

No.

In the
Supreme Court of the United States

RAFAEL TANCO-PIZARRO,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

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QUESTIONS PRESENTED

- I. Whether the punishment factor of the federal sentencing statute, Title 18 U.S.C §3553(a)(2)(A), is a permissible or prohibited factor in sentencing a revocation defendant under the statute governing Revocations of Supervised Release, Title 18 USC § 3583(e).

- II. Whether the Due Process Clause of the United States Constitution requires a revocation defendant be granted an opportunity to request discovery, and be granted sufficient time to receive and review discovery, before the Title 18 USC § 3583(e) Supervised Release Revocation Hearing.

PARTIES TO THE PROCEEDING

The parties to the proceeding below in the United States Court of Appeals for the First Circuit were Rafael Tanco-Pizarro and the United States identified in the caption above, and have been the parties throughout.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

.... Petitioner Rafael Tanco-Pizarro respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered in the matter of *United States v. Rafael Tanco-Pizarro*, USCA, 1st Cir. Case, 15-2388 entered on June 13, 2018.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the First Circuit, affirming Petitioner's Supervised Release Revocation Judgment, docketed below as *United States v. Rafael Tanco-Pizarro*, United States Court of Appeals for the First Circuit, Case No. 15-2388, is attached hereto as Appendix A (at A 1-25). The Revocation Judgment of the United States District Court for the District of Puerto Rico, imposing sentence on Mr. Tanco-Pizarro in the matter of *United States v. Rafael Tanco-Pizarro*, Case No. 3:06-cr-00257-008 (PG)¹, is attached hereto as Appendix B (at A 27-28).

JURISDICTION

The Court of Appeals for the First Circuit entered its decision on June 13, 2018. The Petitioner seeks review of the decision of the First Circuit Court of Appeals which upheld the Supervised Release Revocation Judgment of the United

¹ Hon. Juan M. Perez-Gimenez, United States District Judge, presiding.

States District Court for the District of Puerto Rico. This Court has jurisdiction to consider this petition and this matter pursuant to Title 28 U.S.C. § 1254(1).

No notice is required pursuant to Supreme Court Rule 29.4(b) or (c), as the United States has been a party throughout.

CONSTITUTIONAL, STATUTORY AND SENTENCING GUIDELINE PROVISIONS, AND COURT RULES INVOLVED

A. Question One: Statutory Limitations on Sentencing

The relevant statutory provisions involved in this case are Title 18 U.S.C. §3583(e) (Revocation of Supervised Release), Title 18 U.S.C. §3553(a) (Imposition of a Sentence in Criminal Cases); and Title 18 U.S.C. §3565(a) (Revocation of Probation).

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

§3583(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) -

...

...

(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;

...

....

Title 18 U.S.C. §3553(a) provides in relevant part:

§3553. Imposition of a sentence

(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.¹

(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.

Title 18 U.S.C. §3565 provides in relevant part:

§3565. Revocation of probation

(a) Continuation or Revocation. – If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the federal rules of criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable-

- (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
- (2) revoke the sentence of probation and resentence the defendant under subchapter A.

The relevant United States Sentencing Guideline provisions involved in this case are U.S.S.G. Chapter 7, Part A(3)(b); U.S.S.G. §7B1.1(a)(2) & (b); U.S.S.G. §7B1.3 application note 2., and U.S.S.G. §7B1.4(a)

USSG, Chapter 7, Part A (3) (b) provides in relevant part

The Commission debated two different approaches to sanctioning violations of probation and supervised release.

The first option considered a violation resulting from a defendant's failure to follow the court-imposed conditions of probation or supervised release as a "breach of trust." While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence. Instead, the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.

The second option considered by the Commission sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as a new federal criminal conduct.

In addition, the Commission rejected the second option because that option was inconsistent with its views that the court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct.....

After lengthy consideration, the Commission adopted an approach that is consistent with the theory of the first option; i.e., at

revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

.....

.....

See USSG Chapter 7, Part A, (3) (b). Above recitation of the policy statement is not the complete policy statement, but recites pertinent parts to Petitioner's argument.

U.S.S.G. §7B1.1(a)(2) & (b) provides in pertinent part that:

§7B1.1 Classification of Violations (Policy Statement)

- (a) There are three grades of probation and supervised release violations:
 - 1.
 - 2. Grade B Violations – conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;
 - 3. Grade C Violations – conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation any other of the conditions of supervision.
- (b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

U.S.S.G. §7B1.3 (Revocation of Probation or Supervised Release (Policy Statement), application note 2 provides in pertinent part that:

Application Notes:

.....

- 2. The provisions for revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. §3583(e), (g)-(i).....

.....

U.S.S.G. §7B1.4(a) (Term of Imprisonment (Policy Statement) provides in pertinent part that:

(a) The range of imprisonment applicable upon revocation is set forth in the following table: Criminal History Category II for Grade B Violation = 6-12 months.

B. Question Two – Due Process Violation:

The relevant constitutional provisions involved are the Due Process Clause, Fifth Amendment to the United States Constitution.

The Fifth Amendment provides in relevant part that: “No person shall be nor be deprived of life, liberty or property, without due process of law[.]” U.S. Constitution, Fifth Amendment.

The relevant court rules involved are Federal Rules of Criminal Procedure, Rule 32.1(b).

Federal Rules Criminal Procedure, Rule 32.1(b) provides in relevant part:

Rule 32.1 Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

...

(b) Revocation.

(1) *Preliminary Hearing.*

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

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

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

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

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

(C) *Referral.* If the judge finds probable cause, the judge must conduct

a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

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

- (A) written notice of the alleged violation;
- (B) disclosure of the evidence against the person;
- (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
- (D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
- (E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

...

(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. §3563 and §3565 (probation) and §3583 (supervised release).

(e) Producing a Statement. Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

STATEMENT OF THE CASE

The Appeal to the First Circuit was a direct appeal from a Supervised Release Revocation Judgment in a Criminal Case entered on October 23, 2015 in the United States District Court for the District of Puerto Rico.² The district court sentenced Mr. Tanco-Pizarro to serve the statutory maximum of five (5) years, although Chapter 7 of the United States Sentencing Guidelines (hereinafter

² In the matter of United States v. Tanco-Pizarro, Case No. 3:06-cr-00257-008 (PG) (Hon. Juan M. Perez-Gimenez presiding)

U.S.S.G) established guideline range was only six (6) to twelve (12) months.

The Petitioner appealed the supervised release revocation to the First Circuit Court Appeals which affirmed the district court sentence. The Petitioner now seeks a Writ of Certiorari to this Court to review the Judgment and Opinion of the First Circuit Court of Appeals. On appeal to the First Circuit, Mr. Tanco-Pizarro challenged the Revocation Judgment arguing that the 500% upward variant sentence was both procedurally and substantively unreasonable.

Relevant Background:

Regarding the underlying criminal prosecution, Petitioner Rafael Tanco-Pizarro was arrested on August 6, 2006 on a criminal complaint, and subsequently charged in a six count Indictment with ten other defendants on August 10, 2006. The Indictment charged the group with two drug conspiracy counts under Title 21 USC §§ 841(a)(1) and 846; and four firearm related counts under Title 18 UUSC §§ 924(c), 922(g), 922(k), and 2.

Pursuant to a Plea Agreement, on January 9, 2007 Mr. Tanco-Pizarro entered a plea of guilty to Count 3 of the Indictment, possession of a firearm in furtherance of a drug trafficking offense. At sentencing, the remaining five charges were dismissed.).

On April 19, 2007, in the underlying Judgment, Mr. Tanco-Pizarro was sentenced to serve a sentence of 60 months followed by a term of 5 years supervised release.

Mr. Tanco-Pizarro was released from prison and began his term of supervised release on December 14, 2010. Mr. Tanco-Pizarro successfully completed four years of his five- year term without violations until December 2014.

On December 30, 2014 the Probation Office filed a Motion Notifying Violations of Conditions of Supervised Release and Request for Issuance of a Warrant, alleging two violations: (1) failure to submit written monthly reports in violation of Supervised Release Condition Number Two, and (2) failure to update contact information and failure to report as instructed in violation of Supervised Release Condition Number Three. On December 30, 2014, the court issued an Order granting the Motion to Show Cause regarding Revocation of Supervised Release and the Motion for Arrest Warrant.

On September 21, 2015, Mr. Tanco-Pizarro was arrested for new criminal conduct and was brought before the court for a consolidated Initial Appearance on the December 30, 2015 motion to revoke supervised release and the September 21, 2015 criminal complaint in the new criminal matter.³ On September 30, 2015 the Probation Office filed a Supplemental Motion Notifying Additional Violations of Conditions of Supervised Release, alleging the following additional violations: (1)

³ Mr. Tanco was charged with new criminal conduct by Criminal Complaint on September 21, 2015, alleging the same criminal conduct which was partly the basis for Revocation of Supervised Release, namely: Felon in Possession of a Firearm on September 19, 2015. The new criminal matter was initially docketed as 3:15-mj-01380-BJM, and subsequently docketed as USA v. Tanco-Pizarro, 3:15-cr-00616-JAF-1.

arrest for and commission of new criminal conduct for possession of firearms and ammunition on September 19, 2015 in violation of statutory conditions of supervised release; (2) failure to notify supervising officer of change in residence in violation of standard condition number six; and (3) unlawful use of controlled substances in violation of standard condition number seven.

On October 5, 2015 the magistrate judge held a consolidated Arraignment on the Indictment in the new criminal matter, United States v. Tanco-Pizarro, case 3:15-cr-00616-JAF-1; and a Preliminary Revocation Hearing in the district case giving rise to this appeal, United States v. Tanco-Pizarro, case 3:06-cr-00257-008 (PG).

On October 16, 2015, Petitioner filed a Motion to Continue the final Revocation Hearing from October 23, 2015 to January 13, 2016 on the grounds that: (1) the petitions for revocation allege new criminal conduct and failure to follow instructions of the probation officer; (2) the offense alleged in the new criminal prosecution arraigned on October 5, 2015, United States v. Tanco – Pizarro, 3:15-cr-00616-JAF-1, constitutes the most serious ground for revocation in the instant case; and (3) the outcome in the new criminal prosecution may have an effect in disposition of the instant case. The Motion to Continue was summarily denied on October 21, 2015.

On October 21, 2015, Petitioner filed a Motion for Discovery regarding Supervised Release Revocation requesting, in lieu of the denied continuance, the

court order the Probation Officer and/or Government to produce evidence regarding the alleged new criminal conduct prior to final revocation hearing pursuant to Federal Rules Criminal Procedure, Rules 26.2, 32.1(b)(2) and 32.1(e). The Motion for Discovery was similarly denied.

A Revocation Report was not filed by Probation, nor was the original PSR amended or updated.

The matter proceeded to final revocation hearing on October 23, 2015.

Petitioner admitted that he had been Indicted for new criminal conduct, but Petitioner did not admit underlying conduct. The district court found the alleged new criminal conduct violation based on the new Indictment in the parallel criminal case charging the same criminal conduct triggering revocation (felon in possession of firearms in violation of Title 18 U.S.C. §922(g)(1) and §924(a)(2).⁴

The Government asked the court to impose the statutory maximum sentence of 60 months, but the Petitioner argued for a lower sentence because Petitioner faced a substantial consecutive sentence in the parallel criminal prosecution for the same criminal conduct.

Although the advisory guideline range was 6 to 12 months, the court imposed the statutory maximum sentence of 5 years – an upward variance of 48 months from the high end of the advisory revocation guideline.

On October 28, 2015, the defense filed a Motion for Reconsideration arguing

⁴ United States v. Rafael Tanco-Pizarro, 3:15-cr-616 (JAF)

that the district court impermissibly sentenced the Petitioner for the new criminal conduct and the sentence was substantively and procedurally unreasonable. On February 9, 2016 the Government filed a Response in Opposition to the Motion for Reconsideration. On April 5, 2015, the district court denied the motion for reconsideration.

In the interim, on October 30, 2015, Petitioner filed a timely notice of appeal of October 23, 2015 Revocation Judgment to the First Circuit Court of Appeals, for which Petitioner now seeks a Writ of Certiorari.

Decisions by The First Circuit for Which Review Is Sought

Question One – Prohibited Sentencing Factors:

Petitioner argued that the supervised release revocation sentence is procedurally unreasonable for reasons including that the court punished the Petitioner for the new criminal conduct rather than breach of trust by improperly considering the punishment factor in Title 18 U.S.C. §3553(a)(2)(A). Petitioner argued that §3553(a)(2)(A) is a prohibited factor by omission from Title U.S.C. 3583(e) list of sentencing factors to be considered. That the sentencing court erred by considering a forbidden factor and punished the Petitioner for the new criminal conduct.

Citing the Second Circuit, in United States v. Williams, 443 F.3d 35, 47 (2nd Cir. 2006), the First Circuit held that Title 18 USC §3583(e) simply requires consideration of the enumerated subsections without forbidding consideration of

other pertinent factors. United States v. Tanco-Pizarro, USCA, First Circuit, Case No. 15-2388, Opinion page 14, Appendix A, page 15. The First Circuit further ruled that Petitioner's arguments had been rejected by prior First Circuit decisions in United States v. Vargas-Davila, 649 F.3d 129, 131-132 (1st Cir. 2011), United States v. Bohan, 496 F. App'x 95, 96 & 96 n. 1 (1st Cir 2012), and United States v. Soto-Soto, 855 F.3d 445, 451 (1st Cir. 2017), in which the First Circuit previously held that "the seriousness of the offense, promoting respect for the law, [and] providing just punishment" were propersentencing factors." United States v. Tanco-Pizarro, USCA, First Circuit, Case No. 15-2388, Opinion page 16, Appendix A, page 17 (internal quotations omitted).

Question Two – Due Process Violation:

Petitioner argued that the district court denied Petitioner due process by improperly denying Petitioner an opportunity to obtain evidence that would be available in the parallel criminal prosecution when it denied Petitioner's Motion for Discovery and Motion to Continue upon courts denial of Motion for Discovery.

The First Circuit rejected this argument based on its perception that the trial attorney failed to adequately preserve issues raised in Petitioner motions and, therefore, Petitioner did not satisfy the standard for finding plain error. United States v. Tanco-Pizarro, USCA, First Circuit, Case No. 15-2388, Opinion page 11-12, Appendix A, page 12-13.

REASONS FOR GRANTING THE WRIT

- I. The question whether the punishment factor of the federal sentencing statute, Title 18 U.S.C §3553(a)(2)(A), is a permissible or prohibited factor in sentencing a revocation defendant under the statute governing Revocations of Supervised Release, Title 18 USC § 3583(e), was decided by the First Circuit Court of Appeals in conflict with decisions by some circuits but in consensus with other circuits, which circuit split should be resolved by this Court; and it is an important question of federal statutory law affecting other defendants that has not been, but should be, addressed by this Court.

Petitioner's supervised release was revoked by the district court pursuant to Title 18 U.S.C. § 3583(e), and sentenced to serve the statutory maximum of five years for the violations although the guideline sentencing range on revocation was six to twelve months for a Grade B violation and Criminal History II representing a 500% increase from the guideline range under U.S.S.G. §§7B1.1(a)(2) and 7B1.4(a).

Petitioner argued on appeal to the First Circuit that the sentencing court impermissibly focused on the Title 18 U.S.C. 3553(a)(2)(A) punishment factor ("to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense") and punished Petitioner for the new criminal conduct rather than sanctioning Petitioner for breach of trust for violating supervised release. Petitioner argued to the First Circuit was that the dramatic 500% upward variant sentence was not supportable as both procedurally and substantively reasonable.

The First Circuit Ruled that the Title 18 U.S.C. § 3583(e) (supervised release revocation) omission of Title 18 U.S.C. § 3553(a)(2)(A) (punishment factor) does not

forbid consideration of that sentencing factor.

Petitioner requests this Court Grant Writ of Certiorari to address this issue because there is a split in the circuits that this Court has not, but should, address; and it is an important question of federal law statutory law affecting other defendants that has not been, but should be, addressed by this Court. Supreme Court Rules, Rule 10.

A court's authority to revoke a term of supervised release is conferred by Title 18 USC §3583(e).

Applying the Guideline 7B1(a)(1) to the alleged facts, the court found that Appellant's highest violation was a grade B violation and Appellant had a criminal history category II. The guideline sentencing range for this offense was six to twelve months. See USSG §§7B1.1(a)(2), 7B1.4(a).

However, the district court sentenced the Appellant to serve the statutory maximum of five years of imprisonment (§3583(e)(3) establishes five years as the statutory maximum for Class A felonies). The sentence ordered by the district court was 48 months higher than the high end of the guideline range. Petitioner argued to the First Circuit that district court record demonstrated that the sentencing judge knew that there was a parallel criminal prosecution in the same court for the same criminal conduct serving as the basis for revocation, felon in possession of a firearm. The district court further knew that Petitioner faced a substantial sentence in that matter for the same conduct that he was sentencing the Petitioner upon

revocation of supervised release.⁵

The provisions for revocation of a term of supervised release are found in Title 18 USC §3583(e), (g)-(i). See 18 USC §3583 and USSG §7B1.3, application note 2.

Petitioner argued that Guideline §7B1.1-5, and some, but not all, 18 USC § 3553(a) factors, apply to revocation sentencing. See 18 USC §3583(e) and §3553(a)(4)(B) and (5). Title 18 USC §3583(e) provides that: “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) - ... revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release...”. 18 USC §3583(e) and (e)(3), emphasis added.

In contrast to probation revocation re-sentencings under Title 18 USC §3565(a), supervised release revocation under 18 USC §3565 does not incorporate all of the §3553(a) factors. Contrast 18 USC §3583(e) and 18 USC §3565(a). As argued by defense counsel below, in the Motion for Reconsideration, a court may not

⁵ Although the result of the parallel prosecution occurred after revocation sentencing in this matter, and the Judgment in that case is not part of the record in this case, the First Court took judicial notice of the result: Appellant was convicted in the parallel prosecution for felon in possession and received a 57-month sentence to be served consecutive to the 60-month sentence in this matter. (United States v. Tanco Pizarro, 3:15-cr-00616-1-JAF, Judgment at ECF # 36). Petitioner noted that he was effectively sentenced to serve 119 months for the same conduct - felon in possession of firearm – which is a Grade B supervised release violation under USSG §7B1.1(a)(2) with a statutory maximum of five years. See USSG §7B1.1(a)(2) and application note 5.

consider factor §3553(a)(2)(A) (“to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”) when imposing a supervised release sentence. See 18 USC §3583(e) specifically omitting §3553(a)(2)(A) as a factor to be considered.

Petitioner argued that the appropriate statutory construction requires the conclusion that a revocation court may appropriately sanction a violator for his breach of trust, and may consider the specifically enumerated factors in §3583(e). However, a revocation court may not punish the defendant for the new criminal conduct underlying the revocation. See United States v. Hammons, 558 F.3d 1100, 1104 (9th Cir. 2009) *quoting* United States v. Miqbel, 444 F.3d 1173, 1182 (9th Cir. 2006); See also United States v. Crudup, 461 F.3d 433, 439 (4th Cir. 2006) (“in devising a revocation sentence the district court is not authorized to consider” §3553(a)(2)(A)); United States v. Simtob, 485 F.3d 1058, 1063 (9th Cir. 2007)(court may not impose revocation sentence solely or even primarily on the new criminal offense underlying the revocation). But see, United States v. Lewis, 498 F.3d 393, 399-400 (6th Cir. 2007) (holding “that it does not constitute reversible error to consider §3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in §3583(e).”); and see United States v. Williams, 443 F.3d 35, 47 (2nd Cir. 2006)(court interpreted §3583(e) as requiring consideration of enumerated §3553(a) factors without forbidding consideration of other pertinent factors including §3553(a)(2)(A)).

The purpose of supervised release is to help reintegrate the offender into society upon release from prison, not to extend punishment for the offense. It follows that a revocation sentence should focus on the personal characteristics of the offender, not on the greater universe of considerations implicated by §3553(a)(2)(A).

Petitioner urges this Court adopt the interpretation of the Ninth Fifth and Fourth Circuits that a court's consideration of factors in revocation of supervised release is limited to those factors specifically listed in §3583(e). Appellant asks that this Court adopt the position of the Ninth, Fifth and Fourth Circuit that it is impermissible to consider §3553(a)(2)(A) when sentencing a defendant for supervised release violations.

Support for this interpretation is also found in different sections of §3583: (1) §3553(a)(2)(A) is also specifically omitted from the factors the court is to consider under §3583(c) when including a term of supervised release at the time of original sentencing; (2) §3583(d) permits a court to order further conditions of supervised release but limits the scope of additional factors to be considered and excludes specifically §3553(a)(2)(A). See Title 18 USC 3583.

The district court's stated reason for the sentence impermissibly weighted consideration of the §3553(a)(2)(A) punishment factor: "To reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense.....the Court includes that a statutory sentence is sufficient but not greater than necessary in this case." Not only did the district court consider

3553(a)(2)(A) as a factor in sentencing, Petitioner argued the record supported the conclusion that the district court gave this impermissible factor disproportionately more weight than the other factors recited.

Petitioner argued to the First Circuit that the prohibited factor construction of §3583(e) is reinforced by the policy statements of USSG Chapter 7, Resolution of Major Issues and the Commission’s adoption of the first approach – breach of trust for violating supervised release, not punishment for the new criminal conduct. The Commission explained that it debated two different approaches to sanctioning violations of probation and supervised release, ultimately choosing the first approach as the appropriate approach to sanctioning violations of supervised release. See USSG Chapter 7, Part A, (3) (b).

The first approach focused on treating violations of court-imposed conditions as a “breach of trust.” The “nature of the conduct leading to revocation could be considered in measuring the extent of the breach of trust.” However, punishment for any new criminal conduct would be left “to the court responsible for imposing sentence for that offense.” See USSG Chapter 7, Part A, (3) (b).

The second approach focused on “sanctioning violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new criminal conduct.” See USSG Chapter 7, Part A, (3) (b).

Petitioner argued to the First Circuit that the Commission’s adoption of the first approach – sanction for breach of trust not the new criminal conduct – supports

Petitioner's argument that the omission of 18 USC § 3553(a)(2)(A) was intended to be a prohibition of considering the punishment factor when determining the appropriate sentence for a supervised release revocation under 18 USC § 3583(e). See USSG Chapter 7, Part A, (3) (b), 18 USC § 3553(a)(2)(A) and 18 USC § 3583(e)

Petitioner argued that the record from the sentencing court supported the conclusion that the sentencing court punished Petitioner for the new criminal conduct, even though Petitioner was being prosecuted in a separate parallel new criminal action for the same new criminal conduct triggering the revocation of supervised release. The other violation, Petitioner argued, was a failure to report violation that would not justify the statutory maximum sentence imposed by the sentencing court.

The First Circuit rejected this argument and held instead that 18 USC § 3553(a)(2)(A) was a permissible factor even though it is omitted from the 18 USC § 3583(e) list of factors. Ruling that the list of factors is merely a recommendation not a mandate, and the sentence imposed was substantively reasonable.

Petitioner argued that the sentencing court punished Petitioner for the new criminal conduct rather than sanctioning Petitioner for his breach of trust. The First Circuit rejected this argument and determined at the abuse of discretion standard that the 500% upward variant sentence was substantively reasonable even though the Petitioner faced a lengthy sentence for the same new criminal conduct in the parallel prosecution to be served consecutively to the revocation

sentence.

In deciding Petitioner's case, the First Circuit opinion results in a conclusion that Petitioner believes is inconsistent with statutory law; i.e., that a sentencing court may punish a defendant for the new criminal conduct that serves as a basis for supervised release even though defendant is simultaneously prosecuted and punished for same said conduct in a parallel criminal prosecution.

Petitioner believes the First Circuit erred in its treatment Title 18 USC §3583(e) as simply requires consideration of the enumerated subsections without forbidding consideration of other sentencing factors that are omitted from the enumeration.

II. The question whether the Due Process Clause of the United States Constitution requires a revocation defendant be granted an opportunity to request discovery, and be granted sufficient time to receive review discovery, before the Title 18 USC § 3583(e) Supervised Release Revocation Hearing, is an important question of federal statutory and constitutional law affecting other defendants that has not been but should be addressed by this Court.

In the case below, in his Main Brief and Reply Brief the Petitioner further argued that the district court erred in denying the Petitioner's Motion to Continue and Motion for discovery in violation of the Petitioners right to Due Process.

The First Circuit ruled that Petitioner's Due Process rights were not violated by the district court's denial of Petitioner's Motion for Discovery and Motion to continue.

Petitioner requests this Court grant writ of certiorari to address this issue and the First Circuit's ruling, because it raises an important question of federal constitutional and federal statutory law affecting other defendants that has not been, but should be, addressed by this Court; and is an important question of federal statutory law affecting other defendants. Supreme Court Rules, Rule 10

Petitioner argued to the first circuit that the district court's denial of Petitioner's Motion for Discovery and Motion to Continue violated Petitioner's right to Due Process as embodied in Federal Rules of Criminal Procedure Rule 32.1. Revocation of supervised release proceedings are governed by Federal Rules of Criminal Procedure, Rule 32.1. The Supreme Court has held that due process requires that revocation proceedings be conducted according to principles of fundamental fairness. See Gagnon v. Scarpelli, 411 US 778, 782 (1973); Morrissey v. Brewer, 408 US 471 (1972); See also, F. R. Crim. P., Rule 32.1(b)(2). By denying Appellants Motion to Continue until after the new criminal action was completed, and the Motion for Discovery, the court effectively denied the Petitioner the opportunity to defend himself and offer potentially mitigating or exculpatory evidence that may be gleaned from discovery and/or from a continuance to permit the prosecution for the new criminal conduct to unfold. Combined with the court's refusal to have evidence offered in the record that

demonstrated the firearm was not fully automatic, the process did not adhere to the guarantee of fundamental fairness embodied in the Due Process Clause and F. R. Crim. P., Rule 32.1.

The First Circuit rejected this argument and ruled that the Petitioner failed to demonstrate plain error. United States v. Tanco-Pizarro, USCA, First Circuit, Case No. 15-2388, Opinion pages 11-12, Appendix A pages 12-14.

CONCLUSION

For the reasons set forth above, Petitioner Rafael Tanco-Pizarro respectfully prays that the Court grant a writ of certiorari, vacate the judgment of the court of appeals and remand the case for further review.

Dated, the 10th day of September 2018,

Respectfully Submitted,

/s/ Gail M. Latouf

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