

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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LATWON JAMES,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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CORRECTED PETITION FOR WRIT OF CERTIORARI  
REDACTED

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## **QUESTIONS PRESENTED**

- I. Whether the Fourth Circuit erroneously dismissed Mr. James's appeal based on a provision in Mr. James's plea agreement waiving his right to appeal when Mr. James did not knowingly and intelligently waive his right to appeal, and he raised arguments on appeal outside the scope of the waiver provision?
- II. Whether the Fourth Circuit erred in affirming a supervised release revocation sentence, based on the increased deference the court said applies to the review of such sentences, where the district court did not consider the applicable sentencing factors in 18 U.S.C. § 3553(a)?

## **PARTIES TO THE PROCEEDINGS BELOW**

Petitioner, who was the Defendant-Appellant below, is Latwon James.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES. ....	v
CITATION OF PRIOR OPINION. ....	1
JURISDICTIONAL STATEMENT.....	1
STATUTES INVOLVED.....	1
STATEMENT OF THE CASE. ....	5
MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW. ....	23
REASONS FOR GRANTING THE WRIT.....	23
DISCUSSION. ....	24
I. MR. JAMES DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO APPEAL, AND HE RAISED ARGUMENTS OUTSIDE THE SCOPE OF THE WAIVER PROVISION IN HIS PLEA AGREEMENT. ....	24
A. Mr. James Did Not Knowingly And Intelligently Waive His Right To Appeal.....	24
B. The Waiver Provision Does Not Bar A Challenge To A Fundamentally Unfair Sentence Where Mr. James Could Not Reasonably Have Contemplated That Challenge At The Time He Entered The Plea Agreement. ....	27
II. THE FOURTH CIRCUIT APPLIED AN OVERLY DEFERENTIAL STANDARD IN AFFIRMING MR. JAMES'S REVOCATION SENTENCE NOTWITHSTANDING THE DISTRICT COURT'S FAILURE TO CONSIDER THE REQUIRED FACTORS IN 18 U.S.C. § 3553(a). ....	29

CONCLUSION. . . . . 33

CERTIFICATE OF SERVICE. . . . . 35

APPENDIX:

A. Order, U.S. Court of Appeals for the Fourth Circuit, entered 24 August 2021.

B. Opinion, U.S. Court of Appeals for the Fourth Circuit, entered 2 November 2021.

## **TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES**

### **Cases**

<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	30
<i>Garza v. Idaho</i> , 139 S. Ct 738 (2019).....	24, 27
<i>United States v. Haymond</i> , 139 S. Ct. 2369 (2019).....	32-33
<i>Holguin-Hernandez v. United States</i> , 140 U.S. 762 (2020).....	30, 31, 32
<i>Johnson v. United States</i> , 529 U.S. 694 (2000).....	20, 32
<i>Mont v. United States</i> , 139 S. Ct. 1826 (2019).....	29
<i>State v. Dye</i> , 291 Neb. 989, 870 N.W.2d 628 (2015).....	28
<i>United States v. Attar</i> , 38 F.3d 727 (4th Cir. 1994).....	27, 28
<i>United States v. Blick</i> , 408 F.3d 162 (4th Cir. 2005).....	25, 28, 29
<i>United States v. Broughton-Jones</i> , 71 F.3d 1143 (4th Cir. 1995).....	28
<i>United States v. Brown</i> , 892 F.3d 385 (D.C. Cir. 2018).....	27
<i>United States v. Harvey</i> , 791 F.2d 294 (4th Cir. 1986).....	27
<i>United States v. Manigan</i> , 592 F.3d 621 (4th Cir. 2010).....	27
<i>United States v. Marin</i> , 961 F.2d 493 (4th Cir. 1992).....	28

### **Statutes**

18 U.S.C. § 3553. ....	<i>passim</i>
18 U.S.C. § 3583. ....	3-4, 29, 30, 31, 32
18 U.S.C. § 3742. ....	2, 3, 6
21 U.S.C. § 841. ....	4, 5

21 U.S.C. § 846. . . . .	5
28 U.S.C. § 994. . . . .	3
28 U.S.C. § 1254. . . . .	2
28 U.S.C. § 2255. . . . .	6

### **Guidelines and Policy Statements**

U.S.S.G. § 2D1.1. . . . .	12
U.S.S.G. § 3E1.1. . . . .	12
U.S.S.G. § 4A1.1. . . . .	13
U.S.S.G. § 4A1.2. . . . .	12, 13
U.S.S.G. § 4A1.3. . . . .	13, 14, 15, 29
	
<i>U.S. Sent'g Guidelines Manual</i> ch. 7, pt. A, p.s.. . . . .	22

### **Rules**

Fed. R. Crim. P. 32. . . . .	14, 29
S. Ct. R. 10. . . . .	23, 24
S. Ct. R. 12. . . . .	2, 23
S. Ct. R. 13. . . . .	2

### **Other Authority**

King & O'Neill, <i>Appeal Waivers and the Future of Sentencing Policy</i> , 55 Duke L.J. 209 (2005). . . . .	27-28
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## **CITATION OF PRIOR OPINION**

The United States Court of Appeals for the Fourth Circuit initially consolidated Mr. James's appeals in Nos. 20-4605 and 20-4613, but on the Government's motion, deconsolidated those appeals. The Fourth Circuit granted the motion to dismiss Mr. James's appeal in No. 20-4613 by order entered 24 August 2021. A copy of the Fourth Circuit's order is included in the Appendix to this petition. The Fourth Circuit decided Mr. James's appeal in No. 20-4605 by unpublished per curiam opinion issued 2 November 2021. *United States v. James*, No. 20-4605, 2021 WL 5074468 (4th Cir. Nov. 2, 2021) (per curiam). The Fourth Circuit affirmed Mr. James's sentence. A copy of the opinion is included in the Appendix.

