

PRIMER



SUPERVISED RELEASE

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Prepared by the Office of General Counsel, U.S. Sentencing Commission

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This primer provides a general overview of the imposition and revocation of supervised release.¹ A variety of statutes, guidelines, and policies govern different aspects of the supervised release framework, and this primer is not a substitute for independent research and primary authority. To the extent this primer and its appendices identify case law, it is not intended to be a comprehensive compilation of cases addressing these issues.

I. INTRODUCTION

If a sentencing court orders a term of incarceration, the court may also impose a term of supervised release to follow the incarceration. The *Guidelines Manual* in Part D of Chapter Five addresses the length and conditions of the supervised release term. The court also has authority to modify a supervised release term, including terminating or extending the term. Once a defendant is serving a term of supervised release, if the defendant violates one or more of the conditions, the court may decide whether to continue or revoke the supervised release and whether to modify the conditions of supervision or impose a term of incarceration for the violation. Chapter Seven of the *Guidelines Manual* addresses violations of the conditions of supervised release.²

The length of a term of supervised release and the conditions of the supervised release are covered by guidelines in Chapter Five of the *Guidelines Manual*. Specifically, §5D1.2 (Term of Supervised Release) addresses the length, and §5D1.3 (Conditions of Supervised Release) addresses the mandatory and discretionary conditions of supervised release.

Chapter Seven of the *Guidelines Manual* addresses violations of the conditions of supervised release. In particular, §§7B1.1-1.4 cover the classification and reporting of violations and possible responses to a violation, including revocation and imprisonment.

¹ Portions of this primer are adapted from the United States Sentencing Commission publication [FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE](#) (2010) [hereinafter Supervised Release Report], which contains additional information, including legislative history of the supervised release statutes and data.

² Under 28 U.S.C. § 994(a)(3), Congress directed the Commission to promulgate “guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.” To date, the Commission has promulgated policy statements only.

A. IMPOSITION OF SUPERVISED RELEASE

A term of supervised release may be imposed by the court at the time of initial sentencing.³ A court must impose a term of supervised release if it is required by the statute of conviction. For example, supervised release is mandated by statute for certain offenses involving domestic violence,⁴ kidnapping of a minor,⁵ drug trafficking⁶ and sex offenses.⁷ A term of supervised release is not required by statute for other cases.⁸ Under the guidelines, a term of supervised release also should follow any sentence of incarceration exceeding one year,⁹ unless a term is not required by statute and the defendant is a “deportable alien” who is likely to be removed after imprisonment.¹⁰ According to data compiled in 2010 by the U.S. Sentencing Commission, federal courts almost always imposed supervised release following incarceration, whether or not it was required by statute.¹¹

In determining whether to impose a term of supervised release not mandated by statute, section 3583 of Title 18 U.S.C., requires a court to consider most of the same factors it considers when imposing a term of imprisonment, including the “nature and circumstances of the offense and the history and characteristics of the defendant,” deterrence, public safety, rehabilitation, typical punishments, and “the need to provide restitution to any victims of the offense.”¹² However, according to the relevant statute and guideline, the court is *not* directed to consider whether the supervised release term is necessary “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹³ In addition to considering the statutory factors,

³ 18 U.S.C. § 3583(a).

⁴ 18 U.S.C. § 3583(a) (for a domestic violence crime as defined by 18 U.S.C. § 3561(b)) (In 2014, the Commission amended the commentary to §5D1.4, providing that supervised release is highly recommended in cases involving domestic violence or stalking offenses that are not subject to the mandatory imposition of supervised release.).

⁵ 18 U.S.C. § 3583(k) (any offense under section 1201 involving a minor victim).

⁶ See 21 U.S.C. §§ 841, 846, 960 and 963.

⁷ 18 U.S.C. § 3583(k).

⁸ 18 U.S.C. § 3583(a). See also *Johnson v. United States*, 529 U.S. 694, 709 (2000) (supervised release departed from the parole system it replaced by giving district courts the “freedom to provide post-release supervision for those, and only those, who needed it”); *United States v. Parker*, 508 F.3d 434, 442 (7th Cir. 2007) (“*Booker* is applicable in this context; supervised release is discretionary absent a separate statutory provision making it mandatory.”).

⁹ USSG §5D1.1(a)(2).

¹⁰ USSG §5D1.1(c).

¹¹ See Supervised Release Report, *supra* note 1, at 4, 52.

¹² See 18 U.S.C. § 3583(c); 18 U.S.C. § 3553(a)(2)(B)-(D); 18 U.S.C. § 3553(a)(4)-(7).

