OFFICE OF DEFENDER SERVICES TRAINING BRANCH
Administrative Office of the United States Courts
One Columbus Circle, NE, Suite G-430
Washington, DC 20544
(800) 788-9908
www.fd.org

REVOCATION OF PROBATION AND SUPERVISED RELEASE

Frances H. Pratt*
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INTRODUCTION

This outline addresses revocation of probation and supervised release. Revocation of probation and revocation of supervised release are, in many ways, treated identically. See, e.g., Fed. R. Crim. P. 32.1 (entitled "Revocation or Modification of Probation or Supervised Release"); U.S.S.G. Ch. 7, Pt. B (entitled "Probation and Supervised Release Violations"); id. intro. comment. ("Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent."). However, the statutory provisions concerning sentencing for each differ in some significant ways.

Consequently, this outline is organized as follows: Part I addresses the issues common to both revocation of probation and revocation of supervised release. Part II focuses on those issues peculiar to probation revocation, and Part III on those issues peculiar to supervised release revocation. (For another take on many of the same issues, see U.S. Sentencing Commission, Office of General Counsel, Probation and Supervised Release Violations (February 2002), available at http://www.ussc.gov/training/educat.htm; for an article written for probation officers, see David N. Adair, Jr., Revocation Sentences: A Practical Guide, Fed. Probation, Dec. 2000, at 67.)

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* Ms. Pratt was a staff attorney with the Defender Services Division Training Branch from July 1995 to March 2002. She is now an attorney with the Office of the Federal Public Defender in the Eastern District of Virginia.

I. REVOCATION OF PROBATION AND OF SUPERVISED RELEASE: CONSIDERATIONS COMMON TO BOTH

A. Jurisdiction of the District Court

1. To have jurisdiction to revoke probation or supervised release, a district court must issue a warrant or summons that is based on an alleged violation of a condition of probation or supervised release prior to the expiration of the period of supervision. United States v. Morales, 45 F.3d 693 (2d Cir. 1995) (supervised release); United States v. Barton, 26 F.3d 490 (4th Cir. 1994) (supervised release); United States v. Naranjo, 259 F.3d 379 (5th Cir. 2001) (supervised release); United States v. Neville, 985 F.2d 992 (9th Cir. 1993) (supervised release); United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996) (probation).

2. On September 13, 1994, Congress amended the statutory revocation provisions to permit courts to exercise their power to revoke probation or supervised release even after the expiration of the supervision period as long as the warrant or summons was issued before the expiration of the supervision period. 18 U.S.C. § 3565(c) (probation); 18 U.S.C. § 3583(i) (supervised release); United States v. Lominac, 144 F.3d 308 (4th Cir. 1998) (supervised release); United States v. Garrett, 253 F.3d 443 (9th Cir. 2001) (supervised release). However, any delay must be "reasonably necessary"; a two-year delay caused by the government was not reasonably necessary, so the court did not have jurisdiction to revoke probation. United States v. Dworkin, 70 F. Supp. 2d 214 (E.D.N.Y. 1999); cf. Garrett. For cases addressing the constitutional dimensions of delay, see Section I.H.2.

3. Jurisdiction and tolling of supervised release: Supervised release is tolled when a defendant is on fugitive status, United States v. Crane, 979 F.3d 687 (9th Cir. 1992), or when a defendant is incarcerated in connection with a conviction, 18 U.S.C. § 3624(e); United States v. Garrett, 253 F.3d 443 (9th Cir. 2001). However, pre-trial detention does not qualify as imprisonment for purposes of § 3624(e). Id., citing United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999).

B. Use of a Magistrate Judge

1. Where the original offense is a misdemeanor for which the defendant consented to trial, judgment, and sentencing by a magistrate judge, the magistrate judge has authority to revoke probation or supervised release. 18 U.S.C. § 3401(b), (d) (probation), (h) (supervised release); United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996) (probation; noting that 18 U.S.C. § 3401(h) was implemented to overrule United States v. Williams, 919 F.2d 266 (5th Cir. 1990)); United States v. Raynor, 764 F. Supp. 1067 (D. Md. 1991) (supervised release); United States v. Crane, 979 F.2d 687 (9th Cir. 1992) (supervised release).

2. In other cases, the district court may refer revocation proceedings to a magistrate judge, who must file proposed findings and recommendations. 18 U.S.C. § 3401(i) (added 1992); United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994); see United States v. Waters, 158 F.3d 933 (6th Cir. 1998). However, the language of section 3401(i) appears to be limited to supervised release cases.

C. Probation Officers May File Petition: Three appellate courts have held that the filing of petitions seeking warrants and revocation proceedings by probation officers does not exceed the probation officers' statutory authority under 18 U.S.C. § 3603, was not an improper delegation of a judicial function, and was not the unauthorized practice of law. United States v. Cofield, 233 F.3d 405 (6th Cir. 2000); United States v. Mejia-Sanchez, 172 F.3d 1172 (9th Cir. 1999); United States v. Davis, 151 F.3d 1304 (10th Cir. 1998); see also United States v. Burnette, 980 F. Supp. 1429 (M.D. Ala. 1997). Contra United States v. Jones, 957 F. Supp. 1088 (E.D. Ark. 1997) (invalidating practice); see also United States v. Waters, 158 F.3d 933 (6th Cir. 1998) (noting district court criticism of Jones, but finding claim waived).

D. Contents of Warrant: Rule 32.1(a)(2)(A); 18 U.S.C. § 3565(c); United States v. Gordon, 961 F.2d 426 (3rd Cir. 1992); United States v. Kirtley, 5 F.3d 1110 (7th Cir. 1993); United States v. Tham, 884 F.2d 1262 (9th Cir. 1989); United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); see also Section I.H.1.

E. The Probable Cause Hearing: Fed. R. Crim. P. 32.1(a)(1) provides that if a defendant is held in custody on the basis of a violation of probation or supervised release, he must be given a prompt hearing to determine if there is probable cause to hold him. The defendant must be given notice of the hearing, an opportunity to appear and present evidence, an opportunity to question opposing witnesses (if requested), and notice of the right to counsel. However, where a defendant has a hearing limited to the issue of detention in the course of which the alleged violation is described, the defendant waives his right to a probable cause hearing unless he specifically requests one. United States v. Whalen, 82 F.3d 528 (1st Cir. 1996). Further, where a defendant is not held in custody solely on probation or supervised release violations (e.g., he is held for committing another offense that also violates his release conditions), he is not entitled to a probable cause hearing under Rule 32.1. United States v. Pardue, 363 F.3d 695 (8th Cir. 2004).

1. Disclosure of evidence required: United States v. Ramos-Santiago, 925 F.2d 15 (1st Cir. 1991); United States v. Ayers, 946 F.2d 1127 (5th Cir. 1991); United States v. Donaghe, 924 F.2d 940 (9th Cir. 1991); United States v. Tham, 884 F.2d 1262 (9th Cir. 1989). Be wary of probation officers testifying to information received but not disclosed.

F. The Revocation Hearing: Rule 32.1(a)(2) requires that a revocation hearing be held within a reasonable time in the district of jurisdiction. The defendant must be accorded various rights and opportunities: written notice of the alleged violation; disclosure of evidence; the opportunity to appear and present evidence; the opportunity to question opposing witnesses; and notice of the right to counsel. See Section I.H for cases addressing the constitutional dimensions of these rights.

G. Evidentiary Issues

1. Discovery: Rule 16 (discovery) applies by virtue of the fact that it is not excluded by Rule 54. See generally Bobbi J. Anello, Annotation, Availability of Discovery at Probation Revocation Proceedings, 52 A.L.R.5th 559 (1997).

