

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 2021 CR 344-2 (JDB)

ABRAM M. MARKOFSKI,

Defendant.

**MOTION FOR EARLY TERMINATION OF PROBATION
OR FOR AUTHORIZATION TO TRAVEL
AND MEMORANDUM OF POINTS AND AUTHORITIES**

Abram Markofski, by counsel, moves the Court for early termination of probation no sooner than May 3, 2023. In the alternative, he moves for authorization to travel to Italy for a pilgrimage program for about 10 days in late May, 2023. He makes this motion pursuant to 18 U.S.C. § 3564(c). Abram Markofski began serving his two-year term of probation on December 10, 2021. After sentencing, the term of supervision was transferred to the Western District of Wisconsin, where he resides.

Counsel conferred with Trial Attorney Seth Meinero about this request. The government categorically opposes the request for early termination of probation,

but does not object to Markofski's request to travel. Counsel also conferred with the Supervisory United States Probation Officer, Michael Nolan (W.D. Wis.), who advised that Abram Markofski has complied with all areas of supervision and USPO Nolan can make sure that the proposed travel does not conflict with any restrictions imposed by the rules of supervision.

A.

Abram Markofski was sentenced to a two-year term of probation on December 10, 2021, for violating 40 U.S.C. § 5104(e)(2)(G), a Class B Misdemeanor, for his actions on January 6, 2021.¹ Abram Markofski paid the fine, restitution, and special assessment. He completed all of the community service. His time on supervision has been uneventful, as the Court would expect.

Abram Markofski attends Viterbo University, in La Crosse, Wisconsin, where he studies engineering. He has an overall GPA of 3.0; he is taking classes in materials engineering, engineering dynamics, linear algebra, Calculus 3 and Diffraction equations. In addition to school, he works at an internship with Chart

¹ On May 3, 2021, the FBI arrested Abram Markofski in connection to his entry into the United States Capitol on January 6, 2020. He appeared in U.S. District Court for the Western District of Wisconsin the same day, and he was released on personal recognizance. He appeared in this Court for an initial appearance, by video, on May 10, 2021, and was released on personal recognizance. Abram Markofski was compliant with all conditions for the seven months that he was on pretrial release (from his arrest to sentencing).

Energy & Chemical, Inc., a position he's held for about one year. Because of his interest in aerospace engineering, he hopes to find another internship in that field this summer. To support himself, Abram Markofski continues to work a part-time job at a warehouse.² At the time of sentencing, Abram Markofski was living at his parent's home. He recently moved into an apartment with friends. Abram remains on-track to graduate from Viterbo University in about a year.

Abram Markofski has been offered an opportunity to participate in a pilgrimage to the Shrine of St. Francis of Assisi for individuals who have been in the military. This pilgrimage provides Veteran students an opportunity to address personal struggles through guided discussions, and lectures while visiting historical sites located in Rome, and Assisi Italy. The trip is organized by the Franciscan Pilgrimage Program, which is affiliated with Viterbo University.³ Structured discussions and lectures are facilitated by leaders from Viterbo University and the Franciscan Pilgrimage program provide Veteran students specific goals, which lead to actions of self-improvement. The trip is scheduled to

² As a result of his misdemeanor conviction, Abram Markofski was discharged from the U.S. Army. His discharge resulted in the loss of GI-Bill benefits, including tuition reimbursement.

³ Correspondence regarding the program from Samuel Morris (Viterbo University's Director of Military Student Success and a chaperone on the trip) is attached as *Exhibit A*.

take place in late May, 2023 and will last 9 days. He has been offered a 95% scholarship to cover the cost of the trip.

B.

Modification of the conditions of probation is addressed in 18 U.S.C. § 3563(c), which provides that:

The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.⁴

A term of probation may be terminated at any time – unlike supervision, there is no minimum amount of time. 18 U.S.C. § 3564(c) addresses probation, specifically the conditions under which a Court may shorten a term of probation:

The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

Federal Rule of Criminal Procedure 32.1(c) addresses the procedure to be used, and provides:

⁴ See 18 U.S.C. § 3563(a) & (b), and U.S.S.G. § 5B1.3.

(c) MODIFICATION.

