No. _____

IN THE

SUPREME COURT OF UNITED STATES

KENTON DAYNE EAGLE CHASING - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Whether the Eighth Circuit Court of Appeals erred on a matter of public importance and created a circuit split when it ruled that subject matter jurisdiction for a revocation under § 3583 is not dependent on subject matter jurisdiction for the underlying criminal offense?

2) Whether the Eighth Circuit Court of Appeals erred on a matter of public importance when it reasoned that revocation under 18 USC 3583(e)(3) does not implicate the Sixth Amendment's right to a jury trial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

IN THE

SUPREME COURT OF UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is reported at 965 F.3d 647.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case was July 14, 2020. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C § 1153; 18 U.S.C § 3583 (See Appendices B and C for the text)

STATEMENT OF THE CASE

Kenton Dayne Eagle Chasing (hereinafter "Eagle Chasing") was Indicted for second degree murder. DCD 15. Thereafter, Eagle Chasing filed a Petition to Plea to the Indictment. DCD 85. For this conviction, the district court sentenced Eagle Chasing to 168 months in prison followed by five years of supervised release. DCD 100; DCD 123 ¶ 4. The district court revoked Eagle Chasing's first term of supervised release after Eagle Chasing admitted to three Grade C violations, and the court sentenced him to ten months imprisonment and three years of supervised release. DCD 126; DCD 123 ¶ 16; *see also United States v. Eagle Chasing*, 717 F. App'x 647 (8th Cir. 2018). Eagle Chasing completed his first revocation-based custodial sentence and began his second term of supervised release which was revoked after Eagle Chasing admitted to a Grade C violation. DCD 130; DCD 147; *see also Eagle Chasing*, 717 F. App'x at 647. The court sentenced him to twenty months imprisonment and thirty months of supervised release. *Id.*

Eagle Chasing completed his second revocation-based custodial sentence and began his third term of supervised release on May 1, 2018. RT 16:10-11. Upon his release, Eagle Chasing was directed to reside at Glory House, a residential reentry center in Sioux Falls, SD. RT 17:6-12. Eagle Chasing resided there until July 7, 2019. At that time, he was stabbed by another resident. RT 19:19-24. Although Glory House staff did not witness the stabbing, the evidence is uncontroverted and Glory House staff did witness blood on the resident who stabbed Eagle Chasing, and the resident refused to answer questions about the same. RT 39:12-18.

Because of the threat to his safety, Eagle Chasing retreated from Glory House and went to Eagle Butte, South Dakota. RT 19:20-24. Consistent with the Court's standard conditions, specifically number 5, Eagle Chasing contacted his probation officer within 72 hours of his departure from Glory House due to unforeseen circumstances. DCD 147, RT 24:8-14; 25:9-11. However, despite Eagle Chasing following that condition and asking for direction from the probation officer (including informing his probation officer of his location), his probation officer did not instruct Eagle Chasing to take any action, but rather that "he would look into it." RT 24:15-19. However, a warrant was issued and no further action was taken by the probation officer, and no contact was made with Eagle Chasing. RT 28:18-20.

Nearly a month later, on July 24, 2019, Officer Jeremy Reede ("Reede") initiated a traffic stop of Eagle Chasing in Eagle Butte. RT 42:5-7. Reede was driving an unmarked vehicle. RT 43:18-19. To an onlooker, it would appear to be a grey Ford Focus with tinted windows. RT 43:16-19; 66:11-14. The vehicle was equipped with emergency lights and sirens that could be activated. RT 43:22-24. Reede testified that he witnessed a white vehicle which did not make a "complete stop" at a stop sign, and turned on his emergency lights to iniate a traffic stop. RT 43:15-44:2. The white vehicle continued on the road for a few blocks, driving under the speed limit without swerving (stopping at a stop sign), and then pulled over, which happened to be at his Eagle Chasing's house. RT 69:6-8.

When stopped, Reede and Officer Norman approved Eagle Chasing, weapons drawn, to take him into custody. RT 45:23-46:1. Reede testified that he could smell

a the odor of alcohol as Eagle Chasing was being handcuffed, and administered a Preliminary Breath Test ("PBT"), which was over a .08% reading. RT 46:2-10. Reede had no knowledge as to it PBT had ever been calibrated. RT 69:12-20. No field sobriety tests were performed. RT 46:16-17. No blood draw was taken. RT 68:19-20. Evidence of an eyewitness was entered into evidence that Eagle Chasing did not drink alcohol that entire day. RT 78:17-79:18. Eagle Chasing was taken into custody, but no evidence is in the record of any tribal convictions.

