No. __-_____

IN THE

Supreme Court of the United States

RICHARD DEWAYNE LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JAMES SCOTT, 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

JOINT PETITION FOR WRIT OF CERTIORARI

GEREMY C. KAMENS
Federal Public Defender
Joseph S. Camden
Assistant Federal Public Defender
Counsel of Record
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 565-0800
Joseph_Camden@fd.org

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QUESTIONS PRESENTED

I. What is the proper standard of review for evaluating supervised release revocation sentences on appeal?

II. May a district court imposing sentence on a revocation of supervised release under 18 U.S.C. § 3583(e) consider extra-statutory or omitted factors such as the need for just punishment, to reflect the seriousness of the offense, or to promote respect for the law?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Scott*, 4th Cir. No. 22-4703, 2024 WL 33673 (4th Cir. 2024); ED. Va. No. 3:07-cr-0066-HEH.

(2) *United States v. Lewis*, 4th Cir. No. 22-4291, 90 F.4th 288 (4th Cir. 2024); E.D. Va. No. 3:03-cr-0309-HEH.

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PETITION FOR WRIT OF CERTIORARI

Richard Lewis and James Scott, Jr. respectfully petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Fourth Circuit. This joint petition is permitted by Supreme Court Rule 12.4 and is appropriate in light of the identical question of federal law presented in both cases under review.

OPINIONS BELOW

The opinion of the United States Court of Appeals in *United States v. Richard Dewayne Lewis* appears at pages 1a to 13a of the appendix to the petition and is published at 90 F.4th 288 (4th Cir. 2024). The opinion of the United States Court of Appeals in *United States v. Scott* appears at pages 14a to 15a of the appendix to the petition and is available at 2024 WL 33673 (4th Cir. 2024).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. §§ 3231 and 3583 in both cases. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment in *United States v. James Scott, Jr.* on January 3, 2024. It issued its opinion and judgment in *United States v. Richard Lewis* on January 8, 2024; therefore this petition is timely in both cases. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Due to their length, relevant statutory provisions have been included in the Petitioner's Appendix. *See* Pet. App. 16a-19a; Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Introduction

Certiorari should be granted because there are long-standing circuit splits both on the standard of review applicable to revocation sentences, and on whether the list of factors to be considered in revoking supervised release and imposing imprisonment is exclusive or merely illustrative.

The district court in these cases imposed significant terms of imprisonment after invoking explicitly and singling out the need to promote respect for the law (for Mr. Lewis) and the need to provide just punishment (for Mr. Scott). Those factors are omitted from consideration on revocation of supervised release under 18 U.S.C. § 3583(e). Therefore the substantive question of this petition asks whether consideration of those goals of sentencing is error – that is, whether the list of sentencing factors in § 3583(e) is exclusive or illustrative. The Circuits are split (or more accurately spread along a spectrum), with some holding such consideration is legal error, some that it is proper, and those in between discouraging but sanctioning the practice.

In order to reach that question, however, the threshold question of the standard of review must be addressed. A split in authority emerged soon after *United States v. Booker*, 543 U.S. 220 (2005), and has not been resolved. The Fourth Circuit, at one extreme, upholds revocation sentences unless they are plainly unreasonable, and it interprets "plainly" to include questions of law as well as the substantive length of the sentence. It takes its definition of "plain" from the "plain error" standard, even for claims that are preserved in district court. At the other end, most Circuits review

revocation sentences under the same reasonableness standard applicable to original sentences, including *de novo* review on matters of statutory interpretation.

Both questions are also important because of the enormous burdens that supervised release revocation proceedings and imprisonment place on federal courts and agencies. Thousands of years of imprisonment are imposed every year, in thousands of cases that require arrests, hearings, and attorneys. Nearly every case ending in revocation (99%) results in a prison sentence. The average sentence is 9.5 months. Thousands defendants are processed for revocations every year. Therefore it is critically important that district courts have a clear understanding of what that imprisonment is meant to accomplish, and whether retribution is a proper goal of revocation.

Proceedings in the District Court

Richard Lewis

Mr. Lewis has been paralyzed from the waist down following a suicide attempt at age 21, because he was chronically depressed and traumatized; when he was a child, his father murdered his mother and then killed himself. C.A.J.A. 83, 85. [1]

In the current case, Mr. Lewis was sentenced in 2004 to 90 months' imprisonment and five years of supervised release for conspiracy to distribute crack cocaine and possession of a firearm in furtherance of a drug trafficking crime.

