No. _____

IN THE

Supreme Court of the United States

ISABEL RICO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the fugitive-tolling doctrine applies in the context of supervised release.

PARTIES TO THE PROCEEDING

Petitioner Isabel Rico was defendant-appellant in the court of appeals and defendant in the district court.

Respondent is the United States of America, which was appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court for the Central District of California:

United States of America v. Isabel Rico, No. 2:10-cr-00381-FLA-1 (Apr. 22, 2024)

United States Court of Appeals for the Ninth Circuit:

United States of America v. Isabel Rico, No. 23-807 (Dec. 14, 2023)

United States of America v. Isabel Rico, No. 24-2662 (Mar. 6, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Isabel Rico respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case concerns the "fugitive tolling" doctrine. That doctrine has long been applied to hold that criminal defendants should not receive credit toward prison sentences for time that they are not behind prison walls. *See Anderson v. Corall*, 263 U.S. 193, 196 (1923). The doctrine is based on the "commonsense proposition" that "a person should not be credited with serving a prison sentence if he is not, in fact, in prison." *United States v. Talley*, 83 F.4th 1296, 1301 (11th Cir. 2023).

The question presented in this case is whether the fugitive-tolling doctrine should be extended to cases where the defendant absconds from supervised release. Lower-court cases presenting this issue share a common fact pattern. A federal criminal defendant on supervised release changes her address without notifying the probation office, starts missing drug tests, or simply goes missing. The government deems the defendant to have absconded and charges her for violating the conditions of supervised release. While on so-called "fugitive" status, the original expiration date of the supervision period passes, and the defendant commits an additional violation of the terms of supervised release following that expiration date. The defendant is later apprehended.

In these cases, the government takes the position that the supervisee's post-expiration violation (in addition to the abscondment itself) can be a basis for

revocation of her supervised release and imposition of a new sentence. The government argues that the clock on the supervised-release term stops running once a defendant absconds, such that the defendant *remains* on supervised release even long after the supervision period's scheduled end date.

The courts of appeals are sharply divided on how to address this set of facts—*i.e.*, on whether the fugitive-tolling doctrine applies in the context of supervised release. Four circuits have held precedentially (and two more nonprecedentially) that the doctrine does apply in these circumstances, and the supervisee's post-scheduled-expiration violations can be adjudicated by the sentencing court. These courts have recognized that there is no statutory basis for tolling a supervised-release period based on abscondment, yet they have deemed it important, for policy reasons, to apply the fugitive-tolling doctrine nonetheless. Two circuits have disagreed and held, based on an analysis of the text and history of the Sentencing Reform Act of 1984, that the sentencing court lacks jurisdiction to adjudicate such a violation. And the courts of appeals, in staking out their respective positions, have candidly acknowledged the clear split of authority.

This case is an ideal vehicle to resolve the circuit conflict. Petitioner Isabel Rico served a term of supervised release that was scheduled to expire in June 2021. In January 2022, she committed a state-law drug-possession offense. But because Ms. Rico had been deemed a fugitive by the probation office in 2018, the district court was authorized, under Ninth Circuit precedent adopting the fugitive-tolling doctrine in the supervision context,

to revoke her supervised release based on the 2022 violation. On the basis of that 2022 offense, which was the most serious of Ms. Rico's alleged supervised-release violations, Ms. Rico was sentenced to 16 months' imprisonment and two years of additional supervised release. The Ninth Circuit affirmed Ms. Rico's sentence based on binding circuit precedent applying the fugitive-tolling doctrine in the context of supervised release. In the First or Eleventh Circuits, however, the district court would have been barred from revoking Ms. Rico's supervised release based on the 2022 offense, and consequently her Sentencing Guidelines range would have been far lower.

The Ninth Circuit's view—shared by the majority of circuits to have addressed the question presented—is wrong. Neither text, history, nor logic supports application of the fugitive-tolling doctrine in the supervised-release context. The Sentencing Reform Act specifically permits tolling of supervision periods under certain circumstances, but is silent on fugitive tolling. And it makes little sense to treat abscondment from supervised release as the equivalent of a prison escape. When a prisoner escapes, there is no sense in which she is still in prison. Yet a supervisee who goes missing is still on supervised release and can be sent back to prison for violations occurring during that period. Indeed, that is exactly what happened to Ms. Rico here—she was sentenced on the premise that she was, simultaneously, both on and off supervised release.

This Court should grant review.

OPINIONS BELOW

The memorandum disposition of the court of appeals (Pet. App. 1a-3a) is unreported but is available at 2025 WL 720900. The judgment and commitment order of the district court (Pet. App. 4a-7a) is unpublished.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 6, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent sections of the U.S. Code, 18 U.S.C. §§ 3583 and 3624, are reproduced in the appendix to this petition. Pet. App. 41a-61a.

STATEMENT

A. Legal Background

1. In the Sentencing Reform Act of 1984, Congress "eliminated most forms of parole" and replaced it with supervised release, "a form of postconfinement monitoring overseen by the sentencing court." *Johnson v. United States*, 529 U.S. 694, 696-97 (2000); *see* Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987. "[I]n contrast to probation," supervised release "is not a punishment in lieu of incarceration." *United States v. Granderson*, 511 U.S. 39, 50 (1994). It is instead meant to "fulfill[] rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000).

Supervised release plays an important role in the federal criminal-justice system. Nearly every custodial sentence in the federal system is followed by a period of

supervised release. Between 2005 and 2009, for instance, approximately 95% of defendants sentenced to prison were also sentenced to supervised release; in cases where the defendant was sentenced to more than one year in prison, the sentencing court imposed a supervised-released term over 99% the time.[1] At the end of fiscal year 2023, there were over 109,000 individuals on supervised release across the United States.[2] And violations of supervised release are also a significant font of federal litigation; for instance, in 2023, nearly 12,000 individuals completed prison sentences for violations of their supervised-release conditions[3]—a sanction that follows only a subset of such violations, *see* 18 U.S.C. § 3583(e)(3).

Courts have significant discretion in choosing the length and conditions of supervised release, although there is a presumptive maximum of one, three, or five years depending on the severity of the offense. 18 U.S.C. § 3583(b)-(c); *see, e.g.*, *Holguin-Hernandez v. United*

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[1] U.S. Sent'g Comm'n, *Federal Offenders Sentenced to Supervised Release* 7, 55 tbl.1 (July 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf. The remaining 1% consists almost entirely of cases where the offender was a noncitizen removed from the United States following release from custody. *Id.* at 7.

[2] Mark A. Motivans, Bureau of Just. Statistics, U.S. Dep't of Just., NCJ 309946, *Federal Justice Statistics, 2023*, at 23 tbl.13 (Mar. 2025), https://bjs.ojp.gov/document/fjs23.pdf.

[3] *Id.* at 15 tbl.9 & n.f.

States, 589 U.S. 169, 173 (2020).[4] Certain conditions are mandatory for certain offenses. *See* 18 U.S.C. § 3583(d). And there are three conditions that are *always* attached to supervised release—including, as relevant here, "that the defendant not commit another Federal, State, or local crime during the term of supervision." *Id.*

2. This case concerns the time at which a supervised-release term ends.

The rules for calculating satisfaction of a supervised-release term appear in 18 U.S.C. § 3624(e). That provision states that "[t]he term of supervised release commences on the day the person is released from imprisonment." *Id.* It provides that defendants can serve periods of supervised release concurrently with probationary periods under state or local law (or with another federal supervised-release term). *Id.* And Section 3624(e) explicitly authorizes tolling of a supervised-release term in one specific circumstance, stating that "[a] term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." *Id.*

A court also has the power to terminate, extend, or (as relevant here) revoke a term of supervised release. *See* 18 U.S.C. § 3583(e)(1)-(3). Revocation is a permissible sanction if the court finds by a preponderance of the evidence that a defendant has violated a condition of his

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[4] For particularly serious offenses (*e.g.*, terrorism, child sexual abuse), there is no upper limit on the length of a supervised-released term. *See* 18 U.S.C. § 3583(j)-(k).

supervised release. *Id.* § 3583(e)(3). The court may then require the defendant to serve additional prison time—potentially up to five years for the most serious underlying offenses. *Id.* And the court may impose a *new* term of supervised release to be served following satisfaction of the prison sentence for the violation. *Id.* § 3583(h).

The Sentencing Reform Act as initially enacted did not address the situation where a court was asked to revoke supervised release *after* the term's expiration based on a violation that occurred during the term. This silence potentially allowed for violations occurring late in a supervision term to evade adjudication; by the time the violation was brought to the court's attention, there might no longer be any active supervised release to "revoke." *See United States v. Buchanan*, 638 F.3d 448, 452 (4th Cir. 2011). Congress addressed this problem in 1994 by enacting 18 U.S.C. § 3583(i). *United States v. Janvier*, 599 F.3d 264, 265-66 (2d Cir. 2010); *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 1796, 2017 (amending 18 U.S.C. § 3583).

Section 3583(i) clarified that a court's power to revoke a term of supervised release and impose additional sanctions generally does not "extend[] beyond the expiration of the term of supervised release." 18 U.S.C. § 3583(i). But that provision extends jurisdiction "for any period reasonably necessary for the adjudication of matters arising before [the supervision term's] expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." *Id.* In other words, if a warrant or summons has issued relating to a violation while a defendant is still on

supervised release, it can be adjudicated for a reasonable period following the end of the term. But if no warrant or summons is issued before the expiration of supervised release, courts lack jurisdiction to issue revocations and impose additional sentences. *See United States v. Hernández-Ferrer*, 599 F.3d 63, 66 (1st Cir. 2010) (Section 3583(i)'s "extension operates only in [the] particular set of circumstances" it explicitly identifies).

3. The Sentencing Guidelines classify violations of supervised release into three categories. The most serious violations—Grade A violations—are crimes of violence, controlled-substance offenses, or weapons-related felonies (or other crimes punishable by more than 20 years' imprisonment). U.S.S.G. § 7B1.1(a)(1). Other felonies are deemed Grade B violations. *Id.* § 7B1.1(a)(2). Lesser crimes and noncriminal violations of supervised-release conditions are Grade C violations. *Id.* § 7B1.1(a)(3). When a supervisee commits multiple violations, "the most serious grade" of those violations is what governs for Guidelines purposes. *Id.* § 7B1.1(b).

The Guidelines also provide sentencing ranges for imprisonment following revocation of supervised release. For Grade A (the most serious) violations, the Guidelines recommend between 33 and 41 months' imprisonment for an individual with a criminal-history category of VI, or between 51 and 63 months if the underlying offense was sufficiently serious. U.S.S.G. § 7B1.4(a). For Grade B violations and offenders in category VI, the Guidelines recommend between 21 and 27 months, and the range is from 8 to 14 months for Grade C violations. *Id.*

B. Procedural History

1. Petitioner Isabel Rico pleaded guilty in 2010 to a drug-trafficking offense. D. Ct. Doc. 47 (Sept. 8, 2010); *see* Pet. App. 11a. She was sentenced to 84 months' imprisonment to be followed by four years of supervised release. Pet. App. 11a. Among the imposed conditions of supervised release were that Ms. Rico would not commit another federal, state, or local crime; that she would refrain from using drugs; that she would undergo drug testing and participate in a drug-treatment program; and that she would notify a probation officer before changing her residence. D. Ct. Doc. 103, at 1, 3 (Oct. 5, 2011).