¹³ 18 U.S.C. § 3583(c); USSG §5D1.1 comment. (n.3(A)). See Supervised Release Report at 9 (“The legislative history indicates that section 3553(a)(2)(A) was not included for consideration under 18 U.S.C.

the guidelines recommend that the court also consider the defendant's criminal history¹⁴ and whether he or she is a substance abuser.¹⁵

B. LENGTH OF THE TERM

Where a term of supervised release is not otherwise provided by statute, a court may impose a maximum term of one, three, or five years, depending upon the class of the offense.¹⁶

<i>Offense of Conviction</i>	<i>Maximum Supervised Release Term</i>
Class A felony (punishable by life) Class B felony (punishable by 25 years or more)	Five years
Class C felony (punishable by 10-25 years) Class D felony (punishable by 5-10 years)	Three years
Class E felony (punishable by 1-5 years) Class A misdemeanor (punishable by 6 months-1 year)	One year

Longer terms apply to many offenses involving child victims, terrorism, drug offenses, and sex offenses.¹⁷ Where a case involves multiple counts of conviction, the court should impose separate terms of supervised release for each count, but run them concurrently.¹⁸ In determining how long a term of supervised release to impose, a court is advised to consider the same factors considered in determining whether to impose a term.¹⁹

II. CONDITIONS OF SUPERVISED RELEASE

If the court imposes a term of supervised release, it will consider an array of mandatory and discretionary conditions of supervision. Appendix A, attached to this primer, provides a list summarizing the various mandatory and discretionary conditions that are set forth in the supervised release guidelines and statutes. Following each

§ 3583(c) because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than punish them.”).

¹⁴ USSG §5D1.1 comment. (n.3(B)).

¹⁵ USSG §5D1.1 comment. (n.3(C)); USSG §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

¹⁶ 18 U.S.C. §§ 3583(b), 3559; *see also* United States. v. Hertler, 776 F.3d 680, 682-3 (9th Cir. 2015) (discussing the maximum terms of supervised release that a court may impose).

¹⁷ 18 U.S.C. §§ 3583(j)-(k).

¹⁸ 18 U.S.C. § 3624(e).

¹⁹ USSG §5D.1.2 comment. (n.4).

condition summary, Appendix A provides a citation to the relevant guideline provision as well as any statutory references to the provision.²⁰

A number of supervised release conditions have been challenged on appeal. Although circuit courts often uphold the conditions imposed, there are some areas in which courts have split with respect to certain conditions.²¹ In some cases, circuit courts have criticized conditions imposed by sentencing courts on the basis that the conditions are vague and overbroad,²² not reasonably related to relevant statutory sentencing factors, and a greater deprivation of liberty than reasonably necessary.²³ Several of the conditions at issue in these cases were revised or clarified in the 2016 amendments to §5D1.3.²⁴

In general, the probation office is responsible for implementing the conditions imposed by the court, and in doing so can exercise discretion. For example, one of the standard conditions is that “the defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so.”²⁵

²⁰ Some conditions of supervised release are expressly provided by 18 U.S.C. § 3583, the statute concerning supervised release. In addition, Section 3583 states that the court has discretion to order any of the discretionary conditions of probation set out in Section 3563(b), the statute that sets out conditions of probation. Accordingly, Appendix A references both the supervised release statute and the probation statute.

²¹ *See generally* United States v. Munoz, 812 F.3d 809 (10th Cir. 2016) (noting disagreement between the circuits regarding several conditions).

²² *See, e.g.*, United States v. Kappes, 782 F.3d 828 (7th Cir. 2015) (“[W]e highlight the ambiguities and/or overbreadth in many of the standard conditions, and suggest modifications for improving them.”).

²³ *See, e.g.*, United States v. Ramos, 763 F.3d 45 (1st Cir. 2014) (prohibition against access to internet for 10-year supervised release term, without approval of probation officer, was not reasonably related to his characteristics and history, and thus deprived him of more liberty than reasonably necessary to achieve goals of sentencing).

²⁴ *See* USSG App. C, amend. 803 (effect. Nov. 1, 2016). For example, in *Kappes*, the court criticized one of the then standard conditions, which stated that “the defendant shall support his or her dependents and meet other family responsibilities.” As the court pointed out, this condition was inappropriate, both because the defendant had no dependents, and because there was no definition of “family responsibilities.” 782 F.3d at 849. In the most recent amendments, this standard condition has been eliminated and replaced with a special discretionary condition that applies only to defendants with dependents.

²⁵ USSG §5D1.3(c)(7).

A. MANDATORY CONDITIONS OF SUPERVISED RELEASE

1. All Offenders

Mandatory conditions of supervised release are set forth in 18 U.S.C. § 3583(d) and §5D1.3(a). These mandatory conditions include that a defendant not commit another offense and not possess a controlled substance while on supervision; refrain from unlawful use of controlled substances and, in most cases, submit to drug testing; make restitution to the victim of the offense; submit to the collection of a DNA sample, when authorized; and pay any fines and assessments imposed, among others.

2. Sex Offenders and Domestic Violence Offenders

Congress has enacted mandatory conditions of release pertaining specifically to sex offenders and domestic violence offenders. The sex offender condition provides that, if the offender is required to register under the Sex Offender Registration and Notification Act (“SORNA”),²⁶ the court shall order, as a condition of supervised release, that the defendant comply with the requirements of that Act.²⁷ The domestic violence offender condition requires the offender to attend a rehabilitation program.²⁸

B. DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

In addition to the mandatory conditions of supervised release, a district court has statutory authority to impose additional conditions of supervised release at its discretion.²⁹ Many districts have set forth standard conditions of supervision in general orders, usually available on the court’s website, and the Judgement in a Criminal Case Form (AO245B) lists suggested standard conditions that mirror those contained in §5D1.3. Sentencing courts have discretion to impose any of the conditions listed in §5D1.3 or to create and impose “any other condition it considers to be appropriate.”

A discretionary supervised release condition may be imposed if it:

- (1) is “reasonably related” to the statutory sentencing factors in 18 U.S.C. §§ 3553(a)(1) and 3553(a)(2)(B) - (D), which include the nature and circumstances of the offense, the history and characteristics of the

²⁶ Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248); 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a). *See also* 18 U.S.C. § 2250 (failure to register).

²⁷ 18 U.S.C. § 3583(d); USSG §§5D1.3(a)(7).

²⁸ *See* 18 U.S.C. § 3583(d); USSG §§5D1.3(a)(3).

²⁹ *See* 18 U.S.C. § 3583(d).

defendant, the need to protect the public from further crimes of the defendant, and the need to provide needed educational or vocational training, medical care, or other correctional treatment;

- (2) involves “no greater deprivation of liberty than is reasonably necessary” to serve the purposes of deterrence, protection of the public, and training and treatment;³⁰ and
- (3) is consistent with any policy statements issued by the Sentencing Commission.

Several appellate courts have addressed discretionary conditions imposed by sentencing courts, including the conditions listed in the guidelines as well as conditions created by the courts.³¹

1. “Standard” Conditions

The guidelines recommend that the court impose in every case the 13 “standard” conditions of supervised release set forth in §5D1.3(c). These standard conditions include requiring the defendant to report to the probation office as directed, to maintain or seek employment (unless excused by the probation officer), and to report any contact with law enforcement to the probation officer, among others.

2. “Special” Conditions

Section 5D1.3(d) of the Guidelines recommends that the court impose “special” conditions in particular kinds of cases. Generally, the special conditions are recommended if the offender committed a particular type of offense, or if the court finds certain facts about the offender’s personal characteristics. The guidelines also note that conditions such as residence in a halfway house, home detention, curfews, and intermittent confinement may be appropriate in some cases, although these conditions are more commonly imposed in response to a violation of supervised release.

³⁰ 18 U.S.C. § 3583(d); *United States v. Zinn*, 321 F.3d 1084, 1089 (11th Cir. 2003).

³¹ *See, e.g., United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014) (remanded for reconsideration of several vaguely worded and contradictory conditions of supervised release); *Kappes*, 782 F.3d at 838–39 (condition of supervised release must be appropriately tailored, adequately justified, and orally pronounced after proper notice).

a. Offense-specific special conditions

Sex Offenses. The guidelines recommend three special conditions if the offense of conviction is a sex offense. The guidelines define the term “sex offense” for this purpose by reference to specific statutes.³² The conditions are: to require the defendant to participate in a treatment and monitoring program; to limit the use of a computer or access to the internet if the defendant used computers or the internet in committing the offense; and to require the defendant to permit law enforcement to search his person or property if law enforcement has a reasonable suspicion that the defendant violated the terms of supervised release or committed any other unlawful act.

b. Offender-Specific Special Conditions

Substance Abuse. The guidelines recommend that the court require a defendant to participate in a substance abuse program if the court finds that the defendant is an abuser of narcotics, other controlled substances, or alcohol.

Mental Health. Similarly, the guidelines recommend that the court require a defendant to participate in a mental health treatment program if the court finds that the defendant is in need of such treatment.

Financial Requirements. If the defendant is ordered to pay restitution, forfeiture, or a fine, the guidelines recommend that the court require the defendant to disclose financial information to the probation office. If the court sets forth an installment schedule for the payment of restitution or a fine, the guidelines recommend that the court prohibit the defendant from taking on additional debt without prior approval. If the defendant has dependents, he or she shall support those dependents and make any required child support payments.

III. SERVICE OF SUPERVISED RELEASE

A term of supervised release commences following the defendant’s release from his or her sentence of imprisonment, including any transitional community-based confinement or home confinement.³³ Supervision begins when the defendant is actually released, and

³² The statutes are listed in USSG §5D1.2, cmt. n. 1 (In 2014, the Commission amended the commentary to § 5D1.2 to clarify that failure to register offenses under 18 U.S.C. § 2250 are not “sex offenses.”)

³³ 18 U.S.C. § 3624(e) (“A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer The term of supervised release commences on the day the person is released from imprisonment”); *see also* United States v. Earl, 729 F.3d 1064, 1068 (9th Cir. 2013) (“We therefore interpret the term ‘released’ in the context of the statute to require not only release from imprisonment, but also release from the BOP’s legal custody at the expiration of the prisoner’s prescribed sentence.”).

not when release should have occurred.³⁴ Unless the sentence is less than 30 days, incarceration during a term of supervised release does not count towards the supervised release term.³⁵ Time spent in a halfway house or other community facility *after* release generally does count towards the term of supervision,³⁶ as does release on bond for another offense committed after release.³⁷

IV. EARLY TERMINATION OF SUPERVISED RELEASE

A court may terminate supervised release “at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice.”³⁸ The guidelines “encourage . . . [courts] to exercise this authority in appropriate cases,” particularly noting that a court may impose a longer term of supervised release on a defendant with a drug, alcohol, or other addiction, but may then terminate the supervised release term early when a defendant “successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.”³⁹ The only circuit to squarely address the issue has held that a court may terminate supervised release early even if the statute of conviction originally required a particular term of supervised release.⁴⁰

³⁴ *United States v. Johnson*, 529 U.S. 53, 57 (2000) (where some convictions were overturned on appeal, and therefore the defendant was imprisoned longer than authorized, the terms of supervised release on the remaining convictions did not begin until he was released).

³⁵ 18 U.S.C. § 3624(e). This includes a sentence of home detention if the detention was part of the custodial portion of the defendant’s sentence. *Earl*, 729 F.3d at 1068.

³⁶ *See, e.g., United States v. Sullivan*, 504 F.3d 969 (9th Cir. 2007) (an offender’s time in custody at a state pre-release center, which was similar to a half-way house, was not imprisonment that tolled the offender’s federal supervised release).

³⁷ *See, e.g., United States v. House*, 501 F.3d 928 (8th Cir. 2007) (supervised release term ran when defendant was released on bond on state charges, but supervised release was tolled when defendant began serving state prison sentence).

³⁸ 18 U.S.C. § 3583(e)(1).

³⁹ USSG §5D1.2, cmt. n. 5.

⁴⁰ *See United States v. Spinelle*, 41 F.3d 1056, 1069 (6th Cir. 1994); *see also United States v. Carpenter*, 803 F.3d 1224, 1229, 1241 n.4 (11th Cir. 2015) (observing that an offender with a five year minimum term of supervised release may have the term shortened or terminated after one year); *United States v. Vargas*, 564 F.3d 618, 622–3 n.3 (2d Cir. 2009) (assuming without deciding that a term of release may be ended after one year); *United States v. Hernandez-Flores*, 2012 WL 119609, *4 (D. N.M. Jan. 3, 2012) (expressing reservations, but declining to reach the issue because the defendant’s conduct did not merit early termination even if the court had the authority to grant it).

V. VIOLATIONS OF SUPERVISED RELEASE

If a defendant violates one of the conditions of supervised release, the court may modify the conditions, terminate the supervised release before the original expiration date, or revoke supervised release and impose a term of imprisonment.⁴¹ Chapter Seven of the *Guidelines Manual* contains policy statements that classify violations, recommend when probation officers should report violations to the court, recommend when courts should revoke supervised release, and recommend terms of imprisonment for classes of violations. A court must consider the same factors from 18 U.S.C. § 3553(a) that the court initially considered in imposing the term of supervised release.⁴²

A. MODIFICATION OF SUPERVISED RELEASE

A court may modify the term or conditions of supervised release following a contested hearing,⁴³ through a voluntary consent to the modification and waiver of hearing, or if “the relief sought is favorable to the [offender] and does not extend the term of . . . supervised release” and the attorney for the government is given notice and a reasonable opportunity to object but does not do so.⁴⁴ A court may extend the term of supervision (after a hearing or by consent of the defendant) only “if less than the maximum authorized term was previously imposed.”⁴⁵

B. REVOCATION OF SUPERVISED RELEASE

1. Statutory Provisions

A revocation of supervised release may be discretionary, 18 U.S.C. § 3583(e), or mandatory, 18 U.S.C. 3583(g). A court is required to revoke supervised release and impose some amount of imprisonment when:

- (1) an offender possesses a controlled substance under some circumstances (discussed below);
- (2) an offender unlawfully possesses a firearm;

⁴¹ 18 U.S.C. § 3583(e).

⁴² *Id.*

⁴³ Fed. R. Crim. P. 32.1(c)(1).

⁴⁴ Fed. R. Crim. P. 32.1(c)(2). *See also* United States v. Johnson, 446 F.3d 272 (2nd Cir. 2006) (after probation officer’s petition requesting additional conditions, district court modified certain conditions without a hearing and modified other conditions only after a hearing).

⁴⁵ 18 U.S.C. § 3583(e)(2).

- (3) an offender refuses to comply with drug testing imposed as a condition of supervised release; or
- (4) an offender has four positive drug tests over the course of one year.⁴⁶

In the case of a federal sex offender who is required to register under SORNA, revocation of the offender’s supervised release is mandatory if the court finds that the offender “commit[ted]” a specified offense while on supervised release.⁴⁷ In such a case, the court must sentence the offender to a term of imprisonment of “not less than 5 years” and is not limited by the provisions in 18 U.S.C. § 3583(e)(3) governing revocation proceedings.

The statute provides a limited exception to the requirement that a court incarcerate an offender who has failed a drug test: if the court finds that an offender would benefit or has benefited from “appropriate substance abuse treatment programs,” the court may provide a substitute punishment in accordance with the sentencing guidelines.⁴⁸ Notably, this exception is not available if a court finds that a defendant possessed illegal drugs, rather than merely failing a drug test.⁴⁹

When an offender violates the conditions of his or her release in another way, the court engages in the three-step process of (1) determining that the defendant has violated a condition of supervised release, (2) finding that revocation of supervised release is appropriate, and (3) imposing a penalty.⁵⁰ As part of its finding that revocation is appropriate, the court must consider the statutory sentencing factors set forth at 18 U.S.C. § 3553(a).

2. Guideline Policy Statements

Sections 7B1.1 through 7B1.3 of the guidelines set forth three grades of violations of supervised release conditions — Grades A through C. Violations resulting in revocation are grouped into three broad “grades” of conduct ranging from the commission of certain serious felonies, other felonious conduct, to misdemeanors and technical violations.

⁴⁶ 18 U.S.C. § 3583(g).

⁴⁷ 18 U.S.C. § 3583(k). These predicate crimes include child pornography offenses, sexual abuse of minors, and kidnapping.

⁴⁸ 18 U.S.C. § 3583(d); *United States v. Thornhill*, 759 F.3d 299, 306 n.5 (3d Cir. 2014).

⁴⁹ *See, e.g., United States v. Miller*, 640 Fed. App’x 522, 524 (7th Cir. 2016) (“Counsel points to a line in § 3583(d), which he reads as creating an exception to the automatic reimprisonment for drug possession . . . [but] counsel misreads § 3583(d). What the provision actually says is that treatment programs must be considered for a person who ‘fails a drug test’ and yet Miller’s supervision was not being revoked for failing a drug test. He was accused of *possessing* a controlled substance, and the district court was required to impose a term of imprisonment upon finding that allegation to be true.” (citations omitted)).

⁵⁰ *See Thornhill*, 759 F.3d at 308.

Recommended ranges of imprisonment are determined by a sentencing table based on the grade of the violation and the defendant’s Criminal History Category, as determined at the defendant’s initial sentencing.

Section 7B1.2 recommends when the probation officer should report the violation to the court, and section 7B1.3 recommends when the court should revoke the term of supervised release. The following table summarizes these recommendations:

<i>Grade</i>	<i>Conduct</i>	<i>Reporting</i>	<i>Revocation</i>
A	constitutes a federal, state, or local offense punishable by more than one year of imprisonment that either: <ul style="list-style-type: none"> • is a crime of violence or a drug trafficking offense; or • involves possession of a firearm or destructive device; or constitutes any other federal, state or local offense punishable by <i>more than twenty years</i> of imprisonment	probation officer shall promptly report to the court	court shall revoke
B	constitutes any other federal, state or local offense punishable by <i>more than one year</i> of imprisonment	probation officer shall promptly report to the court	court shall revoke
C	constitutes a federal, state or local offense punishable by <i>one year or less</i> of imprisonment; or is a violation of any other condition of supervised release	probation officer shall promptly report to the court <i>unless</i> <ul style="list-style-type: none"> • minor, not part of a pattern, and • no risk to the public 	court may revoke, extend term or modify conditions

Notably, a conviction for a new offense is not necessary for a finding of a violation, and proof of culpable conduct by a preponderance of the evidence is sufficient for revocation.⁵¹

Although part of section 7B1.3 is written in mandatory terms (“the court shall revoke”) for Grade A and B violations, as previously noted, Chapter Seven of the Guidelines Manual contains only non-binding policy statements. The only truly mandatory grounds for revocation are the four grounds set forth in 18 U.S.C. § 3583(g), which are discussed above.

⁵¹ USSG §7B1.1, comment. (n.1) (“The grade of violation does not depend on conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant’s actual conduct.”).

In all other cases in which a violation is found, the court may opt not to revoke supervised release and incarcerate the offender and, instead, continue him or her on supervision (under the same terms or with modified terms), extend the term of supervision, or sentence the offender to a term of home detention in lieu of incarceration.⁵² Before doing so, however, the court must first consider the pertinent provisions in Chapter Seven of the guidelines.⁵³

C. SENTENCING FOLLOWING REVOCATION

1. Statutory Provisions

The statutory maximum term of imprisonment that may be imposed upon revocation is governed by 18 U.S.C. § 3583(e)(3). There are two limits on the term of imprisonment. It may not be longer than the term of supervised release the court could have originally imposed, and it may not be longer than a specified number of years, depending on the class of the original offense: for class A felonies, 5 years; for class B felonies, 3 years; for class C or D felonies, 2 years; for any other offense, 1 year.⁵⁴ The supervised release statute that was in effect at the time of the original offense controls.⁵⁵

2. Policy Statements

The revocation table at §7B1.4 provides ranges of imprisonment for each violation grade with increasing severity based on an offender's criminal history category at the time of the original sentencing. An offender's criminal history category at the time of the revocation hearing — even if it would be greater or lesser than the original criminal history category — is not factored into the guidelines' revocation table. This revocation table is entirely separate from the Sentencing Table in Chapter 5, Part A of the *Guidelines Manual*, which applies at original sentencing hearings.

⁵² 18 U.S.C. § 3583(e)(1)-(4).

⁵³ 18 U.S.C. §§ 3553(a), 3583(e).

⁵⁴ In cases where a defendant has violated a second or subsequent term of supervised release, the statutory maximum prison sentence is based on the class of the original offense of conviction. *See* United States v. Collins, 848 F.3d 911 (10th Cir. 2017); United States v. Ford, 798 F.3d 655 (7th Cir. 2015).

⁵⁵ *See, e.g.,* United States v. Smith, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.) (“[S]upervised release sanctions are part of the punishment for the original offense, and . . . the sanctions of the original offense remain applicable, despite subsequent amendment.” (citing *Johnson*, 529 U.S. at 700–2)).

Grade of Violation		Criminal History Category					
		I	II	III	IV	V	VI
A	Class A felony	24-30	27-33	30-37	37-46	46-57	51-63
		12-18	15-21	18-24	24-30	30-37	33-41
B		4-10	6-12	8-14	12-18	18-24	21-27
C		3-9	4-10	5-11	6-12	7-13	8-14

Note that the revocation table divides Grade A violations into two categories, depending on the seriousness of the defendant’s original offense of conviction – in other words, not the conduct that led to the violation, but the offense that led to the original terms of imprisonment and supervised release. If the original offense of conviction was itself a Class A felony, and the violation is a Grade A, the table contains higher ranges.

3. *Concurrent and Consecutive Sentences*

Under 18 U.S.C. § 3584, district courts have discretion whether to impose consecutive or concurrent sentences of imprisonment; this statute applies to prison terms for violations of supervised release as well.⁵⁶ Likewise, in the case of a violation based on the commission of a new federal offense, resulting in both a new sentence and a revocation of an existing term of supervised release, a court may decide whether to impose a sentence of imprisonment for the new offense to run concurrently with or consecutively to the revocation sentence (unless the new offense carries a mandatory consecutive prison sentence).⁵⁷ Such discretion exists notwithstanding provisions in the advisory guidelines that call for a consecutive sentence in such cases.⁵⁸

⁵⁶ See, e.g., *United States v. Xinidakis*, 598 F.3d 1213, 1215–17 (9th Cir. 2010); *United States v. Gonzalez*, 250 F.3d 923, 925–29 (5th Cir. 2001).

⁵⁷ *United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1256 (10th Cir. 2006).

⁵⁸ See *id.* (“In such a case, the defendant bears the burden to demonstrate that the District Court should exercise its discretion to impose concurrent sentences in spite of that statement.”); USSG §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment), comment. (n.3(C)) (“[I]n cases in which the defendant was on . . . supervised release at the time of the instant offense and has had such . . . supervised release revoked[,] . . . the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.”); USSG §7B1.3(f) (“Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.”).

VI. APPELLATE ISSUES

A term of supervised release will be reviewed for procedural and substantive reasonableness in light of the court's stated reasons, as with a sentence of imprisonment.⁵⁹ The standard of review for particular challenges will vary depending on the nature of the challenge and the procedural posture of the appeal.⁶⁰

A. APPEAL OF CHALLENGED CONDITIONS

Fully preserved challenges to conditions of supervised release are ordinarily reviewed on appeal for abuse of discretion,⁶¹ although the issue of “whether a supervised release condition illegally exceeds the [district court’s statutory authority] or violates the Constitution is reviewed *de novo*.”⁶² Claims that a district court imposed an invalid condition raised for the first time on appeal are ordinarily reviewed only for “plain error.”⁶³

B. APPEAL OF REVOCATION DECISIONS

The issue of whether a district court had jurisdiction to revoke supervised release is reviewed *de novo*.⁶⁴ The district court’s factual findings that a defendant violated the conditions of release are reviewed for clear error; legal conclusions are reviewed *de novo*.⁶⁵

⁵⁹ See, e.g., *United States v. Windig*, 817 F.3d 910, 910–11 (11th Cir. 2016) (reviewing revocation sentence); *United States v. Henry*, 819 F.3d 856, 873–76 (6th Cir. 2016) (reviewing condition of release); *United States v. Aldeen*, 792 F.3d 247, 251–56 (2d Cir. 2015) (reviewing revocation sentence and remanding for further explanation by the district court).

⁶⁰ See *United States v. Speed*, 811 F.3d 854, 857–59 (7th Cir. 2016) (discussing waiver and the applicable standards of review).

⁶¹ See *id.* at 858 (“In general, our rule has been to review for abuse of discretion when defendants contest conditions of release in the district court, while examining uncontested conditions for plain error.”); *United States v. Scott*, 821 F.3d 562, 570 (5th Cir. 2016) (“Abuse-of-discretion review typically applies to conditions of supervised release, but plain-error review applies if the defendant fails to object in the district court.”); *United States v. Bare*, 806 F.3d 1011, 1016 (9th Cir. 2015) (“We review conditions of supervised release for abuse of discretion. In applying this standard of review, we give considerable deference to a district court’s determination of the appropriate supervised release conditions, recognizing that a district court has at its disposal all of the evidence, its own impressions of a defendant, and wide latitude.” (citations omitted)).

