

From Last Prisoner Project & National Association of Criminal Defense Lawyers

EARLY TERMINATION OF SUPERVISED RELEASE

A GUIDE ON HOW TO HELP YOUR CLIENT SECURE
EARLY TERMINATION OF SUPERVISED RELEASE



LAST
PRISONER
PROJECT

INTRODUCTION¹

“[T]he reach of federal corrections extends well beyond prison walls.” PEW Charitable Trusts, *Number of Offenders on Federal Supervised Release Hits All-Time High* 1 (Jan. 2017) (“PEW”). “In most cases, individuals’ release from federal prison does not mark the end of their sentences, [which] typically also includes a term of ‘supervised release,’ which the U.S. Sentencing Commission defines as a ‘unique type of post-confinement monitoring that is overseen by federal district courts with the assistance of federal probation officers.’” Berman, Richard M., *The Regulatory Review, Federal Court Involvement in Supervised Release* (June 28, 2021) (“Berman”) at 1-2. With nearly 160,000 inmates, the federal prison is the largest in the nation, far exceeding those of California, Texas, and other states. *See* Bureau of Prisons, Population Statistics [found at https://www.bop.gov/about/statistics/population_statistics.jsp]. Federal courts sentence close to three-quarters (72.9%) of defendants convicted of federal offenses to a term of supervised release. Congressional Research Service, *Supervised Release (Parole): An Overview of Federal Law* at 1 (Sept. 28, 2021) (“CRS”); U.S. Sentencing Comm’n, *2020 Sourcebook of Federal Sentencing Statistics, Table 18* (2020). For persons convicted of marijuana offenses that number is far higher, due to the mandatory minimum terms of supervised release under 18 U.S.C. § 841(b)(1)(A). There were an estimated 115,000 persons on federal supervised release in 2015. PEW, *supra*, at 1.

STATUTORY FACTORS

Motions for early termination of supervised release are governed by 18 U.S.C. § 3583(e)(1), which provides for early termination “at any time after the expiration of one year of supervised release.” In pertinent part, 18 U.S.C. § 3583(e)(1) provides as follows:

(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. . . .

Under section 3553, the factors the courts must consider in ruling on motions to terminate supervision are:

1. the nature and circumstances of the offense and the characteristics of the defendant;
2. the need to afford adequate deterrence;
3. the need to protect the public from further crimes by the defendant;

¹ By Joseph D. Elford, Project Director for the Last Prisoner Project’s Early Termination of Supervised Release Project.

4. provide the defendant with needed educational or vocational training, medical care, or to other correctional treatment;
5. the kinds sentence and sentencing range established for the applicable category of offense committed by the applicable category of offense as set forth in the Sentencing Guidelines;
6. pertinent policy statement issued by the Sentencing Commission;
7. the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
8. the need to provide restitution to victims of the offense.

18 U.S.C. § 3553(a), 3583(e); *Harris*, 689 F.Supp.2d at 694 n.3.

In short, once a defendant has served a year of supervised release, the court has the discretion to terminate it “in the interest of justice,” which is based on equitable factors, such as: the defendant’s performance on supervised release; the effect of his conditions on supervised release as a hindrance to his reintegration into community life; and the cost of continued supervision. *See e.g., United States v. Johnson*, 529 U.S. 53, 60 (2000) (describing “interest of justice” as being based on equitable factors) (citing 18 U.S.C. § 3583(e)(2)). Each of these factors are discussed below.

GLOBAL ARGUMENTS IN FAVOR OF EARLY TERMINATION

At the outset of, and throughout, any motion for early termination of supervised release, a practitioner should emphasize that (1) the purpose of supervised release is rehabilitative, not punitive (Section A, *supra*; *United States v. Johnson*, 529 U.S. 53, 59 (2000)); and (2) that persons granted early termination have a *lower* rate of recidivism than releasees who are required to serve their full terms (Section B, *supra*; *United States v. Harris*, 258 F.Supp.3d 137, 148 n.10 (D.D.C. 2017) (noting that a recidivism study conducted by the Administrative Office of the U.S. Courts showed that “early-term offenders in this study presented a lower risk of recidivism than their full-term counterparts”). Thus, “early termination is a practice that holds promise as a positive incentive for persons under supervision and as a measure to contain costs in the judiciary without compromising the mission of public safety.” *United States v. Crehore*, 2014 WL 3892161, at *1 (S.D. Miss. Aug. 8, 2014) (quoting Laura M. Baber & James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety* 17 (Sept. 2013) (“*No Compromise to Community Safety*”) (available at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/201309/no.compromise.html>) (“Baber & Johnson”).

Accordingly, the United States Sentencing Commission “encourages” courts to exercise their authority under section 3583 to terminate supervised release early in appropriate cases. *See* U.S.S.G. § 5D1.2, cmt n.5; *see also United States v. Shaw*, -- F.Supp.3d --, 2020 WL 1062896, at *3 (D. Colo. Mar. 5, 2020) (noting that the *Judicial Conference Guide to Judiciary Policy* explicitly states that there is a presumption in favor of early termination after a releasee has served 18 months of supervision where six factors are met) (citing Administrative Office of the United States Courts, *GUIDE TO JUDICIARY POLICY*, Volume 8, Part E, *Supervision of Federal Offenders (Monograph 109)*, § 380.10 (2012)). “The literature confirms that the early termination of supervised release is favored.” *Crehore*, 2014 WL 3892161, at *1 (citing

Committee Report stating that early termination “promotes justice, conserves resources, and protects the public”).

A. The Purpose of Supervised Release is Rehabilitative, Not Punitive

The most important starting point for any motion for early termination of supervised release is to emphasize that the purpose of supervised release is rehabilitation, not punishment. *United States v. Johnson*, 529 U.S. 53, 59 (2000) (“Supervised release fulfills rehabilitative ends, distinct from those served by incarceration”) (citations omitted). It is designed to assist individuals transition to community life. *Id.*² To this end, 18 U.S.C. § 3583(e)(1) authorizes courts, after considering the factors set forth in 18 U.S.C. § 3553, to terminate supervised release “at any time after the expiration of one year of supervised release” and “is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3583(e)(1); *United States v. Harris*, 689 F.Supp.2d 692, 694 (S.D.N.Y. 2010). To rebut the government’s arguments focusing on the unchanging circumstances of the underlying offense, counsel should emphasize the rehabilitative purpose of supervised release.

B. Early Termination of Supervised Release Reduces Recidivism

Somewhat surprisingly, the data has shown that persons granted early termination have a *lower* rate of recidivism than releasees who are required to serve their full terms. *See* Baber & Johnson, *supra*, at 1, 19.³ A study conducted by the AO in 2009 found that in the three years following the termination of supervision, persons who were granted early termination were less likely to commit new crimes than those who’ve served their full supervised terms, and any new charges were less serious. Baber & Johnson, *supra*, at 19; *see also id.* (“[H]igh-risk offenders who were granted early term were much less likely to be rearrested than their full-term high-risk counterparts.”) Specifically, the new arrest rate for offenders whose supervised release was terminated early was almost half that for offenders whose served full terms (10.2% to 19.2%). *Id.* at 2. Only 5.9 percent of persons whose supervision was terminated early were arrested for major offenses following their release from supervision compared to 12.2 percent of full-term offenders. *Id.* One explanation for this surprising disparity is that persons whose supervision is terminated early feel that they have been rewarded for their positive behavior, so they are

² *See also* S.Rep. No. 98-225, p. 124 (1983) (declaring that “the primary goal [of supervised release] is to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense”); *United States v. Shaw*, -- F.Supp.3d --, 2020 WL 1062896 (D. Colo. March 5, 2020) (noting “shift in focus from coercing a person to act lawfully to monitoring and fostering a person’s ability to self-manage lawful behavior and desire to act lawfully”); *United States v. Trotter*, 321 F.Supp.3d 337, 339-41 (E.D.N.Y. July 12, 2018) (“Supervised release is designed to assist with rehabilitation, not to punish”); Berman, *supra*, at 2 (“Supervised release is intended to assist people who have served prison terms with their effective reintegration, or ‘reentry,’ into the community”).

