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Supervised Release (Parole): An Overview of Federal Law

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Summary

Supervised release replaces parole for federal crimes committed after November 1, 1987. Like parole, supervised release is a term of restricted freedom following a defendant'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 a defendant has completed his full prison sentence. Where revocation of parole could lead to a return to prison to finish out a defendant's 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 term at the time of initial sentencing. As a general rule, 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 a defendant's supervised release and to revoke the term and return a defendant to prison for violation of the conditions.

Several conditions are standard features of 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 practice 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 Sentencing Guidelines recommend additional conditions appropriate for specific circumstances. A sentencing court may impose any of these discretion conditions, as long as they offend no constitutional limitations and as long as they involve no greater deprivation of liberty than is reasonably necessary and "reasonably relate" to the nature of the offense; the defendant's crime-related history; deterrence of crime; protection of the public; or the defendant's rehabilitation.

Both a defendant's 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.

The conditions of supervised release have been a source of constitutional challenges. Yet a constitutionally suspect condition is also likely to run afoul of statutory demands. In which case, the courts often resolve the issue on statutory grounds.

This report is available in an abridged form, without footnotes or citations to authority, as CRS Report RS21364, *Supervised Release: An Abbreviated Outline of Federal Law*.

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Introduction

Supervised release is the successor to parole in the federal criminal justice system.¹ 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 Both parole and supervised release call for a period of supervision following release from prison and for reincarceration 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).⁴

Sentencing courts determine the terms and conditions of supervised release at the same time that they determine other components of a defendant’s sentence, and “[t]he duration, as well as the conditions of supervised release are components of a sentence.”⁵ Sentencing courts are said to have broad discretion when imposing the conditions for supervised release,⁶ although 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 must be afforded the Sentencing Guidelines. Except in specified drug and domestic violence cases, courts may technically exercise discretion to decline to impose supervised release altogether for a particular defendant. 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.⁷

¹ 18 U.S.C. 4201-4218 (1982), reprinted 18 U.S.C. 4201 note.

² Sentencing Reform Act, enacted as Chapter II of the Comprehensive Crime Control Act of 1984, which is in turn Title II of P.L. 98-473, 98 Stat. 1987.

³ Parole continues to apply to the small number of remaining federal offenders serving sentences for crimes committed prior to November 1, 1987. Although Congress officially repealed the parole provisions, including those authorizing the Parole Commission’s activities, in 1984, Congress has several times extended the life of the United States Parole Commission to address these remaining offenders. Congress also vested the Commission with authority over parole of defendants incarcerated for violations of the laws of the District of Columbia, P.L. 105-33, §11231, 111 Stat. 745 (1997). The District of Columbia abolished parole as of August 5, 2000, but the Commission continues to have responsibility for parole decisions concerning those convicted for DC offenses committed before that date, cf., D.C. Code §22-403.01. The Commission is now scheduled to expire on November 1, 2018, P.L. 113-47, §2, 127 Stat. 572 (2013); 18 U.S.C. 4201 note.

⁴ See, U.S.S.G. ch. 7, pt.A.2(b) (“Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court”).

⁵ *United States v. Wilson*, 707 F.3d 412, 414 (3d Cir. 2013).

⁶ *United States v. Morrison*, 771 F.3d 687, 693 (10th Cir. 2014); *United States v. Bell*, 770 F.3d 1253, 1259 (9th Cir. 2014); *United States v. Santiago*, 769 F.3d 1,8-9 (1st Cir. 2014) (“Under ordinary circumstances, the district court has significant discretion in formulating conditions of supervised release”).

⁷ 18 U.S.C. 3583; U.S.S.G. §5D1.1, comt. app. n.1 (“[T]he 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)[relating to aliens likely to be deported after service of their term of imprisonment], when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline [on supervised release] 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, that supervised release is not necessary.... [3.(A)] In determining whether to impose a terms 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 vocation training, medical care, or other correctional treatment in the most effective manner; (iii) the (continued...)

A term of supervised release begins when a prisoner is actually released, regardless of when he should have been released.⁸ There is a split among the circuits, however, over when the term of supervised release begins for a defendant whose release from federal custody is stayed pending a civil commitment determination.⁹

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.¹⁰ This rule applies even where criminal statutes require a defendant to serve the multiple terms of imprisonment consecutively.¹¹

Duration

Section 3583(b) sets the authorized duration for a term of supervised release, subject to exceptions for certain drug, terrorism, and sex offenses.¹² It authorizes a term of supervised release of not more than five years, when the defendant is convicted of a Class A or B felony (e.g., bank fraud); not more than three years, when the defendant is convicted of a Class C or D felony (e.g., bank robbery); and not more than one year, when the defendant is convicted of a Class E felony or a misdemeanor (crimes with a maximum penalty of imprisonment of three years or less).¹³ The exceptions for various drug, terrorism, and sex offenses permit supervised release terms for any number of years up to life and often come with mandatory minimums.

