No. _____

In the Supreme Court of the United States

JAMES B. NORRIS, JR.
PETITIONER

V.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner pleaded guilty, after waiving pretrial motions, to one count of possession of child pornography in 2009. In July 2021, the probation office sought revocation of Petitioner's supervised release. On August 24, 2021, Petitioner appeared in court on the revocation petition, waived an evidentiary hearing on the allegations within that revocation petition, and, through his then-attorney, indicated a willingness to admit to having "violated the condition of being on the – accessing the internet without permission." Transcript of Supervised Release Revocation Hearing, Appendix p. A42. Specifically, Petitioner admitted to "accessing the internet on a daily basis through various means," Appendix p. A43; and to accessing "dating websites, ... of an adult nature" ... which "could be viewed" as pornographic. Appendix p. A44. At no time during the hearing did the court inquire of Petitioner whether he had reviewed the probation office's Petition for Revocation; any of its violation reports; or its Supervised Release Revocation Sentencing Computation (DCR Doc. #61), Appendix p. A24. The district court did not inquire of Petitioner whether he disagreed with factual allegation in any of those documents. Nevertheless, the district court found that Petitioner had violated conditions of his supervised release, revoked that sentence, imposed a new, three-month sentence of imprisonment, and a twenty-year sentence of supervised release with the same conditions originally imposed at sentencing on February 18, 2009. Appendix at pp. A26-40.

On September 1, 2021, Petitioner filed a pro se motion to terminate his supervision or to modify the conditions of his supervised release. The government filed no written response to that motion. The probation office created a Supervision Summary (DCR Doc. #72), Appendix pp. A22-23, apparently in response to the pro se motion, and shared that document with the district court. The document contained factual allegations, including the assertion that Petitioner had revealed to the probation office his "belief" that he was not bound by the court-imposed conditions; a statement of the government's opposition to the pro se motion; and a recommendation that the district court deny the pro se motion because Petitioner had been found to have violated conditions of supervision put in place for community safety. On October 28, 2021, the district court adopted the recommended disposition, denying the pro se motion. Doc. 72 was not initially given any docket attribution; there was simply a gap in the docket between documents 71 and 73.

Some two weeks later, Petitioner's probation officer telephoned him to inform him that the district court had denied his motion for early termination or modification of conditions. The undersigned entered her appearance on Petitioner's behalf, and moved to unseal and release Doc. #72 for purposes of appeal, and also to be granted an extension of time in which to file Petitioner's notice of appeal. Those

requests were granted. Counsel filed a timely notice of appeal, and ultimately filed briefs and requested argument.

The Eighth Circuit affirmed the district court's judgment, indicating that its holding – that a denial of a motion for early termination and/or modification of conditions of supervision pursuant to 18 U.S.C. Sec. 3583(e) required no explanation – was contrary to the six other circuit courts which have addressed the issue, and noting that it was consistently cited as the "outlier." Nevertheless, being bound by Eighth Circuit precedent, it affirmed.

The following question is presentend:

Whether the Eighth Circuit erred – contrary to the holdings of the Second, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuit Courts of Appeals, which hold that a district court record must provide sufficient explanation of its decision to permit meaningful appellate review and maintain public confidence in sentencing – in holding that the district court did not abuse its discretion in summarily denying, without a hearing and with no explanation or discussion, Petitioner Norris's pro se motion to terminate and/or to modify the conditions of his supervised release.

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James B. Norris, Jr. petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

II. OPINIONS BELOW

The Eighth Circuit's opinion is reported at United States v. James B. Norris, Jr., ___ F.4th ___, slip op. No. 21-3849 (8th Cir. Mar. 13, 2023), and attached as Appendix pp. A01-21. The district court's summary order denying Petitioner's motion to terminate or to modify the conditions of his supervised release is unreported, and attached as Appendix pp. A22-23.

III. JURISDICTION

The Eighth Circuit entered judgment on March 13, 2023. See Appendix p. A02. This petition is timely filed pursuant to Supreme Court Rule 13.2. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). Norris's petition for writ of certiorari is due on June 12, 2023.

