No. 17-7873

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO BARINAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner had an individualized entitlement in the context of supervised-release-revocation proceedings to allege a violation of a rule-of-specialty provision in Article IV of the 1909 extradition treaty between the United States and the Dominican Republic.

2. Whether petitioner's fugitive status tolled his term of supervised release for the period of time during which he had absconded from supervision.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 865 F.3d 99.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. A petition for rehearing was denied on October 19, 2017 (Pet. App. 48a). On January 10, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including February 16, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess with the intent to distribute crack cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(A). In 1997, the district court sentenced petitioner to time served, to be followed by five years of supervised release. Petitioner failed to report for supervision and was a fugitive from justice for many years. In 2016, after petitioner had been apprehended in the Dominican Republic and extradited to the United States, the district court revoked his supervised release and required him to serve one year and one day of imprisonment, to run consecutively to a separate federal sentence imposed by the United States District Court for the District of New Jersey. The court of appeals in this case affirmed. Pet. App. 1a-20a.

1. a. Petitioner is a citizen of the Dominican Republic with a history of drug trafficking. Pet. App. 5a. In November 1995, petitioner pleaded guilty in this case to conspiracy to possess with the intent to distribute crack cocaine. Corrected C.A. App. (C.A. App.) 3, 6, 9-10. In March 1997, the district court sentenced petitioner to time served (21 months of imprisonment), to be followed by five years of supervised release. Id. at 6, 9. As relevant here, the conditions of supervised release set out in the judgment of conviction required that petitioner report to the U.S. Probation Department upon his release from

imprisonment; not leave the judicial district without permission from the court or a probation officer; and not commit another state, federal, or local offense. Id. at 10, 13.

Petitioner's term of supervised release began on March 7, 1997, but petitioner failed to report to the Probation Department. C.A. App. 10. In April 1997, after determining that petitioner was residing in the Southern District of New York with his sister, the Probation Department transferred petitioner's supervision to that District, and petitioner began reporting there. Id. at 10-11. But after June 13, 1997, petitioner ceased reporting to the Probation Department altogether. Id. at 11. The Probation Department informed the district court about petitioner's supervised-release violation, id. at 9-12, and, on August 1, 1997, the district court issued a warrant for his arrest, id. at 6, 14.

b. About 11 years later, in 2008, a federal grand jury in the District of New Jersey indicted petitioner on three federal drug-offense counts (the New Jersey offenses) for his role in the November 2007 trafficking of more than five kilograms cocaine from the Dominican Republic to New Jersey. 08-cr-772 Indictment 1-3 (D.N.J. Oct. 15, 2008). Petitioner was not arrested at the time because he was still a fugitive from justice.

c. Petitioner was later located in the Dominican Republic. In 2009, the United States requested that the Dominican Republic extradite petitioner to stand trial for the New Jersey offenses under the since-superseded Convention Between the United States and the Dominican Republic for the Extradition of Criminals (1909 Extradition Treaty), June 19, 1909, 36 Stat. 2468. See C.A. App. 20-49. The request did not seek petitioner's extradition on the basis of the 1997 judgment of conviction and petitioner's violation of its conditions of release. See id. at 23-24; Pet. App. 6a.

More than four years later, in September 2013, the Dominican Republic extradited petitioner to the United States. C.A. App. 14; Pet. App. 6a. Petitioner was then held pending trial for his New Jersey offenses, and he later pleaded guilty to one drug-conspiracy count pursuant to a plea agreement. 08-cr-772 Plea Agreement 1-2, 6 (D.N.J. Nov 18, 2015). The United States District Court for the District of New Jersey convicted petitioner of conspiracy to import cocaine into the United States, in violation of 21 U.S.C. 963, and, in March 2016, sentenced him to 78 months of imprisonment, to be followed by three years of supervised release. 08-cr-772 Judgment (D.N.J. March 28, 2016).

