No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

MELVIN RIVERS,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether the denial of a motion to terminate probation made during a probation revocation hearing but prior to the final revocation hearing is a final and appealable order under Federal Rule of Appellate Procedure 4(b)(1)(A) and 4(b)(1)(C)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The Petitioner, Melvin Rivers, hereby prays that a Writ of Certiorari issue from the decision of the United States Court of Appeals for the Ninth Circuit in case number 23-50043, dismissing his appeal from the district court's denial of his motion to terminate supervised release pursuant to 18 U.S.C. § 3583(e)(1). The Ninth Circuit dismissed his appeal as untimely because the notice of appeal had been filed fifty days after the district court denied the petitioner's motion to terminate supervised release, even though the notice of appeal was filed four days after the final proceedings when the district court revoked and reinstated the petitioner's supervised release. The petitioner argued first in his reply brief

in response to the Respondent's claim that the notice of appeal was untimely, and then in his Petition for Rehearing *en banc*, that the notice was appeal was timely because it was filed within ten days of the district court's final order revoking supervised release, sentencing him to six months in custody and placing him on supervised release for another three years. The Court of Appeal issued its unpublished decision dismissing Mr. Rivers's appeal on January 10, 2024 [Appendix A-2]. It denied his timely filed Petition for Rehearing on February 20, 2024 [Appendix B].

OPINION BELOW

On January 10, 2024, the United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum opinion, dismissing Mr. Rivers's appeal from the district court's denial of his motion to terminate supervised release pursuant to 18 U.S.C. § 3583(e)(1). [Appendix A-1] The same Court denied his timely filed Petition for Rehearing and Rehearing *en banc* on February 20, 2024. [Appendix B]. This petition is filed within ninety days of the denial of the Petition for Rehearing and is therefore timely pursuant to Supreme Court Rule 13.3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Appellate Procedure 4(b)(1)(A) provides in relevant part:

In a criminal case, a defendant's notice of appeal must be filed within 10 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of the government's notice of appeal.

Federal Rule of Appellate Procedure 4(b)(3) provides in relevant part:

(A) Effect of a Motion on a Notice of Appeal

If a defendant timely makes and of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal must be filed within 10 days after the order disposing of the last remaining motion, or within 10 days of the entry of the judgment of conviction, whichever ends later. This provision applies to the following timely motion: (i) for judgment of acquittal under Rule 29; (ii) for a new trial under Rule 33, . . ; or (iii) for arrest of judgment under Rule 34.

STATEMENT OF THE CASE

The issue before this Court is whether Melvin Rivers, the petitioner, was required to file a notice of appeal prior to the conclusion of proceedings before the district court that revoked his supervised release, sentenced him to six months, and placed him on supervised release for another three years on February 24, 2023. Prior to that final judgment, Mr. Rivers had moved to terminate his supervised release, on January 9, 2024.[1] The district court denied that motion, but continued the proceedings to February 24, 2023. After that final proceeding,

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[1]The Court of Appeals did not address that the motion to terminate supervised release was renewed orally at the final revocation proceeding on February 24, 2023.

Mr. Rivers appealed from the denial of his motion to terminate supervised release and the imposition of a three year term of supervised release because his sentence 97 months imposed in 2014, all of which he had served, applied a base offense level of thirty, much greater than a base offense level of fourteen under the analysis of the Ninth Circuit's subsequent decision in *United States v. Wei Lin*, 841 F.3d 823 (9th Cr. 2016).

Before the Court of Appeals for the Ninth Circuit, the Appellee argued the appeal should be dismissed because the notice of appeal had been filed on February 28, 2023, more than ten days after the district court had denied the motion to terminate supervised release on January 9, 2023. Mr. Rivers replied that the notice of appeal had been timely filed within ten days of the final judgment because interlocutory appeals are disfavored in criminal cases. The Ninth Circuit dismissed the appeal on the basis that the notice of appeal was not timely filed, and denied Mr. Rivers's Petition for Rehearing *en banc*.

This petition is filed because the dismissal of Mr. Rivers's direct appeal on the basis the notice of appeal was untimely filed cannot be reconciled with this Court's clear precedent that interlocutory appeals are disfavored in criminal cases and the denial of the motion to terminate supervised release would not fit within the limited category of motions filed prior to the final judgment that can be the basis for an interlocutory appeal.

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT DISFAVORING INTERLOCUTORY APPEALS IN CRIMINAL CASES AND CANNOT IS CONTRARY TO THE FEDERAL RULE OF APPELLATE PROCEDURE 4(b)(3).

A. Applicable facts:

1. Guilty plea to Conspiracy to Commit Sex Trafficking of children

In 2014, Melvin Rivers pleaded guilty to a superseding information charging him with Conspiracy to Commit Sex Trafficking of Children, in violation of 18 U.S.C. § 1594(c) [CR 36, 38, ER-134][2]. The plea agreement listed the elements of the offense to be (1) Mr. Rivers conspired with at least one other person to knowingly recruit, entice, harbor, transport, provide, obtain, or maintain a person; (2) he did so knowingly, [or] was in reckless disregard, that the person had not attained the age of 18 years or had a reasonable opportunity to observe the person would be caused to engage in a commercial sex act, and (3) his actions were in or affecting interstate or foreign commerce. [CR 41; ER-124-125]. The parties made a joint recommendation that the base offense level was 30, pursuant to USSG § 2G1.3(a)(2), increased by two levels based upon the use of a computer, pursuant to USSG § 2G1.3(b(3), increased by two levels based

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[2]"CR" refers to the Docket of the district court; "ER" refers to the Excerpts of Record filed before the Ninth Circuit.

upon a commercial sex act, pursuant to USSG § 2G1.3(b)(4)(A), and reduced by three levels pursuant to USSG § 3E1.1 to reflect acceptance of responsibility, to a final adjusted offense level of 31. [CR 41; ER-129]. There was no agreement as to criminal history, the defense could not ask for any additional downward adjustments, departures, or variances, and the Government would request the low end of the advisory guideline range. [CR 41; ER-130]. Mr. Rivers was also informed that there would be a minimum term of supervised release of five years to a maximum term of life. [CR 41; ER-125]. Mr. Rivers waived appeal and collateral attack. [CR 41; ER-130].

The Pre-sentence Report (PSR) mirrored the plea agreement [7PSR ¶¶23-26, 8PSR ¶¶27-30]. The PSR found Mr. Rivers had three criminal history points, placing him in CHC II [10PSR ¶¶ 39-40]. This resulted in a guideline range of 121-151 months in prison, but the PSR recommended a downward variance of two levels, to recommend a sentence of 97 months in prison. [21PSR ¶¶117-118]. The Government filed objections concerning the recommended conditions of supervised release, but also recommended a sentence of 108 months on prison, one level below the guideline range [CR 53, 54]. Because the defense was precluded under the agreement from asking for a downward adjustment, departure, or variance, Mr. Rivers did not object to a guideline range was of 121-151 months [CR 56, 57].

B. Imposition of sentence by the district court

At the sentencing hearing, the Court found that the sentencing range was 121 to 151 months, based upon the base offense level and adjustments set forth in the PSR [Exhibit ER-89]. It noted the PSR recommended 97 months and the Government 108. [ER-89, 92]. The Court imposed a sentence of 97 months in prison, followed by a ten year term of supervised release [ER-98]. The Court noted that after serving five years of supervised release, Mr. Rivers could move to terminate it if he had no violations [ER-98-99].

C. Subsequent decision the Ninth Circuit in *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016)

After Mr. Rivers was sentenced, the Ninth Court decided *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016). That case held that because Wei Lin, like Mr. Rivers, had been convicted of conspiracy under 18 U.S.C. § 1594(c), instead of the substantive offense of sex trafficking as a result of fraud or coercion in violation of 18 U.S.C. § 1591(a)(1), the base offense was not 34, as set forth at USSG § 2G1.3(a)(1), but 14. Had Wei Lin been sentenced for the substantive offense, he would have been subject to the higher base offense level and a range of fifteen years to life pursuant to 18 U.S.C. § 1591(b)(1). 841 F.3d at 825-827.

Mr. Rivers had been sentenced using the base offense level of 30 under USSG § 2G1.3(a)(2) as if he had been convicted of the substantive offense of sex trafficking of a minor between ages of 14 and 18, in violation of 18 U.S.C. §

1591(a)(1), punishable under 18 U.S.C. § 1591(b)(2) to a term of ten years to life [7PSR ¶23, ER-98]. Under the logic of *Wei Lin*, his base offense level would be fourteen, not thirty because he had been convicted of the conspiracy, not the substantive offense. Even with the addition of four levels based upon the use of a computer and that the violations involved sexual acts, the adjusted offense level would be sixteen after a two level reduction for acceptance of responsibility. At CHC II, his range would have been twenty-four to thirty months, the high end of which is sixty-seven months less than the sentence he served.

3. Motion to terminate supervised release

After Mr. Rivers had served his prison sentence of 97 months, the district revoked his supervised based upon his use of marijuana, sentenced him to six months, and reimposed a supervised release term of ten years. On June 17, 2022, a second request for an order to show cause (OSC) why supervised release should not be revoked was filed [CR 134]. Mr. Rivers was arrested on August 30, 2022, in Ohio on the warrant that issued in response to the request for an order to show cause [CR 136]. He eventually appeared in the Southern District of California on October 10, 2022, when he filed a motion to terminate his supervised release on October 31, 2022 [ER-54-59, CR 140, 146]. On January 9, 2023, at his first appearance on this second OSC before the district court judge who sentenced him, he moved to terminate supervised release based upon his

most recent motion to terminate supervised release. That motion was denied [ER-43-44]. The district court continued the revocation proceeding, however, until February 24, 2034, when Mr. Rivers orally renewed motion to terminate supervised release, which was again denied [ER-40]. The final order of district court on February 24, 2023, revoked supervised release, imposed a prison term of six months (equivalent to time served) and reimposed a three year term of supervised release [ER-35-36, CR 158]. Mr. Rivers filed a notice of appeal from that final judgment on February 28, 2023 [CR 159, ER 3].

On appeal, Mr. Rivers argued the district court erred in refusing to terminate his supervised release in order to offset the additional years he had served after being sentenced under guidelines that were later clarified to apply to the substantive offense of sex trafficking, and not conspiracy of which he was convicted, in light of the Ninth Circuit's decision in *Wei Lin*. The Appellee responded that the appeal should be dismissed because the notice of appeal had been filed fifty days after the district court had denied Mr. Rivers's motion to terminate his supervised release. Mr. Rivers replied that had he filed a notice of appeal within ten days of January 9, 2023, while the proceedings on his supervised release were still pending before the district court, that appeal would have been dismissed as a disfavored interlocutory appeal in a criminal case, citing *United States v. Mehrmanesh*, 652 F.2d 766, 768 (9th Cir. 1980). The three

judge penal dismissed the appeal. [Appendix A1-A2].

Mr. Rivers then filed a petition for rehearing, citing *Mehrmanesh* and relying upon this Court's decisions in *Abney v. United States*, 431 U.S. 561 (1977); *McDonald v. United States*, 435 U.S. 850 (1980), and *Flanagan v. United States*, 465 U.S. 259 (1984). The Ninth Circuit denied rehearing without comment. [Appendix B]

B. The dismissal of Mr. River's direct appeal on the basis that the notice of appeal should have been filed prior to the final judgment revoking and reimposing supervised release is contrary to this Court's decisions that interlocutory appeals are disfavored in criminal cases.

For more that forty years, decisions of this Court have made it clear that interlocutory appeals in criminal cases are limited to double jeopardy or from "collateral orders" related to rights that are "independent of the merits of the action and are too important to be denied prompt review." *United States v. McDonald*, 435 U.S. 850, 853-854 (1978); *Abney v. United States*, 431 U.S. 651, 659 (1977). Prior decisions of the Ninth Circuit have applied these cases to hold that a notice of appeal in a criminal case must be filed after a"final decision" in the case"which ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *United States v. Vela*, 624 F.3d 1148, 1151 (9th Cir. 2009).

In this case, Mr. Rivers's motion to terminate his supervised release was filed after he had been arrested in Ohio on a warrant issued by the district court based upon allegations he had violated the terms of his supervised release and he was returned to the Southern District of California. At the initial appearance on January 9, 2023, before the district court on the order to show cause why his supervised release should not be revoked, he moved to terminate supervised release because his prison sentence of 97 months was based upon a base offense level of thirty under guidelines for the substantive offense of sex trafficking, not a base offense level of fourteen for conspiracy to commit that offense, in light of *United States v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016).[3] The district court denied the motion but continued the OSC hearing until February 22, 2023 [ER-41, ER-48]. On February 17, 2024, the district court, on its own motion, continued the proceedings to February 24, 2023 [ER-155, CR 156].

At that point, the proceedings regarding Mr. Rivers's supervised release were still pending. Had he filed a notice of appeal within ten days of January 9, 2023, before the proceedings concerning his supervised

[3]The merits of that claim are not raised in this Petition.

release had been concluded and a final judgment entered on February 24, 2024, it would have been dismissed because it was not from a claim of double jeopardy or from a "collateral order" related to rights that are "independent of the merits of the action and are too important to be denied prompt review." Had a notice of appeal been filed within ten days of the proceedings on January 9, 2023, it would most likely been dismissed because that notice of appeal would have been filed before, not "after the order disposing of the last remaining motion, or within 10 days of the entry of the judgment of conviction, whichever ends later" as stated in Federal Rule of Appellate Procedure 4(b)(3)(A)(i). It would also not fit with the limited category exceptions of an appeal from a "timely motion: (i) for judgment of acquittal under Rule 29; (ii) for a new trial under Rule 33, . . ; or (iii) for arrest of judgment under Rule 34," as stated in Federal Rule of Appellate Procedure 4(b)(3)(A)(ii).

In the unlikely event this interlocutory appeal were not dismissed, it would have stayed the proceedings before the district court until the Court of Appeals had decided the merits of the motion to terminate supervised release. Mr. Rivers would likely have remained in custody and the case lingered on the district court's docket until the merits of the motion to dismiss had been decided by the Court of Appeals. This is the scenario of a Pandora's box of piecemeal litigation that this Court's decisions in *Abney*, *Flanagan*, and *McDonald* seek to

avoid. This Court should grant certiorari to correct the clear procedural error of the Ninth Circuit and remand the case to that Court to decide the merits of Mr. Rivers's motion to terminate his term of supervised releases.

CONCLUSION

For the foregoing reasons, Melvin Rivers requests the Court grant his Petition for Writ of Certiorari on following issue: is the denial of a motion to terminate supervised release under 18 U.S.C. § 3583(e)(1) made during a hearing to revoke supervised release but prior to the final revocation hearing, a final and appealable order under Federal Rule of Appellate Procedure 4(b)(1)(A) and 4(b)(1)(C)?

Respectfully submitted,

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