

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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Report RL31653

Supervised Release: A Brief Sketch of Federal Law

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Abstract. The USA PATRIOT Act made a number of violent crimes, frequently associated with terrorism, punishable by life-time supervision, 18 U.S.C. 3583(j). Except for certain federal drug offenses, other federal crimes carry a term of supervised release of no more than five years.

WikiLeaks



Supervised Release in the Federal Criminal Justice System: Court Discretion and Legal Issues

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January 16, 2009

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Summary

Supervised release replaced parole in the federal criminal justice system for convictions after November 1, 1987. Like parole, supervised release is a term of restricted freedom following an offender's release from prison. The nature of supervision and the conditions imposed during supervised release are also similar to those that applied in the old system of parole. However, whereas parole functions in lieu of a remaining prison term, supervised release begins only after an offender has completed his full prison sentence.

A sentencing court determines the duration and conditions for an offender's supervised release term at the time of initial sentencing. In most cases, federal law limits the maximum duration to five years, although it permits, and in some cases mandates, longer durations for relatively serious drug, sex, and terrorism-related offenses. A sentencing court retains jurisdiction to modify the terms of an offender's supervised release and to revoke the term and return an offender to prison for violation of the conditions.

Several conditions are standard features for supervised release. Some conditions, such as a ban on the commission of further crimes, are mandatory. Other conditions, such as an obligation to report to a probation officer, have become standard by practice and by the operation of the federal sentencing guidelines, which courts must consider along with other statutorily designated considerations.

Together with these regularly-imposed conditions, the federal sentencing guidelines recommend additional conditions appropriate for specific circumstances. Courts also have the discretion to impose "any other" conditions, as long as they involve no greater deprivation of liberty than is reasonably necessary and "reasonably relate" to at least one of the following: the nature of the offense; the defendant's crime-related history; deterrence of crime; protection of the public; or the defendant's rehabilitation.

In addition to the statutory "reasonably relate" requirement, both defendants' constitutional rights and federalism concerns create outer limits for the application and scope of supervised release conditions. By nature, such conditions restrict a releasee's freedom, and some conditions involve systems, such as child support orders, ordinarily governed by the states. Nonetheless, federal courts have upheld a wide range of such conditions against constitutional challenges.

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Introduction¹

Supervised release is the successor to parole in the federal criminal justice system. In 1984, Congress eliminated parole to create a more determinate federal sentencing structure.² In its place, Congress instituted a system of supervised release, which applies to all federal crimes committed after November 1, 1987.³ Like parole, supervised release is a period of supervision following release from prison. However, an important difference distinguishes the two systems: whereas parole stands in lieu of a portion of an offender's original prison term, supervised release begins only after full service of a prison term.⁴ Thus, supervised release does not operate to reduce the duration of imprisonment. Instead, sentencing courts determine terms and conditions of supervised release at the same time they determine other components of a federal offender's sentence, and "[t]he duration, as well as the conditions of supervised release are components of a sentence."⁵

Sentencing courts have "broad discretion" when determining the duration and imposing the conditions for supervised release.⁶ In addition, except in specified drug and domestic violence cases, courts may technically exercise discretion to decline supervised release altogether for a particular defendant. However, the federal sentencing guidelines, promulgated by the United States Sentencing Commission, recommend that sentencing courts impose a term of supervised release in most federal felony cases.⁷

As a rule, courts impose supervised release only in conjunction with prison sentences. However, a former Bush Administration official's case made news when his lawyers agreed to supervised release despite President George W. Bush's commutation of his prison sentence.⁸

¹ Two reports on this topic were originally prepared by Charles Doyle, Senior Specialist, American Law Division.

² Comprehensive Crime Control Act of 1984, P.L. 98-473, Title II, 98 stat. 1976; *See* 154 Cong. Rec. H7237 (daily ed. July 29, 2008) (statement of Sen. King) (referring to the 1984 law's "unquestioned success" and stating that "[d]eterminate sentencing makes incarceration terms more meaningful and ensures that offenders actually serve most of their sentences.")

³ Parole continues to apply to the small number of remaining federal offenders serving sentences for crimes committed prior to November 1, 1987. It also applies to offenders convicted for pre-2000 violations of the District of Columbia's criminal code. Although Congress officially repealed the parole provisions, including those authorizing the Parole Commission's activities, in the 1984 act, Congress has several times extended the life of the federal Parole Commission to address these remaining offenders. Most recently, the 110th Congress extended the life of the Parole Commission to October 31, 2011. P.L. 110-312. In administering parole, the Parole Commission follows federal policy guidelines, which are the precursors to the policies contained in the sentencing guidelines promulgated by the United States Sentencing Commission. 28 C.F.R. 2.20; U.S.S.G. §5D.

⁴ *See* U.S.S.G. pt.A.2(b) ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court").

⁵ *United States v. Goodson*, 544 F.3d 529, 538 (3d Cir. 2008).

⁶ *United States v. Proctor*, 281 Fed. Appx. 72, 73 (3d Cir. 2008).

⁷ 18 U.S.C. §3583; U.S.S.G. §5D1.1. The Application Note accompanying §5D1.1 in the Sentencing Guidelines suggests that a court should decline to impose supervised release only if "it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute." For background and analysis related to the federal sentencing guidelines, see CRS Report RL32766, *Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*, by Lisa M. Seghetti and Alison M. Smith.

⁸ *See, e.g.,* Neil A. Lewis, *Issue of Supervised Release for Libby is Cleared Up*, NY Times, A.15 July 10, 2007 (East Coast, late ed.).

Supervised release terms begin when a prisoner is actually released, regardless of when he should have been released.⁹ Although a court may sentence an offender to several terms of supervised release for each of several crimes, the terms are served concurrently rather than consecutively.¹⁰ This rule applies even where criminal statutes require an offender to serve the multiple terms of imprisonment consecutively.¹¹

Duration

Supervised release term lengths generally correspond to the severity of the crime for which the sentence is imposed. Thus, a longer imprisonment generally corresponds with a longer term of supervised release. Special rules govern term lengths for terrorism-related crimes, drug offenses, kidnapping, and some sex offenses. For other crimes, maximum durations range from less than a year to not more than five years. Specifically, federal statute limits such terms to: (1) five years for class A or class B felonies, such as first-degree murder; (2) three years for class C or class D felonies, such as bank robbery; and (3) one year for all other crimes.¹² Within the maximum and minimum limits set by statute, courts typically have significant discretion over the length of supervised release.

