No. 21-8093

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Albert Aiad-Toss — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Albert Aiad-Toss Reg. No. 66973-060
(Your Name)

Federal Correction Institution Ashland
P.O. Box 6001
(Address)

Ashland, Kentucky 41105
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether Mr. Aiad-Toss's lifetime supervised release term was procedurally unreasonable because the district court failed to adequately explain its decision and substantively unreasonable because the district court ignored 18 U.S.C. Section 3553(a)'s mandate to impose a term no greater than necessary.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2022 U.S. App. LEXIS 3665; 2022 FED App; 0070N (6th Cir.); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2020 U.S. Dist. LEXIS 54539, 2020 WL 1514482 (N.D. Ohio, Mar. 30, 2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 8, 2022.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

On August 28, 2019, a federal grand jury returned an indictment charging Defedant Aiad-Toss ("Mr. Aiad-Toss") with four counts of Sex Trafficking of a Minor, in violation of 18 U.S.C. Section 1591(a), and one count of Production of Child Pornography, in violation of 18 U.S.C. Section 2251(a). (Doc. 5, PageID #16-21.) On September 18, 2019, Mr. Aiad-Toss waived his right to a detention hearing and consented to being held without bail pursuant to Title 18 U.S.C. Section 3142(c) and (i), but "reserve[d] the right to raise the issue of detention at a later date should circumstances change." On November 19, 2019, a federal grand jury returned a superseding indictment adding three charges of Sex Trafficking of a Minor, in violation of 18 U.S.C. Section 1591(a) against Mr. Aiad-Toss (Doc. No. 28 PageID # 94-101.)

In June 2019, Mr. Aiad-Toss had sexual relations with six underage girls, aged twelve to fifteen, at hotels in the Ashland, Ohio, area. Mr. Aiad-Toss used Snapchat to make initial contact with his victims and later met them for sexual encounters. In exchange for performing sexual acts with Mr. Aiad-Toss and with each other, the girls were paid in cash and through Venmo, an online payment application; taken shopping; and given drugs and alcohol. He had sexual intercourse with three of the victims, including a tweleve-year-old girl; watched and filmed the victims engage in sex acts with each other; inserted a sex toy into one victim's vagina; rubbed a vibrator on the genitals of two victims; and paid another victim to produce and send him explicit photos and videos of herself masturbating. Mr. Aiad-Toss had budgeted $2,000 per month for illicit activities with minors and used digital payment applications to keep track of his payments to his victims. On July 5, 2019, Mr. Aiad-Toss was detained at the Fort Lauderdale International Airport in Florida.

In a federal grand jury's superseding indicment, Mr. Aiad-Toss was charged with three counts of sex trafficking of a minor under the age of fourteen in violation of 18 U.S.C. Section 1591(a)(1), (b)(1); four counts of sex trafficking of a minor under the age of eighteen in violation of 18 U.S.C. Section 1591(a)(1), (b)(2); and one count of production of child pornography in violation of 18 U.S.C. Section 2251(a). Subsequent to him initially pleading not guilty, Mr. Aiad-Toss pled guilty to all eight of the superseding indictment pursuant to a written plea agreement. The parties agreed to several terms, including: a 264-month term of imprisonment, subject to the district court's acceptance of the plea agreement; an offense level of 50, with a three-level acceptance of responsiblity reduction, resulting in a total offense level of 47; and a criminal history category to be determined by the district court following completion of a presentencing report ("PSR").

The plea agreement included a table listing the "Statutory Sentence Per Count" for each of the eight counts to which Mr. Aiad-Toss pled guilty. The agreement listed, for each count, both a maximum statutory fine of $250,000 and a special assessment of "$100 + $5,000." DE 77, Plea Agreement, Page ID 353. In a paragraph entitled "Special Assessment," the agreement stated Mr. Aiad-Toss "has been deemed indigent" and must pay a "mandatory special assessment of $100 for each count of conviction." Id. at 354.

The agreement also included a waiver of Mr. Aiad-Toss's appellate rights:

> Defendant acknowledges having been adivised by counsel of Defendant's rights, in limited circumstances, to appeal the conviction or sentence in this case, including the appeal of right conferred by 18 U.S.C. Section 3742, and to challenge the conviction or sentence collaterally through a post-conviction proceeding, including a proceeding under 28 U.S.C. Section 225. Defendant expressly and voluntarily waives those rights, except as specifically reserved below. Defendant reserves the right to appeal: (a) any punishment in excess of the statutory minimum; or (b) any sentence to the extent it exceeds the maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing

stipulations and computations in this agreement, using the Criminal History Category found appliable by the Court. **Nothing in this paragraph shall act as a bar to Defendant perfecting any legal remedies Defendant may otherwise have on appeal or collateral attack with respect to claims ineffective assistance of counsel or prosecutorial misconduct.** Id. at 359.
(Bold added for emphasis).

Mr. Aiad-Toss at his change of plea hearing affirmed that he understood he was waiveing his rights to appeal except as listed in the plea agreement. He also acknowledged the factual basis for his guilty plea. The court informed Mr. Aiad-Toss that the statutory maximum punsihments for his offenses included a life term of imprisonment, a $250,000 maximum statutory fine for each of the eight counts, and lifetime of supervised release. Mr. Aiad-Toss counsel failed to object to his receiving a lifetime of supervised release. The court did not, however, discuss the $5,000 per-count JVTA special assessment, noted in the written plea agreement, at the change of plea hearing.

Mr. Aiad-Toss pled guilty to seven counts of sex trafficking of minors and one count of production of child pornography. On appeal, Mr. Aiad-Toss challenged the district court's imposition of a $50,000 fine, a $40,000 payment under the Justice for Victims of Trafficking Act ("JVTA"), and a lifetime term of supervised release. He argued on appeal the judge selected a sentence based on erroneous facts, failed to adequately consider the Section 3553(a) factors, and imposed a sentence that is greater than necessary to comply with the purposes and principles of sentencing.

The Court of Appeals held that when Mr. Aiad-Toss pled guilty, he waived his rights to appeal except under limited circumstances, none of which applied as to the appeal of Mr. Aiad-Toss. Accordingly, the Court of Appeals dismissed his appeal.

REASONS FOR GRANTING THE PETITION

In United States v. Inman, 666 F.3d 1001 (6th Cir. 2012), the United States Court of Appeals for the Sixth Circuit vacated defendant Brandon M. Inman's sentence of lifetime supervision and remanded the case, because the district court judge--the Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky--did not adequately explain why he was sentencing Inman to a lifetime of supervised release when the parties had requested a ten-year term of supervised release. See 666 F.3d at 1003-04. The Sixth Circuit directed the district court to, on remand, "consider the lifetime term of supervised release" and a number of conditions of supervised release. 666 F.3d at 1007.

On remand, Judge Van Tatenhove noted that the Sixth Circuit "vacated seven discrete parts of the sentence because insufficient rational was offered." United States v. Inman, Criminal No. 08-127-GFVT, 2013 U.S. Dist. LEXIS 66716, 2013 WL 2389814, at *2 (E.D. Ky. 2013). He explained that the Sixth Circuit instructed him to "reexamine the imposition of a lifetime term of supervised release," which he viewed as "consistent with the Sixth Circuit's growing skepticism regarding the efficacy of lifetime supervision in this context," meaning, in sex offense cases.[1] 2013 U.S. Dist. LEXIS 66716,

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1 The tests and batteries currently used by the mental health profession to predict sex offense recidivism offer, according to one study, "statistically moderate correlations with sexual recidivism." Shoba Sreenivasa et al., Predicting the Likelihood of Future Sexual Recidivism: Pilot Study Findings from a California Sex Offender Risk Project and Cross-Validation of the Static-99, 35 AM. ACAD. PSYCHIATRY & L. 454, 454(2007); see Jan Looman & Jeffery Abracen, Comparison of Measures of Risk for Recidivism in Sexual Offenders, J. INTERPERSONAL VIOLENCE 2009 Jul 8. [Epub ahead of print](finding two primary tests for recidivism "failed to predict significantly" for rape recidivism and that "none of the risk-assessment instruments were able to significantly predict sexual recidivism" in child molesters.). Whether or not moderate success in predicting sexual offense recidivism is a sufficient basis upon which to confine individuals to BOP custody under the auspices of perceived future dangerousness is outside the scope of this matter, but, at a minimum, the issue raises some level of concern. See Kelly K. Bonnar-Kidd, 100(3) Sexual Offender Laws and Prevention of Sexual Violence or Recidivism,

2013 WL 2389814, at *2. Judge Van Tatenhove considered the lifetime term of supervised release that the Guideline recommended, explaining that "there must be something about this category of crime that suggests to Congress that ongoing remedial intervention and monitoring is needed." 2013 U.S. Dist. LEXIS 66716, 2013 WL 2389814, at *3. **He went on to state that, "as a judge, it is tempting to reconsider this conclusion. After all, the literature on this topic is far from conclusive.** (Bold added for emphasis). 2013 U.S. Dist. LEXIS 66716, 2013 WL 2389814, at *3. Judge Van Tatenhove then cited a number of federal cases that consider the "disputed research pertaining to relationship between viewing child pornography and committing sexual abuse," and all scientific studies relied upon which the judges relied in those cases. 2013 U.S. Dist. LEXIS 66716, 2013 WL 2389814, at *3 (citing United States v. C.R., 792 F.Supp. 2d 343, 375-77 (E.D.N.Y 2011)(discussing disputed research pertaining to relationship between viewing child pornography and committing sexual abuse); United States v. Cunningham, 669 F.3d 723, 731 (6th Cir. 2012)(holding the same); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012)(citing Richard Wollert, The Implications of Recidivism Research and Clinical Experience For Assessing and Treating Federal Child Pornography Offenders: Written Testimony Presented to the U.S. Sentencing Commission (Feb. 15, 2012), avaliable at 215-16/Testimony_15_Wollert_2.pdf)); United States v. Johnson, 588 F. Supp. 2d 997, (S.D. Iowa 2008)(citing Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (2008) favorably while criticizing Michael L. Bourke & Andres E. Hernandez, The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders, 24 J. Fam. Violence 183-91 (2008))).

AM. J. PUB. HEALTH 412, 416 (2010)("...moderate validity (a 30%-36% likelihood of error)should not be acceptable for instruments designed to limit freedoms and impose additional regulatory restrictions...").

district court to adequately state on the record the rationale for the conditions selected aids in assuring that those chosen are applicable to that particular defendant and thus are more likely to encourage his rehabilitation. Following this procedure provides the occasion to consider the effect of special conditions of supervised release on education, employment, and other factors that substantially impact the opportunity and capacity to reintegrate into society. Moreover, the imposition of conditions for rehabilitation in a manner calculated to enable a successful return to productive participation in society serves to protect the public-the other goal of probation.

Lord Justice Denning, the great English jurist, has called punishment "the emphatic denunciation by the community of a crime." In his view, punishment reinforces the community's respect for its legal and moral standards. The restraint on this principal, however, is that punishment is only justifiable when it is deserved. Mr. Aiad-Toss has admitted guilt and the proof exists. Nonetheless, the utilitarian assertion is that every human being should be treated with at least a minimum of respect as a source of right and expectation s and not merely as an instrument for promotion of the social order. While the practice of punishment has been existent throughout the history of human culture, so, too, has been its cautionary curtailment. See generally United States v. Gigante, 989 F.Supp. 436, 442 (E.D.N.Y. 1998).

Title 18 Section 3553(a) provides evaluative criteria to restore balance between the order of society emphasized by the retributivist approach and the utilitarian view that every human being must be treated with respect for his or her individual circumstances. The stated criteria may clash, and not all apply in each case. The criteria also point to individual considerations: No one size fits all. The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one - one that is decent, appropriate and deserved under all attendant circumstances.

More recently, in United States v. Maxwell, 483 F. App'x 233, 238 (6th Cir. 2012, the defendant pled guilty to one count of failing to register as a sex offender. Id. at 235-36. Following a term of imprisonment, the district court imposed supervised release for life with a number of highly restrictive special conditions. Id. The defendant challenged the conditions requiring that he not consume alcohol; have extensive contact with minors; possess or view pornography; possess or use a device capable of creating pictures or video; and possess or use a computer or device with Internet access. Id. at 237-38. The Maxwell panel, guided by Inman, found that the defendant's "sentencing suffers from nearly identical shortcomings." Id. at 239. The extent of the district court's explanation for imposing the restrictions occurred at the beginning of the hearing, when it stated that "it intended to impose 'a substantial period of supervised release with some fairly strict conditions on it in order to protect the public from future crimes that might be committed.'" Id. This, the panel found, was an insufficient explanation for the ban on possessing or using a device that could access the Internet without the approval of the defendant's probation officer. Id. The district court found the same to be true for the restriction on pornography, as nothing suggested that it previously had "a harmful influence on [the defendant]." Id. Although observing that the special conditions regarding the prohibition on alcohol consumption and restrictions on contact with minors were "better tethered to the record evidence" because the presentence report indicated that the defendant had a history of substance abuse and his prior offense involved a minor, the court concluded that the district court failed to set forth its actual rationale on the record. Id. at 240. Because the panel declined to "formulate a post-hoc justification for [the] conditions," it vacated and remanded to the district court for reconsideration. Id. at 240-41.

