Volume 69 Number 2

Federal PROBATION
a journal of correctional philosophy and practice

Looking At The Law

Endnotes

Joe Gergits
Assistant General Counsel, Administrative Office of the U.S. Courts

Update to *Legal Developments in the Imposition, Tolling, and Revocation of Supervision*

Catherine M. Goodwin's December 1997 article, "Legal Developments in the Imposition, Tolling, and Revocation of Supervision" [1] ("Legal Developments"), remains a useful and exhaustive reference for probation and supervised release issues up to 1997. Nonetheless, there have been significant legislative and case law developments in the intervening years that justify the following supplement to discrete topics discussed in the original article.

back to top

I. Imposing Supervision

There have been no marked changes to imposition of a term of probation for a conviction since 1997, but there have been significant legislative changes to 18 U.S.C.

§ 3583 concerning supervised release. The most substantial changes came about due to the 21 st Century Department of Justice Appropriations Authorization Act ("21 st Century Act") [2] and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"). 3 Most provisions of the two Acts did not include effective dates. Thus, they took effect on their dates of enactment, unless applying specific provisions would violate the Ex Post Facto Clause of Art. 1, § 9, cl. [3] of the United States Constitution.

A. Clarification of the Length of Supervised Release Terms in Controlled Substance Cases

Section 3005 of the 21 st Century Act amended subsections of 21 U.S.C. §§ 841(b)(1) and 960(b), which provide for the mandatory imposition of terms of supervised release in drug cases, by clarifying that the maximum terms of supervised release set out in 18 U.S.C. § 3583(b) do not limit the length of supervised release called for in §§ 841(b)(1) and 960(b). [4] This clarifying amendment removed the limitation on courts' authority to impose terms of supervised release greater than the minimum terms provided in §§ 841(b)(1) and 960(b) that had been prescribed by Fourth and Fifth Circuit precedent. [5] The minimum terms of supervised release in §§ 841(b)(1) and 960(b) are expressed by the phrase "at least" a number of years depending on the subsection, with maximum terms of life. Because this amendment expressly stated that it simply clarified the existing statutes, it should have no effect outside the Fourth and Fifth Circuits, where it overrules case law that had confined supervised release terms for §§ 841(b)(1) and

960(b) convictions to the limits expressed in § 3583(b).

B. Supervised Release in Juvenile Cases

Section 12301 of the 21 st Century Act extensively revised 18 U.S.C. § 5037, thereby revamping juvenile delinquency sentencing. Most significantly, it authorized district courts to impose a term of post-release supervision on juveniles sentenced to imprisonment. [6] Prior to this amendment, 18 U.S.C. § 5037 only permitted the court to impose as a juvenile delinquent sentence either a term of official detention without post-detention supervision or probation. The amendment also preserved the court's authority to order restitution in juvenile delinquency cases and clarified that an order of restitution could be imposed with one of the three dispositional options of suspension, probation, and official detention. The disjunctive language in the prior version of the statute could have been read to imply that restitution could not be combined with probation or official detention.

The 21 st Century Act also incorporated the Supreme Court's holding in *United States v. R.L.C* [7] in revised § 5037(c)(2)(A) and (B), by limiting a juvenile sentence to a term of imprisonment no longer than the sentence that the court could impose on a similarly situated adult under the sentencing guidelines.

Subsection (c)(2)(A), which deals with incarceration for more serious offenses, previously limited incarceration to five years, with no reference to the adult maximum. To be consistent with other provisions of section 5037, periods of incarceration for juveniles falling under this subsection now may not exceed those that would apply to a similarly situated adult under the sentencing guidelines. The period of incarceration may be increased if the guidelines would allow an upward departure for a similarly situated adult. Subsection 7 of the 21 st Century Act created new § 5037(d), which sets forth the details of the new juvenile delinquent supervision term. Subsection 5037(d) confines the length of delinquent supervision terms within the previous maximum terms and ages for juvenile probation and detention. Terms of probation for juveniles may not now extend past the juvenile's twenty-first birthday if the juvenile is under eighteen at the time of sentencing and for more than four years if the juvenile is between the ages of eighteen and twenty-one at the time of sentencing. [8] Under no circumstances, therefore, may a juvenile's probation extend beyond the juvenile's twenty-fourth birthday. Terms of official detention may not extend past the juvenile's twenty-first birthday if the juvenile is under eighteen at the time of sentence, or past the juvenile's twenty-fourth birthday if the juvenile is between the ages of eighteen and twenty-one at the time of sentencing. If an older juvenile is found to have committed an act of juvenile delinquency that would have been a Class A, B, or C felony had the juvenile been convicted as an adult, however, the term of official detention may not exceed five years. [9] Accordingly, under no circumstances may detention extend until the juvenile's twenty-sixth birthday. The amendment limits any sentence that includes a term of juvenile delinquency supervision to the currently existing maximums.

New subsection 5037(d)(3) provides that the provisions of 18 U.S.C. § 3563, which set out mandatory and discretionary conditions of probation, and section 3564, which provides rules for the commencement and running of a term of probation, apply to juvenile delinquent supervision. New section 5037(d)(4) authorizes the court to modify, reduce, or enlarge the conditions of juvenile delinquency supervision.

back to top

II. Tolling Supervision

The statutory bases for tolling (18 U.S.C. § 3564(b) for probation and 18 U.S.C. § 3624(e) for supervised release) are unchanged. Nonetheless, there have been several case law developments that merit mention.

A. Incarceration

The Sentencing Reform Act [10] codified the common law rule that supervision is tolled if an

offender makes himself unavailable for supervision by his wrongful act. The relevant text from the statutory tolling provisions provides that supervision does not run "during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." [11] While the precise meaning of "imprison[ment] in connection with a conviction" remains vague, several cases have addressed disputed categories of confinement that arguably constitute imprisonment.

Because section 3624(e) provides that supervised release begins when an offender is "released from imprisonment," but does not run when the offender is thereafter "imprisoned in connection with a conviction," most circuit courts refused to credit offenders for excess time served in prison notwithstanding the reason. [12] The Ninth Circuit, however, held in *United States v. Blake* [13] that supervised release commences on the date defendants "should have been released, rather than on the dates of their actual release." Under the Ninth Circuit's rationale, tolling would not occur during any excess imprisonment on a revocation sentence. This circuit conflict, which also bore on the propriety of tolling for excess prison time, was essentially resolved by the Supreme Court in *United States v. Johnson*. [14] The defendant in *Johnson* had been convicted of multiple crimes and sentenced to 171 months' imprisonment and three years' supervised release. Two of Johnson's convictions were vacated when he prevailed on a motion filed pursuant to 28 U.S.C. § 2255, which reduced his sentence to fifty-one months. Johnson was immediately released because he had already been imprisoned longer than required by his remaining convictions. Johnson then sought a reduction in his supervised release term for the extra time that he had served in prison. He contended that his term of supervised release should be deemed to have started at the conclusion of his lawful prison term, and not when he was actually released. The Supreme Court rejected this argument, and held that supervised release begins on the date of actual release, and not on the date that a defendant should have been released. Relying upon the plain language of § 3624(e), the Court noted that the statute states that supervised release does not begin until an offender is "released from imprisonment," and not when the offender should have been released. While *Johnson* directly addressed only the commencement, but not the tolling, of a term of supervised release, the holding logically would require tolling to continue until release from imprisonment. [15]

The Supreme Court's analysis in *Johnson* of § 3624(e)'s commencement provision should inform a court's analysis of the statute's tolling provision. The Fifth Circuit affirmed the district court's reliance on this analysis for tolling calculations in *United States v. Jackson*. In *Jackson* , an offender placed on parole for a state robbery conviction was arrested on federal drug charges one month before his parole term was due to expire. Jackson pled guilty to the federal drug charges, served his sentence, and began his three-year term of supervised release. While on supervised release, state authorities revoked Jackson's parole based on his federal drug conviction. Jackson filed a habeas corpus petition in state court challenging the validity of his parole revocation. The state court found a procedural due process violation that warranted a sentence reduction, but did not otherwise alter the state revocation sentence. Jackson was released from state custody after approximately eight months of unconstitutional detention. After Jackson was released, he violated numerous conditions of his federal supervised release, prompting the government to petition for revocation. Jackson responded by challenging the district court's jurisdiction. He contended that his term of supervised release had been improperly tolled under § 3624(e) during his state incarceration as a result of the unconstitutional parole revocation. Jackson argued that, absent the lengthy tolling period attributable to his unconstitutional state revocation sentence, his federal term of supervised release would have expired well before the alleged violations had taken place.

The district court held that Jackson's eight-month imprisonment on his state parole revocation tolled his federal supervised release pursuant to § 3624(e), notwithstanding that the state court had ruled in the habeas proceeding that his parole revocation sentence should be reduced because of a procedural due process violation. [16] The court stated that the plain language of § 3624(e), which requires tolling whenever an offender is imprisoned (and not simply when he is *lawfully* imprisoned) for thirty consecutive days or more, mandates tolling so long as the offender's conviction remains valid. [17] The court observed that reducing supervised release

because of an error resulting in excess prison time would frustrate the purposes of supervised release: rehabilitation and assistance in the transition to community life. [18]

B. Administrative Detention and Civil Commitment

"Legal Developments" advised, and at least one court has held, that INS administrative detention does not toll supervised release because § 3624(e) does not expressly provide for tolling other than for "imprisonment." [19] This logic would preclude tolling for any form of civil commitment even if it is "in connection with a conviction." A number of states have enacted statutes, and the U.S. House of Representatives has passed a bill, [20] that subject sexual offenders to involuntary commitment under some form of "Sexually Violent Predator Act" ("SVPA"). [21] Such statutes typically establish procedures for the civil commitment of persons who, due to a "mental abnormality," are likely to engage in "predatory acts of sexual violence." [22] In the event the offender is committed under an SVPA (typically following the conclusion of a state prison sentence for committing a sexual offense), a federal court with supervision jurisdiction would have to determine whether § 3624(e) would continue to toll the offender's term of supervised release. While no published case yet addresses the issue, courts would likely determine that commitment under an SVPA does not toll supervision because such confinement is not "*imprisonment* in connection with a conviction."

C. Pretrial Detention

"Legal Developments" advised that time spent in pretrial detention was clearly imprisonment "in connection with a conviction" that should result in tolling under § 3624(e). [23] While one could persuasively argue that time spent in pretrial detention should toll a term of supervised release pursuant to § 3624(e), the only court of appeals to consider the issue disagreed. In an opinion issued after "Legal Developments" advised that pretrial detention could toll a term of supervised release, the Ninth Circuit held in *United States v. Morales-Alejo* [24] that a person in pretrial detention is not "imprisoned" in connection with a conviction so as to toll a term of supervised release. As a result, the Ninth Circuit held that the district court lacked jurisdiction to revoke a one-year term of supervised release that, absent tolling, had expired prior to the issuance of a warrant or summons. *Morales-Alejo* is binding precedent in the Ninth Circuit and for all cases supervised elsewhere in which a Ninth Circuit district court has retained jurisdiction. [25] Because *Morales-Alejo* is the only case to directly address the propriety of using pretrial detention to toll supervised release pursuant to § 3624(e), it merits consideration as persuasive authority in evaluating whether to toll under sections 3564(b) for probation and 3624(e) for supervised release.

D. Deportation

If an alien offender is deported and therefore is not subject to supervision, no statute authorizes termination or tolling of his term of supervised release. [26] In 1994, the AO recommended that courts not impose any condition designed to toll supervision while an offender is absent due to deportation, instead suggesting that courts allow the term to run as inactive supervision. [27] In 1997, the Sixth Circuit held that a condition tolling an alien defendant's period of supervised release after his deportation was appropriate, notwithstanding the absence of statutory authorization for such a condition. [28] The Second, Eighth, and Eleventh Circuits subsequently held to the contrary. [29]

back to top

III. Termination and Revocation

The statutory options to terminate supervision after one year for probation under § 3564(c) and supervised release under § 3583(e)(1) remain unchanged since "Legal Developments" was published in 1997, but the 21 st Century Act clarified the application of specific supervision provisions for drug offenses set forth in the statute of conviction as opposed to the supervision statute. The 21st Century Act also created juvenile delinquent supervised release and a corresponding revocation provision. The Sixth Circuit's decision in *United States v. Spinelle* [30]

remains the only case on point. *Spinelle* holds that a district court sentencing a defendant to the mandatory minimum three-year term of supervised release for a drug conviction under 21 U.S.C. § 841(b)(1)(C) retains its separate discretionary authority in 18 U.S.C. § 3583(e)(1) to terminate supervised release after completion of one year. The court reasoned that the imposition of the supervision sentence and consideration of post-sentencing modification were two chronologically separate phases governed by different statutes. [31]

Legislative changes to 21 U.S.C. §§ 841 and 960 in 2002 strengthened the *Spinelle* court's holding that congressional mandates regarding imposition of sentences do not mandate full service of such sentences when different statutes allow early termination of the mandatory term. Section 3005 of the 21 st Century Act amended those subsections of §§ 841 and 960 that provide for the mandatory imposition of terms of supervised release by clarifying that the maximum terms of supervised release set out in 18 U.S.C. § 3583(b) do not limit the length of supervised release that may be imposed in drug cases. In addition, the amendment stated that, notwithstanding any other statutory provision, courts were precluded from placing a person sentenced for the specified drug offense on probation or suspending their sentence, and "no person [so] sentenced shall be eligible for parole during the term of imprisonment." As one district court observed, Congress specifically limited post-incarceration discretion to provide relief from sentences imposed under § 841, but consciously "left untouched the possibility of early termination of supervised release allowed by § 3583(e)." [32]

A. Delayed Revocation

The ability to conduct a delayed revocation simply means that a court's jurisdiction to revoke probation and supervised release survives the expiration of a supervision term. Judicial authority to conduct delayed revocations has varied over the years, and was created first by case law and then by statute. Under 18 U.S.C. § 3653 (repealed), a court could issue a warrant for a violation that occurred within the probation term at any time within the 5-year statutory maximum probation period (and thereby preserve jurisdiction to revoke after the term had ended) even if the term actually imposed was less than the maximum. When Congress amended 18 U.S.C. § 3583(e) to allow for revocation of supervised release, it initially failed to allow for delayed revocation. While some inferred that this oversight meant that courts might not have jurisdiction to conduct revocation hearings any time after the term ended, [33] several courts held that the inherent authority to conduct delayed revocation hearings was necessary to enforce supervision conditions for the full term of supervision. [34]

The Sentencing Reform Act of 1984 and the 1994 Crime Bill created essentially identical statutory delayed revocation provisions for probation and supervised release. Sections 3565(c) and 3583(i) of Title 18 preserve a court's power to revoke a probation or supervised release and to impose another sentence after the term expires if the delay is "reasonably necessary" to adjudicate matters that arose before expiration, so long as a warrant or summons "has been issued" on the basis of the alleged violation. [35] Because the delayed revocation provision for probation is more lenient than the case law that preceded it, and the supervised release provision essentially reflected pre-existing case law, courts have applied sections 3565(c) and 3583(i) to cases in which the offenses occurred prior to enactment. [36]

Preserving a court's jurisdiction under §§ 3565(c) and 3583(i) requires issuance of a *valid* warrant or summons, however. In a case of first impression, the Ninth Circuit held in *United States v. Vargas-Amaya* [37] that jurisdiction to revoke supervised release can be extended beyond the term of supervision under 18 U.S.C.A. § 3583(i) based upon a warrant issued during the term only if the warrant was issued upon probable cause, supported by oath or affirmation, as required by the Fourth Amendment Warrant Clause. Of course, this holding would apply equally to warrants issued for the arrest of probationers. To address the Ninth Circuit's holding, and to preclude any future warrant challenges in other circuits, the AO revised Probation Form 12C to include a 28 U.S.C. § 1346 certification. The Parole Commission did not alter procedures for preparing warrant requests in response to *Vargas-Amaya*, because the parole statutes and cases interpreting parole warrant requirements regard a parolee as "already under arrest" and subject to the control and care of the Parole Board. The parole statute itself specifically stated that a

parolee is "in the legal custody and under the control of the Attorney General." [38] In addition, the warrant provision of parole statutes was enacted for the purpose of "retaking of the parolee." Courts therefore interpreted a commissioner's warrant for retaking as different from a judicial warrant for arrest. Thus, a warrant for retaking did not have to be supported by an oath.

If the basis for issuing the invalid warrant was that the offender had become a fugitive, however, the absconder doctrine would allow a new warrant to issue upon *sworn* allegations. On August 29, 2005, the Ninth Circuit, in *United States v. Murguia-Oliveros*, [39] reaffirmed the common law absconder doctrine, holding that offenders who abscond from supervision thereby toll their terms of supervised release. The *Murguia-Oliveros* panel stated that because the offender was an absconder, the district court had jurisdiction to revoke the offender's term of supervised release, "and on the basis of an unsworn warrant [sic]. See 18 U.S.C. § 3582(e); *Vargas-Amaya*, 389 F.3d at 907." The quoted phrase appears contrary to the *Vargas-Amaya* court's declaration that all such warrants are invalid, unconstitutional, and cannot preserve a district court's jurisdiction.

As a practical matter, *Murguia-Oliveros* simply reaffirms the common law absconder doctrine, which provides that if an offender absconds before his predicted expiration date, he tolls his period of supervision. Historically, the Office of Probation and Pretrial Services and the Office of General Counsel have recommended that when an offender absconds, an officer should petition for an arrest warrant to document that the defendant had absconded during the term of supervision. The warrant was not deemed necessary to preserve the court's jurisdiction under 18 U.S.C. §§ 3565(c) (delayed revocation for probation) or 3582(i) (delayed revocation for supervised release), because the avoidance of supervision itself tolled the term and extended the court's jurisdiction. *Murguia-Oliveros* can be read consistently with *Vargas-Amaya* if one regards the original warrant issued on an unsworn petition as no more than evidence that the offender had absconded before supervision was due to expire. If an offender absconds, he thereby tolls the term, and the court continues to have jurisdiction to issue a new warrant even though the predicted supervision expiration date has passed.

While the delayed revocation provisions and the absconder doctrine resolve some of the exigencies of addressing violations that occur towards the end of a supervision period, a serious logistical challenge is unavoidable if an officer learns of violations immediately before supervision terminates. Although issuance of a summons or warrant will preserve the court's jurisdiction, there often is not enough time to arrange for the clerk's office to *issue* the summons or warrant even when the officer petitions for the warrant with dispatch and the court orders issuance of a warrant. "Legal Developments" had suggested that a court in such a situation might find that an officer who "initiates" the process with a timely petition thereby "issues" the functional equivalent of a warrant or summons. [40] The cases cited in support of this proposition, however, simply dealt with the "reasonable necessity" of delay for conducting the revocation hearing after expiration of the term. They involved a predecessor statute to § 3565 or an earlier version of § 3583 that did not include a delayed revocation provision and a requirement that a summons or a warrant issue before expiration. [41] Cases interpreting the plain language of §§ 3565(c) and 3583(i) requiring that a summons or warrant "has been issued" to preserve jurisdiction are unanimous in holding that this means a summons or warrant must actually issue, and that completion of any preliminary step is not the functional equivalent of issuance. [42]

One solution for insuring the immediate issuance of warrants in response to the officer's petition and court's order is for the court to direct that the probation officer, rather then the clerk, issue the warrant. In *United States v. Bernardine*, [43] the Eleventh Circuit endorsed this procedure, after noting that 18 U.S.C. § 3603(10), the "catch-all" provision requiring officers to "perform any other duty that the court may designate," is sufficient authority for a district court to order the probation officer to perform the ministerial act of issuing a summons or warrant. [44] The court noted that this could not be construed as an improper delegation of a judicial function, "because by ordering the issuance of a summons, the court directed the probation officer to perform a ministerial act or support service" and the court itself ultimately determined whether the revocation proceedings should go forward and a warrant be issued. [45]

B. Revocation of Juvenile Supervision

1. Revocation of Juvenile Delinquent Probation

The 21st Century Act deleted the previous cross-reference in § 5037(b) to the adult probation revocation authority at 18 U.S.C. § 3565 in favor of a probation revocation procedure specific to juvenile probation. By eliminating the reference to the adult revocation provision, the revised § 5037(b) avoided the mandatory revocation provisions of adult supervision. To treat adult offenders consistently, however, the amendment preserved the mandatory revocation provisions for those persons who have been adjudicated juvenile delinquents, but who are over 21 years of age at the time of the revocation proceeding.

The new probation revocation provision allows a court to impose any disposition appropriate under § 5037 upon revoking a term of probation. Since the current statute provides different probation ranges for different ages, but fails to state at what point the age determinations are to be made, specifying that the age referred to is the age of the juvenile at the time of reimposition of disposition averts the potential for illogical results. [46]

2. Revocation of Juvenile Delinquent Supervised Release

The 21st Century Act created a new § 5037(d)(5), providing for the revocation of juvenile delinquent supervision. The new revocation authority is similar to the new probation revocation provision. As with the probation revocation amendments, this section avoids the mandatory revocation provisions of adult supervision for persons under 21, but preserves them for persons over 21 at the time of the violation proceeding.

New subsection 5037(d)(6) permits the court to order a term of juvenile delinquent supervision to follow a term of detention that was imposed as a result of a violation of supervision. To avoid an inordinate term of juvenile supervision and detention, any combination of supervision and detention, including sanctions following revocation, may not extend beyond the periods available in § 5037. For example, a juvenile delinquent who committed an act that would have been a Class C felony if committed as an adult would not continue under juvenile detention or supervision beyond the juvenile's twenty-sixth birthday, no matter how many times his supervision has been revoked.

This section has no effective date, and the Office of General Counsel originally opined that the provisions could apply to juveniles who committed the act of delinquency prior to November 2, 2002, but were sentenced after that date, or who were facing probation revocation. This initial interpretation observed that applying this provision retroactively would not offend the *ex post facto* clause because the total amount of time a juvenile may be sentenced to any combination of incarceration and supervision was limited to the same amount of time juveniles could previously have been subject to incarceration. In other words, a juvenile who committed a delinquent act before November 2, 2002, would be no worse off than if she received an original or revocation sentence based on the revised version of § 5037. While this analysis may have accorded with Congress' *unspoken* intent that the revisions would govern sentencing proceedings that took place after the law's enactment (particularly because juveniles sentenced under the new provisions would likely be better off), it overlooked the independent threshold requirement that Congress clearly express that it intended retroactive application. [47]

In *United States v. J.W.T.*, [48] the Eighth Circuit considered this threshold requirement when it reviewed a district judge's determination that the new supervised release provision applies when revoking a juvenile's probation even if the underlying act of delinquency occurred before November 2, 2002. The district court undoubtedly applied the new supervised release provision because the maximum length of a juvenile revocation sentence was the same under the original and amended versions of § 5037, except that under the amended statute part of the sentence could be supervised release in lieu of detention. Presumably, a court imposing detention as a component of a revocation sentence that included a period of supervised release would impose a shorter period of detention because this *combination* was subject to the same limits as detention under the old statute.

The Eighth Circuit, however, held that because nothing indicated that Congress intended the law to apply retroactively, the presumption against retroactive application meant that it could not apply to a juvenile whose delinquent act occurred before enactment. The court's reasoning was straightforward: there is a presumption that legislation should not be applied retroactively absent an express statement to the contrary by Congress; such a statement was absent regarding the revocation provisions; therefore, the November 2002 amendments to § 5037 could not be applied retroactively. [49] In reaching its conclusion, the Eighth Circuit invoked the Supreme Court's holding in *Johnson v United States* [50] that a term of supervised release must be considered as part of the penalty for the original criminal act (or in this context, the act of juvenile delinquency). The Eighth Circuit, like the Supreme Court in *Johnson* , essentially held that the case did not turn on whether J.W.T. was worse off under the revised statute (in other words, whether the statute passed muster under the *ex post facto* test). Instead, the statue could not be applied retroactively because of the "longstanding presumption . . . [that new statutes] appl[y] only to cases in which the initial offense occurred after the effective date of the amendment." [51] Absent this presumption against retroactivity, the statute likely would have passed the test recited in *Johnson* for determining whether retroactive application violates the *ex post facto* clause, which requires that an offender show "both that the law he challenges operates retroactively… and that it raises the penalty from whatever the law provided when he acted." [52]

C. Mandatory Revocation of Probation and Supervised Release for Failing a Drug Test

Section 2103 of the 21st Century Act amended 18 U.S.C. §§ 3565(b) and 3583(g) to require mandatory revocation if an offender "as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year." The amendment left the provision requiring revocation for the possession of drugs undisturbed. For purposes of revocation, the statute now arguably distinguishes between "possession" and a positive drug test. In the case of a positive drug test, the statute does not require action by the court until the fourth positive test within one year. In *United States v. Hammonds*, [53] however, the Tenth Circuit nonetheless held that the provisions mandating revocation of supervised release for more than three failed drug tests within a single year do not preclude a finding that a *single* failed drug test, combined with proof of culpable state of mind, equals "possession" and thus mandates revocation.

The 21st Century Act did not revise the provisions in 18 U.S.C. §§ 3563(e) and 3583(d) that allow the court to 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 United States Sentencing Commission guidelines from the [mandatory revocation provisions in] section 3565(b) [or 3583(g)], when considering any action against a defendant who fails a drug test. [54]

The 21st Century Act amendment to §§ 3565(b) and 3583(g), combined with the alternative of treatment available under §§ 3563(e) and 3583(d), appear to allow a court to consider treatment in lieu of revocation after the fourth positive drug test. As a practical matter, since the court is no longer *required* to revoke or to order treatment after every positive drug test, this new language allows the probation officer to work with the offender for the first three positive drug tests without being required to involve the court.

D. PROTECT Act Amendments Concerning Revocation of Supervised Release

Section 101 of the PROTECT Act, "Supervised Release Term for Sex Offenders," made two significant amendments to § 3583 that, upon revocation, greatly increase the length of incarceration and the reimposed term of supervised release. First, the Act amended 18 U.S.C. § 3583(h) to delete the italicized language in the first sentence:

When 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 subsection (e)(3),* the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such 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.

Striking the italicized language permits a court revoking supervised release to impose another term of supervised release regardless of the length of imprisonment imposed. The length of the term of imprisonment upon revocation is still limited by the maximum terms in section 3583(e), however. Before the statute was amended, an additional period of supervised release upon revocation could not be imposed if the court imposed the maximum term of imprisonment permitted under (e)(3).

Section 101 also amended § 3583(e)(3), which sets forth the maximum revocation prison sentences, by inserting after the phrase, "required to serve," the phrase, "on any such revocation." Before the amendment, section 3583(e)(3) stated that "a defendant whose term is revoked under this paragraph may not be required to serve more than" a specified maximum prison term depending on the class of offense. The new language means that the maximum prison sentences only apply to each revocation, thereby removing the requirement that sentences of imprisonment imposed in multiple revocations be aggregated in calculating the term of supervised release available. [55] Thus, each time a court revokes supervised release and imposes a term of imprisonment, the term of supervised release available is the difference between the maximum term of supervised release for that offense and the term of imprisonment just imposed without reference to any terms previously imposed.

back to top

Endnotes

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information

[1] This is similar to Bazemore & Terry's (1997) treatise on viewing offenders in a dichotomy as either villains or victims. Those adopting a "tough" approach may well be influenced by the villain view while those adopting a "soft" approach may do so if they view offenders through only a victim lens. A villain lens would reduce outcomes as villains "don't care" and "don't want to change." A victim lens would hold progress back since as victims, they're not responsible and since they didn't cause the trouble, they shouldn't be involved in the resolution. These authors suggest adopting a third view (or lens). Since offenders will come to us as villains or victims, we need to move beyond these limiting views to see offenders with a third lens—as capable and as a resource in the process of change. This "third lens" as proposed by Bazemore & Terry corresponds with a motivational approach (middle ground) that lies between the extremes of "tough" and "soft."

[2] A good example of this sole focus is evidenced by our field's skewed use of "risk" factors. The terms "Risk and Protective factors" came from resiliency research, started in the 1950s. Risk and protective factors were thought to be indivisible, much like the natural pairing of two eyes or two ears—they came as a pair, inseparable from each other yet complimentary to each other. One could not speak of risk factors without noting protective factors as well. However, as evidenced in our field, "risk factors" came to the forefront and now exclusively dominate, while "protective factors" are seldom mentioned—much less assessed and integrated in probation plans.

[3] This contrast of power vs. force, so pertinent to which type of influence should be applied by probation staff, can also be found as a book title by David Hawkins (2002) *Power vs. Force: The Hidden Determinants of Human Behavior* . In this book Hawkins states, "Whereas power always results in a win-win solution, force produces win-lose situations…the way to finesse a (solution) is to seek the answer which will make all sides happy and still be practical. …Successful solutions are based on the powerful principle that resolution occurs not by attacking the negative, but by fostering the positive." Hawkins concludes, "Only the childish proceed from the assumption that human behavior can be explained in black and white terms." (pps. 138-139) I would contend the "either/ or" conception is similar to the "black and white terms" as noted by Hawkins.

back to top

Looking At The Law

[1] 61 Fed. Probation 76 (1997).

[2] Pub. L. 107-273, 116 Stat 1758 (Nov. 2, 2002).

[3] Pub. L. 108-21, 117 Stat. 650 (April 30, 2003).

[4] See *United States v. Johnson* , 331 F.3d 962, 967 n.4 (D.C. Cir.2003) (Finding that the 21st Century amendment "resolved the circuit conflict by adding the words 'Notwithstanding section 3583 of title 18' to the supervisory release provision of § 841(b)(1)(C)…thus making it clear that the term of supervised release for a conviction under that section can exceed 3 years.").

[5] *See United States v. Pratt* , 239 F.3d 640, 647 n.4 (4th Cir. 2001); *United States v. Good* , 25 F.3d 218, 221 (4th Cir.1994); *United States v. Kelly* , 974 F.2d 22, 25 (5th Cir.1992).

[6] *See* 18 U.S.C. § 5037(d).

[7] 503 U.S. 291 (1992) (maximum sentence that can be imposed on a juvenile is the maximum sentence that could be imposed if sentenced after application of United States Sentencing Guidelines).

[8] 18 U.S.C. § 5037(b).

[9]

Id. § 5037(c).

[10] *Id.* §§ 3551-3673, 28 U.S.C. §§ 991-998.

[11] 18 U.S.C. §§ 3564(b) & 3624(e).

[12] *United States v. Jeanes* , 150 F.3d 483, 485 (5th Cir. 1998) (supervised release cannot run during any period of imprisonment); *United States v. Joseph*, 109 F.3d 34 (1st Cir. 1997) (same); *United States v. Douglas* , 88 F.3d 533, 534 (8th Cir. 1996) (same).

[13] 88 F.3d 824, 825 (9th Cir. 1996).

[14] 529 U.S. 53 (2000).

[15] Even though prison time is not interchangeable with a term of supervised release, and tolling continues until release from excess incarceration, an offender could attempt to diminish the effect on the length of unserved supervised release by seeking a modification or early termination of her supervised release term under 18 U.S.C. § 3583(e)(1) and (2).

[16] *Id.* at 778-79.

[17] *Id.* at 778.

[18] *Id.* at 778-79.

[19] *See Abimobola v. United States* , 369 F. Supp.2d 249, 253 (E.D.N.Y. 2005) ("The statute… does not expressly authorize the tolling of a term of supervised release during a period of detention by immigration authorities, and such tolling would be inconsistent with other statutory provisions."); cf. *United States v. Balogun*, 146 F.3d 141, 147 (2d Cir.1998) ("In light of … Congress's express provision for a suspension of the supervised-release term in one instance without providing for a similar suspension while a defendant is excluded from the United States, …we conclude that Congress did not intend to authorize the courts to toll the supervised-release term after the defendant's release from prison for a period during which he is deported or excluded from the United States."); *see also* Catharine M. Goodwin, *Legal Developments in the Imposition, Tolling, and Revocation of Supervision* , 61 Fed. Probation 76, 78 (1997) ("Legal Developments") (surmising that civil administrative detention awaiting deportation would not toll supervised release under § 3624(e).

[20] *Children's Safety Act of 2005* , H.R. 3132, 109th Cong. § 511 (2005).

[21] *See, e.g.* , Mo. Rev. Stat. §§ 632.480 to 632.513 (2005).

[22] See *Kansas v. Crane* , 534 U.S. 407, 409 (2002); *Kansas v. Hendricks* , 521 U.S. 346, 361 (1997); see also Julia C. Walker, *Freedom is to Confinement as Twilight is to Dusk: The Unfortunate Logic of Sexual Predator Statutes* , 67 Mo. L. Rev. 993, 1003 n.74 (2002).

[23] *Legal Developments* , 61 Fed. Probation, at 78.

[24] 193 F.3d 1102 (9th Cir. 1999).

[25] In the event a case sentenced by a district court in the Ninth Circuit is transferred for supervision under 18 U.S.C. § 3605, *Morales-Alejo* would not be binding precedent for the transferee court. No case law has interpreted the deference that a transferee court must pay to a transferor court's interpretation of federal law in the context of a § 3605 transfer. Nonetheless, all circuits interpreting similar civil transfer statutes have concluded that transferee courts are obliged to apply their own interpretation of federal law. *See Temporomandibular Joint Implant Recipients v. E.I. DuPont De Nemours & Co.*, 97 F.3d 1050, 1055 (8th Cir. 1996) ("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located."); *Newton v. Thomason* , 22 F.3d 1455, 1460 (9th Cir. 1994) (same); *Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (same); *In re Korean Air Lines Disaster*

of September 1, 1983, 829 F.2d 1171, 1173 (D.C. Cir. 1987) (same); *see also Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 n.4 (8th Cir. 1998) (the consolidated issues that the court is considering were controlled by the law of its circuit and not the law of the various circuits from which the cases were transferred). Under Federal Rule of Criminal Procedure 21, which provides for change of venue in criminal cases, the possibility that a court in another circuit will interpret federal law differently is not among the factors to be considered when ruling on a transfer motion. See *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964); *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 455 (S.D.N.Y. 1997); C. Wright, 2 Fed. Prac. & Proc. Crim.3d § 346 (2004). This implies that the transferee forum's interpretation of federal law should generally apply after the transfer of a criminal case. C. Wright, 2 Fed. Prac. & Proc. Crim.3d § 346; *see also United States v. Barrientos*, 485 F. Supp. 789, 791–93 (E.D. Pa. 1980).

[26] *See United States v. Williams* , 369 F.3d 250, 252 (3d Cir. 2004) (The language of § 3583(d)(3) establishes that Congress "was aware that some defendants sentenced to supervised release would be deported yet [it] chose not to provide for automatic termination of supervised release when the defendant was deported."); *United States v. Ramirez-Sanchez* , 338 F.3d 977, 981 (9th Cir.2003) ("Had Congress intended for deportation to terminate a term of supervised release, it could have provided so"); *United States v. Brown* , 54 F.3d 234, 238 (5th Cir.1995) ("If Congress intended for deportation to terminate this sentence, it could have specifically provided for such to occur. However, Congress has not done so.").

[27] April 13, 1994, Administrative Office memorandum to chief probation officers on tolling of supervision terms.

[28] *U.S. v. Isong* , 111 F.3d 428, 429-31 (6th Cir.1997); *see also U.S. v. (Mary) Isong* , 111 F.3d 41, 42 (6th Cir.1997) (affirming condition of supervised release that defendant remain under supervision for three years, not including any time she is not in the country if she is deported).

[29] *United States v. Okoko* , 365 963 (11th Cir. 2004) ("[S]upervised release is to commence immediately upon an alien defendant's release from imprisonment. [I]ts tolling during deportation as a condition of the release would circumvent the policy underlying that provision."); *U.S. v. Juan-Manuel* , 222 F.3d 480, 485-88 (8th Cir.2000) ("Congress did not intend to authorize sentencing courts to suspend a defendant's period of supervised release upon deportation and during any period of exclusion from or unknown presence in the United States."); *U.S. v. Balogun* , 146 F.3d 141, 144-47 (2d Cir.1998) ("[W]e conclude that Congress did not intend to authorize the courts to toll the supervised release term after the defendant's release from prison for a period during which he is deported or excluded from the United States.").

[30] 41 F.3d 1056 (6th Cir. 1994).

[31] *Id.* at 1059-61.

[32] *United States v. Scott* , 362 F. Supp.2d 982, 985 (N.D. Ill. 2005).

[33] *See* , e.g., Toby D. Slawsky, *Counting the Days: When Does Community Supervision Start and Stop?*, Fed. Probation 71, 73 (Sept. 1992).

[34] *United States v. Schmidt* , 99 F.3d 315, 318 (9th Cir.1996); *United States v. Morales* , 45 F.3d 693, 696-97 (2d Cir.1995) (court retains jurisdiction to extend or modify as well as to revoke supervision); *United States v. Barton* , 26 F.3d 490, 491-92 (4th Cir.1994); *United States v. Neville* , 985 F.2d 992, 995 (9th Cir.1993). *See also United States v. Schimmel* , 950 F.2d 432, 435-6 (7th Cir.1991) (authorizing delayed revocation for probation without the issuance of a warrant, but based on notice otherwise provided to the defendant).

[35] The only difference between 18 U.S.C. §§ 3563(c) and 3583(i) is that § 3583(i) allows for imposition of a further term of supervised release following a revocation sentence of imprisonment.

[36] *United States v. Schmidt* , 99 F.3d 315 (9th Cir.1996); *United States v. Throneburg* , 87 F.3d 851 (6th Cir.1996); *United States v. Kosth* , 65 F.3d 170 (7th Cir.1995) (unpublished).

[37] 389 F.3d 901 (9th Cir. 2004).

[38] 18 U.S.C. 4210(a); *see United States v. Polito* , 583 F.2d 48, 54-56 (2d Cir. 1978) (sworn allegations were not required to issue a warrant for the arrest of a parolee); *see also Story v. Rives*, 97 F.2d 182, 188 (D.C. Cir. 1938) (distinguishing for Fourth Amendment purposes between retaking of parolee and arrest of individual charged with a crime); *Jarman v. United States* , 92 F.2d 309, 311 (4th Cir. 1937) (same).

[39] *United States v. Murguia-Oliveros* , No. 04- 50612, 2005 WL 2063858 (9th Cir. Aug. 29, 2005).

[40] *Legal Developments* , 61 Fed. Probation at 79.

[41] *Legal Developments* cited three cases in support of the proposition that "[s]ome delayed revocation cases find no error where the 'petition' for revocation was filed within the term of supervision." *Id.* at n.54. All of these cases, however, involved an earlier version of § 3583 and a predecessor to 3565 (18 U.S.C. § 3563 (repealed)) that did not include the present "delayed revocation" provisions requiring issuance of a warrant or summons prior to the termination of supervision. See *United States v. Morales* , 45 F.3d 693, 697 (2d Cir. 1995) (court issued summons seven days before supervision was due to expire; offender challenged court's jurisdiction to conduct revocation hearing after supervision expired); *United States v. Barton* , 26 F.3d 490, 491-92 (4th Cir. 1994) (by filing petition for revocation within supervision term, probation officer preserved the court's jurisdiction to conduct a revocation hearing within a reasonable time after supervision expired); *United States v. Schimmel* , 950 F.2d 432, 435-36 (7th Cir. 1991) (repealed 3563, which applied to probationer, allowed a court to issue a warrant at any time within the maximum allowable probation period even if the probation sentence imposed was less than the maximum).

[42] See *United States v. Hondras* , 176 F. Supp.2d 855 (E.D. Wis. 2001) (Neither the pre-termination petition to order an arrest warrant nor order that a warrant issue satisfied the requirement that a warrant "issue" to extend a court's jurisdiction to revoke supervised release); *United States v. Crusco* , No. 90 CR 945 JES, 2000 WL 776906, *2 (W.D.N.Y. June 15, 2000) (court lacked jurisdiction to revoke supervised release; neither a petition for a warrant or summons nor the judge's signature approving the petition extends the court's jurisdiction). *See also United States v. Rivard* , 127 F. Supp.2d 512, 516 n. 10 (D. Vt. 2000) (citing Crusco for the proposition that "where no summons or warrant has issued before the expiration of the supervised release period, the court does not have jurisdiction to hear claims of such violations").

[43] 237 F.3d 1279 (11th Cir. 2001).

[44] *Id.* at 1282-83.

[45] *Id.*

[46] *See United States v. A Female Juvenile* , 103 F.3d 14 (5th Cir. 1996).

[47] *See Johnson v. United States* , 529 U.S. 694, 701 (2000) ("Quite independent of the question whether the *Ex Post Facto Clause* bars retroactive application of § 3583(h), then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.").

[48] 368 F.3d 994 (8th Cir. 2004).

[49] *Id.* at 995-97.

[50]

529 U.S. 694 (2000).

[51] *Id.* at 702-03.

[52] *Id.* at 699.

[53] 370 F.3d 1032 (10th Cir. 2004).

[54] There is a minor difference between the exception provisions for probation and supervised release. Section 3563(e) refers to a drug test "administered in accordance with subsection (a)(5)." This variation reflects that the supervised release exception appears in the same subsection as the mandatory testing condition, whereas the probation exception does not.

[55] *See United States v. Tapia-Escalera* , 356 F.3d 181, 188 (1st Cir. 2004) (Discussing the pre-PROTECT Act aggregation rule, rejecting the government's contention that revocation penalties do not aggregate, but acknowledging that "Congress *has* altered the statute to adopt the government's position for the future. The 2003 PROTECT Act adds to subsection (e)(3) the phrase 'on any such revocation' so that the statute now reads 'a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years.'").

back to top

References

Published by the Administrative Office of the United States Courts www.uscourts.gov
Publishing Information