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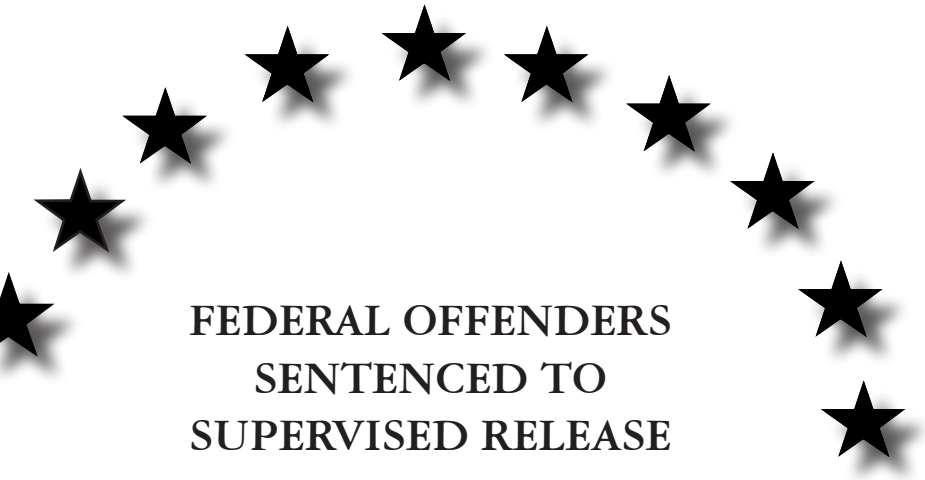

FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE

U.S. v. Apodaca, No. 09-50372 archived on May 5, 2011

JULY 2010

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I. Introduction

This report addresses the legal framework and most common legal issues that arise in regard to supervised release and analyzes data concerning the imposition, modification, and revocation of supervised release terms.

In 1984, as part of the Sentencing Reform Act ("SRA")[1] that created the federal sentencing guidelines system, Congress prospectively eliminated parole and established supervised release.[2] Supervised release is a "unique" type of post-confinement monitoring that is overseen by federal district courts with the assistance of federal probation officers, rather than by the United States Parole Commission.[3] A sentencing court is authorized (and, in some cases, required) to impose a term of supervised release in addition to a term of imprisonment. While on supervised release after reentry into the community following release from imprisonment, an offender is required to abide by certain conditions, some mandated by statute and others imposed at the court's discretion. If an offender violates a condition, a court is authorized (and, in some cases, required) to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on post[-]release supervision . . . ."[4]

Although supervised release has some similarities to the other two primary types of "nondetentive monitoring,"[5] parole and probation, there are significant differences. Just as with

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[1] Pub. L. No. 98–473, 98 Stat. 1987 (1984).

[2] This report is limited to a discussion of legal and data issues related to federal supervised release and does not address broader issues concerning reentry of offenders into the community after serving their terms of imprisonment (such as the use of risk-assessment tools and other "evidence-based practices"). For a discussion of such issues, *see, e.g.*, Tonya Long, *Designing a Prisoner Reentry System Hardwired to Manage Disputes*, 123 Harv. L. Rev. 1339 (Mar. 2010); Symposium, *Prisoner Reentry*, 20 FED. SENT. R. 2 (2007) (series of articles on prisoner reentry issues); Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, D.C.: The Pew Charitable Trusts, March 2009). Other governmental and private agencies currently are studying such reentry issues. *See* Charles J. Hines, *After Release: The Challenge of Successful Reentry*, 24 CRIM. JUST. 1, 1 (Winter 2010) ("The National Institute of Justice (NIJ) . . . is currently funding a multiyear comprehensive evaluation of the Serious and Violent Offender Reentry Initiative, a collaborative federal effort to improve reentry outcomes along criminal justice, employment, education, health, and housing dimensions. The study is being jointly conducted by the Urban Institute and the Research Triangle Institute.").

[3] Gozlon-Peretz v. United States, 498 U.S. 395, 407 (1991).

[4] 18 U.S.C. § 3583(e)(3).

[5] Johnson v. United States, 529 U.S. 694, 710 (2000). A fourth type of nondetentive monitoring, "special parole," was used in federal drug cases in the 1970s and 1980s. *See* Manso v. Fed. Det'n Ctr., 182 F.3d 814, 816 (11th Cir. 1999) ("Unlike regular (or traditional) parole, whereby the Parole Commission releases an individual into the community before the end of his term of imprisonment, special parole was imposed by the district court at sentencing and

federal parole, "Congress intended supervised release to assist individuals in their transition to community life"; therefore, "supervised release fulfills rehabilitative ends, distinct from those served by incarceration."[6] Yet, unlike parole, offenders do not serve terms of supervised release as a substitute for a portion of their sentences of imprisonment.[7] Furthermore, "[s]upervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who need[] it."[8] Like federal probationers, offenders on supervised release are subject to the jurisdiction of federal courts, are monitored by federal probation officers, and they also are typically subject to the same types of conditions.[9] But "[s]upervised release, in contrast to probation, is not a punishment in lieu of incarceration"[10] and, moreover, supervised release is primarily concerned with "'facilitat[ing] the reintegration of the defendant into the community.'"[11]

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followed the term of imprisonment. Special parole was eventually replaced by supervised release, a similar mechanism that is administered by the courts."); Evans v. U.S. Parole Comm'n, 78 F.3d 262, 263 (7th Cir. 1996) ("Three things are 'special' about special parole: first, special parole follows the term of imprisonment, while regular parole entails release before the end of the term; second, special parole was imposed, and its length selected, by the district judge rather than by the Parole Commission; third, when special parole is revoked, its full length becomes a term of imprisonment.").

[6] United States v. Johnson, 529 U.S. 53, 59 (2000).

[7] USSG, Ch.7, Pt.A(2)(b) ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court.").

[8] *Johnson*, 529 U.S. at 709.

[9] Indeed, the authorized conditions for supervised release are generally the same ones as probation. *See* 18 U.S.C. §§ 3563(b), 3583(d).

[10] United States v. Granderson, 511 U.S. 39, 50 (1994).

[11] United States v. Vallejo, 69 F.3d 992, 994 (9th Cir. 1995) (quoting USSG §5D1.1 comment. (n.2) (Nov. 1992)). "[T]he basic purpose of probation [is] . . . to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuses this opportunity." Roberts v. United States, 320 U.S. 264, 272 (1943). The primary purpose of supervised release — to facilitate the reintegration of federal prisoners back into the community — is similar to the purpose of the Second Chance Act of 2007 (Pub. L. No. 110–199), which was intended to "reduce recidivism, increase public safety, and help state and local governments better address the growing population of ex-offenders returning to their communities." H.R. Rep. No.110–140 (2007). The Second Chance Act focuses on "development and support of programs that provide alternatives to incarceration, expansion of the availability of substance abuse treatment, strengthening families of ex-offenders, and the expansion of comprehensive re-entry services." *Id*. "The goal of [the prison re-entry] initiative is to help America's prisoners by expanding job training and placement services, improving their ability to find transitional housing, and helping newly released prisoners get mentoring, including from faith-based groups." Pub. L. No. 110–199, Statement by President George W. Bush Upon Signing, *as reprinted in*, 2008 U.S.C.C.A.N. S10. "In this Act, the Congress has directed a shift from policing those on parole to rehabilitating them.

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Since supervised release was first instituted in the late 1980s,[12] nearly one million federal offenders have been sentenced to terms of supervised release.[13] During that period, several legal issues concerning supervised release have arisen and have been addressed by Congress and the courts, including the Supreme Court, as well as the United States Sentencing Commission. These legal issues arise at three different junctures in federal criminal cases: first, at the original sentencing hearing, when a sentencing court must decide whether to impose a term of supervised release and, if so, the length of the term; second, upon an offender's release from prison when he or she must abide by certain conditions of supervised release and to supervision by a federal probation officer;[14] and, third, at a revocation hearing in those cases in which an offender is alleged to have violated one or more conditions of his or her supervised release. This report will address the major recurring legal issues that have arisen at each of the three stages as well as issues related to appellate review in supervised release cases. Although, as discussed below, some of these issues concerned prior versions of the applicable supervised release statutes, they remain noteworthy because the Ex Post Facto Clause requires that many defendants with lengthy prison sentences imposed in years past are subject to the prior versions of the relevant statutes upon their release from prison.[15] Knowledge of the evolution of the supervised release statutes since their original enactment as part of the SRA continues to be essential in applying these provisions.

This report will also analyze available data concerning the widespread imposition of supervised release by federal courts, even in cases in which a statute does not require it. A statute requires imposition of a term of supervised release in less than half of federal cases subject to the sentencing guidelines. In the remaining cases, the guidelines provide for

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The parole system now bears an increasing special obligation to help . . . offenders successfully reenter into society. . . . It is clear that the spirit of the Second Chance Act of 2007 intends that the entire penal systems, state and federal, work towards the rehabilitation of prisoners for the purpose of reducing recidivism. " United States v. Wessels, 539 F.3d 913, 915 (8th Cir. 2008) (Bright, J. concurring).

[12] With the exception of certain drug offenses committed on or after October 27, 1986, *see* Gozlon-Peretz v. United States, 498 U.S. 395, 397-98 (the provision for supervised release in the Anti-Drug Abuse Act of 1986 applied even before the general effective date of the Sentencing Reform Act), supervised release was not authorized for offenses committed before November 1, 1987, the effective date of the Sentencing Reform Act of 1984. *Id.*

[13] USSC, 1989 – preliminary 2009 Datafiles (USSCFY98 – USSCFY09). Courts imposed terms of supervised release in 917,908 cases from 1989 to 2009.

[14] Federal probations officers are guided by *The Supervision of Federal Offenders, Monograph 109* (March 2007 revision), which was authored by the Office of Probation and Pretrial Services, Administrative Office of the United States Courts *available at* http://www.fd.org/pdf_lib/Monograph%20109.pdf.

[15] *See, e.g.*, United States v. Thomas, 600 F.3d 387 (5th Cir. 2010) (ex post facto violation resulting from district court's retroactive application of 2003 amendment to 18 U.S.C. § 3583(e)(3)).

supervised release terms where the prison sentence imposed exceeds one year. From 2005 through 2009, sentencing courts imposed supervised release terms in 99.1 percent of such federal cases where supervised release was not statutorily required and such terms averaged 35 months. The overwhelming majority of federal offenders sentenced to prison who did not receive terms of supervised release were non-citizens subject to deportation. The data also show that courts imposed supervised release at very high rates regardless of both the offense type (with a few exceptions) and an offender's criminal history. Over 95 percent of offenders in each of the sentencing guidelines' Criminal History Categories (CHCs) I through VI who were sentenced to prison received terms of supervised release. Offenders in each of the CHCs except CHC VI received an average term of 41 months of supervised release, while offenders in CHC VI received an average term of 48 months.

The data on offenders' violations of the conditions of the supervised release show that two-thirds of federal offenders successfully completed their terms of supervision (17.9% of whom were terminated early by sentencing courts based on their compliance with the conditions of supervision), while one-third had their terms revoked and were sent back to prison. Those defendants whose terms were revoked were sentenced, on average, to a new prison term of 11 months. Unlike the rates of imposition of supervised release, which generally were consistent across criminal history categories and offense types, rates of offenders' violations of the conditions of supervision resulting in revocation were not consistent across the various offense types and criminal history categories. Offenders who had little or no criminal history at the time of their original sentencing committed violations at significantly lower rates than offenders who were in higher criminal history categories at the time of their original sentencing. Of the major offense types, drug offenders on average had lower rates of revocation than firearms and immigration offenders.

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II. Legal Framework for the Imposition of Supervised Release

When a district court imposes a prison sentence, the court is faced with the issue of whether to impose a concomitant term of supervised release to follow the defendant's ultimate release from incarceration. Under the primary statute governing supervised release, 18 U.S.C. § 3583, unless otherwise provided by another statute, in federal felony and Class A misdemeanor cases,[16] a term of supervised release following any period of imprisonment may

[16] Although § 3583(a) speaks of "a felony or a misdemeanor," § 3583(b) indicates that supervised release is not authorized in the case of a "petty offense," *i.e.*, one punishable by no more than six months of imprisonment. *See* 18 U.S.C. § 3583(b)(3); *see also* United States v. Thornton, 225 F.2d 665, 2000 WL 732929, at *1 (9th Cir. 2000) (unpublished table decision) ("Because [the defendant] was convicted of petty offenses, and 18 U.S.C. § 3583(b)(3) specifically exempts petty offenses from the imposition of supervised release, the government concedes [the district court's imposition of a term of supervised release] was error").

be imposed in the sentencing court's discretion.[17] In such cases, section 3583(b) provides the following maximum terms depending on the class of federal offense of conviction: five years for Class A and B felonies; three years for Class C and D felonies; one year for Class E felonies and Class A misdemeanors.[18]

In some felony cases — those involving most drug-trafficking offenses;[19] kidnapping of a minor victim and child sex offenses; certain sex offenses involving a victim of any age;[20] and certain crimes of domestic violence[21] — supervised release is mandated by statute[22] unless some

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[17] *See* 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or misdemeanor *may* include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment [unless otherwise required by statute].") (emphasis added).

[18] *See* 18 U.S.C. § 3583(b)(1)-(3). The classification of felonies, which looks to the maximum authorized penalty unless the offense is specifically classified by a letter grade within the applicable penal statute, is as follows: Class A felony offenses are punishable by a maximum of death or life imprisonment; Class B offenses are punishable by 25 years or more but less than life imprisonment; Class C offenses are punishable by ten years or more but less than 25 years of imprisonment; Class D offenses are punishable by five years or more but less than ten years of imprisonment; and Class E offenses are punishable by more than one year but less than five years of imprisonment. *See* 18 U.S.C. §§ 3559(a)(1)-(5), 3581. Class A misdemeanor offenses are punishable by more than six months but not more than one year of imprisonment. *See* 18 U.S.C. § 3559(a)(6).

[19] For drug-trafficking offenses proscribed in 21 U.S.C. §§ 841, 846, 960 and 963, mandatory minimum terms of one, two, three, four, or five years of supervised release apply for defendants with no prior convictions who are convicted of felony drug offenses involving specified types and quantities of drugs; mandatory minimum terms of two, four, six, eight, or ten years apply to such defendants who have one or more prior felony drug convictions. *See* 21 U.S.C. §§ 841(b) & 960(b). Those mandatory minimum terms of supervised release set forth in § 841(b) double in length for defendants who also are convicted under 21 U.S.C. § 859(a) of distributing to persons under the age of 21 or under 21 U.S.C. § 860(a) of distributing or manufacturing drugs in or near educational facilities or other protected locations. Such offenders' otherwise applicable mandatory minimum terms of supervised release triple in length if the offenders are twice convicted for such offenses. *See* 21 U.S.C. §§ 859(b), 860(b).

[20] *See* 18 U.S.C. § 3583(k) ("[T]he authorized term of supervised release for any offense under [title 18, U.S.C.] section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life."). These enumerated offenses include kidnapping of a minor, interstate transportation of a minor for sexual purposes, sexual trafficking (including the buying or selling) of minors, sexual exploitation of minors, interstate solicitation of a minor for sexual purposes, sexual abuse of or abusive sexual contact with a victim of any age, interstate transportation of a prostitute, various child pornography offenses, and failure to register as a sex offender.

[21] *See* 18 U.S.C. § 3583(a) ("The court . . . shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release . . . if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).") However, 18 U.S.C. § 3561(b) explicitly provides that a court has the option of sentencing a "domestic violence offender" to either probation or a term of imprisonment. Section 3583(b) thus appears simply to require a term of supervised release *if* a court opts to sentence such a defendant to prison rather than to probation. *See also* 18 U.S.C. § 3563(a)(4) (requiring, as a condition of probation for domestic violence

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type of statutory relief from imposition of the mandatory term applies.[23] In these cases, the relevant statutes usually set forth specific mandatory minimum terms of supervision for particular offenses (*e.g.*, five-year minimum terms for most child sex offenses) and usually have statutory maximum terms of lifetime supervision.[24]

Although statutorily required terms of supervised release are limited to certain offenses, the federal sentencing guidelines[25] have significantly broadened the applicability of supervised release to virtually all felonies. Specifically, in felony cases in which a federal statute does not mandate a term of supervised release, USSG §5D1.1(a) provides that a sentencing court "shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed . . . ." Under USSG §5D1.1(b), supervised release is optional in Class A misdemeanor and felony cases if the term of imprisonment imposed is one year or less (absent a statutory minimum term of supervised release). Application Note 1 at USSG §5D1.1 authorizes a court to depart from USSG §5D1.1(a)'s requirements — and not impose supervised release in cases where the court imposes a prison sentence of more than one year — "if it

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offenders, that they attend mandatory domestic violence counseling). Section 3561(b) defines "domestic violence crime" as "a crime of violence for which the defendant may be prosecuted in a court of the United States in which the victim or intended victim is the spouse, former spouse, intimate partner, former intimate partner, child, or former child of the defendant, or any other relative of the defendant."

[22] For the offenses set forth in 18 U.S.C. § 2332b(g)(5)(B) — which, if calculated to influence or affect the conduct of government, are considered "Federal crimes of terrorism," 18 U.S.C. § 2332b(g)(5)(A) — the authorized term of supervised release is "any term of years or life." 18 U.S.C. § 3583(j). It appears that no federal court has yet decided whether "any term of years" means at least one year and a day. State courts have interpreted similar language in state penal statutes in inconsistent ways. *Compare* Bush v. State, 922 So. 2d 802, 806 (Miss. App. 2005) (interpreting state-law imprisonment range of "any term of years . . . up to 30 [years]" to include no prison after concluding that "[z]ero years falls within that time frame"), *with* People v. Crawford, 321 N.W.2d 717, 718 (Mich. App. 1982) (when "the minimum sentence is any term of years . . . some courts have interpreted [that language] to mean that the defendant must serve at least one year and one day").

[23] Relief from otherwise statutorily-mandated terms of supervised release is available in 18 U.S.C. § 3553(e) (governing "substantial assistance" motions), which is potentially applicable in all types of cases involving a mandatory term of supervised release, and in 18 U.S.C. § 3553(f) ("safety valve"), which is applicable only in certain federal drug-trafficking cases. *See* USSG §5D1.2, comment. (nn.2-3).

[24] *See supra* notes 19-21; *see also* United States v. Jackson, 559 F.3d 368, 370-71 (5th Cir. 2009) (statutory maximum of lifetime supervised release for drug-trafficking offenses under 21 U.S.C. § 841(b)).

[25] As discussed throughout this paper, the sentencing guidelines contain several provisions in both Chapter Five and Chapter Seven of the *Guidelines Manual* that concern supervised release. Some of those provisions (*e.g.*, USSG §5D1.1(a)) are guidelines — which were mandatory before the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), and advisory thereafter — and others (including all of the provisions in Chapter Seven) are policy statements, which always have been advisory in nature. *See* USSG, Ch. 7, Pt. A ("Introduction to Chapter Seven").

determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition (*i.e.*, a fine or restitution); (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute."[26] As discussed below, federal courts almost always follow USSG §5D1.1(a)'s provision for supervised release in cases in which a prison sentence in excess of one year are imposed; supervised release terms have been imposed in 99.1 percent of such cases in recent years, even when not required by statute.[27]

Once the district court determines that a term of supervised release is authorized (or required), it must then decide the length of such term. Section 5D1.2(a) provides that, in cases in which a district court chooses to impose supervised release and no minimum term is otherwise required by statute, a minimum term of three years should be imposed for defendants convicted of a Class A or B felony, a minimum term of two years should be imposed for defendants convicted of a Class C or D felony, and a minimum term of one year should be imposed for defendants convicted of a Class E felony or a Class A misdemeanor.[28] Before *United States v. Booker*,[29] USSG §§5D1.1(a) & 5D1.2(a) were mandatory in nature and, thus, absent a valid basis for a departure, a sentencing court was required to order the minimum terms of supervised release prescribed by the guidelines in all felony cases in which a sentence of imprisonment exceeding one year also was imposed.[30] Since *Booker*, in the vast majority of cases, courts continue to impose at least USSG §5D1.2(a)'s minimum terms.[31] Section 5D1.2(b) additionally provides that a sentencing court may impose a lifetime term of supervision in cases involving certain actual or attempted sex offenses against minors (including child pornography cases) and in cases of international terrorism brought under 18 U.S.C. § 2332b that resulted in, or involved a foreseeable risk of, bodily injury or death.[32] Section 5D1.2(b) explicitly

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[26] USSG §5D1.1, cmt. n.1.

[27] *See infra* note 241 and accompanying text.

[28] *See* USSG §5D1.2(a)(1)-(3).

[29] 543 U.S. 220 (2005).

[30] *See* United States v. Huerta-Pimental, 445 F.3d 1220, 1222 n.3 (9th Cir. 2006) (in a case of a defendant sentenced for a conviction for a Class C felony before *Booker*, "the then mandatory Sentencing Guidelines required the imposition of supervised release"); *see also* United States v. Parker, 508 F.3d 434, 442 (7th Cir. 2007) ("*Booker* is applicable in this context; supervised release is discretionary absent a separate statutory provision making it mandatory.").

[31] *See infra* note 251 and accompanying text.

[32] USSG §5D1.2(b)(1)-(2).

"recommend[s]" a lifetime term of supervision for defendants convicted of the specified sex offenses involving minors,[33] although courts have imposed such life terms in only one-quarter of eligible cases.[34] When lifetime terms of supervision have been imposed for such offenses, including possession of child pornography cases, appellate courts repeatedly have upheld such terms as reasonable.[35]

Under 18 U.S.C. § 3583(c), a court, both in deciding whether to impose supervised release in a case not mandated by another statute and in deciding the length of the term, must consider most of the same section 3553(a) factors that the court must consider in imposing a sentence of imprisonment.[36] Appellate courts have held that, in order for a sentence of supervised release to be deemed "reasonable" on appeal, a district court must consider such factors when imposing a sentence of supervised release.[37]

Notably, the only section 3553(a) factor *not* relevant to a court's decision of whether to impose supervised release (and, if so, how long the term should be) is "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to

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[33] USSG §5D1.2(b).

[34] *See infra* note 240 and accompanying text.

[35] *See, e.g.*, United States v. Daniels, 541 F.3d 915, 923 (9th Cir. 2008); United States v. Rosenthal, 295 F. App'x 985 (11th Cir. 2008).

[36] Those factors are:

(1) "the nature and circumstances of the offense and the history and characteristics of the defendant";
(2) "the need . . . to afford adequate deterrence and criminal conduct";
(3) "the need . . . to protect the public from further crimes of the defendant";
(4) "the need . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner";
(5) any applicable sentencing guidelines and "any pertinent policy statements";
(6) "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct"; and
(7) "the need to provide restitution to any victims of the offense."

