

NO. _____

IN THE
Supreme Court of the United States

SEAN OVERSTREET,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May counsel waive a criminal defendant's right to be present during the portion of his sentence in which special conditions of supervised release are pronounced.

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In the
Supreme Court of the United States
October Term, 2023

Sean Overstreet,
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v.
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the Constitutional violations and remedy the lower courts' decision in conflict with other appellate court authority, resulting in a circuit split. Both the lower court's precedential conflicts, and the refusal to remedy Petitioner's due process violations under *United States v. Gall*, warrant the grant of the writ.

Opinion Below

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A. 1).

Jurisdictional Statement

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued a summary order affirming Petitioner's conviction on June 30, 2023 (A. 1).

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 43(a)(3)(A. 6).

STATEMENT OF THE CASE

Petitioner was charged with knowingly conspiring to distribute and possess with intent to distribute a controlled substance, involving heroin, knowingly transporting in interstate commerce one or more motor vehicles, knowing such vehicles were stolen, and knowingly conspiring to conduct financial transactions affecting interstate commerce. On April 7, 2017, Petitioner pled guilty to all three charges.

On November 18, 2021, Petitioner was sentenced to 180 months' imprisonment on Count One, 120 months on Count Two, and 180 months on Count Three, all to run concurrently. The Court found that there were special conditions set forth in the U.S. Probation Sentence Recommendation that seemed "appropriate." Defense counsel stated that there was no objection to the special conditions. These special conditions were not read into the record or orally pronounced during the sentencing hearing as the Court stated that the conditions were "very lengthy." The Court incorporated the special conditions by reference. Among the special conditions of supervised release imposed on Petitioner is a condition requiring Petitioner to disclose his financial information to the probation department including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns, and prohibiting Petitioner from maintain or opening any

additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Department. Under the condition, Petitioner is also required to cooperate with the probation officer in the investigation of his financial dealings and provide truthful monthly statements of his income and expenses, as well as sign any necessary authorization to release information forms permitting the U.S. Probation Department access to his financial records.

Second Circuit

Petitioner appealed the imposition of the financial-disclosure special condition of his supervised release, contending that the District Court committed error when the Court failed to orally pronounce the special conditions of supervised release at sentencing but included the conditions in the final written judgment.

While the government argued that defense counsel specifically agreed to the financial disclosure special condition and their inclusion in the judgment at Appellant's sentencing, Petitioner replied that counsel was asked whether he had any objection to any of the special conditions in general and was not asked about the financial disclosure condition specifically. In addition, Petitioner explained that although counsel was asked about whether he had any objections in general, the special conditions were still not orally pronounced for Petitioner's benefit as required, nor did Petitioner himself waive his right to receive pronouncement of the supervised release portion of his sentence. In addition, Petitioner argued that the

District Court failed to conduct an individualized assessment of the propriety of the special conditions of supervised release.

Summary Order

In its Summary Order affirming the judgment, the Second Circuit held that Petitioner waived any objections to the special conditions at his sentencing hearing as Petitioner acknowledged that he reviewed the materials generated by the probation department with defense counsel. The Court also held that defense counsel raised no objections to any of the special conditions during the sentencing hearing and agreed that incorporating the conditions into the record by reference, rather than reading them into the record would be satisfactory. The Second Circuit affirmed the District Court's judgment.

REASONS FOR THE GRANTING OF THE WRIT

POINT I

THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE STATUTORY AND CONSTITUTIONAL VIOLATION OF PETITIONER'S RIGHT TO BE PRESENT AT SENTENCE.

Federal Rule of Criminal Procedure 43(a)(3) requires that a defendant be present at sentencing. The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, *e. g.*, *Illinois v. Allen*, 397 U.S. 337 (1970), but the Supreme Court has “recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.” *United States v. Gagnon*,

470 U.S. 522, 526-27 (1985). In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Supreme Court explained that a defendant has a due process right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Id.*, at 105-106, 108; see also *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975).

The District Court imposed Petitioner’s “very lengthy” financial disclosure condition of supervised release by incorporating it by reference, rather than advising Petitioner of it in open court, violating Petitioner’s right to be present for sentencing.

Various circuit courts have found that where a written judgment contains a special condition that was not orally pronounced at sentencing, the condition should be vacated. *See, United States v. Sepulveda-Contreras*, 466 F.3d 166, 170-173 (1st Cir. 2006)(vacating financial disclosure special condition where written judgment contained the condition that was not announced orally at sentencing, finding defendant's right to be present at sentencing was violated); *United States v. Rogers*, 961 F.3d 291, 299-301 (4th Cir. 2020)(vacating and remanding defendant’s sentence where district the district court was required to orally pronounce the discretionary conditions of supervised release imposed, but failed to do so); *United States v. Timpson*, No. 19-50924, 2022 U.S. App. LEXIS 25110, at *2 (5th Cir. Sep. 7, 2022)(finding that any discretionary condition of supervised release that 18

U.S.C. § 3583(d) does not require must be orally pronounced at sentencing); *United States v. Plada*, 628 F. App'x 443, 444 (7th Cir. 2016) vacating and remanding defendant's sentence where district court failed to explain its reasons for imposing special conditions of supervised release —"an error which would independently require a remand."); *United States v. Anstice*, 930 F.3d 907, 908 (7th Cir. 2019)(vacating two non-mandatory conditions provided in the written judgment because the district court failed to announce them during sentencing); *United States v. Reyes*, 18 F.4th 1130, 1139-40 (9th Cir. 2021)(finding that defendant's sentence must be vacated because numerous supervised release conditions which appeared in her written judgment were not pronounced orally at sentencing); *United States v. Rodriguez*, No. 20-13534, 2023 U.S. App. LEXIS 19766, at *31 (11th Cir. Aug. 1, 2023)(vacating the conditions and remanding for resentencing where the non-mandatory supervised release conditions were imposed only as part of defendant's written sentence and not orally announced at the sentencing hearing). As such, the Second Circuit's decision to affirm the district court's imposition of Petitioner's financial disclosure special condition of supervised release conflicts with decisions of other circuits, as to call for an exercise of this Court's supervisory power.

Additionally, the Second Circuit in *United States v. DeMartino*, 112 F.3d 75, 78 (2d Cir. 1997), held that a defendant has the "constitutional right to be present when he is sentenced." The Second Circuit has decided that the district court deprives a defendant of his right to be present at sentencing if the final judgment

contains special conditions of supervised release that were not part of the court's oral pronouncement of his sentence. *United States v. Handakas*, 329 F.3d 115, 118-19 (2d Cir. 2003). "Where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment and commitment[,] the oral pronouncement must control." *United States v. Truscello*, 168 F.3d 61, 62 (2d Cir. 1999).

The Second Circuit wrongfully decided that Petitioner waived any objections to imposition of the special conditions. While Petitioner acknowledged that he reviewed the materials generated by the probation department with defense counsel and defense counsel raised no objections to any of the special conditions during the sentencing hearing, it was Petitioner's waiver that was necessary, not counsel's.

The District Court did not discuss the burdensome special financial conditions with Petitioner. Nor did the District Court clearly obtain Petitioner's waiver of his right to receive the pronouncement of the special conditions verbally. Thus, any argument that Counsel effectively waived Petitioner's right to be present must be rejected. For the waiver to be effective as knowing and voluntary, Petitioner would have had to have been explicitly advised of what rights he was relinquishing. *United States v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989)(an effective waiver must be both knowing and voluntary, and may be revealed either in the record of the proceedings or by "an allegation and evidence" that the accused was advised of and waived his right to be present). *See also, United States v. Nichols*, 56 F.3d 403, 417 (2d Cir. 1995); *Carnley v. Cochran*, 369 U.S. 506

(1962). In Petitioner's case, it was only counsel who purportedly waived the recitation of the special conditions imposed by the Court, falling far short of an effective waiver of Petitioner's right to be present at sentence. While Petitioner did acknowledge that he reviewed the lengthy presentence report with counsel, Petitioner was never told that he had a right to have the special conditions explained to him. And, the District Court did not cause Petitioner to specifically acknowledge the burdensome special financial condition that was imposed. Thus, any purported waiver was not effective. *Fontanez*, 878 F.2d at 35; *Nichols*, 56 F.3d at 417; *Cochran*, 369 U.S. at 516.

Because of the violation of Petitioner's right to be present at sentencing, and the erroneous imposition of the financial disclosure special condition, which conflicts with the decisions of other circuits, as well as Second Circuit precedent, this Court should grant certiorari.

Compounding the error here, the Second Circuit approved of the faulty imposition of a serious condition of supervised release even though the District Court failed to make an individualized assessment as to whether the imposed condition was appropriate for Petitioner. The Court has held that "[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party . . . [and] make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

Further highlighting this vital procedural step, circuit courts have decided that “[c]onditions of supervised release must be supported by some evidence that the condition imposed is tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns,” *United States v. Voelker*, 489 F.3d 139, 143-144 (3d Cir. 2007), and “where a sentencing court fails to adequately explain its reasons for imposing a condition of supervised release or the condition's relationship to the applicable sentencing factors, we may nevertheless affirm the condition if we can ‘ascertain any viable basis for the . . . restriction in the record before the District Court on our own.’” *Id.* at 144.

The Fourth Circuit has also found that the district court may impose any special condition that is reasonably related to the statutory sentencing factors but “must specifically explain the bases for a discretionary condition of supervised release unless (1) the reasons are self-evident, (2) a defendant did not raise any nonfrivolous objections to the condition, and (3) the court provided an adequate explanation for the sentence as a whole.” *United States v. Boyd*, 5 F.4th 550, 559 (4th Cir. 2021).

In Petitioner’s case, the District Court failed to make an individualized assessment even though it imposed an onerous special condition of supervised release. The condition was neither mandatory nor recommended under the relevant Guideline. The District Court did not offer a reason for its imposition of Petitioners’ special condition. Consequently, the District Court’s failure to explain its

justification for the special condition conflicts with the Court's straightforward instructions in *Gall*, warranting the grant of certiorari. Supreme Court Rule 10(c); *Gall*, 552 U.S. at 49-50.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: November 3, 2023
Mill Valley, California

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21-3034-cr
United States v. Overstreet

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of June, two thousand twenty-three.

PRESENT: GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 21-3034-cr

SEAN OVERSTREET,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT:

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Attorney for the Eastern
District of New York,
Brooklyn, NY

Appeal from a judgment of conviction entered in the United States District
Court for the Eastern District of New York (Denis R. Hurley, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED that the judgment of the District Court is AFFIRMED.

Sean Overstreet appeals from a judgment of conviction entered on
November 19, 2021 in the United States District Court for the Eastern District of
New York (Hurley, J.), after a guilty plea.¹ The District Court sentenced
Overstreet principally to two terms of 180 months' imprisonment and one term
of 120 months' imprisonment, to run concurrently. As relevant here, the District
Court also imposed special conditions of supervised release requiring Overstreet
to disclose all of his financial records to the Probation Department, obtain the

¹ Overstreet pleaded guilty to conspiracy to possess heroin with intent to distribute, transportation of stolen motor vehicles, and money laundering conspiracy.


1 Probation Department's permission before opening any new financial accounts,
2 and disclose his monthly income. Although the Probation Department did not
3 include those special conditions in its Pre-Sentence Investigation Report ("PSR"),
4 it later recommended that the District Court impose them in its Revised Sentence
5 Recommendation. We assume the parties' familiarity with the underlying facts
6 and the record of prior proceedings, to which we refer only as necessary to
7 explain our decision to affirm.

8 On appeal, Overstreet challenges the special conditions of supervised
9 release on two grounds. First, he argues that the District Court failed to notify
10 the parties that it was considering imposing the special conditions in advance of
11 the sentencing hearing and failed to perform an individualized assessment and
12 state on the record its reasons for imposing the conditions. Second, he argues
13 that the District Court improperly imposed the special conditions without orally
14 pronouncing them at sentencing.

15 We review a district court's decision to impose special conditions of
16 supervised release for abuse of discretion. See United States v. Kunz, 68 F.4th
17 748, 758 (2d Cir. 2023). Here, Overstreet waived any objections to the special
18 conditions at his sentencing hearing. During the hearing, the District Court

1 asked Overstreet, "Have you reviewed with your attorney the materials
2 generated by the probation department which includes the presentence report,
3 the addendum to the report, and also a recommendation from probation as to
4 what the appropriate sentence would be[?]" Overstreet responded that he had
5 reviewed the materials with counsel. The District Court then asked Overstreet's
6 attorney whether he had "any problem with the special conditions that [were]
7 recommended by probation." The attorney answered, "No objection." The
8 District Court also explicitly noted that the Probation Department's
9 recommended special conditions had been made available to both parties and
10 proposed incorporating the text of the special conditions by reference into the
11 judgment, rather than reading them into the record. Overstreet's attorney
12 specifically agreed that such an approach would be "satisfactory." Overstreet
13 has thus waived his challenge to these special conditions of supervised release on
14 appeal, and we affirm the District Court's imposition of the challenged
15 conditions.

16

 Catherine H. Wolfe

5

Federal Rule of Criminal Procedure 43

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

- (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
- (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
- (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

USCS Fed Rules Crim Proc R 43

U.S.C.A. Const. Amend. VI

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