

No. _____

In the

Supreme Court of the United States

Colvis Jerrod Higgins,

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. Did the district court plainly err when it imposed a special condition of supervised release requiring Mr. Higgins to abstain from alcohol and to attend drug treatment even though Mr. Higgins does not have a history of drug or alcohol abuse?
- II. Did the district court plainly err when it failed to adequately explain the basis for the special alcohol prohibition and drug treatment condition?

PARTIES TO THE PROCEEDING

Petitioner is Colvis Jerrod Higgins, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Higgins*, 834 F. App'x 965 (5th Cir. 2021)
- *United States v. Higgins*, No. 4:19-cr-00086-A-1 (August 2, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Colvis Jerrod Higgins 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 reported at *United States v. Higgins*, 834 F. App'x 965 (5th Cir. 2021). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on February 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—

The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 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).

STATEMENT OF THE CASE

I. Facts and Proceedings Below

On December 19, 2018, Appellant sold a pistol and a controlled substance to an undercover officer. (ROA.26). At the time, Appellant was prohibited from possessing a firearm due to a prior felony conviction for burglary. (ROA.26).

Appellant waived indictment and was charged by information on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (ROA.18). On March 22, 2019, Appellant pleaded guilty to the one-count information. (ROA.99).

In its presentence investigation report (PSR), U.S. Probation identified a base offense level of 20 on account of the prior burglary conviction. (ROA.140). He then received a 2-level enhancement for possession of three firearms. (ROA.140). He then received a 2-level enhancement for possession of a stolen firearm. (ROA.140). He then received a 4-level enhancement for possession of a firearm in connection with another felony offense: drug trafficking. (ROA.140). He then received a 2-level enhancement for directing his 16-year-old brother to participate in the offense. (ROA.140). After a 3-level reduction for acceptance of responsibility, Appellant's total offense level was 27, with a Criminal History Category of III. (ROA.140). This translated to an advisory guideline range of 87-108 months. (ROA.151).

Appellant's sentencing hearing was held on August 2, 2019. After considering the 3553(a) factors, the district court sentenced Appellant to 96 months imprisonment

followed by a 3-year term of supervised release. (ROA.123-24). One of the special conditions of supervised release applied stated:

The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.

(ROA.55). This appeal follows to challenge the above special condition of supervised release.

REASON FOR GRANTING THIS PETITION

The district court imposed a special condition of supervised release requiring Mr. Higgins to participate in an approved narcotics treatment program, as well as abstaining from any use of alcohol or other intoxicants during or after completion of the program, and contributing to the costs himself, at the rate of at least \$25 per month. This special condition is not reasonable related to the statutory sentencing factors. Moreover, the district court did not adequately justify the reasoning for this condition as required by statute. The reasoning of the district court also cannot be deduced from the record. The district court's error is plain and obvious under Fifth Circuit case law, it affects Mr. Higgin's substantial rights, and merits correction in this case because of the impact on his autonomy, privacy, finances, and create a stigma around his person for mandated treatment.

I. The district court plainly erred when it imposed a special condition of supervised release requiring Mr. Higgins to abstain from alcohol and to attend drug treatment even though Mr. Higgins does not have a history of drug or alcohol abuse.

A. Standard of Review: Plain Error

"When challenged on appeal, conditions of supervised release are reviewed for an abuse of discretion." *United States v. Huor*, 852 F.3d 392, 397 (5th Cir. 2017). Because Mr. Higgins did not object when the district court imposed the challenged special condition, review is for plain error. *United States v. Halverson*, 897 F.3d 645, 657 (5th Cir. 2018). To show plain error, Mr. Higgins must show (1) an error (2) that is clear or obvious (3) that affected his substantial rights (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.*

B. Discussion

A district court has broad discretion in imposing special conditions of supervised release, but that discretion is limited by the statutory requirements set forth in 18 U.S.C. § 3583(d). *See United States v. Fernandez*, 776 F.3d 344, 346 (5th Cir. 2015); *see also United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009). First, a special condition must be “reasonably related” to one of the following four sentencing factors: “(1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the public from further crimes of the defendant, and (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.” *Weatherton*, 567 F.3d at 153 (citing 18 U.S.C. §§ 3583(d)(1), 3553(a)(1), (a)(2)(B)-(D)). Second, the special condition “must be consistent with the policy statements issued by the Sentencing Commission.” *Weatherton*, 567 F.3d at 153 (citing 18 U.S.C. § 3583(d)(3)). The Sentencing Commission has supplied that conditions requiring narcotics treatment programs and abstinence from alcohol are recommended when “the court has reason to believe the defendant is an abuser of narcotics, other controlled substances or alcohol.” USSG § 5D1.3(4).

1. The district court’s error was plain.

Here, the district court imposed the following special condition of supervised release:

The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or

alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.

(ROA.55). This condition breaks down into two discrete requirements: (1) that Mr. Higgins abstain from alcohol and other intoxicants; and (2) that Mr. Higgins participate in drug treatment and pay money toward doing so. The problem is that the statutory sentencing factors applicable to conditions of supervised release do not support this condition or these requirements.

The instant offense is a firearms offense. While Mr. Higgins was also found in possession of illicit drugs—marijuana and Alprazolam—he was not under the influence of any drugs at the time. (ROA.140). In fact, the PSR describes how Mr. Higgins’s history of drug and alcohol experimentation would be far less than the typical college student and perhaps less than many high school students:

The defendant reported a limited substance abuse history. He advised he first consumed alcohol at age 22, and only drinks during social occasions.

The defendant disclosed he first tried marijuana at age 16, and has only experimented with the substance on three occasions, the last being sometime in 2018. The defendant’s criminal history revealed he has one conviction and several pending cases for distributing marijuana.

(ROA.149). Certainly legal social drinking and three instances of marijuana experimentation cannot justify a blanket alcohol prohibition or required paid drug treatment. While it is true that Mr. Higgins is an accused drug dealer, his addiction appears to be to making money—legal or otherwise—not to the substances he is

accused of selling. (ROA.145-47). This does not satisfy the relevant policy statement's suggestion that such a condition is warranted when "the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol." USSG § 5D1.3(d)(4). And Mr. Higgins is already paying the price for those choices in the form of a 4-level enhancement for possession of the firearm in connection with another felony offense. (ROA.140). Mr. Higgins's personal use, however, is too scant to justify this onerous condition.

2. The error affects Mr. Higgins substantial rights.

Courts have previously held that the imposition of special conditions affects substantial rights when "no evidence in the record supports the imposition of the challenged special conditions." *United States v. Mahanera*, 611 F. App'x. 201, 204 (5th Cir. 2015). Also, courts have found many times that the imposition of mental health treatment affected the defendant's substantial rights in part because the defendant is required to pay for it, and it could create an unwanted perception that the defendant requires such treatment. *United States v. Alvarez*, 880 F.3d 236, 241 (5th Cir. 2018); *United States v. Garcia*, 638 F. App'x 343, 346 (5th Cir. 2016). As argued above, there is scant evidence in the record that supports Special Condition No. 5. Even if this Court finds that there is, similar to *Garcia* and *Alvarez*, Mr. Higgins would have to pay for the narcotics treatment himself, and it would create an unwanted perception that he needs such treatment. For these reasons the error affects Mr. Higgins substantial rights.

3. The district court's error seriously affects the fairness, integrity or public reputation of judicial proceedings.

“The fourth prong is meant to be applied on a case-specific and fact-intensive basis.” *United States v. Prieto*, 801 F.3d 547, 554 (5th Cir. 2015). With that in mind, there are fact patterns where courts have used similar circumstances to this case to exercise their discretion. Again, *Garcia* and *Alvarez* are guides. In both cases, the special conditions were vacated because of autonomy and privacy concerns, while *Garcia* expands the reasoning to financial costs and stigma related to being required to attend mental health treatment. *Alvarez*, 880 F.3d at 242, *Garcia*, 638 F. App'x. at 347. Mr. Higgins will have the same concerns as these two cases. His autonomy and privacy are taken away by having to attend court mandated treatment, and as in *Garcia*, he will be responsible for the financial costs. While it can be argued there is less stigma for narcotics treatment compared to mental health treatment, there is still an effect on how the public could view someone on court mandated narcotics treatment.

II. Even if Mr. Higgins's mild past experimentation with alcohol and marijuana can save the district court's special condition on plain error review, the district court plainly erred when it failed to adequately explain the basis for the special alcohol prohibition and drug treatment condition.

1. The district court's error was plain.

“A district court is required by statute to provide the reasons justifying the imposition of special conditions.” *United States v. Garcia*, 638 F. App'x 343, 346 (5th Cir. 2016) (citing 18 U.S.C. §3553(c)). Accordingly, a “district court abuse[s] its discretion by not explaining how [special conditions] [are] reasonably related to the

statutory factors.” *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014). The Fifth Circuit has even held that a failure to explain the reasons for a special condition constitutes plain error. *United States v. Kielbasinski*, 783 F. App’x 371, 375 (5th Cir. 2019) (unpub.).

The district court did not adequately justify the imposition of Special Condition No. 5. In *Garcia*, the Fifth Circuit concluded a showing of plain error when the district court listed “two of the § 3553(a) factors, deterrence and protection of the public.” *Garcia*, 638 F. App’x at 346. Similarly, the Fifth Circuit vacated a special condition “because the district court made no specific factual findings to establish that Special Condition Six was reasonably related to one of the four factors under § 3553(a).” *Caravayo*, 809 F.3d at 275. Here, the district court simply stated that it “t[ook] into account all of the factors the court should consider in sentencing under 18 United States Code Section 3553(a).” (ROA.123). This explanation is similar to *Caravayo* and less descriptive than *Garcia*, as *Garcia* listed two of the possibilities under § 3553(a). The district court did file a Statement of Reasons, but it does not explain the special conditions of supervised release. (ROA.169-72).

The district court’s reasoning also cannot be inferred from the record. Mr. Higgins has a limited history with narcotics. (ROA.149). The district court adopted the findings in the presentence report, (ROA.169), with the substance abuse portion stating:

The defendant reported a limited substance abuse history. He advised he first consumed alcohol at age 22, and only drinks during social occasions.

The defendant disclosed he first tried marijuana at age 16, and has only experimented with the substance on three occasions, the last time being sometime in 2018. The defendant's criminal history revealed he has one conviction and several pending cases for distributing marijuana.

(ROA.149). The Sentencing Guidelines suggest a condition similar to Special Condition No. 5 when "the court has reason to believe the defendant is an abuser of narcotics, other controlled substances or alcohol." USSG § 5D1.3(4). The substance abuse portion of the PSR is not sufficient to make a finding that Mr. Higgins is an abuser of narcotics. This case is similar again to *Garcia*, in which the probation officer suggested the special condition "based on the nature of some of Garcia's prior offenses." *Garcia*, 638 F. App'x. at 346. Mr. Garcia's priors were far more extensive than Mr. Higgins's, and dealt with many violent crimes. The Fifth Circuit found that there was not enough in the record because there was "no explanation of how his prior offenses reflect or suggest the need for mental health treatment." *Id.* Similarly, there was no finding that Mr. Higgins is an abuser of narcotics, simply that he had a limited history. Therefore, the district court's reasoning for Special Condition No. 5 cannot be deduced from the record.

2. The error affects Mr. Higgins substantial rights.

Courts have previously held that the imposition of special conditions affects substantial rights when "no evidence in the record supports the imposition of the challenged special conditions." *United States v. Mahanera*, 611 F. App'x. 201, 204 (5th Cir. 2015). Also, courts have found many times that the imposition of mental health treatment affected the defendant's substantial rights in part because the defendant

is required to pay for it, and it could create an unwanted perception that the defendant requires such treatment. *United States v. Alvarez*, 880 F.3d 236, 241 (5th Cir. 2018), *Garcia*, 638 F. App'x. at 346. As argued above, there is no evidence in the record that supports Special Condition No. 5. Even if this Court finds that there is, similar to *Garcia* and *Alvarez*, Mr. Higgins would have to pay for the narcotics treatment himself, and it would create an unwanted perception that he needs such treatment.

3. The district court's error seriously affects the fairness, integrity or public reputation of judicial proceedings.

The Fifth Circuit has stated “the fourth prong is meant to be applied on a case-specific and fact-intensive basis.” *United States v. Prieto*, 801 F.3d 547, 554 (5th Cir. 2015). With that in mind, there are fact patterns where this Court has used similar circumstances to this case to exercise their discretion. Again, *Garcia* and *Alvarez* are guides. In both cases, the special conditions were vacated because of autonomy and privacy concerns, while *Garcia* expands the reasoning to financial costs and stigma related to being required to attend mental health treatment. *Alvarez*, 880 F.3d at 242, *Garcia*, 638 F. App'x. at 347. Mr. Higgins will have the same concerns as these two cases. His autonomy and privacy are taken away by having to attend court mandated treatment, and as in *Garcia*, he will be responsible for the financial costs. While it can be argued there is less stigma for narcotics treatment compared to mental health treatment, there is still an effect on how the public could view someone on court mandated narcotics treatment.

C. Even if this Court does not find plain error, the case should still be remanded for the district court to provide further explanation for Special Condition No. 5 or to conduct further factfinding.

The Fifth Circuit has previously remanded a case in order for the district court to provide further explanation, even when it was determined that the defendant's appeal did not pass plain error review. *United States v. Kielbasinski*, 783 F. App'x 371, 375 (5th Cir. 2019). *Kielbasinski* dealt with two conditions of supervised release: "(1) abstaining from the use of alcohol and all other intoxicants during the term of supervision and (2) participating in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency and contributing at least \$20 per month toward such program." *Id.* at 373. These conditions apply a nearly identical effect to Mr. Higgin's Special Condition No. 5. *Compare Id.* and (ROA.55). The two cases are also similar in that *Kielbasinski* was challenging the district court's reasons for imposing the special conditions. Given this prior holding and the striking similarity between the two cases, the case, in the alternative, should be remanded for the district court to provide further explanation or to conduct further fact finding in regards to Special Condition No. 5.

CONCLUSION

This Court should grant the Petition and proceed with briefing on the merits and oral argument.

Respectfully submitted,

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