

## “THE FEDERAL CORNER”

There is a Limit to the Power of Federal Probation Officers

Buck Files

On October 27, 2020, a panel<sup>1</sup> of the United States Court of Appeals for the Fifth Circuit, held *as a matter of first impression*, that the district court abused its discretion by giving the defendant’s probation officer the option to choose between inpatient and outpatient drug treatment; and, that *when substance abuse treatment is a condition of supervised release, the decision to restrict the defendant’s liberty during the course of substance abuse treatment must remain with the judge, as opposed to the defendant’s probation officer.* *United States v. Martinez*, \_\_\_F.3d\_\_\_, 2020 WL 6281738 (5<sup>th</sup> Cir., 2020)

Over the years, we have had a number of instances where a federal probation officer, we believed, was overstepping his authority; however, we have been able to resolve these issues without the necessity of a hearing or an appeal. *Martinez* gives us something of a road map of where to go if we cannot do this. Judge Elrod’s opinion, reads, in part, as follows:

[Martinez Has Continuing Drug Issues at His Halfway House]

Martinez pleaded guilty to unlawful escape after he failed to return to a halfway house at the end of a workday. Martinez began serving the supervised-release portion of his sentence for that offense in August of 2018. In November 2018, Martinez’s probation officer petitioned the district court to modify the conditions of Martinez’s supervised release because Martinez tested positive for cocaine use. The modification required Martinez to ‘participate in a program of testing and treatment for drug abuse.’

Martinez’s probation officer once more petitioned the court for a modification in August of 2019 because Martinez continued to engage in drug use. At the revocation hearing for this petition, Martinez’s counsel said that Martinez ‘would be the first to admit there are times that he struggles with substance abuse.’ Martinez’s substance-abuse struggles sparked the following dialogue between the district court and Martinez:

[The Dialogue Between the Court and Martinez]

[THE COURT:] It seems to me—you know, I may be off base, or maybe not—that you’re your own worst enemy. You walked away from a halfway house; that got you the escape charge. You failed to report. You’ve done, you know, cocaine on a number of occasions. And I understand how hard sometimes those habits are to break.

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<sup>1</sup> Panel: Circuit Judges Elrod, Duncan and Wilson (Opinion by Elrod).

But, you know, as a judge, we can order drug treatment, we can order all these different things to try to help, but you're the only one that can make that decision for yourself. You need to really take it to heart....

*I'm going to sentence you, but I'm also going to recommend to the Bureau of Prisons that you participate in the drug treatment program. When you get out, I want you to participate in the drug treatment program.*

All right. The Court hereby revokes the term of supervised release in 17-CR-34 and sentences the defendant Abran Martinez to 10 months in the custody of Bureau of Prisons with the reimposition of supervised release under the same terms and conditions of one year....

Mr. Martinez, as I said, I can order things until I'm blue in the face. It only works if you really put your heart into it.

THE DEFENDANT: By continuing on this release, it just—I mean, I've tried it. I've tried it several times. I don't know what it is. I just can't—I can't do it. I mean, I'll try. I'll try again.

THE COURT: I want you to try again. I know that the probation department didn't recommend it. And that is one of the reasons I only put you back on for a year. If I can help you make that step, I want to help you, but try it one more time.

Our goal is to get you off drugs. I don't want to run your life. I have enough trouble running my life. But I want to give you a chance to break this drug habit. (emphasis added)

#### [The Written Conditions of Supervised Release]

*After the hearing, the district court imposed the following written condition: You must participate in an inpatient or outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able. (emphasis added)*

#### [Martinez's Arguments on Appeal]

Martinez appealed the written condition, challenging particularly the words 'inpatient or outpatient.' *Martinez argues first that he did not have an opportunity to object to these words because he encountered them for the first time in the written judgment. Thus, according to Martinez, our review should be for abuse of discretion. Martinez then argues that the words 'inpatient or outpatient' impermissibly delegate judicial sentencing authority to Martinez's probation officer because inpatient drug-treatment involves a significant deprivation of liberty. (emphasis added)*

[The Government's Response]

The government, conversely, asserts that we should review for plain error because Martinez failed to object to the condition of supervised release in the district court. According to the government, Martinez did have the opportunity to object because the district court stated it was imposing a term of supervised release 'under the same terms and conditions' as the 2018 modification to Martinez's supervised release. On the government's theory, although the 2018 modification did not contain the words 'inpatient or outpatient,' it implicitly contained those options; 'by leaving those terms unstated, the 2018 condition necessarily contains both.'

[The Court Agrees With Martinez]

We agree with Martinez. He had no opportunity to object, and so we review for abuse of discretion. In *United States v. Franklin*, we reviewed an appeal of a condition of supervised release for abuse of discretion because the defendant had no opportunity to object to the discretion given to a probation officer to require mental-health treatment. 838 F.3d 564, 567 (5th Cir. 2016). The district court's oral pronouncement at the sentencing hearing did not mention or define the probation officer's role in the recommended mental-health treatment. *Id.* Similarly, in this case the district court's oral statements at the sentencing hearing did not mention or define the discretion the court would give to the probation officer to choose between inpatient and outpatient treatment.

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[The District Court Abused Its Discretion]

The district court abused its discretion by giving Martinez's probation officer the option to choose between inpatient and outpatient drug treatment. While probation officers may 'manage aspects of sentences' and oversee the conditions of supervised release, *a probation officer may not exercise the "core judicial function" of imposing a sentence, "including the terms and conditions of supervised release."* *United States v. Barber*, 865 F.3d 837, 839 (5th Cir. 2017) (quoting *Franklin*, 838 F.3d at 568). This duty belongs to the court and may not be delegated. *Id.* We have previously vacated special conditions that delegate judicial authority to the probation officer by allowing the probation officer to decide whether mental-health or substance-abuse treatment should be required. *United States v. Simpson*, 788 F. App'x 991, 992 (5th Cir. 2020); *United States v. Griffin*, 780 F. App'x 103, 106–07 (5th Cir. 2019); *United States v. Moreno*, 697 F. App'x 384, 384–85 (5th Cir. 2017); *Franklin*, 838 F.3d at 568. *We have not yet, however, decided whether giving a probation officer the option to require inpatient treatment impermissibly delegates a core judicial function.* (emphasis added)

[The Second, Ninth and Tenth Circuits Have Addressed This Issue]

*Three of our sister circuits have addressed this question in published opinions, and each has decided that the court may not delegate the decision to require inpatient treatment to a probation officer because of the significant liberty interests at stake in confinement during inpatient treatment. See United States v. Matta, 777 F.3d 116, 122–23 (2d Cir. 2015); United States v. Mike, 632 F.3d 686, 695–96 (10th Cir. 2011); United States v. Esparza, 552 F.3d 1088, 1091 (9th Cir. 2009). Inpatient treatment differs from outpatient treatment because the patient cannot leave; the patient must remain at the hospital or facility day and night throughout the duration of the treatment. Matta, 777 F.3d at 122. ‘Conditions that touch on significant liberty interests are qualitatively different from those that do not.’ Mike, 632 F.3d at 695.*

[The Court Agrees With the Second Circuit]

*Mike is right. The decision to place a defendant in inpatient treatment cannot be characterized as one of the managerial details that may be entrusted to probation officers. See Barber, 865 F.3d at 839. The decision to restrict a defendant’s liberty during the course of treatment must remain with the judge. That said, our decision should not be construed to prevent a defendant from electing inpatient treatment in the absence of a court order. Instead, we hold today that the judge may not delegate to the probation officer the decision to require inpatient, rather than outpatient, treatment because of the liberty interests at stake. (emphasis added)*

\* \* \*

[Conclusion]

The condition allowing Martinez’s probation officer to elect between inpatient or outpatient treatment is vacated, and the case is remanded for further proceedings consistent with this opinion.

My Thoughts

- In most opinions, the judge of the court below is mentioned by name in the opinion; however, Judge Elrod did not tell us who the judge was in Martinez’s case. During his colloquy with Martinez, the judge showed both patience and kindness in his comments. I want him to hear my next drug case.

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Buck Files is a member of TDCLA’s Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA’s Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 247<sup>th</sup> column or article. He practices in Tyler with the law firm of Files Harrison, P.C., and can be reached at [bfiles@bainfiles.com](mailto:bfiles@bainfiles.com) or (903) 595-3573.