No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

BRIAN WRIGHT, *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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err by finding that there was no "egregious violation" of Mr. Wright's Fourth Amendment rights when Mr. Wright's cellular phone, without a related supervised release condition, was subjected to warrantless tracking for twenty-four (24)-hours a day, for over twenty-one (21) days in time?

2. Did the Ninth Circuit err by finding that Mr. Wright's supervised release conditions as to criminal activity and associating with persons "engaged in criminal activity" were not unconstitutionally vague or overbroad, or denied Mr. Wright his Constitutional due process?

3. Did the Ninth Circuit err by finding there was not a *Tapia* error in the district court sentencing Mr. Wright to three (3) years of supervised release in large part for a need for rehabilitation?

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I.

PRAYER FOR RELIEF

Mr. Brian Wright respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision dismissing a number of aspects of his appeal. The basis of this petition is that the Ninth Circuit erroneously dismissed his appeal issues as to: (1) the warrantless tracking of Mr. Wright's cellular phone during his supervised release term, (2) certain supervised release terms being unconstitutionally vague or overbroad, or denying Mr. Wright his Constitutional due process, and (3) an erroneous imposition of three (3) years of supervised release based upon a need for rehabilitation.

A. As to the warrantless tracking of Mr. Wright's cellular phone, the Ninth Circuit Panel's decision conflicts with conflicts with the United States Supreme Court of *Carpenter v. United States*, 589 U.S. ___, 138 S.Ct. 2206, 2018 WL 3073916 (2018) and the Eighth Circuit case of *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001). *Carpenter* should apply to the tracking of Mr. Wright's cellular phone in a supervised release setting, as identified in the Ninth Circuit in a prior case called *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016).

B. As to certain supervised release conditions being unconstitutionally vague or overbroad, or denying Mr. Wright his Constitutional due process, the revocation based upon said conditions violate Mr. Wright's right to free speech pursuant to the Sixth Circuit case of *United States v.*

Peete, 919 F.2d 1168, 1181 (6th Cir. 1990), and are unconstitutionally broadly-worded pursuant to the Fifth Circuit case of *United States v. Woods*, 547 F.3d 515, 518-19 (5th Cir. 2008). Said case law precedent is in conflict with the November 2018 memorandum disposition by the Ninth Circuit Court of Appeals.

C. As to the original sentencing of Mr. Wright to three (3) years of supervised release based upon a need for rehabilitation, said finding conflicts with United States Supreme Court precedent in *Tapia v. United States*, 564 U.S. 319 (2011), and is in conflict with *United States v. Grant*, 664 F.3d 276 (9th Cir. 2011) in a supervised release setting.

In the alternative, the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This includes the recent decision in *Carpenter v. United States*, 589 U.S. ___, 138 S.Ct. 2206, 2018 WL 3073916 (2018), finding that the government violated the Fourth Amendment by accessing historical records containing the physical locations of cellular phones without a search warrant.

II.

OPINION BELOW

A three-judge panel of the Ninth Circuit entered judgment in a memorandum that was final and unpublished, affirming most of the prior rulings and revocation sentence of the district court. *United States v. Brian Wright*, No. 17-10101 (9th Cir. November 2, 2018). *Appendix A.*

III.

BASIS FOR JURISDICTION

On November 2, 2018, a Panel of the Court of Appeals for the Ninth Circuit delivered an unpublished memorandum that dismissed Mr. Wright's appeal in most aspects. *Appendix A.* This is the final judgment for which a writ of certiorari is sought. On November 16, 2019, Mr. Wright filed a timely petition for panel rehearing. On December 11, 2018, a three-judge panel of the Ninth Circuit subsequently denied Mr. Wright's petition for panel rehearing. *United States v. Brian Wright*, No. 17-10101 (9th Cir. December 11, 2018). *Appendix B.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Sections (3) and (4) of Title 18 United States Code Section 3583(e), the district court may do the following after considering the factors in imposing a supervised release sentence:

> (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 that the defendant 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.

V.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

B. Facts Material to the Questions Presented.

This is a supervised release revocation case. The district court imposed three (3) years of supervised release despite the parties entering into a joint recommendation for no supervised release. The district court imposed supervised release because it thought that "some structure and some guidance from the Probation Office will help [Mr. Wright]."

On February 10, 2017, approximately seven months after his supervision began, United States Probation filed a petition for revocation, and later filed a supplement to said petition. Mr. Wright was arrested on the petition the same day, and ordered detained pending the outcome of the proceedings. The petition and supplement alleged:

a. A person was working for Mr. Wright as a prostitute, and that Mr. Wright provided bail money to said person. Mr. Wright's association with a person who is engaged in prostitution was associating with criminals.

b. Mr. Wright's phone number was connected to online escort service advertisements.

c. Mr. Wright was not living at his reported address on Smoke Ranch Drive, and was instead living at a residence on West Arby Avenue.

d. Mr. Wright assaulted, resisted, or impeded officers during the execution of the warrant when Mr. Wright "attempted to flee from the residence by entering a BMW and reversing out of the garage," bumping into an officer's vehicle.

A revocation hearing took place in February of 2017. Four witnesses testified. Mr. Wright's probation officer testified during the hearing that once he became suspicious of Mr. Wright, he reached out to a special agent with the Federal Bureau of Investigation for further investigation. The special agent conducted continuous geolocation tracking of Mr. Wright's cellular number to determine Mr. Wright's whereabouts. This tracking included approximately three (3) weeks of geolocation "pings" of Mr. Wright's cellular phone movements

At the conclusion of the hearing, the district court found that Mr. Wright had violated certain parts of the original petition, and the addendum. The district court sentenced Mr. Wright to twenty-one (21) months of custody, followed by fifteen (15) months of supervised release.

VI.

REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the Ninth Circuit Panel's decision erroneously dismissing several aspects of Mr. Wright's appeal. The Ninth Circuit erred by finding:

a. That Mr. Wright was not subject to an egregious violation of his Fourth Amendment rights through the tracking of his cellular phone for several weeks;

b. That Mr. Wright's supervised release conditions as to criminal activity and associating with persons "engaged in criminal activity" were not vague or overbroad, nor denied Mr. Wright his Constitutional due process;

c. That the district court did not commit an error pursuant to *Tapia* by originally sentencing Mr. Wright to three (3) years of supervised release for rehabilitation purposes.

As these material points of fact were overlooked by the Ninth Circuit, and by default the district court, it is respectfully requested that Mr. Wright's petition for writ of certiorari be granted.

A. Mr. Wright was Subjected to a Greater Deprivation of Liberty than Reasonably Necessary Through Near Real-Time 24-Hour Geolocation Tracking of his Cellular Phone for Over Three Weeks, Without a Warrant or Supervised Release Condition for Cell Phone Tracking.

Supervised release is to "involve no greater deprivation of liberty than is reasonably necessary." 18 U.S.C. § 3583(d)(2). Egregious violations of an individual's

Fourth Amendment right to be free from unreasonable searches and seizures still warrant suppression in a revocation setting. *Ohrorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). Although broad search conditions have been upheld, said search conditions must reasonably relate to the factors considered in imposing a sentence and cannot involve a greater deprivation of liberty than is reasonably necessary. *United States v. Scott*, 270 F.3d 632, 635 (8th Cir. 2001).

In *Scott*, the condition that a "defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable place and time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release" was reversed when the record did not show that the defendant was "likely to repeat the offense, or that additional restrictions on his freedom [were] necessary to deter him from doing so." *Id.*

In its November of 2018 memorandum, the Ninth Circuit Court of Appeals found that there was not an "egregious violation" of Mr. Wright's Fourth Amendment rights even though there was over three (3) weeks of warrantless geolocation tracking of Mr. Wright's cellular phone. (*See Appendix A*, at page 4 of 6; *see also Orhorhaghe v. INS*, 38 F.3d at 493). This finding of the Ninth Circuit Court of Appeals was in error, and was an "egregious violation" of Mr. Wright's Fourth Amendment right to be free from unreasonable searches and seizures.

Pursuant to *Carpenter*, the tracking of Mr. Wright's cellular phone was a Fourth

Amendment search requiring a warrant. The Fourth Amendment protects the privacy and security of individuals against "arbitrary invasions by governmental officials." *Carpenter v. United States*, 589 U.S. ___, 138 S.Ct. 2206, 2018 WL 3073916, at *5 (2018). The Fourth Amendment protects "people, not places," and when an individual "seeks to preserve something as private," then official intrusion into that private area "requires a warrant supported by probable cause." *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

It is true that there is a limited expectation of privacy in a supervised release setting, however the limited expectation of privacy in a supervised release context is not substituted for no expectation of privacy in all things and places to be searched. *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 2489 (2014). The tracking Mr. Wright's cellular phone was a comprehensive chronicle of Mr. Wright's life, without any related or prior affirmative act, notice, or consent, on Mr. Wright's part.

Mr. Wright did not consent to tracking of his cellular phone through a supervised release condition. Mr. Wright's warrantless search provision provided that Mr. Wright shall submit his "person, property, residence, place of business and vehicle" to a search. Geolocation tracking goes beyond the special condition of supervision of a warrantless search when a cellular phone is not listed in the areas or places to be searched under said condition. None of the listed conditions "clearly or unambiguously" encompasses Mr. Wright's cellular phone. *United States v. Lara*, 815 F.3d 605, 610 (9th Cir. 2016). Further, pursuant to *Scott*, the similar condition that a

supervisee "shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable place and time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release" was not enough to demonstrate that the supervisee was "likely to repeat the offense, or that additional restrictions on his freedom [were] necessary to deter him from doing so." *Id.*

This type of search intrudes far more into an individual's privacy than it promotes legitimate governmental interests. The government's interest in this case was small. The government had merely suspected that Mr. Wright was being untruthful about where he was living, and based upon said suspicion the government decided to track Mr. Wright's cellular phone for twenty-four (24) hours a day, for several weeks.

The amount of intrusion into Mr. Wright's privacy was, in contrast, large and far-reaching. A cell phone search is not "property" when the data within the cell phone was the subject of the search. *Id.*, at 611. Cellular phones differ from conventional property in that they "provide access to data," and not small amounts of data but instead "a broad array of private information," unlike a traditional search of a property or container. *Id.*, at 611 (citing *Riley*, 134 S.Ct. 2491). Mr. Wright had a reasonable expectation of privacy in his location data, and the government's continuous geolocation "pings" equals "near perfect surveillance" of a cellular phone, a device that is "indispensable to participation in modern society." *Carpenter, id.*, at 2210.

The subject geolocation tracking went beyond historical data like in *Carpenter*, and was instead live near real-time tracking of not only the cellular phone, but also Mr. Wright himself as the holder of said cellular phone. Mr. Wright was subject to geolocation "pings" of his cellular phone every fifteen minutes, equaling ninety-six (96) pings in a 24-hour period, for just over three (3) weeks in time. Twenty-one (21) days of geolocation tracking equaled over two thousand (2,000) individual "pings" of Mr. Wright's cellular phone. The actions by the government in tracking Mr. Wright's cellular phone were thus an "egregious violation" of Mr. Wrights' Fourth Amendment rights.

There was no good faith on the Government's part to fail to obtain a warrant, or exigency by which a warrant could not have been obtained prior to tracking Mr. Wright's cellular phone. *See, e.g. Frimmel Mgmt., LLC v. United States*, 897 F.3d 1045 (9th Cir. 2018). From the time of the United States Supreme Court case of *United States v. Knotts* in 1983, there has been an expectation of privacy in physical location and movements. 460 U.S. 276 (1983). Further, the Ninth Circuit case of *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016) was in existence as of the time of tracking Mr. Wright's cellular phone, which specifically addressed searches of a cellular phone in a supervised release context. At the very least the appellate precedent was unclear, and conflicting authority is not "binding precedent" that the government can rely upon to guide its conduct. *Lara, id.*

Plain error existed that should have allowed for a reversal of the judgment

against Mr. Wright. *United States v. Johnson*, 626 F.3d 1085, 1088-1089 (9th Cir. 2010) (citing *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003)). The error was both clear and obvious, and affected Mr. Wright's substantial rights in being free from egregious searches and seizures in violation of his Fourth Amendment rights. This error affected the fairness, integrity and public reputation of the judicial proceedings when the cell phone evidence was used to unlawfully support the violations against Mr. Wright.

Plain error is also exactly the issue when trying to appeal a supervised release case without a condition addressing the potential conduct. The tracking of Mr. Wright's cellular phone without a condition that allows for tracking is a violation of Mr. Wright's due process, without notice or the opportunity to respond.

Without a supervised release condition to address, said non-condition is consequently not subject to an overbreadth or vagueness challenge. Additionally, the exclusionary rule does not apply to supervised release hearings, meaning there would not be a motion to suppress said evidence. The standard of review was thus necessarily plain error without any other or more advantageous level of review available.

But for the tracking of Mr. Wright's cellular phone, the likelihood of a revocation petition being filed against him would have been minimal. As evidence seized during an unlawful search cannot constitute proof, the cellular tracking information against Mr. Wright should have been excluded. *United States v. Crews*, 502 F.3d 1130, 1135

(9th Cir. 2007) (citing *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)). Certiorari should be granted on this basis.

B. Mr. Wright's Supervised Release Conditions Related to Criminal Activity and Associating with Persons "Engaged in Criminal Activity" were Vague and Overbroad, and Violated Mr. Right's Constitutional right to Due Process.

In its November of 2018 memorandum, the Ninth Circuit Court of Appeals found that the conditions prohibiting criminal activity and associating with persons "engaged in criminal activity" were not vague or overbroad. (*See* Appendix A, at pages 2-3 of 6.) The Ninth Circuit further found that said condition prohibits associating with persons were recently arrested for prostitution-related activities, who at Mr. Wright's "behest and with his support, continues to be engaged in similar behavior." (*See* Appendix A, at page 3 of 6.)

Both the prohibition on criminal activity and association conditions were vague and overbroad. Pursuant to *United States v. Evans*, 883 F.3d 1154, 1160 (9th Cir. 2018), the condition violated due process because it forbids an act that Mr. Wright was left to "guess at its meaning and differ as to its application." The conditions were further substantively unreasonable when it ultimately infringed more on the Mr. Wright's liberty than is reasonably necessary to accomplish these statutory goals. *Id.* Said vague supervised release condition cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect. *Id.*, at 1164.

A district court may impute knowledge when the activity is in and of itself a criminal act, but when the proscribed acts are not criminal, the individual must receive actual notice. *United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987); *see also United States v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983). Here, Mr. Wright did not receive notice as to the purported prohibited activities, because the conditions related to the purported violations were vague and/or overbroad such that Mr. Wright's due process interests were violated. Mr. Wright did not have a condition of supervised release that included a prohibition on internet advertisements, or a prohibition on bailing out any other person. Instead, Mr. Wright's supervised release condition prohibited "criminal activity."

Two events are at issue here, the one being bailing out a girlfriend from jail, and the second was a cellular phone number being listed on internet advertisements. First, there nothing directly violative of a condition as to "criminal activity" when bailing out a girlfriend, and said act should not have been construed as a violation of a supervised release term. Second, Mr. Wright was allowed freedom of speech, and an internet advertisement that includes Mr. Wright's cellular phone number was protected by the First Amendment. *United States v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990). Mr. Wright was thus entitled to actual notice prior to a revocation petition being filed against him as to an internet advertisement, and whether bailing out a girlfriend was prohibited under his supervised release terms. *United States v. Tham*, 884 F.2d 1262, 1265 (9th Cir. 1989) (due process requires that an individual receive fair warning that

an activity is prohibited).

As to the condition on associating with persons "engaged in criminal activity," said condition is unconstitutionally broadly-worded. *United States v. Woods*, 547 F.3d 515, 518-19 (5th Cir. 2008); *see also United States v. Soltero*, 510 F.3d 858, 867 (9th Cir. 2007). Pursuant to *Woods*, Mr. Wright was deprived of the constitutional right to liberty in the intimate details of his personal life by associating with his girlfriend. Mr. Wright further does not have a condition that he cannot associate with a person with a past offense, or arrested in general without the charges being adjudicated. The word "engaged," does not provide enough guidance, because it does not distinguish between persons currently or previously engaged in criminal activity. Finally, pursuant to the Ninth Circuit case of *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010), the association condition does not serve the ends of deterrence, rehabilitation, or public safety. Mr. Wright respectfully requests that his Petition for Certiorari be granted on this basis.

C. The District Court's Original Imposition of a Three-Year Supervised Release Term was a in Error Pursuant to the Holding in *Tapia*.

The district court imposed three years of supervised release at Mr. Wright's underlying sentence because it thought that "some structure and some guidance from the Probation Office will help [Mr. Wright]." A federal court, however, cannot give a defendant a longer sentence to promote rehabilitation. *Tapia v. United States*, 564 U.S. 319 (2011).

In its November of 2018 memorandum, the Ninth Circuit Court of Appeals found

that the district court did not err in sentencing Mr. Wright to three years of supervised release with the need for rehabilitation. (*See* Appendix A, at page 2 of 6.) The Court further found that under *United States v. Grant*, 664 F.3d 276 (9th Cir. 2011), the district court may factor in rehabilitation when they are terminating or extending supervised release, because "neither of these actions involves sending a defendant to prison." (*Id.*)

The *Grant* court found that *Tapia* applies in both the initial sentencing and the revocation context. *Id.*, at 280. The holding in *Grant* was that prison, in either an initial sentencing or revocation setting, can be only decided in imposition and duration if it relates to retribution, deterrence, and incapacitation, but not rehabilitation. *Id.*, at 282.

Mr. Wright's case is inapplicable to the *Grant* holding or findings when Mr. Wright's case involved the imposition of supervised release, and not the imposition of a prison sentence or the termination or extension of supervised release. The exact language from *Grant* that the Court utilized in its finding in Mr. Wright's case was that "[c]ourts may factor in rehabilitation when they are *terminating* or *extending* supervised release, because neither of these actions involves sending a defendant to prison." *Id.*, at 280 (emphasis added).

Tapia does not limit the sentence consideration to prison, and should be extended to Mr. Wright's case. Further, a three-year term of supervised release was imposed when there was no supervised release contemplated in the parties' underlying

plea agreement. For the foregoing reasons, Brian Wright respectfully requests that his Petition for Certiorari be granted.

VII.

CONCLUSION

For the foregoing reasons, Mr. Brian Wright respectfully asks this Court to grant this petition for writ of certiorari.

Dated: March 8, 2019.

Respectfully submitted,

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