

Probation Conditions Versus Probation Officer Directives: Where the Twain Shall Meet

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IN 1980, THERE were an estimated 1,840,400 individuals under some form of correctional control (U.S. Department of Justice, 2004). Approximately two-thirds of that number were under probation or parole supervision. By 2004, the total estimated correctional population in the United States had reached a whopping 6,996,500 (U.S. Department of Justice, 2004). Of that number, a total of nearly five million individuals were under probation or parole supervision. More recently, several states and the federal government have initiated “reentry” and “transition” programs designed to prepare prison inmates for community release (U.S. Department of Justice, 2006). By 2002, 49 states had received federal funding to implement these community-based reentry programs (U.S. Department of Justice, 2002).

Such reentry programs, coupled with the high percentage of offenders who are granted probation as an initial disposition, will dramatically increase the number of those offenders who are under probation and parole supervision over the next few years. Because the supervision of these offenders will frequently include serious and violent offenders, emphasis on community protection and offender accountability will be paramount. Courts and parole boards will need to assure improved delivery of “service,” not only for the benefit of the offender, but also for the protection of the community. Obviously, probation and parole programs will continue to be the major vehicle for community supervision.

Currently, both federal and state probation and parole systems utilize what are known as “standard conditions of supervision.” These “standard” conditions routinely require the offender to: 1) avoid commission of any new offenses; 2) notify the supervising agency prior to leaving the district of supervision; 3) notify the supervising agency of any change in residence; 4) maintain stable employment; 5) report any new arrests without delay to the supervising agency; 6) report regularly to the supervising agency; and 7) to comply with any directives or instructions from the supervising corrections agent. Frequently, special conditions for the defendant’s unique circumstances are also imposed.

To be effective, however, community supervision must be flexible enough to respond not only to

the offender's needs, but also to the needs of the community. Because every change in circumstance cannot be anticipated at the time of sentencing, it is helpful if the conditions of supervision can be adjusted and modified, sometimes on very short notice, in order to meet a particular offender's needs or answer a particular concern in the community. Indeed, the American Bar Association specifically recommends that probation officers should have the authority to "implement" judicially imposed conditions (American Bar Association Standards for Criminal Justice, 1993).

Problems arise, however, when the community supervision agent, under the auspices of issuing "directives or instructions" to the offender, actually imposes distinctly new and perhaps more onerous conditions of supervision. Such a situation raises serious questions. First, to what extent are community supervision personnel given the authority to impose new and different conditions of supervision consistent with the separation of powers doctrine? Second, even if authority does exist for the community supervision agent to impose substantially new requirements of supervision, to what extent is such authority consistent with an offender's due process rights and other rights at sentencing?

The answers to these questions are significant because courts, parole boards, and community supervision personnel must understand the parameters of their power and discretion. Furthermore, an understanding of the extent to which an agent's directives may impose new requirements of supervision will better enable such personnel to adjust community supervision to meet the needs of the offender and better meet the safety needs of the community.

This article examines recent trends in the case law addressing the extent to which probation, parole, and other community supervision personnel may impose additional or modified conditions of supervision. Both federal and state cases are discussed in regard to the correctional agent's statutory and constitutional authority. Also, the cases are discussed in terms of an offender's rights at sentencing, such as representation by counsel, the right to be present, the right to object to the sentence imposed, the right to notice of the factors on which the sentence is to be based, and the right to notice of the conditions under which the defendant will be supervised. The paper also provides suggestions for a "condition modification procedure" that will not only enable community corrections personnel to respond to spontaneous situations in the field, but also honor any sentencing rights retained by the offender.

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Federal Cases

The federal courts have thus far been reasonably strict in assuring that district courts observe the limits of their authority to delegate to others the duty of fixing conditions of supervision. In a thorough discussion of a court's delegation of duties to the probation officer, the Fourth Circuit identified sentencing, including the terms of supervised release, as a "core judicial function" that could not be delegated to other officials, *U.S. v. Johnson*, 48 F.3d 806, 808 (4th Cir., 1995). According to the Fourth Circuit, the district court's attempt to "anticipate" problems in the collection of restitution by delegating to the probation officer the ability to set amounts and times of payments was an unlawful delegation of a judicial function. The court identified the various duties and responsibilities imposed on probation officers under the federal probation scheme. It noted no statutory authority for the delegation of a uniquely judicial function to the probation officer. The court reached this result even in the face of a general statutory charge that probation officers were to "perform any other duty that the court may designate," 18 U.S.C. § 3603(9)(2005).

