No. 17-8995

IN THE SUPREME COURT OF THE UNITED STATES

JASON J. MONT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

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

QUESTION PRESENTED

Whether a period of supervised release for one offense is tolled under 18 U.S.C. 3624(e) during a period of pretrial confinement that upon conviction is credited toward a defendant's term of imprisonment for another offense.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-8995

JASON J. MONT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the Federal Reporter but is available at 723 Fed. Appx. 325.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2018. The petition for a writ of certiorari was filed on May 15, 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 Northern District of Ohio, petitioner was convicted of conspiring to possess with intent to distribute and to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846, and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to concurrent terms of 120 months of imprisonment on both counts, to be followed by concurrent terms of five years of supervised release on the drug count and three years of supervised release on the firearms count. Judgment 2-3. While on supervised release, petitioner was charged with a number of state crimes and ultimately convicted of several of those offenses. The district court revoked petitioner's supervised release and ordered a 42-month term of imprisonment, to be served consecutively to his state sentence. Pet. App. 5a. The court of appeals affirmed. Id. at 1a-12a.

1. In 2005, petitioner pleaded guilty to one count of participating in a drug trafficking conspiracy and one count of being a felon in possession of a firearm. He was sentenced to concurrent terms of 120 months of imprisonment on each count, to be followed by an aggregate five years of supervised release. Pet. App. 1a.

The district court later granted two sentence reductions under 18 U.S.C. 3582(c), and ultimately reduced petitioner's terms of imprisonment to 84 months. Gov't C.A. Br. 3-4.

2. Petitioner's five-year period of supervised release began on March 6, 2012, and was "slated to end on March 6, 2017." Pet. App. 2a. In January 2016, petitioner's probation officer filed a violation report with the district court, alleging that petitioner had violated the conditions of his supervised release by testing positive for controlled substances for which he lacked a prescription (Oxycodone and Oxymorphone) and by "using [an] 'unknown' liquid to try to pass two subsequent drug tests." Ibid. (citation omitted). The probation officer also noted that petitioner had been "'secretly indicted'" in Ohio state court on two counts of marijuana trafficking in March 2015, with a jury trial scheduled for March 2016. Ibid. The district court declined to issue a warrant "in light of the pending state-court case" and instead asked to 'be notified of the resolution of the state charges.'" Ibid. (citation omitted).

Petitioner's marijuana-trafficking trial was postponed, and in or about June 2016, before that state case was resolved, petitioner was arrested again on a new state indictment charging five counts of trafficking in cocaine. Pet. App. 3a; see id. at 3a n.3 (noting "minor confusion" in the record on whether arrest occurred on May 26 or June 1). Petitioner was "incarcerated in

the Mahoning County Jail" following that arrest, and "remained in state custody going forward." Id. at 3a (citation omitted). Meanwhile, petitioner's federal probation officer filed a supervision report alleging in light of the new state charges that petitioner had violated the terms of his supervised release by committing the new state offenses. Ibid.; see Gov't C.A. Br. 5.

In October 2016, petitioner entered into a plea agreement with state prosecutors in which he agreed to plead guilty to "some of his state court charges in exchange for a predetermined six-year sentence." Pet. App. 3a. He also "filed a written admission in federal court acknowledging that he had violated the terms of his supervised release and requesting a hearing on the matter." Ibid. The district court initially scheduled a supervised release hearing for November 2016. But petitioner "had not yet been officially sentenced for the new, state-court convictions," and "a flurry of continuances followed in both state and federal court." Ibid.

On March 21, 2017, petitioner was sentenced in state court to a total of six years of imprisonment. Pet. App. 3a-4a. The judge "credited the roughly ten months that [petitioner] had already been incarcerated pending a disposition as time served." Id. at 4a.

On March 30, 2017, petitioner's probation officer filed a report updating the district court on petitioner's state

convictions and sentences. Pet. App. 4a. The district court ordered issuance of a warrant on the same date. Ibid.

