Primer

Supervised Release

Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of the statutes, guidelines, and case law related to supervised release, including the types of conditions imposed and the framework governing termination and revocation of supervised release.[1] Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. OVERVIEW OF SUPERVISED RELEASE

Supervised release is a form of post-imprisonment supervision provided for by statute at 18 U.S.C. § 3583 (Imposition of a term of supervised release after imprisonment).[2] Pursuant to section 3583, if a sentencing court orders a term of incarceration, the court also may impose a term of supervised release to follow.[3] Congress established supervised release as part of the Sentencing Reform Act ("SRA") that created the federal sentencing guidelines system.[4] Although similar to parole, which was eliminated by the SRA, a term of supervised release "does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court."[5]

In conjunction with section 3583, the *Guidelines Manual* addresses supervised release in Part D of Chapter Five. Specifically, §5D1.2 (Term of Supervised Release) addresses the length of supervision and §5D1.3 (Conditions of Supervised Release) addresses the mandatory and discretionary conditions of supervised release.

Once a defendant is under post-release supervision, the court also has authority to modify, terminate, or extend a supervised release term. In particular, if a defendant violates any condition of supervised release, the court may decide whether to continue, revoke, or terminate the term, and whether to modify the conditions of supervision or impose a term of incarceration for the violation.[6] Chapter Seven of the *Guidelines Manual* addresses

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1 Portions of this primer are adapted from the Commission's publication, *Federal Offenders Sentenced to Supervised Release*, which includes legislative history of the supervised release statutes and data on its application. U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [hereinafter SUPERVISED RELEASE REPORT].

2 18 U.S.C. § 3583.

3 *Id.*; U.S. SENT'G COMM'N, *Guidelines Manual*, Ch.7, Pt.A, intro. comment (Nov. 2018) [hereinafter USSG].

4 Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 212(a)(2), 98 Stat. 1837, 1999.

5 *Id.*; USSG Ch.7, Pt.A (backg'd).

6 18 U.S.C. § 3583(e).

violations of the conditions of supervised release.[7] In particular, §§7B1.1 to 7B1.4 cover the classification and reporting of violations and possible responses to a violation, including revocation and imprisonment.

A. IMPOSITION OF SUPERVISED RELEASE

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,[8] kidnapping of a minor,[9] drug trafficking,[10] terrorism,[11] and sex offenses.[12] Although a term of supervised release is not required by statute for other offenses of conviction,[13] the sentencing court has discretionary authority to impose a term of supervised release to be served following incarceration for those offenses.[14]

Under the guidelines, a term of supervised release should follow any sentence of incarceration exceeding one year,[15] unless a term is not required by statute and the defendant is a "deportable alien" who is likely to be ordered removed after imprisonment.[16] According to data compiled in 2010 by the Commission, from 2005 through 2009, courts

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7 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. 28 U.S.C. § 994(a)(3).

8 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 §5D1.1 (Imposition of a Term of Supervised Release), 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. USSG App. C, amend. 781 (effective Nov. 1, 2014).

9 18 U.S.C. § 3583(k) (any offense under 18 U.S.C. § 1201 involving a minor victim).

10 21 U.S.C. §§ 841, 846, 960 and 963.

11 18 U.S.C. § 3583(j) (any federal crime of terrorism listed in 18 U.S.C. § 2332b(g)(5)(B)).

12 *Id.* § 3583(k). *But see* United States v. Haymond, 139 S. Ct. 2369 (2019) (portion of 18 U.S.C. § 3583(k) authorizing mandatory minimum sentence based on violation found by preponderance of evidence violates Due Process Clause and Sixth Amendment right to jury trial).

13 18 U.S.C. § 3583(a); *see also* Johnson v. United States, 529 U.S. 694, 709 (2000) (supervised release departed from parole system it replaced by giving courts "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.").

14 18 U.S.C. § 3583(a).

15 USSG §5D1.1(a)(2).

16 USSG §5D1.1(c). *But see* United States v. Hernandez-Loera, 914 F.3d 621, 622 (8th Cir. 2019) (per curiam) (though supervised release generally deemed unnecessary in deportable alien cases, court did not err in imposing three-year term under Application Note 5 to §5D1.1 based on belief such term "would provide an added measure of deterrence and protection based on the facts and circumstances of" this case).

almost always imposed supervised release following incarceration, whether or not it was required by statute.[17]

In determining whether to impose a term of supervised release not mandated by statute, 18 U.S.C. § 3583 requires a court to consider most, but not all, of the same factors it considers when imposing a term of imprisonment. [18] These factors include those listed in 18 U.S.C. § 3553(a) (Imposition of a sentence), such as 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."[19] However, the court need not 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," or the kinds of sentences available.[20]

Just as with the imposition of a term of imprisonment, the court must make individualized findings concerning whether to impose a term of supervised release and, if so, what conditions should be imposed.[21] In addition to considering the statutory factors, the guidelines recommend that the court also consider the defendant's criminal history[22] and any substance abuse problems.[23]

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.[24]

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17 *See* SUPERVISED RELEASE REPORT, *supra* note 1, at 4, 52 (courts follow §5D1.1(a) to impose terms of supervised release in 99.1% of cases; overwhelming majority of federal offenders sentenced to prison who did not receive terms of supervised release were non-citizens subject to deportation).

18 18 U.S.C. § 3583(c); s*ee also id.* § 3553(a)(2)(B)–(D), (a)(4)–(7); USSG §5D1.1, comment (n.3(A)).

19 18 U.S.C. § 3553(a)(1), (7).

20 18 U.S.C. §§ 3583(c), 3553(a)(2)(A); USSG §5D1.1, comment (n.3(A)); *see also* SUPERVISED RELEASE REPORT, *supra* note 1, at 9 (citing S. REP. NO. 98–225 at 124 (1983)) ("The legislative history indicates that section 3553(a)(2)(A) ["the need for the sentence imposed to . . . reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"] was not included for consideration under 18 U.S.C. § 3583(c) because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than punish them.").

21 *See, e.g.*, United States v. Bell, 915 F.3d 574, 577–78 (8th Cir. 2019) (court abused its discretion in imposing special conditions based on its general experience with prior offenders and without conducting individualized inquiry).

22 USSG §5D1.1, comment. (n.3(B)).

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

24 *See* 18 U.S.C. §§ 3583(b), 3559; *see also* United States. v. Hertler, 776 F.3d 680, 682–83 (9th Cir. 2015) (discussing the maximum terms of supervised release that a court may impose).

