

19-8775

No. _____

Supreme Court, U.S.
FILED

MAR 24 2020

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

KIRBY GARDNER — PETITIONER
(Your Name)

vs.

LORIE DAVIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

WR-17,070-21 (Tex. Ct. No. 0831335-I)

PETITION FOR WRIT OF CERTIORARI

Kirby Gardner
(Your Name)

HIGHTOWER UNIT
902 FM 686

(Address)

Dayton, Texas 77535

(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

WHETHER PETITIONER HAVE BEEN
DEPRIVED DUE PROCESS OF LAW
GUARANTEED BY THE FOURTEENTH
AMENDMENT.

Petitioner was sentenced to a 20yr
state statutory maximum penalty
that expired December 15, 2019.
After revocation of his parole September
30, 2015, this original expiration date
was artificially extended to March
5, 2023 "contrary to" U.S. v HAYMOND,
139 S. Ct. 2369 (June 26, 2019)

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

UNITED STATES v HAYMOND
139 S.Ct. 2369
June 26, 2019

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CASES

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STATUTES AND RULES

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the 185th District court appears at Appendix C to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 3/4/20.
A copy of that decision appears at Appendix D.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ART. I §9, cl. 3; §10, cl. 1

- EX POST FACTO LAW -

Finality of a maximum sentence authorizing
no penalty behind that annexed by statute,

6th AMENDMENT

Authorized maximum penalty to
facts determined by jury's finding
of guilt beyond a reasonable
doubt,

14th AMENDMENT

Due Process of Law to
protection of state statute maximum
authorized penalty to be sentence
and served!!

STATEMENT OF THE CASE

Without new charge, trial, or conviction, Petitioner began serving a new 3yr, 2mo, 15day prison term December 16, 2019, one second after midnight of December 15, 2019 date his 20yr maximum sentence officially expired.

After trial by jury for^d December 15, 1999 offense, the trial judge announced in open court punishment of a 20yr statutory maximum sentence in Trial Court No. 0831335.

The new 3yr, 2mo, 15day prison term arbitrarily added by prison officials for the Sept. 30, 2015 revocation of Petitioner's parole, artificially prolongs his stay "in custody & control" of Tr. Ct. No. 0831335 until March 5, 2023
See Appx E.

REASON FOR GRANTING THE PETITION

U.S. v. HAYMOND, 139 S.Ct. 2369 decided June 26, 2019 held that, "after revocation of a traditional parole a defendant returning to prison may only be exposed to the remaining term of his original sentence for the crime of conviction by verdict under facts determined by a jury beyond a reasonable doubt."

Petitioner exercised his 6th Amdt. right to trial by jury, electing to be sentenced by trial judge.

By statute in Texas, a convicted defendant is entitled to choose to have his punishment fixed by trial judge or/ by jury. ART. 42.01 § 1(8) T.C.C.P.

Petitioner's conduct underlying his crime of conviction sets a limited statutory maximum penalty of punishment to 20 yrs:

AN INDIVIDUAL ADJUDGED GUILTY
OF A FELONY OF THE 2nd DEGREE
SHALL BE PUNISHED BY IMPRISON-
MENT TO TDCJ FOR ANY TERM OF NOT
MORE THAN 20 YRS OR/ LESS THAN 2 YRS

Texas Penal Code § 12.33(a)

↑ ↑ ↑

REASONS FOR GRANTING THE PETITION

This Supreme Court holds that a state statute creates a liberty interest protected under the Due Process Clause of the 14th Amdt. under mandatory language such as "SHALL BE" creates an expectancy of release. See BOARDS OF PARDONS v. ALLEN, 482 U.S. 369, 107 S.Ct. 2415-17 ('87); GREENHOLTZ v. NEB. PENAL INMATES, 442 U.S. 1, 99 S.Ct. 2100 ('79). --- 23 yrs, 2 mos, 15 days exceeds the defined legal boundaries of Petitioner's state-jail offense enhanced to a 2nd degree felony, Tex. Penal Code §§ 12.35(a), 12.425(b), 12.33(a)

"Any law that makes greater punishment annexed to a crime when committed violates the EX POST FACTO CLAUSE," CALDER v. BULL, 3 Dall. 386, 390 (1798); ART. I §9, cl. 3; §10, cl. 1. U.S. CONST.

Appx E shows Petitioner's original 20yr maximum sentence Dec. 15, 2019 expiration date extended to March 5, 2023

"It is impossible to dissociate the ceiling of a sentence range from the penalty affixed to the crime," ALLEYNE v. U.S., 570 U.S. 99, 133 S.Ct. 2151, 2160 (113)

Petitioner has been deprived of a substantial and legitimate expectation that he would be deprived

of his liberties only to the extent determined by verdict of the jury and trial judge's open court sentence announcement of the statutory maximum penalty of 20 yrs. Tex. Penal Code §§12.35(c), 12.425(b), 12.33(a)

U.S. v HAYMOND, 139 S.Ct. 2369 (June 26, 2019) invokes the "common law rule" that "a prison sentence is continuous from date a defendant surrenders to begin serving it. The government is not permitted to delay the expiration of the sentence by releasing the prisoner for a time & then reimprison him to thereafter artificially extend the original sentence expiration date," citing DUNNE v KEDHANE, 14 F.3d 335-36 (7th Cir '94)

JONES v CUNNINGHAM, 371 U.S. 236 ('63) holds a defendant on parole is sufficiently "in custody & control" for service on sentence for habeas corpus challenge of a fundamentally defected sentence increase that exceeds that permitted by law. CALDER v BULL, supra,

The Tex. Court of Crim. App., Appx D fast tracked the trial court's fast track adoption of the D.A.'s Proposed Findings of Facts & Conclusion of Law w/ Order, Appx C, "contrary to" a decision of this Supreme Court that, "after revocation of a parole a defendant

may only be exposed to the remaining terms
of his original sentence." U.S. v WAYMOND, 139
S.Ct. 2369 (June 26, 2019). RULE 10(c)

Petitioner has served 20 yrs of a 20yr maximum
sentence, determined by verdict of a jury & announced
in open court by trial judge under limits set by state
law. 14th Amdt. Due Process Clause

Petition should be granted, and remanded back
to the Tex. Court of Crim. App. in light of U.S. v WAYMOND
& the Due Process Clause to the 14th Amdt. U.S.
CONST.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kirby Gardner

Date: 5/1/20

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