THE SUPERVISED OFFENDER'S QUANDARY: MODIFYING CONDITIONS OF SUPERVISED RELEASE FOR LEGALITY WITH 18 U.S.C. § 3583(E)(2)

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I. INTRODUCTION

> *Mr. Neal, you are going to be sentenced today . . . .*[2] *It is the judgement of this court that sentence shall be imposed as follows. I'm gonna give [you] 137 months . . . .*[3] *It is further ordered that [you] shall pay to the United States a total fine of $1,250 . . . . When [you are] released, [you] will be on supervised release . . . . While on supervised release, [you] shall not commit another federal, state, or local crime and [you] will comply with the*

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[2] Transcript of Sentencing at 8, United States v. Neal, No. 00-40101-06-GPM (Southern District of Illinois, July 20, 2001).

[3] *Id.* at 84.

> *standard conditions adopted by this court.*[4]

In 2014, approximately 110,000 people heard similar words at their federal court sentencings.[5] When a person is sentenced to over a year in prison, they are almost certain to be sentenced to a term of supervised released in addition to their prison time.[6] Primarily focusing on rehabilitation, district court judges implement, and sometimes craft, conditions that assist an offender's reentry into the community after a prison term.[7] The conditions for which offenders must abide by while on a term of supervised release include: not committing crimes,

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[4] *Id.* at 85-86.
[5] *See* U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, 18 (2015), http://www.bjs.gov/content/pub/pdf/ppus14.pdf. This number includes the 2,149 adults on supervised release in the US Territories. *Id.* at 12.
[6] The United States Sentencing Commission reports that between 2005 to 2009, sentencing courts imposed a term of supervised release in over 99 percent of the cases. OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 4.
[7] The use of the term "offender" in this Article is not meant to be pejorative, but is intended to clearly identify those individuals in the supervised release system.

abstaining from controlled substances, holding a job, and other commonsense prohibitions.[8]

Judges may also craft unique conditions for offenders, leading to some absurd conditions, such as effectively divorcing a husband and wife, and alleged treatment that requires a sex offender to submit to attraction tests measuring penis engorgement.[9] While these conditions are generally imposed during the defendant's sentencing, district courts have jurisdiction to modify them at any time for a variety of reasons.[10] However, due to a recent circuit split, it is unclear whether district courts can modify conditions specifically due to legality, that is, if an offender believes conditions imposed violate a statute or the Constitution.

For example, Cynthia Hobbs is an offender who recently experienced a modification of the conditions of her supervised release.[11] After she and

[8] U.S. SENTENCING COMM'N, PRIMER ON SUPERVISED RELEASE 6-7 (2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Supervised_Release.pdf.
[9] *See* Part V(a).
[10] 18 U.S.C. § 3583(e)(2) (2012).
[11] United States v. Hobbs, 845 F.3d 365 (8th Cir. 2016).

her husband were convicted of identity theft and conspiring to commit bank fraud, the district court was charged with implementing and maintaining Mrs. Hobbs' term of supervised release.[12] Mrs. Hobbs initially "did well" on supervised release, but when her husband was released from prison, she began to neglect some terms such as holding a job and making restitution payments.[13] She ultimately failed to abide by the terms of her supervised release, causing the district court to modify her basic conditions to include a special condition that prohibited "direct, indirect, or electronic contact" with her husband.[14] She challenged the special condition as being substantively illegal on the ground that it violated her constitutional right to marry, and procedurally illegal because the district court exceeded its authority in crafting the condition.[15] The appellate court reviewing the condition never addressed the substantive challenge because it held that the district court had

[12] *Id.* at 367.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 368.

procedurally abused its discretion in imposing the condition because the sentencing statute required conditions to "not constrain the defendant's liberty more than reasonably necessary," and there was not enough evidence to make a virtual divorce necessary.[16]

Ms. Hobbs was able directly to appeal the legality of her absurd special condition; yet, not every offender directly challenges conditions at sentencing and must rely on other statutory avenues to challenge the legality of conditions of supervised release.[17] One of the most flexible statutes built into the supervised release scheme, 18 U.S.C. § 3583(e)(2), allows a district court to modify conditions, but the circuits are split as to whether challenges to legality are permissible under the statute.

The Seventh Circuit has recently diverged from other circuits regarding the modification of supervised release conditions, holding that defendants may substantively challenge conditions

[16] *Id.* at 369 (quoting 18 U.S.C. § 3583(d)(2) (2012)).
[17] *See* Part V(g).

of supervised release for legality using the supervised release statute, 18 U.S.C. § 3583(e).[18] The Second, Fifth, and Ninth Circuits have each interpreted 18 U.S.C. § 3583(e)(2) to forbid a district court from doing so.[19] This has led to a circuit split regarding challenges to supervised release conditions, as well as uncertainty as to how district courts should treat supervised release conditions and offenders.

After examining the recent circuit divide, this Article will interpret § 3583(e)(2) using the method used by two United States Supreme Court cases involving supervised release.[20] Once a thorough examination of the modification statute is completed, this Article argues that the policy considerations forwarded by the Seventh Circuit in the case United States v. Neal should be adopted by Congress, regardless of any future interpretation by

[18] United States v. Neal, 810 F.3d 512, 519 (7th Cir. 2016).
[19] *See* United States v. Lussier, 104 F.3d 32 (2nd Cir. 1997); United States v. Hatten, 167 F.3d 884 (5th Cir. 1999); United States v. Gross, 307 F.3d 1043 (9th Cir. 2002).
[20] Twin cases, Johnson v. United States, 529 U.S. 694 (2000), and United States v. Johnson, 529 U.S. 53 (2000), will be the basis for statutory interpretation of 18 U.S.C. § 3583(e)(2).

the Supreme Court because the other available appellate schemes are not sufficiently effectively to aid rehabilitation.

II. SUPERVISED RELEASE AND MODIFICATION OF CONDITIONS

A. Supervised Release Generally

Under the Sentencing Reform Act of 1984, supervised release was intended to be "a separate part of the defendant's sentence" after imprisonment, designed to "eas[e] the defendant's transition into the community after a long prison term."[21] For a person who has spent a relatively short amount of time in prison, the purpose is to provide "supervision and training programs after release."[22] Both Congress and the Supreme Court have emphasized that the purpose of imposing a term of supervised release is to "improve the odds of a successful transition from the prison to liberty" for those defendants who are convicted in the

[21] S. REP. NO. 98-225, at 3307 (1983).
[22] *Id.*

federal system.[23] Thus, the overall goal and purpose of supervised release is not geared towards "incapacitation and punishment," but is rather designed to be rehabilitative in nature.[24]

Sometimes a supervised release condition may seem to be punitive, but is actually designed for the offender's reintegration into society.[25] For example, a condition mandating a curfew is not imposed to punish an offender and make him regret committing an offense, but rather to ensure that he is home during the time of night when a district court believes recidivism into drugs or other crime is more likely to occur.[26] Instead of holding the rod, the district court is supposed to hold the offender's hand during supervised release, leading him or her towards liberty.

Codified under 18 U.S.C § 3583, supervised release allows a district court judge to impose a parole-like period of post-incarceration supervision

[23] Johnson v. United States, 529 U.S. 694, 708-09 (2000) (referencing United States v. Johnson, 529 U.S. 53, 59 (2000)); *see also* S. REP. NO. 98-225, at 3307 (1984).
[24] S. REP. NO. 98-225, at 3307 (1983).
[25] *See* OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 9.
[26] *Id.* at 14.

during the initial sentencing.[27] Before imposing a term of supervised release, the district court is given a list of sentencing factors that must be considered.[28] The factors include: "the nature and circumstances of the offense and the history and characteristics of the defendant,"[29] "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."[30] The district court must also consider the suggested offense category under the sentencing guidelines;[31] any applicable policy statement issued by the United States Sentencing Commission (USSC);[32] the need to provide restitution;[33] and, most importantly, "the need to avoid unwarranted

[27] 18 U.S.C. § 3583(a) (2012).
[28] 18 U.S.C. § 3583(c) (2012).
[29] 18 U.S.C. § 3553(a)(1) (2012).
[30] 18 U.S.C. § 3553(a)(2)(B)–(D) (2012).
[31] 18 U.S.C. § 3553(a)(4) (2012).
[32] 18 U.S.C. § 3553(a)(5) (2012).
[33] 18 U.S.C. § 3553(a)(7) (2012).

sentence disparities among defendants with similar records who have been found guilty of similar conduct."[34] This factor is of utmost importance because the Sentencing Reform Act of 1984 was primarily intended to eliminate "unwarranted sentencing disparity."[35] In deciding to largely replace parole with a system that gives more discretion to the sentencing judge, the 1984 Legislature was attempting to provide a more consistent and meaningful sentencing by allowing "the judge who hear[d] and saw the evidence" to specifically tailor a rehabilitative program rather than a non-judicial parole board.[36]

After considering the applicable factors and deciding that the offender and society would benefit from a term of supervised release, the district court may impose a term of supervised release that lasts

[34] 18 U.S.C. § 3553(a)(6) (2012).
[35] S. REP. NO. 98-225, at 3236 (1984).
[36] SENTENCING REVISION ACT OF 1984: REPORT OF THE COMMITTEE ON THE JUDICIARY, TOGETHER WITH ADDITIONAL AND DISSENTING VIEWS, H. R. REP. NO. 98-1017, at 249 (1984) (Additional View of Representative John Conyers, Jr.).

up to five years.[37] For terrorism or sex crimes involving a minor, crimes that seem especially dangerous if recommitted, an offender may be placed on a life-long term of supervised release.[38] While initially discretionary, Congress has enacted additional statutes that mandate a term of supervised release in certain circumstances.[39] However, the USSC recognizes that almost all felonies are now subject to supervised release.[40]

Mandatory conditions of supervised release always include: (1) not committing another crime, (2) not possessing controlled substances, and (3)

[37] Class A and B felonies have a maximum limit of five years, Class C and D felonies have a limit of three, and Class E felonies or misdemeanors have a limit of a year. 18 U.S.C. § 3583(b)(1)–(3)(2012).
[38] 18 U.S.C. § 3583(j), (k)(2012). The United States Sentencing Commission reports that 2,273 people have been sentenced to lifetime terms of supervised release, largely for pornography and prostitution offenses. OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 58–59. The USSC also reports that the number of life terms has been steadily increasing. *Id.*
[39] *See* 18 U.S.C. § 3583(a)(2012) (first-time domestic violence offenders); 18 U.S.C. § 3583(k)(2012) (offenses including minors and certain sex offenses); 21 U.S.C. § 842(2)(2012) (certain schedule IV drug offenses). The USSC notes that statutes require supervised release in under half of all cases. OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 3.
[40] OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 6.

submitting to periodic drug tests.[41] The USSC also provides district courts with a list of recommended conditions for every term of supervised release like maintaining a job, obeying probation officers, abstaining from drunkenness and controlled substances, and not associating with other criminals.[42] In addition to the mandatory and recommended standard conditions, "special" conditions are recommended for certain offenders.[43] The special conditions suggested for certain offenders include: (1) those convicted of crimes involving weapons should be prohibited from possessing dangerous weapons; (2) white-collar criminals should pay back debt and provide restitution; (3) drug offenders should be enrolled in a substance abuse treatment program; (4) offending, deportable aliens should be deported; and (5) sex offenders should be restricted from using a computer or be searchable at any time.[44] However, the USSC or sentencing statute do not limit

[41] 18 U.S.C. app. § 5D1.3(a)(1)–(8) (2012).
[42] 18 U.S.C. app. § 5D1.3(c)(1)–(15) (2012).
[43] 18 U.S.C. app. § 5D1.3(d)(1)–(7) (2012).
[44] *Id.*

judges.[45] "Judges routinely develop other special conditions for individual defendants," and they sometimes impose controversial conditions like "shaming sanctions, requiring defendants to take prescribed medications, strict alcohol bans, and waiving the right to confidentiality for mental health treatment."[46] Judges may craft any number of conditions that they deem appropriate, so long as the conditions are reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a), "involve[] no greater deprivation of liberty than is reasonably necessary," and do not deviate from USSC policy.[47]

District courts are required to impose clear and understandable conditions to assist an offender's rehabilitation after a term of imprisonment. To aid an offender in understanding conditions imposed, the district court must announce "in open court the reasons for the imposition of the particular"

[45] *Id.*
[46] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. REV. 958, 1013 (2013).
[47] 18 U.S.C. app. § 5D1.3(d)(1)–(3) (2012).

conditions,[48] and must also give the defendant a clear written statement explaining the length of the term and reasons for the conditions imposed.[49] Ensuring that an offender knows the metes and bounds of his conditions is critical because a violation of a condition may lead to the revocation of his supervised release and an imposition of additional prison time.[50] Using a mere preponderance of the evidence standard, a district court may revoke a defendant's term of supervised release and require him or her to spend the remainder of the supervised release term in a federal prison.[51] In addition, the federal district court may impose another term of supervised release after the prison term for revocation, and the court may then establish different conditions.[52] Thus, for an offender to reintegrate back into society, the conditions of supervised release ought to be

[48] 18 U.S.C. § 3553(c) (2012).
[49] 18 U.S.C. § 3583(f) (2012).
[50] 18 U.S.C. § 3583(e)(3) (2012).
[51] 18 U.S.C. § 3583(e)(3) (2012).
[52] 18 U.S.C. § 3583(h) (2012).

sufficiently clear for the offender to understand and comply.

B. Modification of Supervised Release Conditions

To improve district courts' ability to tailor appropriate conditions of supervised release, section 3583(e) contains subsections dedicated to modifying conditions.[53] The modification subsections of § 3583 allows the district court to terminate an offender's term of supervised release after a year if the court believes doing so is in "the interest of justice."[54] For noncompliant offenders, the court may place an offender on house arrest and have him monitored, instead of revoking his term of supervised release and sending him back to prison.[55]

Yet, the most important modificatory provision is found in § 3583(e)(2), where a district court is given perhaps the greatest discretion to tailor an offender's supervised release conditions:

[53] 18 U.S.C. § 3583(e)(2) (2012).
[54] 18 U.S.C. § 3583(e)(1) (2012).
[55] 18 U.S.C. § 3583(e)(4) (2012).

> The court may, after considering the factors set forth in section 3553(a) . . . 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.[56]

Subsection 2 grants a district court the ability to "extend a term of supervised release," and/or "modify, reduce, or enlarge the conditions of supervised release, at any time."[57] As with every other modification provision, first, the court must consider the factors set forth in 18 U.S.C. § 3553(a), but subsection 2 is unique in that the statute specifically directs the district court to follow the

[56] This quotation includes the prefatory clause of 18 U.S.C. § 3583(e) and combines it with (e)(2) for readability.
[57] 18 U.S.C. § 3583(e)(2) (2012).

applicable Federal Rules of Criminal Procedure.[58] The directly applicable federal procedural rule is Rule 32.1, Revoking or Modifying Probation or Supervised Release.[59] Rule 32.1 generally requires a district court to provide a hearing and counsel to the defendant to represent the defendant when modification of conditions occur.[60]

Apart from § 3583(e)(2), defendants have various avenues to challenge conditions of supervised release, but these avenues are often limited. When being sentenced, or soon thereafter, a defendant may challenge conditions of supervised release on direct appeal.[61] Additionally, a district court may modify any sentence within 14 days if the sentence was incorrectly imposed.[62] A defendant may also challenge the legality of supervised release conditions under 28 U.S.C. §

[58] "…pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation." 18 U.S.C. § 3583(e)(2) (2012).
[59] FED. R. CRIM. P. 32.1.
[60] Furthermore, the court must provide the defendant "an opportunity to make a statement and present any information in mitigation." FED. R. CRIM. P. 32.1(c).
[61] *See* FED. R. APP. P. 4.
[62] Using a clear error standard. FED. R. CRIM. P. 35(a).

2255 within a year of his sentencing if he believes a condition violates a statute or the Constitution.[63] However, it is not clear if section 3583(e)(2) allows a district court to modify a defendant's sentence for legality past the 14-day modification period allowed by Rule 35(a).[64] This lack of clarity has recently lead to an interpretative and policy-driven circuit split among the appellate courts.

III. THE CIRCUIT SPLIT

In 1997, the Second Circuit interpreted § 3583(e)(2) as not allowing a district court to entertain challenges to conditions of supervised release for legality.[65] The Fifth and Ninth Circuit soon thereafter adopted the Second Circuit's

[63] "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a) (2012).
[64] FED. R. CRIM. P. 35(a).
[65] United States v. Lussier, 104 F.3d 32, 37 (2nd Cir. 1997).

reasoning and interpretation of § 3583(e)(2).[66] However, the Seventh Circuit recently deviated from both the reasoning and interpretation of the other circuits in holding that a defendant can use the modificatory provision in § 3583(e)(2) to challenge conditions of supervised release for substantive legality.[67] This recent circuit split has focused attention on the policy underlying supervised release and the purpose of a federal district court in crafting and overseeing the rehabilitation of offenders. This section will describe the various circuits' reasonings.

A. *Lussier*: The Second, Fifth, and Ninth Circuit's Interpretation of § 3583(e)(2)

The first federal appellate court to address using the modification provision in 18 U.S.C. § 3583(e)(2) to challenge conditions of supervised release for legality was the Second Circuit in United

[66] United States v. Hatten, 167 F.3d 884 (5th Cir. 1999); United States v. Gross, 307 F.3d 1043 (9th Cir. 2002).
[67] United States v. Neal, 810 F.3d 512, 519 (7th Cir. 2016).

States v. Lussier.[68] In *Lussier*, a bank manager was convicted of fraud and deceit, and originally sentenced to three-and-one-half years in prison and two years of supervised release, as well as being ordered to pay half-a-million dollars in fines and restitution.[69] He was also given a special supervised release condition: 10% of his gross monthly income would be used to pay his fines and make his restitution payments while he was on supervised release.[70] After his direct appeal was denied, the defendant challenged the special supervised release condition ordering him to pay restitution using 18 U.S.C. § 3583(e)(2).[71] He argued that the supervised release condition ordering him to pay restitution was illegally imposed under 18 U.S.C. § 3663(a)(B)(ii) and (g) (1996), and that the district court could modify, reduce, or vacate this special condition at any time under 18 U.S.C. §

[68] *Lussier*, 104 F.3d at 32.
[69] The defendant was charged with 17 counts of self-dealing while acting as the "former president and chairman of the board of Lydonville Savings Bank." *Id.* at 33.
[70] *Id.*
[71] *Id.*

3583(e)(2).[72] The district court promptly denied the defendant's request to modify the conditions of supervised release on the basis of legality, claiming it lacked jurisdiction to do so.[73]

As a case of first impression, the Second Circuit upheld the decision of the district court, holding that district courts lack jurisdiction to entertain motions to modify conditions of supervised release for legality under 18 U.S.C. § 3583(e)(2).[74] In reaching this decision, the court advanced three rationales: doing so would (1) be "inconsistent with the plain language of subsection 3583(e)(2);" (2) "ignore[] the context in which th[e] provision appears;" and (3) "disrupt[] the established statutory scheme governing appellate review of illegal sentences."[75] Thus, the court reasoned that the plain language, the context, and the statutory scheme of § 3583(e)(2) does not allow a district court to modify conditions of supervised release for legality. The Second

[72] *Id.* at 33–34.
[73] *Id.*
[74] *Lussier*, 104 F.3d at 37.
[75] *Id.* at 34.

Circuit explained the three rationales for its holding in detail.

First, the *Lussier* court reasoned that the plain language of § 3583(e)(2) does not allow a district court to modify conditions of supervised release for alleged illegality.[76] "Subsection 3583(e)(2), in sum, requires the court to consider general punishment issued such as deterrence, public safety, rehabilitation, proportionality, and consistency, when it decides to 'modify, reduce, or enlarge' the term or conditions of supervised release."[77] In examining § 3583(e), the Second Circuit viewed "the factors set forth in section 3553(a)" as exclusive factors for the district court to consider before modifying terms using § 3583(e)(2).[78] Emphasizing the absence of any mention of legality in the factors of § 3553(a) or elsewhere in the overall statute,[79] the court concluded that §

[76] *Id.*
[77] *Id.* at 35.
[78] *Id*.
[79] The court also states that FED. R. CRIM. P. 32.1(b) and 18 U.S.C. § 3583(c) and (d) also discuss various factors to be considered when modifying conditions of supervised release, but do not mention legality. *Id.* at 35 n.4.

3583(e)(2) "on its face authorizes the court to modify conditions of supervised release only when general punishment goals would be better served by a modification."[80] Thus, the Second Circuit concluded that the plain and exclusive language of § 3583(e)(2) forecloses a district court from modifying conditions of supervised release for legality.[81]

Second, the Second Circuit explained that the context surrounding § 3583(e)(2) does not provide for any challenges to legality.[82] The court laid out four situations where § 3583(e) grants a district court to alter terms or conditions of supervised release,[83] and explained that the statute only allows a district court the ability "to account for new or unforeseen circumstances."[84] "Unforeseen

[80] *Id.* at 35 (emphasis added).
[81] *Lussier*, 104 F.3d at 35.
[82] *Id.*
[83] The four situations are: (1) after a year served on supervised release, the "court may terminate the remainder;" (2) modification pursuant to the procedures in FED. R. CRIM. P. 32 and 32.1; (3) when a defendant violates a condition and the court orders the defendant reincarcerated; and (4) "where incarceration is permitted, the court may order a defendant placed under 'house arrest.'" *Id.* at 36 (quoting United States v. Truss, 4 F.3d 437, 438-39 (6th Cir. 1993)).
[84] *Id.*

circumstances" may either arise from the defendant's behavior, whether good or bad, and thereby render conditions "too harsh or inappropriately tailored," or not sufficiently "harsh" enough for the defendant who habitually violates conditions of supervised release.[85] The Second Circuit pointed to a Third Circuit case to bolster its rationale, wherein the Third Circuit explained that Rule 32.1(b) of the Federal Rules of Criminal Procedure, which constrains any modification under 18 U.S.C. § 3583(e)(2), only allows for modification of supervised release terms "when changing circumstances warrant it, or when terms in the order are unclear."[86] Reasoning that challenges to conditions on the basis of legality do not "involve changed circumstances or affect in any way general punishment aims such as deterrence, rehabilitation, and proportionality," the Second Circuit concluded that the context surrounding § 3583(e)(2) does not

[85] *Id.*
[86] *Lussier*, 104 F.3d at 36 (referencing United States v. Kress, 944 F.2d 155, 158 n.4 (3d Cir. 1991)).

allow a district court to entertain challenges to conditions of supervised release for legality.[87]

Third, the Second Circuit stated that allowing a district court to modify terms of supervised release for legality would be inconsistent with "the scheme of appellate and collateral review established by the Sentencing Reform Act [(SRA)] of 1984."[88] Before the SRA,[89] defendants could only obtain a review of their sentences through direct appeal, habeas corpus, or filing a motion under what was then Fed. R. Crim. P. 35(a),[90] but after the SRA was enacted, a defendant could appeal their sentence on legality grounds on direct appeal only if it deviated from the sentencing guidelines,[91] and through habeas

[87] *Id.*
[88] *Id.*
[89] The Sentencing Reform Act of 1984.
[90] "Former Rule 35(a) . . . authorized a court to 'correct an illegal sentence at any time.'" *Lussier*, 104 F.3d at 36 n.5.
[91] *See* 18 U.S.C. § 3742(a)(2)–(3) (2012), "A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines or is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range."

corpus.[92] The foreclosure of Rule 35(a) and the unmodified retention of habeas corpus in 28 U.S.C. § 2255, created, in the view of the Second Circuit, a streamlined appellate process through which a defendant could obtain relief from illegal sentences.[93] Interpreting § 3583(e)(2) to allow modification of supervised release terms for legality would functionally make § 3583(e)(2) a "mini version of the pre-1984 Rule 35(a)."[94] Noting that there is no indication that Congress intended § 3583(e)(2) to function in this manner, the Second Circuit in *Lussier* concluded that the appellate review scheme enacted by Congress in the SRA precluded § 3583(e)(2) from being used to allow a district court to modify conditions of supervised release on the basis of legality.[95] The defendant's argument was that the restitution calculation was procedurally illegal because it was "based on a particular check-kiting scheme" that was improper

[92] *Lussier*, 104 F.3d at 36–37.
[93] *Id.* at 32, 37 (citing in part United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990)).
[94] *Id.*
[95] *Id.* at 33, 37.

under the specific controlling restitution statute.[96] Without the ability to modify the statute under 18 U.S.C. § 3583(e)(2), he was precluded from bringing this challenge because he failed to raise it on direct appeal.[97]

Two years after the Second Circuit's decision in *Lussier*, the Fifth Circuit adopted *Lusisier's* reasoning in United States v. Hatten.[98] At the district court level, a defendant pled guilty to student loan and social security fraud and was sentenced to one-and-one-half years in prison and five years of supervised release.[99] Three years after being sentenced, the defendant used Section 3583(e)(2) to request a modification of a condition of supervised release that ordered him to make restitution payments to the United States Probation Office on the grounds that "the court incorrectly delegated the task of determining the schedule for restitution payments."[100] The government conceded

[96] *Id.*
[97] *Id.*
[98] United States v. Hatten, 167 F.3d 884 (5th Cir. 1999).
[99] *Id.* at 885.
[100] *Id.*

that it had incorrectly delegated the schedule of restitution payments under the Declaratory Judgement Act,[101] causing the district court to adopt the schedule proposed by the probation office and modify the defendant's condition of supervised release using 18 U.S.C. § 3583(e)(2), albeit in a solely procedural manner.[102] On review, the Fifth Circuit vacated the district court's order, fully adopting *Lussier's* reasoning and holding that a district court lacks jurisdiction under Section 3583(e)(2) to modify conditions of supervised release for legality.[103]

In the 2002 decision United States v. Gross, the Ninth Circuit adopted the reasoning in *Lussier* and *Hatten*, reiterating that a district court lacks jurisdiction to modify conditions of supervised release for legality.[104] The defendant in *Gross* challenged his conditions of supervised release using Section 3583(e)(2) after a bankruptcy fraud

[101] 28 U.S.C. §§ 2201–2202 (2012).
[102] *Hatten*, 167 F.3d at 885–86.
[103] *Id.* at 887.
[104] United States v. Gross, 307 F.3d 1043 (9th Cir. 2002).

conviction.[105] The defendant's conditions did not allow him to conduct any real estate business or transfer assets over one-hundred dollars without the permission of his probation officer while serving his term of supervised release.[106] He contended that imposing these conditions was unlawful because they prevented the defendant from "working or engaging in business" while on supervised release,[107] but the district court concluded that it lacked authority to modify the conditions on the basis of legality under Section 3583(e)(2).[108] On review, the Ninth Circuit agreed with *Lussier* and *Hatten* in maintaining that "[Section] 3583(e)(2) may not be used as a backdoor to challenge the legality of a sentence,"[109] and remanded the case to the district court.[110] Thus, the Second, Fifth, and Ninth Circuits all agree that 18 U.S.C. § 3583(e)(2)

[105] His direct appeal of his conviction and sentencing was still pending when he made a motion to modify the conditions of his supervised release. *Id.* at 1044.
[106] *Id.*
[107] Brief for Appellant at 44, United States v. Gross, 2002 WL 32102799 (C.A.9) (No. 01-50033).
[108] *Gross*, 307 F.3d at 1044.
[109] *Id.* (quoting United States v. Miller, 205 F.3d 1098, 1101 n.1 (9th Cir. 1999)).
[110] *Id.* at 1044–45.

does not allow a district court to modify conditions of supervised release for legality.

B. *Neal*: The Seventh Circuit Departs from *Lussier*

With the Second, Fifth, and Ninth Circuits agreeing over a 19-year period, any other circuit confronted with the issue of modifying conditions of supervised release for legality under 18 U.S.C. § 3583(e)(2) could readily adopt the holding of *Lussier*. However, the Seventh Circuit used an expansive interpretation of Section 3583(e)(2) in United States v. Evans that would lay the grounds for an abrupt departure from the other circuits' modification of conditions of supervised release for legality precedent.[111]

In *Evans*, the defendant was sentenced to four-and-a-half years in prison and three years of supervised release for federal drug and firearm offenses.[112] A few days later, in a separate proceeding, the defendant pled no contest to "one

[111] United States v. Evans, 727 F.3d 730 (7th Cir. 2013).
[112] *Id.* at 731.

count of 'child enticement-sexual contact' and one count of 'sex with a child age 16 or older'," after he allegedly abducted a teenage girl and forced her to take drugs and have sexual intercourse with him.[113] The court sentenced the defendant to three years supervised release wherein he would undergo sex offender therapy as a condition, to be served consecutively after the five years served for the firearm and drug offense convictions.[114] These sentences amounted to eight years of supervised release, but with differing conditions. After he began his first term of supervised release, the probation department asked the district court to modify the defendant's original five-year term of supervised release to also include sex offender therapy.[115]

After a hearing, the district court modified the original conditions of supervised release to include the requested sex offender therapy.[116] The defendant appealed, arguing that the district court

[113] *Id.*
[114] *Id.*
[115] *Id.* at 731–32.
[116] *Id.* at 732.

could not modify conditions of supervised release unless he first violated one of the conditions, and that the district court could not add sex offender therapy to supervised release conditions for drug and firearm offenses.[117] The Seventh Circuit held that the district court acted correctly in modifying the conditions of supervised release, and used an expansive interpretation of 18 U.S.C. § 3583(e)(2) to reach its decision.[118]

In reaching its decision, the Seventh Circuit highlighted the "at any time" language in Section 3583(e)(2) to hold that a district court could modify conditions of supervised release without any violation first occurring or "even changed circumstances."[119] To bolster this broad interpretation, the court quoted a Committee Note to Fed. R. Crim. P. 32.1 that states in part: "[C]onditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well

[117] *Evans*, 727 F.3d at 732, 733.
[118] *Id.* at 735.
[119] *Id.* at 732.

as new ideas and methods of rehabilitation."[120] The use of the Committee Note that includes the ability to respond to not only specific circumstances, but an overall change in criminological or penological rehabilitative philosophy led the Seventh Circuit to conclude that "just as the district court has wide discretion when imposing the terms of supervised release, so too must it have wide discretion in modifying the terms of that supervised release."[121] This broad reading of the use and purpose of Section 3583(e)(2) laid the groundwork for the Seventh Circuit's recent decision in *Neal* that departed from other circuits' interpretations.

The Seventh Circuit diverged from the prevalent interpretation of 18 U.S.C. § 3583(e)(2) in 2016, in the appellate case United States v. Neal.[122] In *Neal*, the defendant, Tyree Neal was sentenced to eleven-and-a-half-years in a federal prison and three-years supervised release for substantive counts involving

[120] *Id.* (citing Advisory Committee Note on Rule 32.1(b) (1979)).
[121] *Id.* (citing United States v. Sines, 303 F.3d 793, 800 (7th Cir. 2002)).
[122] United States v. Neal, 810 F.3d 512 (7th Cir. 2016).

powder and crack cocaine.[123] One month into his supervised release, Mr. Neal's probation officer sought to impose a new, special supervised release condition for mental health treatment, which was granted by the district court.[124] A year later, the probation officer requested that Mr. Neal's conditions be modified again to include a special curfew and warrantless searches based on reasonable suspicion of violations of a condition of supervised release.[125] However, before the district court could rule on the suggested conditions, the probation officer requested a revocation of Mr. Neal's supervised release for lying to him and for possessing marijuana.[126] The district court revoked Mr. Neal's release and sentenced him to a year and a half in prison, and imposed a new term of three-years supervised release.[127] After being released from prison, and two weeks into his new supervised release term, he filed a pro se motion to modify the

[123] *Id.* at 514.
[124] *Id.* at 514. *See also* United States v. Neal, 662 F.3d 936 (7th Cir. 2011).
[125] *Neal*, 810 F.3d at 514.
[126] *Id.* at 512.
[127] *Id.* at 515 (citing 18 U.S.C. § 3583(h) (2012)).

conditions of his supervised release.[128] Mr. Neal contested the warrantless search requirement, arguing that it should only be imposed on those convicted of sex offenses against minors, not drug offenders like himself.[129] The district court upheld the conditions, holding that they were "necessary because Neal had failed three drug tests and had a history of deceiving probation officers and using drugs while on supervised release."[130] Mr. Neal then appealed.[131]

In reviewing the district court's decision, the Seventh Circuit acknowledged that the Second, Fifth, and Ninth Circuits have "precedential opinions addressing the scope of § 3583(e)(2)," and stated that it did "not necessarily disagree with the results in those cases."[132] However, the Seventh Circuit held, contrary to the other circuits, that 18 U.S.C. § 3583(e)(2) permits a "defendant to bring

[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Neal*, 810 F.3d at 515.
[132] However, the Seventh Circuit did say that, while they agree with the result in *Lussier*, they are not as confident approving the results in *Hatten* and *Gross*. *Id.* at 518.

substantive challenges to the current legality of conditions of supervised release."[133] It qualified this holding by excluding any "late challenges based on asserted procedural errors from the time of original sentencing."[134] This view, in the opinion of the Seventh Circuit, is (1) "more consistent with the aims of supervised release and," (2) is more consistent "with the language and evident purpose of § 3583(e)(2)."[135]

1. *Neal:* Adhering to the Aims of Supervised Release

The Seventh Circuit reasoned that allowing substantive challenges to conditions of supervised release for legality is more consistent with the aims of supervised release.[136] District courts are given "flexibility and discretion to formulate a beneficial plan of supervised release"[137] to craft conditions that will "facilitate an offender's transition back to

[133] *Id.*
[134] *Id.* at 514.
[135] *Id.* at 518.
[136] *Neal*, 810 F.3d at 518–19.
[137] *Id.* at 519.

ordinary life rather than to stand as 'a significant barrier into full reentry into society.'"[138] However, judges are not given a "crystal ball" to predict what the most appropriate supervised release conditions should be at the time of sentencing with the perfect precision necessary to fully rehabilitate an offender and ease the difficult transition from prison to liberty.[139] To remedy the lack of the appropriate foreknowledge necessary in crafting supervised release conditions at the time of sentencing, the modificatory provision of "Section 3583(e)(2) accommodates these uncertainties by allowing changes to an offender's conditions of supervised release at any time" to ensure the conditions "remain relevant and beneficial."[140] To bolster its argument, the Seventh Circuit provided examples of changes to supervised release conditions that might

[138] *Id.* (quoting United States v. Goodwin, 717 F.3d 511, 522 (7th Cir. 2013)).
[139] *Id.* at 519 (quoting United States v. Kappes, 782 F.3d 828, 838 (7th Cir. 2015)).
[140] *Id.*

be necessary and the reasons these changes would be required.[141]

First, the court illustrated that conditions may need to be modified to "fit changes in society" or to accommodate for "new ideas and methods of rehabilitation."[142] The court used the example of internet usage to highlight this principle; while once "considered a luxury" that could easily be prohibited or severely restricted by a court, the internet is now a "practical necessity," in which prohibitions could severely stifle an offender's reintegration back into society.[143] A district court could use Section 3583(e)(2) to modify an offender's supervised release condition that restricted internet, imposed 10 years ago, to now allow use with a restrictive filter or other similar measure put into place.

Second, the court explained that supervised release conditions may need to be modified "to address issues arising with real-world applications

[141] *Id.* at 519–20.
[142] *Neal*, 810 F.3d at 519 (quoting FED. R. CRIM. P. 32.1, Advisory Committee Note on Rule 32.1(b) (1979)).
[143] *Id.* at 519.

of particular conditions."[144] Examples include an offender seeking clarification for conditions in order that he may not unintentionally violate them,[145] and instances where an offender believes certain conditions or implementations of conditions to be arbitrary.[146] The court referenced an Eighth Circuit opinion concerning a sex offender, who was restricted from having any contact with children without permission from his probation officer.[147] The offender's contention with the condition was that he would be restricted from visiting his grandchildren, but the Eighth Circuit made clear that if permission by the probation officer was "arbitrarily or unfairly denied, he is free to seek relief from the district court under § 3583(e)."[148] Furthermore, the Eighth Circuit explained that it would not be unreasonable for the sex-offender to

[144] *Id.*
[145] *Id.* at 519–20 (7th Cir. 2016) (citing United States v. Lilly, 206 F.3d 756 (7th Cir. 2000), where an offender asked the district court to decide that he had fulfilled his obligation to fully pay restitution, to which the district court explained that he had not yet fully paid the restitution and must continue making payments).
[146] *Id.* at 520
[147] United States v. Mickelson, 433 F.3d 1050, 1051 (8th Cir. 2006).
[148] *Id.* at 1057.

be prohibited from having access to his grand-children because "most sexual abuse of children takes place at the hands of family members."[149]

Both modifying conditions to fit changes in society and to address difficulties with applications of those conditions are modifications that the other circuits would likely agree are proper applications of section 3583(e)(2) because they are expressly authorized in the statute.[150] However, the Seventh Circuit took the examples of modification scenarios that could be accommodated with Section 3583(e)(2) and applied the underlying rationales to challenges to the legality of certain supervised release conditions. The court stated that it could not ascertain why challenges to the legality of conditions would be treated differently than challenges to modification schemes that focus on changing circumstances or conditions that are

[149] *Id.*
[150] Changes are to be made "pursuant to the Federal Rules of Criminal Procedure," which encourage changes based on these reasons. 18. U.S.C. 3583(e)(2) (2012); Advisory Committee Note on Rule 32.1(b) (1979).

ambiguous to the offender.[151] The court further explained that barring challenges to arguably unconstitutional or invalid conditions would defeat the goal of supervised release because an offender who failed to challenge conditions during sentencing would be more likely to fail rehabilitation during supervised release.[152] "The very nature of some invalid conditions makes compliance difficult or uncertain, and a misstep risks an unjustified return to prison."[153]

The Seventh Circuit also reasoned that allowing a defendant to challenge conditions based on legality using Section 3583(e)(2) was more efficient than "perpetuating expensive and time-consuming appeals and resentencings," and "promotes the integrity and public reputation of criminal proceedings."[154] An example put forth by the court was an earlier case, United States v. Silvious, where

[151] "We do not see a reason to treat a condition of supervised release that arguably is facially invalid or even unconstitutional differently from conditions that are ambiguous or outdated." *Neal*, 810 F.3d at 520.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 519.

an offender argued that his conditions of supervised release were overbroad.[155] The Seventh Circuit in *Silvious* held that because he did not raise the issue on direct appeal, he could only challenge the conditions on overbreadth grounds later using section 3583(e)(2).[156] Instead of using costly and time-consuming appeals to challenge supervised release conditions, defendants can appear before the district court that crafted the conditions to request a modification.

2. *Neal*: The Language of § 3583(e)(2) Supports Legality-Based Challenges

The Seventh Circuit in *Neal* also concluded that the language of Section 3583(e)(2) allows offenders to challenge the conditions of supervised release on grounds of legality. Again emphasizing a district court's inability to always fashion the best supervised release conditions at the time of sentencing, the Seventh Circuit acknowledged the

[155] United States v. Silvious, 512 F.3d 364, 370–71 (7th Cir. 2008).
[156] *Id.* at 371.

"at any time" language of Section 3583(e)(2),[157] and interpreted it to mean that Congress intended to give the greatest flexibility in modifying supervised release conditions to all parties: "the judge, the probation office, counsel, and the defendant."[158]

The Seventh Circuit recognized that the "at any time" language in the statute could be construed much more restrictively because of the other avenues available to an aggrieved defendant, such as direct appeal or a challenge under 28 U.S.C. §2255.[159] To rebut a restrictive construction, the Seventh Circuit not only used the crystal ball rationale, but further explained that "the detailed conditions of a distant term of supervised release are typically far from the mind of a defendant at sentencing."[160]

The court tempered its expansive reading of the statute by stating that an offender could not use

[157] "[A]nd 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." 18 U.S.C. § 3583(e)(2) (2012) (emphasis added).
[158] *Neal*, 810 F.3d at 520.
[159] *Id.*
[160] *Id.*

Section 3583(e)(2) to challenge the legality of his conditions due to alleged *procedural* errors.[161] The court stressed that procedural shortcomings "must be raised at the first opportunity or not at all" because allowing challenges based on procedural errors would destroy appellate review by making it "difficult for the government or the probation office to prepare a fair 'do-over' of the original sentencing."[162] Thus, the Seventh Circuit ultimately held that only substantive challenges to the legality of supervised release conditions could be raised using section 3583(e)(2), whereas procedural challenges would be left in the realm of direct appeal or § 2255.

3. *Neal*: Conclusion

The Seventh Circuit in United States v. Neal ultimately affirmed the lower court's denial of the defendant's motion to modify his supervised release

[161] *Id.*
[162] *Id.*

conditions.[163] In doing so, they departed significantly from other circuit courts' interpretation of 18 U.S.C. § 3583(e)(2) by holding that the offender could utilize the statute to challenge conditions on the basis of legality.[164] The court came to this conclusion due to their past decisions, but also because it reasoned that its interpretation was more consistent with the rehabilitative aims of supervised release, and the "at any time" language of the statute seemed to suggest great flexibility in the modification of conditions. Yet, as with many other circuit splits, the Supreme Court of the United States will be the final arbiter in the interpretation of Section 3583(e)(2). Thus, examining this statute considering recent interpretive Supreme Court cases may provide a glimpse of the correct interpretation of the statute.

[163] *Neal*, 810 F.3d at 521.
[164] *Id.* at 520.

IV. STATUTORY INTERPRETATION

A. *Johnson* & *Johnson*: The Supreme Court's Statutory Interpretation of Section 3583(e).

Two recent Supreme Court decisions provide a framework for understanding the proper way to interpret 18 U.S.C. § 3583(e)(2). Both cases, United States v. Johnson[165] and Johnson v. United States,[166] involve supervised release, and were decided months apart from one another.[167] In United States v. Johnson, the Court decided when supervised release begins.[168] While it did not delve too deeply into interpreting 18 U.S.C. § 3583, the case did establish the basic groundwork for how the Court analyzes a subpart of Section 3583.

In the second case, Johnson v. United States, the Court analyzed 18 U.S.C. § 3583(e)(3), the subpart of the statute that follows Section 3583(e)(2), to

[165] United States v. Johnson, 529 U.S. 53 (2000).
[166] Johnson v. United States, 529 U.S. 694 (2000).
[167] *Id.* United States v. Johnson, 529 U.S. 53 (2000). The decisions are only two months apart; United States v. Johnson was argued in December 1999, and decided March 2000, whereas Johnson v. United States was argued February 2000, and decided May 2000.
[168] *See* United States v. Johnson, 529 U.S. 53, 58 (2000).

determine if a district court could revoke supervised release and order an offender back into prison, and still sentence him to another term of supervised release.[169] This Article relies on these two cases to derive a controlling statutory interpretation to analyze Section 3583. Next, it analyzes Section 3583(e)(2) using the Supreme Court's methodology under the various circuit courts' interpretations.

The first case, United States v. Johnson, focused on when a term of supervised release begins.[170] The offender, Roy Johnson,[171] was originally sentenced to fourteen years in prison and three years of supervised release for drug and weapon charges.[172] After serving six-and-a-half-years in prison, some of his weapon charges were dropped and his sentence was reduced to four years, resulting in his immediate release and the commencement of his term of supervised release.[173] Roy then petitioned the district court to reduce his term of supervised

[169] Johnson v. United States, 529 U.S. 694 (2000).
[170] United States v. Johnson, 529 U.S. 53, 54 (2000).
[171] Hereinafter referred to as "Roy" to avoid unnecessary confusion with the similar case names.
[172] United States v. Johnson, 529 U.S. 53, 54 (2000).
[173] *Id.*

release by two-and-a-half years, arguing that his term of supervised release began while he was in prison.[174] The district court denied the motion because it believed that supervised release begins when the prisoner is physically released from prison, and because accepting Roy's interpretation would "undermine Congress' aim of using supervised release to assist convicted felons in their transitions to community life."[175]

The Supreme Court affirmed the district court's actions after analyzing another statute's language[176] and looking into Congress's intent.[177] The Court also explained that the statutory scheme of supervised release allows an offender to seek relief using 18 U.S.C. § 3583(e)(2) to accommodate any inequitable fallout resulting from serving too much

[174] *Id.*
[175] *Id.*
[176] Namely, that 18 U.S.C. § 3624(e), Release of a Prisoner: Supervision After Release, mandates that a prison sentence begins once a person is "released from imprisonment." The Court used WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949) to determine what the term "release" meant in the statute, and ultimately concluded that the "ordinary, commonsense meaning of release is to be freed from confinement." *Id.* at 56–57.
[177] United States v. Johnson, 529 U.S. 53, 56, 57, 59 (2000).

prison time.[178] While not going into detail of the extent that Section 3583(e)(2) could accommodate an offender, the Court explained that "[t]he trial court, *as it sees fit*, may modify an individual's conditions of supervised release."[179] The Court's emphasis on the language "as it sees fit" suggests that the Supreme Court assigns broad power to the district court in deciding motions for modification.

The next Supreme Court case, Johnson v. United States,[180] interpreted 18 U.S.C. § 3583(e)(3), the subpart of the statute following § 3583(e)(2). In *Johnson*, the Court focused on whether district courts were given the discretion to re-impose an additional term of supervised release after revocation under a now-outdated version of 18 U.S.C. § 3583(e)(3), that allowed a district court to:

> 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

[178] *Id.* at 60.
[179] *Id.* (emphasis added).
[180] Johnson v. United States, 529 U.S. 694 (2000).

> such term of supervised release without credit for time previously served on post-release supervision[181]

In this case, offender Cornell Johnson was sentenced to two-years imprisonment and three-years supervised release for conspiracy to commit fraud using an access device.[182] After being released from prison early due to good conduct, and less than a year into his supervised release, Cornell was arrested and later convicted of multiple counts of forgery.[183] The district court judge revoked Cornell's supervised release, ordered reimprisonment for a year-and-a-half, and included an additional year-long supervised release term to follow.[184] Cornell appealed, arguing that the district court did not have power under 18 U.S.C. § 3583(e)(3) to impose another term of supervised release after revoking a term and requiring the

[181] 18 U.S.C. § 3583(e)(3) (2012). Johnson v. United States, 529 U.S. 694, 697 (2000). *See* Johnson v. United States, 529 U.S. 694, 698 n.2 (2000).
[182] Johnson v. United States, 529 U.S. 694, 697 (2000).
[183] *Id.*
[184] *Id.* at 698.

defendant to serve the remaining time in prison.[185] The circuit courts were split on the issue of whether Section 3583(e)(3) allowed district courts to re-impose supervised release after revoking it, much like they are currently split in interpreting modifications using 18 U.S.C. § 3583(e)(2).[186] Before the Court's decision in *Johnson*, nine circuit courts had decided that Section 3583(e)(3) did not allow a district court to reimpose a term of supervised release, while only two decided that it did.[187]

To interpret the statute, the Court first examined the plain language of the statute and its context.[188] The Court scrupulously examined the term

[185] *Id.*
[186] *Id.*
[187] *Id. See* Johnson v. United States, 529 U.S. 694, 698 n.2 (2000) ("Of the 11 Circuits to consider the issue, 9 had reached this conclusion. *See, e.g.*, United States v. Koehler, 973 F.2d 132 (CA2 1992); United States v. Malesic, 18 F.3d 205 (CA3 1994); United States v. Cooper, 962 F.2d 339 (CA4 1992); United States v. Holmes, 954 F.2d 270 (CA5 1992); United States v. Truss, 4 F.3d 437 (CA6 1993); United States v. McGee, 981 F.2d 271 (CA7 1992); United States v. Behnezhad, 907 F.2d 896 (CA9 1990); United States v. Rockwell, 984 F.2d 1112 (CA10 1993); United States v. Tatum, 998 F.2d 893 (CA11 1993). Two, the First and the Eighth, found that § 3583(e)(3) did grant district courts such power. See United States v. O'Neil, 11 F.3d 292 (CA1 1993); United States v. Schrader, 973 F.2d 623 (CA8 1992).")
[188] Johnson v. United States, 529 U.S. 694, 704 (2000).

"revoke," relying on definitions found in dictionaries *published* around the time of the statutes' enactment.[189] The Court used the context of the subpart of the statute to support its conclusion that the term "revoke" allowed the re-imposition of supervised release.[190] The majority's opinion also explained that its interpretation "enjoys the virtue of serving the evident congressional purpose" of supervised release.[191] The Court stated that the policy evident in supervised release was to supplant the federal system of parole and replace it with a system in which district courts had "freedom to provide post-release supervision for those, and only those, who need[] it."[192] Removing district courts' power to re-implement supervised release after re-incarceration would be fundamentally contrary to the statutory scheme because it would take

[189] *See id.* at 704.
[190] If the term "revoke" meant to completely terminate supervised release in (e)(1), then Congress would have likely used the same terminology, using the word "terminate" instead of "revoke" in (e)(3). *Id.* at 738–39.
[191] Johnson v. United States, 529 U.S. 694, 708 (2000).
[192] Johnson v. United States, 529 U.S. 694, 709 (2000) (referring to S. REP. NO. 98-225, at 125 (1983)).

discretionary judgment away from district courts for the worst cases of offenders.[193]

While the Court ultimately disagreed on the exact meaning of the word "revoke" in Section 3583(e)(3), every Justice seemed to agree that to correctly interpret the statute, they must analyze the plain meaning of the word.[194] In every case surveyed previously and at all appellate levels, congressional intent was inevitably discussed. To determine the correct interpretation of 18 U.S.C. § 3583(e)(2), the reasoning of the appellate courts will be compared to how the Supreme Court interpreted supervised release statutes in *Johnson*[195] and *Johnson*.[196]

B. The Language of 18 U.S.C. § 3583(e)(2)

The first and most fundamental step in statutory interpretation is examining the statutory text to see

[193] Johnson v. United States, 529 U.S. 694, 709-10 (2000).
[194] Justice Antonin Scalia wrote a scathing and lengthy dissent where he criticized the majority's interpretation of the word "revoke" as "both linguistically and conceptually absurd." *Id.* at 719.
[195] United States v. Johnson, 529 U.S. 53 (2000).
[196] Johnson v. United States, 529 U.S. 694 (2000).

if it is plain and unambiguous;[197] if the language in 18 U.S.C. § 3583(e)(2) is plain and unambiguous, there would likely be no reason to continue examining the statute, and it may then be applied "according to its terms."[198]

At issue in the current circuit split regarding Section 3583(e)(2) are the terms "after considering the factors set forth" in Section 3583(e), and "at any time" in Section 3583(e)(2).[199] The majority of the circuits in the current split view the statute's prefatory instruction to consider the select factors set forth in Section 3553(a) as an exhaustive list that excludes the possibility of challenging conditions due to legality.[200]

However, the Seventh Circuit in *Neal* rejected this argument, saying that it would "need much

[197] Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (citing United States v. Gonzales, 520 U.S. 1, 4 (1997)).
[198] *Id.*
[199] The court "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." 18 U.S.C. § 3583(e)(2) (2012).
[200] *See* Section III(a).

more explicit statutory direction . . . in the text of § 3583(e) to refuse to consider the issue" of legality.[201] Thus, as the Supreme Court handled the subpart in Johnson v. United States,[202] the language and context of Section 3583(e)(2) should be examined before analyzing the policy rationales behind supervised release because "[t]he text of a statute or rule is the primary, essential source of its meaning."[203]

The language of Section 3583(e) may or may not prohibit a district court from considering legality in modifying conditions of supervised release. Section 3583(e) controls all the subparts by instructing courts to first consider certain sentencing factors in Section 3553(a). As the court in *Neal* correctly identifies:

> The references in § 3583(e) to portions of § 3553(a) incorporate, for purposes of decisions to modify conditions of supervised release,

[201] United States v. Neal, 810 F.3d 512, 518 (7th Cir. 2016).
[202] Johnson v. United States, 529 U.S. 694, 726 (2000).
[203] LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 62 (2008) (citing the UNIF. STATUTE & RULE CONSTR. ACT, § 19 (1995)) [hereinafter STATUTORY INTERPRETATION]

> nearly all of the original sentencing goals, excepting only the need for a sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, and the directive to consider the "kinds of sentences available."[204]

However, the circuits are split as to the nature of the word "considering": Is the word exclusive, prohibiting a district court from considering things such as legality in modifying a sentence, or is the word more suggestive in nature, only directing certain objectives to be pondered before modifying conditions for any other reason?

As the word "revoke" was highly examined using dictionaries in Johnson v. United States, so too must the word "considered" be examined using dictionaries around the time of the enactment of the SRA in 1984. *Webster's Third New International Dictionary* defines "considering" as "matured by extended deliberative thought" or "regarded with respect or esteem."[205] Additionally, *Black's Law*

[204] *Neal*, 810 F.3d at 516.
[205] "Considering" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1625 (1976).

Dictionary defines "consider" as "to fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to."[206] Finally, *West's Legal Dictionary* defines "consider" as "to fix the mind of something in order to examine it carefully."[207] These definitions lack ambiguity, specifically in having the word "consider" be used in multiple ways with different meanings. Yet, these definitions do not shine much light on the extent that "consider" is permissive or exclusive in the context of Section 3583(e).

Fortunately, the Supreme Court has examined the word "consider" in other contexts. In National Endowments for the Arts v. Finley, the Supreme Court examined 20 U.S.C. § 954(d)(1), which directed the Chairperson of the National Endowment for the Arts to take into "*consideration* general standards of decency and respect for the

[206] "Consider" BLACK'S LAW DICTIONARY, 5TH EDITION, WEST PUBLISHING COMPANY (1979).
[207] "Consider" WEST'S LEGAL THESAURUS/DICTIONARY, SPECIAL DELUXE EDITION, WILLIAM STATSKY, WEST PUBLISHING COMPANY (1986).

diverse beliefs and values of the American public."[208] The majority opinion barely touches upon the word "consider," but the concurring opinion states that the word requires that decency always be a factor examined in making an artistic determination, but qualifies this hardline rule by explaining that "[t]his does not mean that those factors must always be dispositive, but it does mean that they must always be considered."[209] This case suggests that the word "consider," as viewed by the Supreme Court, mandates that factors be pondered, but does not confine the actor engaging in the consideration exclusively to the listed factors.

The Court also examined the word "consider" in United States v. Booker.[210] In *Booker*, the Supreme Court severed two provisions from the Sentencing Reform Act, where supervised release resides, making the sentencing guidelines advisory rather

[208] National Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (emphasis added).
[209] *Id.* at 591.
[210] United States v. Booker, 543 U.S. 220 (2005).

than mandatory.[211] While doing so, the Court discussed the role of the factors that must be considered in Section 3553(a) when a judge sentences an offender.[212] After pronouncing that the sentencing guidelines were no longer mandatory, the Court stated that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[213] This quote suggests that consideration of Section 3553(a) factors is permissive rather than exclusive because taking something into account does not usually preclude the consideration of other things.[214]

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[211] The Court severed 18 U.S.C. §§ 3553(b)(1) and 3742(e) (2012). Booker, 543 U.S at 266 (this severing was done to make the statutory scheme consistent with the Sixth Amendment to the United States Constitution).
[212] *Booker*, 543 U.S. at 264.
[213] *Id.*
[214] "With the decision in Booker, many judges are expected to take the opportunity to exercise full discretion in sentencing in order to achieve a just punishment. In his dissent, Justice Scalia reasoned that 'logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range.' Viewed as legitimate advisory guidelines, a court could sentence a defendant as if operating within an indiscriminate sentencing scheme." Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion*

One of the problems with interpreting Section 3583(e) is the absence of guidance regarding modifications of supervised release conditions for legality. The majority of the circuits involved in the current split hold that the statute "authorizes the court to modify conditions of supervised release only when general punishment goals would be better served by a modification" and not "to assess the lawfulness of a condition."[215] Yet, the Seventh Circuit believes that the statute must allow challenges to a condition's legality because, for such a serious situation to arise and be barred from the district court, the statute would need explicitly to bar challenges to legality.[216] When reasonable minds can differ on the meaning of the statute, the Court's interpretive method in Johnson v. United States suggests that the court examine the underlying policy of the statute.[217]

Revived in Booker and Fanfan, 33 PEPP. L. REV. 615, 672 (2005/2006).
[215] United States v. Lussier, 104 F.3d 32, 35 (2nd Cir. 1997).
[216] United States v. Neal, 810 F.3d 512, 518 (7th Cir. 2016).
[217] Johnson v. United States, 529 U.S. 694, 726 (2000).

The Seventh Circuit in *Neal* also advanced another textual argument unexamined by the other circuits in interpreting the "at any time" language of § 3583(e)(2) to allow challenges to the legality of conditions.[218] While the prefatory provision in Section 3583(e) still controls the entirety of Section 3583(e)(2) due to the subpart being a whole and complete sentence, the Seventh Circuit argued that the "at any time" language allows challenges to legality due to the allowance of changes of conditions even when a direct appeal is pending.[219] The term "at any time" accords the district court the power to modify conditions whenever they see fit, or terminate a term of supervised release after a year served.[220] The contextual argument of the Seventh Circuit is that since a district court is given the power to modify conditions at any time, including during a pending direct appeal, district courts must also have the ability to challenge

[218] *Id.* at 517.
[219] *Id.* at 518.
[220] 18 U.S.C. § 3583(e)(1) (2012).

conditions for legality.[221] While this logical argument is somewhat compelling, it is secondary to the ambiguous "considering" language found in Section 3583(e).

C. The Policy Underlying Section 3583(e)(2) and Supervised Release

The policy underlying Section 3583(e)(2) must be examined if the word "considering" is ambiguous. The legislative history of supervised release may assist in the interpretation of Section 3583(e)(2) considering the federal courts' inevitable discussion of it. Furthermore, the legislative history can "shed light on the specific intent of the enacting legislature" and "identify the statutory purpose" of supervised release.[222] The legislative history may answer the difficult question of whether the district courts must only consider the factors set forth in Section 3553(a), or if they are also free to hear challenges to the legality of conditions.

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[221] United States v. Neal, 810 F.3d 512, 518 (7th Cir. 2016); *see also* United States v. Ramer, 787 F.3d 837, 838 (7th Cir. 2015); United States v. D'Amario, 412 F.3d 253, 255 (1st Cir. 2005).
[222] STATUTORY INTERPRETATION, at 169.

The legislative history of supervised release is found largely in the Senate Report of the Sentencing Reform Act of 1984.[223] In this report, supervised release is described as a program designed "to ease the defendant's transition into the community after the service of a long prison term . . . or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release."[224] One of the "hallmarks of this legislation w[as] the elimination of parole."[225] Parole would often fool judges and mislead the public and the offender because of the uncertainty of when a defendant would actually be released.[226] Thus, the purpose of supervised release was to eliminate parole and to put in its place a

[223] S. REP. NO. 98-225 (1983).
[224] *Id.* at 3307.
[225] KATE STITH AND JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998).
[226] Michael P. Kenstowicz, *The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law*, 82 U. CHI. L. REV. 1411, 1415 (2015) (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988)).

rehabilitative system controlled by the district courts that would be consistent and fair.

In arguing that its interpretation is consistent with the underlying policy, the Second Circuit in *Lussier* pointed to the change in appellate routes that a defendant is able to use when sentenced.[227] Prior to the imposition of supervised release in the Sentencing Reform Act of 1984, the Federal Rules of Criminal Procedure allowed a defendant to appeal a sentence "by filing a motion at any time during service of the sentence."[228] The SRA changed the rule of criminal procedure and "thus 'explicitly foreclosed [the Rule 35(a)] route for obtaining judicial review of an allegedly illegal sentence' at any time."[229] The *Lussier* court also drew attention to the advisory notes in Rule 35 that state that the "committee's assumption is that a defendant detained pursuant to [a plainly illegal] sentence could seek relief under 28 U.S.C. §

[227] United States v. Lussier, 104 F.3d 32, 37 (2nd Cir. 1997).
[228] *Id.* (citing United States v. Jordan, 915 F.2d 622, 626 (11th Cir. 1990) (citing an older version of FED. R. CRIM. P. 35(a))).
[229] *Id.* (citing United States v. Jordan, 915 F.2d 622, 627-28 (11th Cir. 1990).

2255."[230] *Lussier* finished its policy argument by explaining that there was no indication that 18 U.S.C. § 3583(e)(2) was meant to replace "the pre-1984 Rule 35(a) and make it applicable only to conditions of supervised release."[231]

The court in *Neal*, arguing from a much broader policy basis, stated that "[a] term of supervised release should 'simulate life after the programs end.' That goal would be defeated by subjecting offenders to conditions of release that are unconstitutional or otherwise facially invalid."[232] The court focused on the possibility of missteps that accompany unconstitutional or unlawful supervised release conditions, which may frustrate the purpose of supervised release—rehabilitation.[233] To rebut the argument in *Lussier*, where Section 3583(e)(2) is described as a backdoor approach to challenging illegal conditions, the Seventh Circuit in *Neal*

[230] *Id.* (citing FED. R. CRIM. P. 35 advisory committee's notes).
[231] *Id.*
[232] United States v. Neal, 810 F.3d 512, 518 (7th Cir. 2016) (citing Perazza-Mercado, 553 F.3d 65, 71 (1st Cir. 2009)).
[233] *Id.* at 519–20.

limited their interpretation to substantive claims of legality.[234]

The Supreme Court in both United States v. Johnson[235] and Johnson v. United States[236] seemed to align more closely to *Neal's* policy rationales. The Court in United States v. Johnson spoke highly of the objectives of supervised release in "assisting individuals in their transition to community life."[237] The Court even went as far as to suggest that when "equitable considerations of great weight exist," such as, when a person is imprisoned longer than they were required to be, Section 3583 is a tool district courts may use to remedy such injustices.[238] Furthermore, in the latter case, Johnson v. United States, the Court used congressional intent to reason that a district court has more power in sentencing and supervision than the statute seemed to possess.[239]

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[234] *Id.* at 520.
[235] United States v. Johnson, 529 U.S. 53 (2000).
[236] Johnson v. United States, 529 U.S. 692 (2000).
[237] United States v. Johnson, 529 U.S. 53, 59 (2000).
[238] *Id.* at 60.
[239] *See* Section IV(a) and Johnson v. United States, 529 U.S. 694, 705 (2000).

