No. 17-8995

In The
Supreme Court of the United States

JASON J. MONT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The essence of the government's argument relies upon a construct which has no foundation. Pretrial detention is not imprisonment in connection with a conviction. Neither does pretrial detention somehow "morph" into imprisonment merely by virtue of post-sentencing credit for time spent in pretrial detention. Time spent in detention prior to the imposition of a sentence after conviction is a credit to a term of imprisonment, not imprisonment itself. To do so would violate an individual's constitutional rights, for there can be no imprisonment without a sentence imposed. Such credit is no more "imprisonment" than is good time credit awarded for good behavior while in confinement.

Failure to toll the running of a supervised release term set to expire during the time an individual is in official detention is not fatal to the district courts' authority to administer and govern its sentences. Congress solved this jurisdictional dilemma by adding 18 U.S.C. §3583(i) to the supervised release statute. 18 U.S.C. §3583(i) is a tolling provision whereby supervised release is suspended, so long as the district court issues a summons or warrant prior to its expiration. With a warrant in place, the district court controls the timing of the running of supervised release, obviating the need to twist the statutory language of 18 U.S.C. §3624(e) in order to save an expiring release term.

There are no comparable tolling statutes which employ the backward looking analysis implemented by

the Sixth Circuit and those circuits which have adopted its reasoning. Pretrial detention, or official detention, is not the same as being imprisoned after sentencing for a crime. The United States Code in its chapters concerning post-sentence administration and imprisonment are concerned with matters involving the administration of a sentence of imprisonment. They necessarily and specifically do not concern pretrial detention, which occurs prior to a finding beyond a reasonable doubt that the individual has committed a crime. This is important, since it leaves individual defendants possessed of their constitutional due process and trial rights. To permit pretrial detention to "morph" into imprisonment as the Government suggests would be to endorse a system where an individual serves imprisonment before being convicted of his crimes.

A. The Government's Overly-Broad Reading of "In Connection With" Ignores Settled Rules of Statutory Construction.

1. *United States v. Roy Lee Johnson*, which Thwarts the Government's Attempts at Confusing a Straightforward Statute.

The government's strained interpretation of "in connection with" fails to acknowledge the fact that the connecting phrase is preceded by the word "is." This single word provides the statute its "temporal moorings." A good example of the "strict temporal mooring" rule of statutory interpretation may be found in *United States v. Roy Lee Johnson*, 529 U.S. 53 (2000). There

this Court highlighted the requirement to read the statute as written. The statute under review will be "moored to its temporal language," dictating contemporaneity:

> The first sentence of §3624(e) supports our construction. [. . .] The phrase "on the day the person is released," in the second sentence of §3624(e), suggests a strict temporal interpretation, not some fictitious or constructive earlier time. The statute does not say "on the day the person is released or on the earlier day when he should have been released." Indeed, the third sentence admonishes that "supervised release does not run during any period in which the person ***is*** imprisoned.

Roy Lee Johnson, 529 U.S. at 57 (emphasis added). Here that "temporal language" is the word "is." Title 18 U.S.C. §3624(e) says "[a] term of supervised release does not run during any period in which the person *is imprisoned* . . . " not "on the earlier day when the person was held in pretrial detention and given credit after the conviction became final." *Johnson* directly counsels against the government's attempt to justify the Sixth Circuit's backward-looking analysis to find that supervised release was tolled at some earlier time. *Johnson* instead requires us to remain moored to the statute's clear temporal requirements.

The government attempts to further broaden the scope of the statute by calling §3624(e) "capacious," citing cases which treat the phrase "in connection with" broadly. But this attempt at broadening the

interpretation of §3624(e) overlooks the statute's temporal moorings and misapplies settled rules of statutory construction, which require this court to give meaning to all words in a statutory provision. See, *Bailey v. United States*, 516 U.S. 137, 145 (1995).

2. The Language in §3624(e) is Plain and Narrowly Circumscribed.

In *Brown v. Gardner*, 513 U.S. 115 (1994), this Court provided: "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Garner*, 513 U.S. at 118, (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). In §3624(e), the use of the phrase "in connection with" has little meaning without the phrases "person is imprisoned" and "a conviction" for a crime. Similarly, the purportedly broad reading of "in connection with" used in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) and *United States v. American Union Transp., Inc.*, 327 U.S. 437 (1946), [Resp.19], involve contextual interpretations, the former in terms of security and exchange sales, the latter in regard to shipping. In their context, those cases confirm that a broad reading of the term effectuated the congressional purpose. But far from being dispositive, the cases cited by the government only serve to reinforce Petitioner's position regarding using context and language to determine a statute's meaning and scope.

The same may be said for the lower court decisions cited by the government as supporting an expansive reading of "in connection with." Contextual interpretation again lays threadbare the government's analysis. While arguing that it supports a broader reading of the words "in connection with" it actually supports a view that the words "in connection with" must be viewed in light of the words which precede and follow it. For example, in *United States v. Loney*, 219 F.3d 281 (3d Cir.2000), the question involved a Guidelines enhancement for possessing a firearm in connection with another felony offense under U.S.S.G. §2K2.1(b)(5).[1] The Third Circuit found through contextual interpretation that the guideline required a broad reading to give meaning to the language of the subsection. The guideline's purpose of punishing use of firearms in felony offenses would be thwarted with a narrow interpretation of the connection between the firearm and the other felony offense. *Loney*, 219 F.3d at 285-286. Similarly, *United States v. Thompson*, 32 F.3d 1 (1st Cir.1994), the First Circuit found that the term "connection" is defined as having a "causal or logical relation or sequence;" a "reasoned link" between the two connecting terms "firearm" and "another offense." *Id*. at 5-6. Viewed in context of the surrounding language, this is correct. This only means that the phrase "in connection with" must be viewed in light of the words which surround it, not as a call for "capacious" reading

[1] The Guideline section has been amended since the *Loney* decision. The applicable subsection is now numbered at U.S.S.G. §2K2.1(b)(6)(B).

of the statute. Nothing in 18 U.S.C. §3624 merits such a broad interpretation.

3. By Analogy, Imprisoned as Used in Chapter 229 Supports Mont's Argument

Whether "in connection with" supposes a narrow or broad interpretation hinges upon the words which are precedent and antecedent thereto, as statutory construction rules instruct that language and meaning matter in determining context. The first term, "imprisoned," does not stand alone and thus is not susceptible to meanings unrelated to a conviction for a criminal offense. [Resp.17-18] However, in each instance in §3624, imprisonment has but one meaning: confinement for a specified term after a conviction and sentence. Indeed, Title 18, United States Code, Chapter 229 is entitled "Postsentence Administration:" which naturally would relate to the period after which a sentence for a crime is imposed. Additionally, 18 U.S.C. §3624 is located in Subchapter C, titled "Imprisonment."

In fact, Subchapter C of Chapter 229 includes statutory instructions for when a prisoner who, prior to his release from federal custody, has been charged or indicted for a State felony. It permits transfer of the defendant to an "official detention facility" within the State prior to release from federal custody. 18 U.S.C. §3623. It is therefore evident that, when Congress passed the Sentencing Reform Act Congress was keenly aware of how to identify imprisonment from

official detention. If pretrial, or official detention was intended to be synonymous with a prison term imposed after a conviction, Congress could have included the appropriate language in §3624. In addition, there would be no need for a statute such as 18 U.S.C. §3585, which was enacted to give authority to the Attorney General to calculate a sentence or a method for granting credit for time spent in pretrial, or official detention. For these reasons, official, pretrial detention is not a term of imprisonment, before, during, or after an adjudication of guilt.

4. Re-Imagining the Statute as the Government Contemplates is Inappropriate and Unnecessary

The government's interpretation of 18 U.S.C. §3624(e) amounts to a finding that the phrase "in connection with a conviction" is superfluous. Petitioner states that this interpretation allows for the expansive application of the term "imprisoned" as espoused by the government, the Sixth Circuit and those Circuits which have followed the reasoning in *United States v. Goins*, 516 F.3d 416 (6th Cir.2008).

