NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER GARCIA,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a waiver of appeal, included in a written plea bargain agreement, procedurally bar the Petitioner's appeal to the Fifth Circuit wherein he argues that the special condition that prohibits the "viewing" of sexual material:

(a) offends his right to due process because it is too vague; and

(b) violates the First Amendment and the Overbreadth Doctrine.

2. Does a waiver of appeal, included in a written plea bargain agreement, procedurally bar the Petitioner's appeal to the Fifth Circuit wherein he argues that the application of said special condition violated his right to due process, by legally requiring him to comply with counseling – ostensibly intended to help him overcome the urge to re-offend – but, then revoking his release because he admitted to his counselor that he had watched the Playboy channel?

3. Is the application of the waiver of appeal in these circumstances unconscionable and does it violate basic fairness and traditional contract principles?

LIST OF PARTIES

Petitioner is Roger Garcia. Garcia was the Appellant below in the United States Fifth Circuit Court of Appeals.

Petitioner Roger Garcia is represented by Attorney Oscar O. Peña who was appointed to represent him at the district court level for trial and pretrial proceedings, and then said counsel was reappointed to handle the appeal.

Respondent is the United States of America. The United States of America was the Appellee below in the United States Fifth Circuit Court of Appeals.

Respondent was represented by Christopher Dos Santos, Asst. United States Attorney, Office of the United States Attorney, Southern District of Texas, Laredo Division.

Respondent is represented on appeal by Paula Offenhauser, Asst. United States Attorney, Office of the United States Attorney, Southern District of Texas, Houston Division.

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Index of Appendices

TABLE OF AUTHORITIES CITED

Page

Federal Statutory Provision

Case Law

OPINION BELOW

Roger Garcia filed a direct appeal to the United States Fifth Circuit Court of Appeals. In it, he complained that the special condition of supervised release he was alleged to have committed, constituted a violation of his right to due process and his rights under the First Amendment. The Fifth Circuit found the appeal was procedurally barred by virtue a plea agreement waiver of appeal signed approximately eleven years earlier.

JURISDICTION

This matter arose from a final order of the Fifth Circuit Court of Appeals. The United States Fifth Circuit Court of Appeals had appellate jurisdiction to review issues raised by Garcia on direct appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

The jurisdiction of the U.S. Supreme Court is invoked under 28 USC §1254(a). This is an appeal of a judgement and/or decree previously rendered by the U.S. Fifth Circuit Court of Appeals, brought by a party to that proceeding, and presented as a Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "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

Appellant, Roger Garcia, (hereinafter referred to as "Garcia") was indicted on July 8, 2008 via three-count indictment. Count One alleged receipt and distribution of child pornography in violation of 18 USC §2252(a)(2) and §2252(b)(1). Count Two alleged receipt and distribution of child pornography in violation of 18 USC §2252(a)(2) and §2252(b)(1). Count three alleged possession of child pornography in violation of 18 USC §2252A (a)(5)(B) and §2252A (b)(2). (ROA.15.)

Garcia pleaded guilty to Count Two on August 12, 2008. (ROA.54.)

Garcia was sentenced to serve 90 months in the custody of the Bureau of Prisons. (ROA.78.)

Garcia was released from Bureau of Prison custody and began a term of supervised release on January 21, 2015.

On December 1, 2017, a Petition for Warrant was filed alleging the defendant violated his supervised release conditions by viewing sexually oriented or sexually stimulating material. (ROA.110.)

On February 26, 2018 and on July 17, 2018 Supplemental Petitions were filed under DOC. 79 and DOC. 80. These supplementals petitions alleged two additional violations, including a new law violation for failure to register as a sex offender and a technical violation, failure to follow U.S. Probation Officer's instructions. (*see* ROA.214.)

On September 5, 2018 the Court found that each of the alleged violations was true and sentenced Garcia to serve six (6) months to run consecutive and in addition to an eighteen (18) month sentence imposed in a different case number. Garcia filed his notice of appeal the same day. (ROA.198.)

On request of the Appellee, the Fifth Circuit dismissed the appeal based on the contractual waiver signed by Garcia roughly eleven years earlier. On May 16, 2019, the Fifth Circuit denied Garcia's motion for reconsideration and dismissed the appeal; see Appendix A.

