

NO. _____
October Term, 2019

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN LAMONT PEARSON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KYLE E. WACKENHEIM
ASSISTANT FEDERAL PUBLIC DEFENDER
Oklahoma Bar Association No. 30760
OFFICE OF THE FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF OKLAHOMA
215 Dean A. McGee, Suite 109
Oklahoma City, Oklahoma 73102
Telephone: 405-609-5930
Telefacsimile: 405-609-5932
Electronic Mail: kyle_wackenheim@fd.org
COUNSEL FOR PETITIONER
KEVIN LAMONT PEARSON

(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

Does the plain text of Rule 32.1 of the Federal Rules of Criminal Procedure bar a district court from considering an alleged violation at a final revocation hearing when a magistrate judge determines it lacks probable cause?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) **Reference to the Official and Unofficial Reports of any Opinions**

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Pearson*, Nos.18-6200, 18-6201, ___ Fed.Appx.___, 2019 WL 4200383 (10th Cir. Sept. 5, 2019) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

(i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed September 5, 2019;

(ii) Date of any order respecting rehearing.

Not applicable;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek

review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

The Constitutional Provisions, Statutes and Rules which the Case Involves.

- (1) Constitutional Provisions:

None.

- (2) Statutes Involved:

None.

- (3) Rules Involved:

Federal Rule of Criminal Procedure Rule 32.1

(a) Initial Appearance.

- (1) Person In Custody. A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) Upon a Summons. When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.

(3) Advice. The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) Appearance in the District With Jurisdiction. If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing--either originally or by transfer of jurisdiction--the court must proceed under Rule 32.1(b)-(e).

(5) Appearance in a District Lacking Jurisdiction. If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred;
or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

(6) Release or Detention. The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that

a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

- (i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

- (ii) an opportunity to appear at the hearing and present evidence; and

- (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

- (A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) Exceptions. A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).

(e) Producing a Statement. Rule 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(4) Other:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the revocation of supervised release. The jurisdiction of the District Court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Pearson's appeal on September 5, 2019. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Facts Material to Consideration of Question Presented

Kevin Lamont Pearson was initially sentenced to a term of incarceration and supervised release in two separate cases arising from the United States District Court for the Northern District of Oklahoma. These cases were transferred to the Western

District of Oklahoma for supervision. (ROA_18-6201, Vol. 1, at 14; ROA_18-6200, Vol.1, at 12). His concurrent terms of supervised release commenced on October 4, 2016. (ROA_18-6201, Vol. 1, at 23; ROA_18-6200, Vol. 1, at 26).

On October 5, 2018, the United States Probation Office filed a Petition for Warrant or Summons for Offender Under Supervision alleging various violations of supervised release. Those alleged violations were:

1. Violation of special search condition: Mr. Pearson refused to provide the access code to unlock his phone;
2. Violation of standard condition: During a search of his residence, a small amount of marijuana was found in his bedroom and a digital scale was located in the kitchen;
3. Violation of special condition: Mr. Pearson smelled of alcohol and refused a breath test on October 5, 2018. He also had a number of specific positive and missed urine tests for marijuana and alcohol;
4. Violation of standard condition: Mr. Pearson left the judicial district without permission of the court officer.

(ROA_18-6201, Vol. 1, at 23-24; ROA_18-6200, Vol. 1, at 26-27).

Mr. Pearson exercised his right to a detention and preliminary hearing before the magistrate court. (ROA_18-6201, Vol. 1, at 27; ROA_18-6200, Vol. 1, at 25). The day before the combined detention and preliminary hearing, the United States Probation Office filed an Amended Petition for Warrant or Summons for Offender Under Supervision alleging two new violations:

5. Violation of mandatory condition: On September 29, 2019, Mr. Pearson physically assaulted his girlfriend;
6. Violation of standard condition: Mr. Pearson possessed a firearm.

(ROA_18-6201, Vol. 1, at 28-32; ROA_18-6200, Vol. 1, at 26-30).