Petitioner submits that such re-imagining of the statute changes the meaning of the entire provision, a result that is unsupported and unnecessary. That the government would state Congress intended a broad definition of "in connection with" because the "inten[t] [was] not to require a temporal or a causal connection between a conviction and a period of imprisonment,"

[Resp.21] shows a failure to follow the plain language of the statute. It ignores canons of interpretation as acknowledged by the decision of this Court in *Roy Lee Johnson,* which requires the statute be moored to its temporal language.

The Court addressed the same phrase "in connection with" in *Maracich v. Spears*, 570 U.S. 48 (2013), a case relied upon by the government. [Resp.19, 21] There, the Court looked to see if a lawyer who solicited individuals whose identification he obtained from the South Carolina DMV violated the Federal Driver's Privacy Protection Act ("DPPA") of 1994. The attorney used the information based upon one of the exceptions in the DPPA, which permitted use of personal information "for use in connection with any civil, criminal, administrative or arbitral proceeding." *Id*. at 52-55. In defining the parameters of "in connection with" as used in the DPPA, the Court looked to the canon of "noscitur a sociis," an interpretive rule that words and people are known by their companions:

> The phrase "in connection with" is essentially "indeterminat[e]" because connections, like relations, "'stop nowhere.'" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). So the phrase "in connection with" provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions. See id., at 656, 115 S.Ct. 1671 ("We simply must go beyond the unhelpful text and the frustrating difficulty of

> defining ['connection with'], and look instead to the objectives of the ERISA statute"); see also *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc*., 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) ("But applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.").

Maracich, 570 U.S. at 59-60. Just like this Court's admonition in *United States v. Roy Lee Johnson*, 529 U.S. 53 (2000) to remain moored to the temporal language of the statute, *Maracich* likewise dictates that the words "in connection with" must be interpreted by the words surrounding it.

By its plain reading it is clear Congress intended the phrase "in connection with" to be conditioned by the words which surround it. The phrases surrounding "in connection with" include "is imprisoned" and "a conviction." These phrases in 18 U.S.C. §3624(e) must be read in direct relation to one another. The only way a person may be imprisoned for a Federal, state, or local crime is after a conviction at sentencing. A person who *is detained* is not imprisoned, for there has been no guilt or punishment after guilt is established.

Indeed, in *Barber v. Thomas*, 560 U.S. 474 (2010) this Court addressed a similar phrase "term of imprisonment," when addressing application of good conduct credits required under 18 U.S.C. §3624(b), and making clear that the phrase almost certainly refers to the

sentence imposed, not to the time actually served." *Barber*, 560 U.S. at 483. This makes clear that, by definition, pretrial detention cannot be the functional equivalent of imprisonment.

The *Barber* Court discussed use of the phrase "term of imprisonment" and the two different meanings used in 18 U.S.C. §3624. Either meaning discussed in *Barber* supports Petitioner's interpretation of §3624(e):

> The phrase "term of imprisonment" is just such a phrase. It can refer to the sentence that the judge imposes, see, e.g., § 3624(a) ("A prisoner shall be released" at the end of "the prisoner's term of imprisonment, less any time credited" for good behavior), but it also can refer to the time that the prisoner actually serves. Thus, § 3624(d) of the statute before us requires the BOP to "furnish [a] prisoner with . . . suitable clothing[,] . . . money, . . . and . . . transportation" "[u]pon the release of [the] prisoner on the expiration of the *prisoner's term of imprisonment*." (Emphasis added.) The statute here means to ensure that the prisoner is provided with these necessities at the time of his actual release from prison (sometime during Year 9 in our example), not at the end of the term that the judge imposed (which would be over a year later). Since the statute uses the same phrase "term of imprisonment" in two different ways, the presumption cannot help petitioners here. And, for the reasons we have given, see Part II, supra, context here indicates that the particular

> instance of the phrase "term of imprisonment" at issue refers to prison time actually served rather than the sentence imposed by the judge.

Barber, 560 U.S. at 484-485.

