No. 19-7904

IN THE SUPREME COURT OF THE UNITED STATES

JASON BONDS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a special condition of supervised release requiring petitioner to submit to periodic polygraph examinations as part of his sex-offender treatment program violates his Fifth Amendment privilege against compelled self-incrimination.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Vt.):

United States v. Bonds, No. 17-cr-40 (Oct. 2, 2018)

United States Court of Appeals (2d Cir.):

United States v. Bonds, No. 18-3018 (Dec. 6, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 786 Fed. Appx. 323.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2019. The petition for a writ of certiorari was filed on March 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Vermont, petitioner was convicted of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4) and (b)(2). Judgment 1. He was sentenced to 45 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-2.

1. In April 2016, Google discovered images of child pornography on its platform and submitted a cybertip to the National Center for Missing and Exploited Children. Presentence Investigation Report (PSR) ¶ 14. Google's tip led investigators to petitioner, who admitted that he had viewed child pornography hundreds or thousands of time on his computer. PSR ¶¶ 14-15. A search of petitioner's computer pursuant to a warrant revealed approximately 1300 images of child pornography. PSR ¶¶ 19-22. The six-year-old daughter of petitioner's girlfriend, with whom he had been living, subsequently revealed that petitioner had sexually abused her. PSR ¶¶ 15, 23-25. In May 2018, petitioner pleaded guilty in Vermont state court to lewd and lascivious conduct with a child. PSR ¶¶ 26, 55.

Petitioner pleaded guilty pursuant to a plea agreement to one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4) and (b)(2). Pet. App. 10. In the plea agreement, the parties agreed, under Federal Rule of Criminal Procedure 11(c)(1)(C), that petitioner should be sentenced to between 36 and

48 months of imprisonment. PSR ¶ 9. The district court accepted the plea agreement and sentenced petitioner to 45 months of imprisonment, to be followed by five years of supervised release. Pet. App. 10-13.

Over petitioner's objection, the district court also ordered, as a special condition of supervised release, that petitioner "participate in an approved program of sex offender evaluation and treatment, which may include polygraph examinations, as directed by the probation officer," where "[a]ny refusal to submit to such assessment or tests as scheduled is a violation of the conditions of supervision." Pet. App. 14. At sentencing, the court explained that "the requirement that a person participate in polygraph tests is fundamental to addressing issues regarding sexual offenses." Sent. Tr. 24. The court further explained that "[i]t is extraordinarily important, it seems to me, that polygraphs be used to enforce the requirement that a defendant not participate in any further abuses of the computer systems, and that this is a fundamental condition to assure that there won't be a continuing offense of possession of child pornography or viewing of child pornography." Id. at 24-25.

2. The court of appeals affirmed, rejecting petitioner's challenge to that special condition of supervised release. Pet. App. 1-2. The court noted petitioner's acknowledgment that binding circuit precedent -- United States v. Johnson, 446 F.3d 272 (2d Cir.), cert. denied, 549 U.S. 953 (2006) (No. 05-11822), and United

States v. Boles, 914 F.3d 95 (2d Cir.), cert. denied, 139 S. Ct. 2659 (2019) (No. 18-9006) -- foreclosed his argument that "the polygraph requirement violates his Fifth Amendment right against self-incrimination." Pet. App. 2.

ARGUMENT

Petitioner contends (Pet. 5-16) that the special condition of supervised release requiring him to submit to polygraph examinations as part of his sex-offender supervision and treatment violates his Fifth Amendment privilege against compelled self-incrimination. The court of appeals correctly rejected his facial challenge to that condition. And although some tension exists in the circuits' approaches to similar supervised-release conditions, any differences concern their implementation, rather than their facial validity, and do not provide a basis for further review here.

1. The Fifth Amendment provides, in relevant part, that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. A core violation of that provision requires "some kind of compulsion," Hoffa v. United States, 385 U.S. 293, 304 (1966), and use of the compelled testimony against the defendant in a criminal case, Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion); see United States v. Patane, 542 U.S. 630, 637 (2004) (plurality opinion) ("[T]he core protection afforded by the Self-

Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.").

This Court also has "recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination," including a rule that permits suspects to "assert the privilege in proceedings in which answers might be used to incriminate them in a subsequent criminal case." Patane, 542 U.S. at 638 (plurality opinion). The Court "ha[s] explained that 'the natural concern which underlies [those rules] is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.'" Id. at 638 (plurality opinion) (brackets and citation omitted).

In Minnesota v. Murphy, 465 U.S. 420 (1984), this Court declined to suppress a defendant's admission to a prior crime, made in a mandatory interview while on probation for a different crime, where the defendant did not expressly invoke his Fifth Amendment rights during that interview. Id. at 422-425. In the course of rejecting the defendant's claim, the Court emphasized that the government "may require a probationer to appear and discuss matters that affect his probationary status." Id. at 435. The Court observed that proceedings to revoke probation are not criminal proceedings and thus do not, in themselves, trigger the privilege against compelled self-incrimination. Id. at 435-436 n.7. The Court accordingly explained that "if the questions put to a probationer [are] relevant to his probationary status and

pose[] no realistic threat of incrimination in a separate criminal proceeding," then "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings." Id. at 435-436 n.7. And the Court emphasized that the government "may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." Id. at 436 n.7. The Court explained that in those circumstances, "nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation." Ibid.

The polygraph requirement here is facially valid under Murphy. Petitioner does not dispute that supervised release is analogous to probation for purposes of Fifth Amendment analysis, and Murphy makes clear that a defendant's conditional-release status may be revoked for refusing to answer "even incriminating questions," as long as the government "recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination." 465 U.S. at 436 n.7. The Second Circuit has accordingly explained that revoking a defendant's supervised release for "refus[ing] to answer questions about a crime" is consistent with the Fifth Amendment as long as the defendant retains the "'right to challenge in a court of law the use of incriminating statements as violations of his Fifth

Amendment rights,'" United States v. Johnson, 446 F.3d 272, 280 (2006) (quoting Asherman v. Meachum, 957 F.2d 978, 983 (2d Cir. 1992) (en banc)) (brackets omitted), cert. denied, 549 U.S. 953 (2006) (No. 05-11822). Where the government "does nothing to impair [a] later invocation of the privilege" to preclude the use of the incriminating statements at any criminal trial, a defendant may not rely on the privilege to remain on supervised release yet refuse to answer questions germane to his supervision. Ibid.

2. Lower courts repeatedly have upheld against Fifth Amendment challenges conditions of supervised release that are substantially similar to the polygraph requirement here. See, e.g., United States v. Lee, 315 F.3d 206, 210, 212–213 (3d Cir.), cert. denied, 540 U.S. 858 (2003); United States v. Kappes, 782 F.3d 828, 855-856 (7th Cir. 2015); United States v. Stoterau, 524 F.3d 988, 1003-1004 (9th Cir. 2008), cert. denied, 555 U.S. 1123 (2009); United States v. Taylor, 338 F.3d 1280, 1283-1284 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1066 (2003). And any differences in courts of appeals' approaches to the interpretation and administration of such conditions do not warrant further review in this case.

a. Petitioner's reliance (Pet. 10-11) on the Tenth Circuit's decision in United States v. Von Behren, 822 F.3d 1139 (2016), is misplaced. Von Behren upheld a defendant's Fifth Amendment challenge to a specific sexual-history polygraph test that the defendant was required to undergo during his supervised

release. See id. at 1141. The questions on the polygraph included whether the defendant had ever "engage[d] in sexual activity with anyone under the age of 15," "physically forced or threatened anyone to engage in sexual contact," or "had sexual contact with someone who was physically asleep or unconscious." Id. at 1143 (citation omitted). And the defendant had to agree that any information about crimes he had committed would be reported to law enforcement. Id. at 1142. In those circumstances, where the treatment provider "specifically authorize[d] [the defendant's] examiner to report his admissions to the police," the Tenth Circuit concluded that the defendant "faced at least some authentic danger of self-incrimination by answering" the questions. Id. at 1147.

No reason exists to interpret the supervised-release condition here to allow for a similar type of polygraph examination, in which petitioner would be required to agree that answers to incriminating questions would be provided to the police. The conditions of petitioner's supervised release do not on their face require him to answer incriminating questions about his prior conduct, much less require him to permit his answers to be conveyed to law enforcement. And the Second Circuit has made clear that among the ways in which the government might impermissibly "impair" a defendant's "self-incrimination privilege" in the context of a supervised-release interview would be to "insist that [his] answers could be used against him in a criminal proceeding" or to "require a waiver of immunity." Asherman, 957 F.2d at 983; see

Johnson, 446 F.3d at 280 (relying on Asherman). It therefore might well consider an interview like the one in Von Behren as an impairment of a defendant's privilege against compelled self-incrimination. At a minimum, its rejection of petitioner's facial challenge to his supervised-release condition in this case does not suggest otherwise.

To the extent that some of the reasoning in Von Behren could be read to say that revocation of a defendant's supervised release for refusal to answer relevant and incriminating questions is permissible only if the government affirmatively grants the defendant immunity for his answers, 822 F.3d at 1150 n.9, it is not clear that any difference between the two circuits' approaches will have a significant practical effect. Both circuits agree that a defendant may not "refuse[] to answer a question that d[oes] not involve the risk of self-incrimination." Ibid. The Second Circuit ensures that no such risk exists by making clear that a supervised-release condition like the one here "preserve[s] [the defendant's] 'right to challenge in a court of law the use of incriminating statements as violations of his Fifth Amendment rights.'" Johnson, 446 F.3d at 280 (quoting Asherman, 957 F.2d at 983). Thus, even without formal immunity, petitioner should be protected against the use of any compelled self-incriminating statements as the basis for future prosecution. In the unlikely event that compelled self-incriminating statements are in fact used to prosecute him, he may seek a remedy at that time. But any

speculation that might occur is not a basis for invalidating the supervised-release condition on its face. Cf. United States v. Morgan, 44 Fed. Appx. 881, 886-887 (10th Cir. 2002) (rejecting Fifth Amendment challenge to a condition of supervised release requiring prompt reporting of unauthorized contact with minors to the Probation Office).

b. Petitioner likewise errs (Pet. 11-14) in asserting a conflict between the decision below and Lee, supra, and United States v. York, 357 F.3d 14 (1st Cir. 2004). Both of those decisions upheld polygraph conditions against Fifth Amendment challenges and thus do not directly conflict with the court of appeals' decision here.

As petitioner observes, the courts in both York and Lee interpreted the supervised-release conditions at issue not to allow for revocation of supervised release if the defendant invoked his Fifth Amendment privilege against self-incrimination as the basis for refusing to answer questions posed to him in a polygraph. See Lee, 315 F.3d at 212-213; York, 357 F.3d at 18, 25. And like Von Behren, York and Lee contain language suggesting that a defendant who, on valid Fifth Amendment grounds, refuses to answer incriminating questions administered as part of a treatment program cannot constitutionally have his supervised release revoked for that refusal. See York, 357 F.3d at 24 (stating that "it would be constitutionally problematic" if a "refusal to answer any question -- even on valid Fifth Amendment grounds -- could

constitute a basis for revocation"); Lee, 315 F.3d at 212 (finding no Fifth Amendment violation "because the [polygraph] condition does not require [the defendant] to answer incriminating questions").

But to the extent the First or Third Circuits would take such a view even when the government "recognizes that the required answers may not be used in a [subsequent] criminal proceeding," Murphy, 465 U.S. at 435 n.7, that approach could not be reconciled with this Court's decision in Murphy. And to the extent that the decisions in York and Lee, like the decision in Von Behren, may reflect an approach that differs from the Second Circuit's in the administration of supervised-release conditions that include polygraphs -- for example, by requiring an up-front grant of immunity before a defendant may be required to answer an incriminating question -- such implementation issues are not squarely presented in this case. Cf. Lee, 315 at 212 n.5 (stating that "[i]f, at a later date, the government seeks to revoke appellant's supervised release based on his assertion of the Fifth Amendment privilege, that matter may be revisited by the court having jurisdiction at that time").

c. Finally, petitioner incorrectly contends (Pet. 15-16) that the decision below conflicts with Lacy v. Butts, 922 F.3d 371 (7th Cir. 2019). Lacy did not address, let alone facially invalidate, a supervised release condition like the one at issue here, but instead required revisions to a state-law provision

revoking a prisoner's good-time credits for failing to participate in a sex-offender treatment program. See id. at 373, 378. The program required each participating inmate to provide "'detailed and specific'" descriptions "about each victim he has harmed," including "the victim's age," "the first name of the victim," and "'where and when' the abuse occurred," id. at 375, and to undergo a polygraph with "highly specific questions," including "'[h]ow many children'" the defendant had "'physically forced into sexual activities'" and "'[h]ow many times'" he had "'made child pornography,'" id. at 376. The treatment provider in Lacy gave an "express warning that neither immunity nor confidentiality will be available," thereby "expos[ing] [the inmate] and his fellow class members to the risk of future criminal investigation and prosecution." Id. at 375.

This case does not present any of those circumstances, and the Seventh Circuit's decision in Lacy accordingly does not conflict with the Second Circuit's decision here. Indeed, as the Seventh Circuit has observed, "[e]very circuit to consider the issue has upheld the imposition of polygraph testing as a condition of supervised release, at least where the circumstances call for it." United States v. Brewster, 627 Fed. Appx. 567, 570 (2015); see id. at 571 ("We have also upheld the imposition of polygraph testing as a condition of supervised release over a Fifth Amendment challenge, while noting that a defendant on supervised release retains the ability to invoke his right under the Fifth Amendment

to be free from self-incrimination, including in a polygraph examination."). No further review of petitioner's facial challenge to the condition in this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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