Probation and Supervised Release Violations

Prepared by the Office of General Counsel
United States Sentencing Commission

February 2002

Disclaimer: *Information provided by U.S.S.C. Sentencing Commission Staff is offered to assist in understanding and applying the sentencing guidelines. This information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.*

TABLE OF CONTENTS

Page

PART ONE
GENERAL PROVISIONS

I. Guideline Provisions on Violations (Policy Statements)

A. Background of Chapter Seven

1. In the Sentencing Reform Act of 1984, Congress abolished parole, redesignated probation as a sentence rather than a suspension of sentence, and introduced supervised release as a new method of post-imprisonment supervision.

2. In 28 U.S.C. § 994(a)(3), Congress directed the Commission to promulgate policy statements or guidelines applicable to revocation of probation or supervised release. The Commission decided to implement policy statements, rather than guidelines, to provide flexibility to the courts, which are in a better position to assess the seriousness of the conduct constituting the violation. Ch. 7, Part A, intro. comment.

3. The policy statements are the "first step in an evolutionary process." The flexibility of policy statements allows a period of evaluation by the courts and the Commission. The Commission may eventually promulgate revocation guidelines. *Id.*

B. Philosophy of Revocation

1. The Chapter Seven revocation policy statements are designed to "sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." *Id.*

2. The "breach of trust" refers to the defendant's failure to abide by court imposed conditions of probation or supervised release. The policy statements do take into account the defendant's criminal history category at the time of the original sentencing and the nature of the underlying conduct leading to the violation as a measure for the extent of the breach of trust. *Id.*

   See United States v. Patterson, 230 F.3d 1168, 1170 (9th Cir. 2000). The Court joined the Fourth and Eighth Circuits in holding that "'as the term of supervised release, the revocation of that term, and any additional term of imprisonment imposed for violating the supervised release are all part of the original sentence,' the defendant's incarceration after revocation of supervised release is custody 'by virtue of' the underlying offense." *See United States v. Evans*, 159 F.3d 908, 913 (4th Cir. 1998); *United States v.*

Pynes, 5 F.3d 1139, 1140 (8th Cir. 1993). Thus, the Court allowed the imposition of a base offense level of 13 under §2P1.1(a)(2) because the defendant's escape attempt was while he was in custody "by virtue of" a felony conviction.

C. Applicability of Chapter Seven Policy Statements

1. Prior to the enactment of the Violent Crime Control and Law Enforcement Act of 1994[1] (1994 Crime Bill), circuit courts of appeal held that the Chapter Seven Policy Statements were advisory and non-binding, but had to be considered by the district court when addressing violations.

   United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993); *United States v. Anderson*, 15 F.3d 278 (2d Cir. 1994); *United States v. Blackston*, 940 F.2d 877 (3d Cir.), *cert denied*, 502 U.S. 992 (1991); *United States v. Davis*, 53 F.3d 638 (4th Cir. 1995); *United States v. Mathena*, 23 F.3d 87 (5th Cir. 1994); *United States v. Sparks*, 19 F.3d 1099 (6th Cir. 1994); *United States v. Hill*, 48 F.3d 228 (7th Cir. 1995); *United States v. Levi*, 2 F.3d 842 (8th Cir. 1993); *United States v. Forrester*, 19 F.3d 482 (9th Cir. 1994); *United States v. Lee*, 957 F.2d 770 (10th Cir. 1992); *United States v. Thompson*, 976 F.2d 1380 (11th Cir. 1992); *United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993).

2. In the 1994 Crime Bill (effective Sept. 13, 1994), Congress amended 18 U.S.C. § 3553(a)(4) to require courts to consider "the kinds of sentence and the sentencing range established . . . in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . ."

3. Most of the circuits have held that although the Crime Bill language requires the district court to consider Chapter Seven policy statements when revoking probation or supervised release, the policy statements remain advisory and non-binding.

   United States v. Lambert, 77 F.3d 460 (Table, unpublished), 1996 WL 84114, No. 95-2115 (1st Cir. Feb. 26, 1996) (supervised release); *United States v. Cohen*, 99 F.3d 69 (2d Cir.1996), *cert. denied*, 520 U.S. 1213 (1997) (supervised release); *United States v. Schwegel*, 126 F.3d 551 (3d Cir. 1997) (supervised release); *United States v. Escamilla*, 70 F.3d 835 (5th Cir.1995), *cert. denied*, 517 U.S. 1127 (1996) (supervised release); *United States v. West*, 59 F.3d 32 (6th Cir.), *cert. denied*, 516 U.S. 980 (1995) (supervised release); United States v. Doss, 79 F.3d 76 (7th Cir.1996) (probation and supervised release); *United States v. Oates*, 105

[1]Pub. L. No. 103-322, 108 Stat. 1796.

F.3d 663 (Table, unpublished), 1997 WL 1837, No. 96-2907 (8th Cir. Jan. 3, 1997) (supervised release); *United States v. George,* 184 F.3d 1119 (9th Cir. 1999) (supervised release)[2]; *United States v. Vogt*, 106 F.3d 414 (Table, unpublished), No. 96-1192, 1997 WL 20125 (10th Cir. Jan. 21, 1997) (probation); *United States v. Hofierka*, 83 F.3d 357 (11th Cir.1996), *cert. denied sub nom., Andrews v. United States*, 519 U.S.1071 (1997) (supervised release).

4. The issue of the policy statements being advisory has also been raised in the context of imposition of consecutive sentences. *See* Part One, I-D-5

D. Basic Approach to Revocation Sentencing under Chapter Seven

1. Determine if there has been a violation. Violation of supervised release may be found by a preponderance of evidence. 18 U.S.C. § 3583(e)(3) *United States v. Schmidt*, 99 F.3d 315, 319-20 (9th Cir. 1996), overruled on other grounds by *United States v. Palomba*, 182 F.3d 1121, 1123 (9th Cir. 1999)). Supervised release revocation need not be accompanied by Apprendi's procedural guarantees. *United States v. Gomez-Gonzalez*, 2002 WL 47064 (9th Cir. 2002).

2. Determine the grade of the violation (A, B, or C) under §7B1.1, p.s.

   United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133 (2d Cir. 1998) (if multiple violations, determine grade based on most serious violation); *United States v. Lindo*, 52 F.3d 106 (6th Cir. 1995) (cannot aggregate multiple Grade C violations to increase to Grade B); *United States v. Schwab,* 85 F.3d 326 (8th Cir. 1996) (grade of violation based on defendant's actual conduct, not offense of conviction); *United States v. Grimes,* 54 F.3d 489 (8th Cir. 1995) (false statements on monthly report to probation officer violates 18 U.S.C. § 1001, thus such conduct constitutes Grade B violation); *United States v. Bonner*, 85 F.3d 522(11th Cir. 1996) (threatening phone call is "crime of violence" that qualifies as a Grade A violation); *United States v. Boisjolie*,74 F.3d 1115 (11th Cir. 1996) (use maximum sentence under state recidivist statute to determine grade of violation based on state habitual offender offense); *United States v. Trotter*, 270 F.3d 1150 (7th Cir. 2001) (prior conviction can be considered in determining if a crime is punishable by more than one year in prison and thus is a class B or class C violation).

---

[2]The Ninth Circuit's interpretation of the statutory provisions regarding probation is not as clear. In *United States v. Plunkett,* 94 F.3d 517, 519 (1996), the Ninth Circuit states that "because section 3553 incorporates policy statements by name, policy statements are independently mandatory." In imposing a sentence upon revocation of probation, a court "may rely upon either the guideline or policy statements." It appears that under the Ninth Circuit's view, once the court chooses to apply either the guideline for the underlying offense or the Chapter Seven policy statements, a sentence outside the chosen applicable range would be a departure.

a. Grade A or B violation: the court "shall revoke" probation or supervised release. §7B1.3(a)(1)

b. Grade C violation: the court may revoke or may extend the term and/or modify the conditions of supervision. §7B1.3(a)(2)

3. Determine the applicable range of imprisonment contained in §7B1.4, p.s. based on the grade of the violation and the criminal history category applicable at the time of the original sentencing.

a. If the statutory maximum term available upon revocation is less than the minimum of the range in §7B1.4, p.s., the statutory maximum shall be substituted for the applicable range.

b. If the statutory minimum term available upon revocation is greater than the maximum of the range in §7B1.4, p.s., the statutory minimum shall be substituted for the applicable range.[3]

4. Determine sentencing options for Grade B or C violations under §7B1.3., p.s.:

a. Sentence of imprisonment based on range in §7B1.4, p.s.

b. Community Confinement or Home Detention[4]

---

[3]In the Crime Bill (effective September 13, 1994), Congress eliminated the minimum sentence requirement for a revocation based on possession of a controlled substance. (18 U.S.C. §§ 3565(a) (one-third of the original sentence); 3583(g) (one-third of the term of supervised release). The Ninth Circuit has held that a defendant who was subject to a mandatory minimum at the initial sentencing, but received probation as a result of a departure, is again subject to the mandatory minimum if the probation is revoked. *See United States v. Nieblas,* 115 F.3d 703 (9th Cir. 1997).

[4]The conditions of supervised release are statutorily authorized in § 3583(d) by reference to certain conditions of probation authorized in § 3563(b). Section 3583(d) authorizes as a discretionary condition of supervised release a condition of probation set forth "in *section 3563(b)(1) through (b)(1)) and (b)(12) through (b)(20)* . . . ." Before Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), 18 U.S.C. § 3583(d) specifically excluded intermittent confinement (previously designated under § 3563(b)(11)) and authorized community confinement (previously designated under § 3563(b)(12)) as a condition of supervised release. In section 203 of the Act, Congress made a number of changes to 18 U.S.C. § 3563 (conditions of probation), but failed to make corresponding changes to 18 U.S.C. § 3583(d). Under the current version of § 3583(d), community confinement (now § 3563(b)(11)) is specifically excluded as a condition of supervised release and intermittent confinement (now § 3563(b)(10)) is specifically authorized as a condition of supervised release. The only circuit to have addressed the issue has held that the failure to revise § 3583(d) was a clerical error, and that the district court retained authority to impose community confinement as a condition of supervised release. *See United States v. Bahe,* 201 F.3d 1124 (9th Cir. 2000). The guideline provisions relating to intermittent confinement and community confinement as conditions of supervised release reflect the statutory policy before the Act.

i. If the applicable range is at least one month but not more than six months, the minimum term may be satisfied by a sentence of imprisonment, that includes a term of "supervised release with a condition that substitutes community confinement or home detention for any portion of the minimum term.

ii. If the applicable range is more than six months but not more than ten months, the minimum term may be satisfied by a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention, provided that the defendant must serve in prison at least one-half of the minimum term.

