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001	Email	Pardon hearing [with attachment] - To: Albert C. Lambert, et al - From: Christopher W. French	2	07/11/2007	P5;
002	Email	Proposed Response to gaggle Question - To: Fred F. Fielding, et al - From: Albert C. Lambert	2	07/05/2007	P5;

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- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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LEXSTAT 18 USC 3583

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*** CURRENT THROUGH P.L. 110-39, APPROVED 6/21/2007 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II. CRIMINAL PROCEDURE
CHAPTER 227. SENTENCES
SUBCHAPTER D. IMPRISONMENT

Go to the United States Code Service Archive Directory

18 USCS § 3583

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].

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

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4) [18 USCS §

3563(a)(4)]. The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [18 USCS § 3583(g)] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 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)(1) through (b)(10) and (b)(12) through (b)(20) [18 USCS § 3563(b)(1)-(b)(10) and (b)(12)-(b)(20)], and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

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

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

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

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

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

- (1) possesses a controlled substance in violation of the condition set forth in subsection (d);
- (2) possesses a firearm, as such term is defined in section 921 of this title [18 USCS § 921], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
- (3) refuses to comply with drug testing imposed as a condition of supervised release; or
- (4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

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

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

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

HISTORY:

(Added Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 212(a)(2), 98 Stat. 1999; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle A, § 1006(a)(1)-(3), 100 Stat. 3207-6; Nov. 10, 1986, P.L. 99-646, § 14(a), 100 Stat. 3594; Dec. 7, 1987, P.L. 100-182, §§ 8, 9, 12, 25, 101 Stat. 1267, 1268, 1272; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle C, § 7108, Subtitle G, §§ 7303(b), 7305(b), 102 Stat. 4418, 4464, 4465; Nov. 29, 1990, P.L. 101-647, Title XXXV, § 3589, 104 Stat. 4930; Sept. 13, 1994, P.L. 103-322, Title II, Subtitle D, § 20414(c), Title XI, Subtitle E, § 110505, Title XXXII, Subtitle I, § 320921(c), 108 Stat. 1831, 2016, 2130; Nov. 26, 1997, P.L. 105-119, Title I, § 115(a)(8)(B)(iv), 111 Stat. 2466; Dec. 19, 2000, P.L. 106-546, § 7(b), 114 Stat. 2734.)

(As amended Oct. 26, 2001, P.L. 107-56, Title VIII, § 812, 115 Stat. 382; Nov. 2, 2002, P.L. 107-273, Div B, Title II, Subtitle A, § 2103(b), Title III, § 3007, 116 Stat. 1793, 1806; April 30, 2003, P.L. 108-21, Title I, § 101, 117 Stat. 651; March 9, 2006, P.L. 109-177, Title II, Subtitle A, § 212, 120 Stat. 230; July 27, 2006, P.L. 109-248, Title I, Subtitle B, § 141(e), Title II, § 210(b), 120 Stat. 603, 615.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

18 USCS § 3583

The "Sex Offender Registration and Notification Act", referred to in this section, is Title I of Act July 27, 2006, P.L. 109-248. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:

This section became effective on the first day of the first calendar month beginning 36 months after enactment, as provided by § 235(a)(1) of Act Oct. 12, 1984, P.L. 98-473, which appears as *18 USCS § 3551* note.

Amendments:

1986. Act Oct. 27, 1986 (effective as provided by § 1006(a)(4) of such Act, which appears as a note to this section), in subsec. (a), inserted ", except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute"; in subsec. (b), in the introductory matter, substituted "Except as otherwise provided, the" for "The"; in subsec. (e), substituted the heading for one which read: "Modification of term or conditions.", in para. (2), deleted "or" following "supervision;", in para. (3), substituted "title; or" for "title.", and added para. (4).

Act Nov. 10, 1986 (effective as provided by § 14(b) of such Act, which appears as a note to this section), in subsec. (e), purported to substitute the heading for one which read: "Modification of term or conditions.", but such amendment had already been executed by Act Oct. 27, 1986, and in para. (1), deleted "previously ordered" following "supervised release".

1987. Act Dec. 7, 1987 (applicable as provided by § 26 of such Act, which appears as *18 USCS § 3006A* note), in subsec. (b), in para. (1), substituted "five years" for "three years", in para. (2), substituted "three years" for "two years", in para. (3), inserted "(other than a petty offense)"; and in subsec. (c), inserted "(a)(2)(C)"; in subsec. (e), in para. (1), inserted "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation," and, in para. (2), deleted "after a hearing," following "(2)" and inserted "the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and", in para. (4), inserted", except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony".

1988. Act Nov. 18, 1988, § 7108, in subsec. (d), in paras. (1) and (2), inserted "(a)(2)(C)"; in subsec. (e), in the introductory matter, inserted "(a)(2)(C)", in para. (2), added "or" following the semicolon, deleted former para. (3) which read: "treat a violation of a condition of a term or supervised release as contempt of court pursuant to section 401(3) of this title; or", and redesignated former para. (4) as para. (3).

Section 7303(b) of such Act further (applicable as provided by § 7303(d) of such Act, which appears as *18 USCS § 3563* note), in subsec. (d), in the introductory matter, inserted "and that the defendant not possess illegal controlled substances"; and added subsec. (g).

Section 7305(b) of such Act further, in subsec. (d), in the concluding matter, substituted "(b)(20)" for "(b)(19)"; in subsec. (e), in para. (3), purported to delete "or" following the semicolon, in para. (4), substitute "; or" for the concluding period, and add para. (5). However, § 7108 of such Act deleted para. (3) and redesignated former para. (4) as para. (3); therefore, "; or" was substituted for the concluding period in para. (3), as redesignated as the probable intention of Congress, and para. [(4)] (5) was added.

1990. Act Nov. 29, 1990, in subsec. (d)(2), inserted a comma following "3553(a)(2)(B)"; and in subsec. (e), in para. (2), deleted "or" following the semicolon, in para. (3), substituted "; and" for the concluding period, and redesignated former para. (5) as para. (4).

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1994. Act Sept. 13, 1994, in subsec. (a), inserted "or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b)"; in subsec. (d), in the introductory matter, substituted "unlawfully possess a controlled substance" for "possess illegal controlled substances", and inserted the sentences beginning "The court shall order as an explicit condition . . .", "The court shall also order . . .", "The condition stated in the preceding sentence . . .", "The results of a drug test . . .", "A drug test confirmation . . .", and "The court shall consider whether . . ."; in subsec. (e), in paras. (1) and (4), substituted "defendant" for "person" wherever appearing, and substituted para. (3) for one which read: "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony; or"; and substituted subsecs. (g), (h), and (i) for former subsec. (g), which read: "(g) Possession of controlled substances. If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release."

1997. Act Nov. 26, 1997 (effective one year after enactment and applicable as provided by § 115(c) of such Act which appears as 42 USCS § 14071 note), in subsec. (d), inserted the sentence beginning: "The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4) . . .".

2000. Act Dec. 19, 2000, in subsec. (d), inserted the sentence beginning: "The court shall order, as an explicit condition of supervised release, that the defendant cooperate . . .".

2001. Act Oct. 26, 2001, added subsec. (j).

2002. Act Nov. 2, 2002, in subsecs. (c) and (e), substituted "(a)(6), and (a)(7)" for "and (a)(6)"; and, in subsec. (g), in para. (2), deleted "or" following the concluding semicolon, in para. (3), added "or" following the concluding semicolon, and added para. (4).

2003. Act April 30, 2003, in subsec. (e)(3), inserted "on any such revocation"; in subsec. (h), deleted "that is less than the maximum term of imprisonment authorized under subsection (e)(3)" following "serve a term of imprisonment"; and added subsec. (k).

2006. Act March 9, 2006, in subsec. (j), deleted ", the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person," following "2332b(g)(5)(B)".

Act July 27, 2006, in subsec. (d), substituted "required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act." for "described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994)." and, in the concluding matter, added the sentence beginning "The court may order, . . ."; and, in subsec. (k), substituted "2243, 2244, 2245, 2250" for "2244(a)(1), 2244(a)(2)", inserted "not less than 5," and added the sentence beginning "If a defendant required to register . . .".

Other provisions:

18 USCS § 3583

Application of section. For provisions as to the application of this section, see § 235 of Act Oct. 12, 1984, P.L. 98-473, which appears as *18 USCS § 3551* note.

Effective date of Oct. 27, 1986 amendments. Act Oct. 27, 1986, P.L. 99-570, Title I, Subtitle A, § 1006(a)(4), 100 Stat. 3207-7, provides: "The amendments made by this subsection [amending this section] shall take effect on the date of the taking effect of *section 3583 of title 18, United States Code* [see the effective date of section note]."

Effective date of Nov. 10, 1986 amendments. Act Nov. 10, 1986, P.L. 99-646, § 14(b), 100 Stat. 3594, provides: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of *section 3583 of title 18, United States Code* [see effective date of section note]."

NOTES:**Related Statutes & Rules:**

This section is referred to in *18 USCS §§ 3401, 3601, 4101; 28 USCS § 994*.

Research Guide:**Federal Procedure:**

26 Moore's Federal Practice (Matthew Bender 3d ed.), ch 632.1, Revoking or Modifying Probation or Supervised Release §§ 632.1.01, 632.1.02, 632.1.05-632.1.07.

26 Moore's Federal Practice (Matthew Bender 3d ed.), ch 632, Sentencing and Judgment § 632.11.

26 Moore's Federal Practice (Matthew Bender 3d ed.), ch 635, Correcting or Reducing a Sentence § 635.05.

27 Moore's Federal Practice (Matthew Bender 3d ed.), ch 644, Right to and Appointment of Counsel § 644.52.

8A Fed Proc L Ed, Criminal Procedure § 22:102.

9A Fed Proc L Ed, Criminal Procedure §§ 22:1533, 1607.

9B Fed Proc L Ed, Criminal Procedure §§ 22:2006, 2008-2014, 2018, 2019, 2021, 2036, 2046-2050, 2056-2058, 2060, 2062.

18B Fed Proc L Ed, Immigration, Naturalization, and Nationality § 45:2499.

Am Jur:

3B Am Jur 2d, Aliens and Citizens § 1554.

3C Am Jur 2d, Aliens and Citizens § 2734.

8A Am Jur 2d, Bail and Recognizance § 160.

21A Am Jur 2d, Criminal Law § 848.

Forms:

17 Bender's Federal Practice Forms, Form CrR32:35, Federal Rules of Criminal Procedure.

17 Bender's Federal Practice Forms, Form CrR32.1:11, Federal Rules of Criminal Procedure.

7A Fed Procedural Forms L Ed, Criminal Procedure (2003) §§ 20:936, 937, 942.

Immigration:

6 Immigration Law and Procedure (rev. ed.); ch 72, Procedure in Deportation Cases §§ 72.01, 72.05.

8 Immigration Law and Procedure (rev. ed.), ch 111, Civil Liabilities and Criminal Offenses § 111.08.

Annotations:

Validity of Condition of Probation, Supervised Release, or Parole Restricting Computer Use or Internet Access. 4
ALR6th 1.

Law Review Articles:

- Nevin; Scott. The USA Patriot Act: Time To Speak Up [Discussion of T. Derden, One Year Under the Patriot Act]. 46 *Advoc* (Boise) 19, December 2003.
- Brandt; Van Valkenburgh. The USA Patriot Act: The Devil is in the Details [Discussion of T. Derden, One Year Under the Patriot Act]. 46 *Advoc* (Boise) 24, December 2003.
- Chemerinsky. Litigation alerts in the USA Patriot Act. 23 *Cal Law* 29, April 2003.
- Rosenszweig. Civil Liberty and the Response to Terrorism. 42 *Duq L Rev* 663, Summer 2004.
- Menendez. De Novo Review of Sentencing Departures: The End of Koon v. United States. 27 *Hamline Law Rev* 457, Summer 2004.
- The USA Patriot Act: Privacy Versus Security in a Post-9/11 World. Symposium. 29 *NC J Int'l & Com Reg* 595, Summer 2004.
- Sproule. The Effect of the USA Patriot Act on Workplace Privacy. 49 *Prac Law* 35, February 2003.

Interpretive Notes and Decisions:

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II. RELATIONSHIP TO OTHER LAWS 11. 18 USCS § 3553 12. 18 USCS § 3563 13. 21 USCS § 841 14. Assimilative Crimes Act 15. U.S. Sentencing Guidelines 16. Miscellaneous

III. AUTHORIZED CONDITIONS 17. Alcohol and drugs 18. --Searches, testing and treatment 19. Confinement in community treatment facility 20. Deportation or surrender to INS 21. --Tolling of period while outside country 22. Financial reporting and restrictions 23. Firearms 24. Freedom of association 25. Gambling 26. Internet access 27. Mental health treatment 28. Notification as to criminal conduct 29. Occupational restrictions 30. Payment of fine 31. Repayment of attorney fees 32. Restitution 33. Restriction of movement 34. Sex offender registration 35. Sexually-oriented places or material 36. Miscellaneous

IV. MODIFICATION AND REVOCATION

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2. Practice and Procedure 40. Jurisdiction 41. Hearing 42. Burden of proof

B. Other Matters 43. Modification of conditions 44. Early termination 45. Extension of term 46. Miscellaneous

V. SENTENCE AFTER REVOCATION 47. Generally 48. Ex post facto clause issues 49. Imposition of term of incarceration 50. --Factors considered 51. --Term greater than maximum for original offense 52. --Other particular terms 53. Reimposition of supervised release 54. Imposition of incarceration and supervised release 55. --Particular sentences 56. Fine 57. Miscellaneous

I. IN GENERAL 1. Generally

Court may tack on period of supervised release to any term of imprisonment authorized by substantive criminal statute, even maximum term. *United States v Montenegro-Rojo* (1990, CA9 Cal) 900 F2d 1376, op withdrawn, substituted op (1990, CA9 Cal) 908 F2d 425 (criticized in *United States v Joseph* (1997, CA1 RI) 109 F3d 34) and (criticized in *United States v Palomba* (1999, CA9 Cal) 182 F3d 1121, 99 CDOS 5859, 99 Daily Journal DAR 7489).

Sentencing court has broad discretion under 18 USCS § 3583(d) to impose conditions of supervised release that it deems appropriate. *United States v Griner* (2004, CA8 Iowa) 358 F3d 979, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 7230.

18 USCS § 3583

Nothing in Mandatory Victims Restitution Act of 1996, codified at 18 USCS §§ 3663A, 3563 or in 18 USCS § 3563 suggests that Congress intended to alter conditions that sentencing court may attach to term of supervised release under 18 USCS § 3583(d). *United States v Del Barrio* (2005, CA5 Tex) 427 F3d 280.

18 USCS § 4101(e) and 18 USCS § 4105(b) of transfer statute point to obvious conclusion that 18 USCS § 3585 should apply to Federal Juvenile Delinquency Act to ensure that juveniles arrested in U.S. receive same treatment as juveniles arrested abroad. *Jonah R. v Carmona* (2006, CA9 Ariz) 446 F3d 1000.

2. Constitutionality

Application to defendant of 18 USCS § 3583(g), which became effective after defendant's offense and required mandatory term of imprisonment for certain violations of supervisory release, violated ex post facto clause. *United States v Parriett* (1992, CA4 NC) 974 F2d 523 (criticized in *United States v Reese* (1995, CA6 Ohio) 71 F3d 582, 1995 FED.App 361P) and (criticized in *United States v Byrd* (1997, CA5 Tex) 116 F3d 770) and (criticized in *United States v McGhee* (1997, CA6 Ohio) 1997 US App LEXIS 21113).

Defendant's rights under Double Jeopardy Clause were not violated by his prosecution for illegally reentering U.S., even though this reentry resulted in revocation of his term of supervised release, which was imposed as punishment for earlier drug offense. *United States v Soto-Olivas* (1995, CA9 Cal) 44 F3d 788, 95 CDOS 179, cert den (1995) 515 US 1127, 132 L Ed 2d 290, 115 S Ct 2289.

Defendant could serve total of sixteen months in prison after nine-month sentence was imposed for violating his supervised release, even though statute under which he was convicted provides for "imprisonment not exceeding one year," since 18 USCS § 3583 authorizes punishment in addition to punishment authorized under substantive statutes, notwithstanding defendant's claim that either he should have been indicted by grand jury pursuant to Grand Jury Clause of Fifth Amendment or jury trial was required for revocation of his supervised release pursuant to petit Jury Clause of Sixth Amendment. *United States v Colt* (1997, CA7 Wis) 126 F3d 981.

DNA Act, 18 USCS § 3583(d), was legitimate exercise of congressional power under Necessary and Proper Clause, regardless of whether DNA Act was construed as civil sanction or as law enforcement tool. *United States v Plotts* (2003, CA10 Kan) 347 F3d 873.

Under Supreme Court's decision in *Booker*, only those provisions of Sentencing Reform Act that made application of Sentencing Guidelines mandatory were excised as contrary to Sixth Amendment; consequently, supervised release statute set forth in 18 USCS § 3583 remained constitutionally valid. *United States v Coleman* (2005, CA8 Ark) 404 F3d 1103.

Because supervised release statute, 18 USCS § 3583, remained valid following *Booker* and district court treated Sentencing Guidelines as advisory when it determined defendant's sentence, district court did not err by imposing three-year supervised release term based on judge-found facts. *United States v Salter* (2005, CA8 Ark) 418 F3d 860, reh den, reh, en banc, den (2005, CA8) 2005 US App LEXIS 20666.

When fundamental liberty interest is implicated by sentencing condition, reviewing court must first consider sentencing goal to which condition relates, and whether record establishes its reasonableness; it must then consider whether it represents greater deprivation of liberty than is necessary to achieve that goal. *United States v Myers* (2005, CA2 NY) 426 F3d 117.

District court's revocation of defendant's supervised release, based on charges of armed bank robbery, did not violate defendant's Fifth Amendment due process rights or Sixth Amendment right to jury trial because constitutional rights afforded defendant subject to revocation of supervised release for violation of its conditions were not coextensive with those enjoyed by suspect to whom presumption of innocence attached. *United States v Carlton* (2006, CA2 NY) 442 F3d 802.

District court's inclusion of supervised release under 18 USCS § 3583(e)(3) as part of defendant's sentence for violating 8 USCS § 1326(a), (b)(2) did not expose defendant to additional punishment above statutory maximum and did not require impermissible judicial fact-finding under U.S. Const. amend. VI because supervised release, its revocation, and associated penalties were part of original sentence which was authorized by fact of conviction and which required consideration of factors under 18 USCS § 3553. *United States v Huerta-Pimental* (2006, CA9 Cal) 445 F3d 1220.

Because revocation of supervised release and subsequent imposition of additional imprisonment is, and always has been, fully discretionary under U.S. Sentencing Guidelines Manual ch. 7 and 18 USCS § 3583(e)(3), it is constitutional under *Booker*. *United States v Huerta-Pimental* (2006, CA9 Cal) 445 F3d 1220.

Defendant in supervised release revocation proceeding was not entitled to indictment by grand jury, to jury trial, or to be found "guilty" of violating terms of his supervised release beyond reasonable doubt; defendant's sentence following revocation was therefore not imposed in violation of *Sixth Amendment*. *United States v Cordova* (2006, CA10 Okla) 461 F3d 1184.

Unpublished Opinions

Unpublished: Supervised release revocation statute, 18 USCS § 3583(e), is constitutional and does not violate *Booker* on ground that it authorizes judge to impose revocation sentence based on facts judge finds by preponderance of evidence. *United States v Burgara-Montana* (2006, CA9 Cal) 2006 US App LEXIS 16173.

Unpublished: Defendant failed to show that district court violated his Sixth Amendment rights when it sentenced him following his conviction for illegally reentering country in violation of 8 USCS § 1326 because (1) imposition of supervised release under 18 USCS § 3583 did not implicate Sixth Amendment since it required no judicial fact-finding and was authorized by mere fact of conviction, and (2) district court had discretion to revoke defendant's supervised release term, and such revocation did not violate *Booker*. *United States v Miranda-Sanchez* (2006, CA9 Cal) 2006 US App LEXIS 16985.

Unpublished: Where defendant appealed her 10-month sentence imposed by district court following revocation of supervised release, her contention that supervised release revocation procedure set forth in 18 USCS § 3583 and *Fed. R. Crim. P. 32.1(b)* was unconstitutional was foreclosed by *United States v. Huerta-Pimental*, 445 F.3d 1220 (9th Cir. 2006). *United States v Morales* (2006, CA9 Cal) 2006 US App LEXIS 20183.

Unpublished: Order revoking defendant's supervised release and imposing six-month term of imprisonment and additional term of supervised release was affirmed because U.S. Supreme Court's *Booker* decision, which rendered U.S. Sentencing Guidelines Manual advisory in nature by severing two provisions of Sentencing Reform Act (Act), did not affect provision of Act governing supervised release set forth at 18 USCS § 3583. *United States v Bonner* (2005, CA4 W Va) 127 Fed Appx 91.

3. Applicability

District court may not sentence juvenile whose probation has been revoked to term of supervised release because juvenile must be sentenced as juvenile under 18 USCS § 5037 and supervised release is not a sentencing option, notwithstanding government's claim that 18 USCS § 3583 authorized terms of supervised release. *United States v Sealed Appellants* (1997, CA5 Tex) 123 F3d 232.

Sentence of home detention followed by three years of supervised release was illegal; plain language of 18 USCS § 3583(a) and § 5D1.1 compels conclusion that supervised release presupposes period of imprisonment. *United States v Thomas* (1998, CA2) 135 F3d 873.

District court was not precluded under 18 USCS § 3583 from imposing term of supervised release in addition to term of imprisonment following revocation of defendant's probation; revocations of probation are not governed by 18 USCS § 3583 but by a separate provision, 18 USCS § 3565. *United States v Garfinkle* (2001, CA10 Utah) 261 F3d 1030, 2001 Colo J C A R 4340.

Modification of supervised release was affirmed because prohibition against contact with certain individual was not imposed as punishment for defendant's previous crime involving sexual exploitation of child, but rather was based on district court's assessment--after considering history and characteristics of defendant pursuant to 18 USCS §§ 3583(e), 3553(a)(1)--that condition would help to deter defendant from further criminal conduct and protect public from further crimes. *United States v Sines* (2002, CA7 Ind) 303 F3d 793.

Where defendants moved to have court correct their alleged illegal sentences, district court used de novo standard to review those portions of magistrate judge's report and recommendation to which defendants objected and adopted report and recommendation finding that, under *Fed. R. Crim. P. 35*, it did not have authority to correct sentences, case relied on by defendants regarding imposition of supervised release was superceded by statutory amendments to 18

USCS § 3583, and sentences did not violate *Ex Post Facto Clause*. *United States v White* (2002, ED Mich) 295 F Supp 2d 709, accepted, adopted, objection overruled, motions ruled upon (2003, ED Mich) 295 F Supp 2d 709.

Unpublished Opinions

Unpublished: Defendant's sentence for violating 8 USCS § 1324(a)(1)(A)(ii) and 18 USCS § 2 was vacated and case was remanded where district court's Booker error was not harmless; however, since defendant had already served his sentence, only practical relief was that provided in 18 USCS § 3583(e). *United States v Rodriguez-Munoz* (2006, CA5 Tex) 2006 US App LEXIS 10900.

Unpublished: Trial court did not err in imposing upon defendant several sex offender supervised release conditions, including registration as sex offender under applicable state law, even though conditions did not relate to current offenses to which he pled guilty; conditions related to defendant's criminal history and characteristics, and defendant did not show that conditions imposed involved greater deprivation of liberty than was reasonably necessary for purposes of sentencing or that they were inconsistent with any pertinent policy statements in federal *Sentencing Guidelines*. *United States v Vinson* (2005, CA10) 147 Fed Appx 763.

4. --Effective date

Terms of supervised release may not be imposed under Anti-Drug Abuse Act of 1986 for offenses committed prior to November 1, 1987, since 18 USCS § 3583 did not become effective until that date. *United States v Whitehead* (1988, CA4 Md) 849 F2d 849, reh den, en banc (1988, CA4) 1988 US App LEXIS 11120 and cert den (1988) 488 US 983, 102 L Ed 2d 566, 109 S Ct 534.

Delayed effective date for 18 USCS § 3583 does not extend to other provisions of Narcotics Penalties and Enforcement Act, which became effective on enactment. *United States v Padilla* (1989, CA8 Mo) 869 F2d 372, cert den (1989) 492 US 909, 106 L Ed 2d 572, 109 S Ct 3223.

1987 amendment increasing maximum period of supervised release for felony escape from 2 to 3 years was applicable to defendant who escaped prior to amendment's effective date but was not captured until after that date. *United States v Vanover* (1989, CA6 Mich) 888 F2d 1117, cert den (1990) 495 US 934, 109 L Ed 2d 506, 110 S Ct 2177.

District Court was authorized under 18 USCS § 3583 to impose term of supervised release in addition to prison sentence in sentencing defendant convicted of narcotics conspiracy under 21 USCS § 846, where conspiracy was operative after November 1, 1987, but terminated prior to 1988 amendment of § 846. *United States v Osborne* (1991, CA7 Wis) 931 F2d 1139, reh den (1991, CA7) 1991 US App LEXIS 12532.

Term of supervised release commenced when defendant was released from prison on regular parole, and thus defendant did not violate his supervised release term which had expired before alleged infraction occurred, notwithstanding government's claim that supervised release did not commence until regular parole had expired. *United States v Reider* (1996, CA10 NM) 103 F3d 99.

Term of supervised release of defendant sentenced to twelve months in prison followed by three year term of supervised release began on date she was released from prison pursuant to 18 USCS § 3624 and not on date she was sentenced, although defendant was free on bail for two years pending appeal, since defendant was not subject to terms and conditions of her supervised release during period when she was free on bail. *United States v Malandrini* (1999, CA9 Cal) 177 F3d 771, 99 CDOS 3679, 99 Daily Journal DAR 4739.

Application of 18 USCS § 3583(h) was plain error because defendant committed last bank robbery on June 30, 1993, more than year before § 3583(h) became effective; § 3583(h) became effective on September 13, 1994, and is not retroactively applicable to defendants who committed their underlying offense prior to September 13, 1994. *United States v Gresham* (2003, CA11 Ga) 325 F3d 1262, 16 FLW Fed C 459.

Three-year supervised release portion of conspirator's sentence is upheld, even though offense was committed in 11/87 and 21 USCS § 846 conspiracy statute was not amended to authorize special parole term/supervised release sentencing until 1988, because previous amendment to 18 USCS § 3583(a) had already permitted inclusion of term of supervised release after imprisonment as to every felony or misdemeanor committed after 11/1/87. *United States v Wallendorf* (1990, ND Ill) 737 F Supp 1018.

Upon revocation of armed drug trafficker's supervised release for several positive tests for cocaine use, court will apply 18 USCS § 3583(e), which would permit court discretion to refuse option of imprisonment, instead of § 3583(g),

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which would mandate at least one year's imprisonment, where acts of firearm and drug trafficking for which he was convicted took place in November 1988, § 3583(g) became law in December 1988, and sentence was determined after guilty plea in October 1989, because application of § 3583(g) to trafficker would be both retrospective and disadvantageous to him, and would violate command of Ex Post Facto Clause. *United States v Flora* (1993, WD Ky) 810 F Supp 841 (criticized in *United States v Reese* (1995, CA6 Ohio) 71 F3d 582, 1995 FED App 361P).

5. --Offenses covered

Although 18 USCS § 924 mandates maximum sentence of 5 years for carrying firearm during drug trafficking crime, statute did not preclude court from sentencing defendant to 5 years imprisonment and 3 year term of supervised release "after imprisonment" under 18 USCS § 3583. *United States v Robertson* (1990, CA9 Or) 901 F2d 733, cert den (1990) 498 US 962, 112 L Ed 2d 405, 111 S Ct 395.

Defendants convicted of aiding and abetting submission of fraudulent documents were properly sentenced to terms of supervised release under 18 USCS § 3583, even though statute violated did not provide for supervised release. *United States v Camacho-Dominguez* (1990, CA5 Tex) 905 F2d 82.

Term of supervised release was properly imposed under authority of 18 USCS § 3583 for conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, even though drug conspiracy statute at time of offense provided only for punishment by fine or imprisonment. *United States v Van Nymegen* (1990, CA5 Tex) 910 F2d 164.

Imposition of term of supervised release on defendant convicted of conspiracy to possess with intent to distribute cocaine in violation of 21 USCS § 846 was authorized by 18 USCS § 3583, despite defendant's claim that supervised release was not permissible penalty under § 816. *United States v Jordan* (1990, CA9 Cal) 915 F2d 563 (criticized in *United States v Jones* (1995, CA5 Tex) 56 F3d 581) and (criticized in *United States v Spring* (1996, CA10 Utah) 80 F3d 1450, 44 Fed Rules Evid Serv 395) and (criticized in *United States v Westbrook* (1997, CA5 Tex) 119 F3d 1176) and (criticized in *United States v Santiago-Becerril* (1997, CA1 Puerto Rico) 130 F3d 11, 48 Fed Rules Evid Serv 27).

Court was authorized under 18 USCS § 3583 to sentence defendant convicted of conspiracy to possess with intent to distribute 2 kilograms of cocaine to 16 months supervised release in addition to prison term; although terms of 18 USCS § 846 that applied to defendant do not expressly permit term of supervised release, they also do not prohibit such term. *United States v Schanning* (1991, CA9 Ariz) 941 F2d 807, 91 CDOS 6060, 91 Daily Journal DAR 9397.

Guidelines section 5D1.1(a) and 18 USCS § 3583 provided authority to sentence defendant convicted of drug conspiracy under 21 USCS § 846, which did not authorize supervised release, notwithstanding defendant's claim that this rendered amendment to § 846 redundant and superfluous; amendment made all penalties available for substantive narcotics crimes applicable to conspiracies. *Rodriguez v United States* (1991, CA2 NY) 951 F2d 26.

Court acted within its discretion in imposing supervised release term under 18 USCS § 3583 on defendant convicted of continuing criminal enterprise and obstruction of justice, even though statutes under which defendant was convicted did not even mention supervised release. *United States v Allen* (1994, CA10 Colo) 24 F3d 1180, cert den (1994) 513 US 992, 130 L Ed 2d 404, 115 S Ct 493 and post-conviction relief den (1998, CA10 Colo) 1998 Colo J C A R 800.

Defendant was precluded from claiming that district court erred in sentencing him to five-year term of supervised release under 18 USCS § 3583 following his conviction upon guilty plea for contempt under 18 USCS § 401(3) because any error in imposition of supervised release was invited error for purposes of *Fed. R. Crim. P.* 52(a); in his plea agreement and at plea colloquy, defendant expressly acknowledged that district court could impose term of supervised release up to five years, and at sentencing, defendant's counsel repeatedly requested that in lieu of additional jail time district court sentence defendant to time served followed by supervised release. *United States v Love* (2006, CA11 Fla) 449 F3d 1154, 19 FLW Fed C 550.

Term "statute," as referenced in 18 USCS § 3583(a), includes, in probation revocation context, statute of defendant's underlying conviction; sentence that is imposed upon revocation of probation is punishment for original criminal offense rather than for conduct that leads to revocation, and supervised release term can be imposed when probation is revoked, if such term is allowed under penalty statute applicable to underlying offense. *United States v Mitsven* (2006, CA11 Fla) 452 F3d 1264, 19 FLW Fed C 693.

District court did not commit legal error or exceed its statutory authority when it imposed three year supervised release term on defendant after revoking his probation because (1) defendant was placed on probation after pleading guilty to violating 21 USCS § 846; (2) 21 USCS § 841(b)(1)(C), which was penalty provision for defendant's drug-related offense, required that term of supervised release be imposed whenever prison term was imposed; (3) § 841(b)(1)(C) was relevant and controlling because sentence that district court imposed, following probation of revocation, was punishment for defendant's underlying offense; (4) mandatory supervised release provision of § 841(b)(1)(C) was invoked because pursuant to 18 USCS § 3565(b) district court was required to impose prison term on defendant after revoking his probation; and (5) 18 USCS § 3583(a) also allowed for imposition of supervised release term on defendant because such term was required by 21 USCS § 841(b)(1)(C), penalty statute for defendant's underlying conviction. *United States v Mitsven* (2006, CA11 Fla) 452 F3d 1264, 19 FLW Fed C 693.

In trespassing on federal naval property, defendants committed petty offenses under 18 USCS § 19, making imposition of supervised release as part of sentence improper under 18 USCS § 3583(b)(3). *United States v Falu* (2000, DC Puerto Rico) 129 F Supp 2d 424.

6. Duty to advise defendant

Failure to advise defendant, who was sentenced to 25 years and three years of supervised release, that his sentence might include period of supervised release, required reversal, and Court of Appeals was not at liberty to remove three year period of supervised release and leave defendant with sentence of 25 years, since 18 USCS § 3583(a) mandates imposition of period of supervised release. *United States v Bounds* (1991, CA5 La) 943 F2d 541, appeal after remand, remanded (1993, CA5 La) 985 F2d 188, reh, en banc, den (1993, CA5 La) 990 F2d 628 and reh, en banc, den (1993, CA5 La) 990 F2d 628 and cert den (1993) 510 US 845, 126 L Ed 2d 98, 114 S Ct 135, reh den (1993) 510 US 1005, 126 L Ed 2d 482, 114 S Ct 584 and (criticized in *United States v Edwards* (1997, CA7 Ill) 105 F3d 1179) and (criticized in *United States v Lewis* (1997, CA3 Pa) 113 F3d 487) and (criticized in *United States v Medina* (1998, CA5 Tex) 161 F3d 867).

Failure to order or provide written statement of conditions of supervised release does not automatically result in ability of sentencing court to revoke supervised release based on violation of one of its conditions; purpose behind written requirement in 18 USCS § 3583(f) is to provide guide for defendant's conduct and for such supervision as is required. *United States v Felix* (1993, CA8 Minn) 994 F2d 550.

Petition to revoke defendant's supervised release gave defendant adequate notice that government would seek to prove that defendant had used and thereby possessed cocaine, and thus 18 USCS § 3583(g) was properly applied, even though defendant did not specifically allege that defendant "possessed" controlled substance. *United States v McAfee* (1993, CA10 NM) 998 F2d 835.

In advising defendant of maximum penalty to which he or she is subject prior to acceptance of guilty plea, district court must tell defendant not only of applicability of term of supervised release but also that violation of term resulting in revocation requires defendant to serve in prison all or part of term of supervised release without credit for time served post-release pursuant to 18 USCS § 3583(e)(3). *United States v Osment* (1994, CA8 Ark) 13 F3d 1240.

Defendant's plea was not invalid on grounds that court did not inform him that his term of supervised release could be extended potentially to life-long term, since defendant's supervised release could only be extended up to maximum originally allowable term, and since maximum term of restricted liberty defendant faced was less than 40-year sentence to which he believed he could be sentenced, any error by sentencing court in explaining term of supervised release was harmless. *United States v Fuentes-Mendoza* (1995, CA9 Ariz) 56 F3d 1113, 95 CDOS 4191, 95 Daily Journal DAR 7222, cert den (1995) 516 US 925, 133 L Ed 2d 227, 116 S Ct 326.

Court did not properly order defendant's deportation as condition of supervised release pursuant to 18 USCS § 3583(d), where defendant was not afforded adequate notice or opportunity at his sentencing hearing to respond to probation officer's recommendation that he be deported, and, in fact, defendant was apparently never even made aware of basis for recommendation. *United States v Oboh* (1995, CA11 Ga) 65 F3d 900, 9 FLW Fed C 543, reh, en banc, gr, vacated (1995, CA11 Ga) 70 F3d 87, 9 FLW Fed C 651.

Defendant was entitled to receive reasonable presentence notice, either from presentence report, a pre-hearing submission from the government, or the district court itself, that a special condition of supervised release requiring him to register as a sex offender was a possibility. *United States v Bartsma* (1999, CA10 Kan) 198 F3d 1191, 1999 Colo J C A R 6432.

District court erred in sentencing defendant to three year period of supervised release, since defendant was convicted of misprision of a felony, which is punishable by a prison term not to exceed three years and is a Class E felony pursuant to 18 USCS § 3581, and term of supervised release for a Class E felony is not more than one year pursuant to 18 USCS § 3583. *United States v Shabazz* (2000, CA7 Wis) 230 F3d 899.

Fact that defendant did not receive notice of conditions of defendant's supervised release in writing as required by 18 USCS § 3585(f) and that defendant might not have received information required under 18 USCS § 3603(1) did not preclude district court from revoking period of supervised release when defendant committed another crime and violated conditions, particularly where there was evidence that defendant knew of conditions to release. *United States v Ortega-Brito* (2002, CA9 Cal) 311 F3d 1136, 2002 CDOS 11430, 2002 Daily Journal DAR 13299, cert den (2003) 539 US 950, 156 L Ed 2d 642, 123 S Ct 2627.

In context of criminal sentencing condition, knowledge that condition of Internet access prohibition was in prospect would have enabled parties to discuss such options intelligently, and sentence was vacated where defendant was not afforded such notice and where condition entailed greater deprivation of liberty than was reasonably necessary for purposes of sentencing articulated in 18 USCS § 3553(a)(2)(B)-(D). *United States v Scott* (2003, CA7 Ill) 316 F3d 733.

District court abused its discretion in revoking defendant's supervised release upon his subsequent violation of 8 USCS § 1326 because defendant was not given written notice of conditions of supervised release as was required under 18 USCS §§ 3603(1), 3583(f) and was not orally advised by sentencing court of prohibition against commission of another federal crime. *United States v Ortuno-Higareda* (2005, CA9 Ariz) 421 F3d 917.

Evidence regarding "practice" of sentencing judges does not establish that defendant received notice of any conditions of supervised release; failure to adhere to congressional mandate under 18 USCS §§ 3603(1), 3583(f) to provide written notice of such conditions should be excused only when there is specific evidence that defendant received actual notice of condition, violation of which formed basis for revocation of his supervised release. *United States v Ortuno-Higareda* (2005, CA9 Ariz) 421 F3d 917.

Defendant received notice, pursuant to *Fed. R. Crim. P. 32(h)*, of possible life term of supervised release for production and possession of child pornography through presentence report, which referenced 18 USCS § 3583(k) and policy statement in USSG § 5D1.2(c), through his rearraignment, and through government's notice of intent to seek upward departure. *United States v Allison* (2006, CA5 Tex) 447 F3d 402.

Supervised release is revoked due to defendant's commission of crime, even though court and probation officer failed to follow precisely edicts of 18 USCS § 3583 and defendant contends with some force that he never received written copy of terms of his supervised release, because release can be revoked anyway since both court and probation officer orally advised, and defendant should have known as citizen that he could not violate law while on supervised release. *United States v Johnson* (1991, DC Tex) 763 F Supp 900.

18 USCS § 3583(f) presumes that sentencing court would not read at sentencing each of standard conditions imposed on defendant, and would leave administration of supervision to duly authorized probation officer, thus precluding determination that terms of supervised release provided to defendant by his probation officer constituted variance with oral sentence imposed. *United States v Crea* (1997, ED NY) 968 F Supp 826, affd sub nom *United States v Truscello* (1999, CA2 NY) 168 F3d 61, cert den (1999) 528 US 933, 145 L Ed 2d 261, 120 S Ct 335.

Unpublished Opinions

Unpublished: Defendant's assertion that he lacked fair notice of risk of exposure for violation of supervised release lacked merit because statutory provisions of 18 USCS § 3583 were listed in his presentence report, and his parole officer and federal public defender carefully explained to him conditions of his supervised release, including, presumably, that he could be imprisoned for violating them. *United States v Elkshouder* (2004, CA9 Mont) 119 Fed Appx 857.

7. Validity

District court could order supervised release under 18 USCS § 3583(a) in addition to maximum term of imprisonment available by statute. *United States v Jenkins* (1995, CA11 Ga) 42 F3d 1370, 8 FLW Fed C 977.

Sentence of home detention followed by three years of supervised release was illegal; plain language of 18 USCS § 3583(a) and § 5D1.1 compels conclusion that supervised release presupposes period of imprisonment. *United States v Thomas* (1998, CA2) 135 F3d 873.

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District court had no jurisdiction to entertain either defendant's motion to invalidate restitution order on grounds that court incorrectly delegated task of determining schedule for restitution payments to probation office or government's cross-motion that conceded court had incorrectly delegated task and moved court to set restitution payment schedule, since 18 USCS § 3663(g) and § 3583(e)(2) do not provide a jurisdictional basis for court's order; district court does not have authority to modify restitution order on ground of illegality. *United States v Hatten* (1999, CA5 La) 167 F3d 884.

Defendant's appeal of conditions of his supervised release imposed after he pled guilty to transporting minor in interstate commerce for illegal sexual activity was dismissed because there was also no allegation that district court failed to comply with *Fed. R. Crim. P. 11* in accepting defendant's guilty plea, defendant did not claim that he failed to enter into appeal-waiver knowingly and voluntarily, or that supervised release conditions constituted miscarriage of justice because they were based on some constitutionally impermissible factor, such as race, as such conditions were not subject to review on appeal. *United States v Andis* (2003, CA8 Mo) 333 F3d 886, cert den (2003) 540 US 997, 157 L Ed 2d 398, 124 S Ct 501.

District court erred in imposing mandatory antipsychotic medication as condition of defendant's supervised release following entry of defendant's guilty plea to one count of transmitting communication in interstate commerce containing threat to injure person of another in violation of 18 USCS § 875(c); district court erred in failing to follow 18 USCS § 3583(d)(2) when it imposed condition. *United States v Williams* (2004, CA9 Or) 356 F3d 1045.

Congress in 18 USCS § 3583 authorized period of supervised release to be imposed in addition to maximum term of imprisonment; thus imposition of 5 year statutory maximum for conspiracy to distribute heroin to be followed by 3 year period of supervised release was not illegal sentence, even though defendant was potentially exposed to total of 7 years incarceration. *United States v Jamison* (1991, App DC) 290 US App DC 83, 934 F2d 371.

Convicted marijuana distributor's challenge to imposition of 3-year term of supervised release pursuant to 18 USCS § 3583 must fail, where 18 USCS § 3583 in conjunction with 21 USCS § 841 call for supervised release after imprisonment and sentencing guidelines require its imposition when mandated by statute, because supervised release supplement to sentence is constitutional and was constitutionally imposed. *United States v Alamillo* (1990, DC Colo) 754 F Supp 827, affd (1991, CA10 Colo) 941 F2d 1085.

28 USCS § 2241 was proper method for challenging decision of federal Bureau of Prisons to deny inmate credit on his federal sentence for time served, however, district court in New York did not have authority to modify sentence it imposed by detention that was spent in Pennsylvania that was related to earlier sentence imposed by district court in Pennsylvania; inmate could not receive "double credit" for time served in New York on state sentence and on federal sentence. *Dent v Zenk* (2005, ED NY) 408 F Supp 2d 103.

Unpublished Opinions

Unpublished: District court had authority to impose term of supervised release against defendant, after he pled guilty to drug and firearms offenses, because Sentencing Reform Act and 18 USCS § 3583, which authorizes imposition of term of supervised release, had not been invalidated and three-year term of supervised release was required under 21 USCS § 841(b)(1)(C). *United States v Corbett* (2005, CA4 W Va) 144 Fed Appx 979.

Unpublished: District court did not commit Sixth Amendment Booker error by imposing term of supervised release when it resentenced defendant as Booker did not invalidate Sentencing Reform Act in its entirety, but rather, United States Supreme Court excised two provisions, 18 USCS § 3553(b)(1) and 18 USCS § 3742(e), and left rest of Act intact, including 18 USCS § 3583, provision which authorized imposition of term of supervised release, and three-year term of supervised release was required under 21 USCS § 841(b)(1)(C). *United States v Johnson* (2005, CA4 W Va) 149 Fed Appx 229, cert den (2006, US) 74 USLW 3543.

Unpublished: Confinement in community corrections facility remains permitted condition of supervised release. *United States v Huffman* (2005, CA10) 146 Fed Appx 939.

8. Length of supervised release

Although language of 18 USCS § 3553(b) is broad enough to allow District Court to depart upward from guidelines' supervised release terms, District Court may not exceed statutory maximum as provided in 18 USCS § 3583(b); District Court, however, may impose consecutive terms of supervised release. *United States v Saunders* (1992, CA8 Minn) 957 F2d 1488, reh, en banc, den (1992, CA8) 1992 US App LEXIS 6910 and cert den (1992) 506 US 889, 121 L

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Ed 2d 187, 113 S Ct 256 and cert den (1993) 506 US 1058, 122 L Ed 2d 143, 113 S Ct 991, subsequent app, motion gr, motion den (1994, CA8 Minn) 1994 US App LEXIS 21313, subsequent app, motion gr, motion den (1994, CA8 Minn) 1994 US App LEXIS 21322.

Defendant convicted of possessing methylamine with intent to manufacture methamphetamine, a Class C felony, was improperly given four year term of supervised release because maximum for Class C felony is not more than three years, and although defendant procedurally defaulted this claim, relief would be granted since 18 USCS § 2255 expressly makes relief available if sentence was in excess of maximum authorized by law. *United States v Wilson* (1993, CA8 Ark) 997 F2d 429.

Imposition of two year term of supervised release, to follow five year sentence of imprisonment, was proper, since it was within three year term authorized by 18 USCS § 3583(b)(2) and § 5D1.2(b)(2), notwithstanding defendant's claim that statute mandated maximum of five year term of imprisonment and that term of supervised release would result in additional imprisonment. *United States v Watkins* (1994, CA8 Mo) 14 F3d 414.

District court was without authority to impose supervised release term of less than two years for Class C felony pursuant to § 5D1.2(a)(2), in resentencing defendant on remand, even though defendant had served time in excess of guidelines range; supervised release begins day person is released from imprisonment, and does not run during any period in which person is imprisoned in connection with conviction for federal crime under 18 USCS § 3624(e). *United States v Douglas* (1996, CA8 Iowa) 88 F3d 533 (criticized in *Johnson v United States* (1998, CA6 Mich) 154 F3d 569, 1998 FED App 261P).

Criminal contempt should be classified for sentencing purposes according to applicable Guidelines range for most nearly analogous offense, and since district court found obstruction of justice, with guidelines range of 6-12 months, to be most nearly analogous offense, defendant's contempt conviction is Class A misdemeanor under classification scheme pursuant to 18 USCS § 3559, and as such, it is subject to \$ 25 special assessment pursuant to 18 USCS § 3013 and no more than one year of supervised release pursuant to 18 USCS § 3583. *United States v Carpenter* (1996, CA9 Wash) 91 F3d 1282, 96 CDOS 5680, 96 Daily Journal DAR 9317.

Defendant should have received maximum one-year term of supervised release for misdemeanor under 18 USCS § 3583(b)(3) because defendant failed to appear in connection with sentence for misdemeanor, which was subject to only misdemeanor charge pursuant to 18 USCS § 3146. *United States v Leaphart* (1996, CA2 NY) 98 F3d 41.

Deportation does not terminate sentence of supervised release, and thus district court did not err in adding two points pursuant to § 4A1.1(d) for defendant's illegally reentering U.S while on supervised release, even though he had been deported. *United States v Akinyemi* (1997, CA7 Ill) 108 F3d 777.

District court properly refused to order defendant's term of supervised release to have begun on date his two concurrent sentences ended, since defendant was not actually released until thirty-nine months later when his third consecutive sentence was vacated, and 18 USCS § 3624 provides that term of supervised release commences on date person is released from imprisonment; however, defendant can ask court to grant early termination of his supervised release in interests of justice under 18 USCS § 3583(e). *United States v Joseph* (1997, CA1 RI) 109 F3d 34.

District court did not abuse its discretion in denying defendant's motion to reduce his term of supervised release under 18 USCS § 3583 on grounds that his sentence had been miscalculated and that he had stayed in prison too long, since court followed statutory mandate to consider defendant's conduct and interest of justice; 18 USCS § 3583(e) allows conduct-based inquiry into continued necessity for supervision after individual has served one full year on supervised release, but does not provide mechanism for collateral attack on an individual's original unappealed sentence. *United States v Pregent* (1999, CA4 NC) 190 F3d 279.

Drug defendants' terms of supervised release must be reduced to maximum term allowable under 18 USCS § 3583 for crack cocaine possession which does not require some showing of drug amount, since terms were calculated by district court based on its determination of amount of drugs by a preponderance of the evidence, and government conceded applicability of U.S. Supreme Court's *Apprendi* decision, which announced constitutional principle that other than fact of a prior conviction, any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *United States v Meshack* (2000, CA5 Tex) 225 F3d 556, 55 Fed Rules Evid Serv 500, cert den (2001) 531 US 1100, 148 L Ed 2d 716, 121 S Ct 834 and (criticized in *United States v Norris* (2001, ED NY) 128 F Supp 2d 739) and (criticized in *United States v Pratt* (2001, CA4 SC) 239 F3d 640, 56 Fed Rules Evid Serv 688) and reh gr, in part, amd (2001, CA5 Tex) 244 F3d 367, cert den (2001) 534 US 861, 151 L Ed 2d 94, 122 S Ct 142 and subsequent app (2003, CA5 Tex) 73 Fed Appx 15 and (ovrld as stated in *United States v Randle*

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(2002, CA5 Tex) 304 F3d 373) and (criticized in *State v Benenati* (2002, App) 203 Ariz 235, 52 P3d 804, 381 Ariz Adv Rep 3) and (criticized in *United States v Newborn* (2003, CA6 Tenn) 71 Fed Appx 557).

District court did not commit plain error by sentencing defendant to concurrent five-years terms of supervised release, although defendant's conviction under 21 USCS § 841(b)(1)(C) is a Class C felony and 18 USCS § 3583(b)(2) allows a maximum of three years' supervised release for Class C felonies except as otherwise provided and amended § USSG 5D1.2(a) provides that supervised release term shall not be more than three years for Class C felony, since neither § 5D1.2(a) nor § 3583(b)(2) restrict 21 USCS § 841(b)(1)(C), which provides that term of supervised release should be at least 3 years. *United States v Heckard* (2001, CA10 NM) 238 F3d 1222, 2001 Colo J C A R-323, 56 Fed Rules Evid Serv 245 (criticized in *State v Benenati* (2002, App) 203 Ariz 235, 52 P3d 804, 381 Ariz Adv Rep 3).

Defendant's five-year supervised release term did not violate Apprendi because it was above three-year maximum for Class C felonies identified in 18 USCS § 3583(b)(2); specific supervised release provisions of 21 USCS § 841, under which defendant was convicted, trumped more general provisions in 18 USCS § 3583(b)(2). *United States v Sua* (2002, CA9 Hawaii) 307 F3d 1150, 2002 CDOS 10284, 2002 Daily Journal DAR 11847, 59 Fed Rules Evid Serv 1126, cert den (2003) 537 US 1221, 154 L Ed 2d 1078, 123 S Ct 1327 and cert den (2003) 538 US 1007, 155 L Ed 2d 840, 123 S Ct 1919 and (criticized in *United States v Thomas* (2004, CA9 Cal) 355 F3d 1191).

Although district court committed plain error by applying 18 USCS § 3583(h), statute that was not in effect at time of defendant's underlying offenses, error was harmless as defendant's sentence was not contrary to 18 USCS § 3583(e)(3), applicable statute; because both language of statute and intent of Congress dictate that defendant is not entitled to credit for pre-revocation time served on supervised release, aggregate of pre-revocation and post-revocation supervised release terms can exceed maximum length of supervised release that 18 USCS § 3583(b) dictates should attach to underlying offense. *United States v Gresham* (2003, CA11 Ga) 325 F3d 1262, 16 FLW Fed C 459.

Defendant did not receive ineffective assistance of counsel and his rights under the Sixth Amendment were not violated at his trial on drug charges, because fact that defendant's attorney had been disbarred prior to start of trial and had not been admitted to practice in federal district court where defendant was convicted did not render verdict inherently unreliable; defendant was also properly sentenced pursuant to 18 USCS § 3583(b)(2) and 21 USCS § 841(b)(1)(C). *United States v Ross* (2003, CA9 Cal) 338 F3d 1054, 2003 CDOS 7126, 2003 Daily Journal DAR 8969, cert den (2004) 540 US 1168, 157 L Ed 2d 1218, 124 S Ct 1187.

Defendant's sentence was vacated and remanded for resentencing because, after sentencing defendant to 23 months' incarceration, district court could only sentence him to one-month of home detention without violating two-year statutory maximum term; statutory framework governing revocation and punishment for violating condition of supervised release implied that incarceration and home detention were alternative punishments that could not be combined in excess of maximum statutory term of incarceration. *United States v Ferguson* (2004, CA5 Tex) 369 F3d 847.

District court committed plain error when it imposed eight-year term of supervised release on defendant upon his convictions for possession of counterfeit UPC codes for purpose of fraud, violation of 18 USCS § 1029, and unlawful production of identification documents, violation of § 1028; each conviction was deemed Class C felony pursuant to 18 USCS § 3559(a)(3) and, thus, maximum term of supervised release for each conviction was three years under 18 USCS § 3583(b)(2); further, terms were required to run concurrently pursuant to 18 USCS § 3624(e) because defendant had multiple terms of supervised release. *United States v Sash* (2005, CA2 NY) 396 F3d 515.

Where defendants were convicted of aiding and abetting alien harboring and attempted alien harboring of illegal aliens for commercial advantage and financial gain, in violation of 8 USCS § 1324(a)(1)(A)(iii), (A)(v)(II), and (B)(i) and 18 USCS § 2, term of imprisonment was limited to five years; because offense was Class D felony under 18 USCS § 3559(a)(4), 18 USCS § 3583(b)(2) limited term of supervised release to three years. *United States v De Jesus-Batres* (2005, CA5 Tex) 410 F3d 154.

District court erred when it sentenced defendant, convicted of violating 18 USCS §§ 371, 892, and 894 by conspiring to make extortionate loan and making extortionate loan, to 51 months' incarceration and five years of supervised release because statutes under which defendant was convicted carried maximum sentences of 20 years' imprisonment and were Class C felonies, pursuant to 18 USCS § 3559(a)(3), and 18 USCS § 3583(b)(2) allowed court to sentence defendant to no more than three years of supervised release for committing Class C felonies. *United States v Madori* (2005, CA2 NY) 419 F3d 159, 67 Fed Rules Evid Serv 1338.

Under plain error standard of review, district court's imposition of three-year term of supervised release for bank fraud was not overturned because defendant acknowledged that such was permissible in plea agreement; there was no

evidence of contrary understanding of parties in plea agreement or presentence report. *United States v Staples* (2006, CA8 Mo) 435 F3d 860.

