1/12/19

No. 18-919

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT DAVIES,
Petitioner
v.
UNITED STATES,
Respondent

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent, but a district court's original sentencing intent may be undermined by altering one portion of the calculus. See *Pepper v. United States*, 131 S.Ct. 1229, 1251 (2011). If a district court cannot properly determine whether, considering all sentencing factors, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), the resulting sentence would not bear the reliability that would support a "presumption of reasonableness" on review. See *Gall v. United States*, 552 U.S. 38, 51 (2007). And regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. See *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1903 (2018).

The question presented is whether, and to what extent, a sentence that lacks reliability because of unjust procedures satisfies the "interest of justice" prong of 18 U.S.C. §3583(e)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Davies respectfully prays that this Court will issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit summarily affirming the denial of his motion to terminate supervised release.

OPINIONS BELOW

The opinion of the Third Circuit, U.S. Court of Appeals appears in the Appendix ("App.") to this petition at App. 1a-8a. The opinion of the U.S. District Court appears at App. 9a-30a. Other relevant opinions of each court follow thereafter.

JURISDICTION

A panel of the court of appeals entered judgment and a *per curiam* opinion on August 17, 2018. No petition for rehearing or rehearing en banc was filed. On October 24, 2018, the Honorable Samuel A. Alito, Justice of the United States Court of Appeals for the Third Circuit, granted Petitioner a 60-day extension of time to file a petition for a writ of certiorari, thereby extending the due date from November 15, 2018, to January 14, 2019. This petition was sent to the Clerk through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on January 11, 2019. The district court had jurisdiction under 18 U.S.C. §3583(e). The court of appeals had jurisdiction under 28 U.S.C. §1291. This court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Fifth Amendment, U.S. Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases aris-

ing in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. §3583—Inclusion of a term of supervised release after imprisonment.

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining 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, shall consider

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).

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a

drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall

be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of Conditions or Revocation.—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 pre-

viously 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 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;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this para-

graph may be imposed only as an alternative to incarceration.

18 U.S.C. §3553. Imposition of a sentence.

(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 imposed, 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 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.

(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.

STATEMENT OF THE CASE

Petitioner Robert Davies is serving a lifetime term of supervised release in the Northern District of Ohio, after pleading guilty in the United States District Court for the Western District of Pennsylvania to knowingly traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. §2423(f)(1), with another person, in violation of 18 U.S.C. §2423(b) and (e). App. 2a. The district court sentenced Davies to a term of imprisonment of 19 months—with credit for 19 months in pretrial detention—followed by a life term of supervised release. Though the plea agreement included a waiver of his right to file a motion under 28 U.S.C. §2255 motion, Davies had valid grounds to collaterally attack his conviction and sentence.

Overall, Davies filed four §2255 motions, one Fed. R. Crim. P. 41(g) motion to return property, one post-conviction motion to dismiss the indictment for lack of subject-matter jurisdiction, one direct appeal from the conviction and sentence, three recusal motions, two mandamus petitions, three certiorari petitions, and one motion to modify conditions of release in 2016. The district court denied each request for relief without a hearing, the Third Circuit summarily affirmed or denied each request for review, and this Court denied each certiorari petition. See *Davies v. United States*, 138 S.Ct. 751 (Jan. 16, 2018); *Davies v. United States*, 137 S.Ct. 2106 (May 1, 2017); *Davies v. United States*, 136 S.Ct. 1202 (Feb. 9, 2016).

On January 3, 2018, Davies filed a motion to terminate his supervised release pursuant to 18 U.S.C. §3583(e)(1). The district court ordered the government's response to Davies' §3583(e)(1) motion on or before January 26, 2018. App. 25a. Without seeking an extension of that deadline, the government's re-

sponse was filed seven days late[1], and it further failed to address the §3553(a) factors.[2] App. 7a, 25a.

In an order entered on May 16, 2018, the district court denied Davies' motion without a hearing, App. 18a, stating that Davies is not entitled to early termination of supervision or modification of the conditions of release, App. 11a-23a, concluding that "the serious crime committed in this case," "the detrimental impact on the minors, petitioner's mental health, history of drug and alcohol abuse, use of a computer, and the dangerousness of the crime committed in this case are still concerning to the court." App. 23a. According to the district court, the need for "ongoing supervision" outweighs Davies' substantial liberty interests. App. 23a.

Davies filed notice of appeal that same day. App. 18a. The next day, however, he woke up to learn that his supervising probation officer petitioned the district court to revoke his supervised release for allegedly violating multiple conditions thereof,[3] although he found compliant the day before. App. Rather than schedule an initial appearance, or a preliminary

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[1] The district court stated that it "did not rely upon the government's response in opposition to deny petitioner's motion to terminate supervision." See App. 7a, 25a.

[2] The district court stated that it "analyzed the §3553(a) factors, which the government did not address, and determined it would deny the motion." See App. 25a (emphasis added).

[3] The initial allegations were dismissed on Nov. 5, 2018, ECF No. 284, after two new allegations were added, Supplemental Petition, ECF No. 301, filed 11/01/2018, one of which the district court rendered moot on Dec. 6, 2018. The sole remaining allegation—traveling outside the district without permission to discuss this case with a Latin-American television station near Columbus, Ohio—awaits adjudication.

hearing, the district court ordered Davies to appear with counsel — that the court knew he did not have — for a final revocation hearing. App. 3a.

The district court retroactively appointed counsel for Davies, and reset the hearing date to June 11, 2018. That day, appointed counsel admitted to Davies and his father that the chief district judge called him personally and asked him to represent Davies. According to counsel, the judge expected Davies to be a "difficult defendant," and thought that that particular attorney could "handle" him. On Nov. 5, 2018, the initial allegations were dismissed, but two more allegations were added. ECF No. 284. The chief district judge rendered one of those allegations moot on December 6, 2018, the day she assumed senior judge status.

On May 24, 2018, prior to the filing of any merit briefs, the Third Circuit notified the parties that the case will be submitted to a panel of this Court for possible summary action and for a decision on the issuance of certificate of appealability ("COA"). Neither party filed a direct response to the notice of summary action. Instead, Davies filed a Motion for Summary Reversal on June 10, 2018, arguing that it cannot be discerned from the record or the decision that the district court appropriately exercised its discretion after considering the statutory factors, and because affirming the decision would promote post-hoc rationalization of sentencing decisions, not meaningful review. See *Motion for Summary Reversal*, p. 1, filed 06/10/2018. Alternatively, Davies requested a merit briefing schedule. Id., p. 5.

The prosecutor responded to the Motion, arguing that Davies focused almost exclusively on the validity of his underlying conviction and sentence, and that his Motion should be denied because his argu-

ments are "properly raised either on direct appeal or in a motion under 28 U.S.C. §2255." See *Response to Motion for Summary Reversal*, p. 2. After giving a distorted summary of prior proceedings, see *Response to Motion for Summary Reversal*, p. 3, including a key distortion that "Davies has filed two motions pursuant to 28 U.S.C. §2255," id., the prosecutor argued that the district court explained in detail "that Davies failed to meet his burden to demonstrate an extraordinary reason, that is, something beyond mere compliance with conditions, to warrant early termination." See *Response to Motion for Summary Reversal*, p. 4. Thus, according to the government, the district court properly considered both §3583(e)(1), (2) and §3553(a), as applied to the facts of the case, to conclude that termination and/or modification was not appropriate". Id.

The prosecutor focused heavily on the fact that the probation office petitioned the district court to revoke Davies' supervision, ECF No. 284, arguing that "the undisputed record of events since Davies filed his motion for early termination and/or modification confirms that the District Court rendered a correct decision. That is, since the time of the motion, Davies' Probation Officer has filed a petition for show cause, and while that petition remains outstanding and Davies has not admitted to the alleged violations, there is no dispute that Davies has been given three months to achieve compliance with his conditions of supervision." *Response to Motion for Summary Reversal*, p. 6-7. According to the government, such an arbitrary order is sufficient proof that Davies "is unable to comply with conditions of supervision" and, therefore, "cannot meet his burden to demonstrate that supervision is no longer warranted." *Id.* The

panel ruled that the revocation proceeding is unrelated to this appeal. App. 3a, n. 3.

Davies replied, pointing out that the government's argument that §3583(e) does not provide a mechanism for a collateral attack on a *previously unchallenged* conviction or sentence was merely a post-hoc rationalization of the district court's decision. See App. 39a, n. 1 ("As detailed in the court's opinion dated May 5, 2016 (ECF No. 200), prior to petitioner filing his third §2255 motion (ECF No. 186), he filed two other §2255 motions (ECF Nos. 103, 181.)." Thus, the government sought to divert the court's attention to the petition for a show cause hearing. See *Reply to Response to Motion for Summary Reversal*, p. 1-2, filed 06/19/2018, citing *Chavez-Meza v. United States*, 585 U.S. ___ (June 18, 2018) (held: where the record *as a whole demonstrates* the judge had a reasoned basis for his decision, the judge's explanation for petitioner's sentence reduction was adequate).

Because the record affirmatively shows that Davies did raise these challenges in his direct appeal, which the court of appeals dismissed as untimely, and in his four §2255 motions, none of which were disposed of on the merits, the government's argument lacked merit. See App. 31a-33a (dismissing direct appeal as untimely); App. 39a, n. 1 ("As detailed in the court's opinion dated May 5, 2016, prior to petitioner filing his third §2255 motion, he filed two other §2255 motions); App. 58a ("to the extent that Davies requests that we order the District Court to grant his recently-dismissed *third* §2255 motion, or take some other action to simply vacate his conviction, he is not entitled to the mandamus relief. Mandamus should not be issued where relief can be obtained through an ordinary appeal.").

Davies further argued that "[s]ubsequent to even the government's response in opposition to summary reversal, the Supreme Court in *Rosales-Mireles v. United States*, 585 U.S. ___ (June 18, 2018), held that a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court of appeals to exercise its discretion under Fed. R. Crim. P. 52(b) to vacate the defendant's sentence. Such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief." See *Reply to Response to Motion for Summary Reversal*, p. 7, ¶18. Thus, *Rosales-Mireles* and *Chavez-Meza* constitute intervening decisions, which overcome summary disposition of an appeal and require merit briefing. See *Reply to Response to Motion for Summary Reversal*, p. 7, ¶18.

On August 17, 2018, a panel of the Third Circuit Court of Appeals summarily affirmed the district court's denial of early termination, finding that "no substantial question is presented by this appeal," App. 3a, and no abuse of discretion simply because the district court "reasoned" that the terms and conditions of supervision were imposed in consideration of the pertinent §3553(a) factors". App. 3a. The panel also ruled that a COA is not required, App. 2a, n. 2, and that the revocation proceeding is unrelated to this appeal, App. 3a, n. 3.

The record as a whole will affirmatively show the following facts and circumstances.

1. During the plea hearing, defense counsel specifically stated for the record that the FBI case agent testified on Feb. 5, 2009, that there was nothing in his investigation which led him to believe that besti-

ality was intended or would have occurred. See *Plea Hearing Transcript*, ECF No. 98 p. 33.

2. The internet chat-rooms involved in this case were not "pre-teen" chat-rooms; they were for ages 15-19 and 18+. *Exhibit*, ECF No. 188-4, filed 7/6/15.

3. On March 17, 2009, Davies filed a motion to suppress statements made to local police, ECF No. 53, alleging that on Nov. 4, 2007 at 12:45 a.m., he was arrested in Cecil Township, Pennsylvania without a warrant or probable cause to believe he committed a crime, and taken to the police station for an investigative detention. At 4:00 a.m., Davies was re-arrested by two City of Washington police officers without a warrant or probable cause to believe he committed a crime, and taken to their police station for an investigative detention until he made an oral statement, which was used to initiate federal prosecution. See *Motion to Suppress*, ECF No. 53, filed 03/17/2009. The district court did not order the government's response or schedule a hearing. Nor did the court issue a decision from which Davies could appeal. App. 67a n.2. In 2010, without the benefit of having the initial arrest report, the district court ruled that the Cecil Township police "had reasonably trustworthy information to believe that petitioner had committed an offense." App. 174a n.5. Nearly five years later, with the benefit of having the Cecil Township arrest report, the district court ruled that the arresting officer "ultimately concluding that a crime did not occur within his jurisdiction," i.e., Cecil Township, "does not mean that a crime did not occur in the City of Washington." App. 125a. Years later, the district court admitted terminating Davies' motion to suppress three months after it was filed, and one day after accepting his guilty plea. App. 66a n.1.

4. The FBI case agent testified on more than one occasion that he discovered evidence of possession of child pornography. More specifically, in his return of a search warrant he obtained in May 2008, the FBI case agent swore under penalty of perjury that he discovered "14 possible images depicting child pornography, 2 possible movie files containing child pornography, the image described in the affidavit, and three additional images with teen or 17 years old in the title."[4] At Davies' bond and sentencing hearings, however, the agent testified that he discovered "72 images and 13 videos". At sentencing, the district court ordered criminal forfeiture pursuant to 18 U.S.C. §2253(a)(3). App. 147a. In 2014, the district court denied Davies Rule 41(g) motion, App. 138a, based on the prior forfeiture order and the government's response that the computer still contained suspected child pornography. One week later, the court granted the government a final order of forfeiture, App. 137a, in which it changed the forfeiture statute from §2253(a)(3) to 18 U.S.C. §2428(a)(1). The court of appeals affirmed, finding "the time for filing a notice of appeal has expired" and "the reference to §2253 in the plea agreement was merely a scrivener's error which does not negate the explicit terms of the plea agreement that stated the property to be forfeited." App 130a-136a. Two months later, the district court denied Davies' §2255 motion stating, in part,

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[4] See *In the Matter of the Search of a Dell XPS 400 desktop computer, a Dell Dimension desktop computer, 82 CD/DVD's, a Seagate external hard drive, a Lexar SD 128 MB card, and a Seagate external HDD, obtained from the home of Robert Davies by Federal search warrant, currently located at 3311 East Carson Street, FBI Headquarters, Pittsburgh, PA 15219,* 08-mj-00271-MPK, ECF No. 3, filed 05/29/08.

> "Petitioner was not charged with possessing child pornography, and during his sentencing hearing, the government conceded that there were questionable images found on petitioner's computer, 'but nothing proven to be child pornography.' The court stated its reasons for petitioner's sentence on the record, and made no mention of the alleged image of child pornography, i.e., the court did not rely upon the evidence presented by the government with respect to the alleged child pornography when it imposed upon petitioner a sentence of time served and a lifetime of supervised release."

App. 113a. The district court did not say that at sentencing.

5. At sentencing, the prosecutor argued that Davies "is not a bottom guideline person" given his prior conviction and "the child pornography that was not even charged in this case." App 108a. Four years later, an Ohio trial court vacated that conviction. App 100a. In denying early termination, the district court said it considered the fact that the prior conviction was vacated, App 24a, 106a, and that the sentencing guidelines range was lowered due to the prior Ohio conviction having been vacated. App 24a, 106a. However, the court previously said: "As evidenced by the court's explanations for the reasons behind petitioner's sentence, however, the district court did not rely upon petitioner's prior conviction that was later vacated to impose upon defendant the lifetime term of supervised release." App 109a.

6. Davies first received copies of the Plea Agreement and Rule 11 Transcript as part of the government's response to his opening brief in *United States v. Davies*, No 14-2971, not as part of the government's response to his first §2255 motion. Thus, his

claim that the district court miscalculated sentencing guidelines range by adding two points under U.S.S.G. §2G1.3(b)(2)(A) (misrepresenting his age) and two points under §2G1.3(b)(3)(A) (use of a computer) was first raised in his numerically third §2255 Motion, ECF No. 186; App. 39a n.1. A stipulation embodied within the written plea agreement stated that a two-point increase applied under §2G1.3(b)(2)(A), and another two points under §2G1.3(b)(3)(A). See *Plea Agreement*, ECF No. 62, p. 5, ¶C-2. However, the requisite intent language of §2G1.3(b)(2)(A)—i.e. to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct—was omitted from both the stipulation and the court's *Tentative Findings*, ECF No. 73, p. 3. At sentencing, the prosecutor failed to present any evidence to support the application of either Guidelines range enhancement.

7. The district court ruled that the reason for the lifetime supervised release was "the need to provide" Davies with antipsychotic medication for Tourette's syndrome and Obsessive compulsive disorder ("OCD"). This, according to the district court, will ensure public safety. See *Sentencing Transcript*, ECF No. 84 p. 61. However, Davies continues to serve the lifetime term, even though a licensed psychologist, with whom the government contracted to see local federal probationers, concluded in 2015 that Davies does not need medication. App. 21a-22a.

8. After accepting the pretrial officer's uncontested finding that restitution is not an issue in this case, to which the prosecutor concurred, the district court accepted the prosecutor's last-minute request for a $3,000 restitution order based on an out-of-court stipulation made 15 minutes before sentencing. See *Sentencing Transcript*, ECF No. 84 p. 37. With-

out a Victim Impact Statement or a calculated loss amount, and absent any evidence that Davies' conduct was the proximate cause of harm, id. p. 39, the district court accepted the stipulation, and then accepted Davies' empathetic, but uninformed, offer to raise it to $5,000. Id. pp. 44-45. If, by chance, there was a need for restitution, the recipient was "made whole" in 2010, App. 25a, when Davies paid the full amount after the prosecution threatened to imprison him if he didn't.

9. At sentencing, the district court imposed a special condition of supervision requiring Davies' participation in a sex-offender treatment program and submission to polygraph exams to ensure compliance with rules of the program and conditions of release. Davies completed the program in 2014. In 2016, he filed an emergency motion to terminate this condition because his then-new probation officer ordered him to submit to a polygraph exam. *Motion*, ECF No. 207, 217. The district court denied the motion for reasons wholly unrelated to the issue. See App. 38a. About a year later, the probation officer reinstated the treatment condition because Davies refused to submit to another polygraph exam. After the district court compelled him to submit, he successfully passed the exam. See *Supplemental Petition*, ECF No. 301, filed 11/01/2018. However, the condition has not been terminated.

10. This case did not involve drugs or alcohol. Davies quit smoking marijuana at the age of 21, never used any other controlled substance, rarely consumes alcohol, and passed every scheduled and random drug test—many with just one-hour's notice—since his release from pretrial detention.

REASONS FOR GRANTING THE WRIT

A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent, but a district court's original sentencing intent may be undermined by altering one portion of the calculus. See *Pepper v. United States*, 131 S.Ct. 1229, 1251 (2011). If a district court cannot properly determine whether, considering all sentencing factors, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), the resulting sentence would not bear the reliability that would support a "presumption of reasonableness" on review. See *Gall v. United States*, 552 U.S. 38, 51 (2007). And regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. See *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1903 (2018).

In *Joshua v. United States*, 17 F.3d 378 (D.C. Cir. 1994), the D.C. Circuit Court of Appeals explained that "summary disposition is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Id.* at 379 (granting the United States' motion for summary affirmance). The court further explained the appropriate standard for summary disposition of an appeal, when there has not yet been full briefing of the merits, and no oral argument has been held or allowed:

> Fed. R. App. P. 2 provides:
>
> In the interest of expediting decision, or for other good cause shown, a court of appeals may ... suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and

may order proceedings in accordance with its direction.

"Under the aegis of Rule 2, circuit courts have summarily disposed of appeals using similar but not always identical language. See, e.g., *Chemical Eng'g Corp. v. Marlo, Inc.*, 754 F.2d 331, 335 (Fed.Cir.1984) (court sua sponte summarily affirmed district court; appeal was "clearly hopeless and unquestionably without any possible basis in fact or law"); *Clark v. Gulesian*, 429 F.2d 405, 407 (1st Cir.1970), cert. denied, 400 U.S. 993 (1971) (oral argument was dispensed with because issues were manifestly simple and clear, legal citations were fully dispositive of the issues, and it was concluded that no useful purpose could be served by oral argument); *James A. Merritt and Sons v. Marsh*, 791 F.2d 328, 331 (4th Cir. 1986) (court summarily reversed before full briefing in the interest of expediting a decision); *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1163 (5th Cir. 1969), cert. denied, 394 U.S. 1012 (1969) (court summarily reversed district court's grant of injunction because time was of the essence and because one party's position was clearly correct as a matter of law); *National Labor Relations Bd. v. Playskool, Inc.*, 431 F.2d 518, 519-520 (7th Cir. 1970) (court granted motion for summary affirmance because one party's contentions were found so unsubstantial as to render the appeal frivolous and because time was of the essence); *United States v. Dura-Lux Int'l Corp.*, 529 F.2d 659, 660-662 (8th Cir. 1976) (court sua sponte concluded that summary disposition was appropriate because the questions presented did not require further argument and because one party's contentions were without merit); *Leigh v. Gaffney*, 432 F.2d 923 (10th Cir. 1970) (court granted motion for summary affirmance because question presented was so un-

substantial as to not warrant further argument); *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1163 n. 2 (D.C.Cir. 1972) (court dispensed with additional briefing and argument because the motion for summary affirmance demonstrated "that the merits of the claim are so clear as to warrant expeditious action"). *Joshua,* 17 F.3d at 380.

The *Joshua* court found it clear that the appellant's complaint did not identify any substantive right, founded upon either a statute or the Constitution, which might form the basis for his claim. Thus, the court ruled, summary disposition was appropriate because the position of the government was "so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua,* 17 F.3d at 380, citing *Groendyke*, 406 F.2d at 1162.

In the present case, the record as a whole affirmatively shows that the district court undermined its original sentencing intent by subsequently altering one or more portions of the calculus. As such, Davies' §3583(e)(1) motion identified a substantial liberty interest, founded upon both 18 U.S.C. §3553(a) and the Fifth Amendment to the U.S. Constitution, which formed the basis for his claim. Further, Davies identified both changed circumstances that make continued supervision an unwarranted restraint on his liberty, and intervening decisions in *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018), and *Chavez-Mesa v. United States*, 138 S.Ct. 1959 (2018). Because it cannot be discerned from the record or the decision that the district court appropriately exercised its discretion after considering the statutory factors, a substantial question was presented in his appeal. Therefore, the court of appeals abused its

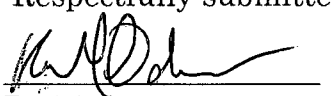
discretion in summarily affirming the district court's decision. App. 1a-8a, 9a-30a.

"There can be no denying that the character of the crime may have an impact on the decisional process. As the Court was required to hold, however, that does not permit any court to condone a violation of constitutional rights." *Nix v. Williams*, 467 U.S. 431, 452 (1984). "The due process right to be sentenced based on accurate information is not limited to information solely about the defendant's actions and criminal history." *United States v. Adams*, 873 F.3d 512, 518 (6th Cir. 2017). With the sentence imposed being "the most critical stage of criminal proceedings," and "the 'bottom-line' for a defendant, particularly where a defendant has pled guilty," *United States v. Rosa*, 891 F.2d 1074, 1079 (3d Cir. 1989), "affirming the [] decision in the instant case would promote post-hoc rationalization of sentencing decisions, not meaningful review." *United States v. Johnson*, 877 F.3d 993, 999-1000 (11th Cir. 2017).

CONCLUSION

Because petitioner has not yet received appellate review on the merits of his claims, and because the same §3553(a) factors must be properly considered before a term of supervised release may be revoked, §3583(e)(3), this Court should issue a writ of certiorari to prevent a fundamental miscarriage of justice.

Respectfully submitted,



Petitioner, *pro se*
Dated: January 11, 2019