

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOE OCTAVIO GRANADO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,

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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the District Court, in revoking supervised release, excessively sentenced Petitioner with consecutive incarceration from an original concurrent sentences and deprived the Petitioner of liberty within the terms of 18 U.S.C. 3583 (c) and (d).

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IN THE SUPREME COURT OF THE UNITED STATES

JOE OCTAVIO GRANADO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, JOE OCTAVIO GRANADO, Appellant in the United States Court of Appeals for the Fifth Circuit in Case No. 21-50839 consolidated with No. 21-50861 and the Defendant in Case No. MO-14-CR-247-1 and MO-14-CR-153-1, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 2022.

OPINION BELOW

On June 30, 2022, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the verdict guilty returned against Petitioner. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment is attached as Appendix B. A copy of the Judgment from Case No. MO-14-CR-247-1 and MO-14-CR-153-1 is included within Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

18 U.S.C. sec. 3583(d) provides, in part: The Court may order, as a further condition of supervised release, to the extent that such condition-

(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); ...

STATEMENT OF THE CASE

Petitioner had been serving a term of supervised release arising from a convictions in the United States District Court, Western District of Texas. in Case No. MO-14-CR-247-1 and MO-14-CR-153-1, stemming from a 2015 conviction.

In 2014, the United States indicted Petitioner for (1) Conspiracy to Commit Wire Fraud in violation of 8 U.S.C. Secs. 1343 and 1349 and (2) Wire Fraud. On or about March 26, 2015, the Hon. Robert Junell, United States District Judge for the Western District of Texas, sentenced Petitioner to 33 months incarceration and three years of supervised release on each count served concurrently.

A broad outline of the case dispositions is:

<u>Case No.</u>	<u>Offense</u>	<u>Date</u>	<u>Sentence</u>
MO-14-CR-153	Conspiracy, Wire Fraud	032621	33 mos + 3 s/r
MO-14-CR-247	Wire Fraud	032621	33 mos + 3 s/r.

On January 02, 2020, the United States Probation department in Midland Division, Western District of Texas, filed against Petitioner a Petition for Warrant or summons for Offender Under Supervision. The Government raised in the Petition five “C” violation, which are the least serious under the United States Sentencing Guidelines.

The District Court consolidated Case No. MO-14-CR-153 and MO-14-CR-247. At the hearing on the Petition, the Government abandoned allegations one through four and proceeded on allegation five.

Petitioner pleaded “true” to allegation five, which alleged submitting inaccurate monthly supervision reports for the months of September 2019, October 2019; November 2019 and December 2019, by falsely showing him employed by an entity named Sunoco Transports, LLC.

The District court re-sentenced Petitioner to a period of 21 months on each case and terminated supervision. The District Court ordered that the term of incarceration run consecutively.

In the United States Court of Appeals for the Fifth Circuit, Petitioner argued that the consecutive sentencing was multiplicitous and therefore unreasonable under that court’s case United States v. Willis, 563 F.3d 168 (5th Cir. 2009). In Willis the supervisee was sentenced originally concurrently on two cases. As a result of revocation proceedings, that district court ordered consecutive re-sentencing. The Willis Court concluded the sentencing was unreasonable.

In the case *sub judice*, the Court of Appeals did not apply Willis and upheld the re-sentencing.

REASON FOR GRANTING THE WRIT

The District Court erred by imposing punishment involving a greater deprivation of liberty

than is reasonably necessary to achieve the goal of deterrence, incapacitation and rehabilitation.

The Court of Appeals aggravated error by failing to follow the Willis case.

With the Sentencing Reform Act of 1984, Congress eliminated most forms of parole for a system of supervised release. Johnson v. United States, 529 U.S. 53, 59-60 (2000). Post-confine-
ment monitoring is overseen by the sentencing court, rather the Parole Commission. Gozlon-
Peretz v. United States, 498 U.S. 395, 400-401 (1991). The sentencing court is authorized to impose a term of supervised release following imprisonment under 18 U.S.C. sec. 3583(a).

The offender is required to abide by certain conditions, some specified and some discre-
tionary. 18 U.S.C. sec. 3583(d). Upon violation of a condition, the sentencing court may
revoke supervised release and require the person to serve in prison for all or part of a term.
18 U.S.C. Sec. 3583(e)(3).

The purpose of supervised release has been variously described as rehabilitation, deter-
rence, training, treatment, protection of the public and reduction of recidivism. Johnson, 529
U.S. at 59-60. Supervised release was not intended to be imposed for the purposes of punish-
ment or incapacitation, since those purposes will have been served to the extent necessary by the
term of imprisonment. Id. at 59. It is the decompression stage between prison and full release.
Conditions of supervised release can not involve a greater deprivation of liberty than is reason-
ably necessary to achieve goals of deterrence, incapacitation and rehabilitation. Goodwin at 572.

A hearing was had in the United States District Court, Western District of Texas, sitting in
Midland, Texas. The District Judge read into the record the allegations from the Petition for
Warrant for Offender Under Supervision. Petitioner pleaded “true” to the allegations

In employing the plainly unreasonable standard, the United States District Court imposed a

greater imposition on liberty than was necessary to meet the objectives of 18 U.S.C. sec. 3583.

United States v. Olano, 507 U.S. 725 (1993); Puckett v. United States, 556 U.S. 129, 135 (2009).

Error was further compounded by the affirmance of the United States Court of Appeals for the Fifth Circuit.

A district court is directed by 18 U.S.C. sec. 3553(a)(3) and (a)(4)(B) to consider the kinds of sentence available and the applicable sentencing range of the Guidelines or Commission policy statements. United States v. Garza, 706 F.3d 655 (5th Cir. 2013). A special condition must comport with the limits provided in 18 U.S.C. sec. 3583(a). Factors are (1) nature and circumstances of the offense; (2) deterrence; (3) protection of the public; and (4) provision for training, medical treatment and correctional treatment. A revocation sentence must involve no greater deprivation of liberty than is reasonably necessary to serve the purposes of section 3553; United States v. Ellis, 720 F.3d 220, 225 (5th Cir. 2013). The deprivation of liberty implicates constitutional protection. See Calder v. Bull, 390 Dall. (3 U.S.) 386 (1798).

Here the consecutive sentencing is a greater deprivation of liberty than is reasonably necessary to serve its purposes. Accord United States v. Booker, 543 U.S. 270 (2005). The District Court sentenced Petitioner to incarceration in the indicted case and sentenced him to incarceration on the supervision case. The District Court ordered consecutive service of the sentences.

In this case, Petitioner was sentenced by Hon. Robert Junell on March 26, 2014, to 33 months. As part of the sentence, Granado was ordered to serve three (03) years of supervised release. There had been prior court actions, including being sentenced to incarceration in October 2018 for a theft conviction and then administration violations.

A roster of incarcerated sentences shows:

March 2014	33 months	original sentence
October 2017	06 months	supervision violation
October 2018	09 months	supervision violation
August 2021	42 months (21 mos + 21 mos)	supervision violation.

Sentencing for supervision violations total 57 months, which exceeds the original sentence of 33 months. This amount of incarceration is unreasonable for the total time is close to double the original sentence. North Carolina v. Pearce, 395 U.S. 711 (1969).

Therefore, Petitioner requests that the United States Supreme Court grant this Petition for Writ of Certiorari on the ground that the sentencing ordered by the District Court place a greater deprivation on Petitioner's liberty than is necessary.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and prays that the Order Revoking Supervised Release be reversed, and the case be remanded for re-sentencing pertaining to the supervision revocation.

Separately Petitioner prays for such relief, in law or in equity in which she is entitled.

PRAYER FOR RELIEF

Petitioner, JOE OCTAVIO GRANADO, requests that the Petition for Writ of Certiorari be granted for the reasons stated and that the conviction entered against him be vacated and this case remanded for re-sentencing, and such other relief to which Petitioner would be entitled to receive in law or in equity.

Respectfully submitted,

Steve Hershberger, Attorney at Law
600 No. Marienfeld St., Ste. 1035
Midland, TX 79701

432-570-4014

By: /s/ Steve Hershberger
Steve Hershberger
Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A
(Opinion of the United States Court of Appeals, for the Fifth Circuit)

United States Court of Appeals
for the Fifth Circuit

No. 21-50839
CONSOLIDATED WITH
No. 21-50861
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 30, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOE OCTAVIO GRANADO,

Defendant—Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC Nos. 7:14-CR-247-1, 7:14-CR-153-1

Before WIENER, DENNIS, and HAYNES, *Circuit Judges.*

PER CURIAM:*

In these consolidated appeals, Joe Octavio Granado contends that the district court's orders revoking his supervised release and imposing consecutive 21-month terms of imprisonment are substantively

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 21-50839
c/w No. 21-50861

unreasonable. He notes that the total sentence exceeds the length of the original concurrent sentences, that his supervised release violations were Grade C violations, and that the sentences imposed exceed the guidelines range of three to nine months.

Because there was no objection, our review is for plain error. *See United States v. Whitelaw*, 580 F.3d 256, 259 (5th Cir. 2009). Granado “must show an error that is clear or obvious and affects his substantial rights.” *Id.* at 260. If he “makes such a showing, this court has the discretion to correct the error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

Granado asserts that the sentences are multiplicitous. He invokes *United States v. Willis*, 563 F.3d 168, 160-70 (5th Cir. 2009). The holding in *Willis* is limited to its material facts, which differ from those presented by the instant case. *See United States v. Fuentes*, 906 F.3d 322, 326-27 (5th Cir. 2018). We have “routinely affirmed revocation sentences exceeding the advisory range, even where the sentence equals the statutory maximum.” *United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013) (internal quotation marks and citation omitted); *see also* 18 U.S.C. § 3583(e)(3). A district court may impose consecutive terms of imprisonment when it revokes concurrent terms of supervised release. *See United States v. Gonzalez*, 250 F.3d 923, 929 (5th Cir. 2001); *see also* 18 U.S.C. § 3584(a). The district court’s orders are AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 30, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 21-50839 USA v. Granado
USDC No. 7:14-CR-247-1
USDC No. 7:14-CR-153-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

APPENDIX B

(Order Revoking Supervised Release, and Resentencing of Defendant, United States District Court for the Western District of Texas, Midland Division)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

Plaintiff

VS

(1) JOE OCTAVIO GRANADO

Defendant

§
§
§
§
§
§

Case No. MO-14-CR-00153-DC

ORDER REVOKING SUPERVISED RELEASE and
RESENTENCING OF DEFENDANT

On this the August 27, 2021, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on October 25, 2018, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Steve Hershberger. The United States was represented by Assistant United States Attorney, Glenn Harwood.

After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on October 25, 2018, and it is hereby **REVOKE**D and **SET ASIDE** and the Defendant is resented as follows:

The Defendant, JOE OCTAVIO GRANADO, is hereby committed to the custody of the United States Bureau of Prisons to serve a term of imprisonment of Twenty-One (21) months. No further Supervised Release shall be imposed. Term to run consecutive to MO-14-CR-247.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on October 25, 2018, to serve as the commitment of the Defendant.

SIGNED this 31st day of August, 2021.



David Counts
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

Plaintiff

VS

(1) JOE OCTAVIO GRANADO

Defendant

§
§
§
§
§
§

Case No. MO-14-CR-00247-DC

ORDER REVOKING SUPERVISED RELEASE and
RESENTENCING OF DEFENDANT

On this the August 27, 2021, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on October 25, 2018, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Steve Hershberger. The United States was represented by Assistant United States Attorney, Glenn Harwood.

After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of his Supervised Release and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Supervised Release. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Supervised Release of Defendant named above granted by the Judgment entered on October 25, 2018, and it is hereby **REVOKE**D and **SET ASIDE** and the Defendant is resented as follows:

The Defendant, JOE OCTAVIO GRANADO, is hereby committed to the custody of the United States Bureau of Prisons to serve a term of imprisonment of Twenty-One (21) months. No further Supervised Release shall be imposed. Term to run consecutive to MO-14-CR-153.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on October 25, 2018, to serve as the commitment of the Defendant.

SIGNED this 31st day of August, 2021.



David Counts
United States District Judge