

No. _____

In the
Supreme Court of the United States of America

STEVEN DEAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Question Presented

Liberty cannot be curtailed without notice and a meaningful opportunity to be heard. In conflict with other circuits, the Eleventh Circuit requires defendants to make detailed objections to new supervised-release conditions, even when the district court imposes them without warning. Did the Eleventh Circuit err in holding that Steven Dean's general objection to new supervised-release conditions imposed without warning at the end of the revocation hearing was tantamount to no objection at all?

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**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

Steven Dean petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Steven Dean*, No. 16-15038, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is appended to this Petition.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on December 1, 2017. This petition is timely filed pursuant to Supreme Court Rule 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Statement of the Case

On June 29, 1989, Steven Dean was convicted in the Northern District of Florida of conspiring to distribute cocaine. He was convicted and sentenced to 30 years in prison plus

five years on supervised release. The only special conditions imposed were that Mr. Dean could not own a gun, that he provide the Probation Office “any requested financial information,” and that he participate in a drug-abuse program. He was released from custody in August 2010 and moved to South Florida where his mother lived.

On January 19, 2016, Mr. Dean’s probation officer petitioned the district court to revoke Mr. Dean’s supervised release because a Florida Circuit Court convicted him of aggravated battery on a child in violation of Florida Statutes § 827.03(2)(A). Mr. Dean, through his counsel, advised the court that he would admit the charged violation. Before the hearing, Mr. Dean’s counsel, having reviewed an undocketed report and recommendation from the probation officer to the court, objected to the use of the current Federal Sentencing Guidelines manual rather than the one in effect at the time of Mr. Dean’s original federal drug offense. The government responded the day before the revocation hearing.

Probation’s undocketed report and recommendation, dated January 28, 2016, recounted uncorroborated and unreliable hearsay information regarding the offense. The report contended that Mr. Dean had originally been charged with lewd and lascivious molestation of a child under the age of 12 because he had allegedly kissed and grabbed the buttocks of his girlfriend’s niece. That information was copied from a police report. The probation officer recommended *only* that the court revoke Mr. Dean’s supervised release; it did not recommend any new special conditions. *See* App’x at A-8–A-9.

The probation officer also reported that he had spoken with a prosecutor who said the original charges were dismissed when Mr. Dean pled guilty to aggravated child abuse

because the girl's family did not want her to testify. The report did not state that the probation officer contacted Mr. Dean's defense attorney or anyone else. The only person contacted was a prosecutor.

At the revocation hearing, the only factual finding the district court made was that Mr. Dean committed aggravated child abuse, just as he had admitted:

THE COURT: What issues remain to be resolved, Ms. Becker?

MS. BECKER: Your Honor, Mr. Dean is admitting the one violation in the superseding petition so it's uncontested as to that. But I don't believe there's a joint recommendation with respect to the sentence.

THE COURT: Okay. So he is admitting that on—hold on, I'll get there—that on or about June the 5th, 2012 in Miami-Dade County, he committed the offense of child abuse, aggravated, great bodily harm or torture, contrary to Florida Statute 827.03(2)(a), by pleading guilty in case number—in Florida case number F12-014020; is that correct?

MS. BECKER: Yes, Judge. That's what he pled to in the state case and he's admitting the same violation.

THE COURT: All right. And therefore I will find that he has violated his terms and conditions of probation and I will now then go to the sentencing time.

App'x at A-30.

At no point before or during the hearing did the prosecution, the probation officer, or the court notify Mr. Dean that he would be sentenced based upon hearsay allegations regarding more serious charges, which the state had dismissed when Mr. Dean pled guilty to aggravated battery on a child. The only topic discussed at the revocation hearing was the issue regarding which Federal Sentencing Guidelines manual applied.

The district court revoked Mr. Dean's supervised release and sentenced him to a 24-month prison term followed by 36 months of supervised release. In addition and without warning, the court also imposed three new special conditions of supervised release without

taking testimony, hearing argument, or providing notice to Mr. Dean and his counsel. The court required Mr. Dean to (1) “have no unsupervised personal mail, telephone or computer contact with children or minors or with-and especially the victim,” (2) “participate in a sex offender treatment program to include psychological testing and polygraph examination,” and (3) “submit to the US Probation Office conducting periodic unannounced searches of the defendant’s person, property, house, residence, vehicles, papers, computers, other electronic communication or data storage device or media, including retrieval and copying of all data from the computers and any internal or external peripherals and effects at any time, with or without warrant, by any law enforcement or probation office, with reasonable suspicion concerning unlawful conduct or a violation of condition of probation or supervised release.” App’x at A-21–A-23. Additionally, the court ordered that Mr. Dean help pay for the sex-offender treatment and the computer monitoring.

