
No. _____

In the

Supreme Court of the United States

JOHN KENNETH SCHIEFER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Did the district court plainly procedurally err when it selected and imposed sentence based on its desire to promote the defendant's respect for the law?

Statement of Related Proceedings

- *United States v. John Kenneth Schiefer*
2:07-cr-01240-ODW-1 (C.D. Cal. Mar. 9, 2009)
- *United States v. John Kenneth Schiefer*,
17-50439 (9th Cir. Sep. 20 2019)

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JOHN KENNETH SCHIEFER, Petitioner

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Petition for Writ of Certiorari

John Kenneth Schiefer petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's order denying Mr. Schiefer's appeal was not published. App. 1a.

Jurisdiction

The Ninth Circuit issued its order affirming Mr. Schiefer's sentence on September 20, 2019. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

1. On April 16, 2008, Mr. Schiefer pled guilty to a four-count information. The information alleged: in count 1, the disclosure of illegally intercepted electronic communications in violation of 18 U.S.C. § 2511(1)(c), (4)(a); in count 2, accessing protected computers to conduct fraud and aiding and abetting an act to be done in violation of 18 U.S.C. §§ 1030(a)(4), (c)(3)(A); in count 3, bank fraud in violation of 18 U.S.C. § 1344; and in count 4, wire fraud in violation of 18 U.S.C. § 1343. (ER 73-93).

Judgment was issued on March 4, 2009, and Mr. Schiefer was placed in custody for 48 months, to be followed by a supervised release term of five years. His supervision was subject to a number of discretionary conditions, including restrictions on the use of computer or internet access, and limits on changing residences without prior approval of the Probation Office.

On March 13, 2013, the Probation Office alleged that Mr. Schiefer had violated the terms of his supervised release, including using computer devices and email accounts that were not approved and failing to keep his probation officer apprised of his residence. (CSD 40-41). On March 4, 2015, the district court revoked Mr. Schiefer's term of supervision and imposed 12-months' imprisonment to be followed by 36 months of supervision.

On March 26, 2017, probation officers searched Mr. Schiefer's home. (CSD 5). Five days later, the Probation Office filed a violation report alleging

that Mr. Schiefer committed numerous violations of his conditions of supervised release. (CSD 1-2; *see also* CSD 15-16, 31). In summary, the Probation Office alleged that Mr. Schiefer had failed to pay restitution, violated his drug conditions by possessing and using marijuana, violated several of his computer restrictions, and falsified a computer form and several supervision reports. (CSD 1-39). The violation report stated that his custodial revocation range was 12-18 months, with a maximum term of 24 months on some counts and 36 months on others. (CSD 36). The Probation Office recommended that Mr. Schiefer be sentenced to an 18-month custodial term, with 30 months of supervised release to follow. (CSD 36-37).

On September 18, 2017, Mr. Schiefer admitted the violations but objected to the nature of the conditions as overbearing. (ER 118-35). He asked the court to extend his term of supervised release in lieu of imprisonment, “and/or modify the condition[s] of supervised release by adding new conditions of supervision to address any violations and forego any further custody time. . . .” (ER 135).

The government recommended that Mr. Schiefer be sentenced to 24 months of custody, to be followed by 24 months of supervised release. (ER 159).

At sentencing, the court stated that Mr. Schiefer had already gotten too many breaks, and was, essentially, making a mockery of the system. (ER 35-

36). The court then sentenced Mr. Schiefer to a 24-month custodial term, to be followed by 24 additional months of supervision. As the basis for its sentence, the district court said that Mr. Schiefer was a recidivist who did not respect the law:

The Court is of the opinion -- this is not a fact, it is simply an opinion -- that this man, who apparently has some brilliance in terms of computer science, simply feels that he can do as he pleases, and the rest of us would not be able to detect his conduct.

It is apparent that he does pose a danger to the community.

It also appears that he has no intention of curbing his conduct.

The fact that he has breached every single condition that has been imposed upon him, pretty much demonstrates that he has no respect for the law, and we can fully expect this conduct to continue, unless, of course, he determines, for himself, that being in the custody of the Bureau of Prisons is simply not the way he wants to spend the rest of his life, and that he will hopefully, upon his release, conform his conduct to the expectations and certainly the orders imposed by the Court.

(ER 65-66).

