

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

BOBBY RAY EVANS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

JONATHAN D. BYRNE
ASSISTANT FEDERAL PUBLIC DEFENDER

Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304/347-3350
Counsel for Petitioner

BRIAN J. KORNBATH
ACTING FEDERAL PUBLIC DEFENDER

I. QUESTION PRESENTED FOR REVIEW

Whether revoking the supervised release term of a defendant who is in need of drug treatment, after he initially failed in a drug treatment program, is an abuse of discretion in light of the purposes of supervised release.

II. TABLE OF CONTENTS

I.	QUESTIONS PRESENTED FOR REVIEW.....	1
II.	TABLE OF CONTENTS.....	2
III.	TABLE OF AUTHORITIES.....	4
IV.	OPINIONS BELOW	5
V.	JURISDICTION	5
VI.	STATUTES AND REGULATIONS INVOLVED	5
VII.	STATEMENT OF THE CASE	6
	A. Federal Jurisdiction.....	6
	B. Facts Pertinent to the Issue Presented.....	7
	1. First Petitions and Revocation.	7
	2. Current Petition and Revocation.....	8
	3. The Fourth Circuit affirms Evans’ revocation sentence.....	11
VIII.	REASON FOR GRANTING THE PETITION.....	11
	The writ should be granted to determine whether revoking the supervised release term of a defendant who is in need of drug treatment, after he initially failed in a drug treatment program, is an abuse of discretion in light of the purposes of supervised release.....	11
IX.	CONCLUSION	15
APPENDIX A:	Opinion of the United States Court of Appeals for the Fourth Circuit in <i>United States v. Evans</i> , 736 F. App’x 64 (4th Cir. 2018)	A-1
APPENDIX B:	Relevant portion of transcript of March 12, 2018, revocation hearing, <i>United States v. Bobby Ray Evans</i> , 2:14-cr-00153	B-1

APPENDIX C: Supervised Release Revocation and Judgment Order entered March 31, 2018, <i>United States v.</i> <i>Bobby Ray Evans</i> , 2:14-cr-00153, Dkt. No. 72.....	C-1
---	-----

III. TABLE OF AUTHORITIES

Cases

<i>Sykes v. United States</i> , 564 U.S. 1 (2011).....	11
<i>United States v. Crace</i> , 207 F.3d 833 (6th Cir. 2000).....	12
<i>United States v. Evans</i> , 736 F. App'x 64 (4th Cir. 2018)	5, 11, 12
<i>United States v. Pierce</i> , 75 F.3d 173 (4th Cir. 1996)	12
<i>Wallace v. Colvin</i> , 193 F. Supp. 2d 939 (N.D. Ill. 2016).....	11

Statutes

18 U.S.C. § 841(a)(1).....	6
18 U.S.C. § 3553(a)(2)(D)	14
18 U.S.C. § 3583	5, 6, 12
18 U.S.C. § 3583(d).....	12
18 U.S.C. § 3742	6
28 U.S.C. § 1254	5
28 U.S.C. § 1291	6

Rules

Sup. Ct. R. 10(c).....	11
Sup. Ct. R. 13.1.....	5
Sup. Ct. R. 13.3.....	5

Other Authorities

S. Rep. No. 225, 98th Cong., 2d Sess. 124 (1983), <i>as reprinted in</i> 1984 U.S.C.C.A.N. 3182, 3307	12
--	----

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Evans*, 736 F. App'x 64 (4th Cir. 2018), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the issue presented in this Petition was presented to the district court at the revocation hearing and ruled upon in open court. The portion of the transcript reflecting the district court's oral ruling revoking Evans' supervised release and imposing a sentence of imprisonment is attached to this Petition as Appendix B. The final judgment order of the district court revoking his term of supervised release is unreported and is attached to this Petition as Appendix C.

V. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on August 30, 2018. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VI. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3583, which provides, in pertinent parts:

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(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; or

VII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the final judgment and sentence imposed upon the district court's revocation of the term of supervised release of Bobby Ray Evans ("Evans"). Evans was originally charged and convicted of distribution of heroin, in violation of 18 U.S.C. § 841(a)(1), and sentenced in the Southern District of West Virginia on December 17, 2014. J.A. 8-15.¹ The authority to impose and revoke a term of supervised release is conferred by 18 U.S.C. § 3583. The district court entered an order revoking Evans' supervised release on March 13, 2018. J.A. 56-58. Evans timely filed a notice of appeal on March 22, 2018. J.A. 59. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

¹ "J.A." refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

B. Facts Pertinent to the Issue Presented

Evans was originally convicted of distribution of heroin in 2014. J.A. 10. He was sentenced to a term of twenty-seven months in prison, followed by a three-year term of supervised release. J.A. 11-12. He was initially released on May 12, 2016. J.A. 16.

1. First Petitions and Revocation

On October 11, 2016, Evans' probation officer filed a Petition for Warrant or Summons for Offender Under Supervision. The petition alleged that Evans had committed criminal offenses by selling drugs to confidential informants on several occasions, during which he also possessed controlled substances. J.A. 16-19. An amendment was filed on November 7, 2016, alleging that Evans had also used controlled substances. J.A. 20. At a hearing on May 12, 2016, the district court dismissed the allegations in the petition, while finding that Evans had used drugs as alleged in the amendment. J.A. 22-23. Rather than revoke Evans' term of supervised release, the district court concluded that Evans was "amenable to treatment" for his drug issues and dismissed the petition. J.A. 23. The district court then modified the conditions of Evans' supervised release to require that he "make himself available for drug abuse counseling and treatment as directed by the probation officer and comply strictly with those directions." J.A. 24.

On October 6, 2017, the probation officer filed a second petition seeking the revocation of Evans' term of supervised release. J.A. 25-28. This petition alleged that

Evans had not been truthful with his probation officer, had used controlled substances on numerous occasions, and failed to appear for drug counseling appointments and drug screens. J.A. 25-27. An amendment filed on November 14, 2017, further alleged another instance of drug use. J.A. 29. A hearing on the petition and amendment was held on December 18, 2017. J.A. 31. The district court found that Evans had violated his supervised release in multiple ways and concluded that “it would unduly depreciate the seriousness of the violations if supervised release were not revoked.” J.A. 34. The district court imposed a sentence of six months in prison, followed by a thirty-month term of supervised release. As a special condition of that future term, Evans was required to “participate in and successfully complete the 9 to 12 month residential drug abuse treatment program at Recovery Point.” *Id.*

2. Current Petition and Revocation.

This appeal arises from proceedings that began on February 5, 2018, when Evans’ probation officer filed another petition seeking the revocation of his term of supervised release. J.A. 36-37. The only allegation in the petition was that Evans failed to complete the program at Recovery Point, leaving “on his own” six days after he started the program. J.A. 36.

A hearing on the petition was held on March 12, 2018. J.A. 38-57. Evans admitted violating his conditions of supervised release as alleged in the petition. J.A. 38-39. The district court found Evans violated those conditions based on his admission. J.A. 39-40.

Evans proposed an alternative to revocation, “a modification of the terms of supervised release that would essentially provide a similar drug abuse treatment program to what was envisioned when [Evans] went to Recovery Point, but at a different facility.” J.A. 41. That program, Riverside, was “an inpatient drug treatment facility for men” and Evans was already “on their waitlist.” *Id.* Riverside would be located much closer to Evans’ home than Recovery Point. J.A. 50. Evans proposed that he remain in custody until a spot at Riverside was available. At Riverside he would be evaluated for 28 days before it was determined whether Evans was placed in a 90 or 180-day program. Following that program, Evans “would agree to apply to stay at a sober living facility here in the Charleston area,” after which he would seek release on home confinement “so that he could go home and help his mother run their convenience store.” J.A. 42. Taken together, “the total time period that this would envision would run would be the 9 to 12 months that was originally envisioned by the Court when the Court directed him to go to Recovery Point.” J.A. 43.

