

# Probation and Supervised Release: Imposition & Revocation

---

Amanda M. LaMotte, U.S. Probation Officer, M.D. Ga.

Laura M. Roffo, Supervisory U.S. Probation Officer,  
D. Ma.

**Moderator:** Brent E. Newton, Deputy Staff  
Director, USSC

# Road Map

- Commission's 2010 Supervised Release Report and Multi-Year Priority for the Study of Chapters 5 and 7
- “Front-End” Issues Related to the *Imposition* of Probation and Supervised Release
- “Back-End” Issues Related to the *Modification/Revocation* of Probation and Supervised Release

# USSC Report

---

## *Federal Offenders Sentenced to Supervised Release – July 2010*

- 70 page, 275 footnote report
- Addresses the legal framework and most common legal issues that arise in regard to supervised release
- Data analysis concerning imposition and revocation of supervised release
- [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722\\_Supervised\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf)

# Commission's 2014-15 Priority

---

- “Continuation of [the Commission’s] multi-year review of federal sentencing practices pertaining to imposition and violations of conditions of probation and supervised release, including possible consideration of amending the relevant provisions of Chapter Five and Seven of the *Guidelines Manual*.”

# Commission's 2013-14 Study of Revocation Practices

- In 2013-14 Commission staff visited 12 districts interviewing USPOs, AUSAs & AFPDs on their practices regarding violations
- An upcoming survey of all U.S. district judges to learn their judicial practices and opinions for handling violations
- A review of Chapter Seven; possible amendment could result

# *Ex Post Facto* and Supervision & Violations

---

- Controlling date for violation issues:  
the date of the original offense of conviction
  - *Johnson v. United States*, 529 U.S. 694 (2000),  
resolved circuit split
- Date of the original offense of conviction also  
controls for other aspects of supervision, *e.g.*,  
mandatory conditions and mandatory revocation

# Statutory Penalties for Probation and Supervised Release

---

- 18 U.S.C. § 3559(a)
  - Classification of offenses (see next slide)
  - In rare cases the statute of conviction will provide the classification, and 18 U.S.C. § 3581(b) is used
- 18 U.S.C. §§ 3561 & 3565
  - Probation penalties
- 18 U.S.C. § 3583
  - Supervised release penalties
    - Section 3583(a): “The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment [unless otherwise required by statute].”

# Classification of Offenses

## 18 U.S.C. § 3559(a)

---

### Maximum Sentence

#### Authorized

Life or Death

25 years +

10 years +

5 years +

1 year & 1 day +

6 months + to 1 year

6 months or less

#### Class

Class A Felony

Class B Felony

Class C Felony

Class D Felony

Class E Felony

Class A Misdemeanor

Class B & C

Misdemeanors &

Infractions



# Probation

Class of Offense *	Authorized Term of Probation **	Max. Imprisonment Upon Revocation ***
A or B Felony	Not authorized	The maximum statutory penalty for the offense
C, D, or E Felony	5 years but not less than 1 year	The maximum statutory penalty for the offense
Class A Misdemeanor	5 years	The maximum statutory penalty for the offense

\* 18 U.S.C. § 3559(a)

\*\* 18 U.S.C. § 3561(a)&(c)

\*\*\* 18 U.S.C. § 3565(a)(2) – subsequent to Crime Bill 9/13/94

# Supervised Release

Class of Offense *	Authorized Term of Supervised Release**	Max. Imprisonment Upon Revocation ***
A Felony	5 Years	5 Years
B Felony	5 Years	3 Years
C or D Felony	3 Years	2 Years
E Felony or Class A Misdem.	1 Year	1 Year

\* 18 U.S.C. § 3559(a)

\*\* 18 U.S.C. § 3583(b)

\*\*\* 18 U.S.C. § 3583(e)(3) – subsequent to Crime Bill 9/13/94

Look to penal statutes for specific exceptions to these general rules

# Statutorily Mandated Supervised Release

- Drug-trafficking offenses
- Kidnapping of a minor victim and child sex offenses
- Certain sex offenses involving a victim of any age
- Certain crimes of domestic violence

# Potential Lifetime Terms of Supervised Release

- Three most common situations:
  - Drug Trafficking offenses, *see* 21 U.S.C. § 841(b) (also includes mandatory minimum terms of supervised)
  - Sex offenses (including child pornography cases) and terrorism related offenses, *see* 18 U.S.C. § 3583(k) (also requires 5-year min term of supervised release)

# USSG §5D1.1, Imposition of a Term of Supervised Release

- (a) The court shall order a term of supervised release to follow imprisonment:
  - (1) when required by statute (see 18 U.S.C. § 3583(a)); or
  - (2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.
- (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).
- (c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

# Relief from Statutorily Mandated Supervised Release

- 18 U.S.C. § 3553(e)
  - “Substantial Assistance”
- 18 U.S.C. § 3553(f)
  - “Safety Valve”

# Departures (i.e., no supervised release)

## USSG §5D1.1(a), App. Note 1

- In cases in which more than one year of imprisonment is imposed, the court may depart and not impose supervised release if:
  - it is not required by statute; and
  - the court determines, after considering the factors in App. Note 3, that supervised release is not necessary.

# Discretionary Supervised Release

## USSG §5D1.1(b), App. Note 2

- Similarly, the court may impose a term of supervised release to follow a term of imprisonment where not required by statute and where a sentence of imprisonment of one year or less is imposed, after considering the factors in App. Note 3.



# Factors to be Considered

## USSG §5D1.1(b), App. Note 3

- (A) Statutory Factors (from 18 U.S.C. § 3583(c))
  - (i) the nature and circumstances of the offense and history and characteristics of defendant;
  - (ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  - (iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
  - (iv) the need to provide restitution to any victims of the offense

# Factors to be Considered (cont'd)

## USSG §5D1.1(b), App. Note 3

- Note: the statutory factors mirror 18 U.S.C. § 3553 for the most part, but notice:
  - 18 U.S.C. § 3553(a)(2)(A) is not one of the factors:  
“the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”

# Factors to be Considered

## USSG §5D1.1(b), App. Note 3 (cont'd)

Criminal History- The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant").

Substance Abuse- In a case in which a defendant is an abuser of controlled substances or alcohol, supervised release is highly recommended.

# USSG §5D1.2, Terms of Supervised Release

- If a term of supervised release is ordered, the length shall be:
  - At least 2 but not more than 5 years for a defendant convicted of a Class A or B felony
  - At least 1 but not more than 3 years for a defendant convicted of a Class C or D felony
  - 1 year for a defendant convicted of a Class E felony or a Class A misdemeanor
- Notwithstanding the above, the length of supervised release shall not be less than the minimum term specified for the offense and may be up to life, for certain acts of terrorism and sex offenses.

# Determining Length of Supervised Release

## USSG §5D1.2, App. Note 4

- The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term.
- The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

# USSG §§5B1.3 & 5D1.3, Conditions of Probation/Supervised Release

- Mandatory Conditions
- Discretionary Conditions
- “Standard” Conditions
- Special Conditions

# USSG §§5B1.3 & 5D1.3, Conditions of Probation/Supervised Release (cont'd)

- Search and Seizure
- Commonly Challenged Conditions
  - Sex offenders
- Local District Rules

# Service of Term of Supervised Release

- Commencement:
  - Supervised release begins the day the offender is released from imprisonment (including into community-based facilities, such as residential re-entry centers – unless the defendant is serving the final portion of his prison sentence in such facility).
- Tolling:
  - If, while on supervised release, an offender is required to serve a sentence of imprisonment in connection with a separate criminal offense, the time served does not count towards the service of supervised release, unless the sentence is less than 30 days.



