No. _____

In the

Supreme Court of the United States

_____

Ronald Frank Lee

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether this Court should grant review to consider whether a condition of supervision requiring the Petitioner to permit a probation officer to visit him at any time at home or elsewhere is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary?

II. Whether this Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019)?

PARTIES TO THE PROCEEDING

Petitioner is Ronald Frank Lee, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Frank Lee seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Ronald Frank Lee*, 771 Fed. Appx. 548 (5th Cir. May 31, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 31, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. §§ 3583(d)(1) and (2) which provide the following:

> 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),

This Petition also involves 18 U.S.C. § 922(g) which provides the following:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one

> year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

STATEMENT OF THE CASE

On December 20, 2017, the Appellant, Ronald Frank Lee was charged in a one count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (ROA.7-9).[1] On February 21, 2018, Mr. Lee entered a guilty plea to the one-count indictment, without a plea agreement. (ROA.57-85).

A pre-sentence report was prepared, and Mr. Lee's base offense level was determined to be 14, applying U.S.S.G. § 2K2.1. (ROA.102). Applying a 4-level enhancement for possession of the weapon in connection with another felony offense (U.S.S.G. §2K2.1(b)(6)(B), Mr. Lee's Adjusted offense level was 18. (ROA.102). Allowing for a 3-level reduction for timely acceptance of responsibility, the total offense level was a level 15. (ROA.103). Mr. Lee had a criminal history score of 6 points, resulting in a category III. (ROA.106). His advisory imprisonment range was 24-30 months. (ROA.114).

Both parties filed statements of no objections to the PSR. (ROA.117-19). At sentencing, Mr. Lee argued for a sentence at the bottom of the guideline range based on Mr. Lee's desire for rehabilitation and his impressive employment history. (ROA.88-89). The district court did sentence Mr. Lee to the bottom the guidelines and imposed a sentence of 24 months, to be concurrent with related pending cases, and to be consecutive to an unrelated pending case. (ROA.92). The court also imposed a term of supervised release of three years, imposed no fine, and imposed a mandatory special assessment of $100. (ROA.92). The written judgment reflects the same

[1] For the convenience of the Court and the parties, Petitioner has cited to the page number of the record on appeal in the court below.

sentence and also reflects that Mr. Lee was sentenced to a three-year term of supervised release. (ROA.48-50).

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 him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer." (ROA.49). No objection was made to this condition.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to consider whether a condition of supervision requiring the Petitioner to permit a probation officer to visit him at any time at home or elsewhere is unreasonable under the Fourth Amendment, constitutionally overbroad and vague, statutorily unreasonable, and a greater deprivation of liberty than is reasonably necessary.

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. This 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).

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, the Seventh Circuit has criticized district courts for imposing these types of conditions without explaining the need for such a condition in a particular case. *See United States v. Kappes*, 782 F.3d 828, 850-51 (7th Cir. 2015); and *United States v. Thompson*, 777 F.3d 368, 373 (7th Cir. 2015).

Although this issue was not raised in the district court, it was raised on direct appeal. The Fifth Circuit Court of Appeals disposed of the issue by simply finding the error was not plain because the issue had not previously been decided. *See United States v. Lee*, 771 Fed. Appx. 548, 449 (5th Cir. 2019) (unpublished); *citing United States v. Cabello*, 916 F.3d 543, 544 (5th Cir. 2019).

While it is true that the Fifth Circuit has in some cases held that when it has "not previously addressed an issue, we ordinarily do not find plain error." *United States v. Serrano*, 640 F. App'x 328, 330 (5th Cir. 2016) citing *United States v. Evans*, 587 F.3d 667, 671 (5th Cir.2009) (emphasis added), it is simply not true that a court of appeals cannot find plain error in a case of first impression. *See, United States v. Silva-De Hoyos*, 702 F.3d 843, 849 (5th Cir. 2012); *United States v. Leonard*, 157 F.3d 343, 344–46 (5th Cir.1998); *United States v. Aderholt*, 87 F.3d 740, 744 (1996); *United States v. Aguilar*, 668 F. App'x 625, 626 (5th Cir. 2016) ("the fact that a case is one of first impression does not preclude a finding of plain error . . . .").

In fact, the court in *Kappes* found the error of including this condition without an explanation to be plain error requiring reversal. *Kappes*, 782 F.3d 828, 844. In the present case, there was error, it was plain and it did affect Mr. Lee's substantial rights. Mr. Lee is now subject to unreasonable requirements that he allow the probation officer to visit him in her home at any time, and anywhere else at any time, regardless of any suspicion. As the court in *Kappes* necessarily found, this error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Again, the Court of Appeals for the Seventh Circuit specifically found that it was plain error to impose the very condition that is at issue in this case. *See United States v. Kappes*, 782 F.3d at 844. Moreover, the Fifth Circuit's position in this regard – that error cannot be plain unless there has been a previous determination that there was error -- is contrary to this Court's precedent. *See Henderson v. United States*,

568 U.S. 1121, 1130 (2013) (For the purposes of determining whether error is plain, "it is enough that an error be plain at the time of appellate consideration.").

Moreover, the fact that a district court must explain the reasons for imposing the conditions of release in a particular case is not new, novel, or of first impression. *See, Salazar*, id. Nor is there anything new or novel in the Fourth Amendment's guarantees of the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const., amend. IV, and the continued application of this right to a person on supervised release. See, *Knights*, id. This Court should grant review to determine whether this condition violates the Petitioner's rights under the Fourth Amendment.

Accordingly, this Court should grant review to determine whether the condition of supervised release at issue violates the Fifth Amendment and to resolve a circuit split on the issue.

II. This Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Petitioner Lee pleaded guilty one count of possession of a firearm in interstate commerce after having sustained a felony conviction, and received a 24 month sentence of imprisonment. In pleading guilty, however, he admitted neither that he knew of his felon status, nor that he knew the firearm had moved in interstate commerce. The district court nonetheless accepted the plea.

Section 922(g) of Title 18 makes it "unlawful" for certain disfavored populations to possess firearms in interstate commerce. People who have been convicted of a prior felony are one such population. 18 U.S.C. §922(g)(1). Aliens illegally in the United States are another such population. 18 U.S.C. §922(g)(5).

Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g)." In *Rehaif v. United States*, No. 17-9560, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), this Court held:

> We conclude that in a prosecution under 18 U.S.C. §922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. We express no view, however, about what precisely the government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here.
>
> *Id*. at 2200.

Of course, neither the Petitioner, when he filed his appeal brief, nor the Fifth Circuit, when it entered the opinion in the Petitioner's case on May 31, 2019, had the

benefit of this Court's opinion in *Rehaif*, which was entered on June 21, 2019. *See* Appendix A.

Accordingly, this Court should grant certiorari, vacate and remand (GVR) for reconsideration by the lower court in light of *Rehaif*. Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168.

As a part of his guilty plea, the Petitioner was advised of the elements of this offense, but he was not advised that knowledge of his status as a person prohibited from possessing a firearm was an element. *See* (ROA.32). He also was not advised that knowledge of the interstate commerce nexus was an element. *See id.* In fact, a complete reading of the elements as described shows that the Petitioner was advised the elements do not require knowledge of the prohibited status or the interstate commerce lement. *See id.* It is not clear from the stipulated facts that the Petitioner stipulated he knew he was a convicted felon at the time he possessed the firearm in question. *See id*. In any event, the record does not show that his plea was knowingly and voluntarily entered because he was not properly advised of the elements of the offense.

GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Any possible or arguable procedural obstacles to reversal – such as the consequences of non- preservation or harmless error analysis – should be decided in the first instance

by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

In the present case, the Petitioner did not raise this issue in the Court of Appeals. However, because neither the Petitioner nor the Fifth Circuit had the benefit of this Court's decision in *Rehaif v. United States*, 139 S.Ct. at 2200, this Court should vacate and remand for re-consideration in light of *Rehaif*. *See Henderson v. United States*, 568 U.S. 1121, 1130 (2013) (For the purposes of determining whether error is plain, "it is enough that an error be plain at the time of appellate consideration."). Alternatively, the Petitioner requests this Court to grant certiorari to decide the issue whether the knowledge element should apply to the interstate commerce element, which was not decided in *Rehaif*.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 29th day of August, 2019.

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