

No. 17-8270

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS L. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

ELIZABETH H. DANIELLO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court has jurisdiction under 18 U.S.C. 3583 to revoke supervised release based on conduct that occurred, but was not charged as a supervised release violation, before a prior revocation of supervised release.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 878 F.3d 111. The memorandum opinion of the district court (Pet. App. 9a-13a) is not published in the Federal Supplement but is available at 2016 WL 3922050.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2017. On March 16, 2018, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including March 28, 2018. The petition for a writ of

certiorari was filed on March 26, 2018. 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 Virginia, petitioner was convicted of possessing five grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a). 3/16/10 Judgment 1. He was sentenced to a term of imprisonment, to be followed by four years of supervised release. Id. at 2-3. After his discharge from prison, the Probation Office petitioned for revocation of petitioner's supervised release, alleging, among other things, that petitioner had violated his supervised release conditions by committing the crime of possession of a firearm by a convicted felon and by failing to timely notify his probation officer of questioning by law enforcement. Pet. App. 4a. The district court revoked petitioner's supervised release on the latter ground, and ordered him to serve one month of imprisonment, to be followed by 40 months of supervised release. Ibid. Petitioner was subsequently convicted of possession of a firearm by a convicted felon. Ibid. The court determined that petitioner had also violated his supervised release by committing that offense and revoked petitioner's supervised release again. It ordered petitioner to serve 36 months of imprisonment, to be followed by

24 months of supervised release. Ibid. The court of appeals affirmed. Id. at 1a-8a.

1. Under the Sentencing Reform Act of 1984, a sentencing court is "authorized to impose a term of supervised release to follow imprisonment, with the maximum length of the term varying according to the severity of the offense. Johnson v. United States, 529 U.S. 694, 697 (2000); see 18 U.S.C. 3583(a)-(c). While on supervised release, a supervised releasee must "abide by certain conditions, some specified by statute and some imposable at the court's discretion." Johnson, 529 U.S. at 697; see 18 U.S.C. 3583(d).

District courts may review an offender's compliance with the conditions of supervised release, and may (1) "terminate" the term of supervised release and "discharge the defendant"; (2) extend the supervised release term or modify the conditions of release; or (3) if the court "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," "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." 18 U.S.C. 3583(e)(1) and (3). If a defendant possesses a controlled substance or a firearm while on supervised release, revocation is mandatory: 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)." 18 U.S.C. 3583(g).

The supervised release statute also contains a tolling provision that states:

The power of the court to revoke a term of supervised release for a violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment * * * 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.

18 U.S.C. 3583(i).

2. In 2008, police officers observed petitioner conducting what appeared to be hand-to-hand drug sales from a car. Presentence Investigation Report (PSR) ¶ 10. When they approached, they saw in petitioner's lap "a clear plastic bag containing an off-white chunky substance." Ibid. They "recovered that bag and two additional plastic bags that had fallen to the ground," one of which also contained "an off-white chunky substance." Ibid. Officers arrested petitioner. Drug testing revealed that the off-white substance in the plastic bags was 46.6 grams of cocaine base. Ibid.

Petitioner pleaded guilty to possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841. 3/16/10 Judgment 1. He was sentenced to 96 months of imprisonment, to be followed by four years of supervised release. Id. at 2-3.¹ The conditions of petitioner's supervised release required, inter alia, that he not commit another crime and that he notify his probation officer within 72 hours of being questioned by a law enforcement officer. Pet. App. 3a-4a.

3. Petitioner began supervised release in September 2014. Pet. App. 3a. Less than a year later, petitioner "was involved in a traffic stop" that "led to the discovery of firearms and substances suspected to be drugs." Id. at 4a. Officers questioned petitioner and subsequently executed two search warrants at petitioner's home. Ibid.

The Probation Office filed a petition for revocation of supervised release. The petition alleged that petitioner had violated the conditions of his supervised release through "commission of a crime -- Possession of a Firearm by a Convicted Felon" and "commission of a crime -- Possession of Controlled Substance." Pet. App. 4a; D. Ct. Doc. 46 (Sept. 3, 2015).

While that petition for revocation was pending, petitioner "was separately arrested" by local police officers and "charged in

¹ Petitioner's sentence of imprisonment was later reduced to 79 months due to retroactive amendments to the applicable Sentencing Guidelines. See D. Ct. Doc. 45 (Sept. 11, 2012).

state court with murder and use of a firearm in the commission of a felony.” Pet. App. 4a. The Probation Office then filed several addenda to the initial petition for revocation. The first addendum alleged that petitioner had violated the conditions of his supervised release because he had failed to notify his probation officer within 72 hours of a contact with law enforcement -- specifically, the contact that occurred when officers had executed search warrants at petitioner’s home. D. Ct. Doc. 58 (Sept. 29, 2015). The second addendum alleged, consistent with the new state charges, that petitioner had violated the terms of his supervised release by committing the crimes of murder and use of a firearm in commission of a felony. D. Ct. Doc. 59 (Sept. 29, 2015). A third addendum requested issuance of an arrest warrant. Pet. App. 4a.

The district court held a hearing and revoked petitioner’s supervised release based on his failure to report law enforcement contacts to his probation officer, as set out in the first addendum. Pet. App. 4a. The court ordered that petitioner serve one month of imprisonment and 40 months of supervised release. Ibid. Because state court proceedings related to the other alleged violations were still ongoing, “the district court neither dismissed nor ruled on the allegations” of possession of a firearm by a convicted felon, possession of a controlled substance, murder, and use of a firearm in the commission of a felony. Ibid.

While petitioner was incarcerated as a result of his failure to report law enforcement contacts to probation, he was indicted by a federal grand jury for possessing a firearm while a convicted felon, based on the gun possession during the traffic stop that had earlier given rise to a state charge. The Probation Office filed a fourth addendum to its revocation petition noting that event. D. Ct. Doc. 100 (Oct. 23, 2015). The addendum re-alleged "commission of a crime -- possession of a firearm by a convicted felon" -- one of the grounds for revocation set out in the initial, still-pending petition for revocation. Ibid. (capitalization and emphasis omitted). It advised the court of the federal indictment and explained that "the information contained in th[e federal] Indictment was previously reported to the Court on September 3, 2015" in the initial petition for revocation. Ibid. After that addendum was filed, the district court granted the government's motion to dismiss "the initial petition alleging violations of the terms of supervised release * * * because the fourth addendum essentially superseded the initial petition, thereby rendering the initial petition moot." D. Ct. Doc. 106, at 1 (Oct. 28, 2015). The court also granted the government's motion to dismiss the third addendum, leaving pending only the allegation that petitioner violated the conditions of supervised release by possessing a firearm as a convicted felon. Pet. App. 4a; see D. Ct. Doc. 111 (Nov. 5, 2015).

Petitioner's one-month term of incarceration for his failure to report law enforcement contacts ended. Petitioner was then held "in pre-trial detention pending his federal criminal trial," Pet. App. 4a, and was convicted at trial of possessing a firearm following a felony conviction, see 15-cr-170 Docket entry 58 (Apr. 6, 2016). Petitioner received a sentence of 120 months of imprisonment for that crime. Pet. App. 4a, 9a.

When the district court sought to adjudicate the remaining supervised release violation following petitioner's conviction on the corresponding federal charge, petitioner moved to dismiss the supervised release charge. He contended that the court lacked jurisdiction because the firearm-possession violation was set out in the fourth addendum, which was filed after his supervised release had already been revoked. See D. Ct. Doc. No. 119, at 7 (June 13, 2016). The court denied the motion. Pet. App. 9a-13a. The court concluded that "a prior revocation on minor or technical violations does not prevent a second revocation on more significant or substantive violations." Id. at 9a. It reasoned that it could revoke supervised release based on the firearms ground in the fourth addendum because that addendum was filed while petitioner was incarcerated following his initial revocation, and "a revocation sentence is part of the period of supervised release for which the revocation sentence was imposed." Id. at 10a. The court then determined, in light of the jury's verdict in the

separate criminal prosecution, that petitioner had violated the conditions of his supervised release by committing the firearms offense while on supervision. Id. at 4a, 9a-13a. It ordered petitioner to serve 36 months of imprisonment, to be followed by 24 months of supervised release. Id. at 4a.

4. The court of appeals affirmed, determining that the district court had possessed jurisdiction to revoke petitioner's supervised release based on his firearms offense. Pet. App. 1a-8a. Relying on this Court's decision in Johnson, supra, the court of appeals observed that 18 U.S.C. 3583 separately provides the district court with authority to "terminate," 18 U.S.C. 3583(e)(1), or to "revoke a term of supervised release," 18 U.S.C. 3583(e)(3). It stated that "[u]nlike termination, revocation does not end the term of supervised release; instead, the term of supervised release continues on past revocation." Pet. App. 5a (citing Johnson, 529 U.S. at 705).

The court of appeals rejected petitioner's argument that his supervised release could not be revoked based on an allegation in an addendum that was filed after the initial revocation of his supervised release. It reasoned that petitioner's argument rested on the mistaken premise that "the supervised release term ceases to exist after revocation." Pet. App. 6a. The court stated that petitioner's premise "directly contradicts the Supreme Court's explanation in Johnson that a supervised release term continues to

exist after revocation.” Ibid. Since “the government filed the fourth addendum during [petitioner’s] post-revocation prison term,” the court wrote, “the government filed the fourth addendum while [petitioner’s] supervised release remained in effect.” Ibid. As a result, the court concluded that the Probation Office had “fil[ed] the petition before the expiration of [petitioner’s] supervised release, and the district court retained jurisdiction to adjudicate the violations alleged in the fourth addendum.” Ibid.

The court of appeals further reasoned that petitioner’s contrary approach “would eviscerate Congress’s purpose in designing the current supervisory release scheme,” by making the court “powerless to act upon a newly discovered or alleged violation if the government does not file a petition before the court revokes the defendant’s supervised release.” Pet. App. 6a. Such an approach would “create[] a powerful incentive for defendants to ‘readily admit to lesser violations to obtain more lenient sentencings’ while hiding a more serious violation from the court.” Ibid. (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 7-18) that the district court lacked jurisdiction to revoke his supervised release based on his possession of a firearm as a convicted felon, arguing that courts lack “jurisdiction to revoke a term of

supervised release that has already been revoked, based on pre-revocation conduct that was not charged as a violation before the first revocation.” Pet. i. The court of appeals correctly rejected petitioner’s claim. And although a shallow disagreement exists in the circuits concerning revocation authority under the circumstances that petitioner posits, the issue has arisen infrequently, and petitioner’s case would be an unsuitable vehicle for its consideration. Further review is therefore unwarranted.

1. The court of appeals correctly rejected petitioner’s jurisdictional arguments.

a. Petitioner’s argument that the district court’s initial revocation of supervised release deprived it of jurisdiction to adjudicate any other violation based on “pre-revocation conduct that was not charged as a violation before the [initial] revocation,” Pet. i, rests on the erroneous premise that the initial revocation ended petitioner’s term of supervised release, making a further revocation impossible. In Johnson v. United States, 529 U.S. 694 (2000), however, this Court -- addressing a prior version of Section 3583(e)(3) -- concluded that a term of supervised release instead “retain[s] vitality” during incarceration for a violation. Id. at 706-707. The Court utilized the “secondary but recognized” definition of “revoke” as to “recall” or “call or summon back.” Ibid.

The Court determined that textual features of Section 3583(e)(3) supported that definition. It noted that the use of "revoke" in subsection (e)(3) contrasted with the use of "terminate" in the "preceding subsection (e)(1)." Johnson, 529 U.S. at 704-705. Further, the Court wrote, by providing that "the court could 'revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release,'" subsection (e)(3) indicated that a period of incarceration was a portion "of the term of supervised release." Id. at 705. The Court also found that this construction served Congress's objective of "improv[ing] the odds of a successful transition from the prison to liberty," id. at 708-709, and was consistent with pre-Sentencing Guidelines practices, id. at 710-711.

Petitioner contends that 1994 amendments to the supervised release statute supplanted Johnson's interpretation of the term "revoke." The 1994 amendments provide that a defendant who violates supervised release may be required to serve a term of imprisonment up to the maximum period of supervised release authorized for his offense -- instead of only up to the length of the period of supervised release to which the defendant had been sentenced. See Public Safety and Recreational Firearm Use Protection Act, Pub. L. No. 103-322, § 110505, 108 Stat. 2016; 18 U.S.C. 3583(e)(3) (specifying that district court may "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"). The amendments also added Section 3583(h), which expressly authorizes a court that imposes "a term of imprisonment" upon revocation to impose a term of supervised release following that imprisonment. 18 U.S.C. 3583(h). Those amendments, however, left the term "revoke" in place. See United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 483 (2012) (rejecting argument that an amendment to a statute undermined this Court's prior decision interpreting a statute where "[t]he operative language is identical"). Moreover, under the revised version of the statute -- just as in the version construed in Johnson -- the "revocation" language of subsection (e)(3) contrasts with the "termination" language of subsection (e)(1).

b. Petitioner's argument, in any event, rests on the mistaken premise that a district court lacks authority to revoke a second term of supervised release based on violations that were committed during an earlier term of supervised release. Section 3583(e)(3) states broadly that a court may "revoke a term of supervised release, * * * if the court * * * finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. 3583(e)(3). Even if

petitioner were correct that his initial supervised release term ended upon the first revocation, Section 3583(e)(3) would permit the court to revoke his second term of 24 months of supervised release when it determined that petitioner possessed a firearm during his earlier term of supervised release. Petitioner's illegal firearm possession indisputably "violated a condition of supervised release," ibid., and no portion of the statute strips the court of authority to punish that breach of trust simply because the violation preceded an intervening revocation.

Petitioner's contrary construction of Section 3583(e)(3) would undercut the supervised release statute's objectives, by denying district courts the ability to calibrate defendants' supervision to account for important facts regarding post-release conduct. "The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty." Johnson, 529 U.S. at 708-709; see also Sentencing Guidelines Ch. 7, Pt. A, § 3(b) (explaining that a violation of supervised release is properly sanctioned as "a breach of trust," with "the nature of the conduct leading to the revocation" relevant "in measuring the extent of the breach of trust"). A defendant who commits a serious violation of supervised release commits a breach of trust warranting sanction, and demonstrates lack of readiness for integration into the community -- regardless of whether the district court

previously revoked supervised release for a different, technical violation. And in those cases in which a court is unaware of a more serious violation until after it revokes a term of supervision for a technical violation, petitioner's reading would deny the court the ability to address the more serious breach of trust altogether. In doing so, petitioner would create a perverse incentive for defendants to "'readily admit to lesser violations to obtain more lenient sentencings' while hiding a more serious violation from the court." Pet. App. 6a (citation omitted).

2. Since the enactment 24 years ago of the current language in Section 3583(e)(3), a two-to-one disagreement in the circuits has emerged on whether courts have "jurisdiction to revoke a term of supervised release that has already been revoked, based on pre-revocation conduct that was not charged as a violation before the first revocation." Pet. i. In 2012, addressing what it described as a "matter of first impression," the Ninth Circuit concluded that "once a term of supervised release has been revoked, a later-discovered violation of a condition of that term cannot form the basis of a revocation of a subsequent term of supervised release." United States v. Wing, 682 F.3d 861, 863, 865. The court below and the Sixth Circuit have since then reached contrary conclusions. See Pet. App. 1a-6a; United States v. Cross, 846 F.3d 188, 189-191 (6th Cir. 2017). A non-precedential decision in the Third Circuit has also rejected petitioner's approach. United States v.

Johnson, 243 Fed. Appx. 666, 667-668 (2007).² That shallow disagreement does not presently warrant this Court's intervention. The small number of decisions over nearly a quarter century that address the permissibility of re-revocation under the circumstances on which petitioner focuses suggests that the issue has not been litigated with sufficient frequency to warrant plenary Supreme Court review. It also indicates that the issue may benefit from further development in the lower courts before any intervention by the Court.

3. In any event, petitioner's case is an unsuitable vehicle for consideration of whether courts lack "jurisdiction to revoke a term of supervised release that has already been revoked, based on pre-revocation conduct that was not charged as a violation before the first revocation," Pet. i. Petitioner's case does not

² The Second Circuit's decision in United States v. Vargas, 564 F.3d 618, 622, cert. denied, 558 U.S. 941 (2009), and the Tenth Circuit's nonprecedential decision in United States v. Hendrix, 630 Fed. Appx. 816, 819 (2015), cert. denied, 136 S. Ct. 1531 (2016), see Pet. 8-9, relied on this Court's definition of "revoke" in Johnson, but did not address the question presented. Both decisions instead addressed courts' authority to modify a sentence for a supervised release violation to contain an additional period of supervision pursuant to Section 3583(e)(2). See Vargas, 564 F.3d at 624 (concluding that the district court was permitted under Section 3583(e)(2) to "correct an inadvertent omission" in its sentence for a violation of supervision, "by extending supervised release even in the absence of a new violation"); Hendrix, 630 Fed. Appx. at 821 (concluding that district court lacked jurisdiction to add a term of supervised release to follow term of imprisonment that it had previously ordered upon revocation, but stating that the court could have extended the defendant's period of supervision pursuant to Section 3583(e)(2)).

present that issue, because the Probation Office did charge petitioner with violating conditions of supervised release through the "commission of a crime -- Possession of a Firearm by a Convicted Felon" before the first revocation of petitioner's supervised release, in the initial petition for revocation. Pet. App. 4a; D. Ct. Doc. 46. The fourth addendum on which the district court ultimately acted restated that ground for revocation, and advised the court that the offense was now charged in a federal indictment. See D. Ct. Doc. 100.

In addition to falling outside the question presented, the circumstances of this case do not present a circuit conflict. The Ninth Circuit decision on which petitioner relies in alleging a conflict held only that a court could not revoke supervised release based on a violation brought to its attention after the initial revocation of supervised release. Wing, 682 F.3d at 865, 874 (ruling on "a later-discovered violation"). The Ninth Circuit has acknowledged, however, that tolling under 18 U.S.C. 3583(i) may extend a court's jurisdiction to revoke a term of supervised release where, as here, "(1) the defendant is properly haled before the court on a warrant or summons issued during the supervision period and (2) the post-expiration allegation is factually related to a matter raised to the court during the supervision period." United States v. Campbell, 883 F.3d 1148, 1153 (2018); see id. at 1151, 1153 (court had jurisdiction over "allegations concerning

[a] Chevrolet Camaro" set out in an amended petition for revocation because "[t]hat amendment was factually related to the version alleged during [the defendant's] term of supervision"). That court has not otherwise addressed the scope of permissible tolling, including whether Section 3583(i) allows tolling upon revocation of supervised release, see Wing, 682 F.3d at 869 n.6 (describing it as "arguabl[e]" whether a term of supervised release "expire[s]" under Section 3583(i) upon revocation), and whether background principles permit tolling based on the filing of a petition for revocation, regardless of whether Section 3583(i) directly applies, see United States v. Janvier, 599 F.3d 264, 266 (2d Cir. 2010) (explaining that tolling with respect to supervised release violations predates Section 3583(i)). Because petitioner's case does not implicate the question presented, and because resolution of the case turns in part on tolling issues that the Ninth Circuit has acknowledged but not addressed, petitioner's case is not a suitable vehicle for addressing the question on which he seeks review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

ELIZABETH H. DANELLO
Attorney

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