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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Dixie Randock, No. 08-30268
N.R. Smith, dissenting only as to Part 3 of the Memorandum:

The parties entered into a Rule 11(c)(1)(C) plea agreement, agreeing to a three-year period of supervised release. This agreement specifically stated that "[t]he United States and the Defendant agree to recommend that the Court impose a 3 year term of supervised release to include the following special conditions, in addition to the *standard conditions* of supervised release." The court imposed 240 hours of community service which was not included in the special conditions listed in the agreement. By statute, a court may impose community service as a discretionary condition of supervised release. *See* 18 U.S.C. §§ 3583(d)(3), 3563(b)(12).

On June 26, 2008, the Probation Office recommended that Randock "complete 240 hours of community service work, at the rate of not less than 20 hours per month at a not-for-profit site approved in advance by the supervising officer." Randock never objected to this recommended condition of supervised release. On July 2, 2008, Randock's sentencing hearing was held. As part of the sentence, the court imposed the community service condition following the Probation Office's recommendation. Randock once again failed to object to this condition of supervised. Further, Randock made no motion to withdraw her plea,

since the court had imposed a "special condition" of release, not listed in and allegedly violating the Rule 11(c)(1)(C) plea agreement. At argument, counsel for Randock stated that withdrawal of her plea agreement is not being sought on appeal; rather, Randock asks this court only to strike this condition.

Randock cites no precedent outlining that the imposition of 240 hours of community service in these circumstances (1) is plain error (2) that it affects her substantial rights, or (3) or that it affects the fairness, integrity, or public reputation of judicial proceedings. The only precedent, where courts have found plain error in failing to follow Rule 11(c)(1)(C) agreements, occurs when the district court has significantly lengthened or significantly modified the sentence. *See United States v. Gilchrest*, 130 F.3d 1131 (3d Cir. 1997) (finding plain error when the parties agreed to no supervised release and the district court imposed a twelve month period of supervised release), *United States v. Mukai*, 26 F.3d 953, 955 (9th Cir. 1994) (finding plain error when the parties agreed to a sentence of five years imprisonment and the district court modified the sentence to five years probation, which was substantially less than the minimum sentence). Randock's sentence was not significantly modified (as in *Mukai*), and it wasn't lengthened at all.

This sentencing of community service (1) does not lengthen the period of the

sentence or supervised release and (2) brought no objection from Randock and no motion to withdraw Randock's plea for failure to abide by the Rule 11(c)(1)(C) agreement. Therefore, this sentencing of community service cannot be said to have been error that "seriously affected the fairness, integrity, or public reputation of judicial proceedings" as required for disturbance of sentence under *United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008). Accordingly, I dissent as to Part 3 of the Memorandum.