No. 24-5608

IN THE SUPREME COURT OF THE UNITED STATES

JASON SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's rights under the Confrontation Clause of the Sixth Amendment by allowing a witness to testify remotely and by admitting a record of a positive drug-test result in a proceeding to determine whether to revoke petitioner's supervised release pursuant to 18 U.S.C. 3583(e)(3).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is available at 2024 WL 3026127.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2024. The petition for a writ of certiorari was filed on September 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Judgment 1. The district court sentenced petitioner to 165 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. 668 F.3d 427. This Court denied a petition for a writ of certiorari. 566 U.S. 1001. Petitioner's sentence was subsequently amended to 147 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 3-4.

In November 2023, the district court revoked petitioner's supervised release and imposed a 21-month term of imprisonment, to be followed by one year of supervised release. Pet. App. 111a-112a. The court of appeals affirmed. Id. at 1a-7a.

1. In 2010, during a traffic stop, police found a loaded revolver, cocaine base, marijuana, and a digital scale in the car petitioner was driving. 668 F.3d at 428-429. After ordering petitioner out of the car, police also found pills suspected to be ecstasy on petitioner's person. Id. at 429-430.

A federal grand jury in the Northern District of Indiana returned an indictment charging petitioner with possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possessing ecstasy with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Indictment 1-4. The government dismissed the ecstasy count after the substance in petitioner's possession was determined to be caffeine pills. D. Ct. Doc. No. 32 (Jan. 11, 2011); 668 F.3d at 430 n.1. The jury found petitioner guilty on the other counts. Judgment 1.

The district court sentenced petitioner to 165 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The supervised release was subject to several conditions, including that petitioner not commit further crimes, refrain from using drugs, take periodic drug tests, and report any arrests or questioning by law enforcement within 72 hours. Am. Judgment 4. The court of appeals affirmed. 668 F.3d 427. This Court denied a petition for a writ of certiorari. 132 S. Ct. 2409.

Petitioner's sentence was subsequently amended to 147 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 3-4. The district court reduced petitioner's term of imprisonment based on amendments to the

Sentencing Guidelines for certain crack-cocaine offenses, and it reduced his term of supervised release following enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. See D. Ct. Doc. No. 136, at 2 (June 25, 2019).

3. In June 2022, petitioner completed his imprisonment and began serving his term of supervised release. Pet. App. 1a. Just six days after his release from prison, petitioner tested positive for marijuana, in violation of his supervised-release conditions. Ibid. Petitioner agreed to an additional condition of supervised release mandating his participation in a substance abuse treatment program. Ibid.

Petitioner's probation officer referred him to a drug-treatment center in South Bend, Indiana, where he enrolled in a relapse prevention program. Pet. App. at 1a-2a. But petitioner failed additional drug tests in July, November, and December 2022, and he was expelled from the treatment program for lack of attendance. Id. at 2a. The probation officer referred petitioner to a second treatment facility, but "his track record there was apparently little better." Ibid.

In February 2023, petitioner was engaged in a high-speed car chase in Ohio, where he was later indicted for the Ohio felony of failing to comply with the directions of a police officer. Pet. App. 2a. Petitioner was also questioned by Indiana police officers on the same day, yet failed to report that contact with police to

his probation officer within 72 hours, in violation of another condition of his supervised release. Ibid.

The Probation Office filed a petition to revoke petitioner's supervised release, citing petitioner's Ohio indictment, four positive drug tests, failure to report for a drug test, failure to report contact with a police officer, and four violations related to the substance-abuse treatment program. Ibid.; D. Ct. Doc. 175, at 1-2 (Mar. 27, 2023). But as federal agents tried to arrest petitioner in South Bend with the assistance of local police officers, he raced away from an approaching police vehicle and another high-speed chase ensued, with petitioner reaching speeds as fast as 121 miles per hour. Pet. App. 2a.

Petitioner managed to drive into Michigan before he ran out of gas and fled on foot, and he evaded arrest for a month. Pet. App. 2a. Based on the flight, state prosecutors in Indiana charged petitioner with resisting law enforcement, and state prosecutors in Michigan charged him with fleeing law enforcement. Ibid. The Probation Office filed an amended revocation petition adding those violations. Ibid.; D. Ct. Doc. 185, at 1-2 (June 21, 2023).

4. Under the amended revocation petition, petitioner faced 13 alleged violations of his conditions of supervised release. Pet. App. 2a-3a; D. Ct. Doc. 188 (July 7, 2023). Nine were related to positive drug tests and failure to abide by the terms of drug-treatment programs. Pet. App. 2a; D. Ct. Doc. 188, at 2-3. Four

arose out of the high-speed chases. Pet. App. 2a-3a; D. Ct. Doc. 188, at 1-2.

At the revocation hearing on July 17, 2023, petitioner admitted to using marijuana before two of the drug tests, and the government opted not to pursue several violations. Pet. App. 3a; Revocation Hearing Tr. (Tr.) 3-6, 65, 68. The scope of the hearing was thus narrowed to seven violations: a positive drug test, a missed drug test, the Indiana felony for fleeing police, and four instances of noncompliance with court-ordered drug-treatment programs. Ibid. The government sought to prove those violations primarily through four sources of evidence: (1) remote video testimony from petitioner's probation officer; (2) live testimony from two South Bend police officers involved in the Indiana high-speed chase; (3) a written lab report indicating that urine collected from petitioner on November 4, 2022, tested positive for marijuana metabolites; and (4) treatment notes from professionals at the drug-treatment center memorializing petitioner's failure to participate in the treatment program. Ibid.

Smith objected to the remote testimony, the lab report, and the drug-treatment center notes on the theory that those forms of evidence violated his rights under the Confrontation Clause of the Sixth Amendment. Pet. App. 3a; see Tr. 6-7, 18, 25. Consistent with longstanding circuit precedent recognizing that the Confrontation Clause does not apply to hearings to revoke

supervised release pursuant to 18 U.S.C. 3583(e)(3) because they are not "criminal prosecutions," see U.S. Const. Amend. VI, the district court overruled petitioner's objections. Pet. App. 3a; Tr. 7; see Tr. 18-19; D. Ct. Doc. 193 (July 14, 2023) (order granting permission for probation officer to testify remotely). The district court did, however, exclude some of the government's evidence -- certain substance-abuse treatment notes and certain testimony about statements made by treatment-center professionals -- under Federal Rule of Criminal Procedure 32.1(b)(2)(C), which gives defendants in revocation proceedings "an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear." Pet. App. 4a; Tr. 27-32.

Based on petitioner's admissions and corroborating evidence from the probation officer, the district court found that petitioner had tested positive for marijuana on July 25 and December 5, 2022. Tr. 67. The court also found, based on the probation officer's testimony and a lab report, that petitioner had used marijuana before the November 4, 2022 test, and that he failed to appear for a test on February 23, 2023. Ibid.; Pet. App. 4a. The court further determined that petitioner violated Indiana law by leading officers on a high-speed chase in May 2023, based on the live testimony of two officers. Tr. 68-69; Pet. App. 4a. The court revoked petitioner's supervised release pursuant to

18 U.S.C. 3583(e)(3) and imposed a 21-month term of imprisonment, to be followed by one year of supervised release. Pet. App. 111a-112a.

5. The court of appeals affirmed in a nonprecedential decision. Pet. App. 1a-7a. The court rejected petitioner's argument that the district court had violated his rights under the Confrontation Clause by allowing his probation officer to testify remotely and by admitting a lab report of a positive drug without testimony from the person who created it. Id. at 4a-5a. The court explained that the district court had correctly rejected petitioner's Confrontation Clause argument for the reasons stated in a decision issued on the same day, United States v. Carpenter, 104 F.4th 655 (7th Cir. 2024), petition for cert. pending, No. 24-5594 (filed Sept. 16, 2024), which recognized that the Sixth Amendment jury-trial right does not apply to supervised-release revocations conducted under 18 U.S.C. 3583(e)(3). Pet. App. 5a. The court remanded with instructions for the district court to correct the revocation judgment's misstatement of the reasons for the revocation. Id. at 6a-7a.

ARGUMENT

Petitioner contends (Pet. 19-30) that the Confrontation Clause of the Sixth Amendment applies at a hearing to revoke supervised release pursuant to 18 U.S.C. 3583(e)(3). For the reasons explained in the government's brief in opposition to the

petition for a writ of certiorari in Carpenter v. United States, No. 24-5594, the Sixth Amendment does not apply in such supervised-release revocation hearings, and petitioner's contrary contention does not warrant further review. See Br. in Opp. at 8-17, Carpenter, supra (No. 24-5594).* Instead, petitioner's revocation proceeding was "precisely the kind of 'ordinary revocation' that Justice Breyer took care to explain falls outside the scope of the Sixth Amendment" in his controlling opinion in United States v. Haymond, 588 U.S. 634 (2019) (Breyer, J., concurring in the judgment). Carpenter, 104 F.4th at 660; see Br. in Opp. at 11-13, Carpenter, supra (No. 24-5594).

Petitioner in this case, like the petitioner in Carpenter, relies on a law review article published earlier this year to argue that the Sixth Amendment applies to supervised-release revocation proceedings. See Pet. 23-24 (citing Jacob Schuman, Revocation at the Founding, 122 Mich. L. Rev. 1381 (2024)). That article concludes that jury trials were historically the norm for "forfeitures of recognizance," which petitioner contends are an analogue for supervised-release revocation hearings. See Schuman,

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* Because the counsel of record in this case is also the counsel of record in Carpenter, he will receive a copy of the government's brief in opposition in that case. Other pending petitions also raise a Sixth Amendment challenge to the revocation of supervised release under 18 U.S.C. 3583(g). See Sevier v. United States, No. 24-5679 (filed Sept. 27, 2024); Stradford v. United States, No. 24-5943 (filed Nov. 6, 2024); Reyes v. United States, 24-5944 (filed Nov. 5, 2024).

supra, at 1384. But even if recognizance were an appropriate historical analogue for modern supervised release -- a premise the government disputes, see Br. in Opp. at 15-17, Carpenter, supra (No. 24-5594) -- the article would not help petitioner's argument. The article addresses only the claimed historical precedent for a jury-trial right for supervised-release revocations, not the entire bundle of Sixth Amendment rights. Id. at 1436-1439. Petitioner acknowledges (Pet. 28) that he never asked for a jury trial, so the article's discussion does not directly bear on his particular claim.

Petitioner also does not demonstrate any conflict between the nonprecedential decision below and any decision of another court of appeals on the Confrontation Clause issue that he presents. He fails to identify any court of appeals case holding that the Confrontation Clause applies to supervised-release revocation proceedings. Indeed, every court of appeals to have reached the issue agrees that it does not. See United States v. Teixeira, 62 F. 4th 10, 20-21 (1st Cir. 2023); United States v. Peguero, 34 F.4th 143, 154 (2d Cir. 2022); United States v. McDowell, 973 F.3d 362, 365 (5th Cir. 2020); United States v. Kirby, 418 F.3d 621, 627 (6th Cir. 2005); United States v. Kelley, 446 F.3d 688, 691 (7th Cir. 2006); United States v. Ray, 530 F.3d 666, 668 (8th Cir. 2008); United States v. Hall, 419 F.3d 980, 985-986 (9th Cir.), cert. denied, 546 U.S. 1080 (2005); United States v. Henry, 852

F.3d 1204, 1206 (10th Cir. 2017) (Gorsuch, J.); United States v. Reese, 775 F.3d 1327, 1329 (11th Cir. 2015) (per curiam).

Finally, this case would be a poor vehicle to address the question presented, because any violation of petitioner's confrontation right was harmless. The district court revoked petitioner's supervised release based on five violations: three failed drug tests, one failure to report for a drug test, and the Indiana high-speed chase. Tr. 67-69; Pet. App. 109a-110a. Petitioner admitted to using marijuana before two of the failed drug tests. Tr. 3; Pet. App. 3a. And the government proved the violation related to the Indiana high-speed chase through live witness testimony with uninhibited cross-examination by petitioner. Tr. 39-62. Petitioner's Confrontation Clause argument is thus limited to the lab report used to prove his third failed drug test, and the probation officer's remote testimony about that failed drug test as well as petitioner's failure to take a later drug test. See Tr. 24-25, 33-34.

The court of appeals already recognized (in the context of a separate challenge under Rule 32.1) that any error in admitting those pieces of evidence was harmless. Pet. App. 6a. As the court recognized, the advisory guidelines range for petitioner's imprisonment following revocation was pegged to his Indiana felony, not to his drug-test violations. Ibid. And because petitioner had already admitted to a pattern of drug use by

admitting to two failed drug tests, there is no reason to think that additional drug-test violations would have affected his term of imprisonment following revocation. Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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