No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JUAN JOSE CAMARENA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: January 7, 2021

QUESTIONS PRESENTED

Is this condition of supervised release a violation of the Fifth Amendment due process right against vague conditions of release and/or a greater deprivation of liberty than is reasonably necessary in violation of 18 U.S.C. § 3583(d)(2)?:

You must not have any contact with anyone who belongs to or is affiliated with gangs or engaged in gang activity.

AND

Following this Court's decisions in *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016), and *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018), is an unlawful condition of supervised release necessarily reversible plain error?

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Juan Jose Camarena ("Mr. Camarena") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The court of appeals issued its disposition denying Mr. Camarena's request for appellate relief on October 9, 2020. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The disposition of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Camarena*, 825 Fed. Appx. 478 (9th Cir. 2020). Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, Appendix B, and 18 U.S.C. § 3583. Appendix C.

STATEMENT OF THE CASE

Mr. Camarena appeals his sentence, challenging the imposition of an unconstitutional condition of supervised release, that is a greater deprivation of liberty than reasonably necessary in violation of 18 U.S.C. § 3583(d)(2).

Mr. Camarena also argues that the imposition of an illegal or unconstitutional term or condition of supervised release is de facto reversible plain error.

Mr. Camarena requests this Court grant his petition for certiorari.

PRIOR PROCEEDINGS

On February 7, 2019, Mr. Camarena was indicted and charged with one count of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), one count of possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1), and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

At the time of the alleged offenses, Mr. Camarena was serving a term of federal supervised release imposed in the Western District of Washington. Mr. Camarena was federally arrested in Montana on a Western District of Washington revocation warrant. Pursuant to Rule 5 of the Federal Rules of Criminal Procedure, Mr. Camarena made his initial appearance on a petition to revoke his supervised release on November 29, 2018, in the District of Montana.

Mr. Camarena was detained following his appearance in Montana and was transferred to the Western District of Washington, where he remained in custody pending resolution of his alleged supervised release violations. Mr. Camarena's supervised release was revoked by the Western District of Washington on February 5, 2019. He was sentenced to thirty months imprisonment with no supervised release to follow.

Mr. Camarena was then transferred to the District of Montana for prosecution in this case.

On June 18, 2019, Mr. Camarena filed a motion to change his plea to guilty without the benefit of a plea agreement. The magistrate recommended that the district court judge accept Mr. Camarena's guilty plea. On July 9, 2019, the district court accepted the magistrate's recommendation.

On October 10, 2019, the district court imposed judgment. The district court sentenced Mr. Camarena to 188 imprisonment on Count I, 188 months on Count II, and 120 months on Count III, all terms to be served concurrently to each other and concurrently to the 30-month revocation sentence imposed by the Western District of Washington. The district court imposed a five year term of supervised release on Count I, a five year term of supervised release on Count II, and a three year term of supervised release on Count III, all terms to run concurrently.

Mr. Camarena appealed on October 18, 2019. The Ninth Circuit Court of Appeals affirmed on October 9, 2020. Appendix A.

FACTUAL BACKGROUND

Mr. Camarena pled guilty to one count of possession with intent to distribute methamphetamine, one count of possession with intent to distribute heroin, and one count of felon in possession of a firearm.

The Presentence Report ("PSR") reported that Mr. Camarena "was involved with gang activities." The PSR claimed Mr. Camarena was a member of the gang MS-13, which Mr. Camarena denied.

The PSR recommended the following special condition of supervised release:

> You shall not have any contact with anyone affiliated with the MS 13 and/or Surenos gangs.

Mr. Camarena objected to the supervised release condition prohibiting "any association with the gang known as 'MS-13'." PSR Addendum. At the sentencing hearing, the district court noted Mr. Camarena's objection to MS-13 membership.

Later, at the sentencing hearing, the Court stated:

> THE COURT: As Mr. Rhodes pointed out and Mr. Camarena alluded to, he didn't have a great childhood. His father was abusive. He didn't grow up in a stable environment. His older brothers were involved in criminal activity. And as a fairly young person he was left basically as the support resource for his family, and he apparently began to engage in criminal activity and was exposed to gang activities. Eventually, I think, joining a gang and, of course, that all leads to the reasons he's been involved in the federal court system.

Transcript of Sentencing at 29-30.

During his allocution, Mr. Camarena stated: "I'm not involved in gangs no more." *Id*. at 25.

The district court imposed a sentence of 188 months imprisonment on Count I, 188 months on Count II, and 120 months imprisonment on Count III, fully concurrent to each other and all concurrent to the 30 month revocation sentence imposed in the Western District of Washington, followed by five years of supervised release on Count I, three years of supervised release on Count II, and three years of

supervised release on Count III, with all terms of supervision to run concurrently to each other.

The district court imposed the thirteen standard conditions of supervised release. It also imposed eight special conditions of supervised release, including:

> THE COURT: You must not have any contact with anyone who belongs to or is affiliated with gangs or engaged in gang activity.

Id. at 36.

Mr. Camarena appealed to the Ninth Circuit. Following briefing, the court of appeals held oral argument via video conference on October 5, 2020. On October 9, 2020, the court issued its unpublished opinion affirming the district court. Appendix A.

REASONS FOR GRANTING THE PETITION

A. The condition is unconstitutionally vague.

It is well-established that a release condition "violates due process of law if it 'either forbids or requires the doing of an act so vague, such that men of common intelligence must necessarily guess at its meaning and differ to its application.'" *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007) (quoting *United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001) (*Loy II*)). The vagueness doctrine serves three purposes:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, . . . [a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis. . . . Third . . . where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (internal citations and quotation marks omitted).

The infringement of the First Amendment right of free association in this case underscores, and enhances, the vagueness here. As a court of appeals explained: "A probationer must be put on clear notice what conduct will (and will not) constitute a supervised release violation, a rule that is of particular importance when the condition seems to reach constitutionally protected conduct. *See United States v. Chapel*, 428 F.2d 472, 473-74 (9th Cir. 1970)." *Soltero*, 510 F.3d at 867 n.10 (also citing "cf. *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ('[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" (internal quotation marks, alterations, citations, and footnotes omitted))).

Because it fails to clearly define or limit the term "gang," the condition violates the "due process right to conditions of supervised release that are sufficiently clear to inform [Mr. Camarena] of what conduct will result in his being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002). A vague condition "cannot be 'saved' merely because the government promises to enforce it in a narrow manner." *Soltero*, 510 F.3d at 867 n.10 (citing *Loy II*, 237 F.3d at 266). Moreover, letting the probation office provide clarity escalates, rather than cures, vagueness. *Id*. (vague supervised release condition "cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect, i.e., the delegation of 'basic policy matters to policemen . . . for resolution on an ad hoc and subjective basis.'") (citation omitted); *see also United States v. Sales*, 476 F.3d 732, 737 (9th Cir. 2007) ("We review the language of the condition as it is written and cannot assume, as the government seems to suggest, that approval will be granted.").

The condition violates due process by providing inadequate notice of requirements, improperly delegating policy decisions for arbitrary and *ad hoc* determination by the probation officer, and, unduly inhibiting the exercise of First Amendment rights.

B. The condition is a greater deprivation of liberty than necessary.

A district court's discretion to impose special conditions of supervised release is constrained by 18 U.S.C. §§ 3583(c) and (d). *See also* U.S.S.G. § 5D1.3(b) (incorporating standards from §§ 3583(c) and (d)). To impose supervised release conditions, pursuant to 18 U.S.C. § 3583(c), the district court must first consider the factors set forth in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). 18 U.S.C. § 3583(c).

After taking these § 3553(a) factors into account, the supervised release condition must:

> (1) [be] reasonably related to the factors set forth in section 3553(a)(1),(a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) 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); and
>
> (3) [be] 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)(1-3).