Offense of Conviction	*Maximum Supervised Release Term*
Class A felony (punishable by life) Class B felony (punishable by 25 years or more)	5 years
Class C felony (punishable by 10–25 years) Class D felony (punishable by 5–10 years)	3 years
Class E felony (punishable by 1–5 years) Class A misdemeanor (punishable by 6 months–1 year)	1 year

Longer terms apply to many offenses involving child victims, terrorism, drug offenses, and sex offenses.[25] Where a case involves multiple counts of conviction, the court should impose separate terms of supervised release for each count, but run them concurrently with any other federal, state, or local term of probation or supervised release.[26] In determining the length of supervision, courts are advised to consider the same factors used in determining whether to impose supervised release in the first place.[27]

III. CONDITIONS OF SUPERVISED RELEASE

If the court imposes a term of supervised release, it will determine an array of mandatory and discretionary conditions of supervision at sentencing, based on the offense, the defendant's history, and other factors. The determination of conditions is based on both the statutory requirements and the supervised release guidelines. Mandatory conditions do not need to be orally pronounced at sentencing, but discretionary conditions do.[28] If an inconsistency exists between an oral sentence and the later written judgment, the sentence pronounced from the bench controls.[29] Defendants can waive the oral pronouncement.[30]

Appendix A, attached to this primer, summarizes the various mandatory and discretionary conditions that are set forth in the statutes and guidelines. Following each

[25] 18 U.S.C. § 3583(j)–(k).

[26] *Id.* § 3624(e).

[27] *Id.* § 3583(c); USSG §5D.1.2, comment. (n.4).

[28] United States v. Diggles, 957 F.3d 551, 558–59 (5th Cir. 2020) (en banc) (pronouncement is part of defendant's due process right to be present at sentencing based on the right to mount a defense, thus pronouncement required for discretionary conditions, but not mandatory conditions where "there is little a defendant can do to defend against it.").

[29] *Id.* at 557 ("Including a sentence in the written judgment that [was] never mentioned . . . in the courtroom is 'tantamount to sentencing the defendant *in absentia*.' " (quoting United States v. Weathers, 631 F.3d 560, 562 (D.C. 2011))); United States v. Johnson, 756 F.3d 532, 542 (7th Cir. 2014) ("if an inconsistency exists between an oral and later written sentence, the sentence pronounced from the bench controls" (quoting United States v. Alburay, 415 F.3d 782, 788 (7th Cir. 2005))).

[30] *See, e.g.*, United States v. Strobel, 987 F.3d 743, 748 (7th Cir. 2021).

condition summary, Appendix A provides a citation to the relevant guideline provision as well as any statutory references.[31]

Imposition of the conditions of supervised release is a core judicial function that cannot be delegated to the probation officer because of the potential restriction on a defendant's liberty interests.[32] For example, a condition that grants discretion to the probation officer to elect between inpatient and outpatient substance abuse treatment is likely an impermissible delegation of a core judicial function.[33] However, the probation officer is responsible for implementing the imposed conditions, and, in doing so, can exercise discretion in undertaking this managerial detail.[34] For example, one of the standard conditions listed in the guideline 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."[35]

A. Mandatory Conditions of Supervised Release

1. All Offenders

Mandatory conditions of supervised release applicable to all categories of offenders,

[31] Some conditions are expressly provided by 18 U.S.C. § 3583. In addition, section 3583 states that the court has discretion to order any of the discretionary conditions of probation set out in 18 U.S.C. § 3563(b) (Conditions of probation). Accordingly, Appendix A references both the supervised release and probation statutes.

[32] United States v. Miller, 77 F.3d 71, 77 (4th Cir. 1996) (noting imposition of sentence, including terms of supervised release, is core judicial function); *see also* United States v. Schrode, 839 F.3d 545, 555 (7th Cir. 2016) ("To determine [whether a delegation is proper, courts] 'distinguish[ ] between those delegations that merely task the probation officer with performing ministerial acts or support services related to punishment imposed, and those that allow the officer to decide the nature and extent of the defendant's punishment.' " (citations omitted)).

[33] United States v. Martinez, 987 F.3d 432, 435–46 (5th Cir. 2021) (court should not delegate decision that might further restrict liberty when condition imposed was a short ten-month sentence); United States v. Matta, 777 F.3d, 116, 122–23 (2d Cir. 2015) (court may not delegate decision-making authority that would make the liberty interest contingent on the probation officer's exercise of discretion); United States v. Mike, 632 F.3d 686, 695–96 (10th Cir. 2011) (same); United States v. Esparza, 552 F.3d 1088, 1091 (9th Cir. 2009) (per curiam) (same). *But see* United States v. Medel-Guadalupe, 987 F.3d 424, 430–31 (5th Cir. 2021) (per curiam) (permitting delegation of decision on inpatient treatment after court mandated the condition, finding "inpatient or outpatient" a detail of the condition, when sentence imposed was ten years and court "cannot predict what the need for substance abuse treatment during supervised release will be.").

[34] *See*, *e.g.*, United States v. Birkedahl, 973 F.3d 49, 53–54 (2d Cir. 2020) (affirming condition to attend sex offender treatment because determination was court-imposed and probation was limited to "administrative aspects of the treatment such as the 'selection of a provider and the schedule' " (citation omitted)). *But see* United States v. Lee, 950 F.3d 439, 447 (7th Cir. 2020) (finding imposition of condition limiting ability to interact with known felons without prior permission of probation officer impermissible delegation of decision-making authority to probation officer); United States v. Miller, 978 F.3d 746, 760 (10th Cir. 2020) (same).

[35] USSG §5D1.3(c)(7).

which the court must impose in some cases and may impose in others, are set forth in 18 U.S.C. § 3583(d) and §5D1.3(a). These mandatory conditions include, among others, that a defendant:

- not commit another federal, state, or local offense while on supervision;
- not possess a controlled substance while on supervision;
- refrain from unlawful use of controlled substances;
- make restitution to the victim of the offense;
- submit to the collection of a DNA sample when authorized;
- pay any fines and assessments imposed; and
- in most cases, submit to drug testing.[36]

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"),[37] the court shall order, as a condition of supervised release, that the defendant comply with the requirements of that Act.[38] The domestic violence condition requires the defendant to attend a rehabilitation program.[39]

3. Drug Testing

Section 3583(d) mandates that the court order, as an explicit condition, that the defendant not engage in unlawful use of controlled substances. The court further must order that the defendant submit to a drug test within 15 days of release to a supervised release term and to at least two periodic drug tests thereafter, as determined by the court.[40] The court, not the probation officer, must determine the maximum number of drug tests to

[36] 18 U.S.C. § 3583(d); USSG §5D1.3(a); s*ee also* Appendix A, *infra*, Part I (Mandatory Conditions).

[37] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, Title I, 120 Stat. 587; 18 U.S.C. §§ 3563(a)(8), 3583(d); *see also* 18 U.S.C. § 2250 (Failure to register).

[38] 18 U.S.C. § 3583(d); USSG §5D1.3(a)(7).

[39] 18 U.S.C. § 3583(d); USSG §5D1.3(a)(3).

[40] 18 U.S.C. § 3583(d).

which the defendant is subject following the initial test.[41] However, the drug testing requirement can be ameliorated or suspended by the court.[42]

B. Discretionary Conditions of Supervised Release

In addition to the mandatory conditions of supervised release, a district court has statutory authority to impose at its discretion additional conditions of supervised release, set forth in 18 U.S.C. § 3583(d) and §5D1.3(b).[43] In determining the conditions of supervised release, the court shall consider the same section 3553(a) factors it considered in its determination whether to impose a term of supervised release.[44] Courts must make an individualized assessment when determining whether to impose a special condition of supervised release.[45]

Many districts have set forth standard conditions of supervision in general orders, usually available on the court's website, and the Judgment in a Criminal Case Form (AO 245B) lists suggested standard conditions that mirror those contained in §5D1.3. Sentencing courts also have discretion to impose any of the conditions listed in 18 U.S.C. § 3563(b) (Conditions of probation) and §5D1.3(b)–(d)(covering discretionary, standard, and special conditions of supervised release) or to create and impose "any other condition it considers to be appropriate."[46]

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41 *See* United States v. Miller, 978 F.3d 746, 758 (10th Cir. 2020) (statutory language "as determined by the court" indicates courts cannot permit the probation officer to determine maximum number of drug tests); United States v. Stephens, 424 F.3d 876, 883 (9th Cir. 2005) ("[W]hile the district court itself determined the *minimum* number of tests . . . required . . . the court erred when it failed to state the *maximum* number of non-treatment drug tests the probation officer could impose.").

42 18 U.S.C. 3583(d), citing 18 U.S.C. § 3563. Section 3563(a)(5) provides that the mandatory drug testing condition may be ameliorated or suspended "if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse."

43 *See* 18 U.S.C. § 3583(d); Appendix A, *infra*, Part II (Discretionary Conditions); s*ee also* United States v. McCullock, 991 F.3d 313, 319 (1st Cir. 2021) (judges have " 'significant flexibility' in crafting special conditions.")

44 18 U.S.C. § 3583(c).

45 *See, e.g.*, United States v. Vigil, 989 F.3d 406, 411 (5th Cir. 2021) (per curiam) (special conditions must be tailored to each individual defendant); United States v. Miller, 978 F.3d 746, 763 (10th Cir. 2020) (court must make individualized assessment before imposing special conditions but need only provide general statements of reasoning for each special condition); United States v. Betts, 886 F.3d 198, 202 (2d Cir. 2018) (court's failure to state reason for imposing special condition on record is error).

46 Courts only may order the condition set forth in 18 U.S.C. § 3563(b)(10) (requiring defendant to remain in custody on nights and weekends) for violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) (extending, modifying, reducing or enlarging conditions pursuant to Fed. R. Crim. P. 32.1 relating to provision applicable to initial setting of terms and conditions), and only if facilities are available. 18 U.S.C. § 3583(d)(3).

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);

(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;[47] and

(3) is consistent with any policy statements issued by the Commission.[48]

1. Reasonably Related

In deciding whether a discretionary condition is reasonably related to sentencing factors, courts consider the section 3553(a) factors involving the nature and circumstances of the offense, the history and characteristics of the 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.[49] If a discretionary condition is based on past conduct that is not temporally remote, it need not be related to the offense of conviction for which the term was ordered to be deemed reasonable.[50]

2. Unnecessary Deprivation of Liberty

Supervised release conditions must be properly tailored under section 3582(d) to avoid a violation of the Due Process Clause.[51] A parent's right to enjoy the companionship of his children is one such fundamental substantive due process liberty interest,[52] as is a romantic relationship with a life partner.[53] Due process further requires that a condition of

[47] 18 U.S.C. § 3583(d)(2); *see, e.g.,* United States v. Garza-Mendez, 735 F.3d 1284, 1292 (11th Cir. 2013).

[48] 18 U.S.C. § 3583(d)(1)–(3); 28 U.S.C. § 994(a).

[49] 18 U.S.C. § 3553(a)(1), (a)(2)(B)–(D).

[50] *See*, *e.g*., United States v. Johnson, 756 F.3d 532, 540–41 (7th Cir. 2014) (reviewing other circuit opinions and concluding sex offender treatment is reasonably related even if offense of conviction is not a sex offense, if recent sex offenses were present in the defendant's history); United States v. Salazar, 743 F.3d 445, 451 (5th Cir. 2014) ("A condition satisfies the requirements if it is reasonably related to any of the four factors."); United States v. Blinkinsop, 606 F.3d 1110, 1119 (9th Cir. 2010) (condition not need be related to offense of conviction; "judge is statutorily required 'to look forward in time to crimes that may be committed in the future[.]' " (citing United States v. Wise, 391 F.3d 1027, 1031 (9th Cir. 2004))).

[51] Johnson v. United States, 576 U.S. 591, 595 (2015) ("[T]he Government violates [due process] guarantee by taking away someone's . . . liberty [] under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

[52] United States v. Lee, 950 F.3d 439, 448–50 (7th Cir. 2020).

[53] United States v. Wolf Child, 699 F.3d 1082, 1087–88 (9th Cir. 2012) ("the fundamental right to familial association, implicated by the parts of the special condition prohibiting [defendant] from residing with or being in the company of his own daughters and socializing with his fiancée, is a 'particularly significant liberty interest.' ").

supervised release be sufficiently clear to give the offender a reasonable opportunity to know what is prohibited and what conduct will result in being returned to prison.[54]

3. Policy Statements

The Commission is statutorily required to promulgate policy statements on the appropriate use of the conditions of supervised release and it implemented this directive in §5D1.3.[55] Section 3583(d) mandates that conditions not directly conflict with the policy statements but does not require the conditions to be expressly covered by the policy statement.[56] Thus, courts tend to evaluate conditions under section 3583(d)(1), which requires that conditions be reasonably related to certain section 3553(a) factors.[57]

4. "Standard" Discretionary Conditions

The guidelines recommend that courts impose in every case the 13 "standard" conditions of supervised release, which are expansions of the conditions required by statute and are set forth in §5D1.3(c).[58] 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.[59]

5. "Special" Discretionary Conditions

Section 5D1.3(d) recommends that courts impose "special" conditions in particular kinds of cases. The special conditions are recommended if the defendant committed a particular type of offense, or if the court finds that certain facts about the defendant's personal characteristics warrant a special condition, such as, for example, a need to support

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54 *See* United States v. Reeves, 591 F.3d 77, 80–81 (2d Cir. 2010) (due process requires that "if a condition, however well-intentioned, is not sufficiently clear, it may not be imposed."); United States v. MacMillen, 544 F.3d 71, 76 (2d Cir. 2008) (a condition is "unconstitutional if it is so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application' " (quoting United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2003) (citations omitted))).

55 28 U.S.C. § 994(a)(2)(B).

56 United States v. Bear, 769 F.3d 1221, 1231 (10th Cir. 2014) ("[18 U.S.C.] § 3583(d) mandates only that the conditions not directly conflict with the policy statements.").

57 *Id.* ("[W]hen considering challenges to supervised release conditions brought under § 3583(d)(3), courts tend to evaluate them under § 3583(d)(1), which requires that conditions be reasonably related to certain § 3553(a) factors.").