The Government objected to Evans’ proposal, noting that he was the one “who requested to go to Recovery Point the last time.” J.A. 43. The Government also noted the “prior violations” that “included failures to comply with his counseling and group therapy sessions.” *Id.*

Evans explained that he left Recovery Point because he felt “that he was falsely accused of violating their rules and regulations” because he was reported to be consuming alcohol. J.A. 43-44. To stay in the program Evans would have been

required to admit the violation. Evans emphasized that he had not tested positive for drugs at the facility, nor did he show evidence of drug use when arrested on the petition. “This is,” Evans concluded, “a situation where his violations in the past and today arise from a drug addiction issue, not from being arrested on any new criminal conduct.” J.A. 44.

The district court rejected Evans’ proposal. The district court noted that Evans was initially allowed to remain on supervised release to “participate in drug abuse counseling and treatment” but “[i]nstead of that, he used, on numerous occasions . . . illicit substances that resulted in revocation of his supervised release just here less than three months ago.” J.A. 45. The sentence given at the time was “in lieu of a guideline sentence that would otherwise have been 12 to 18 months.” *Id.* Still, Evans “immediately failed to comply and, as a consequence, is here once more.” *Id.* Therefore, “in light of that history . . . it is appropriate to revoke supervised release, and the Court accordingly does so.” *Id.*

The district court calculated the advisory Guideline range to be six to twelve months, to which neither of the parties objected. J.A. 45-46. The district court imposed a sentence of eight months in prison, followed by another twenty-two month term of supervised release. J.A. 52. The district court explicitly did not impose a new condition of supervised release that Evans pursue any particular drug treatment program when released. J.A. 52-53.

3. The Fourth Circuit affirms Evans' revocation sentence.

The Fourth Circuit affirmed the revocation of Evans' supervised release and his sentence in an unpublished opinion. *United States v. Evans*, 736 F. App'x 64 (4th Cir. 2018). The court held that the district court, in fully considering Evans' history on supervision and his continued violations, "acted well within its discretion in revoking Evans' supervised release term on this basis." *Id.* at 66.

VIII. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether revoking the supervised release term of a defendant who is in need of drug treatment, after he initially failed in a drug treatment program, is an abuse of discretion in light of the purposes of supervised release.

"Insanity, it has been said, is doing the same thing over and over again, but expecting different results." *Sykes v. United States*, 564 U.S. 1, 28 (2011)(Scalia, J., dissenting); *see also Wallace v. Colvin*, 193 F. Supp. 2d 939, 941 (N.D. Ill. 2016) (attributing the quote to Albert Einstein). When a supervisee has issues with drug abuse that persist in spite of his incarceration for a criminal conviction and then another incarceration following the revocation of his term of supervised release, further incarceration for drug-related conduct is "doing the same thing over and over again" while "expecting different results." Whether such a revocation and further incarceration is an abuse of discretion because it fails to further the goals of supervised release is an important question of federal law that has not yet been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

Supervised release “is designed ‘to ease the defendant’s transition into the community after the service of a long prison term . . . or to provide rehabilitation to a defendant who has spent a fairly short period in prison . . . but still needs supervision . . . after release.’” *United States v. Pierce*, 75 F.3d 173, 177 (4th Cir. 1996)(quoting S. Rep. No. 225, 98th Cong., 2d Sess. 124 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3307. To that end, great attention is given in 18 U.S.C. § 3583 to a supervisee’s drug use and the consequences of such. However, § 3583(d) requires that the district court “shall consider whether the availability of appropriate substance abuse treatment programs, or an individual’s current or past participation in such programs, warrants an exception” to the general rule of revocation.

The Fourth Circuit is technically correct that the mandatory revocation and exception provisions of § 3583 do not apply to this revocation because Evans’ violation of supervised release was failing to complete a drug treatment program, not further use of drugs itself. *Evans*, 736 F. App’x at 65. Nonetheless, it is incorrect to dismiss the import of those provisions in a case like this one. Evans has a serious history of drug use. J.A. 26-27. He needs treatment to address that, a truth that did not change because he failed in one particular program.

Thus, in situations like Evans’ the district court should “consider whether an appropriate substance abuse program was available, and whether enrollment in such a program was an option preferable to prison.” *United States v. Crace*, 207 F.3d 833, 835 (6th Cir. 2000). In this case, the district court was presented with evidence that

Evans' difficulty on supervised release was caused by his addiction to drugs. The district court should have concluded that a second attempt at enrollment in an available substance abuse program was "an option preferable to prison."

There is no doubt that Evans has a serious drug problem. The second petition alone lays out eight occasions where he was caught using drugs in a just a five-month period, not to mention numerous failures to even appear for drug testing. J.A. 26-27. Still, when Evans was arrested on the third petition he did not test positive for drugs. J.A. 44. Furthermore, the only allegation in the third petition did not involve illegal drug use. J.A. 36. In other words, Evans, while making a bad choice about how to handle a false allegation of breaking Recovery Point's rules, was also making progress toward dealing with his substance abuse problem.

The district court was not wrong to be suspect of Evans' request for yet another opportunity at drug treatment. However, Evans explained why Riverside would be different than Recovery Point. "Riverside," he said, "I think would be good for me" because "[i]t's closer"² and it "wouldn't be a whole, you know, 12 months that I wouldn't be able to be allowed to go out and work." J.A. 50. Employment, or seeking employment, is a condition of Evans' supervised release. J.A. 13. In none of the

² Evans is a resident of Charleston, West Virginia. J.A. 61. While not specified below, Recovery Point only has men's programs in Huntington, Bluefield and Parkersburg, West Virginia. <https://www.recoverypointwv.org/locations/> (last visited November 26, 2018). Per Google Maps, Huntington and Parkersburg are approximately one hour and one hour and twenty minutes away from Charleston, while Bluefield is approximately two hours away.

petitions has the probation officer alleged Evans failed to meet that requirement. As the district court recognized when imposing sentence, Evans' "full-time engagement in that work may be one avenue by which you ultimately get out of the continuation of drug use." J.A. 52. There were reasons to think this time Evans would have done better in treatment.

A second attempt at treatment, perhaps backed by a warning of a lengthier sentence in the future, would do more to actually deal with the problem of Evans' drug abuse than the revocation and sentence imposed by the district court. There is no evidence that the term of imprisonment, just two months longer than his first revocation and about one-third the length of his initial sentence, will address Evans' drug abuse problem in any way that has not already been tried. If simple incarceration would have worked to address such a problem it would already be dealt with. Furthermore, the district court did not impose any new condition of supervised release that Evans participate in a drug treatment program. J.A. 52-53.

Among the factors the district court is required to consider in a supervised release proceeding is the need "to provide the defendant with needed . . . medical care . . . in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). The district court had already tried revocation and imprisonment as a means to make address Evans' substance abuse issues and make him comply with the conditions of his supervised release. It did not work. Another sentence of imprisonment will not provide Evans with treatment that he needs. Presented with an alternative to incarceration that

would address the underlying cause of Evans' violations and would serve the goal of "eas[ing] the defendant's transition into the community," the district court should have chosen that alternative. To do otherwise was an abuse of discretion.

IX. CONCLUSION

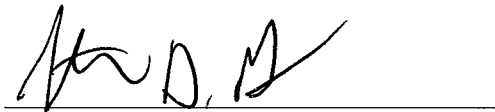
For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

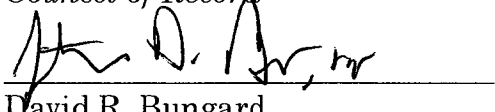
BOBBY RAY EVANS

By Counsel

BRIAN J. KORNBATH
ACTING FEDERAL PUBLIC DEFENDER



Jonathan D. Byrne
Assistant Federal Public Defender
Counsel of Record



David R. Bungard
Assistant Federal Public Defender