

# 14-1063

*To Be Argued By:*  
DAVID E. NOVICK

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 14-1063**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

JOHN JOHNSON, aka Duke, aka Duke  
Hardcore, aka Johnnie Johnson,  
*Defendant-Appellant.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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DEIRDRE M. DALY  
*United States Attorney  
District of Connecticut*

DAVID E. NOVICK  
*Assistant United States Attorney*  
SANDRA S. GLOVER  
*Assistant United States Attorney (of counsel)*

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### **Statement of Jurisdiction**

This is an appeal from a judgment entered on April 7, 2014 by the United States District Court for the District of Connecticut (Janet Bond Arterton, J.) after the defendant was found to have violated the conditions of his supervised release. Appellant's Appendix ("A\_\_") 10, A50. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. On April 8, 2014, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A10. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issue  
Presented for Review**

In a violation of supervised release proceeding, should the statutory maximum penalties for any term of imprisonment upon revocation be determined by reference to the law under which the defendant was convicted, or, if the law has changed, by reference to the law at the time of the revocation proceeding?<sup>1</sup>

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<sup>1</sup> This same question is currently pending before this Court in *United States v. Ortiz*, No. 13-4835. That case was argued November 14, 2014.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-1063

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

JOHN JOHNSON, aka Duke, aka Duke  
Hardcore, aka Johnnie Johnson,  
*Defendant-Appellant.*

---

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

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

## **Preliminary Statement**

In January 2006, the defendant, John Johnson, pleaded guilty to possession with intent to distribute and distribution of more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a) and (b)(1)(B). He was ultimately sentenced to 61 months' imprisonment, to be followed by a 5-year term of supervised release.

Johnson began his supervised release term on August 31, 2009. In May 2012, he brutally assaulted his then-girlfriend, and was subsequently sentenced to 18 years' imprisonment for first-degree assault. That assault also led the district court to find that Johnson had violated the terms of his supervised release. The court imposed the statutory maximum incarceration term of 36 months for the violation.

On this appeal from the revocation sentence, Johnson argues that the district erred in finding that the statutory maximum incarceration term for the supervised release violation was three years. Johnson maintains that under current law, his offense conduct was an offense under 21 U.S.C. § 841(b)(1)(C) instead of § 841(b)(1)(B), and thus a Class C felony, subjecting him to only a two-year maximum penalty for a violation of supervised release.

Johnson's argument has no merit. As the district court properly concluded, regardless of any change in the law, the original count of conviction was a Class B felony because it carried a maximum 40-year prison term. Under 18 U.S.C. § 3583(e)(3), a Class B felony carries a maximum possible sentence of three years' imprisonment for any subsequent violation of supervised release. The district court's judgment should be affirmed.

### Statement of the Case

On July 14, 2005, a grand jury sitting in Bridgeport, Connecticut, indicted Johnson on one count of possession with the intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). A3. He pleaded guilty and in September 2008, was ultimately sentenced to a term of imprisonment of 61 months, to be followed by a period of supervised release of 5 years. A8-A9.

Johnson violated the conditions of his supervised release in May 2012 when he brutally assaulted his girlfriend. A12-A13. After pleading guilty to charges brought by the State of Connecticut related to the assault, Johnson admitted to the violation of his supervised release for the same conduct. A12-A15, A18-A19. On March 26, 2014, the district court (Janet Bond Arterton, J.), sentenced him to the statutory maximum total of 36 months' incarceration, with 18 months to run concurrently with, and 18 months to run consecutively to, his state sentence. A10, A50-A51.

Judgment on the supervised release violation entered on April 7, 2014, A10, and Johnson filed a timely notice of appeal on April 8, 2014, A10, A54. Johnson is currently serving his state court sentence with the Connecticut Department of Correction.

### **A. The underlying conviction and sentence**

In January 2006, Johnson pleaded guilty to a one-count indictment charging him with possession with intent to distribute and distribution of more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a) and (b)(1)(B)(iii). A4. In his written plea agreement, Johnson admitted that he faced a maximum term of imprisonment of 40 years. *See* Jan. 20, 2006 Plea Agreement, Government’s Appendix (“GA\_\_”) 2. The written plea agreement also memorialized Johnson’s understanding “that should he violate any condition of supervised release during its term, he may be required to serve a further term of imprisonment of up to five years.”<sup>2</sup> GA2. Johnson further signed a petition to enter a plea of guilty with the district court in which he specifically acknowledged that he faced a maximum term of imprisonment of 40 years. *See* Jan. 20, 2006, Petition to Enter Plea of Guilty, GA12.

On August 3, 2006, at the conclusion of two sentencing hearings, the district court imposed a 156-month sentence, to be followed by a four-year term of supervised release. A6. Johnson ap-

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<sup>2</sup> This language was incorrect. Because Johnson pleaded guilty to a Class B felony, under 18 U.S.C. § 3583(e)(3), he faced a maximum term of three years’ imprisonment on revocation of supervised release.

pealed, and this Court vacated Johnson's sentence, remanding for "plenary reconsideration of the sentence imposed" in light of the Supreme Court's then-recently issued decisions in *Kimbrough v. United States*, 552 U.S. 85 (2007) and *Gall v. United States*, 552 U.S. 38 (2007). *United States v. Johnson*, 259 Fed. Appx. 360 (2d Cir. 2008).

On remand, the government conceded that Johnson did not qualify as a career offender, and the court sentenced him to a substantially lower sentence of 61 months' imprisonment, to be followed by a 5-year term of supervised release. A8. Johnson did not appeal or otherwise collaterally attack this new sentence. He was released from custody and began his term of supervised release on August 31, 2009. A12.

### **B. The supervised release violation and sentence**

On May 7, 2012, the Bridgeport police responded to a domestic complaint filed by a child. When the police entered the house, Johnson was choking the victim (the child's mother); he had to be "physically pulled off the victim." A12. As the supervised release violation report summarized, Johnson was involved in an "extremely violent physical and sexual assault on the victim which was witnessed by their children." A15. Johnson was arrested on multiple state charges related to this incident and was ultimately convicted of

first-degree assault and sentenced to 18 years' imprisonment. A12.

In addition to the state charges, Johnson also faced the charge that his state offense was a violation of his federal supervised release conditions. A9. At a hearing on that charge on March 26, 2014, Johnson admitted that he violated the mandatory condition of supervised release that he not commit another state crime. A18-A19.

After finding that Johnson had violated a condition of his supervised release, the district court turned (as relevant here) to a discussion of the maximum penalty available under the law for a violation of supervised release. Defense counsel argued that in light of the passage of the Fair Sentencing Act of 2010, Johnson's original offense conduct would not be a violation of 21 U.S.C. § 841(b)(1)(B), but rather would only be a violation of § 841(b)(1)(C), a Class C felony. Accordingly, defense counsel argued that the maximum term of incarceration for any violation was two years, and not the three-year term that would apply to a § 841(b)(1)(B) offense. A20-A24. The government disagreed, arguing that the court should apply the penalties in place at the time of the conviction of the original offense. A28-A30.

Following argument from counsel, the court imposed sentence on Johnson. The court identified the factors in 18 U.S.C. § 3553(a) that it found most significant, including Johnson's

lengthy criminal history, his long-standing substance abuse problem, his significant physical disabilities, and his tumultuous—yet long-term—relationship with the victim in this case. A44-A45. In addition to these factors, the court also considered the nature and circumstances of the offense, which Johnson committed while on supervised release and which the court found “beyond shocking.” A45. As the court noted, Johnson’s attack left the victim physically scarred, and also likely imposed psychological damage on the children who had witnessed the attack. A45-A46. The court considered, in addition, the need to impose a sentence that would protect the public and promote respect for the law in someone who committed a violent attack while on supervision. A46. Having weighed all these factors, the court imposed the statutory maximum term of three years’ imprisonment. A46, A51. The court further ordered that half of that sentence be served consecutively to Johnson’s 18-year term on the state conviction:

I will, however, in recognition of the fact that you have a long sentence to serve, and that you do—it will be a hard sentence to serve given your disabilities, I’m going to split that half concurrent and half consecutive, and that is the measure of lenity that Mr. Willson urges, but it is also one that ensures that you will be under—serving an additional federal sentence

when you complete your state sentence and give further protection to the public, to your victim, to others should you again relapse. No supervision will follow.

\* \* \*

By the length of the sentence, even notwithstanding the way I have split it up, I have taken what authority does exist as counsel have argued it and have no basis on which to conclude that the offense classification ratchets down to a Class C.

A46-47. This appeal followed.

### **Summary of Argument**

The district court applied the correct statutory penalty here. There is no dispute that Johnson was sentenced for a Class B felony in 2008, *i.e.*, a felony which carried a maximum term of imprisonment of 25 years or more. *See* 18 U.S.C. § 3559(a)(2). The fact that the offense conduct which served as the basis for that conviction would, if committed in 2014, be a Class C felony is of no moment to the question of what statutory penalties should apply to a supervised release violation based on his original conviction. As this Court held in *United States v. Warren*, 335 F.3d 76 (2d Cir. 2003), in this context, the only relevant inquiry is what penalties applied at the time of the defendant's original conviction. And there is no dispute that at the time of his origi-

nal conviction, Johnson faced a statutory maximum of 40 years' imprisonment. Nothing that has occurred since the entry of that judgment has changed the fact that Johnson pleaded guilty, was convicted of, and ultimately sentenced for a Class B felony. The district court properly held that the violation of Johnson's supervised release for that Class B felony is subject to a three-year statutory maximum.

### **Argument**

#### **I. The district court applied the correct statutory penalties in imposing sentence.**

##### **A. Governing law and standard of review**

Title 18, United States Code, Section 3559(a) sets out the various letter grades that apply to federal criminal offenses:

An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—(1) life imprisonment, or if the maximum penalty is death, as a Class A felony; (2) twenty-five years or more, as a Class B felony; (3) less than twenty-five years but ten or more years, as a Class C felony; (4) less than ten years but five or more years, as a Class D

felony; (5) less than five years but more than one year, as a Class E felony . . . .

The letter grade classification applicable to a particular offense establishes the maximum supervised release term that may be imposed for that offense. “[I]n imposing a sentence to a term of imprisonment for a felony or a misdemeanor, [a sentencing court] may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]” 18 U.S.C. § 3583(a). For a Class A or B felony, the term of supervised release ordered may not exceed five years; for a Class C or D felony, the term may not exceed three years. *See* 18 U.S.C. § 3583(b).

The letter grade classification also establishes a ceiling on the term of imprisonment that may be imposed when a defendant violates a condition of supervised release. A court “may, after considering [various factors in 18 U.S.C. § 3553] 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 . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . . .” 18 U.S.C. § 3583(e)(3). But a “defendant whose term is revoked . . . 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.” *Id.*

“Section 7B1.1(a) of the Guidelines recommends sentencing ranges for violation of supervised release based on alphabetical classifications.” *United States v. McNeil*, 415 F.3d 273, 278 (2d Cir. 2005). The range of imprisonment applicable upon revocation is set forth in a “Revocation Table” listed under U.S.S.G. § 7B1.4(a). For a defendant, like Johnson, whose original criminal history category was VI, the incarceration range for a Grade A violation is 33-41 months, subject to the 36-month statutory maximum. *See* A13.

This Court has noted that a “violation of supervised release is a serious matter.” *United States v. Warren*, 335 F.3d 76, 79 (2d Cir. 2003). A sentencing court has broad discretion to revoke an earlier grant of supervised release and impose imprisonment up to the statutory maximum, after due consideration to policy statements and the sentencing guidelines. *See United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997); *United States v. Wirth*, 250 F.3d 165, 169 (2d Cir. 2001) (per curiam); *see also United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006) (noting that post-*Booker* sentencing judges have an “enhanced scope” of discretion). A sentencing

judge handling the revocation of supervised release must consider non-binding factors such as policy statements and the guideline range, but is not required to sentence within any advisory range. *See, e.g., United States v. Goffi*, 446 F.3d 319, 322-23 (2d Cir. 2006). Rather, the sentence need only be consistent with the general provisions of sentencing pursuant to 18 U.S.C. § 3553. *Id.* “The standard of review on the appeal of a sentence for violation of supervised release is . . . the same standard as for sentencing generally: whether the sentence imposed is reasonable.” *McNeil*, 415 F.3d at 277.

## **B. Discussion**

There is no dispute here that Johnson’s underlying conviction from his original case was a Class B felony. Specifically, he was convicted of possession with intent to distribute and distribution of more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a) and (b)(1)(B)(iii). Under then-existing law, he faced a possible maximum statutory prison term of 40 years. Under 18 U.S.C. § 3559, any crime which carries a maximum penalty of 25 years or more is a Class B felony. A subsequent revocation of supervised release ordered as part of the sentence for a Class B felony results in a maximum incarceration term of three years under 18 U.S.C. § 3583(e)(3).

