No. _____

IN THE
Supreme Court of the United States

BRENDON JANIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Sentencing Commission recommends imposing several standard conditions of supervised release. Standard Condition 12 is as follows:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

U.S.S.G. § 5D1.3(c)(12).

The questions presented are:

1. Does Standard Condition 12 unconstitutionally delegate authority to the probation officer?
2. Is Standard Condition 12 unconstitutionally vague?

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Brendon Janis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit affirming the District Court (Pet. App. 1a-10a) is reported at 995 F.3d 647. The district court's final judgment (Pet. App. 11a-26a) is unreported. The transcript of the sentencing hearing (Pet. App. 27a-32a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on April 27, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

The U.S. Sentencing Commission recommends imposing several "standard" conditions of supervised release. Standard Condition 12, at issue in this case, provides:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

U.S.S.G. § 5D1.3(c)(12).

The circuits are divided over the constitutionality of

Standard Condition 12:

- In the decision below, the Eighth Circuit upheld Standard Condition 12 against nondelegation and vagueness challenges.
- The Second Circuit has invalidated Standard Condition 12 on nondelegation and vagueness grounds.
- The Tenth Circuit has invalidated Standard Condition 12 on nondelegation grounds.
- The Seventh Circuit has invalidated a condition materially identical to Standard Condition 12 on vagueness grounds.
- The Ninth Circuit has upheld Standard Condition 12 based on an unusual narrowing construction.

This circuit split warrants resolution. Because Standard Condition 12 is a standard condition of supervised release, it is imposed on thousands of defendants each year. Hence, if the circuit split is allowed to stand, thousands of people will receive disparate treatment on account of the happenstance of geography. Moreover, the circuit split will cause significant practical problems in the administration of supervised release, as probation officers and courts struggle to determine which circuit's rule applies to a particular offender.

This case is an ideal vehicle. Petitioner expressly preserved nondelegation and vagueness challenges, and the Eighth Circuit addressed both challenges *de novo*. Hence, the Court should grant certiorari in this case to

resolve the circuit split.

STATEMENT OF THE CASE

A. Statutory background.

Federal sentencing courts may, and in some cases must, "include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a). Defendants on supervised release must abide by the conditions imposed by the sentencing court. If the defendant violates a supervised release condition, the court may revoke the term of supervised release and require the defendant to serve additional prison time, followed by an additional period of supervised release after the defendant's release. 18 U.S.C. § 3583(e)(3).

Some supervised release conditions are expressly required by statute. *See* 18 U.S.C. § 3583(d) (enumerating mandatory standard release conditions, such as conditions that defendants not commit future crimes, make restitution, and not unlawfully possess controlled substances). In addition to those conditions, Congress has provided:

> 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.

18 U.S.C. § 3583(d).

Congress has also authorized the Sentencing Commission to promulgate "general policy statements" regarding "the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18." 28 U.S.C. § 994(a)(2)(B). Pursuant to that authority, the Sentencing Commission has promulgated a policy statement containing a series of "'standard' conditions" that "are recommended for supervised release." U.S.S.G. § 5D1.3(c).

Prior to November 1, 2016, one of the Sentencing Commission's standard conditions was as follows:

> [A]s directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

U.S.S.G. § 5D1.3(c)(13) (2015). In *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015), the Seventh Circuit harshly criticized this condition, finding it "riddled with ambiguities." *Id.* at 379. The court

observed that there was "no indication of what is meant by 'personal history' and 'characteristics' or what 'risks' must be disclosed to which 'third parties.'" *Id.*[1]

In response to *Thompson*, the Sentencing Commission revised that standard condition. As revised, the condition—Standard Condition 12—now reads:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

U.S.S.G. § 5D1.3(c)(12). The Sentencing Commission, citing *Thompson*, "determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased." U.S. Sentencing Commission, *Amendment 803 to the United States Sentencing Guidelines*, https://www.ussc.gov/guidelines/amendment/803.

Notably, however, this amendment did not provide any additional guidance as to "what 'risks' must be disclosed to which 'third parties.'" *Thompson*, 777 F.3d

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[1] As discussed below, the Seventh Circuit has reiterated its concern about that standard condition and similar conditions in numerous subsequent decisions. *See infra* at 15-16.

at 379. It did remove the references to "personal history" and "characteristics," but replaced those references with nothing—and therefore left probation officers completely adrift as to what "risks" are sufficient to trigger the risk-notification requirement.

B. Proceedings below.

Following a jury trial, petitioner Brendon Janis was convicted of conspiracy to distribute methamphetamine and unlawfully possessing firearms. Pet. App. 2a. The district court imposed a sentence of 180 months on the conspiracy charge and 60 months on the firearms charge, to run concurrently. *Id.*

At the sentencing hearing, petitioner expressly objected to the imposition of Standard Condition 12 on both vagueness and nondelegation grounds. Pet. App. 29a ("With respect to standard condition 12, my argument and my position is that th[e] condition that—I call it the risk condition—is both unconstitutionally vague and overbroad, but also that it presents an improper delegation of the judicial function, in that it gives the probation officer the discretion to make someone report, or, in effect, give them a condition which is exercised by the probation officer rather than the Court."). Petitioner made clear he was intending to preserve these points for appellate review. Pet. App. 30a-31a ("And my purpose in arguing this is I'm not trying to sandbag the Court and make arguments on appeal that I'm not going to make before the Court."). He pointed out that the Tenth Circuit had invalidated the same condition on nondelegation grounds. Pet. App. 31a.

The district court overruled the objection. It reasoned that "if a probation officer determined that Mr. Janis violated standard condition No. 12, a document would be provided to me, setting out the circumstances of that and asking for a determination of what type of action, if any, should be taken. So it's always ultimately a judicial determination as to the handling of these standard conditions before any sanction is imposed." Pet. App. 30a. Emphasizing that counsel was "citing out-of-circuit precedent," and that the "Eighth Circuit has not given us guidance on this particular standard condition," the district court rejected petitioner's challenge to Standard Condition 12. Pet. App. 32a. Petitioner's sentence therefore includes Standard Condition 12 as a condition of supervised release. Pet. App. 19a.

The Eighth Circuit affirmed, rejecting both the vagueness challenge and the nondelegation challenge. Pet. App. 8a. The court applied *de novo* review, confirming that petitioner had preserved these arguments in the district court. *Id.*

The court relied on its prior decision in *United States v. Robertson*, 948 F.3d 912 (8th Cir. 2020). As to petitioner's vagueness challenge, the court noted that *Robertson* had rejected a vagueness challenge to the same standard condition. In *Robertson*, the court reasoned as follows: "[T]he condition states that Robertson's probation officer will determine whether Robertson poses a risk to a particular person, and only then may he require Robertson to notify that person of the particular risk. Thus, the scope of this condition can be ascertained with sufficient ease." 948 F.3d at

920 (internal quotation marks omitted). The *Robertson* court observed, however, that this was "a close question and some circuits have refused to uphold similar risk conditions." *Id.* (citing Ninth Circuit precedent). Unlike this case, the *Robertson* court applied plain-error review. *Id.* Nonetheless, in the decision below, the panel deemed itself bound by *Robertson*'s holding that "the scope of this condition can be ascertained with sufficient ease." Pet. App. 9a (quotation marks omitted).

As to petitioner's nondelegation challenge, the *Robertson* court applied Eighth Circuit case law finding that "a special condition of supervised release is an impermissible delegation of authority 'only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.'" 948 F.3d at 919 (quoting *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011)). In *Robertson*, because the district court made "no affirmative indication" that it was "disclaim[ing] ultimate authority over Robertson's supervision," there was no unconstitutional delegation of authority. *Id.* In the decision below, the court deemed *Robertson* to be binding precedent that foreclosed petitioner's nondelegation challenge. Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT SPLIT OVER WHETHER DISTRICT COURTS MAY IMPOSE STANDARD CONDITION 12.

The circuits are fractured over whether criminal defendants may be subjected to Standard Condition 12.

As just explained, the Eighth Circuit upheld Standard Condition 12 against vagueness and nondelegation challenges. By contrast, the Second, Tenth, and Seventh Circuits have invalidated Standard Condition 12, while the Ninth Circuit has upheld it subject to a narrowing construction.

A. Second Circuit.

The Eighth Circuit's decision conflicts with *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019). In *Boles*, the district court imposed the identical standard condition of supervised release as in this case. *Id.* at 110-11. The Second Circuit invalidated the condition, holding that "the 'risk' condition is vague and affords too much discretion to the probation officer." *Id.* at 111.

The Second Circuit relied on its prior decision in *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001), in which the court invalidated conditions that "required Peterson to notify employers about his federal conviction." *Boles*, 914 F.3d at 111-12 (citing *Peterson*, 248 F.3d at 85-86). The *Peterson* court found that "the [district] court must determine, rather than leaving to the discretion of the probation officer, whether such notification is required … [and] may not simply leave the issues of employer notification to the probation officer's unfettered discretion." *Boles*, 914 F.3d at 112 (quoting *Peterson*, 248 F.3d at 86) (alteration in original).

The *Boles* court explained: "Because the condition at issue here extends to warning employers of risk and gives the probation office unfettered discretion with respect to the notification requirement, we agree with

Boles that the condition is largely indistinguishable from the one we struck down in *Peterson*." 914 F.3d at 112. The court therefore vacated the risk condition and remanded for the district court to clarify its scope. *Id.*

In the wake of *Boles*, the Second Circuit has repeatedly invalidated sentences that included Standard Condition 12, finding them unconstitutionally vague. *See, e.g.*, *United States v. Booker*, 825 F. App'x 4, 12 (2d Cir. 2020) (finding that "there is no dispute" that Standard Condition 12 is unconstitutionally vague and vacating that condition); *United States v. Griffin*, 839 F. App'x 660, 661 (2d Cir. 2021) (same). In addition, district courts within the Second Circuit have taken action to allow all criminal defendants, including those whose sentences were already final, to benefit from *Boles*'s holding:

- On March 22, 2019, the Western District of New York issued a standing order stating that in light of *Boles*, the court would "amend the Judgment and Commitment order in all criminal cases in which a term of probation or supervised release is imposed by removing the standard 'risk' condition."[2] The court replaced that standard condition with a new condition stating that the risk determination would be made by "the court … in consultation with your probation officer,"

[2] Amended Standing Order, *In re: United States v. Boles* (W.D.N.Y. Mar. 22, 2019), https://www.nywd.uscourts.gov/sites/nywd/files/PTPR-2019-AmendedBolesStandOrd.pdf.

rather than by the probation officer. *Id.*

- In a series of standing orders, the Southern District of New York followed suit. In the current operative order, dated July 1, 2019, the court noted *Boles*'s holding that "Old Standard Condition #12 impermissibly delegated too much authority to a probation officer."[3] It stated that in light of *Boles*, "it is the intention of the Court that all persons upon whom Old Standard Condition #12 was imposed should be relieved of that condition immediately and without the need for motion practice or other judicial proceedings." *Id.* Hence, it ordered that "any and all judgments of conviction" containing Old Standard Condition #12 "are hereby modified by vacating and eliminating therefrom Old Standard Condition #12, and any defendant who was sentenced subject to said standard condition is immediately and permanently relieved from such condition." *Id.* The court replaced Old Standard Condition #12 with a new condition requiring that the probation officer receive "prior approval of the [c]ourt" before imposing a risk notification requirement. *Id.*

- On February 10, 2021, the Eastern District of

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[3] Second Amended Standing Order No. M10-468, *In re Vacatur of Standard Condition of Supervision Pertaining to Third Party Risk*, No. 1:19-mc-00218-CM (S.D.N.Y. July 1, 2019), ECF No. 3.

> New York issued a standing order similar to the Southern District of New York's standing order. It immediately and retroactively relieved all defendants of the requirements of the now-invalidated standard condition, and replaced it with a new condition requiring the probation officer to receive "prior approval of the Court" before imposing the risk condition.[4]

B. Tenth Circuit.

The Eighth Circuit's decision conflicts with *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019). In *Cabral*, the district court imposed the identical standard condition of supervised release as in this case. *Id.* at 691. The *Cabral* district court noted that the probation officer would have broad discretion in determining what risks would trigger the condition, observing: "I can't anticipate every risk, and I am not going to sit here and pretend that I can." *Id.* at 692.

The Tenth Circuit held that Standard Condition 12 was an unconstitutional delegation of judicial authority. *Id.* at 696-99.[5] It held: "By tasking Mr. Cabral's probation officer with determining whether Mr. Cabral poses a 'risk' to others in any facet of his life and

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[4] Administrative Order No. 2021-03, *In re: Modification of the Standard Condition of Supervision Pertaining to Third-Party Risk* (E.D.N.Y. Feb. 10, 2021), https://img.nyed.uscourts.gov/files/general-ordes/AdminOrder%202021-03.pdf.

[5] The court deemed Cabral's vagueness challenge to be unripe. 926 F.3d at 694-96.

requiring Mr. Cabral to comply with any order to notify someone of any such risk, the district court delegated broad decision-making authority to the probation officer that could implicate a variety of liberty interests." *Id.* at 697. The court pointed to the district court's recognition that the condition could be applied to numerous unanticipated risks. *Id.* at 697-98. It emphasized that the risk-notification condition could affect Cabral's family relationships and employment prospects. *Id.* at 698-99.

Like in the Second Circuit, courts in the Tenth Circuit have ensured that all defendants, including defendants who were already sentenced, could obtain the benefit of *Cabral*.