District court's imposition of three years of supervised release following defendant's conviction for making false statement to federally licensed firearms dealer, violation of 18 USCS § 922(a)(6), was proper under 18 USCS §§ 922(a)(6), 924(a)(2), 3559(a)(3), and 3583(b)(2) because district court correctly classified defendant's offense as Class C felony pursuant to 18 USCS § 3559(a) under plain language of statute, which did not contemplate consultation of sentencing guidelines; also, because defendant's maximum term of supervised release was properly computed based on maximum term of imprisonment authorized by statute of conviction as no more than three years both before and after Booker, there was no ex post facto increase; moreover, even if he had been exposed to greater term of supervised release post-Booker, that would not constitute ex post facto violation of *Due Process Clause*. *United States v Lovett* (2006, CA3 Pa) 467 F3d 374.

Where government, probation office, and defendant all agreed that defendant had been fully compliant with terms of his supervised release and had turned his life around sufficiently to justify early termination of supervised release, 21 USCS § 841 did not preclude court from exercising its discretion under 18 USCS § 3583 and court granted defendant's motion for early termination of supervised release. *United States v Scott* (2005, ND Ill) 362 F Supp 2d 982.

21 USCS § 841 does not preclude court from exercising its discretion under 18 USCS § 3583. *United States v Scott* (2005, ND Ill) 362 F Supp 2d 982.

9. --Five years or more

Ten year term of supervised release exceeded 3 year maximum under 18 USCS § 3583 for cocaine conspiracy, Class C felony, and thus reversal was required. *United States v Cardenas* (1990, CA2 NY) 917 F2d 683.

Required penalty for conspiracy to distribute over 500 grams of cocaine of at least four years supervisory release is limited by 18 USCS § 3583(b)(1), which does not permit supervisory release longer than 5 years, and thus court erred in sentencing conspiracy defendant to six year period of supervised release. *United States v Esparsen* (1991, CA10 NM) 930 F2d 1461, 32 Fed Rules Evid Serv 1191, cert den (1992) 502 US 1036, 116 L Ed 2d 786, 112 S Ct 882 and cert den (1992, US) 112 S Ct 882.

Ten year supervised release term for drug offender was expressly permitted by 21 USCS § 841(b)(1)(A), which required a supervised release term of at least 5 years, and by 18 USCS § 3583(b), which authorizes supervised release term of not more than 5 years "except as otherwise provided", and 10 year term did not conflict with § 5D1.2(a); 21 USCS § 841(b)(1)(A) and § 5D1.2 are easily reconciled if supervised release term authorized in § 5D1.2 is construed as guidelines range--3 to 5 years--that is subject to same departure as imprisonment range. *United States v LeMay* (1991, CA8 Minn) 952 F2d 995.

Court committed clear error in sentencing defendant to five years supervised release since defendant's offense of possession with intent to distribute cocaine base is Class C felony for which term of supervised release is limited to 3 years under 18 USCS § 3583, notwithstanding government's claim that § 5D1.2 applies to give guideline range of 3 to 5 years supervised release. *United States v Kelly* (1992, CA5 Tex) 974 F2d 22 (criticized in *United States v Orozco-Rodriguez* (1995, CA10 NM) 60 F3d 705) and (criticized in *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P) and (criticized in *United States v Heckard* (2001, CA10 NM) 238 F3d 1222, 2001 Colo J C A R 323, 56 Fed Rules Evid Serv 245) and (criticized in *United States v Sanchez* (2001, CA11 Ga) 269 F3d 1250, 14 FLW Fed C 1401) and (criticized in *United States v Sanchez-Gonzalez* (2002, CA3 Pa) 294 F3d 563) and (criticized in *United States v Cortes-Claudio* (2002, CA1 Puerto Rico) 312 F3d 17) and (superseded by statute as stated in *United States v Johnson* (2003, App DC) 356 US App DC 377, 331 F3d 962).

Court lacked authority to impose six year term of supervised release, which was mandatory minimum supervised release term for repeat drug offender, because no informational notice was filed as statutorily required; absent notice, defendant's crimes constituted Class C felonies for which no more than three years may be imposed under 18 USCS § 3583. *Suveges v United States* (1993, CA1 Me) 7 F3d 6 (criticized in *United States v Vanness* (1996, App DC) 318 US App DC 95, 85 F3d 661) and (criticized in *United States v Sanchez* (2001, CA11 Ga) 269 F3d 1250, 14 FLW Fed C 1401).

Imposition of five-year term of supervised release, which consisted of three years of "active supervised release" and two years of "inactive supervised release" was error, since it exceeded maximum period permitted by United States Code and Sentencing Guidelines. *United States v Ravoy* (1993, CA8 Minn) 994 F2d 1332.

Although written judgment stating that defendant shall be on supervised release for five years on Counts I and II to be served concurrently exceeded three year statutory maximum for Count II, unambiguous and conflicting oral sentence of five years supervised release on Count I and sixty months imprisonment on Count II controlled. *United States v Corey* (1993, CA10 Colo) 999 F2d 493, cert den (1993) 510 US 1001, 126 L Ed 2d 473, 114 S Ct 574 and post-conviction relief dismd (1997, CA10 Colo) 1997 Colo J C A R 3113 and (criticized in *United States v Barragan-Mendoza* (1999, CA9 Mont) 174 F3d 1024, 99 CDOS 2810, 99 Daily Journal DAR 3645, 43 FR Serv 3d 639) and (criticized in *United States v Austin* (2000, CA8 Ark) 217 F3d 595) and (criticized in *United States v Shank* (2005, CA4 Md) 395 F3d 466).

Five year term of supervised release to which defendant was sentenced exceeded statutory maximum for Class C felony under 18 USCS § 3583 and constituted plain error. *United States v Guzman-Bruno* (1994, CA9 Cal) 27 F3d 420, 94 CDOS 4643, 94 Daily Journal DAR 8606, amd (1994, CA9 Cal) 94 CDOS 7274 and reprinted as amd, remanded, in part (1994, CA9 Cal) 94 Daily Journal DAR 13399 (criticized in *United States v Perez-Perez* (2002, SD Iowa) 2002 US Dist LEXIS 16049) and (criticized in *United States v Olivares-Rangel* (2004, DC NM) 324 F Supp 2d 1218) and cert den (1994) 513 US 975, 130 L Ed 2d 360, 115 S Ct 451 and (criticized in *United States v Mendoza-Carrillo* (2000, DC SD) 107 F Supp 2d 1098) and (criticized in *United States v Guevara-Martinez* (2000, DC Neb) 2000 US Dist LEXIS 16131) and (criticized in *United States v Guevara-Martinez* (2001, CA8 Neb) 262 F3d 751).

Five year term of supervised release was excessive under 18 USCS § 3559 and § 3583, since maximum term for mail fraud conviction is five years where violation does not affect financial institution, and violation carrying maximum prison term of five years carries maximum term of supervised release of three years. *United States v Bauers* (1995, CA2 NY) 47 F3d 535.

Ten-year term of supervised release was not impermissible in sentencing drug defendant for offense under 21 USCS § 841(b)(B), since statute sets minimum term of supervised release of at least four years, and five year maximum for Class A or B felonies of 18 USCS § 3583(b)(1) did not apply to defendant's Class B felonies. *United States v Williams* (1995, CA2 NY) 65 F3d 301.

Defendant convicted of possessing with intent to distribute kilogram of phencyclidine (PCP), a Class C felony, properly received five-year term of supervised release, where statute provided for minimum term of three years, and version of § 5D1.2(a) in effect at time of defendant's sentencing required defendant to be sentenced to term of supervised release of not more than five years, or minimum period required by statute, whichever is greater, notwithstanding fact that 18 USCS § 3583(b)(2) sets maximum period of supervised release of three years for Class C felons. *United States v Garcia* (1997, CA9 Cal) 112 F3d 395, 97 CDOS 2888, 97 Daily Journal DAR 5075 (superseded by statute as stated in *United States v Johnson* (2003, App DC) 356 US App DC 377, 331 F3d 962).

District court's decision to impose five year term of supervised release on defendant as part of his original sentence was correct, because statute under which drug defendant was convicted, 21 USCS § 841(b)(1)(C), provides for term of "at least" 3 years, even though 18 USCS § 3583 limits maximum sentence for Class C felony to three years of supervised release; 21 USCS § 841(b)(1)(C) controls and supersedes provision of 18 USCS § 3583(b)(2). *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P, reh, en banc, den (1998, CA6) 1998 US App LEXIS 5554 and cert den (1998) 525 US 828, 142 L Ed 2d 61, 119 S Ct 77.

District court did not breach plea agreement by imposing five-year term of supervised release for Class B felony, although plea agreement misstated that three years was maximum term of supervised release, instead of five years under 18 USCS § 3583 and § 5D1.2, since it is apparent from reading plea agreement that term of supervised release represented a recitation and not an agreement. *United States v Cupit* (1999, CA8 Mo) 169 F3d 536, cert den (1999) 528 US 860, 145 L Ed 2d 126, 120 S Ct 149, reh den (1999) 528 US 1039, 145 L Ed 2d 443, 120 S Ct 568.

There was no plain error under Apprendi in sentencing defendant to five years of supervised release, which exceeded three-year maximum term authorized under 18 USCS § 3583, even though jury did not make drug quantity finding, since term of supervised release did not exceed maximum term of at least 3 years authorized under 21 USCS § 841. *United States v Scott* (2001, CA8 Minn) 243 F3d 1103, 56 Fed Rules Evid Serv 874, post-conviction relief den (2002, DC Minn) 2002 US Dist LEXIS 21645.

Because defendant's five year term of supervised release represents an enhanced penalty under 21 USCS § 841(b)(1)(B) but a quantity of drugs was not stated in indictment or submitted to a jury for a finding of proof beyond a reasonable doubt, district court plainly erred in sentencing defendant to five year supervised release, and since defendant may receive term of supervised release between two and three years, he is entitled to a corrected sentence. *United*

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States v Vasquez-Zamora (2001, CA5 Tex) 253 F3d 211 (criticized in *United States v Price* (2001, CA10 Okla) 265 F3d 1097, 2001 Colo J C A R 4626, 57 Fed Rules Evid Serv 366) and (criticized in *United States v Davis* (2003, CA11 Ala), 329 F3d 1250, 16 FLW Fed C 575).

Sentence of 120 months' imprisonment followed by eight years supervised release was not erroneous, even though defendant claimed he could only be sentenced to maximum of four years of supervised release because no particular quantity of marijuana was charged, since sentence did not exceed statutory maximum; defendant faced "at least four years" of supervised release under 21 USCS § 841, and due to his prior felony, defendant was not subject to four year sentence of supervised release under 18 USCS § 3583(b). *United States v Combs* (2001, CA10 NM) 267 F3d 1167, post-conviction relief den (2003, CA10 NM) 60 Fed Appx 198.

Defendant's challenge to his failure to receive credit for time served pursuant to 18 USCS § 3583(b) was not ripe for judicial review because Attorney General, through Bureau of Prisons, was authorized to compute sentence credit awards after sentence; thus, defendant was required to exhaust administrative remedies before seeking relief. *United States v Williams* (2005, CA11 Fla) 425 F3d 987, 18 FLW Fed C 976.

District court's imposition of lifelong term of supervised release did not constitute cruel and unusual punishment with regard to two of defendant's three child pornography convictions; term of supervised release was not disproportionate to convictions because defendant had engaged in pattern of sexually abusing children and had propensity for child pornography. *United States v Moriarty* (2005, CA11 Fla) 429 F3d 1012.

District court's imposition of lifelong term of supervised release for defendant's conviction for violating 18 USCS § 1466A(a)(1) and (2) had to be vacated; because 18 USCS § 3583(k) did not authorize lifelong term of supervised release for violations of 18 USCS § 1466A, maximum term of supervised release for defendant's violation, Class C felony, was three years. *United States v Moriarty* (2005, CA11 Fla) 429 F3d 1012.

Court of appeals found that district court did not act unreasonably when it ordered defendant who pled guilty to knowingly transporting child pornography in interstate commerce, in violation of 18 USCS § 2252A, to be placed on supervised release for remainder of his life, after he was released from prison, because defendant was convicted in state court of sexually abusing 12-year-old girl more than year after events which gave rise to his conviction in federal district court, so he had already crossed line from distributing child pornography to molesting children. *United States v Hayes* (2006, CA2 NY) 445 F3d 536.

Bank fraud defendant was improperly sentenced to term of five years of supervised release on each of two counts of which she was convicted, since conviction for uttering was a Class C felony and maximum authorized term of supervised release for a Class C felony is three years. *United States v Breedlove* (2000, App DC) 340 US App DC 229, 204 F3d 267.

Unpublished Opinions

Unpublished: Inmate, who pleaded guilty to bank robbery in violation of 18 USCS § 2113(d), was not entitled to relief under 28 USCS § 2255; counsel was not ineffective for failing to move for downward departure under 18 USCS § 3553(b)(1) and USSG § 5K2.0 to reflect time spent in home confinement, as inmate was not entitled to credit for home confinement under 18 USCS § 3585(b) and departure would not have been warranted; counsel was also not ineffective for failing to challenge 60-month term of supervised release that was properly imposed under 18 USCS § 3583; there was no Apprendi violation given that inmate's sentence of 60 months' imprisonment plus term of supervised release was substantially below 25-year maximum under 18 USCS § 2113(d). *O'Shea v United States* (2005, DC NJ) 2005 US Dist LEXIS 32908.

10. Miscellaneous

Court unlawfully delegated to probation officer court's authority under 18 USCS § 3583 to determine number of drug tests during supervised release. *United States v Bonanno* (1998, CA7 Ill) 146 F3d 502, reh den (1998, CA7 Ill) 1998 US App LEXIS 15776.

Upward departure with respect to term of supervised release as hedge against downward departure affecting term of imprisonment was not error in view of early start to defendant's criminal career and fact his law abiding years largely coincided with previous term of imprisonment, despite defendant's claim upward departure was fatally inconsistent with downward departure; there is no doubt that imprisonment is most reliable check on recidivism, but it is just as clear that

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in certain cases supervised release is a more reliable way to achieve just punishment and rehabilitation. *United States v Rivera* (1999, CA2 Conn) 192 F3d 81.

Without clear indication of supervised release condition's purpose, court cannot evaluate whether condition involves "greater deprivation of liberty than is reasonably necessary" under 18 USCS § 3583(d)(2). *United States v Myers* (2005, CA2 NY) 426 F3d 117.

Federal prisoner's sentence of 12 months' imprisonment followed by one year of supervised release on 21 USCS § 844(a) conviction of misdemeanor possession of marijuana and heroin was affirmed where recent caselaw did not change rule that term of supervised release could be imposed in addition to statutory maximum term of imprisonment and fact that no additional prison time could have been imposed if appellant violated supervised release did not make her sentence illegal given that 18 USCS § 3583(e)(2) and (e)(4) contemplated that re-imprisonment was not only possible punishment for violation of post-release supervision. *United States v Cenna* (2006, CA11 Ga) 448 F3d 1279, 19 FLW Fed C 540.

Supervised release is part of defendant's sentence, and, like imprisonment, restricts defendant's liberty and fundamental rights; as result, when government seeks to restrict defendant's liberty through term of supervised release, it shoulders burden of proving, pursuant to 18 USCS § 3583, that particular condition of supervised release involves no greater deprivation of liberty than is reasonably necessary to serve goals of supervised release. *United States v Weber* (2006, CA9 Cal) 451 F3d 552.

Defendant did not have to refuse to abide by condition of supervised release to challenge its legality under 18 USCS § 3583 on direct appeal from imposition of sentence; that is, jurisdictional prerequisite of ripeness did not require violation of specified supervised release condition to permit appellate review. *United States v Weber* (2006, CA9 Cal) 451 F3d 552.

Initial search of storage closet was lawful pursuant to 18 USCS § 3583, regardless of whether or not warrant was obtained, where there was knowledge of prior and informant information about ongoing distribution of meperidine syringes, because there was both probable cause and reasonable suspicion that there were drugs on premises and that resident had violated conditions of his supervised release. *United States v Sorenson* (1998, DC Utah) 28 F Supp 2d 1310.

Unpublished Opinions

Unpublished: Where nothing in record indicated classification of defendant's conviction for possession with intent to distribute marijuana in violation of 21 USCS § 841(a)(1), appeals court could not determine whether 24-month sentence imposed upon revocation of defendant's supervised release was proper under 18 USCS §§ 3559(a) and 3583(e); limited remand was necessary. *United States v Rocha* (2006, CA5 Tex) 2006 US App LEXIS 1913.

Unpublished: Where defendant had served his sentence, his appeal of his sentence was not moot as district court had authority to modify conditions of supervised release pursuant to 18 USCS § 3583(e)(2) or, after expiration of one year of supervised release, to terminate his supervised release obligations pursuant to 18 USCS § 3583(e)(1). *United States v Rodriguez-Munoz* (2006, CA5 Tex) 2006 US App LEXIS 10900.

Unpublished: Where, before sentencing, defendant objected to many, but not all, of special conditions of supervised release imposed by district court, those conditions to which he objected below were reviewed for abuse of discretion; remainder were reviewed for plain error. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: Court rejected defendant's argument that district court imposed 19 special conditions on defendant during his supervised release only because district court followed "categorical" policy of imposing special conditions in cases of child pornography; district court considered particularized submissions from Probation Office and parties, including defendant's objections to proposed conditions of supervised release, gave defendant additional opportunity to argue his case after informing defendant that his arguments had failed, and, in fact, amended residency restriction to accommodate defendant's objection. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: Appeal of sentence to 13-month term of imprisonment and 1-year term of supervised release on conviction under 8 USCS § 1326(a) was not rendered moot by defendant's release, because term of supervised release had not yet elapsed, and legally that term could be reduced under 18 USCS § 3583(b)(3). *United States v Martinez-Ventura* (2005, CA4 NC) 138 Fed Appx 525.

Unpublished: Since supervised release, while form of post-imprisonment supervision, was still considered to be component of defendant's total sentence, his Booker challenge still presented case or controversy even though he had been released from prison as he was still subject to supervised release. *United States v Abney* (2005, CA5 Tex) 131 Fed Appx 445, cert den (2005, US) 126 S Ct 289, 163 L Ed 2d 254, reh den (2005, US) 126 S Ct 726, 163 L Ed 2d 623.

II. RELATIONSHIP TO OTHER LAWS 11. 18 USCS § 3553

Downward departure from guideline range of 130-162 months imprisonment to mandatory minimum prison term of 60 months, with ten years of supervised release, so that defendant could enter drug treatment program to which he had been admitted, would be reasonable sentence under 18 USCS § 3742 and account for need to avoid risk of unwarranted sentence disparities pursuant to 18 USCS § 3553(a)(6), if on remand court imposed special conditions of supervised release that would ensure that defendant would serve at least his guideline minimum sentence in the event that he did not successfully complete drug treatment program. *United States v Williams* (1995, CA2 NY) 65 F3d 301.

District court considered factors under 18 USCS § 3553(a) in revoking defendant's supervised release under 18 USCS § 3583 and imposing 30-month sentence, even though court did not mention need to avoid unwarranted disparities between similarly situated defendants; court considered nature and circumstances of defendant's offense, his own history and characteristics, and need for sentence that would deter similar conduct *United States v Hale* (1997, CA7 Ill) 107 F3d 526.

Case would be remanded where district court failed to state reason pursuant to 18 USCS § 3553(c) for imposing, in addition to prison term, a three-year term of supervised release under 18 USCS § 3583, when none is required by statute, or for deciding that defendant must serve first six months of that release in home confinement pursuant to 18 USCS § 3563; it is not appropriate to assume that sentencing court's reason for imposing prison term likewise extends to its decision regarding supervised release and home confinement. *United States v Zanghi* (2000, CA10 Colo) 209 F3d 1201, 2000 Colo J C A R 2085.

Where district court, pursuant to 18 USCS § 3583, imposed conditions on defendant's supervised release, including that defendant pay child support as ordered by state authorities and participate in program for mental health treatment, appellate court held that (1) defendant had sufficient notice that such conditions might be imposed, (2) defendant's long record of violent incidents supported district court's conclusion that defendant needed mental health counseling, (3) defendant's \$ 7,890 debt for child support validated district court's imposition of condition that child support payments be made; and (4) conditions imposed reasonably related to other factors listed in 18 USCS § 3553(a), including needs to deter future criminal conduct, to protect public from future crimes, and to provide defendant with needed medical care; thus, sentence was affirmed. *United States v Barajas* (2003, CA10 Kan) 331 F3d 1141.

18 USCS § 3583(e) simply requires consideration of enumerated subsections of 18 USCS § 3553(a), without forbidding consideration of other pertinent factors. *United States v Williams* (2006, CA2 NY) 443 F3d 35.

18 USCS § 3583(e)(3), while requiring consideration of enumerated subsections of 18 USCS § 3553(a), did not forbid consideration of other pertinent factors when determining whether to revoke supervised release, including seriousness of offense; first, it did not seem likely that, in order to impose sentence that would provide adequate deterrence and protection of public from defendant's further crimes in light of nature and circumstances of offense, court could possibly ignore seriousness of defendant's offense; and second, legislative history of § 3553(a)(1) supported interpretation of § 3583 that allowed court to properly consider seriousness of offense when sentencing defendant for violation of supervised release. *United States v Williams* (2006, CA2 NY) 443 F3d 35.

18 USCS § 3583(e) specifically omits 18 USCS § 3553(a)(2)(A), which provides for consideration of need for sentence imposed to reflect seriousness of offense, to promote respect for law, and to provide just punishment for offense; given that § 3553(a)(2)(A) is factor that Congress deliberately omitted from list applicable to revocation sentencing, relying on that factor when imposing revocation sentence would be improper. *United States v Miqbel* (2006, CA9 Cal) 444 F3d 1173.

Sentence was vacated because, while district court correctly identified and was aware of relevant 18 USCS § 3553(a)(2)(B)-(D) sentencing factors, sentence imposed--five years imprisonment and no supervised release after defendant pleaded guilty to use of Internet to attempt to entice minor between twelve and fifteen years of age to engage in sexual activity, in violation of 18 USCS § 2422(b)--did not reflect these considerations; because sentence failed to reflect any of these statutory goals, and because district court substantially deviated from advisory Sentencing Guidelines range without articulating valid, fact-specific reasons for doing so, sentence was unreasonable insofar as it lacked term of supervised release. *United States v Armendariz* (2006, CA5 Tex) 451 F3d 352.

Sentencing Commission guideline making supervised release following imprisonment mandatory in many cases and imposing supervision for specified terms is proper under 18 USCS §§ 3553(a) and 3583(a), (c) and 28 USCS § 994(a)(1)(C), and thus convict's prison sentence is proper, because none of these sections, alone or together, give rise to claim that in all cases guidelines must permit judge to dispense with post-release supervision. *United States v Mendez* (1988, SD NY) 691 F Supp 656.

Unpublished Opinions

Unpublished: Sentence following revocation of supervised release pursuant to 18 USCS § 3583(e) was reasonable in light of factors set out in 18 USCS § 3553(a); district court properly considered defendant's personal characteristics, circumstances of violations of her supervised release, and need for sentence to address defendant's substance abuse problems. *United States v Morales* (2006, CA9 Cal) 2006 US App LEXIS 20183.

Unpublished: Where district court did not explicitly mention 18 USCS § 3553(a) factors, but they were included in report and recommendation from probation officer and were implicated in arguments of parties before court, appellate court was satisfied that § 3553(a) factors were considered by district court in imposing 13-month sentence for defendant's violation of terms of his supervised release. *United States v Nunez* (2006, CA11 Fla) 2006 US App LEXIS 26974.

Unpublished: Defendant's sentence following revocation of supervised release, pursuant to 18 USCS § 3583(e), was affirmed because, inter alia, sentence was legally imposed and district court properly considered 18 USCS § 3553(a) factors; defendant's sentence was reasonable. *United States v Daniels* (2005, CA11 Fla) 154 Fed Appx 883.

Unpublished: Defendant's two-year sentence following revocation of his supervised release was affirmed because, even though district court did not explicitly reference every factor listed in 18 USCS § 3553(a) before imposing sentence, it did explicitly mention: (1) deterrence, (2) need to protect society, and (3) maximum sentence suggested by guidelines and accompanying policy statement, while stating, that for all reasons set forth in statute, two years was appropriate in case. *United States v Lackey* (2005, CA11 Ga) 155 Fed Appx 482.

12. 18 USCS § 3563

District court's decision to revoke supervised release did not affect defendant's obligation to pay restitution under VWPA because obligation was authorized under 18 USCS §§ 3551, 3556 as element of sentence of conviction rather than as discretionary condition of supervised release or probation pursuant to 18 USCS §§ 3583, 3563. *United States v Webb* (1994, CA6 Ky) 30 F3d 687, 1994 FED App 263P.

Defendant convicted of selling unregistered securities and for acting as unregistered broker or dealer was properly ordered to pay restitution totaling \$ 1,997,003 to investment scam victims in context of supervised release, in light of evidence that defendant was involved in common plan or scheme to defraud investors; 18 USCS §§ 3583(d) and 3563(b) permit restitution award regardless of limitations set out in 18 USCS § 3663(a). *United States v Dahlstrom* (1999, CA5 Tex) 180 F3d 677, reh den (1999, CA5 Tex) 1999 US App LEXIS 22031 and cert den (2000) 529 US 1036, 146 L Ed 2d 345, 120 S Ct 1530, reh den (2000) 529 US 1124, 146 L Ed 2d 822, 120 S Ct 1999.

District court had authority to impose confinement in a community treatment center or halfway house for rehabilitative purposes as condition of supervised release; absence of a reference in 18 USCS § 3583(d) to the subsection of 18 USCS § 3563(b) that authorizes community confinement for rehabilitative purposes was an inadvertent clerical error made twelve years after enactment of § 3583(d). *United States v Bahe* (2000, CA9 Ariz) 201 F3d 1124, 2000 CDOS 187, 2000 Daily Journal DAR 279, cert den (2000) 531 US 1027, 148 L Ed 2d 514, 121 S Ct 601 and (criticized in *United States v Mills* (2002, ED Wis) 186 F Supp 2d 965) and (criticized in *United States v Barrett* (2002, SD Iowa) 198 F Supp 2d 1046).

Case would be remanded where district court failed to state reason pursuant to 18 USCS § 3553(c) for imposing, in addition to prison term, a three-year term of supervised release under 18 USCS § 3583, when none is required by statute, or for deciding that defendant must serve first six months of that release in home confinement pursuant to 18 USCS § 3563; it is not appropriate to assume that sentencing court's reason for imposing prison term likewise extends to its decision regarding supervised release and home confinement. *United States v Zanghi* (2000, CA10 Colo) 209 F3d 1201, 2000 Colo J C A R 2085.

Both Eighth Circuit and Ninth Circuit hold that community confinement remains authorized condition of supervised release under 18 USCS § 3583(d), despite omission of accurate reference to current community confinement provision, 18 USCS § 3563(b)(11); both courts hold that omission of cross-reference is result of inadvertent clerical error

18 USCS § 3583

caused by changes made to, and renumbering of, 18 USCS § 3563(b)(11), occurring 12 years after 18 USCS § 3583(d) was enacted; both conclude that, despite that clerical error, district court retains authority to impose community confinement as condition of supervised release. *United States v D'Amario* (2005, CA1 RI) 412 F3d 253.

District court's previous decision to require defendant to serve 120 days in community corrections facility was not made as prison sentence, but had in fact been made as condition of supervised release for earlier conviction, as contemplated by 18 USCS § 3563(b). *United States v Del Barrio* (2005, CA5 Tex) 427 F3d 280.

For proving drug possession under 18 USCS § 3583 to justify revocation of supervised release, drug use indicated by urinalysis is only circumstantial evidence of drug possession. *United States v Roman* (2001, ED Pa) 133 F Supp 2d 378.

18 USCS § 3583 applies to modification of terms of supervised release that are to be served after period of imprisonment; 18 USCS § 3563 gives court authority, in certain cases, to modify probation. *United States v Hamburger* (2006, ED NY) 414 F Supp 2d 219.

13. 21 USCS § 841

Court did not violate 18 USCS § 3583(b) when it sentenced narcotics defendant to lifetime term of supervised release, where minimum supervised release term of five years specified for violation of 21 USCS § 841(b)(1)(A) was same as maximum specified in 18 USCS § 3583(b); Congress intended statutory sentencing authority to override limitation in § 3583(b). *United States v Eng* (1994, CA2 NY) 14 F3d 165, cert den (1994) 513 US 807, 130 L Ed 2d 13, 115 S Ct 54.

District court's decision to impose five year term of supervised release on defendant as part of his original sentence was correct, because statute under which drug defendant was convicted, 21 USCS § 841(b)(1)(C), provides for term of "at least" 3 years, even though 18 USCS § 3583 limits maximum sentence for Class C felony to three years of supervised release; 21 USCS § 841(b)(1)(C) controls and supersedes provision of 18 USCS § 3583(b)(2). *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P, reh, en banc, den (1998, CA6) 1998 US App LEXIS 5554 and cert den (1998) 525 US 828, 142 L Ed 2d 61, 119 S Ct 77.

District court could not have committed plain error in imposing terms of supervised release for cocaine offense, a Class C felony, in excess of 3 years, regardless of quantity of drugs involved, where there is no Supreme Court or Eleventh Circuit precedent on issue of whether maximum term of supervised release is three years under 21 USCS § 841 and 18 USCS § 3583 and circuits that have addressed the issue are split, with a majority resolving it against defendants' position. *United States v Gerrow* (2000, CA11 Fla) 232 F3d 831, 14 FLW Fed C 140, cert den (2001) 534 US 830, 151 L Ed 2d 40, 122 S Ct 75 and cert den (2001) 534 US 830, 151 L Ed 2d 40, 122 S Ct 75 and (ovrld in part by *United States v Sanchez* (2001, CA11 Ga) 269 F3d 1250, 14 FLW Fed C 1401).

Where a statute's mandatory minimum term of supervised release is the same as, or exceeds, 18 USCS § 3583's maximum terms, § 3583's maximum terms do not apply, and thus § 3583, which provides for three year maximum for a Class C felony except as otherwise provided, does not apply to defendant's five-year term of supervised release under 21 USCS § 841(b)(1)(C), since statute provides for term of supervised release of "at least three years." *United States v Pratt* (2001, CA4 SC) 239 F3d 640, 56 Fed Rules Evid Serv 688.

There was no plain error under Apprendi in sentencing defendant to five years of supervised release, which exceeded three-year maximum term authorized under 18 USCS § 3583, even though jury did not make drug quantity finding, since term of supervised release did not exceed maximum term of at least 3 years authorized under 21 USCS § 841. *United States v Scott* (2001, CA8 Minn) 243 F3d 1103, 56 Fed Rules Evid Serv 874, post-conviction relief den (2002, DC Minn) 2002 US Dist LEXIS 21645.

District court erred by employing preponderance of evidence standard of proof to determine amount of marijuana attributable to defendant convicted of conspiracy to distribute marijuana, since court's finding increased statutory maximum penalty from five years to forty years under 21 USCS § 841, and error was not harmless, even though defendant was sentenced to only five years in prison, since supervised release is part of a sentence, and defendant was sentenced to four-year term of supervised release, which was in excess of three year maximum for Class D felony authorized by 18 USCS § 3583. *United States v Velasco-Heredia* (2001, CA9 Cal) 249 F3d 963, 2001 CDOS 3730, 2001 Daily Journal DAR 4607, op withdrawn (2001, CA9 Cal) 264 F3d 1150 and substituted op (2003, CA9 Cal) 319 F3d 1080, 2003 CDOS 607, 2003 Daily Journal DAR 753.

18 USCS § 3583

18 USCS § 3583(b)(2), which limits term of supervised release for Class C felony to not more than three years except as otherwise provided, does not limit term of supervised release of "at least three years" authorized in 21 USCS § 841(b)(1)(C), and thus four-year terms of supervised release were authorized under § 841(b)(1)(C). *United States v Sanchez* (2001, CA11 Ga) 269 F3d 1250, 14 FLW Fed C 1401, cert den (2002) 535 US 942, 152 L Ed 2d 234, 122 S Ct 1327 and (criticized in *United States v Gutierrez Rodriguez* (2002, CA2 Conn) 288 F3d 472) and (criticized in *State v Benenati* (2002, App) 203 Ariz 235, 52 P3d 804, 381 Ariz Adv Rep 3).

Since maximum terms of supervised release set out in 18 USCS § 3583(b) apply only "except as otherwise provided," and since 21 USCS § 841 otherwise provides for greater terms of supervised release, imposition of term of supervised release under § 841 which is greater than that permitted by 18 USCS § 3583 does not exceed permissible maximum term. *United States v Sanchez-Gonzalez* (2002, CA3 Pa) 294 F3d 563.

Court of Appeals for First Circuit joined majority of other circuits in finding that 18 USCS § 3583(b) does not limit length of supervised release terms in cases under 21 USCS § 841. *United States v Cortes-Claudio* (2002, CA1 Puerto Rico) 312 F3d 17.

Although government conceded that its failure to include drug quantity in indictment, fact that increased statutory maximum sentence, was erroneous under reasoning of Apprendi, error did not seriously affect fairness, integrity, or public reputation of judicial proceedings and did not rise to level of remediable plain error, where, inter alia, it was undisputed that defendant's truck contained over 150 kilograms of marijuana, and defendant admitted as much in statement produced by his attorney. *United States v Mendoza-Gonzalez* (2003, CA5 Tex) 318 F3d 663, cert den (2003) 538 US 1049, 155 L Ed 2d 1091, 123 S Ct 2114.

"At least" language in 21 USCS § 841(b)(1)(B) establishes mandatory minimum term of supervised release, but no maximum, and 18 USCS § 3583(b) does not limit length of supervised release terms in cases under 21 USCS § 841; consequently, maximum term of supervised release that sentencing court can impose ranges from mandatory minimum set forth in 21 USCS § 841(b) up to life. *United States v Nieves* (2003, CA1 Mass) 322 F3d 51, cert den (2003) 538 US 1049, 155 L Ed 2d 1091, 123 S Ct 2114.

In parolee's challenge of reimposition of his special parole by U.S. Parole Commission following revocation, special parole statute, 21 USCS § 841(c), and supervised release statute, 18 USCS § 3583, were interpreted together because supervised release replaced special parole and two statutes used substantially similar language; because prior court of appeals case argued by parolee to support his position was abrogated by later Supreme Court case, Commission could reimpose special parole following revocation and incarceration pursuant to 21 USCS § 841(c). *Rich v Maranville* (2004, CA2 Vt) 369 F3d 83, cert den (2004, US) 160 L Ed 2d 193, 125 S Ct 233.

District court did not err in denying defendant's motion to dismiss indictment on ground that 21 USCS § 841(b) violated federal statutory provisions by authorizing term of supervised release as part of sentence because there was no merit to argument that 18 USCS § 3583 only authorized supervised release as component of maximum term of imprisonment; further, defendant's crime was governed by 21 USCS § 841(b), which required both imprisonment and supervised release and which dictated separate terms for each, and term of supervised release imposed upon defendant's conviction did not come out of maximum prison sentence. *United States v Postley* (2006, CA8 Iowa) 449 F3d 831.

14. Assimilative Crimes Act

District court had authority to impose term of supervised release upon revocation of probation that defendant received under Assimilative Crimes Act for driving while impaired on army base in violation of North Carolina law, even though supervised release was not available sentencing alternative under North Carolina law, since state law provided for parole eligibility, and supervised release is a "like punishment" as required by ACA. *United States v Pierce* (1996, CA4 NC) 75 F3d 173.

Although term of incarceration imposed upon defendant convicted under Assimilative Crimes Act may not exceed that provided by state substantive law, total sentence imposed, consisting of term of incarceration followed by period of supervised release, may exceed maximum term of incarceration provided for by state law, and thus defendant was properly sentenced to custodial sentence of 12 months and one year period of supervised release pursuant to 18 USCS § 3583(a), even though maximum term of incarceration court could impose under state law for attempted indecent exposure on Indian reservation was one year. *United States v Engelhorn* (1997, CA8 SD) 122 F3d 508.

15. U.S. Sentencing Guidelines

18 USCS § 3583

Imposition of mandatory term of supervised release and minimum term of supervised release under sentencing guidelines' does not conflict with 18 USCS § 3583 so as to render them invalid. *United States v West* (1990, CA11 Fla) 898 F2d 1493, 30 Fed Rules Evid Serv 155, cert den (1991) 498 US 1030, 112 L Ed 2d 676, 111 S Ct 685.

Guidelines §§ 5D1.1 and 5D1.2 can be read consistently with 18 USCS § 3583, although Sentencing Guidelines impose mandatory minimum term of supervised release and Sentencing Reform Act permits optional term, since guidelines allow for departure if trial judge determines no post release supervision is necessary. *United States v Chinske* (1992, CA9 Mont) 978 F2d 557, 92 CDOS 8990, 92 Daily Journal DAR 14862.

Court did not exceed its authority under 18 USCS § 3583 by imposing on defendant both 13 month sentence of imprisonment for violating his supervised release and four month sentence, which represented unserved portion of his work release program; language of statute did not conflict with policy statements § 7B1.3 or § 7A1.3. *United States v Levi* (1993, CA8 Mo) 2 F3d 842, reh, en banc, den (1993, CA8 Mo) 1993 US App-LEXIS 27131.

Deportation does not terminate sentence of supervised release, and thus district court did not err in adding two points pursuant to § 4A1.1(d) for defendant's illegally reentering U.S. while on supervised release, even though he had been deported. *United States v Akinyemi* (1997, CA7 Ill) 108 F3d 777.

Defendant convicted of possessing with intent to distribute kilogram of phencyclidine (PCP), a Class C felony, properly received five-year term of supervised release, where statute provided for minimum term of three years, and version of § 5D1.2(a) in effect at time of defendant's sentencing required defendant to be sentenced to term of supervised release of not more than five years, or minimum period required by statute, whichever is greater, notwithstanding fact that 18 USCS § 3583(b)(2) sets maximum period of supervised release of three years for Class C felons. *United States v Garcia* (1997, CA9 Cal) 112 F3d 395, 97 CDOS 2888, 97 Daily Journal DAR 5075 (superseded by statute as stated in *United States v Johnson* (2003, App DC) 356 US App DC 377, 331 F3d 962).

It was not a "plainly unreasonable" for district judge to deviate from applicable range set forth in § 7B1.4(a) and impose two-year sentence, the maximum allowed under 18 USCS § 3583, for defendant's repeated contemptuous conduct in violating his supervised release, notwithstanding defendant's claim that sentence was based upon mischaracterization of record and unsupported factual assumptions, and was not exacted pursuant to incremental approach. *United States v Marvin* (1998, CA7 Wis) 135 F3d 1129.

District court did not commit plain error when it sentenced defendant to the 24-month statutory maximum term of imprisonment authorized by 18 USCS § 3583 upon revocation of her supervised release, where court explicitly mentioned chapter seven guidelines and decided that sentence they recommended was inadequate. *United States v Aguillard* (2000, CA11 Ala) 217 F3d 1319, 13 FLW Fed C 846.

Defendant's drug possession was treated as Grade B violation under U.S. Sentencing Guidelines Manual § 7B1.1 because Guidelines placed violations of state law on equal footing with violations of federal law when deciding whether to revoke supervised release. *United States v Jolibois* (2002, CA9 Wash) 294 F3d 1110, 2002 CDOS 5608, 2002 Daily Journal DAR 7089.

Procedure for revocation of supervised release and imposition of prison term is governed not by U.S. Sentencing Guidelines, but by 18 USCS § 3583(e), which cabins term of incarceration permitted in consequence of supervised release violation with reference to offense of conviction. *United States v McInnis* (2005, CA1 Me) 429 F3d 1.

Defendant's appeal from imposition of four-level enhancement under USSG § 2K2.1(b)(5) was dismissed as moot because (1) defendant had completed his prison sentence and had just begun his term of supervised release, and decision in his favor would yield no effectual relief, (2) there was every indication in record that district court would not reduce defendant's term of supervised release on remand as transcript of sentencing revealed court's design to keep as close eye on defendant as possible for as long as possible, and (3) there was little reason to suppose that district court might reduce defendant's term of supervised release, to which Sentencing Guidelines calculations had limited relevance, pursuant to 18 USCS § 3583(c), in light of possible correction as to applicability of USSG § 2K2.1(b)(5) enhancement. *United States v Blackburn* (2006, CA2 NY) 461 F3d 259.

Amendment of 18 USCS § 3553(a)(4)(B) in 1994, which added phrase "or policy statements," did not render Sentencing Guideline § 7B1.4 policy statement binding on sentencing courts; thus, when resentencing defendant for violating terms of supervised release, district court may impose up to maximum sentence of imprisonment allowed by 18 USCS § 3583(e)(3). *United States v Bruce* (2002, App DC) 350 US App DC 417, 285 F3d 69.

18 USCS § 3583

Sentencing Commission guideline making supervised release following imprisonment mandatory in many cases and imposing supervision for specified terms is proper under 18 USCS §§ 3553(a) and 3583(a), (c) and 28 USCS § 994(a)(1)(C), and thus convict's prison sentence is proper, because none of these sections, alone or together, give rise to claim that in all cases guidelines must permit judge to dispense with post-release supervision. *United States v Mendez* (1988, SD NY) 691 F Supp 656.

Court's revocation of defendant's supervised release and imposition of prison sentence of 12 months without any additional supervised release was consistent with court's finding that defendant could be sentenced up to maximum of 3 years under 18 USCS § 3583(e)(3), because original offense was Class B felony, and with finding under USSG Manual § 7B1.3(c)(1) that recommended range should be 6 to 12 months when defendant's criminal history was category IV and defendant had committed Grade C violations. *United States v Thompson* (2003, ED Pa) 240 F Supp 2d 325.

Treatment of revocation of probation under U.S. Sentencing Guidelines Manual was advisory rather than mandatory, and district court could impose prison sentence that was in conformance with 18 USCS § 3583 when it found grounds for revocation of defendant's probation. *United States v Bibbs* (2003, ED Pa) 252 F Supp 2d 170.

Following amendments to 18 USCS § 3583, supervised release provisions of USSG are advisory rather than mandatory. *United States v Rafeh* (2003, ED Pa) 274 F Supp 2d 690.

Unpublished Opinions

Unpublished: Where district court revoked defendant's supervised release and sentenced him to 24 months imprisonment pursuant to 18 USCS § 3583(e)(3) instead of 5-11 months set forth on USSG § 7B1.4(a), there was no abuse of discretion because district court was not required to apply recommended range of 5-11 months since it explicitly mentioned Chapter 7 guidelines of U.S. Sentencing Guidelines Manual and decided that recommended sentence was inadequate. *United States v Richardson* (2005, CA11 Ala) 133 Fed Appx 604.

Unpublished: Court affirmed 24-month sentence imposed on defendant pursuant to 18 USCS § 3583(e)(3) following revocation of defendant's supervised release where recent United States Supreme Court decisions that rendered U.S. Sentencing Guidelines Manual advisory did not affect defendant's sentence; district court had discretion to impose sentence above advisory range suggested by Chapter 7 of U.S. Sentencing Guidelines Manual up to statutory maximum. *United States v Stafford* (2005, CA8 Ark) 132 Fed Appx 87.

Unpublished: Court affirmed revocation of defendant's supervised release and imposition of 24-month prison sentence; because defendant's original sentence included significant downward departure and defendant violated terms of his supervision twice before, district court's decision to impose sentence above range suggested in USSG § 7B1.4(a) was reasonable; additionally, district court's consideration of defendant's need for substance abuse treatment in determining length of sentence imposed on revocation was proper under 18 USCS § 3583. *United States v Williams* (2005, CA4 NC) 131 Fed Appx 955.

16. Miscellaneous

Drug possession proviso in 18 USCS § 3565(a) need not be construed in pari materia with parallel provision (18 USCS § 3583(g)), passed at same time, expressly providing that revocation sentence of not less than one-third of term of supervised release be served in prison. *United States v Granderson* (1994) 511 US 39, 127 L Ed 2d 611, 114 S Ct 1259, 94 CDOS 1989, 94 Daily Journal DAR 3669, 8 FLW Fed S 1.

Offense of making fraudulent income tax return for which authorized term of imprisonment is not more than three years is Class E felony and not Class D felony under 18 USCS § 3559, and since term of supervised release for Class E felony under 18 USCS § 3583 is not more than year and defendant received three year term, case must be vacated. *United States v Stokes* (1993, CA5 La) 998 F2d 279, 93-2 USTC P 50545, 72 AFTR 2d 5716, 93 TNT 181-31.

District court had authority under 18 USCS § 3583(a) to impose term of supervised release for conspiracy under pre-amendment 21 USCS § 846, which makes no provision for imposition of either supervised release or parole. *United States v Wagner* (1993, CA8 Iowa) 999 F2d 312.

District court's decision to revoke supervised release did not affect defendant's obligation to pay restitution under VWPA because obligation was authorized under 18 USCS §§ 3551, 3556 as element of sentence of conviction rather than as discretionary condition of supervised release or probation pursuant to 18 USCS §§ 3583, 3563. *United States v Webb* (1994, CA6 Ky) 30 F3d 687, 1994 FED App 263P.

18 USCS § 3583

Downward departure from guideline range of 130-162 months imprisonment to mandatory minimum prison term of 60 months, with ten years of supervised release, so that defendant could enter drug treatment program to which he had been admitted, would be reasonable sentence under 18 USCS § 3742 and account for need to avoid risk of unwarranted sentence disparities pursuant to 18 USCS § 3553(a)(6), if on remand court imposed special conditions of supervised release that would ensure that defendant would serve at least his guideline minimum sentence in the event that he did not successfully complete drug treatment program. *United States v Williams* (1995, CA2 NY) 65 F3d 301.

Because defendant's case was pending on effective date of 8 USCS § 1229a of the IIRIRA, which wholly abrogates district courts' authority to order deportations pursuant to 18 USCS § 3583, district court did not have authority to order defendant's deportation as condition of his supervised release. *United States v Mejia* (1998, CA11 Fla) 154 F3d 1297, 12 FLW Fed C 97.

District court could not order defendant to pay restitution to Social Security Administration for defendant's social security fraud convictions under 42 USCS § 408, since 18 USCS § 3663 does not include violations of Title 42, but if restitution is ordered as special condition of supervised release, order is permissible. *United States v Fore* (1999, CA2 NY) 169 F3d 104, cert den (1999) 527 US 1028, 144 L Ed 2d 783, 119 S Ct 2380.

Defendant convicted of selling unregistered securities and for acting as unregistered broker or dealer was properly ordered to pay restitution totaling \$ 1,997,003 to investment scam victims in context of supervised release, in light of evidence that defendant was involved in common plan or scheme to defraud investors; 18 USCS §§ 3583(d) and 3563(b) permit restitution award regardless of limitations set out in 18 USCS § 3663(a). *United States v Dahlstrom* (1999, CA5 Tex) 180 F3d 677, reh den (1999, CA5 Tex) 1999 US App LEXIS 22031 and cert den (2000) 529 US 1036, 146 L Ed 2d 345, 120 S Ct 1530, reh den (2000) 529 US 1124, 146 L Ed 2d 822, 120 S Ct 1999.

Upon revocation of defendant's supervised release, district court plainly erred in ordering as condition of new supervised release term that defendant pay restitution to persons whom defendant stole from when he absconded from supervised release; the VWPA, 18 USCS §§ 3556, 3663, authorizes restitution to compensate "victims of the offense," which has been interpreted to allow restitution only for losses caused by conduct underlying offense of conviction, and same limitation applies to orders as conditions of probation and supervised release pursuant to 18 USCS § 3583 because rules regarding probation and supervised release adopt the VWPA standard. *United States v Romines* (2000, CA11 Fla) 204 F3d 1067, 13 FLW Fed C 416.

Probation officer's motion, which informed court of defendant's violations of his supervised release conditions and recommended a course of action, was fully consistent with probation officer's statutorily mandated role pursuant to 18 USCS § 3603 as an assistant to the district court, despite defendant's claim that probation officer exceeded her statutory authority, violated separation of powers, and engaged in the unlicensed practice of law. *United States v Bermudez-Plaza* (2000, CA1 Puerto Rico) 221 F3d 231.

Trial court did not violate defendant's double jeopardy rights by imposing longer sentence when resentencing defendant, as it was also not clear that defendant had completed his sentence on that conviction at time of resentencing since defendant was still serving his term of "supervised release" imposed as part of his sentence, and, thus, defendant did not have legitimate expectation of finality until completion of supervised release. *United States v Radmall* (2003, CA9 Cal) 340 F3d 798, 2003 CDOS 7377, 2003 Daily Journal DAR 9253.

Where federal prisoner was placed on supervised release after filing 28 USCS § 2241 habeas petition, which challenged Bureau of Prisons' interpretation of maximum good time credit federal prisoner could receive under 18 USCS § 3624(b), issue was not rendered moot under U.S. Const. art. III, § 2, cl. 1 because there was possibility that prisoner could receive reduction in his term of supervised release under 18 USCS § 3583(e)(2). *Mujahid v Daniels* (2005, CA9 Or) 413 F3d 991.

In consolidated cases, where defendants' sentences for bank fraud and other offenses included restitution and supervised release, and where during revocation of supervised releases, restitution orders were remitted based on findings that it was impossible for defendants to satisfy their respective restitution orders, and where restitution orders were reinstated on appeal because restitution was mandatory under Mandatory Victim Restitution Act, 18 USCS § 3663A(a), thus, district court lacked authority to remit orders, reference to restitution in 18 USCS § 3583, which required district courts to consider 18 USCS § 3553(a) when imposing or revoking term of supervised release, did not grant district court power to remit previously imposed restitution orders. *United States v Roper* (2006, CA4 NC) 462 F3d 336.

Sentencing Guidelines promulgated under 28 USCS § 994 are not inconsistent with enabling statute, because (1) § 994(j) direction does not compel that probation be option in every first offender case except those involving crime of

violence that results in bodily injury, (2) Sentencing Commission's consideration of nature and capacity of penal facilities under § 994(g) cannot be gauged without extended evidence of prison capacities, projections of prison populations and expected effects of guidelines, and (3) ability of court to sentence outside guidelines eliminates inconsistency with options to impose supervised release and fine under 18 USCS §§ 3583 and 3571. *United States v Smith* (1988, WD Tenn) 686 F Supp 1246.

Sentencing Commission guideline making supervised release following imprisonment mandatory in many cases and imposing supervision for specified terms is proper under 18 USCS §§ 3553(a) and 3583(a), (c) and 28 USCS § 994(a)(1)(C), and thus convict's prison sentence is proper, because none of these sections, alone or together, give rise to claim that in all cases guidelines must permit judge to dispense with post-release supervision. *United States v Mendez* (1988, SD NY) 691 F Supp 656.

Where petitioner inmate sought writ of habeas corpus, arguing that Bureau of Prisons acted contrary to law in failing to place him in community confinement center (CCC) six months prior to expiration of his release date under 18 USCS § 3624(c) and that CCC was "place of imprisonment" within meaning of 18 USCS § 3621(b), examination of amendments made by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 203(2)(A), (B) (1996), and policies, statutes, and cases in context of release while on bail under 18 USCS § 3585(b), probation, under 18 USCS §§ 3561(b), 3563(b)(11), 3564(b), 3565(a), temporary release under 18 USCS § 3622, supervised release under 18 USCS § 3583(d), USSG, §§ 5C1.1, 5D1.3(e)(1), and designation of place of confinement after escape from custody and capture under 18 USCS § 4082(a), led to conclusion that CCC was not "penal or correctional facility" under 18 USCS § 3621(b) and decision not to transfer inmate was not disturbed. *Loeffler v Menifee* (2004, SD NY) 326 F Supp 2d 454 (criticized in *Schorr v Menifee* (2004, SD NY) 2004 US Dist LEXIS 10758) and (criticized in *Schoenfeld v Menifee* (2004, SD NY) 2004 US Dist LEXIS 12499) and (criticized in *Solomon v Zenk* (2004, ED NY) 2004 US Dist LEXIS 22136).

Federal district court lacked jurisdiction to hear prisoner's claims for relief from his federal conviction pursuant to 28 USCS § 2255 where prisoner was no longer in custody pursuant to his federal sentence when he filed his habeas application because (1) prisoner's term of supervised release was not tolled under 18 USCS § 3624(e) because it ended one year after his release from prison, notwithstanding his detention by immigration authorities during that period based on state conviction, and (2) tolling of prisoner's supervised release term would be inconsistent with 18 USCS § 3583(d). *Rafiu Ajadi Abimbola v United States* (2005, ED NY) 369 F Supp 2d 249.

Unpublished Opinions

Unpublished: When sentencing defendant for violation of period of supervised release, district court properly considered factors set forth in 18 USCS § 3553, 18 USCS § 3583 and U.S. Sentencing Guidelines Manual chapter 7, including defendant's lengthy criminal history and his history of committing violations when he was on supervised release; it was not plain error for district court to impose period of imprisonment, even if district court were under mistaken belief that imprisonment was mandatory, and there was no evidence that sentence would have been different if district court knew of availability of other options. *United States v Johnson* (2005, CA11 Fla) 135 Fed Appx 399.

III. AUTHORIZED CONDITIONS 17. Alcohol and drugs

Although there was no evidence linking alcohol consumption and conviction for unlawfully transporting explosive materials, and no concrete evidence of alcohol abuse, district court did not abuse its discretion in imposing condition that defendant abstain from use of alcohol and frequenting bars and other drinking establishments, given evidence of his propensity toward violence and his prior mental instability; and evidence that he abused his wife and children and that he and his wife consumed large quantities of alcohol on weekends when he was employed as truck driver. *United States v Cooper* (1999, CA8 Iowa) 171 F3d 582.

Total prohibition on drug trafficking defendant's purchase, use or distribution of alcohol was proper special condition of supervised release, since court was entitled to rely on evidence indicating that alcohol ban was necessary for defendant's total rehabilitation; defendant's personal history includes years of substance abuse, consisting largely of methamphetamine abuse along with infrequent use of cocaine and LSD. *United States v Behler* (1999, CA8 Neb) 187 F3d 772, reh, en banc, den (1999, CA8) 1999 US App LEXIS 25852.

District court may impose, as part of defendant's supervised release, condition that defendant refrain from consumption or possession of alcoholic beverages. *United States v Crose* (2002, CA8 Mo) 284 F3d 911.

District court abused its discretion by imposing special conditions on defendant's supervised release that defendant submit to testing and treatment for drug and alcohol abuse and abstain from consuming alcoholic beverages; record did not support imposition of such conditions, and defendant's failure to cooperate with presentence investigation did not authorize district court to impose whatever conditions it chose. *United States v Modena* (2002, CA6 Mich) 302 F3d 626, 59 Fed Rules Evid Serv 1129, 90 AFTR 2d 6225, 2002 FED App 305P, cert den (2003) 537 US 1145, 154 L Ed 2d 845, 123 S Ct 950.

