

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 JOSEPH MERLINO : NO. 99-363-01
 :

MEMORANDUM

SURRICK, J.

OCTOBER 20, 2014

Presently before the Court is Defendant's Motion to Dismiss the Government's Petition alleging a violation of supervised release (ECF No. 1008), and the Government's Response in opposition (ECF No. 1010). Defendant contends that the Court lacks jurisdiction to have a hearing on Defendant's alleged violation of supervised release. The issue before the Court is whether a request by a criminal defendant to the Court Clerk, to delay issuance of the summons until after his period of supervised release terminates, operates to toll the time in which to issue the summons such that this Court retains jurisdiction under 18 U.S.C. § 3583(i). We hold that it does. For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

A federal grand jury returned a thirty-six count Fourth Superceding Indictment in January 2001, charging Joseph Merlino, among others, with various conspiracy and substantive Racketeer Influenced and Corrupt Organizations (RICO) violations, all stemming from Merlino's alleged involvement as a member of the Philadelphia La Cosa Nostra crime family. *United States v. Merlino*, 349 F.3d 144, 146 (3d Cir. 2003). Following trial before the Honorable Herbert J. Hutton, a jury returned a verdict finding Merlino guilty of the following: one count each of RICO and RICO conspiracy, 18 U.S.C. § 1962(c) and (d); one count of racketeering

through collection of an unlawful debt, 18 U.S.C. § 1962(c); one count of illegal sports bookmaking, 18 U.S.C. § 1955; three counts of receiving stolen goods, 18 U.S.C. § 659; and one count of conspiracy to receive stolen goods, 18 U.S.C. § 371. *United States v. Merlino*, No. 99-CR-363-01, 2006 WL 1479781, at *1 (E.D. Pa. May 26, 2006). Merlino was sentenced on December 3, 2001, to a prison term of 168 months, followed by a period of three years of supervised release, and, in addition to fines, Merlino was ordered to pay \$337,943.89 in restitution. *Id.* The Third Circuit Court of Appeals affirmed the judgment of sentence on November 12, 2003. *Merlino*, 349 F.3d at 162.

Merlino was released from federal custody in March 2011, and placed in a halfway house in Florida for a period of six months. (Def.’s Mot. ¶ 3, ECF No. 1008)¹; (Gov’t’s Resp. ¶ 2, ECF No. 1010.) On September 7, 2011, Merlino was released from the halfway house and began his three year term of supervised release in Boca Raton, Florida, under the direct supervision of the United States Probation Office for the Southern District of Florida. (Def.’s Mot. ¶ 4 & Ex. “B”); (Gov’t’s Resp. at ¶ 3.) The term of supervised release was due to expire on September 6, 2014.

This Court retained jurisdiction over the instant criminal action, and the Probation Office for this District worked in conjunction with the Probation Office for the Southern District of Florida in monitoring Merlino while on supervised release. (Oct. 10, 2014 Hr’g Tr. 6-7, ECF No. 1013.) On August 26, 2014, the United States Probation Office presented a Violation of Supervised Release Petition (VOSR Petition) to this Court, alleging four violations of supervised release by Merlino. (*Id.* at 8-9.) The VOSR Petition was a standard form petition, which requested relief in the form of “THE ISSUANCE OF A SUMMONS DIRECTING THE

¹ Merlino styled his Motion as a “Legal Memorandum,” filed at ECF No. 1008. Due to the jurisdictional challenge he raises, Merlino’s “Legal Memorandum” will be treated as a Motion to Dismiss, and cited herein as “Def.’s Mot.”

NAMED SUPERVISED RELEASEE TO APPEAR AT A REVOCATION HEARING.”

(VOSR Pet. 4, ECF No. 1003.)² On September 2, 2014, the VOSR Petition was signed as an Order of the Court and filed of record. (*Id.*) Counsel for the Government and Counsel for Merlino received a copy of the September 2, 2014 Petition and Order that same day via e-notification, and a copy was forwarded to the Probation Office. (*Id.*) Edwin Jacobs, Jr., Esquire entered his appearance on behalf of Merlino on September 4, 2014. (ECF No. 1004.)³

After discussions between Counsel and the Criminal Deputy Clerk, a formal Notice of the Revocation Hearing was forwarded to Counsel for Merlino and the Government on September 16, 2014 and filed of record. (Hr’g Notice, ECF No. 1005.) The September 16, 2014 Notice includes Merlino’s name and current address, Docket Number, and an attached copy of the VOSR Petition setting forth the alleged supervised release violations. (*Id.*) The Notice provides as follows:

NOTICE

TAKE NOTICE, That Petition of the Probation Officer, a copy of which is attached, charges you with certain violation which may warrant revocation of your supervised release.

You are directed to appear at the United States Courthouse, 601 Market Street, Phila., PA on **Friday, October 10, 2014, at 10:00 a.m.** in Courtroom 8-A, at which time you will be given a hearing on the charges.

You may have legal counsel present at the hearing if you so desire, in which event you should make appropriate arrangements with your attorney.

(*Id.*) The Notice was signed and issued by the Criminal Deputy Clerk. (*Id.*)

² Aside from requesting the issuance of a summons, the Probation Office may alternatively request the issuance of a warrant, whereby the U.S. Marshal’s Office will arrest and incarcerate a defendant until the time of the revocation hearing. (Oct. 10, 2014 Hr’g Tr. 11.)

³ Attorney Jacobs represented Merlino during the course of the jury trial in 2001. Although Attorney Jacobs filed an entry of appearance on September 4, 2014, the record does not reflect that Attorney Jacobs previously withdrew his appearance.

On October 6, 2014, prior to the October 10, 2014 Revocation Hearing, Merlino filed a Legal Memorandum, which set forth various legal issues with respect to the VOSR Petition. (Def.'s Mot. ¶¶ 8-32.) Merlino challenged the jurisdiction of this Court to hold the October 10, 2014 Revocation Hearing because the formal Notice of the October 10, 2014 Hearing was not issued until September 16, 2014, ten days after the expiration of his supervised release. (*Id.* at ¶¶ 8-10.) The Government responded on October 8, 2014 asserting that Merlino's jurisdictional challenge was without merit, because the Notice was issued after the expiration of the supervised release term only because of Defense Counsel's request. (Gov't's Resp. 4-6.) Under the circumstances, the October 10, 2014 Hearing was limited to the presentation of testimony and argument concerning the jurisdictional issue.

At the October 10, 2014 Hearing, the Government presented two witnesses. The Government presented the testimony of James Muth, a Supervisor in the United States Probation Office for the Eastern District of Pennsylvania. (Oct. 10, 2014 Hr'g Tr. at 5.) Mr. Muth testified that the Probation Office does not itself issue a summons. (*Id.* at 15-17.) Following execution and entry of the Court's Order granting the issuance of a summons, it is the practice in this District for the Criminal Deputy Clerk for the assigned District Court Judge to issue a standard form "notice" of the revocation hearing. (*Id.* at 13, 16-19.)⁴ No official document titled "summons" is used by the Probation Office, since the "notice" to appear that is used is essentially the same as a summons. (Oct. 10, 2014 Hr'g Tr. at 14, 17.)

The Government also presented the testimony of Christina Franzese, the Criminal Deputy Clerk for this Court. (*Id.* at 31.) Ms. Franzese testified that, following the entry of an order granting the issuance of a summons, she immediately contacts counsel of record to schedule a

⁴ Each District Court Judge is assigned a Criminal Deputy who handles the administrative and scheduling tasks of criminal matters assigned to that Judge.

revocation hearing and issues a standard form “notice of violation of supervised release hearing.” (*Id.* at 31-32, 34 and 50.) With regard to the instant VOSR Petition, Ms. Franzese contacted Merlino’s Counsel on September 2, 2014, immediately following entry of the Court’s Order and requested dates for the scheduling of the Revocation Hearing. (*Id.* at 35.) She was told by Defense Counsel that he would not be available until December because he was having a medical procedure in November and his schedule in September and October was packed. (*Id.*) Later on September 2, 2014, after advising the Court and the United States Attorneys’ Office of the scheduling difficulties, Ms. Franzese received a telephone call from Defense Counsel requesting that she wait until the end of the following week, September 12, 2014, to schedule a hearing because his schedule might clear up. (*Id.* at 36-37.) Following receipt of Defense Counsel’s request to delay issuance of a hearing date, Ms. Franzese advised the Court of the request and it was approved. (*Id.* at 37.) Ms. Franzese received a letter from Defense Counsel on September 11, 2014, advising of his availability in October as follows:

I promised I would call you about scheduling today and have done so, but this letter may make things easier.

I was not released from the Federal Depositions as I hoped, but here is my suggestion. Thus far I have been unable to confirm whether my September 29 trial will or will not start, but if it does it should conclude in just a few days. If Judge Surrick has availability the weeks of October 6, 13, 20 or 27, I am firmly committed on October 7 and 9 and must avoid October 30 for medical reasons. My commitments on all remaining dates can be adjourned if they conflict with the Judge’s availability. Thank you.

(*Id.* at 37-39); (Oct. 10, 2014 Hr’g Ex. “2” (on file with Court).) After confirming with all Counsel their availability on October 10, 2014, the formal Notice of the Revocation Hearing was sent to all Counsel on September 16, 2014. (Oct. 10, 2014 Hr’g Tr. at 41.) But for the request of Defense Counsel, the formal Notice would have been issued by Ms. Franzese on September 2 or 3, 2014. (*Id.* at 37, 53.)

Merlino presented no evidence or testimony at the October 10, 2014 Hearing. Following argument on their respective positions, the matter was taken under advisement.

II. STANDARD OF REVIEW

In a case of statutory interpretation, the primary function of the court is to effectuate legislative intent. *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001). “The plain meaning of legislation should be conclusive, except in [] rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal citations and quotations omitted). “[O]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.” *United States v. One “Piper” Aztec “F” De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057*, 321 F.3d 355, 359 (3d Cir. 2003) (citation omitted). “However, in that rare instance where it is uncontested that legislative intent is at odds with the literal terms of the statute, then a court’s primary role is to effectuate the intent of Congress even if a word in the statute instructs otherwise.” *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006).

III. DISCUSSION

Merlino posits a simplistic view that no summons was issued prior to the expiration of his term of supervised release, and therefore this Court may not hear the alleged violations of his supervised release under 18 U.S.C. § 3583(i). We believe that the issue presented is more accurately stated to be whether Merlino’s request to delay issuance of the summons until after his term of supervised release expired tolls the time in which a formal summons may issue and this Court may hear the alleged violations of his supervised release.

At common law, courts were permitted to hear allegations of a violation of the terms of supervised release after the expiration of the supervised release period. For the court to retain jurisdiction to revoke a defendant’s supervised release, it was required that “some formal revocation proceeding had begun within the term of supervised release—whether it be a warrant, summons, an order to show cause, or a petition charging a violation of supervised release.” *United States v. Sczubelek*, 402 F.3d 175, 179 (3d Cir. 2005) (“[t]he logical inference is that Congress expected some time to pass between the time a supervised release violation is discovered and the time supervised release is actually revoked.” (quoting *United States v. Neville*, 985 F.2d 992, 995-96 (9th Cir. 1993)), “[i]f the district court were to lose jurisdiction upon the lapse of the term of supervised release, persons who violated the conditions of their release near the end of the supervisory period would be immune to revocation.” (quoting *United States v. Barton*, 26 F.3d 490, 492 (4th Cir. 1994))); *United States v. Buchanan*, 638 F.3d 448, 452 (4th Cir. 2011); *United States v. Janvier*, 599 F.3d 264, 265-66 (2d Cir. 2010); *United States v. Naranjo*, 259 F.3d 379, 381-82 (5th Cir. 2001); *United States v. Bazzano*, 712 F.2d 826, 835 (3d Cir. 1983); *Franklin v. Fenton*, 642 F.2d 760, 764 (3d Cir. 1980).

Congress passed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, to codify this common law principle. Specifically, Congress amended the prior statutory provision governing supervised release after imprisonment by adding subsection (i), which provides as follows:

Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 U.S.C. § 3583(i). “[T]he most likely purpose,” of adding subsection (i), “was to make absolutely clear Congress’ earlier intention that sentencing courts have the authority to hold hearings to revoke or extend supervised release after expiration of the original term if they issue a summons or warrant during the release period.” *Sczubelek*, 402 F.3d at 179 (quoting *United States v. Morales*, 45 F.3d 693, 701 (2d Cir. 1995)).

Section 3583(i) has been held to be a tolling provision, grounded in the principles of equity. *United States v. English*, 400 F.3d 273, 275-76 (5th Cir. 2005) (citing *Naranjo*, 259 F.3d at 383); *United States v. Okoko*, 365 F.3d 962, 964-65 (11th Cir. 2004). In *English*, the defendant contended that a valid warrant did not issue prior to the expiration of his term of supervised release because the timely issued warrant failed to correctly list his name, in violation of the Fourth Amendment. 400 F.3d at 274-75. The court did not view the issue to be whether the warrant complied with the Fourth Amendment; rather, the court framed the question as “whether the warrant, with the erroneous name, was sufficient to extend the time period in order to allow the district court to order imprisonment after the term of supervised release expired.” *Id.* at 275. Applying equitable principles, the *English* court concluded that the “clerical error by the deputy district clerk was not sufficient to nullify the extension of the limitation period.” *Id.* at 276.

Based upon the testimony presented at the October 10, 2014 Hearing, there can be no doubt that equitable principles should apply to toll the time for the formal summons to issue on September 16, 2014. The uncontradicted testimony established that the Probation Office relies upon the assigned Judge’s Criminal Deputy Clerk to schedule a revocation hearing, and that the hearing is scheduled via issuance of a “notice” which is equivalent to a “summons.” The uncontradicted testimony further established that Ms. Franzese dutifully endeavored to issue this

notice on September 2, 2014, prior to the expiration of Merlino's supervised release, by contacting Merlino's Counsel to apprise him that the VOSR Petition was signed and entered as an Order of the Court and that the Court sought to schedule a revocation hearing. The sole reason why the notice was not issued on September 2, 2014 (or on September 3) was due to the fact that Merlino's Counsel requested a delay in scheduling a firm hearing date. As a result, the notice was not issued until after Merlino's supervised release had expired. Based upon this evidentiary record, we are satisfied, as was the court in *English*, to apply equitable principles and conclude that this series of events is sufficient to extend the time period in order to allow this Court to hear the allegations of Merlino's supervised release violations under 18 U.S.C. § 3583(i).

Our decision is in accord with Congressional intent. By the enactment of Section 3583(i), Congress sought to codify the prior common law decisions and permit courts to hold hearings to revoke or extend supervised release after the expiration date, so long as a summons is issued prior thereto. *Sczubelek*, 402 F.3d at 179. While Congress left the term "summons" in Section 3583(i) undefined, "summons" is legally defined as "a writ or process commencing the plaintiff's action and requiring the defendant to appear and answer." *Black's Law Dictionary* 1574 (9th ed. 2009). No Federal Rule of Criminal Procedure governs issuance of a summons under Section 3583(i). *See United States v. Vallee*, 677 F.3d 1263, 1265 (9th Cir. 2012) ("There is no Federal Rule of Criminal Procedure that by its terms governs the issuance of a summons or warrant on a petition to revoke supervised release."); *United States v. Moore*, 443 F.3d 790, 794 n.4 (11th Cir. 2006) ("No [] rule of criminal procedure, relevant statute or case law supports the application of Rules 4 or 9 in the context of a supervised release violation hearing."); *Cf. United States v. Nnanna*, 281 F. App'x 708, 710 (9th Cir. 2008); *United States v. Crusco*, No. 90-945,

2000 WL 776906, at *2 (S.D.N.Y. Jun. 15, 2000). Accordingly, it is clear that Congress intended for a supervised releasee to be called to account for alleged violations that occur during the time of supervised release, so long as the defendant is put on notice of the alleged violations prior to the expiration of the supervised release term. That is the situation here. What Congress could not have intended is to permit a defendant to evade review of alleged supervised release violations by requesting that the issuance of a summons be held in abeyance until after his term of supervised release expires.

Courts have routinely held that minor procedural defects in the context of a Section 3583(i) hearing, created at the hands of, or with the consent of, the defendant, are not fatal to the district court's jurisdiction. For example, in *United States v. Buchanan*, 638 F.3d 448 (4th Cir. 2011), the Fourth Circuit Court of Appeals faced a question of whether a term of supervised release is tolled while a defendant absconds from supervision, such that the supervising court is empowered to revoke supervised release after the term expires under Section 3583(i). *Id.* at 450-51. Noting that Congress did not intend to preclude the judicially created concept of fugitive tolling in the supervised release context by enacting Section 3583(i), the court applied the principles of equitable tolling to conclude that the defendant's supervised release term was tolled during the thirteen years he was on fugitive status. *Id.* at 457-58. In addition, the Second and Third Circuits have rejected challenges by defendants that the time period between the filing of a supervised release revocation petition and the final adjudication of the petition was not "reasonably necessary" under Section 3583(i), where the defendant consented to numerous continuances of the revocation hearing, *United States v. Spencer*, 640 F.3d 513, 518-19 (2d Cir. 2011), and where the delay was caused by the defendant's separate, ongoing state criminal proceedings, *United States v. Poellnitz*, 372 F.3d 562, 570-71 (3d Cir. 2004). *Buchanan*,

Spencer and *Poellnitz* all present parallels to the instant case because the procedural defect rested at the feet of the defendant—here, the request to delay issuance of the summons. Applying the principles set forth in *Buchanan*, *Spencer* and *Poellnitz*, it cannot be said that the request by Merlino to delay issuance of the summons divests this Court of the ability to hold a hearing on the VOSR Petition under Section 3583(i).

Merlino relies upon a series of cases that adopted a rigid approach to Section 3583(i) to dismiss a violation of supervised release petition due to the absence of a warrant or summons. *See United States v. Janvier*, 599 F.3d 264 (2d Cir. 2010); *United States v. Hazel*, 106 F. Supp. 2d 14 (D.D.C. 2000); *United States v. Venable*, 416 F. Supp. 2d 64 (D.D.C. 2006); *United States v. Daraio*, No. 04-cr-245, 2012 WL 6652628 (D.N.J. Dec. 20, 2012). None of these cases, however, address a situation where the sole reason a summons did not issue within the supervised release period was due to the request of the defendant. Based upon the factual circumstances presented here, we decline to follow the approach to the requirements of Section 3583(i) espoused in these decisions.

Merlino also attempts to couch the issue as one of subject matter jurisdiction, to thereby posit that the September 2, 2014 request to delay issuance of the summons did not constitute a waiver of his jurisdictional challenge. This argument misses the mark, however. The issue presented is not whether there was a waiver, but rather whether the September 2, 2014 delay request operates to toll the time in which a summons may issue.

Based upon the totality of the circumstances, we will retain jurisdiction to hold a hearing on the VOSR Petition and Merlino's alleged violations of supervised release under Section 3583(i). Clearly, Congress did not intend for the summons requirement in Section 3583(i) to operate as a vehicle for a defendant such as Merlino to evade review of his alleged release

violations by requesting that the summons be issued after his supervised release term expires. The summons requirement was an effort by Congress to afford a defendant the right to be properly noticed before the expiration of his supervised release that he will be called to account for alleged release violations.⁵ Merlino cannot complain that the official September 16, 2014 Notice⁶ was issued untimely under Section 3583(i), because it not was issued until the 16th at his request. Moreover, Merlino cannot credibly argue that he did not receive proper notice of his alleged violations and hearing prior to the expiration of his supervised release term. On September 2, 2014, Merlino was properly given notice of the alleged violations and received the opportunity to schedule the hearing at his availability—a scenario that squares directly with Congressional intent and the legal definition of “summons.” *See Black’s Law Dictionary* at 1574 (defining “summons” as a “process...requiring the defendant to appear and answer”). Based upon these circumstances, the principle of equitable tolling must apply. This Court will retain jurisdiction to hold the Revocation Hearing pursuant to Section 3583(i).

IV. CONCLUSION

It is the duty of the courts to effectuate, not obfuscate legislative intent. To accept Merlino’s proposition would lead to an absurd result, something Congress surely did not intend

⁵ *Cf. United States v. Garcia-Avalino*, 444 F.3d 444, 446-47 (5th Cir. 2006) (supervised releasees “do not enjoy the full spate of constitutional rights enjoyed by criminal defendants”), (quoting *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365-66 (1998) (“[P]arolees in parole revocation hearings are ‘not entitled to the ‘full panoply’ of rights to which criminal defendants are entitled.”)).

⁶ Merlino does not contend, and could not argue, that the September 16, 2014 Notice does not constitute a “summons” under Section 3583(i). The September 16, 2014 Notice included Merlino’s name and address, attached a copy of the VOSR Petition, which detailed the violation allegations against him, and provided a specific date, time, and place for him to appear to answer the charges. Although no Federal Rule of Criminal Procedure governs summons issued under Section 3583(i), as discussed *supra*, the content of the September 16, 2014 Notice would meet either standard set forth in Rules 4 or 9 of the Federal Rules of Criminal Procedure. That the document is titled a “Notice,” as opposed to a “summons,” is a distinction without a difference.

by enacting Section 3583(i). *United States v. Brown*, 333 U.S. 18, 27 (1948) (“No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences”). Therefore, Defendant’s Motion to Dismiss will be denied.

An appropriate Order follows.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'R. Surrick', is written above a horizontal line.

R. BARCLAY SURRICK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION NO. 09-363-01
 :
 JOSEPH MERLINO :

ORDER

AND NOW, this 20th day of October, 2014, upon consideration of the Defendant's Motion to Dismiss the Government's Petition to Revoke Supervised Release (ECF No. 1008), the Government's Response in opposition, and the Hearing held on October 10, 2014, it is **ORDERED** that the Defendant's Motion is **DENIED**.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.