5. Off-Set for Credit Awarded for Time in Official Detention[5]

Under §7B1.3(e), p.s., in imposing a sentence of imprisonment for a violation, the court "shall increase the term of imprisonment . . . by the amount of time in official detention" that the Bureau of Prisons will award the defendant under 18 U.S.C. § 3585(b), except for custody credits awarded for time spent in official detention resulting from the probation violation warrant or proceeding. *See* example in §7B1.3, comment. (n.3)

6. Consecutive Sentence

a. Section 7B1.3(f), p.s. directs the court to order that any revocation sentence run consecutively to any other sentence the defendant is serving.

b. Correspondingly, the guidelines also direct a court to require that a sentence for a new offense run consecutively to a revocation sentence. §5G1.3, comment (n.6). There is a circuit split on this issue (*see United States v. Swan*, 2002 WL 5492 (3d Cir. 2002), recognizing circuit split and holding that language of note 6 is not mandatory).

c. Several Courts have ruled that because Chapter Seven policy statements are advisory only, district courts may use their discretion in deciding whether to run a revocation sentence consecutively or concurrently with another sentence the defendant

[5]A defendant receives credit for time "spent in official detention prior to the date the sentence commences– (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence." 18 U.S.C. § 3585(b).

is serving. *United States v. Sparks,* 19 F.3d 1099 (6th Cir. 1994); *United States v. Hill,* 48 F.3d 228 (7th Cir. 1995); *United States v. Caves,* 73 F.3d 823 (8th Cir. 1995).

E. "Departures" – Sentences Outside the Applicable Range in Chapter Seven

Because the Chapter Seven policy statements are merely advisory and non-binding, the sentencing court is not "departing" from any binding guideline when it imposes a sentence in outside the recommended range.

1. Although Chapter Seven refers to "departures" from the applicable range (*see, e.g.*, §7B1.4 p.s., comment. (n. 3)), these "departures" do not carry the legal authority of departures from a guideline sentence.

   a. In imposing a revocation sentence, a court is bound only by the statutory maximum.

   b. Although Rule 32 requires a court to give notice before departing from the guidelines,[6] a defendant is not entitled to notice of the court's intent to impose a sentence outside the applicable range in the revocation table.

      See United States v. Pelensky, 129 F.3d 63, 70-71 (2d Cir. 1997); *United States v. Mathena*, 23 F.3d 87, 93 n. 13 (5th Cir. 1994); *United States v. Shaw,* 180 F.3d 920 (8th Cir. 1999);*United States v. Burdex*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (11th Cir. 1996), *modified*, 92 F.3d 1108 (11th Cir. 1996), *cert. denied sub nom*,. *Andrews v. United States*, 519 U.S. 1071 (1997).

   c. A district court is not required to make explicit, detailed findings in imposing a revocation sentence outside the applicable range of imprisonment.

      Example: The Fifth Circuit has found that: "[b]ecause there are no guidelines for sentencing on revocation of probation, and because the district court was not limited to the sentencing range available at the time of the initial sentence" the court is not required to "employ the analysis normally required in a departure

[6] *See Burns v. United States,* 501 U.S. 129, 138-39 (1991) (district court must give parties reasonable notice before departing based on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the government.)

case." *United States v. Pena,* 125 F.3d 285 (5th Cir. 1997), *cert. denied*, 523 U.S. 1079 (1998).[7]

d. The court should nonetheless provide some explanation to allow for appellate review.

Example: In *United States v. McClellan*, 164 F.3d 308 (6th Cir. 1999), the Sixth Circuit found that the district court failed to make even minimal findings to justify a revocation sentence of 18 months where the applicable range was 5-11 months. There was no evidence the district court had considered the relevant statutory factors listed in 18 U.S.C. § 3553; the court had stated only that it had reviewed the presentence report. The failure to give reasons makes it impossible to determine whether the sentence was plainly unreasonable; the court "must articulate at least enough of its reasoning to permit an informed appellate review."

2. Standard of Review

Under 18 U.S.C. § 3742(a)(4), the standard of review of a sentence imposed when there is no binding *guideline* is "plainly unreasonable." *United States v. Doss,* 79 F.3d 76, 79 (7th Cir. 1996).

II. *Ex Post Facto* Clause and Savings Clause Issues

A. *Ex Post Facto* Clause, Generally

Whenever a law is enacted that potentially affects the criminal penalties for acts already completed, the Constitution's prohibition against *ex post facto* laws may be triggered.

1. Article I, § 9 of the Constitution prohibits any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Calder v. Bull,* 3 U.S. 386 (U.S. Conn. 1798).

2. The Supreme Court has interpreted this clause to prohibit application of any law that (1) is retrospective in that it applies to conduct that occurred before its enactment, and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *California Department of Corrections v. Morales*, 514 U.S. 499, 506 n.3, 115 S. Ct.1597, 1602 n.3 (1995).

---

[7]In *Pena*, the defendant's original guideline range was 4-10 months. The court sentenced him to five-years' probation. The defendant committed a Grade C violation, for which the revocation table called for a sentence of 3-9 months. The court sentenced the defendant to two years' imprisonment.

B. *Ex Post Facto* Clause and Revocation Penalties: *United States v. Johnson*

1. Revocation penalties are "retrospective" if applied to a defendant whose original offense occurred before the law was enacted. *United States v. Johnson,* 529 U.S. 694 (2000).[8]

   a. The defendant in *Johnson* argued that application of 18 U.S.C. § 3583(h) (explicitly authorizing a term of supervised release to follow a term of imprisonment imposed upon revocation of supervised release) violated the *Ex Post Facto* Clause because the statute was enacted after the defendant committed the original offense, but before his violation.

   b. The Supreme Court held that § 3583(h) could not apply retroactively to the defendant, but that under the law in effect at the time the defendant committed the original offense, a court had authority to impose a term of supervised release as part of a revocation sentence under § 3583(e)(3).[9]

2. Before determining whether the *Ex Post Facto* Clause bars retroactive application of a particular law, the court must make a "preliminary determination of whether Congress intended such application."

   a. "[S]tatutes burdening private interests" do not apply retroactively unless Congress gives a clear indication of that intent.

   b. Absent any such indication, the "general rule" is that a statute with no effective date takes effect on the date of its enactment.

---

[8]The Supreme Court resolved a split in the circuits by concluding that revocation penalties are part of the punishment for the original offense. The Sixth and Fifth Circuits held that revocation penalties punish the conduct leading to the revocation, not the initial offense; and therefore *ex post facto* concerns are triggered only by a law that becomes effective after the date of the violation that led to revocation of the period of supervision. *See United States v. Samour,* 199 F.3d 821 (6th Cir. 1999); *United States v. Female Juvenile,* 103 F.3d 14 (5th Cir.), *cert. denied,* 518 U.S. 1007 (1996); *Byrd,* 116 F.3d 770 (5th Cir.), *cert. denied*, 522 U.S. 1020 (1997). The Second, Third, Fourth, Seventh, and Ninth Circuits held that *ex post facto* concerns are triggered if the law becomes effective after the date the defendant committed the original offense for which the defendant received probation or supervised release. *See, e.g., United States v. Meeks,* 25 F.3d 1117 (2d Cir. 1994); *United States v. Dozier,* 119 F.3d 239 (3d Cir. 1997); *United States v. Parriett,* 974 F.2d 523 (4th Cir. 1992); *United States v. Beals,* 87 F.3d 854 (7th Cir. 1996), *overruled on other grounds, United States v. Withers*, 128 F.3d 1167 (7th Cir. 1997); *United States v. Paskow,* 11F.3d 873 (9th Cir. 1993).

[9]In finding that the law prior to the enactment of § 3583(h) authorized a court to impose a term of supervised release to follow a term of imprisonment upon revocation, the Supreme Court resolved a split in the Circuits. *See* Part Three, V-A.

c. Congress did not give a clear indication that § 3583(h) should apply to offenses that occurred before its effective date, thus the statute applies only to cases in which the initial offense occurred on or after the effective date of the amendment, September 13, 1994.

C. Savings Clause

1. "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 1 U.S.C. § 109.

   a. Purpose

      The purpose of the Savings Clause, commonly conceptualized as the converse of the *Ex Post Facto* Clause, is to insure that when the law has changed to provide more lenient punishment, a defendant is subject to the penalties in place at the time he committed the offense, unless Congress specifically provides that the new, more lenient penalty will be retroactive.

   b. Example

      In *United States v. Schaefer*, 120 F.3d 505 (4th Cir. 1997), the defendant's violation conduct occurred prior to the September 1994 changes to § 3565. He argued that he should be sentenced under the amended version of the statute, which was in effect by the time he was arrested and brought in for revocation of his probation. The amended version of the statute would have allowed the district court to depart downward from the initial guideline range for grounds not mentioned at the original sentencing. Fourth Circuit jurisprudence had not permitted such a departure under the prior law. The court held that, pursuant to the Savings Clause, Schaefer was properly sentenced under the pre-1994 law in effect when the defendant committed the original offense.

2. Implications after *United States v. Johnson*, 529 U.S. 694 (2000)

   In *Johnson,* the Supreme Court cited the "general rule" that absent a clear indication of congressional intent to the contrary, legislation takes effect the day it is enacted. The holding was in the context of the *Ex Post Facto* Clause, which prohibits retroactive application of legislation that increases a defendant's penalty. Although the opinion does not address the Savings

Clause, it does raise questions about whether ameliorative legislation may be applied retroactively.

a. Does the "general rule" apply to "ameliorative" legislation, *i.e.*, a law that would subject the defendant to a lighter penalty than the law in effect at the time the defendant committed the original offense; or

b. Is the ban on retroactive application limited to a law that would increase the penalty of a defendant whose original offense occurred prior the effective date of the statute?

D. Violent Crime Control and Law Enforcement Act of 1994

On September 13, 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994,[10] which modified statutory provisions relating to sentencing generally and amended the provisions on probation and supervised release.

1. Notable Changes to Probation Provisions

a. modified the language in 18 U.S.C. § 3565(a)(2) regarding the maximum sentence available upon revocation;

b. eliminated a specified minimum imprisonment requirement (one-third of the original sentence) for defendants whose probation was revoked for possession of a controlled substance (18 U.S.C. § 3565(b);

c. added 18 U.S.C. § 3563(e) to provide an exception to mandatory revocation if finding that defendant possessed a controlled substance is based on a drug test and defendant is amenable to drug treatment;

d. added 18 U.S.C. § 3565(b)(3) to require mandatory revocation and imprisonment if the defendant refuses to submit to drug testing;

e. modified the language in 18 U.S.C. § 3565(b)(2) pertaining to mandatory revocation for possession of a firearm to require the defendant to be sentenced to a term of imprisonment;

f. added 18 U.S.C. § 3565(c) to provide for delayed revocation under certain circumstances.

