

13-282

To Be Argued By:
ALINA P. REYNOLDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-282

UNITED STATES OF AMERICA,
Appellee,

-vs-

PETER MANCINI, MARCIOUS KELLY,
DENTON MYERS, DALTON MYERS,
Defendants,

GREGORY JETTER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court (Janet B. Arterton, J.) entered an order revoking the defendant's supervised release on January 10, 2013. Defendant's Appendix ("DA__") 15. On January 18, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA15, DA164. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

Whether the time between the defendant's arrest on a petition for violation of supervised release and the ultimate adjudication of that petition violated his rights to a timely revocation hearing and to due process when that delay allowed the defendant to resolve pending state court charges without any prejudice from the federal proceedings and when the defendant suffered no prejudice from the delay.

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-vs-

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In 1994, the defendant, Gregory Jetter, was sentenced to 192 months' imprisonment and 5 years' supervised release after he pleaded guilty to charges arising from an armed bank robbery. Jetter began his term of supervised release in 2007.

In February 2010, Jetter was arrested on a warrant alleging that he violated the conditions of supervised release by committing a state law

crime. By the time Jetter appeared for a preliminary hearing on that charge in federal court, he faced additional state charges and accordingly the federal hearing was continued. In the fall of 2012, after Jetter pleaded guilty and was sentenced on charges relating to three separate robberies, Jetter ultimately admitted that he had violated the conditions of his supervised release. The court sentenced him to 36 months' imprisonment, consecutive to his state sentences, with no supervised release to follow.

On appeal, Jetter claims that the delay between his initial presentment on the violation petition and his final revocation hearing violated his right to a reasonably prompt revocation hearing and his right to due process. As set forth below, there was no error in this case because the delay here was reasonable and necessary to protect Jetter's rights in state court. Moreover, Jetter has not shown that the delay prejudiced him in any way. Accordingly, this Court should affirm the judgment below.

Statement of the Case

On February 11, 2010, Jetter was arrested on a petition for violation of supervised release, alleging that he had violated the condition that he not commit another crime. DA12, DA19. After resolution of the state charges against him, Jetter moved to dismiss the violation of supervised release petition, claiming that his rights under

Federal Rule of Criminal Procedure 32.1 and the Due Process Clause were violated by the delay in adjudicating that petition. DA77-86. The district court (Janet B. Arteron, J.) denied the motion in an oral ruling on November 2, 2012. DA14, DA151-62. Jetter subsequently admitted three violations of his federal supervised release, and was sentenced to 36 months' imprisonment, to be served consecutively to the state sentences he was serving, with no supervision to follow. DA15; Government Appendix ("GA__") 56-57, GA77-84.

Jetter is currently serving the sentences imposed by the state courts for his robbery convictions.

A. Jetter's 1994 conviction

In 1993, Gregory Jetter was arrested by federal agents in connection with the armed robbery of a bank in Stamford, Connecticut. DA5, DA31. In 1994, Jetter entered a guilty plea to one count of armed bank robbery, in violation of 18 U.S.C. § 2113(d), and one count of carrying a weapon in connection with a crime of violence, in violation of 18 U.S.C. § 924(c). DA8, DA17. On July 11, 1994, Jetter was sentenced to 192 months' imprisonment, to be followed by a 5-year term of supervised release. DA9, DA17. One of the mandatory conditions of supervised release was that the defendant "shall not commit another federal, state, or local crime." GA1.

B. The supervised release term and initial appearances on the violation petitions

Jetter's term of supervised release began on October 30, 2007. DA17. On February 11, 2010, the Probation Office filed a violation of supervised release report alleging that Jetter had violated the condition that he not commit another crime by threatening a witness in connection with the investigation into an armed robbery. DA12; GA1. The district court issued an arrest warrant. GA3.

On February 11, 2010, Jetter was arrested on the violation of supervised release warrant. DA19. On February 12, 2010, Jetter appeared before United States Magistrate Judge William I. Garfinkel for an initial appearance, and was informed of the charge he faced, the applicable penalties, and his rights. DA12, DA21-29. He was represented by Assistant Federal Public Defender Paul Thomas. DA12, DA25-26.

At the outset of the hearing, Jetter was informed that the charge in the violation petition stemmed from threats he had allegedly made against the family member of a witness to a Greenwich, Connecticut jewelry store robbery. DA22-23. Jetter agreed to a temporary order of detention, and the case was adjourned for a preliminary hearing to be scheduled with the district court. DA27.

