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March 11, 2011

U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC., 20002-8002

**RE: PROPOSED GUIDELINE AMENDMENT #5:
SUPERVISED RELEASE**

Dear members of the Sentencing Commission:

Thank you for the opportunity to present comments on the proposed amendments to the U.S. Sentencing Guidelines. In the past my department has provided written comments on the proposed amendments in their entirety and we plan on continuing that tradition. However, I believe that the proposed amendment in regard to supervised release is of such significance that I have decided to write separately on the issue to urge the Commission to delay submitting the TSR amendment to Congress during this amendment cycle. I believe that it is imperative that before this amendment is submitted to Congress it needs to be fully researched and debated.

At the outset, let me say that I believe too many defendants are given a term of supervised release, or are given too lengthy a term of supervised release and are not given the appropriate conditions. In addition, I believe anything that gives the sentencing court more discretion is a positive step in the right direction. My concerns with the proposed amendment is that I believe the Commission is correct in the desired outcome, but has not considered the proper way to achieve it. The use of outdated and/or incorrect research data and a cookie cutter approach to the issue will not support the desired outcome.

I can see no harm in delaying implementing this proposed amendment as the current guidelines already give a sentencing court discretion in imposing a term of supervised release, absent a statutory requirement. Under USSG § 5D1.1, Application Note 1, *The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.*

These are the concerns that I have with the current proposed amendment as it is written:

Deportable Aliens:

This seems to be the main focus of those who are debating this amendment and its impact to the southern border states. My understanding is that many courts on our southern border were already, based on the application note above and the advisory nature of the guidelines, not imposing a term of supervised release on cases involving deportable aliens. However, there was concern that it needed to be specifically addressed in the guidelines.

Specifically addressing this issue in the guidelines creates various problems. Most importantly, the statute, under 28 U.S.C. § 994(d), prohibits the use of national origin in implementing guidelines and policy statements. According to your proposal, supervised release for a deportable alien is unnecessary because if a defendant returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. This is based on the fact that a deportable alien would likely face prosecution for a new offense if they were to return illegally to the United States. But couldn't this be said of all offenders on supervised release? The moment a convicted felon touches a handgun they are exposing themselves to prosecution for a new offense. The same can be said for an offender who commits any criminal offense while under supervision. Why are we carving out one class of offenders? Although TSR is rehabilitative, and not punitive in nature, violating TSR exposes an offender to additional custodial time. By carving out deportable aliens from implementation of TSR an argument could be made that this violates the equal protection clause. If you are a US citizen you are potentially exposed to additional penalties based on your national origin.

Another concern I have with this provision is the term deportable alien is not clearly defined. All non US citizens are potentially deportable. Yet many non US citizens are not deported based on their country of origin (Cuba, Iran, etc. which seems to be increasing daily with the troubles in the Middle East), political asylum issues, etc. There are also Resident Aliens who, by definition, are deportable aliens, that receive short sentences for fraud cases, etc. and are not subject to deportation. Other aliens with prior convictions have later faced deportation based on changes to ICE policy.

Although deportation is now almost inevitable to some degree, it is not absolute. As an anecdote, I am aware of a non US Citizen who was born in England. At the age of 19 he was convicted of Attempted Home Invasion. He was subsequently ordered deported by an Immigration Judge. He appealed the judges ruling and was eventually allowed to stay in the US. The whole time the immigration case was being considered, this individual was on bond, working and living in the community. Under this proposed amendment, he would have not been on TSR if he had been convicted in federal court. Which also begs the question, how will a presentence writer know, at the time of preparing the report, if a deportable alien will actually be deported? In this time of decreased budgets and increased work loads does a presentence officer have the resources to investigate this properly before sentencing?

Factors to be Considered in Determining to Impose TSR:

Under the proposed amendments the Commission has listed the following factors to be considered in determining whether to impose a term of supervised release at the time of sentencing: required by statute; 3583(c) factors (nature and circumstance, etc.); criminal history; and substance abuse. With regard to criminal history your proposed amendment states: "The court should give particular consideration to the defendant's criminal history (which is one aspect of the history and characteristics of the defendant in subparagraph (A)(i) above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release".

