No._____

IN THE SUPREME COURT OF THE UNITED STATES

JONITA DESIRREA BROWN, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

PHILIP J. LYNCH
Law Offices of Phil Lynch
17503 La Cantera Parkway
Suite 104-623
(210) 378-3114
LawOfficesofPhilLynch@satx.rr.com

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether appellate review of a sentence imposed after the revocation of a defendant's supervised-release term is for reasonableness, as *United States v. Booker,* 543 U.S. 220 (2005), *Kimbrough v. United States,* 552 U.S. 85 (2007), and *Holguin-Hernandez v. United States,* 140 S. Ct. 762 (2020) indicate or is it, as the Fifth Circuit held, merely to see if the sentence is plainly unreasonable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rule

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

Jonita Brown asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 30, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 30, 2022. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3742 of Title 18 of the U.S. Code provides in pertinent part, after the decision in *United States v. Booker,* 543 U.S. 220 (2005), that:

(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or

includes a more limiting condition of probation or supervised release under section 3563(b))6 or (b)(11) than the maximum established in the guideline range or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the minimum established in the guideline range or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

. . .

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

STATEMENT

Petitioner Jonita Brown pleaded guilty in 2007 to possessing more than 50 grams of cocaine base with the intent to distribute it. *See* 21 U.S.C. §§ 841(a) and (b)(1)(A) (2007).[1] The district court sentenced her to a 135-month term of imprisonment and a 10-year term of supervised release. The imprisonment term was later reduced to 120 months. Brown served her prison sentence and was released onto supervision in late 2015.

In May 2021, a probation officer petitioned for revocation of Brown's supervised-release term. The petition alleged that Brown had violated the conditions of her release forbidding her from committing another crime, forbidding her from using alcohol or other intoxicants, and forbidding her from excessive use of alcohol and having controlled substances other than prescription medicines. Counsel was appointed, and Brown waived a preliminary hearing on the petition. ROA.83-84.

At the final revocation hearing, the district assured itself that Brown understood the revocation allegations. It then reviewed the actions taken in the case since Brown had been on supervision, noting that in 2016 Brown had been placed on color compliance UA reporting after using marijuana, in 2017 she had been sent to

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

anger management classes after a fight with her brother, and in 2019, a home-search condition had been added to her conditions after she used marijuana.

Brown pleaded not true to the new-crime allegation in the 2021 petition, and true to the drug and alcohol allegations. The government opted to abandon the new-crime allegation. The prosecutor read a factual basis for the pleas of true that stated Brown had been drinking before she was involved in a speed-related auto accident with another car in 2021.

The district court determined that the allegations were Grade C violations and that the revocation sentence range under the policy statements in Chapter 7 of the U.S. Sentencing Guidelines was to 3 to 9 months' imprisonment. Defense counsel made clear that, while the range might be low, a 60-month sentence would be too far too high. Brown spoke on her own behalf, admitting that her substance abuse was "a problem I let get in my way every time."

The district court revoked Brown's supervised-release term and imposed a sentence of 60 months' imprisonment. Brown objected to the sentence, and she appealed it.

On appeal, she argued that, in the circumstances of her case, imposition of the maximum 60-month sentence violated the parsimony principle of 18 U.S.C. § 3553(a) and thus the sentence was unreasonable. The lengthy sentence did not offer any useful response to Brown's substance-abuse relapse, and it was far longer than was needed for any deterrent or protective goal. This was especially so because Brown had

not had her release revoked before. The Fifth Circuit reviewed the sentence under a plainly unreasonable standard and affirmed it. Appendix at 2-3 (citing *United States v. Miller,* 634 F.3d 841, 843 (5th Cir. 2011) and *United States v. Kippers,* 685 F.3d 491, 500-01 (5th Cir. 2012)).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW THAT APPLIES TO REVOCATION SENTENCES.

.

In *United States v. Booker,* the Court held that the mandatory sentencing guidelines scheme enacted by Congress violated the Sixth Amendment. *United States v. Booker,* 543 U.S. 220, 234-44 (2005). The Court remedied the constitutional infirmity by excising two portions of the statutes that implemented the mandatory guideline system. The two portions were 18 U.S.C. § 3553(b)(1), which required a district court to sentence within the guidelines-derived range and 18 U.S.C. § 3742(e), which set standards of review for all sentences appealed, including those for which no guidelines existed. *Booker*, 543 U.S. at 259. To fill the gap left by the excision of §3742(e), the Court held that, going forward, sentences would be reviewed for reasonableness. 543 U.S. at 260-63. The operation of this system of reasonableness appellate review and the criteria that guide it has been delineated, explained, and refined in several cases since *Booker. See, e.g., Gall v. United States,* 552 U.S. 38 (2007); *Kimbrough v. United States,* 552 U.S. 85 (2007); *Holguin-Hernandez v. United States,* 140 S. Ct. 762 (2020).

Despite the Court's elaboration of reasonableness review, a circuit split has existed since shortly after *Booker.* The courts of appeals are divided over what standard of review to apply to sentences imposed following the revocation of a defendant's supervised-release term. *Compare United States v. Fleming,* 397 F.3d 95, 99 (2d Cir. 2005) (review for reasonableness) with *United States v. Crudup,* 461 F.3d

433, 437 (4th Cir. 2006) (review for plain unreasonableness). This split means that, for two decades now, revocation sentences have been reviewed differently in different circuits. The difference is critical to those defendants in the plainly unreasonable circuits, for, in practice, it is all but impossible to show that any sentence within the statutory maximum is plainly unreasonable. See, e.g., *United States v. Nobles,* 195 Fed. Appx. 265 (5th Cir. 2006). The Court should decide which standard applies to the review of revocation sentences. It should also clarify whether there is a meaningful difference between reasonableness review and plainly unreasonable review, as a third position taken by some of the courts of appeals is that reasonableness review and review for plain unreasonableness are the same thing. *See, e.g., United States v. Sweeting,* 437 F.3d 1105, 1106-07 (11th Cir. 2006); *United States v. Cotton,* 399 F.3d 913, 916 (8th Cir. 2005).

The split that arose right after *Booker* stemmed primarily from the fact that revocation sentences were never dictated by mandatory guidelines. The Sentencing Commission did not promulgate guidelines pertaining to sentencing after revocation of supervised release. Instead, it published non-binding policy statements about revocation sentences and placed them in Chapter 7 of the *Guidelines Manual*. The policy statements contained sentencing ranges that were based on a revokee's criminal history and the nature of his revocation violation. The district courts were to consider these policy statements before imposing sentence upon revocation of supervised release. *See* U.S.S.G. Ch.7, Pt.A.; *see also United States v. Mathena*, 23 F.3d 87, 91–92 (5th Cir. 1994).

To the courts of appeals that concluded after *Booker* that reasonableness review did not apply to revocation sentences, this lack of applicable guidelines was crucial. They pointed out that the excised § 3742(e) had not set a detailed standard of review for non-guidelines sentences as it had for guideline sentences or for departure sentences. *Crudup,* 461 F.3d at 337-38; *Miller,* 634 F.3d at 842-43. They also believed it significant that, § 3742(a) that, in defining what sentences could be appealed, stated that non-guidelines sentences could be appealed when they were plainly unreasonable. *Crudup,* 461 F.3d at 337-38; *Miller,* 634 F.3d at 842-43; see also *United States v. Kizeart,* 505 F.3d 672. 674 (7th Cir. 2007).

The courts that held that reasonableness review did apply to revocation sentences thought that *Booker* had excised the standards of review for all sentences and had instructed that sentences were to be reviewed for reasonableness. *Fleming,* 397 F.3d at 99; *Cotton*, 399 F.3d at 916. To these courts, the excision of the only congressionally provided standards of review meant that one had to apply the standard *Booker* had set: "However, once the Court in its Remedy Opinion excised section 3742(e), which included subsection 3742(e)(4)'s standard of `plainly unreasonable` for review of a sentence for which there is no guideline, the Court is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable guidelines." *Fleming,* 397 F.3d at 99. The Ninth Circuit reached the same conclusion. *United States v. Miqbel,* 444

F.3d 1173, 1177 & n.5 (9th Cir. 2006); *see also United States v. Santa-Soler,* 985 F.3d 93 (1st 2021) (reasonableness review).

The split persists to this day, *compare United States v. Patlan,* 31 F.4th 552, 556 (7th Cir. 2022) *with United States v. Richardson,* 2021 WL 5492979 (4th Cir. 2021), even though the Court's opinions after *Booker* appear to require application of reasonableness review. When a district court imposes a sentence after revoking a term of supervised release, that sentence must accord with several factors set out in 18 U.S.C. § 3553(a) that are incorporated by 18 U.S.C. § 3583, the revocation statute. The most important of these factors, for revocation sentencing as for original sentencings, is the "overarching" command of § 3553(a)(1) that a district court "'impose a sentence sufficient, but not greater than necessary' to accomplish the goals'" listed in subsection 3553(a)(2). *Kimbrough v. United States,* 552 U.S. 85, 101 (2007)); *see also Dean v. United States,* 137 S. Ct. 1170, 1175 (2017) (reaffirming parsimony principle). *Holguin-Hernandez* teaches that, in applying the parsimony command in revocation contexts, the question is the same as under *Booker, Gall,* and *Kimbrough*: whether the sentence was greater than needed under the § 3553 parsimony clause. *Holguin-Hernandez,* 140 S. Ct. at 766 (in revocation sentencing case, Court observed that proper question on review is reasonableness of sentence). *Holguin-Hernandez* also reemphasized that the overarching principle through which reasonableness is evaluated is the parsimony principle. 140 S. Ct. at 765-66.

None of this Court's post-*Booker* cases have prompted the circuits on either side of the divide to reconsider the standard they apply to review of revocation sentences.

The Court's guidance on the issue is necessary to do so. The Court's guidance will also ensure that review of revocation sentences through the federal system is uniform. Brown's case presents a good vehicle for resolving the issue. The policy statements suggested a range of 3 to 9 months. The record may have supported a sentence somewhat above that range, as Brown had long struggled with sobriety, but a sentence more than six times the suggested range seems excessive when the record did not show Brown was a likely recidivist criminal. Under reasonableness review, a court might well conclude that the five-year sentence was greater than necessary. Under the plainly unreasonable standard, the reviewing court gives little weight to the parsimony principle and looks instead only to the statutory maximum. Thus, Brown's case demonstrates how the circuit split affects federal defendants in the different circuits. The Court should resolve the split and bring the courts of appeals into harmony on the review of revocation sentences.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: July 25, 2022.