A Revocation Hearing was held on March 27, 2019 before Magistrate Judge Mark A. Moreno. Judge Moreno issued a Report and Recommendation (DCD 201) recommending dismissal of the DWI and reckless driving allegations, but recommending that Eagle Chasing be adjudged to having violated his supervised release for failing to reside and participate in a residential re-entry center and for engaging in "eluding police" as conduct which violated tribal law. DCD 201 at 10-11. The District Court adopted the Report and Recommendation and sentenced Eagle Chasing to the highest legal sentence of thirty months custody. DCD 216.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit Court of Appeals erred on a matter of public importance and created a circuit split when it ruled that subject matter jurisdiction for a revocation under § 3583 was not dependent on subject matter jurisdiction for the Underlying Criminal Offense.

The Eighth Circuit held that a lack of subject matter jurisdiction for an underlying offense does not impact whether the court has subject matter jurisdiction to revoke supervised release. Specifically, the Eighth Circuit reasoned:

> Although § 1153 provided the jurisdictional basis for his original prosecution, it does not affect the district court's jurisdiction over revocation proceedings. That jurisdiction derives from 18 U.S.C. § 3583. . . . The district court had jurisdiction under § 3583 and so we will not consider Eagle Chasing's argument that the location of the 2002 murder deprived the court of jurisdiction at his original prosecution.

Eagle Chasing, 965 F.3d 647 (8th Cir. 2020)

Defendant recognizes the general proposition that a defendant "may challenge the validity of his underlying conviction and sentence through a direct appeal or a habeas corpus proceeding, not through a collateral attack in a supervised-release revocation proceeding." *United States v. Miller*, 557 F.3d 910, 913 (8th Cir. 2009). However, subject matter jurisdiction is distinguishable, as unlike other substantive challenges on the merits, "[s]ubject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation[.]" *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S. Ct. 641, 648 (2012).

The Eighth Circuit's holding that 18 U.S.C. § 3583 provides an independent and separate basis for subject matter jurisdiction in a revocation hearing is in error. The correct view is that 18 USC § 3583, instead, provides for *retention* of subject matter jurisdiction from the underlying conviction. *See United States v. Best,* 430 F. App'x 128, 130 (3d Cir. 2011) ("The District Court had subject matter jurisdiction over the underlying criminal offense pursuant to 18 U.S.C. § 3231. District courts retain jurisdiction to revoke a term of supervised release pursuant to Section 3583(e) of the Sentencing Reform Act of 1984, 18 U.S.C. § 3583(e)."). At least one circuit, the Third Circuit, has recognized the same, creating a conflict in the circuit

split with the reasoning of the Eighth Circuit in the present case. *See id.*; *United States v. Brashear*, 797 F. App'x 77, 80 (3d Cir. 2019) ("The District Court had subject matter jurisdiction over the underlying substantive offense under 18 U.S.C. § 3231, and accordingly was authorized to revoke the sentence of supervised release under 18 U.S.C. § 3583(e).").

Indeed, the rationale of the Eighth Circuit is internally inconsistent. As it relates to subject matter jurisdiction, the Eighth Circuit reasoned § 3583 is independent and separate from the underlying conviction. However, the basis for which the Eighth Circuit reasons that Eagle Chasing does not have a right to a jury trial is that "revocation under §3583(e)(3) is a sanction connected to the original offense." *Eagle Chasing*, 965 F.3d 647 at *4. Simply stated, this reasoning is not congruent, and both cannot be valid at the same time.

This case presents this Court with an opportunity to clarify the now existing circuit split as to whether subject matter jurisdiction granted in 18 U.S.C. § 3583 is dependent on having subject matter jurisdiction over the underlying substantive offense. Accordingly, the Court should grant the Petition for Writ of Certiorari and remand the matter to the Eighth Circuit to address the merits of the challenge to subject matter jurisdiction.

II. The Eighth Circuit Court of Appeals erred on a matter of public importance when it reasoned that revocation under 18 USC 3583(e)(3) does not implicate the Sixth Amendment's right to a jury trial.

