Additional Comments By The Practitioners Advisory Group Regarding Proposed Supervised Release Amendments

Supplement to February 16, 2011 Written Testimony of David Debold – Chair, Practitioners Advisory Group

March 28, 2011

The Practitioners Advisory Group (PAG) writes with additional comments on the proposals related to supervised release.

Ending The "One Size Fits All" Formula For Imposing Supervised Release

At the February 16, 2011 public hearing, one of the issues discussed was whether United States Probation and Pretrial Services (USPPS) possesses the necessary tools to make the recommendations to judges that would be required if Options 1B and 2B were adopted by the Commission. The PAG respectfully submits that USPPS does indeed possess these tools, and uses them successfully every day to assess risk to the community and the need for supervision in the context of pretrial release decisions. And the experience of state probation agencies demonstrates that tests and techniques already in use by USPPS can be successfully adapted to make the assessments, evaluations, and recommendations that would be necessary if Options 1B and 2B were adopted.

Federal pretrial services officers already provide needs and risk assessments to judges on a daily basis when assessing the question of pretrial release.[1] Using tools that measure risk to the community and the need for supervision, and a menu of pretrial release options, pretrial services officers make recommendations that are no less nuanced than the ones involved in deciding whether supervised release should be imposed post-conviction and for how long a period. The same tools that are used to guide pretrial release decisions at the outset of a criminal prosecution can be used even more effectively at sentencing. This is because the analysis of whether to release or detain pretrial is made with far less data than is typically available to USPPS at the time the question of supervised release is assessed in the sentencing context. The types of data available about an individual at sentencing could be incorporated into the proposed commentary being contemplated by the Commission. That commentary will ask Probation Officers and judges to

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[1] The United States Department of Justice, in conjunction with the Crime and Justice Institute and the Administrative Office of the United States Courts, has advised USPPS in connection with the recommendations that Pretrial Services Officers make. *See, e.g.*, Pretrial Risk Assessment in the Federal Court (2009), available at: http://www.luminosity-solutions.com/publications/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report.pdf; "Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services" (2007), available at: http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/Resources/Resources.aspx?doc=/uscourts/FederalCourts/PPS/LEBP_OfficialReleaseReport_MarieVanNostrand_April2007.pdf.

apply the factors set forth in 18 U.S.C. § 3553 to the question of supervised release, to determine a defendant's need for post-incarceration supervision. In the post-*Booker* landscape, probation officers are already providing analysis and recommendations to judges using these statutory factors to measure what the sentence should be, in light of the evidence they have gathered during the presentence investigation. By necessity, the presentence investigation process evaluates the same factors and evidence that Options 1B and 2B would apply to the question of post-incarceration supervision.

Experience in state justice systems provides further support for adoption of Options 1B and 2B. A majority of state probation agencies across the country have implemented the use of standardized risk and needs assessment to guide case management decisions. In fact, a recent national survey of community supervision agencies and releasing authorities conducted by the Vera Institute of Justice found that more than 60 agencies in 41 states reported using an actuarial assessment tool.[2] There are numerous existing instruments in use in the states that could easily be adapted to the federal context. These tools inform probation officers about an individual's risk of reoffending, the appropriate level of supervision, and the specific dynamic risk factors that must be targeted to decrease the likelihood of future criminality.

Research has consistently demonstrated that the implementation of evidence-based practices built on accurate offender risk classification significantly improves offender outcomes, reduces recidivism, and enhances public safety. This approach has increasingly been adopted by states. For example, Washington's Offender Accountability Act, passed in 1999, required that felony offenders be classified according to their risk of reoffending and that those at higher risk receive proportionally more staff attention and rehabilitation resources.[3] A 2009 Illinois law requires the use of a standardized, validated risk and needs assessment on 75% of the incarcerated and parole populations within five years, as well as individualized case planning, substantive programming, and staff training on evidence-based practices.[4] In 2010, the New Hampshire

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[2] Vera Institute of Justice, National Information on Offender Assessments, Part II (2010), available at: http://www.idoc.state.il.us/subsections/RANA/files/RANA_Documents/National%20Information%20on%20Offender%20Assessments%20Part%20II%20Memo.pdf.

[3] Robert Barnoski, Steve Aos, Washington's Offender Accountability Act: An Analysis of the Department of Corrections' Risk Assessment (2003), available at http://www.wsipp.wa.gov/pub.asp?docid=03-12-1202.

[4] Adrienne Austin, Criminal Justice Trends, Key Legislative Changes in Sentencing Policy, 2001-2010 at 10 (Vera Institute of Justice, 2010), available at http://www.courtinfo.ca.gov/programs/ccp/documents/ccp-sentencingtrends.pdf.

legislature mandated the administration of a risk and needs assessment to all offenders on probation and parole to inform decisions about the length of active supervision terms.[5]

There is also evidence that the use of risk assessment tools can save significant taxpayer dollars. For example, a study conducted by the National Center for State Courts of Virginia's use of a risk assessment instrument in six pilot sites saved the state's taxpayers a net $1.2 million by diverting low risk offenders from costly prison beds. Researchers estimate the state would have saved $2.9 million to $3.6 million had the initiative been implemented statewide.[6]

There is no reason to think that federal Probation Officers will be less skilled than their state counterparts in using the risk assessment tools available to USPPS to achieve similar success. The changes being contemplated by the Commission can be successfully implemented by USPPS and judges to increase the likelihood that more judicious use of supervised release will result in substantial cost reduction and better supervision outcomes as resources are allocated to those who need the most assistance in making the transition from prison back to the community.

Discouraging Unnecessary Supervised Release Terms For Deportable Aliens

The PAG also reiterates its strong support for an amendment that would discourage imposition of supervised release for deportable alien defendants. "Supervised" release is a misnomer as applied to deported aliens; unlike U.S. citizen defendants, deported aliens cannot be (and routinely are not) supervised by the probation department. Specifically, programs and options that probation officers ordinarily rely on to assist the reintroduction of the offender into society, such as mental health treatment, substance and alcohol treatment, and education programs, are quite literally foreign to defendants who have been deported.

Supervised release has no role to play in the administration of the sentence of a deported alien unless and until he places himself within the jurisdictional reach of the probation department. At that instant, the statutory purposes of supervised release give way to an entirely different purpose: a short-cut to what is all too often a duplicative prosecution for the new offense of illegal reentry. By way of example, in the Western District of Texas, which processes thousands of cases yearly with foreign national defendants, the U.S. Attorney's Office as a matter of course proceeds with the revocation of supervised release of any alien who re-enters the United States. In the vast majority of these cases, the offender actually faces two new proceedings: revocation of supervised release under Chapter 7 of the Guidelines, and a new prosecution on a criminal charge for illegal

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[5] Id.

[6] Brian Ostrom, Matthew Kleiman. Fred Cheesman, and Randall Hansen, Offender Risk Assessment in Virginia (August 2002), available at http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=133.

reentry. The new illegal reentry charge under 8 U.S.C. § 1326 often proceeds hand-in-hand with a revocation, resulting invariably in additional sentencing exposure for the defendant. The notion that the revocation might be a cost-effective *alternative* to a new prosecution is contrary to the experience of our members who practice in border districts.

The Department of Justice witness expressed concern in her February 16, 2011 testimony that a judge might not know for sure whether a defendant will be deported. This concern is misplaced. In our experience, foreign nationals accused of felonies are almost immediately placed under an immigration hold, even prior to the detention hearing. There is little mystery in the vast majority of cases as to whether the defendant will face deportation.

Finally, the PAG notes that the present approach actually creates administrative and logistical difficulties that would be avoided under the proposed amendment. It is not uncommon for the new prosecution for illegal reentry to take place in a district other than the one in which the supervised release revocation proceeding will be held. These inter-district complications create unnecessary burdens on the courts, the U.S. Marshals Service, the parties, and others who must try to coordinate an individual's revocation in one district with a separate, and at times geographically distant, prosecution.

The PAG enthusiastically endorses the proposed discouragement of supervised release for deportable aliens, and prefers Option 1A for the reasons previously stated.

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The PAG appreciates this opportunity to supplement its views on an important aspect of the 2011 proposals. We remain eager to work with the Commissioners and their staff on ways to improve federal sentencing.