

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 15-2213

UNITED STATES OF AMERICA,

Appellee,

v.

KARINA CARRASCO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION
HONORABLE GREG KAYS, CHIEF DISTRICT JUDGE

BRIEF FOR THE UNITED STATES

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SUMMARY OF THE CASE

After pleading guilty to importing marijuana in the Western District of Texas, the appellant, Karina Carrasco, was sentenced to 24 months in custody and three years of supervised release. She transferred her supervision to the Western District of Missouri, and while on supervision, Carrasco submitted a total of 13 positive methamphetamine sweat patches, including five positive patches after nail and hair tests tested negative. The district court sentenced Carrasco to 12 months, a three-month upward variance from the Chapter Seven revocation table suggested range, and five years of supervised release.

On appeal, Carrasco argues the district court improperly revoked her supervision based on evidence of positive sweat patches which she claims were unreliable, and imposed a sentence that was not substantively or procedurally reasonable. However, the court revoked Carrasco's supervised release based on her repeated positive sweat patches as found reliable by circuit case law, and sentenced her after considering relevant factors, within the statutory authorized range of punishment.

Carrasco requests 15 minutes for oral argument, however, the Government believes that both issues can be resolved based on the record below and briefs, without oral argument.

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STATEMENT OF THE ISSUES

I.

Whether the district court properly revoked Carrasco's supervised release term, where the Government proved by a preponderance of the evidence that she had 13 positive sweat patches indicating that she used methamphetamine in violation of the terms of her supervised release, including five positive sweat patches submitted after Carrasco's alleged negative nail and hair tests, and the court found the sweat patch evidence to

be reliable based on circuit case law, rejecting Carrasco's nail and hair samples tests as unreliable.

Cases

United States v. Goodon, 742 F.3d 373 (8th Cir. 2014)

United States v. Boyd, 792 F.3d 916 (8th Cir. 2015)

United States v. Meyer, 483 F.3d 865 (8th Cir. 2007)

II.

Whether the district court properly sentenced Carrasco to 12 months in custody, a three-month upward variance from the Chapter 7 revocation table suggested range of 3 to 9 months, and imposed a five-year term of supervised release to follow, where the court articulated the relevant sentencing factors and stated that the variance was based on Carrasco's steadfast denials and failure to demean herself to supervision, and both the term of imprisonment and the five-year term of supervision are within the range authorized by statute.

Cases

United States v. Rogers, 543 F.3d 467 (8th Cir. 2008)

United States v. Bongiorno, 139 F.3d 640 (8th Cir. 1998)

United States v. Martin, 757 F.3d 776 (8th Cir. 2014)

STATEMENT OF THE CASE

A. Procedural History

Karina Carrasco pled guilty before the Honorable Kathleen Cardone, United States District Judge, Western District of Texas (El Paso) to a one-count indictment charging her with importing a quantity of marijuana (26.6 kilograms); a Class D felony, in violation of 21 U.S.C. §§ 952(a) and 960(b)(4). (WDTX PSR 1, ¶ 2.) On January 12, 2006, Carrasco was sentenced to a 24-month term of custody to be followed by a 24-month term of supervised release. (WDTX DCD 23.)

On March 4, 2014, Carrasco was released under supervision, and her supervision was transferred to the Western District of Missouri on April 22, 2014. (DCD 1.) On May 19, 2015, the parties appeared before the district court, the Honorable Greg Kays, Chief United States District Judge for the Western District of Missouri, for a show cause hearing after Carrasco submitted 13 positive sweat patches revealing methamphetamine use. (DCD 27.) After considering the evidence adduced at the hearing, the district court revoked Carrasco's supervised release, finding that she had 13 positive sweat patches. (Tr. 27-28, 29.)¹ Based on her grade C violation and criminal history category of I, the revocation table in Chapter 7 of the

¹“Tr.” refers to the transcript of the revocation hearing before Judge Kays on May 19, 2015.

Sentencing Guidelines recommended a range of three to nine months. (Tr. 30.) The statutory range for Carrasco's revocation was not more than 24 months in prison and a supervised release range of up to life. (Tr. 30.) After hearing argument from both counsel, the court sentenced Carrasco to 12 months in custody, an upward variance of three months from the top of the three-to-nine-month Chapter 7 advisory revocation table range, and five years of supervised release. (DCD 27, 30.) The judgment and commitment order was filed on May 19, 2015, and Carrasco filed a timely notice of appeal on June 2, 2014. (DCD 30, 33.)