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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*.

⁸ 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).

⁹ *United States v. Maranda*, 761 F.3d 689, 690 (7th Cir. 2014) (In the case of “a defendant who has completed his prison term, but who remains in federal custody while he awaits a determination of whether he will be civilly committed, ... his term of supervised release [does] not begin until there [commitment] proceedings were resolved in his favor ... ”); *United States v. Neuhauser*, 745 F.3d 125, 131 (4th Cir. 2014); *United States v. Mosby*, 719 F.3d 925, 929 (8th Cir. 2013); *contra*, *United States v. Turner*, 689 F.3d 1117, 1121-126 (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, 113-116 (3d Cir. 2009), citing in accord decisions from the Sixth, Eleventh, Eighth, and Second Circuits.

¹⁰ 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).

¹¹ U.S.S.G. §5G1.2, cmt. app. n.2(C).

¹² 21 U.S.C. 841; 18 U.S.C. 3583(j); 18 U.S.C. 3853(k).

¹³ 18 U.S.C. 3583(b); see 18 U.S.C. 3581(b) (“The authorized terms of imprisonment are- (1) for a Class A felony, the duration of the defendant’s life or any period of time; (2) for a Class B felony, not more than twenty-five years; (3) for a Class C felony, not more than twelve years; (4) for a Class D felony, not more than six years; (5) for a Class E felony, not more than three years; (6) for a Class A misdemeanor, not more than one year; (7) for a Class B misdemeanor, not more than six months; (8) for a Class C misdemeanor, not more than thirty days; and (9) for an infraction, not more than five days”).

While possession with intent to distribute illicit drugs ordinarily permits a sentence of supervised release for any term of years up to life, the accompanying mandatory minimum terms will vary according to the dangerousness of the drug, the volume involved, and whether the defendant is a recidivist.¹⁴

Similar mandatory minimum terms of supervised release apply in the case of kidnaping a child and certain sex offenses.¹⁵ In those instances, the mandatory minimum is five years, regardless of the triggering offense or the defendant's criminal record.¹⁶

¹⁴ 21 U.S.C. 841(b) (emphasis added): “ ... [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 ... 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 ... 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 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 years* in addition to such term of imprisonment.

“(2) In the case of a controlled substance in schedule IV,.... 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 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.... ”).

¹⁵ 18 U.S.C. 3583(k); *United States v. Babcock*, 753 F.3d 587, 593 (6th Cir. 2014). The offenses covered by section 3583(k): 18 U.S.C. 1201 (kidnapping) of a child, 1591 (commercial sex trafficking), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact), 2245 (sexual abuse resulting in death), 2250 (failure to register as a sex offender), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (sexual exploitation of children), 2252A (child pornography), 2260 (overseas production of child pornography), 2421 (interstate transportation for illegal sexual purposes), 2422 (coercing or enticing interstate travel for illegal sexual purposes), 2243 (interstate or foreign travel for purpose sexual abuse of a child), 2245 (interstate transmission of information about a child).

¹⁶ 18 U.S.C. 3583(k).

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.¹⁷ The obligation applies regardless of whether the offense was committed for terrorist purposes.¹⁸

In any event, 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.¹⁹ The circuits

¹⁷ 18 U.S.C. 3583(j). Section 2332b(g)(5)(B) lists a substantial number of federal offenses, i.e., “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) ² 842(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), 2281 (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 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).”

¹⁸ 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.” 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).

¹⁹ 18 U.S.C. 3583(e)(1) (“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. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014); *United States v. Mosby*, 719 F.3d 925, 930 (8th Cir. 2013).

The sentencing factors the court must consider are: “(1) the nature and circumstances of the offense and the history and (continued...)

are divided over whether the court may dismiss such a petition out of hand or must explain its action.²⁰

Conversely, 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.²¹

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 federal Sentencing Guidelines.²² There are two kinds of conditions for supervised release: mandatory and discretionary.

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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.”

²⁰ *United States v. Emmett*, 749 F.3d 817, 820 & n.1 (9th Cir. 2014) (“A district court’s duty to explain its sentencing decisions must also extend to requests for early termination of supervised release. 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 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, 315-316 (2d Cir. 2003) (requiring a statement that the court has considered the statutory factors but not findings of fact”).

²¹ 18 U.S.C. 3583(e)(2) (“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 ...”).

²² Once thought binding, the Sentencing Guidelines are now simply a primary consideration. *Gall v. United States*, 552 U.S. 38, 40-51 (2007) (internal citation omitted) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.... Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It (continued...)”).