58 *See* United States v. Truscello, 168 F.3d 61, 63 (2d Cir. 1999) ("Because the so-called 'standard conditions' [of USSG §5D1.3(c)] imposed in this case are 'basic administrative requirement[s] essential to functioning of the supervised release system,' they are almost uniformly imposed by the district courts and have become boilerplate" (quoting United States v. Smith, 982 F.2d 757, 764 (2d Cir. 1992))).

59 *See* Appendix A, *infra*, Part II.A ("Standard" Discretionary Conditions).

dependents.[60] 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.[61]

a. Special conditions for sex offenses

The guidelines recommend three special conditions if the offense of conviction is a "sex offense," a term defined by reference to specific statutes.[62] The conditions are: (i) requiring the defendant to participate in a treatment and monitoring program; (ii) limiting the use of a computer or access to the internet if the defendant used such items in committing the offense; and (iii) requiring the defendant to permit law enforcement or the probation office to search his person or property upon a reasonable suspicion that the defendant violated the terms of supervised release or committed any other unlawful act.[63]

b. Defendant-specific special conditions

i. Financial requirements

If the defendant has dependents, the court may set a condition specifying that the defendant shall support those dependents and make any required child support payments.[64] 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.[65] 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.[66]

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60 *See* USSG §5D1.3(d); Appendix A, *infra*, Part II.B ("Special" Discretionary Conditions).

61 USSG §5D1.3(e)(6) ("Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available.").

62 *See* USSG §5D1.3(d)(7). The statutes are listed in Application Note 1 of §5D1.2. In 2014, the Commission amended the commentary to §5D1.2 to clarify that a conviction for failure to register as a sex offender under 18 U.S.C. § 2250 is not included in the term "sex offense." USSG App. C, amend. 786 (effective Nov. 1, 2014).

63 USSG §5D1.3(d)(7). Section 3583(d) also authorizes the court to order a special condition for sex offenders required to register under SORNA, that the defendant submit to a search, with or without a warrant, of his person, any property, including a residence and a vehicle, papers, computers (including any electronic communications or data storage devices). 18 U.S.C. § 3583(d)(3).

64 USSG §5D1.3(d)(1).

65 USSG §5D1.3(d)(2).

66 USSG §5D1.3(d)(3).

ii. 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.[67] The program may include testing for drugs and alcohol. The guidelines also recommend a condition specifying that such defendant shall not use or possess alcohol.[68]

iii. 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.[69]

IV. SERVICE OF SUPERVISED RELEASE

A person placed on supervised release is supervised during that term by a probation officer.[70] A term of supervised release commences following the defendant's release from imprisonment, including any transitional community-based confinement or home confinement,[71] and including any civil commitment.[72] The Supreme Court has held that supervision begins when the defendant is actually released, and not when release should have occurred, even if the defendant was mistakenly held in prison beyond a lawful term of imprisonment.[73] Unless the sentence is less than 30 days, incarceration during a term of

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67 USSG §5D1.3(d)(4).

68 *Id.*

69 USSG §5D1.3(d)(5).

70 18 U.S.C. § 3601.

71 18 U.S.C. § 3624(e) ("A prisoner whose sentence includes a term . . . 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.").

72 United States v. Mosby, 719 F.3d 925, 929–30 (8th Cir. 2013) (civil commitment under 18 U.S.C. § 4248 (Civil commitment of a sexually dangerous person) is federal custody and is therefore "imprisonment" for purposes of section 3624(e)).

73 United States v. Johnson, 529 U.S. 53, 57–60 (2000) (where some convictions were overturned on appeal, and therefore defendant was imprisoned longer than authorized, terms of supervised release on remaining convictions did not begin until release; because "[s]upervised release fulfills rehabilitative ends, distinct from those served by incarceration," it would not make sense to "treat[] . . . time in prison as interchangeable with [a] term of supervised release"); United States v. Maranda, 761 F.3d 689, 695 (7th Cir. 2014) (same).

supervised release does not count towards the supervised release term.[74] Time spent in a halfway house or other community facility after release generally does count towards the term of supervision,[75] as does release on bond for another offense committed after release.[76] The Supreme Court has held that pretrial detention for charges that later lead to a conviction tolls a term of supervised release.[77]

Depending on the defendant's individual circumstances, it may be beneficial for his or her supervised release to be transferred to a district other than that in which he or she was originally sentenced. For example, if the defendant was arrested, charged, convicted, and sentenced in the District of Arizona, but upon his release from imprisonment, all of his or her family resides in the Eastern District of Virginia, where the defendant would also like to live, those respective districts and probation offices may wish to transfer the defendant's case from Arizona to Virginia.

Section 3605 of title 18 provides that "[a] court, after imposing a sentence, may transfer jurisdiction over a . . . person on supervised release to the district court for any other district to which the person is required to proceed as a condition of . . . release, or is permitted to proceed, with the concurrence of such court."[78] Once such a transfer takes place, the "court to which jurisdiction is transferred under this section is authorized to exercise all powers over the . . . releasee that are permitted by" all the various statutes governing the administration, modification, termination, and possible revocation of supervised release, which are discussed elsewhere herein.[79]

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[74] 18 U.S.C. § 3624(e). In addition, a term of supervised release does not begin during a period of home confinement served as part of a federal sentence. *See Earl*, 729 F.3d at 1068. ("[R]egardless of where the BOP decided to place [the defendant], his term of supervised release could not begin until his prescribed term of imprisonment expired.").

[75] *See, e.g.*, United States v. Sullivan, 504 F.3d 969, 972–73 (9th Cir. 2007) (time in custody at state prerelease center, which was similar to halfway house, was not imprisonment that tolled federal supervised release).

[76] *See, e.g.*, United States v. House, 501 F.3d 928, 930 (8th Cir. 2007) (term ran when defendant released on bond on state charges, but was tolled when defendant began serving state prison sentence).

[77] Mont v. United States, 139 S. Ct. 1826, 1832 (2019) ("pretrial detention later credited as time served for a new conviction is 'imprisonment in connection with a conviction' and thus tolls the supervised release term under § 3624(e)").

[78] 18 U.S.C. § 3605.

[79] *Id.*; *see also* United States v. Adams, 723 F.3d 687, 689 (6th Cir. 2013) ("[S]ection 3605 expand[s] the power of the transferee court over the supervised offender" as it "was intended to permit the transferee court 'to exercise all the powers over the . . . releasee that are permitted' by the statutes dealing with supervised releasees." (citation omitted)); United States v. King, 608 F.3d 1122, 1126 (9th Cir. 2010) (18 U.S.C. § 3605 provides that the transferee court "is authorized to exercise all powers over the probationer or releasee" permitted under statute).

In addition, it is not uncommon for a probation office in one district to provide "courtesy supervision" of a releasee on behalf of a probation office in a different district.[80] In such situations, formal jurisdiction over the releasee and any decisions concerning his or her term of supervised release remains with the original sentencing court, and the supervising district merely performs the limited supervisory duties set forth in 18 U.S.C § 3603 (Duties of probation officers).[81]

V. 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 interest of justice," after considering the specified section 3553(a) factors.[82] Courts disagree on whether they must explain such consideration on the record in deciding whether to grant a defendant's motion for early termination of supervised release under section 3583(e)(1).[83]

The guidelines "encourage[] . . . [courts] to exercise this authority in appropriate cases."[84] In particular, the authority to terminate a term early is one factor a court may consider in determining the length of a term of supervised release. For example, a court may impose a longer term 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

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80 United States v. Johnson, 861 F.3d 474, 479 n.18 (3d Cir. 2017) (citing the *Guide to Judiciary Policy*, which "set[s] forth statutory bases for short-term courtesy supervision and longer-term 'transfer of supervision' without transfer of jurisdiction").

81 In such an instance, the supervising district is required to, among other things, assess any current risks and develop and implement a supervision case plan. *See, e.g.*, *Johnson*, 861 F.3d at 479 n.18 (discussing how above-referenced policy concerning "courtesy supervision" sets forth "statutory bases for short-term courtesy supervision and longer-term 'transfer of supervision' without transfer of jurisdiction").

82 18 U.S.C. § 3583(e)(1); s*ee also* United States v. Johnson, 529 U.S. 53, 60 (2000) (defendant may seek relief under section 3583(e)(1) after completing one year on supervised release where some convictions were overturned on appeal, and therefore defendant was imprisoned longer than authorized); United States v. Mathis-Gardner, 783 F.3d 1286, 1288 (D.C. Cir. 2015) (court must consider specified section 3553(a) factors before denying motion for early termination); United States v. Hook, 471 F.3d 766, 771 (7th Cir. 2006) (courts have wide discretion in determining whether to terminate term early).

83 *Compare* United States v. Johnson, 877 F.3d 993, 1000 (11th Cir. 2017) (vacating a district court's summary order denying, without explanation, defendant's motion for early termination), *and* United States v. Emmett, 749 F.3d 817, 820 (9th Cir. 2014) (court has duty to explain sentencing decisions, including decisions on early termination), *with* United States v. Mosby, 719 F.3d 925, 931 (8th Cir. 2013) (no explanation required); United States v. Lowe, 632 F.3d 996, 998 (7th Cir. 2011) (court need not make explicit finding on each factor but record must reveal court gave consideration to section 3553(a) factors), *and* United States v. Gammarano, 321 F.3d 311, 315–16 (2d Cir. 2003) (requiring statement that court considered statutory factors, but not requiring statement court considered findings of fact).

84 USSG §5D1.2, comment. (n.5).

defendant."[85] The Sixth Circuit has held that a court may terminate supervised release early even if the statute of conviction originally required a particular term of supervised release.[86]

VI. 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.[87] Chapter Seven of the *Guidelines Manual* contains policy statements that classify violations and that recommend: (i) when probation officers should report violations to the court; (ii) when courts should revoke supervised release; and (iii) the terms of imprisonment for classes of violations. A court must consider the same factors from 18 U.S.C. § 3553(a) that it initially considered in imposing the term of supervised release.[88]

A. MODIFICATION OF SUPERVISED RELEASE

A court maintains broad discretion throughout the term of supervised release to modify the term or conditions. While a hearing typically is required,[89] supervised release may be modified without a hearing (i) through a voluntary consent to the modification and waiver of hearing, or (ii) 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.[90] In deciding to modify supervised release, a court weighs the same specified section 3553(a) factors to be considered when determining an early termination of a term of supervised release. 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."[91]

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85 *Id.*

86 United States v. Spinelle, 41 F.3d 1056, 1060–61 (6th Cir. 1994) (court has discretion to terminate supervised release after one year under section 3583(e)(1) even when defendant sentenced to mandatory three-year term under 21 U.S.C. § 841(b)(1)(C)); *see also* United States v. Carpenter, 803 F.3d 1224, 1241 n.4 (11th Cir. 2015) (five-year minimum term may be shortened or terminated after one year); United States v. Vargas, 564 F.3d 618, 622–23 n.3 (2d Cir. 2009) (assuming without deciding that term of supervised release may be ended after one year).

87 18 U.S.C. § 3583(e).

88 *Id.*

89 FED. R. CRIM. P. 32.1(c)(1).

90 FED. R. CRIM. P. 32.1(c)(2); s*ee also* United States v. Johnson, 446 F.3d 272 (2d Cir. 2006) (after probation officer's petition requesting additional conditions, court modified certain conditions without hearing and modified other conditions only after hearing).

91 18 U.S.C. § 3583(e)(2).

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 an offender:

(1) possesses a controlled substance under some circumstances (discussed below);

(2) unlawfully possesses a firearm;

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

(4) has four or more positive drug tests over the course of one year.[92]

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 guidelines.[93] Notably, this exception is not available if a court finds that a defendant possessed illegal drugs, rather than merely failing a drug test.[94]

When an offender violates the conditions of his or her release in another way, the court engages in a 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.[95] 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).

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92 18 U.S.C. § 3583(g). Section 7B1.3 mandates revocation for commission of any federal or state crime punishable by imprisonment for more than one year. USSG §7B1.3.

93 18 U.S.C. § 3583(d); United States v. Thornhill, 759 F.3d 299, 306 n.5 (3d Cir. 2014) (section 3583(d) allows the court to consider a defendant's past or present participation in a program and warrants an exception to the rule in section 3583(g) when considering a response to a failed drug test).

94 *See, e.g.*, United States v. Price, 901 F.3d 746, 751 (6th Cir. 2018) (no abuse of discretion in revoking supervised release because use of cocaine equated to possession of controlled substance in violation of conditions and although defendant had not failed a drug test, he failed four drug tests in one year during prior term of supervised release); United States v. Miller, 640 F. App'x 522, 524 (7th Cir. 2016) (section 3583(d) provides that treatment programs must be considered for one who fails drug test; revocation was not for failing drug test but for possession of controlled substance, thus imposition of term of imprisonment was required (citations omitted)).

95 *See Thornhill*, 759 F.3d at 308.

If a revocation hearing is held, the defendant has certain rights.[96] Specifically, the defendant is entitled to:

- written notice of the alleged violation;
- disclosure of the evidence against him or her,[97]
- an opportunity to appear, present evidence, and question adverse witnesses;
- counsel; and
- the opportunity to make a statement and present any mitigating information.[98]

2. Policy Statements

Section 7B1.1 sets forth three grades of violations of supervised release—Grades A through C. Violations are grouped into these three broad grades based on the severity of the conduct, ranging from the commission of certain serious felonies and other felonious conduct, to misdemeanors and technical violations.[99] Recommended ranges of imprisonment are set forth in a Revocation Table[100] based on the grade of the violation and the defendant's criminal history category, as determined at the defendant's initial sentencing hearing for the underlying criminal case.[101] Section 7B1.2 recommends when the probation officer should report the violation to the court, and §7B1.3 recommends when the court should revoke the term of supervised release.

The following table summarizes these recommendations.[102]

96 *See* FED. R. CRIM. P. 32.1(b)(2).

97 Because most courts have deemed revocation proceedings to be noncriminal, they have held that the Fifth Amendment right against self-incrimination does not apply, thereby allowing statements made by the defendant to be used against him or her at these proceedings. *See, e.g.*, United States v. Hulen, 879 F.3d 1015, 1020 (9th Cir. 2018).

98 FED. R. CRIM. P. 32.1(b)(2).

99 USSG §7B1.1, comment. (n.1) ("The grade of violation does not depend upon the 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.").

100 USSG §7B1.4.

101 *See* USSG §§7B1.1–7B1.3; *see also* United States v. McNeil, 415 F.3d 273, 277 (2d Cir. 2005) ("In imposing a sentence for violation . . . judge may freely impose a term lower or higher than the recommended Guidelines range, but must start with a legally correct interpretation of the Guidelines.").

102 Where there is more than one violation, or if the violation includes conduct constituting more than one offense, grade of violation is determined by most serious graded violation. USSG §7B1.1(b).

Grade	Conduct	Reporting	Revocation
A	constitutes a federal, state, or local offense punishable by more than one year of imprisonment that either: • is a crime of violence • controlled substance offense; or • involves possession of a firearm or destructive device; **or** constitutes any other federal, state, or local offense punishable by *more than twenty years* of imprisonment	probation officer shall promptly report to the court	court shall revoke upon finding of violation
B	constitutes any other federal, state, or local offense punishable by *more than one year* of imprisonment	probation officer shall promptly report to the court	court shall revoke upon finding of violation
C	constitutes a federal, state, or local offense punishable by *one year or less* of imprisonment; **or** is a violation of any other condition of supervised release	probation officer shall promptly report to the court *unless* • minor, not part of a pattern, and • no risk to an individual or the public	court may revoke or extend term and/or modify conditions of supervision upon finding of violation

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.[103]

Although part of §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. In all other cases, the court may opt not to revoke supervised release and incarcerate the defendant, but instead continue him or her on supervision (under the same terms or with modified terms), extend the term of supervision, or sentence the defendant to a term of home detention in lieu of incarceration.[104] Before doing so, however, the court must first consider the pertinent provisions in Chapter Seven of the guidelines.[105]

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, five years; for class B felonies, three years; for class C or D felonies, two years; for any other offense, one year.[106]

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[103] United States v. Frederickson, 988 F.3d 76, 85–86 (1st Cir. 2021) (government's use of acquitted conduct at revocation hearing to prove offense does not violate principles of collateral estoppel; revocation hearing governed by a lower standard of proof to show by a preponderance of the evidence that crime was committed on supervised release); United States v. Colon-Maldonado, 953 F.3d 1, 13 (1st Cir. 2020) (court misapplied guidelines in finding defendant committed "aggravated abuse" based on unsubstantiated allegations in two complaints); United States v. Teran, 98 F.3d 831, 836 (5th Cir. 1996) ("Regardless of [the defendant's] acquittal by a jury, the revoking court had a preponderance of evidence before it to support the finding of th[e] probation violation.").

[104] 18 U.S.C. § 3583(e)(1)–(4).

[105] 18 U.S.C. §§ 3553(a), 3583(e).

[106] 18 U.S.C. § 3583(e)(3); *see also, e.g.*, United States v. Salazar, 987 F.3d 1248, 1261 (10th Cir. 2021) (imposition of ten-month sentence after revocation did not constitute illegal sentence even though aggregate sentence of 125 months exceeded 120 month statutory maximum for original offense; ten-month sentence fell within two-year maximum established in section 3583(e)(3), where statute authorized revocation even where resulting incarceration, when combined with time already served for offense, will exceed maximum incarceration permissible), *petition for cert. filed*, No. 21–5231 (U.S. July 29, 2021). 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, e.g.*, United States v. Collins, 859 F.3d 1207, 1214 (10th Cir. 2017) ("Congress meant for the term 'offense' in [section 3583(e)(3)] to refer, in all instances, to the *crime* that caused a defendant to be placed on supervised release in the first place—that is, the defendant's *original* crime of conviction."); United States v. Ford, 798 F.3d 655, 663 (7th Cir. 2015) ("The phrase 'the offense that resulted in the term of supervised release' refers to the offense for which the defendant was initially placed on supervised release."). Courts may take recidivism enhancements into account in

The supervised release statute that was in effect at the time of the original offense controls.[107]

2. Policy Statements

The Revocation Table at §7B1.4 provides ranges of imprisonment for each violation grade with increasing severity based on a defendant's criminal history category as determined at the time of the original sentencing. A defendant's criminal history category at the time of the revocation hearing—even if greater or lesser than the original criminal history category—is not factored into the 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.

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
A	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 itself was a Class A felony, and the violation is classified as Grade A, the table contains higher ranges.

3. Concurrent and Consecutive Sentences

Under 18 U.S.C. § 3584 (Multiple sentences of imprisonment), district courts have discretion to impose either consecutive or concurrent sentences of imprisonment. This statute also applies to prison terms for violations of supervised release.[108] Likewise, in the

determining the maximum potential term of imprisonment for an offense constituting a violation of supervised release. *See* United States v. Ramos, 979 F.3d 994, 1000 (2d Cir. 2020) (collecting cases).

[107] United States v. Smith, 354 F.3d 171, 174 (2d Cir. 2003) ("[S]upervised release sanctions are part of the punishment for the original offense, and . . . sanctions of the original offense remain applicable, despite subsequent amendment." (citing Johnson v. United States, 529 U.S. 694, 701 (2000))).

[108] *See, e.g.*, United States v. Campbell, 937 F.3d 1254, 1258 (9th Cir. 2019) (affirming imposition of term that included five consecutive five-month prison terms, holding it was not plain error to impose consecutive prison terms following revocation of concurrent supervised release terms and rejecting argument that Chapter 7 precludes imposition of such sentence); United States v. Gonzalez, 250 F.3d 923, 929 (5th Cir. 2001) (court within its authority to impose consecutive terms of imprisonment following revocation of three concurrent terms of supervised release).

case of a violation based on the commission of a new federal offense, resulting in both a new sentence and a revocation sentence stemming from an existing term of supervised release, a court may decide whether a sentence of imprisonment for the new offense should run concurrently with or consecutively to the revocation sentence (unless the new offense carries a mandatory consecutive prison sentence).[109] Such discretion exists notwithstanding provisions in the guidelines that recommend a consecutive sentence in such cases.[110]

VII. APPELLATE ISSUES

As with a sentence of imprisonment, a term of supervised release may be reviewed on appeal for procedural and substantive reasonableness in light of the court's stated reasons.[111] The standard of review will vary depending on the nature of the challenge and the procedural posture of the appeal.[112]

A. APPEAL OF CHALLENGED CONDITIONS

Claims that a district court imposed an invalid condition of supervised release raised

[109] United States v. Rodriguez-Quintanilla, 442 F.3d 1254, 1256 (10th Cir. 2006) (imposition of sentence upon revocation of supervised release to run consecutively to sentence for new offense was in accordance with section 3584(a) and the advisory policy statement at §7B1.3(f)).

