No.

in the

Supreme Court

of the

United States

Term,

GEORGE PATRICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

A sentence imposed upon revocation of supervised release is governed by the class of felony determined at the time of the original sentence. 18 U.S.C. § 3583(b). Where a district court determines that it erred in its original determination of the class of felony, does a district court have the authority to correct that error at a revocation hearing?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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ON PETITION FOR A WRIT OF CERTIORARI FROM
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The Petitioner, George Patrick, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on September 9, 2021.

OPINION BELOW

The Sixth Circuit's opinion in this matter is unpublished, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on September 9, 2021. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3583(b) states:

> Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

18 U.S.C. § 3583(h) states:

> Supervised release following revocation.–When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

STATEMENT OF THE CASE

After his plea of guilty to one count of possession of a firearm by a convicted felon, Petitioner George Patrick was held by the district court to be an Armed Career Criminal (a Class A felony), and on March 19, 2007, was sentenced to 199 months incarceration, to be followed by five years supervised release. The problem with this sentence is that Patrick was never an Armed Career Criminal – he had only one qualifying "serious drug offense", and had no countable "violent felonies." Therefore, he should have been only subject to a statutory range of 0-10 years incarceration, and a maximum 3 year supervised release. (Class C felony).

Patrick did not appeal his sentence, but on June 30, 2014, filed a 28 U.S.C. § 2255 petition, claiming that he should not have had his sentence enhanced under the ACCA pursuant to this Court's decision in *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276 (2013). The district court denied this motion as untimely, and the Sixth Circuit affirmed that decision on appeal. Later, Patrick filed for successive petitions after this Court's decisions in *Johnson v. United States*, 576 U.S. ——, 135 S.Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), but these were also denied.

It was not until 2019 when a probation officer created an updated PSR (in response to a 28 U.S.C. § 2241 petition filed by Patrick) that the truth came out. Despite this revelation, Patrick received no relief from the district court (he had been pursuing *Johnson*/*Welch* litigation), and served the rest of his sentence. He was

released from BOP custody on June 11, 2020, after serving his entire sentence, and began to serve his five year term of supervised release.

On January 25, 2021, probation filed a Petition for Warrant, alleging that Patrick had violated his release by using suboxone without a prescription, and being at the house of a felon. A hearing was held on this petition on February 24, 2021. Defense counsel argued that pursuant to *Welch* and *Johnson*, Petitioner Patrick faced a criminal history category II for purposes of revocation.

Counsel for the Government addressed to the court whether, given the 2019 PSR, the amended statutory ranges should apply to the revocation proceedings. "I think the issue that I'm wrestling with as we're having the discussion is what statutory exposure is, and if there is retroactivity as an armed career criminal. He's a Class A felon and as a 922(g) felon, he would be not more than ten years. That would affect the maximum statutory exposure that the Court could impose today." The district court sidestepped this issue, indicating he had already ruled on the defense's Guidelines issue. The court then found: "Based upon the more serious of the violations, the Grade B violation of the defendant's criminal history category of 6, the guideline range in the case would be a range of 21 to 27 months with a maximum of five years and the authorized term of supervision that could be reimposed would be five years, less any term of imprisonment which may be imposed for any violations." The court revoked Patrick's supervised release, and imposed a sentence of 15 months, to be followed by 45 months supervised release.

Patrick appealed this sentence to the Sixth Circuit Court of Appeals, raising three issues:

1. The district court committed procedural error by relying on erroneous facts, and misinterpreting the Guidelines.
2. The 15 month sentence imposed, along with the 45 month term of supervised release, was substantively unreasonable.
3. The 45 month term of supervised release imposed was illegal, as it is beyond the statutory authorized term.

