March 3, 2025

U. S. Sentencing Commission
Attn.: The Honorable Carlton Reeves
Chair of the U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Public Comment Concerning 2025 Proposed Amendments

Dear Judge/Chairman Reeves:

Thank you for the opportunity to provide commentary concerning proposed amendments to the U.S. Sentencing Guidelines (hereinafter referred to as "USSG"). This letter offers feedback, from a probation perspective, concerning proposed guidelines, based on my years of experience serving U.S. District Courts, in the capacities as U.S. Probation Officer, Supervisory U.S. Probation Officer, Assistant Deputy Chief U.S. Probation Officer, and Chief U.S. Probation Officer. I have spent considerable time reviewing and approving presentence investigation reports (PSR), in four judicial districts. My commentary is based on my experience acquired from these districts and knowledge of others. So, I hope Your Honor and Commissioners find value in my commentary.

This correspondence will focus on the potential impact related to Part D of Chapter Five, governing supervised release: (1) Introductory commentary encouraging Courts to assess a wide range of factors to ensure its decisions fulfill rehabilitative needs of the defendant and protect the public from further crimes of the defendant; (2) Imposition of supervised release only in cases required by statute. However, where discretionary, Courts may order a term of supervised release "when warranted by an individualized assessment of the need for supervision"; (3) Require the Court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute; and (4) Add a provision requiring Courts to conduct an individualized assessment to determine what discretionary conditions are warranted. Part A of Chapter Five also encourages Courts to conduct an individualized assessment impacting the term of supervised release and in the case of early termination, consider consulting with the government and U.S. Probation Officer to assess whether such termination is warranted "by the conduct of the defendant and the interest of justice."[1]

Part D – Supervised Release

Introductory Commentary

The intent of the U.S. Sentencing Commission (hereinafter referred to as the "Commission") is clear, with respect to guidance tendered to Courts reiterating the purpose of supervised release. The Commission articulates how individualized assessments will help Courts "assure" the public that "those who will need post-release supervision will receive it while prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them." This

[1] United States Sentencing Commission. (2025). *Proposed Amendment to the Sentencing Guidelines*.

guidance, which warrants reiteration, aligns with prior Congressional intent and existing precedents issued by varying Courts throughout the judiciary.

The Commission's "assurance" is noteworthy; in that, the overall introductory commentary focuses on front-end supervised release (i.e., the decision to impose, length of term, and conditions of supervised release). The proposed introductory comments remind practitioners and Courts of supervised release having equal importance as the term of imprisonment. Research suggests "one possible explanation for why supervised release receives so little attention is that both practitioners and scholars tend to focus on the extremely long prison terms recommended by the U.S. Sentencing Guidelines."[2] I would concur; in that, during my time preparing, reviewing, and approving PSRs, there were minimal objections filed concerning supervised release. In fact, I cannot think of any instance where either party argued for the duration of supervised release, in any of my prior judicial districts. However, there were a few instances where the parties objected to special conditions.

While front end analysis determines suitability of supervised release (see USSG §§ 5D1.1-5D1.3), the proposed introductory commentary lacks narrative addressing the Commission's back-end intent regarding supervised release (see USSG §5D1.4). The primary goal of supervised release is "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation."[3] Modification or a reduction concerning supervised release warrants equal consideration worth referencing in this section of the USSG Manual. Based on the Commission's proposed amendments to USSG §5D1.4, "Introductory Commentary" should also express the Commission's intent of ensuring that justice continues by way of assessing the need for persons under supervision to remain on supervised release (i.e., either through modification or extension), or have such terminated early. The Commission's silence inadvertently minimizes the importance of continued assessment regarding supervised release on the back end.

USSG §5D1.1 – Imposition of a Term of Supervised Release

Individualized Assessments

When not required by statute, the Commission, under USSG §5D1.1(b), proposes that the Court should order a term of supervised release, "when, and only when, warranted by an individualized assessment of the need for supervision." Guideline commentary seems to define "individualized assessments" by referring to 18 U.S.C. §3553(a) factors, previously termed "Factors to Be Considered." I will defer to legal scholars concerning supervised release and it being discretionary (or not). My concern, however, rests with the term individualized assessments; and whether this is best achieved by solely relying on 18 U.S.C. §3553(a) factors.

