

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

<p>UNITED STATES OF AMERICA,</p> <p style="text-align:center">v.</p> <p>STEVEN ROBERTS and DANIEL MANGINI, Defendants.</p>	<p>CRIMINAL ACTIONS No. 04-00037-1 and No. 04-00037-2</p>
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MEMORANDUM & ORDER

Katz, S.J.

January 24, 2007

Before the court are “Defendants’ Joint Motion for Reconsideration of Their Request for Clarification or Modification of the Terms of Supervised Release” (Document No. 106), and the government’s response thereto (Document No. 115). For the following reasons, the motion will be denied.

I. Summary of Facts

On December 31, 2003, Defendants Steven Roberts and Daniel Mangini were arrested for conspiring to possess methamphetamine and related crimes. After fleeing together while on pretrial release, Defendants were recaptured, indicted, and each pleaded guilty in May 2004 to one count of conspiracy to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846. On September 9, 2004, the court sentenced Defendant Mangini

to 18 months' imprisonment, followed by 5 years of supervised release; on September 10, 2004, the court sentenced Defendant Roberts to 30 months' imprisonment, also followed by 5 years of supervised release. A condition of each Defendant's supervised release is that he "shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer."

Defendant Mangini was released by the Bureau of Prisons on April 29, 2005; Defendant Roberts was released on June 29, 2006. Both Defendants are currently on supervised release under the supervision of the U.S. Probation Office in Reading, Pennsylvania.

Before being sentenced in this case, Defendants were in a committed relationship for 19 years. During that time, they lived together and raised Defendant Roberts' niece as their foster daughter. Although they apparently are no longer romantically involved, they still value their relationships with each other, their families, and their foster daughter.

Defendants have asked their probation officer for permission to associate with one another, but that permission has not been granted. By letter-motion dated December 14, 2006, Defendants jointly requested that the court clarify or modify the conditions of their supervised release to permit them to

associate with one another. On December 18, 2006, the court denied this motion as to Defendant Mangini; on January 4, 2007, the court denied it as to Defendant Roberts. The instant motion for reconsideration asks the court to reconsider these two Orders.

II. Legal Standard

The court applies the following standard in ruling on a motion for reconsideration:

A federal district court will grant a motion for reconsideration based upon one of three reasons: “(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent a manifest injustice.” Environ Products, Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1996); see also Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171, 106 S.Ct. 2895, 90 L.Ed.2d 982 (1986) (“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.”).

Gen. Instrument Corp. of Delaware v. Nu-Tek Electronics & Mfg., Inc., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998). Defendants present newly discovered evidence and allege clear errors of law in the Orders they are asking the court to reconsider, so the court will address the merits of Defendants’ arguments.

III. Discussion

In their joint motion for reconsideration, Defendants present three arguments for modifying or terminating the terms or conditions of their supervised release. First, they argue that the condition of supervised release at issue here – that neither Defendant shall “associate with any person convicted of a felony, unless granted permission to do so by the probation officer” (i.e., the “anti-association condition”) – does not satisfy the statutory requirements of 18 U.S.C. § 3583(d). Second, they argue that the anti-association condition violates their rights under the Due Process Clause of the Fifth Amendment. Third, they argue that the condition’s enforcement by the Probation Office has violated their Fifth Amendment right to equal protection. The court will address each argument below. All will be rejected, and Defendants’ joint motion for reconsideration will be denied.

A. The Anti-Association Condition Comports with 18 U.S.C. § 3583(d) and the Due Process Clause of the Fifth Amendment.

1. 18 U.S.C. § 3583(d)

Defendants first argue that the anti-association condition should be modified, clarified, or terminated under 18 U.S.C. § 3583(e)(2), because it fails to satisfy the statutory requirements of 18 U.S.C. § 3583(d). (To comport with 18 U.S.C. § 3583(d), a condition of supervised release “[1] must be reasonably

related to the factors set forth in 18 U.S.C. § 3553(a)(1) & (2)(B)–(D),” and “[2] must involve no greater deprivation of liberty than is reasonably necessary to achieve the deterrence, public protection and/or correctional treatment for which it [was] imposed.” United States v. Smith, 445 U.S. 713, 717–18 (3d Cir. 2006) (quoting United States v. Loy, 237 F.3d 251, 256 (3d Cir. 2001)); see also 18 U.S.C. § 3583(d) (2004).) In this regard, Defendants also find it significant that “their probation officer has stated that he does not believe that permitting [Defendants] to see and speak to one another would lead either of them to return to criminal conduct.” Defendants’ Memorandum of Law at 5.

The court respectfully disagrees on both points.^{1,2} The anti-association condition is designed “to protect the public from further crimes of the defendant[s],” see 18 U.S.C. § 3553(a)(2)(C) (2006), by keeping Defendants away from those who “would most likely cause [them] to engage in further criminal activity,” and its restrictive effect is mitigated by the fact that the probation officer can permit Defendants to have contact with convicted felons if he deems it appropriate. United States v. Sicher, 239 F.3d 289, 291, 292 (3d Cir. 2000) (also observing that “it is not necessary for all of the factors identified in § 3553(a) to be

¹ The anti-association condition satisfies the third condition of 18 U.S.C. § 3583(d) – i.e., that the condition be “consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).” 18 U.S.C. § 3583(d)(3) (2004); see also U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(c)(9) (2003) (“The following ‘standard’ conditions are recommended for supervised release: . . . (9) the defendant shall not associate with any persons engaged in criminal activity, and *shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.*”) (emphasis added). It is also worth noting that the anti-association condition is a “condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10)” 18 U.S.C. § 3583(d); see also 18 U.S.C. § 3563(b)(6) (“The court may provide . . . that the defendant . . . (6) refrain from frequenting specified kinds of places *or from associating unnecessarily with specified persons.*”) (emphasis added).

² 18 U.S.C. § 3583(d) does not accord the probation officer’s opinion any weight. The court appreciates Defendants’ frustration with the probation officer’s refusal of permission for them to associate with each other when he allegedly has admitted that such association would not, in his opinion, endanger the public or lead them to commit further crimes, but the probation officer’s opinion is irrelevant to the validity of the anti-association condition under 18 U.S.C. § 3583(d). Besides, the record is not entirely clear with respect to the Probation Office’s position. On January 4, 2007, the Probation Office sent the court a memorandum (Document No. 111) in which it asserted that Defendants were not granted permission to associate with each other “due to the seriousness of their offense.” This memorandum added that Defendant Mangini “has become romantically involved with another individual” and is “not interested in resuming a romantic relationship with Mr. Roberts.”

present before a special condition of supervised release may be imposed”); see also United States v. Standifer-Abell, No. A03-088-03, 2005 WL 2704972, at *6 (D. Alaska Oct. 7, 2005); State v. Allen, 634 S.E.2d 653, 659 (S.C. 2006); Allen v. State, 645 So.2d 579, 580 (Fla. App. 1994); Waters v. State, 520 So.2d 678, 679–80 (Fla. App. 1988).^{3,4} Since Defendants also have demonstrated an inclination to commit crimes together,⁵ the court rejects Defendants’ argument that the anti-association condition is invalid under 18 U.S.C. § 3583(d).⁶

2. The Due Process Clause of the Fifth Amendment

³ The condition also contributes to both Defendants’ rehabilitation (*i.e.*, “other correctional treatment” under 18 U.S.C. § 3553(a)(2)(D)), because it keeps Defendants away from each other’s criminal influence. See United States v. Bortels, 962 F.2d 558, 559–60 (6th Cir. 1992).

⁴ For the same reasons, the court declines to terminate or modify Defendants’ conditions of supervised release under 18 U.S.C. § 3583(e).

⁵ The Presentence Investigation Reports (“PIRs”) for both Defendants show that they were convicted for their involvement in a conspiracy to distribute methamphetamine that they transported from Arizona to Philadelphia. PIR, ¶¶ 15–20. In addition, while released on bond before trial, “[t]he defendants failed to report to US Pretrial Services and fled to Florida. They were eventually captured by the United States Marshal Service and returned to Pennsylvania.” PIR, ¶ 21. These facts inform the court’s analysis under 18 U.S.C. § 3553(a)(1) – *i.e.*, its consideration of “the nature and circumstances of the offense and the history and characteristics of the defendant[s].”

⁶ The court is mindful of the fact that Defendants’ separation is painful, especially given their close family ties and Defendant Mangini’s ongoing battle against AIDS. However, the court does not believe that these mitigating factors outweigh the need to protect the public from the crimes that Defendants might commit if they were allowed to associate with each other.

Defendants further argue that the anti-association condition should be modified, clarified, or terminated under 18 U.S.C. § 3583(e)(2), because it violates their Fifth Amendment right to substantive due process by interfering with their intimate family relationship without adequate justification. In a similar (though non-precedential) case, the Third Circuit has summarized the applicable constitutional principles as follows:

While [Defendant Mangini's] relationship with [Defendant Roberts] is constitutionally protected, see Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984), those convicted of crimes lose a measure of their liberties. See Griffin v. Wisconsin, 483 U.S. 868, 874 (1987). Thus, special conditions that restrict constitutional rights are upheld so long as they (1) are directly related to deterring the defendant and protecting the public and (2) are narrowly tailored. United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999).

United States v. Rodriguez, 178 Fed. Appx. 152, 158 (3d Cir. 2006).^{7, 8, 9}

The anti-association condition satisfies the Crandon test, despite Defendants' intimate, long-term relationship, because Defendants' have demonstrated an inclination to commit crimes together. As noted above, it protects the public from further crimes by keeping Defendants away from those (including each other) who "would most likely cause [them] to engage in further criminal activity." Sicher, 239 F.3d at 292; see also Rodriguez, 178 Fed. Appx. at 158–59. Moreover, it is narrowly tailored, because, aside from the fact that it permits Defendants to associate with those convicted of non-felony offenses, its prohibition is not absolute. Defendants may associate with each other if their

⁷ In Rodriguez, the special condition of supervised release prohibited the defendant "from having direct or indirect contact with her *husband* during her release without the prior approval of the United States Probation Office." Rodriguez, 178 Fed. Appx. at 153 (emphasis added). Here, Defendants are not married, but the court assumes arguendo that Defendants are entitled to the same constitutional protection as a married couple. But cf. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

⁸ Defendants cite Lawrence v. Texas, 539 U.S. 558 (2003) and Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) as authority for the proposition that they have a constitutionally-protected right to associate with each other, even though they are both convicted felons with a history of joint criminal conduct. Both cases are inapposite. Lawrence upheld, under the Due Process Clause of the Fourteenth Amendment, the right of consenting adults, whether or not homosexual, to engage in "the most private human conduct, sexual behavior, . . . in the most private of places, the home." 539 U.S. at 567. Bonadio struck down, on grounds of due process and equal protection (both state and federal), a state statute that prohibited sodomy between unmarried persons (but not married persons), as well as bestiality. 415 A.2d at 51–52.

⁹ The court is aware that Rodriguez, an unpublished opinion, lacks precedential force. The court therefore cites it only as persuasive authority.

probation officer permits it. Sicher, 239 F.3d at 292; Rodriguez, 178 Fed. Appx. at 158–59. The anti-association condition therefore does not violate Defendants’ rights under the Due Process Clause of the Fifth Amendment.

B. Defendants’ Fifth Amendment Right to Equal Protection

Defendants’ last argument is that the anti-association condition should be modified, clarified, or terminated under 18 U.S.C. § 3583(e)(2), because its enforcement is violating their Fifth Amendment right to equal protection.¹⁰

Although Defendants’ argument may have merit, the court will not modify, clarify, or terminate the anti-association condition on this ground, because it lacks jurisdiction to do so under 18 U.S.C. § 3583(e)(2). See United States v. Myers, 426 F.3d 117, 123 (2d Cir. 2005) (observing that a defendant may not “challenge the constitutionality of [a] condition [of supervised release] under [18 U.S.C. § 3583(e)(2)]”); see also 18 U.S.C. § 3583(e)(2) (2006) (requiring the district court to consider the punishment goals of 18 U.S.C. § 3553(a) before modifying, terminating, or revoking a term or condition of supervised release); Smith, 445 F.3d at 717 (relying on Lussier – cited below); United States v. Alevras, 114 Fed. Appx. 488, 489 (3d Cir. 2004) (citing Lussier for the proposition that “federal

¹⁰ The anti-association condition does not discriminate against homosexuals on its face. Rather, Defendants’ complaint is that it has been enforced discriminatorily by the Probation Office.

courts lack jurisdiction to entertain challenges to the legality of release conditions under section 3583(e)(2)"); United States v. Gross, 307 F.3d 1043, 1044 (9th Cir. 2002); United States v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); United States v. Lussier, 104 F.3d 32, 36 (2d Cir. 1997) (refusing to consider the defendant's 18 U.S.C. § 3583(e)(2) motion to modify a condition of supervised release where the defendant's challenge did not "involve changed circumstances or affect in any way general punishment aims such as deterrence, rehabilitation, and proportionality"). Defendants' equal protection claim, if any, lies against the Probation Office in a separate action. See Davis v. Passman, 442 U.S. 228, 248 (1979) (authorizing Bivens actions for violations of equal protection); Ex Parte Young, 209 U.S. 123, 167 (1908) (authorizing injunctive relief against unconstitutional official conduct).

IV. Conclusion

For the foregoing reasons, Defendants' joint motion for reconsideration will be denied.¹¹

An appropriate Order follows.

¹¹ To the extent that Defendants' motion sought clarification of the conditions of their supervised release, this memorandum provides that clarification.

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ORDER

AND NOW, this 24th day of January, 2007, upon consideration of “Defendants’ Joint Motion for Reconsideration of Their Request for Clarification or Modification of the Terms of Supervised Release” (Document No. 106), and the government’s response thereto (Document No. 115), it is hereby **ORDERED** that said motion is **DENIED**.

BY THE COURT:

/s/ **Marvin Katz**

MARVIN KATZ, S.J.