

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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ANTHONY ALEXANDER FERRARI,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent,*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. This Court should grant *certiorari* to resolve a split in circuit authority regarding whether it is plain error to require as a condition of supervised release that a defendant permit a probation officer to visit the probation officer at any time at home or elsewhere, as this condition is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary, and requires, at the least, an explanation by the district court for its imposition.

## **PARTIES TO THE PROCEEDING**

Petitioner is Anthony Alexander Ferrari, defendant-appellant below.

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

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Appendix B Judgment and Opinion of Fifth Circuit

## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Anthony Alexander Ferrari respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

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

### **JURISDICTION**

The judgment of the court of appeals was entered on November 28, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISION**

The Fourth Amendment to the United States Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV

## STATUTE INVOLVED

18 U.S.C. §3583(d)(1) & (d)(2) provide, in pertinent part:

**(d) Conditions of Supervised Release.--. . .**

The court may order, as a further condition of supervised release, to the extent that such condition--

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and (C) to protect the public from further crimes of the defendant; . . .

## **STATEMENT OF THE CASE**

### **1. Proceedings in the trial court**

This is a criminal case on direct appeal. On July 19, 2017, Mr. Ferrari was charged by a one count indictment with possession of methamphetamine with intent to distribute. On August 16, 2017, Mr. Ferrari pled guilty without a plea agreement. The district court sentenced Mr. Ferrari to 151 months.

At issue in this case is a condition of release imposed by the district court, to wit: “the defendant shall . . . permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer.” No objection was made to this condition.

### **2. The appeal**

On direct appeal to the Fifth Circuit, Petitioner challenged the condition of release which allows a probation officer to require the Petitioner to visit the probation at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer. That condition is procedurally unreasonable, especially in the absence of an explanation. The condition would allow the probation officer to ‘visit’ the defendant at 3:00 a.m. every morning and look around for contraband, and also allow him to follow the defendant everywhere, looking for contraband.

The Fifth Circuit ruled that, under plain error review, because there was a split in the circuits, “even assuming error, it is not clear or obvious.” See Appx. B, p.2.

## REASONS FOR GRANTING THE PETITION

- I. **This Court should grant certiorari to resolve a split in circuit authority regarding whether it is plain error to require as a condition of supervised release that a defendant permit a probation officer to visit the probation officer at any time at home or elsewhere, as this condition is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary, and requires, at the least, an explanation by the district court for its imposition.**

A condition of his supervised release allows the probation officer to require Petitioner to visit the probation at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer. That condition is procedurally unreasonable, especially in the absence of an explanation. The condition “would allow the probation officer to ‘visit’ the defendant at 3:00 a.m. every morning and look around for contraband, and also allow him to follow the defendant everywhere, looking for contraband.” *United States v. Kappes*, 782 F.3d 828, 850-51 (7th Cir. 2015) quoting *United States v. Thompson*, 777 F.3d 368, 380 (7th Cir. 2018).

The Fourth Amendment guarantees the “right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const., amend. IV. Warrantless searches are unreasonable and violate the Fourth Amendment. See, e.g., *Payton v. New York*, 445 U.S. 573, 576 (1980).

A person on conditional release, such as parole, probation, or supervised release, does have a limited expectation of privacy, but that expectation of privacy is not eliminated. The Supreme Court requires at least reasonable suspicion to conduct a search of a probationer's house. *United States v. Knights*, 534 U.S. 112, 121 (2001). In any event, the "Fourth Amendment's touchstone is reasonableness. . ." *Id.*, at 112.

Congress also requires that the conditions of release be reasonable. Other than the mandatory conditions set forth in 18 U.S.C. § 3583(d), any additional condition must be "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)" and must involve "no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). . ." 18 U.S.C.A. §§ 3583(d)(1) & (2).

Moreover, a district court must explain the reasons for imposing the conditions of release in a particular case. *See, United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014), citing 18 U.S.C. § 3553(c).

The condition in this case was unreasonable.

As stated by one court:

There are two problems with the condition. The first is "or elsewhere." There is no problem with the probation officer and the defendant agreeing to meet outside the defendant's home, but it is unclear why the probation officer should be allowed to pick a location that may be inconvenient for the defendant. Replacing "elsewhere" with "at some other mutually convenient location designated by the probation officer" would solve this problem.

Another solution is found in *United States v. Armour*, 804 F.3d 859, 864, 870 (7th Cir. 2015)-"You shall permit a probation officer to visit you at home or any other reasonable location between the hours of 6:00 AM and 11:00 PM, unless investigating a violation or in case of emergency" (emphasis added). Omitting such a qualification (as the judge did in this case) leaves open at least the theoretical possibility that the probation officer could require the defendant to meet him in an inappropriate location, such as a funeral, or in a remote one, say a place many miles away.

*United States v. Henry*, 813 F.3d 681, 683-84 (7th Cir. 2016).

Moreover, in Petitioner's case, just in *Kappes*, "[t]he sentencing judge made no effort to explain why this condition-especially in its current, broadly worded form-is connected to [the defendant's] offense, history, and personal characteristics, or how it is reasonably necessary to furthering the deterrence, public protection, and rehabilitation goals referred to in 18 U.S.C. § 3583(d)(2)." *Kappes*, 782 F.3d, at 850-51. Still further, "[r]egardless of any possible constitutional concern, [this condition is] too broad in the absence of any effort by the district court to explain why [it is] needed." *Thompson*, 777 F.3d at 380.

The court in *Kappes* found the error of including this condition without an explanation to be plain error requiring reversal. *Kappes*, 782 F.3d at 844. The Fifth Circuit found not plain error because it found that the circuits were not in agreement.<sup>1</sup>

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<sup>1</sup> There are only two cases that appear to be contrary to the rule of the seventh circuit, but neither require a different result. One is *United States v. Clarke*, 428 F. App'x 712, 713 (9th Cir. 2011), but that case is

Not only is there a split in the circuits on this issue, but in a published opinion on this issue, a concurring judge in the Fifth Circuit asserted that the Seventh Circuit's view, and thus Petitioner's, was the better result. *United States v. Cabello*, No. 18-10001, 2019 WL 851068, at \*1–4 (5th Cir. Feb. 22, 2019) (Elrod, J., concurring). Judge Elrod stated:

In my view, the Seventh Circuit's approach is more faithful to § 3553(c) and § 3583(d). The Seventh Circuit requires its district courts to explain why they are imposing standard conditions. *United States v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015). As the Seventh Circuit observed, “a condition’s label in the guidelines is ultimately irrelevant. All discretionary conditions, whether standard, special or of the judge’s own invention, require findings.” *Id.*

*Id.*, at 4. She added that “the more textually faithful practice for sentencing courts under § 3553(c) and § 3583(d) is to explain the reasons for imposing all statutory discretionary conditions—both standard and special conditions under the Guidelines.” *Id.*

This Court should grant certiorari review of this case to resolve this split in circuit authority and to affirm the better reasoned position of the Seventh Circuit.

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unpublished, and of no precedential value. The other is *United States v. Munoz*, 812 F.3d 809, 821 (10th Cir. 2016), but it is not on point as it did not address the issues raised here or in the Seventh Circuit. Rather it deals only with the issue of whether the conditions were vague or a deprivation of due process.

## CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari* and reverse the judgment below, so that the case may be remanded to the district court for resentencing, or for a reformation of the judgment. He prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted February 26, 2019.

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