³ *See also Harris*, 258 F.Supp.3d at 148 n.10 (noting that a recidivism study conducted by the AO showed that “early-term offenders in this study presented a lower risk of recidivism than their full-term counterparts”) (citing Sentencing Commission Report at 62–63 n.263); James L. Johnson, *Are Early Terminated Offenders a Greater Risk to the Community*, News & Views, Vol. XXXV, No. 2, Jan. 18, 2010, at 1 (biweekly newsletter published by the AOUSC–OPPS)).

motivated to refrain from committing future crimes. *Cf.* Urban Institute, *Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes* (Dec. 2008) (“Urban Institute”) at 16 (“Providing incentives for meeting case-specific goals of supervision is a powerful tool to enhance individual motivation and promote positive behavior change”) (citations); Berman, *supra*, at 5 (“Early termination is a critical incentive and a meaningful reward. It is often a welcome counterpoint to the length and severity of prior incarceration”). Furthermore, the results of the 2008 AO study “suggest that offenders granted early termination under the current policies pose no greater danger to the community than offenders who serve a full term of supervision.” *Id.* at 4. This provides practitioners a very powerful argument that early termination of supervision can reduce “costs in the judiciary without compromising the mission of public safety,” as the AO found. *Id.* at 1-2. This argument may be very effective in convincing conservative judges, as further described below.

C. Supervision of Those Who Do Not Need It Imposes Significant Costs on the Public

Along with reducing recidivism, the most important public policy to emphasize in early termination motions is that early termination of supervised release under 18 U.S.C. § 3583(e)(1) avoids the needless waste of public funds where employed in appropriate cases. Courts have regularly recognized this. *See, e.g., United States v. Chapman*, 827 F.Supp. 369, 372 (E.D. Va. 1993) (“The public interest is best served by terminating supervised release [in appropriate circumstances], which will allow the Probation Office to invest the public’s limited resources on those who are in need of supervision. Clearly there is no benefit to be derived by maintaining a supervised release at public expense over someone who has proven himself to be beyond supervision”); *United States v. Corbett*, 2019 WL 2110367, at *1 (D. Idaho May 14, 2019) (“The public interest is no longer served by expending taxpayer funds (even at a reduced level) to monitor Mr. Corbett’s activities. Accordingly, it is in the interest of justice to terminate Mr. Corbett’s supervised release”); *see also United States v. Trotter*, 321 F.Supp.3d 337, 339-41 (E.D.N.Y. July 12, 2018) (“As a result in these errors in our sentencing practice [for habitual marijuana users], money and the time of our probation officers are wasted, and releasees are unnecessarily burdened” “The cost to tax-payers of long, repeating sentences and extended, unnecessary supervised release is substantial”); *United States v. Thomas*, 346 F.Supp.3d 326, 335 (E.D.N.Y. 2018) (“Termination is appropriate when the rehabilitative goals of supervised release may no longer be attained or can be attained at too great a cost to the defendant and society”); *United States v. Lewis*, 2020 WL 5128372, at *2 (D. Conn. June 5, 2020) (same).⁴

In 2021, for instance, the average monthly cost of supervision was \$286.11 per defendant, which includes probation officer salary costs, the cost of law enforcement measures, and miscellaneous operating expenses. Bader & Johnson, *supra*, at 5 n.4. While this number may

⁴ *See also Johnson v. United States*, 529 U.S. 694, 709 (2000) (“Congress aimed ... to use the district courts’ discretionary judgment to allocate supervision to those releasees who needed it most”); PEW, *supra*, at 1 (“Although post-prison monitoring can be an important correctional tool, research shows that policymakers can maximize limited resources and maintain public safety by reducing the length of supervision for certain offenders and prioritizing oversight and services for those most likely to reoffend.”).

not seem like much at first glance, early termination significantly reduces public costs in the aggregate, especially when combined with the cost savings in future law enforcement, since there were an estimated 115,000 persons on supervised release in 2015, PEW, *supra*, at 1. and early-term offenders are less likely to commit future crimes, *see* Bader & Johnson, *supra*, at 5. As noted, courts (and conservative judges, in particular) are more favorable to granting early termination motions when they perceive it as a cost-saving measure with no risk to the public.

SPECIFIC ARGUMENTS FOR EARLY TERMINATION

A. Supervision Conditions that Impair a Releasee's Transition into Community Life

1. Generally

After pointing out the general public policies in favor of early termination, the next step in drafting a motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1) is to identify the restrictive conditions of supervision that impede the releasee's ability to fully reintegrate himself into community life. For this, counsel should review the releasee's supervised release conditions and argue how these restrictions create a hardship on the defendant that would be ameliorated if supervised release is terminated. Except for several mandatory conditions, section 3583 vests broad discretion in the trial court to set the conditions for a defendant's supervised release. *See, e.g., United States v. Hamilton*, 986 F.3d 413, 417 (4th Cir. 2021). The supervised release conditions that most often impair one's transition to community life are that: (1) the defendant not use controlled substances and submit to periodic testing, 18 U.S.C. § 3583(d); and (2) the defendant remain within the jurisdiction of the court, unless granted permission to leave that jurisdiction by the court or a probation officer; 18 U.S.C. § 3563(b)(14).

2. Employment

The most common way that supervised release impairs transition into community life is that supervision impairs a releasee's ability to perform his job though travel restrictions, *see* 18 U.S.C. § 3563(b)(14), and the need to leave work on short notice at any time to take a drug test, *see* 18 U.S.C. § 3583(d). The former is particularly problematic for releasees whose job requires them to travel on short notice. *See United States v. Etheridge*, 999 F.Supp.2d 192, 193 (D.D.C. 2013) (granting defendant's motion for early termination of supervised release, noting defendant "had recently been promoted to a position that required travel on short notice, but the conditions of his release prevented him from traveling without permission"). Courts have recognized that conditions of supervised release that impair one's employment strongly favors early termination. *See, e.g., United States v. Beckham*, 2021 WL 2651300, at *3 (N.D. Cal. June 28, 2021) (Slip Copy) ("Beckham has shown extraordinary efforts in reestablishing employment and reintegrating himself into society;" although the releasee works as a parts manager, he is qualified to work as a technician, which would enable him to earn more money through commissions, [but] his supervised status makes him ineligible for this position" "The original supervised release sentence is no longer suitably tailored to Beckham's conduct and career goals. [Citation]. Granting this motion best serves justice and will allow Beckham to continue to advance his career"); *United States v. Parker*, 219 F.Supp.3d 183, 190 (D.D.C. 2016) (granting

early termination motion; “After his release, [defendant] successfully completed further training with Project Empowerment and obtained a full-time job with the D.C. Department of Public Works. He has maintained full-time employment for almost four years”); *United States v. Etheridge*, 999 F.Supp.2d 192, 193 (D.D.C. 2013); *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (granting early termination motion, noting defendant’s “current employment status indicates that he has returned to a stable environment and therefore presents a lower risk of recidivism”); *United States v. Harris*, 689 F.Supp.2d 692, 694-96 (S.D.N.Y. 2010);⁵ *United States v. Schuster*, 2002 WL 31098493, at *1 (S.D.N.Y. Sept. 19, 2002) (“It is of value both to defendant and his family and also to the community for [defendant] to obtain productive employment which utilizes his considerable talents. It is distinctly possible that termination of defendant’s probation will assist in this regard”).

B. The Releasee’s Positive Performance While Under Supervision

In addition to demonstrating how supervision poses barriers to the defendant’s successful transition into community life, counsel should emphasize the releasee’s successful efforts towards rehabilitation both while in custody and under supervision. A non-exhaustive list of such achievements, in addition to employment, discussed *infra*, are as follows:

1. Family/Social Ties

A releasee’s demonstrated ability to maintain strong social and family ties is a factor that counsel should emphasize to support a motion for early termination. Family ties may include relationships between the releasee and his or her spouse, partner, parents, children, or other family members. Social ties include having close friends and being a member of community groups, such as religious groups and volunteer organizations. Courts have found all of these factors as favoring early termination. *See, e.g., United States v. Shaw*, ___ F.Supp.3d ___, 2020 WL 1062896, at *5 (“Mr. Shaw’s deep relationship with his partner . . . demonstrates that he is motivated to remain a law-abiding citizen beyond the term of supervised release”); *United States v. Thomas*, 346 F.Supp.3d 326, 335 (E.D.N.Y. 2018) (defendant’s “family and community, including consistent and stable employment, will probably help him avoid criminal conduct”);

⁵ *United States v. Harris*, 689 F.Supp.2d 692 (S.D.N.Y. 2010) framed the issue as follows: “[The defendant’s] conduct post-conviction has been beyond reproach. He was apparently a model prisoner during a long term of incarceration. He has fully complied with the terms and conditions of supervised release. He has obtained and is pursuing productive employment. He is caring for his family. * * *

There are two possible resolutions to this case. The Court can terminate Harris’ supervised release, do away with crippling obstacles to his professional advancement, and make straight his path to rehabilitation and redemption. Or the Court can require Harris to serve his full term of supervised release, leave him blocked and at risk in his employment, and confer no benefit or any significance upon the victimized banks. Which resolution is “in the interest of justice?” The question is not close. Justice requires the termination of Harris’ supervised release.

Id. at 694-96. This is a passage worth citing in the employment section of any motion for early termination where appropriate.

United States v. Trotter, 321 F.Supp.3d 337, 335 (E.D.N.Y. 2018) (“With support of friends and family, [the releasee] is likely to lead a productive, law-abiding life”); *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (granting early termination motion, noting that releasee “appears to have a good relationship with his wife, who is also elderly, and his grandchildren,” while family ties are not ordinarily relevant to determining the sentence, they are relevant in considering motion for early termination) (citing *United States v. Nellum*, 2005 WL 3000073, at *4 (N.D. Ind. Feb. 3, 2005)). Counsel should support her arguments on this point through supporting declarations submitted by the releasee’s partner, family members, and/or religious organization or volunteer group, as well as in a declaration from the releasee.

2. Age/Health of Releasee

Many releasees are at an advanced age, either because of the length of their custodial sentence or their age when they were convicted. Studies have shown that older offenders are less likely to recidivate after release, so counsel should stress this when applicable. *See, e.g.*, United States Sentencing Commission, “The Effects of Aging on Recidivism Among Federal Offenders” (Dec. 2017) at 3 (“Older offenders were substantially less likely than younger offenders to recidivate following release”) (found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf); *United States v. Adams*, 873 F.3d 512, 519 (6th Cir. 2017) (“a recent study by the U.S. Sentencing Commission found that recidivism rates for offenders over the age of sixty—both violent and non-violent—are the lowest among all age groups”) (citing United States Sentencing Commission, “The Recidivism Among Federal Offenders: A Comprehensive Overview” (2016)); *United States v. Mabry*, 528 F.Supp.3d 349, 357 (E.D. Pa. 2021) (fact that defendant was 57 years old cited by court as factor supporting early termination); *United States v. Castro*, 2021 WL 274304, at *6 (Jan. 26, 2021) (Slip Copy) (“because of Defendant’s advanced age, the likelihood of recidivism is low”); *cf. United States v. Luna*, 478 F.Supp.3d 859, 863 (N.D. Cal. 2020) (sentencing defendant to five-year term of supervised release, despite government’s request for ten-year term, where defendant has no history of committing violent crimes, is in an age group with a low risk of recidivism (67 years old)); *United States v. Marshall*, -- F.Supp.3d --, 2020 WL 882138, at *5 (C.D. Ill. Feb. 24, 2020) (“Mr. Marshall will be in his mid-40’s when he’s released. Recidivism is significantly less likely than at the age of 27 that Mr. Marshall was when he committed these crimes”); *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (granting early termination motion; “The likelihood of recidivism by an over-65 offender is very low”).

Furthermore, regardless of age, an inmate may suffer from a health condition that did not exist when he was sentenced. If this is so, the releasee’s health should be emphasized to the court to support the motion for early termination. *See, e.g.*, *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (finding that defendant’s poor health weighs in favor of early termination); *United States v. Way Long*, No. 2:21-cr-00026-RSL (W.D. Wash. May 31, 2022) (Dkt. 9) (granting defendant’s motion for early termination of supervised release, noting that defendant recently suffered a stroke that left him disabled); *cf. also* 21 U.S.C. § 3582(c)(1)(A)(2) (providing special category for compassionate release for defendants who are at least 70 years of age and who have served at least 30 years in prison); *United States v. Rodriguez*, 451 F.Supp.3d 392, 394 (E.D. Pa. 2020) (reducing sentence to time served, because

of COVID, for an inmate who was 1½ years from release after serving 17 years and suffered from diabetes, hypertension, and liver abnormalities). In particular, with respect to releasees who obtained compassionate release, a scholar states: “Because many of the inmates who are compassionately released are suffering from terminal illnesses, it may be unnecessary from a public safety perspective and inefficient from a resource perspective to continue to provide supervision in these cases.” Baber & Johnson, *supra*, at 22.

3. Positive Performance While in Custody and Under Supervision

In addition to employment, age, health, and strong social ties, counsel should also cite any significant educational, training, and/or rehabilitation programs, or therapy, that the defendant completed while incarcerated or under supervision, as well as his clean record in custody and under supervision, where applicable. *United States v. Beckham*, 2021 WL 2651300, at *3 (N.D. Cal. June 28, 2021) (Slip Copy) (“Courts can consider the benefits of “provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment” when considering a motion for early termination of supervised release”) (citing 18 U.S.C. § 3553(a)(2)(D)); *Harris*, 258 F.Supp.3d at 149 (noting that 18 U.S.C. § 3583(e) requires courts to consider “the conduct of the defendant released”) (quoting 18 U.S.C. § 3583(e)).

Some illustrative cases are as follows:

4. Education and Vocational Training

United States v. Harris, 258 F.Supp.3d 137, 146 (D.D.C. 2017) (noting “releasee completed about 900 hours of educational development, 225 of vocational building maintenance training, 92 hours of parenting classes, and numerous other courses during his 23 years of incarceration”); *United States v. Parker*, 219 F.Supp.3d 183, 190 (D.D.C. 2016) (granting early termination motion; “While incarcerated, he earned his GED and took training courses available to him through the Bureau of Prisons to learn the skills he will need to become a productive member of society”).