B. Statement of the Facts

At the supervised release show cause hearing, Judge Kays was proceeding on three violations reports, one dated March 2, 2015, a supplemental violation report dated April 7, 2015, and another supplemental report dated April 22, 2015, all for the same violation – allegations related to the use of methamphetamine. (Tr. 3.) Specifically, each report pertained to a violation of a mandatory condition prohibiting the unlawful use of a controlled substance and a standard condition, which likewise prohibits the use of any controlled substance, except as prescribed by a physician. (See Tr. 3.)

For a historical background, the court admitted, without objection, five additional Pharmchem positive methamphetamine sweat patches worn

by Carrasco and collected on September 5, 2014, October 20, 2014, November 24, 2014, and December 1 and 15, 2014, that tested positive for methamphetamine. (Tr. 4-5, 8-10, 20; Gov. Exh. 21.) All told, during her supervision period, Carrasco wore a total of 13 sweat patches that tested positive for methamphetamine. (Gov. Exh. 21.) Carrasco consistently denied that she used methamphetamine. (Tr. 3-4, 13, 23-25.)

On behalf of Carrasco, her counsel informed the court that she denied the allegations in each report, thereby denying the use of methamphetamine at any time while on supervised release. (Tr. 3-4, 13, 23-25.) Carrasco did not dispute the fact that the 13 sweat patches that she wore while under supervision tested positive for methamphetamine. (Tr. 3-4, 13.)

In support of the March 2, 2015, violation report, the Government offered, and the court admitted without objection, the following Pharmchem Lab reports:

<u>Type of Test</u>	<u>Test Date</u>	<u>Test Result</u>
Sweat Patch	01/05/15 - 01/12/15	Methamphetamine
Sweat Patch	01/12/15 - 01/19/15	Methamphetamine
Sweat Patch	01/26/15 - 02/02/15	Methamphetamine
Sweat Patch	02/09/15 - 02/16/15	Methamphetamine

(Tr. 4-5, 11 ; Gov. Exhs. 15, 16, 17, 3.)

To support her denial of drug use and to rebut the January and February 2015 positive sweat patches, Carrasco offered a negative hair analysis by Arcpoint KC of a sample collected on February 18, 2015. (Tr. 13-14; Carrasco Exh. 502.) The Arcpoint negative hair analysis was admitted into evidence without objection. (Tr. 13-14; Carrasco Exh. 502.) While not objecting to the admission of the hair test, government counsel noted *United States v. Meyer*, 483 F.3d 865, 870 (8th Cir. 2007), where this Court observed that hair tests have shortcomings and are generally not viewed as reliable indicators of drug usage. *Id.* (See Tr. 14.)

Also, to support her denial, Carrasco paid for a drug test on a nail sample collected by Arcpoint KC on February 26, 2015, that also tested negative. (Tr. 13-14; Carrasco Exh. 501.) The nail test was admitted into evidence without objection. (Tr. 13-14; Carrasco Exh. 501.)

In support of the April 7, 2015, supplemental violation report, the Government offered, and the court admitted without objection, the following Pharmchem Lab reports:

<u>Type of Test</u>	<u>Test Date</u>	<u>Test Result</u>
Sweat Patch	03/09/15 - 03/16/15	Methamphetamine
Sweat Patch	03/16/15 - 03/23/15	Methamphetamine

(Tr. 5 ; Gov. Exh. 2, 1.)

In support of the April 22, 2015, supplemental violation report, the Government offered and the court admitted without objection the evidence of following Pharmchem Lab reports:

<u>Type of Test</u>	<u>Test Date</u>	<u>Test Result</u>
Sweat Patch	03/23/15 - 03/30/15	Methamphetamine
Sweat Patch	03/30/15 - 04/06/15	Methamphetamine
Sweat Patch	04/06/15 - 04/13/15	Methamphetamine

(Tr. 5; Gov. Exhs. 14, 13, 12.)

Once again, although Carrasco denied using methamphetamine, she did not dispute that the five sweat patches that she wore from March 23, 2015 through April 13, 2015, tested positive for methamphetamine. (Tr. 13.) Other than a denial of drug use, Carrasco offered no evidence to contradict the five positive methamphetamine sweat patches that she wore in March and April 2015. (Tr. 13-14.)

To rebut, Carrasco's evidence of the negative hair and nail test, the Government offered into evidence, without objection, a testimonial as to the reliability of sweat patch drug testing from Carrasco's own expert, Arcpoint Labs' website. (Tr. 15-16; Gov. Exh. 19.) According to Arcpoint Labs, sweat patch drug testing is one of the best ways to receive 24/7 substance abuse monitoring. The Arcpoint Labs website also states that sweat patch drug testing is often used in a judicial setting when 24/7 monitoring is

necessary. (Tr. 16; Gov. Exh. 19.) Government counsel highlighted three additional important points from Arcpoint Labs website regarding the reliability of sweat patches, to wit:

1. If drugs are used while the patch is on the sweat that is collected in the patch will show traces of abused substance. (Gov. Exh. 19 at 2; Tr. 16.)
2. There is no way to trick this system. There is no way to trick this system, or to prevent drugs or alcohol from entering the sweat glands. (Gov. Exh. 19 at 2; Tr. 16.)
3. The patch may be used to test amphetamine. (Gov. Exh. 19 at 2; Tr. 16.)

(Tr. 15-16; Gov. Exh. 19.)

Also admitted into evidence without objection, was a drug test results record for Carrasco logging all sweat patches collected from her and noting that numerous patches tested negative throughout the period in question. (Tr. 19-20; Gov. Exh. 19.) The Government argued that the negative drug tests to which Carrasco does not object reinforce the reliability of the sweat patch as to the positive tests. (Tr. 19-20.)

Following the presentation of evidence, the Government argued for revocation. (Tr. 21-23.) Carrasco's counsel that "it is undisputed that absent the dirty sweat patches, there's been no other violations that Ms. Carrasco has –has incurred." (Tr. 23-26.) Carrasco's counsel also argued that the major issue with the hair test in *Meyer* was that the hair test

that Meyer submitted was a mail-in kit, and there is no evidence that the hair actually came from his head. (Tr. 23.) Defense counsel stated, “[i]n Ms. Carrasco’s case this is a hair that was collected directly from her scalp, not some mail-in kit.” (Tr. 23-24.) Counsel for Carrasco also argued that the Arcpoint website indicates that the hair test accurately detected drug use within a 14- to 90-day window. (Tr. 24.) Counsel also argued that “[t]he purpose of Ms. Carrasco completing the hair test was because she was continuously receiving the violations for methamphetamine, and she wanted to prove that she was had not been using. Her supervision release orders were modified for [a] weekend in jail, two weekends in jail, and she’s consistently complied with it.” (Tr. 24.)

Then, the following colloquy occurred:

THE COURT: So she’s admitted she’s done this before? She’s –are you saying that she’s admitted she’s taken meth before but not in these last 12 months?

MS. BURTON: No. Absolutely not, Judge.

THE COURT: Okay.

MS BURTON: No what I’m saying is that she’s never admitted to the usage, but she’s taken the punishment for it.

THE COURT: Uh-huh.

MS. BURTON: Also, even with the – if you want to contest the reliability of the hair test, when that came back negative, and that wasn’t received well, she went back and had a nail test

done. And you'll note the date of the nail test was collected on February 26, 2015, and that also came back negative.

And so it's not that Ms. Carrasco is unwilling to participate in her supervision, but without having a logical reason, if, you know, the argument is she's not using meth, absent a logical reason why this keeps showing up, why then keep taking the punishment. Surely, Judge, it would be a lot easier to go to the halfway house, be out in the community with her children, and be able to move forward and continue on supervised release, accept the treatment, and go forward. But, Your Honor, she contends that she's never used methamphetamine. And that is why she took out of her own expense the nail test and the hair test to refute and show that she's not been using methamphetamines.

THE COURT: Okay.

MS. BURTON: Your Honor, also, as I said previously, Ms. Carrasco's been on supervision for approximately a little over one year – one year now. And for the first six months she was on supervision there were no instances of positive sweat patches. She was doing well. She was scheduled for the patch to be removed and be taken off the patch, and then the test started reading as positive for methamphetamines.

(Tr. 24-26.)

Defense counsel closed by saying that her client has consistently held a job, maintained a stable home plan, not associated with any felons or anyone on supervision, taken care of her girls and until these violations, she's been a model client. (Tr. 25-26.) Counsel added that her client "doesn't know what's causing these sweat patches to come back positive for methamphetamine. She contends that she hasn't used, Your Honor."

(Tr. 26.)

Prior to pronouncing sentence, the district court stated:

THE COURT: Thank you. Let me – let me tell you how I look at this. Ms. Carrasco, we do this – we’re in the business of checking people’s – what’s in their system. That’s what we do. That’s what – we have a whole probation department. They do a lot of important things, but an important component of their job is to make sure people who are here for drug offenses, like Ms. Carrasco, stay off drugs. And one the tools that we use, one of the most important tools we use, is sweat patch. I was a state court judge for 14 years. We use sweat patch. We use it in federal court. The courts have found that sweat patches are consistently accurate, and reflect what’s in a person’s system. It’s – it’s – you know, to say, well, it’s well settled law is to maybe not give it enough respect.

