No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON STRUBBERG, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Mr. Strubberg was arrested after a "sting" operation in which, over a three day period a male police officer posed online as the mother of a 14-year-old girl who was looking for someone to "teach" her daughter. Mr. Strubberg was stopped at the scene of an agreed meeting place after he passed a decoy truck in his vehicle. He had no prior criminal history. All contacts between the officer and Mr. Strubberg were made via mobile phone. No computer was seized from Mr. Strubberg. The case presents the following questions for review:

1. Whether the Sixth Amendment and Due Process Clause allow a court to instruct the jury, over objection, that "Undercover agents may properly make use of false names, false appearances, and may properly assume the roles of members in criminal organizations. . . . If you are satisfied beyond a reasonable doubt that the defendant committed the offense as charged in the indictment, the fact that the government made use of investigative techniques that deceive is not relevant to your determination."

2. Whether a court may, without case-specific findings or evidence of prior criminal history involving children or online sexual activities, impose stringent conditions of supervised release restricting a released prisoner's access to computers and children.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Jason Strubberg is the Petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle..

The United States is the Respondent and was represented in the court below by Assistant U.S. Attorney Lawrence E. Miller.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

LIST OF DIRECTLY RELATED CASES

United States v. Strubberg, 2:16-CR-04008-BCW(1), W.D. Mo., Judgment entered May 2, 2017.

United States v. Strubberg, 17-2087, Eighth Circuit Court of Appeals, Judgment entered July 12, 2019

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Petitioner Jason Strubberg prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals, Eighth Circuit entered in *United States v. Strubberg*, Case No. 17-2087, decided July 12, 2019.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is printed at Appendix (hereinafter "App.") pp. 1a-, and is reported at 929 F.3d 969. The order of the Eighth Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page 25a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered on July 12, 2019, affirming Mr. Strubberg's conviction and sentence. App. p. 1a. That court denied a timely petition to that court for rehearing on August 28, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 3583(d)

Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate

experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of

appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. 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); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person

submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

STATEMENT OF THE CASE

Mr. Strubberg was charged with use of an interstate facility to induce a minor to engage in illicit sexual acts. Law enforcement officers placed an ad on Craigslist, a website featuring sales and services of a variety of types. The advertisement read, "single mom needs help from discreet man to help teach daughter, no games, W4M." Trial Tr. Vol. 1, p. 34. Using his smartphone, Mr. Strubberg responded to the ad, "so what you wanting to teach her." Trial Tr. Vol. 1, p. 37. Posing as a woman, the officer responded, "discipline, respect, and birds and bees stuff." Trial Tr. Vol. 1, p. 38. After Mr. Strubberg requested a picture, the officer told him that the "daughter" was "only 14." *Id.* The officer then sent a picture of a Boone County Sheriff's office employee, representing that the person in the picture was 14 years old.

Mr. Strubberg informed the "mother" that he would only engage in activities with the "daughter" if there was a signed agreement from the mother consenting to Mr. Strubberg's actions with the daughter, specifically including sexual activity. Mr.

Strubberg later texted the officer a proposed contract, which included only the following reference to sexual activity: "you stated in this you want me teach her about sexual thing in life by doing and explaining to how things work explain the feeling who and show how things happen." Trial Tr. Vol. 1, p. 45.

The officer and Mr. Strubberg interacted over three days. On the third day, the two made an appointment to meet at a convenience store in Columbia, Missouri. The officer then changed the meeting place to a nearby hotel. Mr. Strubberg drove into the hotel parking lot. He passed the decoy truck occupied by two women but did not stop. As he drove around the lot, he was stopped and arrested.

Mr. Strubberg was interviewed after his arrest, and the recorded interview was played for the jury. During the interview, he admitted that he had participated in the text exchange, but denied intent to engage in sexual activity with the fictitious fourteen-year-old. The officer who conducted the interview was cross-examined, without objection, about the fact that he not only pretended to be a mother seeking sex for her daughter but, during the interview, continued to maintain that an actual mother and daughter existed.

At trial, Mr. Strubberg testified that he had no intention, when he proceeded to the meeting place, of engaging in sexual activities with the "daughter;" he intended only to meet and engage with the "mother." Once he arrived, he decided not to stop and was leaving the parking lot when apprehended.

Over defense objection, the district court gave Instruction 14. The instruction informed the jury that "Law enforcement officers are not precluded from engaging

in stealth and deception, such as the use of undercover agents, in order to apprehend persons engaged in criminal activities." The instruction continued, "If you are satisfied beyond a reasonable doubt that the defendant committed the offense as charged in the indictment, the fact that the government made use of investigative techniques that deceive is not relevant to your determination."