Similarly, in *United States v. Gunning*, 401 F.3d 1145 (U.S. 9th Cir. 2005), the Ninth Circuit held that the district court erred when it delegated to the Bureau of Prisons the duty of setting a payment schedule for the defendant's payment of restitution. According to the court, the Mandatory Victims Restitution Act of 1996 required the district court to set the payment

schedule itself. It could not delegate that duty to a correctional agency. A similar result was reached by the Second Circuit in *United States v. Green*, 81 Fed. Appx. 364 (U.S. 2nd Cir. Nov. 2003). In *Green* the court agreed with the defendant that the district court impermissibly delegated to the probation office the court's authority to set the defendant's payment schedule, even though the delegation of authority was limited and contingent. The district court had stated in relation to the defendant's restitution obligations that, "[I]f payments in that amount are not possible, then payments obviously in a lesser amount as determined by the Probation Department would be appropriate," *Green* at 367. Although the grant of authority was thus very limited, it nonetheless constituted an impermissible delegation of a judicial function which, by itself, warranted remand.

The cases that strike down improper delegations of a judicial function are not limited to restitution conditions. In *United States v. Padilla*, 393 F.3d 256 (U.S. 1st Cir. Dec. 2004)(*Padilla I*)(reversed essentially on other grounds by the court en banc, *U.S. v. Padilla*, 415 F.3d 211 (1st Cir. 2005)(*Padilla II*)), the First Circuit held that the district court erred when it allowed the probation officer to determine the number of drug tests that the defendant would be required to undergo during his period of supervised release. According to the court, the district court may not delegate to the probation office the judicial function of imposing appropriate conditions of supervision. See *United States v. Melendez-Santana*, 353 F.3d 93 (1st Cir.2003)(reversed on essentially other grounds *U.S. v. Padilla*, 415 F.3d 211 (1st Cir. 2005) (En Banc)(*Padilla II*)). Under 18 U.S.C. § 3583(d), the district court is required to determine the maximum number of drug tests to be performed. It may not delegate that duty to the probation office.

It is interesting to note that the court in *Padilla II* determined that the delegation of duties error was not "plain error" in large part because the probationer could redress over-reaching by the probation officer through Federal Rule of Criminal Procedure 32.1(c). Thus, *Padilla II* recognized the wrongful delegation of duties to the probation officer as "error," just not fundamental error of which the court could take notice on appeal without an objection being lodged by the defendant in the district court.

In *United States v. Parker*, sub nom, *United States v. Green*, 81 Fed. Appx. 364 (U.S. 2nd Cir. 2003), the Second Circuit held that the district court impermissibly delegated to the probation office the court's authority to set the defendant's payment schedule. The district court, in an apparent attempt to account for foreseeable financial difficulties on the part of the defendant, stated: "[I]f payments in that amount are not possible, then payments obviously in a lesser amount as determined by the Probation Department would be appropriate," *Parker* at 367. This, according to the Second Circuit, constituted an impermissible delegation of a judicial function which by itself warranted remand for re-sentencing.

Similarly in *United States v. Dempsey*, 180 F.3d 1325 (11th Cir. 1999), Eleventh Circuit held that an occupational restriction imposed by the probation officer was invalid. According to the court, "[A] probation officer lacks the authority to impose an occupational restriction as a condition of supervised release," *Dempsey* at 1326.

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State Cases

Cases from various state jurisdictions have also considered the problem of unauthorized delegation of authority to the probation officer. In the case of *People v. K.D.*, 781 N.Y.S.2d 856 (Sup. Ct. Kings Co. N.Y. July 2004), the court discussed the problems created when supervisory personnel are permitted to add new and distinct conditions of supervision. In *K.D.*, the defendant was convicted of grand larceny in relation to incidents in which he wrote checks to himself while employed as an accountant. The defendant was placed on probation. One of the conditions of probation required the defendant to work at suitable employment. At no time was the defendant informed by the court that his employment as an accountant would be inappropriate. It was only after the defendant began his period of supervision that he was informed by the probation office

that he would have to resign from his employment as an accountant or the probation department would notify his employer and have him terminated. This action was apparently taken pursuant to probation department policy.

