

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

JAMES E. HOMAN  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 23-60396

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether the district court violated Mr. Homan's right to due process during the sentencing phase of this supervised release revocation proceeding when it relied on facts that were neither in the record nor specifically known by the court.

## **PARTIES TO THE PROCEEDING**

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

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## I. OPINIONS BELOW

This case involves a supervised release revocation proceeding. The case arises out of an underlying conviction entered by the United States District Court for the Southern District of Mississippi for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922 and 924. On October 8, 2015, Mr. Homan accepted responsibility for the felon in possession crime by entering a plea of guilty. After that, the district court ordered a 42-month prison term, followed by a three-year period of supervised release.

While on supervised release, Mr. Homan violated one condition of supervised release – using methamphetamine.<sup>1</sup> He accepted responsibility for his actions by admitting this violation during a supervised release revocation hearing on July 13, 2023. On the same day, the district court entered a Revocation Judgment that sentenced Mr. Homan to 12 months in prison, followed by 24 months of supervised release. The Revocation Judgment is attached hereto as Appendix 1.

Mr. Homan appealed the sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the district court's rulings via an Order entered on February 1, 2024. Aggrieved by the Fifth Circuit's approval of the

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<sup>1</sup> The Petition for Warrant stated two other alleged supervised release violations. The district court, however, found that the prosecution failed to prove these two allegations.

district court's reliance on evidence outside of the record, Mr. Homan filed a Motion for Panel Rehearing. The Fifth Circuit entered an Order denying the Motion on April 1, 2024. The Fifth Circuit's Orders are attached hereto as Appendices 2 and 3.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed its Order denying Mr. Homan's Motion for Panel Rehearing on April 1, 2024. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

### **III. CONSTITUTIONAL PROVISION INVOLVED**

The issue in this case pertains to the district court sentencing decision that relied on information that was neither in the record nor specifically known to the court. This fact scenario raises due process concerns. The Due Process Clause of the Fifth Amendment to the United States Constitution states, “[n]o person shall ... be deprived of life, liberty, or property, without due process of law[.]”

## **IV. STATEMENT OF THE CASE**

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

This case arises out of a supervised release Revocation Judgment entered against Mr. Homan. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the underlying criminal conviction entered against Mr. Homan arose from the laws of the United States of America.

### **B. Statement of material facts.**

Mr. Homan was arrested for allegedly violating the following three conditions of supervised release: (1) that he not commit a federal, state, or local crime (possession of methamphetamine and Fentanyl pills); (2) that he not unlawfully possess an illegal controlled substance; and (3) that he refrain from any unlawful use of a controlled substance. At the revocation hearing, Mr. Homan admitted to using methamphetamine but remained silent on the allegations that he violated the law by possessing illegal controlled substances.

The Government attempted to establish through testimony that the two disputed violations related to possession of an illegal controlled substance. The Government was unable to prove, however, that the items seized from Mr. Homan's home were, in fact, illegal controlled substances because they had not been tested. The district court concluded that it would resolve those alleged

violations in Mr. Homan's favor and proceed to sentence him for the admitted violation.

Mr. Homan expressed remorse for the violation. He stated that he had been an active user for many years and had relapsed after missing an appointment with his doctor to refill a Suboxone prescription.<sup>2</sup> Before the relapse, Mr. Homan was successfully working at an automotive plant.

Mr. Homan requested a six-month prison sentence, the bottom of the six to 12-month range calculated under the United States Sentencing Guidelines (hereinafter "Guidelines" or "Sentencing Guidelines"). The prosecution argued for the maximum Guidelines sentence of twelve months. It contended that Mr. Homan's "criminal history and the circumstances surrounding his revocation, Your Honor, clearly warrant the maximum." The defense rebutted that argument, noting that "the purpose of revocation is to sentence him for what he did as a violation of this revocation, not to punish him further for his prior criminal history."

The prosecution responded that the factors "the Court does certainly have to look at, according to the statute, is the nature and circumstances of the offense and the circumstances surrounding it to afford adequate deterrence of the criminal

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<sup>2</sup> "Suboxone (buprenorphine/naloxone) is an oral film prescribed to treat dependence on opioid drugs. It works to reduce withdrawal symptoms when stopping opioids and for an extended period of time afterward." Medical News Today at <https://www.medicalnewstoday.com/articles/325827>.

conduct, which is continuing and ongoing. ... To protect the public from further crimes and provide the defendant with needed educational, vocational training, or medical care.” In response, Mr. Homan’s counsel pointed out that under 18 U.S.C. § 3582, not all the 18 U.S.C. § 3553(a) factors that the Government had cited were proper for consideration in a revocation hearing. Mr. Homan’s counsel also rebutted the Government’s assertion that the district court could consider any criminal activity because the court had dismissed those alleged violations.

