No. 19-6926

IN THE SUPREME COURT OF THE UNITED STATES

ROGER WILLIAM CAMPBELL, II, AKA ROGER WILLIAM CAMPBELL,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that the district court's imposition of consecutive terms of reimprisonment -- which he has already completed -- following revocation of multiple terms of supervised release was outside the range recommended by the Sentencing Guidelines' advisory policy statement.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Campbell, No. 09-cr-1297 (Aug. 26, 2010) (original criminal judgment)

United States v. Campbell, No. 09-cr-1297 (Dec. 20, 2017) (order revoking supervised release)

United States Court of Appeals (9th Cir.):

United States v. Campbell, No. 17-10561 (Sept. 11, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 937 F.3d 1254.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2019. The petition for a writ of certiorari was filed on December 10, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Arizona, petitioner was convicted on 35 counts of mail fraud, in violation of 18 U.S.C. 1341. Judgment 1. The district court sentenced petitioner to concurrent terms of 24 months of imprisonment, to be followed by concurrent terms of three years of supervised release. Judgment 2. Following his release from prison, petitioner violated his supervised-release conditions by failing to contact his probation officer for more than two years. Pet. App. A4. The district court revoked petitioner's terms of supervised release and imposed five consecutive five-month terms of reimprisonment and 30 concurrent one-day terms of reimprisonment, to be followed by five concurrent 31-month and 30 concurrent 35-month-and-a-day terms of supervised release. Id. at A5. The court of appeals affirmed. Id. at A1-A16.

1. While employed by American Express between July 2007 and July 2008, petitioner defrauded a supplier by falsely claiming that parts covered by a service contract were defective, receiving replacement parts, and then selling those replacement parts to third parties for personal profit. See Pet. App. A3-A4; Presentence Investigation Report (PSR) ¶¶ 3, 5-12. A federal grand jury charged petitioner with 80 counts of mail fraud, in violation of 18 U.S.C. 1341. Indictment 2-8.

Pursuant to a plea agreement, petitioner pleaded guilty to 35 of the charged counts. PSR ¶ 3. The district court sentenced

petitioner to 35 concurrent terms of 24 months of imprisonment, to be followed by 35 concurrent terms of three years of supervised release, and ordered petitioner to pay more than $850,000 in restitution. Pet. App. A4; Judgment 2. In addition to the standard conditions of supervised release, such as remaining in contact with a probation officer and paying the court-ordered monetary penalties for his crimes, the court imposed several special conditions of supervised release, including performing 300 hours of community service and providing access to financial information. Judgment 3-4.

2. In November 2012, petitioner was released from prison and began serving his terms of supervised release. Supervised Release Disposition Report 5 (Disposition Report). Petitioner, however, "basically did not comply with any portion of his supervised release conditions." Ibid. Among other violations, he "moved without permission, did not complete any of the 300 community service hours, paid [only] $190 toward his criminal monetary penalties in excess of $850,000," and failed to provide the required access to financial information. Ibid.

In August 2015, the Probation Office moved to revoke petitioner's supervised release. Pet. App. A4. The district court issued a warrant for petitioner's arrest, but petitioner remained at large without contact for more than two years before his eventual arrest in September 2017. Ibid.; see Disposition Report

5 (noting that petitioner "absconded from supervision for a total of 755 days").

3. Following his arrest, petitioner admitted to violating the supervised-release condition requiring him to contact his probation officer. Pet. App. A4. Under 18 U.S.C. 3583(e)(3), a district court may, "after considering" certain listed factors, "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," up to specified maximum periods of reimprisonment. Chapter 7 of the advisory Sentencing Guidelines contains policy statements that include recommendations on when courts should revoke supervised release and the terms of reimprisonment that they should order. See Sentencing Guidelines §§ 7B1.1-7B1.5. The Guidelines do not expressly address whether multiple terms of reimprisonment imposed on the revocation of multiple terms of supervised release should run concurrently or consecutively. Under 18 U.S.C. 3584(a), however, "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt."

