NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY FOLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is the "reasonableness" standard, under *United States v. Booker*, 543 U.S. 220 (2005), the proper standard for appellate review of a sentence imposed upon revocation of supervised release, as a number of federal circuit courts have held, or is the "plainly unreasonable" standard set forth in 18 U.S.C. §3742(a)(4) (applicable to non-Guidelines offenses) the proper standard, as other federal circuits have held?

II. Should a federal court of appeals vacate a sentence imposed upon revocation of supervised release when it finds that the sentence is unreasonable due to an error that was preserved in the court below, or should it require a showing that such a sentence, even though unreasonable, is "plainly unreasonable" under published circuit precedent?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Foley, 946 F.3d 681 (5th Cir. 2020), *reh'g denied*, No. 19-20129 (5th Cir. Feb. 5, 2020).

United States v. Foley, Case No. 4:08-CR-331-1 (S.D. Tex.).

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PRAYER

Petitioner Anthony Ray Foley respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued its opinion on January 3, 2020, and denied rehearing on February 5, 2020. In the alternative, Mr. Foley prays that the Court grant equitable vacatur of the Fifth Circuit's judgment or grant certiorari, vacate the judgment, and remand. *See infra* text, at 2 & nn.1-2, 22-23 & nn.6-7.

OPINIONS BELOW

On January 3, 2020, the Fifth Circuit entered its judgment and opinion affirming Mr. Foley's judgment of conviction and sentence. *See United States v. Foley*, 946 F.3d 681 (5th Cir. 2020). The Fifth Circuit's opinion is reproduced as Appendix A to this petition. On February 5, 2020, the Fifth Circuit entered its order denying panel rehearing. *See* Order, *United States v. Foley*, No. 19-20129 (5th Cir. Feb. 5, 2020). The order denying rehearing is reproduced as Appendix B to this petition.

JURISDICTION

On January 3, 2020, the Fifth Circuit entered its opinion and judgment in this case. On February 5, 2020, the Fifth Circuit entered its order denying Mr. Foley's petition for panel rehearing in this case. This petition is filed within 150 days after the order denying rehearing and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court

is invoked under 28 U.S.C. § 1254(1).

Moreover, should this case become moot in light of the October 20, 2020, release date for Mr. Foley shown on the Bureau of Prisons' web site,[1] Mr. Foley requests that the Court grant equitable vacatur of the Fifth Circuit's opinion and judgment to prevent that decision "'from spawning any legal consequences'" and "'strip the decision below of its binding effect.'" *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950), and *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).[2] In the further alternative and to expedite this case, Mr. Foley requests that the Court grant certiorari, vacate the judgment, and remand for resentencing.

[1] Mr. Foley's projected release day can be found at https://www.bop.gov/inmateloc/.

[2] *See also United States v. Schaffer*, 240 F.3d 35, 36 (D.C. Cir. 2001) (applying *Munsingwear* in a criminal case); *United States v. Mora*, 135 F.3d 1351, 1358 & n.4 (10th Cir. 1998) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V

Section 3553 of Title 18, United States Code, provides in pertinent part as follows:

> (a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—
> >
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (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;
> >
> > (3) the kinds of sentences available;
> >
> > (4) the kinds of sentence and the sentencing range established for—
> >
> > > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> > >
> > > > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject

to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately

> taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(a)-(b)(1).

Section 3583 of Title 18, United States Code, provides in pertinent part as follows:

> (e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> > (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
> >
> > (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
> >
> > (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal

> Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or
>
> (4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

18 U.S.C. § 3583(e)(1)-(4).

STATEMENT OF THE CASE

In 2008, the petitioner, ANTHONY RAY FOLEY, was sentenced to serve 120 months in custody and a three-year term of supervised release for possessing a firearm subsequent to a felony conviction. Two years after Mr. Foley began his term of supervised release, his probation officer filed a petition to revoke his supervised release alleging that he had: (1) possessed with intent to manufacture or deliver a controlled substance; (2) assaulted a family member; and (3) failed to notify the probation officer of his arrest within 72 hours.

The allegations in the petition were as follows:

> On or about December 29, 2018, in Houston, Harris County, Texas, Anthony Foley did then and there commit the offense of possession with intent to man/del a controlled substance, in violation of Texas Health and Safety Code, Chapter 481.112. Mr. Foley was arrested by the Houston Police Department and charged under Cause No. 1616504 in the 339th Criminal District Court in Harris County, Texas. On January 1, 2019, Mr. Foley was released on a $20,000 bond, and the next Court date is February 27, 2019.
>
> . . .
>
> On or about December 29, 2018, in Houston, Harris County, Texas, Anthony Foley did then and there commit the offense of assault-family member, in violation of Texas Penal Code, Section 22.01. Mr. Foley was arrested by the Houston Police Department and charged under Cause No. 2240131 in the 339th Harris County Criminal Court at Law No. 2. On January 1, 2019, Mr. Foley was released on a $3,000 bond, and the next Court date is February 28, 2019.
>
> . . .
>
> Mr. Anthony Foley was arrested on December 29, 2018 as evidenced by the Houston Police Department offense report number 163774118. Mr. Foley failed to notify the U.S. Probation Officer within 72 hours of his arrest.

At the revocation hearing, defense counsel and the prosecutor informed the court that the government did not intend to proceed on the controlled substance violation or the assault violation and was withdrawing them. The court confirmed that the government was only proceeding on the Grade C violation of failing to timely inform the probation officer of an arrest, and Mr. Foley then pleaded true to the Grade C violation.

Defense counsel requested a prison sentence of 7 months based on the applicable Guideline range of 7 to 13 months for a Grade C violation, the imposition of the maximum sentence for the original offense, the completion of 2 out of the 3 years of supervised release without incident, and the potential penalty Mr. Foley was facing on pending charges in state court. Mr. Foley personally requested leniency, and the government asked for a prison term of 13 months.

The court then imposed sentence as follows:

> THE COURT: ***Considering the seriousness of the pending char***ges, his criminal history category of five, which is second highest in the whole federal system – six is the very highest. He's back in front of me at a criminal history category of five – and his willful failure to notify the probation office within 72 hours of arrest, and I believe, ***based upon these pending – just pending charges, he's a continued threat to the community***. I believe an upward variance is appropriate.
>
> The sentence is being imposed pursuant to the chapter seven policy statements, and with the variance, I believe, now satisfies 18, United States Code, Section 355 – Section 3553(a).
>
> The sentence – the, what is it – the supervised release is hereby revoked. He's sentenced to – back to the federal penitentiary for a term of 24 months with no term of supervision of release as follows and is to run concurrent to any other sentence that he might – I mean, to run consecutive to any sentence that he might receive in the current pending state proceedings. (Emphasis added).

Defense counsel "object[ed] to the sentence imposed as being greater than necessary to serve the purposes of [§] 3553(a), specifically, that Mr. Foley is being unduly punished for conduct that is pending before the state." The court responded that the objection was noted.

On appeal, Mr. Foley argued that the district court had erred by sentencing him based on unsupported allegations in the revocation petition. *See* App. Br. 8-11. In its opinion, the Fifth Circuit recognized its unpublished opinions holding that a district court errs by revoking supervised release and sentencing a defendant based on unsubstantiated allegations. *United States v. Foley*, 946 F.3d 681, 686-87 (5th Cir. 2020) (relying *United States v. Perez*, 460 Fed. Appx. 294, 302 (5th Cir. 2012) (unpublished), and *United States v. Standefer*, No. 95-50043, 1996 WL 46805, *3 (5th Cir. Jan. 15, 1996) (unpublished)), The Fifth Circuit thus agreed with Mr. Foley and decided:

> We now hold that a district court errs when it relies on a bare allegation of a new law violation contained in a revocation petition unless the allegation is supported by evidence adduced at the revocation hearing or contains other indicia of reliability, such as the factual underpinnings of the conduct giving rise to the arrest.

Foley, 946 F.3d at 687. The Fifth Circuit also specifically held that "[t]he revocation petition included only bare allegations of new violations of law, and the allegations were not supported by evidence at the revocation hearing and do not have other indicia of reliability. As a result, these bare allegations were impermissible factors for the district court to consider." *Id.*

But, the Fifth Circuit affirmed the sentence because it applied the "plainly unreasonable" standard of review, which it articulated as follows: "Even if we determine that a sentence is substantively unreasonable, we only vacate it if the error is 'obvious under existing law,' so that the sentence is not just unreasonable but is plainly unreasonable." *Id.* at 685. The Fifth Circuit held that "this error was not clear under existing law" and that "the district court's error was not plainly unreasonable" because "[w]e have never held, in a published opinion, that it is impermissible for the sentencing court to rely on 'bare allegations' of new law violations alleged in the petitions." *Id.* at 688.

Mr. Foley filed a petition for panel rehearing, in which he pointed out that the Fifth Circuit's opinions in *Standefer* and *Perez* were unpublished because they relied on and were merely applications of binding precedent articulating the well-established legal rules that the preponderance of the evidence standard applies at a revocation hearing and that, when a trial court relies upon erroneous information or assumptions, a remand for resentencing is required. *See* Pet. Reh'g 6-7 (quoting 5th Cir. R. 47.5.1 (regarding unpublished opinions), and noting that *Perez* cited *Gall v. United States*, 552 U.S. 38, 51 (2007), and that *Standefer* cited *United States v. Alaniz-Alaniz*, 38 F.3d 788, 792 (5th Cir. 1994)). The petition also pointed out that a published Fifth Circuit opinion, *United States v. Warren*, 720 F.3d 321, 330 (5th Cir. 2013), had reiterated that sentences based upon erroneous and material information or assumptions violate due process, that this principle covers a revocation sentencing as well as an original sentencing, and that it is procedural error at a revocation sentencing to base a sentence on clearly erroneous facts. Pet. Reh'g

8-9 (quoting *Warren*, 720 F.3d at 331, and noting that *Warren* relied on, among other cases, *Perez*, 460 Fed. Appx. at 302). The petition additionally pointed out that, after deciding to vacate and remand on other grounds, the *Warren* opinion stated that the district court would have procedurally erred had it imposed a revocation sentence based on conduct charged in the revocation petition when the defendant had not pleaded true to that conduct and the court had declined to hear the government's supporting evidence. Pet. Reh'g 9 (quoting *Warren*, 720 F.3d at 331).

On February 5, 2020, the Fifth Circuit denied rehearing. Order, *United States v. Foley*, No. 19-20129 (5th Cir. Feb. 5, 2020).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the federal circuits are divided on the standard of review for revocation sentences, because the "plainly unreasonable" standard contravenes this Court's precedent, and because this case presents a question of exceptional importance.

A. Introduction

This case presents an issue that is of significant import. The decision below as well as the holdings of other courts of appeals stand in direct contravention of the standard announced in *Booker* that "courts of appeals review sentencing decisions for unreasonableness." *United States v. Booker*, 543 U.S. 220, 264 (2005). This case presents a unique opportunity for the Court to provide guidance to the lower courts and notice to prosecutors and defense attorneys regarding the standards that apply to review of sentences imposed upon revocation of probation and supervised release.

B. The Circuits Are Divided on the Question Presented.

Prior to Booker, federal courts of appeals reviewed revocation sentences using the "plainly unreasonable" standard articulated in § 3742(e)(4) because such revocation sentences were not expressly governed by actual Sentencing Guidelines but instead by advisory policy statements. *See United States v. Ryans*, 237 Fed. Appx. 791, 793 (4th Cir. 2007) (unpublished) ("Pre-Booker, courts agreed . . . the policy statements in Chapter 7 are merely advisory.") This Court's opinion in *Booker*, however, made the Sentencing Guidelines advisory and excised the appellate standard of review set forth in § 3742(e), which depended upon the Guidelines' "mandatory nature." *Booker*, 543 U.S. at 245. In so

doing, this Court instructed appellate courts to apply a standard of reasonableness in reviewing sentences. *Id.* at 264.

1. The Second, Third, Eighth, Ninth, and Eleventh Circuits have held that *Booker* did replace the "plainly unreasonable" standard found in § 3742(e)(4). *United States v. Bungar*, 478 F.3d 540, 541 (3d Cir. 2007) (holding, on an appeal of a sentence imposed upon revocation of supervised release, "post-*Booker*, that our review should be for reasonableness"); *United States v. Miqbel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006) ("Booker's 'reasonableness' standard has displaced the former 'plainly unreasonable' standard in the context of revocation sentencing."); *United States v. Sweeting*, 437 F.3d 1105, 1106 (11th Cir. 2006) ("In Booker . . . the Supreme Court excised § 3742(e) and replaced it with a reasonableness standard."); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005) ("the [Supreme] Court is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable guidelines. Thus, we will review the District Court's sentence for reasonableness."); *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005) ("The new standard is review for unreasonableness with regard to § 3553(a)."). Two circuits, the Sixth and Tenth, also apply a reasonableness standard of review, but do not deem that standard to be different than the standard applied before *Booker*. *United States v. Riggans*, 346 Fed. Appx. 309, 311 n.3 (10th Cir. 2009) (plainly unreasonable "is the same level of review as the reasonableness standard of review called for by *Booker* and its progeny"); *United States v. Bolds*, 511 F.3d

568, 575 (6th Cir. 2007) ("we hold that there is no practical difference between the pre-*Booker* 'plainly unreasonable' standard of review of supervised release revocation sentences and our post-*Booker* review of sentences for 'unreasonableness'"). All of these courts have reviewed revocation sentences to determine whether such sentences are unreasonable.

In contrast, the Fourth, Fifth, and Seventh Circuits have found that *Booker* did not abrogate the "plainly unreasonable" standard of review for revocation sentences. *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011) (agreeing with the Fourth Circuit's holding that *Booker* did not abrogate the "plainly unreasonable standard"); *United States v. Kizeart*, 505 F.3d 672, 674 (7th Cir. 2007) ("a defendant who challenges his sentence for violating supervised release must show that the sentence is plainly unreasonable"); *United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006) ("[W]e hold that revocation sentences should be reviewed to determine whether they are 'plainly unreasonable' with regard to those § 3553(a) factors applicable to supervised release revocation sentences."). These courts have rejected the *Booker* reasonableness standard and have continued to use their pre-*Booker* approaches to review of revocation sentences.

The split is acknowledged and characterized not only by the language of the standard to be applied, but different interpretations of that language. *Bolds*, 511 F.3d at 574 (stating that, "[f]rom the twelve circuits, five different approaches have emerged," and explaining the standard of review in other circuits). Several circuits have attempted to reconcile the split. The Sixth, Eighth, Tenth, and Eleventh Circuits have held that review

under the Booker reasonableness standard is effectively the same as review under the "plainly unreasonable" standard. *Riggans*, 346 Fed. Appx. at 311 n.3 (plainly unreasonable "is the same level of review as the reasonableness standard of review called for by Booker and its progeny"); *Bolds*, 511F.3d at 575 ("we hold that there is no practical difference between the pre-Booker 'plainly unreasonable' standard of review of supervised release revocation sentences and our post-Booker review of sentences for 'unreasonableness'"); *Sweeting*, 437 F.3d at 1106 ("numerous circuits applying the reasonableness standard prescribed in *Booker* to sentences imposed upon revocation of supervised release have concluded that the reasonableness standard of *Booker* is essentially the same as the 'plainly unreasonable' standard of § 3742(e)(4). We agree."); *Cotton*, 399 F.3d at 916 ("The new standard is review for unreasonableness with regard to § 3553(a). This is the same standard prescribed in § 3742(e)(4).").

2. There is, however, a meaningful difference between the two standards of review because the "plainly unreasonable" standard is interpreted to impose a standard of review that is even more stringent than abuse of discretion. Indeed, under the "plainly unreasonable" standard, a procedurally and substantively unreasonable sentence may be upheld if the district court's error is not "obvious." This case is a prime example of that. Here, the Fifth Circuit acknowledged that its prior unpublished opinions had held that a district court errs by revoking supervised release and sentencing a defendant based on unsubstantiated allegations. *Foley*, 946 F.3d at 686-87. And, the Fifth Circuit even agreed with Mr. Foley and decided that "a district court errs when it relies on a bare allegation of

a new law violation contained in a revocation petition unless the allegation is supported by evidence adduced at the revocation hearing or contains other indicia of reliability, such as the factual underpinnings of the conduct giving rise to the arrest." *Id.* at 687. Moreover, the Fifth Circuit also specifically held that "[t]he revocation petition included only bare allegations of new violations of law, and the allegations were not supported by evidence at the revocation hearing and do not have other indicia of reliability. As a result, these bare allegations were impermissible factors for the district court to consider." *Id.*

But, the Fifth Circuit applied the "plainly unreasonable" standard of review to affirm the sentence, holding that the district court's error was not "plainly unreasonable" because it was not clear under existing law: "We have never held, in a published opinion, that it is impermissible for the sentencing court to rely on 'bare allegations' of new law violations alleged in a revocation petition." *Id.* at 688. And, when Mr. Foley subsequently filed a petition for panel rehearing, the Fifth Circuit still refused to vacate the sentence even though his petition pointed out that published Fifth Circuit case law recognized that it is procedural error for a district court to impose a revocation sentence based on conduct charged in the revocation petition when the defendant has not pleaded true to that conduct and the court has heard no supporting evidence for it. Pet. Reh'g 9. In other words, here the sentence was unreasonable, *see, e.g.*, *Gall*, 552 U.S. at 51 (reiterating that "selecting a sentence based on clearly erroneous facts" is a significant error and unreasonable), but that was insufficient under the Fifth Circuit's "plainly unreasonable" standard of review. And, it is clear not only from the Fifth Circuit's opinion that the sentence in this case would have

been vacated under the reasonableness standard, but also from cases in other circuits. *See, e.g.*, *United States v. Adams*, 873 F.3d 512, 523 (6th Cir. 2017) (finding sentence imposed on revocation of supervised release to be unreasonable because the court imposed the sentence based on unreliable information, and vacating and remanding for resentencing).

Because the "plainly unreasonable" standard of review produces different outcomes for similarly-situated defendants when a judge imposes an unreasonable sentence upon revocation of supervised release, and because this creates geographic disparities that are wholly inconsistent with Congress's goals in sentencing reform, *see Booker*, 543 U.S. at 265, this Court should grant certiorari.

C. Application of the "Plainly Unreasonable" Standard of Review Contravenes the Court's Precedent in this Area.

Although *Booker* involved review of an initial Guidelines-governed sentence and not a sentence resulting from revocation of supervised release, the Court's pronouncements regarding the appellate standard of review were clear. The statute that dictated the "plainly unreasonable" standard for non-Guidelines cases was excised in *Booker*. 543 U.S. at 258-62. Appellate courts should instead review sentencing decisions for "reasonableness." *Id.* at 260. In excising § 3742(e), this Court found that "a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly." *Id.* The Court inferred an appropriate review standard based on "related statutory language, the structure of the statute, and the 'sound administration of justice.'" *Id.* at 260-61. The Court found that these factors implied "a practical standard of review already familiar to appellate courts: review for 'unreasonableness.'" *Id.*

Although *Booker* did not excise § 3742(a)(4), which permits a defendant to file a notice of appeal if the sentence "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable," the Court's dicta makes clear that it did not intend for appellate courts to look to § 3742(a) for a standard of review. Indeed, in its pronouncement of the reasonableness standard of appellate review, the Court cited six exemplary "reasonableness" cases – all of which were appeals from revocation decisions. *Booker*, 543 U.S. 262. If the Court had intended that appellate courts review revocation sentences using a "plainly unreasonable" standard of review, it would not have cited these revocation decisions as evidence that appellate judges were well-equipped to engage in reasonableness review.

The Court's post-*Booker* jurisprudence further suggests that the proper standard of appellate review of any sentencing decision is "reasonableness." *See Gall*, 552 U.S. at 46 ("As a result of our decision [in *Booker*], the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'"); *see also Kimbrough v. United States*, 552 U.S. 85, 90-91 (2007) ("*Booker* further instructed that 'reasonableness' is the standard controlling appellate review of the sentence district courts impose.") Indeed, this Court has repeatedly instructed appellate courts to review sentencing decisions for reasonableness. In *Pepper v. United States*, 562 U.S. 476 (2011), for example, this Court reiterated that "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'" *Id.* at 490 (citing Gall, 552 U.S. at 49-

51).

Most recently, in a case involving an appeal of a sentence imposed upon revocation of supervised release, this Court stated that an appellate court's task is to review "whether the trial court's chosen sentence was 'reasonable' or whether the judge instead 'abused his discretion in determining that the § 3553(a) factors supported' the sentence imposed." *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020) (quoting *Gall*, 552 U.S. at 56, and citing *Booker*, 543 U.S. at 261-262); *see also id.* at 766 ("Our decisions make plain that reasonableness is the label we have given to 'the familiar abuse-of-discretion standard' that 'applies to appellate review' of the trial court's sentencing decision.") (quoting *Gall*, 552 U.S. at 46). "The "reasonableness" standard announced in *Booker* coupled with this Court's subsequent jurisprudence suggest that reasonableness is the appropriate standard of review for revocation sentences. The Court's failure to strike § 3742(a)(4) in *Booker* is no more significant, for purposes of the standard of review, than its failure to strike § 3742(a)(3).[3] It was not an invitation for appellate courts to apply the "plainly unreasonable" standard of review to sentencing decisions.[4]

The Fifth Circuit and other courts applying the "plainly unreasonable" standard of

[3] Moreover, review of revocation sentences using the "plainly unreasonable" standard necessarily relies on the same statutory language that was excised in §3742(e)(4). It cannot be the case that this Court intended courts of appeals to review revocation sentences using a "plainly unreasonable" standard when it clearly excised the portion of the statute that provided for such review.

[4] More importantly, Mr. Foley's appeal was proper under § 3742(a)(l) because his sentence "was imposed in violation of the law," specifically § 3583(e)(3). Because his right to appeal arose independent of § 3742(a)(4), that provision should not affect appellate review of his case.

review to revocation sentences have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). They have seized upon the Court's failure to excise §3742(a)(4) in order to stand by the course of review they had adopted pre-*Booker*. In this case, the Fifth Circuit's application of its version of the "plainly unreasonable" standard produced a clearly unjust result. At the revocation hearing, Mr. Foley's counsel objected to the sentence because it was based on an improper consideration of conduct that was pending adjudication in the state court. Despite finding that the district court erred by reliance unsubstantiated allegations, the Fifth Circuit upheld the sentence. Mr. Foley thus has no relief from his unreasonable sentence that was twice the top end of the Guideline range and was based on bare allegations. As even the Fifth Circuit's opinion shows, the error in this case is evident and demonstrates "the need to clarify at once" the standard of review for revocation sentences. *See Spears v. United States*, 555 U.S. 261, 268 (2009). Review is necessary to provide Mr. Foley with relief and to clarify the standard of review for the multitude of other defendants will face revocation of their supervised release.

