No. _____

In The

# Supreme Court of the United States

## BRIAN KEITH PERSON, JR.,

*Petitioner,*

v.

## UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Circuit Erred By Applying a "Plainly Unreasonable" Standard of Review for Mr. Person's Supervised Release Violation Sentence instead of the Court's Reasonableness Standard.

II. Whether the Fourth Circuit Erred in Holding that the District Court's Procedural Error of Failing to Address or Acknowledge Mitigating Arguments Mr. Person's Counsel Raised During the Revocation Hearing was Harmless.

## LIST OF PARTIES

BRIAN KEITH PERSON, JR, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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## ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Brian Person, Case No. 21-4462, Docket Entry No. 41, entered on December 14, 2022. A copy of the unpublished per curiam opinion of the Fourth Circuit issued that date is attached.

## JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on December 14, 2022 on direct appeal of a sentence imposed against Petitioner Brian Person in the United States District Court for the Eastern District of North Carolina for a supervised release violation in E.D.N.C. No. 4:15-cr-00035-FL-1. Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

## CONSTITUTIONAL PROVISIONS INVOLVED

**"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.**

## STATEMENT OF THE CASE

### A. Procedural History.

On May 12, 2015, Mr. Person was indicted in a three-count Indictment. [J.A. at 13-18.][1] The Indictment charged three separate violations of 18 U.S.C. § 287 for

[1] Citations in this Petition for Certiorari are taken from the Joint Appendices filed in the Fourth Circuit Court of Appeals at 21-4462 and the related appeal, 21-4450. The citations without additional appeal number references are taken from 21-4462.

false claims against the United States, occurring on or about June 15, 2014, September 27, 2012, and September 3, 2012 respectively. [J.A. at 13-18.]

Mr. Person pled guilty to Count One of the Indictment and was sentenced on July 5, 2016, with a written judgment filed on the same day. [J.A. at 19-25.] He was given a self-reporting date of August 19, 2016. [J.A. at 8.]

Mr. Person began supervised release on April 17, 2017. [J.A. at 27.]

On October 19, 2018, the Probation Office of the Eastern District of North Carolina filed a Petition for revocation of supervised release. [J.A. at 10.]

On February 6, 2019, a federal grand jury convened in the Eastern District of North Carolina returned a two-count Indictment against Mr. Person in a new case, E.D.N.C. No. 4:19-cr-10-FL-1 (hereinafter "the 2019 case"). [21-4450 J.A. at 10-13]. The Indictment in the 2019 case charged in Count One that:

> From a date unknown to the Grand Jury, but no later than in or about August 2018, and continuing until on or about October 16, 2018, in the Eastern District of North Carolina, the defendant, BRIAN KEITH PERSON JR., did knowingly and intentionally combine, conspire, confederate, agree and have a tacit understanding with others, known and unknown to the Grand Jury, to distribute and possess with the intent to distribute twenty-eight (28) grams or more of cocaine base (crack) and a quantity of cocaine, Schedule II controlled substances, in violation of Title 21 United States Code, Section 841(a)(1).
>
> All in violation of Title 21, United States Code, Section 846.

[21-4450 J.A. at 10.] Count Two charged that:

> On or about October 16, 2018, in the Eastern District of North Carolina, the defendant, BRIAN KEITH PERSON JR., did knowingly and intentionally possess with the intent to distribute a quantity of cocaine base (crack) and cocaine, Schedule II controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

[21-4450 J.A. at 10-11.]

Also on February 6, 2019, the Government filed a Notice of Related Case in the 2019 case which gave notice of the Petition for Revocation of Supervised Release in this case. [J.A. at 26.] The revocation petition in this case was based upon the criminal conduct charged in the 2019 offense. [J.A. at 26-28.]

On July 11, 2019, Mr. Person pled guilty in the 2019 case pursuant to a written plea agreement. [21-4450 J.A. at 150-57.]

On January 2, 2020, Mr. Person's revocation counsel filed a sentencing memorandum asking the trial court to run the sentence in both this case and the 2019 case concurrently. [J.A. at 79-81.] That memorandum incorporated by reference a motion for downward variance filed in the 2019 case. [21-4450 J.A. at 133-44.]

On January 6, 2020, the Probation Office filed an Amended Motion for Revocation of Supervised Release as to Mr. Person. [J.A. at 27-28.]

On August 24, 2021, the trial court sentenced Mr. Person to 113 months imprisonment each on Counts 1 and 2 to be served concurrently. [21-4450 J.A. at 66.] The written Judgment in the 2019 case was filed on the same day. [21-4450 J.A. at 77-84.]

After the sentence was announced in the 2019 case, the trial court turned to the amended revocation petition in this case. The trial judge revoked Mr. Person's supervised release and sentenced Mr. Person to serve 24 months consecutive to the sentence imposed in the 2019 case. [J.A. at 49-56.] A written judgment on revocation was also filed on the same day. [J.A. at 57.]

On August 27, 2021, Mr. Person's revocation counsel filed a timely notice of appeal on his behalf. [J.A. at 58-59.] On December 14, 2022, the Fourth Circuit affirmed the trial court.

**B. Statement of the Facts.**

After his indictment and guilty plea in this case for making false claims against the United States in violation of 18 U.S.C. § 287, on July 5, 2016 Mr. Person was sentenced to eight months of imprisonment and four years of supervised release. [J.A. at 19-25.] Mr. Person was also ordered to surrender to the U.S. Marshals Service at Greenville, NC on August 19, 2016. [J.A. at 8.] Mr. Person's supervision started on April 17, 2017. [J.A. at 26.]

According to the Presentence Reports filed in both this case and the 2019 case, Mr. Person is intellectually disabled. The Presentence Report in this case notes that:

> 52. In May 2012, Person was committed to the psychiatric unit at Vidant Roanoke Cowan Hospital in Ahoske, North Carolina, after having auditory hallucinations and stating that he wanted to kill himself and his mother. Person was diagnosed with major depressive disorder with psychotic features, mood disorder, psychotic disorder, and borderline intellectual functioning. Upon his discharge, Person met with Integrated Family Services in Greenville as part of recommended aftercare. Person was again evaluated and diagnosed with severe major depression, Post-Traumatic Stress Disorder, and borderline intellectual functioning. At that time, Person was prescribed Haldol, Cogentin, Zoloft, and Trazadone. Person was seen for medication management and individual therapy through at least October 2012. Records also reflect a history of schizophrenia.
>
> 53. As already stated, Person underwent a competency evaluation in October 2015. The evaluator, Kristine Herfkens, PhD, summarized that Person functions in the mild intellectual disability range, with a full-scale intelligence quotient of 71, in the borderline range of intellectual functioning, and adaptive deficits in academic, personal, and occupational abilities. The defendant's verbal abilities were described as weaker than his nonverbal abilities, he was deemed completely illiterate, and the defendant's ability to comprehend and glean substantive information from

> orally presented material was considered equally impaired. Furthermore, Dr. Herfkens noted that Person was vulnerable to manipulation by trusted family and friends. Person's listening comprehension and memory retention was also deemed significantly impaired. With respect to his competency to proceed with court proceedings, Dr. Herfkens summarized that Person has a limited and largely incorrect understanding of the legal process; however, he was deemed able to understand the necessary information to stand trial and to assist in his own defense, noting that any new information must be given to Person in "small chunks with simply vocabulary," and then confirm that he has comprehended the information before moving forward with new information. As the competency evaluation has been filed with the court, the full content and results of the evaluation are otherwise incorporated herein by reference.
>
> 54. Person also reported that he was diagnosed with biopolar disorder during his adolescence. He advised that he has not seen a doctor or taken psychotropic medications in two years, asserting that he does not like taking medication. As previously mentioned, Dr. Herfkens[']  evaluation noted that Person believes his short-term memory has never fully recovered. As verified by the competency evaluation, Person began receiving disability income due to his psychiatric condition and intellectual disability in 2012.

[J.A. at 71-72.]

On January 2, 2020, Mr. Person's trial counsel filed a motion for downward variance based on Mr. Person's mental disabilities in the 2019 case. [21-4450 J.A. at 133-44.] In addition, on January 9, 2020 Mr. Person's revocation counsel filed a Sentencing Memorandum in this case which adopted and incorporated by reference the matters contained in the motion for downward variance. This document asked the Court to run the supervised release violation and the felony sentence in this case concurrently, based upon Mr. Person's guilty plea, his efforts to cooperate, and his limited mental functioning. [J.A. at 80.]

Previously, Mr. Person's trial counsel had asked for a 30 percent variance downward based primarily upon his mental and physical difficulties. [21-4450 J.A. at 133-43.] That motion documented Mr. Person's school record, his CAT Test scoring

in the bottom tenth percentile nationally in all of the texted subjects, including being in the bottom 1% for word analysis. [21-4450 J.A. at 135, 139-43.] Mr. Person's trial counsel reiterated the mental health diagnoses and his evaluation by Dr. Herkens. [21-4450 J.A. at 135-36.] He also noted that Mr. Person had suffered a head injury in 2011 and was shot in the right leg during a home invasion two years later. Further, Mr. Person was suffering from an ACL tear in his right knee and various other injuries recounted in the PSR. [21-4450 J.A. at 136.]

As stated above, the sentencing hearing and the supervised release revocation hearing were conducted in the same session on August 24, 2021. [J.A. at 29-56.]

In that hearing, the trial judge noted that Mr. Person's trial counsel had objections and a motion for downward departure, and asked him if he wished to be heard on the objections. [J.A. at 37.] Mr. Person's trial counsel stated he did not wish to be heard further, and the trial court stated that it would rely on the Probation Officer's response and overrule the objections. [J.A. at 37.]

The trial judge then asked Mr. Person's trial counsel whether he wanted to argue his motion for downward variance separately or together with addressing the sentencing factors under 18 U.S.C. § 3553(a). [J.A. at 37.] Trial counsel responded that he would argue both at one time, and was given permission to proceed. [J.A. at 37.] Trial counsel reiterated the arguments he made in his motion about Mr. Person's mental and physical impairments. [J.A. at 38-39.]

After his argument was concluded, the Government contended that a sentence of 113 months was sufficient but not greater than necessary to meet the Section 3553(a) factors in the 2019 case. [J.A. at 42-45.]

Mr. Person was given the opportunity to speak with the Court. He apologized for leaving his children and vowed to not be involved in drugs in the future. [J.A. at 45.]

The trial judge then announced a sentence of 113 months without explicitly addressing the motion for downward variance. She stated:

> THE COURT: All right. Thank you. Well, I've considered the advice of the guidelines specifically and generally and the factors under law that inform a sentence that's sufficient but not more than what it needs, and clearly there needs to be a lengthy term of incarceration, given your background and your history, your lack of respect for the law, the danger that you present. There's a need to discourage this type of conduct. Drug dealing is a gravely dangerous course of action, and it affects people, families, communities. And you've obviously been the source of a lot of harm. All things considered, I think a sentence of 113 months accomplishes the purposes of sentencing. That's a sentence of 113 months on each count to run concurrently. Your behavior is going to be supervised for four years on Count One and three years on Count Two again to run concurrently.

[J.A. at 46.] At no time during the sentencing of Mr. Person in the 2019 case did the trial court specifically address the argument made by the motion for downward variance. [J.A. at 29-49.]

Immediately after the sentence was imposed in the 2019 case, the trial judge turned to the supervised release revocation portion of the hearing. [J.A. at 49.] For the revocation hearing, Mr. Person was represented by a retained counsel, Mr. Keith Williams (hereinafter "Mr. Williams" or "revocation counsel"). [J.A. at 29.]

After Mr. Williams confirmed that Mr. Person was admitting the violation, the trial judge announced a calculation of imprisonment range based of 24 months based on a Grade A violation with a criminal history category IV. She then turned to the Government to state its position on sentencing. [J.A. at 49.]

The Government asked the trial judge to follow the probation officer's recommendation of 24 months in the related case. [J.A. at 49-50.] After the Government stated this position, the trial judge turned to hear from Mr. Person's revocation counsel.

Mr. Williams first corrected the record as to the length of supervision, noting that Mr. Person had been released in April 2017 and the violation report was filed in October 2018, which confirmed the probation officer's statement that he actually supervised Mr. Person for 18 months and not one month as the Government had stated. [J.A. at 51-52.] The Government then observed that there was a typo in the PSR in paragraph 16 which was the source of its earlier argument. [J.A. at 52.]

After this, Mr. Person's revocation counsel renewed his request for the two years to run concurrently with the 113 month sentence in this case, based upon Mr. Person's cooperation and the factors that had been previously discussed in the Sentencing Memorandum and in the previous part of the combined hearing. [J.A. at 53.]

When announcing the revocation sentence, the trial judge stated as follows:

> THE COURT: Well, Mr. Person, needless to say, we're all disappointed here. And I'm going to revoke your supervised release, and I'm going to sentence you to 24 months in prison, and it's going to run consecutive to the sentence that I just imposed a few minutes ago. And you're going to have to pay that $4,500 restitution balance. And I come to the conclusion that this is justified by virtue of the egregious breach of trust where you turned around and started dealing in drugs, and you were pretty organized about it and somewhat effective in your drug dealing for a certain period of time. And this is so dangerous and so counter to my expectations of your conduct. If I could sentence you to more, I would, but I'll cap it at 24 because I have to.

[J.A. at 53-54.] At no time during the revocation portion of the hearing did the trial judge specifically address Mr. Person's mental and physical health issues which were raised in favor of his arguments for a variance downward. Nor did she specifically comment on any of the argument revocation counsel had advanced in his request to run Mr. Person's sentence concurrent with his sentence in the 2019 case. [J.A. at 49-54.]

On appeal, the Fourth Circuit Court of Appeals concluded that Mr. Person's revocation sentence "is procedurally unreasonable because the district court did not address or acknowledge the mitigating arguments his counsel raised during the revocation hearing." Slip op. at 3 (citing its precedent of United States v. Slappy, 872 F.3d. 202, 206 (4th Cir. 2017). However, the Fourth Circuit agreed with the Government's contention that this error was harmless because the Government met its burden of demonstrating that the district court's explicit consideration of the defendant's arguments would not have affected the sentence imposed. Slip op. at 3-4 (citing United States v. Lewis, 958 F.3d 240, 245 (4th Cir. 2020).

## REASONS CERTIORARI SHOULD BE GRANTED

### I. The Court Should Grant Certiorari to Clarify that the Fourth Circuit's "Plainly Unreasonable" Standard of Review for Mr. Person's Sentence is Inconsistent with The Court's Recent Affirmation of a Reasonableness Standard for Supervised Release Violations.

According to the Fourth Circuit, a district court has broad, though not unlimited, discretion in fashioning a sentence upon revocation of a defendant's term of supervised release. United States v. Webb, 738 F.3d 638, 640 (4th Cir. 2013); United States v. Thompson, 595 F.3d 544, 547 (4th Cir. 2010). Accordingly,

when an appellate Court examines a revocation sentence, it takes a more deferential appellate posture concerning issues of fact and the exercise of discretion than in a reasonableness review of guidelines sentences. United States v. Moulden, 478 F.3d 652, 656 (4th Cir. 2007); United States v. Crudup, 461 F.3d 433, 439 (4th Cir. 2006)). "We will affirm a revocation sentence if it is within the statutory maximum and is not 'plainly unreasonable.'" Webb, 738 F.3d at 640 (quoting Crudup, 461 F.3d at 438). If a revocation sentence is plainly unreasonable, the Court will still affirm it if it finds that any errors are harmless. See Thompson, 595 F.3d at 548.

In Holguin-Hernandez v. United States, the Court, in referring to its previous precedents, stated in the context of an appeal of a supervised release violation sentence that "such a claim must show that the trial court's decision was not "reasonable." " Holguin-Hernandez v. United States, ___ U.S. ___, 140 S. Ct. 762, 766 (2020) (citing Gall v. United States, 552 U.S. 38, 55 (2007); Kimbrough v. United States, 552 U.S. 85, 90-91 (2007); Rita v. United States, 551 U.S. 338, 350 (2007); United States v. Booker, 543 U.S. 220, 261 (2005).

Thus, the precedent of the Fourth Circuit as well as other circuits adds an additional element or heightened requirement to appellate review of revocation sentences in excess of what has been adopted or recognized by the Court.

Specifically, the Fourth Circuit precedent instructs that to consider whether a revocation sentence is plainly unreasonable, it must first determine whether the sentence is procedurally or substantively unreasonable. Thompson, 595 F.3d at 546. In making this determination, the Court will "follow generally the procedural and substantive considerations that we employ in our review of original sentences, .

. . with some necessary modifications to take into account the unique nature of supervised release revocation sentences." Crudup, 461 F.3d at 438–39.

With respect to reasonableness in federal felony sentencings:

> The overarching standard of review for unreasonableness will not depend on whether we agree with the particular sentence selected, but whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law.

United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (internal citation omitted). Thus, a sentencing court "has flexibility in fashioning a sentence outside of the Guidelines range." United States v. Diosdado-Star, 630 F.3d 359, 364 (4th Cir. 2011) (citing Rita v. United States, 551 U.S. 338, 356 (2007)).

Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range." Gall v. United States, 552 U.S. 38, 41 (2007).

Similarly, a revocation sentence is considered to be procedurally reasonable if the district court adequately explains the chosen sentence after considering the Sentencing Guidelines' nonbinding Chapter Seven policy statements and the 18 U.S.C. § 3553(a) factors that are applicable. Thompson, 595 F.3d at 546–47. A revocation sentence is substantively reasonable if the court "sufficiently state[s] a proper basis for its conclusion that" the defendant should receive the sentence imposed. Crudup, 461 F.3d at 440.

Only if the Fourth Circuit finds a revocation sentence unreasonable does it consider "whether it is 'plainly' so, 'relying on the definition of "plain" [used] in our "plain" error analysis'—that is, 'clear' or 'obvious.'" Moulden, 478 F.3d at 657 (quoting Crudup, 461 F.3d at 439). "If a revocation sentence —even an unreasonable one—is not 'plainly unreasonable,' we will affirm it." United States v. Slappy, 872 F.3d 202, 208 (2017).

There does appear to be a circuit split on the question of whether or not the Court's reasonableness standard has superseded the plainly unreasonable standard that was previously in place in a number of circuits. See, e.g., United States v. Bolds, 511 F.3d 568, 574-75 (6th Cir. 2007) (describing different approaches to the question by the various circuit courts). Moreover, the Fourth Circuit's plainly unreasonable approach is clearly explained to be distinct from the Court's reasonableness standard in that it adds an extra element and requirement in the "plainly" stage.

Given the above, the Court should grant certiorari to clarify what the standard of review is for review of supervised release violation sentences.

## II. The Court Should Grant Certiorari in Order to Clarify the Use of Harmless Error Analysis in Reviewing Supervised Release Violation Sentences.

When imposing a supervised release revocation sentence, "the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S. Sentencing Guidelines Manual ch. 7, pt. A(3)(b).

18 U.S.C. § 3583(e) lists the specific applicable 18 U.S.C. § 3553(a) factors that should be taken into account in fashioning a sentence for a supervised release violation. These include (1) "the nature and circumstances of the offense and the history and characteristics of the defendant;" (2) "the need for the sentence imposed ... to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;" (3) the sentencing range established by the Guidelines; (4) the Sentencing Commission's pertinent policy statements; (5) "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct;" and (6) "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). Cf. 18 U.S.C. § 3583(e).

In the context of federal felony sentencing, "'[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence' than that set forth in the advisory Guidelines, a district judge should address the party's arguments and 'explain why he has rejected those arguments.'" United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009) (quoting Rita v. United States, 551 U.S. 338, 357 (2007)). If the court determines that a sentence outside the advisory range is appropriate, it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." Gall v. United States, 552 U.S. 38, 50 (2007).

The requirements that a district court meaningfully respond to the parties' nonfrivolous arguments and sufficiently explain the chosen sentence are intended "to allow for meaningful appellate review and to promote the perception of fair sentencing." Id. Although the trial court need not be as detailed or specific when imposing a revocation sentence as it must be when it imposes a post-conviction sentence, it still must provide a statement of reasons for the sentence imposed. Thompson, 595 F.3d at 547.

In this case, the trial judge implicitly denied without discussing requests by Mr. Person's trial and revocation counsel to vary downward based on Mr. Person's mental disability and physical health issues in the 2019 case and to run the two sentences concurrently.

In so doing, the trial judge did not address an extremely significant factor in Mr. Person's history and characteristic that both Mr. Person's trial counsel and revocation counsel had briefed and argued at significant length in the combined hearing. Thus, the trial judge did not meaningfully respond to the nonfrivolous arguments raised by Mr. Person's trial counsel and revocation counsel based upon his mental disabilities. When Mr. Person's revocation counsel requested that his sentence be run concurrently with the 2019 case sentence in light of this significant impairment and a number of other factors, the trial judge should have at least mentioned it in her discussion of the sentence.

This was procedural error and was found as such by the Fourth Circuit Court of Appeals. Nevertheless, the Fourth Circuit affirmed the sentence on the grounds

that this procedural error was "harmless" since the trial judge expressed an opinion that she would have given Mr. Person more time on the revocation if she had the authority to do so. Slip op. at 3-4. Thus, the Fourth Circuit reasoned, "the court's explicit consideration of Person's mitigating arguments would not have resulted in a lower sentence." Slip op. at 4.

Respectfully, this conclusion does not necessarily follow. An explicit consideration of the arguments raised by Mr. Person's trial counsel may have affected the trial court's calculus. Because they were not mentioned, however, it is unclear what consideration was actually given to the mitigation arguments, if any, by the trial court. It is also unclear on appeal what weight the trial court would have given them or did give them. This is a procedural error that cannot be deemed harmless as a matter of law because of a comment by the trial judge that did not actually address the arguments substantively. A district court is required to provide "an individualized assessment" based on the facts before the court, and to explain adequately the sentence imposed "to allow for meaningful appellate review and to promote the perception of fair sentencing." Gall, 552 U.S. at 50, 128 S. Ct. 586. The trial judge in this case did not do this, but instead identified one factor, the breach of trust involved in reentering the drug trade while on supervised release, without discussing any other factors or the non-frivolous arguments of Mr. Person's trial counsel.

The Court should grant certiorari in this case in order to address the boundaries of the harmless error analyses in sentencing and hold that the error in Mr. Person's case was not harmless.

## CONCLUSION

For the above stated reasons, Petitioner Brian Person hereby requests that the Court grant a writ of Certiorari in this case, reverse the courts below, order a resentencing on his Supervised Release Violation, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 14th day of March, 2022.

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