In special cases – particularly those involving drug offenses, terrorism-related crimes, kidnapping, and some sex offenses – federal statute allows, and sometimes mandates, supervised release terms that exceed the typical one- to five-year maximums. For example, several federal controlled substance statutes establish mandatory minimum, rather than maximum, durations for supervised release terms. In cases involving relatively large quantities of the most dangerous controlled substances (for instance, a kilogram or more of heroin), courts must sentence defendants to a term of supervised release of at least five years after an initial conviction, or ten years upon a subsequent conviction.¹³ Mandatory minimums also apply, but are lower, when smaller quantities (for instance, 100 to 1,000 grams of heroin) or less dangerous controlled substances are involved.¹⁴ These minimum statutory terms double (treble for recidivists) in cases involving aggravating circumstances. Aggravating circumstances include, among other things:

⁹ 18 U.S.C. 3624(e); *United States v. Johnson*, 529 U.S. 53, 54 (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).

¹⁰ “.... The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any federal, state, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a federal, state, or local crime unless the imprisonment is for a period of less than 30 consecutive days....” 18 U.S.C. §3624(e); *United States v. Hernandez-Guevara*, 162 F.3d 863, 877-78 (5th Cir. 1998).

¹¹ U.S.S.G. §5G1.2, Application Note 2(C).

¹² 18 U.S.C. §3583(b). Federal statute defines classes according to maximum possible sentence: (1) death or life imprisonment for class A; (2) 25 years or more for class B; 10 to 25 years for class C; and 5-10 years for D. In *United States v. Cunningham*, the U.S. Court of Appeals for the Second Circuit held that the statutory maximums trump sentencing guidelines in offense classification. 292 F.3d 115, 118-19 (2d Cir. 2002).

¹³ 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1). At one time, it was thought that these mandatory minimum terms of supervised release in drug cases might be subject to the 5-3-1 year maximums delineated in 18 U.S.C. §3583. *See, e.g., United States v. Kelly*, 974 F.2d 22, 25 (5th Cir. 1992); *United States v. Good*, 25 F.3d 218, 222 (4th Cir. 1994). However, statute now makes clear that these minimums apply “notwithstanding” 18 U.S.C. §3583(e). 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1).

¹⁴ 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2).

distribution at a truck stop or highway rest area; distribution using an individual under the age of 18; and distribution to a pregnant woman.¹⁵

A similar reversal of maximum to minimum term duration applies to supervised release in the context of specified federal kidnaping and sex offenses. For those crimes, the “authorized term” of supervised release is any term of at least five years, and may extend to life.¹⁶

For terrorism-related offenses, the statutory rules essentially eliminate any minimum or maximum length for supervised release terms, instead permitting courts to determine the appropriate duration. Specifically, the USA PATRIOT Act and the USA PATRIOT Improvement and Reauthorization Act authorize supervised release terms of any number of years or life for specified crimes associated with acts of terrorism.¹⁷

Conditions

Conditions for supervised release are determined during a federal offender’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 statute and federal sentencing guidelines. Following a 2005 Supreme Court case, *Booker v. United States*, courts may depart from the Sentencing Guidelines if grounds for departure exist.¹⁸ Courts also exercise independent judgment in each individual case.

Courts must impose a small set of mandatory conditions any time they order supervised release. Other conditions enumerated in statute or by the sentencing guidelines are discretionary, although some discretionary conditions have become standard practice over time. In addition to specifically listed conditions, courts may impose almost any other condition as long as the condition satisfies several parameters and is constitutionally permissible.

Courts may delegate some decisions regarding specific conditions to probation officers to determine during the course of an offender’s supervised release term.¹⁹ However, such delegations must be relatively minor; courts cannot delegate key decision-making obligations. For example, although a court may assign a probation officer discretion to determine the specifics of a condition imposing treatment, the order for supervised release may not delegate the determination of whether such treatment is necessary.²⁰ Likewise, courts, rather than probation officers, must decide broad parameters for the number of drug tests necessary for a particular defendant.²¹

¹⁵ 21 U.S.C. §849; 21 U.S.C. §861(a); 21 U.S.C. §861(f).

¹⁶ 18 U.S.C. §3583(k). The offenses covered by section 3583(k) include kidnaping, sex trafficking, producing child pornography, sexual exploitation of children, aggravated sexual abuse, and related offenses.

¹⁷ 18 U.S.C. §3583(j). This subsection applies to a long list of activities that endanger national security, such as hostage taking, attempting to murder government officials, and unlawful use of biological weapons. *See* 18 U.S.C. 2332b(g)(5)(B).

¹⁸ 543 U.S. 220, 245-46 (2005) (holding that courts must consider federal sentencing guidelines when sentencing federal offenders but that the guidelines do not ultimately bind a court’s decision).

¹⁹ Probation is similar to supervised release in that it is a term during which an offender lives outside of prison but is subject to various conditions. However, probation typically applies in lieu of a prison sentence, whereas supervised release typically applies after an offender has served a prison term. Despite the differences, probation officers are the officials responsible for monitoring offenders’ activity in both systems.

²⁰ *See* *United States v. Nash*, 438 F.3d 1302, 1305-306 (11th Cir. 2006); *United States v. Pruden*, 398 F.3d 241, 250 (3d continued...)

Mandatory Conditions

Federal statute mandates several mandatory conditions that apply to all defendants, and a few additional conditions that apply only in cases involving domestic violence or sex offenses. All supervised release orders require offenders to: (1) refrain from criminal activity; (2) cooperate with authorized collection of DNA samples; and (3) submit to periodic drug tests.²² In addition, prior to release, all prisoners must agree to adhere to the payment schedule for any unpaid fine imposed; however, federal statute does not specify that such agreements will be enforced as conditions of supervised release after the agreement is made.²³ To fill this gap, federal sentencing guidelines suggest that courts require adherence to such agreements as conditions of supervised release.²⁴

Additional mandatory conditions apply to domestic violence and sex offenses. Specifically, first-time domestic violence offenders must attend an approved rehabilitation program if one is located within 50 miles of their residence, and convicted sex offenders must register their addresses with relevant authorities if the federal sex offender registry requirements apply.²⁵

Discretionary Conditions

Courts have relatively broad discretion to impose supervised release conditions that supplement the mandatory conditions for a particular defendant. A court may impose any discretionary condition that (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.²⁶

(...continued)

Cir. 2005).

²¹ The permissible scope of probation officer discretion relating to the mandatory drug testing condition has been the subject of considerable litigation. For example, the United States Court of Appeals for the Ninth Circuit has heard multiple appeals addressing this issue. *See* United States v. Stephens, 424 F.3d 876 (9th Cir. 2005) (striking down the sentencing court’s delegation to the probation officer of the authority to determine of the number of additional non-treatment drug tests to which the defendant was required to submit); United States v. Garcia, 522 F.3d 855 (9th Cir. 2008) (distinguishing *Stevens* where a probation officer had the discretion to order non-treatment drug tests, but only up to a total of three, the maximum amount implied by the court’s order).

²² 18 U.S.C. §3583(d). DNA collection would be appropriate if authorized by the DNA Analysis Backlog Elimination Act of 2000, codified at 42 U.S.C. §14135a. *Id.* For more information on DNA collection in the federal criminal justice system, see CRS Report R40077, *Compulsory DNA Collection: A Fourth Amendment Analysis*, by Anna C. Henning.

²³ 18 U.S.C. §3624(e).

²⁴ U.S.S.G. §5D1.3(a)(6) (suggesting the following condition: “The defendant shall (A) make restitution in accordance with [relevant statutory provisions], and (B) pay the assessment imposed ...”). A separate, discretionary guideline applies to payment of special assessments. U.S.S.G. §5D1.3(c)(14) (suggesting: “The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment”). 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. 18 U.S.C. §3013.

²⁵ 18 U.S.C. §3583(d). A domestic violence crime is “a crime of violence for which the defendant may be prosecuted in a court of the United States in which the victim or intended victim is the spouse, former spouse, intimate partner, former intimate partner, child, or former child of the defendant, or any other relative of the defendant.” 18 U.S.C. §3561(b).

²⁶ 18 U.S.C. §3583(d).

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.²⁷ 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 generally interpreted the statute such that a reasonable relationship to any one factor is sufficient to justify a discretionary condition.²⁸

As long as these prerequisites are satisfied for each condition, a court may impose any of twenty discretionary conditions listed in statute, any conditions recommended by the sentencing guidelines, or “any other condition it considers to be appropriate” for a particular offender.²⁹ Nineteen of the twenty statutorily-enumerated discretionary conditions are borrowed from the list of permissible conditions for probation.³⁰ The twentieth condition authorizes deportation of defendants who are foreign nationals.³¹

Federal sentencing guidelines quote some of the statutorily identified discretionary conditions, suggest expanded versions of others, and propose additional considerations in still other situations.³² They divide the discretionary conditions into three groups—“standard” conditions, which courts impose as a matter of practice in most cases; “special” conditions that may be applied to particular kinds of cases; and “additional” conditions, such as community confinement, curfews and occupational restrictions.

²⁷ *Id.* (incorporating by reference 18 U.S.C. §3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(d)).

²⁸ *See, e.g.,* United States v. Johnson, 998 F.2d 696, 697-99 (9th Cir. 1993).

²⁹ 18 U.S.C. §3583(d).

³⁰ The statutorily-enumerated discretionary conditions require a person on supervised release to: (1) support his dependents; (2) make restitution to a victim of the offense; (3) in cases involving fraud or other intentional deception, give appropriate notice of the conviction to the victims; (4) work conscientiously at suitable employment or pursue study or vocational training; (5) refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense; (6) refrain from frequenting specified places or associating with specified persons; (7) refrain from excessive use of alcohol or other controlled substances; (8) refrain from possessing a firearm or other dangerous weapon; (9) undergo available treatment and remain in a specified institution; (10) remain in the custody of the Bureau of Prisons during nights or weekends; (11) work in community service; (13) reside in a specified place or area or refrain from residing in a specified place or area; (14) remain within the jurisdiction of the court; (15) report to a law enforcement officer; (16) permit a probation officer to visit him at his home or elsewhere; (17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment; (18) notify the probation officer promptly if arrested or questioned by a law enforcement officer; (19) remain at his place of residence during nonworking hours; and (20) comply with the terms of any court order or order of an administrative process ordering child support. 18 U.S.C. §3563(b)(1)-(b)(10), (b)(12)-(b)(20).

³¹ 18 U.S.C. §3583(d). A defendant’s deportation as a supervised release condition does not automatically terminate supervised release nor the obligation to comply with other conditions of supervised release. *See* United States v. Williams, 369 F.3d 250, 252-53 (3d Cir. 2004), citing in accord, United States v. Ramirez-Sanchez, 338 F.3d 977, 980 (9th Cir. 2003); United States v. Cuero-Flores, 276 F.3d 113, 117 (2d Cir. 2002). However, a defendant’s term of supervised release is not tolled during the time the defendant is lawfully outside the country pursuant to a deportation order. United States v. Okoko, 365 F.3d 962, 964-67 (11th Cir. 2004).

³² U.S.S.G. §5D1.3.

