No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER WILLIAM CAMPBELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the "stacking" of multiple consecutive sentences, upon revocation of multiple concurrent terms of supervised release, consistent with the United States Sentencing Guidelines?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Roger William Campbell respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 11, 2019. App. A.

OPINION BELOW

The court of appeals' opinion is published at 937 F.3d 1254. The district court's sentencing decision is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Campbell pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 11, 2019. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT SENTENCING GUIDELINES PROVISION

Section 7B1.4(a) of the United States Sentencing Guidelines (Guidelines) consists of a "Policy Statement" regarding the sentence to be imposed upon revocation of a term of supervised release:

> (a) The range of imprisonment applicable upon revocation is set forth in the following table:

Grade of Violation	**I**	**II**	**III**	**IV**	**V**	**VI**
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	**(1)** Except as provided in subdivision (2) below:					
	12-18	15-21	18-24	24-30	30-37	33-41

> **(2)** Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:
>
> 24-30 27-33 30-37 37-46 46-57 51-63
>
> * The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

U.S. Sentencing Guidelines Manual § 7B1.4(a) (U.S. Sentencing Comm'n 2016).

STATEMENT OF THE CASE

Roger William Campbell is a 46-year-old married father of three. In 2010, he pleaded guilty to 35 counts of mail fraud. While working for American Express, Mr. Campbell had engaged in a series of fraudulent transactions involving the ordering of replacement parts from a supplier. The district court sentenced him to 35 concurrent 24-month prison sentences, followed by 35 concurrent three-year supervised release terms.

Mr. Campbell began serving his supervised-release terms in November of 2012. In August of 2015, the probation officer filed a report indicating that Mr. Campbell was out of compliance with the conditions of his supervised release. Specifically, the report indicated that Mr. Campbell had failed to comply with supervised release conditions requiring him to perform community service, pay down his monetary penalties, submit financial reports, and remain in contact with the probation officer. The probation officer requested a warrant, which the district court issued.

Twenty-six months later, police arrested Mr. Campbell in Scottsdale, Arizona. Mr. Campbell ultimately admitted to having violated the supervised-

release condition requiring him to "report to the probation officer in a manner and frequency directed by the court or probation officer." He acknowledged that since May of 2015, he had failed to report to the probation office.

The probation officer's Disposition Report noted that Mr. Campbell had admitted to a Grade C violation of his supervised release conditions, and that his Criminal History Category was I. Accordingly, the recommended sentencing range pursuant to Chapter 7 of the Guidelines was three to nine months of imprisonment. U.S. Sentencing Guidelines Manual § 7B1.4(a) (U.S. Sentencing Comm'n 2016). The statutory maximum term of imprisonment on revocation of each of the 35 supervised-release terms that Mr. Campbell was serving was 24 months. 18 U.S.C. § 3583(e)(3). The probation officer noted that the court was statutorily authorized to impose consecutive custody terms on revocation of each of the 35 supervised release terms, "for a total of 840 months."

The probation officer recommended an aggregate sentence of 30 months of custody, comprised of six months each on five of the revoked supervised release terms, to run consecutively, followed by one day each on the remaining revoked supervised release terms, to run concurrently. The probation officer justified this recommendation on the ground that Mr. Campbell "[a]t no time" took "his supervision conditions seriously," and that the sentence should "impress[] upon [him] the serious nature of his offense and conduct on supervision."

At the final disposition hearing, the government concurred with the probation officer's recommendation. When Mr. Campbell's counsel requested a

sentence "within the policy statement," the court responded that the probation officer's recommendation was "actually within the policy statement, it's just consecutive." Given the opportunity to allocute, Mr. Campbell stated that he understood "there's some serious things that have taken place here," that he "underst[ood] the seriousness of all of this," and that it was "past time to really grow up and take responsibility for these things."

The court sentenced Mr. Campbell to 25 months of imprisonment, consisting of five months each on five of the supervised release terms that were being revoked, to run consecutively, and one day each on the remaining revoked supervised release terms, to run concurrently. The court further imposed an aggregate supervised release term of 35 months and one day, consisting of 31 months each on five of the revoked supervised release terms, and 35 months and one day on each of the remaining revoked supervised release terms, all running concurrently. The court justified this sentence by stressing the amount of time during which Mr. Campbell had "absconded from supervision," his "very deliberate" attempt to avoid his obligations, and his need to "recognize the seriousness of his responsibilities." Mr. Campbell appealed the sentence.

On appeal, Mr. Campbell acknowledged that the district court's "stacking" – *i.e.*, running consecutively – of the sentences imposed upon revocation of multiple terms of supervised release did not violate the governing statutes, as construed by the court of appeals. But Mr. Campbell argued that this practice was not consistent with the applicable provisions of the Guidelines. Mr. Campbell noted that the

applicable Guidelines were silent as to whether multiple revocation sentences should be "stacked" in this fashion, and he argued that pursuant to the "negative pregnant" and rule of lenity doctrines, this silence should be construed as recommending against this harsh sentencing practice.

The court of appeals issued a published opinion rejecting Mr. Campbell's argument. App. A. The court relied on decisions of the Fifth and Eleventh Circuits to reject Mr. Campbell's reliance on the "negative pregnant" doctrine. *Id*. at 7-8 (*citing United States v. Gonzalez*, 250 F.3d 923 (5th Cir. 2001); and *United States v. Quinones*, 136 F.3d 1293 (11th Cir. 1998)). The court also rejected Mr. Campbell's reliance on the rule of lenity, reasoning that the Guidelines are unambiguous because the "governing statute," which the court described as "the ultimate interpretive aid," has been construed to permit revocation sentences to be run consecutively. *Id*. at 8-9.

Judge Berzon filed a separate opinion "dubitante." *Id*. at 10. She described the outcome of the decision – which sanctioned a revocation sentence longer than Mr. Campbell's sentence for the underlying offense – as "baffling" and "incompatible with both the purposes and the practicalities of supervised release." *Id*. But she placed the blame on the Guidelines, which she described as "completely opaque" as to whether the "stacking" of consecutive revocation sentences is proper. *Id*. at 13. And she observed that, given the dramatic effect that this question may have on a supervisee's possible revocation sentence, she doubted that the Sentencing Commission actually "meant to recommend revocation sentences measured by the

number of 'terms of supervised release' rather than by the violations of the uniform conditions of supervised release and the nature of the underlying offense." *Id*. at 15-16. She urged the Commission to "confront[] this anomaly." *Id*. at 16.

REASON FOR GRANTING THE WRIT

This case presents an important question of federal law relating to the proper construction of the United States Sentencing Guidelines. The question may arise in any case in which a defendant is sentenced to multiple concurrent terms of supervised release – and such cases are not rare, because multiple supervised release terms are *required* to run concurrently. 18 U.S.C. § 3624(e). In any such case, when the defendant violates a condition of supervised release, the sentencing court will face the question of whether to run sentences for the defendant's violation of multiple supervised release terms concurrently, or consecutively. The distinction may have an enormous effect on the sentence imposed, particularly in cases in which the defendant was sentenced to a large number of concurrent supervised release terms. In the instant case, for example, the distinction spelled the difference between a maximum Guidelines recommendation of nine months, and a maximum Guidelines recommendation of over *twenty-five years*. In light of this fact, the interrelated doctrines of the "negative pregnant" rule and the rule of lenity require that the Guidelines' silence as to the propriety of such "stacking" of consecutive revocation sentences be construed as a recommendation *against* such a practice.

ARGUMENT

The Sentencing Guidelines should be construed to recommend against the "stacking" of multiple supervised release revocation sentences.

The district court initially sentenced Mr. Campbell to concurrent 24-month sentences on each of the 35 counts to which he pleaded guilty, followed by concurrent 3-year supervised-release terms on each of those 35 counts. Thus, at the time of his violation, Mr. Campbell was serving 35 concurrent supervised-release terms. The district court ran the sentences for Mr. Campbell's violation of five of these supervised-release terms consecutively, generating a total prison sentence of 25 months. The court of appeals' precedent holds that the applicable statutes permit such "stacking" of consecutive sentences, upon revocation of multiple concurrent supervised release terms. *United States v. Xinidakis*, 598 F.3d 1213 (9th Cir. 2010); *United States v. Jackson*, 176 F.3d 1175, 1176-78 (9th Cir. 1999). The district court reasoned that 18 U.S.C. § 3584(a) – which specifies that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively" – gives district courts discretion to impose consecutive sentences in this context. *Xinidakis*, 598 F.3d at 1215-16. For present purposes, Mr. Campbell does not challenge that holding. But he has raised, and raises again here, an entirely separate question: Is the stacking of consecutive sentences, upon revocation of multiple concurrent terms of supervised release, consistent with the *Guidelines*? The answer is "no."

The Guidelines provisions applicable to sentencing on revocation of supervised release are set forth in Chapter 7. They are designated "policy

statements," rather than guidelines, but this distinction lost significance after *United States v. Booker*, 543 U.S. 220 (2005), rendered *all* provisions of the Guidelines advisory. Moreover, sentencing courts addressing supervised-release violations are statutorily required to consider the Chapter 7 policy statements in determining the appropriate sentence. 18 U.S.C. §§ 3583(e), 3553(a)(4)(B).

Section 7B1.4(a) of the Guidelines includes a table specifying recommended sentencing ranges for violations of supervised release:

Grade of Violation	**I**	**II**	**III**	**IV**	**V**	**VI**
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A **(1)** Except as provided in subdivision (2) below:	12-18	15-21	18-24	24-30	30-37	33-41
(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:	24-30	27-33	30-37	37-46	46-57	51-63

In his Disposition Report, the probation officer observed that this table yielded a "revocation range of 3 to 9 months imprisonment." Neither party disputed this calculation at the final disposition hearing, and the district court described the Disposition Report as "correctly not[ing] the Chapter 7 policy statement." The Disposition Report went on to observe that the court was statutorily authorized to stack multiple consecutive 24-month sentences, to impose a sentence as high as 840 months. The report recommended that the court take advantage of this authority to

impose a sentence of 30 months, consisting of five consecutive six-month sentences (plus 30 concurrent one-day sentences).

At the outset of the final disposition hearing, the government stated that it "concur[red] with the recommendation of the probation officer." Mr. Campbell's attorney, however, urged the court to "consider a sentence within the policy statement, the recommended range." The district court believed the Guidelines were consistent with the stacking of multiple consecutive three-to-nine-month sentences:

> MR. WILLIAMS: Judge, we would ask the Court to consider a sentence within the policy statement, the recommended range. This is his first violation –
>
> THE COURT: This is actually within the policy statement, it's just consecutive.
>
> MR. WILLIAMS: I mean concurrent, within the three to nine months range. Within the three to nine month range.

The district court accepted the probation officer's recommendation to impose consecutive sentences for Mr. Campbell's breach of five supervise-release terms, although she reduced the per-term sentence from the recommended six months to five months, yielding a total prison sentence of 25 months. The court clearly believed that running the sentences for the violation of multiple concurrent supervised-release terms consecutively was consistent with the Guidelines. But this belief was incorrect.

Chapter 7 of the Guidelines specifies the recommended sentencing ranges for violation of individual supervised release terms. But Chapter 7 does not expressly address the question of whether, or under what circumstances, the sentences

imposed upon revocation of multiple concurrent supervised release terms should be run consecutively. *United States v. Johnson*, 138 F.3d 115, 119 n.6 (4th Cir. 1998) (noting that a "close reading" of the pertinent Guideline provisions "reveals no official policy favoring or disfavoring running terms of imprisonment, resulting from terms of supervised release that are revoked together, consecutively to each other"); *United States v. Quiñones*, 136 F.3d 1293, 1295 (11th Cir. 1998) (noting that applicable Guidelines "say nothing about concurrence or consecutiveness"); *see also Jackson*, 176 F.3d at 1178 (noting that Guidelines § 5G1.3 is inapplicable in this context).

In view of the Guidelines' silence on the question of "concurrence or consecutiveness" in sentencing on revocation of multiple concurrent supervised release terms (*Quinones*, 136 F.3d at 1295), the Guidelines should be construed as recommending *against* such a practice. This is evident from the application of ordinary principles of statutory interpretation, which apply to the Guidelines. *United States v. Leal-Felix*, 665 F.3d 1037, 1040 (9th Cir. 2011) (en banc); *United States v. Carbajal*, 290 F.3d 277, 283 (5th Cir. 2002).