2. Applicability of Jencks Act: Rule 32.1(c) provides for the application of Fed. R. Crim. P. 26.2, concerning witness statements, to revocation proceedings. Allowing defense counsel only nine minutes to review Jencks materials is not an abuse of discretion. United States v. Stanfield, 360 F.3d 1346 (D.C. Cir. 2004).

3. Applicability of evidentiary rules

   a. Federal Rules of Evidence: Rule 1101(d)(3) provides specifically that the Rules of Evidence do not apply to sentencing or to the granting or revoking of probation. See also United States v. McCallum, 677 F.2d 1024 (4th Cir. 1982). Rule 1101, however, does not mention revocation of supervised release. In United States v. Frazier, 26 F.3d 110 (11th Cir. 1994), aff'g 807 F. Supp. 119 (N.D. Ga. 1992), the Eleventh Circuit held that the Rules of Evidence do not apply to supervised release revocations, because supervised release is comparable to probation and parole. See also United States v. Portalla, 985 F.2d 621 (1st Cir. 1993); United States v. Walker, 117 F.3d 417 (9th Cir. 1997).

   b. Exclusionary rule: The Supreme Court has held that the exclusionary rule does not apply to state parole revocation proceedings. Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998) (5-4 decision); see United States v. Armstrong, 187 F.3d 392 (4th Cir. 1999); United States v. Hebert, 201 F.3d. 1103 (9th Cir. 2000). Prior to this decision, the majority of courts addressing the issue had held that the exclusionary rule does not apply to federal revocation proceedings unless there is police harassment of the defendant. E.g., United States v. Montez, 952 F.2d 854 (5th Cir. 1992); United States v. Finney, 897 F.2d 1047 (10th Cir. 1990).

4. Use of hearsay: Hearsay testimony is admissible as long as it is reliable. United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991); United States v. Pratt, 52 F.3d 671 (7th Cir. 1995); United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978); United States v. Miller, 514 F.2d 41 (9th Cir. 1975); cf. U.S.S.G. § 6A1.3, comment. (court may consider any information "so long as it has 'sufficient indicia of reliability to support its probable accuracy,'" and specifically permitting consideration of reliable hearsay). If the hearsay is reliable, the court must weigh the need for it against the defendant's right to confront and examine adverse witnesses. United States v. Waters, 158 F.3d 933 (6th Cir. 1998) (use of reliable hearsay not barred by Rule 32.1(a)(2)(D)); United States v. O'Meara, 33 F.3d 20 (8th Cir. 1994); United States v. Reynolds, 49 F.3d 423 (8th Cir 1995); United States

v. Walker, 117 F.3d 417 (9th Cir. 1997); United States v. Frazier, 26 F.3d 110 (11th Cir. 1994); see Section I.H.4.

5. Standard of proof

a. To revoke a defendant's supervised release, the court must find by a preponderance of the evidence that the defendant violated a condition of supervised release. 18 U.S.C. § 3583(e)(3); see also United States v. Whalen, 82 F.3d 528 (1st Cir. 1996); United States v. Marshall, 371 F.3d 42 (2nd Cir. 2004); United States v. Poellnitz, 372 F.3d 562 (3d Cir. 2004); United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994); United States v. Goad, 44 F.3d 580 (7th Cir. 1995); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994).

b. Preponderance of the evidence is also the standard applied to probation revocation. United States v. Bujak, 347 F.3d 607 (6th Cir. 2003); United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993).

6. Evidence of drug possession: Most circuits have held that drug use (typically proven by a defendant's admission or by urinalysis test results) can constitute evidence of drug possession. United States v. Dow, 990 F.2d 22 (1st Cir. 1993); United States v. Wirth, 250 F.3d 165 (2nd Cir. 2001); United States v. Blackston, 940 F.2d 877 (3d Cir. 1991); United States v. Clark, 30 F.3d 23 (4th Cir. 1994); United States v. Courtney, 979 F.2d 45 (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. Oliver, 931 F.2d 463 (8th Cir. 1991); United States v. Baclaan, 948 F.2d 628 (9th Cir. 1991); United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993), overruled on other grounds by Johnson v. United States, 529 U.S. 694 (2000); United States v. Granderson, 969 F.2d 980 (11th Cir. 1992), aff'd on other grounds, 511 U.S. 39 (1994).

7. Sufficiency of evidence: United States v. Brennick, 337 F.3d 107 (1st Cir. 2003) (corroborated confession sufficient to establish violation); United States v. Alaniz-Alaniz, 38 F.3d. 788 (5th Cir. 1994) (testimony of single witness sufficient); United States v. Levine, 983 F.2d 785 (7th Cir. 1993) (evidence sufficient to establish defendant's commission of theft by deception); United States v. Huusko, 275 F.3d 600 (7th Cir. 2001) (court entitled to rely on state conviction as proof of violation of state law); United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996) (evidence sufficient where defendant admitted to two violations and store security officer testified in detail about defendant's shoplifting); United States v. Hall, 984 F.2d 387 (10th Cir. 1993) (evidence sufficient to establish defendant's involvement in cocaine distribution); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994) (police officer's testimony sufficient to establish that person selling cocaine to officer was defendant; although defendant presented evidence to contrary, court entitled to find officer's testimony more credible).

8. Nolo contendre pleas: While a nolo plea does not necessarily establish a factual basis or admission to a violation, see United States v. Poellnitz, 372 F.3d 562 (3d Cir. 2004), it does not violate due process for a court to rely upon a certified judgment from a nolo plea to establish a violation, United States v. Verduzco, 330 F.3d 1182 (9th Cir. 2003).

H. Constitutional Concerns: In Morrisey v. Brewer, 408 U.S. 471 (1972), and by extension in Gagnon v. Scarpelli, 411 U.S. 788 (1973), the Supreme Court held that a defendant must be accorded a minimum of due process before his parole or probation can be revoked. Fed. R. Crim. P. 32.1, added in 1979, incorporates the Court's requirements. This section covers the most frequently litigated of those due process requirements, as well as some arising under other parts of the Constitution.

1. Notice: Rule 32.1(b)(1)(B) requires that a defendant be given notice of the probable cause hearing and of the alleged violation. Rule 32.1(b)(2)(A) requires that a defendant be given written notice of the alleged violation. A petition alleging a defendant's use of drugs in violation of a condition of supervised release instructing the defendant not to purchase, possess, use, distribute, or administer any drug was found to give sufficient notice of an allegation of possession of drugs to trigger mandatory revocation. United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); see also Section I.G.6 (evidence of drug use as evidence of drug possession).

   Where the violation consists of committing "another federal, state, or local crime," the petition for revocation must clearly specify a statutory provision that the defendant's conduct is alleged to violate. United States v. Chatelain, 360 F.3d 114 (2d Cir. 2004); United States v. Havier, 155 F.3d 1090 (9th Cir. 1998).

2. Delay: Rule 32.1(b)(1)(A) requires the preliminary hearing to be held promptly. Rule 32.1(b)(2) requires the revocation hearing to be held "within a reasonable time." United States v. Sanchez, 225 F.3d 172 (2d Cir. 2000) (four-year delay between occurrence of violation and issuance of summons did not violate due process where summons and revocation hearing took place before term of supervised release ended); United States v. Poellnitz, 372 F.3d 562 (3d Cir. 2004) (two-year delay due to prosecution of state charges not unreasonable); United States v. Tippens, 39 F.3d 88 (5th Cir. 1994) (30-month delay); United States v. Throneburg, 87 F.3d 851 (6th Cir. 1996) (holding revocation hearing nearly two years after issuance of violation warrant neither violation of due process nor abuse of discretion where warrant issued eight months into term of supervised release and hearing held before expiration of term of supervision; due process concerns implicated only where delay prejudices defendant's ability to challenge validity of revocation, not where delay affects defendant's ability to have revocation sentence run concurrently with state sentence); United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993) (although unreasonable delay between time of violation and revocation proceeding may violate due process, five-month delay in this case was acceptable).

3. Presence

a. Revocation hearing: Rule 32.1(b)(2)(C) requires that the defendant be given the opportunity to appear at the revocation hearing. If the defendant chooses, however, to waive a revocation hearing, that waiver must be knowing and voluntary. United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997); United States v. LeBlanc, 175 F.3d 511 (7th Cir. 1999); United States v. Stocks, 104 F.3d 308 (9th Cir. 1997).

b. Sentencing: The Fifth Circuit vacated a revocation sentence where the district court sentenced the defendant in absentia. The appellate court found that the lower court's adoption of the magistrate judge's proposed findings and recommendations violated the defendant's right to be present and to have allocution pursuant to Fed. Crim. R. 43(a) and 32(a)(1)(C). United States v. Rodriguez, 23 F.3d 919 (5th Cir. 1994); see also United States v. Waters, 158 F.3d 933 (6th Cir. 1998).

4. Confrontation: Rule 32.1(b)(2)(C) gives the defendant the opportunity to question adverse witnesses "unless the court determines that the interest of justice does not require the witness to appear." The confrontation issue arises most frequently in the context of the use of positive drug tests as evidence of drug possession without presenting the person who processed the urine or blood sample used for testing. The right includes the ability to impeach the accuracy of test results. The court must balance the defendant's right to confrontation against the government's "good cause" to deny the right. The court must also consider the reliability of the evidence. Good cause for the government is typically the difficulty and expense of procuring witnesses. See, e.g., United States v. McCormick, 54 F.3d 214 (5th Cir. 1995) (no violation where testimony of lab technician would be of limited value and where defendant failed to pursue even one of various alternative means of challenging test results); United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (defendant's confrontation rights were not violated by admission of urinalysis test through testimony of probation officer); United States v. Martin, 371 F.3d 466 (8th Cir. 2004) (finding some hearsay inadmissible because government explanation for not producing witness suggested statements were not reliable); United States v. Comito, 177 F.3d 1166 (9th Cir. 1999) (use of witness's testimony regarding defendant's girlfriend's unsworn verbal statements without performing balancing test violated confrontation clause); United States v. Martin, 984 F.2d 308 (9th Cir. 1993) (although right to confrontation not as strong in revocation proceeding as in trial setting, defendant's right violated in this case where district court refused to allow defendant to retest urine samples that were the only evidence of drug possession); United States v. Penn, 721 F.2d 762 (11th Cir. 1983).

Following Crawford v. Washington, 124 S. Ct. 1354 (2004), courts have considered the the application of that decision to revocation proceedings and found that it does not apply because it involves the Sixth Amendment right to confrontation in a criminal prosecution

whereas Rule 32.1 provides a limited due process right to confront witnesses. United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004); United States v. Barraza, 318 F. Supp. 2d 1031 (S.D. Cal. 2004); see also United States v. Taveras, 380 F.3d 532 (1st Cir. 2004) (avoiding consideration of Crawford issue).

5. Voluntary and Knowing Nature of Plea: Unlike Rule 11, Rule 32.1 does not require the district court to make specific inquiries of a defendant who wishes to admit to violations and waive the procedural rights provided under that rule. Four courts of appeals, however, have found that, to comply with the dictates of the due process clause, a defendant's admission of violations and waiver of Rule 32.1 rights must be knowingly and voluntarily made, and that the record must reflect such a waiver. See United States v. Correa-Torres, 326 F.3d 18 (1st Cir. 2003); United States v, LeBlanc, 175 F.3d 511 (7th Cir. 1999); United States v. Pelensky, 129 F.3d 63, 68 n.9 (2d Cir. 1997); United States v. Stocks, 104 F.3d 308, 312 (9th Cir.), cert. denied, 522 U.S. 904 (1997). The Fourth Circuit has this issue presently under review. United States v. Farrell, No. 04-4196.

6. Defendant's right to speak

   a. At the revocation hearing: The Sixth Circuit found that a defendant was denied due process when the district court prohibited the defendant from testifying as a witness at the final probation revocation hearing and allowed the defendant only to make unsworn oral statements unassisted by counsel. United States v. Dodson, 25 F.3d 385 (6th Cir. 1994).

   b. At the sentencing: Among the circuits addressing the issue, there is a split as to whether Rule 32 applies to sentencing in revocation cases.

      i. Probation: Because section 3565(a) requires the court to "resentence the defendant under subchapter A," the better view is that Rule 32 does apply to sentencing hearings held after revocation of probation. However, only the Fifth Circuit applies Rule 32. United States v. Anderson, 987 F.2d 251 (5th Cir. 1993). The Sixth Circuit does not apply Rule 32. United States v. Coffey, 871 F.2d 39 (6th Cir. 1989) (but see United States v. Waters, 158 F.3d 933 (6th Cir. 1998)). The Eighth Circuit addressed, but did not decide, the issue. United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996).

      ii. Supervised release: The Fifth, Eighth, and Ninth Circuits apply Rule 32 to sentencing hearings held after revocation of supervised release. United States v. Reyna, 358F.3d 344 (5th Cir. 2004) (en banc); United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997); United States v. Carper, 24 F.3d 1157 (9th Cir. 1994). The Sixth Circuit, while not applying Rule 32,

invoked its supervisory powers to require district courts to provide defendants with an opportunity to allocute before imposing sentence for a violation of supervised release. United States v. Waters, 158 F.3d 933 (6th Cir. 1998). The Eleventh Circuit has agreed with the Sixth Circuit. United States v. Frazier, 283 F.3d 1242 (11th Cir. 2002). The Third Circuit has also concluded that a defendant has a right to allocution at a supervised release revocation hearing. United States v. Plotts, 359 F.3d 247 (3rd Cir. 2004) (collecting cases).

7. Double jeopardy: Using the same conduct as the basis for a probation or supervised release violation and as the basis for criminal prosecution does not violate double jeopardy principles. United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996); United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995). Similarly, because the punishment for violating a condition of probation or supervised release by committing a criminal offense is punishment for the offense for which probation or supervised release was imposed, the Double Jeopardy Clause does not preclude punishment for the new criminal conduct. United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996).

8. Self-incrimination: Where the defendant appeared voluntarily at the probation office for an appointment, she was not "in custody" for purposes of Miranda; consequently, the failure to give warnings against self-incrimination did not preclude use of her statements against her in revocation proceedings. United States v. Nieblas, 115 F.3d 703 (9th Cir. 1997).

A defendant is not denied his Fifth Amendment privilege when a district court conducts a hearing to revoke the defendant's supervised release before the adjudication of underlying state charges against him, inasmuch as the defendant is not compelled to testify at the hearing. United States v. Jones, 299 F.3d 103 (2d Cir. 2002).

9. Ex Post Facto Clause

a. Bases for mandatory revocation

i. On November 18, 1988, Congress added the provisions for mandatory revocation based on drug possession found in 18 U.S.C. § 3565(a) (subsection (b) after September 13, 1994) and 18 U.S.C. § 3583(g). Section 7303(d) of Public Law 100-690, 102 Stat. 4464, provided that the provisions applied "with respect to persons whose probation, supervised release, or parole begins after December 31, 1988." In keeping with that provision, the Sixth Circuit uses the date of the violation leading to revocation as the critical date for ex post facto purposes. United States v. Reese, 71 F.3d 582 (6th Cir. 1995). In contrast, the

Second, Fourth, and Ninth Circuit use the date of the original offense as the critical date. United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); United States v. Parriett, 974 F.2d 523 (4th Cir. 1992); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993).

ii. On September 13, 1994, Congress amended the mandatory revocation provisions in two ways. First, for supervised release, it expanded the possible bases for mandatory revocation to include firearm possession and refusal to submit to drug testing. Pub. L. No. 103-322, § 110505, 108 Stat. 2016-17. For probation, where firearm possession was already a basis for revocation, see 18 U.S.C. § 3565(b) (1993), Congress added the drug testing provision as an additional basis for revocation. Pub. L. No. 103-322, § 110506, 108 Stat. 2017-18. Second, Congress removed the "one-third" sentence requirement from both the supervised release and probation provisions. See Sections II.A.3.a and III.A.3.a for text comparisons. In United States v. McGee, 60 F.3d 1266 (7th Cir. 1995), the court found on plain error review that there was no ex post facto violation because the defendant was not subjected to any increase in punishment from the application of the amendments.

iii. On November 2, 2002, Congress further amended the mandatory revocation provisions to include drug test failures (more than three positive tests within a one-year period) as another basis for revocation. Pub. L. No. 107-273, Div. B, Title II, § 2103(a), (b), 116 Stat. 1793; see 18 U.S.C. §§ 3565(b)(4), 3583(g)(4).

b. Imposition of additional supervised release following revocation of supervised release: On September 13, 1994, Congress amended 18 U.S.C. § 3583 by adding section (h), which specifically permits the imposition of additional supervised following imprisonment for a violation of supervised release. Pub. L. No. 103-322, § 110505, 108 Stat. 2017. (For cases addressing this issue prior to the amendment, see Section III.B.2.a.) The circuits addressing whether section 3583(h) can be applied retroactively to defendants whose offenses took place prior to the amendment had split on the issue. In Johnson v. United States, 529 U.S. 694 (2000), the Supreme Court resolved this split when it ruled that § 3583(h) did not apply to revocations for offenses occurring prior to the section's enactment. However, the Court also ruled that under § 3583(e)(3) as it stood prior to Sept. 13, 1994, district courts had authority to impose additional supervised release following a term of imprisonment punishing a revocation violation.

When Congress added section (h) in 1994, it limited the imposition of supervised release to those cases in which a district court imposed less than the full amount

of imprisonment available upon revocation: "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." Pub. L. No. 103-322, § 110505, 108 Stat. 2017. Effective April 30, 2003, however, Congress amended section (h) to permit additional supervised release even where the district court gives the full amount of imprisonment available: "When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment." PROTECT Act, Pub. L. No. 108-21, § 101(2), 117 Stat. 651.

c. Sentencing Guidelines: Courts have found that using the amended Chapter 7 policy statements does not create an ex post facto violation on two bases. United States v. Levi, 2 F.3d 842 (8th Cir. 1993) (Chapter 7 not subject to ex post facto analysis because it does not have the force of law); United States v. Schram, 9 F.3d 741 (9th Cir. 1993) (the offense for Chapter 7 purposes is the violation of probation or supervised release, not the original offense).

I. Defenses

1. Insanity: The federal insanity defense is not available in revocation proceedings because revocation is not a "prosecution under any Federal statute" within the meaning of 18 U.S.C. § 17. United States v. Brown, 899 F.2d 189 (2d Cir. 1990). Moreover, there is no minimum standard of criminal responsibility required for revocation. Id.

2. Indigency: Where a condition of probation is that a defendant pay a fine or restitution, probation cannot be automatically revoked for inability to make payments. Bearden v. Georgia, 461 U.S. 660 (1983); see 18 U.S.C. § 3614; see also United States v. Leigh, 276 F.3d 1011 (8th Cir. 2002) (failure to pay monthly restitution warranted revocation of probation absent evidence that defendant lacked ability to pay or made good faith efforts to pay).

3. Underlying conduct: Where the conduct underlying the revocation proceedings also results in a conviction in state court, the defendant cannot use the revocation proceedings to collaterally challenge the state conviction. United States v. Brown, 656 F.2d 1204 (5th Cir. 1981). However, where the appeal of the revocation is consolidated with the appeal of the federal conviction for the conduct giving rise to the revocation, the vacation of the latter also results in vacation of the former. United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981). The fact that a defendant has been acquitted of the conduct giving rise to the revocation proceeding does not preclude revocation. Morishita v. Morris, 702 F.2d 207 (10th Cir. 1983).

J. Findings

1. Revocation: The Supreme Court held in Morrisey v. Brewer, 408 U.S. 471 (1972), and by extension in Gagnon v. Scarpelli, 411 U.S. 788 (1973), that in revoking parole or probation, a court must issue a written statement specifying the evidence it relied upon and its reasons for its decision to revoke. The appellate courts have developed an exception to this rule: written findings are not required, and due process is satisfied, where oral findings, if recorded or transcribed, create a record sufficient to advise the parties of the reasons for revocation and to permit appellate review. United States v. Barth, 899 F.2d 199 (2d Cir. 1990); United States v. Barnhart, 980 F.2d 219 (3d Cir. 1992); United States v. Copley, 978 F.2d 829 (4th Cir. 1992); United States v. Gilbert, 990 F.2d 916 (6th Cir. 1993); United States v. Yancey, 827 F.2d 83 (7th Cir. 1987); United States v. Sesma-Hernandez, 253 F.3d 403 (9th Cir. 2001) (en banc); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994); see also United States v. Whalen, 82 F.3d 528 (1st Cir. 1996) (on plain error review, no due process violation in court's failure to make written findings when defendant failed to request court to do so and court stated on record that it concluded defendant committed offense leading to revocation and adopted presentence report); cf. United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (remand for written findings not necessary when evidence at hearing was overwhelming that defendant possessed drugs, thus mandating revocation).

2. Sentencing: United States v. Blackston, 940 F.2d 877 (3d Cir. 1991) (court's statement of reasons for decision to sentence defendant above minimum required for revocation based on drug possession was sufficiently detailed); United States v. McClelland, 164 F.3d 308 (6th Cir. 1999) (reversing because district court's articulation of reasons insufficient to justify sentence); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998) (district court made sufficient findings to justify sentence at statutory maximum); United States v. Lockard, 910 F.2d 542 (9th Cir. 1990) (18 U.S.C. § 3553(c) requires judge to state in open court the general reasons for imposing particular sentence); United States v. Rose, 185 F.3d 1108 (10th Cir. 1999) (district court must state reasons for sentence, even when range does not exceed 24 months).

K. Sentencing

1. Application of the U.S. Sentencing Guidelines

a. Chapter 7 of the U.S. Sentencing Guidelines addresses revocation of probation and supervised release. Every circuit has held that because the Sentencing Commission intended the policy statements of Chapter 7 to be recommendations, those policy statements are not binding on the courts. However, the courts must consider them. United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993); 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.

1991); United States v. Davis, 53 F.3d 638 (4th Cir. 1995) (supervised release); United States v. Denard, 24 F.3d 599 (4th Cir. 1994) (probation); 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. Washington, 147 F.3d 490 (6th Cir. 1998) (district court adequately considered policy statements even though court did not refer to them by name); 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) (probation); United States v. Hurst, 78 F.3d 482 (10th Cir. 1996); United States v. Thompson, 976 F.2d 1380 (11th Cir. 1992) (supervised release); United States v. Milano, 32 F.3d 1499 (11th Cir. 1994) (probation). Cf. United States v. Wright, 92 F.3d 502 (7th Cir. 1996) (although not binding, it would be abuse of discretion for district court to ignore Ch. 7); United States v. Montez, 952 F.2d 854 (5th Cir. 1992) (no plain error in failing to consider guidelines).

b. On September 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 for . . . in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . ." 18 U.S.C. § 3553(a)(4)(B). Several courts have found that the inclusion of this language in section 3553 still does not make application of the Chapter 7 policy statements mandatory. See United States v. Bruce, 285 F.3d 69 (D.C. Cir. 2002); United States v. Cohen, 99 F.3d 69 (2d Cir. 1996); United States v. Schwegel, 126 F.3d 551 (3d Cir. 1997); United States v. Escamilla, 70 F.3d 835 (5th Cir. 1995); United States v. West, 59 F.3d 32 (6th Cir. 1995); United States v. Brown, 203 F.3d 557 (8th Cir. 2000); United States v. George, 184 F.3d 1119 (9th Cir. 1999); United States v. Hofierka, 83 F.3d 357 (11th Cir. 1996).

c. Although the policy statements are not binding, district courts are required to interpret them correctly. United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133 (2d Cir. 1998).

d. Determining a revocation sentence under the Guidelines

i. Begin by determining what grade the violation is under U.S.S.G. § 7B1.1. United States v. Kingdom (U.S.A.), Inc., 157 F.3d 133 (2d Cir. 1998) (where defendant has committed multiple violations, sentence to be based on most serious violation); United States v. Lindo, 52 F.3d 106 (6th Cir. 1995) (multiple Grade C violations do not aggregate into a Grade B violation); United States v. Schwab, 85 F.3d 326 (8th Cir. 1996) (look to defendant's actual conduct, not offense of which he was convicted, to determine grade); United States v. Bonner, 85 F.3d 522 (11th Cir. 1996) (making a threatening phone call is "crime of violence" that is grade A

violation); United States v. Cawley, 48 F.3d 90 (2d Cir. 1995) (witness intimidation is crime of violence that is grade A violation).

In determining the grade of violation for criminal conduct, courts are not restricted to considering only conduct constituting federal offenses. Put another way, when a defendant commits a crime that constitutes a relatively minor federal offense but that also constitutes a more serious state offense, courts may use the more serious state offense to determine the grade of violation. United States v. Brennick, 337 F.3d 107 (1st Cir. 2003); United States v. Jolibois, 294 F.3d 1110 (9th Cir. 2002).

Further, in determining the grade of violation, courts must take into account any recidivist provisions to which the defendant could be subjected if he were charged with the offense conduct. United States v. Trotter, 270 F.3d 1150 (7th Cir. 2001); United States v. Boisjolie, 74 F.3d 1115 (11th Cir. 1996).

ii. Determine the guideline range of imprisonment contained in section 7B1.4.

iii. For information related to departures, see sections II.B.1.a, III.B.3.

iv. Apply section 7B1.3(c) for sentencing options relating to Grade B and C violations. If imprisonment is imposed, adjust for time spent in official detention. U.S.S.G. § 7B1.3(e); United States v. Whaley, 148 F.3d 205 (2d Cir. 1998).

2. Concurrent v. consecutive sentences

a. Revocation after sentencing for new offense: The statutes governing revocation are silent on this subject. U.S.S.G. § 7B1.3(f) and application note 4 require a sentence imposed upon revocation to run consecutively to any other sentence a defendant is serving. However, several courts have ruled that because Chapter 7 is advisory only, district courts can use their discretion in deciding whether to run a sentence consecutively or concurrently. 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); United States v. Rose, 185 F.3d 1108 (10th Cir. 1999). Approaching the issue from the perspective of § 5G1.3, the Second Circuit has ruled that the directive in that provision's application note 6 is not mandatory. United States v. Maria, 186 F.3d 65 (2d Cir. 1999).

b. Revocation sentence imposed simultaneously with new offense sentence: Similarly, one court has found that the district court has discretion to impose a revocation sentence concurrently or consecutively to a sentence for the substantive offense

giving rise to the revocation that is imposed at the same time as the revocation sentence. United States v. Urcino-Sotello, 269 F.3d 1195 (10th Cir. 2001).

c. Revocation before sentencing for new federal offense: Where a defendant is sentenced federally for a new offense after having been sentenced on a federal or state revocation violation, the Sentencing Guidelines state that the sentence for the instant conviction "should" run consecutively to the revocation sentence. U.S.S.G. § 5G1.3, comment. (n.6) (Nov. 2002) (added Nov. 1, 1993 as note 4). Several circuits have interpreted this language as mandating that the new sentence run consecutively to the revocation sentence. See United States v. Gondek, 65 F.3d 1 (1st Cir. 1995); United States v. Alexander, 100 F.3d 24 (5th Cir. 1996); United States v. Goldman, 228 F.3d 942 (8th Cir. 2000); United States v. Bernard, 48 F.3d 427 (9th Cir. 1995); United States v. Flowers, 13 F.3d 395 (11th Cir. 1994). Other circuits, however, have found that the language is permissive. See United States v. Maria, 186 F.3d 65 (2d Cir. 1999); United States v. Swan, 275 F.3d 272 (3rd Cir. 2002); United States v. Tisdale, 248 F.3d 964 (10th Cir. 2001).

To resolve the circuit split, the Sentencing Commission amended the commentary in November 2003 to make clear that the Commission only recommends that district courts impose the new sentence consecutively to the revocation sentence. U.S.S.G. § 5G1.3, comment. (n.3(C)) (Nov. 2003). The Commission expressly followed the position of the Second, Third, and Tenth Circuits. U.S.S.G. App. C, amend. 660. See also United States v. Huff, 370 F.3d 454 (5th Cir .2004) (discussing application of amendment to case pending on direct appeal at time of amendment).

d. Revocation before imposition of state sentence: The Guidelines do not address this issue directly. U.S.S.G. § 7B1.3(f) refers only to running a revocation sentence consecutive to a sentence the defendant "is serving;" similarly, section 5G1.3 addresses situations where the defendant is already serving another sentence. The circuits are split as to whether a court may order a federal revocation sentence to run consecutively to a state sentence that has not yet been imposed. Two circuits have addressed the issue directly. The Sixth Circuit held that 18 U.S.C. § 3584(a) does not give the district courts such authority. United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998). In contrast, the Eighth and Eleventh Circuits have held that the district courts do have authority. United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001); United States v. Andrews, 330 F.3d 1305 (11th Cir. 2003).[1]

[1] The circuits are also split in non-revocation cases, with the Seventh and Ninth Circuits concluding there is no authority, United States v. Romandine, 206 F.3d 731 (7th Cir. 2000); United States v. Clayton,

e. Multiple terms of imprisonment for revocation violation: Several circuits have held that when concurrent terms of supervised release are revoked, the district court may impose consecutive terms of imprisonment as punishment. United States v. Johnson, 138 F.3d 115 (4th Cir. 1998); United States v. Gonzalez, 250 F.3d 923 (5th Cir. 2001); United States v. Cotroneo, 89 F.3d 510 (8th Cir. 1996); United States v. Rose, 185 F.3d 1108 (10th Cir. 1999); United States v. Jackson, 176 F.3d 1175 (9th Cir. 1999); United States v. Quinones, 136 F.3d 1293 (11th Cir. 1998).

L. Appeals

1. Jurisdiction of appellate court: Following Spencer v. Kemna, 523 U.S. 1 (1998), two courts of appeals have ruled that they do not have jurisdiction to hear an appeal where the defendant has completed the term of imprisonment imposed upon revocation. United States v. Probber, 170 F.3d 345 (2d Cir. 1999); United States v Meyers, 200 F.3d 715 (10th Cir. 2000). In these cases, however, the district court imposed only a term of imprisonment. Therefore, if a defendant's revocation sentence included a term of supervised release that he is serving at the time of appeal, the appeal should be ripe, and the defendant should have standing because he is still under sentence. See United States v. Searan, 259 F.3d 434 (6th Cir. 2001); United States v. Trotter, 270 F.3d 1150 (7th Cir. 2001); cf. United States v. Palomba, 182 F.3d 1121 (9th Cir. 1999) (defendant lacked standing to appeal sentence where he had completed supervised release term).

2. Standard of review

   a. Unless a violation is based upon drug or firearm possession, which requires revocation, a district court's decision to revoke probation or supervised release will be reviewed for abuse of discretion. United States v. Morin, 889 F.2d 328 (1st Cir. 1989); United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991); United States v. Levine, 983 F.2d 785 (7th Cir. 1993); United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996); United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994).

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927 F.2d 491 (9th Cir. 1991). The Fifth, Tenth, and Eleventh Circuits have reached the opposite conclusion. United States v. Brown, 920 F.2d 1212 (5th Cir. 1991); United States v. Williams, 46 F.3d 57 (10th Cir. 1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993). The Second Circuit has held that a district court may impose a consecutive sentence to an as-yet-to-be-imposed state sentence under the statutory scheme that predated § 3584(a), Salley v. United States, 786 F.2d 546 (2d Cir. 1986); in a recent case, however, that court expressly reserved the question as to whether Salley would still apply under the new statute. McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998).

b. The factfinding underlying a decision to revoke will be reviewed for clear error. United States v. Whalen, 82 F.3d 528 (1st Cir. 1996); United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994); United States v. Hall, 984 F.2d 387 (10th Cir. 1993).

c. Questions of law will be reviewed de novo. See, e.g., United States v. Morales, 45 F.3d 693 (2d Cir. 1995) (jurisdiction of district court); United States v. Barton, 26 F.3d 490 (4th Cir. 1994) (jurisdiction of district court); United States v. Naranjo, 259 F.3d 379 (5th Cir. 2001) (interpretation of § 3583(i)); United States v. Truss, 4 F.3d 437 (6th Cir. 1993) (whether district court exceeded authority under 18 U.S.C. § 3583); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998); United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004) (constitutional question); United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993) (interpretation of 18 U.S.C. § 3565); United States v. Neville, 985 F.2d 992 (9th Cir. 1993) (jurisdiction of district court); United States v. Kelley, 359 F.3d 1302 (10th Cir. 2004); United States v. Boisjolie, 74 F.3d 1115 (11th Cir. 1996) (interpretation of Guidelines).

d. The sentence imposed upon revocation will be reviewed for reasonableness, i.e., abuse of discretion. United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996); United States v. Mathena, 23 F.3d 87 (5th Cir. 1994); United States v. Bujak, 347 F.3d 607 (6th Cir. 2003); United States v. McClanahan, 136 F.3d 1146 (7th Cir. 1998); United States v. Touche, 323 F.3d 1105 (8th Cir. 2003) (abuse of discretion); United States v. Oliver, 931 F.2d 463 (8th Cir. 1991) (reasonableness); United States v. Kelley, 359 F.3d 1302 (10th Cir. 2004).

In United States v. Tschebaum, 306 F.3d 540 (8th Cir. 2002), the Eighth Circuit actually found that a sentence imposed for violating probation was "plainly unreasonable."

II. REVOCATION OF PROBATION: SPECIAL CONSIDERATIONS

A. The Relevant Statutory Provisions

1. In general, the imposition of probation is governed by 18 U.S.C. §§ 3561-3566. Revocation, in particular, is governed by 18 U.S.C. § 3565. The text of the current version of section 3565, last amended substantively as of November 2, 2002, is reproduced in Appendix A.

2. Discretionary revocation: Under subsection (a), revocation of probation is within the discretion of the court.

3. Mandatory revocation: If a defendant violates certain conditions of probation, the court is required to revoke probation.

a. Drug possession

i. Prior to September 13, 1994: Effective December 31, 1988, Congress added a provision to section 3565(a) requiring that "if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence." Pub. L. No. 100-690, § 7303(a)(2), (d), 102 Stat. 4464. The split that developed among the circuit courts as to the meaning of "one-third of the original sentence" was resolved by the Supreme Court in favor of the majority position, that "original sentence" means the original Guidelines sentence, not the term of probation. United States v. Granderson, 511 U.S. 39 (1994).

ii. After September 13, 1994: On September 13, 1994, Congress added section 3565(b)(1) to require 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." Pub. L. No. 103-322, § 110506, 108 Stat. 2017.

iii. Drug use can constitute evidence of possession. See Section I.G.6.

iv. In at least one case, a court held that it must revoke probation if it finds that defendant possessed drugs, even where the drug possession is not the event triggering the revocation proceeding. United States v. Shampang, 987 F.2d 1439 (9th Cir. 1993). In contrast, another court found that it was not required to revoke probation where the drug possession was not the triggering event for revocation. United States v. White, 770 F. Supp. 503 (W.D. Mo. 1991).

b. Drug testing

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

ii. On September 13, 1994, Congress added section 3565(b)(3), which requires revocation and a sentence of imprisonment. Pub. L. No. 103-322, § 110506, 108 Stat. 2017. See United States v.

Coatoam, 245 F.3d 553 (6th Cir. 2001) (first appellate decision to interpret provision).

iii. On November 2, 2002, Congress added section 3565(b)(4), which requires revocation when a defendant tests positive more than three times in a one-year period. Pub. L. No. 107-273, Div. B, Title II, § 2103(a), 116 Stat. 1793.

iv. In the case of a defendant who fails a drug test, the court must consider whether the availability of drug treatment programs, or the defendant's past or present participation in such programs, warrants an exception to the mandatory revocation and imprisonment requirements. 18 U.S.C. § 3563(e); U.S.S.G. § 7B1.4 comment. (n.6).

c. Firearm possession

i. Prior to September 13, 1994: On November 18, 1988, Congress enacted section 3565(b), requiring revocation "[i]f the defendant is in actual possession of a firearm, as that term is defined in section 921 of [Title 18]" and the imposition of "any other sentence that was available under subchapter A at the time of the initial sentencing." Pub. L. No. 100-690, § 6214, 102 Stat. 4361.

ii. On September 13, 1994, Congress amended section 3565(b)(2) to require revocation "[i]f a defendant . . . possesses a firearm." The court "shall . . . resentence the defendant under subchapter A to a sentence that includes a term of imprisonment." Pub. L. No. 103-322, § 110506, 108 Stat. 2017.

