

No. _____

IN THE

Supreme Court of the United States



BERNARD THOMAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

PETER J. TOMAO, ESQ.
Counsel for Petitioner
600 Old Country Road, Suite 328
Garden City, New York 11530
516-877-7015
ptomao@tomaolaw.com

January 6, 2020

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred by affirming the sentence pronounced by the United States District Court for the Eastern District of New York on one count of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) which included a special condition of supervised release requiring Petitioner Thomas to undergo a psychosexual evaluation at the direction of the Probation Department when the

offense of conviction did not involve any sexual misconduct and the only instance of sexual misconduct occurred more than 35 years ago based on a ruling of the Second Circuit which conflicts with holdings in the Sixth Circuit.

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CERTIORARI SHOULD BE GRANTED TO RESOLVE A
CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS
ON AN IMPORTANT MATTER NAMELY, WHETHER
DISTRICT COURTS HAVE DISCRETION TO IMPOSE
SPECIAL CONDITIONS OF SUPERVISED RELEASE
BASED ON PRIOR CONDUCT WHICH IS REMOTE IN
TIME

FOR ALL OF THE FOREGOING REASONS, WE
RESPECTFULLY URGE THIS COURT TO GRANT A
WRIT OF CERTIORARI TO REVIEW THE
JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW
YORK AND THE OPINION AND ORDER OF THE
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OPINION BELOW

The Summary Order and Judgment of the United States Court of Appeals for the Second Circuit in *United States v. Thomas*, No. 19-2410, 2020 U.S. App. LEXIS 29623 (2d Cir. Sep. 16, 2020), which is unpublished, appears as Appendix A (A1-8)¹.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1) and predicated upon the entry of a decision by a United States court of appeals in conflict with the decision of other United States courts of appeals on the same important issue as to call for an exercise of the Court's supervisory power, and Rules 10(a) and 13 of this Court's rules.

The Summary Order of the Court of Appeals was entered on September 16, 2020. (Petitioner did not move for rehearing en banc.) This petition was filed within ninety days of the date of entry of the summary order. U.S. Sup. Ct. Rule 13 (1) and (3).

¹ "A" followed by a number refers to pages in the appendices being filed with this petition.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 3583

Inclusion of a term of supervised release after imprisonment

Excerpts – full text in appendix F

- (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 ...
- (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 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 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, ... 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...

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Bernard Thomas respectfully requests that a writ of certiorari issue to review the Summary Order and Judgment dated September 16, 2020 (A1-8), entered by the United States Court of Appeals for the Second Circuit, which affirmed the judgment of conviction and the sentence entered against him on August 15, 2019, in the United States District Court for the Eastern District of New York, after remand from the Second Circuit for resentencing. See, United States v. Thomas, 765 F. App'x 553, 558-60 (2d Cir. 2019). As part of that sentence, the district court impose Special Condition Number 3 to his term of Supervised Release, which provides "The defendant must undergo a psychosexual evaluation at the direction of the Probation Department" (A28).

The district court also reimposed a term of 51 months imprisonment and three years of supervised release, as well as other

special conditions of supervised release which are not at issue in this petition.

This petition for certiorari asks the Court to resolve the conflict among the circuits regarding whether sentencing judges may impose special release conditions related to the defendant's sexual behavior when the instant conviction does not involve a sexual offense and prior sexual offenses were remote in time. Three Circuit Courts of Appeals, namely the Second, Fifth and Eleventh Circuits have held that the sentencing courts may impose conditions based solely on the remote offense, while the First, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held such conditions may not be imposed solely on that basis.

The instant petition results from Petitioner Thomas' conviction following a jury trial on one count of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (A9). The conviction was based on his possession of a spent shell casing which he voluntarily had disclosed to the New York Police Department detectives (A13-14).

On December 8, 2017, the district court sentenced Mr. Thomas to

a term of 51 months incarceration and a supervised release term of three years with special conditions (A2).

After both parties appealed, the Second Circuit reversed the 2017 judgment and remanded the case to the district court for resentencing.

United States v. Thomas, 765 F. App'x 553 (2d Cir. 2019)². The Second Circuit did not rule on the issue of the special conditions, but rather indicated that:

with respect to the special conditions of supervised release, the judge will now have an additional opportunity, with the benefit of fully-developed arguments by the defense, to reconsider those conditions and, if he continues to believe that they are appropriate, to explain why that is so.

765 F. App'x at 558.

On remand, the district court judge ordered the Probation Department to prepare a new presentence report (A61). On May 22, 2019, the Probation Department issued its Revised Presentence Report (“RPSR”) as well as a Memorandum from Supervisory Probation Officer

² The government appealed the district court’s finding that the enhanced sentencing provisions of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1) did not apply to this case. 765 F. App’x at 559-560. On remand, after obtaining additional state records, the government conceded that the ACCA did not apply (A15).

Michael Dorra to United States District Judge William F. Kuntz, II, dated May 22, 2019 (the “Dorra Memo”³).

The Dorra Memo addressed several proposed special conditions, including the recommendation that the Petitioner undergo a psychosexual evaluation. The only basis cited by the Dorra Memorandum for the condition challenged by this petition was Petitioner’s 1983 conviction at age 17 for first-degree sexual abuse in violation of New York Penal Law § 130.65 (RPSR ¶25) and the fact that he had not been evaluated or treated “for his sexual offense” (Dorra Memo at 19). The Probation Department did not consider that Petitioner had no history of sexual misconduct in the following 36 years.

According to the memorandum:

To effectively consider how the defendant's static and dynamic sex offense risk factors impact his recidivism risk, we require the proper tools to assess him, which in this case is a psychosexual evaluation completed by a licensed professional. Based on this, there is an unknown risk to the community, and the Probation Department believes that a psychosexual evaluation is warranted to aid in determining that risk.

(Dorra Memo at 19.) The Dorra Memo described the facts underlying

³ We are submitting a motion for leave to file the Dorra Memo as a supplemental appendix under seal.

the 1983 conviction as “serious and troubling conduct,” which is certainly true.

The facts underlying the conviction are not in dispute. On July 26, 1983, when Petitioner Thomas was 17 years old, he sexually abused a 15 year old mentally challenged girl, who was incapable of consent, by forcibly removing her pants and having sexual intercourse with her (Dorra Memo at 19). Petitioner pled guilty and sentenced to one to three years in custody. He was paroled on September 20, 1985 (RPSR ¶25). Since completing the sentence for that offense, Petitioner Thomas has not faced any allegations of sexual impropriety.

At the resentencing, the district judge questioned Mr. Dorra about the recommendation for psychosexual evaluation. Mr. Dorra stated that “the underlying basis would be that 1983 conviction” (A89). When the district judge asked the government whether that conviction may be “too remote in time,” the assistant U.S. attorney responded that they needed more time to research the issue but the district judge could sentence Petitioner anyway and let the Court of Appeals decide whether he was correct. The district judge summarized their position as follows “So what you are saying is it is up to me to rule and if I get reversed, so

be it; right?” to which the response was “That’s correct, Your Honor.” (A90-91). Petitioner restated his objection to this condition (A91).

After hearing from the parties, the lower court reimposed the original sentences of imprisonment, which Petitioner Thomas had almost completed⁴, and a three year term of supervised release (A24-30). The district court imposed special conditions including Special Condition Number 3 which is challenged in this petition (A103-110). The district judge also issued a Memorandum & Order dated August 1, 2019, which explained the reasons for doing so. The district court’s decision is annexed as Appendix B (A9-23).

Special Condition Number 3 provides “The defendant must undergo a psychosexual evaluation at the direction of the Probation Department” (A28).

Other than the 1983 conviction, the only other basis for imposing this condition cited by the district judge was:

⁴ While rejecting the defense request to impose a sentence of time served which would be within the guidelines, the lower court reduced the custodial period by a few months. Petitioner Thomas served the balance of the incarceratory term in a half-way house and was released on December 9, 2019.

According to Probation, Defendant was referred for treatment in 2014 but was not admitted because there was "too little time remaining on parole to engage in treatment."... Well, we have that time now.

(A21 (Citations omitted); see A108; Dorra Memo at 4; RPSR ¶ 71).

On appeal, the Second Circuit affirmed. The appellate court applied its holding in other cases that sentencing courts may impose special release conditions related to the defendant's sexual behavior even when the instant conviction does not involve a sexual offense. See, A3 citing *United States v. Dupes*, 513 F.3d 338, 344 (2d Cir. 2008) and 18 U.S.C. § 3583(d). See also, *United States v. Peterson*, 248 F.3d 79, 84-86 (2d Cir. 2001); *United States v. Rosario*, 386 F.3d 166 (2d Cir. 2004). Accord, *United States v. Sines*, 303 F.3d 793, 801 (7th Cir. 2002). The Second Circuit upheld the lower court's decision and stated:

Here, as part of its discussion of the sentencing factors of 18 U.S.C. § 3553(a), the district court recounted Thomas's criminal history, which includes criminal possession of stolen property, attempted robbery and robbery, resisting arrest, narcotics offenses, and assault, and noted that in 1983 when Thomas was 17 years old, he was convicted of first-degree sexual abuse in violation of New York Penal Law § 130.65 in connection with his abuse of a mentally challenged 15-year-old girl. The court acknowledged Thomas's arguments that the current conviction did not involve a sexual offense and that Thomas's conviction for

sexual abuse was remote in time, but stated that Thomas's history of sexual abuse and overall characteristics justified a condition requiring him to be evaluated. ... The court also noted that Thomas's prior sentence in state court had required him to attend treatment when he was released in 2014, but that the length of the intake process prevented Thomas from receiving treatment. The court stated that now that there is sufficient time to complete an evaluation, Thomas should be subject to the condition.

We discern no abuse of discretion in this determination. Although Thomas points to cases from our sister circuits disfavoring reliance on distant-in-time convictions to support special conditions of supervised release in some circumstances, see, e.g., *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003), we have not taken this approach, but have approved the consideration of even distant convictions in appropriate cases, see, e.g., *Dupes*, 513 F.3d at 343-44 (affirming imposition sex offender conditions of supervised release eight years after defendant's offense); see also *United States v. Fields*, 777 F.3d 799, 803 (5th Cir. 2015) (upholding a condition of supervised release prohibiting the defendant from "going to places where a minor or minors are known to frequent without prior approval" where the defendant's last sexual offense occurred twenty-five years before). Further, the instant condition merely requires Thomas to submit to an evaluation and does not necessarily require any further deprivation of Thomas's liberty after the evaluation is complete, unlike treatment conditions that we have upheld in the past. See, e.g., *United States v. Genovese*, 311 F. App'x 465, 466-67 (2d Cir. 2009) (summary order) (approving of a condition of supervised release which required participation in sex offender treatment programs where the defendant's conviction occurred twelve years previously). Given Thomas's criminal history and the serious conduct involved in his conviction for sexual abuse in particular, the district court did not abuse its discretion in concluding that the special condition was

appropriate.

(A7 (citations to the record omitted).)

Since the panel deciding the instant case applied Second Circuit precedent, Petitioner did not seek rehearing or rehearing en banc.

REASON FOR GRANTING THE PETITION

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON AN IMPORTANT MATTER NAMELY, WHETHER DISTRICT COURTS HAVE DISCRETION TO IMPOSE SPECIAL CONDITIONS OF SUPERVISED RELEASE BASED ON PRIOR CONDUCT WHICH IS REMOTE IN TIME

The question in this case is whether an unrelated conviction for a sexual offense which occurred many years prior to the offense of conviction can, by itself, be a basis for imposing a special condition⁵. In the instant case, the Second Circuit held that it could, putting itself in conflict with the First, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, which have held such conditions may not be imposed, where, as here, the event was too remote in time for the special conditions to be reasonably related. The Fifth and Eleventh Circuits have issued opinions similar to the Second Circuit's decision in the instant case. Certiorari is sought to resolve this conflict among the circuits.

Special conditions to supervised release must be "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C),

⁵ This petition does NOT ask the Court to consider whether a psychosexual evaluation may be imposed in a case in which the offense of conviction did not relate to sexual misconduct.

and (a)(2)(D)," See 18 U.S.C. § 3583(d)(1), and involve "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)." See 18 U.S.C. § 3583(d)(2).

The condition imposed in this case namely psychosexual evaluation is extremely intrusive and implicates defendant's rights to liberty and due process. The requirement of a psychosexual evaluation at this point is greater than necessary to effectuate the goals of sentencing. The Dorra Memorandum stated that the psychosexual evaluation would assist the Probation Department to "effectively consider how the defendant's static and dynamic sex offense risk factors impact his recidivism risk" (Dorra Memo at 4). However, that fact that the condition may be helpful is insufficient to justify its imposition.

Psychosexual evaluations are by their nature highly intrusive. Generally, the subject is required to share with a stranger his entire sexual history and often submit to a polygraph examination of dubious value. In this case, Mr. Thomas is a 54 year old man would be asked to disclose his entire sexual history for a conviction for his actions as a 17 year old. Such an intrusive condition constitutes a significant

deprivation of liberty in violation of 18 U.S.C. § 3583(d)(2) (conditions of supervised release must "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes" of sentencing) and must be related to the "history and characteristics" of the defendant. *United States v. Eaglin*, 913 F.3d 88, 97 (2d Cir. 2019).

As noted above, the United States Courts of Appeals for First, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held that psychosexual evaluation and similar conditions may not be imposed, where, based solely on an event which was too remote in time for the special conditions to be reasonably related.

The First Circuit vacated associational conditions where the defendant's prior sex offense occurred in the distant past, the intervening time was marked by lawful social activity, and the district court did not otherwise explain the need for such restrictions. *United States v. Pabon*, 819 F.3d 26, 31 (1st Cir. 2016) citing *United States v. Del Valle-Cruz*, 785 F.3d 48, 59-64 (1st Cir. 2015). See also, *United States v. Fey*, 834 F.3d 1, 4 (1st Cir. 2016).

Similarly, Fourth Circuit has held that a remote conviction, standing alone, is insufficient to support the conclusion that the

defendant's current behavior and character require these restrictions.

United States v. Worley, 685 F.3d 404, 409 (4th Cir. 2012).

Sixth Circuit in a homophonous case, *United States v. Thomas*, 212 F. App'x 483, 488 (6th Cir. 2007), vacated the special condition that the defendant participate in a sex offender assessment program because the condition did not bear a reasonable relation to the nature of the offense or the history and characteristics of the defendant. The Court of Appeals held that the nineteen year gap between the convictions was too remote to justify the imposition of the condition. 212 F. App'x at 488. See also, *United States v. Brogdon*, 503 F.3d 555, 565 (6th Cir. 2007).

The Seventh Circuit has held that a fifteen-year old sexual misconduct misdemeanor, alone would not support any present need to provide just punishment for the instant offenses, to deter criminal conduct, to rehabilitate Johnson, or to protect the public. *United States v. Johnson*, 756 F.3d 532, 541-42 (7th Cir. 2014). That Circuit Court of Appeals held that "In order to justify the imposition of such conditions, the record must show something more than a remote conviction.

The Eighth Circuit Court of Appeals has held that a gap of fifteen years between the prior offense and the current offense was too remote to show a propensity to commit any future sexual offenses. Therefore, the special conditions seem unlikely to serve the goals of deterrence or public safety, *United States v. Scott*, 270 F.3d 632, 633 (8th Cir. 2001). See also, *United States v. Kent*, 209 F.3d 1073, 1077 (8th Cir. 2000) (13 year-old sex offense).

Similarly, the Ninth Circuit held that a sex offense which was more than a decade old at the time of sentencing was too remote by itself to justify the conditions. *United States v. Sharp*, 469 F. App'x 523, 525 (9th Cir. 2012). However, that Circuit Court of Appeals recognized that a remote conviction might be relevant if it were part of a series of events or is relevant to a current condition. See, *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003).

The Tenth Circuit has rejected the imposition of sex-offender conditions based solely on prior crimes that are remote in time absent evidence of propensity to commit any future sexual offenses. See, *United States v. Dougan*, 684 F.3d 1030, 1037 (10th Cir. 2012). However, the Tenth Circuit Court of Appeals upheld such conditions in cases in which

a defendant's prior conviction while remote in time, but was nevertheless relevant because defendant had been continuously incarcerated since that conviction, *United States v. Ford*, 882 F.3d 1279, 1288 (10th Cir. 2018), or had not been adequately evaluated at the time of the offense. *United States v. Bear*, 769 F.3d 1221, 1227 (10th Cir. 2014). We note that in an unpublished case, the Tenth Circuit Court of Appeals upheld sex offender conditions based on a nine-year-old conviction where there was no evidence the defendant had undergone mental health treatment and he had an intervening conviction for failure to register under Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20913. *United States v. Vinson*, 147 F. App'x 763, 771-75 (10th Cir. 2005) (unpublished). See, *United States v. Mike*, 632 F.3d 686, 693 (10th Cir. 2011) (conditions upheld based in addition to a 1997 sexual offense conviction, the results of psychological evaluations performed in 2004 and 2008 and his failure to comply with his sex offender registration requirements).

On the other hand, the Court of Appeals for the Fifth Circuit has upheld a sex-offender related special condition in cases based only on a sexual offense which occurred many years before the conviction leading

to the imposition of the special condition. See, United States v. Fields, 777 F.3d 799, 803-04 (5th Cir. 2015)(plain error); even where there is no evidence of predatory sexual behavior beyond his singular and now-remote sexual offense. *United States v. Salazar*, 743 F.3d 445, 452 (5th Cir. 2014); *United States v. Warden*, 291 F.3d 363, 365-66 (5th Cir. 2002). In *Sealed Appellant v. Sealed Appellee*, 937 F.3d 392, 403 (5th Cir. 2019), the appellate court upheld assessment and treatment conditions based on the heinous nature of the previous sex-offense convictions, the lack of evidence demonstrating that he had ever received sex-offender treatment, and the uncertainty regarding whether he remains a danger to the community.

The opinions of the Court of Appeals for the Eleventh Circuit generally noted that remote offense could be considered for special conditions in conjunction with other factors, such as the failure to register as a sex offender and being in household with a minor female shortly after release from prison. *United States v. Moran*, 573 F.3d 1132, 1139 (11th Cir. 2009).

However, recently, in an unreported case, the Eleventh Circuit, upheld the imposition of sex-offender restrictions based on a ten year

old conviction on the grounds that it was reasonably related to his rehabilitation and the public's protection. *United States v. Maxwell*, 729 F. App'x 784, 786 (11th Cir. 2018). In that case, like Petitioner's case, the defendant never received psychological treatment related to his sexual misconduct with a minor. 729 F. App'x at 785.

As noted above, the Second Circuit Court of Appeals commented on these different approaches in affirming the challenged condition in Petitioner's case, but choose to cleave to its own caselaw. *United States v. Dupes*, 513 F.3d at 344; *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006); *United States v. Jennings*, 652 F.3d 290, 294 (2d Cir. 2011).

As a result, the Court should grant certiorari to resolve the split among the circuits regarding whether a remote prior conviction is sufficient to justify unnecessarily intrusive conditions of supervised release.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, WE
RESPECTFULLY URGE THIS COURT TO GRANT A
WRIT OF CERTIORARI TO REVIEW THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK AND THE OPINION
AND ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT AFFIRMING
PETITIONER'S SENTENCE

Dated: Garden City, New York
January 6, 2021

Respectfully Submitted,



Peter J. Tomao, Esq.
CJA Counsel to the Petitioner
Bernard Thomas
600 Old Country Road, Suite 328
Garden City, NY 11530
(516) 877-7015

APPENDICES

19-2410
United States v. Thomas

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of September, two thousand twenty.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
JOHN M. WALKER, JR.,
DENNIS JACOBS,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

19-2410

BERNARD THOMAS,

Defendant-Appellant.

For Defendant-Appellant:

PETER J. TOMAO, Garden City, NY

For Appellee:

ALICIA N. WASHINGTON, (Amy Busa *on the brief*)
Assistant United States Attorney *for* Richard P.
Donoghue, United States Attorney for the Eastern
District of New York, Brooklyn, NY

Appeal from a judgment of the United States District Court for the Eastern District of New York (Kuntz, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Bernard Thomas appeals from an August 15, 2019 amended judgment of the United States District Court for the Eastern District of New York (Kuntz, J.) sentencing him, after his conviction, following a jury trial, of being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), to 51 months' imprisonment and three years' supervised release. In a previous appeal, a panel of this Court vacated Thomas's original sentence of 51 months' imprisonment and three years' supervised release and remanded for resentencing, ordering the district court to first determine whether Thomas had previously been convicted under subdivision 1 of the New York Sexual Abuse in the First Degree statute (New York Penal Law § 130.65) in 1983, and, if so, whether the conviction qualified as a violent felony under the Armed Career Criminal Act ("ACCA").¹ *United States v. Thomas*, 765 F. App'x 553, 558–60 (2d Cir. 2019) (summary order). We declined to reach Thomas's objections to certain special conditions of supervised release, noting that the court could address and reconsider these conditions on remand. *Id.* at 558. At the resentencing hearing, the court again pronounced a sentence principally of 51 months' imprisonment and three years of supervised release. At issue in this appeal are three of four special conditions of supervised release imposed by the court.² These conditions require Thomas to be subject, upon reasonable suspicion, to search of his

¹ At resentencing all parties agreed that Thomas's conviction did not qualify as a violent felony under ACCA.

² Thomas does not challenge a special condition requiring him to participate in a mental health treatment program including anger management.

computer(s) and electronic devices by a United States Probation officer, to undergo a psychosexual evaluation, and to comply with any applicable state or federal sex offender registration requirements. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

At the start, district courts possess "broad authority pursuant to 18 U.S.C. § 3583(d) to impose any condition of supervised release that [they] consider[] to be appropriate, provided such condition [] is 'reasonably related' to certain statutory sentencing factors listed in section 3553(a)(1) and (a)(2) of that title, 'involves no greater deprivation of liberty than is reasonably necessary' to implement the statutory purposes of sentencing, and is consistent with pertinent Sentencing Commission policy statements." *United States v. Dupes*, 513 F.3d 338, 343 (2d Cir. 2008) (first quoting 18 U.S.C. § 3583(d); and then quoting *United States v. Myers*, 426 F.3d 117, 123–24 (2d Cir. 2005)). As such, conditions of supervised release must be reasonably related to "the nature and circumstances of the offense and the history and characteristics of the defendant [and] the need for the sentence imposed . . . 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." 18 U.S.C. § 3553(a). We generally review conditions of supervised release imposed by a district court for abuse of discretion, but a challenge to conditions of supervised release that presents an issue of law is generally reviewed *de novo*. *Dupes*, 513 F.3d at 342–43.

A. Special Condition Two

Thomas argues that the district court erred in imposing Special Condition Two to the extent that this search condition applies not only to his "person, house, property, and residence," but also

“requires the Defendant [to] submit his . . . computers []as defined by 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media” to searches conducted by a United States Probation Officer on the basis of reasonable suspicion. Thomas argues that the condition, as applied to computers or other electronic devices, is not reasonably related to his criminal history and characteristics. For the following reasons, we disagree.

We have frequently approved of such conditions where the conduct underlying a conviction or prior conviction has involved the use of computers or other electronic devices. *See, e.g., United States v. Franco*, 733 F. App’x 13, 16 (2d Cir. 2018) (summary order) (upholding a computer search condition where the defendant’s prior convictions involved the use of a computer). Here, the district court noted that Thomas had used electronic devices in the conduct leading up to his instant conviction, likely referring to Thomas’s cellphone contacts with his New York Police Department handlers, and also reasoned that at least one of Thomas’s prior convictions involved an accomplice, justifying (upon reasonable suspicion) the potential search of these devices for communications with others. J.A. at 188–89. The court specifically noted that because of Thomas’s “current offense of conviction and his extensive history of possessing weapons and contraband,” the search condition “is warranted to protect the community and to deter further criminal activity.” *Id.* As such, the condition was supported by Thomas’s history and characteristics, did not work a greater deprivation of liberty than necessary, and was thus not an abuse of discretion for the district court to order.³

³ Thomas further argues that the special condition is inconsistent with the relevant policy behind such conditions announced in U.S.S.G. § 5D1.3(d)(7)(C) because his instant conviction is not a sex offense. Section 5D1.3(d) does not restrict the search condition challenged here to sexual offenses, however, but instead explicitly provides that such conditions may be appropriate in other types of cases. For the reasons already noted, we discern no abuse of discretion in the district court’s determination that the condition was appropriate in this case.

B.**C. Special Condition Three**

Thomas next contests Special Condition Three, which requires him to submit to a psychosexual evaluation, on the grounds that his instant conviction did not involve sexual acts and that his prior conviction for sexual abuse is too remote to justify the condition. We disagree.

Sentencing courts in appropriate cases have broad discretion to impose special release conditions related to the defendant's sexual behavior even when the instant conviction does not involve a sexual offense. *See Dupes*, 513 F.3d at 343–44 (upholding conditions requiring the defendant to, *inter alia*, attend sex offender treatment where his instant conviction was for securities fraud). Here, as part of its discussion of the sentencing factors of 18 U.S.C. § 3553(a), the district court recounted Thomas's criminal history, which includes criminal possession of stolen property, attempted robbery and robbery, resisting arrest, narcotics offenses, and assault, and noted that in 1983 when Thomas was 17 years old, he was convicted of first-degree sexual abuse in violation of New York Penal Law § 130.65 in connection with his abuse of a mentally challenged 15-year-old girl. The court acknowledged Thomas's arguments that the current conviction did not involve a sexual offense and that Thomas's conviction for sexual abuse was remote in time, but stated that Thomas's history of sexual abuse and overall characteristics justified a condition requiring him to be evaluated. J.A. at 189–90. The court also noted that Thomas's prior sentence in state court had required him to attend treatment when he was released in 2014, but that the length of the intake process prevented Thomas from receiving treatment. *Id.* at 190. The court stated that now that there is sufficient time to complete an evaluation, Thomas should be subject to the condition. *Id.*

We discern no abuse of discretion in this determination. Although Thomas points to cases from our sister circuits disfavoring reliance on distant-in-time convictions to support special conditions of supervised release in some circumstances, *see, e.g.*, *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003), we have not taken this approach, but have approved the consideration of even distant convictions in appropriate cases, *see, e.g.*, *Dupes*, 513 F.3d at 343–44 (affirming imposition sex offender conditions of supervised release eight years after defendant’s offense); *see also United States v. Fields*, 777 F.3d 799, 803 (5th Cir. 2015) (upholding a condition of supervised release prohibiting the defendant from “going to places where a minor or minors are *known to frequent* without prior approval” where the defendant’s last sexual offense occurred twenty-five years before). Further, the instant condition merely requires Thomas to submit to an evaluation and does not necessarily require any further deprivation of Thomas’s liberty after the evaluation is complete, unlike treatment conditions that we have upheld in the past. *See, e.g.*, *United States v. Genovese*, 311 F. App’x 465, 466–67 (2d Cir. 2009) (summary order) (approving of a condition of supervised release which required participation in sex offender treatment programs where the defendant’s conviction occurred twelve years previously). Given Thomas’s criminal history and the serious conduct involved in his conviction for sexual abuse in particular, the district court did not abuse its discretion in concluding that the special condition was appropriate.

D. Special Condition Four

Finally, Thomas argues that the district court erred in imposing Special Condition Four, which requires him to “comply with any applicable state or federal sex offender registration requirements as instructed by the probation office, the Bureau of Prisons, or any state registration agency in the state where he resides, works, or is a student.” J.A. at 222. Thomas argues that Special Condition Four is duplicative of Mandatory Condition Six, not challenged on appeal,

which requires Thomas to “comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901 et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student or were convicted of a qualifying offense.” J.A. at 220. He argues that the district court abused its discretion by imposing a condition that is redundant and potentially subject to misinterpretation in light of the parties’ agreement that Thomas, a New York resident, is not required to register as a sex offender under New York law. We disagree.

Special Condition Four merely requires Thomas to comply with applicable law. It therefore imposes no additional obligations upon him beyond what state and federal law require. And while there may be overlap between Special Condition Four and Mandatory Condition Six, we disagree with Thomas that Special Condition Four is merely a restatement of that mandatory condition. Mandatory Condition Six requires compliance with federal law. The parties agree that as a New York resident, Thomas is not now required to register in New York under state law. Special Condition Four is not limited to New York, however, nor to the present, but requires Thomas to comply with the law of any state in which Thomas may in future reside, work, or study, or to New York requirements, should they be altered. As such, Special Condition Four is not duplicative of Mandatory Condition Six, is reasonably related to Thomas’s history and characteristics, and does not work a greater deprivation of liberty than necessary. The district court therefore did not abuse its discretion in imposing the condition.

* * *

We have considered Thomas's remaining arguments and find them to be without merit.

Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
: **MEMORANDUM & ORDER**
: 16-CR-147 (WFK)
v. :
: BERNARD THOMAS, :
: Defendant. :
-----X

WILLIAM F. KUNTZ, II, United States District Judge:

On October 21, 2016, a jury found Bernard Thomas ("Defendant") guilty of one count of Felon in Possession of Ammunition, in violation of 18 U.S.C. § 922(g)(1). On December 7, 2018, the Court sentenced Defendant to 51 months of incarceration, 3 years of supervised release, and payment of a \$100.00 special assessment. This Court now re-sentences Defendant and provides a complete statement of reasons pursuant to 18 U.S.C. § 3553(c)(2) of those factors set forth by Congress and contained in 18 U.S.C. § 3553(a). For the reasons discussed below, Defendant is hereby sentenced to 51 months of incarceration, 3 years of supervised release, and payment of a \$100.00 special assessment.

BACKGROUND

On March 25, 2016, the United States filed an Indictment charging Defendant with one count of Felon in Possession of Ammunition, in violation of 18 U.S.C. § 922(g)(1). ECF No. 7. Beginning on August 1, 2016, Defendant was tried by a jury on the sole count of the Indictment in front of the Honorable Edward R. Korman. *See* ECF Nos. 64-66. On August 3, 2016, the jury reported it was unable to reach a unanimous verdict, and Judge Korman declared a mistrial. ECF No. 66. The matter was subsequently transferred to this Court.

On September 9, 2016, the Government filed a Superseding Indictment charging Defendant with one count of Felon in Possession of Ammunition, in violation of 18 U.S.C. § 922(g)(1). ECF No. 79. Defendant was thereafter tried in this Court on the sole count of the Superseding Indictment and, on October 21, 2016, the jury returned a verdict of guilty. ECF No.

101. The Court sentenced Defendant on December 8, 2017. *See* Memorandum and Order at 1, ECF No. 129.

On March 20, 2019 the United States Court of Appeals for the Second Circuit affirmed Defendant's conviction, vacated his sentence, and remanded the case to this Court for resentencing. *See United States v. Thomas*, 765 F. App'x 553, 555 (2d Cir. 2019) (summary order). Specifically, the Second Circuit instructed the Court to determine: (1) whether Defendant was convicted under subdivision 1 of the New York Sexual Abuse Act in the First Degree (N. Y. Penal Law § 130.65), and if so, whether that conviction qualifies as a violent felony warranting a sentencing enhancement under the Armed Career Criminal Act ("ACCA"), *id.* at 10-11; and (2) whether the special conditions of release requiring Defendant submit to a psychosexual evaluation and comply with sexual offender registration requirements are appropriate in this case.

The Court held a status conference to discuss the resentencing issues, *see* Minute Entry, dated March 25, 2019, and set a briefing schedule with respect to those issues, *see* Order, ECF No. 175. On March 29, 2019, the Court granted the Government's motion to direct the Clerk of Court for Queens Supreme Court to provide the government and Probation access to the file regarding Defendant's conviction for sexual abuse for inspection and copy. *See* ECF No. 177.

DISCUSSION

The Court first addresses the Defendant's sentence using the rubric of the 18 U.S.C. § 3553(a) factors pursuant to 18 U.S.C. § 3553(c)(2) and then the proposed special conditions of supervised release.

I. Sentencing

A. Legal Standard

18 U.S.C. § 3553 outlines the procedures for imposing a sentence in a criminal case. The “starting point and the initial benchmark” in evaluating a criminal sentence is the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 49 (2007). If and when a district court chooses to impose a sentence outside of the United States Sentencing Guidelines range, the court “shall state in open court the reasons for its imposition of the particular sentence, and . . . the specific reason for the imposition of a sentence different from that described” in the Guidelines. 18 U.S.C. § 3553(c)(2). The court must also “state[] with specificity” its reasons for so departing “in a statement of reasons form.” *Id.* “The sentencing court’s written statement of reasons shall be a simple, fact-specific statement explaining why the guidelines range did not account for a specific factor or factors under § 3553(a).” *United States v. Davis*, 08-CR-332, 2010 WL 1221709, at *1 (E.D.N.Y. Mar. 29, 2010) (Weinstein, J.).

B. Analysis

Section 3553(a) provides a set of seven factors for the Court to consider in determining what sentence to impose on a criminal defendant. This Court addresses each in turn.

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

The first § 3553(a) factor requires the Court to evaluate “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1).

Defendant was born on August 30, 1965, in Far Rockaway, New York, where he lived in a low-income household with his mother and his six maternal half-siblings. *See* Revised Presentence Investigation Report (“Revised PSR”) ¶¶ 55-57, ECF No. 183. Growing up,

Defendant's biological father provided him with financial support but was not otherwise involved in Defendant's upbringing. *Id.* ¶ 55. Defendant is close to his stepfather, who lives in Alabama with Defendant's mother, and who Defendant considers a father figure. *Id.* Defendant reports he also is close with his maternal half-siblings, although his half-sister reported Defendant is not in regular contact with most of the siblings. *Id.* ¶¶ 56, 58. One of Defendant's half-brothers reported he has a good relationship with Defendant and Defendant's son. *Id.* ¶¶ 58, 61. Defendant does not maintain relationships with his three paternal half-siblings, as they did not inform him when his father died in 2014. *Id.* ¶¶ 55, 57.

Defendant lived in his mother's home until he was first arrested at the age of sixteen. *Id.* ¶¶ 22, 59. Thereafter, he moved between correctional facilities, half-way houses, and the homes of friends or girlfriends, and was also homeless for periods of time. *Id.* ¶¶ 59-60. As to his education, Defendant reports he attended Manhattan High School in New York, New York, and received good grades, *id.* ¶ 78, but he did not graduate and instead earned his GED in 1990, *id.* ¶ 80. Defendant also received carpentry, construction, and electrician training in a Jobs Corps program in Morganfield, Kentucky, *id.* ¶ 79, and took college courses while incarcerated in the 1990s, *id.* ¶ 81. Defendant worked for a construction company for six months in 1997, but he did not report any other formal employment. *Id.* ¶ 82.

In 1999, Defendant married Lorraine Dawson, an employee of the Metropolitan Transportation Authority; he was incarcerated at Riker's Island at the time. *Id.* ¶ 61. The couple has one son together, who is now 21 years old. *Id.* Although Defendant and his wife are currently estranged, Defendant says he is in contact with his son and financially supports him when he is able. *Id.*

Defendant has a history of substance abuse. Defendant began using crack cocaine in or about 1989 and reports that he used the drug daily when he could afford to do so, often financing this habit through theft. *Id.* ¶ 74. Defendant also reported drinking alcohol often, *id.* ¶ 72, using marijuana occasionally, *id.*, and using opiates daily, *id.* ¶ 75, in the period leading up to his arrest. Defendant has participated in a number of substance abuse treatment programs while incarcerated and has even served as a facilitator in substance abuse programs. *Id.* ¶ 76. Defendant has also been treated for depression, as well as aggression and anger management, while in and out of custody. *Id.* ¶¶ 69-71.

As noted, Defendant was arrested for the first time at the age of sixteen and was ultimately convicted of attempted resisting arrest. *Id.* ¶ 22. Over the next four decades, he developed an extraordinary, extensive history of criminal conduct. *Id.* ¶¶ 22-46. Defendant's adult criminal convictions include possession of stolen property, *id.* ¶ 23, sexual abuse in the first degree, *id.* ¶ 25, attempted robbery, *id.* ¶ 30, multiple counts of criminal sale or possession of a controlled substance, *id.* ¶¶ 31-34, and multiple counts of petit larceny or attempted petit larceny, *id.* ¶¶ 37-42. In 1998, Defendant was convicted of two counts of robbery in the first degree, one count of assault in the first degree, and one count of reckless endangerment, after he and an accomplice, armed with handguns, forcibly robbed one victim and critically wounded another. *Id.* ¶ 43. Defendant was sentenced to sixteen years in custody—during which he incurred a number of disciplinary infractions—and was paroled on January 22, 2014. *Id.* After his release, Defendant's wife acquired an order of protection against him due to threats he made against her; Defendant was twice arrested for violating this order. *Id.* ¶¶ 44-45.

Regarding the instant offense, on February 29, 2016, Defendant notified the New York Police Department (“NYPD”) that he was in possession of a shell casing from a recent shooting

that had occurred at the Queensbridge Houses in Queens, New York. *Id.* ¶¶ 3-4. Defendant further told NYPD officers that an individual named “Holloway” had asked him to hold a firearm on the day of the shooting but that he had returned the firearm to Holloway that same evening. *See id.* ¶¶ 3-5. Defendant was arrested by NYPD officers and later transferred to federal custody. *Id.* ¶ 7.

According to Bureau of Prisons SENTRY database, Defendant has been in federal custody since March 4, 2016 and was released to a residential re-entry center on March 6, 2019. *Id.* ¶ 62. Defendant has been enrolled in several programs, including a child support seminar class, a repeat offender program, and drug counseling. *Id.* Defendant worked as a unit orderly for three months. While in custody, Defendant incurred one infraction for telephone abuse. *Id.*

2. The Need for the Sentence Imposed

The second § 3553(a) factor instructs the Court to consider “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.” 18 U.S.C. § 3553(a)(2).

The Court’s sentence punishes Defendant for violating federal law and is crafted to deter him and others from engaging in similar criminal activity in the future. The Court takes into account Defendant’s extraordinary, extensive criminal history as well as his need for treatment for addiction, depression, and anger management.

3. The Kinds of Sentences Available

The third § 3553(a) factor requires the Court to detail “the kinds of sentences available” for Defendant. 18 U.S.C. § 3553(a)(3).

Defendant was convicted of one count of Felon in Possession of Ammunition, in violation of 18 U.S.C. § 922(g)(1). By statute, Defendant faces a maximum term of imprisonment of ten years. *See* 18 U.S.C. § 924(a)(2) (“Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.”).

Defendant also faces a maximum term of supervised release of three years, *id.* § 3583(b)(2); a maximum fine of \$250,000.00, *id.* § 3571(b); and a special assessment of \$100.00, *id.* § 3013. Defendant is statutorily eligible for between one- and five-years’ probation because the offense for which he was found guilty is a Class C felony. *Id.* § 3561(c)(1).

4. The Kinds of Sentence and the Sentencing Range Established for Defendant’s Offense

The fourth § 3553(a) factor requires the Court to discuss “the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.” 18 U.S.C. § 3553(a)(4)(A).

Sentencing Guideline § 2K2.1 applies to violations of 18 U.S.C. § 922(g)(1). Because Defendant committed the instant offense subsequent to sustaining one felony conviction of a crime of violence—namely, Robbery in the First Degree—Guideline § 2K2.1(a)(4)(A) sets the base offense level at 20. *See* United States Sentencing Commission, *Guidelines Manual* (“USSG”), §§ 2K2.1(a)(4)(A) & cmt. n.1, 4B1.2(a)(2) (Nov. 2016).

All parties agree the ACCA does not apply to Defendant’s statutory sentencing range such that he would be subject to a mandatory minimum sentence of fifteen years of incarceration.

See 18 U.S.C. § 924(e) (requiring imposition of sentence of imprisonment for “not less than fifteen years” upon any person who violates § 922(g) and has “three previous convictions” for violent felonies). Of Defendant’s prior convictions, the Second Circuit identified two that qualify as “violent felonies” within the meaning of the ACCA: (1) a 1989 conviction for Attempted Robbery in the Third Degree; and (2) a 1998 conviction for two counts of Robbery in the First Degree, *See Thomas*, 765 F. App’x at 549 (holding “all degrees of robbery and attempted robbery under New York law constitute violent felonies within the meaning of the ACCA”). Less clear was whether Defendant’s 1983 conviction for Sexual Abuse in the First Degree, New York Penal Law (“NYPL”) § 130.65(01), also qualified as a crime of violence. NYPL § 130.54 is a “divisible” offense in that it covers several types of conduct, defined in distinct statutory subdivisions. *Id.*; *see also* N.Y. Penal Law § 130.65 (McKinney).

The Second Circuit instructed this Court to determine upon remand whether Defendant was convicted under subdivision (1), which requires “forcible compulsion,” and if so, whether a violation of that provision is a violent felony under recent Second Circuit case law. *Id.* After reviewing the relevant Queens Supreme Court file, the Government and Probation determined Defendant was not convicted under subdivision 1. *See* Gov’t Resentencing Mem. (“Gov’t Mem.”) at 4, ECF No. 181. Among the items reviewed were a Waiver of Indictment, signed by Defendant, and an Information, charging him with Sexual Abuse in the First Degree. *Id.* at 4 n.3. The language in the Information largely tracks the language of subdivision 2 of N.Y. Penal Law § 130.65. *Compare* Gov’t Mem., Ex. A at 5, ECF No. 181-1 (accusing Defendant of “the crime of sexual abuse in the first degree [whereas] Defendant . . . subjected [] a person who was incapable of consent by reason of being physically helpless, to sexual contact”), *with* N.Y. Penal Law § 130.65(2) (“A person is guilty of sexual abuse in the first degree when he or she subjects

another person to sexual contact . . . when the other person is incapable of consent by reason of being physically helpless . . .”). Because “it is unlikely that the defendant would have waived indictment and pleaded guilty to a crime not charged in the Information,” the Government concluded Defendant was not convicted under subdivision (1). Gov’t Mem. at 4 n.4. Accordingly, this Court need not determine whether Defendant’s conviction for Sexual Abuse in the First Degree qualifies as a violent felony to warrant the sentencing enhancement under the ACCA.

Indeed, all parties agree the ACCA does not apply. *See id.* at 4; Def. Resentencing Mem. (“Def. Mem.”) at 2-3, ECF No. 184; PSR ¶¶ 87-88. Defendant has not clearly demonstrated acceptance of responsibility for the offense to warrant a reduction by two levels under USSG § 3E1.1. *See* Revised PSR ¶ 19. Defendant’s total offense level is 20.

Given a total offense level of 20 and a criminal history category of III, the Guidelines suggest a term of imprisonment of 41 to 51 months. USSG Ch. 5, Part A. All parties agree with this Guidelines calculation. *See* Revised PSR ¶ 12; Gov’t Mem. at 4; Def. Mem. at 2. The Guidelines further recommend a term of supervised release of between one and three years, *id.* § 5D1.2(a)(2); a fine of between \$15,000.00 and \$150,000.00, *id.* § 5E1.2(c); and payment of the costs of prosecution, *id.* § 5E1.5. Defendant is ineligible for probation under the Guidelines. *See id.* § 5B1.1 cmt. n.2.

5. Pertinent Policy Statement(s) of the Sentencing Commission

The fifth § 3553(a) factor, which requires the Court to evaluate “any pertinent policy statement . . . issued by the Sentencing Commission,” 18 U.S.C. § 3553(a)(5), does not apply.

6. The Need to Avoid Unwarranted Sentence Disparities

The sixth § 3553(a) factor requires the Court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). For the reasons stated in this memorandum and order, and in consideration of the other six § 3553(a) factors, the Court’s sentence sufficiently avoids unwarranted sentence disparities.

7. The Need to Provide Restitution

Finally, the seventh § 3553(a) factor, which requires the Court to touch upon “the need to provide restitution to any victims of the offense,” 18 U.S.C. § 3553(a)(7), is not applicable to Defendant’s case.

II. Special Conditions of Release Analysis

The Court next addresses Probation’s proposed special conditions of release.

A. Legal Standard

District courts have broad discretion in imposing conditions of supervised release. *See United States v. Betts*, 886 F.3d 198, 202 (2d Cir. 2018). The Court must follow the statutory procedure set forth in 18 U.S.C. § 3583(d) when imposing special conditions of supervised release. Special conditions of supervised release must: (1) be “reasonably related” to certain statutory factors set forth in § 3553(a)—specifically, the nature and characteristics of the offense and the history and characteristics of the defendant, § 3553(a)(1), the need to afford adequate deterrence to criminal conduct, § 3553(a)(2)(B), the need to protect the public from further crimes of the defendant, § 3553(a)(2)(C), and the need to provide the defendant with necessary training or correctional treatment, § 3553(a)(2)(D); (2) “involve[] no greater deprivation of liberty than is reasonably necessary” to implement the statutory purposes of sentencing; and (3)

are consistent with pertinent policy statements issued by the Sentencing Commission. 18 U.S.C. § 3583(d); *see also United States v. Myers*, 426 F.3d 117, 124 (2d Cir. 2005).

B. Analysis

Probation has proposed four special conditions of release to follow Defendant's sentence:

Condition 1: "Defendant shall participate in a mental health treatment program, to include anger management";

Condition 2: "Defendant must comply with a search condition";

Condition 3: "Defendant must undergo a psychosexual evaluation";

Condition 4: "[D]efendant shall comply with any applicable state or federal sex offender registration requirements"

Revised Probation Sentencing Recommendation at 1, ECF No. 183-1. The Government has not taken a position with respect to any of the proposed special conditions. The only conditions in dispute are Condition 2 (search condition), Condition 3 (psychosexual evaluation), and Condition 4 (applicable sex offender registration). The Court addresses the proposed special conditions in turn.

1. Condition 1

Condition 1 states "Defendant shall participate in a mental health treatment program, to include anger management, as approved by the Probation Department." *See* Probation Mem. Regarding Recommended Supervised Release Conditions ("Probation Supervised Release Mem.") at 2, ECF No. 183-2. Defendant does not oppose Condition 1 (mental health treatment), and this Court finds this special condition is warranted given Defendant's history of depression and aggression.

2. Condition 2

Condition 2 requires Defendant “submit his or her person, property, house, residence, . . . computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media . . . to a search conducted by a United States probation officer . . . only when reasonable suspicion exists. . . .” *See Probation Supervised Release Mem.* at 2-4. Defendant opposes this search condition to the extent it authorizes Probation to search his computers, other electronic communications, data storage devices, or media. *Def. Mem.* at 6. The Second Circuit has repeatedly upheld search conditions based on a defendant’s current offense and prior criminal history, as well as the need to protect the public and further the objectives of sentencing. *See, e.g., United States v. Franco*, 733 F. App’x 13 (2d Cir. 2018) (summary order) (upholding computer search condition for defendant who used computers in prior convictions for aggravated identity theft and access device fraud). Given Defendant’s current offense of conviction and his extraordinary, extensive history of possessing weapons and contraband, the proposed search condition is warranted to protect the community, to deter further criminal activity, and to support officer safety. Moreover, a complete review of the record reflects a need to deter Defendant from engaging in illicit activity involving computers, data storage devices, and other electronic communications. Defendant’s activity, including his most serious offenses, such as his 1998 conviction for robbery in the first degree, have involved other individuals, suggesting a need to monitor any attempts to conspire with others to commit additional crimes. Any search of Defendant would only be conducted upon reasonable suspicion—inflicting no greater deprivation of liberty than necessary to effectuate the sentencing objectives. *Compare United States v. Eaglin*, 913 F.3d 88, 97 (2d Cir. 2019) (“imposition of a total internet ban as a condition of supervised release inflicts a severe deprivation of liberty”).

The Court hereby imposes Condition 2 in its entirety following Defendant's term of imprisonment.

3. Condition 3

Condition 3 states: “[D]efendant must undergo a psychosexual evaluation at the direction of the Probation Department.” Probation Supervised Release Mem. at 4. Defense counsel argues such an “intrusive” condition is inappropriate here because Defendant has not been convicted of a sexual offense nor has he faced any allegations of sexual impropriety. Def. Mem. at 7. However, the Second Circuit has upheld sex-offender specific treatment for defendants whose history and characteristics have involved sexual misconduct. *See, e.g., United States v. Dupes*, 513 F.3d 338 (2d Cir. 2008) (upholding sex-offender treatment for defendant convicted of securities fraud who was previously convicted of possessing child pornography); *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) (upholding sex-offender treatment for defendant convicted of bank larceny who had prior conviction involving sexual abuse of his own disabled daughter). Here, Defendant was previously convicted in 1983 for a sex offense, which “involved the defendant forcibly removing the pants off of and having sexual intercourse with a 15-year old mentally challenged girl.” *See* Probation Supervised Release Mem. at 4. According to Probation, Defendant was referred for treatment in 2014 but was not admitted because there was “too little time remaining on parole to engage in treatment.” *Id.*; *see also* Revised PSR ¶ 71. For these reasons, the Court finds Condition 3 imposing a psychosexual evaluation is appropriate and involves no greater deprivation of liberty than is reasonably necessary.

4. Condition 4

Condition 4 states: “[D]efendant shall comply with any applicable state or federal sex offender registration requirements as instructed by the probation office, the Bureau of Prisons, or

any state registration agency in the state where he resides, works, or is a student.” Probation Supervised Release Mem. at 5. A court may impose a special condition requiring sex offender registration following conviction for non-sex offenses for defendants who were previously convicted of sexual abuse of children. *See, e.g., United States v. Rosario*, 386 F.3d 166 (2d Cir. 2004) (upholding special condition requiring defendant to register as a sex offender based on prior conviction for attempted rape of a seven-year-old child).

Defense counsel argues such a condition is not warranted here because in Defendant’s view, he is not required to register as a sex offender. *See* Def. Mem. at 7. New York’s sex offender registration law, the Sex Offender Registration Act of 1996 (“SORA”), applies only prospectively or to persons on parole for qualifying offenses at the time SORA became effective. Because Defendant’s sexual abuse offense occurred more than a decade before SORA was enacted, and he was not on parole for that offense in 1996, Defendant is not required to register as a sex offender. Def. Mem. at 7-8.

Although Probation concedes Defendant is not required to register as a sex offender under New York sex offender registration law, Defendant nevertheless must comply with the federal Sex Offender Registration and Notification Act (“SORNA”). *See* Probation Supervised Release Mem. at 5. The Attorney General’s Final Rule on SORNA, dated January 29, 2011, applies retroactively to all sex offenders including those convicted before SORNA was enacted in 2006. *Id.* Here, proposed Condition 4 does not force Defendant to register as a sex offender; rather it “merely states that the defendant is to comply with any sex offender registration requirements *that apply to him.*” *Id.* (emphasis added). The Court finds no reason to strike a special condition requiring Defendant to comply with the law. In light of Defendant’s prior sex offense and the need to protect the public from any further crimes committed by Defendant, the

Court finds Condition 4, as written, is warranted in this case.

For the reasons set forth above, the Court concludes the proposed special conditions are reasonably related to the statutory factors set forth in this opinion, are proportionate to the need to afford adequate deterrence to criminal conduct, and involve no greater deprivation of liberty than necessary.

CONCLUSION

A sentence of 51 months of incarceration, 3 years of supervised release, and payment of the \$100.00 mandatory assessment is appropriate and comports with the dictates of § 3553. This sentence is consistent with, and is sufficient but no greater than necessary to accomplish, the purposes of § 3553(a).

The Court expressly adopts the factual findings of the Revised Presentence Investigation Report, barring any errors contained therein, to the extent they are consistent with this memorandum and order. The Court imposes the special conditions of release proposed by the Probation Department.

SO ORDERED.

s/WFK


HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: August 1, 2019
Brooklyn, New York

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA

v.

Bernard Thomas

Date of Original Judgment: 12/14/2017

(Or Date of Last Amended Judgment)

Reason for Amendment:

Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
 Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
 Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
 Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

) AMENDED JUDGMENT IN A CRIMINAL CASE

)

) Case Number: 1:16-CR-00147-001

) USM Number: **75822-054**

) Peter Tamao, Esq., Garden City, NY 11530

) Defendant's Attorney

)

) Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))) Modification of Imposed Term of Imprisonment for Extraordinary and
Compelling Reasons (18 U.S.C. § 3582(c)(1))) Modification of Imposed Term of Imprisonment for Retroactive Amendment(s)
to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))) Direct Motion to District Court Pursuant 28 U.S.C. § 2255 or
 18 U.S.C. § 3559(c)(7)) Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

pleaded guilty to count(s) _____
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1)	Felon in Possession of a Firearm	10/21/2016	1

and 924(a)(2)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____
 Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 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. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/1/2019

Date of Imposition of Judgment

8/1/2019

Signature of Judge

William F. Kuntz, II

U.S.D.J.

Name and Title of Judge

Date

Aug. 15, 2019

DEFENDANT: Bernard Thomas
CASE NUMBER: 1:16-CR-00147-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

Fifty-one (51) months

The court makes the following recommendations to the Bureau of Prisons:

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

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 UNITED STATES MARSHAL

DEFENDANT: Bernard Thomas

CASE NUMBER: 1:16-CR-00147-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Bernard Thomas
CASE NUMBER: 1:16-CR-00147-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Bernard Thomas
CASE NUMBER: 1:16-CR-00147-001

SPECIAL CONDITIONS OF SUPERVISION

The Court ordered the following special conditions of supervision:

- (1) The defendant shall participate in a mental health treatment program, to include anger management, as approved by the Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he or she is reasonably able, and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his or her ability to pay;
- (2) The defendant must comply with a search condition: The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media, or office to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner;
- (3) The defendant must undergo a psychosexual evaluation at the direction of the Probation Department; and
- (4) The defendant shall comply with any applicable state or federal sex offender registration requirements as instructed by the probation office, the Bureau of Prisons, or any state registration agency in the state where he resides, works, or is a student.

DEFENDANT: Bernard Thomas
CASE NUMBER: 1:16-CR-00147-001**CRIMINAL MONETARY PENALTIES**

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	JVTA Assessment*	Fine	Restitution
	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
----------------------	---------------------	----------------------------	-------------------------------

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
---------------	----------------	----------------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Bernard Thomas
CASE NUMBER: 1:16-CR-00147-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA, : 16-CR-00147(WFK)

16-CR-00147 (WFK)

-against-

United States Courthouse
Brooklyn, New York

Monday, March 25, 2019
12:00 p.m.

Defendant.

Y

*** SEALED PORTION REDACTED ***

**TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE WILLIAM FRANCIS KUNTZ, II
UNITED STATES DISTRICT JUDGE**

APPPEARANCES:

For the Government: RICHARD P. DONOGHUE, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ALICIA WASHINGTON, ESQ.
Assistant United States Attorney

For the Defendant: FEDERAL DEFENDERS OF NEW YORK, INC.
One Pierrepont Plaza
16th Floor
Brooklyn, New York 11201
BY: MILDRED M. WHALEN, ESQ.
MICHAEL K. SCHNEIDER, ESQ.

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(In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 (Judge WILLIAM F. KUNTZ, II, entered the courtroom.)

4 THE COURTROOM DEPUTY: The Honorable William F.

5 Kuntz, II is now presiding.

6 Criminal cause for status conference, docket number
7 16-CR-147, USA versus Thomas.

8 Counsel, may you please state your appearances for
9 the record, spell your first and last names for the court
10 reporter, including the United States probation officers.

11 MS. WASHINGTON: Alicia Washington for the United
12 States. A-L-I-C-I-A, Washington is W-A-S-H-I-N-G-T-O-N.

13 | Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 USPO MALKO: Good afternoon, Your Honor. Michelle
16 Malko from Probation, M-I-C-H-E-L-L-E, last name is M-A-L-K-O.
17 And with me is Michael Dorra.

18 THE COURT: Good afternoon.

19 USPO DORRA: Good morning, Your Honor. It's Michael
20 Dorra. M-T-C-H-A-F-I-D-O-R-R-A.

21 THE COURT: Good afternoon. Please be seated and
22 remain seated for the balance of the proceeding.

23 MR. TOMAO: Good afternoon, Your Honor. My name is
24 Peter Tomao. I was the CJA attorney on appeal. My name is
25 spelled P-E-T-E-R T-O-M-A-O

Proceedings

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1 And Mr. Thomas is sitting next to me.

2 THE COURT: Good afternoon.

3 THE DEFENDANT: Bernard Thomas. You want me to
4 spell it?

5 THE COURT: Sure.

6 THE DEFENDANT: B-E-R-N-A-R-D, T-H-O-M-A-S.

7 THE COURT: Good afternoon.

8 THE DEFENDANT: Good afternoon, Judge.

9 THE COURT: You may be seated.

10 MS. WHALEN: Good afternoon, Your Honor, the Federal
11 Defenders of New York by Mildred Whalen; M-I-L-D-R-E-D,
12 W-H-A-L-E-N.

13 THE COURT: Good afternoon, Ms. Whalen.

14 MR. SCHNEIDER: And Michael Schneider,
15 M-I-C-H-A-E-L, S-C-H-N-E-I-D-E-R.

16 THE COURT: Mr. Schneider, please be seated as well.

17 We are here for a status conference in the action
18 United States versus Bernard Thomas, 16-CR-147.

19 Mr. Thomas, I believe is in custody, although I have
20 been informed he is in a halfway house. Is that correct?

21 THE DEFENDANT: Yes, Your Honor.

22 MS. WASHINGTON: That is correct.

23 THE COURT: Thank you.

24 The procedural history of this action is as follows:
25 On March 5th of 2016 the United States of America

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1 filed a complaint alleging that on or about February 29th,
2 2016, in Queens, New York, the defendant possessed ammunition;
3 to wit, a shell casing made by Armscor, A-R-M-S-C-O-R, USA,
4 which manufactures its ammunition outside of the State of New
5 York.

6 The complaint further avers that in February of 1999
7 this defendant was convicted of robbery in the first degree, a
8 felony. The Government filed an Indictment on March 25th of
9 2016 charging the defendant with one count of being a
10 felon-in-possession of ammunition in violation of Title 18 of
11 the United States Code Sections 922(g)(1) and 924(a)(2). The
12 Indictment also contained a criminal forfeiture allegation.

13 On July 25th, 2016 the Honorable Magistrate Judge
14 Levy presided over voir dire in the first jury trial in this
15 action. The jury trial commenced on July 28th of 2016 before
16 my brother judge, Edward Korman. On August 3rd of 2016, after
17 the jury was unable to return a unanimous verdict, Judge
18 Korman declared a mistrial. On August 17th of 2016 the action
19 was reassigned from Judge Korman to this Court.

20 On September 9th of 2016, the United States of
21 America filed a Superseding Indictment charging the defendant
22 with one count of being a felon-in-possession of ammunition in
23 violation of Title 18 United States Code Sections 922(g)(1)
24 and 924(a)(2).

25 On October 11th of 2016 this Court commenced the

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1 second trial in this action. The jury found the defendant
2 guilty of the sole count in the Superseding Indictment.

3 On December 8th of 2017 this Court sentenced the
4 defendant to 51 months of incarceration to be followed by
5 three years of supervised release with special conditions, and
6 ordered the defendant to pay the \$100 special assessment fee.

7 This Court entered judgment on the appeal on
8 September 15th of 2017. That same day, the defendant appealed
9 both his conviction and his sentence. The Government later
10 filed a cross appeal arguing this Court should have applied
11 the enhanced sentencing provision of the Armed Career Criminal
12 Act, ACCA, 18 United States Code Section 924(e)(1).

13 On March 20th of 2019 the United States Court of
14 Appeals for the Second Circuit issued a summary order finding
15 no error with the defendant's conviction, vacating the
16 judgment, and remanding this case for re-sentence in United
17 States versus Thomas 17-CR-4022, 2019 Westlaw 1299705, Second
18 Circuit 2019, Summary Order.

19 This Court then scheduled this conference for today,
20 Monday, March 25th, 2019.

21 The Second Circuit mandate addressed the following
22 issues:

23 The Second Circuit affirmed the defendant's
24 conviction, but vacated the judgment and remanded the case to
25 this Court for re-sentence.

1 On appeal the defendant challenged his conviction on
2 four grounds. First, the defendant argued the District Court
3 abused its discretion when it interviewed and then dismissed a
4 juror during deliberations after the Government asserted one
5 of its witnesses, a police detective, heard the juror say,
6 "Huh, liars," loud enough for the witness and other jurors to
7 hear during his testimony.

8 The Second Circuit held the Court did not abuse its
9 discretion in choosing to interview the juror after learning
10 of possible misconduct and in the presence of all counsel of
11 record, in finding the juror expressed an opinion of the case
12 to fellow jurors in violation of the Court's instructions and
13 on removing that juror. That transpired, as you will recall,
14 in court and on the record.

15 Second, the defendant contends the evidence was
16 insufficient to support the jury's finding of guilt beyond a
17 reasonable doubt because as a matter of law a "spent shell
18 casing" is not ammunition within the meaning of the statute.
19 And as a matter of fact, the defendant did not know a spent
20 shell casing was ammunition.

21 The Second Circuit noted during trial the Government
22 had argued the defendant possessed live ammunition when he
23 shot the victim and the defendant had failed to argue to the
24 jury he was unaware spent shell casings constituted
25 ammunition. The Circuit thus found the defendant's new

Proceedings

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1 arguments moot and waived.

2 Third, the defendant argued the Court erred when
3 during the cross-examination of a police detective it
4 sustained the Government's objection to a question about
5 whether the defendant's acquaintance, whom the defendant
6 contended committed the shooting, was a police informant.

7 The Second Circuit held the Court reasonably
8 accepted the Government's argument that any possible prejudice
9 to public safety that could arise when questioning the
10 identities of police informants outweighed the minimal
11 probative value of the defendant's question. Accordingly, the
12 Court did not abuse its discretion in limiting
13 cross-examination.

14 Fourth, the defendant argued the Court erred in its
15 jury instructions. Because the language he objected to on
16 appeal was language he initially requested, however, the
17 Second Circuit held the defendant affirmatively had waived
18 such a challenge. Moreover, the Second Circuit held the jury
19 instructions did not mislead the jury as to the correct legal
20 standing. Accordingly, the Second Circuit found no clear
21 error in the Court's jury instructions.

22 Finding the Court made no clear error during the
23 trial, the Second Circuit affirmed the defendant's conviction
24 by a jury of his peers beyond a reasonable doubt.

25 Now, with respect to the defendant's sentencing,

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1 however, on appeal the defendant challenged both the process
2 and the substance of his sentence. In his first appeal the
3 Government argued the enhanced sentencing provisions of the
4 ACCA applied to the defendant's sentence. The defendant
5 argued that the Court made procedural error by, one, stating
6 in the written judgment an accompanying statement of reasons,
7 guideline ranges and legal findings different from those
8 stated in the oral sentencing procedure. And, two, including
9 in the judgment special conditions of supervised release not
10 alluded to in the oral sentencing proceeding.

11 With respect to substance, the defendant argued that
12 his 51-month sentence was unreasonable and the special
13 conditions of release, including the requirements that he
14 submit to a psychosexual evaluation and that he comply with
15 sex offender registration requirements were not reasonably
16 related to his offense or his history and characteristics.

17 The Second Circuit did not address these arguments,
18 instead it suggested on remand this Court may: One, correct
19 any "arguable procedural errors"; and, two, reconsider the
20 special conditions of supervised release, but in the event the
21 Court believes those conditions remain appropriate, explain
22 its reasons.

23 The Government's arguments were as follows:

24 The Government argues the Court erred in finding the
25 enhanced penalty provision in the ACCA inapplicable to the

1 defendant's case. At sentencing, this Court concluded the
2 enhanced sentencing provision of ACCA did not apply to the
3 defendant. The ACCA mandates a sentence of 15 years in prison
4 for a defendant convicted of violating Section 922(g) who has
5 three or more prior convictions for "violent felonies."

6 At the time of sentence the defendant had been
7 previously convicted of three New York State felonies, first
8 degree robbery, attempted third degree robbery, and first
9 degree sexual abuse. Concluding that at least two of these
10 offenses, attempted robbery and sexual abuse, did not qualify
11 as crimes of violence, this Court held the defendant's prior
12 convictions did not warrant an enhanced sentence under ACCA.

13 The Second Circuit, however, noted that the Supreme
14 Court's decision in Stokeling, S-T-0-K-E-L-I-N-G, versus
15 United States, 139 Supreme Court 544 in 2019 and the recent
16 Second Circuit decisions in United States versus Thrower,
17 T-H-R-0-W-E-R, 914 F.3d 770 Second Circuit 2019 and the
18 Pereira-Gomez, P-E-R-E-I-R-A dash G-0-M as in Mary E-Z
19 decision, 903 F.3d 155, Second Circuit 2018, now qualified the
20 defendant's previous conviction for attempted robbery as a
21 crime of violence under the ACCA warranting a new sentence.
22 The Second Circuit also questioned, but declined to decide,
23 whether under these new developments and caselaw the
24 defendant's sexual abuse conviction would also qualify as a
25 crime of violence under the ACCA. See Thomas 2019 Westlaw

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1 1299705 at *5 noting sexual abuse in the second degree is
2 "divisible covering several types of conduct," and subdivision
3 1 requires forcible compulsion. Thus, Second Circuit remanded
4 the case for resentencing, directing this Court to determine
5 whether the defendant's sexual abuse conviction was pursuant
6 to the forcible compulsion subdivision of New York Penal Law
7 Section 130.65. It stated that if the Court finds the
8 defendant was, indeed, convicted of Subdivision 1, the Court
9 must then determine whether under the authority of
10 Pereira-Gomez, Thrower, and Stokeling, that subdivision
11 qualifies as a violent felony under ACCA.

12 Is that a fair and accurate summary of the case,
13 counsel?

14 MS. WASHINGTON: Yes, it is, Your Honor.

15 MR. TOMAO: Yes, it is, Your Honor.

16 THE COURT: Well, how do you suggest we proceed?
17 I will hear from the Government first, and then
18 defense counsel.

19 MS. WASHINGTON: Yes, Your Honor.

20 I do know that defense counsel has some housekeeping
21 matters to address with respect to Federal Defenders
22 withdrawing. I don't know if you want to deal with that first
23 or you would rather here how we want to proceed.

24 THE COURT: I would like to hear from you.

25 MS. WASHINGTON: Okay.

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1 THE COURT: And then I will hear from them, and then
2 I will hear from you, and then I will hear from them, and then
3 I will hear from you, and then I will hear from them.

4 MS. WASHINGTON: Fair enough, Your Honor.

5 So, the Government proposes that we set this matter
6 for resentencing sometime in Mid-May, perhaps the week of
7 May 13th. I have conferred with defense counsel about that
8 week. The reason -- a couple reasons for that. One, we
9 expect that the Second Circuit mandate will have actually
10 issued by that point. I believe in the docket entry that came
11 down last Thursday on March 21st, it was clear that the
12 mandate has not issued yet and I expect it will issue within
13 the next twenty or so days. I don't expect defense counsel to
14 file a petition for re-hearing, but I know there is that time
15 in between when the mandate issues and when the certified copy
16 comes down.

17 Secondly, the Government and Probation are
18 endeavoring to get court records from Queens Supreme Court
19 that might have additional information regarding the exact
20 nature of the sexual abuse charge. So we are hoping that we
21 can get more beyond the Certificate of Disposition, which is
22 in question in light of what was happening in the 1980's where
23 sometimes it defaulted just to the first subsection. So we
24 are hoping that we can get records from Queens Supreme Court.
25 The clerk's office has to pull them from archives, but whether

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1 it's a plea transcript or some other document, we are hoping
2 it will indicate the exact nature of the charge.

3 Mr. Dorra did make that request on March 7th. The
4 records only come in every Friday, and as of last Friday they
5 had not yet arrived. So we are hoping that the time of
6 resentencing in mid-May will allow for us to get those records
7 and then for the defendant and the Government to file any
8 supplemental sentencing submissions.

9 THE COURT: Anything else?

10 USPO DORRA: No, Your Honor.

11 THE COURT: I will now hear from defense counsel.

12 Ms. Whalen.

13 MS. WHALEN: Thank you, Your Honor.

14 Your Honor, after Mr. Thomas was sentenced, but
15 before his appeal was written or filed, he brought to our
16 attention some misconduct that was happening at the MCC. We
17 notified the Government. There were a number of meetings, but
18 it turned out that some of the other individuals participating
19 in the misconduct were represented by the Southern District
20 office of the Federal Defenders.

21 We spoke with the head of our office and the head of
22 Appeals because Mr. Thomas's case was finished. The Southern
23 District had to be relieved from the other individuals' cases.
24 We spoke to Appeals about whether or not Appeals could
25 continue, but they said that because of an appearance of

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1 impropriety or an appearance of favoritism among defendants,
2 we had to be relieved on the appeal as well and any future
3 purposes.

4 THE COURT: You said "misconduct," what does that
5 mean?

6 MS. WHALEN: Your Honor, I would just ask that this
7 portion of the record be sealed, and I am happy to speak.

8 THE COURT: Any objection?

9 MS. WASHINGTON: No objection.

10 THE COURT: Your application is granted.

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12 (By Order of the Court, the sealed portion of the
13 proceeding begins on the following page.)

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Sealed Proceedings - By Order of the Court

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1 MS. WHALEN: And that would have all of their
2 discovery. So in these cases these individuals were charged
3 with terrorism actions and their discovery contained all of
4 the items that had been found in their possession.

5 THE COURT: Including presumably how to make
6 weapons?

7 MS. WHALEN: Right.

8 And so what they were doing was those individuals,
9 who our Southern District office represented, were meeting in
10 the law library trying to recruit other inmates who were
11 Muslim to their plot, which was to provide these other inmates
12 with copies of their discovery.

13 THE COURT: So they would duplicate the disks that
14 contained, we will say, how to make the bomb --

15 MS. WHALEN: Right.

16 THE COURT: -- or whatever, and then the disk would
17 be given to other people?

18 MS. WHALEN: Right, but the problem was they were
19 using disks -- so in our office if we have extensive
20 discovery, rather than send it to our clients on paper, we'll
21 provide it to them on a CD.

22 THE COURT: Right.

23 MS. WHALEN: And so what was happening was they were
24 recruiting inmates to give them -- the terrorism inmates were
25 recruiting the other inmates to give them copies of their --

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1 THE COURT: Is that acceptable to you, remaining
2 counsel?

3 MR. TOMAO: Well, yes, assuming I am remaining
4 counsel.

5 THE COURT: Well, you can be seated, sir. You paid
6 enough homage to my enormous Article III ego.

7 Why don't you once again state your name, I saw it
8 from the appeal papers, but state it again and tell us how you
9 would like to enter as counsel of record for these purposes.

10 MR. TOMAO: Thank you, Your Honor. My name, my full
11 name is Peter J. Tomao, T-O-M-A-O. I was appointed to
12 represent Mr. Thomas on appeal after the Federal Defenders had
13 to request to be relieved.

14 I am not a member of the CJA panel in the Eastern
15 District; however, under the Second Circuit rules I am to
16 appear when a case is remanded, and then it's up to the
17 District Court how to proceed.

18 I have in the past been on the Eastern District
19 panel, but I am no longer on the panel. Occasionally judges
20 in this situation like yourself have appointed me. Once the
21 order is entered, I work with the CJA clerks and manage to get
22 paid.

23 THE COURT: Well, as an old Wall Street guy, I
24 thoroughly encourage lawyers being paid. There's pro bono and
25 then there's pro bono.

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1 MR. TOMAO: Right.

2 THE COURT: Do you have an application to submit or
3 do you wish to submit your application on ECF?

4 Certainly, given your fine work to date I have no
5 problem telling you I will approve it. It is just
6 logistically, how do you want to proceed on that basis?

7 MR. TOMAO: Well, it is kind of a course --

8 THE COURT: Cart before the horse.

9 MR. TOMAO: Cart before the horse, yes. I can't
10 file anything until I put a notice of appearance in.

11 THE COURT: So why don't you put in a notice of
12 appearance --

13 MR. TOMAO: I will put in a notice of appearance.

14 THE COURT: -- and I will grant your application.
15 Spoiler alert.

16 MR. TOMAO: Okay, fine.

17 Well, with that assumption, that is going to be
18 granted --

19 THE COURT: I take it there is no opposition from
20 your worthy adversary?

21 MS. WASHINGTON: No objection, Your Honor.

22 THE COURT: There you go. So the Court has told you
23 he is going to approve it. Your adversary said there is no
24 objection.

25 Mr. Thomas, would you like to have this gentleman

1 represent you?

2 THE DEFENDANT: Yes, sir, I do.

3 THE COURT: I would think you would. Okay, so there
4 you go.

5 MR. TOMAO: So thank you, Your Honor. Yes.

6 THE COURT: You're welcome.

7 MR. TOMAO: The statement that you made of the
8 status of the case appeared to me to be 100 percent accurate.

9 We're before the Court with several resentencing
10 issues to be decided. The principal one has to do with this
11 prior conviction for the sexual abuse in the first degree.

12 THE COURT: Let me stop you right there.

13 What I had anticipated doing, which has been touched
14 on, I think, by counsel, is to have the parties file proposed
15 findings of fact and conclusions of law with respect to all of
16 the issues in this case that are open on this resentencing by
17 a given date, and then to have the parties file replies by a
18 given date, and then to have the resentencing on a given date.

19 So, in other words, both sides will have an
20 opportunity, again, in light of the procedural complexities
21 that exist in the case, by date X, and then you would have a
22 week or two or three weeks after day X to put in responses.
23 And then we would have the re-sentencing at some date
24 thereafter.

25 So just in terms of a structure, does that make

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1 sense to you or do you think that you need something other
2 than that?

3 MR. TOMAO: Well, Your Honor, respectfully --

4 THE COURT: Yes.

5 MR. TOMAO: -- and, again, from the argument, the
6 Government has the burden of proof on this issue. And there
7 may be, because of the age of this conviction and just getting
8 records out of Queens County, there may be an issue with
9 regards to whether they can meet that burden and get --

10 THE COURT: Well, that is their burden.

11 MR. TOMAO: Right, but I would say because of that I
12 would prefer to have responsive pleadings, where they go
13 first, put in what they have; I respond to that, and they,
14 essentially, get last word.

15 THE COURT: Well, I was suggesting that -- I take it
16 at this point you have things to say to the Court, is that
17 true or not true? I understand they have the burden.

18 MR. TOMAO: Yes.

19 THE COURT: But I think at this point it would seem
20 to me that, I am just giving you an opportunity --

21 MR. TOMAO: Sure.

22 THE COURT: -- to file at the same time that they
23 file. You do not have to. They can put in their papers, you
24 do not have to put anything in. Then you have an opportunity
25 to respond, and then they have an opportunity to reply.

1 So in other words, I want to have as much briefing
2 of these issues as we can have that will be of assistance to
3 the Court. So not that I am trying to put any burden on you
4 or have you show your hand prematurely. I am happy to have
5 the Government go forward and you do not have to put anything
6 in at all on that first date, it's up to you. Then you have
7 an opportunity to respond to whatever they put in, which is
8 what you just indicated you want, and then they will have an
9 opportunity to reply.

10 So I am not so interested in your place or mine or
11 who goes first, what I am really interested in is having both
12 sides have an opportunity to address the issues in this case.

13 MR. TOMAO: That's fine, Your Honor. Especially now
14 that you've added to this and instructed me that I would have
15 the option of basically saying, Judge, I have nothing to say
16 on this issue because of the burden of proof.

17 THE COURT: Absolutely.

18 MR. TOMAO: And then be prepared to raise any issue
19 on my second responsive filing. I think I am not going to
20 turn down the chance to file an additional paper with the
21 Court that may be helpful.

22 THE COURT: I didn't think you would. I didn't
23 think you would.

24 MR. TOMAO: I know. I've been doing this for a
25 little while myself.

1 THE COURT: I know.

2 Well, initially I had thought, before hearing about
3 the Raiders of the Lost Ark exercise to find the missing crate
4 in Queens, that we might have a fairly focused briefing
5 schedule, but let me start this way.

6 Let me ask the Government, if I might, when do you
7 anticipate being able to put in your proposed findings of fact
8 and conclusions of law, on or before what date? And I will
9 give you whatever date you want in 2019. I will draw the line
10 at December 31, 2019. Just tell me the date.

11 MS. WASHINGTON: April 30th.

12 THE COURT: April 30th, okay. Let's say you have
13 that.

14 Now the bid is back to you, sir. You are certainly
15 welcome to file something preliminarily on April 30th if you
16 wish, but you do not have to. What reply date would you like,
17 sir? I will give you as much time as you want.

18 MR. TOMAO: Let me just speak with Mr. Thomas.

19 THE COURT: Sure. And by the way, if you hit the
20 green button I will not be able to hear what you say; more
21 importantly, your adversaries will not be able to hear what
22 you say either.

23 (Pause.)

24 MR. TOMAO: Your Honor, why don't we ask to file our
25 papers by May 31st.

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1 THE COURT: You have it. May 31st of 2019.
2 Now the bid is back to you, counsel. How long do
3 you require to put in your response to their papers? I will
4 give you as much time as you want.

5 MS. WASHINGTON: April 21st.

6 THE COURT: No, it can't be April.

7 MS. WASHINGTON: I'm sorry.

8 THE COURT: I'm good, but I'm not that good. Even
9 Article III powers don't go that far.

10 What date would you like?

11 MS. WASHINGTON: June 21st.

12 THE COURT: June 21st; you have it. And would you
13 like a right of reply?

14 MR. TOMAO: To that, Your Honor?

15 THE COURT: To that.

16 MR. TOMAO: Yes, Your Honor.

17 THE COURT: Okay, what date would you like?

18 MR. TOMAO: We just got to June 21st?

19 THE COURT: Yes, still in 2019.

20 MR. TOMAO: We are doing very well, Your Honor.

21 THE COURT: Yes.

22 MR. TOMAO: How is July 19th?

23 THE COURT: July 19th; you have it.

24 Mr. Jackson, would you call out the dates? And if
25 you do not have them, I have attempted to write them down.

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1 THE COURTROOM DEPUTY: I have them, Judge.

2 THE COURT: Okay. Keep your voice up and then we
3 will set a date for the re-sentencing to follow that.

4 Let's say that we stick with those dates, when do
5 you envision a re-sentencing date that works for people after
6 July 19th? Assuming that you would like the Court to have the
7 opportunity to review the papers prior to the re-sentence, and
8 I am assuming that Probation will also put in papers as well,
9 the PSR, which I assure you I will read out loud very slowly
10 and carefully for my friends on the 17th floor every word so
11 there is no doubt about what was stated.

12 All right, when would you like to do this, counsel?

13 MS. WASHINGTON: Your Honor, the Government is
14 amenable and happy to defer to your calendar.

15 THE COURT: Well, don't defer, just give me a date.
16 Sorry about that.

17 MS. WASHINGTON: I would --

18 THE COURT: Give me a date and then I will see if it
19 works for defense counsel. We are talking about a date either
20 at the very end of July or sometime in August.

21 MS. WASHINGTON: I would say August 1st.

22 THE COURT: Okay, August 1st. What day of the week
23 is that?

24 MS. WASHINGTON: That's a Thursday.

25 THE COURT: Thursday, August 1st.

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1 Defense counsel, bid is back to you. Does that work
2 for you as a date for the sentencing, the re-sentencing?

3 MR. TOMAO: Just a second, please, Your Honor.

4 THE COURT: Yes.

5 (Pause.)

6 MR. TOMAO: It is kind of an interesting date for
7 me.

8 THE COURT: Your wedding anniversary or something?

9 MR. TOMAO: No, Your Honor.

10 THE COURT: Your birthday? I will go through the
11 list.

12 MR. TOMAO: You will never get it.

13 THE COURT: All right, there you go. Then I won't
14 ask.

15 Does August 1st ask?

16 MR. TOMAO: It's the date -- it's the week that our
17 son is kicking us out of our home up in Maine, so I planned
18 to --

19 THE COURT: What part of Maine?

20 MR. TOMAO: Moosehead Lake, halfway between Bangor
21 and Quebec.

22 THE COURT: I have a brother who is a pediatric
23 psychiatrist in Ellsworth, Maine.

24 MR. TOMAO: Oh, okay.

25 THE COURT: And you might think he became a

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1 pediatric psychiatrist because I am his big brother. I asked
2 him once, Why did you take that route? And he said, Why do
3 you think? So that was the end of that discussion.

4 Okay, August 1st does that work or is that a bad
5 day?

6 MR. TOMAO: No, we'll make it work, Judge.

7 THE COURT: August 1st. Can we do it at noon,
8 Mr. Jackson?

9 THE COURTROOM DEPUTY: We can, we just have a ten-
10 day jury trial scheduled for that Thursday, Judge.

11 THE COURT: Civil or criminal?

12 THE COURTROOM DEPUTY: It's criminal.

13 THE COURT: Which case?

14 THE COURTROOM DEPUTY: The Griffin action.

15 THE COURT: Okay, well, we will do it then,
16 August 1st, Thursday, at noon.

17 Okay, so why don't you call out the dates. We will
18 put them in an order on ECF. Mr. Jackson will call out the
19 dates now so you have them.

20 THE COURTROOM DEPUTY: The Government shall e-file
21 its findings of fact and conclusions of law by April 30th.

22 Defense counsel shall submit his response on or
23 before May 31st.

24 The Government shall submit its reply on or before
25 June 21st.

1 And the defendant shall submit its sur-reply by
2 July 19th.

3 The re-sentencing of this action is scheduled for
4 August 1st at 12 o'clock noon.

5 THE COURT: Is there anything else that I can help
6 counsel with?

7 MS. WASHINGTON: Nothing from the Government, Your
8 Honor.

9 MR. TOMAO: Your Honor, the only open issue that
10 part of all this is that in -- the Court at the request of the
11 Probation Department created -- ordered some special
12 conditions --

13 THE COURT: Right.

14 MR. TOMAO: -- that are -- were difficult. And I
15 know you just mentioned that there would be at some point an
16 addendum to the PSR, which I assume would be principally
17 directed to explaining -- one of the issues would be to
18 explain that issue.

19 THE COURT: What I want them to do is not to explain
20 an issue, this is a re-sentence. So I want them to do a PSR
21 that is complete and entire for this Court to consider, as if
22 we were having, what we refer to in Brooklyn where I grew up
23 and in Manhattan where I grew up, as a do-over. So I want a
24 full A to Z PSR. This is not a truncated, built-on-the-
25 earlier-one, this is a re-sentence and I want a full bore PSR.

1 Hopefully, one informed by whatever you can unearth from our
2 friends in Queens.

3 MR. TOMAO: So we are entitled to that 35 days
4 before August, before sentencing.

5 THE COURT: I am assuming that as soon as they can
6 find it, if they can find it and write it up.

7 Well, there area two points. One is they have to
8 find the earlier judgment, and they may or may not find that.
9 So let's assume for the moment that they find it tomorrow and
10 they write up their PSR report and everything is fine and here
11 we are in August 1st and everybody has had ample opportunity
12 to read it.

13 However, in the real world the other problem is they
14 never find it. They never find it. Then what? What if you
15 can't find it? What if we don't know any more than we know
16 today about that previous conviction?

17 USPO DORRA: Then I believe Probation --

18 THE COURT: Why don't you use the microphone, sir,
19 so we can hear you.

20 USPO DORRA: Oh, sorry.

21 And I will ask Ms. Washington to correct me, but if
22 that is the case and there is no new information, then I
23 believe the Government would not be able to meet its burden of
24 proof that the sexual abuse conviction is a crime of violence.

25 THE COURT: Is that your view, if they can never

1 find it, if the record is as it is today, we have the two
2 robbery convictions, right, but -- you can't say uh-hum, you
3 have to say yes or no.

4 MS. WASHINGTON: Yes. Yes, we do.

5 THE COURT: Okay.

6 -- but we never find the underlying documents in
7 Queens because they are in the Raiders of the Lost Ark box
8 somewhere in the middle of the modern pyramid, so are you then
9 just going to put up the white flag and say, with respect to
10 ACCA, never mind; or are you going to come in and say under
11 your view of the statute it still constitutes the third prong,
12 enter the third murderer, as they say in Macbeth, and you will
13 go forward or do you want to think about that?

14 MS. WASHINGTON: Your Honor, I think we would want
15 to think about that, especially because there's caselaw that
16 suggests that the certificates of disposition at that time
17 defaulted to that, but we could come upon information that
18 would suggest otherwise.

19 THE COURT: Right, but if you do not find anything,
20 you are just reserving at this point in terms of what position
21 the Government would take with respect to that issue, that is
22 your position today?

23 MS. WASHINGTON: Yes. Yes, Your Honor.

24 THE COURT: Does that answer your question?

25 MR. TOMAO: I guess so, Your Honor. I was just

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1 wondering when we would hear that, but I guess we will find
2 out on April 30th.

3 THE COURT: Either before or after Tisha B'Av, as we
4 say in the hood. I don't know.

5 MR. TOMAO: I think you've explored the issue as
6 much as we can at this point. We will see what comes from
7 that table.

8 THE COURT: Now, if you do not find it by then, are
9 you going to come back and ask for an adjournment of the
10 sentencing while you continue to have the Raiders of the Lost
11 Ark search?

12 MS. WASHINGTON: I don't think we want the search to
13 go on longer. And, in fact, we've all discussed, and I think
14 are in agreement, that if we don't have something from the
15 clerk's office in the next week or two, that we would come to
16 Your Honor and at least get some sort of court order directing
17 that it be pulled from archives because as far as we are
18 aware --

19 THE COURT: I will give you that. You don't have to
20 wait, I will give you that order now that it be pulled from
21 the archives. If you think that they are sort of, I'll use
22 the polite term, diddling because they do not have an order
23 from a federal court, I will enter that order now. You can
24 submit it on ECF on notice to the other side and I will enter
25 that order now directing them to do it.

1 MS. WASHINGTON: Okay. We are happy to have that
2 order, Your Honor.

3 THE COURT: Why don't you submit it on ECF on notice
4 and I will sign the order and enter it on ECF, and then you
5 folks can have your hunting license with respect to my friend
6 DA Brown and his 30 potential successors who are running for
7 DA.

8 MR. TOMAO: Mr. Thomas is just asking me about
9 Mr. Brown.

10 THE COURT: He is very busy and he is a wonderful
11 district attorney, but he is somewhat ill.

12 MR. TOMAO: Yes, and he's indicated that --

13 THE COURT: And he has indicated he is not seeking
14 another term of election.

15 So, what else can I help you folks with today?

16 USPO DORRA: Nothing from Probation, Judge.

17 MS. WASHINGTON: Nothing from the Government.

18 MR. TOMAO: Nothing from the defense, Your Honor.
19 Thank you very much.

20 THE COURT: Thank you. We are adjourned.

21 MS. WASHINGTON: Thank you.

22

23 (Matter adjourned.)

24

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SAM

OCR

RMR

CRR

RPR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 16-CR-00147(WFK)

-against- : United States Courthouse
: Brooklyn, New York

BERNARD THOMAS, : 12:00 p.m.

Defendant.

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TRANSCRIPT OF CRIMINAL CAUSE FOR RESENTENCING
BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT COURT JUDGE

APPPEARANCES:

For the Government: RICHARD P. DONOGHUE
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ALICIA WASHINGTON, ESQ.
ERIN ARGO, ESQ.
Assistant United States Attorney

For the Defendant: LAW OFFICE OF PETER J. TOMAO
600 Old Country Road
Garden City, New York 11530
BY: PETER J. TOMAO, ESQ.

Court Reporter: Michele D. Lucchese, RPR, CRR
Official Court Reporter
E-mail: MLuccheseENDY@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

1 THE COURTROOM DEPUTY: All rise. The Honorable
2 William F. Kuntz, II is now presiding. Criminal cause for
3 resentencing, Docket No. 16-CR-147. USA versus Thomas.

4 Counsel, please state your appearances for the
5 record. Spell your first and last names for the court
6 reporter, including the two probation officers.

7 MS. WASHINGTON: Alicia Washington for the United
8 States, A-L-I-C-I-A, W-A-S-H-I-N-G-T-O-N. Good afternoon,
9 Your Honor.

10 THE COURT: Good afternoon. Please be seated.

11 PROBATION OFFICER MALKO: Michelle Malko from
12 Probation, M-I-C-H-E-L-L-E, M-A-L-K-O.

13 THE COURT: Good afternoon. Please be seated.

14 PROBATION OFFICER DORRA: Also from Probation,
15 Michael Dorra, M-I-C-H-A-E-L, D-O-R-R-A.

16 THE COURT: Good afternoon. Please be seated.

17 MR. TOMAO: Good afternoon, Your Honor. On behalf
18 of Mr. Thomas, Peter Tomao, P-E-T-E-R, T-O-M-A-O. And Mr.
19 Thomas is here with me.

20 THE COURT: Good afternoon, gentlemen. Please be
21 seated.

22 Are there any other counsel who wish to note their
23 appearances? Hearing none.

24 Good afternoon, Mr. Thomas.

25 THE DEFENDANT: Good afternoon, sir.

1 THE COURT: Welcome back. Are you ready to proceed?

2 THE DEFENDANT: Yes, I am.

3 THE COURT: Mr. Thomas, have you had an opportunity
4 to review carefully the revised pre-sentence investigation
5 report filed in your case on May 23, 2019?

6 THE DEFENDANT: Yes, sir, I have.

7 THE COURT: Have you discussed it with your counsel?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Have you read the Government's
10 resentencing memorandum filed on April 30th of 2019?

11 THE DEFENDANT: Yes, I have, sir.

12 THE COURT: And the defense counsel's resentencing
13 memo dated May 31st of 2019?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you also read the following
16 materials, the indictment in this case filed on March 25th of
17 2016? Did you read that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: The superseding indictment filed on
20 September 9th of 2016, did you read that?

21 THE DEFENDANT: Yes, I have.

22 THE COURT: The jury verdict dated October 21st of
23 2016, did you read that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Any other documents either counsel would

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1 like the Court to pay attention to at the moment?

2 MS. WASHINGTON: None from the Government, Your
3 Honor.

4 MR. TOMAO: Your Honor, in addition, there is the
5 memorandum from the Probation Department regarding the special
6 conditions and Mr. Thomas and I have specifically discussed
7 that as well.

8 THE COURT: Thank you.

9 Mr. Thomas, do you feel prepared to go forward with
10 your resentencing today?

11 THE DEFENDANT: Yes, sir, I am.

12 THE COURT: Sir, you have the right to address the
13 Court before I impose sentence in your case. I will give you
14 the opportunity to do so in just a few minutes. Feel free to
15 say anything you think appropriate at that time before I
16 finalize my judgment in your case. Do you understand?

17 THE DEFENDANT: Yes, sir, I do.

18 THE COURT: Mr. Thomas, are you satisfied with your
19 counsel's representation of you in this case?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Sir, do you believe that you have
22 received the effective assistance of counsel in your case?

23 THE DEFENDANT: Yes, sir, I have.

24 THE COURT: If you do not believe you have received
25 the effective assistance of counsel in your case, you may

1 raise a claim of ineffective assistance of counsel at an
2 appropriate time and in an appropriate forum. Do you
3 understand?

4 THE DEFENDANT: Yes, sir, I do.

5 THE COURT: The record should reflect that Ms. Argo
6 has joined us. Good afternoon, counsel.

7 MS. ARGO: Good afternoon, Your Honor. Apologies
8 for my delay.

9 THE COURT: No problem. I know you have more than
10 one case.

11 United States Code states the following sentencing
12 parameters for one count in felon of possession of ammunition:
13 The statutory maximum imprisonment term of up to ten years,
14 120 months, statutory maximum imprisonment term of supervised
15 release of three years, a fine in an amount of up to \$250,000,
16 a mandatory special assessment of \$100 per count, which I am
17 required to impose in all cases.

18 All parties in this case agree the appropriate
19 guidelines for violation of Title 18, United States Code,
20 Section 922(g)(1) is guideline Section 2K2.1(a)(4)(A) which
21 provides a base offense level of 20 because the Defendant
22 committed the instant offense after sustaining one felony
23 conviction of a crime of violence, Robbery in the First
24 Degree, forcible theft armed with a deadly weapon.

25 The parties agree the Defendant has not clearly

1 demonstrated acceptance of responsibility for the offense to
2 justify a two-level reduction. The parties agree the
3 Defendant is not a, quote/unquote, armed career criminal
4 within the meaning of the Armed Career Criminal Act to warrant
5 an enhancement. Accordingly, the Defendant's total offense
6 level is 20.

7 Is that the position of the Government?

8 MS. WASHINGTON: Yes, it is, Your Honor.

9 THE COURT: And of probation?

10 PROBATION OFFICER MALKO: Yes, Your Honor.

11 THE COURT: And of the defense?

12 MR. TOMAO: Yes, it is, Your Honor. And --

13 THE COURT: Hang on. We will get to you in a
14 second.

15 MR. TOMAO: Okay.

16 THE COURT: Just answer my question and then make
17 your speech later.

18 MR. TOMAO: Of course, Judge.

19 THE COURT: With a Criminal History Category of III
20 and a total offense level of 20, the parties' calculations
21 yield an advisory guideline imprisonment range of 41 to 51
22 months. The guidelines further recommend a term of supervised
23 release of one to three years, a fine between \$15,000 and
24 \$150,000 and also suggests this Defendant is ineligible for
25 probation.

1 All parties recommend a sentence within the
2 guideline range. Probation recommends 51 months' custody to
3 be followed by three years of supervised release with special
4 conditions. The Government also recommends a sentence of 51
5 months of imprisonment. The Defendant requests a sentence of
6 time served, that is to say 46 months' custody after applying
7 a good-time reduction of 15 percent for time served.

8 Is that an accurate statement of the parties'
9 position?

10 MS. WASHINGTON: Yes, it is, at least of the
11 Government's.

12 THE COURT: Is that an accurate statement,
13 Probation?

14 THE PROBATION OFFICER: Yes, sir.

15 THE COURT: Is that yours as well?

16 MR. TOMAO: Your Honor, I'm sorry. I may have
17 mis --

18 THE COURT: Would you like me to read it again more
19 slowly?

20 MR. TOMAO: No. I heard every word you said.

21 THE COURT: Then you didn't miss it.

22 MR. TOMAO: I may have misled the Court is what I
23 was about to say.

24 THE COURT: You haven't misled the Court because you
25 haven't said anything yet.

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1 MR. TOMAO: We are looking for time served.

2 THE COURT: You haven't misled me yet, so don't
3 worry about that.

4 MR. TOMAO: Okay.

5 THE COURT: Counsel, am I missing anything pertinent
6 to today's proceedings?

7 MS. WASHINGTON: No, Your Honor.

8 THE COURT: Are there any objections either counsel
9 wishes to raise?

10 MS. WASHINGTON: Not from the Government.

11 THE COURT: That being the case, I will now turn it
12 over to the defense. You are on, Counsel.

13 MR. TOMAO: Thank you, Your Honor. I apologize for
14 interrupting the Court. I did not mean to do that.

15 THE COURT: That's okay. I always let defense
16 counsel have their say.

17 MR. TOMAO: Thank you. Your Honor, we do have an
18 objection to one sentence in the revised probation report,
19 which we indicated in our letter, and that was the second
20 section of paragraph 58, which suggested that Mr. Thomas was
21 not in contact with his family. In our sentencing letter, we
22 submitted the letter from his sister, which made it very clear
23 that he enjoys the support of his family and they look forward
24 to his fully being returned to the family.

25 THE COURT: So noted.

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1 MR. TOMAO: Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. TOMAO: Your Honor, the second issue, before I
4 go on to some general comments, is regarding what we are
5 looking for in terms of time served. Mr. Thomas has served to
6 this time 41 months. We are suggesting that that be the
7 sentence so that he can released as of today. That's our
8 position. That's what we are seeking.

9 THE COURT: Yes.

10 MR. TOMAO: That's what I thought I might have
11 misstated in my letter.

12 Your Honor, the issues before the Court have been
13 narrowed to two particular issues: One is the length of Mr.
14 Thomas's sentence and whether he will be released today or
15 have to served the balance of the 51-month sentence, which the
16 Bureau of Prisons estimates would have him released on
17 November 14, 1990. That's three months and two weeks. In
18 terms of many of the sentences we see in this courthouse, it
19 is not a long period of time; however, it is a long period of
20 time for any individual to actually serve a serious sentence
21 and it does have some serious effects on Mr. Thomas, which I
22 am about to address.

23 Your Honor, Mr. Thomas has, since his incarceration,
24 been working diligently to better himself and better his
25 position, and as the Second Circuit has always stated, the

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1 Court sentences the Defendant as he appears before the Court
2 on the day of sentencing and, therefore, you may consider what
3 has happened since he was initially incarcerated in this case.

4 In addition to what I set forth in the letter, Mr.
5 Thomas brought with him today three cards further evidencing
6 his work towards rehabilitation. If I may briefly, Your
7 Honor, these were cards that were issued -- one is by OSHA,
8 the Occupational Safety and Health Administration indicating
9 his completion of a 30-hour construction safety and health
10 course dated May 16, 2019.

11 THE COURT: Why don't we mark that as Defense
12 Exhibit 1. Any objection to that being admitted?

13 MS. WASHINGTON: No objection.

14 THE COURT: It is admitted.

15 (Defendant's Exhibit 1 received in evidence.)

16 MR. TOMAO: I showed these documents to AUSA
17 Washington and the Probation Officers earlier.

18 THE COURT: Just describe them, mark them and make a
19 motion to have them admitted and I am sure I will admit them.
20 We will have a nice, clean record for my friends on the 17th
21 floor.

22 MR. TOMAO: I appreciate it, Your Honor, but we
23 would ask to have custody of the originals back because Mr.
24 Thomas needs them.

25 THE COURT: We will have a copy made.

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1 MR. TOMAO: We will take care of that.

2 THE COURT: Good.

3 MR. TOMAO: The second and third documents are cards
4 issued by Hostos Community College, H-O-S-T-O-S, one is NYC
5 DOT approved four-hour flagger course and that is dated May
6 21, 2019. The flagger course, Your Honor, are those guys you
7 see, and women, they're in construction zones.

8 THE COURT: Wearing construction outfits, wearing
9 hardhats. I know what they look like.

10 MR. TOMAO: They have the stop or slow signs that
11 tell you when it is safe to move.

12 THE COURT: I know exactly what Mr. Thomas would
13 look like wearing one. No problem. I have seen that movie.

14 MR. TOMAO: The other course is also a NYC DOB
15 approved four-hour supportive scaffold user and refresher.

16 THE COURT: So that will be Defendant's 3.

17 Any objection to Defendant's 2 being admitted?

18 MS. WASHINGTON: No objection.

19 THE COURT: Any objection to Defendant's Exhibit 3
20 being admitted?

21 MS. WASHINGTON: No objection.

22 THE COURT: They are admitted and we will make
23 copies of those and they will be in the record, Counsel.

24 MR. TOMAO: Thank you, Your Honor.

25 THE COURT: Go ahead.

1 MR. TOMAO: These cards are evidence of his desire
2 to work and to get back out into the community and to earn an
3 income to support himself. Unfortunately, he tells me, and I
4 think it is reasonable, that he can't do this right now
5 because he is in the halfway house. And as Your Honor can
6 appreciate, especially with that flagger program, they want
7 them out first thing in the morning and leaving the halfway
8 house at 7:00 a.m. does not permit him to get to a jobsite
9 earlier. So he's got the courses. He's ready to go and work.
10 He's confident he'll find work and he asks the Court to allow
11 to him do that.

12 He has already been allowed to have an overnight
13 pass. He is under the supervision of United States Probation
14 Green, and he tells me that Officer Green allowed him to have
15 a 12-hour overnight pass. In order to do that, he had to
16 establish that he had an appropriate place to stay, among
17 other things. Where he stayed was with his girlfriend Glenda
18 Jones, and he tells me that Ms. Jones is looking forward to
19 his release so he can come and live with her. She would be
20 here today, but she had to work.

21 Your Honor, in addition to this, as set forth in my
22 letter, he has completed other courses, including the Osborne
23 Association program and has dealt with a number of programs
24 while he was incarcerated, which were laid out in the revised
25 probation report at paragraph 62.

1 Your Honor, this shows his desire to get out and
2 work. The Government, in its memorandum, and the probation,
3 in its memo, suggest that Mr. Thomas should serve the full
4 sentence of -- the maximum of the guidelines of 51 months in
5 part because they said he was the shooter in connection with
6 the incident that underlies this case. I noted that Your
7 Honor, in your December 13, 2007 opinion, specifically
8 rejected that theory.

9 THE COURT: Well, I wouldn't say I rejected the
10 theory. I said I rejected the notion that he had been
11 convicted by a jury of his peers on that case beyond a
12 reasonable doubt and I noted that he had not pled guilty, but
13 I certainly didn't reject the theory that he was the shooter
14 who wound up with the bullet in that case. I didn't reject
15 the theory.

16 MR. TOMAO: Well, Your Honor stated, if I can --

17 THE COURT: You are not going to hear the T word
18 coming out of my mouth with this Defendant. You really don't
19 want to go down the theory road with me, counsel, I assure
20 you. I assure you you don't want to go down the theory road.

21 MR. TOMAO: I understand, Your Honor.

22 THE COURT: Good. I'm trying to be very clear about
23 that. I'm trying to be very clear about that.

24 MR. TOMAO: You're extremely clear about that, Your
25 Honor.

1 THE COURT: Good. Let's keep moving.

2 MR. TOMAO: So, we also argued, Your Honor, that the
3 earlier release, the three-month reduction in the sentence is
4 consistent with the purpose of the First Step Act, which is to
5 expedite the re-introduction of incarcerated individuals into
6 society.

7 Your Honor, I'd like to turn to the special
8 conditions that were proposed by the Probation Department now,
9 if that's appropriate.

10 THE COURT: Of course.

11 MR. TOMAO: Your Honor, there are three conditions
12 that we are referring to generically as the sex offender
13 conditions that are at issue here. I know the Probation
14 Department talked about two other conditions, No. 1 and two.
15 We don't object to those. Those are not at issue here. The
16 conditions that we did object to specifically were these ones
17 that are more based upon a history of being a sex offender.
18 That is specifically part of the remand in this case. And, of
19 course, in terms of imposing special conditions, the Court has
20 broad discretion to do that, but that discretion is not
21 unlimited. The conditions must be reasonably related to the
22 offense and to the history and characteristics of the
23 Defendant.

24 Now, in this case, obviously the sex offender
25 conditions have nothing to do with the instant offense other

1 than the argument that the Probation Department brings up
2 regarding the possibility that he may have a firearm, which I
3 will address in a moment. But the sole sex-related offense in
4 Mr. Thomas's history is very remote in time. It occurred back
5 in 1983 when he was 17. There is no history of any other
6 offenses or even of any sexual impropriety involving Mr.
7 Thomas since that time and, therefore, we would argue that any
8 conditions that are based upon that history are too remote and
9 are not reasonably connected to the man as he stands before
10 this Court.

11 There is no evidence of any need -- that he has any
12 need for treatment or that there is any -- that these
13 conditions would provide any specific deterrence of Mr. Thomas
14 against committing such offenses since he hasn't done them
15 without these conditions.

16 Turning individually to the conditions. Condition
17 number two is a broad search condition. The portion that we
18 object to is the portion that would seek the search of his
19 computer, of any computers. There is simply no basis for such
20 a search. Even the old 1983 offense had nothing to do with a
21 computer. There's nothing in Mr. Thomas's history that would
22 suggest that he would use a computer in connection with a sex
23 offense or any reason that that should be searched. The
24 conviction, of course, did not involve the use of computers.

25 What the Probation Department suggests is the

1 rationale for this condition is that he may have a firearm.
2 Now, while I have argued in my memo that even that is pretty
3 remote, we don't object to the search condition except as it
4 relates to a computer. And, clearly, they are not going to
5 find a firearm on a computer, so there's no basis for that
6 condition.

7 The second condition which we object to, which is
8 psychosexual evaluation, Your Honor, we believe that condition
9 is also inappropriate in this case. When he was sentenced in
10 1983, there was a provision in the New York State judgment for
11 treatment. New York State never pursued that and there has
12 been no history after 1983 that any such treatment is
13 necessary or any such evaluation is necessary. And this is
14 not just a simple matter, Your Honor. These types of
15 evaluations would require Mr. Thomas to discuss his entire
16 sexual history and he is currently 53. To go back and discuss
17 everything from the time he reached puberty until today is an
18 awful burdensome thing to do, as well as being embarrassing.

19 The other aspect of it is that these evaluations
20 always include polygraphs and polygraphs have been a great
21 source of problems with the courts in terms of the way that
22 they're conducted.

23 I have an appeal right now in the Second Circuit
24 regarding the way a polygraph was conducted in which the
25 judge, the district court judge just threw out the entire

1 polygraph examination as part of his rationale. It went
2 forward on a different basis for the violation. But the
3 polygrapher was seeking to have the individual admit to things
4 that he was never convicted of and was never prosecuted for.
5 So we see no real purpose for that and to come into that in
6 this case.

7 There are conditions that we don't object to that
8 currently exist for mental health evaluations. If, in the
9 course of those mental health evaluations, the person
10 conducting the evaluation finds a basis for a further
11 evaluation to go into a psychosexual evaluation, then all the
12 Probation Department has to do is apply to the Court and give
13 Mr. Thomas notice, and if there is no objection, the Court can
14 go forward with that or overrule an objection and order it. I
15 don't see anything in the record, though, that suggests that
16 at this stage that type of evaluation is necessary.

17 And, finally, Your Honor, there is perhaps the most
18 difficult condition, which is now numbered four, which
19 requires his registration, as directed by the Probation
20 Department, to register as a sex offender with New York State.
21 Now, he has already been required to do that, Your Honor, by
22 the Bureau of Prisons. They sent him over to Manhattan and
23 directed that he register as a sex offender.

24 THE COURT: He is already required do it?

25 MR. TOMAO: He was required to do it only because of

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1 the judgment that Your Honor had entered. He is not required
2 to do it under New York State law. In fact, when he went, he
3 tells me when he went to register, the officer that he was
4 registering with wasn't sure why he was even there. But he
5 said look, if the United States Bureau of Prisons tells you
6 you have to register, I'm going to require you to register.

7 THE COURT: I have the authority to order it, right?

8 MR. TOMAO: I would say while you have the power to
9 do so, if you do so, that would be improper.

10 THE COURT: Why?

11 MR. TOMAO: Because the record does not support the
12 need for that registration.

13 THE COURT: Why not?

14 MR. TOMAO: Because, Your Honor, the 1983 conviction
15 did not require his registration under the New York State law.
16 The U.S. Probation Department, in its report, describes the
17 fact that even today there are no regulations in place that
18 require his registration for this offense. The suggestion
19 that maybe he would have to register, but that isn't there
20 right now. And the way the order is written, Your Honor, says
21 that he is supposed to register if he is directed to do so by
22 the Probation Department. And that, Your Honor, we believe
23 would be improper.

24 We also believe that the Court should consider the
25 detrimental effect this has on his ability to work since now

1 he's not going to be able to work in certain situations. I
2 have had cases, Your Honor, where individuals who were
3 involved in construction were not able to work on school
4 construction.

5 As Your Honor knows, one of the principal entities
6 doing construction in the City of New York is the New York
7 State Dormitory Authority. And even if he was to go and want
8 to work at a building that was being built by the New York
9 State Dormitory Authority in which there were no students, he
10 would not be allowed to work there if he was a registered sex
11 offender. And why is he registering, Your Honor, he would
12 only be registering because back in 1983 there was this single
13 offense with no history since then. Frankly, Your Honor, we
14 think that if Your Honor was to impose this condition, it
15 would be arbitrary and capricious and without a basis in the
16 record and it would be something that we would seek to have
17 reviewed. But we don't think it is necessary, Your Honor.

18 If something changes in the future and some
19 regulation comes down which says he has to register, again,
20 the Probation Department can apply to the Court and ask that
21 he be directed to register. At the present time, on the
22 condition as it's currently written, his only option would be
23 to refuse to follow the Probation Department's direction but
24 then file a notice of violation and he would be back before
25 the Court answering to a violation. He doesn't want to be in

1 that position. He wants to be in the position of complying
2 with the Probation Department's conditions, of getting his
3 life back in order, of following through on his hard work and
4 getting these certifications so he can work and not to be
5 caught up in this situation.

6 Your Honor, there has been a lot of statistics and a
7 lot of literature in the recent years about recidivism.
8 Consistently these reports and analyses point to the fact that
9 as particularly men age and come into their 50s, the incidents
10 of recidivism drops dramatically from what it is when they're
11 a younger man in their 20s and 30s. And, Your Honor, this is
12 where Mr. Thomas is today. He is not the young man who was
13 involved in these violations. He is not the young man who --
14 I'm sorry, involved in the 1983 violation. He is not the
15 young man who was involved in the subsequent ones. He is not
16 even the younger man who was involved in the instances in
17 terms of his adjustment to his incarceration at an earlier
18 stage.

19 We now have over three years of real experience, of
20 this Mr. Thomas, who is before you today, in 50s, under
21 incarceration without the record of problems with the federal
22 Bureau of Prisons. He has been out, released for months in
23 the halfway house without any violations, without any problems
24 and, in fact, progressing very positively towards the new life
25 we all hope he will have. And, Your Honor, we believe that if

1 he's permitted to be released today and if he's not subject to
2 the conditions that we described, especially the condition of
3 registration, he will be able to do that. And certainly I
4 believe it is his hope, as well as everyone else's in this
5 courtroom, that he never be back here to answer any charges or
6 to deal with any alleged violations. What I am asking Your
7 Honor to do is to set him on that course by granting the
8 request we made of time served and of not imposing the
9 conditions of registration, search of his computer and
10 psychosexual evaluation.

11 Thank you, Your Honor, for your patience.

12 THE COURT: Thank you.

13 Just so we are clear, what we are talking about in
14 terms of the adult criminal convictions of Mr. Thomas on 5/17
15 of 1982, at the age of 16, he was convicted of attempting
16 resisting arrest in Queens County Criminal Court. On
17 September 9th of 1982, at age 17, he was convicted of
18 possession of stolen property.

19 On November 3rd of 1982, he was convicted of
20 trespass in Queens County Criminal Court.

21 On July 26, 1983, at the age of 17, as you have
22 stated, he was convicted of sexual abuse in the first degree
23 in Queens County Supreme Court.

24 And on September 2nd of 1983, at the age of 18, he
25 was convicted of Possession of Stolen Property in the Third

1 Degree.

2 And on October 21st of 1986, at the age of 21, he
3 was convicted of resisting arrest in Bronx County Criminal
4 Court.

5 And on April 4th of 1987, he was convicted, at the
6 age of 21, of disorderly conduct in Queens County Criminal
7 Court.

8 Then on June 10th of 1987, at the age of 21, he was
9 convicted of criminal trespass in third degree Queens County
10 Criminal Court.

11 On July 31st of 1987, at the age of 21, he was
12 convicted of attempted robbery of the third degree in Queens
13 County Criminal Court and on August 16th of 1989, at the age
14 of 23, he was convicted of criminal sale of a controlled
15 substance in the fifth degree.

16 And on July 9th of 1993, at the age of 27, he was
17 convicted of criminal possession of a controlled substance in
18 the Seventh Degree in Bronx County.

19 And on July 24th of 1993, at age 27, he was
20 convicted of criminal possession of a controlled substance in
21 the Seventh Degree in Bronx County Criminal Court.

22 Then on August 17th of 1993, at the age of 27, he
23 was convicted of criminal possession of a controlled substance
24 in the Seventh Degree in Bronx County Criminal Court.

25 Then on May 10th of 1994, at the age of 28, he was

1 convicted of intent to obtain transportation without paying in
2 Bronx County.

3 Then on October 4th of 1994, at the age of 29, he
4 was convicted of attempt to obtain transportation without
5 paying in Queens County Criminal Court.

6 Then on May 11th of 1995, at the age of 29, he was
7 convicted of petty larceny in Queens County Criminal Court.

8 Then on November 21st of 1995, he was convicted of
9 petty larceny. He got 30 days of custody for that in Queens
10 County Criminal Court.

11 Then on January 6th of 1996, at the age of 30, he
12 was convicted of petty larceny in Queens County Criminal
13 Court.

14 Then on January 28, 1996, at the age of 30, he was
15 convicted of petty larceny in Nassau County, First District,
16 Hempstead, New York. 30 days custody, released from custody.

17 March 11, 1996, at age 30, petty larceny, New York
18 County Criminal Court, 30 days custody.

19 May 2, 1996, age 30, petty larceny, Queens County
20 Supreme Court, one-year custody.

21 May 4, 1998, age 32, Robbery, First Degree, forcible
22 theft, armed with a deadly weapon; Count Two, Robbery First
23 Degree, caused serious injury; Count Three, assault First
24 Degree; Count Four, reckless endangerment.

25 Age 48, August 17, 2014, menacing, Third Degree,

1 Kings Criminal Court, one-year conditional discharge.

2 September 5, 2014, age 49, criminal contempt, Second
3 Degree, disobeyed court, Kings County, 60 days' custody.

4 August 19, 2015, age 49, disorderly conduct, Queens
5 County, time served.

6 I will hear from the Government now.

7 MS. WASHINGTON: The Government rests on its
8 submission, Your Honor.

9 THE COURT: Anything from probation.

10 PROBATION OFFICER DORRA: Yes, Judge. Just to
11 respond briefly to counsel's arguments. First, I just wanted
12 to make it clear that the search condition was not imposed
13 because of the prior sex offense.

14 THE COURT: Why don't you pull the mic closer to
15 you. I can see the reporter is having trouble hearing you.
16 And even if she is not, I am. Go ahead.

17 PROBATION OFFICER DORRA: I just wanted to make
18 clear that the search condition was not recommended because of
19 the prior sex conviction.

20 THE COURT: Why was it recommended?

21 PROBATION OFFICER DORRA: Primarily because of the
22 history of the violent convictions involving firearms, as well
23 as stolen property that Your Honor just recited.

24 As far as the computer aspect of the search
25 condition, the search condition as set forth in Probation's

1 memo is the standard language for the search condition. I
2 believe that computers have been added to recognize that in
3 this day and age a lot of interaction with people is done
4 through computers, whether e-mail, social media, and that
5 provides the Probation Department with the tool to monitor
6 those avenues of interaction.

7 Regarding the sex offender registration special
8 condition, really that is just -- the probation officer would
9 just instruct the Defendant that under New York State law or
10 under, if the Defendant moves, under another state's law or
11 federal law, that he is required to register. If the
12 Defendant was not required to register, the officer would not
13 be telling him to register.

14 THE COURT: Is he required to register?

15 PROBATION OFFICER DORRA: Under SORNA, the federal
16 sex offender registration is he.

17 THE COURT: Is there an objection to that
18 characterization of the law, defense counsel?

19 MR. TOMAO: Yes, Your Honor.

20 According to Mr. Dora's memo there are no
21 regulations. He is just believing that it would be an
22 interpretation of that regulation. I don't see a citation to
23 a particular section of any regulation.

24 THE COURT: What is your response to that? And keep
25 your voice up.

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1 PROBATION OFFICER DORRA: On January 29, 2011, the
2 Attorney General issued a rule regarding the SORNA that it
3 applied retroactively to all sex offenders, including sex
4 offenders convicted before the enactment of SORNA in 2006.

5 THE COURT: What is the citation to that because
6 obviously defense counsel didn't see it? Do you have a
7 citation for him?

8 PROBATION OFFICER DORRA: I apologize, Judge, I do
9 not.

10 THE COURT: Do you have a citation for him?

11 MS. WASHINGTON: I don't. I would just note that it
12 is on page five of the memo that the Probation Department
13 submitted.

14 PROBATION OFFICER DORRA: I think what counsel is
15 referring to is the implementation of that rule is still being
16 developed.

17 THE COURT: Well, is it a rule or is it not a rule?

18 PROBATION OFFICER DORRA: It is a rule, but I
19 believe they're still working on how to implement that across
20 the country and that may be what counsel is referring to.

21 THE COURT: I didn't hear the end of your mumbled
22 statement.

23 PROBATION OFFICER DORRA: I believe they're still
24 working on developing a system to implement that rule.

25 THE COURT: What does that mean? Is there a rule?

1 PROBATION OFFICER DORRA: Yes.

2 THE COURT: But they don't implement it?

3 PROBATION OFFICER DORRA: They're not sure how to
4 implement it yet.

5 THE COURT: How long has this rule been here, since
6 2011? I realize that sometimes things take a while in
7 Washington. But you are telling me that an eight-year-old
8 rule, they don't know how to implement it; is that right?

9 PROBATION OFFICER DORRA: As far as we are aware,
10 they're still working on it.

11 THE COURT: Does anyone have to comply with a rule
12 that the government doesn't know how to implement in the real
13 world?

14 If I tell him he has to comply with it, what does
15 that mean in the real world? Because that is what I have to
16 deal with. I am not in Washington. I am in Brooklyn.

17 PROBATION OFFICER DORRA: The way we would interpret
18 that is once there is a rule for complying with that statute,
19 or once there is a method for complying, then he would be
20 required to comply.

21 THE COURT: Okay. But until there is a method of
22 complying, he doesn't have to comply, is that what you are
23 saying?

24 PROBATION OFFICER DORRA: There would be no way for
25 him to comply.

1 THE COURT: What is the answer to my question? He
2 doesn't have to comply until there is a mechanism for
3 compliance?

4 PROBATION OFFICER DORRA: Correct.

5 THE COURT: And if there is a mechanism for
6 compliance, then he will have to comply as a matter of law;
7 correct?

8 PROBATION OFFICER DORRA: Yes.

9 THE COURT: Okay. I understand your position.

10 Anything else?

11 PROBATION OFFICER DORRA: Just on the evaluation,
12 the psychosexual evaluation, one reason why Probation
13 recommended that is that although the Defendant has been
14 scheduled to go through sex offender treatment in as recently
15 as 2014 while he was on parole, he did not because of the
16 timing of -- how much time he had left on parole versus how
17 long the treatment would take. So, as far as we're aware, he
18 has never actually been evaluated for sex-offender treatment.

19 THE COURT: What is the basis for having him
20 evaluated for sex-offender treatment given the date of the
21 offense being back in 1983?

22 PROBATION OFFICER DORRA: Because since he has never
23 been evaluated, we don't know what the risks are, there may be
24 no risks at all.

25 THE COURT: I will rephrase the question. What is

1 the basis for having him evaluated in 2019? I understand he
2 wasn't evaluated back in the day, but as we sit here today, as
3 counsel points out, I have to sentence the man who is before
4 me today, understanding his history, what is the basis today
5 for having a sexual psychological evaluation?

6 PROBATION OFFICER DORRA: Well, the underlying basis
7 would be that 1983 conviction.

8 THE COURT: But I thought that's too remote in time?
9 No? Is it too remote in time in your view?

10 PROBATION OFFICER DORRA: Our position would be that
11 because he has never been evaluated, that it's not.

12 THE COURT: Well, suppose someone had committed a
13 sexual crime in 1983 and had never been evaluated because they
14 had never been caught until 2019, would they be required, in
15 your understanding of the law, to be evaluated in 2019, having
16 never been evaluated before?

17 PROBATION OFFICER DORRA: Having been convicted of
18 that prior --

19 THE COURT: Supposed they get convicted in 2019. We
20 will just make up a name. Call him Epstein. Okay? He is
21 convicted in 2019. What happens? Does he get evaluated based
22 on what he did in 1983 or is that too remote? What is your
23 understanding of the law, if you have one? If you don't, I
24 will ask the lawyers to your right.

25 PROBATION OFFICER DORRA: Then I would defer to the

1 Government.

2 THE COURT: Okay. Counsel?

3 MS. WASHINGTON: Your Honor, the only thing I would
4 cite back is some of the case law that is cited by the
5 Probation Department in its memorandum, which notes that the
6 Second Circuit.

7 THE COURT: Vader. Not Woody Allen.

8 MS. WASHINGTON: The Second Circuit has upheld sex
9 offender specific treatment even when the instant offense of
10 conviction was not a sex offense.

11 THE COURT: So you're saying if I ordered it, the
12 Second Circuit would affirm me when it's appealed, right? You
13 are comfortable about that? I don't mind getting reversed if
14 I am relying on the best information I have from learned
15 counsel and it is my call. But you are comfortable that if
16 this goes up to the Circuit, they will agree with your
17 position, is that what you are telling the Court?

18 MS. WASHINGTON: Well, I think, as I read the cases
19 that are in front of me on page 4 of the memorandum, I think
20 there is case law to support it; however, it's not clear to me
21 what the timing of these cases were. So if there's a specific
22 issue about remoteness, I think we would need more time to
23 research that.

24 THE COURT: Well, we don't have more time because we
25 are here to sentence him today. So what you are saying is it

1 is up to me to rule and if I get reversed, so be it; right?

2 MS. WASHINGTON: That's correct, Your Honor.

3 THE COURT: Okay. That's why they pay me the big
4 bucks.

5 Anything else defense counsel wants to say in
6 response before Mr. Thomas is free to make a statement or say
7 nothing at all?

8 MR. TOMAO: Thank you, Your Honor. Just briefly, I
9 would point to the -- that I have responded to the cases cited
10 by the Probation Department. I did point out that there were
11 cases that reject special conditions because the prior sex
12 offenses were remote in time, 17 years in one case and 19
13 years in another case, and we are far beyond that. I hope
14 that Your Honor does not impose it because I don't necessarily
15 want to be up in the Second Circuit arguing these cases. It
16 is, however, a substantial issue with Mr. Thomas and would
17 substantially affect his life.

18 The search condition, Your Honor, I'm still not
19 clear why they need to search a computer because they thought
20 he might have a gun, so I don't think that's reasonable.

21 THE COURT: Well, you heard what they had to say. I
22 understand your position on it.

23 MR. TOMAO: Thank you, Your Honor.

24 THE COURT: Mr. Thomas, do you have anything to say
25 to the Court?

Proceedings

32

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: I didn't think so.

3 On March 25th of 2016, United States of America
4 filed an indictment charging this Defendant with one count of
5 being a Felon in Possession of Ammunition, in violation of
6 Title 18, United States Code, Section 922(g)(1). ECF No. 7.

7 Beginning on August 1st of 2016, this Defendant was
8 tried by a jury of his peers on the sole count of the
9 indictment in front of my brother judge, the Honorable Edward
10 R. Korman. On August 3rd of 2016, the jury reported it was
11 unable to reach an unanimous verdict and Judge Korman declared
12 a mistrial. ECF No. 66. The matter was subsequently
13 transferred to this Court.

14 On September 9th of 2016, the Government filed a
15 superseding indictment charging this Defendant with one count
16 of being a Felon in Position of Ammunition, in violation of 18
17 U.S.C. Section 922(g)(1), ECF No. 79. The Defendant was
18 thereafter tried in this court on the sole count of the
19 superseding indictment and on October 21st of 2016, the jury
20 returned a verdict of guilty. ECF No. 101. The Court
21 sentenced this Defendant on December 8th of 2018. See
22 memorandum and order at 1, ECF No. 129.

23 On March 20th of 2019, the United States Court of
24 Appeals for the Second Circuit affirmed the Defendant's
25 conviction, however, it vacated his sentence and remanded the

1 case to this Court for resentencing. See *United States versus*
2 *Thomas*, 765 F. App'x 553, 555 (Second Circuit 2019), a summary
3 order. Specifically, the Second Circuit instructed this Court
4 to determine, one, whether the Defendant was convicted under
5 Subdivision 1 of the New York Sexual Abuse Act in the First
6 Degree, N.Y. 1 Penal Law Section 130.65, and if so, whether
7 that conviction qualifies as a violent felony warranting a
8 sentencing enhancement under the Armed Career Criminal Act,
9 (ACCA); and two, whether the special conditions of release
10 requiring the Defendant to submit to a psychosexual evaluation
11 and to comply with sexual offender registration requirements
12 are appropriate in this case.

13 The Court held a status conference to discuss the
14 re-sentencing issues, see the minute entry dated March 25th of
15 2019. And this Court then set a briefing schedule with
16 respect to those issues, see order at ECF No. 175.

17 On March 29th of 2019, the Court granted the
18 Government's motion to direct the Clerk of Court for Queens
19 Supreme Court to provide the Government and Probation access
20 to the file regarding Defendant's conviction for sexual abuse
21 for inspection and copying. ECF No. 177.

22 The Court now addresses first the Defendant's
23 sentencing using the rubric of 18 U.S.C. Section 3553(a)
24 pursuant to Section 3553(c)(2) and then the proposed special
25 conditions of supervised release.

1 Sentencing, legal standard: 18 U.S.C. Section 3553
2 outlines the procedures for imposing a sentence in a criminal
3 case. The starting point and initial benchmark in evaluating
4 a criminal sentence is the guidelines sentencing range
5 consistent with *Gall versus United States*, 552 U.S. 38, 49
6 (2007). If and when a District Court chooses to impose a
7 sentence outside of the United States Sentencing Guideline
8 range, the Court shall state in open court the reasons for its
9 imposition of the particular sentence and the specific reasons
10 for the imposition of a sentence different from that described
11 in the guidelines. The Court must also state with specificity
12 its reasons for so departing on a statement of reasons form.
13 And the sentencing Court's written statement of reasons shall
14 be a simple, fact-specific statement explaining why the
15 guideline range did not account for a specific factor or
16 factors under 3553(a), *United States versus Davis*, 8-CR-332,
17 2010 Westlaw 1221709 at star one, Eastern District of New
18 York, March 29, 2010, decided by my brother Judge Jack
19 Weinstein

24 One, the nature and circumstances of the offense and
25 the history of and characteristics of the Defendant.

1 The first 3553(a) factor requires the Court to
2 evaluate the nature and circumstances of the offense and the
3 history and characteristics of the Defendant, 18 U.S.C.
4 Section 3553(a)(1).

5 This Defendant was born on August 30th of 1965 in
6 Far Rockaway, New York, where he lived in low-income housing
7 with his mother and his six maternal half-siblings. See
8 revised pre-sentence investigation report, the revised PSR,
9 paragraphs 55-57, ECF No. 183. Growing up, the Defendant's
10 biological father provided him with financial support but was
11 not otherwise involved in the Defendant's upbringing. The
12 Defendant is close to his stepfather, who lives in Alabama
13 with the Defendant's mother and who the Defendant considers a
14 father figure. The Defendant reports he is also close with
15 his maternal half-siblings, although his half-sister reported
16 the Defendant is not in regular contact with most of the
17 siblings. One of the Defendant's half-brothers reported he
18 has a good relationship with Defendant and Defendant's son.
19 The Defendant does not maintain relationships with his
20 paternal half-siblings, as they did not inform him when his
21 father died in 2014.

22 Defendant lived in his mother's home until he was
23 first arrested at the age of 16. Thereafter, he moved between
24 correctional facilities, halfway houses, and the homes of
25 friends or girlfriends and was also homeless for periods of

1 time. With respect to his education, the Defendant reports he
2 attended Manhattan High School in New York and received good
3 grades, but he did not graduate and he earned his GED in 1990.
4 The Defendant also received carpentry, construction, and
5 electrician training at a Jobs Corps program in Morganfield,
6 Kentucky, and took college courses while incarcerated in the
7 1990s. The Defendant worked for a construction company for
8 six months in 1997, but did not report any other formal
9 employment.

10 In 1999, the Defendant married Lorraine Dawson, an
11 employee of the Metropolitan Transit Authority. He was
12 incarcerated in Rikers Island at the time. The couple has one
13 son together, who is now 21 years old. Although the Defendant
14 and his wife are currently estranged, Defendant says he is in
15 touch with his son and financially supports him when he is
16 able to do so.

17 Defendant has a history of substance. The Defendant
18 began using crack cocaine in or about 1989 and reports that he
19 used the drug daily when he could afford to do so, often
20 financing this habit through theft. Defendant also reported
21 drinking alcohol often, using marijuana occasionally and using
22 opiates daily in the period leading up to his arrest. The
23 Defendant has participated in a number of substance abuse
24 treatment programs while incarcerated and has even served as a
25 facilitator in substance abuse programs. The Defendant has

1 been treated for depression, as well as aggression and anger
2 management, while in and out of custody.

3 As noted, the Defendant was arrested for the first
4 time at the age of 16 and was ultimately convicted of
5 attempted resisting arrest. Over the next 40 years, four
6 decades, he developed an extraordinary extensive history of
7 criminal conduct. The Defendant's adult criminal convictions
8 include, as I have recited earlier, possession of stolen
9 property, Sexual Abuse in the First Degree, attempted robbery,
10 multiple counts of criminal sale or possession of controlled
11 substances, multiple counts of petty larceny and attempted
12 petty larceny.

13 In 1998, the Defendant was convicted of not one but
14 two counts of Robbery in the First Degree, one count of
15 Assault in the First Degree, one count of reckless
16 endangerment after he and an accomplice, armed with handguns,
17 forcibly robbed one victim and critically wounded another.
18 The Defendant was sentenced to 16 years in custody, during
19 which he incurred a number of disciplinary infractions. He
20 was paroled on January 22nd of 2014. After his release, the
21 Defendant's wife acquired an order of protection against him
22 due to threats he made against her. The Defendant was not
23 once but twice arrested for violating this order.

24 Regarding the instant offense, on February 29th of
25 2016, the Defendant notified the New York City Police

1 Department that he was in possession of a shell casing from a
2 recent shooting that had occurred at the Queensbridge Houses
3 in Queens, New York. Defendant further told NYPD officers
4 that an individual named "Holloway" had asked him to hold the
5 firearm on the day of the shooting but that he had returned
6 the firearm to Holloway that same evening. The Defendant was
7 arrested by the NYPD and those officers later transferred him
8 to federal custody.

9 According to Bureau of Prisons SENTRY database,
10 Defendant has been in federal custody since March 4th of 2016
11 and was released to a residential re-entry center on March 6th
12 of 2019. The Defendant has been enrolled in several programs,
13 as we heard today, including a child support seminar class, a
14 repeat offender program, and drug counseling. Defendant
15 worked as a unit orderly for three months. While in custody,
16 the Defendant incurred one infraction for telephone abuse.

17 The second 3553(a) factor addresses the need for the
18 sentence imposed to reflect the seriousness of the offense, to
19 promote respect for the law and to provide just punishment for
20 the offense, to avoid adequate deterrence to criminal conduct,
21 to protect the public from further crimes of the Defendant,
22 and to provide the Defendant with needed educational or
23 vocation training, medical care, or other correctional
24 treatment in the most effective manner.

25 The Court's sentence punishes Defendant for

1 violating federal law and is crafted to deter him and others
2 from engaging in similar criminal activity in the future. The
3 Court takes into account the Defendant's extraordinary,
4 extensive criminal history, as well as his need for treatment
5 for addiction, depression, and anger management issues.

6 The third 3553(a) factor requires this Court to
7 detail the kinds of sentences available for the Defendant. 18
8 U.S.C. Section 3553(a)(3).

9 The Defendant was convicted of one count of being a
10 Felon in Possession of Ammunition, in violation of 18 U.S.C.
11 Section 922(g)(1). By statute, the Defendant faces a maximum
12 term of imprisonment of ten years, 120 months, 18 U.S.C.
13 Section 924(a)(2), which provides that whoever knowingly
14 violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of
15 Section 922 shall be fined as provided in this title,
16 imprisoned not more than 10 years or both.

17 The Defendant also faces a maximum term of
18 supervised release of three years, 3583(b)(2); a maximum fine
19 of \$250,000, Section 3571(b); and a special assessment of
20 \$100, Section 3013. The Defendant is statutorily eligible for
21 between one- and five-years' probation because the sole count
22 to which he was found guilty is a Class C felony, Section
23 3561(c).

24 Let's address the kinds of sentence and sentencing
25 range established for Defendant's offense.

1 The fourth 3553(a) factor requires this Court to
2 discuss the kinds of sentence and the sentencing range
3 established for the applicable category of offense committed
4 by the applicable category of defendant as set forth in the
5 guidelines, 18 U.S.C. 3553(a)(4)(A).

6 Sentencing guidelines Section 2K2.1 applies to
7 violations of Section 922(g)(1). Because the Defendant
8 committed the instant offense subsequent to sustaining one
9 felony conviction of a crime of violence, namely, Robbery in
10 the First Degree, Guideline Section 2K2.1(a)(4)(A) sets the
11 base offense level at 20. See the Sentencing Commission,
12 Guidelines Manual Sections 2K2.1(a)(4)(A) and the comment
13 note one, 4B1.2(a)(2), November 2016.

14 All parties to this action agree that the ACCA does
15 not apply to the Defendant's statutory sentencing range such
16 that he would be subjected to a mandatory minimum sentence of
17 15 years of incarceration pursuant to 18 U.S.C. Section
18 924(e), requiring imposition of sentence of imprisonment for
19 not less than 15 years upon any person who violates 922(g) and
20 has three previous convictions for violent felonies. Of
21 Defendant's prior convictions, the Second Circuit identified
22 two might qualify as violent felonies within the meaning of
23 ACCA, the 1989 conviction for Attempted Robbery in the Third
24 Degree, and the 1998 conviction for two counts of Robbery in
25 the First Degree. Less clear was whether the Defendant's 1983

1 conviction, about which we have heard much today, was Sexual
2 Abuse in the First Degree, New York Penal Law 130.65(01) would
3 also qualify as a crime of violence. New York Penal Law
4 Section 130.54 is a "divisible" offense in that it covers
5 several types of conduct, defined in distinct statutory
6 subdivisions.

7 The Second Circuit instructed this Court to
8 determine upon remand whether the Defendant was convicted
9 under subdivision 1, which requires forcible compulsion, and
10 if so, whether a violation of that provision is a violent
11 felony under recent Second Circuit and Supreme Court law.
12 After reviewing the relevant Queens Supreme Court file, the
13 Government and Probation determined the Defendant, in fact,
14 was not convicted under subdivision 1. See the Government
15 resentencing memorandum at 4, ECF 181. Among the items
16 reviewed were a waiver of indictment, signed by the Defendant,
17 and an Information, charging him with Sexual Abuse in the
18 First Degree. The language in the Information largely tracks
19 the language of subdivision 2 of NY Penal Law Section 130.65.
20 Compare Government memorandum, Exhibit A, at 5, ECF 181-1
21 accusing the Defendant of the crime of sexual abuse in the
22 first degree, whereas the Defendant subjected a person, who
23 was incapable of consent by reason of being physically
24 helpless, to sexual contact, with NY Penal Law Section 130.65
25 (2), a person is guilty of sexual abuse in the first degree

1 when he or she subjects another person to sexual contact when
2 the other person is incapable of consent by reason of being
3 physically helpless. Because it is unlikely that the
4 Defendant would have waived indictment and pled guilty to a
5 crime not charged in the Information, the Government concluded
6 the Defendant was not convicted under subdivision 1. See the
7 Government memorandum at 4, note 4. Accordingly, this Court
8 need not determine whether the Defendant's conviction of
9 Sexual Abuse in the First Degree qualifies as a violent felony
10 to warrant the sentencing enhancement under ACCA.

11 Indeed, all parties agree that ACCA does not apply.
12 See the Defendant's resentencing memorandum at 2-3, ECF No.
13 184, the PSR 87-88. The Defendant has not clearly
14 demonstrated acceptance of responsibility for the offense to
15 warrant a reduction by two levels under Section 3E1.1, see the
16 revised PSR at 119. Thus, the Defendant's total offense
17 level, as previously stated is 20. Given a total offense
18 level of 20 and Criminal History Category III, the Guidelines
19 suggest a term of imprisonment of 41 to 51 months, USSG
20 Chapter 5, Part A. All parties agree with this Guideline
21 calculation. See the revised PSR 12; the Government
22 memorandum at 4; the defense memorandum at 2. The Guidelines
23 further recommend a term of supervised release as between one
24 and three years, Section 5D1.2(a)(2), a fine of between
25 \$15,000 and \$150,000, see section 5E1.2(c); and payment of the

1 cost of prosecution, see section 5E1.5. The Defendant is
2 ineligible for probation under the guidelines, see section
3 5B1.1, comment note 2.

4 The fifth 3553(a) factor addressing pertinent policy
5 statements of the Sentencing Commission requires this Court to
6 evaluate any pertinent policy statement issued by the
7 Sentencing Commission. That does not apply in this case.

8 The sixth 3553(a) factor addresses the need to avoid
9 unwarranted sentencing disparities. For the reasons set forth
10 in this memorandum and order and in consideration of the other
11 six 3553(a) factors, this Court's sentence sufficiently avoids
12 unwarranted sentencing disparities.

13 Seven, the need to provide restitution.

14 The final, the seventh 3553(a) factor, which
15 requires the Court to touch upon the need to provide
16 restitution to any victim of the offense is not applicable in
17 this Defendant's case.

18 The Court next addresses Probation's proposed
19 special conditions of release about which we have had
20 considerable discussion today.

21 A, the legal standard.

22 District courts have broad discretion in imposing
23 conditions of supervised release. See *United States versus*
24 *Betts*, 886 F.3d 198, 202, Second Circuit 2018. The Court must
25 follow the statutory procedures set forth in 18 U.S.C. Section

1 3553(d) when imposing special conditions of supervised
2 release. Special conditions of supervised release must, one,
3 be reasonably related to certain statutory factors set forth
4 in 3553(a), specifically, the nature and characteristics of
5 the offense and the history and characteristics of the
6 Defendant, Section 3553(a)(1), the need to afford adequate
7 deterrence to criminal conduct; 3553(a)(2)(B), the need to
8 protect the public from further crimes of this Defendant;
9 Section 3553(a)(2)(C), and the need to provide the Defendant
10 with necessary training or correctional treatment;
11 3553(a)(2)(D)(2), involved no greater deprivation of liberty
12 than is reasonably necessary to implement the statutory
13 purpose of sentencing; and three, are consistent with
14 pertinent policy statements issued by the Sentencing
15 Commission, 18 U.S.C. Section 3583(d). See also *United States*
16 *versus Myers*, 426 F.3d 117, 124 Second Circuit 2005.

17 Probation, as has been stated, has proposed four
18 special conditions of release to follow the Defendant's
19 sentence. Condition 1 involves the Defendant participating in
20 mental health treatment programs, including anger management;
21 Condition 2 involves the Defendant complying with search
22 conditions; Condition 3 involves the Defendant undergoing
23 psychosexual evaluation; condition four, the Defendant must
24 comply with any applicable state or federal sex offender
25 registration requirements as implemented and as brought to

1 fruition and reality. See the revised probation sentencing
2 recommendations at 1, ECF No. 183-1. The Government has not
3 taken a position with respect to any of the proposed special
4 conditions. The only conditions in dispute are Condition 2,
5 as we've heard, the search conditions, especially as related
6 to computers; Condition 3, psychosexual evaluation; Condition
7 4, applicable sex offender registration.

8 The Court now addresses the proposed special
9 conditions each in their turn. Condition 1: Condition 1
10 states Defendant shall participate in a mental health
11 treatment program to include anger management as approved by
12 the Probation Department. See Probation memorandum regarding
13 recommended supervised release conditions, Probation
14 Supervised Release memo at 2, ECF No. 183-2. The Defendant
15 does not oppose Condition 1, the mental health treatment, and
16 this Court finds this special condition is warranted given the
17 Defendant's history of depression and aggression.

18 Next, Condition 2. Condition 2 requires the
19 Defendant submit his person, property, house, residence
20 computers as defined by 18 U.S.C. Section 1030(e)(1), other
21 electronic communications and data storage devices or media to
22 a search condition conducted by the United States Probation
23 Officer only when reasonable suspicion exists. See the
24 Probation Supervised Release memo 2-4. The Defendant opposes
25 this search condition to the extent it authorizes Probation to

1 search his computers, other electronic communications, data
2 storage devices or media. The Second Circuit has repeatedly
3 upheld such search conditions based on the Defendant's current
4 offense and prior criminal history, as well as the need to
5 protect the public and further the objectives of sentencing.
6 In this case in particular, there has been some computer
7 activity, which the Court is not going to go into, that make
8 it particularly relevant that the computer search conditions
9 be complied with, see *United States versus Franco*, 733 F.
10 App'x 13, Second Circuit 2018, upholding computer search
11 conditions for defendant who used computers in prior
12 convictions for aggravated identity theft and access device
13 fraud. Now, given the Defendant's current offense of
14 conviction and his extensive history of possessing weapons and
15 contraband, the proposed search condition is warranted to
16 protect the community and to deter further criminal activity,
17 and to support officer safety. Moreover, a complete review of
18 the record reflects the need to deter the Defendant from
19 engaging in illicit activity involving computers, data storage
20 devices, and other electronic communications that might put at
21 risk this nation, foreign and domestic dangers.

22 The Defendant's activity, including his most serious
23 offenses, such as his 1998 conviction for Robbery in the First
24 Degree, have involved other individuals, suggesting a need to
25 monitor any attempts to conspire with others to commit any

1 additional crimes. Any search of the Defendant's property
2 would only be conducted upon reasonable suspicion, inflicting
3 no greater deprivation of liberty than necessary to effectuate
4 the sentencing objectives. Compare, for example, *United State*
5 *versus Eaglin*, 913 F.3d 88, 97, Second Circuit decided in
6 2019, which held that imposition of a total internet ban as a
7 condition of supervised release inflicts a severe deprivation
8 of liberty. We are not talking about that here. The Court
9 hereby imposes Condition 2 in its entirety following the
10 Defendant's term of imprisonment.

11 Condition 3: Condition 3 states the Defendant must
12 undergo a psychosexual evaluation at the discretion of the
13 Probation Department. Probation Supervised Release memo at
14 four. Defense counsel argues such an intrusive condition is
15 inappropriate here because the Defendant has not been
16 convicted of a sexual offense nor has he faced any allegations
17 of sexual proprietary. However, the Second Circuit has upheld
18 sex-offender specific treatment for defendants whose history
19 and characteristics have involved sexual misconduct. See
20 *United States versus Dupes*, 513 F.3d 338, Second Circuit 2008,
21 upholding sex-offender treatment for Defendant convicted of
22 securities fraud who was previously convicted of possessing
23 child pornography; *United States versus Peterson*; 248 F.3d 79,
24 a 2001 Second Circuit decision upholding sex-offender
25 treatment for Defendant convicted of bank larceny who had a

1 prior conviction involving sexual abuse of his own disabled
2 daughter. Here, the Defendant was previously convicted,
3 albeit in 1983, for a sex offense which involved the Defendant
4 forcibly removing the pants and having sexual intercourse with
5 a 15-year-old mentally challenged girl. See Probation
6 Supervised Release memo at 4. According to the Probation
7 Department, Defendant was referred for treatment in 2014 but
8 was not admitted because there was too little time remaining
9 on parole to engage in treatment. Well, we have that time
10 now. And for those reasons, the Court finds Condition 3,
11 imposing a psychosexual evaluation is appropriate in this case
12 for this Defendant and involves no greater deprivation of
13 liberty than is reasonably necessary in this case for this
14 Defendant on this record.

15 Condition 4 states the Defendant shall comply with
16 any applicable state or federal offender registration
17 requirements as instructed by the Probation Office, the Bureau
18 of Prisons, or any state registration agency in the state
19 where he resides, works or is a student.

20 Probation Supervised Release memo at five. A court
21 may impose a special condition requiring sex offender
22 registration following conviction for non-sex offenses for
23 defendants who were previously convicted of sexual abuse of
24 children. See *United States versus Rosario*, 386 F.3d 166,
25 Second Circuit 2004, upholding special condition requiring

1 Defendant to register as a sex offender based on prior
2 convictions for attempted rape of a seven-year-old child.
3 Given what this Defendant has been convicted of doing with a
4 15-year-old girl, I see no problem with requiring to comply
5 with the special conditions involving registration of sex
6 offenders. This Court will protect the children under his
7 watch.

8 Defense counsel argues such a condition is not
9 warranted here because in Defendant's view he is not required
10 to register as a sex offender. New York sex offender
11 registration law, the Sex Offender Registration Law of 1996
12 referred to earlier, the SORA, applies only prospectively or
13 to persons on parole for qualifying offenses at the time SORA
14 became effective, and defense counsel argues because the
15 Defendant's sexual abuse offense occurred more than a decade
16 before SORA was enacted and he was not on parole for that
17 offense in 1986, the Defendant is not required to register as
18 a sex offender.

19 Although Probation concedes the Defendant is not
20 required to register as a sex offender under New York sex
21 offender registration law, the Defendant nevertheless must
22 comply with the federal Sex Offender Registration and
23 Notification Act, the SORNA. See Probation Supervised Release
24 memo at 5. The Attorney General's final rule on SORNA, heard
25 about that earlier, it is dated January 29th of 2011, applies

1 retroactively to all sex offenders, including those convicted
2 before SORNA was enacted in 2006. Here, proposed Condition 4
3 does not force the Defendant to register as a sex offender,
4 rather it merely states directly that the Defendant is to
5 comply with any sex offender registration requirements that
6 apply to him. The Court finds no reason to strike a special
7 condition requiring the Defendant to comply with that law
8 whenever Washington manages to get its act together to protect
9 our children. In light of Defendant's prior sex offense and
10 the need to protect the public from any further crimes
11 committed by the Defendant, the Court finds Condition 4 as
12 written warranted in this case. One would have to be deaf,
13 dumb, blind, and willfully stupid to not protect our children
14 and this Court is not going to fall in that category. Other
15 courts might; not this one.

16 For the reasons set forth above, this Court
17 concludes the proposed special conditions are reasonably
18 related to the statutory factors set forth in this opinion
19 with respect to this Defendant and are proportionate to the
20 needs to afford adequate deterrence of criminal conduct by
21 this Defendant and involve no greater deprivation of liberty
22 than is necessary for this Defendant.

23 A sentence, therefore, of 51 months of
24 incarceration, to be followed by three years of supervised
25 release, and the payment of \$100 mandatory special assessment

1 is appropriate and comports with the dictates of 3553. This
2 sentence with this Defendant in this case at this time under
3 the laws that are applicable in the United States of America
4 is consistent with, and is sufficient but no greater than
5 necessary, to accomplish the purposes of 3553(a).

6 Insanity is doing the same stupid things over and
7 over again and expecting a different result. Not this Court.
8 Not on my watch.

9 The Court expressly adopts the factual findings of
10 the revised Presentence Investigation Report, barring any
11 errors contained therein, to the extent they are consistent
12 with this memorandum and order. The Court imposes the special
13 conditions of release proposed by the Probation Department and
14 directs Probation Department to read those conditions out loud
15 into the record in detail now.

16 PROBATION OFFICER MALKO: The Defendant shall
17 participate in a mental health treatment program to include
18 anger management as approved by the Probation Department. The
19 Defendant shall contribute to the cost of such services
20 rendered and/or any psychotropic medications prescribed to the
21 degree he or she is reasonably able and shall cooperate in
22 securing any applicable third-party payment.

23 Defendant shall disclose all financial information
24 and documents to the Probation Department to assess his or her
25 ability to do so. Defendant must comply with the search

1 condition.

2 The Defendant must undergo a psychosexual evaluation
3 at the direction of the Probation Department. The Defendant
4 shall comply with any applicable state or federal sex offender
5 registration requirements as instructed by the Probation
6 Office, the Bureau of Prisons, or any state registration
7 agency in the state where he resides, works or is a student.

8 The following model search condition is recommended:
9 The Defendant shall submit his or her person, property, house,
10 residence, vehicle, papers, computers, as defined in 18 U.S.C.
11 1030(e)(1), other electronic communications or data storage
12 devices or media or office to a search conducted by a United
13 States Probation Officer. Failure to submit to a search may
14 be grounds for revocation of release.

15 The Defendant shall warn any other occupants that
16 the premise may be subject to searches pursuant to this
17 condition. An officer may conduct the search pursuant to this
18 condition only when reasonable suspicion exists that the
19 Defendant has violated a condition of his supervision and that
20 the areas to be searched contain evidence of this violation.
21 Any search must be conducted at a reasonable time and in a
22 reasonable manner.

23 THE COURT: Mr. Jackson, would you get copies of
24 those documents and make Court Exhibits 1, 2, and 3 those
25 cards and return the originals back to defense counsel as we

1 previously stated.

2 Anything else from the Government?

3 MS. WASHINGTON: Yes, Your Honor. The Government
4 requests that you orally pronounce the final order of
5 forfeiture and attach that order to the judgment.

6 THE COURT: Why don't you read it out loud and then
7 I will adopt your reading.

8 MS. WASHINGTON: This is the final order of
9 forfeiture originally filed May 21, 2018. It states,
10 "Whereas, on October 21, 2016, Bernard Thomas, the Defendant
11 was convicted after a jury trial of the offense charged in the
12 sole count of the above-captioned superseding indictment
13 charging a violation of Title 18, United States Code, Section
14 922(g)(1), whereas on December 8, 2017, this Court entered a
15 preliminary order of forfeiture, preliminary order, pursuant
16 to Rule 32.2 of the Federal Rules of Criminal Procedure
17 finding that all right, title and interest in the Armscor, USA
18 ammunition seized from the Defendant on or about March 4,
19 2016, the seized ammunition, forfeitable to the United States
20 pursuant to 18, United States Code, Section 924(d)(1) and 28,
21 United States Code, Section 2461(c), as any firearm or
22 ammunition involved in or used in any knowing violation of 18,
23 United States Code, Section 922(g)(1), and/or as substitute
24 assets pursuant to 21, United States Code, Section 853(p),
25 whereas legal notice was published in this district on the

1 official Government website www.forfeiture.gov for 30
2 consecutive days beginning December 27, 2017, through and
3 including January 25, 2018. And whereas, no third-party has
4 filed with the Court any petition or claim in connection with
5 the seized ammunition, and the time to do so under 21, United
6 States Code, Section 8:53(n)(2) has expired. Now, therefore,
7 it is hereby ordered, adjudged and decreed that pursuant to
8 18, United States Code, Section 924(d)(1); 28 United States
9 Code, Section 2461(c); 21, United States Code, Section 853(p),
10 and the preliminary order, all right, title and interest in
11 the seized ammunition is hereby condemned, forfeited and
12 vested in the United States of America.

13 It is further ordered that the Bureau of Prisons, or
14 its duly authorized agent and/or contractors be and hereby are
15 directed to dispose of the seized ammunition in accordance
16 with all applicable laws and regulations.

17 It is further ordered that the United States
18 District Court for the Eastern District of New York shall
19 retain jurisdiction over this case for the purposes of
20 enforcing the preliminary order and this final order of
21 forfeiture and any supplemental orders or forfeiture as may be
22 necessary.

23 It is further ordered that Clerk of the Court shall
24 enter final judgment of forfeiture to the United States in
25 accordance with the terms of this final order of forfeiture

1 and the preliminary order.

2 It is further ordered that the Clerk of the Court
3 shall send by interoffice mail three certified copies of this
4 executed final order of forfeiture to FSA Law Clerk Anthony J.
5 Casalaspro, United States Attorneys Office, Eastern District
6 of New York, 271-A, Cadman Plaza East, Brooklyn, New York
7 11201, Brooklyn, New York, dated May 17, 2018. So ordered by
8 Your Honor.

9 THE COURT: So ordered.

10 Anything else?

11 MR. TOMAO: Yes, Your Honor. As suggested by the
12 revised pre-sentence report paragraph 63, the Defendant
13 formerly requested the Government return any documents which
14 were seized incident to his arrest. To the extent such
15 documents are still in the Government's possession and have
16 not been returned.

17 THE COURT: Your response to that request?

18 MS. WASHINGTON: To the extent the Government or law
19 enforcement agencies have any of those documents, they will be
20 returned.

21 THE COURT: So ordered.

22 MR. TOMAO: Your Honor, I respectfully request that
23 you permit Mr. Thomas to proceed on appeal as a poor person,
24 authorize the Clerk of the Court to accept his notice of
25 appeal without paying fees and for the appointment of counsel

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1 to represent him in connection with that appeal.

2 THE COURT: Any objection?

3 MS. WASHINGTON: No objection, Your Honor.

4 THE COURT: So ordered.

5 Anything else?

6 MR. TOMAO: Your Honor, I also specifically request
7 that the Court authorize me to purchase a copy of the
8 transcript from the court reporter pursuant to the Criminal
9 Justice Act.

10 THE COURT: Any objection?

11 MS. WASHINGTON: No objection.

12 THE COURT: So ordered.

13 Anything else?

14 MS. WASHINGTON: Not from the Government, Your
15 Honor.

16 MR. TOMAO: Not from the defense, Your Honor. Thank
17 you very much.

18 PROBATION OFFICER DORRA: Not from Probation.

19 THE COURT: We are adjourned. Have a nice day,
20 everybody.

21 (Matter concluded.)

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 /s/ Michele D. Lucchese

September 10, 2019

25 Michele D. Lucchese

DATE

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by [United States v. Haymond](#), U.S., June 26, 2019

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: December 16, 2016
[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, that the defendant make restitution in accordance with [sections 3663](#) and [3663A](#), or any other statute authorizing a sentence of restitution, 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; [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, 4464, 4465; [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. 2466; [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; [Pub.L. 114-324](#), § 2(a), Dec. 16, 2016, 130 Stat. 1948.)

VALIDITY

<The United States Supreme Court in [United States v. Haymond](#), (U.S. 2019) 139 S. Ct. 2369, 204 L.Ed. 2d 897, held that as applied, subsection (k) of this section governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, rather than beyond a reasonable doubt, violated the Due Process Clause and the Sixth Amendment right to jury trial.>

Notes of Decisions (1031)

18 U.S.C.A. § 3583, 18 USCA § 3583
Current through P.L. 116-193.