No. _____

In the

Supreme Court of the United States

_____

Ronald Rene Deleon, Jr.,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTIONS PRESENTED

Whether application of a mandatory minimum term of supervised release following a revocation amounts to plain error?

PARTIES TO THE PROCEEDING

Petitioner is Ronald Rene Deleon, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Rene Deleon seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Deleon*, No. 22-10583, 2023 WL 4118578 (5th Cir. June 22, 2023). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B. The district court's judgment revoking supervised release is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 22, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND RULE

Section 841(b)(1)(C) of Title 21 reads in relevant part:

> Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment.

Section 3583(h) of Title 18 provides:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised

release, less any term of imprisonment that was imposed upon revocation of supervised release.
Federal Rule of Criminal Procedure 52(b) provides:

Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Ronald Rene Deleon suffered conviction for conspiring to traffic a mixture or sub-stance containing a detectable amount of methamphetamine, enhanced by one prior conviction. *See* (Record in the Court of Appeals, at 95-97, 111); 21 U.S.C. §§841(b)(1)(C), 846. This produced a sentencing range of zero to thirty years imprisonment, and a mandatory six-year term of supervised release at his initial sentencing. *See* 21 U.S.C. §§841(b)(1)(C), 846.

In February of 2022, Probation petitioned to revoke the term of release, stating that the "Statutory Maximum for Reimposition of Supervised Release" was "6 years to Life." (Record in the Court of Appeals, at 179). Petitioner admitted a cluster of violations related to his drug use: falsifying a drug test, using drugs and alcohol, missing drug tests, and failing drug tests. See (Record in the Court of Appeals, at 243).

The court revoked supervised release, imposed two years imprisonment, and imposed six years supervised release. See (Record in the Court of Appeals, at 248-249). Before doing so, it said:

> [t]he statutory maximum for reimposition of supervised release is 6 years to life, minus any revocation sentence that I impose.

(Record in the Court of Appeals, at 247).

B. Appellate Proceedings

Petitioner appealed, contending that the district court erred in applying a mandatory minimum term of release to him on revocation. In support, he cited *United States v. Campos*, 922 F.3d 686 (5th Cir. 2019), which held that a district court commits plain, reversible error when it applies a mandatory minimum term of supervised release from the drug statute following a revocation.

The court of appeals affirmed at the government's urging. *See* [Appx. A]; *United States v. Deleon*, No. 22-10583, 2023 WL 4118578 (5th Cir. July 14, 2020). It said that "the district court did not apply a mandatory minimum," but rather only a maximum. *Deleon*, No. 22-10583, 2023 WL 4118578, at *2. Further, it said that the error did not affect Petitioner's substantial rights because he received six years post-imprisonment release, rather than the four that might result from a minimum of six minus two years. *See id.*. Finally, it said that the error did not affect the fairness, integrity, and public reputation of judicial proceedings because Petitioner had previously benefitted from a retroactive Guideline Amendment, and had previously been continued on release rather than revoked. *See id.*

REASONS FOR GRANTING THE PETITION

The court below has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. The largely incoherent decision of the court below sows confusion as to the penalties available following revocation of supervised release.

A. The decision below conflicts with other courts of appeals on multiple points; moreover, because it is logically incoherent, it is likely to sow confusion as to an important issue in federal criminal sentencing.

Federal law requires a minimum term of supervised release upon conviction for certain offenses. *See* 21 U.S.C. §§841(b)(1)(A),(B),(C), 18 U.S.C. §3583(k). When a defendant suffers revocation of supervised release, 18 U.S.C. §3583(h) permits the district court to impose a new term of release. It also sets forth the length of that term, which:

> shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

§3583(h). The combination of these authorities raises a question of statutory interpretation: do minimum terms of release required at an initial sentence apply upon revocation?

