No. _____

In the
Supreme Court of the United States

_____

TIMOTHY JAY KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Does a defendant's maximum term of supervised release serve as a cumulative maximum on the length of imprisonment available following revocation of supervised release?

PARTIES TO THE PROCEEDING

Petitioner is Timothy Jay King, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Jay King respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was unreported, and is reprinted as Appendix A. The district court's sentencing decision was documented in a written judgment, reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals denying Petitioner's Petition for Rehearing En Banc was entered on February 9, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3583 provides in part :

> § 3583. Inclusion of a term of supervised release after imprisonment (a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are--(1) for a Class A or Class B felony, not more than five years;(2) for a Class C or Class D felony, not more than three years; and(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

***(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]--(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

***(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of

> supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

STATEMENT OF THE CASE

1. Proceedings in the trial court

In 2006, Petitioner Timothy King was sentenced to twelve months imprisonment for violating 18 U.S.C. §500, a Class D felony. He was also sentenced to a term of supervised release. This term of supervised release was revoked in 2008, and he was sentenced to 24 months imprisonment, followed by an

additional term of supervised release. This appeal arises from a second revocation. The district court revoked the second term of supervised and imposed an additional 24 months of incarceration.

2. The appeal

Mr. King argued on appeal that his second revocation term of imprisonment exceeded the maximum aggregate term permitted by 18 U.S.C. §3583. He argued that § 3583(e)(3) contained two limits to the term of incarceration that might be imposed upon revocation: the per-revocation limit (5 years for Class A felony, 3 years for Class B felony, 2 years for Class C or D felony, or 1 year, otherwise), and an aggregate limit of "the term of supervised release authorized by statute for the offense" of conviction. In his case, he had already served 24 months after revocation, so the maximum remaining term of imprisonment was 12 months. He quoted his plea agreement, which had warned him that if he "violates the conditions of supervised release, the consequence could be imprisonment for the entire term of supervised release."

The panel rejected Petitioner's claim. *See United States v. King*, 2011 U.S. App. LEXIS 276 (5th Cir. Jan. 6, 2011)(unpublished). It cited *United States v. Hampton*, 636 F.3d 334 (5th Cir. 2011), a published case resolved the same day, which reasoned that "Section 3583(e)(3) allows a court to 'revoke ***a*** term of supervised release,' and therefore, refers to one particular revocation." *Hampton*, 636 F.3d at 338 (emphasis in opinion). In its original opinion, the *Hampton* panel minimized the concern that its Rule would jeopardize the voluntariness of pleas for

defendants who received the same kind of advice as Hampton and King, suggesting that the maximum term of supervised release would constitute only a "collateral" rather than a "direct" consequence of the plea about which the defendant need not be informed. *United States Hampton*, 2011 U.S. App. LEXIS 252, at *18, n.3 (Jan. 6, 2011)(citing *United States v. Lewis*, 519 F.3d 822, 825 (8th Cir. 2008). This opinion in *Hampton* was withdrawn, however, and the problem was instead dismissed with the court's "confiden[ce] that the district court will be able to confect the necessary disclosure." *Hampton*, 633 F.3d at342, n.3.

Petitioner then filed a Petition for Rehearing En Banc, urging that the panel's decision could open standard plea agreement in several judicial districts to voluntariness challenge, and including plea agreements that were public records in several major Fifth Circuit locale. The Petition was denied on February 9, 2011, along with two other comparable Petitions in *United States v. Hampton*, No. 10-10035, and *United States v. Sescil*, 10-10623.

NOTE – Counsel advises the Court that Petitioner is due to be released from the Bureau of Prisons January 26, 2012.

REASONS FOR GRANTING THE PETITION

I. The cumulative maximum term of imprisonment upon multiple revocations of supervised release upon is an important question of federal law that has not been, but should be, settled by this Court.

A. The opinion below subjects criminal defendants to illegal terms of imprisonment.

Section 3583(e)(3) specifies that the defendant may suffer revocation and imprisonment for "*all or part*" of the term of supervised release authorized by statute. 18 U.S.C. §3583(e)(3). But it furthers limits the permissible term of imprisonment: "on any such revocation" the defendant may ***not*** be sentenced to "more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case." *Id*. This series of per-revocation limits is described by the second *Hampton* opinion as "felony class revocation limits." *Hampton*, 633 F.3d at 339.

The plain text of 18 U.S.C. §3583(e)(3) (specifically, its reference to "all or part" of the maximum term of supervised release) plainly does not authorize the district court to require defendants to serve more than the term of supervised release authorized by statute following revocation. Yet, the *Hampton* opinion would permit just that – it holds that defendants may be sentenced anywhere within the felony class revocation limits. And the canon against superfluity strongly counsels against any reading of the statute that would render this a per-revocation limits. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Ratzlaf v. United States*, 510 U.S.135, 140-41 (1994); *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000); *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979). The statute already contains a series of per-revocation limits, and they

are uniformly less than or equal to the maximum terms of supervised release. *See* 18 U.S.C. §3583(e)(3). There would thus be no reason for two sets of *per revocation* limits – in the present case, it would be akin to saying that the defendant could be sentenced to three years on each revocation, but in no event more than two.

The *Hampton* opinion rejected this concern, stating that the language at the beginning of §3583(e)(3) referencing the maximum term of supervised release served an independent function in the statute because it "remov[ed] the otherwise arguable limitation that a prison term imposed could never be longer than the term of the revoked supervised release." *Hampton*, 633 F.3d at 339 (quoting *United States v. Jackson*, 329 F.3d 406, 407, n.4 (5th Cir. 2003)). But this response misunderstands the superfluity concern. The superfluous language generated by the court below's reading is not "term of supervised release authorized by statute," but "all or part," the portion of the statute that unmistakably establishes either a cumulative or a per revocation limit on the term of imprisonment. The *Hampton* opinion simply does not have an account of the function of this language.

In the event that the statute is ambiguous, lenity compels Petitioner's reading. The remaining relevant canons of construction certainly do not point uniformly in favor of the government's view of the statute. As the *Hampton* panel noted, Subsection (h) shows that Congress knew how to command aggregation of prior terms when it wished to do so – that Subsection commands the district court to subtract the defendant's prior terms of imprisonment from the defendant's available

additional term of supervised release. *See Hampton*, 633 F.3d at 339; 18 U.S.C. §3583(h). But the "felony class revocation limits" demonstrate that Congress knew equally-well how to establish per-revocation limits when it wished to do so. Yet Congress declined to specify that the maximum term of supervised release represented a per-revocation limit rather than a cumulative limit. The canon that different language in different parts of the same statute must be interpreted differently (*see Quarles v. St. Clair*, 711 F.2d 691, 701 n.31 (5th Cir. 1983)), thus points in both directions.

The canon of *inclusio unis, exclusio alterius*, moreover, supports Petitioner's reading – the statute deliberately excludes credit for "postrelease *supervision,*" suggesting that postrelease *incarceration* is credited. Further, nothing in the plain language of the statute explicitly states either that the maximum term of supervised release serves as a *per-revocation* limit, ***or even that a defendant may be sentenced to the maximum of the felony class revocation limits***. To the contrary, the statute states that a defendant may ***not be*** sentenced to ***more than*** the felony class revocation limits. *See* 18 U.S.C. §3583(e)(3).

Finally, as discussed below, a great many parties to criminal pleas have understood the maximum term of supervised release as a maximum term of imprisonment. This demonstrates, at a minimum, grave misunderstanding of the statute if the government's view of it is correct. If Congress intended to authorize more than the maximum supervised release for any given term it left us "with no

more than a guess" as to that fact. *Reno v. Koray*, 515 U.S. 50, 65 (1995). Lenity applies.

The *Hampton* panel mustered three reasons to prefer its interpretation. First, it reasoned that Subsection (e)(3) created a per-revocation, rather than an aggregate, limit to the amount of imprisonment because it spoke only of a single term of supervised release, rather than multiple such terms. *See Hampton*, 633 F.3d at 337-338. The statute, however, refers not to one ("***a***") revocation but to one ("***a***") "term of supervised release." 18 U.S.C. §3583(e)(3). And this Court has held that a single term of supervised release may be revoked more than one time without being terminated. *See Johnson v. United States*, 529 U.S. 694, 705-707 (2000)(holding "something about the term of supervised release survives the preceding order of revocation" and that "a 'revoked' term of supervised release [] retain(s) vitality after revocation.") The statute's use of the singular "a" thus strongly supports Petitioner's reading of the statute. Because a term of supervised release survives even after it is revoked, a defendant will have received more than the maximum supervised release authorized by statute on "a" single term of supervised release if he receives more than that maximum over multiple revocations. *See Johnson*, 529 U.S. at 705-707.

Second, the *Hampton* panel reasoned that its position was better harmonized with Subsection (h) because that Subsection established an indirect limit on the amount of imprisonment available over multiple terms. Because Subsection (h) provides a cumulative limit on the supervised release that may be

imposed, the court reasoned, that subsection "imposes an indirect limit on the aggregate amount of revocation imprisonment." *Hampton*, 633 F.3d at 339. But this does not provide a reason to prefer the government's interpretation over Petitioner's—it simply eliminates one possible reason to prefer Petitioner's.

Third, the *Hampton* opinion suggests that its reading is more consistent with the legislative history. *See Hampton*, 633 F.3d at 340-341. It noted that the portion of the statute referring to the maximum term of supervised release was not interpreted as a cumulative limit on the maximum term of revocation imprisonment prior to the 2003 PROTECT ACT. *See id.* at 341 (citing *United States v. Tapia-Escalera*, 356 F.3d 181, 187 & nn. 6-7 (1st Cir. 2004)). Indeed, it would have been superfluous as a cumulative limit at that time, since the felony class revocation limits were understood as cumulative limits prior to the PROTECT Act, and they are uniformly less than or equal to the maximum terms of supervised release. *See id*. The opinion thus plausibly reasoned that since the PROTECT Act left the portion of the statute referring to the maximum term of supervised release untouched, no change was intended in the portion of the statute that references the maximum supervised release terms. *See id*. at 340-341.

This presumes, however, that the cases interpreting the felony class revocation limits as cumulative limits accurately reflected Congressional will. Congressional repudiation of these decisions -- by adding the phrase "on any such revocation" to the felony class revocation limits -- casts doubt on that conclusion. In any case, forced to choose between an interpretation of the statute that produces

superfluity in a prior version, and one that produces superfluity in the present version, the Court should act to render every part of the statute operative in its present version.

It is accordingly likely that the opinion below has sanctioned the imprisonment of a substantial class of revokees beyond their lawful terms.

B. The Rule announced below poses a substantial threat to the smooth administration of justice.

The *Hampton* opinion holds that a defendant may be sentenced on any revocation to the maximum of the "felony class revocation limitation." *See id.* at 336. And this is so whether or not the defendant's cumulative term of imprisonment over multiple revocations exceeds the maximum term of supervised release. *See id.* The Ninth Circuit has also affirmed a sentence of imprisonment following revocation resulting in a cumulative term in excess of "the term of supervised release authorized by statute for the defendant's offense...." *See United States v. Knight*, 580 F.3d 933 (9th Cir. 2009)(affirming cumulative post-revocation sentence of imprisonment of 42 months for class C felony). The practical impact of this Rule is that a great many defendants in these circuits have likely been misadvised of the maximum term of imprisonment.

Counsel has located plea agreements in seven judicial districts in these two Circuits – including those containing the large cities of Los Angeles, Houston, Dallas, Fort Worth, and New Orleans—advising defendants that they may be re-imprisoned for some amount of time *up to* the entirety of the term of supervised

release. *See United States v. Hampton*, 5:09-CR-579, Doc. 24 (S.D. Tex. May 12, 2009)("Defendant acknowledges and understands that if he/she should violate the conditions of any period of supervised release . . . , the defendant may be imprisoned for the entire term of supervised release"); *United States v. Worth*, 2:05-CR-3(02), Doc. 547 (E.D. Tex. Oct. 26, 2005) ("If Defendant violates the conditions of supervised release, she could be imprisoned for the entire term of supervised release."); *United States v. Smith*, 2:08-CR-00077, Doc. 18 (E.D. La. Aug. 29, 2009)(same); *United States v. Rankin*, 1:06-CR-41, Doc. 26 (S.D. Miss. Sept. 19, 2006)(same); *United States v. Clarke*, Cr. No. 5:08-cr-00098-VAP, Doc. 61 (C.D. Ca. Feb. 5, 2009)(Eastern Division)("Penalties... Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above."); *United States v. Villegas-Delgadillo*, 1:03-CR-00109-BLW, Doc. 35 (Dist. Id. Sept. 26, 2003)("Violation of any condition of supervised release may result in defendant being imprisoned for the entire term of supervised release or being prosecuted for contempt of court under Title 18, United States Code, Section 401(3).")

Defendants in these jurisdictions have thus been advised that the "worst case scenario" from revocations was reimprisonment for a term up to the maximum term of supervised release. But if *Hampton*, and the result in *Knight*, are correct, this advice is often not true in any sense. It isn't ever true cumulatively, since the

defendant can now be repeatedly imprisoned for the full felony class revocation limits without regard for the cumulative term of imprisonment over multiple revocations. And it often isn't true on a per-revocation basis, since the felony class revocation limits do not always match the maximum supervised release terms. *Compare* 18 U.S.C. § 3583(b) *with* 18 U.S.C. § 3583(e)(3).

The problem, moreover, is not likely to remain contained within these two Circuits. Counsel has also located plea agreements from the Southern District of Iowa, Eastern District of Virginia, and Western District of Michigan that offer similar advice. *See United States v. Sauz-Flores*, No. 4:08-cr-00135-JEG-CFB, Doc. 100 (So. Dist. Iowa Sept. 4, 2009)("If the Defendant violates any condition of supervised release following imprisonment, the Defendant may be returned to prison for all or part of the term of supervised release."); *United States v. Myrie*, 3:08-cr-00498-HEH, Doc. 22 (E.D. Va. Jan. 30, 2009)(Richmond Div.)("The defendant understands that this supervised release term is in addition to any prison term the defendant may receive, and that a violation of a term of supervised release could result in the defendant being returned to prison for the full term of supervised release."); *United States v. Atkinson*, No. 1:07-cr-00026-RHB, Doc. 13 (W.D. Mich. Apr. 2, 2007)(So. Div.)("The Defendant understands that if he violates one or more of the conditions of any supervised release imposed, he may be returned to prison for all or part of the term of supervised release, which could result in the Defendant serving a total term of imprisonment greater than the statutory maximums stated above.") If other

courts of appeals join the opinion below, the same voluntariness challenge may become possible for a large number of defendants in these jurisdictions as well.

The result is the potential for a large number of voluntariness challenges by every defendant not satisfied with the decision to plead guilty. There are, notably, three very nearly identical petitions presenting the issue to be just this week. *See United States v. Sescil*, 2011 U.S. App. LEXIS 385 (5th Cir. Jan. 6, 2011); *United States v. King*, 2011 U.S. App. LEXIS 276 (5th Cir. Jan. 6, 2011); *United States v. Hampton*, 633 F.3d 334 (5th Cir. Feb. 9, 2011).

The *Hampton* panel minimized this problem, reasoning in its first withdrawn opinion that the maximum term of imprisonment following revocation was a merely collateral consequence and could accordingly not vitiate the voluntariness of the defendant's plea. *See United States v. Hampton*, 2011 U.S. App. LEXIS 252, at *18-19, n.3 (5th Cir. Jan. 6, 2011). In the subsequent opinion, however, it stated only that it was "confident that the district court will be able to confect the necessary disclosure." *Hampton*, 633 F.3d at 342, n.3. Notably, the court did not at any time defend the accuracy of the identical advice given to Petitioner and Hampton. And it underestimated the serious challenges that might be raised to the voluntariness of the plea in Petitioner's circumstance. Even if all future district courts altered their admonishments in connection with the taking of a plea, this does not change the fact that many defendants are now sitting in prison on the basis of misadvice about their statutory maximums.

Further, it is not at all clear that misadvice about the maximum term of imprisonment over multiple revocations amounts merely to a "collateral consequence" of conviction. To the contrary, both the term of supervised release and any resulting term of imprisonment have been held to constitute a part of the defendant's sentence of imprisonment. *See Johnson*, 529 U.S. at 700-701 (surveying constitutional difficulties of treating revocation terms of imprisonment as punishment for conduct producing the revocation, and "therefore attribut[ing] postrevocation penalties to the original conviction").

The distinction between direct and collateral consequences of a plea is not sharply delineated, but no common formulation supports characterizing the maximum term of imprisonment upon revocation of supervised release as a "collateral" consequence of the plea. In the court below, the difference between direct and collateral consequences has been described as the difference between factors that affect the maximum sentence, and those that do not. *See United States v. Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000)(collecting cases); *Barbee v. Ruth*, 678 F.2d 634, 635 (5th Cir.1982)("consequences of guilty plea, with respect to sentencing, mean only that the defendant must know ***the maximum prison term*** and fine ***for the offense charged***.")(emphasis added); *Trujillo v. United States*, 377 F.2d 266, 269 (5th Cir. 1967)(consequences of plea understood where defendant advised of "the mandatory minimum sentence, the maximum ***possible*** sentence, and the maximum possible fine.")(emphasis added). Because imprisonment following revocation of supervised release is punishment for the defendant's initial

offense, the maximum penalty that may be imposed upon revocation is logically characterized as a part of "the maximum prison term...for the offense charged." *Barbee*, 678 F.2d at 635. It is accordingly a *direct* consequence of the plea under the law of that circuit.

The law of the Ninth Circuit notably distinguishes between parole eligibility and advice about supervised release, holding that the latter must be advised at the time of the plea. *Compare Trujillo*, 377 F.2d 266, 269 (absence of parole eligibility need not be advised) *with United States v. Sanclemente-Bejarano*, 861 F.2d 206, 209 (9th Cir. 1988) (district court must advise of supervised release which "may increase the length of the ultimate sentence"), *and United States v. Harris*, 534 F.2d 141 (9th Cir. Cal. 1976)(special parole is consequence of the plea); *see also Zhang v. United States*, 506 F.3d 162, 167 (2d Cir. 2007)(imposition of supervised release termed a direct consequence of a guilty plea) .

Alternatively, courts applying the distinction between "direct" and "collateral" consequences have held that direct consequences are those that are within the control of the district court, while a "collateral consequence is one that 'remains beyond the control and responsibility of the district court in which that conviction was entered.'" *Santos-Sanchez v. United States*, 548 F.3d 327, 337 (5th Cir. 2008)(quoting *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002))(further quotations omitted), *called into question by Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Unless the defendant relocates, the term of imprisonment following revocation of supervised release generally remains under the control of the initial

sentencing court. *See* Fed. R. Crim. P. 32.1(a)(1). This distinguishes supervised release revocations from immigration consequences (imposed by immigration judges), consecutive service with respect to the sentence of another jurisdiction (imposed by the judge of another jurisdiction), possible civil commitment (imposed by a judge presiding over a civil commitment hearing), parole eligibility (determined by the prison), and subsequent sentence enhancement (imposed by the judge presiding over the subsequent case).

And Rule 11 affirmatively requires the district court to ensure that the defendant understands "***any*** maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed. R. Crim. P. 11(b)(1)(H). This Rule makes no distinction between "direct" and "collateral consequences," but rather simply names matters that must be addressed. Subsection (H) refers expansively to ***any*** maximum penalty, indeed to any ***possible*** penalty, a phrase that surely encompasses the cumulative term of imprisonment following revocation of supervised release. The term "any," after all, carries an expansive meaning that captures all elements of the phrase it modifies. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009).

Finally, even if the distinction between direct and collateral consequences dictated the outcome of voluntariness challenges, the pleas taken from defendants in Petitioner's position would still be vulnerable to challenge as the product of ineffective assistance of counsel. It is exceedingly likely that most attorneys provided their clients the same advice about the maximum term of imprisonment

following revocation that appears in their plea agreements. It is certainly unlikely that most affirmatively corrected that advice. The distinction between direct and collateral consequences no longer governs the determination of ineffectiveness claims attacking the adequacy of pre-plea advice. *See Padilla*, 130 S.Ct. at 1481 ("We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*..."). Rather, the question is the seriousness of the unadvised consequence, its materiality to the plea, and the "close[ness of] its connection to the criminal process." *Id*. The total term of possible imprisonment is of obvious materiality to a plea of guilty, and is closely related to the initial proceeding. Thus even if the voluntariness of the plea is not impacted, many pleas in the Fifth and Ninth Circuit, and in any other jurisdiction that adopts their holdings, may become vulnerable to attack as the products of ineffective representation.

Misadvice as to the maximum term of imprisonment following revocation of supervised release thus carries a serious risk to the validity of the defendant's plea. Under Petitioner's reading of the statute, every defendant advised in his fashion has been afforded adequate notice of the maximum term of imprisonment. Each of them will have been told that they could receive the maximum term of supervised release, and that all of their term of supervised release can be converted into imprisonment. This gives each of them notice that the maximum term of supervised release could be converted into imprisonment. By contrast, the statute as it was interpreted below calls a great many guilty pleas into question.

CONCLUSION

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

Respectfully submitted,

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Northern District of Texas
525 Griffin Street, Suite 629
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(214) 767-2746

May 10, 2011

No. _____

In the Supreme Court of the United States

_____

TIMOTHY JAY KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

_____

PROOF OF SERVICE

_____

I, KEVIN JOEL PAGE, do swear or declare that on this date, May 10, 2011, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other document required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Neal Katyal
Acting Solicitor General of the United States
Room 5614, Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov.

Susan Cowger
Assistant United States Attorney
United States Attorneys Office
1100 Commerce Street
Dallas, Texas 75242

I further certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2011.

_____

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UNITED STATES OF AMERICA,
Respondent,

_____

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

_____

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner, Stephanie Hampton, asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this May 10, 2011.

_____
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