18 U.S.C. §§ 3553(a), 3583(c).

[37] *See, e.g.*, United States v. Presto, 498 F.3d 415, 418 (6th Cir. 2007); United States v. Hayes, 445 F.3d 536, 537 (2d Cir. 2006). However, a court ordinarily need not engage in an *express* consideration of the relevant § 3553(a) factors with respect to imposing a term of supervised release when the court has done so with respect to the prison sentence imposed. *See* United States v. O'Georgia, 569 F.3d 281, 289 (6th Cir. 2009) ("According to the statute that controls supervised-release sentencing, most of the factors from § 3553(a) must be considered by a district court in imposing a term of supervised release. 18 U.S.C. § 3583(c). . . . [However, a] district court's failure to repeat its § 3553(a) analysis with respect to the supervised-release term . . . would serve no useful purpose in the ordinary case.").

provide just punishment for the offense."[38] The legislative history indicates that section 3553(a)(2)(A) was not included for consideration under 18 U.S.C. § 3583(c) because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than to punish them.[39]

In cases in which a defendant's offense level and criminal history category (CHC) place him or her in Zone B or Zone C of the guidelines' Sentencing Table and the court wishes to impose at least some period of imprisonment rather than a sentence of probation, a court may impose supervised release as a substitute for a portion of the minimum term of imprisonment. If the guideline range is in Zone B, a court may substitute supervised release with a condition that substitutes community confinement or home detention for a portion of the term of incarceration, provided that at least one month of the minimum term is satisfied by imprisonment.[40] If the guideline range is in Zone C of the Sentencing Table, the minimum term of imprisonment may be satisfied by a sentence of imprisonment followed by a term of supervised release with a condition that substitutes community confinement or home detention for a portion of the term of incarceration, provided that at least one-half of the minimum term is satisfied by imprisonment.[41] Such alternative "split" sentences have been imposed in only 3.3 percent of cases in which a court has imposed a sentence of imprisonment followed by a term of supervised release.[42]

If multiple counts of conviction exist in a case, the court should impose separate terms of supervised release for each count but run them concurrently with one another.[43] Sentencing upon revocation in multiple-count cases is discussed below.

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[38] 18 U.S.C. § 3553(a)(2)(A).

[39] *See* S. Rep. No. 98-225 at 124 (1983) (explaining that the 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").

[40] USSG §5C1.1(c)(2).

[41] USSG §5C1.1(d)(2).

[42] *See infra* note 258 and accompanying text.

[43] *See* 18 U.S.C. § 3624(e); *see also* United States v. Sanders, 67 F.3d 855, 856 (9th Cir. 1995).

III. Major Recurring Legal Issues Related to Supervised Release

A. Conditions of Supervised Release

When a court imposes a term of supervised release, it must set conditions of supervision. Some conditions are expressly mandated by 18 U.S.C. § 3583(d), such as the prohibition against unlawful possession of a controlled substance.[44] The court also has discretion to order "any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate" as long as the condition is "reasonably related" to the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and is consistent with any pertinent policy statements issued by the Commission pursuant to 28 U.S.C. § 994(a).[45] Such discretionary conditions include maintaining stable employment and refraining from the excessive use of alcohol.[46]

To implement fully the statutorily required conditions of supervised release and provide useful guidance on reasonable discretionary conditions of supervision that will facilitate an offender's successful reentry, the *Guidelines Manual* sets forth required and suggested conditions of supervised release. Section 5D1.3(a) lists mandatory conditions, which track those listed in 18 U.S.C. § 3583(d), and adds certain other conditions relating to fines and restitution. The guidelines list 15 "standard" conditions that are "recommended for supervised release" and mostly track the discretionary conditions of probation found in 18 U.S.C. § 3563(b).[47] "Special conditions" are listed in USSG §5D1.3(d) as policy statements and are recommended in certain defendant-specific circumstances.[48] Section 5D1.3(e), also a policy statement, lists other "special

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[44] 18 U.S.C. § 3583(d) directs courts to order, as conditions of supervised release, that the defendant not commit another crime; not unlawfully possess or use a controlled substance; and cooperate with the DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106–546, 114 Stat. 2726 (2000). In addition, those defendants convicted of a crime of domestic violence must participate in a domestic violence rehabilitation program, and those defendants required to register under the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109–248, 120 Stat. 587 (2006), must so register.

[45] 18 U.S.C. § 3583(d).

[46] *See* 18 U.S.C. § 3563(b)(4), (7).

[47] USSG §5D1.3(c).

[48] For example, USSG §5D1.3(d)(3) recommends a condition requiring defendants who are ordered to pay a fine or restitution to provide the probation officer access to any requested financial information, and USSG §5D1.3(d)(4) recommends a condition requiring those defendants suspected of abusing narcotics or alcohol to participate in a substance abuse program.

conditions" that may be appropriate on a case-by-case basis, such as a curfew enforced by electronic monitoring.[49]

In addition to 18 U.S.C. § 3583(d) and USSG §5D1.3, the Administrative Office of the United States Courts includes standard conditions of supervised release in Form AO-245B (Judgment in a Criminal Case).[50] The form tracks the mandatory conditions listed in 18 U.S.C. § 3583 and some of the standard conditions listed in the guidelines.

Defendants often challenge conditions of supervised release as not "reasonably related" to the relevant factors in 18 U.S.C. § 3553(a), as required by 18 U.S.C. § 3583(d)(1), or as unconstitutional under the First, Fourth, or Fifth Amendments to the United States Constitution. Defendants also challenge procedural aspects of supervised release, such as lack of presentence notice of special conditions of supervised release and allegedly improper implementation of conditions by a probation officer. This section examines how courts typically resolve these challenges and addresses some uncommon conditions of supervised release imposed by some district courts.

1. Commonly Challenged Conditions

Both 18 U.S.C. § 3583(d) and USSG §5D1.3(a) mandate that defendants subject to the DNA Analysis Backlog Elimination Act of 2000[51] submit a DNA sample at the direction of the probation office.[52] The Act, including a 2004 amendment requiring all felony offenders on supervised release (including those convicted of non-violent offenses) to provide DNA samples, has survived Fourth Amendment scrutiny.[53] Courts have upheld this condition of supervision

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[49] For example, conditions imposing community service or occupational restrictions. USSG §5D1.3(e)(3) & (4).

[50] Form AO-245B (Judgment in a Criminal Case), *available at* http://www.uscourts.gov/FormsAndFees/Forms/Viewer.aspx?doc=/uscourts/FormsAndFees/Forms/AO245B.pdf. A copy of that standard form is attached to this report as an appendix.

[51] *See* 42 U.S.C. § 14135a.

[52] USSG §5D1.3(a)(8).

[53] *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 946-47, 950 (9th Cir. 2007) ("[W]e agree in principle with the other circuits that have considered the issue, and hold that in the case before us, requiring Kriesel to comply with the 2004 amendment to the DNA Act is constitutional because the government's significant interests in identifying supervised releasees, preventing recidivism, and solving past crimes outweigh the diminished privacy interests that may be advanced by a convicted felon currently serving a term of supervised release."); United States v. Weikert, 504 F.3d 1, 2-3, 8-9 (1st Cir. 2007) ("This case presents a question of [whether it is] . . . a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures to require an individual on supervised release to provide a blood sample for purposes of creating a DNA profile and entering it into a centralized database? Agreeing with the eleven

by reasoning that collection of a DNA sample (including a blood sample) is a minimal search under the Fourth Amendment, individuals on supervised release have a lower expectation of privacy than those in the general population, and collection of DNA from criminal offenders serves important public interests.[54]

Section 3583(d) also authorizes courts to order a defendant to make restitution to a victim of the offense as a condition of supervised release.[55] If the offense involved is one for which restitution is required by statute (such as the Mandatory Victims Restitution Act), restitution becomes a mandatory condition of supervised release by the terms of that statute.[56] If a statute authorizes restitution but does not require it (such as the Victim and Witness Protection Act), USSG §5E1.1(a)(1) provides that a sentencing court nonetheless "shall . . . enter a restitution order for the full amount of the victim's loss."[57]

Even in the absence of a statute requiring or authorizing restitution to victims, courts have discretion under 18 U.S.C. § 3583(d) to impose restitution as a condition of supervised release at least in some cases where one or more victims have been harmed.[58] Section 5E1.1(a)(2) provides that a sentencing court "shall . . . impose a term of . . . supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized" by statute.[59]

The definitions of "victim" and "loss" for purposes of a supervised release condition requiring restitution is the same as the definition found in the Victim and Witness Protection Act as construed in *Hughey v. United States*.[60] Under *Hughey*, a district court may order

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other circuits that have held similarly, we hold that it is not.") (citing cases).

[54] *See, e.g.*, United States v. Sczubelek, 402 F.3d 175, 185-88 (3d Cir. 2005).

[55] 18 U.S.C. § 3583(d) (authorizing court to impose as a condition of supervised release any condition that is a discretionary condition of probation under section 3563(b)).

[56] 18 U.S.C. § 3563(a)(6)(A).

[57] USSG §5E1.1(a)(2).

[58] United States v. Love, 431 F.3d 477 (5th Cir. 2005) (courts may order restitution as a discretionary condition of probation under 18 U.S.C § 3563(b)(2) or as a condition of supervised release under 18 U.S.C. § 3583(d)); United States v. Farr, 419 F.3d 621 (7th Cir. 2005); United States v. Bok, 156 F.3d 157 (2d Cir. 1998).

[59] USSG §5E1.1(a)(2).

[60] 495 U.S. 411 (1990); *see also* United States v. Varrone, 554 F.3d 327, 333-34 (2d Cir. 2009) ("The supervised release statute's authorization of restitution to 'a victim of the offense' is very similar to the VWPA's authorization of

restitution as a condition of supervised release only for those losses caused by the specific conduct that is the basis for the offense of conviction.[61]

The courts of appeal have disagreed on whether the government may recover "buy money" expended in a sting operation as restitution. The Seventh Circuit held that repayment of buy money is permissible because in ordering restitution the court can order "any other condition it considers appropriate."[62] The Third Circuit held that the government is not a victim as contemplated by the statute that requires restitution as a condition of supervised release, and the Sixth Circuit held that the cost of the government's investigation and prosecution of the defendant is not a direct loss resulting from defendant's illegal conduct for which restitution may be awarded.[63] Four circuits have held that restitution to victims of sex offenders can include anticipated future costs of psychological treatment.[64]

If an order of restitution, forfeiture, or a fine has been imposed, the guidelines recommend a "special" condition "prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the

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restitution to 'any victim of such offense,' and is identical to the language used in the previous version of the VWPA, which the Supreme Court [in *Hughey*] noted in dicta would have been subject to the same construction. . . . [E]very other circuit that has considered this question has applied *Hughey* to awards of restitution as a condition of supervised release under 18 U.S.C. §§ 3583(d), 3563(b)(2)." (citations omitted).

[61] *See, e.g.*, United States v. Frith, 461 F.3d 914 (7th Cir. 2006) (order of restitution vacated where government did not show and the district court did not find that the losses involved were attributable to defendant's offenses of conviction); United States v. Romines, 204 F.3d 1067 (11th Cir. 2000) (restitution order unauthorized because the victims to whom restitution was ordered were not victims of the offense of conviction).

[62] United States v. Gibbs, 578 F.3d 694 (7th Cir. 2009).

[63] United States v. Cottman, 142 F.3d 160, 169-70 (3d. Cir. 1998); Gall v. United States, 21 F.3d 107 (6th Cir. 1994) (costs of the government's investigation and prosecution of the defendant is not a direct loss resulting from defendant's illegal conduct for which restitution may be awarded).

[64] *See* United States v. Doe, 488 F.3d 1154 (9th Cir. 2007) (upholding restitution to cover two years of counseling, as well as educational and vocational programs, for each victim because the district court reasonably relied on medical testimony in calculating the amount); United States v. Johnson, 400 F.3d 187 (4th Cir. 2005) (upholding restitution for the total cost of victim's treatment; the reduced amount paid by the victim as well as the difference between victim's price paid and total cost to provider); United States v. Danser, 270 F.3d 451 (7th Cir. 2001) (award to defendant's minor daughter for expected lifelong cost of therapy because evidence indicated such therapy was likely); United States v. Julian, 242 F.3d 1245 (10th Cir. 2001) (upholding restitution for future psychiatric services, but remanding for findings of fact and a specific dollar amount supported by evidence in the record); United States v. Laney, 189 F.3d 954 (9th Cir. 1999) (upholding restitution for future counseling, but requiring an estimate of the appropriate and specific amount of funds with reasonable certainty); *but see* United States v. Follett, 269 F.3d 996 (9th Cir. 2001) (as of the date of the original sentencing, no evidence indicated the victim's need for future therapy, but allowing remand to permit amendment of restitution order if necessary).

defendant is in compliance with the payment schedule."[65] Likewise, USSG §5D1.3(D)(3) recommends a condition "requiring the defendant to provide the probation officer access to any requested financial information" if an order of restitution, forfeiture, or fine has been imposed.[66] The Second and Eighth Circuits have upheld such a financial disclosure condition without an accompanying order of restitution because "monitoring [defendant's] financial situation would aid in detecting any return to his former lifestyle of drug distribution."[67] If the underlying offense is financial in nature, the Fifth and Seventh Circuits have upheld financial reporting conditions that extend to entities or individuals under defendant's control.[68]

In the guidelines list of "standard" conditions, USSG §5D1.3(c)(7) recommends that the defendant "shall refrain from excessive use of alcohol . . . ." The Sixth, Eighth, and Ninth Circuits have addressed a strict alcohol ban imposed by the district court on an offender as a condition of supervised release. The circuit courts agree that such a stringent alcohol ban is appropriate if there is some evidence of prior alcohol abuse or alcohol-related crimes but inappropriate if there is no relation to the offense or no evidence of abuse.[69]

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[65] USSG §5D1.3(d)(2).

[66] USSG §5D1.3(d)(3).

[67] United States v. Behler, 187 F.3d 772, 780 (8th Cir. 1999); United States v. Brown, 402 F.3d 133 (2d Cir. 2005) (upholding financial monitoring condition but vacating condition prohibiting defendant from incurring any debt as unrelated to the offense); *see also* United States v. Camp, 410 F.3d 1042 (8th Cir. 2005) (upholding financial monitoring condition unrelated to underlying offense of felon-in-possession because condition related to defendant's history of non-payment of child support obligations).

[68] *See* United States v. Kosth, 943 F.2d 798 (7th Cir. 1991) (defendant required to report wife's financial situation); United States v. Grant, 117 F.3d 788 (5th Cir. 1997) (defendant, a minister, required to report financial condition of his church).

[69] *See* United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (condition prohibiting alcohol upheld; although no evidence linked alcohol consumption and the offense of conviction and no evidence of abuse, condition was related to goals of rehabilitation and protection where defendant abused his wife and children, consumed large amounts of alcohol on weekends, and argued more while drinking); United States v. Carter, 159 F.3d 397 (9th Cir. 1998) (no alcohol condition upheld despite lack of alcohol abuse and lack of relation to underlying crime (armed robbery) because defendant attempted suicide by overdosing on migraine medication and defendant's behavior was unstable and erratic); United States v. Bass, 121 F.3d 1218, 1223 (8th Cir. 1997) (defendant convicted of marijuana trafficking offense; condition prohibiting all use of alcohol not related to defendant's offense and not appropriate for this defendant, despite defendant's admission to occasional marijuana use and the district court's concern that defendant may substitute alcohol for marijuana); *Behler*, 187 F.3d at 772 (condition prohibiting alcohol upheld due to defendant's history of methamphetamine abuse and infrequent use of cocaine and LSD); *see also* United States v. Betts, 511 F.3d 872 (9th Cir. 2007) (condition vacated absent evidence of prior abuse or contribution to offense of conviction); United States v. Modena, 302 F.3d 626, 636 (6th Cir. 2002) (condition banning alcohol and requiring drug and alcohol testing vacated as not bearing a reasonable relationship to rehabilitating the defendant or protecting the public where no evidence alcohol played a role in the crime nor that defendant had a substance abuse problem;

Occupational restrictions are listed as an additional "special condition" under USSG §5D1.3(e)(4) and as a sentencing option in USSG §5F1.5. The circuit courts that have addressed the issue to date agree that such a condition must bear a "reasonably direct relationship" between the defendant's occupation and the conduct relating to the offense of conviction and that the condition must be "reasonably necessary to protect the public" from reasonably similar crimes.[70]

Deportation of a non-citizen defendant is listed as a special condition under the guidelines if the defendant and the United States stipulate to the deportation or if the Attorney General demonstrates that the defendant is legally deportable.[71] Section 3583(d) also lists deportation as a condition of supervised release "[i]f an alien defendant is subject to deportation . . . ." Every circuit court to have addressed the issue, however, has held that a district court may not order immediate and automatic deportation without the defendant's stipulation or without a deportation hearing because the authority to deport rests solely with the Executive Branch.[72]

Courts sometimes impose "lifestyle" restrictions as special conditions of supervised release that seek to prevent offenders from "rever[ting] into a former crime-inducing lifestyle by

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defendant's failure to participate in a presentence interview with the probation officer to determine any past drug or alcohol abuse does not permit district court to impose condition without evidence of substance abuse); United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992) (condition vacated absent evidence of prior abuse or contribution to offense of conviction).

[70] USSG §5F1.5(a)(1), (2); *see* United States v. Gill, 523 F.3d 107 (2d Cir. 2008) (upholding condition prohibiting defendant from engaging in the business of providing mental health counseling where defendant was convicted of making false statements relating to health care); *Betts*, 511 F.3d at 872 (upholding condition that defendant not be employed in a capacity wherein he has control of his employer's funds because there was a reasonably direct relationship between the crime of conspiracy to defraud and the condition intending to prevent embezzlement); United States v. Weber, 186 F. App'x 751 (9th Cir. 2006) (upholding condition prohibiting defendant convicted of child pornography offense from employment at any establishment that principally sells sexually explicit material as narrowly tailored and reasonable); *Cooper*, 171 F.3d at 582 (vacating condition prohibiting defendant from employment as a truck driver if it involved absence from home for more than 24 hours as not reasonably related to his offense and overly harsh).

[71] *See* USSG §5D1.3(d)(6).

[72] *See* United States v. Tinoso, 327 F.3d 864 (9th Cir. 2003); United States v. Romeo, 122 F.3d 941, 943-44 (11th Cir. 1997); United States v. Phommachanh, 91 F.3d 1383, 1386 (10th Cir. 1996); United States v. Xiang, 77 F.3d 771, 773 (4th Cir. 1996); United States v. Quaye, 57 F.3d 447, 449-51 (5th Cir. 1995); United States v. Olvera, 954 F.2d 788, 793 (2d Cir. 1992); United States v. Ramirez, 948 F.2d 66, 68 (1st Cir. 1991).

barring contact with old haunts and associates, even though the activities may be legal."[73] The Ninth Circuit has rejected First Amendment challenges to a condition prohibiting membership or participation in a motorcycle club,[74] a condition prohibiting visits to Irish pubs or participation in any Irish organization,[75] and a condition prohibiting association with white supremacist members.[76] The Fifth Circuit in *United States v. Woods* vacated as overbroad and more restrictive of defendant's liberty than reasonably necessary a condition prohibiting a defendant from living with anyone to whom she was not married or related by blood.[77] Despite this holding, the court's opinion in *Woods* collects cases from other circuits that affirmed conditions restricting a defendant's intimate associations and notes that such restrictions are appropriate with a narrowly-defined prohibited association and a direct connection between

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[73] United States v. Ross, 476 F.3d 719, 722 (9th Cir. 2007) (citation and internal quotation marks omitted); *but cf.* United States v. Napulou, 593 F.3d 1042 (9th Cir. 2010) (vacating condition restricting contact with misdemeanants as broader than the condition upheld in *Ross* because it did not bear a reasonable relationship to the risk that defendant would return to her criminal behavior due to the minor nature of misdemeanor offenses).

[74] United States v. Bolinger, 940 F.2d 478, 480-81 (9th Cir. 1991) (court upheld condition because the sentencing judge properly concluded that the defendant was more likely to relapse into crime upon a return to his prior associations); *see also* Turner v. United States, 347 F. App'x 866, 868-69 (3d Cir. 2009) (a condition of federal parole that restricted the offender from associating with a motorcycle gang did not violate the First Amendment; court noted that there was substantial evidence that much of the offender's prior criminal activity occurred during his association with a motorcycle club).

[75] Malone v. United States, 502 F.2d 554, 555-57 (9th Cir. 1974) (court noted defendant's "tremendous emotional involvement" with the Irish Republican movement; even though some association with Irish organizations will not lead to criminal activities, the court upheld the condition of probation as justified to prevent incidental association with criminals).

[76] *Ross*, 476 F.3d at 722.

[77] United States v. Woods, 547 F.3d 515 (5th Cir. 2008).

the condition and a valid sentencing goal.[78] Reasonable conditions restricting defendants' fundamental right to travel have similarly been upheld in the Third, Sixth, and Ninth Circuits.[79]

Another liberty interest implicated in supervised release conditions is the right to be free from unwanted medications. Relying on Supreme Court precedent applicable to courts' orders of involuntary medication in the pretrial context,[80] the Ninth Circuit has applied heightened constitutional scrutiny to conditions of supervision that require offenders to take unwanted medication.[81] In particular, the court has held that a drug that "alters mental processes, affects behavior and demeanor, and 'interferes with a person's self-autonomy'" is particularly intrusive.[82] Before requiring defendants to take such medication, the district court must conduct a thorough inquiry and make explicit findings on a medically-informed record that court-ordered medication is necessary to accomplish sentencing goals and involves no greater deprivation of liberty than is reasonably necessary.[83] Conversely, the Seventh Circuit has upheld a condition requiring an offender to participate in a mental health treatment program

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[78] *See* United States v. Smith, 436 F.3d 307, 311 (1st Cir. 2006) (affirming condition directing defendant to stay away from minor daughter as a means of protecting public safety); United States v. Rodriguez, 178 F. App'x 152, 158-90 (3d Cir. 2006) (affirming condition prohibiting defendant from having contact with her husband because district court found that defendant committed crimes at her husband's behest); United States v. Brandenburg, 157 F. App'x 875, 878-80 (6th Cir. 2005) (affirming condition prohibiting defendant from cohabitating with any female because defendant "has a history of abusing women with whom he lives and narrower, previously imposed condition proved "inadequate to prevent the defendant from committing domestic violence."); United States v. Bortels, 962 F.2d 558, 559-60 (6th Cir. 1992) (affirming condition that defendant not associate with her fiancé); *but see Napulou*, 593 F.3d at 1041(vacating condition prohibiting defendant from contact with her life partner and remanding for an individualized review of the relationship and justification of the condition).

[79] United States v. Watson, 582 F.3d 974 (9th Cir. 2009) (upholding condition that defendant could not enter San Francisco without prior approval aimed at keeping defendant away from circumstances that might lead him to offend again); United States v. Alexander, 509 F.3d 253, 256-58 (6th Cir. 2007) (upholding condition requiring defendant to live in a different city from the town where he committed his offenses); United States v. Sicher, 239 F.3d 289, 292 (3d Cir. 2000) (condition prohibiting a convicted drug dealer from entering the two counties where her mother and children lived without permission upheld to promote defendant's rehabilitation by keeping her away from negative influences).

[80] *See, e.g.*, Sell v. United States, 539 U.S. 166 (2003); Riggins v. Nevada, 504 U.S. 127 (1992).

[81] *See, e.g.*, United States v. Williams, 356 F.3d 1045 (9th Cir. 2004).

[82] United States v. Cope, 527 F.3d 944, 956 (9th Cir. 2008) (citations omitted), *cert. denied*, 129 S. Ct. 321 (2008).

