16-2918

To Be Argued By:
ELIOT LAUER

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JONATHAN J. POLLARD,

Petitioner-Appellant,

—against—

UNITED STATES PAROLE COMMISSION, J. PATRICIA WILSON SMOOT, solely in her capacity as Chair of the United States Parole Commission, UNITED STATES PROBATION OFFICE, FOR THE SOUTHERN DISTRICT OF NEW YORK, MICHAEL J. FITZPATRICK, solely in his capacity as Chief United States Probation Officer,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PETITIONER-APPELLANT

ELIOT LAUER
JACQUES SEMMELMAN
GABRIEL HERTZBERG
SYLVI SAREVA
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue, 35th Floor
New York, New York 10178
(212) 696-6000

Attorneys for Petitioner-Appellant

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Jonathan J. Pollard appeals from the final order ("Order") of the United States District Court for the Southern District of New York (Forrest, J.), denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (the "Petition"). Pollard filed the Petition to challenge special conditions of parole (as defined below, the "Special Conditions") imposed upon him by the United States Parole Commission (the "Commission") without rational basis and in derogation of the parole statute and regulations.

PRELIMINARY STATEMENT

Pollard served exactly 30 years in federal custody after pleading guilty to one count of conspiracy to commit espionage without intent to harm the United States. In 2015, he was released on statutorily-prescribed "mandatory" parole. Under the governing statute, that release was necessarily predicated on a determination by the Commission that he was not likely to commit a new crime. The Commission made that determination upon recommendation from the Department of Justice.

The Commission also ruled, however, that Pollard would be subject to several Special Conditions of parole supervision. Those Special Conditions are extremely onerous and are neither necessary nor relevant to any legitimate goal of parole. First, Pollard is required to wear a GPS monitor on his wrist 24 hours a day. Second, should Pollard commence employment at the firm that has made him

a written offer of employment, his employer would be required to permit the government to install monitoring software on its computers. Third, Pollard is confined to his apartment from 7 p.m. to 7 a.m. every day, with limited exception.

The Special Conditions are purportedly premised on the notion that Pollard, who has had no access to intelligence data for 31 years, might possibly remember something of current value that he would criminally disclose. Yet the government can identify no such information. It litigated for and was granted the opportunity to submit such information to the district court *in camera* and *ex parte* — over the objections of Pollard's security-cleared counsel. When the court required a generalized description to Pollard's counsel of any such information, the government reversed itself to avoid subjecting its purported evidence to scrutiny, and opted to rely instead on broad characterizations of the types of information it "believes" Pollard may have accessed in 1984-1985. (A. 371).

If Pollard were truly a disclosure risk, the government never would have permitted him (as it did) to communicate freely with federal prisoners in general population for 20 years. Nor would it now permit him (as it has) to meet with and talk with anyone, anywhere in the Southern District, or to correspond by mail with anyone, anywhere in the world. In light of what the government *permits* Pollard to do, a requirement that he submit to a monitor on his physical location and on his employer's computers — and a nighttime curfew — is not rational.

Pollard is not a dangerous criminal, like a stalker, pedophile or someone who sold drugs in schools, where watching his every movement could plausibly prevent or deter a crime. He has never used the internet to commit a crime. He was never a nocturnal criminal. There is no rational relationship between the Special Conditions and what the Commission says it seeks to achieve with them.

The district court should have remanded to the Commission with a direction to vacate the Special Conditions. The Order should be reversed.

JURISDICTIONAL STATEMENT

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. § 2241. It entered a Final Order denying the Petition on August 12, 2016. Pollard timely filed and served a Notice of Appeal on August 19, 2016. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. The Commission asserted that the Special Conditions were justified to prevent Pollard from disclosing classified information, but Pollard has had no access to any such information for 31 years. The government failed to identify any document accessed by Pollard 31 years ago that he could possibly remember. Did the district court err in accepting as rational the Commission's determination that Pollard presents a disclosure risk?

2. The Commission claimed that the Special Conditions are justified on

the basis of (a) a single disputed claim that Pollard violated his plea agreement in 1987; (b) a twenty-year old allegation that Pollard included confidential information in the letters he submitted to government reviewers while in prison; and (c) the Commission's assertion that Pollard has a "propensity to dissemble" because at his parole hearing, Pollard accurately told the Commission that he had a written offer of employment, which he later deferred on the advice of counsel when the Computer Monitoring Condition was imposed. Did the district court err in concluding that the Commission had a rational basis to believe Pollard would choose to now engage in criminal dissemination of classified information?

3. At his mandatory parole hearing, Pollard explained that he wished one day to live lawfully in Israel. Two members of Congress lawfully petitioned the Attorney General to permit Pollard to leave the United States for Israel. Primarily on this basis, the Commission ruled that Pollard was a "flight risk," and imposed GPS monitoring and a curfew. Did the district court err in accepting that the Commission had a rational, non-arbitrary basis to assess Pollard as a flight risk?

4. The Commission has required that any employer that chooses to hire Pollard submit its computer system to government monitoring, even though Pollard is free to meet with, talk with or correspond with anyone by non-internet means. This effectively prevents Pollard from obtaining meaningful employment. Did the district court err in accepting that the Commission had a rational, non-arbitrary

basis to require computer monitoring?

5. Pollard never committed a nocturnal or violent crime. He passed classified information, to which he has had no access for 31 years. Did the district court err in holding that the Commission had a rational, non-arbitrary basis to confine him to his apartment for 12 hours a day?

STATEMENT OF THE CASE

A. Nature of the Case

On November 20, 2015, Pollard was released on "mandatory" parole to the custody of the Commission and the U.S. Probation Department for the Southern District of New York (the "Probation Office"). As conditions of his release, the Commission required that Pollard submit to: (i) 24-hour GPS monitoring of his person (the "GPS Monitoring Condition"); (ii) monitoring of his computer use both at home and at his place of employment (the "Computer Monitoring Condition"); and (iii) a curfew that, as implemented by the Probation Office, required him to be at home from 7 p.m. to 7 a.m with limited exceptions (collectively, the "Special Conditions").

Pollard filed the Petition upon his release, on the grounds that the Special Conditions violate the federal parole statute and regulations, as well as the Constitution, because they bear no reasonable relationship to the nature and circumstances of Pollard's underlying espionage offense, his history or

characteristics, or any goals of criminal sentencing. *See* 18 U.S.C. § 4209(a); 28 C.F.R. § 2.40(b). The district court denied the Petition. This appeal followed.

B. Statement of Facts

1. Pollard's Conviction

Pollard was arrested on November 21, 1985. The indictment alleged that while employed as a civilian intelligence analyst for the U.S. Navy, Pollard delivered classified documents to the State of Israel. (A. 79).

On June 4, 1986, pursuant to a written plea agreement, Pollard pleaded guilty to one count of conspiracy to commit espionage without intent to harm the United States, in violation of 18 U.S.C. § 794(c). (*Id.*). On March 4, 1987, Pollard was sentenced to life in prison. (*Id.*).

2. The Parole Proceedings

Pursuant to 18 U.S.C. § 4206, a prisoner sentenced to life in prison before 1987 is deemed to be serving a 45-year term. At the two-thirds mark, i.e., after 30 years, the prisoner is entitled under the statute to a mandatory parole hearing. Pollard became eligible for "mandatory" parole on November 20, 2015. A federal prisoner who has served 30 years of a life sentence "shall be released on parole" unless the Commission determines that (i) the prisoner has "seriously or frequently violated institution rules and regulations," or (ii) "there is a reasonable probability that he will commit any Federal, State, or local crime." 18 U.S.C. § 4206(d) (1985). The statutory language is echoed in a regulation, 28 C.F.R. § 2.53(a).

Pollard was a model prisoner throughout his 30-year term of incarceration. The Department of Justice has never suggested that Pollard's conduct in prison should be a basis for refusing mandatory parole. (A. 224).

The other statutory ground for denying release would be "a reasonable probability that [Pollard] will commit any Federal, State, or local crime." 18 U.S.C. § 4206(d). Pollard is a one-time white collar offender. The only conceivable argument in opposition to parole would have been that even though Pollard has no classified *documents* in his possession, if he still retains 31-year old classified information *in his head*, he might disclose it.

Although such an argument would have required a series of unrealistically aggressive assumptions, Pollard submitted declarations by (a) Robert C. McFarlane, who served as U.S. National Security Advisor at the time of Pollard's arrest and was familiar with the classified information delivered by Pollard, and (b) former Senator Dennis DeConcini, who served on the Senate Intelligence Committee at the time of the arrest and reviewed the classified portion of the Pollard file. (A. 46, A-48). Mr. McFarlane and former Senator DeConcini each affirmed that the classified information accessed by Pollard would have no value today.

On July 1, 2015, Assistant U.S. Attorney Jay I. Bratt, Deputy Chief, National Security Section of the U.S. Attorney's Office in Washington D.C. wrote:

"the government does not intend to advocate to the . . . Commission that, for the purposes of applying 18 U.S.C. § 4206 (d), there is a reasonable probability that Pollard will commit a Federal, state, or local crime if released on parole." (A. 51).

On July 28, 2015, the Commission granted mandatory parole. (A. 53).

3. Pollard's Education and Employment

Pollard has a bachelor's degree in political science from Stanford University, and has had two additional years of study toward a master's degree at Tufts University. (A. 85). Prior to his release, Pollard secured, through his counsel, a written offer of employment in New York in the finance department of an investment firm. (*Id.*). Pollard would be required to use a company computer and the internet on a daily basis. (*Id.*).

C. Proceedings in the District Court

1. The District Court's Remand to the Commission

Following briefing by the parties and an oral argument, on December 16, 2015, the district court issued an order remanding the case to the Commission and directing it to make findings of fact in order to justify the Special Conditions, because the existing record of the Commission's reasons was "insufficient to support the nature and the breath of the restrictions." (A. 145). The district court correctly identified the "fundamental issue" in reviewing the Special Conditions to be "the question as to whether there is anything that Pollard can disclose that would endanger the public." (*Id.*).

2. The Commission's Supplemental Notice of Action

On March 2, 2016, the Commission issued a Supplemental Notice of Action (the "Supplemental Notice") purporting to provide additional "findings of fact" in support of the Special Conditions. (A. 214). The Commission contended that Pollard's "base offense of espionage was by definition an exercise in deception," and cited Pollard's unsuccessful attempt to seek asylum at the Israeli Embassy upon his arrest in 1985. (A. 215). In addition, the Commission cited a letter written 21 years ago by William O. Studeman, then Acting Director of the CIA (the "1995 Studeman Letter"), for the assertion that Pollard sent "at least 14 letters that contained classified information" from prison. (A. 216).

The Commission also claimed that Pollard has "a propensity to violate the terms of his plea agreement and/or an order of the sentencing court" – based on Pollard's *alleged* violation in 1987 of a gag order issued prior to his sentencing, when Pollard, while incarcerated, was interviewed by journalist Wolf Blitzer, who was admitted to the prison by federal authorities. (*Id.*); *see also United States v. Pollard*, 959 F.2d 1011, 1017 (D.C. Cir. 1992).

Next, the Commission cited Pollard's alleged "propensity to dissemble," pointing to his statement at his parole hearing that he would be employed upon his release by a named employer. That statement was true. Pollard deferred his employment *after* the imposition of the Special Conditions because he could not

ask his employer to subject its computers to government monitoring. (A. 168).

The Commission contended that Pollard is a flight risk. It relied primarily on a letter from two Members of Congress, Jerrold Nadler and Eliot Engel, addressed to the Attorney General (the "Nadler/Engel Letter") and requesting that "fair consideration" be given to Pollard's request that he be given permission to join his family in Israel. (A. 171). The Commission also pointed to a statement by Mr. Bratt during Pollard's 2014 discretionary parole hearing expressing "concern" that Pollard would flee the country upon his release. (A. 214).

Lastly, the Commission provided a letter from the Director of National Intelligence, James R. Clapper (the "Clapper Letter"). Clapper wrote that he had been informed by the intelligence community that the information Pollard had compromised "remains classified at the Top Secret and Secret levels, and future unauthorized disclosure of the information could risk harm to the national security of the United States." (A. 203). The Clapper Letter did not address whether the information was of a type that Pollard could retain in his head for 31 years.

3. The Commission's Application to Rely on Ex Parte Evidence

After receiving the Supplemental Notice, Pollard moved to reopen the case and renew the Petition (the "Renewed Petition") on the ground that the Supplemental Notice failed to set forth any factual basis to justify the Special Conditions, as required by the district court's December 16 Order. (A. 163).

On April 12, 2016, the district court entered an order granting Pollard's motion to reopen the case (the "April 12 Order"). In the April 12 Order, the district court questioned whether the Commission should be required to offer specific examples of information at risk. (A. 227).

On May 6, 2015, the Commission informed the district court of its intent to support its response to the Renewed Petition with an *ex parte* and *in camera* submission. On June 6, 2016, the district court issued a Memorandum Opinion authorizing "an *ex parte* filing addressing the types of classified information[.]" (A. 265). The district court required the Commission only to "disclose the general substance of the submission to Pollard's counsel and include … an explanation of the reason Pollard's counsel was determined not to need to know [it]." (A. 266).