The first violation the government alleged came to light during a polygraph session (ROA.227.) The polygraph requirement was included "to

assist in treatment and case monitoring administered by the sex offender contractor or their designee." (ROA.80.) Sex offender counseling sessions were also required by the special conditions of supervised release. The relevant conditions appear below. (ROA.80.):

> The defendant shall participate in a mental health treatment program and/or sex offender treatment program provided by a Registered Sex Offender Treatment Provider, as approved by the United States Probation Officer, which may include but not be limited to group and/or individual counseling sessions, Abel Screen, polygraph testing and/or psycho-physiological testing to assist in treatment and case monitoring administered by the sex offender contractor or their designee. Further, the defendant shall participate as instructed and shall abide by all policies and procedures of the sex offender program, until such time as the defendant is released from the program as approved by the United States Probation Officer. The defendant will incur costs associated with such sex offender treatment program and testing, based on ability to pay as determined by the United States Probation Officer. The defendant shall waive his right of confidentiality in any records for mental health treatment imposed as a consequence of this judgment to allow the supervising United States Probation Officer to review the defendant's course of treatment and progress with the treatment provider. The Court authorizes the release of the presentence report and available mental health evaluations to the mental health provider. the Court authorizes the release of the presentence report and available mental health evaluations to the mental health provider, as approved by the probation officer.
>
> The defendant shall not view, possess or have under his control, any nude depictions of children, sexually oriented or sexually stimulating materials, including visual, auditory, telephonic, or electronic media, computer programs or services. The defendant shall not patronize any place where such material or entertainment is the primary source of business. The defendant shall not utilize any sex-related telephone numbers.

On October 6, 2017 the defendant participated in a polygraph examination as part of his sex offender treatment. During the polygraph Garcia admitted that he had viewed **adult** pornography twice, despite the terms of his supervision. Two days later, during a treatment session with Grover Rollins, Licensed Professional Counselor (the local probation office's sex offender treatment provider), Garcia further clarified that he had viewed adult pornography on satellite television at his brother's home where he was living at the time. Garcia's brother had a satellite television subscription with access to

the Playboy channel. (ROA.226-230.) **NOTE**: There is no suggestion that the defendant viewed child pornography.

The defendant advised probation that his brother in law had cancelled the cable television subscription to the Playboy channel as a result of this issue that Garcia was having with the probation office. Nevertheless, the events led to the filing of a Form 12C and the defendant was arrested. These facts were recited into the record during the sentencing hearing held on September 5, 2018. The Court took judicial notice of Garcia's brother in law's actions upon a request by the defense. (ROA.263-264.)

Garcia also argued that the special condition relating to viewing sexual material[1] was overbroad in violation of his Due Process rights and First Amendment rights, i.e. that the special condition was unconstitutionally overbroad. (ROA.229-230.)

Garcia also argued that the application of the special conditions to this circumstance violated his Due Process insofar as it was self-defeating to revoke Garcia for conduct that he had divulged while honestly participating in sex