In advance of the supervised-release hearing, petitioner challenged whether the court had jurisdiction to adjudicate his violations of supervised release. Pet. App. 4a. Petitioner relied on the fact that his supervised-release had initially been scheduled to expire on March 6, 2017. See D. Ct. Doc. 107 at 2 (June 26, 2017); see also Pet. App. 4a.

The district court rejected petitioner's contention, concluding that it did have jurisdiction. 6/28/17 Tr. (Tr.) 7. It invoked 18 U.S.C. 3583(i), which provides that "[t]he power of the court to revoke a term of supervised release for a violation of a condition of supervised release * * * extends beyond the expiration of a 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." See Tr. 8-9. The court stated that it had "give[n] notice by way of a summons on November 1st of 2016 setting this for a supervised release violation hearing for November 9th of 2016." Tr. 7. And it stated that the delays in adjudicating the violation were necessary "because it was the actions of the defendant that caused the various extensions of time of having the supervised release violation hearing.'" Tr. 9.

The district court ordered a 42-month term of imprisonment, to be served consecutively to his state sentence. Tr. 17. The court explained that a term of that length was appropriate in light of petitioner's criminal history, which included 18 convictions, of which the "overwhelming majority [we]re for drugs and guns." Ibid.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-12a. The court observed that although petitioner's "supervised-release clock" was initially set to expire on March 6, 2017, "the clock's countdown was not inexorable." Id. at 6a. In particular, it wrote, the time "could have been extended" under 18 U.S.C. 3583(i), "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.'" Pet. App. 6a (citation and emphasis omitted). In addition, the court explained, "the clock could have been paused" under 18 U.S.C. 3624(e), which tolls a period of supervised release when the defendant "is imprisoned in connection with a conviction for a Federal, State, or local crime," when the imprisonment is for at least 30 days. Pet. App. 6a (citation and emphasis omitted).

The court of appeals observed that its prior decision in United States v. Goins, 516 F.3d 416, 422, 424 (6th Cir.), cert.

denied, 555 U.S. 847 (2008), established that the district court had jurisdiction to revoke petitioner's supervised release under the "second, clock-pausing provision." Pet. App. 7a. In Goins, the court of appeals determined

> that [1] when a defendant is held for thirty days or longer in pretrial detention, and [2] he is later convicted for the offense for which he was held, and [3] his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under § 3624.

Ibid. (quoting Goins, 516 F.3d at 417). Applying that standard here, the court found that petitioner's supervised release did not run during his ten months of pretrial detention on the state drug charges for which he was ultimately convicted. Id. at 8a. As a result, the court wrote, "there was still quite a bit of time left on the clock when the district court issued its warrant on March 30, 2017." Ibid.

The court of appeals noted the government had alternatively argued that even if the period of supervised release had not been tolled, the district court retained jurisdiction under Section 3583(i) because it had issued a summons before supervised release was initially scheduled to expire on March 6, 2017. Pet. App. 7a n.5; see Gov't C.A. Br. 12-14. The government maintained that because the district court issued a summons on November 1, 2016, "several months before the original March 2017 expiration date, the court was entitled to continue the supervised release

revocation proceedings pending resolution of [petitioner's] state court case." Gov't C.A. Br. 13. The court of appeals noted, however, the petitioner disputed whether the district court had actually filed a summons in November 2016. Pet. App. 7a n.5. It concluded that it need not resolve this issue, because Goins required affirmance "regardless." Id. at 8a n.5.