My question is what research is this taken from? Criminal history is a static risk factor. You can't do anything about it. In all honesty it offers no guidance on how to reduce an offender's risk of recidivism. Static risk tools (like an offender's guideline criminal history score) 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. (See Roger K. Warren's prepared remarks to the US Sentencing Commission on 09/10/2009 on the Commission's website). All the research that the Administrative Office (AO) has used in implementing evidence based practices on the post conviction side says you have to concentrate on the dynamic factors. If you can change the dynamic factors related to an offender's criminogenic needs you can minimize the importance of one's criminal history. In determining if someone would benefit from a term of supervised release the court should be looking at an offender's risk/needs level. The strongest predictors of an offender's risk is the offender's criminal attitudes, peers, and personality, all of which can be changed.

With respect to substance abuse the proposed amendment states: "In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is 'highly recommended' that a term of supervised release also be imposed". Although this is appropriate, the research that we use in implementing EBP states that substance abuse is a weaker predictor of offender risk than those I listed above. There are also factors within the substance abuse matrix that need to be identified to determine the risk level. Those would be the defendant's age during treatment, age of criminal onset, age of substance abuse onset, prior rehabilitative failures, etc. All of these factors would have to be identified during the presentence process to give the court information necessary to exercise its discretion.

The proposed amendment notes in its remarks that research shows low risk individuals who are on supervised release increase their chance of recidivism the longer they are on supervision. This is true, especially because some agencies do not move these individuals to administrative caseloads and/or some courts are reluctant to exercise their early termination authority. Current research also shows, however, that low risk individuals who are sentenced to prison actually increase their recidivism rate the longer they stay incarcerated (this is a research area where I think the Commission could take a lead role in the debate).

What is really needed to assist the sentencing court in exercising its discretion when deciding to impose a term of supervised release is a validated, actuarial risk needs assessment tool. This is a discussion that is in its infancy on the federal level. In the interim, however, this amendment proposes to direct courts to look at factors that really have little bearing on whether or not an offender needs supervised release. By doing this, courts will be putting the wrong people on supervised release, with a probation department being forced to match supervision and programming to inappropriate services, which will have the opposite effect of what we are trying to accomplish. We, as an institution, may actually be adding to an increase recidivism rate.

Early Termination and Extension:

The proposed amendment attempts to offer guidance to the court on when to consider early termination or to extend a term of supervised release. The only example the amendment gives is again in the area of substance abuse. The amendment states: "The court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant".

Again, what research is being used? As I stated earlier, the AO in implementing EBP, acknowledges that substance abuse is an indicator of an offender's risk level. However, it is not the strongest indicator available to us. The factors most correlated with risk, in order of importance, are attitudes; peers; personality; family; employment; substance abuse; recreation; accommodations; and financial. The fact that an offender has completed a substance abuse program, especially if it is one that is not EBP compliant, is not a very good indicator of future recidivism reduction.

What we are doing in MIE:

What I am also concerned about is that we are asking presentence writers to, effective November 1, 2011, start making recommendations to the court on whether or not to impose TSR, for how long, and under what conditions, when they are not well versed, or properly trained in this area. As a former presentence writer myself, I can say that when it came time to making a recommendation on TSR we would typically always recommend the high or low end, standard conditions, and if they had special conditions relative to substance abuse, mental health, employment or restitution. That was it. We have now realized, and institutionally accepted, that matching supervision and programming according to risk provides the greatest likelihood for change in high risk offenders and avoids providing inappropriate services to low risk offenders. Yet, nationally, we haven't trained our presentence writers on this principle.

In MIE, over two years ago we began training our presentence writers on using EBP in Sentencing. It was a long process that involved training in Motivational Interviewing, changing the Form 1 to include MI consistent questions, and using a risk/needs assessment tool to identify the client's criminogenic needs. We use this information to fashion a recommendation to the court in regard to TSR as a treatment modality. This includes length of TSR and matching programs to the specific needs of that defendant. It was not something that my staff could have learned overnight with minimal direction. I am not, at this time, advocating using risk assessment nationally at the time of sentencing. We first must make sure that our post conviction programs are EBP compliant and in place.

In closing, I truly believe that if we implement this proposed amendment as written, we will do more harm than good and create more victims. This issue needs to be slowed down and debated by all concerned.

I thank you for considering my thoughts on this subject.

Sincerely,

A handwritten signature in black ink, appearing to read "P. R. Miller", with a long horizontal flourish extending to the left.

Philip R. Miller, Chief
United States Probation Officer