

No. ____

IN THE
Supreme Court of the United States

JOSHUA HAYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When sentencing a defendant to a term of supervised release, a district court will routinely impose standard conditions of supervised release listed in the United States Sentencing Guidelines. Mr. Joshua Hayes submits that one of those standard conditions, Standard Condition (12), U.S.S.G. § 5D1.3(c)(12), which allows a probation officer to determine if a defendant is a ‘risk’ to a third party and to then mandate that the person or organization be notified, is unconstitutional. Standard Condition (12) states as follows:

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.

U.S.S.G. § 5D1.3(c)(12). Currently several circuit courts of appeal are in conflict as to whether this condition is unconstitutional. The question presented is:

Whether the imposition of Standard Condition (12), U.S.S.G. § 5D1.3(c)(12), violates a defendant’s right to Due Process because the condition unconstitutionally delegates judicial authority to a probation officer and is unconstitutionally vague?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Joshua Hayes, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Joshua Hayes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The U.S. District Court for the Middle District of Florida, Tampa Division, adjudicated Mr. Hayes guilty of three counts and sentenced him to 480 months imprisonment. (Appendix A). Mr. Hayes appealed his judgment and sentence to the Eleventh Circuit Court of Appeals, and it affirmed the district court in its opinion which was reported at *United States v. Joshua Hayes*, --- F. App'x ---, 2022 WL 810429 (11th Cir. 2020). (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The opinion of the Eleventh Circuit Court of Appeals was issued on March 17, 2022. (Appendix B).

CONSTITUTIONAL PROVISION INVOLVED

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.

STATEMENT OF THE CASE

A. Statutory background

Federal sentencing courts may, and in some cases must, “include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.” 18 U.S.C. § 3583(a). Defendants on supervised release must abide by the conditions imposed by the sentencing court. If the defendant violates a supervised release condition, the court may revoke the term of supervised release and require the defendant to serve additional prison time, followed by an additional period of supervised release after the defendant’s release. 18 U.S.C. § 3583(e)(3).

Some supervised release conditions are expressly required by statute. *See* 18 U.S.C. § 3583(d) (enumerating mandatory standard release conditions, such as conditions that defendants not commit future crimes, make restitution, and not unlawfully possess controlled substances). In addition to those conditions, Congress has provided:

The court may order, as a further condition of supervised release, to the extent that such condition-

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary

condition of probation in section 3563(b) and any other condition it considers to be appropriate.

18 U.S.C. § 3583(d).

Congress has also authorized the Sentencing Commission to promulgate “general policy statements” regarding “the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18.” 28 U.S.C. § 994(a)(2)(B). Pursuant to that authority, the Sentencing Commission has promulgated a policy statement containing a series of “‘standard’ conditions” that “are recommended for supervised release.” U.S.S.G. § 5D1.3(c).

Prior to November 1, 2016, one of the Sentencing Commission’s standard conditions was as follows:

[A]s 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.

U.S.S.G. § 5D1.3(c)(13) (2015). In *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015), the Seventh Circuit harshly criticized this condition, finding it “riddled with ambiguities.” *Id.* at 379. The court observed that there was “no indication of what is meant by ‘personal history’ and ‘characteristics’ or what ‘risks’ must be disclosed to which ‘third parties.’” *Id.*

In response to *Thompson*, the Sentencing Commission revised that standard condition to address the concerns regarding ambiguity. As revised, the condition-Standard Condition (12) now reads:

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.

U.S.S.G. § 5D1.3(c)(12). The Sentencing Commission, citing *Thompson*, “determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased.” U.S. Sentencing Commission, Amendment 803 to the United States Sentencing Guidelines, <https://www.ussc.gov/guidelines/amendment/803>.

Notably, however, this amendment did not provide any additional guidance as to “what ‘risks’ must be disclosed to which ‘third parties.’” *Thompson*, 777 F.3d at 379. It did remove the references to “personal history” and “characteristics,” but replaced those references with nothing-and therefore left probation officers completely adrift as to what “risks” are sufficient to trigger the risk-notification requirement.

B. Proceedings Below

Mr. Hayes was charged by indictment in the United States District Court for the Middle District of Florida with two counts of producing child pornography, in violation of 18 U.S.C. § 2551(a) and (e), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). (Appendix A). Mr. Hayes pled guilty as charged and was sentenced to 240 months’ imprisonment on the two production counts and to a consecutive term of 240 months’ imprisonment

on the possession count, to be followed by 30 years of supervised release. (Appendix A). At the sentencing hearing, as a condition of Mr. Hayes' supervised release, the district court imposed Standard Condition (12). U.S.S.G. § 5D1.3(c)(12). *Id.* Mr. Hayes did not object to this condition at sentencing. *Id.*

Mr. Hayes appealed his judgment and sentence to the United States Court of Appeals for the Eleventh Circuit. (Appendix B). He argued that Standard Condition (12) is an unconstitutional delegation of judicial authority and unconstitutionally vague. *Id.* The Eleventh Circuit reviewing the claims for plain error and affirmed holding:

Hayes argues for the first time on appeal that Standard Condition (12) is an unconstitutional delegation of judicial authority and unconstitutionally vague. But Hayes has not shown that the district court plainly erred because there is no precedent from this Court or the Supreme Court demonstrating that Standard Condition (12) unconstitutionally delegates judicial authority or is unconstitutionally vague. *See Lange*, 862 F.3d at 1296. Accordingly, the district court is AFFIRMED.

Id. at *1–2.

REASONS FOR GRANTING THE PETITION

Whether the imposition of Standard Condition (12), U.S.S.G. § 5D1.3(c)(12), violates a defendant's right to Due Process because the condition unconstitutionally delegates judicial authority to a probation officer and is unconstitutionally vague?

A. Standard Condition (12) is unconstitutionally vague

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This Court denoted “three important values” served by this principle. *Id.* First, the law should give a person “of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.* “Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* And third, some vague enactments touch on First Amendment freedoms, and can lead people to “‘steer far wider of the unlawful zone’” than necessary. *Id.* at 109.

Standard condition (12) is unconstitutionally vague because it threatens each of the three values set forth by the Supreme Court. To begin with, a defendant does not know, based on the condition as ordered by the judge, what is required of him. The condition offers no guidance other than to obey the probation officer lest he face a violation proceeding. Individuals are entitled to more specific guidance so that they may act accordingly and avoid future punishment. Furthermore, the condition does not provide sufficient standards to prevent the probation officer’s “arbitrary and discriminatory” enforcement of the condition. *Id.* at 108. Finally, the third-

party warning requirement affects a defendant's freedom of association. Such warnings might mean a lost job opportunity, or lost opportunities to forge new, healthy friendships and relationships. Given these implications, it is particularly important that a sentencing court clearly define the condition, in particular the term 'risk,' for the benefit of the probation officer and defendants. The ambiguity of this condition results in the following problems:

First, since the term "risk" is completely left completely undefined by the guideline, the term will necessarily be defined by the individual probation officers. Leaving the term "risk" to be defined by the probation office exacerbates the problem of lack of due process, because each probation officer will have a different interpretation of that word. Thus, defendants on supervised release will be treated differently based on the personal beliefs and experiences of each individual probation officer.

Second, the term "risk" lacks any specific meaning. The risk could be physical violence, but it could also be construed to mean a financial risk, or a psychological risk. Without any statutory or fixed definition, the word "risk" lacks constitutionally specific meaning in the supervised release context. Besides the problem of interpretation issues with the probation department, a defendant is necessarily left to guess what risks he or she may pose to what persons or organizations.

Third, there is also no clear standard as to what constitutes proper notice. A defendant could be found to have violated this condition based on his failure to appreciate the risk perceived by his probation officer and failure to then give the

‘proper’ notification. There is no guidance as to what constitutes the appropriate type of notification, but there is clearly the possibility of revocation should a defendant fail to meet this undefined standard.

B. Standard Condition (12) unconstitutionally delegates judicial authority

Standard Condition (12) is an unconstitutional delegation of a district court’s authority under Article III. Here, the vagueness of standard condition (12) is so great that the decision whether or not to actually impose the condition rests with the probation officer and not with the district court. The probation officer will decide if there is a risk, when is there a risk, whether the risk is so great a notice must be given, who is could be harmed by the risk, who must be informed of the risk, what form the notice must take, and whether or not the defendant has adequately given notice. In essence, the probation officer has been given the authority of a judge to not only dictate the nature of the requirements on the defendant’s behavior, but also authority to determine when the defendant has violated those requirements. It is therefore an unconstitutional delegation of the district court’s Article III responsibilities.

C. There is a circuit split over whether a district court may impose Standard Condition (12)

The circuits are fractured over whether criminal defendants may be subjected to Standard Condition (12). As explained above, the Eleventh Circuit declined to address the issue in Mr. Hayes’s appeal, because he was under the plain error standard. (Appendix B). The Eighth Circuit has upheld Standard Condition (12)

against vagueness and nondelegation challenges. *United States v. Janis*, 995 F.3d 647 (8th Cir. 2021) *cert. denied*, 142 S.Ct. 483. By contrast, the Second and Tenth have invalidated Standard Condition (12), while the Ninth Circuit has upheld it subject to a narrowing construction. See *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019) (holding the condition is vague and grants too much discretion to the probation officer); *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019)(holding the condition improperly delegates authority).

The Ninth Circuit in *United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021), upheld Standard Condition (12), but with a unique interpretation of the condition. *Id.* at 422-23. The court explained that “the risks referenced in the condition are limited to the specific risks posed by the defendants’ criminal record.” *Id.* at 423 (internal quotation marks omitted; emphasis in original). Based on that narrowing construction, the court held that “probation officers do not have unfettered discretion under this condition.” *Id.* “The limited discretion vested in the probation officer as to when the condition should be triggered does not render it unconstitutionally vague.” *Id.* *Gibson’s* analysis is perplexing, however, in that the narrowing construction came out of nowhere. Nothing in the text of current Standard Condition (12) suggests that the category of “risks” covered by the condition is any narrower than before. Thus, *Gibson’s* determination that Standard Condition (12) is limited to “the specific risks posed by the defendant’s criminal record,” *Gibson*, 998 F.3d at 423 (internal quotation marks omitted), does nothing to resolve these ambiguities.

The Court should grant certiorari to resolve the circuit split. The issue is important as the split will cause practical problems.

First, the issue in this case is important. The Sentencing Commission recommends imposing Standard Condition (12) on all criminal defendants who receive a term of supervised release as part of their sentences. Hence, this is the rare case that affects almost all federal criminal defendants in the United States.

Additionally, in this case there is a circuit split and an unusually fractured one at that. The Second Circuit has invalidated Standard Condition (12) on both nondelegation and vagueness grounds; the Tenth Circuit has invalidated it on nondelegation grounds; the Ninth Circuit has upheld it based on a limiting construction; and the Eighth Circuit has upheld it as written. As a result of this circuit split, all defendants outside the Second and Tenth Circuits are potentially subject to Standard Condition (12) each year, while no defendants within those circuits are subject to that condition. As matters now stand, thousands of criminal defendants receive disparate treatment based on the happenstance of geography.

The Court should grant certiorari, resolve the circuit split, hold that Standard (12) is unconstitutional, and reverse the Eleventh Circuit's decision.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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