On June 17, 2016, the Commission filed its opposition to Pollard's Renewed Petition. (A. 7). Despite the district court's explicit authorization of an *ex parte* submission, the Commission declined to make an *ex parte* submission, and chose instead to rely on an unclassified declaration by the director of the Information Management Division within the Office of the Director of National Intelligence (the "Hudson Declaration."). (A. 371). The Hudson Declaration provided no detail whatsoever about the specific documents the government said remain "properly and currently" classified. Rather, it described in general terms the information Pollard "is believed to have compromised." It also stated, again in the

most general way, that "some" of this information remains properly and currently classified. As such, the Hudson Declaration was deliberately structured around a series of vague "beliefs" in order to avoid the question specifically posed by the court – whether Pollard retains any information in his head that could possibly be of any value to anyone today.

4. Final Order of the District Court

The district court heard argument on July 22, 2016. On August 8, 2016, the district court issued an Opinion and Order denying Pollard's Petition. Holding that it "may not substitute its own judgment for that of the commission, but may consider only whether there is a rational basis for the commission's decision," the court ruled that the Supplemental Notice "presented significant explanation" of the Commission's reasoning in support of the Special Conditions. Judgment was entered on August 12, 2016, and this appeal followed.

SUMMARY OF ARGUMENT

The district court erred when it held that the Commission acted rationally in ruling that the Special Conditions were "reasonably related" to Pollard's "history and characteristics," or to the "nature and circumstances" of his offence. 18 U.S.C. § 4209. The parole statute requires that an imposition of special parole conditions be *reasonably* related to the parolee's history and characteristics. *Id.* Meaningful judicial review under this standard means that the Special Conditions cannot

merely bear a *theoretical* relationship to past conduct, but must bear a *reasonable* relationship based on rational determinations.

Specifically, the district court erred in the following respects. *First,* the district court accepted as rational the Commission's ruling that simply because some of the classified information Pollard accessed in 1984-85 remains technically classified today, there is a risk Pollard will disclose it, even without any finding that he could possibly remember it, or that it would be of any value to anyone.

Second, the district court accepted as rational the Commission's determination that Pollard has a "propensity to dissemble" and represents a "flight risk." The findings on which those determinations were based do not merit judicial deference because they are entirely arbitrary.

Third, the district court failed to reject the Special Conditions as arbitrary, even though Pollard is free to use any non-internet means to meet with and talk to anyone, anywhere. In light of what Pollard is permitted to do, these restrictions are wholly irrational.

STANDARD OF REVIEW

Appellate courts review a district court's denial of a petition for a writ of habeas corpus brought pursuant to § 2241 de novo and review any factual findings for clear error. *See Cruz v. Walsh*, 633 F. App'x 794, 795 (2d Cir. 2015). This Court's review of the issues raised on appeal is thus de novo, since the issues

present legal questions as to the statutory and regulatory validity of the Commission's imposition of the Special Conditions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ACCEPTING THE COMMISSION'S CONCLUSION THAT POLLARD STILL REMEMBERS CLASSIFIED INFORMATION OF VALUE

The district court gave the government an explicit opportunity to come forward with specific examples of such information on an *in camera* and *ex parte* basis. The government came forward with none. Instead, the government proffered the Hudson Declaration, which contained no specific examples of documents Pollard accessed, and relied instead on a general description of the *types* of information that Pollard is "believed" to have accessed in 1984-1985. The district court accepted that as a rational basis for the Commission's determination Pollard could still possibly recall classified information from over 30 years ago that would be of any value. There was, however, no rational basis for that determination. The district court should have viewed the government's refusal to make an *ex parte* submission as an admission that it cannot point to a single document of the type that anyone could possibly remember after 31 years, or that would have any intelligence value today.

A. The Commission Failed to Establish that Pollard is Capable of Disclosing Classified Information

Whether a particular document that Pollard reviewed 31-plus years ago is

"classified" has no bearing on whether he can remember its content after 31 years, or whether the information contained therein could possibly be of any value to anyone if disclosed in summary fashion without detail.

In reviewing the Commission's decisions, the court is required to assess "whether there is a rational basis in the record for the Commission's conclusions embodied in its statement of reasons." *Gometz v. United States Parole Comm'n*, 294 F.3d 1256, 1260 (10th Cir. 2002). Pointing to the Clapper Letter and Hudson Declaration, the Commission concluded that because the documents Pollard compromised remain classified as "Secret" and "Top Secret," Pollard automatically poses a threat to national security because he saw them 31 years ago. The missing link is that the Commission failed to find that Pollard *himself* still remembers – or can remember – any classified information. Aerial photographs, lines of computer code, signals intelligence manuals, and other such documents are not the types of documents that can be reproduced from memory.

Had the Commission provided specific examples of documents a person could plausibly recall after 31 years, those examples could then be subjected to scrutiny by Pollard's security-cleared counsel. But without any specifics, it is impossible for Pollard's counsel – or the Court – to evaluate the nature of the evidence. The Commission has a statutory burden to satisfy before it may deprive Pollard of his liberties, and it has not satisfied that burden.

The Commission did not make any findings of fact as to whether Pollard could possibly still retain any classified information in his head after 31 years. The Commission imposed the Special Conditions – especially the oppressive Computer Monitoring Condition – on the basis that the 31-year old codes and aerial photographs are still classified. That does not meet the statutory standard. The district court's acceptance of the Commission's ruling is reversible error.

B. The Commission Failed to Identify Any Documents Pollard Actually Compromised

The Hudson Declaration fails to identify a single example of information that Pollard *actually* compromised. Instead, the Hudson Declaration repeatedly states that the Intelligence Community "*believes*" that Pollard compromised certain documents. (A. 376). Such vague, conclusory assertions underscores the absence of any basis for the Commission's determination.

The Government does not need to rely on its "belief" in order to ascertain the specific documents Pollard *actually* shared with Israel, because those documents have previously been identified. By way of example:

- In a declaration submitted by then-Secretary of Defense Caspar Weinberger to the sentencing court, Weinberger gave "brief but specific examples *of actual documents passed*." (A. 564).

- A 1987 CIA damage assessment explains that investigators were "assisted by Pollard in *reconstructing the inventory of compromised material*," such that they were able to identify specific "categories and approximate numbers of compromised . . . documents." (A. 456).

- Pollard's plea agreement states that he revealed the details of his conduct, including "the specific classified documents and information requested." The government admits that "the veracity of the foregoing information was confirmed through independent investigation." (A. 36).

The government therefore does not have to rely on the "belief" of the intelligence community in order to identify the documents Pollard compromised.

The district court concluded that "it does not follow from the fact that the government knows much, or even most, of the information Pollard accessed that it can identify all such information," and that "[t]he existence of some uncertainty does not render the government's submissions nor the Parole Commission's determinations fatally flawed." (A. 598). The issue is not, however, that there may be some "uncertainty" regarding the precise number or identification of the documents Pollard compromised. Rather, the point is that the government had the capacity to identify specific documents from among the documents it *knows* Pollard compromised, and it did not identify even one.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMMISSION HAD A RATIONAL BASIS TO DETERMINE THAT POLLARD'S HISTORY AND CHARACTERISTICS JUSTIFY THE SPECIAL CONDITIONS

Even assuming *arguendo* that Pollard could possibly remember any information technically still classified, the Commission has failed to adequately justify its concern that Pollard presents any realistic threat of actually disclosing it. Just because in theory a parolee has the means necessary to commit a crime cannot

mean the Commission may automatically conclude that he is inclined to commit it.

Here, the Commission relied on a series of disjointed observations that misconstrue facts and draw inferences that are at best tenuous and at worst disingenuous. While a court's authority to review the Commission's determinations is limited, it is nevertheless required to review "whether the Commission has followed criteria appropriate, rational and consistent with its enabling statutes so that its decision is not arbitrary and capricious, nor based on impermissible considerations." *Furnari v. Warden, Allenwood Fed. Corr. Inst.*, 218 F.3d 250, 254 (3d Cir. 2000). To this end, "the Commission may not base its judgment as to parole on an inaccurate factual predicate." *Feist v. Shartle*, No. 12-3572 (NLH), 2013 U.S. Dist. LEXIS 84391, at *6 (D.N.J. June 17, 2013). The Court's obligation to review the Commission's ruling "cannot be fulfilled without making some inquiry into the evidence relied on" by the Commission. *Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir. 1976).

The Commission's determination that Pollard has demonstrated character traits that justify the imposition of the Special Conditions was based on an "inaccurate factual predicate" and "impermissible considerations," and has no rational basis in the record. The district court erred in ruling that the Commission's characterization of Pollard's purported "history and characteristics" justifying the Special Conditions had a rational basis.

A. The Commission's Ruling that Pollard Is a Flight Risk Was Not Rationally Based

The district court erred in concluding that the Commission had "a number of evidentiary bases for its concerns" that Pollard could be viewed as "a potential flight risk," sufficient to justify the Special Conditions. According to the Commission, GPS tracking is necessary "to monitor [Pollard's] activity for the purposes of minimizing the risk that [he] will flee the country and engage in further criminal acts" because Pollard has "a history of deception and an expressed desire to leave the country. (A. 214).

The Commission relied primarily on the Nadler/Engel Letter, in which the Congressmen express to the Attorney General Pollard's desire to move to Israel *in compliance with U.S. law*. (A. 170). It is arbitrary to suggest that because two U.S. Congressmen wrote to the Attorney General expressing *their* request that Pollard be granted permission to move to Israel lawfully, Pollard himself somehow demonstrates a propensity to *unlawfully* violate the terms of his release.

The Commission's effort to portray Pollard as a "flight risk" also relies on the expression of "concern" by Mr. Bratt at Pollard's 2014 non-mandatory parole hearing. One year later, however, the government assessed those risks differently. On July 1, 2015, Bratt provided a letter to Pollard stating that the government would not advocate that there was a "reasonable probability that Mr. Pollard will commit a federal, state or local crime." (A. 50). Bratt did not express any concern

that Pollard might flee the country, in violation of his parole conditions. Likewise, at Pollard's parole hearing six days later, Gregg Maisal, Chief of the National Security Section of the D.C. U.S. Attorney's Office, merely stated that *if* Pollard were to request foreign travel from the Commission, the Commission should notify the U.S. Attorney's Office. (A. 224). Maisal did not ask the Commission to impose a GPS monitor, a curfew, or any other condition relating to foreign travel. He did not repeat the concern expressed a year earlier that Pollard might be a flight risk. He merely asked for notification if Pollard were to make a travel request.

Thus, the Commission's reliance on the superseded expression of concern at the 2014 hearing ignored subsequent events that showed the concern was no longer being expressed. That 2014 statement, essentially abandoned by the government in 2015, cannot provide a rational factual basis for the GPS Monitoring Condition.

Pollard, who does not have a passport, fully understands that he would likely spend the rest of his life in prison if he were so much as attempt to board an airplane without permission. The Commission's suggestion that Pollard's "history and characteristics" imply that he is a flight risk, thus justifying GPS monitoring, is devoid of any factual support.[1]

Citing 18 U.S.C. § 4209(a)(2), the district court concluded that there is "no

[1] Similarly devoid of a rational basis is the Commission's contention that Pollard is a flight risk because he sought asylum at the Israeli Embassy immediately prior to his arrest in 1985. (A. 214). That fact has no bearing on Pollard's *current* risk of flight.

principle of law that suggests that a non-criminal characteristic cannot be considered, nor would such a principle be consistent with the goals and broad discretion of the Parole Commission." (A. 601). While this may be so as an abstract principle, it does not obviate the requirement that the Commission have a rational basis for its ruling. To rule that Pollard is a flight risk because he has openly expressed a desire to live abroad *lawfully* and because two elected representatives chose to intercede with the Attorney General lacks any rational basis. Parolees should not be retaliated against by being subjected to deprivations of their liberty as a result of making lawful requests as to the terms of their release.

B. The Commission's Ruling that Pollard Has a Propensity to Violate Binding Conditions or Violate the Law Was Not Rationally Based

The district court erred in concluding that Pollard's alleged "propensity to violate binding conditions, including a gag order," provided a "valid and serious base[] on which the Commission was permitted to act." (*Id.*). The Commission misconstrued events from over 31 years ago in an attempt to establish that Pollard's "history and characteristics" justify the Special Conditions. None of these events has any bearing on Pollard's *current* propensity to violate the law, and none provides any factual basis for the Special Conditions.

First, the Commission relies upon the deceptive character of Pollard's crime. However, as the district court itself observed, that "demonstrates a level of criminality at a much earlier point in time, which may justify a certain amount of

ongoing monitoring, but it has to be . . . *brought forward to justify and support the very severe broad restrictions*" the Commission has imposed. (A. 147) (emphasis added). Similarly, the district noted that while Pollard's crime indeed may have "involved covert means, . . . that is as to a past fact, and it is unclear how that relates to protection of the public welfare or any other sentencing factor currently." (A. 149-150). The Commission provided no explanation for its inference that Pollard's 31-year old crime implies he poses a criminal risk today. Having recently been released on parole after spending 30 years in prison, the notion that Pollard would risk returning to prison in order to disclose 31-year old classified information is irrational and devoid of any factual basis.

Next, the Commission claimed that Pollard has "a propensity to violate the terms of the plea agreement and/or an order of the sentencing court" on the basis of Pollard's alleged violation of a gag order in 1987, which occurred before Pollard was sentenced. (A. 216). Even if, as the district court stated, the Commission is "entitled to rely on sources that predate a parolee's incarceration," that does not convert a single unproven instance of a violation of a gag order 31 years ago into an alleged "propensity" to violate parole today. Such reasoning also ignores the

reformative effect of serving 30 years in prison as a model prisoner.[2]

Finally, the Commission relied on the 1995 Studeman Letter for the misleading assertion that Pollard sent "at least 14 letters that contained classified information" during the first ten years of his prison term. The Studeman Letter has been in Pollard's parole file for 20 years, and the Commission has never purported to rely on it as a reason to deny mandatory parole on grounds of recidivism, or for any other purpose. Moreover, during the time referenced in the Studeman Letter, Pollard was under intense scrutiny by government censors, who reviewed all of his correspondence. Pollard was never charged or disciplined in any way for any alleged infraction regarding the letters he sent. To the contrary, as the Commission has admitted, Pollard was a "model inmate" with an outstanding prison record. (A.__). Had Pollard violated the law, prison regulations, and his plea agreement by disclosing confidential information post-sentencing, the government would surely have invoked such serious violations to oppose his release on mandatory parole, and could not have admitted that Pollard was a model inmate.

C. The Commission's Conclusion That Pollard Has a Current "Propensity to Dissemble" was Irrational

In an attempt to furnish contemporary evidence that might support the

[2] The Government used this alleged "fact" in connection with Pollard's 1987 sentencing, arguing that these in-prison interviews violated the plea agreement, demonstrated Pollard's "continuing unwillingness or inability to conform his conduct to proscribed rules or laws," and indicated that he "is a recidivist and unworthy of trust." However, the Government failed to mention that Pollard was in federal custody at the time of the interviews, which could only have taken place because the Government permitted them.

Computer Monitoring Condition, the Commission made the offensive, demonstrably false assertion that Pollard has "a recent propensity to dissemble" because he "represented to the Commission at [his] mandatory parole hearing that [he] had secured employment," and then represented to the Court "that the [Special Conditions] interfere with [his] ability to obtain employment." (A. 217).

This disingenuous assertion underscores the irrationality that permeated the Commission's approach. Pollard had indeed secured a written offer of employment prior to his release. (A. 225). The written offer of employment was produced to the Commission during Pollard's mandatory parole hearing. (*Id.*). Once the Computer Monitoring Condition was imposed, however, Pollard was forced to defer the employment, because, as his counsel represented in a sworn declaration, he could not reasonably ask his prospective employer to subject its company computers to government monitoring. Pollard's undersigned counsel has repeatedly affirmed that Pollard's offer of employment remains open, and he will be able to begin employment as soon as the Computer Monitoring Condition is removed. (A. 168). The very fact that the Commission chose to rely on this so-called "dissembling" indicates the insincerity of its reasoning.[3]

Pollard has been entirely truthful with the Commission in every respect. The

[3] As further putative evidence of Pollard's alleged "propensity to dissemble," the Commission states that Pollard has "consistently represented [him]self as a 'White Knight' for Israel," when in fact "the record shows [he] passed or attempted to pass classified information to a number of entities unconnected with Israel." (A. 217). The record shows no such thing. Pollard was never charged with delivering information to any nation other than Israel.

Special Conditions cannot be founded on false assertions to the contrary. The district court stated that "this argument is an invitation for the Court to replace the Commission's credibility determination with its own, which is precisely what courts are directed not to do in evaluating habeas petitions[.]" (A. 596). But the Commission did not make a credibility determination. The Commission simply invented facts that have no basis. In so doing, the Commission acted arbitrarily, and the district court erred in deferring to the Commission.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SPECIAL CONDITIONS ARE RATIONALLY RELATED TO THE GOVERNMENT'S INTERESTS

Even assuming that (i) Pollard retains properly classified information in his head, the disclosure of which could harm national security; and (ii) Pollard has a propensity to violate "binding conditions" and to disseminate classified information, the Special Conditions do nothing to prevent the unauthorized disclosure of the information at issue. In other words, even if, as the district court concluded, it is "rational and appropriate to minimize the risk that he will either disclose information without authorization or flee the United States," (A. 602-603), the Commission provided no explanation as to how the specific conditions it chose will aid it in doing so. Because the government has failed to set forth any rational, logical connection between the alleged theoretical risk posed by Pollard and the Special Conditions imposed on him, the district court erred in concluding

that there was a "reasonable nexus between the special condition of release and the crime for which the individual was convicted." (A. 599).

A. The Commission Failed to Establish that the GPS Monitoring Condition Bears a Reasonable Relationship to Its Stated Interests

In its attempt to justify the GPS Monitoring Condition, the Commission relied in large part upon Pollard's underlying crime of 31-plus years ago, claiming that his "base offense of espionage was by definition an exercise in deception and furtive movements that included trips abroad and a false identity[.]" (A. 696). However, the Commission did not explain how GPS tracking bears any connection to that behavior. All crimes involve "furtive movements" in the sense that the offender sought to avoid detection when committing them. If that were the test, all parolees would be automatically subject to GPS tracking, which is not the case. (A. 71). Only exceptional crimes of a particular nature (e.g., pedophilia, stalking, dealing drugs near a school) result in GPS tracking. The district court therefore erred in concluding that the Commission had a rational basis for its determination that the GPS Monitoring Condition is "reasonably related" to Pollard's offense.

The GPS Monitoring Condition bears no relationship to the nature of Pollard's offense, as it does nothing to prevent Pollard from doing what the government purports to fear: that Pollard will disclose classified information he might still retain in his head from 31 years ago. As the district court initially noted, "if the issue is simply dissemination of additional secret information, that

could be accomplished in one's kitchen or office in a meeting at home without the need for flight." (A. 149). Monitoring Pollard's movement merely allows his parole officer to follow his location, but does nothing to prevent him from releasing information via telephone, hard mail, or in person.

This is not a case in which in which a particular location is relevant to the crime at issue. Unlike cases in which GPS tracking operates to keep an offender away from potential victims, GPS tracking bears no relationship to Pollard's ability to disclose information, which could be theoretically accomplished anywhere.

B. The Commission Failed to Establish that the Computer Monitoring Condition Bears a Reasonable Relationship to Its Stated Interests

Similarly, the Commission failed to explain how the Computer Monitoring Condition in any way alleviates its alleged fear that Pollard will disseminate further classified information, or violate the terms of his plea agreement.

The Commission claims to "view[] monitoring [Pollard's] computer usage as an aid to [his] rehabilitation, as knowing [his] usage is subject to review will assist . . . in pro-social usage of computer access." (A. 217). This makes no sense. Pollard's crime did not involve use of the internet, which did not exist at the time. There has never been any anti-social or unlawful computer use.

As the district court itself initially acknowledged (A. 148), no employer would allow the government unfettered access to its computer system. The Computer Monitoring Condition does not advance any legitimate goal of parole,

but rather, effectively precludes this highly educated individual from working, in contravention of the goals of parole.[4]

Significantly, the Commission never expressed any concern that Pollard will transmit classified information via telephone, in a personal meeting, or via hard mail, and it imposed *no restrictions* that would prevent Pollard from doing so were he able and inclined to do so.

The district court accepted the Government's argument that Pollard's offense "involved the distribution of information, an activity most efficiently accomplished using a computer in today's society." (A. 599). But courts have upheld broad internet and computer restrictions only where "(1) the defendant used the internet in the underlying offense; (2) the defendant had a history of improperly using the internet to engage in illegal conduct; or (3) particular and identifiable characteristics of the defendant suggested that such a restriction was warranted." *United States v. Perazza-Mercado*, 553 F.3d 65, 70 (1st Cir. 2009). None of these circumstances is present here. The fact that a particular condition might make it more difficult for an offender to commit the same underlying offense does not mean that the condition is "reasonably related" to the underlying offense.

[4] The Commission also did not establish that more typical conditions are insufficient, as the parole regulations require. 28 C.F.R. § 2.40. Releasees are often prohibited from visiting locations where their crimes occurred or where they would be at risk of recidivism, but they are typically supervised using less restrictive means. As Pollard's probation officer has admitted, GPS monitoring is highly unusual and uncommonly imposed. (A. 71). Pollard could be adequately supervised with periodic visits to the Probation Office, phone contact, and field spot checks.

Also baseless is the Commission's argument that the Computer Monitoring Condition will assist the Probation Office in ensuring that Pollard complies with his obligations under the 1986 plea agreement. That agreement requires Pollard to refrain from disclosing any classified information, and to submit any book manuscript or article to the Director of Naval Intelligence for pre-publication approval. (A. 40). Having recently been released on parole after spending 30 years in prison, the notion that Pollard would risk returning to prison for the rest of his life in order to disclose 31-year old classified information that has no value, or to publish an unauthorized book or article, is irrational and has no basis in fact.

C. The Commission Failed to Establish that the 12-Hour Curfew Bears a Reasonable Relationship to Its Stated Interests

Finally, the district court erred in concluding that the Commission had a rational basis for the imposition of a 12-hour curfew. Pollard's offense cannot be compared to a drug deal or violent act, where the nocturnal nature of the crime might justify keeping the offender off the streets at night, to safeguard against repeat conduct, and to ensure public safety. Moreover, even if a curfew is "neither uncommon nor unusual," and the "twelve-hour curfew to which Pollard is subject most days of the week is the most commonly imposed curfew . . . for newly paroled individuals," that does not justify the curfew in this case. (A. 603).

The district court ruled that "[b]y restricting Pollard's movements to particular times, the curfew condition assists the Probation Office's monitoring

efforts and thereby contributes to the minimization of" the risks that Pollard will "either disclose information without authorization or flee the United States." (*Id.*). Neither the Commission nor the district court, however, offered any support for how the curfew would do so, as nothing prevents Pollard — were he inclined to do so — from disclosing information from his apartment within the confines of the curfew. And if the curfew helps ensure that Pollard does not flee the country, that simply supports the conclusion that the GPS Monitoring Condition is excessive. The district court erred in concluding that the imposition of a curfew was rational.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court Order and direct the Commission to vacate the Special Conditions.

Dated: November 14, 2016
New York, NY

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: *Eliot Lauer*
Eliot Lauer
Jacques Semmelman
Gabriel Hertzberg
Sylvi Sareva
101 Park Avenue
New York, NY 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559

Attorneys for Jonathan J. Pollard

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 7,121 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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New York, NY

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: *Eliot Lauer*
Eliot Lauer
Jacques Semmelman
Gabriel Hertzberg
Sylvi Sareva
101 Park Avenue
New York, NY 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559

Attorneys for Jonathan J. Pollard

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN J. POLLARD,

Petitioner,

-v-

UNITED STATES PAROLE COMMISSION; J. PATRICIA WILSON SMOOT, solely in her capacity as Chair of the United States Parole Commission; UNITED STATES PROBATION OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK; MICHAEL J. FITZPATRICK, solely in his capacity as Chief U.S. Probation Officer,

Respondents.

15-cv-9131 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

In this action, petitioner Jonathan J. Pollard challenges certain special conditions imposed by respondent United States Parole Commission and implemented by respondent United States Probation Office for the Southern District of New York. (ECF Nos. 1 & 36.) For the reasons stated below, Pollard's petition for a writ of habeas corpus is hereby DENIED.

I. LITIGATION HISTORY

In 1984 and 1985, Pollard, then an Intelligence Research Specialist with the United States Navy, delivered classified information to the State of Israel. (ECF No. 1 at ¶ 1.) On June 4, 1986, pursuant to a written plea agreement, he pled guilty to one count of conspiracy to deliver national defense information to a foreign

government, in violation of 18 U.S.C. § 794(c). (Id. at ¶ 21; ECF No. 3, Exh. B.) On March 4, 1987, he was sentenced to life in prison. (ECF No. 1 at ¶ 22.)

Under the parole statutes in place at the time Pollard pled guilty, he was entitled to be released on parole after serving thirty years unless the Parole Commission "determine[d] that he ha[d] seriously or frequently violated institution rules and regulations or that there [wa]s a reasonable probability that he w[ould] commit any Federal, State, or local crime." 18 U.S.C. § 4206(d) (1985).

As the thirtieth anniversary of Pollard's imprisonment approached, his attorney submitted declarations from two former government officials. The man who served as National Security Advisor at the time of Pollard's arrest attested that any information Pollard recalled "would have no value to anyone today," and a retired Senator who served on the Senate Select Committee on Intelligence at the time of Pollard's arrest attested that he had "reviewed the content of the classified portion of the Pollard file when [he] still had the ability to do so," and did "not believe any such information would be valuable to anyone." (ECF No. 3, Exhs. C & D.) The government notified Pollard's attorney that it did not intend to advocate to the Commission that there was a reasonable probability Pollard would commit a crime if released. (Id. Exh. E.)

On July 7, 2015, the Parole Commission conducted a mandatory parole hearing. (ECF No. 22, ¶ 4.) The ensuing Post Hearing Assessment noted, among other things, Pollard's acknowledgment of his errors and responsibilities and the fact that he had a job as an analyst, as well as an apartment, promised to him. (Id.

Exh. A.) The Examiner opined that Pollard "should be released on mandatory parole," and also that "he should have special conditions for GPS monitoring and computer monitoring." (Id.)

On July 28, 2015, the Parole Commission issued a Notice of Action which granted Pollard his mandatory parole, thereby implicitly finding that he neither seriously or frequently violated institution rules nor posed a reasonable probability of future crimes. (ECF No. 1 at ¶ 30; ECF No. 3, Exh. F.) The Commission scheduled Pollard's release for November 20, 2015. (Id.)

In the Notice of Action granting parole, the Commission also imposed conditions of release pursuant to its authority under 18 U.S.C. § 4209(a). Two of the special conditions of release included in the Notice are at issue in this proceeding. First, the Commission ordered that Pollard would be "subject to the Global Positioning Systems monitoring inclusive of a curfew and/or exclusion zones as determined by [his] U.S. Probation Officer." (ECF No. 3, Exh. F.) Second, the Commission ordered that Pollard

> (1) consent to [his] probation officer and or probation service representative conducting periodic unannounced examinations of [his] computer(s) equipment which may include retrieval and copying of all memory from [his] computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and (2) consent at the direction of [his] probation officer to having installed on [his] computer(s), at [his] expense, any hardware or software systems to monitor [his] computer use. (Id.)

Pollard appealed the imposition of these requirements to the Parole Commission's National Appeals Board. (ECF No. 1 at ¶ 36; ECF No. 22, Exh. B.)

The Board removed one condition[1] included in the prior Notice of Action as "not the least restrictive means available," and affirmed both of the conditions now at issue. (ECF No. 3, Exh. G.) In so doing, the Board clarified that the computer monitoring condition applied "regardless of whether it is a personal communication device, home computer, or a computer you use for employment because, as a practical matter, the boundaries between personal and business computer use are blurred." (Id.) The Board ruled that this condition would "assist the U.S. Probation Office with ensuring that you are complying with your ongoing obligations under the terms of the plea agreement." (Id.) It further ruled that the GPS monitoring condition was "reasonably related to [Pollard's] offense that involved covert conduct to obtain and sell national security information to a foreign government" and "reasonably related to the need to deter [him] from further criminal conduct." (Id.)

Upon Pollard's release, he was required to visit the Probation Office for the Southern District. (ECF No. 8 at ¶ 3.) He did on November 20, 2015, the day he was released from prison. (Id.) During the visit he signed an agreement requiring him to, among other things, respond promptly to his probation officer's calls and visits and obey, with limited exceptions, a 7:00 p.m. to 7:00 a.m. curfew. (Id. at ¶¶ 4 & 7, Exh. H.) The Probation Office also provided Pollard with a GPS monitor to be worn on his wrist. (Id. ¶ 5, Exh. I.) During subsequent meetings between Pollard, his counsel, and the Probation Office, the Office informed Pollard that he could

[1] The Parole Commission had originally prohibited Pollard from using any computer with access to the internet without the Commission's prior written approval. (ECF No. 3, Exh. F.)

request modifications to his curfew for events or changed circumstances, such as securing employment. (ECF No. 20 ¶ 14.) On November 24, 2015, the Office agreed to modify Pollard's curfew to accommodate his observance of the Sabbath, such that it would not begin until 11:00 p.m. on Friday nights and would end at 6:00 a.m. on Saturday mornings. (Id. ¶ 19.) The Probation Office has continued to remind Pollard that he is permitted to request further modifications to his curfew, including through informal telephone calls, but to date Pollard has not requested another change. (ECF No. 58 ¶¶ 15-17.)

Pollard's counsel, who obtained the financial analyst job offer that awaited Pollard upon his release, has since recommended to the employer that any start of employment await the determination of the challenge to the computer monitoring condition. (ECF No. 25 at 3 n.2.) Accordingly, Pollard has not worked since his release. There is no evidence in the record that the potential employer in fact objected to hiring Pollard based on the imposed conditions or any other factor. (ECF No. 58 ¶ 18.) The Probation Office's computer monitoring software "is highly customized and individualized," and the Office has offered to "work with the employer to account for [any] concerns [about the government's access], or to block the computer user from certain types or areas of usage."[2] (Id. ¶ 20.)

The same day he was released from prison and first met with the Probation Office in this district, November 20, 2015, Pollard filed the original petition for a

[2] The Court notes that throughout this litigation the Probation Office has both committed to and demonstrated flexibility in the manner in which the three challenged conditions are implemented.

writ of habeas corpus pursuant to the Court's authority under 28 U.S.C. § 2241 in this matter, seeking an order that respondents eliminate the GPS monitoring and computer monitoring conditions, which he challenged as inconsistent with federal parole statutes and regulations, the federal Religious Freedom Restoration Act, and the Constitution. (ECF No. 1.) The parties briefed the matter on an expedited basis, and the Court heard oral argument on December 14, 2015. (ECF No. 27.)

Ruling orally from the bench, the Court expressed its view that "the record of the Parole Commission's reasons … is insufficient to support the nature and the breadth of the restrictions." (Id. at 12.) The Court therefore remanded the matter to the Commission to provide it with "an opportunity … to more fully set forth its rationale." (Id.) The Court also identified what it took, under the record then before it, to be a "fundamental issue": "whether there is anything that Mr. Pollard can disclose that would endanger the public;" in other words, "is there any confidential government information left to disclose?" (Id.) The Court directed the Commission to "grapple with this question," which, although "not something which necessarily is required to support the restrictions," would nonetheless "certainly go a long way to supporting the restrictions." (Id. at 13.) The Court left the contested conditions in place during the remand. (Id. at 17; ECF No. 26.)

On remand, Pollard submitted memoranda setting out his position to the Parole Commission. (ECF No. 38, Exhs. C & E.) The Commission also received, among other things, a letter from Director of National Intelligence James R. Clapper dated February 10, 2016. (Id., Exh. D.) Clapper's letter explained, among

other things, that the United States Intelligence Community had "confirmed that certain information compromised by Mr. Pollard remains currently and properly classified at the Top Secret and Secret levels." (Id.)

On March 2, 2016, the Parole Commission published a four-page, single-spaced Notice of Action relating to Pollard's conditions. (Id., Exh. G.) The Commission upheld both the GPS monitoring and computer monitoring conditions and provided additional reasoning not present in its July 2015 Notice of Action.

The Notice first addressed the GPS monitoring condition, which it found reasonably related to the nature and circumstances of Pollard's offense, his history and characteristics, and the deterrent and public-protecting purposes of criminal sentencing. (Id. at 1.) The Commission found that Pollard had "a history of deception and an expressed desire to leave the country," both of which could be addressed by GPS tracking. (Id.) It also determined that this this condition would encourage compliance with Pollard's plea agreement, which he had "previously demonstrated a propensity to violate" when he "violated a gag order" a federal judge had issued by speaking with a journalist before his sentencing without giving required prior notice. (Id. at 2.) The Notice of Action further recounted that Pollard "compromised information that remains classified at the Top Secret and Secret levels and future unauthorized disclosure of the information could risk harm to the national security of the United States." (Id. at 2.)

As to the computer monitoring condition, the Parole Commission similarly found it reasonably related to the nature and circumstances of Pollard's offense, his

history and characteristics, and the deterrent and public-protecting purposes of criminal sentencing. (Id. at 3.) The Commission reasoned that this monitoring would help ensure Pollard obeyed the requirements of his plea agreement that he not disclose classified information and that he submit any publications for review. (Id.) The Notice again found Pollard's violation of a gag order relevant, and further noted that he attempted to send letters containing classified information from prison 14 times during his incarceration and that the Bureau of Prisons prohibited him from computer access. (Id. at 3-4.) The Commission also determined that Pollard had "demonstrated a recent propensity to dissemble," through his representations about the employment waiting for him after parole, and through his consistent self-representation "as a 'White Knight' for Israel," which the Commission determined was an inaccurate characterization of his actions. (Id. at 4.) As a result of these findings, the Parole Commission maintained the two challenged special conditions of parole.

On April 8, 2016, Pollard moved to re-open the case and renew his petition. (ECF No. 36.) The Court re-opened the case and set a briefing schedule. (ECF Nos. 40 & 41.) As part of that order, the Court noted that "respondents may deem it appropriate to address whether information at issue remains 'Secret' or 'Top Secret.'" (ECF No. 40 at 1.) The Court therefore directed the parties to "confer as to whether (1) the Court can or should resolve such factual disputes; (2) the standard that would apply; and (3) whether respondents should/must support their position

on this motion with reference – in camera – to specific examples of 'Secret' or 'Top Secret' information deemed to be at risk." (Id. at 1-2.)

On May 6, 2016, respondents moved for an extension of time to oppose Pollard's renewed petition. (ECF No. 44.) The letter also expressed an "intention to support [respondents'] response to the renewed Petition with a classified submission for the Court's ex parte and in camera review." (Id. at 1.) Pollard filed a letter on May 9 objecting to the proposed use of ex parte submissions. (ECF No. 47.)

On June 6, 2016, the Court published a memorandum opinion and order addressing the proper role of ex parte evidence in this proceeding. (ECF No. 51.) After surveying the case law and constitutional principles the parties invoked, the Court permitted the government to submit ex parte materials, but only if it also "disclose[d] the general substance of the submission to Pollard's counsel" and included "an explanation of the reason Pollard's counsel was determined not to need to know the information contained in the submission." (Id. at 20.)

In the end, the government did not submit any ex parte evidence to the Court for review. (ECF Nos. 56-59.) Respondents noted their disagreement with the Court's memorandum opinion and order, but argued that an ex parte submission was not necessary in light of the letters submitted to the Parole Commission by Director Clapper and a public declaration of Jennifer L. Hudson, Director of the Information Management Division for the Office of the Director of National Intelligence. (ECF No. 56.) Hudson's declaration stated that "certain information believed to have been compromised by Mr. Pollard remains currently

and properly classified at the Top Secret and Secret levels." (ECF No. 59 at 6.) The declaration further explained that disclosure of some of the information Pollard is believed to have accessed "holds the potential of revealing intelligence collection methods and techniques … still in use by the Intelligence Community today," including the identity of human sources of intelligence. (Id. at 7-8.)

Pollard submitted a reply in support of his renewed petition on July 7, 2016, and the Court heard oral argument from both parties on July 22, 2016.

II. LEGAL STANDARDS

A. Parole Statutes and Regulations

A prisoner who is granted parole "remain[s] in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which such parolee was sentenced." 18 U.S.C. § 4210(a). It has been described, by both the Supreme Court and other courts, as "closely analogous to supervised release following imprisonment." Johnson v. United States, 529 U.S. 694, 710-711 (2000). However, while courts impose terms of supervised release, see 18 U.S.C. § 3583, parole decisions are committed to the exclusive discretion and jurisdiction of the United States Parole Commission. 18 U.S.C. §§ 4206, 4209. Although federal parole was abolished for later-sentenced individuals in 1984, the Parole Commission retains jurisdiction over inmates who committed a federal offense before November 1, 1987. Comprehensive Crime Control Act of 1984 (Pub. L. 98-473, Oct. 12, 1984).

Federal statutes and regulations in place at the time of Pollard's unlawful conduct and sentencing created a regime for the imposition of conditions of parole for federal parolees. Under 18 U.S.C. § 4209(a), the Parole Commission is required to impose certain conditions and further authorized to "impose or modify other conditions of parole to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense; and (2) the history and characteristics of the parolee." The same statute further authorizes the Commission to "provide for such supervision and other limitations as are reasonable to protect the public welfare."

Federal regulations require that special conditions of release be "reasonably related to the nature and circumstances of [the parolee's] offense or [the parolee's] history and characteristics, and at least one of" three purposes: the need for individual deterrence; protecting the public from further crimes; or the parolee's need for training, treatment, or care. 28 C.F.R. § 2.40(b). The Parole Commission "will also consider whether the condition involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence of criminal conduct, protection of the public from crime and offender rehabilitation." Id.

B. Judicial Review of Special Conditions of Parole

"Federal court review of parole commission decisions is extremely limited, because the commission has been granted broad discretion to determine parole eligibility." Bialkin v. Baer, 719 F.2d 590, 593 (2d Cir. 1983) (citing 18 U.S.C. § 4218(d)). Courts apply the same deferential standard when a parolee challenges

special conditions imposed by the Commission. LoFranco v. United States Parole Comm'n, 986 F. Supp. 796, 803-04 (S.D.N.Y. 1997). "The appropriate standard for review of the commission's decisions is whether there has been an abuse of discretion. This means that a court may not substitute its own judgment for that of the commission, but may consider only whether there is a rational basis for the commission's decision." Bialkin, 719 F.2d at 593 (internal citations omitted).

"The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Morrissey v. Brewer, 408 U.S. 471, 477 (1972). Those rules "restrict [parolees'] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." Id. Indeed, the Second Circuit has held that just as "the Government can infringe the [constitutional] rights of prisoners so long as the restrictions are reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment," so too can the government impose substantial, otherwise-impermissible restrictions "when a convict is conditionally released on parole" without violating the Constitution. Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972).

Nonetheless, the Commission must comport with the statutes and regulations which govern its discretion, and "the Court may review constitutional claims arising from Parole Commission actions." LoFranco, 986 F. Supp. at 804 n.7 (citing Billiteri v. United States Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976)). In the analogous circumstance of an appellate court's review of a district court's

imposition of special conditions of supervised release, the Second Circuit has "cautioned that [it] will 'carefully scrutinize unusual and severe conditions.'" United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (quoting United States v. Doe, 79 F.3d 1309, 1319 (2d Cir. 1996)).

Courts lack statutory authority to amend conditions of parole. See 18 U.S.C. §§ 4201-18. Therefore, where courts determine that a challenge condition does not pass judicial review, the appropriate course of action is to remand the condition to the Parole Commission for further consideration and proper action. See Billiteri, 541 F.2d at 946; LoFranco, 986 F. Supp. at 811.

C. Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA") provides that the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

As a threshold matter, a religious objector who invokes RFRA has the burden to show "a substantial burden on their exercise of religion." Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 216 (2d Cir. 2015), vacated, 2016 WL 816249 (U.S. May 23, 2016) (citing City of Boerne v. P.F. Flores, 521 U.S. 507, 533 (1997)). "If the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter." Id. (alteration omitted) (quoting Priests for Life v. United States Dep't of Health & Human Servs., 772 F.3d 229, 244 (D.C. Cir. 2014)). A

substantial burden exists where the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996). "[W]hether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question of fact." Catholic Health Sys., 796 F.3d at 217 (quoting Priests for Life, 772 F.3d at 247.)

III. ANALYSIS

A. The Special Conditions Are Supported By A Rational Basis And Are Valid Exercises Of The Parole Commission's Discretion

Pollard's primary challenge to the three special conditions at issue is that they do not comport with the relevant federal statutes and regulations which guide and limit the Parole Commission's discretion to set special conditions of parole and the Probation Office's discretion to achieve those conditions. The Court's review of such a challenge is appropriately limited to the question of whether the Commission abused its discretion by acting without a rational basis for its decision. Bialkin v. Baer, 719 F.2d 590, 593 (2d Cir. 1983). None of the three special conditions Pollard challenges were adopted without a rational basis in the record.

1. Computer Monitoring

The first special condition Pollard challenges is the requirement that he consent to the Probation Office installing monitoring software on, and periodically examining, any personal computer, work computer, and smartphone he uses. The Probation Office for the Southern District of New York "currently supervises … approximately 46 individuals who are subject to monitoring of their computers or other electronic devices." (ECF No. 58, ¶ 22.)

The Parole Commission's March 2, 2016 Notice of Action presented significant reasoning in support of the computer monitoring condition. The Commission focused on "minimizing the risk that you will engage in criminal behavior by disclosing classified information to unauthorized sources" and ensuring "compliance with your plea agreement." (ECF No. 38, Exh. G at 3.) This focus was, as the Commission noted, "reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender and the purposes of criminal sentencing under 18 U.S.C. § 3553 to: (1) deter the offender from further criminal conduct and to; (2) protect the public from further crimes." (Id.)

The Notice explained the basis for the Commission's concerns and the reasons it believed the computer monitoring condition helped to address them. The Commission noted that, in addition to the fact that Pollard's original offense centered on unauthorized disclosure of secret intelligence, Pollard had also engaged in subsequent conduct that raised concerns. For example, he had violated a gag order by speaking with a journalist about his case while he was awaiting sentencing. (Id.) He had also sent at least 14 letters during his first seven years of imprisonment that Navy intelligence censors deemed to contain classified information, in contravention of both the law and Pollard's plea agreement. (Id.)

Pollard argues that the Commission erred by considering these factors because the gag order violation was considered by the sentencing judge and because the letters simply demonstrated Pollard's compliance with the screening program in place for his communications from prison. Neither argument is persuasive. The

statute governing the Commission's authority to set special conditions does not limit the timeframe the Commission should consider in evaluating "the history and characteristics of the parolee," 18 U.S.C. § 4209(a)(2), and indeed the Commission is directed to consider a number of sources that predate a parolee's incarceration, including presentence investigation reports and the recommendations of the sentencing judge. 18 U.S.C. § 4207(3)-(4). Similarly, the fact that there are multiple potential explanations for the presence of classified information in Pollard's letters is not a strike against the Commission's rationality or discretion. The Court is not tasked with evaluating which of several competing inferences the Parole Commission should have drawn from a particular piece of evidence, but is instead only concerned with whether there is a rational basis for the inference the Commission drew. Bialkin v. Baer, 719 F.2d 590, 593 (2d Cir. 1983) ("[A] court may not substitute its own judgment for that of the commission." (citing Zannino v. Arnold, 531 F.2d 687, 691 (3d Cir. 1976))).

The Commission also addressed what it labeled Pollard's "recent propensity to dissemble." (ECF No. 38, Exh. G at 4.) The two pieces of evidence the Commission cited in support of this concern were Pollard's original statement that he had secured employment and later retraction in light of the special conditions of parole and Pollard's consistent representation of himself "as a 'White Knight' for Israel," which the Commission determined was inconsistent with evidence he had passed or attempted to pass intelligence to non-Israeli entities. (Id.)

Pollard argues that the Parole Commission's interpretation of the events surrounding Pollard's offer of employment was "illogical" and the result of "cynicism." (ECF No. 37 at 15.) But this argument is an invitation for the Court to replace the Commission's credibility determination with its own, which is precisely what courts are directed not to do in evaluating habeas petitions like this one. Iuteri v. Nardoza, 732 F.2d 32, 38 n.5 (2d Cir. 1984). The Court cannot conclude that the Commission's interpretation of the evidence before it on this point was an irrational abuse of discretion.

Pollard also advances a broader argument against the computer monitoring condition: that he is no threat to disclose classified information because he retains no information that would in fact be dangerous to release. Pollard has consistently advanced this position in connection with his parole, including through the submission of letters from government officials active in the intelligence community at the time of Pollard's offense who affirmed that the intelligence he accessed "would have no value to anyone today." (ECF No. 3, Exhs. C & D.)

Pollard's view is inconsistent with the letter submitted by Director Clapper, which was before the Parole Commission, and the declaration of Director Hudson, which was not. Clapper's letter stated that elements of the United States Intelligence Community had "confirmed that certain information compromised by Mr. Pollard remains currently and properly classified at the Top Secret and Secret levels. As such, future unauthorized disclosure of this information could risk harm to our national security." (ECF No. 38, Exh. D.) Hudson's declaration describes

similar concerns about "certain information believed to have been compromised by Mr. Pollard," which it explains could harm the country by "revealing intelligence collection methods and techniques" that are still in use, as well as the identities of human sources of intelligence. (ECF No. 59, ¶¶ 10-12.)

The Commission was certainly within its discretion to credit Director Clapper's characterization of the intelligence Pollard compromised over the characterization advanced by Pollard's preferred sources. The Hudson declaration persuasively advanced multiple theories for the continued value of the intelligence, including the theory that even if the specific intelligence Pollard accessed was no longer relevant, it could nonetheless reveal sources, methods, and techniques. The Parole Commission could properly and rationally determine that this basis was adequate to accept Director Clapper's view, and did not err by so doing.

Nor is the Court persuaded that the government's decision not to submit particular examples of compromised intelligence for the Court's ex parte review indicates any weakness or irrationality in the view that Pollard remains a risk for disclosing classified information. It bears repeating that the Court is tasked with evaluating the decision the Parole Commission reached, not rendering a decision in the first instance, and the Parole Commission's members "do not carry secret or top secret clearances, and do not review classified information in handling parole cases." (ECF No. 57 ¶ 17.) Thus, while the Court at various points indicated its willingness to directly consider examples of the intelligence at issue, it never suggested that such a review was necessary to decide Pollard's petition. (ECF Nos.

40, 51.) Placing too much weight on the Court's own survey of the compromised documents at issue risks both overstepping the limited scope of judicial review of Parole Commission decisions, Bialkin, 719 F.2d at 593, and acting without appropriate recognition "that information which appears harmless to the untrained judicial eye can be useful information to a sophisticated intelligence analyst." Nat'l Lawyers Guild v. Attorney General, 96 F.R.D. 390, 401 n.21 (S.D.N.Y. 1982) (internal quotation marks omitted).

Pollard also argues that Director Hudson's referenced to "information believed to have been compromised" (ECF No. 59 ¶ 10) is a hedge because the government "should easily have been able to identify the specific documents Mr. Pollard actually accessed." (ECF No. 62 at 6.) Pollard's argument on this point depends on a number of documents in which government officials reference particular materials Pollard compromised and the reconstruction of an "inventory of compromised material." (Id., quoting ECF No. 64 Exh. D.) However, it does not follow from the fact that the government knows much, or even most, of the information Pollard accessed that it can identify all such information; even the documents Pollard quotes in support of his argument reference "approximate numbers of compromised, published documents," not exact figures. (Id. (emphasis added).) The existence of some uncertainty does not render the government's submissions nor the Parole Commission's determinations fatally flawed.

Pollard's final argument against the computer monitoring condition is that it fails to achieve its aims and is thus irrational and not reasonable related to

deterrence or the prevention of future crimes. (ECF No. 37 at 11-12.) The Court cannot agree. The Parole Commission may properly act "[a]s long as there is a reasonable nexus between the special condition of release and the crime for which the individual was convicted." LoFranco v. United States Parole Comm'n, 986 F. Supp. 796, 804 (S.D.N.Y. 1997). Pollard argues that his offense did not involve computers and in fact predated the internet, but the government persuasively responds that his offense involved the distribution of information, an activity most efficiently accomplished using a computer in today's society. The devices that will be monitored are those Pollard is most likely to use for extended periods of time. They are also those which Pollard can use without raising any questions about his activities; in this, the monitored devices are unlike, to take an example raised at oral argument, the computers at an internet café, which Pollard's probation officers could know he visited by monitoring his GPS device. The computer monitoring condition, therefore, tends to deter further disclosure and protect the public from further crimes. 18 U.S.C. § 4209(a). Pollard's argument that unless the government fully prevents him from speaking without monitoring it must also permit him to use a computer without monitoring proves too much, particularly in light of the regulatory direction that the Parole Commission "consider whether the condition involves no greater deprivation of liberty than is reasonably necessary." 28 C.F.R. § 2.40(b).

The Court concludes that the Parole Commission did not abuse its discretion or act without a rational basis in imposing the computer monitoring condition.

2. GPS Monitoring

The second special condition Pollard challenges is the requirement that he wear a GPS monitoring device at all times. Monitoring by an electronic signaling device is explicitly anticipated by the Parole Commission's statutory authority to impose special conditions. See 18 U.S.C. § 4209(c)(2). The Probation Office for the Southern District of New York "currently supervises over 85 individuals who are subject to location monitoring," including Pollard. (ECF No. 58, ¶ 22.)

The Parole Commission's March 2, 2016 Notice of Action presented significant explanation of its reasoning in support of the GPS monitoring condition. The Commission focused on "minimizing the risk that you will flee the country and engage in further criminal acts." (ECF No. 38, Exh. G at 1.) This focus was, as the Commission noted, "reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender and the purposes of criminal sentencing under 18 U.S.C. § 3553 to: (1) deter the offender from further criminal conduct and to; (2) protect the public from further crimes." (Id.)

The Commission noted a number of evidentiary bases for its concerns as to flight. First, it surveyed the deceptive nature of Pollard's criminal conduct, which had involved trips abroad, false identities intended to aid further trips, and attempts to seek asylum at the Israeli embassy after he was discovered. (Id. at 1-2.) The evidence in the record before the Parole Commission supports this description of Pollard's offense. The Parole Commission's authorizing statute makes clear that the nature and circumstances of a parolee's offense, as well as other information

about the parolee's conduct before his conviction, is an appropriate basis for consideration. 18 U.S.C. §§ 4207, 4209(a)(1).

The Commission also cited more recent information suggesting a risk of flight, including Pollard's expressed desire to leave the United States for Israel and a request by members of Congress that he be allowed to do so. (ECF No. 38, Exh. G at 1-2.) Pollard has strenuously argued that these items only sought permission to take a legal action were an inappropriate basis for the GPS monitoring condition. However, there is no requirement that the Commission only consider evidence of criminal conduct or conspiracies; instead, it is tasked with crafting conditions which reasonably relate to Pollard's history and characteristics. 18 U.S.C. § 4209(a)(2). Pollard identifies no principle of law that suggests that a non-criminal characteristic cannot be considered, nor would such a principle be consistent with the goals and broad discretion of the Parole Commission.

