

APPENDIX

<i>United States v. Thompson</i> , 813 F. App'x 918 (No. 19-4807) (4th Cir. 2020)	1a
<i>United States v. Thompson</i> , 924 F.3d 122 (No. 18-4100) (4th Cir. 2019).	3a
18 U.S.C. § 3583.	14a
18 U.S.C. § 3624(e).	18a

813 Fed.Appx. 918 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.

Phillip Jazir THOMPSON, a/k/a Dashawn Andre Saunders, a/k/a Phillip Thompson, a/k/a Jonathan Bellamy, Defendant - Appellant.

No. 19-4807

Submitted: June 11, 2020

Decided: July 31, 2020

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. [Henry E. Hudson](#), Senior District Judge. (3:03-cr-00420-HEH-1)

Attorneys and Law Firms

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Before [GREGORY](#), Chief Judge, [THACKER](#) and [HARRIS](#), Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

***919** Phillip J. Thompson appeals from the district court's order re-imposing a 30-month sentence upon revocation of his

supervised release after remand following this court's opinion in [United States v. Thompson](#), 924 F.3d 122 (4th Cir. 2019). Finding no error, we affirm. Thompson pled guilty, pursuant to a plea agreement, to drug and firearms offenses in 2004 and was sentenced to 180 months' imprisonment, followed by 5 years of supervised release. The judgment included a special provision of supervision that Thompson, a citizen of Jamaica, would be remanded to the custody of the U.S. Marshal Service after he completed his term of imprisonment and surrender to the Bureau of Immigration and Customs Enforcement ("ICE") for deportation proceedings. The special condition also stated that Thompson was not permitted to reenter the United States without the express permission of the United States Attorney General and, if he did so within the period of his supervised release, he was required to report to the probation office within 72 hours.

Thompson's term of supervised release commenced in June 2010; he was deported later that month. Thompson illegally reentered the United States in 2011, and he was arrested by ICE and charged with reentry after deportation. On May 25, 2011, he was again removed from the United States. In July 2011, the probation officer filed a petition seeking revocation of Thompson's supervised release, alleging that Thompson violated a mandatory condition—committing a crime by illegally reentering—and the special condition by reentering without express permission by the Attorney General.

In 2014, law enforcement became aware that Thompson had again illegally reentered the United States; he was finally arrested in June 2017. In September 2017, the probation officer filed an addendum to the unadjudicated 2011 petition on supervised release including allegations that Thompson had committed additional crimes during his term of supervised release including a second illegal reentry, conspiracy to distribute and possess with the intent to distribute marijuana, and conspiracy to commit money laundering. Thompson objected to the district court's jurisdiction, arguing that his five-year term of supervised release had expired in 2015.

Relying on [United States v. Buchanan](#), 638 F.3d 448 (4th Cir. 2011), the district court held that Thompson's five-year term of supervision was tolled from the time he absconded from supervision—when he returned to the United States and failed to report to probation within 72 hours as required by the conditions of his supervision. The court concluded that December 2014 was the appropriate start date for tolling and

that his supervised release remained tolled until his January 2018 revocation hearing. Thompson appealed.

We agreed that, applying the fugitive tolling doctrine in *Buchanan*, Thompson's supervised release period stopped running in December 2014, with six months remaining of the five-year term. However, we concluded that the district court erred in determining that Thompson's supervised release remained tolled until his revocation hearing. Rather, we concluded that fugitive tolling stopped upon his arrest in June 2017. Accordingly, we vacated the *920 judgment and remanded for the district court to consider other possible bases of jurisdiction. *United States v. Thompson*, 924 F.3d 122, 127 (4th Cir. 2019).

On remand, the district court concluded that Thompson's supervised release period was tolled from the time of his June 2017 arrest until his revocation hearing in January 2018 pursuant to 18 U.S.C. § 3624(e) (2018). Citing the recent Supreme Court decision in *Mont v. United States*, — U.S. —, 139 S. Ct. 1826, 204 L.Ed.2d 94 (2019), the district court held that Thompson's supervised release remained tolled while awaiting disposition of pending charges. The court then reinstated Thompson's 30-month sentence. Thompson appeals.

We “review de novo a challenge of a district court's jurisdiction to rule upon alleged violations of supervised release.” *United States v. Winfield*, 665 F.3d 107, 109 (4th Cir. 2012). Thompson argues, first, that this court should not apply the doctrine of fugitive tolling in a supervised

release revocation proceeding. However, he concedes that this argument is foreclosed by *Buchanan*. See *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016) (recognizing that one panel cannot overrule a decision issued by another panel). Thompson also concedes that the application of the fugitive tolling doctrine to his release term is “law of the case” and may not be revisited in this appeal.