One of the justices of the United States Supreme Court, Justice O’Connor, wrote this for the Eighth Circuit. And it’s clear in the Eighth Circuit, which is the intermediate Court of Appeals above this court, that *the sweat patch is the way we should conduct business. And it’s accurate. And it is more accurate than hair and nails.*

And we have a person here, so you’re basically saying, Judge, I want you to disregard the four positive drug tests on the March 2nd report. I want you to disregard the two positive drug tests in the April 7th report. I want you to disregard the three positive drug tests in the April 22nd report, and also those four other reports, where I tested positive for methamphetamine from September 5th 2014, to December 1st, 2014, those aren’t right either. So I need you Judge, to jump here with me, hold my hand, smile, and jump across this chasm of illogical conclusions for 13 positive drugs tests. And then I got some – some more to jump, though. *We’ve got a hair follicle test, and we have a nail test that I have done, that the Court of Appeals says it’s not as accurate.* I’m not jumping. I’m not going with you, Ms. Carrasco.

They have proved – their burden is by the preponderance of the evidence. They’ve more than proved that. Your attorney does a good job, but you didn’t give her much to work

with today. I believe they have proved that you are a consistent – consistent methamphetamine user. No question about it. And, you know, I hate to tell you this, I deal with people and addiction all the time. I have friends who are recovering addicts. And I know a big part of this is denial. That's – and I think some of my friends in addiction would say that Ms. Carrasco is not ripe yet. She's not really ready for any help because she keeps denying all this. Because that's . . . why we hired Mr. Brown here. His job is to help you be successful. And he's very good at his job. But you got to want help, because . . . he can't do this on his own. The Court can't make you want help. You've got –you're a mother, I hear, and you got children. That sometimes help people realize they've had enough of dope and drugs. Because you may be functioning very well as a methamphetamine user. I don't know that. I suspect you're not.

But you're definitely not the mother your kids deserve if you're using methamphetamine. You're falling short of the requirements of this Court if you're using methamphetamine, and you're going to prison. I mean, those three things are clear.

So, I'm sorry. *I cannot disregard the 13 positive reports of you taking methamphetamine.* There's only one logical conclusion. So I am going to find *you are in violation of your supervised release on all three of those reports that I'm dealing with today, the March 2nd report, the April 7th report, and the April 22nd report.* It's always a good sign that people are honest with their probation officer and say, you know, I've got a problem here. Mr. Brown help me. Give me – give me some tools, and you work a program. Because we've had success like that. You're not ready. You're not ripe yet. You're in denial. And I understand that's part of the disease of addiction, I believe.

So – and also, here's the way this works, Ms. Carrasco. People get a lot of points for being honest with us. Not only does it help their treatment, but they score big with judges and prosecutors if they are honest with us. But I understand you

can't be honest. That's part of your problem. That's part of your addiction, and maybe the next time we meet you, I hope we don't meet you again under these circumstances, you can decide, you know what? I'm going to give this up. I'm going to be honest and tell the truth here. I don't think that's happened here, because of these denials. But it's not my job to twist people's arm and make them admit this stuff they're you're not ready to . . . Maybe you will be one day.

Now, I have found this defendant in violation of her supervised release. . . . [T]here's a statutory range of not more than 24 months. So I can't lock you up in prison more than 24 months on a revocation. The guidelines, the most serious grade violation is a category C. The criminal history category is still a I, and the revocation table range is three to nine months. Supervised release range of up to life.

(Tr. 26-30.) (Emphasis added.)

The parties agreed that the court correctly calculated the Guidelines.

(Tr. 30.) The Government recommended a sentence of nine months with a two-year period of supervision to follow. (Tr. 31.) Ms. Burton recommended a sentence within the revocation table Guidelines range with no supervision to follow. Carrasco declined the opportunity to speak to the court. (Tr. 32-33.)

The Court explained its consideration of factors under 18 U.S.C. § 3553(a), as follows:

THE COURT: My job is to do this: To conduct an analysis based on 18 U.S.C. § 3553(a).

And before I get started, you know, I know this is difficult for the people here supporting Ms. Carrasco. And I know – we appreciate that you are here, though, to support her.

She needs your help and she's going to need your help in the days to come. So thank you all for being here.

So Ms. Carrasco, here's the deal. I've considered all the factors. Let me talk about some of them that I – that I think are important. The nature and circumstances of the underlying offense are important. There was – there was kind of a plea of guilty with some denials in there too, . . . I note, which were resolved by the district judge in Texas. Your history and characteristics are troubling, because the denial part, because I believe you're not ready for help. I wish you were. You've got a long way to go, Ms. Carrasco, and I'm not going to throw you back to the wild. You're not going to be done with supervised release for a while, even though right now it's – it's very labor intensive for the Karina Carrasco case.

It concerns me that the level of denial that we have here. It concerns me the lack of – of work with the probation officer, or supervised release officer in this case. These are serious crimes. Methamphetamine affects not only your family, but families in the community, because you help create this demand for this terrible drug.

The need for deterrence. Ms. Carrasco, there's no reward for what you've done here today. . . . I want to make sure I want to deter this conduct, that you know what the price of poker goes up each time. And so at this time . . . considering the need to protect the public, because that's part of people who use meth, we are concerned about protecting the public from meth users. In consideration of all those factors, it is the judgment and sentence of this Court that Karina Carrasco is hereby committed to the custody of the Bureau of Prisons to be imprisoned for 12 months. Upon release from imprisonment the defendant shall be placed on supervised release for five years.

(Tr. 34-36.)

The court explained the upward variance from the Chapter 7 revocation table range, stating, “[a]nd this is a variance above the guidelines based on her steadfast denials, based on her conduct while on supervision, and based upon her failure to demean herself to the supervision of this court.” (Tr. 36.)

SUMMARY OF THE ARGUMENTS

Carrasco raises two points on appeal. First, she argues that the district court erred in concluding that the 13 positive sweat patch test results indicate that she used methamphetamine during her supervision in light of “substantial evidence” of one hair sample and one nail sample test that were both negative. (Carrasco Brf. 12.) Carrasco, however, ignores the evidence of 5 of the 13 methamphetamine positive sweat patches that she wore in March and April 2015, were after her hair and nail samples were collected on February 18 and 26, 2015, respectively. The five positive patches alone juxtaposed with her steadfast denials, without more, provided more than a preponderance of evidence to support the revocation. Also, the five March and April 2015, positive sweat patches corroborate the eight positive sweat patches worn by Carrasco in January and February 2015, despite Carrasco’s contention that they are contradicted by the negative nail and hair tests.

Throughout her supervision, Carrasco wore numerous sweat patches without incident. The negative sweat patches indicate that the method worked adequately for Carrasco thereby corroborating the reliability of all of the positive patches. And, the negative patches would appear to rule out any possibility that she had a physiological condition which caused the sweat patches to return false positive, although she never made such an

argument. The court, therefore, found the nail and hair tests to be unreliable based on case law, and that the negative nail and hair tests do not undermine the proven reliability of any of the positive sweat patches.

In her second point on appeal, Carrasco contends that the sentence imposed was “unreasonable.” (Carrasco Brf. 12.) Although the 12-month sentence represented a three-month variance above the three-to-nine month Chapter 7 revocation table Guidelines range, the district court adequately explained its reasoning and the sentence was within the statutory maximum range of 24 months. The court also specifically took into account Carrasco’s repeated denials of usage of drugs, and thoroughly discussed the appropriate factors under § 3553(a), as directed in 18 U.S.C. § 3583(c).

The district court further properly imposed a five-year term of supervised release to follow the 12-month term of incarceration. The five-year term, with which Carrasco does not contest, is within the statutory range authorizing a supervision period of at least two years and up to life.

The district court’s sentencing decision is both procedurally sound and substantively reasonable, and this Court should affirm the district court’s decision to revoke Carrasco’s supervised release term and exercise its discretion in varying upward to impose a 12-month custodial sentence, and a five-year term of supervised release.

ARGUMENTS

I.

The district court properly revoked Carrasco's supervised release term, because the Government proved by a preponderance of the evidence that she had 13 positive sweat patches indicating that she used methamphetamine in violation of the terms of her supervised release, including five positive sweat patches submitted after Carrasco's alleged negative nail and hair tests, and the court found the sweat patch evidence to be reliable based on circuit case law, rejecting Carrasco's nail and hair samples tests as unreliable.

In her first point, Carrasco contends that the district court erred in revoking her term of supervised release by relying on evidence of 13 sweat patches that tested positive for methamphetamine rather than the single negative hair and nail sample she submitted and claims corroborates her claim of denial of drug use throughout her entire period of supervision. (Carrasco Brf. 12.) What she fails to mention is the fact that five of the positive sweat patches she wore after her nail and hair sample test was collected also tested positive for methamphetamine. Other than a steadfast unbelievable denial of drug use, Carrasco offered no evidence to counter those five positive test results. In fact, logically the five post-hair and nail sample tests were positive for drug usage and those results corroborate the eight preceding positive results. Negative unchallenged sweat patch results, also corroborate the effectiveness of the sweat patch drug testing

method. The district court properly exercised its discretion in revoking Carrasco's supervised release where it found that the sweat patch results were reliable and credible by a preponderance of evidence. The court's finding supported the conclusion that Carrasco violated her conditions of release by using methamphetamine. This Court should affirm the district court's revocation decision.

