IN THE SUPREME COURT OF THE UNITED STATES

NO. 19-5678

JOHN T. BEYERS, PETITIONER

VERSUS

UNITED STATES OF AMERICA, RESPONDANT

Petitioner's Response to the United States

The United States argues that United States v Haymond, 204 L.Ed.2d 897 (2019) should not be held to be a retroactive case because it is a new non-watershed rule of procedure. This "requires only" that a jury rather than a judge find the essential facts' necessary for a particular outcome, which the Court has described as a 'protrypical procedural rule.'" (Response p. 3). This response misses the mark.

Haymond invalidated the second sentence of §3583(k), which allowed the imposition of a five-year enhanced penalty on those who are found to have committed a new pornography crime while on supervised release. Unless the 10th Circuit finds that the Government preserved its argument that a jury can be empaneled, the second sentence of (k) is facially invalidated, and a releasee can be subjected only to the penalties prescribed in § 3583(e)(3), here two years for a Class C felony.

The reduction from a minimum of five years to a maximum of two years unquestionably changes the range of the punishment for the statute, "narrowing its terms." The statute under which Beyers was sentenced no longer would exist if the 10th Circuit's ruling stands, and, without a valid statute to authorize his punishment, it could no longer stand, Welch v United States, 194 L.Ed.2d 387, 403 (2016); Bond v United States, 180 L.Ed.2d 269, 284 (2011).

This is the definition of a substantive rule. As it stands, a certain punishment is taken off of the table, and may not be imposed regardless of the procedures employed.

The Solicitor General's argument is little different than the one this Court rejected in Welch. There, amicus argued that the striking down of the residual clause was not a substantive rule because it had a procedural source and justification. This court disputed such a mechanical test, noting that it was the effect of the holding, not its source or label that determined its nature, id at 401. Nothing was a clearer substantive rule than one striking down a law, in whole or in part, id at 402.

Like Welch, Haymond struck down part of a statute, and would necessarily be retroactive to cases on collateral review under this court's precedents. Whether it comes from the 6th Amendment, or another source, the current result is that the second half of (k) no longer exists to authorize a 5-year sentence.

Just in case, the Solicitor General argues that, even if Haymond is retroactive, it would not apply to Beyers, as he admitted his violation (Response p. 4). If the law itself is a nullity, it is irrelevant how validly guilt was established under it, Class v United States, 200 L.Ed.2d 37, 43 (2018). If the law is not restored, Beyers is still entitled to relief, and the 8th Circuit's denial of a C.O.A. is not just debatable, it is plainly wrong.

Nevertheless, assuming than an as-applied solution was devised, Beyers would still have a constitutional claim. As the Solicitor General recognizes, Justice Breyer's decision in Haymond was narrowest, which, in many circuits, makes it the controlling one, see, United States v Hoskins, 489 Fed. Appx. 990, 992 (8th, 2012). Justice Breyer decided that a penalty under (k) was **not** a penalty for the original offense, but rather was a penalty for the new criminal conduct, at 914 (citing Johnson v United States, 529 US 694,

200 (2000)).

Yet, if this is true, Johnson tells us it is unconstitutional, for if the penalty is attributed to the new criminal conduct, then the defendant or releasee is subjected to double jeopardy. This statement has been taken to mean there are no double jeopardy problems with attributing the violation to the original term. This unbriefed point is hard to accept in light of Haymond's admission that release modifies a final sentence, id at 907, n 5, a violation of double jeopardy. If a sentence under (e)(3) avoids these problems, then it is clear that (k) cannot stand. Even the releasee who admits to his conduct cannot authorize two sentences on one offense, Menna v New York, 423 US 61, 62 (1975).

Beyers must therefore dispute the Solicitor General's analysis as fatally flawed. And, as Haymond's plurality opinion sheds light on Beyers' broader challenges to release, they should be explored further. Courts have been using the false parole/release dichotomy for decades to justify practices. If the comparison is false, those practices necessarily need to be revisisted.

For these reasons, a GVR should be granted.

Respectfully submitted this 5th day of November, 2019,

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