2. Ms. Rico was released from prison in 2017 and began serving her supervised-release term. Pet. App. 11a. Several months later, she violated several drug-related conditions of her supervised release. *Id.* That led the district court to revoke Ms. Rico's supervised release and sentence her to two additional months' imprisonment, to be followed by a new 42-month supervised-release term. *Id.*

In December 2017, Ms. Rico was again released from prison and began serving her second term of supervised release, which was scheduled to expire in June 2021. Pet. App. 11a. Within a few months, Ms. Rico failed a drug test and was placed in a residential drug-treatment program, which she successfully completed. *Id.*; Appellant's C.A. Br. 5; Gov't C.A. Br. 6. A probation officer then attempted to place Ms. Rico in an outpatient program, but she did not report, missed a drug test, and lost contact with the officer. Appellant's C.A. Br. 5; Gov't C.A. Br. 6; *see* C.A. Doc. 10.1, at 3-4 (Aug. 19, 2024). The

officer visited Ms. Rico's last known address but learned that Ms. Rico had moved out. Appellant's C.A. Br. 5; *see* C.A. Doc. 10.1, at 4. With her whereabouts unknown, the probation officer determined that Ms. Rico had absconded. Appellant's C.A. Br. 6; *see* C.A. Doc. 10.1, at 3-4.[5]

In May 2018, the probation office filed a violation petition alleging that Ms. Rico had violated the conditions of her supervised release by using drugs and by changing her residence without notice. Appellant's C.A. Br. 6; Gov't C.A. Br. 6. The probation office calculated a Sentencing Guidelines range of 8 to 14 months based on a Grade C violation of the supervised-release conditions. Appellant's C.A. Br. 6; *see* Gov't C.A. Br. 24; C.A. Doc. 10.1, at 5. A bench warrant then issued. Appellant's C.A. Br. 6; Gov't C.A. Br. 6.

3. Ms. Rico was ultimately arrested on the bench warrant in January 2023—roughly a year and a half after the scheduled expiration of her supervised-release term. D. Ct. Doc. 155, at 1 (Jan. 25, 2023). The probation office then amended the pending violation petition. The probation office dismissed the earlier drug-use charges but now alleged that, in addition to absconding, Ms. Rico had also committed multiple new state-law offenses—evading police and driving without a license in January 2021 (before the scheduled expiration of the supervised-

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[5] Though the labels "abscondment" and "fugitive" may evoke images of a dangerous outlaw repeatedly evading capture, in reality Ms. Rico (joined by her mother) had simply gone to live in Northern California without informing her probation officer of her change in address. Appellant's C.A. Br. 6 n.2; *see* Pet. App. 34a; D. Ct. Doc. 174, at 5-6 (Apr. 11, 2023).

release term), and a possession-for-sale offense in January 2022 (*after* the scheduled expiration). Pet. App. 24a-25a; *see* Appellant's C.A. Br. 7-8; Gov't C.A. Br. 7.[6]

Ms. Rico admitted the alleged violations. Pet. App. 4a-5a, 12a-13a.[7] The abscondment violation and January 2021 offenses were deemed to be Grade C violations, but the January 2022 offense was deemed to be a Grade A violation (and thus the pertinent violation for sentencing purposes). *Id.* at 24a-26a. Ms. Rico objected that the district court lacked jurisdiction to adjudicate the January 2022 drug-related offense as a supervised-release violation, since her term of supervised release had expired in June 2021. D. Ct. Doc. 202, at 5-8 (Mar. 8, 2024). The government responded that the clock on Ms. Rico's supervision term was paused when she absconded in May 2018 (with about three years remaining) and did not resume until she was apprehended in January 2023—meaning that she was still technically on supervised release when she committed the 2022 drug offense. D. Ct. Doc. 201, at 5-7 (Mar. 8, 2024); D. Ct. Doc. 204, at 1-2 (Mar. 22, 2024); *see* Pet. App. 14a. For her part, Ms. Rico argued that the "fugitive tolling" doctrine on which the government relied was inapplicable in the context of

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[6] During a portion of the period of alleged abscondment, Ms. Rico was in custody following state-court convictions for these offenses. Appellant's C.A. Br. 7; *see* C.A. Doc. 10.1, at 41-42.

[7] After an initial revocation sentence in April 2023, Ms. Rico appealed and the case was remanded for resentencing by agreement of the parties. D. Ct. Doc. 178 (Apr. 18, 2023); *see* Order, *United States v. Rico*, No. 23-807 (9th Cir.), ECF No. 24.1 (Dec. 14, 2023). The first appeal concerned an aspect of the case not relevant in this Court, so the focus above is on the post-remand revocation proceedings.

supervised release, though she acknowledged that Ninth Circuit precedent was to the contrary. D. Ct. Doc. 202, at 6-7.

4. The district court held that the fugitive-tolling doctrine applied in Ms. Rico's case, and that it therefore had jurisdiction to adjudicate even her January 2022 violation. Pet. App. 26a-31a. The court considered itself bound by Ninth Circuit precedent, "regardless of what other circuits think," *id.* at 28a-29a, and declined to apply any other rule "until the Ninth Circuit or the Supreme Court hold otherwise," *id.* at 31a. Because that violation was a Grade A violation, it controlled the Sentencing Guidelines analysis, and the district court calculated Ms. Rico's range as 33 to 36 months. *Id.* at 31a-32a.[8] The court revoked Ms. Rico's supervised release and sentenced her to 16 months' imprisonment—a significant downward variance, but still above the 8-to-14-month range that would have applied if the January 2022 violation were not considered. *Id.* at 35a; *see* U.S.S.G. § 7B1.4(a). The court also imposed an additional two-year term of supervised release. Pet. App. 35a. That term is scheduled to expire in May 2026. *See* D. Ct. Doc. 155, at 1 (Ms. Rico began serving custodial portion of sentence on January 24, 2023).

5. Ms. Rico appealed her sentence, renewing her argument that the district court lacked jurisdiction to revoke her supervised release based on the January 2022

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[8] The range was 33 to 41 months under the Guidelines, but the statutory maximum was 36 months due to the classification of Ms. Rico's underlying federal conviction. Pet. App. 31a; *see* 18 U.S.C. § 3583(e)(3); U.S.S.G. § 7B1.4(b)(1).

offense. Appellant's C.A. Br. 16-29. She argued that the Ninth Circuit's application of the fugitive-tolling doctrine to cases like hers is erroneous and that the court should reconsider its approach. *Id.* at 16-37.

The Ninth Circuit rejected Ms. Rico's argument and affirmed her sentence. Pet. App. 1a-3a. The panel noted that it was "bound by circuit precedent applying the fugitive tolling doctrine," *id.* at 2a, and under that doctrine, Ms. Rico's "term of supervised release was tolled while she was a fugitive from May 2018 to January 2023," *id.* at 3a. It therefore concluded that the district court had jurisdiction to adjudicate all the violations at issue—even the January 2022 violation occurring after the scheduled expiration of Ms. Rico's supervision term. *Id.*

Finally, Ms. Rico had also requested that the full Ninth Circuit reconsider its precedent on fugitive tolling. Appellant's C.A. Br. 35-36. The court, however, "decline[d] to reconsider the fugitive tolling doctrine en banc." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The case for certiorari is straightforward. There is an acknowledged, intractable split among the courts of appeals on an important and recurring question of federal criminal law. The majority view applied below, which led to a 16-month custodial sentence and an additional 24-month term of supervised release for Ms. Rico, is wrong. And this case presents an unusually strong vehicle for resolving this question.

I. THERE IS AN UNMISTAKABLE SPLIT ON THE QUESTION PRESENTED.

The split on the question presented is clear and entrenched: "[t]he circuits are divided over the application of 'fugitive tolling' to terms of supervised release." *United States v. Talley*, 83 F.4th 1296, 1301 (11th Cir. 2023).

Each of the cases discussed below has the same fact pattern as this case: a defendant serving a period of supervised release absconds and then commits a criminal offense following the scheduled expiration of the supervised-release term. The government argues that the post-expiration offense is nonetheless a violation of supervised release because, under the fugitive-tolling doctrine, the supervision term stopped running following the defendant's abscondment. The lower courts have sharply divided over whether the government is correct.

A. Four Circuits, Including the Ninth Circuit, Have Held That the Fugitive-Tolling Doctrine Applies in the Context of Supervised Release.

The Ninth Circuit has long held that when a supervisee is in "fugitive status," his period of supervised release is tolled and violations of the terms of supervised release can support revocation even if occurring after the nominal expiration of that period. *See United States v. Crane*, 979 F.2d 687, 691 (9th Cir. 1992). The court has acknowledged that "[t]he statutory provisions regarding supervised release do not expressly provide for tolling during fugitive status," but has nevertheless maintained that "specific statutory language is not

required." *United States v. Murguia-Oliveros*, 421 F.3d 951, 953 (9th Cir. 2005). "To hold otherwise," the Ninth Circuit has reasoned, would "reward those who flee from bench warrants and maintain their fugitive status until the expiration of their original term of supervised release." *United States v. Delamora*, 451 F.3d 977, 980 (9th Cir. 2006) (quoting *Crane*, 979 F.2d at 691).

The Second, Third, and Fourth Circuits have taken the same view. In *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011), the defendant was sentenced to several years in prison for supervised-release violations committed after the scheduled expiration of his initial supervision term. *Id.* at 449-50. He argued that "the court lacked jurisdiction to adjudicate the violations . . . because they were not charged in a warrant or summons before the scheduled expiration." *Id.* at 449. The Fourth Circuit rejected that argument, holding that the defendant's "supervised release term was tolled during the 13 years he was a fugitive." *Id.* at 458. The court of appeals acknowledged that the First Circuit and Ninth Circuit had split on this question and opted to follow the Ninth Circuit. *Id.* at 453-55; *see* pp. 18-19, *infra*.

In *United States v. Barinas*, 865 F.3d 99 (2d Cir. 2017), the Second Circuit acknowledged the existing split on the question presented and "decline[d]" to reject fugitive tolling in the context of supervised release, "finding more persuasive the majority view that tolling is appropriate." *Id.* at 106. The court relied on what it viewed as "Congress's goals in requiring supervised release," along with a purported analogy to the doctrine's application in the custodial-abscondment context. *Id.* at 107-08. And the court brushed aside concerns that the

statutory text does not authorize jurisdiction "to adjudicate a charge that the defendant absconded during the supervised-release period and while a fugitive committed a prohibited act after the scheduled end of the period." *Id.* at 107.

The Third Circuit's decision in *United States v. Island*, 916 F.3d 249 (3d Cir. 2019), is of a piece. Acknowledging no statutory support for applying the fugitive-tolling doctrine to supervised release, the panel majority nonetheless believed that "fugitive tolling furthers the purposes of the supervised release scheme." *Id.* at 253. The majority recognized the circuit split on the question and adopted the majority position, holding that "a defendant's supervised release term tolls while he is of fugitive status." *Id.* at 251; *see id.* at 253-54. In dissent, Judge Rendell argued that the doctrine should be confined to custodial abscondment, observing that "the opportunity to benefit from absconding is small" and noting "the difficulties associated with defining a 'fugitive' in the supervised release context." *Id.* at 258-59.

B. Two Other Circuits Have Agreed in Nonprecedential Opinions.

Two other circuits have weighed in on the question presented in decisions that are not binding circuit precedent, in one case because the decision was withdrawn and in the other because the decision was unpublished.

The Fifth Circuit addressed the question presented in *United States v. Cartagena-Lopez*, 979 F.3d 356 (5th Cir. 2020), *opinion withdrawn on grant of reh'g*, No. 20-40122, 2020 WL 13837259 (5th Cir. Nov. 19, 2020). The court surveyed the arguments on either side of the split

and chose to "join the Second, Third, Fourth, and Ninth Circuits in adopting the fugitive tolling doctrine in the context of supervised release." *Id.* at 363; *see id.* at 360-63. It turned out, however, that the defendant's revocation sentence had ended before the Fifth Circuit issued its opinion; the defendant pointed this out in a petition for panel rehearing, so the court withdrew its prior opinion and dismissed the appeal as moot. *Cartagena-Lopez*, 2020 WL 13837259, at *1; *see* Appellant's Petition for Panel Rehearing at 4-6, *Cartagena-Lopez*, No. 20-40122 (5th Cir.), ECF No. 64 (Nov. 4, 2020).

The Tenth Circuit has also held in a nonprecedential opinion that the fugitive-tolling doctrine applies in the supervised-release context. *See United States v. Gomez-Diaz*, 415 F. App'x 890, 894 (10th Cir. 2011). There, the court of appeals held that the defendant's period of supervised release was "tolled" from the time an arrest warrant issued for a supervised-release violation and throughout the subsequent period during which his whereabouts were unknown. *Id.*; *see id.* at 892. At least one district court in the Tenth Circuit has treated that decision as persuasive and applied the fugitive-tolling doctrine in a supervised-release case. *See United States v. Clark*, No. 19-cr-10, 2024 WL 1411539, at *3 (N.D. Okla. Apr. 2, 2024).[9]

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[9] On the other hand, at least one district court in the Tenth Circuit has opted to follow the minority view that the fugitive-tolling doctrine does *not* apply to supervised release. *See United States v. Wilkerson*, No. 00-cr-557, 2023 WL 5564948, at *7-8 (D.N.M. Aug. 29, 2023) ("Because supervised release does not have the same punitive purpose as imprisonment, the Court does not import the

C. The First and Eleventh Circuits Have Reached the Exact Opposite Conclusion.

Expressly rejecting the views of these circuits, the First and Eleventh Circuits have declined to apply the fugitive-tolling doctrine in the context of supervised release.

In *United States v. Hernández-Ferrer*, 599 F.3d 63 (1st Cir. 2010), the First Circuit addressed facts nearly identical to those here: the supervisee committed both Grade C and Grade A violations, but the Grade A violation occurred after the scheduled expiration of the supervised-release period. *Id.* at 65-66. The district court imposed a revocation sentence based on the Grade A violation. *Id.* at 66. The court of appeals vacated this sentence. *Id.* at 70. The court held that the district court lacked jurisdiction to adjudicate the post-expiration violation, rejecting the government's argument "that a term of supervised release is tolled during any period in which an offender has absconded from supervision." *Id.* at 67; *see id.* at 66-69.

To start, the First Circuit noted that 18 U.S.C. § 3624(e)—which tolls a supervised-release term while a supervisee is serving a custodial sentence—is the only statutory provision addressing tolling in the supervised-release context. *Hernández-Ferrer*, 599 F.3d at 67. The court found "[t]he absence of an express tolling provision for fugitive status, coupled with the presence of an express tolling provision that encompasses other circumstances," to be "highly significant." *Id.* The court also

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Supreme Court's determination that a prison term is tolled for a fugitive defendant to the supervised-release context.").

noted that courts had uniformly applied this same rationale to hold that "the pertinent statutes do not authorize tolling a term of supervised release during the period in which an offender is absent by reason of his deportation." *Id.* at 68. The First Circuit recognized that the Ninth Circuit had taken the opposite position, but it rejected the Ninth Circuit's purposivist rationales. *See id.* at 68-69; *see also United States v. Collazo-Castro*, 660 F.3d 516, 518 (1st Cir. 2011) (noting that *Hernández-Ferrer* had "rejected the doctrine of fugitive tolling" in the supervised-release context).[10]

The Eleventh Circuit's decision in *Talley*, 83 F.4th 1296, also involved circumstances practically indistinguishable from those here: the defendant was "imprisoned based in part on a violation committed after his supervised release had lapsed but while he was, based on the district court's findings, a fugitive from justice." *Id.* at 1297. In holding that the fugitive-tolling doctrine did not apply, the Eleventh Circuit expressly "join[ed] the First Circuit and part[ed] company with the Second, Third, Fourth, and Ninth Circuits." *Id.*; *see id.* at 1300-05.

The Eleventh Circuit provided two justifications for its conclusion that "the First Circuit has the better position." *Talley*, 83 F.4th at 1301. First, the court explained that "the justifications for fugitive tolling in other contexts—such as prison escapes—do not apply to the context of supervised release." *Id.*; *see id.* at 1301-

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[10] When the First Circuit decided *Hernández-Ferrer*, the Second, Third, Fourth, Fifth, and Tenth Circuits had not yet weighed in on the question presented.

03. Second, the court agreed with the First Circuit's view that "the doctrine is inconsistent with the text of the statute[s]" governing supervised release. *Id.* at 1301; *see id.* at 1303-05.

* * *

In short, faced with the same facts and the same arguments, six circuits have precedentially split 4-2 (or 6-2, counting nonprecedential opinions) on the question presented. This intractable split of authority creates unacceptable disparities in the ways similarly situated defendants are treated following violations of supervised release. This Court should grant review to restore the "uniformity and predictability in federal sentencing" that Congress sought to achieve in the Sentencing Reform Act. *United States v. Gonzales*, 520 U.S. 1, 13 (1997) (Stevens, J., dissenting).

II. THE NINTH CIRCUIT'S POSITION IS WRONG.

The Ninth Circuit's view—that the fugitive-tolling doctrine applies in the context of supervised release—is erroneous. The doctrine is entirely judge-made and it is inconsistent with the statutory scheme governing supervised release. And the policy-based justifications courts have provided in the custodial-abscondment context do not apply to abscondments from supervised release.

A. The Ninth Circuit's Position Disrespects the Sentencing Reform Act's Text and History.

To start, applying fugitive tolling in the context of supervised release has no textual basis. Indeed, even the courts agreeing with the Ninth Circuit have

acknowledged that there is no explicit statutory basis for application of the doctrine. *See*, *e.g.*, *Barinas*, 865 F.3d at 107; *Buchanan*, 638 F.3d at 456. In the face of the text and history of the Sentencing Reform Act, there is no room for the judge-made fugitive-tolling doctrine in this area.

As explained above, there is only one statutory provision that governs tolling in the supervised-release context: 18 U.S.C. § 3624(e). *See* pp. 6-8, *supra*. Section 3624(e) states that "[a] term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." *Id.* Neither Section 3624(e) nor any other provision authorizes tolling of a supervised-release period for any other reason.[11] That itself should be dispositive. As this Court has recognized *in the precise context of Section 3624(e)*: "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *accord Talley*, 83 F.4th at 1304 ("Congress knew

[11] Indeed, even some of the circuits in the majority have applied this same logic to "rule[] that the pertinent statutes do not authorize tolling a term of supervised release during the period in which an offender is absent by reason of his deportation." *Hernández-Ferrer*, 599 F.3d at 68; *see id.* (collecting cases).

how to authorize tolling a term of supervised release, but it chose not to do so in the fugitive context.").[12]

Section 3583(i) points the same way. That provision was added by Congress in 1994 to specifically address edge-case situations involving adjudication of supervised-release violations after the expiration of the supervision term. *See* pp. 7-8, *supra*. Congress's solution was to allow adjudication of late-in-term violations during a "reasonably necessary" period following expiration, but it demanded that a warrant or summons be issued for the violation before the supervision term expires. 18 U.S.C. § 3583(i). Congress had every opportunity to address the abscondment scenario and create a similar exception; to the contrary, it added language that unambiguously *precludes* jurisdiction over violations occurring after the scheduled expiration date of the supervised-release term.[13]

What's more, other provisions of federal criminal law *do* account for the possibility that a defendant may abscond. For instance, 18 U.S.C. § 3290 provides that "[n]o statute of limitations shall extend to any person fleeing

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[12] The question presented in *Johnson* was whether a custodial term later found to be erroneously imposed could be credited toward a defendant's subsequent period of supervised release. 529 U.S. at 54. This Court held that because Section 3624(e) specifically provides for concurrency of custodial and supervised-released terms only when the custodial sentence is less than 30 days, there can be no concurrency under any circumstances for longer sentences. *Id.* at 56-59.

[13] All courts of appeals to address the issue have held that Section 3583(i) is jurisdictional. *See United States v. Gulley*, ___ F.4th ___, No. 24-3078, 2025 WL 747686, at *5 (10th Cir. Mar. 10, 2025) (collecting cases).

from justice"; as this Court has explained, "the statute of limitations normally applicable to federal offenses would be tolled" under this provision "while [the defendant] remained at large." *United States v. Bailey*, 444 U.S. 394, 414 n.10 (1980). Congress did not include equivalent language in Section 3583, and courts should respect that policy choice.

Finally, consider the pre-Sentencing Reform Act history. Prior to the creation of supervised release, the lower courts consistently "allowed tolling of a term of *probation* while an offender was not actually under probationary supervision because he had *either* absconded *or* gone to prison for another offense." *Hernández-Ferrer*, 599 F.3d at 68 (emphasis added). The Sentencing Reform Act codified that practice *in part* in 18 U.S.C. § 3564(b), which provides that "[a] term of probation does not run while the defendant is imprisoned in connection with a conviction for a Federal, State, or local crime" unless the imprisonment is brief. And as discussed, Congress enacted the same rule for supervised release in Section 3624(e). But Congress *declined* to codify fugitive tolling as to either probation or supervised release. Again, Congress's silence speaks volumes, and the majority position gives short shrift to Congress's deliberate policy choices.[14]

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[14] Application of the fugitive-tolling doctrine in the supervised-release context cannot be justified by reference to common-law practices. There simply "is no common law history of tolling terms of supervised release because supervised release is a recent statutory innovation." *Talley*, 83 F.4th at 1304; *see also Johnson v. United States*, 529 U.S. 694, 696-97 (2000) (noting that supervised release was created by Congress in the late 20th century).

B. The Ninth Circuit's Position Is Illogical.

Against this powerful statutory and historical evidence, the circuits in the majority have resorted to the argument that if a prisoner's custodial sentence is tolled upon his abscondment, a supervisee's period might as well be tolled under those circumstances, too. *See, e.g.*, *Island*, 916 F.3d at 253; *Buchanan*, 638 F.3d at 453-54. These courts have also fretted about rewarding supervisees who abscond. *See, e.g.*, *Island*, 916 F.3d at 256; *Murguia-Oliveros*, 421 F.3d at 954. That reasoning is not persuasive.

1. The rationale for the fugitive-tolling doctrine in the custodial context is that the "[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." *Anderson v. Corall*, 263 U.S. 193, 196 (1923). Or put even more simply, "[t]he idea is that a person should not be credited with serving a prison sentence if he is not, in fact, in prison." *Talley*, 83 F.4th at 1301.

This logic does not apply, however, in the case of supervised release. Whereas tolling in the case of custodial abscondment results in the *correct* amount of time served in prison, tolling in the supervised-release context results in *adding* time to the term of supervised release. Consider this very case: the government's position is that Ms. Rico, having absconded, should be deemed *not* to have been on supervised release between her abscondment in 2018 and her arrest in 2023. Yet the government simultaneously maintains that Ms. Rico *was* on supervised release and thus can have her release revoked for several *violations* of her supervised-release conditions committed during that period. Ms. Rico is not

Schrödinger's cat, capable of being both on and off supervised release at the same time. *Accord Talley*, 83 F.4th at 1301 (true tolling "would do little good for the government, considering that Talley's state law offense occurred during the 'tolled' period").

As an illustration, consider the case of a custodial abscondment (*i.e.*, a prison escape). Of course, a prisoner can be punished for the act of escaping, and common sense likewise dictates that the prisoner should not get credit toward his sentence for time spent on the lam. But equally obvious is that the prison *cannot* punish the escapee for, say, possessing a cell phone while missing—even though that conduct would be a violation if it occurred inside the prison walls. That is because the escapee was *not in prison* when he possessed the phone. By contrast, a supervisee *can* be charged for violations of release terms occurring following abscondment. That follows because, despite losing contact with the probation office (itself a violation worthy of revocation), she remains on supervised release.

Put differently, the majority view is "inconsistent with the nature of supervised release," which involves "'restraint[s] contemplated by the law' that a defendant must follow no matter where he is physically located." *Talley*, 83 F.4th at 1302 (alteration in original) (citation omitted) (quoting *Anderson*, 263 U.S. at 196). And "[b]ecause the conditions of supervised release are a continuing restraint on a supervisee's liberty, even when he is violating them, there is no role for fugitive tolling to ensure that an absconder serves the full term of his sentence." *Id.*

2. Some courts of appeals have also expressed concern that supervisees who abscond would receive a undeserved benefit from their misconduct if their supervision period were not tolled. These concerns are overblown.

As a general rule, abscondment will not inure to a supervisee's benefit because *abscondment itself will almost always be a violation of supervised release*. And so long as a "warrant or summons" issues before the supervision term expires, the sentencing court retains its revocation jurisdiction "for any period reasonably necessary for the adjudication of matters arising before its expiration." 18 U.S.C. § 3583(i). The Sentencing Reform Act thus already provides a mechanism to ensure that a defendant who absconds before the expiration of her supervised-release term "will not do so with impunity." *Hernández-Ferrer*, 599 F.3d at 69; *see Talley*, 83 F.4th at 1303 ("[T]he district court . . . did not need to resort to the fugitive tolling doctrine to ensure Talley was not rewarded for absconding.").

That is the situation here, for instance: Ms. Rico concedes that she is subject to revocation for the Grade C violation of changing her residence without proper notice to the probation office. She receives no "windfall" if the government is not able to seek a *greater* sentence for a violation that occurred after her supervision term expired. *Island*, 916 F.3d at 258 (Rendell, J., dissenting).

III. THIS CASE PRESENTS A CLEAN VEHICLE FOR RESOLVING A FREQUENTLY RECURRING YET EVASIVE QUESTION OF FEDERAL CRIMINAL PROCEDURE.

The question presented arises frequently yet has evaded this Court's ultimate resolution. It is cleanly teed up in this case, in which application of the fugitive-tolling doctrine undeniably increased Ms. Rico's applicable Sentencing Guidelines range. The arguments have been exhaustively scrutinized in the lower courts for several decades and no further percolation is necessary. This Court should grant review now because it might not get another pristine chance to do so later.

A. The Question Presented Arises Frequently.

As should be clear from the discussion of the split, the question presented here—and, indeed, the precise facts presented here—arise frequently. The issue has arisen to the court-of-appeals level in eight different circuits over the past two decades.

That stands to reason, too, given the ubiquity of supervised release. As noted above, the vast majority of custodial sentences in the federal criminal system are followed by periods of supervised release, which can last for up to five years (or more in rare cases). *See* pp. 4-5, *supra*. Violations are frequent as well; over 10,000 individuals are re-sentenced to prison each year following revocations of supervised release. *See* p. 5, *supra*. And it is far more likely that an abscondment issue will arise in the supervision context than in the custodial context; after all, a supervisee is not physically confined, and abscondment can consist of nothing more than (as here)

simple failure to maintain accurate contact information with the probation office or to show up for drug testing.

Further, for every case raising this issue that results in a published opinion, there are many more that do not. District courts do not generally issue detailed opinions following revocation proceedings, and because sentences for supervised-release violations are relatively short, by the time a case could be resolved on appeal, the defendant will usually be finished with the custodial portion of his revocation sentence and may well be finished with the supervised-release term as well. Indeed, that is exactly what led the Fifth Circuit to withdraw its opinion in *Cartagena-Lopez*—the case became moot before the court issued its ruling. *See* pp. 16-17, *supra*.

B. This Case Is a Particularly Good Vehicle for Resolving the Question Presented.

While the question presented often evades appellate review, this case presents an excellent vehicle for resolving it.

First, as just noted, because terms of imprisonment and supervised release for violations of the sort at issue here are generally brief, it is rare that a case implicating the question presented will stay live long enough for this Court's resolution. Not so here. The district court sentenced Ms. Rico to 16 months' imprisonment and two years of additional supervised release. Pet. App. 5a. Because of the prompt resolution of the proceedings below (and the speed with which Ms. Rico has filed this petition), Ms. Rico still has over a year remaining on her supervised-release term, which expires in May 2026. *See* D. Ct. Doc. 155, at 1 (Jan. 25, 2023); Pet. App. 5a. If this

Court were to grant certiorari in late June 2025, the case could easily be briefed in time for argument by November 2025 (or October 2025 if the briefing schedule is slightly expedited), leaving plenty of time for an opinion to issue before Ms. Rico's supervised-release term ends.[15] If the Court denies this opportunity to resolve the clear and entrenched circuit split, it is not clear that another opportunity will soon arise for this Court's review—regardless of the frequency with which sentencing courts are faced with the question presented.

Second, the issue is cleanly presented here. In both the district court and the court of appeals, Ms. Rico argued that fugitive tolling is inapplicable in the supervised-release context. Pet. App. 2a, 26a; Appellant's C.A. Br. 16-29; D. Ct. Doc. 202, at 5-8 (Mar. 8, 2024). Indeed, that was her sole argument on appeal. *See* Appellant's C.A. Br. 14-15.

Third, resolution of the question presented in Ms. Rico's favor is highly likely to affect her sentence. As explained above, Ms. Rico's revocation sentence was premised on her January 2022 offense, which was deemed a Grade A violation and thus significantly increased her Guidelines range. *See* pp. 11-12, *supra*. If this Court were to reverse, Ms. Rico's revocation would be based only on a Grade C violation. Moreover, if the error were corrected, it is probable that the sentencing court would account for Ms. Rico's overservice in

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[15] If the Court were to grant certiorari in October 2025, Ms. Rico would request an expedited briefing schedule that would allow the case to be heard in the December 2025 argument session. This would also leave sufficient time to decide the case before Ms. Rico's supervision term ends.

deciding whether to unconditionally release her without any additional supervision. *Cf. Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016) ("Where . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights.").

Lastly, no further percolation is necessary. There are only two possible answers to the question presented—the fugitive-tolling doctrine either applies in the supervised-release context or not—and at least six circuits have already staked out firm positions (four yes, two no). These courts have all been exposed to the panoply of arguments on each side of the split and have analyzed the issue in depth. They simply disagree, and intractably so. Indeed, in this very case, the court of appeals refused to reconsider its own precedent, despite the circuit split that has arisen since the Ninth Circuit first adopted the fugitive-tolling doctrine in this context. Pet. App. 3a. There is no reason to think any future case will shed additional light on the legal arguments, so this Court should grant review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2025

APPENDIX

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APPENDIX A

FILED

MAR 6 2025

Molly C. Dwyer, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ISABEL RICO, AKA Bad Girl, Defendant-Appellant.	No. 24-2662 D.C. No. 2:10-cr-00381-AG-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted March 4, 2025[**]
Pasadena, California

Before: IKUTA and CHRISTEN, Circuit Judges, and LIBURDI,[***] District Judge.

Defendant Isabel Rico appeals from the district court's revocation of her supervised release and imposition of a 16-month prison sentence, followed by a new two-year period of supervised release. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we affirm.

Contrary to Rico's assertion, we are bound by circuit precedent applying the fugitive tolling doctrine. *See, e.g.*, *United States v. Crane*, 979 F.2d 687, 691 (9th Cir. 1992); *United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005); *United States v. Ignacio Juarez*, 601 F.3d 885, 889 (9th Cir. 2010) (per curiam). The fugitive tolling doctrine is consistent with *Bowles v. Russell*. 551 U.S. 205, 214 (2007). *Bowles* held that the Supreme Court cannot create an equitable exception to a jurisdictional requirement created by Congress. *Id.* at 213, 214. Because Congress has not stripped the courts of jurisdiction over implementation of a term of supervised release, the fugitive tolling doctrine is not "clearly irreconcilable" with intervening higher authority. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Michael T. Liburdi, United States District Judge for the District of Arizona, sitting by designation.

Here, the district court correctly concluded that the fugitive tolling doctrine applied. Rico absconded in May 2018, after she had served five months of a 42-month term of supervised release. This means that she had 37 months of supervised release remaining. Pursuant to the fugitive tolling doctrine, Rico's term of supervised release was tolled while she was a fugitive from May 2018 to January 2023, a period of four years and eight months. After tolling ended in January 2023, Rico's term of supervised release would have expired in February 2026, i.e., 37 months from January 2023. Therefore, the district court had the authority to revoke Rico's 42-month term of supervised release—and to sentence her to 16 months in prison, followed by two years of supervised release—based on violations that the probation office first raised in February 2023. *See* 18 U.S.C. § 3583(i).

