

No. _____

In the

Supreme Court of the United States

OMAR MACIAS-MACIAS,
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**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

J. MATTHEW WRIGHT
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NORTHERN DISTRICT OF TEXAS
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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-10058

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
versus

OMAR MACIAS-MACIAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, COSTA, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that appellee's alternative motion to extend the time to file its brief is DENIED as unnecessary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10058

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

OMAR MACIAS-MACIAS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

Before SMITH, COSTA, and HO, Circuit Judges.

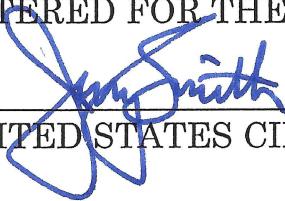
PER CURIAM:

↙ () Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and

a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

19-10058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

OMAR MACIAS-MACIAS,
Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Texas
Dallas Division
District Court No. 3:18-CR-092-M

UNITED STATES' MOTION TO DISMISS THE APPEAL OR, ALTERNATIVELY, FOR EXTENSION OF TIME

“Ripeness reflects constitutional considerations that implicate ‘Article III limitations on judicial power[.]’” *Stolt-Nielsen S. A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 671 n.2 (2010). The government moves to dismiss Omar Macias-Macias’s appeal because the sole issue raised—which depends on his unlawful return to the United States after deportation—is unripe and, as such, the Court lacks jurisdiction. Should the Court deny this motion, the government requests an extension of 30 days to file a brief on the merits.

1. **The district court imposes a sentence that includes a term of supervised release to ensure that Macias-Macias will face an additional penalty if he returns unlawfully after removal.**

Macias-Macias pled guilty to one count of illegal reentry after removal from the United States, in violation of 8 U.S.C. §§ 1326(a) and (b)(1). (ROA.8, 33, 56.) As noted in his presentence report (“PSR”), he has a prior conviction in Illinois for Child Abduction/Luring of a child younger than 16 years. (ROA.121-22.) That conviction required him to register as a sex offender with an expiration date of November 23, 2020. (ROA.122.) At sentencing, the district court told Macias-Macias that it was imposing a term of supervised release upon him, notwithstanding that he would be removed from the United States after his term of imprisonment, so that he would face additional sanction if he unlawfully returned. (ROA.102.) One of the conditions of his term of supervised release was the following: “You will also comply with all registration requirements given your conviction as a sex offender.” (ROA.103.) The court then reiterated: “Now, I want to reiterate again so you understand me, Mr. Macias, these latter conditions that I stated . . . et cetera, you are not going to be in the United States if you are complying with my order. So those provisions will apply only if you are here illegally.” (ROA.103.) The court imposed a guideline sentence of 28 months’

imprisonment. (ROA.102, 128.) The court's judgment included as a special condition of supervision that “[t]he defendant must comply with the requirements of the Sex Offender Registration and Notification Act [SORNA] (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.” (ROA.51.)

2. The only issue on appeal is one that is not ripe because it is contingent upon Macias-Macias returning to the United States unlawfully, being under active supervision, and upon a determination that he must register under SORNA.

On appeal, Macias-Macias contends that the condition as stated in the judgment is broader than the condition as pronounced at sentencing. (Brief at 8-11.) According to him, the district court's oral pronouncement was only that he continue to observe the registration requirement owing to the Illinois conviction, which he posits exists only under state law and not under SORNA. (Brief at 8-21.) He therefore asks this Court to remove that condition. (Brief at 21.) Macias-Macias is plainly wrong in his contention that there is a conflict—at sentencing the district court said that he was to “comply with *all* registration requirements given his conviction as a sex offender” and did not limit its order

to obligations arising under state law. (ROA.103 (emphasis added).) But more importantly, his issue is not ripe.

“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Although a litigant need not “await the consummation of threatened injury to obtain preventive relief,” the injury must, at least, be “certainly impending.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (internal quotation marks omitted).

There is no indication—and Macias-Macias does not argue—that he has been or is about to be directed to register under SORNA. *See United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013) (“This challenge is not ripe for review because Ellis may never be subjected to such medication or testing.”). To the contrary, the district court’s order was that, following release from prison, he be “surrendered to a duly-authorized immigration official for deportation in accordance with the procedures provided by the Immigration and Nationality Act.” (ROA.51, 103.) The obligation to register pursuant to SORNA is contingent upon two speculative events: 1) he is not removed from the United States or is removed and unlawfully returns, and 2) is directed to do so by

specified authorities. (ROA.51.) As such, it is a “matter of conjecture” whether “the condition will take effect.” *See United States v. Magana*, 837 F.3d 457, 459 (5th Cir. 2016) (quoting *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003)).

Where a contingency makes the condition speculative or a matter of conjecture, an appeal challenging the condition is not ripe. *See id.*; *see also Ellis*, 720 F.3d at 227 (rejecting as unripe challenge to condition that included the possibility that defendant might be required to undergo psychotropic medication); *United States v. Segura-Resendez*, 515 F. App’x 316, 319 (5th Cir. 2013) (holding that, because defendant was ordered to be surrendered to immigration authorities, it was a matter of conjecture whether he would be subject to participate in alcohol abuse counseling as directed by a probation officer); *United States v. Tang*, 718 F.3d 476, 485 (5th Cir. 2013) (challenges to conditions that depended on Probation Office direction were not ripe for review); *Carmichael*, 343 F.3d at 757 (same).¹

If Macias-Macias returns to the United States unlawfully and if he is ordered to register pursuant to SORNA, “he may petition the district court for

¹ This case is unlike *United States v. Morin*, 832 F.3d 513, 515-16 (5th Cir. 2016), where this Court found a challenge to a condition of supervised release ripe because the defendant’s claim presented a question of law, namely, whether the condition constituted an improper delegation of judicial authority.

a modification of his conditions. 18 U.S.C. § 3583(e)(2); Fed. R. Crim. P. 32.1(c)." *Ellis*, 720 F.3d at 227. This current appeal, however, should be dismissed for lack of jurisdiction. *See United States v. Ortega*, 485 F. App'x 656, 660-61 (5th Cir. 2012) (dismissing a challenge to a condition of supervised release that may have required plethysmograph testing for lack of jurisdiction because the issue was not ripe).

Conclusion

Given the above facts and authorities, this Court should dismiss the appeal as unripe. Should the Court deny this motion, the government requests an extension of time of 30 days from the denial to respond to Macias-Macias's brief.

Respectfully submitted,

Erin Nealy Cox
United States Attorney

/s/Brian W. Portugal

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Attorneys for Appellee

Certificate of Conference

I certify that counsel for the appellant is opposed to dismissal but unopposed to the alternative of an extension of time.

/s/ Brian W. Portugal _____

Brian W. Portugal
Assistant United States Attorney

Certificate of Service

I certify that this document was served on counsel for the appellant, James Matthew Wright, through the Court's ECF system on July 12, 2019, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Brian W. Portugal _____

Brian W. Portugal

Certificate of Compliance

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,111 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Calisto MT font.

/s/ Brian W. Portugal _____

Brian W. Portugal
Assistant United States Attorney
Date: July 12, 2019

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

§ JUDGMENT IN A CRIMINAL CASE

v.

OMAR MACIAS-MACIAS

Defendant.

§ Case Number: 3:18-CR-00092-M(1)
§ USM Number: 84010-279
§ Gabriela Vega
§ Defendant's Attorney**THE DEFENDANT:**

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 1 of the Indictment, filed on February 14, 2018.
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326 (a) and (b)(1) Illegal Reentry after Removal from the United States	01/09/2018	1

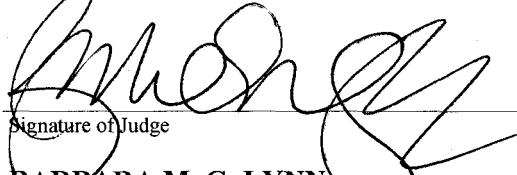
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 21, 2018

Date of Imposition of Judgment


 Signature of Judge
BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE
 Name and Title of Judge
 1/16/19
 Date

DEFENDANT: OMAR MACIAS-MACIAS
CASE NUMBER: 3:18-CR-00092-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TWENTY-EIGHT (28) MONTHS.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.
 The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons;

before 2 p.m. on

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:

at 123 Main Street, Anytown, USA, with a certified copy of this judgment.

UNITED STATES MARSHAL.

By
DEPUTY UNITED STATES MARSHAL.

DEFENDANT: OMAR MACIAS-MACIAS
CASE NUMBER: 3:18-CR-00092-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **THREE (3) YEARS.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: OMAR MACIAS-MACIAS
CASE NUMBER: 3:18-CR-00092-M(1)

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. 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 of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: OMAR MACIAS-MACIAS
CASE NUMBER: 3:18-CR-00092-M(1)

SPECIAL CONDITIONS OF SUPERVISION

As a condition of supervised release, upon the completion of the sentence of imprisonment, the defendant shall be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. As a further condition of supervised release, if ordered deported or removed, the defendant shall remain outside the United States.

In the event the defendant is not deported upon release from imprisonment, the defendant shall comply with the standard conditions contained in this Judgment and shall comply with the mandatory and special conditions stated herein.

The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

Excerpts from Sentencing Transcripts in
United States v. Macias-Macias, No. 3:18-CR-92 (N.D. Texas)

From Volume 1, December 21, 2018:

THE COURT: Mr. Macias, you may speak to me about anything that you like.

THE DEFENDANT: I would just like to apologize, Your Honor, for being here; but I feel like I had no other option after what happened to me when they had tried to kill me. That's all. I really did not think I was going to end up being here again, but I felt like I had no option.

That would be all.

THE COURT: All right. Thank you.

Ms. Miller?

MS. MILLER: Your Honor, something we haven't talked about that's obviously discussed in the PSR is that the defendant is a sex offender that's required to register for two more years; and he's in the country illegally after committing a pretty heinous crime a few years ago.

So the government would ask the Court to impose on the higher end of the guidelines for that reason, because this is his third conviction for illegal reentry and the second one at least, if not this one, was committed while he was on supervised release for the previous conviction. So we would ask for a higher end of the guidelines.

THE COURT: I have to say, Mr. Macias, I may be wrong but I don't remember ever seeing a person who had two federal court convictions for illegal reentry that

came back a third time. It may very well be that if you testified under oath you might have convinced me about the circumstances surrounding you doing that, but I don't have the evidence to substantiate that so I'm not crediting the explanation.

The offense that Ms. Miller alluded to, all I have is a description of it at the top of Page 7 of the presentence report. That is a very serious offense as described. Now, I recognize you received a sentence of one year, which seems low based on the description; but it came with a removal and so it may very well have been that the Court concluded that you were going to get removed anyway and so a longer prison sentence was costly and not necessary. I don't know the details of that, but that's a very serious crime. You left, you came back again. You have a federal reentry conviction and then you have another one; so to say you didn't expect to be here, your luck hasn't been very good about coming back here and getting caught. You've been caught twice, now three times; and I regard this as all very serious.

The Court is required to consider the guidelines, which I do, which is the 24- to 30-month range; but I'm also obligated particularly to consider the statutory factors, which I will do in just a moment.

For the record, Judge Toliver took your plea on May 15th, 2018, without a plea agreement. I accepted your recommendation that I accept your plea on June the 14th, 2018.

In determining the appropriate sentence, the Court looks to the various factors under the statute and the nature and the circumstances of the offense. So you've got a very serious criminal conviction. I'm sure you were told by two other federal

judges that you couldn't come back to the United States and yet you did. And that history and the characteristics associated with all three of those convictions is of concern to the Court.

I am to impose a sentence that reflects the seriousness of the offense while promoting respect for the law in justly punishing you. Hopefully this will deter others.

Given the number of people that come illegally, I doubt this has much of a deterrent impact, but we just have to hope it does. And last I am to impose a sentence sufficient to protect the public. That is a factor that the Court is definitely considering.

So considering all of those factors and giving you some time reduction for the time that you served in the state and in immigration custody, the Court's determination is an appropriate sentence for you is 28 months in custody; and that is the sentence that the Court will impose.

I will not require you to pay a fine because you do not have the financial resources or earning capacity to pay a fine. You are, however, required to pay a mandatory special assessment of \$100.

I am going to place you on supervised release. I don't have to do that, but you've come back here twice without having family here and so I want to make sure you understand you can't come back here. If you do come back here again, there's going to be a new charge against you, Mr. Macias; and there will be a charge against you for violating the conditions that I am now imposing on you. So all of that is to say to

you that you cannot come back here. Every time you do, you're going to serve more time in prison. Do you understand what I'm saying to you?

THE DEFENDANT: Yes.

THE COURT: All right. So you will be on supervised release for a period of three years when you are released from custody. You are required, I think I said, to pay a mandatory special assessment of \$100. As a condition of supervised release, when you complete your sentence of imprisonment, you will be surrendered to a duly authorized immigration official for deportation in accordance with the procedures provided by the Immigration Nationality Act.

As a further condition of supervised release, if you are ordered deported or removed, you will remain outside the United States. If you are not deported when you are released from prison, you will comply with the standard conditions contained in the Court's judgment and with these mandatory and special conditions.

You will not commit another federal, state or local crime. You will not unlawfully possess a controlled substance. You will cooperate in the collection of DNA as directed by the probation officer. You will not unlawfully use a controlled substance. You will submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the Court. You will also comply with all registration requirements given your conviction as a sex offender. Now, I want to reiterate again so you understand me, Mr. Macias, these latter conditions that I stated, cooperating in the collection of DNA, et cetera, you are not going to be in the United States if you are complying with my order. So those

provisions will apply only if you are here illegally; and if you are here illegally or not, you're obligated to comply with those. But if you are here in the United States without having secured permission, that is a violation of the conditions of release that I have imposed. Do you understand me?

THE DEFENDANT: Yes.

(5th Cir. R. 99–104)

* * * *

From Volume 2, January 16, 2019:

THE COURT: All right. Then I will also advise you, Mr. Macias, that you have 14 days from the date of judgment to file any notice of appeal. You have already qualified for court-appointed counsel at no expense to you, and that will continue in connection with any appeal.

I don't believe there are any other matters that I needed to cover with the defendant or with counsel. So if not, the Court adopts everything that I said before in connection with the sentence, and the Court will enter judgment accordingly.

(5th Cir. R. 112)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-10058

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OMAR MACIAS-MACIAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R :

IT IS ORDERED that appellant's motion for an extension to August 23, 2019, to file his petition for rehearing/petition for rehearing en banc is GRANTED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge