

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE G. PADILLA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MICHAEL HERMAN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

QUESTION PRESENTED

In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court established that parole revocation hearings must be held in accordance with certain minimal due process guarantees. The Court recognized that revocation involves two steps: a “wholly retrospective factual question” of “whether the parolee has in fact acted in violation of one or more conditions of his parole” and a second step of “deciding what to do about the violation once it is identified” (i.e., whether the parolee should be returned to prison). Morrissey, 408 U.S. at 479-80. Federal courts and the Federal Rules of Criminal Procedure have applied Morrissey to hearings to revoke supervised release. In United States v. Williams, 847 F.3d 251 (5th Cir.), cert. denied, 138 S. Ct. 192 (2017), however, the Fifth Circuit abandoned Morrissey’s due process guarantee for the second step in a revocation hearing by adopting a bright-line rule that “[a] revocation defendant’s due process right to confrontation does not apply in connection with the length of any resulting prison sentence.” Williams, 847 F.3d at 254.

The Fifth Circuit applied the Williams rule to the petitioner in this case, finding harmless the district court’s refusal to allow him to confront adverse witnesses on the most serious violation alleged, even though the court based his sentence on that violation, because the court’s decision to revoke was adequately supported by evidence showing other less serious violations. The Fifth Circuit held that the district court’s use of the most serious violation to impose a more severe sentence than called for by the other violations was not cognizable under Williams because “the right of confrontation does not apply to the length of any resulting prison sentence.” United States v. Padilla, 707 Fed. Appx. 817, 2018 WL 264812 at *1 (5th Cir. Jan. 2, 2018) (unpublished). The Fifth Circuit’s bright-line rule, as established in Williams and applied to petitioner, conflicts with the decisions of the Third, Seventh, and Eighth Circuits and with a more recent decision of the Tenth Circuit.

In light of the foregoing, the question presented is as follows:

Does a district court violate a defendant’s due process right under Morrissey v. Brewer, 408 U.S. 471 (1972), to confront adverse witnesses at a revocation hearing when the district court accepts hearsay evidence to establish the most serious alleged violation conduct and uses that conduct to determine the length of the prison sentence, if the district court also had a basis to revoke supervised release based on less serious alleged violations established by competent evidence?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
PRAYER	1
OPINION BELOW	1
JURISDICTION	1
FEDERAL RULE OF CRIMINAL PROCEDURE AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Proceedings in District Court	3
B. Proceedings on Appeal	5
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	7
REASONS FOR GRANTING THE WRIT	8

Contrary to the practice of other federal courts of appeals, the Fifth Circuit has adopted a bright-line rule that a revocation defendant's due process right to confrontation does not extend to alleged violations affecting the length of the prison sentence when the decision to revoke is based on other violations. That bright-line rule is based on a confusion of the limited due process confrontation right at revocation proceedings with the Sixth Amendment's more stringent confrontation clause. The Fifth Circuit's rule ignores the importance of constitutional protections in all phases of revocation proceedings. To resolve this conflict among the federal courts of

TABLE OF CONTENTS – (Cont’d)

Page

appeals and to safeguard the constitutional protections of due process in revocation proceedings, the Court should grant certiorari in this case.	8
A. The Fifth Circuit’s bright-line rule that there is no due process confrontation right in revocation proceedings with respect to an alleged violation that affected only sentencing is in conflict with decisions of other federal courts of appeals.	11
B. The Fifth Circuit’s bright-line rule in <u>Williams</u> as applied in the instant case undermines <u>Morrissey</u> ’s due process protections and confuses those protections with the Sixth Amendment’s more stringent confrontation clause rights.	15
CONCLUSION	21
APPENDIX: Westlaw version of the opinion of the Court of Appeals in <u>United States v. Padilla</u> , 707 Fed. Appx. 817, 2018 WL 264812 (5th Cir. Jan. 2, 2018) (unpublished).....	22

TABLE OF CITATIONS

Page

CASES

Crawford v. Washington, 541 U.S. 36 (2004).....	16-17
Curtis v. Chester, 626 F.3d 540 (10th Cir. 2010)	16-17
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	9-10
McMillan v. Pennsylvania, 477 U.S. 79 (1986)	20
Morrissey v. Brewer, 408 U.S. 471 (1972)	<i>passim</i>
United States v. Aspinall, 389 F.3d 332 (2d Cir. 2004)	17
United States v. Beydoun, 469 F.3d 102 (5th Cir. 2006)	17-18
United States v. Booker, 543 U.S. 220 (2005)	17
United States v. Copeland, 20 F.3d 412 (11th Cir. 1994)	9
United States v. Geathers, 297 Fed. Appx. 885 (11th Cir. 2008) (unpublished)	17
United States v. Hall, 419 F.3d 980 (9th Cir. 2005)	9, 16-17
United States v. Henry, 852 F.3d 1204 (10th Cir. 2017)	14-15
United States v. Henry, 854 F.3d 1177 (10th Cir. 2017)	14-15
United States v. Jimenez, 275 Fed. Appx. 433 (5th Cir. 2008) (unpublished)	17-18

TABLE OF CITATIONS – (Cont’d)

Page

CASES – (Cont’d)

United States v. Johnson, 710 F.3d 784 (8th Cir. 2013)	12, 15
United States v. Jordan, 742 F.3d 276 (7th Cir. 2014)	13, 15
United States v. Kelley, 446 F.3d 688 (7th Cir. 2006)	17
United States v. Kirby, 418 F.3d 621 (6th Cir. 2005)	17
United States v. Lloyd, 566 F.3d 341 (3d Cir. 2009)	11-15
United States v. McCormick, 54 F.3d 214 (5th Cir. 1995)	9
United States v. Moslavac, 779 F.3d 661 (7th Cir. 2015)	13-14
United States v. Padilla, 707 Fed. Appx. 817 (5th Cir. 2018) (unpublished)	i, 6, 10, 19
United States v. Ray, 530 F.3d 666 (8th Cir. 2008)	17
United States v. Rondeau, 430 F.3d 44 (1st Cir. 2005)	17
United States v. Ruby, 706 F.3d 1221 (10th Cir. 2013)	14
United States v. Walker, 263 Fed. Appx. 316 (4th Cir. 2008) (unpublished)	17

TABLE OF CITATIONS – (Cont’d)

Page

CASES – (Cont’d)

United States v. Williams, 847 F.3d 251 (5th Cir.), <u>cert. denied</u> , 138 S. Ct. 192 (2017).....	<i>passim</i>
---	---------------

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	2
U.S. Const. amend. VI	2, 17-19

STATUTES AND RULES

18 U.S.C. § 2	3
18 U.S.C. § 3231	7
18 U.S.C. § 3583(e).....	7
21 U.S.C. § 841(a)(1)	3
21 U.S.C. § 841(b)(1)(A)(ii)	3
28 U.S.C. § 1254	1
Fed. R. Crim. P. 32.1	2
Fed. R. Crim. P. 32.1(b)(2).....	9
Fed. R. Crim. P. 32.1(b)(2)(C)	2, 13-16
Sup. Ct. R. 13.1.....	1

TABLE OF CITATIONS – (Cont’d)

Page

SENTENCING GUIDELINES

USSG § 4B1.2, comment. (n.1).....	5
USSG § 4B1.2(a).....	5
USSG § 7B1.1(a)(2) (p.s.).....	5
USSG § 7B1.1(a)(3) (p.s.).....	5
USSG § 7B1.2, comment. (n.2) (p.s.)	5
USSG § 7B1.2(a)(1) (p.s.).....	5
USSG § 7B1.4(a) (p.s.).....	4-5

PRAYER

Petitioner José G. Padilla respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on January 2, 2018.

OPINION BELOW

On January 2, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of revocation of supervised release and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On January 2, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of revocation of supervised release and sentence. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE
AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

“No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law” U.S. CONST. amend V.

2. The Sixth Amendment to the United States Constitution provides, in relevant part:

“In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him” U.S. CONST. amend. VI.

3. Federal Rule of Criminal Procedure 32.1 provides in relevant part:

(b)(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

. . . .

(C) 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;

. . . .

STATEMENT OF THE CASE

A. Proceedings in District Court.

On March 28, 2012, Petitioner José G. Padilla pleaded guilty to an indictment in the Houston Division of the Southern District of Texas charging him with possessing with the intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(ii) and 18 U.S.C. § 2. On August 21, 2012, he was sentenced to a term of imprisonment of 85 months to be followed by 5 years of supervised release, subject to terms of supervision including that he not commit another federal, state or local crime and that he not unlawfully possess a controlled substance. The district court later reduced Mr. Padilla's prison sentence to 70 months in custody based on an amendment to the Sentencing Guidelines.

Mr. Padilla commenced his supervised release upon his release from prison on April 1, 2016. An initial petition for revocation of supervised release was filed on October 21, 2016, and the district court transferred jurisdiction to the McAllen Division of the Southern District of Texas. On December 8, 2016, a superseding petition for revocation was filed alleging the following violations: the commission of the offenses of public intoxication, driving while intoxicated ("DWI"), aggravated assault and resisting arrest, the possession and use of a controlled substance (marijuana) confirmed by lab analysis, and the failure to participate in a drug treatment program by reason of a positive urinalysis.

