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Attorney for Burton Viers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

-VS-

BURTON DEAN VIERS,

Defendant

CR. No. 94-62-01-HA

MOTION TO DISMISS SUPERVISED
RELEASE REVOCATION PROCEEDINGS
FOR LACK OF JURISDICTION
(Expedited Hearing Requested)

The defendant, through counsel, Terri Wood, hereby moves the Court to dismiss the warrant and the Order To Show Cause why his supervised release in the above-styled cause should not be revoked upon the ground of lack of jurisdiction, due to expiration of his term of supervised release prior to the issuance of said warrant and Order.

This motion is supported by the records and files herein, and the points and authorities below, and such other grounds or authorities as may be offered at time of hearing on this motion.

Defendant requests an expedited hearing on this motion because this alleged violation substantially impacts a determination of whether he should be released in another pending case, CR No. 04-60094-01-H0. See *United States v. Loya*, 23 F3d 1529 (9th Cir. 1994)(to release defendant with pending violation of supervised release, the defense must show by clear and convincing evidence that the defendant is not likely to flee or pose a danger).

POINTS & AUTHORITIES

1. Mr. Viers was sentenced to serve a five-year term of supervised release that commenced on November 14, 1998, and would have expired, absent any tolling, revocation, or extension, on November 14, 2003.
2. On March 2, 2001, the district court issued a warrant and order to show cause why Mr. Viers' supervised release should not be revoked, based upon a petition which alleged his whereabouts were unknown, among other grounds. Mr. Viers remained a fugitive until making a voluntary surrender on October 15, 2001, and the warrant was executed. See warrant, Clerk's Record #38, copy attached as Exhibit #1. Supervised release is tolled during the period the defendant is a fugitive. *United States v. Crane*, 979 F2d 687, 691 (9th Cir. 1992). Mr. Viers was a fugitive from March 2, 2001 until October 15, 2001, which is a period of seven months and 14 days. His term of supervised release would thereafter have expired on July 1, 2004, absent any further tolling, revocation, or extension.
3. Mr. Viers remained in federal custody for the violation until October 18, 2001, when he was ordered released pending hearing. The terms of his release included a special condition that he "Follow all conditions of the U.S. Probation Office," and "Report to the U.S. Probation Office located in Bend, Oregon, immediately upon release from Deschutes County custody." See Order Setting Conditions of Release, page 2, Clerk's Record#40, copy attached as Exhibit#2. This Order makes clear that Mr. Viers continued on supervised release while on release pending the revocation hearing, because the only conditions for the U.S. Probation Office to enforce over Mr. Viers were those of his supervised release.
4. In *United States v. Morales-Alejo*, 193 F3d 1102 (9th Cir. 1999), the Ninth Circuit reversed Judge Haggerty's determination that the term of supervised release was tolled during the defendant's pretrial detention on new federal charges. 193 F3d at 1103-04. The Ninth Circuit determined that the operative language of the applicable statute, 18 U.S.C. §3642(e), which provided for tolling while a defendant was

“imprisoned in connection with a conviction,” did not apply to pretrial detention. 193 F3d at 1104-06. As pretrial detention does not operate to toll the period of supervised release, it therefore follows that pretrial release, as occurred in Mr. Viers’ case on October 18, 2001, does not operate to toll the period of supervised release.

Furthermore, it is clear from the order granting release in Mr. Viers’ case that he remained under the supervision of the US Probation Office and subject to the conditions of his supervised release. That same order also subjected him to the authority of Pretrial Services. See Special Condition 7(a), Exhibit#2. Thus, the instant case is distinguished from *United States v. Vallejo*, 69 F3d 992 (9th Cir. 1995), where the court held that time Vallejo spent on bail, after release from imprisonment when his conviction was vacated and the case remanded for a new trial, did not serve supervised release statutory goals as the defendant was not subject to supervised release conditions while he was free on bail. The issue in *Vallejo* was not the tolling of supervised release during pretrial release, but rather, when supervised release commenced, see 69 F3d at 994; there is no question of when supervised release commenced in Mr. Viers’ case.

5. Mr. Viers had state charges pending in the Circuit Court for Deschutes County, Oregon, Case No. 01FE0230MS, when he was released from federal custody on the supervised release violation on October 18, 2001. He remained in custody pursuant to a state detainer and was transported to the Deschutes County Jail, a process which took 7 days. Mr. Viers was subjected to pretrial detention at the Deschutes County Jail on these charges from October 25, 2001 until October 30, 2001 (5 days) before securing his release. He later pled guilty to reduced charges and the state court sentenced Mr. Viers on June 10, 2002; he was imprisoned from June 10, 2002, until June 28, 2002 (18 days), in connection with that conviction.¹

¹ This information regarding the time Mr. Viers spent in jail was provided to defense counsel via a telephone call with staff at the Deschutes County Jail. The defense has sent for written

6. 18 U.S.C. §3642(e) provides for tolling the term of supervised release while a defendant is imprisoned for another offense. The statute states, in pertinent part: “A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.” *Id.* In *United States v. Morales-Alejo, supra*, the Court held that pretrial detention did not count in determining the “period in which the person is imprisoned in connection with a conviction,” even when the person is given credit for time served on pretrial detention against the sentence imposed upon conviction. *Id.*, 193 F3d at 1105-06.
7. Mr. Viers submits that, under 18 U.S.C. §3642(e) as interpreted by the Ninth Circuit, his fugitive status ended on the date of his arrest on the supervised release violation, October 15, 2001. His 3-day federal detention prior to release pending hearing on the violation would not toll the term of release, whether viewed as “pretrial detention,” see *Morales-Alejo, supra*, or “imprisoned in connection with a conviction,” because it was “less than 30 consecutive days,” see §3642(e). Mr. Viers’ total of 12 days pretrial detention in October 2001 on the Deschutes County case would not toll the term of supervised release. *Morales-Alejo, supra*. Mr. Viers’ subsequent service of 18 consecutive days in jail in connection with his convictions stemming from the Deschutes County case would also not toll the term of supervised release. 18 U.S.C. §3642(e). As a result, his term of supervised release that would have otherwise expired on July 1, 2004, was not affected by the periods of pretrial detention or imprisonment that occurred after his fugitive status ended on October 15, 2001. July 1, 2004 remained the expiration date, absent any further tolling, revocation, or extension.
8. Mr. Viers appeared before Judge Haggerty on August 12, 2002, and admitted that he violated the conditions of supervised release. He was allowed to remain on release

confirmation of this information from the jail, pursuant to a records request, and it should be available by the time of hearing on this motion.

under the same terms, including abiding by the conditions of his supervised release, pending sentencing. On October 7, 2002, Judge Haggerty found Mr. Viers violated his supervised release, but chose to continue Mr. Viers on supervised release subject to the same conditions previously imposed. See minute order, Clerk's Record#45, copy attached as Exhibit#3. It is clear from both the minute order and the later entered Order Finding Violation And Continuing Supervised Release, Clerk's Record#46, copy attached as Exhibit#4, that the Court did not extend the original 5-year term of supervision. The Order further provided that "defendant's time from the issuance of the warrant March 2, 2001, shall be tolled." That language is ambiguous because while it sets the start date for tolling the term of supervision, it is silent as to the end date of the tolling period.

9. The defense submits that the Court's authority to toll the term of supervised release is constrained by 18 U.S.C. §3642(e), and the case law authorizing tolling during fugitive status. Therefore, even if the Order Continuing Supervised Release was intended by the Court to toll the period during which Mr. Viers was pending hearing and disposition on the violation—from October 15, 2001, when his fugitive status ended, through October 7, 2002, when the Court sentenced Mr. Viers for the violation—there is no legal authority to support such an order.² Accordingly, Mr. Viers' term of supervised release expired on July 1, 2004, as there was no further tolling, revocation or extension of his supervised release prior to that expiration date.
10. A district court's authority to revoke a term of supervised release extends for a reasonable time beyond the expiration of the supervised release term if, *prior to expiration of the supervised release term*, a warrant or summons has been issued based upon an allegation that a condition of supervised release has been violated. See 18 USC 3583(i); see also *United States v. Vargas-Amaya*, 389 F3d 901 (9th Cir.

² It is also logically impossible to "toll" the term of supervised release of a defendant simultaneously subject to the conditions of supervised release and being supervised by the US

2004). In Mr. Viers' case, the first warrant for the instant supervise release violation issued on October 8, 2004, more than three months after expiration of his supervised release term. An amended petition for warrant and order to show cause was filed on November 30, 2004, and so ordered by the Court that same date, to comply with *Vargas-Amaya*.

11. As the warrant that brings Mr. Viers before the Court to show cause why his supervised release should not be revoked did not issue until after his term of supervised release expired, this Court has no jurisdiction to proceed. *Vargas-Amaya*, 389 F3d at 903. The order to show cause should be dismissed.

DATED this ____ day of January, 2005.

Terri Wood, OSB 88332
Attorney for Defendant Viers

Probation Office, as ordered in Mr. Viers' case when the Court released him from custody on October 18, 2001, pending hearing and disposition.