

Supervised Release: Imposition & Revocation

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Discussion Outline

- **Data Review**
- **“Front End” Sentencing**
 - Statutory Provisions
 - 2011 USSG Provisions
- **“Back End” Issues
(Revocation/Sentencing)**

USSC Data

Post-Booker FY2005 – FY2011

- 527,121 Total Cases – 88.4% received a prison term imposed (54-month average sentence)
- 94.4% of those who received a term of imprisonment also received a term of supervised release (41-month average term)
- 99.1% of those not facing a mandatory term of SR under a *statute* but who had an “advisory” SR term under the *guidelines* received a term of SR (35-month average term)

Criminal History Category for Offenders Sentenced to Supervised Release

U.S. Sentencing Commission Data

Post-Booker Fiscal Year 2005 - Fiscal Year 2011

Criminal History Category	Total Cases	Prison Term Imposed		Supervised Release Imposed		Average Prison Term	Average Supervised Release Term
		Number	Percent	Number	Percent	Months	Months
Total	462,068	416,752	90.2	400,586	96.2	58	42
I	210,611	173,212	82.2	164,603	95.1	45	42
II	56,763	52,891	93.2	50,173	95.0	49	40
III	74,323	71,614	96.4	68,839	96.2	52	41
IV	45,331	44,603	98.4	43,430	97.4	59	41
V	27,064	26,769	98.9	26,337	98.4	70	41
VI	47,976	47,663	99.3	47,204	99.1	116	49

Statutory Provisions

18 U.S.C § 3583(a)

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 [unless otherwise required by statute].

18 U.S.C. 3583(c)

- In determining the length of the term and the conditions of supervised release, the court shall consider the following factors:
 - 18 U.S.C. 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), (a)(7)

18 U.S.C. 3583(c) (cont.)

Note that 18 U.S.C. 3553(a)(2)(A) is not one of the factors.

- (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

Statutory vs. Discretionary Imposition

Statutorily Mandated

- Drug-trafficking offenses
- Kidnapping of a minor victim and child sex offenses including any child pornography offenses (including possession)
- Certain sex offenses involving a victim of any age
- Certain crimes of domestic violence
- Terrorism-related offenses - 18 U.S.C. § 2332b(g)(5)(B)
- EVERYTHING ELSE IS DISCRETIONARY

Relief from Statutorily Mandated Supervised Release

- 18 U.S.C. § 3553(e)
 - “Substantial Assistance”

- 18 U.S.C. § 3553(f)
 - “Safety Valve”

USSG, Chapter 5

United States v. Booker

-Before *Booker*, USSG §§5D1.1(a) & 5D1.2(a) were mandatory in nature.

-Since *Booker*, these provisions, like any other USSG provision, are “advisory.”

2011 Guidelines

(effective November 1, 2011)

§5D1.1. Imposition of a Term of Supervised Release

(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (see 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

§5D1.1 (n.1)

- court may “depart” and not impose SR in cases where the court imposes a prison sentence of more than one year if SR term is not required by statute and after considering purposes in application note 3

§5D1.1 (n.3)

- 3. Factors to Be Considered.—

- (A) *Statutory Factors.*—*In determining whether to impose a term of supervised release [where not required by statute], the court is required by statute to consider, among other factors:*

- *(i) the nature and circumstances of the offense and the history and characteristics of the defendant;*
- *(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;*
- *(iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*
- *(iv) the need to provide restitution to any victims of the offense.*

§5D1.1 (factors continued)

- (B) Criminal History.—*The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.*
- (C) Substance Abuse.—*In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).*

§5D1.1(c) (n.5)

- Application of Subsection (c)

- *In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release... The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.*

“Split Sentences” - §5D1.1(c) (n.4)

- Zone B
 - may substitute SR with a condition that substitutes community confinement or home detention for a portion of the term of incarceration, provided that at least one month of the minimum term is satisfied by imprisonment
- Zone C
 - Minimum term of incarceration may be satisfied by sentence of imprisonment followed by term of SR with condition that substitutes community confinement or home detention for a portion of the imprisonment... at least one-half of minimum term must be satisfied by imprisonment.

2011 Guidelines

(continued)

§5D1.2. Term of Supervised Release [note changes from prior version]

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

- (1) At least ~~three~~two years but not more than five years for a defendant convicted of a Class A or B felony. See 18 U.S.C. § 3583(b)(1).
- (2) At least ~~two~~one year but not more than three years for a defendant convicted of a Class C or D felony. See 18 U.S.C. § 3583(b)(2).
- (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. See 18 U.S.C. § 3583(b)(3).

2011 Guidelines

(continued)

- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense and may be up to life, if the offense is --
 - (1) any offense in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
 - (2) a sex offense [*including any child pornography offenses*] .
- (Policy Statement) If the instant offense is a sex offense, however, the statutory maximum term of supervised release is recommended. . . .

§5D1.2 (n.4)

Determining the Length Of SR

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.

§5D1.2 (n.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.

Conditions of Supervised Release

- Mandatory conditions
- Discretionary conditions
 - Search and seizure
- Commonly challenged conditions
 - Sex offenders
- Local district rules

Chapter 7: Violations of Probation and Supervised Release

- Service of a Term of Supervised Release
 - Commencement
 - Tolling
- Modification, Early Termination, and Revocation of Supervised Release

Chapter 7 (continued)

• Commencement

- Supervised release begins the day that the offender is released from imprisonment (including into community-based facilities, such as a halfway house – unless the defendant is serving the final portion of his *prison* sentence in such facilities).

Chapter 7 (continued)

• Tolling

• If, while on supervised release, an offender is required to serve a sentence of “imprisonment” in connection with a separate criminal offense, the time served does not count towards the service of supervised release unless the sentence is less than 30 days.

Chapter 7 (continued)

- Modification of SR
 - Authorized by 18 U.S.C. § 3583(e)
 - Hearing not required if agreed upon by parties

- Court may extend the term of supervision (after a hearing or by consent of the defendant) only “if less than the maximum authorized term was previously imposed.”

Chapter 7 (continued)

- **Early Termination of Supervised Release**

- 18 U.S.C. § 3583(e)(1) authorizes the court to terminate an offender's term of supervised release "at any time after the expiration of one year of supervised release...if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice."

Chapter 7 (continued)

Revocation and Sentencing Proceedings

- Procedural issues
- Mandatory grounds for revocation
- Sentencing following revocation
- Delayed revocation

Procedural Issues

- Petition must be filed by probation officer or the government
 - Court may issue a summons or an arrest warrant
- Offender must go before the court “without unnecessary delay”
 - May be released on bail pending revocation hearing
- If probable cause found, court “must hold the revocation hearing within a reasonable time...”
- Rules of evidence do not apply (although some courts have ruled, as a constitutional matter, that hearsay is inadmissible under some circumstances)

Mandatory Grounds for Revocation

Statutory Provisions

18 U.S.C. § 3583(g)

- **When an offender**

- Possesses a controlled substance (some circumstances)

- Limited exceptions

- Unlawfully possesses a firearm

- Refuses to comply with drug testing imposed as a condition of supervised release

- Has four positive drug tests over the course of one year

Mandatory Grounds for Revocation

Guidelines Provisions

§§7B1.1 – 7B1.3

- Grade A or B violation
 - “upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release”
- Grade C violation
 - upon a finding of a Grade C violation, the court “may” revoke probation or supervised release

Mandatory Grounds for Revocation

•Guidelines Provisions

•Grade A violation

- Federal , state, or local offenses punishable by more than one year of imprisonment, which constitute crimes of violence or drug trafficking offenses or involve possession of a firearm or destructive device

•Grade B violation

- Any other federal, state, or local offenses punishable by more than one year of imprisonment

•Grade C violation

- Federal, state, or local offenses punishable by one year or less in prison or a violation of any other condition of supervision

Mandatory Grounds for Revocation

•Guidelines Provisions

Although USSG §7B1.3 is written in mandatory terms (“the court shall revoke”) for Grade A and B violations, Chapter Seven contains only non-binding policy statements.

Sentencing Following Revocation

Common issues facing the court after revocation:

(1) the maximum length of a prison sentence that the court may impose

(2) the amount of any “recommenced” supervised release to follow imprisonment that the court may impose

Sentencing Following Revocation

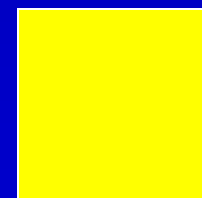
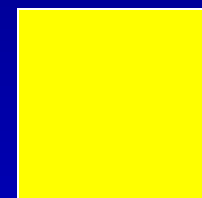
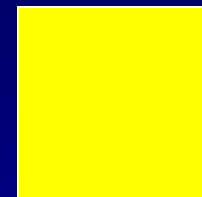
18 U.S.C. § 3583(e)(3)

- Class A felony
 - Not more than 5 years
- Class B felony
 - Not more than 3 years
- Class C or D felony
 - Not more than 2 years
- Not more than one year in any other case...

Determining the Term of Supervised Release Available Upon Revocation Pre-Crime Bill

Original offense prior to 9/13/94

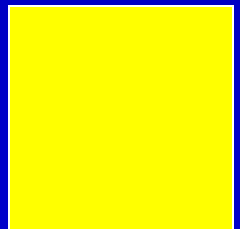
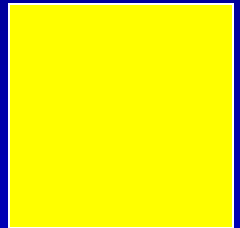
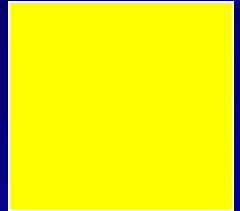
1. Determine the length of the current supervised release term being revoked (NOTE: Court may first extend term to statutory maximum (§3583(e)(2)))
2. Subtract the amount of imprisonment to be imposed (in addition to any term of imprisonment imposed on prior revocation of the supervised release) upon revocation
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



Determining the Term of Supervised Release Available Upon Revocation Post-Crime Bill

Original offense on/after 9/13/94 through 4/29/03

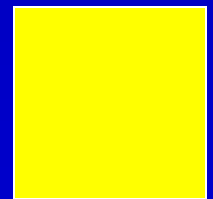
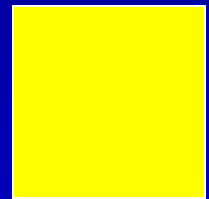
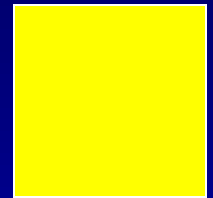
1. Determine the statutorily authorized maximum imprisonment available upon revocation (§ 3583(e)(3))
2. Subtract the amount of imprisonment to be imposed (in addition to any term of imprisonment imposed on prior revocation of the supervised release) upon revocation
3. If the difference is greater than zero an additional term of supervised release can be imposed



Determining the Term of Supervised Release Available Upon Revocation Post-PROTECT Act

Original offense on/after 4/30/03

1. Determine the statutorily authorized maximum term of supervised release available for the original offense
2. Subtract the amount of imprisonment to be imposed upon revocation (without regard to any term of imprisonment imposed on prior revocation of the supervised release)
3. The difference is the maximum term of supervised release that can be imposed upon revocation of supervised release



Follow-up Questions and Discussion

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