# Early Termination and Extension

## USSG §5D1.2, App. Note 5

- The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

# Statutory Responses to Violations of Probation & Supervised Release

---

18 U.S.C. §§ 3563(c), 3564, 3565, & 3583

- Continue supervision
  - May modify or enlarge the conditions
  - May extend term (if not at maximum)
- Terminate supervision
  - After expiration of one year (or at any time for misdemeanor probation)
- Revocation

# Statutory Responses to Violations of Probation & Supervised Release

---

## 18 U.S.C. § 3553(a)(1)-(7)

- Probation
  - Consider the factors at § 3553(a) “to the extent they are applicable”
- Supervised release
  - Consider the factors at § 3553 *except* (a)(2)(A) (“**punishment**”) is **not** a factor
    - Neither is (a)(3) (“the kinds of sentences available”)
    - Yet some circuit courts have held that (a)(2)(A) may be indirectly considered as part of the circumstances of the offense and history and characteristics of the offender, *see, e.g., United States v. Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007)

# Chapter Seven of the *Guidelines Manual*

---

- Applicable to both probation and supervised release violations
- Policy statements
- Must be considered, but not binding; never were
- Sanctions the “breach of trust”

# Chapter Seven

---

- §7B1.1 - Classification of Violations
- §7B1.2 - Reporting of Violations
- §7B1.3 - Revocation
- §7B1.4 - Term of Imprisonment
- §7B1.5 - No Credit for Supervision Time

# Revocation Table - §7B1.4

---

## Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C	3-9	4-10	5-11	6-12	7-13	8-14
B	4-10	6-12	8-14	12-18	18-24	21-27
A(1)*	12-18	15-21	18-24	24-30	30-37	33-41
A(2)**	24-30	27-33	30-37	37-46	46-57	51-63

\* Except as provided in (2) below.

\*\* Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony.

# Application of Chapter Seven

---

- Criminal history category is that available at the *original* sentencing
  - Involves no recalculation of criminal history (§7B1.4(a))
- Three grades of violations based on *actual conduct*
  - Grades A, B, & C (§7B1.1(a))
  - If more than one grade, use the greatest (§7B1.1(b))

# “Actual Conduct”

---

## §7B1.1(a) & App. Note 1

- Established by the preponderance of evidence
- Does not require a separate criminal charge or conviction to have resulted from the conduct
- Actual conduct may be distinct from any charges or convictions that have resulted
  - A conviction which has resulted would provide prima facie evidence of the corresponding grade of violation, however



# Grade A Violations

---

- *Conduct* constituting a federal, state, or local offense

**EITHER**

- Punishable by imprisonment exceeding one year, if
  - Crime of violence
  - Controlled substance offense
    - Trafficking, **not** simple possession
  - Possession of § 5845(a) firearm or device

**OR**

- Any other offense punishable by imprisonment exceeding 20 years

# Grade B Violations

---

- *Conduct* constituting any other federal, state, or local offense punishable by imprisonment exceeding one year

# Grade C Violations

---

- *Conduct* constituting a federal, state, or local offense punishable by imprisonment of one year or less

**OR**

- A violation of any other condition of supervision (*e.g.*, “technical violations”)

# Disposition of Violations

---

## §7B1.3

- Grade A or B violations
  - Revoke supervision
- Grade C violations
  - Revoke supervision
  - Extend the term of supervision
  - Modify conditions of supervision

# Revocation Table - §7B1.4

## Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C	3-9	4-10	5-11	6-12 <sup>1</sup>	7-13	8-14 <sup>2</sup>
B	4-10	6-12	8-14	12-18	18-24	21-27
A(1)*	12-18	15-21	18-24	24-30	30-37	33-41
A(2)**	24-30	27-33	30-37	37-46	46-57	51-63

\* Except as provided in (2) below.

\*\* Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony.

1 See 7B1.3(c)(1)

2 See 7B1.3(c)(2)

# Sentencing Options Available Under §7B1.3(c)(1)

---

(In months of imprisonment)  
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C	3-9	4-10	5-11	6-12 <sup>1</sup>		
B	4-10	6-12				

- Imprisonment
- Imprisonment plus supervised release with a condition that substitutes community confinement or home detention for any portion of the minimum term

# Sentencing Options Available Under §7B1.3(c)(2)

---

(In months of imprisonment)  
Criminal History Category

Grade of Violation	I	II	III	IV	V	VI
C					7-13	8-14
B			8-14			

- Imprisonment
- Imprisonment of at least one half the minimum term plus supervised release with a condition of community confinement or home detention for the balance

# Sentencing “Add-Ons”

---

## §7B1.3(d): Unsatisfied Sentences

- If the sentence being revoked has unpaid fines or restitution, or unserved conditions of community confinement, home detention, intermittent confinement, those are to be ordered in addition to the sanction determined under §7B1.4
  - Community confinement, home detention, intermittent confinement may be converted to an equivalent period of imprisonment
  - Uncompleted supervision is not an add-on



# Sentencing “Add-Ons”

---

## §7B1.3(e): Official Detention Credit

- Time that will be credited by the Bureau of Prisons for official detention resulting from the violation warrant or proceeding will not be used to increase the revocation imprisonment sentence
- Otherwise, time that will be credited by the BOP for official detention will be used to increase the revocation imprisonment sentence

# Consecutive Sentence of Imprisonment

---

## §7B1.3(f) & App. Note 4

- Imprisonment imposed upon revocation is to be consecutive to any imprisonment already being served
  - Whether or not the sentence already being served is for conduct that is the basis of the revocation
  - If the revocation occurs first, the policy is for any *subsequent* sentence to run consecutively (see §5G1.3, App. Note 3(C))

# Application of *Tapia* to Revocations

---

*Tapia v. U.S.*, 131 S. Ct. 2382 (2011)

- A district court may not impose or lengthen a term of imprisonment in order to promote the defendant's rehabilitation

# *Tapia* Applies to a Revocation Sentence

---

- *U.S. v. Molognaro*, 649 F.3d 1 (1<sup>st</sup> Cir. 2011)
- *U.S. v. Bennett*, 698 F.3d 194 (4<sup>th</sup> Cir. 2012)
- *U.S. v. Garza*, 706 F.3d 655 (5<sup>th</sup> Cir. 2013)
- *U.S. v. Deen*, 706 F.3d 760 (6<sup>th</sup> Cir. 2013)
- *U.S. v. Taylor*, 679 F.3d 1005 (8<sup>th</sup> Cir. 2012)
- *U.S. v. Grant*, 664 F.3d 276 (9<sup>th</sup> Cir. 2011)
- *U.S. v. Mendiola*, 696 F.3d 1033 (10<sup>th</sup> Cir. 2012)

# **Imposing a Term of Supervised Release to Follow the Imprisonment Upon Revocation**

---

# Decision to Order Supervised Release to Follow the Imprisonment

---

## §§ 3583(c) & 3553(a)(1)-(7)

- In deciding generally whether to include a term of supervised release, its length and conditions, consider the § 3553(a) factors
- *Except* (a)(2)(A) (“punishment”) is **not** a factor
  - Neither is (a)(3) (“the kinds of sentences available”)

# Policy Statements Regarding Supervised Release to Follow Imprisonment Upon Revocation of Probation

---

## §7B1.3(g)(1)

- Apply §§5D1.1-1.3 regarding imposition, length, and conditions
  - *In general*, supervised release is to be imposed if the revocation imprisonment is over one year and the defendant is not likely to be deported

# Policy Statements Regarding Supervised Release to Follow Imprisonment Upon Revocation of Supervised Release

---

## §7B1.3(g)(2)

- “Reimposition” (also called “recommencement”) of supervised release is not required, but **may** be imposed, subject to statutory limitations
  - Not required by statute at § 3583(h)



# Worksheets for Determining the Supervised Release Statutorily Available to Follow Revocation of Supervised Release

---

18 U.S.C. § 3583(h)

*Johnson v. U.S.*, 529 U.S. 694 (2000)