Standard Discretionary Conditions

Courts regularly impose the sentencing guidelines' standard conditions as a matter of practice.³³ Many such conditions ensure that defendants remain in regular contact with probation officers. For instance, they recommend that courts order defendants to: report to a probation officer on a regular basis;³⁴ allow his probation officer to visit him;³⁵ respond honestly to his probation officer's questions and follow the officer's instructions;³⁶ notify his probation officer of any change in address or employment;³⁷ remain in the district unless the court or probation officer approves leaving;³⁸ and notify his probation officer if the defendant is arrested or questioned by law enforcement officers.³⁹

Other standard conditions prevent criminal entanglements. For example, they recommend that courts require defendants to avoid: criminal associations;⁴⁰ illicit drug markets, stash houses, and crack houses;⁴¹ the use of illicit drugs or the excessive use of alcohol;⁴² and becoming an informant without permission of the court.⁴³ A related condition requires a defendant to stay gainfully employed during the term of supervised release.⁴⁴

The remaining standard conditions instruct defendants to honor specific or general legal obligations. For example, they recommend that courts require each defendant to: support his family;⁴⁵ pay any unpaid special assessment;⁴⁶ advise his probation officer of circumstances that

³³ U.S.S.G. §5D1.3(c); *United States v. Truscello*, 168 F.3d 61, 63 (2d Cir. 1999) (“because the so-called standard conditions [of U.S.S.G. §5D1.3(c)] imposed in this case are basic administrative requirements essential to functioning of the supervised release system, they are almost uniformly imposed by the district courts and have become boilerplate”).

³⁴ U.S.S.G. §5D1.3(c)(2) (“The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month”).

³⁵ U.S.S.G. §5D1.3(c)(10) (“The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer”).

³⁶ U.S.S.G. §5D1.3(c)(3).

³⁷ U.S.S.G. §5D1.3(c)(6) (“The defendant shall notify the probation officer at least ten days prior to any change of residence or employment”).

³⁸ U.S.S.G. §5D1.3(c)(1).

³⁹ U.S.S.G. §5D1.3(c)(11) (“The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer”).

⁴⁰ U.S.S.G. §5D1.3(c)(9) (“The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer”).

⁴¹ U.S.S.G. §5D1.3(c)(8) (“The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court”).

⁴² U.S.S.G. §5D1.3(c)(7) (“The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician”).

⁴³ U.S.S.G. §5D1.3(c)(12) (“The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court”).

⁴⁴ U.S.S.G. §5D1.3(c)(5) (“The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons”). *See also* *United States v. McKissic*, 428 F.3d 719, 724-25 (7th Cir. 2005) (upholding a supervised release condition that required the defendant with a checkered employment history to seek to obtain a high school diploma or equivalent, obtain and maintain employment and provide community service while unemployed).

⁴⁵ U.S.S.G. §5D1.3(c)(4) (“The defendant shall support the defendant's dependents and meet other family responsibilities ...”).

⁴⁶ U.S.S.G. §5D1.3(c)(14) (“The defendant shall pay the special assessment imposed or adhere to a court-ordered (continued...)”).

might prevent his making fine, restitution or special assessment payments;⁴⁷ and notify victims and those possibly at risk.⁴⁸

Special Discretionary Conditions

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, the sentencing guidelines recommend that a court prohibit a defendant’s possession of weapons during supervised release if the defendant used a weapon in the commission of the crime at issue or had a record including prior felony convictions.⁴⁹ Likewise, when a conviction is for a sex or child pornography offense or a defendant has a history of sexual misconduct, a court might mandate sex-offender treatment, limit computer use, or authorize warrantless searches of the defendant’s possessions.⁵⁰ 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 or ordering deportation if the defendant is an alien who is eligible for deportation under immigration laws.⁵¹

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 compliance with his scheduled payments or mandate probation officers’ access to a defendant’s financial information.⁵² Moreover, when reasonably related to an offense, such conditions might

(...continued)

installment schedule for the payment of the special assessment”).

⁴⁷ U.S.S.G. §5D1.3(c)(14).

⁴⁸ U.S.S.G. §5D1.3(c)(13) (“As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement”). *See also* United States v. Nash, 438 F.3d 1302, 1306 (11th Cir. 2006) (upholding a condition under which the individual was required to “notify third parties of risks that may be occasioned by [his] criminal record or personal history or characteristics as directed by the probation officer”).

⁴⁹ U.S.S.G. §5D1.3(d)(1). Under appropriate circumstances, the condition limiting the possession of weapons may extend not only to firearms but to crossbows, bows, and arrows. United States v. Gallagher, 275 F.3d 784, 793-94 (9th Cir. 2001).

⁵⁰ U.S.S.G. §5D1.3(d)(7). Courts have had some difficulty formulating conditions limiting computer use in such cases. *Compare* United States v. Mark, 425 F.3d 505, 508-10 (8th Cir. 2005) (rejecting a complete ban on Internet access when a more tailored condition might have been sufficient); United States v. Sofsky, 287 F.3d 122, 126-27 (2d Cir. 2002) (striking down a condition barring all computer access without probation officer approval as too restrictive when a more narrowly drawn condition would suffice); United States v. White, 244 F.3d 1199, 1205-206 (10th Cir. 2001) (rejecting a condition banning possession of a computer with internet access as at once too broad (undue restrictions on lawful computer use) and too narrow (failure to ban access using someone else’s computer)) *with* United States v. Rearden, 349 F.3d 608, 619-21 (9th Cir. 2003) (approving ban on computer use or possession with access to online service without the approval of his probation officer); United States v. Walser, 275 F.3d 981, 987-88 (10th Cir. 2001) (approving internet access ban absent probation officer approval); United States v. Paul, 274 F.3d 155, 165-72 (5th Cir. 2001) (upholding a ban on computer and Internet access, a prohibition on direct contact with children, and a bar on possession of photographic or like equipment); United States v. Crandon, 173 F.3d 122, 127-28 (3d Cir. 1999) (upholding a condition requiring probation officer approval for all Internet access).

⁵¹ U.S.S.G. §5D1.3(d)(4) (drugs); U.S.S.G. 5D1.3(d)(5) (mental health); U.S.S.G. §5D1.3(d)(6) (deportation).

