

No. 20-7189

IN THE
Supreme Court of the United States



BERNARD THOMAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit*

REPLY TO OPPOSITION

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June 7, 2021

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REPLY BRIEF FOR THE PETITIONER

This reply addresses the new issues raised by the government, namely that the petition violates the Sup. Ct. Rule 10 as well as the “two court rule” which it does not, and responds to other arguments by the government.

Petitioner asks the Court to resolve the conflict among the circuits regarding whether a sentencing judge may impose a supervised release condition requiring a psychosexual evaluation following a conviction which did not involve a sexual offense and where the only prior sexual

offense was remote in time, in this case more than 37 years. The Petition specifically did NOT ask whether a psychosexual evaluation could be imposed in a case in which the offense of conviction did not relate to sexual misconduct (Pet. for Cert. at 1).

Petitioner does not ask the Court to review an error based on erroneous factual findings or the misapplication of a properly stated rule of law, as the government argues (Br. in Opp. at 10). Rather petitioner asks the Court to consider whether Second Circuit precedent conflicts with the decisions of other United States courts of appeals on the same important matter, namely the imposition of psychosexual evaluations based on remote offenses in compliance with Sup. Ct. Rule 10.

Nor does this petition involve a “fact-bound decision” as the government repeatedly states (Br. in Opp. at 10, 13). The facts here are straight forth and undisputed – petitioner was sentenced on offense of conviction that did not relate to sexual misconduct, petitioner’s single act of sexual misconduct occurred more than 37 years ago, petitioner had a lengthy history of non-sexual criminal conduct which resulted in his incarceration for approximately half of the time since his sexual

offense, and at one point New York State Department of Corrections and Community Supervision ordered but choose not to enforce a requirement that petitioner undergo “sex offender treatment” ¹.

The two court rule, which the government invokes (Br. in Opp. at 10 citing *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting)) is inapplicable here. This is not a case in which the court of appeals and district court reviewed the same issue and arrived at the same result. In the instant case, the district court applied Second Circuit precedent to the undisputed facts and the circuit judges did the same thing. As the petition points out in doing so, the Second Circuit continued a rule which conflicts with other courts of appeal.

Notably, the Second Circuit acknowledged that its precedent conflicted with that of other courts of appeals (A 6). The government concedes that petitioner identified three cases of other circuit courts of appeal which conflict with the decision of Second Circuit in this case but attempts to distinguish each of them (Br. in Opp. at 14).

¹ Contrary to the government’s suggestion, petitioner took no steps to “avoid” treatment. There is no dispute that petitioner was not admitted because there was "too little time remaining on parole to engage in treatment." (PSR ¶¶ 43, 71, Br. in Opp. at 5).

While there are differences in the fact patterns, those differences are immaterial. In each case, the court of appeals reversed the imposition of conditions based on remote convictions for sex offenses. For example, the government argues that *United States v. Dugan*, 684 F.3d 1030 (2012) is inapplicable because there is nothing in the record to show that the defendant “avoided” a prior requirement for sex-offender treatment (Br. in Opp. at 15). However, as noted above, petitioner in this case did not “avoid” treatment. The state authorities chose NOT to enforce the requirement after having petitioner incarcerated for more than a decade.

The government likewise distinguishes the other cases which the petitioner cited based on differences among the individual defendants, their criminal histories and the conditions imposed (Br. in Opp. at 16). However, these are differences without distinctions. In the cases, which petitioner cited, the courts of appeals rejected conditions which had been applied based on temporally remote convictions – a rule which the Second Circuit declined to apply in this case, placing it in conflict with its sister circuits.

CONCLUSION

To resolve the conflict among the circuits, the instant petition for a writ of certiorari should be granted.

Dated: Garden City, New York
June 3, 2021

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Peter J. Tomao", is written over a horizontal line.

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