ARGUMENT

Petitioner renews his contention (Pet. 13-21) that a period of pretrial detention credited against a defendant's sentence is not "imprison[ment] in connection with a conviction," 18 U.S.C. 3624(e), that tolls the expiration of a term of supervised release for a separate federal offense. The court of appeals correctly rejected that contention, and its decision does not warrant further review in this case. Although some disagreement exists among courts of appeals concerning whether pretrial detention credited against a defendant's sentence tolls expiration of a term of supervised release, that disagreement does not warrant intervention at this time. Moreover, petitioner's case is an unsuitable vehicle for addressing the question presented because of the lack of clarity in the record concerning whether the district court did in fact issue a summons that would have triggered Section 3583(i). This Court has repeatedly denied review of the question presented, and the same result is warranted here. See Herrera-Montes v. United States, 568 U.S. 1012 (2012) (No. 12-

5264); Becker v. United States, 566 U.S. 941 (2012) (No. 11-8279); Ide v. United States, 563 U.S. 1035 (2011) (No. 10-9260); Johnson v. United States, 561 U.S. 1012 (2010) (No. 09-9702); Molina-Gazca v. United States, 558 U.S. 1150 (2010) (No. 09-6457); Goins v. United States, 555 U.S. 847 (2008) (No. 07-11060).

1. A district court's authority to revoke supervised release and return a defendant to prison "extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before [the term's] expiration," as long as, "before [the term's] expiration, a warrant or summons has been issued on the basis of an allegation" that the defendant has violated a condition of supervised release. 18 U.S.C. 3583(i). In addition, 18 U.S.C. 3624(e) provides 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 this case, the court of appeals concluded that petitioner's term of supervised release had not expired before the district court adjudicated his supervised-release violation, because that term had been tolled during the period of state pretrial detention that was ultimately credited to his state sentence. In reaching that conclusion, the court of appeals relied on its earlier decision in United States v. Goins, 516 F.3d 416, 422, 424 (6th

Cir.), cert. denied, 555 U.S. 847 (2008), which correctly determined that a period of pretrial detention on a new federal charge is a "period in which the person is imprisoned in connection with a conviction" for a crime when the defendant is ultimately convicted on that charge and the period of detention is credited toward his sentence, 18 U.S.C. 3624(e).

Pretrial detention constitutes imprisonment under the ordinary meaning of the word "imprisoned." See Webster's Third New International Dictionary 1137 (1993) (defining "imprison" as "to put in prison: confine in a jail" or "to limit, restrain, or confine as if by imprisoning"). That interpretation is reinforced by Congress's use of similar terms elsewhere in Title 18. See 18 U.S.C. 3626(g)(5) (defining "prison" as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law") (emphasis added); 18 U.S.C. 3041 (general arrest statute) ("[T]he offender may * * * be arrested and imprisoned or released * * * for trial.") (emphasis added). By contrast, interpreting the term "imprison[ment]" to encompass only post-conviction incarceration would render superfluous Section 3624(e)'s additional requirement that the imprisonment be "in connection with a conviction." See Goins, 516 F.3d at 421 (observing that if imprisonment meant only "confinement that is

the result of a penalty or sentence," the statutory phrase "in connection with a conviction" would be unnecessary).

Time spent incarcerated is imprisonment "in connection with a conviction" when the period of incarceration is credited to a defendant's sentence for the conviction at issue. Section 3624(e) places no temporal limitation on the "connection" between imprisonment and conviction. This Court has repeatedly held that the phrase "in connection with" has a broad meaning. See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006) (noting that the Court has "espoused a broad interpretation" of "in connection with" in Section 10(b) of the Securities Exchange Act, 1934, 15 U.S.C. 78j(b)); United States v. American Union Transp., Inc., 327 U.S. 437, 441-443 (1946) (describing the use of "in connection with" in Section 1 of the Shipping Act of 1916, ch. 451, 39 Stat. 728, as "broad and general"); see also United States v. Loney, 219 F.3d 281, 283-284 (3d Cir. 2000) (observing that dictionaries and usage experts give "expansive" scope to the phrase "in connection with" as "express[ing] some relationship or association, one that can be satisfied in a number of ways"); United States v. Thompson, 32 F.3d 1, 7 (1st Cir. 1994) ("[T]he phrase 'in connection with' should be interpreted broadly."). That reading is appropriate here: Section 3624(e) uses "in connection with" to make clear that the period of imprisonment must have some relationship to a

conviction, but nothing in the statute requires that the imprisonment come after the conviction.

