No. _____ 09-392 SEP 29 2009

In The

Supreme Court of the United States

VIRGIL MORAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Federal Rule of Criminal Procedure 32(i)(1)(C)'s requirement that a defendant be permitted to comment on "matters relating to an appropriate sentence" entitles a defendant to notice prior to the pronouncement of sentence that sex offender special conditions of supervised release are contemplated, where the special conditions are not among the statutory mandatory or discretionary conditions of supervised release and there is no nexus between the special conditions and the offense of conviction?

II. Whether 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3's requirement of a reasonable relationship between special conditions of supervised release and a defendant's offense of conviction, history, and characteristics and the statutory purposes of sentencing is satisfied when sex offender special conditions are imposed based on a single sex offense in the remote past even though there is no evidence the defendant presently has a propensity to commit sex offenses?

III. Whether, for purposes of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3's requirement that special conditions of supervised release not involve a greater deprivation of liberty than reasonably necessary to achieve the statutory purposes of sentencing, a special condition of supervised release prohibiting internet access without the permission of the probation officer is an undue deprivation of liberty when there is no connection between computers or the internet and the offense of conviction or any prior alleged wrongdoing?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

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Petitioner Virgil Moran respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-17) is reported at 573 F.3d 1132 (11th Cir. 2009). The Judgment of the district court (App. 18-30) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on July 1, 2009. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Federal Rule of Criminal Procedure 32(i)(1)(C) requires that at sentencing, the district court "must allow the parties' attorneys to comment on the probation officer's determinations *and other matters relating to an appropriate sentence*." (Emphasis added).

In pertinent part, 18 U.S.C. Section 3583(d) provides:

> 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 [18 U.S.C.] 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.

The subsections of Section 3553(a) referred to are the following:

> The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> . . .

United States Sentencing Guideline Section 5D1.3 provides as follows:

> (b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any

pertinent policy statements issued by the Sentencing Commission.

STATEMENT OF THE CASE

I. Background

The United States District Court for the Middle District of Florida had jurisdiction of this matter pursuant to 18 U.S.C. Section 3231.

In the district court, Mr. Moran pled guilty to a charge of being a felon in possession of a firearm. App. 18. Mr. Moran was sentenced on the firearm charge in April 2007. App. 3. Over thirteen years earlier, in March 1994, Mr. Moran was charged in Florida state court with committing a lewd and lascivious act on a child under sixteen based on an incident that allegedly took place in 1993. Pre-Sentence Investigation Report (PSR) ¶ 33. Although he pled no contest to the 1994 charge, Mr. Moran stated in his response to the PSR that he was offered a sentence of time served followed by probation in return for his plea. PSR ¶ 33. Mr. Moran was required as a condition of his probation to attend sex offender counseling. PSR ¶ 33.

Mr. Moran had never been convicted of a sex offense prior to the 1994 case and has not been convicted of another sex offense since 1994. PSR ¶¶ 29-32, 34-37. While he was charged with sex offenses on several occasions, in all but one of those cases the charges were dropped, and in the remaining case

Mr. Moran pled no contest to a simple assault charge and was sentenced to time served. App. 3-4; PSR ¶¶ 34, 45, 46, 48. None of the five times Mr. Moran was sentenced on new charges or supervision violations following the 1994 conviction resulted in Mr. Moran being subjected to sex offender sanctions. PSR ¶¶ 33-37.

Mr. Moran objected to the allegations relating to sex offenses in the PSR. App. 4. He denied that the alleged acts had taken place and asserted that the allegations had been concocted by his sister-in-law. App. 4. The government presented no evidence at sentencing to establish that Mr. Moran had committed any new sex offense since 1994, that Mr. Moran presently has a propensity to commit sex offenses, or that Mr. Moran is in need of sex offender mental health treatment or any other sex offender special conditions to further the statutory purposes of sentencing.

II. Sex offender special conditions are imposed on Mr. Moran at his sentencing for being a felon in possession of a firearm without notice.

The first mention of sex offender special conditions of supervised release came when the district court pronounced sentence and imposed a number of special conditions. App. 5-6. Among other things, these special conditions require that Mr. Moran:

(1) participate in a mental health program specializing in sex offender treatment;

(2) register as a sex offender;

(3) refrain from having any contact with minors without written approval of the probation officer and refrain from entering into any area in which children frequently congregate;

(4) not possess any video, magazines, or literature depicting children in the nude or in sexually explicit positions;

(5) not possess or use a computer with access to the Internet without written approval from the probation officer, and permit routine inspection of his computer, hard drive, and other media storage materials;

(6) submit to search of his person, residence, place of business, storage units, computer, or vehicle, by the probation officer, based on reasonable suspicion.

App. 24-25.

Following pronouncement of the sentence, the district court asked whether there were any objections to the sentence. App. 6. Although the district court had already ruled, Mr. Moran's counsel stated that he had a "generalized objection" because he was not "prepared to respond to" the sex-offender conditions of supervised release. App. 6. Mr. Moran's counsel advised the court that he had not "previously

been apprised" that sex offender conditions would be imposed and hadn't "specifically examined the statutes" relevant to the imposition of such conditions. App. 6.

Mr. Moran's counsel pointed out that Mr. Moran's only sex offense conviction took place in 1994, and that as a result of that offense, Mr. Moran received sex offender treatment in the Florida state system. Doc. 75 at 81. He explained that sex offender conditions had never been imposed on Mr. Moran in any case after the 1994 conviction. Doc. 75 at 81-82. Mr. Moran's counsel argued that based on the long period of time that had passed since that offense, imposing sex offender conditions would subject Mr. Moran to unnecessary conditions of supervised release. App. 6-7.

Mr. Moran's counsel stated that the sex offense allegations against Mr. Moran were "false" and "unsubstantiated to the point that" Mr. Moran was not prosecuted. App. 6. Mr. Moran's counsel additionally proffered that all of the allegations of sexual misconduct against Mr. Moran, including the allegation that led to his single sex offense conviction, originated with Mr. Moran's sister-in-law. Doc. 75 at 82. According to Mr. Moran, the sister-in-law responsible for those allegations was a crack cocaine addict who later died of an overdose and fabricated the allegations because she wished to hurt him. Doc. 75 at 82; PSR ¶¶ 34, 45-48.

The district court overruled Mr. Moran's objections to sex offender special conditions. App. 7.

III. The Court of Appeals' decision

Mr. Moran argued on appeal that reversal was required for two reasons: (1) the district court failed to provide him notice that it intended to impose special conditions of supervised release; and (2) the special conditions the district court imposed were not reasonably related to the nature and circumstances of Mr. Moran's conviction, Mr. Moran's history and characteristics, or the statutory purposes of sentencing and the special conditions unnecessarily infringed on his liberty. The court of appeals affirmed. App. 2.

The court of appeals ruled that Mr. Moran was not entitled to notice that the district court intended to impose special conditions of supervised release. It recognized that several "circuits have required notice before the imposition of sex offender special conditions." App. 9 (citing *United States v. Atencio*, 476 F.3d 1099, 1108 (10th Cir. 2007), *overruled on other grounds*, *Irizarry v. United States*, 128 S. Ct. 2198, 2201 n.1 (2008); *United States v. Wise*, 391 F.3d 1027, 1032-34 (9th Cir. 2004); *United States v. Angle*, 234 F.3d 326, 346-47 (7th Cir. 2007); *United States v. Coenen*, 135 F.3d 938, 941-43 (5th Cir. 1998)). The court of appeals stated, however, that these decisions were based on the due process concerns that led the Court to rule in *Burns v. United States*, 501 U.S. 129 (1991), that notice must be provided before an

upward departure from the United States Sentencing Guidelines. App. 9. The court of appeals held that the Court's ruling in *Irizarry v. United States*, 128 S. Ct. 2198 (2008), that *Burns*' notice requirement does not apply to a variance from the sentencing guidelines should be extended to special conditions of supervised release. App. 10.

The court of appeals also affirmed the special conditions the district court imposed on Mr. Moran. App. 17. The court of appeals stated that the special conditions relate to Mr. Moran's criminal history and promote the interests of rehabilitation and protecting the public. App. 13, 15, 16.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's decision that notice is not required prior to the imposition of special conditions of supervised release creates a circuit conflict on an important matter and will result in defendants being denied an opportunity to comment on a matter relating to an appropriate sentence.

Certiorari should be granted because the Eleventh Circuit's holding that defendants need not be afforded notice prior to the imposition of sex offender special conditions of supervised release conflicts with decisions of other circuit courts of appeals "on the same important matter." Sup. Ct. R.

10(a). The Eleventh Circuit recognized that its decision was in conflict with decisions of other circuit courts requiring notice prior to the imposition of sex offender special conditions, but held that the rule stated in *Irizzary v. United States*, 128 S. Ct. 2198 (2008), that notice is not required prior to the imposition of a sentence that is a variance from the Sentencing Guidelines, should be extended to special conditions of supervised release. The new rule announced by the Eleventh Circuit is not required by *Irizzary* and will result in defendants being denied an opportunity to comment on an important matter related to sentencing. Further review is therefore warranted.

A. The Eleventh Circuit's decision conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits.

The Eleventh Circuit's ruling that notice is not required prior to the imposition of sex offender special conditions of supervised release conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits in *United States v. Coenen*, 135 F.3d 938 (5th Cir. 1998); *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000); *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003); *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008); *United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004); *United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007), *overruled on other grounds*, *Irizarry*, 128 S. Ct. at 2201 n.1; *United States v. Bruce*, 458 F.3d 1157 (10th Cir. 2006); and *United States v. Bartsma*,

198 F.3d 1191 (10th Cir. 1999), *overruled on other grounds*, *Atencio*, 476 F.3d at 1105 n.6. Evaluating the conflicting opinions of the circuit courts of appeals requires a discussion of Federal Rule of Criminal Procedure 32 and the Court's opinions in *Burns v. United States*, 501 U.S. 129 (1991), and *Irizzary*.

1. Rule 32, *Burns*, and *Irizzary*

Rule 32(i)(1)(C) requires that district courts allow the parties to comment on "matters relating to an appropriate sentence." The Court stated in *Burns* that this rule "contemplates full adversary testing of the issues relevant to a Guidelines sentence." 501 U.S. at 135. For that reason, the Court held in *Burns* that a defendant is entitled to notice before a district court *sua sponte* departs from the applicable United States Sentencing Guidelines range. 501 U.S. at 135. The Court stated, "Obviously, whether a *sua sponte* departure from the Guidelines would be legally and factually warranted is a 'matter relating to the appropriate sentence.'" *Id.* at 135. It found that implicit in "the right *to comment* on the appropriateness of a *sua sponte* departure" is "the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-36.

The Court stated in *Burns* that a rule allowing *sua sponte* departure from the Guidelines in the absence of notice would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing

Guidelines sentences." 501 U.S. at 137. Under such a rule:

> At best . . . parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

Id. Accordingly, the Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.* at 138. The Court further noted that if it were "to read Rule 32 to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.*

Rule 32 was amended in the 2002 amendment cycle to reflect *Burns*' holding. *See* Rule 32, Advisory Committee Notes, 2002 Amendment. As a result, Rule 32(h) now provides that before a district court may "depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."

Following the Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines are advisory, not mandatory, the Court addressed in *Irizzary* whether the notice requirement established in *Burns* and Rule 32(h) applies when the sentence imposed is a "variance," as opposed to a "departure" from the applicable Sentencing Guidelines range. 128 S. Ct. at 2200. The rationale of *Irizzary*'s holding that defendants are not entitled to notice of a potential variance was threefold. First, the Court held that because defendants are no longer entitled to expect a within-Guidelines sentence following *Booker*, due process does not require notice before a variance is applied. 128 S. Ct. at 2202. As the Court noted, although the Guidelines "continue to play a role in the sentencing determination" post-*Booker*, "there is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a District Court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Id.* at 2202-03 (citation omitted). Second, the Court stated, providing notice often

"would not affect the parties' presentation of argument and evidence." *Id.* at 2203. Third, the Court expressed confidence that "Rule 32's other procedural protections" would ensure that "all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id.* at 2203-04.

2. The Fifth, Seventh, Ninth, and Tenth Circuit opinions

Prior to the Court's opinion in *Irizzary*, cases in the Fifth, Seventh, Ninth, and Tenth Circuits held that notice is required prior to the imposition of sex offender special conditions of supervised release. Although the cases addressing the notice issue vary somewhat in the manner in which they frame the notice rule, the essence of their holdings is that a defendant is entitled to notice of a special condition unless the defendant should reasonably have anticipated the condition. Notice has accordingly been required where the special condition imposed was not among the statutory mandatory and discretionary special conditions, the condition was unexpected, or the condition was not related to the offense of conviction. Under any of these permutations of the notice rule, Mr. Moran was entitled to notice before sex offender special conditions were imposed on him in this case.

The Fifth, Seventh, and Ninth Circuits have held that notice is required prior to the imposition of a

special condition that is not among the mandatory or discretionary statutory conditions of supervised release identified in 18 U.S.C. Section 3563 or United States Sentencing Guideline 5D1.3. *Coenen*, 135 F.3d at 943; *Wise*, 391 F.3d at 1033; *Cope*, 527 F.3d at 953. The Fifth Circuit stated in *Coenen* that a defendant was entitled "under Rule 32 and *Burns*" to notice prior to the imposition of a sex offender special condition that was "not expressly contemplated by the Guidelines," stating that such notice would "serve to greatly further Rule 32's 'purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences.'" 135 F.3d at 943 (quoting *Burns*, 501 U.S. at 137). The Seventh Circuit stated in *Angle* that it agreed with the Fifth Circuit's decision in *Coenen* and held that the defendant in that case was entitled to notice prior to the imposition of a sex offender registration condition that was not listed among the mandatory or discretionary statutory conditions of supervised release. 234 F.3d at 347. Similarly, the Ninth Circuit held that "[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness." *Wise*, 391 F.3d at 1033; *see also Cope*, 527 F.3d at 953.

The Seventh Circuit stated the rule slightly differently in *Scott*, where it held that defendants are entitled under Rule 32 to notice "of terms that are out

of the ordinary, and thus unexpected." 316 F.3d at 736. Accordingly, *Scott* held that a defendant who would not "have foreseen that Internet access would be a subject of discussion at sentencing," was entitled to notice that the court was contemplating a condition prohibiting internet access without prior permission of the probation officer. *Id.* The court explained that "[k]nowledge that a condition of this kind was in prospect would have enabled the parties to discuss" possible alternative provisions that might not have infringed on the defendant's liberty so dramatically and would have allowed defense counsel to research and more effectively argue the law regarding conditions of that type. *Id.* at 735.

Employing similar reasoning, the Tenth Circuit held in *Bartsma* that "the *Burns* rationale" – that "'the right to be heard has little reality or worth unless one is informed that a decision is contemplated'" – "applies when a district court is considering imposing a sex offender registration requirement as a condition of supervised release, and the condition is not on its face related to the offense charged." 198 F.3d at 1199-1200 (quoting *Burns*, 501 U.S. at 136). The court explained that the case before it, in which a sex offender registration special condition was imposed in sentencing a defendant on a felon in possession of a firearm charge, illustrated the concerns raised by the lack of notice:

> Neither party had any inkling the district court was considering imposing the sex offender registration requirement, so both

> sides were utterly unprepared to make reasoned arguments to the court. It strains credulity to argue Mr. Bartsma should have known registration was a possibility after his possession of a gun conviction. . . . Had the district court given the parties notice, they could have briefed the propriety of the condition, as well as the practical application. An intelligent, adversarial argument would have helped the court flesh out the problems with the current order.

Id. at 1199 n.6. The Tenth Circuit therefore held that "[f]undamental fairness requires notice" when a special condition "implicate[s] a liberty interest and there [is] a lack of any obvious nexus between the condition and the crime of conviction." *Id.* at n.7; *see also Atencio*, 476 F.3d at 1108; *Bruce*, 458 F.3d at 1167-68.