The district court responded:

The Court can consider the factors that the United States Attorney just stated, though, and those are the nature and circumstances of the offense, which Mr. Baldwin (the Assistant United States Attorney) referred to, and the history and characteristics of the defendant, and the need to protect the public from further crimes of this defendant. And the other factors that a court may consider in this revocation situation, and the Court has done that, has not taken into consideration those as you state, which may not be taken into consideration at this hearing. So having considered the ones that the Court can consider, the Court is ready to proceed with sentencing.

The district court continued: “So the Court’s aware of the sentencing guidelines, the fact that they are advisory, must be considered, have been considered, all the factors the Court may or should consider, rather, have been considered, and the policy statement at 7B1.4(a).” The district court then imposed the maximum Guidelines sentence of 12 months, to be followed by 24 months of supervised release. The two above cited statements constitute the entirety of the district court’s reasoning.

After the court pronounced its sentence, counsel for Mr. Homan asked the district court to impose a sentence of 12 months and one day. The additional day would qualify Mr. Homan to earn “good time” credit to apply against the 12-month sentence.<sup>3</sup> The district court advised that it had considered that option “but he’s had some problems while he was in custody before, some violations. I don’t know the particulars of those violations, but I know he’s had some problems, according to the records I have here, while he was in custody, and I’m going to stick with the 12 months that I have imposed upon him.”

The undersigned inquired about the nature of those violations because he was not aware of any. The district court turned to the probation officer, who stated that he did not have the Bureau of Prison’s (hereinafter “BOP”) report with him. The probation officer said he remembered “some disciplinary actions. The exact number and the severity of them, we don’t have that in our hands today.” The district court then told defense counsel, “[w]hat I have before me simply says generically that there were some violations that did occur. I don’t have the specifics of it. My information is based on what Officer Counts told me that he has just stated.” The undersigned again objected on the grounds that he had not

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<sup>3</sup> Good time can be accrued by “a prisoner who is serving a term of imprisonment of more than 1 year[.]” 18 U.S.C. § 3624(b)(1) (emphasis added).

received the disciplinary information. The district court overruled the objection, and this appeal followed.

## V. REVIEW ON CERTIORARI SHOULD BE GRANTED

In review, the district court ordered a Mr. Homan to serve 12 months in prison for violating one condition of supervised release. Defense counsel asked the court to order one additional day to the 12-month sentence so that he would be eligible to accrue “good time” credit.<sup>4</sup> The court denied that reasonable request.

The district court considered a clearly erroneous set of facts when it refused to add one day to Mr. Homan’s sentence. It relied on purported BOP disciplinary records. As presented below, reliance on the purported disciplinary records violated Mr. Homan’s constitutional right to due process because neither the district court nor the probation officer could produce a BOP disciplinary report. Also, neither the district court nor the probation officer could remember the specifics of the purported disciplinary history. Relying on “facts” not in evidence and not within the district court’s scope of knowledge was constitutionally impermissible.

Under Fifth Circuit precedent, “[d]ue process requires ‘that sentencing facts ... be established by a preponderance of the evidence.’” *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013) (citation omitted). “If the factual recitation lacks sufficient indicia of reliability, then it is error for the district court to consider it at

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<sup>4</sup> See *supra*, footnote 3.

sentencing – regardless of whether the defendant objects or offers rebuttal evidence.” *Id.* (citation omitted).

This Court’s precedent is consistent with the Fifth Circuit’s rulings in *Windless*. Due process limits a court’s consideration of facts to those that are either admitted by a defendant or that can be determined from the record. *Gallegos v. State of Nebraska*, 342 U.S. 55, 61, 72 S.Ct. 141, 145 (1951).

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” The important due process concern raised in Mr. Homan’s case represents a “compelling reason” for this Court to exercise its discretion and grant this Petition for Writ of Certiorari.

The importance of this issue is magnified because the great majority of federal criminal cases involve guilty pleas. When a defendant admits guilt, sentencing becomes the most important part of the entire criminal proceeding. The sentencing process determines how long a person’s right to freedom will be lost. Therefore, allowing a court to base a sentence on nonexistent facts is particularly egregious. This provides another reason to grant certiorari.

## VI. CONCLUSION

Based on the arguments presented above, Mr. Homan asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted April 4, 2024 by:



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**CERTIFICATE OF SERVICE**

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that  
today, April 4, 2024, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of  
the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis  
was served on Counsel for the United States by Federal Express, No.  
775817390880, addressed to:

The Honorable Elizabeth B. Prelogar  
Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



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