No. 17-1154

IN THE
Supreme Court of the United States

CALVIN COLEMAN,
*Petitioner,*

*v.*
UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

# REPLY ON PETITION FOR CERTIORARI

ROBERT A. RATLIFF
ROBERT A. RATLIFF, PC
713 Dauphin Street
Mobile, AL 36602

ISHAN K. BHABHA
*Counsel of Record*
KATHRYN L. WYNBRANDT*
JENNER & BLOCK, LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 637-6327
ibhabha@jenner.com

**Not admitted in D.C.; supervised by principals of the Firm*

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In its brief in opposition to certiorari, the Government does not contest that a clear conflict of authority exists on the question presented. It does not make any meaningful attempt to defend as correct the legal rule applied by the Eleventh Circuit below and those circuits with which the Eleventh Circuit is in agreement. It does not disagree that the question presented impacts a significant number of federal inmates nationwide. And, it does not dispute that the sole basis for the Eleventh Circuit's ruling in Petitioner Calvin Coleman's case was the legal question that is the subject of the circuit split. Thus, if the Court were to grant certiorari and agree with the rule proposed by Petitioner—a rule that is the law in the Third Circuit—it would vacate the Eleventh Circuit's decision and remand the case for that court to apply the correct legal rule to the facts of Petitioner's case.

The Government's basis for opposing certiorari is its hypothesis that Petitioner's sentence might ultimately not change upon remand. But that is no basis at all. The fact that once a procedural sentencing error is corrected, a defendant may nonetheless receive the same sentence under the correct application of the law is no reason for this Court to deny certiorari on the question of the legality of the sentencing procedure.

The petition for certiorari should be granted.

## I. THE ELEVENTH CIRCUIT'S DECISION WAS BASED SOLELY ON THE LEGAL ISSUE UPON WHICH THE CIRCUITS ARE IN CONFLICT.

With good reason, the Government does not dispute that the Eleventh Circuit ruled on a single ground: as a matter of circuit law, a district court is not required to consider the 18 U.S.C. § 3553(a) factors when resentencing a defendant whose supervised release has been revoked pursuant to 18 U.S.C. § 3583(g). BIO 5-6. As the court of appeals explained, "[t]his Court has held that, 'when revocation of supervised release is mandatory under 18 U.S.C. § 3583(g), the statute does not require consideration of the § 3553(a) factors.'" Pet. App. 4a (quoting *United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000)). As a result, and because the court recognized itself "bound to follow *Brown* unless and until it is overruled . . . by the Supreme Court," the court held it could not "follow the reasoning of the Third Circuit, which has held that district courts must consider the § 3553(a) factors even when revocation of supervised release is mandatory." *Id.* 4a-5a & n.4 (citing *United States v. Thornhill*, 759 F.3d 299, 309 (3d Cir. 2014)). As a result of its ruling as a matter of law, the Eleventh Circuit "did not address" the Government's alternative arguments for affirmance of Petitioner's sentence. BIO 6.

The Government's arguments for denial of certiorari are the same arguments the Eleventh Circuit declined to address. As here, *see* BIO 15-16, the Government argued below that "even if the reasoning of *Thornhill* applied, the record in this case makes clear that the district court adequately considered the § 3553(a)

factors." Pet. App. 5a n.5. The court explicitly noted it "d[id] not address" this argument. *Id.* Likewise, and again as here, *see* BIO 9-11, the Government argued that Petitioner "cannot show that any error would have affected his substantial rights." Pet. App. 5a n.5. And, again, the court explicitly did not base its affirmance of Petitioner's sentence on this alternate ground. *Id.*

As explained below, there are strong reasons to question the Government's predictions as to what might occur on remand. And, even if the Government were correct and Petitioner would receive the same sentence under the correct legal rule, that is no reason to deny certiorari. Critical here—and undisputed by the Government—is that the Eleventh Circuit based its ruling on a legal rule that it acknowledged was in conflict with the Third Circuit. The ruling below thus presents the precise issue upon which courts are divided, and were the Court to agree with Petitioner, the Eleventh Circuit's decision would need to be vacated and the case remanded.

## II. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

As described in the petition, and not disputed by the Government, there is an acknowledged and entrenched conflict among the circuits on the question presented. The Third Circuit has held district courts are required to apply the § 3553(a) factors when resentencing a defendant under § 3583(g). *See* Pet. 11-12. The Fifth, Sixth, Tenth, and Eleventh Circuits have held district courts are not required to apply those factors. *See id.* 8-10. Courts in multiple circuits have recognized this

conflict. *See United States v. Jones*, 774 F.3d 399, 404 (7th Cir. 2014); Pet. App. 4a-5a n.4. And there is no reason to believe—and the Government does not suggest otherwise—that the disagreement on this legal question will be resolved absent this Court's intervention.

The Government devotes all of three paragraphs to discussing the circuit conflict, *see* BIO 7-9, and it does not dispute that a conflict exists, *see id.* 10 (noting "some disagreement among the circuits"); *id.* 16 (noting "the conflict that petitioner identifies"). Rather, the Government attempts to minimize the extent of this conflict in two unpersuasive ways.

*First*, the Government notes "[a]t least in the published decisions on which petitioner relies . . . courts of appeals did not confront circumstances in which district courts in fact declined to consider the Section 3553(a) factors." *Id.* 8. But the Government does not dispute that courts of appeals have on numerous occasions confronted circumstances in which there is no indication that the § 3553(a) factors were considered, including multiple cases cited in Mr. Coleman's petition. *See, e.g.*, *United States v. Burke*, 677 F. App'x 619 (11th Cir. 2017) (per curiam); *United States v. Hefflin*, 563 F. App'x 722 (11th Cir. 2014) (per curiam); *United States v. Hodges*, 559 F. App'x 927 (11th Cir. 2014) (per curiam); *United States v. Freeman*, 396 F. App'x 674 (11th Cir. 2010) (per curiam); *United States v. Davis*, No. 09-11628, 2009 WL 3193997 (11th Cir. Oct. 7, 2009) (per curiam); *United States v. Pritchett*, 338 F. App'x 883 (11th Cir. 2009) (per curiam); *United States v. Johnson*, 340 F. App'x 590 (11th Cir. 2009) (per curiam); *United States v.*

*Jacobs*, 312 F. App'x 238 (11th Cir. 2009) (per curiam); *United States v. Turk*, 240 F. App'x 859 (11th Cir. 2007) (per curiam); *United States v. Polke*, 224 F. App'x 945 (11th Cir. 2007) (per curiam); *United States v. Finney*, 154 F. App'x 865 (11th Cir. 2005) (per curiam); *see also* Pet. 9 n.3, 10 n.4.

In one of the cases cited in the petition, for example, the Eleventh Circuit relied on *Brown* to affirm a 36-month sentence—the maximum for the offense—despite the lower court giving "no weight" to the defendant's cooperation with authorities, which the court acknowledged was "relevant to multiple 18 U.S.C. § 3553(a) factors." *Burke*, 677 F. App'x at 620. In another, the Eleventh Circuit affirmed a defendant's sentence without any inquiry at all into what the district court considered because "the only limitation on a sentence imposed following the mandatory revocation of supervised release is that it not exceed the [statutory] maximum term[.]" *Hefflin*, 563 F. App'x at 723 (internal quotation marks omitted). The Government does not dispute that the governing law in these circuits is that district courts need not consider the § 3553(a) factors, and these cases are indicative of the unremarkable proposition that courts follow this governing law.

*Second*, the Government claims that although district courts are not required as matter of law to consider the § 3553(a) factors, a number of district courts "consider the Section 3553(a) factors as a matter of course in imposing a sentence upon the revocation of supervised release." BIO 17. But even if courts voluntarily apply the correct procedure on occasion, that is scant comfort for defendants in situations where

courts follow circuit law and decline to apply the § 3553(a) factors—as was the case for Petitioner and many others like him. *See supra* 4-5. Put another way, an assertion that courts may "seldom rely upon impermissible factors in reaching sentencing decisions," BIO 17 (quoting *United States v. Santiago-Rivera*, 594 F.3d 82, 85 (1st Cir. 2010)), says nothing about the instances in which they do. *See United States v. Santiago-Rivera*, 594 F.3d 82, 85-86 (1st Cir. 2010) (acknowledging the existence of cases where impermissible factors were considered).

Indeed, the government's acknowledgement that district courts within the Eleventh Circuit occasionally apply the § 3553(a) factors in § 3553(g) resentencing proceedings only provides further support for Petitioner's proposed legal rule. That district courts sometimes *voluntarily* apply the § 3553(a) factors in § 3553(g) proceedings demonstrates the Third Circuit's rule is both sensible and non-burdensome. The Government's cases thus provide yet another reason for this Court to grant certiorari and hold the Third Circuit's rule is correct.

Ultimately, the Government offers no justification for the Eleventh Circuit's rule. As noted in the petition, the Third Circuit's rule is correct both because Congress would have had no reason to include reference to the § 3553(a) factors in § 3553(g), and because consideration of the § 3553(a) factors during resentencing comports with the broader statutory sentencing scheme. *See* Pet. 17-18 (discussing *Thornhill*, 759 F.3d at 309). The Government makes no counterargument. It quotes the one-sentence holdings of courts that disagree with the

Third Circuit, but makes no claim that those courts are correct. *See* BIO 7-8.

## III. All Of The Issues Raised By The Government Should Be Addressed By The Eleventh Circuit on Remand.

As discussed above, the Government disputes neither the existence of a conflict among the circuits, nor that the Eleventh Circuit based its affirmance of Petitioner's sentence *solely* on the legal ground over which the circuits are in conflict. Rather, its primary bases for urging this Court to deny certiorari are suppositions about what might occur if the Court were to agree with Petitioner on the law and then remand the case to the Eleventh Circuit. Those arguments provide no reason for this Court to deny review.

