ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-3032

UNITED STATES OF AMERICA, Appellee,

v.

BRANDON ROCK, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. No. 11-376 (RMC)

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee hereby states as follows:

Parties and Amici

The parties to this appeal are appellant, Brandon Rock, and appellee, the United States of America. There are no intervenors or *amici*.

Rulings Under Review

Appellant appeals the sentence imposed by the Honorable Rosemary M. Collyer on May 11, 2012, after appellant's guilty plea to one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2). Appellant challenges his sentence as procedurally unreasonable on the grounds that the district court (1) relied on incorrect information regarding recidivism rates and (2) failed to address his mitigation argument. Appellant also challenges the special conditions of supervised release imposed by the district court by asserting that a number of the special conditions do not meet the

requirements of 18 U.S.C. § 3583(d) and other applicable legal standards. There is no official citation to the district court's ruling.

Related Cases

Appellee is unaware of any related cases.

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee states that all pertinent statutes and regulations are contained in the attached Addendum.

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* Authorities upon which we chiefly rely are marked with asterisks.

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ISSUES PRESENTED

I. Whether the district court abused its discretion by committing procedural error in sentencing appellant, where the court heard the arguments of both parties regarding appellant's tendency to reoffend and did not base its sentence on any incorrect information regarding recidivism rates for his crime.

II. Whether the district court plainly erred by committing procedural error in sentencing appellant, where the court discussed appellant's mitigation argument with counsel and agreed with appellant's assertions, but found nonetheless that the mitigation was insufficient to warrant a lesser sentence given the serious nature of appellant's crime.

III. Whether the district court plainly erred (as to three of the conditions) or abused its discretion (as to one of the conditions) by imposing certain special conditions of supervised release, where the conditions imposed by the district court were procedurally and substantively reasonable, and consistent with this Court's precedent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On June 16, 2011, appellant Brandon Rock was charged by complaint with one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2) (A.3).[1] On February 10, 2012, the

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[1] "A." refers to the Appendix filed with appellant's brief. "5/11/12 Tr." refers to the transcript of the May 11, 2012 sentencing, which is appended to appellant's brief.

government filed a superseding information and appellant pled guilty to the sole count of the superseding information, distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), before the Honorable Rosemary M. Collyer (A.6; 5/11/12 Tr. 1-25). On May 11, 2012, the district court imposed a 172-month term of incarceration and 120 months of supervised release (with conditions) (5/11/12 Tr. 33. 35-42). Appellant noticed this timely appeal on May 21, 2012 (A.7-8).

Factual Background

Creation of Pornography of Girlfriend's Child

Prior to June 2011, appellant was engaged in a romantic relationship with a woman who had an 11-year old daughter (hereinafter "the child") (A.27-28 (referring to the child as appellant's "stepdaughter")). Appellant would from time to time stay overnight at his girlfriend's home (A.33). The child was at the girlfriend's house "every other week" (A.28). At some point, appellant installed a hidden camera in the child's bedroom (A.28, 31, 33). Appellant snuck into the bedroom to place and retrieve the camera, so as not to get caught (A.91). The camera could be watched live or could be set to record any motion

(A.31). The recording happened without the knowledge of appellant's girlfriend or the child (A.31-32).

Over the course of six months, appellant captured "thousands" of video segments of the child in her bedroom (A.33, 91). The camera was focused on the child's bed (A.33). On at least two occasions, appellant controlled the camera to maneuver it into a wider shot to capture the child's entire body (*id.*). Some of the video segments showed the child changing and also completely naked from the front and the back (*id.*). Appellant used the videos of the child to create still pornographic images (A.29).

Appellant stated that he masturbated to images of the child (A.28-29). Additionally, in one video clip, appellant went into the child's bedroom, picked up an item from the bed, and then "manually manipulate[d] the crotch area of his pants" (A.34). Appellant stated that he had approached the child to gage her interest in him. Specifically, appellant stated that he "'accidently' left a vibrating egg in [the child's] room," which the child returned to him (A.31). Appellant had allowed the child to see him naked and see him aroused (A.30-31). Appellant

also stated that he had attempted to get video of the child's friends at sleepovers (A.31).

Online Chats with Undercover Officer

1. June 9, 2011

On June 9, 2011, appellant entered an Internet chat room, known to be frequented by individuals sexually interested in prepubescent children (A.27). Undercover Metropolitan Police Department Detective Timothy Palchak (hereinafter "the UC") was also in the chat room, posing as an individual who had access to a 12-year-old (fictional) girl (*id.*). At approximately 4:55 p.m., the UC messaged a query whether there were "[a]ny other no limit pervs in DC MD VA," to which appellant responded in the affirmative (*id.*). The UC and appellant began a private chat. Appellant told the UC that he "like[d] to perv on [his] stepdaughter," referring to the child (A.28).

Appellant told the UC about his secret camera recordings and sent several of the still images of the child to the UC (A.28-29). When asked by the UC, appellant told the UC that the UC could masturbate to these still images of the child (A.29). Appellant also stated that he had "pussy shots" of the child (*id.*). In response to the photos, the UC commented, "i

bet that just must make you want to fuck her so bad," and appellant replied, "pretty much" (*id.*). Appellant stated that he was not "active" with the girl, but "REALLY wish[ed]" he was (A.28). Later in the same chat, appellant sent the UC one of the secretly-recorded video clips (A.29).

In the same chat on June 9, the UC offered to allow appellant to have oral sex with the 12-year-old girl, to which appellant responded, "i would love to" (A.29). The two discussed setting up a meeting the next week and appellant stated, "just let me know when and where" (*id.*). Specifically, appellant stated he could meet at night during the week, and suggested the following Tuesday (A.29-30). Appellant gave the UC his cellular phone number (*id.*).

2. June 13-15, 2011

On June 13, 2011, appellant and the UC spoke again via Yahoo instant messenger (A.30). The UC stated that he would have the 12-year-old girl with him on Wednesday (*id.*). Appellant stated he did not know if he was "ready to cross that line" and was concerned about getting "busted" (*id*). The UC suggested that they continue to exchange pornographic pictures or that appellant watch the UC with the 12-year-

old girl via a webcam (*id.*). Appellant stated that would be "a bit more comfortable" so that they could "get to know" each other (*id.*).

Thereafter, appellant sent the UC another still photograph of the child (A.30). Appellant also shared with the UC how he was conducting surveillance of the child (A.31). Further, appellant lamented that the child did not seem interested in him and that he was unable to obtain pictures of the child's friends, despite his efforts (A.30-31).

Finally, during this chat, appellant agreed to send child pornography in exchange for being able to watch the UC have sex with the 12-year-old girl on a webcam show (A.32). Specifically, the UC asked for 10 images as a "downpayment" and another 10 images after the UC and the 12-year-old girl were on the webcam (*id.*). Thereafter, appellant sent to the UC 11 image files, 6 or 7 of which showed children in sexually explicit poses, including:

- a prepubescent girl ling on a bed wearing no underwear and exposing her vagina;
- a prepubescent girl sucking an adult male penis; and
- a prepubescent girl being vaginally penetrated by an adult male penis while the girl sat atop the male. (A.32-33.)

After sending the images, the UC asked what type of show appellant wanted, and he responded that he "would love to see" the UC having sexual intercourse with the 12-year-old girl on the webcam (A.33). The UC agreed to a 15-minute webcam show showing intercourse (*id.*). Appellant responded "sweet" (*id.*). The UC said he would message appellant about setting up the show (A.227).

The next day, June 14, the UC told appellant that the 12-year-old girl would be with the UC on the following Saturday (A.228). Appellant responded "cool" (*id.*). On June 15, the UC messaged appellant asking if they could change the date of the webcam show to Friday (A.229). Appellant did not respond (*id.*)

Search Warrants and Arrest

Appellant was arrested on June 17, 2011 (A.33).[2] In a search of appellant's home pursuant to a warrant, a desktop computer was recovered from appellant's bedroom (*id.*). During a search of appellant's girlfriend's home pursuant to a warrant, appellant's laptop computer was recovered (*id.*). On these computers were "more than 100 videos

[2] June 17, 2011 was the Friday immediately following the chats between appellant and the UC on June 13-14.

containing child pornography" and "thousands of short video segments" of the child, including some that showed her "naked from the front and back" and getting dressed (*id.*).

The Plea Proceeding

Pursuant to the plea agreement, appellant pled guilty to one count of distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2) (A.11, 15). In exchange, the government agreed not to further prosecute appellant either in Washington, D.C. or in the Middle District of Pennsylvania in connection with the distribution of child pornography to the UC or the production of pornographic images of the child (A.16). The parties agreed to a sentence of between 144 and 180 months' imprisonment under Fed. R. Crim. P. 11(c)(1)(C) (*id.*).

Sentencing

Prior to the May 11, 2012, sentencing hearing, the defense filed a memorandum requesting a sentence of 144 months' imprisonment (A.38). The government also filed a sentencing memorandum in advance of the hearing, in which it requested a sentence of 180 months' incarceration (A.191-93). The court stated that it had received and read

all the documents submitted by the parties (5/11/12 Tr. 2), and had reviewed the videos of the child from appellant's computer, as well as the pornographic images of the other children (5/11/12 Tr. 29). The court heard arguments from both counsel and heard a statement from appellant (5/11/12 Tr. 1-29).

The district court sentenced appellant to 172 months' imprisonment and 10 years' supervised release (5/11/12 Tr. 33). The district court enumerated the factors set forth in 18 U.S.C. § 3553(a), and stated that it would determine "the sentence that is sufficient but not greater than necessary to fulfill the goals of sentencing" (5/11/12 Tr. 29). The court stated that the "seriousness of the offense" dictated the long sentence in the case (5/11/12 Tr. 27).[3] The court's primary concern was appellant's behavior toward the child, stating that there was a "real" victim in the "the young child next door in the next room" (5/11/12 Tr. 7, 11, 16, 29-30, 32). "[It] is pretty horrifying to put a camcorder in the room of an 11 year old girl so that you can see her undress . . . . It

[3] Through its questions, the court further noted that its choice of sentence was affected by an agreement of both the U.S. Attorney's Office in Washington, D.C. and in the Middle District of Pennsylvania not to prosecute the case (5/11/12 Tr. 14).

was recorded and it was sent to Detective Palchak . . . [a]nd who knows where else it was sent." (5/11/12 Tr. 16.) Additionally, the court noted that appellant's collection of child pornography was "fairly large" and there were "identifiable children who have been treated in the most repulsive ways" (5/11/12 Tr. 29).

The court imposed the general conditions of supervised release, and also a number of special conditions of supervised release, as set out infra (5/11/12 Tr. 35-42).[4]

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in sentencing appellant because it did not base its sentence on any incorrect information regarding recidivism rates. Nor did the district court plainly err by in failing to consider appellant's mitigation argument because the court agreed with appellant's argument but found, nonetheless, that that the mitigation was insufficient to warrant a lesser sentence given the serious nature of appellant's crime. Finally,

[4] Appellant has never moved the district court under 18 U.S.C. § 3583(e)(2) to modify the conditions of release.

the district court did not plainly err (as to three of the conditions) or abuse its discretion (as to one of the conditions), in its imposition of special conditions of supervised release. The conditions of supervised release are reasonable, narrowly tailored restrictions that promote the sentencing goals described in 18 U.S.C. § 3583, and are consistent with this Court's precedent.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion By Relying on Erroneous Facts.

Appellant incorrectly argues that the court committed procedural error by considering a "false or unreliable" fact—that appellant's offense "involved a higher rate of recidivism" (Brief of Appellant at 18). Contrary to appellant's claims, the district court did not so rely, and there was no procedural error.

A. Additional Background

In his sentencing memorandum, appellant made numerous arguments that he was unlikely to reoffend (A.40-43), but appellant never mentioned statistics or rates of recidivism. Appellant did argue that he was a "non-contact" offender (A.42-43). Dr. Richard C. Blanks, a

psychiatrist from George Washington University, opined that appellant had a "low-moderate" risk of reoffending (A.42-43, 97, 98).

In its sentencing memorandum, the government made several arguments about the rates of recidivism, i.e.: "Some studies show a high rate of recidivism among pedophilic sex offenders generally" and other studies showed that 6-10 percent of child pornography consumers had been charged again within 6 years (A.207 (quoting *United States v. Garthus*, 652 F.3d 715 (7th Cir. 2011)). Moreover, the government noted that studies regarding non-contact offenders showed substantial underreporting of actual contact; as many as 55 percent of supposed non-contact offenders later, through the use of anonymous reporting or polygraphs, admitted to contact offenses against children (A.208).

At the beginning of the sentencing hearing, the court stated that "historically this has not been an easy sort of crime to avoid recidivism," (5/11/12 Tr. 6). Defense counsel stated, "I agree," but argued that appellant was a non-contact offender and "the literature shows a big difference between contact offenders and non-contact offenders" (5/11/12 Tr. 7-8). The district court rejected appellant's contention that these circumstances were similar to the typical "non-contact" case: this was

"not non-contact" because appellant created pornographic images of an actual child in his life (5/11/12 Tr. 7). The court explained this was not a "victimless crime" (*id.*), but rather involved "the young child next door in the next room" (5/11/12 Tr. 30).

The court then explained its concern with respect to recidivism as follows: "[i]t's a very serious offense and part of its seriousness is that it is so hard to know about and so easy to do again and again" (5/11/12 Tr. 30). The court added: "recidivism," or lack of recidivism, is "very hard to predict in this kind of crime" (5/11/12 Tr. 32).

B. Standard of Review and Applicable Legal Principles

This Court's review of a properly preserved sentencing challenge is for abuse of discretion "to 'ensure that the district court committed no significant procedural error, such as . . . selecting a sentence based on clearly erroneous facts.'" *United States v. Lawrence*, 662 F.3d 551, 556 (D.C. Cir. 2011) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)) (alteration in original). While the Court defers to a sentence based on "informed discretion of a trial judge," such deference is not afforded to a sentence "founded" on information that is "materially untrue." *United*

States v. Tucker, 404 U.S. 443, 447 (1972) (citation omitted) (court based sentence on the defendant's prior convictions, which were unconstitutional); *see also United States v. Campbell*, 684 F.2d 141, 153 (D.C. Cir. 1982) (collecting cases dealing with "improper or inaccurate information" at sentencing).

If a district court is found to have committed a procedural error in sentencing, its sentence will nonetheless be affirmed if the error was harmless. "If the party defending the sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required . . . and the court of appeals may affirm the sentence." *Williams v. United States*, 503 U.S. 193, 203 (1992); *accord United States v. Ayers*, 795 F.3d 168, 172 (D.C. Cir. 2015); *see also* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). "For the real question here is . . . whether the sentence . . . might have been different if the sentencing judge had known" about the false fact. *Tucker*, 404 U.S. at 448.

C. The Court Did Not Rely on Erroneous Facts About Recidivism Rates.

Appellant's challenge fails because the district court did not base its sentence on recidivism rates, let alone even mention such rates in choosing the sentence (see Brief of Appellant at 19). At the beginning of the hearing, the court expressed concerns about "historic" trends in recidivism and engaged with defense counsel in a discussion about recidivism of contact versus non-contact offenders (5/11/12 Tr. 8-12). At the close of the hearing, in explaining the basis for the sentence, the court recognized that this type of crime "is so hard to know about and so easy to do again and again" (5/11/12 Tr. 30). The court promptly qualified its remark by noting that "recidivism" or the lack thereof is "very hard to predict in this kind of crime" (5/11/12 Tr. 32). Thus, the court's recidivism concerns were wholly independent of statistical recidivism data (5/11/12 Tr. 29-33). This Court should decline appellant's invitation (at 19) to construe the district court's single statement, early in the hearing, as evidence that the court relied on recidivism rates at all, given that the court made no mention of such statistical data in explaining the basis for the sentence (5/11/12 Tr. 29-33).

Even if the court had so relied, there is no basis to conclude that the court relied on "misinformation." The government cited to numerous studies in its memorandum concluding that as many as 10 percent of child pornography offenders reoffended within 6 years and that as many as 55 percent of supposed non-contact child pornography offenders were found to have, in fact, had inappropriate contact with children (A.207-08). A certain amount of repeat "criminal activity by [child pornography] offenders . . . is undiscovered or unreported . . . . It is [also] widely accepted among researchers that sex offenses against children often go unreported or undetected . . . ." UNITED STATES SENTENCING COMMISSION, FEDERAL CHILD PORNOGRAPHY OFFENSES, CHAPTER 11: RECIDIVISM BY CHILD PORNOGRAPHY OFFENDERS 294-95 (2012).[5] The district's court statement that "historically this has not

[5] Appellant is wrong to rely (at 19-20) on the conclusion of the Sentencing Commission's 2012 report regarding recidivism rates. The study to which appellant cites is about recidivism rates for "non-production offenders." *See* FEDERAL CHILD PORNOGRAPHY OFFENSES 293. Appellant does not fall in this category: he produced "thousands" of pornography videos of the child. Likewise, appellant wrongly relies on "the literature [which] shows a big difference between contact offenders and non-contact offenders" (5/11/12 Tr. 6). As the district court found, the circumstances here are not those of a typical "non-contact" offender; appellant not only looked at child pornography but he also created

(continued . . .)

been an easy sort of crime to avoid recidivism," was not based on materially false or misleading facts (5/11/12 Tr. 6).

Even if the district court relied on misinformation, appellant has not shown, or even argued, that such reliance had any impact on appellant's sentence within the Rule 11(c)(1)(C) range. The district court's explanation of its sentence was based on all of the § 3553 factors, including the severity of the crime, promoting respect for the law, providing a just punishment, and deterrence (5/11/12 Tr. 29-33). When read as a whole, it is clear that the district court was greatly influenced by the nature of the case, calling it "horrifying," "extraordinarily injurious," and "gross[ly] disrespect[ful]" (5/11/12 Tr. 16, 31). The court's sentence was based on its view of the crime itself, not on statistics to which the court never cited.

(. . . continued)
pornography using an actual child in his life (5/11/12 Tr. 7), and he made repeated overtures to the child, exposing himself to her, letting her see him aroused, and giving her a vibrator (A.31). As the court explained, appellant had crossed the line from "looking" to "doing" things that harmed this child (5/11/12 Tr. 18).

II. The District Court Did Not Plainly Err in Considering Appellant's Arguments About Mitigation.

Appellant incorrectly asserts that the district court failed to address his arguments about mitigation, i.e., that he did not, in fact, agree to meet the UC or to watch the UC engage in sexual acts with a minor (at 22-23). To the contrary, the district court not only addressed that argument but agreed with appellant's contentions about his conduct, and sentenced appellant accordingly. The court did not plainly err.

A. Additional Background

The parties disputed the import of appellant's failure to respond to the UC's final message. In its sentencing memorandum, the government stated that while "it is true that the defendant never ultimately met with [the UC or the 12-year-old girl,] nor did he view them engaged in sex over the Internet webcam," that was "not due to any lack of effort on the defendant's part" (A.199). At sentencing, the government further argued that appellant failed to watch the webcam only because he was arrested (5/11/12 Tr. 21).

Appellant challenged the government's characterization of the facts in his sentencing memorandum and at the sentencing hearing (A.38; 5/11/12 Tr. 12, 18, 26). At the hearing, appellant argued that the UC "aggressively pursued" appellant to come to Washington, D.C., and to participate in the webcam, but that appellant was not going to cross that "line" (5/11/12 Tr. 12). Appellant argued that there is a "meaningful distinction" between the "doing versus the looking" (5/11/12 Tr. 18). Appellant argued that he did not respond to the UC's final message to set up the webcam session not because he was arrested, but because he had a change of heart (5/11/12 Tr. 26).

In response to these arguments, the district court stated that it "would agree" with the defense argument that the UC "aggressively" urged appellant on and that appellant refused the UC's invitations (5/11/12 Tr. 18). However, in response to appellant's claims that there was a "meaningful distinction" in "the doing versus the looking," the court found that on "his own . . . *without* Detective Palchak having anything to do with it[,] *Mr. Rock was doing*" (5/11/12 Tr. 18 (emphasis added)). Defense counsel responded, "To an extent" (*id.*).

B. Applicable Legal Principles and Standard of Review

"A sentencing court . . . must consider nonfrivolous arguments for mitigation." *United States v. Bigley*, 786 F.3d 11, 12 (D.C. Cir. 2015) (per curiam). However, 18 U.S.C. § 3553 "does not require a full opinion in every case." *United States v. Locke,* 664 F.3d 353, 357 (D.C. Cir. 2011). "[S]o long as the judge provides a 'reasoned basis for exercising his own legal decisionmaking authority,' [this Court] generally presume[s] that [the judge] adequately considered the arguments and will uphold the sentence if it is otherwise reasonable." *Id.* at 358. Moreover, the sentencing court does not err where it is clear from the record that the court "listened to each argument" and was "fully aware" of the defendant's contentions, even where the court does not explicitly state its reasons for rejecting such arguments. *Rita v. United States*, 551 U.S. 338, 356-58 (2007) (sentencing judge's statement that the sentencing range was "appropriate" was sufficient given the "context and the record").

When a defendant fails to timely raise a procedural reasonableness objection at sentencing, this Court reviews for plain error. *Bigley*, 786 F.3d at 13; *see also Locke*, 664 F.3d at 357 ("Because

Locke did not challenge the adequacy of the district court's statement of reasons below, we review her claim for plain error."). Plain error review applies to appellant's claim that the district court did not properly consider his mitigation argument because appellant did not object to, and even agreed with, the court's conclusion regarding his involvement (5/11/12 Tr. 18). Nor did appellant request a more complete statement by the district court regarding his mitigation argument.

To prevail under the plain-error standard, appellant must show that the district court, in considering his mitigation argument, made: (1) a legal error; that was (2) plain or obvious; and that (3) affected appellant's substantial rights. *United States v. Olano*, 507 U.S. 725, 733-34 (1993). If the district court did in fact plainly err, this Court may exercise its discretion to correct the error only where (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 736-37. Appellant bears the burden of showing that he has met these requirements. *United States v. Smith*, 267 F.3d 1154, 1160 (D.C. Cir. 2001).

C. The Court Did Not Plainly Err in Considering Appellant's Arguments About Mitigation.

Appellant has not shown that the court plainly erred in failing to consider his argument about mitigation because the record shows that the court considered and rejected appellant's argument. The parties disputed the significance of appellant's failure to go through with meeting the UC or watching the UC on the webcam. Appellant had the last word, arguing that the UC had encouraged appellant, that appellant "refused" the UC's invitations, and that without the UC's actions, "it's just not something that he would have done" (5/11/12 Tr. 18). The court stated, "*I would agree*" (*id.* (emphasis added)). However, the court found that "without [the UC] having anything to do with it[,]" appellant was doing more than just looking at child pornography—referencing his victimization of the child (*id.*). Thus, although the court took into account appellant's arguments about mitigation, they were insufficient to mitigate appellant's conduct of creating and exchanging pornography of the child.[6]

[6] Nor did the government mislead the court by a "false representation" about why appellant "failed to join the UC" in the webcam (Brief of (continued . . .)

Appellant has not shown that the court's explanation, although limited, was erroneous. The court reviewed the numerous documents filed by both sides and was actively engaged at the sentencing hearing. Although the court did not specifically "resolve the dispute" between the parties regarding why appellant stopped contacting the UC (Brief of Appellant at 23), the court's statements need not be "a full opinion," especially where, as here, the court explained that it found appellant's ultimate argument insufficient. *Rita*, 551 U.S. at 356. Moreover, appellant never asked the court to make more specific findings about mitigation. Where, as here, a defendant neglects his "initial responsibility to ensure that the district court explains its reasoning for the record," this Court must "assume 'that the district court kn[ew] and applie[d] the law correctly.'" *United States v. Pinnick*, 47 F.3d 434, 439

(. . . continued)
Appellant at 20). Appellant agreed to exchange child pornography in return for watching the UC have sexual intercourse with the 12-year-old girl (A.32-33, 228-29). The record is ambiguous about why he failed to continue efforts to view the webcam show. He was, in fact, arrested on Friday, June 17, 2011, which was the day before he and the UC had arranged to watch the webcam show (A.33, 228-29).

(D.C. Cir. 1995) (quoting *United States v. Garcia-Garcia*, 927 F.2d 489, 491 (9th Cir. 1991)).

Finally, contrary to appellant's claim (at 23), he has not shown that the court's "failure to resolve" the parties' disagreement about these facts impacted his sentence in any way. Appellant speculates that there "was a significant possibility" that the court relied upon misinformation regarding his mitigation (Brief of Appellant at 23). But, as discussed, the court's statements at sentencing show that it based appellant's sentence on appellant's conduct: secretly taping the child and then distributing that pornography.

III. The District Court Did Not Plainly Err or Abuse Its Discretion in Imposing Special Conditions of Supervised Release.

The court did not abuse its discretion, or plainly err, in imposing various terms and conditions of supervised release. On appeal, appellant challenges four of the release conditions, only one of which he objected to below. None of appellant's contentions have merit under this Court's precedent.

A. Additional Background

The district court imposed several special conditions on appellant's 120-month term of supervised release. Relevant here are the following conditions:[7]

> Computer/ Internet Condition: You shall not possess or use a computer or have access to any online service without prior approval of the United States Probation Office. You shall identify all computer systems, internet capable devices and similar memory and electronic devices to which you have access and allow installation of a computer and internet monitoring program. You are limited to possessing only one personal internet capable device to facilitate our ability to monitor your internet related activities effectively. Monitoring may include random examinations of computer systems, along with internet, electronic, and media storage devices under your control. The computer system or device may be removed for more thorough examination if necessary. You shall be responsible for the cost of such monitoring services. (5/11/12 Tr. 36-37; A.236.)
>
> Computer Pornography Condition: You shall not use a computer internet capable device or similar electronic device to access pornography of any kind. This includes but is not

[7] The court also imposed various other special conditions of supervised release that appellant does not challenge on appeal (5/11/12 Tr. 37-39; A.236). The government understands that the Probation Office no longer requests the Pornography Condition, the Relationship Condition, penile plethysmograph testing, or limitations to one internet-capable device as part of its standard conditions of release for sex offenders. However, certain judges in this jurisdiction continue to impose some of these conditions.

limited to accessing pornographic websites, including websites depicting images of nude adults or minors. You shall not use your computer to view pornography stored on computer media such as CDs or DVDs and shall not communicate via your computer with any individual or group who promotes the sexual abuse of children. (5/11/12 Tr. 37; A.236.)

Physiological Testing Condition: You shall participate in a program of sex offender assessment and treatment as directed by the Probation Office until such time as you are released from the program. This assessment in treatment may include . . . physiological testing such as polygraph to assist in planning, case monitoring, and supervision. . . . You shall submit to penal plethysmograph testing as directed by the United States Probation Office as part of your sexual offender therapeutic treatment. The cost of the testing are to be paid by you as directed by the Probation Office. (5/11/12 Tr. 38; A.236.)

Relationship Condition: You shall neither reside in a residence where minor children also reside nor shall you work or volunteer for any business or organization that provides services or employs persons under 18 years of age without the permission of the U.S. Probation Office. You shall not associate with any known sex offender or group. You shall notify the U.S. Probation Office when you establish a significant romantic relationship and then shall inform the other party of your prior criminal history concerning your sex offenses. You understand that you must notify the U.S. Probation Office of that significant other's address, age and where the individual may be contacted. (5/11/12 Tr. 40-41; A.236.)

The district court went through the majority of the conditions without objection (5/11/12 Tr. 31-39). Appellant objected to an alcohol restriction, which the court thereafter declined to impose (5/11/12 Tr. 39-41). After the court concluded all of the special conditions, defense counsel then objected to the Relationship Condition (5/11/12 Tr. 41). The district court overruled appellant's objection, explaining that,

> The reason for that I assume is because of the nature of the relationship here. Mr. Rock was in a significant relationship and used that as a vehicle to prey on a young child. (*Id.*)

In response, defense counsel argued that other conditions sufficiently covered access to children (*id.*). Thereafter, defense counsel stated:

> We'll just object and – I'll object to that specifically and generally object to the conditions so that the objection is preserved. But I have never heard that before and it just sounds wrong to me. (5/11/12 Tr. 41-42.)

The court stated it "noted for the record" the objections, and that "the one on alcohol restriction, the Court has accepted, the others it does not for the reason I just gave" (5/11/12 Tr. 42).

B. Applicable Legal Principles and Standard of Review

In imposing conditions of supervised release, the district court has "wide discretion." *United States v. Sullivan*, 451 F.3d 884, 895 (D.C. Cir.

2006). The court, as authorized by 18 U.S.C. § 3583(d), may impose any condition "'it considers to be appropriate,' to the extent the condition is 'reasonably related' to the nature and circumstances of the offense and the history and characteristics of the defendant, and to the need to deter crime, to protect the public from further crimes of the defendant, and to provide needed training, medical care, or other correctional treatment." *United States v. Stanfield*, 360 F.3d 1346, 1352-53 (D.C. Cir. 2004) (quoting § 3583). No condition of supervised release may result in any "greater deprivation of liberty than is reasonably necessary." § 3583(d)(2).

Where an objection is preserved, this Court reviews for abuse of discretion, evaluating the conditions the district court imposed "against the statutorily enumerated sentencing goals." *Sullivan*, 451 F.3d at 895 (*quoting Stanfield*, 360 F.3d at 1352-53). However, the Court applies a plain-error standard when "a defendant fails to raise a timely objection." *Id.* at 892, 895-96 (upholding, under the plain error standard, district court's imposition of supervised release conditions restricting Internet access, contact with children, and possession of adult pornography and video equipment). On plain-error review, the

Court will vacate a condition of supervised release "only if it is plainly out of sync with the statutory goals enumerated in [18 U.S.C.] § 3553(a)." *United States v. Laureys*, 653 F.3d 27, 34 (D.C. Cir. 2011) (citation omitted). To prevail under the plain-error standard, appellant must show that the imposition of the condition of supervised release meets the four-part test of *Olano*, 507 U.S. at 733-34.

Appellant claims that he is entitled to review for abuse-of-discretion as to all four special-condition categories outlined in his brief (Brief of Appellant at 23). At sentencing, appellant specifically objected to the Relationship Condition (5/11/12 Tr. 41-42). As to the remaining conditions, he "generally object[ed] to the conditions so that the objection is preserved" (*id.*). Appellant made no other argument about the remaining conditions (*id.*).

As this Court has previously held, appellant's "general objection to the other conditions" is "insufficient to preserve [appellant's] arguments for appeal." *United States v. Love*, 593 F.3d 1, 11 (D.C. Cir. 2010) (finding an objection "to any condition of supervised release beyond that which I indicted in my proffer" was insufficient). Appellant failed to identify any basis for his general objection, and the district court was

left with no indication as to what it was being asked to address or what grounds underlay appellant's concern. Thus, the objection was "too general to have alerted the trial court to the substance of the petitioner's point." *United State v. Breedlove*, 204 F.3d 267, 270 (D.C. Cir. 2000); *United States v. Pryce*, 938 F.2d 1343, 1350 (D.C. Cir. 1991) (holding that a general objection is not sufficient to avoid plain-error review, because it does not alert the trial court to the defendant's current claim).[8] Indeed, the record shows that the court construed appellant's objection as only about the Relationship Condition (5/11/12 Tr. 42 (stating that it was overruling appellant's objections "*for the reason I just gave*" (emphasis added))).[9] Thus, appellant preserved his

[8] This case is factually distinct from *United States v. Malenya*, 736 F.3d 554, 559 (D.C. Cir. 2013), where the Court found a statement in defendant's sentencing memorandum that the suggested release conditions were not "reasonably related to this case" preserved his arguments for appeal. Not only was that objection more specific than that in this case, but the defendant in that case had thought he was engaging in sexual conduct with an adult, who turned out to be a minor, and thus Malenya's arguments that the standard conditions of release for child sex predators were not related or necessary would have been fairly obvious to the court. *See id.* at 236. No similar argument can be entertained here.

[9] It matters not that the district court stated the objections were "preserved," as the court was not sufficiently put on notice as to the

(continued . . .)

objection to the Relationship Condition, but his remaining objections are reviewed for plain error.

C. Analysis

1. The Computer/ Internet Condition

a. General Limitation on Computer and Internet Access

As an initial matter, the district court did not plainly err by imposing limitations on appellant's computer and Internet access because appellant had used a computer and the Internet as the means to initiate and facilitate his crime (see Brief of Appellant at 25-26). He met the UC on a social networking Internet site and transmitted child pornography over the Internet on four different occasions: (1) on June 9, 2011, appellant sent several still images of the child (A.28-29); (2) separately on June 9, appellant sent a secretly-captured video clip of the child (A.29); (3) on June 13, 2011, appellant sent a still photograph

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scope of the objections (5/11/12 Tr. 41). Because appellant specifically objected to both the relationship and the alcohol condition, the court explained its rationale as to both and took corrective action as to the latter condition (5/11/12 Tr. 39-42). Had the court understood that appellant was objecting to all the conditions, it would undoubtedly have addressed those objections on the record as well.

of the child (A.30); (4) separately on June 13, appellant sent 11 images of children, 6 or 7 of which showed children in sexually explicit poses (A.32-33). Further, the final transmission of images was in furtherance of an agreement wherein appellant would watch, over the Internet, the UC have sexual intercourse with the 12-year-old girl (A.33). Thus, the district court's restriction on appellant's computer and Internet usage was directly related to the offense conduct, and was not "out of sync" with the goals of § 3553(a)." *Laureys*, 653 F.3d at 34.

This Court has upheld an almost identical Internet restriction in the past, where the defendant used the Internet to facilitate his crime. In *United States v. Legg*, 713 F.3d 1129 (D.C. Cir. 2013), the defendant also met the UC in a chat room, and agreed to and did travel to Washington, D.C., to engage in sexual conduct with a minor. *Id.* at 1130. This Court upheld a near-identical condition of supervision that "forbade" the defendant "from possessing or using a computer or any online service without prior approval of the probation office" and "limited him to the possession of only one personal Internet-capable device." 713 F.3d at 1131. This Court found no plain error because the defendant "'used' a computer both to 'initiate' and 'facilitate' his

offense." *Id.* at 1132-33; *accord Laureys*, 653 F.3d at 35 (no plain error in either "a total ban on the possession or use of a computer with Internet access without prior approval from the probation office" or less restrictive conditions where the defendant "solicited sex with [the UC's] fictitious daughter online" (citation omitted)).

Likewise, this Court has found no plain error for imposing "qualified Internet bans where, as here, the defendant used a computer for distribution of child pornography." *United States v. Accardi*, 669 F.3d 340, 343, 348 (D.C. Cir. 2012).[10] In *Accardi*, the defendant distributed 13 images of child pornography over the Internet and this Court upheld a restriction on Internet usage, which banned access to any "computer that has access to any online computer service . . . without prior approval of the probation office." 669 F.3d at

[10] Even if this Court finds appellant's objection preserved and reviews for abuse of discretion, the qualified Internet restriction is "eminently reasonable" as this Court held in *Love*, 593 F.3d at 4, 11-12. There too the defendant "not only distributed child pornography but . . . also solicited" the UC regarding sexual acts with a minor. *Id.* (defendant exchanged images with UC and repeatedly stated that he wanted to have sex with the UC's daughter, but did not travel to meet the UC). This Court found a similar Internet restriction was "properly tailored to the circumstances of the offense." *Id.*

343, 348 (discussing disagreement among the circuit courts regarding these restrictions); *see also Sullivan*, 451 F.3d at 886, 892 (no plain error in imposing similarly-worded restriction for possession of child pornography); U.S. Sentencing Guidelines Manual § 5D1.3(d)(7)(B) (2011) ("A condition limiting the use of a computer or an interactive computer service [is recommended] in cases in which the defendant used such items.").[11]

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[11] Given this precedent, appellant's reliance on precedent from other circuits is unavailing (see Brief of Appellant at 26-27). This Court has reviewed those same cases, and after noting the circuit split, has nonetheless upheld such restrictions on both plain error and abuse of discretion review in cases involving distribution of child pornography over the Internet. *Accardi*, 669 F.3d at 348 (no plain error in light of circuit split); *Love*, 593 F.3d at 12 (no abuse of discretion (citing, among other cases, *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009); *United States v. Crume*, 422 F.3d 728 (8th Cir. 2005); *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003))); *Sullivan*, 451 F.3d at 895 (discussing the circuit split and finding no plain error).

In any event, there is "consensus . . . among our sister circuits that Internet bans, while perhaps unreasonably broad for defendants who possess or distribute child pornography, may be appropriate for those who use the Internet to 'initiate or facilitate the victimization of children.'" *Love*, 593 F.3d at 12 (quoting *Holm*, 326 F.3d at 872) (collecting circuit cases). Here, appellant not only traded in child pornography, but created pornography of the child and used the Internet as a means to facilitate further victimization of the child by sending the images of her to the UC and "who knows where else" (5/11/12 Tr. 16). Thus, even the circuits to which appellant cites would

(continued . . .)

Appellant's reliance on *United States v. Malenya*, 736 F.3d 554 (D.C. Cir. 2013), is misplaced. (See Brief of Appellant at 26.) Although *Malenya* involved a similarly-worded restriction on computer and Internet use, *id.* at 557, that case is factually dissimilar. There, the defendant met a minor, who posed as an 18-year-old, on Craigslist.com and then continued the relationship even after discovering the minor's actual age. *Id.* at 555-56. Malenya, however, did not further use the Internet to facilitate his crime. *Id.* Reviewing for abuse of discretion, the Court noted the "ubiquity of computers in modern society and their essentialness" to employment, and found that the "mere possibility that 'the Internet can be used to arrange sexual encounters with minors' is inadequate to justify an Internet restriction." *Id.* at 560 (quoting *United States v. Burroughs*, 613 F.3d 233, 242-43 (D.C. Cir. 2010) (vacating an Internet log-keeping requirement because "Burroughs *did not use a computer to facilitate* his crimes" (emphasis added)). The *Malenya* Court did not address any of the precedents of this Court that have upheld

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(. . . continued)
likely agree that imposition of the qualified Internet restriction here is not plain error.

Internet restrictions in cases like this one, where the defendant used the Internet to "initiate" and "facilitate" his crime. *Legg*, 713 F.3d at 1132-33.

Finally, while the qualified Internet ban may limit appellant's ability to use computers at work (Brief of Appellant at 28), it is not a greater deprivation than necessary. The record is devoid of any factual assertions, or findings, that appellant needs a computer for his work as a mechanic or that the qualified condition, which permits use computers with the Probation Office's approval, is insufficient to permit appellant to use a computer at work.

b. Prior Approval of Probation Office

Nor did the district court plainly err by delegating to the Probation Office the details of appellant's computer and Internet access (5/11/12 Tr. 36-37; A.236).[12] This Court has previously permitted

[12] Appellant proposes "less restrictive conditions" for monitoring his computer activity (at 27), all of which are part of the district court's order: "a computer and Internet monitoring program," "random examinations of computer systems," and removal of devices for "more thorough examination" (5/11/12 Tr. 36-37; A.236). As the district court explained, requiring pre-approval of the Probation Office is necessary "to facilitate [the] ability to monitor [appellant's] internet related (continued . . .)

restrictions that require "prior approval of the [P]robation [O]ffice" for computer and Internet access. *Accardi*, 669 F.3d at 348 (no plain error); *see also Laureys*, 653 F.3d at 35 (no plain error); *Love,* 593 F.3d at 12 (no abuse of discretion); *Sullivan*, 451 F.3d at 896 (no plain error).

> [T]he continuing development of the Internet makes it reasonable for the district court to give the Probation Office broad authority to determine the scope of [the appellant's] permissible Internet use. [Appellant's] term of supervised release will not begin any time soon. Sentencing courts can predict neither the new ways in which child pornography will then be available nor the new technologies the government may use to police its availability. An Internet restriction that today imposes "no greater deprivation of liberty than is reasonably necessary" to deter illegal conduct may, by the time Love is released, be either wholly inadequate or entirely too burdensome. A broad Internet prohibition, which the Probation Office will tailor to the technology in use at the time of Love's release, is an appropriate way to deal with that uncertainty.

Love, 593 F.3d at 12. So too, here, appellant's supervised release will not begin until approximately 2026. The district court did not plainly err in permitting the Probation Office discretion to determine, in 2026, the details of appellant's computer access.

(. . . continued)
activities effectively" (5/11/12 Tr. 36-37; A.236). This Court has previously held that restricting monitoring to one device was reasonable to "effectively monitor [the defendant's] Internet use at reasonable cost." *Legg*, 713 F.3d at 1133.

Appellant argues that the district court violated Article III of the United States Constitution when it delegated to the Probation Office authority to determine which computer and Internet devices appellant may access (see Brief of Appellant at 29). However, this Court permits delegation of the implementation details of a computer and Internet restriction. *See, e.g.*, *Love,* 593 F.3d at 12. Other circuits have upheld similar delegations. *United States v. Ullmann*, 788 F.3d 1260, 1265 (10th Cir. 2015); *United States v. Quinzon*, 643 F.3d 1266, 1274 (9th Cir. 2011). Here, the district court determined that appellant was "limited to possessing only one personal internet capable device" (5/11/12 Tr. 36-37; A.236), and, given this precedent, it was not plain error to delegate to the Probation Office the details of appellant's access and use of that and other devices.[13]

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[13] The cases cited by appellant (at 30-31) from other circuits involve delegations of authority that are factually dissimilar to that at issue in this case. *See, e.g.*, *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) (overturning delegation of decision whether defendant will have *any* mental health treatment); *United States v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001) (vacating order because unclear whether district court intended to delegate participation in mental health program as a whole or simply details); *United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000) (overturning delegation about whether defendant "would undergo counseling"); *United States v. Johnson*, 48 F.3d 806, 807 (4th Cir. 1995)

(continued . . .)

Finally, appellant will have an available remedy to challenge the Probation Office's exercise of its delegated authority. Appellant "remains free throughout his term of supervised release to ask the district court to modify the challenged conditions in light of changed circumstances, which the court is statutorily authorized to do." *Legg,* 713 F.3d at 1134.

2. Computer Pornography Restriction

The district court did not plainly err by imposing conditions on appellant's access to pornography, including adult pornography (5/11/12 Tr. 37; A.236). Appellant had thousands of pornographic video and still images on his computer, including over 100 videos of child pornography (A.33). The district court itself reviewed appellant's collection of pornography, and stated it was "fairly large" and included "identifiable children who have been treated in most repulsive ways" (5/11/12 Tr. 29).

(. . . continued)
(overturning delegation of decision about how much restitution payments will be); *see also United States v. Allen,* 312 F.3d 512 (1st Cir. 2002) (*affirming* delegation of administrative details regarding type of mental health treatment). Even if this Court applied the test described in *Peterson*, as appellant urges (at 30), the delegation here appropriately involves the "details" of appellant's computer and Internet usage. *Peterson*, 248 F.3d at 85.

Moreover, appellant traded pornography online with the UC on four occasions (A.27-33). Given this factual background and the "connection between pornography and sex crimes," a ban on access to all pornographic material is not "plainly out of sync with the statutory goals enumerated in [18 U.S.C.] § 3553(a)." *Laureys*, 653 F.3d at 34 (citing *Amatel v. Reno*, 156 F.3d 192, 199–201 (D.C. Cir. 1998); *United States v. Sebastian*, 612 F.3d 47, 52 (1st Cir. 2010) (noting a possible "link between recidivism of sexual offenders and exposure to pornography")).

This Court has found no plain error regarding similar bans on possession of any pornography in cases involving child pornography possession and distribution. *E.g., Laureys*, 653 F.3d at 34 (no plain error in prohibiting "patroniz[ing] any place where pornography or erotica can be accessed"); *Love*, 593 F.3d at 14 (no plain error in imposing conditions regarding "possession of pornographic materials"); *Sullivan,* 451 F.3d at 895 (no plain error in forbidding possession of any "sexually stimulating materials").

Appellant's reliance on *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001), is unpersuasive. In *Accardi*, this Court addressed *Loy* while

considering whether a restriction on "patroniz[ing] any place where pornography or erotica can be accessed" was so vague as to implicate First Amendment protected activity. 669 F.3d at 347. The Court held, "we do not believe that the district court intended to prevent [the defendant] from going to the library or buying a newspaper" by imposing the restriction and, after differentiating *Loy*, narrowly construed the language of the restriction to "avoid any constitutional problem." *Id.* If this Court determines the district court's restriction on "pornography" is too vague, it can likewise construe the restriction narrowly, by defining pornography as images of "sexually explicit conduct," as defined in 18 U.S.C. § 2256. *See, e.g.*, *United States v. Magner*, 455 F. App'x 131, 135 (2d Cir. 2012) ("[I]n the context of child pornography convictions, the term "pornography" in a condition of supervised release should be interpreted in light of the definition of pornography in 18 U.S.C. § 2256, which is sufficiently clear to defeat the vagueness argument, and . . . restricting access to adult pornography as so defined is permissible in such cases." (citations omitted)).

3. Physiological Testing

a. Appellant's Challenge to Penile Plethysmograph Testing Is Unripe.

Appellant challenges the condition requiring him participate in physiological testing and sex offender treatment, to the extent that it includes penile plethysmograph testing (Brief of Appellant at 32). Appellant's challenge is not ripe for review. The condition imposing testing is part of general "sex offender assessment and treatment," during which the Probation Office will determine the appropriate "therapeutic treatment" (5/11/12 Tr. 38; A.236). It is not clear that appellant will ever be subject to penile plethysmograph testing in 2026 or thereafter, and his challenge is thus unripe.

In *United States v. Lee*, 502 F.3d 447, 450 (6th Cir. 2007), the court dismissed a similar challenge to penile plethysmograph testing as unripe. The court observed that "the [probation] condition implicates only the *potential* use of a penile plethysmograph" and found the challenge unripe because "the occasion may never arise" where the appellant is subject to testing. *Id.* at 450. Noting that the use and efficacy of penile plethysmograph testing had been challenged in other

circuits and that the defendant would be imprisoned for 15 years, the Sixth Circuit determined that the defendant's "rights will be better served if his appeal is preserved until after he is released from prison." *Id.* at 450-51 ("[I]t is unclear whether, by the year 2021, penile plethysmograph testing will still be used.")

The Seventh Circuit adopted that reasoning, finding that the defendant had not established a "concrete and particularized injury" in challenging a similar requirement that he submit to penile plethysmograph testing only if deemed necessary. *United States v. Rhodes*, 552 F.3d 624, 628 (7th Cir. 2009). Given the "fair amount of discretion regarding the techniques to be utilized" during treatment, the appellant could not show a "concrete" injury. *Id.* Moreover, the Seventh Circuit expressly declined to adopt *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006), which appellant urges this Court to adopt (at 33). To do so would require

> addressing a question full of contingency and abstraction founded in an evolving scientific field, perhaps to the detriment of the defendant's rehabilitation—and doing so with an undeveloped trial court record. Experts already disagree as to which evaluation and treatment methods are the most effective, and we would do well to await a more concrete presentation of this issue.

Id. at 628. This Court should likewise find appellant's challenge unripe and decline to consider the validity of this condition on an undeveloped factual record. *But see United States v. Medina*, 779 F.3d 55, 66-67 (1st Cir. 2015) (declining to follow this precedent).

b. No Plain Error in Possible Penile Plethysmograph Testing

If this court were nonetheless to reach appellant's challenge, it should find that the district court did not plainly err in requiring that appellant may, if the Probation Office finds it necessary, be required to undergo penile plethysmograph testing. "[The procedure] has become *routine* in the treatment of sexual offenders and is often imposed as a condition of supervised release." *Weber*, 451 F.3d at 554 (quoting Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 2 (2004)) (emphasis added).[14] The Fourth Circuit held that the "plethysmograph test is 'useful for treatment of sex

[14] "Penile plethysmograph testing is a procedure that 'involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.'" *Id.*

offenders,'" and that a district court "clearly act[s] within its discretion in imposing this condition." *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (citation omitted). The condition furthers several goals of § 3583(d)(3), including providing appellant with "treatment, fostering deterrence, and protecting the public." *Id.*

As appellant explains (at 33), other circuits have questioned the efficacy of penile plethysmograph testing. *See, e.g.*, *Weber*, 451 F.3d at 562, 564 (testing is "not a run-of-the-mill medical procedure," and studies have shown that results may be unreliable); *Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992) ("There has been no showing regarding [plethysmography]'s reliability . . . ."). Some circuits have required the trial court to provide a substantial justification for imposing the condition. *See, e.g.*, *United States v. Bear*, 769 F.3d 1221, 1230-31 (10th Cir. 2014); *Weber*, 451 F.3d at 567. However, as the First Circuit explained, "we, like the Ninth Circuit, are not prepared to 'say categorically that, despite the questions of reliability, [penile plethysmograph] testing can never reasonably' be imposed as a special condition of supervised release." *Medina*, 779 F.3d at 69-70 (quoting *Weber*, 451 F.3d at 556) (alteration in original). *But see United States v.*

McLaurin, 731 F.3d 258, 264 (2d Cir. 2013) (finding the condition violated due process).

Appellant "raises a question of first impression for this [C]ourt which would be inappropriate to address under plain error review." *Accardi*, 669 F.3d at 348. As in *Accardi*, this Court should find that the "district court cannot 'plainly' err on an issue that has so divided the circuits." *Id.* (citing *Sullivan*, 451 F.3d at 895-96).

4. Relationship Condition

The district court did not abuse its discretion in ordering that appellant notify the Probation Office of his "significant romantic relationship" and also "inform the other party of your prior criminal history concerning your sex offenses" (5/11/12 Tr. 40-41; A.236). The district court explained that the basis for this condition was because appellant "was in a significant relationship and used that as a vehicle to prey on a young child" (5/11/12 Tr. 41). On appeal, appellant argues that the condition lacks a "reasonable relation" to the facts of the case and is a greater deprivation than necessary because it is not limited to relationships in which the significant other has children (see Brief of

Appellant at 34-35). Appellant also challenges the condition as "vague" by failing to define "significant romantic relationship" (*id.* at 34).

First, the condition reasonably relates to the facts of the case and furthers the goals of 18 U.S.C. § 3553(a). Here, appellant expressly used his significant romantic relationship with his girlfriend to prey on the child. The court rightfully attempted to deter like future conduct and protect the public by imposing a condition in which appellant's sex-crime history would be known to appellant's significant other. With such knowledge, the significant other would be more likely to watch for any repetition and the likelihood of repetition would naturally decrease.

Moreover, although the condition applies to romantic relationships even when the significant other does not have children, the condition is not a greater deprivation than necessary (see Brief of Appellant at 35). Entry into a romantic relationship typically entails including the significant other in one's friendships and family relationships. Thus, even if appellant's significant other is childless, appellant may well be exposed to children in the significant other's life, including young extended family members and children of friends. The district court did not abuse its "wide discretion" in ordering that the

significant other, who would naturally introduce appellant to extended family and friends, should know about appellant's past use of romantic relationships to prey on children. *Stanfield*, 360 F.3d at 1352-53.

Second, the condition is not vague because people of common intelligence understand what "significant romantic relationship" means. The Fifth Circuit overruled a similar challenge to a restriction about romantic "relationships," finding that "the requirement of romantic involvement provides sufficient specificity to put [the defendant] on notice of when he must notify" the probation office. *United States v. Pennington*, 606 F. App'x 216, 223 (5th Cir.) *cert. denied*, 136 S. Ct. 166 (2015); *see also United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013) (finding no plain error in the face of a challenge on vagueness grounds to the term "dating"). In fact, appellant's own brief notes that the condition applies to his "significant other," a commonly-used term, which shows he understands when the condition applies (Brief of Appellant at 35). Moreover, appellant "may consult with his probation officer or, as appropriate, the district court regarding the proper construction of th[e] terms should [he] disagree with how they are applied in practice by the probation officer." *Malenya*, 736 F.3d at 565

(Kavanaugh, J., dissenting) (*citing United States v. Forde*, 664 F.3d 1219, 1224–25 (8th Cir. 2012)).

United States v. Reeves, 591 F.3d 77, 81 (2nd Cir. 2010), is unpersuasive (see Brief of Appellant at 34-35). *Reeves* was a child-pornography case where there was no evidence that the defendant used a romantic relationship to prey on a child, as appellant did here. *Id.* at 79-80. In any event, the Second Circuit, in finding the term "significant romantic relationship" vague, cited movies, operas, and novels for the proposition that "[t]he history of romance is replete with precisely these blurred lines and misunderstandings." *Reeves*, 591 F.3d at 81. "However, while the line between friendship and romance may not be immediately clear to a moviegoer, or even to the target of affections, [the defendant] should know when he intends to become romantically involved with another person." *Pennington*, 606 F. App'x at 223.[15]

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[15] Should this Court disagree, remand "would afford the district judge the opportunity to define the term 'significant romantic relationship' in a way that might eliminate the vagueness objection altogether." *United States v. Orozco*, 371 F. App'x 188, 191 (2d Cir. 2010); *see also, e.g.*, *Newcomb v. Belleque*, No. 3:09-CV-936-HU, 2012 WL 1758639, at *8 (D. Or. Jan. 23, 2012) report and recommendation adopted, No. 3:09-CV-00936-HU, 2012 WL 1755678 (D. Or. May 15, 2012)("'Dating relationship', as used in Special Condition 10 is sufficiently precise to

(continued . . .)

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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(. . . continued)
give a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited; and prevents a parole officer from exercising arbitrary discretion.").

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I HEREBY CERTIFY pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 11,679 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1), and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/
KAREN P. SEIFERT
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief of Appellee to be served by electronic means, through the Court's CM/ECF system, upon counsel for appellant, Jonathan Jeffress, Esq., Assistant Federal Public Defender, 625 Indiana Avenue, NW, Suite 550, Washington, D.C., 20004, on this 29th day of March, 2016.

/s/
KAREN P. SEIFERT
Assistant United States Attorney

ADDENDUM FOR APPELLEE

INDEX

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2252

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

Effective: December 7, 2012
Currentness

(a) Any person who--

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or

foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative defense.--It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

CREDIT(S)

(Added Pub.L. 95-225, § 2(a), Feb. 6, 1978, 92 Stat. 7; amended Pub.L. 98-292, § 4, May 21, 1984, 98 Stat. 204; Pub.L. 99-500, Title I, § 101(b) [Title VII, § 704(b)], Oct. 18, 1986, 100 Stat. 1783-75; Pub.L. 99-591, Title I, § 101(b) [Title VII, § 704(b)], Oct. 30, 1986, 100 Stat. 3341-75; Pub.L. 100-690, Title VII, § 7511(b), Nov. 18, 1988, 102 Stat. 4485; Pub.L. 101-647, Title III, § 323(a), (b), Nov. 29, 1990, 104 Stat. 4818, 4819; Pub.L. 103-322, Title XVI, § 160001(d), (e), Title XXXIII, § 330010(8), Sept. 13, 1994, 108 Stat. 2037, 2143; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[5]], Sept. 30, 1996, 110 Stat. 3009-30; Pub.L. 105-314, Title II, §§ 202(a), 203(a), Oct. 30, 1998, 112 Stat. 2977, 2978; Pub.L. 108-21, Title I, § 103(a)(1)(B), (C), (b)(1)(C), (D), Title V, § 507, Apr. 30, 2003, 117 Stat. 652, 653, 683; Pub.L. 109-248, Title II, § 206(b)(2), July 27, 2006, 120 Stat. 614; Pub.L. 110-358, Title I, § 103(a)(3), (b), (c), Title II, § 203(a), Oct. 8, 2008, 122 Stat. 4002, 4003; Pub.L. 112-206, § 2(a), Dec. 7, 2012, 126 Stat. 1490.)

Notes of Decisions (408)

18 U.S.C.A. § 2252, 18 USCA § 2252
Current through P.L. 114-115 (excluding 114-94 and 114-95) approved 12-28-2015

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2256

§ 2256. Definitions for chapter

Effective: October 13, 2008
Currentness

For the purposes of this chapter, the term--

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) [1] of this section, "sexually explicit conduct" means--

(i) graphic sexual intercourse, including genital-genital, oral- genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"--

(A) means a person--

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

CREDIT(S)

(Added Pub.L. 95-225, § 2(a), Feb. 6, 1978, 92 Stat. 8, § 2253; renumbered § 2255 and amended Pub.L. 98-292, § 5, May 21, 1984, 98 Stat. 205; renumbered § 2256, Pub.L. 99-500, Title I, § 101(b) [Title VII, § 703(a)], Oct. 18, 1986, 100 Stat. 1783-74; Pub.L. 99-591, Title I, § 101(b) [Title VII, § 703(a)], Oct. 30, 1986, 100 Stat. 3341-74; amended Pub.L. 99-628, § 4, Nov. 7, 1986, 100 Stat. 3510; Pub.L. 100-690, Title VII, §§ 7511(c), 7512(b), Nov. 18, 1988, 102 Stat. 4485 to 4487; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[2]], Sept. 30, 1996, 110 Stat. 3009-27; Pub.L 108-21, Title V, § 502(a) to (c), Apr. 30, 2003, 117 Stat. 678, 679; Pub.L. 110-401, Title III, § 302, Oct. 13, 2008, 122 Stat. 4242.)

Notes of Decisions (65)

Footnotes

1 So in original. Probably should be "(8)(B)".

18 U.S.C.A. § 2256, 18 USCA § 2256

Current through P.L. 114-115 (excluding 114-94 and 114-95) approved 12-28-2015

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted **Held Unconstitutional by** U.S. v. Booker, U.S., Jan. 12, 2005

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: May 27, 2010
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera

in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216.)

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). >

Notes of Decisions (2256)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 114-115 (excluding 114-94 and 114-95) approved 12-28-2015

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3583

§ 3583. Inclusion of a term of supervised release after imprisonment

Effective: May 29, 2015
Currentness

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release.--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA

sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.--If the defendant--

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

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

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

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

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.--When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a 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.

(i) Delayed revocation.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary

for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates.--Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1999; amended Pub.L. 99-570, Title I, § 1006(a)(1) to (3), Oct. 27, 1986, 100 Stat. 3207-6, 3207-7; Pub.L. 99-646, § 14(a), Nov. 10, 1986, 100 Stat. 3594; Pub.L. 100-182, §§ 8, 9, 12, 25, Dec. 7, 1987, 101 Stat. 1267, 1268, 1272; Pub.L. 100-690, Title VII, §§ 7108, 7303(b), 7305(b), Nov. 18, 1988, 102 Stat. 4418, 4419, 4464 to 4466; Pub.L. 101-647, Title XXXV, § 3589, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title II, § 20414(c), Title XI, § 110505, Title XXXII, § 320921(c), Sept. 13, 1994, 108 Stat. 1831, 2016, 2130; Pub.L. 105-119, Title I, § 115(a)(8)(B)(iv), Nov. 26, 1997, 111 Stat. 2465; Pub.L. 106-546, § 7(b), Dec. 19, 2000, 114 Stat. 2734; Pub.L. 107-56, Title VIII, § 812, Oct. 26, 2001, 115 Stat. 382; Pub.L. 107-273, Div. B, Title II, § 2103(b), Title III, § 3007, Nov. 2, 2002, 116 Stat. 1793, 1806; Pub.L. 108-21, Title I, § 101, Apr. 30, 2003, 117 Stat. 651; Pub.L. 109-177, Title II, § 212, Mar. 9, 2006, 120 Stat. 230; Pub.L. 109-248, Title I, § 141(e), Title II, § 210(b), July 27, 2006, 120 Stat. 603, 615; Pub.L. 110-406, § 14(b), Oct. 13, 2008, 122 Stat. 4294; Pub.L. 114-22, Title I, § 114(d), May 29, 2015, 129 Stat. 242.)

Notes of Decisions (731)

18 U.S.C.A. § 3583, 18 USCA § 3583
Current through P.L. 114-115 (excluding 114-94 and 114-95) approved 12-28-2015

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
IV. Arraignment and Preparation for Trial

Federal Rules of Criminal Procedure, **Rule 11**

Rule 11. Pleas

Currentness

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a **sentence**, the court's obligation to calculate the applicable **sentencing**-guideline range and to consider that range, possible departures under the **Sentencing** Guidelines, and other **sentencing** factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the **sentence**; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular **sentence** or **sentencing** range is appropriate or that a particular provision of the **Sentencing** Guidelines, or policy statement, or **sentencing** factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific **sentence** or **sentencing** range is the appropriate disposition of the case, or that a particular provision of the **Sentencing** Guidelines, or policy statement, or **sentencing** factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in **Rule 11**(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in **Rule 11**(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in **Rule 11**(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in **Rule 11**(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes **sentence** if:

(A) the court rejects a plea agreement under **Rule 11**(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes **sentence**, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under **Rule 11**(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

CREDIT(S)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7076, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 16, 2013, eff. Dec. 1, 2013.)

ADVISORY COMMITTEE NOTES

1944 Adoption

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. § 564 (Standing mute); Fogus v. United States, 34 F.2d 97, C.C.A.4th, (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts. *Hudson v. United States*, 47 S.Ct. 127, 272 U.S. 451, 71 L.Ed. 347; *United States v. Norris*, 50 S.Ct. 424, 281 U.S. 619, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. former (now § 3651) 724. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

1966 Amendments

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
IX. General Provisions

Federal Rules of Criminal Procedure, Rule 52

Rule 52. Harmless and Plain Error

Currentness

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

CREDIT(S)

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

ADVISORY COMMITTEE NOTES

1944 Adoption

Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C. former § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U.S.C. former § 556; "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *." A similar provision is found in rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (b). This rule is a restatement of existing law, *Wiborg v. United States*, 16 S.Ct. 1127, 1197, 2 cases, 163 U.S. 632, 658, 41 L.Ed. 289; *Hemphill v. United States*, 112 F.2d 505, C.C.A.9th, reversed 312 U.S. 657, 85 L.Ed. 1106, 61 S.Ct. 729, conformed to 120 F.2d 115, certiorari denied 62 S.Ct. 111, 314 U.S. 627, 86 L.Ed. 503. Rule 27 of the Rules of the Supreme Court, 28 U.S.C., formerly following § 354, provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

2002 Amendments

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52(b) has been amended by deleting the words "or defect" after the words "plain error." The change is intended to remove any ambiguity in the rule. As noted by the Supreme Court, the language "plain error or defect" was misleading to the extent that it might be read in the disjunctive. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(b) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n. 12 (1985) (use of disjunctive in Rule 52(b) is misleading).

Notes of Decisions (4759)

Fed. Rules Cr. Proc. Rule 52, 18 U.S.C.A., FRCRP Rule 52
Including Amendments Received Through 2-1-16

End of Document

4. *Factors Considered.—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. See 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.*

5. *Early Termination and Extension.—The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.*

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 52); November 1, 1989 (see Appendix C, amendment 302); November 1, 1995 (see Appendix C, amendment 529); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 637 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2005 (see Appendix C, amendment 679); November 1, 2007 (see Appendix C, amendment 701); November 1, 2009 (see Appendix C, amendment 736); November 1, 2011 (see Appendix C, amendment 756).

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions--

(1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

(4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any

individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));

(5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;

(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

(d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States

Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) --

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

(2) Home Detention

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

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. *Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of*

enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 276, 277, and 302); November 1, 1997 (see Appendix C, amendment 569); November 1, 1998 (see Appendix C, amendment 584); November 1, 2000 (see Appendix C, amendment 605); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 644 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701 and 711); November 1, 2009 (see Appendix C, amendment 733).