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March 3, 2025

The Honorable Carlton W. Reeves
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendments to the U.S. Sentencing Guidelines, Supervised Release (Jan. 24, 2025)

Dear Judge Reeves,

I am writing to respond to the Commission's request for comment on the Proposed Amendments to the Supervised Release Guidelines issued on January 24, 2025.[1]

I am a Clinical Professor at the University of Iowa College of Law where I direct the Federal Criminal Defense Clinic and teach courses in criminal law, criminal adjudication, and the federal courts.[2] In my Clinic, students and I represent people who have been charged with federal offenses in the U.S. District Courts for the Northern and Southern Districts of Iowa, as well as work on post-conviction litigation across the country. Prior to entering the legal academy, I was the Supervising Attorney for the Federal Defenders of Eastern Washington and Idaho, where I represented indigent people charged with federal offenses. Apart from two, year-long federal circuit court clerkships, I have worked in the federal criminal system for the entirety of my legal career.

For the past 15 years, in particular, I have litigated over, taught about, presented on, and published about supervised release ("S/R"). Through this work, I have seen firsthand the need to amend the S/R Guidelines to offer additional individualization and transparency to people laboring under, administering, and adjudicating their terms. I commend the Commission for its thoughtful work in tackling S/R so intentionally. I have limited my comments here to the Commission's requests related to Chapter 5, Part D.

[1] U.S. Sent'g Comm'n, Proposed Amendment: Supervised Release in *Proposed Amendments to the Sentencing Guidelines* 1–53 (Jan. 24, 2025).

[2] I submit this letter in my individual, not institutional, capacity.

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A. § 5D1.1, § 5D1.2 (Issue for Comment 1(A), 1(B)) – Supervised release should not be the default, and requiring an individualized assessment using the statutory criteria in 18 U.S.C. §§ 3583(c), (d) as a touchstone is appropriate.

The proposal to eliminate § 5D1.1(a)'s default recommendation that courts impose S/R in most cases and, instead, to direct courts to focus on the specific, individual needs of the people before them when deciding (1) whether to impose S/R, (2) its length, and (3) the specific conditions is a laudable and necessary amendment.

Given S/R's rehabilitative purpose,[3] an individualized approach has always been the program's intent, and this purpose is reflected throughout federal law.[4] Amending Chapter 5 to remind stakeholders of the non-punitive purpose of S/R and why supervision, if any, must be tailored through deliberate, individualized consideration helps redirect the program's resources to the people who most need them and away from those for whom supervision will do more harm than good.[5] Individualization is key to S/R's success.

Moreover, including and using 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is particularly useful for two reasons. First is the need to capitalize on institutional knowledge and conserve adjudicatory resources. By proposing courts "state on the record the reasons for imposing or not imposing a term of supervised release" and make a more considered determination of what conditions, if any, are appropriate,[6] the

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[3] *See generally* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958 (2013).

[4] *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983); 18 U.S.C. §§ 3583(c), (d); *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Supervised release . . . [gave] district courts the freedom to provide postrelease supervision for those, and only those, who needed it."); *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011) ("[T]he SRA instructs courts, in deciding whether to impose . . . supervised release, to consider whether an offender could benefit from training and treatment programs.").

[5] *See* Haci Duru et. al, *Does Reducing Supervision for Low-Risk Probationers Jeopardize Community Safety*, 84 Fed. Prob. 21, 22 (June 2020) (discussing the empirical research that has concluded "low-risk individuals subject to intensive treatment and supervision tend to fare worse than low-risk individuals that are given minimal supervision"); Alex Roth, Sandhya Kajeepeta, & Alex Boldin, *The Perils of Probation: How Supervision Contributes to Jail Populations*, Vera Inst. of Just. 6 (Oct. 2021) ("Intensive supervision of people for compliance with [technical conditions] tends to increase rather than decrease violations and revocations."); Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L.J. 521, 522–23 (2006) ("[R]esearch has clearly demonstrated that when we place low-risk [individuals] in our more intense programs, we often increase their failure rates (and this reduces the overall effectiveness of the program)" by exposing them to "anti-social behavior" and "disrupt[ing] their pro-social networks."); Christopher T. Lowenkamp, Edward J. Latessa, & Alexander M. Holsinger, *The Risk Principle in Action: What Have we Learned from 13,676 Offenders and 97 Correctional Programs?*, 52 Crime & Delinquency 77, 77–93 (2006).

[6] U.S. Sent'g Comm'n, *supra* note 1, at 6, 8.

amendments will require additional work. This may be work that overburdened courts[7] are likely to resist. But adhering to the well-worn statutory standards that stakeholders litigate or adjudicate daily—namely, the § 3553(a) factors—helps mitigate some of this concern. Much of what the Commission is suggesting courts do is required,[8] and because courts engage in this exact type of analysis to enable review of their sentencing decisions already,[9] competency building would be limited.

Second, the use of 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is appropriate because those statutory standards preserve courts' broad discretion. "Discretion," defined generally, is the "power of free decision or latitude of choice within certain legal bounds."[10] The more circumscribed those legal bounds become, the more that real sentencing "discretion" dies a slow death,[11] thus undermining the enterprise of ensuring that a S/R term and its conditions, if any, are right-sized for the person it seeks to assist. The key to discretion is that it provides courts with the ability to determine what they believe is feasible, practicable, and appropriate within the limits that Congress has set given the facts before them. The Guidelines' legal bounds should track those of Congress.

For this same reason, I would suggest removing § 5D1.2's commentary directing courts to evaluate criminal history and substance use.[12] The individualized assessment using the statutory factors as a touchstone must include a person's history and characteristics, and § 5D1.2's commentary is duplicative.

Yet the next question may be: if individualization is already required for the lawful exercise of discretion, then what good do these proposed amendments do? Plenty. Data shows that courts habitually fail to articulate any justification prior to imposing a term of S/R or selecting its conditions.[13] A directive from the Commission will help fix this

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[7] *The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, Admin. Off. of the U.S. Courts (Nov. 18, 2024) (describing the "growing caseloads" for Article III judges nationwide).

[8] *See* 18 U.S.C. §§ 3583(c)–(d); 18 U.S.C. § 3553(a); *see also United States v. Siegel*, 753 F.3d 705, 714 (7th Cir. 2014) ("But remember that the judge is not required to accept the parties' agreed-upon sentencing recommendations, or even permitted to do so without first complying with his independent duty to determine the reasonableness of every part of a sentence, including the conditions of supervised release.").