[83] *Williams*, 356 F.3d at 1056-57. Even in the case of medication that does not have such stark psychological or physiological effects, any condition of supervised release requiring a defendant to take such medication must nonetheless be necessary to accomplish the goals of supervised release. *See Cope*, 527 F.3d at 956 (remanding in view of a condition requiring defendant to take "all prescribed medication" in order to allow the district court to make medically-informed findings with regard to medications that may implicate a significant liberty interest).

and to take any prescribed medications because the condition satisfied the statutory requirements of 18 U.S.C. § 3583(d).[84]

The Fifth and Seventh Circuits have upheld prohibitions on gambling and visits to casinos if the history and characteristics of the defendant reflect a gambling problem.[85] The Seventh and Eighth Circuits have found gambling restrictions improper where the record did not demonstrate a gambling problem, but nonetheless have upheld the conditions under plain error review.[86]

Defendants also have challenged the condition giving probation officers authority to conduct warrantless searches of their bodies or residences as violating their Fourth Amendment rights. Although the guidelines specifically provide for such warrantless searches as conditions for sex offenders[87] — the supervision of whom is discussed further below — courts also have imposed that condition upon other types of offenders as well.[88] The Supreme Court has held that warrantless searches of probationers (as a condition of their probation) are constitutional if supported by mere "reasonable suspicion."[89] In so holding, the Court balanced the lower expectation of privacy probationers enjoy with the state's interest in preventing further criminal conduct.[90]

Subsequently, in *Samson v. California*, the Court upheld a warrantless search of a state parolee in California predicated solely upon a parole condition authorizing such a search,

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[84] *See* United States v. Wilson, 154 F.3d 658, 667 (7th Cir. 1998); *see also* United States v. Holman, 532 F.3d 284, 290 (4th Cir. 2008) ("There is some question as to whether the . . . constitutional analysis supplants or supplements the statutory requirements set forth in § 3583(d).").

[85] United States v. Brown, 136 F.3d 1176, 1186 (7th Cir. 1998); United States v. Cothran, 302 F.3d 279 (5th Cir. 2002) (applying plain error review but holding that district court did not abuse its discretion).

[86] United States v. Lacey, 328 F. App'x 346 (8th Cir. 2009); United States v. Silvious, 512 F.3d 364 (7th Cir. 2008).

[87] *See* USSG §5D1.3(d)(7)(C).

[88] *See, e.g.*, United States v. Medley, 362 F. App'x 913, 917 (10th Cir. Jan. 25, 2010) (defendant convicted of wire fraud and money laundering; a condition of her supervised release required her to "submit to a search of her person, property, or automobile under her control to be conducted in a reasonable manner and at a reasonable time").

[89] *See* United States v. Knights, 534 U.S. 112 (2001); *see also* Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless search of probationer upheld even when not a condition of probation where "special needs" justified the search).

[90] *See Knights*, 534 U.S. at 121-22.

without any accompanying reasonable suspicion.[91] The Court noted that parole is more akin to imprisonment than probation because parole constitutes an early release from prison before the parolee completes his sentence.[92] The Court also approvingly cited a Second Circuit case stating that "federal supervised release, . . . in contrast to probation, is meted out in addition to, not in lieu of, incarceration" (comparable to parole) and, thus, probationers have greater protections under the Fourth Amendment than offenders on post-incarceration supervision.[93] Federal offenders on supervised release, like parolees, therefore enjoy a lesser expectation of privacy than probationers.[94] Citing *Samson*, the Ninth and Tenth Circuits have since held that a federal defendant on supervised release has no constitutional basis to object to a condition subjecting the offender to a suspicionless search.[95] No circuit court has held to the contrary.

Prior to *Samson*, the Judicial Conference of the United States issued a policy concerning search and seizure, including a model search condition for supervised release and probation.[96] Under the policy, which remains in effect after *Samson*,[97] searches are generally disfavored, require reasonable suspicion, and should be conducted only pursuant to conditions of supervised release or by consent of the offender.[98] The sentencing guidelines address

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[91] *See* Samson v. California, 547 U.S. 843 (2006).

[92] *See id.* at 850.

[93] *See id.* (quoting United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002)).

[94] *See Samson*, 547 U.S. at 850.

[95] *See* United States v. Betts, 511 F.3d 872, 876 (9th Cir. 2007) ("[T]he Supreme Court recently held in *Samson* . . . that a similarly worded condition imposed by statute on all California parolees did not violate the Fourth Amendment, even though the condition did not require reasonable suspicion. . . . There is no sound reason for distinguishing parole from supervised release with respect to this condition. The federal system has abolished parole, and uses supervised release to supervise felons after they get out of prison. People on supervised release have not completed their sentences, they are serving them. The Court in *Samson* itself drew the analogy to supervised release. After *Samson*, there is no room for treating the search condition in this case as an abuse of discretion."); United States v. Hanrahan, 508 F.3d 962, 971 (10th Cir. 2007) ("[W]e are satisfied that in this case the District Court acted within its discretion when it imposed the suspicionless-search special condition on Mr. Hanrahan's supervised release.") (citing *Samson*).

[96] *See Supervision of Federal Offenders, Monograph 109*, *supra* note 14, at IV-9.

[97] *See id.* (March 2007 revision of monograph retained same policy).

[98] *See id.*

warrantless search conditions only in the case of sex offenders and, consistent with the Judicial Conference's policy, require "reasonable suspicion" for such a search to occur.[99]

2. Commonly Challenged Conditions Specifically for Sex Offenders

In cases with defendants either convicted of sex offenses or convicted of other types of offenses but whose criminal histories include sex offenses, courts often have imposed additional conditions related to their current or past offenses, and such defendants often have challenged such conditions of supervised release.[100] Both 18 U.S.C. § 3583 and the guidelines list as a mandatory condition that a defendant comply with state[101] and federal sex offender registration requirements.[102] Section 5D1.3(d)(7) of the guidelines lists as special conditions applicable to sex offenders participation in a treatment and monitoring program, restrictions on computers and interactive services, and submission to a warrantless search by the probation officer.[103]

Defendants occasionally challenge the level of participation in treatment programs that USSG §5D1.3(d)(7) requires, but these challenges have failed in every circuit in which the issue has been raised.[104] Most challenges to treatment programs arise when the condition is applied to defendants whose offense of conviction is not a sex offense, as courts occasionally require defendants who are not convicted of sex offenses to register as sex offenders or participate in

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[99] *See* USSG §5D1.3(d)(7)(C).

[100] *See, e.g.*, United States v. Ross, 475 F.3d 875 (7th Cir. 2007).

[101] Although federal courts may condition supervised release upon compliance with state laws, conditions may not compel state action. For example, the court may not suspend an offender's state drivers license, United States v. Snyder, 852 F.2d 471 (9th Cir. 1988), or impose a condition requiring defendant to pay an outstanding child support obligation. United States v. Lakatos, 241 F.3d 690 (9th Cir. 2001).

[102] 18 U.S.C. § 3583(d); USSG §5D1.3(a)(7); *see* United States v. Jorge-Salgado, 520 F.3d 840, 842-43 (8th Cir. 2008) (state law required defendant to register as a sex offender; sex offender registration condition imposed by the district court was simply a more specific pronouncement of the mandatory condition that he not commit a state crime during his term of supervised release).

[103] USSG §5D1.3(d)(7).

[104] USSG §5D1.3(a)(7)(A); *see* United States v. Metzener, 584 F.3d 928, 935 (10th Cir. 2009) (district court did not abuse its discretion in determining that defendant did not "participate" in sex offender treatment program, but strongly encouraged district courts to be more specific as to the amount of participation required); United States v. Kreitinger, 576 F.3d 500, 505 (8th Cir. 2009) (requiring defendant to "participate in and successfully complete" treatment program); United States v. Taylor, 338 F.3d 1280, 1283-84 (11th Cir. 2003) (requiring defendant to "participate in a mental health program specializing in sexual offender treatment approved by the probation officer, and abide by the rules, requirements and conditions of the treatment program").

sex offender treatment.[105] Across the circuits, these conditions are upheld if reasonably related to the defendant's criminal history and the purposes of supervised release[106] but vacated if the offense of conviction is not a sex offense *and* the defendant's prior convictions are too remote in time or not clearly sexual in nature.[107] In the Ninth Circuit, conditions imposing mental health and drug treatment programs are similarly upheld for non-sex offenders if the conditions are related to the history and characteristics of the defendant, even if unrelated to the offense of conviction.[108]

Although USSG §5D1.3(d)(7)(B) recommends "limiting the use of a computer or an interactive computer service in cases in which the defendant used such items," courts sometimes have issued an outright ban on Internet or library access. The Eighth Circuit held that an absolute ban on library access is disfavored under the First Amendment;[109] however, absolute bans on Internet access are sometimes upheld in the Eighth Circuit and in other

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[105] *Ross*, 475 F.3d at 871 (under plain error review, evidence of fantasies about crimes against children sufficed to impose sex offender treatment condition); United States v. Perkins, 207 F. App'x 559 (6th Cir. 2006) (district court did not abuse its discretion in imposing sex offender treatment condition upon defendant convicted of felon in possession where such condition was reasonably related to defendant's need for rehabilitation and therapy and where circumstances of instant offense indicated a pattern of aggression toward women); United States v. Vinson, 147 F. App'x 763 (10th Cir. 2005) (condition reasonably related to history and characteristics of defendant).

[106] United States v. Smart, 472 F.3d 556 (8th Cir. 2006) (upholding condition requiring defendant, convicted of a firearms offense, to register as a sex offender where defendant's criminal history included two sexual abuse offenses, for one of which he was still on probation); *see* United States v. York, 357 F.3d 14 (1st Cir. 2004) (upholding sex offender treatment condition where defendant, convicted of mailing a threatening letter to his estranged common-law spouse, had two prior convictions for sexually assaulting young girls).

[107] *See* United States v. Carter, 463 F.3d 526 (6th Cir. 2006) (sex offender treatment condition vacated as not related to the offense of conviction and defendant's sex offense committed in 1988 was too remote); United States v. Scott, 270 F.3d 632 (8th Cir. 2001) (numerous sex offender conditions vacated as not reasonably necessary to deter defendant from future misconduct where conditions did not relate to the offense of conviction but were imposed because of a sex offense conviction 15 years prior); *see also* United States v. Prochner, 417 F.3d 54 (1st Cir. 2005) (upholding on plain error review condition requiring defendant convicted of credit card fraud to participate in sex offender treatment because of a report from mental health experts indicating defendant's potential problem with adolescent boys; defendant did not have to register as a sex offender and therefore the condition was no greater deprivation of liberty than reasonably necessary).

[108] United States v. Lopez, 258 F.3d 1053 (9th Cir. 2001) (upholding condition requiring defendant, who was convicted of escape from a halfway house, to participate in mental health program where record belied defendant's need for treatment based on his inability to cope with less-structured life at the halfway house); United States v. Johnson, 998 F.2d 696 (9th Cir. 1993) (upholding condition requiring defendant convicted of unlawful possession of identification documents to submit to drug abuse treatment and mental health counseling given defendant's long history of substance abuse and violent aggression).

[109] *See* United States v. Bender, 566 F.3d 748 (8th Cir. 2009).

circuits if the defendant made some use of the Internet to victimize children or if less restrictive prohibitions would not be effective.[110] Across the circuits, however, courts seek to ensure that Internet bans are narrowly tailored to prohibit inappropriate behavior and serve sentencing objectives without overly restricting a defendant's liberty.[111] In considering a condition banning Internet access, courts primarily examine the nexus between the Internet and the underlying offense.[112]

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[110] *See* United States v. Love, 593 F.3d 1, 12 (D.C. Cir. 2010) (where defendant used the Internet to commit a child pornography offense, total ban upheld, but courts should consider the substantial effect such bans have on day-to-day activities, such as "pay[ing] bills, check[ing] the weather, stay[ing] on top of world events, and keep[ing] in touch with friends," as well as the availability of alternatives such as remote monitoring of Internet usage, and unannounced examinations of the defendant's computer); United States v. Alvarez, 478 F.3d 864, 868 (8th Cir. 2007) (ban prohibiting residential Internet access upheld because online material provided defendant encouraging and actionable ideas and severe restrictions were the only way to prevent defendant from accessing prohibited material due to defendant's admitted problem with self-control); United States v. Johnson, 446 F.3d 272, 282-83 (2d Cir. 2006) (absolute ban upheld where defendant's sophisticated computer skills would enable him to evade monitoring software); United States v. Paul, 274 F.3d 155, 169 (5th Cir. 2001) (total ban upheld where defendant used the Internet to seek out other pedophiles and advise them how to locate potential child victims); *cf.* United States v. Mark, 425 F.3d 505 (8th Cir. 2005) (remand required to determine whether a complete ban on Internet access is justified; court must develop the record with respect to evidence concerning potential alternatives and explain why less restrictive means are inadequate).

[111] *See* United States v. Russell, 600 F.3d 631 (D.C. Cir. 2010) (30-year ban on defendant's access to a computer for any purpose was "substantively unreasonable" because it significantly interfered with the defendant's future employment prospects, notwithstanding the fact that the defendant had been convicted of using the Internet in the attempt to have sex with a minor); United States v. Perazza-Mercado, 553 F.3d 65 (1st Cir. 2009) (total ban on defendant's home Internet use struck down where defendant had no history of impermissible Internet use and the Internet was not an instrumentality of the offense of conviction); *Bender*, 566 F.3d at 751-52 (8th Cir. 2009) (ban was not a greater deprivation of liberty than is reasonably necessary because defendant used his computer to do more than merely possess child pornography, and because defendant could use a computer and Internet with the permission of his probation officer); United States v. Boston, 494 F.3d 660, 668 (8th Cir. 2007) (ban prohibiting defendant from accessing a computer without permission from probation officer upheld because it was not absolute); United States v. Voelker, 489 F.3d 139 (3d. Cir. 2007) (lifetime ban on computer use and Internet access not narrowly tailored); United States v. Freeman, 316 F.3d 386, 392 (3d Cir. 2003) (outright Internet ban vacated as more restrictive than necessary where a less restrictive prohibition on pornographic sites and images could be enforced by unannounced visits by the probation officer and by monitoring defendant's hard drive); United States v. Holm, 326 F.3d 872, 877-78 (7th Cir. 2003) (outright ban on computer and Internet use vacated so the district court could fashion more narrowly tailored restrictions); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003) (restricted use with probation officer's approval upheld); United States v. Rearden, 349 F.3d 608 (9th Cir. 2003) (same as *Bender*); United States v. Sofsky, 287 F.3d 122 (2d Cir. 2002) (same as *Freeman*); United States v. White, 244 F.3d 1199 (10th Cir. 2001) (total ban prohibited).

[112] United States v. Miller, 594 F.3d 172 (3d Cir. 2010) (vacating a condition banning Internet use for life because of the length of the ban and because defendant did not use a computer to solicit or personally endanger children); United States v. Heckman, 592 F.3d 400 (3d Cir. 2010) (a condition banning Internet use was plain error because of the length (lifetime) and coverage (no exceptions for approved use) of the ban, and, although defendant's criminal history was extensive, he had never been convicted of criminal behavior that involved the use of the Internet); United States v.

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Courts also often impose conditions on sex offenders that are not listed in the guidelines or in the statutes. The most common is a condition banning a defendant from possessing any kind of pornography. There is no unqualified First Amendment right for those on supervised release to possess sexually stimulating materials, and the Ninth Circuit recognized that "[a] defendant's right to free speech may be abridged to effectively address [his] sexual deviance problem."[113] But, as the Third Circuit stated, "[w]hen a ban restricts access to material protected by the First Amendment, courts must balance the § 3553(a) considerations against the serious First Amendment concerns endemic in such a restriction."[114] To uphold such a ban, both the Third and Ninth circuits have looked for a significant nexus between restricting the defendant from access to adult materials and the goals of supervised release.[115] Along these lines, the First, Fourth, and Eighth Circuits struck down pornography bans where no such nexus existed or the condition was otherwise not justified.[116] There is also a separate due process right to conditions

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Crume, 422 F.3d 728 (8th Cir. 2005) (condition banning Internet use without prior permission from probation officer vacated because defendant did not use his computer for anything illegal beyond simply possessing child pornography); United States v. Peterson, 248 F.3d 79 (2d Cir. 2001) (condition imposing ban on computer possession and Internet access vacated as not reasonably related to defendant's incest conviction nor reasonably necessary to the sentencing objectives); United States v. Crandon, 173 F.3d 122, 127-28 (3d Cir. 1999) (upholding prohibition on Internet use without prior permission from probation officer as narrowly tailored and related to deterrence and protection of the public where defendant used the Internet to develop an illegal relationship with a minor); *see also* United States v. Sales, 476 F.3d 732 (9th Cir. 2007) (vacating a ban on all Internet and computer use where the breadth of the condition was not reasonably related to defendant's counterfeiting offense and defendant had no history of illegal conduct involving computers or the Internet); *see generally* Note, *Recent Case: United States v. Thieleman, 575 F.3d 265 (3d Cir. 2009)*, 123 HARV. L. REV. 776 (Jan. 2010) (discussing circuit court decisions addressing Internet restrictions for sex offenders).

[113] United States v. Reardon, 349 F.3d 608 (9th Cir. 2003) (citations and quotations omitted).

[114] *Thielemann*, 575 F.3d at 272-73 (citing United States v. Voelker, 489 F.3d 139, 151 (3rd Cir. 2007)), *cert. denied*, 130 S. Ct. 1109 (U.S. 2010).

[115] *See id.* at 277 (finding such a nexus where exposure to adult material might lead defendant to encourage associates to initiate or continue sexual abuse of children); United States v. Reardon, 349 F.3d 608 (9th Cir. 2003) (condition furthered the goals of rehabilitating defendant and protecting the public).

[116] United States v. Perazza-Mercado, 553 F.3d 65, 78 (1st Cir. 2009) (condition banning possession of "pornographic materials" struck down under plain error standard absent evidence that pornography played a role in the offense or evidence that the ban would achieve sentencing goals); United States v. Armel, 585 F.3d 182, 186 (4th Cir. 2009) (condition prohibiting pornography possession struck down where district court did not adequately explain the necessity of such a condition for a defendant whose underlying conviction was not sex-related); *Bender*, 566 F.3d at 748 (ban on sexually stimulating materials vacated and remanded for more specific findings to the particular defendant where district court considered defendant only as part of a class of sex offenders in imposing the condition).

of supervised release that state clearly what conduct will result in revocation.[117] The Third and Ninth Circuits have held that a ban on "any pornography" is too vague because, unlike obscenity, it lacks any recognized legal definition, and a probation officer's interpretation of the term could differ from the interpretation intended by the court.[118] But the Third and Ninth Circuits, along with the Eighth, upheld conditions that prohibit possession of depictions of "sexually explicit conduct" as not vague or overbroad because of the statutory definition of the term in 18 U.S.C. § 2256(2)(A).[119]

Sex offenders have challenged conditions prohibiting them from associating with minors (whether generally or in connection with an occupation) or from frequenting places where children are present, such as parks or schools, without prior permission from a probation officer as violating their right to free association, right to travel, right to work, and right to contact with their own children. These conditions are typically upheld by the circuit courts addressing the issue; incidental violations are often excused, and defendants' option to petition probation officers to visit their own children addresses the concern that such a condition would interfere with defendants' liberty interest in their relationship with their children.[120] Even a condition

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[117] *See* United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

[118] *See* United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008) (word "pornography" in condition banning pornography was too vague to put defendant on notice of what conduct would result in a violation of supervised release), *cert. denied*, 129 S. Ct. 957 (2009); United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005) (condition banning "any pornographic, sexually oriented or sexually stimulating materials" struck down); *Guagliardo*, 278 F.3d at 872 (striking down pornography condition as overly vague, citing Farrell v. Burke, No. 97 Civ. 5708, 1998 WL 751695, at *6 (S.D.N.Y. Oct. 28, 1998), where the probation officer interpreted the prohibition on "any pornography" to include any nude depiction whatsoever, whether "*Playboy Magazine* or a photograph of Michelangelo's sculpture, David"); United States v. Loy, 237 F.3d 251, 254 (3rd Cir. 2001) (condition prohibiting defendant from possessing "all forms of pornography, including legal adult pornography" is "unconstitutionally vague because it fails to provide any method for [defendant] or his probation officer to distinguish between those items that are merely titillating and those items that are 'pornographic'").

[119] See *Thielemann*, 575 F.3d at 277, *cert. denied*, 130 S. Ct. 1109 (U.S. 2010); *Rearden*, 349 F.3d at 620; *see also* United States v. Boston, 494 F.3d 660, 667-68 (8th Cir. 2007) (upholding prohibition on possessing "any form of pornography, sexually stimulating or sexually oriented material" as not overly broad given defendant's "history of sexual offenses and the desire to deter him from this conduct in the future").

[120] *See* United States v. Daniels, 541 F.3d 915, 928-29 (9th Cir. 2008) (upholding condition that prohibited defendant from working in an occupation that "causes him to regularly contact persons under the age of 18" as reasonable); United States v. Johnson, 446 F.3d 272 (2d Cir. 2006) (upholding condition because, generally, inadvertent violations of a condition are excused and incidental contact with minors followed by immediate removal will not result in revocation); United States v. Mickelson, 433 F.3d 1050 (8th Cir. 2006) (upholding condition barring contact with children despite defendant's slight criminal record because requiring prior approval before contact with minors ensures that such contact remains appropriate; a blanket exception for defendant's grandchildren was unnecessary because defendant can seek approval to visit his grandchildren); United States v. Crume, 422 F.3d 728 (8th Cir. 2005)

that infringed on defendant's right to associate with his girlfriend, another consenting adult who had young children, was upheld in the First Circuit as reasonably related to sentencing goals because the condition prevented recidivism and protected the children from harm.[121] By contrast, the Second Circuit vacated as overly vague and not reasonably related to sentencing goals a condition requiring defendant to "notify the Probation Department when he establishes a significant romantic relationship and . . . inform the other party of his prior . . . sex offenses."[122] Similarly, the Third, Eighth, Ninth, and Tenth Circuits will not uphold conditions that lack clarity or conditions totally restricting access to family members where there is no evidence the defendant has sexually abused a child.[123]

Courts have addressed sex offenders' challenges based on the Fifth Amendment right against self-incrimination in two contexts. First, defendants challenge the condition mandating participation in sex offender therapy that requires admission of past sexual conduct without a grant of immunity. Only the Ninth Circuit has held that a district court may not revoke a sex offender's supervised release for refusing to make incriminating statements during mandated

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(upholding condition barring defendant from places where children congregate, such as residences, beaches, and parks, interpreting same to mean only places where children actually congregate; condition prohibiting defendant from contact with children upheld because defendant can petition his parole officer to visit his own children); *but see* United States v. Myers, 426 F.3d 117 (2d Cir. 2005) (vacating and remanding a condition requiring defendant convicted of child pornography offense to obtain permission from the probation officer before visiting his son because the record at sentencing was insufficient to determine whether the condition was reasonable, related to the sentencing goals, and represented no greater deprivation of liberty than is necessary).

[121] *See* United States v. Roy, 438 F.3d 140 (1st Cir. 2006).

[122] United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) (notification requirement not reasonably necessary where nothing in the record suggested defendant had been a threat to a romantic partner and where requirement might prematurely end any intimate relationship, thereby increasing the risk of social isolation and impairing his rehabilitation).

[123] *See* United States v. Blinkinsop, 606 F.3d 1110 (9th Cir. 2010) (remanding for district court to consider whether it should narrowly tailor special condition that prohibited defendant, who was convicted of possessing a large amount of child pornography, from going to or loitering near places primarily used by children under age of 18 so as to permit defendant to attend school events involving his children with prior permission of probation officer); United States v. Smith, 606 F.3d 1270 (10th Cir. 2010) (upholding district court's imposition of special condition of supervised release limiting the defendant's ability to have contact with children and disabled adults was reasonable, subject to reconsideration of their application to the defendant's own child and minor siblings once defendant was released from prison; defendant was convicted of raping an unconscious adult woman); United States v. Voelker, 489 F.3d 139 (3d Cir. 2007) (remanding ban on association with minors, on plain error review, for clarification whether district court intended ban to extend to defendant's own children and to guide the exercise of probation officer's discretion on association); United States v. Davis, 452 F.3d 991 (8th Cir. 2006) (remanding for consideration of condition banning association with minors, on plain error review, where there was no evidence that defendant ever abused a child).

therapy.[124] Second, defendants challenge conditions requiring them to submit to polygraph tests as violating their privilege against self-incrimination. The Second, Third, Fourth, Tenth, and Eleventh Circuits value polygraph testing as a reasonable condition for sex offenders because it ensures compliance with other conditions of supervision and furthers sentencing goals of rehabilitation and deterrence. These courts have found no Fifth Amendment violation in the requirement of polygraph testing, so long as an offender is permitted to challenge the use of incriminating statements if a separate prosecution is brought based on any compelled answers.[125] The First Circuit, however, "declin[ed] to issue a blanket decision on the propriety of polygraph testing as a tool of supervised release" in the face of questionable accuracy of such testing coupled with the district court's order disallowing any revocation proceedings based solely on test results.[126]

Sex offenders also have challenged conditions requiring them to undergo penile plethysmograph testing, which measures sexual arousal in response to visual and auditory stimuli. The test requires a male to place a device on his penis that measures its circumference as a measure of arousal.[127] The test sometimes requires self-stimulation and can last two or

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[124] United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005) (revocation of supervised release for refusal to answer sexual history questions violated Fifth Amendment right against self-incrimination); *but cf.* Ainsworth v. Stanley, 317 F.3d 1 (1st Cir. 2002) (consequences of refusal to answer sexual history questions in prison sex-offender treatment program were not severe enough to raise Fifth Amendment concerns because participants faced no additional penalties for refusal to answer); Defoy v. McCullough, 301 F. App'x 177 (3d Cir. 2008) (denial of reparole based in part on inmate's refusal to undergo sex offender treatment did not violate Fifth Amendment).

[125] *Johnson*, 446 F.3d at 272 (condition furthered sentencing goals of rehabilitation and deterrence without excessive deprivation of liberty; nor does the condition violate defendant's Fifth Amendment rights because revocation is an administrative decision that can be made based on a refusal to answer questions, and defendant can later invoke the privilege against self-incrimination in a court of law); United States v. Dotson, 324 F.3d 256 (4th Cir. 2003) (condition upheld because polygraph test results would not be made public and test is a potential treatment tool); United States v. Zinn, 321 F.3d 1084, 1089-90 (11th Cir. 2003) (polygraph testing to ensure compliance with other conditions of supervised release was reasonably related to the offense and defendant's history); United States v. Lee, 315 F.3d 206 (3d Cir. 2003) (condition upheld because it enhances supervision, the scope of the examination is properly interpreted as limited to that which relates to supervision of defendant, and the condition imposes no great restriction on liberty because the defendant is already directed to report to the probation officer; nor does the condition violate defendant's Fifth Amendment rights because the condition itself does not require defendant to answer incriminating questions); *see also* United States v. Morgan, 44 F. App'x 881 (10th Cir. 2002) (condition requiring defendant to self-report any violation of his supervised release upheld because defendant may assert his Fifth Amendment right if he is ever penalized for legitimately exercising his right).

[126] United States v. York, 357 F.3d 14, 23 (1st Cir. 2004).

[127] *See* United States v. Weber, 451 F.3d 552, 561-62 (9th Cir. 2006) (quoting Berthiaume v. Caron, 142 F.3d 12, 13 (1st Cir. 1998);) Doe *ex rel*. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1262 (9th Cir. 2000)).

three hours.[128] The Fourth and Tenth Circuits have upheld these conditions as reasonably related to the treatment of sex offenders and the goals of sentencing,[129] although the Ninth Circuit has held that the strong liberty interest in freedom from unwanted bodily intrusions or manipulations requires that sentencing courts justify the condition as necessary to a particular defendant through specific findings and a developed evidentiary record.[130] Abel testing, another type of testing that measures visual reaction time to gauge an individual's sexual interest in various categories of adults and children, does not impinge upon this liberty interest, according to the Ninth Circuit.[131]

3. Special Conditions Set By Local District Rules

Many federal districts use their own customized forms listing mandatory and standard conditions of supervised release. Some districts include additional special conditions found neither in the guidelines nor the statutes for defendants convicted of certain offenses. For instance, in the District of New Jersey, such special conditions include: gambling treatment, with registration on a casino self-exclusion list; refraining from entering the Gateway National Park; no contact with minors; submission to polygraph testing; and not liquidating interest in any asset unless in direct service of a fine obligation.[132] In the Eastern District of Virginia, special conditions include: waiving rights of confidentiality regarding mental health treatment; anger management treatment; not engaging "in any aspect of the banking business, or any similar occupation where the defendant would have access to money"; penile plethysmograph testing to be paid for by defendant; no paid or volunteer positions involving children; no "pornographic material or pictures displaying nudity or any magazines using young juvenile models or pictures of juveniles under the age of 18"; no contact with minors without supervision; no owning or being in the presence of domesticated animals "such as dogs, sheep, goats, etc."; no "spamming or email bombing"; no selling items on the Internet without pre-approval; no sex-related adult telephone services or websites, or electronic bulletin boards; and no video game system, console "or other such device which would enable contact and/or the

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[128] *See Weber*, 451 F.3d at 562 (citing Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 8-9, 23 (2004)).

[129] See United States v. Dotson, 324 F.3d 256, 260-61 (4th Cir. 2003); United States v. Morgan, 44 F. App'x 881 (10th Cir. 2002).

[130] *Weber*, 451 F.3d at 552.

[131] United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008).

[132] UNITED STATES PROBATION OFFICE, DISTRICT OF NEW JERSEY, SPECIAL CONDITIONS (2006). *Available at* http://www.njp.uscourts.gov/services/supervision/conditions-overview/special-conditions.php.

sharing of data with other individuals known or unknown to the defendant."[133] The Southern District of New York lists certain sex offender specific conditions: no contact with any child under 17, no loitering within 100 feet of schoolyards, playgrounds, arcades, or other places primarily used by children under the age of 17; no contact with the victim of the offense; no use of a computer, Internet-capable device, or similar electronic device to access child pornography or promote sexual relations with children.[134]

Other districts have modified mandatory or standard conditions. For instance, the District of Arizona reduces the time allowed a defendant to notify the probation officer following arrest or questioning by a law enforcement officer from 72 hours (listed in USSG §5D1.3(c)(11)) to "immediately," or within 48 hours if during a weekend or holiday.[135] The Middle District of North Carolina requires the defendant to submit to substance abuse testing "at anytime, as directed by the probation officer" in contrast to USSG §5D1.3(a)(4), which requires one drug test within 15 days of release and at least two thereafter.[136]

Courts also occasionally craft "unique" conditions of supervision. The Ninth Circuit upheld a condition that required an offender to wear a sign that read "I stole mail; this is my punishment."[137] The Eighth Circuit vacated a condition prohibiting defendant from fathering a

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[133] Information about supervised release conditions in the Eastern District of Virginia was provided to Sentencing Commission staff by William Byerley, United States Probation Officer, E.D.Va.

[134] Information about supervised release conditions in the Southern District of New York was provided to Sentencing Commission staff by Christopher Palladino, Assistant Deputy Chief U.S. Probation Officer, S.D.N.Y.

[135] UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, STANDARD CONDITIONS OF SUPERVISED RELEASE (2005), *available at*: http://www.azd.uscourts.gov/azd/courtinfo.nsf/94f84d258ee1614707256eba006022ac/765c021ebe2a624d072570ee007bb802/$FILE/05-36.pdf.

[136] UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA, CONDITIONS OF PROBATION (2001), *available at*: http://www.ncmp.uscourts.gov/docs/Supervision%20Conditions.pdf.

[137] United States v. Gementera, 379 F.3d 596, 602 (9th Cir. 2004) ("Read in its entirety, the record unambiguously establishes that the district court imposed the condition for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and for the protection of the public.")

child with a woman other than his wife.[138] The Ninth Circuit vacated a condition of probation requiring a convicted draft-dodger to donate a pint of blood to the Red Cross.[139]

4. Procedural Issues Related to Conditions

Several courts of appeals have held that a district court must give a defendant reasonable presentence notice before imposing a special condition of supervised release.[140] However, citing the Supreme Court's decision in *Irizarry v. United States*[141] and disagreeing with the other circuit courts that have required such notice, the Eleventh Circuit has held that a district court was not required to notify the defendant before imposing a special condition where the defendant could not show that he was prejudiced by the lack of notice (insofar as the presentence report contained all of the information upon which the court based the special condition).[142] Those courts of appeals that have required advance notice have held that a defendant is considered to have notice of any condition of supervised release that is listed as a mandatory or discretionary condition in the sentencing guidelines.[143]

The district court maintains the ultimate authority to supervise, evaluate compliance with, and enforce all conditions of supervised release because "a probation officer may not decide the nature or extent of the punishment imposed" upon an offender on supervised

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[138] United States v. Smith, 972 F.2d 960, 962 (8th Cir. 1992) ("There is no reason to believe that restricting Smith from fathering more children will deter Smith from future criminal conduct, protect the public, or assist in Smith's rehabilitation. Furthermore, the right to have offspring is a sensitive and important area of human rights.") (citation and internal quotation marks omitted).

[139] Springer v. United States, 148 F.2d 411, 416 (9th Cir. 1945) ("[W]e regard the requirement that a pint of blood be given as invading the physical person in an unwarranted manner and void on its face.")

[140] *See, e.g.*, United States v. Cope, 527 F.3d 944, 953 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 321 (2008); United States v. Angle, 234 F.3d 326, 347 (7th Cir. 2000); United States v. Coenen, 135 F.3d 938 (5th Cir. 1998).

[141] 553 U.S. 708 (2008) (ordinarily, a sentencing court need not give presentence notice that a court intends to "vary"— as opposed to "depart" — from the applicable guidelines' sentencing range).

[142] United States v. Moran, 573 F.3d 1132, 1138 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1879 (2010). In an unpublished decision, the Fourth Circuit also has held that "there is no explicit requirement for advance notice of a special condition of supervised release," although the court did not cite *Irizarry*. *See* United States v. Green, 326 F. App'x 197, 198 (4th Cir. 2009).

[143] *See, e.g.*, United States v. Lopez, 258 F.3d 1053 (9th Cir. 2001) (no notice required for a condition of supervised release that is contemplated by the guidelines).

release.[144] The probation officer is, however, "an investigatory and supervisory arm of the sentencing court," and is given wide discretion in enforcing conditions of supervised release.[145] Probation officers are permitted to make administrative determinations that the court did not address at the original sentencing.[146] The courts' ability to delegate authority to a probation officer is limited, however, and the Third Circuit in particular has discussed these limits. If the court delegates to the probation officer substantive aspects of a defendant's sentence as opposed to simple administrative details, or if the condition is subject to the *ad hoc*, subjective interpretation of the probation officer, it will not be upheld.[147] The Eighth Circuit held that as long as the condition provides a definitive standard capable of implementation free from the personal opinions of the probation officer, the condition will stand.[148] For example, though a

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[144] United States v. Pruden, 398 F.3d 241, 250 (3d. Cir. 2005) (citing Ex parte United States, 242 U.S. 27, 41-42 (1916) ("under our constitutional system the right to . . . impose punishment provided by law is judicial . . . .").

[145] *See* United States v. Talbert, 501 F.3d 449 (5th Cir. 2007) (no improper delegation to probation officer to determine whether state law required defendant to register as a sex offender).

[146] *See id.*

[147] *See* United States v. Heckman, 592 F.3d 400 (3d Cir. 2010) (condition requiring defendant to "follow the directions of the . . . Probation Office regarding any contact with children of either sex under the age of 18" was an improper delegation of authority under plain error review); United States v. Mangan, 306 F. App'x 758 (3d Cir. 2009) (vacating condition that bestowed upon the probation officer the authority to determine the type of mental health program and the duration of treatment, if any, because the district court must determine these substantive aspects of defendant's sentence); *Pruden*, 398 F.3d at 241 (plain error to give probation officer authority to decide whether defendant will have to participate in a mental health treatment program); United States v. Loy, 237 F.3d 251 (3d Cir. 2001) (vacating pornography condition as without a definite standard to guide the probation officer's discretion because of the danger that the prohibition on pornography "may ultimately translate to a prohibition on whatever the officer personally finds titillating"); *see also* United States v. Nash, 438 F.3d 1302, 1306 (11th Cir. 2006) (condition delegating to the probation officer the "ultimate responsibility" of determining whether defendant would participate in mental health counseling was plain error because "the court, and only the court, [may] impose 'a condition requiring that the defendant participate in a mental health program'") (quoting United States v. Heath, 419 F.3d 1312, 1315 (11th Cir. 2005)).

[148] *See* United States v. Wynn, 553 F.3d 1114 (8th Cir. 2009) (limited delegation of authority to probation officer whether to order mental health counseling upheld where probation officer would likely consult with the court about the matter or where court would consider a motion to reconsider probation officer's decision); United States v. Smart, 472 F.3d 556 (8th Cir. 2006) (no indication that district court abdicated its ultimate authority over defendant's conditions of supervised release); *cf.* United States v. Betts, 511 F.3d 872, 876-77 (9th Cir. 2007) (district court erred by delegating to the probation office how restitution payment terms would be affected by any financial windfalls received by defendant); United States v. Kent, 209 F.3d 1073, 1076 (8th Cir. 2000) (district court indicated that it improperly granted final authority to the probation officer to determine whether defendant had to undergo psychiatric treatment when the court stated it hoped not to be "riding herd" on the probation officer's decision); *see also* United States v. Bender, 566 F.3d 748 (8th Cir. 2009) (condition requiring defendant to submit to "lifestyle restrictions" imposed by a therapist was not an improper delegation of authority because there was no indication that the court would relinquish ultimate authority over the condition).

court may not delegate entirely to the probation officer the decision whether a defendant must receive mental health treatment, a court may order that the defendant comply with such treatment if the probation officer deems it appropriate after consulting with the court.

Finally, the scope-of-delegation issue arises in the context of drug testing to which offenders are subject while on supervised release. All offenders on supervised release are required to submit to a drug test within 15 days of release and at least two periodic drug tests thereafter, "as determined by the court . . . ."[149] The Ninth Circuit identified the widely accepted principle that the sentencing court must determine whether a defendant is subject to additional drug testing and how many tests an offender must undergo, but the probation officer may determine where and when the testing will occur.[150] For example, in *United States v. Stephens*, the Ninth Circuit held that the sentencing court properly determined that the defendant would undergo testing, but that it failed to determine the maximum number of drug tests to which the defendant was subject.[151] The court distinguished between drug testing ordered by the court as a specific condition of supervised release as contemplated by 18 U.S.C. § 3583(d) and drug testing ordered as part of a drug treatment program administered by substance abuse professionals; only in the former must the sentencing court determine the maximum number of drug tests.[152] In a subsequent decision, the Ninth Circuit held that when a sentencing court orders the defendant to comply with the statutorily-mandated drug testing, it implies that the testing is limited to the three tests (one within 15 days and two thereafter) contemplated by the statute. A probation officer may not order additional tests without approval by the court.[153]

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[149] 18 U.S.C. § 3583(d); USSG §5D1.3(a)(4).

[150] *See* United States v. Stephens, 424 F.3d 876, 880 n.2 (9th Cir. 2005) (citing United States v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998)) (drug testing order which required the defendants to submit to urinalysis "at random . . . within the discretion of the probation officer" was beyond the parameters of the supervised release statute and gave the probation officer too much discretion in the management of the drug testing order); United States v. Melendez-Santana, 353 F.3d 93, 103 (1st Cir. 2003) (while courts need not become involved in details such as scheduling tests, Congress assigned the courts the responsibility of stating the maximum number of tests to be performed or to set a range; they may not vest probation officers with the discretion to order an unlimited number of drug tests); United States v. Tulloch, 380 F.3d 8, 10-11 (1st Cir. 2004) (giving probation officer discretion to order unlimited drug tests is an improper delegation; allowing the probation officer to determine the timing of tests is permissible administrative task).

[151] 424 F.3d 876 (9th Cir. 2005).

[152] *See id*.

[153] *See* United States v. Garcia, 522 F.3d 855 (9th Cir. 2008).

B. Defendant's Service of a Term of Supervised Release

1. Commencement of Supervised Release

Once an offender has finished serving his sentence of imprisonment (including in any community-based facility under contract with the Bureau of Prisons, such as a halfway house) and is released from such confinement, the term of supervised release commences.[154] Even if an offender erroneously is kept in custody beyond the date when he or she should have been released, the term of supervised release does not commence on the date that the offender *should* have been released; it begins on the date he or she is actually released.[155]

2. Tolling of the Term of Supervised Release

If an offender on supervised release is required to serve a sentence of "imprisonment" in connection with a separate criminal offense (whether federal, state, or local), the time that the offender serves that sentence of imprisonment for the separate offense does not count towards the service of the term of supervised release unless the sentence is less than 30 days.[156] "Imprisonment" in this context ordinarily means time spent in a jail or prison and does not include custody in a halfway house or similar facility; the latter would not toll the supervised

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[154] 18 U.S.C. § 3624(e) ("A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer . . . . The term of supervised release commences on the day the person is released from imprisonment . . . ."); *see also* United States v. Miller, 547 F.3d 1207 (9th Cir. 2008) (inmate's term of supervised release did not commence when the Federal Bureau of Prisons transferred him to a custodial work-release program for the final portion of his federal prison sentence).

[155] United States v. Johnson, 529 U.S. 53 (2000). In *Johnson*, the Court held that the defendant was not legally entitled to reduce his term of supervised release by the extra time that he erroneously spent in the custody of the Bureau of Prisons. *Id.* at 57-59. The Court noted that, to rectify the situation, a district court, "as it sees fit, may modify an individual's conditions of supervised release" pursuant to 18 U.S.C. § 3583(e)(2) or even terminate the defendant's supervised release after he serves at least one year pursuant to 18 U.S.C. § 3583(e)(1). *Id.* at 60.

[156] 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.").

release term.[157] In addition, the time that an offender is released on bond on a new charge does not toll the term of supervised release.[158]

An issue that has divided the courts of appeals is whether the time that an offender on supervised release spends in custody *pending* disposition of a new charge tolls a term of supervised release when the offender ultimately is convicted of the new charge but only *after* the term of supervised release is originally scheduled to expire. Resolution of this issue depends on whether such an offender was "imprisoned in connection with a *conviction* for a Federal, State, or local crime" within the meaning of in 18 U.S.C. § 3624(e) (emphasis added). Some courts have held that such *pretrial* detention does not count as imprisonment and thus does not toll the term of supervised release; however, other courts have concluded that such pretrial detention does toll the term of supervised release so long as the offender ultimately was convicted and given credit for the pretrial detention (even if the conviction occurred after the date that the term of supervised release was otherwise scheduled to expire).[159]

The only express statutory "tolling" provision in 18 U.S.C. § 3624(e) concerns offenders who serve unrelated sentences of imprisonment during their terms of supervised release. Federal courts generally have refused to toll a supervised release term for other reasons[160] except in the case of an offender who absconded from supervision (although that issue has divided the federal courts of appeals).[161] Courts have refused to toll supervised release terms based on the deportation of a non-citizen offender and thus concluded that supervised release

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[157] *See, e.g.*, United States v. Sullivan, 504 F.3d 969 (9th Cir. 2007) (an offender's time in custody at a state pre-release center, which was similar to a half-way house, was not imprisonment that tolled the offender's federal supervised release).

[158] United States v. House, 501 F.3d 928 (8th Cir. 2007) (supervised release term ran when defendant was released on bond on state charges, but supervised release was tolled when defendant began serving state prison sentence).

[159] *Compare, e.g.*, United States v. Morales-Alejo,193 F.3d 1102 (9th Cir. 1999) (such pretrial detention does not toll the term of supervised release if the state conviction ultimately occurs after the term of supervised release is scheduled to expire), *with* United States v. Molina-Gazca, 571 F.3d 470 (5th Cir. 2009) (such pretrial detention tolls the term of supervised release so long as the defendant ultimately is convicted and given credit towards his sentence for the pretrial detention), *cert. denied*, 130 S. Ct. 1138 (2010).

[160] *See* United States v. Cole, 567 F.3d 110, 112-13 (3d Cir. 2009).

[161] *Compare, e.g.*, United States v. Ignacio Juarez, 601 F.3d 885 (9th Cir. 2010) (offender's absconding tolls supervise release term), *with* United States v. Hernandez-Ferrer, 599 F.3d 63 (1st Cir. 2010) (offender's absconding does not toll supervised release term).

terms continue to run during the time that an offender is out of the country.[162] Although the deportation of an offender does not toll the term of supervised release during the time that the offender is outside of the country, deportation does not extinguish the term of supervised release. Therefore, if a deported offender returns to the United States during the period of supervision (thereby violating the terms of supervised release), the sentencing court has jurisdiction to revoke the offender's supervised release, assuming a petition to revoke is filed before the expiration of the supervised release.[163]

C. Modification, Early Termination, and Revocation of Supervised Release

Depending on the circumstances, courts have the authority to modify the conditions of an offender's supervised release, to terminate it before the original expiration date, or to revoke supervised release and return an offender to prison. Before modification, termination, or revocation may occur, a court must consider the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), & (a)(7) — the same factors a court initially must consider in deciding whether to impose a term of supervised release.[164]

1. Modification of Supervised Release

Modification of supervised release is authorized by 18 U.S.C. § 3583(e) and Federal Rule of Criminal Procedure 32.1. Although a court may modify conditions after a contested hearing,[165] a hearing is not required if the offender either voluntarily waives the requirement for a hearing and consents to the modification or if "the relief sought is favorable to the [offender] and does not extend the term of . . . supervised release" and the attorney for the government is given notice and a reasonable opportunity to object but does not do so.[166] A court may extend

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[162] *See, e.g.*, United States v. Ossa-Gallegos, 491 F.3d 537 (6th Cir. 2007) (en banc); *Cole*, 567 F.3d at 112 (agreeing with the other four circuit courts that have addressed the issue).

[163] United States v. Akinyemi, 108 F.3d 777, 779 (7th Cir. 1997); United States v. Brown, 54 F.3d 234, 238 (5th Cir. 1995).

[164] *Compare* 18 U.S.C. § 3583(c), *with* 18 U.S.C. § 3583(e).

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

[166] Fed. R. Crim. P. 32.1(c)(2); *see also* United States v. Johnson, 446 F.3d 272 (2nd Cir. 2006) (after probation officer's petition requesting additional conditions, district court modified certain conditions without a hearing and modified other conditions only after a hearing).

the term of supervision (after a hearing or by consent of the defendant) only "if less than the maximum authorized term was previously imposed."[167]

2. Early Termination of Supervised Release

Under 18 U.S.C. § 3583(e)(1), a court may terminate an offender's term of supervised release "at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice." Such early terminations may occur even in cases where a statute originally required the sentencing court to impose a term of supervised release in excess of one year.[168] As discussed below, such early terminations have occurred in a relatively small percentage (12%) of total supervision cases in recent years.[169]

3. Revocation and Sentencing Proceedings

a. Procedural Issues Related to Revocation Proceedings

If the government or a probation officer supervising an offender believes that the defendant has violated one or more conditions of supervised release, the government or the probation officer is authorized to file with the court a petition to revoke supervised release; the petition need not be filed by an attorney for the government.[170] The petition serves as the "written notice of the alleged violation" of the conditions of the defendant's supervised release.[171] In response to the petition, a court may issue a summons or an arrest warrant. If the court fails to issue a summons or warrant before the date that an offender's term of supervision expires, the court loses jurisdiction to revoke supervised release (even if the probation officer's petition to revoke is filed during the supervised release term).[172]

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[167] 18 U.S.C. § 3583(e)(2).

[168] *See* United States v. Spinelle, 41 F.3d 1056 (6th Cir. 1994); United States v. Scott, 362 F. Supp. 2d 982 (N.D. Ill. 2005).

[169] *See infra* note 262 and accompanying text.