Johnson correctly points out that the Fair Sentencing Act of 2010 revised 21 U.S.C. § 841 to reduce the sentencing disparities between cases involving crack cocaine as compared to those involving powder cocaine. As relevant here, § 841 was revised to require 28 grams of crack cocaine—instead of 5 grams—to invoke the penalties in § 841(b)(1)(B). Thus, under the revised statute, Johnson’s offense conduct (involving six grams of crack cocaine) would have been insufficient to support a plea to a violation of § 841(b)(1)(B). Rather, if Johnson had committed the same conduct in 2014 rather than 2005, he could only have been charged with a violation of § 841(b)(1)(C), which carries a statutory maximum sentence of 20 years’ imprisonment and is thus a Class C felony. The government does not dispute these facts.

But Johnson claims that, because his offense conduct would be a Class C felony if committed today, rather than the Class B felony at the time he actually committed it, he should face a lower statutory maximum penalty on his supervised release violation. Johnson cites no legal precedent to support his argument and merely casts the claim as one supporting the goal of reducing sentencing disparities between crack cocaine and powder cocaine. *See* Def.’s Br. at 12-13. According to Johnson, because he would now face a maximum incarceration term of twenty years based on his intent to distribute and distribution

of more than five grams of cocaine base, a conviction for which would be a Class C felony, he should only face a two-year maximum incarceration term on the supervised release violation, rather than the three-year maximum incarceration attached to the crime he actually committed. *See* Def.'s Br. at 11.

Johnson's argument is foreclosed by this Court's decision in *United States v. Warren*, 335 F.3d 76 (2d Cir. 2003), where this Court held that the maximum term of imprisonment for revocation of supervised release is determined by the statutory penalties applicable at the time of the defendant's original conviction. In *Warren*, the defendant claimed that although his 1989 drug conviction was a Class B felony at the time of his conviction, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it was clear that his conviction was really a Class C felony so that the maximum penalty for his post-*Apprendi* supervised release violation should have been two years, instead of three years. *Id.* at 77-78. This Court rejected the argument and held "that the validity of an underlying conviction or sentence may not be collaterally attacked in a supervised release revocation proceeding[.]" *Id.* at 78. The Court explained that this holding promotes the finality of judgments, *id.*, and serves other purposes as well:

The orderly administration of justice also calls for limiting revocation proceed-

ings to the issue at hand—the fact or non-fact, as the case may be, of a violation of supervised relief. The avenues of relief from error in the conviction or original sentence available to defendants have been dictated by Congress and the Constitution. They are both well-marked and well-traveled. Allowing claims of such error to be raised in proceedings designed to adjudicate a violation of supervised release would lead to endless confusion over the nature of the claims that could be made and in what circumstances such claims could be brought. In particular, courts would face confusion over whether to entertain arguments that are raised during a revocation proceeding in order to evade or trump the procedural and substantive limitations on other avenues for challenging the underlying conviction. This confusion would, therefore, sacrifice the orderly and efficient administration of justice for no particular gain in fairness.

*Id.* at 79. The Court continued to note that “[a] violation of supervised release is a serious matter, and prosecution of it should not be impeded by the threat of consuming judicial and prosecutorial resources in addressing a host of issues unrelated to the violation.” *Id.* In short, under *Warren*, the validity of the underlying sentence

cannot be challenged in the supervised release hearing.

The Third Circuit reached the same conclusion in *United States v. Turlington*, 696 F.3d 425 (3rd Cir. 2012). In that case, the defendant argued—on facts directly analogous to the facts here—that because his original conviction for a Class A felony would be considered a Class B felony after the reductions enacted by the Fair Sentencing Act, he should face lower statutory penalties on the revocation. *Id.* at 427. The Third Circuit rejected that argument, however, concluding that the relevant statutory penalties were tied to “the law under which the defendant was convicted.” *Id.* (quoting *McNeill v. United States*, 131 S. Ct. 2218, 222 (2011)); see also *United States v. Brewer*, 549 Fed. Appx. 228, 229 (4th Cir. 2014) (unpublished per curiam) (in case involving revocation of supervised release, holding that district court properly classified the defendant’s conviction as Class A felony, based on the classification that was applicable at time of conviction, even though the offense would be Class B felony after Fair Sentencing Act).

