

No. _____

In the
Supreme Court of the United States

Thomas Gilmore Stewart,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Christopher Curtis
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis@fd.org

QUESTIONS PRESENTED

- I. Whether a district court's decision to revoke a term of supervised release that is based upon a previous state court conviction which is being challenged by the defendant results in a denial of due process?

PARTIES TO THE PROCEEDING

Petitioner is Thomas Gilmore Stewart, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS	1
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THIS PETITION.....	6
I. This Court should grant review to determine whether a district court's revocation of supervised release based upon a state court conviction which is being challenged by the defendant violates due process.....	6
CONCLUSION.....	11

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment Revoking Supervised Release of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

Federal Cases

<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972)	6
<i>Roberson v. Connecticut</i> , 501 F.2d 305 (2d Cir. 1974)	7
<i>United States v. Copeland</i> , 20 F.3d 412 (11th Cir. 1994)	6
<i>United States v. Fleming</i> , 9 F.3d 1253 (7th Cir. 1993)	7
<i>United States v. Grandlund</i> , 71 F.3d 507 (5th Cir. 1995)	6
<i>United States v. McCormick</i> , 54 F.3d 214 (5th Cir. 1995)	6
<i>United States v. Minnitt</i> , 617 F.3d 327 (5th Cir. 2010)	6
<i>United States v. Poellnitz</i> , 372 F.3d 562 (3d Cir. 2004)	7, 9
<i>United States v. Spraglin</i> , 418 F.3d 479 (5th Cir. 2005)	6, 7
<i>United States v. Stewart</i> , 730 F. App'x 254 (5th Cir. July 11, 2018)	1

Statutes

18 U.S.C. § 3583(3)	1
18 U.S.C. § 3583(e)(3)	1
28 U.S.C. § 1254(1)	1

United States Constitution

U.S. Const. Amend V	2
---------------------------	---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Gilmore Stewart seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Stewart*, 730 Fed. Appx. 254 (5th Cir. July 11, 2018) (unpublished). It is reprinted in Appendix A to this Petition. The district court's written judgement revoking supervised release and imposing sentencing is attached to this petition as Appendix B..

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 11, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. § 3583(3), which states that a court may:

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

18 U.S.C. 3583(e)(3).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This is a direct appeal of a revocation of supervised release hearing. On December 10, 1992, Stewart was sentenced in the Northern District of Texas, Dallas Division cause number 3:92-CR-231-P to 46 months imprisonment and a three-year term of supervised release. (ROA.12).¹ It appears that Stewart had to complete a lengthy sentence at the Texas Department of Criminal Justice before serving his federal sentence, and his term of supervised release did not begin until October 17, 2013. (ROA.17). On March 25, 2014, Stewart was arrested for possession of a controlled substance, methamphetamine. (ROA.17). On May 20, 2014, the probation officer filed a petition for offender under supervision for the March 25, 2014 violation. (ROA.17-18). On September 15, 2014, the probation officer filed a second petition for offender setting forth that Stewart had pleaded guilty and was sentenced on July 10, 2014. (ROA.155). A warrant was issued for the supervised release violation on September 15, 2014. (ROA.40).

Stewart was arrested on the supervised release violation in the Southern District of Texas on July 13, 2017. (ROA.22). Stewart waived his Rule 32 hearing and was returned to the Northern District of Texas where he appeared on the supervised release violation on July 21, 2017. (ROA.25-34).

A revocation hearing was held on October 27, 2017. (ROA.117). Stewart, through his attorney, pleaded not true and notified the Court that there was currently

¹ For the convenience of the parties and the Court, Petitioner is citing to the record on appeal in the court below.

pending in Cause Number 3:16-CV-003306, a motion filed pursuant to 28 U.S.C. 2254. The defendant affirmatively stated that he was not conceding anything that was being actively litigated in the Section 2254 motion. (ROA.120-121). At the revocation hearing, the government offered as the only evidence in support of the revocation and the only evidence in support of the single violation alleged in the petition, a certified copy of the July 10, 2014 conviction and indictment in state court for a Thomas Gilmore Stewart for the offense of possession of a controlled substance in which Stewart was sentenced to three years TDCJ. (ROA.75-79,121). No other evidence was introduce by the government in support of the alleged violation.

At the revocation hearing, Stewart's attorney made it clear at several points that he was objecting that the use of the certified judgment was insufficient evidence to support a revocation. (ROA.122,126). At the hearing, Stewart stated that his guilty plea had been coerced, and that he was not guilty of possessing the methamphetamine that was the basis of the underlying conviction. (ROA.137-138).

Stewart's advisory guideline imprisonment range was 21-27 months. (ROA.148). The district court revoked Stewart's supervised release and sentenced him to 21 months custody with no more supervised release. (ROA.73,142).

For the information of the Court, on November 28, 2016, Mr. Stewart did file a Petition for Writ of Habeas Corpus in United States District Court, Northern District of Texas, challenging his July 10. 2014 conviction in Ellis County, Texas, cause number 39171 CRA. (See Pacer Docket Sheet, Document Number 2 for Cause Number 3:16-CV-3306-C). On January 22, 2018, the United States Magistrate Judge

filed findings, conclusions and recommendations in that cause. (Cause Number 3:16-3306-C, Document Number 25). The District Court entered an order adopting the findings and recommendations on February 2, 2018 and entered a judgment dismissing the petition on that same date. (Cause Number 3:16-3306-C, Document Numbers 26, 27). Mr. Stewart filed objections to the recommended findings on February 23, 2018. (Cause Number 3:16-3306-C, Document Number 28). Mr. Stewart filed a notice of appeal on March 13, 2018. (Cause Number 3:16-3306-C, Document Number 30). His appeal was dismissed of lack of prosecution on May 24, 2018. (Cause Number 3:16-3306-C, Document Number 31).

On direct appeal of the present case, Stewart argued that the district court's consideration of the previous conviction based upon the guilty plea that Stewart was alleging was involuntary violated his due process rights. The Court of Appeals affirmed the revocation.

REASONS FOR GRANTING THIS PETITION

- I. This Court should grant review to determine whether a district court's revocation of supervised release based upon a state court guilty plea and conviction – which is being challenged by the defendant as coerced and involuntary -- violates due process..**

“A district court may revoke a defendant’s supervised release if it finds by a preponderance of the evidence that a condition of release has been violated.” *United States v. Minnitt*, 617 F.3d at 332; quoting *United States v. McCormick*, 54 F.3d at 219.

This Court has held that a defendant facing possible revocation of probation or parole, although not entitled to all of the procedural protections afforded in a criminal proceeding, is entitled to some due process protections. *See Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972).

“The same protections granted those facing revocation of parole are required for those facing revocation of supervised release” *United States v. Copeland*, 20 F.3d 412, 414 (11th Cir. 1994); *see also United States v. McCormick*, 54 F.3d at 221.

“Because a person’s liberty is at stake, however, due process requires that a defendant be given a fair and meaningful opportunity to refute and challenge adverse evidence to assure that the court’s findings are based on verified facts.” *United States v. Grandlund*, 71 F.3d 507, 510 (5th Cir. 1995).

The general rule in the Fifth Circuit is that evidence of a defendant’s state court conviction is “sufficient to establish by a preponderance of the evidence that he had violated the terms of his supervised release.” *United States v. Spraglin*, 418 F.3d 479, 481 (5th Cir. 2005). This is true even if the state conviction is not final. *See id.*

In reaching it's decision in *Spraglin*, a panel of the Court of Appeals for the Fifth Circuit relied upon *United States v. Flemming*, 9 F.3d 1253, 1255 (7th Cir. 1993); and *Roberson v. Connecticut*, 501 F.2d 305, 308 (5th Cir. 1973).

However, Petitioner contends that when a defendant such as Stewart argues that his guilty plea to the underlying offense that is the basis for the revocation was illegally coerced, the district court cannot simply rely on a certified copy of a judgment and sentence – and nothing more – to revoke the term of supervised release. *See United States v. Poellnitz*, 372 F.3d 562, 570 (3rd Cir. 2004)(Holding that a certified copy of a conviction that was based on a *nolo contendere* plea was, by itself, not sufficient to support a supervised release revocation).

Stewart contends that at the very least, the district court in this case should have looked more completely into the state court proceedings, such as the guilty plea hearing, any plea admonishments, and any judicial confessions, to determine if Stewart's guilty plea was a reliable admission of guilt that could support a revocation of supervised release. *See id.* In the alternative, the district court could have also taken testimony from an arresting officer to establish the alleged violation by a preponderance of the evidence, regardless of Mr. Stewart's argument that his guilty plea had been coerced.

In the present case, the probation officer attached to the violation petition, and the district court considered, a certified copy of a July 10, 2014 "Judgment on Plea of Guilty" for Thomas Gilmore Stewart for the offense of possession of a controlled substance, resulting in a sentence of imprisonment of three years. (ROA.150-154).

At his revocation hearing, Stewart's attorney objected on the grounds that the judgment was insufficient evidence to show by a preponderance of evidence that Mr. Stewart violated his conditions of supervised release. (ROA.120-122,125,126). Stewart's attorney advised the district court that Stewart was denying that he possessed the methamphetamine in question. (ROA.125). In his statement to the Court, the defendant stated that "I didn't know there was anything in my trunk." (ROA.137).

In light of Mr. Stewart's plea of "not true" and in light of both his and his attorney's statements to the court denying that Mr. Stewart had possessed the methamphetamine in question, the government needed to present more than a mere certified copy of a judgment to show even by a preponderance of evidence that Mr. Stewart violated his supervised release in the manner alleged in the petition.

In other words, even if the district court were entitled to rely upon the certified copy of the judgment, the government needed to present some evidence to show that the particular judgment was for the same Mr. Stewart that was facing revocation of his supervised release and needed to present some evidence relating the judgment to the allegations in the petition.

More importantly, faced with the particular objection to the sufficiency of the evidence, and the specific factual background of that conviction, the district court should not have relied merely on the certified copy of the judgment in support of the revocation. Both Mr. Stewart and his Attorney advised the district court that Mr. Stewart denied possessing the methamphetamine in question. (ROA.125,137). The

district court was also advised that Mr. Stewart had filed, nearly a year prior to his revocation hearing, a federal habeas corpus petition attacking this conviction, and that the petition was still pending. (ROA.120). Mr. Stewart told the Court during his allocution that his guilty plea had been coerced by a threat of denying him medical treatment and medication. (ROA.137).

Under facts such as these, due process requires that the district court should not simply rely on a certified copy of the judgment when the court knows that the defendant on supervised release is claiming he was innocent of the offense and is claiming that his guilty plea was illegally coerced. Due process requires that the district court in this case should have, at the very least, looked more closely at the underlying proceedings resulting in the judgment it was relying on in support of the revocation. The district court should have looked at the plea admonishments, any plea agreement, any judicial confession and perhaps a record of the proceeding. *See United States v. Poellnitz*, 372 F.3d at 570.

Moreover, the government could have also chosen to simply put the arresting officers on to testify to the arrest of Mr. Stewart to establish this violation of the conditions of supervised release by a preponderance of the evidence, and the evidence could have been sufficient to support the revocation regardless of the pending habeas corpus petition and Mr. Stewart's claims of innocence. Instead, the government chose to rely solely on the certified copy of a judgment based on a guilty plea which the defendant was in the process of challenging as being illegally coerced.

As a policy matter, it makes sense that the district court in a situation similar to Mr. Stewart's should not be allowed to rely solely on the certified copy of the judgment. The district court in Mr. Stewart's case knew that Mr. Stewart was arguing that his guilty plea was illegally coerced. The district court knew that Mr. Stewart had properly challenged that guilty plea by filing a petition for habeas corpus in federal court. The district court knew that the habeas corpus petition was still pending.

All the district court had to do was base the revocation on information in addition to the guilty plea that Mr. Stewart was contesting. There would have been no great inconvenience for the district court to have looked at the other documents and information surrounding the guilty plea or to have taken additional testimony from one arresting witness to establish by a preponderance of the evidence that Mr. Stewart had committed the violation – regardless of Mr. Stewart's attack on the guilty plea.

On the other hand, by allowing a district court to rely solely on a certified copy of a judgment that is based on a guilty plea which the defendant is contesting as being illegally coerced, the court of appeals has effectively prevented a defendant in Mr. Stewart's situation from ever being able to remedy his situation if he indeed was illegally coerced into entering his guilty plea on the underlying conviction.

Accordingly, the Petitioner is requesting this Court adopt a simple rule that when the certified copy of a judgment or conviction is based on a guilty plea, the

voluntariness of which is actively being challenged, the district court should not be allowed to rely solely on that judgment in support of a supervised release revocation.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 9th day of October, 2018.

**JASON D. HAWKINS
Federal Public Defender
Northern District of Texas**

/s/ Christopher A. Curtis
Christopher Curtis
Assistant Federal Public Defender
Federal Public Defender's Office
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
Telephone: (978) 767-2746
E-mail: Chris_Curtis@fd.org

Attorney for Petitioner