

No. _____

IN THE
Supreme Court of the United States

DERRICK BELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

- I. Since there is a Guidelines range for supervised release and the Supreme Court requires a judge to make Guideline calculations as part of a sentencing hearing, did the sentencing judge err by imposing a 3-year term of supervision without calculating that Guidelines range?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM 2018

DERRICK BELL,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner, DERRICK BELL, respectfully prays that a writ of certiorari issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on April 10, 2018, denying Mr. Bell's criminal appeal.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at --- F.3d ---- 2018 WL 1725060. (Pet. App. 1a-6a)

JURISDICTION

The appellate court entered its judgment on April 10, 2018. (Pet. App. 7a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

In *Rita v. United States*, 551 U.S. 338, 347-48 (2007) and *Gall v. United States*, 552 U.S. 38, 49-51 (2007), this Court said district courts must calculate a defendant's Guidelines range at the sentencing hearing. A defendant's length of supervised release is part of a defendant's sentence. See *United States v. Kappes*, 782 F.3d 828, 837 (7th Cir. 2015); 18 U.S.C. § 3583(b)(2). It is subject to a Guidelines range calculation. See U.S.S.G. § 5D1.2(a)(2). Therefore, a district court's failure to calculate a defendant's Guidelines range for the term of supervised release violates *Rita* and *Gall*.

STATEMENT OF THE CASE

This petition seeks review of Seventh Circuit precedent which allows district court to forgo performing a Guidelines calculation during a defendant's sentencing hearing. This Court should address this issue because Seventh Circuit precedent contradicts controlling Supreme Court precedent and will allow

district courts in the Seventh Circuit to disregard *Rita* and *Gall* with respect to supervised release.

1. Mr. Bell pled guilty to violating 18 U.S.C. § 922(g)(1). (Pet. App. 1a-2a). Statutorily, he faced up to ten years' imprisonment and up to three years' of supervised release for his offense. *See* 18 U.S.C. § 924(a)(2); 18 U.S.C. § 3583(b)(2). The U.S. Sentencing Guidelines advised the judge to impose one to three years of supervised release. *See* U.S.S.G. § 5D1.2(a)(2).

2. At Mr. Bell's sentencing hearing, the judge imposed the statutory maximum three years of supervision. (Pet. App. 2a). The judge did so without ever calculating the Guidelines range for supervised release. (Pet. App. 2a).

3. Mr. Bell appealed to the Seventh Circuit and argued, among other things, that the district court erred by not calculating the Guidelines range for supervised release. (Pet. App. 2a).

4. After acknowledging that *Gall* require a sentencing judge to calculate a defendant's Guidelines range at the beginning of the sentencing hearing and that failure to calculate a Guidelines range is a significant procedural error under *Gall*, the Seventh Circuit's *Bell* opinion nonetheless decided that district court is "not required" to determine the Guidelines range. (Pet. App. 3a).

REASON FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve the disconnect between controlling authority such as *Rita* and *Gall* and the discordant approach of the Seventh Circuit which allows district courts to forgo calculating the Guidelines range for supervised release at the sentencing hearing. This case presents an ideal vehicle for resolving the conflict since the rule of *Rita* and *Gall* is clear and the Seventh Circuit's divergence from the rule allows for ongoing disregard of a simple sentencing procedure that protects defendants.

I. Since there is a Guidelines range for supervised release and the Supreme Court requires a judge to make Guideline calculations as part of a sentencing hearing, the sentencing judge erred by imposing a 3-year term of supervision without calculating that Guidelines range.

1. A defendant's length of supervised release is part of a defendant's sentence. *See United States v. Kappes*, 782 F.3d 828, 837 (7th Cir. 2015); *see also* § 3583(b)(2). It is necessarily subject to a Guidelines range calculation. *See* U.S.S.G. § 5D1.2(a)(2). So, Supreme Court precedent requires district courts to calculate a defendant's Guidelines range at the sentencing hearing. *Rita*, 551 U.S. at 347-48; *Gall*, 552 U.S. at 49.

2. Supervised release is a serious issue. More than 95% of all defendants receive supervised release. *See* Christine S. Scott-Hayward, "Shadow Sentencing: The Imposition of Federal Supervised Release," 18 *Berkeley J.Crim. L.* 180, 182 n.6 (2013). Supervision comes with a multitude of mandatory and discretionary conditions which greatly restrict defendants' liberty. *See* 18 U.S.C. §

3583(d); 18 U.S.C. § 3563(b). Should a mere preponderance of the evidence show a defendant has violated even one supervised release condition, a judge can imprison a defendant. *See* 18 U.S.C. § 3583(e)(3). Indeed, one in three people on supervised release will have their supervised release revoked. *See* Scott-Hayward, 18 Berkeley J.Crim. L. at 182 n.8. A defendant has no Sixth Amendment rights at a revocation hearing since revocations are not considered criminal proceedings. *See United States v. Boultinghouse*, 784 F.3d 1163, 1171 (7th Cir. 2015). A defendant has, however, a Fifth Amendment right to counsel if the defendant has a colorable claim against revocation. *See United States v. Eskridge*, 445 F.3d 930, 932 (7th Cir. 2006). And a defendant who is imprisoned upon revocation gets an average sentence of eleven months. *See United States v. Thompson*, 777 F.3d 368, 375 (7th Cir. 2015) (citing Scott-Hayward, 18 Berkeley J.Crim. L. at 182).

3. Given how the imposition of supervised curtails a defendant's basic liberties and poses a huge risk of reimprisonment, it is important for a judge to consider what amount of supervision is necessary per 18 U.S.C. § 3553(a)'s parsimony provision. Calculating the Guidelines range at the sentencing hearing is a critical means of demonstrating that the judge has considered that serious sentencing issue. Moreover, both *Rita* and *Gall* require a judge to explicitly make

a Guideline calculation at the sentencing hearing. *Rita*, 551 U.S. at 347-48; *Gall*, 552 U.S. at 49.

4. Yet, in *Bell*, the Seventh Circuit eliminated that important procedural protection by allowing district courts to forgo the Guidelines calculation with respect to supervised release. (Pet. App. 3a). *Bell* said it was confident that the district court knew the Guidelines range because it was included in the presentence investigation report (PSR) which the sentencing judge adopted. (Pet. App. 3a).

5. *Bell* cannot be squared with *Rita* and *Gall*. *Rita* and *Gall* each had a PSR and the judge presumably adopted the PSR. While every jurist who considered those cases likely had confidence that the sentencing judge knew the Guideline range, *Rita* and *Gall* nevertheless vacated and remanded. In doing so, *Rita* and *Gall* established the primacy of calculating the Guidelines as part of a sentence's procedural reasonableness. See *Rita*, 551 U.S. at 347-48; *Gall*, 552 U.S. at 51. *Bell* cannot create a rule that allows lower courts to disregard *Rita* and *Gall*.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

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