[10]Pub. L. No. 103-322, 108 Stat. 1796.

2. Notable Changes to Supervised Release Provisions

a. added to 18 U.S.C. § 3583(e) maximum terms of imprisonment to be imposed for violations if the original offense was a Class A felony or a misdemeanor;

b. eliminated cap on imprisonment available upon revocation to length of term of supervised release originally imposed by amending 18 U.S.C. § 3583(e)(3) to authorize imprisonment of up to maximum term of supervised release available for original offense;

c. eliminated a specified minimum imprisonment requirement (one-third of the original supervised release term) in 18 U.S.C. § 3583(g) for defendants whose supervised release was revoked for possession of a controlled substance;

d. provided exception in 18 U.S.C. § 3583(d) from mandatory revocation if finding that defendant possessed a controlled substance is based on a failed drug test and defendant is amenable to drug treatment;

e. added 18 U.S.C. § 3583(g)(3) to require revocation and a sentence of imprisonment if the defendant refuses to comply with drug testing;

f. added 18 U.S.C. § 3583(g)(2) to require revocation and a sentence of imprisonment if the defendant possesses a firearm while on supervised release;

g. added 18 U.S.C. § 3583(h) to authorize imposition of an additional term of supervised release to follow a sentence of imprisonment imposed upon revocation;

h. added 18 U.S.C. § 3583(i) to authorize delayed revocation if a warrant or summons is issued before the term expires.

3. *Ex Post Facto* Clause

Before *Johnson*, application of the Crime Bill revocation provisions, particularly 18 U.S.C. § 3583(h), to defendants whose conduct occurred before the effective date of the Crime Bill prompted *ex post facto* challenges. In *Johnson,* the Supreme Court determined that the effective date of § 3583(h) was September 13, 1994 (the effective date of the Crime Bill) because Congress did not clearly indicate any effective date for the provision. Presumably September 13, 1994, is also the effective date of those provisions that increase a defendant's exposure upon revocation,

because Congress did not indicate an effective date for them either. If those provisions do not apply retroactively, then there are no grounds for an *ex post facto* challenge.

4. The Savings Clause

Before *Johnson,* it was common practice to apply ameliorative provisions retroactively. *But cf., Schaefer,* 120 F.3d 505 (4th Cir. 1997) (*see* Part One, II-C-2). For instance, before the Crime Bill, a defendant who violated his supervised release by possessing drugs faced mandatory revocation and a sentence of at least one-third the term of supervised release. After the Crime Bill, the same defendant would not be subject to a minimum term upon revocation, and if the defendant's violation were based on a failed drug test, the court would have the option of providing the defendant with drug treatment instead of a mandatory revocation sentence of imprisonment. After *Johnson,* it is unclear whether these ameliorative post-Crime Bill provisions apply to a defendant whose original offense occurred before September 13, 1994. *See* Part One, II-C

III. Revocation and the Assimilative Crimes Act, 18 U.S.C. § 13

The Assimilative Crimes Act (ACA) authorizes federal jurisdiction over state offenses, not punishable by federal statute, committed in special maritime or territorial jurisdictions. The elements and penalties of the state offense are "assimilated" into federal law. The defendant "shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. § 13(a).

A. The "like punishment" requirement referred to in the ACA does not mean that federal penalties must be identical to state penalties. Thus, supervised release may qualify as "like punishment" in a state that authorizes a period of incarceration followed by a period of probation, even if the state law has no provision for supervised release. "[A]lthough a federal prisoner is convicted and sentenced in accordance with the ACA, he is still subject to federal correctional policies." *United States v. Engelhorn,* 122 F.3d 508, 510 (8th Cir. 1997) (citing *United States v. Harris,* 27 F.3d 111 (4th Cir. 1994)).

Example: United States v. Gaskell, 134 F.3d 1039 (11th Cir.), *cert. denied*, 118 S. Ct. 1541 (1998): The district court properly sentenced defendant under the Assimilative Crimes Act (ACA) to five years' probation, even though the term of imprisonment for the offense under state law could not exceed one year. The court of appeals held that federal courts sentencing under the ACA may exceed the state statutory maximum term for a sentence of probation when necessary to effectuate the policies behind the federal probation statutes.

B. Thus, some circuits have allowed a revocation sentence of a term of imprisonment and supervised release that exceeded the maximum term of imprisonment available under state law.

See United States v. Pierce, 75 F.3d 173 (4th Cir. 1996) ("if limited to the maximum term of imprisonment permitted by the state, a district court would be unable to impose an appropriate term of supervised release upon individuals it determined to be in need of post-incarceration supervision, even though the crime was committed within an area of federal jurisdiction."); *see also United States v. Burke,* 113 F.3d 211 (11th Cir. 1997); *United States v. Rapal,* 146 F.3d 661 (9th Cir. 1998).

PART TWO
PROBATION VIOLATIONS

I. Imposition of a Term of Probation

A. Availability of Probation under 18 U.S.C. § 3561[11]

A defendant may be sentenced to probation unless the defendant was convicted of

1. a Class A or B felony;

2. an offense that precludes probation as a sentence; or

3. the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense

B. Availability of Probation under §5B1.1[12]

Under §5B1.1, a defendant may be sentenced to probation if –

1. the applicable guideline range is in Zone A of the Sentencing Table (0-6 months); or

2. the applicable guideline range is in Zone B (1-7, 2-8, 4-10, or 6-12 months) and the court imposes for the minimum term a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in §5C1.1(c)(3).

   Example: If the applicable range is 4 - 10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range. §5C1.1, comment, (n. 3).

[11]A defendant who is not eligible for probation under § 3561 is not necessarily required to serve time in prison. The Tenth Circuit has held that a sentence of zero months imprisonment for a Class A or B felony "does not literally violate the prohibition on probation in 18 U.S.C. § 3561(a)(1)." *United States v. Elliot,* 971 F.2d 620, 621 (10th Cir. 1992); *cited with approval in United States v. Lahey,* 186 F.3d 272, 274 (2d Cir. 1999) ("nothing in the statute requires a minimum term of imprisonment.").

[12]Note that neither the guidelines nor the policy statements apply to infractions; they only apply to felonies and Class A misdemeanors.

C. Minimum and Maximum Terms of Probation under 18 U.S.C. § 3561

1. Felony: not less than one nor more than five years

2. Misdemeanor: not more than five years

3. Infraction: not more than one year

D. Minimum and Maximum Terms of Probation under §5B1.2

1. Offense level 6 or greater: at least one year

2. Any other case: no more than three years

E. Multiple Terms of Probation

Whether imposed at the same time or at different times, multiple terms of probation run concurrently with each other, and with any federal, state, or local term of probation, supervised release, or parole for another offense. 18 U.S.C. § 3564(b)

F. Commencement of a Term of Probation

1. 18 U.S.C. § 3564(a) states that a "term of probation commences on the day the sentence of probation is imposed, unless otherwise ordered by the court."

2. A term of probation does not run while a defendant is "imprisoned in connection with a conviction" for a crime, unless the imprisonment is for less than 30 consecutive days. 18 U.S.C. § 3564(b)

II. Termination, Continuation, or Extension of Probation

A. Early Termination

After considering the factors in 18 U.S.C. § 3553(a), a court may terminate a term of probation, if the court is satisfied that such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3564(c).

1. Misdemeanor or Infraction: the court may terminate the probation at any time.

2. Felony: the court may terminate the probation at any time after the expiration of one year of probation**.**

B. Extension

If less than the maximum authorized term was previously imposed, the court may extend the term of probation at any time prior to the termination or expiration of the term probation. 18 U.S.C. § 3564(d)

C. Continuation

Upon finding that the defendant violated a condition of probation, the court may continue the probation, "with or without extending the term or enlarging the conditions; or revoke the sentence of probation . . ." 18 U.S.C. § 3565(a)

III. Revocation of Probation

A. Statutory Term of Imprisonment Available Upon Revocation

1. Pre-Crime Bill

18 U.S.C. § 3565(a)(2) provided that, upon revocation, the court could "impose any other sentence that was available under subchapter A (§§ 3551-3559) at the time of the initial sentencing."

a. The revocation sentence could not exceed the guideline range available at the time of the initial sentencing for the underlying offense.

United States v. Boyd, 961 F.2d 434 (3d Cir.), *cert. denied*, 506 U.S. 881(1992); United States v. Alli, 929 F.2d 995 (4th Cir. 1991); *United States v. Von Washington*, 915 F.2d 390 (8th Cir. 1990); *United States v. Forrester*, 19 F.3d 482 (9th Cir. 1992); *United States v. Maltais*, 961 F.2d 1485 (10th Cir. 1992); *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990); *United States v. Dow*, 990 F.2d 22 (1st Cir. 1993). *See also United States v. Granderson,* 511 U.S. 39, 56 (1994) (maximum sentence available upon revocation for drug possession under 18 U.S.C. § 3565(a) is the maximum of the originally applicable guideline range).

b. Departures from the guideline range calculated for the underlying offense could be based only on factors present at the time of the original sentence; post-sentence conduct could not provide a basis for departure.

United States v. Alli, 929 F.2d 995 (4th Cir. 1991). *United States v. Williams*, 961 F.2d 1185 (5th Cir. 1992); *United States v. Von Washington,* 915 F.2d 390 (8th Cir. 1990); *United States v. White,* 925 F.2d 284 (9th Cir. 1991); *United States v. Smith,* 907 F.2d 133 (11th Cir. 1990).

c. If the original sentence was the result of a downward departure, the court was not required to depart downward again, but could sentence up to the maximum of the originally calculated guideline range. *United States v. Forrester,* 19 F.3d 482 (9th Cir. 1994); *United States v. Redmond*, 69 F.3d 979 (9th Cir. 1995). If the original sentence was the result of a downward departure for substantial assistance, the court could only depart on that basis if the government renewed its motion before the resentencing. *United States v. Schaefer,* 120 F.3d 505 (4th Cir. 1997).