On February 22, 2010, Jetter appeared in district court before United States District Court Judge Janet B. Arterton for a preliminary hearing on the violation of supervised release allegation stemming from the threatening charge. DA12, DA36. By that time, officers of the Greenwich Police Department had obtained a state warrant charging Jetter with robbery in the first degree, conspiracy to commit robbery in the first degree, and larceny in the first degree. DA38, DA40-41. The robbery charges arose from the July 13, 2009 armed robbery of the Estate Treasures consignment jewelry store in Greenwich, Connecticut. DA32, DA40. Officers of the Greenwich Police Department appeared in district court at the February 22, 2010 preliminary hearing to serve Jetter with the arrest warrant, and were prepared to take Jetter into state custody that day. DA37, DA41.

In light of the newly revealed state robbery charges, defense counsel told the court that it did not make sense to proceed on the threatening charge at that time. DA39-40, DA43. Accordingly, the parties agreed that a hearing on the violation petition should be postponed for at least a couple of months to await the outcome of the state charges and the possibility of an amended violation petition. DA39-43, DA46-47.

The court read the charge in the initial violation petition to Jetter. DA45-46. Jetter indicated that he understood the charge and entered a not

guilty plea. DA46. After entering his not-guilty plea, Jetter spoke at length on the record about the threatening charge contained in the initial violation petition, DA48-51, and requested that he be allowed to stay in federal custody pending the outcome of the state charges, DA52. The district court explained that the defendant was to be transferred to state custody based on the pending arrest warrant and that it would be up to the state to determine where Jetter would be housed. DA52. At defense counsel's request the hearing was adjourned to April 5, 2010.¹ DA12, DA46-47, DA51-52.

On May 6, 2010, the district court held another hearing on the violation of supervised release petition. DA12-13, DA56. By that time, Jetter had been charged by the state in connection with two robberies: the Greenwich robbery and another armed robbery in Orange, Connecticut. DA32. The violation petition had been amended to add two additional alleged violations of the condition that Jetter not commit another crime based on these robberies. DA59-60. The court read these additional charges to Jetter, DA59-60, and Jetter indicated he understood the charges, DA60.

After reading the charges to Jetter, the district court addressed a request from Jetter's at-

¹ The April hearing did not go forward on that date, and was reset for May 6, 2010. DA12.

torney, Paul Thomas, that new counsel be appointed for Jetter. DA60. When the court turned to Jetter on this issue, Jetter proceeded to speak at length about the initial threatening charge that had been brought against him. DA61-68.

The court responded by explaining that it would not proceed with the probable cause hearing because the two new robbery charges were pending state court matters and to move forward in federal court could potentially compromise Jetter's rights in state court. DA69. Jetter indicated he understood the court's explanation for not proceeding at that time, DA69, but then asked to go forward anyway, DA69-70. At this point, Attorney Thomas intervened and asked the court to appoint new counsel to advise Jetter. DA71. Attorney Thomas informed the court and Jetter that even if the federal violation charges could be resolved before the state charges were resolved, proceeding that way in federal court would have to be done "very carefully to avoid compromising [Jetter's] interests in those [state] cases." DA71.

The district court granted Attorney Thomas' request to withdraw as counsel, and to adjourn the proceeding to allow new counsel time to counsel Jetter. The court explained as follows:

[T]his is not a proceeding that is intended to in any way compromise Mr. Jetter's position in the state court matters and it cannot proceed without having the delicate

interrelationship between this matter and the state court proceedings carefully thought through. So, I'm going to grant your motion for withdrawal of your appearance.

DA72.

The court explained to Jetter that it would appoint a new lawyer for him and that he should talk with his new lawyer about how to proceed. DA72. Jetter asked that Attorney Bruce Koffsky, who was already representing him in state court, be appointed in the federal case. DA73. Four days later, on May 10, 2010, Attorney Koffsky was appointed to represent Jetter in the federal case. DA13.

C. The state court proceedings

Two days after Attorney Koffsky was appointed to represent Jetter in the federal proceedings, on May 12, 2010, Jetter was arrested on state charges related to a *third* robbery, this one in Monroe, Connecticut. *See* DA32; GA6.

Although the full state court records were not presented in the federal proceedings, the record reflects that in 2012, Jetter was ultimately sentenced for the three charged robberies:

- *Greenwich*: On March 29, 2012, Jetter admitted to participating in the Greenwich jewelry store robbery, and pleaded guilty in Stamford Superior Court to one count of

robbery in the first degree, and one count of conspiracy to commit robbery in the first degree. GA6; DA32. On June 19, 2012, he was sentenced to a term of imprisonment of 12 years, to be followed by a 4-year term of special parole. GA6; DA32.

