NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

EDWARD LEE LEWIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the appropriate standard of review for a sentence following the revocation of supervised release is the "plainly unreasonable" standard once found in 18 U.S.C. § 3742(e) or the "reasonableness" standard announced by this Court in *United States v. Booker*, 543 U.S. 220 (2005).

2. Whether it was unreasonable (or plainly so) for the district court to impose an eighteen-month revocation sentence on a defendant who was originally incorrectly classified for sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), without any consideration of the time that defendant had overserved due to that erroneous designation.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provision

Rules

Guideline

Other Authorities

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Lewis*, ___ F. App'x ___, 2018 WL 4090862 (4th Cir. 2018), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the issue presented in this Petition was presented to the district court at the revocation hearing and ruled upon in open court. The portion of the transcript reflecting the district court's oral ruling revoking Lewis' supervised release and imposing a sentence of imprisonment is attached to this Petition as Appendix B. The final judgment order of the district court revoking his term of supervised release is unreported and is attached to this Petition as Appendix C. The district court's order modifying Lewis' original sentence under 28 U.S.C. § 2255 is attached to this Petition as Appendix D. Lewis' memorandum in support of his motion for reconsideration is filed as Appendix E. The district court's order denying that motion is attached as Appendix F.

V. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on August 28, 2018. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VI. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3583, which provides, in pertinent parts:

> **(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; or

VII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the final judgment and sentence imposed upon the district court's revocation of Edward Lee Lewis' ("Lewis") term of supervised release. Lewis was originally charged and convicted of four counts of mailing threatening communications, in violation of 18 U.S.C. § 876 (Counts One through Four), mailing threatening communications to the President, in violation of 18 U.S.C. § 871 (Count Five), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1)

(Count Six), and sentenced in the Southern District of West Virginia on November 7, 2002. J.A. 29-42.[1] Original jurisdiction over offenses against the United States is given to the district courts by 18 U.S.C. § 3231. The district court entered an order revoking Lewis' supervised release on March 8, 2018. Appendix C. Lewis also timely filed a notice of appeal on March 8, 2018. J.A. 182. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from the district court's revocation of Lewis' term of supervised release. However, to properly understand that revocation, this Court must consider the related proceedings in which Lewis challenged the validity of his original sentence. The district court agreed that Lewis was sentenced in violation of the Constitution, but provided inadequate relief. The revocation of Lewis' supervised release and his continued incarceration exacerbates that error.

1. Lewis is convicted and sentenced under the Armed Career Criminal Act.

Lewis was charged in a six-count indictment with four counts of mailing threatening communications, mailing a threatening communication to the President, and being a felon in possession of a firearm. J.A. 29-35. He was convicted on all six counts after a jury trial. J.A. 186. As a basis for the felon in possession charge the

[1] "J.A." refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

indictment alleged that Lewis had three prior convictions for daytime burglary in West Virginia. J.A. 34. As set forth in the Presentence Investigation Report, at the time those offenses qualified as "violent felonies" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). J.A. 186-187. As a result, Lewis faced a mandatory minimum sentence of fifteen years on the felon in possession count, as opposed to a statutory maximum sentence of ten years. That designation also drove his then-mandatory Guideline range of 188 to 235 months in prison. J.A. 201.

The district court sentenced Lewis to 192 months in prison, followed by a 3-year term of supervised release. J.A. 38-39. The Fourth Circuit affirmed that sentence on appeal. *United States v. Lewis*, 75 F. App'x 164 (4th Cir. 2003).

2. Lewis challenges his sentence under *Johnson* and begins a term of supervised release before that challenge is resolved.

On May 6, 2016, Lewis was appointed counsel to represent him in determining whether his sentence could be challenged under *United States v. Johnson*, 135 S. Ct. 2551 (2015), which declared ACCA's residual clause to be unconstitutionally vague.[2] On June 21, 2016, the Fourth Circuit gave authorization to Lewis to file a second or successive claim under 28 U.S.C. § 2255 to challenge his sentence under *Johnson*. J.A. 133.

In his § 2255 motion Lewis argued that his sentence was unconstitutional because it was based on the conclusion that he had three prior convictions for violent

[2] Lewis' counsel in that proceeding was a member of the Criminal Justice Act panel.

felonies and was therefore eligible for an enhanced sentence under the ACCA. J.A. 44. As relief, Lewis requested that the court "grant his § 2255 motion, and vacate his § 924(e) conviction and sentence." *Id.* In a supplemental brief Lewis argued that "he should be resentenced in a manner affording him due process of law." J.A. 19.