At the detention and preliminary hearing, the magistrate court ordered Mr. Pearson detained pending the final revocation hearing. It also failed to find probable cause to support Violation No. 6, possession of a firearm. (ROA_18-6201, Vol. 1, at 33; ROA_18-6200, Vol. 1, at 31).

The United States Probation Office again filed an Amended Petition for Warrant or Summons for Offender Under Supervision. (ROA_18-6201, Vol. 1, at 34; ROA_18-6200, Vol. 1, at 32). This second Amended Petition added additional violations and modified the description of other violations. The two new violations alleged:

7. Violation of mandatory condition: Mr. Pearson committed the new offense of Possession with Intent to Distribute Controlled Dangerous substances (marijuana), as evidenced by text messages retrieved from his phone;
8. Violation of standard condition: Mr. Pearson associated with individuals engaged in criminal activity as evidenced by text message conversations with individuals discussing obtaining, packaging, and distributing narcotics.

(ROA_18-6201, Vol. 1, at 37; ROA_18-6200, Vol. 1, at 35).

It also included additional information concerning Violation Nos. 5 and 6. In Violation Nos. 5 and 6, the Amended Petition included corroborating text messages found on Mr. Pearson's phone. (ROA_18-6201, Vol. 1, at 36-37; ROA_18-6200, Vol. 1, at 34-35).

Mr. Pearson's final revocation hearing was held on October 22, 2018. Mr. Pearson stipulated to Violation Nos. 1, 3, 4, and 5. (Tr. at 9). Violation Nos. 2, 6, 7, and 8 were contested. (Tr. at 10, 12). Mr. Pearson also argued the Court could not proceed on Violation No. 6 because the magistrate court had determined it was unsupported by probable cause at the preliminary hearing under Federal Rule of Criminal Procedure 32.1(b)(1)(C). (Tr. at 10). The Government disagreed and argued the United States Probation Office conducted a more thorough examination of Mr. Pearson's cellular telephone subsequent to the preliminary hearing and had marshaled additional evidence not presented to the magistrate court. (Tr. at 10-11). The district court took the issue under advisement and later determined the probable cause determination did not present a legal impediment to consideration of the violation at the final revocation hearing:

First, with respect to violation No. 6 -- I'm going to take these a little out of order, but with respect to violation No. 6, there -- which is the gun possession allegation, there was an objection grounded in Federal Rule of Criminal Procedure 32.1(b)(1)(C) in light of the lack of probable cause that was determined by the magistrate judge during the preliminary hearing.

As I mentioned earlier, in this case, the case as a whole was not -- the proceedings were not terminated. It doesn't appear from the record that there was even a dismissal of any part of the case, although there was a failure to find probable cause with respect to the allegations in violation No. 6.

The case continued. And it doesn't appear, at least from the plain language of Rule 32.1, that proceeding in considering violation No. 6 at this hearing is a clear violation of the rule.

Nevertheless, there is case authority where there was a clear deviation from Rule 32.1 in that a defendant did not receive a preliminary hearing, but there was no prejudice found to the defendant's substantial rights as the defendant received a full hearing in district court -- in the district court and was able to cross-examine the witnesses and present evidence.

So in light of those two observations, the Court finds that there is no legal impediment to a consideration in this hearing of the allegations in violation No. 6.

(Tr. at 42-43).

It later supplemented its ruling during the sentencing portion of the hearing:

The preliminary hearing in question was held on the first amended petition, and, subsequently, there was a second amended petition which was filed. And there was no request for a new preliminary hearing on the second amended petition, which actually words the violation in question differently.

(Tr. at 55).

At the final revocation hearing, the Government offered the testimony of three probation officers and admitted four exhibits depicting text messages found on Mr.

