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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

JUSTIN STABLER
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 22-60005

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the 120-month sentence ordered by the district court is substantively unreasonable because, among other reasons, the Guidelines sentencing range was 46 to 57 months in prison.
- 2) Whether the district court abused its discretion by ordering the following two special conditions of supervised release:
 - a) requiring Mr. Stabler to submit his electronic communication devices to searches; and
 - b) requiring him to refrain from consuming alcohol.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Stabler for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The Grand Jury returned the Indictment on November 7, 2017.

Mr. Stabler took responsibility for his actions by pleading guilty to the charge. The court sentenced him to serve 90 months in prison, followed by three years of supervised release. Mr. Stabler appealed the sentence to the United States Court of Appeals for the Fifth Circuit on June 28, 2018, and the court assigned the appeal case number 18-60475. The prosecution filed a Motion for Voluntary Remand in the Fifth Circuit on July 17, 2019. Through the Motion, the prosecution agreed that the probation officer's confidential sentence recommendation to the district court was at odds with the content of the Presentence Investigation Report (hereinafter "PSR"). Therefore, the Fifth Circuit remanded the case to district court for resentencing via an Order filed on July 19, 2019, in case number 18-60475.

On remand, the district court ordered a 120-month term of imprisonment, which was 30 months higher than the initial 90-month sentence. The sentence range on remand under the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines" or "Guidelines") was only 46-to-57-month prison. The court also ordered three years of supervised release and a \$1,500 fine. Two of the

special conditions of supervision ordered by the court – submission of Mr. Stabler’s electronic communication devices to searches by the probation officer and prohibition against consuming alcohol – are at issue on appeal. The court entered a Judgment on December 30, 2021. The district court’s Judgment is attached hereto as Appendix 1.

Mr. Stabler filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on January 4, 2022. The Fifth Circuit case number is 22-60005. The Fifth Circuit affirmed the district court’s rulings via an Opinion filed on November 4, 2022. The Fifth Circuit filed a Judgment on the same day. The Fifth Circuit’s Opinion and Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on November 4, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. STATUTE INVOLVED

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;

* * * * *

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Stabler for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Mr. Stabler arose from the laws of the United States of America.

B. Statement of material facts.

Mr. Stabler accepted responsibility for his actions by pleading guilty to the subject felon in possession of a firearm charge. The parties entered into a Plea Agreement and a Plea Supplement through which the prosecution agreed to recommend a sentence within the lower fifty percent of the Sentencing Guidelines range. At sentencing, the prosecutor stood behind this lower fifty percent recommendation.

The Guidelines sentence range was only 46-to-57 months in prison. The lower fifty percent of that range is 46 to 52 months in prison, which is significantly less than the 120-month prison term ordered by the district court. Also, the ordered term is 30 months more than the 90-month prison term ordered at the

initial sentencing hearing, before the Fifth Circuit remanded the case for resentencing.¹

The defense objected to the sentence as substantively unreasonable, focusing on the fact that the Sentencing Guidelines account for all the court's reasons for ordering an upward variance. The defense also objected to imposing the following two special conditions of supervised release: (1) prohibiting alcohol consumption during supervised release; and (2) requiring Mr. Stabler to submit his electronic devices to warrantless searches during supervised release. The court overruled the objections.

¹ Mr. Stabler acknowledges that the range under the Sentencing Guidelines increased between the time of the initial sentencing hearing and the sentencing hearing after remand. The original Guidelines range was 33 to 41 months in prison. Before the final sentencing hearing, the district court learned about Mr. Stabler's purported misconduct while in the Bureau of Prisons' custody. Therefore, the probation officer recommended that Mr. Stabler should no longer benefit from a three-point reduction of his offense level for acceptance of responsibility. This resulted in an increase in Mr. Stabler's offense level from 13 to 16. Correspondingly, his Guidelines range raised from 33 to 41 months in prison, to 46 to 57 months in prison.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

One issue in this case is whether the significantly above-Guidelines 120-month prison sentence ordered by the district court is unreasonable. The sentencing range under the Sentencing Guidelines was 46 to 52 months in prison. Considering this Guidelines range and considering the facts of Mr. Stabler's case, the 120-month sentence is unreasonably high.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” The Court should exercise its discretion and grant certiorari because this case involves a grossly unwarranted deviation from the Sentencing Guidelines. While the Guidelines are not mandatory, they provide researched and well-reasoned grounds for ordering sentences within a particular range for similarly situated defendants. Granting certiorari in this case will allow the Court an opportunity to provide guidance about necessary justification for deviating from the Guidelines.

The second issue in this case is whether the district court erred by ordering two special conditions of supervised release – a requirement that Mr. Stabler refrain from consuming alcohol, and a condition requiring him to submit his electronic devices to warrantless searches. Both issues are important, as imposing these conditions of supervised release is a nationwide problem.

The electronic device search requirement is particularly important. The warrantless search of cellular telephones and computers seriously infringes on a supervisee's Fourth Amendment right to be free from unreasonable searches. As this Court ruled in *Riley v. California*, 134 S.Ct. 2473, 2496 (2014), these types of devices contain a wealth of personal information that reveals many or most aspects of a person's private life.

This Court should grant certiorari to review whether a defendant on supervised release should be required to submit his or her cellular telephones, computers and other electronic devices to warrantless searches by a probation officer. While some fact scenarios may warrant this type of intrusion, it has become an all too commonplace special condition of supervision. In other words, this has become more of a "standard" condition of supervised release, as opposed to a "special" condition, which it was originally intended to be. The Court should grant certiorari to correct this incursion on defendants' Fourth Amendment right to privacy.

B. The 90-month sentence is substantively unreasonable because, among other reasons, the Guidelines sentencing range was 46 to 57 months in prison.

1. Legal tests to measure the substantive reasonableness of a sentence.

An above-Guidelines sentence is substantively unreasonable if it "(1) does not account for a factor that should have received significant weight, (2) gives

significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015) (emphasis added; citation omitted). Mr. Stabler contends that the sentence is unreasonable because the district court erred in balancing the sentencing factors under 18 U.S.C. § 3553(a).

A court must consider “the totality of the circumstances” in the reasonableness of sentence analysis. *United States v. Gerezano-Rosales*, 692 F.3d 393, 398 (5th Cir. 2012) (citations omitted). The starting point for the totality of the circumstances analysis is 18 U.S.C. § 3553, titled “Imposition of a sentence.”

Section 3553(a) requires judges to consider several factors when they craft appropriate punishments for offenses. The factors include, inter alia:

- “the nature and circumstances of the offense” (§ 3553(a)(1));
- “the history and characteristics of the defendant” (*id.*);
- “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (§ 3553(a)(2)(A));
- “to afford adequate deterrence to criminal conduct” (§ 3553(a)(2)(B));
- “to protect the public from further crimes of the defendant” (§ 3553(a)(2)(C));

- “to provide a defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (§ 3553(a)(2)(D));
- “the kinds of sentences available” (§ 3553(a)(3));
- “the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines” (§ 3553(a)(4)(A)); and
- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” (§ 3553(a)(6)).

These factors are considered under the following subheadings. All or most of these factors support a conclusion that the district court ordered a substantively unreasonable sentence.

2. The nature and circumstances of the offense under § 3553(a)(1).

There is nothing unusual or egregious about Mr. Stabler’s possession of the gun. He possessed it for only about 20 or 30 minutes. Mr. Stabler was taking the gun back to the person that he purchased it from when the police encountered him. He dropped the gun when police ordered him to do so. These facts do not support an above-Guidelines sentence.

3. The history and characteristics of the defendant under § 3553(a)(1).

The vast majority of Mr. Stabler's prior convictions do not involve violence against others. Also, as defense counsel argued at sentencing, the criminal history component of the Guidelines calculation adequately accounted for Mr. Stabler's criminal history. Even the prosecutor acknowledged that the Sentencing Guidelines calculation accounts for Mr. Stabler's criminal history.

We note that the district court concluded that Mr. Stabler is or was a member of the Simon City Royals street gang. Mr. Stabler denied current gang membership and the issue was hotly contested at the sentencing hearings. But the bottom line is this – the district court stated that the gang membership issue did not affect his decision to order a 120-month sentence. Therefore, that issue should not be considered in this Court's analysis either.

4. Just punishment for the offense and adequate deterrence to criminal conduct under § 3553(a)(2)(A) and (B).

The Sentencing Guidelines are adopted by the Sentencing Commission. The stated purpose of the Sentencing Commission "is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." Sentencing Guidelines, Ch. 1, Pt.

A.1.1. (emphasis added). Also, the Guidelines are meant to “combat crime through an effective, fair sentencing system.” *Id.* at Ch. 1, Pt. A.1.3. (emphasis added).

The statutory maximum penalty for felon in possession of a firearm is ten years in prison, and the statute carries no required minimum sentence. 18 U.S.C. §§ 922(g)(1) and 924(a)(2). A sentence within the 46-to-57-month Guidelines range met the goals of punishment and deterrence.

Further, even the prosecutor believed that a sentence within the lower fifty percent of the Guidelines range represented just punishment for the offense and adequate deterrence to criminal conduct. The prosecutor made this recommendation at sentencing, but the district court ignored his reasonable advice.

5. Protection of the public from further crimes of the defendant under § 3553(a)(2)(C).

As stated above, the majority of Mr. Stabler’s priors do not involve violence against others. Therefore, a Guidelines sentence would have been sufficient to protect the public from future criminal activity.

6. The need for educational or vocational training, medical care, or other correctional treatment under § 3553(a)(2)(D).

This factor does not come into play in the subject analysis.

7. The kinds of sentences available under § 3553(a)(3).

This factor does not come into play in the subject analysis.

8. The Guidelines sentencing range under § 3553(a)(4)(A).

The Guidelines sentence range was 46 to 57 months in prison. As the Court is aware, the Sentencing Commission goes to great lengths to study and provide guidance regarding what constitutes a fair sentence for all federal crimes. A sentence within the Commission's recommended range would have been sufficient to meet the § 3553(a) considerations in this case.

9. Conclusion: § 3553(a) analysis.

All or most of the § 3553(a) factors support a finding that Mr. Stabler should have been sentenced within the 46-to-57-month Guidelines sentence range. Mr. Stabler therefore asks this Court to grant certiorari, then vacate his sentence and remand the case to the district court for resentencing.

C. The district court abused its discretion by ordering two of the special conditions of supervised release.

1. Legal tests to determine whether a district court abuses its discretion by ordering a special condition of supervised release.

A district court's discretion to impose special conditions of supervised release is restricted in at least two ways. *United States v. Scott*, 821 F.3d 562, 569 (5th Cir. 2016) (citation omitted).²

² In *Scott*, the Fifth Circuit vacated the district court's imposition of two special conditions of supervision – a lifetime ban on accessing any computer with internet access and a ban on having unsupervised contact with minors. 821 F.3d at 572. The Court reached this conclusion under a *plain error* standard of review. *Id.* at 570.

First, under 18 U.S.C. § 3583(d)³ the condition of supervision must be reasonably related to one of the following four factors found in 18 U.S.C. § 3553(a):

- (1) the nature and characteristics of the offense and the history and characteristics of the defendant,
- (2) the deterrence of criminal conduct,
- (3) the protection of the public from further crimes of the defendant, and
- (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.

Scott, 821 F.3d at 570 (citation omitted). If any one of the factors is satisfied, then this initial test for reasonableness is met. *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014) (citation omitted).⁴

³ In relation to a court's authority to order special conditions of supervision, § 3583(d) states: 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[.]

⁴ In *Salazar*, the Fifth Circuit vacated the district court's imposition of a special condition of supervision that required the defendant to "refrain from purchasing, possession, or using any sexually stimulating or sexually oriented materials[.]" 743 F.3d at 448, 453.

Second, “the condition must be narrowly tailored such that it does not involve a ‘greater deprivation of liberty than is reasonably necessary’” to achieve the above stated goals. *Scott*, 821 F.3d at 570 (emphasis added; citation omitted).

When applicable, a third factor applies – “the condition must be consistent with the policy statements issued by the Sentencing Commission.” *United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009) (citing 18 U.S.C. § 3583(d)(3)).

The above tests are consistent with the provisions of 18 U.S.C. §§ 3553(a) and 3583(d). Also, the restrictions on imposing special conditions of supervision set forth in U.S.S.G. § 5D1.3(b) are similar to the above stated tests. Section 5D1.3(b) states:

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

See also United States v. Caravayo, 809 F.3d 269, 272, 274 (5th Cir. 2015)

(citation omitted) (applying the above tests and vacating a special condition of supervision that barred the defendant from dating anyone with minor children).

2. Analysis: the district court abused its discretion by requiring Mr. Stabler to submit his electronic communication devices to searches and refrain from consuming alcohol.

We now move to the crux of this issue – whether application of these tests indicates that the district court abused its discretion when it ordered the following two special conditions of supervision:

- (1) requiring Mr. Stabler to “submit [his] ... electronic communication devices ... to a search conducted by a United States Probation Officer[;]” and
- (2) requiring him to “refrain from consuming alcohol[.]”

First considered are the three sub-tests under § 3553(a). Section 3553(a)(1) requires us to consider whether ordering these two special conditions of supervision is reasonably related to either “the nature and circumstances of the offense” or “the history and characteristics of the defendant[.]”

The district court’s stated no reason at all for ordering the special condition requiring searches of electronic devices or the special condition prohibiting Mr. Stabler from consuming alcohol. The court’s silence on the issue obviously does nothing to explain why this special condition of supervision relates to either “the nature and circumstances of the offense” or “the history and characteristics of the defendant[.]” And in fact there is no relationship between ordering this special condition of supervision on the one hand, and the two legal tests stated in § 3553(a)(1) on the other.

The next consideration is § 3553(a)(2)(B), which questions whether ordering the special conditions of supervision is reasonably related “to afford[ing] adequate deterrence to criminal conduct[.]” Subjecting any person’s communication devices to searches and/or barring a person from drinking alcohol may or may not have a deterrent effect on criminal activity. However, Mr. Stabler’s crime of conviction and/or his personal history do not indicate that these two special conditions of supervision would provide any more deterrent effect on criminal conduct than it would with any other person. This factor does not support imposing the subject special condition of supervision.

Next considered is § 3553(a)(2)(C), which requires the special conditions of supervision to be reasonably related “to protect[ing] the public from further crimes of the defendant[.]” The defense sees no reason why subjecting Mr. Stabler to the subject special conditions of supervision protects the public.

Finally, under § 3553(a)(2)(D), the instant special conditions of supervision must be reasonably related “to provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]” The special conditions of supervision at issue are not related to this factor at all.

Neither requiring Mr. Stabler to subject all of his electronic communication devices to searches nor barring him from alcohol consumption are supported by the

§ 3553(a) factors analyzed above. If this Court agrees, then it must grant certiorari and ultimately vacate these two special conditions of supervision without the need to analyze the remaining tests for reasonableness. *See, Salazar*, 743 F.3d at 451-53 (vacating a special condition of supervision because the district court failed to demonstrate “that it was reasonably related to the statutory factors” set forth in § 3553(a)). Nevertheless, Mr. Stabler will analyze the remaining tests that must be met for a court to legally impose a special condition of supervision.

Under the next test, we consider whether “the condition [is] narrowly tailored such that it does not involve a ‘greater deprivation of liberty than is reasonably necessary’” to achieve the goals stated in § 3553(a). *Scott*, 821 F.3d at 570 (emphasis added; citation omitted). An example of why the special condition related to searches of electronic devices is overly broad is because it allows a probation officer to access all aspects of Mr. Stabler’s life, which will reveal a wealth of private information that has nothing to do with possessing a firearm or any other illegal activity.

For this point, we look to this Court’s holdings in *Riley v. California*, 134 S.Ct. 2473, 2496 (2014), a case in which the Court found that a warrant is typically required to search a cellular telephone incident to arrest. In *Riley*, the Court recognized the wealth of highly private information contained on a modern cellular phone. The Court held “[w]ith all they contain and all they may reveal, they hold

for many Americans ‘the privacies of life[.]’” *Id.* at 2494-95 (citation omitted). Stated another way, “[t]he sum of an individual’s private life can be reconstructed” through a cell phone search. *Id.* at 2489. For these reasons, imposition of the subject special condition of supervision requiring Mr. Stabler to subject his electronic communication devices to searches must be vacated because it is not narrowly tailored to achieve the goals of § 3553(a).

The condition requiring Mr. Stabler to refrain from drinking alcohol is likewise overly broad to meet the goals of § 3553(a). This is true because Mr. Stabler’s recent history indicates no issues with alcohol abuse. This condition should be vacated as well.

The third test is that “the condition must be consistent with the policy statements issued by the Sentencing Commission.” *Weatherton*, 567 F.3d at 153 (citing 18 U.S.C. § 3583(d)(3)). Mr. Stabler’s crime of conviction is felon in possession of a firearm. The Guidelines Policy Statement pertaining to ordering special conditions of supervision is U.S.S.G. § 5D1.3(d). This Policy Statement states nothing about ordering any special condition of supervision in relation to a felon in possession conviction. Therefore, the Policy Statement does not support imposing the subject special conditions of supervision.

VI. CONCLUSION

For all the reasons stated above, this Court should grant Mr. Stabler's
Petition for Writ of Certiorari.

Submitted January 31, 2023, by:



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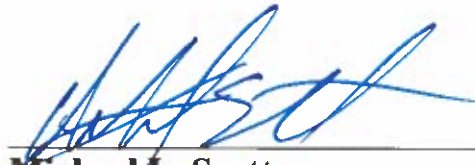
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Fifth Circuit Case No. 22-60005

CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, January 31, 2023, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 771173047123, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



Michael L. Scott

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