B. United States Code's use of Word "Imprisoned" Informs its Meaning

1. Review of Title 18, United States Code – Imprisoned

There are over 700 instances in Title 18 where the word "imprisoned" is used specifically, as opposed to the word "imprisonment." While the government only referenced one instance in 18 U.S.C. §3041, the other 700-plus instances were part of Congress's definition of the sentence to imposed for a specific statutory offense. Thus under 18 U.S.C. §1344, Bank fraud, the statute proscribed the penalties which attach and states that the person convicted "shall be fined not more than $1,000,000 or *imprisoned* not more than 30 years." 18 U.S.C. §1344 (emphasis added). A common variant on a penalty provisions in Title 18 provide for definite terms of imprisonment as opposed statutory maxima.

Although penalties constitute the bulk of the "imprisoned" references, there are references to "imprisoned" in Title 18 that are important to illuminate the critical flaw in the government's reasoning. In 18 U.S.C. §4002, Congress uses "imprisoned" when referencing federal prisoners in working while in state

custody: "Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are *imprisoned*." (emphasis added). In §4106A, a parole remnant that remains relevant states regarding jurisdiction for appeal: "A determination by the United States Parole Commission under this subsection may be appealed to the United States court of appeals for the circuit in which the offender *is imprisoned* at the time of the determination of such Commission." 18 U.S.C. §4106A(b)(2)(A). And in 18 U.S.C. §4245, Hospitalization of an imprisoned person suffering from mental disease or defect, the statute provides: "If a person serving a sentence of imprisonment objects . . . to being transferred to a suitable facility for care or treatment, an attorney for the Government, at the request of the director of the facility in which the person is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing. . . ."

Use of "imprisoned" in these statutes is in direct support of the reading of 18 U.S.C. §3624(e) by Mont. Further perusal through Title 18 provides additional support, albeit through use of the terms relevant to detention.

The government referenced 18 U.S.C. §3041, as an example where "imprison" was used for pretrial custody. However, the second paragraph of §3041 was amended as a direct result of the passage of the Bail Reform Act and its redefining of pretrial custody as

official detention.[2] In the following statute which discusses authority to hold a person for whom a warrant exists, 18 U.S.C. §3042, Extraterritorial jurisdiction, Congress explains that a person who is a fugitive from justice who either fled prior to trial or after conviction, may be "arrested and detained or conditionally released pursuant to section 3142," pending removal.

C. No Tolling of Time in Official Detention

The purpose of holding an individual in official detention pending trial is to assure the presence of the individual in case of a risk of flight, and to provide for public safety when there is a finding that release of the individual may cause danger to the public. Conversely, the purposes of imprisonment are commonly compartmentalized into four categories: retribution, incapacitation, deterrence and rehabilitation. Petitioner states that the goals of imprisonment cannot be met through pretrial detention, and therefore even after sentencing, time spent in official detention prior to the imposition of the sentence can never equal imprisonment.

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[2] SEC. 204. Chapter 203 of title 18, United States Code, is amended as follows:

(a) The last sentence of section 3041 is amended by striking out "determining to hold the prisoner for trial" and inserting in lieu thereof "determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial." P.L. 98-473 (H.J. Res. 648), Oct. 12, 1984, 98 Stat. 1837.

1. Credits Toward Service of a Sentence Do Not Equal Imprisonment

Credit for time spent in detention prior to sentencing is regularly awarded after sentencing to those individuals whose freedom was limited in order to insure their presence in court and to provide for public safety. This is true both in the state and in Federal courts, where the presiding judge imposes a sentence of imprisonment and provides whether the defendant will receive custody credits. In Petitioner's state of conviction, Ohio judges are mandated to provide for custody credits at sentencing, and under Ohio Rev. Code §2967.191, the Department of Rehabilitation and Correction reduces the prison term for any time spent in confinement arising out of the offense.[3]

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[3] §2967.191 Credit for confinement awaiting trial and commitment

> The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2)(f)(i) of section 2929.19 of the Revised Code, and confinement in a juvenile facility. . . .