First, the Tenth Circuit has held that sentences containing Standard Condition 12 should be vacated even when the defendant did not object to that condition in the district court. *See United States v. Golightley*, 840 F. App'x 319, 327-28 (10th Cir. 2020) (vacating Standard Condition 12 on plain-error review in light of *Cabral*). The Tenth Circuit has even permitted a defendant who filed an appeal waiver to gain the benefit of *Cabral*. *See United States v. Pendleton*, 789 F. App'x 97, 97-98 (10th Cir. 2019) (remanding for entry of new judgment that omits Standard Condition 12, notwithstanding defendant's appeal waiver). Commendably, in both cases, the Justice Department consented to those dispositions, even going as far as to withdraw its motion to enforce the appeal waiver in *Pendleton*. *See id.*

Second, courts within the Tenth Circuit have issued districtwide orders permitting defendants to gain the

benefit of *Cabral*, including defendants whose sentences were already final.

- On July 10, 2019, the District of New Mexico issued a general order providing that "[i]n accordance with *Cabral*, the United States Probation Office ('USPO') shall cease enforcing the risk-notification condition for those Defendants already under supervision, unless Court approval is first obtained."[6] The court expressly modified the risk-notification provision to require judicial pre-approval before requiring third party risk notification. *Id.*
- On August 15, 2019, the District of Kansas similarly announced that all criminal defendants sentenced after November 1, 2016 (when Standard Condition 12 became effective) would now be subject to a new risk-notification condition requiring judicial pre-approval.[7]
- On December 4, 2019, the District of

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[6] Administrative Order Regarding Conditions of Supervised Release, *In re Enforcement and Imposition of Standard Condition of Supervised Release and Probation No. 12*, No. 19-MC-00004-27 (D.N.M. July 10, 2019), ECF No. 27, https://www.nmd.uscourts.gov/sites/nmd/files/general-ordes/121110431731.pdf.

[7] Standing Order No. 19-03 (formerly Standing Order No. 16-02), *In re: Standard Conditions of Supervision* (D. Kan. Aug. 15, 2019), http://www.ksd.uscourts.gov/wp-content/uploads/2019/08/Standing-Order-19-03-Standard-Conditions-of-Supervision.pdf.

Wyoming issued a general order substantively identical to the District of New Mexico's order.[8]

- On November 13, 2020, the District of Colorado similarly adopted a new Standard Condition 12 requiring judicial pre-approval of the risk notification requirement.[9]

C. Seventh Circuit.

The Eighth Circuit's decision conflicts with *United States v. Greco*, 938 F.3d 891 (7th Cir. 2019), which invalidated a condition materially identical to current Standard Condition 12.

As explained above, in *United States v. Thompson*, 777 F.3d 368, the Seventh Circuit found former Standard Condition 12 "riddled with ambiguities." *Id.* at 379. The court observed that there was "no indication of what is meant by 'personal history' and 'characteristics' or what 'risks' must be disclosed to which 'third parties.'" *Id.* The Seventh Circuit reiterated its concern with former Standard Condition 12 in numerous subsequent decisions. *United States v.*

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[8] General Order Amending Standard Conditions of Supervision (D. Wyo. Dec. 4, 2019), https://www.wyd.uscourts.gov/sites/wyd/files/General_Order_2019-02.pdf.

[9] District Court General Order 2020-20, *Order Adopting Conditions of Supervision Pursuant to 18 U.S.C. § 3563 and 18 U.S.C. § 3583* (D. Colo. Nov. 13, 2020), http://www.cod.uscourts.gov/Portals/0/Documents/Orders/GO_2020-20_Standard_Conditions_of_Supervision.pdf.

Kappes, 782 F.3d 828, 849 (7th Cir. 2015) (following *Thompson* and noting, "[p]resumably, the meaning of these terms would change from defendant to defendant, which makes definitions particularly important with this condition"); *United States v. Hill*, 818 F.3d 342, 344-45 (7th Cir. 2016) (finding condition "[h]opelessly vague" and asking, "Does this mean that if he happens to be standing next to a six-year-old girl at a soda fountain he has to warn her that he has been convicted of receipt of child pornography? Does he have to explain to her what child pornography is?"); *United States v. Dickson*, 849 F.3d 686, 690-91 (7th Cir. 2017) (rejecting same standard condition on vagueness grounds); *United States v. Guidry*, 817 F.3d 997, 1010 (7th Cir. 2016) (same); *United States v. Poulin*, 809 F.3d 924, 934 (7th Cir. 2016) (same); *United States v. Sewell*, 780 F.3d 839, 851 (7th Cir. 2015) (same).

As noted above, the Sentencing Commission amended former Standard Condition 12 in response to *Thompson*. In addition, in an effort to comply with *Thompson*, multiple district courts within the Seventh Circuit made their own amendments to former Standard Condition 12. Some of these amendments yielded conditions that were substantially narrower than current Standard Condition 12—yet the Seventh Circuit invalidated them anyway. When the Seventh Circuit ultimately confronted current Standard Condition 12, it invalidated that condition, too.

First, in *United States v. Bickart*, 825 F.3d 832 (7th Cir. 2016), the district court declined to impose former Standard Condition 12. Instead, it imposed a modified risk-notification condition requiring judicial pre-

approval: "If the Probation Officer believes notification is necessary, she shall inform the defendant and seek the Court's permission in advance." *Id.* at 841. The government argued that this new version cured the constitutional defect identified in *Thompson* because "notification requires the court's prior approval and gives defendants an opportunity to respond." *Id.*

The Seventh Circuit rejected the government's argument and invalidated the condition. "Although the district court's modification softens the consequences of the vagueness we identified in *Thompson* and *Kappes*, the underlying vagueness remains." *Id.* "We disapproved of the condition in *Thompson* and *Kappes* because we thought that 'personal history,' 'characteristics,' 'risks,' and 'third parties,' were impermissibly vague. The modified condition in this case still contains these vague terms and offers no additional guidance as to their meaning." *Id.* "We appreciate the district court's effort to rescue this condition by adding a procedural mechanism, but we believe that it is appropriate to tackle vagueness head-on by defining or removing vague terms." *Id.* at 841-42.

Next, in *United States v. Canfield*, 893 F.3d 491 (7th Cir. 2018), the Seventh Circuit rejected an even narrower risk-notification condition. Unlike Standard Condition 12, the condition was explicitly limited to risks associated with the defendant's criminal history. *Id.* at 495 ("The Notification Condition requires Canfield to 'notify any individuals or entities of any risk associated with this history [of possessing child pornography].'" (bracket in original)). Nonetheless, the Seventh Circuit held that this condition was invalid:

"[W]e have required sentencing courts to define with greater specificity the identities or categories of individuals and the types of risks to which notification conditions such as this would apply." *Id.*

Finally, in *United States v. Greco*, 938 F.3d 891 (7th Cir. 2019), the Seventh Circuit confronted a standard condition materially identical to current Standard Condition 12. The condition provided in relevant part: "[I]f the probation officer determines that [Greco] pose[s] a risk to another person (including an organization or members of the community), the probation officer may require [him] to tell the person about the risk." *Id.* at 894 (quoting standard condition) (alterations in original).[10] On appeal, both parties agreed that this condition was unconstitutionally vague under post-*Thompson* circuit precedent. The parties relied on *Bickart*, where the court "held that a similar

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[10] The condition, in its entirety, was as follows:

> [I]f the probation officer determines that you pose a risk to another person (including an organization or members of the community), the probation officer may require you to tell the person about the risk, and you must comply with that instruction. Such notification could include advising the person about your record of arrests and convictions and substance use. The probation officer may contact the person and confirm that you told the person about the risk.

See Brief of Appellant at 21, *United States v. Greco*, No. 18-3496 (7th Cir. Mar. 8, 2019), 2019 WL 1224348 (quoting Notice of Appeal, R.153 at p.6).

condition was impermissibly vague because, among other things, it did not define the term 'risks.'" *Id.* at 897. The Seventh Circuit accepted the parties' concession and vacated the condition. It remanded for the district court to "provide more guidance on what types of risk trigger the notification requirement." *Id.*[11]

D. Ninth Circuit.

The Ninth Circuit has charted its own path. It has invalidated a supervised release condition closely similar to Standard Condition 12, while upholding Standard Condition 12 itself based on a peculiar narrowing construction that did not solve the constitutional problem.

In *United States v. Evans*, 883 F.3d 1154 (9th Cir. 2018), the Ninth Circuit invalidated the former version of Standard Condition 12, which stated as follows:

> [A]s directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Supra, at 4. The Ninth Circuit concluded that this condition was unconstitutionally vague. 883 F.3d at

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[11] Because the court upheld the defendant's vagueness argument, it declined to address the defendant's alternative argument based on the nondelegation doctrine. 938 F.3d at 897.

1162. The court observed that the condition provided no guidance on what risks must be disclosed and to whom. "Evans has several convictions for being a felon in possession of a firearm; must he disclose that there is a risk he may have a gun? To whom must he make this disclosure? Only to social acquaintances, or also to coworkers? If he goes to a bank in order to open a savings account and meets with a bank employee, must he disclose that he might have a gun? He has no way of knowing." *Id.* at 1163-64.

In defense of the supervised release condition, the government argued that "this condition does not leave Evans guessing because it 'requires consultation with the probation officer.'" *Id.* at 1164. The Ninth Circuit rejected this argument, reasoning that "a vague supervised release condition cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect, *i.e.*, the delegation of basic policy matters to policemen for resolution on an ad hoc and subjective basis." *Id.* (quotation marks and alterations omitted). "The language of the condition must provide some determinate guidance to Evans's probation officer, as well as to Evans." *Id.*

Evans was decided after the Sentencing Commission had amended Standard Condition 12 to the current version. The Ninth Circuit suggested in dicta that the current version of Standard Condition 12 might be constitutional. *See id.*; *see also United States v. Magdirila*, 962 F.3d 1152 (9th Cir. 2020) (similarly invalidating former version of Standard Condition 12,

but suggesting in dicta that current version is constitutional).

In *United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021), the Ninth Circuit followed its prior dicta and upheld Standard Condition 12. *Id.* at 422-23. To distinguish *Evans*, the court explained that "the risks referenced in the condition are limited to the specific risks *posed by the defendants' criminal record*." *Id.* at 423 (internal quotation marks omitted; emphasis in original). Based on that narrowing construction, the court held that "probation officers do not have unfettered discretion under this condition." *Id.* "The limited discretion vested in the probation officer as to when the condition should be triggered does not render it unconstitutionally vague." *Id.*

Gibson's analysis is perplexing. The Ninth Circuit held that current Standard Condition 12 cured the constitutional defect in former Standard Condition 12 because, unlike the former version, the current version is limited to "the specific risks *posed by the defendants' criminal record*." *Id.* (internal quotation marks omitted; emphasis in original). However, that narrowing construction came out of nowhere. Nothing in the text of current Standard Condition 12 suggests that the category of "risks" covered by the condition is any narrower than before. Nor does the Sentencing Commission's commentary accompanying the Guidelines amendment support the Ninth Circuit's narrowing construction. *Supra*, at 5-6. The Ninth Circuit's sole support for this narrowing construction was its prior dicta in *Magdirila*, and *Magdirila* simply asserted this construction with no explanation or

analysis.

Moreover, it is not clear how this narrowing construction is an improvement on the former version. As noted above, in *Evans*, the Ninth Circuit posed a series of rhetorical questions concerning the risk-notification condition: "Evans has several convictions for being a felon in possession of a firearm; must he disclose that there is a risk he may have a gun? To whom must he make this disclosure? Only to social acquaintances, or also to coworkers? If he goes to a bank in order to open a savings account and meets with a bank employee, must he disclose that he might have a gun?" 883 F.3d at 1163-64. *Gibson*'s determination that Standard Condition 12 is limited to "the specific risks posed by the defendant's criminal record," *Gibson*, 998 F.3d at 423 (internal quotation marks omitted), does nothing to resolve these ambiguities. Are the risks enumerated in *Evans*' rhetorical question "specific risks posed by the defendant's criminal record," or not? *Gibson*'s narrowing construction does not answer these questions.

Be that as it may, *Gibson* is now binding precedent in the Ninth Circuit. And *Gibson* provides yet another rule: Standard Condition 12 is unconstitutional if it applies to all "risks," but is constitutional if it is limited to "the specific risks posed by the defendant's criminal record," whatever that means.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT IN THIS CASE.

The Court should grant certiorari to resolve the circuit split. The issue is important, the split will cause

practical problems, and this case is an ideal vehicle.

First, the issue in this case is important. The Sentencing Commission recommends imposing Standard Condition 12 on all criminal defendants who receive a term of supervised release as part of their sentences. Hence, this is the rare case that affects almost all federal criminal defendants in the United States. It is unusual for the Court to confront issues with such far-reaching impact; indeed, in the past, the Supreme Court has granted certiorari in such cases even without a circuit split. *See, e.g.*, *Barber v. Thomas*, 560 U.S. 474, 480 (2010) (granting certiorari to address the BOP's method of administering good time credits, even without a circuit split, because "affects the interests of a large number of federal prisoners").

But in this case there is a circuit split—and an unusually fractured one at that. The Second Circuit has invalidated Standard Condition 12 on both nondelegation and vagueness grounds; the Tenth Circuit has invalidated it on nondelegation grounds; the Seventh Circuit has invalidated it on vagueness grounds; the Ninth Circuit has upheld it based on a limiting construction; and the Eighth Circuit has upheld it as written.

As a result of this circuit split, all defendants outside the Second, Seventh, and Tenth Circuits are potentially subject to Standard Condition 12 each year, while no defendants within those circuits are subject to that condition. Moreover, as explained above, several district courts within the Second and Tenth Circuit have promulgated district-wide orders retroactively invalidating Standard Condition 12 as to sentences that

are already final. *Supra*, at 10-12, 14-15. Hence, as matters now stand, *thousands* of criminal defendants receive disparate treatment based on the happenstance of geography.

Granting certiorari in this case would be consistent with this Court's recent practice. This Court regularly resolves circuit splits related to federal sentencing. For instance, in recent years, the Court has resolved two splits concerning constitutional challenges to applications of the advisory Guidelines. *See Beckles v. United States*, 137 S. Ct. 886 (2017) (Due Process challenge); *Peugh v. United States*, 569 U.S. 530 (2013) (Ex Post Facto challenge). The Court also regularly resolves splits concerning federal sentencing procedures. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016).

Moreover, there is a particularly pressing need to resolve this circuit split: it will cause significant practical problems in the administration of supervised release. Criminal defendants often move to different locations after they are released from prison, and jurisdiction over those prisoners may be transferred to other courts. *See* 18 U.S.C. § 3605. Thus, a single probation officer and court may supervise criminal defendants sentenced within multiple geographic circuits. The circuit split will put probation officers and courts into a very difficult situation. Suppose a probation officer within the Eighth Circuit supervises an offender who was sentenced by a court in the Second, Seventh, Ninth, or Tenth Circuits (or vice versa). What should the probation officer and court do?

Apply the law of the sentencing court, or of the local court? If the former, probation officers and courts will have to apply Standard Condition 12 in different ways depending on the location of sentencing. If the latter, then a defendant who moves from one district to another may suddenly face different conditions of supervised release. For instance, if the offender lives in Kansas City, Kansas (within the Tenth Circuit), his probation officer cannot impose the risk-notification requirement without ex ante judicial approval, but if the offender moves in Kansas City, Missouri (within the Eighth Circuit), his probation officer can. This situation will create unnecessary complexity for probation officers and courts. Further, it will defeat the Sentencing Commission's purpose of providing standard conditions that are supposed to apply to all criminal defendants.

This case is the perfect vehicle to resolve the circuit split. Petitioner expressly preserved both arguments that have been litigated in other circuits—nondelegation and vagueness. The Eighth Circuit resolved both arguments on *de novo* review. The Eighth Circuit did not muddy the waters by imposing any kind of narrowing construction. Both issues are therefore perfectly teed up for this Court's review.

III. THE EIGHTH CIRCUIT'S DECISION IS WRONG.

The Eighth Circuit erred in upholding Standard Condition 12. Contrary to the Eighth Circuit's decision, Standard Condition 12 is unconstitutionally vague and unconstitutionally delegates authority to the probation officer.

Standard Condition 12 is unconstitutionally vague. A law is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). In *Johnson*, the Supreme Court held that the Armed Career Criminal Act's residual clause was unconstitutionally vague. That provision stated that an offense that "involves conduct that presents a serious potential risk of physical injury to another" could be a predicate for an enhanced sentence. *Id.* at 596 (internal quotation marks omitted). The Court held that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 598.

Johnson establishes that Standard Condition 12 is unconstitutionally vague. Standard Condition 12 merely states: "If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction." U.S.S.G. § 5D1.3(c)(12). It gives no guidance whatsoever on *what type* of risks; *how much* risk; *how to determine* those risks; *which* third parties; or any other information that can allow this provision to be applied intelligibly.

The Eighth Circuit did not suggest that Standard Condition 12 is remotely intelligible. Instead, it

reasoned that the "condition states that Robertson's probation officer will determine whether Robertson poses a risk to a particular person, and only then may he require Robertson to notify that person of the particular risk. Thus, the scope of this condition can be ascertained with sufficient ease." Pet. App. 9a (quoting *Robertson*, 948 F.3d at 920).

It is true that offenders will not be subject to Standard Condition 12's risk-notification requirement until they receive a warning from the probation officer. But under this Court's cases, that is not good enough to withstand a vagueness challenge. "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, … the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotation marks omitted). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 358 (internal quotation marks and alteration omitted).

The same principles apply to a vague condition of supervised release. The judge must provide some minimal guidelines to govern the probation officer. Otherwise, the probation officer can pursue his own standardless predilections on what risks should trigger the risk-notification requirement. "[A] vague supervised release condition cannot be cured by

allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect, *i.e.*, the delegation of basic policy matters to policemen for resolution on an ad hoc and subjective basis." *Evans*, 883 F.3d at 1164 (quotation marks omitted).

Beckles v. United States, 137 S. Ct. 886 (2017), is not to the contrary. In *Beckles*, the Court rejected a void-for-vagueness challenge to the application of the advisory career-offender Guideline. The Court reasoned that the advisory Guidelines "do not regulate the public by prohibiting any conduct," but instead "advise sentencing courts how to exercise their discretion within the bounds established by Congress." *Id.* at 895. Here, however, petitioner does not challenge a guideline that merely advises sentencing courts on how to exercise their discretion to impose a term-of-months sentence within the statutory range. Instead, petitioner challenges a substantive component of a criminal sentence that directly imposes legal obligations on him. In that context, the principles underlying the void-for-vagueness doctrine apply with full force.

The Eighth Circuit further erred in rejecting petitioner's nondelegation challenge. A condition of supervised release is a substantive component of a criminal sentence. If the offender violates the condition, the court is free to send him back to jail. 18 U.S.C. § 3583(e)(3). It is the court—not the probation officer—who is vested with the authority to decide what conditions the defendant must obey in order to

preserve his freedom.

Standard Condition 12 reflects an unconstitutional delegation of that authority. A delegation is constitutional if it sets forth "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quotation marks and brackets omitted). Standard Condition 12 does not satisfy that standard. It offers no intelligible standards on which risks warrant notification, and to whom.

In reaching a contrary conclusion, the Eighth Circuit applied its precedent holding that "a special condition of supervised release is an impermissible delegation of authority only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release." Pet. App. 10a (quotation marks omitted). The district court made a similar point: "[I]f a probation officer determined that Mr. Janis violated standard condition No. 12, a document would be provided to me, setting out the circumstances of that and asking for a determination of what type of action, if any, should be taken. So it's always ultimately a judicial determination as to the handling of these standard conditions before any sanction is imposed." Pet. App. 30a.

That reasoning is misguided. It is true that, even in the Eighth Circuit, the district court retains ultimate authority on whether to revoke supervised release. *See* Fed. R. Crim. P. 32.1(b). But that point does not resolve the fundamental nondelegation problem.

Under Standard Condition 12, the probation officer decides, in the first instance, whether the offender is obligated to notify the third party. The nondelegation doctrine demands more. It demands that the *judge* make an ex ante determination—or at least identify intelligible principles for determining—whether a risk warrants notifying a third party. The judge may not delegate that responsibility to the probation officer, subject only to post-hoc judicial supervision.

The Court should grant certiorari and reverse the Eighth Circuit's decision upholding Standard Condition 12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals
for the Eighth Circuit

No. 20-1077

United States of America

Plaintiff – Appellee

v.

Brendon Janis

Defendant – Appellant

Appeal from United States District Court
For the District of South Dakota – Rapid City

Submitted: February 19, 2021
Filed: April 27, 2021

Before LOKEN, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Brendon Dale Janis of conspiracy to distribute methamphetamine and unlawfully possessing firearms, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. § 922(g)(3). The district court[1] sentenced him to 180 months on the conspiracy charge and 60 months on the firearms charge, to run concurrently. He appeals his conviction and sentence. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Janis believes the district court improperly vouched for the credibility of prosecution witnesses when it explained Federal Rule of Criminal Procedure 35 to the jury. This court reviews jury instructions "for abuse of discretion," affirming "if the instructions, taken as a whole, fairly and adequately submitted the issues to the jury." *United States v. Thomas*, 422 F.3d 665, 668 (8th Cir. 2005). Where there is no objection, this court reviews for plain error, reversing only if the defendant shows error, that was plain, that affected substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See United States v. Fast Horse*, 747 F.3d 1040, 1041-42 (8th Cir. 2014).

During trial, defense counsel questioned prosecution witnesses about their cooperation with the government, referencing "Rule 35" and saying: "the more information

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[1] The Honorable Jeffrey L. Viken, Chief Judge, United States District Court for the District of South Dakoa.

that you give [the prosecution], the bigger the benefit you're going to get;" "the quantity and quality of information you give [the prosecution] results in the recommendation that you get;" "you've been told that you can get up to 50 percent off of [your sentence] with cooperation;" and "the government's there to help you ... [b]ecause they can reduce your sentence."

After defense counsel finished, the district court instructed the jury:

> You know, it might be helpful. This Rule 35, this is a matter of law. These are Federal Rules of Criminal Procedure. Rule 35 in these cooperation agreements, the United States can but does not have to make a motion under Federal Rule of Criminal Procedure 35 after the cooperation is complete or if the government makes certain decisions about the level of cooperation and its thoroughness, and so on. They make a motion to the Court, to me, in these cases for a sentencing. The defense has an opportunity to add more information if they want.
>
> And based on the information in front of me and what I see and—you know, after seeing people testify, and later there's a motion. It's entirely up to the judge. There are cases where I've given people time served; they're out the next day or the next week. There are cases where I give very minimal cuts because—for a variety of reasons. Lack of truthfulness, cooperation fails, the information isn't actually useful.

> So it's discretionary with every federal judge in a sentencing. This half, it's sort of become a regular matter, I think, across the United States, with full cooperation a 50-percent cut. But there's absolutely no assurance of that. And every case is judged based on the information that's presented to the judge considering the Rule 35.
>
> And so there's a very wide range of discretion as to what the cut would be, if any.
>
> Does that help? All right.
>
> I can't testify; but that's a matter of law, and I can tell you about that matter.

The court then asked if there were any objections to the explanation. Defense counsel requested a side bar:

> Defense Counsel: Your Honor, I don't want to contradict here in front of—but isn't it true that the prosecutor also makes a recommendation?
>
> The Court: Nope. Not on a Rule 35. They never tell us what they think the cut should be. I've never seen it.
>
> Defense Counsel: Okay. Fair enough. Fair enough.
>
> The Court: I really never have.
>
> Defense Counsel: Fair enough. I wanted to ask that before we—
>
> The Court: I know that the implication was made in one of your questions earlier. And it's sort of a mysterious process for everybody except prosecutors and judges, and the defense

> attorneys have a chance to add information. But I—there's never a recommendation.
>
> Defense Counsel: I agree with that, Your Honor. But I think a lot of the defendants' understanding, from a lot of anecdotal evidence over 14 years, comports with what I'm arguing.
>
> The Court: Never seen that on a Rule 35.
>
> Defense Counsel: Thank you, Your Honor.

Defense counsel did not object to the instruction, claim the court improperly vouched for any witnesses, or seek a clarifying instruction or mistrial. Before deliberations, the court gave thorough instructions about witness testimony. *See generally Eighth Circuit Manual of Model Jury Instructions (Criminal)*. It told the jury to consider witness motivation for testifying and said the jury could "believe all of a what a witness says, only part of it, or none of it." It instructed the jury that it might have heard testimony from witnesses who pled guilty or received a reduced sentence and that it should decide whether those factors influenced the testimony. It also said that it was up to the jury to decide whether testimony "may have been influenced by a hope of receiving a more lenient sentence" and that "[y]ou may give this testimony whatever weight you think it deserves."

The court's explanation of Rule 35 was accurate and reasonable. Rather than improperly vouching for witness credibility, the explanation clarified any confusion defense counsel may have created. The court did not plainly err. *See, e.g., United States v. Baldenegro-Valdez*, 703 F.3d 1117, 1124 (8th Cir. 2013)

(upholding an instruction about witness cooperation because it correctly stated the law and was supported by the evidence).

II.

Janis asserts the district court erred by relying on trial testimony in calculating the drug quantity attributable to him for sentencing. "Drug quantity determinations are factual findings, which we review for clear error, applying the preponderance-of-the-evidence standard." *United States v. King*, 898 F.3d 797, 809 (8th Cir. 2018) (internal quotation marks omitted). When "the quantity of drugs was established through witnesses' testimony, the issue becomes one of credibility." *United States v. Quintana*, 340 F.3d 700, 702 (8th Cir. 2003). "It is . . . well established that in sentencing matters a district court's assessment of witness credibility is quintessentially a judgment call and virtually unassailable on appeal." *Id.* (internal quotation marks omitted).

At trial, the court concluded that the evidence was sufficient to permit a reasonable jury to find Janis conspired to distribute over 500 grams of meth. And the jury convicted him of a conspiracy involving at least 500 grams. However, the court sentenced Janis for a conspiracy involving 1,500 grams of meth. Janis asserts the court "had an affirmative obligation to put factual findings on the record, rather than merely referring to 'trial testimony' in its calculation." But "it is well-established that the testimony of coconspirators may be sufficiently reliable evidence upon which the district court may base its drug quantity calculation for sentencing purposes." *United States v. Plancarte–*

Vazquez, 450 F.3d 848, 852 (8th Cir. 2006). *See United States v. Young*, 689 F.3d 941, 945 (8th Cir. 2012) (noting the district court may rely on trial testimony to determine drug quantity).

Here, the district court explained that its factual findings as to drug quantity were based on trial testimony that it "well remembered." And when the amount of drugs seized does not reflect the scale of drug trafficking, "'the court shall approximate the quantity of the controlled substance' for sentencing purposes." *United States v. Walker*, 688 F.3d 416, 421 (8th Cir. 2012), *quoting U.S.S.G. § 2D1.1, cmt. n.12*. *See United States v. Shaw*, 965 F.3d 921, 927 (8th Cir. 2020) ("To determine properly the applicable drug quantity in a conspiracy, a sentencing court shall approximate the quantity of the controlled substance[s] for sentencing purposes if the amount of drugs seized does not reflect the scale of the offense." (internal quotation marks omitted)).

The district court did not clearly err in calculating the drug quantity attributable to Janis at sentencing.

III.

Janis contends the district court erred in imposing the following standard condition of supervised release:

> If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

Specifically, he argues the condition is vague, ambiguous, and unconstitutionally delegates the judicial function to his probation officer.

This court reviews the imposition of standard conditions, "recommended for supervised release," for an abuse of discretion." *United States v. Sterling*, 959 F.3d 855, 861 (8th Cir. 2020). However, where, as here, a defendant challenges a supervised release condition on constitutional grounds, this court reviews de novo. *United States v. Kelly*, 625 F.3d 516, 520 (8th Cir. 2010). Under 18 U.S.C. § 3583(d), special conditions must: (1) be "reasonably related to five matters: the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, and the defendant's educational, vocational, medical or other correctional needs;" (2) "involve no greater deprivation of liberty than is reasonably necessary to advance deterrence, the protection of the public from future crimes of the defendant, and the defendant's correctional needs;" and "be consistent with any pertinent policy statements issued by the *653 sentencing commission." *United States v. Simons*, 614 F.3d at 479 (cleaned up), *quoting 18 U.S.C. § 3583(d)*.

This court addressed this issue in *United States v. Robertson*. *See Robertson*, 948 F.3d 912, 920 (8th Cir.), *cert. denied*, —— U.S. ——, 141 S. Ct. 298, 208 L.Ed.2d 51 (2020). There, the defendant argued the same condition was vague because the term "risk" was not defined by statute and had "wide-ranging meanings." *Id.* Rejecting that argument, this court said:

> Robertson asserts this condition is vague because the term "risk" is undefined by statute and has wide-ranging meanings. But the condition states that Robertson's probation officer will determine whether Robertson poses a risk to a particular person, and only then may he require Robertson to notify that person of the particular risk. Thus, the "scope of this condition can be ascertained with sufficient ease," [*United States v.] Key*, 832 F.3d [837] at 840 [(8th Cir. 2016)], because the probation officer will identify and communicate the risk to Robertson before Robertson has a duty to inform another person of that risk, *see United States v. Hull*, 893 F.3d 1221, 1223-34 (10th Cir. 2018) (upholding a similar condition of supervised release). Moreover, if there is genuine confusion about what the condition requires, Robertson "may ask questions of his probation officer, who is statutorily required to instruct [him] ... as to the conditions specified by the sentencing court." *United States v. Forde*, 664 F.3d 1219, 1224 (8th Cir. 2012) (internal quotation marks omitted).

Id. Although the Robertson court reviewed the issue for plain error and noted this was "a close question and some circuits have refused to uphold similar risk conditions, *see United States v. Evans*, 883 F.3d 1154, 1163-64 (9th Cir. 2018)," this panel is bound by the holding that "the scope of this condition can be ascertained with sufficient ease." *Id.*

Similarly, the *Robertson* defendant argued the condition was an impermissible delegation of authority. This court disagreed:

> We have held a special condition of supervised release is an impermissible delegation of authority "only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release." *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011) (internal quotation marks omitted). Robertson points to nothing in the record to show the district court disclaimed ultimate authority over Robertson's supervision. The court made no affirmative indication it was doing so. Thus, the risk and blood conditions were not unconstitutional delegations of authority.

Id. As the *Robertson* court held, the condition is not an impermissible delegation of authority. *Id. See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.").

* * * * * * *

The judgment is affirmed.

Appendix B

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of South Dakota, Western Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 5:17CR-50076-1
BRENDON JANIS	USM Number: 17134-273
	Stephen D. Demik Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1 and 2 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1) (A), and 846	Conspiracy to Distribute a Controlled Substance	07/31/2018	1ss

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(3)	Prohibited Person in Possession of Firearms	04/10/2017	2ss

The defendant is sentenced as provided in this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

01/03/2020
Date of Imposition of Judgment

SIGNATURE REDACTED
Signature of Judge

Jeffrey L. Viken, Chief Judge
Name and Title of Judge

January 6, 2020
Date

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR-50076-1

IMPRISONMENT

■ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 180 months on Count 1 and 60 months on Count 2, to run concurrently.

■ The court makes the following recommendations to the Bureau of Prisons:

The defendant has been convicted of a non violent offense. The history of substance abuse indicates the defendant would be an excellent candidate for the Bureau of Prisons' substance abuse treatment program. It is recommended the defendant be allowed to participate in that program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR-50076-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 5 years on Count 1 and 3 years on Count 2, to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state, local, or tribal crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

   ☐ The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. (*Check if applicable.*)

4. ■ You must cooperate in the collection of DNA as directed by the probation officer. (*Check a*pplicable.)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which

you reside,. *work, are a student, or were convicted of a qualifying offense. *(Check if applicable)*

6. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other state authorizing a sentence of restitution: *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this Court as well as with any other conditions on the attached page.

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR-50076-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at reasonable times, at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person

without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR-50076-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit to a warrantless search of your person, residence, place of business, or vehicle, at the discretion of the probation office.
2. You must not illegally consume any controlled substance.
3. You must submit a sample of your blood, breath, or bodily fluids at the discretion or upon the request of the probation office.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, *see Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date_____

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR50076-1

CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments set below.

	Assessment	AVAA Assessment[†††]	JVTA Assessment[‡‡‡]	Fine	Restitution
TOTALS	$ 200	Not Applicable	Not Applicable	Waived	Not Applicable

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (*AO 245C*) will be entered after such determination.

☐ You must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18

[†††] The Amy, Vicky, & Andy Child Pornography Assistance Act of 2018.

[‡‡‡] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss[§§§]	Restitution Ordered	Priority or Percentage
	$	$	
TOTALS	$ ____	$ ____	

☐ Restitution amount ordered pursuant to Plea Agreement $ _____

☐ You must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that you do n have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution. Is modified as follows:

[§§§] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

DEFENDANT: Brendon Janis
CASE NUMBER: 5:17CR50076-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. ■ Lump sum payment of $ 200 _____due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below); or

B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C. ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____, to commence _____ (*e.g., 30 or 60 days)* after the date of this judgment; or

D. ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____, to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E. ☐ Payment of the total restitution and other criminal monetary penalties shall be due in regular quarterly installments of 50% of the deposits in your inmate trust account while the you are in custody, or 10% of your inmate trust account while serving

custody at a Residential Reentry Center. Any portion of the monetary obligation(s) not paid in full prior to your release from custody shall be due in monthly installments of $, such payments to begin days following your release.

F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

You shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ You shall pay the cost of prosecution.

☐ You shall pay the following court cost(s):

■ You shall forfeit your interest in the following property to the United States:

1. Glock, model 17 Gen4, 9x19 Luger caliber semi-automatic pistol, bearing serial number YZB973;
2. a Smith & Wesson, model SW4OVE, .40 Smith & Wesson caliber semi-automatic pistol bearing serial number RANI199; and

3. any and all ammunition seized on April 10, 2017.

Payments shall be applied in the following order: (1) assessment, (2) restitution. principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

* *

UNITED STATES OF AMERICA,	*	CR.17-50076
Plaintiff,	*	Rapid City, SD
-vs-	*	January 3, 2020
BRENDON JANIS,	*	
Defendant.	*	

* *

PUBLIC TRANSCRIPT OF
SENTENCING HEARING

(PURSUANT TO STANDING ORDER 16-04,
PORTIONS OF ALL CHANGE OF PLEA
AND SENTENCING TRANSCRIPTS
ARE RESTRICTED)

BEFORE THE HONORABLE JEFFREY L.
VIKEN, UNITED STATES DISTRICT JUDGE

* *

APPEARANCES:

Counsel for Plaintiff:	MS. KATHRYN RICH U.S. Attorney's Office 515 9th St. Rapid City, SD 57701
Counsel for Defendant:	MR. STEPHEN D. DEMIK Federal Public Defender 703 Main St., 2nd Floor Rapid City, SD 57701
Also Present:	MR. BRENDON JANIS – Defendant
Court Reporter:	MS. CHERYL A. HOOK, RMR, CRR U.S. District Court 225 S. Pierre St. Pierre, SD 5750

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[Page 26] So, Mr. Janis, do you wish to speak today?

THE DEFENDANT: I would just like to say I'm sorry. If I hurt anybody you know, I'm asking for forgiveness. I wasn't in my right state of mind at the time. And I just, going through losses, didn't know how to deal with it. My history shows that I'm really not a bad person. I just made some mistakes. And I am asking for forgiveness. And I'm sorry if I hurt anybody.

THE COURT: Well, I understand that. And I also understand you have a right to appeal this case. And this is not the time for you to make statements that could be contrary to your interests. So I appreciate that. Thank you for speaking.

Mr. Demik, do you want to take up your concern about the standard conditions?

[Page 27] **MR. DEMIK:** I'm happy to, Your Honor. With respect to standard condition 12, my argument and my position is that that condition that—I call it the risk condition is both unconstitutionally vague and overbroad, but also that it presents an improper delegation of the judicial function, in that it gives the probation officer the discretion to make someone report or, in effect, give them a condition which is exercised by the probation officer rather than the Court. That's the nature of my objection to standard condition No. 12.

THE COURT: I'm not sure it's well understood in the defense bar that what happens if there is a violation of a standard condition or a special condition of supervised release, if it's not a new law violation or

something so serious that—a petition to revoke supervised release and go to a sentencing, if that's not the circumstance, if it's some lesser matter, what's called a 12A is filed. The United States does not get that. It's an internal judicial document where probation notifies the sentencing judge that there has been some type of an issue or problem develop on supervision. Those are typically handled as a judicial matter internally.

But the decision as to what should be done, as to whether or not there should be a sanction or that enhanced supervision or special condition should be applied, that is a judicial determination. That determination is not made by the [Page 28] United States probation officer and—in each instance.

So, for example, if a probation officer determined that Mr. Janis violated standard condition No. 12, a document would be provided to me, setting out the circumstances of that and asking for a determination of what type of action, if any, should be taken. So it's always ultimately a judicial determination as to the handling of these standard conditions before any sanction is imposed.

Now, I would be interested at some point if there's some briefing to be had on the constitutional side of it, improper delegation of authority. My view is that what I've just explained to you means that there isn't an improper delegation. Everything goes back to the sentencing judge.

MR. DEMIK: There is, Your Honor. And my purpose in arguing this is I'm not trying to sandbag the Court and make arguments on appeal that I'm not going

to make before the Court. There is authority in the Tenth Circuit —not in the Eighth Circuit—on the same condition, finding that it is an improper delegation of judicial authority. And the reason is this, Your Honor: Notwithstanding everything that the Court said, the language of this condition allows the probation officer to determine what is in violation or not in violation, using unconstitutionally vague terms, such as "if the defendant poses a risk." Well, what is "risk"? I don't think there is any dictionary definition that can save that term [Page 29] legally from being overbroad and vague.

And so, understanding everything that the Court said, it still puts the probation officer in a position that I believe is in contradiction to Article III.

THE COURT: How does that differ from any other standard condition if the probation officer required to supervise a defendant sees what the officer considers to be a violation and it makes a report to the Court potentially with sanctions for defendant?

MR. DEMIK: Well, my argument is, Your Honor, the wording of it is too vague. An example of special condition No. 1, "You must submit to a warrantless search of your person." You know, one thing is the word "must" is used in every condition but for standard condition No. 12. And the other is I don't think the same—I don't think the other conditions are subject to the same—the same vagueness challenge. So that's my argument on standard condition 12.

And alternatively, Your Honor, even if the Court determines that it's not an improper delegation, I think

it's vague and it's overbroad. I don't think anybody can make sense of what exactly that means.

THE COURT: All right.

Do you wish to speak to that, Ms. Rich?

MS. RICH: Well, Your Honor, I wasn't really prepared to address this particular issue today. So I [Page 30] don't— I don't—I'm not familiar with what the authority is on that. So without having that time to prepare, I would just argue that that's a standard condition that has been used in this district. And while there could be, perhaps, argument that it's overbroad because the Court does have the—the sentencing Court would have the ability to look at that before a sanction is imposed—and then if there were to be a petition to revoke at some point, there could be further litigation on that. So we would—the United States would argue against the defendant's objection to that condition.

THE COURT: Yeah. I would welcome some thorough briefing, where the United States is on notice and can respond, on the constitutional proportions of the challenge to standard condition No. 12.

But under the circumstances of this case, you are citing out-of-circuit precedent. The Eighth Circuit has not given us guidance on this particular standard condition. I would certainly welcome that, if the circuit wished to take that up as a matter to address.

But at this point I'm going to overrule the objection to standard condition No. 12, based on our record here.