[9] *Gall v. United States*, 552 U.S. 38, 50–51 (2007); *Rita v. United States*, 551 U.S. 338, 357 (2007).

[10] *Discretion*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); *Discretion*, *Oxford English Dictionary* (2013) ("Law. The power of a court, tribunal, government minister, or other authority to decide the application of a law . . . subject to any expressed or implied limits.").

[11] *See* Hon. Robert Pratt, *The Discretion to Sentence*, 28 Fed. Sent. Rep. 161, 161–64 (2016).

[12] *See* U.S.S.G. § 5D1.2 cmt.3(B)–(C) (2024).

[13] Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Supervised Release*, 18 Berkeley J. Crim. L. 180, 215 (2014) ("Although it is possible that they are engaging in reasoned decisions with respect to its imposition, their reasoning is not explained on the record . . . ."); *Siegel*, 753 F.3d at 711 ("[The judge] will merely repeat what is in the Sentencing Recommendation in or attached to the

problem. The Guidelines remain the lodestar in courts' determinations as to S/R's imposition, length, and conditions.[14] And given the impact they play in sentencing, highlighting the need for stakeholders to engage in a more intentional analysis on the record is a necessary step toward much-needed reform.[15]

Finally, the proposed amendments' push for a more individualized analysis on the record is an appropriate way to recenter S/R-related sentencing discretion in the Article III courts, rather than with the U.S. Probation Office ("USPO"). It is uncontroversial that the imposition of a term of S/R and its conditions is a "core judicial function."[16] But one that all too often—and for a variety of reasons, including the routine and regular adoption of suggested conditions of supervision without analysis—appears to rest with the USPO.[17]

In short, I support the Commission's proposed individualization amendments, and I believe that using 18 U.S.C. §§ 3583(c), (d) as a touchstone for the individualized analysis is appropriate given the need to balance the individual interests of the people facing supervision with the resources and competencies of the courts.

B. § 5D1.1, § 5D1.2 (Issue for Comment 4) – Although supervision should not be imposed when unnecessary, the new policy statement should advise courts that the failure to impose supervision can impact programming in the Bureau of Prisons and some term may be appropriate to further 18 U.S.C. §§ 3553(a)(2)(B) and (a)(2)(D).

Given that the proposed amendments' goal is to encourage a more individualized assessment of supervision—which should result in courts imposing fewer terms of S/R—it is important to inform courts about the potential consequence of declining to impose a term of supervision on a person's eligibility for First Step Act earned time credits while in the custody of the Federal Bureau of Prisons ("BOP").[18] Under 18 U.S.C. § 3624(g)(3), the BOP

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presentence report. [The judge] will not explain how the recommendation comparts with the sentencing factors. . . .").

[14] U.S. Sent'g Comm'n, *Federal Offenders Sentenced to Supervised Release* 3 (2010); *see also Peugh v. United States*, 569 U.S. 530, 536 (2013) (noting the Guidelines are always the starting point in the sentencing analysis).

[15] Safer Supervision Act, S.2861, H.R. 5005, 118th Cong. (2023).

[16] *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) ("[T]he imposition of a sentence, including any terms for probation or supervised release, is a core judicial function." (quoting *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995))); *cf. United States v. Martinez*, 987 F.3d 432, 435 (5th Cir. 2021) ("While probation officers may manage aspects of sentences and oversee the conditions of supervised release, a probation officer may not exercise the core judicial function of imposing a sentence, including the terms and conditions of supervised release." (cleaned up)).

[17] *See Siegel*, 753 F.3d at 711 (describing why "judges seem not to look behind the [USPO] recommendations" and questioning the ability of the USPO to make judgments with respect to the appropriate conditions given their areas of expertise).

[18] U.S. Sent'g Comm'n, *supra* note 1, at 24 (Issue for Comment 4).

may apply a person's First Step Act earned time credits so that they can begin their term of S/R up to 12 months earlier than the person otherwise would. However, the statute allows this only "[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment."[19] How long the BOP requires an S/R term to be to enable a person to "cash in" 12 months of credits remains unclear; although at least one court has imposed a one-month term.[20]

In light of the interplay between 18 U.S.C. § 3634(g)(3) and the potential amendments, I would suggest adding the following language to § 5D1.1's commentary:

> **Supervision to incentivize participation in evidence-based recidivism reduction programming or productive activities while in Bureau of Prisons' custody**: In some circumstances when supervised release would not otherwise be appropriate, the court may wish to impose a term of supervision (not to exceed 12 months) to incentivize a defendant to participate in evidence-based recidivism reduction programming or productive activities while in the Federal Bureau of Prisons' custody. Under The First Step Act of 2018, Pub. L. 115–391, eligible people who have successfully participated in certain programs can earn earned time credits that the Bureau of Prisons "shall" apply "toward time in prerelease custody or supervised release." 18 U.S.C. § 3632(d)(4)(C). Some term of supervised release would ensure that a person who successfully participates in programming is able to benefit from the incentives the statute provides. *See* 18 U.S.C. § 3624(g)(3).

In the individualized analysis, whether to impose a term of supervision for this custodial-programming purpose may reflect the need "to afford adequate deterrence to criminal conduct" upon release,[21] or "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training."[22]

C. § 5D1.3 (Issue for Comment 5) – Relabeling "standard conditions" as "examples of common conditions" would encourage courts to conduct the required individual analysis, but the proposal still contains too many suggestions for "examples of common conditions."

[19] 18 U.S.C. § 3624(g)(3); 28 C.F.R. § 523.44(d); *see Saleen v. Pullen*, No. 3:23-CV-147 (AWT), 2023 WL 3603423, at *1 (D. Conn. Apr. 12, 2023) ("[T]he Bureau of Prisons cannot apply any First Step Act credits toward early transfer to supervised release because the petitioner's sentence does not include a term of supervised release.").

[20] *United States v. Nunez-Hernandez*, No. CR 14-20(8) (MJD), 2023 WL 3166466, at *1 (D. Minn. Apr. 27, 2023) (granting a motion to reduce a sentence "to include a one-month term of supervised release so that [the petitioner] may benefit from a new BOP earned-time credit rule promulgated pursuant to the First Step Act").