In further explanation of its reasons for imposing GPS monitoring, the Commission also noted Pollard's propensity to violate binding conditions, including a gag order, and explained that the information he had compromised "remains classified at the Top Secret and Secret levels." (ECF No. 38, Exh. G at 2.) As discussed more fully above in connection with the computer monitoring condition, these considerations are valid and serious bases on which the Commission was permitted to act. The fact that Pollard accessed information the disclosure of which "could risk harm to the national security of the United States" increases the peril

associated with his risk of flight and provides logical reinforcement for efforts aimed at minimizing that risk.

Although he has been paroled, Pollard remains in the custody of the United States Attorney General for the rest of his life sentence. 18 U.S.C. § 4210(a). Any effort to leave the country would be inconsistent with that custody and violate Pollard's parole. It would also, if successful, all but erase the United States' ability to ensure that Pollard complied with the terms of his plea agreement and committed no further crimes, including disclosure of information that remains classified. The evidentiary record and the Parole Commission's explanations directly connect these concerns to the imposition of the GPS monitoring condition. Accordingly, this condition is supported by a more than rational basis and its inclusion in Pollard's conditions of parole does not amount to an abuse of the Commission's discretion.

3. Curfew

Pollard also challenges the Probation Office's imposition of a curfew as irrationally unrelated to the governing statutes and regulations. As discussed above, Pollard is subject to a 7:00 p.m. to 7:00 a.m. curfew, with the exception of Friday nights when he may be out of his apartment until 11:00 p.m. and Saturday mornings, when he may leave his apartment starting at 6:00 a.m. (ECF No. 20, ¶ 19.)

As discussed above, the record that has been compiled from the time of Pollard's offense through today demonstrates that it is rational and appropriate to

minimize the risk that he will either disclose information without authorization or flee the United States. By restricting Pollard's movements to particular times, the curfew condition assists the Probation Office's monitoring efforts and thereby contributes to the minimization of those risks. The twelve-hour curfew to which Pollard is subject most days of the week is "the most commonly imposed curfew condition for newly paroled individuals." (ECF No. 58, ¶ 15.) In addition, the Probation Office has already modified it once and has committed to permit further modifications where appropriate, a recourse Pollard has not sought since December 2015. (Id. ¶¶ 15-17.) The record as a whole thus demonstrates that the imposition of a curfew was not irrational, arbitrary, or otherwise an abuse of discretion.

B. The Special Conditions Do Not Violate The Constitution

Pollard's renewed petition does not assert a constitutional challenge to the special conditions imposed by the Parole Commission and Probation Office, nor did Pollard's counsel advance such an argument at oral argument on the renewed petition. (ECF Nos. 37, 62.) However, Pollard does include a footnote in his memorandum of law in support of his renewed petition which assets that the instant motion "is made on all prior pleadings and filings to date." (ECF No. 37 at 18 n.4.) Pollard's original submissions did advance constitutional challenges. (ECF Nos. 4, 11-1.) The Court therefore addresses these additional challenges.

Pollard's first constitutional argument is that the GPS monitoring condition and curfew violate various rights enshrined in the Constitution to the extent they restrict his right to move freely within this district and impair his career. However,

there is no evidence in the record that the conditions actually interfere with travel in this district or Pollard's employment; the former concern is seemingly based on the incorrect view that GPS monitoring prohibits subway travel, while the latter is pure conjecture in the absence of more specific factual allegations. Moreover, the liberty to which parolees are entitled is not absolute, but is instead conditional and dependent on the observance of special restrictions. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Thus, even if a travel restriction was the effect, that fact would not demonstrate a constitutional violation. Pena v. Travis, No. 01 Civ. 8534 SAS, 2002 WL 31886175, at *12 n.5 (S.D.N.Y. Dec. 27, 2002).

Pollard's second constitutional argument is that the computer and GPS monitoring conditions violate the Fourth Amendment unless they are "narrowly tailored and bear a close and substantial relation to the government's interest in pursuing the searches." (ECF No. 11-1 ¶¶ 66, 73.) This is not an accurate statement of the law as it applies to parolees like Pollard after Samson v. California, 547 U.S. 843 (2006). Pollard's argument relies on cases either decided before Samson or interpreting a statutorily, rather than constitutionally, imposed narrow tailoring requirement that applies to supervised release but not parole. See, e.g., United States v. Malenya, 736 F.3d 554, 559-60 (D.C. Cir. 2013) ("Section 3583(d)(2) is thus, as the Seventh Circuit put it, a 'narrow tailoring requirement.'" (quoting United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003))).

Pollard's constitutional argument relies most heavily on United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004). In that case, the Second Circuit considered a

Fourth Amendment challenge to a computer monitoring and filtering condition that was imposed as part of a three year term of probation following a guilty plea to one count of receiving child pornography. Id. at 176-77. The Lifshitz court evaluated this condition of probation under the "special needs" doctrine. Id. at 179 (citing Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)). It concluded that this doctrine permitted suspicionless searches of the probationer's computer, but that to comply with the Fourth Amendment "the monitoring condition must be narrowly tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net," and "the means employed must bear a 'close and substantial relation' to the government's interest in pursuing the search." Id. at 190, 192 (quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 676 (1989)). Because there was "very little information in the record about what kind of monitoring the probation condition authorize[d]," id. at 190, the Second Circuit remanded for further consideration of whether the condition was "overbroad" and "whether or not monitoring is sufficiently effective to justify its implementation." Id. at 193.

Subsequently, in Samson, the Supreme Court upheld a California statute which permitted suspicionless searches of parolees. Samson, 547 U.S. at 846. The Court focused on the nature of parole, "release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Id. at 850 (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)). Because California plainly conditioned parolees' release on his agreement to be searched without a warrant or reasonable suspicion, the Court "conclude[d]

that petitioner did not have an expectation of privacy that society would recognize as legitimate." Id. at 852. The Samson Court explicitly declined to invoke the special need doctrine, reasoning that its "holding under general Fourth Amendment principles renders such an examination unnecessary." Id. at 852 n.3.

After Samson, the Second Circuit has limited its approval of suspicionless searches to parolees, rather than probationers. "Parole is meted out in addition to, not in lieu of, incarceration.... On the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers." United States v. Grimes, 225 F.3d 254, 258 (2d Cir. 2000) (quoting United States v. Cardona, 903 F.2d 60, 63 (1st Cir. 1990)). In United States v. Amerson, 483 F.3d 73 (2d Cir. 2007), the Second Circuit noted that the Samson Court had distinguished between the privacy interests of parolees and probationers, and thus concluded that it "must follow Lifshitz and apply the special-needs test to … suspicionless searches of probationers." Id. at 79 (emphasis added).

The necessary implication of the Amerson Court's distinction between parolees and probationers in evaluating the reach of Samson is that searches of parolees are no longer evaluated according to the Lifshitz test. Where the Second Circuit has evaluated parolee search conditions using the special needs doctrine after Amerson, it has always noted that it does so because meeting that standard necessarily means the search at issue "would have also satisfied the lower bar imposed" by the special needs doctrine. United States v. Barner, 666 F.3d 79, 86

(2d Cir. 2012) (quoting United States v. Watts, 301 F. App'x 39, 42 n.2 (2d Cir. 2008)).

So too here. The goals and reasoning laid out in the statutory and regulatory scheme for federal parole and the Parole Commission's March 2, 2016 Notice of Action provide a special need to monitor Pollard's computer activities; as discussed above, the monitoring is reasonably related to the characteristics of Pollard and his crime. The specific monitoring need is wide-spread; unlike parolees or probationers convicted of possessing child pornography, there are not certain categories of files or programs which require governmental supervision while others could logically be exempt. Instead, the potential risk could come through any number of communicative methods, programs, or features; notably, Pollard has not suggested how this condition could be limited while still maintaining its purpose and efficacy.

The Court therefore finds that as a special need, and certainly as a clearly communicated condition of parole, the computer monitoring condition does not offend the Fourth Amendment. See Samson, 547 U.S. at 852; Barner, 666 F.3d at 86.

C. The GPS Monitoring Condition Does Not Substantially Burden Pollard's Religious Exercise

Pollard's final argument is that the requirement that he wear a GPS monitoring device which must be periodically charged violates RFRA because it burdens his efforts to observe and celebrate the Sabbath and other religious holidays without being the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. However, this challenge fails, as

Pollard has not carried his initial burden of demonstrating a substantial burden on his religious exercise. See City of Boerne v. P.F. Flores, 521 U.S. 507, 533 (1997).

The Court accepts Pollard's statement that during the Sabbath, which lasts 25 hours, the tenets of his Jewish faith prohibit him from either inserting a plug into an outlet to charge the batteries that power his location monitor or swapping out those batteries for previously charged ones. (ECF No. 6 ¶¶ 6-9, 14.) Certain Jewish holidays, during which the same prohibitions apply, last up to 49 or 73 hours. (Id.) And group worship is an integral portion of Pollard's faith. (Id. ¶¶ 11-12.)

The question posed by a RFRA challenge, however, is whether the GPS monitoring condition "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996). There is no indication that it does. According to the uncontroverted declarations of the Chief United States Probation Officer for this district, the monitoring device Pollard wears can maintain a charge for 80 hours when close to its base station (i.e., when Pollard is at home) and for "well over 24 hours" when away from the base station. (ECF No. 58 ¶ 10.) Thus, there is no basis in the record to conclude that the monitor would power down even if Pollard were away from the base charger for the entirety of a 25-hour Sabbath (currently impermissible in light of his curfew restrictions).

Moreover, the history of the eight months Pollard has spent on parole while subject to the GPS monitoring condition further undercuts the argument that this

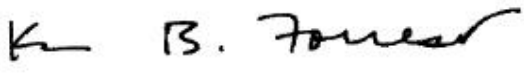
special condition violates RFRA. The uncontroverted evidence is that Pollard "has never reported to the USPO-SDNY that his GPS device has lost its charge during the Sabbath, or at any other time." (Id. ¶ 12.) On one occasion Pollard informed the Probation Office before the start of the Sabbath that his charger was not working, but "the charge lasted for well over 24 hours and did not run out during the Sabbath." (Id.) Simply put, Pollard has not identified any aspect of his religious exercise which has in fact been hindered or burdened by the charging capabilities of his location monitor. Accordingly, "that is the end of the matter." Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 216 (2d Cir. 2015), vacated, 2016 WL 816249 (U.S. May 23, 2016) (quoting Priests for Life v. United States Dep't of Health & Human Servs., 772 F.3d 229, 244 (D.C. Cir. 2014)).

IV. CONCLUSION

For the reasons stated above, Pollard's petition is DENIED. The Clerk of Court is directed to terminate the motions at docket nos. 1, 11-1, and 36, and to terminate this matter.

SO ORDERED.

Dated: New York, New York
August 11, 2016



KATHERINE B. FORREST
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN J. POLLARD,

Petitioner,

-against-

UNITED STATES PAROLE COMMISSION; J. PATRICIA WILSON SMOOT, solely in her capacity as Chair of the United States Parole Commission; UNITED STATES PROBATION OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK; MICHAEL J. FITZPATRICK, solely in his capacity as Chief U.S. Probation Officer,

Respondents.

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15 **CIVIL** 9131 (KBF)

JUDGMENT

In this action, Petitioner Jonathan J. Pollard challenges certain special conditions imposed by Respondent United States Parole Commission and implemented by Respondent United States Probation Office, and the matter having been submitted to the Honorable Katherine B. Forrest, United States District Judge, and the Court, on August 11, 2016, having rendered its Opinion & Order denying Pollard's petition and directing the Clerk of Court is directed to terminate the motions at docket nos. 1, 11-1, and 36, and to terminate this matter, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order dated August 11, 2016, Pollard's petition is denied; accordingly, the case closed.

DATED: New York, New York
August 12, 2016

RUBY J. KRAJICK

Clerk of Court

BY: _____

Deputy Clerk

18 USCS § 3583

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 **>** ***TITLE 18. CRIMES AND CRIMINAL PROCEDURE*** **>** ***PART II. CRIMINAL PROCEDURE*** **>** ***CHAPTER 227. SENTENCES*** **>** ***SUBCHAPTER D. IMPRISONMENT***

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [*18 USCS § 3561(b)*].

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are--

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [*18 USCS § 3561(b)*] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [*42 USCS § 14135a*]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry

techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [*18 USCS § 3583(g)*] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), and (a)(2)(D)];

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [*18 USCS § 3553(a)(2)(B)*, (a)(2)(C), and (a)(2)(D)]; and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to *28 U.S.C. 994(a)*;

any condition set forth as a discretionary condition of probation in section 3563(b) [*18 USCS § 3563(b)*] and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) [28 USCS § 3563(b)(10)] shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) [*18 USCS § 3583(e)(2)*] and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this *title [18 USCS § 921*], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [*18 USCS § 2332b(g)(5)(B)*] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [*18 USCS § 1201*] involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [*18 USCS § 1591*, *1594(c)*, *2241*, *2242*, *2244(a)(1)*, *2244(a)(2)*, *2251*, *2251A*, *2252*, *2252A*, *2260*, *2421*, *2422*, *2423*, or *2425*], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [*18 USCS §§ 2241* et seq., *2251* et seq., *2421* et seq., *1201*, or *1591*], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

History

(Added Oct. 12, 1984,*P.L. 98-473*, Title II, Ch II, § 212(a)(2), *98 Stat. 1999*; Oct. 27, 1986, *P.L. 99-570*, Title I, Subtitle A, § 1006(a)(1)-(3), *100 Stat. 3207*-6; Nov. 10, 1986, *P.L. 99-646*, § 14(a), *100 Stat. 3594*; Dec. 7, 1987, *P.L. 100-182*, §§ 8, 9, 12, 25, *101 Stat. 1267*, 1268, 1272; Nov. 18, 1988, *P.L. 100-690*, Title VII, Subtitle C, § 7108, Subtitle G, §§ 7303(b), 7305(b), *102 Stat. 4418*, 4464, 4465; Nov. 29, 1990, *P.L. 101-647*, Title XXXV, § 3589, *104 Stat. 4930*; Sept. 13, 1994, *P.L. 103-322*, Title II, Subtitle D, § 20414(c), Title XI, Subtitle E, § 110505, Title XXXII, Subtitle I, § 320921(c), *108 Stat. 1831*, 2016, 2130; Nov. 26, 1997, *P.L. 105-119*, Title I, § 115(a)(8)(B)(iv), *111 Stat. 2466*; Dec. 19, 2000, *P.L. 106-546*, § 7(b), *114 Stat. 2734*; Oct. 26, 2001, *P.L. 107-56*, Title VIII, § 812, *115 Stat. 382*; Nov. 2, 2002, *P.L. 107-273*, Div B, Title II, Subtitle A, § 2103(b), Title III, § 3007, *116 Stat. 1793*, 1806; April 30, 2003, *P.L. 108-21*, Title I, § 101, *117 Stat. 651*; March 9, 2006, *P.L. 109-177*, Title II, Subtitle A, § 212, *120 Stat. 230*; July 27, 2006, *P.L. 109-248*, Title I, Subtitle B, § 141(e), Title II, § 210(b), *120 Stat. 603*, 615.)

(As amended Oct. 13, 2008,*P.L. 110-406*, § 14(b), *122 Stat. 4294*, May 29, 2015, *P.L. 114-22*, Title I, § 114(d), *129 Stat. 242*.)

UNITED STATES CODE SERVICE

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18 USCS § 4206

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART III. PRISONS AND PRISONERS > CHAPTER 311. PAROLE [REPEALED]

[§ 4206. Repealed (Caution: For continuation of this section as to certain individuals and terms of imprisonment, see § 235(b) of Act Oct. 12, 1984, P.L. 98-473, and provisions extending the Parole Commission, which appear as notes to 18 USCS § 3551.)]

Annotations

Notes

This section (Act March 15, 1976, P.L. 94-233, § 2, 90 Stat. 223) was repealed by Act Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 218(a)(5), 98 Stat. 2027, effective on the first day of the first calendar month beginning 36 months after enactment as provided by § 235(a)(1) of such Act, as amended, which appears as 18 USCS § 3551 note. For continuation of this section as to certain individuals and terms of imprisonment, see § 235(b) of Act Oct. 12, 1984, P.L. 98-473, and provisions extending the Parole Commission, which appear as notes to 18 USCS § 3551.

Such section read:

"§ 4206. Parole determination criteria

"(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

"(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

"(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

"(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

"(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing:

Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

"(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.".

A prior § 4206 (Act June 25, 1948, ch 645, § 1, *62 Stat. 855*), was repealed in the general revision of this chapter by Act March 15, 1976, *P.L. 94-233*, § 2, *90 Stat. 223*. Such section provided for the authority of Federal officers of penal or correctional institutions to execute parole violation warrants.

18 USCS § 4209

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART III. PRISONS AND PRISONERS > CHAPTER 311. PAROLE [REPEALED]

[§ 4209. Repealed (Caution: For continuation of this section as to certain individuals and terms of imprisonment, see § 235(b) of Act Oct. 12, 1984, P.L. 98-473, and provisions extending the Parole Commission, which appear as notes to 18 USCS § 3551.)]

Annotations

Notes

This section (Act March 15, 1976, P.L. 94-233, § 2, 90 Stat. 225; Oct. 12, 1984, P.L. 98-473, Title II, §§ 235(a)(1), 238(e), (i), 98 Stat. 2031, 2039; Oct. 30, 1984, P.L. 98-596, §§ 7, 12(a)(5), (9), (b), 98 Stat. 3138, 3139; Nov. 10, 1986, P.L. 99-646, § 58(c), 100 Stat. 3612; Nov. 10, 1988, P.L. 100-690, Title VII, Subtitle G, §§ 7303(c)(1), (2), 7305(c), 102 Stat. 4464, 4466; Sept. 13, 1994, P.L. 103-322, Title II, Subtitle D, § 20414(d), 108 Stat. 1832; Nov. 26, 1997, P.L. 105-119, Title I, § 115(a)(8)(B)(v), 111 Stat. 2466; Dec. 19, 2000, P.L. 106-546, § 7(c), 114 Stat. 2734; July 27, 2006, P.L. 109-248, Title I, Subtitle B, § 141(j), 120 Stat. 604) was repealed by Act Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 218(a)(5), 98 Stat. 2027, effective on the first day of the first calendar month beginning 36 months after enactment as provided by § 235(a)(1) of such Act, as amended, which appears as 18 USCS § 3551 note. For continuation of this section as to certain individuals and terms of imprisonment, see § 235(b) of Act Oct. 12, 1984, P.L. 98-473, and provisions extending the Parole Commission, which appear as notes to 18 USCS § 3551.

Such section read:

"§ 4209. Conditions of parole

"(a) In every case, the Commission shall impose as conditions of parole that the parolee not commit another Federal, State, or local crime, that the parolee not possess illegal controlled substances[.] and, if a fine was imposed, that the parolee make a diligent effort to pay the fine in accordance with the judgment. In every case, the Commission shall impose as a condition of parole for a person required to register under the Sex Offender Registration and Notification Act [42 USCS §§ 16901 et seq., generally; for full classification, consult USCS Tables volumes] that the person comply with the requirements of that Act. In every case, the Commission shall impose as a condition of parole that the parolee cooperate in the collection of a DNA sample from the parolee, if the collection of such a sample is authorized pursuant to section 3 or section 4 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a or § 14135b] or section 1565 of title 10. In every case, the Commission shall also impose as a condition of

parole that the parolee pass a drug test prior to release and refrain from any unlawful use of a controlled substance and submit to at least 2 periodic drug tests (as determined by the Commission) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the Commission for any individual parolee if it determines that there is good cause for doing so. The results of a drug test administered in accordance with the provisions of the preceding sentence shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The Commission shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 4214(f) when considering any action against a defendant who fails a drug test. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to--

"(1) the nature and circumstances of the offense; and

"(2) the history and characteristics of the parolee;

and may provide for such supervision and other limitations as are reasonable to protect the public welfare.

"(b) The conditions of parole should be sufficiently specific to serve as a guide to supervision and conduct, and upon release on parole the parolee shall be given a certificate setting forth the conditions of his parole. An effort shall be made to make certain that the parolee understands the conditions of his parole.

"(c) Release on parole or release as if on parole (or probation, or supervised release where applicable) may as a condition of such release require--

"(1) a parolee to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of such parole; or

"(2) a parolee to remain at his place of residence during nonworking hours and, if the Commission so directs, to have compliance with this condition monitored by telephone or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration.

"A parolee residing in a residential community treatment center pursuant to paragraph (1) of this subsection may be required to pay such costs incident to such residence as the Commission deems appropriate.

"(d)

(1) The Commission may modify conditions of parole pursuant to this section on its own motion, or on the motion of a United States probation officer supervising a parolee: *Provided,* That the parolee receives notice of such action and has ten days after receipt of such notice to

express his views on the proposed modification. Following such ten-day period, the Commission shall have twenty-one days, exclusive of holidays, to act upon such motion or application. Notwithstanding any other provision of this paragraph, the Commission may modify conditions of parole, without regard to such ten-day period, on any such motion if the Commission determines that the immediate modification of conditions of parole is required to prevent harm to the parolee or to the public.

"(2) A parolee may petition the Commission on his own behalf for a modification of conditions pursuant to this section.

"(3) The provisions of this subsection shall not apply to modifications of parole conditions pursuant to a revocation proceeding under section 4214.".

A prior § 4209 (Act Aug. 25, 1958, *P.L. 85-752*, § 4, *72 Stat. 846*), was repealed in the general revision of this chapter by Act March 15, 1976, *P.L. 94-233*, § 2, *90 Stat. 225*. Such section provided for treatment of a defendant as a young adult offender.

28 USCS § 2241

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART VI. PARTICULAR PROCEEDINGS > CHAPTER 153. HABEAS CORPUS

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (*10 U.S.C. 801* note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

History

(June 25, 1948, ch 646,*62 Stat. 964*; May 24, 1949, ch 139, § 112, *63 Stat. 105*; Sept. 19, 1966, *P.L. 89-590*, *80 Stat. 811*; Dec. 30, 2005, *P.L. 109-148*, Div A, Title X, § 1005(e)(1), *119 Stat. 2742*; Jan. 6, 2006, *P.L. 109-163*, Div A, Title XIV, § 1405(e)(1), *119 Stat. 3477*; Oct. 17, 2006, *P.L. 109-366*, § 7(a), *120 Stat. 2635*; Jan. 28, 2008, *P.L. 110-181*, Div A, Title X, Subtitle F, § 1063(f), *122 Stat. 323*.)

Prior law and revision:

1948 Act

Based on *title 28, U.S.C., 1940 ed., §§ 451*, *452*, *453* (R.S. §§ 751, 752, 753; March 3, 1911, ch 231, § 291, *36 Stat. 1167*; Feb. 13, 1925, ch 229, § 6, *43 Stat. 940*).

Section consolidates sections 451, 452 and 453 of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in former *28 USCS § 452* were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices shall not be burdened with applications for writs cognizable in the district courts.

1949 Act

This section inserts commas in certain parts of the text of subsection (b) of *section 2241 of title 28, U.S.C.*, for the purpose of proper punctuation.

UNITED STATES CODE SERVICE

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28 USCS § 2241

Current through PL 114-244, approved 10/14/16

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART VI. PARTICULAR PROCEEDINGS > CHAPTER 153. HABEAS CORPUS

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(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

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(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

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History

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1949 Act

This section inserts commas in certain parts of the text of subsection (b) of *section 2241 of title 28, U.S.C.*, for the purpose of proper punctuation.

UNITED STATES CODE SERVICE

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28 CFR 2.204

This document is current through the November 2, 2016 issue of the Federal Register

Code of Federal Regulations > ***TITLE 28 -- JUDICIAL ADMINISTRATION*** > ***CHAPTER I -- DEPARTMENT OF JUSTICE*** > ***PART 2 -- PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS, AND JUVENILE DELINQUENTS*** > ***SUBPART D -- DISTRICT OF COLUMBIA SUPERVISED RELEASEES***

§ 2.204 Conditions of supervised release.

(a)

(1) General conditions of release and notice by certificate of release. All persons on supervision must follow the conditions of release described in paragraphs (a)(3) through (6) of this section. These conditions are necessary to satisfy the purposes of release conditions stated in *18 U.S.C. 3583*(d) and 3553(a)(2)(B) through (D). Your certificate of release informs you of these conditions and other special conditions that we have imposed for your supervision.

(2) Refusing to sign the certificate of release does not excuse compliance. If you refuse to sign the certificate of release, you must still follow the conditions listed in the certificate.

(3) Report your arrival. After you are released from custody, you must go directly to the district named in the certificate. You must appear in person at the supervision office and report your home address to the supervision officer. If you cannot appear in person at that office within 72 hours of your release because of an emergency, you must report to the nearest CSOSA or U.S. probation office and obey the instructions given by the duty officer. If you were initially released to the custody of another authority, you must follow the procedures described in this paragraph after you are released from the custody of the other authority.

(4) Provide information to and cooperate with the supervision officer --(i) Written reports. Between the first and third day of each month, you must make a written report to the supervision officer on a form provided to you. You must also report to the supervision officer as that officer directs. You must answer the supervision officer completely and truthfully when the officer asks you for information.

(ii) Promptly inform the supervision officer of an arrest or questioning, or a change in your job or address. Within two days of your arrest or questioning by a law-enforcement officer, you must inform your supervision officer of the contact with the law-enforcement officer. You must also inform your supervision officer of a change in your employment or address within two days of the change.

(iii) Allow visits of the supervision officer. You must allow the supervision officer to visit your home and workplace.

(iv) Allow seizure of prohibited items. You must allow the supervision officer to seize any item that the officer reasonably believes is an item you are prohibited from possessing (for example, an illegal drug or a weapon), and that is in plain view in your possession, including in your home, workplace or vehicle.

(v) Take drug or alcohol tests. You must take a drug or alcohol test whenever your supervision officer orders you to take the test.

(5) Prohibited conduct --(i) Do not violate any law. You must not violate any law and must not associate with any person who is violating any law.

(ii) Do not possess a firearm or dangerous weapon. You must not possess a firearm or other dangerous weapon or ammunition.

(iii) Do not illegally possess or use a controlled substance or drink alcohol to excess. You must not illegally possess or use a controlled substance and you must not drink alcoholic beverages to excess. You must stay away from a place where a controlled substance is illegally sold, used or given away.

(iv) Do not leave the district of supervision without permission. You must not leave the district of supervision without the written permission of your supervision officer.

(v) Do not associate with a person with a criminal record. You must not associate with a person who has a criminal record without the permission of your supervision officer.

(vi) Do not act as an informant. You must not agree to act as an informant for any law-enforcement officer without the prior approval of the Commission.

(6) Additional conditions --(i) Work. You must make a good faith effort to work regularly, unless excused by your supervision officer. You must support your children and any legal dependent. You must participate in an employment-readiness program if your supervision officer directs you to do so.

(ii) Pay court-ordered obligations. You must make a good faith effort to pay any fine, restitution order, court costs or assessment or court-ordered child support or alimony payment. You must provide financial information relevant to the payment of such a financial obligation when your supervision officer asks for such information. You must cooperate with your supervision officer in setting up an installment plan to pay the obligation.

(iii) Participate in a program for preventing domestic violence. If the term of supervision results from your conviction for a domestic violence crime, and such conviction is your first conviction for such a crime, you must attend, as directed by your supervision officer, an approved offender-rehabilitation program for the prevention of domestic violence if such a program is readily available within 50 miles of your home.

(iv) Register if you are covered by a special offender registration law. You must comply with any applicable special offender registration law, for example, a law that requires you to register as a sex-offender or a gun-offender.

(v) Provide a DNA sample. You must provide a DNA sample, as directed by your supervision officer, if collection of such sample is authorized by the DNA Analysis Backlog Elimination Act of 2000.

(vi) Comply with a graduated sanction. If you are supervised by CSOSA, you must comply with the sanction(s) imposed by the supervision officer and as established by an approved schedule of graduated sanctions. We may decide to begin revocation proceedings for you even if the supervision officer has earlier imposed a graduated sanction for your alleged violation of a release condition.

(vii) Inform another person of your criminal record or personal history as directed by the supervision officer. You must inform a person of your criminal record or personal history if your supervision officer determines that your relationship or contact with this person may pose a risk of harm to this person. The supervision officer may direct you to give this notice and then confirm with the person that you obeyed the officer's direction. The supervision officer may also give the notice directly to the person.

(b)

(1) Special conditions of release. We may impose a condition of release other than a condition described in paragraphs (a)(3) through (6) of this section if we determine that imposing the condition is reasonably related to the nature and circumstances of your offense or your history and characteristics, and at least one of the following purposes of criminal sentencing: The need to deter you from criminal conduct; protection of the public from further crimes; or the need to provide you with training or correctional treatment or medical care. In choosing a condition we will also consider whether the condition involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence of criminal conduct, protection of the public from crime and offender rehabilitation.

(2) Examples. The following are examples of special conditions that we may impose--

(i) That you reside in and/or participate in a program of a community corrections center for all or part of the period of supervision;

(ii) That you participate in a drug- or alcohol-treatment program, and not use alcohol and other intoxicants at any time;

(iii) That you remain at home during hours you are not working or going to school, and have your compliance with this condition checked by telephone or an electronic signaling device; and

(iv) That you permit a supervision officer to conduct a search of your person, or of any building, vehicle or other area under your control, at such time as that supervision officer decides, and to seize any prohibited items the officer, or a person assisting the officer, may find.

(3) Participation in a drug-treatment program. If we require your participation in a drug-treatment program, you must submit to a drug test within 15 days of your release and to at least two other drug tests, as determined by your supervision officer. If we decide not to impose the special condition on drug-treatment, because available information indicates you are a low risk for substance abuse, this decision constitutes good cause for suspending the drug testing requirements of *18 U.S.C. 3583*(d).

(c)

(1) Changing conditions of release. After your release, we may change or add to the conditions of release if we decide that such action is consistent with the criteria described in paragraph (b)(1) of this section.

(2) Objecting to the proposed change. (i) We will notify you of the proposed change, the reason for the proposed change and give you 10 days from your receipt of the notice to comment on the proposed change. You can waive the 10-day comment period and agree to the proposed change. You are not entitled to the notice and 10-day comment period if:

(A) You ask for the change;

(B) We make the change as part of a revocation hearing or an expedited revocation decision; or

(C) We find that the change must be made immediately to prevent harm to you or another person.

(ii) We will make a decision on the proposed change within 21 days (excluding holidays) after the 10-day comment period ends, and notify you in writing of the decision. You may appeal our action as provided in §§ 2.26 and 2.220.

(d) Imposing special conditions for a sex offender.

(1) If your criminal record includes a conviction for a sex offense, we may impose a special condition that you undergo an evaluation for sex offender treatment, and participate in a sex offender treatment program as directed by your supervision officer. We will impose the sex offender evaluation and treatment conditions using the procedures described in paragraph (c) of this section.

(2)

(i) If your criminal record does not include a conviction for a sex offense, we may decide that the nature and circumstances of your offense or your history and characteristics show that you should be evaluated for sex offender treatment. In this case, we may impose a special condition requiring an evaluation for sex offender treatment using the procedures described in paragraph (c) of this section.

(ii) At the conclusion of the evaluation, if sex offender treatment appears warranted and you object to such treatment, we will conduct a hearing to consider whether you should be required to participate in sex offender treatment. You will be given notice of the date and time of the hearing and the subject of the hearing, disclosure of the information supporting the proposed action, the opportunity to testify concerning the proposed action and to present evidence and the testimony of witnesses, the opportunity to be represented by retained or appointed counsel and written findings regarding the decision. You will have the opportunity to confront and cross-examine persons who have given

information that is relied on for the proposed action, if you ask that these witnesses appear at the hearing, unless we find good cause for excusing the appearance of the witness.

(iii)A hearing is not required if we impose the sex offender treatment condition at your request, as part of a revocation hearing or an expedited revocation decision, or if a hearing on the need for sex offender treatment (including a revocation hearing) was conducted within 24 months of the request for the special condition.

(iv) In most cases we expect that a hearing conducted under this paragraph will be held in person with you, especially if you are supervised in the District of Columbia. But we may conduct the hearing by videoconference.

(3) Whether your criminal record includes a conviction for a sex offense or not, if we propose to impose other restrictions on your activities, we will use either the notice and comment procedures of paragraph (c) of this section or the hearing procedures of this paragraph, depending on a case-by-case evaluation of the your interest and the public interest.

(e) Application of release conditions to an absconder. If you abscond from supervision, you will stop the running of your supervised release term as of the date of your absconding and you will prevent the expiration of your supervised release term. But you will still be bound by the conditions of release while you are an absconder, even after the original expiration date of your supervised release term. We may revoke the term of supervised release for a violation of a release condition that you commit before the revised expiration date of the supervised release term (the original expiration date plus the time you were an absconder).

(f) Revocation for certain violations of release conditions. If we find after a revocation hearing that you have possessed a controlled substance, refused to comply with drug testing, possessed a firearm or tested positive for illegal controlled substances more than three times in one year, we must revoke your supervised release and impose a prison term as provided at § 2.218. When considering mandatory revocation for repeatedly failing a drug test, we must consider whether the availability of appropriate substance abuse programs, or your current or past participation in such programs, justifies an exception from the requirement of mandatory revocation.

(g) Supervision officer guidance. We expect you to understand the conditions of release according to the plain meaning of the conditions. You should ask for guidance from your supervision officer if there are conditions you do not understand and before you take actions that may risk violation of your release conditions. The supervision officer may instruct you to refrain from particular conduct, or to take specific actions or to correct an existing violation of a release condition. If the supervision officer directs you to report on your compliance with an officer's instruction and you fail to do so, we may consider that your failure is itself a release violation.

(h) Definitions. As used for any person under our jurisdiction, the term--

(1) Supervision officer means a community supervision officer of the District of Columbia Court Services and Offender Supervision Agency or a United States probation officer;

(2) Domestic violence crime has the meaning given that term by *18 U.S.C. 3561,* except that the term "court of the United States" as used in that definition shall be deemed to include the Superior Court of the District of Columbia;

(3) Approved offender-rehabilitation program means a program that has been approved by CSOSA (or the United States Probation Office) in consultation with a State Coalition Against Domestic Violence or other appropriate experts;

(4) Releasee means a person who has been released to parole supervision, released to supervision through good-time deduction or released to supervised release;

(5) Certificate of release means the certificate of supervised release delivered to the releasee under § 2.203;

(6) Firearm has the meaning given by *18 U.S.C. 921;*

(7) Sex offense means any "registration offense" as that term is defined at D.C. Code 22-4001(8) and any "sex offense" as that term is defined at *42 U.S.C. 16911*(5); and

(8) Conviction, used with respect to a sex offense, includes an adjudication of delinquency for a juvenile, but only if the offender was 14 years of age or older at the time of the sex offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in *18 U.S.C. 2241),* or was an attempt or conspiracy to commit such an offense.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

18 U.S.C. 4203(a)(1) and 4204(a)(6).

History

[65 FR 70466, 70468, Nov. 24, 2000; *68 FR 41696, 41701,* July 15, 2003; *79 FR 51254, 51258,* Aug. 28, 2014]

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28 CFR 2.40

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Code of Federal Regulations **>** ***TITLE 28 -- JUDICIAL ADMINISTRATION*** **>** ***CHAPTER I -- DEPARTMENT OF JUSTICE*** **>** ***PART 2 -- PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS, AND JUVENILE DELINQUENTS*** **>** ***SUBPART A -- UNITED STATES CODE PRISONERS AND PAROLEES***

§ 2.40 Conditions of release.

(a)

(1) General conditions of release and notice by certificate of release. All persons on supervision must follow the conditions of release described in § 2.204(a)(3) through (6). These conditions are necessary to satisfy the purposes of release conditions stated in *18 U.S.C. 4209.* Your certificate of release informs you of these conditions and special conditions that we have imposed for your supervision.

(2) Refusing to sign the certificate of release.

(i) If you have been granted a parole date and you refuse to sign the certificate of release (or any other document necessary to fulfill a condition of release), we will consider your refusal as a withdrawal of your application for parole as of the date of your refusal. You will not be released on parole and you will have to reapply for parole consideration.

(ii) If you are scheduled for release to supervision through good-time deduction and you refuse to sign the certificate of release, you will be released but you still must follow the conditions listed in the certificate.

(b) Special conditions of release. We may impose a condition of release other than a condition described in § 2.204(a)(3) through (6) if we determine that imposing the condition is reasonably related to the nature and circumstances of your offense or your history and characteristics, and at least one of the following purposes of criminal sentencing: The need to deter you from criminal conduct; protection of the public from further crimes; or the need to provide you with training or correctional treatment or medical care. In choosing a condition we will also consider whether the condition involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence of criminal conduct, protection of the public from crime and offender rehabilitation. We list some examples of special conditions of release at § 2.204(b)(2).

(c) Participation in a drug-treatment program, If we require your participation in a drug-treatment program, you must submit to a drug test within 15 days of your release and to at least two other drug tests, as determined by your supervision officer. If we decide not to impose the special condition on drug-treatment, because available information indicates you are a low risk for substance abuse, this decision constitutes good cause for suspending the drug testing requirements of *18 U.S.C. 4209*(a). You must pass all pre-release drug tests administered by the Bureau of Prisons before you are paroled. If you fail a drug test your parole date may be rescinded.

(d) Changing conditions of release. After your release, we may change or add to the conditions of release if we decide that such action is consistent with the criteria described in paragraph (b) of this section. In making these changes we will use the procedures described in § 2.204(c) and (d). You may appeal our action as provided in §§ 2.26 and 2.220.

(e) Application of release conditions to an absconder. If you abscond from supervision, you will stop the running of your sentence as of the date of your absconding and you will prevent the expiration of your sentence. You

will still be bound by the conditions of release while you are an absconder, even after the original expiration date of your sentence. We may revoke your release for a violation of a release condition that you commit before the revised expiration date of your sentence (the original expiration date plus the time you were an absconder).

(f) Revocation for possession of a controlled substance *(18 U.S.C. 4214*(f)). If we find after a revocation hearing that you have illegally possessed a controlled substance, we must revoke your release. If you fail a drug test, we must consider whether the availability of appropriate substance abuse programs, or your current or past participation in such programs, justifies an exception from the requirement of mandatory revocation. We will not revoke your release on the basis of a single, unconfirmed positive drug test if you challenge the test result and there is no other violation found by us to support revocation.

(g) Supervision officer guidance. See § 2.204(g).

(h) Definitions. See § 2.204(h).

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

18 U.S.C. 4203(a)(1) and 4204(a)(6).

History

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