At the revocation hearing on February 2, 2017, Mr. Padilla admitted the allegations that he violated the terms of his supervision by committing the offenses of public

intoxication, DWI, resisting arrest, illegal use and possession of a controlled substance and failure to participate in the drug and alcohol treatment program as directed, but he denied the allegation of aggravated assault. Based on his plea of true to the allegations of public intoxication, DWI, resisting arrest, possession and use of controlled substances, and failure to participate in drug and alcohol treatment programs, the district court found those allegations established.

With regard to the allegation of aggravated assault, the district court took evidence. Mr. Padilla did not object to the district court's use of a police report, which the court found insufficient to establish the aggravated nature of the assault. The government presented two officers who arrived at the scene of the alleged aggravated assault, but neither officer witnessed the assault itself. The district court accepted into evidence affidavits of the complainant and a witness over Mr. Padilla's objections that the government had not presented sufficient good cause to overcome his important interests in cross-examining the two declarants. The district court ultimately overruled Mr. Padilla's objections, finding the affidavits to be sufficiently reliable.

The district court then proceeded to sentencing. In his allocution, Mr. Padilla admitted a simple assault (without use of a deadly weapon or serious bodily injury). Emphasizing the assault, the district court revoked Mr. Padilla's supervised release and sentenced him to a 40-month term of imprisonment with no recommenced supervision. That 40-month sentence fell at the midpoint of the range established under United States Sentencing Guideline (USSG) § 7B1.4(a) (p.s.) for a criminal history category IV and a

Grade A violation, which would include an aggravated assault as a state felony offense considered a “crime of violence.” USSG § 7B1.2(a)(1) (p.s.) & comment. (n.2), referencing USSG § 4B1.2(a) and comment. (n.1) (including “aggravated assault” as a “crime of violence.”) Without a Grade A violation, the recommended Sentencing Guideline range would have been at most 12-18 months (Grade B violation) or 6-12 months (Grade C violation). See USSG §§ 7B1.1(a)(2), (3) (p.s.); 7B1.4(a) (p.s.) (Table).

B. Proceedings on Appeal.

Mr. Padilla filed a timely notice of appeal. On appeal, he argued that the district court erred in balancing the government’s proffered reasons for not calling the complainant or other eyewitnesses and the reliability of the affidavits against his interest in cross-examining those witnesses. He identified the key error in the case as a failure to establish the reliability of any evidence with respect to the aggravated nature of the assault, resulting in the Grade A categorization of the alleged violation. Mr. Padilla argued that the drastic change in recommended sentencing ranges based on a Grade A violation instead of a lower grade of violation caused his interest in confronting the adverse witnesses to outweigh the proffered government justifications. He further argued that this error was not harmless because, absent a Grade A violation, the district court could have imposed options short of revocation, and because of the great disparity in recommended Sentencing Guidelines ranges.

The Fifth Circuit affirmed the judgment revoking supervised release and the sentence. United States v. Padilla, 707 Fed. Appx. 817, 2018 WL 264812 (5th Cir. Jan. 2,

2018) (unpublished). The Fifth Circuit assumed that the district court erred in admitting the affidavits in violation of Mr. Padilla's due process right to confront and cross-examine adverse witnesses, but found that error to be harmless. Id., 2018 WL 264812 at *1. The Fifth Circuit stated that Mr. Padilla's supervised release would have been revoked even without the aggravated assault violation because of his admission of illegally possessing and unlawfully using controlled substances and of committing the simple assault. Id. With regard to Mr. Padilla's argument that the disparity in recommended sentencing ranges meant the error was not harmless, the Fifth Circuit responded: "To the extent that admission of the hearsay evidence affected the length of his sentence, we have held that the right of confrontation does not apply to the length of any resulting prison sentence." Id.

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 over the original prosecution in this case, and the district court had jurisdiction to proceed with revocation of supervised release under 18 U.S.C. § 3583(e).

REASON FOR GRANTING THE WRIT

Contrary to the practice of other federal courts of appeals, the Fifth Circuit has adopted a bright-line rule that a revocation defendant's due process right to confrontation does not extend to alleged violations affecting the length of the prison sentence when the decision to revoke is based on other violations. That bright-line rule is based on a confusion of the limited due process confrontation right at revocation proceedings with the Sixth Amendment's more stringent confrontation clause. The Fifth Circuit's rule ignores the importance of constitutional protections in all phases of revocation proceedings. To resolve this conflict among the federal courts of appeals and to safeguard the constitutional protections of due process in revocation proceedings, the Court should grant certiorari in this case.

In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court established that parole revocation hearings must be held in accordance with certain minimal due process guarantees. The Court recognized that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." Id. at 480. However, given the liberty interests at stake, the absence of significant burdens from the "informal procedural guarantees" the Court adopted, and the interest of society in ensuring that parole is not revoked "because of erroneous information or because of any erroneous evaluation of the need to revoke parole," the Court set out a framework of basic procedural protections. Id. at 482-84. Those protections included a final revocation hearing at which, among other rights, the parolee would have "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Id. at 488-89.

Subsequently, this Court extended the revocation due process framework to revocations of probation. Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973). And the Federal Rules of Criminal Procedure incorporated substantially the same procedural protections with respect to revocation of federal supervised release. See Fed. R. Crim. P. 32.1(b)(2). The Fifth Circuit, along with other federal courts of appeals, recognized that the incorporation of these same due process protections for purposes of federal supervised release revocation meant that “[t]he same protections granted those facing revocation of parole are required for those facing the revocation of supervised release.” United States v. McCormick, 54 F.3d 214, 221 (5th Cir. 1995) (citing United States v. Copeland, 20 F.3d 412, 414 (11th Cir. 1994)); see also United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir. 2005) (“Parole, probation and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner”).)

In adopting basic procedural due process in revocation hearings, this Court recognized that revocation involves two steps: a “wholly retrospective factual question” of “whether the parolee has in fact acted in violation of one or more conditions of his parole” and a second step of “deciding what to do about the violation once it is identified,” a step that combines factual elements with a “predictive and discretionary” function about whether the parolee should be returned to prison or whether other alternatives should be pursued. Morrissey, 408 U.S. at 479-80. In both of these steps, this Court emphasized that “it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were.” Id. at 480. The due

process imposed on both steps, therefore, was meant to “assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” *Id.*; see also *Scarpelli*, 411 U.S. at 784-86 (recognizing that the due process through hearings imposed in *Morrissey* reflected the need for an “accurate finding of fact” as to the fact of a violation and “the informed use of discretion” to decide what should be done to the probationer).

In *United States v. Williams*, 847 F.3d 251 (5th Cir.), *cert. denied*, 138 S. Ct. 192 (2017), the Fifth Circuit sundered the due process protections adopted in *Morrissey* from a substantial portion of one of the two steps: the second, discretionary step about what to do in response to a violation. Instead of applying all the due process protections to a supervised release revocation proceeding in its entirety, the Fifth Circuit adopted a bright-line rule that “[a] revocation defendant’s due process right to confrontation does not apply in connection with the length of any resulting prison sentence.” *Williams*, 847 F.3d at 254. The Fifth Circuit applied the *Williams* rule to petitioner Padilla’s case, finding that any error of a failure to require confrontation of adverse witnesses was harmless because the decision to revoke was adequately supported by other violations, such that the district court likely would have revoked supervised release and imposed imprisonment in any case, and that the effect of a more serious violation in lengthening the sentence was not cognizable because “we have held that the right of confrontation does not apply to the length of any resulting prison sentence.” *United States v. Padilla*, 707 Fed. Appx. 817, 2018 WL 264812 *1 (5th Cir. Jan. 2, 2018) (unpublished). The effect of applying this rule in petitioner

Padilla's case meant that the Morrissey due process protections ensured the district court relied on "verified facts" to determine whether only some of several violations occurred to justify the decision to revoke, but not with regard to the most serious violation. The Fifth Circuit thereby permitted the district court to forgo due process protections when it came "to know[ing] accurately how many and how serious the violations were" for the purpose of exercising its discretion to determine what to do about such violations in the context of all violation conduct. See Morrissey, 408 U.S. at 480. This procedure of omitting due process protections, as sanctioned by the Fifth Circuit, fails to ensure "that the exercise of discretion will be informed by an accurate knowledge of the [supervisee's] behavior" in determining the extent of deprivation of liberty to be suffered by supervisees like petitioner Padilla. Id.

This Court should grant this petition for a writ of certiorari for the following reasons:

- A. The Fifth Circuit's bright-line rule that there is no due process confrontation right in revocation proceedings with respect to an alleged violation that affected only sentencing is in conflict with decisions of other federal courts of appeals.

The Fifth Circuit's bright-line rule from Williams and applied in petitioner Padilla's case conflicts with the procedures in several other federal courts of appeals.

The Third Circuit took exactly the opposite approach in United States v. Lloyd, 566 F.3d 341 (3d Cir. 2009), where that court vacated a revocation sentence precisely because the sentence was determined by reference to a more serious violation established only by unreliable hearsay:

Lloyd's firearm violation is supported by non-hearsay evidence . . . and is not in dispute. This violation suffices to justify revocation of Lloyd's

supervised release, so the only issue on appeal is the proper calculation of his Guideline ranges and the length of his new sentence. Lloyd's 12-18 month Guidelines range was based on his most severe relapse, a Grade A violation for aggravated domestic battery. Absent this violation, his Guidelines range would have been 4-10 months (based on his Grade B firearm violation). The issue is therefore whether the out-of-court statements supporting Lloyd's aggravated domestic battery violation were properly admitted.

Lloyd, 566 F.3d at 344. Finding the out-of-court declarations unreliable and in the absence of a government justification for failure to produce the witness, the Third Circuit vacated the sentence because that hearsay was "the sole basis for the critical violation." Id. at 346. The Third Circuit's conclusion is the exact opposite of the conclusion the Fifth Circuit would have drawn under Williams' rule. Under Williams, the existence of the firearms violation would have justified revocation, and the Fifth Circuit would have upheld the sentence because, as Williams holds, no due process confrontation right attaches with regard to that sentence determination – even though, as the Third Circuit stated in Lloyd, that sentence was determined by reference to the "critical violation" whose existence was established only by evidence violating the due process standards of Morrissey, as incorporated in the Federal Rules of Criminal Procedure.

The Eighth Circuit followed the same rule as in Lloyd (without explicitly so stating) in United States v. Johnson, 710 F.3d 784 (8th Cir. 2013). In that case, the supervisee admitted less serious violations (leaving a rehabilitation facility and submitting a positive urine test for marijuana) but denied more serious pending state charges. Id. at 786. The district court allowed the government to prove that more serious conduct by reading into the record a police report, and sentenced in accordance with that more egregious state

offense conduct. Id. at 786-87. The Eighth Circuit held that the district court's admission of that police report narrative violated the due process standards of Morrissey and remanded for resentencing on the basis of the less serious, admitted violations. Id. at 789-90 & n.1 (refusing to permit the government to argue harmlessness of the error by reference to another Grade B violation not admitted by the defendant at the district court's hearing).

The Seventh Circuit applies due process confrontation rights at revocation in the same manner as the Third Circuit. In United States v. Jordan, 742 F.3d 276, 278 (7th Cir. 2014), the revocation defendant admitted three Grade C violations of supervision but denied the Grade A violation of possession with intent to distribute. The Seventh Circuit found that use of a police report without confrontation to prove the more serious conduct violated Fed. R. Crim. P. 32.1(b)(2)(C), and that "none of the evidence sufficiently corroborates the [police] report's account of the Grade A violation to allow us to determine on appeal that the evidence was so reliable as to render the district court's error harmless." Id. at 281. The Seventh Circuit has gone even further, finding that a violation of due process confrontation rights at a revocation was not harmless even though all violations produced the same Guideline sentencing range when the district court placed greater emphasis on the alleged conduct proved by the hearsay evidence. See United States v. Moslavac, 779 F.3d 661, 665 (7th Cir. 2015) ("In light of the considerable and apparent weight that the district court gave to the . . . battery during Moslavac's sentencing, we cannot conclude that Moslavac would have received the same sentence notwithstanding the [battery] incident.")

While the Tenth Circuit adopted a rule similar to the Fifth Circuit in United States v. Ruby, 706 F.3d 1221, 1228 (10th Cir. 2013) (rejecting Lloyd, stating “Rule 32.1(b)(2)(C) does not apply to the sentencing phase of a revocation proceeding”), that court has not consistently applied its own rule. In United States v. Henry, 852 F.3d 1204 (10th Cir. 2017), the Tenth Circuit held that a violation of Fed. R. Crim. P. 32.1(b)(2)(C) was not harmless precisely because the court could not determine the effect of the conduct found through hearsay on the *sentence*.

The government suggests any error in the admission of hearsay concerning the second assault was indeed harmless because the district court needed to find only one assault to revoke Mr. Henry’s supervised release, and its error-free finding on the first assault will do.

But though attractive on first blush, closer scrutiny reveals problems with this argument too. It’s certainly true, as the government notes, that the district court found each assault independently sufficient to warrant revocation. But after doing that much the court proceeded to consider both of these violations *together* when fashioning its sentence And, on the record before us, we simply cannot disaggregate what role, if any, the second violation played in the district court’s final sentencing decision.

Henry, 852 F.3d at 1208 (italics in original). The Tenth Circuit could have applied its rule in Ruby, just as the Fifth Circuit applied its Williams rule in the instant case, to find that no confrontation rights applied with respect to a violation affecting only sentencing. Instead, the Tenth Circuit created its own internal conflict, adopting an approach more in line with Lloyd and the other circuits that apply confrontation rights, whether under Morrissey or the equivalent Fed. R. Crim. P. 32.1(b)(2)(C), to all stages of a revocation proceeding, including violations affecting sentencing.¹

¹ On petition for panel rehearing, the Tenth Circuit considered the government’s belated

The Court should grant this petition for a writ of certiorari to resolve these conflicting circuit decisions on the important due process issues involved in applying Morrissey and the Federal Rules of Criminal Procedure in revocation proceedings. If petitioner Padilla had been in revocation proceedings in the foregoing circuits, those courts of appeals would not have excused an error in admitting the affidavits as used in petitioner's case on the grounds that the most severe violation proved in that manner affected only his sentence, since less egregious conduct could have been the basis for the decision to revoke. On the contrary, Lloyd, Johnson, Jordan and Henry would have required petitioner Padilla's sentence to be vacated precisely because the finding of the most serious violation, without adequate due process confrontation, caused the district court to impose a more severe sentence. The due process rights of revocation defendants and the degree of deprivation of their liberty for violations of supervised release should not depend on the region of the nation where they happen to reside.

- B. The Fifth Circuit's bright-line rule in *Williams* as applied in the instant case undermines *Morrissey*'s due process protections and confuses those protections with the Sixth Amendment's more stringent confrontation clause rights.

In Morrissey, this Court began its analysis by recognizing that "revocation . . . is not part of a criminal prosecution, and thus the full panoply of rights due a defendant in such a proceeding does not apply to . . . revocations." Morrissey, 408 U.S. at 480. The Court then defined the limited due process rights that the Constitution nevertheless requires in

argument citing Ruby, but rejected that argument on the grounds that the district court found the supervisee committed the second violation based on hearsay and that only speculation could lead the court to a finding of harmlessness. United States v. Henry, 854 F.3d 1177, 1178 (10th Cir. 2017).

revocation proceedings, including the limited right of confrontation – limited in that the district court could dispense with confrontation on a finding of good cause. Id. at 488-89. The Federal Rules of Criminal Procedure subsequently incorporated that same balancing test for a limited right of confrontation at supervised release revocation hearings. Fed. R. Crim. P. 32.1(b)(2)(C), advisory notes to 2002 Amendments (“The court is to balance the person’s interest in the constitutionally guaranteed right to confrontation against the government’s good cause for denying it.”).

Under Morrissey, it was clear from the beginning that the due process confrontation right for revocation proceedings was not the same as the Sixth Amendment confrontation right. The Sixth Amendment confrontation right provides a much more stringent protection against admission of out-of-court testimonial evidence, namely, “only when the common law requirements of unavailability and a prior opportunity for cross-examination are met.” United States v. Hall, 419 F.3d 980, 985 (9th Cir. 2005) (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)) (internal quotation marks omitted). The due process balancing test of Morrissey and of Fed. R. Crim. P. 32.1(b)(2)(C) provides less protection against the use of such testimonial statements by permitting their introduction when the district court weighs the government’s reason for not producing the witness and reliability of that evidence against the defendant’s interest in confrontation – regardless of whether the more stringent Sixth Amendment requirement of a prior opportunity to cross-examine has been fulfilled. See Hall, 419 F.3d at 986-89. For that reason federal circuit courts of appeals have recognized that the Sixth Amendment right of confrontation as defined in Crawford does

not apply to revocation hearings, but that the more limited due process confrontation right under Morrissey and the Federal Rules of Criminal Procedure does apply.²

In adopting its bright-line rule in Williams that due process confrontation rights do not apply to alleged violations whose effect is to increase a sentence, the Fifth Circuit confused these two different Constitutional protections. The only basis the Fifth Circuit cited for adopting this bright-line rule was its own decision in United States v. Beydoun, 469 F.3d 102 (5th Cir. 2006). Williams, 847 F.3d at 253 n.1.³ But Beydoun addressed only whether the Sixth Amendment's confrontation clause as defined in Crawford applied to sentencing proceedings. Beydoun, 469 F.3d at 108. In line with its pre-Crawford decisions and the decisions of other courts of appeals, the Fifth Circuit in Beydoun unsurprisingly concluded that "there is no Crawford violation when hearsay testimony is used at sentencing, rather than at trial." Id. That conclusion concerning the Sixth Amendment confrontation clause, however, says nothing about the more limited due process confrontation rights under Morrissey and the Federal Rules of Criminal Procedure. The

