to probation. About 75% of those federal probationers apparently were first offenders, and almost all of those probationers had been convicted of a non-violent offense. In the state courts, on the other hand, about half of felony probationers have prior records—and about half have been convicted of a violent or drug-related offense.

The relatively restricted use of federal probation appears in large part to result from the provision in 28 USC section 994(j) that the guidelines reflect "the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant *is a first offender who has not been convicted of a crime of violence or otherwise serious offense*." [Emphasis added] To expand the use of "alternatives to incarceration" in the federal courts, the Commission might consider legislation or guidelines that provide probation officials and sentencing judges with more flexibility to recommend or sentence offenders to probation in additional situations not now described in section 994(j) when the seriousness of neither the offense nor the offender's criminal history requires more restricted discretion.

Finally, in order to maximize the availability of effective evidence-based probation services and programs, as well as appropriate intermediate sanctions, in as many federal jurisdictions as possible, the Commission might consider collaboration with the US Administrative Office of the Courts for that purpose. Starting in 2003, for example, the State of Oregon expanded state-wide availability of evidence-based corrections programs by requiring that a gradually increasing percentage of corrections programs be certified as evidence-based over the next six years.

Thank you for the opportunity to appear before the Commission.