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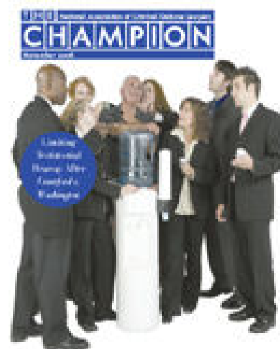

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Representing a Client Charged With Violating Conditions of Supervised Release--Part I

By Douglas A. Morris

Like everything else in federal criminal defense, there is nothing simple about representing someone who is accused of violating the conditions of their term of probation or supervised release. That is not to say that there are not cases that are straightforward and without error, it is to say that there is more than meets the eye when it comes to representing such people. Thus, failing to know the "ins and outs" of representing such folks can lead to a defendant spending more time in prison than is necessary.

"Supervised release, and by extension, probation, are components of the original sentence[,]" and violation and revocation of supervised release does not constitute a separate charge, because supervised release is merely "a continuation of the original charge."1 Yet, "[t]he period of supervised release is an independent element of the [original] sentence. It is not carved out of the maximum permissible time allotted for incarceration under some other criminal statute."2

Probationers and those who serve a term of supervised release are similar because they both report to a probation officer, the violation reports are the same, and the district court will consider Chapter Seven of the Sentencing Guidelines when determining the appropriate sentence. As to the distinction between the two, "probation is imposed instead of imprisonment, while supervised release is imposed after imprisonment."3 As such, supervised release is a "mechanism 'to improve the odds of a successful transition from the prison to liberty.'" 4

I. Key Differences

There are other key differences between the two forms of supervision. Both are based on separate statutes, which is particularly important when the probationer faces revocation of the term of probation.5 Additionally, unlike supervised release, revocation of a term of probation, for all intent and purpose, is the same as the sentencing procedure in place after United States v. Booker,6 including the possible imposition of the original statutory maximum sentence, which could include a term of supervised release to follow imprisonment.7 Unlike the aforementioned consequences, upon revocation of supervised release the defendant "only" faces the terms of imprisonment found in 18 U.S.C. § 3583(e)(3) and the potential, under some circumstances, of a continued term of supervision release pursuant to § 3583(h).

Accordingly, with these types of significant differences, the scope of this article is limited to those occasions where a probation officer files a petition for offender under supervision ("petition")8 with the United States District Court that might lead to the revocation of an adult defendant's term of supervised release.9 In this type of case, the probation officer usually begins by filing a petition with the end goal of, more often than not, the alteration of the

conditions of supervision, the revocation of the term of supervision followed by imprisonment and no further term of supervised release, or revocation of the term of supervision followed by imprisonment and an additional term of supervised release.10 Considering this scope, this article provides the reader with helpful information and some tools and "tricks of the trade" to prevent imprisonment or minimize the term of imprisonment.

II. Jurisdiction: Warrant and Tolling

We start with a defendant who initially appears in the judicial district that has jurisdiction of the case — the defendant is appearing in the same district that sentenced him or her for the underlying offense.11 The first issue that defense counsel must address is whether the defendant's term of supervision expired before a federal judge signed the violator's warrant. A court may "revoke a term of supervised release for violation of a condition of supervised release . . . if, before . . . expiration . . . [of the term of supervised release,] a warrant or summons has been issued on the basis of an allegation of such a violation."12

This is relatively easy to determine; examine the petition to see when the term of supervision began (it begins when the defendant has served the federal sentence and is no longer in federal or state custody — the defendant is in the "free world"),13 and then see if the valid warrant was signed before the term expired.14 Frankly, it will be a rare instance where the warrant is invalid and/or signed after the term of supervision expires; however, there might be instances where the term appears to have expired, but it has not expired due to the term of supervision being tolled for reasons such as imprisonment or becoming a fugitive while on supervised release.15 When is incarceration not imprisonment for purposes of tolling? When the incarceration is pretrial detention. "[P]retrial detention does not constitute an 'imprisonment' within the meaning of § 3624(e) and thus does not operate to toll a term of supervised release."16 Note that, with the exception of one circuit, the removal of an undocumented alien who is serving a term of supervised release to that person's native country does not toll a term of supervised release.17 Also, removal does not automatically extinguish the term of supervised release.18

Lastly, defense attorneys may face occasions where the warrant was signed many months or years before the execution of the warrant and appearance of the defendant before the magistrate judge. This usually occurs due to the defendant absconding or serving a sentencing of imprisonment at a non-federal facility. The delay between the date of the warrant and the initial appearance before the magistrate judge, by itself, does not violate a defendant's constitutional rights and does not extinguish the court's jurisdiction.19

III. Preliminary Hearing: a.k.a. Probable Cause

If the government does not move to detain the defendant and the magistrate judge agrees that he should not be detained, the magistrate judge will inform the person of the alleged violations of the conditions of supervised release and the right to retain counsel or the right to have counsel appointed.20 If the defendant is then released, for all practical purposes he will not receive a preliminary hearing and, of course, will not need a detention hearing.21

If the government moves to detain the person and the person is in federal custody (as opposed to being in the legal custody of a state or local government agency), the magistrate judge will advise the defendant of the right to have a preliminary hearing and a detention hearing.22 That is, the "magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred."23 The defendant also has a right to appear at the hearing and may request the "opportunity to question any adverse witness[.]"24

Rule 32.1(b) of the Federal Rules of Criminal Procedure, however, allows a defendant to waive this preliminary hearing.25 There are practical reasons that weigh for and against waiving this hearing.26 Before the hearing, counsel should have received a copy of the petition for offender under supervision that lists each noncompliance along with the conditions of supervision. However, this petition does not always include every noncompliance. Sometimes the probation officer includes just what that probation officer thinks is required to get the defendant detained and meet the burden of proof: "probable cause to believe that a violation occurred."27

If the defendant chooses to proceed with a probable cause hearing, however, the government will most likely call the probation officer to the stand and that probation officer may then "add"

any individual noncompliance that is missing from the petition. The effect of this is to torpedo the defendant's chances of receiving a bond. With this in mind, it is important to get the defendant to inform defense counsel of any noncompliance that is missing from the petition so that the government and the probation officer do not broadside defense counsel with harmful missing information.28

Once the magistrate judge finds probable cause, the district "court must hold the revocation hearing within a reasonable time[.]"29 The defendant may also waive the revocation hearing.30

IV. Detention Hearing

Beyond the hearing for probable cause, the aforementioned defendant has a right to have a detention hearing.31 The right to a detention hearing is somewhat different than the hearing that occurs when a defendant appears before the magistrate judge in a pretrial situation.32 One important difference is that the defendant, no matter the violation or underlying offense of conviction, bears the burden of proof regarding flight risk and the threat to the community.33 When the defendant appears on a violator's warrant, the defendant must prove the absence of these risks by clear and convincing evidence.34

As it is in a pretrial situation, it is important to bring witnesses to support an argument that the defendant is neither a flight risk nor a danger to the community. Ties to the community are usually not the largest problem; even the most troubled defendant will have someone to reside with and will have resided in the community for a number of years. In many instances, the largest obstacle will be the defendant's use of illegal controlled substances. There is no doubt that the use of an unprescribed or illegal controlled substance is against the law, but such use does not, per se, constitute a threat to the community. Nevertheless, magistrate judges may be inclined to detain individuals who have tested positive for the use of illegal controlled substances, because the drug use is a threat to the defendant and constitutes continued criminal activity, which would be a violation of the conditions of release. Keep in mind, however, the appropriate test is whether the defendant is a threat to the community and/or a risk of flight; it is not whether the defendant will continue using illegal substances.35

V. After the Preliminary and Detention Hearings, but Before the Revocation Hearing

A. Introduction

At this point, defense counsel and defendant should have received the petition for offender under supervision, the defendant is either in custody or out on a bond, and there should be a date scheduled for the revocation hearing. Examining the petition will give defense counsel an idea of what is going on in the defendant's case. The petition usually includes the original sentencing date, the statute of the underlying offense of conviction, the sentence imposed for the underlying conviction, and the date that the probation officer started supervising the defendant. Of course, it must also include the violated conditions of supervision and how the defendant allegedly violated the conditions.36

B. Presentence Reports, Classifications of Underlying Offenses, and the Guidelines

What defense counsel must also get at this time is the defendant's original Presentence Report (PSR) with any and all objections, addenda, rulings related to the objections and addenda, and the judgment in the original case. Why? There are a number of reasons. As noted, the petition will include the underlying statute of conviction and the sentence imposed, which includes the sentence of imprisonment, the length of supervised release, and the date supervision began. Where did the probation officer get this information? Usually from the first page of the PSR. The problem is that in some cases the objections to the PSR may have substantially and materially "changed" the true statute of conviction. How is this possible?

Before June 26, 2000, which is when the Court decided Apprendi v. New Jersey,37 the government was able to indict a person for an offense that might have a mandatory minimum term and statutory maximum sentence of life in prison and then try to prove relevant conduct at sentencing.38 For example, the government used to be able to indict a person for violating 21 U.S.C. §§ 841(a) and 841(b)(1)(A), which requires a minimum sentence of imprisonment of 10 years and has a statutory maximum term of life in prison, without indicating a quantity of drugs to support the indictment.39 An offense that has a statutory maximum of life in prison is a Class

A felony.40 Because it is a Class A felony, the statutory maximum sentence that may be imposed upon revocation of supervised release is five years imprisonment.41

However, prior to Apprendi, which was a period where the concept of “statutory maximum sentence” had little meaning in relation to the charging document and judgment, a defendant could successfully object to the drug quantity in the PSR and end up with a lower statutory maximum sentence, which, for all intent and purpose, functioned to lower the classification of the charged offense.42 That is, a successful objection to drug quantity might have resulted in a functional reduction from a Class A felony to a Class C felony; the maximum term of imprisonment that can be imposed upon revocation of supervised release for a Class C felony is no more than two years.43 As one can see, relying on the probation officer, who may have relied on the first page of the PSR to determine the classification of the defendant’s underlying offense, will simply be insufficient.

If the erroneous classification is allowed to stand, and, hypothetically, the violation that the defendant is alleged to have committed is considered to be a Grade A violation,44 the defendant will have a higher statutory maximum sentence and a higher suggested revocation sentencing range.45 For instance, our hypothetical defendant has a Criminal History Category VI,46 the sole underlying offense is erroneously categorized as a Class A felony47 with a statutory maximum revocation sentence of five years imprisonment,48 and the defendant commits a Grade A violation of a condition of supervised release.49 Under Chapter Seven of the Sentencing Guidelines, the defendant would face 51-63 months, (60-month statutory maximum).50 However, under the hypothetical defendant’s true offense classification, which is a Class C felony,51 the sentencing range is 33-41 months, but the statutory maximum upon revocation is only 24 months!52 Reading the PSR saved our hypothetical client up to 36 months imprisonment.53

There is one significant problem with this analysis. The United States Court of Appeals for the Fifth Circuit has held that, during a revocation of supervised release, the sentencing court is to consider “the ‘statute for the offense that resulted in the original term of supervised release.’”54 This same quoted language is found in § 3583(e)(3). United States v. Moody continued by stating that the defendant could not “use her new term of supervised release as a vehicle . . .” to appeal the application of the incorrect statute of conviction.55 Thus, for those defendants who did not appeal and get the statute corrected or did not successfully object to the drug quantity at sentencing, which would have, for all intents and purposes, changed the statute of conviction, the sentencing judge, at the supervised release revocation hearing, is to consider the statute of conviction even if the original application of that statute violated the Fifth and Sixth Amendment of our Constitution as noted in Apprendi.56 If defense counsel represents such an unfortunate defendant, counsel must point out the seriousness of the prior error and argue that the defendant should not be sentence based on what is now an unconstitutional sentence.57

Beyond this, sometimes the probation officer who wrote the original PSR simply botched the classification — the original writer committed a scrivener’s error — and the probation officer who wrote the petition perpetuates the error by repeating it without examining the entire PSR, addenda, and objections. Again, for example, the underlying offense has a statutory maximum sentence of less than 25 years, but more than 10 years, and the statute does not enumerate any specific classification or term of supervision, so it is a Class C felony.58 A Class C felony calls for no more than three years of supervised release and no more than two years imprisonment upon revocation.59 However, for some inexplicable reason, the PSR notes that the offense is a Class B felony, which can result in up to five years of supervised release and can also result in three years imprisonment upon revocation.60 As the reader can tell from the above discussion, failing to catch this error, which is what occurred during the original sentencing and permitted this particular mistake to get this far, can result in a higher term of imprisonment upon revocation.61

This type of error should not face the same problems as that seen in Moody.62 After all, the original offense does not support the erroneous classification and such an error is more akin to a scrivener’s error. Nevertheless, if defense counsel does not catch the error, the defendant could be sentenced to more time in prison than the statute allows.

There are two "morals" to the two aforementioned "stories." The first is that defense counsel must know the classification of the underlying offense. In order to know the classification, defense counsel must first know the offense of conviction and the statutory maximum sentence that could have been imposed for that offense. Armed with that information, counsel can then determine the correct classification, which will then inform defense counsel (with limited exception of controlled substance offenses, terrorism-related offenses, and certain sex-related offenses)63 of the maximum term of supervised release and the maximum term of imprisonment that can be imposed upon revocation.64 This article includes a chart that offers assistance in determining the correct classification, term of supervised release, and term of imprisonment upon revocation.65 The related second "moral" is that defense counsel must get the PSR in order to know the true offense of conviction.66

Another reason to get the PSR is to examine the Criminal History Category.67 The sentencing range for a revocation is partially based on the Criminal History Category at the time of conviction for the underlying offense, not at the time of the revocation hearing.68 This is important because, sadly, the defense attorney, the prosecutor, and the district judge may have overlooked an error in the probation officer's calculation of the criminal history, which not only may have resulted in the defendant spending more time in prison than called for in the original sentence, but may be used as a basis to imposing extra time in prison upon revocation of supervised release.69

For example, at some previous time the defendant received a sentence of 10 days in the local jail followed by six months probation for misdemeanor criminal mischief. The defendant then picked up the federal case and the PSR assessed one criminal history point for the offense of misdemeanor criminal mischief. Assuming only one other reason to impose a criminal history point, such as a conviction for driving while intoxicated that resulted in less than 60 days imprisonment, the defendant is in Criminal History Category II.70 Combining Criminal History Category II with a net offense level of 24 results in a sentencing range of 57-71 months imprisonment; the judge then went to the low end of the sentencing range for a sentence of 57 months imprisonment, which the defendant served.

What is wrong? Pursuant to U.S.S.G. § 4A1.2(c)(1), based on the nature of the federal offense and the sentence imposed for the prior offense in question, the defendant should not have received a criminal history point for misdemeanor criminal mischief,71 which put the defendant into Criminal History Category II. In Criminal History Category I, the sentencing range would have been 51-63 months; assuming the sentencing judge would have imposed the low end of the correct guideline range means that the defendant served six months that he or she should not have served.72

No one caught the error below, the defendant did not appeal the error, and now the defendant is back for a revocation of supervised release. What can a defense attorney do? Apparently, there is no jurisdictional or legal basis for a sentencing judge to revisit and correct an erroneous calculation of the criminal history (which cuts both ways because probation officers sometimes err in favor of the defendant).73 Indeed, the Sentencing Guidelines state that "[t]he criminal history category is the category applicable at the time the defendant originally was sentenced to a term of imprisonment."74 Thus, the best a defense attorney can do is to argue that the sentencing judge should take into consideration the error that everyone made at the original sentencing and compensate for that error by reducing the sentence believed to be appropriate for violating the conditions of supervised release. One of counsel's strongest arguments will be that it is unreasonable to punish a defendant more than the law truly calls for.75 Chapter Seven of the Sentencing Guidelines has always been advisory so the district court has the latitude to adjust the sentence accordingly, but this will depend on the attorney's persuasiveness.

