No. 19-6256

In the
SUPREME COURT OF THE UNITED STATES

JASON SIMON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On petition for a writ of certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF
FOR PETITIONER JASON SIMON

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I.

NEW MATTERS

Pursuant to Supreme Court Rule 15.8, Mr. Simon files this supplemental brief to bring to the Court's attention the following new matters in support of why the Court should grant certiorari.

A. First New Matter

Since the filing of Mr. Simon's petition for a writ of certiorari, this Court decided United States v. Haymond, 588 U.S. ___ (June 26, 2019), in which the Court stated:

> A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct.
>
> * * *
>
> And the truth of every accusation that was brought against a person had to be confirmed by the unanimous suffrage of twelve of his equals and neighbours.

Id. at ___ (internal quotations and citations omitted).

This statement by the plurality set the tone for the Court's holding that a sentence imposed under 18 U.S.C. Sec. 3583(k) based on a mere accusation was unconstitutional, because it bypassed the centuries-old rule that only a jury may authorize a punishment by its finding of the necessary facts of the crime. See Id. at ___ (Justice Breyer's concurring opinion that §3583(k) is unconstitutional).

In pertinent part, §3583(k) required a court to impose a sentence on any sex offender on supervised release who "commits" a new sex offense. The problem the Court had with

this part of the statute was that all it took was an accusation of a crime to allow a court to impose a prison sentence.

The defendant in Haymond was accused of possessing child pornography while on supervised release. It was only an accusation, but it was enough for the judge to impose a new prison sentence, after finding by a preponderance of the evidence that he had possessed the 13 images at issue.

Justice Gorsuch, writing for the plurality, noted that the government could have charged the defendant with a new crime, "But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy supervised release revocation hearing before a judge carries a penalty of five years to life?" he said.

This same reasoning applies just as strongly in Mr. Simon's case. His sentence was nearly doubled to the 30-year statutory maximum after his sentencing judge relied on an accusation that occurred almost seven years earlier in a completely unrelated situation.

What's worse, the accusation against Mr. Simon was fully investigated by law enforcement, with his total cooperation, and was dropped as unfounded. The accusation was false — demonstrated false by the government. But it was still used to nearly double his sentence.

This offense to the principles of due process of law is exactly why Justice Gorsuch, in Haymond, centered his opinion on the role of the jury as the "supervisor" of a court. See id. at ___ ("juries in our constitutional order exercise

supervisory authority over the judicial function by limiting the judge's power to punish"). Once the jury finds the facts essential for a conviction, the judge has authority to impose the sentence.

But that didn't happen here. No jury found that the years-old false accusation was true, and neither did Mr. Simon admit to it. Furthermore, this Court's decision in United States v. Watts, 519 U.S. 148 (1997) is inapposite to Mr. Simon's case. This is so for a few reasons.

First, the holding in Watts was clarified and narrowed by this Court in United States v. Booker: "in Watts ... we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines." 543 U.S. 220, 240 (2005). Thus, Watts did not decide any issue other than the Double Jeopardy Clause. It did not deal with whether a sentencing judge could find the facts necessary to impose a dramatic increase in a sentence without a jury having found those facts. That would be a Sixth Amendment issue, which was not before the Court. But it was the issue before the Court in Haymond.

Most of the lower courts have simply assumed that Watts applies to both the Fifth and Sixth Amendments. And there is a circuit split on that, see United States v. White, 551 F.3d 381, 392 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (collecting cases on assumptions of Watts); United States v. Long, 328 F.3d 655, 671 (D.C. Cir. 2003) (collecting cases on circuit split); United States v. Watts,

519 U.S. at 156, n.2 (acknowledging the split).

But Watts clearly does not apply to the Sixth Amendment problem, which Haymond did address in its four-judge opinion.

In fact, Haymond effectively opened the door for the question left open in Watts — and Mr. Simon's case is the perfect opportunity to wrap up what Haymond started. First, the "facts" the judge found to dramatically increase his sentence to the maximum under law came from an unsubstantiated accusation completely removed from the instant offense. Every other case to come before this Court begging for an answer to Watts and the Sixth Amendment problem was about whether facts from acquitted or uncharged conduct in the instant offense could be used. Mr. Simon's case is different.

Second, nearly every case trying to get this Court's attention dealt with a nominal increase in the sentence, as in the cases of Mr. Watts (and Ms. Putra). Mr. Simon, on the other hand, presents that "dramatic increase" in his sentence that this Court suggested in Watts would likely require its intervention. See id. at 156-57 ("We acknowledge a divergence of opinion among Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue").

According to Haymond, at least four judges of this Court have agreed that a jury should play a role in such an increase

in sentence rather than its being merely the whim of the sentencing judge. This is the Sixth Amendment question that Watts did not answer. Under the reasoning in Haymond, increasing the standard to "clear and convincing" evidence, as suggested in Watts, would still not satisfy the Sixth Amendment — emphasizing the pressure behind the dam.

B. Second New Matter

In United States v. Bagcho, No. 12-3042, 2019 U.S. App. LEXIS 14244 (D.C. Cir. May 14, 2019), Judge Millett, once again, voiced her concern over the use of acquitted and uncharged conduct to increase a person's sentence:

> I write separately to express my continued opposition to the use of conduct for which a defendant was acquitted to increase the length of that person's sentence. It stands our criminal justice system on its head to hold that even a single extra day of imprisonment can be imposed for a crime that the jury says the defendant did not commit.

Id. at *23.

Judge Millett supported her position by quoting then-Judge Kavanaugh's concurring opinion in United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (en banc):

> Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?

See Bagcho, 2019 U.S. App. LEXIS 14244, at *23.

Judge Kavanaugh has also noted his support of Judge Millett: "I share in Judge Millett's overarching concern about the use of acquitted conduct at sentencing, as I have written before." Bell, 808 F.3d at 927.

The list of complaining judges goes on and on. But Haymond paves the way for the Court to address all of these issues, and Mr. Simon's case presents the ideal vehicle with which to do so.

THEREFORE, the foregoing new matters shed even more light on the significant constitutional question presented by Mr. Simon in his petition for a writ of certiorari.

This Court should grant his petition to finally answer the open question in Watts that has severely divided the courts for over two decades.

Respectfully submitted,

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