No. 14-10405

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's challenge to a testing procedure that his probation officer might direct him to undergo in the future, as part of the sex-offender-treatment condition of his term of supervised release, is not yet ripe for review.

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OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal (Pet. App. A1) is not reported. An earlier opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 579 Fed. Appx. 249.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2015. The petition for a writ of certiorari was filed on June 22, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of receiving a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2) and 2. Pet. App. B1. He was sentenced to 210 months of imprisonment, to be followed by 20 years of supervised release. Id. at B2-B3. As a condition of supervised release, the district court required petitioner to participate in sex-offender-treatment services as directed by his probation officer, which might include plethysmographic testing. Id. at B4. The court of appeals vacated petitioner's sentence in part and remanded to the district court for resentencing. See United States v. Lopez, 579 Fed. Appx. 249 (5th Cir. 2014) (Lopez I). This Court denied a petition for a writ of certiorari. Lopez v. United States, 135 S. Ct. 1549 (2015) (No. 14-7212). On remand, the district court imposed the same sentence and special condition of supervised release. Pet. App. C2-C4. The court of appeals dismissed the appeal for lack of subject-matter jurisdiction. Id. at A1.

1. Petitioner used his computer, file-sharing software, and the Internet to obtain pornography. Presentence Investigation Report (PSR) ¶¶ 15-31; D. Ct. Doc. 29, at 3 (Factual Resume). He collected several child-pornography videos, some of which depicted prepubescent minors engaged in sexually explicit

conduct, including genital-genital and genital-anal intercourse, sadistic and masochistic conduct, and lascivious exhibition of the genitals and pubic areas. Ibid.

On October 24, 2012, while searching the Internet for such material, petitioner downloaded a file depicting a prepubescent female engaged in oral-genital sexual intercourse and lascivious exhibition of the genitals and pubic areas of both the child and an adult male. Factual Resume 3. After downloading the video to his computer, petitioner saved it to a flash drive that he owned. Ibid.

When agents spoke to petitioner, he admitted that he had used peer-to-peer software to download child pornography, which he then watched and saved. PSR ¶ 23. Forensic examination showed that he possessed more than 50 video files of child pornography. PSR ¶ 30. Several of those files depicted toddlers and small children being sexually assaulted, including a toddler engaged in oral-genital intercourse with an adult male and a prepubescent girl engaged in genital intercourse with an adult male. PSR ¶ 31.

2. A grand jury in the United States District Court for the Northern District of Texas returned an indictment charging petitioner with five counts of receiving a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2) and 2; and two counts of possessing child

pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and 2. D. Ct. Doc. 14, at 1-8.

Petitioner pleaded guilty to one count of receiving a visual depiction of a minor engaging in sexually explicit conduct. D. Ct. Doc. 28, at 1-2. He was sentenced to 210 months of imprisonment, to be followed by 20 years of supervised release. Pet. App. B2-B3. Among the conditions of supervised release imposed by the district court was a requirement that petitioner "participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e. clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community." Id. at B4.

3. Petitioner appealed his sentence, and the court of appeals affirmed in part, vacated in part, and remanded to the district court for resentencing. Lopez I, 579 Fed. Appx. at 250. As relevant here, the court of appeals declined to consider petitioner's contention that the district court had erred in providing, as a condition of supervised release, that the probation officer could require petitioner to submit to plethysmographic testing. Id. at 249. Relying on its prior decision in United States v. Ellis, 720 F.3d 220 (5th Cir.), cert. denied, 134 S. Ct. 681 (2013), the court held that it lacked

jurisdiction over petitioner's claim because the issue was not yet ripe for review. Lopez I, 579 Fed. Appx. at 249. In Ellis, the Fifth Circuit had determined that a defendant's challenge to a similar condition of supervised release was not ripe for review because the defendant "may never be subjected to such medication or testing." 720 F.3d at 227 (citing United States v. Carmichael, 343 F.3d 756, 761 (5th Cir. 2003), cert. denied, 540 U.S. 1136 (2004)). The Ellis court added that, if the defendant is eventually "required to submit to such medication or testing," he will be able to "petition the district court for a modification of his conditions." Ibid. (citing 18 U.S.C. 3583(e)(2); Fed. R. Crim. P. 32.1(c); United States v. Rhodes, 552 F.3d 624, 628-629 (7th Cir. 2009)).

