No. 19-5678

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

John Beyers — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Beyers # 72664-004
(Your Name)

PO Box 4000
(Address)

Springfield, MO 65801
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

John Beyers was sentenced in part, under a statute held unconstitution, 18 USC § 3583(k). Rather than wait until this court's ruling in Haymond, as the government suggested, both the District Court and the Eighth Circuit speedily dismissed the case before Haymond issued and without addressing the substantive objections to release.

1. In light of the Eighth Circuit's consistent practice of failing to give consideration to pro se applicants, often declining opportunity to brief why a certificate should issue, does 28 USC § 2253 process unconstitutionally dilute the writ, by removing even the modest review available under common law?
2. Do those on supervised release have the same diminished expectation of privacy as those on probation or parole, or do the "differences of constitutional significance" affect this expectation?
3. As a revocation of supervised release "adjusts" the original term of imprisonment, allowing imposition of "punishment" for one offense in multiple proceedings, does this violate a releasee's legitimate expectation of finality? Given the inability of the case law to coherently and consistently define the scope and purpose of release, is further guidance needed?
4. Can a releasee be forced, under the guise of "therapy" into the Hobson's choice of waiving constitutional rights, including self incrimination, or of losing his freedom? May courts use therapy as a backdoor to impose constitutionally questionable conditions?
5. Should a GVR issue in light of United States v Haymond, No. 17-1672 (2019) to have the Eighth Circuit address its impact on Beyers' challenge to release and his sentence?

Questions Presented (Continued)

6. Is the holding of Dean v United States, 197 L.Ed.2d 490 (2017) limited to §924(c) or is its guidance on sentencing with multiple counts widely applicable?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Comes now, John T. Beyers, on behalf of himself and others similarly situated seeking certiorari from this honorable court, either to further review the Eighth Circuit's hasty dismissal in United States v Beyers, No. 19-1388 (2019) or to issue a GVR. The Eighth Circuit's summary denial of a Certificate of Appealability is included at Appendix A, and appears to be unpublished.

The District Court's denial is included at Appendix C and is unpubished.

JURISDICTION

The Eighth Circuit's initial denial was issued on May 8, 2019. A timely motion for rehearing was denied on June 14, 2019, which is included at Appendix B.

The jurisdiction of this court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V ...nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law...

18 USC § 3553(a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.

18 USC § 3583(e) The court may...

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release...

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time served on post release supervision...

18 USC § 3583(h) When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised

release shall not exceed the term of supervised release authorized by the statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

18 USC § 3583(k) Notwithstanding subsection (b), the authorized term of supervised release for any [sex offense] is any term of years not less than 5, or life. <If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal [sex offenses] for which imposition of more than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall not be less than 5 years.>

Note: Text within <...> was found unconstitutional in United States v Haymond, No. 17-1672 (2019).

28 USC § 2253(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(B) the final order in a proceeding under section 2255

(2) A Certificate of Appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Following a 2007 conviction for Receipt of Child Pornography, John Beyers was released from prison on October 5, 2012, and had his supervised release transferred to the Western District of Missouri. As a porn offender, Beyers was subjected to extremely strict conditions of supervised release, significantly impeding his ability to successfully reintegrate and live a normal life. This included sex offender therapy, which included its own conditions, preventing Beyers from engaging in constructive, constitutionally protected activities, that would reduce recidivism and lead to personal fulfillment.

Adjusting poorly to this constant scrutiny and interference, and unable to vent his frustration in healthy, productive ways, Beyers reached out to his probation officer, telling him that Beyers was worried about relapsing into pornography and potentially reoffending. Explaining that his current therapy was not helping, and that the increased level of stress might lead to recidivism, he begged to be given different therapy. His probation officer told him he could supplement his therapy if he could pay for it himself. Beyers tried several more times, only to continue to be rebuffed.

As part of his therapy, Beyers had to take polygraph tests. Several months after giving up on asking for help, he had an inconclusive result on a polygraph. This was used to justify a search on Beyers' property to determine if he was complying with the term of his release. On May 17, 2013, several computers were seized for search, and child pornography was later found.

On October 15, 2013, Beyers was indicted in the Western District of Missouri, case 13-00349-01-CR-W-BP with several violations of 18 USC § 2252

and 1466A. While Beyers challenged the search for lack of probable cause, the court dismissed the claim due to the diminished expectations of privacy probationers have. On December 2, 2014, Beyers entered a plea of guilty to all counts with no plea deal. His sentencing and revocation hearing were combined into one proceeding, set for February 3, 2016.

At sentencing, the only issue for the court was whether Beyers' ten year sentence for his crime, the mandatory minimum for §§ 2252 and 1466A, and his five year revocation, the minimum under § 3583(k), would run consecutively or concurrently. The joint witness for both parties testified at length about how Beyers was amenable to treatement, and, had he gotten treatment when he originally asked, he almost certainly would not have reoffended again. As the new head of the probation office's sex offender therapy, she detailed at length the systematic failures in the program Beyers was enrolled in, and how it did not provide help.

Ignoring this, the court cited Beyers' pointing out the failures of therapy to provide him the help he needed as an aggravating factor, as he was failing to take responsibility for his actions. Noting that a ten year prison term would otherwise be sufficient, the judge cited the recommendation to run the violation consecutively and imposed a 15-year term. All requests to run partially concurrent were ignored without explanation. Another five year term of release was also imposed.

On appeal, the Eighth Circuit affirmed, United States v Beyers, 854 F.3d 1041 (8th, 2017). Noting that it was likely true that "the system failed Beyers," the Court of Appeals determined that the District Court did not want to address that argument. While not explaining why a court could "refuse" to address claims, the court found it irrelevant whether or not therapy was effective. Beyers filed a pro se petition for rehearing on these claims,

and in light of Dean v United States, 197 L.Ed.2d 490 (2017). It was denied, and this court denied certiorari on December 7, 2017.

Beyers filed a § 2255 motion, reraising his Dean claim, and alleging various infirmities with supervised release. After the government response (which did not address all claims raised), Beyers filed a supplement, expanding his preexisting claim under United States v Haymond, 869 F.3d 1153 (10th, 2017) and noting that a district court in the Eighth Circuit had found § 1466A unconstitutional. Originally, the district court granted permission to amend, ordering the government to respond, and no objection was made by the government.

After the government suggested Beyers' case should be held in abeyance pending this court's resolution of United States v Haymond, No. 17-1672, however, the court sua sponte decided to dismiss the amendment on plainly incorrect procedural grounds. Claiming Beyers' sentence became final the date the Eighth Circuit originally denied his appeal, as opposed to when the Supreme Court denied certiorari, the district court claimed it was untimely, a calculation that both parties disagreed with.

Over the next several months, the judge raised several such claims, forcing Beyers to file response after response to increasingly incorrect and unteniable claims. The process became so abusive and concerning, Beyers asked for mandamus intervention from the Eighth Circuit, without success.

Ultimately, the district court denied Beyers without addressing all of his § 2255 claims, and declining to rule on any structural limits to release. Many of Beyers' claims were reconstrued in ways never intended to deny him. The Haymond issue as to the legality of § 3583(k) was ignored. Beyers sought a Certificate of Appealability from the Eighth Circuit, citing this court's impending Haymond decision. Ignoring the common practice to

hold any case in which a higher court ruling might impact its decision, the Eighth Circuit rushed to deny the C.O.A. twice before it could be decided. The denial of rehearing came mere days before the opinion in Haymond was published.

REASONS FOR GRANTING THE PETITION

I. 28 USC § 2253 raises serious constitutional concerns.

This court has held, at a minimum, the suspension clause protects habeas as it existed at the founding, and has suggested that it may actually protect some (or all) of its twentieth century expansion, INS v St. Cyr, 533 US 289, 301 (2001). However, the current practical operation of 28 USC § 2253, which requires permission to file an appeal of the denial of a § 2255 motion, comes perilously close to denying many a shot at the protections of the great writ at all, Lonchar v Thomas, 517 US 314, 324 (1996). This is especially true in the Eighth Circuit, where pro forma denials without briefing or opportunity to be heard are the norm, not the exception for pro se inmates.

Only one court seems to have addressed the legality of § 2253, summarily dismissing the challenge due to the lack of a constitutional right to appeal, Soto v United States, 185 F.3d 48, 57 (2nd, 1998), but that was indirectly. Whatever, the merits of this observation, review has always been inherent in habeas corpus actions. Even before Congress opened up the appellate courts to review in habeas petitions, one seeking a writ of habeas corpus could simply refile to another judge after receiving a denial, Schlup v Delo, 513 US 298, 317 (1995). Once appellate review was provided, the ability to file successive motions was curtailed by the abuse of the writ doctrine, McClesky v Zant, 499 US 467, 479-80 (1991).

While replacing multiple rounds of district review with appellate review creates no problems, merely substituting one process for another, Swain v Pressley, 430 US 372, 383-84 (1977) placing later impediments to getting review which has always been offered provides a radical departure

from existing practices, Boumediene v Bush, 553 US 723, 773-74 (2008). This court has already acknowledged the strict limits that this process puts on the courts and has noted that it necessarily closes the doors to claims that would **otherwise merit relief**, Miller-El v Cockrell, 537 US 332, 337 (2003).

This has had a significant affect on the quality of judgments, not just quantity. Though ever applicant has a right to a ruling on the merits of the claims they raise in habeas, see for example Link v Wabash Railroad Co, 370 US 626, 645 (1962), if a district judge arbitrarily denis them on a plainly incorrect procedural ground, they must show that the underlying question, which was never reached, has **significant** merit, in addition to showing the procedure was wrong, Miller-El, at 349. Moreover, while courts can grant § 2255 relief on the ground that the **laws** of the U.S. are being violated by detention, on appeal, only constitutional claims may get argued, for example, Lord v Lambert, 347 F.3d 1091 (9th, 2003).

The practical effect of these changes has been to weaken the efficacy of the writ, Ex Parte Yerger, 8 Wall 85, 102-03 (1869) as appellate review prevents hasty or biased denials, Barefoot v Estelle, 463 US 880, 911 (1983) (citing Garrison v Patterson, 391 US 464, 466 n2 (1968). According to Lexis Nexis, in 2018, the Eighth Circuit Court of Appeals reviewed 17 cases where a Certificate of Appealability had been granted, but had only issued three of the COAs itself. None of these were pro se. And, out of the 17, only four were remanded. None led to relief. To put this number into perspective, in 1997, before the COA process took affect, nine § 2255s got relief at the appellate level, eight substantively on the merits.

This case perfectly illustrates the problems with the COA process. Beyers got no ruling on his amended claims based on a plainly incorrect

calculation of the time to file, which the judge refused to correct even when notified. Both claims involved Beyers getting convicted and sentenced under statutes found illegal by other courts, § 3583(k) by both this court **and** the Tenth Circuit in Haymond, and § 1466A by a district court in the Eighth Circuit, United States v Handley, 564 F.Supp.2d 996 (SD Iowa, 2008). Obviously, jurists of reason **already have** resolved these claims in a manner more favorable to Beyers.

Despite plainly meeting the test for a COA, Beyers was denied. Even though several of Beyers' claims would be impacted by this court's decision in Haymond, and though cases are normally held in abeyance when the outcome of a Supreme Court case would likely determine the appeal, Cervantes v United States, 693 Fed. Appx. 470 (8th, 2017); Nelson v United States, 909 F.3d 964, 969 (8th, 2018), the Eighth Circuit twice denied Beyers before Haymond could issue. Given that a minimum of four judges had already found that § 3583(k)'s constitutionality was deserving of Supreme Court review, it is legally impossible that Beyers' claim based on Haymond could be found lacking for a COA. And yet, Beyers inability to get actual review is consistent with the Eighth Circuit's refusal to grant any pro se COAs.

It's simply not possible, statistically speaking, that absolutely no pro se petitioner had a single issue worth reviewing, let along granting relief on. It's likewise difficult to believe only 17 petitions in the whole Eighth Circuit deserved a COA. In the Eighth Circuit, this is due, in large part, to the deliberate decision to deny pro se petitioners an opportunity to brief the COA, which as good as guarantees a dismissal, West v Schneiter, 485 F.3d 393, 395 (7th, 2007). But its also due to the generally lax procedures inherent in the COA process, something this court repeatedly notes, but which continues, see Buck v Davis, 197 L.Ed.2d 1, 16 (2016).

These problems alone make review of the § 2253 process warranted. But, in recent years, this court has realized that our system has become a system of pleas, and this requires adaptation of constitutional rights to reflect this reality, Lafler v Cooper, 182 L.Ed.2d 398, 403 (2012); Betterman v Montana, 194 L.Ed.2d 723, 733 (2016). This change means that habeas review may be the only review any petitioner gets. Moreover, the § 2255 process may be the only time a court has to answer important questions. Having appellate review is essential to develop jurisprudence, something this court recognized over 150 years ago in Yerger.

Addressing these due process concerns, ensuring that the writ is not whittled away by slow encroachment as our founders feared many of our rights would be, Haymond (slip op p 21), and to ensure the integrity-both real and perceived-of the judiciary, but ensuring pro se litigants are not discriminated against, this court should grant certiorari.

II. Supervised Release Violates a Releasee's Legitimate Expectation of Finality

Historically, this court has held that a sentence becomes final when the highest court authorized to review a sentence affirms the judgment of the lower courts, denies discretionary review, or when the time to appeal has passed, United States v DiFrancesco, 449 US 117, 134 (1980); Andrews v United States, 373 US 334, 340 (1963); Gonzalez v Thaler, 181 L.Ed.2d 619, 637 (2011). Once finality attached, that sentence could no longer be modified, except by certain means, like § 2255, § 3582, or clemency. See also, DiFransesco, at 133-34; Freeman v United States, 180 L.Ed.2d 519, 531 (2011).

Yet, now, Congress has created a system where sentencing may be imposed at final judgment, but modified later:

> As Johnson recognized, when a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's sentence for his original crime. Even the dissent recognizes that the sword of Damascus hangs over a defendant "every time [he] wakes up to serve a day of supervised release."

Haymond (slip op p 13 n5).

Allowing a court to "adjust" a defendant's sentence, after it is concluded at that, raises significant constitutional questions. Supervised release allows a court to modify, not just a finalized sentence, but a **concluded** one. After the releasee has served his entire term, it may be given new life by commission of a new crime, or even by wholly innocent acts that still "violate" conditions of release. The double jeopardy and due process clauses are supposed to protect against increases of a final sentence, United States v Ursery, 518 US 267, 319 (1996).

In Jones v Thomas, 491 US 376, 385, 392 (1989), a unanimous court

agreed that the Constitution would prohibit a trial court from sentencing a man to 10 years, and then later bringing him back and increasing it to 15. Almost 150 years ago, the court in Ex Parte Lange, 85 US 163, 173 (1874) stated that it would make the protection against multiple trials or multiple prosecutions to no avail if a court could just keep bringing a man back and resentencing him on the same crime again and again. This prospect horrified the courts.

Supercised release, especially as now understood does exactly this. Releasees can be brought back, again and again, repeatedly having their sentences "modified" in the way that scandalized the Lange court. The majority of offenders today have no statutory maximum on their supervised release, meaning that they can face violation and reimposition of release under §§ 3583(e)(3) and (h) or increase their term under (e)(2), over and over, potentially for life.

Even when this does not exceed the statutory maximum, it is difficult to say that it does not implicate a defendant's rights to have his sentence increased from five years to seven to nine, in two year increments. If anything such installment plans may be far worse than a single long stretch of sentence, as the back and forth then tails its own costs. Since the loss of conditional freedom is a "grevious loss" in itself, Morrisey v Brewer, 408 US 471, 481 (1972), the removal of full term liberty and post hoc extension of sentence is just as concerning under (e)(2) or (g) as it is in (k).

As recognized here, just saying this part of the original sentence does not make it so. While some cases involve plausible claims that it is still part of one sentence, others make clear it is a fiction, see United States v Phillipsm 785 F.3d 282 (8th, 2015) (even ignoring the length of prison, the length of release increased on each violation, from five years

to 10 years to life). This involves a new sentencing proceeding, and, usually, an increase in total sentence.

While often justified, or akin to, parole, revocation of parole, by definition, did not modify or extend a final sentence, DiFrancesco, at 137. Release revocation proceedings are categorically different:

> In parole's place, Congress established the system of supervised release. But "[u]nlike parole," supervised release wasn't introduced to replace a portion of the defendant's prison term, only to encourage rehabilitation **after** the completion of his prison term.... Where parole and probation violations generally only exposed a defendant to the **remaining** prison term...supervised release violations...expose a defendant to an additional ...prison term...

Haymond (slip op at 17, emphasis in original). While parole hearings comported with the Constitution **because** the judge could not increase a sentence at revocation (see id at 16), **every** revocation of release involves such a modification. Where increase of a probation term was allows if a defendant **avoided** prison, United States v Granderson, 511 US 39, 44 (1994) release allows both prison **and** extension or restarting of release.

While this court has repeatedly promised defendants that they were guaranteed that, at some point, litigation on their case would conclude, Schriro v Summerlain, 542 US 348, 364 (2004), this process guarantees the right in theory, while denying it in reality, Mapp v Ohio, 367 US 643, 656 (1961). And, while this court has consistently disapproved of attempts by inmates to relitigate their cases via habeas, imposing costs upon the system without any real purpose, see, for example, Engle v Isaac, 456 US 107, 126-27 (1982). Yet the over one million revocations carry far more cost than the habease cases done in the same time. And, if anything, this causes far

more loss of faith by society to have the state keep opening closed cases to increase punishment than inmates asking for lenience (and getting summary denials) does.

The conflicting opinions from this court (not even considering the lower ones) are producing confusion amongst litigants and courts alike. This court has said that supervised release is part of the same sentence as prison, Haymond (slip op p unknown), and that it is an interrelated, yet completedly separate, not-interchangeable term, United States v Johnson, 529 US 53, 58-59 (2000)(citing United States v Granderson, 511 US 39, 50 (1994)).

Supervised release has been held to be a rehabilitative end, assisting the individual reenter society, serving different ends than prison, which is punishment, Mont v United States, 139 S.Ct. 1826, at p 16-17 (2019) and then, in the same case, declining to interpret release in a way that "benefits" the offender. Other cases openly admit it as punishment, Johnson v United States, 529 US 694, 700 (2000). Haymond stated it was part of a final sentence (slip op p 12), then admitted that was untrue and "saying it did not make it so" (id at 13 n5).

This lack of a consistent interpretation, and the fact that courts are still using Johnson, which analyzed the pre-1994 version of release (which had already changed, it at 698) to interpret release today, see United States v Zerha, 709 Fed. Appx. 415 (8th, 2018) are causing confusion amongst both litigants and courts. The case law involving supervised release dramatically needs to be revisisted to bring some harmony to the matter.

Right now, there are no practical limits on this practice. Certiorari is warranted to provide guidance and examine where finality attaches in this new creation of of Congress.

III. **Releasees do not have the same status as probationers or parolees, and therefore do not have the same diminished expectation of privacy.**

This court has consistently noted that those on probation or parole are not entitled to absolute liberty like normal citizens, but have diminished expectations of privacy due to their status on supervision, Griffin v Wisconsin, 483 US 868, 874 (1987). The individual gets unwarranted leniency, and is allowed to avoid prison by accepting certain limitations on their freedom for the balance of the term of punishment, Morrissey v Brewer, 408 US 471, 477 (1972).

Despite the fact that both are conditional liberty, this court has consistently distinguished them, especially for purposes of fourth amendment protection. Parolees have fewer expectations of privacy that "society would find legitimate," as parole is closer to imprisonment than probation is, Samson v California, 547 US 843, 850, 852 (2006). Society has much stronger interests in searching parolees than probationers. And, as he would have no fourth amendment rights at all in prison, Samson, at 850 n2, the limited expectations on parole are still an improvement.

Much like probation and parole are different, supervised release is different than both, United States v Granderson, 511 US 39, 50-51 (1998). Where as there is no "right" to early release from a valid sentence, Rummel v Estelle, 445 US 263, 293-94 (1980), the releasee has not gotten the benefit of early release at all. He has completed his term. This was meant to be a follow-up to prison, meant to help rehabilitate the prisoner, distinct from the goals of parole, Haymond (slip op at 16-17).

Regardless of any similarities, this difference must have some constitutional significance for a releasee's right to privacy, and the state's interest in subjecting him to warrantless searches. This is especially true as the

releasee, unlike those on probation or parole may not refuse his consent and serve the rest of his term, Samson, at 852 n3. If he refuses, he may be sent back to prison for a new prison sentence, Haymond (slip op at p 16-17).

While this court has never attempted to fully delineate a parolee or probationer's rights under the fourth amendment, Haymond necessitates a review of what, exactly, a releasee's legitimate privacy expectations are. It is one thing to say that society can demand such searches from parolees, as otherwise parole might not be offered, Samson at 861, and parole can be denied by the one who it is offered to. It is another thing altogether to demand that releasees submit to such searches when their release is a constitutional requirement. Society may not have to give parole, but it may not withhold full term release.

Just because society has an "interest" in searching former inmates does not make that interest valid. Simply claimint that there is a valid societal goal does not let the state take any action it wants supposedly in service to that goal, Williams-Yulee v Fla Bar, 191 L.Ed.2d 570, 598 (2015). Were society to simply vote down the applicability of the fourth and fifth amendments to all felongs, or certain classes of them, that would be unconstitutional. Using release to accomplish this same end through a different label presents the same problem.

The lower courts were presented with this question and refused to address any aspect of it. The Eighth Circuit went so far as to rush a denial of Certificate of Appealability **before** Haymond issued as to avoid it. As it has already been recognized that due process and jury trial rights are not the same in release context as in probation context, it is likely that there are other differences as well. The refusal to address this distinction

when it was firmly presented was unreasonable. A COA should have issued to give Beyers actual review of the merits of this claim.

IV. McKune v Lile cannot constitutionally be appliedoutside of volunteer prison therapy programs. Coerced therapy on supervised release cannot be squared with this court's precedent.

In McKune v Lile, 536 US 24 (2003), the court approved the use of intensive and intrusive sex offender therapy involving polygraph tests. This was determined not to violate the fifth amendment privelage against self-incrimination because the program itself was voluntary, id at 40. While the petitioner argued that the loss of housing, and other privileges, amounted to punishment for exercising his rights, the court chose to view these things as benefits offered to entice participation in the program, which was permissible, id at 29. Since no genuine liberty interest was involved, there was no compulsion for fifth amendment purposes, at 39.

Despite the limited context that McKune addressed, courts have taken it to mean that such therapy is per se permissible, see, for example, Meza v Livingston, 607 F.3d 392, 403 (5th, 2010); Aruanno v Corzine, 687 Fed. Appx. 226, 230 (3rd, 2017); United States v Jones, 798 F.3d 613, 620 (8th, 2015). Now, sex offenders are, as a matter of routine, given such therapy with polygraph testing either as a component of it, or as a condition in its own right. Though offenders on release are categorically different than those in prison, the same test somehow gets applied.

As McKune repeatedly noted that failure to complete, or refusal to participate in such therapy did not affect the prisoner's eligibility for parole, result in loss of good time or impact any other liberty interest, at 37-38, 42, 47, it would seem to be inapplicable in any case where the individual's liberty interests were impacted. In the release context, failure to participate "adequately" as definted by one's probation officer can lead to the imposition of more conditions, house arrest, placement in a halfway

house, or revocation of release altogether. Liberty interests are undoubtedly implicated.

While this court has stated that those on probation or parole retain fifth amendment protections, Minnesota v Murphy, 465 US 420, 426 (1984), the mandated use of a polygraph effectively removes that right. Refusal to take the polygraph results in immediate sanctions. If a polygraph comes back that the releasee is being deceptive, or is inconclusive, as it was here, the probation officer can use it for justification for a search, or it can be used to impose new conditions, limit the releasees liberty by confining him to a halfway house or house arrest, or even revoke release altogether.

Though this court has denied that individuals can be given such a Hobson's choice, Murphy, at 443, it is a daily occurrance for those on release. The McKune justification continues to be applied even though years of the individual's freedom are at stake, something that clearly counts as compulsion.

This raises other concerns. Polygraphs are inherently unreliable, and are not admissible in court, even in civil trials, United States v Scheffer, 523 US 303, 312 (1998). Results are subjective, and open to whatever interpretation the administer of the test wishes to ascribe them to. Under this regime, the releasee's freedom is constantly at risk of arbitrary removal based on incompetent evidence, at the whime and caprice of agents of the state. Due process is supposed to protect against this.

Finally, these therapies remove any structural limitations on conditions a court can set. By enrolling in sex offender therapy, the individual must agree to abide by any rules set down. Therapists add numerous irrational conditions banning releasees from engaging in constitutionally protected activities without the need for justification of any kind. While the releasee

cannot be directly punished for violating these conditions, he can be removed from therapy, which carries the same consequences. For the releasee, this distinction makes no difference, as it has the same practical result.

While judges are limited by the requirements of 18 USC §§ 3353(a) and 3583(d), therapists do not abide by such restrictions. They do not worry about making sure conditions are related to the facts of the case, the releasee's needs, or ensuring that they don't deprive him of more liberty than necessary. As they are not technically government agents, they do not comply with court cases limiting the power to impose conditions or constitutional restrictions. Were such poer given to a probation officer, it would be struck down as a delegation of authority to make conditions of release (as opposed to enforcing a condition), but it is permitted under the guise of "therapy".

These serious problems have never been addressed. By simply treating the situation of the probationer, parolee, or releasee as identical to that of the prisoner, the court ordered therapy creates the very problems this court found did not exist in McKune. Not only is the one in therapy compelled to incriminate himself, and punished if he refuses, he is deprived of his liberty outside of due process of law even if he complies.

As constitutionally suspect as this process is for the probationer or parolee, it is even more problematic for the releasee, who is not just subject to the completion of his original term of imprisonment, Haymond (slip op p 13 n 5), but new prison terms under § 3583(e)(3) or an extension of release under (e)(2), not to mention the numerous restrictions that can be added.

The lower courts did not even attempt to square this with constitutional restrictions, and, in light of Haymond's understanding that the releasee is not on the same constitutional standing as other forms of supervision,

it is a question that needs to be confronted. This is all the more problematic as the original appeal essentially undermined the legitimacy of therapy in general by stating it did not have to be effective, United States v Beyers, 854 F.3d 1041, 1044 (8th, 2017), meaning there is no valid state purpose in imposing it.

All these concerns warrant certiorari.

V. A GVR is warranted in light of Haymond.

Beyers was given a five year enhancement under § 3583(k) for committing a new pornography offense while on supervised release, which he challenged, in part, based on the Tenth Circuit's decision in United States v Haymond, 869 F.3d 1153 (10th, 2017). When this court granted certiorari, No. 17-1672, the government asked that the case be held in abeyance pending this court's decision. The lower court denied this request and dismissed the § 2255 without addressing the issue. As the Eighth Circuit denied a Certificate of Appealability, the issue was never decided.

Now that this court has decided subsection (k) is unconstitutional, Beyers sentence is called into question. This he means he may be subject to a penalty that may not constitutionally be applied to him. The remedy, whatever its scope would necessarily have to be retroactive, Welch v United States, 194 L.Ed.2d 387, 403 (2016); Montgomery v Louisiana, 193 L.Ed.2d 599, 613 (2016).

Beyers position that he was sentenced under an unconstitutional law has been vindicated. The lower courts could not have found that a COA was unwarranted had Haymond been decided. This intervening change almost certainly alters the outcome and the lower court should therefore be required to address the matter in the first instance, warranting a GVR, Lawrence v Chater, 516 US 163, 167 (1996).

This is especially true as this court did not fashion a remedy in Haymond, but left it for the lower courts to do so. It is uncertain how Haymond will impact Beyers, and requires a more fact intensive inquiry than this court normally undertakes without an existing record. Whether the Eighth and Tenth Circuits come to conflicting conclusions on still pending appeals will also help inform whether further intervention is needed by

this court. Further, as Beyers has raised broader challenges to the legality of other aspects of release, which Haymond is potentially applicable to, allowing the Eighth Circuit to address it first inconsistent with this court's GVR practices.

This is especially important in light of signs that the Eighth Circuit seems prepared to completely disregard Haymond and continue its current practice of ignoring challenges to release practices. In United States v Simpson, No. 18-1692 (8th, 2019), the court refused to address a challenge to § 3583(e)(3) which a releasee had previously challenged in a past violation. Despite the fact that Haymond unambiguously allowed attacks to the legality of the statute of revocation at violation, including (e)(3), the Eighth Circuit told Simpson that it would continue to decline to address his challenge.

This would be problematic enough on its own, but, combined with Beyers' case, and both in very close proximity to the Haymond decision, it hints that the Eighth Circuit will simply decline to follow this court's precedent, which is very troubling and requires this court's quick correction to prevent.

VI. Dean's rationale was clearly relevant to this case. In holding otherwise, the Eighth Circuit has created a circuit split.

When Beyers was originally sentenced, the district court made clear that a ten year sentence would be sufficient to satisfy the § 3553(a) factors. Unfortunately, Beyers had both an underlying sentence and a supervised release violation, both with mandatory minimums. After Beyers was sentenced and shortly before the opinion in his case was issued, this court decided Dean v United States, 197 L.Ed.2d 490 (2017) in which it was noted that the parsimony principle of § 3553(a) was not just to be used to determine each sentence individually, but was to be used to create an aggregate sentence as well, including whether to run sentences concurrently or consecutively, at 497.

The lower court, in response to the claim in the § 2255, that Beyers' sentencing violated this understand of sentencing advanced in Dean, denied the claim as Dean involved only § 924(c), and, as Beyers was not convicted of § 924(c), it could have no application to him. Yet, this is the very argument that the government advanced in Dean, that § 924(c) was unique, that something set it apart. This court rejected that claim, and noted nothing in § 924(c) made it different from any other "sentencing packaging case," and noted that it was to be treated the same, id at 498. Most circuits have taken this to mean exactly what it says, and have treated **all** sentencing package cases, including § 924(c) ones the same to where any question about any part of the sentence, requires a full remand, United States v Grant, 887 F.3d 131, 154 (3rd, 2017); United States v Thomas, 856 F.3d 624 (9th, 2017). Any departure from this rule requires special justification, plain in the text of a statute, like § 1028A, United States v Lara, 733 Fed. Appx. 433 (10th, 2018).

The denial of a COA gives tacit support to the district court's plainly incorrect application of Dean, diluting this court's precedents and encouraging lower courts to disregard them. Further, it creates a circuit split, as the Seventh Circuit has explicitly held that Dean is not limited to § 924(c), United States v Cureton, 887 F.3d 318, 319 (7th, 2018) but can be used for sentencing addon, United States v Fox, 878 F.3d 574, 576 (7th, 2017). The Tenth Circuit has used it for the very purpose asked for here, to determine whether sentences involving criminal charges and revocations should be run concurrently as opposed to consecutively, United States v Meraz-Martinez, 2018 US App Lexis 26060 (10th, 2018).

Upholding its precedent against district court disregard and settling this dispute warrant this court's supervisory review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John T. Beyers

Date: 8-14-19