Petitioner submits that the Bureau of Prisons has been granted similar authority to grant custody credits, both for pretrial detention through arrival at the designated facility for service of the federal sentence. Importantly, the statute which gives the Attorney General, acting through the Bureau of Prisons, authority to grant credit for prior custody, 18 U.S.C. §3585(b), also is instructive as to when a term of imprisonment begins:

> (a) **Commencement** of sentence. – A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

18 U.S.C. §3585(a). Therefore, being imprisoned in connection with a conviction, in the context of federal law, would categorically exclude any period of pretrial detention and detention during the period between an adjudication of guilt and sentencing. In addition to signaling the beginning of a term of imprisonment, 18 U.S.C. §3585 also provides for the granting of credit for prior custody for time spent in official detention prior to the commencement of the sentence, and permits credits for official detention for the offense related to the sentence, and also for other charges where the person was detained after the commission of the offense. See, 18 U.S.C. §3585(b).

The giving of credit toward a sentence of imprisonment as the Attorney General is instructed to do in

18 U.S.C. §3585 is not the only instance where credit against a term of imprisonment is provided. Credits toward service of sentence for satisfactory behavior, better known as "good conduct" credits, have been a part of 18 U.S.C §3624(b) since its inception in the 1984 Sentencing Reform Act. That section permits the Bureau of Prisons to periodically calculate good conduct credits of up to 54 days at the end of each year of imprisonment served. These credits are not "imprisonment," but are awarded much the same way as credits for official detention in §3585(b).

D. Equity Argument and Purposes of Supervised Release

1. Detention does not relinquish duties and responsibilities under supervised release

The essence of the argument presented by the government regarding the purposes of supervised release being unattainable when a person is in official, or pretrial detention, is that the purposes of re-acclimation into society after an extended period of imprisonment, employment assistance, substance abuse counseling and testing, are not available to the detained supervised releasee. Contrary to this notion, a probation officer may continue to supervise a releasee while being held in pretrial detention: more importantly, the supervised releasee must also abide by the rules of the local jail, as any misconduct will serve as an additional violation of the terms and conditions of supervised release.

In *Burns v. United States*, 287 U.S. 216 (1932), the Court had the opportunity to consider whether a probationer who was in the local jail on a different case from that which he was on probation, was amenable to supervision. *Id*. at 219-222. The *Burns* Court determined that a probationer remains under his probation officer's supervision, notwithstanding being held in detention on another matter:

> But, even in jail, he was subject to the conditions of the probation. By its terms, he was to refrain from violation of law and 'in all respects conduct himself as a law-abiding citizen.' As, at the same time that the sentence in question was suspended and probation was granted, he was committed to jail upon a distinct sentence, there was also a condition necessarily implied that he should not be guilty of conduct inconsistent with obedience to that sentence. Abuse of the liberty granted him to leave the jail for a particular purpose, and absenting himself in the circumstances described in his testimony – apart from the question of violation of law (see Act of May 14, 1930, c. 274, s 9, 46 Stat. 325, 327, U.S.C., tit. 18, s 753h (18 USCA s 753h)) – was clearly a breach of that condition, and the court was entitled to take note of it.

Burns, 287 U.S. at 223. Even under supervised release, a person is required to follow the rules of whatever society they are in: that includes the rules and regulations of the local jails and detention facilities. See, 18 U.S.C. §3583(g), which requires mandatory revocation

of supervised release for possession of a controlled substance or refusal to submit to drug testing, and the imposition of a term of imprisonment. Included in the standard conditions under the current day supervised release statute is the requirement to inform the probation officer if one has had an encounter with law enforcement, or an arrest, within a specified period of time, usually 72 hours. This standard condition requires reporting which necessarily requires reporting while detained. Thus, contrary to the government's position, there is regular, and expected compliance with standard and mandatory conditions of supervised release, notwithstanding the fact that the releasee is in jail.

2. No unfair benefit from being jailed while on supervised release

The government endorses its interpretation of §3624(e), making official detention synonymous with imprisonment in connection with a conviction, by arguing that tolling is necessary so that the detained supervised releasee does not gain any "benefit" from his detention, or any advantage over a similarly sentenced person who is not detained during the pendency of the supervised release term. [Resp.27-29] The government's concerns for equity are readily remedied without resorting to transforming a straightforward statute into one which effectively re-writes the statute and transforms detention before sentencing into imprisonment for a conviction which occurred after the official detention.

3. Remedy for alleged inequity in supervised release statute – §3583(i)

The alleged inequity of a supervised releasee benefitting from being detained versus having the release term run during official detention is readily remedied: the district court may issue a warrant or summons for the individual to appear, based upon the clear violations of the terms and conditions of supervised release. See, 18 U.S.C. §3583(i). The issuance of the warrant will "stop the clock" from ticking inexorably forward toward expiration of a term of supervised release, and will allow the district court to control and manage its supervised release judgment order. Indeed, §3583(i) was added to the supervised release statute for this precise reason: it permits a district court to control its own judgment order, instead of relying on factors outside of its control in state and local courts.

By using §3583(i) as intended, the government's identified inequities become non-existent. That section permits delayed revocation of supervised release, allowing a district court to "hold serve" until the local courts have completed their charges. The district court exercises its authority, and is no longer reliant upon a local court which may, or may not grant official detention credit at the time of sentencing: indeed, there may be an extended detention, and the individual may be acquitted or the charges dropped.[4] By using

[4] In a Study completed by the Bureau of Justice Statistics, 22% of individuals charged with state felony charges in the United States who were held in pretrial detention were released either by acquittal or dropped charges. The average amount of

18 U.S.C. §3583(i), as Congress intended, no "backward-looking" application of 18 U.S.C. §3624(e) need be contemplated.

Use of the statutory authority granted under 18 U.S.C. §3583(i) also solves the government's perceived disparity in sentences. The argument, that a supervised releasee who is held in detention receives a "benefit" because he is detained and has less of an opportunity to violate the conditions of supervised release, thus unfair to the other, non-detained supervised releasee, is novel. Defendants are individuals, not interchangeable widgets in a machine: thus each person will experience their own manner of service of a sentence imposed, even if those sentences are exactly the same in lengths of imprisonment and supervised release. There are no guarantees that those two individuals will share the same experiences, serve their sentences under the same custody level, receive good conduct credits at the same or equal rates, or serve their supervised release judgment identically. This fictitious "disparity" is no reason to find that §3624(e)'s use of the phrase, "is imprisoned in connection with a conviction," includes pretrial, official detention.

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time spent in detention prior to release was 45 days. See, Thomas H. Cohen and Brian A. Reaves, "Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004;" *Special Report* (NCJ 214994), November 2007, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, available at: http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf.

E. Backward-Looking Tolling Inapplicable Regardless of When an Adjudication of Guilt Occurs

1. No Analogous Tolling Statute

In its attempt to find an example of a tolling statute which applies tolling to events which have already occurred, the government cites a statute located in Chapter 213, the Limitations chapter of Title 18, which provides the method for the United States to use when it requires suspension of the statute of limitations while waiting to obtain evidence from a foreign country, 18 U.S.C. §3292. The government alleges that the tolling under this statute is backward looking, because the district court who receives the application from the government, has 30 days to rule on the request to suspend the running of the statute of limitations. See, 18 U.S.C. §3292(a)(2). [Resp.33]

The analysis espoused by the government is not analogous to the backward looking exercise displayed in Petitioner's case, and is in fact not a backward application of tolling of the limitations period. The application under §3292 is made prior to the expiration of the statute of limitations for the crime being presented before the grand jury. The district court then has a limited, 30-day period within which to rule on the requested suspension. These time frames are wholly inapposite to the backward analysis employed in Petitioner's case, as not only did the Sixth Circuit look back to a detention to toll the running of the release term, the looking back also changed the nature of the detention from being held to insure presence and safety, to

being held as punishment for a crime for which neither guilt nor penalty had been established.

2. 18 U.S.C. §3583(i) Intended for Precisely these Instances

A better analogy to the time frame included in the limitations statute cited by the government would be a comparison to 18 U.S.C. §3583(i), where a district court is provided a violation report by the United States probation officer indicating that a supervised release violation has occurred, and provides the status of the defendant under supervision. Armed with that violation report, like the application referenced in §3292(a)(1), the district court issues a warrant, likely within a reasonable time similar to the 30-day limit in §3292(a)(2), thus suspending the running of the supervised release term, just as the statute of limitation would be suspended while awaiting the foreign evidence sought by the government. In this respect, the government's reference to the limitations statute is applicable to this case, and the failure of the district court to exercise its power to suspend, or toll the release term under 18 U.S.C. §3583(i).

