

Docket number

Supreme Court of the United States

Anthony Shockey,
Petitioner,

vs

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of
Appeals
for the Seventh Circuit

Petition for Certiorari

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Question Presented

1. When an addict on supervised release fails a drug test should the failure be treated as crime, a grade B violation under Sentencing Guideline § 7B1.1(a)(2), or as a manifestation of a disease and a violation of the condition that the defendant not use any controlled substance Sentencing Guideline § 7B1.1(a)(3) a grade C violation.

2. Parties

1. Petitioner, Anthony Shockey.
2. Respondent, United States of America.

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The opinion of the United States Court of Appeals for the Seventh Circuit was decided October 22, 2019 in case No. 19-1308 *United States v Anthony Shockley* and published in 941 F3rd 282 (7th Cir 2019) A copy is reproduced in the Appendix.

Jurisdiction

The judgment and opinion of the Court of Appeals sought to be reviewed was entered October 22, 2019. No extension of time to file this petition for writ of certiorari was sought. Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 USC § 1254 by filing this petition by first class mail within 90 days of October 22, 2019 in that the 90th day falls on Martin Luther King day January 20, 2020 and that day is a federal holiday 5 USC § 6103 and under Supreme Court Rule 30 Tuesday January 21, 2020 is next day which is not a Saturday, Sunday or legal holiday.

Guideline Provision Involved

§7B1.1 - Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) **GRADE A VIOLATIONS** — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) **GRADE B VIOLATIONS** — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) **GRADE C VIOLATIONS** — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

(b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

§7B1.3 - Revocation of Probation or Supervised Release (Policy Statement)

(a) (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.

(2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the

conditions of supervision.

(b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).

(c) In the case of a Grade B or C violation—

(1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and

(2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

(d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

(e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C.

§ 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

(g) (1) If probation is revoked and a term of imprisonment is imposed, the provisions of §5D1.1 –§5D1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Statement of the Case

Defendant was originally sentenced to 40 months imprisonment and one year of supervised release (document 45 1/19/2016) . The conditions of supervised release included, “ 1. The defendant shall not commit another federal, state, or local crime.2. The defendant shall not unlawfully possess a controlled substance. 3. The defendant shall not unlawfully use any controlled substance,

including marijuana, and shall submit to one drug test within 15 days of the beginning of supervision and at least 2 periodic tests after that for use of a controlled substance.”

On March 20, 2018 defendant completed the imprisonment and commenced supervised release. The supervising officer applied for a warrant November 30, 2018 and alleged:

“The probation officer believes that the offender has violated the following condition(s) of supervision as set forth in the Judgment.

Condition of Supervision No. 3: The defendant shall not unlawfully use any controlled substance, including marijuana, and shall submit to one drug test within 15 days of the beginning of supervision and at least 2 periodic tests after that for use of a controlled substance.

Violation No. 1: On May 30, 2018, the defendant provided a specimen which was analyzed and yielded positive results for the presence of methamphetamine. On June 18, 2018, the defendant signed a report, admitting to illegal use of amphetamine, on June 17, 2018. On July 17, 2018 the defendant signed a report admitting to illegal use of methamphetamine during the week of July 10 through 17, 2018.

Violation No. 2: On October 3, 2018, the defendant admitted to this officer during a phone call that he took Xanax without a valid prescription approximately one week prior.”

At the final revocation hearing the parties stipulated, “1.

Defendant Anthony Shockey, admits the violation of supervised release listed in the November 2018 Petition to Revoke Supervised Release, specifically his violation of release of unlawful use of controlled substances by failing a drug test on May 30, 2018, his use of methamphetamine on June 17, 2018, his use of methamphetamine the week of July 10-17, 2018 and his unlawful use of Xanax on October 3, 2018. " (document 72). Defendant contended that the conduct constituted a grade C violation Guideline §7B1.1(a)(3). The government cited *United States v Trotter* 270 F3d 1150 (7th Cir 2001) and contended that the violation constituted a grade B violation. The court ruled that defendant's guideline under §7B1.4(a) was Grade B category VI 21-to 27 months. The court varied from the guideline range and imposed a sentence of 15 months.(document 74) No further supervised release was ordered.

The 7th Circuit held:

On appeal, Shockey maintains that the district court erred in classifying his violation as Grade B without finding that he violated any law prohibiting possession of a controlled substance that was statutorily punishable by more than a year in prison. Although it would have been good practice for the court to cite a specific statute, Shockey was entitled only to fair, written notice of the alleged conduct underlying his Grade B violation. See *United States v. Lee*, 795 F.3d 682, 686-87 (7th Cir. 2015) (citing Fed. R. Crim. P. 32.1(b)(2)). Here, Shockey was notified before the hearing by the probation officer in writing that he was alleged to have violated *United States v Shockey* 941 F3rd 281, 283 (7th Cir 2019)

Reasons for Granting the Writ

In the absence of express allegations of specific violations of drug crimes, district courts considering violations of supervised release should be required to treat drug use relapses as a violation of the condition that the defendant not use any controlled substance rather than a crime.

When the petitioner failed drug tests and the government sought revocation the district court was faced with the choice: punish for a crime or treat the disease of addiction. This court should require simple revocation rather than punishment for a crime unless that crime is expressly alleged.

The joint Committee of the American Bar Association and the American Medical Association in 1961 observed, "Drug addiction is primarily a problem for the physician rather than the policeman, and it should not be necessary for anyone to violate the criminal law solely because he is addicted to drugs." The report concluded that drug addiction was a disease, not a crime, that harsh criminal

penalties were destructive, that drug prohibition ought to be reexamined, and that experiments should be conducted with British-style maintenance clinics for narcotic addicts.

The very nature of addiction and alcoholism tells us that fear of consequences will not overcome the compulsion of the alcoholic to drink or the addict to use. Kevin T. McCauley, M.D's article provides some incite into alcoholism "Is addiction really a disease" July 2004 *Texas Bar Journal* 528.

The Big Book of Alcoholics Anonymous at page 37 tells the jay-walker parable. The jay walker is driven by an involuntary compulsion to run into traffic despite danger and injury. The alcoholic compulsively drinks even though the drinking leads to bodily harm and mental destruction.

Powerlessness over the compulsion to drink and drug is also reflected in *Powell v Texas* 392 US 514 justice White concurring (1965) and *Robinson v California* 370 US 660 (1962). Imprisonment is no deterrent to the defendant or to other alcoholics.

Imprisonment is not treatment for drug addiction or alcoholism. 18

USC §3553(a)(2)(D) tells us that providing correctional treatment in the most effective manner is a goal of sentencing. Imprisonment is not treatment for alcoholism. 18 USC § 3582 (a) provides, "The court, in determining whether to impose a term of imprisonment, and if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. ..."

Treating the addict's relapse as a crime disregards the fundamental nature of his addiction. This court should require district courts promote treatment of addicts by only upholding revocations for drug crimes when those crimes are expressly alleged.

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Conclusion

For the foregoing reasons This court should grant certiorari.

Respectfully Submitted,
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Appendix

Court of Appeals Opinion: *United States v Shockey* 941 F3rd 281 (7th Cir 2019)