No. 17-5503

IN THE SUPREME COURT OF THE UNITED STATES

RAMIRO OCHOA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits reliance on conduct that was the subject of a state court criminal prosecution in revoking a defendant's federal supervised release.

2. Whether the district court plainly erred in including the considerations stated in 18 U.S.C. 3553(a)(2)(A) in explaining the reasons for revocation of petitioner's supervised release.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 687 Fed. Appx. 305.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2017. The petition for a writ of certiorari was filed on July 31, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). C.A. App. 8. He was sentenced to 94 months of imprisonment, to be followed by three years of supervised release. Petitioner did not appeal, served his term of imprisonment, and began his supervised release. Id. at 9-10. While on supervised release, petitioner shot his wife and left the judicial district without permission. Pet. App. 2a. The district court determined that petitioner had violated the terms of his supervised release, revoked his release, and ordered him to serve an additional 24 months of imprisonment. Id. at 5a. The court of appeals affirmed. Id. at 1a-3a.

1. In August 2004, 62 firearms were stolen from a pawn shop in Spokane, Washington. Presentence Investigation Report (PSR) ¶ 18. Subsequent investigation led to the execution of a search warrant at petitioner's residence. Before entering the residence, federal law enforcement agents found a loaded firearm next to a parked vehicle in which petitioner had been sitting. PSR ¶ 21. In the residence, which petitioner shared with his brother, agents recovered a stolen 20-gauge slide action shotgun, a stolen .45 caliber semiautomatic pistol, multiple rounds of ammunition, a police scanner, marijuana, a bag containing glass pipes and white powder, and additional drug paraphernalia. PSR ¶¶ 23-25. At his

arrest, petitioner acknowledged ownership of all three firearms. PSR ¶ 27. He also admitted that he bought and sold methamphetamine. PSR ¶ 28.

After a federal grand jury indicted petitioner on three firearms-related offenses, petitioner pleaded guilty to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). PSR ¶¶ 4, 6. The district court sentenced him to 94 months of imprisonment, to be followed by three years of supervised release. C.A. App. 9-10. Petitioner served his term of imprisonment. On November 26, 2010, petitioner was released from custody and began his three-year term of supervised release. Pet. App. 5a.

In October 2011, while still on supervised release, petitioner shot his wife in the leg while she was holding a newborn baby. C.A. App. 22. Petitioner then forced her, the baby, and his wife's two teenage daughters from a previous relationship into a car, which he drove five hours across the state to Charlotte, North Carolina. Ibid. In Charlotte, he parked the car at a hospital and then fled on foot. Id. at 14. Based on that conduct, petitioner was convicted under North Carolina law of three counts of attempted first degree kidnapping, two counts of possession of a firearm by a felon, and one count of assault with a deadly weapon causing serious injury. Id. at 16. He was sentenced to a term of imprisonment no less than 60 months and no greater than 81 months,

ultimately spending 60 months in prison before being released on an order of supervision. Id. at 16, 23.

2. a. The Probation Office filed a petition alleging that petitioner had violated the terms of his supervised release. On November 7, 2016, the district court held a supervised release revocation hearing. C.A. App. 18-30. Petitioner admitted that he had been convicted of various crimes stemming from his shooting his wife and kidnapping her and her daughters, and that he had also violated the terms of his release by traveling out of the judicial district without permission. Id. at 21. The court accepted petitioner's admissions and revoked his release. Id. at 22, 28.

When a district court determines that a defendant has "violated a condition of supervised release," it "may, after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," revoke the defendant's 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." 18 U.S.C. 3583(e) and (e)(3). The factors enumerated in the provisions cross-referenced by Section 3583(e) include the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. 3553(a)(1); the need for the sentence imposed to deter crime and protect the public, 18 U.S.C. 3553(a)(2)(B) and

(C); the need to provide the defendant with educational or vocational training, medical care, or other corrective treatment, 18 U.S.C. 3553(a)(2)(D); the sentencing range recommended by the Sentencing Guidelines, 18 U.S.C. 3553(a)(4); pertinent policy statements issued by the Sentencing Commission, 18 U.S.C. 3553(a)(5)(A); the need to avoid unwarranted sentence disparities, 18 U.S.C. 3553(a)(6); and the need to provide restitution to victims, 18 U.S.C. 3553(a)(7). Section 3583(e) does not include a requirement to consider the factors identified in 18 U.S.C. 3553(a)(2)(A), which addresses "the need for the sentence imposed * * * to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Ibid.

b. After deciding to revoke petitioner's supervised release, the district court considered what term of imprisonment was appropriate. The court explained that the "principal focus" in imposing a term of imprisonment upon revocation of supervised release is the "breach of trust associated with the violations." C.A. App. 23. After hearing from the parties, the court further explained that, in addition to the "egregious nature of the breach of trust," it also took into account the "serious nature of the conduct." Id. at 28. The district court stated that petitioner's conduct was "deeply troubling." Id. at 27. The court emphasized the violence petitioner directed toward his wife, the baby, and the teenage children, followed by the travel to Charlotte. Id.

at 27-28. The court viewed that conduct as a "serious, serious breach of trust." Id. at 28.

Based on petitioner's criminal history (criminal history category V) and the nature of the violation, the applicable advisory Sentencing Guidelines range was "capped" at 24 months. C.A. App. 22. The court imposed a within-Guidelines term of imprisonment of 24 months. Id. at 28. The court explained that, if it had committed procedural error by miscalculating the Sentencing Guidelines range, it would nonetheless have imposed 24 months as an "alternative variant sentence." Ibid. Petitioner did not raise any substantive or procedural objection in the district court.

3. Petitioner appealed, arguing that the 24-month revocation term was substantively unreasonable and violated the Double Jeopardy Clause. Pet. C.A. Br. 7-22. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. First, the court rejected petitioner's challenge to his within-Guidelines term of imprisonment. The court explained that the district court had correctly calculated the Sentencing Guidelines range and appropriately considered petitioner's "personal history and characteristics" before imposing that term for his "serious breach of trust." Id. at 2a. The court of appeals found "no basis" to disturb that "presumptively reasonable" within-Guidelines term. Id. at 3a. Second, in a footnote, the court agreed with petitioner's acknowledgement that his double jeopardy

challenge is foreclosed by this Court's decision in Abbate v. United States, 359 U.S. 187 (1959), which applied the dual-sovereignty doctrine to reject a double-jeopardy challenge to a federal prosecution that followed a state conviction. Pet. App. 3a n.*.

ARGUMENT

Petitioner contends (Pet. 11-17) that, although his double jeopardy claim is foreclosed by controlling precedent from this Court, see, e.g., Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1867 (2016), the Court should grant certiorari to reconsider the Double Jeopardy Clause's dual-sovereignty doctrine. That contention lacks merit. This case would also be a poor vehicle for considering the validity of the dual-sovereignty doctrine, because revocation of petitioner's supervised release was part of the punishment for petitioner's underlying federal offense (possession of a firearm by a felon), not punishment for the offenses for which he was convicted under state law.

Petitioner also contends (Pet. 17-21) that the district court erred by considering the seriousness of his conduct when addressing the appropriate term of imprisonment to impose upon revocation of petitioner's supervised release. That question was neither pressed nor passed upon below, and this Court has repeatedly denied review in other cases raising it. See, e.g., Clay v. United States, 135 S. Ct. 945 (2015) (No. 14-6010); Overton v. United States, 565 U.S. 1063 (2011) (No. 11-5408); Young v. United States,

565 U.S. 863 (2011) (No. 10-11026); Lewis v. United States, 555 U.S. 813 (2008) (No. 07-1295). The Court should deny review here as well.

1. The court of appeals correctly rejected petitioner's claim that the Double Jeopardy Clause prohibits a federal court from revoking a grant of supervised release based in part to conduct that was the subject of a state criminal prosecution.

a. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. As this Court recently reaffirmed in Sanchez Valle, 136 S. Ct. at 1867, the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns for offenses that consist of the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence" for purposes of the Double Jeopardy Clause. See United States v. Wheeler, 435 U.S. 313, 316-318 (1978); Sanchez Valle, 136 S. Ct. at 1870 (explaining that the Double Jeopardy Clause "drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns'") (brackets in original) (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)). The Double Jeopardy Clause thus does not forbid dual prosecutions by a State and the federal government because a State and the federal government are "two sovereignties, deriving power from different sources." United States v. Lanza, 260 U.S. 377, 382 (1922).

Petitioner recognizes (Pet. 17) that this "dual sovereignty" doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 11-17), however, that this Court should reexamine the line of cases explaining and applying that doctrine on the theory that it is inconsistent with the text and history of the Double Jeopardy Clause. This Court, however, has considered those contentions before and rejected them. In using the term "same offence" in the Double Jeopardy Clause, the Framers incorporated the common law conception of a crime as an offense against the sovereignty of the government. Heath, 474 U.S. at 88. Accordingly, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" Ibid. (quoting Lanza, 260 U.S. at 382). The Court "has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle." Id. at 93.

Moreover, "undesirable consequences would follow" if prosecution by any one State could bar prosecution by the federal government. Abbate v. United States, 359 U.S. 187, 195 (1959). "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts," the Court has explained, "federal law enforcement must necessarily be hindered." Ibid. At the same time, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable

completely to displace state power to prosecute crimes based on acts which might also violate federal law." Ibid. Thus, the dual sovereignty doctrine "finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." Heath, 474 U.S. at 92.

b. In any event, this would be a poor vehicle for reconsidering the validity of this Court's dual-sovereignty precedents because petitioner's claim would fail even if those decisions were overruled. Petitioner has not been prosecuted twice for two offenses with the same elements. The district court's revocation of petitioner's term of supervised release, on the grounds that he violated the conditions of his release by shooting his wife and leaving the judicial district without permission, did not constitute punishment for the conduct for which he was convicted and sentenced under state law.

It is well-settled that the revocation of a term of supervised release based on criminal conduct in violation of the conditions of release does not implicate the Double Jeopardy Clause, because the revocation is not a new prosecution but instead simply part of the punishment for the initial underlying offense (here, possession of a firearm by a felon). See Johnson v. United States, 529 U.S. 694, 700 (2000) (concluding that "postrevocation sanctions [are] part of the penalty for the initial offense"); see also Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("revocation of

parole is not part of a criminal prosecution"). Indeed, in Johnson, this Court cited approvingly United States v. Wyatt, 102 F.3d 241, 244–245 (7th Cir. 1996), cert. denied, 520 U.S. 1149 (1997), for "rejecting [a] double jeopardy challenge on [the] ground that sanctions for violating the conditions of supervised release are part of the original sentence." Johnson, 529 U.S. at 700. Wyatt correctly concluded that "[b]ecause revocation of supervised release amounts only to a modification of the terms of the defendant's original sentence, and does not constitute punishment for the revocation-triggering offense, the Double Jeopardy Clause is not violated by a subsequent prosecution for that offense." Wyatt, 102 F.3d at 245; see also id. at 244 (collecting cases from other circuits). Further review of petitioner's claim that his revocation violated the Double Jeopardy Clause is accordingly unwarranted.

2. Petitioner also contends (Pet. 17-21) that when the district court revoked his supervised release and required him to serve a term of imprisonment, it erred by considering the seriousness of the underlying offense, a factor listed in 18 U.S.C. 3553(a)(2)(A), in addition to the criteria enumerated in 18 U.S.C. 3583(e). That contention lacks merit and does not warrant this Court's review.

a. As a threshold matter, further review would conflict with this Court's "traditional rule * * * preclud[ing] a grant of certiorari * * * when 'the question presented was not pressed

or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"). In the court of appeals, petitioner argued that the 24-month sentence was unreasonable because the district court failed to consider the "totality" of petitioner's "history and characteristics." Pet. C.A. Br. 9. Petitioner did not contend, however, that the district court erred by considering the seriousness of his underlying conduct. Nor did the court of appeals address that issue sua sponte. Petitioner also did not raise the issue in the district court. Petitioner accordingly has failed to preserve the claim in any manner that would make it suitable for review.

b. In any event, petitioner's claim of error is unsound and would not warrant certiorari even if petitioner had preserved it. This Court has repeatedly denied petitions raising this issue. See pp. 7-8, supra (collecting cases). Petitioner provides no basis for a different result here.

Section 3583(e) provides that the district court "may, after considering [certain] factors set forth in [Section 3553(a)]---

> (1) terminate a term of supervised release * * *;
>
> (2) extend a term of supervised release * * *, and may modify, reduce, or enlarge the conditions of supervised release * * *;

> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release * * * if the court * * * finds by a preponderance of the evidence that the defendant violated a condition of supervised release * * *; or
>
> (4) order the defendant to remain at his place of residence during nonworking hours.

18 U.S.C. 3583(e). The list of enumerated factors includes eight of the ten factors in Section 3553(a), but does not mention Section 3553(a)(2)(A) or (a)(3). Section 3583(e) neither expressly requires nor expressly prohibits consideration of the factors set forth in those provisions.

Consistent with the views of the Fourth Circuit, the majority of circuits that have faced the issue have correctly concluded that "the enumeration in § 3583(e) of specified subsections of § 3553(a) that a court must consider in revoking supervised release does not mean that it may not take into account any other pertinent factor." United States v. Young, 634 F.3d 233, 239 (3d Cir.), cert. denied, 565 U.S. 863 (2011); see United States v. Webb, 738 F.3d 638, 641 (4th Cir. 2013) (joining "many of our sister circuits"); see also United States v. Clay, 752 F.3d 1106, 1108 (7th Cir. 2014) (district court may consider Section 3553(a)(2)(A) so long as it "relies primarily on the factors" in Section 3583(e)), cert. denied, 135 S. Ct. 945 (2015); United States v. Vargas-Dávila, 649 F.3d 129, 132 (1st Cir. 2011) (Section 3583(e)(3) "does not forbid consideration of other pertinent section 3553(a) factors."); United States v. Lewis, 498 F.3d 393,

399-400 (6th Cir. 2007) (Section 3583(e) "does not state that a court may revoke supervised release after 'only considering' the enumerated factors"), cert. denied, 555 U.S. 813 (2008); United States v. Williams, 443 F.3d 35, 47 (2d Cir. 2006) (Section 3583 does not "forbid[] consideration of other pertinent factors.").

Reading the statute to preclude consideration of those factors would draw an artificial and untenable line between Section 3553(a)(2)(A) and the factors that are enumerated in Section 3583(e). The enumerated factors include "the nature and circumstances of the offense," "the history and characteristics of the defendant," the need "to afford adequate deterrence," the need "to protect the public from further crimes of the defendant," and the "policy statements" of the Sentencing Commission about the revocation of supervised release. 18 U.S.C. 3553(a)(1), (2)(B), (2)(C) and (4)(B). The policy statements, in turn, expressly recognize the need to "sanction * * * the defendant's breach of trust [in violating the terms of supervised release]," which requires the court to "tak[e] into account, to a limited degree, the seriousness of the underlying violation." Sentencing Guidelines Ch. 7, Pt. A(3)(b) intro. comment.

Effective consideration of those factors will often require consideration of the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." 18 U.S.C. 3553(a)(2)(A). As the Second Circuit has explained, it is hard to "see how" a district court "could possibly

ignore the seriousness of the offense" while evaluating many of the other permissible factors, including "adequate deterrence," "protecting the public from further crimes of the defendant," and "the nature and circumstances of the offense." Williams, 443 F.3d at 48 (quoting 18 U.S.C. 3553(a)(1), (2)(B) and (C)). Similar analysis applies to the other prongs of Section 3553(a)(2)(A). See Lewis, 498 F.3d at 400 ("[T]he three considerations in § 3553(a)(2)(A), namely the need 'to reflect the seriousness of the offense,' 'to promote respect for the law,' and 'to provide just punishment for the offense,' are essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release.").

c. Petitioner identifies (Pet. 20) a purported circuit conflict over whether a district court may consider the factors listed in Section 3553(a)(2)(A) in revoking supervised release. Like other petitioners who have raised this same question, e.g., Clay, supra (No. 14-6010), petitioner substantially overstates the extent of any disagreement in the circuits.

In United States v. Miqbel, 444 F.3d 1173 (2006), the Ninth Circuit held that the district court at a revocation hearing erred by failing to set forth sufficient reasons for its imposition of a term of imprisonment outside the recommended Guidelines range. Id. at 1177-1179. In providing guidance for the district court on remand, the Ninth Circuit remarked that because "§ 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list

applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." Id. at 1182. But the court then explained that it would contravene the statute only if a district court relied on Section 3553(a)(2)(A) "as a primary basis for a revocation sentence" and concluded that "mere reference to promoting respect for the law" would not itself "render a sentence unreasonable." Ibid. Thus, the Ninth Circuit has not taken the categorical view petitioner suggests.

Indeed, the Ninth Circuit has clarified that Miqbel "did not set forth a blanket proposition that a court in no circumstances may consider the seriousness of the criminal offense underlying the revocation," but merely explained that this consideration should not be the primary "focal point" of revocation sentencing. United States v. Simtob, 485 F.3d 1058, 1062 (2007); see also United States v. Anderson, 302 Fed. Appx. 723, 724 (9th Cir. 2008) (seriousness of the offense may be considered "provided that such a consideration is not 'a focal point of the inquiry.'" (quoting Simtob, 485 F.3d at 1062)).

The Fifth Circuit has held "that it is improper for a district court to rely on § 3553(a)(2)(A) for the modification or revocation of a supervised release term." United States v. Miller, 634 F.3d 841, 844, cert. denied, 565 U.S. 976 (2011). But Miller appears to be based on a misunderstanding of the positions of the other circuits. The Fifth Circuit relied on Miqbel and United States v. Crudup, 461 F.3d 433 (4th Cir. 2006), cert. denied, 549 U.S. 1283

(2007), but neither establishes that consideration of the Section 3553(a)(2)(A) factors is per se unreasonable. As noted above, Miqbel created no such bright-line rule. And Crudup merely stated in dicta that a district court was "not authorized to consider" the Section 3553(a)(2)(A) factors. 461 F.3d at 439. The Fourth Circuit---which is the court below here---has since joined the majority of circuits in holding that Section 3583(e) "does not expressly prohibit a court from referencing other relevant factors omitted from the statute." Webb, 738 F.3d at 641.

Subsequent Fifth Circuit decisions applying Miller, albeit in unpublished orders, also illustrate that there is little practical difference between the different formulations of the rule. For example, in United States v. Zamarripa, 517 Fed. Appx. 264 (2013) (per curiam), the panel explained that, under Miller, it was proper for a district court to consider the need to punish a defendant for violating the conditions of supervised release by committing another offense. Id. at 265. The court of appeals held that no error had occurred because the district court in that case had been considering the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence to deter future criminal conduct and protect the public. Ibid. (citing Section 3553(a)(1), (2)(B) and (C)); see also United States v. Jones, 538 Fed. Appx. 505, 508 (5th Cir. 2013) (per curiam) (finding no error where the district court twice referred to "punishment" in imposing revocation sentence because the

"record indicate[d] that the court sought to punish Jones for violating the conditions of his supervised release").

d. This case would also be a poor vehicle for considering the second question presented, because petitioner cannot show that the outcome of his case would be different in any circuit. Petitioner's failure to object below triggers at most plain-error review, under which petitioner must establish that the district court erred; the error was clear or obvious; the error affected his substantial rights; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. United States v. Olano, 507 U.S. 725, 732-737 (1993); see Fed. R. Crim. P. 52(b). Petitioner cannot make that showing.

As discussed above, no error occurred, see pp. 13-15, supra, and any error would have been neither plain nor obvious. To the contrary, such an error would have been extraordinarily subtle because of the significant overlap between the factors in Sections 3553(a)(2)(A) and 3583(e). On petitioner's view of the law, the district court could have reached the very same substantive result based on virtually identical considerations while relying on Section 3583(e) alone. Whether an error occurred, on petitioner's view, thus would depend on detailed parsing of the precise wording a district court uses when explaining its reasoning. By failing to object to the district court's statement of reasons, however, petitioner failed to give the court notice that some part of its stated rationale was potentially flawed and thus deprived the court

of an opportunity to clarify whether or to what extent its sentence depended on considerations outside Section 3583(e)(3)'s enumerated factors. Accordingly, when confronted with this issue, the courts of appeals have repeatedly held that any such error was not obvious. E.g., Webb, 738 F.3d at 642-643; United States v. Overton, 419 Fed. Appx. 173, 175-176 (3d Cir.), cert. denied, 565 U.S. 1063 (2011); Miller, 634 F.3d at 844; United States v. Pitre, 504 F.3d 657, 664-665(7th Cir. 2007). The overlap between the factors in Sections 3553(a)(2)(A) and 3583(e) also makes it doubtful that petitioner could satisfy the third and fourth requirements for plain-error relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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