D. Review Is Warranted Because this Case Presents Questions Of Exceptional Importance.

The questions presented in this case are exceptionally important, meriting this Court's immediate attention. Most noteworthy is the sheer number of defendants affected by this issue. As of September 30, 2019, 128,904 federal offenders were under post-conviction supervision, and 113,198 federal offenders were serving terms of supervised release. *See* Judicial Business of the United States Courts: Annual Report of the Director,

Post-Conviction Supervision and Table 8 (2019).[5] Moreover, there were 17,208 revocations of post-conviction supervision. *See id.*

Under the Fifth Circuit's application of the "plainly unreasonable" standard of § 3742(a)(4), an individual serving a term of supervised release may be forced to endure an unreasonable sentence if the district court committed an error and imposed an unreasonable sentence merely because the error is determined not to be "obvious" or "plain" under existing precedent.

For the foregoing reasons, this Court should grant certiorari to clarify the proper standard of appellate review of revocation sentences and to make clear that the proper standard is reasonableness. Should this case become moot in light of the October 20, 2020, release date for Mr. Foley shown on the Bureau of Prisons' web site,[6] he alternatively requests that the Court grant equitable vacatur of the Fifth Circuit's opinion and judgment to prevent that decision "'from spawning any legal consequences'" and "'strip the decision below of its binding effect.'" *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950), and *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).[7] In the further alternative and to expedite this case, Mr. Foley requests that the Court grant certiorari, vacate the judgment, and remand for resentencing.

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[5] *Available at* https://www.uscourts.gov/post-conviction-supervision-judicial-business-2019.

[6] Mr. Foley's projected release day can be found at https://www.bop.gov/inmateloc/.

[7] *See also United States v. Schaffer*, 240 F.3d 35, 36 (D.C. Cir. 2001) (applying *Munsingwear* in a criminal case); *United States v. Mora*, 135 F.3d 1351, 1358 & n.4 (10th Cir. 1998) (same).

CONCLUSION

For the foregoing reasons, the petitioner, Anthony Ray Foley, prays that this Court grant certiorari. In the alternative, Mr. Foley request that this Court grant equitable vacatur of the Fifth Circuit's opinion and judgment or grant certiorari, vacate the judgment, and remand for resentencing. *See supra* text, at 2 & nn.1-2; *see also supra* text, at 22 & n.6-7.

Date: July 6, 2020

Respectfully submitted,

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946 F.3d 681
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Anthony Ray FOLEY, Defendant – Appellant

No. 19-20129
|
FILED January 3, 2020

Synopsis

Background: Defendant was found, on his plea of true, to have violated condition of his supervised release, for failing to timely report the fact that he had been arrested, and the United States District Court for the Southern District of Texas, David Hittner, Senior District Judge, imposed maximum 24-month sentence. Defendant appealed.

Holdings: The Court of Appeals, Wiener, Senior Circuit Judge, held that:

[1] as matter of first impression, district court errs when it relies on a bare allegation of a new law violation contained in a revocation petition in order to impose revocation sentence;

[2] district court improperly relied on bare allegations of new law violations when sentencing defendant on revocation of supervised release violation, and its reliance on those bare allegations was dominant factor in sentence imposed; but

[3] the Court would not set aside defendant's sentence as plainly unreasonable, where it had never before held, in published opinion, that it was impermissible for court to rely on "bare allegations" of new law violations alleged in revocation petition.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (14)

[1] **Criminal Law** Probation

When defendant preserves his objection for appeal, the Court of Appeals reviews a sentence imposed on revocation of supervised release under a "plainly unreasonable" standard.

[2] **Criminal Law** Probation
Criminal Law Sentencing

On appeal from sentence imposed on revocation of supervised release, the Court of Appeals first ensures that district court committed no significant procedural error, such as failing to consider the statutory sentencing factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence, including failing to explain a deviation from the Guidelines range. 18 U.S.C.A. § 3553(a).

[3] **Criminal Law** Revocation of probation or supervised release

If sentence imposed on revocation of supervised release is not procedurally unreasonable, the Court of Appeals, on challenge to sentence, considers the substantive reasonableness of the sentence under an abuse-of-discretion standard.

[4] **Sentencing and Punishment** Factors or Purposes in General

Sentence is substantively unreasonable if it: (1) does not account for a factor that should have received significant weight, (2) gives significant weight to irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors. 18 U.S.C.A. § 3553(a).

[5] **Criminal Law** Sentencing and Punishment

Even if the Court of Appeals determines that sentence imposed by district court is substantively unreasonable, the Court will only vacate it if the error is obvious under existing law, so that the sentence is not just unreasonable, but is plainly unreasonable.

[6] **Sentencing and Punishment** Matters considered

Sentence imposed on revocation of supervised release is substantively unreasonable if it gives significant weight to an irrelevant or improper factor, and if that impermissible consideration is a dominant factor in the court's revocation sentence.

[7] **Sentencing and Punishment** Admissibility in General

Sentencing and Punishment Documentary evidence

While, as general rule, no limitation should be placed on information concerning background, character, and conduct of defendant which federal court may receive and consider for purpose of imposing an appropriate sentence, it is improper for a district court to rely on a "bare" arrest record in the context of sentencing following a criminal conviction. 18 U.S.C.A. § 3661.

[8] **Sentencing and Punishment** Documentary evidence

Arrest record is "bare arrest record," on which district court should not rely when sentencing following a criminal conviction, if it refers to the mere fact of arrest, I.e., to the date, charge, jurisdiction and disposition, without corresponding information about the underlying facts or circumstances regarding defendant's conduct that led to the arrest.

[9] **Sentencing and Punishment** Documentary evidence

Arrest record is not "bare arrest record," and is one on which district court may rely when sentencing following a criminal conviction, if it is accompanied by factual recitation of defendant's conduct that gave rise to a prior unadjudicated arrest, and if that factual recitation has an adequate evidentiary basis with sufficient indicia of reliability.

[10] **Sentencing and Punishment** Sentence within statutory or other limitation for offense of conviction

In sentencing defendant following revocation of supervised release, district court errs when it relies on a bare allegation of a new law violation contained in a revocation petition, unless the allegation is supported by evidence adduced at the revocation hearing or contains other indicia of reliability, such as the factual underpinnings of the conduct giving rise to the arrest.

[11] **Sentencing and Punishment** Sentence within statutory or other limitation for offense of conviction

District court improperly relied on bare allegations of new law violations when sentencing defendant on revocation of supervised release, where revocation petition contained only bare allegations regarding defendant's state arrest on firearm possession and assault charges without providing any context regarding the underlying facts and circumstances surrounding defendant's arrest or his conduct leading to the arrest, and where the government, defense counsel, and defendant while each referenced the pending state charges at revocation hearing, never introduced any evidence relating to those charges.

[12] **Criminal Law** Probation and related dispositions

Even when district court considers an impermissible factor in imposing a sentence on revocation of supervised release, the Court of Appeals will not vacate that sentence unless the impermissible factor was a dominant factor in the court's decision.

[13] **Criminal Law** Probation and related dispositions

Sentencing and Punishment Sentence within statutory or other limitation for offense of conviction

Unsubstantiated state assault and firearm possession charges against defendant whose supervised release had been revoked were a dominant factor in district court's imposition of a maximum 24-month sentence, as required for the Court of Appeals to vacate the revocation sentence as substantively unreasonable, where those charges pervaded the revocation hearing, and it was clear from transcript of revocation hearing that district court impermissibly gave substantial weight to the unsubstantiated assault and firearm possession charges alleged in revocation petition.

[14] **Criminal Law** Probation and related dispositions

While district court, in sentencing defendant on revocation of supervised release, improperly relied on bare allegations of unsubstantiated state assault and firearm possession charges pending against defendant, and while its reliance on these bare allegations was dominant factor in the maximum 24-month sentence that it imposed for defendant's violation of supervised release condition in failing to timely report his arrest on these state charges, the Court of Appeals would not set aside defendant's sentence as plainly unreasonable, where the Court had never before held, in prior published opinion, that it was impermissible for court, in sentencing for supervised release violation, to rely on "bare allegations" of new law violations alleged in revocation petition.

***683** Appeals from the United States District Court for the Southern District of Texas, David Hittner, U.S. District Judge

Attorneys and Law Firms

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Marjorie A. Meyers, Federal Public Defender, Evan Gray Howze, Assistant Federal Public Defender, H. Michael Sokolow, Assistant Federal Public Defender, Federal Public Defender's, Office Southern District of Texas, Houston, TX, for Defendant-Appellant.

Before WIENER, HIGGINSON, and HO, Circuit Judges.

Opinion

WIENER, Circuit Judge:

Defendant-Appellant Anthony Foley appeals his twenty-four month sentence for violating a condition of his supervised release. Foley contends that the district court improperly relied on "bare allegations" of new violations of law contained in the revocation petition. We have not previously held in a published decision whether such reliance constitutes error. We do so ***684** now and AFFIRM the decision of the district court.

I. BACKGROUND

In March 2009, Foley pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court sentenced him to 120 months of imprisonment, followed by three years of supervised release. The conditions of supervised release prohibited Foley from committing any crime and required him to report any arrest or questioning by law enforcement to his probation officer within seventy-two hours.

Foley's supervised release began in December 2016. In January 2019, the U.S. Probation Office filed a petition to revoke Foley's supervised release, alleging that he had violated his supervised release by: (1) committing a new violation of law because he was arrested and charged by the state with possession with the intent to manufacture or deliver a controlled substance, (2) committing a new violation of law because he was arrested and charged by the state with assault of a family member, and (3) failing to notify his probation officer within seventy-two hours following his arrest.

At the revocation hearing, the government withdrew the first two alleged violations because the possession and assault charges remained pending in state court. Explaining the decision to withdraw the first two alleged violations, counsel for the government said: "Having conversed with the [state's]

prosecutor actually handling the cases, I believe that they have a very strong case that they wish to pursue. And given the amount of time that he's looking at on the state side versus what he's looking at here, I don't wish to interfere in their prosecution." Foley pleaded true to the remaining revocation charge of failure to notify the probation officer of his arrest within seventy-two hours, a grade C violation under United States Sentencing Guideline § 7B1.1(a)(3). Foley had a criminal history category of V, so his revocation guideline range was seven to thirteen months of imprisonment.[1] The maximum revocation sentence for a grade C violation of supervised release is twenty-four months.[2]

The government requested a sentence of thirteen months imprisonment. Defense counsel requested a sentence of seven months of imprisonment, with no additional supervised release. During allocution, Foley implored the court, "please let me be done with the federal system, and let me go back to Harris County because I'm dealing with a tougher matter than, you know, what I'm dealing with [in] the federal."

The district court sentenced Foley to twenty-four months of imprisonment, to run consecutively to any state sentence given for the pending charges, with no additional term of supervised release. At sentencing, the district court explained:

> Considering the seriousness of the pending charges, his criminal history category of five, which is second highest in the whole federal system —six is the very highest. He's back in front of me at a criminal history category of five—and his willful failure to notify the probation office within 72 hours of arrest, and I believe, based upon these pending—just pending charges, he's a continued threat to the community. I believe an upward variance is appropriate.

Foley promptly objected to the sentence on the grounds that it was greater than ***685** necessary to satisfy the objectives of 18 U.S.C. § 3553(a), and he timely filed a notice of appeal. On appeal, Foley contends that the district court erred when it based his sentence on the unsupported allegations regarding his commission of the possession and assault offenses.

II. STANDARD OF REVIEW

[1] [2] [3] [4] [5] When a defendant preserves his objection for appeal, we review a sentence imposed on revocation of supervised release under a "plainly unreasonable" standard.[3] Under this standard, we first "ensure that the district court committed no significant procedural error, such as failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence, including failing to explain a deviation from the Guidelines range."[4] We "then consider 'the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.' "[5] "A sentence is substantively unreasonable if it '(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.' "[6] Even if we determine that a sentence is substantively unreasonable, we only vacate it if the error is "obvious under existing law," so that the sentence is not just unreasonable but is *plainly* unreasonable.[7]

III. ANALYSIS

[6] The parties agree that Foley preserved his objection to the sentence and that we should review his sentence under the plainly unreasonable standard. Foley argues that the district court imposed a substantively unreasonable sentence because it improperly gave significant weight to the unsubstantiated, bare allegations in the revocation petition concerning his commission of the possession and assault offenses.[8] "A sentence is substantively unreasonable if it ... gives significant weight to an irrelevant or improper factor"[9] and that "impermissible consideration is a dominant factor in the court's revocation sentence."[10] We first consider whether the district court gave weight to an impermissible factor and, if it did so, we then determine whether that factor was dominant in the revocation sentence. Doing so in this case, we conclude that the district court erred because it gave significant weight to the bare allegations contained in the revocation petition regarding Foley's arrest on the assault and possession charges

and because this impermissible factor was a ***686** dominant factor in its decision. Nonetheless, we ultimately affirm the instant decision of the district court because this error is not clear under our existing law.

[7] **[8]** **[9]** Generally, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." [11] However, we have routinely held that it is improper for the district court to rely on a "bare" arrest record in the context of sentencing following a criminal conviction. [12] "An arrest record is 'bare' when it refers ... 'to the mere fact of an arrest—i.e.[,] the date, charge, jurisdiction and disposition —without corresponding information about the underlying facts or circumstances regarding the defendant's conduct that led to the arrest.' " [13] In contrast, an arrest record is not bare, and may be relied on, "when it is accompanied by a 'factual recitation of the defendant's conduct that gave rise to a prior unadjudicated arrest' and 'that factual recitation has an adequate evidentiary basis with sufficient indicia of reliability.' " [14]

We have applied this rule in the context of probation revocation and sentencing relating to a special condition of supervised release. [15] In *United States v. Weatherton*, we held that the district court properly relied on information in the revocation petition which alleged that a warrant for the defendant's arrest had been issued for attempted first degree murder, aggravated kidnapping, and aggravated rape. [16] We concluded that the allegations had sufficient indicia of reliability to be relied on because they contained a "reasonably detailed" account of the alleged crimes. [17]

We have intimated that this rule applies in the context of supervised release revocation and sentencing, but we have not expressly done so in a published opinion. [18] In *United States v. Perez*, the district court declined to hear evidence related to the defendant's commission of three new law violations alleged in the revocation petition despite the government's readiness to offer testimony and documentation about the violations. [19] We concluded, in an unpublished opinion, that any reliance on the bare allegations of the violations to determine the appropriate revocation sentence would constitute error. [20] Similarly, in ***687** *United States v. Standefer*, we concluded that the district court erred in revoking the defendant's supervised release because the government had failed to produce any evidence regarding the new law violations alleged in the revocation petition as the reasons for revocation. [21]

[10] We now hold that a district court errs when it relies on a bare allegation of a new law violation contained in a revocation petition unless the allegation is supported by evidence adduced at the revocation hearing or contains other indicia of reliability, such as the factual underpinnings of the conduct giving rise to the arrest.

[11] In this case, the revocation petition contains only bare allegations regarding Foley's state arrest on the possession and assault charges. The revocation petition includes information about the date, charge, jurisdiction, and disposition of the pending possession and assault charges, including that Foley was (1) arrested by the Houston Police Department on December 29, 2019; (2) charged with possession with the intent to manufacture or deliver a controlled substance in violation of Texas Health and Safety Code, Chapter 481.112 under cause number 1616504 in Harris County Criminal Court; (3) charged with assault of a family member in violation of Texas Penal Code Section 22.01 under cause number 2240131 in Harris County Criminal Court; and (4) released on bond on January 1, 2019. The petition also states that Foley's next state court dates were February 27, 2019 on the possession charge and February 28, 2019 on the assault charge. The revocation petition does not provide any context regarding the underlying facts and circumstances surrounding Foley's arrest or his conduct leading to the arrest.

Although the government, defense counsel, and the defendant each referenced the pending charges at the revocation hearing, none introduced evidence relating to those charges. In fact, the government stated, "we wish to allow [the state] to handle [the possession and assault] cases and not bring them here to have to prove them up." Despite the government's acknowledgement of the "strong case" in state court, it did not introduce evidence of the underlying facts and circumstances related to the pending charges. Defense counsel likewise acknowledged that the defendant faced "state charges with a significant penalty" but did not provide any information regarding the underlying charges. Foley requested that he be released from the federal system so that he could handle the "tougher matter" pending in state court. He did not, however, admit to the behavior, provide context surrounding

the charges, or otherwise give the charges any indicia of reliability.

The revocation petition included only bare allegations of new violations of law, and the allegations were not supported by evidence at the revocation hearing and do not have other indicia of reliability. As a result, these bare allegations were impermissible factors for the district court to consider. We next consider whether these improper factors were dominant factors in the revocation sentence.

[12] **[13]** Even when the district court considers an impermissible factor in imposing a revocation sentence, we will not vacate that sentence unless the impermissible factor was a dominant factor in the court's decision. [22] For example, in *United States v. Walker*, we upheld the imposition of a revocation sentence which gave some weight to the impermissible factor of the ***688** defendant's rehabilitative needs because "it was at most a secondary concern or additional justification for the sentence, not a dominant factor." [23] We did so because "the district court referred to rehabilitation only after detailing [the defendant's] multiple violations of his conditions of supervised release" and after considering the § 3553(a) factors. [24] In contrast, we concluded in *United States v. Wooley* that the impermissible factor of the defendant's rehabilitative needs "pervaded the court's sentencing determination," despite the court's reference to other factors, because the court repeatedly expressed concern for the defendant's need for treatment and expressly stated that it sentenced him to thirty months "for purposes of getting [him] that help." [25]

In the instant case, the unsubstantiated assault and possession charges were a dominant factor in the court's imposition of the twenty-four month sentence because those charges pervaded the hearing. At the beginning of the revocation hearing, the district court expressed frustration with the government's withdrawal of the alleged violations of supervised release related to the commission of new offenses, repeatedly questioning the government's reasoning for doing so. The court expressed concern about the government's decision to defer to the state-court prosecution of the charges, noting that even though Foley faced a prison term of twenty-five years to life on those charges, "there's no guarantee what's going to happen in those cases, correct? ... In state court, as you know ... there's parole or, ... they can give him 25 years probated, walk him out the door."

When imposing the sentence, the district court explained that it had considered: (1) *the seriousness of the pending charges*, (2) the defendant's criminal history category, (3) the defendant's willful failure to notify his probation officer of his arrest, and (4) the defendant's continued threat to society, *based on the pending charges*. It is clear from the transcript of the revocation hearing that the district court impermissibly gave substantial weight to the unsubstantiated assault and possession charges alleged in the revocation petition. [26]

[14] Nevertheless, this error was not clear under existing law. And we only reverse a sentencing court if we further determine that the error was "obvious under existing law." [27] We have never held, in a published opinion, that it is impermissible for the sentencing court to rely on "bare allegations" of new law violations alleged in a revocation petition. Consequently, the district court's error was not plainly unreasonable.

***689 IV. CONCLUSION**

The judgment of the district court is AFFIRMED.

All Citations

946 F.3d 681

Footnotes

1 *See* 18 U.S.C. § 3583(e)(3); U.S.S.G. § 7B1.4(a).

2 18 U.S.C. § 3583(e)(3).

3 *United States v. Warren*, 720 F.3d 321, 326 (5th Cir. 2013).

4 *Id.* (quoting *United States v. Kippers*, 685 F.3d 491, 497 (5th Cir. 2012)).

5 *United States v. Winding*, 817 F.3d 910, 913 (5th Cir. 2016) (quoting *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011)).

6 *Warren*, 720 F.3d at 332 (quoting *United States v. Peltier*, 505 F.3d 389, 392 (5th Cir. 2007)).

7 *United States v. Sanchez*, 900 F.3d 678, 682 (5th Cir. 2018); *Warren*, 720 F.3d at 326; *Miller*, 634 F.3d at 843.

8 Foley does not argue that the district court committed procedural error and has thus waived any argument regarding procedural error. *See, e.g., United States v. Ogle*, 415 F.3d 382, 383 (5th Cir. 2005) (holding an argument not raised in appellant's brief is waived).

9 *Warren*, 720 F.3d at 332 (internal quotation omitted).

10 *United States v. Rivera*, 784 F.3d 1012, 1017 (5th Cir. 2015) (citing *United States v. Walker*, 742 F.3d 614, 616 (5th Cir. 2014)).

11 18 U.S.C. § 3661.

12 *See, e.g., United States v. Fields*, 932 F.3d 316, 320 (5th Cir. 2019); *United States v. Harris*, 702 F.3d 226, 232 (5th Cir. 2012).

13 *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013) (quoting *Harris*, 702 F.3d at 229) (alteration in original).

14 *Id.* (quoting *Harris*, 702 F.3d at 231).

15 *United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009); *United States v. Deleon*, 280 F. App'x 348, 351 (5th Cir. 2008).

16 *Weatherton*, 567 F.3d at 154.

17 *Id.* at 154 n.3 ("The petition for revocation states: The offense details indicate the defendant took a female to a[n] open field where he beat, strangled, and raped her. After she pled for her life, he left her bound at the ankles and wrists and unclothed from the waist down. The victim managed to get only her feet untied and she ran to a nearby chemical plant, where workers discovered her walking with her hands bound and unclothed from the waist down.").

18 *See United States v. Perez*, 460 F. App'x 294, 302 (5th Cir. 2012) (unpublished); *United States v. Standefer*, No. 95-50043, 1996 WL 46805, *3 (5th Cir. Jan. 15, 1996) (unpublished).

19 *Perez*, 460 F. App'x at 302.

20 *Id.* (vacating sentence on other grounds and remanding with instructions to clearly indicate whether the court relied on the unsupported new law violations in sentencing).

21 *Standefer*, 1996 WL 46805 at *3.

22 *Rivera*, 784 F.3d at 1017; *Walker*, 742 F.3d at 617.

23 *Walker*, 742 F.3d at 617.

24 *Id.*

25 *United States v. Wooley*, 740 F.3d 359, 361, 363 (5th Cir. 2014); *see also Rivera*, 784 F.3d at 1017 (holding impermissible factor was dominant in the revocation sentence because it was "the district court's main focus throughout the hearing").

26 *Contra United States v. Torres*, 680 F. App'x 349 (5th Cir. 2017) (finding no reliance on pending state charges, which had in fact been dropped, because the court referenced the charges only in the context of ordering the revocation sentence to be served consecutively to any state sentence).

27 *Miller*, 634 F.3d at 843 (upholding a revocation sentence even though the district court erred in giving significant weight to an impermissible factor because the error was not obvious under existing law, noting that

"our circuit's law on this question was unclear"); *United States v. Salinas*, 480 F.3d 750, 759 (5th Cir. 2007) (holding that because of unsettled case law, district court's error was not obvious and, therefore, not plain).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20129

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANTHONY RAY FOLEY,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before WIENER, HIGGINSON, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
UNITED STATES CIRCUIT JUDGE