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United States Sentencing Commission
Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act
of 1984

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View from the Probation Office

As many already know, the Judicial Conference of the United States initially opposed the establishment of the United States Sentencing Commission and the federal sentencing guidelines it promulgated.

When confronted with a bill that would establish an independent five-person Sentencing Commission within the judicial branch, which would promulgate a set of sentencing guidelines,¹ the Conference opposed the measure, indicating that a straightforward review of sentences (either by appellate review or by a three-judge panel) would be preferable to the legislation.² Later, commenting on legislative provisions that culminated with the passage of the Sentencing Reform Act of 1984 (“SRA”), the Judicial Conference suggested “that if the integrity of the principle of separation of powers is to be maintained, another needless and expensive entity should not be created which would in many ways only duplicate the services currently performed effectively and efficiently by the Administrative Office of the United States Courts and the Federal Judicial Center.”³ This view was echoed in subsequent meetings of the Judicial Conference.⁴

The newly-promulgated federal sentencing guidelines were initially attacked in hundreds of constitutional challenges.⁵ The Judicial Conference remained wary of them, as well.⁶ After the

¹ S. 2966, 94th Cong., 2d Sess. (1975).

² JCUS-APR 76, pp. 11-12.

³ JCUS-SEP 77, p. 82.

⁴ See JCUS-SEP 83, pp. 68-69 (reporting that a permanent, independent Sentencing Commission “would unnecessarily duplicate work currently performed by the Judicial Conference, the Federal Judicial Center and the Administrative Office of the United States Courts”).

⁵ There were more than 300 constitutional challenges to the establishment of the United States Sentencing Commission and the promulgation of the federal sentencing guidelines between 1987 and the Supreme Court’s

guidelines were upheld in *Mistretta v. United States*, however, the Judicial Conference accepted their validity. In 1990, for example, the Judicial Conference voted to take no action on several proposals to seek fundamental reconsideration of the guidelines system.⁷

Individual judges came to accept the legitimacy of the guidelines system, as well.⁸ Between 1991 and the Supreme Court's 2005 decision in *United States v. Booker*,⁹ between 81.3% and 92.5% of federal sentences were either within guidelines ranges or reflected substantial assistance departures made upon the motion of the government; only 0.6% to 1.7% of sentences were above guidelines ranges; and only 5.8% to 18.1% were below guidelines ranges for other reasons (including government-initiated downward departures for reasons other than substantial assistance, such as §5K3.1 early disposition programs).¹⁰

1989 decision in *Mistretta v. United States*, 488 U.S. 361. United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System ii (1991).

⁶ JCUS-SEP 87, pp. 54-55 (noting, *inter alia*, "the mixed reaction of judges to the substance of the guidelines").

⁷ JCUS-SEP 90, p. 71 (noting that the Conference took no action on Federal Courts Study Committee recommendations that included such wide-sweeping suggestions as "the guidelines issued pursuant to the Sentencing Reform Act not be treated as compulsory rules, but, rather, as general standards that identify the presumptive sentence" and "the Congress should reevaluate the process by which Commission-promulgated guidelines become law").

⁸ See United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 95-96* (2004) (noting that a 1991 survey of federal judges indicated that judges were equally split in believing that the guidelines would increase disparity, decrease disparity, and would have no effect on disparity, while a 2001 survey indicated that more than 60% of judges believe that guidelines often (or almost always) reduce disparity).

⁹ 543 U.S. 220 (2005).

¹⁰ See United States Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* 32 fig.1 (2003); United States Sentencing Commission, *Annual Report 42* (2002); United States Sentencing Commission, *Annual Report 37* (2003); United States Sentencing Commission, *Annual Report 49, 56* (2004); United States Sentencing Commission, *Annual Report 39* (2005). The Sentencing Commission did not disaggregate downward departures initiated by the government for reasons other than substantial assistance from other downward departures until 2003. In 2003, 6.3% of sentences were government initiated for reasons other than substantial assistance; 7.5% of sentences reflected other downward departures. In 2004, government-sponsored downward departures eclipsed other downward departures. Before the Court's decision in *United States v. Blakely*, 542 U.S. 296 (2004), 6.4% of sentences were government initiated for reasons other than substantial assistance, while only 5.2% of sentences reflected other downward departures. After *Blakely*, the trend increased. In 2004, government-sponsored downward departures for reasons other than substantial assistance applied in 8.6% of sentences, while other downward departures were reflected in only 4.6%. In 2005, pre-*Booker*, government-sponsored downward departures for reasons other than substantial assistance applied in 9.4% of sentences, while other downward departures were reflected in only 4.3%.

Even after the Supreme Court’s remedial opinion in *Booker* rendered the guidelines advisory, judges have continued to apply (and many have continued to follow) the guidelines.¹¹ Since *Booker*, approximately 85-86% of sentences have been within guidelines ranges or reflected downward departures made upon the government’s motion.¹²

Despite concern by some that *Blakely* and *Booker* would fundamentally disrupt guideline sentencing,¹³ within-guidelines sentences remain the rule – not the exception – in the federal courts.¹⁴ The federal criminal justice system is still a system of sentencing guidelines. Indeed, the Supreme Court’s decision in *Booker* explicitly states that district judges *must* calculate the guidelines and consider them when sentencing.¹⁵

Judges are affected by this obligation, obviously. But prosecutors and defense counsel think in terms of sentencing by the guidelines, as well. Although *Booker* opened sentencing to the full panoply of sentencing factors enumerated at 18 U.S.C. § 3553(a), old habits die hard. Many contemporary plea negotiations are still structured in terms of offense levels, criminal history, and viable departures. Only when a desired outcome appears elusive under the guidelines do federal practitioners reach for a “variance,” appealing to the abstract principles of § 3553(a).

¹¹ See United States Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing 46 (2006) (“The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent.”).

¹² See United States Sentencing Commission, Annual Report 46 (2005); United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2006 (n.d.); United States Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2007 (n.d.) (all showing combined rates of within-guidelines and government-sponsored below range sentences between 85.4% and 86.4%).

¹³ See, e.g., *Blakely*, 542 U.S. at 326 (Justice O’Connor, dissenting) (“What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.”); Douglas Berman, *Supreme Court Cleanup in Aisle 4* (July 16, 2004) (available at: <http://slate.msn.com/id/2104014>) (“*Blakely* is the biggest criminal justice decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court.”); United States v. Booker: One Year Later—Chaos or Status Quo? Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 109th Cong., 109-121 (2006) (asking whether the Supreme Court’s *Booker* decision required a legislative “fix”).

¹⁴ See United States Sentencing Commission, Preliminary Data Quarterly Report, Fourth Quarter Release 1 (2008) (indicating that 85.1% of sentences were within-guidelines or government-sponsored below range).

¹⁵ *Booker* at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”). Of course, judges cannot abdicate their responsibility to assess the competing sentencing considerations in each individual case. The Supreme Court has been explicit in stating that judges may not treat the sentencing guidelines as presumptively reasonable. See, e.g., *Nelson v. United States*, 555 U.S. ____ (2009) (per curiam). The guidelines must be part of the judicial inquiry, but may not substitute for it.

United States probation officers also remain deeply enmeshed in the application of sentencing guidelines. In most districts, it is the probation officer who calculates the guidelines, and who incorporates the result into the sentencing recommendation of the presentence report. It is often the probation officer who completes the statement of reasons, the form designated by the Judicial Conference to record the judge's rationale for sentencing.¹⁶ Indeed, the U.S. probation officer plays such a central role in guideline sentencing that they have been called "the guardians of the guidelines."¹⁷

There is a great deal about sentencing under the federal guidelines that is laudable. The last twenty years have demonstrated that sentencing guidelines have accomplished the "first and foremost"¹⁸ goal of the SRA: reducing unwarranted sentencing disparity.¹⁹ We have come a long way from the "judicial lawlessness" condemned by District Judge Marvin Frankel in 1972:

The scope of what we call "discretion" permits imprisonment from anything from a day to 1, 5, 10, 20 or more years. All would presumably join in denouncing a statute that said "the judge may impose any sentence he pleases." Given the morality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable.²⁰

King and Klein note that horror stories about identical offenders before different judges, one who received a sentence of probation while the other was sentenced to imprisonment, were

¹⁶ See JCUS-SEP 03, p. 18 ("[T]he Conference designated the Statement of Reasons as the mechanism by which courts comply with the requirements of the PROTECT Act to report reasons for sentences to the United States Sentencing Commission.").

¹⁷ Sharon Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 933 (1995).

¹⁸ See Kenneth Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295 (1993); see also United States Sentencing Commission, *supra* note 8, at 79 ("Eliminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.").

¹⁹ See generally United States Sentencing Commission, *supra* note 8, at 93-99 (describing research suggesting that promulgation of sentencing guidelines, along with other changes made by the SRA, led to reduced inter-judge disparity).

²⁰ Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4 (1972). Of course, some suggest that the federal sentencing guidelines went too far. See Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT. REP. 319, 319 (2002) (arguing that the flexible guideline proposed by Frankel bears little resemblance to the "extraordinarily rigid, detailed, and cumbersome guideline system" at work in the federal system).

not the exception before promulgation of the guidelines, but the rule.²¹ Appellate review was virtually non-existent.²² This has changed under the guidelines.

The federal sentencing guidelines also accomplished several other goals of the SRA. They made federal sentencing significantly more rational,²³ more certain,²⁴ and more transparent.²⁵ The Sentencing Commission has suggested that sentencing now may be the most transparent part of the entire federal criminal justice system.²⁶ Because of the guidelines, punishment has become far more predictable. Now, confronted with an offense level of 21 and a criminal

²¹ Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. 316 (2004).

²² See MICHAEL TONRY, SENTENCING MATTERS 6 (1996).

For all practical purposes, appellate review of sentences and parole release decisions was nonexistent. Judges' and corrections officials' decisions were supposed to be governed by the unique circumstances of particular cases. Without rules governing decisions whose correct application could be examined, there was little that appellate courts could review except gross abuses of discretion or allegations of corruption; no bodies of case law on sentencing or parole appeals could or did accumulate.

Id., at 6.

²³ See United States Sentencing Commission, *supra* note 8, at 136.

Under the existing code, similar conduct can be charged in a variety of ways and there is no systematic grading of offenses to ensure punishment proportionate to the seriousness of the crime. The guidelines brought order to the code by assigning the plethora of statutory offenses to generic categories representing the basic classifications of criminal conduct. These generic offenses were then graded in terms of seriousness, and specific adjustments for aggravating and mitigating circumstances were provided to adjust for the facts of each particular case.

Id. (citations omitted).

²⁴ The "establishment of truth-in-sentencing through the elimination of parole" ... increased sentencing certainty "at a stroke." *Id.*, at 11. Real offense sentencing helps to sever the punishment imposed from the idiosyncratic manner in which an offense is charged. See *supra* note 23. While the Sentencing Commission did not settle on a pure real offense system when it promulgated the guidelines, it included a number of real offense elements. United States Sentencing Commission, Guidelines Manual 5-6 (2008).

²⁵ See *id.* at 80-81 (describing increased transparency and increased research focus on sentencing because of that transparency).

²⁶ *Id.* at 80 ("Sentencing may now be the most transparent part of the criminal justice system.").

history score of 2, a defendant knows that he is facing 46-57 months in prison,²⁷ and can make informed decisions about accepting responsibility, providing assistance to prosecutors, or accepting a plea bargain.

Despite these laudable achievements, the federal sentencing guidelines have been excoriated by many commentators.²⁸ Critics of the federal guidelines frequently complain that they are too complicated,²⁹ too rigid,³⁰ and too draconian.³¹ Even Supreme Court Justice Anthony Kennedy has complained that our punishments are too severe and our current sentences are too long.³² The severity of the guidelines is exacerbated by the Commission's efforts to reconcile the guidelines against congressionally-enacted mandatory minimum sentences.³³ Under the

²⁷ See United States Sentencing Commission, *supra* note 24, at inner back cover (reproducing sentencing table).

