Supervised Release (Parole): An Overview of Federal Law

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SUMMARY

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Supervised Release (Parole): An Overview of Federal Law

Federal courts sentence almost 75% of the defendants convicted of federal offenses to a term of supervised release. A term of supervised release is a period following a defendant's release from prison when a probation officer monitors the defendant to ensure compliance with the conditions for the defendant's release. Under some circumstances, the court may terminate the term of supervised release, extend it, or revoke it.

Supervised release replaces parole for federal crimes committed after November 1, 1987. Like parole, supervised release is a period of restricted freedom following a defendant's release from prison. The nature of supervision and the conditions imposed during supervised release are similar to those that applied in the earlier system of federal parole. However, while parole operates in lieu of the remainder of an unexpired prison term, supervised release begins only after a defendant has completed his full prison sentence. Where revocation of parole could result in a defendant's return to prison to finish out his original sentence, revocation of supervised release can lead to a return to prison for a term in addition to that imposed for the defendant's original sentence.

A sentencing court determines the duration and conditions for a defendant's supervised release at the time of initial sentencing. As a general rule, federal law limits the maximum duration of supervised release to five years, although in the case of serious drug, sex, and terrorism-related offenses it sometimes permits, and sometimes mandates, supervision for a term of any duration or for life.

Several conditions are standard features of supervised release. Some conditions, such as a ban on the commission of further crimes, are required. Other conditions, such as an obligation to report to a probation officer, have become standard practice by the operation of the Sentencing Guidelines, which federal courts must consider along with other statutorily designated considerations. Together with these regularly imposed conditions, the Sentencing Guidelines recommend additional conditions appropriate in specific offense- or offender- situations. A sentencing court may impose any of these discretionary conditions, as long as they offend no constitutional limitations, involve no greater deprivation of liberty than is reasonably necessary, and are "reasonably related" to the nature of the offense, the defendant's crime-related history, deterrence of crime, protection of the public, or the defendant's rehabilitation. If the court finds that a defendant has violated a condition of his release, it may revoke his supervised release and resentence him to a further term of imprisonment and supervised release.

Both a defendant's constitutional rights and separation-of-powers concerns set boundaries for supervised release conditions. Federal courts have upheld a wide range of conditions against constitutional challenges. A constitutionally suspect condition is also likely to run afoul of statutory "reasonably related" or excessive "deprivation of liberty" limitations. In such cases, the courts often resolve the issue on statutory grounds.

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Introduction[1]

Federal courts sentence close to three quarters (72.9%) of the defendants convicted of federal offenses to a term of supervised release.[2] Supervised release is the successor to parole in the federal criminal justice system.[3] In the 1984 Sentencing Reform Act, Congress eliminated parole in future cases to create a more determinate federal sentencing structure.[4] In its place, Congress instituted a system that includes supervised release, which applies to all federal crimes committed after November 1, 1987.[5]

Both parole and supervised release call for a period of supervision following release from prison and for a return to prison upon a failure to observe designated conditions. Parole ordinarily stands in lieu of a portion of the original term of imprisonment, while supervised release begins only after full service of the original term (less any "good time" credits).[6] Parole restrictions last no longer than the remainder of a defendant's original sentence. Supervised release restrictions can last for the remainder of a defendant's life, although the court may modify the conditions at any time and may terminate supervised release after a year.[7]

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[1] This report is available in an abridged form, without the footnotes, attributions, citations to authority, or attachments found here, as CRS Report RS21364, *Supervised Release (Parole): An Abbreviated Outline of Federal Law*, by Charles Doyle.

[2] U.S. SENTENCING COMM'N, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 18 (2020), https://www.ussc.gov/research/sourcebook-2020.

[3] 18 U.S.C. §§ 4201–4218 (1982), reprinted 18 U.S.C. § 4201 note. *See generally*, *Forty-Ninth Review of Criminal Procedure: Section IV: Sentencing—Supervised Release*, 49 GEO. L.J. ANN. REV. CRIM. PROC. 929 (2020); U.S. SENTENCING COMM'N, PRIMER: SUPERVISED RELEASE (March 2020).

[4] Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 211 *et seq.*, 98 STAT. 1837, 1987 (codified at 18 U.S.C. § 3551 note).

[5] 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 a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b)."); U.S.S.G. § 5D1.1 & cmt. n.1 ("(a) The court shall order a term of supervised release to follow imprisonment – (1) when required by statute (see 18 U.S.C. § 3583(a)); or (2) except as provided in subsection (c) [relating to deportable aliens], when a sentence of imprisonment of more than one year is imposed. (b) The court may order a term of supervised release to follow imprisonment in any other case. . . . 1. **Application of Subsection (a)**. – Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3[relating to the sentencing factors mentioned in 18 U.S.C. § 3553(a)(1), (2), (6), (7)], that supervised release is not necessary."). The Sentencing Reform Act became effective by and large on November 1, 1987. 18 U.S.C. § 3551 note. Parole continues to apply to the small number of remaining federal offenders serving sentences for crimes committed prior to November 1, 1987. Pub. L. No. 100-182, § 2, 101 STAT. 1266 (1987), 18 U.S.C. § 3551 note; *cf.* United States v. Stewart, 865 F.2d 115, 116-19 (7th Cir. 1988). Although Congress officially repealed the parole provisions, including those authorizing the U.S. Parole Commission's activities, in 1984, Congress has several times extended the life of the Parole Commission to address these remaining offenders. 18 U.S.C. § 3551 note. Congress also vested the U.S. Parole Commission with authority over parole of defendants incarcerated for violations of the laws of the District of Columbia. Pub. L. No. 105-33, § 11231, 111 STAT. 251, 745 (1997). The District of Columbia abolished parole as of August 5, 2000, but the U.S. Parole Commission continues to have responsibility for parole decisions concerning those convicted for D.C. offenses committed before that date. *Cf.* D.C. CODE § 22-403.01. The U.S. Parole Commission is now scheduled to expire on November 1, 2022. Pub. L. No. 116-159, 134 STAT. 741 (2020); 18 U.S.C. § 3551 note.

[6] *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 7A.2(b) (2018), https://guidelines.ussc.gov/chapters/7/parts ("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.").

[7] 18 U.S.C. § 3583(e).

Because of their differences, some commentators[8] and judges have highlighted the way that supervised release works differently from parole.[9] Differences and critics notwithstanding, supervised release is now a regular feature of sentencing in the federal system. Parole is not.

Federal courts ordinarily set the terms and conditions of supervised release when they sentence a criminal defendant to prison, [10] and "[t]he duration, as well as the conditions of supervised release are components of a sentence."[11] Sentencing courts have broad discretion when imposing the conditions of supervised release;[12] yet their exercise of such discretion must be understood within the confines established for mandatory conditions, the scope of permissible standard discretionary conditions and special conditions, and the deference that the Sentencing Guidelines require.

Except in specified drug offenses, federal crimes of terrorism, certain sex offenses, and domestic violence cases, courts may decline to impose supervised release for a particular defendant.[13] However, the Sentencing Guidelines, promulgated by the United States Sentencing Commission, recommend that sentencing courts impose a term of supervised release in most felony cases.[14]

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[8] Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. OF L.A. L. REV. 587, 642-43 (2019) ("Although the circuit courts regard them as 'constitutionally indistinguishable,' there are actually three key differences between parole and supervised release: their method of imposition (relief/penalty), their theory of punishment (rehabilitative/punitive), and their governing institutions (agency/courts). . . . Supervised release is a unique form of post-release supervision, a significant feature of the federal justice system that impacts nearly every criminal defendant and is responsible for the incarceration of tens of thousands.").

[9] United States v. Ka, 982 F.3d 219, 227 n.4 (4th Cir. 2020) (Gregory, J., dissenting) ("[A]t its most expansive, the federal parole system supervised . . . about one-fourth of the number now on supervised release' and 'federal probation has declined by about two-thirds since' the introduction of supervised release. . . . 'Supervised release is now the dominant form of federal community supervision . . . [and] is responsible for sending a significant number of offenders back to prison.' 'Revocations have also become more common, and more than half of all revocations are for noncriminal conduct.' 'One-third of all defendants are eventually found in violation of a condition of their release. . . . [i]n 2009, over 10,000 people were in federal prison for violating their supervised release, which is between 5 and 10 per cent of the total federal prison population.' Thus, '[w]hile Congress intended supervised release to reduce government interference in the lives of former prisoners,' it has instead grown to vast scale and, for many people, extends involvement with the criminal system, raising the chances of reincarceration.") (quoting Fiona Doherty, *Indeterminate Sentencing Reforms*, 88 N.Y.U. L. REV. 958, 997-98, 1014-15 and *Schuman*, 53 LOY. OF L.A. L. REV. at 603-07).

[10] 18 U.S.C. § 3583(a), *supra* note 5. The sentencing court must inform the defendant of the conditions and duration of any term of supervised release either explicitly or by reference to the presentence report. United States v. Omigie, 977 F.3d 397, 406 (5th Cir. 2020) (citing United States v. Diggles, 957 F.3d 551, 561 (5th Cir. 2020) (en banc)).

[11] United States v. Wilson, 707 F.3d 412, 414 (3d Cir. 2013) (citation omitted); United States v. Perrin, 926 F.3d 1044, 1049 (8th Cir. 2019).

[12] United States v. Hinojosa, 956 F.3d 331, 334 & n.4 (5th Cir. 2020) (citing United States v. Hathorn, 920 F.3d 982, 984 (5th Cir. 2019) (citing 18 U.S.C. § 3583(d)(1)–(3)) (footnote omitted); United States v. Mumuni, 946 F.3d 97, 106 (2d Cir. 2019); United States v. Boucher, 937 F.3d 702, 708 (6th Cir. 2019); United States v. Spallek, 934 F.3d 822, 824 (8th Cir. 2019) (referring to 18 U.S.C. § 3583(d), which "requires that the condition be 'reasonably related' to certain § 3553(a) factors, 'involve[ ] no greater deprivation of liberty than is reasonably necessary for the purposes' enumerated in those provisions of § 3553(a), and be consistent with policy statements issued by the Sentencing Commission." (internal citations omitted)).

[13] 18 U.S.C. §§ 3583(a), 3583(j), 3583(k); 21 U.S.C. § 841(b).

[14] 18 U.S.C. § 3583; U.S.S.G. § 5D1.1 cmt. n.1; *id.* § 5D1.1 cmt. n.3(A) ("In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (iv) the need to provide restitution to any victims of the offense."); for background and analysis related to the federal Sentencing Guidelines, *see generally*, CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

A term of supervised release begins when a prisoner is actually released, regardless of when he should have been released.[15] There is a split among the circuits over when the term of supervised release begins for a defendant whose release from federal custody is stayed pending a civil commitment determination.[16]

A court may sentence a defendant to several terms of supervised release for each of several crimes, but the terms are served at the same time rather than consecutively.[17] This rule applies even when criminal statutes require a defendant to serve the multiple terms of imprisonment consecutively.[18]

Duration

Section 3583(b) sets the authorized duration for a term of supervised release, subject to exceptions for certain drug, terrorism, and sex offenses:[19]

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[15] 18 U.S.C. § 3624(e); United States v. Johnson, 529 U.S. 53, 60 (2000) (holding that a prisoner's term of supervised release could not be reduced by the two and a half years during which he inadvertently remained incarcerated after the expiration of his lawful prison term). Nevertheless, supervised release follows imprisonment; if the court does not sentence a defendant to prison, it may not sentence him to a term of supervised release. United States v. Lopez-Postrana, 889 F.3d12, 21 (1st Cir. 2018).

[16] *Compare* United States v. Maranda, 761 F.3d 689, 690 (7th Cir. 2014) (In the case of "a defendant who has completed his prison sentence, but who remains in federal custody while he awaits a determination of whether he will be civilly committed[,] . . . his term of supervised release d[oes] not begin until the [commitment] proceedings [a]re] resolved in his favor[.]"), United States v. Neuhauser, 745 F.3d 125, 131 (4th Cir. 2014), *and* United States v. Mosby, 719 F.3d 925, 929–30 (8th Cir. 2013), *with* United States v. Turner, 689 F.3d 1117, 1121–26 (9th Cir. 2012).

A sentencing court, however, may not delay the term beyond the defendant's release from federal custody. Appellate courts in a number of circuits have held that a district court may not impose an indefinite condition of supervised release which prohibits the defendant from returning to the United States, that is, postponing or tolling the term of supervised release during the defendant's absence from the United States. United States v. Cole, 567 F.3d 110, 113–16 (3d Cir. 2009) (citing in accord United States v. Balogun, 146 F.3d 141, 146 (2d Cir. 1998); United States v. Juan-Manuel, 222 F.3d 480, 487 (8th Cir. 2000); United States v. Okoko, 365 F.3d 962, 966 (11th Cir. 2004); United States v. Ossa-Gallegos, 491 F.3d 537, 541 (6th Cir. 2007)).

[17] 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."); United States v. Hernandez-Guevara, 162 F.3d 863, 877–78 (5th Cir. 1998); United States v. Zizkind, 471 F.3d 266, 272 (1st Cir. 2006).

[18] U.S.S.G. § 5G1.2 cmt. n.2(C).

[19] 21 U.S.C. § 841(b) (text *infra* note 20); 18 U.S.C. § 3583(j) ("Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [relating to federal crimes of terrorism without reference to the terrorist-motivation requirement of section 2332b(g)(5)(A)] is any term of years or life."); *e.g.*, United States v. Dais, 482 F. Supp. 3d 800, 807 (E.D. Wis. 2020).

For exceptions, see 18 U.S.C. § 3583(k) ("Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [relating to kidnapping] involving a minor victim, and for any offense under section 1591 [relating to commercial sex trafficking], 1594(c)) [relating to attempts or conspiracies to engage in commercial sex trafficking], 2241 [relating to aggravated sexual abuse], 2242 [relating to sexual abuse], 2243 [relating to sexual abuse of a minor or ward], 2244 [relating to abusive sexual contact], 2245 [relating to sexual abuse offenses resulting in death], 2250 [relating to failure to register as a sex offender], 2251 [relating to sexual exploitation of children], 2251A [relating to selling or buying children], 2252 [relating to material involving sexual exploitation of minors], 2252A [relating to child pornography], 2260 [relating to production of child pornography abroad], 2421 [relating to interstate transportation for unlawful sexual purposes], 2422 [relating to coercive interstate travel for unlawful sexual purposes], 2423 [relating to transportation of minors for unlawful sexual purposes], or 2425 [relating to use of interstate facilities to transmit information about a minor], is any term of years not less than 5, or life."). The Supreme Court in *Haymond* held unconstitutional another portion of section 3583(k), which purports to authorize a mandatory minimum term of imprisonment upon revocation of supervised release based on a judge's finding by a preponderance of the evidence. United States v. Haymond, 139 S. Ct. 2369, 2373 (2019) (plurality opinion); *id.* at 2386 (Breyer, J., concurring in the judgment).