Mandatory Conditions

Section 3583 insists upon imposition of 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 defendants to (1) refrain from criminal activity; (2) forgo the unlawful possession of controlled substances; (3) cooperate with collection of DNA samples; and (4) submit to periodic drug tests.²³ In addition, prior to release, all prisoners must agree to adhere to the payment schedule for any unpaid fine imposed; however, the statute does not specify that such agreements will be enforced as conditions of supervised release after the agreement is made.²⁴ To fill this gap, the Sentencing Guidelines identify the payment of fines and restitution as a mandatory condition of supervised release.²⁵

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 with relevant authorities if the federal sex offender registry requirements apply.²⁶

Discretionary Conditions

Courts have relatively broad discretion to impose supervised release conditions that supplement the mandatory conditions for a particular defendant. Section 3583(d) is very specific about a few of these discretion conditions. For example, it provides that a court may condition an alien's supervised release upon his deportation and remaining outside the United States.²⁷ It also

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must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(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 Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance").

²³ 18 U.S.C. 3583(d). DNA samples are collected from those convicted and imprisoned for a federal offense, 42 U.S.C. 14135a; 28 C.F.R. §28.12.

²⁴ 18 U.S.C. 3624(e).

²⁵ U.S.S.G. §5D1.3(a)(5), (6) (“(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)); (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013”). 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.

²⁶ 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).

²⁷ 18 U.S.C. 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 ... ”). A defendant's deportation as a supervised release (continued...)

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.²⁸ Section 3583(d) permits a wider range of specific conditions by adopting most of the probation discretionary conditions.²⁹ Finally, it allows a court to impose any other appropriate condition as long as the condition is reasonably related to one of several sentencing goals and as long as it involves no greater deprivation of liberty than is reasonably necessary to accommodate those goals.³⁰

The Sentencing Guidelines quote some of the statutorily identified discretionary conditions, suggest expanded versions of others, and propose additional considerations in still other

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condition does not automatically terminate supervised release or 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. Cole*, 567 F.3d 110, 113-16 (3d Cir. 2009).

²⁸ 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, the circuit court vacated the condition in the case of defendant convicted of extortion in which the district court had failed indicate how the condition met the “reasonably related” standard, discussed below with respect to *United States v. Farmer*, 755 F.3d 849, 854 (7th Cir. 2014).

²⁹ 18 U.S.C. 3583(d). 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).

³⁰ 18 U.S.C. 3583(d) (“... 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 ...”).

situations.³¹ 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.

Standard Discretionary Conditions

For the most part, the Sentencing Guidelines replicate the probation conditions and standard conditions of supervised release.³² Courts regularly impose the Sentencing Guidelines’ standard conditions as a matter of practice.³³ Many of these conditions ensure that defendants remain in regular contact with their probation officers. For instance, they recommend that courts order defendants to report to a probation officer on a regular basis;³⁴ allow their probation officer to visit them;³⁵ respond honestly to their probation officer’s questions and follow the officer’s instructions;³⁶ notify their 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 their probation officer if they are 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

³¹ U.S.S.G. §5D1.3.

³² U.S.S.G. §5D1.3(c).

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”). At least one court has rejected as overbroad a condition barring contact with any person convicted of a misdemeanor and noted with respect to a ban against contact with a particular convicted felon, “[w]hen, however, such a condition goes beyond the standard prohibition on contact with convicted felons, and singles out a person with whom the individual on supervised release has an intimate relationship, the sentencing court must undertake an individualized review of that person and the relationship at issue, and must provide a justification for the imposition of such an intrusive prohibitory condition.” *United States v. Napulou*, 593 F.3d 1041, 1047 (9th Cir. 2010).

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”). The appellate courts are particularly demanding when large areas are involved, but have upheld conditions covering extensive geographical areas, such as a city or county. *See, United States v. Watson*, 582 F.3d 974, 983-85 (9th Cir. 2009) (noting that “[t]he breadth of the geographical limitation here gives us some pause and requires a careful examination of the justifying actors,” but upholding a condition that the defendant not enter the City or County of San Francisco without the permission of his probation officer); *United States v. Garrasteguy*, 559 F.3d 34, 42-4 (1st Cir. 2009) (noting that it was “uneasy over the (continued...)”).

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

Special Discretionary Conditions

The conditions which the statute refers to as “other” discretionary conditions, the Sentencing Guidelines divide into special and additional discretionary conditions.⁴⁹ 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, the Sentencing Guidelines recommend that a court ban 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.⁵⁰ Likewise, when a conviction is for a sex or child

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fact that the condition in this case is not subject to any qualification,” but upholding a condition that the defendant not enter Boston or anywhere else in Suffolk County, subject to a petition for modification).

