

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p style="text-align:center"><b>UNITED STATES OF AMERICA</b></p> <p style="text-align:center">v.</p> <p style="text-align:center"><b>ERNEST BONNEY, Defendant.</b></p>	<p style="text-align:center"><b>CRIMINAL ACTION</b></p> <p style="text-align:center"><b>No. 98-405-1</b></p>
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**MEMORANDUM & ORDER**

**Katz, S.J.**

**May , 2001**

Now before the court is the Probation Office's April 20, 2001 petition for revocation of Ernest B. Bonney's probation. After a hearing, and upon consideration of the government's submission, the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. On December 17, 1998, this court placed Mr. Bonney on five years' probation for bank fraud, a Class B felony. Mr. Bonney's Criminal History Category was I at the time of sentencing.
2. A general condition of Mr. Bonney's probation is that he refrain from any unlawful use of a controlled substance.
3. On July 20, 2000, and on March 13 and 19, 2001, Mr. Bonney submitted urine specimens to the Bureau of Prison's Sanction Center Program, which tested positive for cocaine metabolite.
4. Another general condition of Mr. Bonney's probation is that he report to the probation officer as directed by the Court or the probation officer, and that he submit a truthful and complete written report within the first five days of each month.
5. Mr. Bonney failed to appear for scheduled office visits on January 8 and 16, 2001; February 5, 12, 19, and 26, 2001 and March 5 and 12, 2000. Also, Mr. Bonney's required written report for

the month of March, 2001 inaccurately reported that he had not used any illicit drugs during that month.

6. Another general condition of Mr. Bonney's probation is that he answer truthfully all inquiries by the probation officer and follow all instructions of the probation officer.

7. On March 28, 2001, Mr. Bonney denied any illicit drug use when questioned over the telephone by his probation officer about his positive urine test result of March 9, 2001. On April 2, 2001, Mr. Bonney again denied any illicit drug use when questioned in person by his probation officer about his positive urine test result of March 13, 2001.

8. The conditions of Mr. Bonney's probation were previously modified on February 4, 2000 due to violations of conditions similar to those raised in the instant petition, including testing positive for drug use, failing to comply with drug treatment, and failing to report to his probation officer. The modification added a special condition that Mr. Bonney be placed in the Bureau of Prison's Sanction Center for six months.

9. Mr. Bonney is now 78 years old. While on probation, he has had hernia, bladder and knee replacement surgeries. His blood pressure is sufficiently high to be conducive to a stroke. He lives primarily by himself in an efficiency apartment at a senior housing complex in West Philadelphia, and has limited contact with family members in the Philadelphia area. There is no evidence that Mr. Bonney poses a threat or danger to any person.

10. Mr. Bonney has tried many times to receive help for his drug addiction. He has participated in narcotics anonymous self help groups, a diagnostic and rehabilitation center outpatient drug program twice, St. Joseph's Hospital 30-day residential drug treatment program, and the Sanction

Center Community Treatment program. Although he was discharged from each program, he ultimately relapsed into drug use during or shortly after completing treatment in each case.

### Conclusions of Law

1. Revocation of probation is governed by the provisions of 18 U.S.C. § 3565. In determining the modification of probation, the court is to consider the factors set forth in 18 U.S.C. § 3553(a)(1). See 18 U.S.C. § 3565(a). These factors include the nature and circumstances of the offense; the history and characteristics of the defendant; and the need for the sentence to punish the defendant, deter the defendant and others, protect the public, and rehabilitate the defendant. See 18 U.S.C. § 3553(a). The court should also consider the types of sentences available, relevant policy statements, and the need to avoid sentencing disparities. See id.
2. If, after considering the foregoing factors, the court finds by a preponderance of evidence that the defendant has committed the violations alleged, the court may continue him on probation, with or without extending the term or modifying or enlarging conditions, or revoke probation. See 18 U.S.C. § 3565. Also, at any time prior to the expiration or termination of the term of probation, the court may modify, reduce or enlarge the conditions of a sentence of probation. See U.S.C. §3563(e).
3. Revocation is mandatory if the defendant possesses a controlled substance in violation of a condition of probation. 18 U.S.C. § 3565(b)(1). However, where a defendant tests positive for drug use, the court is not required to make a finding of possession, and mandatory revocation is not required. See United States v. Blackston, 940 F.2d 877 (3d Cir. 1991) (addressing parallel provision with respect to supervised release); United States v. McCauley, 102 F. Supp. 2d 271, n.2

(E.D. Pa. 2000) (same). The court does not make a finding of possession in this case, and therefore, mandatory revocation is not applicable.

4. Alternatively, a defendant who has failed a drug test may qualify for an exception to the mandatory revocation provision of 18 U.S.C. § 3565(b) upon the court's consideration of whether the availability of appropriate substance abuse programs or the defendant's current or past participation in such programs warrants such an exception in accordance with the Sentencing Guidelines. See 18 U.S.C. §3563(e); U.S.S.G. § 7B1.4 n.6. Accordingly, the court finds that the defendant's past participation in numerous programs, albeit with limited success, evidences perseverance in attempting to control his addiction and warrants an exception to the mandatory revocation provision.

5. The Sentencing Guidelines' treatment of revocation of probation is advisory rather than mandatory, as noted previously, and these policy statements are only one of the factors the court shall consider in addressing modification of supervised release. See United States v. Schwegel, 126 F.3d 551 (3d Cir. 1997) (holding that supervised release provisions remained advisory after amendments to 18 U.S.C. § 3583).

6. Under the advisory policy statements set forth in the Sentencing Guidelines, the government established by a preponderance of evidence that the defendant committed three Grade C violations of probation pursuant to U.S.S.G. § 7B1.1(a)(3), namely, the use of illicit drugs, the failure to appear for scheduled office visits, and the failure to answer truthfully all inquiries of and to follow the instructions of his probation officer. Taken together, this conduct constitutes a Grade C violation pursuant to U.S.S.G. § 7B1.1(b). The court may, upon a finding of a Grade C violation,

revoke probation, extend the term of probation, and/or modify the conditions of probation. Id. at § 7B1.3(a)(2).

7. If the court rejects the Guidelines' policy statements, the court need not make specific findings with respect to each of the section 3553(a) factors that it must consider; rather, the court must simply state on the record its general reasons under section 3553(a) for rejecting the Guidelines' policy statements. See United States v. Blackston, 940 F.2d at 893-94.

8. Upon consideration of 18 U.S.C. § 3553(a), the court rejects the Guidelines' policy statements and continues the defendant's probation with respect to the restitution obligation only. The defendant is 78 years old. He suffers from a variety of health problems and from drug addiction, for which he has repeatedly sought help, although with limited success. The offense for which the defendant was sentenced to probation was not of a violent nature and there is no evidence that he poses a threat to others. He lives quietly and usually meets his monthly financial obligations, including his court-imposed obligations.

An appropriate Order follows.

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**ORDER**

**AND NOW**, this                      day of May, 2001, upon consideration of the Petition for Revocation of Supervised Release, the Government's Proposed Findings of Fact and Conclusions of Law, and after a hearing, it is hereby **ORDERED** that the defendant's probation is **CONTINUED** with respect to the restitution obligation only.

**BY THE COURT:**

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**MARVIN KATZ, S.J.**