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Review of Issues and Objections to Supervised Release Conditions
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I. Rules and Procedures Review

A. Mandatory Conditions of Release § 3583(d) / U.S.S.G. § 5D1.3(a)

In short, Defendant 1) is not to commit another offense; 2) is to refrain from unlawful use of controlled substances and submit to drug testing; 3) is to make restitution; 4) submit to the collection of a DNA sample; 5) (domestic violence crime) is to attend rehabilitation program; and 6) (sex offenders) comply with the requirements of SORNA.

B. Discretionary Conditions §§ 3583(d), 3553(a); U.S.S.G. § 5D1.3(b); “Standard” and “Special” Conditions Recommended in U.S.S.G. § 5D1.3(c) & (d)

Court has the discretion to impose additional conditions to the extent that any condition:

(1) is reasonably related to certain factors, including (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) deterring further criminal conduct by the defendant, or (c) protecting the public from further criminal conduct by the defendant; and

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public.

C. Notice

Defendant is generally considered to have notice of any condition suggested in the Guidelines and by the facts outlined in the PSR. See *United States v. Weatherton*, 567 F.3d 149 (5th Cir. 2009) (because post- *Irizarry v. United States*, 128 S.Ct. 2198 (2008), it is no longer clear whether defendant was entitled to notice before imposition of sex offender conditions, district court did not plainly err); *United States v. Moran*, 573 F.3d 1132(11th Cir. 2009) (922(g) defendant not entitled to notice of sex offender conditions of release given history detailed in PSR); *United States v. Cope* 527 F.3d 944 (9th Cir. 2008) (notice required for conditions not listed in the Guidelines); *United States v. Wise*, 391 F.3d 1027, 1032-33 (9th Cir. 2004); *United States v. Scott*, 316 F.3d 733 (7th Cir.2003) (notice is required before the imposition of “out of the ordinary, and thus unexpected” special conditions); *United States v. Barajas*, 331 F.3d 1141 (10th Cir.2003) (defendant was on notice to possibility of condition requiring payment of child support,

both the guidelines and statute listed supporting dependents as a standard provision for supervised release); *United States v. Angle*, 234 F.3d 326 (7th Cir.2000) (defendant entitled to presentencing notice of the sex offender registration requirement not listed in Guidelines as a mandatory or discretionary condition, remanding to provide parties with an opportunity to comment on the appropriateness).

D. Presence

Imposition of non-mandatory, non-standard conditions of supervised release for first time in written judgment violated defendant's right to be present at sentencing. *United States v. Sepulveda-Contreras*, 466 F.3d 166 (1st Cir. 2006). Under Rule 43, a defendant has a right to be present when sentence is imposed. For this reason, special conditions that are not pronounced in open court but instead appear only in the judgment are void. See *United States v. Love*, 593 F.3d 1, 10-11 (D.C. Cir. 2010); *United States v. Sepúlveda-Contreras*, 466 F.3d 166, 169 (1st Cir. 2006); *United States v. Napier*, 463 F.3d 1040, 1042-43 (9th Cir. 2006); *United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001).

E. Appeal Waiver

Waiver of appellate rights in plea included special conditions of supervised release. *United States v. Joyce*, 357 F.3d 921 (9th Cir. 2004). Defendant's affirmative oral waiver of right to object to special condition at sentencing precluded review. *United States v. Volungus*, 8 Fed. Appx. 555 (6th Cir. 2001) (unpublished).

Appeal from Revocation: *United States v. Carruth*, 528 F.3d 845 (11th Cir. 2008) (defendant's appeal waiver in original plea agreement did not also waive right to appeal from subsequent revocation of supervised release).

F. Ripeness

Following imposition of sentence: *United States v. Davis*, 242 F.3d 49 (1st Cir. 2001) (issue is ripe where defendant is challenging the legality, rather than the enforcement of the condition); *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001)(*Loy II*); *United States v. Ofchinick*, 937 F.2d 892 (3d Cir. 1991); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (challenge to polygraph condition generally is ripe, challenge to implementation not ripe).

Beginning of supervised release term: *United States v. White*, 244 F.3d 1199, (10th Cir. 2001) (challenge to condition was ripe absent any efforts by government to enforce as condition was "currently in effect").

Challenge Not Ripe: *United States v. Balon*, 384 F.3d 38 (2d Cir. 2004) (on-site checking and off-site monitoring of data - Given the rapid changes in technology, court could not determine whether the condition will constitute a greater deprivation of liberty than necessary in the future, thus issue was not fit for judicial consideration); *United*

States v. Carmichael, 343 F.3d 756 (5th Cir. 2003) (challenge on direct appeal to DNA collection as a mandatory condition of supervised release was not ripe for review where the prisoners would only be required to submit to sampling during supervised release if the Bureau of Prisons (BOP) failed to collect the offenders' DNA during incarceration); *United States v. Lee*, 502 F.3d 447 (6th Cir. 2007) (challenge to condition requiring specialized sex offender treatment that might include use of a penile plethysmograph was not ripe for review; defendant would not be released from prison for 14 years, and there was no guarantee that he would ever be subject to plethysmograph testing); *United States v. Rhodes*, 552 F.3d 624 (7th Cir. 2009) (same).

H. Tolling/ Pretrial Detention

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999) (Period of supervised release is not tolled during periods of pretrial detention on other charges); *but see United States v. Molina-Gazca*, 571 F.3d 470 (5th Cir. 2009) (Supervised Release is tolled during period of pretrial detention on other charges); *United States v. Goins*, 516 F.3d 416 (6th Cir. 2008) (if defendant is incarcerated on other charges more than 30 days and is later convicted and credited for pretrial time, supervised release is tolled under § 3624(e)).

II. General Objections and Potentially Objectionable Conditions

– **Be specific with objections and facts to support the objection.**

A. Insufficient Explanation/Factual Findings

District courts must state clearly on the record at sentencing the factual findings and rationale underlying conditions being imposed. *See United States v. Loy*, 191 F.3d 360, 371 (3d Cir. 1999) (“*Loy I*”) (“While the district court has broad discretion in fashioning conditions of supervised release, the sentencing judge is required by statute, [18 U.S.C. § 3553(c)], to state the reasons in open court for imposing a particular sentence.”); *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007) (“courts of appeals have consistently required district courts to set forth factual findings to justify special probation conditions.”). “By explaining the reasons behind the sentence, the court ensures that appellate review does not ‘flounder in the zone of speculation’” as to the court’s motives. *United States v. Edgin*, 92 F.3d 1044, 1049 (10th Cir.), *cert. denied*, 519 U.S. 1069 (1997). May be Subject to Harmless Error: *United States v. Brogdon*, 503 F.3d 555 (6th Cir. 2007) (Court’s lack of explanation harmless where conditions were supported by record); *United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001) (same).

Inadequate record or basis: *See Loy I*; *Voelker*; *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005); *United States v. Bender*, 566 F.3d 748 (8th Cir. 2009) (district court did not provide sufficient individualized findings to support pornography restriction); *United States v. Wisecarver*, 644 F.3d 764 (8th Cir. 2011) (plain error to impose special conditions of supervised release, prohibiting defendant from consuming any alcoholic beverages or frequenting establishments selling alcoholic beverages and requiring

defendant to submit to warrantless searches and to submit blood, breath, or urine samples at discretion of probation office, where government's contention that alcohol use could exacerbate defendant's volatile temper appeared to be purely speculative).

B. Vagueness

Where interpretation of compliance with a supervised release condition is left to the probation officer, the condition may be unconstitutionally vague. *Farrell v. Burke*, 449 F.3d 470, 488 (2d Cir. 2006) (vagueness in term “pornography” could not be cured by probation officer’s authority to interpret restriction); *United States v. Keiffer*, 257 Fed. Appx. 378, 379 (2d Cir. 2007) (condition prohibiting defendant from being around “any area in which children are likely to congregate” was impermissibly ambiguous); *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) (conditions requiring defendant to enroll in sex-offender program as directed by probation office and prohibiting defendant from being in any area in which children are likely to congregate were impermissibly vague); *United States v. Maloney*, 513 F.3d 350 (3d Cir. 2008) (Condition of supervision requiring defendant to report that he had been questioned by law enforcement was impermissibly vague. It is important that conditions of supervision be drafted with sufficient specificity to ensure that they do not result in the arbitrary enforcement of supervised release. As applied to the facts of this case, the language of the questioning condition left open such arbitrariness.); *United States v. Schave*, 186 F.3d 839 (7th Cir. 1999) (see Right of Association below); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (conditions of probation prohibiting possession of any pornography and prohibiting defendant from residing in “close proximity” to places frequented by children were unconstitutionally vague); *United States v. Mike*, 632 F.3d 686 (10th Cir. 2011) (condition calling for monitoring of defendant's computer usage was impermissibly vague).

C. Delegation of Authority to Probation

Similarly, a district court “may not wholesaledly abdicate its judicial responsibility for setting the conditions of release” by delegating unfettered discretion in setting conditions to the probation office. *United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001) (“Loy II”) (internal quotation omitted). A probation officer may not decide the nature or extent of the punishment imposed. This limitation extends not only to the length of a prison term imposed, but also to the conditions of probation or supervised release. *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995).

Contact with Minors: *United States v. Voelker*, 489 F.3d 139,153 (lifetime prohibition against associating with minors without prior approval of the probation officer, and a requirement that any contact be supervised by an adult familiar with the defendant’s history impermissibly delegated authority to probation officer).

Mental Health Treatment: *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (special condition of supervised release which required that “defendant shall

participate in a mental health treatment program at the discretion of the probation officer” impermissibly delegated authority to probation officer); *United States v. Nash*, 438 F.3d 1302 (11th Cir.2006)(condition of supervised release requiring defendant to participate in a mental health program “as deemed necessary by the probation officer” was an improper delegation of judicial sentencing authority).

Drug Testing: *United States v. Sepulveda-Contreras*, 466 F.3d 166 (1st Cir. 2006) (condition requiring defendant to submit to at least one drug test then periodic testing as required by probation was an improper delegation of authority to determine number of drug tests beyond statutory minimum); *United States v. Tejada*, 476 F.3d 471 (7th Cir. 2006) (As a special condition of supervised release, participation in a program of drug testing should be determined at the discretion of the court and not at the hands of a probation officer. Granting the probation officer that authority to require testing is error. But it does not constitute plain error because it does not seriously affect the fairness, integrity, or public reputation of the proceedings. The defendant cannot show that he would have been better off had the judge imposed the drug testing himself. Furthermore, the condition can be altered at any time through a motion to modify the conditions of supervised release.).

Restitution: *United States v. Betts*, 511 F.3d 872 (9th Cir. 2007) (Where the defendant shall apply all monies received from financial gains to the outstanding court-ordered financial obligation, only the judge, and not the parole officer, may make all relevant determinations with regard to the restitution.).

D. Restrictions on Right of Association

United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010) (striking condition that required notification of a “significant romantic relationship”); *United States v. Woods*, 547 F.3d 515 (5th Cir. 2008) (condition forbidding defendant from residing with anyone to whom she is not married or related by blood is overbroad.); *United States v. Schave*, 186 F.3d 839 (7th Cir. 1999) (condition that defendant “shall not associate, either directly or indirectly, with any member or organization which espouses violence or the supremacy of the white race” following conviction related to providing explosives to such aims, was not void for vagueness or unconstitutional infringement on right to associate given appropriate limiting construction); *United States v. Soltero*, 510 F.3d 858 (9th Cir. 2007) (condition requiring that the defendant not associate with members of a specific street gang was not impermissibly vague. However, non-association with a member of a “disruptive group” was vague because it may be interpreted to include a labor union, political protestors, or sports fans.); *United States v. Watson*, 582 F.3d 974 (9th Cir. 2009) (restriction from returning without permission to San Francisco where def frequented a bad crowd reasonable); *United States v. Napulou*, 593 F.3d 1041(9th Cir. 2010) (Condition prohibiting regular contact with anyone having a misdemeanor conviction, absent prior permission, was overbroad; record also did not support condition prohibiting defendant from having “any contact telephonic, written or personal with”

defendant's life partner, who was a convicted felon); *LoFranco v. U.S. Parole Com'n*, 986 F.Supp 796 (S.D.N.Y. 1997 (rejecting a parole condition prohibiting defendant's contact with "outlaw motorcycle gangs" because the phrase was vague).

E. Specific Restrictions:

1. Ban on gambling: *United States v. Silvius*, 512 F.3d 364 (7th Cir. 2008) (recognizing as overbroad and arbitrary certain special conditions of supervised release, including ban on gambling where there no evidence defendant had gambling problem; however, no plain error because conditions did not affect defendant's "substantial" rights and condition modifiable upon defendant's request); *United States v. Lacey*, 2009 WL 1940716 (8th Cir. 2009) (unpublished) (no plain error in prohibition on gambling although condition may be overbroad and unrelated to circumstances).

2. Mental Health Treatment: *United States v. Pruden*, 398 F.3d 241 (3d Cir. 2005)(Court may not impose mental health treatment condition where no evidence of need was found in nature of offense or defendant's history).

4. Ban on Alcohol: *United States v. Modena*, 302 F.3d 626 (6th Cir. 2002) (Abuse of discretion where no evidence of abuse found in record); *United States v. Betts*, 511 F.3d 872 (9th Cir. 2007). Whether the defendant consumed alcohol is not reasonably related to the purposes of sentencing unless alcohol played some role in the defendant's criminal conduct. Absent such a showing, this requirement is not narrowly tailored. *See United States v. Wisecarver*, 644 F.3d 764, 775 (4th Cir. 2011) (vacating conditions requiring abstention from alcohol use in absence of individualized assessment establishing need); *United States v. Bass*, 121 F.3d 1218, 1224 (8th Cir. 1997) (vacating alcohol conditions despite defendant's long-time marijuana use, because nothing showed defendant was "prone to abuse alcohol").

5. Tolling as Condition: Court may not toll period of supervised release as a condition of supervised release. *United States v. Cole*, 567 F.3d 110 (3d Cir. 2009) (plain error); *United States v. Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007) (en banc); *United States v. Okoko*, 365 F.3d 962 (2d Cir. 1998); *United States v. Juan-Manuel*, 222 F.3d 480 (8th Cir. 2000); *United States v. Balogun*, 146 F.3d 141 (2d Cir. 1998).

Tolling held permissible: *United States v. Zepeda-Dominguez*, 545 F. Supp.2d 547 (E.D. Va. 2008).

6. Occupation: U.S.S.G. § 5F1.5, specifically provides that

occupational restrictions can only be imposed if a “reasonably direct relationship existed between the defendant’s occupation, business, or profession and the conduct relevant to the offense of conviction.” *United States v. Prochner*, 417 F.3d 54 (1st Cir. 2005) (condition prohibiting occupations involving direct supervision of minors on credit card defendant not plain error); *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) (occupational restriction must be based on offense of conviction, not criminal history); *United States v. Smith*, 445 F.3d 713 (3d Cir. 2006) (modification of release for wire fraud defendant, work in law firm was narrowly tailored in scope and duration; wire fraud conduct was directly related to legal work, and defendant had a history of committing similar offenses); *United States v. Betts*, 511 F.3d 872 (9th Cir. 2007) (Where a defendant abuses the trust of his employer with regard to the company funds and/or trust of the company, the defendant may be barred from future employment during supervised release that involves custody, control or management of his employers funds, lines of credit, or similar sources of money.); *United States v. Mike*, 632 F.3d 686 (10th Cir. 2011) (condition prohibiting defendant from engaging in an occupation with access to children was improper where court failed to make findings required by Sentencing Guidelines and finding that occupational restriction was the minimum restriction necessary).

7. Travel: *United States v. Garrasteguy*, 559 F.3d 34 (1st Cir. 2009)(condition of supervised release that prohibited defendants from entering entire county during full term of supervised release reasonable; defendants had repeatedly disregarded housing authority's no-trespass orders denying them permission to enter housing project, and in disregard of orders defendants sold crack cocaine several times at or near project); *United States v. Sicher*, 239 F.3d 289 (3d Cir. 2000) (affirming condition prohibiting drug defendant from entering two counties in order to prevent return to previous locations and associates affirmed).

8. Driving: *United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001) (ban on driving reasonably related to past automotive violations); *United States v. Shires*, 199 Fed.Appx. 295, 2006 WL 2604846 (4th Cir. 2006) (District court's decision to ban defendant from driving a motor vehicle as a special condition of supervised release was not plainly unreasonable, given defendant's history of alcohol and substance abuse).

9. Forced Medication: *United States v. Holman*, 532 F.3d 284 (4th Cir. 2008) (special condition requiring injections of antipsychotic medication did not violate defendant’s due process rights)

10. Searches/Visits: *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007) (It is a standard condition of supervised release that defendant shall permit the probation officer to visit him at any time at home *or elsewhere*

and shall permit confiscation of contraband in plain view. Refusal to provide the officer with the location where defendant spends numerous nights a week may result in violation of release.); *United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001) (condition requiring defendant to submit to random warrantless searches not plain error where defendant had 20 year history of drug and weapons violations); *United States v. Betts*, 511 F.3d 872 (9th Cir. 2007) (affirming condition permitting search of person and property at any time without warrant); *United States v. Hoffer*, 270 Fed. Appx. 658 (9th Cir. 2008) (requiring defendant to submit to person or property at any time affirmed given defendant's history of violating supervised release); *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (search condition which did not require reasonable suspicion did not violate defendant's Fourth Amendment rights given history); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (same).

III. Sex Offender Conditions

A. **Computer restrictions:** Condition may not be proper if computer not used in sex offense. See *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002); *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir. 2003). **Breadth:** *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009) (prohibition on any access to internet at home overly broad); *Freeman*, 316 F.3d at 391-92 (“a special condition forbidding [defendant] from . . . using any on-line computer service without the written approval of the probation officer is overly broad”); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007)(lifetime ban on computer use and internet access not narrowly tailored - “we have never approved such an all-encompassing, severe, and permanent restriction”); *United States v. Miller*, 594 F.3d 172 (3d Cir. 2010)(striking down lifetime ban on use of the internet without probation officer's permission); *United States v. Heckman*, 592 F.3d 400 (3d Cir. 2010) (same); *United States v. Brigham*, 569 F.3d 220 (5th Cir. 2009) (that defendant shall not possess or utilize a computer or internet connection device during the term of supervised release *not* overbroad); *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003) (total ban on internet use after conviction for possessing child does not meet narrow tailoring requirement); *United States v. Bender*, 566 F.3d 748 (8th Cir. 2009) (mere possession of child pornography isn't enough to justify internet ban); *United States v. Barsumyan*, 517 F.3d 1154 (9th Cir. 2008) (condition requiring no contact or use of computers anywhere, anytime, under any circumstances overbroad); *United States v. Riley*, 576 F.3d 1046 (9th Cir. 2009) (condition prohibiting defendant from using a computer to access any material relating to minors imposed a greater deprivation of liberty than reasonably necessary); *United States v. White*, 244 F.3d 1199 (10th Cir. 2001)(condition that defendant “shall not possess a computer with internet access throughout his period of supervised release” was both too narrow and overly broad requiring remand – “any condition limiting [] use of a computer or access to the Internet must reflect these realities and permit reasonable monitoring by a probation officer”); *United States v. Burroughs*, 613 F.3d 233 (D.C. Cir. 2010) (fact that an offense is sometimes committed with the help of a computer does not mean that the district court can restrict the Internet access of anyone convicted of that offense). **Other Electronic Equipment:** *United States v. Blinkinsop*, 606 F.3d 1110 (9th Cir., 2010) (special condition of supervised release that prohibited defendant from possessing camera phone or electronic devices that could be used for covert photography was not impermissibly

overbroad); *United States v. Carlson*, 2010 WL 3521970 (9th Cir. 2010) (condition that restricted defendant from possessing devices capable of covert photography, including phones, was not unreasonable).

B. Restrictions on “pornographic material:” *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009) (condition barring possession of any pornographic materials was plain error); *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001) (Loy II) (condition of supervised release prohibiting “all forms of pornography, including legal adult pornography” was unconstitutionally vague); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (lifetime ban on sexually explicit materials lacked requisite nexus with goals of supervised release and was not narrowly tailored); *United States v. Bender*, 566 F.3d 748 (8th Cir. 2009) (district court did not provide sufficient individualized findings to support condition banning sexually stimulating materials); *United States v. Simons*, 614 F.3d 475 (8th Cir.2010) (condition barring defendant from possessing any material, legal or illegal, that contained nudity or that depicted or alluded to sexual activity or depicted sexually arousing material, was plain error); *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002) (ban on “any pornography, including legal adult pornography unconstitutionally vague); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008); *but see United States v. Kelly*, 2012 WL 15708717 (8th Cir. 2012) (“special condition of supervised release of firearms defendant with history of child sexual abuse, that defendant not possess any child pornography or any ‘photographic depictions of child nudity or of children engaged in any sexual activity,’ was not unconstitutionally overbroad); *United States v. Brigham*, 569 F.3d 220, 232 (5th Cir.2009) (defendant shall not possess any pornographic, sexually oriented or sexually stimulating materials not vague or overbroad); *United States v. Reardon*, 349 F.3d 608 (9th Cir. 2003) (phrase "sexually explicit conduct" is neither vague nor overly broad).

C. Restrictions on Contact with Minors: *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005) (condition preventing defendant from visiting son absent permission from probation remanded based on inadequacy of record as to why condition was imposed); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (restrictions on association with minors lacked clarity as to whether they applied to relatives and lacked guidance for probation); *United States v. Bender*, 566 F.3d 748 (8th Cir. 2009) (condition barring defendant from frequenting places where minors were known to frequent without approval and only with another adult present imposed greater deprivation than necessary); *United States v. Simons*, 614 F.3d 475 (8th Cir. 2010) (conditions (1) barring any contact with children, including defendant's own, without prior approval by probation officer, and requiring him to report any incidental contact with children, and (2) barring defendant from coming within 500 feet of schools, parks, playgrounds, and other places used by children, without approval, were not plain error); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (condition prohibiting defendant from residing in “close proximity” to places frequented by children were unconstitutionally vague); *United States v. Riley*, 576 F.3d 1046 (9th Cir. 2009) (vacating sweeping condition precluding “any material that relates to minors”); *United States v. Blinkinsop*, 606 F.3d 1110 (9th Cir., 2010) (Remand appropriate to determine whether tailoring of condition that prohibited defendant from going to or loitering near school yards, parks, play grounds, arcades, or other places primarily used by children under age of eighteen, to permit defendant to attend school events involving his children, upon obtaining written permission from his probation officer prior to attendance, was considered by

district court); *but see United States v. MacMillan* (2nd Cir. 2008) (Affirming conditions that (1) defendant not frequent areas where children are likely to gather, and (2) probation office be permitted to address third-party risks with defendant's employers).

D. Testing

Plethysmograph: *United States v. Lee*, 502 F.3d 447 (6th Cir. 2007) (declining to review conditions requiring plethysmograph immediately following the imposition because intrusive nature of the test has been the subject of recent due process concerns and may not be in use by 2021); *United States v. Rhodes*, 552 F.3d 624 (7th Cir. 2009) (challenge to condition requiring defendant to undergo psychosexual evaluation and counseling which could involve use of penile plethysmograph testing was not ripe for review where there was no guarantee that defendant would ever be subject to PPG, and defendant could later petition court to modify condition); *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (remanding for district court to clarify whether it ordered psychological or physiological testing, which could include a variety of intrusive physical testing including plethysmograph, and specify its relationship to mental health treatment).

ABEL Testing: Used for evaluation of sex offenders. Test developed by Dr. Abel, and scoring of test can only be performed by Dr. Abel (for a fee). Test has found to not be reliable and not subjected to peer review. *See United States v. Birdsbill*, 243 F. Supp. 2d 1128 (D. Mt. 2003) (questioned accuracy of test for Native American subjects); *United States v. White Horse*, 177 F. Supp. 2d 973 (D.S.D. 2001); *In the Interest of CDK, JLK, and BJK*, 64 S.W. 3d 679, 683 (Ct. App. Tex. 2002 (“For all we know, they and their components could be mathematically based, founded on indisputable empirical research, or simply the magic of young Harry Potters’ mixing potions at the Hogwarts School of Witchcraft and Wizardry”).

Polygraph: Fifth Amendment: *United States v. York*, 357 F.3d 14 (1st Cir. 2004) (“because revocation proceedings are not criminal proceedings, [a person on supervised release] will not be entitled to refuse to answer questions solely on the ground that his replies may lead to revocation of his supervised release ...[A person on release] will have a valid Fifth Amendment claim if his probation officers ask, and compel him to answer over his assertion of privilege, a particular question implicating him in “a crime other than that for which he has been convicted.”); *United States v. Locke*, 482 F.3d 764, 767-68 (5th Cir. 2007) (Required participation in a treatment program that included polygraph testing as a condition of probation did not violate the Fifth Amendment); *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) (Sex offender may refuse to reveal his complete sexual history and invoke Fifth Amendment rights against self-incrimination); *United States v. Stoterau*, 524 F.3d 988, 1003-04 (9th Cir. 2008) (sex offender polygraph testing condition of supervised release does not infringe Fifth Amendment because defendant can invoke privilege and remain silent).

Conditions affirmed: *United States v. Roy*, 438 F.3d 140 (1st Cir. 2006) (requiring defendant to submit to polygraph on questions regarding girlfriend's children); *United States v. Johnson*, 446 F.3d 272 (2d Cir.2006) (“[T]he incremental tendency of polygraph testing to promote ... candor furthers the objectives of sentencing by allowing for more careful scrutiny of offenders on supervised release.”); *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003); *United*

States v. Dotson, 324 F.3d 256, 261 (4th Cir.2003); *United States v. Begay*, 631 F.3d 1168 (10th Cir. 2011) (upholding imposition of required polygraph testing); *United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003) (condition requiring submission to polygraph was valid); *United States v. Zinn*, 321 F.3d 1084, 1090 (11th Cir.2003).

E. Sex Offender Conditions in Non Sex-Offender Cases:

Conditions Vacated: *United States v. Scott*, 270 F.3d 54 (1st Cir. 2005) (prior too remote); *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006) (where § 922(g) defendant had only prior conviction for stalking, sex offender treatment condition not reasonably related to offense or history); *United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003) (prior too remote); *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001) (same); *United States v. Sales*, 478 F.3d 732 (9th Cir. 2007) (computer condition overbroad in non-sex case)

Conditions Upheld: *United States v. Prochner*, 417 F.3d 54 (1st Cir. 2005) (sex offender evaluation and treatment and restrictions on contact with minors not plain error in credit card fraud case); *United States v. Weatherton*, 567 F.3d 149 (5th Cir. 2009) (conditions requiring psychosexual evaluation and treatment and registration as a sex offender not plain error following violation of probation for false claims conviction); *United States v. Brogdon*, 503 F.3d 555 (6th Cir. 2007) (harmless error to impose conditions requiring DNA collection, sex offender treatment, prohibition on pornography and contact with minors on defendant convicted of firearms offense, based on lengthy history); *United States v. Ross*, 475 F.3d 871 (7th Cir. 2007) (sex offender mental health assessment and treatment not plain error in false statements case); *United States v. Kelly*, 2012 WL 1570817 (8th Cir. 2012) (condition of supervised release of firearms defendant with history of child sexual abuse, that defendant not possess any child pornography or any “photographic depictions of child nudity or of children engaged in any sexual activity,” upheld, not overbroad); *United States v. Hahn*, 551 F.3d 977 (10th Cir. 2008) (sex offender conditions upheld in misapplication of bank funds case); *United States v. Moran*, 573 F.3d 1132 (11th Cir. 2009) (affirming conditions requiring mental health treatment, registration as sex offender, and restrictions on internet access in firearms case).