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## ***Representing a Client Charged With Violating Conditions of Supervised Release--Part Two***

By Douglas A. Morris



### **VI. The Revocation Hearing and the Options Available A. The Guidelines**

Up to this point everything should be copesetic; at least there should be no undisclosed statutory or guidelines errors, and defense counsel should be ready to appear before the sentencing court for the revocation hearing. What can happen next? In sum, at the revocation hearing the district court can, statutorily, in some cases, simply continue the defendant on supervised release. In the alternative, the court can revoke the term of supervised release and impose a term of imprisonment for as short a period as one day with no supervised release to follow. Also, the court can impose a statutory-maximum term of imprisonment with, in instances where the defendant falls under the PROTECT Act, an additional term of supervised release.<sup>1</sup> In fact, the district court has many options to consider.<sup>2</sup>

Pursuant to Chapter Seven of the suggested Guidelines, however, when the district court finds, by a preponderance of evidence,<sup>3</sup> that the defendant's conduct constitutes a "Grade A" or "Grade B" violation, the court must revoke that defendant's term of supervision.<sup>4</sup> If the defendant's conduct constitutes a "Grade C" violation, revocation and imprisonment are not required.<sup>5</sup> Nonetheless, except for those with the lowest sentencing ranges, Chapter Seven recommends imprisonment.<sup>6</sup>

Be that as it may, Chapter Seven, like the balance of the Sentencing Guidelines after *Booker*, merely suggests the appropriate sentence and the district court need not follow those suggestions.<sup>7</sup> In fact, Chapter Seven, which is a policy statement, appears to continue to have some lower value than the portions of the Sentencing Guidelines that are "true" Guidelines, even though the remedial portion of *Booker* held that the entire Sentencing Guidelines are advisory.<sup>8</sup>

### **B. 18 U.S.C. § 3583(g)**

Statutorily, there are only four bases for mandatory revocation of a term of supervised release, which are found in 18 U.S.C. § 3583(g).<sup>9</sup> In the context of § 3583(g), many defendants will be accused of possession of "a controlled substance[.]" testing "positive for use of illegal controlled substances more than three times" in a year, or refusing "to comply with drug testing imposed as a condition of supervised release[.]"<sup>10</sup> Though the statute calls for mandatory revocation, a glimmer of hope remains, but it is buried in § 3583(d); that is, § 3583(d) includes an exception to mandatory revocation. "The court *shall* consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an

exception in accordance with . . . [G]uidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test.”<sup>11</sup> It appears, however, that this exception is not available to defendants who committed an offense before September 13, 1994, which is when § 3583(d) was implemented.<sup>12</sup>

Indeed, if the defendant committed the offense of conviction before the implementation of § 3583(d), “§ 3583(g) . . . requires that a defendant found to have possessed a controlled substance *shall* have his supervised release terminated and *shall* receive a prison sentence of not less than one-third of the length of the supervised release term.”<sup>13</sup> This is so because “supervised release sanctions are part of the punishment for the original offense[] . . . and . . . the sanctions of the original offense remain applicable, despite subsequent amendment[.]”<sup>14</sup> thus, “the date of the ‘initial offense’ is determinative of the applicable law at sentencing.”<sup>15</sup> Consequently, when a defendant committed the original offense of conviction before the implementation of the exception within § 3553(d), that defendant cannot take advantage of the exception within § 3553(d) even when the defendant is sentenced after September 13, 1994, for a violation of supervised release.<sup>16</sup>

Pursuant to “the federal ‘saving statute,’ . . . which was designed to ensure that a convicted criminal defendant does not fortuitously benefit from more lenient laws that may be passed after he or she had been convicted,” the key date of this analysis is the date the defendant *committed and concluded* the offense of conviction.<sup>17</sup> Though the statute in effect at the time of the offense is to be applied, it is the Sentencing Guidelines in effect at the time of the revocation hearing, not the Sentencing Guidelines in effect at the original sentencing, that apply in conjunction with the applicable statute.<sup>18</sup>

### Possession Versus Use

Beyond the exception, the most troubling aspect of the bases for mandatory revocation are the portions of 18 U.S.C. § 3583(g) dealing with “possession” of controlled substances and testing positive for illegal controlled substances<sup>19</sup> (which has been considered to be “use” of an illegal controlled substance)<sup>20</sup> at least four times in a year.<sup>21</sup>

One approach is that § 3583(g)(1) “does not swallow” § 3583(g)(4),<sup>22</sup> because all that § 3583(g)(4) requires is four positive tests for an illegal controlled substance in one year even if it is “accidental or unwilling ingestion.”<sup>23</sup> Therefore, at least four accidental or unwilling “uses” in one year will constitute an adequate basis for mandatory revocation pursuant to § 3583(g)(4).<sup>24</sup> Stated another way, “*four positive* tests in one year is sufficient evidence that a defendant’s use was knowing and voluntary, making an independent *mens rea* finding unnecessary.”<sup>25</sup> To convert less than four uses (*i.e.*, less than four positive tests for an illegal controlled substance) to a possession, however, it must be proven by a preponderance of evidence that the use was *knowing* and *voluntary*.<sup>26</sup> In sum, there is a *mens rea* element to § 3583(g)(1), but not to § 3583(g)(4).<sup>27</sup>

Somewhat differently, the United States Court of Appeals for the Fifth Circuit in *Courtney* held that “‘use’ requires knowing and voluntary ingestion.”<sup>28</sup> Thus, absent *voluntary* and *knowing* ingestion, there is no “use” of a controlled substance “for sentencing or supervised release purposes . . . .”<sup>29</sup> Hence, if there is no “use,” there is no “possession.”<sup>30</sup> Yet, once “use” is determined, there is no distinguishing “use” from “possession.”<sup>31</sup> In order to determine that “use” and, by extension, “possession” of controlled substance has occurred:

the . . . court should have a proper record basis for concluding that a positive result on the tests may not reasonably be accounted for by passive inhalation. This could be adequately established through expert testimony, . . . by probation officer’s testimony . . . or perhaps through judicial notice based on an adequately developed foundation and prior notice and opportunity to rebut.<sup>32</sup>

Another approach is straightforward: “use of narcotics amounts to possession thereof for the purposes of § 3583(g).”<sup>33</sup> “Inferring possession of a drug from the consumption of that drug is just as sensible as inferring, from the statement ‘I ate a hamburger for lunch,’

that the person possessed the hamburger before wolfing it down.”<sup>34</sup> Of course, for this analogy to be valid in the context of revoking a term of supervised release, the defendant must admit eating the hamburger. No matter the approach, if the government asserts, through a positive urinalysis, that the defendant at least *used* a controlled substance, and the defendant denies “use” of a controlled substance, the government must confirm the positive test through use of “gas chromatography/ mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy.”<sup>35</sup> However, the district court is not “*per se* precluded from finding that a defendant ingested . . . [a controlled substance] when the so-called confirmation test . . . [falls] below the cutoff level specified in the contract between the testing laboratory and the . . . [Administrative Office.]”<sup>36</sup> “Nothing in . . . [§] 3583(d) precludes the [d]istrict [c]ourt from considering the *totality of the evidence* before it — including the dilution of defendant’s urine sample — in determining whether ‘a preponderance of evidence,’ 18 U.S.C. § 3583(e), indicates that defendant ingested drugs.”<sup>37</sup>

### C. Disputed Facts

Nevertheless, whether it be disputed results from a urinalysis or a dispute over other types of evidence used against the defendant during the revocation hearing, in addition to the right to counsel<sup>38</sup> and written notice of the alleged violations, the government must disclose the evidence that it will use against the defendant.<sup>39</sup> “Because a person’s liberty is at stake, . . . due process requires that a defendant be given a fair and meaningful opportunity to refute and challenge adverse evidence to assure that the court’s relevant findings are based on verified facts.”<sup>40</sup> The defendant has the “opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear . . . .”<sup>41</sup>

Though a defendant enjoys some rights under the Due Process Clause of the Fifth Amendment, “[r]evocation hearings are not part of the criminal prosecution, are not formal trials, and the rules of evidence are not applied mandatorily.”<sup>42</sup> In fact, “[t]he full panoply of procedural safeguards does not attach to revocation proceedings because the Supreme Court has ‘distinguished revocation proceedings from criminal prosecutions on the ground that a probationer *already stands convicted of a crime.*’”<sup>43</sup> Accordingly, under some circumstances, the sentencing court can consider hearsay evidence, and, correspondingly, it can restrict the defendant’s ability to cross-examine witnesses.<sup>44</sup> That is, because a hearing to revoke supervised release is not necessarily criminal in nature, a defendant does not have a right under the Sixth Amendment to confront a witness; rather, the defendant’s *ability* to cross-examine a witness in the context of a revocation hearing is based in the Due Process Clause of the Fifth Amendment.<sup>45</sup> Indeed, as noted, the sentencing court need only use the “preponderance of evidence” standard, not the standard of “proof beyond a reasonable doubt,” to find that the violation of the conditions of supervised release occurred.<sup>46</sup>

If the district court restricts the defendant’s rights in this area of confrontation, it “must engage in a balancing test and weigh the defendant’s right to confront adverse witnesses against the grounds asserted by the government for not producing the witness.”<sup>47</sup> It is the government’s burden to “show good cause by demonstrating [that] the hearsay evidence is reliable and by offering a reasonably satisfactory explanation why live testimony is undesirable or impracticable.”<sup>48</sup> After the government has met its burden, the district “court must expressly find that there is ‘good cause’ to deny a defendant the right to confront and cross-examine an adverse witness in a . . . revocation hearing.”<sup>49</sup>

An exception to this rule is found in *United States v. Williams*.<sup>50</sup>

[N]either the Due Process Clause nor Rule 21.1 obliges the district court to perform a good-cause analysis with respect to a ‘proffered out-of-court statement [that] is admissible under an established exception to the hearsay rule.’<sup>51</sup> . . . On the other hand, if the statement does not fall under such an exception, Rule 32.1 requires the court to determine whether good cause exists to deny the defendant the opportunity to confront the adverse witness.<sup>52</sup>

In the end, “a finding that a defendant violated the terms of his supervised release may rest upon reliable hearsay evidence . . . .”<sup>53</sup>

## D. Sentencing

### 1. Introduction

Assuming that the defendant either pleaded “true” to the asserted violations or the district court determined that the government met its burden of proof and then determined that the defendant’s supervised release should be revoked, what next? Something defense counsel should know before arriving at this point is how much prison time, statutorily, the defendant can receive.

As previously discussed, 18 U.S.C. § 3559 classifies each offense based on the statutory maximum sentence that can be imposed for each underlying offense,<sup>54</sup> and, in most instances, § 3583(b) mandates the maximum terms of available supervised release.<sup>55</sup> The exceptions to § 3583(b) are certain, *inter alia*, drug offenses, terrorism-related offenses, and offenses involving minor victims; these types of offenses may include the possibility of lifetime terms of supervised release.<sup>56</sup> In the end, it is the *classification* of the underlying offense that restricts the length of imprisonment upon revocation of the term of supervised release: the restrictions on the length of imprisonment upon revocation are seen in § 3583(e)(3).<sup>57</sup> Thus, it is clear that the statutes “drive” the available terms of supervised release and imprisonment upon revocation of the defendant’s term of supervised release.<sup>58</sup>

### 2. -Before and After the PROTECT Act<sup>59</sup>

This brings us to a point where the date the defendant committed the underlying offense becomes important again. The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, PL 108-21, Apr. 30, 2003, 117 Stat. 650, (a.k.a. The PROTECT Act), substantially changed the potential terms of imprisonment upon revocation of supervised release.

For example, before the PROTECT Act, a hypothetical defendant committed a Class C felony and received a sentence of 18 months imprisonment and three years supervised release.<sup>60</sup> The defendant then started the term of supervised release, but violated the conditions of supervised release. Upon revocation, the sentencing court imposed a 23-month term of imprisonment, which is one month short of the statutory maximum sentence of imprisonment that could have been imposed, and 12 more months of supervised release.<sup>61</sup> After serving the term of imprisonment, the defendant, again, violated the conditions of supervised release. This time, the sentencing judge imposed a 13-month term of imprisonment with no further supervision. This sentence, before the PROTECT Act, is incorrect.

Why? Before the PROTECT Act, the statutory maximum sentences under 18 U.S.C. § 3583(e) represented the entire statutory maximum sentence of imprisonment available upon revocation.<sup>62</sup> That is, terms of imprisonment noted in § 3583(e)(3), which are directly related to the classification of the defendant’s original offense of conviction,<sup>63</sup> represent “the cap for *maximum reimprisonment*” that can be imposed upon revocation; therefore, any and all “revocation sentences” must be added together or “aggregated” to meet the statutory maximum sentence of imprisonment.<sup>64</sup> In the above example, which is similar to what occurred in *Jackson*, the sentencing court could only impose one month imprisonment upon revocation, because that was all of the “time” available under the two-year statutory maximum for a Class C felony.<sup>65</sup>

The sentencing court did not, however, exceed the statutory limits when it imposed 12 additional months of supervised release to follow the 23 months of imprisonment.<sup>66</sup> Indeed, “[w]hen a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is *less than* the maximum term of imprisonment authorized under . . . [§ 3583(e)(3)], the court *may* include a requirement that the defendant be placed on a term of supervised release after imprisonment.”<sup>67</sup> Yet, “[t]he length of the term of supervised release shall not exceed the term of supervised release authorized by *statute* for the offense that resulted in the original term of supervised

release, *less any* term of imprisonment that was imposed upon revocation of supervised release.”<sup>68</sup>

Be aware that the *statute* represents the limit; the term of supervised release that the *district court imposed* at the sentencing for the underlying offense is *not* the limit. In other words, if the district court *originally* imposed a term of supervised release somewhere short of the maximum under § 3583(b), or elsewhere, that would not limit the sentence of imprisonment under § 3583(e)(3) or the length of supervised release that could follow under § 3583(h).<sup>69</sup> With this in mind, once the statutory maximum sentence of reimprisonment upon revocation of supervised release is imposed, the district court *cannot* impose another term of supervised release.<sup>70</sup>

In our example, that meant that the district court could have imposed a 13-month term of supervised release, but it could have only imposed a one-month term of reimprisonment upon revocation of that extended term of supervised release, which, clearly, makes for a mostly toothless threat of reimprisonment for not conforming to the conditions of supervised release.<sup>71</sup> Importantly, as to credit for time served on supervised release under § 3583(h), the statute does not require sentencing courts to credit the defendant’s sentence of imprisonment or term of supervision for time spent on supervised release. There is no requirement that the defendant receive credit for so-called, “street time.”<sup>72</sup>

As to the PROTECT Act, it dramatically changed the limitation noted in *Jackson* and similar cases. The sentencing courts are still limited to the terms of imprisonment noted in 18 U.S.C. § 3583(e)(3), but these limits are now imposed on *any* revocation, which appears to cancel the “aggregation” requirement.<sup>73</sup> Specifically, prior to the PROTECT Act, § 3583(e)(3) simply stated the following:

The court may . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute . . . except that a defendant whose term of supervised release is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term or supervised release is a Class A felony . . . .<sup>74</sup>

After the PROTECT Act, § 3583(e)(3) states the following:

The court may . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute . . . except that a defendant whose term of supervised release is revoked under this paragraph may not be required to serve *on any such revocation* more than 5 years in prison if the offense that resulted in the term of supervised release is a Class A felony . . . .<sup>75</sup>

It may not seem like much, but these few words, *on any such revocation*, when read in conjunction with the changes to § 3583(h),<sup>76</sup> indicate that a sentencing court can now order a defendant reimprisoned for up to the applicable statutory maximum term of supervised release under §§ 3559(a) and 3583(b), but only in the increments noted in § 3583(e)(3). Thereafter, the court can impose an additional term of supervised release pursuant to § 3583(h) up to the limits found in § 3583(b).<sup>77</sup> Furthermore, pursuant to 18 U.S.C. §§ 3583(b), 3583(j) and (k), and 21 U.S.C. §§ 841 and 960, the district court can impose an additional term of supervised release extending to the higher limits within the statute of conviction, which trumps the limits within § 3583(b).<sup>78</sup>

What has not been addressed after the PROTECT Act is whether, (for those whose offenses do not trigger an exception to § 3583(b)), the combined changes to 18 U.S.C. §§ 3583(e)(3) and (h) allow a district court to exceed the limits of § 3583(b) with repeated revocations and reimprisonment. For example, a district court revokes the supervised release of the hypothetical defendant and imposes 24 months reimprisonment and 12 months additional supervised release following reimprisonment. The hypothetical defendant completes the term of reimprisonment but violates a condition of supervised release, again, before completing the 12-months supervision. After the PROTECT Act, § 3583(e)(3) states that up to 24 months imprisonment can be imposed “on *any such*

revocation . . . .”<sup>79</sup> Does this mean that even though § 3583(b) authorized three years supervised release for the hypothetical defendant, § 3583(e)(3) allows a district court to exceed that limit by allowing an additional 24 months imprisonment “on *any* such revocation” for a total of 48-months imprisonment?<sup>80</sup>

The answer to this appears to come from a “holistic” reading of § 3583(e): “The court may . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release *authorized by statute* for the offense that resulted in such term of supervised release. . . .”<sup>81</sup> Thus, relying on 18 U.S.C. §§ 3559, 3583(b), (e)(3), and (h), after the PROTECT Act it appears that a district court can revoke the defendant’s term of supervised release and imprison the hypothetical defendant for up to 24 months at one time for a grand total of three years, but cannot impose an additional term of 24 months for up to 48 months of imprisonment.<sup>82</sup>

As previously noted, unlike the hypothetical defendant who benefits from the meaningful limitations within §§ 3583(e)(3) and (h), a district court can lawfully exceed the limits of § 3559 and impose lifetime supervised release upon defendants who have been convicted of committing offenses that fall within 18 U.S.C. §§ 3583(j) and (k) and 21 U.S.C. §§ 841 and 960. This can clearly result in repeated trips to prison upon revocation of supervised release.<sup>83</sup>

For example, a defendant is charged and convicted of violating 18 U.S.C. § 2252A(a)(5) after the implementation of the PROTECT Act.<sup>84</sup> As a first-time offender, the statutory maximum sentence of imprisonment is 10 years.<sup>85</sup> This maximum sentence results in this offense being a Class C felony.<sup>86</sup> The authorized term of supervised release for a Class C felony is three years;<sup>87</sup> but, “[n]otwithstanding subsection (b), the authorized term of supervised release . . . for an offense under . . . section . . . 2252A . . . is any term of years or life.”<sup>88</sup> Thus, upon revocation of the defendant’s term of supervised release, regardless of whether the district court originally imposed a lifetime term of supervise release or not,<sup>89</sup> the district court can revoke the term of supervise release, impose a term of imprisonment lasting two years,<sup>90</sup> and then reimpose a lifetime term of supervised release.<sup>91</sup> Obviously, this can be repeated until the district court either quits imposing additional terms of supervised release following revocation, the defendant dies, or the defense attorney convinces the district court to end the defendant’s term of supervised release pursuant to 18 U.S.C. § 3583(e)(1).<sup>92</sup>

### 3. 18 U.S.C. § 3553(a)

Similar to sentencing under *Booker*,<sup>93</sup> the district court must “consider” the various factors within § 3553(a) when revoking a term of supervised release and then when imposing a term of imprisonment.<sup>94</sup> Nonetheless, when it imposes a sentence upon revocation of supervised release, the district court need not mechanically dictate and record the factors included within § 3553.<sup>95</sup>

That is, “[m]agic words . . . are not required to demonstrate fulfillment of this requirement.”<sup>96</sup> Nevertheless, the record should reveal that the court gave consideration to those factors.<sup>97</sup> Either way, the district court need not provide a written order dictating the basis of the sentence pursuant to 18 U.S.C. § 3553(c)(2),<sup>98</sup> and it need not give notice before sentencing above the suggested sentencing range in the context of supervised release.<sup>99</sup>

“Where the parties have any specific disagreements, however, the record must clearly reflect that the court considered the position of each of the parties and must identify the basis on which the court resolved any disputes at the time of the hearing.”<sup>100</sup> This finding need not be in writing, but must be clear from the transcribed record.<sup>101</sup> The U.S. Court of Appeals for the Second Circuit recently held that a district court’s failure to comply with § 3553(c) when sentencing above the suggested guideline range found in Chapter Seven was plain error.<sup>102</sup>

As to defense counsel’s role at the revocation hearing, it is important to consider the defendant’s facts and how those facts apply to the factors within § 3553(a) in determining

how and what to argue under § 3553(a).<sup>103</sup> The plain truth is that sometimes the factors in § 3553(a) are simply “bad” for the defendant, and the district court may use those factors to impose a higher sentence than otherwise would be applicable. Thus, defense counsel may not want to rely on the factors within § 3553(a) in every case.<sup>104</sup>

#### 4. The Final Sentence

As to the sentence that can be imposed, statutorily, the district court can, in some instances, continue the person on supervised release or impose a sentence anywhere from one day of imprisonment to the statutory maximum punishment available; the maximum imprisonment includes imposing consecutive terms of imprisonment upon those who were serving multiple terms of supervised release.<sup>105</sup>

The possibility of consecutive sentencing upon revocation is something that must be considered when initially pleading a defendant to the underlying charged offenses, particularly for those defendants who committed the underlying charged offenses after the implementation of the PROTECT Act. After all, district courts can now sentence such defendants to consecutive *maximum* terms of imprisonment upon revocation of multiple terms of supervised release and then order additional terms of supervised release that can, again, be revoked.<sup>106</sup> Thus, in some circumstances, it may be better to have a plea agreement that includes only one of multiple counts in an indictment than to plead guilty to all of the counts in the indictment, which is, oddly enough, usually a better option due to broad waivers of rights included within plea agreements.<sup>107</sup> Of course, the underlying basis of this “idea” is the pessimistic view that defendants might violate the conditions of supervised release and be reimprisoned. Thus, defense attorneys must “know” their clients in order to know the best approach to take at sentencing for the underlying offense.

Once defense counsel has ensured that (1) all of the statutory requirements have been met; (2) no error has occurred in determining the applicable classification of the underlying offense, the criminal history, and the grade of the violation; and (3) the government has adequately proven the violations or the defendant has pleaded true to the violations, it will just be about advocacy. When the defense counsel and the defendant are standing before the sentencing judge, the best that defense counsel can do is (1) look for favorable factors within § 3553(a); (2) if applicable and available, argue for the exception from mandatory revocation found in § 3583(d); and (3) passionately argue for continued supervision or a revocation that includes the least amount of time in prison possible followed by no further term of supervision. Lastly, just as in sentencing for substantive offenses, it is important to prepare the defendant to speak to the sentencing judge, which the defendant has a right to do.<sup>108</sup>

### VII. After the Revocation

#### A. -Possible “Credits” Against the Imposed Sentence

If the district court imposes a term of reimprisonment, one important issue that defense counsel must cover with the defendant is credit for time served in custody that has not been credited toward any sentence.<sup>109</sup> This usually arises in those situations where the defendant was detained prior to sentencing for the underlying offense and then received a sentence of probation; a term of probation does not include imprisonment.<sup>110</sup> It might also occur in those rare instances where the defendant benefited from a reduction in the sentence for the underlying offense pursuant to Rule 35 of the Federal Rules of Criminal Procedure,<sup>111</sup> or even had a conviction for one of two or more offenses overturned and vacated<sup>112</sup> and the new sentence for the underlying offense was lower than the time the defendant has already served in custody. In these circumstances and others, the time spent in custody *may* be “banked” and might be used as a credit against an imposed term of imprisonment.<sup>113</sup>

Chapter Seven has a mechanism to “account” for credit for time served and adjusts the reimprisonment sentence accordingly.<sup>114</sup> However, this should not keep defense counsel from trying to determine whether and to what extent the defendant is eligible for credit for time already served; credit for time served might include time spent in home

detention. Home detention is considered to be incarceration,<sup>115</sup> but it may not include time spent at a halfway house, which not considered incarceration.<sup>116</sup> Lastly, if defense counsel faces such a situation, it is important to inform the defendant that the district court is not the place to address this credit; the defendant must first pursue credit through the Bureau of Prisons.<sup>117</sup>

### B. Appeals

It should come as no surprise that defendants might be unhappy with the sentence imposed and might want to appeal.<sup>118</sup> If a defendant has a substantive reason to appeal, such as a constitutional error, statutory error, or an erroneous decision to revoke the term of supervision, then the defendant is likely to appeal the revocation and the imposed sentence.

As to the standard of review upon appeal of a revocation sentence, before *Booker* and outside of the aforementioned substantive grounds, courts upheld “‘a sentence unless it . . . [was] in violation of the law or plainly unreasonable,’ which was consistent with the provisions of section 3742(a) and (e) that applied to sentences ‘for which there is no sentencing guideline.’”<sup>119</sup>

Nevertheless, after *Booker*, there has been a debate amongst appellate courts regarding the correct standard of review. Some circuits have held that the standard of review of the sentence imposed upon revocation of supervised release is whether the sentence is “reasonable,” not whether the sentence is “plainly unreasonable.”<sup>120</sup> In contrast, the Tenth Circuit examines whether the sentence is “reasoned and reasonable.”<sup>121</sup> The First and Ninth Circuits use neither test, but “review revocation sentences for abuse of discretion.”<sup>122</sup> Interestingly, in *McInnis*, the First Circuit specifically mentioned the reasonableness standard of review found in *Booker*, but stated that it was “not relevant to the present case.”<sup>123</sup> In *Johnson*, the Sixth Circuit analyzed the issue but did not decide it.<sup>124</sup> The Fifth Circuit in *Hinson* specifically noted that it was not addressing the standard of review and found that the defendant’s sentence met either standard “and was not imposed in violation of law.”<sup>125</sup> Be that as it may, the analysis in *Johnson* best illustrates that there remains a dispute regarding the standard of review of sentences imposed after a revocation of supervision.<sup>126</sup>

Barring a substantive issue such as a constitutional error, statutory error, or an erroneous decision to revoke the term of supervision, most appeals of sentences imposed upon revocation of supervised release will result in the defense attorney filing an *Anders* brief.<sup>127</sup>

### VIII. Conclusion

The goal of this article is to illustrate that there is more than meets the eye when it comes to revocation of supervised release of adults in federal court. Yet, while there certainly is plenty to know in this narrow field, the vast majority of cases are fairly straightforward: the defendant is validly detained in the original jurisdiction and admits to nonconformance with or violations of the conditions of supervised release. Indeed, most supervised release cases are straightforward and give the defense attorney an excellent opportunity to do what defense attorneys do best — advocate for the defendant and try to get the best sentence possible. This helps defense attorneys sharpen their skills for hearings, trials, and complicated sentencing issues dealing with original convictions and sentencing hearings.

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#### Notes

1. Cf. 18 U.S.C. §§ 3583(e)(3) and (h) (2005); *Williams*, 425 F.3d at 988-89; *infra* pp. 43-52.
2. See *id.*; *United States v. Tsosie*, 376 F.3d 1210, 1214-15 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1298 (2005).
3. See § 3583(e)(3); *McInnis*, 429 F.3d at 3-5; *Spraglin*, 418 F.3d at 480; *Marrow Bone*,

378 F.3d at 808; *Poellnitz*, 372 F.3d at 566.

4. See U.S.S.G. § 7B1.3(a); see also *Wright*, 92 F.3d at 504; *United States v. Hooker*, 993 F.2d 898, 900-01 (D.C. Cir. 1993); *Payan*, 992 F.2d at 1397.

5. See *Ahlemeier*, 391 F.3d at 923; *Lowenstein*, 108 F.3d at 84; U.S.S.G. § 7B1.3(b).

6. See U.S.S.G. §§ 7B1.3 and 7B1.4(a).

7. See *Booker*, 125 S. Ct. at 756-71; *White*, 416 F.3d at 1317-19; *McNeil*, 415 F.3d at 276-77.

8. Cf. *Booker*, 125 S. Ct. at 756-71; *Larison*, 432 F.3d at 922-23; *White*, 416 F.3d at 1318; *Work*, 409 F.3d at 487-92; *United States v. Carter*, 408 F.3d 852, 854-55 (7th Cir. 2005); *Tedford*, 405 F.3d at 1161-62.

9. Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.

If the defendant

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

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

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

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

The court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3). 18 U.S.C. § 3583(g);

See *Fleming*, 397 F.3d at 97-98; *Tsosie*, 376 F.3d at 1214-15; *Alvarado*, 201 F.3d at 380-82. Importantly, prior to the changes on September 13, 1994, § 3583(g) was far more limited and did not include the conditions found in 18 U.S.C. § 3583(g)(2)-(4) (2005).

Compare 18 U.S.C. § 3583(g)(1993) to 18 U.S.C. § 3583(g)(2005). Thus, for those defendants who committed the underlying offense before the changes to § 3583(g) were implemented, there is no *mandatory* revocation for those additional “new” conditions found in § 3583(g)(2)-(4). Cf. U.S. Const. art. I, § 9, cl. 3 (Ex Post Facto); *United States v. Smith*, 354 F.3d 171, 174 (2nd Cir. 2003); *United States v. Wirth*, 250 F.3d 165, 170 (2nd Cir. 2001) (*per curiam*). “[I]n the absence of express congressional intent to apply a criminal statute retroactively, the date of the ‘initial offense’ is determinative of the applicable law at sentencing.” *Smith*, 354 F.3d at 174 (citing and discussing *Johnson*, 529 U.S. at 702).

10. § 3583(g); see *United States v. Hammonds*, 370 F.3d 1032, 1035 (10th Cir. 2004); U.S.S.G. § 7B1.4, comment. (n.5).

11. 18 U.S.C. § 3583(d) (emphasis added); see *United States v. Crace*, 207 F.3d 833, 837 (6th Cir. 2000); *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997); U.S.S.G. § 7B1.4, comment. (n.6).

12. See Violent Crime Control and Law Enforcement Act of 1994, Sept. 13, 1994, Pub. L. No. 103, 108 Stat. 1796; see also *Wirth*, 250 F.3d at 170 (citing *Johnson*, 529 U.S. at 701-02); cf. *Crace*, 207 F.3d at 836-37.

13. *United States v. Fareed*, 296 F.3d 243, 245 (4th Cir. 2002); see *United States v. Giddings*, 37 F.3d 1091, 1093 (5th Cir. 1994).

14. *Smith*, 354 F.3d at 174.

15. *Id.* (citing *Johnson*, 529 U.S. at 702).

16. See *Wirth*, 250 F.3d at 169-70; see *Smith*, 354 F.3d at 173-74.

17. See *Smith*, 354 F.3d at 174-75 (citing 1 U.S.C. § 109; *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659-64 (1974); *United States v. Ross*, 464 F.2d 376, 378 (2nd Cir. 1972)); see also *Johnson*, 529 U.S. at 701-02; *United States v. Smith*, 869 F.2d 835, 836-37 (5th Cir. 1989). The savings statute takes on particular importance where the defendant was convicted of committing a Class A felony that exceeds the five-year limit for a term of supervised release found in 18 U.S.C. § 3583(b). An example is a drug offense that has a mandatory minimum term of supervised release, but no maximum term of supervised release — *before* the implementation of the Violent Crime Control and

Law Enforcement Act of 1994. Specifically, before September 13, 1994, § 3583(e)(3) did not list a maximum term of imprisonment that could be imposed upon a defendant who had previously been convicted of a Class A felony. See 18 U.S.C. § 3583(e)(3)(1993). The only cap on the revocation sentence came from § 3583(b), which enumerates the total term or supervised release; some of the offenses, such as certain offenses within Title 21 of the United States Code, provide exceptions to § 3583(b). See 21 U.S.C. §§ 841(b) and 860. Hence, based on the Savings Statute, it may be possible, except in the U.S. Court of Appeals for the Fourth and Fifth Circuits, for a defendant who was convicted of violating certain class A felonies before September 13, 1994, to receive a revocation sentence that exceeds the five years imprisonment found in § 3583(b). *Cf. McWaine*, 290 F.3d at 277; *United States v. Pratt*, 239 F.3d 640, 647 and n.4 (4th Cir. 2001); *United States v. Good*, 25 F.3d 218, 220-21 (4th Cir. 1994); *United States v. Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992); compare 18 U.S.C. § 3583(e)(3)(1993) to 18 U.S.C. § 3583(e)(3)(2003). The two aforementioned circuits held that the mandatory minimum term of supervised release was also the maximum term of supervised release that could be imposed. See *McWaine*, 290 F.3d at 277; *Good*, 25 F.3d at 220-21; *Kelly*, 974 F.2d at 24-25; *cf. Pratt*, 239 F.3d at 647 and n.4. Arguably, the 21st Century Department of Justice Appropriations Authorization Act, November 2, 2003, overruled the relevant holdings of these two circuits. See *United States v. Johnson*, 331 F.3d 962, 967 n.4 (D.C. Cir. 2003).

The bottom line is that a defendant who was convicted of committing, *inter alia*, a drug offense that is a Class A felony before September 13, 1994, in any federal court of appeals but the Fourth and the Fifth Circuits may face a sentence of imprisonment greater than the five years that is currently enumerated in § 3583(e)(3).

18. *Cofield*, 233 F.3d at 409.

19. 18 U.S.C. § 3583(g)(1).

20. A positive test for an illegal controlled substance is viewed as only a "use." See *Hammonds*, 370 F.3d at 1035; *cf. United States v. Trotter*, 270 F.3d 1150, 1153 (7th Cir. 2001); but see *United States v. Lewis*, 424 F.3d 239, 241-42 (2nd Cir. 2005); *Alvarado*, 201 F.3d at 381 n.1; *United States v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

21. See § 3583(g)(4); *cf. Lewis*, 424 F.3d at 241-43; *Wirth*, 250 F.3d at 170; *United States v. Blackston*, 940 F.3d 877, 881-92 (3rd Cir. 1991); U.S.S.G. § 7B1.4, comment. (n.5) and (n.6); Sam Torres, Ph.D. and Robert M. Latta, *Selecting the Substance Abuse Specialist*, FED. PROBATION, June 2000, at 46; Hon. George P. Kazen, *Mandatory Revocation for Drug Use: A Plea for Reconsideration*, 6 FED. SENT'G REP. 202 (Jan./Feb. 1994). For a brief discussion of how long marijuana stays in one's system, see *United States v. Dawson*, 52 F.3d 631, 633 n.3 (7th Cir. 1995).

22. Congress implemented 18 U.S.C. § 3583(g)(4) in 2002. See *Hammonds*, 370 F.3d at 1035.

23. *Hammonds*, 370 F.3d at 1037 (citing *United States v. Rockwell*, 984 F.2d 1112, 1114 (10th Cir. 1993), *overruled on other grounds by, Johnson v. United States*, 529 U.S. 694 (2000)).

24. See *id.*

25. *Hammonds*, 370 F.3d at 1037 n.3 (emphasis added); see 18 U.S.C. § 3583(g).

26. See *Hammonds*, 370 F.3d at 1037. *Hammonds* does a yeoman's job in trying to address the thorny question regarding the validity of § 3583(g)(4). It is hard to imagine circumstances where a defendant tests positive for a controlled substance four or more times in a year without possessing the controlled substance at least once. It only takes one possession to fall under mandatory revocation under § 3583(g)(1), so why did Congress add § 3583(g)(4) and the threshold of four positive drug-tests? In fact, the "real world," § 3583(g)(4) is superfluous. Rare is the occasion where Probation initiates proceedings against a defendant who has suffered a "contact high" and lacks the *mens rea* that *Hammonds* relies on to distinguish the possessor from the defendant who tests positive less than four times in a year. *Cf. id.* at 1035-38.

27. See *id.*; *cf. Blackston*, 940 F.2d at 882-92.

28. *Courtney*, 979 F.2d at 49. In a "revocation context it is clear that 'use' requires knowing and voluntary ingestion. But once the court finds a substance has been voluntarily and knowingly ingested, then, at least in almost any imaginable circumstance,

it necessarily follows that the defendant has possessed the substance.” *Id.*

29. *Id.*

30. *See id.*

31. *See id.* at 48-50; *Alvarado*, 201 F.3d at 381 n.1; *United States v. Clark*, 30 F.3d 23, 24-25 (4th Cir. 1994).

32. *Courtney*, 979 F.2d at 50 (citing Fed. R. Crim. P. 32.1(a)(2); Fed. R. Evid. 201; *United States v. Kindred*, 918 F.2d 485, 487 (5th Cir. 1990)); *see Clark*, 30 F.3d at 25-26; *cf. Blackston*, 940 F.2d at 882-92.

33. *Wirth*, 250 F.3d at 170; *see Lewis*, 424 F.3d at 241-42.

34. *Trotter*, 270 F.3d at 1153; *see Alvarado*, 201 F.3d at 381 n.1.

35. 18 U.S.C. § 3583(d); *see* § 3608; *United States v. Klimek*, 411 F.3d 50, 53 (2nd Cir. 2005).

36. *Klimek*, 411 F.3d at 53; *see generally* Michael J. Elbert, *The Use of Creatinine and Specific Gravity Measurement to Combat Urine Test Dilution*, FED. PROBATION, Dec. 1997, at 3; Sam Torres, Ph.D., *The Use of a Credible Drug Testing Program for Accountability and Intervention*, FED. PROBATION, Dec. 1996, at 18.

37. *Klimek*, 411 F.3d at 53 (emphasis added).

38. When a defendant disputes facts, the Due Process Clause offers a basis to the right to counsel along with 18 U.S.C. § 3006A(a)(1)(E). *Eskridge*, 445 F.3d at 932-33.

39. *See Stanfield*, 360 F.3d at 1354-58; Fed. R. Crim. P. 26.2(a) and 32.1(e). This does not mean that the government must provide a list of witnesses who will testify against the defendant at the revocation hearing. *See Ahlemeier*, 391 F.3d at 921. Yet, after an adverse witness testifies, defense counsel can move for the production of that witness’ “statements pursuant to Fed. R. Crim. P. 26.2, which is analogous to the Jencks Act, 18 U.S.C. § 3500.” *Stanfield*, 360 F.3d at 1351 (citing Fed. R. Crim. P. 26.2 Advisory Committee Note (1979)).

40. *United States v. Grandlund*, 71 F.3d 507, 509-10 (5th Cir. 1995) (citations omitted); *see Ramos*, 401 F.3d at 115; *Stanfield*, 360 F.3d at 1354-59; *cf. Romano*, 471 U.S. at 610-12.

41. Fed. R. Crim. P. 32.1(b)(2); *see Ahlemeier*, 391 F.3d at 919; *United States v. Taveras*, 380 F.3d 532, 536-38 (1st Cir. 2004); *cf. Romano*, 471 U.S. at 611-14; *Gagnon v. Scarpelli*, 411 U.S. 778, 781-91 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 472-90 (1972); *United States v. Santostefano*, 448 F.3d 681, 682 (3rd Cir. 2006); *Stephenson*, 928 F.2d at 732.

42. *Grandlund*, 71 F.3d at 509 (citations omitted); *see Carlton*, 442 F.3d at 806-10; *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005); *Stanfield*, 360 F.3d at 1354-59; *Verduzco*, 330 F.3d at 1185; *Pelensky*, 129 F.3d at 68-69; Fed. R. Evid. 1101(d)(3).

43. *Carlton*, 442 F.3d at 809 (quoting *United States v. Brown*, 899 F.2d 189, 192 (2nd Cir. 1990) (emphasis in the original)); *see Eskridge*, 445 F.3d at 932-33.

44. *See* Fed. R. Crim. P. 32.1(b)(2)(C); *see also Romano*, 471 U.S. at 612; *United States v. Rondeau*, 430 F.3d 44, 46-49 (1st Cir. 2005); *Hall*, 419 F.3d at 985-89; *Ahlemeier*, 391 F.3d at 921; *United States v. Martin*, 371 F.3d 446, 448-49 (8th Cir.), *cert. denied*, 125 S. Ct. 608 (2004); *Grimes*, 54 F.3d at 493.

45. *See United States v. Kelley*, 446 F.3d 688, 690-93 (7th Cir. 2006); *Carlton*, 442 F.3d at 806-10; *United States v. Williams*, 443 F.3d 35, 45-47 (2nd Cir. 2006); *Rondeau*, 430 F.3d at 46-49; *Hall*, 419 F.3d at 985-86; *Taveras*, 380 F.3d at 536-38; *Stephenson*, 928 F.2d at 732; *see generally Crawford v. Washington*, 541 U.S. 36, 38-69 (2004). *Carlton* provides an excellent discussion of the rights a defendant has and does not have in the context of a revocation hearing. *See Carlton*, 442 F.3d at 806-10. The primary basis for being able to cross-examine a witness is based on Rule 32.1(b)(2)(C) of the Federal Rules of Criminal Procedure and procedural due process. *See Williams*, 443 F.3d at 45-47.

46. *See* 18 U.S.C. § 3583(e)(3); *McInnis*, 429 F.3d at 3; *Spraglin*, 418 F.3d at 480; *Poellnitz*, 372 F.3d at 566; *Stanfield*, 360 F.3d at 1359-60.

47. *Ahlemeier*, 391 F.3d at 922 (citing *United States v. O’Meara*, 33 F.3d 20, 21 (8th Cir. 1994)); *see Rondeau*, 430 F.3d at 47-49; *Taveras*, 380 F.3d at 536-38; *Stanfield*, 360 F.3d at 1354-59; *Grandlund*, 71 F.3d at 510; *see also* Fed. R. Crim. P. 32.1(b); *cf. Grimes*, 54 F.3d at 493. “In the balancing process, the defendant’s interest in confronting

the declarant is entitled to little, if any, weight where the declarant's absence is the result of intimidation by the defendant." *Williams*, 443 F.3d at 45.

48. *O'Meara*, 33 F.3d at 21; see *Rondeau*, 430 F.3d at 47-49; *Hall*, 419 F.3d at 985-89; *Ahlemeier*, 391 F.3d at 992; *Martin*, 371 F.3d at 448-49; *Kindred*, 918 F.2d at 486-87.

49. *United States v. McCormick*, 54 F.3d 214, 220 (5th Cir. 1995) (citing *Morrissey*, 408 U.S. at 489); see *Stanfield*, 360 F.3d at 1354-59; *Stephenson*, 928 F.2d at 732; but see *Kelley*, 446 F.3d 688, 690-93.

50. 443 F.3d 35 (2nd Cir. 2006).

51. *Williams*, 443 F.3d at 45 (quoting *United States v. Aspinall*, 389 F.3d 332, 344 (2nd Cir. 2004) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973); *United States v. Jones*, 299 F.3d 103, 113 (2nd Cir. 2002), and noting that the "established exception to the hearsay rule" is also known as the "'firmly rooted' hearsay exception").

52. *Williams*, 443 F.3d at 45.

53. *Lowenstein*, 108 F.3d at 83; see *Rondeau*, 430 F.3d at 46-49; *Hall*, 419 F.3d at 984-89; *United States v. Kirby*, 418 F.3d 621, 625-28 (6th Cir. 2005); *Ahlemeier*, 391 F.3d at 921-92; Fed. R. Evid. 1101(d)(3).

54. See § 3559; *Nelson*, 2006 WL 1896392, at \*1.

55. (b) Authorized terms of supervised release.

*Except as otherwise provided*, the authorized terms of supervised release are

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

§ 3583(b) (emphasis added); cf. §§ 3583(j) and (k) and 21 U.S.C. §§ 841 and 960.

56. See 18 U.S.C. §§ 3583(j) and (k); *United States v. Meyer*, No. 06-1283, 2006 WL 1889309, at \*1 (8th Cir. July 11, 2006); *Postley*, 449 F.3d at 832-34; *United States v. Moriarty*, 429 F.3d 1012, 1023-25 (11th Cir. 2005) (*per curiam*). *Moriarty* recently held that a lifetime term of supervised release does not violate the Eighth Amendment to our Constitution, see *Moriarty*, 429 F.3d at 1023-25, and *Pettus* stated that "[t]here is no constitutionally imposed limit on how long a supervised release term can be[.]" *United States v. Pettus*, 303 F.3d 480, 487 (2nd Cir. 2002). Nevertheless, a lifetime term of supervised release is considered to be an upward departure from the sentencing guidelines. See *United States v. Gonzalez*, 445 F.3d 815, 818-20 (5th Cir. 2006). Though it is an upward departure, a lifetime term of supervised release is not unreasonable. *United States v. Hayes*, 445 F.3d 536, 537 (2nd Cir. 2006).

57. See §§ 3559, 3583(b) and (e)(3); *Tapia-Escalera*, 356 F.3d at 184-88.

58. See § 3583(e)(3); *United States v. Palmer*, 380 F.3d 395, 396-99 (8th Cir. 2004) (*en banc*). That is, in some instances the district court could have imposed a five-year term of supervised release, but only imposed a three-year term. The three-year term does not "cabin" the district court when it revokes the term of supervised release, but the statute does. See *Palmer*, 380 F.3d at 396-99; cf. §§ 3583(e)(3) and (h); *United States v. Rogers*, 382 F.3d 648, 650-52 (7th Cir. 2004); *United States v. Russell*, 340 F.3d 450, 452 (7th Cir. 2003).

In line with the requirement that federal statutes trump other sources of sentencing is the fact that, pursuant to the Assimilative Crimes Act (18 U.S.C. § 13), district courts may impose a combined sentence of imprisonment and supervised release that exceeds the punishment that a state court could impose for the same offense when that offense is committed within the appropriate jurisdiction. See *United States v. Rapal*, 146 F.3d 661, 664-65 (9th Cir. 1998); *United States v. Gaskell*, 134 F.3d 1039, 1041-45 (11th Cir. 1998); *United States v. Engelhorn*, 122 F.3d 508, 509-14 (8th Cir. 1997); *United States v. Burke*, 113 F.3d 211 (11th Cir. 1997) (*per curiam*); *Pierce*, 75 F.3d at 175-78; cf. *United States v. Thomas*, 68 F.3d 392, 393-395 (10th Cir. 1995); but see *United States v. Marolejo*, 915 F.2d 981, 983-85 (5th Cir. 1990). For purposes of the Assimilative Crimes Act, "we hold that when the applicable state law provides for parole, a sentence of imprisonment plus supervised release is 'like punishment' when the period of imprisonment plus the period of supervised release does not exceed the maximum sentence allowable under state law." *Marmolejo*, 915 F.2d at 985.