[170] *See* United States v. Ahlemeier, 391 F.3d 915 (8th Cir. 2004); United States v. Amatel, 346 F.3d 278 (2d Cir. 2003).

[171] Fed. R. Crim. P. 32.1(b)(2)(A).

[172] *See* 18 U.S.C. § 3583(i); *see also* United States v. Janvier, 599 F.3d 264 (2d Cir. 2010) (a court's mere "order" that directed the clerk to issue a warrant based on a probation officer's petition — entered before the offender's supervision release term expired — was not sufficient to maintain jurisdiction over the offender when the clerk did not issue the warrant until after the term had expired).

An offender who is arrested based on an alleged supervised release violation must be taken before a federal court "without unnecessary delay," and an offender who receives a summons must likewise appear before the court for an initial appearance.[173] The court must advise the offender of the alleged violation, advise the offender of the right to counsel (retained or appointed), and then conduct a preliminary hearing at which counsel for the government is required to establish probable cause unless the offender elects voluntarily to waive the preliminary hearing.[174] The court is authorized to release the offender on bail pending the ultimate revocation hearing, but the offender bears the burden to show he or she will not flee and does not pose a danger to any individual or to the community as a whole.[175]

If the court finds probable cause at the preliminary hearing or if the offender waives the preliminary hearing, a court with jurisdiction over the offender — which most often is the original sentencing court — then "must hold the revocation hearing within a reasonable time . . . ."[176] At the revocation hearing, the offender possesses several rights: the right to be present,[177] the right to counsel,[178] the right to disclosure of the evidence upon which the government is relying in seeking revocation of supervision or modification of its terms, the opportunity to be heard and present witnesses and documentary evidence, a limited right to confront and cross-examine adverse witnesses, and the right to a written statement by the court as to the evidence relied on and the reasons for the revocation.[179] At the revocation hearing, the

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[173] Fed. R. Crim. P. 32.1(a).

[174] Fed. R. Crim. P. 32.1(a)(3), (b); *see also* United States v. Correa-Torres, 326 F.3d 18 (1st Cir. 2003) (waiver of a supervised releasee's rights under Rule 32.1 must be knowing and voluntary).

[175] Fed. R. Crim. P. 32.1(a)(6).

[176] Fed. R. Crim. P. 32.1(b)(2).

[177] *See* United States v. Thompson, 599 F.3d 595 (7th Cir. 2010) (reversing judgment revoking defendant's supervised release term where judge presided over revocation hearing via speaker phone and, thus, defendant was not physically present in place where judge presided) (citing Fed. R. Crim. P. 32.1(b)(2)).

[178] A "defendant has a constitutional right to counsel only if the denial of counsel would violate due process of law, which ordinarily will be true only if the defendant makes a colorable claim '(i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate.'" United States v. Eskridge, 445 F.3d 930, 932 (7th Cir. 2006) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)). There is, however, a broader statutory right to counsel that applies in any case in which an offender "is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release." 18 U.S.C. § 3006(a)(1)(E).

[179] Fed. R. Crim. P. 32.1(b)(2); *see also* Morrissey v. Brewer, 408 U.S. 471 (1972).

government — typically represented by an assistant United States attorney — bears the burden of proving an alleged violation by a preponderance of evidence.[180]

Neither the rules of evidence nor the Fourth Amendment's exclusionary rule apply at revocation hearings[181] but there are constitutional limits on the introduction of certain types of hearsay.[182] A commonly recurring evidentiary issue in revocation cases is whether the results of a drug laboratory report showing that a controlled substance was detected in an offender's urine is admissible if the defendant objects and demands to confront the technician who prepared the report. The federal courts of appeals have taken inconsistent approaches in deciding whether an incriminating lab report is admissible without the accompanying

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[180] *See, e.g.*, United States v. Whalen, 82 F.3d 528 (1st Cir. 1996).

[181] *See* Fed. R. Evid. 1101(d)(3); *see* United States v. Frazier, 26 F.3d 110, 114 (11th Cir. 1994) (rules of evidence do not apply at revocation hearing); *see also* United States v. Bari, 599 F.3d 176, 179 (2d Cir. 2010) ("the Federal Rules of Evidence, except those governing privileges, do not apply at supervised release revocation proceedings"); United States v. Charles, 531 F.3d 637, 640 (8th Cir. 2008) (Fourth Amendment's exclusionary rule does not apply at revocation hearing). Although the rules of evidence are not applicable, the Jencks Act, 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2, apply to revocation hearings. *See* Fed. R. Crim. P. 32.1(e). Therefore, a party must tender a written statement of its witness to the opposing party upon request after the witness has testified on direct examination.

[182] In *Morrissey*, 408 U.S. at 471, the Supreme Court held that, in parole revocation proceedings, the Due Process Clause (as opposed to the Confrontation Clause of the Sixth Amendment) affords offenders facing revocation "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." *Id.* at 489; *see also Gagnon*, 411 U.S. at 782-86 (due process requirements are the same in probation revocation and parole revocation proceedings, including the right to confrontation absent a showing of good cause). The lower federal courts have extended this holding to supervised release revocation cases. *See, e.g.*, United States v. Lloyd, 566 F.3d 341, 343 (3d Cir. 2009) ("Due process requires that supervise releasees retain at least a limited right to confront adverse witnesses in a revocation hearing.") (citing *Morrissey*, 408 U.S. at 489); United States v. Hall, 419 F.3d 980, 986 (9th Cir. 2005). (The defendant "enjoys a due process right to confront witnesses against him during his supervised release proceedings."). This requirement also has been codified in Federal Rule of Criminal Procedure 32.1(b)(2)(C).

Note, however, that the Court in *Morrissey* also held "the process [in revocation hearings] should be flexible enough to consider evidence . . . that would be inadmissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489. Some lower courts have interpreted this passage to mean that "reliable" hearsay – *i.e.*, that which falls within well established exceptions to the hearsay rule – is admissible at revocation hearings even without a showing of good cause for the lack of the declarant. *See, e.g.*, *Hall*, 419 F.3d at 987 ("[L]ong-standing exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding."); United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006) ("[W]e have interpreted *Morrissey* and *Gagnon* to permit the admission of *reliable* hearsay at revocation hearings without a specific showing of good cause."); *but see* United States v. Lloyd, 566 F.3d 341, 344 (3d Cir. 2009) (noting the division among the federal courts of appeals concerning whether good cause is required if an out-of-court statement falls within a well-established exception to the hearsay rule).

testimony of the technician when the defendant disputes the results of a positive drug test and no other evidence of drug use or possession is offered.[183]

b. Mandatory Grounds for Revocation

i. Statutory Provisions

Under 18 U.S.C. § 3583(g), revocation of supervised release followed by some amount of imprisonment is mandatory in certain situations: (1) when an offender possesses a controlled substance under some circumstances (discussed below); (2) when an offender unlawfully possesses a firearm; (3) when an offender refuses to comply with drug testing imposed as a condition of supervised release; and (4) when an offender has four positive drug tests over the course of one year. In the case of a federal sex offender who is required to register under the Sex Offender Registration and Notification Act (SORNA),[184] 18 U.S.C. § 3583(k) requires the revocation of the offender's supervised release if the court finds that the offender "commit[ted]" a specified offense[185] while on supervised release. In such a case, where the offense occurred on or after July 27, 2006,[186] the court must sentence the offender to a term of imprisonment of "not less than 5 years" and is not limited by the provisions in 18 U.S.C. § 3583(e)(3) governing revocation proceedings. In all other situations involving violations of the conditions of supervised release, revocation under section 3583 is discretionary rather than mandatory.

Section 3583(d) provides a limited exception to the requirement that a court incarcerate an offender for possessing drugs: if a failed drug test constitutes the sole evidence of drug possession, and if the court finds that an offender would benefit from "an appropriate substance abuse treatment program," the court may substitute drug abuse treatment for imprisonment.[187] This exception is not available if a court finds that a defendant had been in

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[183] *Compare*, *e.g.*, United States v. Martin, 984 F.2d 308 (9th Cir. 1993) (lab reports are inadmissible under such circumstances, at least when the court refuses the defendant's request to retest the urine sample), *with* United States v. Pierre, 47 F.3d 241 (7th Cir. 1995) (upholding admission of lab reports as sufficiently reliable and not requiring live testimony of lab technician).

[184] 42 U.S.C. § 16913.

[185] Section 3583(k) lists, as predicate offenses, "any criminal offense under Chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than a year can be imposed." 18 U.S.C. § 3583(k). These predicate crimes include child pornography offenses, sexual abuse of minors, and kidnapping.

[186] *See* Adam Walsh Act, Pub. L. No. 109–248, 120 Stat. 587 (2006).

[187] *See* United States v. Hammonds, 370 F.3d 1032, 1035-36 (10th Cir. 2004).

actual *knowing* possession of illegal drugs (as opposed to merely failing a drug test).[188] The federal courts of appeals have concluded that a failed drug test together with any proof of *knowing* possession (direct or circumstantial) is generally sufficient evidence upon which to find that a defendant does not qualify for the exception to mandatory revocation and imprisonment under section 3583(d).[189]

ii. Guidelines Provisions

Sections 7B1.1 through 7B1.3 of the guidelines set forth three grades of violations of supervised release conditions — Grades A through C. Section 7B1.3 provides that "[u]pon a finding of a Grade A or B violation, the court shall revoke probation or supervised release"; the court "may" do so for Grade C violations, although revocation is recommended for an offender who commits a Grade C violation after previously having been reinstated on supervised release following an earlier violation.[190] Grade A violations involve federal, state, or local offenses punishable by more than one year of imprisonment, which constitute crimes of violence or drug trafficking offenses or involve possession of a firearm or destructive device. "Crimes of violence" and "drug trafficking" crimes are defined in USSG §4B1.2.[191] Grade B violations include any other federal, state, or local offenses punishable by more than one year of imprisonment. Grade C violations are federal, state, or local offenses punishable by one year or less in prison or a violation of any other condition of supervision (including "technical"

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[188] United States v. Piece, 132 F.3d 1207, 1208 (8th Cir. 1997).

[189] *See Hammonds*, 370 F.3d at 1035-36 n.2 (discussing the decisions of several circuits); *see also* United States v. Courtney, 979 F.2d 45, 49-50 n.5 (5th Cir. 1992) ("[I]t would not, for sentencing or supervised release purposes, be either 'use' or 'possession' if one believed the ingested substance was some other (non-controlled) substance or ingested it involuntarily or unknowingly. If evidence establishes that a positive result from a drug test is at a level such that passive inhalation or similar phenomenon may not reasonably account for it, then the district court may find that the defendant knowingly and voluntarily had, alone or jointly with others, actual physical control over the drug, or the power and intent to exercise dominion or control over it, and was hence in possession of it. The district court may ordinarily rely solely on this evidence, but being the trier of fact, its duty, of course, is to draw the appropriate inferences and determine 'factual contentions and whom to believe.'"); *but cf.* United States v. Blackston, 940 F.2d 877, 891 (3d Cir. 1991) (suggesting that failed drug test with other evidence of voluntary ingestion is some evidence, but not necessarily conclusive evidence, of possession); *id.* at 895 (Nygaard, J., concurring) ("[Unlike the majority,] I would hold that laboratory analysis confirming illegal drug use alone constitutes 'possession' for purposes of § 3583(g)."). A former application note following USSG §7B1.4, comment. (n.5) provided: "The Commission leaves to the court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. §§ 3565(a) and 3583(g)." The Commission deleted that application note in 1995. *See* USSG App. C, Amend. No. 533.

[190] USSG §7B1.3(a)(1), (2); *see also id.*, comment. (n.1).

[191] *See* USSG §7B1.1, comment. (nn. 2, 3).

violations such as failure to report to a probation officer).[192] Notably, a conviction for a new offense is not necessary for a finding of a violation, and proof of culpable conduct by a preponderance of the evidence is sufficient for revocation.[193] If the government alleges that an offender committed a new offense while under supervision, evidence of the fact that a defendant was convicted of a new offense generally is sufficient by itself to prove that the defendant committed the new offense, unless the defendant pleaded no contest to the charge.[194] In the latter situation, a no contest plea may or may not be sufficient evidence to prove that the defendant violated the terms of supervised release depending on the legal effect of such a plea under state law.[195]

Although USSG §7B1.3 is written in mandatory terms ("the court shall revoke") for Grade A and B violations, Chapter Seven of the *Guidelines Manual* contains only non-binding policy statements.[196] The only truly mandatory grounds for revocation are the four grounds set forth in 18 U.S.C. § 3583(g), which are discussed above. In all other cases in which a violation is found, the court may opt not to revoke supervised release and incarcerate the offender and, instead, continue him or her on supervision (under the same terms or with modified terms), extend the term of supervision, or sentence the offender to a term of home detention in lieu of incarceration.[197] Before doing so, however, the court must first consider the pertinent

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[192] USSG §7B1.1(a)(1)-(3).

[193] USSG §7B1.1, comment. (n.1) ("The grade of violation does not depend on conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.").

[194] *See, e.g.*, United States v. Hofierka, 83 F.3d 357, 363-64 (11th Cir.1996).

[195] *Compare* United States v. Poellnitz, 372 F.3d 562, 567-70 (3d Cir. 2004) (no contest plea under Pennsylvania law did not establish by a preponderance of the evidence that the offender violated the conditions of his federal supervised release), *with* United States v. Verduzco, 330 F.3d 1182, 1185 (9th Cir. 2003) (a no contest plea under California law was sufficient evidence that the offender violated the conditions of his federal supervised release).

[196] Chapter Seven was non-binding even before the Supreme Court held that the guidelines are "advisory" in nature. *See* United States v. Booker, 543 U.S. 220 (2005). As stated in the "Introduction to Chapter Seven," the original Commission decided to issue policy statements rather than guidelines to provide greater "flexibility" but stated the Commission's "inten[t] to promulgate revocation guidelines . . . [a]fter an adequate period of evaluation." USSG, Ch.1, Pt.A, intro. comment. The Commission stated that the original Chapter Seven policy statements were "the first step in an evolutionary process." *Id.*

[197] 18 U.S.C. § 3583(e)(1)-(4).

provisions in Chapter Seven of the guidelines.[198] Failure to do so will constitute reversible error on appeal.[199]

c. Sentencing Following Revocation

If a court revokes a defendant's supervised release, the court next must decide what sentence to impose. The most common issues that arise at the sentencing phase of a revocation proceeding concern (1) the maximum length of a prison sentence that the court may impose and (2) the amount of any "recommenced"[200] supervised release to follow imprisonment that the court may impose.

i. Maximum Term of Imprisonment Upon Revocation

The statutory maximum term of imprisonment that may be imposed upon revocation is governed by 18 U.S.C. § 3583(e)(3). That section provides, in pertinent part, that —

> The court may . . . revoke the 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 a defendant whose term of supervised release 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

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[198] *See* 18 U.S.C. §§ 3553(a), 3583(e).

[199] *See, e.g.*, United States v. Yopp, 453 F.3d 770, 773 (6th Cir. 2006) ("Viewing the transcripts and record, there is no evidence of the district court's consideration of the Chapter Seven policy statements. For this reason, the sentence must be vacated.").

[200] "Recommenced" supervised release refers to further supervision that a court may order after a defendant's supervised release term has been revoked and the defendant is ordered back to prison. In the early years after supervised release was instituted, the sentencing guidelines referred to such additional supervised release as "recommence[d]" supervision — in apparent recognition of the fact that the original term began again (*i.e.*, recommenced) upon the defendant's release from prison after serving the revocation term. *See* USSG §7B1.3(g)(2) (1993 edition); *see also Johnson v. United States*, 529 U.S. 694, 701-02 (2000). In 1994, as discussed above, Congress amended 18 U.S.C. § 3583 to allow for an entirely new term of supervision to follow imprisonment as a sanction for violation of the original term of supervised release. Thus, strictly speaking, since 1994, such additional supervised release is not "recommenced." Nonetheless, because courts today continue to refer to such additional terms as "recommenced" terms, *see, e.g.*, United States v. Williams, 2009 WL 2485539, at *1 (E.D. Tex. 2009), this paper shall use that expression as well.

class B felony, more than 2 years in prison if such an offense is a class C or D felony, or more than one year in any other case . . . ."[201]

In 1994, section 3583(e)(3) was amended by the addition of the phrase "authorized by statute" following "term of supervised release."[202] The clear intent of Congress in adding that language was to permit a sentencing court to impose a prison sentence upon revocation that exceeded the length of the original term of supervised release imposed, assuming the original term was less than the statutory maximum term available.[203] The prior version of the statute allowed imprisonment upon revocation for "all or part of the [original] term of supervised release" but did not specify whether it referred to the term originally *imposed* or, instead, the maximum *authorized* term. The lower courts have divided over the interpretation of the prior version of section 3583 in cases with offenses committed prior to the effective date of the 1994 amendment (September 13, 1994). Some courts have held that the maximum term of imprisonment upon revocation is limited to the length of the original term of supervised release actually imposed by the district court (assuming it was less than the statutory maximum otherwise set forth in section 3583(e)(3)). Other courts have held that the maximum term of imprisonment available is the statutory maximum term of supervised release that was authorized by statute whether or not such a maximum term was in fact imposed.[204]

A recurring issue about authorized sentence length upon revocation concerns those cases in which an offender is subject to multiple, sequential revocation proceedings while on

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[201] 18 U.S.C. § 3583(e)(3).

[202] Violent Crime Control Act of 1994, Pub. L. No. 103–322, § 110505, 108 Stat. 1796 (1994).

[203] *See* United States v. Palmer, 380 F.3d 395, 397-98 (8th Cir. 2004) (en banc).

[204] *Compare, e.g.*, United States v. Roach, 303 F. App'x 332, 336 (6th Cir. 2008) ("[W]e conclude that the district court did not err in sentencing Roach to a term of imprisonment that exceeded his original period of supervised release.") (citing United States v. Marlow, 278 F.3d 581 (6th Cir. 2002)), *with* United States v. Russell, 340 F.3d 450, 457 (7th Cir. 2003) ("[W]e conclude that the district court exceeded its authority under § 3583(e)(3) by sentencing the defendant to a combined term of reincarceration and additional supervised release 22 months over his original term of supervised release.") (expressly disagreeing with *Marlow*). In Johnson v. United States, 529 U.S. 694 (2000), the majority stated in dicta that, in a case in which "less than the maximum [term of supervised release was originally imposed], a court [at a revocation hearing] presumably may, before revoking the term, extend it pursuant to [18 U.S.C.] § 3583(e)(2); this would allow the term of imprisonment to equal the term of supervised release authorized for the initial offense." *Id.* at 712. However, Justice Kennedy, in a concurring opinion, stated that he would not "suggest as the Court does, that a court could extend a term of supervised release pursuant to § 3583(e)(2) prior to revoking the term under § 3583(e)(3)." *Id.* at 714 (Kennedy, J., concurring in part).

supervision. Until April 30, 2003, when section 3583 was amended by the PROTECT Act,[205] in "calculating the maximum term of imprisonment to impose upon revocation of a defendant's supervised release, the district court was required to subtract the aggregate of length of any and all terms of . . . imprisonment [imposed in prior revocation proceedings] from the statutory maximum."[206]

The PROTECT Act amended 18 U.S.C. § 3583(e)(3) to eliminate the requirement that a court subtract imprisonment imposed in prior revocation proceedings in determining the maximum term of imprisonment available in subsequent revocation proceedings. The maximum term of imprisonment available to impose thus starts anew with each revocation. Courts no longer have to aggregate time served on prior revocations and subtract it from the maximum available prison term.[207]

ii. Maximum Length of Recommenced Term of Supervised Release

The maximum term of recommenced supervised release that may be imposed upon revocation is governed by 18 U.S.C. § 3583(h), which provides —

> 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 recommenced] term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term 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.

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[205] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003).

[206] United States v. Knight, 580 F.3d 933, 937 (9th Cir. 2009) (discussing the law in effect 1987 through 2003).

[207] *Id.* at 937-38 ("[I]t is clear that Congress intended to ensure that a district court is no longer required to reduce the maximum term of imprisonment to be imposed upon revocation by the aggregate length of prior revocation imprisonment terms. In the 2003 Amendment, Congress added the phrase 'on any such revocation' to § 3583(e)(3). Pub. L. No. 108–21, § 101, 117 Stat. 650, 651. Although the addition of the phrase 'on any such revocation' was the only change to § 3583(e)(3), the impact of this revision is substantial. The amended language of § 3583(e)(3) now explicitly states that the statutory maximum term of imprisonment . . . applies 'on any such revocation.' Accordingly, under the amended version of § 3583(e)(3), it is clear that defendants are not to be credited for prior terms of imprisonment imposed upon revocation of their supervised release."); *see also* Douglas A. Morris, *FYI: Supervised Release and How the PROTECT Act Changed Supervised Release*, 18 FED. SENT. REP. 182 (Feb. 2006); Joe Gergits, *Looking at the Law: Update to Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, 69 FED. PROBATION 35, 39-40 (2005).

Section 3583(h) was added by Congress as part of the 1994 amendment discussed above and applies to cases in which the offense was committed on or after September 13, 1994.[208] Section 3583(h) was amended by the PROTECT Act to eliminate the statute's previous limitation on a court's imposing a recommenced term of supervised release in a case in which the court had revoked an offender's supervised release and imposed the statutory maximum prison sentence. Therefore, in cases with offenses committed on or after April 30, 2003, section 3583(h) "permits a court revoking supervised release to impose another term of supervised release regardless of the length of imprisonment imposed."[209]

Section 3583(h) conditions the maximum recommenced term of supervised release available at the revocation proceeding upon the maximum term *authorized* for the original criminal offense and not on the amount of supervised release actually *imposed* at the original sentencing.[210] In *Johnson v. United States*, however, the Supreme Court held that, for cases in which the offense occurred before that date, the former version of section 3583(e) independently authorized a recommenced term of supervised release following revocation of the original supervised release and imprisonment.[211]

In the case of multiple, sequential revocation proceedings involving the same offender, the PROTECT Act amendment to section 3583 addressed only the amount of imprisonment that could be imposed in subsequent revocation proceedings but did not affect the amount of recommenced supervised release that could be imposed in such subsequent proceedings. Section 3583(h), both before and after the PROTECT Act, has provided that the length of the recommenced 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*."[212] According to the

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[208] *See Johnson*, 529 U.S. at 701-02.

[209] Gergits, *Looking at the Law*, *supra* note 207, at 39-40.

[210] *See, e.g.*, United States v. Jackson, 559 F.3d 368 (5th Cir. 2009) (although sentencing court originally imposed a three-year term of supervised release for a defendant convicted of a Class C drug-trafficking felony, the court was authorized at the sentencing at the revocation proceeding to impose a four-year term of recommenced supervised release because 21 U.S.C. § 841(b)(1)(C) authorizes a maximum term of lifetime supervised release); United States v. Rogers, 543 F.3d 467 (8th Cir. 2008) (although sentencing court originally imposed a three-year term of supervised release for a defendant convicted of a Class D drug-trafficking felony, the court was authorized at the sentencing at the revocation proceeding to impose a four-year term of recommenced supervised release because 21 U.S.C. § 841(b)(1)(D) authorizes a maximum term of lifetime supervised release).

[211] 529 U.S. at 704-13.

[212] 18 U.S.C. § 3583(h) (emphasis added).

only two circuit courts that have addressed the issue to date, the italicized language limits the amount of recommenced supervised release that may be imposed in a subsequent revocation proceeding by requiring the court to subtract from the original authorized term the aggregate amount of imprisonment imposed in all prior revocation proceedings.[213] Although this limitation is significant in cases in which the maximum authorized supervised term is one, three, or five years — which is true in most federal cases— it does not affect those cases in which the maximum term of supervised release is life (*e.g.*, federal drug-trafficking cases and certain sex offenses).[214] In the latter types of cases, courts may impose recommenced terms of supervised release without limit in subsequent revocation proceedings.

iii. Sentencing Guidelines' Chapter Seven Policy Statements Regarding Sentences Imposed Upon Revocation of Supervised Release

When imposing a sentence for the violation of a term of supervised release or extending the term of supervised release, a district court must consider most of the factors in 18 U.S.C. § 3553(a), including Chapter Seven of the *Guidelines Manual*.[215] As noted above, USSG §7B1.3(a)(1) provides that "the court shall revoke probation or supervised release" for offenders with Grade A or B violations and impose a term of imprisonment. The guidelines' revocation table at USSG §7B1.4 provides ranges of imprisonment for each violation grade with increasing

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[213] *See* United States v. Knight, 580 F.3d 933, 937-39 (9th Cir. 2009) ("Prior to the 2003 Amendment [to § 3583], circuit courts were in agreement that when calculating the maximum term of *supervised release* to be imposed upon revocation of a defendant's supervised release, district courts were required to subtract the aggregate length of any and all terms of imprisonment imposed upon revocation of the defendant's supervised release . . . . We see nothing in the amended version of the statute to suggest that the pre-amendment rule no longer applies. Although the 2003 Amendment clearly altered the text of § 3583(e)(3), which governs the maximum term of *imprisonment*, the 2003 Amendment did not significantly alter the relevant portions of § 3583(h), which governs the maximum term of *supervised release*.") (citations omitted; emphasis in original); *accord* United States v. Vera, 542 F.3d 457 (5th Cir. 2008).

[214] *See* Morris, *Supervised Release and How The PROTECT Act Changed Supervised Release*, *supra* note 207, at 183; *see also* United States v. Tapia-Escalera, 356 F.3d 181, 186 nn.4-5 (1st Cir. 2004); *cf. Jackson*, 559 F.3d at 369-72 (affirming revocation sentence of 15 months in prison and seven years of recommenced supervised release where the defendant originally had been sentenced to 30 months in prison and a three-year term of supervised release after being convicted of possession with intent to distribute marijuana under 21 U.S.C.§ 841(a)(1) and (b)(1)(C)).

[215] *See* 18 U.S.C. § 3583(e); United States v. Larison, 432 F.3d 921 (8th Cir. 2006); *see also* United States v. Hammons, 558 F.3d 1100 (9th Cir. 2009) (district court's failure to provide reasons for revocation sentence and failure to calculate appropriate guidelines range constituted plain error); *In re* Sealed Case, 527 F.3d 188 (D.C. Cir. 2008) (imposition of sentence that was twice the guideline range without explanation was plain error); United States v. Velasquez, 524 F.3d 1248 (11th Cir. 2008) (district court considered an improper factor in sentencing when it sentenced defendant based on the immigration judge's decision to release defendant on bond pending immigration proceedings); United States v. Vargas, 564 F.3d 618 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 308 (2009) (sentence vacated where district court erred by not considering § 3553(a) factors in extending and modifying the term of supervised release).

severity based on an offender's criminal history category at the time of the original sentencing. An offender's criminal history category at the time of the revocation hearing — assuming it is greater or lesser than the original criminal history category — is not factored into the guidelines' revocation table. This revocation table is entirely separate from the Sentencing Table in USSG, Chapter 5, Part A of the *Guidelines Manual*, which applies at original sentencing hearings. The guidelines do not discuss whether a court should order a recommenced term of supervised release in addition to a term of imprisonment for a violation of the conditions of supervision. Courts thus must exercise discretion solely under 18 U.S.C. § 3583 in terms of whether and to what extent such a recommenced term should be ordered.

iv. Concurrent and Consecutive Sentences

Under 18 U.S.C. § 3584, district courts have discretion whether to impose consecutive or concurrent sentences of imprisonment upon revocation of supervised release in the case of multiple counts of conviction.[216] Likewise, in the case of a new federal offense resulting in both a new sentence and a revocation of an existing term of supervised release, a court possesses similar discretion in deciding whether to impose a sentence of imprisonment for the new offense to run concurrently with or consecutively to the revocation sentence (unless the new offense carries a mandatory consecutive prison sentence).[217] Such discretion exists notwithstanding provisions in the advisory guidelines that call for a consecutive sentence in such cases.[218]

d. Delayed Revocation

Under 18 U.S.C. § 3583(i), a district court possesses jurisdiction to revoke a defendant's supervised release "for any period reasonably necessary for the adjudication of matters arising before [the] expiration [of the term of supervised release] if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation."[219] Furthermore,

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[216] United States v. Xinidakis, 598 F.3d 1213 (9th Cir. 2010); United States v. Gonzalez, 250 F.3d 923 (5th Cir. 2001).

[217] United States v. Rodriguez-Quintanilla, 442 F.3d 1254, 1256 (10th Cir. 2006).

[218] *See* USSG §5G1.3, comment. (n.3(C)) ("[I]n cases in which the defendant was on . . . supervised release at the time of the instant offense and has had such . . . supervised release revoked[,] . . . the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation."); *id.*, USSG §7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.").

[219] *See, e.g.*, United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005) (district court retained jurisdiction to enforce order requiring DNA sample past the expiration of supervised release because a summons alleging violation was issued

revocation after the term of supervised release has ended can be based on any violation during the term, even if that ground was not specifically listed in the petition to revoke filed during the term, as long as a warrant or summons was issued during the term on the basis of some alleged violation.[220]

D. Appellate Issues Related to Supervised Release

1. Appeal of Challenged Conditions

Challenges to conditions of supervised release are ordinarily reviewed on appeal for abuse of discretion,[221] although the issue of "whether a supervised release condition illegally exceeds the [district court's statutory authority] or violates the Constitution is reviewed *de novo*."[222] Unpreserved claims that a district court imposed an invalid condition raised for the first time on appeal are reviewed only for "plain error" under Federal Rule of Criminal Procedure 52(b).[223]

2. Appeal of Revocation Decisions

The issue of whether a district court had jurisdiction to revoke supervised release is reviewed *de novo*.[224] The district court's factual findings that a defendant violated the conditions of release are reviewed for clear error; legal conclusions are reviewed *de novo*.[225] If the government proved by a preponderance of the evidence that the defendant violated a valid condition of supervised release, the district court's decision to revoke supervised release is

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during the supervised release term).

[220] *See, e.g.*, United States v. Naranjo, 259 F.3d 379, 383 (5th Cir. 2001) (subsection (i) "permits revocation based on *any* violation of a condition of supervised release occurring during the supervision term, even if *not* contained in a petition for revocation filed during that term, so long as a warrant or summons was issued during that term on the basis of an alleged violation").

[221] *See, e.g.*, United States v. Watson, 582 F.3d 974, 981 (9th Cir. 2009); United States v. Stults, 575 F.3d 834 (8th Cir. 2009); United States v. Theilemann, 575 F.3d 265 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1109 (2010).

[222] *See, e.g.*, *Watson*, 582 F.3d at 981.

[223] *See, e.g.*, United States v. Weatherton, 567 F.3d 149, 152 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 300 (2009).

[224] *See, e.g.*, United States v. Johnson, 581 F.3d 1310 (11th Cir. 2009).

[225] *See, e.g.*, United States v. Farmer, 567 F.3d 343 (8th Cir. 2009); United States v. Kontrol, 554 F.3d 1089 (6th Cir. 2009).

reviewed for abuse of discretion.[226] With respect to appellate review of the type and length of the sentence imposed upon revocation, the federal courts of appeals are divided over whether sentences are reviewed under a *Booker*-type "reasonableness" standard or, instead, under the "plainly unreasonable" standard that uniformly was followed in supervised release appeals before *Booker*.[227]

3. Ripeness and Mootness Issues on Appeal

On a regular basis, appellate courts must decide whether a defendant's challenge to a condition of supervised release is ripe when raised on direct appeal of the original sentence (as opposed to being raised on appeal of a judgment revoking supervised release for a violation of the challenged condition). The courts of appeals have issued inconsistent decisions regarding ripeness of challenges to conditions raised on direct appeal.[228] Similarly, the courts are divided as to whether an appeal from a judgment of revocation is the appropriate point at which to challenge a condition when the challenge was not originally made on direct appeal.[229] Finally,

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[226] United States v. Black Bear, 542 F.3d 249 (8th Cir. 2008); *see also* United States v. Disney, 253 F.3d 1211 (10th Cir. 2001) (district court abused its discretion when it revoked defendant's supervised release for inquiring into address of DEA case agents because inquiry did not violate statute proscribing threats or intimidation of law enforcement officers); United States v. Turner, 312 F.3d 1137 (9th Cir. 2002) (district court abused its discretion in revoking defendant's supervised release where record did not support court's finding that defendant had incurred new debt).

[227] *Compare, e.g.*, United States v. Bungar, 478 F.3d 540 (3d Cir. 2007) ("reasonableness" standard), *with* United States v. Crudup, 461 F.3d 433 (4th Cir. 2006) ("plainly unreasonable" standard); *see also* United States v. Sweeting, 437 F.3d 1105 (11th Cir. 2006) (holding that "unreasonable" and "plainly unreasonable" have essentially the same meaning).

[228] *Compare, e.g.*, United States v. Lee, 502 F.3d 447 (6th Cir. 2007) (on direct appeal of his original sentence, defendant's challenge to a condition requiring penile plethysmograph testing was deemed not ripe for review; court held that his challenge could not be brought until after he was released from prison because there was no guarantee he would ever be subject to the test; if a probation officer sought to implement that condition, the defendant could move to modify the condition under 18 U.S.C. § 3583(e)(2) and appeal if he were to lose), *with* United States v. Weber, 451 F.3d 552 (9th Cir. 2006) (defendant's challenge to plethysmograph testing as supervised release condition was ripe for review on direct appeal and prior to the defendant's release from prison); *see also* United States v. Myers, 426 F.3d 117 (2d Cir. 2005) (challenge to constitutionality of condition that defendant convicted of possessing child pornography could not visit with his son unless supervised was ripe prior to release from imprisonment because a motion to modify the condition after release under 18 U.S.C. § 3583(e)(2) cannot challenge the lawfulness of the condition).

[229] *See, e.g.*, United States v. Brimm, 302 F. App'x 588, 589 (9th Cir. 2008) ("We also reject the government's contention that Brimm waived the right to appeal the conditions of his supervised release because he waited until after he violated the conditions before he challenged them. *Compare* United States v. Jeremiah, 493 F.3d 1042, 1044, 1046 (9th Cir. 2007) (finding jurisdiction to hear the appellant's challenges to the conditions of his supervised release during an appeal of the revocation of supervised release)"), *with* United States v. Ofchinick, 937 F.2d 892, 897 (3d Cir. 1991) ("We deem an order to be ripe for appeal in the present context when a . . . condition of probation . . . is imposed, and failure to timely appeal will result in a waiver. The imposition of such a condition or sanction, if opposed,

courts have held that a defendant's challenge to the district court's revocation of supervised release on appeal is moot if the defendant has been unconditionally released from all types of custody (including any recommenced term of supervised release) at the time that the appellate court hears the appeal.[230]

IV. Analysis of Supervised Release Data

As explained above, supervised release issues arise at three different junctures in federal criminal cases — at the original sentencing, during post-incarceration supervision, and in revocation or modification proceedings. The first, the original sentence hearing, is the only one for which the Commission's data is informative. The Commission's data include information on the rates of imposition and the lengths of terms of supervised release as well as information on certain offender and offense characteristics in cases in which supervised release is imposed. At this time, information about specific conditions of supervised release imposed by the courts and revocation and termination information are not available in the Commission's datasets. However, data obtained from the Administrative Office of the United States Courts, Office of Probation and Pretrial Services (AOUSC-OPPS) provide some relevant information about revocation and modification of supervised release terms from 2003–2008.

A. Rates of Imposition and Average Lengths of Supervised Release Terms

The Commission's Offender Datasets used for this analysis are from the period following the Supreme Court's decision on January 12, 2005, in *Booker* through the end of fiscal year 2009.[231] In the five years following *Booker*, nearly 300,000 federal offenders[232] were

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creates a controversy worthy of adjudication and is of sufficient immediacy to establish ripeness.").

[230] *See, e.g.*, United States v. Hardy, 545 F.3d 280, 284 (4th Cir. 2008) ("courts considering challenges to revocations of supervised release have universally concluded that such challenges also become moot when the term of imprisonment for that revocation ends").

[231] As authorized by Congress, the Commission's numerous research responsibilities include (1) establishing a research and development program to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices; (2) publishing data concerning the sentencing process; (3) collecting and disseminating information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in 18 U.S.C § 3553(a); and (4) collecting and disseminating information regarding the effectiveness of sentences imposed (28 U.S.C. § 995(a)(12) and (14) through (16)). Section 994(w) of title 28, United States Code, requires the chief judge of each district to ensure that within 30 days after entry of judgment in a criminal case, the Commission receives a report of sentence which includes (1) the judgment and commitment order (J&C); (2) the written statement of reasons (SOR); (3) any plea agreement; (4) the indictment or other charging document; (5) the presentence report (PSR); and (6) any other information the Commission requests. Data from these documents are extracted and coded for input into computerized databases. For each case in its Offender Dataset, the Commission routinely collects case identifiers, demographic variables, statutory information,

sentenced to prison and subsequent terms of supervised release. The majority (88.1%) of federal offenders convicted of felony and Class A misdemeanor offenses[233] during this time period were sentenced to prison. The vast majority (95.1%) of such imprisoned offenders also were sentenced to terms of supervised release. Prison sentences for offenders also sentenced to terms of supervised release were 60 months on average and the supervision terms were 41 months on average (excluding those offenders sentenced to life terms of supervision).[234] The following analysis further addresses the imposition and length of those terms in the context of statutory and guideline supervision requirements.

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the guideline provisions applied to the case, and sentencing information. All Commission data in this section are from the post-*Booker* 2005–2009 datafiles unless otherwise noted.

[232] Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed, and 42,554 who did not receive prison sentences also were excluded. Of the remaining 313,817 (offenders sentenced to prison), 451 were excluded due to missing information on imposition of supervised release. Of the 313,366 remaining offenders, 297,959 were sentenced to a term of supervised release.

[233] The Commission's datasets do not include information on Class B and Class C ("petty") misdemeanors because such offenses are not covered by the sentencing guidelines. Notably, supervised release may not be imposed in such cases. *See supra* note 16.

[234] Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. Of the remaining 313,366 offenders, 297,959 were sentenced to a term of supervised release. Of these, 4,170 were excluded due to missing length of prison sentenced imposed, 2,273 were excluded due to the imposition of a life sentence of supervised release, and 35 were excluded due to an unspecified term of supervised release.

Life terms of supervised release have been excluded from the calculation of the average because the actual term of months is unknown. Therefore, the average lengths of supervised release reported in this paper are necessarily shorter than the actual average because they do not include life terms. In its data analysis of prison terms, the Commission factors in life prison terms by treating them as 470 months. That figure is an estimate provided by the Federal Bureau of Prisons based on actuarial tables for imprisoned federal offenders. The Commission does not have comparable information for offenders sentenced to life terms of supervised release. Such life terms are relatively recent in origin and many offenders sentenced to life terms of supervised release are still serving prison sentences. For these reasons, an accurate estimate of the actual average length of a life term of supervision will not be available for many years.

1. Mandatory Supervised Release

As discussed above, supervised release is mandated by statute for some types of offenders who receive prison sentences.[235] Mandatory minimum terms of supervised release are required for drug trafficking offenses proscribed in 21 U.S.C. §§ 841, 846, 960 and 963 and are determined by the types and quantities of drugs and by prior drug convictions. In addition, convictions for distribution of drugs to specified persons or in specified places under 21 U.S.C. §§ 859(a) or 860(a) require that the mandatory terms be doubled or tripled.[236] The Commission's data indicate that, in the relevant time period, a total of 119,533 offenders were convicted under one of these statutes. Courts imposed supervised release for 99.6 percent of those sentenced to prison, and the average supervised release term for these offenders was 52 months.[237]

As noted, 18 U.S.C. § 3583(k) requires, in the case of a defendant convicted of specified sex offenses, a supervised release term of at least five years[238] and as much as lifetime supervision.[239] A total of 9,046 offenders were convicted under at least one of the specified sex offense statutes during the relevant time period, and courts imposed supervised release terms for 99.5 percent of those sentenced to prison. Notwithstanding the recommendation in USSG §5D1.2(b) that "[i]f the instant offense of conviction is a sex offense, . . . the statutory maximum term of supervised release [*i.e.*, a life term] is recommended," only one-fourth (25.1%) of the eligible sex offenders sentenced to supervised release were sentenced to life terms. For the

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[235] *See supra* notes 19-21 and accompanying text. As noted in *supra* note 22, it is unclear whether offenses covered by 18 U.S.C. § 3583(j) (terrorism predicates) — which are set forth in 18 U.S.C. § 2332b(g)(5) — are subject to mandatory supervised release terms. The Commission's data indicate a total of 17,446 offenders (accounting for 4.9% of the total during the relevant time period) were convicted of at least one of these offenses. Nearly all (98.7%) of these offenders were sentenced to supervised release following imprisonment. The average term of supervised release for such offenders was 36 months. The range of supervised release terms imposed indicates the broad spectrum of offense seriousness in this list of statutes; terms ranged from two to 660 months.

[236] *See supra* note 19.

[237] Of the 119,533 offenders with such convictions during the relevant time period, 3,656 were excluded who were not sentenced to prison or who were missing information on type of sentence imposed. Of the remaining 115,877 offenders, 52 were excluded due to missing information on imposition of supervised release, and 434 offenders were excluded because no term of supervised release was imposed. An additional 76 offenders were excluded from the calculation of length of supervised release due to missing information on length of term imposed or because life terms of supervised release were imposed.

[238] The mandatory minimum term of five years was added by the Adam Walsh Act, which became effective for offenses committed on or after July 27, 2006. *See* United States v. Reader, 254 F. App'x 479, 480, n.1 (6th Cir. 2007).

[239] *See supra* note 20.

remaining offenders not sentenced to life terms, the average supervised release term imposed was 82 months.[240]

2. Supervised Release Under the Guidelines

a. High Overall Rate of Imposition of Supervised Release

Section 5D1.1(a) of the guidelines provides that courts "shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed," even if a statute does not otherwise require it. Sentencing courts imposed supervised release in the vast majority of cases subject only to USSG §5D1.1(a): 99.1 percent of the 116,945 offenders[241] sentenced to prison terms of more than one year but not subject to statutorily mandated supervised release in the post-*Booker* period. The average term of supervised release for these offenders was 35 months.[242]

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[240] 18 U.S.C. § 3583(k) specifies that "the authorized term of supervised release for any offense under [title 18 U.S.C.] section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life." Of the 9,046 offenders convicted under one of these statutes during the relevant time period, 229 were excluded who were not sentenced to prison or due to missing information on type of sentenced imposed. Of the 8,817 sex offenders sentenced to prison, eight were excluded due to missing information on imposition of supervised release. Of the 8,767 sex offenders sentenced to prison and supervised release, 2,199 who were sentenced to life terms of supervised release were excluded from the calculation of the average; an additional four offenders for whom no term was specified were excluded. A total of 216 offenders were convicted under 18 U.S.C. § 1201 (kidnapping) during the relevant time period. The Commission's datasets, however, do not include information on the age of the victim, so it was not possible to determine how many of the § 1201 offenders were subject to USSG §5D1.2(b). Thus, all 216 offenders were excluded from the analysis.

[241] Of the 313,817 offenders sentenced to prison terms during the relevant time period, 117,021 met the guideline requirements for supervised release due to length of prison term imposed (*i.e.*, more than one year) but were not required by statute to serve terms of supervised release. Of these 117,021 cases, 76 were excluded due to missing information on whether imposition of supervised release was imposed. Of the remaining 116,945 cases, 115,931 (99.1%) were sentenced to a term of supervised release.

[242] Of the 117,021 offenders who met the guideline requirements for supervised release due to length of prison term imposed but were not required by statute to serve terms of supervised release, 1,090 were excluded because they were not sentenced to terms of supervised release or because the documentation provided by the courts was missing information on whether a term of supervised release was imposed. An additional 22 offenders were excluded because they were sentenced to life terms of supervised release or because their cases were missing information regarding the length of supervised release imposed in their cases.

As discussed earlier,[243] courts are expressly authorized to depart from the provisions in USSG §5D1.1(a) and not impose a term of supervised release. Courts are required by 18 U.S.C. § 3553(c) to provide to the Commission with reasons for prison sentences outside the guideline range as part of the statement of reasons for a sentence,[244] and that statute also appears to require reasons when a sentencing court does not impose a supervised release term in accordance with USSG §§5D1.1 and 5D1.2.[245] However, the departure provision in application note 1 following USSG §5D1.1(a) was not specifically cited by any court on an SOR form in the 0.9 percent (1,014) of cases in which the guidelines provided for supervised release but in which such terms were not imposed. It is unclear from the documentation submitted to the Commission whether courts in those cases departed pursuant the application note but did not record the departure on the SOR form[246] or, instead, courts, in deciding not to impose supervise release, did not do so as an Application Note 1 departure.

b. Rates of Imposition of Supervised Release by Offense Type and Criminal History Category

Although the majority of all offenders in the 32 different offense categories set forth in the Commission's *2009 Sourcebook of Federal Sentencing Statistics* who were sentenced to prison also were sentenced to terms of supervised release, the proportions ranged from 56.7 percent to 99.6 percent depending on the offense type (*see* Table 1). No single offense type had supervised release imposed in all cases, although many offense types had rates close to 100 percent. For

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[243] *See supra* note 26 and accompanying text.

[244] *See* 18 U.S.C. § 3553(c)(2).

[245] *See* United States v. Marquez, 941 F.2d 60, 64 (2d Cir. 1991) ("[W]e perceive that there may be circumstances not adequately taken into account by the Guidelines as to the term of supervised release but adequately taken into account as to the term of imprisonment. Of course, it would be incumbent upon the sentencing court in such a case to identify those circumstances and explain why they justify a departure in the term of supervised release but not in the term of imprisonment.") (citing § 3553(c)(2)).

[246] *The Statement of Reasons for Use in Reporting Sentencing Decisions* (Oct. 2005), a guide provided to federal district judges by the Administrative Office of the United States Courts, generally states that "[t]he court should determine the total offense level, criminal history category, imprisonment range, *supervised release range*, and fine range" and include such information on the SOR. *Id.* at p.15 (emphasis added). The monograph addresses departures and other sentences imposed outside of the "guideline range," yet it appears to address only sentences of probation or imprisonment and does not also separately address sentences outside of the guideline range for supervised release. *See id.* at 15-31. Similarly, the Statement of Reasons Form (AO Form 245B) includes a "supervised release range" section along with the "imprisonment range" section at the beginning of the SOR but thereafter does not mention departures or other bases for imposing a term of supervised release outside the guideline range. *See* U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at Appendix A (Mar. 2006) (copy of SOR form).

example, at least 99.0 percent of manslaughter, sexual abuse, robbery, arson, drug trafficking, firearms, extortion/racketeering, pornography/prostitution,[247] and national defense offenders sentenced to prison also were sentenced to terms of supervised release. Of the four most common offense types (drug-trafficking, immigration, fraud and firearms), which constituted more than 80 percent of all cases sentenced during the relevant time period, the rates of imposition of supervised release ranged from 89.2 percent to 99.6 percent. The lowest rates of imposition of supervised release were imposed for offenders convicted of simple drug possession (56.7%) and antitrust (62.5%) offenses.[248]

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[247] "Pornography/prostitution" includes child pornography offenses, the illegal transportation of minors for prostitution, sexual abuse of minors, and the selling or buying of children for pornography. Complete offense type definitions can be found in the Commission's *2009 Sourcebook of Federal Sentencing Statistics* at Appendix A.