⁵² U.S.S.G. §5D1.3(d)(2); U.S.S.G. §5D1.3(d)(3). Courts have upheld conditions requiring probation officers’ access to financial information in various circumstances, ranging from a goal of preventing a return to drug dealing to a goal of ensuring compliance with child support payments. *See, e.g.,* United States v. Behler, 187 F.3d 772, 780 (8th Cir. 1999) (continued...)

include demands to provide information concerning the financial activities of a defendant's spouse or legal entities under the releasee's control.⁵³

Additional Discretionary Conditions

"Additional" conditions address defendants' mobility and work activities. They include community confinement;⁵⁴ home detention;⁵⁵ community service;⁵⁶ curfew;⁵⁷ and restrictions on a defendant's occupation.⁵⁸

Perhaps because many additional conditions restrict defendants' freedom of movement, commentary accompanying these additional conditions in the federal 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."⁵⁹ Likewise, it limits community service conditions to no more than 400 hours.⁶⁰

(...continued)

(holding that the district court had reasonably believed that "monitoring [the defendant]'s financial situation would aid in detecting any return to his former lifestyle of [financially motivated] drug distribution"); *United States v. Brown*, 402 F.3d 133, 137-38 (2d Cir. 2005) (upholding a condition that defendant, convicted on drug charges, report financial information to his probation officer); *United States v. Camp*, 410 F.3d 1042, 1045-46 (8th Cir. 2005) (upholding a condition requiring a defendant, convicted of unlawful possession of a firearm, to disclose financial information to his probation officer in order to ensure payment of child support). However, courts have occasionally invalidated such conditions, particularly if they impede a relatively broad range of activity. *See, e.g., Brown*, 402 F.3d at 138-39 (striking down a condition requiring the defendant to obtain advance approval for "any debt," including use of a credit card) (emphasis in original).

⁵³ *See, e.g., United States v. Kosth*, 943 F.2d 798, 800-801 (7th Cir. 1991) (in a case involving fraudulent credit card use, upholding a condition requiring reporting of debt incurred by the defendant's wife); *United States v. Grant*, 117 F.3d 788, 792-93 (5th Cir. 1997) (upholding a condition requiring a minister convicted of tax evasion to report income received on behalf of religious organizations).

⁵⁴ U.S.S.G. §5D1.3(e)(1). *See also United States v. Bahe*, 201 F.3d 1124, 1127-136 (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); *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."

⁵⁵ U.S.S.G. §5D1.3(e)(2). 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. U.S.S.G. §5F1.2.

⁵⁶ U.S.S.G. §5D1.3(e)(3).

⁵⁷ U.S.S.G. §5D1.3(e)(5).

⁵⁸ U.S.S.G. §5D1.3(e)(4).

⁵⁹ U.S.S.G. §5F1.1.

⁶⁰ U.S.S.G. §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.*

The sentencing guidelines similarly limit the appropriate time frame for restrictions on a defendant's occupation, advising that such restrictions last only "for the minimum time and to the minimum extent necessary to protect the public."⁶¹ The guidelines also limit occupational restrictions to the narrow set of circumstances where both: "(1) a reasonably direct relationship existed 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."⁶²

"Any Other Condition"

Finally, a court may impose any other condition that it "considers to be appropriate," provided that the condition meets the same statutory prerequisites which apply to all discretionary conditions.⁶³ Courts occasionally exercise this discretion to impose unique conditions upon a defendant's supervised release. For example, in *United States v. Gementera*, the U.S. Court of Appeals for the Ninth Circuit upheld a condition requiring a defendant to stand outside a post office for one day wearing or carrying a sign declaring, "I stole mail; this is my punishment."⁶⁴ In that case, the defendant argued that the condition failed to satisfy the statutory requirements because its only purpose was "humiliation."⁶⁵ The court rejected this argument.⁶⁶ Emphasizing a sentencing court's "wide discretion" to impose conditions, the court held that the sentencing court had not abused its discretion in finding that the condition was reasonably related to deterrence and rehabilitation factors and that it did not restrict the defendant's liberty more than was reasonably necessary.⁶⁷

In other circumstances, courts use their discretionary authority to impose conditions in areas other than the one for which the sentencing guidelines recommend it. For example, in *United States v. Goodson*, a district court had imposed a condition authorizing warrantless searches of the defendant's place of business in a case in which a defendant pled guilty of wire fraud and making and uttering counterfeit checks – a condition that the sentencing guidelines recommend for child pornography cases but do not specifically mention for financial crimes.⁶⁸

Case Law on "Reasonably Related" Requirement

Some defendants have successfully argued that a condition imposed on supervised release is invalid because it is not "reasonably related" to the offense in question. For example, in *United States v. Ferguson*, the U.S. Court of Appeals for the Fifth Circuit held that a history of drug abuse and conviction for possession of a machine gun do not justify supervised release conditions prohibiting use of tobacco or consumption without a prescription of aspirin or over-the-counter

⁶¹ U.S.S.G. §5D1.3(e)(4).

⁶² *Id.*

⁶³ 18 U.S.C. 3583(c), (d).

⁶⁴ 379 F.3d 596, 601-02 (9th Cir. 2004).

⁶⁵ *Id.* at 601.

⁶⁶ *Id.* at 601-02.

⁶⁷ *Id.*

⁶⁸ *United States v. Goodson*, 544 F.3d 529 (3d Cir. 2008).

cold remedies.⁶⁹ Similarly, in *United States v. Abrar*, the U.S. Court of Appeals for the Second Circuit invalidated a supervised release condition requiring a defendant to repay his personal debts where the defendant had been convicted of illegal transfer of false immigration documents.⁷⁰ Likewise, in a case involving wire fraud, the U.S. Court of Appeals for the Eighth Circuit struck down conditions requiring a defendant to abstain from alcohol and submit to unannounced warrantless searches.⁷¹

In all three examples, courts emphasized that a sentencing court has “wide discretion”⁷² and typically may impose a condition “if it is reasonably related to any one or more of the specified factors.”⁷³ However, they concluded that the imposed condition did not bear a sufficiently reasonable relationship to the particular offense at issue, the defendant’s history, or any other statutory factors.⁷⁴

On the other hand, many courts have upheld conditions based solely on a defendant’s history, even in the absence of any nexus to the particular offense at issue. For example, courts have upheld the imposition of special conditions targeted to sex offenders based on a defendant’s prior sex offenses in cases where the crime of conviction was for bank robbery, narcotics, or other offenses unrelated to sex.⁷⁵ Numerous courts have likewise upheld drug or mental health treatment conditions justified solely by a defendant’s previous history.⁷⁶ However, courts have occasionally invalidated such conditions in cases where the need for the treatment or other condition appears to have disappeared or grown stale.⁷⁷

The federal courts have developed unique rules governing the “reasonable relationship” analysis in a few categories of conditions. For instance, although the federal sentencing guidelines

⁶⁹ 369 F.3d 847, 852-54 (5th Cir. 2004).

⁷⁰ 58 F.3d 43, 46-7 (2d Cir. 1995).

⁷¹ *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992).

⁷² *Id.* at 1292.

⁷³ *See Abrar*, 58 F.3d at 46.

⁷⁴ *See, e.g., Id.* (“We fail to perceive how the debt repayment condition imposed in this case reasonably relates to any of these factors”); *Prendergast* at 1293 (“The district court failed to explain any relationship between the wire fraud offense and the supervised release provision permitting warrantless searches for drugs or controlled substances. We see no reasonable relationship, and are of the view that the district court abused its discretion in imposing these special conditions of supervised release.”).

⁷⁵ *See, e.g., United States v. Rosario*, 386 F.3d 166, 171-72 (2d Cir. 2004) (in a case involving a narcotics offense, upholding a condition requiring the defendant to register as a sex offender based upon the defendant’s previous conviction for attempted rape of a seven-year-old girl); *United States v. York*, 357 F.3d 14, 19-21 (1st Cir. 2004) (upholding a condition requiring sex offender treatment even though it bore no relation to the crime of conviction, based upon the defendants’ previous conviction for sexually abusing a minor); *United States v. Scott*, 270 F.3d 632, 635-36 (8th Cir. 2001) (in a case involving bank robbery, upholding special conditions for sex offenders based on the defendant’s prior rape conviction).

⁷⁶ *See, e.g., United States v. Mickelson*, 433 F.3d 1050, 1056-57 (8th Cir. 2006) (in a child pornography case, upholding conditions of alcohol screening and mental health treatment based on the defendant’s history of alcohol and mental health issues).

⁷⁷ *See, e.g., United States v. Kent*, 209 F.3d 1073, 1075-78 (8th Cir. 2000) (invalidating a condition requiring psychological counseling where evidence of the need was stale and otherwise weak); *United States v. Pruden*, 398 F.3d 241, 248-49 (3d Cir. 2005) (holding that the sentencing court had abused its discretion where the condition was unrelated to the offense and there was insufficient evidence of any present need for treatment).

recommend occupational restrictions in some circumstances, courts will not typically uphold such conditions unless they directly relate to the offense of conviction.⁷⁸

Conversely, courts appear to permit restrictions of alcohol use justified by only relatively small connections to the particular defendant or offense.⁷⁹ Furthermore, although the federal sentencing guidelines specifically permit a court to prohibit the *excessive* consumption of alcoholic beverages as a condition of supervised release, conditions demanding total abstinence are apparently common. There may be some question, however, whether a ban on alcoholic consumption may be imposed as condition of supervised release where there is no connection with either the offense at issue or the defendant's particular history.⁸⁰

Constitutional Considerations

The U.S. Constitution stands as the ultimate authority over government action. Thus, even if a supervised release condition satisfies all statutory requirements, a court will invalidate it if it runs afoul of a defendant's constitutional rights or exceeds the federal government's constitutional power vis-à-vis the states.

Defendants' Constitutional Rights

Because they restrict a person's freedom and may intrude upon a person's privacy, supervised release conditions occasionally implicate defendants' constitutional rights. For instance, conditions might implicate the Fourth Amendment right against unreasonable searches and seizures, the First Amendment right to free speech and free association, or the Fifth Amendment right against self-incrimination. However, although the Supreme Court has made clear that conviction does not eliminate an individual's constitutional rights, it has also emphasized that "by virtue of their status alone, probationers [and others along the "continuum of punishment" in the criminal justice system] do not enjoy the absolute liberty to which every citizen is entitled."⁸¹ Perhaps in part because of this diminishment of constitutional rights, courts have upheld most supervised release conditions against constitutional challenges.

⁷⁸ See, e.g., *United States v. Erwin*, 299 F.3d 1230, 1232-233 (10th Cir. 2002); *United States v. Scott*, 270 F.3d 632, 634-36 (8th Cir. 2001); *United States v. Cooper*, 171 F.3d 582, 585-86 (8th Cir. 1999); *United States v. Mills*, 959 F.2d 516, 518-20 (5th Cir. 1992). In *United States v. Prochner*, the U.S. Court of Appeals upheld a condition forbidding a defendant "from engaging in an occupation, business or profession that would require direct supervision of children under the age of 18" even though the crime of conviction was credit card fraud. 417 F.3d 54, 65 (1st Cir. 2005). However, the defendant in that case had been found in possession of material indicating a "desir[e] to have sexual relationships with adolescent males" during the course of his arrest for the crime at issue. *Id.* at 58, 65.

⁷⁹ See, e.g., *United States v. Henkel*, 358 F.3d 1013, 1015-16 (8th Cir. 2002); *United States v. Brown*, 235 F.3d 2, 6-7 (1st Cir. 2000); *United States v. Behler*, 187 F.3d 772, 789 (8th Cir. 1999); *United States v. Schave*, 186 F.3d 839, 842-43 (7th Cir. 1999); *United States v. Wesley*, 81 F.3d 482, 484 (4th Cir. 1996); *United States v. Johnson*, 998 F.2d 696, 699 (9th Cir. 1993).

