

Docket number

**Supreme Court of the United States**

Christopher Hibshman,  
*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. For violation of supervised release is the imposition of a 24 month sentence consecutive to a 2 year Indiana prison term unreasonable and at odds with considerations required by 18 USC §3583(e) when the Sentencing Guidelines recommend a 7-13 month sentence, no new criminal conduct was found, and the statutory standards for revocation did not include punishment for the violation.

## **2. Parties**

1. Petitioner, Christopher Hibshman
2. Respondent, United States of America.

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Sventh Circuit Opinion *United States v Hibshman* unpublished 21-1934 (7th Cir. January 25, 2022)

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## **Citations Below**

The opinion of the United States Court of Appeals for the Seventh Circuit was decided January 25, 2022 in case No. 21-1934 and is unpublished. A copy is reproduced in the Appendix.

## **Jurisdiction**

The judgment and opinion of the Court of Appeals sought to be reviewed was entered January 25, 2022. 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 January 25, 2022 and on or before Monday April 25, 2022.

## **Constitutional and Statutory Provision Involved**

### **Fifth Amendment**

#### **Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Sixth Amendment**

#### **Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**18 USC § 3584.**

**Multiple sentences of imprisonment**

**(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.

**(b)**

Factors To Be Considered in Imposing Concurrent or Consecutive Terms.—

The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

**(c)**

Treatment of Multiple Sentence as an Aggregate.—

Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2000.)  
CITE AS: **18 USC 3584**

**18 USC §3583 (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) --**

....

**(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**

## **18 U.S. Code § 3553 - Imposition of a sentence**

**(a) Factors To Be Considered in Imposing a Sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;

- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
    - (i) issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28](#), United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and
    - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
  - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28](#), United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));
- (5) any pertinent policy statement—
  - (A) issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28](#), United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[\[1\]](#)
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

## **Statement of the Case**

While serving a one year term of supervised release on December 28, 2020 defendant left his wife's home and stopped communicating with his supervising officer. On March 26, 2021 the officer petitioned the court for a violation of supervised release warrant alleging defendant's failure to report. On April 5, 2021 the defendant was arrested on the violation warrant. At the revocation hearing on May 10, 2021 defendant admitted the failure to communicate with the supervising officer and was sentenced to 24 months imprisonment in the Bureau of Prisons consecutive to a two year Indiana sentence for violation of probation. The Indiana probation violation was triggered by the Federal 18 USC §751(a) Conviction for which the supervised release had been imposed.

The district court calculated the sentencing guidelines as follows: Mr Hibshman's failure to notify the probation officer of his move, his change of address is a Grade C violation under §7B1.1(a)(3) (5/10/21 tr p 15 lines 4-5) . The guidelines recommend that upon a finding of a grade C violation the court may revoke supervised release and or modify the conditions of supervision. Under Section 7B1.4, the guidelines recommend a sentencing range of 7 to 13 months because Mr Hibshman's criminal history was category V at the time of his original offense (5/10/21 tr p 15 lines 5-14) The court

noted, "...your original offense was a Class D Felony, punishable by no more than five years imprisonment, so under Section 3583(c)(3) of title 18 of the United States code, I may not impose a term of imprisonment greater than two years without giving you credit for the time previously served on post-release supervision. (5/10/21 tr p 15 lines 15-20)

The government declined to offer evidence on the application of 18 USC §3553(a) (5/10/21 tr p 16 lines14-17) Defendant called Angela Hibshman. She was married to Christopher Hibshman December 23, 2020. After the marriage he contributed to her support and the support of his step children (tr 5/10/21 p 17 lines 15-20). By April 2021 Mr Hibshman was not home full time (tr 5/10/21 p17-18 lines21-25, 1-9) On December 21, 2020 the Elkhart Superior Court held a probation revocation hearing. Mr. Hibshman's Indiana probation was revoked because he had been convicted in Federal Court of escape. (tr 5/10/21 p19 lines lines 13-18) The Elkhart Superior court sentenced him to two years imprisonment (tr 5/10/21 p 20 lines 6-19).

When Mr. Hibshman completed his in custody sentence for escape, he came home, a life set, ready to go. He had a job at Thor. He did not commit a new crime. He acknowledged he needed help with his drug problem and had contacted Oak Lawn and attended two meetings.

He acknowledged that his wife has been put through a lot and that he had not been around his family since 2011 ( tr 5/10/21 p27 lines 24-25 p 28 lines 1-25) He noted that he plead guilty served his jail time for the escape. (tr 5/10/21 p 28 line 19-22) He said, "I got a violation for changing my addresses,..." (tr 5/10/21 p 29 lines 1-2).

The district court ruled, ... in consideration of all of the factors that I have in front of me in Section 3553(a) it is my determination that a sentence of imprisonment of 24 months should be imposed and that it should be consecutive to the state sentence in 20D03-1108-FC-78. In terms of the appropriate term, that the level of chronicness, the level of persistance, given the duration of the time that defendant ignored federal supervised release obligations, and in particular the need for deterrence under 3553(a)(2)(B) those require in my mind not just a 24 month term but a consecutive 24-month term.(tr 5/10/21 p36 lines 20-25) The court entered a final revocation judgment imposing a 24 month term of imprisonment consecutive to the Indiana sentence of imprisonment and not followed by any term of supervised release.

On appeal the Seventh Circuit held that the 24 month sentence consecutive to a 2 year Indiana probation violation sentence for committing a Federal offense (even though his Federal sentence of imprisonment had been served) was not plainly unreasonable.

## Reasons for Granting the Writ

This Court should adopt a clear standard, founded upon the Acts of Congress, 18 USC §3583(e), §3553 and §3584 for district courts to apply when revoking supervised release and considering the question should imprisonment be consecutive or concurrent.

Application of the statute governing the imposition of concurrent or consecutive sentences, 18 USC § 3584, have been far from uniform among the circuits: compare *United States v Taylor* 628 F3d 420 (7<sup>th</sup> Cir 2010); *McCarthy v Doe* 146 F3d 118 (2<sup>nd</sup> Cir 1998); *United States v Eastman* 758 F2d 1315 (9<sup>th</sup> Cir 1985). The statute 18 USC § 3584 (b) provides, “The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).” In some circuits a sentence imposed upon revocation of supervised release is substantively reasonable if it “is supported by a plausible sentencing rational and reaches a defensible result *United States v Santa-Soler* 985 F3d 93 (1<sup>st</sup> Cir 2021); *United States v Clark* 998 F3d 363 (8<sup>th</sup> Cir 2021). In the Fifth Circuit a revocation sentence is unreasonable if 1) it does not account for a factor that should have

received significant weight; 2) gives significant weight to an irrelevant or improper factor, or 3) represents a clear error of judgment in balancing the sentencing factors *United States v Cano* 981 F 3d 422 (5<sup>th</sup> Cir 2020). The Second Circuit applies a shockingly high or shockingly low test for unreasonableness *United States v Bleau* 930 F 3d 35 (2<sup>nd</sup> Cir 2019). The Tenth Circuit uses the terms arbitrary, capricious, whimsical or manifestly unreasonable in the light of the 3553(a) factors *United States v Williams* 994 F3d 1176 (10<sup>th</sup> Cir 2021).

The Federal Sentencing Commission notes that 72.9 % of sentenced defendants have a term of supervised release imposed. U.S. Sentencing Commission 2020 Source Book of Federal Sentencing Statistics, Table 18 (2020) <https://www.ussc.gov/research/sourcebook> 2020.

The statute on revocation of supervised release 18 USC §3583(e) requires the court to consider the following factors prior to revocation: 1) Section 3553(a)(1) nature and circumstances of the violation and the characteristics of the defendant; 2) (a)(2)(B) afford adequate deterrence to criminal conduct; 3) (a)(2)(C) the need of the sentence to protect the public from crimes of the defendant( ; 4) (a) (2)(D) provide the defendant with necessary services such as education and medical treatment; 5) (a)(4) the Guidelines; 6) (a) (5) Sentencing Commission policy statements; 7) (a)(6) need to avoid

sentencing disparities; 7) (a)(7) restitution. Omitted from the factors to be considered on revocation is the need to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense. Yet viewing the district Court's remarks at sentencing and the repeated attempts of defense counsel to have the court justify the imposition of consecutive imprisonment, the Court's primary purpose was to punish the defendant and lock him up for the statutory maximum on top of the Indiana sentence. Here the Court's view of the seriousness of the offense trumped the Guidelines, the positive characteristics of the defendant or the noteworthy fact that his failure to submit to supervision did not involve the commission of a new offense. The Seventh Circuit excused the district court's reliance on just punishment so long as the sentencing court focuses primarily on the factors that §3583(e) does mention *United States v Dawson* 980 F3d 1156 (7<sup>th</sup> Cir 2020) This Court should adopt a clear standard, founded upon the Acts of Congress, for district courts to apply when revoking supervised release and considering the question should imprisonment be consecutive or concurrent.

## **Conclusion**

For the foregoing reasons This court should grant certiorari.

Respectfully Submitted,

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## **Appendix**

Court of Appeals Opinion