Irizarry has created uncertainty regarding whether it remains the law that notice is required prior to the imposition of special conditions. In two cases post-*Irizarry*, the Fifth Circuit has stated in *dicta* that "[w]hether, post *Booker*, sex offender conditions require notice, or even whether there is a notice requirement at all for any conditions in the context of supervised release, is unclear." *United States v. Weatherton*, 567 F.3d 149, 156 (5th Cir. 2009); *United States v. Ybarra*, 289 Fed. Appx. 726, 734 (5th Cir. 2008).

3. The Eleventh Circuit decision

Relying on the Court's opinion in *Irizzary*, the Eleventh Circuit rejected the notice rule established in the Fifth, Seventh, Ninth, and Tenth Circuit cases and held that the district court was not required to provide notice before it imposed sex offender special conditions of supervised release on Mr. Moran. App. 10. The Eleventh Circuit recognized that its decision was in conflict with the decisions of other circuit courts of appeals. App. 9 (citing *Atencio*, 476 F.3d at 1108; *Wise*, 391 F.3d at 1032-33; *Angle*, 234 F.3d at 346-47; *Coenen*, 135 F.3d at 941-43). It stated, however, that the conflicting opinions were based on the reasoning of *Burns*, which *Irizarry* subsequently held does not apply to variances from the Sentencing Guidelines. App. 9-10. It held that *Irizarry*'s reasoning should be extended to special conditions of supervised release. App. 10.

B. The Eleventh Circuit's decision is an unwarranted extension of *Irizarry* and is inconsistent with *Burns* and Rule 32(i)(1)(C).

The Eleventh Circuit's decision extends the rule stated in *Irizarry* beyond what the reasoning of that case will support. While the Court held in *Irizarry* that notice of a variance is not required to protect the parties' right under Rule 32(i)(1)(C) to comment on "matters relating to an appropriate sentence," the same is not true regarding special conditions of supervised release that a defendant should not

reasonably have been expected to anticipate. In holding that *Irizzary* should be extended to special conditions of supervised release, the Eleventh Circuit focused on the first of the factors the Court discussed in *Irizzary*, whether a defendant is entitled to expect a within-Guidelines sentence. The court of appeals stated that a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of supervised release" because "[t]he Guidelines contemplate that a defendant will receive a term of supervised release" and "[s]upervised release, by its nature, comes with conditions." App. 10-11. The Eleventh Circuit did not address the second or third factors discussed in *Irizarry* – whether notice would affect the parties' presentation of argument and evidence and whether sentencing practices and the other procedural protections of Rule 32 would ensure that all relevant matters are considered before a sentence is determined. Neither factor applies to special conditions of supervised release that a defendant should not reasonably have expected. Instead, denial of notice regarding a potential special condition of supervised release may prevent defendants from being able to meaningfully comment on an important "matter[] relating to an appropriate sentence."

1. Notice of contemplated special conditions is necessary to ensure that the parties have an adequate opportunity to address the relevant factual and legal issues.

The Court stated in *Irizzary* that there was no indication that notice of the possibility of a variance "would have changed the parties' presentations in any material way; nor do we think it would in most cases." 128 S. Ct. at 2203. As the Court explained, the parties are on notice that the court might impose a sentence outside the applicable Sentencing Guidelines range. 128 S. Ct. at 2202-03. Accordingly, post-*Booker*, the parties know they must address at a sentencing proceeding all issues that bear on the question of how long the defendant should be incarcerated for his offense. The same cannot be said regarding special conditions of supervised release that are not among the statutory list of mandatory and discretionary conditions and have no nexus to the offense of conviction.

Anticipating any possible special condition of supervised release that is neither among the statutory mandatory or discretionary conditions nor related to the offense of conviction is a much more formidable task than being prepared to address the single question of how long a defendant should be imprisoned. Given that the variety of special conditions of supervised release a district court can

impose is virtually limitless,[1] holding defense counsel responsible for presenting the arguments and evidence relevant to any condition that could conceivably be imposed on a defendant with no notice that a special condition is contemplated is neither reasonable nor fair.

Moreover, depriving defendants of notice of the potential imposition of special conditions of supervised release that they cannot reasonably be expected to anticipate leads to precisely the harm identified in *Burns*: that "a critical sentencing determination will go untested by the adversarial process." *Burns*, 501 U.S. 137. This is the basis on which the pre-*Irizarry*

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[1] *See, e.g., United States v. May*, 568 F.3d 597, 608 (6th Cir. 2009) (special condition barring defendant from association with the financial services industry); *United States v. Rodriguez*, 558 F.3d 408, 412-14 (5th Cir. 2009) (special condition prohibiting defendant from unsupervised contact with minors, including his own children); *United States v. McCann*, 317 Fed. Appx. 405, 406 (5th Cir. 2009) (special condition prohibiting defendant from hunting); *United States v. Holman*, 532 F.3d 284, 288-91 (4th Cir. 2008) (special condition requiring intramuscular injections of anti-psychotic medications); *United States v. Mitchell*, 308 Fed. Appx. 162, 164-65 (9th Cir. 2009) (special condition prohibiting defendant from having or using a cell phone); *United States v. Rodriguez*, 178 Fed. Appx. 152, 157-58 (3d Cir. 2006) (special condition prohibiting defendant from having contact with her husband); *United States v. Cardine*, 192 Fed. Appx. 241, 242 (4th Cir. 2006) (special condition prohibiting defendant from "employment in the equestrian industry"); *United States v. Sicher*, 239 F.3d 289, 291-92 (3d Cir. 2000) (special condition barring defendant from entering two counties); *United States v. Stephan*, 9 Fed. Appx. 125, 126-27 (4th Cir. 2001) (special condition barring defendant from operating a motor vehicle).