[248] Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed. Of the remaining offenders, 42,554 not sentenced to prison terms were excluded. Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. Of the remaining 313,366 offenders sentenced to prison, 15,407 were excluded who were not sentenced to supervised release. An additional four offenders were excluded due to missing information on offense of conviction.

Table 1
Offense Type for Offenders Sentenced to Supervised Release
U.S. Sentencing Commission Data
Post-*Booker* Fiscal Year 2005 – Fiscal Year 2009

		Prison Term Imposed		Supervised Release Imposed		Average Prison Term	Average Supervised Release Term
	Total Cases	Number	Percent	Number	Percent	Months	Months
Offense Type							
Total	**356,339**	313,811	88.1	297,955	94.9	60	41
Murder	**386**	385	99.7	365	95.1	250	53
Manslaughter	**280**	271	96.8	269	99.3	53	35
Kidnapping	**230**	230	100.0	225	97.8	204	54
Sexual Abuse	**1,845**	1,782	96.6	1,771	99.4	97	71
Assault	**2,981**	2,510	84.2	2,336	93.2	43	33
Robbery	**5,365**	5,241	97.7	5,220	99.6	88	40
Arson	**309**	298	96.4	296	99.3	78	38
Drug Trafficking	**115,933**	112,268	96.8	111,781	99.6	85	52
Drug Communication Facility	**1,956**	1,606	82.1	1,585	98.7	44	14
Drug Simple Possession	**3,393**	1,585	46.7	887	56.7	15	17
Firearms	**39,596**	37,177	93.9	36,958	99.5	84	40
Burglary	**199**	175	87.9	173	98.9	22	35
Auto Theft	**310**	272	87.7	266	97.8	69	38
Larceny	**8,156**	3,366	41.3	3,128	93.0	19	32
Fraud	**34,850**	25,254	72.5	23,060	91.5	28	37
Embezzlement	**2,426**	1,191	49.1	1,167	98.3	18	41
Forgery/Counterfeit	**5,021**	3,483	69.4	3,378	97.0	21	34
Bribery	**974**	669	68.7	659	98.5	26	32
Tax	**2,932**	1,753	59.8	1,719	98.1	23	25
Money Laundering	**4,249**	3,392	79.8	3,338	98.5	45	33
Extortion	**3,139**	2,870	91.4	2,840	99.0	96	38
Gambling	**500**	166	33.2	158	95.2	12	33
Civil Rights	**311**	194	62.4	187	96.4	60	29
Immigration	**95,304**	91,948	96.5	81,758	89.2	22	29
Pornography/Prostitution	**7,259**	7,070	97.4	7,032	99.6	104	83
Prison Offenses	**1,756**	1,660	94.5	1,478	89.3	18	33
Administration of Justice	**4,940**	3,171	64.2	2,998	94.7	27	24
Environmental	**936**	213	22.8	190	89.6	13	25
National Defense	**208**	178	85.6	177	99.4	63	36
Anti-Trust	**84**	56	66.7	35	62.5	13	19
Food and Drug	**348**	87	25.0	83	95.4	22	23
Other	**10,163**	3,290	32.4	2,438	74.3	23	29

SOURCE: U.S. Sentencing Commission, 2005–2009 Datafiles, FY05–FY09.

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The rates of imposition of supervised release do not vary substantially for offenders by criminal history category (CHC) (*see* Table 2). Rates of supervised release range from a low of 95.7 percent of offenders in CHC II[249] to 99.2 percent of offenders in CHC VI.[250]

Table 2

Criminal History Category for Offenders Sentenced to Supervised Release
U.S. Sentencing Commission Data
Post-*Booker* Fiscal Year 2005 – Fiscal Year 2009

		Prison Term Imposed		Supervised Release Imposed		Average Prison Term	Average Supervised Release Term
	Total Cases	Number	Percent	Number	Percent	Months	Months
Criminal History Category							
Total	**312,982**	281,320	89.9	271,429	96.5	60	41
I	**144,997**	118,736	81.9	113,602	95.8	45	41
II	**36,841**	34,203	92.8	32,523	95.1	50	41
III	**48,882**	47,040	96.2	45,329	96.5	54	41
IV	**30,279**	29,792	98.4	29,032	97.5	61	41
V	**18,305**	18,097	98.9	17,795	98.4	72	41
VI	**33,678**	33,452	99.3	33,148	99.2	119	48

SOURCE: U.S. Sentencing Commission, 2005–2009 Datafiles, FY05–FY09.

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[249] Notably, 96.5% of offenders in CHC I received a term of supervised release. *See* Table 2.

[250] Of the 356,974 offenders sentenced during this period, 43,813 were excluded due to incomplete sentencing guideline application information. Of these, 173 offenders were excluded due to missing information on type of sentence imposed. Of the remaining offenders, 31,662 not sentenced to prison terms were excluded. Of the 281,326 offenders sentenced to prison, 331 were excluded due to missing information on imposition of supervised release. Of the remaining 280,995 offenders sentenced to prison, 9,560 were excluded who were not sentenced to supervised release. An additional 2,308 offenders were excluded who were sentenced to life terms of supervised release or were missing information on the length of supervised release imposed. An additional six offenders were excluded due to missing information on criminal history category.

c. Lengths of Supervised Release Terms

In addition to following the guideline provisions concerning the decision to impose supervised release, sentencing courts also generally have followed USSG §5D1.2's provisions concerning the lengths of terms. Section 5D1.2 includes ranges of supervised release terms for offenders convicted of certain classes of offenses who are not otherwise required by statute to serve a mandatory minimum term of supervised release. During the post-*Booker* period, the vast majority (94.9%) of these offenders sentenced to supervised release received terms within the ranges provided by USSG §5D1.2(a). Section 5D1.2(a) provides for at least three years but not more than five years for a defendant convicted of a Class A or B felony, and such terms were imposed in 97.9 percent of cases with such felony classes in the post-*Booker* period. The clear majority (97.4%) of Class C and D felonies were sentenced within the guideline range of at least two years but not more than three years of supervised release. Courts imposed supervised release terms within the guideline range at lower rates for less serious offenders; only 69.6 percent of defendants convicted of a Class E felony or a Class A misdemeanor were sentenced to the one-year guideline requirement.[251] The largest proportion of defendants convicted of Class A and B felonies (62.3%) received five-year terms; another 32.4 percent received three-year terms. The majority of defendants convicted of Class C and D felonies (80.7%) received three-year terms; 19.2 percent received two-year terms.

Although the Commission's data showed that the rates of imposition of supervised release varied only slightly by the type of offense at issue (with a few exceptions), there was significantly more variation between offense types when comparing the average lengths of supervised release terms. Considering all offense types, the average term of supervised release was 41 months — ranging from an average of 14 months (for offenders convicted of using a communication facility in connection with a drug offense) to an average of 83 months (for prostitution/pornography offenders) (*see* Table 1). The varying lengths of supervised release terms by offense type was likely in part a function of the class of the underlying offense of conviction, which affected the guideline range for supervised release terms. For example, in the case of the longest average supervised release term (83 months for pornography/ prostitution offenders), almost all (99.7%) of such offenders were convicted of Class A, B, C, or D felonies and, therefore, were subject to the guideline minimum terms of two or three years under USSG §5D1.2(a). In contrast, in the case of the shortest average term (14 months for drug offenses

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[251] Of the 356,974 offenders sentenced during this period, 239,953 were excluded who had statutory supervised release requirements or did not meet the guideline requirements for supervised release based on the class of offense. An additional 1,078 offenders were excluded due to missing information on class of offense. An additional nine offenders were excluded due to missing information on length of supervised release.

involving a communication facility), the overwhelming majority (96.5%) of such offenders were convicted of a Class E felony for which the guidelines provide a one-year term of supervision.[252]

Just as the Commission data showed little differences in the rate of imposition of supervised release when comparing criminal history categories, there also is little difference in average lengths of supervised release terms when comparing criminal history categories. Supervised release terms are 41 months on average for offenders in Criminal History Categories I through V and 48 months on average for offenders in Criminal History Category VI (*see* Table 2).[253]

d. Lifetime Terms of Supervised Release

During the relevant time period, 2,273 federal offenders were sentenced to life terms of supervised release. Each year, from 2005 to 2009, the number of such cases increased steadily. Life terms were imposed for 120 offenders (0.3%) sentenced to supervised release terms in post-*Booker* fiscal year 2005, but that number increased to 743 offenders (1.1%) in fiscal year 2009 (*see* Figure 1). The overwhelming majority (82.5%) of offenders sentenced to life terms of

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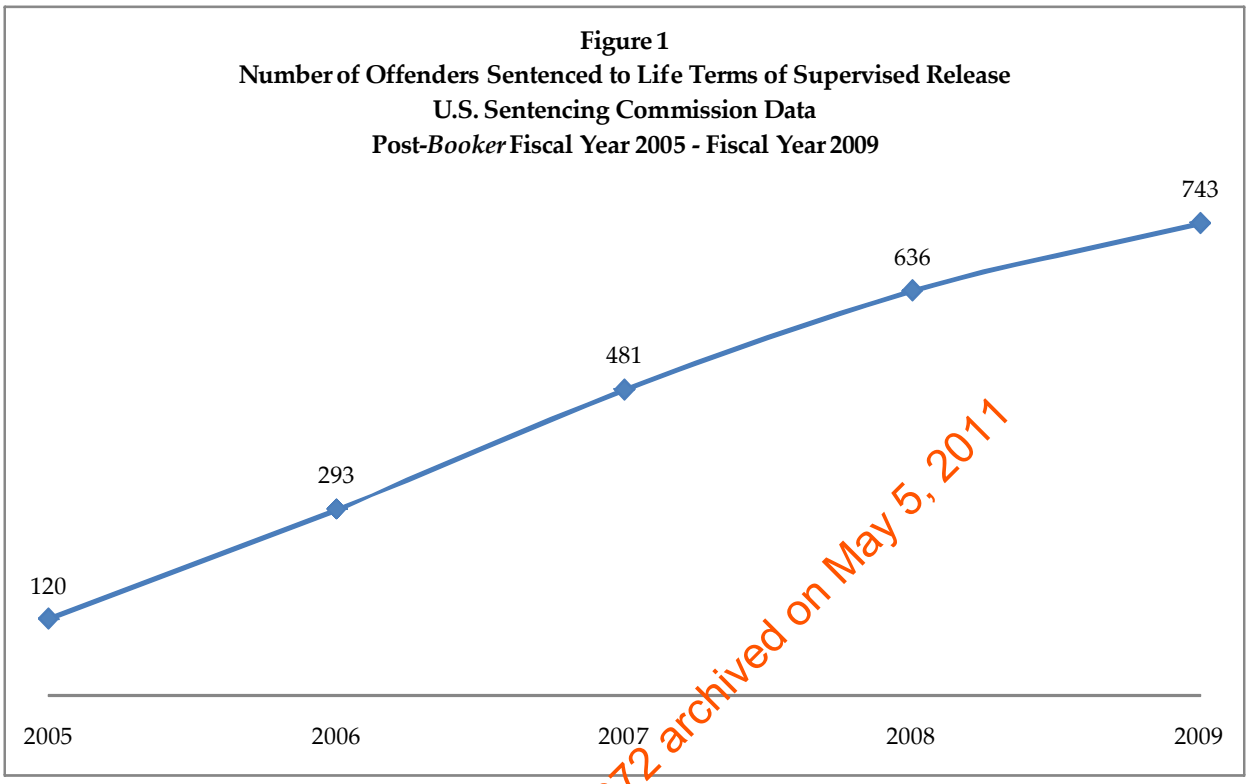
[252] Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed. Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. An additional 15,407 offenders were excluded who were not sentenced to a term of supervised release. An additional 2,273 offenders were excluded who were sentenced to life terms of supervised release or were missing information regarding the length of supervised release. Four additional offenders were excluded due to missing information on offense of conviction. Of the 1,585 offenders convicted of a drug offense involving a communication facility, 14 were excluded due to missing information on class of offense. Of the 7,032 pornography/prostitution offenders, 22 were excluded due to missing information on class of offense.

The two Class E felonies or Class A misdemeanor pornography/prostitution offenders were convicted of Aiding and Abetting Prostitution (18 U.S.C. § 1384) and Sending or Displaying Offensive Material to Persons Under 18 (18 U.S.C. § 223(d)). The 41 Class C or D felony drug offenses involving a communication facility predominantly were convicted under 21 U.S.C. § 843(b), Use of a Communication Facility in Facilitating the Commission of Violations of the Controlled Substances Act.

[253] Of the 356,974 offenders sentenced during this period, 43,813 were excluded due to incomplete sentencing guideline application information. An additional 173 offenders were excluded due to missing information on type of sentence imposed. Of the remaining offenders, 31,662 were excluded that were not sentenced to prison terms. Of the 281,326 offenders sentenced to prison, 331 were excluded due to missing information on imposition of supervised release. Of the remaining 280,995 offenders sentenced to prison, 9,560 were excluded who were not sentenced to supervised release. An additional 2,221 offenders were excluded who were sentenced to life terms of supervised release or were missing information on the length of supervised release imposed. An additional six cases were excluded due to missing information on criminal history category.



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supervised release were convicted of pornography/prostitution offenses.[254] An additional 13.0 percent were convicted of sexual abuse. The total number of pornography/prostitution cases increased from 900 in post-*Booker* fiscal year 2005 to 1,969 in fiscal year 2009. Similarly, the number of sexual abuse cases increased from 237 to 478 during the same time period. Along with this increase in the number of cases for each offense type, the proportion of both pornography/prostitution and sex offenses sentenced to life terms of supervised release has increased. In fiscal year 2005, 10.3 percent of pornography/prostitution offenders were sentenced to life terms of supervised release, but that proportion increased to 30.6 percent in fiscal year 2009. The corresponding increase in the proportion of sex abuse offenders sentenced to life terms of supervised release is from 9.3 percent to 20.5 percent.

The life terms of supervised release imposed since *Booker* were imposed in connection with prison sentences that averaged approximately 15 years (185 months). Offenders sentenced

[254] USSG §5D1.2(b)(2) recommends life terms of supervised release for sex offenders.

to life terms of supervised release overwhelmingly are United States citizens (96.3%), White (83.8%), and male (98.7%).[255]

e. Citizenship of Offenders under Supervision

The overwhelming majority of both United States citizen (99.1%) and non-citizen (91.2%) offenders sentenced to prison terms also were sentenced to terms of supervised release. However, non-citizens constitute the overwhelming majority (87.8%) of the small percentage of offenders overall who were sentenced to prison but *not* to supervised release.[256] Ninety-three percent of these non-citizens were not subject to such terms under the guidelines because they were sentenced to prison terms of one year or less, as provided for in USSG §5D1.1(a).[257]

f. Section 5C1.1 Alternative Sentences

Only a small proportion (3.3%) of offenders sentenced to imprisonment followed by supervised release were sentenced pursuant to USSG §5C1.1(d)(2), which authorizes a term of community confinement or home detention to be substituted as a condition of supervised release for some part of the guidelines' range of imprisonment when an offender's guideline range is in Zone B or Zone C of the Sentencing Table.[258] The remaining 96.7 percent of federal

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[255]Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed. Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. An additional 15,407 offenders were excluded who were not sentenced to a term of supervised release. Of the remaining 297,953 offenders, 2,273 were sentenced to life terms of supervised release. Five offenders were excluded due to missing information on the length of prison term imposed. Offenders with missing information regarding citizenship, race, and gender were excluded from the relevant analyses. Note that only cases sentenced after the decision in *Booker* on January 12, 2005, are included in the fiscal year 2005 data.

[256] Criminal aliens subject to deportation are not subject to traditional supervision in the United States, except that "[if] an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d)(3). If such a non-citizen offender illegally reenters the United States after being deported before the expiration of the term of supervision, the offender is subject to having the term revoked based on the illegal reentry. *See, e.g.*, United States v. Marquez-Romero, 298 F. App'x 737 (10th Cir. 2008) (deported defendant's supervised release revoked for illegal reentry during term of supervised release).

[257] Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed. Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. An additional 7,194 offenders were excluded due to missing information on citizenship information. Of the 11,539 non-U.S. citizens sentenced to prison but not to a term of supervised release, 563 were excluded due to missing information on the length of prison term imposed.

[258] Home confinement alone was the most common type of substitution for these offenders, and was imposed for 76.3% of such offenders who were sentenced post-*Booker*. Another 21.2% served their supervised release terms with

offenders sentenced to prison and subsequent terms of supervised release were sentenced to prison terms as provided by USSG §5C1.1(f) such that the entire confinement term was served by imprisonment and no part of the supervised release term was substituted.

B. Early Termination and Revocation of Supervised Release

As noted above,[259] depending on the circumstances, courts have the authority to modify the conditions of an offender's supervised release, to terminate it before the original expiration date, or to revoke supervised release and return an offender to prison. An analysis of data from the AOUSC-OPPS provides information concerning termination and revocation.

1. Overall Rates of Revocation and Early Termination

The AOUSC-OPPS data show that two-thirds (67%) of the 35,724 active supervised release cases closed during 2008 were successfully closed, including those that were terminated early in the interest of justice (*see* Figure 2); very similar percentages are apparent in the data from the prior three years.[260] As a general rule, a case is classified as a "successful" closure if the term of supervision expired or was terminated without revocation.[261] It should be noted that courts have discretion to impose sanctions other than revocation after the commission of a violation of the conditions of supervised release, including modification of the conditions of supervision or an extension of term length. As a result, a successful closure indicates that the offender met all of the conditions mandated by the courts, but does not necessarily indicate that the offender's behavior was in full compliance throughout the term.

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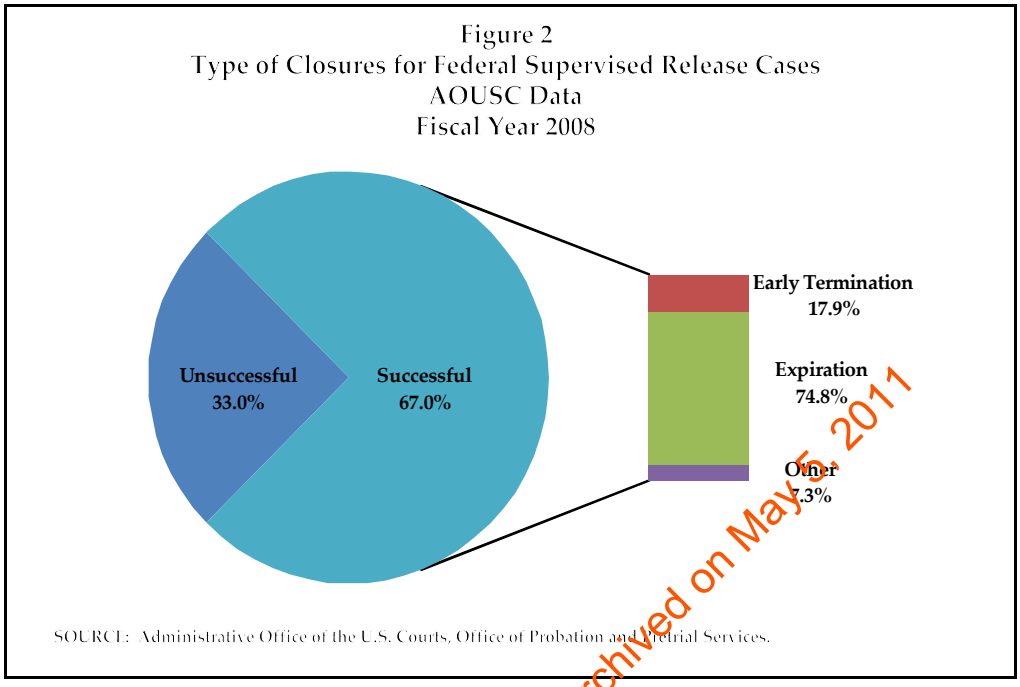
some type of community confinement. Of the 356,974 offenders sentenced during this period, 603 were excluded due to missing information on type of sentence imposed. Of the remaining offenders, 42,554 not sentenced to prison terms were excluded. Of the 313,817 offenders sentenced to prison, 451 were excluded due to missing information on imposition of supervised release. Of the remaining 313,366 offenders sentenced to prison, 15,407 were excluded who were not sentenced to supervised release. An additional two offenders were excluded due to missing information on alternative sentence imposed. Of the remaining 297,597 offenders, the 288,052 sentenced only to prison were excluded. The remaining offenders were sentenced to a combination of home and community confinement (1.9%) or some other type of supervision (0.6%).

[259] *See supra* note 168 and accompanying text.

[260] "Active" cases are those in which a federal probation officer currently supervises the offender in the community. The numbers discussed above exclude "inactive" cases in which offenders were unavailable for supervision for more than 30 days due to deportation, incarceration in connection with an unrelated criminal case, or absconding. "Active" and "inactive" cases are further discussed below.

[261] "Other" successful closures, as categorized by AOUSC-OPPS — which includes closures based on events such as deaths of offenders or inter-district transfers — accounted for 7.3 percent of "successful" cases.



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During 2008, 74.8 percent of the cases that were successfully closed were closed due to the expiration of the full, original term. A smaller proportion, 17.9 percent of successful closures (representing 12% of all supervision cases), were early terminations by the court, which may occur at any time after one year of supervision if the court determines such action is warranted by the defendant's conduct and serves the interests of justice.[262] On average, offenders whose supervised release terms were terminated early served more than 60 percent of the original supervision term imposed. In fact, offenders who benefit from early termination of supervision generally serve terms well beyond the one-year minimum required by statute. For instance, in 2006, offenders whose supervised release terms were terminated early were sentenced to an average of 42 months supervision and served an average of 26 months before being terminated.[263]

[262] *See* 18 U.S.C. § 3583(e)(1) ("The court may . . . terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.").

[263] A recent recidivism study by the AOUSC-OPPS examined a cohort of offenders whose supervision terms expired or were terminated early in fiscal year 2005. The study found that during the 36-month follow-up period,"offenders granted early termination do not pose a greater safety risk to the community" than offenders who successfully served the entire supervised release term imposed by the sentencing court. *See* James L. Johnson, *Are Early*

AOUSC-OPPS data indicate that, in 2008, federal courts revoked the supervised release terms of 33 percent of federal offenders being actively supervised (*i.e.*, 11,797 out of the 35,724 actively supervised offenders) as a result of commission of new offenses or other violations of the conditions of supervised release. These offenders were returned to prison for terms averaging 11 months following revocation. By comparison, in the same year, Commission data indicate that federal courts imposed prison sentences in 67,354 felony and Class A misdemeanor cases involving original convictions (as opposed to revocations). The average prison sentence imposed for original convictions in 2008 was 57 months.[264]

Violations of conditions of supervision that result in revocation on average occur early in the supervision process.[265] For instance, in 2006, offenders whose supervision was revoked were sentenced to an average of 36 months of supervised release and served an average of only 17 months before revocation (*see* Figure 3). In recent years, revocations have been occurring earlier in the terms of supervision. In 2003, on average, revocations occurred after 55.3 percent of the initial term was served. This proportion declined to 48.2 percent in 2006. Offenders who successfully served to completion the full original term imposed also had the shortest average terms imposed. The average term imposed (and served) for this group of offenders decreased from 37 months in 2003 to 30 months in 2006.

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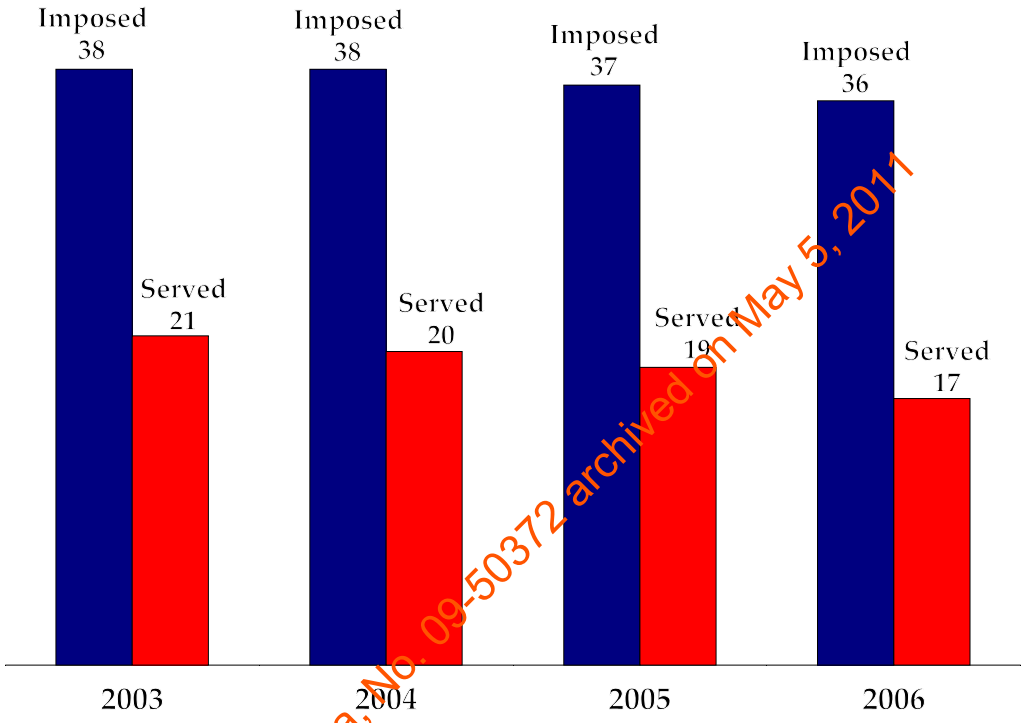
Terminated Offenders a Greater Risk to the Community, NEWS & VIEWS, Vol. XXXV, No. 2, at 1 (Jan. 18, 2010) (biweekly newsletter published by AOUSC-OPPS). "In fact, early-term offenders in this study presented a lower risk of recidivism than their full-term counterparts. Not only were early-term offenders charged with a new criminal offense at a lower rate than full-term offenders, they were charged with proportionally fewer felonies . . . ." *Id.*

[264] Of the 79,478 offenders, 102 were excluded due to missing information on type of sentence imposed. Of the 67,354 offenders sentenced to prison, 1,250 were excluded due to missing information on length of prison sentence imposed.

[265] The fact that offenders on federal supervision who violate the conditions of supervision tend to do so early in their terms of supervision is consistent with findings of other researchers. *See, e.g.*, PEW CENTER ON THE STATES, PUTTING PUBLIC SAFETY FIRST: 13 STRATEGIES FOR SUCCESSFUL SUPERVISION AND REENTRY, 7 PUBLIC POLICY BRIEF 2 (Dec. 2008) ("Research clearly identifies the period immediately following release from prison and jail as a particularly high-risk time for offenders.").

Figure 3
Federal Supervised Release Cases Closed by Revocation:
Average Months of Supervision Imposed and Served
AOUSC Data
Fiscal Year 2003 – Fiscal Year 2006



SOURCE: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services.

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2. Inactive Supervision Cases

In addition to cases actively supervised by federal probation officers, there are "inactive" supervision cases in which the offender is unavailable for supervision for a period of more than 30 days. The AOUSC-OPPS does not count such offenders as part of the "active" caseload of federal probation officers. Inactive cases may include offenders who are incarcerated or absconding, but these cases must be reactivated before a revocation proceeding may occur. Inactive cases that are never activated and ultimately closed successfully involve non-citizen offenders who were deported after their release from imprisonment and whose term of supervision did not thereafter get revoked. If an inactively supervised offender is arrested in the

United States for a violation of the conditions of supervision, his case typically will be activated and a revocation proceeding will occur. Such inactive cases that are not activated for revocation are closed upon expiration of the term of supervision. In 2008, more than 10,000 inactive cases were closed without revocation. When the closure of these inactive cases is considered in conjunction with actively supervised successful closures in 2008, the rate of cases closed successfully increases from 67.0 percent to 74.3 percent. However, because the inactive cases closed successfully involved deported offenders who were not being supervised by (or were not required to report to) probation officers, such cases arguably should not be considered in determining the rate of successful closures.

3. Rates of Revocation by Offense Type and Criminal History Category

As noted above, Commission data show that the vast majority of offenders sentenced to prison also were sentenced to supervised release regardless of offense type (with a few exceptions). By comparison, AOUSC-OPPS data show that, in fiscal year 2008, the rates of successful closures varied across offense types, ranging between 46.8 and 81.1 percent.[266] The offenses with the highest rates of successful completion of supervision were property offenses (73.9%), public order offenses (73.2%), and drug offenses (70.8%).[267] Conversely, only 53.2 percent of actively supervised immigration offenses were closed successfully.[268]

Drug offenders constituted the largest portion of the supervision caseload (16,052 cases or 44.9% of supervision cases closed in fiscal year 2008), which reflects the fact that such offenders typically are subject to statutorily mandated supervision terms. However, case closure data from the AOUSC-OPPS indicate that the drug supervision caseload may consume less resources than the numbers of drug offenders under supervision would suggest. In addition to

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[266] In the AOUSC-OPPS data, offense type refers to the offense of conviction. The offense typology used by AOUSC-OPPS is similar to, but in some respects, different from the offense typology used by the Commission. For purposes of this analysis, the main offense types — *e.g.*, drugs, firearms, and immigration — are essentially the same. In cases involving multiple counts of conviction, AOUSC-OPPS determined the offense type by referring to the offense of conviction with the highest statutory maximum penalty. In the event two offenses had the same statutory maximum penalty, the most serious offense was determined based on the circumstances of the case. In comparison, in the Commission's datasets, the offense type is determined by the offense of conviction with the highest statutory maximum; in the case that two or more offenses of conviction have the same maximum, the Commission selects the offense with the highest statutory minimum. If multiple offenses of conviction have identical minima and maxima, then the offenses are categorized by offense type (violent, drug, etc.), and the most serious offense type is selected.

[267] The addition of inactive cases closed without a revocation increases the success rates for each of these offenses to 78.3% of property offenses, 83.8% of public order offenses, and 77.3% of drug offenses.

[268] The successful closure rate increases to 76.3% when inactive immigration cases closed without revocation are included in the calculation.

having a relatively high successful closure rate of 70.8 percent among actively supervised cases, drug offenders had a higher rate of early termination (accounting for 25.2% of the 11,364 successful drug terminations) than any other offense type in fiscal year 2008.[269]

As noted, Commission data show that neither the imposition rate nor the average length of supervised release terms at the original sentencing varies substantially when comparing offenders in the six guidelines' criminal history categories. There are, however, trends in the rates of successful completion for offenders with different prior records that suggest that consideration of criminal history may be useful in the initial determination of whether to impose supervised release (as well as the length of a term) at the original sentencing. The success rate for offenders in CHC I is nearly twice that for offenders in CHC VI.[270] In 2008, 81.3 percent of supervision cases involving offenders in CHC I were closed successfully. The rates decreased steadily across criminal history categories: 67.5 percent for CHC II, 58.5 percent for CHC III, 50.6 percent for CHC IV, 44.4 percent for CHC V, and 40.2 percent for CHC VI (*see* Figure 4). Similarly, the percentage of cases successfully closed by early termination was highest for offenders in CHC I (19.9% of successful closures for CHC I offenders were early terminations). The percentage of early termination cases as part of the overall successful case closures gradually but consistently declined across categories to a low of 12.4 percent in Category VI.[271]

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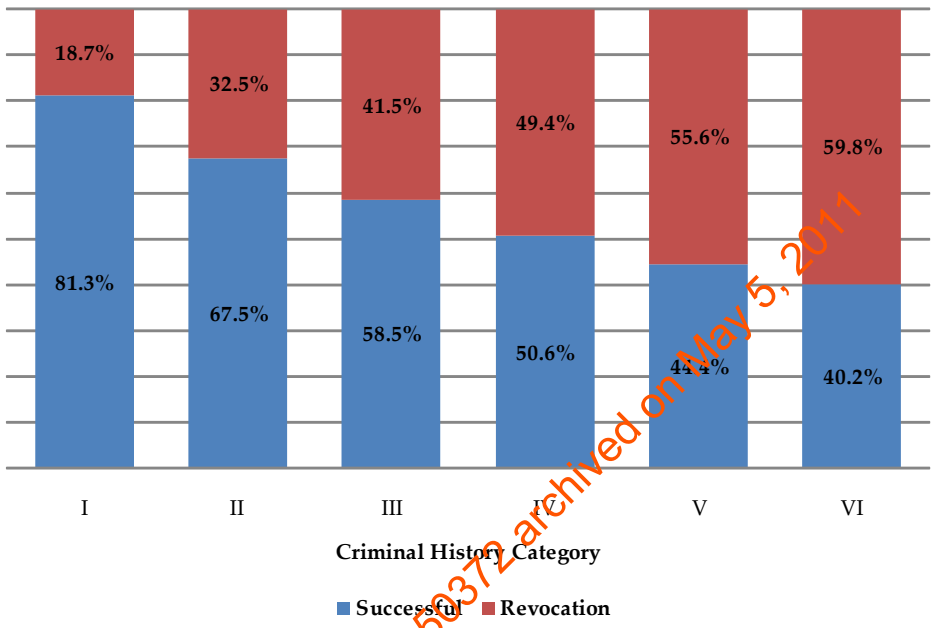
[269] When inactive cases without revocation are included in the calculation of successful closures, the rate of successful closure increases to 77.3%.

[270] The AOUSC-OPPS determines criminal history category from the criminal history score provided in the probation officer's Presentence Investigation Report. The category provided in the AOUSC's data does not account for sentencing enhancements that affect the final determination of criminal history category such as Career Offender (USSG §4B1.1), Armed Career Criminal (USSG §4B1.4), or Repeat and Dangerous Sex Offender Against Minors (USSG §4B1.5). Commission data, on the other hand, account for these issues. Comparisons of criminal history category between the two datasets, therefore, may not be precise.

[271] The data mentioned here include only active cases.

Figure 4
Type of Closures for Federal Supervised Release Cases for Each Criminal History Category
AOUSC Data
Fiscal Year 2008



SOURCE: Administrative office of the U.S. Courts, Office of Probation and Pretrial Services.

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4. Types of Violations of the Conditions of Supervision

The AOUSC-OPPS classifies offenders' misconduct constituting a violation of the conditions of supervised release as "major" violations, "minor" violations, or "technical" violations. Major violations are more serious criminal offenses (*e.g.*, felony drug-trafficking or illegally possessing a firearm as a convicted felon); minor violations are less serious criminal offenses (*e.g.*, misdemeanor assault); and technical violations include lesser infractions such as failure of a drug test, failure to report to a supervising probation officer, and non-payment of financial conditions. These classifications are different than the three "grades" of violations (A, B, and C) that can lead to revocations under Chapter Seven of the *Guidelines Manual*.[272] The average prison term imposed following a revocation varied by the type of violation (using the AOUSC-OPPS classification system), and ranged from nine months for technical violations to 17 months for illegally possessing a firearm.

[272] *See supra* note 190.

As noted, revocations accounted for one-third of all supervision cases closed between 2005 and 2008. In 2008, the three offenses types (original convictions) with the highest rates of unsuccessful closures were escape/obstruction (53.2%), firearms/weapons (47.0%), and immigration (46.8%). In addition, a relatively large proportion of the revocations for these three offense types were due to commission of a "major" offense. Specifically, 49.4 percent of unsuccessfully closed immigration cases involved revocation for a major violation, followed by 34.9 percent of escape/obstruction cases and 32.1 percent of firearms/weapons cases. The high rate of unsuccessful closure (based on commission of a major violation) for immigration offenders appears to be explained by the large number of felony illegal reentry offenses[273] committed by such non-citizen offenders whose supervision was reactivated upon their arrest in the United States. Notably, despite the fact that drug offenders have one of the highest rates of successful early termination compared to other offenders, 32.6 percent of their unsuccessful closures were for major violations. Although drug offenders, overall, are less likely to have their supervision terms revoked, those with revocations commit more serious violations than other types of offenders on supervision.

Immigration law violations were the basis of 12.1 percent of all revocations between 2005 and 2008, and drug violations (excluding failed drug tests, which typically are classified as "technical" violations) were the basis of 10.3 percent of all revocations during the same period. These rates have generally remained stable in recent years, with the exception of drug offenses, which increased from 9.5 percent of revocation violations in 2007 to 13.1 percent in 2008.

Despite the large proportion of major violations for immigration, escape/obstruction, and weapons offenders, technical violations accounted for the majority (51.6%) of all violations from 2005 to 2008. Sex offenders had the highest revocation rates (72.6%) due to technical violations. In contrast, immigration offenders had the lowest revocation rates (45.5%) due to technical violations.

Consistent with their more serious prior records and higher rates of violations, offenders in higher criminal history categories have higher rates of major violations. Of CHC I cases closed unsuccessfully, 29.2 percent were revocations for major violations, compared to 38.9 percent of cases in CHC VI. As is true for case closures overall, unsuccessful closures primarily consist of cases in which technical violations occurred regardless of criminal history category. However, the incidence of technical violations slightly decreases across the criminal history categories. For instance, in fiscal year 2008, technical violations constituted 65.0 percent of unsuccessful supervision closures for offenders in CHC I, compared to 55.8 percent of unsuccessful closures for offenders in CHC VI.

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[273] *See* 8 U.S.C. § 1326.

5. Rate of Recommenced Terms of Supervised Release

Of those offenders whose supervised release terms were revoked and who were ordered back to prison in 2008, 5,477 (46.4%) also were sentenced to a recommenced term of supervised release following the prison term. Courts increasingly are imposing supervision terms following these prison terms. The rate of violations resulting in a recommenced term has increased in recent years from 33.5 percent in 2005 to 46.4 percent in 2008.

C. Revoked Offenders as a Percentage of the Federal Prison Population

According to data provided by the federal Bureau of Prisons ("BOP"), at the end of calendar year 2009 (December 31, 2009), there were 207,815 federal inmates in BOP custody serving sentences of imprisonment; slightly more than six percent (12,839) of them were serving prison sentences imposed after revocation of their terms of supervised release.

V. Conclusion

With nearly one million federal offenders having been sentenced to supervised release since the passage of the Sentencing Reform Act (including more than 100,000 offenders currently on supervised release)[274] and with revocations occurring in approximately one-third of cases in which supervised release terms were imposed, issues concerning the imposition and revocation of such terms arise frequently. This report has addressed a wide variety of legal and data issues concerning supervised release. The federal courts of appeals have taken divergent positions on many of the legal issues.

Although supervised release is mandated by statute in less than half of all federal cases in which it is authorized,[275] the sentencing guidelines provide for supervised release in the vast majority of remaining cases. Courts have followed USSG §5D1.1(a) in 99.1 percent of cases in which a statute did not require imposition of a term of supervised release but the guidelines provided for it. In the vast majority of Class A, B, C, and D felony cases, courts also have followed the provisions in USSG §5D1.2 concerning the length of the terms of supervised

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[274] *See supra* note 13 and accompanying text; *see also* http://jnet.ao.dcn/Probation_and_Pretrial_Services/Caseload_Tables/Probation_E_Tables_December_2009/Persons_Under_PostConviction.html (noting, as of December 31, 2009, there were 100,197 offenders on supervised release).

[275] Of the 356,974 defendants sentenced during the relevant time period, approximately 146,000 (or 41%) were subject to statutes mandating supervised release if a prison sentence also was imposed. That percentage is lower (36%) if the 17,446 defendants convicted of offenses listed in 18 U.S.C. § 2332b(g)(5)(B) were not subject to mandatory terms of supervised release under 18 U.S.C. § 3583(j), a legal question not yet resolved by the courts. *See supra* note 22.

release. However, they have followed the guidelines' provisions concerning the length of terms in Class E felony and Class A misdemeanor cases in less than a majority of cases and have followed the guidelines' recommendation for a lifetime term of supervision for federal sex offenders in only one-quarter of cases.

Courts' close adherence to the guidelines' provisions concerning the imposition of supervised release has been consistent for most of the major offense types (drug-trafficking, firearms, immigration, and fraud/larceny cases) and also has been consistent across the criminal history categories. Data concerning the termination and revocation of supervised release terms are informative concerning whether such uniformity across offense types and criminal history categories has been warranted. In particular, the percentage of successful terminations of supervision for certain offense types (*e.g.*, drug cases) has been significantly higher than for other offense types (*e.g.*, firearms cases). Furthermore, success rates in supervision are highly correlated with offenders' criminal history categories at the time of the original sentencing. On average, the lower the criminal history category an offender has, the greater likelihood that the offender successfully will complete supervision without revocation for violation of the conditions of supervision.

The Commission will continue to study supervised release to evaluate the effectiveness of the guidelines and policy statements governing this aspect of sentencing and whether changes may be warranted. Meanwhile, this report is intended to provide relevant information and guidance to assist courts in the important tasks of deciding whether to impose supervised release at the original sentencing (and, if so, the appropriate length) and, once offenders have been released from prison, deciding whether to terminate or revoke supervised release.

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VI. Appendix

AO-245B (Rev. 09/08) Judgment in a Criminal Case

U.S. v. Apodaca, No. 09-50372 archived on May 5, 2011

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA
v.

JUDGMENT IN A CRIMINAL CASE

Case Number:

USM Number:

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Judgment

Signature of Judge

Name of Judge Title of Judge

Date

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DEFENDANT:
CASE NUMBER:

ADDITIONAL COUNTS OF CONVICTION

Title & Section ?	Nature of Offense	Offense Ended	Count

U.S. Apoc No. 9-50 arc d on ay 5, 11

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DEFENDANT:
CASE NUMBER:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT:
CASE NUMBER:

ADDITIONAL IMPRISONMENT TERMS

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DEFENDANT:
CASE NUMBER:

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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ADDITIONAL SUPERVISED RELEASE TERMS

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CASE NUMBER:

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

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DEFENDANT:
CASE NUMBER:

SPECIAL CONDITIONS OF SUPERVISION

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Yes No
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DEFENDANT:
CASE NUMBER:

PROBATION

The defendant is hereby sentenced to probation for a term of :

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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CASE NUMBER:

ADDITIONAL PROBATION TERMS

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DEFENDANT:
CASE NUMBER:

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

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DEFENDANT:
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SPECIAL CONDITIONS OF SUPERVISION

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DEFENDANT:
CASE NUMBER:

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT:
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ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

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DEFENDANT:
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ADDITIONAL RESTITUTION PAYEES

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT:
CASE NUMBER:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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DEFENDANT:
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ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

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DEFENDANT:
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ADDITIONAL FORFEITED PROPERTY

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No

DEFENDANT:
CASE NUMBER:

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____ .

☐ ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____ .

☐ be ineligible for the following federal benefits for a period of _____ .

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

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DEFENDANT:
CASE NUMBER:
DISTRICT:

STATEMENT OF REASONS

(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The court adopts the presentence investigation report without change.**

B ☐ **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

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II COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply.)*

A ☐ No count of conviction carries a mandatory minimum sentence.

B ☐ Mandatory minimum sentence imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C. § 3553(e))

☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE *(BEFORE DEPARTURES)*:

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $ _____ to $ _____

☐ Fine waived or below the guideline range because of inability to pay.

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Yes No

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DEFENDANT:
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DISTRICT:

STATEMENT OF REASONS

(Not for Public Disclosure

IV ADVISORY GUIDELINE SENTENCING DETERMINATION *(Check only one.)*

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B ☐ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** *(Use page 4 if necessary.)*

C ☐ **The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.** *(Also complete Section V.)*

D ☐ **The court imposed a sentence outside the advisory sentencing guideline system.** *(Also complete Section VI.)*

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES *(If applicable.)*

A **The sentence imposed departs** *(Check only one.)*:
☐ below the advisory guideline range
☐ above the advisory guideline range

B **Departure based on** *(Check all that apply.)*:

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
☐ 5K1.1 plea agreement based on the defendant's substantial assistance
☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
☐ binding plea agreement for departure accepted by the court
☐ plea agreement for departure, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** *(Check all that apply and check reason(s) below.)*:
☐ 5K1.1 government motion based on the defendant's substantial assistance
☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected

3 **Other**
☐ Other than a plea agreement or motion by the parties for departure *(Check reason(s) below.)*:

C **Reason(s) for Departure** *(Check all that apply other than 5K1.1 or 5K3.1.)*

☐ 4A1.3 Criminal History Inadequacy
☐ 5H1.1 Age
☐ 5H1.2 Education and Vocational Skills
☐ 5H1.3 Mental and Emotional Condition
☐ 5H1.4 Physical Condition
☐ 5H1.5 Employment Record
☐ 5H1.6 Family Ties and Responsibilities
☐ 5H1.11 Military Record, Charitable Service, Good Works
☐ 5K2.0 Aggravating or Mitigating Circumstances
☐ 5K2.1 Death
☐ 5K2.2 Physical Injury
☐ 5K2.3 Extreme Psychological Injury
☐ 5K2.4 Abduction or Unlawful Restraint
☐ 5K2.5 Property Damage or Loss
☐ 5K2.6 Weapon or Dangerous Weapon
☐ 5K2.7 Disruption of Government Function
☐ 5K2.8 Extreme Conduct
☐ 5K2.9 Criminal Purpose
☐ 5K2.10 Victim's Conduct
☐ 5K2.11 Lesser Harm
☐ 5K2.12 Coercion and Duress
☐ 5K2.13 Diminished Capacity
☐ 5K2.14 Public Welfare
☐ 5K2.16 Voluntary Disclosure of Offense
☐ 5K2.17 High-Capacity, Semiautomatic Weapon
☐ 5K2.18 Violent Street Gang
☐ 5K2.20 Aberrant Behavior
☐ 5K2.21 Dismissed and Uncharged Conduct
☐ 5K2.22 Age or Health of Sex Offenders
☐ 5K2.23 Discharged Terms of Imprisonment
☐ Other guideline basis (*e.g.*, 2B1.1 commentary)

D **Explain the facts justifying the departure.** *(Use page 4 if necessary.)*

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STATEMENT OF REASONS

(Not for Public Disclosure

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM

(Check all that apply.)

A **The sentence imposed is** *(Check only one.)*:

☐ below the advisory guideline range
☐ above the advisory guideline range

B **Sentence imposed pursuant to** *(Check all that apply.)*:

1 **Plea Agreement** *(Check all that apply and check reason(s) below.)*:

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court
☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** *(Check all that apply and check reason(s) below.)*:

☐ government motion for a sentence outside of the advisory guideline system
☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object
☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system *(Check reason(s) below.)*:

C **Reason(s) for Sentence Outside the Advisory Guideline System** *(Check all that apply.)*

☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))
☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** *(Use page 4 if necessary.)*

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DEFENDANT:
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DISTRICT:

STATEMENT OF REASONS
(Not for Public Disclosure

VII COURT DETERMINATIONS OF RESTITUTION

A ☐ Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered *(Check only one.)*:

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. *(Explain.)*

D ☐ Partial restitution is ordered for these reasons *(18 U.S.C. § 3553(c))*:

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE *(If applicable.)*

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Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's Residence Address:

Defendant's Mailing Address:

Date of Imposition of Judgment

_____

Signature of Judge

Name of Judge Title of Judge

Date Signed _____

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