No. 18-7857

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN RAYMOND JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court relied on an improper factor to determine the term of reimprisonment it imposed following the revocation of petitioner's supervised release.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2018. A petition for rehearing was denied on November 6, 2018 (Pet. App. 7). The petition for a writ of certiorari was filed on February 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of malicious use of fire, in violation of 18 U.S.C. 844(i). Pet. App. 1. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Ibid. After his release from prison, petitioner violated the conditions of his supervised release. Id. at 1-2. The court revoked his supervised release and ordered 18 months of reimprisonment, to be followed by three years of supervised release. Id. at 2. The court of appeals affirmed. Id. at 1-6.

1. In 2010, petitioner helped to burn down a Detroit store so that its owner could claim insurance proceeds. 554 Fed. Appx. 460, 462-463. The fire engulfed three neighboring businesses, and seven firefighters were injured fighting the blaze. Id. at 463. A grand jury indicted petitioner for malicious use of fire, in violation of 18 U.S.C. 844(i). Pet. App. 1. A jury found petitioner guilty of that offense, and the district court sentenced him to 180 months of imprisonment. Ibid. The court of appeals reversed, concluding that the district court had erroneously excluded evidence that supported petitioner's duress defense. 554 Fed. Appx. at 462, 470.

On remand, petitioner pleaded guilty to the charged offense and was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1. The conditions

of supervised release included reporting at least monthly to a probation officer, paying restitution, not using or possessing controlled substances, and participating in a program for substance abuse, which could include drug testing. Judgment 4.

2. In December 2016, petitioner completed his prison term and began his three-year term of supervised release. Pet. App. 1. The next month, "he stopped attending substance abuse treatment." Ibid. In April 2017, he tested positive for cocaine. Ibid. "After that positive test, [he] made no further contact with his probation officer." Ibid.

In October 2017, the Probation Office filed a petition alleging that petitioner had violated the terms of his supervised release. Pet. App. 1-2. Under 18 U.S.C. 3583(e)(3), a district court that determines a defendant has violated a condition of supervised release "may, after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," revoke the defendant's term of supervised release and order reimprisonment. The provisions of 18 U.S.C. 3553(a) that Section 3583(e) cross-references set forth a number of factors to consider in imposing a sentence, including the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. 3553(a)(1); the need for the sentence imposed to deter crime and protect the public, 18 U.S.C. 3553(a)(2)(B) and (C); the need to provide the defendant with educational or vocational training, medical care, or other

corrective treatment, 18 U.S.C. 3553(a)(2)(D); the sentencing range recommended by the Sentencing Guidelines, 18 U.S.C. 3553(a)(4); pertinent policy statements issued by the Sentencing Commission, 18 U.S.C. 3553(a)(5)(A); the need to avoid unwarranted sentence disparities, 18 U.S.C. 3553(a)(6); and the need to provide restitution to victims, 18 U.S.C. 3553(a)(7). Section 3583(e) does not cross-reference 18 U.S.C. 3553(a)(2)(A), which addresses "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."

At a revocation hearing, petitioner admitted three violations of the conditions of his supervised release: failing to report to his probation officer, testing positive for cocaine, and failing to attend the substance abuse treatment program. Pet. App. 16-18. The district court accepted petitioner's admissions and revoked his term of supervised release. Id. at 3, 18, 26. In determining the appropriate term of reimprisonment, the court explained that its responsibility was "to fashion a sentence that is sufficient, but not greater than necessary to accomplish the sentencing goals," which included "the need to vindicate the law that [petitioner has] has now flouted and * * * to deter [petitioner] from committing future crimes and [to] deter[] others who might imitate his conduct." Id. at 25. The court further explained that it was "tak[ing] into account all the appropriate factors including the history and characteristics of [petitioner]

and the nature and circumstances of these violations." Ibid. The court stated that it was "struck by the number of ways in which [petitioner] violated supervised release so soon after leaving prison where he had served a significant amount of time for the underlying offense," which the court described as "very grave." Ibid. The court added that, by violating the conditions of supervised release, petitioner had "violated the trust that he was obligated to honor," and that the violations confirmed that petitioner "still hasn't come to the conclusion that he needs to get his life on the right side of the law." Id. at 25-26.

The district court imposed a reimprisonment term of 18 months, which fell within the Sentencing Guidelines range of 12-18 months. Pet. App. 2. The court ordered that the term of reimprisonment be followed by three years of supervised release. Ibid. Petitioner's counsel "place[d] a general objection on the record," and, when asked by the court to be "more specific," asserted that petitioner's gainful employment, family support, and lack of involvement in criminal activity aside from his "drug problem," justified a term of reimprisonment below the guidelines range. Id. at 27.

3. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 1-6. As relevant here, the court rejected petitioner's claim that his sentence was substantively unreasonable because the district court had considered the "seriousness of the underlying offense," id. at 5, one of the

factors listed in 18 U.S.C. 3553(a)(2)(A) and not cross-referenced by Section 3583(e). The court of appeals noted that "[s]entences within the applicable guidelines range are afforded a rebuttable presumption of reasonableness." Pet. App. 4. The court added that consideration of "the seriousness of the underlying offense * * * is permissible in this circuit" and "does not warrant reversal." Id. at 5 (citing United States v. Lewis, 498 F.3d 393, 399-400 (6th Cir. 2007), cert. denied, 555 U.S. 813 (2008)).[1]

4. Petitioner was released from prison on March 21, 2019. Federal Bureau of Prisons, U.S. Dep't of Justice, *Find An Inmate*, https://www.bop.gov/inmateloc.

ARGUMENT

Petitioner contends (Pet. 5-6, 10-16) that the district court erroneously considered "a need * * * to reflect the seriousness of the [underlying] offense," 18 U.S.C. 3553(a)(2)(A), in revoking his supervised release and ordering his reimprisonment for a within-guidelines term of 18 months. That contention lacks merit. Section 3583(e)'s directive that a court consider certain factors listed in Section 3553(a) before revoking supervised release and ordering reimprisonment did not require that the district court wholly disregard the seriousness of his underlying offense,

[1] The court of appeals did not decide whether petitioner's claims were properly reviewed only for plain error, as urged by the government in light of petitioner's failure to object to consideration of the seriousness of the offense in the district court. Pet. App. 4 n.1. The court of appeals instead concluded that petitioner's claims failed even under an abuse-of-discretion standard more favorable to him. Ibid.

regardless of its relevance to those expressly cross-referenced factors. Any modest disagreement among the circuits on this question has no practical effect and would not change the result of petitioner's case, in which the district court only briefly mentioned the gravity of petitioner's underlying offense in the course of considering undisputedly permissible factors. This Court has repeatedly denied review in other cases presenting this question, including the Sixth Circuit decision relied upon by the court below. Lewis v. United States, 555 U.S. 813 (2008) (No. 07-1295); see also, e.g., Clay v. United States, 135 S. Ct. 945 (2015) (No. 14-6010); Overton v. United States, 565 U.S. 1063 (2011) (No. 11-5408); Young v. United States, 565 U.S. 863 (2011) (No. 10-11026). The same result is warranted here, particularly because petitioner's claim can be reviewed only for plain error and because his case is moot in light of his release from prison.

1. As relevant here, Section 3583(e) provides that a district court may revoke supervised release and reimprison a defendant "after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. 3583(e). Although Section 3583(e) does not cross-reference 18 U.S.C. 3553(a)(2)(A), which describes the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," nothing in Section 3583(e) precludes consideration of the seriousness of the offense when the district court deems it

relevant. Pet. App. 5. The "enumeration in § 3583(e) of specified subsections of § 3553(a) that a court must consider in revoking supervised release does not mean that it may not take into account any other pertinent factor." United States v. Young, 634 F.3d 233, 239 (3d Cir.) (emphasis omitted), cert. denied, 565 U.S. 863 (2011). Consistent with the presumption that Congress "act[ed] intentionally and purposely" in deciding to incorporate only some parts of Section 3553(a) in Section 3583(e), Pet. 8-9 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)), Section 3583(e)'s cross-reference to specific provisions of Section 3553(a) reflects a legislative judgment that the factors listed in those provisions are the only ones that a court must consider. But the omission of Section 3553(a)(2)(A) from the list of mandatory factors does not mean that any reference to the seriousness of the underlying offense is automatically erroneous. See, e.g., Young, 634 F.3d at 239.

Nothing in the statute required the district court to wholly disregard the seriousness of the original offense -- the very crime to which the imposition and revocation of supervised release are attributable, see Johnson v. United States, 529 U.S. 694, 701 (2000), to determine the appropriate postrevocation penalty. As a practical matter, the factors listed in Section 3553(a)(2)(A) overlap substantially with those listed in the provisions of Section 3553(a) that Section 3583(e) cross-references. The cross-referenced provisions state that a court may consider, among other

factors, "the nature and circumstances of the offense," "the history and characteristics of the defendant," the need to "afford adequate deterrence," and the need to "protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(1), (a)(2)(B), and (a)(2)(C). Effective consideration of those factors will often require some recognition of "the seriousness of the offense." 18 U.S.C. 3553(a)(2)(A). It is hard to "see how" a district court "could possibly ignore the seriousness of the offense" while evaluating, for example, the need for "'adequate deterrence,'" the objective of protecting "'the public from further crimes of the defendant,'" and "'the nature and circumstances of the offense.'" United States v. Williams, 443 F.3d 35, 48 (2d Cir. 2006) (quoting 18 U.S.C. 3553(a)(1), (2)(B) and (C)); see United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007) ("[T]he three considerations in § 3553(a)(2)(A) * * * are essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release."), cert. denied, 555 U.S. 813 (2008).