Pearson's phone. Officer Raymond Doud was Mr. Pearson's supervising officer. He was present during the search of Mr. Pearson's residence on October 5, 2018. (Tr. at 14-15). He described text messages found on Mr. Pearson's phone supporting Violation No. 6 – possession of a weapon. (Tr. at 17-21). These messages were produced in Government's Exhibit 2. (Supplemental Record, Exhibit 2). One of the messages stated, "Left your mail in your mailbox and me and your son had words. And he stole my gun. He's about to get his head busted." (Tr. at 17). The messages also reference going to "bring your papers and get my gun." (Tr. at 18). Later, a message read, "And that gun was for our protection, not for his bitch ass to go sell it for some weed[.]" (Tr. at 18). Also included on the phone was a text message stating, "you can keep the gun you stole[,] I will pull the big dog out" juxtaposed with a photograph of the front door of the recipient of the message. (Tr. at 20, Exhibit 2).

Officer Doud had never seen Mr. Pearson with a gun (or ammunition), nor had he seen a picture of Mr. Pearson with a gun. (Tr. at 18, 24). Officer Doud also did not know when Mr. Pearson was alleged to have possessed a firearm. (Tr. at 24).

After hearing the evidence, the district court concluded Violation No. 2 (possession of marijuana and scale) had not been established. (Tr. at 44). The district court then concluded Violation Nos. 6, 7, and 8 were established by a preponderance of the evidence. With respect to Violation No. 6 (gun possession), the district court

concluded the messages were adequately tied to him and discussed having a gun stolen. For Violation No. 7 (possession of marijuana with intent to distribute), the district court found the text messages supported the violation. Violation No. 8 (associating with individuals engaged in criminal activity) was likewise supported by a preponderance of the evidence.

As a result, the statutory range of punishment was 36 months, with an advisory guideline range of 30-36 months, based on a Grade A Violation. (Tr. at 8-9, ROA_18-6201, Vol. 2, at 6; ROA_18-6200, Vol. 2, at 6). In CR-17-235-D, the district court sentenced Mr. Pearson to 36 months imprisonment on Count 1 and 24 months on Count 2, all concurrent with CR-17-236-D. (ROA_18-6201, Vol. 1, at 41). In CR-17-236-D, Mr. Pearson was sentenced to one month, concurrently with CR-17-235-D. (ROA_18-6200, Vol. 1, at 39). The district court imposed 24 months of supervised release on Count 1 of CR-17-235-D, concurrent with 24 months of supervised release in CR-17-236-D. (ROA_18-6201, Vol. 1, at 42; ROA_18-6200, Vol. 1, at 40).

Mr. Pearson appealed the judgments in both cases. (ROA_18-6201, Vol. 1, at 47; ROA_18-6200, Vol. 1, at 45). The United States Court of Appeals for the Tenth Circuit denied relief in an unpublished order and judgment. In relevant part, the Tenth Circuit concluded the purpose of a preliminary hearing is to ensure there is probable cause to hold the defendant pending a final decision by the district court. *United*

States v. Pearson, 2019 WL 4200383, at *2 (10th Cir. Sept. 5, 2019) (unpublished) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)). It further reasoned that so long as a magistrate court concluded there was probable cause for at least one violation, the proceeding continues to a final revocation hearing. *Id.* at *3. The Tenth Circuit also opined that nothing stopped the Government from refiling the violation. *Id.* In sum, the Court of Appeals concluded it was not error for the district court to consider the violation. *Id.*

Mr. Pearson did not seek rehearing.

(h) **Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.**

This case presents the Court with the opportunity to clarify the importance and effect of the failure to find probable cause for an alleged supervised release violation. This Court should grant review because the plain language of Federal Rule of Criminal Procedure 32.1 requires an alleged supervised release violation to be supported by probable cause before adjudication by a district court.

I. Federal Rule of Criminal Procedure 32.1 requires alleged violations of supervised release to be supported by probable cause

In relevant part, Federal Rule of Criminal Procedure 32.1 provides:

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

- (i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

- (ii) an opportunity to appear at the hearing and present evidence; and

- (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

FED. R. CRIM. P. 32.1(b).

When a defendant is in custody for violating a condition of supervised release, a magistrate judge must promptly conduct a preliminary hearing to determine whether there is probable cause to believe a violation has occurred. Rule 32.1(b)(1)(A). If probable cause is found, a final revocation hearing is held. Rule 32.1(b)(1)(C). However, if the judge fails to find probable cause, “the judge must dismiss the proceeding.” Rule 32.1(b)(1)(C).

Rule 32.1 derived from the due process protections for parolees recognized by the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972). *See also United States v. Jones*, 818 F.3d 1091, 1098-99 (10th Cir. 2016) (discussing Rule 32.1).

Here, Mr. Pearson exercised his right to a preliminary hearing before the magistrate court on the alleged violations. As a result of that hearing, the magistrate court determined no probable cause existed as to Violation No. 6 as alleged in the Amended Petition filed on October 9, 2018. (ROA_18-6201, Vol. 1, at 33; ROA_18-6200, Vol. 1, at 31).

As Mr. Pearson admitted to the Tenth Circuit Court of Appeals, he has not located controlling authority that directly controls this inquiry. However, the plain text of Rule 32.1 states that when probable cause is not found, the magistrate judge must dismiss the proceeding. Rule 32.1(b)(1)(C). In this case, there was probable

cause found on other violations. This finding permitted Mr. Pearson's revocation to proceed, and for him to remain in custody.

However, Rule 32.1(b)(1)(C) should not be read to limit the probable cause determination to have significance only when the entire proceeding may be dismissed. Though there are not many cases and orders addressing this feature of Rule 32.1(b)(1)(C), final revocation hearings can proceed when one or more violations are dismissed for lack of probable cause. *See, e.g., United States v. Sisimit-Sanic*, 305 F.Supp.3d 1351, 1358 (S.D. Fla. 2018) (dismissing one of two violations due to lack of probable cause).

The probable cause determination at a preliminary hearing is a crucial stage in a revocation proceeding. In light of the inapplicability of the Rules of Evidence to final revocation proceedings, a releasee has a strong interest in determining the evidence and allegations he will face at a final revocation proceeding. There are no formal rules governing the time limits for setting a final revocation hearing. *See* FED. R. CRIM. P. 32.1(b)(2) (“[T]he court must hold the revocation hearing within a reasonable time in the district having jurisdiction.”). There is no limit to the number of times a petition may be amended before proceeding to a final revocation hearing. Nothing prevents the Government or United States Probation Office from including new alleged violations not included in the petition at the preliminary hearing stage.

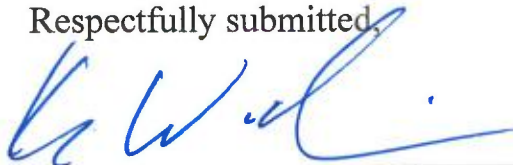
For this precise reason, a releasee has a compelling interest in not facing prosecution for an alleged violation that has been previously determined to lack probable cause.

If it is true that the “preliminary examination has as its sole function the determination of whether sufficient evidence exists to warrant the defendant’s detention[,]” *United States v. Kysar*, 459 F.2d 422, 423 (10th Cir. 1972), then Rule 32.1’s directive to dismiss the petition absent a finding of probable cause is superfluous. Without probable cause, as the rule dictates, a violation is not to be considered by the district court at a final revocation hearing. The Tenth Circuit’s conclusion otherwise is error of sufficient importance to require intervention by this Court.

Conclusion

The petition should be granted.

Respectfully submitted,



KYLE E. WACKENHEIM
Assistant Federal Public Defender
215 Dean A. McGee Avenue, Suite 109
Oklahoma City, Oklahoma 73102
Telephone (405) 609-5930
Telefacsimile (405) 609-5932
kyle_wackenheim@fd.org
COUNSEL FOR PETITIONER
KEVIN LAMONT PEARSON

(i) Appendix.

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Pearson, Nos.18-6200, 18-6201, ___ Fed.Appx.___, 2019 WL 4200383 (10th Cir. Sept. 5, 2019) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

None.