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”). The cases where the district court conditions a defendant’s supervised release on a total abstention from alcohol are mixed.

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

⁴⁷ U.S.S.G. §5D1.3(c)(15).

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, 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”); *United States v. MacMillen*, 544 F.3d 71, 76-8 (2d Cir. 2008) (upholding a condition for a defendant convicted of computer possession of child pornography that his employers be notified of his conviction when his employment presented the risk of improper computer use); *but see, United States v. Reeves*, 591 F.3d 77, 80-3 (2d Cir. 2010) (considering both a violation of due process on vagueness grounds and not reasonably related to the defendants’ situation, a condition requiring a defendant convicted of possession of child pornography tell anyone with whom he entered into a “significant romantic relationship” of the conviction).

⁴⁹ U.S.S.G. §5D1.3(d), (e).

⁵⁰ U.S.S.G. §5D1.3(d)(1). Under appropriate circumstances, the condition limiting the possession of weapons may (continued...)

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.⁵¹ 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.⁵²

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.⁵³ Moreover, when reasonably related to an offense, such conditions might include demands to provide information concerning the financial activities of a defendant's spouse or legal entities under the releasee's control.⁵⁴

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extend not only to firearms but to crossbows, as well as bows and arrows. *United States v. Gallagher*, 275 F.3d 784, 793-94 (9th Cir. 2001).

⁵¹ U.S.S.G. §5D1.3(d)(7); U.S.S.G. §5D1.3(d)(7)(B) (emphasis added) (“A condition limiting the use of a computer or an interactive computer service *in cases in which the defendant used such items*); *see also*, *United States v. Ramos*, 763 F.3d 45, 62 (1st Cir. 2014) (“We note that cases in other circuits are in general accord: where a defendant’s offense did not involve the use of the internet or a computer, and he did not have a history of impermissible internet or computer use, courts have vacated broad internet and computer bans regardless of [the] probation [officer]’s leeway in being able to grant exceptions); *United States v. Ellis*, 720 F.3d 220, 225 (5th Cir 2013) (“Ellis appeals the [lifelong] 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”); *compare United States v. Malenya*, 736 F.3d 554, 565 (D.C. Cir. 2013) (“Another special condition forbids Malenya from using a computer to view pornography. But that prohibition is hardly onerous, and it is justified for an admitted sex offender by the apparent connection that courts have recognized between pornography and sex crimes”), *with*, *United States v. Adkins*, 743 F.3d 176, 194-95 (7th Cir. 2014) (vacating pornography ban condition for defendant convicted of possession of child pornography and observing, “[o]ur 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 ...)”).

⁵² 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).

⁵³ 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. *E.g., United States v. Behler*, 187 F.3d 772, 780 (8th Cir. 1999) (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. *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).

⁵⁴ *E.g., United States v. Koth*, 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).

“Additional” Discretionary Conditions

The Sentencing Guidelines identify other, “additional” conditions which address defendants’ mobility and work activities. They include community confinement;⁵⁵ home detention,⁵⁶ community service,⁵⁷ curfew,⁵⁸ and restrictions on a defendant’s occupation.⁵⁹

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.”⁶⁰ Likewise, it limits community service conditions to no more than 400 hours.⁶¹

Limits on Discretionary Conditions

As noted earlier, 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.⁶²

Reasonably Related

The threshold question for any general 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.⁶³ Factors to which the condition must be “reasonably related” include (1) the

⁵⁵ 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.” U.S.S.G. §5D1.3(e)(1); §5F1.1, cmt. app. n.1.

⁵⁶ 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.

⁵⁷ U.S.S.G. §5D1.3(e)(3).

⁵⁸ U.S.S.G. §5D1.3(e)(5); *e.g.*, *United States v. Asalati*, 615 F.3d 1001, 1006-1008 (8th Cir. 2010) (upholding a curfew as a condition of supervised release).

⁵⁹ 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).

⁶⁰ U.S.S.G. §5F1.1.

⁶¹ 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.*

⁶² 18 U.S.C. 3583(d).

⁶³ *Id.* (incorporating by reference 18 U.S.C. 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(d)).

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.⁶⁴ Thus, since a condition may be reasonably related to a defendant's history or future protection of the public, it need not be related to the offense for which supervised release was ordered.⁶⁵ Yet "reasonably related" may turn on the currency and seriousness of past misconduct.⁶⁶ 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.⁶⁷

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.⁶⁸ The assessment is one of balancing. A

⁶⁴ 18 U.S.C. 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(d); *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").