*First*, the Government observes this case was before the Eleventh Circuit on plain error review, and that "because any error was not plain, the court of appeals correctly affirmed the district court's decision." BIO 10. It likewise claims Petitioner could not establish that "any error affected his substantial rights." *Id.* But the Government's certainty on these points conflicts with the Eleventh Circuit, which could have, but *explicitly declined to*, rule that any error was not "plain" or that Petitioner could not "show that any error would have affected his substantial rights." Pet. App. 5a n.5. It is not this Court's practice to rewrite lower court decisions to modify their holdings, and were the Court to agree with Petitioner it would be up to the Eleventh Circuit to determine whether any error was plain in light of the application of the correct legal rule. The Government

provides no reason why the Eleventh Circuit should not be the court to conduct this analysis in the first instance. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals, however, did not address this argument, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim." (internal citation omitted)).

*Second*, substituting its brief for the opinion below, the Government argues "[t]he record demonstrates that the district court adequately considered the Section 3553(a) factors." BIO 11. This argument fails on a number of grounds. It fails at the outset for the same reason the Government's plain-error argument fails: the Eleventh Circuit expressly declined to evaluate this argument below, so this Court should not evaluate it in the first instance. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider arguments "not addressed by the Court of Appeals" because "we are a court of review, not of first view"). Moreover, the Eleventh Circuit notably chose not to take the approach reflected in several Eleventh Circuit decisions cited by the Government—holding that a district court need not consider the § 3553(a) factors but that the court had done so anyway. BIO 17. This, too, suggests the Eleventh Circuit would not have found that the district court in fact considered the § 3553(a) factors when sentencing Petitioner.

Regardless, the Government's argument fails because any fair reading of the sentencing transcript demonstrates the district court did not consider or apply the § 3553(a) factors. The district court made no

reference whatsoever to § 3553(a) during the sentencing—contrary to the Eleventh Circuit's command that when a district court applies the § 3553(a) factors the court should "state that it has taken the § 3553(a) factors into account." *United States v. Sanchez*, 586 F.3d 918, 936 (11th Cir. 2009). And while the Government selectively relies on statements it views as suggesting the district court relied on § 3553(a), it ignores statements during sentencing that suggest exactly to the contrary. The court made clear the only upper limit on its sentencing power was the statutory maximum, a lesson taken directly from *Brown*. *See* Pet. App. 12a ("Believe me, if the statutory maximum was higher, I would give it to you. If I could give you the high end of the guidelines, I would give it to you . . . ."). In deciding to impose the highest allowable sentence, the district court dismissed Petitioner's arguments, without explanation, as efforts to "fool" the court. *Id.* 11a. And, rather than provide reasons tethered to *any* § 3553(a) factor, the district court applied its personal judgment that Petitioner had "no future with [his] family or with anybody else." *Id.* 12a.

Ultimately, even were it the case that the district court, applying the § 3553(a) factors, would reach the same 36-month sentence on remand, that is of course no reason for this Court not to vacate the Eleventh Circuit's decision below and require resentencing. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (holding a sentence presumptively reversible when calculated under the wrong guidelines range, regardless of "whether or not the defendant's ultimate sentence falls within the correct range"). In fact, this

Court has in the past vacated and remanded cases notwithstanding its recognition that the same sentence might be imposed. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 505 (2011) (vacating and remanding where proper application of the § 3553(a) factors might still yield the same sentence).

*Third*, the Government claims "[t]he district court's consideration of and explanation of the Section 3553(a) factors would have sufficed in the Third Circuit, just as it did in the Eleventh Circuit." BIO 15. That assertion is incorrect. In *United States v. Thornhill*, the district court considered in detail the § 3553(a) factors in a manner completely absent from Petitioner's sentencing. The *Thornhill* court analyzed "incapacitation and deterrence," discussed various alterative options probation officers had tried, and only once concluding that the defendant had "fail[ed] to comply with any directive," did the court impose a sentence. 759 F.3d 299, 313 (3d Cir. 2014) (alteration in original and quotation marks omitted). In Petitioner's case, the Court engaged in none of this analysis, choosing instead to dismiss Petitioner's account out of hand and impose the maximum sentence. Pet. App. 11a ("I don't know who you think you're trying to fool with your comments here today, but they didn't fool me and they don't fool me."). Petitioner's sentencing does not reflect any consideration of the § 3553(a) factors as required by the Third Circuit, and would not have sufficed under *Thornhill*.

As noted in the petition, this Court has granted cases arising on plain error review, determined the correct substantive legal rule, and then remanded the case for

the lower courts to apply that rule. *See* Pet. 16 n.6 (citing *Fowler v. United States*, 563 U.S. 668, 678 (2011)). The Court should follow this practice here. It should grant the petition and make clear that the Third Circuit's rule—which the Government does not even argue is incorrect as a matter of law—should govern the numerous § 3583(g) resentencings that occur annually.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. RATLIFF
ROBERT A. RATLIFF, PC
713 Dauphin Street
Mobile, AL 36602

ISHAN K. BHABHA
*Counsel of Record*
KATHRYN L. WYNBRANDT*
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 637-6327
ibhabha@jenner.com

**Not admitted in D.C.; supervised by principals of the Firm*

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