- *Monroe*: On May 14, 2012, Jetter pleaded guilty to larceny in the first degree, conspiracy to commit larceny in the first degree, and burglary in the third degree for his participation in the Monroe robbery. GA6. Jetter was sentenced on August 20, 2012 to a term of imprisonment of 18 months. GA6.
- *Orange*: Although not reflected in the amended violation petitions, Jetter subsequently informed the district court that he had been convicted and sentenced to 5 years' imprisonment for the Orange jewelry store robbery. GA51.

D. Jetter's motion to dismiss the federal violation petition

In August 2012, shortly after Jetter had been sentenced for the Greenwich robbery and had pleaded guilty to the Monroe robbery, the district court scheduled a hearing on the petition for revocation of supervised release for August 2, 2012. DA13. That hearing was immediately reset for September 7, 2012. DA13.

By the time of the September 7 hearing, Jetter had been sentenced on both the Greenwich and Monroe robberies. GA6. At this hearing, Jetter's attorney claimed that Jetter had not been given proper notice of the supervised release charges, and he indicated that he wanted to pursue a motion to dismiss the charges. GA36. The district court set a briefing schedule, and continued the case to October 22, 2012. GA42-43; DA13.

On October 4, 2012, an amended report of violation was prepared by the Probation Office. GA5-8. The amended violation report listed three charges—corresponding to the three state robberies—that Jetter had violated the condition that he not commit another crime while on supervised release. GA5-8. In addition, the first charge, relating to the Greenwich robbery, contained the original allegations regarding the alleged threatening of a witness in connection with the Greenwich robbery investigation. GA5.

On October 18, 2012, Jetter filed a motion to continue the supervised release violation hearing. DA14. On October 22, 2012, Jetter filed a motion to dismiss the amended violation of supervised release report, claiming his rights under Federal Rule of Criminal Procedure 32.1 and the Due Process Clause were violated by the delay between the initial hearings in 2010 and the September 2012 hearing. DA14, DA80-85.

The government filed its response on November 1, 2012. DA14, DA87-96. The government argued the delay was caused not by a lack of prosecutorial diligence, but rather by the numerous state charges faced by Jetter. It argued that the delay protected Jetter by ensuring that the federal proceedings did not compromise his position with regard to the pending state charges. DA93-95.

On November 2, 2012, the district court held a hearing on the motion to dismiss. DA14, DA98. After listening to argument from defense counsel and counsel for the government, the court took a brief recess, and then denied Jetter's motion on the record. DA150-62. In sum, the district court found that under this Court's rulings in *United States v. Sanchez*, 225 F.3d 172 (2d Cir. 2000), and *United States v. Ramos*, 401 F.3d 111 (2d Cir. 2005), Jetter failed to show both that the delay was unreasonable, and that he was prejudiced by the delay.

In addressing Jetter's claim that the delay was unreasonable because he had not requested a postponement, the district court explained that, "[a]lthough the proceedings were not delayed at the request of the defendant, the delay did operate to preserve and protect his state court rights." DA159. The district court found that "the postponement of both [the February 2010 and the May 2010] hearings, rather than prejudicing the defendant's ability to mount his

defense, actually operated to protect [the] defendant from prejudice in state court.” DA159-60. The court further noted that Jetter was represented by counsel during the delay “and made no effort to schedule any hearing between May 2010 and August 2012 when a third violation hearing was scheduled in light of the resolution of the state charges” DA160.

The district court also rejected Jetter’s claim that the delay precluded him from presenting evidence that could have aided in the defense of the violation charges, explaining that “by staying the federal case, the defendant had the opportunity to present this defense in state court where he faced these more serious charges.” DA160.

Finally, the district court addressed Jetter’s claim that he was prejudiced because he had been held as a federal prisoner detainee, and had been prevented from seeking bond in the state. The district court rejected this claim reminding Jetter that he was “writted out to state custody in order to face the state robbery charges soon after the federal supervised release violation was served.” DA161.

The district court, citing *Ramos*, concluded its ruling as follows:

The Second Circuit has recognized that delay of the violation proceedings pending an adjudication of state court proceedings

is reasonable and, thus, although the federal arrest may have preceded the state arrest, a delay of federal charges for federal adjudication was appropriate.

DA161.

E. The final revocation hearing

On December 12, 2012, the district court held a final revocation hearing. DA15; GA45. The parties agreed that if Jetter admitted the violations in the report, he could still reserve his right to appeal the earlier denial of his motion to dismiss. GA53-56. With this reservation of rights confirmed, Jetter admitted all three violations of supervised release set forth in the amended violation report. GA56-57.

