

Statement before the United States Sentencing Commission

“The Sentencing Reform Act of 1984: 25 Years Later”

Northwest Regional Hearing

Community Impact Panel

Larry M. Fehr

**Senior Vice President, Corrections and Behavioral Health, Pioneer Human Services
Seattle, Washington**

Lecturer, Law, Societies and Justice Program, University of Washington

Chair., Community Corrections Committee, American Correctional Association

Larry.Fehr@p-h-s.com

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Stanford Law School

Mr. Chairman and members of the Commission, my name is Larry Fehr and I appreciate the invitation to participate on the "Community Impact Panel" in this hearing to obtain public input on "The Sentencing Reform Act of 1984," twenty-five years following its enactment.

I would like to begin by commending the Commission for its interest in receiving testimony about how the federal sentencing system is operating and considering what recommendations witnesses may have for changes to the federal sentencing system. I have been invited to participate on this panel as a representative of community-based organizations providing services to offenders, including federal offenders, returning to the community from prison. As you know, in recent years that process has become known as "reentry." I am honored to have this opportunity to provide this perspective.

It may be helpful at the outset to summarize my professional background in order to provide context to the recommendations that I will subsequently offer. I have worked in the criminal justice system for 35 years in four basic capacities: first as a criminal justice planner during the days of the Law Enforcement Assistance Administration; then as the Director of the Washington Council on Crime and Delinquency, an organization devoted to improving the justice system¹ (a major focus of which was the adoption of Washington State's Sentencing Reform Act in 1981² and its implementation in 1984); next as a university lecturer for over twenty years, most recently in the University of Washington's "Law, Societies and Justice Program"³; and finally for the past twelve years managing a statewide nonprofit organization, Pioneer Human Services, which provides direct services to the formerly imprisoned. The presentation that follows, no doubt, reflects my various experiences as a planner, policy advocate, professor, and provider of services.

Perhaps a little information concerning our work at Pioneer Human Services would be appropriate.⁴ With programs in 61 locations in Washington state and providing an integrated array of services, such as residential reentry centers, chemical dependency programs, mental health counseling, 700 units of low-barrier and affordable housing, and a variety of employment and training services, Pioneer Human Services has been referred to as "the largest local program serving individuals released from prison in the country."⁵ It is not just the size of Pioneer Human Services, however, that makes it distinct, but also its results. A leading researcher in the field of reentry and former President of the American Society of

¹ See Jerry Large, "Shaping the Crime Debate: Head of Nonprofit Groups Works to Influence Laws Affecting Justice System," *The Seattle Times*, (August 31, 1994): B1.

² Revised Code of Washington, 9.94A.010-910.

³ <http://depts.washington.edu/class/lcj/>

⁴ See www.pioneerhumanservices.org and also, Larry M. Fehr, "Changing Lives and Changing the Way Nonprofits Do Business," *Journal of Community Corrections*, Vol. XVII, No. 2 (Winter 2008): p. 21-22.

⁵ Council of State Governments, *The Report of the Reentry Policy Council* (New York: Council of State Governments, 2005): 583.

Criminology, Joan Petersilia, found that after a two-year follow-up period, “the recidivism rate is less than 5 percent for its work-release participants.”⁶ A second independent study funded by the Ford and Casey Foundations found that after two years from being discharged from Pioneer’s work release programs, former clients had a 6.4% recidivism rate.⁷ I am sure you recognize how favorably those outcomes compare to the best national studies on recidivism in which a majority of former offenders (52%) were re-incarcerated.⁸ Across this country, we can be more effective in helping returning offenders live law-abiding lives and reduce the likelihood of future victimization, and I will make some recommendations on this matter later, but first, I wanted to begin my suggestions to the Commission with some broader issues.

My discussion and recommendations fall into two main groups: general sentencing-related issues and specific issues concerning community-based services and reentry of federal offenders.

General Federal Sentencing-Related Issues

Perhaps the proper starting point in assessing the Sentencing Reform Act over the last twenty-five years is to acknowledge that the central objectives of the legislation are largely being achieved. As the Commission has previously demonstrated, and I believe it is important to continue to acknowledge today, the federal guidelines have reduced unwarranted sentencing disparity (a primary goal of the legislation), while increasing rationality, certainty, predictability and transparency.⁹ These achievements are important and should be applauded at the outset. At the same time, there are a number of areas that the Commission and the Congress should re-examine for improvements. I would support the suggestions that have been made by others to consider the following reforms:

- **Urge Congress to Repeal Mandatory Minimum Sentences or Expand the “Safety Valve”**
Mandatory sentences are contrary to the principle of structuring but not eliminating discretion of judges in sentencing. They also undermine consistency in application due to plea negotiations, conflict with the goal of imposing a sentence that is “sufficient but not greater than necessary to achieve the purposes of sentencing,” and result in disproportionate and overly punitive impacts. As another former President of the American Society of Criminology,

⁶ Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press, 2003): 198.

⁷ Paul Sommers, Bronwyn Mauldin, and Sara Levin, *Pioneer Human Services: A Case Study* (Seattle: Daniel J. Evans School of Public Affairs, University of Washington, 2000).

⁸ See, Patrick Langan and David Levin, *National Recidivism Study of Released Prisoners: Recidivism of Prisoners Released in 1994* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, June 2002).

⁹ 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*, (2004): 79-81.

Michael Tonry, has succinctly stated: “Mandatory penalties do not work.”¹⁰ But if outright abolishment of mandatory minimums is not practical, an interim step would be to amend the federal statute to broaden the “safety valve,” which allows judges to impose a sentence under the advisory guidelines in certain drug cases, in place of a mandatory minimum upon a judicial finding that various conditions are met. Congress should consider expanding the “safety valve” by revising the criminal history criteria, clarifying acceptance of responsibility standards, and applying it to other mandatory minimums beyond drug offenses.

- **Reform Sentences for Crack Cocaine Offenses**

The U.S. Sentencing Commission is to be commended for reducing guideline penalties for crack offenses and for applying those changes retroactively, but federal sentencing of cocaine cases remaining fundamentally unfair. I have spent part of my career trying to research and ameliorate racial and ethnic disparities in the justice system.¹¹ There is no more blatant example of policy in the justice system with disparate impact than crack and powder cocaine penalties in the federal system. By repealing the mandatory sentencing requirement for possession cases and raising the quantity threshold for drug sales cases to the level of powder cocaine, we would shift resources to a more appropriate focus on higher-level drug cases, while reducing consequent racial disparities and unnecessarily long periods of incarceration. I applaud the statement of the Acting Chair of the Commission before the Senate’s Subcommittee on Crime and Drugs on April 29, 2009, that: “The Commission continues to believe that there is no justification for the current statutory penalty scheme for powder cocaine and crack cocaine offenses.”¹² Many of us were also encouraged that in an appearance before the same subcommittee, a representative of the Department of Justice said that the current administration believes that the goal in Congress “should be to completely eliminate the disparity” between the two forms of cocaine, and that “a growing number of citizens view it as fundamentally unfair.”¹³

- **Examine the Role of Prosecutorial Discretion in Sentencing Outcomes and Consider Guidelines**
Charging and plea negotiation decisions made by U.S. Attorneys need to be considered in any

¹⁰ Michael Tonry, “Mandatory Penalties,” in Michael Tonry, ed., *Crime and Justice: A Review of Research*, Vol. 16, (Chicago: University of Chicago Press, 1992): 243.

¹¹ See Larry M. Fehr, “Racial and Ethnic Disparities in Prosecution and Sentencing: Empirical Research of the Washington State Minority and Justice Commission,” *Gonzaga Law Review*, Volume 32, Number 3, (1996/97): 577-592.

¹² Statement of Ricardo H. Hinojosa, Acting Chair., United States Sentencing Commission, Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, April 29, 2009: 16.

¹³ Statement of Assistant Attorney General Lanny Breuer, Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, April 29, 2009, as reported by The Associated Press, “Obama Seeks Crack Cocaine Sentence Changes: Congress Urged to Equalize Penalty, Correct Racial Disparity.”

assessment of federal sentencing practices; yet, limited research has focused on the behaviors of prosecutors under the Sentencing Reform Act, and little structure is placed on their discretion. This issue is especially important since 96% of federal convictions are obtained by a guilty plea.¹⁴ Some commentators have warned about the displacement of discretion and potential circumvention of sentencing guidelines without a prosecutorial guidelines counterpart. In Washington State, in addition to the adoption of sentencing guidelines for judges, voluntary prosecutorial guidelines for charging and plea-bargaining were adopted and perhaps could provide a model for such guidelines at the federal level.¹⁵ Research on the impact of the prosecutorial guidelines in Washington State relating to racial and ethnic disparities, commissioned by the Washington State Minority and Justice Commission, found “few disparities by race of the offender in the various recommendations of deputy prosecuting attorneys.”¹⁶

Community-based Corrections: Alternatives to Incarceration and Reentry of Federal Offenders

When I started working in the criminal justice field thirty-five years ago, there were fewer than 200,000 adults in all the state and federal prisons in this country. Today, there are nearly 2,000,000.¹⁷ Adult incarceration rates in this country have quadrupled during that period of time¹⁸ and not surprisingly, the costs of imprisonment have soared. In twenty years time, the correctional budgets have increased from \$9 billion in 1982 to \$60 billion in 2002.¹⁹ But one thing has not changed during recent decades—two-thirds of those released from prison will be rearrested within three years.²⁰

Whether or not we believe that increased reliance on incarceration is a good thing or bad, one thing is certain—95% of those imprisoned eventually return and 40% of those in prison today will be released within the next year.²¹ According to the Bureau of Justice Statistics, today more than 700,000 inmates

¹⁴ Rodney L. Engen, Testimony before the United States Sentencing Commission, Atlanta, Georgia, February 11, 2009: 4.

¹⁵ Revised Code of Washington, 9.94A.430-460 (enacted in 1983).

¹⁶ Robert D. Crutchfield, et al., *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County*, (Olympia, WA: Washington State Minority and Justice Commission, 1995): 4.

¹⁷ Jeremy Travis, Testimony Before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, March 12, 2009: 2.

¹⁸ *Id.*

¹⁹ Lynn Bauer, *Justice Expenditure and Employment in the United States*, (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 2002).

²⁰ Langan and Levin, *supra* note 8.

²¹ Petersilia, *supra* note 6.

leave our state and federal prisons each year.²² To paraphrase the title of Jeremy Travis's excellent book on the subject, "they all come back."²³

A brief look at just offenders under the jurisdiction of the Federal Bureau of Prisons is illuminating. According to testimony provided by the Bureau's Director, Harley G. Lappin, to Congress recently,²⁴ today the Bureau is responsible for 202,000 inmates. In contrast, in 1940, the federal prison population was 24,360. *That number did not change significantly for 40 years*, so that in 1980, the population was 24,640. From 1980 to 1989, the inmate population more than doubled to almost 58,000. During the 1990s, the population more than doubled again, reaching 134,000 at the end of 1999. The current population is expected to increase to over 215,000 by the end of 2011. Annually, the Bureau returns 45,000 federal inmates to our communities, a number that will continue to increase as the population grows. The Director reported to Congress that the Bureau's total rated capacity is 122,366 beds at the end of FY2008, and it confined 166,000 inmates, thereby operating 36 percent over its total rated capacity.²⁵ The Bureau of Prisons has no control over the number of inmates who come into federal custody, the length of sentences they receive, or the types of deficits they bring with them. It is important for us to recognize that the overcrowding of the federal prison system is contrary to a stated goal of the federal sentencing legislation, "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."²⁶

In addition to the recommendations previously summarized, what additional steps should be considered to allow more sentences at the "front-end," for placement in the community, instead of prison, and what suggestions should be considered at the "back-end" as inmates prepare to leave prison and return to communities across this country? I would offer the following:

- **Expand Alternatives to Incarceration in the Federal Sentencing Guidelines**

The primary currency of sentencing guidelines is incarceration. Yet, when Congress established the U.S. Sentencing Commission in 1984, it included among its duties a mandate "to insure 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

²² U.S. Department of Justice, *Prison Inmates at Midyear 2007* (Washington, D.C.: Office of Justice Programs, Bureau of Justice Statistics, 2008).

²³ Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry*, (Washington, D.C.: The Urban Institute, 2005).

²⁴ Harley G. Lappin, Testimony, U.S. House of Representatives, Committee on Appropriations, Subcommittee on Commerce, Justice Science, and Related Agencies, March 10, 2009.

²⁵ *Id.*, at p. 3.

²⁶ 28 U.S.C. Sec. 994(g).

a crime of violence or otherwise serious offense...”²⁷ In addition, the guidelines were to address the “determination of whether to impose a sentence to probation, a fine, or a term of imprisonment...”²⁸ It is encouraging that the Commission hosted a symposium on the topic of alternatives to incarceration in 2008²⁹ and has proposed to “consider alternatives to incarceration” as a priority policy issue during its current amendment cycle. As a provider of residential community correctional programs, I would like to point out that federal judges used to have the power to “direct commit” eligible offenders to our federal residential community centers in lieu of confinement in prison, but, as I understand it, that authority was taken away in following an opinion from the Office of General Counsel in the Department of Justice a few years ago that asserted that they lacked such statutory authority. Speaking on behalf of many providers across the country, we believe that federal judges should have this authority restored. Offering the choice between probation and prison for judges, is like offering the choice between an aspirin and a frontal lobotomy for doctors. A graduated continuum of community-based correctional options, in addition to imprisonment, should be provided.

- **Expand Federal Drug Treatment Courts and Create a Diversionary Option**

According to Director Lappin’s recent testimony before Congress, 53% of inmates in federal prisons are serving sentences for drugs.³⁰ Over half of those federal drug offenders have no or very minimal criminal history. Yet, over 95% of all persons convicted of federal drug offenses are sentenced to incarceration.³¹ Currently in the federal system, drug courts operate in selected districts for eligible offenders who have already served their federal sentence and are under post-release supervision. The current approach, however, of prison first, drug courts or reentry courts later, is insufficient and overly restrictive. Instead, as over 2,100 drug courts operated at the state and local level across this country can attest, diverting appropriate minor offenders to drug courts that focus on treatment and recovery, instead of just confinement, is an appropriate direction for the country. A recent assessment of “The First Twenty Years of Drug Treatment Courts” in this country concludes that sound studies “demonstrate that drug use and criminal behavior are substantially reduced while clients are participating in and after graduating from drug treatment courts.”³² Drug offenders processed through federal courts

²⁷ 28 U.S.C. Sec. 994(j).

²⁸ 28 U.S.C. Sec. 994(a) (1) (A).

²⁹ For an overview of the Commission’s symposium on alternatives to incarceration, see, http://www.ussc.gov/symp_agenda7_08.pdf.

³⁰ Lappin, *supra* note 24, at 1.

³¹ See U.S. Sentencing Commission, Discussion Paper, *Sentencing Options Under the Guidelines*, <http://www.ussc.gov/simple/sentopt.pdf>.

³² Arthur J. Lurigio, “The First Twenty Years of Drug Treatment Courts: A Brief Description of Their History and Impact,” *Offender Programs Report*, Vol. 12, No. 6, (March/April 2009): 89.

should have the same opportunity for diversion, treatment, and recovery, as do their counterparts in the state courts across this nation.

- **Expand the Residential Drug Abuse Program (RDAP)**

RDAP is a voluntary six to twelve month program for selected federal prisoners with substance abuse problems.³³ Research has confirmed that three out of every four offenders released from prison have a substance abuse problem.³⁴ According to Director Lappin's recent testimony, "since FY 2007, however, the BOP has been unable to meet the requirement for residential drug abuse treatment of all eligible inmates due to a lack of funding for expansion of the program...Currently, the waiting list is in excess of 7,000 inmates."³⁵ This is all the more regrettable since, as the Director reported, rigorous research has found that "inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release."³⁶ Congress should be encouraged to more fully fund this program that is proven to reduce recidivism, drug abuse relapse, and prison costs, both by shortening sentences for up to one year and by reducing recidivism. The Bureau should be encouraged to make the program available to all qualifying non-violent prisoners and to appropriately administer the sentence reduction incentive.

- **Increase the Capacity of Residential Reentry Centers**

The Federal Bureau of Prisons relies on Residential Reentry Centers (RRC's), also known at various times as community corrections centers and halfway houses, to place inmates back into the community prior to their release from custody. A focus during this period of time, which averaged 101 days in FY08,³⁷ is to find suitable employment, access substance abuse treatment when needed, begin the process of family reunification if appropriate, and help participants adjust to life back in the community. These programs provide a highly structured and supervised environment to assist in the reintegration process. As Director Lappin testified to Congress, "Research has shown that inmates who release through halfway houses are less likely to recidivate than those who release directly to the street."³⁸ The Bureau should be greatly

³³ Authorized by 18 U.S.C. Sec. 3621, which directs the Federal Bureau of Prisons to provide "residential substance abuse treatment and make arrangements for aftercare...for all eligible prisoners," giving priority to eligible prisoners closest to their release dates.

³⁴ Christopher J. Mumola, *Substance Abuse and Treatment, State and Federal Prisoners* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1999).

³⁵ Lappin, *supra* note 24, at 7.

³⁶ *Id.*, p. 4.

³⁷ Data presented by the Federal Bureau of Prisons at the "RRC Partnership Meeting," March 25, 2009, in Washington, D.C.

³⁸ Lappin, *supra*, note 24, at 9.

credited with utilizing this proven³⁹ graduated release mechanism with 80% of all federal offenders who transition through this type of program,⁴⁰ rather than being given “gate money,” a bus ticket, and an appointment with a parole officer, which is the experience of the vast majority of state prisoners.⁴¹ “Research has caught up with common sense in evaluating successful methods for releasing offenders” and with validated risk and need assessment tools, “targeting resources to higher risk offenders, focusing on the factors that we know are related to criminal behavior, and effectively implementing treatment programs that address these risk factors”⁴² we have greatly expanded our understanding of “What Works” in reducing recidivism. I am pleased that the Washington State Institute for Public Policy has led national research on the costs and benefits of evidence-based correctional programs as compared to traditional incarceration.⁴³ While the Bureau’s track record is exemplary in its reentry efforts, more can and should be done. The historic Second Chance Act,⁴⁴ was signed into law in 2008 and is currently being funded at a level of \$25 million, with the new administration announcing a request for \$75 million for reentry programs in the 2010 budget. In addition to increasing federal funding for community reentry services, the legislation extends the period of time that federal inmates are eligible for placement in Residential Reentry Centers from up to six months to up to one year. While not every federal inmate should be considered for a stay in a community-based residential program for a year, indeed there are probably very few who would benefit from such an increased length of stay; the Federal Bureau of Prisons should be encouraged to expand placements beyond the FY08 average length of stay of 101 days,⁴⁵ consistent with the intent of Congress. In order to increase the length of stay, additional capacity for Residential Reentry Center beds will be required and Congress should appropriate necessary funds to the Bureau to accomplish this objective.

³⁹ See Larry M. Fehr, “Review of Recent Evaluation Research on Community Residential Reentry Centers,” *Journal of Community Corrections*, Vol. XV, No. 2, (Winter 2005-2006): 11-13.

⁴⁰ *Supra*, note 37.

⁴¹ *Supra*, note 39, at p. 11, citing national research suggesting that over 90% of offenders who leave prison are directly released to the community.

⁴² Larry M. Fehr, Guest Editorial, “Charting a Path to a Better Life When the Prison Gates Open,” *The Seattle Times*, (May 10, 2006): B7.

⁴³ Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (Olympia, WA: Washington State Institute for Public Policy, October 2006).

⁴⁴ Pub. L. 110-199; 122 Stat. 657.

⁴⁵ *Supra*, note 37.

Final Comments

As referenced previously, the evidence is clear that federal sentencing guidelines have largely achieved its objectives of making sentencing decisions more certain and proportional, less disparate and inequitable. These accomplishments have been hard-fought and are significant, and Congress and the Commission should be applauded for increasing rationality in the sentencing of federal offenders. But we can and should do more. In addition to focusing on consistency and exceptions, we should also be focusing on cost and effectiveness. A specific recommendation is to consider including “reducing recidivism” among the other goals of the Sentencing Reform Act.

If we are serious about improving public safety and reducing the spiraling costs of the prison system--at least as these goals pertain to federal sentencing--we should give serious consideration to eliminating mandatory sentences and reducing the length of imprisonment for certain federal offenders, expanding proven drug treatment programs both in prison and as a diversion from it, and increasing community-based programs, both as an alternative to placement in federal prisons and as a mechanism for providing a graduated, accountable and proven transition process for offenders returning to our communities.