The district court's approach here did not violate Section 3583(e). The court referred briefly to the "grave" nature of the underlying offense only in the context of considering other, expressly authorized factors. Pet. App. 25. The court explained that it was "tak[ing] into account all the appropriate factors including the history and characteristics of [petitioner] and the nature and circumstances of these violations." Ibid. In doing

so, the court observed, in particular, that petitioner had "violated the trust that he was obligated to honor" by violating "supervised release so soon after leaving prison where he had served a significant amount of time for the underlying offense," which was "very grave." Ibid. The court's reference to a violation of trust follows directly from the Sentencing Guidelines' provision that a court revoking supervised release should "sanction primarily the defendant's breach of trust." Ch. 7, Pt. A(3)(b) (2014). Section 3583(e) requires consideration of that guidelines provision because it is a "pertinent policy statement * * * issued by the Sentencing Commission." 18 U.S.C. 3553(a)(5)(A); see 18 U.S.C. 3583(e) (requiring consideration of factors in Section 3553(a)(5)). The court's passing reference to the gravity of the underlying offense in the context of considering undisputedly permissible factors does not contradict the text or purpose of Section 3583(e).

Petitioner's reliance (Pet. 10) on this Court's decision in Tapia v. United States, 564 U.S. 319 (2011), is unavailing. The question in Tapia was whether a district court could properly consider the need for rehabilitation in an initial sentencing despite the statement in 18 U.S.C. 3582(a) that "imprisonment is not an appropriate means of promoting correction and rehabilitation." The Court relied on the plain meaning of that statutory language to conclude that the sentencing court could not consider rehabilitation. 564 U.S. at 326-327. No similar

statutory language prohibits consideration of the factors specified in Section 3553(a)(2)(A) at a supervised-release revocation proceeding. As Tapia illustrates, Congress knows how to clearly prohibit consideration of a sentencing factor, see ibid., but it did not do so here.[2]

2. Petitioner identifies (Pet. 6-10) a purported circuit conflict over whether a district court may consider the factors listed in Section 3553(a)(2)(A) in revoking supervised release and ordering reimprisonment under Section 3583(e). Like other petitioners who have unsuccessfully raised this question, e.g., Clay, supra, petitioner substantially overstates the extent of any disagreement in the circuits. As in those previous cases, any modest disagreement has little practical effect and does not warrant this Court's review. See p. 7, supra.

The majority of circuits that have addressed the issue, including the court below, have correctly determined that Section 3583(e)'s directive that a court revoking supervised release and ordering reimprisonment must consider factors enumerated in particular provisions of Section 3553(a) does not mean that a court

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[2] In describing the statutory background, Tapia stated that "a court may not take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release." 564 U.S. at 326. Petitioner does not suggest that the Court's statement on that point constitutes a holding, see Pet. 10 (contending that the statement "offer[s] helpful guidance about how to read" a different provision), and the Court in any event referred only to the "imposi[tion]" of supervised release, 564 U.S. at 326, not to revocation of supervised release or an order of reimprisonment -- the proceedings at issue here.

may not consider other pertinent factors. See, e.g., United States v. Vargas-Dávila, 649 F.3d 129, 132 (1st Cir. 2011) (stating that Section 3583(e) "does not forbid consideration of other pertinent section 3553(a) factors"); Young, 634 F.3d at 239; Williams, 443 F.3d at 47 (concluding that Section 3583 does not "forbid[] consideration of other pertinent factors"); see also United States v. Clay, 752 F.3d 1106, 1108 (7th Cir. 2014) (concluding that a district court may consider Section 3553(a)(2)(A) so long as it "relies primarily on the factors" in Section 3583(e)), cert. denied, 135 S. Ct. 945 (2015); United States v. Webb, 738 F.3d 638, 641 (4th Cir. 2013) (joining "many of our sister circuits" on this issue).[3]

The Ninth Circuit has taken a slightly different approach. In United States v. Miqbel, 444 F.3d 1173 (2006), that court concluded that a district court revoking supervised release erred by failing to set forth sufficient reasons for ordering a term of reimprisonment outside the recommended guidelines range. Id. at 1177-1179. In providing guidance for the district court on remand, the Ninth Circuit stated that because "§ 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." Id. at 1182. The Ninth

[3] As petitioner largely acknowledges (Pet. 8 n.1), any contrary dicta in United States v. Crudup, 461 F.3d 433, 439 (4th Cir. 2006), cert. denied, 549 U.S. 1283 (2007), which affirmed a revocation term, is superseded by the Fourth Circuit's direct consideration of the issue in Webb.

Circuit then explained, however, that consideration of the factors in Section 3553(a)(2)(A) would contravene Section 3583(e) only if reliance on those facts was "a primary basis for a revocation sentence." Ibid. (emphasis added). For example, the Ninth Circuit explained, a "mere reference to promoting respect for the law" would not itself "render a sentence unreasonable." Ibid. In keeping with that understanding, the Ninth Circuit has clarified that Miqbel "did not set forth a blanket prohibition that a court in no circumstances may consider the seriousness of the criminal offense underlying the revocation," but merely explained that this consideration should not be the primary "focus" of an order of reimprisonment following revocation. United States v. Simtob, 485 F.3d 1058, 1062 (2007).

The Fifth Circuit has stated "that it is improper for a district court to rely on § 3553(a)(2)(A) for the modification or revocation of a supervised release term." United States v. Miller, 634 F.3d 841, 844, cert. denied, 565 U.S. 976 (2011). But the Fifth Circuit did not grant relief to the defendant in Miller, ibid., and subsequent decisions of that court (albeit in unpublished orders) illustrate that any marginal difference between its standard and that of other courts of appeals makes little practical difference. For example, in United States v. Zamarripa, 517 Fed. Appx. 264 (2013) (per curiam), the Fifth Circuit rejected a claim that a district court had violated Miller, distinguishing "properly [considering] the nature and

circumstances of the original offense" from "intend[ing] improperly that the sentence reflect the seriousness of or impose just punishment for the underlying offense." Id. at 265; see United States v. Jones, 538 Fed. Appx. 505, 508 (5th Cir. 2013) (per curiam) (rejecting Miller claim). Petitioner thus fails to show that any court of appeals would resolve his case differently. And as noted above, this Court denied review in Miller and has denied review in subsequent cases presenting the same question.

3. Finally, even if this Court were inclined to consider the question presented at some point, this case does not provide an appropriate vehicle for at least two significant reasons.

First, petitioner failed to raise the objection he now asserts in the district court, so he would be entitled to relief only if he could show plain error. See Fed. R. Crim. P. 52(b). Under the plain-error standard, petitioner must establish that the district court erred; the error was clear or obvious; the error affected his substantial rights; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. See United States v. Olano, 507 U.S. 725, 736-737 (1993). Petitioner cannot make that showing. Even if an error occurred, the error would not be clear or obvious; to the contrary, the error would be highly subtle given the district court's brief reference to the seriousness of the offense and the significant overlap between that factor and other factors that the court is required to consider under Section 3583(e). Moreover, even on petitioner's

view of the law, 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. Given those circumstances, any error would not affect petitioner's substantial rights or the fairness, integrity, or public reputation of the proceedings. See ibid. Indeed, courts of appeals have repeatedly determined that any potential error of the kind petitioner alleges would not be plain. See, e.g., Webb, 738 F.3d at 642-643; Miller, 634 F.3d at 844; United States v. Pitre, 504 F.3d 657, 664-665 (7th Cir. 2007).

Second, this case is moot because petitioner was released from prison in March 2019. When a defendant challenges only his sentence and that sentence "expire[s] during the course of [appellate] proceedings, th[e] case is moot." Lane v. Williams, 455 U.S. 624, 631 (1982). This Court has applied that rule to conclude that challenges to parole revocation were moot after the defendant completed his term of imprisonment, see Spencer v. Kemna, 523 U.S. 1, 12-14 (1998), and courts of appeals have applied the same rule to conclude that challenges to supervised-release revocation are moot when the defendant is released from reimprisonment during the pendency of the appeal, as petitioner was here, see, e.g., United States v. Mazzillo, 373 F.3d 181, 182 (1st Cir. 2004) (per curiam) ("An appeal from an order revoking supervised release is ordinarily moot if the sentence is completed before the appeal is decided."); United States v. Meyers, 200 F.3d

715, 722 (10th Cir. 2000) (similar). The mootness of the case reinforces that no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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