

No. 19-6692

IN THE
SUPREME COURT OF THE UNITED STATES

Kenneth Simpson
(Your Name)

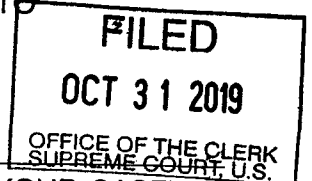
— PETITIONER

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

8th Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)



PETITION FOR WRIT OF CERTIORARI

Kenneth Simpson
(Your Name)

MCEP Springfield PO Box 4000
(Address)

Springfield, MO 65801 (until Nov 7, 2019)
(City, State, Zip Code)

n/a
(Phone Number)

Kenneth Simpson has had his supervised release revoked on three separate occasions. On each occasion, Simpson has challenged the Constitutionality of §3583(e)(3), (h), and (k). In violation of both then existing precedent, and now United States v Haymond, 204 LEd2d 897 (2019) the 8th Circuit refused to address these challenges, imprisoning him under a statute of contested Constitutionality.

Questions Presented

- 1) Does the 8th Circuit's current practice of refusing to address challenges to the Constitutionality of release deny releasees due process and conflict with this Court's holding in Haymond?
- 2) As §3583(h) imposes a new penalty in a separate hearing, does it run afoul of the Double Jeopardy Clause and traditional parole principles as described in Haymond? Are reimpositions of release under (h) truly authorized under the original jury verdict or plea?
- 3) Does Haymond's recognition of the dangers of "perpetual release" call the remaining part of §3583(k) authorizing lifetime release into question? Does the practice of repeatedly violating an individual without Due Process threaten the same dangers even if it can only be done two years at a time?
- 4) As supervised release authorizes a sentence to be "modified" after it becomes final, must an individual be given an opportunity to raise constitutional infirmities in the "adjusted" judgment? Does the Government's ability to relitigate the original crime require a similar ability for the defendant/releasee?

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In The
Supreme Court of the United States
Petition For Certiorari

Opinions Below

Comes now Kenneth Simpson, seeking this Court's review of the 8th Circuit's continuing refusal to address challenges to the legality of his terms of supervised release in U.S. v Simpson, No. 18-1692 (8th, 2019), in effect allowing him to be endlessly reincarcerated again and again, without opportunity to test the legality of that detention, directly in contradiction to U.S. v Haymond, 204 LEd2d 897 (2019). This denial is included at Appendix A, and it is unknown if it is published or not.

The District Court issued no written opinion in this case.

Jurisdiction

The 8th Circuit Court of Appeals denied review on August 6, 2019. A timely petition for rehearing was denied September 11, 2019 and is included at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Constitutional/Statutory Provisions

Amendment V ... nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb...

18 U.S.C. § 3583(e)(3) revoking a term of supervised release and requiring the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release...

18 U.S.C. § 3583(h) Supervision following release. 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 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 U.S.C. § 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. (The status of the second sentence remains uncertain pending further proceedings by the 10th Circuit.)

Factual Background

Kenneth Simpson was indicted in 2010 in the Eastern District of Missouri with Receipt and Possession of Child Pornography under 18 U.S.C. §2252. When he insisted on his right to trial, Judge Rodney Sippel threatened him into a plea, violating F.R.Cr.P. 11 and federal law. Simpson quickly pled guilty, and was given two sentences: 5 years imprisonment and lifetime supervised release, even though §2252 has a statutory maximum of 20 years.

Though Simpson appealed, his appointed counsel chose to file an Anders brief, rather than challenge the judge's conduct. Confined in the SHU for protective custody, Simpson asked for an extension of time to file a Person response, but the 8th Circuit ignored the request and proceeded with the case. The Anders was granted, denying Simpson an appeal.

Simpson's §2255 was equally fruitless. Though he challenged the threats, jurisdiction, and his innocence, amongst others, Rodney Sippel, the same judge whose conduct was being challenged, failed to address these issues. The 8th Circuit denied a Certificate, without letting Simpson brief the matter. Simpson tried to correct this via (a)(b), only to receive another denial without addressing his claims. Sippel then barred Simpson from filing any more motions, in violation of precedent, and, when Simpson tried to get the ban lifted, filed a false report with the Marshalls, claiming Simpson threatened to kill him.