The jury returned a verdict of guilty. After reviewing a presentence investigation report showing that Mr. Strubberg had no criminal history of any kind, the court sentenced Mr. Strubberg to 120 months' imprisonment, the minimum provided for the offense.

The court also sentenced Mr. Strubberg to five years of supervised release. His special supervised release conditions included:

c) The defendant shall not possess or use any computer or electronic device with access to any on-line computer service,' without the prior approval of the Probation Office. This includes any public or private computer network.

e) The defendant will not associate or have any contact with persons under the age of 18, except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense and who has been approved by the Probation Office.

i) The defendant is barred from places where minors (under the age of 18) congregate; such as residences, parks, pools, daycare centers, playgrounds and school, unless prior written consent is granted by the Probation Office.

k) The defendant shall not possess or use any computer or electronic device with access to any 'online computer service' without the prior approval of the Probation Office. This includes any public or private computer network.

n) The defendant shall consent to having installed any hardware or software systems on his/her computer(s), to monitor computer use. The defendant shall pay any associated costs as directed by the Probation Office.

No objection was made to these conditions.

On appeal, the court of appeals rejected Mr. Strubberg's contention that the challenged instruction regarding deceptive government activity was improper under the Due Process Clause because it lessened the government's burden of proof. The court acknowledged, "We share the Seventh Circuit's concern that the instruction could signal indirect judicial approval of the government's management of the investigation."[1] App. p. 20a. The court then went on to find the error harmless due to the overwhelming evidence of Mr. Strubberg's guilt. *Id.*

Turning to the special condition of release challenge, the court, reviewing for plain error, declined to vacate the conditions due to the trial court's failure to explain them. The court then found that the computer conditions were proper because there was evidence that Mr. Strubberg had "perused websites in an effort to arrange casual sexual encounters. . . ." App. p. 22a. The court also approved the restrictions on Mr. Strubberg's residence and contact with minors, commenting,

[1] The court was referring to the Seventh Circuit decision in *United States. v. McKnight*, 665 F.3d 786, 789–90 (7th Cir. 2011)

"We trust the probation office and, if necessary, the district court will interpret these conditions in a manner where they will not unreasonably interfere with Strubberg's liberty." App. p. 24a.

After rehearing en banc was denied, this petition follows.

REASONS FOR GRANTING THE WRIT

I. THE INSTRUCTION THAT THE JURY WAS NOT TO CONSIDER THE GOVERNMENT'S DECEPTIVE CONDUCT LESSENED THE GOVERNMENT'S BURDEN OF PROOF.

Mr. Strubberg's jury was tasked with evaluating the credibility of law enforcement officers who operated under a false identity and lied to Mr. Strubberg for three days in an effort to catch a wrongdoer. His jury, however, was instructed that this fact "is not relevant" to their determination of his guilt.

Over objection, the district court instructed the jury as follows;

> During this trial you heard testimony from undercover agents who were involved in the government's investigation in this case. Undercover agents may properly make use of false names, false appearances, and may properly assume the roles of members in criminal organizations. The government may utilize a broad range of schemes and ploys to ferret out criminal activity. Law enforcement officers are not precluded from engaging in stealth and deception, such as the use of undercover agents, in order to apprehend persons engaged in criminal activities.
>
> Whether or not you approve of the use of such investigative techniques to detect unlawful activities is not to enter into your deliberations in any way. If you are satisfied beyond a reasonable doubt that the defendant committed the offense as charged in the indictment, the fact that the government made use of investigative techniques that deceive is not relevant to your determination.

While the first paragraph of the instruction simply informs the jury of the law, the second paragraph should be of serious concern to this Court.[2] It limits the jury's consideration of evidence that was clearly before it, telling the jury that the evidence of deception is "not relevant" to their determination. This is substantially different than the instruction in the case the Eighth Circuit relied on, *United States v. McKnight*, 665 F.3d 786, 789–90 (7th Cir. 2011). There, the jury was not instructed that evidence of deception was irrelevant. Rather, it was told, "Whether or not you approve of such techniques[] should not enter into your deliberations in any way." *Id.* at 790, alteration in original.