The Sixth Circuit denied this appeal on September 9, 2021, finding in part:

> Patrick argues that his post-revocation 45-month term of supervised release exceeds the statutory maximum. To that end, he contends that because he was wrongly classified as an armed career criminal, his § 922(g) conviction was wrongly deemed a Class A felony when it was actually a Class C felony. And under § 3583(b)(2), district courts may impose an initial term of supervised release of "not more than three years" if the underlying conviction is a Class C felony. If a district court revokes supervised release, it may impose a term of imprisonment "on any such revocation" not to exceed "2 years in prison if [the underlying] offense is a class C . . . felony." 18 U.S.C. § 3583(e)(3). Additionally, the court may impose a post-revocation term of supervised release that does "not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." Id. § 3583(h). But Patrick's argument on this point necessarily challenges his status as an armed career criminal. As previously mentioned, it was not plain error for the district court to conclude that this attempted correction is not cognizable in a revocation proceeding.
>
> (Appendix 1, p.7)

REASON FOR GRANTING THE WRIT

1. The district court had the authority to determine the correct class of felony when determining the statutory range to impose for a supervised release revocation

When imposing a term of incarceration (and new term of supervised release) upon the revocation of a term of supervised release, 18 U.S.C. § 3583 requires a court to determine the class of felony for "the offense that resulted in the term of supervised release." Petitioner Patrick submits that the plain language of this statute demands a sentencing court to consider the correct class of felony, in order to determine the correct statutory range for revocation purposes. Here, it is beyond argument that the original determination of the class of felony was improper – Petitioner Patrick never should have been held to be an Armed Career Criminal by the district court at the original sentencing. Yet the district court, armed with this knowledge, imposed a sentence and a term of supervised release upon revocation based upon this error, finding it had no authority to "correct" the decision. In doing so, the district court imposed a sentence violative of Due Process.

A. The plain language of the statute requires a court to determine the class of felony at the revocation proceeding

"When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, --- U.S. ---, 141 S. Ct. 1474, 1480, 209 L. Ed. 2d 433 (2021). Where the language in a statute is unambiguous, "[o]ur

analysis begins and ends with the text." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, --- U.S. ---. 140 S. Ct. 2367, 2380, 207 L. Ed. 2d 819 (2020).

Here, the plain language of the statute requires that the district court determine, at the time of revocation, the class of felony for "the offense that resulted in the term of supervised release." 18 U.S.C. § 3583(e)(3). "[I]f the offense that resulted in the term of supervised release is a class A felony,", the maximum term of incarceration which can be imposed is 5 years. However, if the class of felony is a B or C felony, the statutory maximums are lower. The plain language of the statute therefore requires the sentencing court, at the time of the supervised release revocation, to determine the class of felony for the original offense.

Notably, Congress chose to use present tense rather than past tense language to describe the underlying offense. Congress could have written the statute to say "if the court at sentencing determined the offense to be . . ." a Class A, B, or C felony, or alternatively, "if the offense . . . *was* a class A felony, but it did not. Instead, Congress chose to use the present tense to describe the class of felony. The use of present tense language to describe an element is a strong indication by Congress of its intent. See *Carr v. United States*, 560 U.S. 438, 450, 130 S. Ct. 2229, 2237, 176 L. Ed. 2d 1152 (2010).

Therefore, it is clear that the plain language of the statute not only allows, but requires the sentencing court to determine the class of felony for the original offense

at the time of the revocation hearing. The district court was free to do so, and the court's determination it was without authority to do so is directly contrary to the plain language of the statute.

B. The challenge to the class of felony was cognizable in the revocation proceeding

The Sixth Circuit held there was no authority for a district court to "correct" a sentencing error during a supervised release revocation proceeding, holding that such claims are not "cognizable in a revocation proceeding." (Appendix 1, p.7) But because there is no finality interest in a sentence yet to be imposed, the Sixth Circuit is in error.

Petitioner Patrick will concede that every circuit to address this issue has determined that a defendant may not "challenge" his underlying sentence in a supervised release revocation proceeding. *United States v. Warren*, 335 F.3d 76, 78 (2d Cir. 2003); *United States v. Jones*, 833 F.3d 341, 344 (3d Cir. 2016); *United States v. Sanchez*, 891 F.3d 535, 538 (4th Cir. 2018); *United States v. Hinson*, 429 F.3d 114, 116 (5th Cir. 2005); *United States v. Flagg*, 481 F.3d 946, 950 (7th Cir. 2007); *United States v. Eagle Chasing*, 965 F.3d 647, 650 (8th Cir. 2020); *United States v. Castro-Verdugo*, 750 F.3d 1065 (9th Cir. 2014); *United States v. Bonat*, 692 F. App'x 510, 513 (10th Cir. 2017); *United States v. Telemaque*, 632 F. App'x 602, 603 (11th Cir. 2016).

These cases are premised on several concepts which simply don't apply here. For instance, some of the caselaw relies on the argument that such claims are "an attack on the underlying conviction." See, for example, *United States v. Eagle Chasing*, 965 F.3d 647, 650 (8th Cir. 2020). However, Patrick's claim is not an attack on his underlying conviction at all: it is simply an attack on the calculation of his supervised release revocation sentence. He is not looking to upend or otherwise vacate his original sentence; rather, he is simply requesting that the district court follow the law regarding his revocation term.

Second, some court have relied on the concept that the interest in finality is greater in a revocation proceeding. As set forth by the Second Circuit in *Warren*: "Remedies for error are thus available to criminal defendants but subject to various substantive and procedural limitations as the legal and temporal distance from the trial or guilty plea increases. This detailed scheme is not consistent with allowing a supervised release revocation proceeding to become a forum for raising claims of error in the conviction or original sentence." 335 F.3d at 79.

But there are no significant "finality" concerns at play during a revocation proceeding. A district court must find, during a revocation proceeding, the "grade" of violation. U.S.S.G. § 7B1.1. Next, the court must determine the advisory Guidelines utilizing the criminal history of the defendant in combination with the court's grade of violation findings. U.S.S.G. § 7B1.4. Finally, the court determines, at the revocation hearing, the maximum potential term of incarceration and supervised

release pursuant to 18 U.S.C. § 3583. These determinations are made using a preponderance of the evidence standard. Additionally, the cases that discuss finality assume that the defendant is attacking the underlying conviction or sentence itself. But the discrete argument raised here is the calculation of the revocation sentence itself, a decision not entitled to any "finality" protection because it has not yet occurred.

C. Manifest injustice results if a court is prohibited from correcting an obvious error which effects the sentence imposed

Finally, Petitioner Patrick submits that any benefit from not allowing visitation of the correct class of felony is substantially outweighed where the sentence results in a manifest injustice.

Supervised release revocation proceedings are punishment imposed as part of the original sentence. *Johnson v. United States*, 529 U.S. 694, 700, 120 S. Ct. 1795, 1800, 146 L. Ed. 2d 727 (2000). Therefore, to the extent that the district court had already decided the class of felony, that decision would be subject to law of the case doctrine, not "finality" concerns.

The law of the case doctrine generally holds that "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997). The "doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided,' but it

does not 'limit [courts'] power." *Musacchio v. United States*, 577 U.S. 237, 245, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016).

This Court has held that, even where an issue of law is decided earlier in a case, it does not continue to govern where adherence to the decision "would work a manifest injustice." *Pepper v. United States*, 562 U.S. 476, 507, 131 S. Ct. 1229, 1250–51, 179 L. Ed. 2d 196 (2011). The law of the case doctrine "cannot prohibit a court from disregarding an earlier holding in an appropriate case. . . ." *Castro v. United States*, 540 U.S. 375, 384, 124 S. Ct. 786, 793, 157 L. Ed. 2d 778 (2003).

There is no reason to adhere to the law of the case doctrine. No one disputes that the district court erred in imposing the ACCA enhancement at the initial sentencing. Somehow, the prosecution, defense counsel and district court all missed the fact that the enhancement was wrong when it was imposed. Without the enhancement, the maximum term Patrick should have faced, upon revocation, is two years incarceration and three years supervised release. Patrick's 15 month sentence leaves a total of 21 months supervised release which could have been imposed under the law. The 45 month term is therefore illegally imposed. It creates a manifest injustice to elevate the law of the case doctrine to impose a clearly illegal term. This Court should grant certiorari review, and hold that the calculation of the correct class of felony at a supervised release revocation hearing is within a district court's authority.

CONCLUSION

Patrick requests this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the sentence.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER September 9, 2021
2. DISTRICT COURT DECISION February 24, 2021

NOT RECOMMENDED FOR PUBLICATION

No. 21-5198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
GEORGE EDWARD PATRICK,	)	KENTUCKY
	)	
Defendant-Appellant.	)	

O R D E R

Before: COLE, GRIFFIN, and STRANCH, Circuit Judges.

George Edward Patrick, a federal prisoner proceeding through counsel, appeals the sentence imposed upon revocation of his supervised release. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2006, Patrick pleaded guilty, pursuant to a written plea agreement, to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). At the time of this conviction, Patrick was classified as an armed career criminal based on three prior predicate convictions. As an armed career criminal, Patrick faced a statutory sentence enhancement: a mandatory minimum term of 180 months' imprisonment and a maximum term of life imprisonment. *See* 18 U.S.C. § 924(e)(1). Therefore, Patrick's conviction was for a Class A felony. *See* 18 U.S.C. § 3559(a)(1). With a total offense level of 31 and a criminal history category of VI, Patrick's sentencing range was 188-235 months' imprisonment. The district court sentenced Patrick to 199 months' imprisonment, to be followed by five years' supervised release. He did not file a direct appeal.

Patrick thereafter unsuccessfully attempted to collaterally attack his designation as an armed career criminal. *See United States v. Patrick*, Nos. Crim. 6:06-034-DCR/Civ. 6:14-7357-DCR, 2014 WL 2991857, at *2-3 (E.D. Ky. July 2, 2014) (denying as untimely Patrick's motion under 28 U.S.C. § 2255 challenging his enhanced sentence in light of the Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254 (2013)); *see also In re Patrick*, No. 15-5759 (6th Cir. Feb. 3, 2016) (order) (denying Patrick authorization to file a second or successive § 2255 motion, in which he sought to challenge his enhanced sentence in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015)).

As relevant here, in 2018, Patrick filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, challenging his enhanced sentence under 28 U.S.C. § 2255(e)'s savings clause. In that petition, Patrick argued that he was actually innocent of being an armed career criminal because his prior drug convictions no longer counted as qualifying predicates. At the district court's direction, the United States Probation Office ("USPO") provided an updated presentence report ("PSR"), which confirmed that Patrick was incorrectly sentenced as an armed career criminal because he had only one qualifying predicate conviction. This meant that Patrick's original conviction should have been only a Class C felony. *See* 18 U.S.C. §§ 924(a)(2), 3559(a)(3). Nonetheless, the district court denied the habeas petition, concluding that Patrick had failed to show that his remedy under § 2255 was inadequate or ineffective because he "could have challenged his designation as an armed career criminal at multiple junctures but failed to do so." *Patrick v. Warden, Fed. Med. Ctr. Lexington*, No. 18-445, 2019 WL 1960334, at *3 (E.D. Ky. May 2, 2019). We affirmed. *Patrick v. Warden, FMC Lexington*, No. 19-5546, 2020 WL 2611190, at *2-3 (6th Cir. May 15, 2020). Thus, despite being seemingly erroneously sentenced as an armed career criminal, Patrick received no relief and served the balance of his 199-month sentence.

Patrick was released from custody and began serving his term of supervised release in June 2020. However, in January 2021, the USPO petitioned the district court to revoke Patrick's supervised release on the bases that he had violated the terms of his supervision by using a

Schedule III controlled substance (Suboxone) and associating with another felon. The district court held a supervised-release-violation hearing, at which time Patrick admitted guilt to the charged violations. Based on those admissions, the district court revoked Patrick's supervised release and calculated a sentencing range of 21 to 27 months' imprisonment based on a criminal history category of VI and the most serious violation being a Grade B violation. *See* USSG § 7B1.4, p.s. After considering the relevant sentencing factors, the district court sentenced Patrick to 15 months of imprisonment with 45 months of supervised release to follow.

On appeal, Patrick challenges the procedural and substantive reasonableness of his 15-month custodial sentence and argues that his 45-month term of supervised release is beyond the statutory authorized term.

A district court may revoke a term of supervised release if it "finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3). Normally, we review a sentence imposed on revocation of supervised release "'under a deferential abuse-of-discretion standard' for reasonableness, which has both a procedural and a substantive component." *United States v. Polihonki*, 543 F.3d 318, 322 (6th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). In this case, however, Patrick concedes that his procedural challenges to his sentence are subject to plain-error review because he failed to raise those objections when the district court afforded him the opportunity to do so at the conclusion of the supervised-release-violation hearing. *See United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc) (discussing *United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004)); *see also United States v. Peppel*, 707 F.3d 627, 633-34 (6th Cir. 2013) (holding that a defendant need not object to the substantive reasonableness of a sentence in order to preserve the issue for appeal). To satisfy plain-error review, a defendant must "show (1) error (2) that 'was obvious or clear,' (3) that 'affected defendant's substantial rights' and (4) that 'affected the fairness, integrity, or public reputation of the judicial proceedings.'" *Vonner*, 516 F.3d at 386 (quoting *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)).

Procedural reasonableness requires district courts to, among other things, "properly calculate the guidelines range." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall*, 552 U.S. at 51). Patrick advances two challenges to the district court's calculation of his guidelines range, neither of which is availing. He first argues that the district court erroneously assigned him to criminal history VI when the updated PSR from his § 2241 proceeding in 2018 noted that his proper criminal history category is actually II. According to USSG commentary "[t]he criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant *originally* was sentenced to the term of supervision. The criminal history category is not to be recalculated . . . ." USSG § 7B1.4, p.s., comment. (n.1) (emphasis added). In this case, that is category VI. The district court did not plainly err by following this instruction. *See United States v. Jones*, 690 F. App'x 336, 337 (6th Cir. 2017); *see also United States v. Johnson*, 570 F. App'x 611, 612 (7th Cir. 2014). Patrick does not cite, nor have we found, any authority permitting a district court to correct a defendant's criminal-history category in the context of a revocation proceeding. Indeed, we have held that "the proper place to challenge an original sentence is on *collateral* attack, not at a supervised release revocation hearing." *United States v. Hill*, 776 F. App'x 908, 909 (6th Cir. 2019) (citing *United States v. Lewis*, 498 F.3d 393, 395 (6th Cir. 2007); *United States v. Hall*, 735 F. App'x 188, 191 (6th Cir. 2018) (collecting cases)). Moreover, as the government correctly points out, the district court explicitly stated that it would have imposed the same custodial sentence even if Patrick had been assigned to criminal history category II, so any possible error would be harmless. *See United States v. Bishop*, 797 F. App'x 208, 212 (6th Cir. 2019).

Patrick next argues that the district court erred by finding that his supervised-release violation for committing another federal, state, or local offense by possessing Suboxone—his most serious violation—was a Grade B violation, rather than a Grade C violation. A Grade B violation encompasses "conduct constituting any . . . federal, state, or local offense punishable by a term of imprisonment exceeding one year," whereas Grade C violations include "conduct constituting . . . a federal, state, or local offense punishable by a term of imprisonment of one year or less." USSG

§ 7B1.1(a)(2)-(3), p.s. Patrick contends that his possession of Suboxone was not a Grade B violation because, under Kentucky law, possession of a Schedule III controlled substance is a Class A misdemeanor that is punishable by 90 days to 12 months' imprisonment. *See* Ky. Rev. Stat. §§ 218A.1416, 532.020(2). However, the guidelines plainly authorize a district court to consider not only state and local laws, but also federal law, in classifying a supervised-release violation. *See* USSG § 7B1.1(a), p.s. The district court correctly found that Patrick's possession of Suboxone was a Grade B violation because it was punishable by up to two years in prison under federal law. *See* 21 U.S.C. § 844(a) (allowing up to two years in prison for defendants who, like Patrick, have a prior drug conviction). Based on this classification and Patrick's criminal history category of VI, the district court correctly calculated an applicable sentencing range of 21 to 27 months of imprisonment. *See* USSG § 7B1.4(a), p.s.

Patrick's final challenge to the procedural reasonableness of his 15-month revocation sentence is that the district court arrived at that sentence by impermissibly relying on Application Note 4 to USSG 7B1.4, p.s., which permits "an upward departure" for a revocation sentence "[w]here the original sentence was the result of a downward departure . . . or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct." But Patrick's argument ignores the fact that his revocation sentence was not the product of an upward departure. To the contrary, it was the product of a *downward* departure from his properly calculated advisory guidelines range of 21 to 27 months. Therefore, this argument is without merit. Considering the foregoing, Patrick's sentence is procedurally sound.

Because no procedural error occurred, we must next consider the substantive reasonableness of Patrick's sentence. *Gall*, 552 U.S. at 51. We review the substantive reasonableness of a criminal sentence for an abuse of discretion. *Id.* "The essence of a substantive-reasonableness claim is whether the length of the sentence is 'greater than necessary' to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a)." *United States v. Tristan-Madrigal*, 601 F.3d 629, 632-33 (6th Cir. 2010). A claim of substantive unreasonableness is "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others."

Rayyan, 885 F.3d at 442. Given that we afford a within-guidelines sentence a rebuttable presumption of substantive reasonableness, Patrick's burden of demonstrating that his below-guidelines sentence "is unreasonably long is even more demanding." *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008).

Patrick has not satisfied that demanding burden. Patrick first contends that his 15-month sentence is substantively unreasonable because the district court failed to meaningfully consider substance-abuse treatment in lieu of incarceration. Although revocation of supervised release is generally mandatory if a defendant possesses a controlled substance, 18 U.S.C. § 3583(g)(1), an exception exists for defendants who fail a drug test if the district court determines that substance-abuse treatment has been or could be effective. 18 U.S.C. § 3583(d). In such cases, § 3583(d) gives the district court discretion not to impose an otherwise mandatory prison sentence. *See United States v. Crace*, 207 F.3d 833, 835 (6th Cir. 2000). However, there is no requirement that "magic words" appear in the record indicating that the court considered substance-abuse treatment in lieu of prison. *Id.* at 836. Moreover, this section applies to revocation of supervised release rather than a sentence imposed after revocation is ordered. But even if the language in § 3583(d) applies to sentencing, the district court's discussion of Patrick's past—including his return to committing drug-related offenses after having participated in drug-treatment programs in past cases—shows that the court did consider treatment in lieu of incarceration but ultimately determined that such treatment would be ineffective given Patrick's history. Further, nothing in the record suggests that the district court mistakenly believed that it lacked discretion to continue Patrick on supervision.

Patrick also presents an undeveloped argument that his revocation sentence is unreasonable because it was intended to punish him rather than to promote his rehabilitation. However, he points to no findings or conclusions by the district court to support this argument. Therefore, Patrick has forfeited review of this argument. *See United States v. Stewart*, 628 F.3d 246, 256 (6th Cir. 2010). In any event, the record reflects that Patrick's sentence was the result of the district court's consideration of the relevant § 3553(a) factors, namely the needs to provide just punishment,

promote respect for the law, provide both specific and general deterrence, and protect the public. Given the district court's careful consideration of the sentencing factors and the presumption of reasonableness afforded to Patrick's below-guidelines sentence, we will not disturb the district court's decision that 15 months' imprisonment was sufficient but not greater than necessary. *See Tristan-Madrigal*, 601 F.3d at 632-33; *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008). Patrick's sentence is substantively reasonable.

Lastly, Patrick argues that his post-revocation 45-month term of supervised release exceeds the statutory maximum. To that end, he contends that because he was wrongly classified as an armed career criminal, his § 922(g) conviction was wrongly deemed a Class A felony when it was actually a Class C felony. And under § 3583(b)(2), district courts may impose an initial term of supervised release of "not more than three years" if the underlying conviction is a Class C felony. If a district court revokes supervised release, it may impose a term of imprisonment "on any such revocation" not to exceed "2 years in prison if [the underlying] offense is a class C . . . felony." 18 U.S.C. § 3583(e)(3). Additionally, the court may impose a post-revocation term of supervised release that does "not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." *Id.* § 3583(h). But Patrick's argument on this point necessarily challenges his status as an armed career criminal. As previously mentioned, it was not plain error for the district court to conclude that this attempted correction is not cognizable in a revocation proceeding. *See Hill*, 776 F. App'x at 909 (citing *Lewis*, 498 F.3d at 395; *Hall*, 735 F. App'x at 191).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
(at London)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 6: 06-034-DCR
	)	
V.	)	
	)	
GEORGE EDWARD PATRICK,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Defendant.	)	

*** *** *** ***

This matter is pending for consideration of alleged violations of the conditions of supervised release committed by Defendant George Patrick. Patrick initially appeared before United States Magistrate Judge Hanly A. Ingram on January 28, 2021. At that time, counsel for the defendant indicated that Patrick's Criminal History Category ("CHC") should be II for purposes of the alleged supervised release violations, as opposed to VI as applied during the original sentencing hearing. [Record No. 105] However, as discussed more fully below, the validity of Patrick's underlying sentence has not been disturbed and CHC VI remains the applicable CHC for purposes of calculating the defendant's non-binding guideline range when considering his alleged violations of the conditions of supervised release imposed at the time the defendant was originally sentenced.

I.

Patrick pleaded guilty on September 19, 2006, to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1). Pursuant to a written plea agreement, the parties agreed that Patrick should be sentenced as an Armed Career Criminal under 18 U.S.C. §

924(e)(1) ("ACCA"). [Record Nos. 66, 70] The parties did not agree on a specific CHC in the plea agreement.

The presentence investigation report ("PSR") prepared subsequently by the probation officer provided that Patrick was an Armed Career Criminal within the meaning of U.S.S.G. § 4B1.4(c)(2). This designation resulted in CHC VI being assigned in calculating Patrick's guideline range.[1] Patrick did not object to that aspect of the PSR. On March 19, 2007, he was sentenced to 199 months' imprisonment to be followed by five years of supervised release. [Record No. 73] Patrick waived the right to appeal as well as the right to collaterally attack his guilty plea and conviction. [Record No. 66]

Notwithstanding the waiver provision of his plea agreement, on June 30, 2014, Patrick filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255. [Record No. 81] In support, Patrick argued that he was no longer an Armed Career Criminal under the decision in *Descamps v. United States*, 570 U.S. 254 (2013). However, the motion was denied because *Descamps* did not create a new rule of constitutional law that was retroactively applicable on collateral review and because Patrick's § 2255 motion was time-barred. [Record No. 82] The United States Court of Appeals for the Sixth Circuit denied Patrick's later request to file a second or successive motion under § 2255. [Record No. 100]

Next, in July 2018, Patrick filed a petition under 28 U.S.C. § 2241. Patrick argued in that petition that he was actually and factually innocent of the ACCA enhancement because he did not have three prior convictions that constitute serious drug offenses and/or violent felonies. [Lexington Civil Action 5: 18-445-DCR] To further evaluate his claim in the civil

[1] The 2006 edition of the Guidelines Manual was used calculate Patrick's guideline range.

action filed under § 2241, the Court directed the United States Probation Office to prepare a report to "identify any Armed Career Criminal Act predicate offenses." The report indicated that Patrick would have only one qualifying ACCA conviction if sentenced at the time of that report. However, the Court ultimately determined that § 2241 was not the proper mechanism to bring this challenge, as it "could have been remedied through objections at sentencing, on appeal, or through a timely § 2255." [5: 18-CV-445, Record No. 29] The Sixth Circuit also affirmed this decision. *Patrick v. Warden, FMC Lexington*, 2020 WL 2611190 (6th Cir. May 15, 2020).

Patrick was released from incarceration to commence his five-year term of supervised release on June 11, 2020. He is now before the Court based on alleged violations of the conditions of supervised release, the most serious of which is a Grade B violation. Considered in conjunction with his original CHC of VI, the non-binding guidelines range of imprisonment is 21 to 27 months. *See* U.S.S.G. § 7B1.4. However, the report prepared by the probation office to assist the Court as part of the § 2241 proceeding would assign a CHC of II. If this CHC were applied, the non-binding range for incarceration upon revocation would be 6 to 12 months. *See id.*

II.

The Court begins by examining the relevant guidelines language to determine the appropriate CHC applied in criminal matters involving violations of supervised release. The Introduction to Chapter Seven of the guidelines manual provides: "The grade of the violation, together with the violator's criminal history category calculated *at the time of the initial sentencing*, fix the applicable sentencing range." U.S.S.G. Ch. 7 Pt. A 4. (emphasis added).

Next, the application notes to section 7B1.4 state:

> [t]he criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision.

U.S.S.G. § 7B1.4, cmt. n.1. *See also United States v. Webb*, 30 F.3d 687, 688-89 (6th Cir. 1994) (observing that the sentencing court must consider the "non-binding policy statement" contained in Chapter Seven of the guidelines).

The Sixth Circuit has interpreted the policy statement consistent with its plain language. In *United States v. Wright*, 2 F.3d 175 (6th Cir. 1993), the defendant was convicted of threatening the lives of various federal officials, including President Ronald Reagan. The presentence report calculated the defendant's CHC as V, but the parties negotiated a plea agreement that included a CHC of IV. Wright was sentenced to 30 months' imprisonment (plus a term of supervised release) consistent with the parties' plea agreement. When Wright later violated the terms of his supervised release, the sentencing judge relied on a CHC of V in determining the appropriate sentence.

Wright argued that the judge impermissibly recalculated his CHC by failing to apply CHC IV. The Sixth Circuit disagreed, observing that the district court acknowledged at the initial sentencing hearing that V was the defendant's actual CHC. The district court could have, but was not required to, give the defendant the same benefit of the doubt he received at the original sentencing. *Id.* at 178.

A group of cases from the Eleventh Circuit sheds additional light on this issue. Levore Jones-Tidwell pleaded guilty to firearm and controlled substance charges. *United States v. Jones-Tidwell*, 610 F. App'x 890 (11th Cir. 2015). The district court used the 2008 edition of

the Sentencing Guidelines Manual to determine that he had 10 criminal history points, which included one recency point because Jones-Tidwell committed the offenses of conviction less than two years after he had been released from imprisonment. Accordingly, his CHC was V. He was sentenced to 42 months' imprisonment and three years of supervised release.

Jones-Tidwell was released and began serving his term of supervised release. In 2014, he violated the conditions and the district court calculated his advisory guidelines range based on a CHC of V. He argued that the calculation was erroneous because the Sentencing Commission had eliminated consideration of recency points in 2010. And without the recency point, he would only have a CHC of IV.

The Eleventh Circuit rejected Jones-Tidwell's argument because the sentencing guidelines specifically instruct that "'[t]he criminal history category is not to be recalculated' for purposes of imposing a revocation sentence." *Id.* at 891-92 (quoting U.S.S.G. § 7B1.4 cmt. n.1). The sentencing court had done exactly as the guidelines instruct: "It used the criminal history category 'applicable at the time [Jones-Tidwell] was originally sentenced to a term of supervision.'" The guidelines amendment regarding recency points was prospective, so the Eleventh Circuit was not faced with the possible effect a retroactive change in the law might have on a defendant's CHC. *See id.* at 891.

Two other cases come closer to addressing the issue presently before this Court. In *United States v. Singleton*, 580 F. App'x 833 (11th Cir. 2014), the defendant argued that "based on changes in the law since his original sentencing date," the district court should have considered whether his CHC overrepresented his criminal history. Although the Eleventh Circuit did not identify which changes in the law Singleton cited in support of his argument, it

explained that the district court was without authority to rely on such changes to depart from the CHC applied at the original sentencing. *Id.* at 835.

Next, in *United States v. Esteen*, 703 F. App'x 825 (11th Cir. 2017), the defendant challenged his 40-month sentence imposed upon revocation of supervised release as procedurally and substantively unreasonable. The court affirmed Esteen's sentence, stating in a footnote,

> [t]o the extent Mr. Esteen argues that the district court erred by relying on a criminal history category of IV instead of II or III, any intervening changes to the way criminal history points are calculated do not affect his guidelines range upon revocation of supervised release, which is calculated using the criminal history category applicable at the time of the initial sentencing.

Esteen, 703 F. App'x at 830 n.3.

Similarly, the court rejected a defendant's argument that his CHC was incorrectly calculated at his original sentencing. *United States v. Chisolm*, 559 F. App'x 800 (11th Cir. 2014). The Eleventh Circuit concluded that the district court imposing a sentence upon revocation correctly applied the original CHC regardless of the alleged mistake. In other words, it would have been inappropriate to entertain such an allegation of error during revocation proceedings.

Relying on *United States v. Almand*, 992 F.2d 316, 317 (11th Cir. 1993), the *Jones-Tidwell, Singleton,* and *Chisolm* Courts observed that a defendant may not challenge the validity of an underlying sentence during revocation proceedings. In *Almand*, the defendant argued that he could not be sentenced following revocation of supervised release because he had not been present when his underlying sentence was imposed. The court held that arguments challenging the validity of the underlying sentence could be raised by collateral

attack only through a separate proceeding. And unless the underlying sentence has been vacated, the court should presume it is valid during the revocation proceeding. *Id.*

As explained above, Patrick's collateral attacks have been unsuccessful. *But see Lewis v. United* States, 2017 WL 4799808 (S.D. W.Va. Oct. 24, 2017) (new lower CHC was applied during revocation proceeding when defendant had successfully challenged ACCA designation under § 2255). And because the defendant's underlying sentence has not been vacated, there is no basis for applying any CHC other than VI as applied during the original sentencing hearing. Accordingly, it is hereby

ORDERED that the defendant's objection to the application of CHC VI is **OVERRULED**.

Dated: February 24, 2021.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky