

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

JIMMY DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Mr. Davis was denied procedural due process as required under the Constitution of the United States and the Federal Rules of Criminal Procedure where the government failed to provide the required notice for revocation of supervised release.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jimmy Davis, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

PARTIES TO THE PROCEEDINGS

The caption of this case provides the names of all parties to the proceeding.

OPINION BELOW

The United States Court of Appeals for the Third Circuit filed a published opinion reported at United States of America v. Jimmy Davis, 2018 WL 4293331 (3d Cir. 2018).

The opinion and the Judgment and Order appear herein as Appendix A.
(App. 1-12)

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1).

The Petitioner, Jimmy Davis, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution reads in pertinent part:

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

Federal Rules of Criminal Procedure Rule 32.1(2) provides:

Revocation Hearing. The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district court of jurisdiction. The person shall be given

- (A) written notice of the alleged violation;
- (B) disclosure of the evidence against the person;
- (C) an opportunity to appear and present evidence in the person's own behalf;
- (D) the opportunity to question adverse witnesses;
- and
- (E) notice of the person's right to be represented by counsel.

STATEMENT OF THE CASE

On March 16, 2010, Jimmy Davis was charged by indictment with the federal offenses of felon in possession of ammunition and a firearm in violation of 18 U.S.C. § 922(g)(1) and local charges of unauthorized possession of a firearm in violation of 14 V.I.C. § 2253(a) and interfering with an officer in the discharging of his duties in violation of 14 V.I.C. § 1508. He plead guilty to the federal counts of possession of ammunition and possession of a firearm on August 2, 2010. Mr. Davis was sentenced on November 17, 2010 to thirty-three (33) months imprisonment, three (3) years of supervised release, a \$500.00 fine and a \$200.00 special assessment. Mr. Davis was released from the Bureau of Prisons and his term of supervised release began on November 8, 2013.

On August 10, 2015, the Office of U.S. Probation ("Probation") notified the court that Mr. Davis violated his conditions of supervised release. Appendix B. (App.

13-17) Specifically, Probation advised the court that on February 23, 2015, Mr. Davis was arrested by the Virgin Islands Police Department pursuant to an arrest warrant alleging unlawful sexual contact first degree/domestic violence in violation of 14 V.I.C. § 1708(a)(4) and 16 V.I.C. § 91(B)(5) and disturbance of the peace by threats/domestic violence in violation of 14 V.I.C. § 622(1) and 16 V.I.C. § 91(b)(11). Id. On March 9, 2015, an information was filed in the Superior Court of the Virgin Islands, SX-15-CR-065.

On September 28, 2015, the district court signed an arrest warrant for Mr. Davis for violating conditions of his supervised release. The United States Marshals' Service executed the warrant on February 10, 2016. Mr. Davis appeared that same day before the Honorable Magistrate Judge George W. Cannon, Jr. for an initial appearance for violation of his conditions of supervised release pursuant to 18 U.S.C. § 3583. On February 17, 2016, Judge Cannon released Mr. Davis from custody with conditions pending the setting of his revocation hearing. The magistrate later detained Mr. Davis on September 13, 2016, after finding that Mr. Davis violated the conditions of his release. Mr. Davis was ordered detained without bond pending his revocation hearing.

On January 12, 2017, the court held the revocation hearing. The government called three witness, Probation Officer Dudley Fabio, the minor complainant, J.D. and police officer Gregory Charlery Joseph. The government introduced exhibits relating to Mr. Davis' previous conviction, his conditions of supervised release, as well

as his new local charges. Mr. Davis filed a motion to dismiss the revocation proceedings and a brief in support of the motion.¹ Appendix C. (App. 18-23) Mr. Davis argued that the government failed to give written notice of the alleged violation of the conditions of supervised release and presented insufficient evidence to prove the alleged violations. On January 27, 2017, almost one year after Mr. Davis made his initial appearance on the supervised release violation, the government filed a notice of supervised release violation charging Mr. Davis with violating the condition that he not commit another federal, state or local crime, specifically, unlawful sexual contact first degree, unlawful sexual contact second degree and disturbance of the peace by threats. Appendix D. (App. 24-26)

On January 30, 2017, the court resumed the revocation hearing. The court deferred ruling on the motion to dismiss. Mr. Davis presented two witnesses: Dr. Shavell Karel, who employed Mr. Davis' on the day of the alleged incident, and J.M., who was the person J.D. stayed with the night before the alleged incident.

On March 14, 2017, the court concluded the revocation hearing. Appendix E. (App. 27-85) The court found that Mr. Davis had sufficient written notice of the allegations of unlawful sexual contact in the first degree and disturbance of the peace by threats. (App. 31-32) However, the court held that he did not have sufficient

¹ Mr. Davis filed an amended motion to dismiss the revocation proceedings on January 22 and 23, 2017. He amended the motion by correcting several errors he found as a result of computer problems.

notice of the alleged unlawful sexual contact second degree and that issue was not properly before the court. (App. 33) The court found Mr. Davis not guilty of violating the local offense of unlawful sexual contact first degree, but found that he committed the local crime of disturbance of the peace by threats. (App. 35-36) The court revoked his supervised release and sentenced Mr. Davis to eight (8) months imprisonment and twenty-eight (28) months supervised release. Appendix F. (App. 86) The court ruled that he would get credit for time served as it related to his violation of the supervised release. Id. On March 17, 2017, Mr. Davis filed a timely notice of appeal.

Mr. Davis argued in his brief to the Third Circuit Court of Appeals that he did not receive sufficient notice of the alleged violations of supervised release as required under the Fifth Amendment of the United States Constitution and the Federal Rules of Criminal Procedure. In addition, he submitted that the government failed to prove that he committed disturbance of the peace by threats. On September 10, 2018, the Court of Appeals issued a decision affirming the district court judgment. (App. 1) The court held that the notice that Mr. Davis received was sufficient such that he understood the nature of the alleged violations of his conditions of supervised release and had a fair opportunity to prepare a defense. (App. 7-8) The Court also ruled that there was sufficient evidence presented from which a jury could find that Mr. Davis committed the offense of disturbance of the peace by threats. (App. 10)

SUMMARY OF ARGUMENT

The government did not provide the written notice required by the Fifth Amendment of the United States Constitution or Rule 32.1(2) of the Federal Rules of Criminal Procedure that apprised him of the alleged violations of his conditions of supervised release. Mr. Davis was not given notice of the specific condition(s) that he was alleged to have violated until almost a year after he first appeared in court. The Court of Appeals erred in deciding that there was sufficient notice provided to Mr. Davis and therefore, the conviction should be overturned.

REASON FOR THE WRIT TO BE GRANTED

Mr. Davis was denied his constitutional right to procedural due process for lack of notice of the supervised release conditions that he is alleged to have violated. The decision by the Third Circuit conflicts with decisions in the Seventh and Ninth Circuit.

Notice of the basis upon which the government proposes to inflict a deprivation of liberty is an essential component of due process. Mr. Davis was arrested on September 28, 2015. The request for an arrest warrant by the Probation Office included language as follows: “18:§ 3585 VIOLATION OF SUPERVISED RELEASE”. Mr. Davis received a copy of the August 10, 2015 memo from Probation alleging that he was arrested and brought before the Superior Court of the Virgin Islands for the local offenses of unlawful sexual contact in the first degree and disturbance of the peace by threats. (App. 13-17) The memo, which was addressed to the district court

judge, was not a petition to revoke probation and did not say which condition of release was violated or if there was going to be a revocation hearing. It did not say that the violations at issue were the charges that Mr. Davis was arrested on in the local Superior Court.

Although a hearing on the revocation of probation is not a stage of a criminal prosecution requiring “the full panoply of due process rights accorded a defendant at a criminal trial,” Carchman v. Nash, 473 U.S. 716, 725 (1985), considerations of procedural and substantive fairness are required for the revocation of the conditional liberty created by probation. Bearden v. Georgia, 461 U.S. 660, 666, n. 7 (1983). In identifying the procedural requirements of due process, this Court ruled that the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question of whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority of whether violation of a condition warrants revocation. See Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973); Morrissey v. Brewer, 408 U.S. 471, 479-480 (1972)(parole revocation). Scarpelli concluded that the procedures outlined in Morrissey for parole revocation should also apply to probation proceedings. 411 U.S. at 782.

A revocation of probation hearing is subject to the following *minimum* requirements of due process: (1) written notice to the probationer of the claimed probation violations; (2) disclosure of the evidence against him; (3) an opportunity for the probationer to be heard in person and to present witnesses and documentary

evidence; (4) a neutral hearing body; (5) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation; (6) the right to cross-examine adverse witnesses unless the hearing body finds good cause for not allowing confrontation; and (7) the right to effective assistance of counsel. Scarpelli, 411 U.S. at 786; Black v. Romano, 471 U.S. 606 (1985). The Federal Rules of Criminal Procedure incorporate these due process rights in Rule 32.1.

Due process requires an accused to be informed of the specific charge against him, and that reasonable notice “sufficiently apprises the defendant of what he must be prepared to meet.” Russell v. United States, 369 U.S. 749, 763 (1962). The written notice requirement seeks to ensure not only that Mr. Davis knew he was subject to a revocation proceeding but that he understood with specificity which condition(s) of supervised release he was alleged to have violated. The probation officer that testified before the district court stated that he reviewed all fifteen conditions of release with Mr. Davis. The government waited almost one year after Mr. Davis appeared for his advise of rights on the revocation proceeding and two weeks after the first part of the revocation proceeding to file a notice of supervised release violation that alleged the specific violations.

