No. 22-7802

In the Supreme Court of the United States

JAMES B. NORRIS, JR.
PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. Introduction: the government's mistaken arguments.

The government makes multiple arguments against granting the petition for certiorari in this matter. It fails across the board.

First, it argues that this Court should deny petitioner's petition for writ of certiorari because, were his direct appeal to have been brought in any of the circuits holding the opposite view to the Eighth Circuit's, it would have been affirmed. Such a position is speculative. It ignores the holdings in the circuits across the split from the Eighth Circuit. It ignores the facts of petitioner's case. And, perhaps worst, it ignores the Eighth Circuit's own recognition that it is an outlier (as compared to the six other circuit courts considering the issue) in its position that a district court's denying a motion for early termination or modification of supervised release must give sufficient reasons to permit meaningful appellate review and confidence in sentencing decisions. This argument seems to suggest that, based on its speculative premise that the opposing sister circuits would affirm Petitioner's direct appeal, there is no circuit split at all. Or, at least, that the circuit split is immaterial or unimportant. This position makes no sense and, essentially, removes the "circuit split" as a reasons for granting certiorari, which defies this Court's rules.

Second, the government further minimizes the circuit split, suggesting that "[s]ome circuit disagreement exists concerning whether and to what extent a district court must explain the basis for its denial of a motion to terminate or modify the conditions of supervised relief." Government's Brief in Opposition

("BIO"), p. 12. This statement is inexplicably and utterly inaccurate. There is not some disagreement about whether a district court must explain its denial of a motion for early termination or modification of conditions of supervised release. There is a complete and growing circuit split on this nationally important and recurring issue. On the one hand, the Eighth Circuit contends that neither the applicable statute nor case law necessitates explanation for denial of such a motion. That circuit's position is, therefore, that no requirement is necessary to explain a denial of such a motion, as opposed to a grant thereof. On the other hand, six circuits uniformly require an explanation based not only upon applicable statutes, but also, now, upon a growing consensus of cases for any ruling on a motion for early termination or modification of conditions of supervised release. This uniform group of circuits, wisely, bases that requirement on the need for meaningful appellate review and public confidence in sentencing, a need present no matter whether a district court grants or denies the relevant motion.

Finally, the government argues that, because "[t]his Court denied certiorari in Mosby ... and the decision below simply applied Mosby... the decision below does not break new legal ground in the court below or deepen or alter any circuit disagreement." BIO p. 15. This suggestion is especially quixotic given the fact that two of the current across-the-split decisions occurred subsequent to the Eighth Circuit's Mosby opinion and this Court's subsequent denial of Mosby's petition for certiorari. The decision below, in its majority opinion, points out the deepening circuit split and seems to decry its position as an outlier.

The bottom line is: this is not a direct appeal, but a petition for writ of certiorari based upon a stark and broadening circuit split on a matter of great national importance, certain to be repeated in a disparate and nonuniform manner. This Court must grant the petition for certiorari in order to resolve this untenable schism between the Eighth Circuit on one side and, to date, six of her sister circuits on the other.

The petition should be granted.

II. Petitioner's case embodies the concerns giving rise to the six circuits on the other side of the split, making stark the need for this Court's intervention.

Given the Eighth Circuit's position that neither statute nor case law requires an explanation for a district court's denial of a motion for early termination or modification of a supervised release term, the district court in the case at bar provided no explanation whatsoever to Petitioner for its denial of his motion. Instead, it literally checked the box for acceptance of the probation office's recommendation in an undocketed, sealed probation supervision summary, after no notice to petitioner, and no hearing or other opportunity to address the requisite statutory sentencing factors, the requisite statutory conditions upon which to base a ruling on a motion for early termination or modification of conditions of supervised release, or inaccuracy in newly-introduced factual allegations.

In its supervision summary, the probation office introduced new facts, in the form of an inflammatory hearsay allegation that Petitioner had told his probation officer that he believed himself not to be bound by the conditions of his supervised release. The probation office ultimately recommended petitioner's motion be denied because he had been recently revoked based upon his violation of supervision conditions put in place for community safety.

Thus, at best, the district court's implicit explanation for its check-the-box ruling on petitioner's motion rested on a consideration of the factually speculative and unchallenged notion that Petitioner believed himself not bound by supervision conditions, and his violation of conditions imposed in the name of community safety.

However, 18 U.S.C. Secs. 3553(a) and 3583(e) require consideration of several sentencing factors other than community safety. Those include, in Sec. 3553(a), defendant's history, adequate deterrence, the need to provide educational and vocational training, medical care, or other correctional treatment in the most effective manner; kinds of sentence and sentencing range; and other factors not relevant to this matter; and, in 3583(e), whether "such action is warranted by the conduct of the defendant released and the interest of justice...."

Moreover, because Petitioner was neither alerted to the probation office, government, and district court positions, nor provided a hearing at which to respond to any of those petitions, there is nothing other than the district court's check-the-box explanation to provide context within which to infer other considerations the district court may have pondered.

In fact, the Eighth Circuit based its holding upon the speculative and unbriefed assertion that petitioner was "ineligible" for early termination of his supervised release. No one, not the probation office or the government, even mentioned "eligibility" for early termination. The district court's check-the-box explanation for its ruling, therefore, could not have been based on that reasoning.

For all of these reasons, petitioner's presents a case study in the problems of meaningful review (as opposed to speculative replacement of appellate judgment for that of the district court) and public confidence in sentencing (given the "double secret handshake" nature of the district court's order below).

The Court should grant the petition for writ of certiorari.

III. The government does not deny the importance of the question presented, nor the fact that the underlying issue – early termination or modification of conditions of supervised release – is one is certain to be raised frequently across the nation.

The government does not dispute the fact that the question presented is one of national importance certain to be often revisited. See generally BIO. The government does not dispute that courts impose a term of supervision in almost every case and, in cases like petitioner's, frequently or nearly always impose a lifetime term of supervision. It does not dispute that early termination is the primary mechanism to ease the work of overburdened probation officers, not to mention to lighten the cost to American taxpayers. The government does not dispute that the conflict in the circuits undermines the efficacy, fairness, and uniformity of the federal supervision system. The government does not dispute the fact that this case embodies the very concerns expressed by the six circuits requiring an explanation by district courts granting or denying motions for early termination or modification of conditions of supervised release: in either case, clear explanations facilitate meaningful appellate review and public confidence in sentencing. This case presents an ideal opportunity for this Court to resolve that conflict.

The government incorrectly and irrelevantly cites this Court's denial of certiorari in Mosby v. United States, ___ U.S. ___, 134 S.Ct. 905 (Jan. 13, 2014) for the proposition that "the same reasons that resulted in the denial of certiorari in Mosby should lead to the same result here." BIO p. 15. Both the Ninth Circuit's

decision in United States v. Emmett, 749 F.3d 817 (9th Cir. 2014) and the D.C. Circuit's decision in United States v. Mathis-Gardner, 783 F.3d 1286 (D.C. Cir. 2015) were decided after United States v. Mosby, No. 13-6596. And it is Emmett and Mathis-Gardner that not only acknowledge the conflict, but knowingly expand it. Mathis-Gardner, 783 F.3d at 1288; Emmett, 749 F.3d at 920 n.1. The government lost both of those cases, but did not seek certiorari. The circuit split is sufficiently widespread and complex to preclude resolution by any court other than this one. And this case, unlike Mosby, which was decided at a time when the conflict was not sufficiently entrenched or acknowledged. This case, therefore, is the best vehicle for this Court to resolve the circuit split and to offer its guidance and instruction in order to ensure a uniform and equitable application of the relevant law.

The petition should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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