A. Standard of Review

The Government must prove by a preponderance of the evidence that a defendant violated a condition of supervised release. *United States v. Goodon*, 742 F.3d 373, 376 (8th Cir. 2014); 18 U.S.C. § 3583(e)(3). “Revocation of probation requires only enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of probation.” *Id.* (quoting *United States v. Leigh*, 276 F.3d 1011, 1012 (8th Cir. 2002)). When a district court revokes an offender's probation, its factual findings are reviewed for clear error. *United States v. Meyer*, 483 F.3d 865, 868 (8th Cir. 2007). “Under clear error review, this Court may reverse only if we have a definite and firm conviction that the District Court was mistaken.” *United States v. Willis*, 433 F.3d 634, 636 (8th Cir. 2006) (quotation omitted). The appellate court reviews the district court's underlying decision to revoke for an abuse of discretion. *Meyer, id.*

B. Discussion

The district court has the discretion to revoke supervised release if the government proves by a preponderance of the evidence that a defendant violated a condition of supervised release. 18 U.S.C. § 3583(e)(3) (“The Court may . . . 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 . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release.”); *United States v. Boyd*, 792 F.3d 916, 919 (8th Cir. 2015). Here, after noting the reliability of the sweat patch, the district court found the 13 total positive sweat patches, including five that were worn by Carrasco after the negative hair and nail samples were collected, provided more than a preponderance of evidence to find that she used methamphetamine, in violation of her conditions of release. (Tr. 26-30.) Based on the evidence and logical conclusions from it, the court’s factual findings were sound.

Carrasco argues that the court deemed the hair and nail samples to be less reliable than the sweat patch by failing to distinguish her facts with the facts in before the *United States v. Meyer*, 483 F.3d 865, 867-68 (8th Cir. 2007). (Carrasco Brf. 14-15.) In *Meyer*, the district court revoked Meyer’s probation after concluding that eight sweat patches that tested

positive for cocaine and a cocaine metabolite supported a finding that he used cocaine while on probation despite numerous negative urine samples and a negative hair sample. *Id.* at 869-70. Carrasco concedes that the facts of *Meyer* are substantially similar to hers in that they both submitted to sweat patch testing. *See Meyer*, 483 F.3d at 867-68. (Carrasco Brf. 14.) Both defendants had a period of negative drug tests results before the positive results surfaced. *See Meyer*, 483 F.3d at 867-68. (Carrasco Brf. 14.) Also, both defendants contend that they did not use any drugs while on supervision. *See Meyer*, 483 F.3d at 867. (Tr. 3-4, 24-25; Carrasco Brf. 14.) Finally, Carrasco notes that both defendants presented alternate forms of testing which yielding negative test results. *See Meyer*, 483 F.3d at 867-68. (Tr. 13-14, 24-25; Carrasco Brf. 14.)

Carrasco distinguishes *Meyer* by pointing out that Meyer also violated his probation by traveling without permission and there was a dispute as to whether the hair sample that tested negative actually came from Meyer's head. (Carrasco Brf. 14-15.) She notes that the hair and nail samples used were collected from her and, presumably, other than the positive sweat patches, she had no other violations while under supervision. (Carrasco Brf. 14-15.) Carrasco also points out that there was no nail test submitted in *Meyer* "to corroborate that no drug use had occurred." (Carrasco Brf. 15.)

The district court did not misread or misapply *Meyer*. In affirming the district court's revocation decision, the court in *Meyer* specifically noted that "the negative hair test that Meyer secured is legally meaningless." *Meyer*, 483 F.3d at 870. Then, the court stated, "[q]uite apart from the shortcomings of hair tests generally, Meyer adduced no evidence establishing that he grew the hair that Omega tested for drugs." *Meyer*, 483 F.3d at 870. By stating without specificity that hair tests generally have shortcomings, the *Meyer* decision can be fairly read as acknowledging that hair testing generally is flawed. *Id.* Also, *Meyer*, held "[t]oday, we join the other courts that have previously determined that sweat patch results are a generally reliable method of determining whether an offender has violated a condition of his or her probation." *Id.* Here, the district court recounted its experience with the sweat patch as a state judge in over 14 years on the bench and in federal court, and consistent with *Meyer*, concluded that sweat patch testing is accurate, and more accurate than hair and nail testing. (Tr. 27.)

