

APPENDIX A

(Judgment and Opinion of the United States Court of Appeals for the
Fifth Circuit)

United States v. Payton

United States Court of Appeals for the Fifth Circuit

May 18, 2020, Filed

No. 19-10360

Reporter

959 F.3d 654 *; 2020 U.S. App. LEXIS 15871 **

UNITED STATES OF AMERICA, Plaintiff - Appellee v. WILLIAM JAMES PAYTON, Defendant - Appellant

Prior History: [**1] Appeal from the United States District Court for the Northern District of Texas.

United States v. Patterson, 2018 U.S. Dist. LEXIS 156515 (N.D. Tex., Aug. 29, 2018)

Disposition: AFFIRMED.

Case Summary

Overview

HOLDINGS: [1]-The Sentencing Commission reasonably concluded that adequate supervision may at times require the imposition of this standard condition, that defendant permit a probation officer to visit him at his home or elsewhere as specified by the court; [2]-As to defendant, the district court implicitly found that adequate supervision required this standard-visitation condition, which, as imposed here, reasonably related to the statutory factors set forth in [18 U.S.C.S. § 3553\(a\)](#); [3]-The condition of supervised release had to be narrowly tailored such that it did not involve a greater deprivation of liberty than was reasonably necessary, but the liberty rights of parolees, though, were limited compared to an average citizen.

Outcome

Judgment affirmed.

Counsel: For United States of America, Plaintiff - Appellee: Amber Michelle Grand, Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX; Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For William James Payton, Defendant - Appellant: William Reynolds Biggs, Fort Worth, TX.

Judges: Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

Opinion by: LESLIE H. SOUTHWICK

Opinion

[*655] LESLIE H. SOUTHWICK, Circuit Judge:

The defendant pled guilty to interference with commerce by robbery and to brandishing a firearm during a crime of violence in violation of 18 U.S.C. §§ 2, 1951(a), and 924(c)(1)(A)(ii). On appeal, the defendant challenges as substantively unreasonable the imposition of a standard condition of supervised release requiring him to "permit a probation officer to visit at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer." We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2018, William James Payton and two other men robbed a Sprint store in Fort Worth, Texas. During the robbery, Payton pointed a .380-caliber handgun at individuals **[**2]** inside the store. The robbers obtained \$94 cash and 41 cell phones, but police soon apprehended them.

Payton pled guilty to interference with commerce by robbery and to brandishing a firearm during a crime of violence. Following his guilty plea, a probation officer prepared a presentence investigation report ("PSR"). The PSR calculated a total offense level of 22. The probation officer calculated six points of criminal history based on Payton's prior offenses, including: multiple convictions for possession of **[*656]** marijuana, theft of merchandise worth \$499, attempted burglary, carrying a concealed weapon, resisting arrest, making terrorist threats, and an unlawful transaction with a minor. The PSR identified multiple probation revocations and multiple pending convictions for Payton, one of which resulted in the revocation of his pretrial release in this case. Payton's six criminal history points placed him in criminal history category III. The resulting advisory

sentencing range was 51 to 63 months of imprisonment for the robbery conviction and 84 months for the firearm conviction.

The district court sentenced Payton to 135 months of imprisonment. This sentence included 51 months for the [**3] robbery conviction and 84 months for the firearm conviction. The district court further imposed a three-year term of supervised release and ordered Payton to comply with the standard conditions of supervised release. Payton objected to the reasonableness of the standard condition permitting a probation officer to visit him at any time at home or elsewhere and permitting confiscation of any contraband the probation officer observes in plain sight. The district court overruled the objection. Payton timely appealed.

I. Ripe ness

DISCUSSION

The Government argues that Payton's claim is not ripe. Ripe ness is a jurisdictional issue that we review *de novo*. *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). "A claim is not ripe for review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (quotation marks omitted). "A court should dismiss a case for a lack of ripe ness when the case is abstract or hypothetical." *Greenstein*, 691 F.3d at 715.

We have previously held that "[i]f the strictures of a condition are patently mandatory — *i.e.*, their imposition is not contingent on future events — then a defendant's challenge to that condition is ripe for review on appeal." *United States v. Magana*, 837 F.3d 457, 459 (5th Cir. 2016) (quotation marks omitted). The relevant condition [**4] here requires Payton to "permit a probation officer to visit [him] at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer." The application of this condition does not involve speculation because upon the beginning of supervised release it will immediately be in effect. The challenge is ripe for judicial review.

II. Substantive reasonableness of the condition of probation

Because Payton objected to the imposition of the condition, we review his substantive reasonableness challenge for an abuse of discretion. *United States v. Ellis*, 720 F.3d 220, 224 (5th Cir. 2013). "District courts have wide discretion in imposing conditions of supervised release." *United States v. Dean*, 940 F.3d 888, 891 (5th Cir. 2019). Indeed, a district court "may impose any condition of supervised release it considers to be appropriate" if the condition comports with the requirements of 18 U.S.C. § 3583(d). See *United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009). Accordingly, a condition of supervised release must reasonably relate to one of four factors:

- (1) the nature and characteristics of the offense and the history and characteristics of the defendant,
- (2) the deterrence of criminal conduct,
- (3) the protection of the public from further crimes of the [**657] defendant, and
- (4) the provision of needed educational or vocational training, [**5] medical care, or other correctional treatment to the defendant.

Id. (citing 18 U.S.C. §§ 3583(d)(1), 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D)).

Additionally, the condition must be narrowly tailored such that it does not involve a "greater deprivation of liberty than is reasonably necessary to advance deterrence, protect the public from the defendant, and advance the defendant's correctional needs." *Id.* (citing [§ 3583\(d\)\(2\)](#), [3553\(a\)\(2\)\(B\)](#), [\(a\)\(2\)\(C\)](#), [\(a\)\(2\)\(D\)](#)). Payton does not argue that the standard condition is not reasonably related to these statutory factors. Instead, he argues the standard condition is unreasonably broad — and therefore not narrowly tailored — for two reasons. His argument is that the phrase "at any time" improperly provides no temporal limitation on when a probation officer may conduct a visit, and, second, the "at home or elsewhere" language provides no limitation on the location of any meeting. Payton contends this condition requires him "to be available to meet with his probation officer at any place and at any time, day or night." Payton relies on Seventh Circuit cases that remanded for resentencing sentences involving nearly identical conditions of supervised release as the standard-visitation condition. *See United States v. Henry*, 813 F.3d 681 (7th Cir. 2016); *United States v. Poulin*, 809 F.3d 924 (7th Cir. 2016); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015); *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015). But *see United States v. Muñoz*, 812 F.3d 809, 821-22 (10th Cir. 2016) (upholding the imposition of [\[**6\]](#) a nearly identical standard condition of supervised release); *United States v. Clarke*, 428 F. App'x 712, 713 (9th Cir. 2011) (same).

Our analysis begins with the statutory authority for the imposition of supervised release, which is found in [18 U.S.C. § 3583](#). In turn, [Section 3583\(d\)](#) incorporates as possible conditions of supervised release the conditions of probation listed in [Section 3563](#). The list includes 23 discretionary conditions that sentencing courts may impose. [§ 3563\(b\)](#). One of the suggested conditions is that the defendant "permit a probation officer to visit him at his home or elsewhere as specified by the court." [§ 3563\(b\)\(16\)](#).

The discretionary conditions listed in [Section 3563](#) are similar to the 13 standard conditions recommended in the Sentencing Guidelines. Indeed, many of these recommended conditions are identical to or expand on some of the discretionary conditions listed in [Section 3563](#). *Compare U.S.S.G. § 5D1.3(c)*, with [18 U.S.C. § 3563\(b\)](#). The Guidelines recommend as a standard condition that "[t]he defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view." [U.S.S.G. § 5D1.3\(c\)\(6\)](#).