As a matter of law, Mr. Dean is not a sex offender. He has never been convicted of any sex offense. He has never admitted to having committed any sex offense. No evidence that he committed any sex offense has ever been produced in any court, other than the triple-hearsay allegations recited in the probation officer’s undocketed report and recommendation. Mr. Dean has never used a computer in the commission of any crime. He has no history of accessing any obscene materials on-line.

Mr. Dean’s lawyer immediately objected to the imposition of two of the new special conditions:

MS. BECKER: Your Honor, to preserve his right to appeal, should he choose to do so, I would renew the objection regarding the application of the guidelines.

I would also object to the court's imposition of sex offender treatment program and the computer search condition.

App'x at A-45.

Mr. Dean appealed. In the briefs and at oral argument, the main issue was whether defense counsel's objection was sufficient to preserve the issue or whether the objection was forfeited for being insufficiently detailed.

Ultimately, the Eleventh Circuit determined that it would review Mr. Dean's claims for plain error because Mr. Dean only "generally objected" and "failed to provide the basis for his objections" to the sex-offender treatment and computer-search conditions. App'x at A-10, A-11. Under that standard, Mr. Dean lost. The court of appeals held that "Dean was entitled to no notice" of new conditions, App'x at A-12, and "was not denied a meaningful opportunity to be heard," App'x at A-13, even though the conditions were imposed at the very end of a contested sentencing proceeding. The court further ruled that, even though the basis for the conditions was unsubstantiated triple-hearsay allegations that were never pursued, that was constitutional because supervised-release conditions are "limited [only] by minimal due-process rights." App'x at A-15. Because review was only for plain error, the court of appeals affirmed imposition of the conditions. App'x at A-16–A-23.

Reasons for Allowance of the Writ

If Steven Dean's supervised release had been revoked in Chicago, Minneapolis, Los Angeles, or Denver rather than in Miami, his appeal would have been reviewed for abuse of discretion rather than for plain error. Unlike the Eleventh Circuit, the Seventh, Eighth, Ninth, and Tenth Circuits require district courts to notify defendants of special conditions

they are considering imposing in advance, so as to enable better informed decision-making. *See United States v. Sherwood*, 850 F.3d 391, 395 (8th Cir. 2017) (“[W]e reject the government’s plain error contention and will review the special conditions at issue for abuse of discretion.”); *United States v. Doe*, 488 F.3d 1154, 1162 (9th Cir. 2007) (noting the government’s concession that “the district court did not provide adequate notice of the special conditions of supervised release” and “agrees that a limited remand should be ordered”); *United States v. Scott*, 316 F.3d 733, 735 (7th Cir. 2003) (“Knowledge that a condition of this kind was in prospect would have enabled the parties to discuss such options intelligently.”); *United States v. Barajas*, 331 F.3d 1141, 1143–44 (10th Cir. 2003) (holding that, when a supervised-release condition is imposed without prior notice, a defendant does not waive “his right to challenge on appeal either the imposition of the condition or the lack of notice”).

While other circuits focus on ensuring a full and fair airing of the issues, the Eleventh Circuit imposes exacting standards on defense counsel while requiring little of district judges. Thus, the Eleventh Circuit faulted defense counsel for not articulating a detailed objection to the district court’s surprise imposition of new special conditions at the end of a contested sentencing. *See* App’x at A-10–A-11. Specifically, the court of appeals held that the general objection was insufficient “to apprise the trial court and the opposing party of the particular grounds upon which appellate relief” would be sought. App’x at A-11.

This is an utterly formalistic and inequitable ruling. On the one hand, the Eleventh Circuit had no trouble discerning, for purposes of its opinion, the likely basis for imposition of these conditions, *see* App’x at A-8–A-10, even though the district judge *articulated no*

basis whatsoever for them. Compare *United States v. Brown*, 789 F.3d 932, 933 (8th Cir. 2015) (“When crafting a special condition of supervised release, the district court must make an individualized inquiry into the facts and circumstances underlying a case and make sufficient findings on the record so as to ensure that the special condition satisfies the statutory requirements.”). On the other hand, the court of appeals claimed that Mr. Dean’s counsel’s objection was opaque and mysterious:

MS. BECKER: Your Honor, to preserve his right to appeal, should he choose to do so, I would renew the objection regarding the application of the guidelines. *I would also object to the court’s imposition of sex offender treatment program and the computer search condition.*

App’x at A-45 (emphasis added). The record does not support the court of appeals’ characterization. The district court did not express any surprise, confusion, or misunderstanding. The court simply responded, “All right.”

