

WHITE-COLLAR CRIME

Expert Analysis

Terms and Conditions Of Supervised Release

Sentences handed down after a federal conviction typically include a term of supervised release usually under the auspices of the U.S. Probation Department. Most of the time, a defendant easily can anticipate the conditions of such supervised release, some of which are mandated by law. However, courts also have wide latitude in imposing non-mandatory conditions to the extent that they: 1) are reasonably related to the nature of the offense and the statutory goals of deterrence, rehabilitation and public safety; 2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and 3) are consistent with any pertinent policy statements set forth in the Sentencing Guidelines.¹

Supervised release conditions, typically delivered at sentencing after the announcement of any term of imprisonment and restitution amounts, may seem secondary at the time, but can have a significant impact on a defendant upon release from prison. Many federal defendants are in need of this probationary period and the guidance of an experienced probation officer to steer them in the right direction.

This need is not as great for many white collar offenders where the likelihood of recidivism is more remote. Extended supervision for such individuals is generally unnecessary, siphons needed resources from already overworked and understaffed probation officers, and is sometimes counter-productive.

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More and more, sentencing courts are using their broad discretion to impose unusual restrictions on a defendant. Recent cases from the U.S. Court of Appeals for the Second Circuit demonstrate this in action and provide an opportunity to review the law surrounding supervised release.

General Rules

Federal courts are permitted to include a term of supervised release after imprisonment for those defendants convicted of a federal crime, whether a felony or misdemeanor. The inclusion of supervised release as part of a sentence is mandatory when required by statute or if the defendant has been convicted for the first time of a crime of domestic violence.²

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The Sentencing Guidelines further mandate that a term of supervised release be imposed where a defendant has been sentenced to more than a year in prison, although a court is permitted to depart from this requirement if it determines that supervised release is not required to protect the public welfare, enforce a financial condition, provide drug or alcohol treatment or testing, assist

in the defendant's community reintegration, or accomplish any other sentencing purpose.³

The Sentencing Guidelines recommend that the duration of the term of supervised release be between three and five years for Class A or B felonies, between two and three years for Class C or D felonies, and up to one year for Class E felonies or Class A misdemeanors.⁴ The exact term to be imposed is within the discretion of the sentencing court after considering many of the same factors considered in imposing the underlying sentence, as set forth in Section 3553(a) of Title 18, such as the nature and circumstances of the offense, the defendant's history and characteristics, the need for deterrence and public protection, and the need to avoid disparity among defendants similarly convicted.⁵

The Sentencing Guidelines mandate that a judge impose as conditions that during the term of supervised release the defendant shall not commit another federal, state or local offense and shall not unlawfully possess a controlled substance.⁶ Other mandatory conditions may be required, depending on the nature of the offense.⁷ As noted above, the sentencing court also is authorized to impose other non-mandatory conditions where warranted and justified.

The Sentencing Guidelines include a number of recommended "standard" conditions to be imposed upon defendants under supervised release. They include, to name a few, travel restrictions, scheduled meetings with a probation officer and full compliance with said officer's instructions, regular employment, and restraint from excessive use of alcohol.⁸

Finally, a number of "special" conditions are included, which may or may not be appropriate in particular cases. They include provisions regarding weapon possession, debt obligations, substance abuse and mental health programs, and deportation.⁹

When conditions of supervised release are appealed, reviewing courts typically review the conditions imposed under an abuse of discretion standard, in recognition of the district court's "wide latitude" in imposing such conditions.¹⁰ Where, however, a defendant did not have prior notice of the condition, and a chance to argue against its imposition, appellate courts may engage in a plain error review, which is more relaxed than the abuse of discretion standard.¹¹

Discretion of Court

In *United States v. Reeves*,¹² the Second Circuit considered the imposition of a supervised release condition that obligated the defendant to notify the probation department when he entered into a "significant romantic relationship" and inform the other individual in the relationship of his conviction for possession of child pornography. The condition was not recommended by the probation department or the government and was not discussed at sentencing. Rather, the court included the condition in the Judgment of Conviction.

Because the defendant had no prior notice of the condition, the Second Circuit reviewed its imposition under the plain error review standard. Noting that a sentencing court's ability to impose non-mandatory conditions of supervised release was limited by statute, the court also stated that the condition must be sufficiently clear in order to satisfy due process concerns. If "a person of ordinary intelligence" is not provided with a reasonable opportunity to know what is prohibited, he is unable to comply with the condition and it is deemed unconstitutional.¹³

In the case at hand, the court expressed uncertainty as to the meaning of a "significant romantic relationship." The term was likely to leave one guessing at its meaning, providing Mr. Reeves with no guidance as to his obligations. Citing Mozart, Jane Austen and the popular films, "When Harry Met Sally" and "He's Just Not That Into You," the Second Circuit noted that "[t]he history of romance is replete with [] blurred lines and misunderstandings."

In addition to finding the condition too vague, the court opined that it was not "reasonably related" to the statutory goals "designed, in light of the crime committed, to promote the [defendant's] rehabilitation and to insure the protection of the public."¹⁴ The court found nothing in Mr. Reeves' history to indicate that he would pose a

risk to individuals with whom he might become romantically involved. The defendant had two children of his own, no history of domestic violence or abuse, a steady employment history, and according to a psychological evaluation, did not possess predatory tendencies or aggression.

Any condition which implicates a liberty interest must be narrowly tailored to serve a compelling government interest. The condition at issue implicated Reeves' protected associational interest, yet was not reasonably necessary for deterrence, the protection of the public, or rehabilitation. Accordingly, the Second Circuit vacated the condition of supervised release.

Unlike the condition imposed in *Reeves*, supervised release conditions that are narrowly tailored typically are sustained on review. For example, the Second Circuit has upheld conditions restricting a defendant's use of computers and the Internet and providing for monitoring of such use by the probation department.¹⁵

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Similarly, the imposition of occupational restrictions has been upheld where the conduct underlying the offense was related to the defendant's occupation, it was reasonably necessary to protect the public, and limited in scope. In *United States v. Gill*, the Second Circuit affirmed a condition of supervised release preventing a defendant convicted of making false statements related to health care from engaging in mental health counseling services.¹⁶

More recently, in *United States v. Ayers*,¹⁷ the defendant appealed from an order modifying the conditions of a ten-year term of supervised release following a conviction for receipt of child pornography. The condition at issue required Mr. Ayers to submit to polygraph and computerized voice-stress examinations at the probation department's request. Mr. Ayers objected to the condition arguing that he would be forced to choose between refusing to undergo the testing, thereby violating his supervised release, or

submitting to the testing at the risk of providing information that could later be used against him during civil commitment proceedings.

The government argued that the possibility of the defendant's civil commitment was too remote to constitute a valid objection and that the issue was not ripe for adjudication. The Second Circuit disagreed, noting that in *United States v. Johnson*, it found that a Fifth Amendment challenge to a supervised release condition requiring polygraph testing was ripe for adjudication "because it presented the defendant with the present dilemma of invoking his right against self-incrimination at the risk of release revocation or of revealing misconduct that could support a future prosecution."¹⁸

Ultimately, however, the *Ayers* court determined that the Fifth Amendment did not apply to a civil commitment proceeding and that the condition imposed was not an unnecessary deprivation of liberty as reflected in an existing right. "Here, nothing in the challenged supervised release condition deprives Mr. Ayers of existing protections available in a civil commitment proceeding, including the right to challenge the use, reliability, and probative value of any statements made by him during supervised release testing."¹⁹

Moreover, the court held that the testing requirement was related to the sentencing goals of deterrence, public safety, and rehabilitation. Finally, the condition was narrowly tailored, requiring a court order for disclosure of test information outside of the probation department, "thereby affording the court and the parties the flexibility to address the propriety of particular disclosures as the circumstances warrant."

Revocation

Pursuant to statute, violation of a condition of supervised release may result in revocation of the release and a sentence of imprisonment. The underlying violation must be proven by a preponderance of the evidence.²⁰ The statute caps the term of imprisonment at five years where the offense that resulted in the term of supervised release is a Class A felony, three years for Class B felonies, two years for Class C or D felonies, and one year in any other case.

In *United States v. Smith*,²¹ the Second Circuit affirmed a district court decision revoking the defendant's term of supervised release and sentencing him to 28 months imprisonment for five separate violations of release. The court held

that the sentence was reasonable in light of the defendant's repeated violations.

On appeal, the defendant argued that his sentence was substantively unreasonable because the district court relied upon a factor not specifically contemplated by statute. Specifically, the statute governing modification of conditions or revocation of release by a court dictates that the court should consider the sentencing factors set forth in Section 3553(a). However, the district court in *Smith* stated that the reason for the sentence was "the incorrigible conduct of [the defendant]" and his continuing criminal ways. The Second Circuit held that while the statute governing modification and revocation of supervised release required consideration of the factors set forth in Section 3553(a), it did not preclude or forbid consideration of other pertinent factors. Accordingly, the sentence of imprisonment was affirmed.

Termination

A district court may, after considering the purpose of sentencing and the relevant statutory factors, terminate a term of supervised release and discharge the defendant from his obligations earlier than originally contemplated at sentencing. This may be done "at any time after the expiration of one year of supervised release...if [the court] is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice."²²

In *United States v. Rentas*, Southern District Judge Victor Marrero considered an application from the defendant requesting early termination of his supervised release. Mr. Rentas was sentenced to seventy months imprisonment and five years supervised release following a conviction for drug conspiracy. Considering Mr. Rentas' request, Judge Marrero noted that changed circumstances, such as exceptionally good behavior by the defendant, "may render a previously imposed term or condition of release either too harsh or inappropriately tailored to serve the general punishment goals."²³

In that case, the court found that the defendant had been steadily employed since his release from prison, had gotten married, successfully completed an outpatient drug treatment program and had tested negative for drug use every four to six months. Further, the probation department indicated that Mr. Rentas had been fully compliant

and always available. Finally, neither the government nor the probation department objected to the defendant's request. Accordingly, the court held that Mr. Rentas' "exemplary law-abiding behavior" demonstrated changed circumstances justifying a reduction of the term of supervised release.

Supervised release and the conditions imposed during a term of such release may be an afterthought in the federal sentencing system where defense counsel and their clients frequently are focused on the length of imprisonment, if any. However, courts enjoy broad discretion in crafting the conditions of supervised release imposed on defendants and may use this power to mandate the smallest aspects of a defendant's life during the probationary period.

Defense counsel should be aware that this discretion is not without limits, however, and the inclusion of restrictions that technically may be related to the underlying offense, but are over-broad in scope can be challenged. Further, it is important for counsel to remind clients that conduct during the term of release will have a tremendous impact, both positively and negatively. Commendable behavior may result in early termination of release, while violation of the set conditions may result in revocation and imprisonment.



1. 18 USC §3583(d); see also Sentencing Guidelines §5D1.3(b).
2. 18 USC §3583(a).
3. Sentencing Guidelines §5D1.1(a); id. at cmt. n. 1.
4. Sentencing Guidelines §5D1.2; 18 U.S.C. §3583(b).
5. 18 USC §3583(c).
6. Sentencing Guidelines §5D1.3(1)-(2).
7. Id. §5D1.3(3)-(8).
8. Id. §5D1.3(c).
9. Id. §5D1.3(d).
10. *United States v. Johnson*, 446 F.3d 272, 277 (2d Cir. 2006).
11. See *United States v. Sofsky*, 287 F.3d 122, 125-26 (2d Cir. 2002) (using plain error review where the presentence report did not recommend the condition and defendant had no prior knowledge that it would be imposed).
12. 591 F.3d 77 (2d Cir. 2010).
13. Id. at 80-81.
14. Id. at 81 (citing *United States v. Tolla*, 781 F.2d 29, 34 (2d Cir. 1986)).
15. *United States v. Balon*, 384 F.3d 38 (2d Cir. 2004) (upholding condition requiring defendant to provide

probation with advance notification of "any computer(s), automated service(s), or connected device(s) that he will use during the term of supervision" and allow probation to install applications needed to monitor use). But see, *United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (vacating as overbroad conditions which restricted defendant's possession of matters that "depicts or alludes to sexual activity" or that "depicts minors under the age of eighteen").

16. 523 F.3d 107 (2d Cir. 2008).
17. 2010 WL 1103224 (2d Cir. March 30, 2010).
18. 446 F.3d at 279.
19. 2010 WL 1103224 at *2.
20. 18 USC §3583(e)(3).
21. 224 Fed.Appx. 133 (2d Cir. 2007).
22. 18 USC §3583(e)(1).
23. 573 F. Supp.2d 801, 802 (SDNY 2008) (citing *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997)).