Upon his release in 2015, Simpson allowed himself to be arrested to challenge his obligation to register as a sex offender, a challenge he won in part. His supervised release was revoked, even though he was still technically in B.O.P. custody, to prevent him from continuing, and he was sentenced to one year. The 8th Circuit raised procedural bars on its own motion, after written arguments concluded, to refuse to address the challenges. Supposedly, a challenge to the legality of the revocation process could not be raised at revocation (though the 8th Circuit had previously addressed such challenges) and Simpson had never challenged the registry before (though it was the basis for his violation, and he'd be entitled to plain error review anyway).

In 2016, Simpson again petitioned the State to avoid registration. Though the P.O. assigned to the case authorized Simpson to do so, he later reversed course and filed a revocation of release. Though he acknowledged this in Court, admitting he'd never ordered Simpson not to challenge registration, Sippel sentenced him to 18 months. Simpson fired

his lawyer on appeal, but the 8th Circuit did not allow him to brief the matter. His appeal was dismissed again without addressing his claims.

This continued refusal led Simpson to disregard his term of release and abscond in 2018, refusing to report to the halfway house. When he was eventually arrested, he fired his attorney and represented himself, arguing it was illegal to keep cycling him in and out of prison without addressing the legality of his detention. He explained, without contradiction, that traditionally such challenges were raised at revocation and were mandatory to address. Simpson also explained at length how supervised release was Constitutionally different from parole, the position later adopted in Haymond. The Magistrate admitted he didn't understand the argument or the law, and Sippel didn't care. Simpson was revoked and sentenced to two years.

While Simpson was appealing, he filed a writ of Mandamus request to this Court, arguing that, since the 8th Circuit had previously refused to address his claims, they would do so again, and would delay until he was within three months of release. He constantly informed the 8th Circuit of Haymond, as this had been his argument for nearly five years. As predicted, on August 6, the 8th Circuit dismissed the appeal based on the "law of the case," even though the prior rulings were contrary both to previous law and now to Haymond. A petition for rehearing pointing this out was summarily denied, making Simpson one of more than a dozen petitioners this year in the 8th Circuit who have challenged release without resolution on the merits.

Reasons For Granting The Writ

The "Law of the Case" is not an excuse to refuse to correctly apply the law. Its use in this case is part of a pattern in this Circuit to disregard precedent and decline to address challenges.

In both 2016 and 2018, the 8th Circuit Court of Appeals refused to hear challenges to the legality of Simpson's violation, on double jeopardy among other grounds, as the panel held such challenges could not be raised at revocation hearings. This was raised after briefing occurred in 2016 (raised by neither party) and there was no briefing in 2018 at all.

The 2019 violation is the first time the matter was briefed, and Simpson extensively showed that this procedural bar has never been the law. All 11 Circuits, including the 8th Circuit, in U.S. v Bennett, 561 F.3d 799 (2009) have addressed double jeopardy (and other) challenges at revocation hearings. Moreover, it was shown that this Court has addressed double jeopardy in probation, Roberts v U.S., 320 U.S. 266-67 (1943), supervised release, Johnson v U.S., 529 U.S. 694, 700 (2000), and has mentioned it in connection with parole revocations, U.S. v DiFrancesco, 449 U.S. 117, 137 (1980).

Simpson's case is unique in holding such challenges can't be raised. Confronted with this, the 8th Circuit said its earlier holding was the "law of the case" and held to it. The problem is, the prior holding in this case is contrary to actual law.

As was pointed out in the motion for rehearing, when a panel is confronted with two conflicting cases in its own Circuit, it must disregard the latter and go with the earlier, Mader v U.S., 654 F.3d 794, 800 (8th, 2011). This is because, in varying from precedent, the latter panel disregarded settled law, and its decision likewise is not law. This obviously takes extra force when the conflict is with this Court's cases, Am. Home Insurance Co. v Pope, 487 F.3d 590, 606 (8th, 2003).

This Court's decision in Haymond, which the 8th Circuit was made fully aware of before it decided, directly addresses the "law of the case" here and refutes it. Haymond, like here, involved a challenge to the legality of the revocation statute, using virtually the same argument Simpson has advanced for 5 years: that release is Constitutionally distinct from parole, at 910. (Haymond raised this for the first time in revocation) This Court agreed,

Finding § 3583(k) infirm, and leaving open challenges to other provisions, at 910 n7.

By asserting that they can follow their previous holding, the 8th Circuit may not be explicitly stating that they don't have to follow this Court's rulings, but the practical effect is the same. The law is deliberately misapplied today because it was misapplied yesterday. Simpson has been repeatedly incarcerated under laws he contests are invalid, and is denied a ruling on that challenge, in rather blatant violation of settled law.

Were this an isolated incident, it would be bad enough, but it seems part of a consistent pattern by the 8th Circuit to refuse to address any substantive challenge to release, especially those involving Haymond. In U.S. v. Beyers, No. 19-1388 (8th, 2019), the Court quickly denied a C.O.A., even after the prosecution had asked for it to be put on hold pending Haymond in the district court, twice denying him before Haymond's opinion could issue. So, too, in U.S. v. Morris, No. 18-8089 (8th, 2019), the 8th Circuit denied a C.O.A. without briefing on the constitutionality of (k) right after Haymond's oral arguments were published.

In U.S. v. Burke, 2019 US App Lexis 2910 (8th, 2019), the Court refused to address whether the pornography condition returning him to prison was unconstitutional or was even applied as written, though the District Court expressed grave misgivings about it. Like here, Burke was told he couldn't raise his challenge at revocation. In U.S. v. Strubberg, No. 17-2087 (8th, 2019), issued after Haymond, the Court upheld "concerningly overbroad and vague" conditions on direct appeal, as they could always be modified later if they "prove unworkable" (slip op at p14-16) which would likely be at revocation, where the same rule as Burke would presumably apply. The Court also denied a variety of challenges to lifetime release and its conditions in U.S. v. Carson, 2019 US App Lexis 14044 (8th, 2019) noting only that "the guidelines call for life."

Whenever the releasee raises the challenge, it is always the wrong time. This is troubling enough on its own, but it pulls the 8th Circuit into conflict with other Circuits, see, for example, U.S. v. Thompson, 777 F3d 368 (7th, 2015); U.S. v. Jenkins, 854 F.3d 181 (2nd, 2017). It is also hard to square with this Court's precedents, and not just on release. If, on the face of the record, a condition is beyond the power of the Government to impose, it must be removed, Class v. U.S., 200 LEd2d 37, 44 (2018). If the power to prohibit conduct or impose punishment is lacking, obviously the State

may not insist the individual stay incarcerated on the punishment illegally imposed, Montgomery v Louisiana, 132 Ed 2d 599, 617 (2016); Welch v U.S., 194 Ed 2d 387, 401 (2016).

In striking down these challenges, the 8th Circuit is allowing individuals to be deprived of their liberty and often their freedom, without even the minimum determination that the deprivation is allowed by law. Such a practice raises serious concerns on its own, but when obviously incorrect and inconsistent procedural explanations justify this, something illegitimate is occurring.

Given that more than 16,000 of these hearings occur every year, Haymond, at 917, and terms are barely considered at sentencing, not to mention are largely unpredictable due to the amount of P.O. discretion, U.S. v Rideout, 478 Fed Appx 339, 340 (8th, 2012) this cannot be allowed to continue without review. Warrants Certiorari.

II. §3583(h) shares similar infirmities to (k).

In Haymond, this Court partially affirmed Judge Kern's finding that, while a judge could revoke a defendant and impose a 0-2 year penalty authorized under (b)(3) under a preponderance of the evidence, it was "repugnant" that a new and increased range could be similarly imposed, at 902. Even where a judge enjoyed discretion, he could not "swell the penalty" above what the law allowed under a jury verdict, at 904. This Court agreed that the change from 0-2 years to 5-life, violated the 6th Amendment, at 902.

Much like §3583(k), (h) alters the legal range of penalties beyond what the judge can impose based on the original verdict. The alteration may not be as severe, but it still affects the legal range. §3583(e)(3) sets the statutory range here, as in Haymond, as "no more than two years", since §2252 is a class C felony. However, once a new term of release is imposed, the range resets, either altering the maximum, or giving a new statutory range.

Here, for example, the initial violation was one year, with a new term imposed of release. At the next violation, the available options were not "up to one year", but, again "up to two years", giving a total range of one to three years, of which another 18 months was

imposed, for a total of 30 months, six months above the original maximum. This violation added 24 months, to bring the total violation to 54 months, four and a half years, more than double the statutory maximum.

By its very terms, (h) allows for a new term of release to be imposed, and that is how it is being used, see U.S. v Perry, 2019 US Dist Lexis 9630 at 2 (8th, 2019). Thus, much like with (k), saying that a sentence under (h) is part of the original sentence does not make it so; it is, instead, imposed again at every violation, Haymond at 907 n5.

And, since judges may consider past proceedings and "unwarranted" leniency, U.S. v Tew, 713 Fed Appx 523, 524 (8th, 2018), subsection (h) allows for the same result as (k), only in piecemeal fashion. A judge can simply find several, petty violations, and sentence the defendant to the statutory maximum each time. If anything, breaking down the sentence into pieces may be even more disruptive to the defendant than a single long term violation. Each violation upends his life and prevents his re-assimilation, causing personal hardship, Morrissey v Brewer, 408 US 471, 482 (1972).

It is not certain a jury could solve this problem. The vast majority of violations are technical. They are not criminal, and, in many cases, may not be made criminal. Many are constitutionally protected. They are not a proper basis to exceed a statutory maximum, even if admitted to. Thus, the "jury remedy" proposed itself causes serious Constitutional problems.

§3583(h) allows the very dangers of perpetual release warned of in Haymond, at 909. One need not have lifetime release (though, in Missouri, many do) to be subjected to this. Even with a term of years, a judge may revoke for a petty infraction (whether or not the individual committed it), give the releasee a token sentence and restart paper. Using this process, a three year term can become six, then nine. Perpetual release is often imposed by degree, surpassing statutory limits.

Like §3583(k), (h) is a sharp departure from traditional probation and parole practices, and from release itself. As the late Justice Scalia explained in Johnson v U.S., 529 US 694, 725-26 (2000), the possibility of parole after revocation is qualitatively different than a new term of release. Since parole was release before completion of a valid

sentence, there were no problems with allowing a parolee a second chance at lenience. Likewise, while a judge could impose another term of probation at revocation, this was used instead of prison, and, as a grant of lenience, it was thought to pose no Constitutional problems, Haymond, at 909.

These practices provide no support for what § 3583(h) does, which is impose additional terms of release, above and beyond what was originally imposed, in later proceedings. This is especially true as the violation of release will often extend past any good time credits the inmate earned, extending his sentence. See Haymond, at 907 n 5 (what release really does is modify the original sentence) (citing Johnson). Even Johnson did not authorize this. It only held that part of the original term remained, at 707. It did not authorize a new term to be imposed, as with (h).

The impact of (h) is just as significant, but widespread, than (k). If even a third of violators are subjected to (h), this means more than 5000 former prisoners a year have their paper restarted. The Constitutional problems with this practice are worthy of certiorari.

III. IF "perpetual release" is constitutionally questionable, the first sentence of (k) is infirm.

The concerns identified about "perpetual release" in Haymond, at 908-09, apply even if the individual never violates. Long term deprivations of liberty are obviously more severe than brief ones, something both common sense and the cases recognize. And the loss of liberty on release is often severe indeed.

Ignoring the wording of the release statute, the 8th Circuit held in Carson that wide, or even complete, deprivations of 1st Amendment rights of releasees are permissible, including internet bans. Under this understanding, Packingham v North Carolina, 1981 Ed 2d 273 (2017) does not apply at all to releasees, meaning porn offenders may be permanently barred from internet use, associating with minors in their own families, and more for the rest of their lives.

If the "Sword of Damocles" literally or figuratively "hangs over a releasee's head every morning when he wakes up," Haymond, at 907, n.5, forcing a releasee to endure this every day for the rest of his life is hard to justify, something this Court once recognized in Weems v. U.S., 217 U.S. 349, 366 (1910):

It is prison bars and chains are removed, it is true... but he goes from them to a perpetual limitation of his liberty. He is kept forever under the shadow of his crime, forever kept within view and view of the criminal magistrate, not being able to change his domicile without giving notice... and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even this hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity and deprivation of essential liberty.

The Weems Court noted lifelong monitoring must astonish anyone who believes in proportionality of punishment, at 366-67.

So, too, the idea of lifetime release has no historic support. Lifetime probation, or suspending of sentence was long ago disallowed, Miller v. Alderhold, 288 U.S. 206, 210 (1933); Pollard v. U.S., 352 U.S. 354, 360 n.4 (1957) (collecting cases). Parole limited the term to that which was still left to serve in prison, and could not exceed the original sentence, Haymond, at 909. Thus, the idea of serving a sentence of release many times in excess of the statutory maximum (and in addition to prison) is unprecedented and raises serious Constitutional problems, as explained in great detail to the 8th Circuit.

Finally, an offense under §2252 is a minor one of the kind worried about in Weems, at 381 and Haymond. Though the 8th Circuit has recognized it as a low level, passive crime, U.S. v. Black, 670 F.3d 887, 883 (8th, 2011). Lifetime "perpetual" release is commonly imposed for first time offenders, unlikely to reoffend.

These Constitutional problems are being deliberately ignored by the 8th Circuit, even in the wake of Haymond. They deserve the Court's review, rather than being brushed to the side as is currently being done.

IV. The refusal to address challenges to the original conviction is contrary to precedent.

Even with parole and probation hearings, this Court has refused to hold that challenges to the original conviction are foreclosed at revocation, Maleng v. Cook, 490 US 488, 494 (1989). To the contrary, it has long been understood that a forum must exist to vindicate releasee's Constitutional rights, Delney v. Lahammar, 70 FSupp2d 1038, 1042 (DSD, 1999).

With the acknowledgement that revocations modify the original sentence, any rationale used to bar challenges to a conviction loses force. By allowing further litigation by the Government, see U.S. v. Johnson, 827 F3d 740, 745 (8th, 2015), it must likewise be opened for the defendant as well. Once it is modified, it is, by definition, not final. Unlike the imposition of a sentence previously suspended, Berman v. U.S., 302 US 211, 212 (1937), here, new punishment is imposed.

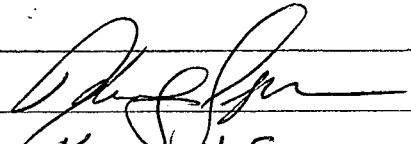
If, at any time, including revocation, it is clear jurisdiction is lacking, the statute of conviction is invalid, or other defects are obvious, it serves neither the interests of justice or judicial economy to refuse to address those claims and impose punishment. If the original decision is infirm, the new judgment based on that decision must be similarly tainted. This is especially true where, as here, the defendant/releasee has raised these claims and denied an adjudication on the merits through no fault of his own, Daniels v. U.S., 532 US 374, 381 (2001); Lackwana County D.A. v. Cass, 532 US 394, 403-06 (2001).

Release, as it currently stands, allows a judge, at any time, for any reason, to modify or enhance conditions of release under § 3583(e)(2) or prison sentence, under (e)(3), but the releasee is effectively forbidden from raising similar challenges to those conditions or terms. He must accept any following penalty from those conditions, even if they are illegal. Even probation and parole do not go so far.

The perpetual ability for the prosecutor to litigate, denied to the releasee, has no basis in historical practice, and seems to violate numerous Constitutional provisions, warranting this Court's review.

Conclusion

For all the reasons included within, the Writ of Certiorari should issue.


Kenneth Simpson

10/29/19