Based on petitioner's admitted failure to contact his probation officer, along with his criminal history, the Probation Office determined that the recommended term of reimprisonment under the policy statements in the Guidelines for each of his 35 counts of conviction was three to nine months of reimprisonment. Sentencing Guidelines § 7B1.4(a); see Disposition Report 5. The Probation Office recommended a total of 30 months of reimprisonment -- consisting of consecutive six-month terms of reimprisonment on five counts and concurrent one-day terms of imprisonment on each of the remaining counts -- to be followed by three further years of supervised release. Disposition Report 5. The Probation Office explained that its recommendation reflected petitioner's supervised-release "violations, * * * the two[] years of absconding from supervision, and his willful intent to not pay his court-ordered criminal monetary penalties." Id. at 6.

During his disposition hearing, petitioner's counsel asked the court to "consider a sentence within the policy statement." Pet. App. B4. The district court observed that the Probation Office's recommendation was "within the policy statement[;] it's just consecutive." Ibid. Petitioner's counsel then requested "concurrent" terms of reimprisonment "within the three to nine months range." Ibid. Petitioner's counsel also noted that the violation admitted by petitioner was his first. Ibid. The court responded, "but it's a doozy." Ibid. Petitioner's counsel agreed. See ibid.

After hearing further from petitioner's counsel and petitioner himself, the district court revoked petitioner's supervised release and imposed consecutive five-month terms of reimprisonment on five counts of conviction and concurrent one-day terms of reimprisonment on each of the remaining counts, to be followed by 35 months of supervised release. Pet. App. B2, B8. In explaining its decision, the court noted that the policy statements in the Guidelines did not take into account the specific circumstances in this case, particularly "the fact that [petitioner] was an absconder for over two years [and] that he made himself completely and totally unavailable for supervision during that time." Id. at B7; see ibid. (stating that petitioner's actions over the preceding two-and-a-half years "suggest that this was a very deliberate attempt to avoid the obligations that he had to the court and to avoid his conditions of supervision"). The court added that it "agree[d] substantially with the [Probation Office's] recommendation that [petitioner] needs to recognize the seriousness of his responsibilities of supervised release and that the significant breach of the trust of this court needs to be acknowledged through" reimprisonment. Id. at B8.

4. The court of appeals affirmed. Pet. App. A1-A16. The court rejected petitioner's contention, made for the first time on appeal, that the Guidelines should be construed as recommending only concurrent, and not consecutive, terms of reimprisonment for violations of multiple terms of supervised release. Id. at A5-

A9. Noting that petitioner's claim was subject to review only for plain error, id. at A5-A6, the court explained that 18 U.S.C. 3584(a) "confer[red] discretion to impose consecutive or concurrent imprisonment terms upon revocation of concurrent supervised release terms," Pet. App. A6, and that "[t]he absence of a concurrent/consecutive sentencing provision in Chapter 7 of the Guidelines results in reversion to the statutory provision [in Section 3584(a) * * * that multiple sentences may be imposed to run consecutively or concurrently," id. at A10. The court observed that other courts of appeals that have addressed the same question have reached the same result. Id. at A9.

Judge Berzon issued a separate "dubitante" opinion. Pet. App. A10-A16. She "specifically * * * encourage[d] the U.S. Sentencing Commission to resolve" this issue by explicitly recommending only concurrent terms of imprisonment following the revocation of multiple terms of supervised release. Id. at A11.

5. Petitioner was released from prison on July 5, 2019. See Federal Bureau of Prisons, U.S. Dep't of Justice, Find an Inmate, https://www.bop.gov/inmateloc.

ARGUMENT

Petitioner renews his contention (Pet. 7-14) that the advisory Sentencing Guidelines should be construed as recommending only concurrent terms of reimprisonment on revocation of multiple terms of supervised release. The court of appeals correctly rejected petitioner's claim on plain-error review, and its

decision does not conflict with any decision of this Court or another court of appeals. This Court has denied review in prior cases presenting the same or similar questions. See, e.g., Banks v. United States, 140 S. Ct. 433 (2019) (No. 19-5969); Dees v. United States, 552 U.S. 830 (2007) (No. 06-10826); see also Braxton v. United States, 500 U.S. 344, 348 (1991). The Court should follow the same course here. Indeed, this case -- which arises in a plain-error posture and which challenges terms of imprisonment that petitioner has already completed -- would be a particularly unsuitable vehicle for reviewing the question presented.

1. The court of appeals' decision is correct. Because petitioner did not contend in the district court that the Guidelines recommend concurrent terms of reimprisonment, Pet. App. A5-A6; see id. at B4, he is entitled to relief only if he can show plain error, see Fed. R. Crim. P. 52(b). To show plain error, petitioner must establish that the district court erred; the error was clear or obvious; the error affected his substantial rights; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. See United States v. Olano, 507 U.S. 725, 736-737 (1993). Petitioner cannot make that showing.

The district court did not err in interpreting the Guidelines. When a defendant violates the conditions of a term of supervised release, a district court has the authority to "revoke [the] 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" underlying offense, subject to certain maximum periods. 18 U.S.C. 3583(e)(3). Here, petitioner's actions -- which included absconding from supervision and failing to maintain contact with this probation officer for a prolonged period -- violated the conditions of each of his 35 "term[s] of supervised release." Ibid.; see Pet. App. A4, B7-B8. The district court determined that petitioner's violations warranted revocation and a term of reimprisonment with respect to each term of supervised release. Pet. App. A5, B8. The court further determined that some of those reimprisonment terms should run consecutively, while others should run concurrently. Ibid. As petitioner expressly recognizes (Pet. 7), the plain language of 18 U.S.C. 3584(a) permits that determination: "If multiple terms of imprisonment are imposed on a defendant at the same time, * * * the terms may run concurrently or consecutively."

Petitioner instead contends (Pet. 10-11) that because the Sentencing Guidelines' non-binding policy statement on supervised-release revocation does not itself explicitly address whether multiple terms of reimprisonment should run concurrently or consecutively, the district court should have inferred that it recommends only concurrent terms of reimprisonment. That contention lacks merit. As the court of appeals explained, the absence of any specific recommendation as to how the district court should exercise its uncontested statutory discretion under Section 3584(a) simply means that the policy statement leaves the matter

to the district court's discretion. Pet. App. A6–A10. Petitioner provides no sound basis for treating the policy statement's silence as to how the discretion should be exercised as an implicit recommendation that it be exercised one way rather than another. The Guidelines expressly favor concurrent terms of imprisonment in some circumstances, see, e.g., Sentencing Guidelines § 5G1.2(c), and consecutive terms of imprisonment in other circumstances (including certain supervised-release-revocation circumstances), see, e.g., Sentencing Guidelines § 7B1.3(f). But the Guidelines take no position on whether multiple terms of reimprisonment following supervised-release revocation should be consecutive or concurrent.

Petitioner asserts (Pet. 11-12) that the rule of lenity supports his claim. But the rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted). As the court of appeals recognized, no such ambiguity exists here. See Pet. App. A8-A9. The governing statute, which is the "ultimate interpretative aid," id. at A8, makes clear that the district court has discretion to impose either consecutive or concurrent terms of imprisonment, see 18 U.S.C. 3584(a), and nothing in the policy statement recommends declining to exercise discretion to impose consecutive terms of imprisonment when

revoking multiple terms of supervised release. In any event, this Court's decision that vagueness challenges cannot be made to the advisory Sentencing Guidelines, see Beckles v. United States, 137 S. Ct. 886, 895 (2017), casts serious doubt on whether the rule of lenity applies to interpretations of the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement, see id. at 892; United States v. Bass, 404 U.S. 336, 348 (1971), that do not apply to the advisory Sentencing Guidelines, Beckles, 137 S. Ct. at 894; see, e.g., United States v. Gordon, 852 F.3d 126, 130 n.4 (1st Cir.) ("[A]s is now clear from Beckles * * * , concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines."), cert. denied, 138 S. Ct. 256 (2017).

