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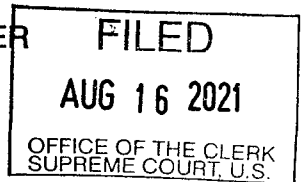
61-5520

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Brunson Roberts — PETITIONER
(Your Name)



vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brunson Roberts
(Your Name)

2501 State Farm Rd.
(Address)

Tucker, AR 72168
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. Does A District Court Abuse Its Discretion When It Varies Upward And Does Not Consider All Of The Relevant 18 U.S.C. Section 3553(a) Factors In Revoking A Sentence?
- II. Does A District Court Abuse Its Discretion When Deciding Upward Variances If That Court Does Not Factor Into The Equation Any 3553(a) Factors Containing Americans With Disability Act (ADA) Issues?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- (1) United States vs. Roberts, Case No. 4:02-cr-00013-BRW, U.S.D.C., E.D. Ark.
- (2) United States vs. Roberts, Case No. 20-2479, 8th Cir.

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FN1 - There was no timely rehearing petition filed.
FN2 - The Addendum was used in the Appendix
as several reference points.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was March 31, 2021.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 United States Code Section 3553(a) states: (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—

Title 18 United States Code Section 3583(e) states: (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;
- (2) extend a term of supervised release, and

Constitutional And Statutory Provisions Involved, cont'd

- (3) revoke a term of supervised release, and
- (4) order the defendant to remain at his place of residence during nonworking hours

Title 18 United States Code Section 3742(e) states: (e) Consideration- Upon review of the record, the court of appeals shall determine whether the sentence-

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is outside the applicable guideline range

Title 42 United States Code Section 12101(a) states: (a) Findings- The Congress finds that-

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of

Constitutional And Statutory Provisions Involved, cont'd

a disability or are regarded as having a disability also have been subjected to discrimination.

Article I, sec. 8, cl. 3 of the United States Constitution states: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Amendment 14, Section 5 of the United States Constitution states: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article,

STATEMENT OF THE CASE

On March 31, 2020, Petitioner's probation officer filed a petition to revoke his supervised release based on 4 alleged violations of that release.

On July 7, 2020, the district court revoked Petitioner's term of supervised release and sentenced him to a term of 30 months in the Federal Bureau of Prisons to run concurrently with his sentence in the Arkansas Division of Correction. (Appendix C)

Petitioner's appointed counsel filed an Anders brief in the Eighth Circuit Court of Appeals. (Appendix D) In that brief, Petitioner argued that the district court abused its discretion in varying upward because the court did not consider all of the relevant 3553(a) factors in imposing his revocation sentence.

On March 31, 2021, the Eighth Circuit

Statement Of The Case, cont'd

Court of Appeals, in an unpublished opinion, denied relief. (Appendix B)

There was no timely filed petition for rehearing due to circumstances beyond Petitioner's control.

He seeks certiorari review in this Court to determine in the first instance whether a district court's failure to consider all of the relevant 3553(a) factors when upwardly departing in revoking a term of supervised release is an abuse of discretion pursuant to Gall vs. United States, 128 S.Ct. 586, 2007,

Further, he seeks certiorari review as to whether post-traumatic stress and other mental stress factors are relevant factors that trigger the Americans With Disabilities Act (ADA) provisions. This question is a case of first impression so this Court should hear and decide the case.

REASONS FOR GRANTING THE PETITION

I. The District Court Abused Its Discretion
When It Varied Upward And Did Not
Consider All Of The Relevant 18 U.S.C.
Section 3553(a) Factors In Revoking
His Supervised Release Sentence

18 U.S.C. Section 3553(a) states in pertinent part: (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-

The statute enumerates various reasons for the imposition of different types of

sentences. The 3553(a) factors are governed by the provisions of 18 U.S.C. Section 3583(c), that statute provides for when a district court may modify the conditions of supervised release or revoke them.

A district court must take into account certain 3553(a) factors, (See United States vs. Perlins, 526 F.3d 1107, 8th Cir. 2008) As this Court explained in Rita vs. United States, 127 S.Ct. 2456 (2007), a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range, (Id. at 347-348) In Gall vs. United States, 552 U.S. 38, (2007), this Court elaborated on the ruling in Rita. There, this Court stated that after giving both parties the opportunity to argue for whatever sentence they deem appropriate,

the district judge should then consider all of the 3553(a) factors to determine whether they support the sentence requested by a party. That Section lists seven factors that a sentencing court must consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" (18 U.S.C. Section 3553(a)(1)).