The majority's reasoning in Johnson v. United States also seems more closely to match *Neal's* logic. The Court stated that when Congress used the word "revoke" in a statute, they "at least left the door open" to an interpretation that allowed the district courts more power than the statute seemed plainly to allow.[240] In bolstering their reasoning, the Court stated that its interpretation aligned with the congressional purpose of supervised release in "improv[ing] the odds of a successful transition from prison to liberty."[241] This resembles the focus in *Neal*, where the Seventh Circuit argued that disallowing challenges to legality would disrupt the statutory scheme of giving district courts the flexibility to assist the rehabilitation of offenders.[242]

After considering the plain meanings and contexts of the terms "consider" and "at any time" in 18 U.S.C. §§ 3583(e) and (e)(2), the proper interpretation likely supports allowing challenges to supervised release conditions for substantive

[240] Johnson v. United States, 529 U.S. 694, 705 (2000).
[241] *Id.* at 708.
[242] United States v. Neal, 810 F.3d 512, 520 (7th Cir. 2016).

legality. Using the guidance found in Supreme Court decisions, the policy underlying the statute would next be analyzed to glean the true meaning of the statute, which seems to also favor allowing challenges to supervised release conditions for legality. Thus, the Seventh Circuit's current interpretation of 18 U.S.C. §§ 3583(e) and (e)(2) is likely the correct interpretation.

V. ARGUMENT

Supervised release is far from the legislature's intent. While statutes only require supervised release to be imposed in "less than half of federal cases subject to the sentencing guidelines," almost everyone sentenced to a federal term of imprisonment is given a term of supervised release.[243] This sentencing occurs even after the Supreme Court's decision in United States v. Booker, where the sentencing guidelines were stripped of their mandatory designation and became

[243] OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 3–4.

merely advisory.[244] This new wave of mass-imposition of supervised release conflicts with a rehabilitative system where "post-release supervision [is provided] for those, and only those, who need[] it."[245] Only 67% of offenders actually successfully complete their term of supervised release without revocation.[246] As many commentators now argue, this mass-imposition of supervised release and revocation has led to a type of "second-class status" for those serving terms of supervised release.[247] Offenders who are attempting rehabilitation have the constant possibility of reimprisonment hovering over their heads due to the mere preponderance of the evidence standard used for violations of conditions of supervised release.[248] The revocation and reimprisonment scheme of supervised release, combined with its high imposition, has made supervised release more

[244] *Id.* at 7; United States v. Booker, 543 U.S. 220 (2005).
[245] Johnson v. United States, 529 U.S. 694, 709 (2000) (referring to S. REP. NO. 98-225, at 125 (1983)).
[246] OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 61.
[247] Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U.L. Rev. 958, 1019 (2013) [hereinafter Doherty, *Indeterminate Sentencing Returns*].
[248] 18 U.S.C § 3583(e)(3) (2012).

"about punishment, oversight, and coercion" than about rehabilitation.[249]

This Article is not intended to go into detail of the various problems with supervised release or explain a way fully to rectify the statute and its scheme. This introduction to some of the issues of supervised release is intended to highlight the scheme in its current state and provide a solution through the modification of supervised release conditions for legality. The current circuit split regarding challenges to supervised release conditions for legality under 18 U.S.C. § 3583(e)(2) may ultimately be settled by the United States Supreme Court, but the possibility of the high court interpreting the statute as not allowing challenges to conditions because of legality remains existent. Thus, Congress should amend 18 U.S.C. § 3583(e)(2) explicitly to allow district courts to modify conditions due to legality.

[249] Doherty, *Indeterminate Sentencing Returns*, at 1002.

A. Conditions of Supervised Release that Raise Constitutional Issues

Amending the statute explicitly to allow challenges to supervised release conditions is necessary to bend the scheme of supervised release into a more rehabilitative system. The Seventh Circuit in *Neal* recognized this need when it stated that district courts are given "flexibility and discretion to formulate a beneficial plan of supervised release," but are not given a "crystal ball" to predict the best conditions of release at the time of sentencing.[250] To give the courts more flexibility in crafting an appropriate rehabilitative monitoring term, judges are given the discretion to create unique conditions for individual offenders.[251] This has led to some strange, and perhaps unconstitutional, supervised release conditions that could be quickly fixed through modification with §

[250] United States v. Neal, 810 F.3d 512, 519 (7th Cir. 2016).
[251] "The court may order, as a further condition of supervised release…any other condition it considers to be appropriate." 18 U.S.C. § 3583(d) (2012).

3583(e)(2) if challenges to their legality were allowed.

One of these strange conditions is the requirement for an offender to undergo penile plethysmograph testing (PPG). A condition almost exclusively imposed on child sex offenders, PPG is a scientific test that requires an offender to place a device on his erect penis so that changes in his penile size can be recorded throughout a series of tests, all in an attempt to capture the amount of supposed sexual attraction.[252] With the device placed on his penis, the offender is forced to view materials that "depict individuals of different ages and genders – in some cases even possessing different anatomical features – and portray sexual scenarios involving varying degrees of coercion," so that the test administrator can record changes in his penis size.[253] Supposedly, this test can capture the level of a persons' sexual desires so that their

[252] Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 9 (2004) [hereinafter Odeshoo, *Penile Plethsymography*].
[253] *Id.*

corresponding level of rehabilitation may be measured. Besides being reminiscent of antiquated criminal phrenology,[254] "[t]he testing is controversial, both as to whether it is effective and as to whether it is unduly invasive and thus degrading."[255] This testing also raises constitutional issues, such as an individual's privacy under the Fourth Amendment and religious freedom under the First Amendment.[256]

Another unique supervised release condition that seems almost unbelievable is a court-ordered separation of husband and wife. The Eighth Circuit recently invalidated a supervised release condition

[254] "Phrenology was the nineteenth century's science of the mind…[that] contended that a person's character could be determined from the bumps and hollows on the outside of the skull." Amanda C. Pustilnik, *Violence on the Brain: A critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183, 191 (2009). "Phrenology had serious impacts on the criminal law in the United States and Europe. Phrenology informed criminal law reform proposals, jurists used phrenology to separate the criminal from the insane and to provide reliable ways to identify both; expert phrenological testimony was introduced at sentencing as a mitigating factor; and the founder of forensic psychiatry embraced phrenology as a way of showing the trier of fact the relationship between brain and behavior." *Id.* at 192–93.

[255] United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (a case involving an offender challenging a supervised release condition that mandated PPG testing when required by a sex offender treatment program).

[256] Odeshoo, *Penile Plethsymography*, at 20–26.

imposed on an offender that required "[t]he defendant [to] have no direct, indirect, or electronic contact with codefendant and husband…during her term of supervised release."[257] This court-ordered "divorcing" of the woman from her husband was to be in effect for the remaining three-and-one-half years of her supervised release term.[258] While the special condition was intended to assist the defendant from "absconding from her supervision" due to her husband's apparent bad influence, it involved a much "greater deprivation of liberty than [was] reasonably necessary.[259] This condition was not an outlier, as other cases also have involved a separation of husband and wife.[260] These cases all raise important Fourteenth Amendment issues and

[257] United States v. Hobbs, 845 F.3d 365 (8th Cir. 2016).
[258] *Id.*
[259] *Id.* at 367, 369.
[260] *See* United States v. Rodriguez, 178 F. App'x 152 (3d Cir. 2006) (wife had to have probation's approval before visiting husband in prison); *see also* United States v. Woods, 547 F.3d 515 (5th Cir. 2008) (a woman was not allowed to domicile with anyone besides a husband and those related by blood)).

bump up against the rehabilitative goals of supervised release.[261]

The United States Sentencing Commission has listed other supervised release conditions that usually produce legality issues, including submitting DNA samples,[262] deportation,[263] lifestyle restrictions,[264] involuntary medication,[265] bans on gambling,[266] warrantless or suspicion-less searches,[267] prohibitions on the use or possession of

[261] "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting in part Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).
[262] *See* United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007) (supervised release condition to provide DNA under the DNA Analysis Backlog Elimination Act).
[263] *See* USSG §5D1.3(d)(6) (2016).
[264] Supervised release conditions may "bar[] contact with old haunts and associates, even though the activities may be legal." OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 16 (examples given are "participation in a motorcycle club . . . visits to Irish pubs . . . and a condition prohibiting association with white supremacist members").
[265] *See* United States v. Williams, 356 F.3d 1045 (9th Cir. 2004) (a condition of supervised release was taking psychotropic medication for mental illness).
[266] *See* United States v. Brown, 136 F.3d 1176 (7th Cir. 1998) (compulsive gambler given a supervised release condition to "not engage in any gambling activities or frequent a gambling establishment for the three-year period of his supervised release").
[267] *See* United States v. Betts, 511 F.3d 872, 876 (9th Cir. 2007) (a supervised release condition provided that "the defendant shall submit person and property to search and seizure at any time of the

pornography,[268] and restrictions on internet and computer usage.[269] Some challenges against supervised release conditions have been struck down, while others have been upheld for being "reasonably related to the [sentencing] factors set forth in section 3553(a)."[270] Many of these conditions may indeed be constitutional and necessary to either protect society or rehabilitate the offender, but there are conditions that will inevitably be imposed that are unconstitutional. The supervised release sentencing scheme would benefit greatly from an explicit amendment that allows for challenges to conditions due to legality.

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day or night by any law enforcement officer, with or without a warrant").

[268] *See* United States v. Reardon, 349 F.3d 608 (9th Cir. 2003) (the court imposed a supervised release condition that effectively prohibited the offender from possessing legal adult pornography).

[269] *See* United States v. Russel, 600 F.3d 631 (D.C. Cir. 2010) (supervised release condition prohibiting use of any computer). *See also* United States v. Perazza-Mercado, 553 F.3d 65 (1st Cir. 2009) (supervised release condition prohibiting any use of home internet).

[270] 18 U.S.C. § 3583(d)(1) (2012).

B. Lacking in the Rehabilitative Long Haul: Direct Appeal and 28 U.S.C. § 2255

The modificatory provision of 18 U.S.C. § 3583(e) would benefit from an amendment explicitly allowing offenders to petition the district court for a modification of conditions due to legality even though an offender could otherwise use a direct appeal or use 28 U.S.C. § 2255 to challenge conditions. An offender may use 28 U.S.C. § 2255 to file a motion to vacate the sentence on grounds of illegality.[271] However, currently under Section 2255, an offender is limited to a one-year period to seek relief from conditions he or she believes to be "imposed in violation of the Constitution or laws of the United States."[272] While there are some exceptions to the one-year limit, an offender may be subjected to conditions of supervised release by a district court that are unconstitutional without an avenue for relief.[273] For example, an offender could find himself in a situation where he is sentenced to a

[271] 28 U.S.C. § 2255(a) (2012).
[272] 28 U.S.C. § 2255(a), (f)(1)–(4) (2012).
[273] 28 U.S.C. § 2255(f)(1)–(4) (2012).

lengthy prison term after committing a sex offense, and given a term of supervised release that includes a special condition to undergo a sex offender treatment program that includes penile plethysmograph testing. The hypothetical offender may think little of this condition during sentencing and the first few years of prison. However, he may have a religious conversion and suddenly believe that viewing sexually explicit material is sin. Without a clear provision in 18 U.S.C. § 3583(e)(2) allowing modification of conditions for legality, he will have no avenue to challenge the PPG testing and the corresponding explicit media involved as violating his First Amendment right to freely practice his religion, seeing that the one-year limitation on 28 U.S.C. § 2255 would have passed long ago. Even if this hypothetical offender ultimately had no claim, his rehabilitation would be hampered because he would effectively be prevented from airing his grievances before a court.[274]

[274] An Explicit and Implicit Sexual Interest Profile (EISIP) may be

While genuine prison-house conversions may be rare, and most constitutional issues are present at the time of sentencing, direct appeals of supervised release conditions at sentencing also do not negate the need for an amendment to 18 U.S.C. § 3583(e)(2). Direct appeal is not available to those offenders who waive their right to appeal supervised release conditions or terms using an appellate waiver as part of a plea agreement.[275] Appellate waivers are agreements where defendants' "relinquish [their] right to appeal [a] yet-to-be-imposed sentence."[276] A sampling of plea agreements between the years 1990 and 2003 revealed that nearly two-thirds of plea-agreements contained a provision that limited a defendant's right to appellate review of a sentence.[277] When courts are confronted with an appeal of a sentence

developed. CARMEN M. CUSACK, J.D., PH.D., CRIMINAL JUSTICE HANDBOOK ON MASCULINITY, MALE AGGRESSION, AND SEXUALITY, 180-181 (2017) (discussing phallometric tests). Supervised release may act as a deterrent; but, supplying sex offenders with child pornography not only fails to deter them, it enables them. *Id.*

[275] Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J. L. REFORM 347, 348 (2015).

[276] *Id.* at 347.

[277] Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005).

where a valid appellate review waiver was signed, they will refuse to hear the appeal, even if made on grounds of legality.[278] Thus, direct appeal is a route that is foreclosed for the many defendants who accept a plea.

Defendants may also be so overwhelmed at the thought of a prison term that they are unable to think clearly at sentencing, and thus fail to negotiate their conditions of supervised release. Congress seemed to predict that a defendant may not be thinking clearly during sentencing when it included the following requirements: that a written statement of the conditions be given to the defendant at the time of sentencing, that the statement be "sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required,"[279] and that the sentencing judge is to "state in open court the

[278] "[T]he duration, as well as the conditions of supervised release are components of a sentence. By waiving his right to take a direct appeal of his sentence, [the defendant] waived his right to challenge the conditions of his supervised release, which were by definition part of his sentence." United States v. Wilson, 707 F.3d 412, 414 (3d Cir. 2013) (quoting United States v. Goodson, 544 F.3d 529 (3d Cir. 2008)).
[279] 18 U.S.C. § 3583(f) (2012).

reasons for its imposition of the particular sentence."[280] The Honorable Harold Baer, Jr. of the Southern District of New York wrote that sentencing judges "may want to bring more rather than less information to the defendant's attention" regarding their term of supervised release because the "concept of supervised release may not be readily perceived by a defendant."[281] He did note, however, that "a failure to advise a defendant of the effect of a term of supervised release will not necessarily entitle the defendant to relief."[282]

C. Sentencing Judges and Explanations of Supervised Release Conditions

Fortunately for sentencing judges, failing to go into detail about supervised release does not negate supervised release conditions. In case surveys, few judges explain the rationale behind supervised

[280] 18 U.S.C. § 3553(c) (2012).
[281] Harold Baer, Jr., *The Alpha & Omega of Supervised Release*, 60 ALB. L. REV. 267, 284 (1996).
[282] *Id.*

release conditions that are imposed.[283] Sentencing transcripts collected between 2013 and 2014 in the Northern District of Illinois showed that in only about three percent of the cases the sentencing judge explained the reasons for all the standard supervised release conditions imposed.[284] Another case study focused on the Eastern District of New York and the sentencing hearings in 2012.[285] Out of the 176 cases studied, not one of the sentencing judges explained the rationale for imposing supervised release, and none of the terms of supervised release were contested.[286] The study included off-the-record conversations with the defense attorneys, who explained that they did not contest supervised release terms because "the perceived mandatory nature of supervised release is

[283] Michael P. Kenstowicz, *The Impostion of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law*, 82 U. CHI. L. REV. 1441 (2015).
[284] *Id.* at 1434. In under half of the cases, the judge provided explanations for some of the conditions imposed. *Id.*
[285] Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 205 (2013).
[286] *Id.* at 208.

so entrenched that they do not even bother to fight its imposition, or the length of its term."[287]

This surprising lack of discussion of supervised release at sentencing is further confirmed by the sentencing transcript of Tyree Neal, the defendant in United States v. Neal, who was initially sentenced to three years of supervised release for drug possession.[288] During sentencing, the judge barely mentioned the conditions of supervised release, and even forgot to tell Mr. Neal the length of his term of supervised release.[289] The primary conversation between the judge and the defendant appears to have focused upon the impending term of federal prison.

[287] *Id.* at 209.
[288] United States v. Neal, 810 F.3d 512 (7th Cir. 2016).
[289] The defense attorney had to ask the judge for the length of the term of supervised release towards the end of the sentencing. The judge stated, "Three years unless my memory fails me, which it never has." This was confirmed by the courtroom deputy. Transcript of Sentencing at 89-90, U.S. v. Neal, No. 00-40101-06-GPM (Southern District of Illinois, July 20, 2001).

D. Temporal Discounting

The lack of discussion of supervised release during sentencing may affect defendants by limiting the instances of direct appeal of supervised release conditions, but the Seventh Circuit in *Neal* likely drew closer to the more usual phenomena when it stated: "[T]he detailed conditions of a distant term of supervised release are typically far from the mind of a defendant at sentencing."[290] A psychological effect known as temporal discounting may make many defendants focus on the impending prison term, rather than the far off supervised release term and conditions. Temporal discounting is a psychological phenomenon that creates "a tendency for proximal factors to influence behavior more strongly than distal factors."[291] While usually used to explain people's impulsive choices, "temporal discounting concepts can inform the analysis of almost any behavior in the natural environment that

[290] *Neal*, 810 F.3d at 520.
[291] Stephanie Madon et. al, *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, LAW AND HUMAN BEHAVIOR, Vol. 36, 13 (2012) [hereinafter Stephanie Madon, *Temporal Discounting*].

incorporates delayed consequences that aggregate over time."[292]

For example, temporal discounting was used in an attempt to explain why people sometimes falsely confess to crimes they did not commit, and the study theorized that "suspects may find it psychologically easier to risk incurring the distal consequences levied by the judicial system in order to attain the short-term goal of ending a police interrogation."[293] The study also suggested that defendants with "psychological vulnerabilities, including those with cognitive deficits, mental illness, [and] substance dependence," tend to be more impulsive, and thus consider the more proximate issue at hand rather than the distal.[294]

Without stretching the significance of psychological effects too far, defendants likely engage in temporal discounting when being sentenced and tend to focus almost entirely on the

[292] Thomas S. Critchfield & Scott H. Kollins, *Temporal Discounting: Basic Research and the Analysis of Socially Important Behavior*, JOURNAL OF APPLIED BEHAVIOR ANALYSIS, 101, 116 (2001).
[293] Stephanie Madon, *Temporal Discounting*, at 18–19.
[294] *Id.*

soon-to-be-realized federal prison term rather than the term of supervised release or its conditions. This phenomenon, as well as the lack of discussion during sentencing, shows the need for 18 U.S.C. § 3583(e)(2) to be amended explicitly by Congress to allow district courts to modify conditions of supervised release for legality. Direct appeals and 28 U.S.C. § 2255 are potential avenues a defendant may use to challenge supervised release conditions, but they are not sufficient to give district courts the flexibility effectively to assist an offender from prison life to the real world as Congress intended supervised release to do.

VI. CONCLUSION

After examining the statutory interpretation methods used by the Court, it seems that the Seventh Circuit correctly interpreted 18 U.S.C. § 3583(e)(2) by allowing challenges to conditions due to legality. The current circuit split regarding the modification of supervised release conditions for legality may eventually be decided by the United

States Supreme Court. However, the Supreme Court may be very far off from unifying the current split among the circuits, and almost every offender sentenced to more than one year in prison will face a term of supervised release. Thus, to further the rehabilitative goals of supervised release and to allow district courts the greatest flexibility in assisting an offender back into freedom, 18 U.S.C. § 3583(e)(2) should be amended explicitly to allow district courts the ability to hear substantive challenges to conditions based on legality. This amendment may lower the rates of re-imprisonment among those serving terms of supervised release and ultimately create a better society with rehabilitated "offenders" who become productive members of society.