## **JURISDICTIONAL STATEMENT**

This petition seeks review of an order of the United States Court of Appeals for the Fourth Circuit dismissing petitioner's appeal from his sentence following his conviction, pursuant to a guilty plea, on drug trafficking charges. The petition also seeks review of the Fourth Circuit's opinion affirming the sentence imposed for violation of supervised release terms. By order dated 15 December 2020, the Fourth Circuit consolidated Mr. James's appeals from his sentence on new charges and his revocation sentence, reflecting that the appeals were closely related. *See Order*, *United States v. James*, No. 20-4605(L), -4613 (4th Cir. Dec. 15, 2020). The Fourth Circuit later deconsolidated the appeals on the Government's motion, when the Government expressed its intention to move to dismiss only one of the appeals,

resulting in the issuance of a separate judgment in each appeal. *See Order, United States v. James*, No. 20-4605(L), -4613 (4th Cir. July 1, 2021). Because the two judgments of the Fourth Circuit at issue involve closely related questions arising from Mr. James's sentencing based on revocation of supervised release and for new criminal conduct, Mr. James seeks review of both judgments in a single petition. *See* S. Ct. R. 12(4).

This Court has jurisdiction to review the Fourth Circuit's order and opinion pursuant to 28 U.S.C. § 1254(1).

The petition was initially filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This corrected petition is being filed within the time permitted, because it is being filed within sixty days of the issuance of notice from the Clerk of Court dated 30 November 2021.

## **STATUTES INVOLVED**

Section 3553(a) of Title 18 provides 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.

18 U.S.C. § 3553(a).

Section 3583(e) of Title 18 provides 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 post-release 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).

## STATEMENT OF THE CASE

### *The 2013 Conviction and Sentence*

In 2013, Mr. James was charged by indictment with one count of conspiracy to possess with intent to distribute a quantity of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and three counts of distribution of a quantity of heroin, in violation of 21 U.S.C. § 841(a)(1). J.A. 2, 3. Mr. James pleaded guilty to the conspiracy charge pursuant to a written plea agreement. J.A. 5. The district court sentenced Mr. James to 56 months' imprisonment and three years of supervised release. J.A. 5, 22-28.

### *The 2019 Indictment and Plea Agreement*

In 2019, Mr. James was indicted on charges of conspiracy to distribute and possess with intent to distribute heroin, a mixture containing methamphetamine, fentanyl, and cocaine base (crack), in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 1); distribution of heroin, in violation of 21 U.S.C. § 841(a)(1) (Count 2); distribution of heroin and fentanyl, in violation of 21 U.S.C. § 841(a)(1) (Counts 3, 5, 6, 7, 8, 9, 10, 11); distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 4); distribution of heroin and methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 12); distribution of fentanyl and tramadol, in violation of 21 U.S.C. § 841(a)(1) (Count 13); possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1) (Count 14); and possession with intent to distribute heroin, fentanyl, and 28 grams or more of cocaine base (crack), in violation of 21 U.S.C. § 841(a)(1) (Count 15). J.A. 15, 29-37.

Mr. James entered a written plea agreement with the Government in which he agreed to plead guilty to Counts 1, 8, 13, 14, and 15. J.A. 17-18, 141-51. Mr. James's plea agreement included a provision in which he agreed:

To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

J.A. 141.

The plea agreement included three other paragraphs addressing waiver.

First, Mr. James agreed to waive

all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided by the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.

J.A. 142.

Mr. James also agreed

To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the Indictment, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The Defendant hereby consents to having the existence and applicability of any convictions decided by the sentencing judge based on a preponderance of the evidence. The Defendant reserves the right to contest at sentencing the existence of any such prior conviction and whether such conviction qualifies to increase

the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing judge using a preponderance-of-the-evidence standard.

J.A. 143.

Finally, Mr. James agreed to forfeit, and “waive[] any further notice” regarding property specified in the indictment. J.A. 142. “In addition, the Defendant forfeits and otherwise waives any ownership right in all items seized during the investigation of the acts alleged in the Indictment.” J.A. 142.

The plea agreement included various provisions regarding imposition of the sentence. The plea agreement provided that Mr. James “understands, agrees, and admits” that “any sentence imposed will be without parole.” J.A. 144, 148. Further, the agreement provided that Mr. James “understands, agrees, and admits” that the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.

J.A. 144, 148. The plea agreement also provided that Mr. James “understands, agrees, and admits” that unless he were found unable to pay, “the Court will impose a fine.” J.A. 144, 148.

#### *Mr. James’s Arraignment*

Mr. James consented to arraignment by a United States Magistrate Judge. J.A. 53-54. The court addressed Mr. James as part of a group of defendants explaining “your rights to a jury trial and other rights relating thereto and the

consequences of pleading guilty.” J.A. 39. The court advised that “[i]f you have reached a plea agreement with the Government, the Court is obligated to examine carefully any such plea agreement to be sure the agreement conforms to the objectives of sentencing, including imposing a sentence within the parameters of your statute of conviction that is appropriate to the seriousness of your actual offense behavior and your past criminal conduct.” J.A. 42. The court further advised that “the Court is not a party” to any plea agreement between a defendant and the Government, and that “the Court will make an independent determination as to your sentence after applying all the sentencing factors to your case and considering all arguments of counsel, your statement, the advisory guidelines range, and any departure or variance motion.” J.A. 43. The court stated that “[r]egardless of the advisory sentencing guideline ultimately found to be appropriate to your case, you may not withdraw a guilty plea tendered and accepted today.” J.A. 46.

The court also addressed the right to appeal:

If you are convicted, whether by a jury or as a result of a guilty plea, you can appeal such conviction if you believe your conviction was somehow unlawful or if there is some other fundamental defect in the proceeding that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence was contrary to law.

J.A. 49. The court added that “you may agree to waive certain appeal rights as to conviction and sentence in the plea agreement.” J.A. 49-50. The court stated for individual defendants “we will go over any such appeal waiver in your plea

agreement,” and that “[s]uch appeal waivers generally are enforceable but if you believe the waiver is unenforceable or inapplicable, you can present that theory to the appellate court.” J.A. 50.

The court addressed Mr. James individually following its explanation of rights to all of the defendants. J.A. 52-90. The court first confirmed that Mr. James was competent to proceed and made that finding on the record. J.A. 54-56. The court reviewed the charges in the indictment, and Mr. James confirmed that he understood the charges. J.A. 56-65. The court then reviewed the maximum penalties based on those charges, and Mr. James confirmed that he understood the maximum penalties. J.A. 65-66. Mr. James also confirmed that he heard and understood the court’s recitation of rights and that he understood that by pleading guilty he would “waive or give up those trial rights.” J.A. 67. Mr. James was represented by counsel, and he said he was satisfied with his lawyer’s legal services. J.A. 71.

The court confirmed that Mr. James had spoken to his attorney “specifically about sentencing.” J.A. 71. The court advised “that in determining your sentence, the Court must calculate the applicable advisory guideline range, consider that range, consider possible departures and variances under the guideline, and consider sentencing factors under Title 18 of the United States Code, Section 3553.” J.A. 71. Mr. James said he understood. J.A. 71. The court also advised Mr. James that “any calculation by your attorney of your anticipated sentence is only an estimate” that was not binding on the court, and “that the Court will determine your actual

sentence on the day of your sentencing hearing.” J.A. 71. Mr. James said he understood. J.A. 71-72. The court further advised “that any estimate by your lawyer or anyone else as to whether the Court will grant or deny a departure or variance motion or what the guideline range is, is not binding on the Court.” J.A. 72. Mr. James said he understood. J.A. 72.

Later in the arraignment, the court asked, “With regard to sentencing, sir, do you understand that if you plead guilty and the Court accepts the guilty plea, the Court would have the authority to sentence you to the statutory maximum sentence permitted by law as to each count to which you pleaded guilty.” J.A. 76. Mr. James answered, “Yes, sir.” J.A. 76. The court followed by asking, “Do you understand that if the Court imposed such a maximum sentence, you would not then be entitled to withdraw your guilty plea.” Mr. James again answered, “Yes, sir.”

Upon questioning by the court, Mr. James said that he read and discussed the plea agreement with his counsel, that the written plea agreement was the whole agreement with the Government, and that he understood each term in the agreement. J.A. 74. The court read the “appeal waiver provision” in the plea agreement, and Mr. James answered, “Yes, sir,” when asked if he understood and agreed to that provision. J.A. 75.

Before taking Mr. James’s plea, the court asked if Mr. James needed any more time to think about his plea or to discuss the case with his attorney, and Mr. James said, “No, sir.” J.A. 78. Mr. James pleaded guilty to Counts 1, 8, 13, 14, and 15; after hearing the Government’s recitation of what facts it could prove at trial,

the court accepted those guilty pleas. J.A. 78-89.

1. **What is the primary purpose of the study?** (Please check one box)

For more information, contact the Office of the Vice President for Research and the Office of the Vice President for Student Affairs.

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*Motion for Revocation of Supervised Release*

The Probation Office filed a motion for revocation of Mr. James's supervised release, and later filed an amended motion for revocation of supervised release.

J.A. 8, 9, 92. Count 1 in the amended motion charged “Criminal Conduct” reflecting the counts to which Mr. James had pleaded guilty. J.A. 92. The district court scheduled consideration of the revocation motion at the same time as Mr. James’s sentencing hearing. J.A. 9.

## *Presentence Investigation Report*

The Probation Office prepared a presentence investigation report. J.A. 152-78. The Probation Office found that Mr. James was responsible for 2,938.415 grams of heroin, 28.385 grams of fentanyl analogue, .75 grams of marijuana, 8.02 grams of methamphetamine, and 30.98 grams of crack; the Probation Office converted these

quantities to 3,368.68 kilograms of converted drug weight. J.A. 159. Based on the drug quantity finding, the Probation Office determined that the base offense level was 32. J.A. 173-74; *see* U.S.S.G. § 2D1.1(a)(5), (c)(4). The Probation Office added two levels based on the specific offense characteristic that a dangerous weapon was possessed, and two levels based on the specific offense characteristic that Mr. James maintained a premises for the purpose of manufacturing or distributing a controlled substance. J.A. 174; *see* U.S.S.G. § 2D1.1(b)(1), (b)(2). After deducting three points for acceptance of responsibility, the Probation Office determined that the total offense level was 33. J.A. 174; *see* U.S.S.G. § 3E1.1(a), (b).

Mr. James's criminal history included convictions in 1996 and 1997, when he was a minor, for larceny, possession of a stolen motor vehicle, selling or delivering cocaine, and breaking and entering a motor vehicle. J.A. 160-61. These convictions were too old to be scored under the Sentencing Guidelines. J.A. 160-61; *see* U.S.S.G. § 4A1.2(d)(2); *id.* § 4A1.2(e)(4). Mr. James also had convictions between 1998 and 2002 for driving offenses, possession with intent to sell or deliver cocaine, possession of cocaine, possession of marijuana, gambling, and resisting a public officer that were too old to be scored under the Guidelines. J.A. 161-64; *see* U.S.S.G. § 4A1.2(a)(2); *id.* § 4A1.2(e)(3).

Mr. James was convicted in North Carolina state court in 2004 for heroin trafficking offenses committed in May through July of 2003 and March of 2004, and also convicted of possession of controlled substances, eluding arrest with a motor

vehicle, reckless driving, and hit and run. J.A. 164-67. The convictions were consolidated for judgment, and Mr. James was sentenced to 85 to 111 months' imprisonment. J.A. 164-66. In 2013, Mr. James was convicted in federal court of conspiracy to possess with intent to distribute a quantity of heroin, and was sentenced to 56 months' imprisonment. J.A. 167.

The Probation Office scored the 2004 and 2013 sentences and added two points because Mr. James committed the instant offenses while on supervised release from the 2013 conviction. J.A. 164, 167-68; *see U.S.S.G. § 4A1.1(a), (d); id. § 4A1.2(a)(2)*. The Probation Office found that Mr. James's total criminal history score was 8, placing him in criminal history category IV. J.A. 168.

Based on the total offense level of 33 and criminal history category IV, the Probation Office determined that Mr. James's advisory Guidelines sentencing range was 188 to 235 months. J.A. 175. The Probation Office stated that “[t]he court may wish to consider an upward departure pursuant to USSG § 4A1.3, Departures Based on Inadequacy of Criminal History Category.” J.A. 177.

The Probation Office reported that Mr. James was raised by his mother and maternal grandmother, without his father in his life. J.A. 169. Mr. James has five children with whom he has a close relationship. J.A. 169. Mr. James suffered from addiction to marijuana. J.A. 170. While on supervised release from his 2013 federal sentence, Mr. James worked regularly for a janitorial service. J.A. 171. Mr. James also reported employment in construction work and sales. J.A. 171.

Neither Mr. James nor the Government objected to the presentence report.

J.A. 178.

*Sentencing and Revocation Hearing*

The district court held a hearing on 1 December 2020 and addressed both sentencing and revocation of supervised release. J.A. 10, 20, 94-128. The court found Mr. James competent to proceed, and first considered sentencing on the convictions of charges in the 2019 indictment. J.A. 96.

The court confirmed that neither Mr. James nor the Government objected to the presentence report. J.A. 98. Consistent with the presentence report, the court found that the advisory Guidelines sentencing range was 188 to 235 months. J.A. 98. Neither party objected to the advisory Guidelines range. J.A. 98-99.

The court noted that the presentence report provided notice under Rule 32(h) of the Federal Rules of Criminal Procedure and advised the parties that it was considering an upward departure under U.S.S.G. § 4A1.3. J.A. 99; *see* Fed. R. Crim. P. 32(h) (court must give reasonable notice of any contemplated departure from applicable sentencing range on ground not identified for departure in presentence report or in prehearing submission).

The court detailed Mr. James's past state law convictions as recorded in the presentence report, noting where some of the sentences were not scored under the Guidelines. J.A. 100-102. The court said Mr. James was a drug dealer "and this is his life and it has been since age 16 and it has never stopped notwithstanding . . . interactions with both the state and federal judiciary." J.A. 101. The court further stated that Mr. James was a "heroin dealer and is who he is, it's who he has been

and it is who this report suggests to me he will always be.” J.A. 101.

The court recited Mr. James’s prior federal conviction before the court and said he “[g]ets a break” with a 56-month sentence. J.A. 102. The court stated “while he’s on supervised release, he engages in all of this criminal conduct that brings us here.” J.A. 102. The court invited the parties to explain how § 4A1.3 “does not fit this man to a T?” J.A. 103.

Mr. James, through counsel, requested a continuance of the sentencing hearing, which the court denied. J.A. 103. Mr. James argued that many of the unscored convictions were more than 20 years old. J.A. 104. The court said, “I agree, and I went through that. . . . He’s now 40. Has he changed? No. He has ramped it up.” J.A. 104.

The court found that an upward departure under § 4A1.3 was appropriate. J.A. 106. The court noted Mr. James’s criminal history and the instant offenses of conviction. J.A. 106-07. The court said that Mr. James’s “criminal history began at age 16. It has continued unabated when he has been outside of a custodial setting.” J.A. 107. The court acknowledged Mr. James’s argument about the convictions that were consolidated for judgment and said Mr. James “for State Court . . . got a serious sentence.” J.A. 107. The court noted that following his release from that state sentence, Mr. James committed the offenses that led to his 2013 federal indictment, and that while on supervised release following service of his federal sentence, Mr. James committed the offenses for which he was presently being sentenced. J.A. 107. The court concluded that Mr. James’s criminal history

category substantially under represented the seriousness of his criminal history, and “the likelihood that he will commit other crimes [is] almost a certainty.” J.A. 107-08.

Considering the extent of the upward departure, the court noted it “initially must move within the sentencing table.” J.A. 108. Mr. James’s criminal history category was IV, and the court stated, “I do not think V is remotely sufficient.” J.A. 108. The court moved to criminal history category VI “to reflect his appropriate criminal history, the seriousness of it, and the likelihood that he will commit other crimes.” J.A. 108. Based on a total offense level of 33 and criminal history category VI, the court found that the new advisory Guidelines range was 235 to 293 months. J.A. 108.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In mitigation, Mr. James, through counsel, argued that Mr. James grew up without a father figure. J.A. 109. Mr. James indicated a desire to go into the drug program in the Bureau of Prisons and to take advantage of other programs. J.A. 109. Mr. James expressed an interest in truck driving as an occupation, and a

desire to support his children. J.A. 109. Mr. James noted that older offenders have a reduced likelihood of recidivism. J.A. 109. Mr. James had been sentenced to prison at age 16 and 17, “learning all the wrong things and this is what happens,” a “product of a system that does not work.” J.A. 110, 111. Mr. James asked the court to consider his conduct since he was arrested. J.A. 109.

The court responded that Mr. James “got a break”; he “got the benefit of the BOP”; he “got the benefit of a probation officer.” J.A. 110. The court said it understood “the young man argument,” and that “some who get breaks here and don’t come back, but that’s not this man. This man is committed, not just now, to dealing heroin.” J.A. 110. The court also acknowledged “the statistics,” but said there are “statistical anomalies,” and that Mr. James was “an outlier.” J.A. 110. The court said Mr. James’s children had not changed his behavior. J.A. 112.

In his allocution, Mr. James apologized and accepted responsibility. J.A. 113. Mr. James said he had learned a lot and had been studying to be an entrepreneur while in custody awaiting his sentencing. J.A. 113. He noted that his grandmother had died of cancer and expressed a desire to help his wife, mother, children, and grandchild upon release. J.A. 113.

[REDACTED]

[REDACTED] J.A. 180. The court referred to the purposes of sentencing under 18 U.S.C. § 3553(a). J.A. 115. The court recited the offenses of conviction. J.A. 115-16. The court noted a statement by co-defendant Ms. Bannerman and said the “domestic violence” reflected poorly on Mr. James. J.A.

116. The court also noted that Mr. James was 41 years old and had a GED. J.A.

116. The court again referred to Mr. James's criminal history. J.A. 116-17.

The court said it had taken into account the arguments regarding Mr. James's post-arrest conduct, that he grew up without a father figure, and that older offenders have a reduced likelihood of recidivism. J.A. 118. The court concluded, taking into account all the factors under § 3553(a), it would impose a sentence of 264 months' imprisonment on Counts 1 and 15, and a concurrent term of 240 months' imprisonment on Counts 8, 13, and 14. J.A. 119. The court added that “[i]n imposing this sentence, I've considered all arguments each side has made. Simply because I have not parroted back each and every argument does not mean I have not considered it. It means I have considered and rejected it in light of my balancing of the 3553(a) factors.” J.A. 120-21.

The court then took up the supervised release revocation. J.A. 122. Mr. James admitted the criminal conduct charged as Violation 1 in the amended motion for revocation. J.A. 122; *see* J.A. 92. The court found Mr. James that had committed a Grade A violation and with a criminal history of category IV, the policy statement sentencing range was 24 months' imprisonment. J.A. 122-23. Neither Mr. James nor the Government objected to that policy statement range. J.A. 123.

Mr. James, through counsel, argued that during his supervised release he had consistently passed his drug tests, and “was doing everything right before this criminal conduct.” J.A. 123. Mr. James argued that the 264-month sentence was sufficient and requested that the court make any supervised release sentence

concurrent to that sentence. J.A. 123. Mr. James admitted his drug problem and said he wanted to “start fresh all over again,” move to Virginia, and take care of his loved ones who needed his support. J.A. 124.

The court said it had considered the policy statement range, the entire record, the parties’ arguments, and Mr. James’s statement. J.A. 124. The court said “the principal focus in a revocation proceeding is on the breach of trust.” J.A. 125. The court acknowledged Mr. James’s argument about passing the drug tests, but said of Mr. James that he was “not long on supervised release when you were ramping it back up as a heroin dealer,” that he had become “a kilogram quantity dealer of heroin” and was also distributing fentanyl. J.A. 125. The court rejected a concurrent sentence, stating it would not recognize “the egregious nature of the breach of trust, the prolonged nature of the breach of trust, the constant deception that took place during the breach of trust” while Mr. James was on supervised release. J.A. 126. Having “fully considered the entire record,” the court imposed a 24-month sentence to run consecutively to the 264-month sentence. J.A. 126.

Mr. James timely filed notices of appeal from the sentence and judgment and the supervised release revocation. J.A. 10, 20, 138-39, 140.

#### *The Fourth Circuit’s Review of Mr. James’s Appeals*

The Fourth Circuit consolidated Mr. James’s appeal from the revocation sentence, No. 20-4605, with Mr. James’s appeal from the sentence imposed based on convictions for his 2019 charges, No. 20-4613. Order (Dkt. No. 5), *United States v. James*, No. 20-4605 (4th Cir. Dec. 15, 2020); Order (Dkt. No. 4), *United States v.*

*James*, No. 20-4613 (4th Cir. Dec. 15, 2020). Mr. James filed his opening brief addressing the issues raised in both appeals, arguing that the sentence based on convictions of the 2019 charges was procedurally and substantively unreasonable, and that the revocation sentence was plainly unreasonable. Appellant's Opening Br. (Dkt. No. 33), *United States v. James*, No. 20-4605 (4th Cir. May 24, 2021); Appellant's Opening Br. (Dkt. No. 32), *United States v. James*, No. 20-4613 (4th Cir. May 24, 2021).

On the Government's motion, the Fourth Circuit deconsolidated Mr. James's appeals. Order (Dkt. No. 39), *United States v. James*, No. 20-4605 (4th Cir. July 1, 2021); Order (Dkt. No. 38), *United States v. James*, No. 20-4613 (4th Cir. July 1, 2021).

The Government moved to dismiss Mr. James's appeal in No. 20-4613. Mot. by United States to Dismiss Appeal (Dkt. No. 44), *United States v. James*, No. 20-4613 (4th Cir. July 27, 2021). Mr. James filed an opposition to the motion to dismiss. Appellant's Resp. in Opp'n to Mot. to Dismiss Appeal (Dkt. No. 50), *United States v. James*, No. 20-4613 (4th Cir. July 29, 2021). The Fourth Circuit granted the motion to dismiss the appeal. Order (Dkt. No. 52), *United States v. James*, No. 20-4613 (4th Cir. Aug. 24, 2021).

The Government filed a response brief in No. 20-4605. Resp. Br. of United States (Dkt. No. 56), *United States v. James*, No. 20-4605 (4th Cir. July 30, 2021). Mr. James filed a reply brief. Appellant's Reply Br. (Dkt. No. 59), *United States v.*

*James*, No. 20-4605 (4th Cir. Aug. 16, 2021).

In an unpublished opinion, the Fourth Circuit affirmed the district court’s imposition of 24 months’ imprisonment upon revocation of Mr. James’s supervised release, consecutive to the 264 months’ imprisonment the court imposed for the new criminal conduct. *United States v. James*, No. 20-4605, 2021 WL 5074468, at \*1-3 (4th Cir. Nov. 2, 2021) (per curiam). The Fourth Circuit said it “will affirm a revocation sentence if it is within the statutory maximum and not plainly unreasonable.” *Id.* at \*1 (quotation omitted). The Fourth Circuit explained that it first determines whether a revocation sentence is procedurally or substantively unreasonable, “evaluating the same procedural and substantive considerations that guide our review of original sentences, but taking a more deferential appellate posture than we do when reviewing original sentences.” *Id.* (quotations omitted). According to the Fourth Circuit, a revocation sentence is “plainly unreasonable” if “the unreasonableness is clear or obvious.” *Id.* (quotation omitted).

The Fourth Circuit explained that a revocation sentence is procedurally reasonable if the district court “adequately explains the chosen sentence after considering the Sentencing Guidelines’ nonbinding Chapter Seven policy statements and the applicable 18 U.S.C. § 3553(a) factors.” *Id.* (quotation omitted). The Fourth Circuit said a district court “need not be as detailed or specific when imposing a revocation sentence as it must be when imposing a post-conviction sentence,” but the court “must provide a statement of reasons for the sentence

imposed.” *Id.* (quotation omitted).

The Fourth Circuit further explained that it would not “guess at the district court’s rationale,” and would not “assume that a sentencing court truly considered a defendant’s nonfrivolous arguments or his individual characteristics when the record fails to make it patently obvious.” *Id.* at \*2 (quotations omitted). But the “context surrounding a district court’s explanation may imbue it with enough content for [the Fourth Circuit] to evaluate both whether the court considered the § 3553(a) factors and whether it did so properly.” *Id.* (quotation omitted).

The Fourth Circuit said that the district court “properly focused on [Mr.] James’s breach of trust when imposing his revocation sentence.” *Id.* (citing U.S. *Sent’g Guidelines Manual* ch. 7, pt. A(3)(b), p.s.). The Fourth Circuit also said that the district court had addressed the arguments Mr. James’s counsel raised regarding the revocation sentence, and that the district court had explained that imposing a concurrent revocation sentence would not recognize the egregious and prolonged nature of the breach of trust. *Id.*

The Fourth Circuit agreed with Mr. James’s argument that the district court did not separately analyze the § 3553(a) factors when providing the reasons for its revocation sentence. *See id.* However, the Fourth Circuit ruled that the district court’s failure to address the § 3553(a) factors in connection with the revocation sentence was not reversible error, reasoning that the district court’s justification for running the sentence consecutively to the sentence for Mr. James’s new criminal

conduct was “abundantly clear in this case.” *Id.* The court held that Mr. James’s sentence was “not procedurally unreasonable, let alone plainly so.” *Id.* at \*3.

### **MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW**

The enforceability and scope of the appeal waiver provision in Mr. James’s plea agreement were argued below, and the Fourth Circuit granted the Government’s motion to dismiss the appeal in No. 20-4613 based on the waiver provision. The question whether the district court erred in imposing Mr. James’s sentence revoking his supervised release was argued and decided below, where the Fourth Circuit affirmed the sentence imposed by the district court. Mr. James’s claims are appropriate for this Court’s consideration.

### **REASONS FOR GRANTING THE WRIT**

This petition seeks review of two judgments of the United States Court of Appeals for the Fourth Circuit involving closely related questions arising from Mr. James’s sentencing based on revocation of supervised release and for new criminal conduct. *See S. Ct. R. 12(4).*

Mr. James respectfully contends that the enforceability of appeal waivers is an important federal question, and the Fourth Circuit’s order dismissing his appeal in No. 20-4613 conflicts with relevant opinions of this Court because Mr. James did not knowingly and intelligently waive his right to appeal, and the arguments he raised were outside the scope of the waiver provision. *See S. Ct. R. 10(c).*

Mr. James further respectfully contends that revocation sentencing

procedures present important federal questions, and the Fourth Circuit’s adoption of an overly deferential standard of review departs from the accepted and usual course of judicial proceedings, and thus calls for this Court’s exercise of its supervisory power. *See* S. Ct. R. 10(a).

## **DISCUSSION**

### **I. MR. JAMES DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO APPEAL, AND HE RAISED ARGUMENTS OUTSIDE THE SCOPE OF THE WAIVER PROVISION IN HIS PLEA AGREEMENT.**

In *Garza v. Idaho*, 139 S. Ct. 738 (2019), this Court discussed the principles relevant to consideration of a criminal defendant’s “appeal waiver.” The Court first made clear that “no appeal waiver serves as an absolute bar to all appellate claims.” *Id.* at 744. The Court recognized that “all jurisdictions appear to treat at least some claims as unwaivable.” *Id.* at 745. The Court said that “[m]ost fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary.” *Id.* A valid and enforceable appeal waiver only precludes challenges that fall within the scope of the waiver. *Id.* at 744. “Additionally, even a waived claim can still go forward if the prosecution forfeits or waives the waiver.” *Id.* at 744-45.

#### **A. Mr. James Did Not Knowingly And Intelligently Waive His Right To Appeal.**

Mr. James acknowledges that the district court questioned him about the appeal waiver, and he stated at his arraignment, in response to the court’s

questions, that he understood he was waiving the right to appeal. *See* J.A. 75. He also acknowledges that the Fourth Circuit has upheld appeal waivers as knowing and voluntary when the court questions the defendant about the waiver at arraignment, and the defendant states on the record that he understands he is waiving the right to appeal. *See, e.g., United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005). Mr. James respectfully contends that the waiver of the right to appeal was not knowing and voluntary under the totality of the circumstances in this case. As discussed below, the plea agreement and the court's questioning at the arraignment made clear that whatever sentence the court imposed, up to the statutory maximum, Mr. James could not withdraw his guilty plea. In contrast, the court advised Mr. James that he could argue that the appeal waiver was unenforceable or inapplicable and thus would not bar an appeal where Mr. James was dissatisfied with the sentence imposed by the court, in this case where the district court departed upward.

Mr. James' plea agreement included a provision reflecting his understanding and agreement that "even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty." J.A. 144, 148. Likewise, during the arraignment, the court made clear that Mr. James would not be allowed to withdraw his guilty plea as long as the court imposed a sentence within the statutory maximum. J.A. 46 ("Regardless of the advisory sentencing guideline ultimately found to be appropriate to your case, you may not withdraw a guilty plea tendered and accepted today."); *see* J.A. 76 (Mr. James confirming his

understanding that he would not be able to withdraw his guilty plea if court sentenced him to the statutory maximum as to each count to which he pleaded guilty). Thus, Mr. James understood that whatever his dissatisfaction with a lengthy sentence that might be imposed by the court, he would not be able to withdraw his guilty plea. Neither the plea agreement nor the court's questioning suggested any limitation on this bar.

In the appeal waiver provision, Mr. James agreed to waive the right to appeal "whatever sentence is imposed on any ground." J.A. 141. However, the court stated that appeal waivers "generally are enforceable but if you believe the waiver is unenforceable or inapplicable, you can present that theory to the appellate court." J.A. 50. In his appeal, Mr. James seeks to challenge the district court's upward departure, and the plea agreement's waiver provision does not specifically include an appeal from an upward departure. Elsewhere in the plea agreement where Mr. James agreed to waive certain rights, the plea agreement explained what rights were included even where the waiver language covered "all rights." *See* J.A. 142 (waiving "all rights" to request or receive records, including specifically FOIA rights and rights under Privacy Act of 1974); J.A. 143 (waiving "any and all rights" to have existence and applicability of prior convictions charged in indictment, submitted to jury, and proved beyond a reasonable doubt). Mr. James's plea agreement lacks this kind of express representation of what appellate rights he was waiving. The imprecise language in the plea agreement and any ambiguity is construed against the Government as the drafter of the plea agreement. *See United*

*States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). Mr. James respectfully contends that he should be permitted to appeal the district court's upward departure notwithstanding the appeal waiver provision. *See generally United States v. Brown*, 892 F.3d 385, 394 (D.C. Cir. 2018) ("Like all other courts of appeals, our circuit holds that a defendant 'may waive his right to appeal his sentence as long as his decision is knowing and voluntary.'") (cited in *Garza v. Idaho*, 139 S. Ct. at 745 n.6); *United States v. Manigan*, 592 F.3d 621, 627-28 (4th Cir. 2010) (declining to enforce appeal waiver where defendant did not knowingly and intelligently waive right to appeal).

B. The Waiver Provision Does Not Bar A Challenge To A Fundamentally Unfair Sentence Where Mr. James Could Not Reasonably Have Contemplated That Challenge At The Time He Entered The Plea Agreement.

While a knowing and voluntary waiver of the right to attack a conviction and sentence may be enforced, such a waiver does not bar a challenge that falls outside the scope of that waiver. *See Garza v. Idaho*, 139 S. Ct. at 744; *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994). Proceedings that affect constitutional rights and fundamental fairness fall outside the scope of such waivers. *See Garza v. Idaho*, 139 S. Ct. at 745 n.6 ("Lower courts have also applied exceptions for other kinds of claims, including 'claims that a sentence is based on race discrimination, exceeds the statutory maximum authorized, or is the product of ineffective assistance of counsel.'") (quoting King & O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 224 (2005)); *United States v. Marin*, 961 F.2d

493, 496 (4th Cir. 1992) (“a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race” falls outside scope of appellate waiver); *Attar*, 38 F.3d at 732 (appeal waiver does not bar review of Sixth Amendment challenge to plea proceedings); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (challenge to validity of sentence falls outside scope of appeal waiver where challenge involves claim that sentence was illegal). This class of claims includes errors the defendant “could not have reasonably contemplated” at the time of the plea agreement. *See United States v. Blick*, 408 F.3d at 172; *see also id.* at 171 n.10 (noting that Fourth Circuit’s analysis of waiver’s scope reflects consideration whether there was a “miscarriage of justice”); *Garza v. Idaho*, 139 S. Ct. at 745 n.6 (citing *State v. Dye*, 291 Neb. 989, 999, 870 N.W.2d 628, 634 (2015) (holding that appeal waivers are subject to “miscarriage of justice” exception)).

The waiver provision in Mr. James’s plea agreement does not bar his challenge to the district court’s decision to depart upward because Mr. James could not have reasonably contemplated the district court’s action. During the arraignment, the court advised that Mr. James that his sentence would be determined at his sentencing hearing, and that in determining the sentence the court would consider “any departure or variance motion.” J.A. 43; *see* J.A. 72 (advising Mr. James that his lawyer’s opinion “whether the Court will grant or deny a departure or variance motion or what the guideline range is, is not binding on the

Court"). Here, the Government not only did not move for an upward departure, but rather moved for a downward departure based on Mr. James's substantial assistance. J.A. 105, 108, 180. Mr. James concedes that the district court could act on its own to consider whether to depart upward, where the Probation Office had stated in the presentence report that "[t]he court may wish to consider an upward departure pursuant to USSG § 4A1.3, Departures Based on Inadequacy of Criminal History Category." J.A. 177; *see* Fed. R. Crim. P. 32(h) (court must give reasonable notice of any contemplated departure from applicable sentencing range on ground not identified for departure in presentence report or in prehearing submission). But Mr. James's notice in the presentence report came long after he pleaded guilty. Where Mr. James could not have reasonably contemplated that the district court would act on its own and depart upward, the waiver provision in his plea agreement does not bar his challenge on appeal to the district court's action. *See United States v. Blick*, 408 F.3d at 172.

II. THE FOURTH CIRCUIT APPLIED AN OVERLY DEFERENTIAL STANDARD OF REVIEW IN AFFIRMING MR. JAMES'S REVOCATION SENTENCE NOTWITHSTANDING THE DISTRICT COURT'S FAILURE TO CONSIDER THE REQUIRED FACTORS IN 18 U.S.C. § 3553(a).

The Sentencing Reform Act of 1984 empowers a court to impose a term of supervised release following imprisonment. 18 U.S.C. § 3583(a), (b). Supervised release is "a form of postconfinement monitoring that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison." *Mont v. United States*, 139 S. Ct. 1826, 1833 (2019) (quotation omitted). Sanctions

imposed upon revocation of supervised release arise from and are “treat[ed] . . . as part of the penalty for the initial offense.” *Johnson v. United States*, 529 U.S. 694, 700 (2000). If the sentencing court finds that a defendant violated a condition of supervised release, the court may revoke 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 of conviction. 18 U.S.C. § 3583(e)(3). In considering whether to revoke supervised release, the sentencing court must consider “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).” *Id.* § 3583(e); *see Holguin-Hernandez v. United States*, 140 U.S. 762, 765 (2020).

Reviewing a challenge to a revocation sentence, this Court affirmed that the “substantive standard that Congress has prescribed for *trial* courts is the ‘parsimony principle’ enshrined in § 3553(a).” *Id.* at 766. “If the trial court follows proper procedures and gives adequate consideration to these and other listed factors, then the question for an appellate court is simply . . . 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.” *Id.* at 765 (quoting *Gall v. United States*, 552 U.S. 38, 56 (2007)); *see id.* at 766 (“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 v. United States*, 552 U.S. at 46) (alteration in *Holguin-*

*Hernandez*)).

In reviewing Mr. James's revocation sentence, the Fourth Circuit applied its "plainly unreasonable" standard. *United States v. James*, 2021 WL 5074468, at \*1. The court said it evaluates the same procedural and substantive considerations that guide the court's review of original sentences, but the court takes "a more deferential appellate posture" in reviewing revocation sentences. *Id.* The Fourth Circuit was thus able to affirm Mr. James's sentence even though the court acknowledged that the district court had not considered the applicable § 3553(a) factors when it determined the revocation sentence. *Id.* at \*2.

Nothing in this Court's jurisprudence suggests that the courts of appeals may apply a "more deferential appellate posture" when reviewing a revocation sentence. To the contrary, when the Court in *Holguin-Hernandez* considered a revocation sentence, it repeated the principles for reviewing original sentences from this Court's seminal decision in *Gall v. United States*. See *Holguin-Hernandez*, 140 S. Ct. at 765, 766.

In deciding whether to revoke supervised release, the sentencing court must consider the factors in § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). 18 U.S.C. § 3583(e). The district court did not discuss these § 3553(a) factors during the revocation sentencing. J.A. 122-27. Having departed upward to impose a sentence of 264 months' imprisonment on the new criminal convictions, the district court imposed a consecutive sentence of 24 months' imprisonment for

Mr. James's violation of supervised release terms. J.A. 126. The district court failed to explain why adding two years to Mr. James's sentence for the new criminal convictions would comply with the purposes of sentencing to reflect just punishment, 18 U.S.C. § 3553(a)(2)(A), afford adequate deterrence, *id.* § 3553(a)(2)(B), or protect the public, *id.* § 3553(a)(2)(C). Where Mr. James's behavior has been affected by substance abuse, J.A. 170, the district court ordered intensive substance abuse treatment, J.A. 126, but did not attempt to explain why a sentence of two additional years in prison was required to provide Mr. James with needed medical care, *see* 18 U.S.C. § 3553(a)(2)(D).

The Fourth Circuit excused the district court's failure to address the applicable § 3553(a) factors during the revocation sentencing by referring to the court's discussion during sentencing for the new criminal conduct. *United States v. James*, 2021 WL 5074468, at \*2. But as this Court has made clear, a revocation sentence "is part of the penalty for the initial offense," *Johnson v. United States*, 529 U.S. at 700, and the sentencing court is required to impose a revocation sentence "sufficient, but not greater than necessary, to comply with" the purposes of sentencing in § 3553, *see Holguin-Hernandez*, 140 S. Ct. at 765-66 (quoting 18 U.S.C. § 3553(a)). "[T]he consequences for violation of the conditions of supervised release under § 3583(e), which governs most revocations, are limited by the severity of the original crime of conviction, not the conduct that results in revocation." *United States v. Haymond*, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring).

The Fourth Circuit's overly deferential standard of review led to its affirmation of a revocation sentence that is inconsistent with § 3553(a) and this Court's precedents.

## **CONCLUSION**

For the foregoing reasons, Latwon James respectfully requests that the Court grant the certiorari petition, vacate the judgments of the United States Court of Appeals for the Fourth Circuit, and remand for further proceedings.

This the 3rd day of January, 2022.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Corrected Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

David A. Bragdon, Esq.  
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This the 3rd day of January, 2022.

/s/ Paul K. Sun, Jr.  
Paul K. Sun, Jr.