Although the court of appeals declined to address petitioner's challenge to the possibility that he could be required to undergo plethysmographic testing, the court separately held that the district court had committed a procedural error in denying petitioner a three-level reduction in his offense level. Lopez I, 579 Fed. Appx. at 250. The court of appeals therefore vacated and remanded for resentencing. Ibid. On remand, the district court resentenced petitioner to 210 months of imprisonment, to be followed by a 20-year term of supervised release subject to the same terms and conditions as before. Pet. App. C2-C4.

4. Petitioner again appealed his sentence, challenging the condition of supervised release that he participate in sex-offender-treatment services as directed by his probation officer, to the extent that such services might include plethysmographic testing. Pet. C.A. Br. 9-20. The government filed a motion to dismiss the appeal, arguing that petitioner's challenge was not ripe for review. Gov't C.A. Mot. to Dismiss 1-3. Petitioner -- who had already conceded that his appeal was foreclosed under circuit precedent, see Pet. C.A. Br. 9, 11 (discussing Ellis, 720 F.3d at 227) -- did not oppose the government's motion. The court of appeals dismissed the appeal for lack of jurisdiction. Pet. App. A1.

ARGUMENT

Petitioner challenges (Pet. 8-18) the court of appeals' determination that his challenge to one condition of his supervised release is not yet ripe for review. The court of appeals' order is correct and does not warrant further review. Although the First and Ninth Circuits have adopted reasoning that is arguably in tension with the apparent basis for the decision below, there is no mature conflict of any significance. This Court has denied previous petitions for writs of certiorari that presented the same question. See Camillo-Amisano v. United States, 135 S. Ct. 2377 (2015) (No. 14-8107); Lopez v. United States, 135 S. Ct. 1549 (2015) (No. 14-7212); Oliphant v. United

States, 133 S. Ct. 106 (2012) (No. 11-9686); Christian v. United States, 559 U.S. 1071 (2010) (No. 09-7950).[1] In addition, this case would be a poor vehicle for this Court's resolution of the question presented, since petitioner failed to assert his current challenge in the district court and that challenge therefore is reviewable only for plain error.

1. a. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998) (citations and internal quotation marks omitted). Although a plaintiff need not "await the consummation of threatened injury to obtain preventive relief," the injury must, at least, be "certainly impending." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985) (citation omitted); see also Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163-164 (1967) (finding that claim was not ripe for review because, even though the issue was framed as a "purely legal question," the purported injury was nonetheless entirely speculative).

b. The court of appeals correctly applied those principles in holding in Lopez I, supra, that petitioner's challenge is not ripe and in dismissing petitioner's subsequent appeal,

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[1] The same question is also presented by the pending petition in Williams v. United States, No. 14-10443 (filed June 24, 2015).

Pet. App. A1. The relevant condition of petitioner's supervised release does not actually require that he undergo penile plethysmography. Instead, that condition provides that petitioner's probation officer will have discretion to determine which sex-offender-treatment services are best suited to petitioner's situation during his term of supervised release. Pet. App. C4.

Lopez I and the order below are consistent with decisions in three circuits holding that such challenges are not ripe for review. See United States v. Ellis, 720 F.3d 220, 227 (5th Cir.), cert. denied, 134 S. Ct. 681 (2013); United States v. Rhodes, 552 F.3d 624, 626-629 (7th Cir. 2009); United States v. Lee, 502 F.3d 447, 449-451 (6th Cir. 2007); see also United States v. Christian, 344 Fed. Appx. 53, 56-57 (5th Cir. 2009), cert. denied, 559 U.S. 1071 (2010). As the Seventh Circuit has explained: "Perhaps the counselor and the Probation Officer responsible for this case may determine that testing would not be efficient, effective, economical, or necessary, or perhaps they would be satisfied with polygraph testing alone, which is not unusual. As the condition is stated, there is a fair amount of discretion regarding the techniques to be utilized." Rhodes, 552 F.3d at 628. Petitioner's own source (Pet. 17) indicates that, as a general matter, only 15% or 25% of adult sex-offender-treatment programs use the form of testing to which he objects. United States v. Weber, 451 F.3d 552, 562 (9th Cir.

2006). And it is particularly difficult to anticipate which services petitioner's own probation officer will decide are appropriate, because it will likely be more than a decade before his term of supervised release begins.[2] Cf. Rhodes, 552 F.3d at 628 (noting that defendant was sentenced to ten years of imprisonment); Lee, 502 F.3d at 450-451 (noting possibility that penile plethysmography will no longer be in use when defendant's supervised release begins). Accordingly, petitioner's challenge to a hypothetical future exercise of discretion is not ripe for review.

c. Applying ripeness principles in this context would not prevent petitioner from raising his challenge when the condition is no longer so contingent. When a condition of supervised release is "determinate," it has an immediate concrete effect and is therefore ripe for appellate review. Rhodes, 552 F.3d at 629 (listing numerous conditions of supervised release that can be challenged as soon as they are imposed because they are determinate).[3] But where, as here, a defendant initially faces

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[2] The Bureau of Prisons' inmate locator currently lists a release date for petitioner of April 22, 2028. Federal Bureau of Prisons, Find an inmate, www.bop.gov/inmateloc (information for BOP Register Number 45723-177) (last visited Aug. 24, 2015).

[3] The sole decision of this Court on which petitioner relies (Pet. 14) fits within that class of cases and thus does not help petitioner. In United States v. Jose, 519 U.S. 54 (1996) (per curiam), the Court held that the IRS had a ripe appeal from a district court's order that conditioned enforcement of an IRS summons on notice by the IRS to the opposing party of its intent

indeterminate conditions that may never be activated, he can later obtain judicial review by asking the district court to modify the conditions of his supervised release if it appears he will be subject to an objectionable examination. See ibid.; Lee, 502 F.3d at 451; see also 18 U.S.C. 3583(e)(2) (the court may modify conditions of supervised release at any time before the supervised-release period ends); Fed. R. Crim. P. 32.1(c).

Petitioner's suggestion (Pet. 15) that the district court could not entertain such a petition is groundless. In Ellis, the decision that the parties recognized as supporting dismissal in this case (Pet. C.A. Br. 9, 11; Gov't C.A. Mot. to Dismiss 2-3), the Fifth Circuit rejected as unripe a defendant's challenge to "the possibility [that] he might be required to submit to" plethysmographic testing as a condition of supervised release. 720 F.3d at 227. But the court explained that, "[i]f [the defendant] is required to submit to such * * * testing, he may petition the district court for a modification of his conditions." Ibid.; see also Christian, 344 Fed. Appx. at 57 (similarly holding that such a challenge to a contingent condition is

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to use the summoned information internally. Id. at 55, 57. The condition imposed on the government by the district court had an immediate adverse impact: the IRS was required not to take a certain step without complying with a certain procedural requirement. Here, in direct contrast, the sex-offender-treatment condition poses no immediate harm to petitioner because it is uncertain whether petitioner will ever be required to submit to any form of psycho-physiological testing, much less to plethysmographic testing in particular.

not ripe on direct appeal, but noting that defendant could "petition the district court to modify this condition if he is ordered to submit to the procedure"). Appellate review would be available for any denial of such a request for modification. See, e.g., United States v. Insaulgarat, 280 Fed. Appx. 367, 369 (5th Cir. 2008) (vacating district court's denial of motion to modify discretionary condition of supervised release); cf. United States v. Miller, 205 F.3d 1098, 1100-1101 (9th Cir. 2000) (reversing district court's conclusion that it lacked authority to modify a mandatory condition of supervised release).[4]

Petitioner suggests (Pet. 16) that his challenge should nevertheless be considered now because of the "psychological impact" he experiences from knowing that he might eventually be subject to "an intrusive condition of supervised release" or that he "may have to defy it in order to secure relief." But petitioner would not have to defy such a condition in order to challenge it. See pp. 12-13, infra. And the type of specula-

[4] The decisions on which petitioner relies (Pet. 15) are inapposite. For example, in United States v. Lussier, 104 F.3d 32 (2d Cir. 1997), the court of appeals held that a defendant could not use a post-conviction motion under 18 U.S.C. 3583(e)(2) to challenge an order of restitution that was imposed and immediately went into effect when the court issued his sentence and that could have been challenged at that time. Id. at 34-37. The court of appeals did not suggest -- and petitioner points to no authority holding -- that the court could foreclose as untimely a challenge to a condition of supervised release that the court previously held was not ripe for review.

tive emotional distress he describes, based on the potential application, many years in the future, of a testing technique to which he may never be subjected, is not the type of hardship that would render his claim ripe. See Texas, 523 U.S. at 302 (recognizing that an alleged "threat to personal freedom" is "inadequate to support suit unless the person's primary conduct is affected") (citing Toilet Goods Ass'n, 387 U.S. at 164).

2. Petitioner notes (Pet. 9-10) that the First and Ninth Circuits have exercised jurisdiction to resolve a challenge to a penile-plethysmography condition of supervised release. See United States v. Medina, 779 F.3d 55, 66-67 (1st Cir. 2015); Weber, 451 F.3d at 556-557. In those cases, however, the defendant either was already serving his term of supervised release (Weber, 451 F.3d at 556 n.5), or was about to begin serving his term (Medina, 779 F.3d at 67), making their challenges less speculative than is petitioner's. Indeed, in Medina, 779 F.3d at 66-67, the First Circuit relied on its decision in United States v. Davis, 242 F.3d 49 (2001), which had held that the defendant's challenge to a condition of supervised release was not hypothetical because his term of supervised release would begin in less than two months. Id. at 50-51.

The Ninth Circuit reasoned that a defendant should not be required to violate the terms of his supervised release in order

to obtain review of his claim and that, as a part of the defendant's sentence, any condition of supervised release may be subject to a "facial challenge" on direct appeal. Weber, 451 F.3d at 556. As the Seventh Circuit explained in rejecting Weber's approach to ripeness analysis, the Ninth Circuit's concern -- that a defendant might be forced to violate the condition in order to obtain judicial review -- is not present in a context like this. See Rhodes, 552 F.3d at 629 ("[I]f [the defendant] were to be ordered to undergo [penile-plethysmograph] testing, he could be faced with undergoing the testing (or the alternative of violating the condition of supervised release) before his request to modify was considered by the district court. We think under those circumstances, [the defendant] should be permitted to have the district court consider his request to modify the condition before he is required to undergo the testing. But he is nowhere near such a crest in the supervised release process."); see also Ellis, 720 F.3d at 227 (following Rhodes). The Ninth Circuit's decision in Weber -- which predated the Fifth, Sixth, and Seventh Circuits' decisions in Ellis, Lee, and Rhodes -- does not explain why a motion to modify the condition of supervised release would not be a fully effective avenue to bring a ripe challenge to such a condition without violating it.

The current disagreement within the circuits does not warrant this Court's review. Notwithstanding the tension between the First and Ninth Circuits' rationale and the decisions of three other circuits, a defendant in any of those circuits can unquestionably obtain review of a condition of supervised release, either in an initial appeal from final judgment (in the First and Ninth Circuits, at least when the term of supervised release has already begun or is about to begin) or in a subsequent proceeding (in the Fifth, Sixth, and Seventh Circuits). The courts diverge only on the question of when such review must take place. Even after that divergence emerged, this Court has denied review of the ripeness question in cases involving challenges to plethysmographic testing. See Camillo-Amisano, supra (No. 14-8107); Lopez, supra (No. 14-7212); Oliphant, supra (No. 11-9686); Christian, supra (No. 09-7950).

3. In any event, this case would be a poor vehicle for resolving the question presented because petitioner did not object to the challenged condition in the district court and his claim therefore is reviewable only for plain error.[5] See Fed. R.

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[5] Petitioner argued in the court of appeals that his claim should be reviewed for abuse of discretion rather than plain error because the district court had not mentioned the possibility of plethysmographic testing at the resentencing hearing. Pet. C.A. Br. 10. That argument had some force at his initial sentencing, when the same thing occurred. 6/13/13 Sent. Tr. 14; Pet. App. B4. But petitioner cannot claim that he had no basis to object to potential plethysmographic testing when -- after Lopez I -- the district court followed the same procedure in

Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). An error constitutes reversible plain error only if the defendant can demonstrate that (1) there was error; (2) the error is plain or obvious; (3) the error affected substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see, e.g., United States v. Marcus, 560 U.S. 258, 262 (2010); Puckett v. United States, 556 U.S. 129, 135 (2009).

Petitioner cannot satisfy those requirements. There is no dispute that sex-offender treatment is appropriate. See 6/13/13 Sent. Tr. 12 (petitioner's counsel requesting placement recommendation in facility that would provide treatment during his prison term). Plethysmographic testing has been accepted by some as useful in the treatment of sexual offenders, see Weber, 451 F.3d at 565-566, and petitioner will be required to undergo such testing only if his treatment program requires it. Cf. United States v. Sebastian, 612 F.3d 47, 52 (1st Cir. 2010) ("[W]e see no plain error in requiring Sebastian to comply with a pornography ban if and only as required by any treatment program he may attend -- in effect, remitting the matter to the judgment of the treatment program. It remains open to him to

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resentencing petitioner to the same term of supervised release and same treatment conditions. See 10/2/14 Sent. Tr. 4.

challenge specific applications of any program's requirements when actually imposed in the future.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

KIRBY A. HELLER
Attorney

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