

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESSE ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

David E. Mullin
COUNSEL OF RECORD FOR PETITIONER

Mullin & Lavery, LC
1636 42nd Street NE
Cedar Rapids, IA 52402
Phone: (319) 395-9191
Fax: (319) 395-9192
E-Mail: dmullin@mullinlavery.com

QUESTIONS PRESENTED FOR REVIEW

- I. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO CONTINUE A REVOCATION HEARING AND INSTEAD REVOKED HIS SUPERVISED RELEASE AND SENTENCED HIM TO PRISON BASED PRINCIPALLY ON AN ALLEGED BUT LATER DISMISSED NEW STATE CRIMINAL LAW VIOLATION?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
CITATION TO OPINION BELOW	1
JURISDICTIONAL STATEMENT.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	11
APPENDIX “A”	17
APPENDIX “B”	18

TABLE OF AUTHORITIES

Cases

<u>Garrity v. New Jersey</u> , 385 U.S. 493 (1967).....	13
<u>Jianole v. United States</u> , 58 F. 115 (8th Cir. 1932).....	12
<u>Lefkowitz v. Cunningham</u> , 431 U.S. 801 (1977).....	13
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305 (2009).....	15
<u>Taylor v. U.S. Parole Comm’n</u> , 734 F.2d 1152 (6th Cir. 1984).....	12, 13
<u>United States v. Doswell</u> , 670 F.3d 526 (4th Cir. 2012).....	15
<u>United States v. Jones</u> , 299 F.3d 103 (2nd Cir. 2002).....	13
<u>United States v. Morales-Isabarras</u> , 745 F.3d 398 (9th Cir. 2014).....	14

Constitutional Provisions

U.S. Const. amend. V.....	12, 13, 14
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CITATION TO OPINION BELOW

A copy of the Opinion of the Eighth Circuit Court of Appeals, dated December 27, 2017, is attached as Appendix “A.” The case is reported at United States v. Alvarez, 878 F.3d 640 (8th Cir. 2017).

JURISDICTIONAL STATEMENT

The date of the Opinion sought to be reviewed is December 27, 2017. The date of Order denying the Petition for Rehearing is March 1, 2018, and is attached as Appendix “B.”

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

U.S. Const. amend. V

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor 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; nor shall private property be taken for public use, without just compensation. [Emphasis added]*

18 U.S.C. § 3553(a)

(a)Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

§7B1.1. Classification of Violations (Policy Statement)

(a) *There are three grades of probation and supervised release violations:*

(1) *Grade A Violations -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;*

(2) *Grade B Violations -- conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;*

(3) *Grade C Violations -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.*

(b) *Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.*

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

(a) (1) *Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.*

(2) *Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.*

(b) *In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).*

(c) *In the case of a Grade B or C violation --*

(1) *Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and*

(2) *Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.*

(3) *In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.*

(d) *Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.*

(e) *Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.*

(f) *Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.*

(g) (1) *If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1-1.3 shall apply to the imposition of a term of supervised release.*

(2) *If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).*

STATEMENT OF THE CASE

A. Course of Proceedings

On October 7, 2016, Jesse Alvarez's probation officer filed a Petition to Revoke his supervised release. At a revocation hearing on October 26, 2016, the district court revoked Alvarez's supervised release and sentenced him to 24 months in prison, followed by up to 60 days in a residential reentry center, and one additional year of supervised release. The Eighth Circuit Court of Appeals affirmed on December 27, 2017, and denied Alvarez's rehearing petition on March 1, 2018.

B. Statement of Facts

Jesse Alvarez was sentenced on April 15, 2010, for the crime of Felon in Possession of a Firearm. At that time, his sentencing guideline range was 51 to 63 months. Alvarez was ordered to serve a prison sentence at the top of the guideline range of 63 months, followed by 3 years of supervised release. On June 20, 2014, Alvarez began his term of supervised release.

On August 18, 2014, and again on October 25, 2014, the urine specimens submitted by Alvarez tested "invalid due to being diluted." The U.S. Probation Officer counseled Alvarez and no formal action was taken. On

March 17 and 18, 2015, and on May 2, 2015, Alvarez failed to report for drug testing. Again, the probation officer counseled Alvarez but took no formal action.

On September 5, 2015, the U.S. Probation Office for the Southern District of Iowa began courtesy supervision of Alvarez, as he had moved to Muscatine, Iowa. Over the next year, Alvarez had no further violations.