In 2016, as part of its "multi-year review of sentencing practices relating [\[**7\]](#) to federal probation and supervised release," the United States Sentencing Commission evaluated the recommended standard conditions and left intact the "any time" and "home or elsewhere" language of the standard condition regarding probation officer visits. *See U.S. SENTENCING GUIDELINES MANUAL*, supp. to app. C, at 168; 162 (U.S. SENTENCING COMM'N 2016). In its Reason for Amendment, the Sentencing Commission rejected the Seventh Circuit's criticism of this condition; the Commission concluded that "in some circumstance[s], adequate supervision of defendants may [\[**658\]](#) require probation officers to have the flexibility to visit defendants at off-hours, at their workplaces, and without advance notice to the supervisee." *Id.* at 171.

This standard condition as recommended by the Guidelines has been incorporated into Administrative Office of the United States Courts Form 245B, "Judgment in a Criminal Case." *See ADMIN. OFFICE OF THE U.S. COURTS, AO 245B, JUDGEMENT IN A CRIMINAL CASE* (2019). That form is substantially similar to the visitation condition imposed here.

The Sentencing Commission reasonably concluded that adequate supervision may at times require the imposition of this standard condition. As to Payton, the [\[**8\]](#) district court implicitly found that adequate

supervision required this standard-visitation condition. The condition, as imposed here, reasonably relates to the statutory factors set forth in Section 3553(a), a point Payton does not contest. Payton's argument that the standard-visitation condition is not narrowly tailored focuses on only part of the district court's consideration in imposing the condition. The condition of supervised release must be narrowly tailored such that it does not involve a "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)." § 3583(d)(2). The liberty rights of parolees, though, are limited compared to an average citizen. *See United States v. Winding, 817 F.3d 910, 916 (5th Cir. 2016)*.

In light of Payton's violent conduct, prior drug convictions, multiple probation violations, and failure to abide by the terms of pretrial release, the district court did not abuse its discretion by imposing this condition.

AFFIRMED.

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APPENDIX B

(Judgment and Sentence of the United States District Court for the
Northern District of Texas)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

WILLIAM JAMES PAYTON

Case Number: 4:18-CR-203-Y(2)

Dan Cole, assistant U.S. attorney

William R. Biggs, attorney for the defendant

On November 20, 2018, the defendant, William James Payton, entered a plea of guilty to counts one and two of the two-count indictment. Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 U.S.C. §§ 1951(a) and 2 ii and 2	Interference with Commerce by Robbery	March 22, 2018	1
18 U.S.C. §§ 924(c)(1)(A)	Using, Carrying, and Brandishing a Firearm During a Crime of Violence	March 22, 2018	2

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$200.00 for counts one and two of the two-count indictment.

The defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed March 26, 2019.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Signed March 27, 2019.

IMPRISONMENT

The defendant, William James Payton, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 51 months on count one and 84 months on count two of the two-count indictment, for a total aggregate sentence of 135 months. This sentence is to run concurrently with any sentence imposed in Case No. 1538171 in the 396th Judicial District Court, Tarrant County, Texas, which is related to the instant offense; but consecutively to any sentence imposed in Case No. CR18-1326, County Court at Law, Douglas County, Nebraska; and Case Nos. 1558761 and 1559010 in the 396th Judicial District Court, Tarrant County, Texas, as they are not related to the instant offense.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years each on counts one and two of the two-count indictment to run concurrently.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- (1) not leave the judicial district without the permission of the Court or probation officer;
- (2) report to the probation officer in a manner and frequency directed by the Court or probation officer;
- (3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) support the defendant's dependents and meet other family responsibilities;
- (5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;
- (7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;
- (11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
- (12) 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; and
- (13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

- not commit another federal, state, or local crime;
- not possess illegal controlled substances;
- not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month;

refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill; and

participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because the victim did not suffer any loss.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States marshal

BY _____
deputy marshal