

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY GALEN TOLBERT, also known as Timothy Tolbert,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,

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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the District Court deprived the Petitioner of liberty within the terms of 18 U.S.C. 3583 (c) and (d) by re-sentencing Petitioner to incarceration with drug treatment in the United States Bureau of Prisons and imposing consecutively a special condition of participation in drug abuse treatment program upon post-release from incarceration.

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IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY GALEN TOLBERT, also known as Timothy Tolbert,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, TIMOTHY GALEN TOLBERT, Appellant in the United States Court of Appeals for the Fifth Circuit and the Defendant in Case No. MO-14-CR-104, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 05 2018.

OPINION BELOW

On June 05, 2018, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the verdict guilty returned against Petitioner. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

18 U.S.C. sec. 3583(d) provides, in part: The Court may order, as a further condition of supervised release, to the extent that such condition-

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); ...

STATEMENT OF THE CASE

Petitioner has been serving a term of supervised release arising from a conviction in the United States District Court, Western District of Texas, in MO-14-CR-104.

On August 24, 2017, an United States Probation Officer filed a Petition for Warrant or Summons for Offender Under Supervision. The Government incorporated the allegations from the Probation Officer's Petition into a Motion to Revoke Probation/Supervised Release which was filed on October 06, 2017.

In the Petition, the Government in allegation 1 alleged noncompliance with the condition requiring abstention from the use of alcohol, drugs, marijuana, bath salts and/or all other intoxicants during the term of supervision. Allegation 1 has the specific allegations regarding Petitioner, Tolbert. Allegation 2 alleges that (1) on June 14, 2017, he submitted positive for Amphetamine; (2) that he admitted to using Methamphetamine on three days in June 2017; (3) that he was referred to an in-patient drug treatment, which he successfully completed on July 5, 2017; (4) that in July 2017, two sweat patches were applied to Tolbert's arm, which tested positive for Methamphetamine; and (5) that in August 2017 Tolbert admitted to using Metham-

phetamine on August 06 and August 12.

The United States District Court held a hearing on the foregoing Motion. Petitioner pleaded "true" to each of the allegations. The District Court granted the Government's Motion, revoked his supervised release. The District Court re-sentenced Tolbert to nine months incarceration in the United States Bureau of Prisons with twenty-four months of supervised release and residence and participation in a residential substance abuse treatment program known as Lifetime Recovery in San Antonio, Texas (ROA.38).

The pertinent contested portions of the Order Revoking Supervised Release are the following:

The Defendant, TIMOTHY GALEN TOLBERT, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Nine (9) months. The Court recommends that he be incarcerated at F.C.I. Springfield, and that he participate in a mental health treatment program, and a drug abuse treatment program while incarcerated.

In addition, the District Court ordered a term of Twenty-four (24) months supervised release, and included special condition 3), which provides:

3) The defendant shall reside in and participate in a residential substance abuse treatment program known as Lifetime Recovery in San Antonio, located at 10290 Southton Road, San Antonio, Texas 78223, (210) 633-0201. Participation in the program may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant shall obey all rules and regulations of said program.

Tolbert filed a Notice of Appeal on October 19, 2017 (ROA 17-38) to the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals affirmed the underlying decision on June 05, 2018.

REASON FOR GRANTING THE WRIT

The District Court erred by imposing punishment involving a greater deprivation of liberty than is reasonably necessary to achieve the goal of deterrence, incapacitation and rehabilitation.

United States v. Goodwin, 717 F.3d 511, 522 (7th Cir. 2013), cert. denied -U.S-, 134 S.Ct. 334 (2013).

With the Sentencing Reform Act of 1984, Congress eliminated most forms of parole for a system of supervised release. Johnson v. United States, 529 U.S. 53, 59-60 (2000). Post confinement monitoring is overseen by the sentencing court, rather the Parole Commission. Gozlon-Peretz, 498 U.S. 395, 400-401 (1991). The sentencing court is authorized to impose a term of supervised release following imprisonment under 18 U.S.C. sec. 3583(a).

The offender is required to abide by certain conditions, some specified and some discretionary. 18 U.S.C. sec. 3583(d). Upon violation of a condition, the sentencing court may revoke supervised release and require the person to serve in prison for all or part of a term. 18 U.S.C. sec.3583(e)(3).

The purpose of supervised release have been variously described as rehabilitation, deterrence, training, treatment, protection of the public and reduction of recidivism. Johnson, 529 U.S. at 59-60. Supervised release was not intended to be imposed for the purposes of punishment or incapacitation, since those purposes will have been served to the extent necessary by the term of imprisonment. Id. at 59. It is the decompression stage between prison and full release. Conditions of supervised release can not involve a greater deprivation of liberty than is reasonably necessary to achieve goals of deterrence, incapacitation and rehabilitation. Goodwin at 572.

A hearing was had in the United States District Court, Western District of Texas, sitting in Midland, Texas. The District Judge read into the record the allegations from the Petition for Warrant for Offender Under Supervision (ROA. 3-4). Tolbert pleaded “true” to the allegations (ROA. 4).

