

No. _____

In the Supreme Court of the United States

October Term, 2018

BENNY RAY REGALADO, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED

Whether a defendant waives his right, under the Due Process Clause of the Fifth Amendment, to a neutral and detached hearing body at his probation-revocation hearing by pleading true to an allegation that he violated a condition of his probation.

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Benny Ray Regalado asks that a writ of certiorari issue to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit in this case. The Fifth Circuit held that, except for the right to present mitigating evidence, a defendant waives his due process rights, including his right to a neutral and detached hearing body, and any appellate challenge based on those rights, when he pleads true to an alleged supervision violation. This holding is in tension with Supreme Court precedent and principles regarding the “jealously guarded” due process requirement of neutrality. The requirement is no less necessary in a probation-revocation hearing, where the judicial officer needs to determine

whether the violation warrants revocation and what sentence to impose or other steps to take. This due process issue affects the estimated 4.5 million individuals serving probation and parole terms and potentially facing allegations of violations.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App., *infra*, 1a–3a) is not published but is available at 768 F. App’x. 270.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Fifth Circuit was entered on April 23, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”

STATEMENT

I. The District Court Proceedings

A. Proceedings on the underlying offense

Regalado pleaded guilty to possession of child pornography. Based primarily on his progressive visual impairment, the district court sentenced him to five years’ probation, which was a downward variance from the advisory Guidelines sentencing range of 78 to 97 months’ imprisonment. The court imposed probation conditions, including one that allowed the probation officer to install monitoring software on any computer that Regalado used and to

conduct periodic unannounced searches of any such computer. The court warned Regalado about violating the conditions.

B. Proceedings on the alleged violations

The probation officer petitioned the district court to revoke Regalado's probation, alleging that he had violated three conditions. One allegation was that he used a PlayStation 3 (PS3) gaming console that did not have computer-monitoring software.

At the final revocation hearing, Regalado's attorney stated that he was prepared to plead true to that allegation. The district court first heard the Government's testimony as to the other two, contested allegations. The court then asked Regalado if it was true that he possessed the PS3. Regalado responded that it was. The court revoked his probation.

During allocution for Regalado, his counsel discussed his psychiatric difficulties and pointed out that the sentencing range for the violations, which were Grade C, was three to nine months' imprisonment. Counsel asked the district court to modify Regalado's probation conditions to include treatment.

During Regalado's allocution, the district court stated: "you're going to go to federal prison. By the way, before I get to that point, do you remember the discussion; that I told you, if you were one of the lucky few to get probation and you violated, that it was going

to be much worse.” (ROA.376.)¹ And, before the court imposed the sentence of 100 months’ imprisonment (and 12 years’ supervised release), it stated “that it will keep its promise made to Mr. Regalado and others, but in this case Mr. Regalado.” (ROA.380.)

Regalado’s counsel objected to the sentence, and, after the hearing, filed a combined written objection and motion to reconsider, objecting that the sentence, in relevant part, “violates his due process rights.” (ROA.687.) The district court “note[d] Defendant’s objection and denie[d] his motion to reconsider his sentence.” (ROA.941.)

II. The Fifth Circuit’s Opinion

Regalado appealed. He claimed that the district court violated his due process right to a neutral and detached judge. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (holding that, in probation-revocation hearings, due process requires a “neutral and detached” hearing body). Regalado argued that the court did so by predetermining that it would revoke his probation and impose a sentence above the Guidelines range for his underlying offense.

¹ ROA refers to the Fifth Circuit Court of Appeals record on appeal, and the number following it is the page of the record.

The Fifth Circuit concluded that Regalado waived this right and claim. “When defendant pleads true to the allegations he violated the terms of his supervised release, as Regalado did, he waives due-process protections except for his right to present mitigating evidence indicating revocation is not warranted. *See United States v. Holland*, 850 F.2d 1048, 1050–51 (5th Cir. 1988). Thus, Regalado’s challenge to his revocation on due-process grounds is waived. *See id.*” App., *infra*, 2a.

The Fifth Circuit affirmed the district court’s revocation of Regalado’s probation and imposition of a sentence of 100 months’ imprisonment and 12 years’ supervised release. *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to decide whether a defendant waives his due process right to a neutral and detached hearing body by pleading true to an alleged probation violation. Supreme Court precedent and principles regarding due process require a neutral and detached hearing body at probation-revocation hearings. In tension with that, the Fifth Circuit held that, except for the right to present mitigating evidence, a defendant waives his due process rights, including his right to a neutral and detached hearing body, and any appellate challenge based on those rights, when he pleads true to an alleged supervision violation. This holding is erroneous because the “jealously guarded” requirement of neutrality is no less necessary in a probation-revocation hearing, where the judicial officer needs to determine whether the violation warrants revocation and what sentence to impose or other steps to take. This due process issue affects the estimated 4.5 million individuals serving probation and parole terms and potentially facing allegations of violations.

I. In Tension with Supreme Court Precedent and Principles, the Fifth Circuit Held That a Defendant Waives His Due Process Right to a Neutral and Detached Hearing Body by Pleading True to an Alleged Probation Violation.

A. Supreme Court Precedent and Principles Hold That Due Process Requires a Neutral and Detached Hearing Body at Probation-Revocation Hearings.

Revocation of probation takes away a probationer’s conditional liberty. This loss is a serious deprivation that requires the probationer to be afforded the due process mandated in *Morrissey v. Brewer* for parolees. *Gagnon*, 411 U.S. at 782. The minimum due process required at the final revocation hearing includes, among other things, a “neutral and detached” hearing body. *Id.* at 786 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). The due process requirements protect against “ill-considered” revocation. *Gagnon*, 411 U.S. at 786.

In deciding whether to revoke a defendant’s probation, the district court makes two analytically distinct determinations: (1) whether the probationer has in fact violated a probation condition and (2), if so, whether to sentence the probationer to imprisonment or to take other steps to protect society and improve his chances of rehabilitation. *Id.* at 784. Throughout this two-step process, the probationer and the Government “have interests in accurate finding of fact and the informed use of discretion.” *Id.* at 785.

B. The Fifth Circuit’s Holding Is in Tension with These Supreme Court Precedent and Principles and Is Erroneous.

The Fifth Circuit holds that, when a probationer pleads true to an alleged violation, *Morrissey*’s procedural safeguards are unnecessary, except for “[an] opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation.” *Holland*, 850 F.2d at 1051; *see, e.g.*, *United States v. Jimenez-Laines*, 354 F. App’x 889, 893 (5th Cir. 2009) (citing *Holland*, 850 F.2d at 1050–51). In support of mitigation, the Fifth Circuit has held that such an individual “has a qualified right to confront and cross-examine witnesses and present [supporting] evidence.” *Williams v. Johnson*, 171 F.3d 300, 305 (5th Cir. 1999). The Fifth Circuit extended that precedent to hold below that, with the exception of the right to present mitigating evidence, a defendant waives his due process rights, and any appellate challenge based on those rights, when he pleads true to an alleged supervision violation. App., *infra*, 2a. The due process right that was the basis of Regalado’s appellate challenge is his right to a neutral and detached judge.

The Fifth Circuit’s holding is tension with Supreme Court precedent and principles regarding the due process requirement of neutrality in adjudicative proceedings, which the Court has “jealously guarded.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (holding that

due process requires that a citizen being held as an enemy combatant be given the right to be heard by an impartial adjudicator and to meaningfully challenge the Government’s case).

As this Court explained in *Marshall*, the neutrality requirement “safeguards the two central concerns of procedural due process”: (1) preventing unjustified or mistaken deprivations and (2) promoting participation and dialogue in the decision-making process. *Marshall*, 446 U.S. at 242 (internal citations omitted). The neutrality requirement safeguards these concerns by (1) “help[ing] to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law” and (2) “preserv[ing] both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done.” *Id.* (internal citations and quotation marks omitted).

These due process concerns exist in probation-revocation hearings and require safeguarding by the neutrality requirement. Even if a defendant pleads true to violating an alleged probation condition, a neutral and detached judicial officer is necessary to determine whether the violation warrants revocation and, if so, what sentence should be imposed or what steps should be taken to protect society and improve the probationer’s rehabilitation chances.

See Morrissey, 480 U.S. at 490 (remanding with instruction to determine if the parolees admitted to the violations and if those violations warrant revocation). “[A] defendant is entitled to a probation revocation hearing before a judicial officer who has not predetermined that probation should be revoked or that a particular punishment should be imposed.” *Gonzales v. Johnson*, 994 F. Supp. 759, 762 (N.D. Tex 1997) (citing *Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990)). “[The] opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation,” *Holland*, 850 F.2d at 1051, serves no purpose if the judicial officer is not neutral and detached.

C. This Due Process Issue Affects Many Individuals.

This due process issue affects the estimated 4.5 million individuals who are serving probation and parole terms in the United States² and may face allegations of violations of their conditions.

² BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NCJ 251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016 (2018), available at <https://www.bjs.gov/index.cfm?ty=pb&detail&iid=6188> (last visited July 22, 2019).

On any given day, 280,000 people are incarcerated for a supervision violation.³

CONCLUSION

FOR THESE REASONS, Regalado asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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³ JUSTICE CTR., COUNCIL OF STATE GOV'TS, CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISONS AND BURDENING BUDGETS (2019), *available at* <https://csgjusticecenter.org/confinedandcostly/> (last visited July 22, 2019).