

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 21 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-10360

Plaintiff-Appellee,

D.C. No.

2:17-cr-00406-DGC-1

v.

CEDRIC JOSEPH TENORIO, AKA Cedric
Tenorio,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

David G. Campbell, District Judge, Presiding

Argued and Submitted September 6, 2018
San Francisco, California

Before: BERZON and FRIEDLAND, Circuit Judges, and CARDONE,** District
Judge.

Defendant-Appellant Cedric Tenorio challenges three conditions of his term
of supervised release from prison: that he (1) “participate in a mental health
program as directed by [his] probation officer, which may include taking

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kathleen Cardone, United States District Judge for the
Western District of Texas, sitting by designation.

prescribed medication” (“Special Condition #5” or “the medication condition”), (2) “participate in an approved program for anger management and be responsible for paying for the costs of such treatment” (“Special Condition #10” or “the anger management condition”), and (3) “notify [his] probation officer” within 72 hours of any time [he] was “questioned or arrested by a law enforcement officer” (“Standard Condition #9”). We have jurisdiction under 28 U.S.C. § 1291, and because Tenorio did not object to the supervised release conditions at sentencing, we review for plain error. *See United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012) (citing *United States v. Johnson*, 626 F.3d 1085, 1088-89 (9th Cir. 2010)).

Based on the Government’s concessions at argument, we remand for (1) revision of the medication condition because the district court did not follow the procedures necessary to require liberty affecting medication, and (2) revision of the anger management condition because the court failed to consider Tenorio’s ability to pay for treatment. Because we are unpersuaded by Tenorio’s argument that the third condition was so vague as to constitute plain error, we affirm that condition.

I.

Tenorio argues that the medication condition was imposed in error because the district court did not make specific procedural findings justifying its imposition. District courts must follow heightened procedural measures before

imposing a condition of supervised release that “implicate[s] a particularly significant liberty interest.” *United States v. Stoterau*, 524 F.3d 988, 1005 (9th Cir. 2008) (citing *United States v. Weber*, 451 F.3d 552, 560-61 (9th Cir. 2006)). In *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004), we held that because a condition that requires a defendant to take antipsychotic medication is an “especially grave infringement of liberty,” the district court could not impose that condition without first making (1) “on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish one or more of the factors listed in [18 U.S.C.] § 3583(d)(1),” and (2) “an explicit finding on the record that the condition ‘involves no greater deprivation of liberty than is reasonably necessary.’” *Id.* at 1055, 1057 (quoting 18 U.S.C. § 3583(d)(2)). In *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008), we expanded on that holding, concluding that *Williams* requires special findings for “any imposed treatment or medication that implicates a particularly significant liberty interest.” *Id.* at 955 (emphasis added).

In light of the district court’s failure to make *Williams* findings during Tenorio’s sentencing as required by our case law, the Government here concedes that Tenorio cannot be forced to take medications that would implicate such a significant liberty interest. Accordingly, we remand with instructions to add to the condition that Tenorio can refuse to take the medication without violating his

supervised release if he has a good-faith belief that the medication will implicate a particularly significant liberty interest.¹

II.

Tenorio also challenges Special Condition #10 on inconsistency grounds. Specifically, Tenorio argues that making his required payment for programs under Special Conditions #1 and #5 *conditional* on the probation officer's consideration of his ability to pay while failing to consider his ability to pay for the anger management program under Special Condition #10 is plainly unreasonable. The Government, for its part, admits that the anger management condition cannot be enforced as literally written—instead, the Government encourages us to assume

¹ We note that the U.S Attorney's Office in Arizona seems to have already adjusted how it approaches the special condition, consistent with its concessions in this case. In *United States v. Ewens*, the parties filed a joint notice that they were having the district court modify a very similar release condition that also required taking prescribed medication. The condition now reads:

You must participate in mental health treatment as determined to be necessary by a medical professional and/or mental health professional providing mental health treatment and follow any treatment directions by the treatment provider. You must take medicine as prescribed by a medical professional providing mental health treatment and approved by the Court. If the medical professional prescribes a change in medication which you do not want to take, you must immediately notify the probation officer, so that the Court can promptly hold a hearing. You must contribute to the cost of treatment in an amount to be determined by the probation officer.

Joint Notice to the Court Re: Resolution of One Issue on Appeal at 1, *United States v. Ewens*, No. 17-10509 (9th Cir. Dec. 3, 2018).

limitations *will* be placed on Tenorio’s responsibility to pay based on the fact that such limitations *may* be placed by a number of mechanisms, including the probation officer’s discretion in enforcing the payment requirement, the court’s authority under 18 U.S.C. § 3583(d)-(e) to modify payment conditions, and even Tenorio’s ability to cover payment for the program through Medicaid. Given that the Government has conceded that Tenorio cannot be forced to pay for treatment he cannot afford, we remand with instructions to add to the condition that Tenorio must pay an amount for the anger management program to be determined by the probation officer after consideration of Tenorio’s ability to pay.

III.

Finally, Tenorio contends that Standard Condition #9’s requirement that he report to his probation officer about any time he is “questioned” by law enforcement is impermissibly vague. To fail on vagueness grounds, a condition of supervised release must define the forbidden conduct “in terms so vague that it fails to provide people of ordinary intelligence with fair notice of what is prohibited.” *United States v. Sims*, 849 F.3d 1259, 1260 (9th Cir. 2017).

The district court did not plainly err in imposing the condition, so we need not reach whether the term “questioned” renders it impermissibly vague.² There is

² The Government’s brief appears to argue that de novo review applies to Tenorio’s challenge to the questioning condition because all void-for-vagueness

no controlling authority or analogous precedent that dictates that the condition is “clear” or “obvious” error, nor is it obvious to us that it is. *See United States v. Gnirke*, 775 F.3d 1155, 1164 (9th Cir. 2015) (explaining that “[a]n error ‘cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results’” (quoting *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011))). The out-of-circuit authority that Tenorio relies on is not binding on this court and, in addition, is distinguishable as an “as-applied” challenge to the relevant supervision condition. *See United States v. Maloney*, 513 F.3d 350, 359 (3d. Cir. 2008) (holding that the interaction between the probationer and a code enforcement officer concerning the

claims are reviewed de novo, even when a defendant like Tenorio has failed to object to the condition at sentencing. But we have long reviewed void-for-vagueness challenges to supervised release conditions for plain error when a defendant fails to object. *See United States v. Johnson*, 626 F.3d 1085, 1090 (9th Cir. 2010) (holding that the district court plainly erred when it imposed a condition of supervised release that was not within constitutional bounds); *United States v. Rearden*, 349 F.3d 608, 618-19 (9th Cir. 2003) (reviewing a defendant's vagueness and overbreadth challenges to his supervised release conditions for plain error); *see also United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012) (“We review the constitutionality of a statute as a matter of law de novo . . . However, constitutional issues not originally raised at trial are reviewed for plain error.” (internal citations omitted)). Accordingly, we “exercise [our] discretion to apply plain error” review despite the Government’s arguing for a standard that would be more lenient to defendants’ challenges. *United States v. Murguia-Rodriguez*, 815 F.3d 566, 574 n.9 (9th Cir. 2016) (holding that because “‘waiver of waiver’ doctrine . . . is ‘like waiver generally—a discretionary doctrine,’” the court “is not bound by any concession made by the government” and may either apply the incorrect standard of review argued by the government if that standard is more favorable to the defendant, or the correct standard).

failure to display a peddler's license was "not comparable to the contact generally contemplated" by the condition and therefore an inappropriate basis for violation).

We therefore hold that it was not plain error for the district court to include Standard Condition #9 as part of Tenorio's supervised release.

VACATED AND REMANDED IN PART AND AFFIRMED IN PART.