2. Post-Crime Bill (effective Sept. 13, 1994)

Congress amended 18 U.S.C. § 3565(a)(2) to require the court, upon revocation, to "resentence the defendant under subchapter A." [18 U.S.C. §§ 3551-3559][13]

a. Section 3553(a)(4)(B) specifically directs the courts to "consider . . . in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . ."

b. The term of imprisonment cannot exceed the statutory maximum for the original offense; the court is no longer limited by the initial guideline range for the original offense. *See, e.g., United States v. Pena,* 125 F.3d 285 (5th Cir.), *cert. denied*, 523 U.S. 1079 (1997); *United States v. Hudson,* 207 F.3d 852 (6th Cir.), *cert. denied*, 121 S. Ct. 214 (2000); *United States v. Schwegel,* 126 F.3d 551 (3d Cir. 1997); *but cf. United States v. Plunkett,* 94 F.3d 517 (9th Cir. 1996) (court may rely on "either the guidelines or the policy statements." *see* Part Two, I-A-2(e)); and *United States v. Olabanji*, 268 F.3d 636 (9th Cir. 2001) (court must consider the range applicable to the underlying offense if it rejects the range proscribed by the policy statement).

c. The legislative history indicates that the amended version of § 3553(a)(4)(B) was enacted in part in response to proposals initiated by the Commission to "make it clear that resentencing for probation and supervised release violations should be based 'upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose,' rather than upon the guidelines applicable to the initial sentencing." *See United States v. Schwegel,* 126 F.3d 551, 554 (3d Cir. 1997) (*citing* 136 Cong. Rec.

[13]Subchapter A encompasses 18 U.S.C. §§ 3551-3559, the general statutes for criminal penalties. Section 3559 lays out the maximum terms of imprisonment authorized for classes of federal offenses.

S14894-95 (Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Commission, 1990 letter to Sen. Strom Thurmond).)

d. The House Report states that the new version of § 3565(a) "is intended to allow the court after revoking probation to sentence the defendant to any statutorily permitted sentence and not be bound to only that sentence that was available at the initial sentencing." H.R. REP. No. 102-242(I) at 189 (1991).

e. The Ninth Circuit interprets the amended version of § 3565(a) differently:

"A sentencing court may rely upon either the guideline or policy statements in resentencing probation violators under § 3553 . . . . The new language continues to give the trial court discretion to sentence a probation violator to the range of sentences available at the time of the original sentencing." *United States v. Plunkett,* 94 F.3d 517, 519 (9th Cir. 1996).

i. The Ninth Circuit takes the view that upon revoking probation, the court resentences the defendant for the original offense – not for the probation violation.[14]

See United States v. Vasquez, 160 F.3d 1237 (9th Cir. 1998). ("[i]t is settled that a probation revocation resubjects the violator to resentencing for the underlying crime; the sentence imposed is thus for the original criminal offense, rather than for the conduct that led to the revocation.")

ii. The Ninth Circuit has found that although a court must consider Chapter Seven policy statements in imposing a sentence upon revocation of probation, any minimum term required by statute for the original offense trumps the range suggested by the policy statements.

United States v. Nieblas, 115 F.3d 703 (9th Cir. 1997) ("[i]f the applicable policy statement range is three-to-nine months and there is a statutorily required minimum sentence

[14]The Ninth Circuit is not alone in its view that a sentence imposed upon revocation of probation requires a resentencing of the original offense. *See* Thomas W. Hutchison, *et al.*, *Federal Sentencing Law and Practice* 1293-94 (1999) ("The premise of the statutory provisions on probation revocation . . . is that when probation is revoked, the defendant is being punished for the underlying offense (the offense that resulted in the imposition of probation). . . . Because the defendant is being punished for the underlying offense, the court should use the chapter five sentencing table. Under the current 18 U.S.C. § 3565, the court can use the defendant's conduct while on probation in recalculating the guidelines or as a basis for departure, if appropriate.")

of sixty months, the sentence suggested by the policy statement under §7B1.4(b)(2) is sixty months.")[15]

B. Mandatory Revocation

1. Drug Possession

18 U.S.C. § 3565(b) requires mandatory revocation of probation for possession of a controlled substance.

a. Pre-Crime Bill (Jan. 1, 1989-Sept. 12, 1994)

i. The Anti-Drug Abuse Act of 1988 (effective Jan. 1, 1989) added § 3565(a) to require mandatory revocation based on drug possession and imposition of a prison term of "not less than one-third of the original sentence."[16]

ii. The Supreme Court resolved a split in the circuits over the meaning of "one third of the original sentence," by finding that "the minimum revocation sentence . . . is one-third the maximum of the originally applicable Guidelines range." *United States v. Granderson*, 511 U.S. 39, 56-57 (1994).

iii. If the original sentence of probation was the result of a downward departure, then upon revocation under § 3565(b), the "original sentence" would probably be the maximum of the guideline range permitting a sentence of probation (12 months, based on a 6-12 month range in Zone B under the guidelines). *See Granderson,* 511 U.S. at 4041 (n. 15).[17]

---

[15]The Ninth Circuit relied on §7B1.4(b)(2), p.s., which provides that "[w]here the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range." The Ninth Circuit also stated that a sentence imposed upon revocation of probation is a sentence for the original offense, therefore, "[i]t follows that the court usually cannot go below the minimum statutory sentence for that offense," *Id.* at 706, *citing* §5G1.1(b).

[16]Section 7303(a)(2) of Pub. L. 100-690, which amended 18 U.S.C. § 3565 to add the "original sentence" provision, applied to persons whose probation, supervised release, or parole began after December 31, 1988.

[17]In a case that involved such a downward departure, the Ninth Circuit upheld a sentence of imprisonment that was higher than the maximum guideline range permitting a sentence of probation. In *United States v. Redmond*, 69 F.3d 979, 981 (9th Cir. 1995), the court noted that defendant's probation was revoked under the general authority of § 3565(a)(2), which governs violation of a condition of probation, as opposed to the specific drug possession provision—even though defendant's violation was using cocaine. Therefore, the reasoning of *Granderson* was inapplicable. The Ninth Circuit also noted that following the *Granderson* dicta in such cases would produce anomalous results by limiting the

b. Post-Crime Bill (effective Sept. 13, 1994)

As part of the Crime Bill, Congress eliminated the requirement that upon revocation for drug possession the defendant must be sentenced to "one-third of the original sentence." If a defendant violates probation by possessing drugs, § 3565(b)(1) now requires a court to "revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559] to a sentence that includes a term of imprisonment."[18]

c. Positive Drug Test as Evidence of Drug Possession

For purposes of mandatory revocation of probation or supervised release (18 U.S.C. §§ 3565(a) and 3583(g)), the appellate courts have held that evidence of drug use may provide evidence of possession.

i. Possession triggers the statutory requirement for revocation; use does not.

ii. A court may infer from a positive drug test that the defendant possessed a controlled substance, but the court is not required to make that finding. *See United States v. Dow*, 990 F.2d 22 (1st Cir. 1993); *United States v. Gordon*, 961 F.2d 426 (3d Cir. 1992) (positive urine test is circumstantial evidence of possession); *United States v. Clark*, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994); *United States v. Smith*, 978 F.2d 181 (5th Cir. 1992); *United States v. Young*, 41 F.3d 1184 (7th Cir. 1994); *United States v. Pierce*, 132 F.3d 1207 (8th Cir. 1997); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991); *United States v. Almandi*, 992 F.2d 316 (11th Cir. 1993) (positive urine test may equate to possession).

The Tenth and Sixth Circuits have found that use automatically constitutes possession. *United States v. Rockwell,* 984 F.2d 1112 (10th Cir. 1993) (controlled

---

court's discretion in sentencing violations based on drug possession, but allowing a court to sentence other violations using the pre-departure guideline range.

[18]In *United States v. Byrd,* 116 F.3d 770, 773-775 (5th Cir), *cert. denied*, 522 U.S. 940 (1997), the Fifth Circuit found that under the new version of § 3565, in sentencing a defendant for a violation based on drug possession, a court is not bound by the initial sentencing determination–including any downward departure. Unlike the pre-Crime Bill version of § 3565, the new version "does not refer to a past sentencing decision . . .".

substance in person's body is possession for purposes of mandatory revocation provisions), *cert. denied,* 508 U.S. 966 (1993); *United States v. Crace,* 207 F.3d 833, 83 (6th Cir. 2000) ("use constitutes possession") *citing United States v. Hancox,* 49 F.3d 223 (6th Cir. 1995).

d. Exemption from Mandatory Revocation if Finding of Drug Possession is Based on a Positive Drug Test

The Crime Bill also added § 3563(e) to require a court to consider "whether the availability of appropriate substance abuse programs, or the individual's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. § 3565(b)." *See* §7B1.4, p.s., comment. (n.6)(1997).

Examples: In *United States v. Pierce*, 132 F.3d 1207 (8th Cir. 1997), the district court revoked the defendant's probation after a finding of drug possession based solely on a failed drug test. The Eighth Circuit remanded the case for the district court to consider whether to apply the exception to mandatory revocation.

In *United States v. Crace,* 207 F.3d 833, 835-36 (6th Cir. 2000), the district court found that the defendant possessed drugs (while on supervised release) based on a failed drug test. The defendant failed on appeal to challenge whether the district court considered the drug treatment exemption in § 3583(d) (comparable to § 3563(e)). Although the Sixth Circuit found the defendant waived the issue, it noted that "[w]e assume that the district court considered and rejected this option . . . we do not require magic words in the record of the sentencing hearing indicating that substance abuse treatment was considered in order to uphold the district court's prison sentence."

i. If a court simply finds that the defendant failed a drug test, then the court is free to require further participation in a substance-abuse program.

ii. Although a court may find possession based on a positive drug test, it is not required to do so and the court may provide for treatment without revoking probation.

2. Refusal to Comply with Drug Testing

a. Pre-Crime Bill

Prior to September 13, 1994, § 3565 contained no provision mandating revocation for a defendant's refusal to comply with drug testing requirements.

b. Post-Crime Bill (effective Sept. 13, 1994)

As part of the Crime Bill, Congress added § 3565(b)(3), which requires revocation and a sentence of imprisonment.

See United States v. Coatoam, 245 F.3d 553, 555 (6th Cir. 2001). The Sixth Circuit held, as a matter of first impression, that the proper reading of 18 U.S.C. § 3565(b)(3) requires probation revocation for a defendant's failure to submit to drug testing when drug testing was imposed as a condition of probation. Essentially, the Court determined that Congress had made an error in drafting the statute: the plain meaning of the statute only required mandatory probation revocation if the defendant was convicted of a domestic violence offense. This produced an absurd result that was at odds with Congressional intent. *Id*. at 558.

3. Firearm Possession

a. Pre-Crime Bill (Jan. 1, 1988-Sept.12, 1994)

On November 18, 1988, Congress enacted § 3565(b), mandating revocation for possession of a firearm and the imposition of "<u>any other sentence that was available under subchapter A at the time of initial sentencing</u>."

b. Post-Crime Bill (effective Sept. 13, 1994)

On September 13, 1994, Congress amended § 3565(b)(2) to require the court upon revoking the defendant's probation for possession of a firearm, to "<u>resentence the defendant under subchapter A to a sentence that includes a term of imprisonment, if the defendant possessed a firearm</u>."

C. Chapter Seven Policy Statements

See Part One, I-D.

D. Supervised Release Following Revocation Sentence of Imprisonment

Under 18 U.S.C. § 3565, a court has discretion to sentence a probation violator to any sentence available under subchapter A. Subchapter A authorizes a court to sentence in accordance with subchapter D, which includes the supervised release provisions in 18 U.S.C. § 3583. A court may therefore impose a period of

supervised release as part of a revocation sentence to follow a term of imprisonment for a probation violation.

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996); *United States v. McCullough,* 46 F.3d 400 (5th Cir.), *cert. denied.,* 515 U.S. 1151 (1995); *United States v. Vasquez*, 160 F.3d 1237 (9th Cir. 1998*); United States v. Donaghe*, 50 F.3d 608 (9th Cir. 1994); *United States v. Hobbs*, 981 F.2d 1198 (11th Cir.), *cert. denied,* 510 U.S. 8323 (1993).

1. The policy statements state specifically that "[w]here probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1-1.3 shall apply to the imposition of a term of supervised release." §7B1.3(g)(1), p.s.

2. A court cannot, however, impose supervised release as part of a revocation sentence if the defendant was originally sentenced to probation under the Federal Juvenile Delinquency Act. *United States v. Sealed Appellant,* 123 F.3d 232 (5th Cir. 1997) (supervised release is not authorized under the Act.)

E. "Departure": Sentencing Outside the Applicable Range in §7B1.4, p.s.

A court is required to impose a sentence within the applicable guideline range unless there are grounds for departure. 18 U.S.C. § 3553(b). Because Chapter Seven policy statements are advisory, non-binding, and are not "guidelines," a revocation sentence outside the applicable range recommended in §7B1.4, p.s. is not a "departure," and a sentence within the statutory maximum of the underlying offense will be upheld unless it is plainly unreasonable. *See* Part One, I-E.

PART THREE
SUPERVISED RELEASE

I. Minimum and Maximum Terms of Supervised Release for the Original Offense

A. Minimum and Maximum Terms of Supervised Release under §5D1.2

1. Class A or B felony: at least three but not more than five years
   Class C or D felony: at least two but not more than three years
   Class E felony or Class A misdemeanor: one year

2. Except as otherwise provided, a term of supervised release shall not be less than any statutorily required term of supervised release.

B. Maximum Terms of Supervised Release under 18 U.S.C. § 3583(b)

18 U.S.C. § 3583(b) sets the maximum authorized terms of supervised release, *except as otherwise provided* (emphasis added); this applies to the initial imposition of supervised release:

Class A or B felony: not more than five years
Class C or D felony: not more than three years
Class E felony or Class A misdemeanor: not more than one year

C. Maximum Terms of Supervised Release under 18 U.S.C. § 3583(j)

18 U.S.C. §3583(j) sets the maximum authorized terms of supervised release for defendants convicted of a any offense listed in section 2332b(g)(5)(B) (federal crime of terrorism), the commission of which resulted in, or created a foreseeable risk of , death or serious bodily injury to another person, as any term of years or life.

D. Minimum Terms of Supervised Release: 21 U.S.C. §§ 841, 960

1. Certain statutes, notably the drug trafficking statutes, 21 U.S.C.§ § 841 and 960, provide for specific *minimum* terms of supervised release, without any stated maximum.[19]

[19]For instance, a defendant convicted of a ten-year mandatory drug offense (statutory maximum of life; Class A felony) faces a term of "at least 10 years" supervised release (in addition to imprisonment), if the defendant has a prior felony drug conviction. 21 U.S.C. § 841(b)(1)(A). Under 18 U.S.C. § 3583(b), the maximum period of supervised release for a Class A felony is 5 years.

2. Exceptions to Minimum Terms of Supervised Release

a. Safety Valve

A defendant who qualifies for the safety valve is not subject to any statutory minimum term of supervised release. 18 U.S.C. § 3553(f), § 5C1.2[20]

b. Substantial Assistance

If the government files a motion pursuant to 18 U.S.C. §3553(e), the defendant may be sentenced to a term of supervised release that is less than any minimum required by statute.

E. Circuit Split: Whether Drug Statutes with Minimum Terms of Supervised Release are Subject to the Maximum Terms Set Forth in § 3583

The Circuits are split over whether the maximum terms set forth in § 3583(b) limit the term of supervised release available if the defendant is subject to a minimum term of supervised release under § 841. The interplay between the two statutes arises in three different circumstances: (1) the minimum term in § 841(b) is less than the maximum term authorized by § 3583(b); (2) the minimum term in § 841 is the same as the maximum authorized by § 3583(b); and (3) the minimum term in § 841(b) is greater than the maximum authorized under § 3583 (b).[21]

1. The **Fourth** and **Fifth** Circuits have held that the maximum terms in § 3583(b) apply to § 841 offenses.

In *United States v. Good*, 25 F.3d 218 (4th Cir. 1994), the **Fourth Circuit** held that if the minimum term of supervised release in 21 U.S.C. § 841 is less than the maximum term set forth in § 3583, the maximum term applies. The Circuit relied in part on a previous version of §5D1.2(a), which stated that a term of supervised release "shall be at least three years but not more than five years or the minimum period required by statute, whichever is greater."

The **Fifth Circuit** has ruled that the maximum terms in § 3583(b) apply, at least in cases in which the § 841 minimum is the same as the § 3583(b) maximum. *United States v. Kelly*, 974 F.2d 22 (5th Cir. 1992).

---

[20]In *United States v. Hendricks*, 171 F.3d 1184 (8th Cir. 1999), the defendant's Class A felony carried a three to five-year term of supervised release under the guidelines; the court sentenced him to a ten-year term under § 841(b)(1)(A). The Eighth Circuit held that, where the safety valve is applicable, a district court is not only not bound by the terms of supervised release set forth in the drug statute, but does not even have authority to consider those terms.

[21]*See United States v. Eng,* 14 F.3d 165, 172-173 (2d Cir.), *cert. denied,* 513 U.S. 807 (1994).

2. The **Second, Sixth, Seventh, Eighth**, **Ninth**, and **Tenth Circuits** have held that the maximum term of supervised release imposed for a drug offense under 21 U.S.C. § 841 may exceed the maximum terms set forth in § 3583(b).

In a case in which the minimum term required under § 841 was the same as the maximum authorized by § 3583(b), the **Second Circuit** held that the maximum set by § 3583(b) did not apply. *United States v. Eng*, 14 F.3d 165 (2d Cir.), *cert. denied*, 513 U.S. 807 (1994). The court noted that § 3583(b) sets the maximums "except where otherwise provided"; thus, the more specific provisions of § 841 override. *See also United States v. Williams*, 65 F.3d 301 (2d Cir. 1995) (the minimum required by § 841 was less than the maximum authorized in § 3583(b) "'Congress intended to enhance the penalties available to combat drug offenses' and thus overrode the general applicable supervised release maximums of § 3583(b) . . .") *Id.* at 309 *citing Eng.*

United States v. Page, 131 F. 3d 1173 (**6th Cir.** 1997), *cert. denied*, 119 S. Ct. 77 (1999), following the rationale in *Eng*, the Sixth Circuit held that the terms set forth in § 841 fall under the "except where otherwise provided" clause in § 3583(b). Further, Congress set forth the minimum terms in § 841 to be "at least" a specified term; thus "the length of the maximum term is at the court's discretion."

*United States v. Shorty,*159 F.3d 312 (**7th Cir**.), *cert denied,* 526 U.S. 1147 (1999), adopted the majority view that the maximums in § 3583(b) do not limit the terms in § 841(b)(1)(C), which "sets a floor requirement, leaving the ceiling open, closed only by a defendant's death."

United States v. Page, 131 F.3d 1173 (**8th Cir.** 1991), adopted *Eng,* finding that the maximum terms set forth in § 3583(b) do not apply to the terms set forth in the drug statutes.

United States v. Garcia, 112 F.3d 395 (**9th Cir.** 1997), adopted the holding in *Eng* and held that the maximum terms in § 3583(b) do not limit the terms of supervised release set forth in § 841. In this case, the maximum term authorized under §5D1.2 was greater than the minimum required by § 841.

United States v. Orozco-Rodriguez, 60 F.3d 705 (**10th Cir.** 1995), cited from § 3583(b) the phrase "except as otherwise provided" to reject the Fourth and Fifth Circuits position; maximums in § 3583 do not limit the terms in § 841.

F. Imposition of Multiple Terms of Supervised Release

1. A term of supervised release runs concurrently with any other supervision (federal, state, or local term of supervised release, probation, parole) to which the defendant is subject. 18 U.S.C. § 3624(e)

2. The statute prohibits the imposition of consecutive terms of supervised release. *United States v. Hernandez-Guevara*, 162 F.3d 863 (5th Cir. 1998), *cert. denied*, 526 U.S. 1059 (1999); *United States v. Bailey*, 76 F.3d 320 (10th Cir.), *cert. denied*, 517 U.S. 1239 (1996); *United States v. Gullickson***,** 982 F.3d 1231 (8th Cir. 1993).

G. Commencement of Term of Supervised Release/Credit

18 U.S.C. § 3624(e) states that a "term of supervised release commences on the day the person is released from imprisonment." The statute also provides that a term of supervised release "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days."

1. Release from Imprisonment

   A Vermont work-release program (called "daily interrupt status") does not constitute release from "imprisonment." Supervised release term does not commence until the defendant is discharged from the program. *United States v. Rivard*, 184 F.3d 176 (2d Cir. 1999).

2. No Credit for Excess Time Served in Prison

   Supervised release commences on the date of "actual release," not on the date the defendant should have been released. (For example, a defendant whose sentence is reduced as a result of a retroactive guideline amendment or a legal error is not entitled to credit for excess time spent in prison.) *United States v. Johnson,* 120 S. Ct. 1114 (2000).

3. No Credit for Street-Time

   Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. 18 U.S.C. § 3583(e)(3); §7B1.5(b)

4. Tolling Supervised Release upon Deportation: Circuit Split

Compare:

In *United States v. Isong,* 111 F.3d 428 (6th Cir. 1997), the **Sixth Circuit** upheld the district court's imposition of a "special condition" that the defendant's term of supervised release be tolled upon deportation and be resumed upon the defendant's reentry into the United States.

With:

In *United States v. Balogun,* 146 F.3d 141 (2d Cir. 1998), the **Second Circuit** found that Congress did not authorize tolling supervised release during deportation or exclusion. To support its conclusion, the Circuit noted the expeditious removal provisions of the Immigration Act; the explicit statutory provision of § 3624(e) authorizing suspension of supervised release while a defendant is in prison for 30 or more consecutive days; and the function of supervised release to assist the defendant's transition from prison to the community.

II. Modification of Supervised Release: Extending a Term of Supervised Release

In lieu of terminating or revoking a term of supervised release, a court may "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." 18 U.S.C. § 3583(e)(2)

The "maximum authorized term" of supervised release may vary depending on the circuit and the original offense. If the term of supervised release was imposed pursuant to a conviction under 21 U.S.C. § 841, the maximum authorized terms set forth in § 3583 will not apply in the **Second, Sixth, Seventh, Eighth, Ninth** or **Tenth Circuits**, but will apply in the **Fourth** and **Fifth Circuits**. *See* discussion in Part Three, I-E

III. Term of Imprisonment Available Upon Revocation of Supervised Release

A. Statutory Limits 18 U.S.C. § 3583(e)

1. Pre-Crime Bill

Prior to the 1994 Crime Bill, 18 U.S.C. § 3583(e)(3) stated that upon revocation of a term of supervised release, the defendant could be required to serve in prison all or part of "the term of supervised release" without credit for time previously served on post-release supervision. As a further limitation, § 3583(e)(3) stated that for a Class B felony, the maximum term of imprisonment upon revocation could not exceed 3 years; for a Class C or D felony, not more than two years.

2. Post Crime Bill (effective Sept. 13, 1994)

a. The 1994 amendment to § 3583(e) states that upon revocation of supervised release, a defendant may be required to serve in prison all or part of "the term of supervised release authorized by statute for the original offense, [§ 3583(b)] without credit for time previously served on post-release supervision."

b. Under 18 U.S.C. § 3583(e), the maximum term of imprisonment available upon revocation depends on the classification of the original offense:

Class A felony: five years[22]
Class B felony: three years
Class C or D felony: two years
Class E felony or Class A misdemeanor: one year

c. Determining the maximum imprisonment available depends on (1) the class of the original offense under 18 U.S.C. § 3559(a); (2) the authorized term of supervised release for the original offense under § 3583(b); (3) the limits set forth in § 3583(e).

B. Chapter Seven Policy Statements

See Part One, I-D.

C. Imprisonment in Excess of the Statutory Maximum for the Original Offense

All circuits that have considered the issue have upheld a revocation sentence of imprisonment, which, combined with the prior term of imprisonment for the original offense, exceeds the statutory maximum for the original offense.

United States v. Celestine, 905 F.2d 59 (5th Cir. 1990); *United States v. Wright,* 2 F.3d 175 (6th Cir. 1993); *United States v. Colt,* 126 F.3d 981 (7th Cir. 1997); *United States v. Purvis,* 940 F.2d 1276 (9th Cir. 1991); *United States v. Robinson,*62 F.3d 1282 (10th Cir. 1995); *United States v. Proctor,* 127 F.3d 1311 (11th Cir.1997).

D. Imprisonment in Excess of Guideline Maximum for Original Offense

All circuits that have considered the issue have held that the term of imprisonment that can be imposed upon violation of supervised release is not limited by the maximum term of imprisonment that was available under the guideline range for the original offense.

[22]Prior to the Crime Bill of 1994, § 3583(e) did not include a maximum term of imprisonment available upon revocation if the original offense had been a Class A felony.

United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991); *United States v. Mandarelli*, 982 F.2d 11 (1st Cir. 1992); *United States v. Dillard*, 910 F.2d 461 (7th Cir. 1990); *United States v. Smeathers*, 930 F.2d 18 (8th Cir. 1991).

E. Revocation of Concurrent Terms of Supervised Release

1. Imposition of Consecutive Terms of Imprisonment upon Revocation of Concurrent Term of Supervised Release

A district court has authority to impose consecutive terms of imprisonment upon revoking concurrent terms of supervised release. 18 U.S.C. § 3584(a)

See United States v. Cotroneo, 89 F.3d 510 (8th Cir.), *cert. denied*, 519 U.S. 1018 (1996). The Eighth Circuit rejected the defendant's argument that imposition of imprisonment upon revocation of supervised release is controlled by 18 U.S.C. § 3624(e), which requires that terms of supervised release run concurrently. Instead, the process is governed by 18 U.S.C. § 3584(a), which states that, if multiple terms of imprisonment are imposed at the same time, the terms may run concurrently or consecutively.

See also United States v. Johnson, 138 F.3d 115 (4th Cir. 1998); *United States v. Quinones*, 136 F.3d 1293 (11th Cir. 1998); *United States v. Jackson*, 176 F.3d 1175 (9th Cir. 1999); *United States v. Rose*, 185 F.3d 1108 (10th Cir. 1999) (remanding imposition of consecutive terms of imprisonment for the district court to state on the record its reasons for imposing consecutive sentences, although district court need not expressly weigh each § 3553(a) factor on the record).

See United States v. Mayotte, No. 99-3845, 2001 WL 491222, at *1 (8th Cir. May 10, 2001) (per curiam). The Court upheld imposition of revocation sentence that was to be served consecutive to a state sentence that had not yet been imposed at the time of revocation. This was a matter of first impression for the Eighth Circuit. The Court joined the Second, Fifth, Tenth, and Eleventh Circuits in holding that a district court has broad discretion and may impose a federal sentence to be served consecutively to a "yet-to-be-imposed" state sentence. *See United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991); *Salley v. United States*, 786 F.2d 546, 547-48 (2d Cir. 1986). The Sixth, Seventh, and Ninth Circuits disagree. *See Romandine v. United States*, 206 F.3d 731, 738-39 (7th Cir. 2000); *United States v. Quintero*, 157 F.3d 1038-41 (6th Cir. 1998); *United States v. Eastman*, 758 F.2d 1315, 1317-18 (9th Cir. 1985).

2. Revocation of a Term of Supervised Release May Not Automatically Terminate Concurrent Term of Supervised Release

In *United States v. Alvarado,* 201 F.3d 379 (5th Cir. 2000), the defendant was on two concurrent terms of supervised release that were imposed on separate dates. The district court revoked the second term of supervised release under § 3583(g) based on drug possession, but did not address the first term of supervised release. After serving his revocation sentence, the defendant was again released from confinement and shortly thereafter the court revoked the first term of supervised release and sentenced the defendant to an additional 12 months in prison. The defendant argued that the court lacked jurisdiction because § 3583(g) mandates revocation for drug possession and therefore the court was required to revoke the first term of supervised release when it revoked the second term. The Fifth Circuit held that the revocation of one term of supervised release does not automatically terminate a concurrent term of supervised release. Although § 3583(g) would have required revocation of the first term of supervised release, the defense attorney failed to comply with the procedural requirements in Fed. R. Crim. P. 32.1 to place the issue before the court.

IV. Mandatory Revocation of Supervised Release

A. Drug Possession

18 U.S.C. § 3583(g) requires revocation of supervised release for possession of a controlled substance.

1. Pre-Crime Bill (Dec. 31, 1988 to Sept.13, 1994)

18 U.S.C. § 3583(g) required mandatory revocation of supervised release and a term of imprisonment of at least "one-third of the term of supervised release" for possession of controlled substances.

2. Post-Crime Bill (effective Sept. 13, 1994)

The 1994 Crime Bill eliminated the requirement that the defendant serve in prison "one-third of the term of supervised release." 18 U.S.C. § 3583(g) now provides that 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 § 3583(e)(3).

3. Positive Drug Test as Evidence of Drug Possession

For purposes of mandatory revocation of probation or supervised release (18 U.S.C. §§ 3565(a) and 3583(g)), the appellate courts have held that evidence of drug use may provide evidence of possession.

a. Possession triggers the statutory requirement for revocation; use does not.

b. A court may infer from a positive drug test that the defendant possessed a controlled substance, but the court is not required to make that finding.

See United States v. Dow, 990 F.2d 22 (1st Cir. 1993); *United States v. Gordon*, 961 F.2d 426 (3d Cir. 1992) (positive urine test is circumstantial evidence of possession); *United States v. Clark*, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994); *United States v. Smith*, 978 F.2d 181 (5th Cir. 1992); *United States v. Hancox*, 49 F.3d 223 (6th Cir. 1995); *United States v. Young*, 41 F.3d 1184 (7th Cir. 1994); *United States v. Pierce*, 132 F.3d 1207 (8th Cir. 1997); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991); *United States v. Almandi*, 992 F.2d 316 (11th Cir. 1993) (positive urine test may equate to possession).

c. The Tenth and Sixth Circuits have found that use automatically constitutes possession.

United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993) (controlled substance in person's body is possession for purposes of mandatory revocation provisions), *cert. denied,* 508 U.S. 966 (1993); *United States v. Crace,* 207 F.3d 833, 83 (6th Cir. 2000) ("use constitutes possession . . .") *(citing United States v. Hancox,* 49 F.3d 223 (6th Cir. 1995)).

4. Exemption from Mandatory Revocation if Finding of Drug Possession is Based on a Positive Drug Test

The Crime Bill also amended § 3583(d) to provide an exception to the mandatory revocation rule in § 3583(g) if the defendant fails a drug test. The exception allows the court to 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 the United States Sentencing Commission guidelines from the rule of § 3583(g)." *See* USSG §7B1.4, p.s., comment. (n.6).

B. Refusal to Comply with Drug Testing

1. Pre-Crime Bill: no provision

2. Post-Crime Bill (effective Sept. 13, 1994)

Section 3583(g) requires revocation and a sentence of imprisonment (not to exceed the maximum term of imprisonment authorized in § 3583(e)(3)) if

the defendant refuses to comply with drug testing imposed as a condition of supervised release.

C. Firearm Possession

1. Pre-Crime Bill: no provision

2. Post-Crime Bill (effective Sept. 13, 1994)

   Section 3583(g)(2) requires revocation and a sentence of imprisonment (not to exceed the maximum term of imprisonment authorized in § 3583(e)(3)) if the defendant possesses a firearm while on supervised release.