2. The following month (April 2016), petitioner was transferred to the Eastern District of New York to appear on the 1997 supervised-release-violation report in this case. Cf. C.A. App. 7 (Docket entry No. 144). The Probation Department submitted a supplement to its 1997 report (id. at 13-17), identifying two additional supervised-release violations: petitioner's departure from the district (by traveling to the Dominican Republic) without permission, and his commission of a federal offense (in October and November 2007) while on supervised release. Id. at 13.

a. Petitioner moved to dismiss the supervised-release-violation charges on the ground that they violated a provision in the 2015 extradition treaty between the United States and the Dominican Republic. 5/23/2016 Mot. to Dismiss 3-5 (Doc. 151). Petitioner, however, had been extradited to the United States in 2013 under the since-superseded 1909 Extradition Treaty, not the 2015 treaty currently in effect. Pet. App. 9a-10a. As relevant here, Article IV of the 1909 Extradition Treaty provided: "No person shall be tried for any crime or offense other than that for which he was surrendered" under the Treaty. Id. at 51a (reproducing Article IV). That provision reflects a form of what is known as the "Rule of Specialty," i.e., the principle that "a nation seeking return of a person under the terms of an extradition treaty may prosecute the extradited person only to the extent expressly authorized by the surrendering nation in the grant of extradition." See United States v. Stokes, 726 F.3d 880, 887-888 (7th Cir.), cert. denied, 571 U.S. 1084 (2013); see also Pet. App. 10a.

Petitioner separately argued (in his reply) that the third supervised-release-violation charge, which alleged that he violated a condition of supervision by committing a federal offense in 2007, should be dismissed. 6/8/2016 Letter Reply 4 (Doc. 153). Petitioner argued that his five-year supervised-release term had ended while he was a fugitive, and that the charge therefore concerned conduct that occurred after its termination. Ibid.

The district court denied petitioner's motion in an oral ruling. Pet. App. 36a-41a.

b. The district court subsequently determined based on stipulated facts that petitioner had violated the three conditions of his release noted above. C.A. App. 89; see id. at 86-87 (stipulations). The court accordingly revoked petitioner's supervised release and ordered that he serve one year and one day of imprisonment, to be served consecutively to the sentence imposed by the district court in New Jersey, id. at 107. See 6/20/2016 Judgment (Doc. 160); see also 18 U.S.C. 3553(e)(3). The court did not impose a new term of supervised release, based on its understanding that an immigration detainer had been submitted for petitioner and that he would be deported to the Dominican Republic upon his release from prison. C.A. App. 107-108.

3. The court of appeals affirmed. Pet. App. 1a-20a.

a. The court of appeals first rejected petitioner's rule-of-specialty claim under Article IV of the 1909 Extradition Treaty. Pet. App. 9a-12a. The court explained that a "treaty is primarily a compact between independent nations" that "establish[es] rights and obligations between States-parties -- and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty's existence." Id. at 10a (citations omitted). "Absent an express provision in [such an] agreement," the court stated, "any 'individual rights are only derivative through the states.'" Id. at 11a (citation omitted).

The "principle of specialty," the court of appeals continued, reflects a concern that "persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government," but the underlying wrong for a violation of a treaty's rule-of-specialty provision is a wrong "only" to "the surrendering government." Pet. App. 11a-12a (citations omitted). For that reason, the court explained, an extraditee "lacks standing to complain of noncompliance with an extradition treaty" unless the treaty contains "language indicating that the intent of the treaty drafters was such that benefits could be vindicated through private enforcement." Id. at 12a (citation and internal quotation marks omitted).

"In the present case," the court of appeals found, the rule-of-specialty provision in Article IV of the 1909 Extradition Treaty contained "no language indicating that the Dominican Republic and the United States intended the Treaty to be enforceable by individual defendants." Pet. App. 12a. For that reason, the court determined that "the principle of specialty" in Article IV "can be invoked here only by the Dominican Republic, which has not lodged any objection to these proceedings." Ibid. Without such an objection, the court stated, petitioner "lacks prudential standing to invoke that principle." Ibid.

b. The court of appeals also rejected petitioner's challenge to his third supervised-release violation based on his 2007 commission of a drug offense. Pet. App. 12a-19a. The court reasoned that petitioner was still subject to the supervised-release conditions in this case in 2007, because the end date of his supervision had been tolled while he remained a fugitive from justice. Id. at 18a; see id. at 19a.

