Recent Developments in the Imposition, Tolling, and Revocation of Supervision

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THIS ARTICLE IS intended to aid probation officers in assessing situations related to the imposition, tolling, and revocation of supervised release. In it, I discuss relevant case law, statutory changes, and recent developments, updating the information on these topics provided in two earlier articles that were published in *Federal Probation* in 1997 and 2005.[1]

Imposition

One notable development around imposition of supervision relates to the First Step Act (FSA) of 2018.[2] Specifically, Congress amended 18 U.S.C. § 3582(c)(1)(A) to allow inmates to seek compassionate release directly from the sentencing court (instead of limiting the process so it could only be initiated on motion of the Director of the Bureau of Prisons). The compassionate release statute already included a provision allowing for a "special term" of supervision, which is a period of probation or supervised release imposed at the time compassionate release is granted, not to exceed the unserved portion of the original term of imprisonment. But the FSA and the inmate-driven process it introduced resulted in a drastic increase in individuals granted compassionate release, bringing renewed attention to special terms of supervision imposed under this section.[3] Based on concerns raised by its Committee on Criminal Law, the Judicial Conference recently agreed to seek legislation clarifying how a special term of supervision interacts with any term of supervised release imposed at the original sentencing.[4] At this time, clarifying legislation has not been enacted. In addition to noting the logistical uncertainties of imposing multiple terms of supervision, the Conference expressed concern that special terms of supervision, particularly if combined with an original supervised release term, may result in individuals being supervised for unnecessarily long periods, contrary to established social science principles.[5] As these issues have not yet been resolved by legislation or case law, the Administrative Office of the U.S. Courts (AO) issued guidance on special terms of supervision.[6]

Tolling

A term of supervision is tolled, meaning the term temporarily pauses, in certain circumstances prescribed by statute or by case law. Although there have not been any statutory changes regarding tolling since the previous *Federal Probation* articles, the case law in this area has evolved.[7]

Pretrial Detention

By statute, a term of probation or supervised release tolls when the person under supervision is "imprisoned in connection with a conviction for a Federal, State, or local crime" for 30 days or longer.[8] In 2019,

[1] Caroline M. Goodwin, *Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, 61 Fed. Probation 76 (1997); Joe Gergits, *Looking at the Law: Update to Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, 69 Fed. Probation 35 (2005).

[2] Pub. L. 115-391.

[3] *See* U.S. Sentencing Comm'n, *The First Step Act of 2018: One Year of Implementation* (Aug. 2020), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf; and U.S. Sentencing Comm'n, *Compassionate Release Data Report, Fiscal Years 2020 to 2021* (May 2022), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220509-Compassionate-Release.pdf.

[4] Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* (Sept. 15, 2020).

[5] *Id.*

[6] Administrative Office of the U.S. Courts, *"Special Term" of Supervision Under Compassionate Release* (Oct. 7, 2020), https://jnet.ao.dcn/news-events/coronavirus-covid-19-guidance/coronavirus-covid-19-guidance-probation-and-pretrial-services-faqs#Special%20Term%20of%20Supervision%20Under% Compassionate%20Release.

[7] The following sections rely primarily on Ninth Circuit cases, as it has addressed tolling and related topics more frequently in recent years than the other Courts of Appeal.

[8] 18 U.S.C. § 3564(b) (probation); 18 U.S.C. § 3624(e) (supervised release).

the Supreme Court in *Mont v. United States* resolved a circuit split relating to tolling and pretrial detention. Previously, the Ninth Circuit and the D.C. Circuit had held that an individual's pretrial detention in another case is not "imprison[ment] in connection with a conviction" for purposes of tolling supervision under 18 U.S.C. § 3624(e), while the Fourth, Fifth, Sixth, and Eleventh Circuits held that pretrial detention in another case is "imprisonment in connection with a conviction" for purposes of tolling supervision.[9] In *Mont*, the Supreme Court held that pretrial detention is "imprison[ment] in connection with a conviction" if (1) the defendant is convicted for the offense, and (2) the time in pretrial detention is credited toward the sentence imposed.[10] As a result of *Mont,* a court may not be able to determine whether supervision is tolled until the new case is resolved.