The government bears the burden of demonstrating that the statutory standards have been met. *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006). Specifically, "it shoulders the burden of proving that a particular condition of supervised release

involves no greater deprivation of liberty than is reasonably necessary to serve the goals of supervised release." *Id*. at 558-59.

A condition is impermissibly overbroad if it is "drawn so broadly that [it]unnecessarily restrict[s] otherwise lawful activities." *United States v. Terrigno*, 838 F.2d 371, 371 (9th Cir. 1988); *see also Soltero*, 510 F.3d at 867 (quoting *Terrigno*). Overbroad conditions "impose a far greater deprivation of liberty than reasonably necessary to achieve legitimate goals of supervised release." *United States v. Riley*, 576 F.3d 1046, 1049 (9th Cir. 2009).

As with vagueness holdings, the courts have often found a condition of supervised release to be overbroad. For example, in *Soltero*, the defendant was prohibited from "associating with any known member of any criminal street gang or disruptive group as directed by the Probation Officer, specifically, any known member of the Delhi street gang." This Court ruled the condition to be overbroad because "the term 'disruptive group' has a broad meaning and could reasonably be interpreted to include not only a criminal gang, but also a labor union on strike, a throng of political protesters, or a group of sports fans celebrating after their team's championship victory." 510 F.3d at 867.

The fact that the term "gang," as commonly understood, *see infra*, includes both lawful and unlawful associations is problematic for multiple reasons. First, the term leaves Mr. Camarena guessing as to what types of people the condition

prohibits him from contacting. If the district court intended to bar him from contacting persons involved in a "criminal street gang" as defined in 18 U.S.C. § 521, the court would have used that language in the condition. Even more specifically, to ensure there is no greater deprivation of liberty than reasonably necessary and achieves the purposes of sentencing, if the court intended to forbid Mr. Camarena from returning to his prior gang membership, the district would have used the precise criminal street gang name, i.e. Sureños. *Soltero*, 510 F.3d at 866.

C. The law requires specifying the prohibited criminal street gang.

The term "gangs," as deployed here, left undefined by the district court, necessarily leaves a person of ordinary intelligence to guess as to its meaning. *See United States v. Washington*, 893 F.3d 1076, 1081 (8th Cir. 2018). "Gang" is a term not defined in any statute relevant to these proceedings. *Id*. And the district court did not define it.

Conversely, "criminal street gang" is defined in 18 U.S.C. § 521 as:

> "criminal street gang" means an ongoing group, club, organization, or association of 5 or more persons –
>
> > (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);
> >
> > (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and
> >
> > (C) the activities of which affect interstate or foreign commerce.

18 U.S.C. § 521(a) (2019).

This discrete statutory definition of "criminal street gangs" is radically different from the definition of "gang" found in dictionaries, which includes groups of people associating for both "unlawful or antisocial ends," or even simply a "group of persons having informal and usually close social relations." https://www.merriam-webster.com/dictionary/gang; *Washington*, 893 F.3d at 1081 (addressing the same issue using a substantially similar definition of "gang" found in Black's Law Dictionary).

"Gang" does not mean a criminal street gang. That is why reviewing courts approve of district courts identifying prohibited gangs by name. *United States v. Vega*, 545 F.3d 743, 746 (9th Cir. 2008) (supervised release condition utilizing "criminal street gang" definition and specifying Harpys street gang affirmed); *United States v. Soltero*, 510 F.3d 858, 866-67 (supervised release conditions utilizing "criminal street gang" definition and specifying "Dehli gang" affirmed, while condition referencing "disruptive group" reversed).

As the Eighth Circuit explained: "[T]he term is not delineated by common use. Black's Law Dictionary defines 'gang' as a 'group of persons who go about together or act in concert, esp. for antisocial or criminal purposes.' Thus, gangs are not necessarily tied to criminal activity." *Washington*, 893 F.3d at 1081.

Washington mirrors the coherence legislated by Congress in defining "criminal street gangs."

That clarity reflects the rule of law. "If the statute uses a term which it does not define, the court gives that term its ordinary meaning." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) (citation omitted). The ordinary meaning of "gang(s)" expands far beyond the Congressional definition of criminal street gangs in § 521.

Washington is on-point instructive. There, the condition, in full, stated:

> The defendant must not knowingly associate with any member, prospect or associate member of any gang without the prior approval of the United States Probation Office. If the defendant is found to be in the company of such individuals while wearing the clothing, colors, or insignia of a gang, the Court will presume that this association was for the purpose of participating in gang activities.

Washington, 893 F.3d at 1081. The court of appeals invalidated the condition. First and foremost, and dispositive here, "the term gang is undefined such that it gives no notice as to which groups of people are actually covered." *Id*. In contrast to "criminal street gang" at § 521, the court noted, "[g]ang is not defined in any relevant statute." *Id*. (contrasting *United States v. Green*, 618 F.3d 120, 123 (2d Cir. 2010) (per curiam) ("The term 'criminal street gang' is cabined by a clear statutory definition that would permit Green to comply with the condition and permit officers to consistently enforce the condition.")).

"And the term gang is not delineated by common use." *Washington*, 893 F.3d at 1081. The court summarized: "Thus gangs are not necessarily tied to criminal activity." *Id*. (citation omitted).

The court held the condition unconstitutional for reasons that control here: "The lack of statutory definition and its wide-ranging use mean that the term 'gang' fails to 'convey sufficiently definite warning as to the proscribed conduct' the district court wants Washington to avoid 'when measured by common understanding and practices.'" *Id*. (citation omitted); *see also United States v. Romig*, 933 F.3d 1004, 1006 (8th Cir. 2019) ("vagueness is not an issue here because the district court struck the term 'or any other gang' from the provision at issue."). The challenged condition in this case refers only to "gangs." *Contrast United States v. Evans*, 883 F.3d 1154, 1160 (9th Cir. 2018) (upholding supervised release condition that specifies "the Down Below Gang or any other gang"); *United States v. Johnson*, 626 F.3d 1085 (9th Cir. 2010) (supervised release condition specifying Rollin' 30's gang unchallenged for vagueness).

D. The imposition of an unlawful, unconstitutional condition of supervision is de facto reversible plain error.

1. Plain error review.

Plain error review is a well-known four part analysis. *United States v. Olano*, 507 U.S. 725 (1993). There must be an error that was not waived. *Id*. at 732-733. The error must be plain. *Id*. at 734. It must have affected substantial rights, meaning but for it, there is a "reasonable probability" the result would have been different. *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). If those conditions are met, the reviewing court should exercise discretion and correct the forfeited error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

Here, this standard of review is self-fulfilling: if a condition of probation or supervised release is erroneous, by definition, but for the error, the result would have been different. There is not a "reasonable probability" the result would have been different. *Dominguez Benitez*, 542 U.S. at 76. A lawful condition is a guaranteed different result.

As explained *supra*, the term "gang(s)" is unconstitutionally vague. But for the error, the result would have been different; that is, the condition would be lawful and constitutional. *Cf. Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016) ("When a defendant is sentenced under an incorrect Guidelines range –

whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."). Maintaining an unconstitutional condition of release that plays out during a five-year term of supervised release seriously affects fairness and judicial proceedings.

2. This Court's decisions in *Molina-Martinez* and *Rosales-Mireles* confirm this analysis.

This Court granted certiorari in *Molina-Martinez* to resolve a circuit split and answer whether "a district court's application of an incorrect Guidelines range can itself serve as evidence of an effect on substantial rights." *Id*. at 1341. In that specific instance, an error in calculating Molina-Martinez's criminal history category meant that the correct and incorrect Guidelines sentencing ranges overlapped. *Id*. at 1344. Ultimately, and despite the overlap, the Court ruled "a defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." *Id*. at 1348. The Court concluded: "a defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b)." *Id*. at 1349.

Having found that an incorrectly calculated and applied Guidelines sentencing range met the third prong of plain error analysis, the Court addressed the fourth prong in *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018). There, the presentence investigation report twice erroneously scored as criminal history points a single misdemeanor conviction. *Id*. at 1905. Applying plain error review, and this Court's decision in *Molina-Martinez*, the Fifth Circuit ruled that Guidelines error was error that was plain and affected Rosales-Mireles' substantial rights. *Id*. The Court refused to vacate and remand for resentencing because it concluded that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id*. "In it's view, 'the type of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" *Id*. (quoting *United States v. Rosales-Mireles*, 850 F.3d 246, 250 (5th Cir. 2017) (omitting internal quotation marks and alterations)).

This Court reversed. "A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b)." *Id*. The Court quoted, then echoed *Molina-Martinez*. "In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than

'necessary' to fulfill the purposes of incarceration." *Rosales-Mireles*, 138 S.Ct. at 1907 (citations omitted). Guidelines error satisfies *Olano*'s fourth prong. "The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error." *Id*. at 1908 (underline added).

Sentencing error does not require a retrial. Resentencing is relatively brief. *Id*. Guidelines error is reversible error. *Id*.

The district court erred in imposing an unconstitutional condition of supervision that is a greater deprivation of liberty than necessary. Reviewing and correcting this error, this Court should follow *Molina-Martinez* and *Rosales-Mireles*.

Like the Guidelines, the conditions of supervised release are central to the term of supervision. That term has two fundamental components: how long, and what are the rules. Mr. Camarena will be on supervised release for five years, during which he will be subject to 23 conditions – the thirteen standard conditions and eight court-authored special conditions.

The conditions of release are the core of the term of supervision; they define it; an unlawful condition, especially an unconstitutional one, is particularly serious. *Accord Molina-Martinez*, 136 S.Ct. at 1345 ("The Guidelines' central role in

sentencing means that an error related to the Guidelines can be particularly serious.").

The conditions of release are the "lodestar" of supervised release. *Id*. at 1346. It cannot be disputed that an erroneous condition of release substantially affects the sentence. *Id*. ("In the usual case, then, the systemic function of the selected Guidelines range will affect the sentence. This fact is essential to the application of Rule 52(b) to a Guidelines error.").

This error requires relief. *Rosales-Mireles*, 138 S.Ct. at 1907 (quoting *Hicks v. United States*, 137 S.Ct. 2000 (2017) (Gorsuch, J., concurring in order to grant, vacate and remand) ("The Court also 'routinely remands' cases involving inadvertent or unintentional errors, including sentencing errors, for consideration of *Olano*'s fourth prong with the understanding that such errors may qualify for relief."). Error fundamental to the sentence, here an unconstitutional condition which subjects Mr. Camarena to the jurisdictional authority of the district court to revoke his release and return him to prison, warrants relief. *Id*. ("A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b).").

The vague and unconstitutional condition here is a greater than necessary liberty deprivation. That error satisfies *Olano*'s fourth prong. "The risk of

unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error." *Rosales-Mireles*, 138 S.Ct. at 1908.

Like Guidelines error, an erroneous condition of release does not require a retrial. Resentencing is relatively brief. *Id*. It is reversible error. *Id*. *Accord United States v. Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999) (internal citations omitted), amended on denial of rehearing en banc, 204 F.3d 1267 (9th Cir. 2000) ("Reversing a sentence does not require that a defendant be released or retried, but simply allows a district court to exercise properly its authority to impose a legally appropriate sentence.").

An erroneous condition of release, which will unconstitutionally restrict Mr. Camarena's liberty for five years, with the attendant possibility of revocation of supervised release and imposition of a new prison term, requires remand.

CONCLUSION

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

Dated this 7th day of January, 2021.

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