[21] 18 U.S.C. § 3583(c) (directing consideration of 18 U.S.C. § 3553(a)(2)(B)).

[22] *Id.* (directing consideration of 18 U.S.C. § 3553(a)(2)(D)).

I commend the Commission for thinking carefully about how to untether courts from the reflexive nature of the imposition of many S/R conditions by suggesting a term other than "standard conditions."[23] I would encourage the Commission to adopt "examples of common conditions" in lieu of "standard," as "standard" is generally defined as "an accepted norm against which something can be compared."[24] In other words, the default. Using the term "standard" runs the risk of undermining a great deal of the work that the proposed amendments do to encourage individuality.

Moreover, I would encourage the Commission to take this opportunity to evaluate the number of current "standard conditions" to make sure that each "common condition" reflects the rehabilitative purpose of S/R. The Administrative Office of the Courts published the *Overview of Probation and Supervised Release Conditions* in July 2024, and it walks through each of the "standard" conditions to identify its statutory purpose.[25] Yet many of those conditions do not appropriately further the proposed purposes. As just an example, "standard" condition § 5D1.3(c)(3) prohibits leaving the judicial district without advance permission.[26] And the purported purpose is that it

> enables the probation officer to . . .to be responsible for any defendant known to be in the judicial district, instruct the defendant about the conditions of supervision specified by the sentencing court, keep informed of the conduct and condition of the defendant, report the defendant's conduct and condition to the sentencing court, and aid the defendant and bring about improvements in his or her conduct and condition. 18 U.S.C. §§ 3603(1)-(4) and (7), 3563(d), 3583(f).[27]

But there are much more narrowly tailored ways to achieve those objectives rather than a blanket prohibition on travel, regardless of duration and regardless of purpose.

Even assuming a standard condition is designed to appropriately further a stated purpose, there must still be an analysis of whether the particular person on supervision needs that intervention. As mentioned above, over-supervising people can be counterproductive and boost recidivism.[28] If conditions are truly tailored to an individual's needs, then there will be very few standard conditions because everyone's needs are

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[23] U.S. Sent'g Comm'n, *supra* note 1, at 12.

[24] *Standard*, *Oxford English Dictionary* (2022).

[25] Admin. Off. of the U.S. Cts., Prob. & Pretrial Servs. Off., *Overview of Probation and Supervised Release Conditions* 13–41 (July 2024).

[26] U.S.S.G. § 5D1.3(c)(3) (2024).

[27] Admin. Off. of the U.S. Cts., Prob. & Pretrial Servs. Off., *supra* note 25, at 19.

[28] *See supra* note 5.

unique.[29] "Moreover, standard conditions often consist of directives or restrictions, providing little to no treatment or interventions to facilitate behavioral change," so they are not aligned with S/R's rehabilitative function.[30] As scholars at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota opine, "[t]o adhere to the risk principle effectively, standard conditions should be eliminated or limited to the minimum necessary to define the requirements of supervision."[31]

Of course, I understand that the most impactful change to the reflexive imposition of standard conditions would require collaboration with the Criminal Law Committee and the Administrative Office of the Courts; it is ultimately the Judicial Conference of the United States that must approve the revisions to the national judgment forms. And because those forms contain a pre-printed list of "standard" conditions,[32] absent a change to those forms, I have reservations about the impact of this particular proposed amendment. Nevertheless, I think the change in terminology coupled with the individualized analysis is progress.

D. § 5D1.4(a) (Issue for Comment 1(B)) – A new policy statement encouraging a "second look" for supervision appropriately reinforces supervised release's rehabilitative function.

I commend the Commission on the proposal to create a new policy statement, § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release),[33] which focuses, in part, on the need to "right size" S/R to reflect people's actual needs and thereby reinforce the program's core rehabilitative function.

The proposed § 5D1.4(a) would encourage at least one post-release review for potential necessary modifications to both S/R's length and conditions: a "second look" for

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[29] "Standard conditions are the least aligned with RNR principles because they are not tailored to the individual's risk or needs." Kelly Lyn Mitchell et. al, Univ. of Minn. Robina Inst., *Policy Brief: Aligning Supervision Conditions with the Risk-Needs-Responsivity Framework* 4 (2023).

[30] *Id.* ("In other words, standard conditions are like telling a person with high cholesterol that they need to change their diet by providing a list of foods they can no longer eat without any other support to help that person change their eating behavior.").

[31] *Id.*; *see also* Doherty, *supra* note 3 at 1025 ("In evaluating the utility of any particular condition, courts should distinguish between conditions that are aimed simply at establishing control over 'criminals' and conditions that provide reintegrative services, such as job-training or mental health treatment. They should consider the regulatory and administrative costs of any condition they impose and require proof that this condition will actually lead to some desired societal goal.").

[32] *Judgment in a Criminal Case*, Admin. Off. of the U.S. Cts. (Sept. 1, 2019) (forms); *see also* Doherty, *supra* note 3, at 1013 ("The thirteen 'standard' conditions have been pre-incorporated into Form AO-245B, the nationwide template for judgments in criminal cases. By way of the AO-245B, people on probation and supervised release are mechanically made subject to exactly the same thirteen standard conditions." (internal citation omitted)).

[33] U.S. Sent'g Comm'n, *supra* note 1, at 18–19.

supervision.[34] This would be an important and long-overdue amendment. Given its importance, the amendment should reflect a strong directive for courts to conduct a regularized re-evaluation, using the proposed "should" instead of "may."[35]

First, the most obvious reason that a second look for S/R is important is because it will ensure that the term is tailored to a person's rehabilitative needs at the moment when they are actually on supervision.[36] Given the length of federal sentences, there can be decades between a term's imposition and its actual implementation. Encouraging courts to revisit and revise S/R would help increase supervision effectiveness by aligning it more strongly with the risk-needs-responsivity framework that the U.S. Probation and Pretrial Services Office already uses.[37]

Moreover, imposing and refining supervision conditions on the back end of a prison term is not a novel idea; it is a regular practice in the criminal legal system across jurisdictions. In the federal parole system, conditions are set in the Certificate of Release when the person is paroled, and there is an appeal if the "parolee believes the conditions" are "unfair."[38] The majority of state parole systems require risk assessments before setting conditions of supervision to help ensure that monitoring is responsive to the person.[39] In

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[34] "Second-look proceedings refer broadly to the universe of mechanisms by which people can petition to have sentences reduced, be granted parole, or otherwise be released from prison early based on a wide range of legal theories." Meredith Esser, *Unpunishment Purposes*, 109 Minn. L. Rev. 1229, 1232–33 n.4 (2025).