Considering this language, four panels of the federal courts of appeals have answered in the negative. *See United States v. Roebuck*, 761 F. App'x 98, 103–04 (3d Cir. 2019) (unpublished); *United States v. Nelson*, 37 F.4th 962, 966–67 (4th Cir. 2022); *United States v. Campos*, 922 F.3d 686, 687–88 (5th Cir. 2019); *United States v. Teague*, 8 F.4th 611, 614-617 (7th Cir. 2021). Indeed, all of these panels have found reversible *plain* error when the district court applies a mandatory minimum in this

circumstance. *See Roebuck*, 761 F. App'x at 103–04; *Nelson*, 37 F.4th at 966–67; *Campos*, 922 F.3d at 687–88; *Teague*, 8 F.4th at 614-617. The government, moreover, has repeatedly confessed error. *See Nelson*, 37 F.4th at 968 (so noting).

The opinion below, however, reached a different conclusion. Here, the district court said:

> [t]he statutory maximum for reimposition of supervised release is 6 years to life, minus any revocation sentence that I impose.

(Record in the Court of Appeals, at 247). The court below reasoned that this reflected no error in the interpretation of §3583(h) because the judge referred to a "maximum" rather than a minimum. [Appx. A]; *United States v. Deleon*, No. 22-10583, 2023 WL 4118578, at *2 (5th Cir. June 22, 2023)(unpublished)("Here, by contrast, the district court did not apply a mandatory minimum. Instead, relying on a probation officer's report, it said the 'maximum' supervised release term was 'six years to life, minus any revocation sentence that I impose.' That is an important distinction from Campos and enough to render any error not 'plain.'"). But this is a baffling distinction: "six years to life, minus any revocation sentence that I impose" is not a maximum. It is plainly a range of punishment, the lesser extreme of which is six or four years. The least amount of punishment that may be imposed is the minimum.

The nearly incoherent holding of the court of appeals is well seen in its treatment of the substantial rights question, which contained the following passage:

> Nor has Deleon shown prejudice to his substantial rights. We do not infer that the district court's comment affected the district court's actual sentence because the low-end of the court's stated maximum—six years minus the two years of prison time—would have generated a four-year "maximum" term of supervised release. Yet the district court imposed six years of supervised release, which suggests the court's oral reference

> to a "maximum" supervised-release term was a mere slip of the tongue and did not affect its revocation sentence.

Deleon, 2023 WL 4118578, at *2. As the court's use of quotation marks around "maximum" reflects, the district court's stated range of supervised release is simply not something one can describe as a "maximum." *See* Oxford English Dictionary Online, entry = "scare quotes," ("Quotation marks used to foreground a particular word or phrase, **esp. with the intention of disassociating the user from the expression or from some implied connotation it carries**.")(emphasis added), *available at https://www.oed.com/dictionary/scare-quotes_n?tab=meaning_and_use#9924148539, last visited September 13, 2023.*

The above passage above also highlights another reason – if more were necessary – that the district court's stated penalty range could not reasonably be understood as a "maximum": such does not comport with the outcome. The six-year term exceeds one part of the "maximum," namely the lower part. By contrast, of course, if the court had accepted the obvious proposition that the district court intended to state both a minimum and a maximum, the outcome would be well explained. The six-year penalty would be higher than the minimum, but less than the maximum.

At best, the decision below sows confusion as to the state of Fifth Circuit law regarding the minimum applicable term of release when the defendant suffers revocation for a drug offense. At worst, it holds that district courts might be required to impose a term of release upon revocation in certain cases after all, though, for reasons the opinion does not make clear, this is not a "minimum." Either way, it

undermines the uniformity of federal law as to the meaning of an important statute governing criminal punishment.

The conflict is especially acute with respect to the Third Circuit's decision in *Roebuck*. In that case, the district court solicited agreement with its view that "the guideline range would be four months to ten months with supervised release of at least five years." *Roebuck*, 761 F. App'x at 103. The following exchange then occurred:

> The Court: And do both Counsel agree that I – the recommended statutory max is at least five years for supervised release?
> Ms. Patterson: Your Honor, yes, there is a statutory max of five years.
> The Court: At least five years.
> Ms. Patterson: At least five years for – for custody, and then there's at least five years for supervised release.
> The Court: Okay. Counsel?

Id. at 103-104.

