2006 WL 236027 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
Vaughn A. KOSH, Defendant-Appellant.

No. 05-3077.
January 26, 2006.

Appeal from the United States District Court for the District of Columbia
Oral Argument Not Scheduled
District Court Cr. No. 00-399 (GK)

Brief for Appellant Vaughn A. Kosh

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***1 JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. A timely notice of appeal having been filed, this Court has jurisdiction over this direct appeal pursuant to 28 U.S.C. § 1291.

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STATUTES AND RULES

In accordance with Federal Rule of Appellate Procedure 28(f) and D.C. Circuit Rule 28(a)(5), pertinent statutes and rules are set forth in the Addendum to this brief.

ISSUES PRESENTED FOR REVIEW

1. Whether a district court errs as a matter of law when it revokes a defendant's supervised release, as mandated by ***2** 18 U.S.C. § 3583(g), then selects a term of imprisonment for the purpose of providing the defendant with rehabilitative treatment, as prohibited by 18 U.S.C. § 3582(a); and

2. Whether it was unreasonable for the district court here to impose a term of imprisonment of 18 months--*twice* the length of the maximum recommended guideline range--when the government requested a sentence one-third that length, when nothing in the record established that 18 months was necessary to accomplish the court's stated rehabilitative goals, and when a factor not authorized in 18 U.S.C. § 3553 (*i.e.*, the Bureau of Prisons's correctional facility placement determination) was the court's primary motivation for selecting that period of imprisonment.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

On November 30, 2000, a federal grand jury returned a one-count indictment charging Vaughn Kosh with unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). A. at 8. [1] Mr. Kosh pled guilty to the charged offense pursuant to a written plea agreement, A. at 9, and, on ***3** March 23, 2001, the district court (Kessler, J.) sentenced him to 24 months in prison to be followed by three years of supervised release. A. at 15.

Mr. Kosh was released from custody and began serving the prescribed period of supervised release on February 14, 2003. A. at 21. On June 13, 2003, the probation office petitioned the district court to issue a bench warrant for Mr. Kosh's arrest as a supervised-release violator, A. at 26, and Mr. Kosh was arrested nearly two years later, on April 8, 2005. A. at 29. On April 20, 2005, after a hearing on the alleged violations, the district court revoked Mr. Kosh's supervised release and sentenced him to a term of imprisonment of 18 months followed by an additional year of supervised release. A. at 32.

This appeal arises out of the district court's supervised release revocation and resentencing determination.

B. Statement of Facts.

When Vaughn Kosh was sentenced in March of 2001 for the offense of being a felon in possession of a gun in violation of 18 U.S.C. § 922(g)(1), the district court imposed standard conditions of supervised release, including reporting and periodic drug testing. A. at 16. The court also ordered special conditions; namely, that Mr. Kosh participate in both mental health and substance abuse treatment programs at the direction of the probation office. A. at 17.

***4** Mr. Kosh's supervision period commenced on February 14, 2003. A. at 21. Mr. Kosh initially reported to his probation officer as directed and submitted to several urinalysis tests. A. at 22. But he also candidly admitted that he continued to use marijuana "due to his depression over remaining unemployed," and that "substance abuse counseling was not a priority" because he was searching for a job and his family was facing eviction. *Id.*

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On June 13, 2003, Mr. Kosh's probation officer sought a bench warrant for his arrest. A. at 26. In support of the warrant request, the officer provided three grounds: first, that Mr. Kosh's urine samples had tested positive for marijuana on numerous occasions; second, that Mr. Kosh had repeatedly failed to report for substance abuse counseling and had missed one urinalysis test; and third, that Mr. Kosh had failed to contact the probation office three days prior to the date the violation report was filed and seemed to have "absconded." A. at 22-23, 26. Judge Kessler granted the request for a warrant on the same day that it was filed. A. at 27. Mr. Kosh was arrested pursuant to the warrant nearly two years later. A. at 29.

At the subsequent hearing regarding the claimed supervised release violations, which commenced on April 15, 2005, defense counsel began by noting that Mr. Kosh admitted all of the violations that the probation office had reported. Tr. 4/15/05 ***5** at 3. Counsel explained that Mr. Kosh's drug use resulted from the stress he felt because he was unemployed and facing eviction and because of serious illnesses suffered by some of his family members, including his mother. *Id.* at 3-4. Counsel also stated that Mr. Kosh had stopped attending the treatment sessions largely because he had difficulty getting to the assigned center (which was at least one and a one-half hours away). *Id.* at 4. And counsel pointed out that Mr. Kosh had not only contacted probation at least once after the violation report was submitted to explain that he was looking for another place to live, but he also voluntarily surrendered to the authorities as soon as he learned about the warrant for his arrest. *Id*. Defense counsel then acknowledged that Mr. Kosh's supervised release should be revoked under the circumstances, but argued that the district court should sentence Mr. Kosh to two months in prison followed by three months in a residential substance abuse/mental health treatment program. *Id.* at 5-6. Counsel also asserted that there should be no supervision to follow. *Id.* at 6.

In contrast to defense counsel, the probation officer did not specify a specific period of imprisonment, but did recommend "that Mr. Kosh serve a period of incarceration which would allow him to be observed and his mental health status to be reviewed." *Id.* at 7. The probation officer also maintained that such incarceration should be followed by an additional period of ***6** supervised release "for monitoring purposes and to help him transition back into the community." *Id*.

The government supported the probation office's recommendation, *id.* at 8, and cited Mr. Kosh's "mental health conditions" as "[a] major factor in his inability to comply, or his unwillingness to comply with the conditions of supervised release," *id.* at 9.[2] The prosecutor requested, specifically, that the court sentence Mr. Kosh to "a period of incarceration at Butner, or Springfield[--]the Bureau of Prisons hospital facilities which have both mental health and obviously regular hospital facilities," so that "he will get the treatment that he needs." *Id.* The following exchange ensued:

THE COURT: The recommended revocation period under the guidelines is three to nine months.
MR. O'MALLEY [the prosecutor]: That is correct, Your Honor. That is my understanding.

THE COURT: What are you suggesting?

MR. O'MALLEY: Your Honor, frankly I think that he needs at least the three months incarceration, and I think that Your Honor would probably be wiser to--I would suggest that you would be wise to do something more than that At least six months.

But it seems to me ...that the critical issue here is stabilizing this man in terms of his mental health issues, and I don't think that--it seems to me that that is a longer rather than a shorter term process.

I don't recommend at this "juncture because we "just ***7** *don't have the basis upon which to do that, going outside the nine months,* but I would suggest to the court that Chapter 7 has always been advisory, and it is certainly advisory now under Booker and Fan-fan, and--that it would be a reasonable exercise of your discretion to go outside the guidelines *if the court had the basis to say that that is the period necessary to stabilize his mental health issues*.

We don't have that specific information right now. I think that the court should send him to Butner for at least a period ... for at least six months.

Tr. 4/15/05 at 10-11 (emphasis supplied). In response to the prosecutor's recommendation that the court sentence Mr. Kosh to a six-month term of imprisonment at Burner, the district court remarked:
My final question is this. What assurance do I have that he will go to Butner? ...

I have to tell you that my experience with the Bureau of Prisons is, despite all of their propaganda to the contrary, my experience is that they ignore my recommendations.

And yes, if I sound frustrated, I am. I write them letters. I give them reasons for why I think someone should be sent to a certain facility, and I don't want to exaggerate, but I can't think of a one where they have actually followed my recommendations.

Id. at 12-13. The court's concern about Mr. Kosh's prison placement prompted the prosecutor to suggest that the revocation hearing be continued so that he might "chase it down" and "get some sort of commitment[] from the Bureau of Prisons before the court takes that step." *Id.* at 14. Responding that "there is no question in my mind ... that Butner is the most appropriate placement," the district court granted the continuance. Id. at 14, 15.

Five days later, on April 20, 2005, the parties returned for ***8** a resolution of the revocation matter. The government reported that the probation office had contacted the Bureau of Prisons and that, although the Bureau " "never commits itself entirely to anything," Tr. 4/20/05 at 3, the probation officer was told that there was space available at Butner to receive persons with Mr. Kosh's category of mental health problems. *Id*.[3] The probation officer's discussion with B.O.P. authorities also purportedly left him with the impression that whether or not Mr. Kosh would be placed at Butner depended to some extent on whether he received a sentence of six months or more. *Id*. Indeed, the prosecutor repeatedly insisted that "the longer that sentence is, the greater the likelihood he will be sent to Butner," *id.*, and he even asserted -- "because I don't want the court to be disappointed" --that "in order to have the kinds of guaranties that the court is looking for, the sentence has to be six months or longer, and the longer it gets the better the guaranty." *Id.* at 5.

The district court proceeded to hear from Mr. Kosh directly, *id.* at 6, then formally revoked his supervised release based on the admitted violations. *Id.* at 8. In pronouncing the revocation sentence, the court explained that it was assuming that *Booker* applied to supervised release revocation cases, and ***9** that, although it had consulted the three-to-nine-month range set forth in the guidelines, it was "going to go outside the guidelines" because of Mr. Kosh's need for mental health and substance abuse treatment and "[b]ecause of the representations made to me by counsel and our probation officer." Tr. 4/20/05 at 10. The court stated, specifically, that
it is, in my view, to Mr. Kosh's benefit to get a sentence of more than nine months for this reason[:]

As the record will demonstrate, inquiries have been made about Butner. There is a very, very good chance that Mr. Kosh can get placed at the mental health unit at Butner. That unit is certainly the most appropriate to deal directly with his mental health and drug abuse problems, and the longer the sentence, the greater the chance that he will get placed at the most appropriate place to provide him some real treatment. Not just incarceration, but real treatment.

There isn't any dispute that Butner is the place to provide that kind of treatment. And for that reason I am going to [im]pose a sentence of eighteen months.

Id. at 10-11.

