No. 18-919

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT DAVIES,
Petitioner

v.

UNITED STATES,
Respondent

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER TO INFORM THE COURT OF NEW INTERVENING MATTER NOT AVAILABLE AT THE TIME OF PETITIONER'S LAST FILING

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NEW MATTER NOT AVAILABLE AT THE TIME OF PETITIONER'S LAST FILING

On January 12, 2019, Petitioner Robert Davies' filed a petition for a writ of certiorari, which is now pending before this Court. The petition was docketed on January 16, 2019. Respondent, through counsel, waived its right to respond. On February 6, 2019, the petition was submitted for this Court's review at its February 22, 2019, conference.

On February 5, 2019, the district court held a revocation hearing to determine whether petitioner's lifetime term of supervised release should be revoked violating one condition thereof. Via telephone, Davies' supervising probation officer asked the court to dismiss the revocation petition. The prosecutor asked the court to find Davies in violation, but recommended no punishment. Following the prosecutor's recommendation, the judge found Davies in violation of the condition prohibiting him from leaving the district of supervision without permission, and continued him on supervised release, without modifying the conditions.

After the judge advised Davies that he has no right to appeal her decision, the prosecutor stated on the record that "after a period of compliance," the government "would be open to considering early termination." The judge then admitted on the record that the revocation proceeding "*was more about forcing compliance than it was about imprisonment,*"[1] but advised Davies that he must "present hard evidence" in the form of "psychiatric records" the next time he seeks early termination.

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[1] Davies has ordered transcripts of the three-part revocation hearing. The italicized statement is paraphrased until such transcripts are made part of the record.

ARGUMENT

1. 18 U.S.C. §3583(e) in general requires a district court to consider certain factors in §3553(a) before it can: (1) terminate a term of supervised release and discharge the defendant; (2) extend or otherwise modify the conditions of a term of supervised release; (3) revoke a term of supervised release and require the defendant to serve the remaining time in prison. See *United States v. Lowe*, 632 F. 3d 996, 998 (7th Cir. 2011) (remanding the denial of early termination where the district court failed to consider the §3553(a) factors), citing *United States v. Gammarano*, 321 F.3d 311, 315-16 (2d Cir. 2003) ("a statement that [the district court] has considered the statutory factors is sufficient.").

2. When, as in the case-at-bar, revocation of supervised release is discretionary, "the court engages in the three-step process of (1) determining that the defendant has violated a condition of supervised release, (2) finding that revocation of supervised release is appropriate, and (3) imposing a penalty." *United States v. Miles*, No. 18-1491 (3d Cir. Jan. 16, 2019) (upholding as "procedurally reasonable" a consecutive statutory maximum sentence for a release-condition violation where, *inter alia*, the district court evaluated the §3553(a) factors). "**As part of its finding that revocation is appropriate, the court must consider the statutory sentencing factors set forth at 18 U.S.C. §3553(a).**" *Primer: Supervised Release*, p. 10, U.S. Sentencing Commission, Office of General Counsel (April 2017); *United States v. Washington*, 147 F.3d 490, 491 (6th Cir. 1998) ("The statute's mandate is thus satisfied if ... the district court's explanation of the sentence makes it clear that it considered the required factors.").

3. "The court may opt not to revoke supervised release and incarcerate the offender and, instead, continue him or her on supervision (under the same terms or with modified terms), extend the term of supervision, or sentence the offender to a term of home detention in lieu of incarceration. 18 U.S.C. §3583(e)(1)-(4). **Before doing so, however, the court must first consider the pertinent provisions in Chapter Seven of the guidelines.**" *Primer: Supervised Release*, pp. 11-12, U.S. Sentencing Commission, Office of General Counsel (April 2017) (citing 18 U.S.C. §§3553(a), 3583(e)); *United States v. Fulton*, No. 18-1149, at ¶9 (10th Cir. Jan. 18, 2019) (noting that while "the district court did not explicitly reference the §3553(a) factors, it acknowledged that it had to consider those factors" and "made clear that it had considered the Chapter 7 policy statements, as well as the factors specified in 18 U.S.C. §3583(e)."); *United States v. Grimm*, No. 10-1572 (6th Cir. 2010) ("When a court imposes a term of imprisonment after revoking a defendant's supervised release, it must also be certain to consider the relevant statutory factors contained in 18 U.S.C. §3583(e) and the policy statements contained in Chapter Seven of the Sentencing Guidelines Manual."); *United States v. Yopp*, 453 F.3d 770, 773 (6th Cir. 2006) (remanding where "there is no evidence of the district court's consideration of the Chapter Seven policy statements").

4. After finding Davies committed a Grade C release-condition violation, but before continuing him on supervision, the district court was required to consider both the statutory sentencing factors set forth at 18 U.S.C. §3553(a) and the pertinent provisions in Chapter Seven of the U.S. Sentencing Guidelines before continuing him on supervision. As

the record and the final order affirmatively show, however, the court failed to make the required considerations. As the record and the final order affirmatively show, the court failed to make the required considerations. See *United States v. Carter*, 408 F.3d 852, 854 (7th Cir. 2005) (reviewing a district court's revocation of a term of supervised release and noting: "Although the court need not make factual findings on the record for each [§3553(a)] factor, the record should reveal that the court gave consideration to those factors.").

5. Davies has already filed two motions for early termination: one in 2016, and another in 2018. The district court denied the first motion without mentioning or considering the §3553(a) factors, and denied the second motion in contradiction of the record itself, without considering the government's untimely response (which did not address the §3553(a) factors) or requesting a response from the supervising probation officer. 18 U.S.C. §3583(e)(1). Had the court considered the §3553(a) factors before continuing Davies on supervision, §3583(e), the lifetime term of supervised release would have likely been terminated. See *United States v. Spinelle*, 41 F.3d 1056, 1060-61 (6th Cir. 1994) (statute requiring district court to impose three-year term of supervised release did not deprive district court of separate authority under §3583(e) to terminate supervised release after completion of one year); *United States v. Carpenter*, 803 F.3d 1224, 1229, 1241 n.4 (11th Cir. 2015) (observing that an offender with a five year minimum term of supervised release may have the term shortened or terminated after one year).

6. Moreover, the guidelines encourage district courts to exercise authority under §3583(e)(1) in appropriate cases," particularly noting that a court

may impose a longer term of supervised release on a defendant with a drug, alcohol, or other addiction, but may then terminate the supervised release term early when a defendant "successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant." U.S.S.G. §5D1.2, cmt. n. 5.

7. Davies successfully completed drug and alcohol treatment, mental health treatment, and sex-offender treatment, yet, his supervising probation officer reinstated the programs without first seeking or obtaining permission from the court. *Weinberger v. United States*, 268 F.3d 346, 359-61 (6th Cir. 2001) (holding that fixing the terms and conditions of probation is a judicial act which may not be delegated, delegating such things as the schedule of restitution payments is permissible), quoting *Whitehead v. United States*, 155 F.2d 460, 462 (6th Cir. 1946). During the revocation proceeding, the court ordered Davies to submit to mental health and substance abuse assessments, and a polygraph exam. Davies passed both assessments and the polygraph exam, leading to dismissal of the initial revocation petition.

8. Nonetheless, the court arbitrarily advised Davies to present "hard evidence" of "psychiatric records" the next time he seeks early termination. See 18 U.S.C. §3553(a)(2)(D) ("The court ... shall consider the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). As the record of this case affirmatively shows, there should not be a next time. See *United States v. Kent*, 821 F.3d 362, 364 (2nd Cir. 2016) (vacating the sentence upon concluding that the district court's application

of the enhancement was not supported by sufficient factual findings); *United States v. Chemical & Metal Industries, Inc.*, 677 F.3d 750, 751 (5th Cir. 2012) (modifying the fine and vacating the restitution order where there was no evidence to support either amount); *United States v. Archer*, 671 F.3d 149, 154 (2nd Cir. 2011) (vacating the sentence and restitution order where the district court, in calculating the Guidelines sentencing range, relied on insufficient evidence to sustain two enhancements, and the record evidence was insufficiently specific to demonstrate that each person to whom the court ordered restitution was a "victim" of the offense); *United States v. Middlebrook*, 553 F.3d 572, 579 (7th Cir. 2009) (an order of restitution that exceeds actual losses is an illegal sentence); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) ("[b]ecause a restitution order imposed when it is not authorized by the [applicable restitution statute] is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum," valid waiver of right to appeal does not bar challenge to restitution order on the ground that it exceeded the court's statutory authority under §3663(a)(1)); *United States v. Hudson*, 483 F.3d 707, 711 (10th Cir. 2007) (no restitution should have been ordered because the government failed to prove that any actual loss); *Tapia v. United States*, 564 U.S. 319, 326 (2011) ("a court may not take account of retribution (the first purpose listed in §3553(a)(2)) when imposing a term of supervised release.").

9. The American judicial system requires "a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share. Judges must be willing to take

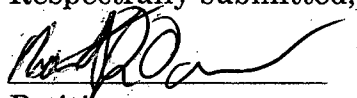
on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation." Chief Justice's 2015 Year-End Report on the Federal Judiciary, p. 10. "[J]udges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing." *Id.* Lawyers "have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship." *Id.*, p. 11. The test "is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results." *Id.* The People of the United States desire "a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice." *Id.* This case presents an opportunity to turn desire into reality.

CONCLUSION

If the Court refrains from reviewing this case now, Davies will eventually file a third motion, which will give the government a third bite at the apple, in spite the rule against allowing even a second bite. *Burks v. United States*, 437 U.S. 1, 17 (1978) ("Given the requirements for entry of a judgment of acquittal, the purposes of the (Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple."). While the statute governing supervised release and revocation, 18 U.S.C. §3583, does not allow a revoking court to dismiss or vacate

convictions, this Court is authorized by 28 U.S.C. §2106 "to 'go beyond the particular relief sought' in order to provide that relief which would be 'just under the circumstances." *Burks*, 437 U.S., at 18. Since "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Id.* As such, the writ should issue.

Respectfully submitted,



Petitioner, *pro se*
Dated: February 15, 2019