

IN THE SUPREME COURT OF THE UNITED STATES

JOSE G. PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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

QUESTION PRESENTED

Whether the district court, in sentencing petitioner after revoking his supervised release, violated petitioner's Due Process Clause right to confrontation when it considered hearsay evidence with respect to one of several supervised release violations.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-8664

JOSE G. PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 707 Fed. Appx. 817.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2018. The petition for a writ of certiorari was filed on February 5, 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 Southern District of Texas, petitioner was convicted of possession with the intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Judgment 1. He was sentenced to 85 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. He completed his term of imprisonment but subsequently violated the conditions of his supervised release. 2/2/17 Sent. Tr. (Tr.) 3. The district court revoked his supervised release and required him to serve 40 months of imprisonment. Id. at 39-40. The court of appeals affirmed. Pet. App. 1.

1. In 2012, petitioner pleaded guilty to possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Judgment 1. The district court sentenced him to 85 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Among other conditions of supervised release, the district court ordered (as required by statute) that petitioner not commit another federal, state, or local crime, and that petitioner not illegally possess or use a controlled substance. Id. at 3; see 18 U.S.C. 3583(d) (2012).

In April 2016, petitioner was released from prison and began serving his supervised release. Gov't C.A. Br. 4. Shortly thereafter, he was arrested for public intoxication, a violation

of the conditions of his supervised release. Id. at 5. The district court modified petitioner's supervised release to include a special condition requiring participation in a drug and alcohol treatment program. Ibid.; see 18 U.S.C. 3583(e)(2) (allowing for modification of conditions of supervised release). Petitioner was later arrested for driving while intoxicated, another violation of his conditions of supervised release. Gov't C.A. Br. 5.

The probation officer then petitioned the district court to order a revocation hearing. Gov't C.A. Br. 5. The probation officer subsequently amended that petition to include additional alleged violations of supervised release based on (1) petitioner's arrest for aggravated assault and resisting arrest, (2) petitioner's failure to abide by the condition that he not use controlled substances, and (3) petitioner's failure to participate in drug and alcohol treatment. Id. at 6-7.

2. The district court held a hearing on whether to revoke petitioner's supervised release. Petitioner admitted all the alleged supervised-release violations except the allegation that he committed aggravated assault. Tr. 4-5. The government submitted the police report from the aggravated assault arrest, which was admitted without objection. Tr. 5. According to the report, a police officer responded to a dispatch report that a woman was being assaulted by a man with a pipe. See D. Ct. Doc. 117-1, at 3 (Feb. 1, 2017). Upon arrival, the officer observed a woman, later identified as petitioner's girlfriend, with bruises

and scratch marks. Id. at 3-4. The woman told the officer that she was three months pregnant and that petitioner had been assaulting her over the course of the past three days. Id. at 4. Petitioner resisted the officer's attempts to place him in handcuffs but was ultimately subdued when other officers arrived at the scene. Id. at 3-4.

The police officer who wrote the report testified at the revocation hearing and explained the events described in the report. Tr. 14-18. Another officer who was present at the scene testified that he had recorded the victim's account of the assault and that she had signed an affidavit describing her experience. Tr. 20-22, 27-28. The government sought to admit the victim's affidavit, but petitioner objected, claiming that admitting the affidavit would violate his "due process rights to confront and cross examine" the witness. Tr. 8. The government responded that "good cause" existed to admit the affidavit because it was unable to locate the witness, who lacked legal status in the United States, and, according to a neighbor, was afraid to testify against petitioner. Tr. 9-10.

The district court overruled petitioner's objection and admitted the affidavit. Tr. 28-30. Petitioner did not introduce any evidence or testimony. Tr. 30. In arguing for a lenient sentence, petitioner's counsel stated that petitioner "accept[ed] responsibility for what we believe is a simple assault" as well as "the rest of the allegations." Tr. 31.

The district court found that petitioner had violated the conditions of his supervised release. Tr. 30-31. Noting that "the real issue here * * * is the assault," the court acknowledged that petitioner denied having committed an aggravated assault, but that he was "willing to admit to even just a[n] assault." Tr. 38. The court further stated that "[i]t is never acceptable, under any circumstances, to engage in the kind of violence that is reflected here, * * * even if, by [petitioner's] own admission, it was just an assault." Tr. 39. The court concluded that "revocation is not simply warranted, but necessary." Ibid. The court accordingly revoked petitioner's supervised release and required him to serve 40 months of imprisonment to run concurrently with any sentence imposed on any pending state charges. Tr. 39-40. Petitioner did not object to the sentence.