Written sentencing judgment did not conflict with defendant's oral sentence as to special conditions of supervised release so as to require excising conditions in written judgment as matter of due process; district court specifically mentioned inpatient treatment at sentencing, so its inclusion in written judgment was consistent with oral sentence, requiring defendant to bear costs of drug treatment was consistent with court's intent that defendant attend treatment, that defendant comply with all rules and regulations of treatment agency was consistent with drug treatment condition ordered at sentencing, and condition of further drug-detection techniques in addition to those of treatment agency was standard condition ordered at sentencing. *United States v Vega* (2003, CA5 Tex) 332 F3d 849.

District court did not abuse its discretion by ordering specific condition on term of supervised release--that defendant not use cough syrups with codeine, NyQuil, or sleeping potions with drugs and alcohol without prescription--where medications contained chemicals that could be addictive and, considering defendant's history with drug abuse, court acted within its discretion by requiring prescriptions for such medications. *United States v Ferguson* (2004, CA5 Tex) 369 F3d 847.

Given that there was no evidence that tobacco and all over counter medications caused any violent or illegal conduct in defendant, condition was not reasonably related to his offense or history and involved greater deprivation of liberty than was reasonably necessary to deter criminal conduct and to protect public; thus, court vacated such condition of defendant's supervised release. *United States v Ferguson* (2004, CA5 Tex) 369 F3d 847.

Although district court should have given defendant prior notice, pursuant to *Fed. R. Crim. P. 32(h)*, that it was contemplating imposing total alcohol use ban as special condition of his supervised release, no plain error was shown arising from lack of notice or imposition of special condition: (1) district court's failure to provide prior notice did not constitute plain error because defendant's substantial rights were not effected, as he could apply to have alcohol ban condition modified at any time pursuant to *Fed. R. Crim. P. 32.1* and 18 USCS § 3583(e)(2); (2) although total alcohol ban went beyond alcohol consumption restrictions conditions enumerated in statutes, 18 USCS §§ 3563(b)(7), 3583(d), and USSG § 5D1.3(c)(7), district court had authority to impose condition because it was reasonably related to need to protect public from further crimes and need to provide defendant with rehabilitative treatment, as specified in 18 USCS § 3553(a)(2)(C), (D). *United States v McKissic* (2005, CA7 Ill) 428 F3d 719.

Unpublished Opinions

Unpublished: District court plainly erred when it precluded defendant's use of tobacco products where such prohibition was not reasonably related to defendant's crime of illegal reentry and, moreover, there was no evidence that tobacco use would prompt illegal behavior in defendant; because prohibition against tobacco use involved greater deprivation of liberty than was necessary to achieve deterrence and public safety, condition of supervised release prohibiting tobacco use was vacated; district court also plainly erred when it worded prohibition against drug use broadly and did not limit drug use prohibition to illegal or controlled substances, or to specific addictive over-the-counter medication; as it currently stood, condition included over-the-counter medication that was potentially stimulative or depressive, but was not necessarily reasonably related to defendant's offense or history; because condition that prohibited use of over-the-counter medication without consent of physician involved greater deprivation of liberty than was reasonably necessary to afford adequate deterrence of criminal conduct and protection of public, in contravention of 18 USCS § 3583, court remanded for resentencing on that condition of supervised release. *United States v Segura-Lara* (2006, CA5 Tex) 2006 US App LEXIS 5919.

Unpublished: Requirement that defendant receive testing and treatment for drug and alcohol abuse as condition of supervised release was reasonably related to dual goals of rehabilitation of defendant and protection of public since defendant admitted that he had been drinking since he was 16 and had been using marijuana since he was 18. *United States v Hill* (2005, CA6 Tenn) 150 Fed Appx 416.

Unpublished: Requirement, over objection, that defendant abstain from using alcohol and/or other intoxicants as condition of supervised release was error where there was no evidence that defendant ever used or abused alcohol or that alcohol played any role in crimes. *United States v Armstrong* (2005, CA9 Wash) 138 Fed Appx 953.

Unpublished: Defendant's premise that district court, which revoked his supervised release for second time because he failed to comply with reporting and drug-testing conditions, relied on 18 USCS § 3583(g) in revoking his release had no foundation in record; neither revocation petition, nor judgment, nor revocation hearing transcript included any allusion to § 3583(g), and defendant offered no record citation whatsoever for his contention that district court implicitly found that he "refused" to submit to drug testing. *United States v Wade* (2005, CA7 Ill) 120 Fed Appx 638.

18. --Searches, testing and treatment

Special conditions of release for wire fraud defendant, which prohibited purchase, possession, and use of any alcohol and subjected him to warrantless searches for alcohol and drugs at any time, did not reasonably relate to goals of rehabilitation and protection; there was no evidence that defendant suffered from alcoholism, that use of alcohol contributed to offenses, or that defendant used fraud proceeds for drug activity, and court failed to explain relationship between offense and provision permitting warrantless searches. *United States v Prendergast* (1992, CA8 Neb) 979 F2d 1289, 118 ALR Fed 791.

Imposition of mandatory drug testing as condition of defendant's supervised release pursuant to 18 USCS § 3583(d) did not violate his rights under *Fourth Amendment*. *United States v Wright* (1996, CA5 Tex) 86 F3d 64.

Giving probation officer authority to require additional drug treatment during supervised release is appropriate discretionary condition that goes beyond drug testing mandated by 18 USCS § 3583(d). *United States v Morey* (1997, CA8 Minn) 120 F3d 142.

District court improperly imposed special conditions of supervised release on crack conspiracy defendant which absolutely prohibit him from obtaining or consuming alcohol, subject him to testing to detect presence of alcohol, and require him to submit to warrantless searches for alcohol, even though defendant admitted that he smoked marijuana approximately twice per week until his arrest and that he drank alcohol on weekends since age of 18, where evidence was not sufficient to support finding that defendant was prone to "abuse" alcohol or that alcohol had any part in commission of offense to which he pleaded guilty. *United States v Bass* (1997, CA8 Neb) 121 F3d 1218.

District court did not abuse its discretion in ordering defendant to submit to drug testing while on supervised release, since submission to drug testing is mandatory and not discretionary condition of supervised release pursuant to 18 USCS § 3583(d), even though there was no evidence that defendant used drugs or that his conviction for armed robbery of letter carrier was drug related. *United States v Carter* (1998, CA9 Cal) 159 F3d 397, 98 CDOS 7894, 98 Daily Journal DAR 10949.

District court's order that defendant submit to alcohol testing and outpatient drug treatment, and abstain from abusing prescription drugs during period of his supervised release pursuant to 18 USCS § 3583 was not abuse of discretion, even though defendant had no history of drug or alcohol abuse, since there was evidence that defendant had attempted suicide by overdosing on migraine medication, defendant's behavior had been unstable, and discretionary conditions reasonably related to 18 USCS § 3553(a)(2)'s goals of protecting the public and providing defendant with correctional treatment. *United States v Carter* (1998, CA9 Cal) 159 F3d 397, 98 CDOS 7894, 98 Daily Journal DAR 10949.

Application of 1997 Guidelines in effect at sentencing pursuant to § 1B1.11 rather than 1992 Guidelines was not error, even though under 1997 Guidelines drug testing is a mandatory condition of supervised release and under 1992 Guidelines court has discretion to impose drug testing as condition, since there is no indication that drug testing condition constitutes punishment for purposes of *Ex Post Facto Clause*. *United States v Jackson* (1999, CA9 Cal) 189 F3d 820, 99 CDOS 7186, 99 Daily Journal DAR 9167.

Case would be remanded where district court imposed special conditions of supervised release under 18 USCS § 3583 requiring child pornography defendant to submit to alcohol testing and treatment, prohibiting him from having unsupervised contact with minors, and prohibiting him from possessing pornography without making any factual findings relating to them or providing any reasons to support them; sentencing judge is required to state reasons in open court for imposing a particular sentence pursuant to 18 USCS § 3553(c). *United States v Loy* (1999, CA3 Pa) 191 F3d 360, cert den (2000) 529 US 1023, 146 L Ed 2d 319, 120 S Ct 1429, appeal after remand, remanded (2001, CA3 Pa) 237 F3d 251.

District court, which sentenced defendant upon revocation of her supervised release to 24-month maximum term, did not commit plain error in basing length of defendant's sentence on prospects of her receiving drug rehabilitation treatment. *United States v Aguillard* (2000, CA11 Ala) 217 F3d 1319, 13 FLW Fed C 846.

Special condition under § 5D1.3 that defendant convicted of being felon in possession submit to random warrantless searches during supervised release was not plain error; defendant's twenty year record, his lifetime abuse of intoxicants, his regular manifestations of psychological derangement, and his disregard of the law, betrayed a dangerous anti-social personality, and condition was crafted to enforce court's proscriptions against defendant's possession of intoxicants, weapons or other contraband, to enable detection of criminal activity or other probation violations, and to protect safety of probation officer and ordinary citizens. *United States v Kingsley* (2001, CA6 Tenn) 241 F3d 828, 2001 FED App 62P, cert den (2001) 534 US 859, 151 L Ed 2d 90, 122 S Ct 137.

Fact that defendant tested positive for marijuana at least 3 times, in violation of supervised release under 18 USCS § 3583, supported inference that defendant possessed marijuana, which potentially supports a Grade B violation under § 7B1.1. *United States v Trotter* (2001, CA7 Ill) 270 F3d 1150, cert den (2002) 534 US 1166, 152 L Ed 2d 123, 122 S Ct 1181.

District court did not err by ordering defendant to participate in outpatient drug treatment and testing as condition of supervised release under 18 USCS § 3583(d) because it was not obvious that undergoing drug treatment would not be beneficial to both defendant and society as he was recreational user of both marijuana and methamphetamine, he had small amount of each in his possession when he was arrested, and psychological profile prepared for sentencing indicated that he occasionally used methamphetamine to intensify effect of his sexual experiences. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

In 18 USCS § 3583 criminal sentencing matter, plain language of 18 USCS § 3583(d) gave courts responsibility to determine maximum number of drug tests beyond three that would be required; courts could not fulfill this Congressionally-assigned responsibility by assigning it to probation officers. *United States v Melendez-Santana* (2003, CA1 Puerto Rico) 353 F3d 93.

By its plain terms, 18 USCS § 3583(d) required courts to determine maximum number of drug tests to be performed beyond statutory minimum of three, with probation officers permitted to decide number of tests to be performed within range established by court. *United States v Melendez-Santana* (2003, CA1 Puerto Rico) 353 F3d 93.

In 18 USCS § 3583 criminal sentencing matter, where sentencing court's drug testing condition delegated its sentencing authority in violation of clear Congressional mandate and disregard of Congressional mandate was plain error, court of appeals vacated drug testing provisions in defendants' sentences and remanded for re-sentencing. *United States v Melendez-Santana* (2003, CA1 Puerto Rico) 353 F3d 93.

18 USCS § 3583 requires courts to determine maximum number of drug tests to be performed beyond statutory minimum of three; therefore, condition of supervised release that stated minimum number of drug tests to be performed was to be construed as stating maximum that were to be performed. *United States v Lewandowski* (2004, CA1 RI) 372 F3d 470.

District courts did not commit reversible error by imposing, in written sentences, standard statutory conditions of supervised release as set forth in 18 USCS § 3583(d), including drug testing, despite not explicitly referencing drug testing condition orally at sentencing. *United States v Mesfin Haile Tulloch* (2004, CA1 Mass) 380 F3d 8.

Participation in alcohol abuse program and required periodic alcohol use testing were properly added to supervised release term of defendant, who was convicted of wire fraud pursuant to 18 USCS § 3583(e)(2), because (1) modification was based on evidence in presentence investigation report, which was available to defendant, (2) added conditions related to defendant's rehabilitation goals, and (3) added conditions were narrowly tailored as they reflected lesser deprivation of liberty than complete ban on alcohol use. *United States v Davies* (2004, CA8 Minn) 380 F3d 329.

Since district court improperly allowed probation officer to determine number of drug tests that defendant would have to take during his term of supervised release, defendant's sentence was vacated only to extent that it improperly delegated district court's authority to determine maximum number of drug tests required during defendant's supervised release term. *United States v Padilla* (2004, CA1 Mass) 393 F3d 256.

District court's imposition of condition of supervised release, which required defendant to submit to searches by any probation or law enforcement officer with or without reasonable or probable cause, following defendant's guilty plea to possession of stolen mail, violation of 18 USCS § 1708, was not facially invalid under Fourth Amendment; constitutionality of condition was controlled by Court of Appeals' decision in *Guagliardo*, and Ninth Circuit was bound by

that holding; further, under Rearden, explicit statement of reasons for condition was not absolutely required by 18 USCS § 3583(d). *United States v Dupas* (2005, CA9 Cal) 417 F3d 1064, amd (2005, CA9 Cal) 2005 US App LEXIS 17233.

Drug testing condition of appellant's supervised release did not vest probation officer with discretion to order unlimited number of drug tests in violation of 18 USCS § 3583(d) where condition could be construed to cap number of drug tests at three unless probation officer obtained modification under 18 USCS § 3583(e). *United States v De Los Santos* (2005, CA1 Puerto Rico) 420 F3d 10.

District court improperly delegated its sentencing authority when it imposed supervised release condition that allowed probation officer to determine number of drug tests that would be conducted during defendants' periods of supervised release, but Court of Appeals found that resentencing was not required because error did not affect defendants' substantial rights. *United States v Sanchez-Berrios* (2005, CA1 Puerto Rico) 424 F3d 65; 68 Fed Rules Evid Serv 320.

District court impermissibly delegated duty imposed on it by 18 USCS § 3583(d) and USSG § 5D1.3(a)(4) when it allowed probation officer to set maximum number of non-treatment drug tests to which defendant would be subjected during course of his supervised release. *United States v Stephens* (2005, CA9 Cal) 424 F3d 876.

Where court required that defendant's drug treatment include testing, it did not shirk its responsibility under 18 USCS § 3583(d) and USSG § 5D1.3(a)(4) to impose conditions of supervised release merely by allowing drug treatment professionals to determine number of in-treatment drug tests to which defendant would be required to submit. *United States v Stephens* (2005, CA9 Cal) 424 F3d 876.

By entering sentencing order that imposed mandatory drug treatment and treatment program urinalysis, while merely delegating administrative details of arranging program to probation officer, district court did not delegate its Article III judicial power regarding primary decision of whether defendant would undergo treatment and that treatment program would include urinalysis. *United States v Stephens* (2005, CA9 Cal) 424 F3d 876.

District court did not improperly delegate its authority to probation officer regarding number of drug tests defendant had to undergo during supervised release where appellate court construed condition to cap number of drug tests at three, to state both maximum and minimum number of tests. *United States v Mojica-Rivera* (2006, CA1 Puerto Rico) 435 F3d 28.

"Standard conditions" worksheet district court used for specifying conditions of supervised release listed as condition "one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by probation officer," and offered no place for judge to enter maximum number of tests as required by *United States v. Melendez-Santana*, 353 F.3d 93 (1st Cir. 2003); this left probation officer's discretion unbounded, and it was suggested that, in resentencing defendant and otherwise, district court should use sentencing form that implemented 18 USCS § 3583(d) as required by *United States v. Melendez-Santana*. *United States v Aitoro* (2006, CA1 Mass) 446 F3d 246.

Sentencing court abused its discretion by imposing drug-treatment condition for supervised release because it did not satisfy statutory criteria of 18 USCS § 3583(d); requirement to undergo drug treatment was not reasonably related to nature and circumstances of offense and history and characteristics of defendant under 18 USCS § 3553(a)(1) where defendant was convicted of defrauding federal government, and there was no evidence of drug abuse bearing any relation to fraud. *United States v Napier* (2006, CA9 Alaska) 463 F3d 1040.

It was abuse of discretion to delegate to probation officer authority to determine number of drug tests defendant had to undergo while on supervised release; abuse of discretion standard applied because district court included drug testing condition in written judgment that it did not include in oral pronouncement of sentence. *United States v Sepulveda-Contreras* (2006, CA1 Puerto Rico) 466 F3d 166.

Where defendant was convicted of conspiracy to defraud government pursuant to 18 USCS § 286 and false statements to federal agency pursuant to 18 USCS §§ 1001, 2, defendant was not required to undergo mandatory drug testing as part of his probation as set forth by 18 USCS § 3563(a) and 18 USCS § 3583(d) where offense was not drug related and defendant did not have history of drug abuse. *United States v Kirsch* (2003, DC Minn) 287 F Supp 2d 1005.

Unpublished Opinions

Unpublished: Federal district court's imposition of non-treatment drug testing supervised released condition that fails to state maximum number of drug tests constitutes impermissible delegation of court's statutory duty under 18 USCS § 3583(d). *United States v Smith* (2006, CA9 Cal) 2006 US App LEXIS 13340.

Unpublished: District court erred by requiring defendant to submit to non-treatment drug testing during supervised released without stating maximum number of drug tests required; omission of that limit constitutes impermissible delegation of court's statutory duty under 18 USCS § 3583(d). *United States v Helem* (2006, CA9 Cal) 2006 US App LEXIS 13341.

Unpublished: Appellate court vacated and remanded defendant's sentence for violating several controlled substances offenses because 18 USCS § 3583(d) required that district court determine number of drug tests to which boyfriend had to submit, and district court impermissibly delegated responsibility to probation officer. *United States v Sam* (2006, CA7 Wis) 2006 US App LEXIS 14200.

Unpublished: Court upheld mandatory drug testing condition of defendant's supervised release because (1) condition was mandated by 18 USCS § 3583(d); (2) presentence report recommended that district court not waive condition, and district court adopted that recommendation; (3) defendant showed awareness of condition by objecting to DNA testing condition, which was imposed under same statute; (4) district court possessed sufficient factual basis for drug testing condition because defendant was charged with drug-related offense, upon which presentence report based its recommendation for drug testing; and (5) defendant presented no evidence at sentencing that he posed low risk for future substance abuse. *United States v McAlister* (2006, CA9 Cal) 2006 US App LEXIS 14585.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), if district court erred by imposing as special condition of supervised release that defendant "participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by Probation Officer," error was not "plain"; any error or prejudice caused by district court's decision to impose that condition did not seriously affect fairness, integrity, or public reputation of judicial proceedings. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: Although district court erred in delegating to probation officer discretion to determine maximum number of drug tests that defendant had to undergo while on supervised release, error neither affected defendant's substantial rights nor seriously impugned integrity of judicial proceedings. *United States v Torres-Colon* (2005, CA1 Puerto Rico) 156 Fed Appx 332.

Unpublished: District court did not commit plain error when, without objection, it required defendant to undergo substance abuse treatment program as condition of supervised release under 18 USCS §§ 3583(d) and 3563(b)(9) because treatment was reasonably related to criminal history. *United States v Armstrong* (2005, CA9 Wash) 138 Fed Appx 953.

Unpublished: It was not error under 18 USCS § 3553(a), § 3583(d), and USSG § 5D1.3(b)(2) to impose special conditions of supervised release requirements that defendant 1) participate in outpatient substance abuse treatment, 2) abstain from using alcohol, and 3) pay costs of his drug and alcohol treatment, even though record contained sparse evidence of defendant's history with drugs and alcohol. *United States v Ortega* (2005, CA9 Cal) 137 Fed Appx 84.

Unpublished: Where district court required defendant, as condition of her supervised release, to submit to drug test within 15 days of her release "and thereafter as required by probation agent" district court improperly delegated to probation officer its authority under 18 USCS § 3583(d) to determine maximum number of drug tests defendant had to undergo. *United States v Vegerano-Rodriguez* (2005, CA1 Puerto Rico) 128 Fed Appx 778, cert den (2005, US) 126 S Ct 181, 163 L Ed 2d 186.

Unpublished: Where district court ordered that defendant had to submit to drug tests while on supervised release, but did not specify number of tests, case was remanded so that district court could make that determination; it was inappropriate delegation of judicial authority to permit probation officer to specify number of drug tests. *United States v Perry* (2005, CA7 Ill) 133 Fed Appx 329, subsequent app (2006, CA7 Ill) 162 Fed Appx 638.

19. Confinement in community treatment facility

Sentencing of defendant to both maximum term of twenty-four months and subsequent 120 days in community confinement as condition of supervised release was not error, since term of community confinement was order of supervision relating to supervised release and was not an additional term of imprisonment. *United States v Elkins* (1999, CA7 Wis) 176 F3d 1016.

District court had authority to impose confinement in a community treatment center or halfway house for rehabilitative purposes as condition of supervised release; absence of a reference in 18 USCS § 3583(d) to the subsection of 18 USCS § 3563(b) that authorizes community confinement for rehabilitative purposes was an inadvertent clerical error made twelve years after enactment of § 3583(d). *United States v Bahe* (2000, CA9 Ariz) 201 F3d 1124; 2000 CDOS 187, 2000 Daily Journal DAR 279, cert den (2000) 531 US 1027, 148 L Ed 2d 514, 121 S Ct 601 and (criticized in *United States v Mills* (2002, ED Wis) 186 F Supp 2d 965) and (criticized in *United States v Barrett* (2002, SD Iowa) 198 F Supp 2d 1046).

When enacted by Congress, 18 USCS § 3583(d) adopted particular provisions of 18 USCS § 3563(b) by specific and descriptive reference and, therefore, it was as if language of those subsections was made part of 18 USCS § 3583(d); in this way, § 3583(d) included language of former 18 USCS § 3563(b)(12) as it was then written to permit community-corrections confinement. *United States v Griner* (2004, CA8 Iowa) 358 F3d 979, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 7230.

18 USCS § 3583(d) continues to include community-corrections confinement as discretionary condition of supervised release. *United States v Griner* (2004, CA8 Iowa) 358 F3d 979, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 7230.

District court did not commit error, plain or otherwise, when it required defendants to reside in community-corrections facility as condition of supervised release where (1) defendants relied on failure of 18 USCS § 3583(d) to cross-reference as discretionary condition of supervised release 18 USCS § 3563(b)(11); (2) when enacted by Congress, 18 USCS § 3583(d) adopted particular provisions of 18 USCS § 3563(b) by specific and descriptive reference and, therefore, it was as if language of those subsections was made part of 18 USCS § 3583(d); (3) in this way, § 3583(d) included language of former 18 USCS § 3563(b)(12) as it was then written to permit community-corrections confinement; (4) although Congress renumbered subsections of § 3563(b), Congress had not re-enacted 18 USCS § 3683(d), and there was nothing to indicate that Congress removed from § 3583(d) community-confinement condition that was incorporated into statute when it was passed; and (5) thus, § 3583(d) continued to include community-corrections confinement as discretionary condition of supervised release. *United States v Griner* (2004, CA8 Iowa) 358 F3d 979, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 7230.

District court's decision to impose statutory maximum sentence of two years on defendant after he violated condition of supervised release was not erroneous because district court's previous decision to require defendant to serve 120 days in community corrections facility was not made as prison sentence, but had in fact been made as condition of supervised release for earlier conviction, as contemplated by 18 USCS § 3563(b). *United States v Del Barrio* (2005, CA5 Tex) 427 F3d 280.

Unpublished Opinions

Unpublished: Where inmate argued that district court was without authority to sentence him to community confinement as condition of supervised release because it was not permitted under plain language of 18 USCS § 3563(b) and 18 USCS § 3583(d), that argument was foreclosed. *United States v Hernandez* (2006, CA5 Tex) 2006 US App LEXIS 6876.

Unpublished: Where district court noted defendant's criminal history, his serious substance problem, and his failure to comply with terms of his prior term of supervised release and district court further discussed 18 USCS § 3553(a) factors prior to revoking his supervised release and imposing sentence, district court's imposition of special condition that defendant spend up to 180 days in community corrections center as part of new term of supervised release following term of incarceration did not violate 18 USCS § 3583(d)(2). *United States v Holt* (2006, CA8 Iowa) 2006 US App LEXIS 12503.

20. Deportation or surrender to INS

District courts have authority to order deportation of defendants "subject to deportation" as condition of supervised release pursuant to 18 USCS § 3583(d). *United States v Chukwura* (1993, CA11 Ga) 5 F3d 1420, 7 FLW Fed C 963, reh, en banc, den (1994, CA11 Ga) 14 F3d 60 and cert den (1994) 513 US 830, 130 L Ed 2d 51, 115 S Ct 102 and (criticized in *United States v Quaye* (1995, CA5 Tex) 57 F3d 447) and (criticized in *United States v Shaw Yan Xiang* (1996, CA4 NC) 77 F3d 771) and (criticized in *United States v Phommachanh* (1996, CA10 Kan) 91 F3d 1383).

District court exceeded its statutory power under 18 USCS § 3583(d) in ordering defendant deported as condition of supervised release. *United States v Quaye* (1995, CA5 Tex) 57 F3d 447 (criticized in *United States v Oboh* (1996, CA11

18 USCS § 3583

Ga) 92 F3d 1082, 10 FLW Fed C 261) and (criticized in *United States v Alvarez* (1997, CA11 Fla) 115 F3d 839, 11 FLW Fed C 53).

18 USCS § 3583 does not authorize court to order deportation directly as condition of supervised release, but merely provides means by which district my order, as condition of supervised release, defendant's surrender to INS for deportation proceedings, and district court did not err in ordering that defendant be deported as condition of supervised release pursuant to § 3583(d), although judgment would be modified to eliminate any ambiguity. *United States v Shaw Yan Xiang* (1996, CA4 NC) 77 F3d 771 (criticized in *United States v Oboh* (1996, CA11 Ga) 92 F3d 1082, 10 FLW Fed C 261) and (criticized in *United States v Alvarez* (1997, CA11 Fla) 115 F3d 839, 11 FLW Fed C 53).

18 USCS § 3583(d) does not authorize district court to deport defendant-alien as condition of supervised release, but instead authorizes district court to impose as condition of supervised release that defendant be delivered to INS for deportation proceedings. *United States v Phommachanh* (1996, CA10 Kan) 91 F3d 1383 (criticized in *United States v Alvarez* (1997, CA11 Fla) 115 F3d 839, 11 FLW Fed C 53).

District court had authority to order deportation of defendant as condition of supervised release pursuant to 18 USCS § 3583(d), and plain language of § 3583(d) gave defendant sufficient notice that district court could deport him as condition of supervised release upon finding that he was subject to deportation. *United States v Oboh* (1996, CA11 Ga) 92 F3d 1082, 10 FLW Fed C 261, and (1996, ND Ga) 10 FLW Fed C 275 and cert den (1997) 520 US 1121, 137 L Ed 2d 337, 117 S Ct 1257, 117 S Ct 1258.

District court did not exceed its authority under 18 USCS § 3583(d) by ordering defendant delivered to INS officials as condition of supervised release. *United States v Ruiz-Castro* (1996, CA10 Wyo) 92 F3d 1519, 45 Fed Rules Evid Serv 691, 35 FR Serv 3d 769.

18 USCS § 3583(d) authorizes district court to order defendant to be surrendered to INS for deportation proceedings in accordance with the Immigration and Nationality Act, but it does not authorize court to order defendant deported. *United States v Romeo* (1997, CA11 Fla) 122 F3d 941, 11 FLW Fed C 529.

As result of enactment of Illegal Immigration Reform and Immigrant Responsibility Act, 18 USCS § 3583(d) authorizes district court to order that defendant be surrendered to INS for deportation proceedings in accordance with INA, but it does not authorize court to order defendant deported as condition of supervised release. *United States v Biro* (1998, CA11 Fla) 143 F3d 1421, 11 FLW Fed C 1509.

Court of appeals must vacate portion of district court's judgment ordering defendant deported, since court lacked jurisdiction to order deportation as condition of supervised release under 18 USCS § 3583(d), even though defendant did not object to order at sentencing and government did not mention issue in their briefs. *United States v Alborola-Rodriguez* (1998, CA11 Fla) 153 F3d 1269, 12 FLW Fed C 85, cert den (1999) 526 US 1133, 143 L Ed 2d 1012, 119 S Ct 1809.

Because defendant's case was pending on effective date of 8 USCS § 1229a of the IIRIRA, which wholly abrogates district courts' authority to order deportations pursuant to 18 USCS § 3583, district court did not have authority to order defendant's deportation as condition of his supervised release. *United States v Mejia* (1998, CA11 Fla) 154 F3d 1297, 12 FLW Fed C 97.

District court did not have the authority under 18 USCS § 3583 to impose condition tolling defendant's supervised release term upon deportation or unknown illegal presence in the U.S.; Congress could not have intended to allow defendant to be excluded from the U.S. as a condition of supervised release while, at the same time, allow all conditions of supervised release to be suspended for the duration of that exclusion. *United States v Juan-Manuel* (2000, CA8 Neb) 222 F3d 480 (criticized in *United States v Rivard* (2000, DC Vt) 127 F Supp 2d 512) and (criticized in *United States v Jimenez* (2000, CA6 Tenn) 2000 US App LEXIS 34041).

It was not plain error for district court to order as condition of supervised release under 18 USCS § 3583 that if defendant were deported he was to remain outside U.S. for entire term of his supervised release, despite defendant's claim that separation of powers doctrine and due process were violated. *United States v Solares* (2000, CA1 RI) 236 F3d 24.

Where district court bypassed procedures provided in Immigration and Naturalization Act for deportation and removal, district court's judgment ordering defendant's immediate deportation as condition of supervised release was in excess of its authority under 18 USCS § 3583(d); sentence was vacated and remanded to district court for resentencing.

which could have included, at district court's discretion, appropriate condition of supervised release. *United States v Tinoso* (2003, CA9 Guam) 327 F3d 864, 2003 CDOS 3499, 2003 Daily Journal DAR 4474.

Because Immigration and Naturalization Act, as amended by Illegal Immigration Reform and Immigrant Responsibility Act, does not "otherwise specify" or authorize judicial deportation pursuant to 18 USCS § 3583(d), 8 USCS § 1229a(a) establishes that district courts have no authority under 18 USCS § 3583(d) to authorize or provide for deportation or removal as condition of supervised release. *United States v Tinoso* (2003, CA9 Guam) 327 F3d 864, 2003 CDOS 3499, 2003 Daily Journal DAR 4474.

Fact that confinement in community corrections facility was not specifically enumerated in 18 USCS §§ 3583(d) and 3563(b) as condition that could be imposed on period of supervised release did not reflect Congressional intent to preclude such alternative as condition, but instead was attributable to drafting error. *United States v Del Barrio* (2005, CA5 Tex) 427 F3d 280.

Condition of supervised release requiring defendant to report for deportation proceedings was not modified because under *Fed. R. Crim. P. 35*, defendant failed to allege arithmetical or technical mistake, and under *Fed. R. Crim. P. 32.1* and 18 USCS § 3583, similar language has been approved by appellate court and condition as modified had been approved by defendant at sentencing; further, defendant did not seek to modify substance of condition only phrasing to avoid misinterpretation, which did not meet requirements of 18 USCS § 3553. *United States v El-Silimy* (2006, DC Me) 417 F Supp 2d 75.

21. --Tolling of period while outside country

Sentencing provision that period of supervised release should be tolled during period of time alien defendant is out of country if she is deported was not illegal or outside sentencing authority of district courts. *United States v Isong* (1997, CA6 Tenn) 111 F3d 41, 1997 FED App 130P (criticized in *United States v Balogun* (1998, CA2 NY) 146 F3d 141) and (criticized in *United States v Rivard* (2000, DC Vt) 127 F Supp 2d 512).

District court had authority to provide that period of supervised release would be tolled upon alien defendant's deportation and would not begin to run again unless he returned to U.S. and reported to nearest probation office; tolling order was appropriate penological measure, given defendant's demonstrated disrespect for immigration laws, which he had repeatedly violated. *United States v Isong* (1997, CA6 Tenn) 111 F3d 428, 1997 FED App 126P, cert den (1997) 522 US 883, 139 L Ed 2d 147, 118 S Ct 212 and (criticized in *United States v Balogun* (1998, CA2 NY) 146 F3d 141) and (criticized in *United States v Juan-Manuel* (2000, CA8 Neb) 222 F3d 480) and (criticized in *United States v Rivard* (2000, DC Vt) 127 F Supp 2d 512).

District court lacked authority to order period of supervised release tolled upon defendant's exclusion from U.S. in sentencing defendant to 21 months' imprisonment, to be followed by three-year term of supervised release, and exclusion from U.S., with term of supervised release to be suspended upon his exclusion and resumed upon his reentry into U.S.; tolling is not within 18 USCS § 3583(d)'s authorization for sentencing court to impose "any other condition it considers to be appropriate." *United States v Balogun* (1998, CA2 NY) 146 F3d 141 (criticized in *United States v Jimenez* (2000, CA6 Tenn) 2000 US App LEXIS 34041).

District court lacked authority to toll defendant's three year term of supervised release while he was deported and, thus, lacked jurisdiction to revoke probation period that had already expired when defendant was rearrested four years later because tolling, which related to timing of supervised release rather than conduct of defendant, should not be viewed as "condition" of release because it related to something beyond control of defendant and was substantively different from all of other conditions expressly provided for under 18 USCS § 3583(d) and USSG § 5D1.3(b). *United States v Okoko* (2004, CA11 Fla) 365 F3d 962, 17 FLW Fed C 389.

Permission to impose "any other condition" during supervised release under 18 USCS § 3583(d) does not include tolling of release upon deportation of alien defendant; phrase "any other condition" must be read in context of statute as whole and was not intended by Congress to provide "untrammelled discretion." *United States v Okoko* (2004, CA11 Fla) 365 F3d 962, 17 FLW Fed C 389.

22. Financial reporting and restrictions

Court did not abuse its discretion in requiring, as condition of supervised release under 18 USCS § 3583(d), that defendant report financial obligations in excess of \$ 250 incurred by his wife, since condition was reasonably related to nature and circumstances of offense under 18 USCS § 3565(d); condition served monitoring purpose in light of defen-

dant's history of masking his income and ownership of assets and related to evaluating defendant's ability to meet restitution schedule. *United States v Kosth* (1991, CA7 Ill) 943 F2d 798.

Special condition of supervised release requiring that defendant convicted of making false statement on credit card applications and mail fraud obtain prior approval from probation department for purchases over \$ 100 was not plain error, where defendant had long history of mental health problems and at times had been unable to control his spending, and court could rationally have concluded that overseeing of expenditures would deter kind of overspending and debt that might once more lead defendant to undertake fraudulent scheme. *United States v Phaneuf* (1996, CA1 Mass) 91 F3d 255.

Fourth and Fifth Amendment rights of defendant ordered to pay restitution of \$ 380,689.23 were not violated by supervised release condition requiring him to provide probation officer access to any requested financial information; 18 USCS § 3583(c) allows court to order any condition that is consistent with any pertinent policy statements, and condition ordered was identical to § 5B1.4(b)(1). *United States v Ismoila* (1996, CA5 Tex) 100 F3d 380, 45 Fed Rules Evid Serv 581, reh den (1997, CA5 Tex) 1997 US App LEXIS 992 and cert den (1997) 520 US 1219, 137 L Ed 2d 836, 117 S Ct 1712 and cert den (1997) 520 US 1247, 137 L Ed 2d 1060, 117 S Ct 1858 and (criticized in *United States v Ensminger* (1999, CA10 Okla) 174 F3d 1143, 1999 Colo J C A R 2139) and (criticized in *Doe v State (In re Doe)* (1999, App) 133 Idaho 811, 992 P2d 1211) and (criticized in *United States v Gilbert* (2004, CA7 Ind) 391 F3d 882, 65 Fed Rules Evid Serv 1292).

Special conditions of supervised release relating to financial disclosures and restrictions were properly imposed on defendant convicted of making false statements in connection with his presentation of document falsely indicating that he had prevailed in civil action and that he was entitled to possession of certain real properties, since all three counts of indictment related to defendant's attempts to defraud financial institutions and defendant belongs to organization which does not believe federal banking system has authority. *United States v Ensminger* (1999, CA10 Okla) 174 F3d 1143, 1999 Colo J C A R 2139.

Court's order that defendant provide his probation officer with access to financial information as condition of supervised release was not abuse of discretion, even though defendant was not ordered to pay restitution or a fine; court understood that money and greed were at heart of defendant's drug distribution offenses and believed that monitoring defendant's financial situation would aid in detecting any return to his former lifestyle of drug distribution. *United States v Behler* (1999, CA8 Neb) 187 F3d 772, reh, en banc, den (1999, CA8) 1999 US App LEXIS 25852.

Special conditions of defendant's supervised release prohibiting defendant from incurring debt without prior probation office approval was vacated and remanded because condition was seemingly unrelated to defendant's offense and circumstances (defendant had pled guilty to possession with intent to distribute and distribution of cocaine base, and had proclivity to support himself through drug dealing), and condition would not deter criminal conduct, protect public, or assist in defendant's rehabilitation; given defendant's indigence, limited use of credit cards or other forms of credit would likely be necessary to facilitate his reintegration into society after his release from prison. *United States v Brown* (2005, CA2 NY) 402 F3d 133.

Where defendant pled guilty to carjacking, defendant's right to be present at sentencing was violated when supervised release conditions involving financial information and searches were imposed for first time in written judgment without being orally announced at sentencing because (1) conditions were non-mandatory, non-standard, and non-recommended conditions, and (2) defendant was not put on constructive notice that two conditions would be imposed in written judgment. *United States v Sepulveda-Contreras* (2006, CA1 Puerto Rico) 466 F3d 166.

Unpublished Opinions

Unpublished: Requirement to submit requested financial information to probation officer was proper where defendant had committed drug offenses, had no record of assets, and had obtained false identification in past in order to use variety of aliases and where, given that defendant was convicted of illegal reentry, condition might allow probation department to better follow defendant's employment and other activities. *United States v Armstrong* (2005, CA9 Wash) 138 Fed Appx 953.

23. Firearms

Condition forbidding defendant who pleaded guilty to theft of mail by postal employee to own or possess firearm while on supervised release was not plain error, since 18 USCS § 3583(d) mandates explicit condition that defendant not

commit crime during supervised release and defendant is now convicted felon who may not lawfully possess firearm. *United States v Morey* (1997, CA8 Minn) 120 F3d 142.

Although defendant argued that condition of supervised release that he not possess dangerous weapons was overbroad and vague, trial court did not abuse its discretion in prohibiting defendant from possessing dangerous weapons as condition of supervised release because, by dictates of common sense, defendant would violate his supervised release only by possessing dangerous weapon in context in which it had no legitimate, everyday use. *United States v Garcia-Mejia* (2004, CA5 Tex) 394 F3d 396.

24. Freedom of association

Condition that defendant convicted of possession of unregistered firearm avoid associating with other skinheads and neo-Nazis did not violate requirement of 18 USCS § 3583(b)(2) that condition involve no greater deprivation of liberty than is reasonably necessary to deter future criminal conduct. *United States v Showalter* (1991, CA7 Ind) 933 F2d 573.

Where court imposed special condition of supervised release preventing defendant convicted of using telephone to communicate threat from contacting his son, without making factual findings or providing any reasons in support, case would be remanded; 18 USCS § 3583(d)(2) requires conditions restricting defendant's liberty to be especially fine-tuned to achieve goals set forth in 18 USCS § 3553(a)(2)(B), (C), and (D). *United States v Edgin* (1996, CA10 Okla) 92 F3d 1044, cert den (1997) 519 US 1069, 136 L Ed 2d 633, 117 S Ct 714.

In prohibiting defendant from having contact with children under age 18 unless approved by his probation officer and loitering within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under 18, district court properly exercised its broad discretion in setting terms and conditions of supervised release under 18 USCS § 3583, despite defendant's claim that the broad conditions set unworkable limits on his activities and involve greater deprivations of liberty than necessary. *United States v Bee* (1998, CA9 Ariz) 162 F3d 1232, 98 CDOS 9261, 98 Daily Journal DAR 12932, cert den (1999) 526 US 1093, 143 L Ed 2d 661, 119 S Ct 1509 and subsequent app (2002, CA9 Ariz) 46 Fed Appx 558.

Supervised release condition that bars defendant convicted of receiving and possessing child pornography from having unsupervised contact with minor children, and further specifies that requisite supervision must come from someone other than his wife would be construed not to extend to any children that defendant might have upon his release from prison, and would also be construed not to extend to accidental or unavoidable contact with children, and as so construed, condition comports with statutory and constitutional requirements. *United States v Loy* (2001, CA3 Pa) 237 F3d 251.

Evidence supported condition of supervised release under 18 USCS § 3583 barring defendant convicted of receiving and possessing child pornography from having unsupervised contact with minors, where it was clear that defendant posed a danger to children; defendant described to agent how he had produced videos by hiding a video camera and filming up the skirts of girls, as well as how he has "hidden" camera videotapes that he made by videotaping through windows. *United States v Loy* (2001, CA3 Pa) 237 F3d 251.

Special conditions under 18 USCS § 3583 that required defendant convicted of possession of child pornography to avoid direct and indirect contact with minors, prohibiting him from engaging in any paid occupation or volunteer service which exposes him either directly or indirectly to minors and instructing him to avoid places, establishments, and areas frequented by minors are not impermissibly vague and overly broad. *United States v Paul* (2001, CA5 Tex) 274 F3d 155 (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122) and cert den (2002) 535 US 1002, 152 L Ed 2d 492, 122 S Ct 1571.

Where defendant, who served time for committing narcotics and firearm offenses, had his supervised release revoked because he violated his probation officer's directive to stay away from defendant's minor daughter, district court properly imposed as condition of defendant's new supervised release that he stay away from his minor daughter because mere existence of biological link did not override all other considerations, and condition served permissible purpose of protecting daughter from defendant. *United States v Smith* (2006, CA1 Mass) 436 F3d 307.

District court did not abuse its discretion in forbidding defendant, who had been convicted of possessing child pornography, from having contact with his girlfriend and her minor children because special condition on his supervised release served permitted goals of protecting children from harm and encouraging him to refrain from recidivism and

was fashioned in reasonable manner by allowing for contact upon prior approval of parole officer. *United States v Roy* (2006, CA1 Me) 438 F3d 140.

District court committed plain error when it imposed supervised release condition on defendant, after he pleaded guilty to receiving child pornography in violation of 18 USCS § 2252(a)(2), which barred defendant from having unsupervised contact with any children, including his minor daughter since, although district court enjoyed broad discretion with regard to imposition of supervised release conditions, it failed to conduct individualized analysis of each case and to consider nature and circumstances of offense and history and characteristics of defendant when crafting special condition of supervised release, pursuant to 3583(d)(1); challenged condition was subject to increased scrutiny because it impacted defendant's constitutional right to have parental relationship with his daughter and district court imposed condition simply as result of defendant's pornography conviction, without conducting individualized analysis of his case; further, government had not presented any evidence showing that defendant had ever sexually abused child or that he would try to abuse his daughter once released from prison, which was type of evidence necessary to support imposition of such special supervised release condition; thus, fairness and integrity of judicial process would be jeopardized if defendant's case was not remanded for modification of supervised release condition, to exempt defendant's contact with his daughter from prohibition. *United States v Davis* (2006, CA8 Mo) 452 F3d 991.

As condition of his supervised release following his conviction for cross burning pursuant to 18 USCS § 241, defendant could read and discuss principles of Creativity, with another person of like beliefs, one on one, but he could not meet with more than one other person at time or conduct any outreach efforts. *United States v Trainer* (2003, DC Md) 265 F Supp 2d 589.

25. Gambling

District court did not abuse its discretion in imposing condition of supervised release that defendant convicted of food stamp fraud not engage in any gambling activities or frequent a gambling establishment for three year period, where defendant admitted to being compulsive gambler, ledgers confiscated from his stores indicated gambling losses of \$ 25,000 to \$ 30,000, and confidential informant testified about his gambling habits. *United States v Brown* (1998, CA7 Ill) 136 F3d 1176, 48 Fed Rules Evid Serv 1168.

26. Internet access

Decision of district court to limit Internet access of defendant convicted of receiving child pornography during his term of supervised release was not abuse of discretion, despite defendant's claim that condition infringed upon his liberty interests and bore no logical relation to his offense; defendant used Internet as means to develop an illegal sexual relationship with young girl over period of several months. *United States v Crandon* (1999, CA3 NJ) 173 F3d 122, cert den (1999) 528 US 855, 145 L Ed 2d 118, 120 S Ct 138 and (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122).

Case would be remanded for district court to specify meaning of special condition prohibiting child pornography defendant from possessing a computer with access to Internet, since condition is at same time potentially too narrow and overly broad; if court intended to prevent defendant's using Internet to order child pornography, prohibition misses mark because it does not bar access to Internet elsewhere, and, if court intended to deny defendant any access to Internet, the condition is greater than necessary and fails to balance competing interests. *United States v White* (2001, CA10 NM) 244 F3d 1199, 2001 Colo J C A R 1638 (criticized in *United States v Paul* (2001, CA5 Tex) 274 F3d 155) and (criticized in *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255).

District court did not abuse its discretion in determining that condition of supervised release under 18 USCS § 3583 absolutely banning computer and Internet use was reasonably necessary to protect public and to prevent recidivism; defendant's computer contained over 1200 images of child pornography defendant used Internet to access child pornography chat rooms, bulletin boards, and newsgroups, and defendant used his e-mail to advise fellow consumers of child pornography how to "scout" single, dysfunctional parents and gain access to their children and to solicit participation of like-minded individuals. *United States v Paul* (2001, CA5 Tex) 274 F3d 155 (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122) and cert den (2002) 535 US 1002, 152 L Ed 2d 492, 122 S Ct 1571.

Condition requiring defendant who pled guilty to receiving child pornography to refrain from using any computer or the internet without permission from his probation officer inflicted greater deprivation on defendant than was reasonably necessary in light of the nature of the offense. *United States v Sofsky* (2002, CA2 NY) 287 F3d 122 (criticized in *United States v Zinn* (2003, CA11 Fla) 321 F3d 1084, 16 FLW Fed C 317) and (criticized in *United States v Ristine*

(2003, CA8 Iowa) 335 F3d 692) and (criticized in *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255) and (criticized in *State v Martin* (2003) 2003 SD 153, 674 NW2d 291).

Following defendant's conviction of selling child pornography in violation of 18 USCS § 2252(a)(3)(B), trial court properly imposed special conditions that restricted defendant's use of computers and internet as terms of supervised release, because restrictions were reasonably related to nature and circumstances of offense as required by 18 USCS §§ 3583(d)(1) and 3553(a), as limits on defendant's use of computers and internet were obviously related to circumstances of his offense, running child pornography website for profit, and conditions were calculated to deter defendant from repeating his illegal activity and to protect public from similar conduct, and further, defendant's Constitutional claims were without merit, as there was nothing vague about conditions imposed by trial court and providing probation officer with discretion regarding defendant's computer use did not subject him to arbitrary or selective enforcement of law, and defendant failed to support his U.S. Const. amend. VIII claim. *United States v Fields* (2003, CA8 Iowa) 324 F3d 1025.

Total ban on Internet use as post-prison release condition for defendant convicted of possessing child pornography swept more broadly and imposed greater deprivation on defendant's liberty than was necessary, and thus, failed to satisfy narrow tailoring requirement of 18 USCS § 3583(d)(2). *United States v Holm* (2003, CA7 Ill) 326 F3d 872, cert den (2003) 540 US 894, 157 L Ed 2d 170, 124 S Ct 236.

Defendant's supervised release conditions imposed after defendant pled guilty to receiving child pornography, which included conditions concerning photographic equipment, computers, and Internet use, did not constitute greater deprivation of liberty than was reasonably necessary to achieve their purposes. *United States v Ristine* (2003, CA8 Iowa) 335 F3d 692.

District court did not err by prohibiting defendant's possession or use of computer with access to any online service at any location without prior approval of probation officer as special condition of release under 18 USCS § 3583(d) because it was reasonably related to his offense that involved e-mail transmissions of graphic child pornography and to important goal of deterring him during period of supervision from reverting to similar conduct; condition did not involve greater deprivation of liberty that was reasonably necessary because it allowed for approval of appropriate online access by probation office. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

Following defendant's convictions for possessing and receiving child pornography, district court erred in imposing supervised release condition that restricted defendant's access to computers and Internet because district court should have imposed more narrowly-tailored restriction. *United States v Crume* (2005, CA8 Iowa) 422 F3d 728.

District court's determination that as condition of supervised release defendant, who had been convicted of possessing child pornography, could not use computer that had e-mail or internet access was overly broad, particularly when defendant made living as computer consultant; condition was vacated and remanded to district court for consideration over whether or not goals of supervised release could be met with more narrow condition. *United States v Mark* (2005, CA8 Neb) 425 F3d 505.

Unpublished Opinions

Unpublished: Conditions of supervised release, which prohibited defendant, who was convicted of using facility of interstate commerce to attempt to induce minor to engage in criminal sexual activity, from using Internet for anything other than employment or for any purpose within his home, did not involve greater deprivation than was reasonably necessary under 18 USCS § 3583(d)(2) because parties stipulated that conditions were intended to include exception for prior approval by his probation officer and district court intended conditions to include exception. *United States v Nisely* (2006, CA9 Cal) 2006 US App LEXIS 4890.

Unpublished: District court did not commit plain error in imposing blanket restriction on internet use, order to complete substance abuse program, and prohibition on working with minors as conditions of supervised release, where defendant used internet to trade child pornography for identification information, defendant had apparent attraction to minors and was willing to exploit them for his own benefit, and defendant had teenage substance abuse record and more recent substance-based suicide attempt. *United States v Landry* (2004, CA3 NJ) 116 Fed Appx 403.

27. Mental health treatment

District court's decisions to order defendant convicted of violating Freedom of Access to Clinic Entrances Act to participate in mental health treatment program as condition of supervised release under 18 USCS § 3583 was justified

based on information, primarily from defendant's mother, that demonstrated that he was in need of such treatment; mother indicated defendant showed signs of emotional disturbance beginning in high school and that his behavior was erratic enough that she attempted to have him evaluated, but he refused, former employer noted that he displayed mood swings and depression, and court had ample opportunity to observe defendant who appeared both pro se and through counsel. *United States v Wilson* (1998, CA7 Wis) 154 F3d 658, cert den (1999) 525 US 1081, 142 L Ed 2d 681, 119 S Ct 824.

Requirement under 18 USCS § 3583 that child pornography defendant follow "all other lifestyle restrictions or treatment requirements imposed by defendant's therapist" was reasonable, given defendant's sordid history and need to protect public; defendant is dangerous pedophile with history of compulsive behavior, while on probation for receiving child pornography he molested young boy, and after being charged with that crime he continued to solicit minors and possess child pornography. *United States v Fellows* (1998, CA9 Wash) 157 F3d 1197, 98 CDOS 7791, 98 Daily Journal DAR 10829, cert den (1999) 528 US 852, 145 L Ed 2d 112, 120 S Ct 133.

Imposition of special condition of supervised release pursuant to 18 USCS § 3583 requiring defendant to potentially submit to psychological counseling as directed by probation officer was an abuse of discretion and an excessive infringement of defendant's liberty, since condition was based on groundless assumption that defendant would become abusive towards his wife upon his release from prison, despite fact that at least thirteen years have passed since defendant physically abused or threatened his wife. *United States v Kent* (2000, CA8 SD) 209 F3d 1073.

Related conditions of participation in a mental health program and disclosure of evaluations and treatment information to probation officer and court were properly imposed under § 5D1.3 and 18 USCS § 3583, where court observed defendant and defendant admitted to being unable to adjust to a non-custodial lifestyle, defendant had escaped from a community confinement center because he could not cope, defendant failed to benefit from previous drug treatment, defendant had history of violent criminal behavior, and both defendant and his sister recognized that he needed counseling, and court could well conclude that disclosure to court and to probation officer was necessary for successfully supervising his reintegration into society. *United States v Lopez* (2001, CA9 Cal) 258 F3d 1053, 2001 CDOS 6700, 2001 Daily Journal DAR 8613, cert den (2002) 535 US 962, 152 L Ed 2d 368, 122 S Ct 1376.

District court did not err by ordering defendant to participate in psychological or psychiatric counseling and/or sex offender treatment program as ordered by probation department as condition of supervised release under 18 USCS § 3583(d) because fact that it deferred to probation office to choose type and extent of such treatment was not too vague to stand. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

Given significant liberty interest under Due Process Clause of Fourteenth Amendment in avoiding unwanted administration of antipsychotic drugs, district court must make on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish one or more of factors listed in 18 USCS § 3583(d)(1) before mandatory medication condition can be imposed on supervised release; district court must also make explicit finding on record that condition "involves no greater deprivation of liberty than is reasonably necessary" under 18 USCS § 3583(d)(2). *United States v Williams* (2004, CA9 Or) 356 F3d 1045.

District court did not abuse its discretion by requiring defendant to participate in sex offender treatment program, even though it was not directly related to his crime of conviction under 18 USCS § 876, as it was related to his criminal history because he was twice convicted of sexually assaulting young girls and his proven recidivism made condition reasonably related to purpose of protecting public from further crimes. *United States v York* (2004, CA1 Mass) 357 F3d 14.

Defendant's sentence was affirmed where prison term at top end of advisory sentencing range was held to be reasonable in light of factors under 18 USCS § 3553(a), and special conditions imposed for counseling, alcohol testing, and no contact with minor children, including defendant's grandchildren was not abuse of sentencing court's discretion. *United States v Mickelson* (2006, CA8 Iowa) 433 F3d 1050.

Sentencing court did not abuse its discretion in imposing mental-health evaluation (specifying gambling or anger management issues) as condition for supervised release because court had reason to believe defendant would benefit from mental health evaluation and possible treatment since he had history of violence towards women. *United States v Napier* (2006, CA9 Alaska) 463 F3d 1040.

Unpublished Opinions

Unpublished: Requirement that defendant participate in mental health and sex offender treatment programs as condition of supervised release was reasonably related to goals of rehabilitation of defendant and protection of public, as defendant had attempted to abduct woman, and had been arrested for attempted rape and aggravated rape. *United States v Hill* (2005, CA6 Tenn) 150 Fed Appx 416.

28. Notification as to criminal conduct

District court was authorized by 18 USCS § 3553(a), 18 USCS § 3563(b)(6) and 18 USCS § 3583(d) to impose as condition of supervised release that tax evasion defendant notify all employers of his past criminal conduct and status on supervised release, and nothing in Fifth or Eighth Amendments prohibited this condition. *United States v Schechter* (1994, CA7 Ill) 13 F3d 1117.

Supervised release condition requiring defendant to notify his present and future employers about his embezzlement conviction was reasonably related to dual objectives of promoting defendant's rehabilitation and protecting public, even though defendant's current job as dispatcher did not involve handling money, financial records, or valuable cargo; at time of plea hearing defendant had not told his employer or his great aunt with whom he lived about his conviction and court was rightly bothered by his reluctance to acknowledge his wrongdoing. *United States v Ritter* (1997, CA6 Mich) 118 F3d 502, 1997 FED App 219P.

Community notification was properly required by defendant's special conditions of supervised release pursuant to § 5D1.3, even though defendant's conviction for transmitting child pornography on Internet was not a violent offense and there was no evidence that he has ever engaged in, or had any interest in engaging in, sexual activity with children; notification conditions were consistent with § 5B1.4, which contemplates notification to third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics. *United States v Coenen* (1998, CA5 La) 135 F3d 938.

District court did not err in revoking defendant's supervised release where it had accepted testimony of two witnesses as credible and found that defendant had pushed, threatened, and harassed his wife thereby violating express prohibitions of protective orders; those actions constituted criminal contempt under N.Y. Penal Law § 215.51(b). *United States v Chatelain* (2004, CA2 NY) 360 F3d 114.

Condition of defendant's supervised release, requiring that defendant notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics was not vague or overbroad considering defendant's previous and current convictions (defendant admitted that she fraudulently received Social Security Benefits and had prior convictions for check fraud, petit larceny, petit theft, and unauthorized use of public assistance) and mandated restitution. *United States v Nash* (2006, CA11 Fla) 438 F3d 1302.

29. Occupational restrictions

Imposition of virtually absolute occupational prohibition on out-of-town truck driving as special condition of supervised release was abuse of district court's discretion, since condition bore no relationship to defendant's offense of unlawfully transporting dangerous explosives and imposed an overly-harsh financial hardship, notwithstanding government's claim that probation office could not effectively monitor whether defendant was taking his anti-depressant medication and abstaining from drug and alcohol use. *United States v Cooper* (1999, CA8 Iowa) 171 F3d 582.

Probation officer lacked authority to impose occupational restriction as condition of supervised release; 18 USCS § 3583(d), which authorizes imposition of occupational restrictions as condition of supervised release, refers exclusively to "court's" authority to impose occupational restrictions, and § 5F1.5, which implements Congress' mandate in 18 USCS § 3583(d), authorizes only court to impose occupational restrictions. *United States v Dempsey* (1999, CA11 Fla) 180 F3d 1325, 12 FLW Fed C 1048.

Special conditions of release imposed on defendant under 18 USCS § 3583(d) concerning use of his computer and Internet, as well as being near any location that minor might frequent, were not occupational restrictions under USSG § 5F1.5(a) because they did not prohibit defendant from working in his previous profession as art director or set decorator. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

District court did not commit any legal error when it imposed special supervised release conditions regarding education, employment, and community service on defendant as (1) district court did not have to provide defendant with prior notice that it was contemplating imposing those conditions pursuant to Fed. R. Crim. P. 32(h) because they were

standard conditions found in *USSG* §§ 5D1.3(c), 5F1.3; (2) 18 USCS § 3583(b) referenced and allowed imposition of discretionary conditions listed in 18 USCS § 3563(b)(4), (12), which included supervised release conditions based on education, employment, and community service; and (3) imposition of education, employment, and community service supervised release conditions furthered statutory goal, articulated in 18 USCS § 3553(a)(2)(D), of providing defendant with needed educational or vocational training in manner that was designed to promote defendant's rehabilitation.

United States v McKissic (2005, CA7 Ill) 428 F3d 719.

Offer of employment by attorney presented new, unforeseen circumstance allowing modification of defendant's supervised release pursuant to 18 USCS § 3583(e); defendant was prevented from working for attorney or law firm because his wire fraud was enabled, in part, by fact that he held himself out as legal consultant. *United States v Smith* (2006, CA3 Pa) 444 F3d 996.

Unpublished Opinions

Unpublished: District court did not abuse its discretion by imposing special condition of supervised release prohibiting defendant from employment in equestrian industry following defendant pleading guilty to one count of conspiracy to commit fraud and swindle of livestock in interstate commerce; his employment in equestrian industry allowed him to accomplish his crime, and bore reasonably direct relationship to offense of conviction. *United States v Cardine* (2006, CA4 Va) 2006 US App LEXIS 19209.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), special condition of supervised release directing that defendant not affiliate with, own, control, and/or be employed in any capacity at facility that caused him to contact persons under 18 regularly was not "improper occupational restriction" because condition did not prohibit defendant from returning to his previously held job or from any other line of work. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

30. Payment of fine

Special condition of supervised release requiring that defendant convicted of supervising and controlling illegal removal of asbestos pay \$ 22,000 fine imposed by city did not transgress powers reserved to states under Tenth Amendment, and court acted within its discretion in requiring that defendant pay city fine at a specified rate of \$ 611.11 a month; in the event city may some day require different rate of payment, defendant may return to court to seek modification of condition of supervised release. *United States v A-Abras Inc.* (1999, CA2 NY) 185 F3d 26, 29 ELR 21393.

18 USCS § 3583(e)(2) provides district court with authority to modify payment of the remainder of defendant's fine when payment of fine is made an express condition of supervised release. *United States v Miller* (2000, CA9 Hawaii) 205 F3d 1098, 2000 CDOS 1855, 2000 Daily Journal DAR 2565.

31. Repayment of attorney fees

Condition that defendant repay CJA attorneys fees violated provisions of 18 USCS § 3583(d) and thus exceeded court's authority, since it bears no relationship to goals of rehabilitation, deterrence, protection of public and training or treatment set forth in 18 USCS § 3553. *United States v Eyler* (1995, CA9 Or) 67 F3d 1386, 95 CDOS 7816, 95 Daily Journal DAR 13416 (criticized in *United States v Merric* (1999, CA1 Me) 166 F3d 406).

District court plainly erred in conditioning defendant's supervised release on reimbursement of counsel fees, since reimbursement was not related in any tangible way to insurance fraud for which defendant was convicted and was not reasonably related to statutory goals of deterrence, protection, and rehabilitation under 18 USCS § 3553, notwithstanding defendant's claim that material misstatements on his financial affidavit were directly related to his filing of fraudulent insurance claims. *United States v Evans* (1998, CA3 Pa) 155 F3d 245 (criticized in *United States v Merric* (1999, CA1 Me) 166 F3d 406).

District court's requirement that defendant repay government pursuant to 18 USCS § 3006A about \$ 3,000 in counsel fees as condition of supervised release pursuant to 18 USCS § 3583 and USSG § 5D1.3 was not error. *United States v Merric* (1999, CA1 Me) 166 F3d 406.

District court erred in conditioning defendant's supervised release pursuant to 18 USCS § 3583 upon his repayment of cost of his court-appointed counsel, since condition does not serve purposes of sentencing and does not involve a greater deprivation than is reasonably necessary to achieve any of them. *United States v Lomow* (2001, CA9 Cal) 266

F3d 1013, 2001 CDOS 8163, 2001 Daily Journal DAR 10081, subsequent app (2003, CA9 Cal) 61 Fed Appx 370, cert den (2003) 540 US 1063, 157 L Ed 2d 722, 124 S Ct 845.

32. Restitution

District court had authority to impose as condition of supervised release pursuant to 18 USCS § 3583(d) that defendant repay \$ 3,650 "buy money" that he received from law enforcement officer in payment for hallucinogenic mushrooms, notwithstanding fact that Victim and Witness Protection Act does not authorize award of restitution except to victim of crime and government could not be victim; it is sufficient that paying cost of government's investigation is sufficiently like two specific conditions that are authorized under 18 USCS § 3563(b), restitution and community service. *United States v Daddato (1993, CA7 Wis) 996 F2d 903.*

District court erroneously ordered defendant, as condition of supervised release under 18 USCS § 3583(d), to make restitution to FBI for funds it spent as part of undercover sting operation to acquire stolen cable equipment from defendant, because FBI was not "victim" under VWP or under 18 USCS § 3563(b), which permits imposition of restitution as condition of supervised release. *United States v Cottman (1998, CA3 NJ) 142 F3d 160 (criticized in United States v Meyers (2000, CA10 Wyo) 200 F3d 715, 2000 Colo J C A R 91).*

District court could not order defendant to pay restitution to Social Security Administration for defendant's social security fraud convictions under 42 USCS § 408, since 18 USCS § 3663 does not include violations of Title 42, but if restitution is ordered as special condition of supervised release, order is permissible. *United States v Fore (1999, CA2 NY) 169 F3d 104, cert den (1999) 527 US 1028, 144 L Ed 2d 783, 119 S Ct 2380.*

Upon revocation of defendant's supervised release, district court plainly erred in ordering as condition of new supervised release term that defendant pay restitution to persons whom defendant stole from when he absconded from supervised release; the VWP, 18 USCS §§ 3556, 3663, authorizes restitution to compensate "victims of the offense," which has been interpreted to allow restitution only for losses caused by conduct underlying offense of conviction, and same limitation applies to orders as conditions of probation and supervised release pursuant to 18 USCS § 3583 because rules regarding probation and supervised release adopt the VWP standard. *United States v Romines (2000, CA11 Fla) 204 F3d 1067, 13 FLW Fed C 416.*

Sentencing court did not commit plain error in ordering defendant to pay restitution to company from which he embezzled and to IRS because, while Victim and Witness Protection Act, 18 USCS § 3663, did not expressly cover tax offenses such as that under which defendant was convicted, under 18 USCS § 3583(d), restitution to IRS was condition of defendant's supervised release. *United States v Miller (2005, CA5 Tex) 406 F3d 323, 2005-1 USTC P 50284.*

In case where defendant was convicted of bank fraud and related offenses, Government asked district court to order restitution as condition of supervised release rather than under Mandatory Victims Restitution Act (MVRA), 18 USCS § 3663A, but defendant argued that 90-day time limit in 18 USCS § 3664(d)(5) also applied to restitution orders entered as condition of supervised release; pursuant to 18 USCS §§ 3583(d) and 3563(b)(2), which cross-referenced § 3664(d)(5), district court could order restitution as condition of supervised release no later than 90 days after sentencing, unless victim petitioned court within 60 days of discovery of its losses and could show good cause for delay, which did not occur; thus, district court did not have authority to order defendant to pay restitution as condition of supervised release when it did so more than three years after sentencing him. *United States v Farr (2005, CA7 Wis) 419 F3d 621.*

District court did not exceed its authority when it required defendant to remain current on restitution payments owed to victims of her previous, unrelated federal crimes as condition of her supervised release because district court did not alter amount owed by defendant or change payment schedules set forth in previous judgments; thus, because district court did no more than insist that defendant comply with preexisting court orders, which was simply requirement that defendant obey law, not order of restitution, district court did not commit plain error, and properly exercised its authority under 18 USCS § 3583(d) when it required defendant to remain current on her restitution payments from previous criminal convictions as condition of supervised release. *United States v Mitchell (2005, CA10 Utah) 429 F3d 952.*

District court order requiring defendant to pay restitution previously ordered by another federal court as condition of supervised release for her present crimes was proper under 18 USCS § 3583(d) because restitution order was not separate order; it merely required defendant to obey law by paying previously ordered restitution. *United States v Love (2005, CA5 La) 431 F3d 477.*

Unpublished Opinions

Unpublished: District court properly denied defendant's motion to modify his restitution order because (1) defendant was not asking district court to modify pertinent condition of his supervised release under 18 USCS § 3583(e)(2) but was seeking partial release of liability, and that relief was unavailable; (2) 18 USCS § 3664(k) allowed defendant to seek revised payment schedule, but not reduced obligation; (3) it was too late for defendant to seek relief under *Fed. R. Crim. P. 35(a)*; and (4) it was also too late for him to seek recourse under 28 USCS § 2255, though challenge to his restitution order would not have presented cognizable claim. *United States v Mandel* (2006, CA7 Ill) 2006 US App LEXIS 11558.

Unpublished: Restitution order was vacated because it exceeded amount that defendant "expressly agreed to" pursuant to his plea agreement in violation of 18 USCS § 3663 and 18 USCS § 3664, but original restitution amount was properly figured as condition of supervised release pursuant to 18 USCS § 3553(a) and 18 USCS § 3583(d) because it was "reasonably related" to offense as it was based on civil judgment entered against defendant, in which he agreed to compensate certain victims. *United States v Fleischer* (2005, CA2 NY) 120 Fed Appx 865, cert den (2005, US) 125 S Ct 2922, 162 L Ed 2d 306.

33. Restriction of movement

District court properly ordered abortion protester convicted of violating Freedom of Access to Clinic Entrances Act in connection with his throwing bottle at car driven by abortion provider and threatening to kill provider to stay at least 1,000 feet away from abortion clinics as condition of supervised release pursuant to 18 USCS § 3583(d) in light of defendant's prior activities involving criminal activity at or near abortion clinics and at residence of abortion provider and his earlier refusal to accept any restrictions on his protest activity; defendant's conviction for violent activity constituted sufficient government interest to justify temporary limitation on defendant's First Amendment rights. *United States v Bird* (1997, CA5 Tex) 124 F3d 667, amd (1997, CA5 Tex) 1997 US App LEXIS 33988 and cert den (1998) 523 US 1006, 140 L Ed 2d 320, 118 S Ct 1189.

In prohibiting defendant from having contact with children under age 18 unless approved by his probation officer and loitering within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under 18, district court properly exercised its broad discretion in setting terms and conditions of supervised release under 18 USCS § 3583, despite defendant's claim that the broad conditions set unworkable limits on his activities and involve greater deprivations of liberty than necessary. *United States v Bee* (1998, CA9 Ariz) 162 F3d 1232, 98 CDOS 9261, 98 Daily Journal DAR 12932, cert den (1999) 526 US 1093, 143 L Ed 2d 661, 119 S Ct 1509 and subsequent app (2002, CA9 Ariz) 46 Fed Appx 558.

34. Sex offender registration

District court did not err in requiring child pornography defendant to comply with registration requirements of Colorado sex offender registration statute as condition of supervised release, even if defendant's conduct did not fall within statutory definition of "unlawful sexual" behavior, since court in its discretion could have properly ordered defendant to register as sex offender in Colorado as condition supervised release. *United States v Fabiano* (1999, CA10 Colo) 169 F3d 1299, cert den (1999) 528 US 852, 145 L Ed 2d 111, 120 S Ct 131.

Language in Sentencing Guidelines indicating that sex offender registration is a mandatory condition of supervised release for sex offenders provided adequate notice of imposition of registration requirement; footnote to § 5D1.3 in 1998 Guidelines Manual explicitly mentions a recent statutory change to 18 USCS § 3583 requiring registration for persons convicted of sexual offenses as a mandatory condition of supervised release. *United States v Paul* (2001, CA5 Tex) 274 F3d 155 (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122) and cert den (2002) 535 US 1002, 152 L Ed 2d 492, 122 S Ct 1571.

Trial court did not err by ordering defendant, who was convicted of receiving or distributing, by computer, images of minors engaged in sexually explicit conduct; possession of images; and distribution of images, to cooperate in collection of DNA sample as condition of his supervised release following his prison sentence as defendant's conduct amounted to sexual exploitation and abuse of children. *United States v Kimler* (2003, CA10 Kan) 335 F3d 1132, 61 Fed Rules Evid Serv 1024 (criticized in *United States v Kincade* (2003, CA9 Cal) 345 F3d 1095, 2003 CDOS 8835, 2003 Daily Journal DAR 11144) and cert den (2003) 540 US 1083, 157 L Ed 2d 759, 124 S Ct 945 and (criticized in *United States v Kincade* (2004, CA9 Cal) 379 F3d 813) and post-conviction relief den (2004, CA10) 119 Fed Appx 213 and (criticized in *Polston v State* (2005, Ark) 2005 Ark LEXIS 36) and (criticized in *State v Cremeans* (2005, Montgomery Co) 160 Ohio App 3d 1, 2005 Ohio 928, 825 NE2d 1124) and (criticized in *United States v Bracy* (2005, SD Iowa) 2005

US Dist LEXIS 6468) and (criticized in *State v Transou* (2005, *Tenn Crim*) 2005 *Tenn Crim App LEXIS 463*) and (criticized in *State v Scarborough* (2005, *Tenn Crim*) 2005 *Tenn Crim App LEXIS 544*).

Unpublished Opinions

Unpublished: Trial court did not err in imposing certain sex offender supervised release conditions, including registration as sex offender in accordance with state law, even though those conditions did not relate to defendant's current offense, as they were shown to be related to defendant's criminal history and circumstances. *United States v Vinson* (2005, *CA10*) 147 *Fed Appx* 763.

35. Sexually-oriented places or material

Condition that defendant convicted of abusive sexual contact with six-year-old girl not possess any sexually stimulating or sexually oriented material deemed inappropriate by his probation officer or treatment staff, or patronize any place where such material or entertainment is available was designed to promote defendant's rehabilitation and to protect public and was not improper, notwithstanding defendant's claim that condition infringed on his First Amendment rights. *United States v Bee* (1998, *CA9 Ariz*) 162 *F3d* 1232, 98 *CDOS* 9261, 98 *Daily Journal DAR* 12932, cert den (1999) 526 *US* 1093, 143 *L Ed 2d* 661, 119 *S Ct* 1509 and subsequent app (2002, *CA9 Ariz*) 46 *Fed Appx* 558.

Condition of supervised release under 18 USCS § 3583 prohibiting defendant convicted of receiving and possessing child pornography from possessing "all forms of pornography, including legal adult pornography" is unconstitutionally vague because it fails to provide any method for distinguishing between those items that are merely titillating and those items that are pornographic and does not provide any guidance as to whether restriction extends only to visual materials, or whether purely textual works and sound recordings fall within its scope. *United States v Loy* (2001, *CA3 Pa*) 237 *F3d* 251.

District court did not err by requiring that defendant not possess any materials depicting sexually explicit conduct as defined in 18 USCS § 2256(2) as special condition of release under 18 USCS § 3583(d) because child pornography he transmitted fell within category of materials addressed by special condition, offense conduct resulted in defendant's involvement with dangerous pedophile and their shared interest in extremely vile and graphic depictions of child rape and murder, and therefore condition furthered goals of rehabilitating defendant and protecting public. *United States v Rearden* (2003, *CA9 Cal*) 349 *F3d* 608, 2003 *CDOS* 9632, 62 *Fed Rules Evid Serv* 1255, cert den (2004, *US*) 160 *L Ed 2d* 32, 125 *S Ct* 32.

Defendant's challenge to supervised release requirement that he undergo evaluation for sex offender treatment and refrain from certain contact with minors, even though he had never been charged with sex offense, was rejected on appeal; entries in journal defendant possessed at time of his arrest indicated he might have had, or, at minimum, desired to have, sexual relationships with adolescent males, and report by his mental health expert and evaluation by clinical social worker suggested he had potential problem with adolescent males. *United States v Prochner* (2005, *CA1 Mass*) 417 *F3d* 54.

Unpublished Opinions

Unpublished: Condition imposed on defendant's supervised release prohibiting defendant from patronizing sexually oriented establishments and from using sex-related telephone numbers was sufficiently narrow not to raise First Amendment concerns. *United States v Hartshorn* (2006, *CA5 Tex*) 2006 *US App LEXIS* 1534.

Unpublished: Defendant convicted of child pornography failed to show that it was plain error for district court to require that, as part of his supervised release, he participate in mental health program, cooperate in DNA collection, not have access to computers, which was means he used to exploit children, and not possess material used to arouse his sexual behavior. *United States v McDermott* (2005, *CA5 Tex*) 133 *Fed Appx* 952, cert den (2005, *US*) 126 *S Ct* 305, 163 *L Ed 2d* 264.

36. Miscellaneous

In sentencing defendants convicted of operating passenger aircraft while under influence of alcohol, it was proper for court to impose sentence that included term of supervised release and precluded them from piloting any aircraft for one year and passenger aircraft for 3 years; District Court did not usurp FAA's authority but merely fashioned penalty that was reasonably related to nature and circumstances of offense and would protect public. *United States v Balzer* (1991, *CA8*) 945 *F2d* 1017.

Sentencing court did not exceed its authority under 18 USCS § 3583 and § 5D1.3 by imposing special condition of supervised release requiring father convicted of international parental kidnapping to effect return to U.S. of his children who he took to Egypt. *United States v Amer* (1997, CA2 NY) 110 F3d 873, cert den (1997) 522 US 904, 139 L Ed 2d 185, 118 S Ct 258, subsequent app (1998, CA2 NY) 162 F3d 1149, reported in full (1998, CA2 NY) 1998 US App LEXIS 22299 and cert den (1998) 525 US 881, 142 L Ed 2d 153, 119 S Ct 188.

Imposition of supervised release condition under 18 USCS § 3583 preventing drug defendant from entering two counties where her mother and children lived, unless given permission by her probation officer, was not error, where there was ample evidence that if defendant were to return to location and associates that shaped her youth, she would be extremely likely to return to life of crime; condition related to history and characteristics of defendant and served to promote rehabilitation, involved no greater deprivation of liberty than necessary, and was not inconsistent with policy statements. *United States v Sicher* (2000, CA3 Pa) 239 F3d 289.

Special condition under § 5D1.3 that defendant convicted of being felon in possession submit to random warrantless searches during supervised release was not plain error; defendant's twenty year record, his lifetime abuse of intoxicants, his regular manifestations of psychological derangement, and his disregard of the law, betrayed a dangerous anti-social personality, and condition was crafted to enforce court's proscriptions against defendant's possession of intoxicants, weapons or other contraband, to enable detection of criminal activity or other probation violations, and to protect safety of probation officer and ordinary citizens. *United States v Kingsley* (2001, CA6 Tenn) 241 F3d 828, 2001 FED App 62P, cert den (2001) 534 US 859, 151 L Ed 2d 90, 122 S Ct 137.

Absolute ban on defendant's driving a motor vehicle during post-incarceration three-year supervised release term pursuant to 18 USCS § 3583 and § 5D1.3 was not plain error, where defendant used van in commission of his felon-in-possession offense, and there was evidence of defendant's life-long pattern of dangerous vehicular offenses, overindulgence in drugs and alcohol, psychological maladjustment, and utilization of his vehicle to execute other firearms offenses. *United States v Kingsley* (2001, CA6 Tenn) 241 F3d 828, 2001 FED App 62P, cert den (2001) 534 US 859, 151 L Ed 2d 90, 122 S Ct 137.

Special condition including possibility of "physiological testing approved by probation officer" should be remanded so that court could clarify type of testing it ordered; sentencing court stated that defendant must participate in mental health program for sex offenders that may include psychological testing approved by probation officer but court's written order states program for sexual offenders may include physiological testing. *United States v White* (2001, CA10 NM) 244 F3d 1199, 2001 Colo J C A R 1638 (criticized in *United States v Paul* (2001, CA5 Tex) 274 F3d 155) and (criticized in *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255).

Imposition of special condition under 18 USCS § 3583 that defendant convicted of receiving child pornography submit to search of his home, automobile, or person under direction of probation officer, following defendant's second violation of supervised release by drinking alcohol, did not violate defendant's Fourth Amendment rights. *United States v White* (2001, CA10 NM) 244 F3d 1199, 2001 Colo J C A R 1638 (criticized in *United States v Paul* (2001, CA5 Tex) 274 F3d 155) and (criticized in *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255).

Imposition of supervised release condition allowing for unlimited, warrantless search and seizure by any law enforcement officer of person and property of defendant, who was convicted of access device fraud and had history of fraudulent endeavors, is vacated to permit court to craft more precisely the seizure authority to ensure that it relates reasonably to ends of rehabilitation and protection of public. *United States v Monteiro* (2001, CA7 Ill) 270 F3d 465.

District court, in imposing third term of supervised release, abused its discretion in imposing "special conditions of sex offenders," since conditions bear no reasonable relationship to nature of convicted offense, armed bank robbery, and there is no evidence supporting need for special conditions; although defendant was convicted of sexual offense fifteen years earlier, government presented no evidence he had propensity to commit any future sexual offenses, or that he has repeated this behavior in any way. *United States v Scott* (2001, CA8 Mo) 270 F3d 632 (criticized in *United States v York* (2004, CA1 Mass) 357 F3d 14).

District court did not abuse its discretion in determining that condition of supervised release under 18 USCS § 3583 absolutely banning computer and Internet use was reasonably necessary to protect public and to prevent recidivism; defendant's computer contained over 1200 images of child pornography defendant used Internet to access child pornography chat rooms, bulletin boards, and newsgroups, and defendant used his e-mail to advise fellow consumers of child pornography how to "scout" single, dysfunctional parents and gain access to their children and to solicit participation of

like-minded individuals. *United States v Paul* (2001, CA5 Tex) 274 F3d 155 (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122) and cert den (2002) 535 US 1002, 152 L Ed 2d 492, 122 S Ct 1571.

It was both reasonable and necessary to prohibit defendant convicted of possession of child pornography from accessing photographic equipment and audio/video equipment during his term of supervised release under 18 USCS § 3583, where search of his apartment revealed photographs of naked children, including neighborhood children, and materials found in his apartment advertising his "medical" examinations and lice removal services provide further evidence that he likely engaged in production of child pornography in the past. *United States v Paul* (2001, CA5 Tex) 274 F3d 155 (criticized in *United States v Sofsky* (2002, CA2 NY) 287 F3d 122) and cert den (2002) 535 US 1002, 152 L Ed 2d 492, 122 S Ct 1571.

District court, upon finding violation of supervised release, may both extend term of supervised release and impose home detention as condition of such release. *United States v Kremer* (2002, CA2 NY) 280 F3d 219.

Under 18 USCS §§ 3583(d) & 3553(a), district court abused its discretion in imposing certain conditions of supervised release based on defendant's alleged status as sex offender where alleged status was based on two events that occurred 40 and 20 years ago, respectively, defendant's subsequent probation violations, e.g., setting up alleged charitable efforts targeting wealthy adults who had soft spot for children, possession of pornographic video cover that did not involve minors, and possession of one-time use camera, even when considered cumulatively with defendant's therapeutic evaluations, did not establish reasonable relationship between defendant's sexually-related conditions of supervised release and either deterrence, public safety, or rehabilitation. *United States v T.M.* (2003, CA9 Ariz) 330 F3d 1235, 2003 CDOS 4687, 2003 Daily Journal DAR 5969, subsequent app, remanded (2004, CA9 Ariz) 118 Fed Appx 286.

Defendants' challenge to provisions of DNA Analysis Backlog Elimination Act of 2000 requiring collection of DNA samples as condition of defendants' supervised release was not ripe; collection of DNA samples during supervised release would be required only if Bureau of Prisons failed to execute its statutorily imposed duty to collect samples during defendants' incarceration. *United States v Carmichael* (2003, CA5 Tex) 343 F3d 756, cert den (2004) 540 US 1136, 157 L Ed 2d 943, 124 S Ct 1116.

District court did not err by prohibiting defendant from frequenting or loitering within 100 feet of schoolyards, parks, public swimming pools, playgrounds, youth centers, video arcade facilities, or other places primarily used by children under age of 18 as special condition of release under 18 USCS § 3583(d) because there was evidence presented at trial from which district court could conclude that defendant posed risk to children; he told law enforcement officers that he had sexual interest in children, that he had had interest his entire life, defendant testified that he used news stories about child murders or abductions to become sexually excited, and his own writings described in graphic detail rape, abuse, and murder of children. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

District court did not err by imposing on defendant condition that all computers, computer-related devices, and peripheral equipment be subject to search and seizure as special condition of release under 18 USCS § 3583(d) because there was no reasonable possibility that computer, computer-related device, and peripheral equipment would be interpreted beyond normal accouterments of one's personal computer such as disks, disk drives, devices for extra storage, etc. *United States v Rearden* (2003, CA9 Cal) 349 F3d 608, 2003 CDOS 9632, 62 Fed Rules Evid Serv 1255, cert den (2004, US) 160 L Ed 2d 32, 125 S Ct 32.

District court did not abuse its discretion by requiring defendant, as condition of his supervised release, to submit to periodic polygraph testing as means to ensure his participation in sex offender treatment program because it was not error to allow defendant's probation officers to determine details of testing, record contained no evidence that would allow court to determine test's reliability, and court construed order as meaning that defendant's supervised release would not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds. *United States v York* (2004, CA1 Mass) 357 F3d 14.

District court properly imposed special supervised release condition on defendant, which required him to make financial disclosures to his probation officer; although condition was not directly related to defendant's 18 USCS § 922(g)(1) conviction, and no fine or restitution order had been entered against him, condition was properly imposed under 18 USCS § 3583 because it was reasonably related to defendant's past history of not paying child support, condition did not restrict defendant's liberty any more than was reasonably necessary, and it would likely prevent defendant from improperly diverting money from his children during his supervised release term. *United States v Camp* (2005, CA8 Ark) 410 F3d 1042.

District court did not abuse its discretion in imposing special condition of supervised release that defendant participate in sex-offense specific treatment program because, having been convicted of possessing materials involving sexual exploitation of his 12-year-old stepdaughter, defendant was not in position to argue that it was inappropriate for district court to require him to participate in sex-offense specific treatment program; and in view of seriousness of underlying offense, appropriateness of treatment program being required, improbability that program would significantly interfere with defendant's employment, and probation officer's testimony that loss of employment would not be considered violation if caused by required treatment, minimal deprivation of liberty that might result from that special condition was not greater than that which was reasonably necessary under circumstances. *United States v Heidebur* (2005, CA8 Mo) 417 F3d 1002.

In case where defendant was convicted of possessing materials involving sexual exploitation of his 12-year-old stepdaughter, district court did not abuse its discretion in imposing special condition of supervised release prohibiting defendant from contact with children under age of 18 unless probation officer had given prior written permission or defendant reported such contact to probation officer within 24 hours; it was justified by several relevant factors set forth in 18 USCS § 3553(a)(1), (2)(B)-(D), including nature and circumstances of underlying criminal offense, defendant's history and characteristics, need to deter future criminal behavior, and need to protect public; in addition, deprivation of liberty that might result from special condition was not greater than that which was reasonably necessary under circumstances. *United States v Heidebur* (2005, CA8 Mo) 417 F3d 1002.

District court did not abuse its discretion when it imposed restrictions on defendant's contact with children unless approved in writing by probation office as condition of supervised release because defendant had been convicted of possessing child pornography, and district court allowed decisions of pending related matter in state court to control over decisions related to defendant's own children. *United States v Mark* (2005, CA8 Neb) 425 F3d 505.

Supervised release Standard Condition 1, which provides that supervisee shall not commit another federal, state or local crime during term of supervision, falls squarely within Ninth Circuit precedent that imputes understanding that violation of law will lead to revocation of probation; that precedent forecloses any argument that defendant can not have their supervised release term revoked, based upon commission of crime, if he or she has not received actual notice, or written copy, of conditions of his or her special release term. *United States v Ortuno-Higareda* (2006, CA9 Ariz) 450 F3d 406.

Because requirement that defendant submit to plethysmograph testing as part of his sex offender treatment program on supervised release was imposed without necessary evidentiary record, justification, and findings that condition furthered goals of 18 USCS §§ 3583(d)(2), 3553(a), and was reasonably necessary, condition was vacated and remanded; before imposing such condition, sentencing court had to articulate how condition met requirements of 18 USCS § 3583(d)(2) of being reasonably related to goal of deterrence, protection of public, or rehabilitation of offender, and it also had to find that condition involved no greater deprivation of liberty than was reasonably necessary to meet those purposes. *United States v Weber* (2006, CA9 Cal) 451 F3d 552.

18 USCS § 3583 did not authorize court to impose halfway house confinement as supervised release condition. *United States v Mills* (2002, ED Wis) 186 F Supp 2d 965 (criticized in *Loeffler v Meniffee* (2004, SD NY) 326 F Supp 2d 454).

Where Government sought to take defendant's blood sample under DNA Analysis Backlog Elimination Act of 2000 (DNA Act), without warrant and without individualized suspicion, while defendant was on supervised release, defendant was granted preliminary injunction because defendant was likely to succeed on merits of claim that DNA Act was violation of Fourth Amendment as applied to individuals on supervised release without any individualized suspicion, whether or not court finds that Government has special need. *United States v Weikert* (2006, DC Mass) 421 F Supp 2d 259.

Unpublished Opinions

Unpublished: Court lacked jurisdiction to entertain defendant's argument that supervised release condition requiring him to cooperate in collection of DNA sample violated Ex Post Facto Clause or general principles against retroactivity because his offense and guilty plea preceded amended DNA Act, which authorized condition; imposition of DNA sample collection was not part of defendant's sentence; rather, it was prison condition that had to be challenged through separate civil action after exhaustion of administrative remedies. *United States v Sierra-Garcia* (2006, CA5 Tex) 2006 US App LEXIS 114.

Unpublished: District court did not exceed its authority under 18 USCS § 3583(d) by imposing condition of supervised release that defendant not be released to Southern District of Texas nor to residence of his biological family because, under 18 USCS § 3624(d)(3), Federal Bureau of Prisons (BOP) alone was authorized to determine location of prisoner's release; therefore, condition imposed by district court was merely nonbinding suggestion to BOP. *United States v Hartshorn* (2006, CA5 Tex) 2006 US App LEXIS 1534.

Unpublished: District court did not err in imposing condition of supervised release requiring defendant to cooperate in probation officer's collection of DNA sample; although DNA Act applicable at time of defendant's conviction did not authorize collection of DNA for his felony, 2004 amendment to statute altered statute from enumerated list of qualifying offenses to include "any felony," 42 USCS § 14135a(d)(1); statute indicated intention for retroactive application, 42 USCS § 14135a(a)(1), and did not run afoul of Ex Post Facto Clause, as taking of DNA sample was not punitive measure; since DNA Act, as amended, authorized taking of DNA sample from defendant, condition did not constitute sentence in excess of statutory maximum and was within scope of defendant's appeal waiver. *United States v Hartshorn* (2006, CA5 Tex) 2006 US App LEXIS 1534.

Unpublished: District court did not abuse its discretion in imposing special condition of supervised release because prohibiting defendant, whose mental illness caused him to believe university had him under surveillance, from filing lawsuits against university and its staff without permission of his mental health professional did not otherwise bar any lawsuit and was narrowly tailored to his circumstances, promoted defendant's recovery, and protected public from his potential recidivism. *United States v Wilinski* (2006, CA4 Md) 2006 US App LEXIS 7970.

Unpublished: Where defendant pled guilty to possession of child pornography, it was not abuse of discretion under 18 USCS § 3583(d) to require defendant to seek favorable recommendation from probation officer to have unsupervised contact with defendant's son and grandson, because, inter alia: (1) condition related to rehabilitating defendant regarding desire to download and possess images of child pornography; and (2) district court expressly retained final authority to modify no-unsupervised-contact order with respect to children in defendant's family. *United States v Bowman* (2006, CA9 Alaska) 2006 US App LEXIS 8027.

Unpublished: District court did not abuse its discretion when it required polygraph testing as condition of supervised release because defendant had admitted history of viewing child pornography and addiction to doing so, and thus, requiring polygraph testing to ensure compliance with probationary terms was both reasonably related to defendant's offense and history, and when reasonably applied, would not unduly burden his rights. *United States v Dalimonte* (2006, CA11 Ala) 2006 US App LEXIS 17408.

Unpublished: District court did not abuse its discretion in including certain sex offense conditions as part of defendant's supervised release term on his drug convictions, where district court imposed such conditions based on defendant's previous criminal history (defendant had been convicted of taking indecent liberties with minor), and for expressly stated purpose of protecting public. *United States v McDowell* (2006, CA4 NC) 2006 US App LEXIS 22597.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), if district court erred by imposing as special condition of supervised release requirement that defendant contribute to costs of substance abuse treatment and sex offender treatment respectively, in both cases as directed by Probation Officer, error was not "plain." *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), district court's oral statement of special condition of supervised release that required defendant not to use computer to access any material that related to child pornography during term of his supervised release was ambiguous, but district court's written statement of condition, precluding computer access to any material that related to depictions of child pornography, resolved ambiguity; thus, written statement prevailed and imposition of special condition did not constitute "plain" error. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), where defendant previously had subscription to child-pornography website that sold mail-order CD-ROMs with images of child pornography, district court did not commit plain error by requiring as special condition of supervised release that defendant not use commercial mail receiving agency or own post office box without his probation officer's approval; condition facilitated defendant's rehabilitation by limiting his access to child pornography. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), although district court had heard argument on whether it should impose 19 proposed special conditions of supervised release in child pornography case, district

court had not provided defendant with sufficient process to impose condition that he submit to penile plethysmograph testing during supervised release; particularly significant liberty interest in being free from plethysmograph testing requires thorough, on-the-record inquiry into whether degree of intrusion caused by such testing is reasonably necessary to accomplish one or more of factors listed in 18 USCS § 3583(d)(1) and involves no greater deprivation of liberty than is reasonably necessary, given available alternatives. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: In child pornography case (18 USCS § 2252A(a)(5)(B)), where district court provided for additional process before defendant would be required to move from his residence, if at all, district court did not abuse its discretion by imposing as special condition of supervised release that defendant not reside within direct view of school yards, parks, public swimming pools, or other places primarily used by persons under age of 18; condition did not have to relate to crime of conviction so long as it related to one of factors listed in 18 USCS § 3553(a), and condition involved no greater deprivation of liberty than necessary to promote defendant's rehabilitation, to deter future criminal conduct, and to protect public. *United States v Yoder* (2006, CA9 Cal) 2006 US App LEXIS 23637.

Unpublished: Condition of supervised release which required defendant to submit his "person and property to search and seizure at any time of day or night by any law enforcement officer with or without warrant," was vacated and remanded because district court failed to make requisite finding that it involved no greater deprivation of liberty than was reasonably necessary to achieve purposes of sentencing. *United States v Reyes* (2005, CA9 Cal) 137 Fed Appx 6.

Unpublished: Defendant, who was sentenced to term of confinement in community corrections facility as special condition of supervised release, did not establish that special condition seriously affected fairness, integrity, or public reputation of judicial proceedings; district court made significant penological decision to sentence defendant to community confinement, and there was no statutory requirement that district court authorize defendant's early release; further, even if district court erred in delegating to U.S. Probation Officer its authority to order defendant to community corrections facility as condition of supervised release, error was not plain because it did not affect defendant's substantial rights where defendant always had option to petition court for early release, irrespective of discretion given to probation officer, and nothing prevented him from exercising that option to obtain complete relief; additionally, he could not show that district court would have released him from community confinement in less than 120 days. *United States v Huffman* (2005, CA10) 146 Fed Appx 939.

Unpublished: Where defendant was convicted of transporting and shipping images of child pornography, in violation 18 USCS § 2252A(a)(1), condition of supervised release that defendant not possess or use any computer which was connected or had capacity to be connected to any network would not have prevented defendant from seeking employment where defendant's work history involved manual labor, defendant was required to obtain approval of his probation officer before accepting any job, and district court explicitly recognized that defendant had option of seeking modification of special condition after he was released. *United States v Granger* (2004, CA4 SC) 117 Fed Appx 247.

IV. MODIFICATION AND REVOCATION

A. Revocation of Supervised Release

1. In General 37. Generally

Where defendant has consented to trial, judgment and sentencing before United States magistrate judge pursuant to 18 USCS § 3401, magistrate judge has jurisdiction to impose and revoke term of supervised release in accordance with 18 USCS § 3583(a) and (e). *United States v Crane* (1992, CA9 Cal) 979 F2d 687, 92 CDOS.8217, 92 Daily Journal DAR 13552.

Revocation of defendant's supervised release after it had expired was affirmed because petition for warrant and order that issued warrant were correctly drafted, filed, and signed by district court; therefore, clerical error by deputy district clerk regarding name of defendant in body of warrant was not sufficient to nullify extension of limitation period under 18 USCS § 3583(i). *United States v English* (2005, CA5 Tex) 400 F3d 273.

Neither 18 USCS § 3583(d) nor 18 USCS § 3608 prohibited federal district court from considering results of drug test that showed presence of cocaine metabolites in defendant's urine, albeit at level that was below what contract between testing laboratory and Administrative Office of U.S. Courts required for positive test, and totality of evidence, including defendant's admission that he used drugs while he was on supervised release supported district court's judgment revoking defendant's release. *United States v Klimek* (2005, CA2 NY) 411 F3d 50.

Failure to provide written notice of conditions of supervised release does not automatically invalidate revocation of such release if defendant received actual notice of conditions imposed. *United States v Arbizu* (2005, CA5 Tex) 431 F3d 469.

Revocation of supervised release and imposition of sentence, upon reconsideration, will not be disturbed, even though state subsequently dismissed 3 criminal charges against defendant upon which court relied, in part, in revocation hearing, because court found by preponderance of reliable, credible evidence, at hearing, that defendant had violated his supervised release by violating state and local law by (1) driving on suspended license, (2) making false statement, and (3) forging signature, as charged, which is all that is required under 18 USCS § 3583(e)(3). *United States v Yancey* (2000, ED Va) 100 F Supp 2d 378.

Government established by preponderance of evidence that defendant violated terms of his supervised release under 18 USCS § 3583 and district court revoked his supervised release, sentenced him to six month's incarceration, and discontinued his supervised release following his release from prison. *United States v Hudicek* (2005, ED Pa) 406 F Supp 2d 559.

Unpublished Opinions

Unpublished: Release can be revoked for reasons that have nothing to do with fault of offender, but instead are more related to protection of public; however, if fundamental fairness required by due process is implicated, U.S. Supreme Court holds revocation of probation is improper; in revocation proceeding, Federal Rules of Evidence are inapplicable; court may consider hearsay and documentary evidence that would not be allowed in criminal trial. *United States v Jones* (2005, CA3 Pa) 133 Fed Appx 824.

Unpublished: Enactments governing revocation of supervised release, 18 USCS § 3583(c), (g), and Fed. R. Crim. P. 32.1, do not require written statement of reasons and do not reference 18 USCS § 3553(c)(2). *United States v Garner* (2005, CA7 Ill) 133 Fed Appx 319.

38. Mandatory revocation for drugs, firearms or testing refusal [§ 3583(g)]

Court did not err in revoking supervised release based on defendant's positive drug test, false urine sample and purchase and use of drugs, even though they previously served as basis for modification of defendant's supervised release, since 18 USCS § 3583 requires revocation and violations occurred within 13 months of final revocation and involved conduct made condition of supervised release. *United States v Kindred* (1990, CA5 Tex) 918 F2d 485.

Insufficient evidence supported finding that defendant violated conditions of supervisory release by committing assault and not refraining from extensive use of alcohol; although defendant admitted to "some pushing", nothing in record established that conduct was extremely offensive and provocative as required for state assault offense, and defendant's routine consumption of 12 beers in his own home over course of weekend, without more information, did not constitute excessive use of alcohol as matter of law. *United States v Stephenson* (1991, CA6 Tenn) 928 F2d 728.

Defendant's three positive urine samples and his admission of drug use were properly considered by court as circumstantial evidence of possession of controlled substance for purposes of 18 USCS § 3583(g). *United States v Blackston* (1991, CA3) 940 F2d 877, cert den (1991) 502 US 992, 116 L Ed 2d 634, 112 S Ct 611.

Defendant, who tested positive for drugs on four occasions within 3 months of his release from prison and admitted he used methamphetamine on two occasions, "possessed" methamphetamine within meaning of 18 USCS § 3583(g). *United States v Baclaan* (1991, CA9 Hawaii) 948 F2d 628, 91 CDOS 8885, 91 Daily Journal DAR 13714.

If evidence establishes that positive result from drug test is at least such that passive inhalation or similar phenomenon may not reasonably account for it, then district court may find that defendant had actual physical control or power and intent to exercise dominion and control over drug and thus was in "possession" of it within meaning of 18 USCS § 3583(g); however, court erred in relying on general recollection of unspecified testimony in prior cases in finding that level of cocaine metabolite from urinalysis tests could not be result of passive inhalation. *United States v Courtney* (1992, CA5 Tex) 979 F2d 45.

Use or consumption of marijuana, evidenced solely by laboratory analysis of urine samples, constitutes possession of marijuana within meaning of 18 USCS § 3583(g). *United States v Dow* (1993, CA1 Me) 990 F2d 22, and (1993, CA1 Me) slip op.

18 USCS § 3583

Revocation of defendant's supervised release for "possession" of drugs in violation of 18 USCS § 3583(g) based on defendant's positive urine test was not erroneous; there was no indication that court believed it was required to equate use with possession, and Sentencing Commission left it to court to determine whether evidence of drug usage established solely by laboratory analysis constitutes possession of controlled substance. *United States v Almand* (1993, CA11 Ga) 992 F2d 316, 7 FLW Fed C 379.

Defendant's proven and admitted cocaine use established possession of cocaine for purposes of 18 USCS § 3583. *United States v Battle* (1993, CA4 NC) 993 F2d 49.

Once district court credits laboratory analysis as establishing presence of controlled substance in specimen and then goes on to find culpable use of substance, possession under 18 USCS § 3583(g) necessarily follows. *United States v Clark* (1994, CA4 NC) 30 F3d 23, cert den (1994) 513 US 1027, 130 L Ed 2d 511, 115 S Ct 600.

District court erred when it refused to revoke supervised release of defendant who admitted to violating supervised release by consuming controlled substances on numerous occasions, since revocation was required under 18 USCS § 3583. *United States v Hancox* (1995, CA6 Ky) 49 F3d 223, 1995 FED App 88P.

Combination of undisputed proof of defendant's work failure, urinalysis report that defendant's specimen had tested positive for amphetamine and methamphetamine, and director of toxicology's affidavit describing testing facility's procedures and results specific to analyses conducted on defendant's specimen provided competent evidence from which court could reasonably conclude that defendant violated terms of his supervised release by failing to maintain employment and by unlawfully possessing and using controlled substance, thereby requiring revocation of his supervised release and justifying his sentence. *United States v McCormick* (1995, CA5 Tex) 54 F3d 214, cert den (1995) 516 US 902, 133 L Ed 2d 187, 116 S Ct 264.

Combination of undisputed proof of defendant's work failure, urinalysis report that defendant's specimen had tested positive for amphetamine and methamphetamine, and director of toxicology's affidavit describing testing facility's procedures and results specific to analyses conducted on defendant's specimen provided competent evidence from which court could reasonably conclude that defendant violated terms of his supervised release by failing to maintain employment and by unlawfully possessing and using controlled substance, thereby requiring revocation of his supervised release and justifying his sentence. *United States v McCormick* (1995, CA5 Tex) 54 F3d 214, cert den (1995) 516 US 902, 133 L Ed 2d 187, 116 S Ct 264.

Revocation of defendant's supervised release was mandatory pursuant to 18 USCS § 3583 because of defendant's knowing and willful failure to comply with drug testing regime imposed by conditions of his supervised release, and it was immaterial that district court took defendant's need for medical treatment into account when it ordered revocation of his supervised release. *United States v Stephens* (1995, CA8 Mo) 65 F3d 738.

Sentence imposed after supervised release revocation hearing did not violate due process, despite defendant's claim that court based sentence in part on unsubstantiated allegations of drug use during supervised release, even though court dismissed allegations that defendant failed several drug tests, since defendant indicated that he had taken drugs during release period, and drug use information was not demonstrable basis for defendant's sentence; defendant admitted that he walked away from drug treatment program in violation of his release conditions, which was valid and adequate basis for his sentence. *United States v Carr* (1995, CA8 Mo) 66 F3d 981.

Court has discretion to provide treatment rather than imprisonment if defendant on probation fails drug test, notwithstanding fact that 18 USCS § 3583(g) requires court to sentence defendant who possessed controlled substance in violation of his supervised release to term of imprisonment. *United States v Pierce* (1997, CA8 Minn) 132 F3d 1207.

District court did not commit plain error by choosing not to suspend pursuant to 18 USCS § 3563 initial drug testing required under 18 USCS § 3583(d) when bank fraud defendant was placed on supervised release, even though defendant never used narcotics in past and her screening test turned up negative. *United States v Guy* (1999, CA7 Ill) 174 F3d 859.

Revocation of term of supervised release for escape based on defendant's using cocaine did not automatically terminate concurrent term of supervised release for marijuana conviction, even though 18 USCS § 3583(g) provides for mandatory revocation of supervised release for drug possession; although court would be required to revoke defendant's supervised release for marijuana conviction, issue was not properly presented for determination at sentencing hearing for revocation of escaped supervised release. *United States v Alvarado* (2000, CA5 Tex) 201 F3d 379.

District court was required by 18 USCS § 3583(g) to revoke defendant's term of supervised release upon defendant's positive drug test and admission of use of a controlled substance, unless defendant could come under exception in 18 USCS § 3583(d) based on availability of appropriate substance abuse treatment program or current or past participation in such programs. *United States v Crace* (2000, CA6 Ky) 207 F3d 833, 2000 FED App 111P.

Where defendant violated two terms of release within days of being released from prison, district court did not err by imposing 15-month custodial sentence when revoking defendant's supervised release; under 18 USCS § 3583(g), district court was required to sentence defendant to term of imprisonment; sentence imposed was less than maximum allowed under § 3583(e)(3); USSG § 7B1.4 was not binding with respect to sentences imposed upon revocation of supervised release; condition that defendant not use controlled substances was important condition of supervised release, and district court did not abuse its discretion by considering leniency shown toward defendant when defendant's original sentence was imposed. *United States v Touche* (2003, CA8 SD) 323 F3d 1105.

Mens rea requirement in 18 USCS § 3583(g)(1), requiring government to prove by preponderance of evidence that defendant knowingly and voluntarily used drug revealed by drug test, sufficiently distinguishes it from 18 USCS § 3583(g)(4) so that latter provision can apply in circumstances where former does not. *United States v Hammonds* (2004, CA10 Okla) 370 F3d 1032.

Revocation of defendant's supervised release was affirmed because controlled substance in person's body was in possession of that person for purposes of 18 USCS § 3583(g), assuming required mens rea, and one instance of knowing and voluntary use, based on single failed drug test together with defendant's admission, constituted possession for purposes of 18 USCS § 3583(g). *United States v Hammonds* (2004, CA10 Okla) 370 F3d 1032.

Results of sweat patch tests on convicts on supervised release are reliable enough to revoke that status, even though sweat patch is relatively new device and of limited interest to scientific community, where it has been subject of several peer review articles and technique of testing for presence of drugs in human body through excretions of perspiration has been generally found to be reliable, because court finds by preponderance of evidence that PharmChem sweat patch drug-testing device is reliable scientific method for testing for improper use of methamphetamine by supervised releasees. *United States v Stumpf* (1999, DC Nev) 54 F Supp 2d 972.

Cocaine dealer's supervised release is revoked and he is sentenced to 18 months, where government showed by preponderance of evidence that he shot 2 persons at close range, because revocation is mandatory if defendant even possesses firearm while on supervised release under 18 USCS § 3583(g)(2). *United States v Ucciferri* (2001, MD Fla) 133 F Supp 2d 1330.

Court was required to revoke supervised release and impose sentence that included term of imprisonment under 18 USCS § 3583(g) and U.S. Sentencing Guidelines Manual § 7B1.4 commentary, application notes 5-6, because defendant violated condition of supervised release by possessing controlled substance and because exception was not warranted in light of defendant's recent unsuccessful participation in drug treatment. *United States v Bell* (2002, ED Pa) 197 F Supp 2d 192.

Court concluded that defendant used methamphetamine in violation of conditions of her supervised release where court found that (1) technician who applied sweat patch was well-trained and properly qualified; (2) leaving sweat patch on defendant for one additional day in no way compromised accuracy and validity of results of tests performed on sweat patch; and (3) defendant's expert witness's opinion that defendant's sweat patch was likely contaminated by outside source was purely speculative without foundation in objective scientific evidence. *United States v Zubeck* (2002, WD Mo) 248 F Supp 2d 895.

Court was compelled to revoke remaining period of defendant's supervised release after defendant tested positive on three occasions for cocaine and defendant admitted to employee in probation office that defendant used cocaine on weekends. *United States v Thompson* (2003, ED Pa) 240 F Supp 2d 325.

Unpublished Opinions

Unpublished: Since policy statements in U.S. Sentencing Guidelines Manual ch. 7 were not binding, district court did not err in choosing imprisonment under 18 USCS § 3583(g) rather than continued supervised release under USSG § 7B1.4 application n. 6 following defendant's admission of possession of controlled substance; district court considered continuation of supervised release with additional drug treatment rather than imposition of imprisonment, but it ultimately imposed 12-month sentence based upon defendant's prior difficulties in complying with supervised release conditions. *United States v Button* (2006, CA9 Mont) 2006 US App LEXIS 2165.

Unpublished: Since defendant violated condition of supervised release by failing to report for drug testing, district court did not abuse its discretion by revoking supervised release because revocation was mandatory under 18 USCS § 3583(g)(3). *United States v Jacobs* (2006, CA5 La) 2006 US App LEXIS 28443.

Unpublished: District court was required to revoke supervised release, given defendant's admission as to violations, i.e., she tested positive for marijuana, passed nine bad checks, and consistently failed to submit monthly reports and make payments on her fine and special assessment. *United States v Garner* (2005, CA7 Ill) 133 Fed Appx 319.

39. Other particular circumstances

In revoking defendant's supervised release because defendant committed burglary, court complied with applicable policy statements, adequately considered specific factors and made its reasons for imposing sentence sufficiently clear. *United States v Lockard* (1990, CA9 Cal) 910 F2d 542, amd, reh den (1990, CA9) 1990 US App LEXIS 15749.

Insufficient evidence supported finding that defendant violated conditions of supervisory release by committing assault and not refraining from extensive use of alcohol; although defendant admitted to "some pushing", nothing in record established that conduct was extremely offensive and provocative as required for state assault offense, and defendant's routine consumption of 12 beers in his own home over course of weekend, without more information, did not constitute excessive use of alcohol as matter of law. *United States v Stephenson* (1991, CA6 Tenn) 928 F2d 728.

Combination of undisputed proof of defendant's work failure, urinalysis report that defendant's specimen had tested positive for amphetamine and methamphetamine, and director of toxicology's affidavit describing testing facility's procedures and results specific to analyses conducted on defendant's specimen provided competent evidence from which court could reasonably conclude that defendant violated terms of his supervised release by failing to maintain employment and by unlawfully possessing and using controlled substance, thereby requiring revocation of his supervised release and justifying his sentence. *United States v McCormick* (1995, CA5 Tex) 54 F3d 214, cert den (1995) 516 US 902, 133 L Ed 2d 187, 116 S Ct 264.

District court did not commit plain error in revoking defendant's supervised release and sentencing him to 24 months imprisonment, despite defendant's claim that court violated ex post facto clause by applying amendment to 18 USCS § 3583(g), which provides for mandatory "revocation" of supervised release, with two year maximum sentence, rather than earlier version, which provided for mandatory "termination" of supervised release, with one-year minimum, since revocation table in § 7B1.4(a) applied to both versions and defendant faced same imprisonment range, 21-24 months, under either. *United States v McGee* (1995, CA7 Ill) 60 F3d 1266.

Court's revocation of defendant's supervised release, on grounds that he assaulted his wife, was not abuse of discretion, despite court's characterization of wife's testimony as problematic, since it is within factfinder's discretion to credit portions of witness's testimony, even though it finds other portions dubious, and wife's testimony was corroborated by other witnesses. *United States v Whalen* (1996, CA1 Me) 82 F3d 528.

Court did not err in relying on state conviction as grounds to revoke defendant's supervised release under 18 USCS § 3583, despite defendant's claim that state's misrepresentations rendered his guilty plea unconstitutional, since supervised release revocation proceeding is not proper forum in which to attack conviction giving rise to revocation. *United States v Hofierka* (1996, CA11 Fla) 83 F3d 357, 9 FLW Fed C 1100, mod, on reh, in part, reh den, in part (1996, CA11 Fla) 92 F3d 1108, 10 FLW Fed C 329 and cert den (1997) 519 US 1071, 136 L Ed 2d 636, 117 S Ct 717.

Court properly revoked defendant's supervised release for violating condition that he remain law abiding, where preponderance of evidence supported district court's determination that defendant intended to abuse or at very least harass two children in violation of 18 USCS § 2246. *United States v Lomayaoma* (1996, CA9 Ariz) 86 F3d 142, 96 CDOS 3783, 96 Daily Journal DAR 6148, cert den (1996) 519 US 909, 136 L Ed 2d 196, 117 S Ct 272.

Case would be remanded where court revoked supervised release pursuant to 18 USCS § 3583 and listed on formal judgment four distinct "Grade A" violations, for which revocation is mandatory under § 7B1.3, but many underlying violations suggested by record appear to be Grade C violations, for which revocation is discretionary. *United States v Wright* (1996, CA7 Ill) 92 F3d 502 (criticized in *United States v Trotter* (2001, CA7 Ill) 270 F3d 1150).

District court's conclusion that defendant had made "harassing" calls which violated amended condition of his supervised release was not error and revocation was not improper, even if calls did not express actual threats of violence directed at victim herself, where call and voicemail message contained obscenities and displayed marked hostility. *United States v Lowenstein* (1997, CA6 Mich) 108 F3d 80, 1997 FED App 76P.

Although district court failed to support its conclusion that defendant engaged in fraud with sufficiently detailed findings, preponderance of evidence supported conclusion that defendant engaged in fraud so as to warrant revocation of his supervised release pursuant to 18 USCS § 3583; record supported conclusion that defendant fraudulently obtained \$ 6,000 from fiancée on pretense that money would be invested in nonexistent project, even though defendant also gave fiancée roughly \$ 6,000 to put into checking account to pay their living expenses. *United States v Daniel* (2000, CA9 Cal) 209 F3d 1091, 2000 CDOS 2985, 2000 Daily Journal DAR 4031, amd, reh den, reh, en banc, den (2000, CA9) 216 F3d 1201, 2000 CDOS 5537, 2000 Daily Journal DAR 7375 and cert den (2000) 531 US 999, 148 L Ed 2d 469, 121 S Ct 499.

District court properly revoked defendant's supervised release under § 3583 where defendant violated conditions of his supervised release by failing to inform probation officer before filing lawsuits, fraudulently misrepresenting himself to be a doctor, failing to maintain gainful employment, failing to notify his probation officer within 72 hours after being contacted by FBI, and failing to follow other instructions of his probation officer. *United States v Cofield* (2000, CA6 Tenn) 233 F3d 405, 2000 FED App 400P, cert den (2001) 532 US 952, 149 L Ed 2d 364, 121 S Ct 1424.

On inmate's challenge to district court's finding that inmate violated conditions of his supervised release, principal requirements laid down by *Fed. R. Crim. P. 32.1* for merits hearing were met because: inmate was advised of his right to notice of alleged violation, his right to counsel, and his rights to appear and present evidence at his preliminary hearing; inmate had counsel; and inmate made no claim that charges were unknown to him; moreover, there was ample evidence of violations of supervised release, which needed only to be shown by preponderance of evidence under 18 USCS § 3583(e)(3). *United States v Tapia-Escalera* (2004, CA1 Puerto Rico) 356 F3d 181.

Denial of defendant's motion seeking to dismiss detainer lodged against him for violating terms of his supervised release was affirmed because supervised release was not automatically extinguished by defendant's deportation. *United States v Williams* (2004, CA3 NJ) 369 F3d 250.

Federal district court's holding that appellant had violated conditions of supervised release by pleading nolo contendere to state offense was reversed; issue was whether defendant committed underlying criminal conduct; plea was not evidence of guilt. *United States v Poellnitz* (2004, CA3 Pa) 372 F3d 562.

Revocation of defendant's supervised release was affirmed because detailed allegations about his misbehavior at store informed defendant that his unsuccessful performance in sex offender treatment was related to store incident and *FRCrP 32.1(b)(2)* did not require disclosure of witness list, but rather, disclosure of evidence upon which Government relied on to support violation. *United States v Ahlemeier* (2004, CA8 Mo) 391 F3d 915.

Requirements of 18 USCS § 3583(i) were met to revoke defendant's supervised release and to order term of imprisonment after term had expired where warrant had been issued before expiration of term of imprisonment even though warrant was not served until later; delays were reasonably necessary for period that state adjudicated criminal charges against defendant, time after state conviction and before execution of warrant did not exceed period authorized by § 3583(i), and delay to adjudicate violation was partially due to defendant's request for stay to file motion to dismiss so that defendant was not prejudiced by that delay. *United States v Ramos* (2005, CA2 NY) 401 F3d 111.

Evidence was sufficient that defendant violated condition of his supervised release for armed bank robbery where evidence consisted of testimony by government informant, which was corroborated by recorded conversation between defendant and informant in which defendant explicitly acknowledged his participation in robbery; however, evidence was not sufficient that defendant violated condition of his supervised release for conspiracy to commit bank robbery where evidence failed to show that defendant conspired with anyone to commit robbery. *United States v Carlton* (2006, CA2 NY) 442 F3d 802.

Where district court imposed five-year term of supervised release after defendant had pled guilty to conspiracy to distribute multi-kilogram quantities of cocaine, and defendant argued that drug testing condition of supervised release improperly delegated authority to probation officer to determine frequency and quantity of drug testing, any improper delegation did not rise to level of plain error because it neither affected substantial rights nor impugned fairness, integrity, or public reputation of criminal proceeding as whole. *United States v Ortiz-Torres* (2006, CA1 Puerto Rico) 449 F3d 61.

Court vacated its original opinion, which had reversed revocation of defendant's supervised release term, because that decision was contrary to existing Ninth Circuit precedent, which imputed knowledge of certain standard release conditions to supervisees, regardless of whether or not that supervisees had received actual notice of conditions of their release as (1) court had originally held that defendant's supervised release term should not have been revoked because

he had not received written copy of conditions of release, which included, as first standard condition, that he would refrain from violating any law during his supervised release term; (2) Ninth Circuit precedent that addressed issue in probation revocation context was applicable, and that precedent held that supervisees had imputed knowledge that they had to refrain from committing crimes while they were being supervised; and (3) district court did not err in revoking defendant's supervised release term, after he reentered country illegally, because he had constructive knowledge that such conduct violated conditions of his supervised release. *United States v Ortuno-Higareda* (2006, CA9 Ariz) 450 F3d 406.

Grand jury indictment against defendant--which by itself was determination of probable cause and was made on oath by grand jury--provided requisite probable cause and oath pursuant to *U.S. Const. amend. IV* to support arrest warrant for defendant's supervised release violation; under 18 USCS § 3583(d), committing any other crime was explicit violation of terms of supervised release. *United States v Hacker* (2006, CA8 SD) 450 F3d 808.

District court properly revoked defendant's supervised release by satisfying requirements of 18 USCS § 3583(i) because District of South Dakota timely assumed jurisdiction over defendant on day before his supervised release term expired; under shelter of that jurisdictional umbrella, South Dakota properly exercised its authority pursuant to 18 USCS § 3606 to issue warrant that same day for defendant's supervised release violation. *United States v Hacker* (2006, CA8 SD) 450 F3d 808.

Supervised release term under Anti-Drug Abuse Act, Pub. L. No. 99-570, 1002(2), 1004, 100 Stat. 3207, codified as amended at 21 USCS § 841(b)(1)(A), and Sentencing Reform Act, Pub. L. No. 98-473, tit. II, § 212(a)(2), 98 Stat. 1837, codified as amended at 18 USCS § 3583, is tolled from time that defendant absconds from supervision until time that he is found by federal authorities; moreover, 21 USCS § 841(b)(1)(A) impliedly affords district court authority to revoke supervised release term, and application of revocation provision, 18 USCS § 3583, is not violation of *Ex Post Facto Clause*. *United States v Delamora* (2006, CA9 Cal) 451 F3d 977.

Convicted bank fraud defendant's changed financial circumstances did not warrant reduction under 18 USCS § 3583(e)(2) in amount of restitution ordered as condition of supervised release, where sentence required defendant to pay only 10 percent of his annual income toward satisfaction of restitution portion of his sentence. *United States v Sarvis* (2000, DC Vt) 102 F Supp 2d 514, affd (2000, CA2 Vt) 234 F3d 1262, reported in full (2000, CA2 Vt) 2000 US App LEXIS 26618 and affd (2000, CA2 Vt) 242 F3d 369, reported in full (2000, CA2 Vt) 2000 US App LEXIS 30124.

Defendant's supervised release was properly revoked when it was determined that defendant had failed to pay special assessment immediately, failed to report for scheduled office visits, and failed to notify probation office of change of residence. *United States v Evans* (2002, ED Pa) 208 F Supp 2d 538.

Court revoked remaining period of defendant's supervised release after it was shown by preponderance of evidence that defendant did not satisfy certain conditions of release, including failure to report to probation office, refusal to disclose new address, drug use, and failure to attend scheduled therapy and counseling sessions. *United States v Thompson* (2003, ED Pa) 240 F Supp 2d 325.

Defendant failed to demonstrate how delay between time of warrant's issuance and its execution, period during which he was incarcerated on state crimes, prejudiced him in his ability to contest violations alleged in petition to revoke his supervised release; therefore, pursuant to 18 USCS § 3583(i) court had authority to revoke defendant's now-expired term of supervised release. *United States v Cobbs* (2006, ED Mich) 436 F Supp 2d 860.

Unpublished Opinions

Unpublished: District court was not required to await outcome of state criminal proceedings before concluding that defendant violated condition of his supervised release that he not commit another federal, state, or local crime; district court properly revoked defendant's supervised release based on preponderance of evidence that underlying state offense had been committed, and fact that state charges were ultimately nolle prossed had no bearing on that decision. *United States v Peterman* (2006, CA7 Ill) 2006 US App LEXIS 354.

Unpublished: District court properly revoked defendant's supervised release under 18 USCS § 3583(e)(5) based on finding that defendant had violated conditions of his supervision based on his positive test result for cocaine and his admitted cocaine use. *United States v Smith* (2006, CA4 NC) 2006 US App LEXIS 1925.

Unpublished: District court did not err in revoking defendant's supervised release for violating state laws proscribing vehicular homicide and requiring drivers to remain at scene of accident, as evidence was sufficient to show that defendant was driving truck when it crashed into building and killed one of two passengers and that defendant left scene

of accident before police arrived; although defendant's expert witness opined that surviving passenger was probably driver of truck, two witnesses, including surviving passenger and police officer who saw defendant shortly before accident, testified that defendant was driver. *United States v Hunt* (2006, CA11 Fla) 2006 US App LEXIS 2053.

Unpublished: Appellate court granted counsel's motion to withdraw because he could not discern nonfrivolous basis for appeal and dismissed defendant's appeal of district court's revocation of his supervised release where plain terms of last sentence of 18 USCS § 3624(e) applied only to fine payment schedule, and no installment payment plan was at issue in defendant's case; moreover, district court was authorized under 18 USCS § 3583(f) and 18 USCS § 3603(1) to revoke defendant's supervised release for violating terms of supervised release since it was undisputed that defendant received notice of conditions of his release because defendant admitted at his revocation hearing that he received copy of district court's judgment that set forth terms of his supervised release, including requirements that he report to probation office within 72 hours and that he obtain permission before leaving *Central District of Illinois*. *United States v Sutton* (2006, CA7 Ill) 2006 US App LEXIS 4183.

Unpublished: Where officers found multiple bags of cocaine in car, including one in defendant's lap, and found on defendant large amount of cash, there was sufficient evidence to find that defendant committed Grade A violation of supervised release under USSG § 7B1.1 and 18 USCS § 3583(e) for possession with intent to distribute near place of worship in violation of Fla. Stat. §§ 775.082(3)(b), 893.03(2)(a)(4), 893.13(1)(e). *United States v Jackson* (2006, CA11 Fla) 2006 US App LEXIS 11667.

Unpublished: Being rendered homeless did not absolve probationer of obligation to inform his probation officer of change of his address, it simply meant probationer was to inform probation officer of address--such as address of shelter, street address where probationer's car/home was parked regularly, etc.--where officer could contact probationer; district court did not err in finding that defendant violated condition obligating him to notify his probation officer of change of address. *United States v Toliver* (2006, CA10 Colo) 2006 US App LEXIS 14302.

Unpublished: Because defendant admitted that he violated conditions of his supervised release, district court acted within its discretion when it revoked his release, under 18 USCS § 3583(e). *United States v Espinoza* (2006, CA11 Fla) 2006 US App LEXIS 17984.

Unpublished: Revocation of supervised release, 18 USCS § 3583(e)(3), was affirmed, as there was sufficient evidence presented by government for district court to find that defendant possessed cocaine found in truck; police located defendant in area and in close proximity to truck described in anonymous tip, defendant had been seen on several occasions driving truck, and he had personal property in truck; by finding that defendant had violated conditions of his supervised release, district court implicitly found that contrary testimony of defendant was not credible. *United States v Knight* (2006, CA5 Miss) 2006 US App LEXIS 18740.

Unpublished: Defendant's appeal from sentence imposed upon revocation of his supervised release was dismissed because it would be frivolous for defendant to argue that district court was powerless to revoke his supervision for violating conditions for which he never gave his consent because defendant's consent to conditions of his supervised release was not necessary for those conditions to be enforceable as he received actual notice of conditions when he was released from custody, and thus, district court was authorized to revoke his supervised release for violating those conditions under 18 USCS §§ 3583(f), 3603(1), and further, district court retained jurisdiction to terminate, modify, or revoke unexpired term of supervised release under 18 USCS § 3583(e) *United States v Sutton* (2006, CA7 Ill) 2006 US App LEXIS 19851.

Unpublished: Record supported district court's determination that defendant more likely than not violated terms of his supervised release including failure to report bank account and mailbox that he was using; his supervised release was properly revoked pursuant to 18 USCS § 3583. *United States v Smith* (2006, CA9 Wash) 2006 US App LEXIS 21262.

Unpublished: District court did not abuse its discretion when it revoked defendant's supervised release because his admission, that he had violated conditions of his supervised release by using drugs and by failing to show up for counseling sessions and drug tests, was sufficient to support district court's revocation decision. *United States v Daniels* (2006, CA7 Wis) 2006 US App LEXIS 21610.

Unpublished: Sufficient evidence supported district court's decision to revoke defendant's supervised released term after victim reported that defendant had assaulted her, and firearm was later found hidden beneath mattress in defendant's residence where (1) as condition of supervised release, defendant was required to refrain from violating any local, state, or federal law, (2) pursuant to 18 USCS § 3583(e)(3), preponderance of evidence was sufficient to support revoca-

tion of defendant's supervised release for violating that condition, (3) testimony of assault victim was sufficient to establish that defendant committed aggravated battery under 720 Ill. Comp. Stat. 5/12-3, 720 Ill. Comp. Stat. 5/12-4, and (4) testimony of police sergeant, who found firearm, was sufficient to establish that defendant's possession of handgun in violation of 18 USCS § 922(g). *United States v Ingram* (2006, CA7 Ill) 2006 US App LEXIS 27281.

Unpublished: District court did not abuse its discretion by revoking defendant's supervised release after defendant violated terms of his release by illegally reentering U.S.; district court correctly informed defendant of conditions of his release pursuant to 18 USCS §§ 3583(f) and 3603(1), interpreter was present during sentencing to assist defendant, who did not speak English, and defendant expressed no confusion over terms of release at sentencing. *United States v Villalona* (2006, CA5 Tex) 2006 US App LEXIS 28107.

Unpublished: District court properly revoked defendant's period of supervised release and imposed period of incarceration of 24 months to be served consecutively with defendant's new conviction because defendant was convicted of new crime in violation of condition of his supervised release that required defendant not to commit additional crimes and court properly considered factors set forth in 18 USCS § 3583(e)(3). *United States v Hall* (2005, CA8 Mo) 147 Fed Appx 623.

Unpublished: In light of defendant's admission that he committed violations of his supervision terms, appellate court found no error by district court in revoking his supervised release. *United States v Wellons* (2005, CA4 SC) 155 Fed Appx 728.

Unpublished: Where robbery victim told officer that defendant and two convicted felons robbed victim at gunpoint and police found defendant driving vehicle with convicted felons as passengers, revocation of supervised release for associating with convicted felons was proper. *United States v Hendricks* (2005, CA11 Ga) 143 Fed Appx 168.

Unpublished: Where defendant failed to provide financial statements and financial release form, which prevented probation officer from determining restitution, revocation of supervised release under 18 USCS § 3583 was warranted because defendant previously committed crimes such as fraud, indicating lack of trustworthiness, did not accept responsibility for crimes, verbally abused probation officer, and was possibly hiding assets to avoid paying restitution. *United States v Livingston* (2005, CA11 Fla) 140 Fed Appx 886.

Unpublished: Revocation of supervised release was proper under 18 USCS § 3583 after defendant was arrested and charged with driving without license. *United States v Lee* (2005, CA4 Md) 136 Fed Appx 578.

Unpublished: Since provision of Sentencing Reform Act that governed supervised release, 18 USCS § 3583, was not affected by Booker decision, inmate's argument that district court did not have authority to impose or revoke any term of supervised release was rejected; district court's revocation of inmate's supervised release and imposition of 12-month prison term was affirmed. *United States v Redman* (2005, CA4 W Va) 131 Fed Appx 26.

Unpublished: Based on defendant's admission to criminal association violation, his no contest plea to criminal conduct violation, and probation officer's proffer of evidence, district court found that defendant violated conditions of his supervision and properly revoked his supervision. *United States v McFadyen* (2005, CA4 NC) 131 Fed Appx 913.

Unpublished: Court affirmed revocation of defendant's supervised release and imposition of 24-month prison sentence; once district court found that defendant had violated terms of his supervised release, based on defendant's admissions and evidence presented at revocation hearing, district court had discretion to revoke defendant's release pursuant to 18 USCS § 3583(e)(3). *United States v Williams* (2005, CA4 NC) 131 Fed Appx 955.

2. Practice and Procedure 40. Jurisdiction

District courts retain jurisdiction to hold hearings related to revocation of supervised release for reasonable period after term of release expires when petition charging violation of conditions of supervised release is filed during period of supervised release, and thus court properly exercised jurisdiction over defendant after her term of supervised release had expired and revoked her supervised release and imposed six month sentence of imprisonment. *United States v Barton* (1994, CA4 W Va) 26 F3d 490.

District court had jurisdiction to revoke defendant's supervised release without issuing warrant or summons under 18 USCS § 3583(i), since court revoked term before it was due to expire; although defendant had been released from jail in supervised release case, he was still in jail for another offense and his supervised release term did not run until his release. *United States v Schmidt* (1996, CA9 Cal) 99 F3d 315, 96 CDOS 7892, 96 Daily Journal DAR 13077 (criticized in *United States v Palomba* (1999, CA9 Cal) 182 F3d 1121, 99 CDOS 5859, 99 Daily Journal DAR 7489).

18 USCS § 3583

District court has jurisdiction to revoke term of supervised release where arrest warrant was issued during term but revocation hearing was not held until after term expired. *United States v Jimenez-Martinez* (1999, CA5 Tex) 179 F3d 980.

District court had jurisdiction pursuant to 18 USCS § 3583(i) to revoke defendant's supervised release subsequent to completion of his supervised release term based on a violation of a supervised release condition that occurred during supervision term, even though different violation of supervised release was alleged in petition for revocation filed during term, where warrant or summons was issued during term on basis of an alleged violation. *United States v Naranjo* (2001, CA5 Tex) 259 F3d 379, cert den (2002) 534 US 1163, 152 L Ed 2d 118, 122 S Ct 1175.

Under 18 USCS § 3583(e)(3), a district court has jurisdiction to revoke a term of supervised release where the summons was issued during the term but the revocation hearing was not held until after the term expired. *United States v Bailey* (2001, CA10 Colo) 259 F3d 1216, 2001 Colo J C A R 3901.

District court's jurisdiction to revoke supervised release can be extended beyond term of supervision under 18 USCS § 3583(i), based upon warrant issued during term of supervision, only if warrant was issued upon probable cause, supported by oath or affirmation, as required by *Fourth Amendment*. *United States v Vargas-Amaya* (2004, CA9 Cal) 389 F3d 901.

Where defendant's probation officer petitioned district court for no-bail bench warrant but factual allegations in petition for warrant or summons for offender under supervision were not sworn to under oath, district court lacked jurisdiction under 18 USCS § 3583(i) to consider defendant's alleged violations of supervised release because warrant issued during term of defendant's supervised release was not based on facts supported by oath or affirmation as required by *Fourth Amendment*. *United States v Vargas-Amaya* (2004, CA9 Cal) 389 F3d 901.

Where 18 USCS § 3583(e)(3), rather than § 3583(i), provided authority for district court to revoke defendant's supervised release, district court did not lack jurisdiction to revoke on ground that warrant that precipitated defendant's arrest was not supported by oath or affirmation; where revocation occurs before expiration of term, 18 USCS § 3583(e)(3) governs and district court will have jurisdiction to revoke supervised release in absence of warrant or even if warrant is defective under *Fourth Amendment*. *United States v Ortuno-Higareda* (2005, CA9 Ariz) 421 F3d 917.

Trial court had jurisdiction under 18 USCS § 3583(e)(3) to revoke defendant's supervised release because he absconded during term of his supervised release and became fugitive for period that tolled term of supervised release; term of supervised release was still running at time of defendant's arrest and revocation hearing. *United States v Murguia-Oliveros* (2005, CA9 Cal) 421 F3d 951.

District court had no jurisdiction over revocation of defendant's supervised release because warrant that supported extension of defendant's period of supervised release was not based on oath or affirmation. *United States v Ortiz-Hernandez* (2005, CA9 Or) 427 F3d 567.

District court had subject matter jurisdiction over defendant because valid summons under 18 USCS § 3583(i) was issued on June 10, 2004, prior to expiration of her supervised release, and district court's factual finding that summons was issued on June 10, 2004 was not clearly erroneous and was supported by record since court's docket sheet reflected that summons was executed on June 15 and returned to clerk's office for filing on June 23. *United States v Moore* (2006, CA11 Fla) 443 F3d 790.

Revocation of defendant's supervised release was affirmed because district court had jurisdiction over defendant since, inter alia, given relaxed constitutional norms that applied in revocation hearings, warrant for arrest of supervised release under 18 USCS § 3583(i) did not have to comply with oath or affirmation clause of *Fourth Amendment*, and neither plain language of 18 USCS § 3583 nor principle of constitutional avoidance suggested that district court did not have jurisdiction over defendant where warrant was not supported by sworn facts. *United States v Garcia-Avalino* (2006, CA5 Tex) 444 F3d 444.

Court rejected defendant's claim, that district court lacked jurisdiction to revoke his supervised release term because warrant that had been issued for his arrest, after he reentered country illegally, did not meet *Fourth Amendment* Warrant Clause requirements because (1) constitutional validity of arrest warrant was only relevant when district court exercised its jurisdiction under 18 USCS § 3583(i) and revoked supervised release term after term had expired, based upon supervisee's pre-expiration conduct; (2) district court was exercising jurisdiction pursuant to § 3583(e)(3) because defendant's supervised release term had not yet expired; (3) jurisdiction under § 3583(e)(3) was not dependent upon issuance of valid arrest warrant; and (4) district court had jurisdiction to revoke defendant's supervised release term even in absence

of warrant and/or despite fact that arrest warrant might be constitutionally defective. *United States v Ortuno-Higareda* (2006, CA9 Ariz) 450 F3d 406.

Pursuant to 18 USCS § 3583(i), district court has jurisdiction to revoke term of supervised release after expiration of original term if summons or warrant is issued during release period; although they were issued after date that defendant's supervised release was originally scheduled to terminate, revocation petition and warrant were still timely issued because defendant's supervised release term had been automatically tolled or suspended under 18 USCS § 3624(e) during time that he was incarcerated for violating his state parole. *United States v Jackson* (2004, MD La) 323 F Supp 2d 775.

Unpublished Opinions

Unpublished: Where defendant was arrested pursuant to 18 USCS § 3583(e)(3) while he was on supervised release, arrest pursuant to unsworn warrant did not deprive court of jurisdiction over revocation proceedings; § 3583(e)(3) expressly authorizes warrantless arrests. *United States v Peters* (2005, CA9 Ariz) 2005 US App LEXIS 22666.

Unpublished: District court did not need warrant to revoke defendant's supervised release because, at time of defendant's arrest and revocation hearing, period of supervised release had not yet expired pursuant to 18 USCS §§ 3583(e)(3) and 3606. Period of supervised release was tolled for three years under 18 USCS § 3624(e) while defendant was in state custody, and it was tolled while he was fugitive for having violated conditions of his release; consequently, district court had jurisdiction to revoke defendant's supervised release. *United States v Schweitzer* (2006, CA9 Cal) 2006 US App LEXIS 15793.

Unpublished: Defendant's 14-month sentence imposed after he admitted to violating terms of his supervised release was affirmed, where his June 2002 arrest and his September 2002 warrant fell within period of time he was on supervised release; illegal arrest did not divest district court of jurisdiction to adjudicate case. *United States v Rodriguez* (2005, CA11 Fla) 153 Fed Appx 662.

41. Hearing

District courts retain jurisdiction to hold hearings related to revocation of supervised release for reasonable period after term of release expires when petition charging violation of conditions of supervised release is filed during period of supervised release, and thus court properly exercised jurisdiction over defendant after her term of supervised release had expired and revoked her supervised release and imposed six month sentence of imprisonment. *United States v Barton* (1994, CA4 W Va) 26 F3d 490.

Although district court did not hold supervised release violation hearing until almost two years after court issued supervised release violation warrant, court did not abuse its discretion, where warrant issued well within term of supervised release, belated hearing fell within three-year term, and defendants suffered no prejudice. *United States v Throneburg* (1996, CA6 Mich) 87 F3d 851, 1996 FED App. 196P, cert den (1996) 519 US 975, 136 L Ed 2d 324, 117 S Ct 411.

Defendant's Fifth Amendment due process rights were not violated by revocation of his supervised release under 18 USCS § 3583(i) because there was no constitutional duty to provide releasee with adversary hearing until he was taken into custody under warrant and, therefore, delay between violation and execution of warrant did not violate due process; further, defendant was not prejudiced by delay because it did not hinder his defense where no allegations were made that witnesses were not available for revocation proceeding due to delay. *United States v Ramos* (2005, CA2 NY) 401 F3d 111.

Second Circuit is not inclined to extend sweep of Blakely and Booker to supervised release; defendants facing revocation are not entitled to have jury decide whether they have, in fact, violated terms of their supervised release. *United States v McNeil* (2005, CA2 NY) 415 F3d 273.

Issuance of warrant for supervised release (SR) violation, served on last day of defendant's SR, tolled period for hearing on violation (HOV) which could then be held after expiration of SR and period of SR would continue to date of HOV under 18 USCS § 3583(i). *United States v Venable* (2006, DC Dist Col) 416 F Supp 2d 64.

Where defendant allegedly violated federal supervised release and was held in state custody, Government's motion to continue federal sentencing hearing until after state court sentenced defendant was denied because of federal-state comity and need to avoid placing judicial imprimatur over overtly strategic, non-substantive motion. *United States v Reeks* (2006, DC Me) 441 F Supp 2d 123.

Unpublished Opinions

Unpublished: Defendant's confrontation rights were not violated in his supervised release revocation proceeding since neither United States Court of Appeals for Eleventh Circuit nor United States Supreme Court had extended Crawford decision to revocation proceedings; right to confrontation is trial right, and United States Court of Appeals for Eleventh Circuit has held that it does not apply to non-capital sentencing. *United States v Wooden* (2006, CA11 Fla) 2006 US App LEXIS 11068.

Unpublished: In supervised release revocation hearings when deciding whether to admit hearsay testimony, court must balance defendant's right to confront adverse witnesses against grounds asserted by government for denying confrontation. *United States v Wooden* (2006, CA11 Fla) 2006 US App LEXIS 11068.

Unpublished: Defendant had to be resentenced after his supervised release was revoked under 18 USCS § 3583 because district court failed to provide him with opportunity to object to his sentence at end of revocation hearing. Because of fact-intensive nature of defendant's argument that district court erred in considering drugs and paraphernalia found at his home at time of his arrest and paucity of evidence in record on that issue, appellate court could not conduct meaningful review. *United States v Jackson* (2006, CA11 Fla) 2006 US App LEXIS 11667.

Unpublished: Where defendant was arrested along with two convicted felons for their involvement in armed robbery, admission of National Crime Information Center reports showing felons' criminal-history were admissible at revocation hearing where defendant failed to show that hearsay was unreliable. *United States v Hendricks* (2005, CA11 Ga) 143 Fed Appx 168.

Unpublished: In revoking defendant's term of supervised release pursuant to 18 USCS § 3583(e), district court violated defendant's U.S. Const. amend. V due process rights by relying on probation officer's testimony regarding police officer's arrest report without first determining if good cause existed that excused Government's failure to call arresting officer as witness at revocation hearing. *United States v Zayas* (2005, CA11 Fla) 146 Fed Appx 346.

42. Burden of proof

District judge properly applied preponderance of evidence standard necessary to revoke defendant's supervised release, even though judge mentioned that he was "reasonably satisfied" with proof of defendant's violations, in light of substantial, overwhelming, and convincing evidence against defendant, and court's solitary reference to incorrect standard of proof. *United States v Goad* (1995, CA7 Wis) 44 F3d 580, reh, en banc, den (1995, CA7 Wis) 1995 US App LEXIS 2065 and cert den (1995) 516 US 826, 133 L Ed 2d 49, 116 S Ct 93.

Fact that 18 USCS § 3583(e)(3) does not require question of whether defendant violated terms of his supervised release to be submitted to jury and proved beyond reasonable doubt does not violate defendant's constitutional rights. *United States v Gómez-Gonzalez* (2002, CA9 Cal) 277 F3d 1108, 2002 CDOS 391, 2002 Daily Journal DAR 511, reh dismd, reh, en banc, den, op withdrawn, app dismd (2002, CA9 Cal) 295 F3d 990, 2002 CDOS 6000, 2002 Daily Journal DAR 7541.

Defendant's due process and U.S. Const. amend. VI rights to confrontation were not violated when district court considered hearsay evidence during his supervised release revocation hearing and relied on that evidence in finding that defendant had committed several Grade A violations; neither Crawford nor Sixth Amendment applied to hearing because it was not criminal proceeding, and full due process rights did not attach to revocation hearing. *United States v Kelley* (2006, CA7 Ind) 446 F3d 688.

Defendant's due process rights were not violated when district court revoked his supervised release term because evidence offered by government was constitutionally sufficient to support revocation decision as (1) one of standard conditions of defendant's supervised release term was that he refrain from violating any laws, which condition did not reference or require actual conviction; (2) government presented border control agent, who testified as to defendant's arrest and conviction for illegally reentering country, and defendant's "A-file," which was file kept by immigration authorities that contained defendant's arrest reports, conviction documents, deportation warrants, immigration judge orders, photographs, and fingerprints; (3) "A-file" was admissible under public records exception to hearsay rule; and (4) despite fact that government did not present certificate conviction record, evidence more than sufficiently established that defendant had violated law by reentering country illegally, which constituted violation of both standard and special condition of his supervised release term. *United States v Ortuno-Higareda* (2006, CA9 Ariz) 450 F3d 406.

Supervised release of unregistered firearms convict is revoked, where he (1) failed to submit to alcohol and drug testing as directed by his probation officer, (2) failed to submit to substance abuse evaluation and complete treatment, and (3) admitted to using marijuana at rock concert, because court finds by preponderance of evidence that convict violated several conditions of his probation. *United States v Snyder* (2002, ND NY) 187 F Supp 2d 52.

Where defendant tested positive for cocaine use on several occasions based on sweat patch results, government was not required to prove such use through preponderance of evidence standard because all that was required under 18 USCS § 3148(b) was that there was probable cause to believe that defendant had committed crime while on pretrial release; as noted in 18 USCS § 3583(e)(3), preponderance of evidence standard applied in context of revocation of supervised release after imprisonment. *United States v Alfonso* (2003, DC Mass) 284 F Supp 2d 193.

Unpublished Opinions

Unpublished: Revocation of defendant's supervised release was proper where preponderance of evidence, including testimony of two witnesses who saw purse fall out of defendant's shirt and defendant's admission that he lied to his probation officer about being at club, showed that he stole purse at club. *United States v McMillan* (2006, CA11 Ga) 2006 US App LEXIS 3751.

Unpublished: Certified copy of sentencing order was more than sufficient to support district court's finding by preponderance of evidence under 18 USCS § 3583(e)(3) (Supp.) that defendant violated one of conditions of his supervised release by committing another crime. *United States v Vanmeter* (2005, CA4 W Va) 142 Fed Appx 778.

Unpublished: Revocation of supervised release was proper under 18 USCS § 3583(e)(3) because state conviction of murder was sufficient to establish that defendant had violated terms of supervised release, although murder conviction was pending on appeal at time of revocation. *United States v Spraglin* (2005, CA5 Tex) 418 F3d 479.

Unpublished: District court did not abuse its discretion in revoking defendant's supervised release where one condition of defendant's supervised release was that he not commit another federal, state, or local crime during term of supervision and that he not unlawfully possess controlled substance, and sufficient evidence was presented for district court to find by preponderance of evidence that defendant violated his supervised release by driving without license, for which he was convicted, and by committing battery against his wife. *United States v Griggs* (2005, CA11 Ga) 130 Fed Appx 303, reported at (2005, CA11 Ga) 143 Fed Appx 308.

B. Other Matters 43. Modification of conditions

Although there is no direct impediment to authorizing person on supervised release to leave United States, if necessary supervision can be enforced abroad, court did not abuse its discretion in refusing to modify conditions of supervised release to permit defendant to return to his home, wife, and child in Thailand, since necessary structure was absent in Thailand. *United States v Pugliese* (1992, CA10 Colo) 960 F2d 913.

When defendant has violated conditions of his supervised release, 18 USCS § 3583(e)(2) authorizes court to modify conditions of supervised release without extending term. *United States v Allen* (1993, CA4 NC) 2 F3d 538.

Court had jurisdiction to extend and modify terms of defendant's supervised release pursuant to 18 USCS § 3583(e)(2), even though hearing was not held until after his supervised release period was supposed to end, where summons was issued during period of defendant's supervised release, and delay of 17 days from date probation officer filed petition until date original hearing was scheduled was not unnecessary or unreasonable. *United States v Morales* (1995, CA2 Conn) 45 F3d 693.

District Court did not have authority under 18 USCS § 3583(e)(2) to modify or rescind restitution order on ground of illegality, where order was not challenged either on direct review or under 28 USCS § 2255, even though restitution was made condition of supervised release and supervised release may be modified pursuant to 18 USCS § 3583(e)(2). *United States v Lussier* (1997, CA2 Vt) 104 F3d 32, subsequent app (2000, CA2 Vt) 219 F3d 217, subsequent app sub nom *Lyndonville Sav. Bank & Trust Co. v Lussier* (2000, CA2 Vt) 211 F3d 697.

Court can modify conditions of defendant's supervised release regardless of whether defendant has violated his existing conditions; § 7B1.3(a)(2) does not provide that violation is necessary prerequisite to modification, but merely states that violation may justify modification. *United States v Lowenstein* (1997, CA6 Mich) 108 F3d 80, 1997 FED App 76P.

District court under pre-1994 version of 18 USCS § 3583 was required to terminate supervised release of defendant who violated terms of his supervised release by testing positive for narcotics and impose a term of imprisonment of at least one-third of his supervised release term, or not less than one year, and court's failure to imprison defendant was plainly unreasonable and required remand. *United States v Wirth* (2001, CA2 NY) 250 F3d 165.

District court, upon finding violation of supervised release, may both extend term of supervised release and impose home detention as condition of such release. *United States v Kremer* (2002, CA2 NY) 280 F3d 219.

District court did not have authority to modify conditions of defendant's supervised release based on illegality of conditions, or based on parties' stipulations. *United States v Gross* (2002, CA9 Cal) 307 F3d 1043, 2002 CDOS 10192, 2002 Daily Journal DAR 11713.

District court erred as matter of law when it vacated its previous order of restitution as void and imposed \$ 100,000 fine upon defendant, since defendant had not violated restitution order, and district court's act was not one of four modifications allowed by 18 USCS § 3583(e). *United States v Turner* (2002, CA9 Wash) 312 F3d 1137, 2002 CDOS 11874, 2002 Daily Journal DAR 13957.

Defendant's argument that trial court erred in imposing special conditions of supervised release that prohibited him from use of alcohol and from frequenting bars, taverns, or other establishments whose primary source of income was derived from sale of alcohol was meritless where, since defendant was allowed to apply for modification of conditions if he was only able to find employment which required him to enter bar, tavern, or other place whose primary source of income was alcohol sales. *United States v Henkel* (2004, CA8 Iowa) 358 F3d 1013, reh den (2004, CA8 Iowa) 2004 US App LEXIS 6504.

Fact that district court could later modify conditions of defendant's supervised release did not suffice to support government's argument that appeals court should delay or avoid consideration of defendant's objection to conditions imposed by district court. *United States v Myers* (2005, CA2 NY) 426 F3d 117.

Government's wait-and-see argument would apply to any incarcerated defendant challenging condition of supervised release on direct appeal, thereby disrupting Congress's intent in providing streamlined procedures for reviewing terms of supervised release. *United States v Myers* (2005, CA2 NY) 426 F3d 117.

Under 18 USCS § 3583(e), parolee's compliance with terms of supervised release warranted modification, rather than termination, of terms of release for remaining period of supervision, where parolee's postincarceration conduct apparently was unblemished, but that alone could not be sufficient reason to terminate supervised release, since such conduct was expected of him. *United States v Medina* (1998, SD NY) 17 F Supp 2d 245.

Under 18 USCS § 3583, modification of defendant's supervised release was warranted, where conditions of release required defendant to participate in program of drug testing and drug treatment as directed by probation officer and to obtain full-time employment, but after defendant tested positive for marijuana on 4 occasions and failed to obtain employment, new condition requiring defendant to serve term of 4 months at in-patient drug rehabilitation center was appropriate. *United States v Bell* (2001, ED Pa) 171 F Supp 2d 487.

Unpublished Opinions

Unpublished: Defendant's motion to modify and clarify his term of supervised release under *Fed. R. Crim. P. 32.1* and 18 USCS § 3583(e)(2) was properly denied because defendant's claim that sentencing judge erred by imposing too long term or conditions unrelated to crime was disguised collateral relief request that was outside scope of § 3583(e)(2), as arguments should have been raised on direct appeal or in *Fed. R. Crim. P. 35(c)* motion, and while clarification of conditions of supervised release was legitimate basis for motion, there was no discrepancy between oral and written pronouncements because written judgment was simply more specific rendering of oral pronouncement at hearing. *United States v Raymer* (2005, CA7 Ind) 148 Fed Appx 555, reh den (2005, CA7 Ind) 2005 US App LEXIS 22307 and reh den (2005, US) 126 S Ct 818, 163 L Ed 2d 643.

44. Early termination

Appeal of sentence enhancement was not moot upon conclusion of defendant's prison sentence, where defendant was on supervised release at time of appeal, and resentencing under revised USSG computation could clearly benefit defendant. *United States v McCoy* (2002, App DC) 354 US App DC 111, 313 F3d 561.

18 USCS § 3583

Probation officer's request for early termination of supervised release of convict is granted, where former Secret Service officer working part-time in gun shop was caught up in sting operation and convicted of conspiring to engage in illegal straw transactions knowingly transferring firearms out of state, because convict served 6 months in jail, paid his fine and special assessments, completed 100 hours of community service, and completed one year of 2-year supervised release term, because 18 USCS § 3583(e) authorizes and facts warrant early termination. *United States v Chapman* (1993, ED Va) 827 F Supp 369.

Probationer's request for early termination of supervised release is granted under authority of 18 USCS § 3583, where probationer used prison time to train as alcohol and drug abuse counselor and since release, prisoner has become licensed counselor and has participated in professional service to community as counselor and grant-writer for counseling programs, because although initial term of supervised release was mandatory, 18 USCS § 3583 allows modification after one year in unusual cases and makes no distinction between mandatory and discretionary supervised release. *United States v Spinelle* (1993, ED Mich) 835 F Supp 987, affd (1994, CA6 Mich) 41 F3d 1056, 1994 FED App 402P.

Marijuana distributor is entitled to release from term of supervised release, after serving approximately 13 months of 5-year term, where probation officer reported that his overall adjustment to supervision was good, that he completed drug and alcohol program, and that he attended community college and was able to purchase rental property, because court is satisfied, after considering factors set forth in 18 USCS § 3583(e)(1), that release is warranted by conduct of defendant and interest of justice. *United States v Gainer* (1996, DC Kan) 936 F Supp 785 (criticized in *United States v Paterno* (2002, DC NJ) 2002 US Dist LEXIS 9334).

Under 18 USCS § 3583(e), parolee's compliance with terms of supervised release warranted modification, rather than termination, of terms of release for remaining period of supervision, where parolee's postincarceration conduct apparently was unblemished, but that alone could not be sufficient reason to terminate supervised release, since such conduct was expected of him. *United States v Medina* (1998, SD NY) 17 F Supp 2d 245.

Court declined to exercise its discretion under 18 USCS § 3583(e) and grant defendant early termination of his three-year term of supervised release; although defendant had resumed his pre-incarceration life, apparently had resumed his participation in civic organizations, and had been restored to his family life, defendant's activities did not constitute "exceptional behavior" that was contemplated in precedents regarding early termination of supervised release. *United States v McKay* (2005, ED NY) 352 F Supp 2d 359.

Defendant who had served 17 months of his 36 month supervised release term was entitled to termination of his supervised release pursuant to 18 USCS § 3583(e)(1) where 1) he was 71 years old, 2) he had cooperated fully with his probation officer, 3) he had given 15 random urine samples which tested negative for controlled substances, 4) he had completed 17 of 36 months of his supervised release time, 5) he had spent at least 8 more months in prison than he should have due to his prison's failure to credit him for completing prison drug and alcohol course, and 6) interests of justice required termination of his supervised release due to his incarceration beyond proper expiration of his prison term. *United States v Norgaard* (2005, WD Wash) 357 F Supp 2d 1274.

Defendant's 18 USCS § 3583(e)(1) motion for early termination of his supervised release was denied because (1) defendant had not shown that his poor health, which was taken into consideration at sentencing, had worsened so as to constitute changed circumstance warranting early termination; (2) health problems of defendant's wife were not shown to be affected by his supervised release; (3) while it was commendable that defendant was model prisoner and supervisee, such good behavior was expected and did not warrant early termination; and (4) defendant's role in criminal conduct, which consisted of illegal removal of asbestos, was that of leader, and his conduct put people at risk of developing health problems, both of which militated against early termination. *United States v Weintraub* (2005, DC Conn) 371 F Supp 2d 164.

In addition to consideration of criteria in 18 USCS § 3553(a), factors considered when deciding whether to approve early termination of supervised release, such as (1) stable community reintegration (e.g., residence, family, employment); (2) progressive strides toward supervision objectives and in compliance with all conditions of supervision; (3) no aggravated role in offense of conviction, particularly large drug or fraud offenses; (4) no history of violence; (5) no recent arrests or convictions; (6) no recent evidence of alcohol or drug abuse; (7) no recent psychiatric episodes; (8) no identifiable risk to safety of any identifiable victim; and (9) no identifiable risk to public safety. *United States v Weintraub* (2005, DC Conn) 371 F Supp 2d 164.

Unpublished Opinions

18 USCS § 3583

Unpublished: Reduction in terms of supervised release in recompense for fact that length of defendant's incarceration exceeded sentence agreed upon by defendant and government in his plea agreement and exceeded U.S. Sentencing Guidelines range was unavailable under 18 USCS § 3642(e); however, such relief might be available, in district court's discretion, upon proper application under 18 USCS § 3583(e)(1), (2). *United States v Pelaez* (2006, CA2 NY) 2006 US App LEXIS 2588.

Unpublished: District court committed Booker error in enhancing defendant's sentence pursuant to USSG § 2B5.1(b)(1)(A) based on face value of counterfeit items involved in counts of indictment to which defendant did not plead guilty and that Government had dismissed, and error was not harmless under *Fed. R. Crim. P. 52(a)* because Government failed to show that district court would not have sentenced differently absent error; however, since defendant had already served prison sentence imposed by district court, only relief possible on remand was modification rather than reduction of three-year supervised release term he was serving because, pursuant to 18 USCS § 3624(e), courts could not reduce length of supervised release term by reason of excess time served in prison; on remand, defendant could invoke 18 USCS § 3583(e)(2) in pursuit of relief, but he had to complete one year of supervised release prior to seeking relief under § 3583(e)(1). *United States v Benavides* (2005, CA5 Tex) 145 Fed Appx 971.

45. Extension of term

Court had jurisdiction to extend and modify terms of defendant's supervised release pursuant to § 3583(e)(2), even though hearing was not held until after his supervised release period was supposed to end, where summons was issued during period of defendant's supervised release, and delay of 17 days from date probation officer filed petition until date original hearing was scheduled was not unnecessary or unreasonable. *United States v Morales* (1995, CA2 Conn) 45 F3d 693.

Defendant's plea was not invalid on grounds that court did not inform him that his term of supervised release could be extended potentially to life-long term, since defendant's supervised release could only be extended up to maximum originally allowable term, and since maximum term of restricted liberty defendant faced was less than 40-year sentence to which he believed he could be sentenced, any error by sentencing court in explaining term of supervised release was harmless. *United States v Fuentes-Mendoza* (1995, CA9 Ariz) 56 F3d 1113, 95 CDOS 4191, 95 Daily Journal DAR 7222, cert den (1995) 516 US 925, 133 L Ed 2d 227, 116 S Ct 326.

18 USCS § 3583(e)(3) does not authorize district court to award post revocation sentence that endures longer than original term of supervised release; however, district court may impose additional term of supervised release under its general sentencing authority pursuant to 18 USCS § 3583(a). *United States v Marlow* (2002, CA6 Tenn) 278 F3d 581, cert den (2002) 535 US 1119, 153 L Ed 2d 171, 122 S Ct 2342 and (criticized in *United States v Russell* (2003, CA7 Ill) 340 F3d 450).

District court, upon finding violation of supervised release, may both extend term of supervised release and impose home detention as condition of such release. *United States v Kremer* (2002, CA2 NY) 280 F3d 219.

Three-year term of supervised release defendant was ordered to serve was tolled, pursuant to 18 USCS § 3624(e), while defendant was incarcerated by State, even though State subsequently determined it incarcerated defendant illegally, and district court ruled correctly that U.S. Government's petition to revoke defendant's supervised release was timely even though it was filed after date that was originally established as expiration date of defendant's supervised release. *United States v Jackson* (2005, CA5 La) 426 F3d 301.

Bank fraud convict's supervised release will not be extended by 2 years, even if court has discretion under 18 USCS § 3583(e)(2), where convict is not in default on restitution payments and has not violated terms of his supervised release, because court trusts him to continue to meet his restitution obligation without need for supervision. *United States v West* (1998, DC Dist Col) 31 F Supp 2d 7.

Arrest warrant issued on date supervised release period was scheduled to expire was issued "before its expiration" as required under 18 USCS § 3583(i) to extend power of court to revoke term of supervised release for violation of condition of supervised release beyond expiration of term of supervised release. *United States v Hondras* (2001, ED Wis) 176 F Supp 2d 855, affd (2002, CA7 Wis) 296 F3d 601.

46. Miscellaneous

Although district court did not hold supervised release violation hearing until almost two years after court issued supervised release violation warrant, court did not abuse its discretion, where warrant issued well within term of super-

18 USCS § 3583

vised release, belated hearing fell within three-year term, and defendants suffered no prejudice. *United States v Throneburg* (1996, CA6 Mich) 87 F3d 851, 1996 FED App 196P, cert den (1996) 519 US 975, 136 L Ed 2d 324, 117 S Ct 411.

District court's finding that defendant did not comply with financial disclosure requirements of his supervised release, so as to warrant revocation, was supported by evidence that defendant never mentioned his work as paralegal to probation officer, did not disclose that he used business bank account for his personal finances, falsified documents so that his probation officer would believe that he earned salary of approximately \$ 2,000 per month for work as manager of business, and refused to provide telephone and financial records. *United States v Schmidt* (1996, CA9 Cal) 99 F3d 315, 96 CDOS 7892, 96 Daily Journal DAR 13077 (criticized in *United States v Palomba* (1999, CA9 Cal) 182 F3d 1121, 99 CDOS 5859, 99 Daily Journal DAR 7489).

Defendant was not entitled to have his time served and good-time credits that accrued during his incarceration on vacated 18 USCS § 924(c) sentence for carrying firearm during drug trafficking offense applied to reduce term of supervised release pursuant to 18 USCS § 3583(e)(1); while court may take into account fact defendant served time under wrongful conviction and sentence, defendant is not entitled to "automatic credit." *United States v Jeanes* (1998, CA5 Tex) 150 F3d 483.

Government's decision to postpone execution of defendant's supervised release violation warrant until after he was released from state custody did not violate 18 USCS § 3583(i), which empowers district court to revoke term of supervised release after term has expired for period "reasonably necessary" for adjudication of matters arising prior to expiration of defendant's supervised release term, despite defendant's claim that there was no reasonable necessity for ten-month delay between expiration of his supervised release term and revocation of his supervised release; purpose of § 3583(i) is to assure reasonable speed of federal adjudication after defendant is in federal custody. *United States v Garrett* (2001, CA9 Cal) 253 F3d 443, 2001 CDOS 4776, 2001 Daily Journal DAR 5903, cert den (2002) 535 US 977, 152 L Ed 2d 393, 122 S Ct 1451 and (criticized in *United States v Ramos* (2005, CA2 NY) 401 F3d 111).

Although 18 USCS § 3583 as it existed in 1990 did not specifically provide for a post-term revocation hearing, subsequent judicial interpretation of statute to allow such a hearing did not violate ex post facto clause, even though § 3583 was amended in 1994 to allow such a hearing; interpreting § 3583 to allow for post-term revocation hearing was clearly foreseeable. *United States v Bailey* (2001, CA10 Colo) 259 F3d 1216, 2001 Colo J C A R 3901.

Fact that 18 USCS § 3583(e)(3) does not require question of whether defendant violated terms of his supervised release to be submitted to jury and proved beyond reasonable doubt does not violate defendant's constitutional rights. *United States v Gomez-Gonzalez* (2002, CA9 Cal) 277 F3d 1108, 2002 CDOS 391, 2002 Daily Journal DAR 511, reh dismd, reh, en banc, den, op withdrawn, app dismd (2002, CA9 Cal) 295 F3d 990, 2002 CDOS 6000, 2002 Daily Journal DAR 7541.

18 USCS § 3583(h) plainly permitted judges to impose renewed terms of supervised release without crediting street time; moreover, this interpretation of statute did not run afoul of Double Jeopardy Clause; supervised release was part of whole matrix of punishment arising out of original offense, and, as such, Congress had power to define its length and terms. *United States v Pettus* (2002, CA2 NY) 303 F3d 480.

District court abused its discretion by revoking defendant's supervised release after his friend had two banks assign friend their restitution claims, since defendant had not violated requirements to pay restitution through court or to not incur new debt without probation department's consent. *United States v Turner* (2002, CA9 Wash) 312 F3d 1137, 2002 CDOS 11874, 2002 Daily Journal DAR 13957.

Defendant could not attack his underlying conviction for drug trafficking in supervised release revocation proceeding pursuant to 18 USCS § 3583(e)(3), based on principles of administrative efficiency and finality of judgments, as he could have sought direct appeal or attacked sentence in habeas corpus proceeding; where defendant did not challenge his underlying conviction and sentence, and he did not object to three-year sentence that was imposed in supervised release revocation proceeding, appellate court only reviewed his claim under plain error standard of *Fed. R. Civ. P. 52(b)*. *United States v Warren* (2003, CA2 NY) 335 F3d 76.

District court did not abuse its discretion by ordering revocation rather than exception pursuant to 18 USCS § 3583(d) where defendant had already participated in treatment program before his positive urinalysis, and there was no indication district court did not recognize it had discretion to order enrollment in substance abuse program. *United States v Hammonds* (2004, CA10 Okla) 370 F3d 1032.

Where district court improperly granted discretion to probation officer to determine number of drug tests that were to be administered on supervised release, error was not of such magnitude or consequence that it would undermine faith in judicial system, and under plain error analysis, pursuant to *Fed. R. Crim. P. 52(b)*, was affirmed; modification of sentence was not warranted. *United States v Padilla* (2005, CA1 Mass) 415 F3d 211.

Even though defendant was released from prison, his challenge to sentencing enhancement was not moot because defendant could be re-sentenced to shorter term of supervised release under 18 USCS § 3583 if court found that sentence enhancement was improper. *United States v Allen* (2006, CA9 Cal) 434 F3d 1166.

Because defendant's Massachusetts supervised release term commenced on September 25, 2001, and ended on September 24, 2004, expiring before district court's final revocation order on August 25, 2005, district court could revoke defendant's supervised release only by satisfying requirements of 18 USCS § 3583(i). *United States v Hacker* (2006, CA8 SD) 450 F3d 808.

Unpublished Opinions

Unpublished: Where *Fed. R. Crim. P. 32.1* required court to hold evidentiary hearing before modification of term of supervised release, but refusal to terminate supervised release did not constitute modification of term of supervised release, district court was not required to hold evidentiary hearing before denying defendant's motion to terminate supervised release. *United States v Reagan* (2006, CA11 Fla) 2006 US App LEXIS 1250.

Unpublished: Defendant contended that district court erred in finding that he violated terms of his supervision where it found that he failed to report for scheduled appointments with his probation officer and failed to work regularly, as directed by terms of his supervision and explained by his probation officer; while defendant asserted that he was not informed of number of appointments and that he was unaware that he was required to work 35 to 40 hours per week, district court found testimony of defendant's probation officer and his former employer credible; as district court apparently weighed contradictory testimony and decided to credit probation officer's version, it did not abuse its discretion by revoking defendant's supervised release and imposing additional term of supervision. *United States v Terry* (2006, CA4 NC) 2006 US App LEXIS 10641.

Unpublished: Government filed petition to revoke defendant's supervised release before expiration of his term, and summons was issued that same day; in addition, delay between end of defendant's original term of supervised release and disposition was reasonably necessary for adjudication of alleged violation; because defendant faced re-imprisonment and additional term of supervision under 18 USCS § 3583(i), appellate court's ruling would provide form of relief to government and, consequently, government's appeal was not moot. *United States v Miles* (2005, CA9 Cal) 130 Fed Appx 108.

Unpublished: Revocation of supervised release is reviewed by appellate court for abuse of discretion, and district court's findings of fact in support of that decision are reviewed for clear error. *United States v Jones* (2005, CA3 Pa) 133 Fed Appx 824.

Unpublished: When probation office filed its pleading on January 5, 2004 alleging that defendant had violated several conditions of supervision, defendant knew or reasonably should have known alleged violations implicated not just one term of supervised release, but all three terms; therefore, pleading filed by probation office satisfied minimum due process requirement of providing defendant with notice of alleged violations and, in turn, she knew or reasonably should have known that district court could revoke all three terms of supervised release if it found alleged violations to be true; further, even if pleading to revoke defendant's supervised release terms was inadequate to satisfy minimum due process standards, it was apparent that any resulting error was harmless because defendant was convicted of three separate criminal violations, sentenced to concurrent terms of imprisonment and supervised release on those convictions, and her admitted conduct violated conditions of each of terms of supervised release. *United States v Stevens* (2004, CA10 Okla) 119 Fed Appx 222.

V. SENTENCE AFTER REVOCATION 47. Generally

18 USCS § 3583 permits district court, upon revocation of term of supervised release, to impose prison sentence or sentence combining incarceration with further term of supervised release, so long as incarcerative portion of the sentence does not exceed specified time limit, and combined length of new prison sentence cum supervision term does not exceed duration of original term of supervised release. *United States v O'Neil* (1993, CA1 Me) 11 F3d 292 (criticized in *Fowler v United States Parole Comm'n* (1996, CA3 NJ) 94 F3d 835) and (criticized in *United States v Robinson* (1997, CA4 Va) 106 F3d 610) and (criticized in *Strong v United States Parole Comm'n* (1998, CA2 NY) 141 F3d 429) and

(criticized in *Robles v United States* (1998, CA9 Cal) 146 F3d 1098, 98 CDOS 4835, 98 Daily Journal DAR 6822) and (criticized in *Manso v Federal Detention Ctr.* (1999, CA11 Fla) 182 F3d 814, 12 FLW Fed C 1136).

District court is expressly empowered under 18 USCS § 3583(e)(3) upon revoking supervised release to impose term of imprisonment equal in length to entire original term of supervision and, absent clear congressional direction to contrary, that power necessarily includes lesser power to impose punishment that combines, over same period, prison and supervised release. *United States v Love* (1994, CA8 Minn) 19 F3d 415, reh, en banc, den (1994, CA8 Minn) 1994 US App LEXIS 10824 and cert den (1994) 513 US 967, 130 L Ed 2d 346, 115 S Ct 434.

Any prison time that defendant receives when he is resentenced for violating supervised release must be reduced by prison time he has already served for violating his release pursuant to 18 USCS § 3585 and time he has served under new unconstitutional term of supervised release. *United States v Lominac* (1998, CA4 Va) 144 F3d 308 (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621).

District court had authority to incarcerate defendant for a second violation of supervised release; although neither 18 USCS § 3583(e) nor (h) mentions second or further revocations, they do permit more than one revocation of supervised release. *United States v Stiefel* (2000, CA5 Tex) 207 F3d 256.

48. Ex post facto clause issues

With respect to challenge to application of 18 USCS § 3583(h)--which authorizes Federal District Court to impose additional term of supervised release following reimprisonment of those who violate conditions of initial term--to accused who had been convicted prior to enactment of § 3583(h), as allegedly violative of Constitution's Art I, § 9, cl 3 prohibition against ex post facto laws, in order to prevail accused must show that statute (1) operates retroactively by applying to conduct completed before statute's enactment; and (2) raises penalty from whatever law provided when accused acted. *Johnson v United States* (2000) 529 US 694, 146 L Ed 2d 727, 120 S Ct 1795, 2000 CDOS 3775, 2000 Daily Journal DAR 5043, 2000 Colo J C A R 2679, 13 FLW Fed S 308.

It was violation of ex post facto clause to apply amendment to 18 USCS § 3583, which increased penalty to be imposed upon revocation of supervised release, where underlying offense was committed before amendment was adopted but conduct that led to revocation of supervised release occurred afterwards. *United States v Paskow* (1993, CA9 Cal) 11 F3d 873, 93 CDOS 8735, 93 Daily Journal DAR 14940 (criticized in *United States v Reese* (1995, CA6 Ohio) 71 F3d 582, 1995 FED App 361P) and (criticized in *United States v Byrd* (1997, CA5 Tex) 116 F3d 770) and (criticized in *United States v McGhee* (1997, CA6 Ohio) 1997 US App LEXIS 21113).

Where defendant's supervised-release violation occurred after enactment of 18 USCS § 3583(g), which provides for mandatory minimum term of imprisonment equal to one-third of term of supervised release for defendant found in possession of controlled substance, but his original offense conduct occurred before enactment, application to defendant of § 3583(g)'s mandatory minimum violated ex post facto clause. *United States v Meeks* (1994, CA2 Vt) 25 F3d 1117 (criticized in *United States v Reese* (1995, CA6 Ohio) 71 F3d 582, 1995 FED App 361P) and (criticized in *United States v Byrd* (1997, CA5 Tex) 116 F3d 770) and (criticized in *United States v McGhee* (1997, CA6 Ohio) 1997 US App LEXIS 21113) and (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621) and (criticized in *United States v Terrell* (2000, CA6 Tenn) 2000 US App LEXIS 2444).

District court did not violate ex post facto clause by applying 18 USCS § 3583(g), which required imposition of mandatory minimum prison term upon revocation of defendant's supervised release for possession of controlled substance, even though § 3583(g) was enacted after defendant's original sentencing, since prison term required by new statute was imposed for new drug offense, not for original case. *United States v Reese* (1995, CA6 Ohio) 71 F3d 582, 1995 FED App 361P, cert den (1996) 518 US 1007, 135 L Ed 2d 1053, 116 S Ct 2529 and (criticized in *United States v Beals* (1996, CA7 Ill) 87 F3d 854).

Court did not violate ex post facto clause of Constitution, upon revocation of defendant's supervised release, by imposing consecutive term of supervised release pursuant to 18 USCS § 3583(h) following expiration of defendant's prison term, since defendant was not prejudiced by enactment of § 3583(h); prior to enactment of subsection (h) defendant could have been sentenced to up to five years imprisonment for violation of his supervised release and under new subsection (h) defendant could be sentenced to combination of imprisonment and supervised release that was not greater than five years. *United States v Brady* (1996, CA3 Pa) 88 F3d 225, cert den (1997) 519 US 1094, 136 L Ed 2d 718, 117 S Ct 773 and (criticized in *United States v Hale* (1997, CA7 Ill) 107 F3d 526).

Application of 18 USCS § 3583(h), which subjected defendants to sentences of both incarceration and additional terms of supervised release after revocation of their original terms of supervised release, violated Ex Post Facto Clause because § 3583(h) was enacted after defendants committed their underlying crimes and its application exposed them to greater punishment than law in effect at time crimes were committed, under which additional term of supervised release could not be imposed following imprisonment. *United States v Collins* (1997, CA9 Wash) 118 F3d 1394, 97 CDOS 5434, 97 Daily Journal DAR 8801 (criticized in *United States v Withers* (1997, CA7 Ill) 128 F3d 1167) and (criticized in *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P) and (criticized in *United States v Davis* (1999, CA6 Tenn) 1999 US App LEXIS 2008) and (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621) and (criticized in *United States v Pate* (2000, CA4 Va) 2000 US App LEXIS 463) and (criticized in *United States v Terrell* (2000, CA6 Tenn) 2000 US App LEXIS 2444) and (criticized in *United States v Russell* (2003, CA7 Ill) 340 F3d 450).

District court committed plain error by retroactively applying 18 USCS § 3583(h), which authorizes imposition of supervised release following revocation of prior term of supervised release, since application increased potential punishment and thus violated prohibition on ex post facto legislation; at time defendant committed his offense, 18 USCS § 3583(e) did not permit imposition of new term of supervised release. *United States v Dozier* (1997, CA3 NJ) 119 F3d 239 (criticized in *United States v Withers* (1997, CA7 Ill) 128 F3d 1167) and (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621).

Retroactive application of 18 USCS § 3583(h) to impose new term of supervised release upon defendant after revocation of her original term of supervised release did not violate Ex Post Facto Clause because, even if § 3583(h) changed prior law, it did not inflict harsher punishment than old law. *United States v Withers* (1997, CA7 Ill) 128 F3d 1167, cert den (1998) 525 US 829, 142 L Ed 2d 62, 119 S Ct 79.

Imposition of subsequent terms of supervised release as part of defendants' sentences for violating conditions of supervised release after their release from prison did not violate Ex Post Facto Clause, even though 18 USCS § 3583(h), which provides that original term of supervised release may be reinstated, was passed after date of defendants' sentencing, since § 3583(h) was passed before defendants had violated their terms of supervised release. *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P, reh, en banc, den (1998, CA6) 1998 US App LEXIS 5554 and cert den (1998) 525 US 828, 142 L Ed 2d 61, 119 S Ct 77.

Retroactive application of 18 USCS § 3583(h), which allowed court upon revocation of defendant's supervised release to impose prison term followed by new term of supervised release, violated Ex Post Facto Clause because it was enacted after he committed his original felonies and disadvantaged him by increasing punishment he could have received for his crimes. *United States v Lominac* (1998, CA4 Va) 144 F3d 308 (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621).

Sentencing defendant under 18 USCS § 3583(h), which permitted defendant to be sentenced to term of imprisonment and additional term of supervised release upon revocation of his supervised release, rather than under § 3583(e), which permits court to revoke individual's remaining supervised release and extend period of supervised release or require individual to spend remainder of supervised release in prison, did not violate the Ex Post Facto Clause, since amount of total restraint to which defendant was subject remained constant, and potential for additional successive revocation sentences was too remote and too theoretical to rise to level of violation. *United States v Shorty* (1998, CA7 Ill) 159 F3d 312, cert den (1999) 526 US 1147, 143 L Ed 2d 1035, 119 S Ct 2024.

Defendant's revocation sentence of one year of prison and two years of supervised release, a total of three additional years under government restraint, violates Ex Post Facto Clause, since under law at time of defendant's original conviction, 18 USCS § 3583(e), defendant would have only been eligible for two additional years of government restraint. *United States v Eske* (1999, CA7 Wis) 189 F3d 536.

Court does not violate Ex Post Facto Clause by sentencing defendant to a term of supervised release following revocation of a previously-imposed term of supervised release, even if defendant's original sentencing occurred prior to enactment of 18 USCS § 3583(h), since § 3583(h) imposes punishment for a new offense. *United States v Samour* (1999, CA6 Ohio) 199 F3d 821, 1999 FED App 422P.

Imposition of both a term of imprisonment and a term of supervised release upon revocation of defendant's supervised release pursuant to 18 USCS § 3583 did not violate Ex Post Facto Clause, since 18 USCS § 3583(e), which was in

effect at time of defendant's original offense, allows a sentencing court to impose sentence of imprisonment followed by a term of supervised release. *United States v Bermudez-Plaza* (2000, CA1 Puerto Rico) 221 F3d 231.

Court could impose term of supervised release pursuant to 18 USCS § 3583(h) in addition to new period of incarceration without violating ex post facto clause, where defendant's supervised release was revoked, even though defendant's underlying criminal conduct predated enactment of statute authorizing reinstitution of supervised release, because statute was not substantive change in law, but rather declaration by Congress of its original intent. *United States v Gaines* (1996, ND Ill) 910 F Supp 434 (criticized in *United States v Beals* (1996, CA7 Ill) 87 F3d 854).

Crack conspirator's 30-month sentence upon revocation of his supervised release did not violate Ex Post Facto Clause, even though 18 USCS § 3583(g) is retrospective under Fourth Circuit precedent, because 1994 amendment to that section does not disadvantage any affected offenders but in fact may advantage them by granting more discretion to impose minimal jail time. *United States v Barrow* (1996, ED Va) 913 F Supp 458.

Revocation and reimposition of drug dealer's supervised release term did not violate prohibition against ex post facto laws, even though statute at time of original sentencing did not provide for imposition of new term of supervised release after first was revoked, where 18 USCS § 3583(h), providing for such imposition, became law before revocation of dealer's supervised release and before conduct leading to revocation, because § 3583(h) has imposed no new burdens upon dealer. *United States v Floyd* (1999, SD Tex) 65 F Supp 2d 487.

49. Imposition of term of incarceration

Because there are no applicable guidelines for sentencing upon revocation of supervised release, court correctly applied 18 USCS § 3583 in determining defendant's sentence after defendant's term of supervised release was revoked for commission of another crime, notwithstanding defendant's claim that court should invent specific guidelines and sentence him as if he had been convicted of another crime. *United States v Scroggins* (1990, CA11 Ga) 910 F2d 768.

District court does not have authority to order defendant's participation in drug treatment program while incarcerated following revocation of his supervised release pursuant to 18 USCS § 3583, although court may recommend that prisoner receive drug rehabilitation treatment while incarcerated. *United States v Jackson* (1995, CA6 Tenn) 70 F3d 874, 1995 FED App 336P (criticized in *United States v Ramirez-Rivera* (2001, CA1 Puerto Rico) 241 F3d 37).

District court was not required under 18 USCS § 3583(e) to explain twelve month revocation sentence it imposed to run consecutively to state sentence for drug offense, where sentence was consistent with all policy statements, as well as agreement of parties. *United States v Caves* (1996, CA8 Minn) 73 F3d 823.

Court's imposition of consecutive sentence for defendant's violation of supervised release was not abuse of discretion, where there was no indication that it believed it had no alternative other than to impose consecutive sentence. *United States v Throneburg* (1996, CA6 Mich) 87 F3d 851, 1996 FED App 196P, cert den (1996) 519 US 975, 136 L Ed 2d 324, 117 S Ct 411.

District court acted within confines of 18 USCS § 3583 when it sentenced defendant to consecutive terms of imprisonment following revocation of his two concurrent terms of supervised release. *United States v Quinones* (1998, CA11 Ga) 136 F3d 1293, 11 FLW Fed C 1113.

Defendant's revocation sentence, which was above recommended sentencing range in Chapter 7 and within statutory maximum allowed, was proper; sentence was not upward departure and requirement of notice of grounds for departure did not apply. *United States v Shaw* (1999, CA8 Neb) 180 F3d 920.

Time periods noted in 18 USCS § 3583(e) and (h) are not absolute and fixed at time of first revocation of supervised release, and thus district court could resentence defendant at second revocation beyond putative discharge date set at first revocation. *United States v Stiefel* (2000, CA5 Tex) 207 F3d 256.

District court under pre-1994 version of 18 USCS § 3583 was required to terminate supervised release of defendant who violated terms of his supervised release by testing positive for narcotics and impose a term of imprisonment of at least one-third of his supervised release term, or not less than one year, and court's failure to imprison defendant was plainly unreasonable and required remand. *United States v Wirth* (2001, CA2 NY) 250 F3d 165.

District court was within its authority under 18 USCS § 3584 to impose consecutive sentences upon its revocation of defendant's concurrent terms of supervised release, notwithstanding defendant's claim that 18 USCS § 3583(e)(3)

18 USCS § 3583

limits to only one year defendant's total time of imprisonment upon revocation of multiple terms of supervised release. *United States v Gonzalez* (2001, CA5 Tex) 250 F3d 923.

18 USCS § 3583(e)(3) and (h) provide for aggregated, rather than per violation, statutory maximum terms of imprisonment for violations of supervised release. *United States v Merced* (2001, CA2 NY) 263 F3d 34.

Defendant's home confinement was not equal to incarceration for purpose of providing credit against maximum revocation prison term under 18 USCS § 3583(e)(3). *United States v Hager* (2002, CA4 W Va) 288 F3d 136, cert den (2002) 537 US 962, 154 L Ed 2d 317, 123 S Ct 391.

Because language and legislative history of 18 USCS § 3583(e)(3) showed that imprisonment cap should have been reduced by revocation terms already served, inmate that served 10 months for supervised release violations could only be sentenced to only 26 months of imprisonment for latest violations. *United States v Tapia-Escalera* (2004, CA1 Puerto Rico) 356 F3d 181.

Defendant's right of allocution extends to hearing concerning revocation of supervised release. *United States v Plotts* (2004, CA3 Pa) 359 F3d 247.

Where defendants violated conditions of their supervised release and defendants were sentenced after revocation to longer period than what was recommended in U.S. Sentencing Guidelines Manual ch. 7, defendants were not entitled to prior notice that district court was contemplating sentence outside Chapter 7 range because Chapter 7 policy statements were not binding and revocation sentences outside their ranges were not departures. *United States v White Face* (2004, CA8 SD) 383 F3d 733.

District court's sentence of 46 months imposed upon revocation of defendant's supervised release pursuant to 18 USCS § 3583(e) was affirmed because district court did not violate written-order requirement of 18 USCS § 3553(c)(2), which did not apply as district court had revoked supervised release and imposed sentence different from that recommended by USSG § 7B1.4, and because sentence was not unreasonable under 18 USCS § 3742(e)(4) as district court had discussed statutory goals and gave four good reasons for its sentence. *United States v Cotton* (2005, CA8 Neb) 399 F3d 913.

While 18 USCS § 3583(b) limits length of each individual term of supervised release that may be imposed upon conviction and 18 USCS § 3583(e)(3) limits further length of each term of imprisonment that may be imposed upon revocation, those restrictions limit only length of each term, not length of overall punishment; therefore, when each individual term is lawful, it may be stacked consecutively with other lawfully imposed terms. *United States v Deutsch* (2005, CA7 Ill) 403 F3d 915, reh den, reh, en banc, den (2005, CA7 Ill) 2005 US App LEXIS 8918.

Where inmate violated conditions of his seven concurrent terms of supervised release, 18 USCS §§ 3583(e) and 3624(e) did not forbid district court from revoking each term and imposing combination of concurrent and consecutive prison terms that totaled 61 more months of confinement. *United States v Deutsch* (2005, CA7 Ill) 403 F3d 915, reh den, reh, en banc, den (2005, CA7 Ill) 2005 US App LEXIS 8918.

Advisory Sentencing Guidelines scheme that Booker created was precisely what prevailed before Booker with respect to fixing penalties for violating kind of release conditions that defendant violated by not obtaining employment; under such circumstances, district court had discretion under 18 USCS § 3583 to revoke defendant's supervised release and impose term of imprisonment so long as it took into account relevant considerations set out in 18 USCS § 3553(a). *United States v Coleman* (2005, CA8 Ark) 404 F3d 1103.

District court did not err in revoking defendant's supervised release and sentencing him to additional prison time because (1) defendant's additional imprisonment did not violate Sixth Amendment as interpreted by *Blakely*, and (2) defendant did not have right to jury trial on question of whether he violated conditions pertaining to his supervised release. *United States v Work* (2005, CA1 Me) 409 F3d 484.

District court was well within its discretion to order defendant's sentence for violation of supervised release to run consecutively to defendant's sentence for illegal reentry under USSG §§ 5G1.3(c) and 7B1.3(f) because (1) original term of supervised release stemmed from separate offense, (2) district court properly considered nature and circumstances of offense, defendant's criminal history, and all other relevant factors, and (3) district court was aware of advisory nature of § 7B1.3(f). *United States v Contreras-Martinez* (2005, CA10 NM) 409 F3d 1236.

Defendant's 22-month sentence imposed upon revocation of his supervised release did not violate *Blakely v Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), or *United States v Booker*, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005).

and did not constitute plain error because although Supreme Court held in *Booker* that Sentencing Reform Act was unconstitutional, it excised from Act only those provisions that made application of sentencing guidelines mandatory, and among remaining provisions of Act recognized as constitutionally valid was 18 USCS § 3583; further, defendant had admitted he violated conditions of his supervised release and had agreed to applicable sentencing range consistent with term imposed. *United States v Griffin* (2005, CA8 Mo) 413 F3d 806, subsequent app (2005, CA8 Mo) 2005 US App LEXIS 17135.

District court properly denied defendant's motion to grant him credit against sentence imposed upon revocation of his supervised release for time he spent in halfway house during his supervised release because 18 USCS § 3583(e)(3) ensured that defendant would not be given such credit, and further, 18 USCS § 3585(b) did not authorize credit because Bureau of Prisons did not have control over defendant during his supervised release pursuant to 18 USCS § 3624(e); thus, defendant was not in "official detention" as that term was used in statute. *United States v Johnson* (2005, CA8 Mo) 418 F3d 879.

District court properly re-imprisoned defendant upon revocation of supervised release under 18 USCS § 3583 where violation was proven by preponderance of evidence without jury, which was all that was constitutionally required under Sixth Amendment and due process and appeal of revocation could not be used to challenge original sentence for possession of stolen mail in violation of 18 USCS § 1708; there was no *Booker* violation because revocation of supervised release had always relied upon advisory guidelines. *United States v Hinson* (2005, CA5 Tex) 429 F3d 114.

Reasonableness standard of *Booker* applicable to sentences imposed upon revocation of supervised release is essentially same as "plainly unreasonable" standard of 18 USCS § 3742(e)(4). *United States v Sweeting* (2006, CA11 Fla) 437 F3d 1105.

District court did not properly communicate to defendant that he had right to allocute before being sentenced at hearing for revocation of supervised release, which was imposed when defendant violated 18 USCS § 1344, Class B felony; however, although it could be assumed that defendant's substantial rights were violated because he was not sentenced at bottom of U.S. Sentencing Guidelines range for Class B felony under 18 USCS § 3583, no miscarriage of justice occurred because district court weighed mitigating information set forth by defendant's attorney, and defendant failed to furnish any information about what he would have allocated to that might have mitigated his sentence. *United States v Magwood* (2006, CA5 Tex) 445 F3d 826.

Amendment of 18 USCS § 3553(a)(4)(B) in 1994, which added phrase "or policy statements," did not render Sentencing Guideline § 7B1.4 policy statement binding on sentencing courts; thus, when resentencing defendant for violating terms of supervised release, district court may impose up to maximum sentence of imprisonment allowed by 18 USCS § 3583(e)(3). *United States v Bruce* (2002, App DC) 350 US App DC 417, 285 F3d 69.

District court could impose statutory maximum term of imprisonment of one year after revoking defendant's probation for leaving district and committing crime in another district, because defendant's original offense had been categorized as misdemeanor. *United States v Bibbs* (2003, ED Pa) 252 F Supp 2d 170.

Unpublished Opinions

Unpublished: Sentence imposed after defendant's supervised release was revoked was controlled by length of term of supervised release, not by aggregate of all of defendant's imprisonment relative to statutory maximum for offense of conviction, and imposition of 24 month sentence stemming from two-year supervised release term, was not unreasonable. *United States v Peterman* (2006, CA7 Ill) 2006 US App LEXIS 354.

Unpublished: District court did not abuse its discretion by imposing 12-month sentence following revocation of defendant's supervised release; district court complied with terms of 18 USCS § 3583(g), applied statute based upon defendant's admission of controlled substance violation, and imposed revocation sentence within relevant statutory maximum. *United States v Button* (2006, CA9 Mont) 2006 US App LEXIS 2165.

Unpublished: Court of Appeals held that District Court did not abuse its discretion by sentencing defendant to eight months in prison for violating terms of supervised release because 12 to 18 month term of imprisonment was provided where term of supervised release was revoked on finding that defendant committed Grade B violation and defendant had criminal history category of IV under USSG §§ 7B1.1(a)(2) and 7B1.4(a); and because eight month sentence was well within district court's statutory power where original offense was Class B felony per 18 USCS § 3583(e)(3). *United States v Luna-Mora* (2006, CA11 Ga) 2006 US App LEXIS 11608.

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Unpublished: Twenty-four month prison sentence imposed by district court upon revoking defendant's supervised release was not unreasonable because, although sentence exceeded sentencing range indicated by policy statements in Sentencing Guidelines, sentence did not exceed statutory maximum prison term district court could have imposed for defendant's original offense--conspiracy to manufacture counterfeit federal reserve notes; thus, sentence was within district court's authority under 18 USCS § 3583(e)(3). *United States v Nobles* (2006, CA5 Tex) 2006 US App LEXIS 22017.

Unpublished: While defendant's three-year term of imprisonment imposed on revocation of supervised release exceeded sentencing range indicated by policy statements in U.S. Sentencing Guidelines Manual ch 7, it did not exceed statutory maximum term of imprisonment district court could have imposed under 18 USCS § 3583(e)(3); therefore, his revocation sentence was neither unreasonable nor plainly unreasonable. *United States v Nickerson* (2006, CA5 Tex) 2006 US App LEXIS 22396.

Unpublished: Finding that his sentence following revocation of his supervised release did not exceed statutory maximum sentence under 18 USCS § 3583, 24-month sentence imposed by district court to run consecutively to 57-month sentence that was imposed for his illegal reentry conviction was affirmed. *United States v Walter* (2006, CA5 Tex) 2006 US App LEXIS 23716.

Unpublished: Defendant's 36-month sentence following revocation of his supervised release was affirmed because it was not plainly erroneous for district judge not to condition sentence upon availability of rehabilitation program or to refuse to provide for local inpatient treatment as alternative to incarceration. *United States v Wesley* (2006, CA11 Ga) 2006 US App LEXIS 25499.

Unpublished: Where defendant complained that 27-month term of imprisonment imposed for his conviction and 14-month term of imprisonment imposed for his violation of supervised release exceeded in aggregate 33-month total term of imprisonment allowed under U.S. Sentencing Guidelines for his initial conviction based on facts alleged in his indictment and admitted by him, defendant's 14-month sentence following revocation of his supervised release was affirmed because, under 18 USCS § 3583(e)(3), sentence did not exceed statutory maximum term of imprisonment that district court could have imposed. *United States v Wheat* (2006, CA5 Tex) 2006 US App LEXIS 26346.

Unpublished: Defendant's 24-month sentence following revocation of his supervised release was affirmed because his violation of 21 USCS § 841(b)(1)(D) was Class C felony pursuant to 18 USCS § 3559(a)(4), and under 18 USCS § 3583(e)(3), maximum term of imprisonment for Class C felony was two years; defendant's sentence was within statutorily acceptable range. *United States v Burns* (2006, CA5 Tex) 2006 US App LEXIS 26358.

Unpublished: District court did not plainly err when it imposed 30-month sentence for violation of 21 USCS § 841(a)(1); although maximum punishment that defendant could have received for violating 21 USCS § 841(a)(1) was 40 years imprisonment, 30-month sentence imposed following revocation of defendant's supervised release was within applicable statutory maximum; district court also considered and was not bound by Sentencing Guidelines ch. Seven guidelines, and district court considered relevant 18 USCS § 3553(a) factors; thus, sentence was reasonable. *United States v Weaver* (2006, CA11 Ga) 2006 US App LEXIS 27234.

Unpublished: District court's revocation of defendant's supervised release pursuant to 18 USCS § 3583(e)(3) was not abuse of discretion and its imposition of 12-month sentence, which did not exceed statutory maximum, was not plainly unreasonable under 18 USCS § 3742(a)(4); sentencing guideline range calculated under USSG § 7B1.4(a) (2003) was purely advisory. *United States v Wiggins* (2005, CA4 W Va) 131 Fed Appx 932.

Unpublished: District court did not violate Sixth Amendment when it revoked defendant's supervised release and imposed term of 18 months of imprisonment because: (1) Supreme Court's decision in *U.S. v. Booker*, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005) did not totally invalidate Sentencing Reform Act; (2) Booker did not affect 18 USCS § 3583, which governed supervised release; and (3) change effected by Booker, making U.S. Sentencing Guidelines merely advisory, was not change in manner in which Guidelines applied to revocations of supervised release pre-Booker. *United States v Brown* (2005, CA4 W Va) 122 Fed Appx 648.

Unpublished: Since defendant's conviction for bank fraud, class B felony, exposed him to maximum sentence of three years upon revocation of supervised release, district court's imposition of sentence of 36 months' imprisonment was affirmed; sentence was not plainly unreasonable. *United States v Muhammad* (2005, CA4 Va) 124 Fed Appx 789.

Unpublished: Where district court imposed 36-month term of incarceration following third revocation of defendant's supervised release, sentence was affirmed; sentence was within statutory limit because it, plus 15 months that defendant had already served for two prior revocations of his supervised release, did not exceed maximum sentence of

60 months authorized pursuant to 18 USCS § 3583(e)(3) for underlying Class A felony offense. *United States v Holt* (2005, CA8 Iowa) 130 Fed Appx 837.

50. --Factors considered

District Court should have considered policy statements in Chapter 7 of guidelines when sentencing defendant after revocation of supervised release, but any error was harmless, where defendant's blatant defiance of terms of supervised release justified prison sentence within statutory maximum. *United States v Fallin* (1991, CA8 Minn) 946 F2d 57.

Failure of District Court to articulate that it considered policy statements for violation of probation and supervised release to determine whether violation of condition was Grade B or Grade C violation was not plain error, where District Court had discretion to impose same sentence as that pronounced. *United States v Ayers* (1991, CA5 Tex) 946 F2d 1127.

Policy statements of Chapter 7 of Sentencing Guidelines regarding supervised release are advisory rather than mandatory, but they must be considered by court in its deliberations concerning punishment for violations of conditions of supervised release. *United States v Lee* (1992, CA10 Okla) 957 F2d 770.

Court may consider defendant's need for medical care, including drug treatment/rehabilitation programs, in determining length of time offender shall be required to serve in prison following revocation of supervised release pursuant to 18 USCS § 3583. *United States v Anderson* (1994, CA2 Conn) 15 F3d 278.

Once imprisonment is mandated by 18 USCS § 3583(g) for possession of controlled substance during supervised release, rehabilitative needs may be considered to determine length of incarceration within sentencing range. *United States v Giddings* (1994, CA5 Tex) 37 F3d 1091, cert den (1995) 514 US 1008, 131 L Ed 2d 203, 115 S Ct 1323 and (superseded by statute as stated in *United States v Jackson* (1995, CA6 Tenn) 70 F3d 874, 1995 FED App 336P).

District court may properly consider defendant's rehabilitative needs in setting length of imprisonment within range prescribed by statute upon mandatory revocation of supervised release under 18 USCS § 3583. *United States v Jackson* (1995, CA6 Tenn) 70 F3d 874, 1995 FED App 336P (criticized in *United States v Ramirez-Rivera* (2001, CA1 Puerto Rico) 241 F3d 37).

Since it was clear from record that district court considered pursuant to 18 USCS § 3583 Chapter 7 policy statements, even if they were not mentioned by name, sentence imposed after revocation of defendant's supervised release, which exceeded recommended range in Chapter 7 policy statements, was not plainly unreasonable. *United States v Washington* (1998, CA6 Mich) 147 F3d 490, 1998 FED App 187P, cert den (1998) 525 US 954, 142 L Ed 2d 319, 119 S Ct 386.

Because district court failed to provide any reasons for imposing 18 month sentence after revoking defendant's supervised release, which was well beyond 5-11 months recommended under § 7B1.4, Court of Appeals could not conclude that court considered factors set forth in 18 USCS § 3553 as required under 18 USCS § 3583 and judgment would be reversed, even though sentence did not exceed statutory maximum. *United States v McClellan* (1999, CA6 Mich) 164 F3d 308, 1999 FED App 1P (criticized in *United States v Muncy* (2000, CA4 NC) 2000 US App LEXIS 23482).

District court did not abuse its discretion in considering availability of drug treatment in imposing a sentence, upon revocation of defendant's supervised release under 18 USCS § 3583, that exceeded sentence recommended by chapter seven of the Guidelines. *United States v Wiggins* (2000, CA11 Ala) 220 F3d 1248, 13 FLW Fed C 930.

It was not plainly unreasonable for court to resentence defendant after he violated his supervised release to maximum 24 month prison term, to be served consecutively to time he was already serving, where court considered factors under 18 USCS § 3583(e), including defendant's past record, which included 54 prior convictions and 37 prior arrests, and the seriousness of his supervised release violations, which included four violations of criminal law, failure to report an arrest, and substance abuse. *United States v Harvey* (2000, CA7 Ill) 232 F3d 585, cert den (2001) 532 US 936, 149 L Ed 2d 313, 121 S Ct 1389.

District court did not abuse its discretion when it considered defendant's drug rehabilitation needs pursuant to 18 USCS § 3553 and 18 USCS § 3583 in imposing prison term of 24 months, which was beyond recommended range, following revocation of his supervised release; sentence was within statutory range and defendant waived argument that 18 USCS § 3582 and 28 USCS § 994(k) preclude federal courts from sentencing defendants to terms of imprisonment for purposes of rehabilitation or medical care. *United States v Ramirez-Rivera* (2001, CA1 Puerto Rico) 241 F3d 37.

District court did not err when it revoked defendant's supervised release and imposed period of incarceration, after considering factors set forth in 18 USCS § 3553, when government entered certified copy of state court proceeding where defendant entered plea of nolo contendere to one count of manufacturing controlled substance, felony in violation of Cal. Penal Code § 11379.6. *United States v Verduzco* (2003, CA9 Cal) 330 F3d 1182, 2003 CDOS 4520, 2003 Daily Journal DAR 5869, 61 Fed Rules Evid Serv 546.

Defendant's 18-month prison sentence for second violation of defendant's supervised release was reasoned and reasonable because sentencing court considered all necessary factors and explained other factors it took into account, including defendant's inability to comply with law, need to ensure respect for obligation to adhere to conditions of supervised release, and safety of community. *United States v Kelley* (2004, CA10 Okla) 359 F3d 1302.

Defendant was properly sentenced by district court to sentence of 24 months because such sentence was allowed under 18 USCS § 3583(e)(3) and USSG § 7B1 for revocation sentence based on commission of felony. *United States v Pardue* (2004, CA8 Ark) 363 F3d 695, reh den, reh, en banc, den (2004, CA8) 2004 US App LEXIS 9455.

Congress intends limitations imposed by 18 USCS § 3582(a) and 28 USCS § 994(k) to apply only when court is initially "imposing sentence to term of imprisonment" for crime committed, but same cautionary tone is not present in statute governing supervised release or revocation thereof; in 18 USCS § 3583(c), Congress identifies factors, including medical and correctional treatment, that court should consider when setting "term of supervised release" (§ 3583(c)), when terminating, extending or revoking "term of supervised release" (18 USCS § 3583(e)(1), (2), (3)) and, in instance of revocation, Congress uses phrase "require defendant to serve in prison all or part of term of supervised release" (18 USCS § 3583(e)(3)), rather than phrase "impose term of imprisonment" (18 USCS § 3582(a)). *United States v Tsosie* (2004, CA10 NM) 376 F3d 1210, cert den (2005, US) 161 L Ed 2d 122, 125 S Ct 1298.

Pursuant to 18 USCS § 3583, Congress intends district court to consider medical and correctional needs of offender in determining how much time that offender should be required to serve in prison after it becomes clear he will not abide by conditions of his supervised release if he is not confined. *United States v Tsosie* (2004, CA10 NM) 376 F3d 1210, cert den (2005, US) 161 L Ed 2d 122, 125 S Ct 1298.

Trial court's sentencing determination, revoking defendant's term of supervised release and sentencing him to 18 months' imprisonment, was not erroneous because (1) defendant had violated conditions of his supervised release, (2) court had considered relevant factors including need for sentence to provide defendant with needed medical care or other correctional treatment for his alcoholism, and (3) defendant's sentence did not exceed two-year statutory maximum for Class C felony. *United States v Tsosie* (2004, CA10 NM) 376 F3d 1210, cert den (2005, US) 161 L Ed 2d 122, 125 S Ct 1298.

Defendant's sentence of 18 months, following revocation of his supervised release, was not improper because trial court gave specific reasons for exceeding suggested range in USSG § 7B1.4, including severity of defendant's alcohol problem, danger he would pose to himself and society if he continued to drink and drive, likely ineffectiveness of 30-day alcohol treatment program, fact that he had repeatedly violated conditions of his supervised release, and his unresponsiveness to community supervision efforts; thus, while defendant could not be forced to participate in drug rehabilitation program offered in prison, it was not unreasonable for trial court to determine that defendant was more likely to successfully address his alcoholism in prison setting, given his failure to address it outside of prison. *United States v Tsosie* (2004, CA10 NM) 376 F3d 1210, cert den (2005, US) 161 L Ed 2d 122, 125 S Ct 1298.

Defendant's two-year sentence for violation of conditions of supervised release was reasonable under 18 USCS § 3583(g)(4) where he had tested positive for marijuana 14 times and for cocaine two times within six-month period; although sentencing judge was required under 18 USCS § 3583(e) to "consider" factors that were listed in 18 USCS § 3553(a), including applicable policy statements that had been issued by Sentencing Commission, judge was not bound by them; it was clear that judge considered policy statements but chose to exercise her discretion after finding that current violations were "massive" where defendant had already served three sentences for supervised release violations. *United States v Fleming* (2005, CA2 NY) 397 F3d 95.

Imposition of sentence of 24 months' imprisonment was not plainly unreasonable although it was double amount recommended by USSG § 7B1.4(a) because district court considered sentencing factors set forth in 18 USCS § 3553(a) as required by 18 USCS § 3583 in imposing sentence on revocation of supervised release when it discussed at length nature of offense, defendant's character, and need to protect community; specifically, although defendant's conduct involved paper crimes in that he used false social security numbers and financial information to obtain cars, conduct was rendered more serious by its serial nature, which indicated defendant's inability or unwillingness to correct prior mis-

takes, and harsher sentence was necessary given pattern of conduct and defendant's minimal efforts to comply with other terms of supervised release, including child support and restitution. *United States v Carter* (2005, CA7 Wis) 408 F3d 852.

Defendant was entitled to resentencing because district court had improperly interpreted and applied *USSG Manual* § 7B1.1, which resulted in imposition of sentence beyond that provided for under federal sentencing guidelines because (1) district court had discretion, based upon defendant's new criminal conduct, to impose greater sentence than that imposed for his underlying offense; (2) in imposing sentence, however, district court first had to determine proper sentencing range under federal sentencing guidelines; (3) district court misinterpreted § 7B1.1 as allowing for classification of defendant's drug offense based upon details that were charged in revocation petition rather than based upon its own revocation findings; (4) defendant's cocaine possession violation did not constitute "controlled substance offense" as defined in *USSG Manual* § 4B1.2, and thus it constituted only Class B violation under *USSG Manual* § 7B1.1; and (5) it was error for district court to sentence defendant for Class drug trafficking offense when it had found him guilty of only cocaine possession violation. *United States v McNeil* (2005, CA2 NY) 415 F3d 273.

Although former 18 USCS § 3583(e)(3) is ambiguous, legislative history and precedent from other circuits requires that statutory caps of § 3583(e)(3) be interpreted to apply to aggregate of sentences imposed on multiple revocations of supervised release rather than to each revocation; thus, defendant's sentence to 21 months after second violation of supervised release from original bank robbery conviction had to be vacated and sentence not to exceed 364 was to be imposed. *United States v Williams* (2005, CA11 Fla) 425 F3d 987, 18 FLW Fed C 976.

Defendant's sentence was properly imposed where there was no evidence to suggest that district court improperly considered conduct underlying defendant's arrest on May 30, 2004 in determining her sentence under 18 USCS § 3583, and because court was concerned with defendant's history of repeated violations, and defendant previously had received downward departure from her original 120 month sentence, court properly departed from advisory guidelines range based on *USSG* § 7B1.4. *United States v Moore* (2006, CA11 Fla) 443 F3d 790.

Although court may consider need to sanction individual for violating conditions of probation or supervised release when formulating its sentence at revocation proceeding pursuant to 18 USCS § 3583(e), that type of "sanction" is distinct from "just punishment" referred to in 18 USCS § 3553(a)(2)(A); at revocation sentencing, court may appropriately sanction violator for his "breach of trust," but may not punish him for criminal conduct underlying revocation. *United States v Miquel* (2006, CA9 Cal) 444 F3d 1173.

Omission of 18 USCS § 3553(a)(2)(A) from 18 USCS § 3583(e) makes clear that in imposing revocation sentence, court may not properly consider need to "promote respect for law," based on nature of underlying criminal offense committed, or on seriousness of underlying offense. *United States v Miquel* (2006, CA9 Cal) 444 F3d 1173.

Defendant's 36-month maximum term under 18 USCS § 3583(e)(3) for violating his supervised release was not plainly unreasonable per 18 USCS § 3742(a)(4) as district court considered applicable 18 USCS § 3553(a) factors, including that advisory range called for between 5 and 11 months' imprisonment and, pursuant to § 3553(a)(2)(D), defendant's need for substance abuse treatment. *United States v Crudup* (2006, CA4 NC) 461 F3d 433.

Cocaine convict has supervised release revoked and is sentenced to 6 months, where he tested positive 3 times for marijuana and has not complied faithfully with his treatment program, because sentence reflects recommendations of sentencing guidelines and probation office and seriousness of violations, but does not overstate magnitude of his error. *United States v Tyler* (2000, ED Pa) 98 F Supp 2d 641.

Considering factors set forth in 18 USCS § 3583(e), court imposed sentence of 10-month imprisonment for violation of conditions of supervised release, where sentence was within recommended range and acknowledged repetitive nature of defendant's failure to comply with terms of his release and might give defendant additional opportunity to address his substance abuse problems. *United States v Nolan* (2000, ED Pa) 109 F Supp 2d 350.

Felon-in-possession-of-weapon convict has supervised release revoked and is sentenced to 12 months and one day in prison, where he has had numerous positive drug screens for cocaine, spanning period of 3 years, because his repeated failure to comply with terms of release, even after prior revocation, indicates that continuation of supervised release would be ineffective. *United States v McCauley* (2001, ED Pa) 168 F Supp 2d 471.

Even though defendant had successfully challenged parole revocation proceedings in state habeas corpus petition, his supervised release term was automatically tolled under 18 USCS § 3624(e) during time that he was incarcerated for violating his state parole; because sentencing guidelines governing supervised release violations set forth policy state-

ments rather than guidelines for courts to follow, court could consider defendant's arguments as to inequity of situation in connection with imposition of sentence upon him. *United States v Jackson* (2004, MD La) 323 F Supp 2d 775.

District court evaluated U.S. Government's petition to revoke supervised release that was imposed on defendant who was convicted of possessing counterfeit U.S. currency, using criteria that appeared in 18 USCS §§ 3583 and 3553, found that defendant violated terms of his release by possessing and using drugs and failing to complete program of treatment in community placement center, and it revoked his release and sentenced him to imprisonment for eight months, period that was at bottom of range recommended U.S. Sentencing Guidelines Manual. *United States v Leach* (2005, ED Pa) 397 F Supp 2d 599.

Unpublished Opinions

Unpublished: Defendant's 24-month sentence upon revocation of supervised release under 18 USCS § 3583 did not constitute plain error where district court indicated that it had considered some of factors of 18 USCS § 3553(a) and was not required to explicitly state that it considered each factor or to detail weight accorded to each factor. *United States v Beason* (2005, CA11 Ala) 2005 US App LEXIS 26815.

Unpublished: Imposition of maximum 24-month prison term pursuant to 18 USCS § 3583(e)(3) for defendant's violations of conditions of his supervised release was not unreasonable, even though it exceeded recommended Sentencing Guidelines range by six months, because sentences outside of Guidelines range were not per se unreasonable, and sentence reflected both seriousness of defendant's offenses and his need for drug rehabilitation. *United States v Brown* (2006, CA6 Mich) 2006 US App LEXIS 1708.

Unpublished: Plain error was not established in consecutive 11-month terms for revocation of defendant's supervised release under 18 USCS § 3583(e)(3) because there was no proof that district court would have sentenced defendant to lesser term had correct criminal history category under USSG § 7B1.4(a) been applied where there was only two-month discrepancy in advisory ranges and terms were within two-year statutory maximum so that they were not unreasonable. *United States v Boykin* (2006, CA5 Tex) 2006 US App LEXIS 6080.

Unpublished: Plain error was not established in consecutive 11-month terms for revocation of defendant's supervised release under 18 USCS § 3583(e)(3) because there was no proof that district court would have sentenced defendant to lesser term had correct criminal history category under USSG § 7B1.4(a) been applied where there was only two month discrepancy in advisory ranges and terms were within two year statutory maximum so that they were not unreasonable. *United States v Boykin* (2006, CA5 Tex) 2006 US App LEXIS 6080.

Unpublished: Thirty-month sentence imposed upon defendant's revocation of supervised release was affirmed because district court did not impermissibly "depart" from sentencing range of 8-14 months recommended in USSG § 7B1.4(a), Pol'y Statement, as it was nonbinding, and district court sufficiently considered 18 USCS § 3553(a) factors as required by 18 USCS § 3583(e), Sentencing Commission's recommendations regarding sentencing and policy, and pertinent policy statements. *United States v Blackburn* (2006, CA7 Ill) 2006 US App LEXIS 6102.

Unpublished: District court did not commit plain error in sentencing defendant to 24 months in prison for violating supervised release by stealing purse at nightclub; even if district court erred in considering theft to be felony rather than misdemeanor under state law, defendant failed to show that his sentence would have been less but for error and, further, 24-month sentence did not exceed statutory maximum. *United States v McMillan* (2006, CA11 Ga) 2006 US App LEXIS 3751.

Unpublished: Plain error was not established in consecutive 11-month terms for revocation of defendant's supervised release under 18 USCS § 3583(e)(3) because there was no proof that district court would have sentenced defendant to lesser term had correct criminal history category under USSG § 7B1.4(a) been applied where there was only two-month discrepancy in advisory ranges and terms were within two-year statutory maximum so that they were not unreasonable. *United States v Boykin* (2006, CA5 Tex) 2006 US App LEXIS 6080.

Unpublished: Thirty-month sentence imposed upon defendant's revocation of supervised release was affirmed because district court did not impermissibly "depart" from sentencing range of 8-14 months recommended in USSG § 7B1.4(a), Pol'y Statement, as it was nonbinding, and district court sufficiently considered 18 USCS § 3553(a) factors as required by 18 USCS § 3583(e), Sentencing Commission's recommendations regarding sentencing and policy, and pertinent policy statements. *United States v Blackburn* (2006, CA7 Ill) 2006 US App LEXIS 6102.

Unpublished: Defendant's 24-month sentence, which was imposed following revocation hearing on violations of defendant's supervised release, was not unreasonably long where defendant had been before district court at least twice before on revocation hearings, defendant's initial sentence of five years of probation reflected downward departure, and defendant had been thoroughly and continually forewarned by district court that it would not take defendant's violations lightly. *United States v Porchia* (2006, CA8 Mo) 2006 US App LEXIS 7751.

Unpublished: Defendant's 18-month sentence under 18 USCS § 3583(e) for violating his supervised release, which exceeded recommended U.S. Sentencing Guidelines range by seven months, was affirmed as sentence was reasonable given that district court adequately considered 18 USCS § 3553 factors and focused on defendant's criminal history and repeated violations of conditions of supervised release. *United States v Roubideaux* (2006, CA10) 2006 US App LEXIS 10140.

Unpublished: Pursuant to 18 USCS § 3583(d), (g)(4), after defendant tested positive for methamphetamine on five different occasions and his drug program took turn for worse while he was at low-security facility and during supervised release, district court did not abuse its discretion in revoking his supervised release and sentencing him to 18 months in prison, which allowed him to participate in long-term residential drug-treatment program while confined. *United States v Zimmerman* (2006, CA8 Iowa) 2006 US App LEXIS 9150.

Unpublished: There was no plain error in imposing 12-month sentence after revocation of defendant's supervised release under 18 USCS § 3583(e)(3) because district court clearly considered factors of 18 USCS § 3553(a) such as defendant's history, seriousness of his offense, and his conduct upon release, and policy statements for U.S. Sentencing Guidelines Manual § 7B1.4 where judge imposed sentence above range based upon defendant's repetitive violations; where no plain error occurred, defendant's due process claims were without merit. *United States v Smith* (2006, CA11 Ga) 2006 US App LEXIS 11130.

Unpublished: Consecutive sentences of 24 months and 12 months imposed upon revocation of defendant's two terms of supervised release were not unreasonable; prison terms were within authorized limits, and district court considered appropriate factors in imposing sentences, including defendant's conduct resulting in revocation and his abusive conduct toward jailers while he was detained pending instant proceedings. *United States v Dion* (2006, CA8 SD) 2006 US App LEXIS 10935.

Unpublished: District court properly departed upward from 8 to 14 month range of USSG § 7B1.4 when it revoked defendant's supervised release under 18 USCS § 3583(e)(3) because that court considered 18 USCS § 3553(a) factors and also considered seriousness of original carjacking offense, his continued substance abuse, and his repeated law violations within months after release. There was also no abuse of discretion in exceeding advisory range based upon offense of grand theft auto charged in revocation petition and admission by defendant that he had tested positive for cocaine. *United States v Hutchinson* (2006, CA11 Fla) 2006 US App LEXIS 11553.

Unpublished: Defendant's supervised release, which was imposed after his conviction for being felon in possession of firearm in violation of 18 USCS § 922(g)(1), was revoked after it was found that he was using drugs; district court did not abuse its discretion in imposing sentence outside of range suggested by Sentencing Guidelines Manual ch. 7 because (1) district court gave reasons for imposing sentence including defendant's need for drug treatment, as required by 18 USCS § 3553(c)(2); (2) district court also considered § 3553(a) factors in selecting two-year sentence, including defendant's history of drug abuse, need for deterrence, need to protect public, and most effective manner of obtaining treatment for defendant; and (3) district court did not exceed maximum penalty set forth in 18 USCS § 3583(e). *United States v Ford* (2006, CA11 Ala) 2006 US App LEXIS 13474.

Unpublished: District court did not err when it refused defendant's request for placement in drug abuse program because 1) district court was authorized to revoke defendant's supervised release because he admitted to having violated his supervision by using controlled substance, 2) record did not support argument that district court was under false impression that it was required to revoke his term of supervised release, and 3) district court properly considered appropriate 18 USCS § 3553(a) factors and concluded that policies of affording adequate deterrence to criminal conduct and protecting public from further crimes of defendant warranted incarcerating defendant. *United States v Allen* (2006, CA11 Ga) 2006 US App LEXIS 17458.

Unpublished: Defendant was properly sentenced to 24 months in prison following revocation of defendant's supervised release, which was attached to sentence for possession of cocaine with intent to distribute in violation of 21 USCS § 841; sentence fell below statutory maximum under 18 USCS § 3583(e)(3), and district court properly took defendant's

repeated drug test failures and apparent unwillingness to seriously commit to rehabilitation into account under 18 USCS § 3553(a). *United States v Hunter* (2006, CA5 Tex) 2006 US App LEXIS 17768.

Unpublished: Defendant's 10-month consecutive sentence, which was imposed upon revocation of defendant's supervised release, pursuant to 18 USCS § 3583(e), was affirmed because (1) sentence was at low end of recommended Sentencing Guideline imprisonment range of 8 to 14 months and within statutory maximum sentence for Grade B felony, under USSG § 7B1.4(a) and 18 USCS § 3583(e), (2) district court adequately considered 18 USCS § 3553(a) factors in arriving at defendant's sentence, including his criminal history, his prior violations of supervised release, his conduct while illegally in U.S., and his responsibility to his family, and (3) district court acted within its discretion when it imposed consecutive sentence. *United States v Espinoza* (2006, CA11 Fla) 2006 US App LEXIS 17984.

Unpublished: Defendant's 24-month sentence, which was imposed for violating conditions of his supervised release, was affirmed because district court considered relevant sentencing factors found in 18 USCS § 3553(a) and there was no question that district court considered recommended range in Sentencing Guidelines; further, based on record, sentence that exceeded advisory Sentencing Guidelines range by ten months was not unreasonable or plainly unreasonable since (1) district court granted defendant leniency in his original sentence, (2) defendant responded by violating five different terms of his supervised release, (3) violations included commission of another crime, in which defendant fled and eluded police who were trying to arrest him for receiving and concealing stolen car, (4) in light of that incident, district court was unconvinced that defendant had been rehabilitated, and (5) accordingly, district court sentenced defendant to maximum term of imprisonment, which, according to district court, gave defendant opportunity to think about what he wanted to do with his life and to think seriously about seeking treatment. *United States v Soto* (2006, CA6 Mich) 2006 US App LEXIS 18552.

Unpublished: When considering 18 USCS § 3553 factors to determine sentence appropriate for defendant who had twice tested positive for drugs, associated with felon, committed several state crimes, and left judicial district, district court did not commit plain error in violation of *Fed. R. Crim. P.* 52(b) and 18 USCS § 3583(e) when it considered seven-mile high-speed chase he had gone on for which state court had convicted and sentenced him; defense counsel had asked district court to consider that defendant had served his five-month term of imprisonment for chase; further, defendant's conduct and state court sentence were relevant to district court's consideration of nature of defendant's violations of supervised release, need to deter his criminal conduct, need to protect public, need to provide defendant with appropriate treatment, and recommended *Sentencing Guidelines* range. *United States v Henley* (2006, CA6 Tenn) 2006 US App LEXIS 19453.

Unpublished: Court of appeals rejected defendant's argument that 18 USCS § 3583(e) did not allow district court to consider nature and circumstances of his convictions for money laundering and engaging in transactions with property derived from unlawful activity when it determined appropriate sentence after it found that he violated terms of his supervised release, it found that district court properly considered factors it was required to review under 18 USCS §§ 3583(e) and 3553(a), and it upheld district court's judgment sentencing defendant to four consecutive terms of 24 months' imprisonment because sentence was reasoned and reasonable. *United States v Johnson* (2006, CA10) 2006 US App LEXIS 20706.

Unpublished: Defendant was properly sentenced following revocation of supervised release, which was imposed following his conviction of distribution of cocaine base; his sentence passed both unreasonable and plainly unreasonable standards since (1) sentence was less than statutory maximum, (2) defendant's most serious supervised release violation was drug offense involving more than 400 grams of cocaine and 600 grams of cocaine base, and (3) original sentence was result of downward departure from applicable guideline range, factor that could warrant upward departure under sentencing guidelines. *United States v Bennett* (2006, CA5 La) 2006 US App LEXIS 20985.

Unpublished: Sentence of 60 months upon revocation of supervised release was clearly reasonable because defendant's suggested range was 27-33 months under USSG § 7B1.1(a)(1), given his admission to submitting 8 urine samples testing positive for cocaine over 4-month period, and district court's consideration of factors under 18 USCS § 3583(e), including his need for intensive in-prison treatment for serious drug addiction. *United States v Mallory* (2006, CA8 Neb) 2006 US App LEXIS 21743.

