

---

No. 10-\_\_\_\_\_

---

IN THE  
Supreme Court of the United States

---

JOSEPH L. OVERTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

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

---

PETITION FOR A WRIT OF CERTIORARI

---

STEPHANOS BIBAS  
University of Pennsylvania Law  
School Supreme Court Clinic  
3400 Chestnut Street  
Philadelphia, PA 19104  
(215) 746-2297  
sbibas@law.upenn.edu

STEPHEN B. KINNAIRD  
*Counsel of Record*  
MITCHELL A. MOSVICK  
EMILY NEWHOUSE DILLINGHAM  
CHRISTOPHER M. MOONEY  
MARY-ELIZABETH M. HADLEY  
Paul, Hastings, Janofsky  
& Walker LLP  
875 15th Street, N.W.  
Washington, D.C. 20005  
(202) 551-1700  
stephenkinnaird@paulhastings.com

---

## QUESTION PRESENTED

When a defendant violates the terms of his supervised release, 18 U.S.C. § 3583 directs a federal sentencing court to consider a specified subset of factors in deciding whether to revoke that term and what sentence to impose. That provision incorporates by reference most of the purposes of sentencing enumerated in 18 U.S.C. § 3553(a) but skips over the purpose of retribution or just punishment in § 3553(a)(2)(A). Three courts of appeals read this omission as precluding reliance on retribution in supervised-release sentencing, while four courts of appeals treat retribution as a permissible consideration.

The question presented is:

May a sentencing court, in revoking a defendant's term of supervised release under 18 U.S.C. § 3583(e), consider the purpose of sentencing set forth in 18 U.S.C. § 3553(a)(2)(A) even though § 3583(e) fails to incorporate § 3553(a)(2)(A)?

## PARTIES TO THE PROCEEDING

Petitioner is Joseph L. Overton, an individual. Respondent is the United States of America.

## TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF APPENDICES.....	iv
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS AND ORDERS ENTERED IN THE CASE .....	1
BASIS FOR JURISDICTION .....	1
STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	1
REASONS FOR GRANTING THE PETITION .....	5
I. THE COURTS OF APPEALS ARE SPLIT 4-3 ON THE QUESTION PRESENTED.....	5
II. THE THIRD CIRCUIT'S DECISION IS INCORRECT.....	9
III. THE QUESTION PRESENTED IS IMPORTANT BECAUSE IT AFFECTS THOUSANDS OF SENTENCES.....	18
IV. THIS CASE IS A CLEAN VEHICLE.....	20

TABLE OF CONTENTS  
(continued)

	Page(s)
CONCLUSION .....	22

TABLE OF APPENDICES

	Page(s)
APPENDIX A	
<i>United States of America v. Overton</i> Criminal No. 01-431-1, Order of U.S. District Court for the Eastern District of Pennsylvania .....	1a
APPENDIX B	
<i>Overton v. United States of America</i> Opinion No. 10-2112 U.S. Court of Appeals for the Third Circuit March 22, 2011, and record below .....	2a
APPENDIX C	
18 U.S.C. § 3583(c), (e) .....	73a
APPENDIX D	
18 U.S.C. § 3553(a) .....	75a

## TABLE OF AUTHORITIES

	Page(s)
 <b>CASES</b>	
<i>Barnhart v. Peabody Coal Co.</i> , 537 U.S. 149 (2003).....	9
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001).....	12
<i>Johnson v. United States</i> , 529 U.S. 694 (2000).....	13
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	16
<i>Nashville Milk Co. v. Carnation Co.</i> , 355 U.S. 373 (1958).....	11
<i>Original Honey Baked Ham Co. v. Glickman</i> , 172 F.3d 885 (D.C. Cir. 1999).....	11
<i>Pepper v. United States</i> , 131 S. Ct. 1229 (2011).....	8, 16
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	10
<i>Tapia v. United States</i> , 131 S. Ct. 2382 (2011).....	13, 15, 21
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001).....	12
<i>United States v. Barnes</i> , 258 F. App'x 95 (9th Cir. 2007).....	7
<i>United States v. Black</i> , 289 Fed. App'x 613 (4th Cir. 2008).....	7
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	8
<i>United States v. Brandon</i> , 247 F.3d 186 (4th Cir. 2001).....	10

TABLE OF AUTHORITIES

(continued)

Page(s)