Before the Eighth Circuit, Appellant argued that, in light of the reasoning in under the reasoning of *United States v. Haymond*, 139 S. Ct. 2369 (2019), revocation

of supervised release under 18 USC 3583(e)(3) implicates the right to a jury trial under the Sixth Amendment to the United States Constitution. The Eighth Circuit reasoned that:

> Unlike a revocation under § 3583(k), revocation under §3583(e)(3) is a sanction connected to the original offense, and the statute affords the district court wide discretion to determine whether to revoke supervision and what sentence to impose. *United States v. Doka*, 955 F.3d 290, 296-97 (2d Cir. 2020); *see also United States v. Wilson*, 939 F.3d 929, 933 (8th Cir. 2019) (holding *Haymond* inapplicable to revocations under § 3583(g)). Even assuming that, in a future case, the Court follows the plurality and holds "a small set of [§ 3583(e)] cases" do "turn[] out to raise Sixth Amendment issues" when the sum of a defendant's initial and revocation sentences is a total term of imprisonment exceeding the statutory maximum for the original crime of conviction, Eagle Chasing would not be impacted because his second degree murder conviction carries a maximum sentence of life in prison. Id. at 2384 (plurality opinion); 18 U.S.C. § 1111(b).

United States v. Eagle Chasing, 965 F.3d 647, *4-5 (8th Cir. 2020).

Booker's "reasonableness" standard that all courts appear to use to justify sentences is not a substitute for the Sixth Amendment protections that are afforded to criminal defendants in criminal cases as the Supreme Court made clear in *Cunningham v. California*, 549 U.S. 270 (2007):

> Reasonableness, however, is not, as the Black court would have it, the touchstone of Sixth Amendment analysis. The reasonableness requirement Booker anticipated for the federal system operates within the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints.

Id. at 292-293.

The Supreme Court's holding in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) put another crack in the underlying rationale upholding revocations under 18 USC 3583(e)(3) which result in imposition of custody based on a new fact,

typically a new criminal violation, cannot be used to add to the original sentence imposed, because the new fact or new criminal violation was not charged in the original indictment nor was it proven beyond a reasonable doubt to a jury. The Court in *United States v. Lara-Ruiz*, 721 F.3d 554 (8th Cir. 2013) applying *Alleyne*, 133 S.Ct. 2151,2158 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to sentences that increase the bottom range of a sentence, reasoned:

> ... the Court recognized that *Apprendi* both "concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" and held that the "Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt." *Id.* at 2160. Because a fact triggering a mandatory minimum impacts the prescribed sentencing range, it follows, then, that a "fact increasing either end of the [sentencing] range produces a new penalty and constitutes an ingredient of the offense." *Id.* Facts that increase the legally prescribed floor, "aggravate" the punishment, and as the Court opined, these facts must therefore be submitted to the jury and found beyond a reasonable doubt, in accordance with the Sixth Amendment. *Id.* at 2161. Id. at 556-557.
>
> .... As Justice Thomas, writing for the majority, insisted, such an increase "aggravate[s] the punishment" and "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161.

Id. at 557.

The final nail in the coffin of regarding whether of 18 USC 3583(e)(3) implicates the right to a jury trial is the reasoning of the plurality opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019), which left open the question of the constitutionality of 18 USC 3583(e)(3). There, the plurality reasoned: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Id.* at 2373. The plurality emphasized the importance of such:

> Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography [**903] of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution §1779, pp. 540-541 (4th ed. 1873).

Id. at 2375.

The plurality defined a "crime" as any "'ac[t] to which the law affixes . . . punishment,'" and says that a "prosecution" is "'the process of exhibiting formal charges against an offender before a legal tribunal.'" *Id.* at 2376; *see also id.* at 2379, ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed. . . . [A]n accused's final sentence includes any supervised release sentence he may receive"). The plurality thereafter quotes *Blakely v. Washington*, 542 U. S. 296 (2004), in the supervised release context, reasoning "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Id.* at 2370.

The plurality opinion then rejects the reasoning advanced by the government reasoning that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d]" "by the simple expedient of relabeling a criminal prosecution a . . . 'sentence modification' imposed at a 'postjudgment sentence administration proceeding.'" *Id.* at 2379; *see also id.* at 2380, ("any accusation triggering a new and

additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt"; and "a jury must find all of the facts necessary to authorize a judicial punishment").

Lastly, the plurality rejected the reasoning advanced adopted by the Eighth Circuit in the present case, while differencing parole revocations from supervised release revocations, reasoning supervised release as "critical[ly] differen[t]," *id.* at 2381-2382, because parole relieved a prisoner from serving part of the prison sentence originally imposed, whereas a term of supervised release is added to the term of imprisonment specified by the sentencing judge.

In accordance with rationale the plurality opinion in *Haymond*, the Fifth and Sixth Amendments are applicable to supervised release revocation proceedings under 18 USC 3583(e)(3). Eagle Chasing did not admit to a violation, and accordingly, Eagle Chasing is entitled to a have charges presented to grand and petit juries. The district court failed to do afford such a right to Eagle Chasing.