Fugitives

There is presently a circuit split regarding the fugitive tolling doctrine, which tolls supervision when an individual absconds. As noted in the 1997 *Federal Probation* article, the "Sentencing Reform Act did not codify the common law that tolled supervision for absconders."[11] However, the Second, Third, Fourth, Fifth, and Ninth Circuits have adopted the fugitive tolling doctrine in post-Sentencing Reform Act cases,[12] while the First Circuit rejected it on the grounds that imprisonment was the only grounds for tolling Congress saw fit to include in § 3624(e).[13]

Although the Ninth Circuit currently follows the fugitive tolling doctrine, it has hinted that the doctrine may be incompatible with Supreme Court case law prohibiting court-created equitable exceptions to jurisdictional requirements.[14] In *United States v. Pocklington*, the court was considering the warrant requirement for delayed revocation hearings, rather than fugitive tolling, but the government pointed to fugitive tolling as an example of an appropriate "extra-textual" exception. The Ninth Circuit rejected the government's argument, noting that the defendants in the fugitive tolling doctrine cases cited had "conceded the general validity of the fugitive tolling doctrine" without addressing courts' lack of authority "to create equitable exceptions to jurisdictional requirements."[15] The Ninth Circuit in *Pocklington* declined to resolve any tensions around the fugitive tolling doctrine, finding it inapposite to the case before it, but also declined to apply any sort of equitable exception to the jurisdictional limits of 18 U.S.C. § 3565(c).

The Ninth Circuit has addressed what it means for the defendant to abscond, for purposes of the fugitive tolling doctrine. First, it held that a defendant absconds supervision by returning to the United States following deportation without advising the probation office of their return.[16] It later held that failing to notify the probation office of a change in address, along with other noncompliant behavior including failure to pay restitution and failing to notify the officer of new criminal charges, was sufficient to find that the defendant had absconded, even though an early termination motion was filed with the court bearing the supervisee's purported new address.[17]

The Ninth Circuit also addressed the termination of fugitive tolling, holding that it ends "when federal authorities are capable of resuming supervision."[18] The court also held that a defendant's multiple arrests in another state while absconding did not impute knowledge of the defendant's whereabouts to federal authorities.[19] This case implies that earlier actual knowledge of an absconder's whereabouts could impact the amount of time tolled, and underscores the importance of securing a warrant or summons as soon as possible to ensure that the court retains the power to revoke.

Civil Commitment

There is also a circuit split regarding the tolling of supervision during civil commitment proceedings for "sexually dangerous persons" under the Adam Walsh Act.[20] These proceedings typically take place at or near the end of imprisonment for a criminal conviction. The Fourth, Seventh, and Eighth Circuits held that supervision tolls between the date a criminal sentence of imprisonment concludes and the date the person is physically released from Bureau of Prisons (BOP) custody following Adam Walsh Act proceedings.[21] The Ninth Circuit held that supervision does not toll, and begins to run on what would have been the BOP release date had the Adam Walsh Act proceedings not been instituted.[22] It should be noted that the Ninth Circuit relied heavily on pretrial detention case law that was subsequently overruled by *Mont*, and the court does not appear to have addressed this issue since *Mont* was decided. Each of these cases involved situations where the defendant ultimately was not committed, either because the government withdrew the petition or because the court found the defendant did not meet the criteria for commitment under the Adam Walsh Act.

