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CRIMINAL LAW—GIVE ME FREEDOM!: HOW AMBIGUOUS FEDERAL SUPERVISED RELEASE CONDITIONS UNDERMINE THE PURPOSE OF THE SENTENCING REFORM ACT

Igor V. Bykov[*]

Vagueness, as the word suggests, is inherently uncertain. This Note addresses the issues of vagueness presented by unclear supervised release conditions, as well as discusses the split of authority pertaining thereto. Specifically, the condition discussed throughout the Note prohibits defendants from frequenting places where controlled substances are illegally present. Because federal appellate courts differ as to the condition's meaning and its application, the existing circuit split will be thoroughly discussed. The main issues with the condition demonstrate a lack of attentiveness and forethought of the sentencing judges that ultimately impose undue hardships onto the defendants wishing to enter back into society. Furthermore, due to the lack of clarity of the proscribed terms, defendants may be uncertain as to what behavior is permitted and what act may result in re-incarceration. Since the proscribed terms are subject to varying interpretations, the defendants subject to this condition may find it difficult to obey. This Note will argue that the imposition of vague supervised release conditions is contradictory to the rehabilitative

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purpose of supervised release, and will urge the sentencing courts to exercise greater caution when imposing terms of federal supervision. This will ensure that defendants are not subject to unclear terms that may be unintentionally violated.

INTRODUCTION

The passage of the Sentencing Reform Act by Congress in 1984,[1] as a part of the Comprehensive Crime Control Act,[2] catalyzed the abolishment of federal parole.[3] Prior to the establishment of the Sentencing Reform Act, Congress had the power to outline the sentencing ranges, and the courts were given the discretion to impose sentences within those ranges on a case-by-case basis.[4] In its stead, Congress created the United States Sentencing Commission,[5] an independent body within the judicial branch, tasked with "provid[ing] certainty and fairness in . . . sentencing."[6] After the Sentencing Reform Act's passage, the Sentencing Commission implemented guidelines in sentencing,[7] under which "district judges determine[d] sentences based on the various offense-related and offender-related factors identified [in] the Guidelines . . . ."[8] These factors, as provided by the United States Code, mandated that the sentencing court—when determining the severity of the sentence to be imposed—consider the nature and circumstances of the offense committed, as well as the need for the imposition of a sentence.[9]

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

2. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

3. 28 U.S.C. § 991(b)(1) (2018). See also Fiona Doherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, 88 N.Y.U. L. Rev. 958, 984 (2013).

> On June 25, 1910, Congress enacted a parole statute for prisoners housed in federal institutions. The new statute applied only to those confined for a definite term of more than a year, whose record of conduct demonstrated that they had obeyed the rules of the institution, and who had served at least one-third of their sentences.

Id. U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 3 (2020). "The SRA and contemporaneous federal sentencing legislation created a fundamentally different sentencing system from the prior system, with the guidelines being the central feature and with parole no longer available for offenders convicted of offenses committed on or after November 1, 1987." *Id.*

4. 3 CRIM. PRAC. MANUAL § 103:2, Westlaw (database updated June 2020). *See also* 18 U.S.C. § 3553(b)(1) (1984), *invalidated* by United States v. Booker, 543 U.S. 220 (2005). In *Pepper v. U.S.*, the Court rendered the referenced section of the Guidelines as advisory and invalidated the requirement for sentencing courts "to impose a sentence within the [applicable] Guidelines range." Pepper v. United States, 562 U.S. 476, 494 (2011).

5. 28 U.S.C. § 991.

6. *Id.* at § 991 (b)(1)(B). 3 CRIM. PRAC. MANUAL § 103:42, Westlaw (database updated June 2020).

7. 3 CRIM. PRAC. MANUAL § 103:42, Westlaw (database updated June 2020).

8. *Id.*

9. 18 § 3553(a)(1)–(2). 3 CRIM. PRAC. MANUAL § 103:2, Westlaw (database updated June 2020).

Specifically, the sentence must

> . . . reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> . . . afford adequate deterrence to criminal conduct;
> . . . protect the public from further crimes of the defendant; and
> . . . provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[10]

These factors were established to ensure that sentences were not disparate, but rather congruent in relation to the offense committed, as originally envisioned by the legislators when enacting the 1984 Act.[11]

In addition to establishing uniformity in sentencing, the Act created a new form of post-imprisonment supervision known as supervised release.[12] This new form of supervision, unlike the old system of parole, did "not replace a portion of the sentence of imprisonment, but rather [acted as] an order of supervision in addition to any term of imprisonment imposed by the court."[13] Its creation required the courts to impose a period of supervised release after either a sentence of one year or more, or when required by the statute.[14] If a court believes a period of supervised release is necessary, it "must impose certain mandatory conditions, including explicit conditions [prohibiting the] defendant [from committing] another federal, state, or local crime, and [from possessing] illegal controlled substances."[15] Additionally, pursuant to Section 5D1.3(b) of the United States Sentencing Guidelines, the courts must rely on a set of factors when determining what type of a sentence to impose.[16] The courts, when imposing a sentence, must consider: the nature of the circumstances; the need of the sentence imposed; types of sentences available; suggestions by applicable agencies; any relevant policies;

10. 18 § 3553(a)(2)(A)–(D).

11. 28 U.S.C. § 994(f) (2018). U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 3 (2020).

12. 3 CRIM. PRAC. MANUAL § 103:42, Westlaw (database updated June 2020); U.S. SENTENCING COMM'N, PRIMER ON SUPERVISED RELEASE 1 (2019), *https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Supervised_Release.pdf.*

13. U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, cmt. background (U.S. SENTENCING COMM'N 2018). 3 CRIM. PRAC. MANUAL § 103:42, Westlaw (database updated June 2020).

14. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a) (U.S. SENTENCING COMM'N 2018).

15. 3 CRIM. PRAC. MANUAL § 103:42, Westlaw (database updated June 2020); U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a) (U.S. SENTENCING COMM'N 2018) (detailing mandatory conditions of supervised release).

16. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (U.S. SENTENCING COMM'N 2018).

prevention of unwarranted sentence disparities; as well as the need to recompense the victim.[17] The sentence "must be 'reasonably related' to the nature of the offense, the defendant's history and characteristics, or the relevant purposes of punishment."[18] The sentence must be tailored as to provide the offender with educational, vocational training as a step towards rehabilitation, as well as to deter any criminal conduct.[19] The sentence must not involve any greater deprivation of liberty than necessary to deter future criminal acts and to protect the public, and can be implemented if the sentence's terms are "consistent with any pertinent policy statements issued by the Sentencing Commission . . . ."[20]

Supervised release is a widely used judicial mechanism to ensure that recently released inmates receive adequate supervision after completing their prison sentences.[21] Meant to serve as a more individual approach, supervised release granted the courts permission to assign conditions based on the varying levels of offenses.[22] The conditions are chosen from three groups: mandatory, discretionary, or special (or otherwise appropriate).[23] The difference in the conditions imposed is future-focused and outcome-based: "For long-term prisoners, [supervised release] should facilitate reintegration, and for select prisoners with short-term prison sentences, it would provide for rehabilitation and supervision."[24]

17. 18 U.S.C. § 3553(a)(1)–(7) (1984).

18. U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 8 (2020).

19. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (U.S. SENTENCING COMM'N 2018).

20. 18 U.S.C. § 3583(d) (2018). *Accord* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (U.S. SENTENCING COMM'N 2018).

21. *See* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 180 (2013) ("More than 95 percent of people sentenced to a term of imprisonment in the federal system are also sentenced to a term of [post-imprisonment supervision]. Since it was first established in the late 1980s, nearly one million people have been sentenced to federal supervised release.").

22. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (U.S. SENTENCING COMM'N 2018) ("The court may impose other conditions of supervised release to the extent that such conditions[] are reasonably related to[] the nature and circumstances of the offense and the history and characteristics of the defendant . . . .").

23. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(b) (U.S. SENTENCING COMM'N 2018); *see also* Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT'G. REP. 231, 232 (2016) ("Without regard to individual risk or needs, courts seem to impose at least all the standard discretionary conditions.").

24. Demleitner, *supr*a note 23, at 232. *See also* S. Rep. No. 98-225, at 124 (1983).

> [T]he primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, 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.

Id.

Ambiguous terms of post-imprisonment supervision, however, undermine the future-focused and outcome-based goals of supervised release.[25] Instead of providing "certainty and fairness in . . . sentencing,"[26] by tailoring conditions to individual offender's needs, the courts are imposing terms of post-imprisonment supervision more broadly.[27]

The courts disregard the individual needs of defendants when they impose heavy-handed conditions of supervised release, especially when the conditions are ambiguous and fail to provide clear limitations on defendants' conduct.[28] For example, the condition forbidding the defendant from "frequent[ing] places where controlled substances are illegally sold, used, distributed, or administered,"[29]—which will be referred to as the *frequenting condition* throughout—is ambiguous and has been challenged in multiple jurisdictions. Unfortunately, there is a lack of uniformity in decisions regarding the condition's terms.[30] The Seventh Circuit, with regards to the analyzed condition, is of different opinion than its Ninth and Tenth counterparts.[31] The Seventh Circuit ruled that this condition is riddled with ambiguities and is, therefore, unconstitutional.[32] To the contrary, the Ninth and Tenth Circuits found the same condition to be free of constitutional deficiencies and affirmed its imposition.[33] When the Third Circuit faced a similar issue they left it undisturbed, reasoning that no plain error was committed by the sentencing court due to the existing split of authority.[34] It therefore did not reach the question of the conditions' merits.[35] Although the condition in question was stricken from the Sentencing Guidelines in 2016,[36] it nonetheless deserves

25. *See* Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 448–50 (2011) (finding that some supervision conditions can inhibit the successful reentry of people on parole).

26. 28 U.S.C. § 991(b)(1)(B) (2018). *See also* 3 CRIM. PRAC. MANUAL § 103:2, Westlaw (database updated June 2020).

27. *See* Demleitner, *supra* note 23, at 232 (noting that "federal judges commonly—almost reflexively—impose a term of supervised release (SR) upon discharge from prison, even if not statutorily required to do so.").

28. *See id.*

29. *See, e.g.*, United States v. Barry, 757 F. App'x 139 (3d Cir. 2018); United States v. Llantada, 815 F.3d 679 (10th Cir. 2016); United States v. Thompson, 777 F.3d 368 (7th Cir. 2015); United States v. Phillips, 704 F.3d 754 (9th Cir. 2012).

30. *See, e.g.*, *Barry*, 757 F. App'x 139; *Llantada*, 815 F.3d 679; *Thompso*n, 777 F.3d 368; *Phillips*, 704 F.3d 754.

31. *Compare Llantada*, 815 F.3d 679, *and Phillips*, 704 F.3d 794 (holding that the condition prohibiting the defendants from frequenting places where controlled substances are illegally sold, used, distributed, or administered is not vague), *with Thompson*, 777 F.3d 368 (holding that the aforementioned condition is impermissibly vague).

32. *See Thompson*, 777 F.3d at 379.

33. *See Llantada*, 815 F.3d 679; *Phillips*, 704 F.3d 754.

34. *See Barry*, 757 F. App'x 139.

35. *Id.*

36. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 44

attention.

This Note examines the circuit split, focusing primarily on whether the condition—prohibiting defendants from frequenting places where controlled substances are illegally sold, used, administered, or distributed—is impermissibly vague. This Note uses the Third Circuit's *United States v. Barry* decision to better illustrate the vagueness issue raised by the Defendant. Furthermore, this Note urges the courts to be more attentive when subjecting defendants to unclear terms of post-imprisonment supervision. Finally, potential remedies to reconcile the circuit split and help achieve uniformity and fairness in sentencing will be provided.

Part I will lay the foundation for the issue by analyzing appellate-level decisions that have confronted the vagueness issue. Although the condition addressed throughout this Note was stricken from the Sentencing Guidelines, its impact has not been fully curtailed. Since the condition was removed recently, there is still a class of people subject to the it's vague terms who, like the defendants in cases central to the Note's discussion, will suffer because of the condition's vagueness. Part II will present the arguments for why vague supervised release conditions are problematic. Part III will provide potential remedies to mend the circuit schism. Moreover, this Note will urge the sentencing courts to modify their reasoning to incorporate more practicality and forethought when imposing terms of supervised release so as to avoid further appellate litigation and unnecessary curtailment of defendants' rights.

I. BACKGROUND ON THE CIRCUIT SPLIT

This Note will focus on the circuit split between the Seventh and the Ninth and Tenth Circuits in regard to the frequenting condition. As the law stands, the Ninth and Tenth Circuits held that the condition's terms are unambiguous and problem-free, whereas the Seventh Circuit deemed the condition to be unconstitutionally vague. Since the courts are split, the condition must be scrutinized for constitutional deficiencies.

A. *The Ninth and Tenth Circuits*

The prohibition on frequenting places where controlled substances are illegally used or sold first reached the appellate level in 2012. In *United States v. Phillips*, Defendant Phillips, convicted of multiple counts of wire and mail fraud, as well as two counts of money laundering, appealed his forty-eight-month prison term and subsequent three-year-period of supervised release.[37] Phillips argued that the frequenting condition is "so vague and overbroad that it would prohibit him from

(2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428_RF.pdf.

37. *Id.* at 754, 757.

visiting many neighborhoods in Seattle where he lived before [imprisonment]," and therefore precludes him from "living and working in [the city] altogether."[38] Phillips also argued that the condition "leaves [him] so confused about what he can and cannot do that it restricts his freedom of movement."[39]

The Ninth Circuit found Phillips's arguments unpersuasive.[40] To clarify the condition's terms, the court incorporated a *mens rea* element.[41] Ultimately, the court held that men of common intelligence would interpret "the prohibition on 'frequenting places' where illegal drugs are used or sold" as "*knowingly* going to a specific place where drugs are illegally used or sold."[42] The Ninth Circuit further ruled "that [the condition] does not prohibit [the defendant] from living in Seattle or going to a given neighborhood simply because a person is selling drugs somewhere within that neighborhood."[43] Instead, the court noted that "incidental contact with [prohibited] places here would not constitute 'frequenting.' Frequent in this context means to 'be in often or habitually.'"[44] Consequently, when applying a common sense reading of the terms at issue, the condition, according to the Ninth Circuit, was neither overbroad nor impermissibly vague.[45]

The Tenth Circuit reviewed a similar issue in 2016.[46] In *United States v. Llantada*, the Defendant "pleaded guilty to charges arising from a drug conspiracy in 2014," and was sentenced to 168 months of imprisonment.[47] In addition to the prison sentence, Llantada was subject to terms of post-imprisonment supervision.[48] The frequenting condition was one of these terms.[49]

The defendant contended that the condition imposed strict liability on defendants who, whether knowingly or not, violated the condition.[50] Unpersuaded, the Tenth Circuit found that "[t]he most reasonable

38. *Id.* at 767.

39. *Id.*

40. *See id.* at 767.

41. *Id.* The *mens rea* element forbids the defendant from *knowingly* violating his condition's terms, as opposed to accidental or unintentional violation thereof. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (quoting MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed. (2003)).

45. *Id.*

46. United States v. Llantada, 815 F.3d 679 (10th Cir. 2016). *C.f.* United States v. Evans, 883 F.3d 1154 (9th Cir. 2018) (The *Evans* court did not agree with *Llantada*, because, under a common-sense approach, probation officers will have difficulty understanding and applying the condition.)).

47. *Id.* at 681.

48. *Id.*

49. *Id.* at 682.

50. *Id.* at 684.

interpretation of the condition is that it prohibits [the defendant] from going to places only if he knows that drugs are used or sold there.'"[51] A similar strict-liability argument was also rejected in *United States v. Muñoz*, an earlier Tenth Circuit decision holding that a literal reading of the terms *frequent* and *place* is not inadequate as a matter of law.[52] The Tenth Circuit held that "[t]he probation officer, and any judges tasked with deciding whether [the condition was violated], must interpret the condition in a reasonable, commonsense manner."[53]

B. *The Seventh Circuit*

Three years after the issuance of the *Phillips* decision, the Seventh Circuit faced a similar issue in *United States v. Thompson*.[54] Thompson, as the first defendant in the consolidated opinion, "was sentenced to 210 months in prison,"[55] after being "convicted [for] possession of child pornography, and [for] traveling in interstate commerce for the purpose of engaging in sexual conduct, in violation of federal laws."[56] The second defendant, Ortiz, "pleaded guilty to three bank robberies and was sentenced to prison for 135 months [as well as] twenty-one conditions of supervised release."[57] The third defendant, Bates, charged with the distribution of crack cocaine, "was sentenced to 188 months in prison"[58] and, like others before him, was subject to "the usual [thirteen] standard conditions and five others (though for eight years, rather than the three years in Ortiz's case)."[59] Finally, the last defendant, Blount, was sentenced to 300 months in prison "for running an extensive organization engaged in the sale of heroin."[60]

Out of the four consolidated cases addressed in the *Thompson* opinion, only Defendant Ortiz was subject to the frequenting condition.[61] However, all of the cases in the consolidated opinion followed a similar trend: the imposed supervised release conditions were not challenged at the time of their imposition, but rather were confronted on appeal. Accordingly, the challenge permitted the Seventh Circuit to take a closer look at the condition's deficiencies.[62]

51. *Id.* (quoting United States v. Muñoz, 812 F.3d 809, 823 (10th Cir. 2016)).
52. *Id.*
53. *Id.*
54. United States v. Thompson, 777 F.3d 368 (7th Cir. 2015).
55. *Id.* at 375.
56. *Id.*
57. *Id.* at 378.
58. *Id.* at 380.
59. *Id.*
60. *Id.* at 380–81.
61. *See id.* at 379.
62. *Id.* at 372.

As a proponent of striking the condition, the Seventh Circuit pronounced that condition is riddled with ambiguities.[63] First, the court noted that there is "no requirement that [the defendant] know or have reason to know or even just suspect that [the prohibited] activities are taking place."[64] Additionally, the court acknowledged that there is no numerical value assigned to the term *frequent*.[65] Accordingly, the Seventh Circuit ruled that the condition imposed was impermissibly vague.[66] The court emphasized that the limitations of the conditions should be specified by the sentencing court, "rather than [being left] to the appellate courts" to decide.[67] Due to lack of judicial guidance regarding the condition's prohibitions, the defendant "may think himself bound by the broader interpretation"[68] of the condition, rather than its intended, narrowly construed meaning.[69] An analogy employed by the court is illustrative in elucidating the conundrum:

> If you're [ninety] percent certain that purchasing girl-scout cookies from someone who rings your doorbell wouldn't violate a condition of supervised release, do you want to risk going back to prison because you may have guessed wrong? If out of caution therefore you decline to purchase the cookies, the sentencing guideline will deter lawful conduct, and thus be overbroad.[70]

As the court provides, ordinary everyday conduct could subject one to re-incarceration.[71] In order to err on the side of caution, a defendant subject to unclear parameters may choose to abstain from otherwise legal endeavors in order to avoid another prison sentence. Because the condition can be violated through innocent conduct, defendants are forced to take extraordinary precautions to avoid re-incarceration. As a result, defendants may avoid lawful conduct and have their liberty curtailed — an unintended consequence of supervised release. Finding the frequenting condition to be unduly restrictive, the Seventh Circuit reversed the district court's decision, vacated the defendants' entire sentences, and remanded the cases for further proceedings.[72]

63. *Id.* at 379.
64. *Id.*
65. *Id.*
66. *Id.* at 380.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 382 (opining that "reconsideration of [the] conditions [imposed] may conceivably induce one or more of the judges to alter the prison sentence that he imposed.").

C. *The Third Circuit's Illustrative Example:* United States v. Barry

Soulemane Barry "pleaded guilty to using and attempting to use 'counterfeit access devices'[,] . . . possessing [fifteen] or more counterfeit access devices[,] . . . and conspiring to commit access device fraud in violation of [federal law]."[73] As a consequence for his wrongdoings, the district court sentenced Barry to a five-year term of supervised release, without imposing a period of incarceration.[74] The conditions imposed upon the Defendant mandated that Barry "'not frequent places where controlled substances are illegally sold, used, distributed, or administered' and . . . 'not associate with any persons engaged in criminal activity' or 'with any persons convicted of a felony' without his probation officer's permission."[75]

Two and a half years later, Barry's period of supervised release was revoked because he "stabbed two people, travelled outside of the Eastern District of Pennsylvania without permission, used controlled substances, stopped attending a drug-treatment program, and did not report to his probation officer as directed."[76] This time, the district court sentenced Barry to fourteen months of imprisonment and a two-year term of supervised release, where he was subject to the same conditions that were initially imposed upon him.[77] On appeal, Barry argued that the court plainly erred by imposing the constitutionally-deficient conditions.[78]

Focusing specifically on the *frequenting* condition, Barry argued that there was no clear indication of "how many trips result in 'frequenting' sites of drug activity, nor does it clarify whether he must knowingly be in such a place to violate it[,]"[79] using the Seventh Circuit decision to support his contention.[80] Moreover, Barry noted that the controlled-substance condition was eliminated from the Sentencing Guidelines by the Sentencing Commission "because [the Commission] concluded that the controlled-substance condition was 'encompassed by'" a condition forbidding the defendant from associating with criminals.[81]

The Third Circuit, recognizing the split of authority regarding the

73. United States v. Barry, 757 F. App'x 139, 140 (3d Cir. 2018).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Barry did not challenge the *association* or the *controlled-substance* conditions in the district court, but instead pled that the sentencing judge committed plain error. To prevail under the plain-error doctrine, the respondent must demonstrate "that (1) an error occurred; (2) the error is '*obvious*'; and (3) the error 'affected the outcome of the district court proceedings.'" *Id.* at 141 (emphasis added) (quoting U.S. v. Olano, 507 U.S. 725, 734 (1993)). *See also* United States v. Garrasteguy, 559 F.3d 34, 44 (1st Cir. 2009).

79. *Barry*, 757 F. App'x at 141.

80. *Id.*

81. *Id.*

controlled-substance condition, opined that "reasonable minds may differ as to [the] condition's meaning and application and that this condition may be unconstitutionally vague."[82] The court concluded that because of the circuit split, the district court's imposition of the condition upon the Defendant was not in plain error.[83] Instead of remanding the case back to the District Court, the Third Circuit affirmed the order, but emphasized the importance for the sentencing courts to impose updated conditions recommended by the Sentencing Guidelines in place of the removed ones.[84]

D. *Removal of the Frequenting Condition from the Sentencing Guidelines*

As previously noted in the discussion of Soulemane Barry's case, the condition analyzed was removed from the Sentencing Guidelines on April 28, 2016.[85] The reason behind this amendment is that the Federal Sentencing Commission "determined that [the condition is either] best dealt with as [a] special condition[] or [is] redundant with other conditions."[86] The Commission indicated that "the prohibition on frequenting places where controlled substances are illegally sold is encompassed by the 'standard' condition that defendants not associate with those they know to be criminals or who are engaged in criminal activity."[87]

Although this condition was removed, its removal is not retroactively applied. When the condition was removed in 2016, there were 192,170 people incarcerated in a federal prison.[88] Because there are defendants still subject to the stricken condition's ambiguous terms, the vagueness issue persists.

82. *Id.*

83. *Id. See supra* text accompanying note 78.

84. *Barry*, 757 F. App'x at 142.

85. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 44 (2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428_RF.pdf.

86. *Id.*

87. *Id.* at 45. The new condition, inserted instead of the one analyzed in this Note, prohibits defendants from "communicat[ing] or interact[ing] with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer." *Amendment 803*, U.S. SENTENCING COMM'N, https://www.ussc.gov/guidelines/amendment/803 (last visited Sept. 21, 2020).

88. *Statistics: Past Inmate Population Totals for FY 2016*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp.

II. UNCLEAR SUPERVISED RELEASE CONDITIONS CREATE UNDUE DIFFICULTIES FOR DEFENDANTS SUBJECT TO THEM

Appellate courts are split regarding the vagueness of the frequenting condition, where the Seventh Circuit was persuaded by the vagueness argument, while the Ninth and Tenth Circuits were not.[89] This Note will be primarily focused on the case of Soulemane Barry, who was subject to the condition's terms. Using the case for illustrative purposes, this Note will argue that vague conditions of supervised release are problematic. Specifically, vague conditions pose undue restraints on defendants' freedom and subject them to a life of uncertainty, where one wrong decision could result in incarceration. The frequenting condition violates defendants' due process rights, negatively impacts their reintegration into the community, and contradicts the rehabilitative and integrating purposes of the Sentencing Reform Act of 1984.[90] The courts' failure in providing the needed clarity impacts recidivism rates and shifts the judicial power, thereby allowing probation officers to determine whether a violation was committed. By vesting the probation officers with such power, Article III of the Constitution is violated, and judicial review is circumvented.

A. *Vague Supervised Release Conditions Violate Due Process of Law*

The vagueness doctrine is grounded in the concepts of "fairness, and thus requires that individuals are given 'fair warning' of their legal obligations."[91] In *United States v. Maloney*,[92] the Third Circuit held that "a condition of supervised release violates due process and is void for vagueness if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[93] The court further noted that supervised release conditions "must provide specific standards [to] avoid arbitrary and discriminatory enforcement."[94] Because the condition cast on Barry, Phillips, Llandata, and Thompson grants no specific and articulable standards and can be arbitrarily enforced, it violates due process.[95] Moreover, since reasonable sophisticated *legal* minds differ as to the condition's application, the imposition of this vague condition has

89. *See supra* Section I.A–C.

90. *See infra* Section III.A–C.

91. United States v. Maloney, 513 F.3d 350, 357 (3d Cir. 2008).

92. The condition at issue required the defendant "to notify his probation officer of questioning by law enforcement officers." *Id.* at 352.

93. *Id.* at 357 (quoting United States v. Lee, 315 F.3d 206, 214 (3d Cir. 2003)).

94. *Id.* (quoting Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099, 1115 (3d Cir. 1997)).

95. *See, e.g.*, Collins v. State 911 N.E.2d 700, 713 (2009) (holding that a defendant has a due process right to conditions of supervised release that are sufficiently clear in order to provide notice regarding what conduct will result in a return to prison).

the effect that the *Maloney* Court sought to prevent.[96] Because the frequenting condition is ambiguous, it requires judicial scrutiny.

The minority stance taken by the Seventh Circuit offers the proper ruling relative to the frequenting condition. The *Thompson* court emphasized the need for clarity and specificity regarding prohibitions of supervised release.[97] Furthermore, the court mentioned that the determination of what conduct is appropriate and what is prohibited should be left for the sentencing courts.[98] Instead of dedicating such delicate and crucial matters to the probation officers, the courts must be the ones to prescribe clear standards and avoid the confusion.[99] By imposing clear and unambiguous terms of supervised release, the courts avoid arbitrary enforcement and unnecessary litigation that would otherwise be needed to establish boundaries of permitted conduct.[100] The imposition of clear and unambiguous parameters would prevent recently-released criminal defendants from avoiding lawful conduct in fear of violating the conditions.[101]

Supervised release "was created 'to assist offenders in their integration back into society and to provide the court with the means to quickly intervene if an offender is a risk to [themselves], or to others.'"[102] Reintegration into society is not achieved by unduly restrictive and unclear conditions imposed upon defendants.[103] Because the unclear supervised release conditions force the defendant to err on the side of caution, the defendant's freedom is unreasonably restricted.[104] Although restrictions on defendant's liberties are inherently ingrained in the terms of supervised release, vague conditions go beyond acceptable restrictions

96. *Maloney*, 513 F.3d at 357 (stating that a condition is vague if it fails to "provide specific standards which avoid arbitrary and discriminatory enforcement.").

97. *See generally id.*

98. *Id.* at 380.

99. *Id.*

100 *See Maloney*, 513 F.3d at 359 (noting that "[i]t is important that conditions of supervision be drafted with sufficient specificity to ensure that they do not result in the arbitrary enforcement of supervised release.").

101. United States v. Thompson, 777 F.3d 368 (7th Cir. 2015).

102. Demleitner, *supra* note 23, at 232.

103. CHARLES DOYLE, CONG. RESEARCH SERV., RL21364, SUPERVISED RELEASE (PAROLE): AN ABBREVIATED OUTLINE OF FEDERAL LAW 4 (2015), https://fas.org/sgp/crs/misc/RS21364.pdf ("The courts' general discretionary authority to order conditions of supervised release is likewise bound by the requirement that it 'involve no greater deprivation of liberty than is reasonably necessary' for the reasonably related purposes. The assessment is one of balancing."). *See also* United States v. Garrasteguy, 559 F.3d 34, 44 (1st Cir. 2009) ("[I]t is axiomatic that the constitutional rights of supervised releasees and probationers are limited . . . such individuals, by virtue of their status, do not forfeit all of their constitutional rights.").

104. *See Thompson*, 777 F.3d at 380 (stating that if a defendant, out of fear of violating terms of supervised release, is precluded from acting lawfully, the condition's terms are overbroad and therefore impermissible).

on freedom.[105] Ambiguous supervised release conditions are inherently overbroad and, thus, deter legal conduct.[106] Ultimately, vague supervised release conditions deprive defendants of liberty without due process of law.[107]

If a defendant is unsure whether his conduct is prohibited or permitted, it comes as no surprise that the defendant subject to supervised release would avoid any potentially prohibited conduct. This contradicts the purpose of supervised release, which is meant to serve rehabilitative, rather than punitive goals.[108] The need for a causal nexus, deterrence, and rehabilitation must be honored when the conditions are imposed.[109] This is so, because the conditions–if imposed–"must involve no greater deprivation of liberty than is reasonably necessary to accomplish the purpose of federal sentencing."[110] As a result, one subject to vague parameters "may encounter difficulty obeying the condition, despite a good faith desire to do so."[111]

The fundamental rehabilitative purpose of supervised release must not be vague and must not pose an unreasonable restriction of liberty.[112] Therefore, when a supervised release condition is impermissibly vague, the condition goes beyond the limits envisioned by the United States Sentencing Commission and unreasonably restricts defendants' constitutional rights.[113] These unreasonable restrictions are a violation of due process and are, therefore, unconstitutional.[114] "It is important to ensure that if such a condition is imposed, the proscribed area must be set out in clear terms, because vagueness in the description of the proscribed area can result in such a condition being ineffective and even stricken on

105. SARAH N. WELLING, 3 FED. PRAC. & PROC. CRIM. § 548 (4th ed.) (database updated June 2020).

106. *See Thompson*, 777 F.3d at 380 (holding that if one is precluded from acting lawfully, out of fear of violating the terms, their freedom is restricted).

107. *See supra* note 95 and accompanying text; *see also* CHRISTINE M. G. DAVIS ET AL., 20 N.Y. JUR. 2D CONSTITUTIONAL LAW § 432 (database updated June 2020) ("[A] law lacks due process if it is so vague that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not.").

108. S. REP. NO. 98-225, at 124 (1983).

109. *Id.*

110. *Id.*

111. NEIL P. COHEN, LAW OF PROBATION & PAROLE § 7:19 (2d ed.) (database updated July 2019).

112. *See* United States v. Maloney, 513 F.3d 350, 357 (3rd Cir. 2008) (stating that the "vagueness doctrine is premised on fairness, and thus requires that individuals are given 'fair warning' of their legal obligations.").

113. *See* 28 U.S.C. § 991(b)(1)(B) (2018).

114. *Maloney*, 513 F.3d at 357 ("[A] condition of supervised release violates due process and is void for vagueness if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'").

appeal."[115] Because the condition imposed on the previously listed defendants does not proscribe specific prohibited areas and fails to specify how many trips constitute *frequenting* and what *places* are considered *off-limits*, the condition, ab initio,[116] is impermissible.[117] Defendants, subject to the condition's vague terms, must receive a reconsideration to cure deficiencies of the condition's unclear parameters.[118]

B. *Ambiguous Supervised Release Conditions Increase Recidivism Rates*

Sentencing courts very frequently impose terms of post-imprisonment supervision.[119] According to a report published by the United States Sentencing Commission, more than ninety-five percent of people sentenced to a term of imprisonment in the federal system "received terms of supervised release."[120] Since the establishment of the Sentencing Reform Act in 1984, "nearly one million [people sentenced to imprisonment] have been sentenced to terms of supervised release."[121] Although supervised release is an important factor in improving public safety and advancing the reintegration of defendants into society, "there is little empirical evidence that post-prison supervision" accomplishes those goals.[122]

It should also be noted that "[w]ith nearly 190,000 inmates, the federal prison system is the largest in the nation."[123] But prison walls do

115. NEIL P. COHEN, LAW OF PROBATION & PAROLE § 10:6 (2d ed.) (database updated July 2020). *See also* U.S. v. Kappes, 782 F.3d 828, 849 (7th Cir. 2015) (holding that a condition of supervised release prohibiting defendant from "frequent[ing] places where controlled substances are illegally sold, used, distributed, or administered" was impermissibly ambiguous; it contained no indication of how many trips constituted "frequent[ing]" such places, and, read literally, improperly imposed strict liability).

116. That is, from the very imposition of the condition.

117. DAVIS ET AL., *supra* note 107 ("[C]onstitutional requirement of definiteness is violated by a [condition] that fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden.").

118. *See* United States v. Murray, 692 F.3d 273, 283 (3d Cir. 2012) (requesting the sentencing court to "more clearly explain why [the]. . . release conditions are no greater than necessary to satisfy the § 3553(a) sentencing factors."). *Id.*

119. U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 3–4 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

120. *Id*.

121. *Id.* at 3.

122. Scott-Hayward, *supra* note 21, at 202.

123. *Number of Offenders on Federal Supervised Release Hits All-Time High*, PEW (Jan. 2017), https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf [hereinafter *Number of Offenders*]; *see also Judicial Business 2015*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/judicial-business-2015 (last visited Sept. 23, 2020) (stating that 114,961 persons were serving terms of supervised release).

not contain the reach of the federal correction system; supervised release was created as a form of *post*-imprisonment supervision where defendants' freedom is constrained.[124] In 2015, approximately 115,000 offenders were subject to supervised release.[125] "More than [eight] in [ten] offenders sentenced to federal prison also undergo court-ordered supervised release."[126] "Congress created supervised release in 1984 as a way to help former inmates [make the] transition back into the community and reduce rates of reoffending."[127] But there is minimal empirical evidence that supervised release supports the accomplishment of the goals set out by Congress.[128]

On the contrary, there is ample evidence demonstrating that supervised release not only fails to meet Congressional goals, but conversely has drastic implications.[129] "One common result [of post-imprisonment supervision] is that more offenders are sent to prison for violating the terms of their supervision . . . than for new crimes."[130] The negative consequences of supervised release do not end there. Evidence shows that "[m]ore than two-thirds of all federal offenders who are revoked from supervised release each year committed technical violations but were not convicted of new crimes."[131] If the conditions imposed on the defendants are not clear at the time of their imposition, the odds are not in the defendants' favor. This is especially frightening considering that the purpose of supervised release is to promote reintegration and aid the defendant in assimilating back into the community, not to place recently released offenders back behind bars. Without defining key terms such as *frequency* and *places*, defendants are not awarded fair warning due to failure in spelling out which areas are permitted, and which are prohibited.[132]

Although initially, supervised release was meant to minimize rates of recidivism, the intended effect is not achieved by post-prison supervision.[133] This notion is underlined by Nora Demleitner, who states that "[i]n making these proscriptions conditions of supervised release, Congress has not banned any additional activities; it has just made it significantly easier to send released 'criminals' to prison for any alleged

124. *Number of Offenders*, *supra* note 123.

125. *Id.*

126. *Id.*

127. *Id.*

128. Scott-Hayward, *supra* note 21, at 202.

129. *Number of Offenders*, *supra* note 123.

130. *Id.*

131. *Id.*

132. United States v. Maloney, 513 F.3d 350, 357 (3d Cir. 2008).

133. *See* United States v. Jeanes, 150 F.3d 483, 485 (5th Cir. 1998) (noting that "[t]he supervised release term serves a broader, societal purpose by reducing recidivism.").

violation of existing law."[134] The ease with which defendants can be resentenced to a prison term furthers the marginalization of "people who have been previously adjudicated as criminals."[135] By subjecting defendants to a "form of cheapened control with respect to substantial amounts of non-criminal" behavior,[136] the goal of reintegration and assimilation back into the community is undermined and those released on federal supervision are branded as "belonging to a criminal class."[137]

Accordingly, defendants subject to unclear and ambiguous conditions must decipher the condition's terms to determine whether their conduct falls within the permitted boundaries of the condition's terms. This action taken by the sentencing courts contradicts the purpose of the program that was envisioned by the Sentencing Reform Act.[138] This guessing game can have disastrous effects on defendants wishing to regain their freedom, especially because the stakes for a wrong conclusion are so high.[139] Violations of terms can have unfortunate consequences and place defendants back to square one, making a life free-of-crime and governmental supervision more unattainable.[140] "Violations of [supervised release] frequently cause a return to prison, often with new supervisory terms attached. This has created the 'threat of never-ending supervision' . . . ."[141] Thus, defendants subject to unclear terms of supervised release may be stuck in a never-ending cycle, going from imprisonment, to supervision, only to return to prison.

Sentencing judges have an adverse impact on the rates of recidivism.[142] Since judges are the gatekeepers—standing between the offender and their freedom—the imposition of ambiguous conditions starts and ends with them. The power vested with the sentencing judges can be used to decrease future violations, while allowing the court and the

134. Doherty, *supra* note 3, at 1019.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Anders Sleight, *Probation Officers' Authority to Determine Conditions of Supervised Release and Restitution Payment: Fair or Foul?*, 22 GEO. MASON U. C.R. L.J. 117, 124 (2011) ("[T]he district court must order a probation officer to furnish the defendant with a written statement that clearly and specifically describes the defendant's conditions of supervised release so that the defendant may have a guide to direct his conduct.").

139. If a defendant (unintentionally or unknowingly) violates the condition's terms, he could be found in violation of the condition and may face a period of incarceration. Doherty, *supra* note 3, at 1019.

140. *See* Demleitner, *supra* note 23, at 235 ("Sanctions imposed for probation violations, however, frequently lead to disproportionate sentences, with probation merely becoming 'a staging area for eventual imprisonment.'").

141. *Id.* at 232. *See also* Doherty, *supra* note 3, at 958.

142. *See, e.g.*, United States v. Kappes, 782 F.3d 828, 842 (7th Cir. 2015) ("The first general principle sentencing judges should consider when imposing conditions of supervised release is that it is important to give advance notice of the conditions being considered.").

probation team to focus on higher-risk individuals.[143] Their decisions often have long-lasting impacts on defendants and their likelihood of re-incarceration.[144] Thus, sentencing courts are integral in defendants' reintegration process, considering that judges have the discretion of imposing supervised release in warranted circumstances.[145] Additionally, sentencing judges could minimize the total amount of conditions imposed by prioritizing terms of supervised release that are specifically tailored to each individual offender.[146] Finally, judges have the power to prematurely terminate post-imprisonment supervision, if circumstances warrant such an action.[147] Those persons should have individualized requirements imposed and supervision provided to help prevent recidivism and assist rehabilitation."[148]

Consequently, because supervised release is so frequently imposed, it should come as no surprise that the high numbers of defendants subject to its terms may also be subject to conditions that are vague in form and application.[149] Therefore, when prohibited conduct is not explicitly enumerated in the conditions' language, a large number of defendants can unknowingly violate their conditions.[150] Yet when an unintentional violation occurs, the price to pay for it is drastic; the defendant found in violation may be subject to another prison sentence.

Inexplicit language is especially worrisome because "people on supervised release may be convicted of violating their [conditions] and sent back to prison, for conduct that may or may not be criminal, based simply on a finding of the preponderance of the evidence."[151] Considering that the burden of proof for finding that a violation of the condition has occurred is so low—just a little more than fifty percent—the defendants are at a risk of being found in violation of the conditions' terms, even when the violation was unintentional.[152]

143. Demleitner, *supra* note 23, at 233.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Number of Offenders*, *supra* note 123 ("The [Sentencing Commission's] rules required courts to impose supervised release terms in most felony cases.").

150. Scott-Hayward, *supra* note 21, at 182 (as previously pointed out, more than 95 percent of defendants sentenced to a prison term are also sentenced to a term of supervised release). *See also Number of Offenders*, *supra*, note 123.

151. Scott-Hayward, *supra* note 21, at 203. *See also* 18 U.S.C. § 3583(e)(3) (2018).

152. Hargrove *ex rel.* Wise v. Sec'y of Health and Human Services, No. 05-0694V, 2009 WL 1220986, at *1 (Fed. Cl. Apr. 14, 2009) ("It is axiomatic to say that the Petitioner bears the burden of proving, by a preponderance of the evidence—which this Court has likened to fifty percent and a feather—that a particular fact occurred . . . .") *See also* Wilson v. Florida, 857 So. 2d 223, 224 (Fla. Dist. Ct. App. 2003) (holding a probation condition prohibiting defendant from "associating with 'persons who use illegal drugs'" to be "too vague and capable of

Sentencing judges fail to consider the impact of vague supervised release conditions, which can be observed from the courts' continuous and automatic imposition of supervised release terms, absent a clear need to do so. This needless over-imposition of supervised release contradicts the federal supervisions rehabilitative and re-integrating purposes.[153] Instead of aiding the recently released defendants in entering back into society, sentencing courts subject defendants to conditions that increase the likelihood of re-incarceration.[154] When sentencing courts needlessly and inattentively impose vague terms of supervised release, they erect barriers standing between the defendants and their freedom.[155] Large-scale imposition of supervised release terms proved to be not only unnecessary, but also pernicious for defendants seeking to enter back into society.[156] Without clear prohibitions, defendants may unknowingly violate their terms and face another period of incarceration.[157] This fact should serve as yet another reason for the sentencing courts to exercise greater caution when broadly imposing terms of supervised release, especially when the terms may be unclear or ambiguous.

C. *Leaving the Determination of Whether the Defendant Violated the Terms of Supervised Release in the Hands of Probation Officers Is Impermissible per Article III*

Probation officers have slowly permeated the judicial system, often taking the enforcing role in post-imprisonment supervision.[158] Probation

unintentional violation").

153. *See* Scott-Hayward, *supra* note 21 ("In most cases, supervised release is not mandatory and yet judges consistently fail to exercise their discretion in this area and impose supervised release in virtually all cases."); *see also* Demleitner, *supra* note 23, at 232 (stating that judges' imposition of supervised release is done "almost reflexively").

154. *See Number of Offenders*, *supra* note 123; *see also supra* notes 124–27 and accompanying text.

155. *See* Demleitner, *supra* note 23, at 232 (explaining that because supervised release is so widely imposed, vague conditions are bound to affect defendants. Therefore, sentencing judges—by continuing to heavy-handedly impose terms of supervised release—hinder defendants from regaining their freedom after serving their sentences in federal prisons.).

156. *See* Scott-Hayward, *supra* note 21, at 202 ("Although limited, national data on recidivism that consider supervision status indicate that people released from prison without any supervision are no more likely to commit new crimes than people released to parole or post-prison supervision.").

157. U.S. SENTENCING COMM'N, PRIMER ON SUPERVISED RELEASE 1 (2019), *https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Supervised_Release.pdf* ("Once a defendant is serving a term of supervised release and violates one or more of the conditions, the court may decide whether to continue, revoke, or terminate the term of supervised release and whether to modify the conditions of supervision or impose a term of incarceration for the violation.").

158. *See* Amanda Rios, *Arms of the Court: Authorizing the Delegation of Sentencing Discretion to Probation Officers*, 21 CORNELL J.L. & PUB. POL'Y 431, 436 (2011) ("[A]s the 'eyes and ears' of the court, probation officers act[] as indispensable entities in the rehabilitation

officers are prison systems' social workers because of their "dual role both to prohibit 'behavior that is deemed dangerous to the restoration of the individual into normal society' and to give probationers guidance."[159] As noted by Anders Sleight, "[i]f a defendant's sentence . . . includes a term of supervised release, then a probation officer supervises the defendant once he completes his term of imprisonment."[160] The duties of probation officers are substantial; probation officers have extensive supervisory and administrative duties to the defendants under their supervision.[161] Their duties include: informing those on supervision regarding their terms of supervised release; watching over them to ensure adherence to the terms; and reporting any violation thereof.[162] "Probation officers, therefore, may serve many roles at the court's option and can significantly impact the determination of a defendant's conditions of supervised release . . . ."[163] Because of their extensive roles, probation officers serve as the overseers for the offenders, aimed to shepherd them to a life free of crime. Courts, however, impermissibly delegated tasks to probation officers that adversely impact defendants; such an action is impermissible.[164] Furthermore, punitive decision-making authority coupled with unclear terms of supervised release greatly heightens concerns for just treatment of defendants.

One of the challenges presented by the condition at the heart of this discussion is that probation officers, like the defendants they supervise, can have uncertainty regarding the exact prohibited conduct. Due to the lack of explicit parameters of the condition, probation officers can fail at clearly describing prescribed boundaries as required by the statute.[165] This notice requirement is vital in ensuring that the supervisee obeys the conditions set forth by the sentencing judge.[166] Therefore, if the probation

model of punishment because they provide[] the crucial information needed to individualize sentences.").

159. Taylor S. Rothman, *Fourth Amendment Rights of Probationers: The Lack of Explicit Probation Conditions and Warrantless Searches*, 2016 U. CHI. LEGAL F. 839, 852 (2016) (arguing that because it is the probation officers' responsibility to not only provide guidance, but also to enforce the law, their duties "create[] a conflict in the relationship between [the defendant] and [the] officer.").

160. Sleight, *supra* note 138, at 125.

161. *See* 18 U.S.C. § 3603 (2018); *see also* Sleight, *supra* note 138, at 125–26.

162. Sleight, *supra* note 138, at 125–26.

163. *Id.* at 126.

164. *See* United States v. Heath, 419 F.3d 1312, 1316 (11th Cir. 2005) ("The fate of [a] defendant must rest with the district court, not the probation office."); *see also* United States v. Browder, 866 F.3d 504, 510 (2d Cir. 2017) (holding that although sentencing courts can delegate minor details to probation office, decision-making authority may not be delegated, for it would make defendant's liberty contingent on officer's exercise of discretion).

165. § 3603.

166. DAVIS, *supra* note 107 ("Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary

officer is uncertain regarding the prohibited conduct—as one may be given the vagueness of the condition imposed—the supervisee is bound to be at least as uncertain as to what conduct is permitted. "Courts have warned against according undue deference to a probation officer's interpretation of a condition of supervision, as 'a probation officer could well interpret the term more strictly than intended by the court or understood by' the individual being supervised."[167] The condition's terms, accordingly, must be explicit at the time of imposition—rather than being supplemented by the probation officers charged with policing supervisees' conduct—in order to foster greater compliance.

"Probation officers' response[s] to noncompliance, new crime, and technical [violations are] all guided by [either] the policies of the Judicial Conference of the United States, the U.S. Sentencing Commission, and the judge [presiding over the case]."[168] Federal policy gives little discretion pertaining to new felony-level crime violations and requires probation officers to *promptly* report any violations to the court.[169] If the supervisee violates a condition, post-imprisonment supervision will be revoked. Additionally, a new term of incarceration, ranging between four and sixty-three months—"depending on the nature of the violation and the supervisee's original offense and criminal history"—will be imposed.[170]

The response is different when it comes to minor violations, such as misdemeanors, new crimes, and technical violations.

> The violations do not have to be reported to the court if the "[probation] officer determines (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to reporting violations." However, even if such violations are not reported to the court, probation officers are still required to take timely and proportional action in response to the violations. Officers can act within existing conditions of supervision conditions or seek to have the conditions modified by the court with the consent of the

people to understand what conduct it prohibits. Second, it may authorize and even encourage arbitrary and discriminatory enforcement.").

167. United States v. Maloney, 513 F.3d 350, 358 (3rd Cir. 2008) (*quoting* United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002)).

168. Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out?: Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, 77 FED. PROB., Sept. 2013, at 3, 7.

169. *Id. See also* U.S. SENTENCING GUIDELINES MANUAL § 7B1.1 (U.S. SENTENCING COMM'N 2018); U.S. SENTENCING GUIDELINES MANUAL § 7B1.2 (U.S. SENTENCING COMM'N 2018).

170. Rowland, *supra* note 168, at 8.

supervisee.[171]

Because a violation of the frequenting condition is likely to be a technical violation—for its unclear prohibitions, rather than felony-level or a new violation that mandates judicial review—probation officers are permitted to take decisive actions, and subsequently, circumvent judicial scrutiny.[172]

This authority provided to the probation officers is in violation of Article III of the Constitution.[173] The power to impose the punishment for federal crimes provided for by law is a judicial task, reserved exclusively for the Article III courts.[174] Although limited delegation of such is constitutionally permissible, the delegation of this power surpasses realms of administrative, scheduling, and managerial duties, and therefore violates the Constitution.[175] Of course "delegation of [judicial] authority to probation officers . . . provides courts with necessary flexibility,"[176] but the line between constitutional and unconstitutional delegation is very fine.

Once a probation officer is given punitive decision-making authority, the limitations devised by the Framers during the drafting process of Article III[177] Although it comes as no surprise that the courts are ill-suited in the micro-managerial aspects of post-imprisonment supervision, the balance of power between the courts and probation officers must not exceed Constitutionally-provided boundaries.[178] Furthermore, probation officers are not equipped with the capacity to remedy a problematic condition.[179] Put differently, "'[a] vague supervised release condition cannot be cured by allowing the probation officer an unfettered power of interpretation.'"[180] Vesting probation officers with power to interpret

171. *Id.* (first alteration in original).

172. Rothman, *supra* note 159, at 852 (stating that "[t]he broad authority bestowed upon a correctional officer can also become 'simply a means of circumventing normal constitutional procedures in a criminal investigation.'").

173. *See* U.S. CONST. art. III; *see also* United States v. Heath, 419 F.3d 1312, 1316 (11th Cir. 2005).

174. *Ex parte* United States, 242 U.S. 27, 40–41 (1916).

175. Sleight, *supra* note 138, at 141–42.

176. *Id.* at 142–43.

177. *Id.* at 141–42.

> A court may delegate administrative, scheduling, or managerial authority over sentencing conditions without running afoul of its Article III power, however, because the court still determines a defendant's punishment under such a delegation. If a court delegates punitive decision-making authority, however, it has violated the Constitution because only courts can exert "[t]he judicial [p]ower."

Id.

178. *Id.* at 142.

179. United States v. Maloney, 513 F.3d 359, 359 (3rd Cir. 2008).

180. United States v. Evans, 883 F.3d 1154, 1164 (9th Cir. 2018).

conditions "on an *ad hoc* and subjective basis create[s] one of the very problems against which the vagueness doctrine is meant to protect."[181]

In the case of Soulemane Barry,[182] his probation officer's duties were, *inter alia*, to ensure that the conditions imposed upon him were obeyed and to provide guidance regarding the conditions and their terms.[183] Barry's probation officer had the discretion to determine whether Barry had visited (or, more specifically, frequented) forbidden places. Because uncertainty is inherent in the condition's terms, the probation officer charged with overseeing the defendant attains a more punitive role, as opposed to his intended supervisory position. This is because the probation officer, who is in closer contact with the offender than the sentencing court, determines whether the condition has been violated.[184] The officer ultimately makes the judgment of whether the defendant can continue to enjoy their (albeit restricted) freedom, or if the terms of post-imprisonment supervision were violated.[185] As a result, the probation officer transcends the limits of the power initially delegated to him.

This transcendence is critical. If the probation officer deems a specific location as one that the supervisee is forbidden from visiting, the probation officer assumes the role of the judge, the jury, and ultimately the executioner when making his determinations. By doing so, the probation officer goes against the prohibitions pronounced by the *Evans* court and, in fact, remedies the condition's vagueness.[186] If the sentencing courts delegate the power to monitor a defendant subject to supervised release to probation officers, it is imperative that judges explicitly provide what areas are forbidden. By clarifying the terms of supervised release, the sentencing courts are remedying the deficiencies of the conditions' terms, rather than leaving such determinations to the officers. If probation officers are charged with explicating the vague conditions' terms and enforcing them against the defendant, they assume the punitive role reserved specifically for the judiciary. Accordingly, if the officers are charged with decision-making powers, probation officers violate Article III of the Constitution.[187] To rectify the situation, sentencing courts should limit probation officers' duties to avoid discretionary and arbitrary

181. *Id.*

182. *See infra* Section I.C.

183. *See* 18 U.S.C. § 3603 (1984) (describing duties of probation officers).

184. *See* Sleight, *supra* note 138, at 142–143.

185. *Id.* at 125–26 ("Should a defendant violate any condition of supervised release, the supervising probation officer must report the violation to the court and the U.S. Department of Justice.").

186. *See supra* note 161 and accompanying text.

187. Sleight, *supra* note 138, at 142. "Limited delegation is practical because courts are ill-positioned to micromanage defendants after sentencing." *Id.* Such delegation, so long as it is controlled and minimal, "complies with the Constitution because it requires judges to set defendants' sentencing conditions, not probation officers." *Id.*

enforcement of vague supervised release conditions. The determination of whether a condition was violated is a decision reserved strictly for the court, not for the probation officer.

III. REMEDYING THE ISSUES CREATED BY VAGUE SUPERVISED RELEASE CONDITIONS

Supervised release is permeated with vagueness issues that contradict and undermine the program's very essence. Accordingly, a remedy for the class of people subject to the "frequenting" condition who are still serving their prison sentences must be crafted.[188] The appropriate remedy comes in three parts. First, vague or problematic terms of supervised release must be removed to avoid further complications. Second, defendants should urge the reviewing court to utilize the sentencing package doctrine in striking conditions that no longer serve the overall purpose of the entire sentence.[189] Finally, public policy considerations demonstrate why the imposition of vague supervised release conditions is detrimental to defendants. The over-inclusive imposition of supervised release is contrary to the purposes of the supervision program. Therefore, the courts must exercise greater caution when imposing conditions that make reasonable minds "guess at [the condition's] meaning and differ as to its application."[190] By reducing the uncertainty in conditions' terms, supervised release will serve its intended rehabilitative, preventative, and assimilative purposes.

A. *Applying the Statutory Remedy*

Section 3583(e) of Title 18 of the United States Code provides a framework for defendants seeking to revoke or modify the conditions imposed upon them.[191] The court may "modify . . . the conditions of supervised release, at any time prior to the expiration or termination of the term."[192] The sentencing court's determination of whether to modify or revoke a supervised release term is aided by subsections 3553(a)(1)–(7), which, among other things, focuses on the nature of the sentence imposed

188. Even though the condition analyzed was removed from the Federal Sentencing Guidelines at the end of the 2016 year, defendants who received their sentences prior to the condition's excision are nonetheless subject to its terms. *See* U.S. SENTENCING COMM'N, *supra* note 33 and accompanying text. Although there is no readily-available data on how many defendants are serving a term of supervised release after the revocation of the condition, "[t]he most recent figures show that by the end of 2010, there were 103,423 people on supervised release and 206,968 people in the federal prisons." Doherty, *supra* note 3, at 1014.

189. *See* United States v. Thompson, 777 F.3d 368, 380–82 (7th Cir. 2015) (applying the sentencing package doctrine).

190. United States v. Maloney, 513 F.3d 350, 357 (3d Cir. 2008).

191. 18 U.S.C. § 3583(e)(1)–(4) (1984).

192. § 3583(e)(2).

and its necessity.[193]

As established above, sentencing judges overuse supervised release and subject nearly every defendant put through the court system to some period of post-imprisonment supervision.[194] By consistently applying the same set of standard supervised release conditions, the sentencing courts fail to utilize this form of post-imprisonment for its full and intended purpose.[195] Because the main focus of the inquiry is whether supervised release is necessary, the courts—by universally applying a set of conditions—disregard the *necessary* element that is central to federal supervision. Ergo, because some supervised release conditions are discretionary, the determination of whether supervision is merited should be subject to scrupulous (or, at least adequate) analysis. As provided by Nora Demleitner, "[f]ederal judges may need to begin to focus on questions of whether to impose [supervised release], for how long, and what discretionary conditions to attach,"[196] rather than heavy-handedly imposing conditions. If this change comes to fruition, "[d]ecreases in length and conditions would likely result in a substantial decline in the number of revocations."[197]

Accordingly, because the necessary prong is crucial in the determination of whether supervised release should be imposed, Soulemane Barry's sentence (and the sentences of defendants in similar predicaments, subject to similar conditions as him) deserves a modification.[198] Judicial review of the conditions, whether occurring prior to the sentencing or thereafter, would eliminate the over-imposition of supervised release and break the cyclical nature of federal post-imprisonment supervision.[199] With heightened judicial scrutiny, issues presented by ambiguous conditions would be of less concern. By avoiding the imposition of problematic conditions, sentencing courts respect the purpose of the Sentencing Reform Act by increasing consistency and avoiding disparity in federal sentencing.[200] Therefore, the courts must painstakingly scrutinize the conditions before imposing them upon the defendants. Because Section 3583(e) allows for reconsideration of sentences, defendants are able to utilize the statutory scheme to challenge vague conditions and urge for their cure.

193. 18 U.S.C. § 3553(a)(1)–(7) (1984).

194. Demleitner, *supra* note 23, at 232 ("Without regard to individual risk or needs, courts seem to impose at least all the standard discretionary conditions.").

195. *Id.* (outlining the intended purposes of supervised release).

196. *Id.*

197. *Id.*

198. The modification would be pursuant to 18 U.S.C. § 3583(e)(2) (1984).

199. *See supra* Part II.B.

200. Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1297 (1986).

B. *Applying the Sentencing Package Doctrine*

The next available remedy is judicial review. The sentencing-package doctrine is a mechanism used by the courts to reconsider the full sentence, when one part of the whole is vacated or overturned.[201] The court in *United States v. Pimienta-Redondo* stated that when the sentencing court finds a defendant guilty on a multicount indictment, "there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan."[202] And when a component of the total sentence package is stricken from the defendant's record,

> common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary in order to ensure that the punishment still fits both [the] crime and [the] criminal.[203]

The application of this doctrine to vague supervised release conditions can remedy this dilemma. Once a reviewing court determines that the condition imposed is ambiguous in its terms and application, the court must choose to remand the case to have the condition be stricken from the package and to holistically reconsider the entire sentence.[204]

The application of the doctrine is in tune with the previously mentioned notions of fairness, consistency, and need to avoid disparity in sentencing.[205] The doctrine's purpose is to establish fairness in sentencing multicount offenders. If one of the counts is dismissed, the purpose of the sentencing package may be undermined. Accordingly, it is essential to ensure that each of the counts reflects a sentence necessary and proportional to the crime committed.[206] By vacating conditions that do not serve the Sentencing Reform Act's greater rehabilitative purposes,[207] sentencing courts have the potential of breaking the self-fulfilling prophesies inherent in the blanket imposition of post-incarceration supervision.[208] Furthermore, when supervised release conditions are

201. *See* United States v. Pimienta-Redondo, 874 F.2d 9, 14 (1st Cir. 1989).

202. *Id.*

203. *Id.*

204. *Id.*

205. Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1070 (2004) ("The goal and structure of the [Sentencing Reform Act] was to achieve uniformity in federal sentencing.").

206. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 14, at (b)(1) (courts may impose SR conditions "to the extent that such conditions . . . are reasonably related to. . . nature and circumstances of the offense. . . .").

207. *See* Demleitner, *supra* note 23, at 232.

208. *See* Doherty, *supra* note 3, at 1018 ("Supervised release, enforced by revocation and

imposed without a clear need to do so, the purpose of federal supervision undermines rehabilitative notions and instead sanctions defendants for alleged violations of their terms.[209] This, in and of itself, is problematic. But when coupled with conditions that are impermissibly vague, defendants are at the mercy of the system rather than in control of their own freedom.[210]

Accordingly, if a defendant is subject to a vague condition failing to address prohibited conduct, he can take the matters into his own hands. By petitioning the court to review the condition at the end of the prison term, supervised release conditions imposed will then be reviewed. Doing so would shift the judicial focus away from the prison term and onto the condition of supervised release, thereby avoiding arbitrary enforcement and unclear parameters.

C. *Policy Considerations*

By subjecting defendants guilty of crimes that do not merit the imposition of supervised release, the courts are disregarding the *necessary* component of the inquiry.[211] Failing to determine whether the conditions are actually necessary to the defendant's circumstances undermines the purposes of the Sentencing Reform Act.[212] A heavy hand must not apply to supervised release, or else the system, and the defendants going through it, suffer.[213] Therefore, if greater judicial scrutiny is employed and unclear conditions are not imposed, the cycle—where the defendant unknowingly violates his terms of supervised release and may be subject to incarceration—can be put to rest.

Another possible way to combat this dilemma is to ensure that judges, at the time of sentencing, not only discuss the conditions of supervised release imposed, but also establish what violations would result in reimprisonment. By shedding light on impermissible conduct, sentencing judges tackle any future confusion early on. Because supervised release

re[-]incarceration, is premised on the notion that rehabilitation (in addition to deterrence) can be effectively generated by the threat of more punishment.").

209. *See supra* notes 22–23 and accompanying text.

210. 18 U.S.C. § 3583(e)(3) (2018). A violation of a condition of supervised release may result in revocation of the release and a sentence of imprisonment. *Id.* The underlying violation must be proven by a preponderance of the evidence. *Id.* But when violations are due to unclear parameters, defendants may be unknowingly engaged in violating conduct, and thus risk being resentenced to a prison term. *Id.*

211. Johnson v. United States, 529 U.S. 694, 709 (2000) (holding supervised release is different from its parole counterpart; it grants the sentencing courts with "the freedom to provide post[-]release supervision for those, and only those, who needed it.").

212. *See infra* Section III A–C.

213. Doherty, *supra* note 3, at 1025 ("Despite the mounting body of conditions, there has been little analysis of the purpose underlying these conditions or the justification for applying them so broadly.").

acts as an asterisk at the end of one's prison sentence,[214] it is imperative to spell out prohibited and permitted conduct at the inception of the judicial proceedings, rather than review them on appeal.[215] If the defendants are not put on notice as to what conduct will subject them to re-incarceration, the courts undermine and weaken the purposes of the Sentencing Reform Act of 1984.[216] Defendants must know what is impermissible from the very start of their sentence, and must be reminded of the conditions' terms at the time of their release. Otherwise, the punitive consequences for violations masquerade under the rehabilitative purpose of supervised release. [217]

As expected, appellate courts will continue to afford "substantial deference to the decisions of the sentencing judge[s]."[218] Therefore, if sentencing judges are not careful in determining whether supervised release is merited (or *necessary*), the reviewing courts are less likely to confront vagueness issues inherent in ambiguous supervised release conditions.[219]

Furthermore, the over-imposition of supervised release can have financially damaging effects on the courts and the defendants stuck in this cyclical process. Since reintegration is at the heart of post-imprisonment supervision,[220] resources should be allocated to accomplish such a goal. Instead, this goal is yet to be achieved and is yet to receive adequate resources to aid its fruition.[221] As provided by Fiona Doherty, "the sizable resources that we now spend on supervised release might be productively transferred to job programs inside and outside prison."[222] Such a reallocation of funds would reinforce the purposes of the Act by aiding

214. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, cmt. background (U.S. SENTENCING COMM'N 2018) (noting that supervised release "is an order of supervision *in addition* to any term of imprisonment imposed by the court.") (emphasis added).

215. *See* United States v. Kappes, 782 F.3d 828, 838–39 (7th Cir. 2015) (holding that supervised release conditions must be appropriately. tailored, adequately justified, and orally pronounced after proper notice).

216. *See* Demleitner, *supra* note 23, at 232 (providing that the purposes of Sentencing Reform Act are rehabilitative, not punitive, and by failing to provide clear parameters of the conditions' terms, the sentencing courts undermine the Act's intentions).

217. *See* Doherty, *supra* note 3, at 961 ("Supervised release [does not] serve the goals of certainty and transparency advanced by the twentieth century proponents of the determinate sentence. In fact, no clear penological or adjudicative principles validate supervised release in its current form.").

218. *See* Van Graafeiland, *supra* note 200, at 1297.

219. As can be observed from the principal case, the appellate review in Defendant Barry's circumstances did not reach its full fruition because, as noted by Judge Smith's opinion, the District Court did not commit plain error.

220. *See* Demleitner, *supra* note 23, at 232.

221. *See Number of Offenders*, *supra* note 123 and accompanying text (stating that there is little evidence that supervised release accomplishes its intended goals).

222. Doherty, *supra* note 3, at 1030.

former prisoners reintegrate into society. Considering the central purposes of supervised release are rehabilitation and reintegration,[223] maximum efforts must be put into the accomplishment of these purposes.

Perhaps the solution to the problem identified in this Note may best be left for Congress to address. Since the legislative branch has already caused a ripple effect with its eradication of federal parole and the imposition of the Sentencing Reform Act in its stead,[224] this is an issue that can be remedied by congressional efforts. As noted by Robert Howell, "[t]he recent enactment of the sentencing reforms contained in the PROTECT Act are proof that Congress believes the Sentencing Reform Act of 1984 was unsuccessful."[225] The fact that Congress passed a separate, yet closely related Act, demonstrates that the lawmakers are capable, and clearly ready, to intervene.

Their intervention can be aimed at limiting the imposition of supervised release by imposing this form of post-imprisonment supervision on a narrow set of cases showing extraordinary need for federal monitoring. Congress could also impose durational limits on supervised release, therefore taking away the courts' heavy-handed imposition of federal supervision on any of the federal offenders. But the most impactful method of legislative intervention would come from clarifying the Sentencing Reform Act by, addressing its deficiencies and reinforcing the foundation upon which it was enacted: to establish fairness and avoid disparity.

Due to the lack of judicial uniformity regarding this issue, it is imperative to ensure that the broad and unnecessary imposition of conditions, coupled with the inadvertent imposition of ambiguous terms, is remedied. The remedy can be administered in a few ways, three of which are presented here.[226] Legislative intervention is most preferred, because an intervention by the lawmakers would be concrete, particularized to the issue, and most importantly, codified in a statute.

On the other side, the judicial branch is equally capable of remedying the issues presented in this Note. In fact, there is an argument to be made that judicial intervention is preferable. Because the courts are intertwined in the criminal system and have personal first-hand experience with what approach provides most promising—and longest-lasting—results, sentencing judges must construct clear conditions that do not run afoul of the Sentencing Reform Act's purposes. However, if the remedy is

223. *See supra* note 80.

224. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976; Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

225. Howell, *supra* note 205 at 1076.

226. Although there is more room for discussion regarding potential avenues at solving the issue presented (and confronted in discussed case-law), the panacea discussion is limited to only those judicial and legislative treatments mentioned throughout this Note.

provided by a combination of the two branches, the results may yield the greatest benefit.

CONCLUSION

There is no place for vagueness in supervised release conditions. The Sentencing Reform Act's purpose was to eliminate disparity and to promote fairness in sentencing.[227] Vagueness and uncertainty undermine the Act's purpose, and instead, terms of supervised release become more detrimental than beneficial.[228] Because the imposition of federal supervised release is so widespread, sentencing judges must exercise heightened caution, as well as be forward-thinking. These precautions, and focus on practicality, can prevent defendants from being subjected to a life of uncertainty, thereby preventing a plethora of future problems.

227. *See* 28 U.S.C. § 991(b)(1) (2018).

228. *See Number of Offenders*, *supra* note 123 (noting that "extended periods of community supervision can have negative consequences for offenders and the public.").