

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ISABEL RICO,)
)
Petitioner,)
)
v.) No. 24-1056
)
UNITED STATES,)
)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 24-1056,
5 Rico versus United States.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONER

9 MR. UNIKOWSKY: Mr. Chief Justice, and
10 may it please the Court:

11 The question in this case is not
12 whether but instead how to hold people
13 accountable for absconding from supervised
14 release. The text and history of the
15 Sentencing Reform Act establish that Congress
16 intended for revocation, not fugitive tolling,
17 to be the means of addressing abscondment.

18 To begin with the text, the effect of
19 the government's position is that Ms. Rico was
20 subject to the conditions of supervised release
21 for a period exceeding the time specified in
22 her judgment, and there's no textual support
23 for that result.

24 The government claims that Ms. Rico
25 wasn't serving her sentence at all during the

1 period of the abscondment. But that argument
2 cannot be squared with the government's
3 simultaneous contention that Ms. Rico violated
4 the conditions of supervised release during
5 that period, warranting an increased sentence.

6 History supports Ms. Rico's position.
7 Contrary to the government's contention, there
8 is no common law tradition of fugitive tolling
9 for parole. Instead, fugitive tolling for
10 parole came to exist via a 1976 statute and a
11 1983 implementing regulation.

12 But, in the Sentencing Reform Act,
13 Congress prospectively repealed that statute
14 and enacted nothing in its stead for supervised
15 release, while leaving it intact for legacy
16 parole cases, and it remains intact today.

17 As a result, Congress has created a
18 two-track scheme, parole with fugitive tolling
19 and supervised release without it, and we ask
20 the Court to adhere to that dichotomy.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Well, Mr. Unikowsky,
23 the government seems to be arguing -- making a
24 simple point. How can it be considered
25 supervised release when this person -- the

1 absconder is not being supervised?

2 MR. UNIKOWSKY: Your Honor, I
3 completely understand the intuitive force of
4 the government's argument that the essence of
5 supervised release is being supervised, and if
6 a person absconds, they're just not being --
7 serving the sentence at all in the same way as
8 a prison escapee isn't serving the sentence at
9 all.

10 But, ultimately, although I understand
11 the intuitive force of that argument at first
12 blush, I don't think it carries the day because
13 the government has -- the government's argument
14 has a counterintuitive component of its own,
15 which is that it requires believing that not
16 only was Ms. Rico subject to the conditions of
17 supervised release during the entire
18 abscondment period, but she actually violated
19 those very conditions during that period,
20 warranting her increased sentence.

21 So it just seems to me almost
22 tautologically, if Ms. Rico violated the
23 conditions of supervised release, she must have
24 been serving the very sentence that imposed
25 those conditions of supervised release.

1 I -- I do understand the intuition
2 underlying the government's argument today that
3 it just doesn't really make sense that a person
4 should get credit when they've absconded. I --
5 I get that. But I think that one point that
6 really blunts the intuitive force of the
7 government's position is that both parties
8 agree that ultimately, the absconder should be
9 deprived of credit for the time spent
10 absconding. The sole question between the
11 parties today is very narrow. It's how that
12 deprivation of credit should be effectuated.

13 So the way we understand the
14 Sentencing Reform Act, if a warrant as --
15 issues based on the abscondment, as occurred in
16 this case, then, once the person is
17 apprehended, even after the term expires, the
18 person can be brought before the sentencing
19 court, and then the judge revokes supervised
20 release and strips the person of all credit for
21 time served during the abscondment period. So,
22 essentially, the judge, rather than stopping
23 the clock, the clock keeps going, and then the
24 clock is rewound back to the beginning.

25 JUSTICE JACKSON: But is it really a

1 credit system, Mr. Unikowsky? I guess I --
2 I'm -- I was a little confused by the
3 government's suggestion even in the beginning
4 of its brief that what's happening in the
5 supervised release world is that the court is
6 depriving the individual of credit for
7 supervised release.

8 My understanding is that even when
9 there's a revocation, the person is not being
10 deemed as given credit. In other words, when
11 supervised release is revoked and the court
12 sends a person back to prison and perhaps
13 imposes another period of supervised release,
14 they don't calculate how much supervised
15 release they're going to give based on how much
16 was already served. You know, you had a
17 three-year period, you absconded after one, so
18 now only two is available.

19 Really, credit doesn't seem like the
20 right framework to understand what's even
21 happening in supervised release.

22 MR. UNIKOWSKY: I agree with what you
23 said, Your Honor, 100 percent. At the
24 revocation hearing, whatever the person has
25 left to serve just sort of goes away and the

1 court imposes a whole new sentence of
2 imprisonment and an additional period of
3 supervised release based on the court's
4 assessment of the defendant at that time.

5 JUSTICE JACKSON: Of the needs, right?
6 I mean, isn't the whole -- the reason why
7 supervised release is sort of fundamentally
8 different than parole or -- or probation or
9 imprisonment is because it's not imposed for
10 punishment. It's supposed to be about helping
11 this person reintegrate into society, and the
12 amount of time that is necessary to do that is
13 evaluated based on who that person is and what
14 they've done but not based on how much time
15 they previously served in supervised release.

16 MR. UNIKOWSKY: Yes, that's correct.
17 So the government's suggestion in its brief
18 that because she absconded for 37 months, she
19 has 37 months left to go doesn't actually
20 capture what happened in this case because
21 those 37 just months went away. After the new
22 revocation hearing, the judge imposed whatever
23 sentence the judge felt was appropriate. The
24 effect of the question presented in this case
25 actually is to consider the time spent during

1 abscondment as still subject to the conditions
2 of supervised release, which allowed the
3 government to argue that a crime committed
4 during that period but after the term expired
5 was a violation of supervised release,
6 resulting in a heightened guidelines range.

7 JUSTICE ALITO: Mr. Unikowsky, you --
8 you said that the problem here results from the
9 Sentencing Reform Act. But I wonder -- and --
10 and I may be -- I may be misunderstanding
11 things, so you'll correct me -- if the problem
12 here is not entirely one created by the
13 Sentencing Guidelines.

14 Suppose the Sentencing Guidelines were
15 not in the picture. So your client absconds.
16 Therefore, she's violated the terms of
17 supervised release. Therefore, her -- her
18 supervised release is revoked. Then the judge
19 has to decide what to do: Send her back to
20 prison, impose a new -- excuse me, an
21 additional term of supervised release.

22 The statute set -- sets out the
23 factors that are relevant to that
24 consideration. We went through those factors
25 last term. And it doesn't seem to me that what

1 she did after the expiration of the 37 months
2 is any less relevant to those determinations
3 than what she did before the expiration of the
4 37 months.

5 So that becomes important, the -- the
6 37-month mark -- point becomes important only
7 because the guidelines grade -- assign a grade
8 to the nature of the offenses that occurred.

9 Am I right in all this?

10 MR. UNIKOWSKY: Yes, I agree with
11 everything you said, Your Honor. So we believe
12 that the sentencing court does have the
13 authority to consider the crimes she committed
14 after that time expired as part of the
15 discretionary decision as to what sentence she
16 should get after the resentencing. So I don't
17 disagree with anything that Your Honor has
18 said.

19 JUSTICE ALITO: So the only thing
20 that's really at stake here is whether the
21 court is going -- will consider whether to
22 depart upward from the range that results from
23 the -- from the grade of the violations that
24 occurred before the 37 months or considers
25 whether to depart downward from the grade that

1 would apply if the post-37-month violations
2 were occurred, right?

3 And the court -- all the court has to
4 do is to give respectful consideration to those
5 guidelines. That's really all that's involved
6 here. Am I right?

7 MR. UNIKOWSKY: On the facts of this
8 case, yes. There are other cases in which
9 fugitive tolling matters for other reasons,
10 but, on the facts of this case, you have
11 accurately characterized the dispute between
12 the parties.

13 JUSTICE GORSUCH: Mr. --

14 MR. UNIKOWSKY: There --

15 JUSTICE GORSUCH: Mr. -- I'm sorry.

16 MR. UNIKOWSKY: I'm sorry.

17 JUSTICE GORSUCH: Go ahead and finish.

18 MR. UNIKOWSKY: No.

19 JUSTICE GORSUCH: Are you done?

20 MR. UNIKOWSKY: Yes.

21 JUSTICE GORSUCH: All right. The
22 government worries that, okay, there is tolling
23 if you get a warrant within the period that's
24 still before -- before the clock runs, before
25 the 37 months is out. You effectively get

1 tolling under (i). But they worry that there
2 are going to be some cases where, as a
3 practical matter, they can't get a warrant in
4 time and the period will expire.

5 Do you have any thoughts or reactions
6 to that?

7 MR. UNIKOWSKY: Yes. I understand
8 that there is a concern that it may be that a
9 violation occurs at the very end of the term
10 and it goes undetected and the warrant doesn't
11 issue in time. But I think fugitive tolling is
12 both too broad and too narrow a solution to the
13 problem that you've identified.

14 So, first of all, I think it's too
15 narrow because that is a problem that can arise
16 with any violation late in the term:
17 committing a crime, possession of drugs,
18 anything else. And --

19 JUSTICE GORSUCH: You mean escape
20 detection, you're saying?

21 MR. UNIKOWSKY: Yes, any crime, any --
22 and, in fact, in some ways, abscondment is the
23 easiest type of violation to detect.

24 JUSTICE GORSUCH: To identify, yeah.

25 MR. UNIKOWSKY: Right, because, you

1 know, the absconder doesn't -- or the
2 supervisee doesn't answer his cell phone and so
3 the probation officer can get a warrant right
4 away. So, if we're concerned about the problem
5 of late-in-term violations, it seems odd to
6 focus only on the one type of violation that's
7 easiest to detect.

8 I also think fugitive tolling is too
9 broad because it applies to supervisees who
10 commit -- who abscond anytime in the term, and
11 it causes the conditions to essentially last
12 forever after the term until the person is
13 apprehended.

14 There's also an amicus brief by
15 NACDL --

16 JUSTICE GORSUCH: Yeah.

17 MR. UNIKOWSKY: -- which walks through
18 empirically that abscondments tend to occur
19 early in -- in the term, so I'm not sure the
20 concern the government identifies has a lot of
21 real-world force.

22 JUSTICE ALITO: What about the
23 situation where the person who's on supervised
24 release is imprisoned for a state offense, so
25 the -- the -- the supervised release term is

1 tolled during that period, and then, when the
2 person is released, the state authorities may
3 not notify the federal court that the person
4 has been released, so no warrant would issue?

5 MR. UNIKOWSKY: Right. So that is the
6 facts of the Swick case, which is currently
7 pending on certiorari to this Court. As far as
8 I know, that's the only time that's come up
9 since 1984. I've looked around, haven't found
10 any other cases with that fact pattern, so it's
11 an unusual case.

12 I think, ultimately, it's a good idea
13 for federal probation officers to maintain
14 contact with state authorities as to when the
15 person is released from state prison, but I
16 don't think that one singular, rather unusual
17 fact pattern is a basis to establish fugitive
18 tolling across the board for -- for all
19 supervisees.

20 I'd like to make a point if I may
21 about another reason that I think --

22 JUSTICE SOTOMAYOR: In the end --

23 MR. UNIKOWSKY: I'm sorry.

24 JUSTICE SOTOMAYOR: In -- in the end,
25 it really doesn't matter. If they commit a new

1 crime, they're subject to arrest and
2 prosecution for that new crime, correct?

3 MR. UNIKOWSKY: Yes. In this very
4 case, Ms. Rico was convicted of a drug offense
5 in state court and was sentenced to prison
6 time, so she was held accountable for that
7 action. And, as Justice Alito stated, that can
8 also be considered as part of the discretionary
9 revocation sentencing. It's only a very narrow
10 question of whether that offense increases her
11 guidelines range.

12 JUSTICE KAGAN: Mr. Unikowsky, it
13 seems that part of the dispute here between you
14 and the government has to do with what it means
15 to be on a term of supervised release, where
16 you say it means being subject to a certain set
17 of conditions, and the government says, well,
18 it means that, but it also means something
19 else. It means that you're being supervised,
20 that you're being monitored in some way,
21 where -- which does not happen when the person
22 has absconded.

23 So what do you -- what do you think of
24 that, that the idea of supervised release
25 contemplates a level of supervision above and

1 beyond the particular conditions of the term?

2 MR. UNIKOWSKY: I respectfully
3 disagree with the government's argument on that
4 score because I think it improperly decouples
5 the burdens imposed by the sentence with how to
6 determine whether the person is serving the
7 sentence.

8 Ordinarily, those two are flip sides
9 of the same coin. Like the government talks
10 about the prison case, so the burden imposed by
11 the sentence is you have to be in prison and
12 you determine if the person's satisfying the
13 sentence by checking if the person has been in
14 prison.

15 But, in this case, the burdens imposed
16 by the sentence are the conditions in the
17 judgment, but the government contends that one
18 determine if one satisfies the sentence based
19 on this concept of supervision which doesn't
20 correspond to any particular supervised release
21 condition, and, because of that decoupling, you
22 have the unusual fact pattern in this case
23 where the government contends that Ms. Rico
24 violated the conditions of supervised release
25 while not serving that sentence.

1 I think the Court should follow the --
2 the ordinary practice of saying that one
3 determines if one is serving the sentence by
4 looking at the binding effect of the sentence.

5 I would like to also talk about some
6 additional statutory clues that I think
7 militate in Ms. Rico's favor.

8 First, I think it's a -- it's a
9 relevant fact that there's no statutory
10 definition of abscondment, and I think it's --
11 and, in fact, that's a difficult concept to
12 define at the margins.

13 There's two amicus briefs, the NACDL
14 amicus brief and the NAFD amicus brief, that
15 talk in some detail about the difficulties
16 courts have had in deciding questions like when
17 a violation of supervised release rises to the
18 level of an abscondment and also when the clock
19 on the abscondment period starts.

20 And it does seem unlikely from our
21 perspective that Congress would have intended
22 the very basic question of when a supervised
23 release term ends to be governed by this
24 nebulous and nonstatutory abscondment standard
25 with judges essentially figuring out the answer

1 to these questions on -- on the fly without any
2 statutory anchor.

3 It just seems more likely from our
4 perspective that Congress intended the regime
5 to operate this way: the clock keeps going
6 unless it's tolled under the explicit language
7 of Section 3624 or until there's a revocation
8 hearing.

9 At that point, the judge can recognize
10 that it's necessary to turn the clock back to
11 the beginning to ensure the person actually
12 serves the full term of supervised release in
13 contact with the probation officer that the
14 court contemplated.

15 I'd like to say a few words about
16 history as well. I think the historical
17 evidence is quite strongly in our favor. The
18 government makes the point that there is a
19 strong historical tradition that when someone
20 escapes from prison, that stops the clock on
21 their sentence, and then the clock resumes when
22 they are returned to prison. I think that
23 makes sense. You know, 20 years in prison, you
24 have to actually be 20 years physically in
25 prison.

1 But I think that the historical
2 evidence really runs the other way in terms of
3 fugitive tolling. The federal parole statute
4 was first enacted in 1910, and then parole was
5 abolished prospectively in 1984, and neither we
6 nor the government can come up with any cases
7 ever in which the government's fugitive tolling
8 rule was applied, you know, in the manner the
9 government proposes today in which the
10 conditions of supervised release -- or, excuse
11 me, of parole extended after the scheduled
12 expiration of the term.

13 And it's not just the absence of
14 evidence of fugitive tolling. There's also
15 evidence of absence in the form of this 1983
16 regulation that we cite in the brief.

17 So that regulation said that,
18 prospectively, based on this 1976 statute,
19 there will be fugitive tolling in exactly -- of
20 exactly the same form that the government
21 advocates in -- in this case.

22 So, in a couple of ways, I think that
23 regulation rebuts the notion that there's a
24 tradition of fugitive tolling. One, it's
25 premised on this 1976 statute, not this

1 longstanding common law tradition; two, it's
2 prospective only, implying that the -- that the
3 rule didn't previously exist; and, second --
4 and, third, excuse me, it's not clear why the
5 Parole Commission would have enacted such a
6 rule if the tradition already existed in
7 advance. So I think that provides pretty
8 strong evidence that there just -- this just
9 wasn't a thing that parole boards were doing
10 until 1983.

11 And then, in the Sentencing Reform Act
12 in 1984, Congress repeals the statute on which
13 this provision was based, 4210(c). It enacts
14 no replacement provision. And, meanwhile,
15 Section 4210(c) is immediately adjacent to this
16 other statute, 4210(b), which enacts a version
17 of prisoner tolling, and Congress does reenact
18 that in the Sentencing Reform Act.

19 JUSTICE ALITO: Well, before the --
20 the abolition of parole with the Sentencing
21 Reform Act, there were no sentencing
22 guidelines. So it's not clear to me why it
23 would be relevant -- why a court would be
24 concerned about whether the -- the parolee
25 committed offenses during the period when the

1 parolee was supposed to be on parole after the
2 expiration of the parole term or not. The --
3 the parolee violates the terms of parole. When
4 the parolee is -- is apprehended, the court
5 would revoke parole and then decide what to do.

6 So why would it be relevant? Suppose
7 your client were on parole. Why would it be
8 relevant to determine whether the additional
9 things that she did while out on parole
10 occurred before or after the 37 months?

11 MR. UNIKOWSKY: I mean, the 1983
12 regulation explicitly says that if you commit
13 the violation after the schedule ending, it
14 will be considered a violation of parole. So,
15 you know, it's hard to reconstruct exactly what
16 they were thinking, but, presumably, it was
17 felt that this was important enough to encode
18 it in -- in a regulation. And so, you know,
19 Congress had that regulation on its desk. It
20 was enacted just a year before the Sentencing
21 Reform Act, and Congress eschewed it in the
22 Sentencing Reform Act.

23 So I just think that that's -- at
24 least some amount of historical consideration
25 is warranted here, especially since I think

1 what this case boils down to are these
2 competing intuitions. The government has this
3 intuition on its side of the house that it
4 doesn't make sense to say that a person who
5 isn't supervised is serving a sentence of
6 supervised release, and then we have the
7 intuition on our side of the house that it
8 doesn't make sense to say that someone could
9 have violated the conditions of supervised
10 release when they're not on supervised release.

11 And, ultimately, it's the Court's job
12 in this case to cut through that Gordian knot.
13 And I think, rather than kind of wrestling with
14 these competing intuitions, I think it's wise
15 to look at the historical tradition here, where
16 we see that this just wasn't happening through
17 the entire history of the parole statute, and
18 so the -- the proposition the government claims
19 in its brief is very obvious didn't occur to
20 the Parole Commission at the time, and so I
21 think the Court should carry that tradition
22 forward at least --

23 JUSTICE JACKSON: So how do you
24 respond to the -- the other point that the
25 government makes, the thrust of it being that

1 the court has ordered this person to serve a,
2 let's say, three-year period of supervised
3 release and they didn't do so? Why should they
4 get the benefit of running away or absconding
5 and not having to comply with the court's
6 order?

7 MR. UNIKOWSKY: Well, in some way,
8 they just shouldn't because, at the revocation
9 hearing, the judge is empowered to rewind the
10 clock and require the person to start all over
11 again. So we think there's an alignment
12 between how abscondment is handled in other
13 types of violations.

14 JUSTICE JACKSON: You mean there's
15 rev -- there's -- the -- the -- that you
16 envision Congress saying, for the absconder,
17 the revocation remedy is what we are imposing
18 here?

19 MR. UNIKOWSKY: That's exactly right.
20 And that's -- that's how it works with other
21 types of violations. Like, it's true that part
22 of the essence of supervised release is
23 supervision, but, I mean, part of the essence
24 of supervised release is also complying with
25 the law. And yet, if a person is in a

1 conspiracy, say, for one year during the
2 supervised release period, that's obviously
3 plainly contrary to the spirit and the letter
4 of supervised release.

5 But the government does not claim that
6 that stops the clock for the year. Instead,
7 what happens is a warrant issues, the person
8 comes to the sentencing court, and then
9 supervised release is revoked, the person goes
10 back to federal prison and then back on
11 supervised release. And so, effectively, the
12 person is stripped of credit for that year, but
13 it's done through the mechanism of revocation.

14 And all we're saying in this case is
15 that the same thing should happen to
16 abscondment, which, after all, is just a
17 different type of violation of the conditions
18 of supervised release.

19 JUSTICE SOTOMAYOR: Counsel, that
20 earlier case, Swift I think you said was the
21 name?

22 MR. UNIKOWSKY: Yes, Swick from the
23 Fifth Circuit, Your Honor.

24 JUSTICE SOTOMAYOR: I haven't read it,
25 so I don't know anything about it, but it's not

1 an issue of keeping in touch with the state
2 authorities. The warrant of absconding could
3 have been issued -- should have been issued at
4 the -- or a warrant should have issued the
5 moment they learned of the state law
6 conviction, correct?

7 MR. UNIKOWSKY: Yes. So that case
8 involved a very idiosyncratic fact pattern of a
9 person who served a federal prison sentence and
10 then served a state prison sentence for many
11 years and then was released and actually did
12 report to his state probation officer. And,
13 apparently, he didn't realize and the federal
14 government didn't realize that he also had to
15 simultaneously start this term of federal
16 supervised release. And, apparently, no one
17 from the federal --

18 JUSTICE SOTOMAYOR: Oh, that really is
19 idiosyncratic. Okay.

20 MR. UNIKOWSKY: So -- yeah. So there
21 haven't -- I mean, the -- that is just an
22 unusual case. It happens to be pending on
23 certiorari right now, but we haven't found any
24 cases like that since 1984 other than this one.
25 So, you know -- and the government cites other

1 exotic fact patterns where a warrant wouldn't
2 issue during the term, such as if there's an
3 administrative error in obtaining the
4 abscondment warrant. And, yes, theoretically,
5 that could happen, but, you know, it doesn't
6 happen very often. And in the ordinary case,
7 like this one, it's perfectly appropriate for
8 the probation officer to get a warrant.

9 JUSTICE SOTOMAYOR: In that Swift
10 case, you have to deal with the language of the
11 statute, which requires a warrant to have
12 issued before the expiration of the date.

13 MR. UNIKOWSKY: Exactly. But, in this
14 case, a warrant did issue --

15 JUSTICE SOTOMAYOR: Exactly.

16 MR. UNIKOWSKY: -- based on her
17 abscondment, and so we agree the sentencing
18 court absolutely had the jurisdiction after the
19 expiration --

20 JUSTICE SOTOMAYOR: All right. Thank
21 you, counsel.

22 MR. UNIKOWSKY: -- but -- okay. Yes,
23 Your Honor.

24 So let me just make one other point
25 about the structure of the statute that I think

1 supports our position that's rooted in Section
2 3583(i), the tolling provision we just talked
3 about.

4 So that's not only about abscondment,
5 but abscondment is one common scenario in which
6 that statute would arise because the statute
7 says that if a warrant issues during the term,
8 then the sentencing court retains jurisdiction
9 after the expiration of the term to revoke
10 supervised release.

11 So, ordinarily, you wouldn't have the
12 situation where the warrant issues during the
13 term but the hearing happens after the term
14 because the probation officer knows where the
15 supervisee lives, so, you know, the warrant can
16 be executed very swiftly.

17 But one situation in which it couldn't
18 be executed swiftly is when the person has
19 absconded, so the warrant issues during the
20 term, but they can't find the person until
21 after the term expires.

22 And yet, even in that context, the way
23 that Section 3583(i) is set up is it assumes
24 that the term is going to end, and then, after
25 the expiration of the term, there will be this

1 revocation hearing that rewinds the clock to
2 the beginning. And I do think that's
3 inconsistent with how the government is looking
4 at things, which is that the term never ends
5 once the abscondment occurs.

6 And so, you know, that's just an
7 additional piece of structural support in the
8 statute that I do think militates in favor of
9 our position.

10 If there's no further questions,
11 I'm --

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas, anything further?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice Kavanaugh, Jackson, are we
18 done here?

19 Thank you, counsel.

20 MR. UNIKOWSKY: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Handell.

22 ORAL ARGUMENT OF JOSHUA K. HANDELL

23 ON BEHALF OF THE RESPONDENT

24 MR. HANDELL: Mr. Chief Justice, and
25 may it please the Court:

1 A supervisee is not discharging her
2 term of supervised release while she is
3 absconding from supervision. That common-sense
4 intuition is consistent with the modern
5 statutory text, with this Court's precedents
6 interpreting it, and with the uniform
7 decisional law preceding it.

8 The supervised release statutes
9 require that a supervisee shall be supervised
10 by a probation officer following her release
11 from confinement, and they detail how that
12 active and ongoing supervision must proceed.
13 This Court has accordingly recognized that
14 supervised release is a system of both
15 post-confinement monitoring and
16 post-confinement assistance, neither of which
17 is possible when the supervisee's whereabouts
18 are unknown because she has absconded.

19 A fugitive who deliberately and
20 successfully evades supervision, depriving the
21 court of any information as to her conduct,
22 condition, and compliance, is not being
23 supervised in any sense that lawyers,
24 legislators, or laymen would understand that
25 word.

1 Petitioner's theory that she was
2 discharging the supervision component of her
3 judgment, despite being entirely unsupervised,
4 because her abscondment did not automatically
5 terminate her release conditions,
6 misunderstands the nature of supervised
7 release. To discharge her term of supervised
8 release, a supervisee must be both under the
9 supervision of a probation officer and subject
10 to release conditions.

11 But her defiance as to the former does
12 not relieve her obligations as to the latter.
13 Just as nothing in the supervised release
14 statutes authorizes a supervisee to earn credit
15 for time spent as an unsupervised fugitive,
16 nothing permits her by means of abscondment to
17 take a vacation from her court-ordered
18 conditions whenever they prove inconvenient.
19 Those two intuitive principles resolve this
20 case.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: You suggest that
23 without the tolling she would receive an
24 unwarranted benefit.

25 What exactly is that benefit?

1 MR. HANDELL: Yes. So I -- I think
2 there are a couple of possible benefits that a
3 supervisee would receive from -- from a period
4 of fugitivity if you did not apply the fugitive
5 tolling doctrine. So it does not apply to this
6 case, but the most obvious and most serious
7 benefit that a fugitive could receive would be
8 the ability to just run out the term of
9 supervised release while she is absconding.

10 JUSTICE THOMAS: So, in this case,
11 what is the benefit?

12 MR. HANDELL: So, in this case, the
13 benefit is essentially that she avoided the
14 post-confinement monitoring -- monitoring and
15 surveillance that --

16 JUSTICE THOMAS: So, if you have
17 revocation as a sanction for that, what is this
18 case about?

19 MR. HANDELL: Right. So -- so this
20 case -- as I believe Justice Alito pointed out,
21 this case really boils down to just a
22 disagreement about the sentencing guidelines.
23 And, candidly, especially given Petitioner's
24 concession that the -- the court at the
25 revocation hearing can consider the full range

1 of conduct postdating the abscondment, we don't
2 think that in the real world this is going to
3 shake out to that much of a difference when it
4 comes to the actual revocation sanction.

5 And I think we've said as --

6 JUSTICE GORSUCH: So, in the -- in the
7 real world --

8 MR. HANDELL: Oh, I'm sorry, Justice
9 Gorsuch.

10 JUSTICE GORSUCH: -- in the real
11 world --

12 MR. HANDELL: Yes.

13 JUSTICE GORSUCH: -- there is no
14 benefit unless she runs out the clock before
15 the government gets a warrant, I think. Is
16 that right?

17 MR. HANDELL: I -- I think that is the
18 situation that we are mostly concerned about,
19 yes.

20 JUSTICE GORSUCH: Okay. And if that's
21 the situation you're concerned about, it seems
22 to me that it's a very unlikely scenario to
23 arise except for, as Mr. Unikowsky says, if the
24 violation occurs at the very end of -- of the
25 supervised release period, it might escape

1 detection.

2 And, similarly, though, that's true
3 with anything a -- a -- a supervised release
4 individual might do. Any crime he or she might
5 commit might escape detection at the end of --
6 of that -- of the -- at the end of that period.

7 MR. HANDELL: So, respectfully,
8 Justice Gorsuch, I -- I disagree about the
9 likelihood of the 3583(i) mechanism failing.
10 So I think, as has been discussed, we have the
11 Swick case out of the Fifth Circuit, where a
12 defendant was serving a state term of
13 imprisonment and then did not report to her
14 federal probation officer as she was directed.

15 There's the Crane case out of the
16 Ninth Circuit, where a supervisee was in a
17 residential treatment program, left early, and
18 that was not reported to the probation officer.

19 JUSTICE GORSUCH: But it's also
20 possible a -- a -- a probation officer will
21 miss other crimes at the very end of a period,
22 right?

23 MR. HANDELL: Absolutely.

24 JUSTICE GORSUCH: Okay.

25 MR. HANDELL: These -- these were not

1 right at the end of the period, though. I
2 mean, this is -- you know, there are -- there
3 are several real-world --

4 JUSTICE GORSUCH: Well, if the
5 government has a problem getting warrants,
6 maybe the government ought to go to Congress
7 and ask for (i) to be amended, as it already
8 has once. Thoughts?

9 MR. HANDELL: Well -- well, Your
10 Honor, so, you know, I -- I know that the
11 government occasionally comes in here and
12 pleads, like, resource constraints and
13 administrability concerns.

14 JUSTICE GORSUCH: That's what this one
15 sounds like to me.

16 MR. HANDELL: Well, let -- let me just
17 say with all respect this process is completely
18 between the probation office and the
19 supervisee. The government does not get
20 involved until --

21 JUSTICE GORSUCH: Whoa, whoa, whoa,
22 whoa, whoa.

23 MR. HANDELL: -- the adjudication
24 stage.

25 JUSTICE GORSUCH: Hold on. The --

1 the -- the -- the probation officer isn't a
2 government employee?

3 MR. HANDELL: The -- the probation
4 officer is a -- a -- a -- a member of the
5 judicial branch, so --

6 JUSTICE GORSUCH: I understand that.
7 But you're -- you're pleading constraints for
8 the government in whatever form it may be.

9 MR. HANDELL: Sure.

10 JUSTICE GORSUCH: And I appreciate
11 those constraints. But the government's always
12 been able to go to Congress and, in fact, did
13 to amend (i) once already. Congress has proven
14 pretty solicitous in this area.

15 And the alternative is for us to
16 create a fugitive tolling doctrine pretty whole
17 cloth. And there appear to be at least two
18 circuit splits, one about what is required to
19 abscond, is it just not showing up or is it
20 actually being completely unavailable for
21 supervision, another circuit split over what --
22 what -- what it means to be an absconder. Is
23 it -- is it -- does it start when the status
24 arises, does it start later?

25 And so we're going to have to come up

1 with a whole common law doctrine here to
2 supplement what (i) already says. Thoughts
3 about that?

4 MR. HANDELL: Well, Justice Gorsuch,
5 I -- I disagree on the -- the circuit case law
6 on what constitutes abscondment. I think that
7 the courts of appeals that --

8 JUSTICE GORSUCH: I thought the
9 Ninth --

10 MR. HANDELL: -- have adopted our --

11 JUSTICE GORSUCH: -- I thought the
12 Ninth Circuit said it's merely failing to
13 appear, and the Fourth Circuit says you have to
14 act in a way that precludes the government from
15 supervising.

16 MR. HANDELL: So I think 20 years ago,
17 the Ninth Circuit had one case that said that
18 it could be any failure to appear or, like,
19 anything that violated a release condition.
20 Since then, they have clarified in Ignacio
21 Juarez that it is actually a pattern of conduct
22 that prevents supervision, that -- that
23 precludes supervision, and I think that is
24 fully consistent with what the Fifth Circuit
25 said in Swick and the Fourth Circuit --

1 JUSTICE SOTOMAYOR: That's one
2 court's --

3 MR. HANDELL: -- said in Thompson.

4 JUSTICE SOTOMAYOR: -- that's one
5 court's view. I think the point that Justice
6 Gorsuch is making is that we would have to
7 decide as a matter of common law which of those
8 approaches is right.

9 MR. HANDELL: Well, Justice Sotomayor,
10 the -- the only point that I'm making is that I
11 believe there is actually a consensus on what
12 constitutes abscondment in the courts of
13 appeals that have adopted our view of how this
14 statutory scheme works.

15 JUSTICE SOTOMAYOR: Counsel,
16 statutorily, supervised release can't go on for
17 more than five years. Under your theory of
18 this case, you're saying supervised release in
19 part continues during the time of abscondment
20 because they're subject to the terms of -- that
21 they violated, and yet it doesn't run out.

22 That's -- isn't that us by common law
23 extending a period of punishment?

24 MR. HANDELL: No, Your Honor. Our
25 view of --

1 JUSTICE SOTOMAYOR: Tell me how not.

2 MR. HANDELL: Well --

3 JUSTICE SOTOMAYOR: Meaning, if you
4 can -- if during the five years you violate
5 those terms, you're still under supervised
6 release terms. If you violate them, you're
7 claiming that violation subjects you to a new
8 warrant.

9 How are we not extending the period?

10 MR. HANDELL: So, Justice Sotomayor, a
11 term of supervised release requires that the
12 supervisee is both subject to --

13 JUSTICE SOTOMAYOR: It actually
14 does --

15 MR. HANDELL: -- those conditions
16 and --

17 JUSTICE SOTOMAYOR: It -- it -- in
18 fact -- in fact, it doesn't. The way the
19 statute is written, it's up to the sentencing
20 judge on whether actual supervision by the
21 probation department's necessary.

22 I grant you that I think in virtually
23 all cases, most judges require it, but it's not
24 legally required.

25 MR. HANDELL: Well, Your Honor, I -- I

1 think, if we read supervision out of supervised
2 release, that essentially renders 18 U.S.C.
3 3601 and 3603 a nullity.

4 JUSTICE SOTOMAYOR: The problem --
5 but -- but then what happens to the defendant
6 who is reporting every week, telling the --
7 doing what he or she is supposed to do in terms
8 of reporting to the agent but is out there
9 running a criminal enterprise every single day?
10 That person in my judgment is not being
11 adequately supervised. That person is
12 violating the essence of the supervision. And
13 yet you would claim he hasn't absconded.

14 MR. HANDELL: Yes. I -- that -- that
15 person is certainly violating his release
16 conditions. And I want to be very clear that
17 we do not view a --

18 JUSTICE SOTOMAYOR: But that person --
19 that person could be not evading the entire
20 spirit of supervised release, but that doesn't
21 subject them to an extended period of
22 supervised release, does it?

23 MR. HANDELL: Well, I -- I think the
24 distinction there is that if that person is
25 actually being supervised, if their whereabouts

1 are known to their probation officer, if they
2 are checking in with their probation officer as
3 required by the terms of their supervision,
4 then their violative conduct is much likelier
5 to actually be detected and to result in a
6 revocation hearing --

7 JUSTICE SOTOMAYOR: The problem is
8 that --

9 MR. HANDELL: -- and a new sanction.

10 JUSTICE SOTOMAYOR: The reality is
11 that it rarely is.

12 JUSTICE GORSUCH: I don't know. I
13 mean, failing to show up is a pretty obvious
14 way to detect a violation, it seems to me, more
15 so than a lot of other criminal enterprises
16 that might be going on. I dutifully show up,
17 but I'm running a, you know, Murder Mayhem Inc.
18 over here, you just don't find it. You know,
19 that's hard to find. You've got to go find
20 that.

21 Somebody doesn't show up, I notice.

22 MR. HANDELL: Yes, I mean, I -- I
23 agree with that, Justice Gorsuch, but I think
24 that, you know, not showing up to a meeting is
25 going to get you maybe a grade C violation at

1 the most. It probably in most instances will
2 not even be reported to the district court.

3 You know, if you are out there running
4 Murder Mayhem Inc. or -- or something like
5 that, I mean, that is obviously much more
6 serious, egregious misconduct that we think, if
7 you are actually checking in with your
8 probation officer, if your probation officer
9 knows where you live and where you work and is
10 able to conduct warrantless searches as is, you
11 know, one of the -- one of the standard
12 conditions of supervised release, that is much
13 likelier for the probation officer to actually
14 detect that misconduct, report it to the
15 district court, and for that to result in the
16 revocation of --

17 JUSTICE JACKSON: So, Mr. --

18 CHIEF JUSTICE ROBERTS: Counsel --

19 JUSTICE JACKSON: -- Mr. --

20 CHIEF JUSTICE ROBERTS: -- counsel,
21 you say, when she absconds, Ms. Rico's
22 supervision term doesn't run, but she's still
23 subject to the requirements and can violate
24 requirements such as that she has to report.

25 Now why isn't that just like a

1 prisoner who escapes and you would say, okay,
2 he's going to be -- not get the prison sentence
3 time during that period, but he also violated
4 the rule about prison inmates can only wear a
5 particular type of clothing? It seems to me
6 that is sort of a double -- double counting.

7 MR. HANDELL: Well, I -- I don't think
8 so, Mr. Chief Justice. I mean, I -- I would
9 point out that when prisoners escape, whether
10 it's from, you know, a physical BOP institution
11 or from one of these other forms of confinement
12 that BOP has developed, like home confinement,
13 furlough, a halfway house, something like that,
14 they can be -- obviously, at the moment of
15 their escape, the clock stops on service of
16 their term and they will have to fulfill the --
17 the -- the undischarged portion of the term
18 when they are recaptured.

19 But they can also face institutional
20 consequences for the -- the behavior that they
21 engage in when they are on escape status. I
22 think the --

23 JUSTICE JACKSON: But not on the --
24 not on the same --

25 JUSTICE BARRETT: Can I ask you --

1 JUSTICE JACKSON: Not for the same
2 reason. I mean, I think both Justice Sotomayor
3 and the Chief might be pointing out that what
4 you are suggesting is not really a tolling rule
5 because the traditional tolling is that the
6 clock stops with respect to the obligation when
7 you run away and it picks up again when you're
8 found again, and what happens in between you
9 can't be held liable for under that same
10 framework because the clock has stopped.

11 So it seems to me that what you're
12 actually asking for is an extension rule, one
13 that allows for the obligations to occur
14 throughout the whole period, even -- when --
15 when you're away, when you've absconded, you
16 say she's still held to account for what
17 happens in the context of supervised release.
18 So that means those conditions are extending,
19 not tolled, right?

20 MR. HANDELL: So, respectfully,
21 Justice Jackson, I -- I disagree with that
22 characterization of it as an extension rule. I
23 think that tolling in every circumstance is
24 about stopping the clock, but tolling has never
25 guaranteed --

1 JUSTICE JACKSON: But you're --

2 MR. HANDELL: -- an immediate --

3 JUSTICE JACKSON: -- you're not asking
4 for stopping the clock. That's my point.

5 You're -- you're saying the clock is still
6 going because that's what allows you to hold
7 her accountable for the things that happened
8 during the period when she's away.

9 MR. HANDELL: We're saying that the
10 clock stops on service of -- of the term. I'm
11 discharging the term of supervised release.
12 But tolling has never meant an immediate
13 cessation of any attendant disabilities or
14 restrictions that run with the sentence, right?

15 JUSTICE GORSUCH: Well, one --

16 MR. HANDELL: I mean, this is true --

17 JUSTICE GORSUCH: -- one big
18 difference is that, you know, your fugitive
19 prisoner from BOP on the lam, he might commit a
20 crime, and if he commits a crime, he's going to
21 get a jury and -- and a trial, whereas, if on
22 supervised release in the abscondment scenario,
23 your -- the government would assert the right
24 for a judge rather than a jury and under a
25 preponderance-of-the-evidence standard rather

1 than under a reasonable-doubt standard to
2 address any misconduct during that period,
3 correct?

4 MR. HANDELL: Not quite, Justice
5 Gorsuch. So I -- I think -- I mean, obviously,
6 you are correct that anytime someone commits a
7 new crime, if they are going to be tried for
8 that crime, they get a -- a jury and, you know,
9 all of the -- the attendant protections of the
10 Sixth and Seventh Amendments, but I think, with
11 the example of the BOP prisoner who's out on
12 the lam, to the extent we are applying BOP
13 institutional consequences for the behavior
14 that he's --

15 JUSTICE GORSUCH: But that -- that's
16 separate. I think the point is that's separate
17 from the tolling rule that we apply to
18 prisoners who are on the lam. That's separate.

19 MR. HANDELL: Well, I -- I think we --
20 we view it as, you know, there is the
21 tolling --

22 JUSTICE GORSUCH: Here, it's inherent
23 in the supervised release power you -- that you
24 say continues but doesn't continue.

25 MR. HANDELL: I -- I think it's the

1 same thing. I think we are -- we are tolling
2 the -- the service of the term, but there still
3 may be additional consequences that attach for
4 the behavior that occurs during that
5 abscondment period.

6 And -- I'm sorry, Justice Alito.

7 JUSTICE ALITO: Well, I was just going
8 to ask whether you think that -- that the
9 Petitioner's argument is inconsistent with or
10 at least in tension with our decision last term
11 in *Esteras*, which discussed the factors that
12 are relevant in deciding whether to revoke
13 supervised release and what to do if supervised
14 release is revoked.

15 Now I recognize the factors are
16 discretionary, but still, the -- the
17 Petitioner's argument is that what occurred
18 after the 37 months is off the table. And I
19 don't understand -- or is of lesser
20 significance, it can be taken into account only
21 through the mechanism of a departure.

22 But I don't see what -- why what --
23 what happened after 37 months is any less
24 relevant than what happened before 37 months.

25 MR. HANDELL: I agree, Justice Alito,

1 and I think that what this Court said in
2 Esteras is that courts at a supervised release
3 revocation hearing can and should take into
4 account all of the forward-looking interests
5 that -- that criminal sentences serve, which
6 includes deterrence, incapacitation, things
7 like that.

8 I think that giving supervised release
9 the effect that Congress wanted, meaning that
10 it is actually supervision, that it is the kind
11 of post-confinement monitoring and
12 post-confinement assistance that this Court
13 recognized in Cornell Johnson and Roy Lee
14 Johnson serves those interests that the Court
15 recognized in Esteras. And I -- I don't quite
16 understand -- I mean, I think there is
17 certainly some tension in the idea that a
18 person who violates their supervised release by
19 absconding is going to be subject to a sanction
20 derived from the full breadth of their conduct
21 post-abscondment but that the guidelines are
22 limited to just a -- a substance --

23 JUSTICE ALITO: Well, what that
24 suggests to me is that this is really -- that
25 tolling is a misnomer. If this were purely

1 tolling, by analogy to what -- to the fugitive
2 tolling rule, Petitioner would not have been on
3 supervised release at all during the whole
4 period -- during the whole period when she was
5 absconding but that she wouldn't be -- she
6 wouldn't be satisfying her term. She also
7 wouldn't be subject to the terms of supervised
8 release. But you don't want that rule.

9 So this doesn't seem to me to be
10 really about tolling at all. Neither party
11 really wants a pure tolling rule. It's about
12 what is relevant, what should inform the
13 decision about what should be done when there
14 is a revocation.

15 MR. HANDELL: So, Justice Alito, we --
16 we think that that is a -- a distant
17 second-best rule. We would prefer that rule to
18 a rule of no tolling at all because our -- as I
19 was discussing, I believe, with Justice Gorsuch
20 earlier, our primary concern here is the idea
21 that defendants will be able to abscond from
22 supervision, wait out the expiration date of
23 their term, and if a warrant or summons does
24 not issue under 3583(i), they will be able to
25 render the supervision component of their

1 judgment a nullity.

2 That is the worst outcome here. That
3 does not serve the -- the system that Congress
4 enacted in the Sentencing Reform Act.

5 JUSTICE JACKSON: But -- but isn't
6 that exactly what Congress wanted? I mean, the
7 reason why we have (i), I think, is because
8 Congress suggests that it's only in the
9 situation in which a warrant does issue under
10 those circumstances that the court's authority
11 can extend to allow for a revocation.

12 So I think what you're asking for
13 seems diametrically opposed to the policy
14 choice that Congress has made about the
15 circumstances under which the person can be
16 held accountable for something --

17 MR. HANDELL: So, Justice --

18 JUSTICE JACKSON: -- in this way.

19 MR. HANDELL: Oh, I'm sorry.

20 JUSTICE JACKSON: Yeah. Yeah.

21 MR. HANDELL: I -- I think I part ways
22 with you on the -- the history and purpose of
23 subsection (i), so I would point out, you know,
24 Petitioner puts a lot of marbles in the 3583(i)
25 bucket because that is essentially the only way

1 that she's able to get around this idea that
2 somebody could just wait out --

3 JUSTICE JACKSON: But that's because
4 that's what Congress says about when this can
5 be extended, when the power could be extended,
6 to hold her accountable.

7 MR. HANDELL: Well, I -- you know, I
8 would point out just as a matter of history
9 that subsection (i) was not enacted until a
10 decade after the Sentencing Reform Act. So, in
11 order to buy into her view, you have to accept
12 the idea that the Congress that enacted the
13 Sentencing Reform Act wanted supervisees to be
14 able to entirely defeat the supervision
15 component of their judgment through fugitivity
16 and waiting out the expiration date of the
17 sentence.

18 I don't think that that's a plausible
19 inference --

20 JUSTICE JACKSON: No, they -- what
21 they did was they -- but -- but what they did
22 was they put the burden on the government or
23 the probation office to alert the court and get
24 a warrant during the time when the person
25 absconds.

1 MR. HANDELL: But, Justice Jackson,
2 there was no 3583(i) at -- at that time. There
3 was no 3583(i). There was no warrant or
4 summons extension mechanism for the first 10
5 years that the Sentencing Reform Act was in
6 effect. That was not enacted until 1994.

7 JUSTICE JACKSON: And your conclusion
8 is then that we have to, now that 3583(i)
9 exists, interpret it consistent with the
10 preexisting state of affairs?

11 MR. HANDELL: Well, I have additional
12 reasons that I think --

13 JUSTICE JACKSON: Okay.

14 MR. HANDELL: -- 3583(i) is
15 insufficient, but I do think it's important
16 to -- to look at the history and think about
17 what the Congress that enacted the Sentencing
18 Reform Act was trying to do. And I think, you
19 know, if -- if Congress gave district courts,
20 for the first 10 years of the supervised
21 release system, gave district courts no tools
22 whatsoever to go after absconding supervisees
23 who are able to wait out the expiration date of
24 their term, I think that that is very strong
25 evidence that Congress anticipated that

1 traditional ideas of fugitive tolling would be
2 incorporated into the new supervised release
3 system that they were enacting.

4 But, in terms of, you know, what I
5 think 3583(i) was -- was going after, I mean,
6 as I think Petitioner acknowledged on page 6 of
7 her opening brief and as the Second Circuit
8 recognized in the Janvier case, this was really
9 about a very narrow subset of late-breaking
10 violations where there was not time left on the
11 clock for the district court to conduct the --
12 the revocation hearing required by Rule 32.1.

13 Every court to have passed on 3583(i)
14 has talked about this as being a -- a -- a
15 provision that is designed just for those very
16 late end-of-term violations. It is not a
17 general fugitive-tolling provision. It --

18 JUSTICE KAGAN: I guess, Mr. Handell,
19 though, the question to you is, in what
20 provision do you put your marbles? I mean, in
21 addition to 3583(i), Mr. Unikowsky would say
22 back to you, well, there is no fugitive-tolling
23 provision in this statute of the kind that the
24 government wants. There is a tolling provision
25 in the statute. It applies to prisoners. It

1 does not apply in this situation. And there is
2 in addition a fairly granular -- granular,
3 detailed instructions about what to do with a
4 person like the Petitioner here, in other
5 words, that there should be a revocation, there
6 should be a new sentence of imprisonment with a
7 term of supervised release attached to it.

8 So the statute offers a solution for
9 what to do with prisoners like Ms. Rico. So
10 where are we supposed to look in the statute
11 for your solution?

12 MR. HANDELL: Right. So I -- I think
13 there are a couple of analytical questions
14 baked into this case, and the first one is
15 just, are you serving a term of supervised
16 release when you're unsupervised? And if you
17 agree with us on that, that is just about, you
18 know, the basic fundamental essence of
19 supervised release looking at the full range of
20 statutes that Congress enacted here, 3601,
21 3603, 3624(e), and saying, yes, Congress
22 anticipated that when someone is sentenced to a
23 term of supervised release, they will actually
24 be supervised by a probation officer.

25 If you agree with us that you have to

1 actually be supervised to be discharging a term
2 of supervised release, then you've already
3 disagreed with Petitioner's position, and then
4 we just get to the -- the secondary question
5 of, okay, what do we do with these release
6 conditions after abscondment?

7 I'm happy to talk about that and why I
8 think that abscondment should not --

9 JUSTICE KAGAN: If I take your
10 argument, right, that suggests that the only
11 statutory provision you're pointing to is the
12 one that identifies the person who actually
13 does the supervision.

14 Is that correct?

15 MR. HANDELL: I -- I think 3601
16 imposes an obligation on a supervisee to be
17 supervised, and 3603 imposes an obligation on
18 the probation officer to supervise. I think
19 those work together, yes.

20 JUSTICE KAGAN: It's pretty
21 bare-bones, yeah?

22 MR. HANDELL: You know, respectfully,
23 I disagree with that characterization, Justice
24 Kagan. And, you -- you know, I think I will --
25 I will acknowledge that there is not an

1 explicit fugitive tolling provision in the
2 Sentencing Reform Act or any of the amendments
3 akin to the carceral tolling provision --

4 JUSTICE KAGAN: Nor is there a lot of
5 detail about what the supervision looks like.
6 So, to the extent that you're putting all your
7 marbles in this idea of supervision, I mean,
8 the statute basically says, go get supervised.

9 MR. HANDELL: I mean, I think 18
10 U.S.C. 3603 actually puts some meat on the
11 bones of what supervision should look like. I
12 grant that that is -- that that is oriented
13 toward probation officers rather than the --
14 the supervisee herself, but, you know, I think
15 that that tells us what Congress thought
16 supervision would look like in practice and
17 what kinds of requirements for monitoring,
18 reporting assistance Congress was trying to
19 bake into this system.

20 JUSTICE KAGAN: Thank you.

21 MR. HANDELL: Yeah. Just -- just to
22 get to the 3624(e) carceral tolling provision,
23 I think, as we pointed out in our brief,
24 Congress had a very good reason for explicitly
25 addressing that, and it's because there was a

1 disagreement in the case law as to whether you
 2 would toll for terms of incarceration that
 3 arose during a period of supervision but were
 4 based on conduct that predated the -- the term
 5 of supervision. So they couldn't quite be
 6 tethered to a violation of supervision in the
 7 way that, you know, this Court treated --
 8 treated the interruption in Anderson versus
 9 Corall and Zerbst versus Kidwell.

10 Congress resolved that judicial
 11 disagreement in favor of more tolling. I don't
 12 think that that tells us much of anything
 13 about, you know, what they thought about
 14 fugitive tolling. Certainly, it doesn't
 15 foreclose the existence of fugitive tolling in
 16 the Sentencing Reform Act.

17 JUSTICE JACKSON: Can I just ask you
 18 one quick question about your supervision
 19 issue?

20 Suppose we have a defendant who's in a
 21 coma. Are they being supervised? Is
 22 abscondment the only thing that triggers your
 23 argument that the person is not being
 24 supervised?

25 MR. HANDELL: Right. So I -- I think

1 there are, you know, any number of situations
2 we could imagine -- a comatose supervisee, you
3 know, a -- a lazy or incompetent probation
4 officer, anything like this -- where
5 supervision is not occurring in the way that
6 Congress envisioned it.

7 JUSTICE JACKSON: And that in your
8 view would -- would -- would warrant an -- an
9 extension of the supervised release provision?

10 MR. HANDELL: No, Your Honor.

11 JUSTICE JACKSON: No?

12 MR. HANDELL: And this -- this is
13 because of, you know, I do think -- I think the
14 text gets us, like, 98 percent of the way. It
15 gets us to the two yard line in terms of what
16 counts as supervision or not. And then the
17 last -- the last couple of yards have to
18 incorporate background principles from the --
19 the preexisting case law.

20 And, there, I think you would look at,
21 you know, against whom do we tax this failure
22 of supervision. We recognize that this is not
23 the system operating as Congress designed it.
24 Maybe the probation officer is not meeting
25 the -- the duties imposed on him in 3603.

1 Maybe the supervisee is not doing what, you
2 know, she's technically required to do under
3 the terms of the judgment. But how do we tax
4 that failure?

5 And I think that the -- the lower
6 courts that have adopted our view of this
7 statutory scheme have gotten it right when
8 they've said that a supervisee absconds, that a
9 supervisee is tolled for her undischarged term
10 of supervised release when she deliberately
11 renders supervision impossible.

12 You -- you would not be able to
13 satisfy the mens rea requirement as to a -- a
14 comatose supervisee or as to any situation in
15 which the probation officer, rather than the
16 supervisee, was at fault for the lack of
17 supervision.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Anything further? No?

22 Thank you.

23 MR. HANDELL: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Unikowsky,
25 rebuttal?

1 REBUTTAL ARGUMENT ADAM G. UNIKOWSKY

2 ON BEHALF OF THE PETITIONER

3 MR. UNIKOWSKY: Thank you, Mr. Chief
4 Justice.

5 I first want to address Justice
6 Alito's question about the possibility of true
7 tolling under which, during the abscondment
8 period, the person wouldn't be subject to the
9 conditions at all.

10 First of all, if that were the rule,
11 then Ms. Rico would prevail in this case
12 because the government hinge -- the
13 government's case hinges on Ms. Rico having
14 violated the conditions of supervised release
15 during that period.

16 But, second, we respectfully disagree
17 with that rule as inconsistent with the
18 judgment. The judgment does say that when the
19 sentence expires, Ms. Rico will be subject to X
20 number of months of supervised release.

21 So I think what that means is that
22 when Ms. Rico is released from prison, she
23 serves X number of months of supervised
24 release, and that doesn't stop because Ms. Rico
25 makes the unilateral decision to abscond.

1 I'd like to talk about Section
2 3583(i). As counsel mentioned, that statute
3 was enacted in 1994, and the reason it was
4 enacted is that there were administration
5 problems prior to the enactment of that
6 statute. Several courts invented these
7 judge-made rules to try to get around them.

8 Finally, Congress solved the problem
9 with Section 3583(i), but I think it's notable
10 that Congress enacted the statute with very
11 reticulated language that self-consciously
12 departed from the parole equivalent, Section
13 4210(c). It specifically required that the
14 warrant issue during the term and only then was
15 jurisdiction extended until after the term.

16 So that would have been a perfect
17 opportunity for Congress to enact the same type
18 of fugitive tolling rule that already existed
19 for parole. Congress's decision not to do that
20 I do think sheds light on the question
21 presented here.

22 I want to say a word about Section
23 3601, the statute that says that the supervisee
24 shall be supervised, which counsel
25 characterized as getting the government

1 98 percent there to the two yard line.

2 I don't think that statute's very
3 helpful to the government. All it says is that
4 the person shall be supervised. Moreover,
5 that's just a prefatory provision in a portion
6 of the U.S. Code addressing the duties of
7 probation officers. That appears in
8 Section 3601. The next section is about how
9 probation officers are appointed. And then the
10 next section after that concerns the duties of
11 probation officers.

12 So I think it's hard to read that as
13 recognizing a fugitive tolling doctrine. It
14 says nothing about tolling, nothing about
15 extending the sentencing court's jurisdiction,
16 nothing about stripping people of credit, and
17 those are all topics that are addressed in
18 other portions of the Sentencing Reform Act
19 that do not enact the government's proposed
20 rule.

21 Ultimately, this case boils down to
22 the proposition that there's just no statutory
23 support for the government's claim that
24 Ms. Rico could have been simultaneously on
25 supervised release for purposes of finding a

1 violation of the conditions but off supervised
2 release for purposes of determining whether she
3 was serving her sentence.

4 Because there's no textual support for
5 fugitive tolling, we would ask the Court to
6 reverse the judgment below.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:01 a.m., the case
12 was submitted.)

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<p>1</p> <p>10 [2] 51:4,20 10:06 [1] 3:2 100 [1] 7:23 18 [2] 39:2 55:9 1910 [1] 19:4 1976 [3] 4:10 19:18,25 1983 [4] 4:11 19:15 20:10 21:11 1984 [4] 14:9 19:5 20:12 25:24 1994 [2] 51:6 60:3</p> <hr/> <p>2</p> <p>20 [3] 18:23,24 36:16 24-1056 [1] 3:4 28 [1] 2:7</p> <hr/> <p>3</p> <p>3 [1] 2:4 32.1 [1] 52:12 3583(i) [14] 27:2,23 33:9 48:24 49:24 51:2,3,8,14 52:5,13,21 60:2,9 3601 [5] 39:3 53:20 54:15 60:23 61:8 3603 [5] 39:3 53:21 54:17 55:10 57:25 3624 [1] 18:7 3624(e) [2] 53:21 55:22 37 [11] 8:18,19,21 10:1,4,24 11:25 21:10 46:18,23,24 37-month [1] 10:6</p> <hr/> <p>4</p> <p>4210(b) [1] 20:16 4210(c) [3] 20:13,15 60:13</p> <hr/> <p>5</p> <p>59 [1] 2:10</p> <hr/> <p>6</p> <p>6 [1] 52:6</p> <hr/> <p>9</p> <p>98 [2] 57:14 61:1</p> <hr/> <p>A</p>	<p>a.m [1] 3:2 ability [1] 31:8 able [8] 35:12 41:10 48:21,24 50:1,14 51:23 58:12 abolished [1] 19:5 abolition [1] 20:20 above [1] 15:25 abscond [4] 13:10 35:19 48:21 59:25 absconded [8] 6:4 7:17 8:18 15:22 27:19 29:18 39:13 43:15 absconder [5] 5:1 6:8 13:1 23:16 35:22 absconding [9] 3:13 6:10 23:4 25:2 29:3 31:9 47:19 48:5 51:22 abscondment [30] 3:17 4:1 5:18 6:15,21 9:1 12:22 17:10,18,19,24 23:12 24:16 26:4,17 27:4,5 28:5 30:4,16 32:1 36:6 37:12,19 44:22 46:5 54:6,8 56:22 59:7 abscondments [1] 13:18 absconds [5] 5:6 9:15 41:21 50:25 58:8 absence [2] 19:13,15 absolutely [2] 26:18 33:23 accept [1] 50:11 accordingly [1] 29:13 account [3] 43:16 46:20 47:4 accountable [5] 3:13 15:6 44:7 49:16 50:6 accurately [1] 11:11 acknowledge [1] 54:25 acknowledged [1] 52:6 across [1] 14:18 act [18] 3:15 4:12 6:14 9:9 20:11,18,21 21:21,22 36:14 49:4 50:10,13 51:5,18 55:2 56:16 61:18 action [1] 15:7 active [1] 29:12 actual [2] 32:4 38:20 actually [20] 5:18 8:19,25</p>	<p>18:11,24 25:11 35:20 36:21 37:11 38:13 39:25 40:5 41:7,13 43:12 47:10 53:23 54:1,12 55:10 adam [4] 2:3,9 3:7 59:1 addition [2] 52:21 53:2 additional [7] 8:2 9:21 17:6 21:8 28:7 46:3 51:11 address [2] 45:2 59:5 addressed [1] 61:17 addressing [3] 3:17 55:25 61:6 adequately [1] 39:11 adhere [1] 4:20 adjacent [1] 20:15 adjudication [1] 34:23 administrability [1] 34:13 administration [1] 60:4 administrative [1] 26:3 adopted [3] 36:10 37:13 58:6 advance [1] 20:7 advocates [1] 19:21 affairs [1] 51:10 agent [1] 39:8 ago [1] 36:16 agree [8] 6:8 7:22 10:10 26:17 40:23 46:25 53:17,25 ahead [1] 11:17 akin [1] 55:3 alert [1] 50:23 alignment [1] 23:11 alito [12] 9:7 10:19 13:22 15:7 20:19 28:14 31:20 46:6,7,25 47:23 48:15 alito's [1] 59:6 allow [1] 49:11 allowed [1] 9:2 allows [2] 43:13 44:6 almost [1] 5:21 already [7] 7:16 20:6 34:7 35:13 36:2 54:2 60:18 alternative [1] 35:15 although [1] 5:10 amend [1] 35:13 amended [1] 34:7</p>	<p>amendments [2] 45:10 55:2 amicus [4] 13:14 17:13,14,14 amount [2] 8:12 21:24 analogy [1] 48:1 analytical [1] 53:13 anchor [1] 18:2 anderson [1] 56:8 another [3] 7:13 14:21 35:21 answer [2] 13:2 17:25 anticipated [2] 51:25 53:22 anytime [2] 13:10 45:6 apparently [2] 25:13,16 appeals [2] 36:7 37:13 appear [3] 35:17 36:13,18 appears [1] 61:7 applied [1] 19:8 applies [2] 13:9 52:25 apply [5] 11:1 31:4,5 45:17 53:1 applying [1] 45:12 appointed [1] 61:9 appreciate [1] 35:10 apprehended [3] 6:17 13:13 21:4 approaches [1] 37:8 appropriate [2] 8:23 26:7 area [1] 35:14 argue [1] 9:3 arguing [1] 4:23 argument [17] 2:2,5,8 3:4,7 4:1 5:4,11,13 6:2 16:3 28:22 46:9,17 54:10 56:23 59:1 arise [3] 12:15 27:6 32:23 arises [1] 35:24 arose [1] 56:3 around [3] 14:9 50:1 60:7 arrest [1] 15:1 assert [1] 44:23 assessment [1] 8:4 assign [1] 10:7 assistance [3] 29:16 47:12 55:18</p>
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