No. ______________

In the

Supreme Court of the United States

Gary E. Larock, Jr.

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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QUESTION 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 her 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?

PARTIES TO THE PROCEEDING

Petitioner is Gary E. Larock., Jr., 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 Gary E. Larock, Jr., 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. Gary E. Larock. Jr.*, 773 Fed. Appx. 794 (5th Cir. July 22, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's original judgement and sentence is attached as Appendix B. The district court's judgment revoking supervised release is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 22, 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),

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 . . .

LIST OF PROCEEDINGS BELOW

1. *United States v. Gary E. Larcock., Jr.*, 6:13-CR-0044 –BL-1 , United States District Court for the Northern District of Texas. Judgement and sentence entered on December 12, 2013. (Appendix B). Judgement revoking supervised release entered was first entered on March 18, 2016, imposing an 18-month sentence of imprisonment and re-imposing a term of supervised release of 180 months. A second judgment revoking supervised release – the basis of this appeal and petition – was entered on October 12, 2018. (Appendix C).

2. *United States v. Gary E. Larock, Jr.*, CA No. 16-10351, Court of Appeals for the Fifth Circuit. Appeal of the 2016 revocation of supervised release was dismissed as frivolous on December 20, 2016, pursuant to *Anders v. California*, 386 U.S. 738 (1967).

3. *United States v. Gary E. Larock*, CA No. 18-11400, Court of Appeals for the Fifth Circuit. Appeal of the 2018 revocation of supervised release, affirmed in the unpublished opinion *United States v. Gary E. Larock, Jr.,*773 Fed Appx. 794 (5th Cir. July 22, 2019). (Appendix A).

STATEMENT OF THE CASE

This is a direct appeal from a judgment revoking supervised release and imposing a revocation sentence. Petitioner admitted that he violated conditions of supervised release (ROA.135)[1] and the court revoked the supervision term, and imposed a sentence of 24 months imprisonment, with an additional term of supervised release of 180 months. (ROA.136-137).

On December 5, 2013, Petitioner (Larock) was convicted of failing to register as a sex offender, a violation of 18 U.S.C. § 2250(a), in the Northern District of Texas, San Angelo Division. (ROA.42). At that time The district court sentenced him to 37 months imprisonment and a 15-year term of supervised release. (ROA.44-45). Larock began serving his first term of supervised release on February 8, 2016. (ROA.46) On March 18 2016, Larock's supervised release was revoked, and Larock was sentenced to 18 months imprisonment and an additional term of supervised release of 180 months. (ROA.61-65).

Larock began serving his second term of supervised release on August 18, 2017. (ROA.81). On September 7, 2017, the probation officer filed a petition for offender under supervision alleging several violations of his conditions of supervised release, including selling a controlled substance to a minor, forgery of a financial instrument, failing to register as a sex offender, possessing marijuana, and by failing to appear for a scheduled urine specimen collection and failing to attend sex offender assessment. (ROA.81-82). The district court ordered a warrant issued for Larock's

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

arrest was on September 7, 2017. (ROA.84). An addendum to the petition was filed on August 24, 2018, alleging that on April 10, 2018, Larock had pleaded guilty and been sentenced to four years imprisonment for the state offenses of fraudulent use and possession of identification items, and forgery of a financial instrument of an elderly individual. (ROA.85). The addendum to the petition also showed that the pending marijuana charges had been dismissed. (ROA.86).

On September 25, 2018, the government filed a motion to revoke the supervised release, alleging that Larock had violated the conditions of supervised release by committing the offenses of fraudulent use and possession of a identification items, and forgery of a financial instrument of an elderly individual, for which he was convicted and sentenced in state court on April 10, 2018. (ROA.99).

At the revocation hearing on October 12, 2018, the district court had the government read the motion to revoke supervised release. (ROA.134). Larock pleaded true to all the allegations in the motion. (ROA.135). Based on Larock's admissions, the court revoked his term of supervised release. (ROA.136). The court found the case involved a Grade B violation and a criminal history category VI. (ROA.136). This resulted in an advisory imprisonment range of 21-27 months. *See* U.S.S.G. §7B1.4. The district court imposed a 24-month imprisonment sentence followed by a term of supervised release of 180 months. (ROA.108-111,136-137).

One of the terms of the supervised release states the following:

> 10) The defendant shall permit a probation officer to visit him or her at any time at home of elsewhere and shall permit the confiscation of any contraband observed in plain view by the probation officer.

(ROA.110).

On Direct appeal Larock raised an issue that one of the conditions of supervised release violates the Fourth Amendment. The Court of Appeals for the Fifth Circuit affirmed the conviction. (See Appendix A).

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. Larock*, 773 Fed. Appx. 794 (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 Fed. Appx. 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 Fed. Appx. 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 Petitioner's substantial rights. Petitioner is now subject to unreasonable requirements that he allow the probation officer to visit him in his 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.

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

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 21st day of October, 2019.

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