No. __-____

IN THE

Supreme Court of the United States

DARRELL TYKWAN ATKINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a federal court from revoking supervised release and sentencing someone based on criminal conduct for which the federal government has already punished that person.

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Petitioner Darrell Tykwan Atkinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's Opinion affirming Mr. Hayes's revocation and sentence is attached at Pet. App. 1a and is reported at 774 F. App'x. 164 (4th Cir. 2019).

LIST OF PRIOR PROCEEDINGS

1. *United States v. Darrell Tykwan Atkinson.*, No. 7:16-cr-120-D-1, United States District Court for the Eastern District of North Carolina.

   Final judgment entered on September 10, 2018.

2. *United States v. Darrell Tykwan Atkinson*, 7:18-cr-58-D-1, United States District Court for the Eastern District of North Carolina.

   Final judgment entered on September 19, 2018

3. *United States v. Darrell Tykwan Atkinson,* No. 18-4659, United States Court of Appeals for the Fourth Circuit.

Opinion issued on August 7, 2019.

JURISDICTION

The Fourth Circuit issued its opinion on August 7, 2019. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United State Constitution

> No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb

STATEMENT OF THE CASE

In July, 2017, the federal district court for the Eastern District of North Carolina sentenced Petitioner, Mr. Darrell Atkinson, to 14 months of incarceration and 2 years of supervised release after he pleaded guilty to aiding and abetting heroin distribution. In October, 2017, he left prison and started his supervised release.

In March, 2018, he sold heroin. A Grand Jury sitting in the Eastern District of North Carolina indicted him for selling heroin. He pleaded guilty and was sentenced to 24 months of incarceration for that conduct.[1] The United States Probation Office filed a motion to revoke Mr. Atkinson's supervised release based on that criminal conduct. Mr. Atkinson admitted that the sold the heroin, but he

[1] The case is docketed as No. 7:18-cr-58-D-1 in the Eastern District of North Carolina.

objected to the revocation, arguing that revoking his supervised release and sentencing him based on conduct for which he was also being criminally punished violated his right not to be put in jeopardy twice for the same crime. The district court overruled the objection, revoked Mr. Atkinson's supervised release, and sentenced him to 24 months of incarceration to run consecutively to the 24 months imposed for the criminal conduct. Mr. Atkinson timely appealed, and the Fourth Circuit affirmed. In rejecting Mr. Atkinson's double jeopardy claim, the Fourth Circuit relied on its two-decades-old case of *United States v. Woodrup*, 86 F.3d 359, 361 (4th Cir. 1996).

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant review because this case presents an important question of federal law that this Court should decide. Sup. Ct. R 10(c).

The Double Jeopardy Clause of the Fifth Amendment says no person will "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It is a "fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Relevant to this appeal, it bars later prosecutions for the same offense as well as successive punishments. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The district court punished Mr. Atkinson twice for selling heroin. It sentenced him to 24 months after he pleaded guilty to doing it. It then sentenced him to a consecutive 24 months for violating his supervised release through

committing criminal conduct by selling heroin. Thus, the district court violated Mr. Atkinson's Fifth Amendment right against being put in double jeopardy.

That the second punishment derived from a revocation does not change this analysis. In rejecting Mr. Atkinson's appeal, the Fourth Circuit relied on its prior decision in *United States v. Woodrup,* which held that "the sentence imposed upon revocation of supervision is punishment for the original offense," and not for the conduct underlying the violation. 86 F.3d at 361. This holding does not survive later changes in the law or Congressional amendments to the revocation statute. The revocation of supervised release and the sentence imposed for the violation conduct is, in part, punishment for that conduct—not simply for the original offense. It thus implicates double jeopardy.

When the Fourth Circuit decided *Woodrup*, the United States Sentencing Guidelines were mandatory. The court naturally focused on the Guidelines to determine whether punishment upon revocation was punishment for the revocation conduct or for the original offense. *Id.* at 361. *United States v. Booker* famously made the Guidelines advisory. 543 U.S. 220, 243-44 (2005). The focus must therefore turn away from those Guidelines and toward the relevant statutes to determine revocation punishment.

Those statutes show that a district court at a revocation punishes a defendant, at least in part, for the conduct underlying the revocation. When a district court decides whether to revoke a term of supervised release and imposed a revocation sentence, Congress requires it to consider, among other things

> (1) the nature and circumstances of the offense . . .
>
> (2) the need for the sentence imposed—
>
> . . .
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(1)-(2) (cross-referenced by 18 U.S.C. § 3583(e)).

The district court must consider the seriousness of the underlying conduct. It must also consider deterrence, incapacitation, and rehabilitation. "These four considerations . . . are the four purposes of sentencing generally." *Tapia v. United States*, 564 U.S. 319, 325 (2011). District courts thus decide to revoke supervised release—and what sentence to impose upon revocation—by applying traditional punishment theory to the revocation conduct. After *Booker*, a revocation punishes the revocation conduct, not the original criminal conviction, whatever the advisory Guidelines may suggest to the contrary.

Congressional changes to the revocation statute after *Woodrup* confirm this understanding. In 1996, when the Fourth Circuit decided *Woodrup*, the revocation statute did not ask the district court to consider "the need to provide restitution to any victims of the offense." Now it does. *Compare* 18 U.S.C. §3583(e) (1996) *with* 18 U.S.C. § 3583(e) (2018). Considering restitution makes sense regarding only the revocation conduct, not the long-past original criminal conviction. Congress thus

requires the district court to focus on the revocation conduct—not the original criminal conviction—when conducting a revocation hearing and sentencing.

The federal government punished Mr. Atkinson for selling heroin. Then it punished him again for the same conduct. The Double Jeopardy Clause forbids this. This Court should grant review to establish that the law has changed and that the Double Jeopardy Clause now applies to revocations of supervised release.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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