No. 19-5790

IN THE SUPREME COURT OF THE UNITED STATES

RONALD FRANK LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to plain error relief on his forfeited challenge to the district court's imposition of a standard condition of supervised release permitting a probation officer to visit him at home and elsewhere.

2. Whether this Court should grant the petition for a writ of certiorari, vacate the decision below, and remand for further proceedings as to petitioner's conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), in light of this Court's holding in Rehaif v. United States, 139 S. Ct. 2191 (2019), that the mens rea of knowledge under those sections applies "both to the defendant's conduct and to the defendant's status," id. at 2194.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Lee, No. 17-cr-268 (June 18, 2018)

United States Court of Appeals (5th Cir.):

United States v. Lee, No. 18-10852 (May 31, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 771 Fed. Appx. 548.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2019. The petition for a writ of certiorari was filed on August 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a). Judgment 1. He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. A1-A2.

1. On September 9, 2017, two Grand Prairie, Texas police officers approached a parked car recently operated by Dilan Smith, who was the subject of an outstanding warrant. Presentence Investigation Report (PSR) ¶ 7. As he approached, one of the officers smelled a strong odor of marijuana. Ibid. He made contact with Smith and asked if there was marijuana in the car, which Smith denied. PSR ¶ 8. Smith then accompanied the officer to the rear of his car. Ibid. Petitioner, who was sitting in the front passenger seat, remained inside the car. Ibid.

After briefly questioning Smith and petitioner, the officers searched the car based on the marijuana odor. PSR ¶¶ 9-10. On the passenger floor board near petitioner's seat, they found a backpack containing three large Ziploc bags full of marijuana, 23 pills of alprazolam, other drug-trafficking paraphernalia, and a .45-caliber pistol loaded with eight bullets. PSR ¶ 10. The officers placed petitioner under arrest and, in their search incident to that arrest, found another baggie of marijuana in his

pocket and $931 in cash on his person. Ibid. The officers contacted dispatch and learned that petitioner had outstanding arrest warrants. PSR ¶ 11. They also learned that petitioner had a prior felony conviction in Tarrant County, Texas, for delivery of marijuana. PSR ¶ 13.

2. A federal grand jury returned an indictment charging petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a). Indictment 1-2. Petitioner pleaded guilty without a plea agreement. D. Ct. Doc. 15 (Feb. 21, 2018). The district court sentenced him to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2.

The court of appeals affirmed. Pet. App. A1-A2. Petitioner's sole contention on appeal was that the district court plainly erred when it imposed one of the "standard conditions" of supervised release in the United States Sentencing Guidelines, under which petitioner was required to "allow the probation officer to visit [him] at any time at his * * * home or elsewhere" and "permit the probation officer to take any items prohibited by the conditions of [his] supervision that [the probation officer] observes in plain view." § 5D1.3(c)(6). Petitioner acknowledged that he had not objected to this condition during the proceedings below, Pet. C.A. Br. 4, and the court of appeals determined that he was not entitled to relief under the plain-error standard applicable to a forfeited claim, Pet. App. A2.

ARGUMENT

Petitioner contends (Pet. 9-11) that his conviction for possessing a firearm as a felon is infirm because the courts below did not recognize that knowledge of status is an element of that offense. This Court should grant the petition for a writ of certiorari, vacate the decision below, and remand for further proceedings so that the court below can evaluate this claim in light of the Court's intervening decision in Rehaif v. United States, 139 S. Ct. 2191 (2019). Petitioner separately renews his contention (Pet. 5-8) that the court of appeals should have vacated a standard condition of supervised release to which petitioner did not object at sentencing. But his challenge to his sentence could be mooted by further proceedings on his Rehaif claim, and lacks merit in any event.

1. Petitioner contends (Pet. 9-11) that his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), is infirm because the courts below did not recognize that knowledge of status is an element of that offense. In Rehaif, this Court held that the mens rea of knowledge under Sections 922(g) and 924(a)(2) applies "both to the defendant's conduct and to the defendant's status." 139 S. Ct. at 2194. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of Rehaif.

2. Petitioner separately argues (Pet. 5-8) that the "condition of supervision requiring [him] 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." Pet. 5 (emphasis omitted).

As a threshold matter, if petitioner were to prevail on his Rehaif-based claim following a remand order from this Court, see p. 4, supra, his conviction would be vacated, obviating any need to resolve his objection to the supervised-release condition. In any event, the court of appeals correctly rejected his forfeited claim, which does not warrant this Court's review.

The Sentencing Guidelines recommend, as a "'standard'" condition of supervised release, that "[t]he defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view." § 5D1.3(c)(6). The imposition of such a condition in appropriate circumstances is consistent with this Court's recognition in Samson v. California, 547 U.S. 843, 854 (2006), that "suspicionless searches" further the state's interests in preventing recidivism and reintegrating parolees into society -- interests that apply with equal force in the context of offenders on federal supervised

release, see Mont v. United States, 139 S. Ct. 1826, 1833 (2019) ("Supervised release is 'a form of postconfinement monitoring' that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison.") (quoting Johnson v. United States, 529 U.S. 694, 697 (2000)). Indeed, the compliance checks by probation officers pursuant to the standard condition "do not constitute as invasive a burden on a [defendant's] expectations of privacy as does" the type of full search -- beyond items in plain view -- that this Court permitted in Samson. Cf. United States v. Williams, 880 F.3d 713, 719 (5th Cir.), cert. denied, 138 S. Ct. 2590 (2018).

As the government explained below, "the record amply supports" imposition of the standard visitation condition in this case. See Gov't C.A. Br. 11-12. Among other things, petitioner has four prior marijuana-related convictions, has "twice violated the terms of his probation by committing further possession offenses," and "possess[ed] * * * the firearm in furtherance of additional possession offenses" here. Ibid. Thus, the standard visitation condition, which functions in part to help probation officers prevent supervised releasees from accumulating contraband, "was plainly related to the nature and characteristics of the offense, [petitioner]'s troubling history and characteristics, [and] deterrence of [petitioner]'s criminal conduct." Id. at 12.

Petitioner invokes a handful of recent decisions from the Seventh Circuit that have "criticized district courts for imposing these types of conditions without explaining the need for such a condition in a particular case." Pet. 6 (citing United States v. Henry, 813 F.3d 681, 683-684 (2016); United States v. Kappes, 782 F.3d 828, 850-851 (2015); United States v. Thompson, 777 F.3d 368, 373 (2015)). But his claim (Pet. 8) that the district court should have more thoroughly "explain[ed] the reasons for imposing the conditions of release in [his] particular case" asserts only a factbound error that does not warrant this Court's review. See Sup. Ct. R. 10. That is particularly so in light of the plain error standard, the applicability of which petitioner does not dispute.*

Petitioner errs in asserting (Pet. 8) "a circuit split on the issue" of "whether this condition violates the [p]etitioner's rights under the Fourth Amendment." None of the decisions he cites passed on the constitutionality of the standard visitation condition or adopted petitioner's position that that condition is categorically unreasonable under the Fourth Amendment or applicable statutes. Instead, those decisions concluded that the

* The petition in this case need not be held pending the Court's decision in Holguin-Hernandez v. United States, cert. granted, No. 18-7739 (argued Dec. 10, 2019), which concerns the Fifth Circuit's practice of requiring a post hoc objection to preserve a challenge to the length of a term of imprisonment, where the defendant explicitly sought a shorter term. Petitioner here did not express any disagreement with this supervised-release condition at any point in the district court.

visitation condition might sometimes require tailoring or further explanation based on the "particulars of the case." Henry, 813 F.3d at 684 ("[I]n any event the home-visit condition is not mandatory, and being optional can be modified by the district judge to fit the particulars of the case."); see Kappes, 782 F.3d at 850-851 ("Given that Jurgens' offense exclusively involved images on a computer -- which presumably would not be left in plain view when Jurgens heard a knock on the door -- and there is no indication Jurgens has ever possessed any other form of 'contraband,' there is no readily apparent justification for this condition to be imposed upon Jurgens."); Thompson, 777 F.3d at 380 ("Regardless of any possible constitutional concern," application of the standard visitation concern was "too broad in the absence of any effort by the district court to explain why [it was] needed."). Even if petitioner could demonstrate that the courts of appeals vary in their imposition of the standard visitation condition in some way that would be relevant to his forfeited objection, this Court has stated that it does not ordinarily resolve circuit conflicts implicating the Sentencing Guidelines because Congress expected the Sentencing Commission itself to do so through amendments to the Guidelines and commentary. See Braxton v. United States, 500 U.S. 344, 347-349 (1991) (declining to resolve circuit conflict on Guidelines provision).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). The petition should otherwise be denied.

Respectfully submitted.

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