3. The court of appeals affirmed the revocation and sentence in an unpublished per curiam opinion. Pet. App. 1-2. The court acknowledged that the "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." Id. at 1. The court determined, however, that even if that right had been violated in this case (a question it did not address), any such error would be harmless. The court explained that petitioner's supervised release "would have been revoked even without the new law violation of aggravated assault," because he admitted "illegally possessing and unlawfully using

controlled substances," a violation that triggers mandatory revocation of supervised release under 18 U.S.C. 3583(g)(1). Ibid.

The court of appeals additionally found it "unlikely" that the district court would have sentenced petitioner "to further treatment instead of imprisonment" for his controlled-substance violation given petitioner's "history of unsuccessful drug treatment." Pet. App. 1. The court of appeals also determined that "the district court's comments show that it would have revoked [petitioner's] supervised release and imposed a term of imprisonment even absent the hearsay evidence" based on petitioner's "admission to simple assault at the revocation hearing." Ibid. Finally, the court of appeals explained that "[t]o the extent that admission of the hearsay evidence affected the length of [petitioner's] sentence," the "right of confrontation does not apply to the length of any resulting prison sentence." Ibid. (citing United States v. Williams, 847 F.3d 251, 254-255 (5th Cir.), cert. denied, 138 S. Ct. 192 (2017)).

ARGUMENT

Petitioner contends (Pet. 8-20) that the district court violated his due process rights to confrontation by considering hearsay evidence in determining the length of his sentence for reimprisonment following his supervised-release violation. That contention lacks merit. The court of appeals correctly rejected petitioner's claim, because the due process right to confrontation does not extend to such determinations. The court's unpublished

decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court recognized a limited due process right to confrontation at parole revocation proceedings. The Court emphasized, however, that confrontation would not be required if the hearing officer found good cause for not allowing it, and the Court refused to equate the revocation proceeding with "a criminal prosecution" at which a defendant would enjoy more robust due process rights. Id. at 489. "[T]he process," the Court explained, "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Ibid. When supervised release replaced parole in the federal system, Federal Rule of Criminal Procedure 32.1(b)(2)(C) adopted the limited confrontation right recognized in Morrissey. See United States v. Taveras, 380 F.3d 532, 536 (1st Cir. 2004).

The confrontation right recognized in Morrissey is not at issue in this case, however, because petitioner no longer challenges the revocation of his supervised release. Instead, he claims in this Court that the district court violated his confrontation right by considering hearsay evidence in determining the length of the term of reimprisonment following that revocation. But this Court's decisions make clear that the Due Process Clause permits consideration of statements not subject to confrontation

for purposes of determining the length of a sentence. See Williams v. New York, 337 U.S. 241 (1949) (declining to recognize a confrontation right at sentencing under the Due Process Clause on the ground that it went beyond the traditional confrontation protection); see also, e.g., Dean v. United States, 137 S. Ct. 1170, 1175 (2017) (“Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence.”).

No reason exists to apply a different rule in the effectively identical context of determining the length of a term of reimprisonment following the revocation of supervised release. Accordingly, every court of appeals that has addressed the question has agreed that the limited right to confrontation under Morrissey applies only to the revocation determination and does not bar the admission of hearsay evidence for purposes of determining the length (if any) of a term of reimprisonment. See Pet. App. 1; United States v. Ruby, 706 F.3d 1221, 1226-1228 (10th Cir. 2013); see also United States v. Grier, 411 Fed. Appx. 614, 616 (4th Cir. 2011) (per curiam); United States v. Prescott, 360 Fed. Appx. 209, 211 (2d Cir.), cert. denied, 559 U.S. 1031 (2010); United States v. Pardee, 224 Fed. Appx. 650, 651 (9th Cir.), cert. denied, 552 U.S. 872 (2007).

2. Petitioner’s arguments to the contrary lack merit.

Petitioner errs in suggesting (Pet. 15-19) that Morrissey should be read to extend the same due process protection to both

the revocation of supervised-release and the determination of the appropriate length of a term of reimprisonment. In describing the "revocation decision," the Court explained that the "first step" in the process involves determining whether the parolee violated one of the parole conditions; if so, a "second question" arises about whether the parolee should "be recommitted to prison" or whether "other steps" would be more appropriate. Morrissey, 408 U.S. at 479-480. No question as to those issues exists in this case; as the court of appeals correctly recognized (Pet. App. 1), petitioner's own admissions required the court to "revoke the term of supervised release and require [him] to serve a term of imprisonment." 18 U.S.C. 3583(g).

Morrissey's discussion of the procedures necessary for parole revocation did not expressly address the determination of the length of any term of reimprisonment that would follow revocation. The Court instead recognized that even the decision whether to revoke parole following a violation was both "predictive and discretionary" and "involve[d] the application of expertise." Morrissey, 408 U.S. at 480. And it treated the "potential of substantial reimprisonment" as a consequence that a "returnee may face" upon revocation, rather than as part of the revocation itself. Ibid. Accordingly, there is no basis to assume that this Court "sought to carve out an exception to normal sentencing law in revocation proceedings." Ruby, 706 F.3d at 1228. As the Ninth Circuit has explained, "neither Morrissey nor the Federal Rules of

Criminal Procedure say anything about Williams [v. New York, supra] or the right to examine adverse witnesses at sentencing. A court is presented with quite a different set of circumstances when it has to decide whether someone is guilty and must go to prison than when it is deciding how long a convicted criminal must serve." United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir.), cert. denied, 549 U.S. 885 (2006).

Petitioner criticizes the court of appeals (Pet. 17) for relying on precedent that addressed a confrontation-related claim under the Sixth Amendment rather than the Due Process Clause. But he provides no basis for concluding that the latter would provide greater protection here. This Court in Williams rejected the defendant's claim that the Due Process Clause requires confrontation in the selection of an appropriate sentence. 337 U.S. at 245, 251. Petitioner identifies nothing in Morrissey or any other decision of this Court to suggest that the Due Process Clause imposes heightened requirements in determining the term of reimprisonment after the court has already decided to revoke a defendant's supervised release.

3. Petitioner errs in asserting a circuit conflict (Pet. 11-15) over whether the right to confrontation under the Due Process Clause applies at sentencing. None of the cases that petitioner cites conflicts with the decision below.

In United States v. Lloyd, 566 F.3d 341 (3d Cir. 2009), the issue before the court was "whether the out-of-court statements

supporting [the defendant's] aggravated domestic battery violation were properly admitted." Id. at 344. The court determined that the alleged violation was not proven because the hearsay documents that were the sole evidence of the aggravated battery were "clearly unreliable." Id. at 345-346. Although the defendant's revocation was also supported by non-hearsay evidence of an additional violation, the court of appeals remanded for resentencing so that the district court could recalculate the Guidelines. Ibid. The court did not address whether the defendant had a right to confrontation under Morrissey.

The other cases cited by petitioner are similarly inapposite. In United States v. Johnson, 710 F.3d 784 (8th Cir. 2013), the court determined that the district court erred by permitting the government to prove a supervised-release violation by reading a police report into the record. Id. at 789-790. In United States v. Jordan, 742 F.3d 276 (7th Cir. 2014), the court determined that the admission of a police report had violated Rule 32.1(b)(2)(C) and remanded for the district court to hold a new revocation hearing in which the government would be permitted to introduce additional evidence or explain its "good cause" for introducing the evidence without allowing confrontation. Id. at 281-282; see also United States v. Moslavac, 779 F.3d 661, 663-665 (7th Cir. 2015) (similar). Those cases did not address whether the confrontation right recognized in Morrissey extends to the determination of the length of a term of reimprisonment following

the revocation of supervised release, and therefore none conflicts with the decision below. Indeed, as noted above, the court of appeals' decision here is consistent with the approach taken by other circuits that have addressed the question. See, e.g., Ruby, 706 F.3d at 1226-1228.* No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

JULY 2018

* Petitioner contends (Pet. 14) that the Tenth Circuit's decision in United States v. Henry, 852 F.3d 1204 (2017), is inconsistent with its decision in Ruby. But Henry held only that an error in admitting a hearsay document without an appropriate balancing of the interests was not harmless because the record did not demonstrate that the court would have imposed the same sentence absent its finding of the hearsay-supported violation. Id. at 1208-1209. That decision does not conflict with Ruby or the decision below. And to the extent that any intracircuit disagreement exists in the Tenth Circuit, that court is best positioned to resolve any inconsistency. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).