⁸⁰ See *United States v. Modena*, 302 F.3d 626, 636-37 (6th Cir. 2002); *Pendergast*, 979 F.2d at 1292-293 (rejecting ban). *But see* *United States v. McKissic*, 428 F.3d 719, 722-23 (7th Cir. 2005) (striking down a condition banning alcohol consumption where a defendant "was issued a citation for operating a motor vehicle in which there were open containers of alcohol ... admitted to first consuming alcohol at the age of 17, to consuming up to three vodka mixed drinks as often as twice a month, and to being intoxicated about a month prior to his arrest").

⁸¹ *Samson v. California*, 547 U.S. 843, 848-49 (2006) (internal quotations omitted).

The Fourth Amendment is implicated when a sentencing court includes as a condition of a defendant's supervised release the warrantless search of his person or property. The Fourth Amendment to the U.S. Constitution guarantees a right "against unreasonable searches and seizures."⁸² To be "reasonable" under the Fourth Amendment, the government's "search" – that is, its intrusion into a person's "reasonable expectation of privacy" – must typically have the support of a judicially-issued warrant (or a valid exception to the warrant requirement) and "probable cause" to believe that evidence of criminal activity will be found.⁸³ However, in cases involving people serving criminal sentences, the Supreme Court has instead employed 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."⁸⁴ 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 are disfavored in this balancing test.⁸⁵ Perhaps in part for this reason, courts have generally upheld such conditions as long as they are reasonably related to the defendant's crime, history, or rehabilitation.⁸⁶ However, whether individual searches conducted pursuant to such a condition pass muster under the Fourth Amendment may depend upon the facts in a particular case.

Other supervised release conditions might implicate a releasee's First Amendment rights to free speech or free association. For example, a condition restricting a defendant's contact with felons may implicate a defendant's First Amendment associational rights. However, courts have generally upheld such conditions against First Amendment challenges. For example, courts have upheld conditions restricting a defendant's associations with people convicted of related misdemeanors, the defendant's associational rights notwithstanding.⁸⁷ In addition, courts have upheld associational restrictions couched in geographical terms. For instance, at least one court has upheld a condition banning a defendant from the scene of her past criminal activities.⁸⁸ Likewise, where the defendant has a history of excessive gambling, courts have upheld conditions that prohibit him from gambling or entering gambling establishments.⁸⁹ Similarly, in the free-speech context, courts have upheld conditions restricting a defendant's possession of sexually explicit material, even if the material is legal.⁹⁰ However, they have occasionally invalidated such conditions if restrictions on access to material are drawn too broadly.⁹¹

⁸² U.S. Const. Amend. IV.

⁸³ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

⁸⁴ *Samson*, 547 U.S. at 848 (citing *United States v. Knights*, 534 U.S. 112, 118-19 (2001)).

⁸⁵ *See Samson*, 547 U.S. 843. Although *Samson* involved parole condition rather than a supervised release condition, it is likely that the Court would have applied the same analysis to evaluate a warrantless search of a supervised releasee.

⁸⁶ *See, e.g., 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).

⁸⁷ *See, e.g., United States v. Sines*, 303 F.3d 793, 800-802 (7th Cir. 2002) ("Several courts, including this court have upheld conditions of supervised release which impose on defendants' rights to freely associate with others" (citing *United States v. Schave*, 186 F.3d 839, 844 (7th Cir. 1999) (no association with white supremacists) *United States v. Showalter*, 933 F.2d 573, 575-76 (7th Cir. 1991) (no association with skinheads or Nazis); *United States v. Bortels*, 962 F.2d 558, 559-60) (6th Cir. 1992) (no association with felons including the defendant's girlfriend)).

⁸⁸ *See, e.g., United States v. Sicher*, 239 F.3d 289, 291-92 (3d Cir. 2000).

⁸⁹ *See, e.g., United States v. Cothran*, 302 F.3d 279, 290 (5th Cir. 2002); *United States v. Brown*, 136 F.3d 1176, 1186 (7th Cir. 1998).

⁹⁰ *See, e.g., United States v. Rearden*, 349 F.3d 608, 619-21 (9th Cir. 2003) (upholding such restriction); *United States v. Bee*, 162 F.3d 1232, 1235 (9th Cir. 1998) (accepting the argument that such a restriction was constitutionally (continued...))

Finally, conditions requiring releasees to respond completely and truthfully to probation officers appear to be valid notwithstanding the defendant's Fifth Amendment privilege against self-incrimination.⁹² However, this rule does not operate to validate the reverse; in other words, a defendant's valid claim of the privilege against self-incrimination may not be considered a violation of a supervised release condition.⁹³

States' Rights

The Tenth Amendment to the U.S. Constitution, together with general federalism principles, limit a sentencing court's authority to impose conditions that "order a state to act."⁹⁴ In other words, unless the federal government has acted pursuant to constitutional authority in a particular area, it cannot require states to act in that area.⁹⁵ For example, because the federal government has not asserted regulatory power over state drivers' licenses, "federal courts are constitutionally barred from unilaterally ordering suspensions of [defendants'] state drivers' licenses."⁹⁶ Likewise, although a sentencing court may condition a defendant's supervised release on his compliance with the terms of a state child-support order,⁹⁷ it may not impose a more demanding payment schedule than the state order requires.⁹⁸

However, these concerns do not limit a court's ability to condition supervised release upon compliance with state laws. For example, a court may require that a defendant comply with state notification provisions even when those requirements are not otherwise applicable.⁹⁹

Modification and Revocation

Although a sentencing court's largest role in supervised release occurs at the time of initial sentencing, it maintains an important decision-making function, and broad discretion, throughout a defendant's sentence. In particular, a court may: (1) modify supervised release conditions at any time; (2) discharge a defendant from supervised release after one year into the term of supervised

(...continued)

permissible where necessary to "effectively address a defendant's sexual deviance problem").

⁹¹ See, e.g., *United States v. Loy*, 237 F.3d 251, 263-67 (3d Cir. 2001) (striking down as too broad a ban on the possession of all forms of pornography).

⁹² *United States v. Davis*, 242 F.3d 49, 51-2 (1st Cir. 2001).