Generally

- Class A felony (felony punishable by death or life imprisonment):[20] 5 years (max.)[21]
- Class B felony (felony punishable by imprisonment for a max. of 25 years or more.):[22] 5 years (max.)[23]
- Class C felony (felony punishable by imprisonment for a max. of 10 years or more but less than 25 years):[24] 3 years (max.)[25]
- Class D felony (felony punishable by imprisonment for a max. of 5 years or more but less than 10 years):[26] 3 years (max.)[27]
- Class E felony/misdemeanor (felony punishable by imprisonment):[28] 1 year (max.)[29]

Exceptions

- Drug trafficking: life (max.)/mandatory min. range from 2 to 10 years
- Federal "crime of terrorism": life (max.)
- Designated sex offenses against a child: life (max.)/ mandatory min.- 5years

As for the exceptions, possession with intent to distribute illicit drugs ordinarily permits a sentence of supervised release for any term of years up to life, and the statute assigns a sliding scale of mandatory minimum terms of supervised release based on the dangerousness of the drug, the volume involved, and whether the defendant is a recidivist.[30] Nevertheless, the Sentencing

[20] 18 U.S.C. § 3559(a)(1).

[21] *Id.* § 3583(b).

[22] *Id.*§ 3559(a)(2).

[23] *Id.* § 3583(b).

[24] *Id.* § 3559(a)(3).

[25] *Id.* § 3583(b).

[26] *Id.* § 3559(a)(4).

[27] *Id.* § 3583(b).

[28] *Id.* § 3559(a)(5)-(9).

[29] *Id.* § 3583(b).

[30] 21 U.S.C. § 841(b) ("[A]ny person who violates subsection (a) of this section [prohibiting possession with intent to distribute] shall be sentenced as follows: (1)(A) In the case of a violation of subsection (a) of this section involving– (i) 1 kilogram or more of . . . heroin; (ii) 5 kilograms or more of . . . (II) [powder] cocaine, . . . (iii) 280 grams or more of . . . cocaine base [crack]; (iv) 100 grams or more of phencyclidine (PCP) . . . ; (v) 10 grams or more of . . . lysergic acid diethylamide (LSD); . . . (vii) 1000 kilograms or more of . . . marihuana . . . ; or (viii) 50 grams or more of methamphetamine[.] . . . Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, *impose a term of supervised release of at least 5 years* in addition to such term of imprisonment and shall, if there was such a prior conviction, *impose a term of supervised release of at least 10 years* in addition to such term of imprisonment, . . . (B) In the case of a violation of subsection (a) of this section involving– (i) 100 grams or more of . . . heroin; (ii) 500 grams or more of . . . (II) [powder] cocaine, . . . (iii) 28 grams or more of . . . cocaine base [crack]; (iv) 10 grams or more of phencyclidine (PCP) . . . ; (v) 1 gram or more of . . . lysergic acid diethylamide (LSD); . . . (vii) 100 kilograms or more of . . . marihuana . . . ; or (viii) 5 grams or more of methamphetamine[.] . . . Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a *term of supervised release of at least 4 years* in addition to such term of imprisonment and shall, if there was such a prior conviction, include *a term of supervised release of at least 8 years* in addition to such term of imprisonment[.] . . . (C) In the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D)[.] . . . Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose *a term of supervised release of at least 3 years* in addition to such term of imprisonment and shall, if there was such a prior conviction, impose *a term of supervised release of at least 6 years* in addition to such term of imprisonment. . . . (D) In

Guidelines point out that the "safety valve" and "substantial assistance" provisions (18 U.S.C. §§ 3553(e), (f)), which excuse the application of mandatory minimums in certain drug cases, apply to the duration of supervised release.[31]

Similar mandatory minimum terms of supervised release apply in the case of kidnaping a child and certain sex offenses.[32] In those instances, the mandatory minimum is five years, regardless of the triggering offense or the defendant's criminal record.[33] For federal "crimes of terrorism," that is, those listed in 18 U.S.C. § 2332b(g)(5)(B), the courts must impose a term of supervised release of any term of years or life.[34] The obligation applies regardless of whether the offense was

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the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection[.] . . . Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, *impose a term of supervised release of at least 2 years* in addition to such term of imprisonment and shall, if there was such a prior conviction, *impose a term of supervised release of at least 4 years* in addition to such term of imprisonment. . . . (E)(i) . . . in the case of any controlled substance in schedule III, . . . (iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose *a term of supervised release of at least 2 years* in addition to such term of imprisonment and shall, if there was such a prior conviction, impose *a term of supervised release of at least 4 year*s in addition to such term of imprisonment. (2) In the case of a controlled substance in schedule IV . . . [a]ny sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose *a term of supervised release of at least one year* in addition to such term of imprisonment and shall, if there was such a prior conviction, impose *a term of supervised release of at least 2 years* in addition to such term of imprisonment.") (emphases added).

[31] U.S.S.G. §5d1.2 cmt nn.2, 3 ("**2. Safety Valve Cases.** – A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. *See* 18 U.S.C. § 3553(f). In such case, the term of supervised release shall be determined under subsection (a). **3. Substantial Assistance Cases**. – Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities)."). *See generally* CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle.

[32] 18 U.S.C. § 3583(k); *see, e.g.*, United States v. Arbaugh, 951 F.3d 167, 171 (4th Cir. 2020).

[33] 18 U.S.C. § 3583(k).

[34] 18 U.S.C. § 3583(j). Section 2332b(g)(5)(B) lists a substantial number of federal offenses. *Id.* § 2332b(g)(5)(B) ("an offense that– . . . (B) is a violation of– (i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States)[,] 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2280a (relating to maritime safety), 2281 through 2281a (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to

committed for terrorist purposes,[35] but under the Sentencing Guidelines the extended duration is limited to terrorism cases "which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person."[36]

The court may terminate a defendant's term of supervised release at any time after the defendant has served a year on supervised release, based on the defendant's conduct, the interests of justice, and consideration of several of the general sentencing factors.[37] The circuits are divided over whether the court may dismiss such a petition out of hand or must explain its action.[38]

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financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title; (ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284); (iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or (iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).").

[35] Section 3583(j) declares that "the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life." 18 U.S.C. § 3583(j). Section 2332b(g)(5) defines crimes of terrorism as those (A) committed for a terrorist purpose and (B) those listed in 18 U.S.C. § 2332b(g)(5)(B). A crime is listed in section 2332b(g)(5)(B) regardless of whether it is committed for the terrorist purposes identified in section 2332b(g)(5)(A). Of course, the same term applies when the offense is committed for a terrorist purpose, *see, e.g.*, United States v. Wright, 747 F.3d 399, 407 (6th Cir. 2014).

[36] U.S.S.G. § 5d1.2(B)(1).

[37] 18 U.S.C. § 3583(e) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . . (1) 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[.]"); United States v. Johnson, 529 U.S. 53, 60 (2000); United States v. Cordero, 7 F.4th 1058, 1071-72 (11th Cir. 2021); United States v. Hamilton, 986 F.3d 4135, 422-23 (4th Cir. 2021).

The sentencing factors the court must consider are: "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed– . . . (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; . . . (4) the kinds of sentence and the sentencing range established for– (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines– (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement– (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence 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 (footnote omitted.

[38] United States v. Johnson, 877 F.3d 993, 994–1000 (11th Cir. 2017) (per curiam) (district court must explain unless its reasons are apparent from the record); United States v. Mathis-Gardner, 783 F.3d 1286, 1286–87 (D.C. Cir. 2015) (district court need not explain if its reasons are discernable from the record); United States v. Emmett, 749 F.3d 817, 820 (9th Cir. 2014) ("A district court's duty to explain its sentencing decisions must also extend to requests for early termination of supervised release."); *id.* at 820 n.1 ("Other circuits have reached conflicting results on this issue. *Compare* United States v. Mosby, 719 F.3d 925, 931(8th Cir. 2013) (requiring no explanation), *with* United States v. Lowe, 632 F.3d 996, 998 (7th Cir. 2011) (holding that 'although a court need not make explicit findings as to each of

A court may extend a defendant's term of supervised release, unless the term has already run or unless the court initially imposed the maximum permissible term.[39]

Conditions

Conditions for supervised release are determined during a federal defendant's initial sentencing, based on the nature of the offense, the defendant's particular history, and other factors. When determining applicable conditions, courts consider both federal statutory requirements and the federal Sentencing Guidelines.[40]

There are mandatory and discretionary conditions for supervised release.

Mandatory Conditions

Section 3583 makes several conditions mandatory regardless of the crime of conviction, and a few additional conditions mandatory in cases involving domestic violence or sex offenses. All supervised release orders require defendants to:

- refrain from criminal activity;[41]
- forgo the unlawful possession of controlled substances;[42]
- refrain from the unlawful use of controlled stances and submit to periodic drug tests;[43]
- cooperate with collection of DNA samples;[44]

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the factors, the record must reveal that the court gave consideration to the § 3553(a) factors'), *and* United States v. Gammarano, 321 F.3d 311, 315–16 (2d Cir. 2003) (requiring a statement that the court has considered the statutory factors but not findings of fact).").

[39] 18 U.S.C. § 3583(e) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . . (2) extend a term of supervised release if less than the maximum authorized term was previously imposed . . . at any time prior to the expiration or termination of the term of supervised release[.]"); United States v. McCullock, 991 F.3d 313, 323 (1st Cir. 2021); United States v. Bobal, 981 F.3d 971, 977 (11th Cir. 2020); United Sates v. Rusnak, 981 F3d 697, 712 (9th Cir. 2020).

[40] Although no longer binding, the Sentencing Guidelines remain a primary sentencing consideration. Gall v. United States, 552 U.S. 38, 40–51 (2007). Those guidelines call for the sentencing court to calculate the applicable Guidelines range, hear the views of the parties on sentencing, and consider the application statutory factors. The district court must then make an "individualized assessment based on the facts presented" and justify a sentence outside the Guidelines range. That sentence may be reviewed by an appellate court under an abuse-of-discretion standard, ensuring that the district court did not make any significant procedural error and taking into account the totality of the circumstances.

[41] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(1).

[42] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(2).

[43] 18 U.S.C. § 3583(d) (". . . The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section [3583(e)]. The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test."); U.S.S.G. § 5D1.3(a)(4).

[44] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(8). DNA samples are collected from those convicted and imprisoned for a federal offense, 34 U.S.C. § 40702; 28 C.F.R. § 28.12; *see e.g.*, United States v. Diggles, 957 F.3d 551, 556 (5th Cir.

- prior to release, agree to adhere to the payment schedule for any unpaid fine imposed;[45]
- pay any remaining restitution and special assessment balances;[46]
- first-time domestic violence offenders must attend an approved rehabilitation program if one is located within 50 miles of their residence; [47]
- convicted sex offenders must register with relevant authorities if federal sex offender registry requirements apply.[48]

The "no new crimes" condition encompasses offenses under federal, state, or local law.[49] Notwithstanding the mandatory general "no new crimes" condition, supervised release comes with two additional, specific mandatory conditions prohibiting the unlawful possession or use of controlled substances.[50]

Section 3583(d) requires defendants, convicted for the first time of a federal crime of domestic violence, to participate in an approved rehabilitation program, if one is available within 50 miles of his residence.[51] Here, a crime of domestic violence is one "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 other relative of the defendant."[52] The mandatory condition requires a domestic violation conviction, but absent a conviction, evidence in the record may support a corresponding discretionary condition.[53]

Regardless of the existence of a mandatory condition, if the court imposes no fines and no restitution is ordered, the "pay your fines and restitution" conditions have no bearing.[54] The existence of the mandatory condition by itself may authorize a restitution order when it would otherwise not have been possible.[55]

2020) (en banc) (replicating that portion of the Probation Officer's Presentence Report (PSR) reciting the obligation to cooperate with the collection of DNA samples).

[45] 18 U.S.C. § 3624(e). The statute, however, does not specify that such agreements will be enforced as conditions of supervised release after the agreement is made. To fill this gap, the Sentencing Guidelines identify the payment of fines and restitution as a mandatory condition of supervised release; U.S.S.G. § 5D1.3(a)(5) ("If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).

[46] *Id.* § 3583(d); U.S.S.G. § 5D1.3(a)(6) ("The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment . . . the defendant shall adhere to the schedule.").

Courts impose "special assessments" upon conviction in amounts ranging from $5 to $100 for individual defendants and up to $400 for organizations and other entities. *Id.* § 3013.

[47] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(3);18 U.S.C. § 3561(b).

[48] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(7).

[49] *Id.* § 3583(d); U.S.S.G. § 5D1.3(a)(1).

[50] 18 U.S.C. § 3583(d) (possession); U.S.S.G. §§ 5D1.3(a)(2) (possession), 5D1.3(a)(4) (use).

[51] 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(a)(3).

[52] 18 U.S.C. §§ 3583(d), 3561(b).

[53] United States v. Gomez, 960 F.3d 173, 179 n.28 (5th Cir. 2020).

[54] United States v. Strobel, 987 F.3d 743, 747 (7th Cir. 2021).

[55] United States v. Adams, 955 F.3d 238, 250 (2d Cir. 2020) ("Adams is correct that the [district] court exceeded its authority by ordering a part of the judgment to begin immediately, since neither 18 U.S.C. § 3663(a) nor 18 U.S.C. § 3663A permits restitution for Title 26 [tax] offenses. But as Adams himself concedes, district courts do have the authority to order restitution as a condition of supervised release. Specifically, 18 U.S.C. § 3583(d) authorizes courts to impose, as a condition of supervised release, any condition set forth as a discretionary condition of probation in section 3563(b). One such condition is the requirement that the defendant make restitution to the victim of the offense. 18

In addition to serving as a mandatory condition of supervised release, failure to register as a sex offender when required to do so may constitute a separate offense under some jurisdictional circumstances.[56]

Discretionary Conditions

Courts have relatively broad discretion to impose other conditions of supervised release to supplement the mandatory conditions. Section 3583(d) is specific about a few of these discretionary conditions. For example, it states that a court may condition an alien's supervised release upon his deportation and remaining outside the United States,[57] although the Sentencing Guidelines recommend a limited exercise of the authority.[58] Under this authority, the defendant's term of supervised release is "in fact unsupervised release with mandatory and standard conditions and the special condition that [the defendant] not illegally re-enter the United States."[59]

Section 3583(d) also authorizes a court, in the case of an offender required to register as a sex offender, to condition supervised release upon the offender's submission to warrantless, suspicionless searches by his probation officer, or with reasonable suspicion warrantless searches by any law enforcement officer.[60] The section adopts the statutory list of conditions for probation

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U.S.C. § 3563(b)(2). Section 5E1.1 of the Sentencing Guidelines further states that '[I]n the case of an identifible victim, the court shall . . . impose a term . . . supervised release with a condition requiring restitution for the full amount of the victim's loss even if the offense does not qualify for restitution under 18 U.S.C. § 3663(a). Thus, we have repeatedly held that district courts may impose restitution in Title 26 cases as a condition of supervised release."); *but see* United States v. Delano, 981 F.3d 1136, 1139-40 (10th Cir. 2020) ("Courts have no inherent authority to order restitution; they may only do so as authorized by statute. Under the VWPA [18 U.S.C. § 3663], Delano's obligation to pay restitution terminated in 2013, twenty years after he was sentenced for armed bank robbery. And, by its express terms, the MVRA [18 U.S.C. § 3663A] cannot apply to him. Accordingly, the district court erred when it concluded the MVRA authorized entry of an order requiring Delano to pay the outstanding balance of the restitution imposed in 1993.") (failing to mention the 18 U.S.C. § 3563 probation provision nor Sentencing Guideline as authority for the district court's order).