Notably, the *Turlington* Court found its holding bolstered by both *McNeill* and *Dorsey v. United States*, 132 S. Ct. 2321 (2012)—two cases relied on heavily by Johnson in his brief. *Turlington* found that *McNeill* required “backward-looking” to the original violation, and that *Dorsey* did “not address, or disturb, the basic

principle that the [Fair Sentencing Act] does not apply to those defendants who were both convicted and sentenced prior to the effective date of the FSA.” 696 F.3d at 428.

The decisions in *Warren* and *Turlington* are based on two core principles that govern the inquiry here. *First*, they reflect the basic idea that “a defendant may not challenge, for the first time on appeal from the revocation of supervised release, his sentence for the underlying offense.” *United States v. White*, 416 F.3d 1313, 1316 (11th Cir. 2005) (per curiam). Though Johnson is not technically challenging his underlying sentence, he is certainly claiming that, based on changes in the law adopted after his sentence, he would no longer be subject to the same statutory penalties and, therefore, should face lower statutory penalties as a result of his supervised release violation. But “[a] sentence is presumed valid until vacated under [28 U.S.C. § 2255].” *Id.* (quoting *United States v. Almand*, 992 F.2d 316, 317-18 (11th Cir. 1993)). Here, Johnson’s original sentence is presumed to be valid.

*Second*, as the Third Circuit explained, these decisions are based on the principle that the “imposition of a new sentence for violating the terms of one’s supervised release is part and parcel of the first offense for which the defendant was convicted.” *Turlington*, 696 F.3d at 427 (citing *Johnson v. United States*, 529 U.S. 694, 700 (2000)). “[P]ostrevocation penalties relate to

the original offense.” *Johnson*, 529 U.S. at 701. This focus on the original offense is also consistent with the statute. As the Third Circuit noted, “[s]ection 3583(e)(3) is . . . backward-looking; it focuses on the previous, underlying conviction.” *Turlington*, 696 F.3d at 428. “Thus, a district court must look to the underlying offense as it existed at the time of his original sentencing when making decisions authorized by § 3583(e)(3).” *Id.* In other words, “[t]he length of a new term of imprisonment for violating supervised release—a penalty which is attributed to the original conviction according to *Johnson*—‘can only be answered by reference to the law under which the defendant was convicted.’” *Id.* at 427 (quoting *McNeill*, 131 S. Ct. at 2222). And the law under which Johnson was convicted was a Class B felony.

Here, as in *Warren* and *Turlington*, Johnson seeks to litigate the validity of his original conviction. He claims, as did the defendants in those cases, that although his conviction was one “class” of felony at the time of his conviction, by the time of his supervised release revocation proceeding, an intervening change in law had made clear that his conviction was really a lower class of felony. Here, just as in those cases, this claim fails because the district court properly “look[ed] to the underlying offense as it existed at the time of his original sentencing when making decisions authorized by § 3583(e)(3).” *Id.* As

the Third Circuit correctly held, “[t]he fact that [the defendant’s] supervised release was revoked after passage of the [Fair Sentencing Act] is of no moment.” *Id.* Accordingly, just as this Court rejected Warren’s attempt to litigate the validity of his original conviction, and just as the Third Circuit rejected Turlington’s attempt to litigate the validity of his original conviction, this Court should reject Johnson’s attempt to litigate the validity of *his* original conviction.

In sum, precedent and principle support the district court’s decision in this case. The defendant’s maximum term of imprisonment upon revocation of supervised release is governed by the penalties in place at the time of his original conviction, not by those in place years later when he eventually violates the conditions of his supervised release.

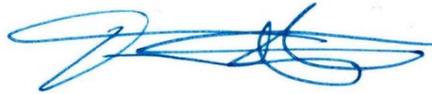
## Conclusion

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

Dated: December 8, 2014

Respectfully submitted,

DEIRDRE M. DALY  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT



DAVID E. NOVICK  
ASSISTANT U.S. ATTORNEY

Sandra S. Glover  
Assistant United States Attorney (of counsel)

## **Addendum**

**18 U.S.C. § 3559. Sentencing classification of offenses**

(a) Classification.--An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twenty-five years or more, as a Class B felony;

(3) less than twenty-five years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

\* \* \*

**18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment**

\* \* \*

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

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

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

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized

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

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

\* \* \*