On October 7, 2016, Alvarez's probation officer filed a Petition to Revoke Supervision. The Petition alleged two violations. The first violation was for the 2014 and 2015 diluted and missed UAs. The second involved an alleged new law violation. The Petition alleged that on October 5, 2016, Alvarez left a voice message with his probation officer stating that he would be having contact with police because he intended to retrieve his vehicle from his ex-girlfriend's residence in Muscatine, Iowa. Later that day, Alvarez left a second voice message stating that he had been arrested and booked into the Muscatine County jail. Alvarez had been charged in Muscatine County with Domestic Abuse Assault/Impeding Airflow, a class D felony.

With respect to Violation #2, the Petition alleged:

The Muscatine Police Department report reflects that, on October 5, 2016, police officers were dispatched to the residence of [ex-girlfriend] in reference to a physical domestic complaint. When police arrived to the residence, they made contact with [ex-girlfriend's daughter]. [Ex-girlfriend's daughter] advised police that, when she arrived home, she observed her mother laying on the floor with the defendant on top of her. [The daughter] stated that her mother appeared dazed and that she had been unconscious. When [daughter]

yelled at the defendant to get off her mother, the defendant left the residence. [Ex-girlfriend] reported that, when she refused to leave the residence with the defendant, the defendant grabbed her and pulled her toward the door. The defendant then grabbed her by the throat and choked her. [Ex-girlfriend] stated that she briefly lost consciousness. Officers observed that [ex-girlfriend] had marks on her neck. While officers were responding to the residence, the defendant contacted police and advised that he would be waiting for them at a nearby intersection. Officers made contact with and arrested the defendant. The Complaint filed in Muscatine County, Iowa, Case No. FECR055727, reflects that the defendant was charged with Domestic Abuse with Strangulation. On October 6, 2016, defendant posted bond and was released from custody. ...

(Names redacted).

The Court scheduled a revocation hearing for October 26, 2016. On October 21, 2016, in accordance with a local Administrative Order, Alvarez filed his Notice Re Contested Allegations. With respect to Violation #1 (substance abuse testing), Alvarez admitted the allegations but pointed out that the most recent incident occurred over 17 months earlier. With respect to Violation #2 (new law violation), Alvarez stated:

Defendant stands on his NOT GUILTY plea entered on the new violation and would request that this revocation matter be postponed until the underlying case has been resolved.

During the October 26, 2016 revocation hearing, Alvarez admitted to Violation #1, the 2014 and 2015 substance abuse testing violations. Upon Alvarez's denial of Violation #2 (new law violation), the government called as its witness Muscatine City police officer Andrew Fry. Officer Fry responded to the

domestic call at Alvarez's ex-girlfriend's residence. While wearing a body microphone, he spoke with the ex-girlfriend and her daughter. The government offered as Exhibit 2 a CD containing a recording of the statements made to Officer Fry by these individuals. Alvarez objected because the two individuals on the recording were expected to testify as government witnesses, and thus the recordings were not the best evidence. Also, Alvarez argued that the government was attempting to bolster the credibility of witnesses who had not yet testified. The district court overruled the objections, stating "the Rules of Evidence don't apply in a revocation proceeding." Exhibit 2 then was played in open court. Officer Fry later identified several photographs (Exhibit 3) depicting marks on the ex-girlfriend's neck. Officer Fry testified that Alvarez denied putting his hands on his ex-girlfriend.

On cross-examination, Office Fry testified that Alvarez was sober and that Alvarez had not violated the no-contact order subsequently issued in the state case.

The government called no further witnesses, and Alvarez called no witnesses, upon the parties' stipulation that: i) if the ex-girlfriend and her daughter, whom the government said were present in the courthouse, testified in open court, they would testify "substantially in accordance with ... the recordings" previously

offered as Exhibit 2; and ii) on September 22, 2016, U.S. Probation had approved Alvarez's request to move out of the residence he had shared with his ex-girlfriend.

During argument, the judge asked whether Alvarez was questioning the court's "jurisdiction to try a new law violation under a preponderance of the evidence standard to determine whether or not he's violated the conditions of his supervision." Alvarez through counsel replied that jurisdiction was not disputed, but rather the court's exercise of discretion to go forward in a revocation hearing concerning a criminal matter that was pending before the State court. Specifically, Alvarez objected:

to proceeding when -- with the defense here. He has rights, procedural and substantive, under the Fifth and Sixth Amendment to the US Constitution. None of this has been presented to a jury. The standard of proof on a revocation hearing is just a lot lower than beyond reasonable doubt. He is in an impossible position of having to defend the case down in Muscatine, and it limits his ability to put on a defense here on a revocation hearing for fear that that will impinge on his rights to a jury. For instance, if he broadcasts his defense here at a revocation hearing, certainly the State of Iowa could get wind of that and use that to their advantage in his criminal case. So he has decided to stand on his right to remain silent, and for those reasons, we object to the proceeding today. This is not a case where it's a theoretical violation or something. This is an actual pending State court case. I checked again this morning. There's a trial information on file. There is a court date in November; I believe it's a pretrial conference. I don't know when the trial's been set. It is not crazy, Judge, in my personal experience in State courts in Iowa, I limit that to Eastern Iowa, typically courts wait on a revocation issue until there's been an underlying determination on the new charge. And it is not unreasonable to request that a similar procedure be applied here as well.

The court denied Alvarez's request to defer action on the new violation pending resolution of the State charges. The government urged the court to revoke Alvarez's supervised release and sentence him to two years of imprisonment to be followed by one year of supervised release, based in part on the alleged grade A violation. Alvarez offered as Exhibit A a letter from his employer attesting to his full time, skilled employment with a electrical contractor. Again pointing out the problem with proceeding with a revocation based on an alleged grade A violation when there is a pending state court case, Alvarez through counsel asked (prophetically, it later turned out):

The question that comes up in terms of Your Honor's finding that this is a grade A violation, what if he's found and convicted of less than a felony? That would be a grade B, possibly a grade C violation, and, correspondingly, there would be reduced guidelines and statutory maximums that he would be subjected to.

(RTR 31).

The court revoked Alvarez's supervision and sentenced him to 24 months in prison. Alvarez appealed on November 7, 2016.

On November 10, 2017, the Muscatine County district court dismissed the underlying state charge against Alvarez (Case No. FECR055727) that was the subject of Violation #2 of the revocation Petition. On November 14, 2016, the same court lifted the state no-contact order filed against Alvarez.

(March 9, 2017 Iowa Courts Online web search for Muscatine County Case No. FECR055727, www.iowacourtsonline.com).

The Eighth Circuit affirmed, finding no abuse of discretion or Fifth Amendment violation in proceeding with a revocation hearing based on the mere allegation of new state criminal law violation even where, as here, the new violation is later dismissed.

C. Basis for Federal Jurisdiction

Federal jurisdiction was premised upon 18 U.S.C. § 3231, as Petitioner was charged with an offense against the laws of the United States.

REASONS FOR GRANTING THE PETITION

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO CONTINUE A REVOCATION HEARING AND INSTEAD REVOKED HIS SUPERVISED RELEASE AND SENTENCED HIM TO PRISON BASED PRINCIPALLY ON AN ALLEGED BUT LATER DISMISSED NEW STATE CRIMINAL LAW VIOLATION?

The district court abused its discretion in refusing to postpone or hold in abeyance the revocation hearing until the underlying state court charge was resolved.

Had the court waited just a few weeks before holding the revocation hearing, the state by then may have dismissed its case against Alvarez and the issue

could then have been considered by the district court in the revocation setting. Alvarez then would have avoided being placed between a rock and hard place in deciding whether to testify or to preview his theory of defense at the revocation hearing. Also, the court would have had a better indication, if it had found a new law violation, as to whether it was a grade A, B or C violation. As it stands, the district court revoked Alvarez's supervised release for a law "violation" that the state of Iowa ultimately determined was not worth pursuing.

Alvarez acknowledges that the federal district court may find a defendant has violated his supervised release even if the defendant is later acquitted of all charges arising from the same conduct; all charges are dismissed prior to trial; or the conviction is subsequently overturned. Taylor v. U.S. Parole Comm'n, 734 F.2d 1152, 1155 (6th Cir. 1984). Likewise, conducting the revocation hearing before the underlying charges have been fully adjudicated might not be a violation of the Fifth Amendment. Jianole v. United States, 58 F. 115 (8th Cir. 1932).

Alvarez argues that the federal court should delay revocation proceedings until after the disposition of state charges that form the basis of the petition for revocation. To require the defendant to choose between remaining silent in federal court (and not fully defending against the revocation allegation) or testifying (and thereby jeopardizing his defense in state court) constitutes a

violation of his Fifth Amendment protection against compelled self-incrimination. Even in Jianole, the Eighth Circuit has not yet fully addressed this question.

The same argument was considered in United States v. Jones, 299 F.3d 103 (2nd Cir. 2002). In its examination, the court cited Garrity v. New Jersey, 385 U.S. 493 (1967), in which the convictions of police officers were set aside because the officers were faced with the loss of their jobs if they invoked their right to remain silent in misconduct investigations. The Supreme Court found that this choice amounted to unconstitutional coercion: “[T]o lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.” Id. at 497; see also Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (“[T]he government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.”).

