Litigating Penalties for Supervised Release Violations

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"Supervised release, as it now operates, is far different from what Congress intended when it established the system in the Sentencing Reform Act of 1984. What was originally designed to assist re-integration into the community is instead facilitating reincarceration."

Paula Kei Biderman & Jon Sands, "A Prescribed Failure: The Lost Potential of Supervised Release," 6 *Federal Sent'g Rep*. 204 (1994).

The Controlling Statute: 18 U.S.C. § 3583

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), ***(a)(2)(B), (a)(2)(C), (a)(2)(D)***, (a)(4), (a)(5), (a)(6), and (a)(7)--

***

The Controlling Statute: 18 U.S.C. § 3583

(3) revoke a term of supervised release, and ***require the defendant to serve in prison all or part of the term of supervised release authorized by statute*** for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision . . . except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

Limitations in sentencing violations

- When a defendant is to be sentenced for a crime, 18 U.S.C. § 3553(a)(2) identifies "four considerations – retribution, deterrence, incapacitation, and rehabilitation." *Tapia v. United States*, 131 S. Ct. 2382, 2387 (2011).
- Our viable argument: when a defendant is to be sentenced for a violation of supervised release, prison may be imposed only insofar as necessary to promote two of these purposes: deterrence of *crime* (*not* of technical misconduct), and incapacitation of those who pose an immediate threat to the public.

Limitations in sentencing violations

That is, courts may *not* send violators to prison for *retributive* or *rehabilitative* purposes, such as:

- vindicating the court's authority in the face of a defendant's recalcitrant failure to comply with technical conditions.
- "helping" the defendant stop using drugs.

No prison to punish the violation

- Argument: Under 18 U.S.C. § 3583(e)(3), the sentencing court may revoke supervised release and impose imprisonment "after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)."
- Conspicuously absent from this enumeration: § 3553(a)(2)(**A**), which calls for sentences "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."
- These are the "retributive," or punitive, functions of sentencing. *Mistretta v. United States*, 488 U.S. 361, 367 (1989).

No prison to punish the violation

Construing the same selective cross-reference in 18 U.S.C. § 3583(c), the Supreme Court has stated that a sentencing court "may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release." *Tapia*,131 S. Ct. at 2388 (emphasis in original).

No prison to punish the violation

In significant tension with *Tapia*, some circuits have held that the omission of the § 3553(a)(2)(A) factors from § 3583(e) is of no significance:

"[T]he enumeration in § 3583(e) of specified subsections of § 3553(a) that a court *must* consider in revoking supervised release does not mean that it may not take into account any other pertinent factor," including those in subsection (a)(2)(A).

United States v. Young, 634 F.3d 233, 239-40 (3d Cir.), *cert. denied*, 132 S. Ct. 204 (2011).

No prison to punish the violation

These cases should be overruled in light of *Tapia*'s construction of the same selective cross-referencing to exclude consideration of retribution. Even before *Tapia*, the Circuits were split.

Prohibiting imprisonment based on (a)(2)(A)'s retributive factors:

- *United States v. Miller*, 634 F.3d 841, 844 (5th Cir.), *cert. denied*, 132 S. Ct. 496 (2011).
- *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006).
- *United States v. Miqbel*, 444 F.3d 1173 (9th Cir. 2006).
- *Cf. United States v. Marrow Bone*, 378 F.3d 806, 808 (8th Cir. 2004) (implicit prohibition).

No prison to punish the violation

Approving consideration of some or all (a)(2)(A) factors:

- *United States v. Vargas-Dávila*, 649 F.3d 129, 132 (1st Cir. 2011).
- *United States v. Young*, 634 F.3d 233, 239-40 (3d Cir.), *cert. denied*, 132 S. Ct. 204 (2011).
- *United States v. Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007).
- *United States v. Williams*, 443 F.3d 35, 48 (2d Cir. 2006).
- *United States v. Sweeting*, 437 F.3d 1105, 1107 (11th Cir. 2006).

No prison to rehabilitate the defendant

- At the same time, *Tapia* casts serious doubt on one-time circuit precedent holding that a court may impose or lengthen post-revocation imprisonment for *rehabilitative* purposes.
- The Court held in *Tapia* that "the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." 131 S. Ct. at 2385.

No prison to rehabilitate the defendant

Tapia looked to 18 U.S.C. § 3582(a):

"**Factors to be considered in imposing a term of imprisonment**.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*…."

No prison to rehabilitate the defendant

Tapia also offered a functional rationale for its holding:

"If Congress had … meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs. But in fact, courts do not have this authority. When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over 'the place of the prisoner's imprisonment,' § 3621(b), and the treatment programs (if any) in which he may participate[.]" 131 S. Ct. at 2390.

No prison to rehabilitate the defendant

Before *Tapia*, courts had held that "Congress intended district courts to consider a defendant's medical and rehabilitative needs in determining whether to revoke supervised release and the duration of imprisonment that is appropriate upon revocation."

United States v. Doe, 617 F.3d 766, 773 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2988 (2011). *Accord*, *e.g.*, *United States v. Tsosie*, 376 F.3d 1210, 1213-1217 (10th Cir. 2004); *United States v. Anderson*, 15 F.3d 278, 282 (2d Cir. 1994).

No prison to rehabilitate the defendant

These cases are no longer good law under *Tapia*. Rehabilitation is not a justifiable ground for imprisonment either in sentencing an offense or in sentencing a violation of supervised release.

- *United States v. Molignaro*, 649 F.3d 1, 4-5 (1st Cir. 2011) (Souter, J. (Ret.), sitting by designation) (extending *Tapia* to sentencing upon revocation of supervised release).
- *United States v. Grant*, 664 F.3d 276, 281 (9th Cir. 2011) (same) (overruling pre-*Tapia* circuit precedent).

No prison to rehabilitate the defendant

The Fifth Circuit had ruled to the contrary in *United States v. Breland*, 647 F.3d 284 (5th Cir. 2011) – but in January of this year the Supreme Court summarily vacated and remanded for further consideration after the Solicitor General agreed with the defendant that *Tapia* extends to supervised release sentencing. On remand, the Fifth Circuit, well … took the Fifth: it recited the SG's position and then, without elaboration, remanded to "the district court for resentencing in accordance with this order."

Limitations on sentencing considerations

In short, argue that a district court may revoke supervised release and impose imprisonment only insofar as necessary to prevent the defendant or others from committing new *crimes*.

(Whether such prevention be by deterrence, the sentencing aim approved in § 3553(a)(2)(B), or incapacitation, § 3553(a)(2)(C), both of which are among the aims cross-referenced in the supervised release revocation provision at § 3583(e).)

Limitations on sentencing considerations

- You don't have to back down when the prosecutor, judge or probation officer argues that the purpose of revocation sentences is to "sanction primarily the defendant's breach of trust." *United States v. Dees*, 467 F.3d 847, 853 (3d Cir. 2006).
- This breach-of-trust theory originated in the Sentencing Commission's introductory comment to Chapter 7 of the Guidelines. *See United States Sentencing Guidelines* Ch. 7, Pt. A(3)(b) intro. comment. (1990). (It's still there.)

Limitations on sentencing considerations

The "breach of trust" theory cannot be sustained in light of Congress's exclusively rehabilitative purpose in creating the institution of supervised release. "[T]he goal of supervised release is 'to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.'" *Johnson v. United* States, 529 U.S. 694, 709 (2000) (quoting S. Rep. 98-225 at 124 (1983)).

Limitations on sentencing considerations

- Moreover, read in context, the point of the commentary is that the maximum authorized terms of imprisonment under 18 U.S.C. § 3583(e)(3) are too short, in the Commission's view, to properly reflect the gravity of certain criminal conduct that might also be prosecuted as a supervised release violation.
- The point is not that there exists some general judicial warrant to "sanction" a defendant's slightest failure to walk the line by sending him back to prison.
- *Supervised release is not parole or probation!* A defendant on supervised release never got a "break" – he got extra years of restraints on his liberty.