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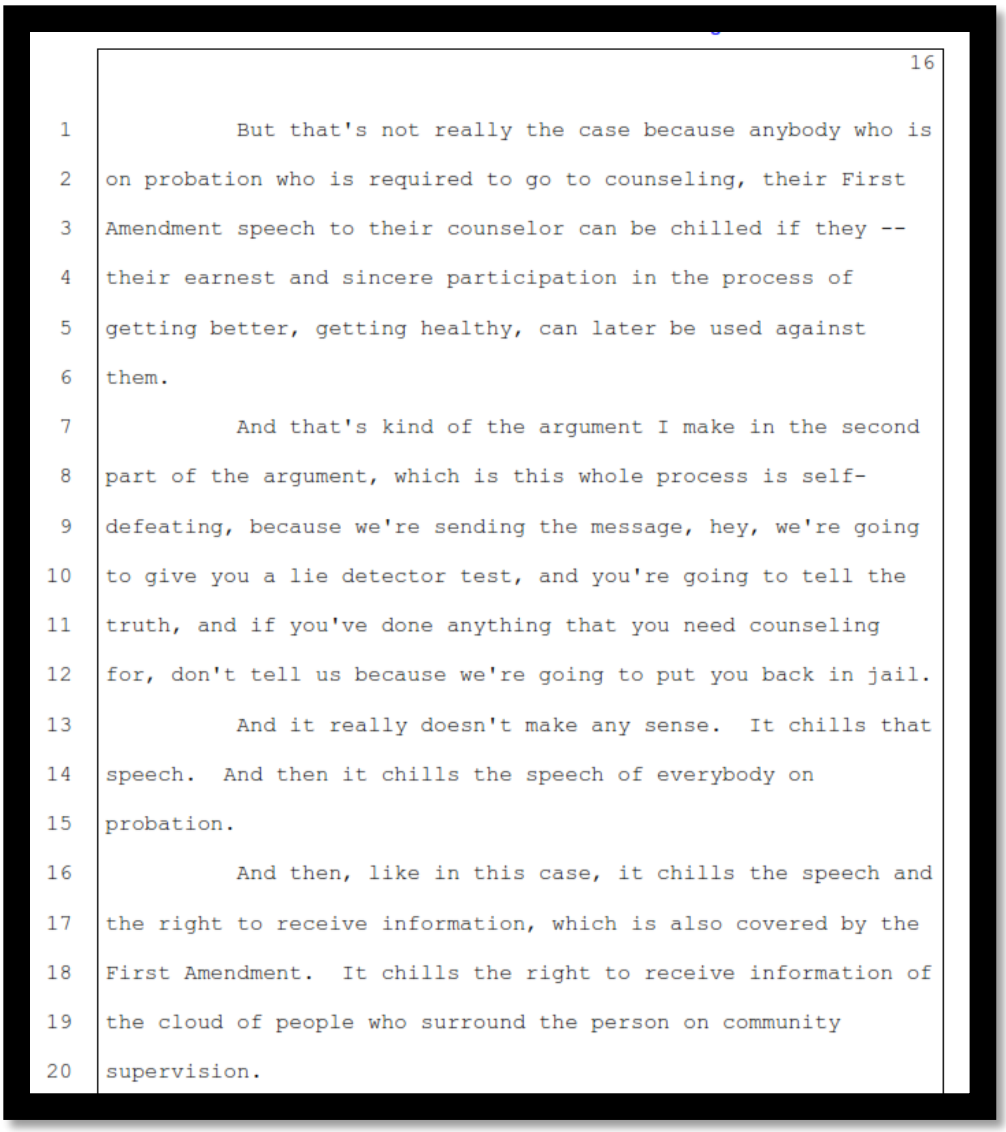
[1] "**The defendant shall not view**, possess or have under his control, any nude depictions of children, **sexually oriented or sexually stimulating materials, including visual**, auditory, telephonic, or electronic media, computer programs or **services**. The defendant shall not patronize any place where such material or entertainment is the primary source of business. The defendant shall not utilize any sex related telephone numbers."

offender counseling in compliance with his special conditions of supervised release.

(ROA.234,237,259.) See the excerpt below for an example:



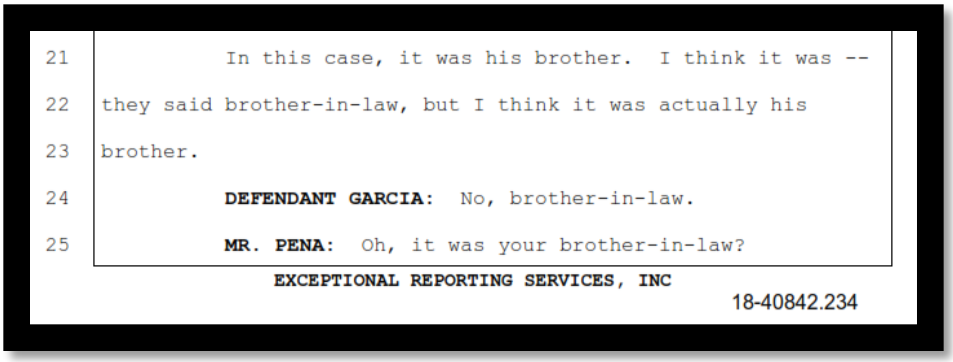
16

But that's not really the case because anybody who is on probation who is required to go to counseling, their First Amendment speech to their counselor can be chilled if they -- their earnest and sincere participation in the process of getting better, getting healthy, can later be used against them.

And that's kind of the argument I make in the second part of the argument, which is this whole process is self-defeating, because we're sending the message, hey, we're going to give you a lie detector test, and you're going to tell the truth, and if you've done anything that you need counseling for, don't tell us because we're going to put you back in jail.

And it really doesn't make any sense. It chills that speech. And then it chills the speech of everybody on probation.

And then, like in this case, it chills the speech and the right to receive information, which is also covered by the First Amendment. It chills the right to receive information of the cloud of people who surround the person on community supervision.



In this case, it was his brother. I think it was -- they said brother-in-law, but I think it was actually his brother.

DEFENDANT GARCIA: No, brother-in-law.

MR. PENA: Oh, it was your brother-in-law?

The Court overruled the objections, found the allegation[2] to be true, and sentenced Garcia as described above.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10(c) of the Supreme Court Rules, the Petitioner contends that the question presented herein constitutes an important question of federal law that has not been, but should be, settled by the Supreme Court. The issue raised concerns language that is in most plea bargains. The question seeks to define the scope of the standard waiver of appeal.

Garcia challenges the relevant special condition as facially overbroad and facially vague. Additionally, Garcia is also challenging the order of revocation, arguing it is an unconstitutional subsequent application of the special condition (i.e. an *as applied* challenge).

In support of revocation, the government quotes the special condition: "The defendant shall not view, possess or have under his control, any nude depictions ***of children***, sexually oriented or sexually stimulating materials, including visual, auditory, telephonic, or electronic media, computer programs or services." NOTE: Garcia is not alleged to have violated his conditions of

[2] The District Court found two other allegations to be true. Garcia addresses this circumstance in the harm analysis.

supervision by viewing "nude depictions of children". He is accused of having "viewed" "sexually stimulating materials".

The government's reasoning would lead one to conclude that the Appellant's original waiver of appeal, executed at the time of conviction and sentence, would bar appeals of all future decisions and actions taken by the Court.

Garcia has not filed a direct appeal challenging the judgment of conviction. Nor has he filed a collateral appeal of the conviction and sentence. Instead, he challenges the result of a subsequent judicial cycle--- the judgment of revocation. The judgment of revocation is the result of a secondary judicial process containing independent factual disputes and different legal issues based on an event that had not yet occurred at the time of the waiver of appeal. Unlike the judgment of conviction and sentence, the revocation had not even been set in motion at the time of the waiver of appeal.

Garcia agrees that there was a waiver of appeal of the conviction, sentence and collateral attacks. He argues however, that he did not understand the waiver to apply to a future ruling on a motion to revoke supervised release, one that incidentally occurred almost eleven years later.

Furthermore, application of the plea bargain waiver of appeal to procedurally bar the later direct appeal of a revocation eleven years later is fundamentally unfair and deprives Garcia of Due Process, by placing him in a

sex offender counseling system that does not serve the compelling interest of rehabilitation and/or control of criminal impulses, but rather serves as a minefield to further punish the sex offender.

There was no meeting of the minds on this issue. At the time of the waiver, Garcia could not have known that the special condition of sex offender counseling would turn his own sincere participation in the sex offender counseling, his own truthfulness, against him for participating sincerely. It was logical for him to presume that the counseling was intended to help him strive to be better, address his weaknesses, and not punish him for revealing his imperfections during the counseling (on the polygraph and person to person with the counselor).

The government's model provides no practical alternative for someone who benefits from a guilty plea containing a waiver of appeal to raise an as-applied challenge to the conditions of supervised release without facing procedural bar. This kind of trap for the unwary would rarely have an opportunity to be fixed because so many plea bargains contain waivers of appeal.

CONSEQUENCES OF GOVERNMENT'S WAIVER MODEL

The government is asking the Court to sanction a waiver framework that creates a stagnant pool in this area of the law. Proper, valid, non-frivolous challenges to enforcement of supervised release conditions would be

procedurally barred in cases with a plea agreement containing a waiver of appeal. (It should be noted that, in the Southern District of Texas, Laredo Division, all plea agreements offered by the government, with rare exception, include/require a waiver of appeal.)

The government's intended use of the waiver of appeal in this context should be disfavored because it hampers the development of jurisprudence. It walls off the jurisprudence of special conditions from those who have the most incentive to analyze it and propose better and better models.

BREACH

Garcia did not appeal his original conviction. He was convicted, sentenced and then placed on supervised release after serving his prison sentence. He later appealed the final order on a different judicial cycle—i.e. the revocation.

This present controversy stems from action taken by the government against Garcia. The government acted against Garcia, sought a new factual determination and obtained an independent order from the Court.

Then, and only then, did Garcia file an appeal. There is no apparent breach.

The Fifth Circuit honored the original waiver of appellate rights that Garcia entered at the time of the conviction and sentence. It enforced a waiver

of appeal that was made in connection with the original conviction and the sentence—not the revocation.

The Fifth Circuit erred by applying a subsequent judgment to revoke the Appellant's term of supervised release.

The relevant language in the plea agreement follows:

> 7. Defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal a conviction and appeal the sentence imposed. Defendant agrees to waive the right to appeal the conviction, the sentence imposed, or the manner in which the sentence was determined. Additionally, Defendant is aware that Title 28, U.S.C. § 2255, affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or sentence has become final. Defendant waives the right to contest his/her conviction or sentence by means of any post-conviction proceeding.

Garcia argues that the waiver invoked by the government does not exist because it was not included in the meeting of the minds or in the plea colloquy. Garcia was not informed, nor did he anticipate, that a plea waiver would also waive a complaint that he may have about a supervised release revocation hearing. Instead, Garcia intended to waive his direct appeal following conviction and sentence, and he agreed to waive habeas corpus complaints about the sentence and conviction. He agreed to waive all unilateral complaints about the conviction and sentence. The government cites several cases to

support contractual waiver—but they all involve challenges to the original judgment of conviction and sentence—not a subsequent action by the Court:

1. U.S. v Walton, 537 Fed.Appx. 430 (2013)(*unreported*); This case involves a direct appeal from conviction, and it arguably supports the Appellant's position insofar as it assumes *arguendo* that Walton's 8th Amendment claims are subject to plain error review despite the valid waiver of appeal rights. The Court also fund that Walton's claims about withdrawing his plea were not barred by the waiver of appeal, but denied the claim *on its merits*;
2. U.S. v Jacobs, 635 F.3d 778 (5th Cir. 2011); This case is distinguishable because Jacobs filed a direct appeal from conviction after sentencing, challenging the reasonableness of the sentence originally imposed. Jacobs is attacking the Court's decision concerning the sentence's length—not a subsequent decision to revoke supervised release;
3. U.S. v Cole, 569 Fed.Appx. 195 (2014)(*unreported*); This case is distinguishable because Cole, on direct appeal from the conviction, claimed that the difference between the oral pronouncement of the special condition differed from the written conditions later signed;
4. U.S. v Boehm-McCauley, 582 Fed.Appx. 464 (2014)(*unreported*); wherein the Appellate Court confirmed that a challenge to the District Court's

failure to orally pronounce a special condition of supervised release on direct appeal was barred by a valid waiver; and

5. U.S. v Scallon, 683 F.3d 680 (5th. Cir. 2012); On direct appeal, Scallon challenged the special conditions of supervised release as being unconstitutionally vague and ambiguous.

Garcia argues that the plea waiver does not encompass a waiver of a complaint challenging a district court's independent factual and legal determinations that lead to a judgment of revocation.

Garcia argues that the plea waiver does not encompass a Due Process and First Amendment as-applied challenge arising during the time Garcia was under supervised release.

This appellate waiver could not have contemplated the claims raised in Points of Error 4 and 5 wherein Garcia complains about the constitutionality of the process that encourages him to participate in counseling, and to do so sincerely, but then revokes him for telling the truth – that he viewed the Playboy channel on his brother's television.

The waiver applies to the right to appeal the conviction, the sentence imposed, or the "manner" in which sentence was imposed. It does not (or should not) apply to a subsequent revocation hearing. Garcia's case is situationally different from the procedural postures described in the cases cited

by the government. As stated, the instant case began with government action against Garcia—not Garcia unilaterally deciding he had buyer's remorse. The instant challenges depend on decisions and observations that occurred after the fact, i.e. (1) that the sex offender counseling process was self-defeating, (2) that the underlying policy violates due process by punishing sincere and truthful participation in sex offender counselling, (3) that the special condition would be interpreted so broadly, or that (4) the chilling effect would cause Garcia's brother to cancel his subscription to the Playboy Channel to avoid problems, despite his own First Amendment rights.

MANNER

Garcia's challenge to the special condition is the result of the manner of enforcement of the special condition against him. In so doing, it has become necessary to challenge the substance of the provision for reasons that are not contemplated by the waiver of appeal that Garcia signed when he pleaded guilty.

Garcia is claiming, among other things, that the exercise of discretion to revoke supervised release may be an abuse of discretion *under these circumstances.* [3]

[3] The Court should consider that Garcia, who was living with his brother, has been revoked because he twice viewed the Playboy Channel and then revealed this fact in counseling. He did not control the cable television subscription or

Garcia could not have waived by failure to object an as-applied challenge to the special condition --- because the special condition had yet been applied to him.

Garcia argues that an appeal of a different, independent judicial cycle, involving fact-determinations and legal analysis, like a revocation for violation of the terms of supervised release, cannot be waived because—unlike a conviction and sentence—a potential future revocation for violation of the conditions of supervised release is not necessarily contemplated by anyone at the time of the execution of the waiver.

It should also be noted that Garcia was even told that he had the right to appeal at the time of the revocation order. The government did not invoke the waiver at that time, and reversing the model, the government should now be procedurally barred from using the waiver by not invoking it in a timely manner.

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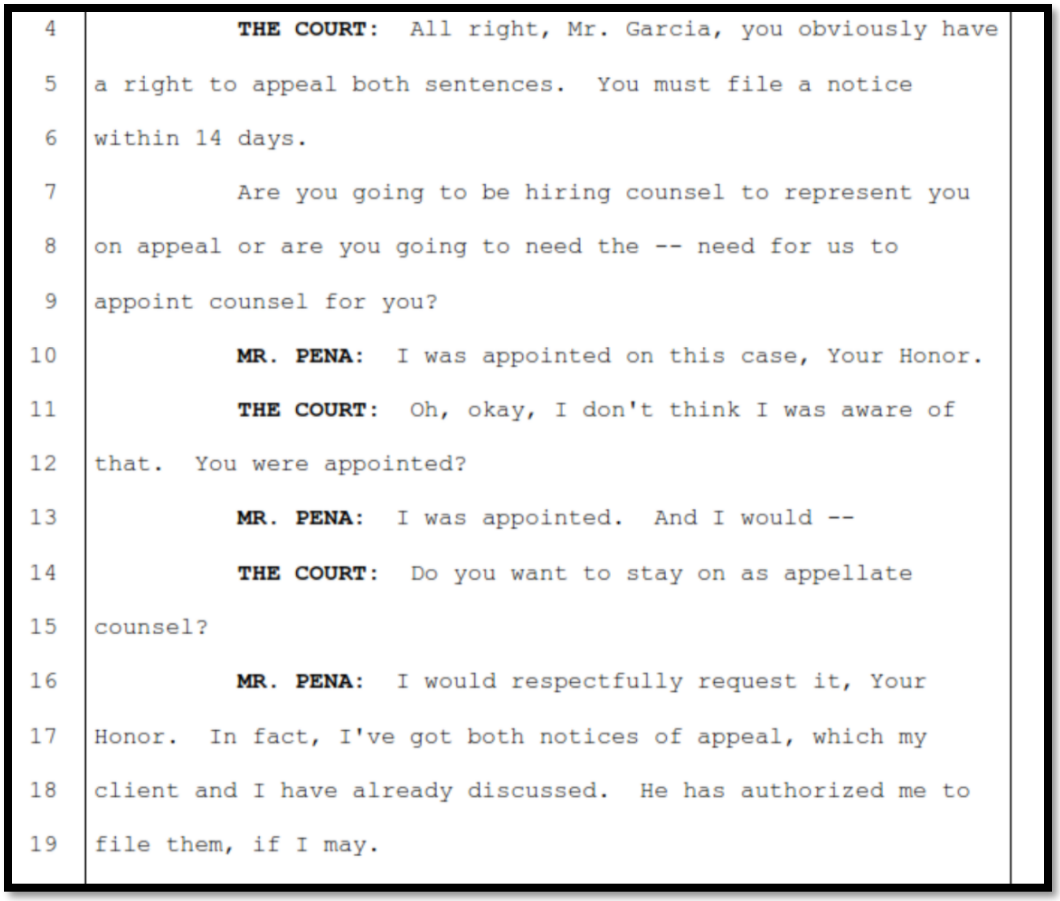
obtain the cable channel—he simply viewed it on someone else's television, made available because of someone else's transaction (subscribing to cable/satellite television). Furthermore, Garcia divulged this information during a court-ordered, therapy-related polygraph examination and then he revealed it again to his counselor in person.



THE COURT: All right, Mr. Garcia, you obviously have a right to appeal both sentences. You must file a notice within 14 days.

Are you going to be hiring counsel to represent you on appeal or are you going to need the -- need for us to appoint counsel for you?

MR. PENA: I was appointed on this case, Your Honor.

THE COURT: Oh, okay, I don't think I was aware of that. You were appointed?

MR. PENA: I was appointed. And I would --

THE COURT: Do you want to stay on as appellate counsel?

MR. PENA: I would respectfully request it, Your Honor. In fact, I've got both notices of appeal, which my client and I have already discussed. He has authorized me to file them, if I may.

The government's waiver by omission model would require the defendant to object to the special conditions twice: first, a facial challenge at sentencing. Arguably, the only claim that Garcia could have made at the time of the original waiver of appeal would be the facial challenge to the overbreadth and vagueness of the special condition. It would be bad policy to require that level of foresight.

KNOWINGLY

One of the fundamental principles of due process underlying our criminal justice system is that a person may be found to have waived a right

only if he or she did so "knowingly." The individual must be advised both of the nature of the right at issue and also of the consequences of waiver. United States v. Tanner, 721 F.3d 1231, 1233 (10th Cir. 2013);

A defendant presented with such a waiver will normally be advised in general terms that he or she has a right to appeal the judgment of conviction or sentence, but that, under the agreement, this right will be forfeited and the judgment will no longer be subject to challenge. But, in too many cases, there is no discussion of the specific issues that might be raised on appeal or of the likelihood of success and potential outcomes associated with any of those issues. The defendant in this situation cannot be said to have "knowingly" waived his or her appeal rights triggered by an occurrence that is eleven years remote in the future, and before knowing how the special condition would be administered.

A NOTE ON HARMLESS ERROR

Garcia's term of supervised release was revoked for additional reasons not addressed in this appeal.

Undersigned counsel is mindful that harmless error may be an obstacle should this motion be granted.

Nevertheless, it is important to note that the vagueness challenge argued in his brief involves First Amendment issues. Ordinarily, a criminal defendant who challenges a criminal statute (as opposed to a special condition of

supervised release) as unduly vague must show that it is vague as applied to the conduct for which he was charged; Bynum v. State, 767 S.W.2d 769, 774 (Tex.Crim.App.1989). But, if the challenged statute implicates the free-speech guarantee of the First Amendment, the defendant is permitted to argue that the statute is overbroad "on its face" because it is unclear whether it regulates a substantial amount of protected speech. United States v. Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Although this matter does not involve a criminal statute, the broad implications of Garcia's argument could be felt by many—including sex offenders on supervised release, their families and support systems, any possibly anyone who has to submit to counseling as part of their conditions of supervised release.

The exception to the usual stricter rule requiring standing to challenge a statute is justified, according to precedent, because the continued existence of the statute in an un-narrowed form would tend to suppress constitutionally protected rights. An example of the unique potential for precedential value is the presence in this case's facts of a concrete chilling effect felt by Garcia's brother-in-law; Gooding v. Wilson, 405 U.S. at 521, 92 S.Ct. 1103.

In this connection, the Court should also note that, under the "substantial overbreadth" doctrine, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to

engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," the law may not be enforced against anyone; Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503–04, 105 S. Ct. 2794, 2801–02, (1985).

Garcia contends that the policy of allowing important First Amendment concerns to be presented and reviewed with respect to criminal statutes also applies to the challenged special condition. This case presents an opportunity to provide guidance in an area of the law that is dominated by broad discretion. This controversy, Garcia submits, can be used to better define the limits of that broad discretion. Despite the harm analysis issues, the Court can still decide this important question of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Garcia prays that this Court reinstate his Appeal for consideration before the Honorable Justices of said court. Garcia also prays for reconsideration of the Court's decision to dismiss the appeal, and general relief to which the Court should conclude he is entitled.

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CJA Attorney for Roger Garcia

Date: August 15, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER GARCIA,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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APPENDIX

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Index of Appendices

Appendix Exhibit A
Notice of Dismissal of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40842

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGER GARCIA,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

This panel previously granted appellee's motion to dismiss the appeal and denied as moot an extension of time to file a brief. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

Appendix Exhibit B
Order to Dismiss Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40842

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROGER GARCIA,

Defendant - Appellant

A True Copy
Certified order issued May 07, 2019
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that appellee's unopposed alternative motion for an extension of time to file a brief until 30 days after denial of the motion to dismiss is DENIED AS MOOT.