² See United States v. Rondeau, 430 F.3d 44, 47-48 (1st Cir. 2005); United States v. Aspinall, 389 F.3d 332, 342-44 (2d Cir. 2004), abrogated on other grounds by United States v. Booker, 543 U.S. 220 (2005); United States v. Walker, 263 Fed. Appx. 316, 317-18 (4th Cir. 2008) (unpublished); United States v. Kirby, 418 F.3d 621, 627-28 (6th Cir. 2005); United States v. Kelley, 446 F.3d 688, 690-92 (7th Cir. 2006); United States v. Ray, 530 F.3d 666, 667-68 (8th Cir. 2008); Hall, 419 F.3d at 985-86 (9th Cir.); Curtis v. Chester, 626 F.3d 540, 544-45 (10th Cir. 2010) (federal parole); United States v. Geathers, 297 Fed. Appx. 885, 886-87 (11th Cir. 2008) (unpublished).

³ The Fifth Circuit also cited its decision in United States v. Jimenez, 275 Fed. Appx. 433 (5th Cir. 2008) (unpublished). Williams, 847 F.3d at 253 n.1. That unpublished decision adopted the same rule based only on the Beydoun opinion as its cited authority. Jimenez, 275 Fed. Appx. at 437-38.

Fifth Circuit simply expanded its Sixth Amendment analysis in Beydoun to the due process rights in revocation proceedings with no analysis and no justification in this Court's case law. See Jimenez, 275 Fed. Appx. at 438 (citing Beydoun for the premise that the "right to confrontation is not extended to the sentencing context," and concluding, "[t]herefore, because Jimenez does not challenge the decision to revoke his supervised release, but only his revocation sentence, the right to confrontation under Morrissey does not apply to this case."); Williams, 847 F.3d at 253 n.1 (citing Jimenez and Beydoun to conclude that "[a] revocation defendant's due process right to confrontation does not apply in connection with the length of any resulting prison sentence.")

This Court should grant the petition and reverse the Fifth Circuit decision in petitioner Padilla's case to correct the Fifth Circuit's confusion of the concededly inapplicable Sixth Amendment confrontation clause rights and the more limited due process confrontation right that this Court imposed in Morrissey. From Morrissey and subsequent decisions of the circuit courts of appeals, it was already clear that the Sixth Amendment did not apply in revocation proceedings and that the Morrissey and rule-based confrontation right was already a limited right specifically crafted by this Court for revocation proceedings. The Fifth Circuit's denial of even the more limited Morrissey due process confrontation right based on confusion with its own Sixth Amendment precedent undermines the viability of that more limited confrontation right. The Morrissey Court stated its intention for the due process rights enumerated in that decision to apply both to the determination of whether facts justified a finding that a violation occurred *and* the

“exercise of discretion” in “deciding what to do about the violation once it has been identified.” Morrissey, 408 U.S. at 480 & 483. In the context of revocation of federal supervised release, the exercise of that discretion and “deciding what to do about the violation” must mean the sentencing context. The Fifth Circuit’s bright-line rule contravenes that intended scope of the Morrissey due process rights and should be corrected by this Court.

The consequences in petitioner Padilla’s case exemplify the harm from permitting the continued confusion concerning due process confrontation rights in Fifth Circuit case law. Based on the finding of an aggravated assault through the use of out-of-court statements,⁴ the district court’s sentencing range under the Sentencing Guidelines policy statements was 37 to 46 months for a Grade A violation. Without a Grade A violation, the recommended Sentencing Guidelines range based on the other violations would have been at most 12 to 18 months (Grade B violation) or 6 to 12 months (Grade C violation). The district court chose a mid-range sentence of 40 months based on that Grade A violation established without adequate due process confrontation – doubling or tripling the Sentencing Guideline recommended sentence that would have applied otherwise. By relying on such evidence without due process confrontation, the district court failed to “know accurately how many and how serious the violations were” when it determined its response to petitioner Padilla’s violations, risking an “erroneous evaluation” of the need to

⁴ The Fifth Circuit assumed arguendo that the admission of these statements violated due process confrontation protections. Padilla, 2018 WL 264812 at *1.

revoke supervision and the appropriate “steps to be taken to protect society and improve changes of rehabilitation.” Morrissey, 408 U.S. at 480 & 483.

The harm in this case and in other cases where the Fifth Circuit applies its bright-line Williams rule is the same derogation of due process Justice Stevens identified in his dissent in McMillan v. Pennsylvania, 477 U.S. 79 (1986) (Stevens, J., dissenting). Justice Stevens gave as an example a state defining a low-level of basic offense (e.g., assault) and then permitting an increased sentence based on aggravating factors not proved in accordance with constitutional standards. See id. at 101-02 (“No legislator would be willing to expose himself to the severe opprobrium and punishment meted out to murderers for an accidental stumble on the subway.”) The Williams bright-line rule permits a judge revoking supervised release to identify even low-grade violations of supervision as the basis for the decision to revoke, and then to dispense with Morrissey’s due process protections to punish based on other more egregious conduct. This result ensures that the tail can always wag the dog and that Morrissey’s due process protections can be circumvented without effective review.

This Court should grant certiorari in this case to remedy that harm, resolve the division in the courts of appeals, and clarify the application of Morrissey’s due process protections to sentencing decisions at revocation hearings.

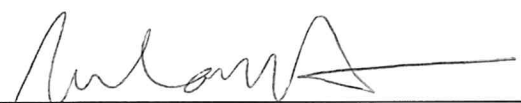
CONCLUSION

For the foregoing reasons, petitioner José G. Padilla prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: February 8, 2018

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By: 

MICHAEL HERMAN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

707 Fed.Appx. 817 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Jose G. PADILLA, Defendant-Appellant

No. 17-20076
|
Summary Calendar
|
Filed January 2, 2018

Appeal from the United States District Court for the
Southern District of Texas, USDC No. 4:11-CR-204-1

Attorneys and Law Firms

Andrew R. Gould, Assistant U.S. Attorney, Carmen
Castillo Mitchell, Assistant U.S. Attorney, U.S.
Attorney's Office, Southern District of Texas, Houston,
TX, for Plaintiff-Appellee

Marjorie A. Meyers, Federal Public Defender, Michael
Lance Herman, Assistant Federal Public Defender,
John Moreno Parras, Federal Public Defender's Office,
Southern District of Texas, Houston, TX, for Defendant-
Appellant

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

Jose G. Padilla appeals the district court's revocation of
his supervised release. He argues that he was deprived of
his due process right to confrontation when the district
court admitted hearsay evidence in the form of an affidavit
to find that he violated the terms of his supervised
release by committing the new law violation of aggravated
assault.

We review a claim that the district court violated the
constitutional right to confrontation in a revocation
proceeding de novo, subject to harmless error analysis.
United States v. Minnitt, 617 F.3d 327, 332 (5th Cir.
2010). "An error is harmless when it does not affect the
substantial rights of a party." *United States v. Carrillo*, 660
F.3d 914, 927 (5th Cir. 2011).

A defendant in a revocation hearing has a qualified right
under the Due Process Clause to confront and cross-
examine adverse witnesses, which may be disallowed upon
a finding of good cause. *United States v. Grandlund*,
71 F.3d 507, 510 (5th Cir. 1995); FED. R. CRIM. P.
32.1(b)(2)(C). Assuming *arguendo* that the district court
erred in admitting the hearsay evidence to find that he
committed aggravated assault, the error was harmless.
See Minnitt, 617 F.3d at 332. Padilla's supervised release
would have been revoked even without the new law
violation of aggravated assault as Padilla pleaded true
to illegally possessing and unlawfully using controlled
substances. *See* 18 U.S.C. § 3583(g)(1) (stating that
revocation is mandatory for possession of a controlled
substance). It is also unlikely that the district court
would have sentenced him to further treatment instead
of imprisonment pursuant to § 3583(d) given Padilla's
history of unsuccessful drug treatment. *See United States*
v. Williams, 847 F.3d 251, 254-55 (5th Cir.), *cert. denied*,
— U.S. —, 138 S.Ct. 192, 199 L.Ed.2d 129 (2017),
Moreover, based on Padilla's admission to simple assault
at the revocation hearing, the district court's comments
show that it would have revoked Padilla's supervised
release and imposed a term of imprisonment even absent
the hearsay evidence. *See United States v. Rentaria*, 692
Fed.Appx. 217, 218 (5th Cir. 2017).

To the extent that admission of the hearsay evidence
affected the length of his sentence, we have held that the
right of confrontation does not apply to the length of any
resulting prison sentence. *Id.* Thus, Padilla cannot show
that the error affected his substantial rights. *See Carrillo*,
660 F.3d at 927. Therefore, the district court's judgment
is **AFFIRMED**.

All Citations

707 Fed.Appx. 817 (Mem)

Footnotes

- * Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.