[110] *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."); *see also* USSG §5G1.3, comment. (n.4(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 . . . 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.").

[111] *See, e.g.*, United States v. Winding, 817 F.3d 910, 910–11 (5th 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 court), *superseded by statute*, Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111–174, 124 Stat. 1216, *as recognized in* United States v. Smith, 949 F.3d 60 (2d Cir. 2020).

[112] *See* United States v. Campbell, 937 F.3d 1254, 1256 (9th Cir. 2019) (applying *Booker* reasonableness standard of review for sentence imposed on revocation, *de novo* review for guideline interpretation, and clear error review for factual findings; "[g]enerally, we review the district court's application of the Guidelines for abuse of discretion. However, when a defendant does not raise an objection to his sentence before the district court, we apply plain error review." (citations omitted)); *see also* United States v. Speed, 811 F.3d 854, 857–59 (7th Cir. 2016) (discussing waiver and the applicable standards of review); United States v. Gallegos, 613 F.3d 1211, 1213–14 (9th Cir. 2010) (applying plain error review when defendant did not preserve objection to imposition of sentence).

for the first time on appeal are ordinarily reviewed only for "plain error."[113] Fully preserved challenges to conditions of supervised release are ordinarily reviewed on appeal for abuse of discretion,[114] 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*."[115] Although circuit courts often uphold the conditions imposed, they also have disagreed about the propriety of certain conditions.[116]

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.[117] Circuit courts have criticized and struck down discretionary conditions imposed because they were vague and overbroad,[118] not reasonably related to relevant statutory sentencing factors,[119] or constituted a greater deprivation of liberty than

[113] United States v. McCullock, 991 F.3d 313, 317 (1st Cir. 2021) ("we inspect fact findings for clear error, legal issues *de novo*, . . . and judgment calls with some deference."); *see also Speed*, 811 F.3d at 858–59 (discussing when plain error review should apply); United States v. Scott, 821 F.3d 562, 570 (5th Cir. 2016) (same); *Henry*, 819 F.3d at 874 (same); *Aldeen*, 792 F.3d at 253 (same).

[114] *See Speed*, 811 F.3d at 858 (noting general rule to review for abuse of discretion when conditions contested, while examining uncontested conditions for plain error); *Scott*, 821 F.3d at 570 ("Abuse-of-discretion review typically applies to conditions . . . 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) (court reviews conditions for abuse of discretion, giving considerable deference to court's determination of the appropriate conditions and recognizing court has "at its disposal all of the evidence, its own impressions of a defendant, and wide latitude." (citations omitted)).

[115] United States v. Aquino, 794 F.3d 1033, 1036 (9th Cir. 2015) (citations omitted).

[116] *See generally* United States v. Munoz, 812 F.3d 809, 815–17 (10th Cir. 2016) (noting disagreement among circuits regarding several conditions).

[117] *See, e.g.*, United States v. Kappes, 782 F.3d 828, 838–39 (7th Cir. 2015) (condition must be appropriately tailored, adequately justified, and orally pronounced after proper notice); United States v. Siegel, 753 F.3d 705, 716–17 (7th Cir. 2014) (remanded for reconsideration of several vaguely worded and contradictory conditions).

[118] *See, e.g.*, United States v. Van Donk, 961 F.3d 314, 323–24 (4th Cir. 2020) (scienter requirement in imposed condition alleviates vagueness concerns); United States v. Hall, 912 F.3d 1224, 1226 (9th Cir. 2019) (per curiam) (reversing, as violative of due process, condition limiting defendant's interaction with his son to "normal familial relations"); United States v. Washington, 893 F.3d 1076, 1081–82 (8th Cir. 2018) (reversing, as unconstitutionally vague, conditions prohibiting defendant from associating with prospective gang members or anyone wearing clothing associated with a gang); *Kappes*, 782 F.3d at 848 ("[W]e highlight the ambiguities and/or overbreadth in many of the standard conditions, and suggest modifications for improving them."). *But see* United States v. Sebert, 899 F.3d 639, 641 (8th Cir. 2018) (per curiam) (rejecting defendant's claim the term "erotica" is unconstitutionally vague based on prior precedent upholding conditions incorporating that term).

[119] *See, e.g.*, United States v. Canfield, 893 F.3d 491, 495–98 (7th Cir. 2018) (reversing a number of conditions on various grounds, including condition barring defendant from viewing all adult pornography due to court's failure to provide sufficient explanation for imposing such condition); United States v. Betts, 886 F.3d 198, 202–03 (2d Cir. 2018) (vacating special condition prohibiting all alcohol use where "[n]either defendant's underlying crime nor any of the conduct contributing to his violations of supervised release involved the use of alcohol."). *But see* United States v. McCullock, 991 F.3d 313, 320–21 (1st Cir. 2021) (finding case-specific reasons for barring defendant from viewing adult pornography and material depicting nude adults and/or sexual activity, based on defendant's history and characteristics); United States v. Vigil, 989 F.3d

reasonably necessary.[120] In 2016 amendments to §5D1.3, the Commission revised or clarified several of the conditions that had been challenged on appeal based on being "conditions [] vaguely worded, [which] pose[d] constitutional concerns," or that were categorized as "standard" conditions "in a manner that [] led to their improper imposition upon particular offenders."[121]

B. Appeal of Revocation Decisions

District courts must adequately explain a defendant's sentence so that reviewing courts can evaluate the validity of the underlying rationale supporting the sentence.[122] Just as with a sentence of imprisonment imposed at a defendant's original sentencing hearing, a post-revocation sentence of imprisonment cannot be based solely on the defendant's need for rehabilitation.[123]

406, 411 (5th Cir. 2021) (per curiam) (where defendant has history of substance abuse and drug-related arrests, court properly has discretion to require substance abuse treatment and prohibit use of alcohol as special conditions, even without specific evidence of alcohol abuse).

120 *See, e.g.*, United States v. Eaglin, 913 F.3d 88, 98–101 (2d Cir. 2019) (rejecting ban on internet, citing to *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), where ban not reasonably related to either nature of offense or defendant's history and characteristics; rejecting "blanket ban" on adult pornography as not "reasonably related to the sentencing factors and reasonably necessary to accomplish the goals of sentencing"); United States v. Ramos, 763 F.3d 45, 62–63 (1st Cir. 2014) (prohibition against access to internet without approval of probation officer for ten-year supervised release term not reasonably related to defendant's characteristics and history, and thus deprived him of more liberty than reasonably necessary to achieve goals of sentencing). *But see* United States v. Hamilton, 986 F.3d 413, 422–23 (4th Cir. 2021) (upholding lifetime internet ban without prior approval of probation officer as not overbroad, noting defendant used internet to meet victim and contact her after offense and noting availability of future condition modification if warranted under section 3583); United States v. Newell, 915 F.3d 587, 591 (8th Cir. 2019) (affirming, as no greater deprivation of liberty than reasonably necessary, imposition of condition restricting internet access without prior written permission of probation officer).