The court of appeals cites the case of United States v. Gordon, 961 F.2d 426 (3d Cir. 1992) to support its finding that Mr. Davis did not need to be “formally charged” to receive the notice required under Rule 32.1(b). (App. 6) In Gordon, the defendant’s probation was revoked due to her use of a controlled substance. Gordon

argued that the violation petition did not charge her with possession of a controlled substance but alleged that her urine tests were positive. The Third Circuit found that she had sufficient notice because the petition cited positive urine specimens and she should have anticipated that she would be questioned about her drug usage.

The difference between this case and Gordon, however is that the conduct in Gordon, drug usage, was a violation of supervised release irrespective of whether it constituted a new offense. In this case, the violation upon which the district court ultimately based its decision was a new offense – misdemeanor disturbance of the peace. In this type of circumstance, the Ninth Circuit requires that the petition to revoke must name the specific statute that is the basis of the alleged violation. See United States v. Havier, 155 F.3d 1090 (9th Cir. 1998). If the specific statute needs to be named, it would logically follow that the condition that was violated would also need to be named.

In the appellate decision in this case, the Third Circuit distinguished Havier by finding that that ruling was based on lack of specificity of the statute violated and not the specific condition of release. (App. 7-8) Mr. Davis respectfully disagrees with the court of appeal's analysis. In Havier, the petition stated only that the defendant “violated another federal, state or local crime”, similar to the circumstances in Mr. Davis. “In this type of situation, it would be unrealistic to expect a defendant to predict the specific statute which the government intended to charge him with violating,” id. at 1093, when there was no mention of the statute. In effect, Mr.

Davis found himself in the same situation as the defendant in Havier. The consequences of the inadequacy of the notice are demonstrated by the results in Mr. Davis' case. Mr. Davis was originally charged with unlawful sexual contact in the first degree and disturbance of the peace by threats. As the revocation hearing proceeded and the government finally filed their notice of violation after almost a year, they added the charge of unlawful sexual contact in the second degree. Ultimately, the district court held that Mr. Davis did not have sufficient notice of the alleged unlawful sexual contact second degree and that issue was not properly before the court. The court found Mr. Davis not guilty of violating the local offense of unlawful sexual contact first degree, but found that he committed the local crime of disturbance of the peace by threats. Mr. Davis was left to guess as to not only what condition of release he had violated but also which statute. See also United States v. Dooley, No. 17-10155, 719 Fed. App'x. 604 (9th Cir. Jan 8, 2018)(insufficient notice when a petition charges a new crime and the offense charged is not evident from the condition of probation being violated).

It is also evident that the circuit courts of appeal are split with respect to the due process requirements as they pertain to the specificity of the notice required in the petition to revoke. Even in cases where the Ninth Circuit approved the petitions to revoke, it is clear that the Ninth Circuit requires more specificity. See United States v. Tham, 884 F.2d 1262, 1265 (9th Cir. 1989) (notice was sufficient where the petition notified the defendant of the *specific* condition he violated, the general dates,

location and basic facts of the violation,) (Emphasis added). See also United States v. Westfall, 959 F.2d 243 (9th Cir. 1992)(The petition stated a violation of conditions 1(b), 3,4 and 5). The Seventh Circuit also requires more specificity. See United States v. Kirtley, 5 F.3d 110 (7th Cir. 1993) (“where the probation officer’s [] petition set forth the specific condition of probation that [the defendant] violated and the two month period during which the violations occurred, as well as some basic facts regarding the violation, such as the specific statute and rule Kirtley disobeyed and the exact date of his suspension. . . .”)

Mr. Davis was not afforded the notice that would have been required under the standards set forth the Seventh and Ninth Circuit Courts of Appeal. Nor does it appear from the appellate opinion in this case that the Third Circuit require the same degree of notice that those circuits would. Certiorari should therefore be granted to resolve the differing standards relating to the due process requirements that defendants like Mr. Davis are entitled.

CONCLUSION

Through the mechanism of imposition of sanctions for violation of a release condition, the defendant may be deprived of his liberty for violating the terms of his supervised release but such deprivation may not take place without due process of law and the notice of what the defendant is expected to fight against. For the reasons given, Petitioner respectfully requests the Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

Dated: December 10, 2018

/s/Omodare Jupiter

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CERTIFICATE OF SERVICE

I, OMODARE JUPITER, an attorney appointed under the Criminal Justice Act of 1964, do hereby certify that I have on this day forwarded via United States Postal Service mail, an original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the Clerk of the Court, U.S. Supreme Court, Washington, D.C. 20543, one (1) copy to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 and to the Office of the United States Attorney, 1108 King Street, Suite 201, Christiansted, USVI 00820, and to Petitioner, Jimmy Davis, Reg. No. 04778-094, MDC Guaynabo, Metropolitan Detention Center, P.O. Box 2005, Catano, PR 00963, on this 10th day of December, 2018.

/s/Omodare Jupiter

OMODARE JUPITER