The court of appeals explained that tolling the end-date of supervision "is consistent with the traditional principle that an absconder should not benefit from his fugitivity" and "Congress's sentencing scheme of supervision to facilitate the defendant's transition to a law-abiding life in free society." Pet. App. 18a; see id. at 15a. The court invoked the longstanding principle that "a defendant who becomes a fugitive is not entitled to credit for the period in which he was in abscondence." Id. at 16a. The court explained that, under "'the common law rule that lapse of time does not constitute service of [a criminal] sentence'" during the period in which a convict is a fugitive from justice, time is "tolled" and "'the sentence [stops] running'" when, "'through some fault of his own, [the convict] has failed to serve his sentence.'" Ibid. (citation and emphasis omitted). That principle, the court reasoned, "applies to a defendant's abscondence from supervised release." Id. at 17a. When "'a defendant absconds while on supervised release,'" the court explained, his absence prevents "'the sentencing court from exercising supervision over him'" and his "'own misconduct'" does not entitle him to "a 'holiday'" from the conditions of his release. Id. at 17a-18a (citation omitted).

The court of appeals noted the First Circuit's decision in United States v. Hernández-Ferrer, 599 F.3d 63 (2010), which had concluded that "courts lack authority to rule that a period of supervised release had been tolled by the defendant's fugitive status." Pet. App. 18a. But the court explained that "even if [it] were to adopt the First Circuit's views," doing so would "afford [petitioner] little consolation," because Hernández-Ferrer concluded that where, as here, "'a warrant or summons issue[d] before the expiration of the [supervised-release] term[,]' the defendant's post-supervised-release-period 'conduct while a fugitive will be considered at sentencing.'" Id. at 19a (quoting Hernández-Ferrer, 599 F.3d at 69) (fourth set of brackets in original).

ARGUMENT

Petitioner contends (Pet. 5-14) that the court of appeals erred by holding that he lacks an individual entitlement to assert a violation of the rule-of-specialty provision in Article IV of the now-superseded 1909 Extradition Treaty between the United States and Dominican Republic. Petitioner has not identified a division of authority that might warrant review on that question and, in any event, for multiple reasons, further review of his asserted rights under a treaty that has no prospective application would provide a poor vehicle for addressing petitioner's broader legal arguments. Petitioner separately contends (Pet. 14-19) that one of the three independent bases for revoking his supervised release is invalid, because, he contends, courts lack authority to toll a term of supervision when a defendant is a fugitive from justice and, absent tolling, his supervision ended before the violation in question. The limited division of authority on that question is of limited importance, and this case would be an unsuitable vehicle to address the issue because petitioner's sentence upon revocation of his supervised release should be the same under the rule he proposes. No further review is warranted.

1. Petitioner "contends that the district court lacked jurisdiction" to revoke his supervised release, because, he argues, the rule-of-specialty provision in Article IV of the 1909 Extradition Treaty deprived that court of "personal jurisdiction" over him. Pet. 1, 7 & n.2; see Pet. 5-7, 9-12. Petitioner further contends that the courts of appeals are divided over whether a defendant is individually entitled to assert that purported defect. Pet. 7-9. The court of appeals' interpretation of the now-superseded 1909 treaty does not implicate a division of authority that might warrant review. In any event, this case would be a poor vehicle to address petitioner's contentions. The Court should therefore deny certiorari on the first question presented.

a. This case concerns the 1909 Extradition Treaty between the United States and the Dominican Republic, which governed petitioner's 2013 extradition to the United States. See Pet. App. 9a. Article IV of that treaty provided that "[n]o person shall be tried for any crime or offence other than that for which he was surrendered" under the treaty. Id. at 51a (reproducing Article IV). The text of the 1909 treaty provides the starting point for the rule-of-specificity questions that petitioner asserts here.

Medellin v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). In addition, "[b]ecause a treaty ratified by the United States is 'an agreement among sovereign powers,'" this Court has considered "the negotiation and drafting history of the treaty [in question] as well as 'the postratification understanding' of [the] signatory nations" to be interpretive aids that may guide its understanding of such provisions. Id. at 507 (citation omitted).

The parties have not previously addressed whether the 1909 Extradition Treaty is "'self-executing,'" i.e., whether it had "automatic domestic effect as federal law upon ratification." See Medellin, 552 U.S. at 505 & n.2. They instead have focused on the separate question whether petitioner may enforce Article IV of the treaty, notwithstanding "the background presumption * * * that 'international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts,'" id. at 506 n.3 (citation and brackets omitted). The court of appeals determined that petitioner cannot do so. Pet. App. 10a-12a. The court found "no language [in the 1909 treaty] indicating that the Dominican Republic and the United States intended the Treaty to be enforceable by individual defendants." Id. at 12a.

Petitioner only briefly addresses (Pet. 6 n.1) the language of the 1909 treaty, and he does not address any contextual factors involving the treaty's negotiation or drafting history or any subsequent understandings of the signatories. Petitioner instead focuses (Pet. 5-9) on decisions from other courts addressing different extradition treaties between the United States and other countries, none of which addresses the rule-of-specialty provision in the 1909 treaty here. For that reason, petitioner is incorrect in his contention (Pet. 7-9) that the court of appeals' decision in this case construing the 1909 treaty conflicts with decisions of other courts of appeals. Only two other court of appeals decisions appear to have addressed rule-of-specialty claims under Article IV of the 1909 Extradition Treaty, and neither conflicts with the decision below.[1]

The decisions by other courts of appeals involving different treaties that petitioner identifies do reflect tension in the general approach to the question of a defendant's entitlement to raise similar rule-of-specialty claims. As petitioner notes (Pet. 8 & n.4), several courts of appeals have determined that criminal

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[1] The Sixth Circuit in United States v. Garrido-Santana, 360 F.3d 565, cert. denied, 542 U.S. 945 (2004), held that Article IV did not prohibit a sentencing court from enhancing an extradited defendant's sentence based on conduct for which he was not extradited, id. at 577-578, without deciding whether or not the defendant "lack[ed] standing to rely upon the extradition treaty's incorporated rule of specialty," id. at 578 n.10. The Third Circuit, in its unpublished, non-precedential decision in Reyes-Vasquez v. United States Att'y Gen., 304 Fed. Appx. 33 (2008) (per curiam), likewise found no violation of Article IV because the defendant was extradited for the offenses on which he was tried, id. at 36, without addressing whether the defendant had standing to assert that Article IV claim, cf. id. at 35.

defendants may under different treaties seek relief on the ground that their prosecution or punishment violated the rule-of-specialty provisions in those treaties. See, e.g., United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir.) (1973 treaty with Uruguay), cert. denied, 516 U.S. 933 (1995); United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994) (same), cert. denied, 513 U.S. 1128 (1995); United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990) (1972 treaty with United Kingdom), cert. denied, 498 U.S. 1049 (1991); United States v. Thirion, 813 F.2d 146, 151 n.5 (8th Cir. 1987) (1939 treaty with Monaco).[2] Petitioner cites (Pet. 8 & n.3) three decisions that he contends hold otherwise, but none reflects a contrary holding.[3] The Seventh Circuit has,

[2] The D.C. Circuit in United States v. Trabelsi, 845 F.3d 1181, cert. denied, 138 S. Ct. 194 (2017), concluded that the Ker-Frisbie Doctrine, which applies only when a defendant was procured for trial by means other than by extradition pursuant to treaty, did not deprive the defendant of standing because he was, in fact, "extradited in accordance with a treaty." Id. at 1186. The court did not independently address the defendant's individual right to invoke the 1987 extradition treaty with Belgium at issue in that case. See ibid.

[3] The Third Circuit in United States ex rel. Saroop v. Garcia, 109 F.3d 165 (1997), stated that the defendant there "would [have] lack[ed] standing" if she had "brought suit invoking the [1931 extradition treaty between the United States and Great Britain] or the Rule of Specialty," but that statement was dicta because the defendant did not invoke that treaty or its rule-of-specialty provision. Id. at 168. The Fifth Circuit in United States v. Kaufman, 858 F.2d 994 (1988), reh'g denied, 874 F.2d 242 (1989) (per curiam), noted in a footnote -- but did not decide -- the standing question, opting instead to hold that the challenged extraditions did not violate the rule-of-specialty provision in a treaty with Mexico. Id. at 1007 & n.3. Petitioner cites (Pet. 8

however, held that a defendant could not challenge his prosecution under a rule-of-specialty provision in the 1977 extradition treaty with the United Kingdom. United States v. Burke, 425 F.3d 400, 408 (2005), cert. denied, 547 U.S. 1208 (2006).

Such tension, however, does not warrant this Court's review. Just as differing interpretations of different statutes do not reflect a conflict of authority, the lower courts' differing conclusions about a defendant's individualized right to bring a rule-of-specialty challenge under different treaties fail to reflect a conflict warranting review. To the extent that the lower courts' decisions reflect variations in their general interpretive approach, any such variations have yet to generate inconsistent results with respect to specific treaties. The absence of conflicting outcomes, and the uncertainty that they will in fact arise, illustrates that this Court's review is unwarranted. Cf. California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (citation

n.3) the order that denied rehearing in Kaufman, which merely noted the State Department's view (not a court holding) that, under that treaty, only Mexico could complain about any rule-of-specialty violation. 874 F.2d at 243. Finally, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986), vacated, 10 F.3d 338 (6th Cir. 1993), cert. denied, 513 U.S. 914 (1994), involved a challenge to a district court's order to extradite an individual from the United States to Israel, not a criminal defendant's challenge to a completed extradition. In that context, the court merely noted a "serious question" whether the extraditee would have "standing to assert the principle of specialty." Id. at 583-584.

omitted). That is particularly true in this context, because rule-of-specialty challenges remain relatively infrequent and successful challenges are even less so. Petitioner identifies no recent decision in which the United States has been found to have violated a treaty's rule-of-specialty provision, and we are aware of none. Cf. United States v. Khan, 993 F.2d 1368, 1375 (9th Cir. 1993) (reversing for violation of "the doctrine of specialty").

b. In any event, this case would not be a suitable vehicle for the Court's review for multiple reasons.

First, this case concerns an atypical rule-of-specialty challenge in which petitioner contends (Pet. 1, 7 n.2) that the district court lacked personal jurisdiction to revoke the term of supervised release imposed for his 1997 drug-conspiracy conviction. A defendant's individualized right to invoke a rule-of-specialty provision in that circumstance -- where the court is enforcing the terms of a judgment that it indisputably had jurisdiction to enter, based in part on petitioner's violation of the judgment's terms by committing the crime for which he was extradited -- may not be congruent to a defendant's right to invoke the rule of specialty in other contexts.

Second, petitioner's rule-of-specialty challenge to his "punishment" under his 1997 judgment of conviction is not sufficiently ripe to warrant review. The rule-of specialty provision in Article IV of the 1909 Extradition Treaty states that "[n]o person shall be tried for any crime or offence other than that for which he was surrendered." Pet. App. 51a (emphasis added). But the Rule 32.1(b) supervised-release-revocation proceedings here do not reflect petitioner's "tri[al] for any crime or offence," ibid.[4] Petitioner thus suggests that Article IV prohibits not only trial for crimes or offenses but also "punishment on prior convictions," i.e., the "service of a sentence on a prior conviction not mentioned in the extradition grant." Pet. 6 & n.1; cf. Johnson v. Browne, 205 U.S. 309, 319-320 & n.1 (1907) (interpreting rule-of-specialty provision in Article III of a 1889 treaty with Great Britain -- which provided that no person "shall be triable or be tried for any crime or offense" other than that "for which he was surrendered" -- as prohibiting "imprisonment" on a pre-extradition conviction, based on an interpretation of the "whole treaty" and its relationship to a 1842 treaty between the same countries, even though Article III "le[ft] out the words 'or be punished'").

But even if petitioner is correct that Article IV of the 1909 Extradition Treaty prohibits any "punishment" for his 1997 conviction, such punishment has yet to commence. Petitioner is

[4] It is well-settled that "[a] supervised release revocation hearing is not a trial," e.g., United States v. Black Bear, 542 F.3d 249, 253 (8th Cir. 2008), and that such proceedings are not "criminal prosecutions" subject to the safeguards "associated with a criminal trial," e.g., United States v. Carlton, 442 F.3d 802, 807 (2d Cir. 2006). See also Johnson v. United States, 529 U.S. 694, 700 (2000) (explaining that "the violative conduct [leading to a revocation of supervised release] need not be criminal and need only be found by a judge [by] a preponderance of the evidence").

currently serving the 78-month prison term imposed in the New Jersey prosecution for which he was extradited. See p. 4, supra. The Bureau of Prisons has projected that petitioner will complete serving that term of imprisonment (with good-conduct-time credit) on March 25, 2019, at which time he would then begin serving the term of imprisonment on the supervised-release revocation that he challenges in this case. By March 25, 2019, however, petitioner's rule-of-specialty challenge may be overtaken by events.

The Department of Justice has notified the Dominican Republic's Office of the Attorney General about this case and about petitioner's allegation that the United States has violated Article IV of the 1909 Extradition Treaty. The Dominican Republic has yet to express any objection with respect to any potential treaty violation. If the Dominican Republic later decides to waive any rule-of-specialty objection in this case, petitioner will no longer be able to assert Article IV as a basis for relief. The courts of appeals that have concluded that defendants are entitled to raise rule-of-specialty challenges under other treaties have generally recognized that a defendant "enjoys this right at the sufferance of the [surrendering] nation," which remains free to "waive its right to object to a treaty violation and thereby deny the defendant standing to object to such an action." Puentes, 50 F.3d at 1575 (collecting cases); see Pet. 8-9. And if the Dominican Republic does not provide a waiver, petitioner could reassert his current claim by moving to vacate his sentence under 28 U.S.C.

2255(a). See Davis v. United States, 417 U.S. 333, 343-344 (1974). Accordingly, it would be premature to grant review on a question that could be overtaken by events.

Finally, this case would be a poor vehicle in which to grant review because the terms of the 1909 Extradition Treaty have been superseded. Although the 1909 treaty governed petitioner's extradition in 2013, the United States and the Dominican Republic later signed a new extradition treaty in 2015, which was ratified in 2016, see Pet. App. 9a, and contains a differently worded, modern rule-of-specialty provision that, inter alia, applies to a defendant's "det[ention], tri[al], or punish[ment] in the Requesting Party." Extradition Treaty Between the Government of the United States of America and the Government of the Dominican Republic (2015 Extradition Treaty), Art. 15(1), Jan. 12, 2015, T.I.A.S. No. 16-1215. As a result, the 1909 treaty has no operative effect with respect to any extradition request submitted after the new treaty's December 15, 2016 effective date. Pet. App. 9a; 2015 Extradition Treaty, Art. 21(3). If this Court were to consider whether a defendant is entitled to raise rule-of-specialty challenge under the terms of an extradition treaty, it should do so only in the context of a treaty that remains in force and that may therefore affect future extraditions.

2. Petitioner separately contends (Pet. 14-19) that one of the three bases for revoking his supervised release is invalid, because, in his view, it concerns conduct that occurred after he

completed serving his term of supervised release and courts lack authority to toll a term of supervision based on a defendant's fugitive status. The court of appeals correctly applied tolling in this case and its decision warrants no further review. Although the decision below conflicts with a 2010 decision of the First Circuit, this Court has previously denied review of the same circuit conflict.[5] The same result is warranted here.

a. Like the court of appeals in this case, the Fourth and Ninth Circuits have determined that a defendant's fugitive status tolls his term of supervised release. See, e.g., United States v. Buchanan, 638 F.3d 448, 452-458 (4th Cir. 2011); United States v. Ignacio Juarez, 601 F.3d 885, 889 (9th Cir. 2010) (per curiam); United States v. Crane, 979 F.2d 687, 691 (9th Cir. 1992). Those courts recognize that a term of supervised release can be extended for a period during which "the defendant remains a fugitive." United States v. Delamora, 451 F.3d 977, 980 (9th Cir. 2006); see Buchanan, 638 F.3d at 458 ("[T]he terms and conditions [of supervised release] remain in effect, and the fugitive-defendant is not at liberty to embark on a 'holiday' from them.").

Such tolling reflects the "well-established common law principle that '[m]ere lapse of time without imprisonment or other

[5] See Ketron v. United States, 568 U.S. 838 (2012) (No. 11-10264); Watson v. United States, 565 U.S. 849 (2011) (No. 10-10774); Nuno-Garza v. United States, 562 U.S. 1182 (2011) (No. 10-6376).

restraint contemplated by the law does not constitute service of sentence.'" Caballery v. United States Parole Comm'n, 673 F.2d 43, 46 (2d Cir.) (quoting Anderson v. Corall, 263 U.S. 193, 196 (1923)) (brackets in original), cert. denied, 457 U.S. 1136 (1982). And because "Congress is understood to legislate against a background of common-law adjudicatory principles," "the courts may take it as given that Congress has legislated with an expectation that [such a well-established] principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (citation omitted).

Tolling a term of supervised release during the period when a defendant has absconded from supervision furthers the design of Congress's supervised-release scheme to assist a defendant's transition into the community. See Johnson v. United States, 529 U.S. 694, 709 (2000). It is impossible for a fugitive to benefit from post-confinement supervision when he is evading all such supervision. Indeed, such a defendant has not properly served any time on supervised release during periods in which he is a fugitive from justice.

Petitioner relies (Pet. 15-16) on 18 U.S.C. 3624(e), which provides, in pertinent part, 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." In petitioner's view, that provision signals a deliberate omission of a tolling provision for fugitives. That is incorrect. Section 3624(e) addresses the distinct circumstance in which an individual is unable to serve a term of supervised release because of government action, namely, his imprisonment for another offense. Moreover, "to abrogate a common-law principle, [a] statute must 'speak directly' to the question addressed by the common law." United States v. Texas, 507 U.S. 529, 534 (1993) (citation omitted). Section 3624(e) does not speak sufficiently directly to make "evident" a "statutory purpose" to displace the common-law rule that a mere lapse of time without the restraint contemplated by the law does not constitute service of a sentence. See ibid. (citation omitted).

Section 3624(e) simply clarifies whether and when supervised release -- including its attendant conditions, such as reporting to a probation officer -- should continue to "run," or instead be suspended when a defendant is under a different type of restraint (incarceration). The statute gives no indication that the total absence of supervision -- let alone nonsupervision created by the defendant's unilateral abscondence -- could constitute service of a sentence of supervised release. And petitioner does not explain why he should have been considered to be on "supervised" release while his whereabouts were unknown to the probation officer who was supposed to supervise him. Cf. Zerbst v. Kidwell, 304 U.S. 359, 363 (1938) ("It is not reasonable to assume that Congress intended that a parolee whose conduct measures up to parole standards should remain under control of the Board until expiration of the term of his sentence, but that misconduct of a parole violator could result in reducing the time during which the Board has control over him to a period less than his original sentence.”).

b. Petitioner contends (Pet. 15-18) that review is warranted because United States v. Hernández-Ferrer, 599 F.3d 63 (1st Cir. 2010), reached a contrary conclusion. Although the First Circuit rejected application of the fugitive-tolling doctrine in the context of supervised release, id. at 67-69, its decision reflects a limited division of authority that has little practical importance and does not warrant review.

Hernández-Ferrer explains that, even under its decision declining to toll a period of supervised release when “an offender absconds,” the offender’s conduct while a fugitive can still be relevant to the revocation of his supervised release. 599 F.3d at 69. In particular, if “a warrant or summons issues before the expiration of the term [of supervised release],” the fugitive “will still be subject to the court’s jurisdiction once located, and his conduct while a fugitive will be considered at sentencing.” Ibid. (emphasis added). That is because “[w]hen a district court revokes a term of supervised release,” it must consider the factors set forth in Section 3553(a) and, in doing so, “may take into account [the] offender’s conduct between the time of the violation underlying the revocation and the time of [revocation],” including the same conduct that it would have considered as a basis for revoking supervision if the supervised-release period had been tolled. Ibid. The district court in Hernández-Ferrer accordingly imposed on remand the same 21-month term of imprisonment that the First Circuit had vacated. See 99-cr-344 Docket entry No. 930 (D.P.R. June 17, 2010).

The unavailability of fugitive tolling such as in the First Circuit is thus unlikely to make a practical difference in many cases. Whenever fugitive tolling might have been at issue, a fugitive will ordinarily have violated the conditions of his supervised release -- such as requirements to periodically report to the probation office and notify the probation office when he changes his residence. Such violations -- which can be independently sufficient bases for revoking supervised release irrespective of tolling -- will necessarily have occurred during the defendant's period of supervised release. Indeed, we are unaware of any case in which the sole basis for revoking supervised release was a violation that occurred while the defendant was a fugitive but outside the period of supervised release absent tolling.

Petitioner's case is illustrative. As the court of appeals recognized (Pet. App. 19a), petitioner would not benefit under Hernández-Ferrer, because the district court issued a warrant for petitioner's arrest before his term of supervised release ended and then found three distinct violations of petitioner's conditions of his release, see pp. 3-4, 6, supra, only one of which petitioner views as occurring after his term of supervision had ended. And as Hernández-Ferrer reflects, even in the absence of tolling, the district court had independent bases for revoking petitioner's supervised release and would have properly considered all of petitioner's conduct, such that its resulting term of imprisonment upon revocation should have been unchanged.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner cites (Pet. 17) decisions that decline to toll a term of supervised release when an offender is absent by reason of deportation, but those decisions are consistent with the decision below. Tolling is warranted when a "fugitive-defendant's absence arises from his own misconduct," but "[t]he same cannot be said about a defendant who has been removed from the country by government order." Buchanan, 638 F.3d at 457.