**Original Offense for Which the  
Defendant Was Convicted Occurred  
On or After April 30, 2003**

---

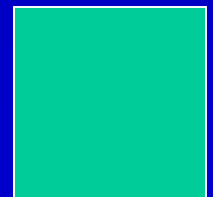
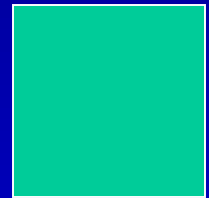
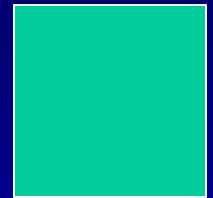
18 U.S.C. § 3583(h)

# Determining the Term of Supervised Release Available Upon Revocation

---

Original offense on/after 4/30/03

1. Determine the statutorily authorized maximum term of supervised release for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release\*)
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



# Determining the Term of Supervised Release Available Upon Revocation

---

Original offense on/after 4/30/03

\*As to Step 2, the only two circuits to address this issue have determined that the aggregate of the imprisonment terms imposed for the current revocation and for any prior revocations must be subtracted from the maximum supervised release term statutorily authorized for the original offense.

-*U.S. v. Vera*, 542 F3d 457 (5<sup>th</sup> Cir. 2008)

-*U.S. v. Knight*, 580 F3d 933 (9<sup>th</sup> Cir. 2009)

**Original Offense for Which the  
Defendant Was Convicted Occurred  
Between September 13, 1994 and  
April 29, 2003, Inclusive**

---

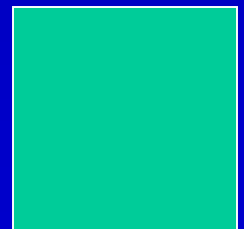
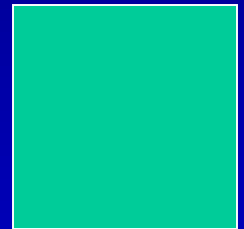
18 U.S.C. § 3583(h)

# I. Upon Revocation of Supervised Release Can a New Term Be Imposed?

---

Original offense between 9/13/94 and 4/29/03, inclusive

1. Determine the statutorily authorized maximum imprisonment available upon revocation (§ 3583(e)(3))
2. Subtract the amount of imprisonment to be imposed (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release) upon revocation
3. If the difference is greater than zero an additional term of supervised release can be imposed

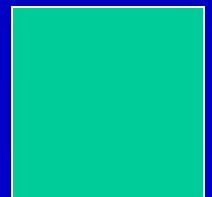
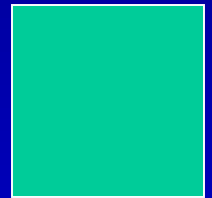
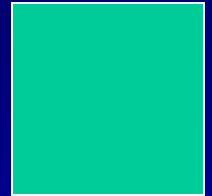


# II. Determining the Term of Supervised Release Available Upon Revocation

---

Original offense between 9/13/94 and 4/29/03, inclusive

1. Determine the statutorily authorized maximum term of supervised release for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release)
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



**Original Offense for Which the  
Defendant Was Convicted Occurred  
Prior to September 13, 1994  
(Prior to 18 U.S.C. § 3583(h))**

---

Pursuant to *Johnson v. U.S.*  
529 U.S. 694 (2000)

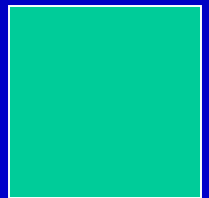
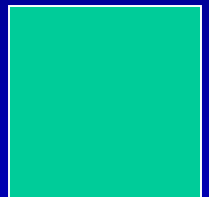
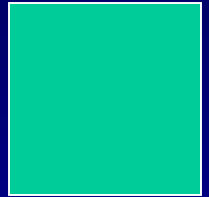


# Determining the Term of Supervised Release Available Upon Revocation

---

Original offense prior to 9/13/94

1. Determine the length of the current supervised release term being revoked (NOTE: Court may first extend term to statutory maximum (§ 3583(e)(2)))
2. Subtract the amount of imprisonment to be imposed upon revocation (in addition to any term(s) of imprisonment imposed on prior revocation(s) of the supervised release)
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



END