On October 5, 2016, while Lewis' § 2255 motion was pending, and before Lewis was released from custody, Lewis agreed to a modification of his conditions of supervised release to require that he spend six months at Dismas Charities, a halfway house. J.A. 105-107. Lewis began his six-month term at Dismas on October 21, 2016. Lewis and his Probation Officer also agreed to further modify his conditions of supervised release to allow him to enroll in a drug treatment program. J.A. 108-110.

On March 9, 2017, a Petition for Warrant or Summons for Offender Under Supervision ("Petition") was filed by Lewis' probation officer.[3] It alleged that Lewis left Dismas without permission and without telling his Probation Officer. J.A. 111-112. Upon Lewis' motion, the district court agreed to hold the Petition in abeyance until Lewis successfully completed a drug treatment program. J.A. 113-119. On September 26, 2017, an amendment to the Petition was filed, alleging that Lewis was discharged from drug treatment after not returning to the program as scheduled. The district court issued a warrant for Lewis' arrest as a result. J.A. 128-129.

[3] The Federal Public Defender, undersigned counsel, was appointed to represent Lewis in the supervised release proceedings.

3. The district court grants Lewis' § 2255 motion, but provides inadequate relief.

On October 24, 2017, while the arrest warrant was outstanding, the district court entered a memorandum opinion and order addressing Lewis' § 2255 motion. Appendix D. The district court recognized that if the ACCA enhancement did not apply, Lewis "would have been subject to a maximum ten-year term of imprisonment," rather than the 192-month sentence imposed. *Id.* at 2. The district court then went on to find that Lewis' motion relied on a new rule of constitutional law and allowed for a review of his sentence. *Id.* at 8. Lewis' prior convictions were all for West Virginia burglary, which the district court recognized no longer qualified as a violent felony under ACCA after *Johnson*. *Id.* at 10, citing *United States v. White*, 836 F.3d 437 (4th Cir. 2016). As a result, the district court concluded, Lewis' "sentence thereunder is unlawful." *Id.* The district court then "granted" Lewis' motion, but concluded that, because he had served his entire sentence, "the only relief that this court can grant . . . is to modify his class of felony and his criminal history category, which may affect any potential revocation sentence." *Id.* at 11. Lewis filed a motion to resentence in the wake of the district court's order, but that motion was denied. J.A. 141.

On November 8, 2017, Lewis, via his supervised release counsel, filed a motion asking the district court to reconsider the motion to resentence filed by Lewis via his § 2255 counsel. J.A. 142-143. In an accompanying memorandum in support of that motion, Lewis argued that the § 2255 proceeding was "intertwined" with the

revocation proceeding. Appendix E at 2. Lewis argued that because the district court had correctly concluded that his original sentence was unlawful, it was required to vacate that sentence and resentence him. *Id.* at 4-5. In addition, reimposing a sentence of time served, even if possible through the stacking of counts, would require a massive variance from the applicable now-advisory Guideline range. *Id.* at 6-7. In concluding, Lewis specifically asked that the district court "vacate the original sentence imposed – including the term of supervised release – and resentence him" where "such resentencing should not include any period of supervised release." *Id.* at 8-9.

The district court denied Lewis' motion to reconsider. Appendix F. It concluded that the language of § 2255 was "clear" and it was not required to vacate the original sentence "if the judgment has the 'practical effect' of vacating the original sentence." *Id.* at 3, quoting *United States v. Lewis*, 708 F. App'x 767, 769 (4th Cir. 2017). In this case, the court determined the appropriate relief was "for the court to *correct* Mr. Lewis' sentence," which it could only do by "amending the term of imprisonment to 'time served.'" *Id.* at 4. The district court also concluded that it was "well aware that it has discretion to amend Mr. Lewis' sentence of supervised release" but "it has chosen not to do so." *Id.* at 5.[4]

[4] Lewis took an appeal of his § 2255 motion to the Fourth Circuit. *United States v. Lewis*, Appeal No. 18-6128. Lewis requested the appointment of counsel. Dkt. No. 11. The court denied that request and affirmed the district court's decision in the § 2255 case. Dkt. No. 12. In this case, the Fourth Circuit denied undersigned counsel's

4. The district court revokes Lewis' term of supervised release and sentences him to eighteen months in prison.

Lewis was arrested on January 16, 2018. J.A. 22. A hearing on the Petition and the amendment was held on March 8, 2018. J.A. 165-178. Lewis did not dispute the allegations against him. J.A. 170. The district court found that Lewis had violated the conditions of his term of supervised release and calculated the advisory Guideline range as five to eleven months in prison, with a statutory maximum revocation term of two years. J.A. 170-172. Neither party objected to those calculations. J.A. 172.

The Government argued for revocation and a Guideline sentence, followed by an additional term of supervised release. J.A. 172-173. Lewis reiterated that "throughout the course of this case and the 2255 he filed" he had "maintained the position that he should be resentenced and he should not be serving any term of supervised release." J.A. 173. However, noting that the district court had already rejected that position, Lewis argued for a sentence of five months in prison, but without any further term of supervised release. J.A. 173-174. Lewis argued that "no matter what way we look at it, we have to step back and say overall there was an unfairness in this case and he's served much more time than he should have served." J.A. 174. "So in light of that," he concluded, "justice requires no more supervised release." *Id.*

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request to consolidate the two appeals. *United States v. Lewis*, Appeal No. 18-4149, Dkt. No. 14.

The district court imposed a sentence of eighteen months in prison, without any further term of supervised release. The district court explained that Lewis had "not proved to be amenable to drug treatment, outpatient or inpatient, or amenable to supervision." J.A. 176. Referencing the § 2255 case, the district court explained that "I understand what point you've preserved below and I think it's entirely appropriate that you preserve that argument," but that "I think you should go back to prison." J.A. 177.

5. The Fourth Circuit affirms Lewis' revocation sentence.

The Fourth Circuit affirmed the revocation of Lewis' supervised release and his eighteen-month sentence in an unpublished opinion. Appendix A. The court concluded that Lewis' sentence was "procedurally and substantively reasonable" because the district court considered the relevant sentencing factors and "was aware" of the advisory Guideline range. *Id.* at 2. The court "reject[ed] Lewis' claims that the court should have considered that he overserved his original sentence" because "supervised release and incarceration serve different ends" and "detention ordered upon revocation of release may not be decreased by time served in official detention other than time spent in detention for the release violation." *Id.*

VIII. REASON FOR GRANTING THE WRIT

I. The writ should be granted to resolve a split among the Circuit Courts of Appeals as to whether the appropriate standard of review for appeals of sentences imposed following the revocation of a term of supervised release is the "plainly unreasonable" standard once found in 18 U.S.C. § 3742(e) or the "reasonableness" standard announced by this Court in *United States v. Booker*, 543 U.S. 220 (2005).

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Sixth Amendment requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244. This Court then remedied the Sixth Amendment problem by excising 18 U.S.C. § 3553(b)(1), which made the United States Sentencing Guidelines mandatory, as well as 18 U.S.C. § 3742(e), which set out the parameters of appellate review of sentences in criminal cases. *Id.* at 245. One portion of § 3742(e) provided that the standard of review when examining a sentence "imposed for an offense for which there is no applicable sentencing guideline . . . is plainly unreasonable." Prior to *Booker*, Courts of Appeals reviewed sentences imposed following the revocation of supervise release, which were not controlled by a mandatory Guideline, using that standard. *See, e.g., United States v. Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998); *United States v. Giddings*, 37 F.3d 1091, 1093 (5th Cir. 1994); *United States v. Washington*, 147 F.3d 490, 491 (6th Cir. 1998). In the wake of this Court's excision of § 3742(e) in *Booker*, "the courts of appeals have

struggled with the question of whether to continue to review supervised release revocation sentences under the 'plainly unreasonable' standard or to apply the *Booker* 'unreasonableness' review standard to such cases." *United States v. Bolds*, 511 F.3d 568, 574 (6th Cir. 2007). Every Circuit Court of Appeals has weighed in on the issue, but they disagree on the proper standard of review and, even among those adopting a reasonableness standard, how that standard should be applied. The proper standard of review in supervised release revocation cases is an important question of federal law on which the Courts of Appeals disagree and that this Court should resolve. Rules of the Supreme Court 10(a).

A. The Courts of Appeals disagree on the proper standard of review to apply in appeals of sentences imposed following the revocation of a defendant's term of supervised release.

In applying the "plainly unreasonable" standard of review to Lewis' sentence, the Fourth Circuit relied upon its decision in *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006). The court in *Crudup* recognized that this Court in *Booker* had excised 18 U.S.C. § 3742(e), the statute which set forth the "plainly unreasonable" standard of review, and stated that "it appears that the 'plainly unreasonable' standard of review at § 3742(e)(4) governing supervised release revocation sentences is no longer valid." *Id.* at 436. Nonetheless, the Fourth Circuit held that the "plainly unreasonable" standard still applies to its review of revocation sentences post-*Booker*. *Id.* at 437. The court reached this conclusion based on 18 U.S.C. § 3742(a)(4), reasoning that this provision authorizes appeal of a revocation sentence only on the

ground that the sentence is "plainly unreasonable." *Id.* at 437. The court also referred to guideline commentary and statutory provisions which it concluded "suggest that revocation sentences should not be treated exactly the same as original sentences." *Id.* at 437-438.

The Fourth Circuit further held that "unlike the two circuit courts that have decided that there is no difference between unreasonableness and the plainly unreasonable standard, . . . we conclude that Congress intended a distinction between the two terms." *Id.* at 438. Finally, the court fashioned a framework for review which required the court to "first decide whether the sentence is unreasonable . . . follow[ing] generally the procedural and substantive considerations that we employ in our review of original sentences." *Id.* If the court finds the sentence reasonable, then it affirms the sentence. *Id.* at 439. If, however, the sentence is unreasonable, the court "must then decide whether the sentence is *plainly* unreasonable, relying on the definition of 'plain' that we use in our 'plain' error analysis." *Id.* (emphasis in original). Initially, only the Seventh Circuit followed the Fourth Circuit's lead in *Crudup*. *United States v. Kizeart*, 505 F.3d 672, 674 (7th Cir. 2007) (applying plainly unreasonable standard of review, acknowledging that "the practical difference between 'unreasonable' and 'plainly unreasonable' is slight, perhaps even nil," but that courts "must seek to give meaning to the difference between 'unreasonable' and 'plainly unreasonable'"). More recently, after sidestepping the issue for a number of years, the Fifth Circuit has also agreed that the plainly unreasonable standard of review is appropriate for supervised

release revocation sentences. *United States v. Miller*, 634 F.3d 841, 643 (5th Cir. 2011).

By contrast, the Second, Third, Sixth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have applied "reasonableness" review, rather than a "plainly unreasonable" standard, to sentences imposed upon revocation of supervised release. *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005); *United States v. Bungar*, 478 F.3d 540, 542 (3d Cir. 2007); *United States v. Bolds*, 511 F.3d 568, 575 (6th Cir. 2007); *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005); *United States v. Miqbel*, 444 F.3d 1173, 1176 (9th Cir. 2006); *United States v. Tedford*, 405 F.3d 1159, 1258 (10th Cir. 2005); *United States v. Sweeting*, 437 F.3d 1105, 1106 (11th Cir. 2006); *In re Sealed Case*, 527 F.3d 188, 190 (D.C. Cir. 2008). Even these courts, however, disagree about the precise effect of *Booker* on the standard of review to be applied to supervised release sentences.

The Second, Third, and Ninth Circuits view *Booker* as having displaced the "plainly unreasonable" standard of review with a "reasonableness" standard of review. For example, the Second Circuit held that, because this Court's remedial opinion in *Booker* excised 18 U.S.C. § 3742(e), "which included subsection 3742(e)'s standard of 'plainly unreasonable' for review of a sentence for which there is no guideline, the Court is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable

guidelines." *Fleming*, 397 F.3d at 99; *see also Bungar*, 478 F.3d at 542 ("[t]he dust has settled, post-*Booker*, and it is now well understood that an appellate court reviews a sentence for reasonableness with regard to the factors set forth in 18 U.S.C. § 3553(a). . . . We see no reason why that standard should not also apply to a sentence imposed upon a revocation of supervised release, and we so hold"); *Miqbel*, 444 F.3d at 1176 ("[w]e join the Second and Eighth Circuits in concluding that *Booker*'s 'reasonableness' standard has displaced the former 'plainly unreasonable' standard in the context of revocation sentencing").

The Sixth, Eighth, Tenth and Eleventh Circuits, by contrast, have concluded that there is no meaningful difference between review for "unreasonableness" and "plain unreasonableness." For example, in *Bolds*, the Sixth Circuit reasoned that "[r]ather than creating a new 'unreasonableness' standard of review for supervised release revocation sentences, the Supreme Court in *Booker* was simply directing appellate courts to apply the same reasonableness standard that they use to review supervised release revocation sentences to their review of all sentences." 511 F.3d at 574; *see also Cotton*, 399 F.3d at 916 (*Booker* standard of review "is actually the same as the one we would have used otherwise. The new standard is review for unreasonableness with regard to § 3553(a) . . . . This is the same standard prescribed in § 3742(e)(4)"); *Tedford*, 405 F.3d 1159, 1161 (holding that review of revocation sentence for reasonableness that it used before *Booker* "remains the same."); *Sweeting*, 437 F.3d at 1106 (agreeing with the "numerous circuits applying the

reasonableness standard prescribed in *Booker* to sentences imposed upon revocation of supervised release" who "have concluded that the reasonableness standard of *Booker* is essentially the same as the 'plainly unreasonable' standard of § 3742(e)(4)").

Finally, the First Circuit and the D.C. Circuit, while not explicitly weighing in on the issue, nonetheless have concluded that reasonableness review, rather than review to determine if the sentence is plainly unreasonable, is appropriate post-*Booker*. *United States v. McInnis*, 429 F.3d 1, 4 (1st Cir. 2005) (holding that *Booker* does not apply to revocation sentences, but nonetheless applying an 'abuse of discretion' standard rather than 'plainly unreasonable' standard of review); *In re Sealed Case*, 527 F.3d at 191-193 (applying the analytical framework of *Gall v. United States*, 128 S. Ct. 586 (2007), to review reasonableness of supervised release sentence without referring to the "plainly unreasonable" standard of review).

B. The exceedingly deferential "plainly erroneous" standard conflicts with this Court's holding in *Booker*.

In addition to perpetuating a split amongst the Courts of Appeals, the Fourth Circuit's application of the *Crudup* decision in Patterson's case conflicts with this Court's opinion in *Booker*. The majority of circuits are correct in interpreting *Booker* to mean that the same review for reasonableness must apply to both original sentences and revocation sentences. The Fourth Circuit's *Crudup* opinion, along with the decisions of the Fifth and Seventh Circuits, conflict with the *Booker* remedial opinion in continuing to apply an exceedingly deferential "plainly unreasonable" standard of review to revocation sentences.

In fashioning its Sixth Amendment remedy in *Booker*, this Court specifically held that it must retain portions of the Sentencing Act that are: "(1) constitutionally valid, . . . (2) capable of 'functioning independently,' . . . and (3) consistent with Congress' basic objectives in enacting the statute." *Booker*, 543 U.S. at 258-59 (internal citations omitted). With this requirement in mind, this Court concluded that it must excise both the provision that made the Guidelines mandatory and "the provision that sets forth standards of review on appeal," which is 18 U.S.C. § 3742(e). *Id.* at 259. Section 3742(e), of course, included the "plainly unreasonable" standard of review of sentences imposed without an applicable sentencing guideline. 18 U.S.C. § 3742(e)(4). Yet, in *Crudup*, *Kizeart*, *Miller*, Patterson's case, and numerous other similar cases, the Fourth, Fifth, and Seventh Circuits have continued to apply the statutory provision invalidated by this Court.

After excising § 3742(e), the *Booker* Court went on to hold that, absent the statutory provision setting forth standards of review, the Sentencing Reform Act still implicitly set forth a "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'" *Booker*, 543 U.S. at 260-61. The Court then referred to supervised release and probation revocation cases to illustrate district courts' familiarity with a reasonableness standard. *Id.* at 262, citing *United States v. White Face*, 383 F.3d 733, 737-740 (8th Cir. 2004); *United States v. Tsosie*, 376 F.3d 1210, 1218-1219 (10th Cir. 2004); *United States v. Salinas*, 365 F.3d 582, 588-590 (7th Cir. 2004); *United States v. Cook*, 291 F.3d 1297, 1300-1302 (11th Cir. 2002);

United States v. Olabanji, 268 F.3d 636, 637-639 (9th Cir. 2001); *United States v. Ramirez-Rivera*, 241 F.3d 37, 40-41 (1st Cir. 2001). Among the authorities cited by the court, the appellate courts had referred to what this Court deemed a "reasonableness" standard variously as "plainly unreasonable," *White Face*, 383 F.3d at 737, "reasoned and reasonable," *Tsosie*, 376 F.3d at 1218, and "abuse of discretion," *Cook*, 291 F.3d at 1302. This Court's explanation of the meaning of "reasonableness" by referring to the standard of review of supervised release revocation and probation revocation sentences in *Booker* reflects its understanding that, after *Booker* made the Sentencing Guidelines advisory rather than mandatory, "reasonableness" review is the same for original sentences and for revocation sentences. The Fourth, Fifth and Seventh Circuits' holdings conflict with this understanding and ignore this Court's excision of 18 U.S.C. § 3742(e) from the Sentencing Act.

This case demonstrates the problems inherent with the plainly unreasonable standard. To be "plain" in the Fourth Circuit, an error must meet the definition use in the standard plain error analysis. Therefore, "[f]or a sentence to be plainly unreasonable . . . it must run afoul of clearly settled law." *United States v. Thompson*, 595 F.3d 544, 548 (4th Cir. 2010). The issue in Lewis' appeal was not whether the district court committed some procedural error. In such cases, it is possible to point to prior holdings about procedural requirements and show that the error ran "afoul of clearly settled law." *See, e.g.*, *Thompson*, 595 F.3d at 548 ("[g]iven how clearly settled this requirement is, even as it applies to revocation sentences, the district

court's failure to provide any reasons for its sentence contravened clear circuit precedent and was, therefore, plainly unreasonable"). However, the only issue in this case was whether Lewis' sentence was substantively unreasonable and unduly punitive. In cases where the length of the sentence, rather than the procedural errors, are the focus, the plainly unreasonable standard will be nearly impossible to meet. The length of any given sentence, provided it is within statutory limits, is so inherently tied to the unique combination of § 3553(a) factors present in every criminal case that it is unlikely that a prior appellate court decision would provide the kind of benchmark needed to trigger a "plain" error. Sentences imposed cannot, therefore, "run afoul of clearly settled law," simply based on their severity. Defendants are thus deprived of any substantive review of the length of their sentences following a revocation of supervised release. Congress could not have intended that result.

C. The Court should grant this Petition to clarify this area of law and provide needed guidance to the lower courts.

The question presented in this petition is a vital one which has split the Courts of Appeals. It recurs every time a court of appeals considers a supervised release revocation sentence. Furthermore, in the Fourth Circuit, the court has already extended its *Crudup* "plainly unreasonable" standard of review beyond revocation sentences to sentences imposed upon probation revocation and to sentences imposed upon conviction of assimilated crimes for which there is no sentencing guideline. *See United States v. Moulden*, 478 F.3d 652, 655-56 (4th Cir. 2007) (holding, "in light of

Crudup," that the court will review probation revocation sentences "to determine if they are plainly unreasonable"); *United States v. Finley*, 531 F.3d 288, 291-94 (4th Cir. 2008) (applying the *Crudup* "'plainly unreasonable' standard for review of assimilated crimes for which there is no sentencing guideline"). To resolve the split in the courts below and provide guidance to those courts on the proper standard of review in cases such as this one, this Court should grant the Petition.

II. The writ should be granted to determine whether it was unreasonable (or plainly so) for the district court to impose an eighteen-month revocation sentence on a defendant who was originally incorrectly classified for sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), without any consideration of the time that defendant had overserved due to that erroneous designation.

This case begins with the imposition of an unconstitutional sentence on Lewis due to his classification under ACCA. Understanding the flaws of that sentence are essential to determining the reasonableness of Lewis' supervised release revocation sentence. Lewis served approximately 176 months in prison. J.A. 111, 184. The district court correctly concluded that that sentence was "unlawful." Appendix D at 10. Still, it reimposed that sentence under the rubric of "time served." Lewis then had his supervised release revoked and the district court imposed a sentence more harsh than even the Government requested. J.A. 172-173. Without any further term of supervised release, Lewis will have no support or assistance in returning to a regular life, as he has repeatedly explained to the district court while this appeal was pending. J.A. 176; *United States v. Lewis*, 2:02-cr-00041-1 (S.D. W. Va.), Dkt. Nos.

333. 334, 335, 338, 339, 343, 346, 347.

At this point the only thing this Court can do in recognition of the totality of the circumstances of this case is to say, "enough." Lewis has more than served his debt to society. Any revocation sentence that continues his incarceration is unreasonable (or plainly so). Therefore it has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rules of the Supreme Court 10(a). This Court should recognize that, vacate Lewis' revocation sentence, and direct the district court to impose a time-served revocation sentence and allow Lewis to resume his life as a free man.

A. Lewis has served many more months in prison than he should have and is continuing to serve additional unwarranted months in prison.

At this point it cannot be denied that Lewis has spent more time in prison for his offenses than he should have. His original 192-month sentence was based on his classification under ACCA which, as the district court correctly recognized, was in error in light of *Johnson*. That sentence is clearly greater than the statutory maximum of his felon in possession offense of conviction.[5] Were Lewis to have been given the full resentencing he requested, he would face an advisory Guideline range

[5] The district court has never, from original sentencing through the § 2255 proceedings, explained how the sentence is divided amongst the counts of conviction. The law presumes the sentence on each count to be served concurrently, unless specifically stated otherwise. 18 U.S.C. § 3584(a).

of only fifty-one to sixty-three months.[6] While the district court could have reimposed the same 192-month sentence by stacking the various counts of convictions, that would have constituted a significant upward variance that would have been unjustified by the applicable sentencing factors.

The district court was presented two opportunities to address this situation in some kind of equitable way. The first was in Lewis' § 2255 proceeding. The second was in Lewis' supervised release proceeding. Rather than crafting an equitable resolution to Lewis' supervision that recognized the peculiarities of this case, the district court imposed a sentence more harsh than either party or the advisory Guidelines called for without, as shown below, adequately explaining why it did so. In addition to being plainly procedurally unreasonable, Lewis' sentence is plainly substantively unreasonable.

B. Lewis' revocation sentence is substantively unreasonable.

The district court is required to consider the factors set forth in 18 U.S.C. § 3583(e) before revoking a term of supervised release and imposing a revocation sentence. Among those factors are the "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). As with any sentence, a sentence imposed following revocation

[6] Each of Lewis' threat counts would still produce a final offense level of 16 or 17, with the felon in possession count now producing a final offense level of 16. After applying the grouping rules of U.S.S.G. § 3D1.4, Lewis' final offense level would be 22 and his Criminal History Category III. J.A. 193-198.

of supervised release must be "sufficient, but not greater than necessary," to accomplish the purposes of sentencing. 18 U.S.C. § 3553(a).

Part of the history and characteristics of Lewis is that he was originally sentenced based upon his classification under ACCA, a classification that has now correctly been concluded was erroneous. As a result, he has spent untold additional months in prison than he otherwise would have served. Another relevant part of Lewis' history is that the district court "corrected" his sentence into one which it lacked the power to impose, compounding the original error of Lewis' ACCA sentencing.

The district court was correct that it had the power to correct Lewis' sentence, rather than fully resentence him. Appendix F at 3; *see also United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1992); *United States v. Hadden*, 475 F.3d 652, 661 (4th Cir. 2007). However, that power is not without limits.

Most fundamentally, a court cannot impose a sentence that it lacks the power to impose. That includes a sentence that exceeds the statutory maximum for the offense of conviction. *United States v. Under Seal*, 819 F.3d 715, 720 (4th Cir. 2016) ("a district court ordinarily has no discretion to impose a sentence outside the statutory range established by Congress for the offense of conviction") (internal quotation omitted); *United States v. Beasley*, 495 F.3d 142, 147 (4th Cir. 2007) ("when a district court impose a sentence for a federal offense outside of the statutory range . . . it is exercising its power erroneously"). That a court may not impose a sentence

above the statutory maximum is so fundamental that it is one of the few errors that a defendant cannot waive the ability to raise on appeal. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) ("a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute").

The district court's corrected sentence, which has never been assigned to any count other than Lewis' felon in possession conviction, is in excess of the statutory maximum for that offense. Lewis served approximately 176 months in prison before his release onto supervised release. J.A. 111, 184. Without the ACCA designation, being a felon in possession of a firearm carries a maximum sentence of only 10 years in prison, 120 months. 18 U.S.C. § 924(a)(2). The district court's corrected sentence, of time served, therefore is a sentence fifty-six months longer than the district court had the power to impose.

In a revocation case the district court must impose the least severe sentence possible that takes into account the defendant's history and characteristics. An examination of Lewis' history and characteristics – his lengthy unjustified additional incarceration – shows that the only proper "least severe" sentence was none at all, or, at most, the time he served in custody while awaiting the revocation hearing. Anything greater is substantively unreasonable.

C. Contrary to the Fourth Circuit's understanding, a person who overserved a sentence will be credited that time against a future revocation sentence.

That Lewis overserved his original prison sentence is not an academic matter. Regardless of whether a defendant overserves time in prison, his term of supervised release begins when he is released from prison, not when he should have been. *United States v. Johnson*, 529 U.S. 53 (2000). In affirming Lewis' sentence, the Fourth Circuit held that "supervised release and incarceration serve different ends" and "detention ordered upon revocation of release may not be decreased by time served in official detention other than time spent in detention for the release violation." Appendix A at 2. That is incorrect. The law provides, and the Bureau of Prisons implements, a system by which time "banked" by inmates that can be credited toward revocation sentences.

The statutory basis for the time bank is 18 U.S.C. § 3585, which provides that a "defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." 18 U.S.C. § 3585(b). The Bureau of Prisons channels that authority via policies laid out in various Program Statements. For example, in Program Statement 5880.28, the Bureau explains that when a "resentencing results in a term which is less than the time the inmate has already served on the vacated sentence, the excess time not now credited to any other sentence shall be credited to the SRA term . . . ." *Id.* at p. 1-17;

see also pp. 1-14C and 1-14D.[7] Program Statement 5800.15 explains how the Designation and Sentence Computation Center is directed to, among other things, "thoroughly review all sentencing and designation material" including "over-served time." *Id.* at 5-21.[8] The review specifically includes "Supervised Release Violators." *Id.* at 5-2. There is also a form the Bureau of Prisons uses to deal with banked time, which states "[t]his information is being provided because the over-served time credit information may be of use to the court in considering the amount of time that should be imposed for a revocation sentence." Form BP-A623 Notice to United States Probation officer of Over Served Time.[9] That is why, in the wake of *Johnson*, the following press release was issued by the Probation and Pretrial Services Office:[10]

BOP TO AWARD OVER-SERVED TIME IN JOHNSON CASES

Monday, September 26, 2016 *Probation & Pretrial Services*

The Probation and Pretrial Services Office (PPSO) has consulted with Federal Bureau of Prisons' (BOP) staff about how they plan to treat over-served time by inmates who received amended sentences under the U.S. Supreme Court's decision in *Johnson* that were less than the amount of time they had already served. BOP staff have determined that, pursuant to and consistent with Bureau of Prisons Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), the BOP will award over-served time to these inmates, which may be applied to any subsequent term imposed for violating supervised release for only the amended sentence. The over-served time for inmates affected by *Johnson* would not apply to any other sentence or any supervised release violator term for any other sentence.

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[7] Available online at https://www.bop.gov/policy/progstat/5880_028.pdf (last visited September 11, 2018).

[8] Available online at https://www.bop.gov/policy/progstat/5800_015_CN-01.pdf (last visited September 11, 2018).

[9] Available online at https://www.bop.gov/policy/forms/BP_A0623.pdf (last visited September 11, 2018).

[10] Available online to court users at http://jnet.ao.dcn/court-services/probation-pretrial-services/bop-award-over-served-time-johnson-cases (last visited September 11, 2018)

In *United States v. Parks*, 2017 WL 3732078 (D. Colo. Aug. 1, 2017), the court recognized the existence of the time bank and its importance in cases like this one. Parks filed a § 2255 motion in the wake of *Johnson*. Among the defenses the Government raised against Parks' motion was that it was moot because he had already finished serving his sentence. The court rejected that argument, noting that there are "collateral consequences that are traceable to the sentence that Mr. Parks seeks to vacate." *Id.* at *10. That was because if Parks were to prevail (he did), "while he would not be entitled to one-to-one credit towards his supervised release, he may still be entitled to some credit for time that he has overserved through the concept of 'banked' time." *Id.* at *10 (citation omitted). "Indeed," the court continued, "the Bureau of Prison[s] issued a press release stating that it 'will award over-served time to . . . inmates [who receive amended sentences under *Johnson*] which may be applied to any subsequent term imposed for violating supervised release for only the amended sentence.'" *Id.*, citing the above quoted press release.

Finally, the Government has recognized the existence of banked time in other *Johnson* cases. In *United States v. Donnelly*, No. 17-15837 (9th Cir. 2017), the Government explained during oral argument that:

> the way the Bureau of Prisons manages this is if it's determined that he wasn't ACCA and therefore he's only got a ten-year max, he has overserved three years of time and what they do is he'll have three years of supervised release, if he violates his term of supervised release and is

> revoked and sent back, the BoP gives him credit for that time. So he'll immediately be released.[11]

Based on all this information, had the district court imposed a reasonable sentence after granting Lewis' § 2255 motion it is almost certain that Lewis would have had sufficient over-served time banked so that he would no longer be incarcerated.

D. Lewis' sentence is plainly substantively unreasonable.

Assuming, *arguendo*, that a defendant challenging a revocation sentence must show it is plainly unreasonable, this sentence meets that burden. Once a Court concludes that a sentence is unreasonable it must further determine if it is "'plainly' unreasonable, relying on the definition of 'plain' that we use in our 'plain' error analysis." *Crudup*, 461 F.3d at 439. In such circumstances, "[p]lain is synonymous with clear or, equivalently, obvious." *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotations omitted). A sentence is plainly unreasonable if "run[s] afoul of clearly settled law." *United States v. Thompson*, 595 F.3d 544, 548 (4th Cir. 2010). Lewis' sentence does so in two ways.

First, it violates the clear language of § 3553(a) that the district court must impose the least severe sentence necessary to achieve the purposes of supervised release. As demonstrated above, when the totality of the circumstances of Lewis' case are considered, the eighteen-month sentence imposed by the district court is greater

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[11] Transcribed from the video recording of the argument, available online at https://youtu.be/KvEnTOqqi8A (last visited June 6, 2018), beginning at 24:14.

than necessary to achieve the purposes of supervised release. Second, the district court's imposition of any sentence (beyond time served) upon revocation of Lewis' term of supervised release perpetuates the error it made by "correcting" Lewis' original sentence to one of time served that is beyond the statutory maximum for the relevant offense of conviction. That a court cannot impose a sentence beyond the statutory maximum for the offense is "clearly settled law" of the most fundamental kind.

IX. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

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By Counsel

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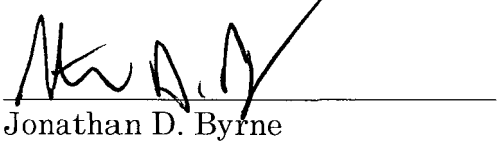

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