One such principle is the "negative pregnant" rule, which provides that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). An examination of Chapter 7 reveals that where the Commission intends to recommend

that sentences imposed upon revocation of supervised release be run consecutively to other sentences, it says so expressly. Thus, § 7B1.3(f) specifies that where the defendant being sentenced upon revocation of supervised release "is serving" a term of imprisonment, the revocation sentence "shall be ordered to be served consecutively" to that sentence. U.S. Sentencing Guidelines Manual § 7B1.3(f) (U.S. Sentencing Comm'n 2016). The Application Notes to this provision further specify that "it is the Commission's recommendation" that any sentence of imprisonment for a criminal offense that is imposed after revocation of supervised release "be run consecutively to any term of imprisonment imposed upon revocation." *Id*. appl. note 4. Pursuant to the "negative pregnant" principle, in view of these express recommendations of consecutive sentencing in Chapter 7, the Commission's silence regarding consecutive sentencing upon revocation of multiple concurrent supervised release terms speaks volumes. *See Johnson*, 138 F.3d at 119 n.6 (noting this comparison).

Another interpretive principle that applies here, and operates in tandem with the "negative pregnant" principle, is the rule of lenity, "under which an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994). This rule favors an interpretation of Chapter 7's silence – and thus, ambiguity – on the question of consecutive sentencing in this context as a recommendation against such a practice. *See United States v. Grissom*, 645 F.2d 461, 465-66 (5th Cir. 1981) (construing statutory silence as ambiguity justifying application of rule of lenity).

Indeed, in view of the magnitude of what is at stake in the resolution of this particular ambiguity, these interpretive principles should apply with special force here. When Mr. Campbell violated the terms of his supervised release, he was serving thirty-five concurrent supervised release sentences. If the applicable Guidelines provisions are construed as recommending concurrent sentences, the maximum recommended sentence is nine months. But if they are construed as recommending consecutive sentences, the maximum recommended sentence is 315 months. In other words, the consequence of resolving this ambiguity against Mr. Campbell is to add more than a quarter century of prison time to the maximum Guidelines recommendation.

It is also worth noting that construing Chapter 7 as recommending against consecutive sentencing in this context directly advances the rationales underlying these interpretive doctrines. The "negative pregnant" principle recognizes that legislators typically do not allow highly significant matters, that they have expressly addressed elsewhere in the same statute, to be assumed from mere silence. And the rule of lenity is intended (among other objectives) "to promote fair notice to those subject to the criminal laws." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). It cannot plausibly be suggested that the Sentencing Commission intended to support adding a possible *quarter century* to a defendant's recommended prison sentence through mere silence – or that this silence put Mr. Campbell on "fair notice" that his conduct could trigger such a recommended

sentence. These doctrines thus weigh heavily in favor of interpreting the Guidelines' silence as a recommendation *against* imposing consecutive sentences in this context.

The court of appeals' analysis does not convincingly refute these observations. Indeed, the court's analysis focuses on knocking over a "straw man" that neither party disputed. The court found that Chapter 7 of the Guidelines does not "preclude" the imposition of consecutive revocation sentences, rejecting the argument – which it attributed to Mr. Campbell – that the Guidelines "deprive the district court of its discretionary authority under § 3584(a)" to impose such sentences. App. A at 3, 9. But Mr. Campbell did not suggest that the Guidelines "precluded" the district court from imposing consecutive revocation sentences.

To the contrary, Mr. Campbell noted that in the wake of *Booker*, even ordinary Guidelines provisions – let alone the "policy statements" set forth in Chapter 7 – cannot "preclude" the district court from imposing a particular sentence. Ct. App. Reply Br. at 6-7. He stressed that the question was whether a sentence incorporating such an exercise of discretion may be deemed consistent with the advisory Guidelines. That question bears on a sentence's reasonableness, because while a sentencing court has the power to sentence outside the Guidelines, the extent of a sentence's deviation from the Guidelines is a factor in assessing the sentence's reasonableness. *Gall v. United States*, 552 U.S. 38, 47 (2007) ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may [] take the degree of variance into account and consider the extent of a deviation from the Guidelines."). Thus, the question at issue here, although it does

not implicate a contraint on a sentencing court's power, does have serious implications with respect to how the reasonableness of individual exercises of that power will be reviewed. The Court should grant the writ and address this important and unresolved question.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on December 10, 2019.

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