IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO. _____

Jonathan Sebert,

Petitioner,

-vs.-

United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

I. WHETHER THE SPECIAL CONDITION OF SUPERVISED RELEASE IMPOSED UPON MR. SEBERT, WHICH (FOR EXAMPLE) WOULD PREVENT HIM FROM SHOPPING AT WAL-MART BECAUSE IT CONTAINS ROMANCE NOVELS, A FORM OF "EROTICA," IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE AND VIOLATES HIS FIRST AMENDMENT RIGHTS?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jonathan Sebert, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

On August 13, 2018, the Eighth Circuit Court of Appeals entered its Opinion and Judgment, Add. 1, affirming the August 1, 2017, Judgment of the United States District Court for the Northern District of Iowa imposing upon Mr. .Sebert a sentence of imprisonment of 240 months, and other consequences, including the Special Condition of Supervised Release at issue in this case.

JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on August 13, 2018. A timely Petition for Rehearing or Rehearing *En Banc* was filed, and denied on October 16, 2018. This Petition for Writ of Certiorari is

timely filed within ninety days of the Eighth Circuit's filing of its Order denying Rehearing *En Banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, First Amendment (emphasis added).

STATEMENT OF THE CASE

Jonathan Sebert was charged with three counts relating to child pornography. (DCD 2 – Indictment, filed December 13, 2016).[1] Mr. Sebert pled guilty, pursuant to a plea agreement, to Receipt of Child Pornography, in violation of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(b)(1) (Count 2). *See* DCD 21 (Report and Recommendation to Accept Guilty Plea); DCD 22 (Order Adopting Report and Recommendation).

[1]"DCD" refers to the District Court's docket. "PSIR" refers to the Presentence Investigation Report relating to Mr. Sebert.

Mr. Sebert was sentenced by the District Court on August 1, 2017. Add. 1; DCD 37 (Judgment). Mr. Sebert was sentenced to a term of imprisonment of 240 months (the statutory maximum), followed by a twenty year term of supervised release with various special conditions, and a $100 special assessment. *Id.*

The PSIR recommended various special Conditions of supervised release. (PSIR ¶¶ 67 to 75). Mr. Sebert objected to Paragraph 71, which provided:

> The defendant must not view, possess, produce, or use any form of erotica or pornographic materials, and must not enter any establishment where pornography or erotica can be obtained or viewed.

The District Court overruled Mr. Sebert's objection and imposed the condition at issue as special condition No. 4. (Add. 5, DCD 37 (Judgment) at 5; Sent. Tr. 9-11, 25).

The Eighth Circuit found itself bound by its prior decision in *United States v. Mefford*, 711 F.3d 923 (8th Cir. 2013). Judge Grasz, in a concurring opinion, discussed the reasons why *Mefford* may have been incorrectly decided. Mr. Sebert now seeks certiorari regarding the imposition of special condition no. 4, particularly the provisions relating to "erotica."

REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit "has decided an important question of federal law that has not been, but should be settled by this Court." Supreme Court Rule 10(c).

The Eighth Circuitl concluded that, based on its prior decision in *United States v. Mefford*, 711 F.3d 923 (8th Cir. 2013), a condition of supervised release preventing possession of "erotica" and presence in any place where "erotica" can be obtained or viewed, is permissible. *Mefford* relied upon *United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003). Judge Grasz, in his concurring opinion, stated several reasons why *Mefford* and *Ristine* may have been incorrectly decided. Those reasons include: (1) *Ristine* did not address "erotica" and, thus *Mefford* incorrectly applied *Ristine's* holding relating to "pornography" to "erotica," and (2) *Ristine* was decided under a plain error standard of review, not the abuse of discretion standard. Mr. Sebert asserts (and discusses below) that, as a constitutional right is implicated, a *de novo* standard of review should be applied. Further, First Amendment concerns are present as "erotica" is a broader term than "pornography" and is more akin to "nudity." The Eighth Circuit has found special

conditions prohibiting possession or viewing of “nudity” constitutionally problematic.

The question for this Court to resolve is the Constitutional one. Does the Eighth Circuit's position approving the restriction upon possession or viewing of “erotica” impermissibly infringe upon Mr. Sebert's First Amendment rights because it is overbroad and vague?

I. SPECIAL CONDITION OF SUPERVISED RELEASE NO. 4 PREVENTING THE POSSESSION OR VIEWING OF EROTICA IS CONSTIUTIONALLY IMPERMISSIBLE

The District Court, as affirmed by the Eighth Circuit imposed a special condition of supervised release providing that Mr. Sebert "must not view, possess, produce or use any form of erotica or pornographic materials," and that he "must not enter any establishment where pornography or erotica can be obtained or viewed," (DCD 37(Judgment) at Special Condition No. 4).

Under 18 U.S.C. § 3583(d), the District Court may impose special conditions of supervised release only "if the conditions are reasonably related to the sentencing factors set forth in § 3553(a), involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a), and are consistent with any pertinent

policy statements issued by the Sentencing Commission." *United States v. Morals,* 670 F.3d 889, 895 (8th Cir. 2012).

The special condition regarding erotica and pornography fails that test. For one, the condition is overbroad and vague, and it provides too much discretion to the probation office in deciding what constitutes a violation. "Pornography" and "erotica" are subjective terms, and what might not be considered pornography or erotica by Mr. Sebert could be determined to be such by the probation office. *See United States v. Loy,* 237 F.3d 251, 261, 266 (3rd Cir. 2001) (striking down a condition banning a defendant from possessing all forms of pornography including legal adult pornography, based on vagueness grounds). For example, material which is available at a retail bookstore, such as a book depicting certain works of art, could be considered by some to be erotica or pornography, but to others it would not be considered such. The vagueness of this recommended condition fails to give Mr. Sebert adequate notice as to when he would be violating the condition.

Of further concern is the fact that the condition is overbroad in that it prohibits Mr. Sebert from accessing lawful materials which are protected by the First Amendment.

In particular, the aspect of Special Condition No. 4 prohibiting Mr.

Sebert from viewing, possessing, producing or using "erotica" violates the First Amendment and is overly broad. The Eighth Circuit concluded that it was bound by its prior decision in *United States v. Mefford*, 711 F.3d 923 (8th Cir. 2013). *Mefford* involved a condition providing that "Defendant shall not access, view, possess, or have under his control any pornography, including any material that depicts or alludes to sexual activity, or sexually explicit conduct as defined by 18 U.S.C. § 2256(2). This includes, but is not limited to, any such material obtained through access to any computer or any other electronic device, and any that are self-produced." *Id.* at 926. The Eighth Circuit upheld that restriction because it was limited to "pornography" and, thus, did not run afoul "of our nudity case law." *Id.* at 927.[2] The Eighth Circuit agreed with the District Court that the restriction was narrowly tailored to prohibit Mefford from accessing pornography, "'while preserving the Defendant's right to view and/or possess non-obscene material that may contain nudity.'" *Id.*

[2] The Eighth Circuit has stated that "more than mere nudity is required before an image can qualify as lascivious within the meaning of the [child pornography] statute." *United States v. Johnson*, 639 F.3d 433, 439 (8th Cir. 2011) (citation omitted). *See also United States v. Soderstrand*, 412 F.3d 1146, 1151 (10th Cir. 2005); *United States v. Kemmerling*, 285 F.3d 644, 645-46 (8th Cir. 2002); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001); *United States v. Knox*, 32 F.3d 733, 743-44 (3d Cir. 1994).

In *United States v. Thompson*, 653 F.3d 688 (8th Cir. 2011), the Eighth Circuit noted:

> we have invalidated special conditions precluding the defendant from possessing any material containing nudity, alluding to sexual activity, or depicting sexually arousing material as overly broad. *Kelly,* 625 F.3d at 519; *Simons,* 614 F.3d at 483–85. In contrast, however, we have consistently rejected overbreadth arguments where the special condition at issue precluded the defendant from possessing pornography or sexually explicit material. *See, e.g., Wiedower,* 634 F.3d at 497; *Ristine,* 335 F.3d at 694–95.

Thompson, 653 F.3d at 695 (citing *United States v. Kelly,* 625 F.3d 516 (8th Cir. 2010); *United States v. Simons*, 614 F.3d 475 (8th Cir. 2010); *United States v. Wiedower*, 634 F.3d 490 (8th Cir. 2011); *United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003). Thompson involved a narrower condition prohibiting "Thompson from possessing or having under his control 'any child or adult pornography which includes any sexually explicit materials.'" *Thompson*, 653 F.3d at 693.

Thompson also expresses concern with the vagueness of the term "pornography" because of the "uncertainty of what constitutes "pornography" because the term lacks a precise legal definition." *Thompson*, 653 F.3d at 695 (citing cases). However, the Eighth Circuit found, in *Thompson*, that tying "pornography" to the statutory

definition of "sexually explicit" materials resolved that uncertainty in that case. *Id.* at 695-96. *See also Farrell v. Burke*, 449 F.3d 470 (2nd Cir. 2006) (discussing vagueness of term "pornography" and need to tie that term to a more specific definition).

The fundamental problem with special condition no. 4 is the use of the term "erotica." "Erotica" is a vague term which has been defined in different ways

> 1. written works, usually fiction, dealing with sexual love.
>
> 2. sexually explicit art, photographs, sculptures, or the like, depicting human sexuality.

http://www.dictionary.com/browse/erotica (last visited October 18, 2017).

> Literature or art intended to arouse sexual desire.

https://www.thefreedictionary.com/erotica (last visited October 18, 2017).

> 1 :literary or artistic works having an erotic theme or quality
>
> 2 :depictions of things erotic

https://www.merriam-webster.com/dictionary/erotica (last visited October 18, 2017), and further defining "erotic" as:

> 1 :of, devoted to, or tending to arouse sexual love or

desire :erotic art

2 :strongly marked or affected by sexual desire

https://www.merriam-webster.com/dictionary/erotic (last visited October 18, 2017).

"Erotica" is a very broad term. For example, romance novels would fall within the definition of "erotica." A romance novel is literature that portrays sexual love or desire. Thus, under the conditions imposed, Mr. Sebert would be prohibited from reading any romance novel or, in fact, any work of literature which contains any depiction of romance, *i.e.,* portraying sexual love or desire. Further, because of the broad wording of Special Condition No. 4, Mr. Sebert is prohibited from entering any stores that sell romance novels, which would include Wal-Mart, Target, grocery stores, convenience stores, and certainly bookstores. He would also be prohibited from visiting art museums, as they typically contain at least some works which fall under the definition of "erotica," such as sculptures or paintings of nudes or depicting romantic scenes.

The fundamental problem is that there is a wide spectrum of materials between pornography and nudity. The issue is complicated by the requirements and protections of the First Amendment. Further,

under 18 U.S.C. § 3583(d), the District Court may impose special conditions of supervised release only "if the conditions . . . involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a) . . . ." *United States v. Morals,* 670 F.3d 889, 895 (8th Cir. 2012). Under the Eighth Circuit's case law, prohibitions relating to "pornography" are generally permissible. Prohibitions relating to "nudity" are not permissible. "Erotica" is a problematic term as it falls in between. Prior decisions of the Eighth Circuit, *Mefford* and *Ristine* in particular, have not always carefully distinguished between the terms "pornography," "erotica," "nudity," and related concepts.

Mefford did uphold a condition prohibiting the defendant from "enter[ing] any location where pornography, erotica, or adult entertainment can be obtained or viewed," noting that condition was the same as the condition approved in *Ristine*. *See Mefford*, 711 F.3d at 928. However, as noted in Judge Grasz' concurrence, *Ristine* expressly did not resolve whether the word "erotica" is overly broad or vague. *See Ristine*, 355 F.3d at 694, n. 2 ("We note that Ristine does not argue that the restrictions concerning "erotica' are overbroad or vague."). *Ristine* also, as noted by Judge Grasz, employed a plain error

standard of review. *Id.* at 694. Thus, *Ristine* does not particularly support that condition. Further, as noted above, many stores sell "erotica" in the form of romance novels, which prohibits Mr. Sebert from entering a wide swath of stores, as well as from entering art museums.

Secondly, the proposed special condition is unnecessary and counterproductive. Although Mr. Sebert pled guilty to a child pornography offense, there is absolutely no evidence that preventing him from looking at erotica, or preventing him from going into any establishment where erotica can possibly be viewed, will protect children or serve any useful purpose. The District Court imposed other, unobjected-to, special conditions of supervision, which: (1) prohibit Mr. Sebert from "contact with children under the age of 18" without the probation office's consent (DCD 37 (Judgment at Special Condition No. 5)); (2) subject any computer or electronic storage devices possessed by Mr. Sebert to random monitoring by the probation office (DCD 37 (Judgment at Special Condition No. 3)); and (3) require GPS monitoring (DCD 37 (Judgment at Special Condition No. 8)). Further, Mr. Sebert did not object to the portion of special condition No. 4 that would preclude him from possessing or viewing child pornography. These special conditions are sufficient to protect children and to

promote Mr. Sebert's rehabilitation.

The District Court found the restriction reasonable without providing more than a generalized explanation. (Sent. Tr. 10-11). The Probation Office, in responding to Mr. Sebert's objection, noted that Mr. Sebert had stated that he had "accidentally" encountered child pornography while downloading adult pornography. (PSIR ¶ 71). While that fact may justify prohibiting Mr. Sebert from accessing adult pornography through use of a computer, it does not justify the restrictions against viewing, possessing, producing or using erotica or entering establishments where erotica can be viewed or obtained. In particular, it is highly unlikely that Mr. Sebert would be able to accidentally view or obtain child pornography at a store that sells romance novels.

In sum, Special Condition No. 4, particularly the provisions relating to "erotica" are unconstitutionally overbroad and vague as those provisions impinge upon Mr. Sebert's First Amendment rights. Additionally, those provisions are not necessary in light of Mr. Sebert's history and characteristics and other relevant factors.

CONCLUSION

Accordingly, this Court should grant *certiorari* to address whether a Special Condition of Supervised Release prohibiting the possession or viewing of "erotica" is overly broad and vague and violates Mr. Sebert's First Amendment Rights.

Respectfully Submitted,

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JONATHAN SEBERT

CERTIFICATE OF FILING

I hereby certify that on the 11th day of January, 2019, I did file this Petition for Writ of Certiorari by causing an original and ten (10) copies thereof to be delivered, via first class United States mail, postage paid, to Clerk, Supreme Court of the United States, 1 First Street N.E., Washington, D.C. 20543.

/s/ *Michael M. Lindeman*
Michael M. Lindeman

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January 2019, I served this Petition for Writ of Certiorari by causing one copy thereof to be delivered via first class United States mail, postage paid to Mark Tremmel, Assistant United States Attorney, United States Attorneys' Office, Northern District of Iowa, 111 Seventh Avenue SE, Box 1, Cedar Rapids, IA 52401, and by causing one copy thereof to be delivered via first class United States mail, postage paid to Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

I further certify that on the 11th day of January, 2019, a copy of this Petition for Writ of Certiorari was forwarded to Petitioner Jonathan Sebert via first class United States mail, postage paid, to Jonathan Sebert Register No. 16965-029 FCI Sandstone P.O. Box 1000 Sandstone, MN 55072.

/s/ *Michael M. Lindeman*
Michael M. Lindeman