59. This section of this article is an abbreviated version of a longer article addressing the

PROTECT Act and its impact on supervised release, including relevant legislative history. The other article is Douglas A. Morris, *FYI: Supervised Release and How the PROTECT Act Changed Supervised Release*, 18 FED. SENT'G REP. 182 (Feb. 2006), available at 2006 WL 1895181. The article is also available through The University of California Press on behalf of the Vera Institute of Justice: (<http://caliber.ucpress.net>).

60. *Cf.* §§ 3559(a)(3) and 3583(b)(2).

61. See §§ 3583(e)(3) and (h).

62. See *id.*; see also *Ferguson*, 369 F.3d at 848-52; *Tapia-Escalera*, 356 F.3d at 184-88; *United States v. Jackson*, 329 F.3d 406, 406-07 (5th Cir. 2003) (*per curiam*); *Pettus*, 303 F.3d at 482-86; *United States v. Swenson*, 289 F.3d 676, 676-77 (10th Cir. 2002); *United States v. Merced*, 263 F.3d 34, 35-37 (2nd Cir. 2001) (*per curiam*); *United States v. Boecker*, 280 F.3d 824, 825 (8th Cir. 2002); *United States v. Brings Plenty*, 188 F.3d 1051, 1054 (8th Cir. 1999) (*per curiam*).

63. 18 U.S.C. § 3559; *cf.* *R.L.C.*, 503 U.S. at 301-02; *Cunningham*, 292 F.3d at 118.

64. See *Williams*, 425 F.3d at 988-89; *United States v. Kelley*, 359 F.3d 1302, 1303 n.1 (10th Cir. 2004); *Tapia-Escalera*, 356 F.3d at 184-88; *Jackson*, 329 F.3d at 406-07; *Pettus*, 303 F.3d at 482-86; *Swenson*, 289 F.3d at 676-77; *United States v. Maxwell*, 285 F.3d 336, 338-43 (4th Cir. 2002); *Merced*, 263 F.3d at 35-37; *Brings Plenty*, 188 F.3d at 1054; see also 18 U.S.C. §§ 3583(b) and (e)(3).

65. See *Jackson*, 329 F.3d at 406-07; see also 18 U.S.C. §§ 3583(b) and (e); *Russell*, 340 F.3d at 457-59; *United States v. Davis*, 187 F.3d 528, 531-33 (6th Cir. 1999); *Bewley*, 27 F.3d at 343-44.

66. See 18 U.S.C. §§ 3583(b), (e)(3), and (h); see also *Russell*, 340 F.3d at 457-59; *Jackson*, 329 F.3d at 406-07; *Boecker*, 280 F.3d at 825.

67. *Pettus*, 303 F.3d at 484 (quoting 18 U.S.C. § 3583(h)) (emphasis added); see *United States v. Pla*, 345 F.3d 1312, 1314 (11th Cir. 2003) (*per curiam*); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

68. *Pettus*, 303 F.3d at 484 (quoting 18 U.S.C. § 3583(h)) (emphasis added); see also 18 U.S.C. §§ 3583(b) and (e); *Russell*, 340 F.3d at 457-59; *Jackson*, 329 F.3d at 406-07; *Boecker*, 280 F.3d at 825; *Cade*, 236 F.3d at 465. “[D]istrict courts . . . can impose both imprisonment and a new term of supervised release[,] if the new term does ‘not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.’” *Palmer*, 380 F.3d at 397 (quoting § 3583(h) and adding emphasis).

For defendants who committed the offense of conviction before the implementation of 18 U.S.C. § 3583(h), (September 12, 1994), the basis for imposing an additional term of supervised release following revocation and reimprisonment is § 3583(e)(3). See *Johnson*, 529 U.S. at 696-713; *Russell*, 340 F.3d at 457-59; *cf.* *United States v. Gresham*, 325 F.3d 1262, 1265-68 (11th Cir. 2003); *Fareed*, 296 F.3d at 246-47; *United States v. Marlow*, 278 F.3d 581, 586-88 (6th Cir. 2002) (discussing and citing §§ 3583(a) and (e)(3)).

69. See 18 U.S.C. § 3583(h); *Palmer*, 380 F.3d at 398 (citing and discussing, *inter alia*, *Pla*, 345 F.3d at 1315; *Moody*, 277 F.3d at 721; *Cade*, 236 F.3d at 466); see also *Rogers*, 382 F.3d at 649-53; *Gresham*, 325 F.3d at 1267-68; *Marlow*, 278 F.3d at 586-88; *cf.* § 3583(b); *Russell*, 340 F.3d at 452-57.

70. See *Ferguson*, 369 F.3d at 850-52; *Tapia-Escalera*, 356 F.3d at 185-88; *Pla*, 345 F.3d at 1314-15; *Merced*, 263 F.3d at 37-38; *Brings Plenty*, 188 F.3d at 1053-54; but see *Russell*, 340 F.3d at 457-59.

[O]nce the statutory maximum period established by . . . [§ 3583(e)(3)] has been exhausted, supervised release is at an end. . . . [W]e reject as unsupported in the statutory language any interpretation that would allow a court that sentenced a defendant who violates the terms of his supervised release to the statutory maximum period minus one day then to reset the clock at the completion of that imprisonment term and, once again, sentence the defendant to nearly the statutory maximum imprisonment term. This would permit an endless cycle of consecutive terms of imprisonment and supervised release based on a single underlying offense, a result that Congress gave no indication whatsoever of

intending. *Merced*, 263 F.3d at 37.

71. See *Jackson*, 329 F.3d at 409 n.8; see also 18 U.S.C. §§ 3583(a), (b), (e), and (h); *Tapia-Escalera*, 356 F.3d at 185-88; *Russell*, 340 F.3d at 457-59; cf. *Boecker*, 280 F.3d at 825; *Fareed*, 296 F.3d at 246-47; David N. Adair, Jr., *Revocation Sentences: A Practical Guide*, FED. PROBATION, Dec. 2000, at 67.

72. See §§ 3583(e) and (h); *Johnson*, 529 U.S. at 54-60; *Pla*, 345 F.3d at 1314-15; *Gresham*, 325 F.3d at 1265-68; *Cade*, 236 F.3d at 466-68; *Bewley*, 27 F.3d at 344; U.S. S.G. § 7B1.5; cf. *Johnson*, 529 U.S. at 705-06.

73. See *Williams*, 425 F.3d at 989; cf. 18 U.S.C. §§ 3583(b), (e)(3), and (h); *Tapia-Escalera*, 356 F.3d at 188. On April 30, 2003, Congress adding “the phrase ‘on any such revocation’ [to § 3583(e)(3)] so that it now reads ‘a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than . . . 2 years in prison if such offense is a Class C or D felon[;]’” thus, “the statutory caps [found in § 3583(e)(3)] now explicitly apply to each revocation of supervised release.” *Williams*, 425 F.3d at 989 (quoting 18 U.S.C. § 3583(e)(3)(2005)).

74. 18 U.S.C. § 3583(e)(3)(2003); see *Jackson*, 329 F.3d at 407 n.2; *Maxwell*, 285 F.3d at 339; *Cade*, 236 F.3d at 465.

75. 18 U.S.C. § 3583(e)(3)(2005) (emphasis added); see also *Williams*, 425 F.3d at 989.

76. The PROTECT Act excised the phrase, “that is less than the maximum term of imprisonment authorized under subsection (e)(3)” from § 3583(h). Compare 18 U.S.C. § 3583(h)(2003) to 18 U.S.C. § 3583(h)(2005).

77. See §§ 3559(a); 3583(b), (e)(3), (h), (j), (k) and 21 U.S.C. §§ 841 and 960; cf. *Williams*, 425 F.3d at 989; *Tapia-Escalera*, 356 F.3d at 188; *United States v. Shorty*, 159 F.3d 312, 313-18 (7th Cir. 1998).

78. See 18 U.S.C. §§ 3583(b) and (e)(3); cf. *Williams*, 425 F.3d at 989; *Tapia-Escalera*, 356 F.3d at 188. The following are examples of drug-related and child-pornography related cases where the sentencing courts imposed terms of supervised release exceeding the limits found in § 3583(b): *United States v. Mathis*, 451 F.3d 939, 941 (8th Cir. 2006)); *Allison*, 447 F.3d at 404-07; *Gonzalez*, 445 F.3d at 818-20; *Hayes*, 445 F.3d at 536-37; *United States v. Vongkaysone*, 437 F.3d 497, 502-03 (1st Cir. 2006); *United States v. Matthews*, 431 F.3d 1296, 1298 (11th Cir. 2005) (*per curiam*); *United States v. Avello-Alvarez*, 430 F.3d 543, 544-46 (2nd Cir. 2005); *Moriarty*, 429 F.3d at 1023-25; *United States v. Brooks*, 427 F.3d 1246, 1249 (10th Cir. 2005); *United States v. Meyer*, 427 F.3d 558, 559 (8th Cir. 2005); *United States v. Long*, 425 F.3d 482, 485 (7th Cir. 2005); *United States v. Storer*, 413 F.3d 918, 921 (8th Cir. 2005); *United States v. Vázquez-Guadalupe*, 407 F.3d 492, 495 (1st Cir.), *cert. denied*, 126 S. Ct. 193 (2005). An example may be helpful. The statutory maximum term of imprisonment for a violation of 18 U.S.C. § 2422(a) is 20 years; § 3559(a)(3) states that a offense with a 20-year statutory maximum term of imprisonment is a Class C felony; § 3583(b)(2) states that the maximum term of supervised release that can be imposed on a Class C felony is three years; however, § 3583(k) trumps this restriction and allows a district court to impose a lifetime term of supervised release. If the defendant’s term of supervised release is revoked and the maximum punishment that § 3583(e)(3) allows is imposed, § 3583(h) allows for the reimposition of another lifetime term of supervised release to be imposed.

79. § 3583(e)(3) (emphasis added); see *Williams*, 425 F.3d at 989.

80. Cf. §§ 3583(b), (e)(3), and (h) (emphasis added); *Williams*, 425 F.3d at 989. Before the PROTECT Act, this clearly could not occur. See *Merced*, 263 F.3d at 37.

81. § 3583(e) (emphasis added).

82. See §§ 3583(e) and (h). With this in mind, the rebuking in *Merced* of repeated revocations for defendants who do not face lifetime supervised release appears to continue to have some validity after the PROTECT Act. Cf. §§ 3583(e) and (h); *Merced*, 263 F.3d at 37.

83. See § 3583(e)(3); cf. *Allison*, 447 F.3d at 404-07; *Gonzalez*, 445 F.3d at 818-20; *Matthews*, 431 F.3d at 1298; *Avello-Alvarez*, 430 F.3d at 544-46; *Moriarty*, 429 F.3d at 1023-25; *Brooks*, 427 F.3d at 1249; *Williams*, 425 F.3d at 989; *Long*, 425 F.3d at 485; *Tapia-Escalera*, 356 F.3d at 188.

84. See *Moriarty*, 429 F.3d at 1015-18.

85. See § 2252A(b)(2); *Moriarty*, 429 F.3d at 1025.

86. See § 3559(a)(3); see also *Allison*, 447 F.3d at 405.

87. See § 3583(b)(2).

88. § 3583(k); see *Gonzalez*, 445 F.3d at 818-20; *Moriarty*, 429 F.3d at 1024 n.11.

[T]he House Conference Report on the PROTECT Act, which authorized the imposition of lifelong terms of supervised release under 18 U.S.C. § 3583(k), states in relevant part:

This section responds to the long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long-term, and in some cases, life-long monitoring and oversight.

*Moriarty*, 429 F.3d at 1025 (quoting H.R. Conf. Rep. No. 108-66, at 49-50 (2003), reprinted in 2003 U.S.C.C.A.N. 683, 684); see also *Allison*, 447 F.3d at 404-07; *Williams*, 425 F.3d at 989; *Tapia-Escalera*, 356 F.3d at 188; *The Child Obscenity and Pornography Prevention Act: Hearing on H.R. 1161 Before the House Subcommittee on Crime, Terrorism, and Homeland Security Committee on the House Judiciary*, 108th Cong. (Mar. 11, 2003), 2003 WL 1079511, at 22-23 (Testimony of Associate Deputy Attorney General Daniel P. Collins, Department of Justice); 149 Cong. Rec. H3059-02, at 2, 20-21, 25, 33, 46 (2003); 149 Cong. Rec. S5113-01, at 41, 62-63 (2003); 149 Cong. Rec. S4899-01, at 40-42 (2003).

89. Remember, the statute trumps the sentencing court's original imposition of supervised release; accordingly, whether the district court sentenced the defendant to a lifetime term of supervised release at the original sentencing does not matter. See 18 U.S.C. § 3583(h); *Palmer*, 380 F.3d at 398 (citing *Pla*, 345 F.3d at 1315); cf. § 3583(b); U.S.S. G. § 5D1.2.

90. See 18 U.S.C. § 3583(e)(3).

91. See § 3583(h).

92. See § 3583(e)(1); *Johnson*, 529 U.S. at 60; *Lares-Meraz*, 452 F.3d at 355; *United States v. Pregent*, 190 F.3d 279, 280-84 (4th Cir. 1999); *United States v. Spinelle*, 41 F.3d 1056, 1057-61 (6th Cir. 1994). The following cases deal with the conflict between the maximum terms of supervised release found in 18 U.S.C. § 3583(b) and 21 U.S.C. §§ 841 and 960, (a lifetime term of supervised release can be imposed under some subsections of 21 U.S.C. §§ 841 and 960, which appears to be in "conflict" with 18 U.S.C. § 3583(b), but is not.) See *Postley*, 449 F.3d at 831-34; compare *McWaine*, 290 F.3d at 277; *Good*, 25 F.3d at 220-21; *Kelly*, 974 F.2d at 24-25 to *Hernandez*, 436 F.3d at 855-56; *United States v. Cortes-Claudio*, 312 F.3d 17, 20-23 (1st Cir. 2002); *United States v. Sanchez-Gonzalez*, 294 F.3d 563, 565-67 (3rd Cir. 2002); *Pratt*, 239 F.3d at 646-48; *United States v. Heckard*, 238 F.3d 1222, 1236-37 (10th Cir. 2001); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (8th Cir. 2000); *Shorty*, 159 F.3d at 315 n.6; *United States v. Abbingtion*, 144 F.3d 1003, 1006 (6th Cir. 1998); *United States v. Page*, 131 F.3d 1173, 1176-81 (8th Cir. 1991), abrogated on other grounds by, *United States v. Johnson*, 529 U.S. 694 (2000); *United States v. Garcia*, 112 F.3d 395, 396-99 (9th Cir. 1997); *United States v. Orozco-Rodriguez*, 60 F.3d 705, 707-08 (10th Cir. 1995); *United States v. Eng*, 14 F.3d 165, 171-73 (2nd Cir. 1994).

As previously noted, this discrepancy between the statutes caused a conflict between the circuits with the Fourth and Fifth Circuits holding that the mandatory minimum term of supervised release also represents the maximum term of supervised release. See *Johnson*, 331 F.3d at 964 n.4; compare *United States v. Barragan*, 263 F.3d 919, 925-926 (9th Cir. 2002); *Garcia*, 112 F.3d at 397-98 to *Pratt*, 239 F.3d at 647 n.4; *McWaine*, 290 F.3d at 277; *Good*, 25 F.3d at 220-21; *Kelly*, 974 F.2d at 25. However, for those cases where the offense was completed after November 2, 2002, it appears that Congress has resolved this "conflict by adding the words 'Notwithstanding section 3583 of title 18' to the supervised release provision of § 841(b)(1)(C) . . . ." *Johnson*, 331 F.3d at 964 n.4 (quoting and discussing 21 U.S.C. § 841(b)(1)(C); the 21st Century Department of Justice Appropriation Authorization Act, Pub. L. 107-273, 116 Stat. 1758

(Nov. 2, 2002); H.R. Conf. Rep. No. 107-685, at 188-89 (2002)); see Joe Gergits, *Looking at the Law*, FED. PROBATION, Dec. 2005, at 35. Mr. Gergits, who is an Assistant General Counsel of the Administrative Office of the United States Courts, wrote a helpful article that updates an article that Catherine M. Goodwin wrote in 1997. See Catherine M. Goodwin, *Update to Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, FED. PROBATION, Dec. 1997.

93. 125 S. Ct. at 756-71.

94. See 18 U.S.C. § 3583(e); *Contreras-Martinez*, 409 F.3d at 1241-42; *Coleman*, 404 F.3d at 1104-05; *United States v. Franklin*, 397 F.3d 604, 606-07 (8th Cir. 2005); *Gementera*, 379 F.3d at 599-602; *Fleming*, 397 F.3d at 97-100; *United States v. Salinas*, 365 F.3d 582, 589 (7th Cir. 2004); *Payan*, 992 F.2d at 1396-97; but see *Giddings*, 37 F.3d at 1095. “[W]hen revocation of supervised release is mandatory under 18 U.S.C. § 3583(g), the statute does not require consideration of the § 3553(a) factors.” *Giddings*, 37 F.3d at 1095; but see *United States v. Touche*, 323 F.3d 1105, 1107 (8th Cir. 2003).

As noted in the discussion of defendants who committed their offenses before the changes to § 3583 were implemented in 1994, § 3583(g) required a specific sentence of imprisonment for possession — one-third of the imposed term of supervised release — which minimizes the need for considering the factors within § 3553(a). See *Giddings*, 37 F.3d at 1093; see also *Fareed*, 296 F.3d at 244-45; *Clark*, 30 F.3d at 24-25; *Kindred*, 918 F.2d at 487-88. For those defendants who committed their offenses after the implementation of the changes to § 3583, § 3583(d) offers defendants some relief from mandatory revocation, and § 3583(g) no longer calls for a mandatory minimum sentence upon revocation of supervised release. See §§ 3583(d) and (g); see also *Crace*, 207 F.3d at 837; *Pierce*, 132 F.3d at 1208; U.S.S.G. § 7B1.4, comment. (n.6). Thus, it appears that *Giddings* should be limited to those cases where the offense occurred before the change to § 3583, and, arguably, sentencing judges must consider the factors within § 3553(a), as noted in § 3583(e), when deciding the appropriate sentence to impose in situation even where revocation is mandatory. Cf. *Booker*, 125 S. Ct. 756-71; *Coleman*, 404 F.3d at 1104-05; *United States v. Cotton*, 399 F.3d 913, 916-17 (8th Cir. 2005); *Franklin*, 397 F.3d at 606-07; *Fleming*, 397 F.3d at 96-101; *Whiteface*, 383 F.3d at 740. Nevertheless, “[m]andatory revocation, governed by § 3583(g) and requiring imprisonment upon revocation, does not expressly require consideration of the § 3553(a) factors, but neither does it prohibit the sentencing court from doing so.” *Tsosie*, 376 F.3d at 1214 n.2.