C. Petty Offenses

An additional error that defense counsel can look for is whether the defendant could have and should have received supervised release in the first place. Specifically, if the defendant was sentenced under a misdemeanor statute, it is possible that the imposition of a term of supervised release violated the law. When a defendant is convicted of a Class B or Class C

misdemeanor, depending on the statute of conviction and the statutory maximum fine, the defendant's offense may be considered to be a petty offense.76 If the defendant's offense is considered to be a petty offense that does not qualify as a domestic violence crime, and the statute does not enumerate the option of a term of supervised release, § 3583(b) does not provide for the imposition of a term of supervised release. 77

Ergo, if a term of supervised release and a term of imprisonment were imposed on a petty offender, and the offense was not a domestic violence crime and the offense did not list supervised release as an option, defense counsel must argue that supervised release was imposed in violation of the law and is an illegal sentence.78 Keep in mind, however, some courts may hold that the defendant waived any complaint regarding the imposition of supervised release by failing to "raise the issue on direct appeal or in" a petition for relief via habeas corpus.79 Nonetheless, the sentencing court "must start with a legally correct interpretation of the Guidelines" . . . and "'[a]n error in determining the applicable Guideline range' may render the ultimate sentence unreasonable under Booker."80

Because some defendants who are convicted of Class B or Class C misdemeanors receive a term of probation, the determination of whether the offense was a petty offense or not usually becomes relevant for purposes of the punishment to be imposed upon revocation of probation.81 That is, a probationer can face imprisonment for violating the conditions of probation, but if the probationer is a "petty offender" and the statute of conviction does not enumerate supervised release as an option, a term of supervised release cannot follow the term of imprisonment imposed for violating the conditions of probation.82

D. Post-Crime Bill Supervised Release Violation Report and Notice

At this point the defendant either has a bond or is detained and defense counsel should have received and examined the petition, the PSR, and the post-crime bill supervised release violation report ("post-crime violation report").83

For those defendants facing revocation of their supervised release, the post-crime violation report is the revocation equivalent of the PSR.84 Similar to the petition for offender under supervision, it usually includes the date of the original sentence; the sentence; the date supervision commenced; the original term of supervised release; any terms of imprisonment served since the original release date; the mandatory, standard, and special conditions of supervision in question; and the specific violations of those conditions that are alleged to have occurred.

In addition, the post-crime violation report usually contains the defendant's custody status; any detainers; possibly more details regarding the conditions of supervision in question and the associated alleged violations; the statutory maximum term of imprisonment that the district judge can impose; the applicable revocation statutes; the statutory maximum punishment that can be reimposed, which may include an additional term of supervised release; the grade of the violation pursuant to U.S.S.G. § 7B1.1; the criminal history category; and the imprisonment range that U.S.S.G. § 7B1.4 suggests. It may also include the classification of the original offense, which, as previously discussed, is important to know so that defense counsel will be able to judge the accuracy of the probation officer's calculations and advice to the district court.

In the end, this amount of information is more than Rule 32.1(b)(2) of the Federal Rules of Criminal Procedure requires so all of this information may or may not be included in the report.85 In fact, relatively very little information is required to meet the requirements of Due Process.86 Though little is required, the defendant must receive sufficient notice of the "charges" so that he or she can "prepare to defend against the 'charges.'"87 Moreover, the defendant must have received notice of the conditions of supervision before a violation of that condition can be used as a basis to revoke supervised release and imprison the defendant.88 Therefore, it is important that defense counsel get a copy of the original judgment so that counsel can insure that the conditions that the defendant is accused of violating are conditions that were actually imposed.89

E. Conditions of Supervision

In most instances, the sentencing court will have imposed the mandatory and standard

conditions of release during the original sentencing; these conditions do not usually raise the aforementioned concerns related to notice.90 Outside of the mandatory and standard conditions, which are outlined in U.S.S.G. § 5D1.3, "sentencing courts have 'broad discretion to tailor conditions of supervised release to the goals and purposes outlined in [U.S.S.G.] § 5D1.3 (b),' [however,] this provision does not provide sentencing courts with untrammelled [sic] discretion in this regard."91

[S]pecial conditions of supervised release must be reasonably related to the factors set forth in § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). . . . Even if these criteria are satisfied, the court may not impose conditions that involve a greater deprivation of liberty than is reasonably necessary to achieve the latter three statutory goals. Finally, the conditions must be consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(a).92

Nevertheless, there are occasions where the sentencing court exceeds these broad limits,93 but in most occasions the reviewing courts will not find an abuse of discretion.94

In addition to the aforementioned conditions, defense counsel should examine the original conditions of supervision and determine whether those conditions were permissible, vague, or violate a constitutional right such as the privilege against self-incrimination.95 During the revocation hearing the sentencing court may or may not "credit" the defendant for these errors, and, as previously stated, the reviewing courts might not give much weight to the defendant's complaints at this stage.96 It goes without saying, however, counsel should make the argument.

F. The Grade of the Violation

As to the grade of the violation, as previously noted, this refers to the guidelines classification of the reason why the defendant is facing revocation, not the statutory classification of the underlying offense.97 Confusingly similar to the classification of the underlying offenses found in 18 U.S.C. § 3559, the grade of the violation is also enumerated alphabetically: "A, B, or C."98 "[T]he grade classification rests on the 'actual conduct' underlying the charged violation supporting the revocation of release . . . [and does not depend on] whether and how the defendant may be charged in a criminal prosecution for the same underlying conduct."99 Yet, when a defendant's "conduct . . . constitutes more than one [criminal] offense, the grade of the violation is determined by the violation having the most serious grade."100 That is, if the conduct constitutes a "Grade C" violation under a federal criminal statute, but a "Grade B" violation under a state statute, the conduct will be treated as a "Grade B" violation.101 Be that as it may, the conduct in question need not even be criminal in nature to serve as a basis for revoking the term of supervised release.102 Additionally, the conduct used to support the warrant for arrest need not be the conduct that is the basis for the ultimate revocation.103

Again, the grade of the conduct does not have to be based on a criminal charge and need not be based on a conviction for a new offense; indeed, even if a conviction occurred, but is being appealed, a sufficient basis for revocation remains.104 Moreover, even suppressible information can be used to support a finding of conduct that supports a revocation.105 Nevertheless, in some circumstances, depending on whether the particular state considers a plea of nolo contendere to be an admission of factual guilt, a plea of nolo contendere, by itself, may be insufficient evidence of the conduct in question.106

The language of U.S.S.G. § 7B1.1 illustrates the importance of researching the state and federal statutes related to the conduct in question so that defense counsel will know if the conduct constitutes, inter alia, a crime of violence or a controlled substance; furthermore, defense counsel will need to learn the maximum potential sentence of imprisonment for the conduct.107 The Guidelines narrow this analysis by stating that U.S.S.G. § 4B1.2 defines both "crimes of violence" and "controlled substance offense."108

In the end, regardless of the conduct or the classification of the violation, the defendant is being revoked and punished for "breach[ing] the trust placed in . . . [the] defendant by the original sentencing court, rather than . . . [being punished for] 'new federal criminal conduct.'"109

