

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 94-50253

(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CHANDLER GROESSEL,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Western District of Texas  
(M-92-CR-5-2)

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(November 1, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:\*

James Chandler Groessel appeals a two-year sentence imposed upon revocation of his supervised release. He contends that the district court should have given him notice of its intention to depart upward from the recommended sentencing range, and that the sentence imposed was plainly unreasonable. Finding that notice of an intention to depart upward from a policy statement

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\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

recommendation is not required, and that the sentence was not plainly unreasonable, WE AFFIRM.

**I**

James Chandler Groessel pleaded guilty to a violation of 18 U.S.C. § 922(g)(1) (1988))felon in possession of a firearm))and was sentenced to thirty-three months of imprisonment and two years of supervised release. Under the conditions of his supervised release, Groessel was required to submit truthful monthly reports to his probation officer, notify his probation officer within 72 hours of a change in employment, and refrain from using or possessing controlled substances. A special condition of supervised release also required Groessel to participate in an approved drug and alcohol treatment program as directed by the probation officer.

Within two months of Groessel's release from prison, his probation officer filed an arrest warrant petition in the district court alleging that Groessel had violated the conditions of his supervised release by submitting a false monthly report to his probation officer, failing to inform his probation officer that he changed jobs or had been terminated from his employment, testing positive for cocaine use on four occasions, and failing to make an appointment for inpatient drug treatment as directed by the probation officer. Based on the probation officer's petition, the government filed a motion to revoke Groessel's supervised release. When the district court conducted a hearing on the government's motion, Groessel admitted that he had violated the terms of his

supervised release, and the district court accordingly revoked Groessel's supervised release. In imposing sentence, the district court considered the recommended range of seven to thirteen months suggested by the policy statement contained in the United States Sentencing Commission's *Guidelines Manual*,<sup>1</sup> but determined that an upward departure was warranted in light of Groessel's repeated serious violations. The district court sentenced Groessel to twenty-four months of imprisonment, the maximum term permitted by statute.<sup>2</sup>

Groessel appeals the district court's decision on the grounds that 1) his sentence is in violation of law because the district court should have given him notice that it intended to depart upward from the recommended sentencing range suggested in Chapter 7 of the *Sentencing Guidelines*; and 2) the sentence of twenty-four months of imprisonment imposed by the district court was plainly unreasonable.

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<sup>1</sup> United States Sentencing Commission, *Guidelines Manual*, § 7B1.4(a) (Nov. 1993) [hereinafter *Sentencing Guidelines*]. Chapter 7 of the *Sentencing Guidelines* provides a sentencing table that recommends ranges of imprisonment upon the revocation of supervised release. The ranges of imprisonment are determined by plotting the criminal history category against the grade of violation of the conditions of supervised release. See U.S.S.G. § 7B1.4(a), p.s. Groessel violated two conditions of his supervised release by not informing his probation officer within 72 hours that he had been terminated from his job and then stating on his monthly report to his probation officer that he had not changed jobs or been terminated. In fact, Groessel had been terminated from his position at Riley Drilling Company on February 24, 1994, for failing to show up to work. Groessel did not inform his probation officer of this until March 3, 1994. He repeatedly violated a third condition by testing positive for cocaine use four times. Lastly, Groessel violated a special condition by failing to make an appointment for inpatient drug treatment as directed by his probation officer. These were Grade C violations. Groessel's criminal history category, based on his conviction of felon in possession of a firearm, was Category V. Plotting Groessel's Grade C violations of the conditions of his supervised release against his original criminal history Category V yields a recommended sentencing range of seven to thirteen months.

<sup>2</sup> 18 U.S.C. § 3583(e)(3)(1988 & Supp. V 1993).

## II

### A

Groessel contends that the district court erred in not giving him notice before imposing a revocation sentence that departed upward from the recommended range of imprisonment suggested in Chapter 7 of the *Sentencing Guidelines*. We review *de novo* the district court's interpretation of sentencing statutes and the *Sentencing Guidelines*. *United States v. Headrick*, 963 F.2d 777, 779 (5th Cir. 1992). Chapter 7 addresses sentencing after revocation of supervised release, but provides no applicable guidelines, only policy statements.<sup>3</sup> The policy statements of Chapter 7 are advisory only. *Id.* at 780. Accordingly, "[a] sentence which diverges from advisory policy statements is not a departure such that a court has to provide notice or make specific fact findings normally associated with departures under § 3553(b)." *United States v. Mathena*, 23 F.3d 87, 93 n.13 (5th Cir. 1994).<sup>4</sup>

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<sup>3</sup> Congress requires the United States Sentencing Commission to issue both guidelines and policy statements applicable to the revocation of probation and supervised release. 28 U.S.C. § 994(a)(3)(1988). However, the Commission has not yet issued guidelines for Chapter 7; it has issued only policy statements. The Commission distinguishes guidelines and policy statements in that it "views th[e] policy statements as evolutionary. . . . Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on th[e] policy statements." U.S.S.G. Ch.7, Pt.A, intro. comment. Consequently, Chapter 7 policy statements "do not have the force of the Guidelines." *United States v. Montez*, 952 F.2d 854, 859 (5th Cir. 1992).

<sup>4</sup> 18 U.S.C. § 3553(b) (1988) requires a district court to impose a sentence within the range specified in the *Sentencing Guidelines* unless the court finds mitigating or aggravating circumstances that warrant a departure. However, § 3553(b) does not apply in this case. Instead, 18 U.S.C. § 3583 (1988 & Supp. V 1993) applies to terms of imprisonment imposed upon a revocation of supervised release. Section 3583 does not require the district court to justify its departure from a recommended sentencing range. See *United States v. Blackston*, 940 F.2d 877, 893 (3d Cir.) ("[T]he district court is not required, in

Groessel argues further that the district court violated his due process rights when it did not give notice of its intended departure from the recommended sentencing range before imposing the revocation sentence. Procedural due process rights apply in revocation proceedings. *Morrissey v. Brewer*, 408 U.S. 471, 488-90, 92 S. Ct. 2593, 2603-605, 33 L. Ed. 2d 484 (1972). In a revocation proceeding, a defendant's opportunity to present mitigating evidence and make arguments as to sentencing alternatives coupled with the factfinder's statement of the reason for its decision and the evidence relied upon satisfy due process. See *Black v. Romano*, 471 U.S. 606, 614, 105 S. Ct. 2254, 2259, 85 L. Ed. 2d 636 (1985) (referring to revocation proceeding procedures required by *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) and *Morrissey*, 408 U.S. at 471, 92 S. Ct. at 2593).

In Groessel's revocation hearing, the district court noted both the recommended range suggested in § 7B1.4(a) of seven to thirteen months and the maximum term allowed by statute of two years. The district court then permitted Groessel to argue as to

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considering revocation of supervised release, to justify its decision to impose a sentence outside of the prescribed range . . . by finding an aggravating factor that warrants an upward departure under 18 U.S.C. § 3553(b)."), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 611, 116 L. Ed. 2d 634 (1991).

Groessel contends that notwithstanding our holding in *Mathena*, the United States Supreme Court holding in *Burns v. United States* requires that the district court give notice of an upward departure before imposing a revocation sentence. In *Burns*, the Supreme Court held that a district court could not depart upward from the sentencing range established by the *Sentencing Guidelines* without first giving the parties reasonable notice that it is considering such a ruling. 501 U.S. at 138-39, 111 S. Ct. at 2187. *Burns* is distinguishable, however, because that case concerned binding guidelines and not advisory policy statements. In Chapter 7, "there are no binding guidelines addressing the sentence for a violation of a condition of supervised release, only a policy statement about a court's options in such a situation . . . ." *United States v. Oliver*, 931 F.2d 463, 465 (8th Cir. 1991). Therefore, the district court did not err in failing to notify Groessel.

the length of the sentence he should receive. Further, the district court stated to Groessel when it imposed the twenty-four month sentence that the upward departure was based upon Groessel's repeated violations of the conditions of his supervised release and that the recommended sentencing range did not adequately reflect the seriousness of the violations. Under *Black*, the due process clause requires no more. Therefore, the district court did not deprive Groessel of due process when it did not provide notice of its intent to depart upwards from the recommended sentencing range.

**B**

Groessel also contends that the twenty-four month sentence imposed by the district court was plainly unreasonable. "We will uphold a sentence unless it (1) was imposed in violation of law, (2) resulted from an incorrect application of the guidelines, (3) was outside the guideline range and is unreasonable, or (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable." *United States v. Headrick*, 963 F.2d 777, 779 (5th Cir. 1992)(citing 18 U.S.C. § 3742(e)(Supp. IV 1992), current version at 18 U.S.C. § 3742(e)(Supp. V 1993)). Because the United States Sentencing Commission has not yet provided any guidelines applicable to sentencing after revocation of supervised release, we will uphold Groessel's sentence unless it was a violation of law or plainly unreasonable.<sup>5</sup>

Upon revoking a defendant's supervised release, a district court must consider the policy statements provided in Chapter 7 of

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<sup>5</sup> Conditions (2) and (3) above apply only to binding guidelines.

the *Sentencing Guidelines* for sentencing; however, these statements are only advisory. *Headrick*, 963 F.2d at 780. The district court has discretion to impose a sentence that is appropriate in consideration of all the circumstances of the case. *See United States v. Ayers*, 946 F.2d 1127, 1131 (5th Cir. 1991) (presuming that the district court considers all circumstances surrounding case when it exercises discretion as to sentencing options).

In imposing the maximum term of twenty-four months,<sup>6</sup> the district court explained the upward departure by citing Groessel's repeated and serious violations of the conditions of his supervised release, and stating that the recommended range did not adequately reflect the seriousness of the violations. We conclude that the district court's imposition of the maximum sentence permitted by statute gave due consideration to both the policy statements contained in Chapter 7 of the *Sentencing Guidelines* and the particular circumstances surrounding the case. Accordingly, we hold that the sentence of twenty-four months imprisonment imposed on Groessel for his repeated violations of the conditions of his supervised release was not plainly unreasonable.

### III

For the foregoing reasons, WE AFFIRM the judgment of the district court.

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<sup>6</sup> Based on Groessel's violations, the Chapter 7 sentencing table yielded a range of seven to thirteen months of imprisonment. *See* U.S.S.G. § 7B1.4(a), p.s. However, the maximum sentence permitted by statute is twenty-four months of imprisonment. *See* 18 U.S.C. § 3583(e)(3) (1988 & Supp. V 1993).