The Ninth Circuit's position on tolling may have an effect on Adam Walsh Act cases beyond the issue of tolling itself. In *United States v. Antone*, the Fourth Circuit noted that the district court considered the likelihood that the defendant would release from BOP without supervision as an additional reason supporting civil commitment.[23] The defendant's underlying criminal case was from the District of Arizona, and the district court hearing his civil commitment case in the Eastern District of North Carolina (Antone was incarcerated at FMC Butner) "predicted that without a tolling mechanism, [he] would not be subject to any term of supervised

[9] *United States v. Morales-Alejo*, 193 F.3d 1102 (9th Cir. 1999); *United States v. Marsh*, 829 F.3d 705 (D.C. Cir. 2016), *United States v. Ide*, 624 F.3d 666 (4th Cir. 2010); *United States v. Molina-Gazca*, 571 F.3d 470 (5th Cir. 2009); *United States v. Goins*, 516 F.3d 416 (6th Cir. 2008); and *United States v. Johnson*, 581 F.3d 1310 (11th Cir. 2009).

[10] *Mont v. United States*, 139 S. Ct. 1826 (2019).

[11] Goodwin, *supra* note 1.

[12] *United States v. Barinas*, 865 F.3d 99 (2d Cir. 2017); *United States v. Island*, 916 F.3d 249 (3d Cir. 2019); *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011); *United States v. Cartagena-Lopez*, 979 F.3d 356 (5th Cir. 2020); *United States v. Crane*, 979 F.2d 687 (9th Cir. 1992) (prior to addition of 18 U.S.C. § 3583(i)); *United States v. Murguia-Oliveros*, 421 F.3d 951 (9th Cir. 2005) (reaffirming the fugitive tolling doctrine after addition of § 3583(i)).

[13] *United States v. Hernandez-Ferrer*, 599 F.3d 63 (1st Cir. 2010).

[14] *United States v. Pocklington*, 792 F.3d 1036, 1040 (9th Cir. 2015), citing *Bowles v. Russell*, 551 U.S. 205 (2007).

[15] *Id.* at 1040, n.1, referencing *Ignacio Juarez* and *Watson*, *infra* notes 13 and 16.

[16] *United States v. Ignacio Juarez*, 601 F.3d 885 (9th Cir. 2010).

[17] *United States v. Grant*, 727 F.3d 928 (9th Cir. 2013).

[18] *Ignacio Juarez*, 601 F.3d 885 at 890.

[19] *United States v. Watson*, 633 F.3d 929 (9th Cir. 2011).

[20] Civil commitment proceedings under the Adam Walsh Act are governed by 18 U.S.C. § 4248.

[21] *United States Neuhauser*, 745 F.3d 125 (4th Cir. 2014); *United States v. Maranda*, 761 F.3d 689 (7th Cir. 2014); *United States v. Mosby*, 719 F.3d 925 (8th Cir. 2013).

[22] *United States v. Turner*, 689 F.3d 1117 (9th Cir. 2012).

[23] *United States v. Antone*, 742 F.3d 151 (4th Cir. 2014).

release under Ninth Circuit law."[24] On appeal, the defendant argued that the district court erred in considering the tolling issue, "because it failed to consider the possibility that he would be judicially estopped from challenging his expressly-agreed-to supervised release…"[25] Because it reversed the district court's grant of the civil commitment petition on sufficiency of the evidence grounds, it did not reach the issues of whether it was proper for the court to consider tolling or whether the defendant would be estopped from later challenging the term of supervision. However, this case demonstrates the need for resolving the circuit split, whether through a Supreme Court decision or clarifying legislation.

ICE Custody and Deportation

The Fifth Circuit held that supervision does not toll during administrative detention in Immigration and Customs Enforcement (ICE) custody or when an ICE detainer is in place during otherwise non-tolling confinement (such as pretrial detention without a conviction).[26] In *Garcia-Rodriguez*, the defendant was released from BOP to ICE custody and was later deported. Almost three years later, he was arrested in Texas on violation of a state or municipal law. The Fifth Circuit concluded that the defendant's supervised release started running the moment he was transferred from BOP to ICE custody, and issued a limited remand for fact-finding on the specific dates involved.[27] *Juarez-Velasquez* arose from a much more complicated factual background involving two prior federal convictions and time in custody on later-dismissed state charges. It is relevant here that an ICE detainer was filed approximately two and a half years into the three-year term of supervised release on the first federal case, while the defendant was in state pretrial detention on charges that were later dismissed. The Fifth Circuit concluded that the ICE detainer was an "administrative hold that did not amount to imprisonment in connection with a conviction" and reversed the revocation of supervised release in the first federal case.[28]