[1] Citations to the district court record are indicated by citation to the parties' Joint Appendix before the Fourth Circuit ("C.A.J.A."). *See United States v. Richard Lewis*, No. 22-4291, Doc. 15 (filed Sep. 6, 2022) (4th Cir.); *United States v. James Scott, Jr.*, No. 22-4703, Doc. 10 (filed Mar. 9, 2023) (4th Cir.).

C.A.J.A. 6-8. Mr. Lewis was released from prison in 2010; he was ineligible for section 8 housing or food stamps due to his drug felony conviction.[2] He lived with his grandmother for three years, then moved out because he could not get around her house in a wheelchair, and had no privacy. C.A.J.A. 23. Over a year after his arrest, Mr. Lewis was found guilty of three counts of manufacture/distribution a Schedule I/II substance, 2nd offense, and sentenced to a total of 19 years unsuspended on those charges and related probation revocations in state cases. C.A.J.A. 26. His expected release date from the Virginia Department of Corrections is January 13, 2031. C.A.J.A. 38, 50.

A petition to revoke supervised release and two addenda were filed, describing Mr. Lewis's ongoing state proceedings, and also alleging positive drug tests for marijuana and opiates. C.A.J.A. 22-27. The last was filed in July of 2016. C.A.J.A. 26. Six years later he was brought from state custody to address the supervised release revocation petition. C.A.J.A. 7-8.

At the violation hearing, counsel for Mr. Lewis admitted the convictions as a basis for revocation. C.A.J.A. 45. The statutory maximum was 60 months, and the guideline range 37 to 46 months. C.A.J.A. 44-45. The district court received evidence and found that Mr. Lewis had an excellent disciplinary and education record in prison, and suffered ongoing and serious medical problems. J.A. 36-40.

[2] Virginia repealed its ban on food stamps for felony drug convictions in 2020, after Mr. Lewis had been reincarcerated. Va. Code § 63.2-505.2 (2020).

Confronting the factors that applied, Mr. Lewis pointed out that 18 U.S.C. § 3583(e) does not reference all of the § 3553(a) factors; it omits just punishment, the seriousness of the offense, and the need to promote respect for the law, and argued those factors could not be considered. C.A.J.A. 56. Relatedly, he argued that Chapter 7 of the U.S. Sentencing Guidelines, with its 37-46 month recommended range, was based on a theory of punishment that conflicted with the omission of punitive factors from § 3583(e). C.A.J.A. 56. He requested a 36-month sentence entirely concurrent to Mr. Lewis's state sentence; or in the alternative that any consecutive period be limited to 18 months.

Mr. Lewis allocuted. He explained that he had moved from his grandmother's house because he had no privacy; but none of the people in the county he asked for help could help him, which is why he resorted to selling drugs, which he used to pay rent. He acknowledged there was no excuse, but that he committed the offense to afford a place of his own. C.A.J.A. 60.

The district court imposed a sentence of 20 months, consecutive to Mr. Lewis's state sentence. C.A.J.A. 61. Its explanation for the sentence was brief. It noted Mr. Lewis's "horrendous" criminal record, but acknowledged that his institutional record had been good. C.A.J.A. 60-61. It also acknowledged his paralysis and medical problems. C.A.J.A. 61. Coming to the goals of sentencing, the district court rejected Mr. Lewis's argument regarding the appropriate factors to consider, and singled out just punishment and the seriousness of the violation conduct:

> And I think that based upon that, that a sentence that is adequate, but not longer than necessary, to satisfy all the factors set forth in 3553(a), and provide for just punishment, and reflect the extent of the breach of trust evidenced by your breaches of supervised release, would be commitment to the U.S. Bureau of Prisons for a term of 20 months. I'm giving you a substantial break based upon your physical condition, and what I understand to be your limited life expectancy.

J.A. 61.

James Scott

James Scott became a ward of the state at age five, was raised in various foster homes and facilities, and separated from his brother. Scott C.A.J.A. 55, 66. He returned to his mother at 17, but she kicked him out at 18 when he could no longer provide benefits, and died in 2002 of AIDS, while he was incarcerated. C.A.J.A. 67; C.A.J.A. 62.