Reviewing the propriety of the actions of the probation office, the Supreme Court of Kings County noted that when a defendant is sentenced to probation, the Court, not the Probation Department, sets the terms and conditions of probation, PL § 65.10(1); CPL § 410.10(1). Moreover, under New York's statutory scheme, there is a mechanism for the modification and/or enlargement of the terms and conditions of probation by the court on notice to the probationer, CPL § 410.20(1). The court went on to find it "abundantly clear...that the court, not the Probation Department, imposes the conditions of probation....The court does not delegate to the Department the unilateral power to impose additional or more severe conditions" K.D. at 857. The court then proceeded to note the major problems presented by the implementation of the policy in this case. First, there was the underlying presumption that the Department knew better than the Court and the District Attorney what the appropriate sentencing ramifications should be for the defendant. Second, the imposition of the employment restriction did not appear to be based on the deliberative process due each individual case, but rather a "knee jerk" application of probation department policy. Third, the broad restriction on the defendant's employment was not discussed in the defendant's presentence report.

Even where a defendant has notice of the additional requirements, however, courts have refused to acknowledge the validity of the new "condition." In *State v. Ornelas*, 675 N.W.2d 74 (Minn. Sup. Feb. 2004), the defendant entered a plea of guilty to third-degree criminal sexual conduct. The defendant was sentenced to a stayed 48-month prison term and 15 years supervised probation. As part of the 15-year supervised probationary term, the court imposed several conditions. A requirement that the defendant have no contact with individuals under the age of 18 was *not* included as one of the conditions imposed by the court.

While on probation, the defendant was convicted of a firearms offense and was granted probation in relation to that offense. On the firearms charge, the judge imposed numerous probation conditions, one of which was "no unsupervised contact with anyone under the age of 18 without agent approval." This condition, however, was not made part of the conditions with regard to the defendant's original offense. After the defendant was found to be residing in a residence where there were children under the age of 18, he was charged with violating his *original* term of probation. The defendant admitted that he violated this term of probation and his probation was revoked.

On review by the Minnesota Supreme Court, the court held that the order of revocation had to be reversed. Stated the court:

"The imposition of sentences," including "determining conditions of probation is exclusively a judicial function that cannot be delegated to executive agencies," *State v. Henderson*, 527 N.W.2d 827, 829 (Minn.1995). When sentencing a defendant, a court "[s]hall state the precise terms of the sentence", Minn. R. Crim. P. 27.03, subd. 4(A). In imposing a probationary sentence, "if non-criminal conduct could result in revocation, the trial court should advise the defendant so that the defendant can be reasonably able to tell what lawful acts are prohibited," Minn. R. Crim P., subd. 4(E),(2). "It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation," *United States v. Dane*, 570 F.2d 840, 843 (9th Cir.1977) (citations omitted).

The court rejected the State's claim that because the defendant was aware of and believed that

the “no contact” provision was a condition of probation that revocation was proper. The defendant’s mere acknowledgment that he was aware of the no-contact provision and his admission that he violated the provision could not form the basis for revoking the defendant’s probation if that condition was not actually imposed by the district court. It was clear from the record that the no-contact provision was never imposed by the district court in the present case. The requirement was not contained in any district court order or other writing, was not stated as a condition of probation at the time of the defendant’s initial sentencing, and was never added as an additional condition of probation at any of the probation revocation hearings at which the defendant’s probation was reinstated. Because there was nothing in the record indicating that the no-contact provision was ever made a condition of the defendant’s original probation, the order of revocation based on the defendant’s violation of this condition had to be set aside.

In a very similar situation, the Florida Court of Appeals held that the revocation of the defendant’s conditional release had to be reversed because the revocation was based on violations of conditions that were never actually imposed on the defendant, *Thomas v. Fla. Parole Commission*, 872 So.2d 339(Fla. App. April 2004). In passing, the court noted that although the conditional release order permitted the control release officer to order the defendant into drug treatment, nothing in the record demonstrated that the defendant had in fact been given such an order. “Thomas’s conditional release cannot legally be revoked for his failure to complete a condition that was neither ordered by the court nor properly delegated to and ordered by his CRO, see *Narvaez v. State*, 674 So.2d 868 (Fla. 2d DCA 1996) (holding that it was fundamental error to revoke defendant’s probation because he violated a condition with which he was never ordered to comply),” *Thomas* at 340.

While the cases are fairly uniform in concluding that only the court may impose “conditions” of supervision, the distinction between what constitutes a “condition” and a legitimate “directive” or “instruction” from the probation agent is less clear. A case that provides perhaps the most thorough analysis of this distinction is *State v. Rivers*, 878 A.2d 1070 (Vt. 2005). In *Rivers* the court recognized that probation officers must be granted a certain amount of discretion in “implementing” conditions of supervision. This discretion notwithstanding, the court struck down the probation officer’s “implementation” of a condition which prohibited the defendant’s contact with persons less than 16 years of age. As implemented by the probation officer, the defendant was prohibited from being in any place where persons under the age of 16 might congregate. Although the defendant was given specific instructions by his supervising agent that his attendance at a fair without adult supervision would place him in violation of his probation, the court held that the instruction was nonetheless invalid. To allow the officer such authority was tantamount to allowing the probation officer to usurp the judicial function of imposing conditions of supervision.

Even where a supervision requirement would seem an “obvious” part of the supervision process, courts have held that the requirement must nonetheless be included in the conditions imposed by the court. In *Barber v. State*, 344 So.2d 913 (Fla. App. 1977), the court struck down a reporting requirement imposed by the probation officer because no such requirement was made a formal condition of the defendant’s supervision.

The courts have also rejected the argument that while a probation officer-imposed “condition” is invalid, supervision may nonetheless be revoked for the probationer’s failure to follow his probation officer’s instruction to obey the new “condition.” In *Paterson v. State*, 612 So.2d 692 (Fla. App. 1993), the probation officer gave the defendant instructions that he was to submit to periodic urinalysis examinations. When he did not do so, his probation was revoked based on his alleged violation of the general condition of his supervision that he “comply with all instructions the probation officer may give him,” *Paterson* at 693. On review by the Florida Court of Appeals, the court reversed the revocation. The general condition of supervision which requires probationers to follow the instructions given them by supervision personnel does not authorize probation officers to impose new requirements of supervision.

In *Ackerman v. State*, 835 So.2d 354 (Fla. App. 2003), the court clarified that probation may not

be revoked for a violation of a condition or requirement unilaterally imposed by the probation officer, but not by the trial court. While reasonable delegations by the trial court of incidental discretion to a probation officer are allowed, the restrictions imposed by the supervising agent went substantially beyond what was restricted by the condition imposed by the court. Thus, the directive from the probation officer was more than the exercise of delegated incidental discretion. Such was improper.

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Cases Upholding Directives

The above cases stand in contrast to cases like *United States v. Allen*, 312 F.3d 512 (U.S. 1st Cir. 2002), in which the court upheld a condition that gave the probation officer discretion to determine the “schedule” of the defendant’s mental health treatment sessions. On review by the First Circuit, the court could not agree that the condition regarding treatment improperly delegated judicial authority to the probation officer. The condition did not leave to the probation officer the decision to require the defendant to receive treatment. Rather, the condition required the defendant to receive treatment and delegated to the probation officer simply the selection and scheduling of the program to be completed.

As stated by the court:

“When we examine the record, it becomes evident that Judge Hornby was merely directing the probation officer to perform ministerial support services and was not giving the officer the power to determine whether Allen had to attend psychiatric counseling. . . . The extensive evidence of Allen’s mental illness indicates that the court was imposing mandatory counseling and delegating the administrative details to the probation officer, actions constituting a permissible delegation,” (see, *U.S. v. Peterson*, 248 F.3d 79, 85 (2d Cir. 2001).

Even delegations of authority that give the probation officer considerable power over an offender’s life style have been approved. In *United States v. Fields*, 324 F.3d 1025 (U.S. 8th Cir. April 2003), for example, Fields pleaded guilty to selling child pornography over the Internet. He was sentenced to a term of confinement and a term of supervised release. One of the special conditions prohibited the defendant from possessing a computer unless he was granted permission to possess it by his probation officer. On review by the Eighth Circuit, the court found nothing improper about the conditions imposed by the district court. The court simply did not believe that providing a probation officer with discretion regarding Fields’ computer use subjected the defendant to arbitrary or selective enforcement of the law.

State courts have similarly upheld conditions that give the probation officer wide latitude to determine a defendant’s legitimate possession of certain material. In *Belt v. State*, 127 S.W.3d 277 (Tex. App. Jan. 2004), for example, the court upheld conditions that prohibited the defendant’s possession of certain materials deemed inappropriate by the supervision office and his counselor or treatment provider. The same case upheld a condition that permitted the supervising probation agent to approve of certain living arrangements.

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Recommended Procedure

As the above cases indicate, the crux of the problem is the extent to which the probation officers’ instructions or directives require the defendant to adhere to new requirements of supervision about which he did not have reasonable notice. Too much limitation of the community supervisor’s discretion is obviously problematic, for it will render the agent unable to

respond to changing conditions in an offender's circumstances. On the other hand, courts cannot abandon their constitutional and statutory sentencing roles by granting plenary powers to correctional personnel. Obviously, some middle ground is needed.

Several jurisdictions, including the federal government, have procedures in place for the modification of probation conditions. As a general matter, these procedures require notice to the defendant, an opportunity to contest the modification, and findings by the trial court that support the necessity for the modifications (see, for example, *People v. K.D.*, supra and CPL §410.20(1)). Of course, such burdensome and time-consuming procedures are obviously problematic when a supervising corrections agent must respond to rapidly changing events in the field. In such situations, the agent is frequently called upon to impose restrictions that significantly impact a defendant's circumstances. While instructions that merely give normal supervisory directions need not be judicially approved (see *Holterhaus v. State*, 417 So.2d 291 (Fla. App. 1982)), where the instruction does more, due process requirements are clearly implicated. But even here, the due process need not precede the "temporary" restrictions imposed on the defendant by the probation officer. Even where the deprivation imposed is quite substantial, at least one court has found that post-deprivation procedures adequately protect the defendant's interests.

In *Dordell v. State*, 850 A.2d 302 (Del Sup.2004), the defendant pleaded no contest to unlawful imprisonment in the second degree and offensive touching. The victim was a five-year-old girl. The defendant was placed on a term of supervision. One of the conditions of supervision prohibited the defendant from having contact with the victim. Based upon an affidavit of probable cause for the defendant's arrest filed during the defendant's probation term, the defendant's probation officer imposed sex offender special conditions. These conditions included a requirement that the defendant have no contact with anyone under the age of eighteen. The defendant filed a motion to review the conditions of supervision. The Superior Court denied the motion; however, the court modified the conditions to allow the defendant to interact with minors in the defendant's immediate family under adult supervision. The defendant appealed.

On review by the Delaware Supreme Court, the court upheld the condition imposed by the probation officer. The existence of post-deprivation procedures, found the court, alleviated any due process concerns. Though the defendant could have refused the new condition and thus been entitled to immediate hearings on his violation of probation, this he did not do. Rather, he accepted the condition and pursued a motion to review the condition. Although the defendant was bound by the condition in the interim, a post-deprivation hearing process adequately protected his due process rights. Not only did the probation officer have the statutory authority to impose the special conditions of probation, but the prompt post-deprivation hearing satisfied due process.

Taking guidance from the above cases, the following procedure is recommended in any circumstance in which the corrections agent seeks to give formal instructions to a defendant or seeks to impose modified conditions of supervision. First, any and all instructions from the corrections agent to the defendant should be thoroughly documented, and adequate measures should be taken to assure that the defendant understands these instructions. Acknowledgement forms that detail the instructions and the reasons for their imposition are recommended. Second, if the instruction seeks to impose new and different "conditions," the defendant should be informed that his "acceptance" of the new condition is on a temporary basis and that he has a right to seek review of the new condition in court. The defendant should also be provided with a statement of the evidence relied on by the supervising agent and the reasons for imposing the temporary condition. The defendant also should be informed that his failure to adhere to the new requirements may nonetheless form the basis for revocation of his supervision status.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court identified three factors for consideration in determining if post-deprivation due process would pass constitutional muster. First, there must be an analysis of the nature of the private interests in question. Second, there should be an assessment of the risk of an erroneous deprivation and the probable value of additional safeguards. Third, courts should consider the nature of the governmental interests at stake.

In the context of community supervision and the temporary imposition of additional conditions on a probationer, the first consideration would seem to clearly balance in favor of the government. Probationers and parolees do not enjoy the full array of rights enjoyed by free citizens. Their freedom is conditional and necessitates continued control and supervision. Moreover, it must be remembered that any new condition imposed by the probation officer is temporary and will not be made permanent until approved by the court.

With regard to the possible risk of an erroneous decision, the requirements that the probationer be informed of the evidence relied on and the reasons for the new condition should keep the risk of erroneous deprivations to a minimum. Additionally, in most jurisdictions, courts retain the authority to modify and add new conditions of supervision any time during the term of supervision.

As to the third Mathews factor, the governmental interests in assuring that the offender adheres to the probation or parole plan and does not pose a risk to the community is paramount. Community supervision personnel not only have a duty to those they supervise, but also to the community at large. Community supervision is only permissible based on an assessment that the offender can remain at large without significant risk to the community. Providing correctional personnel with a flexible means of dealing with problems in the field not only enables them to adjust terms of supervision to meet an offender's needs, but also provides a means for enhanced public protection.

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