[56] 18 U.S.C. § 2250. See generally CRS Report R42692, *SORNA: A Legal Analysis of 18 U.S.C. §2250 (Failure to Register as a Sex Offender)*, by Charles Doyle.

[57] *Id.* § 3583(d) ("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.").

[58] U.S.S.G. § 5D1.1(c) ("The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."); *see also id.* cmt, n. 5 ("In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an additional measure of deterrence and protection based on the facts and circumstances of a particular case.").

[59] United States v. Chavez-Morales, 894 F.3d 1206, 1208 n.1 (10th Cir. 2018); *see also* United States v. Hernandez-Loera, 914 F.3d 621, 622-23 (8th Cir. 2019).

[60] 18 U.S.C. § 3583(d) (". . . The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions."); *see also* U.S.S.G § 5D1.3(d)(7). In a district in which the warrantless search condition had become a standard condition, regardless of whether the defendant was required to register as sex offender, one circuit court vacated the condition in the case of a defendant convicted of extortion in which the district court had failed to indicate how the condition met the "reasonably related" standard, *see* United States v. Farmer, 755 F.3d 849, 854 (7th Cir. 2014).

as another source of discretionary conditions of supervised release.[61] Finally, the section allows a court to impose any other appropriate condition subject to the general limitations on discretionary conditions of supervised release, *i.e.*, the condition must be reasonably related to one of several sentencing goals, it may involve no greater deprivation of liberty than is reasonably necessary to accommodate those goals, and it must be consistent with Sentencing Guideline policy statements.[62]

Limits on Discretionary Conditions

Thus, a court may impose a discretionary condition only if it (1) is "reasonably related" to specified factors; (2) "involves no greater deprivation of liberty than is reasonably necessary"; and (3) is "consistent with" policy statements issued by the U.S. Sentencing Commission.[63]

Reasonably Related

The threshold question for any discretionary condition of supervised release is whether it is reasonably related to the offense, the defendant, increased public safety, or one of several other sentencing factors.[64] Factors to which the condition must be "reasonably related" include (1) the nature and circumstances of the offense and the defendant's history and character; (2) deterrence of crime; (3) protection of the public; and (4) the defendant's rehabilitation.[65] Since a condition may be reasonably related to a defendant's history or to future protection of the public, it need not be related to the offense for which supervised release was ordered.[66] Yet "reasonably related" may

[61] 18 U.S.C. § 3583(d).

[62] *Id.* ("The court may order, as a further condition of supervised release, to the extent that such condition– (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); (2) 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 (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(a); any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available.").

Section 3553(a) provides in pertinent part: "The court, in determining the particular sentence to be imposed, shall consider– (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed– . . . (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) 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).

[63] 18 U.S.C. § 3583(d). The Sentencing Guidelines caption sections 5D1.3(c), (d), and (e) as "policy statement[s]." *See, e.g.*, U.S.S.G. § 5D1.3(c) (titled " 'Standard' Conditions (Policy Statement)").

[64] 18 U.S.C. § 3583(d) (incorporating by reference 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)).

[65] *Id.* § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(d); United States v. Bolin, 976 F.3d 202, 210 (2d Cir. 2020); United States v. Morrison, 771 F.3d 687, 693 (10th Cir. 2014) ("[A] court may order . . . conditions of supervised release as long as the conditions are 'reasonably related' to 'the nature and circumstances of the offense and the history and characteristics of the defendant,' and the need 'to afford adequate deterrence to criminal conduct,' 'to protect the public from further crimes of the defendant,' and ' to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.' "); United States v. Bell, 770 F.3d 1253, 1259 (9th Cir. 2014); United States v. Salazar, 743 F.3d 445, 452 (5th Cir. 2014) (A "condition that is not related to the crime of conviction will nevertheless be upheld as long as it is justified by a defendant's criminal history.").

[66] United States v. Taylor, 997 F.3d 1348, 1353 (11th Cir. 2021); United States v. Johnson, 756 F.3d 532, 540–41 (7th Cir. 2014) ("We [have] reviewed our sister circuits' decisions and concluded that '[t]he common theme of these decisions is that sex-offender treatment is reasonably related . . . , even if the offense of conviction is not a sex offense, as long as the sexual offenses are recent enough in the defendant's history[.]' " (second set of brackets in original; citation omitted)); United States v. Bainbridge, 746 F.3d 943, 951 (9th Cir. 2014) ("A condition of supervised release does not have to be related to the offense of conviction because the sentencing judge is statutorily required to look forward in time to crimes that may be committed in the future by the convicted defendant." (citation omitted)).

turn on the currency and seriousness of past misconduct.[67] Although the statutory language repeats the conjunction "and" between factors and thus appears on its face to require that a particular condition relate to all, rather than just one, of these factors, courts have sometimes interpreted the statute so that a reasonable relationship to any one factor is sufficient to justify a discretionary condition.[68]

Unnecessary Deprivation of Liberty

The courts' general discretionary authority to order conditions of supervised release is likewise bound by the requirement that it "involve[] no greater deprivation of liberty than is reasonably necessary" for the reasonably related purposes.[69] The assessment is one of balancing. A considerable deprivation of liberty will be considered justified, when a condition is clearly reasonably related to a serious crime of conviction and a criminal history that cries out for close supervision.[70] At the other end of the spectrum, a serious deprivation of liberty will not be

[67] United States v. Richards, 958 F.3d 961, 965 (10th Cir. 2020) ("Defendant's prior drug and alcohol problems may appear . . . remote in time. But these were not the only facts before the district court."); United States v. Ford, 882 F.3d 1279, 1287 (10th Cir. 2018) ("'[P]rior sex offenses can be too temporally remote for sex offender conditions of supervised release to be reasonably related to the factors' prescribed by § 3583." (quoting United States v. Bear, 769 F.3d 1221, 1227 (10th Cir. 2014)); *Johnson*, 756 F.3d at 540–41; United States v. McLaurin, 731 F.3d 258, 264 (2d Cir. 2013) ("A condition of supervised release must also be 'reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant.' The charge to which McLaurin pleaded guilty was failure to register as a sex offender in Vermont in 2011. . . . McLaurin did not hide his whereabouts; he purposefully informed sex offender registry officials of his address in Vermont. His crime was failing to complete paperwork—albeit important paperwork. His criminal history includes one other instance when he failed to register his move between two Alabama counties. McLaurin's only conviction for an actual sexual offense was for photographing his daughter topless in 2001. Ten years passed between that offense and the instant failure to register, and McLaurin has not been convicted or accused of any substantively sexual crime in that period. We fail to see any reasonable connection between the defendant, his conviction more than a decade ago, his failure to fill out paperwork, and the government-mandated measurement of his penis.").

[68] *E.g.*, United States v. Taylor, 997 F.3d at 1353 (11th Cir. 2021) (noting that the condition need not be supported by each of the sentencing factors); United States v. Perkins, 935 F.3d 63, 65 (2d Cir. 2019) (explaining a condition may be supported by "any one" of the factors); United States v. Santiago, 769 F.3d 1, 9 (1st Cir. 2014) ("The conditions must just be reasonably related to one or more of the goals of supervised release, i.e., the nature and circumstances of the offense and the history and characteristics of the defendant, the need to deter criminal conduct, the need to protect the public, and the needed training, care, or treatment of the defendant."); United States v. Salazar, 743 F.3d 445, 451 (5th Cir. 2014) ("District courts have wide discretion in imposing special conditions of supervised release. First, such conditions must be reasonably related to one of the following statutory factors: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed training, medical care, or other correctional treatment in the most effective manner. A condition satisfies the requirements if it is reasonably related to any of the four factors.") (internal citations omitted).

[69] 18 U.S.C. § 3583(d).

[70] United States v. Ellis, 720 F.3d 220, 225–27 (5th Cir. 2013) (per curiam) (In the case of a defendant with a history of child molestation, sentenced to a lifetime of supervised release, the court observed: "First, Ellis appeals the special condition that he not 'possess, have access to, or utilize a computer or internet connection device . . . without prior approval of the court.' . . . However, restrictions on Internet and computer use are often imposed in cases involving child pornography, and this circuit has routinely upheld such restrictions. . . . Second, Ellis appeals the condition requiring him to 'have no contact with persons under the age of 18, including by correspondence, telephone, internet, electronic communication, or through third parties.' This circuit has affirmed bans on contact with children. Ellis's ban does not contain an exception for permitted contact and is, along with the other conditions, for life. Importantly, however, it references activities by which Ellis could initiate and carry on regular contact with children. By contrast, the condition in the subsequent paragraph, which prohibits 'unsupervised contact . . . at any location' without permission, makes clear that Ellis may in fact request permission from his probation officer for incidental contact in locations such as his place of work should the need arise. Third, Ellis appeals the condition that prohibits him from 'access to or loiter[ing] near school grounds, parks, arcades, playgrounds, amusement parks, or other places where children may frequently congregate' and from 'seek[ing] or maintain[ing] employment or volunteer work at any location . . . where persons under the age of 18 congregate, without prior permission of the probation officer.' Although

considered justified, when the connection between the condition and the defendant's crime and his past is tenuous.[71] Between the two poles, some courts see the standard as "a narrow tailoring requirement," one that compels the district court to "choose the least restrictive alternative."[72]

Consistent with Guidelines' Policy Statements

The third discretionary condition requirement, that it be consistent with pertinent Sentencing Guidelines policy statements. The Sentencing Commission has captioned the sentencing guidelines for standard conditions, special conditions, and additional conditions—"policy statements," *i.e.*, conditions must be consistent with Guideline requirements.[73]

Three Classes of Discretionary Conditions

The Sentencing Guidelines quote some of the statutorily identified discretionary conditions, suggest expanded versions of others, and propose additional considerations in still other situations.[74] They divide the discretionary conditions into three groups—Thirteen "standard" conditions, which courts impose as a matter of practice in most cases;[75] eight "special" conditions that may be applied to particular kinds of cases;[76] and six "additional" conditions.[77] When a court elects to impose a discretionary condition of supervised release, it must refer to the condition during the pronouncement of sentence.[78]

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it is true there is no evidence Ellis targeted children in public places, his crime and the evidence of past molestation is sufficient reason for the district court to be concerned with his access to children absent permission. . . . Fourth, Ellis appeals as not related to public safety the condition that he not 'date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.' This restriction is reasonably related to public safety because 'Congress has made clear that children . . . are members of the public it seeks to protect.' Even though the conditions contain separate restrictions on contact with minors, the evidence showed Ellis has a proclivity to use close relationships to reach children. . . . Therefore, restricting his contact with other adults who have minor children is related to public safety. . . . In addition, Ellis appeals on the ground that the cumulative effect of all these conditions is a greater depravation of liberty than necessary. . . . [S]ince we have determined that none of these conditions are unreasonable, their cumulative effect is not unreasonable.") (internal citations and footnote omitted; last set of brackets added).

[71] United States v. Bear, 769 F.3d 1221, 1229 (10th Cir. 2014) ("When the liberty interest at issue is substantial, such as a parent's right to have contact with his child, a challenged condition will be subject to strict scrutiny.); United States v. Ramos, 763 F.3d 45, 64 (1st Cir. 2014) ("A condition with no basis in the record or with only the most tenuous basis, will inevitably violate 18 U.S.C. § 358[3](d)(2)'s command that such conditions involve no greater deprivation of liberty than is reasonably necessary.") (citation omitted); *Johnson*, 756 F.3d at 540–41; United States v. Wolf Child, 699 F.3d 1082, 1099 (9th Cir. 2012).

[72] United States v. Hamilton, 986 F.3d 413, 420 (4th Cir. 2021) ("There must be some tailoring of the condition to the case."); United States v. Bolin, 976 F.3d 202, 214 ("If the liberty interest at stake is fundamental, a deprivation of that liberty is 'reasonably necessary' only if the deprivation is narrowly tailored to serve a compelling government interest."); United States v. Malenya, 736 F.3d 554, 559 (D.C. Cir. 2013) (citing in accord United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003)); *but see* United States v. Santiago, 769 F.3d 1, 9 (1st Cir. 2014) ("With respect to conditions of supervised release, the 'hallmark' that separates the permissible from the impermissible is whether, given the facts, a certain restriction was 'clearly unnecessary.' ").

[73] U.S.S.G. §§ 5D1.3(c), (d), (e). United States v. Hinojosa, 956 F.3dn 331, 334 (5th Cir. 2020)("[T]hat section of the Guidelines is a policy statement, so the condition need only be 'consistent' with it."); *see also* United States v. Perkins, 935 F.3d 63, 65-66 (2d Cir. 2019) (noting that binding policy statements may be found in the application notes of the Sentencing Guidelines in U.S.S.G. § 5D1.3).

[74] U.S.S.G. § 5D1.3. The Sentencing Commission substantially amended section 5D1.3 effective November 1, 2016. 81 Fed. Reg. 27,262 (May 5, 2016).

[75] U.S.S.G. § 5D1.3(c).

[76] U.S.S.G. § 5D1.3(d).

[77] U.S.S.G. § 5D1.3(e).

[78] United States v. Singletary, 984 F.3d 341, 345 (4th Cir. 2021) ("To reiterate, under *Rogers*, in order to sentence a

Standard Discretionary Conditions

For the most part, the Sentencing Guidelines' standard conditions replicate or build upon the probation conditions or statutory conditions of supervised release. Courts regularly impose the Sentencing Guidelines' standard conditions as a matter of practice.[79] Many of these conditions relate to the defendants relationship with their probation officers. The standard conditions require that a defendant:

- report to the probation office upon release from prison;[80]
- follow instructions relating to reporting to a probation officer;[81]
- refrain from leaving the judicial district without permission;[82]
- answer the probation officer's questions truthfully;[83]
- live in an approved residence and notify the probation officer of moves;[84]
- allow probation officer visits and permit the officer to seize prohibited items found in plain sight;[85]
- secure or seek full-time employment;[86]
- avoid communications or contact with convicted felons or anyone engaged in criminal activity;[87]

defendant to a non-mandatory condition of supervised release, the sentencing court must include that condition in its oral pronouncement of a defendant's sentence in open court." (citing United States v. Rogers, 961 F.3d 291, 296 (4th Cir. 2020)); United States v. Garcia, 983 F.3d 820, 822 (5th Cir. 2020).

[79] United States v. Truscello, 168 F.3d 61, 63 (2d Cir. 1999) ("[B]ecause the so-called 'standard conditions' [of U.S.S.G. § 5D1.3(c)] imposed in this case are 'basic administrative requirement[s] essential to the functioning of the supervised release system,' they are almost uniformly imposed by the district courts and have become boilerplate.") (internal citation omitted; alteration in original).

[80] U.S.S.G. § 5D1.3(c)(1) ("The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.").

[81] U.S.S.G. § 5D1.3(c)(2) ("After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.").

[82] U.S.S.G. § 5D1.3(c)(3) ("The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.").

[83] U.S.S.G. § 5D1.3(c)(4) ("The defendant shall answer truthfully the questions asked by the probation officer.").

[84] U.S.S.G. § 5D1.3(c)(5) ("The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.").

[85] U.S.S.G. § 5D1.3(c)(6) ("The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.").

[86] U.S.S.G. § 5D1.3(c)(7) ("The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.").

[87] U.S.S.G. § 5D1.3(c)(8) ("The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first get-ting the permission of the probation officer.").

- notify the probation officer of arrest or police questioning;[88]
- refrain from possession of firearms or dangerous weapons;[89]
- avoid becoming an informant without permission;[90]
- notify third parties of risks posed by the defendant upon the probation officer's determination;[91]
- adhere to the probation officer's instructions concerning the conditions of release.[92]

At one time, the territorial condition barred the defendant from leaving the "jurisdiction" without permission, which some considered vague; use of the term "federal judicial district" removes some of the uncertainty,[93] as does addition of the word "knowingly" to the traditional formula.[94]

The "answer your probation officer truthfully" condition might appear to raise questions concerning the defendant's privilege against self-incrimination. The Fourth Circuit Court of Appeals, however, has rejected that suggestion for two reasons. First, "a person seeking to invoke the Fifth Amendment privilege against self-incrimination generally must assert the privilege rather than answer [the probation officer's question]."[95] Second, the privilege is not implicated unless the statement is used in criminal proceedings, and supervised release revocation proceedings are not criminal proceedings.[96]

Defendants have found little more availing the suggestion that the Fourth Amendment's reasonable search and seize requirements undermine the "allow probation officer visits and plain sight seizures" condition. The standard condition applies "at any time at home or elsewhere."[97] At one time, the Seventh Circuit indicated that this was a bit too sweeping. [98] The Sentencing Commission later rejected the Seventh Circuit's view and left the wording of the standard unchanged.[99] The Commission explained that "in some circumstance[s], adequate supervision of defendants may require probation officers to have the flexibility to visit defendants at off-hours,

[88] U.S.S.G. § 5D1.3(c)(9) ("If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.").

[89] U.S.S.G. § 5D1.3(c)(10) ("The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).").

[90] U.S.S.G. § 5D1.3(c)(11) ("The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.").

[91] U.S.S.G. § 5D1.3(c)(12) ("If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk."). *See* United States v. Rasheed, 981 F.3d 187, 199 (2d Cir. 2020) (noting that the standard "risk-notification" condition is an impermissible delegation); United States v. Cabral, 926 F.3d 687, 699 (10th Cir. 2019) ("Because the risk-notification condition, as imposed by the district court, grants Mr. Cabral's probation officer decision-making authority that could infringe on a wide variety of liberty interests, it is improper delegation of judicial power."); *but see* United States v. Janis, 995 F.3d 647, 717 (8th Cir. 2021) (". . . the condition is not an impermissible delegation of authority.").

[92] U.S.S.G. § 5D1.3(c)(13) ("The defendant shall follow the instructions of the probation officer related to the conditions of supervision.").

[93] *See* United States v. Collins, 939 F.3d 892, 896–97 (7th Cir, 2019).

[94] Unted States v. Gawron, 929 F.3d 473, 477-78 (7th Cir. 2019).

[95] United States v. Riley, 920 F.3d 200, 204 (4th Cir. 2019).

[96] *Id.* at 205; United States v. Ka, 982 F.3d 218, 221-22 (4th Cir. 2020).

[97] U.S.S.G. § 5D1.3(c)(6).

[98] United States v. Peyton, 959 F.3d 654, 657 (5th Cir. 2020) (listing Seventh Circuit cases).

[99] *Id*. at 657 (citing U.S. Sentencing Guidelines Manual, supp. to app. C at 168, 162 (2016)).

at their workplaces, and without advance notice to the supervisee."[100] Assessing the standard condition, one court pointed out that "[t]he liberty rights of parolee . . . are limited compared to an average citizen."[101] A special discretionary condition available in sex offender cases calls for even more expanded search authority,[102] and may be applied in appropriate cases involving other offenses.[103]

An earlier version of the "risk notification" condition faced vagueness challenges,[104] which some courts suggested might be overcome by having the probation officer identify the specific risks posed to specific victims by the defendant's criminal record.[105] Other courts foresaw delegation problems in the solution.[106]

Special Discretionary Conditions

The conditions which the statute refers to as "other" discretionary conditions, the Sentencing Guidelines divides into "special" and "additional" discretionary conditions.[107] The so-called special discretionary conditions address case-specific factors, such as the nature of an offense, the defendant's character, or another condition contained in a defendant's sentence. For example, when a conviction is for a sex offense, a court might mandate sex-offender treatment, limit computer use, or authorize warrantless searches of the defendant's possessions by a law enforcement officer on reasonable suspicion or by a probation officer.[108] Other special conditions based on a particular defendant's character or history include requiring participation in a drug or mental health treatment program based on a history of substance abuse or mental health problems;[109] or ordering deportation if the defendant is an alien who is eligible for deportation under immigration laws.[110]

In cases involving financial offenses, unpaid fees, or restitution orders, the Sentencing Guidelines recommend that a court prohibit a defendant from incurring new credit charges, or opening additional lines of credit without approval of the probation officer unless the defendant is in

[100] *Id.* at 657-68 (quoting U.S. Sentencing Guidelines Manual, supp. to app. C at 171 (2016)).

[101] *Id.* at 658 (citing United States v. Windling, 817 F.3d 910, 916 (5th Cir. 2016)).

[102] U.S.S.G. § 5D1.3(d)(7) ("If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)* . . . (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.").

[103] United States v. Sterling, 959 F.3d 855, 862 (8th Cir. 2020).

[104] United States v. Gipson, 998 F.3d 415, 422 (9th Cir. 2021) (citing United States v. Hill, 818 F.3d 342, 345 (7th Cir. 2016); United States v. Evans, 883 F.3d 1154, 1163 (9th Cir. 2018).

[105] *Gipson*, 998 F.3d at 422; United States v. Magdirila, 962 F.3d 1152, 1159 (9th Cir. 2020).

[106] United States v. Cabral, 926 F.3d 687, 697, 699 (10th Cir. 2019) ("Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer. . . . By tasking Mr. Cabral's probation officer with determining whether Mr. Cabral poses a 'risk' to others . . . and requiring Mr. Cabral to comply with any order to notify someone of any such risk, the district court delegated broad decision-making authority to the probation officer that could implicate a variety of liberty interests. . . . Because the risk-notification condition . . . grants Mr. Cabral's probation officer decision-making authority that could infringe on a wide variety of liberty interests, it is an improper delegation of judicial power.").

[107] U.S.S.G. § 5D1.3(d), (e).

[108] *Id.* § 5D1.3(d)(7).

[109] U.S.S.G. § 5D1.3(d)(4).

[110] U.S.S.G. § 5D1.3(d)(6).

compliance with his scheduled payments, or mandating the probation officers' access to a defendant's financial information.[111]

More specifically, the eight special conditions include requirements that direct the defendant to:

- support his dependents;[112]
- satisfy his debt obligations;[113]
- provide the probation officer with financial information;[114]
- abstain from controlled substances and alcohol and participate in a substance abuse treatment program;[115]
- participate in a mental health program;[116]
- adhere to deportation requirements;[117]
- participate in a sex offender treatment program; refrain from computer use; submit to searches;[118]

[111] *Id.* § 5D1.3(d)(2), (3), (8).

[112] U.S.S.G. § 5D1.3(d)(1) ("(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents. (B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.").

[113] U.S.S.G. § 5D1.3(d)(2) ("If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.").

[114] U.S.S.G. § 5D1.3(d)(3) ("If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.").

[115] U.S.S.G. § 5D1.3(d)(4) ("If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol."). *E.g.*, United States v. Hinojosa, 956 F.3d 331, 334–35 (5th Cir. 2020) ("[J]ust two years before his arrest, Hinojosa used cocaine; he'd used marihuana earlier in life; and he was being sentenced for offenses that involved large quantities of drugs. . . . The testing condition is therefore related to, among other things, 'the nature and circumstances' of [Hinojosa's] offense,' his personal 'history and characteristics,' and 'the need . . . to afford adequate deterrence.' ") (quoting 18 U.S.C. § 3553(a)); *see also* United States v. Vigil, 989 F.3d 406, 410 (5th Cir. 2021) (finding no abuse of discretion in "the imposition of 'no alcohol' conditions when there was evidence in the record that the defendant abused controlled substances, even absent evidence that the defendant had a history of abusing alcohol specifically."); United States v. Miller, 978 F.3d 746, (10th Cir. 2020) (holding that the court may not delegate to the probation officer the decision of how many drug tests the defendant is required take as a condition of supervised release).

[116] U.S.S.G. § 5D1.3(d)(5) ("If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

[117] U.S.S.G. § 5D1.3(d)(6) ("If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)[So in original. Probably should be 8 U.S.C. § 1228(d)(5).]; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.").

[118] U.S.S.G. § 5D1.3(d)(7) ("If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)* -- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in

- notify the probation officer of a change in economic circumstances.[119]

"[A] outright ban on [a defendant]'s internet access cannot be sustained under § 3583(d)(1)'s 'reasonably related' requirement absent some evidence linking his offense or criminal history to unlawful use of the internet."[120] Nevertheless, the courts may sustain a condition imposing broad restrictions when (1) "'the defendant used the internet in the[ir] underlying offense'"; (2) "'the defendant had a history of improperly using the internet to engage in illegal conduct'"; and (3) "'particular and identifiable characteristics of the defendant suggested that a restriction was warranted.'"[121]

Restrictions on a defendant's access to legal pornography are permissible "where the district court adequately explains why they are appropriate, and the record supports such a finding," but are otherwise impermissible particularly when coupled with a restriction on visiting locations where it is likely to be found.[122]

The special substance abuse condition prohibiting the use of intoxicating substances may include a ban on consumption of alcohol even when the only substance abuse on the record involves controlled substances.[123]

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the lawful discharge of the officer's supervision functions."). * "'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code [relating to sexual abuse]; (ii) chapter 110 of such title [relating to sexual exploitation of children], not including a recordkeeping offense; (iii) chapter 117 of such title [relating to transportation for illegal sexual activity], not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201 [relating to kidnaping]; or (v) an offense under 18 U.S.C. § 1591[relating commercial sex trafficking]; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register)." *See* United States v. Ellis, 984 F.3d 1092, 1102 (4th Cir. 2021) ("Ultimately, on this record, the district court's ban on legal pornography cannot be sustained as 'reasonably related' under § 3583(d)(1) and is overbroad under§ 3583(d)(2). . . . We first conclude that an outright ban on Mr. Ellis's internet access cannot be sustained under § 3583(d)(1)'s 'reasonably related' requirement absent some evidence linking his offense or criminal history to unlawful use of the internet."); United States v. Koch, 978 F.3d 719, (10th Cir. 2020) (characterizing as plain error the district court's failure to explain how a condition restricting access to sexually oriented (but non-pornographic material) would aid in rehabilitation or protect the public); United States v. Hathorn, 920 F.3d 982, 984–87 (5th Cir. 2019).

[119] U.S.S.G. § 5D1.3(d)(8) ("If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay."). *E. g*., United States v. Hart, 829 F.3d 606, 609–10 (8th Cir. 2016) (holding record supported imposing financial conditions); United States v. Sherwood, 850 F.3d 391, 395–97 (8th Cir. 2017) (holding the district court abused its discretion by imposing financial conditions without explanation or notice and inconsistent with circuit precedents).

[120] United States v. Ellis, 984 F.3d 1092, 1101 (4th Cir. 2021) (citing in accord United States v. Eaglin, 913 F.3d 88, 95-99 (2d Cir. 2019); United States v. Ramos, 763 F.3d 45, 61-62 (1st Cir. 2014); United States v. Baker, 755 F.3d 515, 525-26 (7th Cir. 2014); United States v. Burroughs, 613 F.3d 233, 242-43 (D.C. Cir. 2010)).

[121] United States v. Comer, 5 F.4th 535, 546 (4th Cir. 2021) (quoting United States v. Hamilton, 986 F.3d 413, 421-22 (4th Cir. 2021) ("adopting factors articulated by the First Circuit in United States v. Perazza-Mercado, 553 F.3d 65, 70 (1st Cir. 2009)").

[122] *Ellis*, 984 F.3d at 1101-102 ("[P]ornography restrictions necessarily encompass various materials that enjoy First Amendment protection. . . . Restricting [a defendant] from being physically present in any location where such material could be accessed amounts to a dramatic restriction of liberty. . . . Ultimately, on the record, the district court's ban on legal pornography cannot be sustained under § 3583(d)(1) and is overbroad under § 3583(d)(2).").

[123] United States v. Vigil, 989 F.3d 406, 409-11 (9th Cir. 2021).

Additional Discretionary Conditions

The Sentencing Guidelines identify other, "additional" conditions which address a defendant's mobility and work activities. They include community confinement;[124] home detention;[125] community service;[126] curfew;[127] and restrictions on a defendant's occupation.[128]

Perhaps because many additional conditions restrict a defendant's freedom of movement, commentary accompanying these additional conditions in the Sentencing Guidelines shows a special caution that such restrictions not become excessive. For example, the commentary advises that "[c]ommunity confinement generally should not be imposed for a period in excess of six months," although "[a] longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation."[129] Likewise, it limits community service conditions to no more than 400 hours.[130]

The inventory of additional conditions relates to:

- community confinement;[131]
- home detention;[132]
- community service;[133]

[124] U.S.S.G. § 5D1.3(e)(1).

[125] *Id.* § 5D1.3(e)(2).

[126] *Id.* § 5D1.3(e)(3).

[127] *Id.* § 5D1.3(e)(5)

[128] U.S.S.G. § 5D1.3(e)(4). *See* United States v. Farmer, 755 F.3d 849, 854 (7th Cir. 2014) (finding that the district court failed to justify a condition that the defendant refrain from self-employment).

[129] U.S.S.G. § 5F1.1.

[130] *Id.* § 5D1.3(e)(3). For community service, the guidelines justify the time limitation in part on the heavy administrative burden that would likely arise from periods of community service greater than 400 total hours. *Id.* § 5F1.3 cmt. n.1.

[131] U.S.S.G. § 5D1.3(e)(1). ("Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement)."). *See also* United States v. Bahe, 201 F.3d 1124, 1127–36 (9th Cir. 2000); United States v. Griner, 358 F.3d 979, 982 (8th Cir. 2004); United States v. D'Amario, 412 F.3d 253, 256 (1st Cir. 2005) (per curiam); United States v. Del Barrio, 427 F.3d 280, 283 (5th Cir. 2005). The Sentencing Guidelines' commentary defines "community confinement" as "residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours." U.S.S.G. § 5F1.1 cmt. n.1

[132] U.S.S.G. § 5D1.3(e)(2). ("Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* § 5F1.2 (Home Detention)."). The Sentencing Guidelines' commentary defines "home detention" as "a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs," and at such other times as may be specifically authorized. *Id.* § 5F1.2 cmt. n.1. It further declares first that "the court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not be sufficiently punitive, the court may limit the amenities available. *Id.* § 5F1.2 cmt. n.2. Then it adds, "The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and other person(s)), from whom consent is necessary, agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will no 'call forwarding,' or "call waiting' services or that there will be no cordless telephones or answering machines." *Id.* § 5F1.2 cmt. n.3.

[133] U.S.S.G. § 5D1.3(e)(3). ("Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service)."). The application note accompanying section 5F1.3 states that "Community service generally

- occupational restrictions;[134]
- curfew;[135]
- intermittent confinement.[136]

Modification and Revocation

Although it first considers supervised release when it initially sentences a defendant, a court retains an important decision-making function, and broad discretion, throughout a defendant's term of supervised release. In addition to early termination of a defendant's term of supervised release, a court may modify supervised release conditions at any time, or revoke a defendant's term of supervised release, require him to return to prison for an additional term of imprisonment

should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance." See United States v. Perkins, 935 F.3d 63, (2d Cir. 2019) (finding the district abuse its discretion when it imposed three years of supervised release conditioned on service of 300 hours of community service per year in light of the Sentencing Guidelines recommendation and the district court's failure to show a specific nexus between the sentencing factors and the community service imposed).

[134] U.S.S.G. § 5D1.3(e)(4). ("Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions)."); United States v. Hamilton, 986 F.3d 413, 419 (4th Cir. 2021) (Finding overbroad and "lack[ing] a sufficient nexus to the nature and circumstances of the offense, a condition that ban any employment without the prior approval of the probation officer.). U.S.S.G. § 5F1.5 states, "(a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that: (1) a reasonable direct relationship exists between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted. (b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public."

[135] U.S.S.G. § 5D1.3(e)(5). ("A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."). *See, e.g.*, United States v. Degroate, 940 F.3d 167176-77 (2d Cir. 2019) (holding that the district court did not abuse its discretion when it imposed a curfew but allowed the probation officer to set the curfew's starting date and nighty duration); United States v. Bell, 915 F.3d 574, 578 (8th Cir. 2019) (lower court abused its discretion by imposing a curfew as a condition of supervised release without a showing that it was reasonably related); United States v. Quiñones-Otero, 869 F.3d 49, 52 (1st Cir. 2017) (upholding a curfew as an appropriate condition of supervised release for protection of the public where the defendant had admitted to nighttime firearm possession); United States v. Asalati, 615 F.3d 1001, 1006–08 (8th Cir. 2010) (upholding a curfew as a condition of supervised release).

[136] U.S.S.G. § 5D1.3(e)(6). ("Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. §3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement)."). U.S.S.G. § 5F1.8 states: "Intermittent confinement may be imposed as a condition of probation during the first year of probation. *See* 18 U.S.C. § 3563(b)(10). It may be imposed as a condition of supervised release during the first year of supervised release, but only for as violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* 18 U.S.C. § 3583(d)." The accompanying application note defines Intermittent confinement to mean "remaining in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. *See* 18 U.S.C. § 3563(b)(10)." *E.g.*, United States v. Patterson, 957 F.3d 426, 429-30 (4th Cir. 2020); United States v. Shimabukuro, 887 F.3d 867, 869 (9th Cir. 2018) (term of intermittent confinement imposed upon revocation of supervised release constitutes time spent in prison for purposes of the sentencing cap in 18 U.S.C. § 3583(e)(3)); United States v. Magana, 837 F.3d 457, 458 (5th Cir. 2016) (noting that intermittent confinement may only be imposed where a facility for confinement is available).

for breach of a condition of release, and impose an additional term of supervised release to be served thereafter.[137]

Modification of Conditions

The court will ordinarily conduct a hearing on a petition to modify a defendant's conditions of supervised release, although the party at interest may waive under some circumstances.[138] In considering whether to modify the conditions of supervised release, the court weighs the same sentencing factors that it considers in an early termination of a term of supervised release:

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- the need for the sentence imposed-
    - to afford adequate deterrence to criminal conduct,
    - to protect the public from further crimes of the defendant, and
    - to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
- any pertinent policy statement issued by the Sentencing Commission;
- the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- the need to provide restitution to any victim of the offense.[139]

A district court may summarily deny a motion to modify the conditions of supervised release as long as the record supports the conclusion that the court considered the required factors.[140] Breach of an existing condition or a change in circumstances may justify modification, but neither is required.[141] In some instances, the courts have greeted objections to the imposition of a condition

[137] 18 U.S.C. § 3583(e); United States v. Jackson, 523 F.3d 234, 240–41 (3d Cir. 2008).

[138] FED. R. CRIM. P. 32.1(c) ("(1) **In General**. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation. (2) **Exceptions**. A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so."). *See* United States v. Hogenkamp, 979 F.3d 1167, 1168 (7th Cir. 2020).

[139] 18 U.S.C. § 3583(e)(2).

[140] United States v. Cordero, 7 F.4th 1058, 1069 (11th Cir. 2021).

[141] United States v. Evans, 727 F.3d 730, 732 (7th Cir. 2013) ("Nothing in Section 3583(e)(2) requires a violation of existing conditions, or even changed circumstances."); United States v. Bainbridge, 746 F.3d 943, 946–47 (9th Cir. 2014) (modification does not require a change in circumstances (citing in accord United States v. Begay, 631 F.3d 1168 (10th Cir. 2011) and United States v. Davies, 380 F.3d 329 (8th Cir. 2004)).

at sentencing with the observation that it can be changed after the defendant is released from prison.[142] In others, they have observed that this can be an uncertain benefit.[143]

Revocation

Sometimes revocation is required.[144] Sometimes it is not.[145] By statute, a court must revoke a defendant's supervised release for (1) unlawful drug or firearm possession; (2) refusal to comply with a drug testing condition; or (3) three or more positive drug tests within a single year.[146] The Sentencing Guidelines are more demanding. They recommend that a court revoke a defendant's supervised release for the commission of any federal or state crime punishable by imprisonment for more than a year.[147]

[142] United States v. Shultz, 733 F.3d 616, 623 (6th Cir. 2013) ("Should family members to whom condition four applies come into being, Shultz may ask the district court then, not now, to exercise its statutory power to modify or reduce the conditions of supervised release." (citation and alteration omitted)); United States v. Ellis, 720 F.3d 220, 227 (per curiam) (5th Cir. 2013) ("Ellis appeals the condition requiring him the participate in mental health and sex offender treatment programs. . . . This challenge is not ripe for review because Ellis may never be subjected to such medication or testing. . . . If he is required to submit to such medication or testing, he may petition the district court for modification of his conditions."); United States v. Legg, 713 F.3d 1129, 1134 (D.C. Cir. 2013) (" 'An Internet restriction that today imposes "no greater deprivation of liberty than is reasonably necessary" to deter illegal conduct may, by the time [the defendant] is released, be either wholly inadequate or entirely too burdensome.' If the latter transpires, Legg remains free throughout his term of supervised release to ask the district court to modify the challenged conditions[.]" (internal citation omitted; brackets in original)); United States v. Hamilton, 986 F.3d 413, 422-23 (4th Cir. 2021).

[143] United States v. Johnson, 756 F.3d 532, 539–40 (7th Cir. 2014) ("The government suggests that we need not decide this issue because a determination on its appropriateness could await Johnson's release from prison. . . . But the government acknowledges that Johnson is unlikely to have counsel at that point, and if we do nothing the default will be that the special condition is in place."); United States v. Siegel, 753 F.3d 705, 708 (7th Cir. 2014) ("And while it's true that conditions of supervised release can be modified at any time, 18 U.S.C. § 3583(e)(2), modification is a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge's successor because the sentencing judge has retired in the meantime.").

[144] 18 U.S.C. § 3583(g). The Supreme Court in a plurality decision declared unconstitutional a second mandatory revocation provision (18 U.S.C. § 3583(k)) that includes a mandatory minimum term of re-imprisonment upon revocation. United States v. Haymond, 139 S. Ct. 2369 (2019). Subsequent lower federal appellate courts have concluded that *Haymond* does not undermine the validity of mandatory revocation under 18 U.S.C. § 3583(g), *e.g.*, United States v. Garner, 969 F.3d 550, 553 (5th Cir. 2020); United States v. Seighman, 966 F.3d 237, 239 (3d Cir. 2020); United States v. Coston, 964 F.3d 289, 291 (4th Cir. 2020).

[145] *Id.* § 3583(e). United States v. Garner, 969 F.3d 550, 551 (5th Cir. 2020) ("Under the general revocation provision . . . a district judge may revoke a defendant's term of supervised release. . . Sometimes, though, revocation is mandatory.").

[146] 18 U.S.C. § 3583(g). It is unclear how a defendant comes to fail a third drug test when failing the first test would seem to evidence possession and consequently trigger mandatory revocation. This question has risen in the case law, and appellate courts have held that sentencing courts may decline to assume drug possession on the basis of a failed drug test. *See* United States v. Hammonds, 370 F.3d 1032, 1037 (10th Cir. 2004) ("We believe the mens rea requirement in subsection (g)(1), requiring the government to prove by a preponderance of the evidence that the defendant knowingly and voluntarily used the drug revealed by the drug test, sufficiently distinguishes it from subsection (g)(4) so that the latter provision may apply in circumstances where the former does not."); United States v. Pierce, 132 F.3d 1207, 1208 (8th Cir. 1997) (court has discretion to not find possession on the basis of a failed drug test); *but see* United States v. Rodriguez, 945 F.3d 1245, 1251 (10th Cir. 2019) ("We hold that controlled substances in a person's body is in possession of that person for purposes of 18 U.S.C. § 3583(g) assuming he required mens rea.").

[147] U.S.S.G. § 7B1.3(a)(1) ("Upon a finding of a Grade A or B violation, the court *shall* revoke probation or supervised release.") (emphasis added); *id.* § 7B1.1(a)(2) ("There are three grades of probation and supervised release violations: . . . GRADE B VIOLATIONS—conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year[.]").

Courts may revoke supervised release for breach of any other condition.[148] A court's revocation jurisdiction, however, expires when the term of supervised release expires,[149] unless the government began the revocation process prior to expiration,[150] or unless the defendant is imprisoned for 30 days or more in "connection with" a conviction for a federal, state, or local crime.[151]

By virtue of the Due Process Clause and operation of the Federal Rules of Criminal Procedure, a person facing revocation of supervised release enjoys many, but not all, of the rights that attend a criminal trial. He must be taken promptly before a magistrate following his arrest for violation of the conditions of supervised release.[152] The federal bail statutes apply to his pre-hearing release, although he has the burden of establishing that he is neither dangerous nor a flight risk.[153] He is entitled to a probable cause preliminary hearing at which he may be represented by appointed counsel if he cannot secure one.[154] He may present evidence at the preliminary hearing and has a limited right to confrontation.[155]

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[148] 18 U.S.C. § 3583(e)(3) ("*The court may*, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)– . . . *revoke a term of supervised release*, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, *if the court*, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, *finds* by a preponderance of the evidence *that the defendant violated a condition of supervised release*, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case[.]") (emphases added); United States v. Wiltshire, 772 F.3d 976, 977 (2d Cir. 2014); United States v. Dillon, 725 F.3d 362, 366 (3d Cir. 2013); United States v. Preacely, 702 F.3d 373, 375 (7th Cir. 2012); United States v. Shimabukuro, 887 F.3d 867, 869 (9th Cir. 2018) (term of intermittent confinement imposed upon revocation of supervised release constitutes time spent in prison for purposes of the sentencing cap in 18 U.S.C. § 3583(e)(3)).

[149] United States v. Block, 927 F.3d 978, 982 (7th Cir. 2019); United States v. Thompson, 924 F.3d 122, 127 (4th Cir. 2019).

[150] 18 U.S.C. § 3583(i). There may be some dispute over whether the term is tolled when revocation proceedings are not possible because of the defendant's flight, *see* United States v. Buchanan, 638 F.3d 448, 453–58 (4th Cir. 2011) (concluding that flight tolls a term of supervised release even in the absence of the timely warrant or summons required under 18 U.S.C. § 3583(i) and discussing the conflicting views expressed in *United States v. Hernández-Ferrer*, 599 F.3d 63, 67–68 (1st Cir. 2010) and *United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005)); *see also* United States v. Cartagena-Lopez, 979 F.3d 356, 360-62 (5th Cir. 2020); United States v. Thompson, 924 F.3d 122, 128 (4th Cir. 2019); United States v. Island, 916 F.3d 249, 254 (3d Cir. 2019); United States v. Barinas, 865 F.3d 99, 109 (2d Cir. 2017).

[151] 18 U.S.C. § 3624(e); Mont v. United States, 139 S. Ct. 1826, 1829 (2019) ("[I]f the court's later imposed sentence credits the period of pretrial detention as time served for the new offense then the pretrial detention also tolls the supervised-release period); United States v. Bussey, 745 F.3d 631, 633–34 (2d Cir. 2014). The Fifth Circuit has held, however, that a term is not tolled by time spent in custody under an immigration detainer. *See* United States v. Juarez-Velasquez, 763 F.3d 430, 436 (5th Cir. 2014). The term is not tolled during the period when the defendant is being detained pending the outcome of a revocation hearing. *See* United States v. Block, 927 F.3d 978, 982 (7th Cir. 2019).

[152] FED. R. CRIM. P. 32.1(a)(1) ("A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.").

[153] *Id*. 32.1(a)(6) ("The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.").

[154] *Id*. 32.1(b)(1) ("(A) . . . If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing. (B) . . . The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person: (i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel . . . (C) . . . If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.").

[155] *Id*. ("(B) . . . The judge must give the person: . . . (ii) an opportunity to appear at the hearing and present evidence;

Upon a finding of probable cause to believe that he has violated a condition of his supervised release, the defendant is entitled to a hearing and enjoys the benefit of counsel, appointed if necessary.[156] As in the case of the preliminary hearing, he is entitled to notice of the charges, to present evidence, to make a statement and offer mitigating evidence,[157] as well as, to a limited extent, to confront witnesses against him.[158]

Nevertheless, the Fifth Amendment's Self-Incrimination Clause does not preclude introduction of compelled incriminating statements at the revocation hearing,[159] nor does the Fourth Amendment exclusionary rule apply in revocation proceedings.[160] Moreover, a person subject to a revocation hearing is not entitled to a jury; or to the benefit of proof beyond a reasonable doubt.[161] The court may revoke his supervised release if it finds by a preponderance of the evidence that he has breached one or more of the conditions of his release.[162] Any time served under supervision prior to revocation is erased.[163]

Upon revocation of a term of supervised release, the court may order the defendant returned to prison for a term capped by the length of "the term of supervised release authorized by statute

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and (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear[.]").

[156] *Id.* 32.1(b)(2) ("Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: . . . (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.").

[157] *Id.* ("The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; . . . and (E) an opportunity to make a statement and present any information in mitigation."). Rule 32.1(b)(2)(E) confirms a previously recognized right to allocution. *See* United States v. Paladino, 769 F.3d 197, 201 & n.3 (3d Cir. 2014). It is plain error for the court to fail "to address a supervised releasee personally to ask if he wants to speak before the court imposes a post-revocation sentence." United States v. Daniels, 760 F.3d 920, 924–26 (9th Cir. 2014).

[158] United States v. Diaz, 986 F.3d 202, (2d Cir. 2021) ("In a revocation hearing, the defendant is afforded the opportunity to 'question any adverse witness unless the court determines that the interest of justice does not require the witness to appear.' When a proffered out-of-court statement by an adverse witness is not within an established hearsay exception, Rule 32.1 requires the court to determine whether good cause exists to deny the defendant the opportunity to confront the adverse witness. This good cause determination is made by balancing 'the defendant's interest in confronting a declarant against . . . the government's reasons for not producing the witness and the reliability of the proffered hearsay.' It is error to admit a hearsay statement that is not otherwise admissible under an established hearsay exception without conducting this balancing test." (quoting Rule 32.1 and United States v. Williams, 443 F.3d 35, 45 (2d Cir. 2006)); *see also* United States v. Mosley, 759 F.3d 664, 667–70 (7th Cir. 2014); United States v. Ferguson, 752 F.3d 613, 616-17 (4th Cir. 2014); United States v. Smith, 718 F.3d 768, 772-73 (8th Cir. 2013).

[159] United States v. Ka, 982 F.3d 219, 222 (4th Cir. 2020) ("[W]e conclude that the Self-Incrimination Clause of the Fifth Amendment does not prevent the use of compelled, self-incriminating statements in supervised release revocation hearings held, as Ka's was, under 18 U.S.C. § 3583(e). . . . The Self-Incrimination Clause provides that no person 'shall be compelled to be a witness against himself.' . . . [T]he clause is violated '*only* if [the self-incriminating] statements are used in a criminal trial. Supervised release revocation proceedings, however, are *not* part of the underlying criminal prosecution.' Thus, the introduction of compelled self-incriminating statements in supervised release proceedings does not violate a defendant's rights under the Self-Incrimination Clause." (quoting United States v. Riley, 920 F.3d 200, 209 (4th Cir. 2019)) (Ka failed to invoke the privilege in his incriminating conversation with his probation officer)).

[160] United States v. Hightower, 950 F.3d 33, 37-38 (2d Cir. 2020).

[161] United States v. Doka, 955 F.3d 290, 294 (2d Cir. 2020); United States v. Colón-Maldonado, 953 F.3d 1, 3 (1st Cir. 2020); United States v. Gavilanes-Ocaranza, 772 F.3d 624, 628–29 (9th Cir. 2014); United States v. Ward, 770 F.3d 1090, 1099 (4th Cir. 2014); United States v. Carlton, 442 F.3d 802, 806–10 (2d Cir. 2006) (citing in accord United States v. Hinson, 429 F.3d 114, 118–19 (5th Cir. 2005); United States v. Work, 409 F.3d 484, 491–92 (1st Cir. 2005); United States v. Coleman, 404 F.3d 1103, 1104–05 (8th Cir. 2005) (per curiam)).

[162] 18 U.S.C. § 3583(e)(3); United States v. Daye, 4 F.4th 698, 700 (8th Cir. 2021); United States v. Gomez, 955 F.3d 1250, 1257–59 (11th Cir. 2020) (per curiam); *Doka*, 955 F.3d at 293; *Colón-Maldonado*, 953 F.3d at 3; United States v. Glenn, 744 F.3d 845, 847 (2d Cir. 2014) (per curiam).

[163] 18 U.S.C. § 3583(e)(3); U.S.S.G. § 7B1.5(b).

authorized by statute for the offense that resulted in such term," which is generally: five years for defendants originally convicted of a Class A felony; three years for a Class B felony; two years for a Class C or D felony; and one year in all other cases.[164] The courts have rejected the argument that the term of the revocation sentence of imprisonment, when added to the time the defendant has already served for the underlying crime before his release, may not exceed the statutory maximum for the underlying crime of conviction.[165]

Upon revocation, the court may also impose a new term of supervised release to be served after the defendant is release from prison under the revocation sentence. The usual caps on the duration of supervision release apply less the length of the term of imprisonment levied upon revocation,[166] except that the court is not bound by any statutory mandatory term of supervised release originally required.[167]

[164] 18 U.S.C. §§ 3583(e)(3) ("The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)- . . . (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case."); U.S.S.G. § 7B1.4; United States v. Dawson, 980 F.3d 1156, 1162 (7th Cir. 2020) ("Revocation sentences are also subject to statutory caps. These statutory caps depend on the seriousness of the original crime of conviction – not the seriousness of the supervised release violation."), *but see id.* at 1164 ("A serious violation [of the conditions of supervised release] correlates to a serious breach of trust, so a court *should* consider the nature of a violation when choosing its revocation sentence.") (emphasis of the court).

[165] United States v. Henderson, 998 F.3d 1071, 1073 (9th Cir. 2021) (" [W]e do not read *Haymond* or any other Supreme Court opinion as holding that a defendant's otherwise reasonable sentence for violating the terms of supervised release may not exceed, when aggregated with the time the defendant was imprisoned for the underlying crime, the maximum statutory sentence for the underlying crime."); *see also* United States v. Salazar, 987 F.3d 1248, 1256 (10th Cir. 2021); United States v, Seighman, 966 F.3d 237, 244-45 (3d Cir. 2020).

[166] 18 U.S.C. § 3583(h) ("When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release."); United States v. Barber, 4 F.4th 689, 691 (8th 2021) ("Barber received a term of imprisonment upon each revocation of supervised release – three months the first time and seven months the second time. Subtracting these terms of imprisonment (totaling 10 months) from the authorized term of supervised release under the statute of conviction (96 months) leaves 86 months. Thus, pursuant to § 3583(h), the district court was authorized to impose a new term of supervised release of up to 86 months.").

[167] *See* United States v. Teague, 8 F.4th 611, 616 (7th Cir. 2021) ("We thus conclude that the court made an error of law when it stated . . . that it was compelled to follow the statutory minimum for supervised release that applies to original sentencing proceedings."); United States v. Campos, 922 F.3d 686, 687-88 (5th Cir. 2019) ("While the minimum supervised release sentence for Campos's underlying drug conviction was eight years, see 21 U.S.C. §§ 841(b)(1)(B), 860(a), that floor did not apply to Campos's post-revocation supervised release, see 18 U.S.C. § 3583(h) (stating that '[w]hen a term of supervisory release is revoked . . . the court *may* include a requirement that the defendant be placed on a term of supervisory release after imprisonment' (emphasis added); U.S.S.G. §7B1.3(g)(2). Campos's supervised release was subject only to a *maximum* of '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.' . . . Here, that is a life term, less Campos's nine-month post-revocation imprisonment.") (Emphasis of the court).

Assuming a timely objection below,[168] federal appellate courts will uphold the sentence imposed upon revocation, unless it is procedurally or substantively unreasonable.[169] A procedurally unreasonable sentence involves the district court "failing to calculate (or improperly calculating) the [Sentencing] Guideline range, treating the Guidelines as mandatory, failing to consider the § 37553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guideline range."[170]

In some circuits a sentence imposed upon revocation of supervised release is substantively reasonable if it "is supported by a plausible sentencing rationale and reaches a defensible result."[171] For others, "a revocation sentence 'is substantively unreasonable if it (1) does not account for a factor that should have received significant weight; (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.'"[172] In still others, a sentence is substantively unreasonable "if it is shockingly high, shockingly low, or otherwise unsupportable as a matter of law"[173] or is "arbitrary, capricious, whimsical, or manifestly unreasonable . . . given all the circumstances of the case in light of . . . the factors set forth in 18 U.S.C. § 3553(a)."[174]

[168] Appellate courts review challenges raised for the first time on appeal under the "plain error" doctrine. *E.g.*, United States v. Teague, 8 F.4th 611, 614-15 (7th Cir. 2021) ("[P]lain-error review—involves four steps, or prongs. First, there must be an error or defect—some sort of '[d]eviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. ... Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. ... Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.'... Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)); United States v. Mims, 992 F.3d 406, 408-409 (5th Cir. 2021).

[169] *E.g.*, United States v. Ayala-Lugo, 996 F.3d 51, 56-7 (1st Cir. 2021); United States v. Trent, 995 F.3d 1029, 1031 (8th Cir. 2021) ("We review a district court's imposition of a revocation sentence for abuse of discretion, 'first ensur[ing] that the court committed no significant procedural error, such as improperly calculating the sentence under the Guidelines.'" (quoting United States v. Cates, 613 F.3d 856, 858 (8th Cir. 2010)); United States v. Williams, 994 F.3d 1176, (10th Cir. 2021) ("'We review this issue for abuse of discretion, Applying this standard, we give substantial deference to the district court and will only overturn a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable. Substantive reasonableness involves whether the length of the sentence is reasonable given all the circumstances of the case in light of . . . the factors set forth in 18 U.S.C. § 3553(a).'" (quoting United States v. Peña, 963 F.3d 1016, 1024); United States v. Hall, 931 F.3d 694, 696 (8th Cir. 2019); United States v. Sayer, 916 F.3d 32, 37 (1st Cir. 2019); United States v. Brooks, 889 F.3d 95, 100 (2d Cir. 2018) (per curiam).

[170] United States v. Boyd, 5 F.5th 550, 558 (4th Cir. 2021) ("No matter how 'routine' a case might be, a defendant's sentence [including conditions of supervised release] is 'procedurally unreasonable if the district court . . . fail[s] to address the defendant's nonfrivolous argument.'") (quoting United States v. Lewis, 958 F.3d 240, 243 (4th Cir. 2020)); United States v. Clark, 998 F.3d 363, 367 (8th Cir. 2021) (citing Gall v. United States, 552 U.S. 38, 51 (2007); see also, United States v. a case may be Frederickson, 988 F.3d 76, 90 (1st Cir. 2021); United States v. Greene, 970 F.3d 831, 834 (7th Cir. 2020); United States v. Traficante, 966 F.3d 99, 102 (2d Cir. 2020).

[171] United States v. Santa-Soler, 985 F.3d 93, 98 (1st Cir. 2021) (quoting United States v. Cameron, 835 F.3d 46, 52 (1st Cir. 2016)); United States v. Clark, 998 F.3d 363, 369 (8th Cir. 2021); United States v. Taylor, 997 F.3d 1348, 358 (11th Cir. 20121).

[172] United States v. Cano, 981 F.3d 422, 427 (5th Cir. 2020) (quoting United States v. Warren, 720 F.3d 321, 332 (5th Cir. 2013)); United States v. Barber, 4 F.4th 689, 692 (8th Cir. 2021).

[173] United States v. Bleau, 930 F.3d 35, 39 (2d Cir. 2019).

[174] United States v. Williams, 994 F.3d 1176, (10th Cir. 2021).

Constitutional Considerations

The Constitution limits the range of permissible conditions of supervised release. Even if a condition of supervised release satisfies all statutory requirements, a court will invalidate it if it runs afoul of a defendant's constitutional rights. On the other hand, a condition which raises constitutional concerns is likely to offend statutory norms as well and can be resolved on those grounds.[175]

Article III

The Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress shall ordain and establish.[176] The power cannot be exercised elsewhere. Sentencing, including imposing the terms and conditions of supervised release, is the exercise of judicial power.[177] In supervised release cases, the issue arises most often in the context of the extent of discretion which a court may assign to a probation officer. In crafting the conditions for a particular defendant, a sentencing court will often delegate initial implementing responsibilities to a probation officer. The line between permissible and impermissible delegation is not always clear. In some cases, it is a question of whether the task assigned a probation officer in a condition of supervised release touches upon a defendant's significant liberty interest.[178] In others, it is a matter of whether the court has declared that a particular condition is to be imposed, even though thereafter the court may have delegated considerable implementing discretion.[179] Yet

[175] United States v. Bolin, 976 F.3d 202, 214 (2d Cir. 2020) ("If a special condition implicates a fundamental interest, we must carefully examine it to determine whether it is 'reasonably related' to the pertinent factors and involves no greater deprivation of liberty than is reasonably necessary and our application of these criteria must reflect the heightened constitutional concerns.").

[176] U.S. CONST. art. III, § 1; *see generally* Cong. Research Serv., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9, https://constitution.congress.gov/browse/essay/artIII-S1-1-1-2-1-3/ALDE_00001178/.

[177] United States v. Carlineo, 998 F.3d 533, 537 (2d Cir. 2021) ("[T]he district court, not the Probation Office, retains exclusive authority to set conditions of supervised release."); United States v. Huerta, 994 F.3d 711, 716 (5th Cir. 2021); United States v. Miller, 978 F.3d 746, 761 (10th Cir. 2020) ("Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer.").

[178] United States v. Bear, 769 F.3d 1221, 1230 (10th Cir. 2014) ("Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer. To decide whether a condition of supervised release improperly delegates judicial authority to a probation officer, we distinguish between [permissible] delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and [impermissible] delegations that allow the officer to decide the nature or extent of the defendant's punishment. This inquiry focuses on the liberty interest affected by the probation officer's discretion. Conditions that touch on significant liberty interests are qualitatively different from those that do not. As a result, allowing a probation officer to make the decision to restrict a defendant's significant liberty interest constitutes an improper delegation of the judicial authority to determine the nature and extent of a defendant's punishment." (internal citations and quotation marks omitted)); *see also Carlineo*, 998 F.3d at 537-38 (noting a district court "may delegate decision-making authority over details of supervised release such as scheduling or duration. But it may not delegate decision-making authority which would make a defendant's liberty contingent on a probation officer's exercise of open-ended discretion over a program no one knows much about"); United States v. Smith, 961 F.3d 1000, 1008 (8th Cir. 2020) ("But conditions delegating limited authority to nonjuducal officials such as probation officers are permissible so long as the delegating judicial officer retains and exercises ultimate responsibility"); United States v. Degroate, 940 F.3d 167, 177 (2d Cir. 2019) ("Where, however, the district court has left to a probation officer the ultimate decision of whether to restrict the defendant's liberty, we must vacate the condition of supervised release as improvidently imposed."); United States v. Esparza, 552 F.3d 1088, 1090–91 (9th Cir. 2009) (per curiam).

[179] United States v. Carpenter, 702 F.3d 882, 885 (6th Cir. 2012) ("when imposing a special condition of drug treatment, . . . the district court need only decide whether such treatment is required. Decisions such as which program to select and how long it will last can be left to the discernment of the probation officer. Furthermore, the details of the

elsewhere, the issue turns on the level of court oversight of the probation officer when implementing a condition.[180]

First Amendment

The sex offender conditions have generated a number of First Amendment challenges, primarily in two areas: overbreadth and freedom of association. Under the First Amendment overbreadth doctrine, a condition is overbroad if it sweeps in a substantial amount of constitutionally protected speech along with legitimately targeted unprotected speech.[181] The courts also recognize a right to intimate or familial relationships as a component of the freedom of association which extends to "personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like."[182] Defendants have often contended that a particular condition to which they are subject is overbroad,[183] or improperly intrudes upon their freedom of

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treatment, including how often and how many drug tests will be performed, can be left to the expertise of the professionals running the program.") (citation omitted); *see also* United States v. Van Donk, 961 F.3d 314, 327 ("We agree with our sister circuits that it's proper for a court to order a [defendant] to follow treatment program rules," (citing United States v. Bender, 566 F.3d 748, 750, 752 (8th Cir. 2009); United States v. Fellows, 157 F.3d 1197, 1207 (9th Cir. 1998); United States v. Miller, 77 F.3d 71, 77 (4th Cir.996)); United States v. Lee, 950 F.3d 439, 447 (7th Cir. 2020) ("A condition that delegates to a probation officer the 'nature or extent of the defendant's punishment' is an impermissible delegation.") (citation omitted); United States v. Heckman, 592 F.3d 400, 411 (3d Cir. 2010) ("Participation in the mental health treatment program itself is mandatory, and only the details are to be set by the Probation Office.").

[180] United States v. Robertson, 948 F.3d 912, 919 (8th Cir. 2020) ("We have held a special condition of supervised release is an impermissible delegation of authority 'only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.' ") (quoting United States v. Thompson, 653 F.3d 688, 693 (8th Cir. 2011)); United States v. Dailey, 941 F.3d 1183, 1194 (9th Cir. 2019) (" '[A] probation officer may not decide the nature or extent of the punishment imposed upon a probationer.' A district court may delegate 'the details of where and when the condition will be satisfied,' but it alone must make[ ] the determination of *whether* a defendant must abide by the condition.") (quoting United States v. Stephens, 424 F.3d 876, 880–81 (9th Cir. 2005)) (brackets in original).

[181] United States v. Stevens, 559 U.S. 460, 473 (2010) ("[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' "); United States v. Mefford, 711 F.3d 923, 927 (8th Cir. 2013) ("We will only strike down a condition of supervised release as unconstitutionally overbroad 'if its overbreadth is real and substantial in relation to its plainly legitimate sweep.' We have however upheld a number of supervised release conditions that substantially limit or completely ban sex offenders from possessing pornography. In contrast, we often reject conditions banning materials with 'nudity' because such breadth may well reach protected forms of art." (internal citations omitted)); *see generally* Cong. Research Serv., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: AN ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9, https://constitution.congress.gov/browse/essay/amdt1-2-2-1/ALDE_00000735/

[182] Pickup v. Brown, 740 F.3d 1208, 1233 (9th Cir. 2014) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 617–19 (1984)); *see also* Goodpaster v. City of Indianapolis, 736 F.3d 1060 (7th Cir. 2013).

[183] United States v. Benhoff, 755 F.3d 504, 506 (7th Cir. 2014) (per curiam) ("Benhoff next challenges the two special conditions of his supervised release as overbroad. He argues that the condition that bans sexually stimulating materials is overbroad in that it bans both lawful material and illegal ones. . . . He also challenges the no-contact provision as overbroad because it impermissibly deprives him of his First Amendment right to associate with minors (including family)[.] . . . The government concedes, and we agree, that a limited remand is appropriate so that the district court can on remand narrowly tailor these conditions."); United States v. Siegel, 753 F.3d 705, 712 (7th Cir. 2014) ("So that key condition remains a muddle, and for the additional reason that the judge did not explain why the condition should not be limited to visual depictions of nudity related or incidental to sexual urges or activities. Is 'nudity' meant to include innocuous partial nudity, such as a photography, in no respect prurient, of an adult wearing a bathing suit? So not only is 'contains' vague, but 'nudity' is over-broad[.]"); United States v. Salazar, 743 F.3d 445, 450–51 (5th Cir. 2014) ("Salazar claims on appeal that Condition No.6, which prohibits him from possessing, using, or purchasing sexually stimulating or oriented materials, is impermissible for two reasons. . . . In his second point of error, Salazar argues that Condition No. 6 is so overbroad that it violates his rights under the First Amendment[.] . . . [W]e hold that the district court abused its discretion by not explaining how Condition No. 6 is reasonably related to the goals of supervised release. We thus do not reach the issue of whether the condition is reasonably necessary, nor the First Amendment issue.").

association.[184] Both doctrines have companions in due process, discussed below. Both challenges are often resolved by recourse to Section 3583(d)'s "reasonably related" and "no unnecessary deprivation of liberty" requirements, which can provide the narrow tailoring that the First Amendment demands.[185] Cases that have First Amendment implications are often resolved on those statutory grounds.[186]

A number of First Amendment challenges have been turned back by distinguishing them from the facts in *Packingham v. North Carolina*,[187] a case in which the Court found First-Amendment-deficient a statute that restricted registered sex offenders' access to social media sites.[188]

[184] United States v. Lonjose, 663 F.3d 1292, 1303 (10th Cir. 2011) ("[A] defendant has a fundamental right of familial association. Where a condition of supervised release interferes with that right, compelling circumstances must be present to justify the condition."); *see also* United States v. Wolf Child, 699 F.3d 1082, 1091–94 (9th Cir. 2012); United States v. Worley, 685 F.3d 404, 408–09 (4th Cir. 2012).

[185] United States v. Van Donk, 961 F.3d 314,326 (4thh Cir. 2020) ("The First Amendment overbreadth doctrine thus isn't relevant in the context of a supervised release condition that satisfies § 3583(d)'s requirements.); United States v. Adkins, 743 F.3d 176, 194 (7th Cir. 2014) ("It is hard to see how the potential breadth of Special Condition Five would satisfy the narrow tailoring requirement of 18 U.S.C. § 3583(d)."); United States v. Zobel, 696 F.3d 558, 576 (6th Cir. 2012).

[186] *E.g.*, United States v. Ramos, 763 F.3d 45, 64 (1st Cir. 2014) ("In *Perazza-Mercado* we also vacated . . . a ban on adult pornography because the ban imposed, in the absence of any evidentiary support, was not reasonably related to the nature and circumstances of the offense and to the history and characteristics of the defendant. . . . Here, the ban on any pornographic material . . . must be vacated for the same reason."); United States v. Malenya, 736 F.3d 554, 560–61 (D.C. Cir. 2013) ("It is unclear if any computer or internet restriction could be justified in Malenya's case, but the condition in its current form is surely a greater deprivation of liberty than is reasonably necessary to achieve the goals referenced in § 3583(d). *Cf. United States v. McLaurin*, 731 F.3d 258, 262 (2d Cir. 2013).").

[187] 137 S. Ct. 1730 (2017).

[188] *E.g.*, United States v. Cordero, 7 F.4th 1058, 1071 (11th Cir. 2021) ("Nothing in *Peckingham* undermines the settled principle that a district court may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens during supervised release.'") (quoting United States v. Bohal, 981 F.3d 971, 977 (11th Cir. 2020)); United States v. Comer, 5 F.4th 535, 544 n.9 (4th Cir. 2021); United States v. Perrin, 926 F.3d 1044, 1048–50 (8th Cir 2019) ("*Packingham*, however, is of no help to Perrin for at least three reasons. *First*, the Court in *Packingham* cautioned that its 'opinion should not be interpreted as barring' the enactment of specific criminal laws against specific criminal acts, as such 'acts are not protected speech even if speech is the means of their commission.' The Court 'assumed that the First Amendment permits [the enactment of] specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that presages a sexual crime, *like contacting a minor* or using a website to gather information about a minor.' . . . *Second*, the statute at issue in *Packingham* prohibited registered sex offenders from accessing commercial social-networking sites, even after 'hav[ing] completed their sentences.' . . . A term of supervised release, however, is 'a part of the sentence' . . . 'rather than a post-sentence penalty[.] . . . *Third*, the Court in *Packingham* found that the North Carolina statute was a 'complete bar to the exercise of First Amendment rights[.] . . . Here, unlike *Packingham*, Perrin may possess or use a computer or have access to the Internet so long as he obtains approval from his probation officer. . . . Accordingly, the district court did not err, much less plainly err, in imposing the special condition [that banned the use of a computer or Internet access without probation officer approval].") (citing United States v. Holena, 906 F.3d 288, 293–95 (3d Cir. 2018) and United States v. Eaglin, 913 F.3d 88, 97–98 (2d Cir. 2019) in support of its first point (First Amendment permits bans on conduct that presage sexual child abuse); (citing United States v. Halverson, 897 F.3d 645, 657–58 (5th Cir. 2018); United States v. Browder, 866 F.3d 504, 511 n.26 (2d Cir. 2017); and United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017) in support of its second point (post-sentence v. sentencing restrictions)). *See also* United States v. Bobal, 981 F.3d 971, 977–78 (11th Cir. 2020); United States v. Bolin, 976 F.3d 202, 214 (2d Cir. 2020); United States v. Becerra, 977 F.3d 373, 378–79 (5th Cir. 2020) ("We have rejected the idea that 'an absolute prohibition on accessing computers or the Internet is per se an unacceptable condition of supervised release.' Such absolute bans, however, have been affirmed only for limited duration such as three or four years. . . . We have rejected such bans where they effectively preclude a defendant 'from meaning fully participating in modern society' for long periods of time.' To this end, the court requires conditions restricting the use of computers and the Internet to be narrowly tailored either by scope or by duration.'") (quoting United States v. Duke, 788 F.3d 392, 399–400 (5th Cir. 2015) and finding error in a ten-year absolute ban).

Fourth Amendment

The Fourth Amendment guarantees protection "against unreasonable searches and seizures."[189] Following an individual's criminal conviction, however, the Supreme Court has used a "general balancing" test, in which it assesses "on the one hand, the degree to which [the government action] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate interests."[190] Because people on supervised release, like others along the "continuum of punishment," have a "reduced expectation of privacy" under the Court's Fourth Amendment jurisprudence, their privacy interests carry less weight in this balancing test.[191]

Section 3583(d) and the corresponding Sentencing Guideline authorize warrantless search conditions in the case of offenders required to register as sex offenders, based on reasonable suspicion of a violation of a condition of supervised release.[192] The Guidelines also permit a warrantless search and plain-view seizure in cases that do not involve a sex offender, if based on reasonable suspicion.[193] As a general rule any condition, other than the conditions required by statute, must be no greater deprivation of liberty than reasonably necessary to deter future criminal conduct, protect the public, or provide for the defendant's rehabilitation.[194] They must also be reasonably related to one of these purposes or to the defendant's offenses or background.[195] With these limitations, the courts have upheld search conditions that might

[189] U.S. CONST. amend. IV; *see generally*, Cong. Research Serv., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 112.9, https://constitution.congress.gov/browse/essay/amdt4-4-5-1-5/ALDE_00000803/

[190] Samson v. California, 547 U.S. 843, 848 (2006) (citing United States v. Knights, 534 U.S. 112, 118–19 (2001)). Although *Samson* involved a parole condition rather than a condition of supervised release, it is likely that the Court would have applied the same analysis to evaluate a warrantless search of the person or property of an individual on supervised release. *See, e.g.*, United States v. McGill, 8 F.4th 617, 623 (7th Cir. 2021) (applying *Knights* to a probation officer's plain view seizure under a home-visit condition of supervised release).

[191] *Samson*, 547 U.S. at 850; *see also* United States v. Rusnak, 981 F.3d 697, 712 (9th Cir. 2020); United States v. Caya, 956 F.3d 498, 500 (7th Cir. 2020) ("Fourth Amendment law has long recognized that criminal offenders on community supervision have significantly diminished expectations of privacy. More specifically, the privacy expectations of offenders on post-imprisonment supervision are weak and substantially outweighed by the government's strong interest in preventing recidivism and safely reintegrating offenders into society. Indeed, the Supreme Court has held that a law-enforcement officer may search a person on parole without *any* suspicion of criminal activity.") (citing *Samson*, 547 U.S. at 847); United States v. Mathews, 928 F.3d 968, 975 (10th Cir. 2019) ("When the terms of a parolee's parole allow officers to search his person or effects with something less than probable cause, the parolee's reasonable expectation of privacy is significantly diminished.") (brackets and citation omitted).

[192] 18 U.S.C. § 3583(d) ("The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer *with reasonable suspicion* concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions." (emphasis added)); *see also* U.S.S.G. § 5D1.3(d)(7)(C).

[193] U.S.S.G. § 5D1.3(c)(6) ("The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.").

[194] 18 U.S.C. § 3583(d)(2), (3); *id.* § 3553(a)(2)(B), (a)(2)(C), (a)(2)(D).

[195] *Id.* § 3583(d)(1); *id.* § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D).

otherwise be suspect.[196] The courts are divided over the question of whether probation officers may conduct a warrantless search in the absence of a specific condition.[197]

Should a probation officer's visit lead to the discovery of incriminating evidence, defendant's motion to suppress may have to overcome many of the obstacles to the exclusionary rule, including plain view doctrine, the reasonable suspicion standard, inevitable discovery, and officer's good faith among others.[198]

Fifth Amendment

The Fifth Amendment declares that "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" This Double Jeopardy Clause, however, does not bar "both a revocation of a defendant's supervised release and a separate criminal conviction."[199]

In addition, the Fifth Amendment provides that [n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]"[200] The privilege against self-incrimination does not preclude a condition of supervised release that requires the defendant to submit to periodic polygraph testing to ensure his compliance with the conditions of his supervised release when the government asserts that it will not seek revocation based on a valid claim of the privilege.[201]

The Amendment also declares that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"[202] Due process requires that a defendant facing revocation of his supervised release be given a reasonably prompt hearing,[203] and be "given adequate notice,

[196] United States v. Dodds, 947 F.3d 473, 477–78 (7th Cir. 2020) (per curiam) (finding no abuse of discretion and contrasting the district court's uncontested, reasonably-related explanation of the search condition, which unlike the condition in *United States v. Farmer*, 755 F.3d 849 (7th Cir. 2014), required reasonable suspicion and did not explicitly allow the probation officer to call upon law enforcement officers to assist in the search. In *Farmer*, the Seventh Circuit vacated a search condition because the lower court had not demonstrated that the condition was reasonably related to the defendant's underlying offense. *Id.* at 850. *See also* United States v. Cervantes, 859 F.3d 1175, 1184 (9th Cir. 2017) (finding no abuse in discretion in a condition permitting suspicionless search in light of the defendant's "long" history of drug and counterfeiting offenses accompanied by a regular pattern of violating his conditions of supervised release).

[197] United States v. Hill, 776 F.3d 243, 249 (4th Cir. 2015) ("[T]hus, law enforcement officers generally may not search the home of an individual on supervised release who is not subject to a warrantless search condition unless they have a warrant supported by probable cause."). The court in *Hill* had previously noted that, "[t]he Fifth and Eleventh Circuits have taken a broader view[.] . . . *See United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2005) (declining to read *Knights* or *Griffin* 'as requiring either a written condition of probation or an explicit regulation permitting the search of a probationer's home on reasonable suspicion'); *United States v. Yuknavich*, 419 F.3d 1302, 1310–11 (11th Cir. 2005) (same)"). *Id.* at 249 n.3. *See also* United States v. Dupas, 419 F.3d 916, 922 (9th Cir. 2005) (holding that a supervised release condition permitting search, day or night, with or without warrant or probable cause by any law enforcement officer was not facially contrary to the requirements of the Fourth Amendment); United States v. Caya, 956 F.3d 498, 503-504 (7th Cir. 2020) (questioning the analysis in *Hill* but distinguishing the facts because Hill was not subject to a "search" condition of supervised release).

[198] United States v. McGill, 8 F.4th 617, 622-24 (7th Cir. 2021).

[199] U.S. CONST. amend. V; United States v. Wilson, 939 F.3d 929, 931–32 (8th Cir. 2019).

[200] U.S. CONST. amend. V.

[201] *See, e.g.*, United States v. Richards, 958 F.3d 961, 966–68 (10th Cir. 2020).

[202] U.S. CONST. amend. V.

[203] United States v. Torres-Santana, 991 F.3d 257, 263-64 (1st Cir. 2021) ("The right to a timely supervised release revocation hearing is 'assured' by Rule 32.1, and, generally, by the Due Process Clause.' . . . Both parties analyze Torres's unreasonable delay claim under the framework articulated in *Baker v. Wingo*. . . . That approach is misguided here. We are not dealing with a Sixth Amendment Speedy Trial claim. . . . [W]e analyze a claim in this circuit under Rule 32.1 akin to how we evaluate a Due Process claim under the Fifth Amendment. To demonstrate a violation caused by a delayed revocation hearing that justifies relief, the defendant must show that the delay was unreasonable and prejudicial.") (citing United States v. Pagán-Rodriguez, 600 F.3d 39, 41 (1st Cir. 2010)); United States v. Gavilanes-Ocaranza, 772 F.3d 624, 628 (9th Cir. 2014).

represented at all times, [permitted to] appear[ ] at the hearing, and . . . afforded an opportunity to make a statement and present information in mitigation."[204] "The minimum requirements of due process [also] include the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."[205] These minimum requirements include a right to representation by counsel "when a defendant has a colorable claim that he has not violated the condition of release, or if he has a substantial case to make against revocation. . . ."[206] Due process also colors the extent to which a condition of supervised release may bar a defendant's access to his own children.[207]

One of the more common due process complaints has been that a particular condition of supervised release is unconstitutionally vague.[208] "A condition of supervised release is unconstitutionally vague if it does not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited."[209] The popularity of the challenge may have something to do

[204] United States v. Jones, 774 F.3d 399, 403 (7th Cir. 2014) ("Fed. R. Civ. P. 32.1 and [*United States*] v. *LeBlanc*, 175 F.3d 511, 515 (7th Cir. 1999) (Rule 32.1 largely codified *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), which defined Fifth Amendment due process rights . . . in parole revocation hearings.)") (parallel citations omitted).

[205] United States v. Smith, 718 F.3d 768, 772 (8th Cir. 2013); *see also* United States v. Mosley, 759 F.3d 664, 667–68 (7th Cir. 2014); United States v. Ferguson, 752 F.3d 613, 616–17 (4th Cir. 2014).

[206] United States v. Jones, 861 F.3d 687, 690 (7th Cir. 2017).

[207] United States v. Hobbs, 710 F.3d 850, 853 (8th Cir. 2013) ("The relationship between parent and child is a liberty interest protected by the Due Process Clause. Thus, in sex offender cases, we scrutinize more carefully conditions restricting the defendant's right to contact his own children than conditions restricting childless sex offenders from contact with children.") (internal citation omitted); United States v. Bear, 769 F.3d 1221, 1229 (10th Cir. 2014) ("When a defendant has committed a sex offense against children or other vulnerable victims, general restrictions on contact with children ordinarily do not involve a greater deprivation of liberty than reasonably necessary. But restrictions on a defendant's contact with his own children are subject to stricter scrutiny. '[T]he relationship between parent and child is constitutionally protected,' and 'a father has a fundamental liberty interest in maintaining his familial relationship with his [children].' ") (internal citations omitted; brackets in original); United States v. Wolf Child, 699 F.3d 1082, 1097 (9th Cir. 2012) ("This record does not, however, support imposition of prohibitions on Wolf Child's residing with or being in the company of his daughters or socializing with his fiancée. We cannot justify the imposition of conditions of supervised release that so drastically infringe on the fundamental right to familial association on the basis of a record devoid of any suggestion that Wolf Child poses a sexual risk to his daughters or to his fiancée (or to her daughters, of whom he is the father).").

[208] *See, e.g.*, United States v. Adkins, 743 F.3d 176, 194-95 (7th Cir. 2014) ("Our conclusion is generally consistent with our sister circuits' approaches to this challenging area. *See, e.g.*, *United States v. Antelope*, 395 F.3d 1128, 1141–42 (9th Cir 2005) (striking down as unconstitutionally vague a supervised release condition banning the possession of 'any pornographic, sexually oriented or sexually stimulating materials'); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (striking down as unconstitutionally vague a supervised release condition banning the possession of 'any pornography,' including legal adult pornography, because 'a probationer cannot reasonably understand what is encompassed by a blanket prohibition on "pornography" '); *United States v. Loy*, 237 F.3d 251, 261 (3d Cir. 2001) (striking down as unconstitutionally vague a supervised release condition banning the possession of 'all forms of pornography, including legal adult pornography'); *Farrell v. Burke*, 449 F.3d 470, 486 (2d Cir. 2006) (noting that the Second Circuit has 'strongly suggest[ed] that the term 'pornography' is inherently vague for defendants whose statute of conviction does not define it.")); *see also* United States v. Reeves, 591 F.3d 77, 80–81 (2d Cir. 2010) (finding unconstitutionally vague a condition requiring the defendant to disclose his conviction to anyone with whom he entered a "significant romantic relationship"); United States v. Johnson, 626 F.3d 1085, 1091 (9th Cir. 2010) (finding impermissibly vague a condition banning the defendant from associating with anyone associated with gang members); United States v. Perazza-Mercado, 553 F.3d 65, 74–76 (1st Cir. 2009) (vacating a condition of supervised release that banned the "possession of any kind of pornographic material" because the district court did not provide an explanation for this condition, and "no evidence in the record justifies the ban"); *cf.* United States v. Armel, 585 F.3d 182, 185–87 (4th Cir. 2009) (holding that sentencing court abused its discretion by imposing an unexplained three-year prohibition on adult "pornography" where defendant had been convicted of threatening federal officials). *But see* United States v. Boston, 494 F.3d 660, 667–68 (8th Cir. 2007) (upholding the breadth of the supervised release condition in part because the defendant was found guilty of producing child pornography).

[209] *Adkins*, 743 F.3d at 193; *see also* United States v. Bolin, 976 F.3d 202, 214 (2d Cir. 2020 ("Due process requires that the conditions of supervised release be sufficiently clear to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (quoting Grayned v. City of Rockford, 408

with the fact that the statutory and Guidelines conditions are worded in general terms in order to allow sentencing courts to adjust them to the facts before them.[210] The most troubling appear to have been adjusted in the 2016 amendments to the Guidelines.[211]

In addition, the Supreme Court in *Haymond* [212] held that one revocation subsection of Section 3583(k) constitutes a violation of Fifth Amendment due process and the Sixth Amendment right to trial by jury. In the case of certain sex offenses, Section 3583(k) purported to establish a mandatory term of reimprisonment and a mandatory term of supervised release thereafter.[213] To exercise the authority of Section 3583(k), a court was required to make certain findings by a preponderance of the evidence. Justice Breyer, whose concurrence marks the point of agreement in the 4-1-4 division of the Court, agreed that Section 3583(k) is unconstitutional. He viewed the procedure under the section as "punishment of new criminal offenses" (the statutorily identified, revocation-triggering offenses) and constitutionally suspect because "a jury [not a judge] must find facts that trigger a mandatory minimum prison term."[214] Subsequent lower court decisions have held that infirmities of section 3583(k) do not imperil revocation under section 3583(e).[215]

U.S. 104, 108 (1972)).

[210] *Siegel*, 753 F.3d at 708 ("A more serious problem with the current system is that, as we'll see when we discuss the conditions imposed in our two cases, a number of the listed conditions, along with a number of conditions that judges modify or invent, are vague.").

[211] *Sentencing Guidelines for United States Courts*, 81 Fed. Reg. 27,277 (May 5, 2016) ("Reason for Amendment: This amendment is a result of the Commission's multi-year review of sentencing practices related to federal probation . . . and supervised release, § 5D1.3[.] . . . In a number of cases, defendants have raised objections (with varied degrees of success) to conditions of supervised release . . . imposed upon them at the time of sentencing[.] . . . Challenges have been made on the basis that certain conditions are vaguely worded[.]").

[212] United States v. Haymond, 139 S. Ct. 2369 (2019).

[213] 18 U.S.C. § 3583(k) ("Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [relating to kidnapping] involving a minor victim, and for any offense under section 1591 [relating to commercial sex trafficking], 1594(c) [relating to attempts or conspiracies to engage in commercial sex trafficking], 2241 [relating to aggravated sexual abuse], 2242 [relating to sexual abuse], 2243 [relating to sexual abuse of a minor or ward], 2244 [relating to abusive sexual contact], 2245 [relating to sexual abuse offenses resulting in death], 2250 [relating to failure to register as a sex offender], 2251 [relating to sexual exploitation of children], 2251A [relating to selling or buying children], 2252 [relating to material involving sexual exploitation of children], 2252A [relating to child pornography], 2260 [relating to production of child pornography abroad], 2421 [relating to interstate transportation for unlawful sexual purposes], 2422 [relating to coercive interstate travel for unlawful sexual purposes], 2423 [relating to transportation and travel for illicit sexual purposes], or 2425 [relating to use of interstate facilities to transmit information about a minor], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A [relating to sexual abuse], 110 [relating to sexual exploitation of a child], or 117 [relating to transportation for unlawful sexual purposes], or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.").

[214] *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment).

[215] United States v. Ka, 982 F.3d 219, 222-23 (4th 2020) ("Justice Breyer highlighted three unique aspects of § 3583(k) that distinguish it from § 3583(e): (1) § 3583(k) applies only to an enumerated list of federal criminal statutes; (2) it strips judges of the discretion to decide whether a violation of a condition of supervised release should result in imprisonment; and (3) it 'limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of [five years]' upon the judge's finding that the releasee had committed one of the enumerated offenses. . . . Notably, however, § 3583(e) 'does not contain any of the features that, in combination, rendered § 3583(k) unconstitutional.' . . . Our sister circuits that have considered whether *Haymond* has implications for their § 3583(e) jurisprudence agree that it does not." (quoting *Haymond*, 139 S. Ct. at 2386 and United States v. Doka, 955 F.3d 290, 296 (2d Cir. 2020) and citing unpublished opinions from the Eleventh, Fifth and Fourth Circuits)); *see also* United States v. Salazar, 987 F.3d 1248, 1259 (10th Cir. 2021); United States v. Henderson, 998 F.3d 1071, 1076 (9th Cir. 2021).

Sixth Amendment

The Sixth Amendment assures the accused a number of rights during the course of his trial.[216] As just noted, the Fifth Amendment Due Process Clause assures the defendant of comparable, if more limited, rights at sentencing and during supervised release revocation hearings. The Sixth Amendment rights, however, do not apply there. More specifically, the Sixth Amendment's right to a speedy trial is not implicated by the passage of time between a defendant's conviction and the revocation hearing triggered by allegations of a violation of the defendant's condition of supervised release.[217] The Sixth Amendment Jury Trial Clause trial does not apply to revocation hearings under Section 3583(e);[218] neither do the Sixth Amendment Confrontation[219] nor the Assistance of Counsel Clauses.[220]

Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment.[221] Its proscription encompasses both the inherently barbaric punishment and in rare cases those grossly disproportionate to the crime for which punishment was inflicted.[222] Eighth Amendment challenges of a sentence of supervised release are rare,[223] and thus far, even more rarely successful.[224]

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[216] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

[217] United States v. Napper, 978 F.3d 118, 126 n.21 (5th Cir. 2020) (". . . Sixth Amendment speedy trial rights are inapplicable in supervised release revocation hearings. . . ."); United States v. Gavilanes-Ocaranza, 772 F.3d 624, 628 (9th Cir. 2014); United States v. Ward, 770 F.3d 1090, 1097 (4th Cir. 2014) (Sixth Amendment speedy trial right does not apply in hearings for the revocation of supervised release) (citing United States v. House, 501 F.3d 928, 931 (8th Cir. 2007) and United States v. Tippens, 39 F.3d 88, 89 (5th Cir. 1994) (per curiam)).

[218] *Doka*, 955 F.3d at 293–94; United States v. Rodriguez, 945 F.3d 1245, 1250 n.5 (10th Cir. 2019); United States v. Collins, 859 F.3d 1207, 1216 (10th Cir. 2017); *Gavilanes-Ocaranza*, 772 F.3d at 628–29; *Ward*, 770 F.3d at 1099 (citing United States v. McIntosh, 630 F.3d 699, 702–03 (7th Cir. 2011) and United States v. Cunningham, 607 F.3d 1264, 1267–68 (11th Cir. 2010)).

[219] United States v. Diaz, 986 F.3d 202, 209 (2d Cir. 2021); United States v. Colón-Maldonado, 953 F.3d 1, 3 (1st Cir. 2020); *Ward*, 770 F.3d at 1098 (citing United States v. Ray, 530 F.3d 666, 668 (8th Cir. 2008) and United States v. Kelley, 446 F.3d 688, 691 (7th Cir. 2006)).

[220] United States v. Jones, 861 F.3d 687, 690 (7th Cir. 2017).

[221] U.S. CONST. amend. VIII; *see generally* Cong. Research Serv., The CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, Sen. Doc. No. 112-9, https://constitution.congress.gov/browse/essay/amdt8-2-1-1/ALDE_00000963/

[222] Graham v. Florida, 560 U.S. 48, 59 (2010) ("The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. . . . For the most part, however, the Court's precedents consider punishments challenged not as in inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment.").

[223] *Cf.* United States v. Demers, 634 F.3d 982, 986 n.4 (8th Cir. 2011) (per curiam) ("Demers also asserts that this condition is 'punitive and an alternative form of incarceration,' and, since the condition will be imposed for life, 'constitutes cruel and unusual punishment under the Eighth Amendment.' Demers makes no argument to support this assertion, nor does he cite any law on point. Demers's Eighth Amendment challenge accordingly fails to show plain error. *See United States v. Fields*, 324 F.3d 1025, 1027–28 (8th Cir. 2003) (concluding that an Eighth Amendment challenge does not show plain error because the defendant 'cites no case in which a condition of supervised release was found to constitute cruel and usual punishment').").

[224] *See, e.g.*, United States v. Williams, 636 F.3d 1229, 1232–34 (9th Cir. 2011) (concluding that the life-time term of supervised release imposed as a consequence of Williams' conviction for receipt of child pornography was not unconstitutionally disproportionate punishment either as punishment for sex offenders generally or as applied to Williams under the circumstances).

Attachments

18 U.S.C. § 3583 (text).

(a) In general.–The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

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

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

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

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

(c) Factors to be considered in including a term of supervised release.– The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release.– The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition–

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) 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

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall

be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. 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. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

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

(1) 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;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

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

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.– The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.– If the defendant**–**

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

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

(i) Delayed revocation.– The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject

to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates.– Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 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. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Rule 32.1. Revoking or Modifying Probation or Supervised Release (text).

(a) Initial Appearance.

(1) *Person In Custody.* A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) *Upon a Summons.* When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.

(3) *Advice.* The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) *Appearance in the District With Jurisdiction.* If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing-either originally or by transfer of jurisdiction-the court must proceed under Rule 32.1(b)–(e).

(5) *Appearance in a District Lacking Jurisdiction.* If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

(6) *Release or Detention.* The magistrate judge may release or detain the person under 18 U.S.C. §3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

(b) Revocation.

(1) *Preliminary Hearing.*

(A) *In General*. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) *Requirements*. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) *Referral.* If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) *Revocation Hearing.* Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) *In General.* Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) *Exceptions.* A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. §3563 and §3565 (probation) and §3583 (supervised release).

(e) Producing a Statement. Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

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