Coming to the instant case, Mr. Scott was originally sentenced in 2007 to over twenty years of imprisonment for possession with intent to distribute of a little over 18 grams of crack cocaine, with five years consecutive for possession of a firearm in connection with the drugs. C.A.J.A. 20; C.A.J.A. 53. As Congress and the Sentencing Commission gradually realized the injustice of such draconian sentences, Mr. Scott received reductions that resulted in his release on April 22, 2020, having served over 13 years. C.A.J.A. 53-54 (arrest December 29, 2006); C.A.J.A. 20 (release April 22, 2020).

During the first year of supervised release, Mr. Scott tested negative for drugs and managed to get two manual labor jobs. C.A.J.A. 20; 34.[3] A former foster mother agreed to provide him a room at $500 per month after his release, and also charged him for items she bought for him when he was released with nothing. C.A.J.A. 34. His need to pay for living led to the instant violations. C.A.J.A. 35; C.A.J.A. 42 (allocution).

Just shy of the one-year mark, Mr. Scott incurred three violations for state crimes: he was arrested and convicted of a violation of Va. Code § 18.2-357.1 in Chesterfield County, Virginia.[4] C.A.J.A. 25. He also was charged and pled guilty to driving without a license there. *Id*. Last, he was charged with distribution of a controlled substance in Henrico County. *Id*. He was sentenced to 10 years with five suspended in the Chesterfield case, and 25 years with 20 suspended in the Henrico case. *Id*. The two ran consecutive, for a total of 10 years; and Mr. Scott is still serving that sentence, with a release date of October 18, 2029. *Id*.

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[3] The minimum wage when Mr. Scott was released in 2020 was $7.25 per hour; it has been gradually increased by legislation and is now $12 per hour.

[4] Although the statute is entitled "Commercial sex trafficking," the offense of which Mr. Scott was convicted describes merely aiding and abetting prostitution. The text of § 18.2-357.1(A) is:

> A. Any person who, with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of § 18.2-346, solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to violate § 18.2-346 is guilty of a Class 5 felony.

Section 18.2-346 describes simple prostitution, and a Class 5 felony carries a maximum of 10 years imprisonment.

Revocation Proceedings

At the hearing, Mr. Scott admitted the violations. C.A.J.A. 28. The guidelines were correctly calculated at 51 to 63 months, with a statutory maximum of 60 months. C.A.J.A. 29. The government argued in favor of a within-guidelines sentence. C.A.J.A. 29. Its proffered reasons were: (1) Mr. Scott's convictions were for "two very serious felony charges," C.A.J.A. 30; (2) in light of prior reductions in Mr. Scott's original sentence, his further crimes constituted a "breach of trust" that merited a guideline sentence. C.A.J.A. 30.

Counsel for Mr. Scott began by pointing out that 18 U.S.C. § 3583(e) omits just punishment, the seriousness of the offense, and promoting resepct for the law. C.A.J.A. 32. He recounted Mr. Scott's history, the progress he had made, and the impossible situation he was in after his release with no support and no resources, along with the long state sentence he would be serving until he was 52 years old. C.A.J.A. 33-36. Counsel pointed out that promoting respect for the law, constituting just punishment, and reflecting the seriousness of the offense were deliberately omitted from the statute. C.A.J.A. 39.

In announcing the sentence, however, the district court emphasized promoting respect for the law: "The Court believes that a sentence that is adequate, but not longer than necessary, *to promote respect for the law*, which I believe *is* a consideration, protect the community, and hopefully *instill some respect for the law* in your mind and your behavior, would be commitment to the U.S. Bureau of Prisons

for a term of 51 months." C.A.J.A. 43 (emphasis added). The Court imposed no further supervised release. C.A.J.A. 44, 47.

Proceedings in the Court of Appeals

Before the Fourth Circuit, both Mr. Lewis and Mr. Scott continued to assert that the § 3583(e) factors are exclusive; and that the district court's reliance on omitted factors – the need to promote respect for the law, in Mr. Scott's case, and the need for just punishment in Mr. Lewis's case – was error. Each also argued that Chapter 7 of the United States Sentencing Guidelines was outside of the Sentencing Commission's mandate because it was based on factors not listed in § 3583(e).

