No. _____

IN THE
Supreme Court of the United States

ARTHUR L. GURBEY
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHELLE ANDERSON BARTH
CJA appointed counsel for Petitioner
Law Office of Michelle Anderson Barth
P.O Box 4240
Burlington, VT 05406
(619) 884-3883

QUESTIONS PRESENTED

Whether a condition of supervised release impermissibly compels a defendant to answer any questions posed during any examination during the period of supervision, including polygraph testing, or risk violation of his supervised release violates the Fifth Amendment by creating a classic penalty situation in contravention to this Court's holding in *Minnesota v. Murphy*, 465 U.S. 420 (1984)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Arthur Gurbey, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR CERTIORARI

Petitioner Arthur Gurbey respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed in a summary order on March 22, 2022 ("the decision"). A three-judge panel of the Second Circuit issued a decision affirming the judgment of the district court. *See United States v. Gurbey*, No. 21-1012-CR, 2022 WL 839283, at *1 (2d Cir. Mar. 22, 2022). The opinion is attached as Appendix A.

JURISDICTION

On March 22, 2022, a three-judge panel for the Second Circuit denied Petitioner's appeal and affirmed his sentence in the aforementioned opinion.[1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. Amend. V:

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. The decision was filed on March 22, 2022, making the petition for writ of *certiorari* due on June 20, 2022. However, June 20, 2022 is a federal holiday making this petition due on June 21, 2022.

> The Fifth Amendment to the United States Constitution provides that "[n]o 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.

I.

STATEMENT OF THE CASE

Mr. Gurbey's case was resolved pursuant to a plea agreement negotiated with the government in which he agreed to waive indictment and plead guilty to Counts One and Two of an Information alleging in Count One, a violation of 18 U.S.C. § 2252A(a)(2)(A), (b)(1) (receipt of child pornography), and in Count Two, a violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2) (possession of child pornography). For these crimes, Mr. Gurbey was sentenced principally to a total custodial term of 151 months followed by a total of fifteen years of supervised release

The district court also imposed a condition of supervised release – a compelled answer condition.[2] On appeal, Mr. Gurbey challenged the district

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2 In the Judgment and Commitment, the compelled answer condition was worded as follows:

> *6. Your supervision may include examinations using a polygraph, computerized voice stress analyzer, or other similar device to obtain information necessary for supervision, case monitoring, and treatment. You must answer the questions posed during the examination, subject to your right to challenge in a court of law the use of such statements as violations of your Fifth Amendment rights. In this regard, you will be deemed to have not waived your Fifth Amendment rights. The results of any*

court's imposition of the compelled answer condition of supervision arguing that the condition's mandate—that he must answer any question posed to him pursuant to any examination during his supervision, including a polygraph examination, or risk violation of the condition—creates a "classic penalty situation" forbidden by this Court and the Fifth Amendment. *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

On March 22, 2022, a three-judge panel of the Second Circuit issued a decision affirming Mr. Gurbey's sentence and judgment. *Gurbey*, 2022 WL 839283 at *6. Relying on prior precedent, the Second Circuit affirmed the compelled answer condition imposed by the district court. *Gurbey*, 2022 WL 839283, at *1 (citing *United States v. Johnson,* 446 F.3d 272, 279-80 (2d Cir. 2006), and *United States v. Boles*, 914 F.3d 95, 112 (2d Cir. 2019). When the Second Circuit affirmed, it further reasoned that under the express terms of the condition, answering questions posed during a polygraph or other examination is "subject to [his] right to challenge in a court of law the use of such statements as violations of [his] Fifth Amendment rights," such that Gurbey "will be deemed to have not waived [his] Fifth Amendment rights." *Id*. (internal citations omitted).

Mr. Gurbey's petition should be granted by this Court for at least two reasons.

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examinations must be disclosed to the U.S. Probation Office and the Court, but must not be further disclosed without the approval of the Court.

First, this case presents this Court with an opportunity to clarify the reach of its holding in *Minnesota v. Murphy,* 465 U.S. 420 (1984). The Second Circuit has ignored *Murphy*'s pertinent holding that putting a supervisee in a "classic penalty situation" is compelled self-incrimination.

Second, the Second Circuit's decision in this case, and the cases upon which it relies, create a circuit split with at least four other circuit courts. It splits from those courts in at least two fundamental ways: (1) it condones a condition of supervision that forbids invocation of the right against self-incrimination upon penalty of revocation; and (2) it finds such a condition constitutionally acceptable because in a later criminal prosecution the defendant may move to suppress incriminating statements. This Court should grant *certiorari* and resolve the entrenched split in the circuits concerning the role of the Fifth Amendment in compelled self-incrimination cases.

II.

ARGUMENT

A. The condition infringes on Mr. Gurbey's right to be free from compelled self-incrimination and is at odds with this Court's holding in *Murphy* in that *any* invocation of the right to remain silent can result in revocation of supervised release.

The condition that Mr. Gurbey undergo a polygraph examination or any other examination as directed by the probation officer as a part of treatment and he "must answer the questions posed during the examination," or risk violation of his condition puts him in a classic compelled self-incrimination situation. On the one hand, if Mr. Gurbey answers questions, he may

incriminate himself and be charged with new crimes. On the other hand, if questions are put to him and he validly invokes his Fifth Amendment right to remain silent, he may have his supervised release revoked. In affirming, the Second Circuit has ignored *Murphy*'s pertinent holding that putting a supervisee in a "classic penalty situation" is compelled self-incrimination.

Further, the Second Circuit's recognition that the district court included a remedy—that such statements may not be used against Mr. Gurbey later if, after-the-fact, he validly asserts his Fifth Amendment rights at some other proceeding—does not cure the constitutional defect. While such a remedy may act to soften the consequences of a Fifth Amendment violation, the Fifth Amendment right guarantees that no person may be compelled to be a witness against oneself in the first place. The vague procedural mechanism proposed by the district court and condoned by the Second Circuit cannot rescue the condition because it bypasses the issue of Constitutional concern—compulsion. The "touchstone" of the Fifth Amendment is the right to be free from compulsion. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *see also Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) ("[A] witness protected by the privilege may rightfully refuse to answer *unless and until* he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." (emphasis added)); *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513 (9th Cir. 1988) ("[I]t is appropriate for a defendant to raise a fifth amendment objection

at the time he is required to [make the potentially incriminating statements.]" (Reinhardt, J., concurring)) (emphasis added).

Prior to its decision in this case, the Second Circuit had upheld a similar condition in *Boles*, which in turn relied on *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (*en banc*)) and *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). *See Boles,* 914 F.3d at 112 (relying on *Asherman* and *Johnson* in upholding an identical polygraph condition). In *Asherman*, a divided *en banc* court of the Second Circuit held that it was not a Fifth Amendment violation to revoke the supervised home release of a sentenced prisoner upon notification that the prisoner refused to answer questions about his crime at a scheduled psychiatric evaluation. *Asherman*, 957 F.2d at 979–80.

Thereafter, in *Johnson*, the Second Circuit relied on *Asherman* to uphold a condition similar to the one here. *Johnson*, 446 F.3d at 279–80. Citing *Johnson*, the Second Circuit in *Boles* upheld a condition similar to the one here holding that a condition "requiring a defendant to take a polygraph test as a condition of his supervised release does not violate the Fifth Amendment because the defendant retains the right to later challenge any resulting self-incrimination in court." *Boles*, 914 F.3d at 112. It is Mr. Gurbey's position that neither *Asherman,* nor *Johnson*—the cases relied on by the *Boles* Court (and ultimately decided the case here)—adequately considered this Court's holding

in. *Murphy*.[3]

In *Murphy*, the defendant, under questioning, admitted to his probation officer that he committed prior crimes. 465 U.S. at 423. In a subsequent prosecution for those admitted crimes, Mr. Murphy moved to suppress his confession based on, *inter alia*, his claim that he felt threatened that he would be punished if he refused to answer his probation officer's question. This Court rejected this argument because it found that there had been no affirmative or implied threat made to Murphy. *Id.* at 437-438. Important to this appeal, however, the *Murphy* Court acknowledged that if the state so threatened Mr. Murphy, expressly or impliedly, such a threat would violate the Fifth Amendment. *Id*. at 435.

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. *There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.*

Id. (emphasis added).

Here, unlike the case in *Murphy*, Mr. Gurbey is being threatened with a

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3 The dissent in *Asherman* did rely heavily on *Murphy* to support its position that revocation of Asherman's "supervised home release status" for failure to answer questions about his crime during a psychiatric evaluation was, in fact, a Fifth Amendment violation. *Asherman*, 957 F.2d at 986-89 (Cardamone, J., dissenting).

violation of his supervision for failure to comply. And while a defendant may have the right to challenge new charges based on his/her/their compelled confession pursuant to this condition, in the interim, that defendant will have been charged with a crime and a violation of supervised release. And it is a near certainty that such a defendant will be in custody waiting for the district court to resolve the defendant's motion to suppress. *See* Fed. R. Crim. P. 32.1(a)(6) (the burden rests with a defendant, charged with a violation of his or her supervised release, to prove by clear and convincing evidence, that he or she is neither a flight risk nor a danger to the community).

The Fifth Amendment cannot abide a condition of supervision that compels incriminating statements simply because sometime in the future the incriminating statements *may* be suppressed—all the while the defendant sits in custody. In the alternative, where a defendant validly invokes his/her/their right to remain silent, the condition envisions a revocation of supervised release—a scenario left unaddressed by the Second Circuit's decisions in *Asherman*, *Johnson* and *Boles*.[4]

B. There is a split in the Circuits.

The Second Circuit has split from other Circuits in at least two ways. First, the Second Circuit in this case and *Boles* has condoned a condition that

4 The Second Circuit addresses compelled self-incrimination with the possibility of a future suppression. But if a supervisee doesn't want to sit in custody while the defense attorney litigates a suppression motion that person may validly invoke their right to remain silent. Such valid invocation, however, will land that same supervisee in custody. The Second Circuit provides no remedy for this intolerable scenario.

makes any invocation against self-incrimination a violation of supervised release. Second, the Second Circuit has held that such a condition is constitutionally permissible because a defendant, after-the-fact, may challenge any incriminating statements in a future prosecution.

1. The Second Circuit is at odds with the Tenth Circuit.

Relying on the reasoning in *Murphy*, the Tenth Circuit held that a condition that would punish a federal supervisee for invoking his right against self-incrimination when refusing a polygraph ran afoul of the Fifth Amendment. *United States v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016). Von Behren was on supervised release after a conviction for distribution of child pornography. *Id*. at 1141. His conditions of supervision required that he complete sex offender treatment. *Id*. at 1142. As part of his treatment program, Von Behren was required to complete a sexual history polygraph. *Id*. at 1142–43. Von Behren objected and appealed to the Tenth Circuit.

The *Von Behren* Court held that "[*Minnesota v.*] *Murphy* makes this case an easy one … It recognizes that a *threat to revoke one's probation* for properly invoking his Fifth Amendment privilege is the type of compulsion the state may not constitutionally impose." *Id*. at 1150 (emphasis added). Because the proposed condition here, like the one in *Von Behren*, *will* punish Mr. Gurbey for validly invoking his Fifth Amendment right to remain silent, it places the Second Circuit at odds with the Tenth Circuit on this point.

2. The Second Circuit is at odds with the First Circuit.

The Second Circuit side-stepped the thorny Fifth Amendment question recognized by the *Von Behren* Court by holding that a mandatory polygraph condition was justified because a defendant is "subject to [his] right to challenge in a court of law the use of such statements as violations of [his] Fifth Amendment rights," such that Gurbey "will be deemed to have not waived [his] Fifth Amendment rights." *Id*. *See also Boles*, 914 F.3d at 112 (the defendant "retains the right to later challenge any resulting self-incrimination in court." (citing *Johnson*, 446 F.3d at 280, and *Asherman*, 957 F.2d at 982-983). The Second Circuit's holdings in *Gurbey*, *Boles*, *Johnson*, and *Asherman* suggest that a Fifth Amendment violation is tolerable because there is some chance it will be remedied in the future. As discussed above, however, the "touchstone" of the Fifth Amendment, however, is the right to be *free* from compulsion—not to be compelled and then later have a court determine such compelled statements can't be used against you. *Lefkowitz v. Cunningham*, 431 U.S. at 806 (1977).

Upholding a condition that compels an examination that compels self-incrimination under threat of violation because any incriminating statement may later be suppressed is a backwards analysis. It leaves unanswered the obvious tension with the Supreme Court's decision in *Murphy*. It also leaves undefined the potential remedy for a person sitting in custody waiting for resolution of a suppression motion. And it therefore fails to provide the lower courts with appropriate guidance. Finally, it does not address what type of

remedy is available to Mr. Gurbey in the event he invokes his right to remain silent in violation of the compelled answer condition and his supervision is revoked.

In contrast to the Second Circuit's approach, is the First Circuit's decision in *United States v. York*, 357 F.3d 14 (1st Cir. 2004). In *York*, the district court included in its sentence a polygraph condition that read as follows:

> The defendant is to participate in a sex offender specific treatment program at the direction of the Probation Office. The defendant shall be required to submit to periodic polygraph testing as a means to insure that he is in compliance with the requirements of his therapeutic program. No violation proceedings will arise based solely on a defendant's failure to "pass" the polygraph. Such an event could, however, generate a separate investigation. When submitting to a polygraph exam, the defendant does not give up his Fifth Amendment rights.

Id. at 24-25. Mr. York challenged the condition as violating his Fifth Amendment rights. The First Circuit affirmed the imposition of the condition—but with its own constitutional interpretation. The First Circuit noted that the district court's order could be construed in three different ways:

> (1) that York's supervised release will not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds; (2) that York must answer every question during his polygraph exams on pain of revocation, but that his answers will not be used against him in any future prosecution; or simply (3) that York will be entitled, in any future prosecution, to seek exclusion of his answers on the grounds that the polygraph procedure forced him to incriminate himself.

Id. at 25. The First Circuit chose to construe the condition in the first and "most sensible" way, *id.*, and rejected the second and third possibilities; the

third being the rationale the Second Circuit offered for condoning a similar condition. In this fundamental way, the First and Second Circuits are split in their respective treatment of compelled answer conditions—the First Circuit has made it clear that a supervisee may invoke his/her/their right to remain silent if asked incriminating questions during a polygraph. In contrast, the Second Circuit has held only that a defendant may later challenge the confession after being charged with a new crime.

Unlike the Second Circuit's decisions here (and in *Boles*, *Johnson*, and *Asherman*), the *York* decision is consistent with *Murphy* and provides needed guidance to the lower courts. Here, Mr. Gurbey's condition has no Fifth Amendment caveat that could save it. As such, it is at odds with *York*, with this Court's decision in *Murphy* and with the Fifth Amendment.

3. The Second Circuit is at odds with the Third Circuit.

For the same reasons, the Second Circuit is also at odds with the Third Circuit. The Third Circuit has held that a sex offender polygraph condition is permissible because "if a question is asked during the polygraph examination which calls for an answer that would incriminate appellant in a future criminal proceeding, [the defendant] retains the right to invoke his Fifth Amendment privilege and remain silent." *United States v. Lee*, 315 F.3d 206, 212–13 (3d Cir. 2003). In considering *Lee*, the Ninth Circuit identified another way in which the Third Circuit splits from the Second.

> [T]he government's reliance on *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003), fails because that case is distinguishable. As we

> noted in *Antelope,* the *Lee* court had simply found the defendant failed to show his probation remained conditioned on waiving his Fifth Amendment privilege: the polygraph condition in *Lee* did not require the defendant to answer incriminating questions, and the prosecutor there had stipulated that a failure to pass the polygraph test would not likely result in violation of supervised release. [*United States v.*] *Antelope,* 395 F.3d [1128,] 1138–39 [(9th Cir. 2005)] (discussing *Lee,* 315 F.3d at 212). Here, in contrast, [the defendant] faced a concrete threat of revocation.

United States v. Bahr, 730 F.3d 963, 967 (9th Cir. 2013). Unlike the condition in Mr. Gurbey's case that makes clear that he "must answer," the supervisee in *Lee* could refuse to answer incriminating questions.

4. The Second Circuit is at odds with the Seventh Circuit.

The Seventh Circuit addressed a case where Indiana inmates were required to complete a sex offender program while still in custody. *Lacy v. Butts*, 922 F.3d 371 (7th Cir. 2019). Part of that program included interviewing inmates about past criminal conduct and, at the program's discretion, polygraphing the inmate. *Id*. at 373–74. Failure to submit to any part of the program was punished with the reduction of "good-time credits." *Id*. at 374. The inmates filed a class action law suit led by Lacy to enjoin the program's requirements. *Id*. at 373.

Relying, in part on *Von Behren*, as well as this Court's holding in *McKune v. Lile*, 536 U.S. 24 (2002), the Seventh Circuit found that the sex offender program was unconstitutional and needed to be changed.

> We acknowledge that the line between permissible pressure and impermissible compulsion can be difficult to draw. That may explain why in *Lile*, the Supreme Court's latest pronouncement on the subject, the justices failed to produce a majority

> opinion. 536 U.S. 24, [ ]. Nonetheless, many cases are not close to the line, and ours is one of them.

Id. at 377. Indeed, with respect specifically to polygraph testing as a condition of supervision, the Seventh Circuit is in lockstep with the First: "A defendant on supervised release retains the privilege to invoke his Fifth Amendment rights." *United States v. Kappes*, 782 F.3d 828, 855–56 (7th Cir. 2015).

The Second Circuit's holdings in *Asherman*, *Johnson*, *Boles* and now this case stand in stark contrast with the Tenth Circuit's holding in *Von Behren*, the First Circuit's holding in *York*, the Third Circuit's holding in *Lee*, and the Seventh Circuit's holding in *Lacy* and *Kappes*. In addition to clarifying the reach of this Court's holding in *Murphy*, this case presents an ideal opportunity to resolve the circuit split on what qualifies as unconstitutional compelled self-incrimination.

5. The Circuit split is entrenched and unlikely to be resolved absent action from this Court.

The circuit split described above is now well established and entrenched. Second Circuit precedent has clearly and repeatedly upheld such conditions over Fifth Amendment objections. By contrast with the Second Circuit, the First, Third, Seventh, and Tenth Circuits have followed a different approach. Adding to the urgency is the fact that conditions like the one at issue in this case are frequently imposed. Many state cases impose similar conditions as well. Review by this Court is necessary to resolve the split and to ensure consistent application of the Fifth Amendment in the federal and

state systems.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MICHELLE ANDERSON BARTH
CJA appointed counsel for Petitioner
Law Office of Michelle Anderson Barth
P.O. Box 4240
Burlington, VT 05406
(619) 884-3883