Relying on technicalities and formalism rather than embracing reality and fairness is intolerable when significant deprivations of liberty are implicated. The Seventh and Eighth Circuit’s approach is, in contrast, even-handed and calculated to achieve fairness in process and in result. In a virtually identical case, the Eighth Circuit rebuffed the government’s argument that a similar objection was insufficient and reviewed the challenged condition for abuse of discretion. That court of appeals explained:

The district court gave Sherwood no notice that it was considering financial conditions of supervised release that are unrelated to his sexual misconduct offense. Advance notice of supervised release conditions “fits into the category of recommended ‘best practice’ rather than mandatory requirement.” *United States v. Kappes*, 782 F.3d 828, 842 (7th Cir. 2015). Thus, lack of notice will not excuse a defendant’s total failure to object to special conditions at sentencing. See *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003). But lack of

notice of an unexpected condition “may make it difficult for the defendant to mount an effective challenge to it.” *United States v. Bryant*, 754 F.3d 443, 444 (7th Cir. 2014). Therefore, ... we reject the government’s plain error contention and will review the special conditions at issue for abuse of discretion.

Sherwood, 850 F.3d at 395.

As this shows, the Seventh and Eighth Circuits follow a sensible, fair, and symmetrical approach that encourages district judges to cooperate with counsel to ensure a fair and orderly proceeding. District judges are informed that providing notice is a “best practice,” and that failure to follow it will expose their rulings to review for abuse of discretion when a general objection is made. This makes sense, as the transcript of the hearing in this case shows.

Requiring a defense lawyer who has just finished presenting points and authorities on an unrelated issue to fully articulate an objection to a surprise condition is just gamesmanship, not justice. Criminal sentences should not be finalized on that basis. “Lawyers should have fair notice and an opportunity to prepare.” *United States v. Gallant*, 306 F.3d 1181, 1189 (1st Cir. 2002).

Had Mr. Dean’s attorney had advance notice from the district court, she would have been able to distinguish *United States v. Moran*, 573 F.3d 1132 (11th Cir. 2009), the case on which the court of appeals relied to affirm the new supervised-release conditions on plain-error review. App’x at A-12–A-13. Virgil Moran’s criminal history included “two convictions for sex-related crimes.” 573 F.3d at 1135. Mr. Dean’s criminal history included no such crimes. Also, “Moran did not contest his conviction of a sex offense against a minor in 1994.”

Id. at 1136. Mr. Moran, unlike Mr. Dean, had ample warning that these sex offenses would be considered:

Moran's misconduct was detailed in the presentence investigation report, and the record reflects that Moran knew the district court likely would consider his criminal history in determining an appropriate sentence. Moran addressed the allegations of sexual misconduct both before and at sentencing, and he did not move for a continuance to develop additional arguments or submit evidence to refute those allegations.

Id. at 1138. In contrast, Mr. Dean's new sentence was based on untested, rank hearsay that his counsel had no reason to believe the district court would consider reliable enough to support substantial, additional deprivations of liberty. *See* App'x at A-8 n.1. This was especially true in light of the fact that the probation officer did not recommend any new special conditions based on the unsupported allegations. *See* App'x at A-8–A-9. *Compare United States v. Cota-Guerrero*, 907 F.2d 87, 90 (9th Cir. 1990) (“The fact that Guerrero's extensive criminal history appeared in the presentence report did not alleviate the need for specific notice of the court's intention. The report neither recommended departure nor identified the unrepresentative character of the criminal history score as a possible ground of departure.”) (citations omitted).

Moreover, the district court did not even give Mr. Dean's lawyer a chance to object to the conditions until *after* the sentence had been imposed. As the Ninth Circuit has held, an opportunity to address the court only after the sentence is imposed is constitutionally inadequate:

It is not enough notice, however, first to impose the sentence, and then to invite counsel to comment, at least where counsel objects as occurred here. That is no notice at all. Talking a judge out of a decision he has already made

is a different and harder task than persuading him not to make it. Also, such an approach prevents negotiation of a condition more precisely tailored to the legitimate interests of both sides.

United States v. Wise, 391 F.3d 1027, 1033 (9th Cir. 2004).

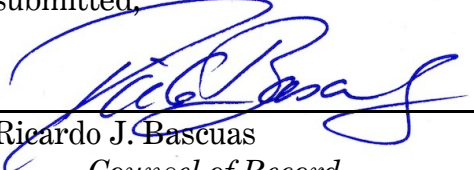
Neither Mr. Dean's initial drug conviction nor the child-abuse conviction underlying the revocation of his supervised release were sexual offenses. He had no reason to suppose that the district court would treat him as a sex offender based on unsubstantiated allegations that the State of Florida declined to pursue. The court of appeals affirmed, holding in conflict with four other circuits that district courts have no obligation to notify defendants before imposing new conditions of supervised release. That holding was based on *Moran*, which held: "A defendant ordinarily should not be surprised when a sentencing court imposes conditions of supervised release" because "[s]upervised release, by its nature, comes with conditions." 573 F.3d at 1138. Even though counsel made a general objection, the Eleventh Circuit analyzed Mr. Dean's appeal as though there had been no objection at all, in conflict with those same other four circuits.

Prayer for Relief

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit to resolve the conflict among the courts of appeals over whether district courts should provide notice before imposing new conditions of supervised release.

Respectfully submitted,

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