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United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

**Re: Amendments to Chapter Five, Part D**

Your Honor and Commissioners,

Thank you for the opportunity to provide input regarding the proposed amendments to the supervised release guidelines in Chapter Five, Part D. My experience includes over 30 years in community corrections, over 22 of which were spent working in the Southern District of Florida as a United States Probation Officer and later as a supervisor. In those roles, I conducted or reviewed over 2,700 presentence investigations and their accompanying reports. As a recently retired Supervisory United States Probation Officer, I remain intimately familiar with Federal sentencing including both its goals and the work necessary to support and achieve those goals.

As a point of reference, my work in the Federal system began in a mandatory guideline environment, and I was trained by supervisors who worked in a mandatory guideline environment. A large number of judges for whom I worked started in a mandatory guideline environment. About five years into my employment, the Supreme Court decided *Booker*, and the guidelines became advisory but necessary when imposing a sentence under 18 U.S.C. § 3553(a). I don't know everything, and I only offer my experiences, observations and suggestions from my perspective.

That miniature history lesson was important because in a mandatory guideline environment, we usually had to recommend supervise release at sentencing, and that reflexive part of our recommendation did not require as much thought to justify the length of the term. However, special conditions were important. After *Booker* and under an advisory system, which even now does not statutorily require a term of supervised release for a large number of cases[1],

[1] The primary exceptions are sex offenses and drug cases where statute specifically requires a term of supervised release.

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probation officers tend to still reflexively recommend a term of supervised release, and Courts continue to impose a term of supervised release.

The imposition of a term of supervised release requires full consideration, even in cases where statute does not require it. The primary changes to Chapter Five, Part D include:

- Removal of a required term of supervised release when the Court imposes a term of imprisonment of more than one year is imposed;
- The imposition of term of supervised only after an individualized assessment of the need for supervision warrants it[2]; and
- The Court should state on the record the reasons for imposing or not imposing a term of supervised release.

As noted in the proposed commentary of § 5D1.1, comment.(n.2) the Court should consider the factors outlined in 18 U.S.C. § 3553(a) when determining whether to impose a period of supervised release as well as the length and conditions if said term is imposed.

Without deeply addressing the nature of the instant offense or a defendant's personal history, the two most obvious reasons for imposing a period of supervised release are the need for correctional treatment (primarily substance and mental health) and the need to provide restitution. Both of those factors most likely will require a term of supervised release. In the case of treatment, the probation office provides viable and effective treatment at an affordable cost, if any cost, to the person under supervision. Conversely, the need to make restitution sometimes implements the guidance of a probation officer to secure employment for the person under supervision but often also requires strict monitoring of the offender's payments, ability to pay and potential to commit further crimes.

A defendant's criminal history and personal history and characteristics often impact the term of imprisonment that the Court imposes and should also impact the imposition of a term of supervised release. A defendant with prior convictions most likely would benefit from the

[2] The proposed commentary at § 5D1.1,comment.(n.1) provides guidance for the individualized assessment but does not indicate in what form the Court will deliver that information to presumably, the parties and the record.

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deterrence a term of supervised release offers, and an easily led defendant would most likely benefit from a probation officer monitoring that defendant's associations.

As to the kinds of sentences available, the availability of a term of supervised release sometimes provides flexibility to the Court in unique situations. For example, if a defendant is convicted of bank fraud, in violation of 18 U.S.C. § 1344, that defendant is statutorily ineligible for probation because that offense is a Class B felony. However, when the loss is low enough to place the defendant in Zone B, the Court can essentially substitute supervised release for probation by sentencing the defendant to time served followed by a term of supervised release.

The need to avoid unwarranted sentence disparities warrants great attention, and perhaps provides the greatest reason not to promulgate the proposed changes. Currently § 5D1.2(a) contains strong advisory guidance with regard to the length of the term of supervised release and offer a great measure against disparity, particularly in large multi-defendant cases where more than one probation officer conducts the presentence investigations[3].

With regard to the individualized assessment, at what point in the sentencing process would this occur, and who will actually conduct it? Is there a need a for this additional work? In the 94 districts across the United States and its territories, dedicated probation officers, when given proper time and resources, conduct thorough presentence investigations and compile detailed and accurate presentence investigation reports. Probation officers constantly assess individuals. That's their job. The formalized need for an additional document appears redundant unless the Court determines the existence of additional types of information beyond the 18 U.S.C. § 3553 factors to glean.

Additionally, if promulgated, a guideline sentence regarding a term of supervised release would essentially mirror the statute, but technically not be a variance. Would the Court actually need to justify on the record a guideline sentence that does not impose a term of supervised release but does not constitute a variance?

[3] This statement pertains to a variety of multi-defendant cases, even those drug cases where the statute specifically requires a term of supervised release. At times, one conspiracy can also consist of a multiple related multi-defendant cases spread among multiple judges.

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The proposed amendments also consider changes at § 5D1.4 regarding early termination of supervision. While an underlying theme suggests that early terminations will lend themselves to conserving the probation system's resources for those offenders that need them, the system should not allow early terminations to simply become caseload management tools.

As outlined in the proposed amendment, the Court *should or may* terminate supervised release after one year and following an individualized assessment, while offering a non-exhaustive list of factors for consideration at § 5D1.4(b). Those factors include:

- (1) any history of court-reported violations over the term of supervision;
- (2) the ability of the defendant to lawfully self-manage beyond the period of supervision;
- (3) the defendant's substantial compliance with all conditions of supervision;
- (4) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;
- (5) a demonstrated reduction in risk level over the period of supervision; and
- (6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.

One factor for consideration that is missing is disparity, or fairness. For example, one probation officer may consider a positive test for marijuana to be insignificant and report that a defendant has the ability to lawfully self-manage beyond the period of supervision, while a different officer may consider such conduct an indicator of a lack of prosocial support. Multiply the number of officers in the average, or even the smallest, district in the system by 94 districts, and we now have several varying degrees of relativism without even factoring in supervisors and judges.

Geographical disparity also exists. In some districts, there are "drug courts" or "Care courts" that provide a defined path to early termination, but those programs do not exist in every district. Additionally, participation in one of those programs, if available, requires time and frequent appearances in court to demonstrate progress. Some potential participants have jobs

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or circumstances that preclude participation in the program, but have made just as much progress as the participants. Everyone deserves the same blueprint.

When I became a probation officer over 30 years ago, I welcomed the opportunity to serve the public by both enforcing the law and helping people. As we've always said, "Ours is a unique profession." We constantly assessed people for their willingness and ability to comply with court-ordered conditions. We assessed violations, offenses, victim losses, etc., and occasionally got to see some action. At some point, the mission collided or collides with the realities of lack of manpower, funding and other resources. Most probation officers will tell you that early on in their careers, time management and caseload management were the benchmarks of their professional development. Sometimes manpower, time and resources directly compete with the mission they are supposed to serve, and demonstrated "caseload management skills" become the hallmark of a "good officer."

When applied properly, early termination provides a great incentive for compliance and a wonderful inspiration for long-term individual change along the way. While not specifically enumerated in 18 U.S.C. § 3553(a), those become positive byproducts of early termination. We as a system, must constantly resist the reflexive urge for early termination to become a mere "caseload management tool." We owe that to our Court, victims, the public, our colleagues and our defendant and supervision population.

Once again, thank you for the opportunity to provide input.

V/R,
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