The government's citation to *United States v. Trainor*, 376 F.3d 1325 (11th Cir.2004) misinterprets that case in a significant respect. Where the government states that the tolling order was refused after an official request, [Resp.34], the decision in *Trainor* states that the tolling request was granted by the district court: however, when the defendant challenged the

order suspending the statute of limitations based upon the insufficient evidentiary support provided by the government in the initial application, the district court hearing the criminal case agreed and dismissed the charges that were time barred. *Trainor*, 376 F.3d at 1328-1329. Therefore, *Trainor* provides no support for a backward tolling analysis.

F. Petitioner's Supervised Release Term Expired Prior to Any Preservation or Suspension by District Court

Petitioner's supervised release expired on March 6, 2017. Petitioner was sentenced for the State law offenses for which he was held in detention on March 21, 2017. No warrant or summons was issued by the district court in his case until March 30, 2017. Petitioner submits that the record of the district court indicates that no warrant or summons was filed at any point during Petitioner's pretrial detention, either before the adjudication of guilt or before the expiration of the supervised release term. These facts, provable by the record in this case, indicate that there was no tolling or suspension of supervised release under 18 U.S.C. §3583(i), or under 18 U.S.C. §3624(e).

1. Definition of "Conviction" in Conjunction with "Imprisoned" – Context

The government has made the alternative argument that after Petitioner entered a guilty plea in state court, the time spent in detention became

imprisonment in connection with a conviction, as the term "conviction" means an adjudication of guilt. [Resp.39-41] Petitioner submits that whether a conviction occurs at the time guilt is established is not dispositive to application of §3624(e), as the statute's tense dictates that a person "is imprisoned" in connection with a conviction, and there is no imprisonment until an individual is sentenced. If this period of detention was synonymous with imprisonment, credit for time served in detention under 18 U.S.C. §3585 would amount to double counting of sentence credits, good conduct credits under §3624(b) would be affected, and the Guidelines would have to take the period of post plea detention into account when calculating a guideline range, etc. The government's timing of conviction argument ignores the necessity of the service of imprisonment and the imposition of a term of imprisonment as punishment for the offense of conviction, all of which, as has been discussed herein and in Petitioner's Merit Brief, is not synonymous with pretrial detention.

2. Instanced in Titles 18 and 28 where "Imprisoned" Used – and Language Relating to Detention

Use of the time held in detention between adjudication of guilt and sentencing as promoted by the government also causes conflict with other provisions of Title 18 and in Title 28. Title 18, United States Code §3731 dictates when the United States may bring an appeal as against a defendant, so as to not do assault to a defendant's right not to be twice placed in jeopardy

of his freedom through a second prosecution. Which is why an acquittal is not appealable, on its own, by the government. However, the government is permitted to appeal a decision granting the release of a person charged with, or convicted of an offense, or denying a motion for revocation of a decision or order granting release. If a conviction signaled a final conviction and the subsequent detention amounted to being "imprisoned in connection with a conviction," the government would not be able to appeal a ruling regarding detention, or lack thereof, by a defendant. See also 18 U.S.C. §3145(c), which clarified that either party may have a limited appeal to a decision under the Bail Reform Act.

Title 28 has additional provisions which a defendant in official detention after a plea or verdict would be unable to avail themselves of, should the government's argument rule the day. A person must be "in custody under a sentence of a court established by an Act of Congress" under 28 U.S.C. §2255(a). The custody requirement is also applicable to state law habeas petitioners under 28 U.S.C. §2254(a). For these very important reasons, a conviction, without a term of imprisonment imposed, is not "imprisoned in connection with a conviction" for a crime.

CONCLUSION

For the foregoing reasons and for the reasons in Petitioner's Merit Brief, the Sixth Circuit Court of Appeals opinion should be reversed.

Respectfully submitted,

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