Lewis

In *Lewis*, the appellant raised the same issues as in the district court, arguing that the district court erred by considering the need for just punishment, and that Chapter 7 of the U.S. Sentencing Guidelines impermissibly incorporated the omitted retributive factors. The Fourth Circuit issued a published opinion after oral argument. *United States v. Lewis*, 90 F.4th 288 (4th Cir. 2024). After reviewing the statutes governing original sentencings and supervised release revocations, it acknowledged that, because the retributive § 3553(a)(2)(A) factors are omitted from consideration when revoking supervised release, the Fourth Circuit "ha[s] recognized that district court are *prohibited* from consideration the retribution factor" "based on the negative pregnant" of the omission of that factor. *Id*. at 295 (emphasis in original).

Regarding the challenge to Chapter 7, the Fourth Circuit focused on whether the seriousness of the offense was the basis for the Guideline's classification of violations into Grades based on severity. It held first that "the seriousness of the offense" in § 3553(a)(2)(A), even in the supervised release revocation context, still referred to the original offense and not the violation conduct, such that the violation conduct was not a deliberately omitted factor. *Id*. at 297 (On revocation, "the court is not imposing such reimprisonment to *punish* the defendant *for the original criminal offense*; the punishment purpose of sentencing was already fully addressed with the original sentence of imprisonment.") (emphasis in original). It held therefore that the seriousness (qua seriousness) of the violation conduct was a proper consideration. *Id*. at 298-99.

Next, the Fourth Circuit addressed the argument that the district court erred by explicitly considering "just punishment" as a justification for the sentence of imprisonment on revocation. The Fourth Circuit acknowledged frankly that the district court's reference to "just punishment" was "inconsistent with § 3583(e)." *Id*. It asserted that the reference to "just punishment" however, was ambiguous, and that it was a "summarization of the particulars on which the court made clear it was relying in selecting the sentence of imprisonment." *Id*. at 299. Those included facts (but not goals) of Mr. Lewis's criminal history, his prison record, and his physical disability. *Id*. at 300. It directly relied on *United States v. Webb*, 738 F.3d 638, 642 (4th Cir. 2013), which held that "mere reference to such [prohibited] factors" does not

make a sentence unreasonable when other factors are considered, and the prohibited factor is not the "predominate[]" factor. *Id*. at 300.

Scott

In *Scott*, despite a materially similar record, the Fourth Circuit issued a brief unpublished opinion. It declined to address the argument regarding Chapter 7. Pet. App. 15a. It rejected the statement in *Crudup* that a district court "may not consider" the omitted § 3553(a)(2)(A) factors as dictum. Pet. App. 15a. It asserted that in *Webb* it had "held that § 3583(e) does not prohibit a court from referencing the § 3553(a)(2)(A) factors omitted from the statute" and affirmed, discerning "no error in the district court's explanation" under *Webb*. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should resolve two related decades-long circuit splits on the nature of supervised release revocation and imprisonment. Courts disagree about both the factors to be considered in the district court when imprisoning a supervisee, and about the standard of review on appeal. These questions are important because the courts spend enormous resources on revocation proceedings, resulting in thousands of years of imprisonment imposed every year.

At the threshold, the Circuit Courts of Appeal do not agree on the standard of review supervised release revocation sentences, especially to review asserted errors of law. Are questions of law reviewed *de novo* under an abuse of discretion rubric applicable to original sentences, as most circuits hold? Or are even preserved legal questions, as the Fourth Circuit has held, reviewed only for whether they are "plainly" wrong under a "plainly unreasonable" rubric?

On the merits, the Circuits still disagree about whether the list of statutory sentencing factors are exclusive. Section § 3583(e) cross references all of the factors in § 3553(a) for original sentencings, but omits the retributive factors – the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. If they are exclusive, as the Tenth Circuit has held, then sentencing courts cannot consider retributive purposes and must impose a sentence only on the prospective factors such as deterrence and protection of the public. If, on the other hand, the list is not exclusive, then courts may consider the punitive factors or any other sentencing factor that a court deems relevant.

This issue is enormously important for the Courts as well as defendants; its impact one way or the other would be well above the threshold this Court's cases set for certiorari. Supervised release revocation and imprisonment puts thousands of people in prison for collective man-millenia every year. More than a quarter of federal arrests are for release violations (two-thirds for noncriminal technical violations), and courts adjudicate and sentence tens of thousands of these cases every year, at an average of 9.5 months of prison per revocation. Allowing courts to continue imprisoning those who struggle on supervised release on a punitive rationale therefore places an enormous burden on the entire criminal justice system, on magistrate judges, district courts, U.S. Probation, Federal Public Defenders, U.S. Marshals and the Bureau of Prisons, all of whom have some role in the revocation-and-imprisonment process.

This petition presents the ideal vehicle to resolve both issues. The district court explicitly relied on omitted punitive goals when sentencing each defendant, and the Court of Appeals directly invoked the "plainly unreasonable" standard to affirm on appeal.

I. The Circuits Disagree On the Standard of Review for Revocation Sentences

All of the Circuits except for the Fourth and Seventh review supervised release revocation sentences just like they review original sentences – under an abuse of discretion standard, for reasonableness. When an argument asserting legal error is preserved, those courts review the question of law *de novo*. That is, a district court abuses its discretion when it makes an error of law, as they all recognize. *See United States v. Frederickson*, 988 F.3d 76, 84 (1st Cir. 2021) ("[W]e review this preserved issue of law de novo."); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005) (reasonableness review applies to sentences for which no guidelines applies, after *Booker v. United States*, 543 U.S. 220 (2005)); *United States v. Maloney,* 513 F.3d 350, 354 (3d Cir.2008) ("[L]egal issues are subject to de novo review."); *United States v. Brigham,* 569 F.3d 220, 232–34 (5th Cir.2009) (abuse of discretion standard, and "legal and constitutional bases of the challenges thereto are reviewed *de novo*"); *United States v. Crace*, 207 F.3d 833, 835 (6th Cir.2000) (de novo review of application of the guidelines to a particular set of facts).

By contrast, the Fourth and Seventh Circuits apply a "plainly unreasonable" standard of review. *See United States v. Crudup*, 461 F.3d 433 (2006) (adopting standard after *Booker*); *United States v. Kizeart*, 505 F.3d 672, 674 (7th Cir. 2007).

But even these two circuits interpret the phrase "plainly unreasonable" differently. The Seventh Circuit has adopted "the narrowest judicial review of judgments . . ., and that is judicial review of the sanctions imposed by prison disciplinary boards." *United States v. Kizeart*, 505 F.3d 672, 675 (7th Cir. 2007) (citing *Superintendent v. Hill*, 472 U.S. 445, 455-57 (1985) (the prison disciplinary board's ruling must be supported by a "modicum" of evidence, "some" evidence, "any" evidence, or even just "meager" evidence)). Imprisonment for revocation under this standard "must indeed be 'plainly' unreasonable to be set aside." *Id.* This standard "presents an uphill battle" even for defendants with preserved objections to above-guidelines sentences and is of course "highly deferential" and gives district court "more than the usual flexibility." *United States v. Dawson*, 980 F.3d 1156, 1165 (7th Cir. 2020) (citations omitted).

However, it appears that the Seventh Circuit does not defer to district courts on questions of law; it applies the deferential standard only to review substantive reasonableness, and evaluates interpretation of statutes *de novo*. *See, e.g.*, *id.* (evaluating claim of procedural error *de novo*); *id.* at 1165 (evaluating claim of substantive unreasonableness under deferential "plainly unreasonable" standard).

The Fourth Circuit, alone at this end of the spectrum, has applied the "plain" component of "plainly unreasonable" to preserved claims arguing errors of law. It will not reverse due to an error of law unless the error is clear or obvious – a standard imported from the "plain error" standard of review ordinarily applicable to forfeited arguments. *Crudup*, 461 F.3d at 439 ("plainly unreasonable" incorporates "the

definition of 'plain' that we use in our 'plain' error analysis") (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)) (intermediate citations omitted).

The disagreement concerns how to apply this Court's opinion in *Booker*, excising 18 U.S.C. § 3742(e), to supervised release revocation sentences. The majority rule recognizes that § 3742(e) was excised in its entirety by this Court in *Booker*, including §3742(e)'s "plainly unreasonable" provision for cases where there is no guideline, and was replaced by an implied reasonableness standard. *See, e.g.*, *Fleming*, 397 F.3d at 99; *Booker*, 543 U.S. at 260-61. The Fourth Circuit, however, notes that other subsections of § 3742 remain which do reference the "plainly unreasonable" standard, and adopted its position in an attempt to give effect to the term "plain" in these surrounding subsections. *Crudup*, 461 F.3d at 439.

II. The Circuits Disagree On Whether the § 3583(e) Factors Are Exclusive

The Circuits also disagree fundamentally about the purpose of imprisonment for a violation of supervised release. Section 3583(e), governing revocations and imprisonment, mandates consideration of a list of cross-referenced § 3553(a) factors, such as the need for deterrence and to protect the public. However, this list does not include § 3553(a)(2)(A), which for original sentencings directs courts to consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The Circuits disagree about whether this omission is significant; whether it shows a Congressional intent to exclude those factors from consideration when revoking supervised release and imposing a prison sentence.

Due to the deference that reasonableness review entails, this disagreement occurs along a spectrum. At one end, the § 3583(e) factors are exclusive, and consideration of one of the omitted § 3553(a)(2)(A) factors is legal error and requires reversal if not harmless. At the other end are courts that hold that the § 3583(e) factors are *not* exclusive, and sentencing courts can determine their own goals for sentencing. Courts in between discourage consideration of the omitted factors, but in those courts considering the factors is not error unless it becomes the predominate goal of the sentence.

The Tenth Circuit, at one end, is most conscientious. It has held that the omission of the retributive § 3553(a)(2)(A) factors was deliberate, and that they cannot be considered in imposing a sentence of imprisonment on revocation. Any reliance on the need for just punishment, to promote respect for the law, or to reflect the seriousness of the offense is reversible error, unless harmless. *United States v. Booker*, 63 F.4th 1254, 1259 (10th Cir. 2023) ("We construe the omission in § 3583(e) of the retribution factor found in § 3553(a)(2)(A) to preclude a sentencing court from relying on the need for retribution when modifying or revoking a term of supervised release and imposing a new prison sentence for violations of supervised release.").

At the far end, the First, Second, Third, and Sixth Circuits hold that the § 3583(e) factors are *not* exclusive, leaving sentencing courts free to invent their own goals for imprisonment to achieve. *See, United States v. Vargas-Davila*, 649 F.3d 129, 132 (1st Cir. 2011) ("Although section 3583(e)(3) incorporates by reference, and thus encourages, consideration of certain enumerated subsections of section 3553(a), it

does not forbid consideration of other pertinent section 3553(a) factors."); *United States v. Williams*, 443 F.3d 35, 47 (2d Cir. 2006) ("[W]e interpret § 3583(e) simply as requiring consideration of the enumerated subsections of § 3553(a) without forbidding consideration of other pertinent factors."); *United States v. Young*, 634 F.3d 233, 240 (3d Cir. 2011) ("[T]he mere omission of § 3553(a)(2)(A) from the mandatory supervised release revocation considerations in § 3583(e) does not preclude a court from taking [the § 3553(a)(2)(A) factors] into account. To hold otherwise would ignore the reality that the violator's conduct simply cannot be disregarded in determining the appropriate sanction."); *United States v. Esteras*, 88 F.4th 1163, 1169 (6th Cir. 2023) ("The general rule is that courts may invoke factors related to the three general considerations in § 3553(a)(2)(A) without creating a procedurally unreasonable sentence.").

In between are the Fourth, Fifth, Eighth, and Ninth Circuits where the consideration of retributive factors is recognized as improper but not unreasonable, or discouraged but tolerated as long as they are not a predominant factor. The factors reside somewhere in a grey area: for example, the Eighth Circuit has "labeled § 3553(a)(2)(A) an improper, irrelevant, or 'excluded' factor," but it has "not declared its consideration an error of law and therefore an abuse of discretion." *United States v. Porter*, 974 F.3d 905, 907 (8th Cir. 2020). Often these reflect internecine disagreement, as in the Fourth and Ninth Circuits. In one of the most-cited cases, *United State v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006), the Ninth Circuit held that because the § 3553(a)(2)(A) factors were omitted, "a court may not properly

consider" those factors in imposing a sentence. A year later, however, another panel essentially disavowed *Miqbel* as a bright line rule, and held that one of the omitted factors – the seriousness of the offense – "may be considered to a lesser degree as part of the criminal history of the violator." *United States v. Simtob*, 485 F.3d 1058, 1062 (9th Cir. 2007).

A similar changeup came in the Fourth Circuit. In *United States v. Crudup*, 461 F.3d 433, 438-9 (4th Cir. 2006), the Fourth Circuit stated plainly that, because the retributive § 3553(a)(2)(A) factors are omitted from § 3583(e), "the district court is not authorized to consider" those factors "in devising a revocation sentence."