²⁸ See, e.g., TONRY, *supra* note 22, at 11 ("Few outside the federal commission would disagree that the federal guidelines have been a disaster."); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, Cato Institute Policy Analysis No. 458, at 23 (2002) ("There are many possible paths to positive change, all leading to the dissolution of the commission and the repeal of its Guidelines."); José Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L. J., July 27, 1992, at 27 ("The sentencing guidelines system is a failure—a dismal failure, a fact well known and fully understood who is associated with the federal judicial system.").

²⁹ See, e.g., TONRY, *supra* note 22, at 98 ("One of the commission's worst blunders was promulgation of the forty-three level sentencing grid. By being so large and giving an appearance of arbitrary sentencing by numbers, it became one of the guidelines' worst enemies."). The guidelines manual (used to interpret the grid) is more than 500 pages long. "To many, the Guidelines make the federal tax code look like *Reader's Digest*." Luna, *supra* note 28, at 12.

³⁰ See, e.g., Luna, *supra* note 28, at 13-15 (criticizing the narrow ranges of the guidelines and the commission's general exclusion of "seemingly relevant" sentencing factors from consideration).

³¹ See, e.g., Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299 (2000).

[T]he narcotics sentences generated by the Guidelines and the various minimum mandatory statutory sentencing provisions are often, if not always, too high. I say this as a former prosecutor of some fourteen years experience, seven of them as an Assistant U.S. Attorney in Miami, who helped send a fair number of folks to prison for narcotics offenses.

Id. at 337.

³² See, e.g., Stephen A. Saltzburg & James R. Thompson, Message from the Co-Chairs, in *SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 3* (American Bar Association, Commission on Effective Criminal Sanctions 2007) (quoting Justice Anthony Kennedy as stating, "Our resources are misspent, our punishments too severe, our sentences too long.").

³³ See TONRY, *supra* note 22, at 78-79.

binding federal guidelines, pre-*Booker*, it was said that judges had been transformed into automatons, into calculators,³⁴ compelled to enforce a system in which they did not believe. When judges did dare to deviate from the guidelines, they were overturned on appeal,³⁵ or worse.³⁶

I do not wish to join this litany of criticism. Nor do I wish to prescribe specific recommendations to improve the implementation of the SRA. Many others – both individuals and organizations – have already done so.³⁷ At the time of *Blakely*, dozens of academics and advocacy groups published thoughtful recommendations for sentencing reform.³⁸ The Judicial Conference, the policy making body for the federal judiciary, regularly articulates its views on behalf of the courts and the probation and pretrial services system.³⁹ More recently, in anticipation of a new

The U.S. Congress has enacted many mandatory penalty laws since 1980 and the commission had to decide how to reconcile the guidelines with laws calling for two-, five-, ten-, or twenty-year minimum sentences. ... [The commission decided to] increase all drug-offense sentences across the board so that the guidelines sentences and the statutory minima for mandatory-penalty offenses would be the same. ... [This] in effect lifts the entire [sentencing grid] lattice and increases severity overall.

Id. at 79.

³⁴ See Bert Brandenburg & Amy Kay, Courts...or Calculators? The Role of Courts in Criminal Sentencing, Justice at Stake Issue Brief, at: <http://www.gavelgrab.org/wp-content/resources/Courts%20or%20Calculators.pdf> (describing consequences of limited judicial discretion in sentencing).

³⁵ See 18 U.S.C. § 3742(a) and (b) (articulating bases for appeal of sentence).

³⁶ See, e.g., David Rubinstein, *Rosenbaum Inquisition*, THE NATION, Dec. 11, 2003, at: <http://www.thenation.com/doc/20031229/rubenstein> (describing legislative attempts to intimidate Judge James Rosenbaum from downward departures in federal sentencing).

³⁷ See, e.g., Justice Kennedy Commission, Reports with Recommendations (Aug. 2004), at: http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/JusticeKennedyCommissionReports_Final_081104.pdf (recommending, *inter alia*, changes to the federal sentencing guidelines to improve the criminal justice system); The Constitution Project, Recommendations for Federal Criminal Sentencing in a Post-*Booker* World (2006), at: <http://www.constitutionproject.org/pdf/SentencingRecs-Final1.pdf> (proposing a simplified and improved guideline sentencing system).

³⁸ See, e.g., Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004) (noting “Bowman fix” solution to the problem presented by *Blakely*, but arguing against it); James Felman, Legislative Solutions to *Blakely* (Sept. 16, 2004), at: http://www.ussc.gov/hearings/11_16_04/felman.pdf (arguing for simplified and codified guidelines); Paul Rosenzweig, Sentencing in a Post-*Booker* and *Fanfan* World (Dec. 17, 2004), at: <http://www.heritage.org/research/legalissues/tst111704a.cfm> (arguing for simplified guidelines).

³⁹ See, e.g., United States v. Booker: One Year Later—Chaos or Status Quo? Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 109th Cong., 109-121 (2006) (statement of

presidential administration, a second volley of criminal justice recommendations has appeared in policy-making circles.⁴⁰ Many of those making recommendations have identified the same problems and have suggested similar solutions (e.g., guideline simplification or repeal of some/all mandatory minimum penalties). Accordingly, I encourage the Sentencing Commission to consider the extant body of policy proposals – not just the testimony submitted for its own regional hearings – when assessing the implementation of the SRA.

Instead of criticizing or enumerating desirable amendments to the guidelines, I want to focus the Commission’s attention on the importance of data and research. Because the guidelines are now advisory,⁴¹ and because the guidelines cannot be treated as presumptively reasonable,⁴² the guidelines themselves are less important than they were pre-*Booker*. Gone are the days when a district judge would be summarily reversed for departing below the guidelines by giving weight to a disfavored factor; today it is the district judge who sentences within the guidelines, without explaining why, who is likely to be reversed.⁴³ For this reason, the data collected by the Sentencing Commission may be equally important – or more important – than the guidelines it promulgates.

Judge Paul G. Cassell, Chair of the Criminal Law Committee of the Judicial Conference) (outlining numerous steps that Congress could take to improve federal sentencing); Mandatory Minimum Sentencing Laws – The Issues, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 110th Cong., 110-110 (2007) (statement of Judge Paul G. Cassell, Chair of the Criminal Law Committee of the Judicial Conference) (describing problems associated with mandatory minimum sentencing, expressing the Judicial Conference’s longstanding opposition to mandatory sentencing, and identifying “alternatives to injustice”). The Judicial Conference has come a very long way since opposing the establishment of the Sentencing Commission and the guidelines. In March of 2005, it resolved “that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible.” JCUS-MAR 05, p. 15.

⁴⁰ See, e.g., Molly M. Gill, Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums (Sept. 2008), at http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf (advocating widespread repeal of mandatory minimum sentences); The Sentencing Project, Smart on Crime: Recommendations for the Next Administration and Congress (Nov. 5, 2008), at: http://www.sentencingproject.org/Admin/Documents/publications/inc_transition2009.pdf (outlining a number of problems in the criminal justice system and advancing corresponding solutions).

⁴¹ See *United States v. Booker*, 543 U.S. 220 (2005) (rendering the guidelines advisory).

⁴² See *Rita v. United States*, 551 U.S. 338, 351 (2007) (“[T]he sentencing court does not enjoy the benefit of a legal presumption that the guidelines should apply.”); *Gall v. United States*, 552 U.S. ___, ___ (slip. Op., at 11-12) (noting that district judges “may not presume that the Guidelines range is reasonable.”).

⁴³ See, e.g., *Nelson v. United States*, 555 U.S. ___ (2009) (reversing sentencing court for applying a presumption of reasonableness).

Sentencing data and data integrity are perhaps more important now than they have ever been. Given President Obama’s announcement that “[t]he question we ask today is not whether our government is too big or too small, but whether it works,”⁴⁴ the Commission (along with judges, prosecutors, defenders, and probation officers) must appreciate the significance that data may soon play in the setting of policy.

In 2004, the Criminal Law Committee of the Judicial Conference endorsed a strategic approach that the probation and pretrial services system be organized, staffed, and funded in ways to promote mission-critical outcomes; and that the capacity be developed to empirically measure the results.⁴⁵ Following up on this commitment to measurable results, the Criminal Law Committee has embraced the use of evidence-based practices in the supervision of defendants and offenders,⁴⁶ and in formulating its budget requests and in making programmatic decisions.⁴⁷

To this end, the Office of Probation and Pretrial Services at the Administrative Office of the United States Courts has distributed grant funding to eighteen offices in sixteen districts to implement evidence-based supervision practices.⁴⁸ These districts have introduced programs such as risk/needs assessment,⁴⁹ motivational interviewing,⁵⁰ cognitive-behavioral techniques,⁵¹ offender workforce development,⁵² and reentry programs based on drug court

⁴⁴ Barack Obama, Inaugural Address (Jan. 20, 2009), available at: <http://www.cnn.com/2009/POLITICS/01/20/obama.politics/index.html>.

⁴⁵ JCUS-SEP 04, p. 15.

⁴⁶ JCUS-SEP 06, p. 19.

⁴⁷ JCUS-SEP 07, p. 14

⁴⁸ See John M. Hughes. *Results-Based Management in Federal Probation and Pretrial Services*, FEDERAL PROBATION 12 n.10 (Sept. 2008) (identifying participating districts).

⁴⁹ See, e.g., Christopher T. Lowenkamp, et al., *Adhering to the Risk and Need Principles: Does it Matter for Supervision-Based Programs?* FEDERAL PROBATION 3-8 (Dec. 2006) (concluding that accurate identification of offender risk and need is important for effective non-custodial supervision, such as that conducted by federal probation and pretrial services officers); Scott VanBenschoten, *Risk/Needs Assessment: Is this the Best We Can Do?* FEDERAL PROBATION 38-42 (Sept. 2008) (calling for improvements upon existing risk/needs instruments).

⁵⁰ See, e.g., Michael D. Clark, *Motivational Interviewing for Probation Staff: Increasing the Readiness to Change*, FEDERAL PROBATION 22-28 (Dec. 2005) (suggesting that skillful use of motivational interviewing by probation officers can significantly increase the likelihood of long-term behavioral change among offenders); Melissa Alexander et al., *Motivational Interviewing Training in Criminal Justice: Development of a Model Plan*, FEDERAL PROBATION 61-66 (Sept. 2008) (identifying stages of motivational interviewing training and outlining a model implementation training plan for districts).

models.⁵³ Other districts within the probation and pretrial services system are employing these interventions, as well. While the impact of these interventions on federal recidivism data is not yet known, a cost-benefit analysis conducted by the Washington State Institute for Public Policy (WSIPP) suggests that a number of these initiatives not only reduce recidivism at the state and local level, but curb reoffending by such a margin that even more-expensive programs are sometimes cost effective.⁵⁴

Type of Intervention	% reduction in Crime (# studies)	Benefit to victims	Benefit to public	Costs	Total (Benefits minus costs)
Intensive supervision: treatment-oriented programs	-16.7% (11)	\$9,318	\$9,369	\$7,124	\$11,563
Cognitive-behavioral therapy in prison or community	-6.3% (25)	\$5,658	\$4,746	\$105	\$10,299
Drug treatment in community	-9.3% (6)	\$5,133	\$5,495	\$574	\$10,054
Adult drug courts	-8.0% (57)	\$4,395	\$4,705	\$4,333	\$4,767
Employment and job training in the community	-4.3% (16)	\$2,373	\$2,386	\$400	\$4,359
Electronic monitoring to offset jail time	0% (9)	\$0	\$0	-\$870	\$870
Intensive supervision: surveillance-oriented programs	0% (23)	\$0	\$0	\$3,747	-\$3,747
Adult boot camps	0% (22)	\$0	\$0	n/e	n/e
Domestic violence education/cognitive-behavioral treatment	0% (9)	\$0	\$0	n/e	n/e
Life Skills education programs for adults	0% (4)	\$0	\$0	n/e	n/e

Thus, intensive treatment-oriented supervision programs cost \$7,124 more than alternative programs, but they reduce recidivism by 16.7% according to 11 different studies, and thereby save victims \$9,318 and save the taxpaying public \$9,369. The net effect is that programs of this kind appear to save a net \$11,563. Of course, other programs (such as surveillance-oriented intensive supervision) have no significant effect on recidivism and impose additional costs (the net totals for surveillance-oriented intensive supervision were not evaluated by WSIPP).

Although the Criminal Law Committee has not endorsed the WSIPP study or the correctional interventions evaluated therein, it *has* repeatedly endorsed the use of evidence-based

⁵¹ See, e.g., Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come from and What They Do*, FEDERAL PROBATION 43-49 (Sept. 2008) (outlining origins and applications of cognitive-behavioral therapy, and discussing its application to the federal probation and pretrial services system).

⁵² See, e.g., Jack McDonough & William D. Burrell, *Offender Workforce Development: A New (and Better?) Approach to an Old Challenge*, FEDERAL PROBATION 71-76 (Sept. 2008) (discussing relationship between employment and recidivism, and describing efforts to establish a workforce development program).

⁵³ See C.A.R.E. Program Summary, at: http://www.rashkind.com/alternatives/dir_09/Sorokin_CAREProgSummary.pdf (describing District of Massachusetts program modeled on drug court principles); see also Daniel W. Close, et al., *The District of Oregon Re-Entry Court: Evaluation, Policy Recommendations, and Replication Strategies*, at <http://www.ord.uscourts.gov/ReentryCourtDoc.pdf> (providing evaluation of District of Oregon program).

⁵⁴ See Steve Aos, et al., *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, at: <http://www.nicic.org/Library/021948> (evaluating evidence-based criminal justice initiatives with a cost-benefit analysis).

practices.⁵⁵ Accordingly, probation and pretrial services officers across the country are trying to use social research to better supervise defendants and offenders. A national risk/needs tool is already in development, and will allow probation officers to tailor evidence-based interventions to the specific criminogenic risks and treatment needs of each individual offender. Having reliable data about sentencing and recidivism would enable judges to impose evidence-based sentences and would enable probation officers to implement those sentences in a way that maximizes their effectiveness.

Interestingly, many of the evidence-based initiatives being implemented by probation and pretrial services offices share common goals and methodologies with the initiatives explored by the Sentencing Commission at its 2008 Symposium on Alternatives to Incarceration.⁵⁶ As alternatives to incarceration are studied by the Sentencing Commission, the Executive Branch,⁵⁷ and the Congress, meaningful sentencing data will be essential to these efforts, as well.

I hope that the Sentencing Commission uses the twenty-fifth anniversary of the SRA to reflect on the sentencing guidelines and ways that they can be improved to guide judges after *Booker*, but I also hope that the Commission remains attentive to the essential role that data will play in the criminal justice system as government agencies look for interventions that work and that use resources in a thoughtful and effective manner.

⁵⁵ See *supra* notes 45-47.

⁵⁶ See United States Sentencing Commission, Symposium on Alternatives to Incarceration, available at: http://www.ussc.gov/SYMPO2008/NSATI_0.htm (providing materials distributed at July 14-15, 2008 symposium).

⁵⁷ See Blueprint for Change: Obama and Biden's Plan for America 65 (2008), at: <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf> (identifying reduction of recidivism by providing support to ex-offenders and expanded use of drug courts as key criminal justice goals).