Unpublished: In sentencing defendant to statutory maximum term after revoking his term of supervised release on account of his having been caught dealing drugs from his home, although probation officer's report stated that defendant was also drug addict, district court was not required to explicitly state on record that it had considered sentencing alternative of drug abuse treatment under 18 USCS § 3583(d). *United States v Robaina* (2006, CA11 Fla) 2006 US App LEXIS 22586.

Unpublished: Although defendant's two-year sentence for violating conditions of his supervised release after being convicted of violating 21 USCS § 841(a)(1) exceeded Sentencing Guidelines' advisory sentence of four to ten months, sentence was reasonable because district court considered defendant's personal history, circumstances of offense, defendant's admission of guilt to charges that he violated terms of his release by using cocaine, failing to report to his probation officer, and being arrested for third-degree felony, and other factors in 18 USCS §§ 3583(c) and 3553(a). *United States v Weese* (2006, CA5 Tex) 2006 US App LEXIS 23016.

Unpublished: District court did not err in sentencing defendant to 36 months in prison upon revocation of his supervised release because district court gave defendant more than one chance to obtain substance abuse and mental health treatment at private facility and to comply with his supervised release conditions, but he repeatedly failed to do so; also, district court considered relevant 18 USCS §§ 3553(a), 3583 factors and reasonably determined that no further period of supervised release was appropriate. *United States v Mullins* (2006, CA4 W Va) 2006 US App LEXIS 24443.

Unpublished: Since district court considered 18 USCS § 3553(a) sentencing factors and recommended guidelines in Chapter 7 of Sentencing Guidelines (Guidelines) before sentencing defendant for violating conditions of his supervised release, 24-month sentence, which was statutory maximum under 18 USCS § 3583(e) and exceeded advisory Guidelines sentencing range under USSG § 7B1.4, Pol'y Statement, was affirmed; overall sentence was not unreasonable since district court's statements demonstrated that it took into account 18 USCS § 3553(a) factors as required and considered policy statements in Chapter 7 of Guidelines. *United States v Herrin* (2006, CA11 Ala) 2006 US App LEXIS 25375.

Unpublished: 36-month sentence imposed upon revocation of defendant's supervised release was not plainly unreasonable because (1) sentence was within statutory maximum of 60 months under 21 USCS § 841(b)(1)(A), (2) district court determined that longer sentence was necessary because of defendant's history of violating terms of supervision and to deter others from violating release terms, and those were permissible considerations when imposing supervised release revocation sentence under 18 USCS §§ 3553(a), 3583(e), and (3) defendant did not contend that court failed to consider any pertinent 18 USCS § 3553(a) factors. *United States v Alexander* (2006, CA4 NC) 2006 US App LEXIS 25471.

Unpublished: Defendant's 36-month sentence following revocation of his supervised release, which was outside Sentencing Guidelines (Guidelines) recommended range of five to eleven months, was affirmed because district court stated that Guidelines range would be inadequate for defendant given his repeated marijuana use while on supervised release; district court considered 18 USCS § 3553(a) factors and considered testimony of both defendant and his mother regarding defendant's history and characteristics. *United States v Wesley* (2006, CA11 Ga) 2006 US App LEXIS 25499.

Unpublished: Counsel's motion to withdraw was granted and defendant's appeal from revocation of his supervised release and imposition of maximum sentence under 18 USCS § 3583(e)(3) was dismissed because (1) defendant admitted at revocation hearing that he tested positive for cocaine and subsequently failed to comply with drug-testing condition of his release, so district court was required to revoke his supervised release under USSG § 7B1.3(a)(1); (2) defendant's sentence was reasonable because district court had properly considered that defendant had attempted rehabilitation during course of his release but always got drawn back into this drug usage pursuant to 18 USCS § 3553(a)(1), (2); and (3) imposition of "intermediate sanction" of defendant's entry into residential treatment program pursuant to agreement between defendant and probation office did not prohibit district court from considering violations that occurred prior to that time because such agreements did not bind district court or deprive it of power to inquire into violation of conditions of supervision. *United States v Alvarez* (2006, CA7 Ind) 2006 US App LEXIS 27346.

Unpublished: Defendant's sentence based on revocation of his supervised release was affirmed because district court specifically stated that defendant's 24-month sentence rested on three grounds: (1) defendant's many prior alcohol related offenses and violent crimes; (2) his repeated failure to comply with conditions of his supervised release; and (3) need for intensive alcohol abuse treatment. *United States v Reid* (2006, CA6 Tenn) 2006 US App LEXIS 28471.

Unpublished: Imprisonment term of 21 months, which was imposed upon revocation of defendant's supervised release, was not plainly unreasonable because (1) sentence was within both applicable statutory range and recommended guideline range, (2) district court specifically noted that defendant had already been given second chance to comply with requirements of supervised release and that circumstances suggested that defendant could not comply with supervised release in future, and (3) district court considered time defendant spent in state prison on charge that served as partial basis for revocation; thus, district court adequately considered policies underlying supervised release statute, 18 USCS § 3583, various applicable sentencing factors under 18 USCS §§ 3553(a) and 3583(e), and available sentencing options. *United States v Fletcher* (2006, CA4 W Va) 2006 US App LEXIS 28708.

18 USCS § 3583

Unpublished: Court of appeals found that district court did not abuse its discretion when it revoked supervised release of defendant who was convicted of theft of mail, in violation of 18 USCS § 1708, and sentenced defendant to 24 months' imprisonment because term of confinement imposed was within sentencing range allowed by Chapter 7 of U.S. Sentencing Guidelines Manual and court stated that it was imposing sentence of 24 months' confinement because defendant's extensive criminal record made it difficult for it to deal leniently with her; court of appeals also found that because district court was guided by factors found in 18 USCS § 3553(a) when it imposed defendant's sentence, it could not find that sentence was unreasonable. *United States v Reid* (2005, CA11 Ga) 153 Fed Appx 605.

Unpublished: District court did not err in imposing more severe sentence than that which U.S. Sentencing Guidelines Manual (USSG) recommended because (1) ranges in USSG § 7B1.4(a) were advisory; (2) district court indicated that it considered Guidelines range and found it inadequate; (3) district court was not required to consider 18 USCS § 3553(a) factors where defendant was subject to mandatory revocation of supervised release under 18 USCS § 3583(g); and (4) defendant's Booker argument was unavailing on plain error review. *United States v Finney* (2005, CA11 Ga) 154 Fed Appx 865.

Unpublished: Defendant's appeal was dismissed as frivolous because record showed that district court had properly complied with 18 USCS § 3583(e) when it revoked his supervised release and re-incarcerated him for 18 months: (1) defendant did not contest government's allegations that he had violated several special conditions of his supervised release, and thus district court's violation finding was based upon more than preponderance of evidence; (2) district court's remarks concerning gravity of defendant's offenses, his character, and need to protect community reflected that it had adequately considered factors set out in 18 USCS § 3553(a), as required by 18 USCS § 3583(e); (3) defendant was not entitled to relief merely because 18-month term imposed upon him exceeded recommended range set out in USSG § 7B1.4 because sentencing guidelines were only advisory and were not binding on district court; and (4) 18-month sentence was not unreasonable because district court had imposed it after considering applicable guidelines range and factors set out in 18 USCS § 3553(a). *United States v Jones* (2005, CA7 Wis) 156 Fed Appx 852.

Unpublished: Where defendant received minimum 15-year sentence and 3 years' supervised release, which was revoked upon his admission to violating release terms, new 12-month sentence was not unreasonable as district court considered appropriate factors under 18 USCS § 3553(a) and 18 USCS § 3583(e)(3), and original offense of being felon in possession of firearm in violation of 18 USCS § 922(g)(1) was Class C felony. *United States v Lapinsky* (2005, CA8 Minn) 156 Fed Appx 873.

Unpublished: Upon revocation of supervised release under 18 USCS § 3583(e)(3), sentence in excess of suggested range set forth in USSG § 7B1.4 was proper where district court considered suggested ranges, as it was required to do, but rejected them as being ineffective. *United States v Goodall* (2005, CA11 Ga) 139 Fed Appx 219.

Unpublished: Because defendant conceded Government's allegations of his continuing involvement in criminal activity and that he was in violation of his supervised release during his revocation hearing, there was ample evidence from which district court could find him in violation of his supervised release under 18 USCS § 3583(e)(3), and 21-month sentence imposed by district court was proper. *United States v Thomas* (2005, CA4 NC) 133 Fed Appx 878.

Unpublished: Pursuant to 18 USCS § 3583(e)(3), district court did not abuse its discretion in imposing 24-month sentence on defendant after it revoked his term of supervised release (although USSG § 7B1.4 suggested range of five to 11 months) because: (1) defendant repeatedly failed to comply with terms of his supervised release, was dishonest with district court, and denied seriousness of his drug use problem; (2) although defendant attempted to make excuses for his failures, district court was not required to credit his explanations or to reduce sentence on that basis; and (3) imprisonment was necessary to punish defendant's noncompliance and to address his need for intensive drug treatment. *United States v Sorenson* (2005, CA8 Neb) 132 Fed Appx 668.

Unpublished: Court affirmed 24-month sentence imposed on defendant pursuant to 18 USCS § 3583(e)(3) following revocation of defendant's supervised release where recent United States Supreme Court decisions that rendered U.S. Sentencing Guidelines Manual advisory did not affect defendant's sentence as provisions in Chapter 7 of Sentencing Guidelines regarding supervised release were already considered advisory, Supreme Court had not recognized Sixth Amendment right to have jury decide facts relevant to revocation of supervised release, and defendant admitted facts relevant to revocation of his sentence. *United States v Stafford* (2005, CA8 Ark) 132 Fed Appx 87.

Unpublished: Defendant's due process rights were not violated by imposition of 24-month sentence that was above presumptive range of USSG § 7B1.4 for violation of supervised release under 18 USCS § 3583; even though district court's failure to consider range was error under 18 USCS § 3553, there was no plain error because defendant's substan-

tial rights were not prejudiced where sentence far exceeded presumptive range so that it was unlikely that district court would have applied range had it been explicitly considered in light of fact that district court considered defendant to be "hopeless." *United States v Frank* (2005, CA11 Ga) 145 Fed Appx 311.

Unpublished: It was within district court's authority to consider sentencing guideline range as advisory and defendant's need for rehabilitation when determining his term of incarceration; accordingly, district court did not commit plain error when it sentenced defendant to two-year maximum term of incarceration authorized under 18 USCS § 3583(e)(3) for violating terms of his supervised release. *United States v Smith* (2005, CA11 Ala) 144 Fed Appx 819.

Unpublished: District court was allowed to consider fact that it had revoked defendant's supervised release on prior occasions when it determined his sentence for violating terms of his supervised release, and to impose sentence that exceeded length of sentence recommended by U.S. Sentencing Guidelines, and court of appeals upheld district court's judgment sentencing defendant to 15 months' imprisonment, four months longer than top of range recommended by U.S. Sentencing Guidelines Manual ch. 7. *United States v Nelson* (2005, CA10) 158 Fed Appx 956.

Unpublished: Revocation of supervised release and sentence of 24 months in prison was affirmed where district court considered all factors set out in 18 USCS §§ 3553 and 3583, and noted defendant's denial of substance abuse problem, minimal progress in treatment programs, and probation office's view that defendant was so negative and lacking in acceptance of responsibility that it did not want to spend any more effort supervising him. *United States v Haukaas* (2005, CA8 SD) 118 Fed Appx 111.

Unpublished: Defendant's 24-month sentence upon revocation of his supervised release, which sentence was permitted by 18 USCS § 3583(e) but exceeded four to 10-month sentence recommended in USSG § 7B1.4(a)'s policy statement, was not abuse of discretion because (1) district court initially gave defendant chance for drug rehabilitation outside prison environment, but defendant failed to complete substance abuse program, and (2) at sentencing, district court stated that it had considered factors in 18 USCS § 3553 and presentence report, and noted defendant's multiple violations and failed opportunities to engage in rehabilitation programs. *United States v Humphrey* (2005, CA8 Neb) 121 Fed Appx 166.

Unpublished: District court did not abuse its discretion when it sentenced defendant to 24 months in prison upon revocation of her supervised release, which was maximum sentence permitted by 18 USCS § 3583(e)(3), because, although sentence exceeded advised sentencing range of eight to 14 months provided by USSG § 7B1.4(a), district court had considered policy statements in U.S. Sentencing Guidelines Manual ch. 7 but found advised sentencing range inadequate to promote defendant's respect for law, to deter her from criminal conduct, and to protect public from her commission of further crimes, some of sentencing factors found in 18 USCS § 3553(a). *United States v Tilford* (2004, CA8 Mo) 116 Fed Appx 40.

Unpublished: Any argument that sentence of eight months' incarceration imposed upon revocation of defendant's probation was unreasonable would have been frivolous because recommended range under USSG § 7B1.4(a) was five to 11 months and district court considered appropriate factors under 18 USCS § 3583(e)(3), including nature and circumstances of violations and defendant's personal history such as his chronic marijuana use, before settling on term in middle of recommended range. *United States v Turner* (2005, CA7 Ill) 126 Fed Appx 750.

Unpublished: Where total punishment allowed by defendant's offense level was 30 to 37 months, district court was permitted to stack one 24-month sentence with other 24-month sentence (discounted to 12 months) to achieve 36-month sentence, under USSG § 5G1.2(d), when defendant violated conditions of two terms of supervised release. *United States v Cruz* (2005, CA9 Cal) 128 Fed Appx 627, cert den (2005, US) 126 S Ct 253, 163 L Ed 2d 231.

Unpublished: District court did not abuse its discretion when it imposed sentence above recommended range for violating two conditions of supervised release, as set forth in USSG § 7B1.4(a), because record showed that district court took into consideration factors set forth in 18 USCS § 3553(a), as required under 18 USCS § 3583, and concluded that 18-month sentence would be beneficial for defendant so he could pursue educational and drug rehabilitation opportunities. *United States v Phillips* (2005, CA6 Mich) 129 Fed Appx 982.

51. --Term greater than maximum for original offense

Imposition of one year term of incarceration after defendant violated conditions of his supervised release did not violate Eighth Amendment, even though addition of one year term to 8 month sentence for misdemeanor theft of government property exceeded statutory maximum of one year, since it was defendant's violations of conditions of his su-

supervised release, rather than underlying offense conduct, that led to additional incarceration. *United States v Celestine* (1990, CA5 Tex) 905 F2d 59.

Court's revocation of defendant's supervised release and imposition of post-release prison sentence that exceeded maximum allowable initial sentence was not error. *United States v Dillard* (1990, CA7 Wis) 910 F2d 461.

Following revocation of defendant's supervised release, court's imposition of sentence of imprisonment under 18 USCS § 3583 greater than maximum guideline sentence for original offense was not abuse of discretion and did not violate defendant's due process rights. *United States v Smeathers* (1991, CA8 Iowa) 930 F2d 18, reh den (1991, CA8) 1991 US App LEXIS 12554.

Two-year sentence of imprisonment imposed upon revocation of defendant's three year supervised release term must be vacated, since court failed to consider § 7B1.4(b)(2), which mandated prison term of one year; because minimum one-year term of imprisonment required by 18 USCS § 3583(g) is greater than maximum term of imprisonment of applicable guidelines range set forth in § 7B1.4(a), it is substituted for applicable guidelines range. *United States v Baclaen* (1991, CA9 Hawaii) 948 F2d 628, 91 CDOS 8885, 91 Daily Journal DAR 13714.

Sentence imposed by district court for violation of supervised release was not abuse of discretion, even if it exceeded statutory maximum for underlying offense when combined with defendant's original sentence. *United States v Wright* (1993, CA6 Tenn) 2 F3d 175.

18 USCS § 3583 authorizes revocation of supervised release, even where resulting incarceration, when combined with period of time defendant has already served for his substantive offense, will exceed maximum incarceration permissible under substantive statute. *United States v Robinson* (1995, CA10 Okla) 62 F3d 1282.

District court had authority to sentence defendant to one-year prison term for violating conditions of his supervised release, even though he had already served maximum statutory prison term. *United States v Proctor* (1997, CA11 Fla) 127 F3d 1311, 11 FLW Fed C 739.

District court properly decided, upon revocation of defendant's supervised release under 18 USCS § 3583 due to misdemeanor witness intimidation, to sentence defendant to statutory maximum three-year prison term, exceeding three-to-nine-month range listed in § 7B1.4 of the sentencing guidelines, where court found defendant, who was convicted of a crime which involved a threat of violence against another person, to be a danger to the community. *United States v Musa* (2000, CA9 Cal) 220 F3d 1096, 2000 CDOS 6128, 2000 Daily Journal DAR 8153, cert den (2000) 531 US 999, 148 L Ed 2d 469, 121 S Ct 498.

A court may consider defendant's rehabilitative needs when imposing specific incarcerative term following revocation of supervised release under 18 USCS § 3583, and thus court did not err in sentencing defendant to 24-month prison term, which exceeded maximum guideline range of 11 months in Chapter 7, provided that if comprehensive, residential drug treatment program was not available, court would amend sentence and sentence defendant to not more than 11 months. *United States v Brown* (2000, CA11 Ala) 224 F3d 1237, 13 FLW Fed C 1011.

District court's imposition of supervised release term that exceeded the statutory maximum under 18 USCS § 3583(h) was in error since court failed to subtract the term of imprisonment imposed on defendant following his first revocation of supervised release from the total amount of supervised release authorized. *United States v Maxwell* (2002, CA4 NC) 285 F3d 336.

Because, under 18 USCS § 3583, no more than two years of imprisonment is able to be imposed when supervised release that is imposed for class C felony is revoked, two year maximum applies on cumulative basis and not separately to each time supervised release is revoked; therefore, where defendant was already sentenced to 23 months' imprisonment on prior revocation of supervised release, defendant's 18 month sentence on current revocation of supervised release was reduced to one month. *United States v Jackson* (2003, CA5 Tex) 329 F3d 406.

Although violation of supervised release is not separate basis for criminal punishment that requires jury verdict, and imprisonment for violation of supervised release may exceed time that defendant could have been jailed on his original conviction, reversible error may occur under Booker if district court increases defendant's sentence beyond that which he faced for his underlying offense based upon incorrect interpretation or application of federal sentencing guidelines. *United States v McNeil* (2005, CA2 NY) 415 F3d 273.

52. --Other particular terms

Imposition of 18 month sentence was within discretion of court after it had revoked defendant's 2 year term of supervised release for admittedly missing drug test in violation of condition of supervised release. *United States v Graves* (1990, CA8 Mo) 914 F2d 159.

Court's imposition of 2 year prison term following revocation of 3-year term of supervised release due to drug use was not erroneous, since at time defendant was sentenced guidelines furnished no yardstick for imprisonment, and court complied with requirement of 18 USCS § 3583(b) that prison term "not less than 1/3 " of defendant's 3 year supervised release term be imposed. *United States v Ramos-Santiago* (1991, CA1 Puerto Rico) 925 F2d 15, cert den (1991) 502 US 840, 116 L Ed 2d 96, 112 S Ct 129.

Sentence of 18 months imposed on revocation of defendant's supervised release term of 3 years was not unreasonable, even though it was longer than 14-month sentence for underlying conviction, since under 18 USCS § 3583 District Court could sentence defendant to maximum of 3 years, his term of supervisory lease, and guidelines do not address what sentence should be imposed upon revocation. *United States v Oliver* (1991, CA8 Minn) 931 F2d 463.

Term of supervised release that is subject to modification, revocation or termination pursuant to 18 USCS § 3583(e) is term originally imposed by court, not existing unserved term of supervised release, and thus district court did not exceed its authority when it imposed 15-month prison term upon revocation of defendant's supervised release. *United States v Krabbenhoft* (1993, CA8 ND) 998 F2d 591.

Case must be remanded where court imposed sentence upon revocation of supervised release to run consecutively to state sentence pursuant to policy statement § 7B1.3(f), since court's ruling was based on earlier incorrect decision, which held that all policy statements in Guideline Manual are binding, and it could not be said that judge's erroneous decision was harmless error, where there was some overlap between conduct for which defendant had been punished by state and conduct that put him in breach of conditions of his supervised release. *United States v Hill* (1995, CA7 Ill) 48 F3d 228.

Two year sentence following revocation of supervised release pursuant to 18 USCS § 3583 was not plainly unreasonable, although it was longer than 8 to 14 month range set out in § 7B1.4, where judge considered policy statements, and articulated his concerns about defendant and need to imprison him for longer period. *United States v Doss* (1996, CA7 Ill) 79 F3d 76.

Judgment revoking defendant's term of supervised release and sentencing him to eighteen months in prison would be vacated because district court might have misapprehended its discretion; record indicated that court might have felt constrained by Chapter Seven policy statements, which recommended term of imprisonment from eighteen to twenty-four months, when in fact court retained broad discretion under 18 USCS § 3583(e)(3) to sentence defendant to anywhere between zero and twenty-four months. *United States v Sweeney* (1996, CA2 NY) 90 F3d 55.

30 month sentence imposed upon revocation of defendant's supervised release was not plainly unreasonable, where court looked at 5 to 11 month range provided in § 7B1.4(a) and decided it was totally unacceptable under circumstances, defendant admitted that recommended sentence was insufficient to deter him from violating supervised release by leaving district, and sentence imposed was six months shorter than three years allowable under 18 USCS § 3583(e)(3). *United States v Hale* (1997, CA7 Ill) 107 F3d 526.

Imposition of sentence of 24 months after revocation of defendant's supervised release, which was maximum sentence permissible under 18 USCS § 3583, was not plainly unreasonable, given seriousness of criminal drug conduct that triggered revocation, court's limited ability to consider that conduct, and disregard defendant exhibited for trust placed in him by court. *United States v McClanahan* (1998, CA7 Ill) 136 F3d 1146 (criticized in *United States v Ramirez-Rivera* (2001, CA1 Puerto Rico) 241 F3d 37).

Twenty-four-month prison term was properly imposed by court after revoking defendant's supervised release, in light of nature of defendant's supervised release violations, including his repeated failure to submit urine specimens, and court's expressed desire to ensure that defendant would receive long-term intensive treatment for drug and alcohol abuse, and for psychiatric, psychological, emotional or mental treatment in highly structured environment. *United States v Shaw* (1999, CA8 Neb) 180 F3d 920.

In sentencing defendant following revocation of his supervised release pursuant to 18 USCS § 3583 because his urine specimen tested positive for cocaine, district court did not engage in impermissible double counting by considering defendant's prior drug convictions when classifying defendant's current conduct as a felony and grade B violation under § 7B1.1, even though defendant's prior convictions also affect calculation of his criminal history, since base of

fense and criminal history category are intended to reflect different concerns. *United States v Crace* (2000, CA6 Ky) 207 F3d 833, 2000 FED App 111P.

It was not plainly unreasonable to resentence defendant after he violated his supervised release to maximum 24 month prison term permitted by 18 USCS § 3583(e)(3), to be served consecutive to time he was already serving, even though at time defendant was resentenced, he was serving sentences for same state law violations that were the basis for revoking term of supervised release; § 7B1.3(f) recommends that term upon revocation be served consecutively to any sentence of imprisonment that defendant is serving. *United States v Harvey* (2000, CA7 Ill) 232 F3d 585, cert den (2001) 532 US 936, 149 L Ed 2d 313, 121 S Ct 1389.

Where defendant violated two terms of release within days of being released from prison, district court did not err by imposing 15-month custodial sentence when revoking defendant's supervised release; under 18 USCS § 3583(g), district court was required to sentence defendant to term of imprisonment; sentence imposed was less than maximum allowed under § 3583(e)(3); USSG § 7B1.4 was not binding with respect to sentences imposed upon revocation of supervised release; condition that defendant not use controlled substances was important condition of supervised release; and district court did not abuse its discretion by considering leniency shown toward defendant when defendant's original sentence was imposed. *United States v Touche* (2003, CA8 SD) 323 F3d 1105.

Defendant was sentenced to 18 months after his supervised release was revoked; although that sentence exceeded suggested range of three to nine months in USSG § 7B1.4, it was shorter than two-year statutory maximum set forth in 18 USCS § 3583(e)(3) for Class C felony. *United States v Tsosie* (2004, CA10 NM) 376 F3d 1210, cert den (2005, US) 161 L Ed 2d 122, 125 S Ct 1298.

Defendant's 24 month consecutive sentence for violating his supervised release pursuant to 18 USCS § 3583(e) was affirmed, even though defendant had already been sentenced to consecutive three-year term of supervised release based on same conduct in another case, because defendant admitted that he violated conditions of his supervised release, sentence was below recommended Guideline imprisonment range and within statutory maximum sentence, district court adequately considered 18 USCS § 3553(a) factors, including his criminal history and his threat to public, and district court acted within its discretion when it imposed consecutive sentence. *United States v Sweeting* (2006, CA11 Fla) 437 F3d 1105.

Under 8 USCS § 1324, sentence of five years was authorized for defendant's offense; thus, under 18 USCS § 3559(a), his offense was Class D felony; for Class D felony, 18 USCS § 3583 authorized sentence of no more than two years upon revocation of supervised release, so sentence of 24 months was affirmed. *United States v Alfaro-Hernandez* (2006, CA5 Tex) 453 F3d 280.

Illegal alien is sentenced to one year in prison, where alien had served 8-month sentence for violation of 8 USCS § 1326, was released but then returned to U.S. in violation of condition of one-year term of supervised release, and was arrested in U.S. for possession of firearm and stolen property but charges for those crimes were dropped, because 18 USCS § 3583(e) authorizes District Court to require violator of supervised-release condition to serve term in prison, after considering 18 USCS § 3553 factors and time served during primary term of incarceration, and within absolute limits set out at § 3583(e)(3). *United States v Medrano-Gonzalez* (1990, DC Kan) 751 F Supp 931.

Cocaine base distributor, who served time in prison before beginning supervised release, is sentenced to serve maximum of 24 months in prison upon revocation of his supervised release under 18 USCS § 3583(e)(3), even though § 3583(g) and sentencing guidelines call for only 12-month sentence for distributor's 2 positive tests for cocaine use, because distributor twice used cocaine soon after beginning supervised release, indicating utter inability to deal with his drug problem and to obey law. *United States v Middleton* (1992, ED Tex) 815 F Supp 990, affd without op (1993, CA5 Tex) 995 F2d 222.

Unpublished Opinions

Unpublished: Defendant's 30-month sentence after revocation of his supervised release pursuant to 18 USCS § 3583(e) was affirmed because: (1) although district court did not explicitly mention Chapter 7 or recommended guideline range under USSG § 7B1.4, it was aware of range since government had informed trial court; (2) district court implicitly rejected guideline range when it noted that government's recommendation of two years was "lenient;" (3) district court announced in open court its specific reason for imposing 30-month sentence, as required by 18 USCS § 3553(c)(2); and (4) even if defendant could have demonstrated that district court erred, defendant did not show that his sentence would have been different absent error. *United States v Oatneal* (2006, CA11 Ga) 2006 US App LEXIS 1853.

Unpublished: Four-to-ten month range recommended by *USSG* § 7B1.4(a) was not binding on district court for purposes of sentencing defendant upon revocation of his supervised release under 18 USCS § 3583(e)(5); imposition of twenty-four month sentence upon revocation of defendant's supervised release was reasonable where defendant had received significant downward departure from his original sentence and given facts of his case. *United States v Smith* (2006, CA4 NC) 2006 US App LEXIS 1925.

Unpublished: District court did not abuse its discretion in imposing 24-month sentence upon revocation of supervised release because Guidelines range calculated under *USSG* § 7B1.4(a) is purely advisory; 24-month sentence was within statutory maximum under 18 USCS § 3583(e)(3); defendant's continued drug use and failure to pay child support were appropriate factual basis for sentencing defendant to high end of advisory Guidelines range. *United States v Brite* (2006, CA4 Va) 2006 US App LEXIS 6297.

Unpublished: District court did not abuse its discretion in imposing 24-month sentence upon revocation of supervised release because Guidelines range calculated under *USSG* § 7B1.4(a) is purely advisory; 24-month sentence was within statutory maximum under 18 USCS § 3583(e)(3), and defendant's continued drug use and failure to pay child support were appropriate factual basis for sentencing defendant to high end of advisory Guidelines range. *United States v Brite* (2006, CA4 Va) 2006 US App LEXIS 6297.

Unpublished: Defendant's consecutive sentences, which totaled 42-months' imprisonment, did not violate 24-month ceiling for Class C felonies spelled out in 18 USCS § 3583(e)(3); district court had discretion to impose two consecutive sentences of 24 months each. *United States v Taylor* (2006, CA9 Cal) 2006 US App LEXIS 9979.

Unpublished: Two-year prison sentence imposed following revocation of defendant's supervised release was not unreasonable because, while sentence exceeded three to nine month range set forth in *USSG* § 7B1.4(a), it was within statutory maximum and, in imposing sentence, district court showed adequate consideration of 18 USCS § 3553(a) factors by stating that defendant needed two-year sentence to complete Bureau of Prisons' drug rehabilitation program. *United States v Chacon-Blanco* (2006, CA11 Fla) 2006 US App LEXIS 21324.

Unpublished: Because defendant was sentenced to maximum term of imprisonment under 18 USCS § 3583(e)(3), district court was prohibited under applicable version of § 3583(h) from imposing subsequent term of supervised release. *United States v Magana* (2006, CA5 Tex) 2006 US App LEXIS 24339.

Unpublished: District court did not err in revoking defendant's supervised release, pursuant to 18 USCS § 3583(e)(3), because defendant admitted he violated terms of his supervision, and defendant's eleven-month term of incarceration imposed by district court was within five-to-eleven-month advisory U.S. Sentencing Guidelines Manual range and was not plainly unreasonable, pursuant to 18 USCS § 3583(e)(3) and *USSG* § 7B1.4(a), because district court considered relevant factors and noted that defendant's non-compliance with his supervised release terms and his numerous violations justified sentence of eleven months. *United States v Moore* (2006, CA4 W Va) 2006 US App LEXIS 28710.

Unpublished: District court revoked supervised release and imposed revocation sentence of 16 months imprisonment without further supervised release, recognizing Sentencing Guidelines Chapter 7 recommended revocation range of 4-10 months imprisonment, but commenting on need to impose greater sentence in order to deter further criminal conduct given defendant's personal circumstances, criminal history and numerous violations, and in order to protect public; defendant's argument that this sentence was above recommended Sentencing Guidelines revocation range was rejected because Chapter 7 Guidelines range was nonbinding, prison term was within authorized limits as 18 USCS § 3583(e)(3) authorized up to 2 years imprisonment upon revocation of supervised release where original offense was Class D felony, and sentence was not unreasonable. *United States v Jackson* (2005, CA8 Mo) 145 Fed Appx 560.

Unpublished: Imposition of consecutive sentence for violation of supervised release was upheld because Sentencing Guidelines recommended that sanction imposed upon revocation be served consecutively to any other term of imprisonment imposed for any criminal conduct that was basis of revocation, and defendant's arguments did not establish that it was unreasonable to apply policy in his case. *United States v Pina* (2005, CA11 Fla) 160 Fed Appx 909.

Unpublished: It would have been frivolous for defendant to argue that classification under 18 USCS § 3559 of his original offense of bank fraud should have been determined not by maximum sentence of 30 years' imprisonment authorized by bank fraud statute but by maximum sentence of 18 months' imprisonment authorized under U.S. Sentencing Guidelines Manual at time of defendant's original sentencing, which would have made original offense Class E felony and thus authorized revocation sentence of no more than one year; there was no precedent for such interpretation of 18

USCS § 3559, and that interpretation had been flatly rejected by at least one federal appellate court. *United States v Acres* (2005, CA7 Ill) 128 Fed Appx 538.

Unpublished: District court did not commit plain error by sentencing defendant to 21 months' imprisonment following revocation of his supervised release because, regardless of whether violation was classified under non-binding advisory guideline of USSG § 7B1.4, district court was authorized under 18 USCS § 3583(e)(3) to sentence defendant to term of imprisonment not to exceed 24 months because his original bank robbery conviction was Class C Felony according to 18 USCS § 3559(a)(3). *United States v Walker* (2005, CA4 NC) 118 Fed Appx 753.

Unpublished: Twenty-month sentence was affirmed, as it did not exceed maximum that could be imposed upon revocation of supervised release, 18 USCS § 3583(e)(3); further, since defendant received significant downward departure from his original sentence and previously violated terms of supervision, sentence above range suggested by USSG § 7B1.4(a) was reasonable. *United States v Wilson* (2005, CA4 NC) 121 Fed Appx 1000.

Unpublished: Where district court complied with requirements of 18 USCS § 3553(a)(4) prior to revoking defendant's term of supervised release, defendant's 36-month sentence was affirmed; district court did not commit plain error by imposing sentence outside recommended range as it considered Chapter Seven of U.S. Sentencing Guidelines Manual and explained its reasoning for sentencing beyond that range. *United States v Jackson* (2005, CA11 Ala) 131 Fed Appx 655.

53. Reimposition of supervised release

Second term of supervised release was properly imposed by court upon revocation of defendant's supervised release, since enactment of 18 USCS § 3583(h) makes it clear that "stacking" is permissible and applied to defendant, where district court did not increase sentence for defendant's original crime but merely punished him for violating his supervised release, an event that occurred after subsection (h) became effective. *United States v Evans* (1996, CA8 Mo) 87 F3d 1009 (criticized in *United States v Hale* (1997, CA7 Ill) 107 F3d 526).

Court did not violate ex post facto clause of Constitution, upon revocation of defendant's supervised release, by imposing consecutive term of supervised release pursuant to 18 USCS § 3583(h) following expiration of defendant's prison term, since defendant was not prejudiced by enactment of § 3583(h); prior to enactment of subsection (h) defendant could have been sentenced to up to five years' imprisonment for violation of his supervised release and under new subsection (h) defendant could be sentenced to combination of imprisonment and supervised release that was not greater than five years. *United States v Brady* (1996, CA3 Pa) 88 F3d 225, cert den (1997) 519 US 1094, 136 L Ed 2d 718, 117 S Ct 773 and (criticized in *United States v Hale* (1997, CA7 Ill) 107 F3d 526).

Retroactive application of 18 USCS § 3583(h) to impose new term of supervised release upon defendant after revocation of her original term of supervised release did not violate Ex Post Facto Clause because, even if § 3583(h) changed prior law, it did not inflict harsher punishment than old law. *United States v Withers* (1997, CA7 Ill) 128 F3d 1167, cert den (1998) 525 US 829, 142 L Ed 2d 62, 119 S Ct 79.

Imposition of subsequent terms of supervised release as part of defendants' sentences for violating conditions of supervised release after their release from prison did not violate Ex Post Facto Clause, even though 18 USCS § 3583(h), which provides that original term of supervised release may be reinstated, was passed after date of defendants' sentencing, since § 3583(h) was passed before defendants had violated their terms of supervised release. *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P, reh, en banc, den (1998, CA6) 1998 US App LEXIS 5554 and cert den (1998) 525 US 828, 142 L Ed 2d 61, 119 S Ct 77.

Court does not violate Ex Post Facto Clause by sentencing defendant to a term of supervised release following revocation of a previously-imposed term of supervised release, even if defendant's original sentencing occurred prior to enactment of 18 USCS § 3583(h), since § 3583(h) imposes punishment for a new offense. *United States v Samour* (1999, CA6 Ohio) 199 F3d 821, 1999 FED App 422P.

District court possesses authority under 18 USCS § 3583(e) to reinstate a term of supervised release after a defendant has violated conditions of that release. *United States v Trenter* (2000, CA9 Wash) 201 F3d 1262, 2000 CDOS 1000, 2000 Daily Journal DAR 1473.

18 USCS § 3583(e)(3) does not authorize district court to award post revocation sentence that endures longer than original term of supervised release; however, district court may impose additional term of supervised release under its general sentencing authority pursuant to 18 USCS § 3583(a). *United States v Marlow* (2002, CA6 Tenn) 278 F3d 581,

18 USCS § 3583

cert den (2002) 535 US 1119, 153 L Ed 2d 171, 122 S Ct 2342 and (criticized in *United States v Russell* (2003, CA7 Ill) 340 F3d 450).

District court had authority under 18 USCS § 3583, as it was written before 1994 amendments, to impose second period of supervised release on defendants to be served after they completed prison terms imposed because defendants had violated terms of their current supervised release. *United States v Fareed* (2002, CA4 NC) 296 F3d 243, cert den (2002) 537 US 1037, 154 L Ed 2d 457, 123 S Ct 570.

Sentence for defendant's violation of supervised release that included 12 months of imprisonment, followed by 24 months of supervised release was proper, despite defendant's request for maximum sentence of 24 years' imprisonment only without supervised release to which U.S. Attorney and U.S. Probation Officer agreed, where defendant needed supervision to transition back into community. *United States v Hurt* (2003, CA9 Or) 345 F3d 1033, 2003 CDOS 9003, 2003 Daily Journal DAR 11307.

Revocation and reimposition of drug dealer's supervised release term did not violate prohibition against ex post facto laws, even though statute at time of original sentencing did not provide for imposition of new term of supervised release after first was revoked, where 18 USCS § 3583(h), providing for such imposition, became law before revocation of dealer's supervised release and before conduct leading to revocation, because § 3583(h) has imposed no new burdens upon dealer. *United States v Floyd* (1999, SD Tex) 65 F Supp 2d 487.

54. Imposition of incarceration and supervised release

Under version of 18 USCS § 3583 (later amended) in effect prior to September 13, 1994, Federal District Courts are authorized, pursuant to 18 USCS § 3583(e)(3)--which authorizes sentencing court to (1) revoke convicted accused's term of supervised release upon violation of condition of release, and (2) require accused to serve in prison all or part of term of supervised release without credit for time previously served on postrelease supervision--to impose additional term of supervised release following further incarceration, as (1) text of § 3583(e)(3) does not speak directly to question whether District Court has such authority; (2) from purely textual perspective, more plausible reading of § 3583(e)(3) leaves open possibility of supervised release after reincarceration, because (a) under parole scheme which supervised release replaced, new term of parole could have followed prison sentence imposed after revocation of initial parole term, (b) it is fair to suppose that absent textual bar, parole's replacement--supervised release--was meant to leave open possibility of further supervised release, (c) term "revoke" is not bar to such reading, and (d) there is no other such bar; (3) such reading serves evident congressional purpose to improve odds of successful transition from prison to liberty; (4) forbidding reimposition of supervised release after revocation and reimprisonment would be fundamentally contrary to congressional aim to use District Courts' discretionary judgment to allocate supervision to those releasees who needed supervision most; (5) idea that sentencing court should have authority to subject reincarcerated prisoner to further supervised release has support in pre-Federal-Sentencing-Guidelines practice with respect to nondetentive monitoring; and (6) traditional rule of lenity in interpreting criminal statutes--which rule applies only when equipoise of competing reasons cannot otherwise be resolved--does not demand contrary result. *Johnson v United States* (2000) 529 US 694, 146 L Ed 2d 727, 120 S Ct 1795, 2000 CDOS 3775, 2000 Daily Journal DAR 5043, 2000 Colo J C A R 2679, 13 FLW Fed S 308.

Once district court has revoked term of supervised release under 18 USCS § 3583(e)(3) and imposed some term of imprisonment, term of release no longer exists, and court has no statutory authority to impose any supervised release following imprisonment. *United States v Williams* (1993, CA11 Ga) 2 F3d 363, 7 FLW Fed C 760.

Disjunctive wording of 18 USCS § 3583(e)(3) and (4) precludes imposition of prison term and new supervised release term which together exceed original supervised release term upon revocation of supervised release. *United States v Stewart* (1993, CA8 ND) 7 F3d 1350.

Newly enacted 18 USCS § 3583(h), which expressly allows district courts to impose revocation sentence consisting of both imprisonment and supervised release, did not indicate that court of appeals previously misinterpreted § 3583(e) by holding that revocation sentence under § 3583(e) may include imprisonment and supervised release, but rather new legislation was intended to confirm court's interpretation of prior law. *United States v Hartman* (1995, CA8 Neb) 57 F3d 670.

Appeal concerning whether defendant's violation of supervised release under 18 USCS § 3583 was a Grade B or Grade C offense was not moot, despite expiration of prison term of defendant, who was sentenced upon revocation of supervised release to 6 months' imprisonment and additional 30 months' supervised release, since judge could have sen-

tenced defendant to 4 months' imprisonment and shorter term of supervised release. *United States v Trotter* (2001, CA7 Ill) 270 F3d 1150, cert den (2002) 534 US 1166, 152 L Ed 2d 123, 122 S Ct 1181.

When defendant, with respect to same underlying offense, is being resentenced following second revocation of his supervised release, 18 USCS § 3583(h) requires district court, in calculating defendant's second post revocation sentence, to subtract term of imprisonment that was imposed upon defendant following first revocation of his supervised release from total amount of supervised release originally authorized by statute for underlying crime. *United States v Maxwell* (2002, CA4 NC) 285 F3d 336.

Under 18 USCS § 3583(e)(3), given that defendant had already served ten months pursuant to sentence imposed for his first violation of supervised release, district court's sentence for second violation of supervised release should not have exceeded fourteen months. *United States v Swenson* (2002, CA10 Utah) 289 F3d 676.

District court cannot simply bypass 18 USCS § 3583(e)(3) and impose combined sentence of reimprisonment and additional supervised release in excess of original term of supervised release by sentencing defendant under 18 USCS § 3583(a). *United States v Russell* (2003, CA7 Ill) 340 F3d 450.

Court of Appeals for Eighth Circuit overrules *U.S. v. St. John*, 92 F.3d 761 (8th Cir. 1996), which construed words "term of supervised release" in 18 USCS § 3583 to mean "term of supervised release in original sentence rather than maximum authorized term of supervised release." *United States v Palmer* (2004, CA8 Iowa) 380 F3d 395.

Pursuant to 18 USCS § 3583(h), upon revocation, defendant may be sentenced to both imprisonment and further term of supervised release; for those defendants whose offense of conviction occurred after 1994 changes, available supervised release term is not measured by term that is initially imposed by district court, but by term that is authorized in 18 USCS § 3583(b) for offense of conviction, minus aggregate amount of any revocation terms of imprisonment. *United States v Palmer* (2004, CA8 Iowa) 380 F3d 395.

Sixth Circuit held that district court's 18 USCS § 3583(e)(3) authority to impose supervised-release term to follow postrevocation prison term was not extinguished simply because that prison term was maximum one. *United States v Vanhooose* (2006, CA6 Ohio) 437 F3d 497, 2006 FED App 48P.

Amendment of 18 USCS § 3553(a)(4)(B) in 1994, which added phrase "or policy statements," did not render Sentencing Guideline § 7B1.4 policy statement binding on sentencing courts; thus, when resentencing defendant for violating terms of supervised release, district court may impose up to maximum sentence of imprisonment allowed by 18 USCS § 3583(e)(3). *United States v Bruce* (2002, App DC) 350 US App DC 417, 285 F3d 69.

Defendant's attempt to deprive his original drug conspiracy sentence of its normal force and effect by arguing, during proceeding to revoke his supervised release after he tested positive twice for cocaine, failed to attend counseling, left his residence, and quit job without notifying parole officer, that original sentence violated Apprendi, was very definition of collateral attack; defendant's original offense conviction was undisturbed by Apprendi and defendant was guilty of Class B felony, authorizing minimum revocation sentence of three years imprisonment. *United States v Hamler* (2003, SD W Va) 289 F Supp 2d 764.

Unpublished Opinions

Unpublished: In light of district court's decision to sentence defendant to maximum term of imprisonment for revocation of his supervised release, district court erred by also imposing one-year term of supervised release; as defendant's offense was class D felony, maximum term of imprisonment that he could receive upon revocation of supervised release was two years. *United States v Willis* (2004, CA5 Tex) 117 Fed Appx 362.

55. --Particular sentences

Under version of 18 USCS § 3583 (later amended) in effect prior to September 13, 1994, Federal District Court, in revoking convicted accused's term of supervised release for violating conditions of his release and in sentencing accused to serve 18-month prison term, does not exceed court's authority by ordering accused to be placed on additional term of supervised release for 12 months following imprisonment--where (1) District Court is authorized under 18 USCS § 3583(e)(3) to (a) revoke term of supervised release, and (b) require person to serve in prison all or part of term of supervised release without credit for time previously served on postrelease supervision; (2) in ordering additional supervised release, District Court cites no authority for such order; (3) 18 USCS § 3583(h)--which has been added to § 3583 subsequent to accused's conviction, and which explicitly gives District Courts power to impose another term of supervised

release following reimprisonment--does not apply retroactively; (4) therefore, no issue concerning violation of Constitution's Art I, § 9, cl 3 prohibition against ex post facto laws arises in accused's case; and (5) § 3583(e)(3) permits District Court to impose supervised release following recommitment. *Johnson v United States* (2000) 529 US 694, 146 L Ed 2d 727, 120 S Ct 1795, 2000 CDOS 3775, 2000 Daily Journal DAR 5043, 2000 Colo J C A R 2679, 13 FLW Fed S 308.

18 USCS § 3583(h)--which, as added by 1994 amendment, explicitly gives Federal District Courts power to impose another term of supervised release following convicted accused's reimprisonment for having violated conditions of accused's initial release--does not apply retroactively, as (1) absent clear statement that Congress intended retroactive application, Supreme Court does not give such effect to statutes burdening private interests; (2) legislative decision to alter rule of law previously established by interpretation by majority of Federal Courts of Appeals--to effect that District Courts had no statutory authority for supervised release after revocation and reimprisonment--does not indicate when or how that legislative decision was intended to take effect; (3) there is no indication of retroactive purpose in omission of express effective date from statute because, absent clear direction by Congress to contrary, when statute has no effective date statute takes effect on date of enactment; and (4) Congress gave no clear indication that Congress believed that § 3583(h) would naturally govern sentencing proceedings for violations of supervised release that took place after statute's enactment. *Johnson v United States* (2000) 529 US 694, 146 L Ed 2d 727, 120 S Ct 1795, 2000 CDOS 3775, 2000 Daily Journal DAR 5043, 2000 Colo J C A R 2679, 13 FLW Fed S 308.

District Court had no statutory authority to revoke original 3 year maximum term of supervised release, impose 6 month sentence, and then sentence defendant to second 3 year term of supervised release. *United States v Williams* (1992, CA11 Fla) 958 F2d 337, 6 FLW Fed C 433.

Total revocation sentence of 16 months in prison to be followed by additional term of supervised release equaling remainder of original four year term of supervised release, which would leave defendant with additional supervised release term of some six or seven months after prison term, was less than two years and was valid, even if prison and supervised release components of revocation sentence could not total more than three years. *United States v Wilson* (1994, CA8 Minn) 37 F3d 1342.

Court's imposition of sentence, upon revocation of defendant's supervised release, that included both term of imprisonment and term of supervised release did not violate ex post facto clause, even though 18 USCS § 3583(e) does not authorize supervised release upon revocation of supervised release and § 3583(h), which does authorize supervised release upon revocation of supervised release, was not in effect at time offenses were committed, since defendant is not potentially subject to increased penalty under newly enacted 18 USCS § 3583(h); maximum period that defendant's freedom can be restrained upon revocation of supervised release under new law is either same as, or possibly less than, under prior law. *United States v St. John* (1996, CA8 Mo) 92 F3d 761 (criticized in *United States v Hale* (1997, CA7 Ill) 107 F3d 526) and (criticized in *United States v Shorty* (1998, CA7 Ill) 159 F3d 312) and (ovrld in part as stated in, criticized in *United States v Palmer* (2003, CA8 Iowa) 77 Fed Appx 919) and (ovrld in part by *United States v Palmer* (2004, CA8 Iowa) 380 F3d 395) and (ovrld as stated in *United States v Holt* (2004, CA8 Ark) 114 Fed Appx 762).

Application of 18 USCS § 3583(h), which subjected defendants to sentences of both incarceration and additional terms of supervised release after revocation of their original terms of supervised release, violated Ex Post Facto Clause because § 3583(h) was enacted after defendants committed their underlying crimes and its application exposed them to greater punishment than law in effect at time crimes were committed, under which additional term of supervised release could not be imposed following imprisonment. *United States v Collins* (1997, CA9 Wash) 118 F3d 1394, 97 CDOS 5434, 97 Daily Journal DAR 8801 (criticized in *United States v Withers* (1997, CA7 Ill) 128 F3d 1167) and (criticized in *United States v Page* (1997, CA6 Ohio) 131 F3d 1173, 1997 FED App 353P) and (criticized in *United States v Davis* (1999, CA6 Tenn) 1999 US App LEXIS 2008) and (criticized in *United States v Bivens* (1999, CA6 Ohio) 1999 US App LEXIS 8389) and (criticized in *United States v Clawson* (1999, CA6 Tenn) 1999 US App LEXIS 8621) and (criticized in *United States v Pate* (2000, CA4 Va) 2000 US App LEXIS 463) and (criticized in *United States v Terrell* (2000, CA6 Tenn) 2000 US App LEXIS 2444) and (criticized in *United States v Russell* (2003, CA7 Ill) 340 F3d 450).

Sentencing defendant under 18 USCS § 3583(h), which permitted defendant to be sentenced to term of imprisonment and additional term of supervised release upon revocation of his supervised release, rather than under § 3583(e), which permits court to revoke individual's remaining supervised release and extend period of supervised release or require individual to spend remainder of supervised release in prison, did not violate the Ex Post Facto Clause, since amount of total restraint to which defendant was subject remained constant, and potential for additional successive revocation sentences was too remote and too theoretical to rise to level of violation. *United States v Shorty* (1998, CA7 Ill) 159 F3d 312, cert den (1999) 526 US 1147, 143 L Ed 2d 1035, 119 S Ct 2024.

18 USCS § 3583

District court properly sentenced defendant to custodial term followed by two-year term of supervised release upon revocation of her probation pursuant to 18 USCS § 3583 and 18 USCS § 3565, notwithstanding defendant's claim that amended § 3565 allows for custodial sentence, but not term of supervised release. *United States v Vasquez* (1998, CA9 Cal) 160 F3d 1237, 98 CDOS 8484, 98 Daily Journal DAR 11793.

Because district court sentenced bank robbery defendant to maximum term of imprisonment available following revocation of defendant's original term of supervised release under 18 USCS § 3583(e)(3), court's imposition of additional one year term of supervised release violated 18 USCS § 3583(h); under § 3583(h) court may impose term of supervised release if and only if defendant is sentenced to term of imprisonment that is less than maximum term allowed under § 3583(e)(3). *United States v Davis* (1999, CA6 Ohio) 187 F3d 528, 1999 FED App 293P.

Two year term of supervised release, which was imposed after defendant's supervised release had been revoked a second time, exceeded statutory maximum under 18 USCS § 3583(h) of eighteen months; maximum term of supervised release is term of supervised release authorized for original conviction (three years), less any term of imprisonment that was imposed upon revocation of supervised release, which includes prison term in current revocation sentence (twelve months) together with all prison time served under any prior revocation sentence (six months). *United States v Brings Plenty* (1999, CA8 SD) 188 F3d 1051.

Defendant's revocation sentence of one year of prison and two years of supervised release, a total of three additional years under government restraint, violates Ex Post Facto Clause, since under law at time of defendant's original conviction, 18 USCS § 3583(e), defendant would have only been eligible for two additional years of government restraint. *United States v Eske* (1999, CA7 Wis) 189 F3d 536.

Upon revocation of defendant's three-year original term of supervised release, district court properly sentenced defendant to a new eighteen-month term of imprisonment and a new three-year term of supervised release because term of imprisonment was less than the maximum term of imprisonment (three years) authorized by 18 USCS § 3583(e)(3) for a class B felony. *United States v Samour* (1999, CA6 Ohio) 199 F3d 821, 1999 FED App 422P.

Where defendant's original offense was Class D felony, district court properly sentenced her under 42 USCS § 408(a)(7)(B) and 18 USCS § 3583(e)(3) and (h) to 18 months imprisonment upon revocation of supervised release. *United States v Tyrolt* (2001, CA10 Colo) 246 F3d 683, reported in full (2001, CA10 Colo) 3 Fed Appx 874, 2001 Colo J C A R 739.

Upon revocation of defendant's supervised release, which was imposed in addition to defendant's 70-month prison term for bank fraud, 18 USCS § 1344, district court exceeded its authority under 18 USCS § 3583(e)(3) by sentencing defendant to combined term of reincarceration and additional supervised release 22 months more than his original 60-month term of supervised release; under 1988 version of § 3583(e)(3), combined term of reimprisonment and additional supervised release could not exceed original term of supervised release. *United States v Russell* (2003, CA7 Ill) 340 F3d 450.

Under 18 USCS § 3583(h), trial court was empowered to impose new term of supervised release that could not exceed five-year maximum term of supervised release that was authorized in 18 USCS § 3583(b) for defendant's offenses of conviction, minus 12-month term of imprisonment that was imposed on revocation; maximum available term of supervised release was difference of two, which was 48 months; because 36-month term of supervised release imposed fell well within that boundary, defendant's new sentence was affirmed. *United States v Palmer* (2004, CA8 Iowa) 380 F3d 395.

In case where defendant was convicted of possession with intent to distribute crack cocaine, because 50-month term that trial court imposed on defendant did not exceed his original sentence of 120 months' imprisonment followed by 60 months' supervised release, trial court's action was appropriate because trial court could, upon revoking term of supervised release under 18 USCS § 3583(e)(3), sentence defendant to serve combined term of re-imprisonment and additional supervised release so long as that sentence did not exceed original term of supervised release, which in this case was 60 months; therefore, there was no plain error in 50-month sentence that trial court imposed at second revocation hearing. *United States v Rogers* (2004, CA7 Ill) 382 F3d 648.

Convicted cocaine distributor's second term of supervised release is vacated, where court revoked distributor's first supervised release term--after completion of 16 months' imprisonment--and sentenced him to term of 9 months' incarceration to be followed by remainder of his term of supervised release, because combination of re-incarceration and further supervised release is not one of listed options under 18 USCS § 3583(e), and use of disjunction "or" between

statutory options precludes court from combining choices to create hybrid sentence. *United States v Johnson* (1992, ED Mo) 791 F Supp 242.

Convicted felon's supervised release will not recommence following incarceration for violating terms of supervised release, where felon violated supervised release order through writing insufficient checks, disorderly conduct, and driving under influence of alcohol, because 18 USCS § 3583(e) prohibits recommencing original period of supervised release after term of incarceration is ordered. *United State v Clown* (1992, DC SD) 794 F Supp 338.

Defendant is committed to federal custody for term of 12 months consecutive to any other sentence, to be followed by term of supervised release equal to unexpired remainder of his initial term of supervised release, where he stipulates to commission of simple assault, failure to report to probation officer, use of controlled substance, and unsuccessful discharge from drug treatment program, because court must revoke supervised release of former bank robber and sentence him in accordance with his criminal history and current situation. *United States v Thompson* (2001, ED Pa) 144 F Supp 2d 967, petition gr, findings of fact/conclusions of law (2003, ED Pa) 240 F Supp 2d 325.

Possessor of stolen mail, who has already had probation revoked for violating his home detention conditions, now has his supervised release revoked and is sentenced to 9 months' imprisonment followed by period of one year of supervised release, because he (1) failed to attend 37 scheduled appointments with his probation officer, and (2) failed to make monthly court-ordered restitution payments of \$ 375. *United States v Allen* (2001, ED Pa) 152 F Supp 2d 826.

Defendant was sentenced, pursuant to 18 USCS § 3583(e)(3), to 18 months imprisonment followed by 18 months supervised release upon revocation of his supervised release because he continued to use alcohol and consistently thwarted rehabilitative attempts to correct problems in his life, he was unwilling to address his admitted addiction to alcohol, defendant could not control his drinking in community setting, and sentence above guidelines range of 6-12 months was necessary because defendant was in need of intensive inpatient substance abuse treatment and mental health counseling that could have been provided best by *Bureau of Prisons 500-hour Residential Drug Treatment Program*. *United States v Wolvin* (2004, WD Wis) 339 F Supp 2d 1062.

Unpublished Opinions

Unpublished: District court applied requirement in 18 USCS § 3583(h) that any term of imprisonment imposed pursuant to revocation be subtracted from statutorily authorized term of supervised release, but apparently did not recognize § 3583(h) prohibited imposition of any supervised release at all; in sum, district court erred, error was plain, ruling affected defendant's substantial rights, and fairness of proceeding was seriously affected, resulting in vacation of part of judgment imposing supervised release. *United States v Corvo* (2006, CA11 Fla) 2006 US App LEXIS 1586.

Unpublished: Imposition of supervised release following maximum 24-month prison term pursuant to 18 USCS § 3583(h) for defendant's violations of conditions of his supervised release was error because, although there was no violation of Ex Post Facto Clause, 18 USCS § 3583(h) permitted imposition of supervised release only where district court imposed less than maximum prison term. *United States v Brown* (2006, CA6 Mich) 2006 US App LEXIS 1708.

Unpublished: In light of defendant's admission that he violated terms of his supervision, there was no error by district court in revoking his supervised release; further, eight-month term of incarceration imposed by district court was within advisory guideline range and was reasonable, and 42-month term of supervised release imposed following eight-month revocation sentence was within statutory maximum and was not plainly unreasonable. *United States v Flippen* (2006, CA4 NC) 2006 US App LEXIS 5215.

Unpublished: Where defendant's supervised release was revoked due to positive and missed drug tests, six-month sentence imposed was reasonable because (1) policy statement in USSG §§ 7B1.1(a)(3) and 7B1.4(a) suggested that range of three to nine months was appropriate range for defendant who was originally convicted of Class C felony and who was in criminal history category I, and (2) district judge was required to revoke defendant's supervised release and six months' imprisonment was within guideline range. *United States v Wortman* (2006, CA10) 2006 US App LEXIS 12457.

Unpublished: Revocation of supervised release and sentence of 24 months' imprisonment was affirmed, as 24-month term of incarceration was within advisory sentencing guidelines range and was reasonable (18 USCS § 3583(e)(3), USSG § 7B1.4(a)); also, 24-month term of supervised release imposed following revocation sentence was within statutory maximum and was not plainly unreasonable (18 USCS §§ 3583(b), (h), 3742(a)(4)). *United States v Maultsby* (2006, CA4 NC) 2006 US App LEXIS 19208.

18 USCS § 3583

Unpublished: Six month terms of re-imprisonment, and new four and two year supervised release terms, imposed on defendant following revocation of his original supervised release terms were reasonable and were within statutory maximums allowed under 18 USCS § 3583 because (1) pursuant to § 3583(e)(3), district court could impose up to three and two year supervised release terms because defendant's underlying 18 USCS §§ 2113(a), 2113(d), 924(c)(1), bank robbery and related firearm possession offenses were Class B and Class D felonies; (2) 1994 version of 18 USCS § 3583, which was in effect when defendant was convicted, was applicable to his case, and it provided that district court could impose new terms of supervised release after revocation, provided that combined term of re-imprisonment and supervised release did not exceed his original supervised release terms; (3) six month re-imprisonment terms, combined with new supervised release terms, did not exceed defendant's original five and three year terms of supervised release; and (4) six month terms of re-imprisonment were within applicable federal guidelines range and were not unreasonable. *United States v Daniels* (2006, CA7 Wis) 2006 US App LEXIS 21610.

Unpublished: Where defendant's supervised release was revoked based on conviction, which was based on guilty plea to conspiracy to possess with intent to distribute 50 or more grams of cocaine base, he was properly sentenced under 18 USCS § 3583(e)(3) to 18 months in prison and three years of supervised release because sentence was not unreasonable in light of admitted violations and it was appropriate based on leniency defendant received in past and based on his repeated violations. *United States v Jenkins* (2006, CA4 Va) 2006 US App LEXIS 26860.

Unpublished: Defendant's sentence was affirmed, as sentence did not exceed statutory maximum, 18 USCS § 3583(h); because defendant was convicted of Class C felony, district court was authorized to sentence her to 28 months of supervised release following eight-month prison sentence received upon revocation, 8 USCS § 1324, 18 USCS §§ 3559(a) and 3583(b)(2). *United States v Sifuentes* (2006, CA5 Tex) 2006 US App LEXIS 27528.

Unpublished: No plain error resulted in calculating defendant's post-revocation sentence because neither statutory language nor controlling precedent established that time spent in community corrections center (CCC) on supervised release amounted to imprisonment for purposes of 18 USCS § 3583(h) and residence in CCC did not effect revocation of original term; court was entitled to order any condition it considered to be appropriate for supervised release, and USSG §§ 5D1.3 and 5F1.1 also permitted defendants to serve portions of their terms of imprisonment in CCC. *United States v Arias* (2005, CA11 Fla) 153 Fed Appx 577.

Unpublished: Defendant did not have due process right to notice of evidence on which district court might rely to exceed recommended U.S. Sentencing Guidelines Manual range and impose statutory maximum of 36 months' imprisonment to be followed by 24 months' supervised release on revocation of defendant's original term of supervised release under 18 USCS § 3583; defendant received sufficient notice that he faced 36-month sentence by virtue of statute under which he was convicted. *United States v Daigle* (2005, CA5 La) 131 Fed Appx 435.

Unpublished: District court did not commit plain error when it exceeded recommended U.S. Sentencing Guidelines Manual range and imposed statutory maximum of 36 months' imprisonment to be followed by 24 months' supervised release on revocation of defendant's original term of supervised release under 18 USCS § 3583 where district court gave consideration to recommended guideline sentence but determined that it was not sufficient in light of defendant's behavior during period of supervised release; district court was not bound by recommended guideline sentence. *United States v Daigle* (2005, CA5 La) 131 Fed Appx 435.

Unpublished: District court did not commit plain error when it exceeded recommended U.S. Sentencing Guidelines Manual range and imposed statutory maximum of 36 months' imprisonment to be followed by 24 months' supervised release on revocation of defendant's original term of supervised release under 18 USCS § 3583 because district court was permitted to consider defendant's need for anger management counseling in determining his sentence. *United States v Daigle* (2005, CA5 La) 131 Fed Appx 435.

Unpublished: Sentence of 10 months' imprisonment and 2 years' supervised release imposed on revocation of defendant's term of supervised release, which was imposed as part of his sentence for conviction of being felon in possession of firearm, Class C felony, was affirmed because sentence was reasonable; district court considered appropriate factors in imposing revocation sentence, prison term was within limitation of 2 years' imprisonment authorized by 18 USCS § 3583(e)(3), and supervised release term was within limits prescribed by § 3583(h). *United States v Bales* (2005, CA8 Mo) 139 Fed Appx 770.

18 USCS § 3583

Court, when it revoked defendant's supervised release and imposed additional prison term pursuant to 18 USCS § 3583, did not err in also requiring defendant to pay fine, even though payment of fine was one of special conditions of supervised release. *United States v Eicke* (1995, CA7 Ill) 52 F3d 165.

57. Miscellaneous

Upon revocation of defendant's supervised release, district court lacked authority under 18 USCS § 3583 to order defendant, who was convicted of reentering U.S. after having been deported, deported or to order him detained by INS without bond pending his deportation. *United States v Aimufa* (1997, CA11 Ga) 122 F3d 1376.

Defendant could serve total of sixteen months in prison after nine-month sentence was imposed for violating his supervised release, even though statute under which he was convicted provides for "imprisonment not exceeding one year," since 18 USCS § 3583 authorizes punishment in addition to punishment authorized under substantive statutes, notwithstanding defendant's claim that either he should have been indicted by grand jury pursuant to Grand Jury Clause of Fifth Amendment or jury trial was required for revocation of his supervised release pursuant to petit Jury Clause of Sixth Amendment. *United States v Colt* (1997, CA7 Wis) 126 F3d 981.

District court properly considered defendant's prior conviction, which made him subject as repeat offender to two year prison term, in determining for sentencing purposes that defendant's possession of marijuana in violation of supervised release under 18 USCS § 3583 was a Grade B offense with a term of prison exceeding one year. *United States v Trotter* (2001, CA7 Ill) 270 F3d 1150, cert den (2002) 534 US 1166, 152 L Ed 2d 123, 122 S Ct 1181.

District court's imposition of 24-month consecutive sentence because defendant violated condition of his supervised release when he was convicted on second charge was not abuse of discretion and sentence imposed was within limits set forth in 18 USCS § 3583. *United States v Rodriguez-Favela* (2003, CA8 Minn) 337 F3d 1020.

In action in which defendant's initial sentences ran concurrently and his sentences after his supervised release was revoked ran consecutively, district court did not err by imposing consecutive sentences where (1) 18 USCS § 3584(a) plainly permitted district court to impose sentences of imprisonment concurrently or consecutively; and (2) neither 18 USCS § 3583(e) nor 18 USCS § 3624(e) limited § 3584(a). *United States v Dees* (2006, CA3 Pa) 467 F3d 847.

Petitioner is not resentenced, where he was sentenced after district court held in earlier case that Sentencing Guidelines were unconstitutional, where Supreme Court later declared Guidelines constitutional, and where petitioner was resentenced and corrected sentence was imposed under Guidelines, but where judgment and commitment order erroneously reflected that petitioner was resentenced based on violation of probation, because it is clear that resentencing was because of holding that Guidelines were constitutional, not for violation of probation, so resentencing did not violate 18 USCS § 3583(e). *Cruz v United States* (1994, SD NY) 863 F Supp 154.

Federal firearms convict has his supervised release revoked and must serve year in prison, where he has prior controlled substance offense, failed to participate in substance abuse program, been convicted of assault and larceny, driving on suspended license, and driving under influence of alcohol, and been caught in possession of marijuana and crack, because convict admits he is drug abuser and has now sought additional counseling. *United States v Wallace* (2000, DC Kan) 90 F Supp 2d 1196.

Unpublished Opinions

Unpublished: When district court revoked defendant's supervised release and sentenced him in part to participate in counseling program at discretion of his probation officer, district court committed plain error, as delegating to probation office authority to decide whether defendant would participate in program was violation of U.S. Const. art. III. *United States v Hunt* (2006, CA11 Fla) 2006 US App LEXIS 2053.

Unpublished: In affirming order of district court that revoked defendant's supervised release and imposed 24-month term of imprisonment, court concluded that Booker had no impact on provisions of Sentencing Reform Act, specifically 18 USCS § 3583 that governed supervised release, and found no reversible error. Under *Seal v Under Seal* (2006, CA4 Va) 2006 US App LEXIS 5936.

Unpublished: Since there was possibility that district court might alter inmate's period of supervised release pursuant to 18 USCS § 3583(e)(2), if it determined that he had served excess prison time, sentence was vacated and remanded. *United States v Hernandez* (2006, CA5 Tex) 2006 US App LEXIS 6876.

Unpublished: Where defendant's supervised release was revoked due to positive and missed drug tests, it was not abuse of discretion to deny defendant placement in residential substance treatment program, because (1) substance abuse program defendant undertook while in prison appeared entirely ineffectual, and (2) defendant refused to acknowledge that defendant had serious problem with drug abuse. *United States v Wortman* (2006, CA10) 2006 US App LEXIS 12457.

Unpublished: District court did not err when it imposed 60-month prison term on defendant after it revoked his supervised release where (1) defendant was serving 60 month supervised release term when his release was revoked; (2) defendant could not assert ex post facto claim, arising out of his post-revocation sentence, because that sentence was not greater than what was allowed under 1990 version of 18 USCS § 3583(e)(3); (3) district court properly concluded that offenses that led to revocation of supervised release were Grade A violations under USSG § 7B1.1(a)(1)(A)(i), (B), because aggravated battery was "crime of violence" that was punishable by term of imprisonment of more than one year under 720 Ill. Comp. Stat. 5/2-7, 720 Ill. Comp. Stat. 5/12-4(e), and possession of firearm by armed career criminal carried maximum 20 year penalty under 18 USCS §§ 922(g), 924(e); and (4) defendant's sentence was not unreasonable because district court considered 18 USCS § 3353(a) sentencing factors before imposing it. *United States v Ingram* (2006, CA7 Ill) 2006 US App LEXIS 27281.

Unpublished: Because U.S. Sentencing Guidelines Manual ch. Seven policy statements are purely advisory, appellate court reviews sentence imposed upon revocation of supervised release and authorized under 18 USCS § 3583(e)(3) for abuse of discretion. *United States v Carter* (2005, CA4 W Va) 134 Fed Appx 640.

Unpublished: In reviewing sentence imposed after revocation of supervised release, appellate court uses abuse of discretion standard. *United States v Muhammad* (2005, CA4 Va) 124 Fed Appx 789.

Withdrawal Marker

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Pardon hearing [with attachment] - To: Albert C. Lambert, et al - From: Christopher W. French	2	07/11/2007	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Fielding, Fred - Subject Files

FOLDER TITLE:

[Libby/Plame]: [Loose Documents] [Folder 3]

FRC ID:

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11252

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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Bakke, Mary Beth

From: Lambert, Albert C.
Sent: Thursday, July 05, 2007 10:32 AM
To: Fielding, Fred F.
Subject: FW: gaggle follow up questions



From: Stanzel, Scott M.
Sent: Thursday, July 05, 2007 10:30 AM
To: Lambert, Albert C.
Cc: Fratto, Tony
Subject: gaggle follow up questions

AI –

The gaggle was nearly entirely about the Libby matter today. A few questions that Tony rec'd that I'd be interested in your guidance on:

Did Fred review the commutation with the thought in mind that there could be this issue with the probation? Was that considered?

How does the process work for people applying for commutations? Do all of those route through DoJ? Is there a new look at similar cases based on this action?

Did the President or White House staff speak to the Pardon Attorney about this matter?

He also got questions about:
Congressional hearings

If the President will pardon him, will he have to eat the words about keeping the other parts of the sentence?

Scott M. Stanzel | Deputy Assistant to the President and Deputy Press Secretary | The White House | 202-456-2673

Withdrawal Marker

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Proposed Response to gaggle Question - To: Fred F. Fielding, et al - From: Albert C. Lambert	2	07/05/2007	P5;

**This marker identifies the original location of the withdrawn item listed above.
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Counsel's Office, White House

SERIES:

Fielding, Fred - Subject Files

FOLDER TITLE:

[Untitled]: [Loose documents] [Folder 3]

FRC ID:

11704

OA Num.:

11718

NARA Num.:

11252

FOIA IDs and Segments:**RESTRICTION CODES****Presidential Records Act - [44 U.S.C. 2204(a)]**

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(Cite as: 41 U.S. Op. Atty. Gen. 251, 1955 WL 3677 (U.S.A.G.))

41 U.S. Op. Atty. Gen. 251, 1955 WL 3677 (U.S.A.G.)

United States Attorney General
 PARDONING POWER OF THE PRESIDENT
 AUGUST 11, 1955.

The constitutional pardoning power of the President (At. II, section 2, clause 1) authorizes the President, in commuting a death sentence, to attach as a condition that the prisoner shall not thereafter be eligible for parole or to receive the benefits of related provisions of law applicable to military offenders. The President's action cannot, of course, bind his successors. The condition may also be attached without obtaining the prisoner's consent thereto.

The PRESIDENT.

MY DEAR MR. PRESIDENT:

In connection with the case of John F. Vigneault you have asked my opinion as to whether you may lawfully attach to a commutation of his death sentence to imprisonment for life or for a definite term of years, should you decide to grant such commutation, a condition that he shall not be eligible thereafter for parole or to receive the benefits of related provisions of law. It is my opinion that you may do so. However, as you know, your action in this regard could not, of course, bind any of your successors.

It appears that Vigneault, while a member of the United States Army, was convicted by a general court-martial of the offenses of murder and of robbery in violation of articles 118(4) and 122, respectively, of the Uniform Code of Military Justice (50 U. S. C. 712(4), 716). His conviction was affirmed by the United States Court of Military Appeals (*United States v. Vigneault*, 3 USCMA 247), and a death sentence has been approved, as required by article 71(a) (50 U. S. C. 658(a)).

Your authority to act in the premises is derived from Article II, section 2, clause 1 of the Constitution, providing that the President 'shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.' That power extends to military offenders (19 Op. 106; see also 4 Op. 432, 11 Op. 19, 22 Op. 36, 27 Op. 178; Winthrop's Military Law and Precedents (2d ed.), pp. 466-468), and it includes the authority to commute a death sentence to a penalty less than death, including imprisonment for life. (*Biddle v. Perovich*, 274 U. S. 480; see also *In Re Ross*, 140 U. S. 453; *Ex Parte Wells*, 18 How. 307). Moreover, it is settled that both a pardon and a commutation of a sentence may be granted on condition. *Ex Parte Grossman*, 267 U. S. 87, 120; *Semmes v. United States*, 91 U. S. 21, 27; *United States v. Klein*, 13 Wall. 128, 142; *Ex Parte Wells*, *supra*; *United States v. Wilson*, 7 Pet. 150, 160. ^{FN(FN1)} And, the condition imposed may be of any nature, so long as it is not one that is illegal, immoral, or impossible of performance. *Lupo v. Zerbst*, *supra*; *Kavalin v. White*, 44 F. 2d 49 (C. A. 10th, 1930); 11 Op. A. G. 227, 229. Conditions that have been sustained include the following: that a life sentence shall begin to run at the date of commutation of a death sentence (*Bishop v. United States*, *supra*); that the prisoner, an alien, shall be deported from the United States and not return (*Vitale v. Hunter*, *supra*; *Kavalin v. White*, *supra*); that the prisoner shall remain law-abiding (*Lupo v. Zerbst*, *supra*; *United States ex rel. Brazier v. Commr. of Immigration*, *supra*; *Ex Parte Weathers*, *supra*), and abstain from the use of

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intoxicating liquor (*Ex Parte Weathers, supra*).

The Federal courts, so far as I know, have not passed on the lawfulness of a condition that a prisoner shall not be eligible to receive the benefit of the parole systems authorized by Congress. A Federal prisoner serving a sentence in a civilian penal institution may be released on parole after serving one-third of his term or after serving fifteen years of a life sentence or of a sentence of over forty-five years. 18 U. S. C. 4202. This applies to a military offender committed to such an institution. *Jones v. Looney*, 107 F. Supp. 624 (D. C. E. D. Mich., 1952); *McKnight v. Hunter*, 98 F. Supp. 605 (D. C. Kans., 1951); *Fitch v. Hiatt*, 48 F. Supp. 388 (D. C. M. D. Pa., 1942); 50 U. S. C. 639; Department of the Army Regulation 600-360, 12. ^{FN[FN2]} With respect to prisoners confined in institutions under the control of the Army, Congress has authorized the Secretary of the Army to establish a parole system. 10 U. S. C. 1457b. That system provides for eligibility to parole after service of one-third of the term of confinement or ten years of a life sentence or of a sentence of more than thirty years. Department of Defense Instruction No. 1325.4, § III, P. 2 (January 14, 1955). ^{FN[FN3]}

State courts that have considered the legality of a condition precluding parole have sustained it. Thus, the Supreme Court of California has held that the constitution of that State authorizes the Governor to commute a death sentence to life imprisonment upon condition that the prisoner shall not be eligible to parole, despite the fact that the California code permits parole after seven years' confinement under a life sentence. *Green v. Gordon*, 39 Calif. 2d 230 (1952), certiorari denied, 344 U. S. 886; *In re Collie*, 38 Calif. 2d 396 (1952), certiorari denied, 345 U. S. 1000. In the first cited case, the court stated (p. 232):

'We recently held that a commutation of a sentence is in the nature of a favor which, under article VII, section 1, of the Constitution, ^{FN[FN4]} may be withheld entirely or granted upon such reasonable conditions, restrictions and limitation as the governor may think proper, that the general statutory regulations relating to parole (Pen. Code § 3040 et seq.) did not amount to an attempt to interfere with the governor's power, and that the withholding of parole upon the commutation of a death sentence to life imprisonment was not unreasonable.' (*In re Collie*, 38 Calif. 2d 396, 398-399 [240 P. 2d 275].) It is also of significance that at least one President appears to have assumed that the imposition of the parole condition was within his constitutional authority. In 1915 President Wilson commuted the death sentence of James Waupoose to life imprisonment upon condition that he waive all rights and benefits to which he might be entitled under the parole law; and in the same year the President commuted the sentence of Jeff Sharum from imprisonment for a term of three years and six months to a term of two years and six months on condition that he was not to have the benefit of the parole law save on the basis of his original term. Annual Report of the Attorney General, 1916, pp. 338, 343. An examination of the files of these two cases does not disclose that any special study was made of the legal aspects of the question.

Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard. See *Ex Parte Grossman*, 267 U. S. 87, 120; *The Laura*, 114 U. S. 411, 414; *Ex Parte Garland*, 4 Wall. 333, 380; *Thompson v. Duehay*, 217 Fed. 484, 487 (D. C. W. D. Wash., 1914), Affirmed, 223 Fed. 305 (C. A. 9th, 1915); 22 Op. A. G. 36, 20 Op. 668, 19 Op. 106, 8 Op. 281, 6 Op. 393, 4 Op. 432. In *Ex Parte Grossman, supra*, Chief Justice Taft, speaking for the Court, stated that 'The Executive can relieve or pardon all offenses * * * conditionally or absolutely, and this without modification or regulation by

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Congress;' and in *Ex Parte Garland, supra*, it was said that 'This power of the President is not subject to legislative control. * * *. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.' FN[FN5] In *The Laura, supra*, the Court stated that the President's 'constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment.'

It is clear, moreover, from the history of the parole statute itself that Congress had no intention of interfering with the President's pardon authority. As enacted in 1910, section 10 provided that nothing in the act 'shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case.' 36 Stat. 821, 18 U.S.C. (1946 ed.) 723. This provision does not appear in the 1948 revision of title 18 of the U. S. Code, and the Reviser's Note to section 3570 of that title, dealing with Presidential remission of a sentence, states that the word 'pardon' was omitted 'as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. 'This power of the President is not subject to legislative control.' *Ex parte Garland*, 1866, 4 Wall. 380.' And, it is also to be noted that State courts have held that the legislature's power to enact parole laws is distinct from the Executive's constitutional pardoning power and that such laws are not intended to interfere with that power. *Green v. Gordon*, 39 Calif. 2d 230, *supra*; *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581 (1942); *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629 (1885). In the *Banks* case it was said (pp. 585-586):

'[Parole] is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition to be returned to the penal institution. Neither is a parole a commutation of sentence within the meaning of that term in the constitutional provisions. * * * The constitutional power of the Governor to grant pardons and commutations is exclusive, so that the fact that the legislature has, by various statutes, given the power of parole to the criminal courts, to the board of managers [etc.] * * * indicates that parole has never been considered as being within the category of either pardon or commutation. The courts in other states have held that a parole is not a commutation as that term is employed in their respective constitutions.' It is my conclusion that the statutes for the parole of Federal prisoners do not limit in any manner the President's constitutional pardoning power. In cases involving a sentence less than death, I should like to examine at such time as the situation may arise, the question of the propriety of action, where the condition to be imposed will reduce the prisoner's rights under the original sentence.

I have dealt thus far with the question of parole. There are, however, other provisions of law relating to persons sentenced by court-martials which should be considered. Article 71(a) of the Uniform Code of Military Justice (50 U. S. C. 658(a)) provides that 'No court-martial sentence extending to death * * * shall be executed until approved by the President' and that he 'may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence;' Article 74(a) of the Uniform Code of Military Justice (50 U. S. C. 661) authorizes the Secretary of the Army to 'remit or suspend any part or amount of the unexecuted portion of any sentence * * * other than a sentence approved by the President;' and Article 140 of the code (50 U. S. C. 736) provides that the President may delegate any authority vested in him under the code, and that he may provide for the subdelegation of any such authority. On November 4, 1953, acting by virtue of the authority conferred by Article 140, you issued Executive Order 10498, (18 F. R. 7003). By that order there was delegated to the Secretary of the

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Army, *inter alia*, 'The authority vested in the President by Articles 71(a) and 74(a) of the Uniform Code of Military Justice to remit or suspend any part or amount of the unexecuted portion of any sentence extending to death which, as approved by the President, has been commuted to a less punishment.' Also of significance is 10 U. S. C. 1457 which provides that 'Whenever he shall deem such action merited the Secretary of the Army may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein * * *.'

The question is thus presented whether by virtue of the above the Secretary of the Army would be entitled, as a matter of law, either to suspend or remit the unexecuted portion of any commuted sentence of Private Vigneault, and thereby effect his release from confinement, despite a condition that he shall not be eligible for parole. In this regard I have had the benefit of the views of the Acting Judge Advocate General of the Army. In his letter of August 2, 1955, he states as follows:

'If it is assumed that the President by prohibiting Private Vigneault's parole intends to prohibit his release by any means, I am of the view that Executive Order 10498 would be impliedly modified by the President's order and that the Secretary of the Army would not be authorized to act under either Article 71(a) or 74(a) to effect Private Vigneault's Army, acting under the further view that the Secretary of the Army, acting under the provisions of 10 U. S. C. 1457, would have the authority to remit the unexecuted portion of Vigneault's sentence, provided Vigneault is serving his confinement in a United States Disciplinary Barracks, regardless of the conditions which the President might impose if he commutes the sentence. However, if the President in his action should designate a Federal penitentiary as the place of Private Vigneault's confinement, the provisions of 10 U. S. C. 1457 would not be applicable * * *.' The Acting Judge Advocate General continues:

'If the term 'parole' is construed more narrowly and is given only its usual military meaning, meaning, the proposed action would in no way affect the authority of the Secretary of the Army to remit or suspend Vigneault's sentence, since 'parole' is not encompassed by either of those terms.' And he concludes with the suggestion that "in the event the President commutes Private Vigneault's sentence, intending to prohibit his release under any circumstances, * * * in his action he include not only the term 'parole,' but also the terms 'remission' and 'suspension.'" In my opinion the suggestion of the Acting Judge Advocate General has merit. Since Vigneault was convicted by an Army court-martial, the provisions of law discussed above are, of course, relevant. And whatever doubts might exist as to their applicability should the condition for commutation be confined to parole they would be removed by adding to the condition the terms 'remission' and 'suspension.' Nor do I have any question as to your authority in this regard. As I have pointed out above, your exercise of authority in the premises is based upon your constitutional pardoning power, and in my opinion the statutes discussed can no more be regarded as a limitation upon that power than the parole laws and regulations.

The remaining question is whether a conditional commutation must be accepted by the prisoner. In Burdick v. United States, 236 U. S. 79, the Supreme Court held that acceptance of a pardon is essential to its validity. Subsequently, in Biddle v. Perovich, 274 U. S. 480, the Court declined to extend this rule to the commutation of a death sentence to life imprisonment, stating, in an opinion delivered by Justice Holmes (pp. 487-488):

'The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an

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execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole. We are of opinion that the reasoning of Burdick v. United States, 236 U. S. 79, is not to be extended to the present case.' The Supreme Court of California is perhaps of the view that a conditional commutation has to be accepted. See Green v. Gordon, 39 Calif. 2d 230, *supra*, at 232. But this view, if such it is, is based on the theory, rejected by the Supreme Court of the United States in the Perovich case, *supra*, that a commutation may not be imposed on a prisoner without his consent. It is also true that President Wilson in commuting the death sentence of James Waupoose to life imprisonment (see *supra*), required the prisoner to waive the benefits of the parole laws. But this action was taken prior to the decision in the Perovich case, and it may have been taken under the belief that so far as acceptance was concerned a commutation stood on the same footing as a pardon-if the latter required acceptance so did the former. Although no definitive answer is possible, I think that the Perovich decision logically compels the conclusion that the President, in commuting a death sentence, can validly attach the condition that the prisoner shall forego parole or suspension or remission of the sentence without obtaining the prisoner's consent to the condition. Should the prisoner withhold his consent, is it to be supposed either that the death sentence must be carried out or the condition withdrawn? Either alternative seems to me to be opposed to the reasoning of the Perovich case that in cases like this, 'the public welfare, not his [the prisoner's] consent, determines what shall be done.' 274 U.S. at 486.

Finally, I should point out that should the sentence be commuted to imprisonment for life the prisoner will not be entitled to 'good time' benefits accruing to prisoners whose records of conduct show that they have faithfully observed prison rules, 18 U. S. C. 4161, AR 600-340. On the other hand, if the sentence is commuted to a definite term of years, the prisoner will be entitled to be released at the expiration of his term less the time deducted for good conduct. *Ibid*.

Respectfully,
HERBERT BROWNELL, JR.

FN1 To the same effect, see Bishop v. United States, 223 F. 2d 582 (C. A. D. C., 1955); Vitale v. Hunter, 206 F. 2d 826 (C. A. 10th, 1953); Lupo v. Zerbst, 92 F. 2d 362 (C. A. 5th, 1937), certiorari denied, 303 U. S. 646; United States ex rel. Brazier v. Commr. of Immigration, 5 F. 2d 162 (C. A. 2d, 1924); Ex Parte Weathers, 33 F. 2d 294 (D. C. S. D. Fla., 1929); Chapman v. Scott, 10 F. 2d 156 (D. C. Conn., 1925), affirmed, 10 F. 2d 690 (C. A. 2d, 1926), certiorari denied, 270 U. S. 657; and see Humbert, The Pardoning Power of the President, pp. 22, 27, 47-48.

FN2 See also Johnson v. Hiatt, 71 F. Supp. 865 (D. C. M. D. Pa., 1947), affirmed 163 F. 2d 1018 (C. A. 3d, 1947); Innes v. Hiatt, 57 F. Supp. 17 (D. C. Pa., 1944); and Wiener, The Uniform Code of Military Justice, pp. 142-145.

FN3 The Department of the Army advises that this instruction supersedes the criteria for determining parole eligibility set forth in AR 600-630, and that pending the publication of a change in that regulation the commandants of disciplinary barracks were directed on May 2, 1955, to employ the standards established by the instruction.

FN4 The Governor 'shall have the power to grant reprieves, pardons, and commutations of sentence * * * for all offenses * * * upon such conditions,

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and with such restrictions, as he may think proper * * *.'

FN5 In *Ex Parte Garland*, it was held that the President having granted Garland a full pardon for all offenses committed by him in connection with his participation in the Rebellion, it was not within the constitutional power of Congress to inflict punishment upon him beyond the reach of the pardon.

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**Treatise on Constitutional Law-Substance & Procedure
Current through the 2007 Update**

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Chapter 7. Presidential Domestic Power

§ 7.5. The Pardoning Power

(a) The Common Law Background

By the time of Henry VII's reign in England, the common law had developed the principle that the monarch was vested, absolutely and exclusively, with the power to pardon those accused or convicted of crime.[FN1] According to Lord Chief Justice Coke, the English King was given great discretion and leeway in the exercise of his power; his pardon could be "either absolute, or under condition, exception, or qualification" [FN2]

The idea of executive pardoning power was so firmly established in the common law that delegates to the Constitutional Convention adopted with little debate a clause perpetuating the power of executive pardon for the President.[FN3] Based on recognized English principles of pardon, Article II, § 2 of the Constitution grants the President " ... Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Case law has now extended the power to pardon far beyond that recognized at common law.

American courts, from the beginning accepted a broad discretion in the President's use of the presidential pardon. Writing for the Supreme Court in *United States v. Wilson*, [FN4] Chief Justice Marshall recognized that a pardon was an act of mercy, "an act of grace, proceeding from the power entrusted with the execution of the laws" [FN5] For almost a full century after *Wilson* most courts adhered to this view of the granting of a pardon as the executive's personal act of mercy toward an individual.[FN6] Common law remained the basis for resolving questions concerning the reach of this "merciful" power. Some politicians regarded the pardon as simply another perk of office, another part of the spoils system even after Presidents had adopted a procedure to administer the pardon power and delegate it to the Attorney General.[FN7] President Taft recalled an incident when a Congressman asked Attorney General Knox for a pardon for a constituent who had robbed a post office. When the Attorney General asked the ground for pardon, the Congressman replied that the convict was "a good fellow" who had been a great supporter of his. The Congressman was told that this was no reason. "But," he said, "I understand that each Congressman has a right to two pardons during his term, and I want this to be one of mine." [FN8]

(b) Moving Beyond the Common Law

The Supreme Court ultimately abandoned the historical "act of grace" approach in *Biddle v. Perovich*. [FN9] *Biddle* enunciated for the first time a theory of presidential pardon that went beyond simple adherence to common law precepts. The Court upheld a commutation of sentence by the President from death to life imprisonment even though the change in sentence was imposed without the prisoner's consent.

The significance of *Biddle* is easily appreciated by comparing it with an earlier case, *Burdick v. United States*, [FN10] which had held that acceptance of the pardon was essential and that a witness in a grand jury proceeding could refuse to accept a pardon and instead assert his privilege against self-incrimination. The decision in *Burdick* recognized that in some instances the stigma of a pardon would not be wanted and that the "merciful" act could be rejected. In *Biddle*, however, Justice Holmes' opinion for the Court made it clear that a pardon is an act for the public welfare, "not a private act of grace from an individual happening to possess power." [FN11] The Court recognized presidential power to impose "less severe" punishments for the public welfare and deemed that consent was not necessary in such a situation, for the prisoner "on no sound principle ought to have any voice in what the law should do for the welfare of the whole." [FN12]

In addition to changing the theoretical focus of the pardon power from a private act to one for the general welfare, the *Biddle* Court for the first time refused to sanction a technical distinction between the power to pardon and the power to commute sentence, which had previously been viewed as completely different forms of

clemency.[FN13] The Court recognized that the President's power extends to imposition of "less severe" punishments; where the substituted sentence is one generally recognized as being less hard the president need not grant full pardon. Although expanding the scope of the pardoning power to include commutation without the prisoner's consent, the Court did not go so far as to hold that the president has unlimited freedom in substituting punishment.

The Supreme Court further defined the effect and operation of a pardon in other cases. In *Ex parte Garland*,[FN14] the Court was faced with the effect of a pardon granted by President Andrew Johnson to one Garland for all offenses committed by him arising from his participation in the Civil War. Prior to the pardon, Congress had enacted a law providing that any individual who wished to practice law in the federal courts first had to take an oath stating that he had never voluntarily borne arms against the United States or given aid to its enemies.

The Court held that the Act was unconstitutional as a bill of attainder. The presidential pardon had relieved Garland from all penalties and disabilities, including the oath, for the named acts. In speaking of the scope of the President's power under Article II, section 2, the Court noted that "[i]t extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." [FN15] A full pardon erases the act and its legal consequences so that "in the eye of the law the offender is as innocent as if he had never committed the offense" and restores the offender to "all his civil rights." [FN16]

This wide scope of the pardoning power was emphasized in *Ex parte Grossman*, [FN17] where the Court held that the power extended not only to indictable crimes but also to contempt of court. Other early decisions have made it clear that the pardoning power encompasses the capacity to remit fines and forfeitures; [FN18] to commute sentences; [FN19] to grant amnesty to specified classes or groups; [FN20] and to pardon conditionally as well as absolutely. [FN21]

Certain limitations on Article II, § 2 power have also been recognized, however. The Court noted in *Knote v. United States* [FN22] that pardon could not compensate the offender for personal injuries suffered by imprisonment, nor can a pardon affect any rights that have vested in others due to the judgment against the offender. The opinion of the Court went on to point out that:

However large ... may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers--it cannot touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power. [FN23]

The power of the President to attach conditions to grants of clemency was affirmed by the Court in *Schick v. Reed*. [FN24] A divided Court [FN25] upheld the presidential commutation of a death sentence to life imprisonment conditioned on permanent ineligibility for parole, even where the commuted sentence was not one which had been specifically provided for by statute. The majority opinion in *Schick* emphasized that the only limits which can be imposed on the presidential pardon power are those in the Constitution itself, and to require the executive to substitute a punishment already permitted by law would place unauthorized congressional restrictions on the pardoning power. [FN26]

Schick continued the historical trend of the Supreme Court of extending the President's pardoning power beyond prior judicially recognized boundaries and far beyond the scope of its English commonlaw counterpart. It may be that one of the few major limitations on the President's power to pardon under Article II, § 2 is that recognized by the majority in *Schick* that the "President may not aggravate punishment." [FN27]

(c) Delivery of the Pardon

President Clinton issues many pardons on the eve of his final day in office. These Eleventh-hour pardons, particularly the pardon of Marc Rich, the fugitive financier who had escaped to Switzerland, caused commentators to raise substantial questions as to the proper scope and administration of presidential power with respect to

pardons.[FN28] One particular legal issue came to the forefront: whether, and how, pardons must be delivered to be effective. There is case law arguing that the pardon is not effective until it is delivered, but the new President, George W. Bush, elected not to object to his predecessor's pardons.[FN29]

(d) Self-Pardons

Can a President pardon himself? There is no case law on this subject and there may never be. But President Nixon—who was pardoned by his successor whom he had appointed, President Ford—actually thought of this possibility. On August 1, 1974, shortly before Nixon resigned, his aides presented for him various options, one of which was that Nixon pardon himself and then resign. Nixon's lawyers "prepared a short memorandum concluding that a self-pardon would be legal." [FN30] Nixon, however, did not take that alternative.

Some commentators have assumed that a self-pardon would be constitutional, [FN31] while others have argued that it would be a conflict of interest and unconstitutional.[FN32] The President is not above the law. As Madison wrote in *The Federalist Papers*, No. 10, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity." [FN33]

[FN30] University Professor and Professor of Law, George Mason University School of Law.

[FN31] David C. Baum Professor of Law Emeritus, University of Illinois College of Law.

[FN32] See Grupp, *Some Historical Aspects of the Pardon in England*, 7 *Am.J.Legal History*, 51, 55 (1963).

See generally R. Rotunda & J. Nowak, eds., *Joseph Story's Commentaries on the Constitution of the United States* § 774 (Originally published, 1833; - reprinted, Carolina Academic Press, 1987); C. Jensen, *The Pardoning Power in the American States* (1922); Barnett, *The Grounds of Pardon*, 17 *J.Crim.L. & Criminology* 490 (1926); Weihofen, *Pardon: An Extraordinary Remedy*, 12 *Rocky Mountain L.Rev.* 112 (1940); W. Humbert, *The Pardoning Power of the President* (1941); N. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* (1969); Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 *U.Colo.L.Rev.* 1 (1976); Duker, *The President's Power to Pardon: A Constitutional History*, 18 *Wm. & Mary L.Rev.* 475 (1977); A.S. Miller, *Presidential Power in a Nutshell* 307-13 (1977); Saliterman, *Reflections on the Presidential Clemency Power*, 38 *Oklahoma L.Rev.* 257 (1985); Sebba, *Criminology: The Pardoning Power--A World Survey*, 68 *J.Crim.L. & Criminology* 83 (1977); K. Moore, *Pardons: Justice, Mercy, and the Public Interest* (1989); Smith & Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 *Wayne L.Rev.* 1113 (1989); Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 *Ohio State L.J.* 655 (1991); Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 *Tex.L.Rev.* 569 (1991).

See, Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, <http://jurist.law.pitt.edu/pardons/love.pdf>, 27 *Fordham Urban L. Journal* 1483 (2000). Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 *Federal Sentencing Reporter* 125 (2001). This article is an introduction to a symposium on the Pardon Power, with very interesting articles by Dan Kobil, John Steer, Marc Miller, John Harrison, Liz Rapaport, and U.S. District Judge David Doty. See, 13 *Federal Sentencing Reporter* 119 et seq. (Issues 3 & 4, 2001).

[FN2] E. Coke, *The Third Part of the Institutes of the Laws of England* 233 (1817).

[FN3] 2 M. Farrand, *The Records of the Federal Convention of 1787* at 626 (1911).

[FN4] *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L.Ed. 640 (1833).

[FN5] 32 U.S. (7 Pet.) at 160.

[FN6] See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380, 18 L.Ed. 366 (1866).

1 Treatise on Const. L. § 7.5 (4th ed.)

[FN7] In 1893, President Cleveland issued an executive order authorizing the Attorney General to assume full responsibility for administering the pardon power and making him the President's principal advisor in clemency matters. Executive Order of June 16, 1893.

[FN8] William Howard Taft, *Our Chief Magistrate and His Powers* 124 (Columbia U. Press, 1916).

[FN9] Biddle v. Perovich, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161 (1927).

[FN10] Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915).

[FN11] 274 U.S. at 486, 47 S.Ct. at 665.

[FN12] 274 U.S. at 487, 47 S.Ct. at 666.

[FN13] See, e.g., Ex parte Wells, 59 U.S. (18 How.) 307, 15 L.Ed. 421 (1855).

[FN14] Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1867).

[FN15] 71 U.S. (4 Wall.) at 380. Note that while Congress cannot limit the presidential pardoning power, see also, United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1872), Congress can enact amnesty statutes. The Laura, 114 U.S. 411, 414-17, 5 S.Ct. 881, 882-84, 29 L.Ed. 147 (1885).

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[FN33] The Federalist, No. 10, at 79 (James Madison)(Clinton Rossiter ed., 1961), quoted in, Brian C. Kalt, Pardon Me?: The Constitutional Case Against Self-Pardons, 106 Yale L. J. 779, 806 & n. 152 (1996).

Indictment of a Sitting President. The question of whether a sitting President can be indicted is considered in, Symposium, Ought a President of the United States To Be Prosecuted?, 2 Nexus: A Journal of Opinion (Spring 1997). The articles include: Akhil Reed Amar & Brian C. Kalt, The Presidential Privilege Against Prosecution, 2 Nexus: A Journal of Opinion 11 (Spring 1997); Erwin Chemerinsky, Justice Delayed is Justice Denied, 2 Nexus: A Journal of Opinion 24 (Spring 1997); Terry Eastland, The Power to Control Prosecution, 2 Nexus: A Journal of Opinion 43 (Spring 1997); Jay S. Bybee, Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination, 2 Nexus: A Journal of Opinion 53 (Spring 1997); Eric M. Freedman, Achieving Political Adulthood, 2 Nexus: A Journal of Opinion 67 (Spring 1997); Scott W. Hoew, The Prospect of a President Incarcerated, 2 Nexus: A Journal of Opinion 86 (Spring 1997). See also Ronald D. Rotunda, The True Significance of Clinton vs. Jones, Chicago Tribune, July 8, 1997, at 12, col. 1-6.

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**Treatise on Constitutional Law-Substance & Procedure
Current through the 2007 Update**

Ronald D. Rotunda[FNa0], John E. Nowak[FNa1]

Chapter 7. Presidential Domestic Power

§ 7.5. The Pardoning Power

(a) The Common Law Background

By the time of Henry VII's reign in England, the common law had developed the principle that the monarch was vested, absolutely and exclusively, with the power to pardon those accused or convicted of crime.[FN1] According to Lord Chief Justice Coke, the English King was given great discretion and leeway in the exercise of his power; his pardon could be "either absolute, or under condition, exception, or qualification" [FN2]

The idea of executive pardoning power was so firmly established in the common law that delegates to the Constitutional Convention adopted with little debate a clause perpetuating the power of executive pardon for the President.[FN3] Based on recognized English principles of pardon, Article II, § 2 of the Constitution grants the President "... Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Case law has now extended the power to pardon far beyond that recognized at common law.

American courts, from the beginning accepted a broad discretion in the President's use of the presidential pardon. Writing for the Supreme Court in *United States v. Wilson*, [FN4] Chief Justice Marshall recognized that a pardon was an act of mercy, "an act of grace, proceeding from the power entrusted with the execution of the laws" [FN5] For almost a full century after *Wilson* most courts adhered to this view of the granting of a pardon as the executive's personal act of mercy toward an individual.[FN6] Common law remained the basis for resolving questions concerning the reach of this "merciful" power. Some politicians regarded the pardon as simply another perk of office, another part of the spoils system even after Presidents had adopted a procedure to administer the pardon power and delegate it to the Attorney General.[FN7] President Taft recalled an incident when a Congressman asked Attorney General Knox for a pardon for a constituent who had robbed a post office. When the Attorney General asked the ground for pardon, the Congressman replied that the convict was "a good fellow" who had been a great supporter of his. The Congressman was told that this was no reason. "But," he said, "I understand that each Congressman has a right to two pardons during his term, and I want this to be one of mine." [FN8]

(b) Moving Beyond the Common Law

The Supreme Court ultimately abandoned the historical "act of grace" approach in *Biddle v. Perovich*. [FN9] *Biddle* enunciated for the first time a theory of presidential pardon that went beyond simple adherence to common law precepts. The Court upheld a commutation of sentence by the President from death to life imprisonment even though the change in sentence was imposed without the prisoner's consent.

The significance of *Biddle* is easily appreciated by comparing it with an earlier case, *Burdick v. United States*, [FN10] which had held that acceptance of the pardon was essential and that a witness in a grand jury proceeding could refuse to accept a pardon and instead assert his privilege against self-incrimination. The decision in *Burdick* recognized that in some instances the stigma of a pardon would not be wanted and that the "merciful" act could be rejected. In *Biddle*, however, Justice Holmes' opinion for the Court made it clear that a pardon is an act for the public welfare, "not a private act of grace from an individual happening to possess power." [FN11] The Court recognized presidential power to impose "less severe" punishments for the public welfare and deemed that consent was not necessary in such a situation, for the prisoner "on no sound principle ought to have any voice in what the law should do for the welfare of the whole." [FN12]

In addition to changing the theoretical focus of the pardon power from a private act to one for the general welfare, the *Biddle* Court for the first time refused to sanction a technical distinction between the power to pardon and the power to commute sentence, which had previously been viewed as completely different forms of

clemency.[FN13] The Court recognized that the President's power extends to imposition of "less severe" punishments; where the substituted sentence is one generally recognized as being less hard the president need not grant full pardon. Although expanding the scope of the pardoning power to include commutation without the prisoner's consent, the Court did not go so far as to hold that the president has unlimited freedom in substituting punishment.

The Supreme Court further defined the effect and operation of a pardon in other cases. In *Ex parte Garland*,[FN14] the Court was faced with the effect of a pardon granted by President Andrew Johnson to one Garland for all offenses committed by him arising from his participation in the Civil War. Prior to the pardon, Congress had enacted a law providing that any individual who wished to practice law in the federal courts first had to take an oath stating that he had never voluntarily borne arms against the United States or given aid to its enemies.

The Court held that the Act was unconstitutional as a bill of attainder. The presidential pardon had relieved Garland from all penalties and disabilities, including the oath, for the named acts. In speaking of the scope of the President's power under Article II, section 2, the Court noted that "[i]t extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." [FN15] A full pardon erases the act and its legal consequences so that "in the eye of the law the offender is as innocent as if he had never committed the offense" and restores the offender to "all his civil rights." [FN16]

This wide scope of the pardoning power was emphasized in *Ex parte Grossman*, [FN17] where the Court held that the power extended not only to indictable crimes but also to contempt of court. Other early decisions have made it clear that the pardoning power encompasses the capacity to remit fines and forfeitures; [FN18] to commute sentences; [FN19] to grant amnesty to specified classes or groups; [FN20] and to pardon conditionally as well as absolutely. [FN21]

Certain limitations on Article II, § 2 power have also been recognized; however. The Court noted in *Knote v. United States* [FN22] that pardon could not compensate the offender for personal injuries suffered by imprisonment, nor can a pardon affect any rights that have vested in others due to the judgment against the offender. The opinion of the Court went on to point out that:

However large ... may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers--it cannot touch moneys in the Treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power. [FN23]

The power of the President to attach conditions to grants of clemency was affirmed by the Court in *Schick v. Reed*. [FN24] A divided Court [FN25] upheld the presidential commutation of a death sentence to life imprisonment conditioned on permanent ineligibility for parole, even where the commuted sentence was not one which had been specifically provided for by statute. The majority opinion in *Schick* emphasized that the only limits which can be imposed on the presidential pardon power are those in the Constitution itself, and to require the executive to substitute a punishment already permitted by law would place unauthorized congressional restrictions on the pardoning power. [FN26]

Schick continued the historical trend of the Supreme Court of extending the President's pardoning power beyond prior judicially recognized boundaries and far beyond the scope of its English commonlaw counterpart. It may be that one of the few major limitations on the President's power to pardon under Article II, § 2 is that recognized by the majority in *Schick* that the "President may not aggravate punishment." [FN27]

(c) Delivery of the Pardon

President Clinton issues many pardons on the eve of his final day in office. These Eleventh-hour pardons, particularly the pardon of Marc Rich, the fugitive financier who had escaped to Switzerland, caused commentators to raise substantial questions as to the proper scope and administration of presidential power with respect to

pardons.[FN28] One particular legal issue came to the forefront: whether, and how, pardons must be delivered to be effective. There is case law arguing that the pardon is not effective until it is delivered, but the new President, George W. Bush, elected not to object to his predecessor's pardons.[FN29]

(d) Self-Pardons

Can a President pardon himself? There is no case law on this subject and there may never be. But President Nixon—who was pardoned by his successor whom he had appointed, President Ford—actually thought of this possibility. On August 1, 1974, shortly before Nixon resigned, his aides presented for him various options, one of which was that Nixon pardon himself and then resign. Nixon's lawyers "prepared a short memorandum concluding that a self-pardon would be legal." [FN30] Nixon, however, did not take that alternative.

Some commentators have assumed that a self-pardon would be constitutional, [FN31] while others have argued that it would be a conflict of interest and unconstitutional.[FN32] The President is not above the law. As Madison wrote in *The Federalist Papers*, No. 10, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity." [FN33]

[FN30] University Professor and Professor of Law, George Mason University School of Law.

[FN31] David C. Baum Professor of Law Emeritus, University of Illinois College of Law.

[FN32] See Grupp, *Some Historical Aspects of the Pardon in England*, 7 *Am.J.Legal History*, 51, 55 (1963).

See generally R. Rotunda & J. Nowak, eds., *Joseph Story's Commentaries on the Constitution of the United States* § 774 (Originally published, 1833; - reprinted, Carolina Academic Press, 1987); C. Jensen, *The Pardoning Power in the American States* (1922); Barnett, *The Grounds of Pardon*, 17 *J.Crim.L. & Criminology* 490 (1926); Weihofen, *Pardon: An Extraordinary Remedy*, 12 *Rocky Mountain L.Rev.* 112 (1940); W. Humbert, *The Pardoning Power of the President* (1941); N. Hurnard, *The King's Pardon for Homicide Before A.D. 1307* (1969); Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 *U.Colo.L.Rev.* 1 (1976); Duker, *The President's Power to Pardon: A Constitutional History*, 18 *Wm. & Mary L.Rev.* 475 (1977); A.S. Miller, *Presidential Power in a Nutshell* 307-13 (1977); Saliterman, *Reflections on the Presidential Clemency Power*, 38 *Oklahoma L.Rev.* 257 (1985); Sebba, *Criminology: The Pardoning Power--A World Survey*, 68 *J.Crim.L. & Criminology* 83 (1977); K. Moore, *Pardons: Justice, Mercy, and the Public Interest* (1989); Smith & Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 *Wayne L.Rev.* 1113 (1989); Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 *Ohio State L.J.* 655 (1991); Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 *Tex.L.Rev.* 569 (1991).

See, Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, <http://jurist.law.pitt.edu/pardons/love.pdf>, 27 *Fordham Urban L. Journal* 1483 (2000). Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 *Federal Sentencing Reporter* 125 (2001). This article is an introduction to a symposium on the Pardon Power, with very interesting articles by Dan Kobil, John Steer, Marc Miller, John Harrison, Liz Rapaport, and U.S. District Judge David Doty. See, 13 *Federal Sentencing Reporter* 119 et seq. (Issues 3 & 4, 2001).

[FN2] E. Coke, *The Third Part of the Institutes of the Laws of England* 233 (1817).

[FN3] 2 M. Farrand, *The Records of the Federal Convention of 1787* at 626 (1911).

[FN4] *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L.Ed. 640 (1833).

[FN5] 32 U.S. (7 Pet.) at 160.

[FN6] See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380, 18 L.Ed. 366 (1866).

[FN7] In 1893, President Cleveland issued an executive order authorizing the Attorney General to assume full responsibility for administering the pardon power and making him the President's principal advisor in clemency matters. Executive Order of June 16, 1893.

[FN8] William Howard Taft, *Our Chief Magistrate and His Powers* 124 (Columbia U. Press, 1916).

[FN9] Biddle v. Perovich, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161 (1927).

[FN10] Burdick v. United States, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915).

[FN11] 274 U.S. at 486, 47 S.Ct. at 665.

[FN12] 274 U.S. at 487, 47 S.Ct. at 666.

[FN13] See, e.g., Ex parte Wells, 59 U.S. (18 How.) 307, 15 L.Ed. 421 (1855).

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1 Treatise on Const. L. § 7.5 (4th ed.)

[FN22] Knote v. United States, 95 U.S. (5 Otto) 149, 24 L.Ed. 442 (1877).

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[FN31] E.g., James Gill, Walsh's Quarry, New Orleans Times-Picayune, Jan. 1, 1993, at B7, cited in, Brian C. Kalt, Pardon Me?: The Constitutional Case Against Self-Pardons, 106 Yale L. J. 779, 779 & n. 4 (1996).

[FN32] See Brian C. Kalt, Pardon Me?: The Constitutional Case Against Self-Pardons, 106 Yale L. J. 779 (1996), which is the most scholarly discussion of this issue. Published reports at the time stated that the staff of the Independent Counsel in the Iran-Contra Investigation concluded that a Presidential self-pardon would be unconstitutional. Saul Friedman, Prosecutor Bashes Bush, Newsday, Dec. 25, 1992, at 4.

[FN33] The Federalist, No. 10, at 79 (James Madison)(Clinton Rossiter ed., 1961), quoted in, Brian C. Kalt, Pardon Me?: The Constitutional Case Against Self-Pardons, 106 Yale L. J. 779, 806 & n. 152 (1996).

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