

APPENDIX A

United States v. Quintela-Galindo,
Nos. 18-50957, 18-50958, unpub. op.
(5th Cir. Aug. 13, 2019)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-50957
c/w No. 18-50958
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 13, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FERNANDO QUINTELA-GALINDO

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas
USDC No. 4:13-CR-488-3
USDC No. 4:18-CR-211-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Fernando Quintela-Galindo appeals the sentence imposed following the revocation of his supervised release. He challenges the substantive reasonableness of his 24-month term of imprisonment, which fell within the range of the guidelines policy statement and which was ordered to run

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-50957
c/w No. 18-50958

consecutively with the sentence imposed for the new law violation of aiding and abetting possession with intent to distribute marijuana.

Sentences imposed upon revocation of supervised release are reviewed under 18 U.S.C. § 3742(a)(4)'s "plainly unreasonable" standard, which is more deferential than the reasonableness standard applicable to sentences imposed upon conviction. *See United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013). The district court heard Quintela-Galindo's mitigating arguments and concluded that a consecutive, within-guidelines sentence of 24 months was appropriate. His arguments here amount to a disagreement with the district court's balancing of the 18 U.S.C. § 3553(a) sentencing factors and decision to run the sentences consecutively. This court will not reweigh those factors. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Further, he cannot establish any error in connection with the district court's decision to impose consecutive sentences. *See United States v. Cotroneo*, 89 F.3d 510, 512 (5th Cir. 1996); *see also* U.S.S.G. § 7B1.3(f), p.s. Quintela-Galindo has not overcome the presumption of reasonableness that applies. *See United States v. Lopez-Velasquez*, 526 F.3d 804, 808-09 (5th Cir. 2008). The district court's revocation sentence is affirmed (No. 18-50957).

Although Quintela-Galindo appealed the judgment on the new law violation, he raises no challenge to that conviction or sentence, citing the appeal waiver in his plea agreement. Thus, the judgment underlying that appeal (No. 18-50958) is likewise affirmed. Quintela-Galindo's pro se motion for appointment of new counsel which, on its face, is labeled "ex parte," is stricken for failure to comply with Federal Rule of Appellate Procedure 25(b) and (d) requiring service of all filings and proof thereof. Alternatively, it is denied as untimely. *See United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998).

No. 18-50957
c/w No. 18-50958

AFFIRMED; MOTION TO APPOINT NEW COUNSEL STRICKEN.

APPENDIX B

18 U.S.C. § 3553(a)



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Held Unconstitutional by [U.S. v. Hecht](#), 4th Cir.(S.C.), Dec. 04, 2006



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: December 21, 2018

[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](#)), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or [section 70503 or 70506 of title 46](#), 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--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, 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.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term “violent offense” means a crime of violence, as defined in [section 16](#), that is punishable by imprisonment.

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; [Pub.L. 115-391, Title IV, § 402\(a\)](#), Dec. 21, 2018, 132 Stat. 5221.)

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 \(2650\)](#)

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. 116-5.

End of Document

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APPENDIX C

U.S.S.G. §7B1.3, p.s.
and
U.S.S.G. §7B1.4, p.s.



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [U.S. v. Detwiler](#), D.Or., Oct. 05, 2004

[United States Code Annotated](#)

[Federal Sentencing Guidelines \(Refs & Annos\)](#)

[Chapter Seven. Violations of Probation and Supervised Release \(Refs & Annos\)](#)

[Part B. Probation and Supervised Release Violations \(Refs & Annos\)](#)

USSG, § 7B1.3, 18 U.S.C.A.

§ 7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

[Currentness](#)

- (a)(1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.
- (2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.
- (b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in [§ 7B1.4](#) (Term of Imprisonment).
- (c) In the case of a Grade B or C violation--
- (1) Where the minimum term of imprisonment determined under [§ 7B1.4](#) (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in [§ 5C1.1\(e\)](#) for any portion of the minimum term; and
- (2) Where the minimum term of imprisonment determined under [§ 7B1.4](#) (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in [§ 5C1.1\(e\)](#), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.
- (d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under [§ 7B1.4](#) (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under [18 U.S.C. § 3585\(b\)](#), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

(g)(1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§ [5D1.1-1.3](#) shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from 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. [18 U.S.C. § 3583\(h\)](#).

CREDIT(S)

(Effective November 1, 1990; amended effective November 1, 1991; November 1, 1995; November 1, 2002; November 1, 2004; November 1, 2009.)

COMMENTARY

<Application Notes:>

<1. Revocation of probation or supervised release generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on supervision after a finding of violation, again violates the conditions of his supervision.>

<2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in [18 U.S.C. § 3583\(e\), \(g\)-\(i\)](#). Under [18 U.S.C. § 3583\(h\)](#) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.>

<3. Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding. Example: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4-10 months, and determines that revocation of probation and imposition of a term of imprisonment of four months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Bureau of Prisons, under [18 U.S.C. § 3585\(b\)](#), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.>

<4. Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.>

<5. Intermittent confinement is authorized as a condition of probation during the first year of the term of probation. [18 U.S.C. § 3563\(b\)\(10\)](#). Intermittent confinement is authorized 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).>

Notes of Decisions (29)

Footnotes

- * “ Note: [Section 3583\(d\) of title 18, United States Code](#), provides that ‘[t]he court may order, as a further condition of supervised release ... any condition set forth as a discretionary condition of probation in [section 3563\(b\)\(1\)](#) through [\(b\)\(10\)](#) and [\(b\)\(12\)](#) through [\(b\)\(20\)](#), and any other condition it considers to be appropriate.’ [Subsection \(b\)\(11\) of section 3563 of title 18, United States Code](#), is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at [18 U.S.C. 3563\(b\)\(11\)](#) was intermittent confinement. The Act deleted [18 U.S.C. 3563\(b\)\(2\)](#), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in [18 U.S.C. 3563\(b\)](#); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

Federal Sentencing Guidelines, § 7B1.3, 18 U.S.C.A., FSG § 7B1.3

As amended to 7-12-19.



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [U.S. v. Detwiler](#), D.Or., Oct. 05, 2004

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Seven. Violations of Probation and Supervised Release (Refs & Annos)

Part B. Probation and Supervised Release Violations (Refs & Annos)

USSG, § 7B1.4, 18 U.S.C.A.

§ 7B1.4. Term of Imprisonment (Policy Statement)

Currentness

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table

(in months of imprisonment)

Criminal History Category^{*}

Grade of

Violation	I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1) Except as provided in subdivision (2) below:					
	12-18	15-21	18-24	24-30	30-37	33-41
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
	24-30	27-33	30-37	37-46	46-57	51-63.

(b) *Provided, that--*

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence--

(A) is not greater than the maximum term of imprisonment authorized by statute; and

(B) is not less than any minimum term of imprisonment required by statute.

CREDIT(S)

(Effective November 1, 1990; amended November 1, 1995; November 1, 2010.)

COMMENTARY

<Application Notes:>

<1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (See the criminal history provisions of §§ 4A1.1-4B1.4.)>

<2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.>

<3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.>

<4. Where the original sentence was the result of a downward departure (e.g., as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.>

<5. Upon a finding that a defendant violated a condition of probation or supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation or supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).>

<6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).>

[Notes of Decisions \(77\)](#)

Footnotes

* The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision. Federal Sentencing Guidelines, § 7B1.4, 18 U.S.C.A., FSG § 7B1.4
As amended to 7-12-19.

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