In *Mont*, the Supreme Court held that “[i]n light of the statutory text and context of § 3624(e), pretrial detention qualifies as imprisonment in connection with a conviction if a later imposed sentence credits that detention as time served for the new offense. Such pretrial detention tolls the supervised-release period, even though the District Court may need to make the tolling determination after the conviction.” *Mont*, 139 S. Ct. at 1835 (internal quotation and alteration omitted). Thompson received credit for his time served in custody while awaiting his revocation hearing. Accordingly, we find no error in the district court's finding that it had jurisdiction to revoke Thompson's supervised release and we affirm the judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and would not aid the decisional process.

AFFIRMED

All Citations

813 Fed.Appx. 918 (Mem)

maliciously, but not if she acted in good faith. *See Whitley*, 475 U.S. at 320–21, 106 S.Ct. 1078. As our cases make clear, whether an officer has complied with or, alternatively, violated a relevant use-of-force policy, while not dispositive, is highly relevant to that inquiry. Adherence to a policy, we have explained, “provide[s] powerful evidence that the application of force was tempered and that the officers acted in good faith.” *Williams*, 77 F.3d at 766. So if Detention Center policy calls for the use of a taser to induce inmates to cooperate in efforts to take their pictures, or in similar circumstances more broadly defined, then that would support the officers’ contention that Johnston acted in a good faith effort to enforce discipline. *See id.* If, on the other hand, Johnston was acting in contravention of an applicable use-of-force policy when Brooks was subjected to three taser shocks, then that would tend to suggest the opposite: that she applied force in bad faith and with punitive intent. *See Iko*, 535 F.3d at 240 (relying in part on violation of “Use of Force Directive” to support inference that pepper spray was administered for improper and malicious purpose); *Orem*, 523 F.3d at 447 (relying in part on violation of taser policy to support inference that taser was deployed maliciously).

Nor are we persuaded by the magistrate judge’s apparent rationale that requests for use-of-force policies typically are denied for security reasons. As demonstrated by *Williams*, *Iko*, and *Orem* — along with numerous other cases cited by Brooks — relevant use-of-force policies routinely are considered in excessive-force litigation, including litigation that arises in the prison

context. Accordingly, the magistrate judge erred by denying Brooks’s motion to compel production of relevant policies concerning the use of force against inmates in similar circumstances. Of course, reasonable mechanisms — such as redaction of text that is not relevant to the case — may be permitted in order to limit any purported security concerns.⁹

III.

For the foregoing reasons, we vacate the grant of summary judgment to the defendants on Brooks’s Eighth Amendment claim and the dismissal of Johnston from the case, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS



UNITED STATES of America,
Plaintiff - Appellee,

v.

Phillip Jazir THOMPSON, a/k/a Dashawn Andre Saunders, a/k/a Phillip Thompson, a/k/a Jonathan Bellamy,
Defendant - Appellant.

No. 18-4100

United States Court of Appeals,
Fourth Circuit.

Argued: January 31, 2019

Decided: May 10, 2019

Background: Defendant, who was citizen of Jamaica, was charged with violating

9. Brooks also argues on appeal that the magistrate judge committed reversible error by denying his several motions for the appointment of counsel. Because we grant the relief that Brooks is seeking on his other three claims, the denial of Brooks’s motions for counsel did not cause any prejudice, and therefore this argument is moot. On remand,

however, we suggest that the court consider appointing counsel for Brooks to assist in litigating the case, consistent with applicable local rules and procedures. *See Williams v. Collier*, 357 F. App’x 532, 536 (4th Cir. 2009) (per curiam) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 205 (2d Cir. 2004)).

terms of his supervised release. The United States District Court for the Eastern District of Virginia, Henry E. Hudson, Senior District Judge, 2018 WL 894030, overruled defendant's objections to its jurisdiction and sentenced him to 30 months' imprisonment for violations of his supervised release conditions. Defendant appealed.

Holdings: The Court of Appeals, Pamela Harris, Circuit Judge, held that:

- (1) fugitive tolling doctrine applied to toll defendant's term of supervised release;
 - (2) district court's determination of date that defendant became fugitive, and thereby triggered fugitive tolling, was supported by sufficient evidence;
 - (3) defendant was no longer fugitive, and thus tolling no longer applied, as of date that he was located and arrested; and
 - (4) district court was required to determine in first instance whether additional period of fugitive tolling applied.
- Vacated and remanded.

1. Criminal Law ⚖️1139

Court of Appeals reviews de novo whether the district court had jurisdiction to rule upon alleged violations of supervised release.

2. Sentencing and Punishment ⚖️2010

As a general rule, a district court's power to revoke a term of supervised release or to sanction violations ends when that term expires. 18 U.S.C.A. § 3583(i).

3. Courts ⚖️90(2)

Panels of the Court of Appeals are bound by circuit precedent.

4. Sentencing and Punishment ⚖️1947

"Fugitive tolling doctrine" provides that a term of supervised release is tolled

when a defendant absconds from supervision.

See publication Words and Phrases for other judicial constructions and definitions.

5. Sentencing and Punishment ⚖️1947

Fugitive tolling doctrine applied to toll defendant's term of supervised release, even if defendant made no active and knowing effort to evade adjudication of particular supervised release petition, where defendant, who was citizen of Jamaica, failed to report for supervision when he re-entered United States after his deportation during originally imposed term of supervision, defendant was fully aware that reporting for supervision was condition of his supervised release, and, instead of reporting, defendant actively and consciously concealed himself and used aliases to avoid supervision. 18 U.S.C.A. § 3583(i).

6. Sentencing and Punishment ⚖️1947

Defendant becomes a fugitive, triggering application of fugitive tolling doctrine to term of supervised release, when he absconds from supervision; it is the flight from supervision, not from a particular supervised release petition or charge, that counts. 18 U.S.C.A. § 3583(i).

7. Sentencing and Punishment ⚖️1947

Defendant does not become a "fugitive," and thereby trigger application of fugitive tolling doctrine to term of supervised release, by virtue of missing a meeting with a probation officer, or simply because he violates a condition of supervised release. 18 U.S.C.A. § 3583(i).

See publication Words and Phrases for other judicial constructions and definitions.

8. Sentencing and Punishment ⚖️2018

Burden is on the government to establish facts that justify fugitive tolling of

term of supervised release. 18 U.S.C.A. § 3583(i).

9. Sentencing and Punishment ⇌1947

Government must establish the starting date of the tolling period for term of supervised release pursuant to fugitive tolling doctrine. 18 U.S.C.A. § 3583(i).

10. Sentencing and Punishment ⇌2021

District court's determination of date that defendant became fugitive, and thereby triggered fugitive tolling of term of supervised release, was supported by sufficient evidence, including police officer's testimony that defendant returned to United States and was in California, organizing multiple shipments of marijuana to Virginia, six months before his supervised release term was to end, probation officer's testimony that defendant obtained driver's license and cell phone number in California, leased car, and was residing with girlfriend in Florida two years after he returned, during which time defendant was failing to report to probation and instead used aliases to avoid detection. 18 U.S.C.A. § 3583(i).

11. Sentencing and Punishment ⇌1947

Defendant was no longer fugitive, and thus tolling no longer applied to term of supervised release, as of date that defendant was located and arrested and thereby returned to supervision. 18 U.S.C.A. § 3583(i).

12. Sentencing and Punishment ⇌1947, 2010

District court was required to determine in first instance whether additional period of fugitive tolling applied to supervised release term of defendant, who was citizen of Jamaica, so as to extend court's jurisdiction to sanction defendant's violation of supervised release condition in failing to report for supervision after his re-entry to United States following deporta-

tion; contrary to district court's determination, defendant's status as fugitive did not extend to revocation hearing, but rather ended when he was located and arrested, which meant defendant's undisputed six-month period of fugitive status ended one month before revocation hearing, but court would be allowed to consider evidence of defendant's earlier re-entry and potential additional period of fugitive status. 18 U.S.C.A. § 3583(i).

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:03-cr-00420-HEH-1)

ARGUED: Patrick L. Bryant, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Aidan Taft Grano, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. ON BRIEF: Jeremy C. Kamens, Federal Public Defender, Alexandria, Virginia, Nia A. Vidal, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Richmond, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Before GREGORY, Chief Judge, and THACKER and HARRIS, Circuit Judges.

Vacated and remanded by published opinion. Judge Harris wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

PAMELA HARRIS, Circuit Judge:

Phillip Jazir Thompson, a native of Jamaica, was sentenced to a five-year term of supervised release. A special condition of that release prohibited Thompson, once deported, from returning to the United

States without permission and required, if he did reenter, that Thompson report promptly to probation. Six months before his supervised release term was to end in June of 2015, Thompson returned to the United States without permission, did not report to probation, and instead used an alias to avoid detection for several years.

When Thompson finally was apprehended in 2017 and charged with violating the conditions of his supervised release, he argued that the government was too late: Because his five-year supervised release term had expired in 2015, the district court was without jurisdiction to sanction any violations. The district court disagreed, holding that the term of Thompson's supervised release was tolled when Thompson became a fugitive, actively concealing himself from probation while residing in the United States. The court went on to sentence Thompson to 30 months' imprisonment for violations of his supervised release conditions.

On the main issue presented by this appeal, we agree with the district court: The doctrine of fugitive tolling applies in this case, extending the period of time during which the district court was authorized to sanction Thompson's violations. Questions remain, however, about the precise duration of that tolling, and whether the fugitive tolling doctrine or some other legal provision authorized the district court to impose sanctions in January of 2018. Accordingly, we vacate the district court's supervised release order and remand for further proceedings.

I.

A.

At the heart of this case is a five-year term of supervised release to which Phillip Jazir Thompson was sentenced in 2004, after pleading guilty to drug and weapons

charges. The term began on June 16, 2010, when Thompson completed a 180-month prison sentence on the same charges, and was to expire on June 16, 2015.

Approximately two weeks after the start of his supervised release term, Thompson, a citizen of Jamaica, was deported. Under a special condition of his supervised release, Thompson could not return to the United States for the remainder of his term without the express permission of the Attorney General. So long as he remained outside the country, Thompson had no reporting obligations. But if he returned to the United States for any reason, then Thompson was required "to report to the nearest United States Probation Office within 72 hours of arrival." J.A. 15.

On two separate occasions and notwithstanding that special condition, Thompson reentered the United States without permission. First, on April 16, 2011 – ten months after his supervised release term began – Thompson was taken into custody in California. A little over a month later, on May 25, 2011, Thompson was deported for a second time. Thompson's probation officer subsequently filed a petition in July of 2011, alleging that Thompson had violated his supervised release conditions – both a mandatory condition prohibiting the commission of any crime (here, the offense of illegal reentry after being deported) and the special condition prohibiting reentry without permission. Based on that petition, the district court entered a warrant for Thompson's arrest.

By December of 2014 – six months before Thompson's supervised release term was to end in June of 2015 – Thompson had returned to the United States for a second time. As law enforcement agents later learned, while in the United States under an assumed name, Thompson was organizing marijuana shipments from California to Virginia and routing payments

for those shipments through various bank accounts. What Thompson was not doing was reporting to probation: Despite knowing of the special condition of his supervised release, Thompson never informed probation that he was in the United States.

Because Thompson was using an alias, law enforcement agents were unable to locate him until June of 2017, when they arrested him in Florida. By then, the date on which Thompson's supervised release term was due to expire – June 16, 2015 – had come and gone. Thompson's probation officer nevertheless filed an addendum to her earlier supervised release petition, in September of 2017, alleging that Thompson again had violated the mandatory condition against commission of a crime, this time by engaging in drug and money laundering offenses as well as by illegally reentering the country.

B.

In January of 2018, the district court convened a hearing to consider the supervised release violations alleged in the July 2011 petition and September 2017 addendum. Before the court could reach the merits, however, Thompson challenged its jurisdiction. District courts, as Thompson noted, generally do not have jurisdiction to sanction supervised release violations once a supervised release term has expired. *See* 18 U.S.C. § 3583(i) (the power of the court to sanction supervised release violations “extends beyond the expiration of the term of supervised release” only in limited circumstances). And because his term had expired as scheduled on June 16, 2015, Thompson argued, the court could not adjudicate his alleged violations almost three years later, in January of 2018.

The government disagreed, arguing that Thompson's supervised release term in fact had *not* expired in June of 2015. Instead, under the fugitive tolling doctrine

recognized by our court in *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011), Thompson's five-year term was tolled when Thompson absconded from supervision, returning to the United States but failing to report to probation within 72 hours as required by the conditions of his release.

In support, Officer Timothy Walker of the Richmond Police Department testified that Thompson had returned to the United States no later than December 2014 – six months before his supervised release term was to end in June of 2015 – by which point he was in California, shipping marijuana to Virginia. According to the officer, Thompson had secured a cell phone number and California driver's license under an alias. He also had leased a car, and in August 2016 had started living with his girlfriend, now in Florida. Thompson's probation officer also testified, explaining that Thompson never contacted a probation officer, and that probation learned of his return to the United States only after his arrest in June of 2017. Thompson, for his part, contested none of those facts. Instead, he argued that they were not enough to make him a “fugitive” for purposes of the fugitive tolling doctrine.