The reiteration of statutory expectations reminds the Court and practitioners of the purpose for supervised release and factors to consider, as part of an individualized assessment; however, I am not sure whether this will generate the desired results of the Commission. The proposed amendments mirror the Safer Supervision Act of 2023[4], to include the need for Courts to state on the record the reasons for imposing (or not) a term of supervised release. The Safer Supervision Act of

[2] Scott-Hayward, C. (2013). Shadow Sentencing: The Imposition of Federal Supervised Release, Berkeley Journal of Criminal Law, 18:2 (180 - 229). https://www.bjcl.org/assets/files/18.2-Scott-Hayward.pdf

[3] Underhill, S. and Powell, G. (2022). Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution. Virginia Law Review Online, 108, 297-325. https://virginialawreview.org/wp-content/uploads/2022/11/UnderhillPowell_Book.pdf

[4] Safety Supervision Act of 2023, H.R.5005, 118th Cong. (2023). https://www.congress.gov/bill/118th-congress/house-bill/5005

2023 also suggests revisions to 18 U.S.C. §3583, specifically with respect to adding language concerning the Court's consideration to an individualized assessment; however, it too defines such based on 18 U.S.C. §3553(a) factors.

The USSG largely governs the sentencing process. As to sentencing considerations, Courts rely on PSRs for the purpose of identifying and addressing 18 U.S.C. §3553(a) factors. PSRs provide substantial information to support the Court's conclusion regarding terms of imprisonment, with minimal analysis explicitly addressing supervised release, other than the range under "Sentencing Options." Further, Courts varied on including suggested special conditions of supervised release in PSRs. The data tendered to Courts, by Probation Departments, results in a sentencing recommendation addressing imprisonment, supervised release, and/or fine. Because PSRs and sentencing recommendations already consider 18 U.S.C. §3553(a) factors taken into consideration by Courts, this verbiage concerning individual assessments may not be necessary. Perhaps, the term "individualized assessment" requires a broader definition beyond statutory factors.

The Need for Supervision and Public Safety

The proposed introductory commentary related to Part D reiterates how the Court should consider the need for supervision to ease transition or further rehabilitation; and assess whether supervision will promote public safety. Reliance on 18 U.S.C. §3553(a) factors, alone, may not be sufficient. In some states, the concept of "evidence-based sentencing" has been deployed to assist judges in their decision making. According to the "Science Bench Book for Judges[5]," the National Judicial College published guidance concerning evidence-based sentencing. The goals of evidence-based sentencing, as explained, are similar to the intent of the Commission with respect to supervised release: (1) identify and determine the need for supervision without jeopardizing community safety; and (2) order appropriate conditions of community supervision which address both individual needs for successful transition back into the community and public safety. The publication references the application of actuarial risk and needs assessments to assist in making evidence-based sentencing decisions.

Validated actuarial risk and needs assessments are supported and utilized. In *Malenchik v. State of Indiana*, the Indiana Supreme Court praised evidence-based sentencing practices for the goal of reduced offender recidivism and improved sentencing outcomes[6]. In *State v. Loomis*, the Wisconsin Supreme Court held that a trial court's use of an algorithmic risk assessment in sentencing did not violate the defendant's due process rights to an individualized sentence.[7] In *Loomis*, the trial court relied upon the PSR and a validated risk assessment instrument (i.e., Correctional Offender Management Profiling for Alternative Sanctions [COMPAS]) to assist with sentencing.

I take no position of whether validated actuarial risk and needs assessments should be utilized in tandem with sentencing. At the federal level, there is a need for greater research. However, I do understand how the information can be helpful to Courts, with respect to supervised release and identifying (or reaffirming) special conditions to address individual needs. In *Loomis*, the Wisconsin Supreme Court cautioned judges when relying on risk assessments. "To ensure that judges weigh

[5] Burke, K. (2020). Evidence-Based Sentencing. https://www.judges.org/wp-content/uploads/2020/03/Chapter10-SBB.pdf
[6] Malenchick v. State, 928 N.E.2d 563, 569 (Ind. 2010).
[7] State v. Loomis, 881 N.W.2d 749 (Wis. 2016).

risk assessments appropriately, the Court prescribed both how these assessments must be presented to trial courts and the extent to which judges may use them."[8]

Presently, Probation Departments rely on an actuarial risk assessment (i.e., Post Conviction Risk Assessment [PCRA]) to establish strategies for addressing risk and needs to achieve successful supervision. Scholars have raised concerns regarding the level of bias involved in actuarial risk and needs assessments. Previously, the District of North Dakota incorporated PCRA outcomes into their PSRs, all to inform the Court of an individual's risk and needs at the time of sentencing. The Eastern District of Michigan also incorporated the same, perhaps using a different instrument. Due to leadership changes, I am unaware of whether these districts continue this practice; or whether there exists research as to how incorporating actuarial risk and needs assessments assisted these Probation Departments. However, because of widespread use, actuarial risk and needs assessments are highly favored, as opposed to clinical judgment alone. Hence, individualized assessments, perhaps, should be based on a combination of other factors, to include at a minimum actuarial risk and needs assessments. Collectively, this may help to "assure that [those] who will need post-release supervision will receive it." According to the Probation and Pretrial Services Office of the U.S. Courts, "research has also demonstrated that empirically based instruments provide a more effective and consistent method for making decisions than relying solely on a probation officer's experience and intuition."[9]