Finally, we conclude that this case does not meet the standard for en banc review. *See* Fed. R. App. P. 40. Therefore, we decline to reconsider the fugitive tolling doctrine en banc. *See* 9th Cir. Gen. Ord. 5.2 (stating that a three-judge panel can deny initial en banc review on behalf of the Court).

AFFIRMED.

APPENDIX B

[Date Filed: 04/22/2024]

cc: USPO; BOP; USM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ISABEL RICO, Defendant.	Case No. 2:10-cr-00381-FLA-1 **JUDGMENT AND COMMITMENT ORDER REGARDING REVOCATION OF SUPERVISED RELEASE**

On April 19, 2024, the court held a resentencing hearing. Assistant United States Attorney Sarah Sun Lee, United States Probation and Pretrial Services Officers Blanca Gonzalez and Marisol Martinez, Defendant Isabel Rico, and Defendant's counsel, Deputy Federal Public Defenders Claire Marie Kennedy and Andrew Talai, were present.

WHEREAS, on March 3, 2023, the Defendant having admitted Allegation Numbers 3, 4, and 5 of the Petition on Probation and Supervised Release and Summary of

Violation Report filed on May 29, 2018 (Dkt. 151) and February 21, 2023 (Dkt. 166) (the "Petition"), and the court having accepted Defendant's admission and found that the Defendant violated the conditions of the supervised release order imposed on September 26, 2011, and November 16, 2017 (Dkts. 146, 147, 166, 169),[1]

The court heard argument and found the defendant committed both Grade A 4 and Grade C violations while on supervised release. IT IS ADJUDGED, for the reasons set forth in the Petition and stated by the court at the hearing, that supervised release is REVOKED. The Defendant is committed to the custody of the Bureau of Prisons for a term of sixteen (16) months as to COUNT 1 of the Indictment. Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of two (2) years under the same conditions previously imposed on September 26, 2011, and November 16, 2017, as well as the following additional conditions:

1. The Defendant shall comply with the rules and regulations of the United States Probation and Pretrial Services and Second Amended General Order 20-04;

2. The Defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urine analysis, breath or sweat patch testing, as directed by the probation officer. The Defendant shall abstain from using alcohol and illicit drugs, and from abusing

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[1] Refers to the original count of conviction which resulted in the term of supervised release.

prescription medications during the period of supervision;

3. The Defendant shall reside at, participate in, and successfully complete a residential substance abuse treatment program approved by the United States Probation and Pretrial Services Office, that includes testing to determine whether the Defendant has reverted to the use of drugs or alcohol and the Defendant shall observe the rules of that facility;

4. The Defendant shall reside for a period not to exceed one hundred and eighty (180) days in a residential re-entry center (pre-release component) as directed by the probation officer and shall observe the rules of that facility; and

5. The Defendant shall submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the Defendant's person, and any property, house, residence, vehicle, papers, computer, cell phones, and other electronic communication or data storage devices or media, e-mail accounts, social media accounts, cloud storage accounts, effects and other areas under the Defendant's control, upon reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct by the Defendant, or by any probation officer in the lawful discharge of the officer's supervisory functions.

The Defendant is advised of her right to appeal.

On the government's motion, Allegation Numbers 1 and 2 of the Petition are hereby DISMISSED.

IT IS ORDERED that the Clerk deliver a copy of this Judgment to the U.S. Marshal and the U.S. Probation and Pretrial Services Office, or other qualified officer.

Dated: April 22, 2024 [*/s/ Fernando L. Aenlle-Rocha*]

FERNANDO L. AENLLE-ROCHA
United States District Judge

Dated: April 22, 2024 BRIAN KARTH, CLERK OF THE COURT

[*/s/ Jennifer Graciano*]
Jennifer Graciano, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – CENTRAL DIVISION

HONORABLE FERNANDO L. AENILLE-ROCHA, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. CR 10-381-FLA

ISABEL RICO,

Defendants.

_____/

REPORTER'S TRANSCRIPT OF SENTENCING HEARING
Friday, April 19, 2024
3:00 p.m.
LOS ANGELES, CALIFORNIA

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ANDREW BRIAN TALAI
Deputy Federal Public Defenders
Central District of California
321 East Second Street
Los Angeles, California 90012

ALSO PRESENT: MARISOL MARTINEZ AND BLANCA GONZALEZ

LOS ANGELES, CALIFORNIA; FRIDAY, APRIL 19, 2024

3:00 P.M.

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THE COURTROOM DEPUTY: All rise. Please be seated.

Calling Item No. 3, LA CR 10-381-FLA, *United States of America versus Isabel Rico.*

Counsel, your appearance, starting with the government.

MS. LEE: Good afternoon, Sarah Lee appearing on behalf of United States, and probation officers Marisol Martinez and Blanca Gonzales are also present at counsel table.

MS. KENNEDY: Good afternoon, Your Honor. Deputy Federal Public Defender, Claire Kennedy, on behalf of Ms. Rico who is custody and present here in court. Joining me at counsel table is DFPD Andrew Talai.

THE COURT: Good afternoon, everyone, welcome.

Are the parties ready to proceed with resentencing in this matter?

MS. LEE: Yes, Your Honor.

THE COURT: Before we begin, I would like to provide a summary of the procedural history of the case and what brings us here.

On September 26, of 2011, Ms. Rico was sentenced to an 84-month term of imprisonment to be followed by a four-year term of supervised release, after her conviction for conspiracy to distribute methamphetamine and heroin.

She was released from custody on January 23, of 2017, and her term of supervised release began on that day.

Six months later on July 25, of 2017, the Court presiding over her case, issued a warrant for Ms. Rico's arrest after the probation officer alleged that she had violated the conditions of supervised release by using methamphetamine and failing to report for drug treatment and drug testing.

On November 16 of 2017, the Court found Ms. Rico to be in violation of her supervised release, revoked her supervision, ordered her to serve a term of two months imprisonment, followed by a 42-month term of supervised release.

Ms. Rico was released from custody on December 11 of 2017, and her second term of supervised release began.

Two months later in February of 2018, Ms. Rico was again testing positive for illegal drugs, and at that point in time the Court did not take any action.

Then a few months after that on May 19th of 2018, Ms. Rico moved out of her residence and did not inform her probation officer.

On May 29 of 2018, a warrant was issued for Ms. Rico's arrest after additional positive drug tests and her absconding from supervision.

Ms. Rico remained a fugitive until January 25 of 2023, when she appeared before a Magistrate Judge in this district.

So as a result, she was missing, and thus, unsupervised for approximately four years and eight months.

On March 3 of 2023, Ms. Rico appeared before me and she admitted Allegations 3, 4, and 5 to the May 29, 2018, and February 21, 2023, petitions that had been filed by the U.S. Probation Office.

Allegation No. 3 of that petition stated that having been ordered by the Court to report to the nearest Probation Office within ten days of any change in residence or employment Isabel Rico has changed her residence and failed to notify the probation officer, her current whereabouts are unknown.

Allegation No. 4 of the petition stated that having been ordered by the Court not to commit another federal, state, or local crime on January 4, 2021, Isabel Rico evaded police in violation of California Vehicle Code Section 2800.1(a) and drove without a license in violation of California Vehicle Code Section 12500(a), as evidenced by her conviction of those charges in the Superior Court of California, County of Ventura, under Case No. 2021-000134.

And Allegation 5 of the petition, stated that having been ordered by the Court not to commit another federal, state, or local crime, on January 22, 2022, Isabel

Rico possessed a controlled substance for sale in violation of California Health and Safety Code Section 11351, as evidenced by her conviction of that charge and the Superior Court of California, County of Ventura, under Case No. 2022-001611.

On April 14, of 2023, Ms. Rico appeared for sentencing here.

I found that Ms. Rico had committed a Grade A violation of supervised release. I revoked her supervised release, and I imposed a term of 24 months' imprisonment with no supervision to follow.

Judgment was entered four days later on April 18 of 2023, and Ms. Rico had been scheduled to be released from custody of October 8 of this year.

On April 28 of 2023, Ms. Rico filed a notice of appeal pursuant to the parties' stipulation, the Ninth Circuit remanded the case for resentencing.

So we are here today for Ms. Rico's resentencing. And I have reviewed the parties' respective filings, and I will now take argument from each side.

So let me start with start with the government.

MS. LEE: Thank you, Your Honor. May I approach the lectern?

THE COURT: You may.

MS. LEE: Your Honor, as the government has explained in its position papers, the defendant has raised two primary arguments on appeal, and the government maintains its prior recommendation of 12 months, the government does not believe that anything has changed

with respect to the defendant's characteristics, or with respect to the underlying allegations, but the government agreed to a joint remand because the government feels that there are facts and arguments that it thinks that it could have made at the District Court level, and that will bolster the record for any other potential appeal.

So that's where we are now. I just want to address the two issues briefly, because there has been a lot of paper submitted by the government on these issues.

But I just want to hit on them briefly, but then open it up to the Court's questions.

So first, the issue of the fugitive tolling doctrine is the first issue I want to address.

The fugitive tolling doctrine has been upheld time and again by the Ninth Circuit. The Ninth Circuit was the first Circuit to consider this doctrine. It upheld the fugitive tolling doctrine, and the majority of Courts to consider this issue, since then, the Courts of Appeals have upheld the fugitive tolling doctrine as well.

The defense now is pointing to a minority of circuits who have not upheld the fugitive tolling doctrine, but those are not relevant to the Court today.

The Court is bound by Ninth Circuit precedent. There has been nothing suggesting that the Ninth Circuit precedent has been overruled either implicitly or explicitly.

The second argument defendant raised on appeal was whether the most serious offense was a Grade A violation or Grade B violation.

The government submits again it was a Grade A violation. The government has now submitted documentation showing that the charging document in the Ventura County case from January 22, charged defendant with possessing Fentanyl.

The government submits that Fentanyl is a controlled substance, and therefore, the defendant's offense was a controlled substance offense under the sentencing guidelines.

There is all of these arguments that defendant has raised with respect to over breadth. The government submits that the California definition of Fentanyl is not overbroad. It matches the federal definition of Fentanyl.

And the defendant's arguments are also aimed at the definition of Fentanyl analogs.

And here, there is just no evidence that defendant possessed Fentanyl analog as opposed to Fentanyl itself, so not only are defendant's arguments wrong, but they are irrelevant to this case where the defendant was charged with and admitted to possessing Fentanyl as opposed to Fentanyl analogs.

So, Your Honor, with those points, unless the Court has any further questions for me, we submit on the papers.

THE COURT: I have one question about the grade, the nature of the violations.

In my looking at the guidelines, it seems that a Grade B violation applies essentially to any felony that isn't a Grade A felony.

Yes, would you agree with that?

MS. LEE: Yes, Your Honor.

