No. __

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID TJADER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PROOF OF SERVICE

State of Illinois)
) ss
County of Sangamon)

DANIEL J. HILLIS, being first duly sworn on oath, deposes and states as follows:

1. On September 5, 2019, the original and ten copies of the petition for writ of *certiorari* and motion to proceed *in forma pauperis* in the above-entitled case were deposited with FedEx Ground in Springfield, Sangamon County, Illinois, properly

addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of *certiorari*.

2. An additional copy of the petition for writ of *certiorari* and motion to proceed *in forma pauperis* were served upon the following counsel of record for Respondent:

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United States Department of Justice
950 Pennsylvania Avenue Northwest
Washington, D.C. 20530

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U.S. Attorney's Office
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DAVID TJADER, Petitioner

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COUNSEL OF RECORD

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Now comes the Petitioner, DAVID TJADER, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent, was sentenced to a term of imprisonment in the U.S. Bureau of Prisons, and was represented by undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

DAVID TJADER, Petitioner

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Date: September 5, 2019

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PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. **By Disregarding the Government's Failure to Brief a Waiver Argument, Did the Seventh Circuit Errantly Look Past the Government's Waiver of Waiver and Disallow Relief Even for a Supervised Release Condition the Government Admitted was Vague?**

II. **By Using Mr. Tjader's Silence at Sentencing to Find he Waived Appellate Challenges to Supervised Release Conditions, Did the Seventh Circuit Errantly Apply Waiver and Essentially Eliminate Plain Error Review of Supervised Release Conditions?**

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No. _____

IN THE

SUPREME COURT OF THE UNITED

STATES OCTOBER TERM 2019

DAVID TJADER,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, DAVID TJADER, respectfully prays that a writ of *certiorari* issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on June 12, 2019 affirming the denial of Mr. Tjader's criminal appeal and the order denying Mr. Tjader's Petition for Rehearing and Petition for Rehearing *en banc* issued July 2, 2019.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 927 F.3d 483. (Pet. App. 1a-5a)

JURISDICTION

The appellate court entered its judgment on June 12, 2019. (Pet. App. 6a). Mr. Tjader timely filed a petition for rehearing and for rehearing *en banc*. (Pet. App. 7a-25a). The Seventh Circuit denied it on July 2, 2019. (Pet. App. 26a). That court had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 3742. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

This petition seeks review of two waiver determinations: (1) whether the Seventh Circuit could disregard the Government's waiver of a waiver argument; and (2) whether the Seventh Circuit correctly found a defendant waives challenges to supervised release conditions imposed at sentencing when the defendant does not object. The circuit courts are split on when the government has waived a waiver. With the issuance of *Tjader*, there is now a circuit split as to

the circumstances that waive sentencing challenges on appeal. No matter how unlawful a supervised release condition may be (due to vagueness, improper delegation of sentencing power to a probation officer, etc.), the Seventh Circuit's approach in *Tjader* ends plain error review.

1. After Mr. Tjader purchased child pornography online from sellers in the Philippines, authorities in Wisconsin arrested and he pled guilty to one count of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2),(b)(1). *See Tjader*, 927 F.3d at 484.

2. A U.S. probation officer prepared a presentence investigation report and a supervision plan which Mr. Tjader received prior to sentencing. As part of the supervision plan, the probation officer proposed these supervised-release terms:

> • Condition 1: Defendant shall not leave the judicial district in which defendant is being supervised without the permission of the Court or probation officer.
>
> • Condition 2: Defendant ... shall ... follow the [probation] officer's instructions ...
>
> • Condition 11: As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics ....
>
> • Condition 12: Provide the supervising U.S. probation officer any and all requested financial information, including copies of state and federal tax returns.

> • Condition 16: As approved by the supervising U.S. Probation Officer, undergo psychosexual evaluations, which may involve use of polygraph examinations. Defendant shall participate in an outpatient sex offender counseling program if recommended by the evaluator, ...
>
> • Condition 17: Not meet or spend time with any person under the age of 18 or have verbal, written, telephonic or electronic communication with any such person .... This provision does not include persons under the age of 18, such as waiters, cashiers, ticket vendors, etc., with whom defendant must deal in order to obtain ordinary and usual commercial services.
>
> • Condition 18: Not work in any occupation, business or profession, or participate in any volunteer activity where he has access to children under the age of 18 without the prior approval of the supervising U.S. probation officer.

Id.

3. Mr. Tjader initially objected to Conditions 12 and 16. He argued that Condition 12 was an "excessive intrusion" and "not rationally designed to supervise him" because his crime was not financial in nature. He also argued that Condition 16 was impermissible to the extent that it authorized Abel Screening and plethysmograph examinations (tests that measure sexual interest) and polygraph tests because those tests, he said, must be shown to be reliable before they could be used. *Id.* at 484-85

4. The district court addressed the objections in detail, overruled them, and adopted the proposed conditions. It then asked Mr. Tjader whether it

should read and justify the remaining conditions or adopt the supervision plan's recitation of them and their explanations. Mr. Tjader responded that he "waive[d] the reading of any justification of the additional conditions that [he] did not object to." He also acknowledged that he reviewed the conditions with counsel and that he understood them and their justifications. The court sentenced Mr. Tjader to seven years in prison and ten years of supervised release, and it ordered him to pay restitution. *Id.* at 485.

5. Mr. Tjader appealed to the Seventh Circuit. (App.R.36). He argued that Conditions 1, 2, 11, 17 and 18 were unlawful due to vagueness and that Condition 16 improperly delegated sentencing authority to a probation officer in violation of Article III of the U.S. Constitution. (App.R.9).

6. The Seventh Circuit concluded that Mr. Tjader waived all of his appellate challenges to the supervised release conditions. *Tjader*, 927 F.3d at 485. It said:

> When a defendant has received advanced notice of conditions of supervised release and is invited to object to them in the district court, a "failure to object ... can amount to waiver." *United States v. Gabriel*, 831 F.3d 811, 814 (7th Cir. 2016); *see also United States v. Raney*, 842 F.3d 1041, 1044 (7th Cir. 2016). Tjader had advanced notice of the conditions because they were in the supervision plan, which he received before sentencing. *See United States v. Gumila*, 879 F.3d 831, 838 (7th Cir. 2018); *United States v. Lewis*, 823 F.3d 1075, 1082 (7th Cir. 2016). The district court also confirmed that Tjader had time to review them and that he understood them. *See Gumila*, 879 F.3d at 838; [*United States v.*] *Bloch*, 825 F.3d [862,] 873 [(7th Cir. 2016)]. And before sentencing, when the district court invited Tjader

> to present his objections to the conditions, Tjader raised some objections (not raised on appeal), but not others. We may infer from his choice to raise these other objections that his decision not to raise the ones he now advances on appeal was strategic and intentional. *See Gumila*, 879 F.3d at 838; *United States v. Ranjel*, 872 F.3d 815, 821–22 (7th Cir. 2017). Tjader's decision to waive an explanation of the remaining conditions—noting that he understood those conditions and their justifications—confirmed his intent. *See Lewis*, 823 F.3d at 1083.

Id.

7. A footnote said the condition requiring Mr. Tjader to notify "third parties" of "risks" he posed---which the Government conceded to be erroneous--- was also waived. *Id.* at 485 n.1 (citing *Raney*, 842 F.3d at 1044).

8. Mr. Tjader moved for a rehearing or for an *en banc* hearing, noting that the *Tjader* opinion: disregarded the Government's waiver of waiver; created a circuit split; and effectively eliminated plain error review of supervised release conditions. (Pet. App. 7a-25a). The Seventh Circuit denied that motion. (Pet. App. 26a).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve two waiver issues. First, the majority of circuits hold that when the government fails to assert a waiver argument as part of its appellate brief, the government waives any waiver argument. *Tjader* contributes to a circuit split by disregarding the Government's failure to assert waiver. Second, while waiver is supposed to be

liberally construed in a defendant's favor, *Tjader* aggressively construes waiver against a defendant by treating silence as proof that a defendant has waived a sentencing issue. That approach not only conflicts with this Court's waiver cases and prior Seventh Circuit precedent, it creates a circuit split. This case presents an ideal vehicle for resolving the foregoing issues.

I. By Disregarding the Government's Failure to Brief a Waiver Argument, the Seventh Circuit Errantly Looked Past the Government's Waiver of Waiver and Disallowed Relief Even for a Supervised Release Condition the Government Admitted was Vague.

1. Waiver is the intentional relinquishment of a known right. *See United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006). By contrast, forfeiture "occurs when a defendant accidentally or negligently fails to assert his or her rights in a timely fashion." *Id.* The difference between the two things is critical since "[w]aiver of a right extinguishes any error and precludes appellate review, whereas forfeiture of a right is reviewed for plain error." *United States v. Brodie*, 507 F.3d 527, 530 (7th Cir. 2007). The party seeking the benefit of a waiver has the burden of establishing a valid waiver. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977).

2. The Government argued that five of Mr. Tjader's six challenges to supervised release conditions failed under plain error review, but agreed that the condition requiring Mr. Tjader to notify "third parties" of "the risks" that his "history" and "characteristics" pose is vague. *See Tjader*, 927 F.3d at 485 n.1.

Several Seventh Circuit cases previously held the notification condition was impermissibly vague. *See United States v. Thompson*, 777 F.3d 368, 379 (7th Cir. 2015).

3. *Tjader* incorrectly deemed Mr. Tjader to have waived his challenges even though the Government never presented any facts or legal support for waiver. Also, *Tjader* wrongly disregarded the Government's waiver of waiver.

4. Since the Government never offered facts or legal to establish a valid waiver, it could not have met its burden of proof. *See, generally, Brewer*, 430 U.S. at 404. That alone should have caused the Seventh Circuit to steer clear of finding that Mr. Tjader waived his challenges. Instead, of allowing the parties to advocate, the Seventh Circuit championed a position the Government never even took and it led to a denial of Mr. Tjader's requested relief. That cuts against basic principles of the adversary system and bleeds into an inquisitorial system that has no place in this country's courthouses. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n. 2 (1991) ("What makes a system adversarial rather than inquisitorial is … the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.").

5. Additionally, *Tjader* is contrary to Seventh Circuit precedent that holds the government waives waiver by not asserting a waiver claim. *See United States v. Adigun*, 703 F.3d 104 (7th Cir. 2012) ("An opposing party can 'waive waiver' if it fails to assert the preclusive effect of the waiver before the appellate court.") (citations omitted).

6. A minority of circuits recognize the government's waiver of waiver only when the government, despite the availability of a waiver defense, specifically agrees to an issue's consideration. *See United States v. Arteaga*, 102 Fed.App'x. 731, *1 (1st Cir. 2004); *United States v. Metzger*, 3 F.3d 756, 757–58 (4th Cir.1993).

7. However, a majority of circuits are consistent with *Adigun's* view that the government waives waiver by not asserting a waiver claim on appeal. *See United States v. Beckham*, 968 F.2d 47, 54 n. 5 (D.C.Cir. 1992) (noting government waiver of waiver issue because of government's failure to brief the issue); *United States v. Doe*, 239 F.3d 473, 474-75 (2d Cir. 2001) (when defendant filed an appeal despite a written appeal waiver in his plea agreement and the government did not assert waiver in its brief, the appeal wasn't barred because "it is well established that as a general matter 'an argument not raised on appeal is deemed abandoned,' and that 'we will not ordinarily consider such an argument unless manifest injustice otherwise would result.'") (quoting

United States v. Quiroz, 22 F.3d 489, 490-91 (2d Cir. 1994) (*per curiam*) (internal quotation marks omitted); *United States v. Bonilla–Mungia*, 422 F.3d 316, 319 (5th Cir. 2005) (the government waives a waiver argument when it raises the issue in supplemental briefing); *United States v. Menesses*, 962 F.2d 420, 425-26 (5th Cir. 1992) (government waived its waiver argument when that argument was not made in briefs, but only at oral argument); *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir.) (government waived waiver argument by proceeding on remand without asserting the issue had been waived by not raising it on appeal), *cert. denied*, ––– U.S. ––––, 130 S.Ct. 776, 175 L.Ed.2d 540 (2009); *United States v. Doe*, 53 F.3d 1081, 1082–83 (9th Cir. 1995) ("This court will not address waiver if not raised by the opposing party." (quoting *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995)); *see also United States v. Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir.), *amended on den. reh'g en banc*, 798 F.2d 1250 (1986) ([b]ecause the government failed to raise [a waiver] question in its brief or at oral argument, we decline to address it."); *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996) (where defendant admitted supervised release violation in district court and expressly waived the argument that his supervised release had already expired, continued assertion on appeal might have been waived but for the government's failure to raise a waiver argument; so, the Tenth Circuit didn't consider the issue) (citing *United States v.*

Archambault, 62 F.3d 995, 998 (7th Cir. 1995) ("because the government does not argue that [defendant] waived this challenge, it has waived [defendant's] waiver.") (additional citation omitted); *United States v. Lewis*, 928 F.3d 980, 987 (11th Cir. 2019) (rejecting defendant's claim that the government waived waiver, but recognizing that the government can waive waiver either implicitly or explicitly) (citing *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002) and saying that *Garcia-Lopez* "merely states the obvious: anything that can be waived implicitly can also be waived explicitly").[1]

II. By Using Mr. Tjader's Silence at Sentencing to Find he Waived Appellate Challenges to Supervised Release Conditions, the Seventh Circuit Errantly Applied Waiver and Essentially Eliminated Plain Error Review of Supervised Release Conditions.

1. The effectiveness of waiver of a federal constitutional right in a proceeding is governed by federal standards. *See Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934 (1965). Typically, the waiver of virtually any right affecting individual liberty must be knowingly and voluntarily made. *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (discussing waiver of rights incident to guilty plea); *Adams v. United States*, 317 U.S. 269, 275, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (discussing waiver of right to jury trial); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82

[1] Mr. Tjader was unable to find authority from the Third and Eighth Circuits that addresses the issue.

L.Ed. 1461 (1938) (discussing waiver of right to counsel). A person has a right to be sentenced to supervised release conditions that conform with 18 U.S.C. § 3583(d)'s statutory requirements. Relatedly, a person has the right to have conditions that are as few in number as 18 U.S.C. §3553(a)(1)'s parsimony principle allows and clear enough to satisfy the Fifth Amendment's due process prohibition on vagueness.[2] "The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case[.]" *See Zerbst*, 304 U.S. at 464 (*overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68

[2] Defendants are regularly given supervised release, even when it's not statutorily required. *See Thompson*, 777 F.3d at 372 (citing United States Sentencing Commission, Federal Offenders Sentenced to Supervised Release 3 (July 2010), www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf). Under supervision, defendants live with parole-like strictures, but are not afforded parole's central benefit of being out of prison. Though supervision is meant to be a period when a defendant transitions back into society, and one would expect that conditions should not go unchanged for the years (sometimes decades) of supervised release, a defendant who signs a plea agreement that waives the ability to challenge a sentence also waives the ability to seek modification under 18 U.S.C. § 3583(e)(2). *See United States v. Miller*, 641 Fed.App'x. 563, 566 (7th Cir. 2016). So, even though a defendant's need for supervision may diminish or cease due to a change of circumstances, a defendant who has waived a challenge to his sentence can never seek a modification. By comparison, does a parolee or a probationer who serves time after entering a plea agreement forgo the ability to modify conditions that are no longer needed or ill-suited? Given that one-third of defendants will be re-incarcerated by judges, often for a technical violation of a supervised release condition and the average sentence is 11 months' imprisonment (*see* Christine S. Scott–Hayward, "Shadow Sentencing: The Imposition of Federal Supervised Release," 18 Berkeley J.Crim. L. 180, 182 (2013)), ensuring that valid conditions get imposed is a necessary part of federal criminal cases.

L.Ed.2d 378 (1981)). Regardless of what a case's circumstances might be, it is infinitely more difficult to find a valid waiver based on a silent record. *Cf. Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (refusing to infer defendant's waiver in the guilty plea context). Also, because waiver principle must be "construed liberally in favor of the defendant", courts are supposed to be "cautious about interpreting a defendant's behavior as intentional relinquishment". *United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018).

2. *Tjader* found that a defendant waives appellate challenges to supervised release conditions if: the defendant received advance notice of supervised release conditions; the defendant had an opportunity to object; the defendant objected to things other than the conditions challenged on appeal; and the appellate court can infer a strategic reason for the defendant's lack of objection to the supervised release conditions. 927 F.3d at 485.

3. *Tjader's* fourth factor is alarmingly defective. Rather than construe waiver liberally in favor of a defendant and be cautious about interpreting his behavior (*e.g.*, the lack of an objection to the conditions he appeals) as an intentional relinquishment per *Barnes*, 883 F.3d at 957, *Tjader* does exactly what *Barnes* says to avoid. *Tjader* aggressively construes waiver in the Government's favor and incautiously conceives strategic reasons to find an intentional

relinquishment of the right to live with the fewest and clearest conditions possible. *Tjader* combines facts that are common to virtually every case (notice, opportunity to object, objections to some things but not others), and then concludes that another common occurrence (a lack of objection to a supervised release condition) signifies the defendant's consent to the condition. *Tjader* presumes the lack of objection to a condition (regardless of the condition's vagueness, its lack of record support, etc.) is strategic and purposeful, but for a condition that is vague, overbroad or inapplicable, the far greater likelihood is that a defendant simply didn't object because the defendant was unaware of the condition's flaw.

4. Supervised release conditions imposed pursuant to 18 U.S.C. § 3583(d) have the force of law and more in that they allow for reimprisonment under § 3583(e)(3) and Federal Rule of Criminal Procedure 32.1's summary proceedings. "In our constitutional order, a vague law is no law at all." *Davis v. United States*, 139 S.Ct. 2319, 2323 (2019). The vagueness of a condition should render it infirm on appellate review unless there's definitely a waiver. *Tjader* weaves common sentencing facts together and infers a lack of objection as proof of waiver, but the few gossamer threads in *Tjader* merely dress up a forfeiture and call it waiver. It is a result-driven effort that contorts waiver law.

5. With no record as to why Mr. Tjader made no objection to the later

challenged conditions, which are in his view infirm and may result in reimprisonment for a § 3583(e)(3) violation during the years he is under supervision, *Tjader* should not have interpreted silence as assent.[3] Finding waiver is supposed to be difficult when a record is silent. *See Boykin*, 395 U.S. at 243. *Tjader* turns that principle on its head and uses silence as a cornerstone of its waiver determination. *Tjader* is inconsistent with *Boykin*.

6. Moreover, *Tjader* creates a circuit split. In *United States v. Barela*, 797 F.3d 1186, 1188 (10th Cir. 2015) (Hartz, Gorsuch, Moritz, J.), a defendant challenged a sentencing enhancement on appeal that he preserved below and he also challenged special conditions of supervised release for the first time on

[3] Perhaps more than anything, *Tjader* is the result of fatigue. In years past, the Seventh Circuit laudably addressed a raft of defective supervised release condition. *See, e.g., United States v. Thompson*, 777 F.3d 368 (2015); *United States v. Kappes*, 782 F.3d 828 (2015). Having repeatedly spoken of the need to comply with due process as well as 18 U.S.C. §§ 3553(c) and 3583(d) only to have district courts continue to impose invalid conditions must be frustrating. However, the solution isn't to reinvent waiver law. District courts can choose to impose none of the discretionary conditions at issue here. *See* § 3583(d). When they elect to impose a condition, they have a duty to ensure its validity as part of the overarching duty to impose a lawful sentence. A defendant seems least likely to recognize a defective condition. Although *Tjader* spoke of how a defendant can seek to modify a condition via 18 U.S.C. § 3583(e)(2), unsophisticated defendants may not know of that option. And since the difficulties of a § 3583(e)(2) modification are well known, *United States v. Johnson*, 765 F.3d 702, 711 (7th Cir. 2014), rejected the notion that appellate challenges should be batted back in favor of the modification route. Moreover, a defendant who gets revoked for violating a vague condition, and appeals that revocation, will fail. Seventh Circuit precedent holds that a vague condition (whose vagueness the government conceded) must be corrected via a modification and cannot be challenged on appeal. *See United States v. Ellis*, 735 Fed.App'x. 212, 213-14 (7th Cir. 2018) (upholding revocation and one year sentence for defendant who "associate[d]" with another felon).

appeal. Although the defendant received notice of the conditions prior to sentencing and objected to an enhancement without also objecting to the supervised release condition he challenged on appeal, *Barela* reviewed the special conditions under plain error. *Id.* at 1192. *Barela* determined the defendant could not show the error warranted relief under plain error review. *Id.* at 1192-94. Importantly, in engaging in plain error review, *Barela* did not find that there was a waiver which precluded all review of the conditions. *Id.*

7. Under broadly identical operative facts, *Tjader* concludes there is waiver where *Barela* found a basis for plain error review. That means that while defendants in the Tenth Circuit who raise challenges for the first time on appeal at least have their claims heard under plain error review, similarly situated defendants in the Seventh Circuit have their challenges muted per *Tjader*. Defendants should not be treated so unequally by federal appellate courts.

8. This case is an ideal vehicle for resolving whether an appellate court can overlook the government's waiver of waiver when deciding an issue. Furthermore, it is an ideal vehicle for resolving whether a defendant's silence at sentencing as to supervised release conditions can properly be deemed a waiver of challenges to the conditions on appeal. Since *Barela* found that conditions that were uncontested at sentencing are reviewed for plain error on appeal, *Tjader* represents a circuit split in its finding that uncontested conditions are waived

and cannot be reviewed for plain error. The issues were squarely presented to the Seventh Circuit and *Tjader* resolved them. However, *Tjader* is contrary to a great deal of precedent on these important points.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

DAVID TJADER, Petitioner

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Dated: September 5, 2019