Justification Concerning Supervised Release

The proposed amendment of USSG §5D1.1(d), requiring the Court to state the reasons for (or not) imposing a term of supervised release, is appropriate; and it should impress upon practitioners the importance of tendering an analysis to assist the Court in reaching a final disposition. I concur with author Scott-Hayward, in that, "one possible explanation for why supervised release receives so little attention is that both practitioners and scholars tend to focus on the extremely long prison terms recommended by the U.S. Sentencing Guidelines" (p. 183 – 184). Relying on sentencing data collected from one judicial district, Scott-Hayward found that: (1) supervised release was imposed on virtually all eligible individuals; (2) there was no discussion and no apparent consideration of the purpose that supervised release is supposed to serve; and (3) judges frequently impose additional special conditions as part of the supervised release sentence, again without any discussion of the purpose those conditions are intended to serve (p. 187).

As a practitioner, I have authored, reviewed, and approved multiple PSRs for Courts. The bulk of objections answered, in preparation for the "Addendum to the Presentence Report (Addendum)," largely focused on the Offense Conduct, Offense Level Computation, Criminal History, and Sentencing Options section of PSRs, all of which address the advisory guideline imprisonment range. While Probation Departments differ concerning the volume of information presented in Part C of PSRs (Offender Characteristics), defense objections, from my experience, focused on grammatical corrections (i.e., date of birth, spelling of relative's name, etc.), data which may impact classification, special conditions (i.e., depending on the instant offense [i.e., sex offenses]), and/or other matters. The data presented in Part C of PSRs is used, by defense counsels, to support legal arguments concerning departure and/or variance requests. This, typically, generates a response from Probation

[8] Id at 1532

[9] Administrative Office of the United States Courts Probation and Pretrial Services Office. (2018). An Overview of the Federal Post Conviction Risk Assessment. https://www.uscourts.gov/file/24308/download

Departments, by way of the Addendum giving Courts and the parties more information. However, this information, again, is usually tied to addressing imprisonment and not supervised release.

A fruitful Part C to PSRs generates a comprehensive analysis, by Probation Departments, to aid in their recommendation of both imprisonment and imposition of (or not) supervised release. As previously stated, Probation Departments utilize this information primarily to determine special conditions of supervised release, which are included in some Probation Department's PSRs. Although it may vary amongst judicial districts, there is minimal discussion linking information available in Part C of PSRs to address the need for and duration of supervised release. In fact, Probation Departments differ on including, in PSRs, an analysis related to factors that may warrant a variance, which further exacerbate (on the front-end) the perception of Probation Departments focusing more on punishment as opposed to reintegration and rehabilitation. Admittedly, Probation Departments may express including this information in their recommendation pages; however, PSRs should be balanced and, thus, the same information should be tendered for both parties to review. Probation Departments, who provide a comprehensive analysis addressing factors warranting departure and/or variance, contributes to offering more information which aid Courts in their judicial findings regarding the applicability, duration, and special conditions of supervised release; and it reflects a concerted effort to control system resources, along with minimizing waste of supervisory services for releasees.

Lastly, documentation of reasons for imposing (or not) a term of supervised release should be treated the same as we do fines, in accordance with 18 U.S.C. §3571. In Part C of PSRs, Probation Departments complete a financial analysis, on behalf of Courts, to assess whether one can pay a fine. This is usually documented in PSRs, and recommendation pages. Hence, I see no reason the same cannot be done with respect to supervised release.

<u>USSG §§ 5D1.2 and 5D1.3 – Length of Term of Supervision/Conditions of Supervised Release</u>

As to USSG §5D1.2, the proposed amendment reiterates the issue of individualized assessments, to determine the term of supervised release; and it re-emphasizes the need for Courts to state on the record the reasons for the term imposed. I would reiterate the above commentary related to USSG §5D1.1.

As to USSG §5D1.3, the proposed amendment suggests completion of an individualized assessment to "determine what, if any, other conditions of supervised release are warranted." With respect to individualized assessments, I would reiterate prior commentary related to USSG §5D1.1. I will defer to Courts regarding any reassessment of special conditions imposed at sentencing upon the defendant's release from imprisonment.

With respect to the "High School or Equivalent Diploma," I applaud this suggested provision of the Commission.

<u>USSG § 5D1.4 – Modification, Early Termination and Extension of Supervised Release</u>

In accordance with USSG §5D1.4(b), the Commission proposes that "any time after the expiration of one year of supervised release and following an individualized assessment addressing the need for ongoing supervision, the Court [should][may] terminate the remaining term of supervision…following consultation from the government and the probation officer."

Probation Departments utilize a validated actuarial risk and needs assessment (i.e., the PCRA), regularly, for identifying and adjusting supervision strategies. Typically, the PCRA is completed

during the first 30 days of supervision, followed by an additional assessment six months later and then one-year thereafter, as to each year of supervision. Probation Departments can recalibrate the PCRA following major life changes impacting persons under supervision. Because of these existing expectations, I am not sure it is necessary to include verbiage requiring individualized assessments. Since actuarial risk and needs assessments are part of supervision strategies, feedback provided to the Court should be inclusive of this information. This demonstrates Probation Departments' reliance on empirical data, in addition to their experience and intuition.

While I support the notion of early termination, the execution of such immediately after one year is a bit concerning. Hence, use of the term "may" be more appropriate. If applied accordingly, individuals sentenced to supervised release, where a term is not required by statute, will take time to successfully reintegrate back into the community and/or address rehabilitative needs, all in the interest of justice to promote public safety. This does not happen instantly. Individuals enrolled in treatment services (i.e., substance abuse, mental health, etc.), as part of supervised release, may be under supervision for some time (i.e., at least one year). While successful completion of these services is admirable, I would be more interested in learning how they can apply themselves in the community, with less intense supervision over time. In my prior capacity as Chief U.S. Probation Officer, this approach was applied to our Reentry Court program. Participants were expected to complete in about 14 months, followed by up to six months of observation. This observation period was just as important as active enrollment in treatment services. While I am supportive of early termination, I would approach with caution concerning the need to fast track. The inclusion of "should terminate", after one year, may present unintentional harm than necessary.

In accordance with USSG §5D1.4(b)(1), the Commission proposes the Court considers "any history of court-reported violations over the term of supervision." I am concerned about the term "any history," and how Probation Departments may perceive this expectation. Again, it takes time for individuals to adjust under community supervision. This is evident throughout many federal Reentry and/or Drug Court programs. In this instance, noncompliance (i.e., relapse) is part of recovery. Hence, one may experience noncompliance resulting in violations early on in their term of supervised release yet excel over a period. With no caveat establishing specific periods (i.e., last 12 or 24 months), Probation Departments may not support a recommendation for early termination when requested. Even if some do, the lack of an established period of compliance would yield disparity amongst Probation Departments and, perhaps, Courts across the judiciary.

In accordance with USSG §5D1.4(b)(2), the Commission proposes the Court considers "the ability of the defendant to lawfully self-manage beyond the period of supervision." I am not sure how Courts, with assistance from Probation Departments, will interpret this provision, which is subjective and has the propensity to wreak disparity. Our differing experiences will most certainly tender varying interpretations of what conduct constitutes having "the ability to lawfully self-manage beyond the period of supervision." Further, how is this provision any different from USSG §5D1.4(b)(4)?

In accordance with USSG §5D1.1(b)(3), the Commission proposes the Court considers "the defendant's substantial compliance with all conditions of supervision." How does the Commission define "substantial compliance." Again, Courts depend heavily on Probation Departments to assist with addressing requests for early termination. With no clear definition of "substantial compliance," this too wreaks disparity amongst Probation Departments, who helps guide Courts in their decision-making.

Despite having higher caseloads, the culture of Probation Departments, which operate in a decentralized environment, may not overwhelmingly embrace early termination of supervised

release. Authors of the Safer Supervision Act of 2023 reference the burden of Probation Departments largely due to unmanageable caseload size; however, Probation Departments also contribute to their own unmanageable caseload size. In 2003 and 2005, the Judicial Conference of the U.S. Courts approved policies that encouraged Probation Departments to seek early termination where possible, which remains in effect today; yet, a review of the Federal Probation System – Post Conviction Supervision Cases Closed With and Without Revocation (i.e., Table E-7A) report highlights early termination percentages below 20% over a three-year period: 16.2% (Ending December 31, 2022), 16.7% (Ending December 31, 2023), and 17.7% (Ending June 30, 2024)[10]. The loss of workload credit concerns (i.e., tied to funding); misinterpretation of national policy; and local district policy expectations, all impact Probation Departments' immediate support for early termination of supervised release. The following examples reflect what could be considered "substantial compliance with all conditions of supervision," yet, arguably, these individuals remained under supervised release for an unnecessary period:

> C.J. Ciaramella published an article describing supervised release as a "wasteful mess."[11] Accordingly, Ciaramella summarized the supervision history of Daniel Brown, who served a lengthy term of imprisonment which included a 10-year term of supervised release. Brown reportedly was a project manager at a construction company; and he was married with five children. It was also reported that Brown and his wife operated a real estate business. Four years into his term of supervised release, his compliance had been flawless, yet Brown had not received the benefit of early termination.
>
> Ciaramella also noted the supervision history of Judith Negron, who served seven-years of a 35-year term of imprisonment, followed by three years of supervised release. Despite her compliance with supervision expectations and an invitation to attend a White House event, she received a telephone call from the Probation Department noting a potential violation for associating with known felons (i.e., at the White House); and a denial to her request to participate in other criminal justice advocacy events. I am baffled as Probation Departments and Courts have allowed (and continue to allow) known felons to provide peer support to Reentry/Drug Court participants. Negron received a commutation of her supervised release; yet her post-release conduct was not sufficient for early termination within the Courts.

As a practitioner, I came across cases with similar supervision backgrounds. I recall three instances where each person under supervision served more than half their term of supervised release; no prior violations of supervision; each were employed; family support; had stable housing; and yet, until directed, U.S. Probation Officers did not support requests for early termination of supervised release. Of the three instances, U.S. Probation Officers relied on circumstances related to criminal history, despite such having already been considered at the time of sentencing; and as to the remaining matter, supervision was not immediately pursued due to Probation Officers' interpretation of national policy. These instances involved different Courts, of whom later approved early terminations. However, this does not negate the existence of two differing interpretations, within the Probation Department, concerning post-release behavior constituting "substantial compliance"

[10] Administrative Office of the United States Courts. (n.d.). Statistical Tables for the Federal Judiciary. https://www.uscourts.gov/data-news/reports/statistical-reports/statistical-tables-federal-judiciary

[11] Ciaramella, C. (2024, June 4). Federal Supervised Release Is a Wasteful Mess. A Bipartisan Bill in Congress Is Trying to Fix That. Reason. https://reason.com/2024/06/04/federal-supervised-release-is-a-wasteful-mess-a-bipartisan-bill-in-congress-is-trying-to-fix-that/

warranting early termination, in accordance with USSG §5D1.1(b)(3). Hence, the subjectivity of this verbiage may create disparity amongst Probation Departments and Courts.

As to local and/or national policy, some Probation Departments may not be amenable to early termination requests for those who possessed a firearm, in connection with a drug offense. Although this fluctuates amongst Probation Departments, what street level dealer does not carry a firearm for protection? This conduct has already been accounted for in the Total Offense Level determining the advisory guideline imprisonment range. Hence, this prior conduct should have no bearing on determining early termination.

Conclusion

The Commission seeks to address supervised release, both on the front and back ends. The Commission reiterates the purpose and/or goals of supervised release. Courts are encouraged to rely upon meaningful individualized assessments for the purpose of ensuring post-release supervision is afforded to those who need it and/or can be discontinued early after achieving the goals of supervision, all to minimize wasteful spending of financial resources. However, the definition of individualized assessments may require expansion beyond 18 U.S.C. §3553(a) factors, to include incorporation of actuarial risk and needs instruments. The experience levels of U.S. Probation Officers are also vital and, thus, their intuition should warrant consideration.

I do wish to reiterate the efforts previously made by the Judicial Conference in 2003 and 2005 and now proposed amendments cited by the Commission, are all noble acts to address supervised release. However, the continued creation of policies, alone, has proven to be ineffective. The need for cultural and/or philosophical change is paramount. Probation Departments have guided Courts for years, via sentencing and/or early termination recommendations. Administratively, there remains the concern regarding early termination and the impact on funding. Some Probation Departments find no financial incentive to support early termination. However, Probation Departments must look past business benefits and remain focused on justice, addressing successful reintegration, rehabilitation, and public safety. Additionally, Probation Departments' policy expectations, in addition to judicial philosophy, contribute to caseload sizes. The proposed amendments seek to reiterate the purpose and goals of supervised release, with the intent of reducing overall judicial resources.

The sentencing of criminal defendants is very complex. Everyone has varying perspectives of what constitutes "justice." I hope my commentary provides some insight, at least from the perspective of probation.

Thank you for the opportunity to offer feedback.

Respectfully,

Kito J. Bess