V. Supervised Release Following a Revocation Sentence of Imprisonment ("Stacking")

A. Pre-Crime Bill

In *United States v. Johnson,* 529 U.S. 694 (2000), the **Supreme Court** resolved a split in the circuits by finding that prior to the Crime Bill, a court had authority under § 3583(e)(3) to impose a term of supervised release to follow a sentence of imprisonment imposed upon revocation.[23]

1. For pre-Crime Bill offenses, the term of supervised release that may be imposed upon revocation is limited to the length of the term of supervised release initially imposed minus the term of imprisonment imposed upon revocation. [24]

---

[23]The **First** and **Eighth** Circuits held that a court could impose a term of supervised release to follow a revocation sentence of imprisonment, if the combined length of the imprisonment for the revocation and the new term of supervised release did not exceed the length of the original term of supervised release. *United States v. O'Neil*, 11 F.3d 292 (1st Cir. 1993); *United States v. Stewart*, 7 F.3d 1350 (8th Cir. 1993). The **Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits** held that § 3583(e) did not authorize the district court to impose an additional term of supervised release. *United States v. Koehler*, 973 F.2d 132 (2d Cir. 1992); *United States v. Malesic*, 18 F.3d 205 (3rd Cir. 1994); *United States v. Cooper*, 962 F.2d 339 (4th Cir. 1992); *United States v. Holmes*, 954 F.2d 270 (5th Cir. 1992); *United States v. Truss*, 4 F.3d 437 (6th Cir. 1993); *United States v. McGee*, 981 F.2d 271 (7th Cir.1992); *United States v. Behnezhad*, 907 F.2d 896 (9th Cir. 1990); *United States v. Rockwell*, 984 F.2d 1112 (10th Cir.), *cert. denied*, 508 U.S. 966 (1993), *overruling United States v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991); *United States v. Tatum*, 998 F.2d 893 (11th Cir. 1993).

[24]In finding that the pre-Crime Bill version of § 3583(e) authorized a court to impose an additional term of supervised release, the Supreme Court relied in part on the meaning of the term "revoke." Because the pre-Crime Bill version of § 3583(g) requires that upon finding that the defendant possessed a controlled substance the court "shall *terminate* the term of supervised release," an argument could be made that a revocation sentence imposed pursuant to the pre-Crime Bill version § 3583(g) cannot include a term of supervised release. *See United States v. Johnson,* 120 S. Ct. at 1814 (n.7) (2000) (Scalia, A., dissenting).

In *Johnson*, the defendant was originally sentenced to 25 months' imprisonment, plus three years of supervised release. He completed his prison portion of the sentence and had served seven months of supervised release. Upon revocation of his supervised release, the court imposed a sentence of 18 months imprisonment, plus 12 months of supervised release.

2. If less than the maximum term of supervised release was originally imposed, then "a court presumably may, before revoking the term, extend it pursuant to § 3583(e)(2); this would allow the term of imprisonment to equal the term of supervised release authorized for the initial offense." *Id.* at 1807.

B. Post-Crime Bill (effective Sept. 13, 1994)

As part of the Crime Bill, Congress enacted 18 U.S.C. § 3583(h), which specifically authorizes a court to impose an additional term of supervised release, if the court imposes a revocation sentence of less than the maximum term of imprisonment authorized under § 3583(d).[25]

1. Once a defendant has been sentenced to the maximum term of imprisonment provided by § 3583(e)(3), whether all at once or after several revocations, the court's power to re-impose supervised release under § 3583(h) is extinguished.[26] Subsection (h) authorizes a court to re-impose supervised release only when the defendant has been required to serve a term of imprisonment that is less than the § 3583(e)(3) maximum.

   Example: In *United States v. Davis*, 187 F.3d 528 (6th Cir.1999), the district court erred by imposing a one-year term of supervised release to follow a two-year term of imprisonment imposed upon revocation, because under § 3583(e) the maximum term of imprisonment available upon revocation was two years.

---

[25]18 U.S.C. § 3583(h) provides: "When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by the 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."

[26]A defendant is subject to successive revocations until he receives the maximum term of imprisonment authorized under § 3583(e). *See United States v. Stiefel,* 207 F.3d 256 (5th Cir. 2000) (court has statutory authority to revoke supervised release imposed as part of previous revocation sentence. (Note: At the first revocation hearing, defendant received what appears to have been an illegal sentence. The defendant received the statutorily authorized maximum term of imprisonment of two years, as well as supervised release. Section 3583(h) authorizes a term of supervised release if the term of imprisonment is less than the maximum allowed under § 3583(e). Because the defendant failed to file a notice of appeal within ten days after the first revocation sentence, the Fifth Circuit found that he waived the issue.)

2. The length of the additional term of supervised release cannot 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." 18 U.S.C. § 3583(h)

Example: In *Davis,* the defendant's original offense was a Class C felony, thus the maximum term of supervised release available was three years under 18 U.S.C. § 3583(b). The court of appeals noted that the district court could sentence the defendant to a term of imprisonment of two years less one day (thus imposing less than the maximum authorized under § 3583(e)(3)) followed by a one-year term of supervised release term.

3. Maximum Term of Additional Supervised Release, if the Original Sentence Included a Statutory Minimum Term of Supervised Release under 21 U.S.C. §§ 841 or 960

Because the **Second, Sixth, Seventh, Eight, Ninth and Tenth Circuits** hold that § 3583(b) supervised release maximums do not apply to offenses under 21 U.S.C. §§ 841 and 960, the maximum term of supervised release available upon revocation in these circuits may be life, as long as the term of imprisonment imposed is less than the maximum available under § 3583(e)(3). *See* discussion in Part Three, I-A-E.

Example: At his initial sentencing, the defendant received the minimum three-year term of supervised release required under 21 U.S.C. § 841(b)(1)(C), a Class C felony. Because the Seventh Circuit takes the view that the maximum term of supervised release authorized for an offense under § 841(b)(1)(C) is life, under § 3583(h), "the court could have sentenced [the defendant] to a maximum of two years minus one day plus a term of supervised release. . . . the maximum amount of supervised release possible would have been life minus the amount of imprisonment imposed during the sentencing for revocation." *United States v. Shorty,* 159 F.3d 312 (7th Cir. 1998), *cert. denied,* 526 U.S. 1147 (1999).

VI. "Departures": Sentencing Outside the Applicable Range in §7B1.4, p.s.

Under 18 U.S.C. § 3553(b), a court is required to impose a sentence within the applicable guideline range unless there are grounds for departure. Because Chapter Seven policy statements are advisory and non-binding and are not "guidelines," a revocation sentence outside the applicable range recommended in §7B1.4, p.s., is not a "departure," and a sentence within the statutory maximum allowed by statute will be upheld unless it is plainly unreasonable. A court is not required to give notice or make detailed findings in imposing a sentence outside the applicable revocation range. *See* Part One-I-E.

See United States v. Ramirez-Rivera, 241 F.3d 37, 39 (1st Cir. 2001). The First Circuit affirmed a term of imprisonment upon revocation of supervised release. The defendant's supervised release was revoked due to failure to comply with drug testing and required drug treatment programs. The term of imprisonment was based on the lower court's determination that the defendant was in need of intensive substance abuse and psychological treatment in a structured environment, justifying a sentence that was well above the recommended range. The recommended range for the prison term was 3-9 months; the defendant was sentenced to 24 months. The Court based its decision on the fact that the defendant had effectively waived his opportunity to object to the term of imprisonment.

See United States v. Tadeo, 222 F.3d 623, 626 (9th Cir. 2000). The Court upheld the district court's upward departure from the recommended sentencing range for revocation of supervised release. The lower court based its departure on the defendant's past criminal behavior, drug use, and danger to society. The Ninth Circuit reiterated that Chapter Seven provides policy statements that may be freely rejected by a district court without abusing its discretion, if the sentence imposed is within the statutory maximum.

PART FOUR
OTHER ISSUES

I. Authority of Probation Office to Petition for Revocation

The Ninth and Tenth Circuits have rejected arguments that the probation office's practice of filing petitions seeking warrants and revocation proceedings (1) exceeds probation officers' statutory authority under 18 U.S.C. § 3603; (2) is an improper delegation of judicial function; (3) usurps the U.S. Attorney's authority and discretion to file an information or seek an indictment; or (4) amounts to the unauthorized practice of law.

United States v. Davis, 151 F.3d 1304 (10th Cir. 1998), *cert. denied*, 528 U.S. 982 (1999); *United States v. Mejia-Sanchez,* 172 F.3d 1172 (9th Cir. 1999). *See also United States v. Burnette,* 980 F. Supp. 1429 (M.D. Ala. 1997) (upholding practice). *Contra United States v. Jones,* 957 F. Supp. 1088 (E.D. Arkansas 1997) (invalidating process).

II. Delayed Revocation

A. Pre-Crime Bill

Prior to the Crime Bill, although there was no explicit statutory authority to delay revocation of probation or supervised release until after the term had expired, several circuits found that the district court possessed inherent authority to delay revocation.

See United States v. Neville, 985 F.2d 992 (9th Cir.), *cert. denied,* 508 U.S. 943 (1993); *United States v. Barton,* 26 F.3d 490 (4th Cir. 1994); *United States v. Jimenez-Martinez,* 179 F.3d 980 (5th Cir. 1999) (holding hearing for revocation of supervised release nearly six years after issuance of arrest warrant did not violate defendant's right to due process; defendant frustrated the execution of the arrest warrant when he absconded); *see also United States v. Morales,* 45 F.3d 693 (2d Cir. 1995) (affirming district court's jurisdiction to modify a term of supervised release pursuant to 18 U.S.C. § 3583(e)(2) after date supervised release was scheduled to expire).

B. Post-Crime Bill (effective September 13, 1994)

Courts now have statutory authority to permit courts to delay revocation proceedings for "any period reasonably necessary" after expiration of a term of probation or supervised release, if the violation occurred within the term, and a warrant or summons was issued before expiration of the supervision period. 18 U.S.C. §§ 3565(c) (probation), 3583(i) (supervised release). *United States v. Naranjo*, 259 F.3d 379 (5th Cir 2001), once the court's post term jurisdiction is preserved, there is no bar to amending the petition. (*But see United States v.*

Downs, 2000 WL 1568598 (WDNY 2000), court may only consider those alleged violations contained in the petition for revocation issued before expiration of supervised release.)

PART FIVE
DISCRETIONARY CONDITIONS OF SUPERVISION

I. Generally

A. In addition to the mandatory conditions of probation and supervised release listed at 18 U.S.C. §§ 3563(a) and 3583(d), the district court may impose discretionary conditions, listed at § 3563(b) and referenced in § 3583(d), or any other conditions it deems appropriate to the extent that–

1. The conditions are reasonably related to the factors set forth in § 3553(a)(1) and (a)(2); and

2. The conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in § 3553(a)(2).

3. Conditions of supervised release are also required to be consistent with any pertinent policy statements issued by the Sentencing Commission.

B. District Court's Authority to Impose Conditions May Not be Delegated to the Probation Officer.

United States v. Dempsey, 180 F.3d 1325 (11th Cir. 1999): Because § 3583(d) refers exclusively to a *court's* authority to impose occupational restrictions, the probation officer lacked the authority to impose an occupational restriction as a condition of supervised release. After the defendant's supervised release was transferred to another jurisdiction, his probation officer in the second district imposed a condition prohibiting him from engaging in the rare coin business.