THE COURT: Okay. So the other conviction, right, not the possession for sale of Fentanyl, but the other conviction, which is evading police and driving without a valid license, aren't those both misdemeanors, and if that is the case, then won't those be grade -- that would be a Grade C violation?

MS. LEE: Your Honor. I have not dug into that issue.

I was focused on the most serious offense alleged here so --

THE COURT: Well, I would use the most serious violation for purposes of determining the sentencing guidelines range.

MS. LEE: Right.

THE COURT: So, if I did adopt the defense's argument and elect, I guess, not -- elect to find that Ms. Rico could not be held accountable for Grade A violation, does that leave me with a Grade C violation as opposed to B, because that does affect the range.

MS. LEE: Your Honor --

THE COURT: If you can't answer it right this minute, I can turn to defense, and hear their arguments.

But in my review of the California Penal Code, it seemed as if those two violations were misdemeanors.

I certainly know that 12500 is a misdemeanor, the driving without a valid driver's license, the 2800.1 I thought also was a misdemeanor in the Penal Code.

MS. LEE: Again, I haven't looked into this issue, Your Honor, I'm not an expert on the vehicle code violations, but with respect to your question --

THE COURT: That's what would make it a Grade B, though, right, is if those --

MS. LEE: Are felonies.

THE COURT: At least one of them is a felony?

MS. LEE: Yes. With respect to -- if you adopt the defendant's arguments with respect to the January 22 conviction for possessing a controlled substance for sale, the conviction is still a felony conviction, and so with respect to the arguments of whether the Court needs to apply the modified categorical approach in order to determine whether the controlled substance at issue is actually a controlled substance offense, under the sentencing guidelines, that is the argument that they are raising.

They are conceding, at minimum, it's a controlled substance offense under California state law, that is a felony violation.

So, the government still believes that at minimum, it's a Grade B violation, if the Court is inclined to accept the defendant's arguments with respect to the over breadth of the statute.

THE COURT: I see. So with respect to the drug conviction, you are saying if I -- I guess, if I didn't find there was sufficient evidence, right, a preponderance of

the evidence, to establish that it was a controlled substance offense, and that leaves -- that means, it's now captured by B, right, because now, it's just a felony as opposed to one of the enumerated felonies in A.

MS. LEE: Yes, Your Honor.

THE COURT: Got it.

MS. LEE: Thank you, Your Honor.

THE COURT: Thank you.

MS. KENNEDY: Your Honor, may I also approach the lectern?

THE COURT: Yes, you may.

MS. KENNEDY: Thank you.

THE COURT: I encourage it.

MS. KENNEDY: Before I address some of the legal issues raised by the defense, I'd like to just begin by saying that the ultimate question here today is still what is the most -- what is the appropriate sentence for Ms. Rico, and all parties maintain that a 12-month sentence is still appropriate here.

In fact, I think Ms. Rico has served beyond 12 months. I think she served just shy of 15 months as of today.

But when we were last here about a year ago, Ms. Rico expressed to the Court she really had changed her life, and I know she wanted to prove that to the Court, and I think her post-offense conduct in BOP illustrates that.

Despite lengthy waiting list for programs, she has gotten herself in to as many courses as she could, Spanish courses, mental health courses, she has been in substance abuse treatment. She is employed through Unicore which is highly-desired job placement within BOP, and I don't think the prison would give that job placement if they didn't find her trustworthy or reliable.

I also do want to note Ms. Rico has served the last 12 months at FCI Dublin, and just this week, it was actually announced her prison facility will be closing.

And this comes on the heels of numerous -- dozens, I think, reports and allegation of sexual abuse of inmates by guards and employees at the prison.

I'm not making any representations about Ms. Rico specifically, but I think, given what was happening regularly at her facility, I think her time in custody has maybe been more difficult than if she had been housed at a different facility.

I just wanted to flag that for the Court. It hasn't been an easy year for Ms. Rico, but she has persevered.

As for the legal arguments raised by the defense as Ms. Lee said, there has been extensive briefing in this case, I know the Court has carefully considered all of the papers and so I don't want to belabor any points or be repetitive.

But as to whether a Grade A offense is appropriate here, the problem is that the state statute of conviction is broader than the federal drug statute.

Although, the state statute is divisible as to drug type, meaning Fentanyl, methamphetamine, heroin, different types of drugs, it's not further divisible once you zero in on drug type.

And in other ways, once you set on a drug type, there is different ways to commit the offense.

You could possess Fentanyl or you could possess an analog of Fentanyl.

And you are charging document is still just going to say Fentanyl, because the California Court doesn't require the charging documents to be more specific than that.

And because the definition of an analog is broader under state law than it is under federal law, we can never categorically match the two offenses.

So, to further answer the Court's question posed to the government, I think that the appropriate highest offense grade here is B, because, yes, the drug conviction is a felony. It's just not a Grade A, and I also am not sure about the other state convictions.

It seems they might be wobblers, punishable, either at a misdemeanor or felony, but regardless, the Grade B offense would control the sentencing guidelines range.

So the defense does agree with the government that if the Court can not find it to be a Grade A, we would agree it would be a Grade B range.

As for the jurisdictional argument, regarding tolling, there is a circuit split and the defense has briefed that issue and they have preserved it for Ms. Rico.

And unless the Court has any other specific questions for me, I think the defense will submit on its papers.

THE COURT: No, I don't think I have any specific sentence.

Okay. I don't think I have any specific questions -- any specific questions. I have read the papers carefully. I think everything is well briefed.

MS. KENNEDY: Thank you.

THE COURT: You have created your record. Does the government wish to be heard further?

MS. LEE: Gosh, Your Honor, I can't help myself.

THE COURT: Sorry, I guess, I should not have opened the door.

MS. LEE: I will try to be brief.

THE COURT: Yeah, let me say this: I think what I'm going to do is rule on these legal issues, and then deal with what I think everyone agrees with, is the most important issue before me, which is the length of the sentence and what it should be and what I should do with respect to Ms. Rico going forward.

Is there anything -- so with that caveat, is there anything more that you would like to argue in connection with the legal issues that have been framed?

MS. LEE: Yes, Your Honor.

I just want to briefly note that defense counsel raises an argument that California does not require the charging document to specify whether a defendant possessed a controlled substance or a controlled substance analog.

For example, I think of defense counsel is arguing that in California state court, you can just allege that a defendant possessed Fentanyl when in fact she possessed a Fentanyl analog.

The government disagrees with that. The defendant cites to this case *People versus Becker*, which as we have explained in our papers does not hold that the charging document can be ambiguous as to that.

Becker involved Ecstasy. There was testimony at trial that Ecstasy itself, because of the chemical structure of it, can be an analog of methamphetamine.

So there was an issue whether the jury found either that the defendant possessed Ecstasy, or an analog of methamphetamine, which is Ecstasy, in some cases.

So, I just want to note that the government disagrees with that divisibility argument that defense counsel raises.

With that, we will submit.

THE COURT: Thank you. All right.

Well as the parties know, I am required to calculate the sentencing guideline range correctly.

MS. LEE: Your Honor, I apologize for interrupting, but I believe under Federal Rule of Criminal Procedure 32 that the defendant should also be allowed to allocute before?

THE COURT: I don't disagree with you, but I was going to rule on these legal issues first.

MS. LEE: I'm sorry.

THE COURT: And give everybody an opportunity to be heard as to sentence, then I would give Ms. Rico an opportunity to be heard.

MS. LEE: Thank you, Your Honor.

THE COURT: All right. So, as I was about to say, as the parties know, I am required to calculate the sentencing guideline range correctly.

I'm required to consider that range before I select and impose a final sentence.

This is a fairly narrow issue, and one that doesn't seem to come up that often in supervised release violation cases, so and given you have already been up to the Circuit once, you very well may go again.

I'm going to do my best to explain my reasoning and analysis for the benefit of all.

So, as you know Guideline Section 7B1.1(a)(1) provides that with respect to the types categories, the grading of violations, that a Grade A violation includes conduct that constitutes a federal, state or local offense, punishable by a term of imprisonment, exceeding one year, that is a crime of violence, a controlled substance offense or involves possession of firearm.

A Grade B violation includes conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year, and a Grade C violation includes conduct constituting a federal, state,

or local offense punishable by a term of imprisonment of one year or less or a violation of any other condition of supervision.

So, on February 22, of 2022, Ms. Rico was convicted of possession for sale of Fentanyl, a felony, in Ventura County Superior Court.

She was sentenced to two years' imprisonment, and I believe that this constitutes a state offense that is punishable by a term of imprisonment exceeding one year, that is a controlled substance offense.

I also believe that there is sufficient evidence in the record before me to demonstrate that Ms. Rico was convicted of a controlled substance offense.

I have, notwithstanding, defense's arguments regarding the nuances of the drug, I have before me documents from the Ventura County Superior Court, including the felony complaint of which pleads a single count charging Ms. Rico with possession for sale of a controlled substance, to wit, Fentanyl, in violation of California Health and Safety Code Section 11351.

I have also been provided with the Oxnard Police Department report stating that Ms. Rico was arrested on January 22, of 2022, in possession of a large quantity of Fentanyl.

The police saw Ms. Rico exit a car that she occupied by herself, that contained approximately 57 grams of Fentanyl, two digital scales, baggies with white residue, a methamphetamine pipe, and an unstated amount of black tar heroin.

Ms. Rico told the police that the substance was Fentanyl. That it was cut, because pure Fentanyl was too strong; that she had bought it earlier that day for $800 to $900, that she intended to sell it to cover her cost of buying it; that she normally sold it in $10 and $20 increments, and she expected to be able to sell it for at least twice what she paid for.

The Superior Court sentencing minute order states that Ms. Rico pled guilty, that the Court found there was a factual basis for her plea, that the request for probation was denied and she was being sentenced to felony jail.

In other words, that she would be serving her two-year term in the Ventura County jail instead of in state prison.

The order also states that the sentence was to be served consecutive to any other time imposed in Ms. Rico's pending federal case.

So I believe that this evidence is sufficient to establish the Grade A nature of the violation, so as a result, I find that allegation No. 5 of the petition, that that is a Grade A violation, and Ms. Rico admitted to this violation when she appeared before me.

On January 4, of 2021, Ms. Rico was arrested by the Oxnard Police Department for evading police, being an unlicensed driver, and possession of drug paraphernalia.

On May 26 of 2021, Ms. Rico pleaded guilty and was convicted of evading police and being an unlicensed driver in violation of California Vehicle Code Sections 2800.1(a), and 12,500(a).

Based on my review of the California Penal Code, these are misdemeanor offenses under California law.

So as a result, I find that allegation No. 4 is a Grade C violation. And Ms. Rico also admitted to this allegation when she appeared before me.

Lastly, Ms. Rico admitted to Allegation No. 3, which alleged that she changed her residence and that she failed to notify the probation officer within ten days of doing so, and I find that Allegation No. 3 is a Grade C violation.

Now, although not all of the legal arguments that I'm about to address were addressed during today's hearing, they have been raised in the parties' papers to me so I'm going to address them now.

I do not agree with Ms. Rico's argument that her term of supervised release continued uninterrupted and expired on June 10 of 2021, and that Title 18, United States Code, Section 3583(i) applies.

The Ninth Circuit has held repeatedly that a defendant's term of supervised release is tolled when she is in fugitive status, and that a defendant is in fugitive status when she fails to comply with the terms of her supervised release.

There is no question that Ms. Rico was in fugitive status. She was ordered to serve a 42-term month of supervised release, which she began to serve upon her release from custody on December 11, of 2017.

Less than six months later, with more than 36 months of supervised release still to serve, Ms. Rico

moved out of her residence, and she did not tell her probation officer where she was going.

She remained a fugitive for the next four years and eight months.

She later admitted to committing crimes during that time period, as I just described.

The facts in *U.S.C. v Watson*, one of the cases cited to me in the papers at 633 F.3d, 929, which the Ninth Circuit decided in 2011. Those facts are helpful; no case is perfectly on point, but the facts in this case are helpful.

Mr. Watson was sentenced in 1989 to 63 months in prison followed by a four-year term of supervised release. His term of supervised release began on September 3rd of 1993, and was set to expire on September 2nd of 1997.

There was no dispute that Mr. Watson became a fugitive from federal supervision in October of 1995.

When he, like Ms. Rico, failed to notify his probation officer of his change of residence, and he stopped -- also stopped submitting monthly reports.

Between 1996 and 2007, Mr. Watson was arrested 11 times in Minnesota, which led to the issuance of three state warrants that remained outstanding. These are all facts set out in the Ninth Circuit's decision.

Like Ms. Rico, Mr. Watson argued that his term of supervised release had expired during the time he lived in Minnesota, and the District Court had no jurisdiction to revoke his supervised release.

The District Court disagreed and sentenced him to three years in prison.

On appeal, the Ninth Circuit quoted Section 3583(i), and noted that the probation officer had issued an unsworn petition in January of 1996, which the District Court signed the next month in February of 1996, and followed that up with a sworn declaration nine years later in May of 2005, reaffirming the original petition and requesting a new bench warrant.

The Court issued the warrant, and Mr. Watson was finally arrested on September 18, of 2009, 12 years after the original supervised release expiration date.

While preparing for the violation hearing, the probation officer learned of the 11 arrests in Minnesota between 1996 and 2007.

The Ninth Circuit held that Mr. Watson's fugitive status tolled the will term of supervised release, and that the District Court had jurisdiction to revoke supervised release and sentence Mr. Watson to prison.

Under Ninth Circuit authority the term of supervised release does not expire, while the defendant remains a fugitive.

It begins to run again when -- I'm quoting from that decision: Federal authorities are capable of resuming supervision, end quote, in other words, once the defendant has been arrested by federal authorities.

The Ninth Circuit issued the *Watson* decision in 2011. It's consistent with other Ninth Circuit rulings upholding the fugitive tolling doctrine, and regardless of what

other circuits think, I am bound by Ninth Circuit precedent.

Now, let me address the Supreme Court decision that the defense is relying on.

The decision of *Bowles v Russell*, 551 U.S. 205, 2007 decision by the United States Supreme Court.

So this decision is issued four years before the Ninth Circuit ruling in *Watson*.

The holding in *Bowles* has nothing to do with supervised release with Section 3583(i) with fugitives or with the fugitive tolling doctrine.

Instead, it concerns an express 14-day window under Federal Rule of Appellate Procedure 4(a)1(a), and 28, United States Code, Section 2107(a), that allows District Courts to extend the filing period for a notice of appeal in a civil case up to 14 days from the day the District Court grants the order.

In that case, the District Court granted the order, but inexplicably extended the time for the petitioner to file his notice of appeal by 17 days, instead of 14 days.

The Supreme Court held that it has, quote, long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature, end quote.

The Court of Appeals had no jurisdiction to hear the appeal even though the petitioner had relied on the District Court's erroneous order.

There is no holding that I have seen, certainly none that has been supplied to me by the parties, holding that

Bowles applies to the fugitive tolling doctrine, or to supervised release. The context is completely different.

Similarly, in another case cited to me, the Ninth Circuit's ruling in *U.S. v Campbell* at 883 F.3d. 1148, from 2018, that case is just not applicable to the facts here.

Ms. Campbell's supervised release commenced on February 15th of 2014, and expired on February 14th of 2017, three years later.

On February 7, seven days before the expiration of her supervised release, the probation officer filed a petition alleging three violations, which the District Court approved two days later, or five days before expiration.

About a month later, on March 17, the probation officer petitioned the Court to approve an amendment alleging 22 new violations.

The parties agreed that these were new post-expiration allegations, they were unrelated to any allegation made before expiration of supervised release.

About a month after that, the probation officer petitioned the District Court again to amend the violation report.

The District Court approved both amendments.

On appeal, the Ninth Circuit held that the District Court will exceeded its jurisdiction under Section 3583(i) only as to those violations that were alleged after the expiration of the defendant's term of supervised release.

Section 3583(i) applied in that case, because supervised release had unambiguously clearly expired.

So, unlike Mr. Watson, and Ms. Rico, Ms. Campbell was not a fugitive and her term of supervised release was never tolled.

So, until the Ninth Circuit or the Supreme Court hold otherwise, a defendant's fugitive status tolls the term of supervised release and prevents it from expiring.

It does not expire, thus Section 3583(i) is not triggered.

So, as a result, I am finding today that the most serious violation that Ms. Rico committed is a Grade A violation.

So on Count 1, if I were to revoke supervised release and impose a term of imprisonment, a new term of supervised release may be imposed.

The underlying conviction in this case, the drug conviction, for which Ms. Rico was placed on supervised release was a Class B felony.

Ms. Rico's criminal history category at the time of her original sentencing was Category VI.

So as a result, the sentencing guideline range under Section 7B1.4 for Grade A violation is 33 to 41 months imprisonment.

The guideline range for a Grade C violation is eight to 14 months, and the statutory maximum term of imprisonment is 36 months, because the crime of conviction that resulted originally in a term of supervised release was a Class B felony.

So, as a result, based on my findings today, which I believe are consistent with my findings the last time we

were here, but nonetheless, hopefully I have explained myself better in light of the parties' briefing, the applicable sentencing guidelines range is 33 to 36 months, the statutory maximum.

So, I now want to give the parties an opportunity to be heard, including Ms. Rico, as to what the appropriate sentence should be at this time.

I will start with the government.

MS. LEE: Again, Your Honor, the government submits on its papers.

We recommended 12 months at the prior sentencing. We recommend 12 months again here, in light of the fact that the defendant's characteristics and history haven't changed, we maintain our recommendation of 12 months.

THE COURT: All right. Thank you.

MS. KENNEDY: Thank you, Your Honor. I combined my sentencing argument with my legal arguments already.

THE COURT: I'm happy to hear it again.

MS. KENNEDY: I don't have much more to add, but I will note that under *United States versus Pepper*, the Supreme Court has held that post-offense rehabilitation in prison is relevant under resentencing hearing.

I understand the government says nothing about Ms. Rico's history or characteristics has changed, I understand what she is saying.

I think those circumstances have changed and that there is more mitigating evidence before the Court about Ms. Rico's conduct and what she has been up to

and how she was being working on herself, and with that, I will submit.

I will agree with the government, the 12 months which would be time served here, is appropriate. Thank you.

THE COURT: All right. Thank you.

Ms. Rico, would you like to speak?

You don't have to, you are under no obligation to say anything, but you certainly have a right to speak.

I'm happy to hear from you.

I have read all of the parties' papers, I have read your letter carefully, which I appreciated, and the other documents that were submitted from the BOP, so if you would like to speak, that would be fine.

THE DEFENDANT: I said everything in my letter.

THE COURT: You said everything in your letter.

THE DEFENDANT: Yes.

THE COURT: All right. Well, before I impose -- before I select a sentence and impose a sentence, I would like -- again, you don't have to say anything, but your sobriety is very important to your future success, and to not falling back into old habits.

THE DEFENDANT: Yes, sir.

THE COURT: So it is my view that I think, given your fairly lengthy history of substance abuse and where it has led you, I think you still need support, so are you open to that, meaning additional programming?

THE DEFENDANT: Well, remember when I was on the run for four years, I was in San Jose being clean and everything, and that's where I'm going back to.

THE COURT: Uh-huh.

THE DEFENDANT: That's where all of my sobriety, was before I --

MS. KENNEDY: If I could just clarify for the Court because it's been a while since our last hearing, before Ms. Rico picked up the two state cases, we spent a lot of time talking about today. Although, she was a fugitive, she was sober, living with her mother.

There was a period of her life, at least for a couple of years, where she was doing well, despite not having reported to her probation officer.

So I think that's what Ms. Rico is referencing, the time where she was living in San Jose, without permission, she was sober, but her sibling's sudden death is what caused her to sudden relapse.

THE COURT: All right. Anything more from anybody?

MS. LEE: No, Your Honor. Thank you.

MS. KENNEDY: Nothing more from the defense.

THE COURT: Thank you. Are the parties of any reason why a sentence should not now be imposed?

MS. LEE: No, Your Honor.

MS. KENNEDY: No, Your Honor.

THE COURT: All right. There being no legal cause appearing, and having reviewed and considered the

most recent and the prior violation reports prepared by the United States Probation Office, and arguments and papers of counsel, Ms. Rico's statement, including her letter to the Court, and the attached documents, the recommendation of the probation officer, the factors that are specified in 18, United States Code, Section 3583(e), concerning the modification or revocation of supervised release, and the Chapter 7 policy statements in the sentencing guidelines, I find that the defendant has committed both Grade A and Grade C violations, while on supervised release, and the following sentence is sufficient, but not greater than necessary, regardless of the applicable sentencing guideline range to comply with the purposes set forth in 18, U.S.C., Section 3553(a) as limited by Section 3583.

It is ordered that the term of supervised release is revoked, and the defendant is committed to the custody of the Bureau of Prisons for a term of 16 months as to Count 1.

Upon release from imprisonment, Ms. Rico shall be placed on supervised release for a term of two years, under the same conditions previously imposed along with the following additional conditions:

One, the defendant shall comply with the rules and regulations of the United States Probation and Pretrial Services Office and Second Amended General Order 20-04.

Two, the defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urine analysis, breath and/or sweat patch testing, as directed by the probation officer.

The defendant shall abstain from using alcohol and illicit drugs and from abusing prescription medications during the period of supervision.

Three, the defendant shall reside at, participate in, and successfully complete a residential substance abuse treatment and counseling program approved by the United States Probation and Pretrial Services Office, that includes testing to determine whether the defendant has reverted to the use of drugs or alcohol, and the defendant shall observe the rules of that facility.

Three, the defendant shall reside for a period, not to exceed 180 days, in a residential re-entry center, prerelease component, as directed by the probation officer and shall observe the rules of that facility.