IV. STATUTORY AND APPELLATE RULE PROVISIONS INVOLVED

18 U.S.C. Sec. 3553(a)

This statute provides, in pertinent part:

(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 iposed, 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 an 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.[1]

(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. Sec. 3583

This statute provides, in pertinent part:

(e) MODIFICATION OF CONDITIONS OR REOVCATION.–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 tot he provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and provisions applicable to the initial setting of the terms and conditions of post-release supervision.

Fed. R. App. P. 28(j)

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed–or after oral argument but before decision–a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citation. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

V. STATEMENT OF THE CASE

This case involves a district court's obligation to provide reasons for its denial of a motion to terminate and/or to modify the conditions of supervised release, pursuant to 18 U.S.C. Secs. 3553(a) and 3583(e), in order to provide a meaningful basis for appellate review and ensure public confidence in sentencing. The text of each of these provisions appears hereinabove.

A. Introduction

This petition arises from an effort by a pro se defendant to obtain early termination and/or modification of the conditions of his supervised release.

B. Prior Proceedngs leading up to Petitioner's pro se Motion to Terminate and/or to Modify the Conditions of his Supervised Release.

In November 2008, after waiving pretrial motions, Petitioner Norris pleaded guilty to a one-count indictment charging him with possession of child pornography, in violation of 18 U.S.C. Sec. 2252A(a)(5)(B). DCR Doc[1]. #27. On February 18, 2009, the district court sentenced Petitioner to thirty-seven months in the Bureau of Prisons, to be followed by lifetime supervised release. Appendix pp. A26-32.

After Petitioner had served just over ten years on supervision, on July 24, 2021 the U.S. Marshal's Service arrested Petitioner on a Petition for Supervised Release Violation. A final revocation hearing was scheduled for August 24, 2021, at

[1]"DCR Doc." refers to district court record document.

which Norris appeared with counsel[2] and waived hearing. At that hearing, the district court asked Petitioner's attorney whether the matter were contested. Appendix p. A42. Petitioner's attorney replied: "It is not, Your Honor. Mr. Norris is willing to admit that he violated the condition of being on the – accessing the internet without permission.." Id. Without identifying from what document it was reading, the district court then questioned Petitioner Norris about whether he was admitting to additional allegations that he "either possessed internet-capable devices without permission, and that the probation office seized a laptop, a smart phone, and that the forensic examination revealed that you had accessed numerous pornographic websites." Appendix p. A44.

At no point during the hearing did anyone refer to or inquire as to whether or not Petitioner Norris had reviewed the probation office's Petition for Revocation, any of its violation reports, or the Supervised Release Revocation Sentencing Computation, DCR Doc. #61 (Appendix pp. A24-25). At no point during the hearing did anyone confront Petitioner Norris about sharing with his probation officer "his belief that he did not have to abide by the Court ordered special conditions." DCR Doc. 72, p. 1 (Appendix p. A22). In fact, Norris indicated to the district court that he "intended to fully comply to the best of my ability, sir." Appendix p. A47.

Although the government initially sought a four-month period of

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[2]Assistant Federal Public Defender Eric Selig represented Petitioner Norris at the August 24, 2021 revocation hearing. The undersigned did not represent Petitioner Norris at that hearing and was not present.

incarceration, it ultimately declined to object to Petitioner's request for a three-month term, "after hearing about his job and everything" id., referring to Petitioner's counsel's informing the court that Norris's employer was able to hold his job for three months and had agreed to do so because "[t]hey consider him an exemplary employee." Appendix p. A45. Sentencing counsel also informed the court that Petitioner Norris served as guardian for his brother, John, who suffers from serious mental health issues and lives with Norris, who cares for him. Id.

The district court found that Petitioner had violated the conditions of his supervised release, revoked his supervision, and sentenced him to three months imprisonment to be followed by twenty years of supervised release. Appendix pp. A33, A35, A47-48. Petitioner did not appeal the district court's revocation sentence.

C. Proceeding on Petitioner's pro se Motion to Terminate and/or Modify Conditions of Supervised Release.

Petitioner Norris served his three-month term in a local county jail and was released to the community on October 13, 2021. Appendix p. A22 (noting that the date supervision commenced was October 13, 2021). While "in custody on the revocation," Petitioner Norris filed a pro se motion "for an early termination from supervised release." Appendix p. A22. The probation office noted that, "[p]ursuant to 18 U.S.C. Sec. 3564(c) and 3583(e)(1), Courts are permitted to terminate supervised release or probation in felony cases after one year, if such action is warranted." Id.. In the very next paragraph, the probation officer notes that Norris was on supervised release for approximately ten years and three months when he

committed the violations that led to his revocation." Id. The probation office indicates that during the service of his supervised release, "Norris' noncompliance included possessing internet capable devices without permission, accessing the internet without permission, viewing obscene material, and his belief that he did not have to abide by the Court ordered special conditions." Id. (emphasis added).

In that same Supervision Summary, the probation officer noted that they had contacted the assistant U.S. Attorney handling Petitioner's case and that that AUSA "would be opposed to an early termination of supervision or modification of conditions at this time." Id.

The Supervision Summary ended with the following recommended disposition: "The U.S. Probation Office respectfully recommends that the motion for early termination and modification of conditions be denied due to the fact Norris was recently revoked for violating conditions of his supervision that were put in place to protect the community." Appendix p. A23. The district court checked the box, "I agree with the recommendation of the Probation Officer," and signed off on that disposition on October 28, 2021. Id.

Nowhere does the probation office assert that Petitioner Norris was ineligible for early termination of supervised release. In relating the government's position on Petitioner's motion, the probation office does not indicate that the government's position was that Petitioner was ineligible for early termination of supervised release. In its recommendation for the district court's disposition of Petitioner's motion, the probation office does not indicate, as a reason for that recommendation,

a belief that Petitioner was not eligible for early termination of his supervised release. Appendix pp. A22-23.

Some two weeks passed before Petitioner's probation officer telephonically informed him that the district court had denied his pro se motion. At that point, Petitioner retained the undersigned, and she entered her appearance on his behalf, moved to have DCR Doc. #72 unsealed, and to be granted an extension of time within which to file a notice of appeal. The district court granted both motions, unsealed Doc. #72, and released it to Petitioner Norris for the first time.

As is often true in cases like Petitioner Norris's, the extreme length of his supervised release sentence has been frustrating[3]. As is also typical in cases like Petitioner's, he has been frustrated by the special condition that he be denied internet access without prior approval by the probation office. That office's continuing refusal to grant him permission to use any device to access the internet had been especially during the pandemic lockdown when so many communications, meetings, and appointments (including, in many instances, medical appointments) were conducted remotely. He expressed these frustrations at his supervised release revocation hearing. Appendix pp. A46-47. In response, the district court suggested he "abide by all the conditions to the T, to the letter, and then apply to have a

[3]Petitioner's sentence of supervised release was initially a lifetime sentence, see Appendix p. A28. Although the district court reduced that lifetime sentence to a term of twenty years as part of its revocation sentence, see Appendix p. A36, Petitioner was born in 1971, Appendix A33. Twenty more years may be a lifetime, for him.

reduction in your supervision." Appendix p. A46.

All of this led Petitioner to file his pro se motion to terminate and/or to modify the conditions of his supervised release. That pro se motion was very brief, and did not include a request for appointment of counsel or for a hearing. The district court signed off on the probation office's recommended disposition, denying Petitioner's motion without factual findings, a hearing, or any explanation other than the probation office's Supervision Summary.

Petitioner, having been granted additional time within which to file his notice of appeal, timely appealed the district court's summary denial of this pro se motion to terminate and/or to modify the conditions of his supervised release.

D. Proceedings on Appeal from the District Court's Summary Denial of Petitioner's Motion to Terminate and/or Modify the Conditions of his Supervised Release.

At the heart of Petitioner's appeal was the district court's failure to create a sufficient record explaining its denial of his motion to terminate and/or to modify the conditions of his supervised release. The Eighth Circuit affirmed the district court's ruling. To do so, however, given the fact that the district court did not explain itself, provide an opportunity for Petitioner to challenge the probation office's facts, or otherwise develop a record capable of meaningful appellate review, the court of appeals engaged in speculative and unsupported reasoning. On the one hand, it stated that Petitioner was not eligible for early termination[4] – "[s]upervised

[4]Nowhere was this issue raised until the government filed a letter, purportedly pursuant to Fed.R.App.P. 28(j), two days before argument, asserting that the language of 18 U.S.C. Sec.

release can only be terminated after the expiration of one year. 18 U.S.C. Sec. 3583(e)(1)." United States v. Norris, ___ F.4th ___ (8th Cir. Mar. 13, 2023), at 11. Appendix p. A12. On the other hand, it strained to find that the "new" fact in the probation office's Supervision Summary, DCR Doc. #72 (Petitioner's alleged belief that he was not bound by the court-ordered conditions), was actually a reference to DCR Doc. #61, the "Supervised Release Revocation Sentencing Computation," Appendix pp. A24-25, which was filed with the district court just before the revocation hearing and in which the probation officer had indicated that, in a discussion of Petitioner's lack of permission to access the internet, Petitioner had become angry and indicated that "the internet is a human right and is not something that the U.S. Probation Office can legally restrict." Appendix A11. "While not artfully crafted, the Supervision Summary's [DCR Doc. #72] statement–when read in context–references Document 61 and Norris's statement that "the U.S. Probation Office can[not] legally restrict" his access to the internet." Id.

Finally, the Eighth Circuit, relying upon its earlier opinion in United States v. Mosby, 719 F.3d 925 (8th Cir. 2013), held that the district court was not "required 'to explain its denial of early termination of supervised release.'" (citing Mosby, 719

3583(e) required the service of an *additional* one year on supervision subsequent to a revocation sentence. *See* Appendix p. A51. The undersigned filed a written response to the government's letter. *See* Appendix A53. At argument on September 23, 2021, *see* ROA recording of oral argument at ROA docket ID 5201282, the panel made no reference to these two written submissions.

F.3d at 930-31). Appendix p. A 15. Interestingly, the Eighth Circuit dropped a footnote following its pull-quote from Mosby, in which it notes: "The majority of other circuits have held to the contrary." Appendix A15 n.4. It then lists the six other circuits which have addressed the need for an explanation in district court denials of a motion for early termination of supervised release. In the Eighth Circuit's words, those other circuits' opinions are as follows:

> United States v. Johnson, 877 F.3d 993, 998 (11th Cir. 2017) ("We accordingly conclude that for a Sec. 3583(e)(1) motion to be properly denied, the court's order, in light of the record, must indicate that the court considered the factors enumerated in the provision. We join a number of our sister circuits in so holding."); United States v. Mathis-Gardner, 783 F.3d 1286, 1287 (D.C. Cir. 2015) (holding district court must consider specified statutory sentencing factors before denying motion for early termination of supervised release); United States v. Emmett, 749 F.3d 817, 820 (9th Cir. 2014) ("A district court's duty to explain its sentencing decisions must also extend to requests for early termination of supervised release."); United States v. Lowe, 632 F.3d 996, 998 (7th Cir. 2011) ("[W]e have held that although a court need not make explicit findings as to each of the factors, the record must reveal that the court gave consideration to the Sec. 3553(a) factors...."); United States v. Gammarano, 321 F.3d 311, 315-16 (2d Cir. 2003) (requiring a statement that the court has considered the statutory factors but not findings of fact); United States v. Pregent, 190 F.3d 279, 283 (4th Cir. 1999) ("[B]ecause the district court followed the statutory mandate to consider both Pregent's conduct and the interest of justice and concluded that Pregent's behavior did not warrant an early termination of supervised release, the district court did not abuse its discretion [in denying the defendant's motion under Sec. 3583(e)].").

Id.

The court of appeals then notes "The Eighth Circuit is routinely cited as the outlier." Id., citing Johnson case, at 877 F.3d at 998 n.10. While it is true that the Johnson footnote's collection of cases dealing with a district court's obligation to

explain its denial of motions to terminate and/or modify supervised release conditions includes a "but see" reference to the Eighth Circuit's Mosby opinion, the Johnson court does not use the faintly perjorative term, "outlier."

Petitioner timely files this Petition for Writ of Certiorari in order to obtain this Court's guidance and resolution of the existing circuit split.

VI. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve a conflict among the circuits regarding the need for a district court to provide explanations for a denial of a motion for early termination or modification of the conditions of supervised release. The Eighth Circuit is, as it has explicitly noted, an outlier on this issue. Every other circuit court to have considered the matter has ruled contrarily to the way the eighth circuit has, and did in this case. The court below, however, held itself to be bound by circuit precedent. Accordingly, this Court's guidance is needed on this important topic, as it is a topic which will certainly arise multiple times in the future in cases, like Petitioner's, where lifetime sentences of supervised release are very common, as are the special condition of supervised release banning internet access absent the probation office's permission.

The Eighth Circuit has held, and reiterated in Petitioner's case below, that a district court's summary denial of a motion for early termination of supervised release, without comment on its reasons, is not an abuse of discretion. Appendix p. A15, quoting United States v. Mosby, 719 F.3d 925 (8th Cir. 2013). This is the Eighth Circuit precedent to which the court below found itself bound.

In Mosby, the Eighth Circuit held that a district court did not abuse its discretion in summarily denying a motion to terminate and/or to modify the conditions of supervised release.

> [the district court] had presided over [the defendant's] trial and was well acquainted with his extensive criminal record, which includes convictions for violent offenses such as first degree attempted murder and first degree sexual assault. The district court was aware of the time that [the defendant] had been detained related to his [18 U.S.C.] Sec. 4248 proceeding, his subsequent positive transition to life outside of custody, and his status as a sex offender subjecting him to state monitoring. Neither 18 U.S.C. Sec. 3583(e) nor relevant case law required the district court to explain its denial of early termination of supervised release. We see no abuse of discretion in its summary denial of [the defendant's] motion.

Appendix p. A15 (emphasis in original), quoting United States v. Mosby, 719 F.3d 925, 931 (8th Cir. 2013).

In fact, both the statute at issue and relevant case law from other circuits hold to the contrary.

The statute clearly provides a framework for the district court's decision-making. It indicates that "[t]he 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)" terminate a term 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;

18 U.S.C. Sec. 3583(e)(1). With respect to a potential modification of the conditions of supervised release, the statute provides that the court may perform such

modification

> 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.

18 U.S.C. Sec. 3583(e)(2). The statute even contains a separate, detailed section on "factors to be considered in including a term of supervised release," which instructs sentencing courts on what to consider when deciding "whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release...." 18 U.S.C. Sec. 3583(c).

As early as 1999, the Fourth Circuit approved a district court's denial of a motion for early termination of supervised release based upon the appellate court's ability to know what the district court's decision-making process was, in United States v. Pregent, 190 F.3d 279 (4th Cir. 1999).

> In this case, the district court considered Pregent's argument that his sentence had been miscalculated, but it nevertheless concluded that Pregent's conduct did not warrant the termination of his supervised release time. Specifically, the district court "note[d] that defendant has an extensive criminal background extending back to at least 1974, a history of drug abuse and a pattern of escape and flight from the law." Pregent does not dispute that the district court's obserbvations regarding his criminal history were correct. Thus, because the district court followed the statutory mandate to consider both Pregent's conduct and the interest of justice and concluded that Pregent's behavior did not warrant an early termination of supervised release, the district court did not abuse its discretion under the plain terms of 18 U.S.C. Sec. 3583(e).

Pregent, 190 F.3d at 283.

In United States v. Gammarano, 321 F.3d 311 (2d Cir. 2003), the Second Circuit considered a motion for early termination of supervised release, pursuant to 18 U.S.C. Sec. 3583(e). After a hearing, at which both sides presented argument, the district court issued a "brief Memorandum and Order" denying Gammarano's motion. He appealed, maintaining, among other issues, that "the District Court abused its discretion because it did not explicitly state that it had considered the factors" set forth in the statutes. 321 F.3d at 316. The Second Circuit noted, that it had earlier held that district courts "must consider the factors listed" in the statute when "deciding whether to modify or terminate a term of supervised release." Id. It conceded that

> [w]e do not, however, require district courts to make specific findings of fact with respect to each of these factors. Instead, we have held that "a statement that [the district court] has considered the statutory factors is sufficient."

Id. (citations omitted). Gammarano argued that the district court's written order did not mention any of the statutorily-required factors. But, the Second Circuit explained

> the District Court's Memorandum and Order of June 28, 2002, which ordered oral argument on this issue, expressly acknowledged the need for the Court to consider these factors before ruling on the matter and, indeed, ordered the hearing for this very purpose. Moreover, it is clear from a review of the transcript of the July 17, 2002 hearing that the District Court properly considered the factors relevant to this case before denying Gammarano's motion to terminate his supervision.
>
> * * * * * *
>
> As the government noted during the July 17, 2002 hearing, Gammarano is a member of the Gambino Crime Family who has been

> convicted of serious crimes and who violated the conditions of his supervision immediately upon his prior release from custody. Accordingly, the District Court did not abuse its discretion in declining to terminate Gammarano's supervision.

Id. In Petitioner's case, no hearing was ordered, no opportunity to be heard was provided to Petitioner (although it was given to the government), and it merely signed off on the probation office's recommended disposition. Such treatment of a motion for early termination or modification of conditions of supervised release does not permit meaningful appellate review and, especially given its secret nature, does not promote public confidence in sentencing.

In United States v. Lowe, 632 F.3d 996 (7th Cir. 2011), the Seventh Circuit remanded "for further proceedings consistent with this opinion." 632 F.3d at 999. As a general rule, the Lowe court noted that

> we believe that the district court must give some indication that it has considered the statutory factors in reviewing a motion for early termination of supervised release. Here, no hearing was held, and the court denied the motion without mention of the Sec. 3553(a) factors. Stating simply that the court has 'reviewed the motion,' as the district court did in this case, is not equivalent to considering the statutory factors. Something more is needed, and we find the district court abused its discretion in failing to consider the statutory factors.

632 F.3d at 998. More specifically, however, and as pertains in Petitioner Norris's case, as well, Lowe

> maintains that the district court's policy of refusing to grant a motion for early termination of supervised release unless a defendant has twelve months or less remaining on his term of supervised release is arbitrary and an abuse of discretion. At oral argument, the appellant informed the court that the district court judge has a general policy of refusing to consider motions for early termination of supervised release until the final twelve months of the defendant's probation [sic]. We

> find that this unexplained, clearly arbitrary policy certainly circumvents the intent and purposes of 18 U.S.C. Sec. 3583(e)(1). Section 3583(e)(1) clearly provides an individual with the opportunity to submit a motion for early termination of supervised release "any time after the expiration of one year of supervised release." Though Sec. 3583(e)(1) gives the court discretion in granting a motion for early termination of supervised release, the district court's failure to even consider such motions until twelve months before the probation's end-date completely disregards the statute it must follow.

Id. In Petitioner's case, the district court's cursory handling of his motion to terminate or to modify the conditions of his supervised release amounts to the same "complete disregard" of the statute it must follow as did the district court in Lowe. This Court must provide guidance for the district courts as to what is and is not appropriate procedure when dealing with motions for early termination or for modification of conditions, especially in cases like Petitioner's which frequently carry lifetime, or, at least, quite lengthy periods of supervision, as well as special conditions banning internet access without prior permission from the probation office.

Since the Eighth Circuit's Mosby opinion, three more opinions have been written consistent with the holdings in Pregent, Gammarano, and Lowe. In 2014, the Ninth Circuit, in United States v. Emmett, 749 F.3d 817 (9th Cir. 2014), held that "[a] district court's duty to explain its sentencing decisions must also extend to requests for early termination of supervised release" in order to allow for meaningful appellate review and also to preserve public trust in sentencing decisions. 749 F.3d at 820-21.

Specifically, Dennis Emmett filed a motion to terminate his supervised

release, pursuant to 18 U.S.C. Sec. 3583(e) two years after he was released from federal custody. He "argued that continuing his term of probation [sic] was a waste of resources because his offense was non-violent; he never violated his terms of supervised release; and the probation office was not providing him with training, medical care, or other correctional treatment." 749 F.3d at 818. Five days after the motion was filed, and without holding a hearing or receiving a response from the government or the probation office, the district court denied Emmett's motion, stating, simply, that "Defendant has not provided any reason demonstrating that continuing supervised release imposes any undue hardship on defendant." 749 F.3d at 819. The Emmett court wondered if the district court improperly employed a "blanket rule" requiring proof of undue hardship, but ultimately considered "whether the district court had a duty to explain its reasons for rejecting Emmett's request for early termination of supervised release, and, if so, whether it provided a sufficient explanation." 749 F.3d at 820.

> It is a general principle of federal sentencing law that district courts have a duty to explain their sentencing decisions. This duty exists for two distinct prudential reasons. First, explanations allow circuit courts to conduct meaningful appellate review of sentencing decisions. Gall v. United States, 552 U.S. 38, 50 (2007). Second, explanations "promote the perception of fair sentencing," id., creating trust in sentencing decisions by reassuring the public of the judiciary's commitment to reasoned decisionmaking, Rita v. United States, 551 U.S. 338, 358 (2007). The duty to offer a reasoned explanation applies to the initial sentence imposed by the district court, and also extends to rulings on requests for a sentencing reduction.
>
> A district court's duty to explain its sentencing decisions must also extend to requests for early termination of supervised release. First, the relevant statutory text is best interpreted to create a duty to

> explain. Section 3583(e) requires a district court to "consider[]" particular Sec. 3553(a) sentencing factors, and explaining whether these factors weigh in favor of early termination is part and parcel of considering the factors.
>
> * * * * * *
>
> Given that a grant or denial of early termination can be appealed, explanations are useful to ensure that the appellate process provides meaningful review.

749 F.3d at 820-21. (citations to this Court's opinions included).

Petitioner's situation is even more egregious than Emmett's. Here, the court consulted with everyone except Petitioner, declined to have a hearing, and gave no indication that it had considered anything other than the sealed, undocketed, Supervision Summary, including the hearsay statement that Petitioner believed he was not bound by the court's conditions. The Eighth Circuit's twisted reasoning for finding that this was not a "new" statement arises precisely from the district court's utter failure to provide any guidance as to what its decision-making process actually was. This Court's guidance is required to resolve this important issue, especially frequently encountered in cases like Petitioner's where lengthy supervision is imposed.

In United States v. Mathis-Gardner, 783 F.3d 1286 (D.C. Cir. 2015), when the defendant had "served her time without incident" and served nearly a year and two months of her three-year supervised release term, she filed an unopposed motion for early termination of supervised release, pursuant to 18 U.S.C. Sec. 3583(e). The district court "denied the motion in a minute order that stated, in its

entirety, 'It is hereby ordered that defendant's motion is DENIED.'" 783 F.3d at 1287. The D.C. Circuit noted:

> Where, as here, the District Court does not spell out its reasoning at all, we must strike a delicate balance. Our review for abuse of discretion does not permit us to "substitute our judgment" for that of the trial court, so we cannot decide the issue by determining whether we would have reached the same conclusion. Furthermore, we cannot just reflexively presume that the learned judge appropriate exercised his discretion and considered all of the relevant factors, because that would risk turning abuse of discretion review into merely a "rubber stamp."

783 F.3d at 1288-89. Ultimately, the Mathis-Gardner court determined:

> It is impossible to discern from the record how or why denying the motion to terminate comported with consideration of the relevant Sec. 3553(a) factors, and the District Court gave us no explanation to assist our review. This Court cannot conclude that the District Court appropriately exercised its discretion under these circumstances. We therefore vacate the District Court's denial of Mathis-Gardner's motion for early termination of supervised release and remand to the District Court for reconsideration consistent with this opinion. We see no other choice, lest we abdicate "our responsibility to review [discretionary] rulings carefully and to rectify any erroneous application of legal criteria and any abuse of discretion.

783 F.3d at 1290 (citations omitted).

Finally, in United States v. Johnson, 877 F.3d 993 (11th Cir. 2017), the Eleventh Circuit confronted exactly the issue described in the Eighth Circuit opinion leading to this petition: "By its plain language, Sec. 3583(e) requires the district court to consider certain factors when it chooses to terminate a supervised-release term or modify the supervised-release conditions. But what must the district court do if it summarily denies a motion for termination of supervised release or modification of conditions? Is the district court required to offer reasons

for denying the motion?" Appendix p. A14 (emphasis in original). The Eighth Circuit explicitly and squarely bases its affirmance of the district court's summary, and secret, denial of Petitioner's motion to terminate or modify conditions of supervised release on its prior decision in United States v. Mosby. "The Eighth Circuit is routinely cited as the outlier. See, e.g., Johnson, 877 F.3d at 998 n.10. However, '[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.'" The Johnson case, which the Eighth Circuit cited as support for its "routinely being cited as the outllier," offers a thoughtful look at the majority circuit position and finds that a district court's denial of a motion to terminate or to modify conditions represents an abuse of discretion where "neither the Court's summary denial nor the record was sufficient to show that [the requisite] consideration [of the statutory sentencing factors] took place." Johnson, 877 F.3d at 996. Johnson holds that, "A court must explain its sentencing decisions adequately enough to all for meaningful appellate review. Else, it abuses it [sic] discretion. This principle applies not only when a court imposes a sentence, but also when it determines whether or not to reduce a defendant's sentence." 877 F.3d at 997, citing Gall v. United States, 552 U.S. 38, 50 (2007). "[A] defendant is 'not without recourse' if he is denied early termination of supervised release precisely because 'he may appeal the district court's denial' of such relief. Appellate review as 'recourse' implies meaningful review, which in turn requires the reasons for the district court's decision to be sufficiently apparent." The Eleventh Circuit's conclusion, in which "[w]e join a number of our sister circuits in so holding," is that

"for a Sec. 3583(e)(1) motion to be properly denied, the court's order, in light of the record, must indicate that the court considered the factors enumerated in the provision." Johnson, 877 F.3d at 998.

The Eighth Circuit's self-branding as an "outlier" reveals its discomfort with its decision in this case. In following Mosby, it perpetuated the circuit split Mosby created. In the absence of a sufficient explanation of its denial of Petitioner's motion to terminate or to modify the conditions of his supervised release, the Eighth Circuit was forced to employ speculative logic when it determined that there were no "new" facts in DCR Doc. #72, the Supervision Summary which was filed under seal, and undocketed. Appendix p A12. That speculative logic, in turn, amounted to the Eighth Circuit's substituting its judgment for that of the district court.

Finally, in finding that Petitioner was ineligible for early termination of supervision, the Eighth Circuit engaged in reasoning neither suggested nor discussed in the district court. There is no precedent for the Eighth Circuit's finding Petitioner's service of more than ten years of supervision at the time he filed his pro se motion for early termination and/or for modification of conditions did not count, rendering him ineligible for early termination. The statute's plain language is that early termination and discharge is appropriate "at any time after the expiration of one year of supervised release...." 18 U.S.C. Sec. 3583(e)(1). This Court's guidance, in resolving the stark circuit split over a district court's required explanation before denying a motion for early termination and/or modification of conditions of supervised release, is clearly and strongly needed. Absent the Court's

granting this petition, issuing its writ of certiorari, and resolving this issue, Petitioner and many others like him serving incredibly lengthy terms of supervised release with potentially inappropriate conditions are likely to be caught in situations just like Petitioner's: he can file another motion for early termination and/or for modification of conditions, only to be met with an undisclosed "supervision summary" which can go to the judge without any input from Petitioner or notice of what may be "new facts," were Petitioner only able to respond to them, only to be summarily denied.

VII. CONCLUSION AND PRAYER FOR RELIEF

The Circuits need guidance about the proper review of a district court's denial of a criminal defendant's motion for early termination or modification of conditions of supervised release, pursuant to 18 U.S.C. Sec. 3583(e). At present, only the Eighth Circuit takes the extremely restrictive position that "neither 18 U.S.C. Sec. 3583(e) nor relevant case law require[] the district court to explain its denial of early termination of supervised release. We see no abuse of discretion in [a] summary denial of [the defendant's] motion." Absent this Court's intervention, the Eighth Circuit's misinterpretation of the statute and the case law surrounding this common pleading will prevent defendants in Petitioner's situation, with extremely length periods of supervised release and extremely restrictive conditions of supervision, from receiving any sort of meaningful consideration of a motion for early termination or for modification of conditions. And the Eighth Circuit's continued permissive reading of 18 U.S.C. Sec. 3583(e) and "relevant case law,"

(with Petitioner's panel clearly calling out for this Court's aid in freeing it from its bondage to Eighth Circuit precedent), means that Petitioner and others convicted of the same crime and with similar lengthy supervised release sentences and similarly inappropriate conditions will never get a meaningful chance at appellate review of substantial legal and factual disputes arising out of motions for early termination and/or modification of conditions of supervised release, thus, effectively, nullifying their important rights under 18 U.S.C. Sec. 3583(e).

The Court should grant certiorari to review the Eighth Circuit's judgment refusing to require the district court to perform the requisite consideration of Petitioner's motion to terminate and/or to modify conditions of his supervised release, summarily reverse the decision below, or grant such other relief as justice requires.

Respectfully submitted,

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