In *United States v. Kent,* 209 F.3d 1073 (8th Cir. 2000): The district court improperly delegated to the probation officer judicial authority to determine whether the defendant would have to participate in mental health counseling while on supervised release.

II. Examples of Discretionary Conditions

A. Conditions Related to Employment

Conditions relating to employment must bear a reasonably direct relationship to the conduct constituting the offense. 18 U.S.C. §§ 3563(b)(5), 3583(d); USSG §5F1.5.

United States v. Coon, 187 F.3d 888 (8th Cir.) *cert. denied,* 120 S. Ct. 1417 (2000): In light of defendants' long-standing and extensive pattern of criminal

racketeering activities, prohibition against self-employment during supervised release was reasonably necessary to protect the public.

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999): Prohibition against defendant's employment as a trucker if it required his absence from town for more than 24 hours was an unreasonable occupational restriction. The restriction did not bear a reasonably direct relationship with his offense (defendant had unlawfully transported explosives to a storage locker many years previously).

United States v. Ritter, 118 F.3d 502 (6th Cir. 1997): Defendant, who had been convicted of embezzling from the bank where he worked, was properly ordered to inform his new and future employers of his arrest and conviction as a condition of his supervised release. The requirement fosters the defendant's ability to account for his behavior and remain law-abiding and thus was not an abuse of discretion.

B. Conditions Imposed on Deportable Aliens

1. Deportation as a Condition of Supervised Release

Although both § 3563(b) and § 3583(d) make reference to the court's ability to order deportation of a deportable alien as a condition of probation or supervision, the Eleventh Circuit has held that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 8 U.S.C. § 1229a(a), eliminated the district court's jurisdiction to order an alien deported as a condition of supervision. *See, e.g.*, *United States v. Romeo*, 122 F.3d 941 (11th Cir. 1997) (supervised release).

2. Suspension or Tolling of Supervised Release

Compare:

United States v. Isong, 111 F.3d 428 (6th Cir.), *cert. denied*, 522 U.S. 883 (1997): After defendant pleaded guilty to immigration charges and was deported, the district court ordered at sentencing that the supervised release term would resume if the defendant returned to the United States. The defendant did reenter and violated supervised release. The Sixth Circuit rejected his argument that the district court was without authority to toll the running of the supervised release term; the court reasoned that it was an appropriate way to make supervised release meaningful for defendants who are being deported.

With:

United States v. Balogun, 146 F.3d 141 (2d Cir. 1998): As a "special condition" of supervised release, the district court ordered that the term of

supervised release be tolled when the defendant was delivered to the INS to be excluded and that the supervised release term be resumed if the defendant reentered the United States within 20 years after the date of the offense. The district court cited as authority for imposing the condition 18 U.S.C. § 3583(d), which authorizes a court to impose "any other condition it considers to be appropriate." The Second Circuit found that neither § 3583(d) nor any other statute confers such authority and that virtually all of the conditions specified in the applicable statutes "are requirements with which a defendant himself must be ordered to comply." The timing of supervised release is not itself an "order that the defendant do or refrain from doing something." Congress did not intend to authorize tolling under these circumstances, the Second Circuit concluded, based on the expedited removal provisions in the Immigration Act, the express provision for tolling of supervised release in § 3624(e), and the purpose of supervised release to facilitate transition from prison to community life.

C. Payments

The circuits are split on the permissibility of ordering various types of payments as conditions for supervised release.

Compare:

United States v. Fore, 169 F.3d 104 (2d Cir.), *cert. denied*, 527 U.S. 1028 (1999): Although the statute did not authorize restitution for defendant's Social Security fraud convictions under 42 U.S.C. § 408, the court could impose restitution payments to the Social Security Administration as a condition of supervised release. *United States v. Dahlstrom*, 180 F.3d 677 (5th Cir.), *cert. denied*, 529 U.S. 1036 (2000): Although restitution may not be directly permitted under § 3663(a), a district court may order restitution within the context of a supervised release.

United States v. Merric, 166 F.3d 406 (1st Cir. 1999): Defendant could be required to repay counsel fees paid by the government for his representation as a condition of supervised release, where defendant had the means to do so. The condition is related to goal of deterrence, just like any other financial imposition, and would not result in deprivation of liberty. *United States v. Turner*, 998 F.2d 534 (7th Cir.), *cert. denied*, 510 U.S. 1026 (1993): Assessment of costs of imprisonment deters criminal conduct.

With:

United States v. Cottman, 142 F.3d 160 (3d Cir. 1998): Requiring restitution of money the FBI used in a sting operation as a condition of supervised release was improper because the Government was not a victim. *United States v. Evans*, 155

F.3d 245 (3d Cir. 1998): A condition supervised release requiring reimbursement of cost of appointed counsel was not reasonably related to defendant's criminal offense and had no relationship to the statutory goals. *See also United States v. Eyler*, 67 F.3d 1386 (9th Cir. 1995); *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992).

D. Conditions Imposed in Pornography and Sex Offenses

United States v. Fellows, 157 F.3d 1197 (9th Cir. 1998), *cert. denied*, 528 U.S. 852 (1999): Requirement that possessor of child pornography follow lifestyle restrictions or treatment requirements imposed by his therapist as part of sex offender treatment met the statutory criteria and was not overly broad or an improper delegation of judicial authority.

United States v. Bee, 162 F.3d 1232 (9th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999): Conditions prohibiting defendant (convicted of child sexual assault) from possessing sexually stimulating or sexually oriented material deemed inappropriate by his probation officer or treatment staff and from patronizing a place in which such material was available were proper to promote defendant's rehabilitation and to protect the public. The district court has broad discretion in setting conditions of supervised release, including restrictions that infringe on fundamental rights like the First Amendment.

United States v. Fabiano, 169 F.3d 1299 (10th Cir.), *cert. denied*, 528 U.S. 852 (1999): For defendant convicted of receipt of child pornography (via the Internet), the district court acted within its discretion in requiring defendant to comply with the registration requirements of Colorado sex offender registration statute.

United States v. Cranden, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999): Condition that defendant not possess, procure or obtain access to a computer network unless approved by the probation office was appropriate to prevent recidivism and protect the public for a defendant convicted of receiving child pornography. The offense involved establishing a relationship with a 14-year-old girl via the Internet and crossing state lines to have sex with her and photograph her.

E. Prohibiting Use of Alcohol, Controlled Substances

United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992): District court abused discretion in imposing special conditions prohibiting purchase or use of alcohol and subjecting defendant convicted of mail fraud to warrantless searches for alcohol and drugs, because there was no evidence of alcoholism or alcohol related crime.

United States v. Guy, 174 F.3d 859 (7th Cir. 1999): It was not plain error for district court not to suspend drug testing requirements even though defendant had no prior history of drug use.

United States v. Behler, 187 F.3d 772 (8th Cir.), *cert. denied,* 513 U.S. 960 (1999): District court's total ban on purchase and use of alcohol as condition of supervised release by defendant who trafficked in methamphetamine was not an abuse of discretion. Even though the offense did not involve alcohol, and there was no evidence of alcoholism, the probation officer's confidential sentencing recommendation indicated that any use of alcohol would limit defendant's ability to maintain a drug-free lifestyle.

United States v. Stoural, 990 F.2d 372 (8th Cir. 1993): Condition that probationer not use alcohol and be subject to warrantless searches for alcohol and drug use held not reasonably related to crime of conversion of collateral

F. Home Detention; Intermittent Confinement

See Part One, I-D-3.

G. Other Conditions of Probation and Supervised Release

1. Conditions allowed:

United States v. Knight, 122 S. Ct. 587 (Dec. 2001): Search of probationers apartment when supported by reasonable suspicion and authorized as condition of probation was reasonable within the meaning of the fourth amendment.

United States v. A-Abras, Inc., 185 F.3d 26 (2d Cir. 1999): District court's order that defendant convicted of illegal asbestos removal pay a municipal fine on a specified monthly schedule as a condition of his supervised release did not violate principles of federalism.

United States v. Schave, 186 F.3d 839 (7th Cir. 1999): Condition that defendant not associate with members of groups that advocate violence or white supremacy was not unconstitutionally vague nor an unreasonable restriction on defendant's freedom of association. Defendant was a white

supremacist convicted of selling explosives to an agent he believed was a member of a white supremacist organization.

United States v. Schiff, 876 F.2d 272 (2d Cir. 1989): Condition that probationer not advocate noncompliance with tax statutes reasonably related to crime of tax evasion.

United States v. Clark, 918 F.2d 843 (9th Cir. 1990): Condition that probationers publicly apologize reasonably related to the permissible end of rehabilitation for the crime of perjury before the Equal Employment Opportunity Commission.

United States v. Jordan, 890 F.2d 247 (10th Cir. 1989): Condition that probationer incur no new debts reasonably related to the crime of making a false statement to obtain a loan.

United States v. Cothran, 855 F.2d 749 (11th Cir. 1988): Condition that probationer stay out of his home county for the first two years of probation reasonably related to goals of rehabilitation and protection of the community.

United States v. Amer, 110 F.3d 873 (2d Cir.), *cert. denied*, 118 S. Ct. 258 (1997): Defendant was convicted of violating the International Parental Kidnaping Crime Act. The Second Circuit upheld a condition of supervised release requiring that the children be returned to the United States, even though the children were then in Egypt and an Egyptian court had granted custody to the defendant. The condition was reasonably related to the offense of conviction and serves the goal of general deterrence.

2. Conditions not allowed:

United States v. Scott, 270 F.3d 362 (8th Cir. 2001): Abuse of discretion when court imposed "special condition of sex offender" when the condition did not relate to the offense of conviction (bank robbery) or the conduct that led to the revocation and the government did not offer evidence of a propensity to commit future sex offenses other than the defendant's 15-year-old prior conviction for a sex offense.

United States v. Mills, 959 F.2d 516 (5th Cir. 1992): Requirement that defendant sell his car dealership not reasonably necessary to protect the public from further fraud by defendant.

United States v. Voda, 994 F.2d 149 (5th Cir. 1993): Condition that probationer not possess a firearm while on probation was abuse of discretion because underlying crime was negligent discharge of a pollutant.

United States v. Kent, 207 F.3d 833 (8th Cir. 2000): District court abused its discretion in including special condition that would potentially (at discretion of probation officer) require the defendant to submit to psychological counseling when there was no evidence suggesting need for the treatment.

United States v. Sun Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 119 S. Ct. 1402 (1999): District court erred in requiring that members of defendant-agricultural cooperative be subject to reporting requirements as a condition of cooperative's probation. There is no precedent for the imposition of probationary conditions on entities who are not defendants. Imposition of a condition on a third party exposes the defendant to revocation for "violations" by persons not under his control. Section 3563 specifies that "defendant" is the person to be burdened with conditions of probation.