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Notes

1. United States v. Valdez-Sanchez, 414 F.3d 539, 542 (5th Cir. 2005); see United States v. McNeil, 415 F.3d 273, 277 (2nd Cir. 2005); cf. United States v. Celestine, 905 F.2d 59, 60-61 (5th Cir. 1990) (per curiam). Correspondingly, because any revocation sentence is tied to the original conviction that served as a basis for the term of supervised release and not to the action associated with any new offense, "[t]he double jeopardy problem is avoided . . . ." United States v. Carlton, No. 05-0974-CR, 2006 WL 758744, at *5 (1st Cir. Mar. 24, 2006).
2. United States v. Work, 409 F.3d 484, 489 (7th Cir. 2005); see Johnson v. United States, 529 U.S. 694, 700 (2000); United States v. Cenna, No. 05-14011, 2006 WL 1277944, at *1-2 (11th Cir. May, 11, 2006); United States v. Hinson, 429 F.3d 114, 118-19 (5th Cir. 2005), cert. denied, 126 S. Ct. 1804 (2006); United States v. Pierce, 75 F.3d 173, 178 (4th Cir. 1996). Simply put, a sentencing judge can impose upon a defendant the statutory maximum sentence of imprisonment for the underlying offense and then later upon revocation of the term of supervised release impose an additional sentence of imprisonment without violating the maxim of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490; see also Hinson, 429 F.3d at 115-20; Work, 409 F.3d at 487-90 (listing a number of cases supporting this assertion).
As most readers know, the Court held that "the Federal Sentencing Guidelines violated the Sixth Amendment right to trial by jury because the Guidelines were mandatory, . . . [the] Court made clear, however, that there would be no Sixth Amendment violation[,] if the Guidelines were merely advisory[.]" Hinson, 429 F.3d at 117 (citing United States v. Booker, 125 S. Ct. 738, 749-50 (2005)); see Carlton, 2006 WL 758744, at *2-7. Because "the portions of the sentencing guidelines dealing with revocations of supervised release are merely policy statements[] . . . [and have always been] deemed advisory rather than mandatory[,] Work, 409 F.3d at 492 (citing U.S.S.G. §§ 7B1.1-7B1.5) (balance of citations omitted); see United States v. Nace, 418 F.3d 945, 949 (8th Cir. 2005); United States v. Contreras-Martinez, 409 F.3d 1236, 1242-43 (10th Cir. 2005), a number of courts have held that Booker does not apply to revocations of supervised release. Hinson, 429 F.3d at 116-20; United States v. McInnis, 429 F.3d 1, 5 (1st Cir. 2005); Nace, 418 F.3d at 949; United States v. White, 416 F.3d 1313, 1316-19 (11th Cir. 2005) (per curiam); McNeil, 415 F.3d at 276-77; United States v. Griffin, 413 F.3d 806, 807-08 (8th Cir. 2005); Contreras-Martinez, 409 F.3d at 1242-43; Work, 409 F.3d at 490-92; United States v. Coleman, 404 F.3d 1103, 1104-05 (8th Cir. 2005) (per curiam). Accordingly, outside of the standard of review upon appeal, Booker has not impacted supervised release. See Work, 409 F.3d at 492 (citing United States v. Antonakopoulos, 399 F.3d 68, 75 (1st Cir. 2005)); see also Hinson, 429 F.3d at 115-20; see generally Booker, 125 S. Ct. at 748-69.
3. United States v. Perez-Macias, 335 F.3d 421, 427 n.13 (5th Cir.), cert. denied, 540 U.S. 994 (2003) (citing United States Sentencing Commission, Guidelines Manual, Ch. 7, Pt. A, intro. comment. (Nov. 2003)); see United States v. Chavez, 204 F.3d 1305, 1312 (11th Cir. 2000); United States v. Colacurio, 84 F.3d 326, 331 (9th Cir. 1996); United States v. Reyes, 48 F.3d 435, 438-39 (9th Cir. 1995).
4. United States v. Huerta-Pimental, No. 04-50037, 2006 WL 1061968, at *2 (9th Cir. Apr. 24, 2006) (quoting and citing Johnson, 529 U.S. at 696-97); see United States v. Allison, No. 04-20922, 2006 WL 1030327, at *2 (5th Cir. Apr. 20, 2006).
5. Compare 18 U.S.C. §§ 3561-3566 to 18 U.S.C.§ 3583.
6. 125 S. Ct. 738 (2005); see § 3565; see also §§ 3551-3559.
7. See § 3565; see also §§ 3551-3559. These distinctions lead to an important point regarding the initial sentencing. Specifically, on those occasions where the defendant is eligible to receive a term of probation — which, statutorily, is any defendant who was not convicted of, inter alia, a Class A or Class B felony, see § 3561 — probation may not be the best option for the defendant. That is, if the defendant qualifies for probation, but has a substance abuse problem or has a problem "conforming" to supervision, a short term of imprisonment and supervised release may be the best option. Indeed, a defendant who has "problems" may violate the conditions of their term of probation, get revoked, receive a sentence of imprisonment that is higher then the original guidelines sentence, and then receive a term of supervised release that

can later be revoked with the result of more time in prison. See § 3565. However, this same defendant may be able to receive as little as one-day imprisonment followed by a term of supervised release, which, if revoked, will result in the defendant spending much less time under supervision and less time in prison. See § 3583. Thus, sometimes less in more and defense counsel must "know" the person they represent and determine the best option for that defendant.
8. "[P]robation officers may properly petition the court for a revocation of supervised release." United States v. Ahlemeier, 391 F.3d 915, 924 (8th Cir. 2004) (citing United States v. Amatel, 346 F.3d 278, 280 (2nd Cir. 2003); United States v. Cofield, 233 F.3d 405, 408-09 (6th Cir. 2000); United States v. Mejia-Sanchez, 172 F.3d 1172, 1174 (9th Cir. 1999); United States v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998)); see United States v. Bermudez-Plaza, 221 F.3d 231, 222-35 (1st Cir. 2000). "As representatives of the public interest, probation . . . officers are often the most appropriate persons to bring to the attention of the court . . . an offender's conduct that is threatening to the public." United States v. Reyes, 283 F.3d 446, 457 (2nd Cir. 2002) (internal alterations and quotations omitted) (citation omitted); see generally Scott T. Ballock, A View From the Field, Fed. Probation, June 2001, at 43; John P. Storm, What United States Probation Officers Do, Fed. Probation, Mar. 1997, at 13.
9. For a complete, but dated, analysis of the law surrounding supervised release, read the following law review article: Hon. Harold Baer, Jr., The Alpha & Omega of Supervised Release, 60 Alb. L. Rev. 267 (1996). Judge Baer's article is quite informative, but it lacks information related to 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); United States v. Booker, 125 S. Ct. 738 (2005); and Apprendi v. New Jersey, 530 U.S. 466 (2000). All of these impact supervised release, which will be explained in this article. In addition to Judge Baer's great article, Charles Alan Wright is always helpful. See Charles Alan Wright, Nancy J. King, & Susan R. Klein, Federal Practice and Procedure: Criminal § 542 (3d ed. 2004); see also Joe Gergits, Looking at the Law, Fed. Probation, Dec. 2005, at 39-40; Thomas W. Hutchinson, Peter B. Hoffman, Deborah Young, & Sigmund G. Popko Federal Sentencing Law and Practice, Ch. 7 (2005 ed.); Leslie A. Cory, Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time, 51 Emory L.J. 379 (Winter 2002); Stephen S. Cook, Selected Constitutional Questions Regarding Federal Offender Supervision, 23 New Eng. J. on Crim. & Civ. Confinement 1 (Winter 1997).
10. Cf. 18 U.S.C. § 3583.
11. Compare Fed. R. Crim. P. 32.1(a)(4) to Fed. R. Crim. P. 32.1(a)(5).
12. 18 U.S.C. § 3583(i); see United States v. Moore, 443 F.3d 790, 791-95 (11th Cir. 2006); United States v. Bailey, 259 F.3d 1216, 1218-19 (10th Cir. 2001); United States v. Naranjo, 259 F.3d 379, 381 (5th Cir. 2001); see generally Catharine M. Goodwin, Legal Developments in the Imposition, Tolling, and Revocation [of] Supervision, Fed. Probation, Dec. 1997, at 76.
13. See § 3624(e); see, e.g., United States v. Johnson, 529 U.S. 53, 57 (2000); United States v. Cook, 329 F.3d 335, 336-38 (3rd Cir. 2003); United States v. Lynch, 114 F.3d 61, 64 (5th Cir. 1997).
14. Moore, 443 F.3d at 791-95; United States v. English, 400 F.3d 273, 275 (5th Cir. 2005); United States v. Vargas-Amaya, 389 F.3d 901, 903-07 (9th Cir. 2004); United States v. Hondras, 296 F.3d 601, 602-03 (7th Cir. 2002). "[A] district court's jurisdiction to revoke supervised release can be extended beyond the term of supervision under § 3583(i), based upon a warrant issued during the term of supervision, only if the warrant was issued 'upon probable cause, supported by Oath and affirmation,' as required by the Fourth Amendment." Vargas-Amaya, 389 F.3d at 907; see United States v. Ortiz-Hernandez, 427 F.3d 567, 579-80 (9th Cir. 2005) (per curiam); cf. English, 400 F.3d at 275-76; contra United States v. Garcia-Avalino, 444 F.3d 444, 45-47 (5th Cir. 2006).
15. See § 3624(e); United States v. Jackson, 426 F.3d 301, 304-05 (5th Cir. 2005) (per curiam); United States v. Murguia-Oliveros, 421 F.3d 951, 952-55 (9th Cir. 2005). "[T]he sands of . . . [the] statutory hourglass . . . remain suspended during the defendant's incarceration on state charges." United States v. Garrett, 253 F.3d 443, 449-50 (9th Cir. 2001); see § 3624(e).
16. Garrett, 253 F.3d at 446 (quoting United States v. Morales-Alejo, 193 F.3d 1102, 1106 (9th Cir. 1999)).
17. See United States v. Okoko, 356 F.3d 962, 964-67 (11th Cir. 2004); United States v. Juan-Manuel, 222 F.3d 480, 485-88 (8th Cir. 2000); United States v. Balogun, 146 F.3d 141, 144-47 (2nd Cir. 1998); but see United States v. Isong, 111 F.3d 428, 430-31 (6th Cir. 1997); cf. United States v. Biyaga, 9 F.3d 204, 205-06 (1st Cir. 1993).

18. See United States v. Williams, 369 F.3d 250, 252-53 (3rd Cir. 2004); United States v. Ramirez-Sanchez, 338 F.3d 977, 980-81 (9th Cir. 2003); United States v. Akinyemi, 108 F.3d 777, 779-80 (7th Cir. 1997); United States v. Brown, 54 F.3d 234, 238-39 (5th Cir. 1995); see, e. g., United States v. Cuero-Flores, 276 F.3d 113, 117-19 (2nd Cir. 2002).
19. See United States v. Ramos, 401 F.3d 111, 115-18 (2nd Cir.), cert. denied, 126 S. Ct. 371 (2005); Garrett, 253 F.3d at 446-50; United States v. Sanchez, 225 F.3d 172, 175-78 (2nd Cir. 2000); United States v. Jimenez-Martinez, 179 F.3d 980, 981-82 (5th Cir. 1999) (per curiam).
20. Fed. R. Crim. P. 32.1(a)(3); see United States v. Pelensky, 129 F.3d 63, 66 n.4 (2nd Cir. 1997). It is important to note that, in the context of supervised release, the right to counsel is not necessarily constitutionally based, but is based on 18 U.S.C. § 3006A(a)(1)(E) and Rule 32.1 of the Federal Rules of Criminal Procedure. See United States v. Eskridge, No. 05-2808, 2006 WL 1008835, at *1-2 (7th Cir. Apr. 19, 2006) (citations to the court's precedent omitted). The Honorable Richard A. Posner does an excellent job in Eskridge of explaining when the Due Process Clause of the Fifth Amendment provides a right to counsel and when it does not. In addition to discussing the court's caselaw, Eskridge notes the differing and concurring views of other circuits on this issue. Eskridge, 2006 WL 1008835, at *2 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000); United States v. Pelnsky, 129 F.3d 63, 68 n.8 (2nd Cir. 1997); United States v. Soto-Olivas, 44 F.3d 788, 792 (9th Cir. 1995)).
21. See, e.g., Fed. R. Crim. P. 32.1(b).
22. See Fed. R. Crim. P. 32.1(a)(3); see also United States v. Pardue, 363 F.3d 695, 696-98 (8th Cir. 2004). If the defendant is being held for state or local charges he or she does not have a right to have a probable cause hearing. See Pardue, 363 F.3d at 697-98; United States v. Sackinger, 704 F.2d 29, 30 (2nd Cir. 1983).
23. Fed. R. Crim. P. 32.1(b); see Pelensky, 129 F.3d at 66 n.4.
24. Fed. R. Crim. P. 32.1(b).
25. Pelensky, 129 F.3d at 66 n.4.
26. See Michael L. Desautels, Defending a Supervised Release Case For Drug Use: The U.S. Probation Department's Own Manual Could Help You, The Champion, Mar. 2006, at 24-26.
27. Fed. R. Crim. P. 32.1(b).
28. To illustrate, I represented a client who only had the bare minimum of violations listed in the petition. The client, who wanted the preliminary hearing and the detention hearing, assured me that the petition included every noncompliance. The preliminary hearing "refreshed" my client's memory for it was at that time that I found out that the client, inter alia, once tried to dodge a urine test by hiding someone else's urine in his mouth, sans container. Needless to say, this kind of information is something that would have been helpful to know before the hearing. The magistrate judge found it helpful in finding probable cause to believe the violations occurred and also in determining that a bond was not appropriate.
29. Fed. R. Crim. P. 32.1(b)(2).
30. See id.
31. See 18 U.S.C. § 3143; Fed. R. Crim. P. 32.1(a)(6); see United States v. Loya, 23 F.3d 1529, 1530-31 (9th Cir. 1994).
32. Compare § 3142; Fed. R. Crim. P. 5 to § 3143; Fed. R. Crim. P. 32.1.
33. Fed. R. Crim. P. 32.1(a)(6).
34. 18 U.S.C. § 3143; Fed. R. Crim. P. 32.1(a)(6); see generally Charles Alan Wright, Nancy J. King, & Susan R. Klein, Federal Practice and Procedure: Criminal § 767 (3d ed. 2004). Of note, in the area of detention there may be some confusion. Section 3142(d) appears to apply to those facing revocation of conditional release, which may not be limited to those serving, inter alia, terms of probation. That is, the heading of this subsection includes the term "revocation of conditional release"; thus, the word "probation" found in the statute does not appear to act as a limitation on the application of this subsection to only probationers. See § 3142(d). Beyond this, § 3142(d) appears to allow a magistrate judge to order the person detained for up to 10 days and not allow that person to have a preliminary hearing and detention hearing. However, Rule 32.1(a)(6) does not support the application of this statute to those initially appearing for violations of supervised release; that is, Rule 32.1(a)(6) specifically references 18 U.S.C. § 3143 (a)(6) in determining release or detention. See Loya, 23 F.3d at 1530-31; see also § 3143; Fed. R. Crim. P. 32.1(a)(6). Ergo, those appearing on a violator's warrant who are in the full custody of the federal government must be given the opportunity to argue for a bond even if such a person will appear for a revocation hearing within 10 days of the initial appearance.

35. Cf. Fed. R. Crim. P. 32.1(a)(6).
36. See Fed. R. Crim. P. 32.1(b)(2)(A); McNeil, 415 F.3d at 275-76.
37. 530 U.S. 466 (2000). “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490; see Booker, 125 S. Ct. at 756; United States v. Kortgaard, 425 F.3d 602, 605 (9th Cir. 2005); United States v. Colomb, 419 F.3d 292, 300-01 (5th Cir. 2005); White, 416 F.3d at 1317; Never Misses A Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005) (per curiam); Work, 409 F.3d at 487; United States v. Webb, 255 F.3d 890, 894-98 (D.C. Cir. 2001); United States v. Promise, 255 F.3d 150, 156-60 (4th Cir. 2001) (en banc); cf. 21 U.S.C. §§ 841(b)(1)(A) and 960.
38. See United States v. Hernandez, 436 F.3d 851, 854-56 (8th Cir. 2006); United States v. Gonzalez, 420 F.3d 111, 122-25 (2nd Cir. 2005); United States v. Velasco-Heredia, 319 F.3d 1080, 1084 (9th Cir. 2003).
39. See Gonzalez, 420 F.3d at 120-21; United States v. Graham, 317 F.3d 262, 273-75 (D.C. Cir. 2003); United States v. Doggett, 230 F.3d 160, 163-65 (5th Cir. 2000); cf., United States v. Cotton, 535 U.S. 625, 627-34 (2000).
40. See 18 U.S.C. § 3559(a)(1).
§ 3559.
Sentencing classification of offenses
(a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
(2) twenty-five years or more, as a Class B felony;
(3) less than twenty-five years but ten or more years, as a Class C felony;
(4) less than ten years but five or more years, as a Class D felony;
(5) less than five years but more than one year, as a Class E felony;
(6) one year or less but more than six months, as a Class A misdemeanor;
(7) six months or less but more than thirty days, as a Class B misdemeanor;
(8) thirty days or less but more than five days, as a Class C misdemeanor; or
(9) five days or less, or if no imprisonment is authorized, as an infraction.
(b) Effect of classification. — Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense.
See United States v. R.L.C., 503 U.S. 291, 301-02 (1992); United States v. Cunningham, 292 F.3d 115, 118 (2nd Cir. 2002); United States v. Rodgers, 245 F.3d 961, 966–67 (7th Cir. 2001); United States v. Gonzalez, 922 F.2d 1044, 1049-50 (2nd Cir. 1991).
41. See § 3583(e)(3); United States v. Larison, 432 F.3d 921, 922-23 (8th Cir. 2006); United States v. Whiteface, 383 F.3d 733, 736 n.1 (8th Cir. 2004); Graham, 317 F.3d at 273.
42. Cf. Cotton, 535 U.S. at 627-34; Velasco-Heredia, 319 F.3d at 1084-87; Graham, 317 F.3d at 273-75; United States v. McWaine, 290 F.3d 269, 271-77 (5th Cir. 2002); Doggett, 230 F.3d at 163-66.
43. See § 3583(e)(3); United States v. Marrow Bone, 378 F.3d 806, 808 (8th Cir. 2004); Graham, 317 F.3d at 273-75.
44. There are three “grades” of the violations in Chapter Seven: Grade “A”, “B”, and “C” violations. U.S.S.G. § 7B1.1. These “classify the violation of supervised release, whereas section § 3583(e)(3) sets the maximum punishment according to the classification of the defendant’ underlying offense.” United States v. Fleming, 397 F.3d 95, 98 n.4 (2nd Cir. 2005) (emphasis added); see McNeil, 415 F.3d at 277-79; compare 18 U.S.C. § 3583(e)(3) to U.S.S.G. § 7B1.1. The specifics of these grades will be further discussed in this article.
45. Cf. Graham, 317 F.3d at 273-75.
46. See U.S.S.G. Ch. 5, Pt. A, Sentencing Table; U.S.S.G. § 7B1.4.
47. 18 U.S.C. § 3559(a)(1).
48. 18 U.S.C. § 3583(e)(3)(2005); but see 18 U.S.C. § 3583(e)(3)(1993).
49. See U.S.S.G. §§ 7B1.1 and 7B1.4.
50. See U.S.S.G. § 7B1.4(a).
51. See 18 U.S.C. § 3559(a)(3).
52. Compare 18 U.S.C. § 3583(e)(3) to U.S.S.G. § 7B1.4(a).
53. There is a potential “catch” to the statutory maximums (18 U.S.C. §§ 3559 and 3583), saving the defendant time in prison. If the defendant has more than one term of supervised release — i.

e., the defendant was convicted of two or more underlying offenses — the district court can run the terms of supervised release consecutive to one another to cover the suggested sentencing range and more. See United States v. Sweeting, 437 F.3d 1105, 1106-07 (11th Cir. 2006) (per curiam); United States v. Deutsch, 403 F.3d 915, 916-18 (7th Cir.), cert. denied, 126 S. Ct. 165 (2005); United States v. Gonzalez, 250 F.3d 923, 925-29 (5th Cir. 2001) (citing 18 U.S.C. §§ 3583 and 3584; United States v. Rose, 185 F.3d 1108, 1110 (10th Cir. 1999); United States v. Jackson, 176 F.3d 1175, 1177-78 (9th Cir. 1999); United States v. Johnson, 138 F.3d 115, 118-19 (4th Cir. 1998); United States v. Quinones, 136 F.3d 1293, 1294-95 (11th Cir. 1998); United States v. Cotroneo, 89 F.3d 510, 513 (8th Cir. 1996)).
Beyond this, the “red flag” for this type of mistake is usually that the sentence imposed for the underlying offense is less than the mandatory minimum or the term of supervised release imposed exceeds the term of supervised release allowed by the classification of the underlying offense. Yes, the only way defense counsel can know that is to know the minimum sentence that can be imposed, the statutory maximum that can be imposed, and the associated classifications. Knowing these will make the “red flags” apparent. “Red flag” or not, defense counsel should double check every one of the probation officer’s entries for errors.
54. United States v. Moody, 277 F.3d 719, 721 (5th Cir. 2001) (emphasis added) (quoting 18 U.S.C. § 3583(h)); see, e.g., United States v. Williams, 425 F.3d 987, 989 (11th Cir. 2005) (per curiam); United States v. Palmer, 380 F.3d 395, 398-99 (8th Cir. 2004) (en banc).
55. Moody, 277 F.3d at 721; see Hinson, 429 F.3d at 116; Williams, 425 F.3d at 989; White, 416 F.3d at 1316; Cofield, 233 F.3d at 407-08; United States v. Francischine, 512 F.2d 827, 828-30 (5th Cir. 1975); United States v. Hamler, 289 F. Supp. 2d 764, 765-69 (S.D. W. Va. 2003); United States v. Greene, 206 F. Supp. 2d 811, 812-14 (S.D. W. Va. 2002).
56. Cf. Apprendi, 530 U.S. at 490; Colomb, 419 F.3d at 300-01.
57. Although the defendant did “not raise this issue, we [as a reviewing court] have the discretion to sua sponte modify the term. We have raised sua sponte Apprendi issues in other cases when necessary to avoid manifest injustice.” McWaine, 290 F.3d at 277 (citations omitted). Though this quote is not directly on point, it can be used to argue for judicial discretion at revocation.
58. See § 3559(a)(3); cf. § 3583(k); 21 U.S.C. § 841(b)(1)(A).
59. See 18 U.S.C. §§ 3583(b)(2) and 3583(e)(3); Marrow Bone, 378 F.3d at 808.
60. See §§ 3559(a)(1), 3583(b)(1), and (e)(3).
61. See §§ 3559(a)(1); 3583(b)(1) and (e)(3). Beyond erroneously classifying the offense is the additional mistake of imposing a longer term of supervised release than the statute of conviction and 18 U.S.C. §§ 3559(a) and 3583(b) allow. See United States v. Madori, 419 F.3d 159, 171 (2nd Cir. 2005), cert. denied, 126 S. Ct. 1080 (2006).
62. Cf. Moody, 271 F.3d at 721.
63. See §§ 3559 and 3583(e)(3), (j), and (k); 21 U.S.C. §§ 841(b) and 960.
64. See 18 U.S.C. §§ 3559 and 3583(e)(3), (j), and (k); 21 U.S.C. §§ 841(b) and 960.
65. See Appendix (Chart).
66. One other unusual reason to get the PSR is to determine whether the defendant is currently serving two terms of supervised release for two separate underlying offenses. If this occurs, defense counsel should consider combining any possible revocation hearings. cf., Sweeting, 437 F.3d at 1106-07; United States v. Alvarado, 201 F.3d 379, 380-83 (5th Cir. 2000).
67. Cf. U.S.S.G. Ch. 4, et. seq.; U.S.S.G. Ch. 5, Pt. A, Sentencing Table; U.S.S.G. § 7B1.4.
68. See U.S.S.G. § 7B1.4(a); see also White, 416 F.3d at 1315 n.1; United States v. Contreras-Martinez, 409 F.3d 1236, 1241 (10th Cir. 2005).
69. See U.S.S.G. § 7B1.4(a). The commentary specifically notes that “[t]he criminal history is not to be recalculated . . . .” U.S.S.G. § 7B1.4(a), comment. (n.1); see also White, 416 F.3d at 1315 n.1; United States v. Wright, 2 F.3d 175, 178-79 (6th Cir. 1993); cf. Work, 409 F.3d at 491 n.1.
70. Cf. U.S.S.G. Ch. 4, et. seq.; U.S.S.G. Ch. 5, Pt. A, Sentencing Table.
71. United States v. Reyes-Maya, 305 F.3d 362, 364-68 (5th Cir. 2002); cf. United States v. Hagenow, 423 F.3d 638, 645-47 (7th Cir. 2005).
72. Cf. U.S.S.G. Ch. 4, et. seq.; U.S.S.G. Ch. 5, Pt. A, Sentencing Table.
73. Cf. Williams, 425 F.3d at 989; White, 416 F.3d at 1315 n.1; Work, 409 F.3d at 491 n.1.
74. U.S.S.G. § 7B1.4(a); see White, 416 F.3d at 1315 n.1; Wright, 2 F.3d at 178-79; cf. Williams, 425 F.3d at 989; Work, 409 F.3d at 491.
75. As ‘[n]o court of justice would require a man to serve . . . undeserved years in prison when it

knows that the sentence is improper,' . . . no court of justice would knowingly require a man to endure significant restrictions on his liberty as provided under supervised release for nearly a year longer than deserved. United States v. Maxwell, 285 F.3d 336, 343 (4th Cir. 2002) (quoting United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996)); see United States v. Bewley, 27 F.3d 343, 344 (8th Cir. 1994).
76. See 18 U.S.C. §§ 19, 3559, 3571(b), and 3583(b); see also Lewis v. United States, 518 U.S. 322, 325-330 (1996); Chavez, 204 F.3d at 1310-16; United States v. Brown, 71 F.3d 845, 846-47 (11th Cir. 1996); Matter of Betts, 927 F.2d 983, 983-88 (7th Cir. 1991); United States v. Kozel, 908 F.2d 205, 206-08 (7th Cir. 1991); Appendix (Chart); cf. Cenna, 2006 WL 1277944, at *1-2.
77. See §§ 3583(a) and (b)(3); 3561(b); Chavez, 204 F.3d at 1312-13.
78. Cf. United States v. Sias, 227 F.3d 244, 246 (5th Cir. 2000); Chavez, 204 F.3d at 1312-16.
79. See White, 416 F.3d at 1316; Cofield, 233 F.3d at 407.
80. McNeil, 415 F.3d at 277 (quoting and citing United States v. Selioutsky, 409 F.3d 114, 118-19 (2nd Cir. 2005); United States v. Kingdom, 157 F.3d 133, 136 (2nd Cir. 1998)).
81. See § 3565; cf. Chavez, 204 F.3d at 1312-16.
82. See §§ 19, 3559, 3565, 3571(b), and 3583(b); cf. Chavez, 204 F.3d at 1312-16.
83. These may be known by other names in other areas. The bottom line is that, usually, one report is given at the initial appearance and a more detailed report is given before the revocation hearing.
84. Keep in mind, however, that probation is not required to complete a new PSR. See Pelensky, 129 F.3d at 68-69.
85. See McNeil, 415 F.3d at 276.
86. See id.; see also Work, 409 F.3d at 491-92.
87. United States v. Chatelain, 360 F.3d 114, 121 (2nd Cir. 2004) (quotations added).
88. See Ortuño-Higareda, 421 F.3d at 921-25; United States v. Stanfield, 360 F.3d 1346, 1352-54 (D.C. Cir. 2004); United States v. Gallo, 20 F.3d 7, 11-13 (1st Cir. 1994); see also Black v. Romano, 471 U.S. 606, 611-14 (1985); but see United States v. Arbizu, 431 F.3d 469, 470-71 (5th Cir. 2005) (per curiam).
89. See Ortuño-Higareda, 421 F.3d at 921-25.
90. See § 3583(d); cf. United States v. Ferguson, 369 F.3d 847, 850-51 (5th Cir. 2004) (per curiam); U.S.S.G. § 5D1.3.
91. United States v. Amer, 110 F.3d 873, 883 (2nd Cir. 1997) (quoting United States v. Abrar, 58 F.3d 43, 46-47 (2nd Cir. 1995)); see United States v. Myers, 426 F.3d 117, 123-25 (2nd Cir. 2005). "Courts generally cannot impose . . . conditions [on a defendant's term of supervised release] — even . . . [a condition] with a clearly rehabilitative purpose — without evidence that the condition imposed is 'reasonably related,' that is, related in a 'tangible way,' . . . to the crime or to something in the defendant's history." United States v. Pruden, 398 F.3d 241, 248-49 (3rd Cir. 2005) (citing and quoting United States v. Evans, 155 F.3d 245, 249 (3rd Cir. 1998)); see United States v. Carlson, 406 F.3d 529, 531 (8th Cir. 2005).
92. Ferguson, 369 F.3d at 852 (quoting and citing 18 U.S.C. §§ 3553(a) and 3583(d); United States v. Paul, 274 F.3d 155, 164-65 (5th Cir. 2001)); see United States v. Roy, 438 F.3d 140, 144-45 (1st Cir. 2006); United States v. Love, 431 F.3d 477, 478-84 (5th Cir. 2005); United States v. Mitchell, 429 F.3d 952, 960-63 (10th Cir. 2005); United States v. Angle, 234 F.3d 326, 346 (7th Cir. 2000); U.S.S.G. § 5D1.3.
93. See Myers, 426 F.3d at 123-30; Ferguson, 369 F.3d at 852-54; United States v. Lakatos, 241 F.3d 690, 691-95 (9th Cir. 2001). Additionally, there are occasions when a district court may have improperly delegated its authority to a probation officer. See United States v. Aitoro, No. 04-1742, 2006 WL 1303940, at *8 (1st Cir. May 12, 2006); United States v. Nash, 438 F.3d 1302, 1304-07 (11th Cir. 2006) (per curiam); United States v. Stephens, 424 F.3d 876, 879-84 (9th Cir. 2005); United States v. Heath, 419 F.3d 1312, 1314-16 (11th Cir. 2005) (per curiam); United States v. Padilla, 415 F.3d 211, 214-24 (1st Cir. 2005) (en banc); Pruden, 398 F.3d at 250-51; United States v. Kent, 209 F.3d 1073, 1078-79 (8th Cir. 2000); United States v. Bonanno, 146 F.3d 502, 510-11 (7th Cir. 1998).
94. See United States v. Smith, 436 F.3d 307, 308-12 (1st Cir. 2006); United States v. McKissic, 428 F.3d 719, 721-26 (7th Cir. 2005); United States v. Prochner, 417 F.3d 54, 62 (1st Cir. 2005); United States v. Gementera, 379 F.3d 596, 598-610 (9th Cir. 2004), cert. denied, 126 S. Ct. 735 (2005); Carlson, 406 F.3d at 531; United States v. York, 357 F.3d 14, 19-25 (1st Cir. 2004); United States v. Cothran, 302 F.3d 279, 290 (5th Cir. 2002). In Ferguson, the defendant pleaded

guilty to illegally possessing a machine gun and the reviewing court found abuse of discretion in the district court's imposing condition requiring the defendant to abstain from the use of tobacco products, aspirin, and all over-the-counter medications; however, it did not find abuse of discretion in the imposed conditions prohibiting the "use of cough syrups with codeine, NyQuil, or sleeping potions with drugs and alcohol without prescription . . . ." Ferguson, 369 F.3d at 853-54. In Gementera, the defendant was convicted of stealing mail, and the reviewing court did not find it to be an abuse of discretion to order the defendant to wear a sandwich board in front of a postal facility, for eights hours, that stated, "I stole mail. This is my punishment." Gementera, 279 F.3d at 598-610. In Williams, the sentencing court imposed, as a condition of supervised release, mandatory psychotropic and other medication without making an "explicit medically-based finding under § 3583(d)(2) . . . ." United States v. Williams, 356 F.3d 1045, 1053 (9th Cir. 2004). Williams remanded and held that Washington v. Harper, 494 U.S. 210 (1990), "compels the conclusion that an order requiring Williams to take antipsychotic drugs is an unusually serious infringement of liberty that calls for more thorough consideration and justification than the conditions of supervised release this court has previously approved." Williams, 356 F.3d at 1055 (citations omitted).
95. See United States v. Rodriguez-Rodriguez, 441 F.3d 767, 769-73 (9th Cir. 2006); Roy, 438 F.3d at 143-44; United States v. Antelope, 395 F.3d 1128, 1133-42 (9th Cir. 2005); cf. York, 357 F.3d at 18, 24-25; United States v. Lee, 315 F.3d 206, 210-15 (3rd Cir.), cert. denied, 540 U.S. 858 (2003); Paul, 274 F.3d at 164-72; United States v. Peterson, 248 F.3d 79, 82-86 (2nd Cir. 2001) (per curiam); United States v. White, 244 F.3d 1199, 1201, 1205-08 (10th Cir. 2001); United States v. Loy, 237 F.3d 251, 256-70 (3rd Cir. 2001); Christopher Wiest, Comment, The Netsurfing Split: Restrictions Imposed on Internet and Computer Usage by Those Convicted of a Crime Involving a Computer, 72 U. Cin. L. Rev. 847 (Winter 2003).
96. Cf. White, 416 F.3d at 1316; Moody, 277 F.3d at 721; Cofield, 233 F.3d at 407.
97. See 18 U.S.C. § 3559; McNeil, 415 F.3d at 277-78; United States v. Tapia-Escalera, 356 F.3d 181, 185 (1st Cir. 2004); U.S.S.G. § 7B1.1.
98. § 7B1.1. Classification of Violations (Policy Statement) (a) There are three grades of probation and supervised release violations:

(1) Grade A Violations — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;
(2) Grade B Violations — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;
(3) Grade C Violations — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. (b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

U.S.S.G. § 7B1.1; see McNeil, 415 F.3d at 277-78; United States v. Brennick, 337 F.3d 107, 109 (1st Cir. 2003) (per curiam); United States v. McClanahan, 136 F.3d 1146, 1150-51 (7th Cir. 1998); United States v. Grimes, 54 F.3d 489, 491 (8th Cir. 1995). When a defendant commits a new crime while on supervised release and a state statute increases the maximum statutory sentence above the unenhanced level, district courts can consider the enhanced statutory maximum sentence in determining how long the defendant can be punished for that new offense. See United States v. Boisgolie, 74 F.3d 1115, 1116-17 (11th Cir. 1996) (per curiam).
99. McNeil, 415 F.3d at 278; see U.S.S.G. § 7B1.1, comment. (n.1).
100. Brennick, 337 F.3d at 109 (quoting U.S.S.G. § 7B1.1(b)); United States v. Kingdom (U.S. A.), Inc., 157 F.3d 133, 136 (2nd Cir. 1998). For example, being dishonest or lying to the probation officer may be a "Grade C" violation, but it also qualifies as a "Grade B" violation because it may qualify as a false statement to a government official. See Grimes, 54 F.3d at 489-93; see also 18 U.S.C. § 1001; Roy, 438 F.3d at 142-43. Nevertheless, a district court cannot combine multiple Grade C violations to create a Grade B violation. See United States v. Liddo, 52 F.3d 106, 108 (6th Cir. 1995).
101. See id. Interestingly, "[t]esting positive for drug use is not an independent crime; it is only a

violation of the terms of . . . supervised release. . . . [T]hese kinds of violations are classified as Grade C under § 7B1.1(a)(3)." United States v. Wright, 92 F.3d 502, 506 (7th Cir. 1996).
102. See Coleman, 404 F.3d at 1104-05; English, 400 F.3d at 274; United States v. Bernadine, 237 F.3d 1279, 1280 (11th Cir. 2001); McClanahan, 136 F.3d at 1150; United States v. Lowenstein, 108 F.3d 80, 81-86 (6th Cir. 1997); United States v. Cotroneo, 89 F.3d 510, 511 (8th Cir. 1996); United States v. West, 59 F.3d 32, 33 (6th Cir. 1995).
103. See Naranjo, 259 F.3d at 381-83.
104. See United States v. Spraglin, 418 F.3d 479, 480-81 (5th Cir. 2005) (per curiam); McNeil, 415 F.3d at 277-78; United States v. Hofierka, 83 F.3d 357, 363-64 (11th Cir. 1996) (per curiam); United States v. Stephenson, 928 F.2d 728, 731 (6th Cir. 1991); U.S.S.G. § 7B1.1.
105. See United States v. Hebert, 201 F.3d 1103, 1104 (9th Cir. 2000) (per curiam); cf. Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 364-68 (1998); United States v. Montez, 952 F.2d 854, 856-57 (5th Cir. 1992); United States v. Farmer, 512 F.2d 160, 162-63 (6th Cir. 1975); United States v. Brown, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam); United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971).
106. See United States v. Poellnitz, 372 F.3d 562, 565-70 (3rd Cir. 2004); but see United States v. Verduzco, 330 F.3d 1182, 1184-86 (9th Cir. 2003).
107. See, e.g., McNeil, 415 F.3d at 277-78; Brennick, 337 F.3d at 109; McClanahan, 136 F.3d at 1150-51; Grimes, 54 F.3d at 491; U.S.S.G. § 7B1.1.
108. U.S.S.G. § 7B1.2, comment. (n.1) and (n.2); see U.S.S.G. §§ 4B1.2(a) and 4B1.2(b); see also McNeil, 415 F.3d at 277-78; Wright, 92 F.3d at 504-06; United States v. Bonner, 85 F.3d 522, 526-27 (11th Cir. 1996).
109. McClanahan, 136 F.3d at 1150 (quoting and citing U.S.S.G. Ch. 7, Pt. A, intro. comment.); see Contreras-Martinez, 409 F.3d at 1241; Brennick, 337 F.3d at 109; United States v. Payan, 992 F.2d 1387, 1396 (5th Cir. 1993

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