No. _____

IN THE

Supreme Court of the United States

AVIAN BRULE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) What is the appellate standard of review applicable to sentences imposed following revocation of supervised release?

(2) Is a district court's erroneous finding of a supervised release violation automatically harmless and immune from appellate review, so long as the district court could have revoked on some other discretionary ground?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Johnson et al.*, No. 12-cr-309, U.S. District Court for the Eastern District of Louisiana. Judgment entered September 9, 2020.
- *United States v. Brule*, No. 20-30571, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 8, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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PETITION FOR A WRIT OF CERTIORARI

This petition presents two issues of critical importance arising from the appellate standards governing supervised release revocation proceedings. One of those issues is the subject of a long-established and intractable circuit split and the other involves a clear misapplication of harmless error doctrine to revocation findings—one that effectively insulates revocation determinations and serious error from any appellate review. The approach taken by the Fifth Circuit in this case illustrates how thousands of criminal defendants facing revocation each year are subject to extreme deprivations of liberty without any meaningful appellate oversight.

This Court should grant certiorari.

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued an unpublished opinion on December 8, 2021, which appended hereto and available at 2021 WL 5832283.

JURISDICTION

The Fifth Circuit entered its judgment on December 8, 2021, and Mr. Brule did not file a motion for panel rehearing and for rehearing en banc. Thus, this petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3742(e) provides in relevant part:

> Upon review of the record, the court of appeals shall determine whether the sentence… was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3583(e) provides in relevant part:

> The court may . . . 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[.]

STATEMENT OF THE CASE

In 2014, Avian Brule pleaded guilty for his part in a drug and gun conspiracy and was sentenced to two, concurrent 50-month terms of imprisonment, followed by two, concurrent three-year terms of supervised release. Mr. Brule was released in 2016. One year later, the government filed a rule to revoke his supervised release, alleging that he violated the terms of his supervision by testing positive for marijuana and for possessing a small amount of cocaine. The district court revoked his supervised release, and sentenced him to a 10-month term of imprisonment, to be followed by two more, concurrent three-year terms of supervision.

In 2020, Mr. Brule's probation officer filed a petition for warrant or summons, alleging that Mr. Brule violated the terms of his supervision a second time. Although most of the alleged infractions were minor, technical violations—such as failing to report a new phone number and failing to submit certain monthly reports to his probation officer—some allegations were more serious. The government ultimately alleged eleven violations in its rule to revoke:

(1) testing positive for marijuana once over a year earlier;
(2) testing positive for methamphetamine;
(3) failing to report to substance abuse treatment on various occasions;
(4) failing to submit monthly reports on various occasions;
(5) failing to report a change of address;
(6) being charged by state law enforcement with possession of Xanax;
(7) failing to report that state arrest within 72 hours;
(8) being charged by state law enforcement with driving without a license and speeding;
(9) failing to report that arrest within 72 hours;
(10) being unemployed during his supervision; and
(11) being in the same car as a convicted felon.

Based on the petition and rule, the district court ordered Mr. Brule to appear to show cause why his supervised release should not be revoked.

At the revocation hearing, counsel stipulated to five relatively minor violations, namely: twice failing to report police interactions; committing certain traffic infractions; missing some substance abuse treatment sessions; and testing positive for marijuana 18 months earlier—a violation for which Mr. Brule already had been reprimanded. Mr. Brule adamantly contested the remaining six allegations, including the most serious allegation that he had used methamphetamine.

To support those contested allegations, the government called only one witness: Mr. Brule's probation officer, who began supervising Mr. Brule in January 2020—only five months before his arrest on the rule to revoke and long after many of the alleged violations occurred. She relied almost entirely on police reports describing events of which she had no firsthand knowledge and, at times, expressly denied knowledge of some of the allegations. The government also introduce a "drug test report" indicating presence of amphetamines, though the government did not call the report's author or any witness that could explain the report's contents. Thus, the defense objected to the report's admission and reliability.

For its part, the defense called three witnesses. Most notably, Mr. Brule's mother testified that he had a valid prescription for Vyvance. A toxicology expert then testified that Vyvance "absolutely" would produce the positive result for amphetamine on the drug test report and described in detail why the report was not a reliable indicator of methamphetamine use. In closing, the prosecution no longer

expressly argued that methamphetamine use as a basis for revocation, seemingly accepting the defense expert's explanation.

Nonetheless, the district court found Mr. Brule in violation of his supervisory conditions based on five of the six contested violations. In doing so, the Court relied on the bare allegations in the petition alone—finding violations for which there had been no evidence at the hearing—and relying on inadmissible hearsay evidence, such as the drug test report.[1] Indeed, many of the court's findings were wholly untethered from the record evidence. And the court appeared to ignore the government's implicit concessions about the most serious allegation, methamphetamine use—an allegation that the court repeatedly harped upon throughout the hearing. Based on these various findings and counsel's stipulations, the court exercised its discretion to revoke Mr. Brule's term of supervision.

At the conclusion of the district court's revocation findings, the government asked for a sentence within the range recommended by Sentencing Guidelines commentary: three to nine months. The district court rejected the government's request, instead tripling the upper bounds of that range and sentencing Mr. Brule to 28 months of imprisonment. That sentence consisted of two consecutive 14-month terms—over two years in total.

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[1] *See, e.g.*, *United States v. Perez*, 460 F. App'x 294, 302 (5th Cir. 2012) ("[T]he bare allegations contained in [a] petition [to revoke supervised release] . . . [do not] constitute evidence in any sense." (quoting *United States v. Standefer*, 77 F.3d 479 (5th Cir. 1996)); *United States v. Minnitt,* 617 F.3d 327, 333 (5th Cir. 2010) ("To deny confrontation, the district court must specifically find good cause and must make the reasons for its finding part of the record.").

Mr. Brule appealed, arguing that five (i.e., half) of the violations upon which the district court based its revocation decision and sentence were erroneous. Mr. Brule noted that those erroneous determinations—most significantly, the methamphetamine allegation—involved the most serious allegations against him. Indeed, Mr. Brule argued, if the district court had made the proper findings, it would have found only a handful of technical violations—such as failing to report police interactions and failing to attend certain classes—in addition to a stale marijuana test from eighteen months earlier for which he already received a punishment from his probation officer. Relatedly, Mr. Brule argued that his exceptionally harsh sentence—triple the advisory range in the Guidelines commentary—was unreasonable and based on the same incorrect factual findings that led to the errors in the revocation determination itself.

Mr. Brule acknowledged, however, that two strands of Fifth Circuit caselaw made his argument a near impossible one to make. First, the Fifth Circuit holds that, "[w]here there is an adequate basis for the district court's discretionary action of revoking probation, the reviewing court need not decide a claim of error as to other grounds that had been advanced as a cause for revocation." *United States v. Turner*, 741 F.2d 696, 698 (5th Cir. 1984). In other words, under Fifth Circuit caselaw, any errors leading to a revocation determination *automatically* are harmless—and therefore futile to raise—so long as there was *some* violation upon which the district court could base revocation. Mr. Brule acknowledged that this binding caselaw foreclosed any arguments with respect to the revocation determination itself and

preserved the issue for further review. Second, in contrast to the well-known *Booker*[2] "reasonableness" standard applicable to criminal sentences generally, the Fifth Circuit applies a much more deferential "plainly unreasonable" standard of review to revocation sentences. Mr. Brule noted that this sentencing-review issue is the subject of a long-entrenched circuit split and, while recognizing that the Fifth Circuit's rule controlled his case, preserved that issue for further review as well.

Applying both of those frameworks, the Fifth Circuit affirmed Mr. Brule's harsh sentence, agreeing that any arguments about the revocation itself were foreclosed by circuit precedent, *see* App'x A at 3 & n.3, and determining that the many errors upon which the district court's sentencing determination were based did not render that sentence "plainly unreasonable," App'x A at 4, 9.

REASONS FOR GRANTING THE PETITION

I. The courts of appeal are hopelessly divided over what standard of review applies to revocation sentences challenged on appeal.

First and foremost, this case presents a preserved challenge to a long-standing and unmoving circuit split that affects thousands of criminal defendants each year. As multiple courts—including the Fifth Circuit—have recognized, the circuits are divided over the proper standard of review applicable to revocation sentences. *See, e.g.*, *United States v. Cantrell*, 236 F. App'x 66, 68 (5th Cir. 2007). A majority of circuits hold that *Booker*'s reasonableness standard applies. *See United States v. Butler-Acevedo*, 656 F.3d 97, 99 (1st Cir. 2011); *United States v. Johnson*, 786 F.3d

[2] *United States v. Booker*, 543 U.S. 220 (2005).

241, 243 (2d Cir. 2015); *United States v. Carter*, 730 F.3d 187, 190 (3d Cir. 2013); *United States v. Deen*, 706 F.3d 760, 762-63 (6th Cir. 2013); *United States v. Growden*, 663 F.3d 982, 984 (8th Cir. 2011); *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010); *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005); *United States v. Sweeting*, 437 F.3d 1105, 1106-07 (11th Cir. 2006). By contrast, the Fifth Circuit—along with the Fourth and Seventh Circuits—hold that a lesser, "plainly unreasonable" standard applies instead. *See United States v. Miller,* 634 F.3d 841, 843 (5th Cir. 2011); *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015); *United States v. Boultinghouse*, 784 F.3d 1163, 1177 (7th Cir. 2015).

That conflict is rooted in confusion over how to apply the various standards of review outlined in Sentencing Reform Act (SRA) in the wake of *Booker*. The SRA—which created the notion of supervised release—does not formally establish sentencing guidelines governing the revocation of supervised release. *See, e.g.*, *United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004). Thus, rather than promulgating formal guidelines for revocation sentencing, the Sentencing Commission has instead published "a series of policy statements, including a Revocation Table of recommended sentencing ranges" that recommends ranges for revocation sentences based on the severity of the violation found and the defendant's criminal history. *Id.* (citing U.S.S.G. Ch. 7, Pt. A, §§ 3, 4). Because these ranges are contained within policy statements, they always have been considered merely advisory, unlike the Sentencing Guidelines applicable at initial sentencings, which were mandatory under the SRA pre-*Booker*.

Although these policy statements are non-binding, even pre-*Booker* courts directed that they be given "great weight" by the sentencing judge. *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995). And, despite the discretionary nature of revocation sentences both pre- and post-*Booker*, defendants always have had a statutory right to seek appellate review of revocation determinations, as well as the punishments imposed for supervised release violations. *See Salinas*, 365 F.3d at 589; 18 U.S.C. § 3742. Before *Booker*, the circuits appeared to agree that the appellate review standard for revocation sentences was governed by 18 U.S.C. § 3742(e)(4), which provides that, "[u]pon review of the record, the court of appeals shall determine whether the sentence . . . was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable." *See United States v. Bolds*, 511 F.3d 568, 574 (6th Cir. 2007) (discussing pre-*Booker* practice and the later circuit split). That general agreement, however, disappeared with this Court's decision in *Booker*.

In *Booker*, this Court held that the SRA violated the Sixth Amendment's right to jury trial by requiring judges to impose sentences within a mandatory Sentencing Guidelines range. 543 U.S. at 249-58. Rather than invalidating the entire Act, however, the Court simply eliminated the two provisions of the statute that made the Guidelines mandatory. *See id.* at 258-65. That included a portion of § 3742(e) that established the appellate framework applicable to sentencing challenges. In place of that framework, the Court announced in *Booker* that sentences should be reviewed

to determine whether they are "unreasonable" in light of the numerous sentencing factors listed in 18 U.S.C. § 3553(a). *Id.*

Circuit confusion quickly emerged as to whether the old "plainly unreasonable" standard still governed review of sentences imposed upon revocation of supervised release or whether those sentences should now be examined under *Booker*'s general reasonableness framework. That conflict is considered and deeply entrenched—decades old and showing no signs of abating. The problem is two-fold, as the Sixth Circuit has explained, with courts disagreeing over both: "(1) whether, by announcing a standard of "unreasonableness" review in *Booker*, the Supreme Court intended to displace the "plainly unreasonable" standard that the courts had used in reviewing supervised release revocation sentences; and (2) whether there is any practical difference between these two standards." *Bolds*, 511 F.3d at 574.

In the years since *Booker*, that split has remained intact, with no signs it will heal itself. Accordingly, uniformity can be achieved only through intervention of this Court. And this disagreement matters. In 2019, more than 110,932 individuals were on federal supervised release.[3] And, each year, federal courts oversee thousands of revocation proceedings. In 2019, approximately 13,000 defendants were incarcerated for parole, probation, or supervised release violations.[4] And, like Mr. Brule those offenders face real, potentially lengthy deprivation of liberty.

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[3] Danielle Kaeble, "Probation and Parole in the United States, 2020," at 17, U.S. Dep't of Justice, available https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf.

[4] *Id.* at 13.

Finally, this case presents the Court an ideal vehicle for resolving this intractable conflict. The issue is fully preserved and properly before this Court. Moreover, the district court proceedings were riddled with errors, with the lengthy sentencing in this case based on clearly invalid factual findings as a result. Thus, Mr. Brule likely would receive real relief were his sentence subject to meaningful appellate analysis through *Booker*'s less deferential standard of review.

II. The Fifth Circuit's refusal to review erroneous revocation determinations is obvious misapplication of the harmless error doctrine that this Court should correct.

This petition presents a second, independent issue for review, which this Court may choose to review instead of or in conjunction with the first question presented. By statute, revocation of supervised release upon a finding of any given violation generally is discretionary, rather than mandatory, with a few limited exceptions. *See* 18 U.S.C. § 3583(e), (g). In other words, in most revocation proceedings, a district court may find violations but nonetheless decline to revoke supervision. Despite that framework, under Fifth Circuit precedent, even if a district court erred in making one (or many) violations findings, a defendant is barred from seeking reversal of a district court's revocation determination so long as there was at least one proper ground for revocation. That is true regardless of whether the district court expressly relied on the erroneous findings in the revocation determination and bars consideration of the errors even if the court did not make clear that it would have revoked regardless. Indeed, the Fifth Circuit holds that, in all cases and circumstances, any "possible error in the consideration of other allegations is harmless and need not be addressed." *United States v. Brown*, 656 F.2d 1204, 1207 (5th Cir. 1981). That rule assumes,

without any review of record evidence, that because a district court *could* have revoked supervision absent the invalid violations findings, the district court necessarily *would* have done so, rending appellate review unnecessary.

Although invoking (in name only) the principle of "harmless error," this framework refuses to actually assess the impact of a given error based on the record as a whole, instead simply assuming that all revocation errors—no matter how grave—must not have mattered. Thus, in this case, because Mr. Brule stipulated to certain (largely technical) violations at the start of his revocation hearing, he was barred on appeal from challenging the district court's numerous other erroneous violations determinations. That, despite the fact that the district court repeatedly and expressly relied on its various erroneous findings.

The Fifth Circuit's approach constitutes a misapplication of the harmless error doctrine—effectively insulating even serious error from appellate review. In a case like this one, the district court may not have exercised its discretion to revoke absent the serious errors infecting the proceedings, necessitating meaningful harmless error analysis on appeal. Indeed, Mr. Brule stipulated to mostly minor, technical violations, while contesting the more serious violations—six in total. On appeal, he argued that half of the district court's violation findings were not supported by the evidence and rested on unconstitutional evidence. Therefore, the more appropriate course in a case like this would have been a remand to the district court with instruction to reconsider its revocation determination, taking into consideration only those violations with proper evidentiary support. At the very least, the Fifth Circuit should be required to

engage in *some* form of meaningful analysis to determine whether there was error and, if so, the impact of that error on the proceedings below.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Brule's petition for writ of certiorari as to one or both of the questions presented.

Respectfully submitted,

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MARCH 2022