[35] U.S. Sent'g Comm'n, *supra* note 1 at 18.

[36] *See* Scott-Hayward, *supra* note 13 at 216 ("Judges cannot predict with any certainty what impact serving a prison sentence will have on an individual's risk and needs. For this reason, the sentencing hearing is not the best time to make a decision about future risks or needs." (citation omitted)); *Siegel*, 753 F.3d at 710 ("[I]t is doubtful that even experienced judges, who have sentenced a great many criminals, acquire from that experience a sophisticated understanding of the likely behavior of convicted criminals upon their release from prison and how that behavior can be altered by imposing post-release restrictions before, often long before, a prisoner's release."); *see also* Fed. R. Crim. P. 32.1(b) Advisory Committee Note (noting that 18 U.S.C. § 3583(e) recognizes that "the sentencing court must be able to respond to changes in the [defendant's] circumstances as well as new ideas and methods of rehabilitation.").

[37] Prob. & Pretrial Servs., *Evidence-Based Practices*, Admin. Off. of the U.S. Cts. (last visited Feb. 28, 2025) ("The Risk-Need-Responsivity Model is used to guide effective assessment and supervision practices in the federal system.").

[38] U.S. Parole Comm'n, *Frequently Asked Questions: May Any of the Conditions of Release Be Changed by the Commission*, U.S. Dep't of Just. (last visited Feb. 28, 2025).

[39] Amanda Essex, Nat'l Conference of State Legislatures, *Legislative Primer Series on Community Supervision: Tailoring Conditions of Supervision* 3 (2020).

Although the U.S. Probation Office uses the Post Conviction Risk Assessment ("PCRA") "to improve the effectiveness and efficiency of post-conviction supervision," that assessment is being used to evaluate who "to target for correctional interventions," which of the "characteristics or needs" they should address with each individual, and "[h]ow to deliver supervision and treatment in a way that produces the best outcomes." Admin. Offi. of the U.S. Cts., Prob. & Pretrial Servs. Off.,

short, adopting a suggestion that back-end review be a regular part of the supervision process furthers S/R's rehabilitative purpose and increases the likelihood of success.

Second, a second look for S/R is also appropriate because the legal validity, practical feasibility, and wisdom of the previously imposed conditions may have changed over time, regardless of the individual needs of the person being supervised. As an example, in 2016, several changes to the standard and special conditions went into effect.[40] Although the amendments were the product of many concerns, one driver was litigation over the ambiguity and vagueness of several conditions' language and whether people on supervision reasonably could be expected to understand what they were being asked to do.[41]

Although the 2016 changes have been important prospectively, because there is no regularized reevaluation of S/R, courts must continue to grapple with the enforceability and wisdom of the now-rejected conditions during the supervision and revocation proceedings of people sentenced prior to 2016.[42] And not only that, but courts prohibit facial challenges to the validity of previously imposed conditions in a revocation proceeding,[43] even if courts have since deemed those conditions suspect or unlawful.[44] Litigation over these questionable conditions could be avoided with regularized and systematic review, resulting in more equitable and less disparate outcomes for all people on S/R at any one time.

Post Conviction Risk Assessment (last visited Feb. 28, 2025). I have been unable to find any data signifying that the U.S. Probation Office considers the Post Conviction Risk Assessment ("PCRA") score to suggest a modification hearing under 18 U.S. Code § 3583(e)(2) when fewer and less onerous conditions may be warranted. Instead, in my experience, modification hearings tend to be a one-way rachet used to increase conditions when someone is believed to be at risk for violation or has, in fact, violated. *See also Siegel*, 753 F.3d at 708 ("[M]odification is a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge's successor because the sentencing judge has retired in the meantime.").

[40] U.S.S.G. App. C, amend. 803 (effective Nov. 1, 2016).

[41] *See generally* Stephen E. Vance, *Conditions of Supervision in Federal Criminal Sentencing: A Review of Recent Changes*, 81 Fed. Prob. J. 3, 5 (June 2017) (describing the litigation history that led to the changes to the conditions' language).

[42] *See, e.g.*, *United States v. Robledo*, 2:16-cr-01015-CJW-MAR, Doc. 91 (N.D. Iowa Mar. 3, 2022) (litigating whether a person violated pre-amendment standard condition USSG § 5D1.3(c)(5) (2016), almost 6 years after it was removed from the Guidelines); *United States v. Nielsen*, No. 21-8087, 2022 WL 3226309, at *4–*5 (10th Cir. Aug. 10, 2022) (unpublished) (detailing the substantial litigation during a revocation proceeding premised on a condition imposed years before the Circuit raised concerns about its constitutionality).

[43] *See United States v. Warren*, 335 F.3d 76, 78 (2d Cir. 2003) ("We join other circuits in holding that the validity of an underlying conviction or sentence may not be collaterally attacked in a supervised release revocation proceeding and may be challenged only on direct appeal or through a habeas corpus proceeding." (citing cases from the Fifth, Eleventh, Ninth, Seventh, and Second Circuits)); *United States v. Miller*, 557 F.3d 910, 913 (8th Cir. 2009) (same); *United States v. LeCompte*, 800 F.3d 1209, 1214 n.6 (10th Cir. 2015) (same).

[44] *See, e.g.*, *Nielsen*, No. 21-8087, 2022 WL 3226309, at *2.

In short, amending the Guidelines to strongly encourage courts to conduct an "individualized assessment of the appropriateness" of a person's conditions "as soon as practicable after" their "release from imprisonment"[45] is both wise and overdue given S/R's rehabilitative purpose and the ever-evolving understanding of the appropriateness of various supervision conditions. Although conducting this second look may, again, require additional work for stakeholders involved in the process, when coupled with the proposed amendment to eliminate the S/R default, the number of people on supervision—and for whom this review would be required—will be fewer than it is today.

E. § 5D1.4(b) (Issue for Comment 1(B) and 3) – A new policy statement governing the early termination of supervised release is an appropriate approach to provide additional transparency for people on supervision, create greater uniformity across the districts, and offer "unpunishment" guidance.

The proposed § 5D1.4(b) would establish a framework for courts to consider motions for early termination and encourage courts to exercise their discretion to terminate after a year.[46] Such guidance should be included in the new policy statement, and it must reflect a strong directive for courts to terminate S/R when appropriate, using the proposed "should" instead of "may."[47] People must not be supervised longer than necessary,[48] and they should be evaluated for early termination as soon as permissible under the statute.[49]

Moreover, the Commission's proposal to include within the policy statement a list of non-exhaustive factors for courts to evaluate in early termination motions is appropriate in light of (1) the need to provide people on supervision with greater direction as to how they can succeed, (2) the need to create greater uniformity as to what may justify early termination, and (3) the difficulty associated with relying solely on the statutory criteria set forth in 18 U.S.C. § 3583(e) in this rehabilitation-focused context.

First, enumerating factors that courts should use as a metric for success—as measured by the right to live freely and without supervision—provides greater transparency for those on S/R. At present, there is no plainly articulated path to early termination.[50] Having represented hundreds of people on S/R over the past 15 years in three different

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[45] U.S. Sent'g Comm'n, *supra* note 1, at 18.

[46] *Id.*

[47] *Id.*

[48] 18 U.S.C. §§ 3583(c), (e)(1); *see also* 18 U.S.C. § 3553(a).

[49] *Id.* § 3583(e)(1).

[50] The Guide to Judiciary Policy articulates criteria that the U.S. Probation Office may consider in determining whether to recommend early termination. *See* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 3, § 360.20). But courts across jurisdictions approach the task with widely different perspectives. *See generally* Jacob Schuman, *Terminating Supervision Early*, 62 Am. Crim. L. Rev. ___ (forthcoming 2025).

federal districts, one of the hardest questions to answer is: "How do I get off my paper early? And is it even possible?" Without clear and understandable criteria against which people on S/R are able to measure whether they can achieve this goal, S/R undermines some of the same values that it seeks to instill in those laboring under its conditions: increased agency and prosocial motivation.

Put simply, we must make it easier for people on S/R to understand how courts may evaluate what they should do to be free from supervision early without the need to consult with a lawyer and before they are brought before a court. This allows them to make choices in light of clear and defined targets, help design and recommend effective conditions to reach those goals, intelligently request particular outreach strategies, and receive an accurate accounting of their progress. In other words, greater transparency is helpful, so that people on S/R can be appropriately involved in their own lives.[51]

Second, including early-termination criteria akin to what the Commission has proposed would help make plain that a person need not show extraordinary or exceptional behavior to warrant early termination. Instead, as contemplated by 18 U.S.C. § 3583(e),[52] when a person's "conduct" and the "interests of justice" require, doing well on S/R can be sufficient on its own. This clarification is important because courts have debated for decades whether 18 U.S.C. § 3583(e) "requires a showing of new, unforeseen, or extraordinary or exceptional circumstances,"[53] and, even if not statutorily required, whether early termination "should generally occur only when . . . something exceptional or extraordinary warrants it."[54]

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[51] As a clinical law professor, I am required by the American Bar Association to articulate "specific and measurable" "learning outcomes" for my students each semester and in each course I teach. *See* Am. Bar Ass'n, *Standard 302. Learning Outcomes* (Feb. 2025). I struggle to understand as a pedagogical matter how we can expect people on S/R to be active participants in their rehabilitation—a form of "education" or "re-education" related to social norms and behaviors— if we do not give them benchmarks against which they will be judged for success as measured by early termination. *See also generally* Rebecca B. Orr et. al, *Writing and Using Learning Objectives*, Life Scis. Educ., Sept. 2022, at 1, 3 (describing the care and detail required to craft effective learning objectives–i.e., objectives that convey clearly what we intend to teach and how we intend to measure learning).

[52] The only thing that the statute requires is that termination be "warranted by the conduct of the defendant . . . and the interest of justice." 18 U.S.C. § 3583(e). As several Circuits have held, "[t]he expansive phrases 'conduct of the defendant' and 'interest of justice' make clear that a district court enjoys discretion to consider a wide range of circumstances when determining whether to grant early termination." *United States v. Melvin*, 978 F.3d 49, 52 (3d Cir. 2020) (quoting *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014)); *United States v. Hale*, 127 F.4th 638, 639 (6th Cir. 2025) (same).

[53] *Melvin*, 978 F.3d at 53 (discussing *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997)); *see also Hale*, 127 F.4th at 641 ("The text [of 18 U.S.C. § 3583(e)(1)] does not make 'exceptionally good' conduct an absolute prerequisite to relief" and discussing the various misinterpretations of § 3583(e)(1)); Schuman, *supra* note 50, at 27–31.

[54] *Melvin*, 978 F.3d at 53.

Although the Circuits to address the question directly now agree that there is nothing in 18 U.S.C. § 3583(e) that requires "extraordinary" or "exceptional" behavior,[55] there is still disagreement among district courts in Circuits without binding opinions.[56] And there is also disagreement about whether "just doing what supervised release requires" [57] or "mere compliance"[58] can ever warrant early termination.[59] Courts wary of considering "mere compliance" as a justification for early termination often note that "[i]f 'unblemished' postrelease conduct warranted termination of supervised release, then 'the exception would swallow the rule,' i.e., diligent service of the full period of supervised release imposed at sentencing."[60]

But requiring more than "mere compliance" and concluding that because a S/R term was imposed the person must serve it, misunderstands the rehabilitative function of S/R in a way that these proposed amendments seek to remind the courts. Given § 3583(e)'s text,

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[55] *See United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016); *Melvin*, 978 F.3d at 53; *United States v. Ponce*, 22 F.4th 1045, 1047 (9th Cir. 2022); *Hale*, 127 F.4th at 641–42.

[56] *See, e.g.*, *United States v. Reisner*, 4:06-CR-077, 2008 WL 3896010, at *1 (N.D. Fla. Aug. 20, 2008) ("Defendant has not cited facts that demonstrate exceptionally good behavior or other extraordinary circumstances sufficient to warrant early termination . . . ."); *United States v. Branscumb*, No. 1:09-CR-10023, 2019 WL 6501208, at *3 (C.D. Ill. Nov. 12, 2019) ("[A] defendant should demonstrate exceptionally good behavior or unforeseen circumstances . . . ."); *United States v. Reed*, No. 15-100, 2020 WL 4530582, at *3 (E.D. La. June 5, 2020) (noting a defendant had not "demonstrate[d] 'exceptionally good behavior'"); *United States v. Thomas*, No. 1:01-CR-0071, 2025 WL 494983, at *2 (N.D. Ind. Feb. 14, 2025) ("Early termination . . . should occur only when the sentencing judge is satisfied that 'new or unforeseen circumstances' warrants it.") (internal citation omitted); *United States v. Courmier*, No. 1:16-CR-19(6), 2023 WL 5434756, at *4 (E.D. Tex. Aug. 22, 2023) ("Generally, early termination of supervised release is not granted unless there are significant medical concerns, substantial limitations on employment, or extraordinary post-release accomplishments that would warrant such a release.").

[57] *United States v. Gutierrez*, 925 F. Supp. 2d 1196, 1202 (D.N.M. 2013) ("Certainly a defendant does not have to save a child from a burning building or start a major nonprofit to feed the poor to show sufficient progress. On the other hand, just doing what supervised release requires also may not be enough.").

[58] *United States v. Scanlon*, No. 14-CR-007, 2024 WL 1716645, at *3 (D.D.C. Apr. 22, 2024) ("[W]hile a defendant need not show extraordinary or unusual conduct' to warrant termination of supervised release, . . . 'mere compliance with the conditions of release' is insufficient to merit early termination because model conduct and compliance is expected of a person under the magnifying glass of supervised release.'" (internal citations omitted)).

[59] *See, e.g.*, *United States v. Pruitt*, No. 06-CR-30062, 2014 WL 4270008, at *3 (C.D. Ill. Aug. 28, 2014) ("The Court also notes that many district courts and other Courts of Appeals have held that the conduct of the defendant necessary to justify early termination should include something more than just following the rules of supervision. . . ."); *United States v. Seymore*, No. 07-358, 2023 WL 3976200, at *1 (E.D. La. June 13, 2023) (collecting cases explaining that mere compliance with supervision will not generally justify early termination).

[60] *United States v. Vary*, 683 F. Supp. 3d 666, 669 (E.D. Mich. 2023) (quoting *United States v. Medina*, 17 F. Supp. 2d 245, 247 (S.D.N.Y. 1998)).

"mere compliance" can be enough. If a court determines that the "conduct of the defendant" and the "interests of justice" show that a person need not be on S/R after a review of the relevant factors under 18 U.S.C. § 3553(a), then termination is required. Otherwise, the sentence is greater than necessary to serve the purposes of punishment.[61] And to rigidly require service of the "the full period of supervised release imposed at sentencing"[62] fails to account for the life lived and the lessons learned in the interim.

Even the Administrative Office of the Courts has noted:

> It is a common misconception that early termination under § 3583(e)(l) must be based on an offender's significantly changed circumstances or extraordinarily good performance under supervision. The offender's conduct while under supervision is only one of many factors that a district judge must consider . . . . [A] court must simply be satisfied that the termination is warranted and is in the interest of justice . . . .[63]

In short, placing suggested criteria in the policy statement would help courts better implement § 3583(e)'s mandate by providing guidance as courts evaluate and frame compliance. And this could, in turn, help reduce significant district-to-district disparities in rates of early termination.[64]

Third, providing courts with more explicit guidance as to the criteria they should consider in the early termination analysis does not infringe upon a court's discretion and provides needed guidance. Unlike when electing to impose S/R or selecting the term's length,[65] using § 3583(e) as the only touchstone in the early termination realm is insufficient. This is because the criteria § 3583(e) references are mostly the same § 3553(a) factors that courts consider when imposing imprisonment.[66] Yet those § 3553(a) factors have one primary valence: punishment.[67] Since no statute guides a court on how to

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[61] 18 U.S.C. § 3553(a).

[62] *Vary*, 683 F. Supp. 3d at 669.

[63] *United States v. Trotter*, 321 F. Supp. 3d 337, 364–65 (E.D.N.Y. 2018) (quoting Letter from Joe Gergits, Assistant General Counsel for the Admin. Off. of the United States Courts to Ellie N. Hayase Asasaki, United States Probation (July 20, 2009)) (internal quotation marks omitted).

[64] *See* Schuman, *supra* note 50, at 40–41.

[65] *See supra* Part A (advocating that the statutory factors are sufficient to provide both discretion and useful guidance related to the question of S/R imposition and length).

[66] *See* 18 U.S.C. § 3583(e) (including the § 3553(a) factors except for § 3553(a)(2)(A)).

[67] *See* Esser, *supra* note 34, at 1243–50, 1273–79 ("[T]he purposes of punishment in many contexts are not suited to the second-look context, partially because the purposes generally point in the direction of more incarceration rather than less. With the possible exception of rehabilitative purposes, judges, when determining whether to grant a sentence reduction, are stuck with punishment purposes that reinforce the default mode of incarceration."); *see also* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. Rev. 161, 205 (2016) ("[I]t

"unpunish,"suggestions from the Commission as to the type of factors the court should consider when deciding whether to set someone free are useful and necessary.

F. § 5D1.4(b)(1)–(6) (Issues for Comments 1(B), 3, and 6) – The early termination policy statement should provide specific criteria for courts to consider, and the Commission's proposal requires some additions to better achieve transparency and uniformity and reflect supervised release's rehabilitative purpose.

The specific criteria the Commission has proposed including in § 5D1.4(b)(1)–(6) is a good starting point. That said, I would urge some refinements and additions to help better achieve the transparency, uniformity, and unpunishment goals I believe should be reflected in the policy statement. I have included a marked-up version of § 5D1.4(b) below. Specific comments related to the justification for the proposed changes are in the footnotes for ease of reading:

> In determining whether termination is warranted, the court should consider the following non-exhaustive list of factors:
>
> (1) any history of court-reported violations over the term of supervision, considering the relative gravity of the behavior and what steps the defendant may have taken into order to mitigate or remedy the behavior;[68]
>
> (2) the defendant's demonstrated ability not to commit a crime ~~of the defendant to lawfully self-manage~~ beyond the period of supervision;[69]

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is unclear why one should approach the decision not to punish (or to punish less) the same way as the decision to impose punishment (or to punish more).")

[68] Because the purpose of S/R is rehabilitative, courts should be directed to look to the ameliorative justifications behind any reported violations or requests for modifications and not simply default to the consideration of a person's behavior under a punitive framework. Some of the S/R modification and revocation cases that my Clinic has litigated in the past three years provide examples: the person may have self-disclosed the violation; they may have missed treatment or a urinalysis test because of illness, *United States v. Reed*, No. 3:21-cr-00043-SHL-SBJ, Doc. 83 at 2–4 (S.D. Iowa Feb. 19, 2025); they may have been suffering mental-health difficulties that inhibited full compliance, *United States v. Campbell*, 6:19-cr-02001-CJW-MAR, Doc. 71 at 4–5 (N.D. Iowa Sept. 23, 2021); they could have been confused about their obligations or received conflicting advice, *Reed*, No. 3:21-cr-00043-SHL-SBJ, Doc. 83 at 2–4; or the U.S. Probation Office could have misunderstood the circumstances of what was occurring on supervision, *United States v. Hickman*, 3:10-cr-00070-RGE-SBJ, Doc. 252 (Gov't Mot. to Dismiss) (S.D. Iowa Mar. 28, 2024) ("Due to the updated information provided to the Probation Office, the Probation Office along with the U.S. Attorney's Office is no longer requesting a Motion to Modify.").

[69] Because the amendment should aim to provide clarity to those under supervision, it would help to eliminate unclear terms of art. "Lawfully self-manage" is a phrase that appears in the *Guide to Judiciary Policy*, and it is defined as "[t]he person's demonstrated ability not to commit a crime during the period of supervision and beyond." *See* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* 3 (Vol. 8E, Ch. 1, § 140). The proposed policy statement should state that plainly.

(3) the defendant's substantial compliance with all conditions of supervision, recognizing that perfect, exceptional, or extraordinary compliance or behavior are not required;[70]

(4) the defendant's engagement in appropriate prosocial activities, including but not limited to[71] employment, education, volunteering, providing emotional or financial support, participating in spiritual or religious activities, participating in community-centered activities, participating in treatment programs, and participating in or successful competition of court-sponsored reentry courts[72] and the existence or lack of prosocial support to remain ~~lawful~~ law-abiding[73] beyond the period of supervision;

(5) a demonstrated reduction in risk level over the period of supervision or maintenance of a risk level in cases where a reduction is not possible through no fault of the defendant;[74]

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[70] Because there is no consensus across jurisdictions as to whether compliance with the terms of supervision without some heightened showing is required for early termination, *see supra* notes 53–62, the policy statement should state a position. And this proposed position—that simple compliance can be enough depending on the individual and the interests of justice—is consistent with both 18 U.S.C. § 3583(e) and the circuit court caselaw interpreting its terms.

[71] Because the amendment should aim to provide clarity to those under supervision, it would help to define terms that are not readily definable. I failed to find a comprehensive or illustrative definition of what "prosocial" means. *See generally* Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 1, § 140). The amendment should state clearly those activities that the court would consider squarely "prosocial."

[72] Because the proposed amendment lists "prosocial activities" as a consideration when determining whether to terminate S/R, then it seems necessary to include, as an example of a plainly prosocial activity, participation in or completion of "reentry programs." *See* U.S. Sent'g Comm'n, *supra* note 1, at 25 (requesting comment on whether "completion of reentry programs . . . should be considered by a court when determining whether to terminate the supervision."). In line with the belief that perfect compliance should not be required for early termination, successful competition of a program should not be required for it to qualify as a "prosocial" experience.

[73] A person is not "lawful" or "unlawful." Rather, a person engages in behavior that is coded as such. For clarity's sake, "law-abiding" is a better choice.

[74] The inclusion of (b)(5) is particularly commendable because it recognizes that courts should meet people where they are in their rehabilitation and require only progress. Given that the PCRA and other risk assessments combine both static and dynamic factors, Admin. Off. of the U.S. Cts., Prob. and Pretrial Servs. Off., Post Conviction Risk Assessment (last visited Feb. 28, 2025), flexibility in the risk level allowed or required for early termination prevents overreliance on static factors that would place early termination out of reach for some despite no lack of trying. The proposed additional language would ensure that people who are not able to lower their level (e.g., they start at the lowest level or are unable to lower their level due to static factors) are not excluded.

(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 disciplinary, educational, and vocational record while incarcerated, the defendant's age, the defendant's health,[75] 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.

Additionally, I suggest the inclusion of one additional factor:

(7) whether the defendant earned sentence-reduction incentives in custody through rehabilitative programming, such as earned-time credits under the First Step Act of 2018, that were not properly credited toward the defendant's sentence or pre-release custody.

This final criteria is necessary given the BOP's sustained failure to calculate and apply earned time credits under the First Step Act of 2018 to people who have participated in rehabilitative programming while in federal custody.[76] For those who otherwise qualify, the incentive for participating in that programming was intended to be a mandatory reduction in a term of imprisonment (up to 365 days) and expanded time in pre-release custody.[77] But the BOP has failed to uphold its end of the bargain, leaving many people without an acknowledgment of the hard work they did and access to the entitlement they earned. Suggesting courts can consider uncredited sentence-reduction incentives would provide credit for carceral overservice in a context where it is appropriate—when evaluating rehabilitation and the person's programming.[78]

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[75] Although the need to consider public safety is a factor that courts are allowed to consider, this proposed criterion should not be a one-way ratchet in favor of supervision by being primarily backwards looking to the crime and a person's criminal history. The criteria should also include individualized factors that speak to public safety, including prison rehabilitation, age, and health. *See generally* U.S. Sent. Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders* (2017).

[76] Letter to the Honorable Merrick Garland, Attorney Gen., from Sen. Richard J. Durbin and Sen. Charles E. Grassley (Nov. 16, 2022) (detailing the stories of people who "were unable to receive the benefit they earned for participating in recidivism reduction programs and productive activities"); *see also* Complaint, *Crowe v. Fed. Bureau of Prisons*, 1:24-cv-03582, Doc. 1 (D.D.C. Dec. 20, 2024) (alleging thousands of people have been unlawfully denied pre-release custody and seeking both declaratory and injunctive relief); Elizabeth Weill-Greenberg, *Incarcerated Protesters Say Federal Prisons Refuse to Release People on Time*, The Appeal (Sept. 30, 2024) (detailing the various ways that the BOP is refusing to award earned time credits).

[77] 18 U.S.C. §§ 3624(g)(2)–(3); *see also* 18 U.S.C. § 3632.

