No. 18-7857

In the Supreme Court of the United States

CALVIN RAYMOND JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FEDERAL COMMUNITY DEFENDER

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REPLY BRIEF FOR PETITIONER

Calvin Jones presents an important question about a recurring issue: whether district courts may consider retribution and the seriousness of the underlying offense when fashioning sentences for supervised release violations. *See* 18 U.S.C. § 3583(e). The government does not dispute the existence of a conflict, minimizing the significance of the conflict instead. In so doing, the government fails to appreciate the need for national uniformity in the context of sentencing for supervised release violations. Moreover, the government admits that the district court relied on the retributive considerations set forth in 18 U.S.C. § 3553(a)(2)(A) but expressly omitted from § 3583(e), effectively conceding that this case falls squarely within the circuit split.

Instead, the government suggests this case is an imperfect vehicle to resolve the split, invoking the mootness and plain-error doctrines. But no obstacles stand in the way of a resolution because Mr. Jones continues to serve a three-year term of supervised release and the error at issue is substantive, not procedural. The government also suggests there is no need for this Court to harmonize the discord in the circuits because the impact of a resolution will be minimal. That contention is also unavailing.

Although this Court has denied petitions for certiorari presenting the issue presented here, this Court's inaction is not a good reason to deny this one, as the government suggests. (Gov't Opp'n at 7.) The "denial of certiorari does not constitute an expression of any opinion on the merits." *Huber v. New Jersey Dep't of Envtl. Prot.*,

562 U.S. 1302, 131 S. Ct. 1308 (2011) (statement of Alito, J.) (citation omitted). That this question continues to appear demonstrates a pressing need for this Court's review. *See Bridgers v. Texas*, 523 U.S. 1034, 121 S. Ct. 1995, 1996 (2001) (statement of Breyer, J.) ("Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. . . . That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention."). Since 2015, the last time this Court considered a petition presenting this question, the courts of appeals have not coalesced around a common answer.

The Court should grant this petition.

ARGUMENT

I. There are No Obstacles to this Court's Review.

A. Mr. Jones's case is not moot.

The government argues that Mr. Jones's appeal is moot because he has been released from incarceration, and in support, relies on *Spencer v. Kemna*, 523 U.S. 1 (1998). (Gov't Opp'n at 15.) A defendant's challenge to a sentence of incarceration following a parole revocation becomes moot when the defendant served his revoked term of imprisonment.[1] *Id.* at 7. In other words, a sentence becomes moot when the entire sentence has been served.

[1] "[T]he Sentencing Reform Act of 1984 replaced parole for federal crimes with supervised release[.]" *United States v. Thompson*, 777 F.3d 368, 372 (7th Cir. 2015) (citing 18 U.S.C. § 3583).

Mr. Jones has not completed his entire sentence. Ten federal circuit courts agree that release from prison does not moot an appeal challenging a sentence if the appellant continues to serve a term of supervised release. *United States v. Ketter*, 908 F.3d 61, 66 (4th Cir. 2018) (citing *United States v. Hulen*, 879 F.3d 1015, 1018 (9th Cir. 2018); *United States v. Albaadani*, 863 F.3d 496, 502–03 (6th Cir. 2017); *United States v. Montoya*, 861 F.3d 600, 603 n.2 (5th Cir. 2017); *United States v. Carter*, 860 F.3d 39, 43 (1st Cir. 2017); *In re Sealed Case*, 809 F.3d 672, 674–75 (D.C. Cir. 2016); *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007); *United States v. Blackburn*, 461 F.3d 259, 262 (2d Cir. 2006); *United States v. Larson*, 417 F.3d 741, 747 (7th Cir. 2005)); *see also United States v. Flores-Juarez*, 723 F. App'x 84, 86 (3d Cir. 2018) ("[B]ecause [the defendant] is serving a term of supervised release and this appeal raises a possibility of credit against the term of supervised release for improper imprisonment."). Terms of imprisonment and supervised release are part of one unitary sentence. *Ketter*, 908 F.3d at 65.

Under the unitary-sentence approach, this petition still presents a live case and controversy even though Mr. Jones has served his custodial sentence because he must also complete a three-year term of supervised release before his sentence is complete. (APP 026.) Though Mr. Jones has finished the incarceration component of his sentence the "associated term of supervised release is ongoing, [and] on remand a district court *could* grant relief . . . in the form of a shorter period of supervised release." *Id.* at 66 (emphasis in original).

B. The appropriate standard of review is abuse of discretion, not plain error.

The government argues that Mr. Jones failed to preserve his challenge to the district court's reliance on the § 3553(a)(2)(A) factors and that he is therefore only entitled to relief if he can show plain error, which the government claims he cannot. (Gov't Opp'n at 14.) This contention rests on the incorrect assumption that Mr. Jones's claim of error is procedural, and so he was required to object. It is not. Basing a "sentence on impermissible factors" is a substantive error. *See, e.g.*, *United States v. Sexton*, 889 F.3d 262, 265 (6th Cir. 2018) (A sentence is "substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.") (citation omitted). The district court based his sentence on retribution, an impermissible consideration. The question is thus substantive, and so the abuse-of-discretion standard applies. *See, e.g.*, *United States v. Adams*, 873 F.3d 512, 520 (6th Cir. 2017).

Indeed, the Sixth Circuit treated this issue as a substantive challenge, as it addressed the issue on the merits after engaging in its procedural analysis. It determined that Mr. Jones's sentence was not based on an impermissible factor because "consideration of that factor is permissible in this circuit." (APP 005 (citing *United States v. Lewis*, 498 F.3d 393, 399–400 (6th Cir. 2007)).) The Sixth Circuit never mentioned the standard of review, and for very good reason: once an appellate court determines "that the district court's sentencing decision is procedurally sound," as the Sixth Circuit did here, "the appellate court then should consider the

substantive reasonableness of the sentence imposed under an abuse-of discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Rita v. United States*, 551 U.S. 338, 361 (2007) (Stevens, J., concurring) ("*Booker* replaced the *de novo* standard of review . . . with an abuse-of-discretion standard that we called 'reasonableness' review.").

The line between procedure and substance has become slippery. *See United States v. Liou*, 491 F.3d 334, 337 (6th Cir. 2007) ("[W]e have noted that the border between factors properly considered 'substantive' and those properly considered 'procedural' is blurry if not porous . . . ." (internal citation omitted)). Since 2007, this Court has not provided much guidance on where the line between procedure and substance should be drawn.

This Court's teachings have always suggested that reliance on an impermissible factor is a substantive error. In *Gall v. United States*, 552 U.S. 38, 51 (2007), this Court explained that courts of appeal must start their review by checking for procedural errors, which include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." Reliance on an impermissible factor was not included in that list. *See id.* After ensuring the sentencing proceedings were "procedurally sound," courts of appeals "then consider the substantive reasonableness of the

sentence imposed under an abuse-of-discretion standard," considering "the totality of the circumstances." *Id.*

Members of this Court have consistently suggested that reliance on an impermissible factor is a substantive error. Justices Stevens and Ginsburg explained that the "abuse-of-discretion standard directs appellate courts to evaluate what motivated the district judge's individualized sentencing decision." *Rita v. United States*, 551 U.S. 338, 364 (2007) (concurring in all but Part II). Dissenting from the denial of a petition for certiorari to address whether the use of acquitted conduct at sentencing violates the Sixth Amendment, Justice Scalia wrote, "Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been '*substantively* unreasonable' and therefore illegal." *Jones v. United States*, 135 S. Ct. 8, 8 (2014) (emphasis added). Because substantive errors do not require an objection, plain-error review is not an obstacle to this Court's ability to review the question presented.

Even if this Court does not want to clarify whether this error is procedural or substantive, the standard review has not been an obstacle to review in the past. In *Tapia v. United States*, 564 U.S. 319, 335 (2011), this Court granted a petition for certiorari to address "whether [18 U.S.C.] § 3582(a) permits a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation," *id.* at 323, even though the defendant did not object. This Court left for the court of appeals to decide "the effect of Tapia's failure to object to the sentence when imposed."

Id. at 335 (citing Fed. Rule Crim. Proc. 52(b); *United States v. Olano*, 507 U.S. 725, 731 (1993)).

II. This is an Ideal Vehicle to Resolve the Question Presented.

The government concedes the existence of a circuit split concerning the propriety of considering the retributive component of § 3553(a), set forth in subsection § 3553(a)(2)(A), when fashioning a sentence under § 3583(e). (*See, e.g.*, Gov't Opp'n at 11–14.) In addition to providing a vehicle to resolve the conflict between the federal circuits, the question presented is "beyond the academic or the episodic," *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955), recurring, and significant to the administration of justice. *Cf. Clay v. United States*, 537 U.S. 522, 526 (2003) (certiorari granted "[t]o secure uniformity in the application of" federal habeas corpus statute); *Bhd. of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R. Co.*, 516 U.S. 152, 156 (1996) (granting certiorari "[b]ecause of the importance of nationwide application of" federal regulatory scheme for railroad safety). Uniformity is of particular importance in the arena of criminal sentencing. Indeed, Congress overhauled the federal sentencing regime based on the perceived need for national uniformity in federal sentencing.

A. There is a clear circuit split.

The government acknowledges the existence of a conflict on the issue presented, but characterizes the conflict as nothing more than "modest disagreement." (Gov't Opp'n at 7.) Modest or not, the disagreement among the circuits creates disparity based on geography alone. For those on supervised release, the

prospect of lengthy reincarceration for technical violations based on the perceived gravity of the underlying offense surely presents a matter of great importance.

In addition to the divide between the federal courts of appeals, the government overlooks what might happen in those circuits where § 3553(a)(2)(A) is deemed a permissible consideration. District judges within the same circuit or even the same courthouse may treat people differently depending on whether they believe retribution is an appropriate consideration. Such divergence undermines the uniformity principle Congress aimed to achieve.

Further, the impact of the uneven application of the law is significant now because the number of individuals on supervised release is at an all-time high. Given the number of people "affected and the expense of housing prisoners," the question presented "surely also has a significant impact on the public fisc." *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 126 S. Ct. 1906, 1907 (2006) (statement of Stevens, J.).

The government also claims the substantive error "has no practical effect and would not change the result of" Mr. Jones's sentence. (Gov't Opp'n at 7.) In addition to being highly speculative, that contention ignores the district court's emphasis on retributive considerations at sentencing. There is a reasonable probability the sentence may be different in Mr. Jones's case had the judge known that retribution is not a reason to impose a particular sentence. That "the district court could have ordered the same within-guidelines term of reimprisonment based on virtually identical considerations while omitting just a few words from its explanation[,]"

(Gov't Opp'n at 15), does not mean that it would have done so. After all, federal judges take an oath to "faithfully and impartially discharge and perform all duties . . . under the Constitution and the laws of the United States." 28 U.S.C. § 453.

As this Court has acknowledged in the context of Guidelines errors, sentences are the product of a complex interplay of factors. *Cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) ("Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights."). District courts "often say little about the degree to which [one sentencing factor] influenced their determination," *id.*, which means appellate courts will have a hard time figuring out if retribution motivated a judge's decision to impose a particular sentence.

Where, as here, the record is silent as to what the district court might have done had it considered only the factors referenced in § 3583(e), the court's reliance on an impermissible factor suffices to show that factor affected the defendant's supervised release revocation sentence. *Cf. Molina-Martinez*, 136 S. Ct. at 1347 ("Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights.").

B. The district judge relied on retributive principles.

The government recognizes that the district court judge in this case relied on the retributive § 3553(a)(2) considerations—"the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"—when imposing Mr. Jones's sentence. (Gov't Opp'n at 7–10.) Nonetheless, the government minimizes the role retribution played in the district court's decision by characterizing any references as "brief[.]" (*Id.* at 7, 9.) The district court judge, however, uttered just 361 words when imposing the sentence. A review of the relevant transcript reveals that the judge relied heavily on retributive principles as justification for Mr. Jones's lengthy sentence.

The district court began by explaining its "responsibility" "to fashion a sentence that is sufficient, but not greater than necessary to accomplish the sentencing goals. Those goals would include . . . the need to vindicate the law that [Mr. Jones] now flouted[.]" (APP 025.) Far from making "passing reference to the gravity of the underlying offense[,]" (Gov't Opp'n at 10), the judge dedicated roughly ten percent of his 361 words to describing the "very grave" offense conduct: "It did not involve simply a destruction of property, but injury associated with that destruction of property, injury to individuals and he created a great hardship for several individuals by his conduct in the underlying offense." (APP 025.) Finally, after listing Mr. Jones's three violations, the judge remarked: "All of these actions confirm that the defendant still hasn't come to the conclusion that he needs to get his life on the right side of the law." (APP 025–26.) Each of these statements elicits a retributive purpose.

The district court's emphasis on retribution disregards Congress's vision of the role of supervised release in our legal system. "Congress intended supervised release to assist individuals in their transition to community life." *United States v. Johnson*, 529 U.S. 53, 59 (2000). The omission of § 3553(a)(2)(A) from § 3583(e) "reinforces the idea that the primary purpose of supervised release is to facility the reentry of offenders into their communities, rather than to inflict punishment." *United States v. Murray*, 692 F.3d 273, 280–81 (3d Cir. 2012) (citing S. Rep. No. 98-225, at 124 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307); *see also United States v. Thompson*, 777 F.3d 368, 374 (7th Cir. 2015) (applying *Murray*). The district court's focus on the gravity of the underlying offense conduct at the supervised release hearing was not only inappropriate but an abuse of discretion rendering Mr. Jones's sentence substantively unreasonable.

Finally, even if this Court doubts whether the district court considered retribution and the seriousness of Mr. Jones's underlying offense, there is ample evidence in the transcript that "suggests the possibility that" the sentence was based on retribution. *Tapia*, 564 U.S. at 334. In *Tapia*, two members of this Court were skeptical that the district judge imposed or lengthened the term of imprisonment based on the defendant's rehabilitative needs. *See id.* at 335 (Sotomayor & Alito, JJ., concurring). Nonetheless, because the judge's comments "were not perfectly clear" and there remained doubts about whether the court lengthened the sentence to promote rehabilitation, both joined the opinion in full. *Id.* at 337.

The judge's comments here were not as equivocal as in *Tapia*. As in *Tapia*, *see* 564 U.S. at 334–36, the sentencing judge identified two primary factors for Mr. Jones's sentence: "the need to vindicate the law" and general and specific deterrence. (APP 025.) Unlike in *Tapia*, *see* 564 U.S. at 336–37 (Sotomayor, J., concurring), the judge did not make comments that suggested which portion of the offense represented the retributive component and which represented the deterrent component of the total sentence. (*See* APP 025–26.) This case is thus a fine vehicle to resolve the long-standing circuit split.

CONCLUSION

For these reasons, as well as those contained in the Petition for Certiorari, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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May 20, 2019