⁶² See *United States v. Aquino*, 794 F.3d 1033, 1036 (9th Cir. 2015) (citing *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009)).

⁶³ See *Speed*, 811 F.3d at 858–59 (discussing when plain error review should apply); see also *Scott*, 562 F.3d at 570; *Henry*, 819 F.3d at 874; *Aldeen*, 792 F.3d at 253.

⁶⁴ See, e.g., *United States v. Johnson*, 581 F.3d 1310 (11th Cir. 2009).

⁶⁵ See, e.g., *United States v. LeCompte*, 800 F.3d 1209, 1215 (10th Cir. 2015) (“Legal questions relating to the revocation of a supervised release are reviewed *de novo*.”); *United States v. Lee*, 795 F.3d 682, 685 (7th Cir. 2015) (“A court may revoke a person’s supervised release if it finds by a preponderance of the evidence that a person has violated a condition of supervision. Normally, we look only to ensure that the revocation decision

If the government proved by a preponderance of the evidence that the defendant violated a valid condition of supervised release, the district court's decision to revoke supervised release is reviewed for abuse of discretion.⁶⁶ With respect to appellate review of the type and length of the sentence imposed upon revocation, the federal courts of appeals are divided over the proper formulation of the standard of review.⁶⁷

C. RIPENESS AND MOOTNESS ISSUES ON APPEAL

On a regular basis, appellate courts must decide whether a defendant's challenge to a condition of supervised release is ripe when raised on direct appeal of the original sentence, as opposed to being raised on appeal of a judgment revoking supervised release for a violation of the challenged condition or as part of a modification proceeding. The courts of appeals have issued inconsistent decisions on this point and the ripeness of any particular challenge may turn on the nature of the condition being challenged.⁶⁸ Finally, courts have held that a defendant's challenge to the district court's revocation of supervised release on appeal is moot if the defendant has been unconditionally released from all types of custody (including any recommended term of supervised release) at the time that the appellate court hears the appeal.⁶⁹

was not an abuse of discretion; constitutional arguments, however, receive *de novo* review." (citations omitted)); *United States v. Boyd*, 792 F.3d 916, 919 (8th Cir. 2015) ("The district court has the discretion to revoke supervised release if the government proves by a preponderance of the evidence that the defendant violated a condition of supervised release. We review the district court's decision to revoke supervised release for an abuse of discretion. The courts subsidiary factfinding as to whether or not a violation occurred is reviewed for clear error." (citations omitted)).

⁶⁶ See, e.g., *Lee*, 795 F.3d at 685; *Boyd*, 792 F.3d at 919; *United States v. Hilger*, 728 F.3d 947, 951 (9th Cir. 2013) ("We review the district court's decision to revoke a term of supervised release for abuse of discretion. A court may revoke a term of supervised release and sentence a defendant to a term of imprisonment if the court finds by a preponderance of the evidence that the defendant violated a condition of his supervised release." (citations omitted)).

⁶⁷ See *United States v. Bolds*, 511 F.3d 568, 574, 575–78 (6th Cir. 2007) ("Post-*Booker*, the courts of appeals have struggled with the question of whether to continue to review supervised release revocation sentences under the 'plainly unreasonable' standard or to apply the *Booker* 'unreasonableness' review standard . . . From the twelve circuits, five different approaches have emerged."); see generally Anne Zygald, *Circuit Circus: What is the Correct Standard of Review Applicable to Supervised Release Appeals After United States v. Booker*, 46 VAL. U. L. REV. 311 (2011) (surveying the split).

⁶⁸ See, e.g., *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016) (discussing ripeness issues in supervised release sentencing and the disagreement among the circuits as to whether a condition of supervised release requiring penile plethysmograph testing is ripe for review at the time of sentencing or only after release); *United States v. Medina*, 779 F.3d 55, 66–67 (1st Cir. 2015) (same).

⁶⁹ See *United States v. Huff*, 703 F.3d 609, 611–12 (3d Cir. 2013) (discussing the application of mootness to released offenders); *United States v. Hardy*, 545 F.3d 280, 284 (4th Cir. 2008) ("[C]ourts considering challenges to revocations of supervised release have universally concluded that such challenges also become moot when the term of imprisonment for that revocation ends.").

APPENDIX A

SUMMARY OF CONDITIONS

This appendix provides a list summarizing the various mandatory and discretionary conditions that are set forth in the supervised release guidelines and statutes.⁷⁰ Following each condition summary is a citation to the relevant guideline provision as well as any statutory references to the provision.⁷¹

I. MANDATORY CONDITIONS

- The defendant shall not commit another federal, state, or local offense. *See* USSG §5D1.3(a)(1), 18 U.S.C. § 3583(d).
- The defendant shall not unlawfully possess a controlled substance. *See* USSG §5D1.3(a)(2), U.S.C. § 3583(d).
- For a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant. *See* USSG §5D1.3(a)(3), 18 U.S.C. §§ 3583(d).
- The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant. *See* USSG §5D1.3(a)(4), 18 U.S.C. § 3583(d).
- If a fine imposed has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)). *See* USSG §5D1.3(a)(5), 18 U.S.C. § 3624(e).

⁷⁰ The summaries relate to the conditions as recently amended and reflected in the 2016 Guidelines Manual.

⁷¹ The statute referenced is primarily 18 U.S.C. § 3583, the statute that sets out the conditions of supervised release. The summaries also reference specific sections of 18 U.S.C. § 3563, the statute that sets out the conditions of probation, wherever the supervised release statute references conditions that are set forth in the probation statute.

- The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule. *See* USSG §5D1.3(a)(6).
- If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)). *See* USSG §5D1.3(a)(7).
- The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a). *See* USSG §5D1.3(a)(8), 18 U.S.C. § 3583(d).

II. DISCRETIONARY CONDITIONS

A. “STANDARD” DISCRETIONARY CONDITIONS

- The defendant shall report to the probation officer in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment unless the probation officer instructs the defendant to report to a different probation office or within a different time frame. *See* USSG §5D1.3(c)(1), 18 U.S.C. § 3563(b)(15).
- After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed. *See* USSG §5D1.3(c)(2).
- The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or probation officer. *See* USSG §5D1.3(c)(3), 18 U.S.C. § 3563(b)(14).
- The defendant shall answer truthfully the questions asked by the probation officer. *See* USSG §5D1.3(c)(4), 18 U.S.C. § 3563(b)(17).
- The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements, the defendant shall notify the probation officer at least 10 days before the change. If that is not possible, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change. *See* USSG §5D1.3(c)(5), 18 U.S.C. § 3563(b)(13) & b(17).

- The defendant shall allow the probation officer to visit the defendant at any time at home or elsewhere, and shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view. *See* USSG §5D1.3(c)(6), 18 U.S.C. § 3563(b)(16).
- The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work, the defendant shall notify the probation officer at least 10 days before the change. If that is not possible, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change. *See* USSG §5D1.3(c)(7), 18 U.S.C. § 3563(b)(4) & b(17).
- The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer. *See* USSG §5D1.3(c)(8), 18 U.S.C. § 3563(b)(6).
- If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours. *See* USSG §5D1.3(c)(9), 18 U.S.C. § 3563(b)(18).
- The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon. *See* USSG §5D1.3(c)(10), 18 U.S.C. § 3563(b)(8).
- The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source without first getting the permission of the court. *See* USSG §5D1.3(c)(11).
- If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm the defendant has notified the person about the risk. *See* USSG §5D1.3(c)(12).
- The defendant shall follow the instructions of the probation officer related to the conditions of supervision. *See* USSG §5D1.3(c)(13).

B. "SPECIAL" DISCRETIONARY CONDITIONS

- If the defendant has one or more dependents -- a condition specifying that the defendant shall support his or her dependents. *See* USSG §5D1.3(d)(1)(A).
- If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child -- a condition specifying that the defendant shall make the payments and comply with the other terms of the order. *See* USSG §5D1.3(d)(1)(B).
- If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule. *See* USSG §5D1.3(d)(2).
- If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information. *See* USSG §5D1.3(d)(3).
- If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol. *See* USSG §5D1.3(d)(4), 18 U.S.C. § 3563 (b)(9).
- If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* USSG §5D1.3(d)(5), 18 U.S.C. § 3563(b)(9).
- If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228([d])(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge. *See* USSG §5D1.3(d)(6), 18 U.S.C. § 3583(d).
- If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) -- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such

items. (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions. *See* USSG §5D1.3(d)(7)(A), (B) & (C), 18 U.S.C. § 3583(d).

- If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay. *See* USSG §5D1.3(d)(8).
- Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation, see §5F1.1 (Community Confinement). *See* USSG §5D1.3(e)(1), 18 U.S.C. § 3563(b)(11).
- Home detention may be imposed as a condition of probation but only as a substitute for imprisonment, see §5F1.2 (Home Detention). *See* USSG §5D1.3(e)(2).
- Community service may be imposed as a condition of probation, see §5F1.3 (Community Service). *See* USSG §5D1.3(e)(3), 18 U.S.C. § 3563(b)(12).
- Occupational restrictions may be imposed as a condition of probation, see §5F1.5 (Occupational Restrictions). *See* USSG §5D1.3(e)(4), 18 U.S.C. § 3563(b)(5).
- A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order. *See* USSG §5D1.3(e)(5), 18 U.S.C. § 3563(b)(19).
- Intermittent confinement (custody for intervals of time) may be ordered as a condition during the first year of supervision, see §5F1.8 (Intermittent Confinement). *See* USSG §5D1.3(e)(6), 18 U.S.C. § 3583(d).