5. Substance Abuse Treatment/Sobriety

United States v. Raymond, 2019 WL 1858285, at *2 (Apr. 25, 2019) (noting that commentary to United States Sentencing Guidelines provides as an example of a candidate for early termination a defendant who “while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of defendant”) (quoting U.S.S.G., § 5D1.2, cmt. n.5); *United States v. Lyle*, NO. CR—EFS-1, 2019 U.S. Dist. LEXIS 51956, at *4 (E.D. Wash. March 26, 2019) (granting early termination motion after the defendant took part in the RDAP program, received counseling at a halfway house, and became a mentor for other program participants); *United States v. Beckham*, 2021 WL 2651300, at *3 (N.D. Cal. June 28, 2021) (Slip Copy) (granting early termination; “Beckham completed the RDAP program while incarcerated, and completed the subsequent aftercare program while at the halfway house and during home confinement”).

6. Therapy

United States v. Raymond, 2019 WL 1858285, at *2 (Apr. 25, 2019) (granting early termination; noting that releasee “has completed all of his therapy sessions since his release”).

7. Clean Record Prior to Offense, in Custody, and While on Release

18 U.S.C. § 3553(a)(1) (courts must consider “the history and characteristics of the defendant”); *United States v. Harris*, 258 F.Supp.3d 137, 146-47 (D.D.C. 2017) (noting “releasee had not had any disciplinary incidents in 13 years, and releasee had unblemished record of compliance with terms of supervised release for over four years” “The defendant's maintenance of an unblemished record of compliance with his conditions of release for over [five] years is, perhaps, the best indicator of his ability to continue as a law-abiding member of his community.”); *United States v. Raymond*, 2019 WL 1858285, at *2 (D.D.C. Apr. 25, 2019) (same) (quoting *Harris*); *United States v. Mabry*, 528 F.Supp.3d 349, 357 (E.D. Pa. 2021) (releasee’s sobriety favors early termination).⁶

8. Risk Assessment

Perhaps the most crucial consideration in any motion for early termination is the Probation Office’s risk assessment of the defendant. If this assessment is low or low/moderate, the attorney should emphasize this fact as much as possible. *See, e.g., United States v. Beckham*, 2021 WL 2651300, at *3 (N.D. Cal. June 28, 2021) (Slip Copy) (granting early termination; “Beckham’s current minimal supervision weighs in favor of early termination. . . . The Probation Office also estimated that Beckham had a Low/Moderate risk of recidivism”); *See Shaw*, 2020 WL 1062896, at *5 (the general interests that undergird sentencing decisions will not be impeded by this early termination, especially given his “low/moderate” risk category on the Post-Conviction Risk Assessment conducted by the Probation Office”); *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (granting motion for early termination, noting

⁶ Counsel should be aware that the government may argue that a releasee’s good performance on supervised release counsels *against* its termination, as this shows that supervision is working. *See, e.g., United States v. Martinez*, 2:04-cr-00758-SJO, at *4 (C.D. Cal. March 4, 2020) (Minute Order) (“the fact that Defendant has benefitted from mental health counseling and treatment does not suggest that supervision should immediately be terminated. Rather, it confirms that supervision has been helping Defendant as intended”). Such an approach extinguishes the expectations of the releasee and destroys any incentive for him to put his best foot forward in abiding the terms of his supervision. *See* Urban Institute, *Supra*, at 16 (“Providing incentives for meeting case-specific goals of supervision is a powerful tool to enhance individual motivation and promote positive behavior change”) (citations); Berman, *supra*, at 5 (“Early termination is a critical incentive and a meaningful reward. It is often a welcome counterpoint to the length and severity of prior incarceration”). These cites can be used to combat this “Catch-22” government argument.

“the Probation Department indicates that Powell is on low-activity supervision because he qualifies as a low-risk offender”).⁷

9. Already Served a Lengthy Custodial Sentence

Where a releasee has served a lengthy period of incarceration, counsel should stress this, since a lengthy custodial sentence makes recidivism less likely, due to the age of the releasee. *See supra*, Section B.2. This is an equitable factor favoring early termination. *See United States v. Parker*, 219 F.Supp.3d 183, 190-91 (D.D.C. 2016) (“by present-day measures of periods of incarceration suitable to Defendant and his crimes, the undersigned believes that Defendant has been punished sufficiently for the crimes he committed twenty years ago”); *United States v. Powell*, 2011 WL 2964006, at *2 (N.D. Ind. July 20, 2011) (“the Court finds that the deterrent value of this case has been fully realized and that there is no longer any need to keep Powell on supervised release. His offenses were non-violent; he served an extended prison sentence; completed more than a year towards his term of supervised release; and paid a substantial court-imposed fine”); *see also* Berman, *supra*, at 5 (“Early termination is a critical incentive and a meaningful reward. It is often a welcome counterpoint to the length and severity of prior incarceration”).

Relatedly, though less often applicable, courts consider “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct” in adjudicating motions for early termination. *See* 18 U.S.C. § 3553(a)(7). Sometimes, the government or the court will point to a “sentencing disparity” between the defendants if the court were to grant early termination. The most common reason for this “disparity” is that the other defendants did not apply for early termination, so counsel should check this and use it in response, if appropriate. In any event, counsel should emphasize the

⁷ To this end, a paper issued by the Urban Institute states:

There is broad consensus, supported by a solid research base, that staff and programming resources ought to be focused on populations at a moderate to high risk of reoffending because this population is more likely to benefit from treatment and supervision. . . . Research has shown that treatment resources focused on low-risk parolees tend to produce little, if any, positive effect. In fact, [two data researchers] assert that involving low-risk offenders in extensive programming may actually worsen outcomes for this group. The available evidence and sound correctional practice strongly suggest a realignment of resources away from low-risk parolees and toward those with the greater needs or risk of recidivism. Focusing more attention on high-risk individuals and less attention on low-risk individuals can also help parole agencies manage caseloads, allowing parole officers to devote valuable and limited case management time to those who warrant it most. Importantly, more supervision by itself—even for high-risk parolees—will not ensure more successful outcomes.

Urban Institute. *Supra*, at 12-13.

chronological difference between sentencing and early termination, *see Spinelle, supra*, so a *sentencing* disparity cannot be caused by early termination.

For marijuana cases, in particular, counsel may wish to argue the fact that a defendant has served a lengthy sentence of incarceration for a drug offense for which public attitudes have changed favors early termination. *See United States v. Parker*, 219 F.Supp.3d 183, 190-91 (D.D.C. 2016) (“Defendant’s supervision should be terminated to avoid further disparities between the sentence he received in 1998 and the likely sentence similarly-situated defendants would receive if they were convicted of the same offenses today”); *cf. United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016) (interpreting appropriations bill as forbidding expenditure of federal funds on medical marijuana prosecutions). However, unless counsel can point to specific changes in the sentencing law, this argument is risky because it may come across as a failure by the defendant to acknowledge the seriousness of his crime and accept responsibility for it. Therefore, counsel should her best judgment whether to advance an argument based on sentencing disparity.

10. Miscellaneous, or Catch-All, Cases

United States v. Mabry, 528 F.Supp.3d 349, 358 (E.D. Pa. 2021) (“the Court concludes that early termination of Mabry’s supervised release term is in the interest of justice because the purpose of supervised release, i.e., his successful reentry into the community, has been accomplished, as evidenced by the absence of arrests or convictions since his release from custody, his steady employment, stable residence, his sobriety, and the relatively short time left on his supervised release term”).

United States v. Shaw, -- F.Supp.3d --, 2020 WL 1062896, at *5 (D. Colo. March 5, 2020) (early termination of defendant’s supervised release was warranted, where defendant satisfied all conditions of supervised release, maintained compliance throughout the duration of supervision, maintained stable employment and a stable residence throughout supervision in addition to paying off all court-ordered fines and restitution, defendant took courageous strides to improve his life through diligent pursuit of gainful employment and positive relationships with a significant other, her daughter, and their newborn son, and defendant did not pose a risk of harm to the public or victims).