The district court's conclusion that Carrasco's sweat patch test results were accurate and reliable, and that Carrasco is an addict in denial (Tr. 26-30), are consistent with the *Meyer* holding that sweat patch results are a generally reliable method of determining whether an offender has violated a condition of her probation absent a compelling reason to believe that

positive sweat patches are erroneous. *Meyer*, 483 F.3d at 869-870. Carrasco offered no explanation for all 13 positive patches, other than a steadfast denial of drug use while on supervised release, an incredible claim as the district court found. (Tr. 26-30.) Under the circumstances, the district court did not abuse its discretion, nor did it clearly err in finding by more than a preponderance of the evidence that Carrasco violated the conditions of release by using methamphetamine as evidenced by 13 positive sweat patches. (Tr. 26-28.) The district court's revocation decision should be affirmed.

II.

The district court properly sentenced Carrasco to 12 months in custody, a three-month upward variance from the Chapter 7 revocation table suggested range of 3 to 9 months, and imposed a five-year term of supervised release to follow, because the court articulated the relevant sentencing factors and stated that the variance was based on Carrasco's steadfast denials and failure to demean herself to supervision, and both the term of imprisonment and the five-year term of supervision are within the range authorized by statute.

In her second point on appeal, Carrasco contends that her sentence to a “one year term of incarceration and an additional five years of supervised release” is substantively unreasonable. (Carrasco Brf. 16.) Carrasco correctly points out that under the Chapter 7 revocation table her most serious grade violation was a C (U.S.S.G. § 7B1.1(b)), and her criminal history category of 1 (U.S.S.G. §§ 7B1.4(a), resulted in an advisory Guidelines range of three to nine months of imprisonment (U.S.S.G. § 7B1.4(a)), with a supervised release range of up to life. (Tr. 30; Carrasco Brf. 16.) Upon revocation of her term of supervised release, the district court was authorized by statute to impose a term 12 months of imprisonment. The district court carefully explained its reasons for varying upward by three months from the Chapter 7 revocation table based on § 3553(a) factors as referred to in 18 U.S.C. § 3583(c), including the nature

and circumstances of the offense, steadfast denials of drug use and protecting the public before imposing the sentence.

Carrasco acknowledges that the statute under which she was convicted authorizes a supervised release term of up to life imprisonment. (Carrasco Brf. 16.) The five-year term of supervised release did not exceed the maximum of statute authorizing supervised release. Like the underlying sentence, as previously stated, applying the relevant § 3553(a) factors, the district court thoroughly explained its reasoning for imposing a five-year term of supervised release to follow her term of incarceration. Because the district court's sentencing decision was expressly based on a thorough discussion of the appropriate § 3553(a) factors, this Court should affirm the district court's ruling as being substantively reasonable and sound.

A. Standard of Review

A challenge to the substantive reasonableness of a revocation sentence is reviewed under the same abuse of discretion standard as initial sentencing decisions. *United States v. Goodon*, 742 F.3d 373, 376 (8th Cir. 2014). On appeal, this Court is “not permitted to apply a presumption of unreasonableness if the sentence is outside the Guideline range.” *United States v. Martin*, 757 F.3d 776, 780 (8th Cir. 2014). Instead, “[the Court] ‘may consider the extent of the deviation but must give due deference to the district court’s decision that the 3553(a) factors, as a whole, justify the

extent of the variance.” *Id.* (quoting *United States v. Feemster*, 572 F.3d 455, 461-62 (8th Cir. 2009)).

B. Discussion

Here, Carrasco was originally sentenced to a Class C felony, and upon revoking her term of supervised release, the district court imposed an additional five-year term of supervised release following the 12-month term of incarceration (Carrasco Brf. 16) as authorized by law. Carrasco argues that the sentence is substantively unreasonable. She also contends that the sentence imposed was unreasonable because the district court departed upward from the Guidelines of three to nine months sentencing her to a year imprisonment and imposed an additional five years’ supervised release. (Carrasco Brf. 12-13, 15.) Carrasco argues that the sentence is unreasonable “in that the five years of supervised release is excessive” essentially because it is “more than double the original” two-year term of supervised release imposed. (Carrasco Brf. 12-13.)

Generally, a district court’s authority to impose a prison sentence upon revocation of supervised release is set forth in 18 U.S.C. § 3583(e)(3). The statute provides that a sentence may not exceed “the term of supervised release authorized by statute for the offense that resulted in such term of supervised release.” 18 U.S.C. § 3583(e)(3). The two-year limit on supervised release for Class C felonies under § 3583(b)(2) applies only

“[e]xcept as otherwise provided.” 18 U.S.C. § 3583(b). “In *United States v. LeMay*, 952 F.2d 995, 998 (8th Cir. 1991), [this Circuit] held that the maximum-term limitations in 18 U.S.C. § 3583(b) do not apply when a statute such as 21 U.S.C. § 841(b) expressly authorizes a longer term of supervised release.” *United States v. Scott*, 243 F.3d 1103, 1108 (8th Cir. 2001.)

To further Congress’s intent to enhance drug offense penalties, a sentencing judge may impose a supervised release term ranging from the minimum specified in the statute to up to life, notwithstanding the limits of 18 U.S.C. § 3583(b). *United States v. Rogers*, 543 F.3d 467, 468-69 (8th Cir. 2008).

Here, Carrasco pled guilty to importing a quantity of marijuana (26.6 kilograms), in violation of 21 U.S.C. §§ 952(a) and 960(b)(4). (WDTX PSR 1.) In 21 U.S.C. § 960(b)(4), it provides that “[i]n a case of a violation under subsection (a) of this section, with respect to less than 50 kilograms of marihuana. . . , the person committing such violation shall be sentenced in accordance of section 841(b)(1)(D) of this title.” Section 841(b)(1)(D), of Title 21 United States Code, provides, in pertinent part, “[i]n the case of less than 50 kilograms of marijuana. . . , such person shall, . . . be sentenced to a term of imprisonment of not more than 5 years. . . . Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment

under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment. . . .” 21 U.S.C. § 841(b)(1)(D); see *United States v. Rogers*, 543 F.3d 467, 468-69 (8th Cir. 2008) (recognizing 21 U.S.C. § 841(b)(1)(D), provides that notwithstanding 18 U.S.C. § 3583, the court shall, absent prior felony drug conviction, impose term of supervised release of at least 2 years).

The relevant sentencing statute, 21 U.S.C. § 841(b)(1)(D), expressly trumps the generally applicable terms of supervised release set forth in 18 U.S.C. § 3583(b). See *United States v. Bongiorno*, 139 F.3d 640, 641 (8th Cir. 1998.) Although the *Bongiorno* panel considered § 841(b)(1)(C), the same principal applies in the context of § 841(b)(1)(D), at issue here.

Carrasco contends that the sentence imposed was unreasonable because the district court departed upward from the Chapter 7 revocation table range of three to nine months, to sentence her to 12 months of imprisonment and an additional five years of supervised release. (Carrasco Brf. 12-13.) However, the district court specified its reasons for varying upward from the Chapter 7 revocation table range, including protecting Carrasco’s children and the community from her addiction. (Tr. 34.) An upward variance may be based on “the need to protect the public.” *United States v. Jones*, 612 F.3d 1040, 1045 (8th Cir. 2010). The court further

stated that, “this is a variance above the guidelines based on her steadfast denials, based on her conduct while on supervision, and based upon her failure to demean herself to the supervision of this court.” (Tr. 36.) This sentence was below the statutory maximum of 24 months. (*See* Tr. 30.)

In stating its reasons for varying upward Chapter 7 revocation table range, the district court properly sentenced Carrasco to 12 months in prison. Furthermore, Carrasco was sentenced to a term of five years of supervised release, which likewise does not exceed the maximum term authorized by statute.

With the court expressly explaining its reasons for imposing Carrasco’s sentence, and applying relevant § 3553(a) factors as described in 18 U.S.C. § 3583(c), namely her history and characteristics, steadfast denials of drug use, her conduct while on supervision, and her failure to demean herself to the supervision of this court (Tr. 26-30, 33-36), the district court committed no error. This Court should affirm.

CONCLUSION

Based on the above reasons and authorities, the United States respectfully asks this Court to affirm the district court's decision to revoke Carrasco's term of supervised release based on reliable sweat patch evidence, and sentence her to 12 months in prison, followed by five years of supervised release.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and contains 7,521 words. The brief was prepared using Microsoft Word 2010 software. In making this certification I have relied upon the word-count feature of Microsoft Word 2010. Furthermore, the brief has been determined to be virus-free in compliance with Eighth Circuit Rule 28A(h).

/s/ Christina Y. Tabor
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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. A paper copy will be served on participants in the case by U.S. Mail, postage prepaid, within five days of the Court's notice that the brief has been reviewed and filed.

I hereby certify that a copy of the Government's brief was mailed on September _____, 2015, to:

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