The Aggregation Rule

The statutory maximum terms of imprisonment upon revocation of supervised release appear in 18 U.S.C. § 3583(e)(3) and (h).

A defendant is subject to the version of 18 U.S.C. § 3583(e) and (h) in effect *at the time of the original criminal offense*, not the violation or the revocation hearing. *Johnson v. United States*, 529 U.S. 694, 700-01 (2000); *see also*, *e.g.*, *United States v. Epstein*, 620 F.3d 76, 81 (2d Cir. 2010).

The Aggregation Rule

For defendants whose offense ended before April 30, 2003, it is uncontroversial that there is an aggregate limit on the total length of imprisonment that may be imposed under successive revocation sentences. This is the term of years specified in the concluding clauses of 18 U.S.C. § 3583(e)(3).

See, *e.g.*, *United States v. Tapia-Escalera*, 356 F.3d 181, 187-88 (1st Cir. 2004).

The Aggregation Rule

Remember:

"… a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case[.]"

18 U.S.C. § 3583(e)(3) (2000 & Supp. II).

The Aggregation Rule

Effective for offenses committed on or after April 30, 2003, the PROTECT Act added four words:

"…a defendant whose term is revoked under this paragraph may not be required to serve ***on any such revocation*** more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case[.]"

18 U.S.C. § 3583(e)(3).

Post-PROTECT Act cases

- Unfortunately, the circuits have unanimously held that the PROTECT Act abolished the rule that the terms of years set forth in the concluding clauses of § 3583(e)(3) apply in the aggregate. *E.g.*, *United States v. Knight*, 580 F.3d 933, 937 (9th Cir. 2009).
- Despite the adverse authority, there are still arguments to make in support of an aggregation rule.

First Argument: No Change in Law

Argument: In adding "on any such revocation," Congress was simply clarifying that imprisonment of up to the maximum may be imposed *no matter how minor the defendant's violation*.

First Argument: No Change in Law

- Given this potential interpretation, the meaning of "on any such revocation" is ambiguous. Recourse must be had to the legislative history.
- The legislative history shows that Congress's sole purpose was to provide for lifetime supervised release for sex offenders. For example, the amendment that added "on any such revocation" was titled "Supervised Release Term for Sex Offenders." H.R. Rep. No. 108-66 (2003), *available at* 2003 WL 1862082.

First Argument: No Change in Law

The Conference Committee report explained:

"This section responds to the long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long-term – and in some cases, life-long – monitoring and oversight." 2003 WL 1862082 at *49-*50.

First Argument: No Change in Law

The legislative history does not specifically explain why the words "on any such revocation" were added, nor does it make any reference to the aggregation rule.

First Argument: No Change in Law

- Sex offenders are commonly thought, rightly or wrongly, to have an especially high rate of recidivism. Thus, Congress may have been concerned to make sure a supervising judge could act aggressively to protect the public upon the first sign of trouble.
- It is consistent with this concern to interpret the addition of the words "on any such revocation" as simply clarifying that imprisonment of up to the maximum may be imposed *no matter how minor the violation*.
- Congress should not be presumed to have struck down the well-established aggregation rule without commenting on the matter whatsoever.
- And particularly not in contravention of the rule of lenity.

First Argument: No Change in Law

Unfortunately, the circuits have uniformly rejected this interpretation of the meaning of "on any such revocation."

- *United States v. Hernandez*, 655 F.3d 1193, 1195-96 (10th Cir. 2011).
- *United States v. Shabazz*, 633 F.3d 342, 345-46 (5th Cir. 2011).
- *United States v. Epstein*, 620 F.3d 76, 80 (2d Cir. 2010).
- *United States v. Knight*, 580 F.3d 933, 937-38 (9th Cir. 2009).
- *United States v. Lewis*, 519 F.3d 822, 825 (8th Cir. 2008).
- *United States v. Williams*, 425 F.3d 987, 989 (11th Cir. 2005).
- *United States v. Tapia-Escalera*, 356 F.3d 181, 188 (1st Cir. 2004).

So…

Second Argument: Higher Aggregate Limit

While the PROTECT Act did amend the statute such that the *concluding* clauses of § 3583(e)(3) no longer specify any aggregate limitation, there remains a freestanding aggregate limit in the *opening* clauses of the statute.

Second Argument: Higher Aggregate Limit

Recall that under § 3583(e)(3), a court may:

"revoke a term of supervised release, and ***require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release*** without credit for time previously served on postrelease supervision…."

Second Argument: Higher Aggregate Limit

So what is the "term of supervised release authorized by statute for the offense that resulted in such term of supervised release"?

Second Argument: Higher Aggregate Limit

(b) **Authorized terms of supervised release**.--Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

Second Argument: Higher Aggregate Limit

(h) **Supervised release following revocation.**--
When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release *shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release*.

Second Argument: Higher Aggregate Limit

- Under § 3583(h), the "term of supervised release authorized by statute" is the *originally* authorized term of supervised release "*less* any term of imprisonment that was imposed upon revocation of supervised release."
- If a defendant has already served prison time for an earlier violation, that time must be subtracted from the originally authorized term to identify what becomes "the term of supervised release authorized by statute."

Second Argument: Higher Aggregate Limit

Thus, subsections (b), (e)(3), and (h) of § 3583 interact to define a diminishing "term of supervised release authorized by statute." The more post-revocation imprisonment a defendant serves, the shorter the authorized term of supervised release becomes. In this way, the statute continues to provide for an aggregate limit on post-revocation imprisonment.

Second Argument: Higher Aggregate Limit

The effect of the rule is that the length of all post-revocation *imprisonment* must not, in the aggregate, exceed the originally authorized term of *supervised release*.

Second Argument: Higher Aggregate Limit

- This means an aggregate limit of:
  - 5 years for Class A and B felonies (felonies punishable by 25 years or more);
  - 3 years for Class C and D felonies (felonies punishable by 5 years or more).
  - 1 year for Class E felonies and misdemeanors.

Second Argument: Higher Aggregate Limit

- Three circuits have rejected this argument, but recognized that it presents an issue distinct from construction of the words "on any such revocation" and the term-of-years limitations in the concluding clauses of § 3583(e)(3).
- *United States v.Williams*, 675 F.3d 275, 279 (3d Cir. 2012).
- *United States v. Hunt*, 673 F.3d 1289, 1293 (10th Cir. 2012).
- *United States v. Hampton*, 633 F.3d 334 (5th Cir.), *cert. denied*, 131 S. Ct. 3042 (2011).

Third Argument: Good Policy

If all else fails, there is still an argument to be made that sound policy calls for limiting post-revocation imprisonment to the aggregate limit under the old law. . . .

Third Argument: Good Policy

Annual cost of supervision per releasee:

$3,433.37

Memo from Matthew Rowland, Acting Assistant Director, Administrative Office of the U.S. Courts, to Chief Probation Officers and Chief Pretrial Services Officers, Apr. 10, 2012, *available at*: http://jnet.ao.dcn/img/assets/7368/PPSAD00022.pdf.

Given this cost, arguing against *renewed* supervision following a violation and imprisonment can be a trump card.

Third Argument: Good Policy

Here is the Judicial Conference's official position:

> "Although it is statutorily permissible to impose a new term of supervised release in most post-April 30, 2003 cases, officers should ordinarily recommend a discretionary new supervised release sentence only when the prison time imposed for the current violation, plus any prison time imposed for a prior revocation(s) of this term of supervised release, is less than the maximum prison term set forth at 18 U.S.C. § 3583(e)(3)."

Guide to Judiciary Policy, Vol. 8, Pt. E, § 650.50(c), *available at* http://jnet.ao.dcn/Guide/.