In Jones, the defendant argued that he was denied constitutional protection against self-incrimination by having to testify at his revocation hearing before the adjudication of the state charges against him. The Second Circuit ultimately rejected his claim, finding that “Jones was not compelled to testify.” Id. 299 F.3d at 110 (emphasis in original). Jones could have chosen to attack the government’s case by offering favorable evidence or testimony of others, or he

could have decided not to present any evidence at all, relying upon cross-examination to undermine the credibility of the government's witnesses.

Jones nevertheless decided to testify himself, presumably having determined that such testimony was the most effective means to discredit the government's case. To be sure, this determination carried with it the risk that his testimony would prejudice his state court defense. But it remained defendant's choice to testify or remain silent. The Fifth Amendment does not immunize a defendant from all the potentially negative consequences of making such a choice.

Id., 299 F.3d at 111.

Alvarez argues that this "choice" nevertheless constitutes an untenable option in situations where the defendant must testify, such as is the case where he asserts a defense of justification (self-defense or defense of another) to charges of assault. When defending against a revocation petition before the state assault charge has been resolved, the defendant faces a disadvantage for asserting his Fifth Amendment right. The most logical way to avoid placing the defendant in this position is to postpone the federal revocation hearing, if the defendant requests it.

Cf. United States v. Morales-Isabarras, 745 F.3d 398, 401 (9th Cir. 2014)

(reviewing legality of delay between revocation petition and hearing; "[W]hen the outcome of an ongoing criminal proceeding is directly related to the issue of whether the defendant violated a condition of supervised release, it is 'reasonably necessary' to delay proceedings on the supervised release violation pending resolution of the underlying criminal charge.")

Alvarez suggests that there may be other reasons a district court should take the state court proceedings into account. For example, in United States v. Doswell, 670 F.3d 526 (4th Cir. 2012), Mr. Doswell’s underlying state charge of attempted distribution and possession of heroin was *nolle prossed* because the drug lab chemist had failed to appear in state court on two occasions to verify the reliability of his report. The appellate court held that the district court should not have revoked Doswell’s supervised release based only on the arresting officer’s probable cause affidavit and the drug analysis report. The government did not provide testimony from the chemist at the revocation hearing, and did offered no explanation for its failure to do so. Given the Supreme Court’s recognition of the potential unreliability of drug analysis reports,¹ the district court abused its discretion when it “admitted the drug report without any reliability finding or any attempt to engage in the balancing test required by Rule 32.1.” Id., 670 F.3d at 531.

Finally, Alvarez remarks that the sentencing court went to great lengths² to emphasize that it had the jurisdiction to proceed with the revocation, a principle not denied by Alvarez. In fact, Alvarez made explicit that he did “not

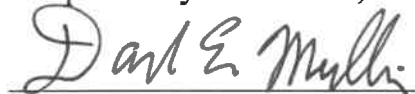
¹ See Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

² The district court stated: “*When someone is under my supervision and they commit a new crime or are alleged to commit a new crime, the Court has the power, which I have exercised here, to take jurisdiction, to hear the evidence. This is what I have done for 14 years as a federal judge, and I’ve never had this argument made ever before, and there’s no law to support that there’s anything wrong with it.*”

contest [the] court's jurisdiction." He urged instead that there is nothing in the case law "that would prevent the court from holding this issue in abeyance pending the conviction." In short, Alvarez does not question the court's jurisdiction, but rather its judgment in proceeding with the hearing when the issue of guilt or innocence was pending before the state court.

Alvarez respectfully requests that this honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "David E. Mullin", is written over a horizontal line.

David E. Mullin

COUNSEL OF RECORD FOR PETITIONER

Mullin & Lavery, LC
1636 42nd Street NE
Cedar Rapids, IA 52402
Phone: (319) 395-9191
Fax: (319) 395-9192
E-Mail: dmullin@mullinlavery.com

APPENDIX “A”

Opinion of the United States Court of Appeals for the Eighth Circuit filed
December 27, 2017.

United States Court of Appeals
For the Eighth Circuit

No. 16-4154

United States of America

Plaintiff - Appellee

v.

Jesse Alvarez

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: December 11, 2017

Filed: December 27, 2017

[Published]

Before WOLLMAN, LOKEN, and MELLOY, Circuit Judges.

PER CURIAM.

After serving a sixty-three month felon-in-possession sentence, Jesse Alvarez began a three-year term of supervised release. On October 7, 2016, his probation officer petitioned the district court to revoke supervised release. The petition alleged multiple violations of drug-testing conditions and that Iowa prosecutors had charged him with a new crime, domestic abuse assault by strangulation, when he attempted

APPENDIX "A"

to strangle his ex-girlfriend. See Iowa Code § 708.2A(5). Alvarez admitted the drug-testing violations but disputed the new law violation, citing his not-guilty plea to the pending state court charges. The district court¹ denied his request to delay the revocation proceeding until the Iowa criminal case concluded.

At the revocation hearing, the government introduced through Muscatine Police Officer Andrew Fry recordings of Fry's interviews of Alvarez's ex-girlfriend and her daughter immediately after the encounter. The ex-girlfriend related that she refused to accompany Alvarez to his new apartment, he tried to drag her to his car, and he choked her, causing her to pass out. Officer Fry observed fresh scratches around the ex-girlfriend's neck, consistent with photos of her injuries and her statement that Alvarez choked her. After Fry testified, Alvarez stipulated that his ex-girlfriend and her daughter, who were present in the courtroom, would testify "substantially in accordance with" the recordings. He also stipulated that he lived with his ex-girlfriend until September 22, 2016, establishing the "domestic" element of the Iowa domestic abuse charge. Alvarez offered no evidence.

After the close of evidence, the district court denied Alvarez's renewed request to postpone the revocation decision and found, based on a preponderance of the evidence, that Alvarez committed the Grade A supervised release violation of felony domestic abuse assault by strangulation in violation of Iowa law. The court revoked supervised release and sentenced Alvarez to 24 months in prison, the maximum revocation term for his underlying felon-in-possession conviction. See 18 U.S.C. § 3583(e)(3). Three days after Alvarez filed this appeal, the state court dismissed the domestic-abuse-by-strangulation charge. On appeal, Alvarez argues the district court abused its discretion by denying his request to postpone the proceeding and revoking his supervised release based on a finding that he violated the Iowa domestic abuse

¹The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

law when state criminal charges were still pending. He cites no authority supporting this contention. We conclude it is without merit and affirm.

We review a district court's decision to revoke supervised release for abuse of discretion. "A district court may revoke supervised release and impose an authorized prison sentence if it finds by a preponderance of the evidence that the defendant violated a condition of supervised release." United States v. Montgomery, 532 F.3d 811, 814 (8th Cir. 2008). Alvarez concedes, as he must, that the district court had jurisdiction to proceed with the revocation and to find that he violated a condition of his supervised release by committing a new violation of state law before he was convicted of charges related to that violation. See United States v. Poellnitz, 372 F.3d 562, 566 (3d Cir. 2004) ("When the condition is that the defendant not commit a crime, there is no requirement of conviction or even indictment" before concluding defendant violated that condition); accord Jianole v. United States, 58 F.2d 115, 118 (8th Cir. 1932) ("[T]he power to finally revoke in advance of and independent of the result of a trial of the criminal charge will of itself add greatly to the effectiveness of probation.")

Alvarez argues the district court abused its discretion by conducting the revocation proceeding before the state law domestic abuse charges were resolved because he was forced to make an "untenable" choice -- either testify in the revocation proceeding, prejudicing his defense in subsequent state court proceedings, or remain silent, hampering his defense to the supervised release revocation allegation. We reject his suggestion that this choice interfered with his Fifth Amendment right against compelled self-incrimination. Just as the Second Circuit concluded in United States v. Jones, 299 F.3d 103, 110 (2d Cir. 2002), Alvarez was not "compelled" to testify at the revocation hearing. The district court noted that he could have defended himself, for example, by cross-examining his ex-girlfriend, putting the government to its proof, and making legal objections. Alvarez attempts to distinguish Jones by arguing that his testimony was necessary in order to disprove

the assault charge by establishing that he acted in self-defense or defense-of-another. But even if choosing to testify would give state prosecutors an opportunity to “preview” his defense to the state court charges, “[t]he Fifth Amendment does not immunize a defendant from all the potentially negative consequences of” choosing to testify or remain silent. Id. at 111.

The district court acted well within its discretion in proceeding with Alvarez’s revocation in an efficient, legally permissible manner, and the evidence at the revocation hearing overwhelmingly supported the district court’s finding that Alvarez committed a Grade A supervised release violation. The revocation judgment of the district court is affirmed.

APPENDIX “B”

Order of the United States Court of Appeals for the Eighth Circuit denying
Petition for Rehearing in the case of United States of America v. Jesse
Alvarez, filed March 1, 2018.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-4154

United States of America

Appellee

v.

Jesse Alvarez

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:09-cr-00078-LRR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

March 01, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX "B"