Based on this undisputed evidence, the district court held that fugitive tolling applied to Thompson's term of supervised release, extending the court's jurisdiction beyond the original expiration date of June 16, 2015. During his supervised release term, the court found, Thompson “was in the country yet failing to report for supervision,” in violation of conditions of which Thompson was fully aware. J.A. 111. And the evidence presented by the government, the court determined – in particular, evidence of Thompson's aliases – was “more than sufficient to support a finding that [Thompson] actively and consciously concealed himself to avoid

detection,” thus “willfully creat[ing] the circumstances under which he was absent from supervision.” *Id.* (internal quotation marks omitted). That was enough, the court concluded, to make “fugitive tolling . . . available to stop the clock on [Thompson’s] supervised release” term. J.A. 112 (internal quotation marks omitted).

The court then turned to the question of timing. The precise date on which Thompson reentered the country after his 2011 deportation was “admittedly unclear,” the district court explained, *id.*, with some evidence indicating Thompson’s presence as early as 2013. That made it “difficult to pinpoint the exact date” on which Thompson could be “deemed to have absconded from supervised release.” *Id.* The court ultimately identified December of 2014 as the starting date for tolling, based on Officer Walker’s testimony that Thompson had returned to the United States no later than that month. So in December of 2014, with six months to go until Thompson’s supervised release term was to end in June of 2015, the “clock stopped” on that term. And it remained stopped, the court explained, through June of 2017 – when Thompson was arrested – and then never restarted, because Thompson never was returned to supervision after his 2017 arrest. Accordingly, the court concluded, Thompson’s supervised release term was still in effect, giving the court jurisdiction over Thompson’s alleged violations.

After the court rejected Thompson’s challenge to its jurisdiction, Thompson admitted to committing the violations alleged in the July 2011 petition and September 2017 addendum. At the close of the hearing – in January of 2018 – the district court revoked Thompson’s supervised release term and sentenced him to 30 months’ imprisonment. This timely appeal followed.

II.

[1] The sole question on appeal is whether the district court correctly concluded that it had the authority in January of 2018 to adjudicate alleged violations of a supervised release term that was set to expire in June of 2015. We “review[] de novo whether the district court had jurisdiction to rule upon alleged violations of supervised release.” *United States v. Harris*, 878 F.3d 111, 115 (4th Cir. 2017).

We are in substantial agreement with the district court in this case. Specifically, we agree that Thompson’s supervised release term was tolled under the fugitive tolling doctrine, extending the court’s jurisdiction beyond the original end of Thompson’s term in June of 2015. On this record, however, we are unable to determine whether that tolling – or some other legal provision – continued to provide the court with jurisdiction in January of 2018, when Thompson was sanctioned for violations of his supervised release. We therefore remand to the district court so that it may make the findings necessary to resolve that question.

A.

[2, 3] According to Thompson, the district court’s jurisdiction to sanction his supervised release violations expired on June 16, 2015, along with his term of supervised release. As a general rule – and this much is undisputed – a district court’s power to revoke a term of supervised release or to sanction violations ends when that term expires. *See* 18 U.S.C. § 3583(i). And here, Thompson argues, there is no ground for extending that expiration date, because he was not a “fugitive” under the fugitive tolling doctrine.¹ Only an active and know-

1. Thompson also argues that *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011), in

ing effort to evade adjudication of a supervised release petition, Thompson contends, is sufficient to trigger the fugitive tolling doctrine, and because he never became aware of the July 2011 petition filed against him – having been deported two months prior, in May – he does not fit the bill. Like the district court, we disagree.

[4] The fugitive tolling doctrine, as we recognized in *Buchanan*, provides that “a term of supervised release is tolled when a defendant absconds from supervision.” 638 F.3d at 455. That is so, we explained, for two primary reasons, neither of which has anything to do with a defendant’s awareness of an outstanding petition against him. First, Congress “inten[ded] . . . defendants to serve their full [supervised] release term.” *Id.* When that term includes a supervision requirement – as Thompson’s did, once he reentered the United States – then a defendant’s fugitive status, by precluding supervision, means that the term is not being served as intended. Tolling addresses that problem by “ensur[ing] that, upon being apprehended, the defendant will be subject to judicial supervision for a complete term.” *Id.* at 458. Second, just as an escaped prisoner’s sentence is not credited for the time the prisoner spends out of custody, we reasoned, a supervised release term should not be credited for time that a defendant, “by virtue of his own wrongful act,” spends out of supervision. *Id.* at 454, 455 (internal quotation marks omitted). Fugitive tolling, in other words, prevents a situation in which we “reward an absconder for his misconduct,” allowing a fugitive defendant to run out the clock on his release term while

which we recognized the doctrine of fugitive tolling as applied to supervised release sentences, was wrongly decided, and that supervised release sentences never should be tolled on the basis of fugitive status. But as Thomp-

refusing to submit to supervision. *Id.* at 455.