Mr. Aiad-Toss submits that these cases emphasize that requiring the

While convenient and time-saving, reducing this task to a mere ministerial one of mechanically applying the advisory sentencing guidelines is antithetical to the adjudicative process. Mr. Aiad-Toss is over 50 years of age, has been a practicing board-certified emergency medical physician for the past 24 years without incident or complaint, and has no prior arrests or other criminal history.

Because Mr. Aiad-Toss counsel did not object to the imposition of these conditions, the error is limited to plain error review. See United States v. Inman, 666 F.3d 1001, 1003 (6th Cir. 2012)(per curaim). In order to establish plain error, a defendant must show that (1) an error occurred; (2) the error was plain, that is, obvious or clear; (3) the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Lucas, 640 F.3d 168, 173-74 (6th Cir. 2011).

The evaluation of a district court's decision is reviewed under the abuse of discretion standard, See id. is two-fold. First, the district court must have "adequately stated in open court at the time or sentencing 'its rationale for mandating [the] special conditions.'" United States v. Brogdon, 503 F.3d 555, 563 (6th Cir. 2007)(quoting United States v. Carter, 463 F.3d 526, 529 (6th Cir. 2006)). If this procedural requirement is met, the special conditions will be upheld on appeal if they are "reasonably related to the dual goals of the public.'" Maxwell, 483 F. App'x at 238 (quoting Brogdon, 503 F.3d at 563). "The condition must reasonably relate to the nature of the offense and the history and characteristics of the defendant and 'involve[] no greater deprivation of liberty than is reasonably necessary' to serve the goals of deterrence, protecting the public, and rehabilitating the defendant." Inman, 666 F.3d at 1004 (alternating in original)(quoting 18 U.S.C. Section 3583(d)(1)-(2)). The conditions imposed must also be consistent with any applicable policy statements issued by the United States Sentencing

Commission. 18 U.S.C. Section 3583(d)(3).

"Sentencing errors [affect the outcome of a district court proceeding] where there is a reasonable likelihood the errors impacted the sentence." Inman, 666 F.3d at 1006 (providing see signal for United States v. Abbouchi, 502 F.3d 850, 858 (9th Cir. 2007)(parenthetical and rest of citation omitted). Inman quoted approvingly a First Circuit case holding that a district court's failure to explain its rationale for imposing special conditions of supervised release affects the outcome of the district court proceedings because there is a reasonable probability that the district court might not have imposed the condition if it had fulfilled its obligation to explain the basis for the special condition-or at least had made sure that the record showed the basis for it. Id. (quoting United States v. Perazza-Mercado, 553 F.3d 65, 79 (1st Cir. 2009)). Therefore, the Sixth Circuit held in Inman that the district court's failure to explain the reasons for the special conditions of supervised release affected Inman's substantive rights. Id.

Under plain error review, it must be determined whether the district court's error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Inman, 666 F.3d at 1006 (Sentencing error leading to a more severe sentence has been held to diminish the integrity and public reputation of the judicial system. Id. (quoting United States v. Oliver, 397 F.3d 369, 380 (6th Cir. 2005))(quotation marks and rest of citation omitted).

Wherefore, as in Inman and Maxwell, a remand is necessary so the district court can reconsider Mr. Aiad-Toss's supervised release. The error here-failure to articulate the reasons for imposing lifetime supervised release at issue-is plain. See, e.g., Inman, 666 F.3d at 1006 (observing that "[a] sentence that is not adequately explained is procedurally erroneous"). This Court should find that the error affected Mr. Aiad-Toss's substantial right because the district court might have imposed less restrictive conditions had

it fully considered and explained its basis for doing so on the record. See id. The error affected the fairness, integrity, or public reputation of the proceedings because supervision is potentially more sever than would have been imposed had the district court followed the procedure required to establish precedent. See Id. at 1006-07.