The second factor requires the consideration of the general purposes of sentencing, (18 U.S.C. Section 3553(a)(2)). The third factor pertains to "the kinds of sentences available," (18 U.S.C. Section 3553(a)(3)); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to "the need to avoid unwarranted disparities" (3553(a)(6)) and the seventh

to "the need to provide restitution to any victim" (3553(a)(7)). The fact that 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.

Gall went on to point out that a district judge may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. After settling on the appropriate

sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. (Gall vs. United States, 552 U.S. at 50) (citing Rita vs. United States, 127 S.Ct. 2456)

This Court views a post revocation sentence like this one "as part of the penalty for the initial offense." (See United States vs. Haymond, 139 S.Ct. 2369, 2019) (quoting Johnson vs. United States, 529 U.S. 694, 2000) Accordingly, the sentence must be reasonable. (See United States vs. Monteverdi, 2021 WL 3028119^{FN3}) A 2 step process is used to determine a sentence's reasonableness. (Gall vs. United States, 552 U.S. 38, 51, 2007) First, it must be confirmed that the sentence is not procedurally unreasonable. (Id.) A sentence is procedurally unreasonable if a district court fails to do certain things, including the 3553(a) factors,
^{FN3} - See also United States vs. Harper, (2021 WL 2934760)

and failing to adequately explain the chosen sentence. (*Id.*) Further, the sentencing court should provide sufficient reasoning to satisfy the appellate court that it has considered the parties' arguments and has a reasoned basis for exercising its own legal decision-making authority, (*Rita*, at 338, 356) A lengthy explanation is not required, (*Id.*)

In this case, the district court did not provide any reason at all for the decision to reject the Grade C violation and did not state what grade violation it relied on. The Court also did not mention any of the 3553(a) factors explicitly, (Appendix C) All that the Court stated at the revocation hearing was that "it appeared that the record supported a Grade A." (Appendix E, H.Tr. Vol. 1, pg. 9) The Government was only

proceeding with a Grade C violation with no recommendation to the Court as to the sentence. This would have exposed him to a sentencing range of 7-13 months. (Id.)

The Court instead sentenced Petitioner to 30 months with no supervised release to follow, an upward variance. (Id.) The Court also stated that it was a Grade A violation. (Id.) Due to this finding, the Court was to make specific written findings as to why it chose to go that route, with citation to the appropriate 3553(a) factors. It did not do so.

Then, on appeal, after appointed counsel lodged an Anders brief, the Eighth Circuit upheld the district court's ruling. (Appendix B) That court did not address any of these matters, other than to recite the standard in this circuit for cases such as this. (Id.)

The district court did not follow the statute's directions by addressing the applicable factors, and did not state in detail or at all why it did not follow the Government's recommendation on the type of violation that it was pursuing. This was required based on this Court's rulings in Gall and Rita.

The question before this Court is whether such a failure constitutes abuse of discretion. Petitioner contends that it is. As such, this Court should grant cert review to address it.

Also, this Court in United States vs. Booker, 125 S.Ct. 738, (2005) invalidated 18 U.S.C. Section 3553(b)(1) which made the Guidelines mandatory. This Court ruled that this particular provision was "incompatible with today's constitutional holding." (Id. at 756) This Court also

struck 18 U.S.C. Section 3742(c) which had established a de novo standard of review in appellate cases and was premised on the Guidelines' mandatory nature, (Id. at 764, 765)

It would appear that the district court adhered to the Guidelines, even though it had downwardly departed on a prior occasion, due to the upward variance,

II. The District Court Abused Its Discretion When It Decided The Upward Variance Due To It Not Factoring Into The 3553(a) Analysis Any Americans With Disability Act Issues

42 U.S.C. Section 12101 et seq. provides for equal opportunity for those with disabilities. These disabilities include mental ones. (42 U.S.C. Section 12101(a)(1))

Congress enacted the ADA upon

finding, among other things, that "society has tended to isolate and segregate individuals with disabilities" and that such forms for discrimination continue to be a "serious and pervasive social problem" (42 U.S.C. Section 12101(a)(2))

In response to these findings, Congress explicitly stated that the purpose of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." (42 U.S.C. Section 12101(b)(1)-(2))

This Court determined that Title II of the Americans With Disabilities Act (Title

42 U.S.C. Section 12131(1)(B), 12132) which prohibits a public entity from discriminating against a qualified individual with a disability on account of that individual's disability, covers incarcerated persons. (See Pennsylvania Dept. of Corrections vs. Yeskey, 524 U.S. 206, 1998)

This Court in Yeskey did not address whether application of the ADA to incarcerated persons in a state prison was a constitutional exercise of Congress' power under the Commerce Clause (U.S. Const. Art. I, Section 8, cl. 3) or under the Fourteenth Amendment enforcement clause (U.S. Const. Amend. 14 Section 5). Prison officials raised the question in their brief, but neither the district court nor the court of appeals addressed it.

In order for Petitioner to raise a claim such as this one, he must have standing to do so. While a claim like this is normally

raised in a trial court regarding a covered entity failing to make a reasonable modification of a facility, Petitioner raises it here due to the fact that it was raised at the revocation hearing in mitigation thereby preserving it.

The doctrine of standing answers the questions who may invoke the jurisdiction of the federal courts and what is required to do so. (See Richard Fallon, "Of Justiciability, Remedies, and Public Law Litigation"; Notes on the Jurisprudence of Lyons, 59 N.Y.U.L. Rev. 1, 13-14, 1984) Standing limitations come from three sources: the language of Article III that limits the power of the federal courts to "cases and controversies", judge-made "prudential principles" and legislative enactments. (Ronald Cass et al., Administrative Law 318, 3d ed. 1998) Because standing is a limitation on judicial power, a federal court may

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inquire into standing at any stage of a suit and, if it finds the plaintiff lacks standing, dismiss the case, (Id. Fallon)

Compared to the other titles of the ADA, Title III has received very little attention from the courts, (See Amy Robertson, Standing to Sue Under Title III of the ADA, Colo. Law., March 1998, at 51-observing that "standing is raised only rarely in Title III cases" and collecting cases) And, admittedly, many courts deciding Title III claims do not even address standing in their decisions, (Id.)

The question presented to this Court here is whether the provisions of the ADA regarding mental disabilities applies to the 3553(a) factors that a district court must consider in deciding whether to revoke a defendant's term of supervised release.

This Court and no other appellate court has ever visited this issue and to Petitioner's knowledge has never been raised in the context of a challenge to the 3553(a) factors.

Petitioner has raised this claim in the district court and thereby preserved it for review. (Appendix E, H.Tr. Vol. 1, ppg. 6, 7, 9) Petitioner preserved the issue for this Court's review in counsel's Anders brief. (Appendix D, pg. 13) In fact, appointed counsel made this very argument when she said regarding Petitioner's diagnoses that "such evidence relates to the factors the Court must consider when imposing a revocation sentence." (Id.) The Eighth Circuit did not address this. (Appendix B)

Petitioner has standing to bring this challenge because he suffers from a

recognized psychological malady, post-traumatic stress disorder, which is listed in the DSM-IV. He has been diagnosed with this. (Appendix F) He has also been diagnosed by the Arkansas Division of Correction as having an "unspecified depressive disorder" and in that document, under the heading "Relevant Mental Health History," it indicates that Petitioner was receiving Depalote in the Pulaski County Regional Detention Facility for anxiety. (Id. pg.)

42 U.S.C. Section 12101(b)(1)-(3) lays out in detail the purpose of the ADA and one of those purposes is to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." (Id. at (b)(2)) It would appear that there is no discernible

"enforceable standard" when it comes to taking into consideration mental disabilities as factors when determining whether to revoke a term of supervised release. In fact, it is precisely the Federal government that is to take a "central role" in "enforcing the standards" "established in that chapter." (Id. at (b)(3))

It would only seem logical that the ADA would apply to the federal courts as arbiters of "enforcing the standards" of the Act. It would also seem logical that the federal courts would apply the ADA to the facts of this particular case. It has been well established that due to Petitioner's documented mental maladies that he had an aversion to being

touched. (Appendix F, pg.) This sparked a reaction when the female deputy poked Petitioner in the chest. As a result, Petitioner used force to repel the intrusion into his personal space. He was charged with assault and battery and as a result, violated the terms of his supervised release.

Precisely because of the deputy's actions the resulting violation occurred. Petitioner's mental maladies played a central role. The average person would recoil at being handled in this way, so how much more so when a person like Petitioner is confronted with it? This was obviously mitigating evidence that should have factored into the district

court's decision, but there is no indication that it did. When Petitioner raised it, it seems that the Government did not know how to respond as evidenced by AUSA Walker stating that "it's almost like a mental disease or defect defense after the fact as it relates to that particular offense, because he later, you know, pled guilty to it" (Appendix E, H.Tr. Vol. 1, pg. 9). It would appear that the courts do not consider this as a factor in the 3553(a) analysis. It did not happen here at all.

Petitioner seeks cert review in this Court so that it can be determined (a) whether mental maladies are valid 3553(a) factors; (b) whether a district court is required to make specific written

findings on the record as to what factors were considered, and (c) whether the Americans With Disabilities Act applies to cases like Petitioner's and to 3553 (a) cases in particular.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Maximum Security Unit
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Tucker, AR 72168

Date: _____