[5] Under that reasoning, as the district court concluded, the fugitive tolling doctrine applies to Thompson. The district court found (and Thompson does not dispute) that “while the originally imposed term of supervision was still running, [Thompson] was in the [United States] yet failing to report for supervision” as required by the conditions of his supervised release. J.A. 111. So Thompson did not – as the district court and Congress intended – serve his full term of supervision under the conditions specified in his judgment of conviction. And that failure to serve the full term was the result of Thompson’s own misconduct, in the form of knowingly absconding from supervision: Thompson, as the district court found (and again, Thompson does not dispute), was fully “aware of [the] terms and conditions” of his supervised release and instead of abiding by them, “actively and consciously concealed himself” and used aliases to avoid supervision. *Id.* Those findings are enough, under *Buchanan*, to satisfy the government’s burden of showing that the fugitive tolling doctrine applies, *see United States v. Williams*, 520 F. App’x 617, 618 (9th Cir. 2013) (“In the revocation proceedings below, it was the government’s burden to prove the facts surrounding both periods of fugitive tolling.”); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (party asserting jurisdiction bears burden of establishing jurisdiction).

[6] Thompson’s contrary position – that only the active and knowing evasion

son recognizes, panels of this court are bound by circuit precedent, *United States v. Prince-Oyibo*, 320 F.3d 494, 498 (4th Cir. 2003), and *Buchanan* governs this case.

of charges in a pending supervised release petition can trigger fugitive tolling – finds no support in *Buchanan*. Under *Buchanan*, a defendant becomes a fugitive for these purposes when he “absconds from supervision,” 638 F.3d at 455; it is the flight from *supervision*, not from a particular petition or charge, that counts. Nor, as Thompson concedes, is there any other court of appeals that has adopted his position. Instead, the Ninth Circuit already has rejected a very similar argument, holding in *United States v. Ignacio Juarez*, 601 F.3d 885 (2010), that a defendant may be a fugitive for tolling purposes even if no warrant against him has issued. It is not the warrant, the Ninth Circuit explained, that triggers tolling; instead, “[f]ugitive tolling begins when the defendant absconds from *supervision* – making it impossible for the Probation Office to supervise his actions.” *Id.* at 890 (emphasis added). Applying that standard – the same one adopted in *Buchanan* – the Ninth Circuit held that the defendant, who, like Thompson, had been ordered to report to his probation officer if he reentered the United States, became a fugitive for purposes of tolling when he reentered the United States but refused to submit to supervision. *Id.* at 886, 890.

[7] Thompson argues that his return to the United States in violation of a supervised release condition cannot be enough to make him a “fugitive,” and that if it were, every minor supervised release violation would become a basis for fugitive tolling. On this point, we agree with Thompson: A defendant does not become a fugitive for tolling purposes by virtue of missing a meeting with a probation officer, or simply because he violates a condition of supervised release. But that is not what happened here. In applying the fugitive tolling doctrine, the district court did not rely on Thompson’s reentry without per-

mission, in violation of his supervised release condition. Nor did the district court label Thompson a fugitive solely because he missed one or even multiple meetings with his probation officer. Instead, the district court found that Thompson had “abscond[ed] from supervision” for several years, J.A. 110 (internal quotation marks omitted), “actively and consciously conceal[ing] himself” through use of aliases and other measures, J.A. 111. It is that sustained and knowing course of conduct, which “precludes the sentencing court from exercising [the] supervision” contemplated by a supervised release term, *Buchanan*, 638 F.3d at 458, that justifies fugitive tolling under *Buchanan*.

B.

Having held, like the district court, that the fugitive tolling doctrine applies, we next address what turns out to be the more difficult aspect of this case: determining when, exactly, Thompson’s supervised release term was tolled, and for how long. Thompson has not challenged the district court’s findings with respect to timing, either before the district court or on appeal. But because those findings implicate the court’s jurisdiction, we address them here. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (“[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”). We conclude that the district court erred in identifying the end date for tolling, and thus vacate the district court’s order and remand so that the district court may consider other possible bases for jurisdiction in this case.

1.

We begin with the question of when fugitive tolling began – that is, at what

point Thompson became a fugitive, so that the clock stopped running on the five-year supervised release term that started on June 16, 2010. As the district court acknowledged, it is unclear when precisely Thompson reentered the country after his 2011 deportation – with some evidence placing him in the United States as early as 2013 – and thus difficult to “pinpoint the exact date” on which Thompson absconded from supervision. J.A. 112. In light of that uncertainty, the district court made a conservative estimate, crediting the testimony of Officer Walker that Thompson had returned to the United States by no later than December of 2014, and found that Thompson became a fugitive by “at least December of 2014,” when he was residing in the United States and concealing himself from probation. *Id.*

[8,9] Under the circumstances of this case, we find no error in the district court’s conclusion. The burden, again, is on the government to establish facts that justify fugitive tolling. *See Williams*, 520 F. App’x at 618. In light of this burden, we generally expect the government to prove up a more precise date for the start of a fugitive tolling period. That date may often be the date on which a warrant issues for the defendant’s arrest based on the defendant’s failure to report when instructed to by a probation officer. Or the government may present evidence that the defendant absconded on another determinable date. *Compare Ignacio Juarez*, 601 F.3d at 890 (noting that the date on which a bench warrant for an absconder is issued “often might” coincide with the date on which a defendant becomes an absconder but that tolling may begin earlier “in a case in which we know that the defendant was a

fugitive at an earlier date” (internal quotation marks omitted)), *with United States v. Island*, 916 F.3d 249, 251, 256 (3d Cir. 2019) (finding that fugitive tolling began upon issuance of arrest warrant despite probation officer’s testimony that defendant ceased required reporting two months earlier, after which defendant’s whereabouts were unknown), *and United States v. Murguia-Oliveros*, 421 F.3d 951, 952, 955 (9th Cir. 2005) (determining that fugitive tolling period began at time of arrest warrant despite evidence that defendant unlawfully reentered United States and failed to report months earlier). Either way, the government must establish the starting date of the tolling period.

[10] In this case, though a robust record is not before us, we are satisfied that the record supports the district court’s finding that by December of 2014 at the outside, Thompson was residing in the United States while taking active measures to conceal his presence and avoid supervision. By then, Officer Walker testified, Thompson had returned to the United States and was in California, organizing multiple shipments of marijuana to Virginia. And there is circumstantial evidence from which the district court could find that Thompson not only entered but also remained in the United States: According to Officer Walker, Thompson obtained a driver’s license and cell phone number in California, leased a car, and, by 2016, was residing with a girlfriend in Florida. Finally, throughout this period, Thompson was failing to report to probation, and instead using aliases to avoid detection by law enforcement and probation. Thompson disputes none of these facts,² and they are enough to justify the district court’s find-

2. Indeed, when probed on this point during oral argument, counsel for Thompson acknowledged that Thompson does not challenge the sufficiency of the evidence showing

that he entered and remained in the United States from at least December 2014 to the date of his arrest in 2017.

ing that Thompson became a fugitive for tolling purposes by December of 2014.

2.

That brings us to the question of when fugitive tolling ended. Thompson’s five-year supervised release term began in June of 2010 and was set to expire in June of 2015. Instead, under the fugitive tolling doctrine, the clock stopped running in December of 2014, with six months still to go on the term. On whatever date fugitive tolling ended, that clock restarted, and the supervised release term continued – and with it, the district court’s jurisdiction – for the remaining six months. *See Buchanan*, 638 F.3d at 458 (explaining that the clock on a defendant’s supervised release term restarts when tolling ends). Whether the district court still had jurisdiction to hold a revocation hearing in January of 2018 turns, in other words, on exactly when tolling ended.

[11] According to the district court, fugitive tolling continued to apply, and the clock on Thompson’s term remained stopped, right through its hearing in January of 2018, because Thompson never was “returned to supervision” by probation. J.A. 112. We cannot agree. *Buchanan* makes clear that fugitive tolling stops when “federal authorities are *capable* of resuming supervision” of the defendant, 638 F.3d at 457 (emphasis added), which means the date on which authorities take the defendant into custody, *id.* at 449, 458 (holding that supervised release term restarted when the defendant was detained by federal authorities). In this case, Thompson was located and arrested in Florida in June of 2017, and so that is the date on which his fugitive status came to an end for tolling purposes.

[12] That presents a problem, because, as explained above, once the clock restart-

ed on Thompson’s supervised release term in June of 2017, Thompson had only an additional six months to go – extending his term and the court’s jurisdiction until December of 2017, or one month *before* the January 2018 revocation hearing. At oral argument, the government conceded the problem, but proposed a solution: Thompson also was a fugitive from supervision, the government argued, when he first reentered the country in 2011, before being taken into custody on April 16 of that year. As a result, the government continued, Thompson’s term was tolled for an additional period of time, so that more than six months remained when Thompson was apprehended again in June of 2017. Indeed, there appears to be evidence that Thompson returned to the United States in March of 2011, before he was detained in April of that year, and the government may be able to establish that fugitive tolling applied during that time as well. But the district court never examined such evidence or made such a finding. Accordingly, we remand so that the district court may consider in the first instance whether Thompson absconded from supervision prior to his April 2011 arrest, and, if so, whether that additional period of fugitive tolling is sufficient to extend the court’s jurisdiction through the January 2018 revocation hearing.

Because the district court believed it could rely on the fugitive tolling doctrine, it also had no occasion to consider two other possible bases for jurisdiction, both of which remain open for the court’s consideration on remand. First, though Thompson was no longer a fugitive once he was apprehended in Florida in June of 2017, his supervised release term may have remained tolled, not under the fugitive tolling doctrine but under 18 U.S.C. § 3624(e), which provides for tolling of a supervised release term while a defendant “is imprisoned in connection with a convic-

tion.” Thompson was imprisoned from the time of his June 2017 arrest through his revocation hearing in January of 2018, and pleaded guilty to and was convicted of several of the crimes for which he was imprisoned. If the district court finds on remand that Thompson’s imprisonment from June of 2017 through January of 2018 was “in connection with a conviction” for purposes of § 3624(e), then Thompson’s supervised release term remained tolled during that period and did not expire prior to the revocation hearing.³

Second, even assuming that no form of tolling suffices to extend Thompson’s supervised release term until January of 2018, the district court still may have retained the power to sanction Thompson’s violations under 18 U.S.C. § 3583(i). As a general rule, as we explained at the start, a district court is without jurisdiction to revoke a supervised release term or sanction violations once the term has expired. But § 3583(i) sets out an exception to that rule, allowing for “[d]elayed revocation” proceedings when two conditions are met: First, a “warrant or summons [must be] issued” before the term’s expiration, and second, any delay in adjudicating that summons must be “reasonably necessary.” 18 U.S.C. § 3583(i). Both the July 2011 petition and the September 2017 addendum charging Thompson with supervised release violations were issued before December 2017, when Thompson’s supervised release term expired under the fugitive tolling doctrine. On remand, the district court may consider in the first instance whether any delay in adjudicating the violations alleged in those petitions was “rea-

sonably necessary” under § 3583(i) in light of Thompson’s fugitive status and other relevant circumstances.

III.

For the foregoing reasons, the district court’s order is vacated, and this case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED



Shudde FATH; Save Barton Creek Association; Friends of the Wildflower Center; Carole Keeton; Frank Cloud Cooksey; Jerry Jeff Walker; Susan Walker; Doctor Laurie Dries; Save Our Springs Alliance, Incorporated; MoPac Corridor Neighbors Alliance; The Friendship Alliance of Northern Hays County, Incorporated; Clean Water Action, Plaintiffs–Appellants

v.

TEXAS DEPARTMENT OF TRANSPORTATION; Central Texas Regional Mobility Authority, Defendants–Appellees

No. 17-50683

United States Court of Appeals,
Fifth Circuit.

FILED July 17, 2018

Background: Environmental groups and local residents brought action against Tex-

3. We have held that a defendant is imprisoned “in connection with a conviction” under § 3624(e) when, like Thompson, he is detained pretrial on charges for which he subsequently is convicted. *United States v. Ide*, 624 F.3d 666, 667 (4th Cir. 2010). But the Supreme Court recently heard argument in a

case challenging that holding. *See Mont v. United States*, No. 17-8995 (argued Feb. 26, 2019). If the Court concludes that a defendant is not “imprisoned in connection with a conviction” until after a judgment of conviction is entered, then § 3624(e) will not fill the temporal gap in this case.

18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days

of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).¹ The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of Conditions or Revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6),

and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) 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 without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(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);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised Release Following Revocation.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after 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.

(i) Delayed Revocation.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised Release Terms for Terrorism Predicates.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, 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 under chapter 109A, 110, or 117, or section 1201 or 1591, 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. § 3624. Release of a prisoner

* * *

(e) Supervision After Release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of failure to pay such fines under sections 3611 through 3614 of this title.