The Third and Sixth Circuits have held that supervision is not tolled due to deportation.[29] The Second, Eighth, and Eleventh Circuits previously reached this same conclusion.[30]

Other Tolling Issues

Courts have issued several additional noteworthy opinions addressing whether tolling applies to various other forms of confinement or unavailability for supervision.

The Second Circuit held that a state parole revocation sentence is imprisonment "in connection with a conviction" and thus tolls the term of federal supervision.[31] Although "revocation of parole is not itself a criminal proceeding, the incarceration that results from revocation is a consequence of the underlying crime of conviction."[32] Although the principles discussed by the Second Circuit are likely widely applicable to parole revocation sentences, its decision relied heavily on New York state laws regarding parole,[33] indicating that other courts considering the issue should review the applicable state's parole laws when determining whether a parole revocation sentence tolls supervision.

The Eighth Circuit held that, because being out on bond on state charges is not imprisonment, it does not toll the term of supervised release; only when the defendant was imprisoned on those charges did tolling begin.[34] Similarly, the D.C. Circuit held that release post-sentencing, while an appeal is pending, is not considered a part of supervised release.[35]

The Ninth Circuit held that time in a halfway house that is part of the federal sentence does not count toward the term of supervised release.[36] However, supervision may begin running when a defendant is at a similar facility as part of a state sentence.[37]

In a case arising out of unusual circumstances, the Seventh Circuit held that a defendant detained pending a revocation hearing was not imprisoned in connection with a conviction, and thus the term of supervision was not tolled during that time.[38] Typically, a supervisee would not end up in detention awaiting a revocation hearing absent a warrant (or a summons, directing the supervisee to appear at a hearing, where the person would then be detained), thereby extending jurisdiction and obviating the need to reach the potential tolling issue. However, in *United States v. Block*, after the probation officer notified the court of alleged violations, the court held a status conference without issuing a warrant or summons. The defendant appeared at the status conference and was remanded to custody. Because there was no warrant or summons—which would have provided a basis for post-supervision jurisdiction under 18 U.S.C. § 3583(i)—and the revocation hearing was not held until after expiration of the term of supervised release, the court was forced to confront an unusual tolling issue. Pointing to the language of 18 U.S.C. § 3583(e) stating that the court may revoke a term of supervised release and "require the defendant to serve in prison *all or part of the term of supervised release*," the Seventh Circuit held that the defendant was simply serving part of his term of supervised release in detention; thus the time did not toll.[39] Finding there was no valid jurisdictional basis for the revocation, the Seventh Circuit vacated the lower court's judgment.

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[24] *Id.* at 165.

[25] *Id.* at 170.

[26] *United States v. Garcia-Rodriguez*, 640 F.3d 129 (5th Cir. 2011); *United States v. Juarez-Velasquez*, 763 F.3d 430 (5th Cir. 2014).

[27] Pursuant to the limited remand, the district court made a factual finding that the defendant was transferred to ICE custody on October 28, 2005, rather than an earlier date in October that had previously been suggested as his transfer date. Subsequently, the Court of Appeals held the district court had jurisdiction to revoke the term of supervised release, as a warrant had been filed on October 24, 2008. *United States v. Garcia-Rodriguez*, 444 F. App'x 25 (5th Cir. 2011).

[28] *Juarez-Velasquez* at 436.

[29] *United States v. Cole*, 567 F.3d 110 (3d Cir. 2009); *United States v. Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007) (en banc) (overruling *United States v. Isong*, 111 F.3d 429 (6th Cir. 1997)).

[30] *U.S. v. Balogun*, 146 F.3d 141, 144-47 (2d Cir. 1998); *U.S. v. Juan-Manuel*, 222 F.3d 480, 485-88 (8th Cir. 2000); *United States v. Okoko*, 365 963 (11th Cir. 2004).

[31] *United States v. Bussey*, 745 F.3d 631 (2d Cir. 2014).

[32] *Id.* at 633.

[33] *Id.*

[34] *United States v. House*, 501 F.3d 928 (8th Cir. 2007).

[35] *United States v. Davis*, 711 F.3d 174 (D.C. Cir. 2013) (release pending appeal ordered by Court of Appeals after the defendant was already in custody on the sentence). *See also United States v. Channon*, 845 F. App'x 783 (10th Cir. 2021) (unpublished) (defendant continued on release by district court after sentencing, but prior to self-surrender, while appeal was pending).

[36] *United States v. Miller*, 547 F.3d 1207 (9th Cir. 2008); *United States v. Earl*, 729 F.3d 1064 (9th Cir. 2013).

[37] *United States v. Sullivan*, 504 F.3d 969 (9th Cir. 2007) (holding that because both federal law and Montana state law indicate that time at a state pre-release center is not "imprisonment," the term of supervised release started when the defendant was placed at the pre-release center, and had expired by the time of the alleged violation).

[38] *United States v. Block*, 927 F.3d 978 (7th Cir. 2019).

[39] *Id.* at 982.

Revocation

Revocation of Special Term

Just as it does not specify the interaction between a term of supervision imposed at sentencing and a special term of supervision, 18 U.S.C. § 3582(c)(1)(A) does not specify whether the general revocation provisions for probation (§ 3565) or supervised release (§ 3583(e)) apply to a special term of supervision imposed on an individual granted compassionate release. In addition to seeking clarifying legislation on the interaction between these special terms of supervision and imposed-at-sentencing terms of supervised release, the Judicial Conference approved seeking clarifying legislation on the revocation and reimposition of special terms of supervision, specifically by including § 3583(e)(3) by reference.[40]

Mandatory Revocation Term for Specified Offenses

18 U.S.C. § 3583(k) specifies a mandatory minimum term of five years of imprisonment upon revocation of supervision for certain offenses of conviction. In the 2019 case *United States v. Haymond*, the Supreme Court found this provision unconstitutional as applied, insofar as the facts resulting in imposition of the mandatory minimum term of imprisonment were found by a judge rather than a jury.[41] In a subsequent case, the Tenth Circuit held that *Haymond* does not apply where imposition of a mandatory minimum sentence under § 3583(k) was based on facts admitted by the defendant under oath in pleading guilty to a new charge and at the revocation hearing.[42] The appellate courts have rejected attempts to expand *Haymond* beyond § 3583(k), including to mandatory revocation for drug possession,[43] where revocation results in imprisonment longer than the statutory maximum for the offense of conviction,[44] or across the board on all revocations.[45] Post-*Haymond*, officers may seek revocation under 18 U.S.C. § 3583(e)(3). Alternatively, the government may seek new criminal charges and/or proceed under § 3583(k), by presenting the facts supporting revocation under this provision to a jury or by relying on an admitted violation consistent with a guilty plea, such that no judicial fact finding is necessary to support the mandatory minimum term of imprisonment.

Revocation in Juvenile Cases

Both of the prior *Federal Probation* articles note the lack of specificity in 18 U.S.C. § 5037 as to whether the potential disposition upon revocation of juvenile probation or juvenile delinquent supervision is based on the juvenile's age at the time of the original disposition or at the time of the revocation.[46] When those articles were written, only the Fifth Circuit had addressed the issue, holding that it is the juvenile's age at the time of revocation that controls the potential revocation disposition.[47] Since then, the Eighth and Eleventh Circuits have reached the same conclusion.[48]

The Ninth Circuit found § 5037(d) ambiguous as to revocation penalties, specifically whether the requirement that the juvenile receive credit for any previously ordered term of official detention applies to all juveniles, regardless of age at revocation, or just to juveniles at or under age 21 at the time of revocation.[49] It ultimately held that credit for previous official detention applies to all juvenile revocation sentences, including where the juvenile was over 21 at the time of revocation.

Delayed Revocation

Several courts have addressed issues regarding the delayed revocation provisions in 18 U.S.C. §§ 3565(c) and 3583(i). These provisions specify that a court retains the power to revoke a term of probation or supervised release beyond expiration of the term "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." The issuance of a warrant or summons does not toll the term of supervision, but extends the jurisdiction of the court to hold a revocation hearing after expiration of the term, so long as the warrant or summons is issued before expiration. An Eighth Circuit case, *United States v. Jordan*, demonstrates the importance of understanding the distinction between tolling and delayed revocation.[50] In *Jordan*, within about two months of commencing supervision, the defendant committed technical violations resulting in issuance of a warrant. He subsequently absconded and committed crimes in other states before being arrested about six months after the revocation warrant was issued. Shortly thereafter, a second revocation warrant was issued, based on some of the new state charges. However, another three years passed before the state charges were fully resolved and he was returned to face revocation proceedings. A third revocation warrant was then issued based on an additional state offense. On appeal of his revocation sentence, the defendant argued that the issuance of the first revocation warrant tolled supervision, and thus his revocation sentence should have been based only on the technical violations underlying the first warrant. Finding "no support" for this argument, the Eighth Circuit noted that § 3583(i) "does not stop the running of the supervised release period; rather, it extends the district court's power to revoke beyond the supervised release period in certain circumstances."[51] *Jordan* also demonstrates that it is not uncommon to find situations involving a combination of tolling and delayed revocation.

Warrant or Summons Requirement

Continuing the trend noted in section III(A) of the 2005 *Federal Probation* article, appellate courts faced with the issue have consistently required actual issuance of a warrant or summons to preserve jurisdiction under 18 U.S.C. § 3583(i).[52] However, in an unpublished opin-

[40] Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* (March 16, 2021).

[41] *United States v. Haymond*, 139 S.Ct. 2369 (2019). *Haymond* is a plurality opinion, with Justice Breyer concurring in the judgment.

[42] *United States v. Shakespeare*, 32 F.4th 1228 (10th Cir. 2022).

[43] *United States v. Seighman*, 966 F.3d 237 (3d Cir. 2020).

[44] *United States v. Henderson*, 998 F.3d 1071 (9th Cir. 2021).

[45] *United States v. Childs*, 17 F.4th 790 (8th Cir. 2021).

[46] Goodwin, *supra* note 1, and Gergits, *supra* note 1.

[47] *United States v. A Juvenile Female*, 103 F.3d 14 (5th Cir. 1996).

[48] *United States v. Silva*, 443 F.3d 795 (11th Cir. 2006); *United States v. E.T.H.*, 833 F.3d 931 (8th Cir. 2016).

[49] *United States v. Juvenile Male*, 900 F.3d 1036 (9th Cir. 2018).

[50] 572 F.3d 446 (8th Cir. 2009).

[51] *Id.* at 448.

[52] *United States v. Janvier*, 599 F.3d 264 (2d Cir. 2010) (order directing issuance of a warrant does not save jurisdiction where warrant was not actually issued until after expiration); *United States v. Merlino*, 785 F.3d 79 (3d Cir. 2015) (failure to issue warrant deprived court of jurisdiction, even though delay in issuing warrant was caused by defense counsel); *United States v. Block*, 927 F.3d 978 (7th Cir. 2019) (court was deprived of jurisdiction where it held a status conference and ordered defendant detained, but never issued a warrant or summons); *United States v. Pocklington*, 792

ion, the Second Circuit found that a court order which met certain requirements was a summons for purposes of the statute, distinguishing it from other court orders that merely directed the issuance of a warrant or summons.[53]

The 2005 article in *Federal Probation* pointed to an Eleventh Circuit case, *United States v. Bernardine*, in support of having the probation officer (rather than the clerk) issue warrants or summons under the "any other duty that the court may designate" provision of 18 U.S.C. § 3603(10).[54] It should be noted, however, that the Ninth Circuit stated in *Pocklington* that a probation office does not have the power to issue a warrant, and that it must instead be issued by a judge or a court.[55] However, the Ninth Circuit was addressing a situation involving a request by the probation office to extend supervision and a question of whether that request could be considered a warrant or summons, rather than a situation where a judge decided a warrant or summons should issue and delegated the ministerial task of issuance to the probation officer. Relatedly, the Ninth Circuit has recognized that a judge can direct a clerk to sign and issue a summons,[56] and the same would presumably be true for a warrant.

The 2005 article also noted a Ninth Circuit case, *United States v. Vargas-Amaya*, in which the court held that revocation warrants must comply with the oath or affirmation clause of the Fourth Amendment.[57] It also notes that the AO addressed *Vargas-Amaya* by amending the Prob 12C form, "Petition for Warrant or Summons for Person Under Supervision," to include a declaration that satisfies 28 U.S.C. § 1746. Since that time, the Fifth and First Circuits have held that the oath or affirmation requirement *does not* apply to revocation warrants.[58] Although the importance of this circuit split is largely rendered moot by the amendment of the Prob 12C form, the oath or affirmation issue may still arise in unusual circumstances (such as a long-term fugitive where the warrant was based on a pre-amendment Prob 12C, as appears to have been the case in *United States v. Collazo-Castro*[59]).

Scope of Delayed Revocation

There is a circuit split over whether a delayed revocation can address only those violations alleged as the basis for the warrant or summons issued prior to expiration of the term of supervision, or whether it can include additional violations. In *United States v. Naranjo*, the Fifth Circuit held that the "such a violation" phrase in 18 U.S.C. § 3583(i) means that so long as a warrant or summons was timely issued, revocation can be based on any violating conduct that occurred during the term of supervision, and is not limited to violations contained in a petition for revocation filed during the term.[60] The Fifth Circuit was later joined by the Second and Eleventh Circuits, although the Second Circuit limited its holding to later-alleged violations that were related to those alleged in the timely filed petition, as it was not faced with addressing unrelated allegations.[61] In unpublished opinions, the Third and Fourth Circuits relied on *Naranjo* to reach the same conclusion, though the Third Circuit limited its holding in the same manner as the Second Circuit.[62]

In *United States v. Campbell*, the Ninth Circuit was faced with the situation the Second and Third Circuits had avoided—revocation based on a violation unrelated to the violations underlying the timely-issued warrant.[63] Just prior to expiration of the term of supervised release, the probation officer filed a report alleging violations relating to an unreported asset, failure to report contact with law enforcement, and using a third party to open a new auto loan without the officer's permission. A summons was issued before the term expired, but a hearing was not held until after expiration. Between expiration and the hearing, the probation officer amended the petition, adding numerous new perjury allegations (relating to unreported casino winnings) and a new instance of failure to report contact with law enforcement—with all of the new allegations being factually distinct from the original allegations. The probation officer later amended the petition a second time to add additional allegations relating to the unreported asset from the original petition. At the revocation hearing, the court found the defendant had violated conditions related to some of the original allegations (including the additional, related facts/allegations from the second amended report) and to some of the perjury allegations from the first amended report.

On appeal, the Ninth Circuit affirmed the revocation based on the allegations in the original report, including the additional related facts/allegations contained in the second amended report. However, it found that the district court "erred in adjudicating the perjury allegations" contained in the first amended report, as it was submitted after the defendant's supervised release expired. The Ninth Circuit reasoned that § 3583(i)'s "such a violation" language is constrained by the preceding clause, which references "adjudication of matters arising before… expiration."[64] It noted that this language evidenced congressional intent "to limit the universe of violations alleged post-expiration" to those factually related to matters raised before expiration of supervision.[65]

"Any Period Reasonably Necessary"

Courts have also interpreted the period of time beyond term expiration that might be "reasonably necessary" to adjudicate revocation matters, 18 U.S.C. § 3583(i), finding the delay to be reasonable in most cases, particularly where custody and/or new criminal charges are involved.[66] However, not all delays

F.3d 1036 (9th Cir. 2015) (probation could not be extended at hearing after expiration date, where a warrant or summons was not issued prior to expiration).

[53] *United States v. Bunn*, 542 F. App'x 50 (2d Cir. 2013) (unpublished).

[54] Gergits, *supra* note 1; *United States v. Bernardine*, 237 F.3d 1279 (11th Cir. 2001).

[55] *Pocklington*, 792 F.3d 1036, 1040-1041.

[56] *United States v. Vallee*, 677 F.3d 1263 (9th Cir. 2012).

[57] Gergits, *supra* note 1; *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004).

[58] *United States v. Garcia-Avalino*, 444 F.3d 444 (5th Cir. 2006); *United States v. Collazo-Castro*, 660 F.3d 516 (1st Cir. 2011).

[59] *Collazo-Castro*, 660 F.3d 516, 517.

[60] *United States v. Naranjo*, 259 F.3d 379 (5th Cir. 2001).

[61] *United States v. Presley*, 487 F.3d 1346 (11th Cir. 2007); *U.S. v. Edwards*, 834 F.3d 180 (2d Cir. 2016).

[62] *United States v. Brennan*, 285 F. App'x 51 (4th Cir. 2008); *United States v. Mike*, 755 F. App'x 132 (3d Cir. 2018).

[63] *United States v. Campbell*, 883 F.3d 1148 (9th Cir. 2018).

[64] *Id.* at 1153.

[65] *Id.*

[66] *United States v. Ramos*, 401 F.3d 111 (2d Cir. 2005) (delays while state charges were being adjudicated, between state conviction and execution of revocation warrant, and between execution of warrant and revocation hearing all found to be reasonable where the defendant was in state custody and was not prejudiced by the delays); *United States v. Madden*, 515 F.3d 601 (6th Cir. 2008) (delay of approximately 3 years between issuance of warrant and revocation hearing was reasonable, where the defendant had pending state and federal charges; the delay in revocation was caused by the court proceedings, "which in turn were caused by Madden's own conduct."); *United States v. Morales-Isabarras*,

are excusable. For example, the Tenth Circuit in *United States v. Crisler* found that a court lacked jurisdiction to revoke probation where a revocation hearing was continued for five months—with the end of the five months still within the term of supervision—yet the revocation hearing was not held until after expiration.[67] In an illustrative case from the Eastern District of Virginia, *United States v. Sherry*, the court found that it did not have the power to hold a revocation hearing where there was a delay of 15 months between issuance and execution of the warrant, where the delay in execution was due to the U.S. Marshals' policy of treating misdemeanor warrants as low priority and due to the probation office failing to communicate with the defendant after issuance of the warrant.[68]

Conclusion

Officers are frequently called upon to assess and provide information to courts regarding the imposition, tolling, or revocation of probation or supervised release. It is important for officers to stay informed about the evolving legal landscape on these issues.

745 F.3d 398 (9th Cir. 2014) (delay of approximately 6 years between issuance of warrant and revocation hearing was reasonable, where defendant had new federal charges in two districts other than the one where he was on supervised release, he was deported prior to execution of the first district's revocation warrant, and was a fugitive between the time he reentered the country and when he was found).

[67] *United States v. Crisler*, 501 F.3d 1151 (10th Cir. 2007).

[68] *United States v. Sherry*, 252 F.Supp.3d 498 (E.D. Va. 2017).