Petitioner is mistaken insofar as he contends (Pet. 15-16) that pretrial detention credited to a defendant's sentence is not imprisonment in connection with a conviction for purposes of Section 3624(e) because the relevant language is "based in the present tense," Pet. 15. Congress likely chose the phrase "is imprisoned" to describe the imprisonment in order to match the present tense in the earlier phrase "does not run." 18 U.S.C. 3624(e) (supervised release "does not run" during any period in which the person "is imprisoned in connection with an offense"). And petitioner does not offer an alternative wording that would better capture Congress's evident intent that a defendant not pretermit his supervised release term based on his commission of another crime. Although the provision requires a "conviction" -- and thereby credits a defendant in circumstances where his commission of a new crime is not proven -- the provision's broad language reaching any imprisonment "in connection with" a conviction naturally encompasses the whole period of imprisonment for that proven crime. Congress did not limit the provision to imprisonment "following a conviction," and no such limitation should be inferred.

Petitioner principally argues (Pet. 20-21) that Section 3624(e) is inapposite because the provision is "a directive to the

Bureau of Prisons when calculating credit for imprisonment and release," rather than a provision concerning "jurisdiction of the court to revoke supervision." That argument lacks merit. Section 3624(e) explains when a term of supervised release runs. See United States v. Johnson, 529 U.S. 53, 57 (1999). It specifies when the term "commences" and then provides that the term "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." 18 U.S.C. 3624(e). Because courts undisputedly have authority to revoke terms of supervised release that have not yet ended, see 18 U.S.C. 3582(e) and (i), Section 3624(e)'s directives on when sentences begin and end bear on courts' authority to revoke supervised release, even though Section 3624(e) is not phrased in jurisdictional terms.

2. Some disagreement exists concerning tolling of supervised release under Section 3624(e), but the evolving case law and limited practical importance of the question presented counsel against this Court's intervention at this time.

a. Four circuits have held that a period of supervised release is tolled under Section 3624(e) during pretrial confinement for a new crime that is credited toward a defendant's sentence of imprisonment for the new crime. See United States v. Ide, 624 F.3d 666, 667-670 (4th Cir. 2010), cert. denied, 563 U.S.

1035 (2011); United States v. Johnson, 581 F.3d 1310, 1311-1313 (11th Cir. 2009), cert. denied, 561 U.S. 1012 (2010); United States v. Molina-Gazca, 571 F.3d 470, 474 (5th Cir. 2009), cert. denied, 558 U.S. 1150 (2010); Goins, 516 F.3d at 422, 424.

Two circuits have held to the contrary. The Ninth Circuit did so in the first decision to address the question presented, in which it concluded that periods of pretrial confinement cannot toll supervised release under Section 3624(e) based on an asserted distinction between "imprisonment" and "detention" and a concern that tolling would be unclear until a conviction was entered. United States v. Morales-Alejo, 193 F.3d 1102, 1105-1106 (1999). More recently, the D.C. Circuit concluded that Section 3624(e) "does not toll supervised-release terms during periods of pretrial detention," but "for different reasons than those articulated by the Ninth Circuit." United States v. Marsh, 829 F.3d 705, 709 (D.C. Cir. 2016). The court based its analysis on "the word 'is,'" reasoning that "[b]y phrasing the statute in the present tense, Congress has foreclosed the type of backward-looking tolling analysis that" other courts allow. Ibid.

b. The disagreement in the circuits does not currently warrant review. The Ninth Circuit's decision rests on an understanding of the term "imprisonment" that later decisions have convincingly refuted, see Ide, 624 F.3d at 668-670; Molina-Gazca, 571 F.3d at 473-474; Goins, 516 F.3d at 419-424, and on which the

Ninth Circuit's own decisions cast significant doubt. In Arreguin-Moreno v. Mukasey, 511 F.3d 1229 (2008), the court interpreted 8 U.S.C. 1101(f)(7), an immigration law that provides that an alien cannot satisfy the "good moral character" requirement for cancellation of removal if he was "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more." The Ninth Circuit concluded that "pre-trial detention that is later credited as time served in the sentence imposed as a result of conviction counts as confinement as a result of conviction within the meaning of § 1101(f)(7)." Arreguin-Moreno, 511 F.3d at 1232. The court held that "after judgment, any credited pre-conviction detention effectively becomes time served on the imposed term of imprisonment," and "pre-conviction custody thereby becomes the term of imprisonment imposed by the judgment." Ibid. (quoting Spina v. Department of Homeland Sec., 470 F.3d 116, 127-128 (2d Cir. 2006)). Arreguin-Moreno did not cite Morales-Alejo, and the Ninth Circuit made no effort to explain why pretrial detention that is credited toward a defendant's sentence upon his conviction "becomes the term of imprisonment" and is imposed "as a result of conviction" for purposes of 8 U.S.C. 1101(f)(7), but is not "imprison[ment] in connection with a conviction" for purposes of 18 U.S.C. 3624(e). The obvious tension between those holdings may

lead the Ninth Circuit to reconsider the question presented en banc in an appropriate case.

The D.C. Circuit's 2016 ruling adopts an analysis that other courts have not yet had occasion to address. As the D.C. Circuit observed, its decision rested on "different reasons than those articulated by the Ninth Circuit" and "on a word that our sister circuits and the parties have appeared to ignore." Marsh, 829 F.3d at 709. No other court of appeals appears to have yet considered that court's novel rationale. While the unpublished order in this case post-dates Marsh, the court of appeals correctly noted that it was bound by its precedent in Goins and could depart only if it sat as an en banc court. Pet. App. 11a. Petitioner did not then seek en banc review. Further percolation in the courts of appeals would be beneficial.

c. Moreover, the question presented has limited practical importance for adjudications like this. Section 3583(i) permits courts to extend their authority to adjudicate violations for any reasonably necessary period -- including a period necessitated by a defendant's pretrial detention on another charge -- by issuing a warrant or summons. In light of that provision, the differing approaches to tolling under Section 3624(e) are unlikely to affect whether courts maintain the authority to adjudicate violations of supervised release following pretrial incarceration in typical cases. See Pet. 17 (suggesting that the court of appeals' approach

is unwarranted because "a warrant or summons filed at the time of his [pretrial] detention * * * would have obviated the need for" the court's interpretation of Section 3624(e)); Marsh, 829 F.3d at 710 (stating that "tolling generally would be unnecessary for a district court to preserve its jurisdiction to revoke a defendant's supervised-release term in circumstances like those in this case" because of Section 3583(i)); Goins, 516 F.3d at 424 (noting in a case where a defendant had violated his conditions of supervised release by absconding from supervision that a warrant would typically be issued when the violation occurred). The limited practical importance of the question presented in this context provides additional reason that this Court's intervention is not warranted here.

3. In any event, this case is not a suitable vehicle for consideration of the question presented because of the lack of clarity concerning whether the district court issued a summons that triggered Section 3583(i). The district court determined that it had jurisdiction to adjudicate the supervised release violation in this case because it had issued a summons to the defendant before supervised release expired. See Tr. 7 (stating that the court gave petitioner "notice by way of a summons on November 1st of 2016 setting this for a supervised release violation hearing for November 9th of 2016"). Moreover, petitioner's counsel filed an opposition to the government's

motion to continue the November 9 hearing, thereby indicating that petitioner obtained actual notice of the hearing date. See D. Ct. Doc. 95, at 1-2 (Nov. 2, 2016). While the court of appeals found it unnecessary to address the application of Section 3583(i) in light of its settled precedent concerning Section 3624(e), Pet. App. 7a n.5, the unresolved factual record and the possible alternative ground for affirmance make this case a poor vehicle for this Court's review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

SEPTEMBER 2018