opinions interpreted *Burns* and Rule 32 to require notice prior to the imposition of non-standard special conditions. *See Wise*, 391 F.3d at 1033 (notice of a special condition is required "so that counsel and the defendant will have the opportunity to address personally its appropriateness"); *Scott*, 316 F.3d at 735 (notice of special condition would have allowed counsel to research and comment more effectively regarding the condition); *Bartsma*, 198 F.3d at 1199 n.6 (notice would have allowed the parties to "brief[ ] the propriety of the condition" and make "[a]n intelligent, adversarial argument"); *Coenen*, 135 F.3d at 943 (notice would "serve to greatly further Rule 32's 'purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences' ") (quoting *Burns*, 501 U.S. at 137).

Mr. Moran's case illustrates the manner in which lack of notice may interfere with a defendant's ability to meaningfully comment on special conditions. Having no inkling that sex offender special conditions were contemplated, defense counsel focused his presentation at sentencing on the charge Mr. Moran had been convicted of and the factors that might affect the appropriate term of incarceration for that charge: Mr. Moran's possession of the gun for reasons of self-defense, his ill health, and his cooperation with the government. Doc. 75 at 13-62. Prior to the pronouncement of sentence, neither Mr. Moran nor the government made any factual presentation or argument regarding the sex offense allegations,

Mr. Moran's risk of committing a sex offense in the future, or Mr. Moran's need for sex offender treatment or other sex offender special conditions. The first mention of sex offender special conditions was upon the pronouncement of sentence. At that point, defense counsel stated that he was not "prepared to respond to all of the sexual-offender special conditions" because he had not "previously been apprised that those" sanctions would be imposed and had not researched the legal issues related to the conditions. Doc. 75 at 80-81. Mr. Moran's counsel could only proffer what he believed the evidence was regarding the allegations that led to the charges against Mr. Moran and the sex offender treatment Mr. Moran had already been provided. Doc. 75 at 81-82.

Further, as discussed below, there were significant arguments that the sex offender special conditions are not reasonably related to Mr. Moran's history and characteristics, do not further the statutory purposes of sentencing, and infringe on Mr. Moran's liberty to an unwarranted degree. Had Mr. Moran been provided notice that the special conditions were contemplated and had an opportunity to meaningfully argue in opposition to those conditions, the district court might have been persuaded to reconsider some or all of the special conditions imposed on Mr. Moran. *See Wise*, 391 F.3d at 1033; *Scott*, 316 F.3d at 735; *Bartsma*, 198 F.3d at 1199 n.6.

2. The procedural protections of Rule 32 other than Rule 32(i)(1)(C) do not adequately protect a defendant's ability to comment on special conditions of supervised release.

The Court explained in *Irizarry* that there was no need to extend Rule 32(h) to variances because sentencing practices and the remaining procedural protections established in Rule 32 adequately ensure defendants' ability to comment on all relevant matters before a sentence is imposed. 128 S. Ct. at 2203-04. Specifically, along with Rule 32(i)(1)(C), the Court noted the requirements that defendants be provided copies of their PSRs in advance of sentencing, given an opportunity to object to the PSR, provided a final PSR stating all unresolved objections, and given an opportunity to speak at sentencing and present mitigation evidence. *Id.* at 2203 n.2 (citing Rule 32(e)(2), (f)(1), (g), (i)(4)(A)(ii)). By contrast, unless Rule 32(i)(1)(C)'s requirement that a defendant be allowed to comment on matters relating to the appropriate sentence is interpreted to require notice of contemplated special conditions, the remaining procedural protections discussed by the Court are inadequate to ensure that there is "focused adversarial resolution of the legal and factual issues relevant" to the imposition of special conditions. *Burns*, 501 U.S. at 137.

Rule 32's procedural requirements related to the PSR[2] will generally provide a defendant with notice of the factual matters and Guideline calculations that may affect the district court's determination of the appropriate term of incarceration; they do not provide a similar level of notice regarding special conditions the district court might impose. The PSR does not typically list potential special conditions of supervised release. As a result, while the parties' objections to the PSR ordinarily identify disputed issues regarding the application of the Guidelines and potential departures or variances, they do not ordinarily focus on the factual and legal issues related to possible special conditions.

Further, a defendant's opportunity to speak and put on mitigation evidence regarding special conditions of supervised release is meaningless if the defendant does not know what conditions are

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[2] PSRs are required to "identify all applicable guidelines and policy statements of the Sentencing Commission;" "calculate the defendant's offense level and criminal history category;" "state the resulting sentencing range and kinds of sentences available;" "identify any factor relevant to . . . the appropriate kind of sentence, [and] the appropriate sentence within the applicable sentencing range;" and "identify any basis for departing from the applicable sentencing range." Rule 32(d)(1). The PSR additionally must contain information regarding, among other things, "the defendant's history and characteristics, including . . . any prior criminal record; . . . the defendant's financial condition; and . . . any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." Rule 32(d)(2)(A).

contemplated. As discussed above, a defendant generally knows that the district court will decide at sentencing how many months or years the defendant must be imprisoned to achieve the statutory purposes of sentencing. *See* § 3553(a). The defendant would not necessarily know even that conditions of supervised release other than those identified by the relevant statute and Guideline might be imposed, much less what those conditions might be. In this case, for instance, Mr. Moran had been sentenced on five separate occasions since his 1994 sentencing for the single sex offense conviction on his record. PSR ¶¶ 33-37. In none of those sentencing proceedings were sex offender special conditions imposed. *Id.* Mr. Moran had no reason to believe that such conditions would be imposed on him in this case, and in fact his attorney had not anticipated that they were under consideration. App. 6.

The manner in which sentencing proceedings are usually carried out also fails to protect a defendant's ability to comment on this matter relating to an appropriate sentence. Here, as in many cases, there was no discussion of special conditions of supervised release until the sentence was pronounced. In the typical case in which the conditions of supervised release imposed on the defendant consist of the relevant mandatory and discretionary conditions identified in the Sentencing Guidelines, postponing discussion of conditions of supervised release is unlikely to make a difference in the sentencing presentation. In cases like this one, however, where

the defendant has no reason to expect the special conditions imposed, "first to impose the sentence, and then to invite counsel to comment. . . . is no notice at all." *Wise*, 391 F.3d at 1033.

C. Whether notice is required prior to the imposition of special conditions of supervised release is an important issue that is likely to recur.

The issue of whether notice is required prior to the imposition of special conditions of supervised release presents an important question regarding the interpretation of Rule 32(i)(1)(C)'s requirement that a defendant be allowed to comment on "matters relating to an appropriate sentence." In the wake of *Irizarry*, this question has become unsettled. The Fifth Circuit has described the law regarding the notice issue as "unclear," *Weatherton*, 567 F.3d at 156; *Ybarra*, 289 Fed. Appx. at 734, and in this case, the Eleventh Circuit broke with the four circuit courts of appeals that had held pre-*Irizzary* that notice is required.

This issue is also likely to recur. Prior to *Irizarry*, the courts had been presented in at least the eight circuit court opinions discussed above with the question of when notice of a special condition is required. The question had been raised in additional cases where the circumstances dictated that notice was not necessary. *See, e.g.*, *United States v. Jorge-Salgado*, 520 F.3d 840, 844 (8th Cir. 2008); *United*

States v. Burke, 252 Fed. Appx. 49, 54 (6th Cir. 2007); *United States v. McConville*, 206 Fed. Appx. 828, 831 (10th Cir. 2006); *United States v. McAlister*, 184 Fed. Appx. 613, 614-615 (9th Cir. 2006). In the time period since *Irizarry* of just over a year, the issue has arisen not only in this case, but also in the two Fifth Circuit cases. Granting certiorari would accordingly allow the Court to clarify this important question.

II. The Eleventh Circuit's decision conflicts with decisions of other circuit courts of appeals regarding the interpretation of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3.

Certiorari should be granted for the second reason that the Eleventh Circuit's opinion conflicted with decisions of other circuit courts of appeals regarding the interpretation of 18 U.S.C. Section 3583(d) and U.S.S.G. Section 5D1.3, which govern the imposition of conditions of supervised release. Under those provisions, three requirements limit a district court's discretion to impose special conditions of supervised release. First, the special conditions must be "reasonably related to" the statutory sentencing factors set forth at 18 U.S.C. Section 3553(a)(1) and (2)(B)-(D). § 3583(d)(1); § 5D1.3(b). That is, they must be reasonably related to "the nature and circumstances of the offense and the history and characteristics of the defendant" and the purposes of sentencing: "(B) to afford adequate deterrence to criminal conduct; (C) to protect the public from

further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." § 3553(a)(1), (2)(B)-(D). Second, the conditions must also involve "no greater deprivation of liberty than is reasonably necessary" to accomplish these statutory sentencing purposes of deterrence, protection of the public, and rehabilitation. §§ 3553(a)(2)(B)-(D), 3583(d)(2); § 5D1.3(b). Third, the special conditions must be consistent with the Sentencing Commission's policy statements. § 3583(d)(3); § 5D1.3(b). The Eleventh Circuit's opinion was inconsistent with the opinions of other courts of appeals regarding the interpretation of both the "reasonable relationship" requirement and the prohibition against undue infringement on a defendant's liberty.

A. The Eleventh Circuit's holding that sex offender conditions based on a single thirteen-year-old sex offense were reasonably related to the history and characteristics of the defendant and the statutory purposes of sentencing conflicts with decisions of the Sixth, Eighth, and Ninth Circuits.

The Eleventh Circuit's opinion conflicts with the opinions of the Sixth, Eighth, and Ninth Circuits in *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006); *United States v. Scott*, 270 F.3d 632 (8th Cir. 2001); *United States v. Kent*, 209 F.3d 1073 (8th Cir. 2000);

and *United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003), regarding the interpretation of Section 3583(d) and Section 5D1.3's requirement that special conditions be "reasonably related to" "the nature and circumstances of the offense and the history and characteristics of the defendant" and the statutory purposes of sentencing. § 3583(d)(1); § 5D1.3(b); § 3553(a)(1), (2)(B)-(D). Those cases hold that a defendant's commission of a sex offense that is remote in time, without more, does not establish the requisite relationship between sex offender special conditions and the defendant's history and characteristics or the statutory purposes of sentencing. *See Carter*, 463 F.3d at 532; *T.M.*, 330 F.3d at 1240; *Scott*, 270 F.3d at 636; *Kent*, 209 F.3d at 1077.

As the court of appeals acknowledged, App. 13, there is no dispute in this case that the "nature and circumstances of the offense" bore no relationship to the sex offender special conditions. Sex-offender special conditions are "not reasonably related to being a felon in possession of a firearm." *United States v. Carter*, 463 F.3d 526, 530 (6th Cir. 2006).

In holding that the sex offender special conditions were reasonably related to Mr. Moran's history and characteristics and the statutory purposes of sentencing based on a single thirteen-year-old sex offense,[3] the Eleventh Circuit broke with the Sixth,

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[3] The court of appeals also discussed sex offense allegations that Mr. Moran was never convicted of. App. at 3-4. It is unclear

(Continued on following page)

Eighth, and Ninth Circuits. Each of those courts has held that a conviction for a single sex offense over a decade prior to sentencing is too remote to be reasonably related to a defendant's present situation. The Eighth Circuit held in *Scott* that it was unreasonable to impose sex offender conditions based on a fifteen-year-old sex offense where there was "no evidence supporting the need for the special conditions" because the government had "presented no evidence that [the defendant had] a propensity to

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from the court of appeals' opinion whether it relied on the unsubstantiated allegations in affirming the conditions of supervised release imposed on Mr. Moran. To the extent it did so, its opinion would conflict with this Court's holding that criminal charges a defendant has not been convicted of may be treated as relevant conduct only if the district court finds that the government proved by a preponderance of the evidence that the defendant committed those acts. *United States v. Watts*, 519 U.S. 148, 155-56 (1997); *see also United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995). The government made no attempt at sentencing to establish that Mr. Moran committed the alleged sex offenses; nor did the district court make the required finding that the government had proven these alleged offenses by the preponderance of the evidence. The court of appeals additionally alluded to the facts that Mr. Moran "was discovered in a household containing a minor female" and "had failed to register as a sex offender." App. 13. Although the PSR recites that at the time of his arrest, Mr. Moran was "living with his girlfriend and her minor niece," PSR ¶ 8, at that time, nothing prohibited Mr. Moran from living in the same household as a minor. There has never been any allegation Mr. Moran engaged in any inappropriate conduct with the minor. Failure to register as a sex offender is not a "sex offense" for purposes of determining the special conditions of supervised release applicable to sex offense defendants. *See* U.S.S.G. § 5D1.2, App. Note 1; § 5D1.3(d)(7).

commit any future sex offenses, or that [the defendant had] repeated this behavior." 270 F.3d at 636. Without evidence that the defendant presently had a propensity to commit sex offenses, the Eighth Circuit stated, sex offender conditions "seem unlikely to serve the goals of deterrence or public safety, since the behavior on which the special conditions are based . . . has ceased." *Id.* Similarly, the Eighth Circuit held in *Kent* that an allegation of spousal abuse thirteen years prior to sentencing did not justify a condition of supervised release requiring psychological treatment. 209 F.3d at 1077. It stated that the evidence did not establish treatment was needed where "the government failed to provide any testimony from a medical expert aimed at addressing [the defendant's] current mental condition" and "the use of the condition as a deterrent makes little sense in light of the fact that the behavior to be deterred had ceased independently." *Id.*

In *T.M.*, the Ninth Circuit relied on *Scott* and *Kent* to hold that sex offenses twenty and forty years prior to sentencing were too remote to justify sex offender special conditions. 330 F.3d at 1240. "Supervised release conditions predicated upon twenty-year-old incidents, without more, do not promote the goals of public protection and deterrence," the court stated. *Id.* "The fact that [the defendant] has lived the last twenty years without committing a sex offense suggests that he no longer needs to be deterred or shielded from the public." *Id.*

The Sixth Circuit adopted *Scott*, *Kent*, and *T.M.* in its opinion in *Carter*. 463 F.3d at 531-532. Based on the rationale of those cases, it held that sex offenses seventeen years prior to sentencing were too remote to be reasonably related to sex-offender special conditions. *Id.* at 532.

The basis for the district court's imposition of sex offender special conditions on Mr. Moran was his single sex offense conviction based on conduct that allegedly took place over thirteen years prior to sentencing. The Eleventh Circuit's opinion thus conflicted with the Sixth, Eighth, and Ninth Circuit opinions in holding that Mr. Moran's remote-in-time sex offense conviction was reasonably related to Mr. Moran's history and characteristics and promoted the purposes of sentencing. The Eleventh Circuit stated in its opinion that the sex offender conditions would further the statutory purposes of rehabilitation and protection on the public. App. 13, 15, 16. But, just as in *Scott* and *Kent*, there was no evidence here that Mr. Moran is in need of rehabilitation to prevent him from committing a new sex offense. The government also offered no evidence that he has a propensity to commit future sex offenses or that Mr. Moran is in need of treatment – or any of the sex offender conditions – to prevent him from doing so or to protect the public from him. Mr. Moran has not been convicted of any sex offense since 1994. Sex offender treatment was ordered in connection with Mr. Moran's 1994 conviction. PSR ¶ 33; Doc. 75 at 81. Mr. Moran has been sentenced in state and federal courts

five times in the interim since the 1994 conviction without sex offender conditions having been imposed. In short, this case presents the same set of circumstances that the Sixth, Eighth, and Ninth Circuits held to be insufficient to justify the imposition of sex offender special conditions.

B. The Eleventh Circuit's holding that a condition prohibiting internet access is not a greater deprivation of liberty than necessary to achieve the statutory purposes of sentencing where there was no nexus between computers or the internet and the offense of conviction or any prior wrongful conduct conflicts with opinions of the Second, Third, Seventh, and Eighth Circuits.

The Eleventh Circuit's affirmance of the condition of supervised release prohibiting Mr. Moran from using the internet without the prior written permission of his probation officer conflicts with the opinions of the Second, Third, Seventh, and Eighth Circuits in *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001); *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003); *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003); *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003); and *United States v. Crume*, 422 F.3d 728 (8th Cir. 2005). Each of these cases interprets the requirement that conditions of supervised release

must involve "no greater deprivation of liberty than is reasonably necessary" to accomplish the statutory purposes of sentencing. §§ 3553(a)(2)(B)-(D), 3583(d)(2); § 5D1.3(b). The Eleventh Circuit's opinion conflicts with *Peterson* by affirming a condition prohibiting internet access where there was no nexus between any wrongdoing by the defendant and computers or the internet. The opinion in this case further conflicts with the remaining cited opinions of the Second, Third, Seventh, and Eighth Circuits holding that the precise condition imposed in this case is overly restrictive.

Peterson holds that a prohibition against access to the internet is overbroad where there was no evidence that the defendant's prior sex offense "had any connection to computers or to the Internet." *Peterson*, 248 F.3d at 82-84; *cf. also United States v. Barsumyan*, 517 F.3d 1154, 1161 (9th Cir. 2008) (special condition prohibiting use of computers was overbroad where there was "no indication that [the defendant] used a computer in any" crime). "Conditions of supervised release must be supported by some evidence that the condition imposed is tangibly related to the circumstances of the offense, the history of the defendant, the need for general deterrence, or similar concerns." *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007). "A condition with no basis in the record, or with only the most tenuous basis, will inevitably violate § 3583(d)(2)'s command that such conditions involve no greater deprivation of liberty than is reasonably necessary." *Id.* (quoting

United States v. Pruden, 398 F.3d 241, 249 (3d Cir. 2005)). Just as in *Peterson*, there was no nexus in this case between use of computers or the internet and any alleged wrongdoing by Mr. Moran. Although the Eleventh Circuit opinion does not acknowledge the conflict, its opinion thus conflicts with *Peterson*.

The remaining Second, Third, Seventh, and Eighth Circuit opinions cited above hold the precise condition at issue here – a prohibition against access to the internet without prior permission of the probation officer – to be a greater restriction on liberty than necessary, even though each of the cited cases involved a nexus between the condition and the defendant's history. *See Crume*, 422 F.3d at 733 (defendant convicted of possession of child pornography); *Freeman*, 316 F.3d at 391-92 (same); *Sofsky*, 287 F.3d at 126 (same); *Scott*, 316 F.3d at 735-36 (defendant found in possession of child pornography). The courts recognize that "[c]omputers and Internet access have become virtually indispensable in the modern world." *Peterson*, 248 F.3d at 83. A ban on internet access "renders modern life – in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website – exceptionally difficult." *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003). The courts have accordingly required narrow tailoring of Internet restrictions. *See United States v.*

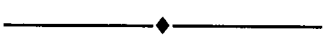
Holm, 326 F.3d 872, 878-79 (7th Cir. 2003) (collecting cases). As the Second Circuit stated in *Sofksy*:

> [A]lthough a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones. The same could be said of a prohibition on the use of the mails imposed on a defendant convicted of mail fraud. A total ban on Internet access prevents use of e-mail, an increasingly widely used form of communication and . . . prevents other common-place computer uses such as doing any research, getting a weather forecast, or reading a newspaper online.

287 F.3d at 126 (quotations, citations, and alterations omitted).

In affirming the internet prohibition, the Eleventh Circuit relied on its prior opinion in *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003), affirming a special condition prohibiting a child pornography defendant from access to the internet. *Zinn* recognized that its holding conflicted with the Second Circuit's opinion in *Sofsky* and the Third Circuit's opinion in *Freeman* and relied on the contrary opinions in *United States v. Paul*, 274 F.3d 155, 169-70 (5th Cir. 2001), and *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001). 321 F.3d at 1093. The Eleventh Circuit also distinguished *Peterson* in *Zinn*, stating that the internet restriction in *Peterson* was based on a prior sex offense that was unrelated to the

internet, while in the case before it, the internet prohibition bore "a strong tie to the offenses that precipitated" the challenged condition.[4] 321 F.3d at 1093 n.12. In this case, notwithstanding that this distinction with *Peterson* does not exist, the Eleventh Circuit held that the condition prohibiting internet access "is not unduly restrictive." App. 16. The Eleventh Circuit's affirmance of the same special condition prohibiting internet access that has been held to be overly broad by the Second, Third, Seventh, and Eighth Circuits, in a case involving no nexus between the internet and any wrongdoing by the defendant, creates a conflict that warrants review by this Court.



[4] The defendants in *Paul* and *Walser* had likewise engaged in wrongdoing related to the use of the internet. 274 F.3d at 169; 275 F.3d at 988.

CONCLUSION

For the reasons set forth above, Petitioner Virgil Moran's petition for a writ of certiorari should be granted.

Respectfully submitted,

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