95. See *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005); *Franklin*, 397 F.3d at 606-07; *Fleming*, 397 F.3d at 97-100.

96. *Tedford*, 405 F.3d at 1161 (citation omitted).

97. See *United States v. Carter*, 408 F.3d 852, 854 (7th Cir. 2005) (citing *Salinas*, 365 F.3d at 589; *United States v. Huusko*, 275 F.3d 600, 603 (7th Cir. 2001)); *Tedford*, 405 F.3d at 1161.

98. See *Cotton*, 399 F.3d at 915-17.

99. *United States v. Shaw*, 180 F.3d 920, 922-23 (8th Cir. 1999) (*per curiam*); *Pelensky*, 129 F.3d at 70-71.

100. *United States v. Sesma-Hernandez*, 253 F.3d 403, 409 (9th Cir. 2001) (*en banc*).

101. See *id.* at 406.

102. See *Lewis*, 424 F.3d at 245-49; but see *Cotton*, 399 F.3d at 915-16.

103. See generally David L. McColgin and Brett G. Sweitzer, *Post-Booker Sentencing Litigation Strategies — Part 1*, THE CHAMPION, Nov. 2005, at 50-56; David L. McColgin and Brett G. Sweitzer, *Post-Booker Sentencing Litigation Strategies — Part 2*, THE CHAMPION, Dec. 2005, at 42-47.

104 Cf. 18 U.S.C. § 3553(a). For example, multiple uses of illegal controlled substances, continued violations of the law, failing to attend mandatory drug-treatment programs, and failing to follow the mandatory and standard conditions of supervised release make it hard to argue that the defendant “respects the law” or that incarceration would not “protect the public from further crimes of the defendant,” which are two of the concerns within S 3553(a). See SS 3553(a)(2)(B) and (C). Hence, sometimes the factors are “bad” for the defenant and it should go without saying that the defense counsel should not highlight the negative factors.

Beyond this, it is noteworthy that there is currently a split between teh circuits on whether

sentencing courts at a revocation hearing can consider 18 U.S.C. S 3553(a)(2)(A): "[t]he need for the sentence to imposed [] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[.]" *United States Miqbel*, 444 F.3d 1173, 1183 (9th Cir. 2006), stated "that S 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." (citing *Rusello v. United States*, 464 U.S. 16, 23 (1983)). The Second Circuit took an opposing view in *United States v. Williams*, 443 F.3d 35, 47-48 (2nd Cir. 2006).

105. 18 U.S.C. §§ 3583(e)(3) and (h); *Sweeting*, 437 F.3d at 1105-07; *Deutsch*, 403 F.3d at 916-18; *Gonzalez*, 250 F.3d at 925-29; *Rose*, 185 F.3d at 1110; *Jackson*, 176 F.3d at 1176-79; *Johnson*, 138 F.3d at 118; *Quinones*, 136 F.3d at 1294-95; *Cotroneo*, 89 F.3d at 513. Additionally, "[a]ny term of imprisonment imposed upon 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 . . . being served resulted from the conduct that is the basis of the revocation of . . . supervised release." U. S.S.G. § 7B1.3; see *Contreras-Martinez*, 409 F.3d at 1241-42; *United States v. Huff*, 370 F.3d 454, 463 n.15 (5th Cir. 2004); *United States v. Swan*, 275 F.3d 272, 281-82 (3rd Cir. 2002); *United States v. Harvey*, 232 F.3d 585, 588-89 (7th Cir. 2000).

106. See 18 U.S.C. §§ 3583(e)(3) and (h); cf. *Moriarty*, 429 F.3d at 1023-25; *Williams*, 425 F.3d at 988-89; *Deutsch*, 403 F.3d at 916-18; *Tapia-Escalera*, 356 F.3d at 185-88; *Gonzalez*, 250 F.3d at 925-29; *Rose*, 185 F.3d at 1110; *Jackson*, 176 F.3d at 1176-79; *Johnson*, 138 F.3d at 118; *Quinones*, 136 F.3d at 1294-95; *Cotroneo*, 89 F.3d at 513.

107. See *United States v. Story*, 439 F.3d 226, 228-33 (5th Cir. 2006); *United States v. Burns*, 433 F.3d 442, 443-51 (5th Cir. 2005); cf. *United States v. Hamdi*, 432 F.3d 115, 116-27 (2nd Cir. 2005).

108. See Fed. R. Crim. P. 32.1(b)(2)(E); *United States v. Magwood*, 445 F.3d 826, 827-30 (5th Cir. 2006); *United States v. Reyna*, 358 F.3d 344, 347-53 (5th Cir.) (*en banc*), *cert. denied*, 124 S. Ct. 1626 (2004). Prior to the amendments to Rule 32.1(b) and (c) there was "no explicit provision in . . . Rule 32.1 for allocution rights for a person upon revocation of supervised release." Fed. R. Crim. P. 32.1, (Advisory Committee Note (2005)).

109. See 18 U.S.C. § 3585(b); *United States v. Wilson*, 503 U.S. 329, 331-37 (1992); *Williams*, 425 F.3d at 990; *United States v. Johnson*, 418 F.3d 879, 880-81 (8th Cir. 2005); *Pardue*, 363 F.3d at 699; *Ruggaino v. Reish*, 307 F.3d 121, 131-32 (3rd Cir. 2002); *United States v. Montez-Gaviria*, 163 F.3d 697, 700-01 (2nd Cir. 1998); *United States v. Whaley*, 148 F.3d 205, 206-07 (2nd Cir. 1998) (*per curiam*); see generally Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403 (Winter 1996).

110. "A defendant on probation has received an alterative to imprisonment." *Chavez*, 204 F.3d at 1312.

111. See Fed. R. Crim. P. 35(b)(2).

112. See *Johnson*, 529 U.S. at 54-60; *United States v. Whaley*, 148 F.3d 205, 206-07 (2nd Cir. 1998) (*per curiam*); see generally *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (*per curiam*).

113. See 18 U.S.C. § 3585(b); cf. *Wilson*, 503 U.S. at 332; *Williams*, 425 F.3d at 990; *Pardue*, 363 F.3d at 699; *Ruggaino*, 307 F.3d at 131-32.

114. See U.S.S.G. § 7B1.3(e); see also *United States v. Waters*, 84 F.3d 86, 87-91 (2nd Cir. 1996) (*per curiam*).

115. See *Ferguson*, 369 F.3d at 850-52; *Boecker*, 280 F.3d at 825-26; cf. *United States v. Thomas*, 68 F.3d 392, 393-95 (10th Cir. 1995).

116. See *Johnson*, 418 F.3d at 880-81; *Chavez*, 204 F.3d at 1312; cf. *United States v. Del Barrio*, 427 F.3d 280, 282-85 (5th Cir. 2005); *United States v. Griner*, 358 F.3d 979, 981-82 (8th Cir. 2004); *United States v. Bahe*, 201 F.3d 1124, 1125-36 (9th Cir. 2000); *Whaley*, 148 F.3d at 206-07.

117. See *Wilson*, 503 U.S. at 331-37; *Williams*, 425 F.3d at 990; *Johnson*, 418 F.3d at 880-81; *Pardue*, 363 F.3d at 699; *Ruggaino*, 307 F.3d at 131-32; *Montez-Gaviria*, 163 F.3d at 700-01; *Whaley*, 148 F.3d at 206-07.

118. See 18 U.S.C. § 3742; *Del Barrio*, 427 F.3d at 281-82; *United States v. Johnson*,

403 F.3d 813, 815-17 (6th Cir. 2005); *Kelley*, 359 F.3d at 1304.

119. *Hinson*, 429 F.3d at 120 (quoting *Gonzalez*, 250 F.3d at 925; 18 U.S.C. §§ 3742(a) and (e)) (respectively). *Booker*, however, eliminated “§ 3742(e) and directed appellate court to review for unreasonable[ness].” *Hinson*, 429 F.3d at 120 (citing and quoting *Booker*, 125 S. Ct. at 742).

120. See *Sweeting*, 437 F.3d at 1106-07; *McNiel*, 415 F.3d at 277; *United States v. Tyson*, 413 F.3d 824, 825-26 (8th Cir. 2005) (*per curiam*); *Cotton*, 399 F.3d at 916; *Fleming*, 397 F.3d at 97-99.

121. See *Contreras-Martinez*, 409 F.3d at 1241-42; *Tedford*, 405 F.3d at 1161; *cf. United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1256-59 (10th Cir. 2006).

122. *McInnis*, 429 F.3d at 3-4 (citing *United States v. Ramirez-Rivera*, 241 F.3d 37, 40-41 (1st Cir. 2001)).

123. *McInnis*, 429 F.3d at 4 (citing *Booker*, 125 S. Ct. at 756-57).

124. See *Johnson*, 403 F.3d at 816-17; see also *Yopp*, 2006 WL 1999138, at \*2.

125. *Hinson*, 429 F.3d at 119-20.

126. See *Johnson*, 403 F.3d at 816-17.

127. See *Anders v. California*, 386 U.S. 738 (1967); *United States v. Edwards*, 400 F.3d 591, 592-93 (8th Cir. 2005) (*per curiam*); *Johnson*, 418 F.3d at 880-81; *Tyson*, 413 F.3d at 825-26.

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