No. 07-___

IN THE

Supreme Court of the United States

TERRANCE L. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

April 11, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

When a defendant violates the terms of his supervised release, may the district court base the new sentence upon the factors enumerated in 18 U.S.C. § 3553(a)(2)(A)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Terrance L. Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a) is published at 498 F.3d 393.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2007. Pet. App. 1a. A timely petition for rehearing was denied on December 21, 2007. Pet. App. 17a. On March 14, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the relevant portions of 18 U.S.C. § 3553 (Pet. App. 34a) and 18 U.S.C. § 3583 (Pet. App. 37a).

STATEMENT

Upon pleading guilty to a drug distribution charge, petitioner was sentenced to a term of imprisonment followed by five years of supervised release. After petitioner served his prison term and completed four and a half years of supervised release, the district court revoked his supervised release, finding that he had violated several of its terms.

In imposing a new sentence for the violation, the district court explained that it calibrated the sentence in part "to reflect the seriousness of the offense," to "promote respect for the law," and to "provide just punishment." Pet. App. 11a. These so-called "just punishment" factors are listed among the considerations the federal sentencing statute requires a court to consider when imposing an initial sentence for a crime. 18 U.S.C. § 3553(a). A separate statutory provision, 18 U.S.C. § 3583(e), governs the revocation of supervised release. The revocation provision incorporates by reference most of the factors listed in the original sentencing provision, but omits the "just punishment" factors relied upon by the district court in this case. On appeal, the Sixth Circuit acknowledged that two courts of appeals have held that because Congress excluded the just punishment factors from the revocation provision, a district court may not rely on such considerations in a revocation proceeding. The Sixth Circuit, however, joined the Second Circuit in rejecting that view and, accordingly, upheld petitioner's sentence.

1. Sentences for original convictions are governed by 18 U.S.C. § 3553, which instructs that "[t]he court, in determining the particular sentence to be imposed, shall consider" a list of enumerated factors. 18

U.S.C. § 3553(a).[1] Among these sentencing considerations are the "just punishment" factors of subsection (a)(2)(A), which provides that the district court "shall consider . . . 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." 18 U.S.C. § 3553(a)(2)(A).

---

[1] The ten factors enumerated in 18 U.S.C. § 3553(a) are:

(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 . . . as set forth in the guidelines . . . [or] (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements . . . ;

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . . 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.

Congress enacted a separate statutory provision to govern revocation of supervised release.[2] 18 U.S.C. § 3583(e). Because "the primary goal [of supervised release] is to ease the defendant's transition into the community . . . or to provide rehabilitation," S. Rep. No. 98-225, at 124 (1983), Congress separately enumerated the considerations to be taken into account in modifying or revoking supervised release. In particular, Congress provided that a court may modify or revoke supervised release only 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)." 18 U.S.C. § 3583(e). Thus, the court must consider most of the factors governing the imposition of an original sentence upon conviction of a crime, with the conspicuous exclusion of the factors listed in section 3553(a)(2)(A) (the just punishment factors) and section 3553(a)(3) (which requires the original sentencing court to consider "the kinds of sentences available").

2. In 1995, petitioner Terrance L. Lewis pled guilty to one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Pet. App. 2a. The district court sentenced him to 137 months' imprisonment, to be followed by five years of supervised release. *Id.* In 1999, the court ordered petitioner's sentence reduced to 92 months. *Id.* Petitioner completed his prison term and began

---

[2] That provision states that if a court finds that a defendant has violated a condition of supervised release, it may "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" subject to certain qualifications not relevant here. 18 U.S.C. § 3583(e)(3).

serving his supervised release on October 26, 2001. *Id.*

On February 16, 2006, the Probation Office filed a petition with the district court seeking to revoke petitioner's supervised release. Pet. App. 2a. After a hearing, the district court found that petitioner violated the terms of his supervised released by failing to report contact with the police after he was briefly detained for minor traffic violations on three occasions; failing to file required monthly reports or to report that he had purchased a motorcycle; and refusing to provide the address of his daughters' house, which would have enabled probation officers to conduct home contacts at his daughters' home. *Id.* at 2a-3a, 18a-21a.

In response, the district court revoked petitioner's supervised release and sentenced him to six months' home detention followed by an additional 24 months of supervised release. Pet. App. 3a. In its written judgment, the court explained that:

> The reasons for the sentence imposed are as follows: *to reflect the seriousness of the offense; to promote respect for the law; to provide just punishment*; to provide an adequate deterrence to this Defendant and others from criminal conduct; and to protect the public from future crimes of this Defendant and of others who may participate in similar offenses.

Id. at 11a (emphasis added). The first three of these factors are taken verbatim from section 3553(a)(2)(A)—the "just punishment" factors that are specifically *omitted* from the list of factors to be considered for a revocation sentence under section 3583(e).

4. Petitioner appealed his sentence to the Sixth Circuit, arguing that his revocation sentence was based in part on impermissible factors.[3] Reviewing decisions from several other circuits, the Sixth Circuit found that the courts of appeals are deeply split over whether a district court may consider the just punishment factors in a revocation proceeding. It first noted that the Second Circuit has interpreted section 3583(e) simply to require the district court to consider the factors incorporated by reference from section 3553, without forbidding consideration of additional factors Congress did not incorporate. Pet. App. 12a (citing *United States v. Williams*, 443 F.3d 35, 47 (2d Cir. 2006)). "By contrast," the Sixth Circuit recognized, the Fourth Circuit has held that "'in devising a revocation sentence[,] the district court is not authorized to consider' § 3553(a)(2)(A)." *Id.* (quoting *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1813 (2007)). "Likewise, the Ninth Circuit held that 'a sentence would be unreasonable if the court based it primarily on an omitted factor, such as a factor provided for in § 3553(a)(2)(A).'" *Id.* (quoting *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006)).

Faced with these conflicting rules, the court of appeals adopted the minority view of the Second Circuit, Pet. App. 13a, holding "the fact that a sentencing court . . . consider[s] § 3553(a)(2)(A) is not error," *id.* at 15a. Finding no other error in the district court's decision, and concluding that the

---

[3] Petitioner also challenged the district court's finding that he had in fact violated the supervised release. The court of appeals rejected that argument, Pet. App. 3a-8a, and petitioner does not renew it here.

sentence was "neither unreasonable nor plainly unreasonable," *id.*, the court affirmed.[4]

5. Petitioner filed a timely petition for rehearing and rehearing en banc, noting that the panel decision exacerbated a circuit split with the Fourth and Ninth Circuits. *See* Pet. Reh. 10-12. The Sixth Circuit nonetheless denied further review. Pet. App. 17a-18a. This petition followed.

---

[4] For that reason, the court found it unnecessary to decide whether a revocation sentence is to be reviewed to determine whether it is "plainly unreasonable," as was the law of the circuit before this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), or whether a revocation sentence should be judged under the "unreasonableness" standard established in *Booker* for the review of an original sentence. Pet. App. 8a-9a. That question is the subject of an unresolved circuit split. *See, e.g.*, *United States v. Jones*, 484 F.3d 783, 791-92 & nn.30-31 (5th Cir. 2007) (collecting cases).

REASONS FOR GRANTING THE WRIT

As the Sixth Circuit's decision frankly acknowledges, whether a district court may consider the "just punishment" factors of 18 U.S.C. § 3553(a)(2)(A) when imposing a revocation sentence has vexed the lower courts and led to an ever expanding division among the circuits. In the past two years alone, four circuits have directly confronted the question, evenly dividing on an important and frequently recurring question that only this Court can conclusively resolve. This case presents the Court an ideal opportunity to eliminate the division in the lower courts and to restore the uniformity in sentencing Congress intended.

I. The Courts Of Appeals Are Intractably Divided Over What Factors A Court May Consider In Sentencing A Defendant For Violation Of The Terms Of Supervised Release.

1. In holding that it is permissible for a court to consider the factors in section 3553(a)(2)(A) when revoking a term of supervised release, the Sixth Circuit rightly acknowledged that it was deepening a circuit conflict.

a. In *United States v. Miqbel*, 444 F.3d 1173 (9th Cir. 2006), as in this case, the district court revoked the defendant's supervised release in part "to promote respect for the law and to provide just punishment for the offense." *Id.* at 1175. The district court acknowledged that it was unclear whether such a consideration was permissible and suggested that the parties seek clarification from the Ninth Circuit on appeal. *Id.* at 1181 n.17. The court of appeals obliged, holding that a district court's consideration of

the "just punishment" factors listed in section 3553(a)(2)(A) is improper. *Id.* at 1182-83.

The court began by noting that "[s]ection 3583(e) incorporates the majority of the factors listed in § 3553(a) as factors to be considered in sentencing upon revocation of . . . supervised release." *Id.* at 1181. "Section 3583(e) specifically omits, however, § 3553(a)(2)(A), which provides for consideration of 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.'" *Id.* at 1181-82. Whereas the Sixth Circuit decided in this case that the omission did not preclude a district court from considering the excluded factors, the Ninth Circuit reached the opposite conclusion. The court held that because "Congress deliberately omitted [section 3553(a)(2)(A)] from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." *Id.* at 1182; *see also, e.g.*, *United States v. Simtob*, 485 F.3d 1058 (9th Cir. 2007) (reaffirming holding);[5]

---

[5] In *Simtob*, the Ninth Circuit clarified that the revocation court may consider one of the just punishment factors – the "seriousness of the offense underlying the revocation," *id.* at 1062 – in the course of evaluating the criminal history of the defendant, a proper revocation factor under 18 U.S.C. § 3583(e). *See* 485 F.3d at 1062-63. The court did not suggest, however, that consideration of any of the other "just punishment" factors would be appropriate and held that even with respect to the seriousness of the defendant's offense, a "district court may not impose a revocation sentence *solely*, or even primarily, based on the severity of the new criminal offense underlying the revocation." *Id.* at 1063. The court of appeals in this case, by contrast, held that a district court may consider and rely upon all of the just punishment factors without limitation. *See* Pet. App. 14a-15a.

United States v. Barnes, No. 07-50198, 2007 WL 4227258 (9th Cir. Dec. 3, 2007) (vacating revocation sentence because district court relied on just punishment factors).

As the Sixth Circuit acknowledged, the Ninth Circuit is not alone in this view. In *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1813 (2007), the Fourth Circuit agreed with the Ninth that "as mandated by § 3583(e), not all the original sentencing factors of § 3553(a) can be considered when reviewing a revocation sentence." *Id.* at 439. Although the court of appeals ultimately concluded that the district court in that case had not actually relied on an inappropriate factor in revoking the defendant's supervised release, the court made clear that a "district court is not authorized to consider whether the revocation sentence 'reflect[s] the seriousness of the offense, ... promote[s] respect for the law, and ... provide[s] just punishment for the offense ...." *Id.* (citing 18 U.S.C. § 3553(a)(2)(A)). The Fourth Circuit has reaffirmed this understanding in subsequent cases as well. *See United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007) (noting that a court revoking supervised release may consider "just some of" the factors listed in 18 U.S.C. § 3553(a)); *United States v. Turner*, 241 F. App'x 168, 170 (4th Cir. 2007) (reaffirming that "[a]ccording to § 3583(e), in devising a revocation sentence, the district court is not authorized to consider whether the revocation sentence" serves the ends of the "just punishment" factors (citing *Crudup*)).

In this case, the Sixth Circuit recognized but explicitly rejected the holdings of the Fourth and Ninth Circuits. Pet. App. 13a. Instead, it "adopt[ed] the Second Circuit's position," *id.* at 13a-14a, as set

forth in *United States v. Williams*, 443 F.3d 35 (2d Cir. 2006). In *Williams*, the Second Circuit reasoned that section 3583(e) "does not state that any particular factor cannot be considered." *Id.* at 47. Instead, in the view of that court, section 3583(e) merely "requir[es] consideration of the enumerated subsections of § 3553(a) without forbidding consideration of other pertinent factors," including the unmentioned factors from section 3553(a). *Id.*

b. The conflict and confusion extends beyond that identified in the Sixth Circuit's decision in this case.

For example, the Seventh Circuit, in *United States v. Dillard*, 910 F.2d 461 (7th Cir. 1990), seemingly approved reliance on the just punishment factors in formulating a revocation sentence, although it is unclear whether the propriety of those factors was challenged in that case. The defendant in *Dillard* asserted that the "district court failed to identify the factors on which it based its decision to impose a sentence of incarceration." *Id.* at 465. The court of appeals responded by quoting at length from the district court's explanation for its sentence and concluding that the stated "reasons fall squarely within those cited in 18 U.S.C. § 3553(a)(2)," including "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.'" 910 F.2d at 465 (quoting 18 U.S.C. § 3553(a)(2)(A)). The court repeated the same list of factors in *United States v. McClanahan*, 136 F.3d 1146, 1151-52 (7th Cir. 1998), and has approved reliance on just punishment considerations in a number of unpublished decisions. *See, e.g.*, *United States v. Franklin*, 239 F. App'x 287, 289 (7th Cir. 2007) ("the nature and seriousness of [the] offense");

United States v. Simmon, 125 F. App'x 744, 746 (7th Cir. 2005) ("the need to reflect the seriousness of the offense [and] promote respect for the law"); *United States v. Stewart*, 107 F. App'x 667, 670-71 (7th Cir. 2004) (seriousness of offense); *United States v. Smith*, 93 F. App'x 956, 959 (7th Cir. 2004) ("the need to 'promote respect for the law.'").

The Eighth Circuit has similarly stated, without analysis, that consideration of just punishment factors is appropriate in revocation cases. *See United States v. White Face*, 383 F.3d 733, 737-38, 740 (8th Cir. 2004) (noting that among the factors a district court "should consider" upon revocation of supervised release is "the need for the sentence to provide just punishment for the offense"); *United States v. Jasper*, 338 F.3d 865, 867 (8th Cir. 2003) (holding that when sentencing a defendant for a violation of supervised release, "the court must consider [the sentencing purpose of] promoting 'respect for the law'"); *United States v. Touche*, 323 F.3d 1105, 1108 (8th Cir. 2003) ("In calculating its [revocation] sentence, the district court must consider the factors set forth in 18 U.S.C. § 3553(a), which include . . . the need to promote respect for the law . . . ."); *see also United States v. Larison*, 432 F.3d 921, 923 n.3 (8th Cir. 2006) (noting but not deciding question of what factors may be considered in revocation proceeding).[6]

The Eleventh Circuit has seemingly gone even further. In *United States v. Sweeting*, 437 F.3d 1105 (11th Cir. 2006), that court held that not only *may* a

---

[6] The Tenth Circuit has said the same in unpublished decisions. *See United States v. Fowler*, 222 F. App'x 738, 746 (10th Cir. 2007); *United States v. Nicholson*, No. 97-1043, 1997 WL 423123, at *1-*2 (10th Cir. July 29, 1997).

district court consider the just punishment factors, it *must* consider them in imposing a revocation sentence. *See id.* at 1107 ("Under 18 U.S.C. § 3583(e), a district court may, upon finding by a preponderance of the evidence that a defendant has violated a condition of supervised release, revoke the term of supervised release and impose a term of imprisonment after considering certain factors set forth in 18 U.S.C. § 3553(a). Section 3553(a) provides that district courts imposing a sentence *must* first consider, *inter alia*, . . . the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense . . . ." (emphasis added)). While it does not appear that reliance on the just punishment factors was challenged in *Sweeting*, the Eleventh Circuit has gone on to repeat the *Sweeting* rule in numerous subsequent revocation decisions. *See United States v. Garnett*, 238 F. App'x. 527, 529 (11th Cir. 2007) (explaining that upon sentencing for revocation of supervised release, "district courts . . . must first consider . . . the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense"); *United States v. Thomas*, 224 F. App'x. 876, 877, (11th Cir. 2007) (same); *United States v. Weaver*, 203 F. App'x. 316, 317-18 (11th Cir. 2006) (same).[7]

---

[7] Other unpublished decisions, however, have not always cited the just punishment factors as among the appropriate factors for a revocation decision. *See United States v. Johnson*, No. 07-14366, 2008 WL 723781, at *2 n.3 (11th Cir. Mar. 18, 2008); *United States v. Bailey*, No. 07-10788, 2007 WL 4226400, at *2 (11th Cir. Dec. 3, 2007).

2. Regardless of the import of the decisions from the Seventh, Eighth and Tenth Circuits, the two-to-two split acknowledged by the Sixth Circuit warrants resolution by this Court.

The conflict among these circuits is considered and entrenched. As noted above, the Sixth Circuit acknowledged the contrary holdings of the Fourth and Ninth Circuits, but adopted the opposite rule of law in this case. Moreover, although petitioner pointed to the circuit split as grounds for en banc review, his petition for rehearing was denied. In addition, shortly after rejecting petitioner's petition for rehearing en banc, the Sixth Circuit reaffirmed its decision in this case, holding once again that "'it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release.'" *United States v. Bolds*, 511 F.3d 568, 580 n.7 (6th Cir. 2007) (quoting Pet. App. 13a). At the same time, none of the other circuits has shown any sign of changing its established precedent. As recounted above, the Fourth and Ninth Circuit have applied their rules in numerous cases over the past two years. Similarly, a unanimous panel of the Second Circuit recently relied on its precedent in *Williams* to hold that "it is . . . permissible for [district courts] to consider the seriousness of the offense leading to revocation." *United States v. Sanders*, No. 06-2403-cr, 2008 WL 687241, at *1 (2d Cir. Mar. 13, 2008); *see also United States v. Parham*, No. 06-4855-cr, 2008 WL 501326, at *2 (2d Cir. Feb. 25, 2008) (same).

Accordingly, there is no realistic prospect of a return to uniformity without the intervention of this Court. Nor is there any reason to delay that intervention any longer. The issue has been thoroughly aired among the four circuits that have

already directly grappled with it. While other circuits will undoubtedly take up the question in future cases, there is little reason to think that those decisions will add appreciably to the debate. Instead, it is overwhelmingly likely that they, like the Sixth Circuit in this case, will simply pick a side in the existing conflict.

3. The depth of the conflict reflects the issue's recurring importance in the administration of the nation's criminal justice system.

Supervised release is an integral and increasingly important element in the federal administration of justice. In 2003, more than 75,000 federal offenders were on supervised release, up from fewer than 35,000 in 1994. Bureau of Justice Statistics, FEDERAL CRIMINAL JUSTICE TRENDS 35, tbl.27 (2003).[8] Each year, thousands of offenders are subject to revocation proceedings. In 2003, for example, district courts terminated the supervised release of more than 10,000 defendants because of technical violations or new crimes. *Id.* at tbl.29.

Because there are so many revocation proceedings each year, it is not surprising that the question presented in this case has arisen frequently. The prior section of this petition collects but a handful of the cases from seven circuits in which district courts have considered just punishment factors in revocation decisions. The issue has arisen, without resolution, in other circuits as well. The Third Circuit has adverted to the question in at least two decisions. *See United States v. Bungar*, 478 F.3d 540, 543 n.2 (3d Cir. 2007) (noting but not deciding the question); *United States*

---

[8] The report is available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf (last visited Apr. 3, 2008).

v. Wogan, 228 F. App'x 214, 217 (3d Cir. 2007) (concluding that the sentencing court did not *plainly err* by referring to a factor omitted from section 3583(e) as one of the bases for a revocation sentence). And the issue was recently briefed before the D.C. Circuit in a case that was dismissed before oral argument. *See* Brief for Appellee 17-20, *United States v. Henry*, 2006 WL 3307339 (D.C. Cir. Aug. 2, 2006) (No. 05-3144).

The rate of growth in both the number of offenders on supervised release and the number of revocations guarantees that the importance of determining the proper considerations for revocation decisions will only increase over time. The total population of offenders on supervised release grew at an average annual rate of 9.3% between 1994 and 2003.[9] FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.27. And the number of terminations that resulted from a technical violation or new crime in 2003 was more than 250% greater than the comparable figure in 1994. *Id.*

The ongoing division of authority over the basic considerations applicable to the revocation of supervised release is untenable. Presently, identical offenders are potentially subject to different sentences for precisely the same conduct in violation of precisely the same conditions of supervised release, based only on the happenstance of their geographic location. Such unwarranted disparate treatment of similarly situated defendants is precisely what

---

[9] The table does not explicitly state the average rate of growth, but compares the number of people on supervised release in 1994 with the number in 2003. There were 34,091 in 1994 and 75,766 in 2003, resulting in an average rate of growth of 9.3%. FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.27.

Congress intended section 3583(e) to minimize by setting forth uniform criteria for courts across the nation to consider when deciding whether to revoke supervised release. The current conflict directly undermines that important congressional objective and should not be allowed to endure.

4. This case presents the Court an ideal vehicle for resolving this intolerable conflict. As the court of appeals acknowledged, the district court expressly relied on the just punishment factors in setting petitioner's sentence. Pet. App. 11a; *see also* Pet. App. 32a (Sentencing Tr.) ("[K]eep in mind, this is part of your punishment."). Moreover, there is substantial reason to believe that the sentence would have been lighter if not for the reliance on the just punishment factors. The prosecution made it clear that punishment was the primary reason that it sought revocation instead of a modification or extension of the term of supervised release. *Id.* at 29a. Thus, in making his sentencing recommendation, the prosecutor relied expressly on the need for punishment, stating that "with regard to the punishment portion of [the sentence] . . . the Government would recommend the minimimum term of five months." *Id.* at 30a; *see also id.* at 29a ("The Government believes two things need to be done here. The first is that the Court should impose some form of punishment to get his attention. And, secondly, that having revoked him, the Court should then reimpose a new term of supervised release of at least two or three years."). Whether the statute allows consideration of those factors was both pressed and passed upon in the court of appeals. *See id.* at 8a-

15a.[10] Moreover, the Sixth Circuit gave the issue extensive treatment, acknowledging and attempting to rebut the analysis of the courts of appeals taking a contrary view. *See id.*

II. Review Is Also Warranted Because The Decision Below Is Wrong.

The decision below also warrants review because it is wrong, in conflict with the plain import of the text of section 3583(e) and the purposes behind it.

1. There can be little question that Congress's omission of section 3553(a)(2)(A) from the list of permissible factors in section 3583(e) was deliberate. As a general matter, the express enumeration of a number of factors for consideration would ordinarily

---

[10] Below, the Government asserted that petitioner failed to timely object to his sentence in the district court and, accordingly, that his claim on appeal was subject to plain error review. Petitioner explained, however, that the district court's reliance on the just punishment factors was not revealed until the court issued its written Statement of Reasons, well after the sentencing hearing. Accordingly, because petitioner did "not have an opportunity to object to" the ruling at the time it was entered, the absence of an objection did not prejudice his right to challenge the order on appeal. Fed. R. Crim. P. 51(b). Apparently accepting petitioner's argument, the court of appeals did not apply plain error analysis, but rather applied the ordinary standard of review for objections to revocation sentences. *See* Pet. App. 8a-9a. Petitioner notes, however, that even if the court of appeals had found that petitioner could have objected to the procedural defect in his revocation sentence in the district court, the assertion that a defendant is required to challenge the procedural reasonableness of his sentence in the trial court in order to avoid plain error review on appeal is the subject of a circuit split. *See United States v. Vonner*, 516 F.3d 382, 409-10 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (collecting cases).

"justify[] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). Here, the inference of deliberate exclusion is inescapable: Congress expressly incorporated by reference every subsection of section 3553(a) except two. Had Congress intended to include all of the factors listed in section 3553(a), it presumably would have incorporated the factors in that provision in their entirety.

That, in fact, is exactly what Congress did in the provision authorizing a court to revoke probation (as distinct from supervised release). Section 3582(c)(1)(A) of Title 18 provides that the district court may revoke probation and resentence the defendant "after considering the *factors set forth in section 3553(a)*" (emphasis added). *See also* 18 U.S.C. § 3584(b) (same with respect to decision whether to impose multiple sentences consecutively or concurrently). When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (citation and internal quotation marks omitted). There can be no claim that Congress intended courts to consider the same factors in both probation and supervised release revocation decisions when it used distinctly different language to describe the relevant factors in the two different provisions.

Nor can there be any reasonable claim that although Congress intentionally omitted the just punishment factors from the supervised release revocation provision, it nonetheless intended to

permit courts to base their decisions on those omitted factors. When Congress takes the time to identify each relevant factor in a list, an inference of exclusivity normally arises. *See, e.g.*, *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958); *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list."). After all, the "listing of the factors to be considered serves to focus attention on the specific purposes of the sentencing process." S. Rep. No. 98-225, at 119 (Senate Report for Sentencing Reform Act of 1984). Where, as in this case, the list of included sentencing factors is created through incorporation of some, but not all, of the factors listed elsewhere in the statute, a strong inference arises that Congress did not intend courts to consider the factors it took great care not to incorporate in section 3583(e).

2. The natural implications of the text are confirmed by the purposes and legislative history of the statute.

The Sentencing Reform Act of 1984 created supervised release as a new form of community supervision. Pub. L. No. 98-473, 98 Stat. 1837, ch. 227, subch. D, § 3583. Congress considered and rejected the use of supervised release for punitive purposes, explaining that it "concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release." S. Rep. No. 98-225, at 124. Thus, the Senate Report explained, "[t]he term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment *and may not be imposed for purposes of punishment* or incapacitation since those purposes

will have been served to the extent necessary by the term of imprisonment." *Id.* at 125 (emphasis added). Thus, unlike probation, which is a form of punishment that may be imposed in lieu of incarceration, *United States v. Sampson*, 547 U.S. 843, 855 (2006) (quoting *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)), supervised release was intended "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison." S. Rep. No. 98-225, at 124.

Accordingly, it is entirely understandable that in authorizing the district court to *impose* a term of supervised release in the first instance upon originally sentencing the defendant pursuant to 18 U.S.C. § 3583(c), Congress pointedly omitted from the list of factors to be considered the just punishment factors (just as it did when it set forth the factors to be considered in *revoking* supervised release). *Compare* 18 U.S.C. § 3583(c) *with* 18 U.S.C. § 3583(e). And as the United States Sentencing Commission has recognized, the omission of the just punishment factors from section 3583(c) makes it inappropriate for a court to consider the need for just punishment in imposing conditions of supervised release. *See* USSG Manual app. C, amend. 584 (2007) (deleting "the reference in the supervised release guideline to 'just punishment' as a reason for the imposition of curfew as a condition of supervised release" because the "need to provide 'just

punishment' is not included in [the relevant statutory language] as a permissible factor to be considered").[11]

Congress used precisely the same language to exclude consideration of the just punishment factors in responding to the breach of those conditions. *See* 18 U.S.C. § 3583(e). Congress could have chosen to treat violations of the terms of supervised release differently, subjecting them to punishment as if they were violations of the criminal code. But Congress opted for a different model. The Senate Report explained that "[i]f the violation is a new offense, the defendant may, of course, be prosecuted for the offense." S. Rep. No. 98-225, at 125.[12] But the violation of the term of supervised release – often, as in this case, in the form of relatively minor, non-criminal conduct – was intended to be dealt with in light of the non-punitive, rehabilitative purposes supervised release serves.

Thus, in its policy guidance for revocation of supervised release, the United States Sentencing Commission has explained that "imposition of an appropriate punishment for any new criminal conduct

---

[11] The text of Amendment 584 is available at http://www.ussc.gov/1998guid/appcsupp.pdf (last visited Apr. 3, 2008).

[12] As originally enacted, the statute did not permit revocation of supervised release in response to a violation. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3583. The revocation option was added a short time later, as one of several "miscellaneous technical amendments" to the Sentencing Reform Act in the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207, § 1006(a). Importantly, however, in adding revocation as a potential response to violations of the terms of supervised release, Congress retained the original set of factors and maintained the parallel with the provision authorizing the initial imposition of a term of supervised release.

[is not] the primary goal of a revocation sentence." USSG Manual ch. 7, pt. A, cmt. 3(b) (2007). Hence, the Sentencing Commission rejected an approach that treated changes to supervised release as "sanction[s] . . . for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct." *Id.* Instead, the Commission explained, Congress intended for district courts to treat the defendant's "failure to follow the court-imposed conditions of . . . supervised release as a 'breach of trust.'" *Id.* Revoking supervised release – or extending it, or modifying its terms – in response to a violation is meant to further the purpose underlying supervised release in the first place: the successful reintegration of the defendant into society. Accordingly, in this context, re-incarceration is intended to serve a rehabilitative – not punitive – purpose, as reflected in the exclusion of the just punishment factors from section 3583(e).

3. The Sixth Circuit nonetheless hypothesized that Congress selectively incorporated only a portion of the section 3553(a) factors because it intended to *require* the district court to consider those factors, but to leave to the district court's discretion whether to consider the excluded factors. *See* Pet. App. 13a-14a.

To be sure, Congress did not expressly state that the listed considerations are the "only" factors that can be considered or that the excluded factors cannot be considered. But Congress rarely, if ever, tells a court that it may consider "only" certain factors. Nor need it do so, given that the background principle of *expressio unius alterius exclusius* will ordinarily ensure that factors excluded are not considered. On the other hand, when Congress lists factors to be considered, yet intends to permit consideration of additional factors as well, it often says so. *See, e.g.*,

18 U.S.C. § 3162(a)(1) (providing that in deciding whether to dismiss an indictment for speedy trial violations the "court shall consider, *among others*, . . . the following factors . . . .") (emphasis added); 12 U.S.C. § 4010(b) ("In determining the amount of any award in any class action, the court shall consider, among other relevant factors — . . . ."); 15 U.S.C. § 1640 (same).

As described above, the more natural inference – supported by general principles of construction as well as the purposes of the Act – is that Congress excluded consideration of the just punishment factors because it intended to preclude their consideration in the revocation decision.

4. The court of appeals also concluded that it was not error for the district court to consider the just punishment factors excluded from Section 3583(a) because those factors were "essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release." Pet. App. 14a. That conclusion is also flawed.

First, it is a "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Accordingly, a court should not lightly conclude that Congress has enacted words – much less entire subsections – that add no meaning to a statute. Here, Congress obviously thought that the just punishment factors identified importantly distinct considerations that were not only worth

separate mention in section 3553(a)(2)(A), but also worthy of exclusion from section 3583(e).

Second, the court of appeals was simply wrong to conclude that the just punishment terms were redundant. While it is true that a court may consider the "circumstances of the offense," 18 U.S.C. § 3553(a)(1), inclusion of that factor does not, as the court of appeals assumed, render meaningless Congress's decision to exclude the just punishment factors from consideration. As the Ninth Circuit has explained, it is perfectly sensible to construe the statute to permit a district court to consider the circumstances surrounding an offense, while also precluding it from imposing "a revocation sentence *solely*, or even primarily, based on the severity of the new criminal offense underlying the revocation, as the sentence for that offense is left to the sentencing court." *Simtob*, 485 F.3d at 1063 (emphasis in original).

The Sixth Circuit's citation to this Court's decision in *Johnson v. United States*, 529 U.S. 694 (2000), is likewise misplaced. *See* Pet. App. 14a. In *Johnson*, the Court recognized that supervised release is intended to provide assistance to an inmate in reintegrating into society after a term of imprisonment. 529 U.S. at 709. In the Sixth Circuit's view, teaching a supervisee to respect the law – by punishing him with imprisonment for violation of the terms of his supervised release – is the kind of "help" a defendant needs. Pet. App. 14a. Accordingly, the court of appeals held, a district court may appropriately revoke supervised release "to promote respect for the law," 18 U.S.C. § 3553(a)(2)(A), even though Congress expressly excluded that consideration from the list of revocation factors in section 3583(e). *See* Pet. App. 14a. But if

Congress intended district courts to help defendants integrate into the community by punishing them with incarceration for violation of the terms of their supervised release, there would have been no need to exclude from the list of considerations for revocation decisions the need to "promote respect for the law." Instead, the exclusion of that factor demonstrates that Congress intended for that purpose to be served through a separate criminal prosecution when the violation constitutes an independent criminal offense and for non-criminal violations of the terms of supervised release to be treated as breaches of trust that may reflect a need for further intervention before the defendant is returned unsupervised to the community.

CONCLUSION

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

Respectfully submitted,

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

April 11, 2008