United States v. Luna, 478 F.Supp.3d 859, 863 (N.D. Cal. 2020) (sentencing defendant to five-year term of supervised release, despite government’s request for ten-year term, where defendant has no history of committing violent crimes, is in an age group with a low risk of recidivism and has already served 30 years in prison).

United States v. Trotter, 321 F.Supp.3d 337, 335 (E.D.N.Y. 2018) (“At the hearing Trotter presented the court with his current resume and a flier from a career fair he recently attended. [Citation] With support of friends and family, he is likely to lead a productive, law-abiding life”).

Harris, 258 F.Supp.3d at 149 (releasee’s “gainful and successful full-time employment, participation in his community through church attendance, assisting at his son’s pre-school, and volunteering in a youth program, and his continuing diligence in working to improve his life and prospects, amply demonstrate that his conduct on supervised release and successful reintegration

into his community has been exemplary, and that ‘continuing the defendant’s probation would have no real value as far as law enforcement or any other community interest is concerned,”) (quoting *Etheridge*, 999 F.Supp.2d at 199).

United States v. Parker, 219 F.Supp.3d 183, 189-91 (D.D.C. 2016) (defendant had record of successful rehabilitation while on supervision, as he maintained full-time employment for almost four years and did not willfully violate the terms of his supervised release, he has been punished sufficiently for the crimes he committed 20 years ago, were he convicted today, he would likely receive prison sentence less than what he actually completed).

11. Cycling from Release on Supervision to Prison

As a possible footnote or a *see also* cite in appropriate cases, counsel may wish to note that scholars and courts have described a problem of supervised release, which further increases its cost, in that it fosters a cycle of a defendant transition from custody to supervision, only to return to custody for violating a supervised release term. *United States v. Thomas*, 346 F.Supp.3d 326, 335 (E.D.N.Y. 2018). (“Continued supervision will probably interfere with his reintegration into society. He may needlessly be placed in prison.” “The court should avoid a cycle of supervised release, use of alcohol, and prison”); *United States v. Trotter*, 321 F.Supp.3d 337, 335 (E.D.N.Y. 2018) (“If [defendant’s] supervision continues, he will probably end up in the almost endless cycle of supervised release and prison. Because the revocation statute requires jail time for drug use, [citation], he is likely to be sent back to prison, to be followed by a term of supervised release, which, when violated, will again send him back to prison.”)

C. Artificial Burden-Raising Obstacles Imposed by the Courts

Since the enactment of 18 U.S.C. § 3583, many courts have imposed burdens on releasees seeking early termination that are not authorized by the statute. This is likely why such a small proportion of releasees are granted early termination. *See United States v. Harris*, 258 F.Supp.3d 137, 148 n.10 (D.D.C. July 7, 2017) (“Perhaps due to this high bar, the U.S. Sentencing Commission reports that only a small proportion, ‘17.9 percent of successful closures (representing 12% of all supervision cases), were early terminations by the court”) (citing U.S.S.C. Report at 62). The major four such burdens are as follows: (1) the releasee must demonstrate “exceptionally good behavior;” (2) the releasee must demonstrate an “undue burden;” (3) the release must have served a minimum threshold period of supervision beyond one year; and (4) the mandatory minimums of 18 U.S.C. § 841 prevent courts from exercising their power under 18 U.S.C. § 3583 to terminate supervised release after only one year. These arbitrary (and improper) burdens are addressed in turn.

A. Early Termination of Supervised Release Does Not Require “Exceptionally Good Behavior”

Until recently, many courts have held that early termination of supervised release is “reserved for rare cases of ‘exceptionally good behavior.’” *See, e.g., United States v. Smith*, 219 Fed.Appx. 666, 668, 2007 WL 187805, at *1 (9th Cir. 2007) (concluding early termination reserved for rare cases of “exceptionally good behavior”) (citing *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997)); *United States v. Atkin*, 38 Fed.Appx. 196, 198 (6th Cir. 2002); *United States v. Evertson*, 2011 WL 841056, at *2 (D. Idaho March 7, 2011) (citing *Smith* and *Lussier*);

United States v. McCay, 352 F.Supp.2d 359, 360 (S.D.N.Y. 2005). The reasoning of these cases is that a defendant is *expected* to comply with his conditions of supervision, so good behavior alone does not suffice to warrant early termination. *See, e.g., McCay*, 352 F.Supp.2d at 360 (“Model prison conduct and full compliance with the terms of supervised release is what is expected of a person under the magnifying glass of supervised release and does not warrant early termination”); *United States v. Ranum*, 2008 WL 2810470, at *2 (July 21, 2008) (Slip Copy); *cf. United States v. Medina*, 17 F.Supp.2d 245, 247 (S.D.N.Y. 1998) (defendant’s “post-incarceration conduct is apparently unblemished, [but] this alone cannot be sufficient reason to terminate the supervised release since, if it were, the exception would swallow the rule”). According to these courts, the releasee’s behavior must not only be impeccable, but it must be “exceptionally good.”

Section 3583(e), however, expressly provides for early termination of supervised release “at any time after the expiration of one year of supervised release” if the court “is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3583(e)(1); *United States v. Harris*, 689 F.Supp.2d 692, 694 (S.D.N.Y. 2010). It does not contain an “exceptionally good behavior” requirement. Based on this plain language of the statute, the Ninth Circuit and other courts have rejected this burden-increasing “exceptionally good behavior” test. *See United States v. Ponce*, 22 F.4th 1045, 1047 (9th Cir. 2022) (“We take this opportunity to make clear that our unpublished disposition in *Smith* misread *Lussier*, and the “exceptional behavior” rule as restated in *Evertson* is incorrect as a matter of law”); *United States v. Melvin*, 978 F.3d 49, 53 (3d Cir. 2020) (*Lussier* did not stand for the proposition that a releasee must demonstrate “exceptionally good behavior” to warrant early termination; exceptionally good behavior is sufficient, but not necessary) (citing *United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016)); *United States v. Campbell*, 2022 WL 3227735, at *2 (D. Idaho Aug. 10, 2022) (Slip Copy) (citing *Ponce*); *United States v. Shaw*, -- F.Supp.3d --, 2020 WL 1062896, at *5 (D. Colo. March 5, 2020). If the government attempts to rely on this exceptionally good behavior requirement in its opposition to a motion for early termination, which it still does, the cases cited above – *Ponce*, *Melvin*, *Campbell*, and *Shaw* – are useful counters.

B. Early Termination of Supervised Release Does Not Require the Releasee to Demonstrate “Undue Hardship”

Another barrier to early termination imposed on releasees by some courts is that the defendant must demonstrate “undue hardship” from supervision to warrant early termination. *See, e.g., United States v. Reyes*, 2022 WL 37469, at *3 (D.N.J. Jan 4, 2022) (Slip Copy); *United States v. Ranum*, 2008 WL 2810470, at *2 (July 21, 2008). In *United States v. Emmett*, 749 F.3d 817 (9th Cir. 2014), the Ninth Circuit rejected such requirement and vacated the district court’s denial of a releasee’s motion for early termination because the trial court found that “[d]efendant has not provided any reason demonstrating that continuing supervised release imposes an undue hardship on defendant.” *Id.* at 819. Other courts are in accord. *See United States v. Ponce*, 22 F.4th 1045, 1047 (9th Cir. 2022) (neither a change in behavior, undue hardship, nor exceptional circumstances are required to terminate supervised release); *United States v. Nicholson*, 2022 WL 2800077, at *1 (N.D. Cal. July 14, 2022) (Slip Copy) (same) (citing *Ponce*). Although this issue has seemingly been resolved, at least in the Ninth Circuit, this may not prevent the

government from arguing that the defendant must demonstrate undue hardship to warrant early termination. Such argument can be countered with *Emmett*, *Ponce*, and *Nicholson*.

