No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO ALVAREZ-MORENO,
AKA ANTONIO ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Guidelines recommend that the following be treated as "standard" conditions of supervised release, to be presumptively imposed in every judgment that includes a term of supervised release:

> If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
>
> The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

U.S.S.G. § 5D1.3(c)(9), (10) (2018).

Are these conditions unconstitutionally vague?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner Antonio Alvarez-Moreno respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 18, 2018.

OPINION BELOW

The court of appeals' memorandum (App. A) is designated "Not for Publication," but is published in the Federal Appendix at 738 F. App'x. 465. The district court's judgment (App. B) is unreported.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Alvarez-Moreno pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 18, 2018. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Antonio Alvarez-Moreno is a 35-year-old father of three, stepfather of four, and citizen of Mexico. For several years, Mr. Alvarez-Moreno has been in a relationship with Alma Jasmine Elenes, who lives in Arizona. The two have a child together, and Mr. Alvarez-Moreno has helped care for Alma's four other children as well.

In February of 2017, state police in Mesa, Arizona arrested Mr. Alvarez-Moreno on local charges. While he was incarcerated, an officer of United States Immigration and Customs Enforcement (ICE) visited him, determined that he was illegally present in the United States, and arranged to have him transferred to ICE custody. Record checks indicated that Mr. Alvarez-Moreno had been convicted of a domestic violence offense in California in April of 2014, and deported to Mexico in September of 2014. The government filed a complaint, and later an information, charging Mr. Alvarez-Moreno with reentry of removed alien in violation of 8 U.S.C. § 1326(a), enhanced (in light of the domestic violence conviction) by § 1326(b)(1). Mr. Alvarez-Moreno pleaded guilty pursuant to a plea agreement and was sentenced to time served (about four months), followed by a three-year term of supervised release. In late June of 2017 Mr. Alvarez-Moreno was deported to Mexico.

In September of 2017 Mesa police arrested Mr. Alvarez-Moreno again on local charges. He was transferred to ICE custody and charged with reentry of removed alien in violation of 8 U.S.C. § 1326(a) and (b)(1). Because his reentry had

also violated his supervised release, a petition to revoke his supervised release was filed. Mr. Alvarez-Moreno admitted to the unlawful reentry.

The probation officer prepared a presentence and disposition report, applying the 2016 edition of the United States Sentencing Guidelines Manual (U.S.S.G. or Sentencing Guidelines). For the new offense, Mr. Alvarez-Moreno's base offense level was 8. Four levels were added because Mr. Alvarez-Moreno had previously been convicted of reentry of removed alien. U.S.S.G. § 2L1.2(b)(1)(A). Four more levels were added in light of Mr. Alvarez-Moreno's 2014 California domestic violence conviction. U.S.S.G. § 2L1.2(b)(3)(D). Three levels were deducted in light of Mr. Alvarez-Moreno's acceptance of responsibility. U.S.S.G. § 3E1.1. The adjusted offense level was 13.

Mr. Alvarez-Moreno's criminal history consisted of the prior reentry offense, as well as two California domestic violence offenses for which he received prison sentences of 45 days and 180 days. Two points were added because he committed the offense while under another sentence. The resulting criminal history score was 7, yielding a criminal history category of IV. An offense level of 13 and criminal history category of IV generated a recommended sentencing range of 24 to 30 months. Mr. Alvarez-Moreno's supervised release violation was a Grade B violation, in criminal history category III, yielding a recommended sentencing range of 8 to 14 months.

The probation officer noted that there were significant "extenuating family circumstances" to be considered in sentencing Mr. Alvarez-Moreno. He had returned to the United States to help Alma "because of the ongoing physical health issues she is experiencing." Alma suffered from chronic heart problems, as well as hypertension, anemia, and low red blood cell and platelet counts. She had received blood transfusions, took several medications, and had a compromised immune system that resulted in her becoming sick very easily. Because of her poor health, she had lost her job at Child Protective Services. As a result, the family was struggling and behind on their mortgage. Mr. Alvarez-Moreno and Alma planned to move to Mexico and had looked at a property, but before they could do so they needed to sell their home in Arizona. Alma explained that Mr. Alvarez-Moreno had returned to the United States "to help with the work needed on their home so they could sell it and relocate to Mexico."

While acknowledging that family responsibilities are not ordinarily relevant, the probation officer reasoned that Mr. Alvarez-Moreno's circumstances "warrant consideration because the loss of his support would cause a loss of caretaking and financial support to the family that would exceed the harm ordinarily incident to incarceration of a similarly situated defendant." In view of these and other factors, the probation officer recommended a sentence of 20 months of incarceration.

The district court began Mr. Alvarez-Moreno's sentencing hearing by confirming that both parties agreed with the probation officer's Guidelines

calculations. Mr. Alvarez-Moreno's counsel described his household as "the picture of poverty." She asked the court to vary further below the Guidelines range than the probation officer had suggested. Mr. Alvarez-Moreno addressed the court briefly, simply asking the court to give him "the least amount of time that you can." The prosecutor acknowledged that she did "feel for [Mr. Alvarez-Moreno's] personal circumstances," but added that they were not "necessarily a reason to treat him more favorably than others." She recommended an aggregate sentence of 27 months of incarceration.

The district court sentenced Mr. Alvarez-Moreno to 20 months of incarceration, stating that during the supervised release term he would be required to comply with "the mandatory and standard conditions of supervision as adopted by this Court in General Order 17-18." The judgment included the conditions set forth in that General Order. App. B at 2-3.[1]

On appeal to the Ninth Circuit, Mr. Alvarez-Moreno argued (*inter alia*) that two of the "standard" supervised release conditions enumerated in the District of Arizona's General Order 17-18 – the condition requiring him to report being "arrested or questioned" by a law enforcement officer and the condition prohibiting him from possessing any "dangerous weapon" – were unconstitutionally vague. The Ninth Circuit summarily rejected Mr. Alvarez-Moreno's claim:

[1] http://www.azd.uscourts.gov/sites/default/files/general-orders/17-18.pdf.

> [C]ontrary to Alvarez-Moreno's contentions, the challenged conditions are not "so vague that [they] fail[] to provide people of ordinary intelligence with fair notice of what is prohibited." *United States v. Sims*, 849 F.3d 1259, 1260 (9th Cir. 2017).

App. A at 3.

REASON FOR GRANTING THE WRIT

The two supervised release conditions challenged here are among those recommended as "standard" conditions by the Sentencing Guidelines, meaning that they are routinely included in federal criminal judgments imposed by district courts across the country. But these conditions are constitutionally flawed, because persons of common intelligence must necessarily guess at their meaning, and differ as to their application, in crucial respects. It is unclear what sort of "questioning" triggers the obligation to report being "arrested or questioned" by a law enforcement officer. Indeed, this condition has been applied to something as trivial as a shoe peddler's failure to report having been asked to produce his peddler's license – and it could be thought to apply even to routine questioning of the sort conducted at an airport security checkpoint. The condition requiring a supervisee to refrain from possessing any "dangerous weapon" is rendered inscrutable by its definition of "dangerous weapon," which simultaneously describes instruments designed for "the specific purpose of causing bodily injury or death," and includes as an example tasers, which are designed for the specific purpose of *avoiding* bodily injury or death.

In light of the fundamental vagueness of these conditions, and of the fact that they are routinely included in federal criminal judgments pursuant to the

Sentencing Commission's recommendation, this Court should grant a writ of certiorari and hold that they are unconstitutionally vague.

ARGUMENT

The "arrested or questioned" and "dangerous weapon" conditions are unconstitutionally vague.

The following "standard" condition is among those that the district court imposed upon Mr. Alvarez-Moreno by reference to District of Arizona General Order 17-18:

> If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.[2]

This condition is drawn from Section 5D1.3(c) of the Sentencing Guidelines. U.S.S.G. § 5D1.3(c)(9) (2018).

The Third Circuit's opinion in *United States v. Maloney*, 513 F.3d 350 (3d Cir. 2008), illustrates the vagueness of this condition. The supervisee in *Maloney*, who was working as a "shoe peddler," was charged with violating this condition after he "failed to report that a law enforcement officer asked him for his peddler's license." *Id*. at 352, 357 (emphasis removed). On appeal, he argued that the term "questioned" was impermissibly vague. *Id*. The Third Circuit noted that "[t]he diverging constructions and artificial limitations" attached to this term by the district court and the parties "demonstrate[d] the unsettled nature of its boundaries." *Id*. The supervisee "believed the condition required him to report questioning when he was in custody or had been arrested, rather than upon the

[2] http://www.azd.uscourts.gov/sites/default/files/general-orders/17-18.pdf.

receipt of a citation." *Id*. at 357-58. The probation officer asserted that the supervisee clearly violated the condition by failing to report his "contact" with law enforcement. *Id*. The district court "asserted that the condition was not so narrow as to be limited to contact resulting in a conviction." *Id*. at 358. The Third Circuit noted that failing to report even a "simple request for identification" would "could be construed as a technical violation of the condition." *Id*. The court found the condition impermissibly vague as applied to the supervisee. *Id*. at 359.

This Court has held that a law is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal quotation marks omitted). In light of the wide differences between the reasonable interpretations given to this condition by the judge, defendant, and probation officer in *Maloney*, it is evident that this condition fails this Court's vagueness test.

The following "standard" condition is also among those that the district court imposed upon Mr. Alvarez-Moreno by reference to District of Arizona General Order 17-18:

> You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).[3]

[3] http://www.azd.uscourts.gov/sites/default/files/general-orders/17-18.pdf.

This condition, too, is drawn from Section 5D1.3(c) of the Sentencing Guidelines. U.S.S.G. § 5D1.3(c)(10) (2018).

This condition is unconstitutionally vague with respect to the meaning of "dangerous weapon." The parenthetical first defines the term as "anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person" – but the same sentence goes on to identify the examples of "nunchakus or *tasers*" (emphasis added). The inclusion of tasers fatally muddies the waters, because it directly contradicts the definitional language that begins the sentence. Tasers are "designed to stun and disable a person by disruption of the nervous system." *United States v. Poland*, 659 F.2d 884, 887 (9th Cir. 1981). As their manufacturer explains, they "specifically target the motor nerves that control movement, which enhances the effectiveness of restraint *while minimizing harm*" (emphasis added).[4] In other words, tasers are designed for the specific purpose of *not* causing bodily injury or death. Their inclusion in the definition of "dangerous weapon" thus makes it impossible to ascertain precisely what – apart from nunchakus and tasers – this phrase is meant to cover. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) ("The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so.") (internal quotation marks omitted).

[4] https://www.axon.com/how-safe-are-taser-weapons (last visited May 3, 2018).

In short, each of these conditions is unconstitutionally vague. And the effect of this vagueness is clearly quite broad, because this language is specifically recommended for routine use as a "standard" supervised release condition by the Sentencing Guidelines. This Court should issue a writ of certiorari to prevent federal criminal defendants from being subjected to supervised release revocations – and ensuing prison sentences – for purported violations of these vague conditions.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on December 17, 2018.

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