SUMMARY OF ARGUMENT

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The district court's imposition of an 18-month term of imprisonment for the purpose of providing Mr. Kosh with "real treatment" was plainly erroneous as a matter of law. When a defendant serving a term of supervised release repeatedly fails a drug test, as was the case here, section 3583(g) (4) of Title 18 of the United States Code mandates that the district court "revoke the term of supervised release and require the defendant to serve a term of imprisonment." Section 3582(a) establishes the factors that a court is to consider when it imposes a term of ***10** imprisonment, and that section expressly *prohibits* the imposition of prison term as a "means of promoting correction and rehabilitation." The district court in the instant case did just that. And as a result of the district court's plain and prejudicial error, this Court should vacate the judgment and remand the case for resentencing.

Even if it was proper for the district court in the instant case to consider rehabilitation when it imposed the prison sentence upon mandatory revocation of Mr. Kosh's supervised release, it was unreasonable for that court to select and impose a prison term of 18 months. The record is devoid of any evidence or argument whatsoever that would support a conclusion that Mr. Kosh needed 18 months in prison--double the length of the maximum suggested revocation term under the sentencing guidelines--in order to be rehabilitated successfully. To the extent that the court imposed the term to ensure Mr. Kosh's placement at the Burner correctional facility, it did so arbitrarily, for the prosecution itself maintained that the door to Butner would be open to Mr. Kosh so long as he received a sentence of "at least six months." Finally, it is clear from the court's comments during the sentencing that it chose 18 months in order to guide the Bureau of Prison's hand in deciding where to house Mr. Kosh, but prison placement is not an appropriate concern of the sentencing court under the pertinent authorizing statutes. ***11** Accordingly, this Court should conclude that the 18-month prison sentence imposed in this case was unreasonable, and, as a result, it should vacate the judgment and remand the case for resentencing.

ARGUMENT

I. THE DISTRICT COURT PLAINLY ERRED AS A MATTER OF LAW WHEN, UPON MANDATORY REVOCATION OF MR. KOSH'S SUPERVISED RELEASE, IT IMPOSED A TERM OF IMPRISONMENT FOR THE PURPOSE OF PROVIDING REHABILITATION.

A. Standard of Review.

Chapter 7 of the Sentencing Guidelines Manual contains policy statements that address, among other things, the "range of imprisonment applicable upon revocation" of supervised release. U.S.S.G. §7B1.4. The revocation guidelines were considered advisory even prior to the Supreme Court's *Booker* decision, *see United States v. Hooker,* 993 F.2d 898, 900-901 (D.C. Cir. 1993), and appellate courts have typically applied a "plainly unreasonable" standard of review when a district court's imposition of a term of imprisonment after revocation of a period of supervised release is challenged. *See, e.g., United States v. Jackson,* 70 F.3d 874, 876 (6th Cir. 1995); *United States v. Giddings,* 37 F.3d 1091, 1093 (5th Cir. 1994).

The issue of whether *vel non* the federal statutes that govern sentencing permit a district court to take into account the rehabilitative needs of the defendant when determining the length of a term of imprisonment to be imposed upon revocation of ***12** supervised release is a question of law, reviewed *de novo. See United States v. Tsosie,* 376 F.3d 1210, 1213 (10th Cir. 2004); *United States v. Duran,* 37 F.3d 557, 560 (9th Cir. 1994); *cf. United States v. Bruce,* 285 F.3d 69, 71 (D.C. Cir. 2002) (addressing *de novo* a question of statutory interpretation potentially affecting defendant's sentence). This issue of statutory construction was not raised by defense counsel below; thus, Mr. Kosh must demonstrate "plain error." *United States v. Simpson,* 430 F.3d 1177, 1183 (D.C. Cir. 2005); *see also United States v. Finney,* 154 Fed. Appx. 865, 867 (11th Cir. 2005) (reviewing new issue of statutory construction for plain error).

Under the "plain error" standard,

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> there must be (1) error, (2) that is plain, and (3) that affects substantial rights; if all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Gomez, 431 F.3d 818, 822 (D.C. Cir. 2005) (quoting *United States v. Coles,* 403 F.3d 764, 767 (D.C. Cir. 2005) (internal quotation marks omitted)). Although the plain error standard is demanding and the burden falls squarely on the appellant, this Court has held that plain-error review is a comparatively less exacting exercise where, as here, the issues on appeal involve only allegations of error at sentencing. *See* *United States v. Saro,* 24 F.3d 283, 288 (D.C. Cir. 1994).

***13 B. Analysis.**

A review of the statutes that govern both supervised release and the sentencing court's authority to impose terms of imprisonment demonstrates clearly that a district court errs as a matter of law when it imposes a term of imprisonment after revocation of supervised release for the purpose of providing rehabilitative treatment.

1. The Supervised Release Scheme.

Supervised release first came into being as part of the Sentencing Reform Act of 1984. Harold Baer, Jr., *The Alpha & Omega Of Supervised Release,* 60 Alb. L. Rev. 267, 268 (1996). As a general matter, supervised release supplanted federal parole and was designed "to provide rehabilitation to a defendant following a term of imprisonment." *Id.* at 268 n.6 (citing S. Rep. No. 98-473, at 124 (1983)S. Rep. No. 98-473, at 124 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307). The statutory provisions at 18 U.S.C. § 3583 govern the supervised-release scheme. Subsections (a) and (b) establish that a district court has the authority to require a defendant to be placed on a term of supervised release after imprisonment, and also set forth the authorized terms of supervised release (which are based on the classification of the original offense). Subsections (c) and (d) make clear that the factors set forth in 18 U.S.C. § 3553(a), including the defendant's need for "medical ***14** care" or "other correctional treatment," are to be considered when the court determines whether to include a supervised release requirement, as well as the length and conditions of any period of supervised release. These subsections also prescribe a set of conditions (both mandatory and discretionary) that accompany a supervised release term.

Significantly for present purposes, subsection (e) gives the court four options for post-sentencing modification of the terms and conditions of supervised release. Pursuant to § 3583(e), and in light of the considerations set forth in § 3553(a), the court may: (1) terminate a term of supervised release; (2) extend the term of supervised release up to the maximum authorized term; (3) revoke the term of supervised release "and require the defendant to serve in prison all or part of the term of supervised release authorized by statute"; or (4) order home detention or electronic monitoring as an alternative to incarceration. By contrast, subsection (g) of § 3583 *requires* revocation of the supervised release term under specified circumstances and makes no mention of any of the § 3553 factors, much less rehabilitation. Subsection (g) provides:
(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.-- If the defendant

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

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(2) possesses a firearm ... in violation of Federal law, or otherwise violates a condition of ***15** supervised release prohibiting the defendant from possessing a firearm;

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

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

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

18 U.S.C. § 3583(g). It is well established that "when revocation of supervised release is mandatory under 18 U.S.C. § 3583(g), the statute does *not* require consideration of the § 3553(a) factors." *Giddings,* 37 F.3d at 1095 (emphasis supplied). In fact, subsection (g) provides no guidance whatsoever in regard to the considerations that are permitted when the district court is required to revoke the term of supervised release and to select a period of incarceration. *Cf.* *United States v. Brown,* 224 F.3d 1237, 1242 (11th Cir. 2000) ("The section governing mandatory revocation of supervised release, 18 U.S.C. § 3583(g), "neither instruct[s] nor prohibit[s] the sentencing court from considering rehabilitative goals in determining the length of a sentence upon mandatory revocation of supervised release.'" (quoting *Jackson*, 70 F.3d at 880)).

2. In Mandatory Revocation Cases, Courts Determine The Term Of Imprisonment In Accordance With Section 3582(a).

Although 18 U.S.C. § 3583(g) does not expressly establish ***16** the factors to be taken into account when the district court selects the term of imprisonment to be imposed after mandatory revocation, the plain language of the revocation statute *ndoes* demand that the district court "require the defendant to serve a term of imprisonment." The parameters of the district court's authority to impose prison terms are addressed in 18 U.S.C. § 3582(a). *See* *United States v. Anderson,* 15 F.3d 278, 281 (2d Cir. 1994). That section states:

(a) Factors to be considered in imposing a term of imprisonment.-- The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*

18 U.S.C. § 3582(a) (emphasis added). As if to underscore the point, Congress also enacted 28 U.S.C. § 994(k), which required the newly formed Sentencing Commission to

> insure that the [sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

28 U.S.C. § 994 (k).

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Consistently with the "clear mandate" of § 3582(a), every circuit court that has interpreted that statute has concluded that it restricts a sentencing court's ability to consider the rehabilitative needs of the defendant. *Tsosie,* 376 F.3d at 1214 ***17** ("[I]t is inappropriate for the district court to consider rehabilitation of the defendant as the sole purpose for imprisonment"); *see also* *Jackson,* 70 F.3d at 879 ("For purposes of initial sentencing, a court may not consider rehabilitative goals in considering whether to impose a sentence of imprisonment."); *Giddings,* 37 F.3d at 1094 ("Typically, a person's need for rehabilitation cannot be used to determine whether a sentence of imprisonment is imposed."); *United States v. Harris,* 990 F.3d 594, 596 (11th Cir. 1993) ("Rehabilitative considerations have been declared irrelevant for purpose of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose." internal quotation marks and citation omitted)); *United States v. Maier,* 975 F.2d 944, 946 (2d. Cir. 1992) ("Rehabilitation is not an appropriate ground for *imprisonment*." (emphasis in original)).[4] And restricting the ***18** factors that a district court sentencing a defendant to a term of imprisonment might otherwise take into account is precisely what Congress intended in enacting 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k). As the Second Circuit noted,

Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur. Incarceration would have to be justified by such traditional penological purposes as incapacitation, general deterrence, specific deterrence, and retribution.

Maier, 975 F.2d at 946.

In light of the plain language of the relevant statutes, as well as Congress's clear intent in regard to the permissible purpose of incarceration, this Court should conclude that it is plainly improper for a district court to impose a term of imprisonment after mandatory revocation of supervised release based on a perceived need for rehabilitation.

3. This Court Should Decline To Follow Other Circuits And Should Hold That Applicable Law Plainly Prohibits Imposing A Term Of Imprisonment After Mandatory Revocation Of Supervised Release For The Purpose Of Accomplishing Rehabilitation.