⁹³ *Id.*

⁹⁴ U.S. Const. Amed. X ("The powers not delegated to the United States by the Constitution ... are reserved to the states...."). See also *New York v. United States*, 505 U.S. 144, 188 (1992) ("the Federal Government may not compel the States to enact or administer a federal regulatory program"); *United States v. A-Abras, Inc.*, 185 F.3d 26, 33 (2d Cir. 1999) ("The Tenth Amendment ... must not be transgressed when a federal court exercises its considerable discretion to impose a sentence [that includes] supervised release.").

⁹⁵ The federal government often incentivizes state action by withholding or providing monetary support for particular programs. The Tenth Amendment does not bar such monetary incentives, but it prohibits direct interference with state police powers.

⁹⁶ *United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. Cal. 1988).

⁹⁷ See, e.g., *United States v. Camp*, 410 F.3d 1042, 1043-46 (8th Cir. 2005).

⁹⁸ See, e.g., *United States v. Lakatos*, 241 F.3d 690, 692-95 (9th Cir. 2001).

⁹⁹ See, e.g., *United States v. Coenen*, 135 F.3d 938, 944-45 (5th Cir. 1998); *United States v. Lawrence*, 300 F.3d 1126, 1128 (9th Cir. 2002).

release; or (3) revoke a defendant's term of supervised release, require him to return to prison, and impose an additional term of supervised release to be served thereafter.¹⁰⁰

A range of factors justify modifications to original terms of supervised release. Such factors include the nature of the crime and defendant's history;¹⁰¹ deterrence;¹⁰² public safety;¹⁰³ rehabilitation;¹⁰⁴ federal sentencing guidelines and accompanying policy statements;¹⁰⁵ sentencing disparity;¹⁰⁶ and restitution.¹⁰⁷ These grounds justify both extension of a term of supervised release and adjustment to supervised release conditions. In addition, they allow a condition for home detention notwithstanding the fact that home detention is characterized elsewhere in federal statute as available only as an alternative to incarceration.¹⁰⁸ They also occasionally justify adjustment of the conditions dealing with the payment schedule for restitution or an unpaid fine.¹⁰⁹ A court may not, however, entertain a petition to modify conditions of a term of supervised release based on the purported illegality of the original conditions.¹¹⁰

Occasionally, a court has an obligation, rather than the discretion, to modify the terms or conditions of supervised release. Specifically, 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.¹¹¹

The same considerations which instruct modification direct revocation.¹¹² However, courts may consider other factors, such as the seriousness of the offense, in determining whether to revoke a defendant's supervised release.¹¹³ As a matter of policy, the Sentencing Guidelines suggest that a court should revoke a defendant's supervised release for the commission of any felony.¹¹⁴ Courts

¹⁰⁰ 18 U.S.C. §3583(e).

¹⁰¹ 18 U.S.C. §§ 3583(e), 3553(a)(1).

¹⁰² 18 U.S.C. §§ 3583(e), 3553(a)(2)(B).

¹⁰³ 18 U.S.C. §§ 3583(e), 3553(a)(2)(C).

¹⁰⁴ 18 U.S.C. §§ 3583(e), 3553(a)(2)(D).

¹⁰⁵ 18 U.S.C. §§ 3583(e), 3553(a)(4), 3553(a)(5).

¹⁰⁶ 18 U.S.C. §§ 3583(e), 3553(a)(6).

¹⁰⁷ 18 U.S.C. §§ 3583(e), 3553(a)(7).

¹⁰⁸ 18 U.S.C. §3583(e)(4). *See also* United States v. Kremer, 280 F.3d 219, 220 (2d Cir. 2002). However, the period in home detention when added to time served incarcerated may not exceed the maximum term permitted as a consequence of revocation. United States v. Ferguson, 369 F.3d 847, 849-52 (5th Cir. 2004).

¹⁰⁹ *See* United States v. Miller, 205 F.3d 1098, 1100-101 (9th Cir. 2000); United States v. Lussier, 104 F.3d 32, 36 (2d Cir. 1997).

¹¹⁰ *See* United States v. Gross, 307 F.3d 1043, 1044 (9th Cir. 2002); United States v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); United States v. Lussier, 104 F.3d 32, 34-5 (2d Cir. 1997).

¹¹¹ 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 arisen in the case law, and courts have held that courts may decline to assume drug possession on the basis of a failed drug test. *See* United States v. Hammonds, 370 F.3d 1032 (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. 1977) (court has discretion to not find possession on the basis of a failed drug test).

¹¹² 18 U.S.C. §§ 3583(e), 3553(a). *See also* United States v. Marrow Bone, 378 F.3d 806, 808 (8th Cir. 2004).

¹¹³ *See* United States v. Williams, 443 F.3d 35, 47-48 (2d Cir. 2006).

¹¹⁴ 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").

may also revoke supervised release for breach of other conditions, such as the failure to notify the probation officer of the defendant's arrest.¹¹⁵

The Federal Rules of Criminal Procedure govern revocation and modification hearings.¹¹⁶ For both modification and revocation, a sentencing court must hold a hearing unless the defendant waives the hearing requirement.¹¹⁷ For revocation, the rule also generally requires a prompt hearing (unless waived) to determine whether probable cause exists to believe a violation of a supervised release condition occurred.¹¹⁸ The fact that a revocation hearing is held without the benefit of a jury does not make it constitutionally suspect.¹¹⁹

Upon revocation of a term of supervised release, a defendant may be imprisoned for a term ranging from one to five years depending upon the seriousness of the original crime,¹²⁰ and upon release may be subject to a new term of supervised release.¹²¹ Federal sentencing guidelines recommend various terms of imprisonment to be imposed upon revocation of an original term of supervised release, calibrated according to the seriousness of the original crime and a defendant's criminal record.¹²²

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¹¹⁵ See, e.g., *United States v. Moore*, 443 F.3d 790, 794 (11th Cir. 2006).

¹¹⁶ Fed. Rule Crim. Pro. 32.1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *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, 1104-105 (8th Cir. 2005).

¹²⁰ 18 U.S.C. §§ 3583(e)(3), 3559.

¹²¹ 18 U.S.C. §3583(h). However, "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." *Id.*

¹²² U.S.S.G. §7B1.4.