(1) *In General.* Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) *Exceptions.* A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

Some additional guidance may be gleaned from looking at the factors under 18 U.S.C. § 3583(e), relating to the early termination of supervised release. This section directs the Court to consider the purposes of sentencing set forth in § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6) and (a)(7) in deciding whether to terminate a term of supervised release.⁵ Moreover, the Judicial

⁵ In addition to consideration of the factors under § 3553(a), the Court must be “satisfied” that early termination of supervised release “is warranted by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3583(e)(1). No “extraordinary or unusual conduct” during supervision is required to meet this standard. See *United States v. Harris*, 258 F. Supp. 3d 137, 148-50 (D.D.C. 2017); *United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016) (per curiam)). In the case of early termination of supervised release, the Court need not consider § 3553(a)(2)(A), “because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than punish them.” U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (July 2010) (“Supervised Release Report”) at 9. Supervised release “serves an entirely different purpose than the sentence imposed under § 3553(a).” *Pepper v. United States*, 562 U.S. 476, 502 n.15 (2011). “Supervised release

Conference has identified criteria to assess eligibility for early termination of probation. Probation Officers are directed to consider the suitability of early termination for offenders as soon as they are statutorily eligible. The general criteria for assessing whether a statutorily eligible offender should be recommended to the court as an appropriate candidate for early termination are as follows:

1. stable community reintegration (e.g., residence, family, employment);
2. progressive strides toward supervision objectives and in compliance with all conditions of supervision;
3. no aggravated role in the offense of conviction, particularly large drug or fraud offenses;
4. no history of violence (e.g., sexually assaultive, predatory behavior, or domestic violence);
5. no recent arrests or convictions (including unresolved pending charges), or ongoing, uninterrupted patterns of criminal conduct;
6. no recent evidence of alcohol or drug abuse;

fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson* ("Johnson I"), 529 U.S. 53, 59 (2000); see also *Johnson v. United States* ("Johnson II"), 529 U.S. 694, 708-09 (2000) (recognizing the "congressional policy in providing for a term of supervised release . . . is to improve the odds of a successful transition from the prison to liberty"). In addition, the Supreme Court has noted the congressional "aim[] . . . to use the district courts' discretionary judgment to allocate supervision to those release[d] who need[] it most," *Johnson II*, 529 U.S. at 709. "The relevant factors under § 3553(a) are, consequently, evaluated mindful of the Supreme Court's clear articulation of the purpose of supervised release and the district court's discretion to limit terms of supervised release to those who need it." *Harris*, 258 F. Supp. 3d at 145.

7. no recent psychiatric episodes;
8. no identifiable risk to the safety of any identifiable victim; and
9. no identifiable risk to public safety based on the Risk Prediction Index.

GUIDE TO JUDICIARY POLICY, Vol. 8E, Ch. 3 § 380.10(b), “Early Termination” (Monograph 109) (rev’d 2010). Pursuant to the policy, “there is a presumption in favor of recommending early termination” for supervisees after the first 18 months if they are not “career violent and/or drug offenders, sex offenders, or terrorists,” if they “present no identified risk to the public or victims,” and if they are “free from any moderate or high severity violations.” *Id.* at § 380.10(g).

Further, on February 16, 2012, the Honorable Robert Holmes Bell, Chair of the Committee on Criminal Law of the Judicial Conference, issued a memorandum to all United States District Court Judges encouraging them to grant early termination of supervised release in appropriate cases as an effort to reduce expenditures in the probation and pretrial services programs. Terminating “appropriate cases before they reach their full term saves resources and allows officers to focus on offenders who continue to pose the greatest risk of recidivism.” Analysis by the Administrative Office of the Courts indicates that offenders who received early termination were “arrested less often, for less serious charges, and were sentenced to terms of imprisonment less often.” Accordingly, “[f]rom a

policy standpoint, it appears that the above criteria, when properly applied, does not jeopardize public safety.” *Id.*

C.

The factors under § 3553(a) to be considered include: (1) the characteristics of the offense and the defendant; (2) whether the sentence reflects the seriousness of the offense, deters other criminal conduct, protects the public, and rehabilitates the defendant; (3) the other available sentences; (4) the sentences and applicable sentencing range for the defendant’s crime; (5) pertinent policy statements provided by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a)(1)-(7).⁶ A court must ensure that the sentence imposed is sufficient, but not greater than necessary, to accomplish the goals of sentencing. *Id.* After considering the 3553(a) factors, the court may “terminate a term of probation previously ordered and discharge the defendant . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3564(c). *United States v. Ferrell*, 234 F. Supp. 3d 61, 63 (D.D.C. 2017).

⁶ For a more complete discussion of the § 3553(a) factors, *see generally* Dkt. # 44 (Defendant’s Memorandum in Support of his Sentencing Recommendation), # 47 (Final Presentence Report), and # 48 (Sentencing Recommendation).

The district court possesses wide discretion in determining whether the interest of justice would be served by terminating supervision early. *See Hook v. Hook*, 471 F.3d 766, 771 (7th Cir. 2006) (considering similar standard under 18 U.S.C. § 3583(e)(1), applicable to supervised release). If a sentence was “sufficient, but not greater than necessary” when first pronounced, 18 U.S.C. § 3553(a), then one might expect that something will have changed in the interim that would justify an early end to a term of supervised release. *United States v. Melvin*, 978 F.3d 49, 52-53 (3d Cir. 2020). The court of appeals, however, “disavow[ed] any suggestion that new or unforeseen circumstances must be shown.” *Id.* (emphasis added). In other words, “a district court need not find that an exceptional, extraordinary, new, or unforeseen circumstance warrants early termination of a term of supervised release before granting a motion. . . .” *Id.* The district court must be “satisfied that early termination is warranted by the defendant’s conduct and is in the interest of justice.” *Id.* (quoting 18 U.S.C. § 3583(e)(1)).

Consideration of the first factor—the nature and circumstances of the offense—confirms the seriousness of Abram Markofski’s offense conduct. The general focus of probation, like supervised release, is forward-looking. This aspect is captured by the remaining second, third and fourth factors of general deterrence of criminal conduct and specific deterrence of the defendant, as well as the need to provide a defendant with educational or vocational training, medical care, or

other correctional treatment.⁷ See *Johnson I*, 529 U.S. at 59 (“Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration”). Consideration of those three factors militate strongly in favor of early termination of the defendant’s term of probation.

In this case, the defendant has complied with the terms of his probation. He has been enrolled full-time in Viterbo University’s engineering program. He has maintained employment, a stable residence and relationship with his family. In these circumstances, the Court may conclude that early termination of supervised release would be in the “interest of justice.”

D.

By May 3, 2023, Abram Markofski will have served 17 months on probation; if pretrial release is considered, he will have demonstrated compliance with conditions of release for two years. Abram Markofski satisfies all of the criteria for

⁷ In his allocution, Abram Markofski accepted responsibility and expressed his remorse for unlawfully entering the Capitol. He did not minimize his conduct or shift blame. He told the Court that his actions placed him on the other side of the line of the National Guard (from which he has since been dismissed). Since he was charged and convicted, Abram has had numerous conversations with his family and educators about what he did. Those conversations, he told the Court, have allowed him to learn and grow as an individual. By placing who Abram is and what he values first (family, education and career), he feels that he will not repeat the decisions that led him to participate in the events of January 6. The pilgrimage is intended to reinforce the maturation of his views.

early termination of probation. He satisfied his financial obligations and remains on-track to graduate from college. He has no conditions requiring programing or counseling, and none have been needed during the course of supervision. (He has complied with Court-imposed conditions since May 3, 2021.) On these facts, it would be appropriate to modify the term of probation to either authorize his early termination from probation, or to allow Abram Markofski to travel to Italy with the pilgrimage program.

The government's categorical approach is attractive when dealing with a large volume of cases involving serious misconduct—it makes dealing with individualized determinations simple. But such an approach runs counter to the considerations under § 3553(a), which require the Court to examine the individual and his offense conduct. Some cases will be mitigated and may support early termination, consistent with the view that where there is a limited pool of resources available to supervise individuals on probation. Those individuals on probation who do not need the resources should be released sooner than those who require more resources. Thus, as Abram Markofski does not fall into a category of heightened concern, has not violated the conditions of probation such that judicial action was required and he does not present an identified risk to the public or victims, then the term of probation should be terminated or modified. Here, "continuing the defendant's probation would have no real value as far as

law enforcement or any other community interest is concerned.” *United States v. Etheridge*, 999 F. Supp. 2d 192, 199 (D.C. 2013). Continuing Markofski’s term of probation is not required to “protect the public from further crimes of the defendant.” *See* 18 U.S.C. § 3553(a). Further, the sentence imposed reflected the seriousness of the offense and has promoted respect for the law and “adequate deterrence” against unlawful protests against proper government operations in the Capitol buildings. *See id.*

WHEREFORE, given his performance on probation over 17 months of his 24-month term of probation, Abram Markofski respectfully requests that that the Court modify the term of probation so that it terminates pursuant to 18 U.S.C. § 3564(c) no sooner than May 3, 2023. In the alternative, Abram Markofski requests that the Court authorize his travel to Italy at the end of May, 2023.

Dated this 23d day of February, 2023.

Respectfully submitted,

ABRAM MARKOFSKI, *Defendant*

Electronically signed by Jonas B. Bednarek

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