

09-4085-cr

To Be Argued By:

DOUGLAS P. MORABITO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4085-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JOHN F. BOUKNIGHT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet Bond Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 25, 2009. (*See* Joint Appendix (“A”) 10). On September 29, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (*See* A 81). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Does a conditional discharge under Connecticut law constitute a “criminal justice sentence” for the purpose of determining, under the Sentencing Guidelines, whether a defendant committed an offense while under a criminal justice sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4085-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JOHN F. BOUKNIGHT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On December 17, 2003, the defendant was convicted in Connecticut Superior Court of distributing a controlled substance, in violation of Conn. Gen. Stat. § 21a-277(a). (*See* A 32). He was sentenced to a term of ten years in prison, execution suspended after four-and-a-half years, followed by a three-year conditional discharge. (*Id.*). The

term of conditional discharge did not include any explicit conditions.

On March 7, 2008, while still on conditional discharge, the defendant was arrested by the Waterbury Police Department and found to be in possession of a firearm. (*See* A 46). On May 27, 2009, the defendant pled guilty in the court below to one count of possession of a firearm by a convicted felon. (*See* A 8).

At sentencing, the district court held that the defendant's conditional discharge qualified as a "criminal justice sentence," yielding two additional criminal history points under section 4A1.1(d) of the Sentencing Guidelines and resulting in a criminal history category of VI rather than a criminal history category of V. (*See* A 56-63). The district court sentenced the defendant, *inter alia*, to a term of 77 months in prison. (*See* A 78).

Because the district court correctly determined, in accordance with *United States v. LaBella-Szuba*, 92 F.3d 136 (2d Cir. 1996), that the defendant's conditional discharge qualified as a "criminal justice sentence," the district court's judgment should be affirmed. *See id.* at 138 (holding that conditional discharge under New York law qualified as "criminal justice sentence" because conditional discharge could be revoked).

Statement of the Case

On August 21, 2008, a federal grand jury returned a two-count indictment charging the defendant with

possession of a firearm by a felon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e) (“Count One”), and possession of “crack” cocaine with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C) (“Count Two”). (See Record on Appeal Doc. No. (“R. Doc.”) 1).

On May 27, 2009, the defendant pled guilty to Count One of the indictment pursuant to a written plea agreement. (See A 8 & 12-20). In the plea agreement, the parties agreed that the defendant belonged in Criminal History Category V or VI, resulting in a recommended Guidelines sentence of 57 to 71 months in prison or 63 to 78 months in prison, respectively. (See A 15). In accordance with Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the parties further agreed to the overlapping sentencing range of 63 to 71 months in prison. (See *id.*).

On August 19, 2009, the district court (Janet Bond Arterton, J.) concluded that the defendant belonged in Criminal History Category VI and rejected the parties’ plea agreement. (See A 63-65). After the defendant elected not to withdraw his guilty plea, on September 23, 2009, the district court sentenced the defendant, *inter alia*, to 77 months in prison. (See R. Doc. 66; *see also* A 78).

Judgment entered on September 25, 2009, and a timely notice of appeal was filed on September 29, 2009. (See A 10). The defendant is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The defendant's prior conviction

On December 17, 2003, the defendant was convicted of distributing a controlled substance, in violation of Conn. Gen. Stat. 21a-277(a). (*See* A 32 & 57). He received a sentence of ten years' imprisonment, execution suspended after four-and-a-half years, followed by three years on conditional discharge. (*See id.*). There were no explicit conditions attached to his conditional discharge. (*See id.*).

B. The instant offense

On March 7, 2008, the defendant was arrested by the Waterbury Police Department and charged with a variety of state offenses. (*See* A 46). On August 21, 2008, a federal grand jury sitting in New Haven returned an indictment against the defendant, charging him with possession of a firearm by a convicted felon and possession of "crack" cocaine with intent to distribute. (*See* R. Doc. 1).

On May 27, 2009, defendant pled guilty to possession of a firearm by a convicted felon pursuant to a written plea agreement. (*See* A 8 & 12-20). In the plea agreement, the parties agreed that the defendant belonged in Criminal History Category V or VI, resulting in a recommended Guidelines sentence of 57 to 71 months in prison or 63 to 78 months in prison, respectively. (*See* A 15). In accordance with Rule 11(c)(1)(C) of the Federal Rules of

Criminal Procedure, the parties further agreed to the overlapping sentencing range of 63 to 71 months in prison. (*See id.*).

At a hearing on August 19, 2009, the district court determined that the defendant belonged in Criminal History Category VI, because his conditional discharge qualified as a “criminal justice sentence” under U.S.S.G. § 4A1.1(d). (*See A 58-63*). Specifically, the district court relied on *LaBella-Szuba*, in which this Court held that a conditional discharge under New York law qualified as a “criminal justice sentence” because such a sentence could be revoked or modified. (*See A 59-60*). The district court concluded that a conditional discharge under Connecticut law could likewise be revoked or modified. (*See A 60-61*).

The district court then rejected the parties’ plea agreement, which the court considered “too lenient for a defendant convicted of numerous narcotic offenses, robbery, assault, and the instant offense . . . possession of a firearm with obliterated serial number.” (*See A 63-64*). Finally, the district court offered the defendant, in accordance with Rule 11(c)(5), the opportunity to withdraw his guilty plea. (*See A 67*).

After the defendant declined to withdraw his guilty plea, he was sentenced on September 23, 2009 to 77 months in prison, 3 years of supervised release, and a \$100 special assessment. (*See A 9 & 78; see also R. Doc. 66*).

Summary of Argument

A conditional discharge under Connecticut law qualifies as a “criminal justice sentence” under section 4A1.1(d) of the Sentencing Guidelines, because such a sentence is subject to both revocation and modification by the Connecticut courts. In this respect, a conditional discharge under Connecticut law is indistinguishable from a conditional discharge under New York law. Because this Court held, in *LaBella-Szuba*, that a conditional discharge under New York law qualifies as a “criminal justice sentence,” the same holds true of a conditional discharge under Connecticut law.

Argument

I. A conditional discharge under Connecticut law constitutes a “criminal justice sentence” under the Sentencing Guidelines

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts and Proceedings Relevant to this Appeal,” above.

B. Governing law and standard of review

Under the Sentencing Guidelines, a defendant receives two criminal history points if the offense of conviction was committed “while under any criminal justice sentence, including probation, parole, supervised release,

imprisonment, work release, or escape status.” U.S.S.G. § 4A1.1(d) (2009). A “criminal justice sentence” refers, in pertinent part, to a sentence “having a custodial or supervisory component, although active supervision is not required” *Id.* cmt. n. 4. Thus, a conditional discharge qualifies as a “criminal justice sentence,” even without active supervision, if the sentencing court retains the authority to modify or revoke the sentence. *See LaBella-Szuba*, 92 F.3d at 138 (holding that sentencing court’s power to revoke conditional discharge under New York law qualified the sentence as a “criminal justice sentence”).

In Connecticut, a defendant convicted of certain offenses may receive a conditional discharge. *See* Conn. Gen. Stat. § 53a-29(b) (2009). A conditional discharge is expressly deemed “a revocable disposition, in that such sentence shall be tentative to the extent that it may be altered or revoked in accordance with [the law] but for all other purposes it shall be deemed to be a final judgment of conviction.” *Id.* § 53a-28(d).

Connecticut courts are authorized to modify or enlarge the conditions of supervision at any time “for good cause shown”:

At any time during the period of . . . conditional discharge, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise, and may extend the period,

provided the original period with any extensions shall not exceed [statutory limits].”

Id. § 53a-30(c). Such conditions may include confinement in a community center or halfway house, electronic monitoring, or any other conditions reasonably related to the defendant’s rehabilitation. *See id.* § 53a-30(a).

The Connecticut statute does not expressly state that a conditional discharge may be revoked for committing another offense, but as the Supreme Court of Connecticut has observed, “it is universally held that the commission of a felony violates a condition inherent in every probation order.” *State v. Cator*, 781 A.2d 285, 301 (Conn. 2001). Connecticut law draws no pertinent distinction between conditions of probation and conditions of conditional discharge, *see* Conn. Gen. Stat. § 53a-30(a) (2009), so the commission of a felony also violates a condition inherent in every conditional discharge. *Cf. State v. Pender*, 976 A.2d 99, 102 (Conn. Super. Ct. 2008) (“Both violation of conditional discharge and violation of probation proceedings are governed by the same standard . . .”).

This Court reviews *de novo* the district court’s interpretation of the Sentencing Guidelines. *See United States v. Ramirez*, 421 F.3d 159, 163 (2d Cir. 2005).

C. Discussion

A conditional discharge under Connecticut law qualifies as a “criminal justice sentence,” because Connecticut courts have the authority to modify the

sentence for good cause and to revoke the sentence upon the commission of another offense. That authority is a sufficient “supervisory component” under the Sentencing Guidelines. U.S.S.G. § 4A1.1 cmt. n.4 (2009); *see LaBella-Szuba*, 92 F.3d at 138.

In *LaBella-Szuba*, the defendant was subject to a conditional discharge under New York law when she committed the offense of conviction. *See id.* Although the defendant was not subject to active supervision, the sentencing court was authorized by law to revoke the conditional discharge if she committed another offense. *See id.* This Court held that the sentence qualified as a “criminal justice sentence,” because it “did include a supervisory component in that the [New York court] retained the power to revoke her conditional discharge sentence.” *Id.* The Court also noted that “a term of unsupervised release is a criminal justice sentence” under the commentary to the Sentencing Guidelines and found “no discernible difference between a conditional discharge sentence and a sentence of unsupervised release.” *Id.* “Indeed, every circuit that has compared a conditional discharge sentence to a sentence of unsupervised release has found them to be functionally equivalent.” *Id.* (citing cases).

As in *LaBella-Szuba*, the defendant in this case was not subject to active supervision, but his sentence could be modified for good cause or revoked upon the commission of another offense. The defendant’s sentence thus included a “supervisory component” within the meaning of the Sentencing Guidelines. Also, there is no discernible

difference between a conditional discharge under Connecticut law and unsupervised release as envisioned under the Guidelines. Therefore, a conditional discharge under Connecticut law qualifies as a criminal justice sentence.

The defendant attempts to distinguish *LaBella-Szuba* by arguing that Connecticut law imposes no mandatory conditions of conditional discharge. The defendant is mistaken, because Connecticut follows the “universally held” rule that the commission of a felony violates an inherent condition of probation or, as in this case, conditional discharge. *See Cator*, 781 A.2d at 301; *see also State v. Roberson*, 327 A.2d 556, 558 (Conn. 1973) (“Had the sentencing court in this case merely placed the defendant on probation and said no more, commission of a felony would nevertheless constitute a violation sufficient to authorize revocation of probation.”).

Even assuming, *arguendo*, that this Court were to hold that Connecticut courts do not have the implicit authority to revoke a conditional discharge upon the commission of a felony, the explicit, statutory authority of Connecticut courts to modify such a sentence for good cause is a sufficient “supervisory component” to qualify a conditional discharge as a criminal justice sentence. In particular, the Sentencing Guidelines do not draw any distinction between the power to revoke and the power to modify a sentence; to the contrary, the Sentencing Guidelines require only the existence of a “supervisory component.” The power to modify a sentence, based on a showing of good cause, is a sufficient supervisory

component. *See Ramirez*, 421 F.3d at 164 (*dictum*) (noting that conditional discharge “has a ‘supervisory component’ insofar as the sentencing court can revoke *or modify* the sentence” (emphasis added)).

The defendant also argues that no state actor had the power or authority to enforce his conditional discharge. Again, the defendant is mistaken. At a minimum, the defendant’s conditional discharge could have been enforced by the Connecticut courts if he were convicted of another offense. *See, e.g., State v. Kirker*, 707 A.2d 303, 305 (Conn. App. Ct. 1998) (imposing consecutive six-month sentence for violating conditional discharge after conviction for larceny and criminal mischief).

In any event, the Sentencing Guidelines make clear that active supervision is not required for a sentence to qualify as a “criminal justice sentence.” U.S.S.G. § 4A1.1, cmt. n.4 (2009). Thus, the Guidelines make no distinction between supervised probation and unsupervised probation. *See id.* (“[A] term of unsupervised probation would be included”). It is therefore irrelevant whether there was any state actor designated to enforce the defendant’s conditional discharge.

Finally, the defendant quotes several passages about probation out of context, to support a misguided argument that the Sentencing Guidelines require at least some conditions to be imposed in order for a sentence to qualify as a “criminal justice sentence.” For example, quoting *Ramirez*, 421 F.3d at 164, the defendant contends that probation must include “a prescribed set of requirements.”

See also Gall v. United States, 552 U.S. 38, 48-49 (2007) (describing typical conditions of probation); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (same).

But in *Ramirez*, this Court rejected the appellant's claim that a sentence at least as severe as probation was required under section 4A1.2(c)(1) of the Sentencing Guidelines, a guideline that specifically refers to "probation." *See Ramirez*, 421 F.3d at 165. Instead, the Court held that a conditional discharge could be considered "probation" under the Sentencing Guidelines, *id.* at 166, even though a conditional discharge is "generally . . . less severe" than probation, *id.* at 165.

Thus, *Ramirez* provides no support for the defendant, because section 4A1.1 of the Sentencing Guidelines broadly refers to a "criminal justice sentence," not merely to probation. Nor, in any event, does *Ramirez* hold that a sentence must include specific requirements to qualify as a criminal justice sentence. To the contrary, *Ramirez* reaffirms that a conditional discharge under New York law is equivalent, for Guidelines purposes, to probation. Because a conditional discharge under Connecticut law is identical in all material respects, it is also equivalent to probation and therefore qualifies as a "criminal justice sentence."

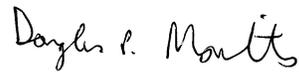
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 22, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script that reads "Douglas P. Morabito".

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ADDENDUM

Conn. Gen. Stat. § 53a-28. Authorized sentences

(a) Except as provided in section 17a-699 and chapter 420b, to the extent that the provisions of said section and chapter are inconsistent herewith, every person convicted of an offense shall be sentenced in accordance with this title.

(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences: (1) A term of imprisonment; or (2) a sentence authorized by section 18-65a or 18-73; or (3) a fine; or (4) a term of imprisonment and a fine; or (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge; or (6) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a fine and a period of probation or a period of conditional discharge; or (7) a fine and a sentence authorized by section 18-65a or 18-73; or (8) a sentence of unconditional discharge; or (9) a term of imprisonment and a period of special parole as provided in section 54-125e.

(c) In addition to any sentence imposed pursuant to subsection (b) of this section, if (1) a person is convicted of an offense that resulted in injury to another person or damage to or loss of property, (2) the victim requests financial restitution, and (3) the court finds that the victim has suffered injury or damage to or loss of property as a

result of such offense, the court shall order the offender to make financial restitution under terms that it determines are appropriate. In determining the appropriate terms of financial restitution, the court shall consider: (A) The financial resources of the offender and the burden restitution will place on other obligations of the offender; (B) the offender's ability to pay based on installments or other conditions; (C) the rehabilitative effect on the offender of the payment of restitution and the method of payment; and (D) other circumstances, including the financial burden and impact on the victim, that the court determines make the terms of restitution appropriate. If the court determines that the current financial resources of the offender or the offender's current ability to pay based on installments or other conditions are such that no appropriate terms of restitution can be determined, the court may forego setting such terms. The court shall articulate its findings on the record with respect to each of the factors set forth in subparagraphs (A) to (D), inclusive, of this subsection. Restitution ordered by the court pursuant to this subsection shall be based on easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses, but may include the costs of counseling reasonably related to the offense. Restitution ordered by the court pursuant to this subsection shall be imposed or directed by a written order of the court containing the amount of damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury

as ascertained by the court. The order of the court shall direct that a certified copy of the order be delivered by certified mail to the victim and contain an advisement to the victim that the order is enforceable as a judgment in a civil action as provided in section 53a-28a.

(d) A sentence to a period of probation or conditional discharge in accordance with sections 53a-29 to 53a-34, inclusive, shall be deemed a revocable disposition, in that such sentence shall be tentative to the extent that it may be altered or revoked in accordance with said sections but for all other purposes it shall be deemed to be a final judgment of conviction.

(e) When sentencing a person to a period of probation who has been convicted of (1) a misdemeanor that did not involve the use, attempted use or threatened use of physical force against another person or (2) a motor vehicle violation for which a sentence to a term of imprisonment may be imposed, the court shall consider, as a condition of such sentence of probation, ordering the person to perform community service in the community in which the offense or violation occurred. If the court determines that community service is appropriate, such community service may be implemented by a community court established in accordance with section 51-181c if the offense or violation occurred within the jurisdiction of a community court established by said section.

Conn. Gen. Stat. § 53a-29. Probation and conditional discharge: Criteria; periods; continuation or termination

(a) The court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony, if it is of the opinion that: (1) Present or extended institutional confinement of the defendant is not necessary for the protection of the public; (2) the defendant is in need of guidance, training or assistance which, in the defendant's case, can be effectively administered through probation supervision; and (3) such disposition is not inconsistent with the ends of justice.

(b) The court may impose a sentence of conditional discharge for an offense, other than a class A felony, if it is of the opinion that: (1) Present or extended institutional confinement of the defendant is not necessary for the protection of the public; and (2) probation supervision is not appropriate.

(c) When the court imposes a sentence of conditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed but shall be subject, during the period of such conditional discharge, to such conditions as the court may determine. The court shall impose the period of conditional discharge authorized by subsection (d) of this section and shall specify, in accordance with section 53a-30, the conditions to be complied with. When a person is sentenced to a period of probation, the court shall impose the period authorized by subsection (d), (e) or (f) of this section and

may impose any conditions authorized by section 53a-30. When a person is sentenced to a period of probation, such person shall pay to the court a fee of two hundred dollars and shall be placed under the supervision of the Court Support Services Division, provided, if such person is sentenced to a term of imprisonment the execution of which is not suspended entirely, payment of such fee shall not be required until such person is released from confinement and begins the period of probation supervision.

(d) Except as provided in subsection (f) of this section, the period of probation or conditional discharge, unless terminated sooner as provided in section 53a-32 or 53a-33, shall be as follows: (1) For a class B felony, not more than five years; (2) for a class C or D felony or an unclassified felony, not more than three years; (3) for a class A misdemeanor, not more than two years; (4) for a class B or C misdemeanor, not more than one year; and (5) for an unclassified misdemeanor, not more than one year if the authorized sentence of imprisonment is three months or less, or not more than two years if the authorized sentence of imprisonment is in excess of three months, or where the defendant is charged with failure to provide subsistence for dependents, a determinate or indeterminate period.

(e) Notwithstanding the provisions of subsection (d) of this section, the court may, in its discretion, on a case by case basis, sentence a person to a period of probation which period, unless terminated sooner as provided in section 53a-32 or 53a-33, shall be as follows: (1) For a class C or D felony or an unclassified felony, not more than five years; (2) for a class A misdemeanor, not more

than three years; and (3) for a class B misdemeanor, not more than two years.

(f) The period of probation, unless terminated sooner as provided in section 53a-32, shall be not less than ten years or more than thirty-five years for conviction of a violation of subdivision (2) of subsection (a) of section 53-21 or section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a, 53a-72b, 53a-90a, 53a-196b, 53a-196c, 53a-196d, 53a-196e or 53a-196f.

(g) Whenever the court sentences a person, on or after October 1, 2008, to a period of probation of more than two years for a class C or D felony or an unclassified felony or more than one year for a class A or B misdemeanor, the probation officer supervising such person shall submit a report to the sentencing court, the state's attorney and the attorney of record, if any, for such person, not later than sixty days prior to the date such person completes two years of such person's period of probation for such felony or one year of such person's period of probation for such misdemeanor setting forth such person's progress in addressing such person's assessed needs and complying with the conditions of such person's probation. The probation officer shall recommend, in accordance with guidelines developed by the Judicial Branch, whether such person's sentence of probation should be continued for the duration of the original period of probation or be terminated. Not later than sixty days after receipt of such report, the sentencing court shall continue the sentence of probation or terminate the sentence of probation. Notwithstanding the provisions of section 53a-32, the

parties may agree to waive the requirement of a court hearing. The Court Support Services Division shall establish within its policy and procedures a requirement that any victim be notified whenever a person's sentence of probation may be terminated pursuant to this subsection. The sentencing court shall permit such victim to appear before the sentencing court for the purpose of making a statement for the record concerning whether such person's sentence of probation should be terminated. In lieu of such appearance, the victim may submit a written statement to the sentencing court and the sentencing court shall make such statement a part of the record. Prior to ordering that such person's sentence of probation be continued or terminated, the sentencing court shall consider the statement made or submitted by such victim.

Conn. Gen. Stat. § 53a-30. Conditions of probation and conditional discharge

(a) When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: (1) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip the defendant for suitable employment; (2) undergo medical or psychiatric treatment and remain in a specified institution, when required for that purpose; (3) support the defendant's dependents and meet other family obligations; (4) make restitution of the fruits of the defendant's offense or make restitution, in an amount the defendant can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance; (5) if a minor, (A) reside with the minor's parents or in a suitable foster home, (B) attend school, and (C) contribute to the minor's own support in any home or foster home; (6) post a bond or other security for the performance of any or all conditions imposed; (7) refrain from violating any criminal law of the United States, this state or any other state; (8) if convicted of a misdemeanor or a felony, other than a capital felony, a class A felony or a violation of section 21a-278, 21a-278a, 53a-55, 53a-56, 53a-56b, 53a-57, 53a-58 or 53a-70b or any offense for which there is a mandatory minimum sentence which may not be suspended or reduced by the court, and any sentence of imprisonment is suspended, participate in an alternate incarceration program; (9) reside in a residential community center or halfway house approved by the Commissioner of

Correction, and contribute to the cost incident to such residence; (10) participate in a program of community service labor in accordance with section 53a-39c; (11) participate in a program of community service in accordance with section 51-181c; (12) if convicted of a violation of subdivision (2) of subsection (a) of section 53-21, section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b, undergo specialized sexual offender treatment; (13) if convicted of a criminal offense against a victim who is a minor, a nonviolent sexual offense or a sexually violent offense, as defined in section 54-250, or of a felony that the court finds was committed for a sexual purpose, as provided in section 54-254, register such person's identifying factors, as defined in section 54-250, with the Commissioner of Public Safety when required pursuant to section 54-251, 54-252 or 54-253, as the case may be; (14) be subject to electronic monitoring, which may include the use of a global positioning system; (15) if convicted of a violation of section 46a-58, 53-37a, 53a-181j, 53a-181k or 53a-181l, participate in an anti-bias crime education program; (16) if convicted of a violation of section 53-247, undergo psychiatric or psychological counseling or participate in an animal cruelty prevention and education program provided such a program exists and is available to the defendant; or (17) satisfy any other conditions reasonably related to the defendant's rehabilitation. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

(b) When a defendant has been sentenced to a period of probation, the Court Support Services Division may

require that the defendant comply with any or all conditions which the court could have imposed under subsection (a) of this section which are not inconsistent with any condition actually imposed by the court.

(c) At any time during the period of probation or conditional discharge, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise, and may extend the period, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any.

(d) The period of participation in an alternate incarceration program, unless terminated sooner, shall not exceed the period of probation authorized by section 53a-29 or two years, whichever is less.

(e) The court may require that the person subject to electronic monitoring pursuant to subsection (a) of this section pay directly to the electronic monitoring service provider a fee for the cost of such electronic monitoring services. If the court finds that the person subject to electronic monitoring is indigent and unable to pay the costs of electronic monitoring services, it shall waive such costs. Any contract entered into by the judicial branch and the electronic monitoring service provider shall include a

provision stating that the total cost for electronic monitoring services shall not exceed six dollars per day. Such amount shall be indexed annually to reflect the rate of inflation.

§ 4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this item.

Commentary

Application Notes

4. § 4A1.1(d). Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* § 4A1.2(n). For the purposes of this item, a “criminal justice sentence” means a sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* § 4A1.2(m).