The difference is significant. It is one thing to inform the jury that their opinions about the law should not affect their deliberations. *See, e.g., United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983), *citing Sparf and Hanson v. United States,* 156 U.S. 51 (1895); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993). It is another to inform the jury about how to consider the evidence. *See United States v. Head*, 707 F.3d 1026, 1030 (8th Cir. 2013) (Reversible error to instruct jury that accessory-after-the-fact case that the principle actor had

[2] The source of the second paragraph of this instruction is unknown. It is not included in the Eighth Circuit instruction manual, which is normally the source of instructions in Missouri federal cases. At trial, the government represented to the Court that it was a model Ninth Circuit instruction. On appeal, Mr. Strubberg contended that this was incorrect; there is a Ninth Circuit instruction similar to the first paragraph of this instruction, but it does not include the second paragraph. In its brief, the government did not cite any source for the second paragraph. Counsel for Mr. Strubberg has since located one district court case in which the second paragraph was used, and which also relied on *McKnight*: *United States v. Calderon*, 2012 WL 2514943 (N.D. Ill. 2012).

committed an offense against the United States). This instruction invaded the province of the jury to consider all of the evidence and determine the credibility of witnesses. And it is in conflict with *United States v. Rockwell*, 781 F.2d 985 (3rd Cir. 1986) (Reversible error to instruct jury that it need not resolve conflicting testimony of witnesses). The instruction thus violated the right to trial by jury under the Sixth Amendment.

In affirming the conviction on the doctrine of harmless error, the Eighth Circuit improperly used an abuse of discretion standard. However, since the instruction lessened the burden of proof, the court should instead have considered whether a reasonable juror would have understood the instruction to do so. Under that standard, the strength of the evidence against Mr. Strubberg is no longer relevant. As this Court explained in *Sandstrom v. Montana*, 442 U.S. 510 (1979), burden-shifting instructions are reversible if a reasonable juror could have interpreted them as reducing the constitutional burden of proof. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). If the court finds that the instruction does shift the burden of proof, the burden is on the government to show the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). There is no evidence that the Eighth Circuit applied this standard. The evidence presented by the government, which the court characterized as "overwhelming," consisted of a series of text messages followed by a meeting aborted by Mr. Strubberg before he was stopped and arrested.

While the practice of giving this instruction does not appear to be widespread, it is a practice which should be eliminated before it becomes routine. Avoiding jury nullification, the apparent purpose of this instruction, is simply not as important as insuring that a defendant is convicted only upon proof beyond a reasonable doubt as to each element of his offense.

This Court should grant review to determine this important question impacting the integrity of the criminal justice system.

II. THE SUPERVISED RELEASE CONDITIONS IMPOSED BY THE COURT IMPERMISSIBLY RESTRICT MR. STRUBBERG'S LIBERTY WITHOUT REASONABLE JUSTIFICATION.

After imposing the thirteen standard conditions of supervised release (including reporting, having his living arrangements approved by the probation officer, working full time, avoiding additional criminal activity, etc.), the court imposed an additional list of 16 special conditions. These conditions were recommended in Mr. Strubberg's presentence report, but his attorney did not object to them before or at sentencing.

As pertinent to this petition, the special conditions included:

> c) The defendant shall not possess or use any computer or electronic device with access to any 'on-line computer service,' without the prior approval of the Probation Office. This includes any public or private computer network.[3]
>
> e) The defendant will not associate or have any contact with persons under the age of 18, except in the presence of a responsible adult who

[3] The conditions also included condition "k)" which is identical to condition "c)".

is aware of the nature of the defendant's background and current offense and who has been approved by the Probation Office.

h) The defendant's place of residence may not be within 1,000 feet of schools, parks, playgrounds, public pools, or other locations frequented by children.

i) The defendant is barred from places where minors (under the age of 18) congregate; such as residences, parks, pools, daycare centers, playgrounds and school, unless prior written consent is granted by the Probation Office.

m) The defendant shall consent to the United States Probation Office conducting periodic unannounced examinations of your [sic] cellular telephone(s) contents and hardware which may include retrieval and copying of all data from your phone. This also includes the removal of any equipment, if necessary, for the purpose of conducting a more thorough inspection.

n) The defendant shall consent to having installed any hardware or software systems on his/her computer(s), to monitor computer use. The defendant shall pay any associated costs as directed by the Probation Office.

App. pp. 5a-6a.

These conditions were imposed, without explanation, on a defendant who, at age 27, had no criminal history. The presentence investigation did not otherwise reveal any improper interest in children, or any improper activities with them. Apparently, law enforcement were not concerned about Mr. Strubberg's computer, because they did not seize it. They did seize the mobile phone he used in his interactions with the officer posing as a mother of a 14-year-old girl. No pornography was found on that phone, nor any other evidence of interactions with underage girls or boys.

A. Computer-related conditions

The court of appeals found that all of the computer-related conditions were proper because Mr. Strubberg "perused websites in an effort to arrange casual sexual encounters, which was the genesis of his attempt to have sex with a minor here. . . . And he used search terms indicating he was looking up information about having sex with a minor immediately before leaving to meet with Abby." App. p. 22a. (The only other justification was the offense conduct itself.)

This decision is far from the individualized determination required by 18 U.S.C. § 3583(d). And it creates a circuit split with *United States v. LaCoste*, 821 F.3d 1187 (9th Cir 2016), where the court found plain error in imposing a condition forbidding internet use without the permission of the probation officer. Similar conditions were also rejected in *United States v. Perazza-Mercado*, 553 F.3d 65, 72 (1st Cir. 2009), where the court observed, "The importance of the internet in modern life has steadily increased over time, and we have no reason to believe that this trend will end." The decision here also conflicts with *United States v. Lifshitz*, 369 F.3d 173 (2nd Cir. 2004), where the court remanded for a determination that a computer monitoring condition of probation did not improperly invade the defendant's privacy. The court noted that the simple fact that Mr. Lifshitz had been convicted of receiving child pornography over the internet did not, by itself, give rise to reasonable suspicion that he would use a computer to commit another offense. Mr. Strubberg did not use a computer at all. And engaging in computer dating (as Mr. Strubberg apparently did) certainly does not give rise to a suspicion of crime.

The Ninth Circuit has made clear that special conditions must be narrowly tailored to produce the minimum necessary deprivation of liberty. *United States v. Sales*, 476 F.3d 732, 737-738 (9th Cir. 2007). Similarly, the court in *United States v. Dunn*, 777 F.3d 1171, 1179 (10th Cir. 2015), found the imposition of such restrictions without individual findings to be plain error. *See also U.S. v. Ferndandez,* 776 F.3d 344 (5th Cir. 2015), supervised release condition restricting computer use improper where not related to the defendant's conviction for failure to register as a sex offender.)

The Eighth Circuit's determination is out of step, and should be corrected by this Court. After he has served his ten year sentence, Mr. Strubberg will likely have even more need of a computer in his daily life than he would if he were at liberty now. The listing of restrictive conditions on computer use should be limited to those who have shown a propensity to use computers to commit crimes.

B. Contact and residence conditions.

Mr. Strubberg never met the "child" contemplated by this offense. In fact, she did not exist. But under his conditions of release, he may not live near children or have any personal contact with them without another adult present.

The conditions are so broad that Mr. Strubberg cannot really know how to comply with them. He is forbidden from living within 1000 feet of anywhere children "congregate." If his neighbors have children whose friends come over to play, does Mr. Strubberg have to move? Is he forbidden from visiting retail stores and movie theaters patronized by children? Similar conditions were invalidated by

the Third Circuit in *United States v. Voelker*, 489 F.3d 139 (3rd Cir. 2007); despite the fact that Mr. Voelker, unlike Mr. Strubberg, committed an offense with an actual minor. *See also United States v. Huor,* 852 F.3d 392 (5th Cir. 2017) (supervised release conditions vacated where, while Mr. Huor was convicted of a sex offense, that offense was remote and restrictive conditions were not justified.)

Trying to find a residence that is 1000 feet from parks, playgrounds, public pools or schools is a difficult proposition. *See* Levenson, Jill, *Restricting Sex Offender Residences: Policy Implications*, American Bar Association, Human Rights Magazine, Spring 2009, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/restriciting_sex_offender_residences_policy_implications/ (visited 8/12/19): "According to mapping research, the vast majority of residential dwellings in metropolitan areas ware within close proximity to places where children congregated, leaving little territory available for sex offenders to find compliant housing."

The court attempted to avoid the weaknesses in these conditions by assigning the duty to enforce the Constitution to the probation office: "We trust the probation office and, if necessary, the district court will interpret these conditions in a manner where they will not unreasonably interfere with Strubberg's liberty." App. p. 24a. But it is the court, not the probation officer, who is responsible for seeing that the conditions are within the law. *See United States v. Kent*, 209 F.3d 1073, 1078-1079

(8th Cir. 2000). *See also United States v. Mickelson*, 433 F.3d 1050, 1056 (8th Cir. 2006).

The offense here involved a scheduled meeting between the officer, a non-existent child, and Mr. Strubberg. There is no evidence that Mr. Strubberg sought out children in *any* location for *any* purpose. This substantial restriction on Mr. Strubberg's liberty is simply not justified, and this Court should grant review to make that clear.

CONCLUSION

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

Respectfully submitted,

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