No. _____

In the
Supreme Court of the United States

_____

BRANDON MAURICE SHANNON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Should this Court grant *certiorari*, vacate the judgment, and remand in light of *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (June 18, 2018), an authority that post-dated the opinion below?

PARTIES TO THE PROCEEDING

Petitioner is Brandon Maurice Shannon, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Maurice Shannon respectfully seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's sentencing decision was documented in a written judgment, reprinted as Appendix A. The opinion of the court of appeals was unreported, and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES, RULES, AND GUIDELINES INVOLVED

18 U.S.C. §3553(a) provides, in pertinent part:

> (a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. §3583(e) provides, in relevant part:

> (e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]--
>
> ***
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

18 U.S.C. §3742 provides, in relevant part:

> (a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence–
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18

USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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(e) Consideration. Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c) [18 USCS § 3553(c)];

(B) the sentence departs from the applicable guideline range based on a factor that–

(i) does not advance the objectives set forth in section 3553(a)(2) [18 USCS § 3553(a)(2)]; or

(ii) is not authorized under section 3553(b) [18 USCS § 3553(b)]; or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title [18 USCS § 3553(a)] and the reasons for the imposition of the particular

> sentence, as stated by the district court pursuant to the provisions of section 3553(c) [18 USCS § 3553(c)]; or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition. If the court of appeals determines that–

> (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> (2) the sentene is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and–
>
> > (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

> (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
>
> (3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

Federal Rule of Criminal Procedure 52(b) provides:

> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

United States Sentencing Guideline 4A1.2 provides in relevant part:

> (k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release
>
> (1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable.
>
> (2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see § 4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see § 4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see § 4A1.2(d)(2)(B) and (e)(2)).
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Application Notes:

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11. Revocations to be Considered. Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under § 4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. Example: A defendant was serving two probationary sentences, each counted separately under § 4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under § 4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under § 4A1.1(c) (for the other probationary sentence).

Guideline Policy Statement 7B1.4 provides in relevant part:

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

	Criminal History Category*					
Grade of Violation	I	II	III	IV	V	VI

Grade C		3-9	4-10	5-11	6-12	7-13	8-14
Grade B		4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1)	Except as provided in subdivision (2) below:					
		12-18	15-21	18-24	24-30	30-37	33-41

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:

24-30 27-33 30-37 37-46 46-57 51-63.

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Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (See the criminal history provisions of §§4A1.1-4B1.4.)

STATEMENT OF THE CASE

1. Proceedings in the trial court

In August of 2011, Petitioner Brandon Maurice Shannon illegally possessed a firearm. *See* (ROA.70-71).[1] He received a sentence of 46 months and a term of supervised release. *See* (ROA.76).

Prior to that sentencing, Probation prepared a Presentence Report (PSR) identifying a Guideline range of 37-46 months. *See* (ROA.76). That range flowed from Probation's belief that the defendant's criminal history score was 6, and that his criminal history category was III. *See* (ROA.178, 181). The PSR noted three convictions – two of these convictions, a burglary and a drug possession offense – involved the revocation of probation on the same day (August 30, 2007). *See* (ROA.177).

When a defendant suffers a single revocation on multiple underlying sentences of probation, USSG §4A1.1 says that any resulting imprisonment should be used to add criminal history points to only ***one*** of those sentences. *See* USSG §4A1.1, comment. (n. 11). Probation, however, used the revocation undertake August 30, 2007 to add points to ***both*** the burglary and the drug possession sentences. *See* (ROA.177-178). The result is that Petitioner received two criminal history points on the drug possession sentence, when he should have received just one point. *See* (ROA.177-178). His Guideline range was thus increased to 37-46 months imprisonment, when it should have been 30-37 months imprisonment. *See* (ROA.178, 181); USSG Ch. 5A.

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[1] Record citations are included in hopes they are of use to the government in answering the Petition or to the Court in evaluating it.

After the term of imprisonment for the federal firearm offense expired, Petitioner's supervised release was revoked. *See* (ROA.96-97). He received an 18 month term of imprisonment and another term of supervised release. *See* (ROA.96-97).

After his release from that term of imprisonment, Petitioner used drugs again. *See* (ROA.143-153). At the revocation hearing, the court found that the recommended term of imprisonment under Chapter 7 of the Sentencing Guidelines was 6-12 months. *See* (ROA.155-156). It reached this conclusion based on a violation grade of C, and a criminal history category of IV, which had been determined in the original proceeding. *See* (ROA.155-156, 178, 181). It imposed 18 months imprisonment. *See* (ROA.156).

2. The appeal

Petitioner appealed, contending that the initial error in the criminal history calculation led to a sentence of imprisonment on revocation that was both procedurally and substantively unreasonable. The court of appeals rejected both claims, noting with respect to the procedural claim that "[a] defendant may not challenge the calculation of his criminal history score for the first time in an appeal from a sentence imposed on the revocation of supervised release." [Appx. B, at p.3](citing *United States v. Hinson*, 429 F.3d 114, 116 (5th Cir. 2005)). It thus concluded that uncorrected – and unnoticed – error in the defendant's initial criminal history calculation does not state a cognizable claim of procedural unreasonableness in a subsequent revocation.

This Court's opinion in *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (June 18, 2018), followed that opinion by more than a month, well after the expiration of any deadline for a Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

I. This Court should grant *certiorari*, vacate the judgment, and remand in light of *Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897 (June 18, 2018), an authority that post-dated the opinion below.

Policy Statement 7B1.4 of the Federal Sentencing Guidelines provides a recommended term of imprisonment when the defendant suffers revocation of the term of his supervised release. *See* USSG §7B1.4(a). These recommended sentences depend on the severity of the defendant's violation of the terms of release, and on his or her criminal history category at the time of the initial sentencing. *See* USSG §7B1.4(a); USSG §7B1.4, comment. (n. 1). Below, Petitioner argued that a district court must be aware of any errors made in the initial criminal history calculation in order to impose a procedurally reasonable revocation sentence. The court of appeals rejected that proposition. [Appx. B, at p.3].

That conclusion is difficult to square with the values and reasoning expressed in this Court's recent decision in *Rosales-Mireles v. United States*, __U.S.__,138 S.Ct. 1897 (June 18, 2018). *Rosales-Mireles* addressed the correction of unpreserved Guideline errors. *Rosales-Mireles*, 138 S.Ct. at 1903. Such errors may be corrected only upon a showing of plain error, that affects the defendant's substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). *Rosales-Mireles* dealt in particular with the last part of this test: whether an error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Rosales-Mireles*, 138 S.Ct. at 1903.

This Court held that "such an error will in the ordinary case ... seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief."

Id. *En route* to that conclusion, it stressed that in a fair judicial system, and in one perceived as fair, courts must generally be willing to correct their own known sentencing errors:

> The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error. Unlike "case[s] where trial strategies, in retrospect, might be criticized for leading to a harsher sentence," Guidelines miscalculations ultimately result from judicial error. *Glover* (*v. United States*), 531 U.S. [198,] 204 [(2001)]; *see also Peugh* (*v. United States*), 569 U.S.[530,] 537 [(2013)]. That was especially so here where the District Court's error in imposing Rosales–Mireles' sentence was based on a mistake made in the presentence investigation report by the Probation Office, which works on behalf of the District Court.
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>
> In broad strokes, the public legitimacy of our justice system relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215–216 (2012). In considering claims like Rosales–Mireles', then, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *United States v. Sabillon–Umana*, 772 F.3d 1328, 1333–1334 (C.A.10 2014) (Gorsuch, J.). In the context of a plain Guidelines error that affects substantial rights, that diminished view of the proceedings ordinarily will satisfy Olano 's fourth prong, as it does in this case.

Id. at 1908-1909.

This reasoning is difficult to square with the decision below. The court below held that a sentencing court need not correct errors in the initial criminal history calculation when imposing a revocation sentence. [Appx. B, at p.3]. Indeed, it held that the sentencing court should ***compound*** those errors, using them to extend not merely the sentence imposed in the original proceedings, but the revocation sentence as well. [Appx. B, at p.3].

This Court "regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision "reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence*, 516 U.S. at 167. *Rosales-Mireles* meets this standard. It recognizes that it corrodes the fairness of judicial proceedings, real and perceived, to allow a known sentencing error to go uncorrected. The court below should have the benefit of this opinion when deciding whether an error in the initial criminal history calculation states a cognizable claim of procedural unreasonableness.

If the court recognizes that unrecognized – and uncorrected – errors in the initial criminal history calculation state a cognizable claim of procedural unreasonableness, the outcome is likely below to be different. There was a plain error of this type here. Here, the initial sentencing determined that the criminal history category was IV, due to Petitioner's criminal history score of 7. *See* (ROA.177-178). This produced a recommended range of 6-12 months imprisonment on revocation. *See* (ROA.155-156). Had Petitioner received one fewer points in his criminal history score, he would have been in criminal history category III, *see* USSG Ch. 5A, and his recommended range at revocation would have been 5-11 months imprisonment, *see* USSG §7B1.4.

In fact, Petitioner's criminal history score should have been 6 at the original sentencing, and his category should have been III. Petitioner received three criminal history points for a burglary sentence. *See* (ROA.177). In that case, Petitioner was originally sentenced to probation, but revoked on August 30, 2007, at which time he was sentenced to four years imprisonment. *See* (ROA.177). Petitioner also received two points for a drug possession offense. *See* (ROA.177-178). In that case, too, he originally received probation, but then suffered revocation on August 30, 2007. *See* (ROA.177-178).

When the defendant suffers a revocation on multiple underlying sentences, the revocation sentence should be used to add criminal history points to only one of those cases. *See* USSG §4A1.1, comment. (n. 11)("Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points."). Thus, Petitioner should have received three points for his burglary sentence, but only point for his drug possession offense. This would have resulted in a criminal history score of 6, a criminal history category of III, and (given a grade C violation of the terms of release) a recommended range of 5-11 months imprisonment in the instant proceeding. *See* (ROA.178); USSG Ch. 5A; USSG §7B1.4.

Below, the government argued that the district court did not actually or plainly err in the initial criminal history calculation. It argued that a court may add simultaneous revocations to multiple sentences if the prior sentences upon revocation are of varying length. This, however, is not the majority position of the courts of appeals who have addressed the question on plenary review. *See United States v. Streat*, 22 F.3d 109, 110-12 (6th Cir. 1994);

United States v. Flores, 93 F.3d 587, 591-92 (9th Cir. 1996); *but see United States v. Norris*, 319 F.3d 1278, 1286-87 (10th Cir. 2003), *limited on other grounds by United States v. Hill*, 539 F.3d 1213, 1219 (10th Cir. 2008); *United States v. Trejo-Montoya*, 677 F. App'x 162, 163 (5th Cir. 2017)(unpublished)(plain error).

And it is difficult to fathom the policy rationale for such a position. A defendant who commits but one probationary infraction may receive revocation sentences of varying lengths, if his or her underlying sentences bring him or her before judges with different approaches to sentencing. The fact that those judges decided on a different revocation sentence does not make his or her infraction more severe. Indeed, by the government's position, a defendant who suffers two revocations of different length would be treated more harshly than one who receives two revocations at the higher length. This would provide more serious punishment to defendants with less serious records.

In any case, the court of appeals did not embrace the government's argument. It may consider the question on remand. *Rosales-Mireles* shows that Petitioner stated a cognizable claim of procedural unreasonableness, and this should be enough to gain a remand.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted this 9th day of August, 2018,

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