No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RANGSEY ARUNDECH PICH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

In federal criminal proceedings, circuit courts agree that an unambiguous oral pronouncement overrides a subsequent inconsistent written order. Courts are divided, however, about what an appellate court may consider when determining ambiguity.

The question for the Court to resolve is whether a reviewing court may find ambiguity by going beyond the words used by the district court when pronouncing the relevant decision.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Rangsey Arundech Pich and the United States. There are no nongovernmental corporate parties requiring a disclosed statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

> *United States v. Rangsey Arundech Pich*, No. 23-1619, 2024 WL 3898618 (9th Cir. Aug. 22, 2024).
>
> *United States v. Rangsey Arundech Pich*, No. 3:17-cr-2402-LAB (S.D. Cal. 2017)

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APP. NO.	DOCUMENT
A.	*United States v. Rangsey Arundech Pich*, U.S. Court of Appeals for the Ninth Circuit, Memorandum, filed August 22, 2024
B.	*United States v. Rangsey Arundech Pich*, U.S. Court of Appeals for the Ninth Circuit, Order Denying Petition for Rehearing, filed October 30, 2024

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Petitioner Rangsey Arundech Pich respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 22, 2024.

INTRODUCTION

All circuits uniformly hold that in the federal criminal context a district court's unambiguous oral pronouncement controls over an after-the-fact written order. But the circuits are divided as what an appellate court may review to determine ambiguity in a district court's oral pronouncement.

At least, the Tenth Circuit holds that "[i]n determining whether an oral sentence is ambiguous, we consider only the words used by the sentencing court in *formally pronouncing* a sentence." *United States v. Barwig*, 568 F.3d 852, 856 (10th Cir. 2009) (emphasis added). Such an approach forecloses searching the remainder

of the transcript for evidence of the district court's intent where the actual words used by the court in pronouncing the holding are unambiguous. *Id.*

The Ninth Circuit and other Circuits, however, have held that the reviewing court can consider other comments made at the hearing and even post-hearing filings or comments when determining ambiguity.

To ensure that all federal courts are affording appropriate weight to a district court's original oral pronouncement, the Court should grant certiorari.

OPINION BELOW

The unpublished panel decision of the court of appeals affirming the decision of the district court is reprinted in Appendix A. Mr. Pich petitioned for panel rehearing and rehearing en banc. On October 30, 2024, the panel voted to deny Mr. Pich's petition for panel rehearing, and the full court declined to hear the matter en banc (attached here as Appendix B).

JURISDICTIONAL STATEMENT

On August 22, 2024, the Ninth Circuit denied Mr. Pich's appeal, affirming the district court's jurisdiction to revoke supervised release. *See* Appendix A. Mr. Pich then filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on October 30, 2024. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

As provided in 18 U.S.C. § 3583(e)(3):

> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> . . .
>
> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release.

STATEMENT OF FACTS

On February 7, 2022, the district court held a revocation hearing regarding Mr. Pich's term of supervised release. The district court had two tasks before it. Its first task was to decide whether it should revoke supervised release based on the allegations of noncompliance. And if it did revoke supervised release, its second task was to decide the appropriate sanction for the breach of the court's trust.

In accomplishing its first task, the district court followed the statutorily prescribed revocation procedures, making sure Mr. Pich was aware of his rights. *See* Fed. R. Crim. P. 32.1. After Mr. Pich admitted to the allegations of noncompliance, the court made a finding that Mr. Pich had violated conditions of supervised release. *See* 18 U.S.C. § 3583(e)(3).

At that point, the court pronounced: "Based on the admissions, I do find [Mr. Pich] in violation of supervised release and supervised release is revoked."

After stating that "supervised release is revoked," the court then pivoted to a discussion of the appropriate post-revocation "sanction." The court calculated the sentencing guidelines and asked the parties to speak about "what, if any, sanction is appropriate given these violations."

The court then heard argument from counsel, Probation and Mr. Pich. Ultimately, the court pronounced: "The court imposes a nine-month sanction. But I am going to stay imposition of that sanction." The court explained that "I'm going to set this for a review in three months and a week. [. . .] In the meantime, I'm going to release him from custody on Wednesday into [a drug treatment] program." The court then set conditions for Mr. Pich's release to the program. These included, "comply with all the rules of the program," do not "do anything that subjects him to getting kicked out of the program," and "successfully complete the program."

The court declared that "[i]f he successfully completed the program, then my inclination would be to make the stay on the sanction, the nine-month sanction, permanent at that time." "On the other hand, if he screws up, he's probably going to face another OSC with new allegations and then he'll owe nine months for not complying this time." Finally, addressing Mr. Pich, the court asked: "Do you understand Mr. Pich? You are going to get out. Then we'll come back and make a final decision." And again, at the very end the court informed Mr. Pich: "You complete the program, like I said, then you won't have to do the nine months. Okay?"

A minute entry issued the same day stating that the court "revoke[d] supervised release" but simultaneously imposed "additional conditions." And an abstract order issued by the courtroom deputy read in relevant part that Mr. Pich was "continued on supervised release."

At the hearing after the three-month mark, Mr. Pich had successfully completed the drug treatment program. When informed of this, the court made "the stay on the custody term permanent," and informed Mr. Pich that "the nine months that I imposed and stayed, the stay is permanent now."

More than a year later, Mr. Pich was brought before the district court again for another revocation hearing. At this hearing, the district court decided to revoke the same term of supervised release that it had already revoked in February of 2022 based on new allegations of noncompliance.

On appeal, Mr. Pich challenged the district court's jurisdiction to revoke a non-existent, previously-revoked-term of supervised release. Specifically, Mr. Pich argued that because the court unambiguously declared that "supervised release is revoked," the term of supervised release "'had been annulled, and the conditions of that term d[id] not remain in effect.'" AOB 17 (quoting *United States v. Wing*, 682 F.3d 861, 868 (9th Cir. 2012)). And since the court did not impose a new term of supervision to follow, Mr. Pich's supervised release ended on February 7, 2022. Thus, the court lacked jurisdiction to once again revoke that term more than a year later.

The Ninth Circuit rejected Mr. Pich's argument. Instead of focusing on the district court's pronouncement "supervised release is revoked," the Ninth Circuit considered all the statements made by the court at the revocation hearing. After considering what the court said after proclaiming "supervised release is revoked," the Ninth Circuit concluded the all the "statements are subject to 'two or more different constructions, both of which are reasonable.'" Appendix A at 2. (quoting *United States v. Allen*, 157 F.3d 661, 668 (9th Cir. 1998)). "Therefore," the panel concluded, "the court's statements are ambiguous." *Id.*

Having found ambiguity, the Ninth Circuit considered "the district court's subjective intent." Using "subjective intent" rather than the district court's words, the panel held that "the court continued Pich on supervised release at the February 2022 hearing." *Id.*

This Petition follows.

REASONS FOR GRANTING THE PETITION

I.
The courts of appeal are divided as to what may be reviewed to determine whether there is ambiguity in the district court's oral pronouncement.

All circuits agree that in the criminal context an unambiguous oral pronouncement controls over a later entered written judgment. But courts are starkly divided as to what may be reviewed to determine ambiguity.

In determining whether an oral pronouncement is ambiguous, the Tenth Circuit "consider[s] only the words used by the sentencing court in formally pronouncing a sentence." *Barwig*, 568 F.3d at 856. This inquiry "focuse[s]

exclusively on the moment when the district court formally impose[s]" its ruling. *Id.* (citing *United States v. Villano*, 816 F.2d 1448, 1451 & n.3 (10th Cir. 1987)). The Tenth Circuit reasons that a broader inquiry would create problems: "If appellate courts were to comb the record in search of alternative meanings to a clearly pronounced sentence, we would undercut 'important principles that underlie the traditional rule'" that the orally announced decision controls. *Id.* (quoting Villano 816 F.2d at 1451). And, as noted in *Barwig*, the Tenth Circuit approach is consistent with the practices in at least some other circuits. *See id.* at 858 n.4 (citing *United States v. Penson*, 526 F.3d 331, 334 (6th Cir. 2008) and *United States v. Moyles*, 724 F.2d 29, 29–30 (2d Cir. 1983)).

But the Ninth and Fourth Circuits clearly take a different approach. In *Fenner v. U.S. Parole Commission*—a case that was relied on by the panel in the present matter—the Ninth Circuit held: "The intent of the sentencing court must guide any retrospective inquiry into the term and nature of a sentence." 251 F.3d 782, 786 (9th Cir. 2001). And *Fenner*'s ambiguity inquiry is diametrically opposed to the Tenth Circuit's because regardless of the specific words used when imposing sentence, "it is the intent of the sentencing judge which controls, and that intent is to be determined by reference to the entire record." *Id.* at 786 (quoting *United States v. Bull*, 214 F.3d 1275, 1279 (11th Cir. 2000)). Similarly, the Fourth Circuit in *United States v. Osborne*, 345 F.3d 281, 283 n.1 (4th Cir. 2003) searched the entire transcript of the hearing to locate ambiguity in the court's oral pronouncement.