At a minimum, the district court did not clearly or obviously err, as necessary to support plain-error relief, see Olano, 507 U.S. at 736, in its interpretation of the policy statement to express no view on its exercise of discretion in these circumstances. Not only the court below, but every other court of appeals to address the issue, has interpreted the Guidelines in the same way. See, e.g., United States v. Gonzalez, 250 F.3d 923, 929 n.8 (5th Cir. 2001); United States v. Quinones, 136 F.3d 1293, 1295 (11th Cir. 1998) (per curiam) (same). Nor is it likely that petitioner could show an effect on his substantial rights or the fairness, integrity, or public reputation of the proceedings, see

Olano, 507 U.S. at 736-737, in any variance from the Guidelines' recommendation. In explaining the need for the reimprisonment that it ordered, the district court emphasized that the Guidelines do not "take into account the fact that [petitioner] was an absconder for over two years [and] that he made himself completely and totally unavailable for supervision during that time." Pet. App. B7. Petitioner does not challenge the court's statutory authority to impose consecutive terms of imprisonment even if the policy statement recommended concurrent ones, or offer any argument as to how his claim satisfies the requirements for plain-error relief.

2. No basis exists for this Court's review. As noted above, the courts of appeals that have considered the question presented have reached the same conclusion as the court of appeals here did, and the Court has previously declined to review similar questions. See pp. 8, 11, supra. That accords with this Court's longstanding recognition that questions about the meaning of the Sentencing Guidelines are better resolved by the Sentencing Commission. See Braxton, 500 U.S. at 348. The Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Ibid. (citing 28 U.S.C. 994(o) and (u)). Congress's conferral of that authority on the Sentencing Commission indicates that it expected the Commission, not this Court, "to play [the] primary role in

resolving conflicts" over the interpretation of the Guidelines. Buford v. United States, 532 U.S. 59, 66 (2001). Accordingly, even Judge Berzon, who viewed concurrent sentences as appropriate, recognized that the Sentencing Commission was the proper entity to address the issue. See Pet. App. A11.

Furthermore, this case would be a particularly unsuitable vehicle for addressing the question presented because petitioner's claim is now moot. Although briefing and oral argument in the court of appeals were completed while petitioner was serving his term of reimprisonment, the court of appeals issued its opinion after petitioner's release. See p. 7, supra. Because petitioner challenges only the term of reimprisonment ordered by the district court, his completion of that term mooted his case. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

Typically, the completion of a criminal defendant's sentence does not moot an appeal challenging the defendant's conviction, because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But the "presumption of collateral consequences" does not extend beyond the criminal conviction. Id. at 12. When a defendant challenges only the length of his term of imprisonment -- as opposed to the underlying conviction -- the defendant's completion of that prison term moots an appeal, unless

the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's" requirement of an injury-in-fact traceable to the challenged action and redressable by a favorable decision. Id. at 14.

This Court has applied that rule to conclude that challenges to parole-revocation procedures were moot after the defendant completed the corresponding term of imprisonment. Spencer, 523 U.S. at 12-14. Courts of appeals have applied the same rule to conclude that challenges to supervised-release revocation are moot when the defendant is released from reimprisonment during the pendency of the appeal, as petitioner was here. See, e.g., United States v. Hardy, 545 F.3d 280, 284 (4th Cir. 2008) (explaining that "courts considering challenges to revocations of supervised release have universally concluded that such challenges * * * become moot when the term of imprisonment for that revocation ends"); United States v. Mazzillo, 373 F.3d 181, 182 (1st Cir. 2004) (per curiam) ("An appeal from an order revoking supervised release is ordinarily moot if the sentence is completed before the appeal is decided."); United States v. Meyers, 200 F.3d 715, 722 (10th Cir. 2000) (similar).

Petitioner does not argue that his now-completed term of reimprisonment imposes any continuing injury that could be redressed by a favorable decision. Although petitioner is now subject to further terms of supervised release that followed his reimprisonment, this Court held in United States v. Johnson, 529

U.S. 53 (2000), that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. Id. at 54. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." Johnson, 529 U.S. at 60. But, as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).* Petitioner therefore lacks a legally cognizable interest in having his term of reimprisonment invalidated. The case is accordingly moot.

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* Other courts of appeals have concluded that the possibility that a sentencing court would exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent a challenge to the length of a term of imprisonment from becoming moot upon completion of his prison term. See Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006). Those decisions, however, failed to address this Court's decision in Johnson. Regardless, the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the underlying Guidelines-interpretation question. See also Braxton, 500 U.S. at 348.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2020