No. _____

IN THE
Supreme Court of the United States

CALVIN COLEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court is required to consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when determining a term of imprisonment for a defendant whose supervised release has been revoked pursuant to 18 U.S.C. § 3583(g).

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PETITION FOR WRIT OF CERTIORARI

Calvin Coleman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit (Pet. App. 1a) is reported at 706 F. App'x 618. The decision of the District Court (Pet. App. 6a, 10a) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on November 30, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. section 3583(g) provides:

> **MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.**—If the defendant—
>
> (1) possesses a controlled substance in violation of the condition set forth in subsection (d);
>
> (2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise

violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

Title 18 U.S.C. section 3553(a) provides, in pertinent part:

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. . . ;

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

(5) any pertinent policy statement . . . [;]

(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.

INTRODUCTION

This case presents an important question of federal law upon which the courts of appeals are firmly divided: Whether a district court is required to consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when setting a term of imprisonment for a defendant whose supervised release has been mandatorily revoked pursuant to 18 U.S.C. § 3583(g). The Eleventh Circuit, along with the Fifth, Sixth, and Tenth Circuits, has held that § 3583(g) does not require consideration of the § 3553(a) factors when a defendant is sentenced after the mandatory revocation of supervised release. *See, e.g.*, Pet. App. 4a-5a; *United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000); *United States v. Illies*, 805 F.3d 607, 609 (5th Cir. 2015); *United States v. Jackson*, 70 F.3d 874, 880 (6th Cir. 1995), *abrogated on other grounds by Tapia v. United States*, 564 U.S. 319, 332 (2011); *United States v. Tsosie*, 376 F.3d 1210, 1214 n.2 (10th Cir. 2004), *abrogated on other grounds by Tapia v. United States*, 564 U.S. 319, 332 (2011). The Third Circuit has held exactly the opposite. *See United States v. Thornhill*, 759 F.3d 299, 309 (3d Cir. 2014).

Not only is there an acknowledged and entrenched conflict within the circuits, but the question presented is important and recurring. A meaningful portion of the federal prison population is serving a sentence imposed as a result of mandatory revocation of supervised release, and there is no justification for the current geographical disparity as to what district judges are required to consider when determining the length of those sentences. Moreover, review is particularly merited here because the Eleventh

Circuit's interpretation of § 3583(g)—and those circuits with which it is aligned—is wrong. Those circuits read § 3583(g) out of its statutory context and, as a result, countenance the absurd result that a district court has "carte blanche" when selecting a term of imprisonment in the *sole* context of mandatory revocation of supervised release. This, notwithstanding a statutory scheme that requires consideration of the § 3553(a) factors "in imposing each component of a sentence." *Thornhill*, 759 F.3d at 310.

Finally, this case presents the ideal vehicle through which this Court can resolve the conflict in the circuits. The facts are not complex or disputed, and on appeal Mr. Coleman challenged his sentence imposed pursuant to § 3583(g) as unreasonable because the District Court failed to consider the § 3553(a) sentencing factors. The Eleventh Circuit affirmed the sentence, explicitly providing that the sole basis for its decision was that § 3583(g) "does not require consideration of the § 3553(a) factors." Pet. App. 4a-5a.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

In 2012, Calvin Coleman pleaded guilty to a drug offense under 21 U.S.C. § 841(a)(1) and was sentenced to a ninety-two month term of imprisonment followed by a four-year term of supervised release.[1] Pet. App. 2a. As a condition of his supervised release, Mr. Coleman was prohibited from possessing a controlled

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[1] The district court had jurisdiction over Mr. Coleman's case pursuant to 18 U.S.C. § 3231.

substance. Pet. App. 2a.

While on supervised release, Mr. Coleman was arrested for the unlawful distribution of Xanax, a controlled substance.[2] Pet App. 2a. The District Court found Mr. Coleman in violation of the terms of his supervised release. Pet. App. 2a. Title 18 U.S.C. § 3583(g)(1) provides "[i]f the defendant . . . possesses a controlled substance in violation of [a condition of supervised release] . . . the court *shall* revoke the term of supervised release and require the defendant to serve a term of imprisonment . . . ." (emphasis added). In light of Mr. Coleman's possession of Xanax, the district court found revocation of Mr. Coleman's supervised release mandatory, and moved to impose a sentence of imprisonment. Pet. App. 2a.

At sentencing, the government requested a 36-month term of imprisonment, which was the statutory maximum. Pet. App. 2a. Mr. Coleman, by contrast, requested a sentence of 20 months. Pet. App. 2a. The District Court imposed 36 months of imprisonment, stating: "as long as you continue to do the things that you're doing and violate the law, you've got no future. You know, you've got no future with your family or with anybody else, and you're just going to have to deal with that. The appropriate sentence in your case is the statutory maximum." Pet. App. 8a, 12a.

Mr. Coleman timely appealed, arguing in the first instance that his sentence was unreasonable because

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[2] Mr. Coleman's supervised release was revoked twice prior to the revocation that is at issue in this petition. Those prior revocations are not relevant to the question presented here. Pet. App. 2a.

the District Court had failed to consider any of the sentencing factors specified in 18 U.S.C. § 3553(a). Pet. App. 3a. Because Mr. Coleman had not raised this objection before the district court, the Eleventh Circuit observed that a plain error standard applied to its review of procedural reasonableness of the sentence, and an abuse of discretion standard to its review of the sentence's substantive reasonableness. Pet. App. 3a-4a. However, the Eleventh Circuit explicitly declined the government's invitation to resolve the case on the basis that the district court's error was not plain. *See* Pet. App. 5a n.5. The Eleventh Circuit also declined to hold that the district court had, as a matter of fact, adequately considered the § 3553(a) factors. Pet. App. 5a n.5.

Rather, the Eleventh Circuit affirmed Mr. Coleman's sentence based solely on its interpretation of the requirements of § 3583(g). Pet. App. 4a-5a. The court first acknowledged that "[i]n most cases, a sentence may be procedurally unreasonable if a district court fails to consider the § 3553(a) factors or substantively unreasonable if the court unjustifiably relies on any particular factor listed in § 3553(a)." Pet. App. 4a. However, the court held that as a matter of law the § 3553(a) factors had no bearing on Mr. Coleman's sentence because "when revocation of supervised release is mandatory under 18 U.S.C. § 3583(g), the statute does not require consideration of the § 3553(a) factors." Pet. App. 4a (quoting *Brown*, 224 F.3d at 1241). In so holding, the court acknowledged that its ruling conflicted with that of the Third Circuit, "which has held that district courts must

consider the § 3553(a) factors even when revocation of supervised release is mandatory." Pet. App. 4a n.4 (citing *Thornhill*, 759 F.3d at 299). Recognizing that the holding in *Brown* controlled, the Eleventh Circuit concluded "[w]e are bound to follow *Brown* unless and until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL-ENTRENCHED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

A. The Fifth, Sixth, Tenth, and Eleventh Circuits Do Not Require District Courts to Consider the § 3553(a) Factors in § 3583(g) Sentencing Proceedings.

The Eleventh Circuit's decision in this case is consistent with *Brown*, a prior published decision of the Eleventh Circuit, as well as decisions from the Fifth, Sixth, and Tenth Circuits. It squarely conflicts with the law in the Third Circuit.

In *Brown*, a district court imposed a 24-month sentence after the mandatory revocation of a defendant's supervised release pursuant to § 3583(g). *See* 224 F.3d at 1239. In imposing this sentence, however, the district court instructed that were the Bureau of Prisons unable to place the defendant in a drug treatment program, the court would reduce the sentence to eleven months. *Id.* On appeal, the

defendant challenged as an abuse of discretion the district court's imposition of a higher sentence based on one of the § 3553(a) factors—the need to provide the defendant with "correctional treatment" under § 3553(a)(2)(D). *Id.* at 1239-41. In affirming the sentence, the Eleventh Circuit reasoned that even though § 3583(g) "does not *require* consideration of the § 3553(a) factors," *id.* at 1241 (quotation marks omitted), "a sentencing court may consider the rehabilitative needs of a defendant when imposing or determining the length of a term of imprisonment upon mandatory or permissive revocation of supervised release," *id.* at 1243 (emphasis added).[3]

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[3] The Eleventh Circuit later recognized that the Supreme Court's holding in *Tapia v. United States*, 564 U.S. 319 (2011), "abrogates our holding in *United States v. Brown*, where we stated that a court may consider a defendant's rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release." *United States v. Vandergrift*, 754 F.3d 1303, 1309 (11th Cir. 2014) (internal quotation marks omitted). *See Tapia*, 564 U.S. at 335 ("As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."). However, notwithstanding the separate issue that a court may not increase a defendant's sentence for purposes of rehabilitation—an issue not relevant here—the Eleventh Circuit's holding in *Brown* that § 3583(g) "does not *require* consideration of the § 3553(a) factors," 224 F.3d at 1241, is controlling in the Eleventh Circuit. *See, e.g.*, *United States v. Henderson*, 706 F. App'x 626, 627 (11th Cir. 2017) (per curiam); *United States v. Burke*, 677 F. App'x 619, 620 (11th Cir. 2017) (per curiam); *United States v. Stafford*, 599 F. App'x 899, 902-03 (11th Cir. 2015) (per curiam); *United States v. Temprano*, 581 F. App'x 803, 806 (11th Cir. 2014) (per curiam); *United States v. Hefflin*, 563 F. App'x 722, 723 (11th Cir. 2014) (per curiam).

The Eleventh Circuit's holding that a district court need not consider the § 3553(a) factors when sentencing a defendant pursuant to § 3583(g) is consistent with decisions of the Fifth Circuit, *see Illies*, 805 F.3d at 609 ("When revoking a term of supervised release under § 3583(g), the district court may consider the § 3553(a) factors in determining the length of the resulting sentence, but is not required to do so."); the Sixth Circuit, *see Jackson*, 70 F.3d at 880 ("Unlike the statutory provisions governing initial sentencing and sentencing upon permissive revocation of supervised release, the statutory provisions governing mandatory revocation of supervised release neither instruct nor prohibit the sentencing court from considering rehabilitative goals in determining the length of a sentence upon mandatory revocation of supervised release."); and the Tenth Circuit, *see Tsosie*, 376 F.3d at 1214 n.2 ("Mandatory revocation, governed by § 3583(g) and requiring imprisonment upon revocation, does not expressly require consideration of the § 3553(a) factors, but neither does it prohibit the sentencing court from doing so.").[4]

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[4] Both the Sixth and Tenth Circuits have affirmed their rule that § 3583(g) sentencings do not require the consideration of the § 3553(a) factors post-*Tapia*. *See United States v. Terry*, 574 F. App'x 579, 581 (6th Cir. 2014) (per curiam); *United States v. Le*, 259 F. App'x 115, 117-18 (10th Cir. 2007).

B. The Third Circuit Does Require District Courts to Consider the § 3553(a) Factors in § 3583(g) Sentencing Proceedings.

In *Thornhill*, by contrast, the Third Circuit held that district courts are required "to consider the sentencing factors in § 3553(a) in determining the duration of the term of imprisonment imposed under the mandatory revocation provision in § 3583(g)." 759 F.3d at 309. The facts in *Thornhill* are identical in all material aspects to the facts here: The defendant's term of supervised release was revoked under § 3583(g), and the district court imposed a 36-month sentence without reference to the § 3553(a) factors. *Id.* at 305-06. The defendant challenged his sentence as procedurally and substantively unreasonable on the ground that the district court had failed to consider the § 3553(a) factors. *Id.* at 307. The government responded by "arguing that a district court is not required to consider the § 3553(a) factors when revocation of supervised release is governed by § 3583(g)." *Id.* (internal quotation marks omitted).

In rejecting the government's argument, the Third Circuit held "the text and structure of § 3583 and the Sentencing Reform Act require a district court to consider the sentencing factors in § 3553(a) in determining the duration of the term of imprisonment imposed under the mandatory revocation provision in § 3583(g)." *Id.* at 309. It reasoned that there was no need for Congress to mention the § 3553(a) factors in the mandatory revocation provision because "the statutory phrase 'term of imprisonment' in § 3583(g)

incorporates both § 3582 and its directive to consider the § 3553(a) sentencing factors." *Id.* Moreover, the court found, the reference to the § 3553(a) factors in § 3583(e) is directed at the decision whether to revoke supervised release in the first place, a question that is inapplicable in the context of *mandatory* revocation under § 3583(g). *Id.* at 308. Accordingly, no inference can be drawn from the fact that § 3553(a) is expressly cited in § 3583(e) but not § 3583(g). *Id.* Finally, the Third Circuit observed that the statutory scheme "repeatedly tethers the exercise of discretion by a sentencing judge to the factors set out in § 3553(a)," and so reached a conclusion that "avoid[s] . . . odd or absurd results." *Id.* at 310 (quoting *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 375 (3d Cir. 2012)).

* * *

There is thus a clear conflict of authority on whether a district court is required to consider the § 3553(a) sentencing factors in determining a term of imprisonment when revocation of supervised release is mandatory under § 3583(g). In addition to the Eleventh Circuit, the Seventh Circuit has recognized that "circuits are split as to whether a district court need consider § 3553 factors when, as here, the revocation is mandatory under § 3583." *United States v. Jones*, 774 F.3d 399, 404 (7th Cir. 2014). Further percolation is unnecessary. The question presented has been addressed in appellate cases since the mid-1990s. *See, e.g.*, *Jackson*, 70 F.3d at 880; *United States v. Giddings*, 37 F.3d 1091, 1095 (5th Cir. 1994). And there is no reason to believe that the Third Circuit, which reached a contrary result in the face of existing

precedent, will change its position.

II. THIS CASE PRESENTS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

The correct and uniform application of § 3583(g) is an important issue meriting this Court's review because it impacts a significant number of federal prisoners. Almost one million offenders were sentenced to terms of supervised release between 1989 and 2009 alone, and supervised release is revoked in approximately one third of the cases in which it is imposed. *See* U.S. Sentencing Comm'n, Federal Offenders Sentenced to Supervised Release at 3 & n.13, 69 (2010), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf; *see also* Administrative Office of the U.S. Courts, Federal Probation System—Persons Under Post-Conviction Supervision as of September 30, 2016 (Sept. 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_e2_0930.2016.pdf (reporting that 118,242 people were on supervised release at that time, with terms of supervised release imposed in every circuit). At the end of 2009, for example, six percent of federal prisoners were serving sentences imposed after revocation of supervised release. Federal Offenders Sentenced to Supervised Release at 69. That share of the current federal prison population amounts to more than eleven thousand people. *See* Federal Bureau of Prisons, *Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp (reporting a total of 183,447 federal inmates as of February 8, 2018). Even though these statistics are not subdivided

based on whether the revocation of supervised release was discretionary under § 3583(e) or mandatory under § 3583(g), they indicate that the correct application of § 3583(g) implicates a non-trivial population of federal inmates. A definitive ruling on whether defendants are entitled to judicial consideration of the § 3553(a) factors in this context will have ramifications in numerous cases in every circuit.

Moreover, there is no principled justification for identically situated federal defendants being sentenced by federal district judges pursuant to different procedures based solely on the happenstance of their geographic location. There is no reason why, for example, a defendant who refuses to comply with drug testing in violation of a condition of supervised release (triggering mandatory revocation under § 3583(g)(3)) should be entitled to consideration of his "history and characteristics" when a judge is determining a revocation sentence in Pennsylvania but not in Florida. But that is the result under current law. *Compare Thornhill*, 759 F.3d at 309, *with Brown*, 224 F.3d at 1241. This heterogeneity among the circuits arises solely from conflicting judicial interpretations of the same federal statute and requires this Court's review.

III. THIS CASE PRESENTS THE IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case is a strong vehicle for this Court to resolve the correct application of § 3583(g). There are no material facts in dispute and the Eleventh Circuit went out of its way to rule in a manner that preserves the precise question of § 3553(a)'s applicability in § 3583(g) proceedings for this Court's review.

On appeal, the government argued that Mr. Coleman's claim should only be reviewed for plain error because Mr. Coleman did not object to the district court's failure to consider the § 3553(a) factors during sentencing. Pet. App. 5a n.5. The government made this argument notwithstanding their knowledge that it would have been futile for Mr. Coleman to have raised this objection before the district court in light of the Eleventh Circuit's decision in *Brown*.[5] And, crucially, the Eleventh Circuit *expressly* declined the government's request that it resolve the case on plain error grounds. Specifically, the Court rejected the government's argument that "Coleman cannot show that any error would have affected his substantial rights," ruling instead that Mr. Coleman's sentence should be affirmed because "*Brown* governs this case." Pet. App. Pet. App. 5a n.5. *Brown*, as demonstrated above and acknowledged by the Eleventh Circuit, squarely conflicts with the Third Circuit's ruling in *Thornhill*. And—perhaps for the very reason that it wished to preserve the legal question on which the circuits are divided for this Court's review—the Eleventh Circuit resolved Mr. Coleman's case based on the legal rule announced in *Brown*, alone.

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[5] Numerous cases in the Eleventh Circuit have rejected the argument that the § 3553(a) factors should be considered during § 3583(g) sentencings in light of *Brown*. *See, e.g.*, *United States v. Henderson*, 706 F. App'x 626, 627 (11th Cir. 2017) (per curiam); *United States v. Burke*, 677 F. App'x 619, 620 (11th Cir. 2017) (per curiam); *United States v. Stafford*, 599 F. App'x 899, 902-03 (11th Cir. 2015) (per curiam); *United States v. Temprano*, 581 F. App'x 803, 806 (11th Cir. 2014) (per curiam); *United States v. Hefflin*, 563 F. App'x 722, 723 (11th Cir. 2014) (per curiam).

As such, were this Court to find that § 3583(g) requires a district judge to consider the § 3553(a) factors when imposing a sentence, it would reverse the Eleventh Circuit. Any subsequent argument regarding plain error could then be considered on remand.[6]

IV. THE ELEVENTH CIRCUIT'S DECISION IS INCORRECT.

Finally, review is warranted in this case because the Eleventh Circuit erred in holding that a district court need not consider the § 3553(a) factors when determining a term of imprisonment under § 3583(g).

Section 3583(g) was enacted as part of the 1984 Sentencing Reform Act, which established a "new system of supervised release." *Gozlon-Peretz v. United States*, 498 U.S. 395, 397 (1991). As part of that system, revocation of supervised release may take one of two forms: discretionary revocation under § 3583(e) and mandatory revocation under § 3583(g). Section 3583(e) expressly requires consideration of the § 3553(a) sentencing factors. Section 3583(g) has no such explicit reference.

As the Third Circuit explained in *Thornhill*, § 3583(g) requires a two-step process: "(1) a finding by the court that one of the four circumstances in § 3583(g)(1)-(4) occurred; and (2) if so, revocation is automatic and the court must impose a 'term of

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[6] This Court has, moreover, granted petitions for certiorari notwithstanding that the legal question presented was raised for the first time before the court of appeals. *See* Brief for the United States at 36 n.6, *Fowler v. United States*, 563 U.S. 668 (2011) (No. 10-5443), 2011 WL 686408.

imprisonment' as a penalty." 759 F.3d at 308. The Third Circuit then explained why this two-step process negated any need for Congress to explicitly mention consideration of the § 3553(a) factors during a § 3583(g) resentencing:

> [The] two-step process makes clear why Congress referred in § 3583(e) to the § 3553(a) sentencing factors, and why it did not need to mention § 3553(a) in the mandatory revocation provision in § 3583(g). Congress explicitly tied consideration of the § 3553(a) factors in § 3583(e) to the exercise of discretion by a district court in deciding whether to "(1) terminate a term of supervised release[,] . . . (2) extend a term of supervised release[,] . . . (3) revoke a term of supervised release[,] . . . or (4) order the defendant to remain at his place of residence." The mandatory revocation provision, however, affords the district court no discretion in making a decision about revocation. Once § 3583(g) is triggered, the revocation is automatic. There was no need, therefore, for Congress to instruct that the § 3553(a) factors should be considered prior to making a decision about mandatory revocation under § 3583(g).

759 F.3d at 308 (citations omitted).

The crucial language in § 3583(g) is its instruction that the district court impose "a term of imprisonment." That is because the immediately preceding section of the U.S. Code, § 3582—also part of the Sentencing Reform Act—provides that "if a term of imprisonment is to be imposed, in determining the length of the term, [the court] *shall* consider the factors

set forth in section 3553(a) . . . ." 18 U.S.C. § 3582(a) (emphasis added). "Thus, the usage of the statutory phrase 'term of imprisonment' in § 3583(g) incorporates both § 3582 and its directive to consider the § 3553(a) sentencing factors." *Thornhill*, 759 F.3d at 309.[7]

This result makes sense in the context of the statutory scheme. Statutory provisions regarding several other aspects of a sentence require judicial consideration of the § 3553(a) factors. *See, e.g.*, 18 U.S.C. § 3562 (probation); *id.* § 3572 (fines); *id.* § 3582 (term of imprisonment); *id.* § 3583(c) (supervised release as part of a sentence); *id.* § 3583(e) (discretionary modification or revocation of supervised release); *id.* § 3584(b) (concurrent or consecutive sentences). As the Third Circuit recognized, "[i]t would be odd indeed for Congress, after specifying that the § 3553(a) factors must inform a district court's exercise of discretion in imposing each component of a sentence,

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[7] Courts have applied the same analysis in interpreting § 3583(h) to incorporate a requirement to consider the § 3553(a) factors. Section § 3583(h) governs the imposition of a term of supervised release following a revocation sentence and does not expressly refer to the § 3553(a) factors. Courts have, nonetheless, held that the provision incorporates a requirement to consider the § 3553(a) factors from § 3553(c), which governs the imposition of a term of supervised release. *See United States v. Clark*, 726 F.3d 496, 501 (3d Cir. 2013) (holding that § 3583(h) requires consideration of the § 3553(a) factors listed in § 3553(c)); *United States v. Santiago-Rivera*, 594 F.3d 82, 84 (1st Cir. 2010) ("As subsection (h) does not list the factors to be considered in imposing a term of supervised release as part of a revocation sentence, it is a reasonable inference that the factors are the same as those to be considered in imposing an initial term of supervised release [under § 3553(c)].").

to then give a district court carte blanche in imposing a term of imprisonment following mandatory revocation of supervised release under § 3583(g)." *Thornhill*, 759 F.3d at 310 (citations omitted).

The District Court in Mr. Coleman's case exercised precisely that sort of "carte blanche" when it imposed the statutory maximum sentence. The Eleventh Circuit erred in approving that unlawful, exercise of discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10233
Non-Argument Calendar

D.C. Docket No. 1:05-cr-00232-WS-D-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CALVIN COLEMAN,

Defendant - Appellant.

Appeal from the United States District Court for the
Southern District of Alabama

(November 30, 2017)

Before HULL, JULIE CARNES and JILL PRYOR,
Circuit Judges.

PER CURIAM:

Calvin Coleman appeals his 36-month sentence, which the district court imposed after revoking his supervised release. He argues that his sentence is procedurally and substantively unreasonable. For the reasons set forth below, we affirm.

Coleman completed a term of incarceration for a drug crime and began a four year term of supervised release. Among other conditions of his supervised release, Coleman was prohibited from using or possessing a controlled substance. Within the next five years, Coleman's supervised release was revoked three times for drug-related violations. The instant violation—his third—occurred when he was arrested for unlawful distribution of a controlled substance after he was caught selling Xanax pills to a confidential informant. The district court conducted a hearing and, after hearing from Coleman, his probation officer, and the deputy who investigated the drug transaction, adjudicated Coleman in violation of the terms of his supervised release. Because Coleman had possessed a controlled substance, revocation of his supervised release was mandatory. 18 U.S.C. § 3583(g)(1).

At sentencing, the government noted that Coleman's guidelines range was 33 to 41 months' imprisonment but requested a 36-month sentence, the statutory maximum, citing the fact that Coleman was repeatedly caught selling drugs while serving terms of supervised release. Coleman requested a sentence of 20 months, explaining that he had a job and family ties and

was trying to "get along with his life." Doc. 85 at 63.[1] The district court imposed a sentence of 36 months' imprisonment, stating: "The appropriate sentence in your case is the statutory maximum. It's a sentence within the guidelines, and I find that that is the sentence that is sufficient but not more than necessary to accomplish the sentencing objectives set forth in the statute." *Id.* at 68. Coleman appealed.

On appeal, Coleman contends that his sentence was procedurally and substantively unreasonable because the district court failed to consider any of the 18 U.S.C. § 3553(a) factors when determining his sentence.[2] We cannot agree.

A district court must impose a sentence that is reasonable, including upon revocation of supervised release. *United States v. Gonzalez*, 550 F.3d 1319, 1323 (11th Cir. 2008); *United States v. Sweeting*, 437 F.3d 1105, 1106-07 (11th Cir. 2006). To determine whether a sentence is reasonable, we "first ensure that the district court committed no significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007). Where, as here,

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[1] "Doc." refers to the numbered entry on the district court's docket in this case.

[2] These factors include the nature and circumstances of the offense and history and characteristics of the defendant; the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes by the defendant, and to provide the defendant with needed educational or vocational training; and the kinds of sentences available and established sentencing ranges. *See* 18 U.S.C. § 3553(a)(1)-(5).

the procedural reasonableness of a sentence is raised for the first time on appeal, we review only for plain error. *United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014).[3] Second, we "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

In most cases, a sentence may be procedurally unreasonable if a district court fails to consider the § 3553(a) factors or substantively unreasonable if the court unjustifiably relies on any particular factor listed in § 3553(a). *Gall*, 552 U.S. at 51; *United States v. Sarras*, 575 F.3d 1191, 1219 (11th Cir. 2009). But, as Coleman acknowledges, this Court has held that, "when revocation of supervised release is mandatory under 18 U.S.C. § 3583(g), the statute does not require consideration of the § 3553(a) factors." *United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000) (internal quotation marks omitted). We are bound to follow *Brown* unless and until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).[4] Because under *Brown*

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[3] Under plain error review, we may reverse only if we conclude that there is error; the error is plain; the error affected the defendant's substantial rights; and "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (internal quotation marks omitted).

[4] Thus we cannot, as Coleman urges, follow the reasoning of the Third Circuit, which has held that district courts must consider the § 3553(a) factors even when revocation of supervised release is

the district court is not required to consider the § 3553(a) factors, Coleman's challenge must fail.[5] We therefore affirm his 36-month sentence.

AFFIRMED.

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mandatory. *See United States v. Thornhill*, 759 F.3d 299, 309 (3d Cir. 2014).

[5] The government asserts that, even if the reasoning of Thornhill applied, the record in this case makes clear that the district court adequately considered the § 3553(a) factors. The government also argues that Coleman cannot show that any error would have affected his substantial rights, citing a statement by the district court that it would have sentenced Coleman to a longer term of imprisonment in the absence of the statutory maximum sentence. Because we conclude that *Brown* governs this case, we do not address these alternative reasons for affirming Coleman's sentence.

Appendix B

AO 245D (Rev. 12/03) Judgment in a Criminal Case for Revocations (8099)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA V. **CALVIN COLEMAN**	**JUDGMENT IN A CRIMINAL CASE** (For Revocation of Probation or Supervised Release) CASE NUMBER: **1:05-00232-001-WS** USM NUMBER: **09190-003**
THE DEFENDANT:	**Ivan Parker** **Defendant's Attorney**

☒ was found in violation of supervision condition(s): the Statutory Condition (x2) and Standard Conditions #7 and #9, all as charged in the Probation Form 12-C, dated November 16, 2016.

Violation Number	Nature of Violation	Date violation Occurred
Statutory Condition	New Offense	11/10/2016
Statutory Condition	Technical	
Standard Condition #7	Technical	
Standard Condition #9	Technical	

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

January 4, 2017
Date of Imposition of Judgment

s/WILLIAM H. STEELE
CHIEF UNITED STATES
DISTRICT JUDGE

January 12, 2017
Date

AO 245D (Rev. 12/03) Judgment in a Criminal Case for Revocations: Sheet 2 – Imprisonment

Defendant: CALVIN COLEMAN
Case Number: 1:05-00232-001-WS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 36 MONTHS.

The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ___.m. on ____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on ___.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

Appendix C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

* * * * * * * * * * *

UNITED STATES OF AMERICA ,	Criminal No.: 05-0232-WS
vs.	JANUARY 4, 2017
CALVIN COLEMAN,	COURTROOM 2A U.S. FEDERAL COURTHOUSE
Defendant.	MOBILE, ALABAMA

* * * * * * * * * * *

REVOCATION HEARING
BEFORE·THE HON. WILLIAM H. STEELE
CHIEF UNITED STATES DISTRICT JUDGE
APPEARANCES

FOR THE GOVERNMENT:	Michael D. Anderson, Esquire Assistant U.S. Attorney U.S. Attorney's Office 63 S. Royal Street, Suite 600 Mobile, Alabama 36602
FOR THE DEFENDANT:	Ivan Lynn Parker, Esquire 5605 Regency Oaks Dr. S. Mobile, Alabama 36609

COURT REPORTER: Mary Frances Giattina, CCR, RDR, CRR
Official Court Reporter
P. O. Box 3021
Mobile, Alabama 36652-3021
(251) 690-3003

Proceedings reported by machine stenography.

Transcript produced by computer.

* * * *

[66] THE COURT: All right. Mr. Coleman, I've already found you in violation of the terms and conditions of supervised release and, having done so, what's left is for me [67] to consider what is appropriate punishment in this case.

I don't know who you think you're trying to fool with your comments here today, but they didn't fool me and they don't fool me. Your record speaks for itself. Your past will be with you forever.

But what's important is what are you doing now? And what you've been doing now is selling pills to undercover confidential informants and getting caught doing it. And you've got to answer for that in State Court. Your problems don't end here today. You've still got charges that probably haven't even been brought based on the other conduct that was testified to today. But certainly, the current charge is pending in State Court. You're going to have to answer for that charge

as well. That's going to be up to you and between you and your attorney and the State of Alabama.

What I have to do is to determine what is appropriate punishment for this case. As already been pointed out, you've been -- this is your third revocation hearing. You were revoked on June 11th, 2012, received a sentence of 33 months, and then again on February 9th, 2015, you were revoked and received a sentence of eight months. Apparently, that wasn't enough to get your attention. And the whole purpose of supervised release is to get you to reform your conduct to bring your conduct in line with what's required by law, and you refuse to do that.

[68] The guideline range in your case is 33 to 41 months. The statutory maximum is 36 months. Believe me, if the statutory maximum was higher, I would give it to you. If I could give you the high end of the guidelines, I would give it to you because apparently nothing else is going to get your attention.

And, you know, you talk to me about your future. You're the guy that's in charge of your future, and as long as you continue to do the things that you're doing and violate the law, you've got no future. You know, you've got no future with your family or with anybody else, and you're just going to have to deal with that.

The appropriate sentence in your case is the statutory maximum. It's a sentence within the guidelines, and I find that that is the sentence that is sufficient but not more than necessary to accomplish the sentencing objectives set forth in the statute.

Accordingly, you're hereby committed to the custody of the United States Bureau of Prisons for a term of 36 months.

Mr. Marsal, you want him back on supervised release after that?

PROBATION OFFICER CLAY MARSAL: No, Your Honor.

THE COURT: All right. I will not re-impose supervised release. You will serve the 36 months, and then you're on your own.

[69] You can appeal the judgment of this Court by filing notice of appeal within 14 days.

Anything further from the United States at this time?

MR. ANDERSON: No, Your Honor.

THE COURT: Mr. Parker, anything further?

MR. PARKER: No, Your Honor.

THE COURT: All right. That's all.

(Proceedings concluded at 3:50 p.m. this date.)

CERTIFICATE

STATE OF ALABAMA)
COUNTY OF MOBILE)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision using computer-aided transcription, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither of counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter as evidenced by the ACCR number following my name found below.

s/Mary Frances Giattina
Mary Frances Giattina, CCR,
RDR, CRR FCRR , ACCR
#181
Official Court Reporter
U.S. District Court
Southern District of Alabama
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