On October 10, 2014, Tolbert was sentenced originally by the District Court to 41 months incarceration for the offense of Aiding and Abetting Possession with Intent to Distribute Meth-Amphetamine (ROA.3-4). The sentence included a term of three years supervised release.

On June 14, 2017, while at the United States Probation Department, Tolbert submitted a positive drug test methamphetamine. He admitted to using methamphetamine on June 09, 2017, June 10 2017 and June 12, 2017 (ROA.4). He was referred to Turning Point, an inpatient drug treatment program, which he successfully completed on July 05, 2017.

On July 21, 2017, the U.S. Probation Department applied a sweat patch to Tolbert's left arm. On July 24, 2017, the U.S. Probation Department removed the patch due to loosening. The patch was sent to a laboratory for test (ROA.4-5). A second sweat patch was placed on his arm.

Both sweat patches were confirmed positive for Methamphetamine (ROA.5). On August 15, 2017, Tolbert submitted a positive drug test for Amphetamine (ROA. 5). He produced a valid prescription for Adderall, which had been filled the day before. The U.S. Probation officer explained to Tolbert that the urine specimen would be referred to a laboratory.

At the hearing, Tolbert stated that he went to the Texas Mental Health and Mental Retardation facilities (ROA. 8). Tolbert learned that MHMR does not treat an individual suffering from Adult ADHD. Through the help of his father, Tolbert became a patient at a geriatric clinic under the care of a psychiatrist. The psychiatrist had given him a prescription for Adderal and Celexa for anxiety.

In employing the plainly unreasonable standard, the United States District Court imposed a greater imposition on liberty than was necessary to meet the objectives 18 U.S.C. sec. 3583. United States v. Olano, 507 U.S. 725 (1993); Puckett v. United States, 556 U.S. 129, 135 (2009).

A district court is directed by 18 U.S.C. sec. 3553(a)(3) and (a)(4)(B) to consider the kinds of sentence available and the applicable sentencing range of the Guidelines or Commission policy statements. United States v. Garza, 706 F.3d 655 (5th Cir. 2013). A special condition must comport with the limits provided in 18 U.S.C. sec. 3583(a). Factors are (1) nature and circumstances of the offense; (2) deterrence; (3) protection of the public; and (4) provision for training, medical treatment and correctional treatment. A special condition must involve no greater deprivation of liberty than is reasonably necessary to serve the purposes of section 3553; United States v. Ellis, 720 F.3d 220, 225 (5th Cir. 2013). The deprivation of liberty implicates constitutional protection. See Calder v. Bull, 390 Dall. (3 U.S.) 386 (1798).

Here the special condition is a greater deprivation of liberty than in reasonably necessary to serve its purposes. Accord United States v. Booker, 543 U.S. 270 (2005). The purpose of the special condition is to provide drug treatment. The District Court ordered drug treatment through the Bureau of Prisons as part of his sentence. The special condition must comport with the limits provided in 18 U.S.C. sec. 3583(a). The doubling of the condition is unreasonable as it fails to accord the treatment provided in the Bureau of Prisons. North Carolina v. Pearce, 395 U.S. 711 (1969).

The additional special condition ignores that Tolbert had been gaining treatment through a geriatric center and a psychiatrist. The nature and circumstance of the offense and protection of the public was addressed by the incarceration and then his efforts of obtaining medical treatment. The special condition operates to hinder Tolbert's financial and employability well-being by him being out of the private employment marketplace.

Therefore, Petitioner requests that the United States Supreme Court grant this Petition for

Writ of Certiorari on the ground that the special condition of drug rehabilitation placement places a greater deprivation on Tolbert's liberty than is necessary, for the reasons the drug treatment was ordered with the Bureau of Prisons re-sentence. As such, the sentence of the United States District Court was plainly unreasonable.

CONCLUSION

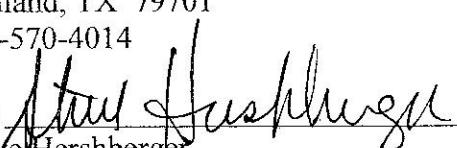
For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and prays that the Order Revoking Supervised Release be reversed, and the decree requiring participation in Lifetime Recoveries be vacated and the Petitioner be released from custody.

PRAYER FOR RELIEF

Petitioner, TIMOTHY TOLBERT, requests that the Petition for Writ of Certiorari be granted for the reasons stated and that the conviction entered against him be vacated and this case remanded for consideration of the motion to set aside jury verdict, and such other relief to which Petitioner would be entitled to receive in law or in equity.

Respectfully submitted,

Steve Hershberger, Attorney at Law
600 No. Marienfeld St., Ste. 850
Midland, TX 79701
432-570-4014

By: 
Steve Hershberger
Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A
(Opinion of the United States Court of Appeals, for the Fifth Circuit)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50938
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 5, 2018

D.C. Docket No. 7:14-CR-104-1

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TIMOTHY GALEN TOLBERT, also known as Timothy Tolbert,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas

Before DAVIS, COSTA, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.



Certified as a true copy and issued
as the mandate on Jun 27, 2018

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 5, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TIMOTHY GALEN TOLBERT, also known as Timothy Tolbert,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:14-CR-104-1

Before DAVIS, COSTA, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Timothy Galen Tolbert was convicted of possession with the intent to distribute methamphetamine, aiding and abetting. After completing his 41-month prison sentence, Tolbert was released to serve a three-year term of supervised release. A motion to revoke his supervised release was filed months after release, alleging that he violated the conditions requiring that he abstain from drug use and that he not unlawfully possess a controlled substance.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 17-50938

Tolbert pleaded true to the allegations and was sentenced to nine months of imprisonment to be followed by 24 months of supervised release. He now appeals.

Tolbert challenges a special condition of supervised release imposed by the district court requiring him to participate in an inpatient drug treatment program called Lifetime Recoveries based in San Antonio. He challenges the substantive reasonableness of the special condition, arguing that it is not related to the relevant sentencing factors and that it places a greater deprivation on his liberty than necessary because he will receive drug treatment while incarcerated and because the treatment will hinder his efforts at finding employment and improving his health.

We review for plain error. *See United States v. Salazar*, 743 F.3d 445, 448 (5th Cir. 2014). Although the district court did not set forth findings to justify imposing this special condition, the court's reasoning can be inferred from an examination of the record. *See United States v. Caravayo*, 809 F.3d 269, 275 (5th Cir. 2015). In light of Tolbert's underlying drug offense, his past problems with substance abuse, his drug-related criminal history, and his drug-related supervised release violations, the record shows that the condition mandating an inpatient drug treatment program is reasonably related to the nature and characteristics of Tolbert's offense as well as to his history and characteristics. *See* 18 U.S.C. § 3553(a)(1); 18 U.S.C. § 3583(d)(1); *see also* *United States v. Fernandez*, 776 F.3d 344, 346 (5th Cir. 2015) (indicating that a special condition must be related to at least one of the relevant § 3553(a) factors). Given that during his first six months of supervised release, Tolbert repeatedly violated the conditions requiring that he abstain from drug use and possession, it is not clear or obvious that the condition is a greater deprivation

No. 17-50938

of liberty than necessary to achieve the goals of deterrence, public protection, and providing needed treatment. *See Caravayo*, 809 F.3d at 273; § 3583(d)(2).

The judgment of the district court is AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 27, 2018

Ms. Jeannette Clack
Western District of Texas, Midland
United States District Court
200 E. Wall Street
Room 222
Midland, TX 79701-0000

No. 17-50938 USA v. Timothy Tolbert
USDC No. 7:14-CR-104-1

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: // Roeshawn Johnson
Roeshawn Johnson, Deputy Clerk
504-310-7998

cc: Mr. Joseph H. Gay Jr.
Mr. James Steven Hershberger

APPENDIX B

(Criminal Judgment, United States District Court for the Western District
of Texas, Midland Division)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA §
§
vs. §
§
TIMOTHY GALEN TOLBERT §

Criminal No. 7:14-CR-104-01 RAJ

ORDER REVOKING SUPERVISED RELEASE and
RESENTENCING OF DEFENDANT

On this the 10th day of October, 2017, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on October 10, 2014, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Steve Hershberger. The United States was represented by Assistant United States Attorney, LaTawn Warsaw.

After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on October 10, 2014, be, and it is hereby **REVOKE**D and **SET ASIDE** and the Defendant is resentenced as follows:

The Defendant, **TIMOTHY GALEN TOLBERT**, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Nine (9) months. The Court recommends that he be incarcerated at F.C.I. Springfield, and that he participate in a mental health treatment program, and a drug abuse treatment program while incarcerated.

A term of Twenty-four (24) months supervised release is imposed, with the following special conditions to be observed as well as all conditions of the Western District of Texas imposed.

- 1) The defendant shall abstain from the use of all intoxicants, including alcohol, marijuana, synthetic marijuana, and bath salts, during the term of supervision.
- 2) The defendant shall not be permitted to reside any place where firearms are possessed or stored.
- 3) The defendant shall reside in and participate in a residential substance abuse treatment program known as Lifetime Recovery in San Antonio, located at 10290 Southton Road, San Antonio, Texas, 78223, (210) 633-0201. Participation in the program may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant shall obey all rules and regulations of said program.

- 4) The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant shall pay the costs of such treatment if financially able.
- 5) The defendant shall participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, shall supervise participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall pay the costs of such treatment if financially able.
- 6) The defendant shall provide a copy of all prescriptions to his probation officer within 48 hours of the receipt of those prescriptions.
- 7) The defendant shall provide his probation officer a medical release so that the probation officer can discuss the defendant's medications and treatment with his physician.
- 8) The defendant shall not be permitted to ingest any medications that are not prescribed to him.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on October 10, 2014 to serve as the commitment of the Defendant.

SIGNED this 12th day of October, 2017.



Robert Jupell
Senior United States District Judge