C. A Releasee Need Not Serve More than a Year of His Supervised Release Term to be Eligible for Early Termination under Section 3583

Other courts, as well as the government, have sought to limit section 3583 by arbitrarily requiring defendants to serve a minimum amount of time beyond one-year of supervision before it will grant, or even entertain, an early termination motion. Two such arbitrary temporal restrictions on a court's discretion under section 3583 that appear in the case law are that: (1) the releasee must serve all but one-year of his term of supervised release before the court can terminate it early, *see United States v. Lowe*, 632 F.3d 996, 998 (7th Cir. 2011); and (2) the releasee must serve all but one-year of his supervised release term before the court can terminate it, *cf. United State v. McClister*, 2008 WL 153771, at *2 (D. Utah Jan. 14, 2008). If presented with either of these policies, the following authorities may be used as counters.

In *United States v. Lowe*, 632 F.3d 996 (7th Cir. 2011), the trial court had a policy of refusing to consider motions for early termination of supervised release until twelve months before its expiration. *Id.* at 998-99. The Seventh Circuit found this arbitrary temporal limitation an abuse of discretion, reasoning as follows:

We find that this unexplained, clearly arbitrary policy certainly circumvents the intent and purposes of 18 U.S.C § 3583(e)(1). Section 3583(e)(1) clearly provides an individual with the opportunity to submit a motion for early termination of supervised release “any time after the expiration of one year of supervised release.” Though § 3583(e)(1) gives the court discretion in granting a motion for early termination of supervised release, the district court's failure to even consider such motions until twelve months before the probation's end-date completely disregards the statute it must follow.

Id. at 999. The holding of *Lowe* can be extended to argue than any judicial policy imposing an arbitrary limitation on the granting of motions for early termination conflict with the statutory factors of section 3583 (after one-year in the “interest of justice”) and is, therefore, an abuse of discretion.

D. Section 3583 Does Not Require a Releasee to Serve All But One-Year of His Term of Supervision Before Being Eligible for Early Termination

In another case, *United States v. McClister*, 2008 WL 153771 (D. Utah Jan. 14, 2008), the government opposed the releasee's motion for early termination because he had served less than half of his supervised release term. *Id.* at *2. Without adopting such a policy as its own, the court “split the baby” by granting defendants early termination motion, but postponing its effective date by one month, which is when the defendant would reach the halfway point of his supervised release term. *Id.* Thus, when presented with such an argument (or policy), an attorney should argue both that the policy conflicts with section 3582, *Lowe*, and, alternatively, that it can be resolved by making the termination effective at the halfway mark. *See McClister*, 2008 WL 153771, at *2 (granting defendant's motion for early termination of supervised release; noting that “the government's objection [in regard to defendant having served less than half of

his supervised release term] is easily resolved by making Defendant's termination effective" at the halfway mark).

E. 18 U.S.C. § 3583 Provides for Early Termination of Supervised Release After One Year, Even if the Defendant was Sentenced to a Mandatory-Minimum Supervised Release Term

The great majority of persons convicted of marijuana offenses are sentenced to a mandatory minimum term of supervised release. *See* 18 U.S.C. § 841(b)(1)(A)(viii) (5-year term of supervised release for individual convicted of offenses involving 1,000 kilograms of marijuana or 1,000 marijuana plants); 18 U.S.C. § 841(b)(1)(B)(viii) (4-year term of supervised release for individual convicted of offenses involving 100 kilograms of marijuana or 100 marijuana plants). Because of these mandatory minimum supervised release terms, one issue that has arisen frequently is whether a trial court has the authority under 18 U.S.C. § 3583 to terminate supervised release after one year, even though the defendant was sentenced to a mandatory minimum supervised release term under one of these statutes. Numerous courts -- in fact, nearly all courts to have considered the issue -- have concluded that 18 U.S.C. § 3583 authorizes a court to terminate supervised release "at any time after the expiration of one year of supervised release," if "is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice," regardless whether the defendant was initially sentenced to a mandatory minimum term of supervised release. *See Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018); *United States v. Spinelle*, 41 F.3d 1056, 1060 (6th Cir. 1994); *United States v. Rodriguez*, No. CR 11-96-DMG (C.D. Cal. July 16, 2021) (Dkt. 40); *United States v. Palacios*, No. 5:11-CR-00080-VAP-1 (C.D. Cal. March 11, 2020) (Dkt. 127); *United States v. Trotter*, No. 15-CR-382, 2018 WL 3421313, at *14 (E.D.N.Y. July 13, 2013) ("All courts, as far as this court is aware, agree with this position that early termination power exists even when a mandatory minimum was required"); *United States v. Harris*, 258 F.Supp.3d 137, 143 (D.D.C. 2017); *United States v. Carter*, No. 03-CR-695 AHM, Slip Op. at 3-4 (C.D. Cal. Jan. 26, 2015); *United States v. Simmons*, No. 05 CR 1049, 2010 WL 4922192, at *4 n.1 (S.D.N.Y. Dec. 1, 2010); *United States v. Slay*, No. 1:03-CR-148 TS, 2010 WL 1006713, at *1 (D. Utah Mar. 16, 2010); *United States v. Stacklin*, 2009 WL 2486336, at *1 (E.D. Mo. Aug. 11, 2009); *United States v. Beagley*, 2008 WL 2323905, at *1 (D. Utah June 5, 2008); *United States v. McClister*, 2008 WL 153771, at *2 (D. Wash. Jan. 14, 2008); *United States v. Scott*, 362 F.Supp.2d 982, 984 (N.D. Ill. 2005); *see also United States v. Way Long*, No. 2:21-cr-00026-RSL (W.D. Wash. May 31, 2022) (Dkt. 9) (granting defendant's motion for early termination of supervised release after he served 16 months of a five-year mandatory minimum term for marijuana trafficking offenses); *but see United States v. Martinez*, CR 04-758-SJO (C.D. Cal. Mar. 9, 2020) (Dkt. 856) (holding that 18 U.S.C. § 841 abrogates the court's authority to terminate supervised release under §3583 after one year).⁸

⁸ The seminal case on the issue is *United States v. Spinelle*, 41 F.3d 1056 (6th Cir. 1994), wherein the Sixth Circuit held "that a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. § 3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a)." *Id.* at 1060-61. The court explained:

After *Spinelle*, in 2002, Congress added the phrase “[n]otwithstanding section 3583” to the mandatory minimum language of 18 U.S.C. § 841, which the government has argued abrogates the court’s authority to terminate supervised release early. *Spinelle*, however, remains good law, as courts have held that “although the *Spinelle* case was decided before the 2002 amendment, the logic of that case clearly supports the notion that the ‘imposition’ of the sentence is both chronologically and conceptually distinct from the post-sentencing alteration of the service of supervised release.” See, e.g., *United States v. Scott*, 362 F.Supp.2d 982, 984 n.5 (N.D. Ill. 2005);⁹ *United States v. Palacios*, No. 5:11-CR-00080-VAP-1 at 7-8 (C.D. Cal. March

The government’s statutory interpretation [that the mandatory minimum terms of supervised release set forth in section 841 deprive district courts of their authority to terminate supervised release early under section 3583] create[s] a conflict [between these statutes] because it attempts to combine in one sentencing phase what Congress has divided into two: sentencing and post-sentence modification.

Both the United States and the district court agree that the [Controlled Substances Act], through 21 U.S.C. § 841(b)(1)(C) and the equivalent amendment to 18 U.S.C. § 3583(a), required the district court to *sentence* *Spinelle* to three years of supervised release in addition to his prison sentence. This, the district court did, satisfying the sentencing phase of the statutory language. [Citation]

In the mind of Congress, as expressed in the plain meaning of the statutes, however, the sentencing phase is different than post-sentence modification. Prior to the Congressional amendment of 18 U.S.C. § 3583(a) in the [Controlled Substances Act], the district courts had the authority under 18 U.S.C. § 3583(a) to impose a term of supervised release on a defendant during sentencing at its discretion. Under 18 U.S.C. § 3583(e)(1), it also had the additional and separate discretionary authority to terminate a term of supervised release after one year of completion. When Congress subsequently amended 18 U.S.C. § 3583(a) to require that courts impose a term of supervised release on a defendant if such a term is required by statute, it only partially limited a court’s discretionary authority to *impose* the sentence. Congress did not alter the court’s separate authority to *terminate* a sentence of supervised release, under 18 U.S.C. § 3583(e)(1), if the conduct of the person and the interest of justice warranted it.

Seen as two separate chronological phases, the statute mandating a specific sentence of supervised release and the statute authorizing the termination of a prior imposed sentence are quite consistent. They are not in conflict as “[n]either statute prohibits the other from working.” [Citation] Therefore, in the absence of clear Congressional expression to the contrary, a court must give effect to both statutes. [Citation] In so doing, we find that even though the district court had to sentence *Spinelle* to a three-year term of supervised release, it still had the subsequent discretionary authority to terminate the term and discharge *Spinelle* after one year of completion.

Id. at 1060-61 (emphasis added and in original).

⁹ *Scott*’s extensive discussion of the issue is worth repeating:

The government’s opposition to defendant’s motion is based on the following language of § 841(b)(1)(B): “Notwithstanding section 3583 of Title XVIII, any sentence imposed under this subparagraph shall . . . include a term of supervised release of at least 4 years in addition to such term of imprisonment. . . .” According to the government, by this language Congress intended to impose harsher sentences of both imprisonment and supervised release for the drug

11, 2020) (Dkt. 127); *United States v. Rodriguez*, No. CR 11-96-DMG (C.D. Cal. July 16, 2021) (Dkt. 40) *see also* *Rewis v. United States*, 401 U.S. 808, 812 (1971) (the rule of lenity provides

crimes specified in § 841, and further intended to eliminate any inconsistent provisions of “the entirety of § 3583” by its use of the term “notwithstanding.” Thus, according to the government, “imposing” a term of supervised release “of at least 4 years” requires an offender to *serve* at least 4 years without eligibility for the early termination allowed by § 3583(e).

Such a reading, however, strains the language and the congressional intent beyond reason. To be sure, § 841 imposes harsher sentences on persons convicted of drug crimes than of other criminal activity, imposing, for example, long mandatory minimum sentences of imprisonment. The *imposition* of these sentences required by § 841, however, cannot be read to require the full *service* of the sentences in the face of other statutes allowing relief from such service, such as § 3583(e). Once the sentencing judge has imposed the sentence required by § 841, as Judge Mills did in this case, he has fulfilled the mandate of that statute.

For example, although § 841 requires the imposition of a mandatory minimum of ten years imprisonment for certain drug offenses, 18 U.S.C. § 3624(b) allows a 15% credit for satisfactory behavior while incarcerated. This credit is no less an alteration of the mandatory sentence of imprisonment required by § 841 than is an early termination of supervised release after a period of at least a year under § 3583(e).

But, argues the government, the “[n]otwithstanding section 3583” language added in 2002 to § 841 requires that statute to be read in isolation of the “entirety” of § 3583. The court respectfully disagrees. First, as defendant points out, the 2002 language was added in response to challenges filed by a number of drug offenders who were sentenced to periods of supervised release greater than the maximum that would otherwise have been allowed by § 3583(b). Second, reading § 841(b)(1)(B) in its entirety makes clear the congressional intent to require the imposition of a longer minimum period of supervised release than otherwise allowed in § 3583(b) without interfering with the remainder of the statutory scheme governing supervised release prescribed by the other subsections of that statute including revocation, modification and early termination of supervised release. Thus, immediately following the “notwithstanding” sentence, the statute reads, “Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any persons sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.” When Congress intended to limit any post-incarceration discretion, therefore, it specifically did so. Its failure to include the long-standing traditional discretion to terminate supervised release early under specified circumstances was not mentioned in the 2002 amendment to § 841.

The only conclusion that the court can draw in the context of the legislative history and the purposes to be served by these various statutes, in light of the less-than-clear language at issue in § 841, is that Congress intended to exclude the maximum periods of supervised release otherwise set forth in § 3583(b), leaving untouched the possibility of early termination of supervised release allowed by § 3583(e). To read § 841 in isolation of § 3583 in its entirety would eliminate the possibility of revocation or modification of supervised release just as it would eliminate the possibility of early termination. Such an untenable result could never have been intended by Congress and will not be so construed by this court.

Scott, 362 F.Supp.2d at 983-84 (emphasis original) (footnotes omitted).

that any ambiguity in criminal statutes should be resolved in favor of lenity). Thus, no matter what the government argues, *Spinelle*'s holding and reasoning remain good law. *Cf.* Office of the General Counsel, *Supervised Release (Primer)* 14 (2021) ("The Sixth Circuit has held that a court may terminate supervised release early even if the statute of conviction originally required a particular term of supervised release") (citing *Spinelle*) (found at https://www.usc.gov/sites/default/files/pdf/training/primers/2021_Primer_Supervised_Release.pdf).

Hopefully, this issue will soon be definitely resolved by the Ninth Circuit and other courts. In the meantime, there is plenty of ammunition for attorneys to argue that the "notwithstanding" language of 18 U.S.C. § 841 does not alter the trial courts' authority to terminate supervised release after one year under section 3583, even if a mandatory minimum supervised release was initially imposed. *See, e.g., Spinelle; Scott; United States v. McClister*, 2008 WL 153771, at *2 (D. Utah Jan. 14, 2008) (granting early termination of supervised release, notwithstanding statutory minimum sentence; "This Court agrees with and adopts the reasoning of the Sixth Circuit and the Northern District of Illinois on this issue"); *see also Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) ("statutory requirements governing how a court must impose a sentence differ from those that control how it may modify one" "The court, therefore, could terminate Pope's term of supervised release after one year even though Pope initially received a term of supervised release below the statutory minimum") (emphasis in original).

F. Internal Government Policies

While there is no definitive data to prove this, it is obvious that many U.S. Attorney's offices have a blanket policy of opposing early termination motions in all cases. If it seems that the local U.S. Attorney's office has such policy, and counsel can produce evidence of this, she can forcefully argue that such policy violates the spirit, if not the letter, of section 3583, since it is not based on an individualized assessment of the facts of the particular defendant, as section 3583 requires. *See United States v. Hartley*, 34 F.4th 919, 931 (10th Cir. 2022) (because of duty to consider particular circumstances of defendant, trial court's blanket policy of denying motions to terminate probation where only probation term was imposed was abuse of discretion); *cf. Harris*, 258 F.Supp.3d at 145 (noting "the case specific inquiry required in evaluating a motion for early termination of supervised release"); *United States v. Mathis-Gardner*, 783 F.3d 1286, 1287 (D.C. Cir. 2015) ("district court is required to consider the statutory factors when reviewing a motion for early termination") (collecting cases); *United States v. Emmett*, 749 F.3d 817, 820 (9th Cir. 2014) (same). Ideally, counsel should discuss the government's responses to motions for early termination in the district in which an early termination motion is filed to ascertain the local U.S. Attorney's Office practice of policy in that district.

III. A Practitioner Should Argue that There Should be a Presumption in Favor of Early Termination after a Releasee Has Served One-Year of His Supervised Release Term

A. The Statute Itself Provides for Early Termination after One-Year

Not only can practitioners effectively argue that the burden-raising limitations on early termination described above violate section 3583, but they should also argue that there is a

presumption in favor of the granting of such motions, absent countervailing reasons, once the releasee has served a year of his supervised release term. It is well-established that the defendant has “the burden of showing that he is entitled to earl[y] termination.” *United States v. Luna*, 2018 WL 10156108, at *1 (E.D. Cal. March 12, 2018), *aff’d* 747 Fed. App’x 561 (9th Cir. 2018); *United States v. Robins*, 2014 WL 11790802, at *2 (C.D. Cal. May 27, 2014) (citing *United States v. Weber*, 451 F.3d 552, 559 n.9 (9th Cir. 2006)); *see United States v. McDowell*, 888 F.3d 285, 291 (3d Cir. 1989) (“the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence”). The United States Sentencing Commission, however, “encourages . . . courts to exercise this authority in appropriate cases,” U.S.S.G. § 5D1.2, cmt. n.5 (emphasis added); Office of the General Counsel, *Primer: Supervised Release* 13 (2021). Thus, counsel should argue that the Sentencing Commission’s “encouragement” of the granting of such motions after one-year, together with the fact that releasees who commit another offense usually do so early in their supervised release term, *see supra*; *United States v. Harris*, 258 F.Supp.3d 137, 147 (D.D.C. 2017), create a presumption in favor the granting of such motions, absent contrary factors. *See United States v. Crehore*, 2014 WL 3892161, at *1 (S.D. Miss. Aug. 8, 2014) (“The literature confirms that the early termination of supervised release is favored”) (citing Committee Report stating that early termination “promotes justice, conserves resources, and protects the public”). Stated another way, once a defendant meets his burden of demonstrating that he has served at least one year of his supervised release term and his conduct on supervision otherwise warrants early termination, the burden shifts to the government to rebut the presumption that supervised release should be granted once the releasee makes this *prima facie* showing. *Cf. United States v. Thomas*, 346 F.Supp.3d 326, 335 (E.D.N.Y. 2018) (“A court’s ability to terminate supervision early or modify conditions provides an opportunity to reevaluate the efficacy of a supervised release term throughout its duration”); *United States v. Lewis*, 2020 WL 5128372, at *2 (D. Conn. June 5, 2020) (same). Not only is such approach consistent with the Sentencing Commission’s encouragement of the use of section 3583 to terminate supervision early, but it is supported by scholarly articles calling for the reform of community supervision.

B. Recidivism Tends to Occur Early in Supervision, if at All

In any event, because federal defendants must serve at least a year of their supervised release terms before seeking their early termination, they should emphasize that violations of conditions of supervised release, if they occur, tend to “occur early in the supervision process.” *See United States v. Harris*, 258 F.Supp.3d 137, 147 (D.D.C. 2017) (quoting U.S.S.C. Report at 63); *see also id.* (“The fact that offenders on federal supervision who violate the conditions of supervision tend to do so early in their terms of supervision is consistent with findings of other researchers.”) (quoting U.S.S.C. Report at 63 n.265). “Indeed, based upon extensive analysis of recidivism data and supervised release, the U.S. Sentencing Commission in 2011 reduced the minimum recommended term of supervised release for defendants convicted of [certain] felonies. . . .” *Id.*; *see* U.S.S.G., App. C, vol. III, amend. 756 (“[t]he Commission determined that these lesser minimum terms [of supervised release] should be sufficient in most cases because research indicates that the majority of defendants who violate a condition of supervised release do so during the first year of the term of supervised release”).

****C. The Judicial Conference Guide to Judicial Policy Expressly States a Presumption in Favor of Early Termination of Supervised Release After A Defendant Has Served 18 months of His Term of Supervision, so Long as Certain Criteria Are Met**

Even without this arguable presumption, the *Judicial Conference Guide to Judiciary Policy* explicitly states that there is a presumption in favor of early termination after a releasee has served 18 months of supervision where six factors are met.¹⁰ *Id.* at § 360.20(c) (Post-Conviction Supervision); see *United States v. Shaw*, -- F.Supp.3d --, 2020 WL 1062896, at *3 (D. Colo. March 5, 2020) (citing *Judicial Conference Guide to Judiciary Policy*). The factors most often at issue are: (3) the person is free from any court-reported violations over a 12-month period and (5) the person is in substantial compliance with all conditions of supervision.

In *United States v. Shaw*, __ F.Supp.3d __, 2020 WL 1062896 (D. Colo. March 5, 2020), the court relied on the Judicial Conference policy to hold that “[f]or a defendant who requests early termination after serving 18 or more months of supervised release, ‘there is a presumption of recommending early termination for persons who meet the [enumerated criteria].’” 2020 WL 1062896, at *3 (quoting Judicial Conference, *Guide to Judiciary Policy*, Vol. 8 (Probation and Pretrial Services, Part E (Post-Conviction Supervision), § 360.20(c)). Based, in large part, on this policy, the court in *Shaw* granted defendant’s motion for early termination because he satisfied the criteria of the *Judicial Conference Guide to Judiciary Policy*. See *Shaw*, 2020 WL 1062896, at *6. Thus, where a releasee has served at least 18 months of his supervised release term and the other factors of section 360.20(c) are met, counsel should stress this policy in support of the motion for early termination. In particular, in cases where a defendant has tested positive for drugs or alcohol in the last 12 months, it is advisable for the releasee to wait until twelve months from the date of the positive drug test to file his early termination motion, so he can avail himself of the Judicial Conference presumption.

VI. Litigating the Early Termination Motion

Prior to drafting the early termination motion, counsel should contact the releasee’s probation officer and the Assistant U.S. Attorney handling the case to touch base and learn their

¹⁰ These factors are as follows:

- (1) The person does not meet the criteria of a career drug offender or career criminal (as described in 28 U.S.C. § 994(h)) or has not committed a sex offense or engaged in terrorism;
- (2) The person presents no identified risk of harm to the public or victim;
- (3) The person is free from any court-reported violations over a 12-month period;
- (4) The person demonstrates the ability to lawfully self-manage beyond the period of supervision;
- (5) The person is in substantial compliance with all conditions of supervision; and
- (6) The person engaged in appropriate prosocial activities and receives sufficient prosocial support to remain lawful well beyond the period of supervision.

Id. § 360.20(c)(1)–(6).

position with respect to early termination, since an unopposed motion is more likely to succeed. When discussing the matter with the probation officer, counsel should be familiar with the *Judicial Conference Guide to Judiciary Policy*, and its presumption in favor of early termination after a releasee has served 18 months of supervision where the six factors are met, *id.* at § 360.20(c) (Post-Conviction Supervision), since this policy is generally used by the probation and can be helpful in convincing the probation officer to support, or not oppose, the early termination motion. The *Judicial Conference Guide to Judiciary Policy* can also be used to sway the Assistant U.S. Attorney. In addition, counsel should check with the Assistant U.S. Attorney and/or the court to determine what procedure the court uses to adjudicate such motions, since different judges have different procedures with respect to briefing schedules and hearings on early termination motions. If possible, counsel should obtain a stipulation with the Assistant U.S. Attorney regarding the briefing and hearing schedule.

In addition, counsel should gather letters in support of the early termination from the releasee, his family and/or spouse/partner, employer, and, if applicable, religious and community groups. The motion and supporting materials can be filed under the attorney's name, if she is licensed to practice in the district where the motion is filed. If not, the attorney can draft the motion on behalf of the releasee and have him file it *pro se*.

APPENDIX

A sample early termination of supervised release motion can be found [here](#).