As demonstrated above, the statutory language clearly compels the conclusion that it is improper for a district court imposing a mandatory term of imprisonment for a violation of supervised release to select the revocation prison term in order to achieve rehabilitative goals. It must be acknowledged, ***19** however, that several circuit Courts of Appeal have concluded otherwise. The authorities that have addressed this issue appear to follow different lines of reasoning. The Second, Tenth, and Eleventh Circuits recognize that by enacting § 3582(a) and 28 U.S.C. § 994(k) Congress intended to prohibit imprisonment for the purpose of achieving rehabilitation, but reason that " "[t]he preclusion against considering rehabilitation ... does not apply when a court sentences a defendant to prison upon revocation of supervised release." *Brown,* 224 F.3d at 1242 (citing *Anderson,* 15 F.3d at 283); *Tsosie,* 376 F.3d at 1216. The Fifth, Sixth, and Eighth Circuits read the statutes' rehabilitation prohibition to be inapposite to the court's determination of the *length* of a prison term; thus, these Circuits conclude that there is no statutory impediment to a sentencing court's consideration of rehabilitation in determining how long a defendant will spend in prison, regardless of whether the sanction is being imposed after initial conviction or after revocation of supervised release. *See* *Jackson,* 70 F.3d at 880 (concluding, based on a narrow reading of § 3582(a), that there is "no reason that a court sentencing a defendant upon mandatory revocation of supervised release should not be able to consider rehabilitative goals in arriving at the length of a sentence while a court imposing either an initial sentence or a sentence upon permissive revocation of supervised release may properly ***20** consider that need"); *Giddings,* 37 F.3d at 1097; *see* also *Hawk Wing,* 2006 WL 27681 at *6

(upholding the lower court's consideration of rehabilitation "in determining the length of the [initial] sentence of incarceration"). Despite taking such divergent paths, the courts in both camps arrive at the same conclusion: a district court imposing a mandatory term of imprisonment after revocation of supervised release is not prevented from considering the rehabilitative needs of the defendant. This conclusion is flawed, and its supporting logic wholly unpersuasive.

Contrary to the views of the Second, Tenth, and Eleventh Circuits, there is absolutely nothing in the relevant statutes that distinguishes the scope of the district court's authority to impose a term of imprisonment as an initial matter from its authority to impose a term of imprisonment after mandatory revocation of supervised release. Both § 3582(a) and § 3583(g) use exactly the same operative phrase: "term of imprisonment." Moreover, even as the mandatory revocation statute requires the district court to impose "a term of imprisonment," it says nothing to exclude the limitations on judicial authority set forth in § 3582 and reinforced by 28 U.S.C. § 994(k). *See* *Anderson,* 15 F.3d at 285 (Kearse, J., dissenting) ("Surely if Congress had meant to override its two explicit statutory constraints and allow a court to impose a term of imprisonment ***21** for purposes of rehabilitation or medical care as part of a sentence for violation of supervised release it could have thought of more revealing language.").

To overcome the obstacle that the plain language presents, the Second, Tenth, and Eleventh Circuits invoke the distinct purposes of imprisonment and supervised release, noting that, while initial imprisonment cannot be imposed with reference to rehabilitative concerns, promotion of rehabilitation is at the heart of a court's decision to prescribe a term of supervised release. *See* *Brown,* 224 F.3d at 1242; *Anderson,* 15 F.3d at 281-82. And, the argument goes, because the supervised release statutes allow the district court to " "require a person to serve in prison the period of supervised release," the statutory scheme "contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation of supervised release." *Anderson,* 15 F.3d at 292; *Brown,* 224 F.3d at 1242; *see also* *Tsosie,* 376 F.3d at 1216 (supervised release addresses rehabilitative concerns and revocation is "merely converting all or a portion of the supervised release period into a term of imprisonment."). The trouble with this interpretation is that there is absolutely no hint in the statutes that Congress intended district courts simply to "convert" the supervised release period (and principles) into a prison term when revocation is required or ***22** otherwise treat mandatory revocation as "merely altering the location of the defendant's supervised release from outside prison to inside prison." *Tsosie,* 376 F.3d at 1216. And a straight reading of the statutes belies that argument. Section 3583(g) plainly links the period of imprisonment to be imposed after mandatory revocation to *the class of the original offense, not* to the amount of supervised release that the district court originally imposed. *See* § 3583(g) (the maximum mandatory revocation term is the term authorized at subsection (e), which varies depending on the class of the initial offense); *cf.* *Johnson v. United States,* 529 U.S. 694, 700-701 (2000) (imprisonment after revocation relates to the original offense). Moreover, rather than ensuring that district courts upon mandatory revocation make the defendant serve a prison term that correlates to (and essentially converts) the period of supervised release, *Congress did the opposite*: it amended the mandatory revocation statute in a manner that eliminates any necessary connection between the term of imprisonment upon revocation and the length of the period of supervised release. *See* *Jackson,* 70 F.3d at 880 (noting that, after the amendment, the revocation sentence "may be unrelated to the length of the original term of supervised release"). As Tenth Circuit Judge O'Brien concluded in his dissent in *Tsosie,* "nothing in the structure or the text of 18 U.S.C. § 3583, or in logic, ... suggest[s] revocations of ***23** supervised release are somehow exempt" from the "global" rehabilitation restriction, and the argument that a revocation sentence is not a "term of imprisonment" because the defendant is just being required to serve out his supervised release term in prison "does not square the box." 376 F.3d at 1221 (O'Brien, J., dissenting). [5]

The argument that the statutes allow the district court to consider rehabilitation when imposing a mandatory revocation sentence is also fatally flawed to the extent that it is based on interpreting § 3582(a) so as *never* to restrict a district court's consideration of defendant's medical and corrective needs when choosing the *length* of the period of incarceration, as the Fifth, Sixth, and

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Eighth Circuits do. These circuits read the ***24** rehabilitation restriction to constrain only the court's initial decision regarding whether to imprison and not its subsequent determination of how long the defendant will be incarcerated. *See supra* note 4. But § 3582(a) explicitly pronounces that rehabilitation is not to be considered when a court is "determining whether to impose a term of imprisonment, *and, if a term of imprisonment is to be imposed, in determining the length of the term*." 18 U.S.C. § 3582(a) (emphasis added). And, as Judge O'Brien noted, "[e]ven a tin ear can discern the *leitmotif* -- defendant rehabilitation, treatment or care cannot drive the incarceration decision either at the threshold or as to length." *Tsosie,* 376 F.3d at 1220 (O'Brien, J., dissenting). By the very terms of the statute, then, if "imprisonment is not an appropriate means of promoting correction and rehabilitation," then *extending* a term of imprisonment for rehabilitative purposes is also plainly improper.

The logic of allowing the district court to take into account the rehabilitative needs of the defendant when determining the length of a period of incarceration is also obviously contrary to the structure of the relevant statutes. Section 3553(a)--the provision that requires the court to consider "the need for the sentence imposed ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment" establishes the ***25** ""'[f]actors to be considered in imposing a sentence." 18 U.S.C. § 3553(a). With respect to the sub-category of sentences that involve "Imprisonment," section 3582(a) expressly prohibits consideration of "correction and rehabilitation." Thus, contrary to the Fifth, Sixth, and Eighth Circuits' reasoning, the district court may neither impose nor extend *a prison term* in order to achieve rehabilitative goals, even if it is permitted take into account the rehabilitative needs of the defendant when it is considering a *non-prison* portion of the defendant's sentence. *See* *Anderson,* 15 F.3d at 281 (explaining that, where a court is considering a sentence "other than imprisonment," such as a period of supervised release, it has discretion to consider rehabilitative concerns like "medical care" and "correctional treatment"); *accord* *Maier,* 975 F.2d at 947 (noting that, under the statutory scheme, "rehabilitation may not be a basis for incarceration," but it "must be considered as a basis for a[nother type of] sentence," such as probation). [6]

***26** In sum, whatever the reasoning, the collective conclusion of the other Courts of Appeal that a sentencing judge is allowed to take the rehabilitative needs of the defendant into account when imposing a term of imprisonment after mandatory revocation of supervised release finds no logical or statutory support. Consequently, this Court should recognize that the plain language of the § 3582(a) prevents district courts from considering rehabilitation either "in determining whether to impose a term of imprisonment" or "in determining the length of the term," and that this rehabilitation restriction plainly applies to imprisonment imposed after mandatory revocation of supervised release. Indeed, the language and intent of the pertinent statutory provisions *require* this result because, when revocation and imprisonment are mandated by § 3583(g), the court's duty is to set the length of the prison term, and § 3582(a) clearly establishes the permitted and prohibited factors when terms of imprisonment are imposed.

In light of the foregoing, the district court in the instant case obviously erred as a matter of law when it focused on Mr. Kosh's rehabilitation while selecting a term of imprisonment as mandated by the revocation statute. *Cf.* *Brown,* 224 F.3d at 1242 (applying the mandatory revocation section because the ***27** circumstances warranted its application even though that statutory provision was "not mentioned by the district court"). The court's error was plain because, as demonstrated above, the plain language of the pertinent statutes mandate this result. Moreover, Mr. Kosh was prejudiced by this error, for the district court selected the lengthy, above-guideline sentence for the express purpose of paving the way for Mr. Kosh's entrance into Butner, the specialized correctional institution that the court deemed "most appropriate" to address his alleged rehabilitative needs. Finally, in the interest of justice, this Court should vacate the district court's judgment and remand the case with an order that the district court resentence Mr. Kosh consistent with the limitations of § 3582(a).

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II. THE DISTRICT COURT'S IMPOSITION OF AN 18-MONTH TERM OF IMPRISONMENT WAS UNREASONABLE IN THIS CASE.

Even if this Court is not inclined to conclude that the district court erred as a matter of law in considering rehabilitation when it sentenced Mr. Kosh, this Court should nonetheless vacate the judgment and remand the case because the 18-month term of imprisonment that the district court imposed upon revocation of Mr. Kosh's supervised release was manifestly unreasonable.

***28** A. Standard of Review.

As noted above, the revocation imprisonment ranges prescribed in Chapter 7 of the Sentencing Guidelines were always purely advisory; thus, even prior to *Booker*, terms of imprisonment imposed upon revocation of supervised release were reviewed for reasonableness. *See* *Anderson,* 15 F.3d at 284; *Giddings,* 37 F.3d at 1093; *United States v. Lee,* 957 F.2d 770, 772 (10th Cir. 1992). [7] Courts ordinarily will not reverse a sentence imposed upon revocation-- even a sentence substantially above the guidelines--"if it can be determined from the record to have been reasoned and reasonable." *Tsosie,* 376 F.3d at 1213. This is not such a case.

B. Nothing in the Record Supports the Conclusion That 18 Months In Prison Was Necessary to Achieve the Court's Stated Rehabilitative Purposes.

The district court failed to render a reasonable decision regarding the term of imprisonment to be imposed upon Mr. Kosh because the record reveals absolutely no basis for a sentence of ***29** 18 months. Pursuant to 18 U.S.C. § 3553(a), it is the district court's unquestionable duty to impose a sentence that is "sufficient but not greater than necessary." Here, the district court asserted that it was sentencing Mr. Kosh to 18 months (as opposed to the 3-to-9-month period called for in the guidelines) so that Mr. Kosh might get "some real treatment" while in prison. Tr. 4/20/05 at 10. But no information or evidence had been presented regarding what form or length of treatment was actually needed to rehabilitate someone with Mr. Kosh's alleged mental and substance abuse problems. Indeed, even the government acknowledged that "we don't have [the] specific information" regarding "the period necessary to stabilize [Mr. Kosh's] mental health issues," and that, therefore, "we just don't have the basis" for seeking an above-guideline sentence. Tr. 4/15/05 at 10-11. And, as a result, the government requested a term of "at least six months." *Id.* at 11.

Not only was the record devoid of any information that would reasonably give rise to the conclusion that Mr. Kosh needed to be imprisoned for 18 months in order to obtain the stated rehabilitative benefits, the information presented at the hearing regarding the length of imprisonment necessary to ensure a placement a Butner did not support that long a sentence. As explained above, the court took a recess in order to give the government the opportunity to determine what sentence was ***30** required to make Mr. Kosh eligible for a Butner placement. When the hearing resumed, the prosecutor reported that all that was needed was a sentence "of six months or more." Tr. 4/20/05 at 3. Thus, even the government's own representations regarding the amount of prison time Mr. Kosh had to have in order to be Butner-eligible was far less than the 18-month term that the district court ultimately imposed.

In the absence of any information whatsoever about the defendant's actual rehabilitative needs, and without any indication that the sentence imposed was necessary to achieve the very purposes that the court recited (*e.g.*, getting the defendant into a particular treatment facility), the court's selection of the sentence in this case was essentially arbitrary--almost like choosing a number out of the air--based simply and solely on the government's blanket assertion that "the longer ... the better." *Id.* at 5. This Court should conclude that, in light of the information presented, the sentence imposed was neither reasoned nor reasonable, and, as a result, it should remand the case for resentencing.

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C. Prison-Placement Considerations Clearly And Improperly Motivated The Sentence In This Case.

Finally, this Court should remand this case for resentencing because the district court imposed the 18-month term primarily as a means of influencing the Bureau of Prison's ("B.O.P.'s") ***31** placement determination. In sentencing Mr. Kosh, the district court made no bones about its objective: to impose a term of imprisonment that would be likely to increase Mr. Kosh's chance of getting into Burner. But prison placement is not an authorized sentencing factor under 18 U.S.C. § 3553(a). Quite to the contrary, Congress has made clear that placement determinations are the *exclusive* province of the B.O.P. At most, a district court imposing a term of imprisonment is allowed to consider "any pertinent policy statements issued by the Sentencing Commission" and to "make a *recommendation* concerning the type of prison facility appropriate for the defendant." *See* 18 U.S.C. § 3582(a) (emphasis added).

The district court in the instant case did much more than that. Focused solely on the placement question, the court actually continued the sentencing and deputized the prosecution to approach B.O.P. in order to determine what term of imprisonment would be required to assure that Mr. Kosh would gain admission into the prison facility of the court's choice.[8] And not only did the court's determination to fashion a sentence that would tip the B.O.P.'s placement scale actually exceed the bounds ***32** of its permissible authority under the statutes, the court made clear that influencing B.O.P. was precisely what it *intended* to do in this case. *See* Tr. 4/15/05 at 12 (court complains that its placement recommendations in prior cases have been "ignored"); *see also* Tr. 4/20/05 at 3-4 (court notes that in a prior case it was told "there was a waiting list at Butner").

In sum, because the sentence here was unquestionably driven by the district court's placement concerns, it fell outside the permissible sentencing criteria prescribed in § 3553(a). Thus, it was an unreasonable exercise of the district court's statutory duty to sentence Mr. Kosh in accordance with the criteria that Congress enumerated in that statute.

CONCLUSION

For the reasons stated above, Mr. Kosh respectfully requests that this Court vacate the district court's judgment and remand the case for resentencing.

Appendix not available.

Footnotes

* Authorities principally relied upon are marked with an asterisk.

1 "A." refers to appellant's appendix, which is filed with this brief. The transcripts of appellant's violation hearings are contained in the appendix behind tabs marked with the dates of the proceedings. Transcripts are cited in this brief by date and page number of the original transcript (*e.g.*, "Tr. 3/5/04 at ___").

2 Although the government did not specify the "mental health conditions" to which it referred, the probation officer's violation report discussed a psychiatric evaluation from May 29, 2003, which had purportedly resulted in a diagnosis of "Axis I: Bipolar II disorder; Intermittent Explosive Disorder; Dissociative Disorder NOS; Partner Relational Problems; and AXIS II: Antisocial Personality Disorder." A. at 23.

3 The nature and extent of Mr. Kosh's mental health condition was not discussed during the hearing. *See supra*, note 2.

4 This is not to say that all of the circuits are in agreement regarding precisely *how* § 3582(a) restricts the district court's sentencing authority. As discussed *infra* at part I(B) (3), the Fifth, Sixth, Eighth, and Ninth Circuits find that the

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rehabilitation limitation in § 3582(a) pertains only to the determination of whether or not to imprison, so that the district court is free to consider rehabilitation when determining the *length* of any term of imprisonment. *United States v. Hawk Wing,* __ F.3d __, 2006 WL 27681, at *6 (8th Cir., Jan. 6, 2006); *Jackson,* 70 F.3d at 880; *Giddings,* 37 F.3d at 1096; *Duran,* 37 F.3d at 561 & n.3. Quite to the contrary, the Second, Tenth, and Eleventh Circuits read § 3582(a) to mean that rehabilitation cannot be considered *either* "for purposes of deciding whether or not to impose a prison sentence" *or* for purposes of determining "what prison sentence to impose." *Harris,* 990 F.2d at 596 (internal quotation marks and citation omitted); *accord* *Tsosie,* 376 F.3d at 1215; *Anderson,* 15 F.3d at 280-81.

5 That the statutes allow the district court, in some cases, to "elect [] to order imprisonment for the length of the original supervised-release term" certainly is not dispositive of whether a term of imprisonment upon revocation may be imposed for the purpose of rehabilitating the defendant. *Anderson,* 15 F.3d at 285 (Kearse, J., dissenting). The "overall effect" may be that the court is imprisoning a violator "for a term that includes a period originally designed to provide rehabilitation," but surely this effect is "incidental," *id.*, for the mandatory revocation statute does not indicate that the prison term must (or even should) be selected with the intent of achieving the same goals that motivated the imposition of the original term of supervised release. Moreover, nothing in the statutory scheme requires that the purpose of imprisonment after revocation mirror the goals the court sought to achieve by prescribing supervised release; to the contrary, the guidelines clarify that revocation occurs after a "breach of trust," *Sentencing Guidelines Manual* ch. 7, pt. A(3) (b), and, whatever the court's initial motives in authorizing supervised release, the court is *revokes* that privilege where the defendant has "tried liberty and failed." *Johnson,* 529 U.S. at 709.

6 The structure of § 3583(e)--the statute that governs permissive modification or revocation of supervised release--also underscores the point. That section clearly establishes that consideration of the defendant's medical and rehabilitative needs *should* play a role in the court's exercise of its discretion when it chooses among the various authorized options (*i.e.*, when the court asks, should supervised release be terminated? extended? revoked? or should house arrest be ordered?). The logic of the Fifth, Sixth, and Eighth Circuits appears to mandate that consideration of rehabilitation be prohibited when the sentencing court is determining whether to revoke supervised release, even though § 3583(e) expressly requires consideration of that factor, but allowed when the court is determining the length of the prison term, even though § 3582(a) expressly prohibits that result.

7 Prior to *Booker,* 18 U.S.C. § 3742(e)(4) required courts of appeal to determine whether a revocation sentence was "plainly unreasonable"--a standard that some circuits took to mean that revocation terms were to be upheld in the absence of an "abuse of discretion" by the sentencing judge. *See, e.g.*, *United States v. Holmes,* 283 F.3d 966, 968 (8th Cir. 2002). However, after the Supreme Court excised § 3742(e), the Eighth Circuit, at least, has adjusted its review standard accordingly: " "[a]lthough our pre-*Booker* decision[s] ... employed a standard of review of abuse of discretion ..., we think it is more consistent with *Booker* to review revocation sentences after *Booker* under the "unreasonableness" standard announced in that opinion." *United States v. Tyson,* 413 F.3d 824, 825 (8th Cir. 2005).

8 Ironically, even though the district court imposed a period of imprisonment that was three times longer than the government thought was necessary in order to ensure a Butner placement, at the time of this writing, B.O.P. had housed Mr. Kosh at the Devens federal medical correctional facility in Ayer, Massachusetts.

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