⁶⁵ *United States v. Johnson*, 756 F.3d 532, 540-41 (7th Cir. 2014) ("We [have] reviewed our sister circuits' decisions and concluded that the common theme of these decisions is that sex-offender treatment is reasonably related ... , even if the offense conviction is not a sex offense, as long as the sexual offenses are recent enough in the defendant's history ... "); *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").

⁶⁶ *United States v. Bear*, 769 F.3d 1221, 1227 (10th Cir. 2014) ("Prior sex offenses can be too temporally remote for sex-offender conditions of supervised release to be reasonably related.... There is no bright-line rule for the outer limit of temporal remoteness, in part because district courts must consider more than just the age of a defendant's prior conviction...."); *United States v. 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 hid 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 other 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 measure of his penis").

⁶⁷ E.g., *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) (internal citations omitted) ("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").

⁶⁸ 18 U.S.C. 3583(d).

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.⁶⁹ At the other end of the spectrum, a serious deprivation of liberty will not be considered justified, when the connection between the condition and the defendant's crime and his past is tenuous.⁷⁰ 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."⁷¹

Consistent with Guidelines' Policy Statements

The third discretionary condition requirement, that it be consistent with pertinent Sentence Guideline policy statements, is rarely mentioned except in passing. It "mandates only that the conditions not directly conflict with the policy statements. Therefore, when considering challenges to supervised release conditions brought under §3583(d)(3), courts tend to evaluate them under §3583(d)(1), which requires that conditions be reasonably related to certain §3553(a) factors."⁷²

⁶⁹ *United States v. Ellis*, 720 F.3d 220, 225-27 (5th Cir. 2013) (internal citations omitted) (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 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 deprivation of liberty than necessary.... [S]ince we have determined that none of these conditions are unreasonable, their cumulative effect is not unreasonable").

⁷⁰ *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. 3583(d)(2)'s command that such conditions involve no greater deprivation of liberty is reasonably necessary"); *United States v. Johnson*, 756 F.3d at 540-41; *United States v. Wolf Child*, 699 F.3d 1082, 1099 (9th Cir. 2012).

⁷¹ *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'").

⁷² *United States v. Bear*, 769 F.3d at 1231, *citing in accord*, *United States v. Kent*, 209 F.3d 1073, 1077-78 (8th Cir. 2006).

Modification and Revocation

Although a sentencing court's primary role in supervised release occurs at the time of initial sentencing, it retains an important decision-making function, and broad discretion, throughout a defendant's term of supervised release. In addition to earlier termination of a defendant's term of supervised release, a court may modify supervised release conditions at any time, may revoke a defendant's term of supervised release, require him to return to prison for an additional term of imprisonment, and impose an additional term of supervised release to be served thereafter.⁷³

Modification

Modification of supervised release conditions usually occurs following a hearing, although a defendant may waive under some circumstances.⁷⁴ 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.⁷⁵ Breach of an existing condition or a change in circumstances may justify modification, but neither is required.⁷⁶ In some instances, the courts have greeted objections to the imposition of a condition at sentencing with the observation that it can be changed after the defendant is released from prison.⁷⁷ In others, they have observed that this can be an uncertain benefit.⁷⁸

⁷³ 18 U.S.C. 3583(e); *United States v. Jackson*, 523 F.3d 234, 240-41 (3d Cir. 2008).

⁷⁴ 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”).

⁷⁵ 18 U.S.C. 3583(e). 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.”

⁷⁶ *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*, 611 F.3d 1168 (10th Cir. 2011) and *United States v. Davies*, 380 F.3d 329 (8th Cir. 2004).

⁷⁷ *United States v. Shultz*, 733 F.3d 616, 623 (6th Cir. 2013) (“Should family members to whom condition four applies (continued...)”).

Revocation

Sometimes revocation is required. Sometimes it is not. 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.⁷⁹ The Sentencing Guidelines are far more demanding. They declare that a court must revoke a defendant's supervised release for the commission of any federal or state crime punishable by imprisonment for more than a year.⁸⁰

Courts may revoke supervised release for breach of any other conditions.⁸¹ A court's revocation jurisdiction, however, expires when the term of supervised release has expired, unless the government began the revocation process prior to expiration,⁸² or unless the defendant is

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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"); *United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013) ("Ellis appeals the condition requiring him to participate in mental health and sex offender treatment programs.... This challenge is not ripe for review because Ellis may never be subject 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 condition"); *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 ...").

⁷⁸ *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 is 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").

⁷⁹ 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 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 (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).

⁸⁰ U.S.S.G. §7B1.3(a)(1) (emphasis added) ("Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release"); U.S.S.G. §7B1.1(a)(2) ("(a) There are three grades of probation and supervised release violations: ... (2) Grade B Violations – conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year").

⁸¹ 18 U.S.C. 3583(e)(3) (emphasis added) ("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"); *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).

⁸² 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, 453-68 (4th Cir. 2011) (continued...)

imprisoned for 30 days or more in “connection with” a conviction for a federal, state, or local crime.⁸³

The defendant 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.⁸⁴ 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.⁸⁵ He is entitled to a probable cause preliminary hearing at which he may be represented by appointed counsel if he cannot secure one.⁸⁶ He may present evidence at the preliminary hearing and has a limited right to confrontation.⁸⁷

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.⁸⁸ As in the case of the preliminary hearing, he is entitled to notice of the charges, to

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(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(8) and discussing the conflicting views expressed in *United States v. Hernandez-Ferrer*, 599 F.3d 63, 67-8 (1st Cir. 2010); and *United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005).

⁸³ 18 U.S.C. 3624(e); *United States v. Bussey*, 745 F.3d 631, 633-34 (2d Cir. 2014). The circuits have split over the question of whether a term of supervised release is tolled under this provision for the time spent in pre-trial detention on charges for which he is later convicted, *United States v. Ide*, 624 F.3d 666, 668-69 (4th Cir. 2010), *citing in accord*, *United States v. Johnson*, 581 F.3d 1310, 1311-312 (11th Cir. 2009); *United States v. Molina-Gazca*, 571 F.3d 470, 474 (5th Cir. 2009); and *United States v. Goins*, 516 F.3d 416 (6th Cir. 2008), *contra*, *United States v. Morales-Alejo*, 193 F.3d 1102, 1105 (9th Cir. 1999). The Fifth Circuit has held however, that a term is not tolled by time spent in custody under an immigration detainer, *United States v. Juarez-Velasquez*, 763 F.3d 430, 436 (5th Cir. 2014).

⁸⁴ 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”).

⁸⁵ Fed. R. Crim. P. 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”).

⁸⁶ Fed. R. Crim. P. 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”).

⁸⁷ Fed. R. Crim. P. 32.1(b)(1) (“(B) ... The judge must give the person: ... (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 ... ”).

⁸⁸ Fed. R. Crim. P. 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”).

present evidence, to make a statement and offer mitigating evidence,⁸⁹ as well as, to a limited extent, confront witnesses against him.⁹⁰

A defendant at a revocation hearing, however, is not entitled to a jury; or to the benefit of proof beyond a reasonable doubt.⁹¹ 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.⁹² Any time served under supervision prior to revocation is erased.⁹³

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,⁹⁴ and upon release from imprisonment may be subject to a new term of supervised release.⁹⁵ Appellate courts

⁸⁹ Fed. R. Crim. P. 32.1(b)(2) (“... 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, *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).

⁹⁰ *United States v. Mosley*, 759 F.3d 664, 667-70 (7th Cir. 2014) (internal citations omitted) (“We have held that the Sixth Amendment, including the Supreme Court’s holding in *Crawford* (that admitting testimonial hearsay without the opportunity to confront the declarant violated the Confrontation Clause), does not apply to supervised release revocation hearings. The Due Process Clause of the Fifth Amendment still secures the right to confront and cross-examine adverse witnesses [in revocation proceedings] (unless the hearing officer specifically finds good cause for not allowing confrontation). But considering the parenthetical clause, we have interpreted *Morrissey* ... to permit the admission of *reliable* hearsay at revocation hearings without a specific showing of good cause. Hearsay is reliable if it bears substantial guarantees of trust-worthiness. And essentially [we] treat[] a finding of ‘substantial trustworthiness’ as the equivalent of a good cause finding for the admission of hearsay. Even if the district court neglects to find either good cause or reliability, there is no error so long as the record ... is sufficiently clear ... that the ... hearsay was substantially trustworthy so as to establish good cause for not producing [the declarants] as live witnesses. If the record so establishes, the admission of hearsay will not undermine the fundamental fairness of [a defendant’s] revocation hearing and [will] not violate his right to due process.... In addition to the protections provided by the Due Process Clause of the Fifth Amendment, Rule 32.1(b)(2)(C) requires a district court in a revocation hearing explicitly to balance the defendant’s constitutional interest in confrontation and cross-examination against the government’s stated reasons for denying them. Unlike the constitutional analysis, ‘reliability cannot be the beginning and end of the ‘interest of justice’ analysis under Rule 32.1(b)(2)(C), and we do not mean to imply that finding the hearsay reliable would alone suffice to support its admission *under the rule*. (emphasis added). Rather, the defendant’s interest must be balanced against the government’s reasons. While reliability of hearsay weakens the defendant’s interest in confrontation, a weak interest is enough to tip the balance toward exclusion if the government offers no reasons for not producing the witness. Accordingly, a showing of reliability in the record on appeal does not mean there was no error, nor does it make the violation of Rule 32.1 harmless. Rather, we must consider whether the hearsay would have been admitted had the district court correctly considered the competing interests. And while the reliability of the hearsay goes a long way toward answering that question, we must also look at the government’s reasons for not affording confrontation.... The district court erred by failing to balance *Mosley*’s constitution interest in confronting and cross-examine Simmons with the government’s reasons for not producing her. But that error was harmless because the result would have been the same even without any of Simmons’ out-of-court statements”); *see also*, *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).

⁹¹ *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, 1104-105 (8th Cir. 2005).

⁹² 18 U.S.C. 3583(e)(3); *United States v. Glenn*, 744 F.3d 845, 847 (2d Cir. 2014).

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

⁹⁴ 18 U.S.C. 3583(e)(3), 3559; U.S.S.G. §7B1.4.

⁹⁵ 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 (continued...)”).

will uphold the sentence imposed upon revocation, unless it is procedurally or substantively unreasonable.⁹⁶

Constitutional Considerations

The Constitution limits the range of permissible conditions. 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.

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.⁹⁷ It cannot be exercised elsewhere. The issue arises most often in the context of the extent of discretion which a court assigns 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.⁹⁸ 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.⁹⁹ Yet elsewhere, the issue turns on the level of court oversight of the probation officer when implementing a condition.¹⁰⁰

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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").

⁹⁶ *United States v. Martin*, 757 F.3d 776, 779 (8th Cir. 2014); *United States v. Vasquez-Perez*, 742 F.3d 896, 900 (9th Cir. 2014); *United States v. Clark*, 726 F.3d 496, 500 (3d Cir. 2013).

⁹⁷ U.S. Const. Art. III, §1.

⁹⁸ *United States v. Bear*, 769 F.3d 1221, 1230 (10th Cir. 2014) (internal citations and quotation marks omitted) ("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"); see also, *United States v. Esparza*, 552 F.3d 1088, 1090-91 (9th Cir. 2009).

⁹⁹ *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 treatment, including how often and how many drug tests will be performed, can be left to the expertise of the professionals running the program"); see also, *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").

¹⁰⁰ *United States v. Johnson*, 773 F.3d 905, 783 (8th Cir. 2014) ("Conditions delegating limited authority to non-judicial officials such as probation officers are permissible so long as the delegating judicial officer retains and exercises (continued...)")

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.¹⁰¹ 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.”¹⁰² Defendants have often contended that a particular condition to which they are subject is overbroad,¹⁰³ or improperly intrudes upon their freedom of association.¹⁰⁴ 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.¹⁰⁵ In fact, cases that have First Amendment implications are often resolved on those statutory grounds.¹⁰⁶

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ultimate responsibility”).

¹⁰¹ *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 material with ‘nudity’ because such breadth may well reach protected forms of act”).

¹⁰² *Pickup v. Brown*, 740 F.3d 1208, 1233 (9th Cir. 2014), citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984); see also, *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013).

¹⁰³ *United States v. Benhoff*, 755 F.3d 504, 506 (7th Cir. 2014) (“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 photograph, 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”).

¹⁰⁴ *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, 408-9 (4th Cir. 2012).

¹⁰⁵ *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).

¹⁰⁶ 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 (continued...)

Fourth Amendment

The Fourth Amendment guarantees a right “against unreasonable searches and seizures.”¹⁰⁷ 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.”¹⁰⁸ 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.¹⁰⁹

Section 3583(d) and the corresponding Sentencing Guideline authorize warrantless, suspicionless search conditions in the case of offenders required to register as sex offenders.¹¹⁰ Elsewhere, it has been said a search condition must satisfy the “reasonably related” standards.¹¹¹ Yet the courts are divided over the question of whether probation officers may conduct a warrantless search in the absence of a specific condition.¹¹²

Fifth Amendment

The Fifth Amendment declares that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law....”¹¹³ Due process requires that an individual facing revocation of his supervised release be given a reasonably prompt hearing,¹¹⁴ and be “given adequate notice,

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(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)”).

¹⁰⁷ U.S. Const. Amend. IV.

¹⁰⁸ *Samson v. California*, 547 U.S. 843, 848 (2006), citing, *United States v. Knights*, 534 U.S. 112, 118-19 (2001)).

¹⁰⁹ *Samson v. California*, 547 U.S. at 850. Although *Samson* involved a parolee condition rather than an individual on supervised release, it is likely that the Court would have applied the same analysis to evaluate a warrantless search of a supervised releasee.

¹¹⁰ 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).

¹¹¹ *United States v. Farmer*, 755 F.3d 849, 854 (7th Cir. 2014).

¹¹² *United States v. Hill*, ___ F.3d ___, ___*5(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*, 491 F.3d 1302, 1310-11 (11th Cir. 2005) (same);” *United States v. Hill*, ___ F.3d at ___*5; 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).

¹¹³ U.S. Const. Amend. V.

¹¹⁴ *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.”¹¹⁵ “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).”¹¹⁶ Due process also colors the extent to which a condition of supervised release may bar an individual’s access to his own children.¹¹⁷

One of the more common due process complaints is that a particular condition of supervised release is constitutionally vague.¹¹⁸ “A condition of supervised release is unconstitutionally vague

¹¹⁵ *United States v. Jones*, 774 F.3d 399, 403 (7th Cir. 2014) citing, “See Fed.R.Civ.P. 32.1 and *U.S. 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”).

¹¹⁶ *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*, 732 F.3d 613, 616-17 (4th Cir. 2014).

¹¹⁷ *United States v. Hobbs*, 710 F.3d 850, 853 (8th Cir. 2013) (internal citations omitted) (“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”); *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) (internal citations omitted) (“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. The relationship between parent and child is constitutionally protected, and a father has a fundamental liberty interest in maintaining his familial relationship with his children”); *United States v. Wolf Child*, 699 F.3d 1082, 1087 (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, or whom he is the father”).

¹¹⁸ See e.g., *United States v. Siegel*, 753 F.3d 705, 712 (7th Cir. 2014); *United States v. Shannon*, 743 F.3d 496, 501 (7th Cir. 2014); *United States v. Schultz*, 733 F.3d 616, 622 (6th Cir. 2013); *United States v. Ellis*, 720 F.3d 220, 225-27 (5th Cir. 2013) (vagueness problems disappear when the language in a condition of supervised release is subject “commonsense understandings”); *United States v. Goodwin*, 717 F.3d 511, 525 (7th Cir. 2013) (“This vague term therefore provides an additional reason for vacation of Condition 6”); *United States v. Adkins*, 743 F.3d 176, 193 (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, 265 (3^d 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 490, 486 (2^d 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, 80-1 (2^d 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, 195-87 (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); *United State v. Phipps*, 319 F.3d 177, 192-93 (5th Cir. 2003) (acknowledging that the ban on ‘sexually oriented or sexually stimulating materials’ is ‘somewhat vague,’ but narrowing it so that it does not reach magazines and so that ‘the prohibition on patronizing sexually oriented establishments refers ... to places such as strip (continued...)

if it would not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited.”¹¹⁹ The popularity of the challenge may have something to do with the fact that the statutory and Guideline conditions are worded generally in order to allow sentencing courts to adjust them to the facts before them.¹²⁰

Sixth Amendment

The Sixth Amendment assures the accused a number of rights during the course of his trial.¹²¹ As just noted, the Fifth Amendment 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.¹²² The Sixth Amendment right to a jury trial does not apply to such revocation hearings;¹²³ neither does the Sixth Amendment Confrontation Clause.¹²⁴

Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment.¹²⁵ Its proscription encompasses both the inherently barbaric and in rare cases those grossly disproportionate to the crime for which punishment was inflicted.¹²⁶ Eighth Amendment challenges of a sentence of supervised release are rare,¹²⁷ and thus far, even more rarely successful.¹²⁸

(...continued)

clubs and adult theaters or bookstores’”).

¹¹⁹ *United States v. Adkins*, 743 F.3d at 193.

¹²⁰ *United States v. 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 invest, are vague”).

¹²¹ 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”).

¹²² *United States v. Gavilanes-Ocaranza*, 772 F.3d 624, 628 (9th Cir. 2014); *United States v. Ward*, 770 F.3d 1090, 1098 (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).

¹²³ *United States v. Gavilanes-Ocaranza*, 772 F.3d at 628-29; *United States v. Ward*, 770 F.3d at 1099, citing, *United States v. McIntosh*, 630 F.3d 699, 702-703 (7th Cir. 2011); and *United States v. Cunningham*, 607 F.3d 1264, 1267-268 (11th Cir. 2010).

¹²⁴ *United States v. Ward*, 770 F.3d 1090, 1098 (4th Cir. 2014), 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).

¹²⁵ U.S. Const. Amend. VIII.

¹²⁶ *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 inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment”).

¹²⁷ *Cf.*, *United States v. Demers*, 634 F.3d 982, 986 n.4 (8th Cir. 2011) (“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 (continued...)”).

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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’”).

¹²⁸ *See e.g., United States v. Williams*, 636 F.3d 1229, 1232-235 (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).