*United States v. Crudup*,  
461 F.3d 433 (4th Cir. N.C. 2006) .....7

*United States v. Lewis*,  
498 F.3d 393 (6th Cir. 2007).....5, 6

*United States v. Marcus*,  
130 S. Ct. 2159 (2010).....21

*United States v. Miller*,  
634 F.3d 841 (5th Cir. 2011), petition for cert. filed (No. 10-10784, filed  
May 27, 2011).....5, 6, 21

*United States v. Miqbel*,  
444 F.3d 1173 (9th Cir. 2006).....7, 8

*United States v. Moulden*,  
478 F.3d 652 (4th Cir. 2007).....7

*United States v. Simtob*,  
485 F.3d 1058 (9th Cir. 2007).....7

*United States v. Smith*,  
319 F. App'x 845 (11th Cir. 2009).....6

*United States v. Sweeting*,  
437 F.3d 1105 (11th Cir. 2006).....6

*United States v. Turner*,  
241 F. App'x 168 (4th Cir. 2007).....7

*United States v. Vonn*,  
535 U.S. 55 (2002)).....9

*United States v. Williams*,  
443 F.3d 35 (2d Cir. 2006) .....6

*United States v. Young*,  
634 F.3d 233 (3d Cir. 2011) ..... passim

STATUTES

12 U.S.C. § 4010(b).....11

**TABLE OF AUTHORITIES**  
(continued)

	Page(s)
15 U.S.C. § 1640(a) .....	11
18 U.S.C. § 3162(a)(1).....	11
18 U.S.C. § 3553 .....	2
18 U.S.C. § 3553(a).....	passim
18 U.S.C. § 3553(a)(2)(A).....	passim
18 U.S.C. § 3562(a) .....	10
18 U.S.C. § 3582(c)(1)(A).....	10
18 U.S.C. § 3583(c) .....	1, 15
18 U.S.C. § 3583(e) .....	passim
18 U.S.C. § 3584(b).....	10
Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1006(a), 100 Stat. 3207 (October 27, 1986) .....	14
Pub. L. No. 100-182, § 9, 101 Stat. 1267 (Dec. 7, 1987).....	15
Pub. L. No. 100-690, § 7108(b)(1), 102 Stat. 4419 (Nov. 18, 1988).....	15
Pub. L. No. 107-273, § 3007, 116 Stat. 1806 (Nov. 2, 2002) .....	15
Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 <i>et seq.</i> and 28 U.S.C. § 991 <i>et seq.</i> ) .....	2
 <b>OTHER AUTHORITIES</b>	
Bureau of Justice Statistics, FEDERAL CRIMINAL JUSTICE TRENDS 35, tbl.27 (2003), <a href="http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf">http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf</a> (last visited July 19, 2011) .....	18
Bureau of Justice Statistics, FEDERAL CRIMINAL JUSTICE TRENDS 35, tbl.29 (2003), <a href="http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf">http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf</a> (last visited July 19, 2011) .....	18, 19

**TABLE OF AUTHORITIES**  
(continued)

Page(s)

Bureau of Justice Statistics, FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, tbl.7.1 (Nov. 2010), <a href="http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st702.pdf">http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st702.pdf</a> (last visited July 19, 2011).....	19
Bureau of Justice Statistics, FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, tbl.7.2 (Nov. 2010), <a href="http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st702.pdf">http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st702.pdf</a> (last visited July 19, 2011).....	18, 19
Fed. R. Crim. P. 52(b).....	21
FEDERAL SENTENCING GUIDELINES HANDBOOK § 7B1.3 (2010-2011 ed.).....	5
S. Rep. No. 98-225 (1983).....	2, 13, 14
United States Sentencing Commission, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 3 (July 2010), <a href="http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2011/018_Supervised_Release.pdf">http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2011/018_Supervised_Release.pdf</a> (last visited June 29, 2011).....	18, 19
USSG Manual, App. C., amend. 584 (eff. Nov. 1, 1998), <i>available at</i> , <a href="http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Appendix_C_Vol_II.pdf">http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Appendix_C_Vol_II.pdf</a> (last visited July 19, 2011).....	17
USSG Manual, ch. 7, pt. A, cmt. 3(b) (2010) .....	16, 17

## INTRODUCTION

Joseph L. Overton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The order of the United States District Court for the Eastern District of Pennsylvania was entered April 9, 2010, and is attached as Appendix A. App. 1a. The opinion and order of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court was entered March 22, 2011. App. 2a.

## JURISDICTION

The United States District Court for the Eastern District of Pennsylvania entered judgment on April 9, 2010. The U.S. Court of Appeals for the Third Circuit entered judgment on March 22, 2011. On June 14, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 20, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant sections of Title 18, United States Code, Sections 3583(c) and (e) and 3553(a) are set forth in Appendices C and D, respectively. App. 73a, 75a.

## STATEMENT OF THE CASE

This case presents an important and recurring statutory sentencing issue on which the lower courts are intractably divided: may a federal sentencing court consider retribution when sentencing a defendant for violating the terms of

supervised release? Four circuits allow courts to rely on this consideration, while three reject it. Only this Court can resolve the entrenched, acknowledged circuit split.

#### A. Statutory Background

The Sentencing Reform Act of 1984, as amended, contains unique provisions regulating the factors a court should consider at various stages of sentencing. Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. § 991 *et seq.*). Sentences for original convictions are governed by, 18 U.S.C. § 3553(a). A separate statutory provision, 18 U.S.C. § 3583(e), governs later sentencing upon revocation of supervised release.

For sentences for original convictions, 18 U.S.C. § 3553, instructs that “[t]he court, in determining the particular sentence to be imposed, shall consider” a list of enumerated factors. Among these are the retributive or “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).

Congress enacted a separate statutory provision to cover revocation of supervised release: 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 a subset of factors to consider when modifying or revoking supervised release. Specifically, 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 exception of the factors listed in section 3553(a)(2)(A) (the just punishment factors) and section 3553(a)(3) (requiring the original sentencing court to consider “the kinds of sentences available”).

### **B. Facts and Proceedings Below**

In 2002, petitioner Joseph L. Overton pled guilty to one count of bank robbery (which involved no weapon) and was sentenced to 77 months’ imprisonment, to be followed by a 36-month term of supervised release. App. 61a. Mr. Overton served his custodial sentence and was placed on supervised release on June 27, 2007.

On July 9, 2007, the United States Probation Office filed a petition with the district court seeking to revoke Mr. Overton’s supervised release. App. 64a. Following a revocation hearing on April 7, 2010, the district court found Mr. Overton violated the terms of his supervised release by, among other things, committing another crime. Mr. Overton had previously pleaded guilty to the second crime – another bank robbery involving no weapon – and was sentenced to 15 years 8 months in prison. App. 68a. Overton, who is fifty-four years old, will not finish serving this sentence until he is in his late sixties.

At the April 7, 2010 revocation hearing, the district judge imposed the maximum 24-month sentence for Mr. Overton’s violation of the terms of his

supervised release. The court explained the reasoning behind its sentence as follows:

I think that based upon the fact that you went on supervised release the end of June, June 27th, and the new arrest was July 6, you weren't on the street for very long, so clearly it's necessary to put you in custody and supervised release is not an alternative here. The Court will make the sentence consecutive, otherwise, *I would not be punishing you for a separate crime.*

App. 71a (emphasis added).

On appeal, Overton argued that a district court sentencing a defendant when revoking supervised release is directed to consider the factors laid out by 18 U.S.C. § 3583(e), and providing punishment for the defendant “is not incorporated by § 3583(e).” See App. 6a. Thus, while punishment may be considered in sentencing for the crime committed (i.e., robbery), see 18 U.S.C. § 3553(a)(2)(A), it may not be considered in revoking supervised release.

The court of appeals rejected Overton's argument on the authority of its prior precedential decision in *United States v. Young*, 634 F.3d 233, 238–39 (3d Cir. 2011), which held that a district court does not err in considering any § 3553(a)(2)(A) factors in revoking supervised release, even factors omitted from § 3583(e) (such as punishment). App. 6a. The court was bound by *Young's* holding that “the consideration of these factors does not constitute a procedural error by itself.” *Id.* (citing *Young*, 634 F.3d at 241).

On the separate question as to whether the district court had weighed the § 3553(a)(2)(A) factors too heavily in relation to the other § 3553 factors, the court of appeals concluded that the district court's “[b]rief” analysis of other factors like

Mr. Overton's criminal history (§ 3553(a)(1)) and the need to protect the public (§ 3553(a)(2)(C)) did not amount to plain error. *Id.*

### REASONS FOR GRANTING THE PETITION

This case presents an entrenched and acknowledged split among the federal courts of appeals on how to interpret an important federal statute. This Court's review is imperative to ensure uniformity on an important and recurring issue of federal sentencing law.

#### **I. THE COURTS OF APPEALS ARE SPLIT 4-3 ON THE QUESTION PRESENTED**

##### **A. The Third Circuit's Rule Exacerbates An Entrenched And Acknowledged Conflict In Authority Over The Interpretation Of § 3583(e).**

The courts of appeals have acknowledged that "a circuit split has emerged" on whether § 3583(e) precludes consideration of factors not listed in the statute governing sentencing for revocation purposes. *United States v. Miller*, 634 F.3d 841, 844 (5th Cir. 2011), *petition for cert. filed* (No. 10-10784, filed May 27, 2011); *accord United States v. Lewis*, 498 F.3d 393, 399–400 (6th Cir. 2007); FEDERAL SENTENCING GUIDELINES HANDBOOK § 7B1.3 (2010-2011 ed.) (noting that "[t]he circuits are divided over whether a court may consider factors other than those listed in 18 U.S.C. § 3583(e)(3) in revoking supervised release").

The Third Circuit has now deepened the circuit conflict, declaring that it was "join[ing] the Courts of Appeals for the Second and Sixth Circuits" in holding that a district court may permissibly consider factors *not* listed in § 3583(e) in sentencing a defendant on revocation of supervised release. *Young*, 634 F.3d at 238-39; App. 6a

(following *Young*). In *United States v. Williams*, the Second Circuit held that “§ 3583(e) cannot reasonably be interpreted to exclude consideration of the seriousness of the releasee’s violation [a § 3553(a)(2)(A) factor], given the other factors that must be considered.” 443 F.3d 35, 48 (2d Cir. 2006). Similarly, in *Lewis*, the Sixth Circuit, expressly joining the Second Circuit and rejecting the position of two other circuits, held that “the fact that § 3583(e) does not require that courts consider § 3553(a)(2)(A) does not mean that courts are forbidden to consider that factor, and the fact that a sentencing court does consider § 3553(a)(2)(A) is not error.” 498 F.3d at 400. Finally, the Eleventh Circuit has approved punishment of supervised release violations, so long as the sentencing court does not attempt to punish the original offense of conviction. See *United States v. Sweeting*, 437 F.3d 1105, 1107 (11th Cir. 2006); *United States v. Smith*, 319 F. App’x 845, 847-48 (11th Cir. 2009) (unpublished per curiam).

On the other side of the divide, the Courts of Appeals for the Fourth, Fifth, and Ninth Circuits take the contrary position that district courts may not consider the retribution factors omitted from § 3583(e) when setting a revocation sentence. In *Miller*, the Fifth Circuit ruled that “the [sentencing] court clearly considered § 3553(a)(2)(A) and in doing so, that court erred.” 634 F.3d at 844. Similarly, in *United States v. Crudup*, the Fourth Circuit found that “[a]ccording to § 3583(e), in devising a revocation sentence the 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.’

§ 3553(a)(2)(A), or whether there are other ‘kinds of sentences available,’ § 3553(a)(3).” 461 F.3d 433, 439 (4th Cir. 2006).<sup>1</sup> The Ninth Circuit interprets the statute in the same manner: “[A]t a revocation sentencing, a court may appropriately sanction a violator for his ‘breach of trust,’ but may not punish him for the criminal conduct underlying the revocation. The omission of § 3553(a)(2)(A) from § 3583(e) also makes clear that in imposing a revocation sentence, a court may not properly consider a need to ‘promote respect for the law,’ based on the nature of the underlying criminal offense committed, or on the ‘seriousness of the [underlying] offense.” *United States v. Miquel*, 444 F.3d 1173, 1182 (9th Cir. 2006) (citation omitted). The Ninth Circuit has repeatedly vacated sentences in which it appeared that the district court did not adhere to the *Miquel* standard. *See, e.g., United States v. Simtob*, 485 F.3d 1058, 1062–64 (9th Cir. 2007) (clarifying that the revocation court may consider the seriousness of the offense underlying the revocation as part of an evaluation of a defendant’s criminal history, but vacating the sentence because of the risk that the revocation sentence was principally based on the seriousness of the underlying offense); *United States v. Barnes*, 258 F. App’x 95, 96 (9th Cir. 2007) (unpublished per curiam) (vacating revocation sentence because district court relied improperly on just punishment factors).

---

<sup>1</sup> The Fourth Circuit has reaffirmed the *Crudup* rule in subsequent cases. *See United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007) (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) (unpublished per curiam) (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*, 461 F.3d at 439). *But see United States v. Black*, 289 Fed. App’x 613, 614–15 (4th Cir. 2008) (unpublished per curiam) (reaffirming *Crudup* but citing *Lewis and Williams* approvingly in finding the sentence not to be plainly unreasonable).

Here, there can be little doubt that Overton's sentence would be reversed in courts following the opposite rule, where "[t]he improper reliance on a factor Congress decided to omit from those to be considered at revocation sentencing, as a primary basis for a revocation sentence," renders the sentence unreasonable. *Miqbel*, 444 F.3d at 1182. Even though the district court considered other factors, App. 71a, punishment was at least a primary factor in the sentencing. Indeed, the very reason that the district court gave for imposing the maximum 24-month term as a consecutive sentence is that "otherwise, I would not be punishing [Mr. Overton] for a separate crime." *Id.*

Because a number of circuits have already expressly rejected the decisions of courts on the other side of the divide, further percolation will not resolve this division in authority; only this Court can do so. Subsequent decisions will only deepen the 4-3 split in authority, and continue the *status quo ante* where revocation sentences are decided according to different factors in different jurisdictions, despite the overriding goal of uniformity animating the federal sentencing scheme. See 18 U.S.C. § 3553(a) (identifying relevant factors in sentencing, including "uniformity"); *United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."); see also *Pepper v. United States*, 131 S. Ct. 1229, 1253 (2011) (Breyer, J., concurring in part and concurring in the judgment) ("Congress wrote statutes designed primarily (though not exclusively) to bring about greater uniformity in sentencing.").

## II. THE THIRD CIRCUIT'S DECISION IS INCORRECT.

### A. The Decision Below Conflicts With The Statutory Text.

By limiting § 3583(e) to a specific, smaller list of potential factors relevant to sentencing after revocation, Congress precluded courts from considering the just punishment factors of § 3553(a) in decisions regarding the revocation of supervised release. But the decision below relies on precisely those forbidden factors. Any other reading of the statute conflicts with well-settled principles of statutory construction, the legislative history behind the Sentencing Guidelines, and the policies of the U.S. Sentencing Commission. The decision below contravenes three well-established principles of statutory construction: (1) the canon of *expressio unis est exclusio alterius*; (2) the maxim that when Congress identifies each relevant factor in a list, that list is exclusive and exhaustive; and (3) the principle that a statute should be construed so that no part of it is void or superfluous. For these reasons, the decision is incorrect.

First, Congress's express enumeration in § 3583(e) of only eight of the ten factors present in § 3553(a)(2)(A) implies that it deliberately excluded the remaining two factors. The canon *expressio unis est exclusio alterius* applies "when the items expressed are members of an 'associated group or series,' justifying 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)). As this Court explained in *Russello v. United States*, 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 inclusion or exclusion.” 464 U.S. 16, 23 (1983) (internal quotation omitted); *see, e.g., United States v. Brandon*, 247 F.3d 186, 190 (4th Cir. 2001) (“courts are obligated’ to give effect to Congress’s decision to use ‘different language in proximate subsections of the same statute”). Here, had Congress intended to include in § 3583(e) every factor listed in § 3553(a), it would have incorporated those factors in their entirety or simply referred to the entire section, not a particular list of subsections.

In fact, Congress did just that in many other sections of the Act. Section 3562, regarding “[f]actors to be considered in imposing a term of probation,” dictates that “[t]he court, in determining whether to impose a term of probation . . . shall consider the factors set forth in section 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3562(a). Similarly, § 3582(c)(1)(A), which authorizes a court to revoke probation, provides that the court may revoke probation and resentence a defendant “after considering the factors set forth in section 3553(a).” 18 U.S.C. § 3582(c)(1)(A). *See also* 18 U.S.C. § 3584(b) (same instruction with respect to court’s decision whether to impose multiple sentences concurrently or consecutively). Because Congress used distinctly different language to describe the factors to be considered in each section of the Act, the only reasonable conclusion is that Congress had distinctly different intentions in doing so.

Second, the decision below ignores the well-settled rule that when Congress identifies each relevant factor in a list, as it has in § 3583(e), the reader of the statute can and should infer that the list is exclusive and exhaustive. *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 [what] it does cover exempts, by omission, the things it does not list.”).

The Third Circuit incorrectly determined that Congress omitted the just punishment factors from § 3583(e) but nevertheless intended to permit courts to base supervised release revocation decisions on those omitted factors. It is true that Congress does not state expressly in the statute that the listed factors in § 3583(e) are the “only factors” that courts can consider, or that courts should not consider the excluded factors. Congress rarely, though, dictates that a court may consider “only” certain factors. Instead, when Congress intends to allow courts to consider factors other than those expressly listed, it often states that intention explicitly. See, e.g., 18 U.S.C. § 3162(a)(1) (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(a) (same). Congress made no such statement in § 3583(e). Instead, it declined to authorize the consideration of additional factors, in addition to excluding those factors from the statutory provision itself. The only natural inference to be drawn, then, is that Congress excluded the “just punishment” factors from § 3583(e) because it intended to preclude courts from considering those factors in their supervised release revocation decisions.

Finally, the Third Circuit's decision violates in two ways the "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)). First, the decision below, like the other courts of appeals with which it agrees, erred in finding that a district court's statement regarding punishment "addressed Overton's criminal history and the need to protect the public, and also could plausibly be taken to reflect a need for deterrence, all of which are factors explicitly incorporated by § 3583(e)." App. 6a (internal citations omitted). With this statement, the Third Circuit implied that the just punishment factors omitted from § 3583(e) are simply redundant of other factors incorporated into that statutory provision. They are not. The district court's stated purpose was to insure that it was "punishing [Mr. Overton] for a separate crime"; it did not mention Mr. Overton's criminal history, deterrence, or protection of the public. App. 71a. Congress believed that the just punishment factors were separate and distinct from the other factors outlined in § 3553(a), and that they merited both separate mention in § 3553(a) and exclusion from § 3583(e).

Second, the Third Circuit's decision further muddles this explicit statutory language by effectively creating a new test for whether consideration of § 3553(a) factors is appropriate during revocation sentencing decisions. The court stated that "there may be a case where a court places undue weight on the seriousness of the violation or the need for the sentence to promote respect for the

law and provide just punishment” even though “the consideration of [§ 3553(a)(2)(A)] factors does not constitute a procedural error by itself.” App. 6a (quoting *Young*, 634 F.3d at 241). This Goldilocks test not only lets sentencing courts consider non-section 3583(e) factors, but also draws an arbitrary line between *some* consideration of these non-listed factors and *too much* consideration. That ambiguous test would make it impossible for district courts to apply § 3583(e) uniformly. *Cf. Tapia v. United States*, 131 S. Ct. 2382, 2388 (2011) (rejecting a reading that would have turned the preceding section of the Sentencing Reform Act from a bar into “a kind of loosey-goosey caution not to put *too much* faith” in the rehabilitative purpose of prison sentencing) (emphasis in original).

#### B. The Third Circuit’s Decision Conflicts With Legislative History

Congress created supervised release as part of the Sentencing Reform Act of 1984. As explained in the Senate Report for the Sentencing Reform Act, “[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.*” S. Rep. No. 98-225, at 125 (emphasis added). *See also Johnson v. United States*, 529 U.S. 694, 708 (2000) (“Prisoners may, of course, vary in the degree of help needed for successful reintegration. Supervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those, who needed it.”) (citing S. Rep. No. 98-225, at 125).

Congress considered using supervised release for punitive purposes but ultimately rejected that idea, concluding “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. Instead, Congress decided that the “primary goal of such a term [of supervised release was] 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 for punishment or other purposes but still needs supervision and training programs after release.” *Id.*

As originally enacted, the Sentencing Reform Act did not authorize the revocation of supervised release pursuant to § 3583(e); courts had the option only to shorten or extend terms of supervised release. Congress created the revocation option two years later as a “technical amendment” to the Sentencing Reform Act, through the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1006(a), 100 Stat. 3207. In granting courts the power to revoke supervised release, Congress opted to use the same list of factors it originally authorized for the modification of supervised release. Had Congress intended to subject violations of supervised release to punishment as though they were violations of the criminal code, it could have done so by incorporating the just punishment factors of § 3553(a). Instead, it opted to eliminate those factors in amending § 3583(e). The Senate Report for the Sentencing Reform Act clarifies that “[i]f the violation [of supervised release] is a new offense, the defendant may, of course, be prosecuted for the offense.” S. Rep.

No. 98-225 at 125. Congress did not intend the sentencing court to impose incarceration in retribution for the revocation offense.<sup>2</sup>

Congress expressed this intention not only when it initially drafted § 3583(e) and amended it to permit revocation of supervised release, but also in additional amendments to the section. Several years later, Congress added protection of the public to the list of factors that courts should consider when imposing, modifying, or revoking a term of supervised release. Pub. L. No. 100-690, § 7108(b)(1), 102 Stat. 4419 (Nov. 18, 1988); Pub. L. No. 100-182, § 9, 101 Stat. 1267 (Dec. 7, 1987) (parallel amendment to § 3583(c), entitled “Inclusion of Protection of Public as Factor in Deciding Whether to Impose Supervised Release” (all capitals and emphasis omitted)). In 2002, Congress clarified that restitution is a proper condition of supervised release by adding § 3553(a)(7) to the list of factors considered in §§ 3583(c) and (e). *See* Pub. L. No. 107-273, § 3007, 116 Stat. 1806 (Nov. 2, 2002) (“Subsections (c) and (e) of section 3583 of title 18, United States Code, are amended by striking ‘and (a)(6)’ and inserting ‘(a)(6), and (a)(7).’”). If Congress had not understood § 3583’s factors to be exhaustive, it would not have needed to amend that section to add these considerations.

Congress therefore omitted the just punishment factors from § 3583(e) not once, but three times – once in the initial drafting of the subsection, once when authorizing courts to revoke terms of supervised release in addition to modifying

---

<sup>2</sup> *See Tapia*, 131 S. Ct. at 2388 (explaining that “a particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration” and noting that “a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release”) (citing § 3583(c)) (emphasis in original).

them, and again when adding restitution as a condition of supervised release. A reading of the statute that permits judges to consider these factors simply runs afoul of Congress's intentions.

**C. The U.S. Sentencing Commission's Policy Statements Likewise Foreclose The Third Circuit's Interpretation.**

Section 3583(e) enumerates as an appropriate consideration "any pertinent policy statement" of the Sentencing Commission. See 18 U.S.C. § 3583(e) (incorporating by reference 18 U.S.C. § 3553(a)(5)); *Pepper v. United States*, 131 S. Ct. at 1241 (a district "court must [still] 'give respectful consideration'" to the Sentencing Commission's policy guidelines) (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)). The decision below is at odds with the policy statements issued by the U.S. Sentencing Commission regarding violations of supervised release, which echo Congress's intentions in omitting the just punishment factors from § 3583(e).

In the introduction to Chapter 7 of the Sentencing Guidelines Manual, the Sentencing Commission addresses head-on the purpose of sanctions for a violation of supervised release, explaining that "imposition of an appropriate [sentence] for any new criminal conduct [is not] the primary goal of a revocation sentence." USSG Manual, ch. 7, pt. A, cmt. 3(b) (2010). For that reason, the Sentencing Commission rejected an approach that "sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct," finding that "that option was inconsistent with its views that the

court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for the new criminal conduct.” *Id.*

Instead, the Sentencing Commission opted “to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.” *Id.* The Commission found that Congress intended for courts to view the defendant’s “failure to follow the court-imposed conditions of . . . supervised release as a ‘breach of trust,’” rather than a criminal act. *Id.*

The Sentencing Commission also addressed the omission of the just punishment factors from § 3583(e) in an amendment to the supervised release guidelines. In Amendment 584 to the Sentencing Guidelines Manual, the Commission deleted “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 statute] as a permissible factor to be considered.” USSG Manual, App. C., amend. 584, (eff. Nov. 1, 1998), available at [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_PDF/Appendix\\_C\\_Vol\\_II.pdf](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Appendix_C_Vol_II.pdf) (last visited July 19, 2011).

The Sentencing Commission’s interpretation of Congressional intent is explicit. Its policy statements, read in combination with the statute’s legislative history and the canons of statutory construction, lead to only one conclusion – that courts may not consider the just punishment factors of § 3553(a) when sanctioning violations of supervised release pursuant to § 3583(e).

### III. THE QUESTION PRESENTED IS IMPORTANT BECAUSE IT AFFECTS THOUSANDS OF SENTENCES

The question this petition presents is broad and important to thousands of individuals on supervised release, to the United States' prosecutorial interests, and to ensuring the effectiveness and efficiency of the sentencing scheme devised by Congress for revocations of supervised release.

Supervised release is a widely used tool in the federal administration of justice, and was instituted as part of the Federal government's sentencing reforms in the late 1980s. Since then, nearly one million federal offenders have been sentenced to terms of supervised release. United States Sentencing Commission, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 3 (July 2010).<sup>3</sup> The rate of imposition of supervised release has steadily risen during this period. In 2008, more than 90,000 federal offenders were on supervised release, up from approximately 75,000 in 2003 and fewer than 35,000 in 1994. Bureau of Justice Statistics, FEDERAL CRIMINAL JUSTICE TRENDS 35, tbl.27 (2003); Bureau of Justice Statistics, FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, tbl.7.2 (Nov. 2010).<sup>4</sup> Each year, approximately 10,000 individuals have their supervised release status revoked because of technical violations or new crimes. FEDERAL

---

<sup>3</sup> The United States Sentencing Commission report is available at [http://www.ussc.gov/Education\\_and\\_Training/Annual\\_National\\_Training\\_Seminar/2011/018\\_Supervised\\_Release.pdf](http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2011/018_Supervised_Release.pdf) (last visited July 19, 2011).

<sup>4</sup> The Bureau of Justice Statistics report and statistical tables are available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf> (last visited July 19, 2011) and <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st702.pdf> (last visited July 19, 2011), respectively.

CRIMINAL JUSTICE TRENDS 37, tbl.29; FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, tbl.7.2.

The rapid growth in both the number of offenders on supervised release and the number of revocations renders this Court's guidance crucial to the fair administration of justice. The problem of inconsistent application of revocation sentencing factors becomes more widespread by the year. The total population of offenders on supervised release grew by more than 150% between 1994 and 2008. See FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.27 (34,091 offenders on supervised release in 1994); FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, *supra*, tbl.7.1 (94,703 offenders on supervised release in 2008). The number of terminations that resulted from a technical violation or new crime rose by a similar percentage during that period. *Id.*<sup>5</sup> By the latest count, about one-third of all offenders on supervised release have their terms revoked and are sent back to prison, with an average new prison term of 11 months. FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, *supra*, at 4, 63.

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 disparate treatment of similarly

---

<sup>5</sup> In 1994, 3,979 offenders had their supervised release revoked due to violation of technical terms or the commission of a new crime. By 2003, that number had grown to 11,007, a 177% increase. FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.29.

situated defendants is precisely what Congress sought to minimize by setting forth uniform criteria for courts to consider when deciding whether to revoke supervised release, namely, the specific factors referred to in section 3583(e). The current conflict directly undermines that important congressional objective and should not be allowed to endure.

#### IV. THIS CASE IS A CLEAN VEHICLE

The decision below presents the Court with a clean vehicle to resolve the deep divide among the Courts of Appeals. In the case below, the district court clearly and explicitly stated that it was setting a revocation sentence based on its perceived need to “punish[]” Overton. App. 71a. The Court of Appeals for the Third Circuit affirmed the revocation sentence, reaffirming its interpretation of § 3583(e) set forth in *Young*, holding that, without more, a district court does not err by considering § 3553(a)(2)(A) factors when deciding the length of a revocation sentence. App. 6A. The facts of this case are simple, not in dispute, and were fully developed during the sentencing hearing. This case arises on direct appeal, and thus presents no collateral-review bar. Overton’s 24-month sentence for violation of supervised release will run consecutive to his 15-year bank robbery sentence. App. 72a. Thus, unlike in many supervised release cases where the term of imprisonment is short, there is no risk of mootness during the Court’s consideration of this case. The Court can therefore cleanly decide the legal issue of the appropriate interpretation of § 3583(e) and settle the split in authority bedeviling the lower courts.

Finally, this is an excellent vehicle because the Court can decide the issue of the permissible factors for revocation sentences without becoming enmeshed in

deciding the reasonableness of the particular sentence (an inquiry that is the subject of another circuit split on the standard of review, *see Miller*, 634 F.3d at 843). Moreover, because it relied on its prior decision in *Young*, the Third Circuit held squarely that consideration of the § 3553(a)(2)(A) factors in revoking supervised release was not reversible error. *See App. 6a*. It did not need to consider whether any error was plain (as it did with regard to the separate issue of whether the district court may have placed undue weight upon retribution, *id.*). Thus, this Court may consider only the straightforward issue of whether district courts are permitted under § 3583(e) to consider the omitted § 3553(a)(2)(A) retribution factors in revoking supervised release, without having to deal with plain error. If this Court were to hold that such consideration is error, it may (consistently with its practice) reverse the judgment and remand to the court of appeals to consider the effect under Federal Rule of Criminal Procedure 52(b) of Overton's failure to object to this error at sentencing. *See Tapia*, 131 S. Ct. at 2393 (citing Fed. R. Crim. Proc. 52(b)); *United States v. Marcus*, 130 S. Ct. 2159, 2164, 2167 (2010).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



STEPHEN B. KINNAIRD

*Counsel of Record*

MITCHELL A. MOSVICK

EMILY NEWHOUSE DILLINGHAM

CHRISTOPHER M. MOONEY

MARY-ELIZABETH M. HADLEY

Paul, Hastings, Janofsky & Walker LLP

875 15th Street, N.W.

Washington, D.C. 20005

(202) 551-1700

stephenkinnaird@paulhastings.com

STEPHANOS BIBAS

University of Pennsylvania Law School

Supreme Court Clinic

3400 Chestnut Street

Philadelphia, PA 19104

(215) 746-2297

sbibas@law.upenn.edu

*Attorneys for Petitioner*

Joseph L. Overton

July 20, 2011