

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Anthony Wilson – Petitioner

vs.

United States of America – Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

The question presented to this Court is whether Petitioner, Wilson, who suffered a criminal prosecution by way of a supervised release revocation hearing pursuant to 18 U.S.C. § 3583(g) for possession of a firearm in violation of federal law and was required by that statute to be imprisoned for said offense, and who was sentenced to eighteen (18) months imprisonment as a result, can thereafter be separately indicted, prosecuted, and punished for possession of a firearm in violation of federal law for the same occurrence, without running afoul of the *Fifth Amendment*'s protection against double jeopardy, particularly in light of this Court's June 26, 2019 ruling in ***United States v. Haymond***, 139 S.Ct. 2369 (2019).

More specifically, two sections of the supervised release revocation statute run afoul of that *Fifth Amendment* protection by prosecuting and punishing for a triggering offense rather than the original offense; 18 U.S.C. § 3583(g) and 18 U.S.C. § 3583(k). Each of those sections specify triggering offenses and the required punishment for committing one of those triggering offenses (a new criminal prosecution), without considering the original offense. As a result, 18 U.S.C. § 3583(k) was found to be unconstitutional in 2017 in ***United States v. Haymond***, 869 F.3d 1153 (10th Cir. 2017). This Court granted certiorari in ***Haymond*** and held oral argument which resulted in an opinion handed down on June 26, 2019. This Court, after expressing a clear opinion in ***Haymond's*** favor on the constitutional concerns presented by the language and effect of 18 U.S.C. §3583(k) and, in footnote 7, specifically identifying § 3583(g), remanded ***Haymond*** in order for the Tenth Circuit to determine: (1) whether the Government preserved their remedial argument of empaneling a jury, and (2) whether empaneling a jury cures § 3583(k)'s

unconstitutionality. After receiving the supplemental briefing order in the Tenth Circuit, the Government filed a motion to dismiss the appeal leaving this issue unresolved.

While **Haymond** was being briefed and argued in this Court, Wilson's case was being heard in the District Court of the Eastern District of Missouri and thereafter, on interlocutory appeal, in the Eighth Circuit Court of Appeals.

LIST OF PARTIES

The following are parties to this action at the Eastern District of Missouri District Court and the Eighth Circuit Court of Appeals:

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RELATED CASES

1. Eastern District of Missouri, District Court; 4:17CR00539.

United States of America, Plaintiff

vs.

Anthony Russell Wilson, Defendant.

Defendant's Motion to Dismiss Denied, July 16, 2018.

Defendant filed Interlocutory Notice of Appeal to Eighth Circuit Court of Appeals on July 23, 2018.

2. Eighth Circuit Court of Appeals; 18-2591.

United States of America, Appellee

vs.

Anthony Wilson, Appellant.

Judgment for United States of America filed September 25, 2019.

Motion for Rehearing En Banc filed by Wilson on October 9, 2019.

Motion for Rehearing Denied on October 30, 2019.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Anthony Wilson, respectfully petitions for a writ of certiorari for this Court to review the judgment of the U.S. Court of Appeals for the Eighth Circuit affirming the district court's determination on Wilson's motion to dismiss indictment based on double jeopardy.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eighth Circuit, was filed September 25, 2019 affirming the decision of the district court, Eastern District of Missouri, and appears at Appendix A-1 to this petition and is unpublished. The motion for rehearing en banc was denied on October 30, 2019 and said notification appears at Appendix A-4. This case is an interlocutory appeal stemming from Petitioner's motion to dismiss his indictment in the District Court of the Eastern District of Missouri. The Eastern District's order and memorandum denying Petitioner's motion to dismiss appears at Appendix A-2.

JURISDICTIONAL STATEMENT

The United States Court of Appeals affirmed the judgment of the district court. The judgment was filed on September 25, 2019. A timely filed petition for rehearing en banc was denied by the United States Court of Appeals on October 30, 2019, and a copy of the notice of the order denying rehearing en banc appears at Appendix A-4. This petition is taken within 90 days of that judgment.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the Constitution provides, in relevant part: “ No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor 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 . . .”

Section 3583(g) of Title 18 provides, in relevant part: “If the defendant . . . possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law . . . the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment . . .” The text of 18 U.S.C. 3583 appears in its entirety at Appendix A-3.

STATEMENT OF THE CASE

The law has allowed prosecution for criminal conduct that also formed the basis of supervised release revocation without running afoul of the *Fifth Amendment*'s protection against double jeopardy because the new prosecution punishes for the new offense (triggering offense) whereas the term of imprisonment imposed upon revocation of supervision is for the original offense for which supervision was imposed. However, two sections of the supervised release revocation statute do run afoul of that *Fifth Amendment* protection by punishing for a triggering offense rather than the original offense; 18 U.S.C. § 3583(g) and 18 U.S.C. § 3583(k). Each of those sections specify triggering offenses and the required punishment for committing one of those triggering offenses, without considering the original offense. As a result, 18 U.S.C. §3583(k) was found to be unconstitutional in 2017 in *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017). This Court granted certiorari in *Haymond* and held oral argument which resulted in an opinion handed down on June 26, 2019. This Court, after expressing a clear opinion in *Haymond*'s favor on the constitutional concerns presented by the language and effect of 18 U.S.C. §3583(k) and, in footnote 7, specifically identifying § 3583(g), affirmed in part, vacated in part and remanded in part, specifically for the Tenth Circuit to determine: (1) whether the Government preserved their remedial argument of empaneling a jury, and (2) whether empaneling a jury cures § 3583(k)'s unconstitutionality. After receiving the supplemental briefing order in the Tenth Circuit, the Government filed a motion to dismiss the appeal leaving this issue unresolved.

While *Haymond* was being briefed and argued in this Court, Wilson's (Petitioner's) case, upon which 18 U.S.C. § 3583(g) was at issue, was being heard in the District Court of the

Eastern District of Missouri and thereafter, on interlocutory appeal, in the Eighth Circuit Court of Appeals for determination as to whether prosecution and punishment pursuant to 18 U.S.C. 3583(g) precludes further prosecution and punishment under the *Fifth Amendment*'s protection against double jeopardy. The important facts leading up to this petition follow.

On November 23, 2009, in cause number 4:09CR00583, Wilson pled guilty to being a felon in possession of a firearm. Wilson was subsequently sentenced to eighty-seven (87) months in the custody of the United States Bureau of Prisons followed by three (3) years of supervised release. Wilson served his eighty-seven (87) month sentence in the Bureau of Prisons and his supervised release began April 15, 2016.

On Monday, September 19, 2017, Sergeant J.R. Campbell, of the Missouri State Highway Patrol, initiated a traffic stop of Wilson's 2014 Ford Taurus, on Interstate Highway 55 in Jefferson County, Missouri. Sgt. Campbell approached Wilson's vehicle and explained to Mr. Wilson that he had been stopped for crossing the fog line.

At Wilson's supervised release revocation hearing Sgt. Campbell testified that at the traffic stop Wilson initially stated his address on his driver's license was not correct, then later Wilson stated it was correct. Sgt. Campbell also testified that he observed a plastic straw in Wilson's console which Campbell believed, in his experience, was utilized as drug paraphernalia. With the observation of the straw and the questionable address, Sgt. Campbell requested that Wilson exit his vehicle. Wilson did not immediately exit his vehicle, but rather, questioned the officer as to why the exit request was being made. Sgt. Campbell then threatened to arrest Mr. Wilson if he did not exit and Wilson exited his vehicle.

After only a few steps outside of his vehicle, at the back of Wilson's car, Sgt. Campbell instructed Wilson to put his hands behind his back. Wilson questioned the reason for the officer

to make such a request since Wilson believed he had not done anything wrong. Simultaneous to Wilson's questioning Sgt. Campbell's arrest, Sgt. Campbell personally grabbed Wilson's right arm and began moving it toward the back of Wilson, then used an arm bar to take him to the ground. Sgt. Campbell handcuffed him and reported locating a firearm on Wilson's torso. Wilson was arrested.

As a result of Wilson's arrest: (1) A hearing was set to revoke Wilson's supervised release for possessing a firearm in violation of federal law, (2) he was criminally indicted in the Eastern District of Missouri for possessing a firearm in violation of federal law, and (3) he was charged in Jefferson County, Missouri, for being a felon in possession of a firearm in violation of state law. Wilson now faced three court proceedings from his September 19, 2017 arrest, a supervised release revocation in the Eastern District of Missouri District Court with the Honorable John Ross, a new criminal prosecution in the Eastern District of Missouri District Court with the Honorable Ronnie White, and a new criminal prosecution in the Circuit Court of Jefferson County, Missouri with the Honorable Antonio Manansala.

In the supervised release revocation case, Wilson's probation officer petitioned the court to issue a warrant and revoke his supervised release. Title 18 U.S.C 3583(g) requires mandatory revocation and imprisonment of supervised release violations for possession of a firearm in violation of federal law. That section states: "If the defendant . . . possesses a firearm . . . in violation of federal law . . . the court **shall** revoke the term of supervised release and require the defendant to serve a term of imprisonment . . ." (emphasis added).

On March 21, 2018, a supervised release revocation hearing was held wherein the Honorable John Ross found that Wilson had committed the Grade B violation, conduct constituting any other federal, state, or local offense punishable by a term of imprisonment

exceeding one year,¹ of unlawful possession of a firearm in violation of a federal law and he was sentenced to eighteen (18) months in the Bureau of Prisons followed by an additional term of supervised release of eighteen (18) months. Specifically, the Court found: “[Wilson] was in unlawful possession of a firearm. He unlawfully possessed a . . . pistol. His possession of that was unlawful, as he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. The . . . firearm would have been transported in interstate commerce. His possession of the firearm was illegal”.

The new federal criminal case, the 2017 indictment pending before the Honorable Ronnie White, charges that on or about September 18, 2017, in Jefferson County, within the Eastern District of Missouri, the Defendant, having been previously convicted of a felony, knowingly possessed a firearm which had traveled in interstate or foreign commerce. This conduct is an alleged violation of 18 U.S.C. 922(g)(1).

Both the supervised release case before the Honorable John Ross and the 2017 indictment before the Honorable Ronnie White are for possession of a firearm in violation of federal law. In the 2017 indictment before the Honorable Ronnie White, Wilson was given an opportunity to file pretrial motions. Wilson filed a motion to dismiss arguing that the 2017 indictment seeks to punish him for the same conduct that resulted in his supervised release prosecution, revocation, and sentence and as such violates the Double Jeopardy Clause of the *Fifth Amendment*. On July 16, 2018, the District Court denied Wilson’s motion to dismiss. Wilson filed his notice of interlocutory appeal on July 23, 2018.

Parties filed their initial briefs in the Eighth Circuit in this matter and oral argument was held on January 14, 2019. This Court issued its opinion and partial remand in ***United States v.***

¹ USSG Section 7B1.1(a)(2).

Haymond, 139 S.Ct. 2369, on June 26, 2019. On July 2, 2019, the Eighth Circuit Court of Appeals requested supplemental briefs addressing the effect this Court’s **Haymond** ruling had on the issues raised by Wilson.

After **Haymond** was remanded the Tenth Circuit requested the parties file supplemental briefs to address: (1) whether the Government’s remedy of empaneling a jury was preserved, and (2) what other remedial options remain. After receiving the supplemental briefing order, the Government filed a motion to dismiss the appeal. On August 23, 2019, the Tenth Circuit entered a Judgment granting the Government’s motion to dismiss leaving the issue unresolved.

The Eighth Circuit Court of Appeals held that Wilson’s reliance on **Haymond** was misplaced because unlike 18 U.S.C. § 3583(k), which increased the allowable punishment range, 18 U.S.C. § 3583(g) requires revocation and imprisonment not to exceed the maximum term authorized under subsection (e)(3) and therefore is not punishing for the new offense as required by (g). In so opining, the Eighth Circuit declines to recognize the following.

First, 18 U.S.C. § 3583(g) requires imprisonment based on the new offense, not the underlying offense. It is the new offense that triggers the mandatory imprisonment. Punishment for the new offense causes jeopardy to attach. The Court’s reliance on the fact that all subsections other than (k) must comply with subsection (e)(3) and therefore “are limited by the severity of the original crime of conviction, not the conduct that results in revocation” ignores that subsection (g) links the mandatory imprisonment to the new offense and is specifically what this Court, in **Haymond**, called the “simple expedient of relabeling a criminal prosecution” and emphasized such would be “repeatedly rejected.” See **United States v. Haymond**, 139 S.Ct. 2369, 2379 (2019).

Second, 18 U.S.C. § 3583(g)'s mandatory imprisonment provision does, in some cases, increase the legally prescribed punishment range. For example, if an individual is a felon in possession of a firearm and is sentenced to 10 years, the maximum allowed pursuant to 18 U.S.C. § 924(a)(2) and to a subsequent term of supervised released, then a violation of supervised release pursuant to 18 U.S.C. §3583(g) by that individual would require imprisonment. This is true even though the individual has already served the maximum sentence allowed by statute, thereby subjecting said individual to an increase in the legally prescribed punishment range – just as in subsection (k). Any fact that increases the penalty for a crime is a criminal prosecution and the *Fifth* and *Sixth Amendment* protections apply. *Apprendi v. United States*, 530 U.S. 466 (2000).

As a result of the above, Wilson's *Fifth Amendment* protection against double jeopardy has been violated.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit ruling is in contradiction to this Court’s opinion in *United States v. Haymond*, 139 S.Ct. 2369 (2019).

The Eighth Circuit found that Wilson’s reliance on this Court’s *Haymond* decision was misplaced. The Eighth Circuit explained: “A plurality of [this] Court concluded that 18 U.S.C. § 3583(k) is unconstitutional because judicial factfinding ‘increased “the legally prescribed range of allowable sentences” in violation of the Fifth and Sixth Amendments,’” and that this Court did not express a view on 18 U.S.C. § 3583(g). *United States v. Wilson*, No. 18-2591, opinion page 3 (September 25, 2019). The Eighth Circuit reasoned that because the term of imprisonment was limited under 18 U.S.C. § 3583(e)(3), the punishment was not for the triggering offense and therefore jeopardy did not attach. *Id.* at page 5.

a. *Labeling a Criminal Prosecution a “Sentencing Modification”*

Less than seven (7) months have passed since this Court forcefully reiterated: “Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a ‘sentencing enhancement.’ Calling part of a criminal prosecution a ‘sentence modification’ imposed at a ‘postjudgment sentence – administration proceeding’ can fare no better.” *United States v. Haymond*, 139 S.Ct. 2369, 2379 (2019).

Wilson was placed on supervised release in April 2016. On March 21, 2018 Wilson had a supervised release revocation hearing in front of a judge. When that judge concluded he had committed the new crime of being a felon in possession of a firearm Wilson was imprisoned for eighteen (18) months. His imprisonment was mandatory under 18 U.S.C. 3583(g). While this

hearing was labeled a “sentence modification” at a “postjudgment sentence – administration proceeding,” it was, in fact, a criminal prosecution for which jeopardy attached. Now, the Government seeks to prosecute and punish Wilson again for the same offense.

b. What defines a “criminal prosecution?”

In *United States v. Haymond*, 139 S.Ct. 2369, 2379 (2019), this Court visited the definition of a criminal prosecution.² The definitions adopted by this Court, in *Haymond*, are also descriptions of the unfolding of events suffered by Wilson.

This Court’s cited definition of a criminal prosecution as “the process of exhibiting formal charges against an offender before a legal tribunal,” *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019), *citing* N. Webster, *An American Dictionary of the English Language* (1st ed. 1828), is analogous to the petition filed against Wilson in his revocation case (the process of exhibiting formal charges) before the District Court (a legal tribunal).

This Court cites a further definition, crime, as “‘acts to which the law affixes . . . punishment,’ or, stated differently, those ‘element[s] in the wrong upon which the punishment is

² “...[S]ee also . . . N. Webster, *An American Dictionary of the English Language* (1st ed. 1828) (defining “prosecution” as “the process of exhibiting formal charges against an offender before a legal tribunal”). And the concept of a “crime” was a broad one linked to punishment, amounting to those “acts to which the law affixes . . . punishment,” or, stated differently, those “element[s] in the wrong upon which the punishment is based.” 1 J. Bishop, *Criminal Procedure* §§80, 84, pp. 51-53 (2d ed. 1872) (Bishop); see also J. Archbold, *Pleading and Evidence in Criminal Cases* *106 (5th Am. Ed. 1846) (Archbold) (discussing a crime as including any fact that “annexes a higher degree of punishment”); *Blakely v. Washington*, 542 U.S. 296, 309 (2004); *Apprendi*, 530 U.S. 466, 481 (2000). *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019).

based.’’’ *Id.*, citing 1 J. Bishop, Criminal Procedure §§ 80, 84, pp. 51-53 (2d ed. 1872) (Bishop).

This definition, as cited in ***Haymond***, is analogous to Wilson being punished by mandatory imprisonment for his new offense, possession of a firearm. Wilson’s mandatory imprisonment was only a requirement because his new offense was an enumerated offense, possession of a firearm. Declaring his imprisonment a modification of his original sentence is “the simple expedient of relabeling a criminal prosecution as a sentencing modification” – the exact scenario this Court warned against in ***Haymond***.

Finally, this Court cites a final definition of crime as “including any fact that ‘annexes a higher degree of punishment.’’’ *Id.*, citing J. Archbold, Pleading and Evidence in Criminal Cases *106 (5th Am. Ed. 1846) (Archbold); ***Blakely v. Washington***, 542 U.S. 296, 309 (2004); and ***Apprendi***, 530 U.S. 466, 481 (2000). This definition is analogous to Wilson’s mandatory imprisonment (a higher degree of punishment) solely based upon his new, triggering offense.

Based on these definitions of criminal prosecution and crime, as cited by this Court in ***Haymond***, it is clear that Wilson suffered a criminal prosecution which requires, based on our constitution, that the *Fifth* and *Sixth Amendment* protections apply. As such, Wilson cannot be denied his *Fifth Amendment* protection from being placed twice in jeopardy by being prosecuted again for the same offense he was found to have violated and sentenced to eighteen (18) months imprisonment.

c. Potential Increase in Maximum Punishment Range

Title 18 U.S.C. § 3583(g)’s mandatory imprisonment provision does, in some cases, increase the legally prescribed punishment range. For example, if an individual is a felon in possession of a firearm and is sentenced to 10 years, the maximum allowed pursuant to 18 U.S.C. § 924(a)(2) and to a subsequent term of supervised released, then a violation of

supervised release pursuant to 18 U.S.C. §3583(g) by that individual would require imprisonment. This is true even though the individual has already served the maximum sentence allowed by statute, thereby subjecting said individual to an increase in the legally prescribed punishment range – just as in subsection (k). Any fact that increases the penalty for a crime is a criminal prosecution and the *Fifth and Sixth Amendment* protections apply. *Apprendi v. United States*, 530 U.S. 466 (2000).

d. Ignoring Warnings from Johnson Court

In May of 2000, this Court, in a decision involving an *ex post facto* issue, *Johnson v. United States*, 529 U.S. 694, this Court opined on the issue of double jeopardy and supervised release revocation. In that case it was said, “[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, *which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense.*” *Id.* at 700 (emphasis added).

2. The Eighth Circuit ruling is in contradiction to the intent of the legislature in creating a supervised release structure to replace parole and enacting 18 U.S.C. 3583.

The legislative intent behind 18 U.S.C. § 3583 can be found in Senate Report 98-225 at 125. That report states, “[i]f the violation is a new offense, the defendant may, of course, be prosecuted for the offense *or* held in contempt of court [later codified as revocation proceedings] for violation of the court order setting the conditions of supervised release” and “the term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the [original] term of imprisonment.” It is worth noting, that when 18 U.S.C. § 3583 was originally enacted subsections (g) and (k) did

not exist. In fact, no subsections specifying the mandatory revocation and imprisonment based on triggering offenses existed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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| <i>United States v. Wilson</i> , No. 18-2591, Sept. 25, 2019 (Eighth Circuit Opinion)..... | A-1 |
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