On appeal, Mr. Schiefer argued that the district court had procedurally erred when it relied on the need to promote respect for the law when it imposed sentence. The Court rejected this argument, saying:

Read in context, the district court’s comment that Schiefer had “no respect for the law” merely explained why Schiefer posed a danger to the community and why the sentence was needed to deter future misconduct; it does not indicate that the district court imposed the sentence “primarily . . . to promote respect for the law.” *United States v. Miqbel*, 444 F.3d 1173, 1180 (9th Cir. 2006).

App. 3a.

Reason for Granting the Writ

The district court committed procedural error in sentencing by relying on an impermissible factor as the basis for its sentence. The Ninth Circuit erred when it failed to acknowledge that error.

1. Standard of Review

Appellate courts review sentences, “including those imposed upon revocation of supervised release, for reasonableness.” *United States v. Simtob*, 485 F.3d 1058, 1061 (9th Cir. 2007). When reviewing a district court’s sentencing guidelines decisions, an appellate court reviews the district court’s “identification of the correct legal standard *de novo*,” its “factual findings for clear error,” and its “application of the Sentencing Guidelines to the facts of a given case” for abuse of discretion. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

Where, as here, a defendant failed to object at sentencing, he must demonstrate that the district court plainly erred in its sentencing procedure. *Miqbel*, 444 F.3d at 1176; *United States v. Blinkinsop*, 606 F.3d 1110, 1114 (9th Cir. 2010); *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108 (9th Cir. 2010). Under the plain error standard, “(1) an error that (2) is plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Blinkinsop*, 606 F.3d at 1114 n.2.

2. Argument

The district court committed plain procedural error in sentencing Mr. Schiefer. Sentencing for supervised release violations is governed in the Ninth Circuit by *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006). In *Miqbel*, this Court explained that a sentencing court can only consider a narrow range of following factors when imposing a sentence in revocation proceedings:

Section 3553(a) provides a list of ten factors to be considered in imposing a sentence upon conviction of a criminal offense. 18 U.S.C. §3553(a). Section 3583(e) incorporates the majority of the factors listed in §3553(a) as factors to be considered in sentencing upon revocation of probation or supervised release 18 U.S.C. § 3583(e). Specifically, §3583(e) incorporates eight of the ten factors listed in §3553(a); to that extent, the provisions are similar Section 3583(e) specifically

omits, however, §3553(a)(2)(A), which provides for consideration of ‘the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.’ 18 U.S.C. §§3553(a) (emphasis added); 3583(e). Given that §3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed. 2d 17 (1983) ([Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ (alteration in original) (citation and internal quotation marks omitted)).

Id. at 1182. Thus a court sentencing a defendant for a breach of his conditional release conditions can “sanction a violator for his ‘breach of trust,’ but may not punish him for the criminal conduct underlying the revocation.” *Hammons*, 558 F.3d at 1104 (quoting *Miqbel*, 444 F.3d at 1182).

In *Miqbel*, the trial court stated that “punishment is the sentence imposed in order to promote respect for the law and to provide just punishment for the offense,” that the sentence given was “necessary in order to promote respect for the law,” which the court could “take . . . into account”

in determining punishment. *Id.* at 1175, 1183. Because “a primary basis for Miqbel’s sentence was punishment that was intended to promote respect for the law,” the Court noted that the sentencing court likely committed reversible error by “bas[ing] its sentencing decision in part on an impermissible factor.” *Id.* at 1183.

Here, the district court’s sentencing remarks suggest that it primarily relied on an improper factor. Although “a mere reference to promoting respect for the law would [not] in itself render a sentence unreasonable,” because “such a reference is often intertwined with the concept of punishment, as it is in § 3553(a)(2)(A) itself,” it would strongly suggest reliance on this improper factor. *Id.* at 1182-83. The court in Mr. Schiefer’s case adopted the government’s argument for an above-Guidelines sentence, but also made opined that “[t]he fact that he has breached every single condition that has been imposed upon him, pretty much demonstrates that he has no respect for the law, and we can fully expect this conduct to continue . . .” (ER 64-66). The court then further opined that if Mr. Schiefer does not mend his ways, he would spend the rest of his life in the custody of the Bureau of Prisons. (*Id.*) These comments indicating that the court was sentencing him primarily because it was trying to promote respect for the law.

Because the district court considered an improper § 3553(a)(2)(a) factors in selecting a sentence, it committed clear procedural error, and the

case should have been remanded for resentencing. The Ninth Circuit's failure to recognize this clear error is erroneous and warrants further review.

Respectfully submitted,

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