It was undisputed that based on a Grade A violation and a Criminal History Category VI, Jetter faced a guidelines range of 33 to 36 months, and that 36 months was the statutory maximum penalty. GA57. Jetter requested a sentence at the low end of the applicable guidelines range, and requested that the court run the sentence concurrent to the state sentence. GA59. The government requested a sentence of 36 months to run consecutive to Jetter's state sentence. GA75. After hearing from defense counsel, Jetter and the government, the district court sentenced Jetter to 36 months' imprisonment, to be served consecutively to the state sentence,

with no period of supervised release to follow. GA79. This appeal followed.

Summary of Argument

Jetter claims that the delay between his arrest on a violation of supervised release petition and the ultimate adjudication of that petition violated his right to a prompt revocation hearing under Federal Rule of Criminal Procedure 32.1(b)(2) and the Due Process Clause. These claims fail primarily because Jetter cannot establish that the delay was unreasonable and unnecessary. To the contrary, the delay permitted Jetter to fully adjudicate his pending state cases (which formed the basis of the alleged supervised release violations), without compromising his defense of those state charges by going forward first in federal court. Additionally, as noted by the district court, there was never a request from Jetter that the hearing take place sooner. In other words, Jetter arguably acquiesced in the delay to accommodate the state proceedings.

Moreover, to the extent Jetter grounds his argument in the Due Process Clause, that claim fails because he failed to establish that he was prejudiced by the delay. Indeed, the delay *protected* Jetter's rights. By delaying resolution of the federal violation petition, Jetter was able to resolve the state court charges without any prejudice from the federal proceedings. Jetter claims he was prejudiced, but he identifies no witnesses

he wanted to call or defenses he wanted to present that were unavailable due to the delay. The only alleged prejudice identified by Jetter— anxiety—is insufficient in this context, when Jetter was already detained and facing conviction on the more serious state robbery charges, to show prejudice from the delay.

Argument

I. The delay in resolution of the supervised release violation petition was consistent with Rule 32.1 and the Due Process Clause.

A. Governing law and standard of review

1. Rule 32.1

Federal Rule of Criminal Procedure 32.1 outlines the procedures for revoking or modifying a term of supervised release. As relevant here, when a defendant is detained for an alleged violation of supervised release, Rule 32.1(b)(1)(A) requires a judge to “promptly conduct” a hearing to determine whether there is probable cause to believe a violation has occurred. If the court finds probable cause, it must hold a revocation hearing to adjudicate the violation “within a reasonable time.” *See* Rule 32.1(b)(1)(C) (“If the judge finds probable cause, the judge must conduct a revocation hearing.”); Rule 32.1(b)(2) (“Unless waived by the person, the court must

hold the revocation hearing within a reasonable time in the district having jurisdiction.”).

A defendant may waive both the probable cause hearing and the revocation hearing. *See* Rule 32.1(b)(1)(A), (b)(2). A defendant may waive a right through his words, his conduct, or by operation of law. *See Ohler v. United States*, 529 U.S. 753, 758-59 (2000) (defendant who introduced her prior conviction may not claim error when court rules that that conviction may be used to impeach her if she testified); *United States v. Quinones*, 511 F.3d 289, 321-22 (2d Cir. 2007) (defendants who argued in district court that life imprisonment was the only alternative to a death sentence waived any claim that court erroneously imposed life imprisonment); *United States v. Agrawal*, 726 F.3d 235, 259 (2d Cir. 2013) (finding that failure to object to a jury instruction as part of strategic trial strategy waives any challenge to the instruction), *cert. denied*, 2014 WL 414166 (Mar. 10, 2014); *United States v. Crowley*, 236 F.3d 104, 109-110 (2d Cir. 2000) (defendant waives challenge to specificity of the indictment by failing to raise the claim prior to trial).

2. The Due Process Clause

In the context of a proceeding for revocation of supervised release, the Due Process Clause provides the same protections as those provided for revocation of parole or probation. *United*

States v. Sanchez, 225 F.3d 172, 175 (2d Cir. 2000). Those protections include, significantly, “a hearing at which the court determines two issues: whether the probationer violated a condition of probation as a matter of fact, and, if so, whether this fact warrants revocation.” *Id.* (quoting *United States v. Brown*, 899 F.2d 189, 193-94 (2d Cir. 1990)). “In addition, as a matter of due process, a probationer is entitled to: written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses (unless the hearing officer finds good cause for not allowing confrontation); a neutral hearing body; and a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation.” *Id.* “The Supreme Court does not, however, attach to revocation proceedings the full range of procedural safeguards associated with a criminal trial, because a probationer already stands convicted of a crime.” *Id.* (citations omitted).

While delay in resolution of an alleged violation of supervised release does not itself violate a defendant’s due process rights “[i]t can, if the delay does in fact prejudice the defendant by substantially limiting the ability to defend against the charge that the conditions of supervised re-

lease were violated.” *United States v. Ramos*, 401 F.3d 111, 115-16 (2d Cir. 2005).

3. Standard of review

This Court reviews *de novo* the district court’s denial of the defendant’s motion to dismiss the supervised release violation. *Sanchez*, 225 F.3d at 175; *Ramos*, 401 F.3d at 115.

B. Discussion

Jetter alleges that his rights under Rule 32.1 and the Due Process Clause were violated as a result of the delay between his arrest on the violation of supervised release warrant and his final revocation hearing. In particular, Jetter argues that the delay was unnecessary and that even though he was not required to show prejudice to establish his claim, he met that burden by showing that he suffered anxiety from the delay. Both claims are without merit and should be rejected.

1. Delaying the revocation proceedings while the state court charges were adjudicated was reasonable.

The district court’s decision to continue the revocation proceedings until after the resolution of the pending state court charges, far from being unnecessary, was reasonable. Indeed, courts generally recognize that postponing a revocation

proceeding while the substantive charges giving rise to that proceeding are adjudicated serves several interests:

Ordinarily, the government's forbearance in commencing probation violation proceedings serves various salutary purposes, such as (1) permitting the probationer to clear himself of the criminal charges with the likely result that the probation violation proceedings will not be held, (2) avoiding the need to have the probationer testify in the probation violation proceeding as to matters which may prejudice him in the criminal case, (3) avoiding inconsistent findings in the probation proceedings and the criminal case and/or (4) avoiding prejudice to the probationer's ability to defend the criminal charges by removing him from the jurisdiction where the criminal prosecution is occurring.

United States v. Sackinger, 537 F. Supp. 1245, 1250 (W.D.N.Y. 1982), *aff'd*, 704 F.2d 29 (2d Cir. 1983).

Similarly, in an analogous context, this Court has recognized that a delay in adjudication of revocation proceedings to allow for the resolution of state court proceedings is reasonable. Under 18 U.S.C. § 3583(i), a district court may revoke a period of supervised release for a violation even after the defendant's supervised release term has expired, so long as a warrant or summons

for the alleged violation is issued before its expiration and so long as the delay is “reasonably necessary” for adjudication of the alleged violation. As this Court explained when interpreting this provision in *Ramos*, a delay in federal violation proceedings to allow for resolution of the state proceedings is reasonable because “state adjudications are plainly relevant to the federal determination of whether or not a releasee has committed a crime in violation of state law. 401 F.3d at 117. Indeed, “[r]equiring a federal court to begin revocation proceedings before the state court has determined whether the defendant is guilty on the charges underlying revocation would thrust the federal court into a determination of the defendant’s guilt under state law, an area fundamentally reserved for the states.” *Id.* at 117-18. Moreover, “judicial efficiency is better served in any event by ascertaining the defendant’s guilt once in state court, rather than twice.”² *Id.* at 118.

² Even courts that have declined to postpone revocation proceedings during the pendency of state court proceedings have recognized the interests that postponement would have served. *See United States v. Reeks*, 441 F. Supp. 2d 123, 127-30 (D. Me. 2006) (court exercised its discretion to go forward with violation proceedings, but recognized that if it went forward first, it would have no means to enforce the federal policy that at least some “reasonable incre-

Here, the district court properly relied on this Court’s decision in *Ramos*—and the principles set forth there—to conclude that the delay in Jetter’s case was reasonable. DA158-59. Thus, the district court properly concluded that awaiting resolution of the state cases operated to “preserve and protect” Jetter’s rights in those cases. DA159. Indeed, it was the court’s repeatedly expressed intention to protect Jetter’s rights in the state court proceedings that motivated the delay in this case. Throughout the proceedings, the district court cautioned Jetter that going forward with the revocation proceedings before the state charges were adjudicated might compromise his position in the more serious state cases. *See* DA69 (court explaining to Jetter that with respect to two pending robbery matters in state court, the federal violation proceedings should not go forward “because you have, I presume, an intention to plead not guilty to them here and not guilty to them in court, and that you will proceed with the criminal procedures there, we can’t proceed without potential compromise”); DA70 (court explaining to Jetter that a delay would protect the presumption of innocence he carried into state court and avoid compromising the state court proceedings).

mental punishment” should attend the violation of the terms of supervised release).

Furthermore, the court's interest in protecting Jetter's rights in state court was echoed by Jetter's first lawyer. After the court explained that the federal proceedings should be stayed pending the state proceedings, Jetter stated that he wanted to go forward anyway. DA70. At that point, Jetter's then-lawyer, Attorney Thomas, intervened to echo the court's concern with proceeding on the violation petition before the state cases were resolved. DA71. As Attorney Thomas explained, "[i]t may well be that there is a way to resolve these [charges] before the lengthy state court process unfolds, but if so, it would need to be done very carefully to avoid compromising his interests in those cases, and I think it would be dangerous for him to continue addressing the Court today . . ." DA71. Attorney Thomas therefore asked the court to adjourn the proceedings so that new counsel could be appointed to advise Jetter on this issue. DA71-72. The district court agreed, because it did not want to "in any way compromise Mr. Jetter's position in the state court matters and [because it could not] proceed without having the delicate interrelationship between this matter and the state court proceedings carefully thought through." DA72. In short, the court properly concluded that the delay in this case operated to protect Jetter's interests in the state court proceedings. DA159-60.

Similarly, the court properly recognized that the delay was reasonable in part because it was

partially attributable to the defendant. As the court recognized, at the May 2010 hearing, *defense counsel* asked for the adjournment to allow for appointment of new counsel who could advise Jetter on how to proceed. DA159. The court agreed to this request, and specifically told Jetter that he needed to speak with his lawyer before the federal violation proceedings could go forward. DA72. And even though the court promptly appointed new counsel for Jetter—thus ensuring that Jetter was represented throughout the period of delay about which he now complains—neither Jetter nor his lawyer ever requested a hearing. DA160.

Indeed, this record arguably supports the conclusion that Jetter waived any claim of error based on the delay in this case. The district judge told Jetter that she did not believe it was in his interest to move forward during the pendency of the state proceedings, and further that he should speak with his new lawyer if he wanted to proceed. The judge then promptly appointed a new lawyer. When Jetter and his lawyer failed to request a hearing during the pendency of the state court proceedings, it is reasonable to conclude that they had reached the same conclusion that the district judge had reached, *i.e.*, that the federal proceedings should await the resolution of the state proceedings. In other words, it is reasonable to conclude from Jetter's failure to request a hearing that he waived any argument

for a revocation hearing while his state matters were still pending.

But even if Jetter's conduct did not amount to waiver, the delay in this case was still reasonable and necessary. That delay not only protected Jetter's rights, as discussed above, but also served the other interests identified by the *Ramos* Court. Here, as in *Ramos*, the resolution of the state court proceedings was "plainly relevant" to the federal court's determination of whether Jetter violated supervised release, and thus it was reasonable for the court to await the outcome of those proceedings. *Ramos*, 401 F.3d at 117. Moreover, the delay in proceedings allowed the district court to avoid deciding whether Jetter was guilty of state law crimes, a matter "fundamentally reserved for the states." *Id.* at 117-18. Finally, the delay served judicial efficiency by "ascertaining the defendant's guilt once in state court, rather than twice." *Id.* at 118.

In sum, where, as here, the district court postponed the revocation proceedings to protect the defendant from prejudice in state court, where the defendant arguably agreed to that delay, and where the delay served interests in judicial efficiency, the delay in resolution of Jetter's revocation proceedings was imminently reasonable and proper under Rule 32.1.

2. Jetter was not prejudiced by the delay in his revocation proceedings.

In *Ramos* and *Sanchez*, this Court held that a defendant must show prejudice from a delay in the resolution of revocation proceedings to establish a due process violation. In *Ramos*, the defendant was arrested in November 2000 for a state felony while on federal supervised release. 401 F.3d at 113. Although the probation office notified the district court of the defendant's arrest, a federal arrest warrant for violation of supervised release was not issued until nearly six months later. *Id.* at 113-14. Nine months after that, in February 2002, the defendant was sentenced on the state charges, but he was not arrested or arraigned on the federal supervised release warrant until October 2002. *Id.* at 114. On appeal, the defendant argued that the nearly two-year delay between the probation office's request for an arrest warrant and the execution of that arrest warrant violated the Due Process Clause. This Court rejected that claim, explaining that a "delay between the filing of the petition for a warrant, pursuant to an alleged violation of supervised release, and the execution of the warrant" can result in a due process violation "if the delay does in fact prejudice the defendant by substantially limiting the ability to defend against the charge that the conditions of supervised release were violated." *Id.* at 116. On

the record before it, the Court found no prejudice, however, because the defendant had not shown that the delay hindered his defense in any way. *Id.*

The Court reached a similar conclusion in *Sanchez*. In that case, the federal probation office waited more than four years from the time that the defendant was arrested on state charges until it obtained an arrest warrant for violation of supervised release. 225 F.3d at 174. This Court held that delay alone was insufficient to establish a due process violation. Instead, the defendant must show some prejudice from the delay. *Id.* at 175-77. *See also United States v. Poellnitz*, 372 F.3d 562, 570-71 (3d Cir. 2004) (concluding that a delay of nearly two years between the filing of the violation petition and the hearing on that petition was reasonable, and emphasizing that the defendant had not shown that he was prejudiced by the delay); *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994) (per curiam) (no due process violation in a delay of over two years in execution of warrant because the defendant had not demonstrated prejudice); and *United States v. Throneburg*, 87 F.3d 851, 853 (6th Cir. 1996) (holding that a delay in execution of a warrant for a violation of supervised release violates due process only when the defendant can show prejudice).

Jetter argues that these cases are inapposite because they involve a delay between the super-

vised release violation and the execution of a warrant for that violation, and not, as here, a delay in conducting a hearing *after* a defendant was arrested on the federal supervised release violation. Def. Br. at 17 n.3. Thus, according to Jetter, because he was arrested and in custody on the federal violation petition, he was not required to show that the delay caused him any prejudice to establish his claim.

In his brief footnote on the topic, Jetter does not explain why the Due Process Clause would require a showing of prejudice in one context but not in another, related context. But more fundamentally, there is no need to establish a separate rule for due process claims in this context. It may well be that a defendant held in custody for a lengthy period on a supervised release warrant could show prejudice from that detention alone, but the mere fact that prejudice might be harder or easier to show in different contexts does not justify the establishment of different rules for those contexts. In sum, this Court should require a showing of prejudice to establish a Due Process Clause violation from a delay between the execution of a warrant for a supervised release violation and the ultimate hearing on that violation.

Applying that standard here, the district court properly found that Jetter failed to show he suffered any prejudice as a result of the delay in the revocation proceedings. Indeed, as the dis-

district court explained, “the postponement of both hearings, rather than prejudicing the defendant’s ability to mount his defense, actually operated to protect defendant from prejudice in state court.” DA159-60. Furthermore, the district court also properly rejected Jetter’s claim that the delay prevented him from presenting evidence and soliciting testimony that could have aided his defense. As the court noted, “by staying the federal case, the defendant had the opportunity to present this defense in state court where he faced these more serious charges.” DA160.

Finally, the district court properly rejected Jetter’s claim that the delay in the revocation proceedings prevented him from seeking bond. The court explained that Jetter was “primarily a state prisoner,” and that “[e]ven if the court were to revoke the federal detainer, he would not be released.” DA161. Noting that “Jetter was writted out to state custody in order to face the state robbery charges soon after the federal supervised release violation was served,” and that he was currently serving the 12-year term imposed for the Greenwich robbery, the court rejected Jetter’s claim that he had been in federal custody during the entirety of the relevant time period. Accordingly, the court properly concluded there was no prejudice shown by Jetter arising from his detention on the state and federal detainers.

Moreover, the fact that Jetter was detained pursuant to state warrants (as well as the federal warrant) precludes any finding that he suffered prejudice merely from his detention on the federal violation warrant. In other words, even if the court had dismissed the federal detainer, Jetter would still have been in custody on the state charges. Accordingly, Jetter cannot show that the custody alone caused him prejudice.

In this Court, in any event, Jetter's claim of prejudice is very limited. He does not repeat the prejudice arguments he raised in the district court. He does not, for example, argue that his detention, in and of itself, caused him prejudice. Nor does he argue that the delay prevented him from presenting evidence or soliciting testimony for his defense, or that the delay prevented him from seeking bond. In addition, Jetter does not argue prejudice from the loss of any opportunity to serve federal and state sentences concurrently.

The only prejudice Jetter identifies on appeal is the "unnecessary anxiety" he allegedly experienced while his federal proceedings were on hold. Def. Br. at 17. The only authority Jetter cites for the proposition that such anxiety is sufficient to give rise to a due process violation is *Barker v. Wingo*, 407 U.S. 514 (1972). A careful reading of *Barker*, however, does not help Jetter.

In *Barker*, the defendant argued that his right to a speedy trial was violated by the more-

than-five year delay between his arrest and trial. 407 U.S. at 516-19. To resolve this claim, the Supreme Court balanced four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. *Id.* at 530. With respect to the prejudice part of the equation, the Court explained that a defendant might face prejudice in the form of lengthy pre-trial detention, anxiety, or the impairment of his ability to present a defense. *Id.* at 532. Of these possible forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* Moreover, when the Court applied these factors to the case before it, the Court concluded "that prejudice was minimal." *Id.* at 534. Although the Court acknowledged that the defendant had lived "for over four years under a cloud of suspicion and anxiety," and was detained for 10 months of that period, the Court found no serious prejudice because the delay had not hampered the defendant's defense in any way. *Id.*

Assuming that the *Barker* Court's analysis of prejudice applies in this context, it does not help Jetter. Although the *Barker* defendant faced close to five years of "anxiety," the Court found that this was insufficient to establish any significant prejudice because the delay had not hampered his ability to present his defense. Accord-

ingly, the 28-month delay in this case—a delay that was less than half the length of the delay at issue in *Barker* and one that had no impact on Jetter’s ability to defend his case—almost certainly could not cause sufficient anxiety to warrant a finding that Jetter suffered prejudice.

This is especially true given the differences between *Barker* and this case. In particular, Jetter cannot claim to have experienced the kind of anxiety described in *Barker* because the defendant in that case was awaiting trial. When the *Barker* Court recognized that a lengthy delay between arraignment and trial can produce anxiety for the defendant, it described defendants who are either forced to remain incarcerated awaiting trial, or who are released pending trial but are nonetheless forced to live under a “cloud of anxiety, suspicion, and often hostility.” 407 U.S. at 532-33. But Jetter was not awaiting trial. He already stood convicted of armed bank robbery, and was serving a five-year term of supervised release as a result of that conviction. In addition, Jetter faced almost none of the factors that the *Barker* Court recognized as producing anxiety. He was held in both state and federal prison awaiting state robbery charges, and did not contest detention in federal court. Any loss of a job, disruption in family life, enforced idleness, or lack of recreational or rehabilitation programs that Jetter may have experienced were due to the state charges pending against him, and not

to the delay in his revocation proceedings. In short, because Jetter faced serious robbery charges in state court, any anxiety he suffered during this time period can hardly be attributed to the pending violation petition. Thus, Jetter cannot show that he suffered “anxiety” due to the delay sufficient to warrant a finding of prejudice.

Finally, to the extent that Jetter invokes *Barker* as a guide to evaluating claims of unconstitutional delay in criminal proceedings,³ then the rest of that case should apply as well. In particular, the *Barker* Court directed courts to consider three factors, in addition to prejudice, when evaluating a claim of unconstitutional delay in criminal proceedings. An analysis of those factors here does not help Jetter. As set forth above, Jetter suffered little, if any, prejudice from the delay. Moreover, the 28-month delay, while long, was not an “extraordinary” delay like the one at issue in *Barker*. This is especially true when the reason for the delay was to avoid prejudicing Jetter in the state court proceedings. Finally, although Jetter initially expressed an in-

³ The *Barker* Court, faced with a claim of a delayed trial, grounded its analysis in the Sixth Amendment’s Speedy Trial Clause. Although the context is somewhat analogous to the claim here (an alleged due process violation from a delayed revocation hearing), the government is aware of no cases from this Court applying *Barker* in this context.

terest in moving forward on the federal violation petition, after the court directed him to speak with his lawyer about that course of action, he never again requested a hearing during the pendency of the state court proceedings. In short, a balancing of the *Barker* factors leads to the conclusion that the delay in this case did not violate Jetter's rights.

In sum, Jetter cannot show that a delay in the revocation proceedings, permitting him to fully adjudicate his state criminal charges, was unreasonable. Nor can he show that he was prejudiced in any way as a result of the delay. To the contrary, the delay ensured that his state rights were protected, and that he was adjudicated of the far more serious state court charges without compromising his position there by proceeding first with the federal revocation proceedings.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 27, 2014

Respectfully submitted,

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A handwritten signature in black ink that reads "Alina Reynolds". The signature is written in a cursive, flowing style.

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,159 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in cursive script that reads "Alina Reynolds".

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

Addendum

**Federal Rule of Criminal Procedure 32.1.
Revoking or Modifying Probation or
Supervised Release**

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

United States Constitution, Amendment 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 offence 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.