No. 17-____

IN THE
Supreme Court of the United States

RAMIRO OCHOA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits the Federal Government from charging, convicting, and sentencing a person who has already been charged, convicted, and sentenced in the court of a State for much of the same conduct.
2. Whether the seriousness of the offense conduct is an appropriate consideration for a district court when fashioning a sentence on revocation of supervised release.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

U.S. SENTENCING GUIDELINES

OTHER SOURCES

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Petitioner Ramiro Ochoa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is unreported, but is available at ___ F. App'x ____, 2017 WL 1545049. Pet. App. 1a-3a. The District Court's judgment is available at Pet. App. 5a.

JURISDICTION

The Fourth Circuit issued its opinion on May 1, 2017. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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 arising 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 offense 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; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3553(a) provides:

> (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.

18 U.S.C. § 3583(e) provides:

(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 previously 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 postrelease 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 paragraph may be imposed only as an alternative to incarceration.

INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment protects individuals from successive prosecutions and punishments for the same conduct. That bedrock principle is a "fundamental ideal in our constitutional heritage." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). And yet, over time, it has admitted of a gaping exception. Known as the "separate sovereigns" exception, this Court has concluded that "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016).

Justices Ginsburg and Thomas recently called for reexamination of this Court's jurisprudence to cure the " 'affront to human dignity' " of "try[ing] or punish[ing] a person twice for the same offense" within the United States. *Id.* at 1877 (Ginsburg and Thomas, J.J., concurring) (quoting *Abbate* v. *United States*, 359 U.S. 187, 203 (1959)). In their concurring opinion, the Justices explained that the separate

sovereigns exception should be eliminated so that "a final judgment in a criminal case * * * should preclude renewal of the fray anyplace in the Nation." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg and Thomas, J.J., concurring).

Exactly this harm came to Ramiro Ochoa in this case. While on federal supervised release, Mr. Ochoa was charged with new criminal conduct in North Carolina state court. He pleaded guilty, was convicted, and served a sixty-month sentence. Immediately after completing his sentence, he was then hauled into federal court to begin the whole process again. After admitting that commission of new criminal conduct constituted a violation of the terms of his federal supervised release, Mr. Ochoa was sentenced a second time, this time for the statutory maximum twenty-four months of imprisonment. This Court should grant certiorari to overrule *Abbate*, and conclude that the Double Jeopardy Clause retains the straightforward, original understanding of the Framers: No government within the United States shall prosecute or punish any person twice for the same conduct.

But even if this Court does not take the opportunity to reconsider the separate sovereigns exception, it nonetheless should grant review of Mr. Ochoa's sentence and vacate the Fourth Circuit's opinion affirming it. This Court's guidance is needed to resolve for the lower courts the proper role of the seriousness of new criminal conduct when fashioning a federal supervised release revocation sentence.

Certiorari should be granted.

STATEMENT

In January 2005, Ramiro Ochoa was charged in a three-count indictment in the Eastern District of Washington with receiving and possessing a firearm not registered to him, in violation of 26 U.S.C. § 5861(d), knowingly possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3), and knowingly possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). CAJA 5.[1] Mr. Ochoa pleaded guilty to count two of the indictment and was sentenced to ninety-four months in the custody of the Bureau of Prisons, with credit for time detained and recommended participation in the residential 500-hour drug treatment program, anger-management counseling, and "any and all educational and vocational training programs he may qualify for." *Id.* at 8-13. He was also ordered to serve a three-year term of supervised release, and to pay a $100 special assessment. *Id.*

Mr. Ochoa completed his term of imprisonment and began his term of supervised release on November 26, 2010. *Id.* at 14. His supervised release was transferred to the Eastern District of North Carolina in June 2011. *Id.*

In October 2011, the United States Probation Office filed a motion for revocation of Mr. Ochoa's supervised release, alleging three violations. *Id.* First, the Office alleged that Mr. Ochoa had engaged in criminal conduct that resulted in a warrant issued by the Havelock Police Department. *Id.* Second, relying on the language of

[1] "CAJA" refers to the Joint Appendix filed in the U.S. Court of Appeals for the Fourth Circuit.

the warrant, it alleged he had possessed a firearm. *Id.* Finally, it alleged Mr. Ochoa left the judicial district without permission of the court or probation officer. *Id.*

Mr. Ochoa pleaded guilty in state court to charges arising out of the warrant cited in his first two violations. *Id.* at 16. He was sentenced to sixty to eighty-one months of incarceration. *Id.* After he served a sixty-month state sentence, the United States Probation Office filed an amended motion for revocation of Mr. Ochoa's federal supervised release, accusing him of two violations. *Id.* The first was for criminal conduct. *Id.* The motion stated:

> On February 12, 2013, Ochoa was convicted of First Degree Kidnapping—Attempt (11CRS1387), Possession of a Firearm by Felon (11CRS1386), First Degree Kidnapping—Attempt (11CRS1388), Assault With a Deadly Weapon Serious Injury (11CRS54175), First Degree Kidnapping—Attempt (11CRS54175), and Possession of a Firearm by Felon (11CRS54207) in Craven County, North Carolina. Ochoa was sentenced to a minimum term of 60 months and a maximum term of 81 months custody in the North Carolina Department of Correction. The defendant committed each of these offenses on October 4, 2011.

Id. The second was for a technical violation, namely leaving the judicial district without the permission of the Court or probation officer. *Id.* The U.S. District Court for the Eastern District of North Carolina had jurisdiction over Mr. Ochoa's supervised release revocation pursuant to 18 U.S.C. § 3583(e).

At his revocation hearing, Mr. Ochoa admitted the violations. *Id.* at 21. The Government proffered facts underlying the violations, explaining that Mr. Ochoa had shot his wife in the leg during an argument and that he "kidnapped" her by transporting her, along with their children, from Havelock, North Carolina, to a

hospital in Charlotte, North Carolina. *Id.* at 21-22. Police later recovered a firearm in the car and one in their home, which Mr. Ochoa was not permitted to possess as a result of a prior felony conviction. *Id.* at 22.

The District Court then calculated the policy statement range applicable to the violations, concluding that the highest grade of violation was A and the applicable criminal history category was V. *Id.* The advisory policy statement range thus was twenty-four months, which was the maximum authorized sentence under 18 U.S.C. § 3583(e)(3). *Id.*

Mr. Ochoa's counsel explained that he had pleaded guilty to the charges listed in the first violation and "has served 60 months in the state court as a result of these charges." *Id.* at 23. She highlighted his participation in "every anger management program that the DOC has to offer," and his pursuit of vocational training. *Id.* at 23-24.

Mr. Ochoa, for his part, apologized to the court and to his family, explaining the "big ripple effect" his actions had set in motion. *Id.* at 24. He explained that his daughter told him in a letter that this "is his last chance," which "shook" him. *Id.* at 24-25. He said that he knew he was wrong for his mistakes and that he did his best to use his state term of imprisonment "to try to better my life" through vocational training and other programs. *Id.* at 25.

The Government then asked for a twenty-four month term of imprisonment—the statutory maximum, referencing historical incidents of "violence toward women" in Mr. Ochoa's history, and the fact that Mr. Ochoa's violation conduct was related to

the subject of his underlying conviction in federal court for unlawfully possessing a firearm. *Id.* at 25-26. The Government closed by arguing that "his punishment in state court was for the conduct itself," whereas "his sentence today will be for the breach of trust." *Id.* at 26.

A probation officer then addressed the Court, explaining that he had reviewed the record maintained by Mr. Ochoa's supervising officer, who had since retired. That record reflected that Mr. Ochoa was reporting as directed, that his drug screens were negative, and that he had committed "no technical violations up to this point." *Id.* at 26-27.

The District Court explained that the "offense conduct is deeply troubling in this case" and "a serious, serious breach of trust," but that Mr. Ochoa had accepted responsibility for it. *Id.* at 27-28. The court declined to vary downward from the policy statement range, revoking Mr. Ochoa's supervision and imposing a sentence of twenty-four months. *Id.* at 28. The court announced that it would impose the same sentence as an alternative variant sentence in the event it miscalculated the policy statement range. *Id.* It recommended Mr. Ochoa be designated to FCI Victorville and also recommended a mental health evaluation and treatment, anger management, and vocational and educational opportunities. *Id.* at 29.

Mr. Ochoa appealed his sentence to the United States Court of Appeals for the Fourth Circuit. That court dispatched with his arguments in a two-page, unpublished per curiam decision. Pet. App. 1a-3a. The court explained that it was reviewing Mr. Ochoa's sentence for plain error only, concluding that his counsel had

"fail[ed] to object to the court's sentencing explanation." *Id.* at 2a. The court affirmed the District Court's calculation of the policy statement range and "appropriately considered Ochoa's personal history and characteristics in fashioning a sentence that punished the serious breach of trust resulting from Ochoa's grievous criminal conduct." *Id.* at 2a-3a. It saw "no basis to disturb Ochoa's presumptively reasonable sentence." *Id.* at 3a.

The Court of Appeals also held, in a footnote, that Mr. Ochoa's challenge to his sentence under the Double Jeopardy Clause "must fail" because *Abbate* v. *United States*, 359 U.S. 187 (1959), remains good law. *Id.* at 3a.

This petition followed.

REASONS FOR GRANTING THE PETITION

Ramiro Ochoa was charged, convicted, and sentenced in state court. Once he completed his sentence, he began the process all over again in federal court, in the context of revocation of his federal supervised release. Although that second sentence is currently authorized under this Court's decision in *Abbate* v. *United States*, that decision contravenes the letter and spirit of the Double Jeopardy Clause and should be overruled, as recently recognized by Justices Ginsburg and Thomas.

But even if this Court does not revisit its decision in *Abbate*, it still should grant the petition to give guidance to the lower courts regarding whether it is error to consider the seriousness of the offense conduct when fashioning a sentence on revocation of supervised release. Conflicting guidance from Congress, the U.S.

Sentencing Guidelines, and this Court tasks district courts simultaneously with giving significant consideration to that fact in determining the grade of the violation and the applicable policy statement range, while nonetheless considering it only "to a limited degree," U.S.S.G. Ch. 7 pt. A.3(b), or not at all, 18 U.S.C. § 3583(e), when arriving at a sentence that is sufficient, but not greater than necessary, to sanction a violation of supervised release. This conflicting guidance has resulted in a split among the Circuits, with the First, Second, Third, Sixth, and Seventh Circuits holding that it is not error to consider the seriousness of the new conduct, and the Fourth, Fifth, and Ninth Circuits holding that it is.

This Court's guidance is needed.

I. THIS COURT SHOULD GRANT THE PETITION TO RECONSIDER THE ONGOING VALIDITY OF *ABBATE* V. *UNITED STATES* AND THE SEPARATE SOVEREIGNS EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. That Clause bars subsequent prosecutions, as well as successive punishments, for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). This Court has called the protection it enshrines a "fundamental ideal in our constitutional heritage." *Benton*, 395 U.S. at 794.

For the past half-century, though, this Court has interpreted the Double Jeopardy Clause to contain a significant exception, known as the "dual-sovereignty doctrine" or the "separate sovereigns" exception. *Sanchez Valle*, 136 S. Ct. at 1867. That exception dictates that "a single act gives rise to distinct offenses—and thus

may subject a person to successive prosecutions—if it violates the laws of separate sovereigns." *Id.*

The separate sovereigns exception took root in two cases from 1959, *Bartkus v. Illinois*, 359 U.S. 121, and *Abbate* v. *United States*, 359 U.S. 187. Bartkus had been tried and acquitted in federal court for robbery of a federally insured savings and loan association. *Bartkus*, 359 U.S. at 121-122. A year later, an Illinois grand jury indicted Bartkus on "substantially identical" facts in violation of that State's robbery statute. *Id.* at 122. Bartkus was tried and convicted. *Id.* The Court noted that the state and federal prosecutions were separately conducted and that the state prosecution thus was not "a sham and a cover" for a second, federal prosecution. *Id.*

If the Due Process Clause of the Fourteenth Amendment were to bar such "independent" prosecutions, and allow a prior federal prosecution to preempt a later one by a State, "the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 137. Declining to impose such a "deprivation," against the States, the Court found no due process violation, in part because the States were "obviously more competent" to decide for themselves whether someone who had already been tried and convicted or acquitted of a federal offense may properly be prosecuted in that State's courts. *Id.*

In *Abbate*, the tables were turned; the State prosecuted first. Several men were charged in the State of Illinois for conspiring to dynamite buildings belonging to a

telephone company in three States. 359 U.S. at 187. The Illinois statute under which they were charged made it a crime to "conspire to injure or destroy the property of another." *Id.* The men pleaded guilty and were sentenced to three months' imprisonment. *Id.* The Federal Government then took its turn, charging the men with "conspiracy to destroy . . . certain works, property, and material[,] which were essential and integral parts of systems and means of communication operated and controlled by the United States." *Id.* at 189. The men were found guilty by a jury at trial. *Id.* The Fifth Circuit reversed some of the convictions on the basis of evidentiary issues, but affirmed others. *Id.* This Court granted certiorari to determine whether the federal prosecutions violated the Double Jeopardy Clause of the Fifth Amendment.

The Court held that they did not. That was so, it reasoned, because the States are free to enforce their laws through criminal prosecutions—and have, in fact, "the principal responsibility for defining and prosecuting crimes." But that power, however vast, cannot hamper the Federal Government's authority to enforce its own laws, especially when the federal interest is more seriously "impinged" than is the State interest. *Id.* at 195. Taken together, *Bartkus* and *Abbate* leave open the possibility that a defendant will face at least two prosecutions—both within the United States—whenever his conduct allegedly violates both federal law and the law of a State.

The analysis supporting these outcomes was flawed in 1959 and is unsustainable now. The historical underpinnings of the Double Jeopardy Clause

make clear that the Founders never intended for such a broad exception to swallow the Constitution's prohibition against successive prosecutions and punishments. The expansion of federal criminal law since 1959 provides a compelling illustration of why they would have resisted such a sweeping exception.

This Court has explained that it "must assur[e] preservation" of constitutional rights as they "existed when [the Bill of Rights] was adopted." *Jones* v. *United States*, 565 U.S. 400, 406 (2012) (internal quotation marks and citation omitted). So we turn first to the understanding of the Framers at the time the Double Jeopardy Clause was drafted. The Clause finds its origins in the English common law pleas of *autrefois acquit* and *autrefois convict*, allowing a defendant to plead a prior acquittal or conviction to bar a pending prosecution, regardless whether the previous prosecution was brought by the same sovereign or by another sovereign. *See United States* v. *Scott*, 437 U.S. 82, 87 (1978). For example, in *R.* v. *Roche*, 168 Eng. Rep. 169 (K. B. 1775), Roche was charged in England with murder after having been acquitted of that same murder in a Dutch colony. The King's Bench held that the Dutch colony's acquittal barred England's prosecution: "It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction." *Id.* at 169 n.a. English legal treatises from the time of the Founding confirm the common-law understanding that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 428 (1802); *see also* 2 William Hawkins, *A Treatise of the Pleas of the*

Crown 372 (1721) ("[A]n Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court.").

The Framers adopted the same approach as their English forebears. And they rejected a proposal that would narrow the common-law rule to allow a subsequent prosecution for the same offense, so long as only one of those prosecutions was pursuant to federal law. The original draft of the Double Jeopardy Clause provided: "No person shall be subject . . . to more than one trial or one punishment for the same offence." 1 Annals of Cong. 781 (1789). Representative George Partridge suggested adding "by any law of the United States," *id.* at 782, to the end of that sentence, which would have enshrined the separate sovereigns exception in the text of the Fifth Amendment. Congress rejected that attempt.

American courts followed suit. In *Houston* v. *Moore*, 18 U.S. 1 (1820), the defendant had been convicted by a state court martial for desertion. Rejecting Houston's motion to dismiss on the basis that desertion was a federal crime and a state conviction "might subject [him] to be twice tried for the same offence," *id.* at 13, the Court spoke plainly: "[I]f the jurisdiction of the two Courts be concurrent the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other." *Id.*; *see also id.* at 30 (Story, J., dissenting) (explaining that if a trial in the State Court Martial ended in conviction or acquittal, a subsequent trial in the United States' Court Martial would be "against the manifest intent of the act of Congress, the principles of the common law, and the

genius of our free government."). South Carolina's Constitutional Court of Appeals came to the same conclusion, explaining that a state conviction for counterfeiting "could not possibly" leave a defendant open to a federal prosecution for the same offense "because it is the established comitas gentium, and is not unfrequently brought into practice, to discharge one accused of a crime, who has been tried by a court of competent jurisdiction." *State* v. *Antonio*, 7 S.C.L. 776, 781 (1816). That rationale only redoubled in light of the special relationship between the Union and its member States: "If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties?" The court found exactly that principle embodied within the text of the Fifth Amendment. *Id.*

Even if the separate sovereigns exception had legitimate constitutional moorings at the time *Bartkus* and *Abbate* were decided, the ensuing fifty-eight years have shown the ship since has sailed. Federal criminal jurisdiction has expanded dramatically since then, increasing by orders of magnitude the situations in which dual prosecutions are possible. In 1999, a task force of the Criminal Justice Section of the American Bar Association, chaired by Edwin Meese III, found that "of all federal crimes enacted since 1865, over forty percent have been created since 1970." *The Federalization of Criminal Law*, 11 Fed. Sent. R. 194 (Feb. 1999). In the early 1980s, the U.S. Department of Justice counted 3,000 federal crimes. By 2007, there were 4,450. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation (June 16, 2008).

To be sure, this Court recently decided a case against the backdrop of the separate sovereigns exception. *Sanchez Valle*, 136 S. Ct. at 1867. But Justices Ginsburg and Thomas called for further examination of that foregone conclusion, explaining that it "warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA." *Id.* at 1877 (Ginsburg and Thomas, J.J., concurring). This is just such a case, and this Court should take the opportunity to set to rights a jurisprudence that has drifted further and further afield of the Framers' language and intent over the past half-century.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT ON WHETHER IT IS ERROR TO CONSIDER THE SERIOUSNESS OF NEW CRIMINAL CONDUCT IN FASHIONING AN APPOPRIATE SENTENCE UPON REVOCATION OF SUPERVISED RELEASE

This Court has recognized that sanctioning new criminal conduct as a revocation of federal supervised release has its pitfalls, explaining that "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." *See Johnson* v. *United States*, 529 U.S. 694, 698 (2000). The United States Sentencing Guidelines have recognized the same risk, explaining that if a federal district court were sentencing the defendant based on the seriousness of the new criminal conduct, it would be "substantially duplicat[ing] the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct." U.S.S.G. Ch. 7 pt. A.3(b). And that would be improper, given that "the court with jurisdiction over the

criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct." *Id.*

For this reason, Congress specifically excluded "the seriousness of the offense" from the list of appropriate sentencing factors for district courts fashioning revocation sentences, rather than federal criminal sentences. *Compare* 18 U.S.C. § 3553(a)(2)(A) *with* 18 U.S.C. § 3583(e). This Court has explained that "postrevocation penalties relate to the original offense" and thus do not "impose[] punishment for defendants' new offenses" *See Johnson*, 529 U.S. at 700-701. The Sentencing Guidelines are in accord, instructing that "at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." U.S.S.G. Ch. 7 pt. A.3(b).

The problem is that those same Guidelines instruct district courts to give considerable weight to the seriousness of the violation conduct. A district court must first calculate the advisory policy statement range, determining the grade of the violation and applying the defendant's criminal history, as calculated in the presentence report prepared for sentencing on his underlying federal case. U.S.S.G. § 7B1.1. The court then must provide an "individualized explanation for its decision to deviate from the policy statement range." *United States* v. *Crudup*, 461 F.3d 433, 439 (4th Cir. 2006). This prerequisite for a procedurally reasonable revocation sentence makes clear that a defendant's prior criminal history and the seriousness of his violation conduct exert a considerable magnetic effect; they form

the lodestone of revocation sentencing in the same way an advisory guideline range does for federal convictions. *See Peugh* v. *United States*, 133 S. Ct. 2072, 2084 (2013).

In practice then, district courts *are* giving substantial weight to the seriousness of the new criminal conduct, despite the strong suggestion by Congress, this Court, and the Sentencing Guidelines that such consideration could run afoul of the Double Jeopardy Clause. Mr. Ochoa's case is a prime example of this. The District Court made several statements at sentencing that reflected its preoccupation with the seriousness of the underlying violation conduct. It noted, for example, that "[t]he offense conduct is deeply troubling in this case. It is serious." In fact, it described the conduct as "serious" no fewer than five times. And although the District Court repeatedly referred to its inquiry as evaluating the magnitude of Mr. Ochoa's "breach of trust," its evaluation of the scope of that breach became hopelessly entangled with the "serious nature of the conduct," leading, in effect, to a second criminal sentence being imposed on top of the sixty months Mr. Ochoa had already served in the North Carolina Department of Corrections.[2]

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[2] Although Mr. Ochoa also faced sentencing on a Grade C violation for leaving the judicial district without the permission of the court or probation officer (a violation that was not punished in the North Carolina state court), this violation alone could not have supported the twenty-four month sentence imposed by the District Court. His statutory maximum term of imprisonment would have remained at two years, but his advisory policy statement range would go from twenty-four months to seven to thirteen months, a reduction of eleven to seventeen months. And the District Court would have retained discretion to "extend the supervised release and/or modify the conditions of supervision" in lieu of imprisonment. *See* U.S.S.G. § 7B1.3(a)(2). If the District Court were reviewing only Mr. Ochoa's unauthorized departure from the district, and not the criminal conduct for which he had already

Because of this tension between the double jeopardy concerns inherent in considering the seriousness of new criminal conduct and the express instructions from Congress and the Sentencing Commission that some consideration of the seriousness of that new criminal conduct is required, the federal courts of appeals have reached different conclusions about whether that consideration is error. This Court never has addressed whether it is error for a district court to consider a factor listed in 18 U.S.C. § 3553(a)(2)(A)—which has notably been left out of 18 U.S.C. § 3583(e)—when fashioning a supervised-release revocation sentence. The First, Second, Third, Sixth, and Seventh Circuits have concluded that it is not error. *See United States* v. *Vargas-Davila*, 649 F.3d 129, 131-132 (1st Cir. 2011); *United States* v. *Williams*, 443 F.3d 35, 47-48 (2d Cir. 2006); *United States* v. *Young*, 634 F.3d 233, 238-239 (3d Cir. 2011); *United States* v. *Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007); *United States* v. *Clay*, 752 F.3d 1106, 1108 (7th Cir. 2014). The Fourth, Fifth, and Ninth Circuits have concluded that it is. *See Crudup*, 461 F.3d at 438-439; *United States* v. *Miller*, 634 F.3d 841, 844 (5th Cir. 2011); *United States* v. *Miqbel*, 444 F.3d 1173, 1181-1183 (9th Cir. 2006).

This Court's guidance is needed to clarify for the lower courts whether it is procedural error for a district court to consider the seriousness of new criminal conduct in fashioning a supervised release revocation sentence. Because of the

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received and served a state sentence, it strains credulity that the court would have nonetheless imposed the statutory maximum sentence of two years of imprisonment.

double jeopardy concerns already identified by this Court in *Johnson*, it is. This Court should grant certiorari to make that plain.

CONCLUSION

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

Respectfully submitted,

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JULY 31, 2017

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