

**20-8146**

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NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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Edward Lee Smith,

Petitioner,

-vs.-

United States of America,

Respondent.

**ORIGINAL**

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On Petition for Writ of Certiorari to  
the Eighth Circuit Court of Appeals

Petition for Writ of Certiorari

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FILED

MAY 12 2021

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Edward Lee Smith  
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## QUESTION PRESENTED FOR REVIEW

1. Whether the District Court committed significant procedural error when it mistakenly interpreted section 7B1.3(f) of the United States Sentencing Guidelines as compulsory, thus, running afoul of this Court's holding in UNITED STATES v. BOOKER, 543 U.S. 220, 246 (2005).

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### **OPINION BELOW**

Petitioner Edward Lee Smith, respectfully pray that a writ of certiorari issue to review the judgement of the Eighth Circuit Court of Appeals in Case No. 19-3528 entered on 23 December 2020. No rehearing or rehearing en banc was filed.

### **JURISDICTION**

The panel of the Eighth Circuit Court of Appeals entered its judgement on 23 December 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### U.S. Constitution, amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

#### U.S.S.G. § 7B1.3(f):

(f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

## STATEMENT OF THE CASE

In 2008, a jury convicted Petitioner Smith of possession with the intent to distribute cocaine base and manufacturing cocaine base. He was sentenced to 120 months imprisonment and eight years of supervised release. In February 2019 - while Smith was still on supervised release - the United States Probation Office filed a Petition for Violation of Supervised Release. In the Petition, the Probation Office alleged that Smith had violated the terms and conditions of his supervised release by, among other things, possessing controlled substances. In May 2019, based on the same conduct, Smith was charged with one count of possession with intent to distribute controlled substances. In July 2019, pursuant to a plea agreement, Smith pled guilty to this count. As a part of Smith's plea agreement, the government agreed to raise no objection to Smith serving concurrent (rather than consecutive) sentences for his possession charge and for his then-pending supervised release violation.

At Smith's sentencing hearing, the district court reminded Smith that his guilty plea to the possession charge implicated a violation of his supervised release terms. The district court stated, "And, of course. . .the plea to this involves a violation of your sentencing supervised release from your previous case, because there's a new offense and you had obviously a requirement to have no new offenses and not be involved with narcotics." S.Tr. at . Smith acknowledged this and waived any hearing on the revocation petition. The district court stated, "[T]he record will reflect that the hearing has been waived, and we'll treat that case as a part of this case under the circumstances and do both sentencings at once." Id. at .

The district court then discussed the Sentencing Guidelines and the Guidelines impact on Smith's case before acknowledging that the parties' plea agreement "simplifie[d]" much of the sentencing process. S.Tr. 2-4. The district court calculated the Guidelines range for Smith's new offense as 168 to 210 months imprisonment and noted the parties' plea agreement (and the agreed-to-range of 144 to 216-months imprisonment). The court stated; "It seems to me that there's sort of an assumption that [Smith's sentences] would be concurrent, but looking at the law it looks to me pretty clear that I probably should be imposing consecutive time on that." Id. at 13. Later in that hearing, the court stated;

I am going to adjust things a little differently than counsel ha[s] done and impose a consecutive sentence, because I think it's required as I read the [G]uidelines or it makes sense to me that it does. So there should be some recognition of committing another federal felony offense, while you are already on federal probation, should be warranted of consecutive time.

S.Tr. at 21. Ultimately, the district court sentenced Smith to 180 months imprisonment on the new conviction and 30 months imprisonment for his supervised release violation to be served consecutively, for a total of 210 months. The court also imposed a supervised release term of eight years.

Smith then appealed to the Eighth Circuit Court of Appeals claiming that; "The District Court committed a significant procedural error when it concluded that a consecutive sentence was required for the supervised release violation when the Sentencing Guidelines are advisory and the District Court had the authority and discretion to impose a concurrent or consecutive sentence." App.Br. at p.iii.

The Eighth Circuit affirmed the District Court, Op. at p.5, holding that although "[t]he district court's statements could have been more precise.", based on the entire record, it was evident that the district court "[u]nderstood the Sentencing Guidelines were advisory rather than mandatory and exercised its discretion in ordering consecutive sentences." Id.

#### **REASON FOR GRANTING THE WRIT**

**I. The Eighth Circuit has sanctioned a significant procedural made by the lower court which effects the substantial rights of the petitioner, thus requiring this Court's intervention.**

In UNITED STATES v. BOOKER, 534 U.S. 220, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005), this Court held that the Sixth Amendment guarantee of a right to a jury trial, as construed in BLAKELY v. WASHINGTON, 524 U.S. 296 (2004), applied to the Sentencing Guidelines, and that by severing the statutory provisions concerning mandatory applicability the Guidelines are now effectively advisory. In Smith's case, as demonstrated by the lower court's statements at sentencing, it is clear that the court did not obey this Court's findings and, instead interpreted section 7B1.3(f) as mandatory. In so doing, the lower court as well as the Eighth Circuit Court of Appeals have violated Smith's substantial rights and therefore the case must be remanded back to the lower court with instructions in accordance with BOOKER.