121 USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The amendment responds to many of the concerns raised in [various appellate] challenges by revising, clarifying, and rearranging the conditions contained in §§5B1.3 and 5D1.3 in order to make them easier for defendants to understand and probation officers to enforce."). For example, in *United States v. Kappes*, 782 F.3d 828, 849 (7th Cir. 2015), 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." The court stated this condition was inappropriate both because the defendant had no dependents, and because it had no definition of "family responsibilities." The 2016 amendments eliminated this standard condition and replaced it with a special discretionary condition that applies only to defendants with dependents.

122 *See* United States v. Lee, 897 F.3d 870, 874 (7th Cir. 2018).

123 *See* United States v. Vazquez-Mendez, 915 F.3d 85, 87–88 (1st Cir. 2019) (SRA provides that courts may not impose or lengthen sentence to promote rehabilitation, and also applies to resentencing after revocation); *see also* Tapia v. United States, 564 U.S. 319, 335 (2011) ("court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation"); United States v. Schonewolf, 905 F.3d 683, 689 (3d Cir. 2018) (*Tapia* applies to post-revocation sentences).

Whether a district court had jurisdiction to revoke supervised release is reviewed *de novo.*[124] The district court's factual findings that a defendant violated the conditions of release are reviewed for clear error, while legal conclusions are reviewed *de novo*.[125]

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.[126] With respect to appellate review of the type and length of the sentence imposed upon revocation, "sentences for violations of supervised release are reviewed under the same standard as for sentencing generally: whether the sentence imposed is reasonable."[127] Reasonableness is reviewed "under a deferential abuse-of-discretion standard."[128] Where a defendant does not object at sentencing to a district court's failure to explain its reasoning, the procedural challenge is subject to plain error.[129]

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, or only becomes ripe on appeal of a judgment revoking supervised release or as part of a modification proceeding. The courts of appeal have issued inconsistent decisions on this point and the ripeness of any particular challenge may turn on the nature of the

[124] *See, e.g.*, United States v. Najjar, 283 F.3d 1306, 1307 (11th Cir. 2002) (per curiam) ("subject matter jurisdiction is a question of law and, is therefore, subject to *de novo* review").

[125] *See, e.g.*, United States v. Miller, 992 F.3d 322, 324 (4th Cir. 2021) (reviewing legal conclusions *de novo* because court interprets guidelines as a matter of federal law); United States v. LeCompte, 800 F.3d 1209, 1215 (10th Cir. 2015) (addressing denial of motion to dismiss petition to revoke supervised release based on challenge to condition allegedly violated, stating "[l]egal questions relating to the revocation of supervised release are reviewed *de novo*"); United States v. Lee, 795 F.3d 682, 685 (7th Cir. 2015) (court may revoke if it finds a violation by preponderance of the evidence; "Normally, we look only to ensure that a revocation decision 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) (court has discretion to revoke if government proves by preponderance of the evidence defendant violated condition; revocation decision reviewed for abuse of discretion, and factfinding reviewed for clear error (citations omitted)).

[126] *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) (reviewing revocation decision for abuse of discretion; stating court may revoke and sentence a defendant to a term of imprisonment if court finds by a preponderance of the evidence defendant violated a condition (citations omitted)).

[127] United v. Smith, 949 F.3d 60, 65–66 (2d Cir. 2020) (citations omitted).

[128] *Id.*; *see also* United States v. Adams, 873 F.3d 512, 516 (6th Cir. 2017) (reviewing sentencing decision, including revocation, for reasonableness under abuse of discretion standard (citations omitted)). *But see* United States v. Foley, 946 F.3d 681, 685 (5th Cir. 2020) ("When a defendant preserves his objection for appeal, we review a sentence imposed on revocation of supervised release under a 'plainly unreasonable' standard. Under this standard, we first 'ensure that the district court committed no significant procedural error' . . . . We 'then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.' " (citations omitted)).

[129] *See Smith*, 949 F.3d at 66.

condition being challenged.[130] Finally, courts have held that a defendant's appeal of a district court's revocation of supervised release is moot if the defendant has been unconditionally released from all types of custody (including any recommenced term of supervised release) at the time the appellate court hears the appeal.[131]

[130] *See, e.g.*, United States v. Bennett, 823 F.3d 1316, 1325–26 (10th Cir. 2016) (discussing ripeness issues in supervised release sentencing and disagreement among the circuits as to whether condition of supervised release requiring penile plethysmograph testing is ripe for review at time of sentencing or only after release); United States v. Medina, 779 F.3d 55, 66–67 (1st Cir. 2015) (same).

[131] *See* United States v. Huff, 703 F.3d 609, 611–12 (3d Cir. 2013) (discussing application of mootness doctrine 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 summarizes the various mandatory and discretionary conditions that are set forth in the supervised release guidelines and statutes.[132] Following each condition summary is a citation to the relevant guideline provision as well as any statutory references.[133]

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); 18 U.S.C. § 3583(d).

- For a first-time domestic violence conviction, as defined in 18 U.S.C. § 3561(b), 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 supervised release 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 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), 3563(a)(5).[134]

- 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 USSG §5D1.3(a)(5); 18 U.S.C. § 3624(e).

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[132] The summaries relate to the conditions as amended in 2016 and reflected in the current *Guidelines Manual*.

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

[134] In addressing the court's ability to ameliorate or suspend the drug testing requirements for certain offenders, section 3583(d) incorrectly cites subsection (a)(4) of the probation statute, section 3563. The correct citation for this authority appears to be subsection (a)(5) of section 3563.

- The defendant shall: (A) make restitution in accordance with 18 U.S.C. §§ 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* USSG §5D1.3(a)(7); 18 U.S.C. § 3583(d).

- The defendant shall submit to the collection of a DNA sample 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 (34 U.S.C. § 40702). *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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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

ten 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), (17) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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 ten 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), (17) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- 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) (as provided in 18 U.S.C. § 3583(d)).

- The defendant shall follow the instructions of the probation officer related to the conditions of supervision. *See* USSG §5D1.3(c)(13) (as provided in 18 U.S.C. § 3583(d)).

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(c)(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); 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 supervised release. *See* USSG §§5D1.3(e)(1), 5F1.1 (Community Confinement); 18 U.S.C. § 3563(b)(11).

- Home detention may be imposed as a condition of supervised release but only as a substitute for imprisonment. *See* USSG §§5D1.3(e)(2), 5F1.2 (Home Detention).

- Community service may be imposed as a condition of supervised release. *See* USSG §§5D1.3(e)(3), 5F1.3 (Community Service); 18 U.S.C. § 3563(b)(12).

- Occupational restrictions may be imposed as a condition of supervised release. *See* USSG §§5D1.3(e)(4), 5F1.5 (Occupational Restrictions); 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, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* USSG §§5D1.3(e)(6), 5F1.8 (Intermittent Confinement); 18 U.S.C. § 3583(d).