But it walked back that statement in *United States v. Webb*, 738 F.3d 638 (4th Cir. 2013). *Webb* criticized *Crudup*'s statement as "without analysis or explanation," cited approvingly to cases from the Second, Third, and Sixth Circuits that criticized *Crudup*, and set out a subjective and equivocal rule, where "a district court may not impose a revocation sentence based *predominately* on the seriousness of the releasee's violation or the need for the sentence to promote respect for the law and provide just punishment[.]" *Id.* at 641-42 (emphasis added). And district courts could assert those factors on the record without risking reversal: "mere reference to such considerations does not render a revocation sentence procedurally unreasonable when those factors are relevant to, and considered in conjunction with, the enumerated § 3553(a) factors." *Id.* at 642.

The Fifth, Seventh, and Eighth Circuit followed a similar course. The Fifth Circuit recognizes generally that "revocation sentences may not take account of

retribution," but that "mention[ing] impermissible factors is acceptable" as long as they are not "dominant." *United States v. Sanchez*, 900 F.3d 678, 684 n.5 (5th Cir. 2018). The Seventh Circuit appear to fall in this camp as well. *United States v. Clay*, 752 F.3d 1106, 1108–09 (7th Cir. 2014) ("[T]his subsection may be considered so long as the district court relies primarily on the factors listed in § 3583(e) .... [T]here is significant overlap between these factors and § 3553(a)(2)(A).").

The only Circuit still on the fence is the Eleventh, which has noted the issue but not resolved it. *United States v. King*, 57 F.4th 1334, 1338 n.1 (11th Cir. 2023) (noting circuit split, acknowledging language in prior cases permitting references to factors that also appear in § 3553(a)(2)(A), but calling for Eleventh Circuit to "squarely address it").

The Fourth Circuit and its compatriots are wrong on both issues. Congress undoubtedly has the power to dictate the goals that a sentence should be crafted to accomplish. *See Tapia v. United States*, 564 U.S. 319 (2011); 18 U.S.C. § 3582(a) (forbidding consideration of the need for rehabilitation in imposing or setting the length of imprisonment). The deliberate cross reference in § 3583(e) to a list of § 3553(a)'s factors, but which omits any reference to retribution in § 3553(a)(2)(A) is a classic example of the *expression unius* canon. This is reinforced by this Court's opinions in *Tapia* and *Concepcion*, considering the same statutory language in § 3583(c), that those factors are forbidden. *See Tapia v. United States*, 564 U.S. 319, 326 (2011) ("[A] court may *not* take account of retributions (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release. See § 3583(c)") (emphasis

in original); *Concepcion v. United States*, 597 U.S. 481, 494 (2022) (when imposing initial term of supervised release, omission of retributive factors in § 3583(c) "expressly preclude[s] district courts from considering the need for retribution").

And courts should be able to reach this question because it is a purely legal issue and should be reviewed *de novo* as any other matter of statutory interpretation is. The Fourth Circuit's importation of the plain error standard to legal questions preserved for review is a misapplication of § 3742 and this Court's opinion in *Booker*. As the Courts who adopted the proper standard note, this Court expressly cited to cases applying the "plainly unreasonable" standard for reviewing supervised release revocations in its remedy excising § 3742(e).

III. The Answers to These Questions is Important: They Directly Affect Thousands of Cases and Thousands of Years of Imprisonment Imposed Every Year

The Administrative Office of the Courts and Department of Justice, in response to Executive Order 14074, 87 Fed. Reg. 32945 (May 25, 2022)[5] have compiled shocking statistics on the burdens supervised release revocations and imprisonment place on the federal criminal justice system.

More than 16,000 supervised release cases terminated with revocation in the last calendar year.[6] Two-thirds of revocations were for non-criminal technical

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[5] Executive Order 14074 directs various agencies to collect and provide information on the use of resources necessary for supervision, and on the number of revocations and length imprisonment. 87 Fed. Reg. 32958, E.O. 14074 § 16(h).

[6] Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release (May 2023) ("DOJ Report") (available at https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-

violations.[7] Ninety-nine percent of those revoked received a sentence of imprisonment.[8] The average sentence was 9.5 months.[9] That results in well over *twelve thousand years of imprisonment* imposed every year.

This burden does not just land on the Bureau of Prisons. Every revocation requires an arrest (or less frequently a summons) executed by the U.S. Marshals. In the last year, according to DOJ, 23% of the 96,857 arrests by federal law enforcement last year were for supervision violations. There is presumptive pre-trial detention for everyone accused of a violation, taking up local Marshals' resources. See Fed. R. Crim. P. 32.1(a)(6); 18 U.S.C. § 3143. Every arrestee has an initial appearance, preliminary hearing (if detained), and final revocation hearing, and is entitled to an attorney at all of those hearings, occupying resources of Federal Public Defender offices, magistrate judges, and U.S. Attorneys' offices. See Fed. R. Crim. P. 32.1. And all of this before a supervisee even gets before the District Court for adjudication and sentencing. The person sentenced to the average of 9.5 months imprisonment is not eligible for good time credits, *see* 18 U.S.C. § 3624(b) and must serve the full sentence; so the 12,000 years of imprisonment imposed every year is close to an actual measure of time and resources spent by BOP incarcerating violators.

%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf) (accessed Apr. 2, 2024); *see also* Federal Probation System Statistical Tables for the Federal Judiciary, Table E-2 (Dec. 31, 2023) (https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2023/12/31) (Accessed Apr. 2, 2024).

[7] DOJ Report at 20.

[8] *Id.* at 17.

[9] *Id.* at 20.

The questions presented here directly impact the allocation of those resources. That nearly every supervisee revoked for a technical non-criminal violation received imprisonment calls into question whether the predominate use of supervised release in practice is, as this Court has said, to provide the "help needed for successful reintegration" to "those, and only those, who need[] it." *Johnson v. United States*, 529 U.S. 694, 709 (2000). Instead, it shows a widespread practice in which "courts . . . wash their hands of the worst cases at the end of reimprisonment." *Id*. at 710. Just like here, where the district court imposed years of imprisonment on men with no resources and significant disabilities with no offer of reentry assistance – at the end of their prison terms, they will be cut off.

IV. These Cases Present Both Issues Cleanly

Both questions presented are material to the outcome of these cases. The difference in standards of review will not always affect the outcome. But it breached the surface in these cases, as it will for every novel legal argument regarding revocation in the Fourth Circuit. Both Mr. Lewis and Mr. Scott raised, in the district court and on appeal, the legal question of whether the § 3583(e) factors are exclusive and whether courts may consider retribution when imposing prison on revocation of supervised release. In Mr. Scott's case, the panel noted that its review of revocation sentences was done in "a more deferential appellate posture than . . . when reviewing original sentences." Pet. App. 14a; 2024 WL 33673, *1 (quoting *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015)). It also relied on *United States v. Webb*, 738 F.3d 638, 641 (4th Cir. 2013), which itself applied the "plain" prong of "plainly

unreasonable" to indulge mentions of omitted statutory factors, as long as they did not predominate. In Mr. Lewis's case, the Court did the same, acknowledging that the district court referenced "the need 'to provide just punishment'" but affirmed, relying on *Webb* to forgive the reference. 90 F.4th at 300. The standard of review therefore matters here.

So does the scope of goals a court may consider when imposing imprisonment on revocation. The district court in these cases expressly invoked just punishment and the need to promote respect for the law – indeed, singled out those particular factors for express mention in its sentencing explanations. And, significantly, it imposed no further supervised release on either defendant, essentially "wash[ing its] hands" of them "at the end of reimprisonment" (and cutting them off from in-prison state reentry services due to the federal detainer, to boot). *Johnson*, 529 U.S. at 710. The characterization of the sentences imposed here as retributive is therefore strong on this record. Evaluated under the proper standard, the result will be different.

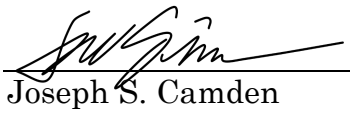
Last, in contrast to many supervised release revocation sentences, which become moot due to their short length (despite their frequent imposition), Mr. Lewis's and Mr. Scott's sentences will not. Due to the intervening state court sentences, they will not even begin serving their supervised release revocation sentences until 2026 and 2031, respectively. This case is therefore the ideal vehicle to resolve both questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender
for the Eastern District of Virginia



Joseph S. Camden
Counsel of Record
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 565-0830
Joseph_Camden@fd.org

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