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I appreciate the opportunity to provide testimony concerning the important issues that the Task Force faces in federal correctional practices. I will herein address two issues: (1) the need for guidance on the in/out decision in sentencing in order to increase the number and rate of non-prison sentences, and (2) the potential for risk-needs assessment practices to inform criminal justice decisions and to impact rehabilitation potential and recidivism rates.

1. The In/Out Decision

A significant contributor to Bureau of Prison overcrowding is the extremely high rate of sentences requirement incarceration. Notably, this is a relatively contemporary phenomenon. Into the mid-1980s, more than half of federal sentences involved alternatives to prison (e.g., straight probation, probation plus some community-based program, or fine-only). Since then, the consistent trend away from alternatives has been marked. From a non-prison rate of greater than 50% in 1987, the rate plummeted to 26% in 1997, to 16% in 2007, and has remained consistent at 10% from 2010 to 2014.[i] In other words, in recent years, nine of ten federal defendants are sentenced to a term of incarceration. Primary reasons for the increase in prison sentences involve a major shift in sentencing philosophy from rehabilitation to retribution and certain policies adopted by the United States Sentencing Commission (USSC). I will focus on the USSC, which deliberately created guidelines that presume imprisonment as the default sentence across cases. I have previously referred to this state of affairs as a "prison-by-default" ideology.[ii]

The prison-by-default theme is found in various policies incorporated into the USSC guidelines. First, the guidelines contain a single grid, which notably solely concerns the length of

prison sentences. The prison grid contains 258 cells and is subdivided into four ordinal zones, from A to D. According to guidelines' policies, judges may issue non-prison sentences to defendants landing in Zones A/B, while a term of imprisonment is dictated for those persons in Zones C/D. Importantly, there is no even distribution among zones. Zones C/D predominant in that 81% of the cells in the prison grid currently fall into them.[iii] Actual sentencing data, perhaps coincidentally, almost replicates this number. For fiscal years 2006–2014, offense levels and criminal history scores relegated 82-83% of defendants into Zones C/D.[iv] While an alternative is permitted in Zones A/B, a term of imprisonment in all cases is expressly allowed. Relatedly, probationary sentences are never the default, even for misdemeanors and first offenders.

Second, the USSC's bias toward prison as the default sentence is evident in the agency's decision not to provide an in/out guideline. This remains the case, despite the Sentencing Reform Act of 1984's requirement to do just that.[v] Congress clearly contemplated that the "sentencing guidelines will recommend to the sentencing judge an appropriate *kind* and range of sentence for a given category of offense committed by a given category of offender."[vi]

Third, the guidelines provide no grids for type (as in community programs) or length of alternative sentences, thus providing no direction to judges in setting alternative consequences. A sentencing law expert appropriately recognizes that imprisonment "rhetorically dominates, since all other sanctions are merely 'alternatives.'"[vii]

The consequence that these policies would have on dramatically minimizing probationary sentences was known to commissioners early in the process.[viii] The trend in the federal criminal system has not been replicated in the states. Over the same time period, states continue to issue probationary sentences in over half of all cases. The states report a rather consistent 30% non-prison statistic for felonies. I have in a previous article countered certain arguments made by

supporters of the federal prison-by-default system, using for support relevant statistics drawn from Department of Justice datasets.[ix] To summarize here: mandatory minimums are not to blame as the percentage of cases in which they are actually applied has declined; federal defendants do not represent more serious offenders—over the last 30 years, mean offense level, mean sentence length, and mean guideline minimum have remained stable; the federal population of sentenced defendants are less likely in recent years to have committed crimes of violence; and prosecutors are now less selective in pursuing cases as the declination rate has dropped significantly over time. Thus, there are many reasons to believe federal officials can safely divert far more than 10% at sentencing as a substantial percentage are rated low risk.[x]

It is widely accepted that imprisonment can itself be criminogenic and remains much more costly than alternatives. Thus, the suggestions for reform are:

- The USSC should develop a guideline providing substantive assistance for the in/out decision. The guideline's orientation should reflect a legislative desire to reserve prison beds for "those violent and serious criminal offenders who pose the most dangerous threat to society."[xi] Notably, states have developed guiding models for in/out decisions.[xii]
- Many more cells in the sentencing grid should be moved from Zones C/D to Zones A/B, thereby focusing judges on their options to issue probationary sentences.
- Carefully creating sentencing guidelines specific to alternative, community-based programming would be helpful to judges. Information already gathered at the USSC's own alternative programming forum held in 2008 can easily be mined.[xiii]

2. Risk-Needs Assessment

An extant literature on risk assessment tools is available and a now popular resource across criminal justice jurisdictions. The risk-needs-responsivity model for reducing recidivism

and promoting healthy and prosocial changes is a laudable effort. Here, though, considering space limitations, I wish to summarily challenge certain myths and misconceptions about the roles and abilities of risk practices, referring interested readers to existing articles for further contextualization and sourcing.[xiv] Perhaps foremost, it should be understood that risk tools are not individual assessment methodologies. Instead, they are population-based models that provide information on recidivism at the group level. Risk tools cannot, empirically or practically, indicate which person(s) within the relevant group is likely to recidivate. Thus, if an individual is scored within his normed group, 30% of whom were observed to recidivate in the developmental samples, it does not translate to the individual having a 30% likelihood of recidivating.[xv]

Risk tools have an affinity for skewing toward high rates of false positives. Notably, risk tool developers often highlight predictive ability statistics that are less salient than others. (In empirical terms, developers tend to justify their models by emphasizing sensitivity and Area Under the Curve (AUC) scores, when positive predictive value is the better measure.) Assessors wishing to use a risk tool developed on a different population must consider, too, differences in base rates of reoffending. It is problematic to use an instrument modeled on a population with, say, a 52% recidivism rate, for a new group whose base rate is 20%. The rate of false positives necessarily soars with a lower base rate. Also, relative measures of risk—such as low, moderate, and high—are merely comparative within the developmental sample(s). There is no commonly accepted metric or meaning to those ordinal terms among scientists or legal practitioners.[xvi]

Risk tools reliant solely upon static factors should be avoided. While providing more efficiency in scoring, static factor-based instruments are quite limited in their utility. If the main desire is to assess and reduce recidivism, dynamic factors are highly relevant. Static factors cannot change and, thus, the potential for rehabilitative success is negated in terms of

assessment. Further, the needs and responsivity principals are arguably more relevant in many criminal justice decisions, and they inherently are better addressed with dynamic factors.

Concerns are raised, though, about relying upon factors that directly, or by proxy, index sociodemographic and immutable characteristics. Nonetheless, officials should bear in mind that simply excising these factors for political correctness undermines the abilities of the tools, both empirically and practically. Many variables used in risk tools may very well be proxies for race, ethnicity, social class, and mental health, but removing those factors found to be statistically significant in recidivism models unfortunately also undermines the evidence-based practices movement.[xvii] Notably, the needs and responsivity principles require an orientation to many of those same characteristics.[xviii] For example, sending women to a drug treatment program developed on male samples simply is a waste of resources as the programs likely do not consider differences unique to women, such as background characteristics (e.g., more likely to have dependent children, have community ties, be reliant upon social services) and experiences (e.g., more likely to have been sexually victimized and to have mental health issues).

For the various reflections just mentioned, a preferred approach is to consider that the risk model that might best be useful likely varies depending on the type of decision at issue (e.g., bail, probation conditions, prison sentence, parole release), the legal rights involved (e.g., greater defense rights at sentencing than institutional placement), and the primary orienting punishment philosophy (e.g., rehabilitation, deterrence, rehabilitation). For example, identifying low risk defendants for diversion at sentencing to probationary terms, a subject discussed earlier, is a popular tool of justice reinvestment in the states. Focusing institutional treatment on high risk-needs offenders is also a responsible correctional management practice.

Thank-you again for an opportunity to outline some important issues.

[i] Data compiled from U.S. SENTENCING COMM'N, 2011-2014 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS fig. D (2012-2015); UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.23.2010 (2010).

[ii] Melissa Hamilton, *Prison-by-Default: Challenging the Presumption of Prison in Federal Sentencing*, 51 HOUS. L. REV. 1271 (2014).

[iii] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

[iv] Data compiled from U.S. SENTENCING COMM'N, 2006–2014 SOURCEBOOKS OF FEDERAL SENTENCING STATISTICS tbl.16 (2007–2015).

[v] 28 U.S.C. § 994(a)(1)(A) (2012) (instructing the Commission to promulgate a guideline that would permit a sentencing judge to determine whether to impose a sentence of probation, a fine, or a term of imprisonment); 18 U.S.C. § 3561(a) (emphasizing the in/out decision to assist judges who are statutorily required to ascertain if a probation sentence is permissible).

[vi] S. REP. NO. 98-225, at 51 (1983) (emphasis added).

[vii] Nora V. Demleitner, *Replacing Incarceration: The Need for Dramatic Change*, 22 FED. SENT'G REP. 1, 1 (2009).

[viii] Michael K. Block & William M. Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 BEHAV. SCI. & L. 51, 52 (1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 24 n.121 (1988); Notice, Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046, 18,122 (May 13, 1987) (dissenting view of Comm'r Paul H. Robinson).

[ix] Melissa Hamilton, *Prison-by-Default: Challenging the Presumption of Prison in Federal Sentencing*, 51 HOUS. L. REV. 1271, 1299-1308 (2014), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=827096.

[x] Christopher T. Lowenkamp et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 PSYCHOL. SERVICES 87 (2013); Timothy P. Cadigan et al., *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 FED. PROBATION, no. 2 (2012).

[xi] 18 U.S.C. § 3551 note (2012).

[xii] *See, e.g.*, ALA. SENTENCING COMM'N, PRESUMPTIVE AND VOLUNTARY SENTENCING STANDARDS MANUAL 32, 40 (2013), *available at* http://sentencingcommission.alacourt.gov/SentStandards/Presumptive%20Manual_2013.pdf; MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, MARYLAND SENTENCING GUIDELINES MANUAL 30–34 & tbls.8- -1 to -3 (2013), *available at* http://www.msccsp.org/Files/Guidelines/guidelinesmanual.pdf.

[xiii] *See generally* U.S. SENTENCING COMM'N, PROCEEDINGS FROM THE SYMPOSIUM ON ALTERNATIVES TO INCARCERATION (2008). Materials offered at the symposium are available at http://www.rashkind.com/alternatives/.

[xiv] Melissa Hamilton, *Risk and Needs Assessments: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. (forthcoming, 2015); *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L.J. (forthcoming, 2015); *Back to the Future: The Influence of Criminal History on Risk Assessment*, 20 BERKELEY J. CRIM. L. (forthcoming, 2015); *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMPLE L. REV. 697 (2011), *all available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=827096.

[xv] *See generally* David L. Faigman, John Monahan, & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014).

[xvi] J.C. Oleson et al., *Training to See Risk: Measuring the Accuracy of Clinical and Actuarial Risk Assessments Among Federal Probation Officers*, 75 FED. PROBATION 52, 55 (2011).

[xvii] Melissa Alexander et al., *Driving Evidence-Based Supervision to the Next Level: Utilizing PCRA, "Drivers," and Effective Supervision Techniques*, 78 FED. PROBATION, no. 2 (2014).

[xviii] Thomas H. Cohen & Jay Whetzel, *The Neglected "R"—Responsivity and the Federal Offender*, 78 FED. PROBATION, no. 2 (2014).