B. Sentencing

1. The language of subsection 3565(a)(2)

a. Prior to September 13, 1994, the language of subsection (a)(2) read "revoke the sentence of probation and impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3553-3559] at the time of the initial sentencing."

i. The revocation sentence could not exceed the guideline range that was calculated for the underlying offense at the original sentencing. United States v. Boyd, 961 F.2d 434 (3d Cir. 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. Dixon, 952 F.2d 260 (9th Cir. 1991); United States v. Smith, 907 F.2d 133 (11th Cir. 1990).

ii. Departures from the guideline range calculated for the underlying offense were possible, but could be based only on factors that were present at the time of the original sentencing; the court could not use post-sentence conduct as a basis for departure. 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); see United States v. Alli, 929 F.2d 995 (4th Cir. 1991).

iii. Conversely, where the original sentence was the result of a downward departure, the court was not required to depart down again, but could sentence the defendant within the guideline range originally calculated. United States v. Forrester, 19 F.3d 482 (9th Cir. 1994); United States v. Redmond, 69 F.3d 979 (9th Cir. 1995). In the case of a departure for substantial assistance, the government must renew its 5K1.1 motion. United States v. Schaefer, 120 F.3d 505 (4th Cir. 1997).

b. On September 13, 1994, Congress amended section 3565(a)(2) to read "revoke the sentence of probation and resentence the defendant under subchapter A [sections 3551-3559]." The effect of this amendment is to subject a defendant to a full resentencing, including a recalculation of his sentence under the Guidelines that takes into account changes in the defendant's circumstances occurring after the original sentencing (e.g., an increase in criminal history score due to additional convictions sustained after the original sentencing). United States v. Schaefer, 120 F.3d 505 (4th Cir. 1997); United States v. Hudson, 207 F.3d 852 (6th Cir. 2000); United States v. Cook, 291 F.3d 1297 (11th Cir. 2002); see United States v. Byrd, 116 F.3d 770 (5th Cir. 1997) (comparing language of former and current statutes and impact of change).

2. Interplay of section 3565 and Chapter 7 policy statements: Keeping in mind that Chapter 7 of the Sentencing Guidelines is not binding, see Section I.K.1, the examples that follow illustrate the interplay between section 3565 and Chapter 7.

a. Defendant A's original guideline range is 4-10 months. His revocation range, according to U.S.S.G. § 7B1.4, is 12-18 months. Under the old version of section 3565(a), Defendant A could not be sentenced to more than 10 months in prison, absent an upward departure based on factors present at the time of the original sentencing. United States v. Dixon, 952 F.2d 260 (9th Cir. 1991). Under the current version of section 3565(a), the court could sentence Defendant A to as much as 18 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure based on factors present at the new sentencing.

b. Defendant B's original guideline range is 0-6 months, and his revocation range is 3-9 months. Under the old version of section 3565(a), Defendant B could be sentenced to no more than 6 months in prison absent an upward departure (and no less than 3 months, if the court chooses to follow section 7B1.4). United States v. Boyd, 961 F.2d 434 (3d Cir. 1992). Under the current version of section 3565(a), Defendant B could be sentenced to as much as 9 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure based on factors present at the new sentencing. See United States v. Olabanji, 268 F.3d 636 (9th Cir. 2001) (remanding for resentencing because trial court did not consider sentencing guidelines applicable to original offense).

c. Defendant C has an original guideline range of 33-41 months, but, thanks to a downward departure, received 5 years probation. His revocation range is 3-9 months. Under the old version of section 3565(a), Defendant C could be properly given a sentence of 33 months. United States v. Forrester, 19 F.3d 482 (9th Cir. 1994). He could also be given a sentence as high as 41 months, or more if the court departs upward. Under the current version of section 3565(a), Defendant C could also be sentenced to as much as 41 months, or more if the guideline range for the original offense, as recalculated, is higher, or there is an upward departure.

3. Supervised release: Upon revoking probation, a court may impose supervised release to follow a sentence of imprisonment. United States v. Wesley, 81 F.3d 482 (4th Cir. 1996); United States v. McCullough, 46 F.3d 400 (5th Cir. 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. 1993); see United States v. Gallo, 20 F.3d 7 (1st Cir. 1994). However, where a defendant was sentenced originally to probation under the Federal Juvenile Delinquency Act, the court cannot impose supervised release as part of a sentence upon revocation of probation. United States v. Sealed Appellant, 123 F.3d 232 (5th Cir. 1997).

4. Credit for time spent previously in detention. The district court, in imposing a maximum sentence for a probation violation, should not reduce the term by the amount of time spent in community confinement or home detention. United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996); United States v. Horek, 137 F.3d 1226 (10th Cir. 1998). Moreover, where a defendant has spent time in pretrial detention for which he would receive credit pursuant to 18 U.S.C. § 3585(b), the court must increase the term of imprisonment imposed for the revocation violation. U.S.S.G. § 7B1.3(e).

III. REVOCATION OF SUPERVISED RELEASE: SPECIAL CONSIDERATIONS

A. The Relevant Statutory Provisions

1. In general, the imposition of supervised release is governed by 18 U.S.C. § 3583. Revocation, in particular, is governed by 18 U.S.C. § 3583(e), (g), (h), and (i). The current version of these provisions, last amended substantively as of April 30, 2003, are reproduced in Appendix B.

2. Discretionary revocation: Under subsection (e), revocation of supervised release is within the discretion of the court.

3. Mandatory revocation: If a defendant violates certain conditions of supervised release, the court is required to revoke the supervised release.

   a. Drug possession

      i. Prior to September 13, 1994: Effective December 31, 1988, Congress enacted section 3583(g), which provided that the court must sentence a defendant found to have possessed a controlled substance to a term of imprisonment "not less than one-third the term of supervised release" in length. Pub. L. No. 100-690, § 7303(b)(2), (d), 102 Stat. 4464.

      ii. After September 13, 1994: On September 13, 1994, Congress amended section 3583(g) to require the court to sentence a defendant to a term of imprisonment "not to exceed the maximum term of imprisonment authorized under subsection (e)(3)." Pub. L. No. 103-322 § 110505, 108 Stat. 2016.

      iii. Evidence of drug use can equal possession. See Section I.G.6.

   b. Drug testing

      i. Prior to September 13, 1994, section 3583 did not contain any provision mandating revocation for a defendant's refusal to comply with drug testing requirements.

      ii. On September 13, 1994, Congress added section 3583(g)(3) to require revocation and a sentence of imprisonment. Pub. L. No. 103-322, § 110505, 108 Stat. 2016.

iii. On November 2, 2002, Congress added section 3583(g)(4), which requires revocation when a defendant tests positive more than three times in a one-year period. Pub. L. No. 107-273, Div. B, Title II, § 2103(b), 116 Stat. 1793.

iv. In the case of a defendant who fails a drug test, the court must consider whether the availability of drug treatment programs, or the defendant's past or present participation in such programs, warrants an exception to the mandatory revocation and imprisonment requirements. 18 U.S.C. § 3583(d); U.S.S.G. § 7B1.4 comment. (n.6); United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997).

c. Firearm possession

i. Prior to September 13, 1994, section 3583 did not contain a provision mandating revocation for a defendant's possession of a firearm.

ii. On September 13, 1994, Congress added section 3583(g)(2) to require revocation and a sentence of imprisonment. Pub. L. No. 103-322, § 110505, 108 Stat. 2016.

B. Sentencing

1. Additional imprisonment

a. Statutory limits: Section 3583(e)(3) permits a court to "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release [section 3583(b)] without credit for time previously served on postrelease supervision."

i. Determine the maximum imprisonment possible for the violation by (1) determining the class of the original offense under 18 U.S.C. § 3559(a); (2) determining the authorized term of supervised release for the original offense under section 3583(b); and (3) determining the limits set forth in section 3583(e)(3). See United States v. Marrow Bone, 378 F.3d 806 (8th Cir. 2004). Note that for Class B, C, and D felonies, the maximum term of imprisonment authorized under section 3583(e)(3) is shorter than the term of supervised release authorized under section 3583(b). However, where the original offense is a drug offense punishable pursuant to 21 U.S.C. § 841(b)(1)-(2), there is no maximum term of supervised release. United States v. Page, 131 F.3d 1173 (6th Cir. 1997). See also 18 U.S.C. §§ 3583(j), (k) (providing for supervised

release for any term of years or life in certain terrorism and sexual abuse cases) (effective April 30, 2003).

ii. Credit for time served: As provided in section 3583(e)(3), a defendant does not have the sentence imposed following revocation of supervised release reduced by the amount of time he spent on supervised release before it was revoked. United States v. Bewley, 27 F.3d 343 (8th Cir. 1994) (maximum length of total revocation sentence possible is three years, the amount of supervised release originally imposed, not 27 months (three years minus nine months already served on supervised release) as defendant argued). Thus, as an extreme example, a defendant whose supervised release is revoked based on a violation occurring just before the end of a five-year term of supervision could be sentenced to five years in prison for the violation.

b. Imprisonment in excess of statutory maximum for original offense: The courts addressing the issue have found that it is acceptable for a court to order imprisonment for a revocation violation even where that imprisonment, when 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 266 (5th Cir. 1991); 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). Apprendi v. New Jersey has not changed this. See United States v. Gomez-Gonzalez, 277 F.3d 1108 (9th Cir. 2002), withdrawn as moot, July 2, 2002.

c. Imprisonment in excess of guideline maximum for original offense: Similarly, courts have found it permissible to order imprisonment for a revocation violation even where that imprisonment, when combined with the prior term of imprisonment for the original offense, exceeds the original guideline range. 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).

d. Factors in determining length of sentence: United States v. Ramirez-Rivera, 241 F.3d 37 (1st Cir. 2001) (court did not abuse discretion when it considered defendant's drug rehabilitation needs in imposing sentence beyond recommended range); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994) (under section 3583(e)(3), it was proper for district court to consider defendant's correctional and medical needs in determining length of imprisonment); United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994) (proper for court to consider need for rehabilitation following mandatory revocation under section 3583(g)); United States v. Jackson, 70 F.3d 874 (6th Cir. 1995) (court can consider rehabilitation

in setting sentence following mandatory revocation under section 3583(g)); United States v. Kaniss, 150 F.3d 967 (8th Cir. 1998) (appropriate for court to consider defendant's repeated violations of supervised release by using marijuana, his failure to participate in drug abuse treatment programs, and leniency of his original sentence); United States v. Tsosie, 376 F.3d 1210 (10th Cir. 2004) (district court may consider need for rehabilitation); United States v. Aguillard, 217 F.3d 1319 (11th Cir. 2000) (district court may consider availability of rehabilitation programs in determining length of sentence imposed).

2. Additional supervised release

a. Until September 13, 1994, section 3583 had no provision addressing the imposition of additional supervised release to follow imprisonment for a revocation violation.

i. The First and Eighth Circuits found it permissible for a court to order additional supervised release as long as 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).

ii. Every other circuit addressing the issue held that a court could not order additional supervised release to follow a term of imprisonment. United States v. Koehler, 973 F.2d 132 (2d Cir. 1992); United States v. Malesic, 18 F.3d 205 (3d 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. 1993); United States v. Williams, 2 F.3d 363 (11th Cir. 1993).

iii. The Supreme Court has resolved this split in favor of the minority position. Johnson v. United States, 529 U.S. 694 (2000).

b. On September 13, 1994, Congress enacted section 3583(h), Pub. L. No. 103-322, § 110505, 108 Stat. 2016, in response to urging from the judiciary and the Sentencing Commission. See Malesic, 18 F.3d at 205-06 & n.2. This section authorizes a court to impose an additional term of supervised release as long as that term does not exceed the amount of supervised release authorized by statute for the original offense minus the amount of imprisonment imposed as punishment for revocation. For a discussion and example of the operation of section 3583(h), see United States v. Brings Plenty, 188 F.3d 1051 (8th Cir.

1999). See also United States v. Maxwell, 285 F.3d 336 (4th Cir. 2002); United States v. Merced, 263 F.3d 34 (2nd Cir. 2001); United States v. Beals, 87 F.3d 854 (7th Cir. 1996), overruled in part on other grounds by United States v. Withers, 128 F.3d 1167 (7th Cir. 1997).

c. As part of the PROTECT Act, Congress amended section (h) to permit additional supervised release even where the district court gives the full amount of imprisonment available under section 3583(e)(3): "When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment." PROTECT Act, Pub. L. No. 108-21, § 101(2), 117 Stat. 651 (April 30, 2003).[2] However, even if the full term of imprisonment is imposed, supervised release may be imposed only if the term of imprisonment is less that the amount of supervised release authorized for the original offense. 18 U.S.C. § 3583(h).

If, in imposing additional supervised release the court adds conditions not previously imposed, they must relate either to the original offense or the revocation violation. See United States v. T.M., 330 F.3d 1235 (9th Cir. 2003); see also United States v. Scott, 270 F. 3d 632 (8th Cir. 2001) (district court erred in imposing upon defendant convicted of armed bank robbery special conditions of supervised release intended for sex offenders where, although defendant had been convicted of sex-based offense previously, that conviction was unrelated to robbery conviction at issue in present case, was fifteen years old, and government failed to establish that defendant had propensity to commit sex offenses).

3. Departures: A number of courts have held that, because the Chapter 7 policy statements are not binding, a sentence greater than that suggested by the Chapter 7 sentencing table is not a departure such that the sentencing court must give notice or make detailed findings. United States v. Pelensky, 129 F.3d 63 (2d Cir. 1997); United States v. Blackston, 940 F.2d 877 (3d Cir. 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. Marvin, 135 F.3d 1129 (7th Cir. 1998); United States v. Shaw, 180 F.3d 920 (8th Cir. 1999); United States v. Burdex, 100 F.3d 882 (10th Cir. 1996); United States v. Hofierko, 83 F.3d 357 (11th Cir. 1996).

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[2] When Congress added section (h) in 1994, it had limited the imposition of supervised release to those cases in which a district court imposed less than the full amount of imprisonment available upon revocation: "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."

4. Deportation: Once a court has revoked an alien defendant's supervised release and sentenced him to imprisonment, the court lacks authority to order the defendant to be deported. United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997).

APPENDIX A

§ 3565. Revocation of probation

(a) Continuation or revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and resentence the defendant under subchapter A [18 U.S.C. §§ 3551-3559].

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

(1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of probation prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4); or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;[1]

the court shall 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.

(c) Delayed revocation.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another

[1] Subsection (4) was added on November 2, 2002, by Pub. L. No. 107-273, Div. B, Title II, § 2103(a), 116 Stat. 1793.

sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

APPENDIX B

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

. . . .

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

. . . .

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release [Rule 32.1], finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation[2] more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; . . .

. . . .

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

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[2] The phrase "on any such revocation" was added as of April 30, 2003. PROTECT Act, Pub. L. No. 108-21, § 101(1), 117 Stat. 651.

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;[3]

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

(h) Supervised release following revocation.— When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment,[4] the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release [section 3583(b)], less any term of imprisonment that was imposed upon revocation of supervised release.

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

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[3] Subsection (4) was added on November 2, 2002, by Pub. L. No. 107-273, Div. B, Title II, § 2103(b), 116 Stat. 1793.

[4] The PROTECT Act, Pub. L. No. 108-21, § 101(2), struck out the language "that is less than the maximum term of imprisonment authorized under subsection (e)(3)" preceding "the court may include." The deleted language had been added in 1994. See Pub. L. No. 103-322, Title XI, § 110505, Sept. 13, 1994, 108 Stat. 2016.