Five, the defendant shall submit to a search at any time with or without a warrant, and by any law enforcement or probation officer of the defendant's person, and any property, house, residence, vehicle, papers, computers, cell phones, other electronic communication or data storage devices or media, e-mail accounts, social media accounts, cloud storage accounts, effects in other areas under the defendant's control upon reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct by the defendant or by any other probation officer in the lawful discharge of the officer's supervisory functions.

The sentence I have imposed is sufficient, but not greater than necessary to effectuate the purposes of 18, U.S.C., Section 3583, after considering the nature and circumstances of the violations in this case, the need to sanction the breach of trust, the need to defer future

criminal conduct, to protect the public from further crimes by Ms. Rico, and to provide Ms. Rico with needed education or vocational training, medical care or other correctional treatment in the most effective manner, especially given Ms. Rico's extensive history of substance abuse.

Ms. Rico, I expect you will be released from custody very soon in the near term.

So again, your sobriety is and should be the single most important focus of your life, going forward.

It is the key to your ability to not find yourself back in court, and to have a more productive life and take care of your mother, and any other family members.

So, I have structured the sentence this way to provide you with support you would not have otherwise, if I did not impose another term of supervised release.

So the United States Probation and Pretrial Services Office is here to provide that support.

If you fall back into using again, and it's a fight between you and probation, this will not be productive.

But, it can be productive if you are committed to your sobriety because they can provide you all of the tools I have just ordered going forward over the next two years.

The goal here is at the end of this period, you are substance-addicted free, and you can hold jobs and take care of yourself and your family and never find yourself inside a state or federal courthouse again.

THE DEFENDANT: Thank you.

THE COURT: Okay. But if you are back here, you know, where to find me, and I certainly know you and your lawyers don't want to be back here.

All right. Ms. Rico, if you wish to appeal this sentence, you must file a notice of appeal within 14 days of today or you will lose your right to appeal.

If you are unable to afford an attorney for your appeal, one may be appointed at no cost to represent you.

Do you understand your right to appeal and the requirement that you must file a notice of appeal within 14 days of today?

THE DEFENDANT: Yes.

THE COURT: Allegation Numbers 1 and 2 were previously dismissed at the prior sentencing hearing, but it would appear as if whatever I did at that point in time has been vacated through the Ninth Circuit's remand, so does the government move to dismiss those allegations again?

MS. LEE: Yes, Your Honor.

THE COURT: That motion is granted. Anything further from counsel?

MS. LEE: Not from the government, thank you.

MS. KENNEDY: Nothing from the defense, thank you.

THE COURT: Thank you, everyone. Good luck to you.

THE DEFENDANT: Thank you.

THE COURTROOM DEPUTY: All rise. Court is adjourned.

(The proceedings concluded at 3:50 p.m.)

* * *

CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, TERRI A. HOURIGAN, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the judicial conference of the United States.

Date: 14th day of May, 2024.

/s/ TERRI A. HOURIGAN

TERRI A. HOURIGAN, CSR NO. 3838, RPR,
CRR Federal Court Reporter

APPENDIX D

1. Title 18 U.S.C. § 3583, as added by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1987, 1999-2000, and as subsequently amended, provides:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if

a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider 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).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The

court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

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[1] See References in Text note below.

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(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); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(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)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(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

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

2. Title 18 U.S.C. § 3624, as added by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1987, 2008-09, and as subsequently amended, provides:

§ 3624. Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—

> (1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[2] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence of up to 54 days for each year of the prisoner's sentence imposed by the court, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence

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[2] So in original. Probably should be followed by a comma.

or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) PRERELEASE CUSTODY.—

(1) IN GENERAL.—The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and

prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

(2) HOME CONFINEMENT AUTHORITY.—The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.

(3) ASSISTANCE.—The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.

(4) NO LIMITATIONS.—Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621.

(5) REPORTING.—Not later than 1 year after the date of the enactment of the Second Chance Act of 2007 (and every year thereafter), the Director of the Bureau of Prisons shall transmit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report describing the Bureau's utilization of community corrections facilities. Each report under this paragraph shall set forth the number and percentage of Federal prisoners placed in community corrections facilities during the preceding year, the average length of such

placements, trends in such utilization, the reasons some prisoners are not placed in community corrections facilities, and number of prisoners not being placed in community corrections facilities for each reason set forth, and any other information that may be useful to the committees in determining if the Bureau is utilizing community corrections facilities in an effective manner.

(6) ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of the enactment of the Second Chance Reauthorization Act of 2018, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—

(A) conducted in a manner consistent with section 3621(b) of this title;

(B) determined on an individual basis; and

(C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs

of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of failure to pay such fines under sections 3611 through 3614 of this title.

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause

as determined and documented on an individual basis.

(g) PRERELEASE CUSTODY OR SUPERVISED RELEASE FOR RISK AND NEEDS ASSESSMENT SYSTEM PARTICIPANTS.—

(1) ELIGIBLE PRISONERS.—This subsection applies in the case of a prisoner (as such term is defined in section 3635) who—

(A) has earned time credits under the risk and needs assessment system developed under subchapter D (referred to in this subsection as the "System") in an amount that is equal to the remainder of the prisoner's imposed term of imprisonment;

(B) has shown through the periodic risk reassessments a demonstrated recidivism risk reduction or has maintained a minimum or low recidivism risk, during the prisoner's term of imprisonment;

(C) has had the remainder of the prisoner's imposed term of imprisonment computed under applicable law; and

(D)

(i) in the case of a prisoner being placed in prerelease custody, the prisoner—

(I) has been determined under the System to be a minimum or low risk to recidivate pursuant to the last 2 reassessments of the prisoner; or

(II) has had a petition to be transferred to prerelease custody or supervised release approved by the warden of the prison, after the warden's determination that—

(aa) the prisoner would not be a danger to society if transferred to prerelease custody or supervised release;

(bb) the prisoner has made a good faith effort to lower their recidivism risk through participation in recidivism reduction programs or productive activities; and

(cc) the prisoner is unlikely to recidivate; or

(ii) in the case of a prisoner being placed in supervised release, the prisoner has been determined under the System to be a minimum or low risk to recidivate pursuant to the last reassessment of the prisoner.

(2) TYPES OF PRERELEASE CUSTODY.—A prisoner shall be placed in prerelease custody as follows:

(A) HOME CONFINEMENT.—

(i) IN GENERAL.—A prisoner placed in prerelease custody pursuant to this subsection who is placed in home confinement shall—

(I) be subject to 24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time, in the case of any violation of subclause (II);

(II) remain in the prisoner's residence, except that the prisoner may leave the prisoner's home in order to, subject to the approval of the Director of the Bureau of Prisons—

(aa) perform a job or job-related activities, including an apprenticeship, or participate in job-seeking activities;

(bb) participate in evidence-based recidivism reduction programming or productive activities assigned by the System, or similar activities;

(cc) perform community service;

(dd) participate in crime victim restoration activities;

(ee) receive medical treatment;

(ff) attend religious activities; or

(gg) participate in other family-related activities that facilitate the prisoner's successful reentry such as a family funeral, a family wedding, or to visit a family member who is seriously ill; and

(III) comply with such other conditions as the Director determines appropriate.

(ii) ALTERNATE MEANS OF MONITORING.—If the electronic monitoring of a prisoner described in clause (i)(I) is infeasible for technical or religious reasons, the Director of the Bureau of Prisons may use alternative means

of monitoring a prisoner placed in home confinement that the Director determines are as effective or more effective than the electronic monitoring described in clause (i)(I).

(iii) MODIFICATIONS.—The Director of the Bureau of Prisons may modify the conditions described in clause (i) if the Director determines that a compelling reason exists to do so, and that the prisoner has demonstrated exemplary compliance with such conditions.

(iv) DURATION.—Except as provided in paragraph (4), a prisoner who is placed in home confinement shall remain in home confinement until the prisoner has served not less than 85 percent of the prisoner's imposed term of imprisonment.

(B) RESIDENTIAL REENTRY CENTER.—A prisoner placed in prerelease custody pursuant to this subsection who is placed at a residential reentry center shall be subject to such conditions as the Director of the Bureau of Prisons determines appropriate.

(3) SUPERVISED RELEASE.—If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to section 3583, the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632.

(4) DETERMINATION OF CONDITIONS.—In determining appropriate conditions for prisoners placed in prerelease custody pursuant to this subsection, the Director of the Bureau of Prisons shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody, so as to most effectively prepare such prisoners for reentry.

(5) VIOLATIONS OF CONDITIONS.—If a prisoner violates a condition of the prisoner's prerelease custody, the Director of the Bureau of Prisons may impose such additional conditions on the prisoner's prerelease custody as the Director of the Bureau of Prisons determines appropriate, or revoke the prisoner's prerelease custody and require the prisoner to serve the remainder of the term of imprisonment to which the prisoner was sentenced, or any portion thereof, in prison. If the violation is nontechnical in nature, the Director of the

Bureau of Prisons shall revoke the prisoner's prerelease custody.

(6) ISSUANCE OF GUIDELINES.—The Attorney General, in consultation with the Assistant Director for the Office of Probation and Pretrial Services, shall issue guidelines for use by the Bureau of Prisons in determining—

> (A) the appropriate type of prerelease custody or supervised release and level of supervision for a prisoner placed on prerelease custody pursuant to this subsection; and

(B) consequences for a violation of a condition of such prerelease custody by such a prisoner, including a return to prison and a reassessment of evidence-based recidivism risk level under the System.

(7) AGREEMENTS WITH UNITED STATES PROBATION AND PRETRIAL SERVICES.—The Director of the Bureau of Prisons shall, to the greatest extent practicable, enter into agreements with United States Probation and Pretrial Services to supervise prisoners placed in home confinement under this subsection. Such agreements shall—

(A) authorize United States Probation and Pretrial Services to exercise the authority granted to the Director pursuant to paragraphs (3) and (4); and

(B) take into account the resource requirements of United States Probation and Pretrial Services as a result of the transfer of Bureau of Prisons prisoners to prerelease custody or supervised release.

(8) ASSISTANCE.—United States Probation and Pretrial Services shall, to the greatest extent practicable, offer assistance to any prisoner not under its supervision during prerelease custody under this subsection.

(9) MENTORING, REENTRY, AND SPIRITUAL SERVICES.—Any prerelease custody into which a prisoner is placed under this subsection may not include a condition prohibiting the prisoner from receiving

mentoring, reentry, or spiritual services from a person who provided such services to the prisoner while the prisoner was incarcerated, except that the warden of the facility at which the prisoner was incarcerated may waive the requirement under this paragraph if the warden finds that the provision of such services would pose a significant security risk to the prisoner, persons who provide such services, or any other person. The warden shall provide written notice of any such waiver to the person providing such services and to the prisoner.

(10) TIME LIMITS INAPPLICABLE.—The time limits under subsections (b) and (c) shall not apply to prerelease custody under this subsection.

(11) PRERELEASE CUSTODY CAPACITY.—The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.