[78] *See, e.g.*, Order Denying Am. Pet. for Writ of Habeas Corpus, *White v. Lauritsen*, No. 4:23-CV-00027-RGE (S.D. Iowa Apr. 1, 2024) (denying a § 2241 petition seeking the application of uncredited earned time credits towards a term of supervised release but noting the court it "can and would consider [Ms.] White's excess time spent in prison in connection with [an early termination] motion"); *Gonzalez v. Pierre-Mike*, No. 1:23-CV-11665-IT, 2023 WL 5984522, at *5 (D. Mass. Sept. 14, 2023) (denying a § 2241 petition seeking the application of uncredited earned time credits but

G. § 5D1.4(b) (Issue for Comment 7) – The Commission should rely on Federal Rule of Criminal Procedure 32.1 for the appropriate early termination procedures and include language in the commentary urging courts to establish district-appropriate procedures and articulate their disposition justifications to increase transparency and accurate data collection

The Commission has requested comment on "the appropriate procedures to employ when determining whether to terminate a term of supervised release" under § 5D1.4.[79]

The procedures that govern motions for early termination of S/R are set forth in Federal Rule of Criminal Procedure 32.1.[80] Courts must hold a hearing before conditions of supervised release can be properly modified.[81] A hearing is not necessary, however, if (1) the modification is favorable to the defendant; (2) the modification "does not extend the term" of S/R; and (3) the United States is aware of the proposed modification and does not object.[82] A hearing is also not required if the court declines to terminate S/R.[83]

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noting that the defendant was "not precluded from requesting early termination of his supervised release at a later time"); *Harrison v. Fed. Bureau of Prisons*, No. 22-14312, 2022 WL 17093441, at *2 (S.D. Fla., Nov. 21, 2022) (same); *cf. United States v. Johnson*, 529 U.S. 53, 60 (2000) ("There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. . . . [T]he court may terminate an individual's supervised release obligations at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." (internal quotations omitted)); *Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) (noting that a finding someone spent "too much time in prison" would carry "great weight in a § 3583(e) motion to reduce [an S/R] term" (internal citation omitted)).

[79] U.S. Sent'g Comm'n, *supra* note 1, at 25.

[80] 18 U.S.C. § 3583(e)(1) (providing that S/R may be terminated "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation").

[81] Fed. R. Crim. P. 32.1(c)(1).

[82] *Id.*

[83] Although a hearing is required pursuant to Federal Rule of Criminal Procedure 32.1 before the Court may modify a term of supervised release, "the Court need not conduct a hearing if, upon consideration of the record, the Court determines that a requested modification will not be approved." *United States v. Thinh Quoc Kieu*, No. CR-02-177-D, 2012 WL 2087387, at *1 (W.D. Okla. June 8, 2012); *see also Karacsonyi v. United States*, 152 F.3d 918 (Table), 1998 WL 401273, at *1–*2 (2d Cir. June 10, 1998) (concluding that, because defendant's "term of supervised release was not modified," Rule 32.1 "did not call for a hearing"); *United States v. Laughton*, 658 F. Supp. 3d 540, 543 (E.D. Mich. 2023) (concluding that because the court was denying the motion for early termination, the "motion will be resolved on the papers").

At this time, I do not believe further procedural guidance is warranted. Districts vary widely with respect to the number of people on S/R[84] and the resources of their courts, U.S. Probation Offices, Federal Defender Offices, and U.S. Attorneys' Offices. I do not believe we can know enough about how the policy statement would impact the early termination process to provide accurate and feasible additional guidance.

Rather, in lieu of providing specific guidance right now, the Commission should include language in the commentary that does two things. First, encourage stakeholders in each district to work together to develop practices to implement the new policy statement. In some districts—perhaps those with the highest denial rates for early termination—stakeholders may believe that counsel would be appropriate in some instances. But, in other districts, submission on the papers may help better achieve the policy statement's goals.

Second, the Commission should encourage courts to collect and report data on the number of motions for early termination brought (and by whom), the disposition of those motions, and the justifications for those dispositions. I litigate S/R cases primary in the district courts in the Eighth Circuit, which lamentably stands as the "outlier" in concluding that "[n]either 18 U.S.C. § 3583(e) nor relevant case law requires the district court to explain its denial of early termination of supervised release."[85]Although justifications may not be required in the Eighth Circuit, given the rehabilitative purposes of S/R they are undoubtedly helpful for both the person on supervision and the public. Not only would encouraging courts to state justifications for motion dispositions on the record further transparency for those on S/R,[86] but it would also allow the Commission to better collect data it could then use to evaluate the effectiveness of the proposed amendments and to revisit the early termination process in the future.

II. Conclusion

In conclusion, the Commission's proposed amendments to Chapter 5, Part D are commendable. The proposal to encourage a shift back to S/R's original rehabilitative purpose by requiring increased individualization will help ensure that S/R is more effective and transparent for those laboring under its terms. And this, of course, is also a win for the public writ large. Certainly, these proposed amendments will require all stakeholders to change their default practices. But the learning curve is shallow, and the benefits are great.

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[84] Admin. Off. of the U.S. Cts., *Federal Judicial Caseload Statistics 2024 Tables*, Fed. Prob. System, tbls. E-1, E-2, and E-3 (Mar. 31, 2024).

[85] *United States v. Norris*, 62 F.4th 441, 450 n.4 (8th Cir. 2023) ("The Eighth Circuit is routinely cited as the outlier."). Other Circuits to address the issue require, at the very least, "an explanation that would permit meaningful appellate review and justify the court's conclusion in light of the parties' nonfrivolous arguments and the legal standard." *Emmett*, 749 F.3d at 822; *see also United States v. Gammarano,* 321 F.3d 311, 315–16 (2d Cir. 2003); *Melvin*, 978 F.3d at 52–53; *United States v. Johnson*, 877 F.3d 993, 998 (11th Cir. 2017); *United States v. Mathis-Gardner*, 783 F.3d 1286, 1287 (D.C. Cir. 2015). This does not necessarily require "explicit findings as to each of the factors," *United States v. Lowe,* 632 F.3d 996, 998 (7th Cir. 2011), but it does require a statement that the court has considered the statutory factors, *Gammarano*, 321 F.3d at 315–16; *see United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999).

[86] *See supra* Part E.

Thank you for the opportunity to comment.

Sincerely,

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