

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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CYNTHIA LEON MONTOYA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

\_\_\_\_\_

***APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE  
A PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

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To the Honorable Elena Kagan, Associate Justice of the United States and  
Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court,  
Cynthia Leon Montoya respectfully requests a 30-day extension of the time, to and  
including Wednesday, April 3, 2024, in which to file a petition for a writ of certiorari  
in this Court. The U.S. Court of Appeals for the Ninth Circuit first entered judgment  
on September 13, 2022. A copy of the Ninth Circuit panel’s opinion is attached as  
Exhibit 1. *United States v. Montoya*, 48 F.4th 1028 (9th Cir.). On December 14, 2022,  
the Ninth Circuit granted Ms. Montoya’s timely petition for rehearing en banc and

vacated the three-judge panel opinion. See Exhibit 2. On September 13, 2023, an en banc panel entered its opinion and judgment. A copy of the en banc opinion is attached as Exhibit 3. *United States v. Montoya*, 82 F.4th 640 (9th Cir.) (en banc). Ms. Montoya again timely petitioned for rehearing. On December 5, 2023, the Ninth Circuit denied that rehearing petition. See Exhibit 4.

This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Without an extension, Ms. Montoya's time to petition for writ of certiorari would expire on Monday, March 4, 2024. This application is being filed more than 10 days before that date.

Ms. Montoya, a mother of five, was arrested for transporting drugs from Mexico into the United States. She pleaded guilty to intentionally importing cocaine and methamphetamine. At sentencing, the District Court accepted Ms. Montoya's guilty plea and imposed a sentence of 100 months' imprisonment and five years of supervised release. During sentencing, the District Court orally pronounced "special" conditions of supervised release, but did not orally pronounce the discretionary "standard" conditions of supervised release listed in Section 5D1.3(c) of the U.S. Sentencing Guidelines. The Court's written judgment nonetheless imposed thirteen standard conditions of supervised release.

On appeal, Ms. Montoya argued that the District Court's decision to impose the standard conditions of supervised release without orally pronouncing them at sentencing violated her constitutional right to be present at sentencing. Initially, a three-judge Ninth Circuit panel issued an opinion rejecting that argument and

affirming the sentence in all respects. See *Montoya*, 48 F.4th 1028 (Exhibit 1). That decision was vacated upon the grant of Ms. Montoya’s petition for en banc rehearing. In September 2023, the en banc Court issued a 10-to-1 decision that held that “a district court must orally pronounce all discretionary conditions of supervised release, including those referred to as ‘standard’ in [the Sentencing Guidelines], in order to protect a defendant’s due process right to be present at sentencing.” *Montoya*, 82 F.4th at 644-645 (Exhibit 3 at 4).

As a remedy for the violation of Ms. Montoya’s right to be present, however, the Court “vacate[d] only the conditions of supervised release that were referred to as the ‘standard conditions.’” *Montoya*, 82 F.4th at 656 (Exhibit 3 at 26). The Court “remand[ed] to the district court for the limited purpose of reconsidering the supervised release conditions” it had vacated. *Ibid.* (Exhibit 3 at 27) (internal quotation marks omitted). While acknowledging that the Ninth Circuit’s prior cases “ha[d] taken different approaches” to “the appropriate scope of remand,” the Court held that a “limited remand approach [was] appropriate” where “the failure to pronounce” the standard conditions was “the only sentencing error.” *Ibid.* (Exhibit 3 at 26–27).

Ms. Montoya timely filed a petition for rehearing of the remedial portion of the en banc Court’s decision, arguing that the appropriate remedy for the constitutional violation in her case is a “full resentencing” on remand, including an opportunity to have the custodial portion of her sentence revisited. Ms. Montoya explained that the en banc Court’s remedial holding contravenes the text and intent of 18 U.S.C. §§ 3553

and 3583. Section 3553(a) provides that the sentence imposed must not be “greater than necessary[] to comply with” a set of listed purposes, including the need for the sentence imposed to “afford adequate deterrence,” “protect the public from further crimes,” and “provide just punishment for the offense.” Section 3583(c) in turn provides that, when setting the conditions of supervised release and the length of the supervised release term, the district court “shall consider the factors set forth in section 3553(a)[].” Given that district courts often view the custodial portion of the sentence and the supervised release term as interdependent tools to comply with Section 3553, “limited” remands like the one imposed by the en banc Court inhibit a district court’s ability to comply with statutory sentencing instructions. Accord *Concepcion v. United States*, 142 S. Ct. 2389, 2396 (2022) (a sentencing court must “consider[] the defendant on that day” and “the district court at resentencing can (and in many cases, must) consider the defendant’s conduct \* \* \* since the original sentencing”).

Ms. Montoya also explained that the en banc Court’s remedial holding conflicts with decisions from other circuits. For example, the Fourth Circuit has adopted a “clear rule” that when discretionary conditions of supervised release are not orally pronounced, the proper remedy is to “vacate the entire sentence and remand” for a “full resentencing.” *United States v. Kemp*, 88 F.4th 539, 546 (4th Cir. 2023); see also *United States v. Singletary*, 984 F.3d 341, 346 n.4 (4th Cir. 2021). And the Seventh Circuit, like the Fourth Circuit, has repeatedly ordered full resentencing following errors in the oral pronouncement of standard conditions. See *United States v. Mobley*,

833 F.3d 797, 801 (7th Cir. 2016) (“[C]omplete resentencing is appropriate because custodial and supervised release portions of a sentence serve somewhat overlapping purposes, and thus there might properly be an interplay between prison time and the term and conditions of supervised release.”) (internal quotation marks, punctuation and citation omitted); *United States v. Sanchez*, 814 F.3d 844, 847-848 (7th Cir. 2016) (similar).

The en banc panel denied Ms. Montoya’s second petition for rehearing. See Exhibit 4. Thus, Ms. Montoya wishes to file a petition for certiorari so this Court may (1) provide clarity to circuit courts on the proper remedy where a district court violates a criminal defendant’s right to be present in connection with the imposition of conditions of supervised release, and (2) resolve the sharp circuit split on this issue.

Undersigned counsel and the University of Virginia Supreme Court Litigation Clinic respectfully submit that the additional time requested is necessary to complete preparation of Ms. Montoya’s petition. Undersigned counsel are working to supplement the work completed by appointed counsel below with respect to the legal issues at stake on appeal. Additional time is also required to ensure that any delay from the federal prison mail screening process does not prevent Ms. Montoya from engaging meaningfully in her representation by reviewing and commenting on draft filings.

Undersigned counsel have also faced numerous overlapping deadlines in other matters during the time for preparation of a petition for writ of certiorari in this case. Among other things, the undersigned is counsel of record for a brief in opposition filed

on February 20, 2024, in this Court's case 23-660; a merits brief for respondent-intervenors in *City of Port Isabel v. FERC*, case 23-1174 in the U.S. Court of Appeals for the District of Columbia Circuit filed on February 12, 2024; an opposition to a motion for stay pending appeal, also filed on February 12, 2024 in that same case; and a merits brief for appellant in *Washington Gas Light Company v. Zinner*, case 1962-23-4 in the Court of Appeals of Virginia, due on February 28, 2024.

Wherefore, Ms. Montoya respectfully requests that an order be entered extending the time to file a petition for writ of certiorari up to and including April 3, 2024.

Respectfully submitted,



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February 22, 2024