

NO:

In the
Supreme Court of the United States

ULISES ALVARADO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a violation of due process for a defendant to have his supervised release revoked for declining to take a COVID-19 test that was not clearly a condition of his supervised release?

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PRIOR OPINIONS IN THIS CASE

The following opinion in other courts in this case is attached and identified as follows:

The Judgment of the United States Court of Appeals for the Eighth Circuit, filed May 25, 2021.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the Petitioner's conviction and which is sought to be reviewed was filed May 25, 2021. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS REVIEW

The United States Constitution, Amendment V, states in part:

No person shall . . . be deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

A. Procedural Background

Ulises Alvarado was charged with violating the terms of his supervised release by a petition filed by the government on July 17, 2020. A preliminary examination was held on July 31, 2020. The Magistrate Judge found probable cause and ruled that the revocation petition should be scheduled for a revocation hearing.

A revocation hearing was held on August 13, 2020. The district court revoked Mr. Alvarado's supervised release and sentenced him to four months imprisonment. Mr. Alvarado filed a Notice of Appeal on August 19, 2020.

The United States Court of Appeals for the Eighth Circuit affirmed the district court judgment on May 25, 2021.

2. Statement of the Facts

Mr. Alvarado was initially convicted of violating the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250(a). As a part of his sentence he was placed on supervised release for a period of five years. A condition of Mr. Alvarado's supervised release was that he was to reside in a residential reentry center for at least 120 days and follow the rules of the reentry center.

One of the requirements of the reentry center was that Mr. Alvarado, before entering the center, was to have a test for COVID-19 (Prelim. Hrg. Tr. p. 6)(App. p. 6). And the test had to be negative in order for Mr. Alvarado to be placed in the center (Prelim. Hrg. Tr. p. 10)(App. p. 7). If the test result is positive for COVID-19, the probation officer who testified at the preliminary hearing was not sure what the protocol would be regarding placement at the reentry center (Prelim. Hrg. Tr. p. 15)(App. p. 9). It appears, however, that a positive test result would lead to a 14-day quarantine and then Mr. Alvarado could be placed in the center (Prelim. Hrg. Tr. p. 16)(App. p. 10). Mr. Alvarado had already been in a quarantine situation in U.S. Marshals custody prior to his expected entry in the reentry center (Prelim. Hrg. Tr. p. 32)(App. p. 11).

Mr. Alvarado was brought to the Dakota County, Nebraska jail from Arizona on July 22, 2020, still in custody of U.S. Marshals. While still in custody in Arizona in late June of 2020, Mr. Alvarado was asked if he wanted to be tested for COVID-19. He took that to mean he had a choice, and he declined.

Prior to his scheduled entry in the reentry center, Mr. Alvarado was approached by a nurse in the jail in Dakota County, Nebraska, where he was being held, in order to administer the COVID-19 test (Prelim. Hrg. Tr. p. 35-36(App. p. 12-13). As Mr. Alvarado described the test, it involved a long steel rod inserted far up into the nostril (Prelim. Hrg. Tr. p. 35)(App. p. 12). Because he understood this test to be very painful and invasive, he refused to take the test (Prelim. Hrg. Tr. p. 35-36)(App. p. 12-13). There was no evidence that Mr. Alvarado was ever offered an alternative test. There was testimony, however, that there is an alternative test that involves a swab taken from the mouth (Prelim. Hrg Tr. p. 10, 13)(App. p. 7,8).

Neither Mr. Alvarado's attorney nor the district court attempted to confirm with the reentry center or some other source if an alternative COVID-19 test was available or if a 14-day quarantine would satisfy the reentry center's requirement. Mr. Alvarado made it clear that he would be willing to take an alternative test or be quarantined (Prelim. Hrg. Tr. p. 39-40)(App. p. 14-15).

REASONS FOR GRANTING THIS PETITION

A defendant facing a revocation hearing is entitled to due process. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973). One aspect of due process in this regard is for the defendant to be notified of what he or she must do to comply with the conditions of release. See, e.g., *United States v. Comer*, 4th Circuit 2021. In this case, Mr. Alvarado was not told that taking a COVID-19 test was a condition of his release.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. It Is a Violation of Due Process for a Defendant's Supervised Release to be Revoked for an Act That Was Not Clearly a Condition of His Supervised Release.

In this case, a condition of Mr. Alvarado's supervised release was that he reside at a residential reentry center upon his release from prison. There was nothing in that condition that required him to take a COVID-19 test. Indeed, when his sentence was imposed and the condition established, COVID-19 had not yet become an issue. So Mr. Alvarado had no notice when he was sentenced, or even when he was released from custody, that taking a COVID-19 test would be a condition of his supervised release.

The only condition imposed in the court's sentence was that Mr. Alvarado had to reside in a residential reentry center. He was willing and ready to do that. It was a requirement of the reentry center, not the court, that Mr. Alvarado submit to a COVID-19 test. It is a violation of due process if a person

of common intelligence must necessarily guess at what is prohibited or required. *FCC v. Fox Television Stations*, 132 S.Ct. 2307 (2012). This rule also applies in the context of revocation of supervised release. *United States v. Comer*, 4th Circuit 2021.

It is important to note that supervised release is not like parole. A violation of parole simply results in completion, or at least partial imposition, of a sentence already imposed. Violation of supervised release, on the other hand, is a new offense and results in a new sentence. Therefore, the constitutional right to have reasonable notice of what would be a violation of supervised release applies. While not every constitutional right, e.g., proof beyond a reasonable doubt or a jury trial, applies to the revocation of supervised release, the right to be adequately informed of what is prohibited does apply.

And Mr. Alvarado's refusal to submit to a painful invasive test infringed on his bodily integrity. This is similar to taking a blood sample from a suspect, which has been held to require a warrant, except in exigent circumstances. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966). There were no exigent circumstances in this case. And there were alternative ways that Mr. Alvarado could have been tested for COVID-19 or been quarantined.

Mr. Alvarado certainly had no notice that he would have to give up his bodily integrity as a condition of supervised release. This Court should clarify

a defendant's due process right to notice of what is prohibited conduct before his or her supervised release can be revoked.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

/s/ *Wallace L. Taylor*

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