If the foregoing had occurred in the court below, the defendant would have been denied relief. This is because the trial judge in *Roebuck*, like the one in this case, referred to a "statutory maximum" rather than a minimum. The Third Circuit sensibly rejected this logic, recognizing that the least available punishment represented a minimum, however labelled. It held:

> It appears that, while referring to a "statutory max" of "at least five years," the Court actually believed that it was required to impose a term of supervised release, as evidenced by the persistent use of "at least" by the Court when stating the term of supervised release as "five years," including correcting the Government attorney that the statutory max is "at least five years." The only curative language can be found when the Court said "the recommended statutory max," but that statement is followed by "at least five years," and the Government's attorney only confirmed that mistake by stating "and then there's at least five years for supervised release." The District Court thus erred by believing it was required to impose a sentence of at least five years, when neither the Guidelines nor § 3583(h) require it to do so.

Id. at 104 (internal citations to record omitted).

The Third Circuit found the reference to a minimum plain, and further found that the error merited relief in the absence of objection. *See id,* In this respect, *Roebuck* comports with that of three other appellate panels from the Fourth, Fifth, and Seventh Circuits, *see Nelson*, 37 F.4th at 966–67; *Campos*, 922 F.3d at 687–88; *Teague*, 8 F.4th at 614-617, all of which conflict with the decision below as to their outcome. At a minimum, the decision below stands in direct conflict to that of the Third Circuit in *Roebuck*: functionally identical inputs produced opposite outcomes.

As noted above, the court below also concluded that any error did not affect Petitioner's substantial rights. *See Deleon*, 2023 WL 4118578, at *2. It reached that conclusion because the court imposed six years release – the minimum applicable for the offense of conviction at initial sentencing – when its comments might be read to call only for four years release. *See id.* This reasoning seems a bit in tension with its earlier conclusion that "the district court did not apply a mandatory minimum." *Id.* But in any case, it is questionable whether the district court intended to subtract the two years of imprisonment from both the maximum and minimum of the range of supervised release it believed applicable. Its comments -- "[t]he statutory maximum for reimposition of supervised release is 6 years to life, minus any revocation sentence that I impose" – might equally be read to state a range of six years to life minus two years. The "minus clause" in the district court's statement appears next to the maximum, and might modify the minimum term it thought applicable. The choice of six years, a decidedly unround number, tends to confirm this reading.

More importantly, the reasoning of the court below as to the substantial rights question is facially dubious and directly contrary to the reasoning of at least one other court of appeals. It is facially dubious because a minimum term of release, as perceived by the district court, will likely affect the outcome even if the court does not impose precisely that number. As the Seventh Circuit explained "[s]tatutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence in the sense that they demarcate the range within which the judge may impose a sentence." *United States v. Currie*, 739 F.3d 960, 966 (7th Cir. 2014). A court that thinks the lawful range to be four years to life may think that six years is a relatively lenient punishment. Six years appears considerably less lenient when the court is informed that the appropriate range is zero to life.

Most importantly, the reasoning of the court of appeals is also clearly contrary to that of the Fourth Circuit in *Nelson*, which has generalized this Court's holding in *Molina-Martinez* to the miscalculation of the statutory range of supervised release. Noting that "[i]n the 'ordinary case,' … a miscalculation of a Guidelines range – which, though advisory, is the 'lodestar' for sentencing – will be enough to establish the necessary effect on substantial rights," the Fourth Circuit concluded that "the same, of course, must be true when a district court, as here, also incorrectly calculates a statutory sentencing range – which is not advisory but mandatory…" *Nelson*, 37 F.4th at 970 (quoting *United States v. Green*, 996 F.3d 176, 186 (4th Cir. 2021)(quoting *Molina-Martinez v. United States*, 578 U.S. 189 (2016)).

That logic would have been plainly sufficient to carry the day in the instant case, were it the law of the Fifth Circuit. The district court misunderstood the appropriate statutory range, thinking to go from a minimum of four years (or six) to life (or life minus two years). As the Fourth Circuit sees it, this numerical change in the options available is sufficient to show a reasonable probability of a different result absent some countervailing evidence, of which none appears in the record. Accordingly, the courts of appeals have issued contrary opinions on this point, meriting review.