Third Argument: Good Policy

A legal opinion from the Administrative Office states that the Judicial Conference policy was adopted as a "cost-containment measure":

> "In essence, the Conference policy recommends that courts extend the aggregation rule that applies to pre-PROTECT Act offenders to PROTECT Act offenders notwithstanding Congress's repudiation of the aggregation rule in the PROTECT Act."

Ltr. from Assistant General Counsel Joe Gergits to Terrence A. Smith, Sept. 28, 2010, at 2, *available at* http://jnet.ao.dcn/img/assets/5896/Smith_PROTECT.pdf.

Third Argument: Good Policy

There is also this exhortation from the Judicial Conference's Committee on Criminal Law:

> "Given the budget constraints under which the probation and pretrial services program are operating, it is imperative that we align our resources effectively to address those cases that are more complex and pose the greatest risks to community safety, while reducing expenditures in less complex and lower risk cases when it is prudent to do so."

Memo from Hon. Robert Holmes Bell, Chair, Judicial Conference Committee on Criminal Law, to United States District Court Judges, Feb. 16, 2012, *available at*: http://jnet.ao.dcn/img/assets/7348/dir12-015.pdf.

Third Argument: Good Policy

Even the Sentencing Commission has provided for curtailment of supervised release terms. By amendments effective November 1, 2011, *see* "Sentencing Guidelines for the United States Courts," 76 Fed. Reg. 24960, 24969 (May 3, 2011), the Guidelines now:

(i) Generally recommend *no* supervised release when the defendant "is a deportable alien who likely will be deported after imprisonment." *See* U.S.S.G. § 5D1.1(c).

(ii) Recommend a minimum of only *two* years' supervised release – instead of three years, as previously – for defendants convicted of Class A or B felonies. *See* U.S.S.G. § 5D1.2(a)(1).

(iii) Recommend a minimum of only *one* year of supervised release – instead of two years, as previously – for defendants convicted of Class C or D felonies. *See* U.S.S.G. § 5D1.2(a)(2).

Apprendi: The Ghost in the Machine

Let's say client was originally sentenced in 1999 for cocaine trafficking. The indictment referred to "kilogram quantities" of the drug but did not charge a specific amount. The client was found guilty by a jury, but the jury did not make any quantity finding. At sentencing the district court found the client to have trafficked in 15 kilograms of powder cocaine. The court imposed a sentence of 151 months' imprisonment to be followed by five years of supervised release.

Apprendi challenges to post-revocation imprisonment

Following the original sentencing, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases like *United States v. Vazquez*, 271 F.3d 93 (3d Cir. 2001) (en banc), made clear that drug quantity, in order to trigger the increased penalties under 21 U.S.C. § 841(b), must be charged in the indictment and either admitted by the defendant or found by a jury on proof beyond a reasonable doubt.

Apprendi challenges to post-revocation imprisonment

You are now representing the client in a revocation proceeding before the judge who presided over the 1999 prosecution. What is the stat max?

Apprendi challenges to post-revocation imprisonment

- Conspiring to distribute five or more kilograms of cocaine is punishable by 10 years to life. Thus a Class A felony under 18 U.S.C. § 3559(a). Upon revocation of supervised release, therefore, the maximum term of imprisonment is five years. *See* 18 U.S.C. § 3583(e)(3).
- Conspiring to distribute cocaine, absent a quantity enhancement, is punishable by no more than 20 years' imprisonment. Thus a Class C felony under 18 U.S.C. § 3559(a). Upon revocation of supervised release, maximum term of imprisonment is two years. *See* 18 U.S.C. § 3583(e)(3).

Apprendi challenges to post-revocation imprisonment

The distinction also affects Sentencing Guidelines ranges.

- When the original offense is anything other than a Class A felony, the highest possible Guidelines range is 33-41 months. *See* U.S.S.G. § 7B1.4.
- If the offense was a Class A felony, the range can go up to 51-63 months.

Apprendi challenges to post-revocation imprisonment

Argument: Because there was no jury finding as to quantity, client was in effect convicted of a Class C felony under § 841(b)(1)(C). Accordingly, the court cannot impose more than two years' imprisonment for the violation, instead of the five years authorized when a defendant was originally convicted of a Class A felony.

Apprendi challenges to post-revocation imprisonment

The case law is mixed.

The Fourth Circuit has found plain error in a district court's treatment of a prior drug conviction as a Class A felony when the indictment had not alleged quantity. *See United States v. Graham*, 48 Fed. Appx. 46, 48 (4th Cir. 2002) (not precedential). It has also reached the opposite result. *See United States v. Conyers*, 284 Fed. Appx. 19, 21 (4th Cir. 2008) (not precedential).

Apprendi challenges to post-revocation imprisonment

- The Third Circuit has rejected the challenge on the part of a defendant who specifically admitted quantity during a plea colloquy. *United States v. Sanchez*, 61 Fed. Appx. 774 (3d Cir. 2002) (not precedential).
- The Ninth Circuit has likewise rejected the challenge on the part of a defendant whose indictment alleged quantity and who specifically admitted quantity during plea colloquy. *United States v. Knox*, 40 Fed. Appx. 374, 376-77 (9th Cir. 2002) (not precedential).

Apprendi challenges to post-revocation imprisonment

- The Eighth Circuit has taken note of the issue but declined to resolve it. *See United States v. Pollard*, 249 F.3d 738, 739 (8th Cir. 2001).
- The Second, Fifth, and Seventh Circuits have rejected the argument: *United States v. Flagg*, 481 F.3d 946, 950 (7th Cir. 2007); *United States v.Warren*, 335 F.3d 76, 78 (2d Cir. 2003); *United States v. Moody*, 277 F.3d 719, 721 (5th Cir. 2001).

Apprendi challenges to post-revocation imprisonment

"The proper method for challenging a conviction and sentence is through direct appeal or collateral review, not a supervised release revocation proceeding. We cannot allow Flagg to use the alternative vehicle of the revocation proceeding to challenge his underlying conviction and sentence when this challenge is forbidden to him on collateral review." *Flagg*, 481 F.3d at 950 (citations omitted).

Apprendi challenges to post-revocation imprisonment

But, sir:

It's not a collateral attack on the original sentence. It's simply faithful to the rule that a defendant cannot be subjected to *new* punishment – *i.e.*, imprisonment upon revocation of supervised release – that exceeds the maximum authorized by the facts admitted by the defendant or found by a jury beyond a reasonable doubt.

Jurisdictional challenges

Not infrequently, a revocation hearing is not held until after the original expiration date of the defendant's supervised release, *e.g.*, three years from the date the defendant was released from prison.

Tolling

18 U.S.C. § 3624(e):

"…The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is ***imprisoned in connection with a conviction*** for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days…."

Tolling

- Because detention will toll supervised release only when the defendant is imprisoned "in connection with a conviction," pretrial detention does not toll in and of itself.
- Thus, no tolling if a defendant is held on state charges that are later dismissed or nolle-prossed. In this situation, if the original expiration date of supervised release passed while the defendant was in state custody, the federal district court lacks jurisdiction.
- *See generally United States v. Goins*, 516 F.3d 416, 423 (6th Cir. 2008).

Tolling

Also no tolling if, despite conviction on the state charges, the period in pretrial detention is not credited toward the state sentence as time served. For example, no tolling if state court sentences client to straight probation.

Tolling – Fugitive Status

- Note that no statutory provision tolls supervised release for any period a defendant is a fugitive. There is a circuit split on the issue:
- *United States v. Hernandez-Ferrer*, 599 F.3d 63, 67 (1st Cir. 2010) (fugitive status does not toll).
- *United States v. Buchanan*, 638 F.3d 448, 455 (4th Cir. 2011) (fugitive status tolls).
- *United States v. Murguia-Oliveros*, 421 F.3d 951 (9th Cir. 2005) (fugitive status tolls).

"Warrant" or Summons

Typically, before supervised release expires, a probation officer files a petition seeking a warrant or summons on ground of an alleged violation. This reflects the rule codified at 18 U.S.C. § 3583(i):

"**Delayed revocation**.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation."

“Warrant” or Summons

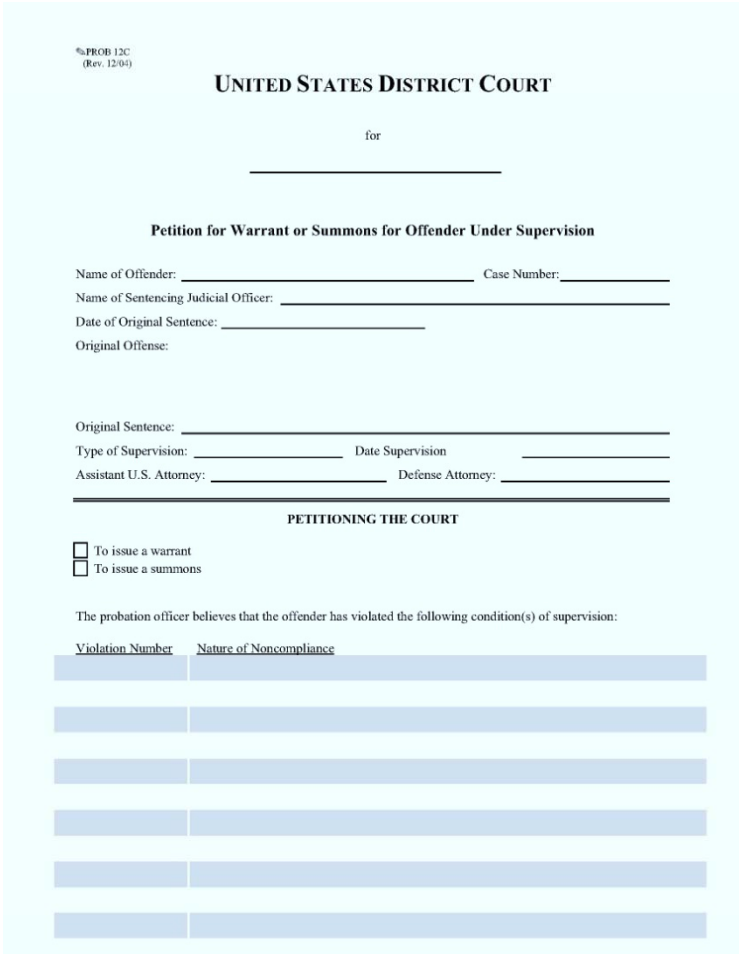
Argument: a “warrant” does not trigger this provision unless it is issued on the basis of probable cause supported by facts stated on “Oath or affirmation.”

And historically not all revocation petitions seeking a warrant have been sworn.

"Warrant" or Summons

- Because the Fourth Amendment defines "warrant" as a type of writ that issues only upon probable cause supported by sworn facts, a "warrant" issued upon a probation officer's unsworn application is not properly a warrant as a matter of law, and cannot trigger the jurisdictional enlargement provision of 18 U.S.C. § 3583(i). *United States v. Vargas-Amaya*, 389 F.3d 901, 907 (9th Cir. 2004).
- *Contra United States v. Collazo-Castro*, 660 F.3d 516 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1593 (2012); *United States v. Garcia-Avalino*, 444 F.3d 444 (5th Cir. 2006).

“Warrant” or Summons



PROB 12C
(Rev. 12/04)

UNITED STATES DISTRICT COURT

for

_____

Petition for Warrant or Summons for Offender Under Supervision

Name of Offender: _____ Case Number: _____
Name of Sentencing Judicial Officer: _____
Date of Original Sentence: _____
Original Offense:

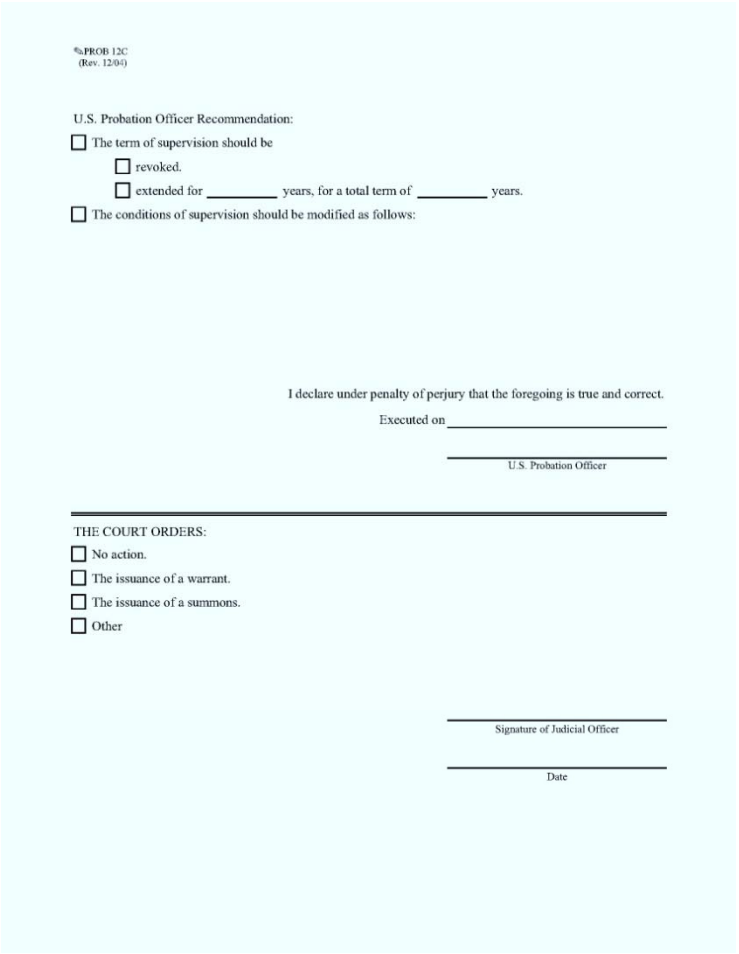
Original Sentence: _____
Type of Supervision: _____ Date Supervision _____
Assistant U.S. Attorney: _____ Defense Attorney: _____

PETITIONING THE COURT

☐ To issue a warrant
☐ To issue a summons

The probation officer believes that the offender has violated the following condition(s) of supervision:

Violation Number	Nature of Noncompliance



PROB 12C
(Rev. 12/04)

U.S. Probation Officer Recommendation:
☐ The term of supervision should be
  ☐ revoked.
  ☐ extended for _____ years, for a total term of _____ years.
☐ The conditions of supervision should be modified as follows:

I declare under penalty of perjury that the foregoing is true and correct.
Executed on _____

_____
U.S. Probation Officer

THE COURT ORDERS:
☐ No action.
☐ The issuance of a warrant.
☐ The issuance of a summons.
☐ Other

_____
Signature of Judicial Officer

_____
Date

"Warrant" or Summons

In my district and perhaps others, the attestation is signed by the *supervisor* of the defendant's probation officer, even while the probation officer is identified as the petition's actual author. The petition never sets forth any basis to suppose the supervisor is attesting to personal knowledge of the facts stated. Thus, the facts are not stated upon "Oath or affirmation."

NATIONAL SEMINAR FOR FEDERAL DEFENDERS
MAY 30 - JUNE 1, 2012
ATLANTA, GA

Review of Issues and Objections to Supervised Release Conditions

Christy Unger, RWS (E.D. Pa.)

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. Tejeda*, 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. Silvious,* 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 compnay, 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.3d1199 (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); *Untied 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 plesythmograph, 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).