The Ninth and Fourth Circuits' intent-focused approach is in direct conflict with the Tenth Circuit's narrow focus on the actual words used when pronouncing sentence. In fact, the Tenth Circuit's "jurisprudence leaves no space for undisclosed and unspoken judicial intent." *Barwig*, 568 F.3d at 856–57.

II.
Mr. Pich's case presents an issue of great importance, and is an excellent vehicle to resolve the conflict because it is outcome determinative.

Revocation and sentencing hearings constitute a significant portion of federal cases. It has long been true that the vast majority of federal cases result in a finding of guilt. Recent statistics show that 97% of federal criminal cases end in guilty pleas. U.S. Sent'g Comm'n, *2023 Sourcebook of Federal Sentencing Statistics*, 32 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf [https://perma.cc/L8CZ-EHXL]. Where there are guilty pleas, there are sentencings; and where there are sentencings, there are terms of supervised release. Under the Sentencing Reform Act of 1984, whenever a federal court sentences a criminal defendant to a term of imprisonment, it may include "a requirement that the defendant be placed on a term of supervised release." 18 U.S.C. § 3583(a). Indeed, a multi-year study of federal sentences imposed after the Court's landmark decision in *United States v. Booker*, 543 U.S. 220 (2005), found that over 99 percent of federal sentences of over one year of imprisonment also included a term of supervised release. *See Federal Offenders Sentenced to Supervised Release*, U.S. Sentencing Comm'n (July 2010), https://www.ussc.gov/sites/default/files/pdf/

research-and-publications/researchpublications/2010/20100722_Supervised_Release.pdf.

Every defendant on supervised release risks revocation and resentencing, should she violate the terms of her release. And it should not be the case that an identical revocation and sentencing can be unambiguous in the Tenth Circuit and ambiguous in the Ninth. A uniform rule is needed to explain what an appellate court may review to determine ambiguity in a district court's oral pronouncement of revocation and sentence.

Mr. Pich's case is the right vehicle to resolve this long-standing split, as his case squarely presents the issue. At the revocation and sentencing hearing, the district court clearly orally pronounced "supervised release is revoked." There was no ambiguity in the actual words the court used when revoking supervised release on February 7, 2022. It is only by looking to the subsequent statements and actions of the court that the panel was able to articulate any ambiguity. And if supervised release was revoked in February of 2022, then the district court lacked jurisdiction to later revoke a non-existent term of supervised release.

Had Mr. Pich's appeal been heard in the Tenth Circuit, he would have prevailed because the inquiry would have ended once it was determined that there was no ambiguity in the oral pronouncement, "supervised release is revoked."

III.
The Tenth Circuit's approach is correct.

It is a firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when

the two conflict. *See United States v. Villano*, 816 F.2d 1448, 1450–51 (10th Cir. 1987) ("This rule is recognized in virtually every circuit and has been the law in this circuit since the 1930's."). If an unambiguous orally pronounced sentence controls, it becomes necessary to ascertain exactly what the oral pronouncement is—specifically whether it encompasses the entire revocation and sentencing hearing, or a discrete portion of the hearing.

The Tenth Circuit's focus on the court's actual words used during oral pronouncement is the correct approach because "[a] defendant must be entitled to rely on a judge's unambiguous words." *Barwig*, 568 F.3d at 858 (citing *Villano*, 816 F.2d at 1452–53). Revocation and sentencing hearings can be long and meandering, as the court interacts with counsel, probation, and the defendant. Many things are said as parties interface with the court about whether to revoke or continue supervised release, whether to impose a lenient or severe sentence. But there comes a point at every revocation and sentencing where the court formally announces its decision.

The Tenth Circuit's focus on the actual words used when formally imposing sentence is the most effective way to limit defendants' potential confusion about the revocation and sentence. Indeed, "[i]f appellate courts were to comb the record in search of alternative meanings" to a clearly pronounced finding, such a process would naturally "undercut 'important principles that underlie the traditional rule' [that the oral pronouncement controls]." *Id.* at 856 (quoting Villano 816 F.2d at 1451). If the oral pronouncement of sentence includes everything the court says

during the entire revocation and sentencing hearing—as well as post-hearing statements and writings—then there are inherently more opportunities for after-the-fact ambiguity findings. In this, the wisdom of the Tenth Circuit's approach—which "leaves no space for undisclosed and unspoken judicial intent"—is made clear. *Id.* at 857.

This Court should grant the petition.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

Date: February 7, 2025

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