Finally, the court of appeals held that any error would not affect the fairness, integrity, and public reputation of judicial proceedings, because he had, in its words, "already received and abused the benefit of several favorable exercises of federal court discretion." *Id.* One of these prior acts of leniency, however, was a reduction in the term of imprisonment due to a change in the Sentencing Guidelines. *See id.* While the district court is not required to reduce a defendant's term of imprisonment in light of a retroactive Guideline Amendment, *see United States v. Dillon*, 560 U.S. 817, 827 (2010), the decision to do so is not a mere act of grace. Rather, it is an effort to conform the sentence to the §3553(a) factors as the Sentencing Commission and the district court see them. *See United States v. Garcia*, 655 F.3d 426, 434 (5th Cir. 2011)("Congress … gave the Commission the discretion to determine, as we have said, 'in what circumstances and by what amount' a sentence may be reduced, and that reductions should further the purposes of § 3553(a).")(internal citations

omitted)(quoting 18 U.S.C. § 994(u)), It ought not count against the defendant for the purposes of the fourth prong.

The court below also noted that the district court previously decided to continue the defendant on supervised release, in spite of a prior infraction. *See Deleon*, 2023 WL 4118578, at *2. It is difficult to see, however, this forbearance makes the error actually imposed any less unfair. The district court may wish to consider Petitioner's prior infraction when deciding how much supervised release to impose, and could certainly do so. But if it would have nonetheless chosen to impose fewer than six years release, aware of the Defendant's history, it would remain "unfair" to insist on a six-year term due to mere accident. Arbitrary punishment casts doubt on the fairness, integrity, and public reputation of public reputation, even if another decision-maker might have reasonably imposed it. See *Rosales-Mireles v. United States*, ____U.S.____, 138 S. Ct. 1897, 1910 (2018)("A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review."). In holding otherwise, the decision of the court below contradicts the reasoning this Court's decision in *Rosales-Mireles*.

In any event, the fourth prong holding is contrary to the decisions of each of the panels that reversed this class of error on plain error review. These courts, though of course stopping short of a bright line rule, recognize that an overlong criminal sentence will ordinarily merit discretionary review. *See Nelson*, 37 F.4th at 970–71 ("We have held already that because the "terms and conditions of supervised release are a substantial imposition on a person's liberty," a plainly erroneous extension of a

supervised release term, like a prison term, affects "substantial rights" and is correctable under Rule 52(b))(citing *United States v. Maxwell*, 285 F.3d 336, 342 (4th Cir. 2002)); *Roebuck*, 761 F. App'x at 103–04 (concluding that the error meets the "high burden" of plain error reversal without specific reference to the fourth prong); *Teague*, 8 F.4th at 615 (following its prior holding in *United States v. Wylie*, 991 F.3d 861 (7th Cir. 2021), which reversed a similar error on plain error review because "improper sentencing calculations are 'of the courts' own making, there is a relatively low cost to correct them, and the proper application of the Guidelines ensures the fairness of sentencing among defendants.'")(quoting *Wylie*, 991 F.3d at 864 (citing *Rosales-Mireles*, 138 S. Ct. at 1908).

B. The issue merits this Court's intervention

The decision below is squarely contrary to those of multiple courts of appeals on multiple independent points. It is clear that Petitioner likely would have received relief in at least one other circuit, the Third, and probably in more than one. The decision passes on, and sows confusion about, the meaning of a statute that proscribes the statutory range of punishment. It is not a question of mere procedure, but of the possible range of punishment, as to which defendants possess a fundamental right to fair warning. *See Sessions v. Dimaya*, ___U.S.___, 138 S. Ct. 1204, 1225 (2018)(Gorsuch, J., concurring)("Perhaps the most basic of due process's customary protections is the demand of fair notice.")

Further, because they will pertain to the mandatory minimum punishment, any misunderstandings fomented by the decision below may well persist without

notice for some time before they are clearly presented. A district court that is not certain as to whether it may sentence below the putative minimum may impose that sentence to avoid possible reversal, without clearly specifying that it wishes to do so. To preserve the uniformity and clarity of federal law in this area, this Court should intervene and limit the damage caused by the facially indefensible opinion below.

The government has repeatedly confessed error when confronted with the error made here. *See Nelson*, 37 F.4th at 968 (so noting). Petitioner respectfully suggests that it should do so again in this case, which is not meaningfully distinguishable. Even if it does not do so, this Court should grant certiorari and reverse the judgment below, with or without merits briefing.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 15th day of September, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner