No.

In the Supreme Court of the United States

Edward Wright,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

I. Currently, the Circuits are split as to whether the standard federal supervision condition requiring third-party risk notification is constitutional. Some Circuits hold the condition is vague and allows the probation officer unfettered discretion that implicates the defendant's liberty interests in violation of the non-delegation doctrine, while others hold that the condition withstands constitutional scrutiny. Is the standard federal supervision condition requiring third-party risk notification unconstitutional for its vagueness, overbreadth, and violation of the non-delegation doctrine?

Related Proceedings

In June 2020, Petitioner Edward Wright pled guilty, pursuant to a plea agreement, to possession of child pornography (Count Two) under 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2) in *United States v. Wright*, No. 3:19-cr-00012-MMD-WGC (D. Nev. June 4, 2020). The district court imposed 57-months in prison and a lifetime term of supervised release. Petitioner's Appendix (Pet. App.) B.

Mr. Wright appealed the denial of his motion to suppress and conditions of supervised release. Specifically, Mr. Wright challenged the third-party risk notification condition as unconstitutional. In an unpublished opinion, the Ninth Circuit affirmed the denial of the motion to suppress and the imposition of the challenged conditions of supervised release, including the risk notification condition. *United States v. Wright*, No. 20-10303, 2022 WL 67341, at *1 (9th Cir. Jan. 6, 2022); *see* Pet. App. A. Mr. Wright did not seek rehearing.

Mr. Wright remains in federal custody of the Bureau of Prisons, with an estimated release date of March 14, 2023.

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Petition for Certiorari

Petitioner Edward Wright respectfully petitions for a writ of certiorari to review the memorandum of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit opinion denying appellate relief is not published in the Federal Reporter but is reprinted at: *United States v. Wright*, No. 20-10303, 2022 WL 67341, at *1 (9th Cir. Jan. 6, 2022). Pet. App. A. The district court's final judgment is unpublished and not reprinted. Pet. App. B.

Jurisdictional Statement

The Ninth Circuit entered the final order affirming the denial of the motion to suppress and imposition of conditions of supervised release on January 6, 2022. Pet. App. A. The district court had jurisdiction over the initial criminal indictment under 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction over the final judgment under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

This petition is timely per Supreme Court Rule 13.1 as it is filed within 90 days from the lower court's judgment.

Relevant Constitutional and Sentencing Guideline Provisions

1. U.S. Const. Art. I, § 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. U.S.S.G. § 5D1.3(c). Conditions of Supervised Release (2018), provides in relevant part:

> (c) "Standard" Conditions (Policy Statement)
>
> > The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:
> >
> > * * *
> >
> > (12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer

may contact the person and confirm that the defendant has notified the person about the risk.

Introduction

Petitioner Wright was ordered to serve lifetime supervision with 5 mandatory conditions, 13 standard conditions, and 5 special conditions he must follow after he completes his prison term. On direct appeal to the Ninth Circuit Court of Appeals, Mr. Wright challenged multiple conditions as unconstitutional that the Ninth Circuit affirmed. One condition in particular—the third-party risk notification condition—warrants this Court's careful review. Sup. Ct. R. 10.

The standard risk notification condition is unconstitutionally vague, overbroad, and violates the non-delegation doctrine. The condition delegates to probation officers the authority to require defendants to notify third parties about any risks the officers determine defendants may pose and authority to confirm defendants have done so. Pet. App. B: 11a (standard condition 12). The condition delegates this authority without identifying any existing risk, without requiring a nexus between the risk and the underlying offense, without establishing the burden of proof required to establish the existence of any future risks, without providing intelligible principles to measure and constrain the notification procedures for any future risks, and without identifying third parties to be notified. Pet. App. B: 11a. This condition also exposes defendants to criminal sanctions based on the unfettered discretion of probation officers without guidance for its application, violating the Article I non-delegation doctrine. *See* U.S. Const. art. I, § 1; *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to

[exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'") (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928)).

The Sentencing Commission advocates the routine imposition of the standard third-party risk-notification. *See* U.S.S.G. § 5D1.3(c). And district courts nationwide follow this recommendation, as the condition is printed on the judicial form used for final criminal judgments.[1] The widespread imposition of the condition subjects thousands of defendants to an unconstitutionally vague and overbroad supervision condition. *See* U.S. Const. amends. V, VI; *Johnson v. United States*, 576 U.S. 591, 595 (2015) (holding vagueness exists when a provision "fails to give ordinary people fair notice of the conduct it punishes," or is "so standardless that it invites arbitrary enforcement").

By affirming the imposition of the standard third-party risk notification here, the Ninth Circuit perpetuated an unconstitutional condition and deepened the circuit split. The Second and Tenth Circuits appropriately hold the risk notification condition is unconstitutional, while the Fifth and Eighth Circuits have affirmed the condition. Review by this Court is necessary to resolve the circuit split.

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[1] *See* Admin. Office of U.S. Courts, Forms, AO 245B - Judgment in a Criminal Case; AO Form 245C - Amended Judgment in a Criminal Case; AO Form 245D - Judgment in a Criminal Case (Revocation of Supervised Release Violation) (eff. Sept. 1, 2019), *available at* https://www.uscourts.gov/services-forms/forms?k=judgment+in+a+criminal+ case&c=All.

Statement of the Case

In February 2019, Mr. Wright was federally charged with receipt of child pornography under 18 U.S.C. § 2252A(a)(2), (b)(1), and possession of child pornography under 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2).

In June 2020, Mr. Wright pled guilty to possession of child pornography pursuant to a plea agreement. In September 2020, Mr. Wright was sentenced to 57 months' imprisonment and a lifetime term of supervised release. Pet. App. B. The district court imposed the standard supervised release conditions recommended by the Sentencing Commission without objection by Mr. Wright.

Mr. Wright timely appealed and the Ninth Circuit affirmed his sentence finding, in part, that the standard third-party risk notification condition was legal. Pet. App. A. Mr. Wright did not seek rehearing.

Reasons for Granting the Petition

In affirming the imposition of the third-party risk condition, the Ninth Circuit deepened the existing circuit split. A large population of criminal defendants are subject to the same unconstitutionally vague and overbroad supervision condition and will be subject to it in the future. Thus, guidance from this Court is necessary to protect and preserve defendants' constitutional rights and ensure courts are adjudicating those rights in accord with the Constitution and this Court's precedent.

I. The third-party risk notification condition's language is vague and overbroad rendering it unconstitutional and in violation of the non-delegation doctrine.

Mr. Wright's risk notification condition permits the probation officer to require the defendant to give notice to yet-to-be-identified third parties of yet-to-be identified risks the probation officer identifies through yet-to-be identified means. The condition at issue here specifically requires that, if a probation officer determines Mr. Wright poses an unidentified risk to an unidentified person or organization:

> (1) the probation officer may require Mr. Wright to notify that unidentified person or organization about the unidentified risk posed;
>
> (2) Mr. Wright must comply with the probation officer's notification instruction; and
>
> (3) the probation officer may contact the unidentified person or organization to confirm compliance.

Pet. App. B: 11a.

This is a standard condition promulgated by the Sentencing Commission that was amended in an attempt to "address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased." *See* U.S.S.G. § 5D1.3(c)(12) (amend. 803 eff. Nov. 1, 2016) (citing *United States v. Thompson*, 777 F.3d 368, 379 (7th Cir. 2015)). The Seventh Circuit found the prior version requiring the notification to third parties of risks that may be posed by the defendant's "criminal record or personal history or characteristics" was "riddled with ambiguities" and impermissibly vague. *Thompson*, 777 F.3d at 37.

Despite the Commission's efforts to fix the condition, it remains vague because it lacks any means for Mr. Wright or his probation officer to identify an alleged risk, how to assess whether a risk warrants notification, or how to identify the parties who would be affected by the risk. It is also overbroad in that it extends to everyone, including Mr. Wright's family and future employers—a protected entity the Sentencing Commission was otherwise careful to carve out special requirements for before a court or probation officer could interfere. *See* U.S.S.G. § 5F1.5 (allowing occupational restrictions only where district court makes specific findings linking defendant's occupation to "the conduct relevant to the offense of conviction" and establishing that such a restriction is "reasonably necessary to protect the public"). Given the lack of guidance to probation officers to determine the condition's application, Mr. Wright's liberty interests are significantly affected by the probation officer's discretion. And because "allowing a probation officer to make the decision to restrict a defendant's significant liberty interest constitutes an improper delegation of the judicial authority to determine the nature and extent of a defendant's punishment," the condition surpasses the proper delegation of tasks probation officers may assume. *United States v. Cabral*, 926 F.3d 687, 697 (10th Cir. 2019).

As written, the condition grants the probation officer broad discretion to make decisions that could infringe on Mr. Wright's liberty interests, an improper delegation of judicial power. The condition's language is so vague and overbroad

that "it would be impossible [] to delineate all the ways in which the condition may or may not be permissibly enforced." *Cabral*, 926 F.3d at 698.

II. This Court should resolve the circuit split as to whether the third-party risk notification is unconstitutional.

A line is now firmly drawn between the federal circuit courts, with the Second and Tenth Circuits holding the standard risk condition is unconstitutional as written, and the Fifth, Eighth, and Ninth Circuits holding it is constitutional. Given this divide, this Court's guidance is necessary.

A. The Second and Tenth Circuits hold the condition is unconstitutional.

In *United States v. Boles*, 914 F.3d 95, 110-11 (2d Cir.), *cert. denied*, 139 S. Ct. 2659 (2019), the Second Circuit reviewed the identical risk condition imposed on Mr. Wright. Like Mr. Wright, Boles argued the condition was too vague to be related to any supervision goal because the district court did not define any risk at the time of sentencing and therefore gave the probation officer too much discretion in assessing the existence of any such risk and who should be notified. *Id.* at 111. The Second Circuit agreed on both fronts. *Id.*

The Second Circuit found that the condition improperly permitted warning employers about risks unrelated to Boles's federal conviction given that "occupational restrictions must be related to the offense of conviction." *Boles*, 914 F.3d at 112 (citing *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) (per curiam); *see also* U.S.S.G. § 5F1.5 (Occupational Restrictions). The condition also improperly gave the probation officer unfettered discretion on issues concerning employment notification, a matter district courts must determine. *Boles*, 914 F.3d

at 112 (citing *Peterson*, 248 F.3d at 86). For these reasons, the Second Circuit vacated the risk condition and remanded to the district court for clarification as to the scope of the condition. *Boles*, 914 F.3d at 112.

Following Boles, the District Court for the Western District of New York entered a standing district-wide order modifying the standard risk-notification condition that reads:

> "**If <u>the court</u> determines in consultation with your probation officer that, based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk of committing further crimes** against another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk."

United States v. Rasheed, 981 F.3d 187, 199 (2d Cir. 2020) (quoting Am. Standing Order in *re: United States v. Boles* (W.D.N.Y. Mar. 22, 2019) [hereinafter "standing order"] (emphasis added).

The standing order's revisions to the standard risk-notification condition cured two central constitutional issues. First, the revisions limited the condition to risks of future crimes based on the defendant's criminal record, personal history and characteristics, and the nature and circumstances of the underlying federal offense—as determined by the court. *Rasheed*, 981 F.3d at 199. Second, the non-delegation doctrine was no longer violated because the probation officer must consult the district court before the condition is triggered. *Id.*; *see United States v. Traficante*, 966 F.3d 99, 104 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2634, (2021)

(explaining that the standing order "clarifies that any obligation to notify at-risk individuals is wholly contingent on a subsequent determination by the district court that the supervisee poses a specific risk to such persons." And "[g]iven the conditional nature of the revised condition, the standing order can have no impact on Traficante unless and until the district court makes such a finding.").[2]

The Tenth Circuit similarly struck the standard risk condition resting its decision on the non-delegation doctrine. In *Cabral*, 926 F.3d at 699, the Tenth Circuit found the risk-notification condition grants the "probation officer decision-making authority that could infringe on a wide variety of liberty interests," rendering it "an improper delegation of judicial power." Among the liberty interests *Cabral* identified susceptible to impermissible intrusion were the defendant's fundamental familial interests and employment interests. *Id*. at 698-99. It therefore struck the condition. *Id*.

After *Cabral*, the government joined in requests seeking new judgments omitting the risk-notification condition of supervised release. *See, e.g., United States v. Pendleton*, 789 F. App'x 97, 98 (10th Cir. 2019) (per curiam) (unpublished disposition). The District of Colorado also revised its standard risk-notification condition to require probation officers to first obtain district court approval before notifying third parties of risks presented by defendants or directing defendants to

[2] Because the standing order restates what courts are already authorized to do, the Second Circuit subsequently held a defendant's non-delegation challenge to the condition issued in compliance with the standing order was not ripe for review. *Rasheed*, 981 F.3d at 200.

do so. *United States v. Martinez*, 860 F. App'x 584, 585 (10th Cir. 2021) (unpublished disposition).

B. The Fifth, Eighth, and Ninth Circuits affirm the risk condition.

In contrast, the Fifth, Eighth, and Ninth Circuits are content with the lack of limits for identifying risks and the carte blanche delegation to probation officers to trigger the risk-notification to third parties without juridical guidance or meaningful guidelines.

The Fifth Circuit affirmed the same standard risk condition in *United States v. Henderson*, ___ F.4th ___, No. 21-50526, 2022 WL 871882 (5th Cir. Mar. 24, 2022). There, Henderson argued "that the district court improperly delegated 'the imposition of the [risk-notification] condition' to the probation officer," and conceded that he was subject to plain error review. *Id.* at *1. The Fifth Circuit held the imposition of the condition was not a "clear or obvious" error because the Circuit had not yet addressed the merits of the notification condition and whether it constituted an improper delegation of judicial authority. *Id.* at *2. Finding no plain error, the court affirmed. *Id.*

In *United States v. Janis*, 995 F.3d 647, 653 (8th Cir.), *cert. denied*, No. 21-68, 2021 WL 5284611 (U.S. Nov. 15, 2021), the Eighth Circuit declined to find the risk-notification condition vague or a violation of the non-delegation doctrine. *Janis* relied on a prior decision reviewed for plain error, *United States v. Robertson*, 948 F.3d 912, 920 (8th Cir.), *cert. denied*, 141 S. Ct. 298 (2020). *Robertson* addressed the vagueness challenge rather circularly stating "the 'scope of this condition can be

ascertained with sufficient ease,' . . . because the probation officer will identify and communicate the risk to" the defendant before the defendant has a duty to notify anyone of the risk. 948 F.3d at 920. *Robertson* also disagreed with the non-delegation challenge because it had previously "held a special condition of supervised release is an impermissible delegation of authority 'only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.'" *Id.* Having found no "affirmative indication" that "the district court disclaimed ultimate authority over" supervision, the Eighth Circuit affirmed the condition as written.

Finally, the Ninth Circuit held in *United States v. Gibson*, 998 F.3d 415, 423 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 832 (2022), that the risk notification condition allows "limited discretion vested in the probation officer" and although the condition "may be flexible, [] it is sufficiently certain to withstand constitutional scrutiny." Here, the Ninth Circuit affirmed Mr. Wright's condition relying entirely on *Gibson.* Pet. App. A; *Gibson*, 998 F.3d at 422–23. But *Gibson* (1) improperly read absent language into the condition that (2) still does not resolve the constitutional problems. Relying on its prior precedent, the Ninth Circuit interpreted the condition "to limit the 'risks' to those "posed by the defendant's criminal record." *Id.* at 422 (citing *United States v. Magdirila*, 962 F.3d 1152, 1159

(9th Cir. 2020), *pet. for reh'g denied*;[3] *United States v. Evans*, 883 F.3d 1154, 1159 (9th Cir. 2018)). The *Gibson* panel was mistaken for two reasons.

First, the *Gibson* panel erroneously believed the Ninth Circuit's prior *Magdirila* decision appropriately confined the scope of the risk that would be subject to third-party notification. *Magdirila* considered a prior version of the risk condition and a compilation of general orders from the Central District of California modifying it.[4] The Ninth Circuit remanded with instructions that the district court

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[3] In his petition for rehearing, Magdirila noted he agreed with the Ninth Circuit that the condition, as modified, allowed the probation officer to require him to "notify specific persons and organizations of specific risks [he] posed" to third parties, but requested the "criminal history" language be struck as it "was nearly identical to and just as unconstitutionally vague as the notification condition" language the court struck down in *United States v. Evans*, 883 F.3d 1154, 1163–64 (9th Cir. 2018). Appellant's Petition for Panel Rehearing, *United States v. Magdirila*, No. 18-50430, Dkt. 51 (9th Cir. June 23, 2020). In *Evans*, the Ninth Circuit remanded a condition requiring the defendant to "notify third parties of risks that may be occasioned by [his] criminal record or personal history or characteristics." *Evans* noted the Sentencing Commission amended the risk condition to remove the ambiguous phrase "personal history or characteristics" and to make clear that probation officers "may only require a defendant to notify specific persons of specific risks that the defendant poses to those persons." 883 F.3d at 1164.

[4] The three risk conditions addressed in *Magdirila* were modified from the standard condition and provided:

> General Order Condition 14: "As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement," . . .

"may wish to consider the language in United States Sentencing Guideline Manual § 5D1.3(c)(12)" (the version at issue in *Gibson* and here) "which suggests that a defendant's notification obligations should be limited to specific persons regarding specific risks posed by the defendant's criminal record." 962 F.3d at 1159. Thus, *Magdirila* did not simply remand to the district court with a blanket endorsement of the Guidelines risk condition language. *Magdirila* instead remanded with a proviso: any risk condition that is imposed using the Guidelines' risk condition language should be limited to (1) specific persons and (2) specific risks, (3) posed by this defendant's criminal record, (4) as crafted by the district court.

In *Gibson*, the Ninth Circuit overstated *Magdirila*'s holding. *Gibson* assumed the Sentencing Commission's current version of the risk condition, as written, passed constitutional muster without requiring more information from the district court to limit the notification provisions to specific persons of specific risks posed by the defendant's criminal record. *Gibson*, 998 F.3d at 422–23. Based on its

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> 4. Specific Condition 2: "As directed by the probation officer, the defendant shall notify specific persons and organizations of specific risks and shall permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications";
>
> 5. Standard Condition 14: "As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications."

962 F.3d at 1156 (quoting United States District Court for the Central District of California General Order 05-02).

misinterpretation of *Magdirila*, *Gibson* affirmed the unguided discretion the risk condition delegates to probation officers.

Second, even with the interpretive gloss the *Gibson* decision placed on the condition—reading in absent language that requires the risks be posed by the defendant's criminal record—the standard risk condition remains unconstitutional. Finding that the condition is limited to "specific risks posed by the defendant's criminal record" is still vague. This added language does not identify the specific risks. This added language does not put the probation officer "on clear notice of what conduct will (and will not) constitute a supervised release violation." *Evans*, 883 F.3d at 1164 (quoting *United States v. Soltero*, 510 F.3d 858, 867 n.10 (9th Cir. 2007)). Thus, this reading of the condition still "open[s] the door to boundless scenarios implicating various liberty interests." *Cabral*, 926 F.3d at 698.

C. This Court should resolve the circuit split.

"Few legislative or judicial guidelines prescribe the degree of clarity" that supervised release conditions require. *See* Cohen, Neil, *Informing probationer or parolee of release conditions—Vague or incomprehensible conditions*, Law of Probation & Parole § 7:19 (2d Sept. 2021 update). When clarity is lacking as it is here, this Court should provide it.

Neither the Sentencing Guidelines nor any judicial guidelines address the vagueness, overbreadth, and delegation issues that cause confusion over this risk notification condition. It remains a standard condition in all but the small minority of districts who have modified its language. Given the ongoing circuit split, it weighs disparately on defendants' fundamental liberty interests, and for Mr.

Wright, it will weigh on him for life. This Court should grant certiorari to review and provide the necessary clarity.

Conclusion

Petitioner Wright requests that the Court grant this petition for a writ of certiorari.

Dated: April 6, 2022.

Respectfully submitted,
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