

No. _____

In the
Supreme Court of the United States

Jerry Lee Thompson,

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. Does a district court commit reversible plain error when, in a sentence revoking supervised release, it imposes a condition of supervised release requiring the defendant to participate in and pay for substance abuse treatment, even though the record shows that the defendant's drug abuse preceded the lengthy sentence for the underlying substantive offense; the defendant successfully completed a lengthy residential treatment program through the Bureau of Prisons; there was no allegation that the defendant used alcohol or drugs during the term of supervised release that was revoked; and there was no allegation that his violation involved alcohol or drugs?

PARTIES TO THE PROCEEDING

Petitioner is Jerry Lee Thompson, 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 Jerry Lee Thompson 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. Jerry Lee Thompson*, 797 Fed. Appx. 169 (5th Cir. Mar. 9, 2020). It is reprinted in Appendix A to this Petition. The district court's judgment 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 September 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Section 3583 of Title 18 of the United States Code provides, in relevant part:

(d) Conditions of Supervised Release.-- . . . 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)(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 set forth in section 3563(b) and any other condition it considers to be appropriate

Section 3553 of Title 18 of the United States Code provides, in relevant part:

(a) Factors To Be Considered in Imposing a Sentence.

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed— . . .

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Rule 52 of the Federal Rules of Criminal Procedure states, in relevant part:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

LIST OF RELATED PROCEEDINGS

1. *United States v. Jerry Lee Thompson*, 6:01-CR-00010-C. United States District Court, Northern District of Texas. Judgment entered August 30, 2001.
2. *United States v. Jerry Lee Thompson*, 6:01-CR-00010-C. United States District Court, Northern District of Texas, motion to revoke supervised release. Motion filed March 19, 2019. Judgment revoking supervised release while imposing a 36-month term of imprisonment and a 9-year term of supervised release was entered on April 5, 2019.
5. *United States v. Jerry Lee Thompson*, CA No. 19-10445, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered March 9, 2020.

STATEMENT OF THE CASE

Jerry Lee Thompson was originally sentenced in 2001 to 312 months in prison and 12 years of supervised release after a jury convicted him on one count of possession with intent to distribute less than 5 grams of cocaine base within 1,000 feet of a playground and aiding and abetting. (ROA.40–44).¹ Thompson’s Presentence Report (“PSR”) for that offense reported that he had used alcohol, marijuana, and cocaine prior to his first federal conviction, which occurred in 1992. (ROA.842).

During his incarceration for that 1992 conviction, Thompson completed the Bureau of Prison’s 500-hour residential drug abuse program; while on supervision for that offense he submitted no positive drug tests. (ROA.842). Other than receiving \$2 from undercover police as a fee—ostensibly for him to buy a beer—for his role in obtaining crack cocaine, the PSR gave no indication that Thompson used drugs or alcohol while on supervision for that his 1992 conviction. *See* (ROA.832–40).

The substantive conviction underlying this case arose from the transaction involving the \$2 fee, and the district court imposed a special condition of supervised release that required Thompson to

participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency, which will include testing for the detection of substance use or abuse. [Thompson] shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment.

(ROA.43).

¹ For the convenience of the Court and the parties, the Petitioner has included citations to the page number of the record on appeal below.

Thompson's term of supervised release relating to this petition began on April 18, 2017. (ROA.422). And he completed his required substance abuse treatment program on May 1, 2018. (ROA.422). However, on December 28, 2018, Probation filed a Petition for Offender Under Supervision, alleging that Thompson violated a mandatory condition of his supervised release by committing another crime, as evidenced by his arrest for the Texas felony offense of Assault Family Violence. (ROA.422). However, no allegation was made that Thompson had used or abused alcohol during the violation or at any time during his term of supervised release.. *See* (ROA.422–44, 819–23).

Thompson's supervised release was revoked on April 5, 2019, after he admitted that the lone allegation against him was true. (ROA.443). The district court sentenced him to 36 months in prison and a 9-year term of supervised release. (ROA.444–45). As a special condition of supervised release, the district court ordered, without explanation, the following:

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month.

(ROA.446). Thompson did not object to the imposition of this condition. *See* (ROA.800).

On appeal, Thompson argued that the district court committed reversible plain error when, without explanation, it imposed the condition requiring Thompson to attend and contribute to the costs of substance abuse treatment, (1) even though the

underlying offense did not involve his abuse of narcotics, drugs, or alcohol; (2) Thompson was not alleged to have used narcotics, drugs or alcohol after his 2001 conviction; (3) he successfully completed a substance abuse treatment program while on supervised release; and (4) his alleged violation of supervised release did not involve narcotics, drugs, or alcohol.

The court of appeals, however, held Thompson could not show clear or obvious error because that the district court's reasoning for imposing the contested condition could be implied from Mr. Thompson's criminal history; the requirements in both federal convictions that he participate in substance abuse treatment; and the fact that the same judge who imposed the conditions in 2001 also deemed treatment necessary at the 2019 revocation. *See* Appendix A.

REASON FOR GRANTING THIS PETITION

- I. The district court committed reversible plain error when, without explanation, it ordered Thompson to participate in and contribute to the costs of drug, narcotic, or alcohol abuse treatment.**

Because Thompson did not object to the district court's imposition of this condition of supervised release, review is for plain error. Fed. R. Crim. P. 52(b). Plain error review considers four prongs: (1) there was "an error or defect . . . that was not intentionally relinquished or abandoned"; (2) that error must be "clear or obvious"; (3) it must "have affected the appellant's substantial rights"; and (4) the error can be remedied only if the first three prongs are satisfied and the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 732–34, 736 (1993)).

The district court committed plain error by ordering Thompson to participate in a treatment program for narcotic, drug, or alcohol abuse and to contribute to the costs of those services. The court's power to impose special conditions of supervised release is broad but not unlimited. A special condition is only authorized by statute if it:

(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);

18 U.S.C. § 3583(d). Under § 3583(d)(1):

such conditions must be reasonably related to one of the following statutory factors: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed training, medical care, or other correctional treatment in the most effective manner.

United States v. Salazar, 743 F.3d 445, 451 (5th Cir. 2014) (citing 18 U.S.C. § 3553(a)(1)–(2)). And the Fifth Circuit has determined that a district court abuses its discretion by imposing a special condition of supervised release without explaining how that condition is reasonably related to the statutory factors. *Salazar*, 743 F.3d at 451.

At his revocation hearing, the district court stated that a special condition of supervised release would include that Thompson “shall participate in a program approved by the United States probation office for the treatment of narcotic, drug, or alcohol dependency. [And Thompson] shall contribute to the cost of services rendered at a rate of at least \$25 a month.” The court provided no explanation for the imposition of this special condition. In the written judgment, the district court ordered Thompson to “participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for the treatment of narcotic, drug or alcohol dependency,” while submitting to testing for substance use or abuse, and contributing to the costs of the services at a rate of at least \$25 per month.

A. The court committed error that was plain.

In *United States v. Mahanera*, 611 F. App'x 201 (5th Cir. 2015) (unpublished), the Fifth Circuit found plain error in the district court's failure to explain its imposition of a special condition requiring the defendant to participate in "a program of testing and/or treatment for alcohol and/or drug abuse as directed by the probation office." *Id.* At 203–05 ("This error is clear and obvious, given our . . . explicit holding on this point." (citing *United States v. Salazar*, 743 F. 3d 445, 451 (5th Cir. 2014))).

Here, just as in *Salazar* and *Mahanera*, the district court imposed a special treatment condition onto Thompson's term of supervised release without explaining why such treatment was appropriate under the circumstances. This failure to explain constituted plain error.

B. The error affected Thompson's substantial rights.

The error affected Thompson's substantial rights because it resulted in a condition of supervised release that was unwarranted, given the record of this case.

First, Thompson's underlying offense did not involve his abuse of narcotics, drugs, or alcohol. Thompson's conviction arose from his sale of less than one-fourth of a gram of crack cocaine, a transaction for which he received \$2 to ostensibly buy a beer. Such facts do not lead to the conclusion that his offense involved abuse of alcohol, narcotics, or drugs.

Second, the record shows no allegations that Thompson used narcotics, drugs, or alcohol after his 2001 conviction. Although the 2001 PSR stated that, before his 1991 conviction, alcohol was Thompson's substance of choice and that he had used

crack cocaine, that PSR recorded that Thompson had completed the Bureau of Prison's 500-hour residential drug abuse program and had no positive drug tests during his first term of supervised release. Moreover, there were no allegations that Thompson violated the terms of his most recent supervised release by any means involving alcohol or drugs.

Third, during the later term of supervised release, Thompson had already successfully completed *another* substance abuse treatment program less than one year before his supervised release was revoked.

Fourth, there was no allegation that alcohol or drugs were involved in the incident that caused Thompson's revocation.

Thus, the imposition of this special condition affected Thompson's substantial rights by "affecting the outcome of the district court proceedings by allowing the judgment to contain [an] unwarranted special condition[]." *Mahanera*, 611 F. App'x at 205.

C. The error affects the fairness, integrity, or public reputation of the judicial proceedings.

Under *Salazar*, the Fifth Circuit requires a district court to explain how a special condition relates to the statutory factors, but here the district court made no effort to do so. To require Thompson to again, after having already successfully completed a similar treatment program, complete and pay for another such program—without justification—is unfair and undermines the integrity and public reputation of the judicial proceedings.

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 7th day of August, 2019.

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