

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

DAVID SMITH-GARCIA, formerly known as David Garland Atwood, II,
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60021

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred by ordering two terms of imprisonment to run consecutive in the subject third supervised release revocation proceeding when only one term of supervised release was ordered at the previous first revocation proceeding.
2. Whether the Fifth Circuit Court of Appeals erred in its application of plain error review.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

In the case from which the subject supervised release revocation proceeding arises, Mr. Smith-Garcia was convicted in the United States District Court for the Southern District of Mississippi on April 1, 2005, of wire fraud under 18 U.S.C. 1343 (Count Two) and one count of enticement of a minor pursuant to 18 U.S.C. 2422(b) (Count Eight). The district court sentenced him to serve 63 months imprisonment of both counts, to run concurrently, and 60 months supervised release on both counts, also to run concurrently (ROA. 130). The other counts were dismissed, and Smith was released from imprisonment on January 23, 2009.

On March 23, 2010 Smith's supervised release was revoked for the first time for violating two conditions of supervision. He was sentenced to serve a single five-month term of imprisonment to be followed by a single term of 55 months supervised release (ROA. 144). The judgment was silent on whether the 55-month term of supervised release was to be discharged under Count Two or Count Eight of the original indictment. A copy of the Revocation Judgment is attached hereto as Appendix 1.

Smith's supervised release was revoked for a second time in 2013 (ROA. 317). The district court sentenced Smith on March 29, 2013 to 36 months imprisonment on both Counts Two and Eight of the indictment, to run consecutive for a total of 72 months, followed by 19 months supervised release under Count

Two and life supervised release under Count Eight (ROA. 555). Smith filed an appeal to the Fifth Circuit (#13-60313) and a subsequent 2255 petition (# 18-60022) but both were affirmed.

Smith was released from imprisonment in April 2017, but his supervised release was revoked for a third time on December 20, 2017. Smith was sentenced to 36 months each as to Counts Two and Eight of the original indictment, to run consecutively for a total of 72 months, to be followed by a single life term of supervised release on Count Eight (ROA. 1358).

Mr. Smith appealed the sentence ordered by the district court, and the Fifth Circuit affirmed the lower court's rulings. Both the Fifth Circuit's Opinion and its Judgment were filed on February 13, 2020. The Opinion and Judgment are attached hereto as Appendix 2.

On February 27, 2020, Mr. Smith filed a Petition for Rehearing En Banc in the Fifth Circuit. The Fifth Circuit denied the Petition on April 1, 2020. A copy of the denial Order is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on February 13, 2020. On April 1, the Fifth Circuit entered an Order denying Mr. Smith's Petition for Rehearing En Banc. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Order denying the Petition for Rehearing En Banc, as required by Rules 13.1 and 13.3 of the Supreme Court Rules and this Court's Covid-19 Order of March 19, 2020. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

(a) Imposition of concurrent or consecutive terms.--If 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. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3584(a)

(e)(3) ... a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation...more than 3 years in prison if the offense that resulted in the term of supervised release is a class B felony...

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.- -If the defendant -(1) possesses a controlled substance in violation of the condition set forth in subsection (d);... the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment authorized under subsection (e)(3).

(k)...[T]he authorized term of supervised release for any offense under section 1201 involving a minor victim...is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense...for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. § 3583(e)(3), (g), (k)

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a supervised release revocation proceeding initiated against Mr. Smith. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges and conviction for which Mr. Smith was serving a period of supervised release arose from the laws of the United States of America.

B. Statement of material facts.

Mr. Smith's two underlying counts of conviction in this case were entered in 2005. His first revocation proceeding was in 2010, the second was in 2013 and the instant revocation proceeding was in 2017.

As to the term of incarceration ordered at the initial revocation proceeding in 2010, the Judgment states in relevant part: "The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: five (5) months[.]" As to supervised release, the Judgment states: "Upon release from imprisonment, the defendant shall be on supervised release for a term of: fifty-five (55) months[.]" (ROA.144). For reasons that are pertinent to Mr. Smith's legal argument below, it is important to note that only a **single** term of supervised release was ordered at the initial revocation proceeding in 2010. The

judgment was silent on whether the 55-month term of supervised release was to be discharged under Count Two or Count Eight of the original indictment.

Smith's supervised release was revoked for a second time in 2013 by a different judge (ROA. 317). The district court sentenced Smith on March 29, 2013 to 36 months imprisonment on both Counts Two and Eight, to run consecutive for a total of 72 months, followed by 19 months supervised release under Count Two and life supervised release under Count Eight (ROA. 555).

Smith's attorney at the 2013 revocation hearing did not raise an objection to Smith being sentenced to consecutive terms of imprisonment after having only been sentenced to one single term of supervised release in 2010. Smith filed a direct appeal to the Fifth Circuit (#13-60313), but his revocation judgment and sentence were affirmed in September 2014.

Smith's supervised release was revoked a third time in 2017 and the district court again imposed two statutory maximum consecutive sentences of 36 months for a total of 72 months, to be followed by lifetime supervised release (ROA.1358). On appeal of that revocation, Smith specifically raised the issue of him serving illegal consecutive sentences after having only one term of supervised release imposed in 2010.

The United States Court of Appeals for the Fifth Circuit affirmed Smith's sentence, reasoning that even if the 2013 sentence was illegal, any attack on the

2017 sentence would be an attack on the 2013 judgment, and that Smith could not meet the "plain error" standard. This panel decision, however, creates a circuit split, constitutes multiple intra-circuit conflicts, is at odds with precedent from the Supreme Court, and presents numerous issues of exceptional importance. This Petition for Writ of Certiorari followed.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

One of the factors considered in the decision to grant or deny certiorari is whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]” Sup. Ct. R. 10(a). The first issue presented for review in this case – whether the district court erred by ordering two terms of incarceration to run consecutive in the subject supervised release revocation proceeding when only one term of supervised release was ordered at the previous revocation proceeding – fits squarely into Supreme Court Rule 10(a).

Under Seventh Circuit law, multiple supervised release revocation sentences **cannot be ordered** unless multiple periods of supervised release were ordered during the prior revocation proceeding. *See United States v. Eskridge*, 445 F.3d 930, 934-35 (7th Cir. 2006). The Third Circuit held the same in *United States v. Dillon*, 725 F.3d 362, 369 (3d Cir. 2013), and the Eleventh Circuit held the same in *United States v. Starnes*, 376 Fed. Appx. 942 (CA11 2010).

In Mr. Smith’s case, the Fifth Circuit’s ruling is diametrically opposed to the ruling of the Seventh Circuit in *Eskridge*, the Third Circuit in *Dillon* and the Eleventh Circuit in *Starnes*. That is, the Fifth Circuit affirmed multiple consecutive revocation sentences when Mr. Smith was ordered to serve only a

single period of supervised release during the prior revocation proceeding. The specifics of this argument are presented under the following heading of this Petition.

Unfortunately, people convicted of federal crimes often suffer supervised release revocation proceedings more than once during their periods of supervised release. Any time that the defendant facing supervised release revocation has two or more underlying counts of conviction, the same scenario that arose in Mr. Smith's case in the Fifth Circuit, in *Eskridge* in the Seventh Circuit, in *Dillon* in the Third Circuit and in *Starnes* can occur again. And when that happens, inconsistent sentences among the circuits can again occur. By granting certiorari, this Court can end the conflict among circuits and provide a measure of consistency in the supervised release revocation sentencing process.

B. The district court erred by ordering two terms of imprisonment to run consecutive in the subject third supervised release revocation proceeding when only one term of supervised release was ordered at the previous first revocation proceeding.

This issue focuses on whether the district court had legal authority to order two separate sentences as a result of the subject violations of conditions of supervised release. When a defendant is first convicted of multiple counts, the sentencing court may order multiple terms of imprisonment to run either concurrently or consecutively, and may also order multiple terms of supervised release to run either concurrently or consecutively. *See* 18 U.S.C. § 3584(a).

Another scenario arises when a district court faces a sentencing decision at a second or subsequent supervised release revocation hearing. At such a hearing, multiple revocation sentences cannot be ordered unless multiple periods of supervised release were ordered during the prior revocation proceeding. *See United States v. Eskridge*, 445 F.3d 930, 934-35 (7th Cir. 2006). This is true even if the underlying criminal conviction is for multiple counts and separate sentences were ordered for each count. *Eskridge* is further analyzed below, but we must first summarize the relevant facts of Mr. Smith's case.

The Judgment in a Criminal Case on which Mr. Smith's underlying conviction is based was filed in the United States District Court for the Southern District of Mississippi on April 1, 2005. Mr. Smith was convicted of wire fraud (Count 2) and enticement of a minor (Count 8), and received two sentences of 63 months in prison on each count, to run concurrently for a total of 63 months in prison. He also received two supervised release sentences of five years on each count, to run concurrently for a total of 5 years.

After his release from prison on the underlying convictions, Mr. Smith began his period of supervised release. On April 1, 2010, his supervised release was revoked and a Revocation Judgment was entered. As to the period of supervised release ordered at the 2010 hearing, the initial Revocation Judgment states: "Upon release from imprisonment, the defendant shall be on supervised

release for a term of: fifty-five (55) months[.]” It is important to note that under this plain language, only one term of supervised release was ordered at the initial revocation hearing.

The instant and third revocation hearing occurred on December 20, 2017. The sentencing judge ordered, as he did in the second hearing in 2013, that Mr. Smith be imprisoned for two statutory maximum consecutive sentences of 36 months for a total of 72 months, to be followed by lifetime supervised release (ROA.1358).

Under these facts, we can now analyze whether the district court had authority to order two separate revocation sentences at the subject revocation hearing. We begin by analyzing the facts and holdings in *Eskridge*, a case in which the Seventh Circuit vacated the district court’s supervised release revocation sentence.

The procedural posture of *Eskridge* leading up to his appeal follows:

William Eskridge was convicted in 1992 of federal crimes and was sentenced to two consecutive prison terms to be followed by two concurrent 36-month terms of supervised release. He violated the terms of his supervised release in 2002, 2004, and 2005, and each time was sent back to prison. He appeals from the imposition in 2005 of a 22-month prison term on the basis of his latest violation.

Eskridge, 445 F.3d at 931.

At issue in *Eskridge* was whether, during the third revocation hearing in 2005, the district judge ordered more prison time than was allowed by statute.

Eskridge, 445 F.3d at 933-34. To answer this question the Seventh Circuit had to analyze whether, at the first revocation hearing in 2002 and the second revocation hearing in 2004, the district ordered single sentences or two sentences to be served concurrently.¹ *Id.* This was the pivotal factual issue because if the district judge ordered a single term of supervised release during the prior revocation hearings, then the 22-month sentence ordered at the 2005 revocation hearing was more than what was allowed by statute. *Id.* If, on the other hand, the district judge ordered two terms of supervised release to run concurrently during the prior revocation hearings, then the 22-month sentence ordered at the 2005 revocation hearing was within what was allowed by statute. *Id.*

To resolve the issue, the *Eskridge* court looked to the language of the 2002 revocation judgment and the language used by the sentencing judge at the revocation hearing. Both indicated that the sentencing judge ordered “a term” of supervised release. *Eskridge*, 445 F.3d at 935. Based on this plain language, the Seventh Circuit found that only a single term of supervised release was ordered at the 2002 revocation hearing. *Id.* The court went on to hold that this meant “that the [sentencing] judge *could not impose consecutive ... terms of imprisonment*

¹ The parties did not dispute that the underlying judgment of conviction imposed two sentences to be run concurrently. The issue was whether the judge ordered two sentences to be run concurrently at the first two revocation hearings. *Eskridge*, 445 F.3d at 934 (stating “[w]hen Eskridge’s supervised release was first revoked in 2002, the district judge was revoking concurrent terms of supervised release because that is what he had imposed at his original sentencing.” (emphasis added)).

when Eskridge again violated the terms of his supervised release.” *Id.* (emphasis added); see also *United States v. Dillon*, 725 F.3d 362, 369 (3d Cir. 2013) (holding “[w]e join the Court of Appeals for the Seventh Circuit and hold that where, as here, a district court’s sentence includes ‘a term’ of supervised release, the court may not sentence the defendant to multiple terms of reimprisonment and/or supervised release upon a subsequent revocation of supervised release.”). The sentence was vacated and the case was remanded to district court for resentencing. *Id.*

The holdings in *Eskridge* apply to resolving the issue in Mr. Smith’s case. The issue in both cases hinges on whether the district court had authority to order multiple sentences at a subsequent revocation hearing when the district court ordered only a single term of supervised release at a prior revocation hearing.

Under the well-developed legal rationale stated in *Eskridge*, if the sentencing court ordered “a term” of supervised release at Mr. Smith’s initial supervised release revocation hearing in 2010, then the court had no authority to order two terms of incarceration at the instant revocation hearing in 2017. To determine what the sentencing court ordered, we again look to the language of the initial Revocation Judgment to determine whether one or multiple terms of supervised release were reimposed. The initial Revocation Judgment states: “Upon release

from imprisonment, the defendant shall be on supervised release for *a term* of: fifty-five (55) months[.]”

This plain language proves that the sentencing court in Mr. Smith’s case ordered only one term of supervised release at the 2010 revocation hearing. So the court was prohibited from ordering two terms of imprisonment at the subject revocation hearing in 2017. It erred by doing so.

More important to the issue of granting certiorari, the decision by the sentencing court and the Fifth Circuit’s affirmation of the lower court is in direct conflict with the law of the Seventh Circuit (*see supra, Eskridge*), the Third Circuit (*see supra, Dillon*), and the Eleventh Circuit (*see supra, Starnes*). Granting certiorari in this case will provide consistency among the circuits and will ensure that defendants are not subjected to disparate sentencing rulings.

C. The Fifth Circuit Court of Appeals erred in applying plain error review.

(a) The Appellate Court ruled that Smith didn't object to the sentence in the district court. However, a detailed review of the record demonstrates otherwise. Smith informed the court that "Judge Bramlette... only imposed “A TERM” of 55 months supervised release" (ROA.3747) and that any consecutive sentences over 36 months would be beyond the statutory maximum (ROA. 3758, 3866, 3912, 3913, 3915, 3936).

This was a sufficient objection to apprise the district judge of the error and the Appellate Court should not have reviewed under plain error. (*United States v. Ocana*, 204 F.3d 585, 589 (CA5 2000) and *United States v. Krout*, 66 F.3d 1420, 1434 (CA5 1995). See also *Holguin-Hernandez v. United States*, 140 S.Ct. 762 (2020), which reversed the Fifth Circuit by holding that so long as “a criminal defendant advocates for a sentence shorter than the one ultimately imposed,” he sufficiently preserves his claim on appeal that a longer sentence is unreasonable, thus insulating the defendant from plain error review.

(b) The Appellate Court ruled that Smith's argument about the impropriety of the consecutive sentences fails because he couldn't show that it was error "under current law" and "not subject to reasonable dispute." However, every other circuit to address this issue ruled precisely in Smith's favor. And there are no circuit split on this issue-- except the one now created by the Fifth Circuit Court of Appeals.

The Fifth Circuit can look to other Circuits to find clearly established law. (*Lincoln v. Turner*, 874 F.3d 833, 850 (CA5 2017)). Because the Third, Seventh, and Eleventh Circuits have all squarely addressed these exact issues, it is "clear" and "plain" that the district court erred in imposing consecutive sentences. The Appellate Court's failure to find clear law in the other circuits is error.

VI. CONCLUSION

This Court should grant Mr. Smith's Petition for Writ of Certiorari.

Granting certiorari will cure the inconsistency in the supervised release revocation sentencing law in the Fifth Circuit, as compared to the law in the Third, Seventh and Eleventh Circuits.

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