CONCLUSION

For the foregoing reasons, Eagle Chasing respectfully requests that the petition for a writ of certiorari should be granted.

Dated this 21st day of August, 2020.

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United States Court of Appeals
For the Eighth Circuit

No. 19-2420

United States of America

Plaintiff - Appellee

v.

Kenton Dayne Eagle Chasing

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Pierre

Submitted: June 18, 2020
Filed: July 14, 2020

Before GRUENDER, WOLLMAN, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Kenton Dayne Eagle Chasing was convicted of murder in 2002 and sentenced to 168 months in prison followed by five years of supervised release. Less than a year after he left prison, his release was revoked because he failed to follow his probation officer's instructions, drank, and drove under the influence. He served ten months and began another term of supervised release. His release was revoked again and he

received twenty months additional prison time when he absconded from supervision. Eagle Chasing's third term of supervised release did not last either—the district court[1] sentenced him to thirty more months in prison for again absconding from supervision and violating tribal law. He appeals, arguing that the district court lacked subject matter jurisdiction, that revocation under 18 U.S.C. § 3583(e)(3) is unconstitutional without a jury trial, that the district court should have recused, that there was insufficient evidence of his violations of the conditions of release, and that his sentence is procedurally and substantively unsound. We affirm.

I.

Although murder is generally a state crime, Eagle Chasing's 2002 prosecution was brought in federal court in part because it was alleged to have occurred in Indian country. *See* 18 U.S.C. § 1153. Eagle Chasing challenges the district court's jurisdiction over his original prosecution by claiming the murder occurred on land that had once been Indian country but had been ceded to a railroad company and could not provide the basis for his federal prosecution.

We cannot review the validity of an underlying conviction through a collateral attack in a supervised-release revocation proceeding. *United States v. Miller*, 557 F.3d 910, 913 (8th Cir. 2009). To evade this limitation, Eagle Chasing argues that the issue also implicates the district court's jurisdiction to revoke his supervised release. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."). We review such challenges *de novo*. *United States v. Hacker*, 450 F.3d 808, 814 (8th Cir. 2006).

Although § 1153 provided the jurisdictional basis for his original prosecution, it does not affect the district court's jurisdiction over revocation proceedings. That jurisdiction derives from 18 U.S.C. § 3583. *See United States v. Mosby*, 719 F.3d

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[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

925, 928 & n.3 (8th Cir. 2013); *Hacker*, 450 F.3d at 814 & n.4 (8th Cir. 2006); *see also*, *United States v. Mosby*, 2018 WL 3383430, at *3 (July 11, 2018) ("A district court's jurisdiction to modify, revoke, or terminate a term of supervised release therefore comes . . . from § 3583(e)."). The district court had jurisdiction under § 3583 and so we will not consider Eagle Chasing's argument that the location of the 2002 murder deprived the court of jurisdiction at his original prosecution.

II.

Eagle Chasing next argues that a revocation sentence under 18 U.S.C. § 3583(e) violates his constitutional rights to have a jury determine his guilt beyond a reasonable doubt. We review constitutional challenges to federal statutes *de novo*. *United States. v. Stephens*, 594 F.3d 1033, 1036–37 (8th Cir. 2010).

Eagle Chasing acknowledges that we have rejected similar arguments before. *See United States v. Coleman*, 404 F.3d 1103, 1104–05 (8th Cir. 2005) (per curiam); *United States v. Shurn*, 128 Fed. App'x 552, 554 (8th Cir. 2005) (per curiam) (unpublished). We did so because the Supreme Court has long recognized that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Shurn*, 128 Fed. App'x at 554 (citing the same).

Nevertheless, Eagle Chasing suggests that the plurality opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019) undermines this precedent and signals a sea change in the law governing revocation proceedings. Eagle Chasing candidly admits *Haymond*, which dealt with proceedings under 18 U.S.C. § 3583(k), left open the constitutionality of § 3583(e)(3), but that understates it. In fact, all three opinions in *Haymond* sit somewhere on a scale between expressing doubt that the right to a jury trial is implicated by revocations under § 3583(e)(3), *see id.* at 2383–84 (Gorsuch, J.) (plurality opinion), to outright asserting it is not, *see id.* at 2386 (Breyer, J., concurring); *id.* at 2391 (Alito, J., dissenting).

There is good reason for this. Unlike a revocation under § 3583(k), revocation under §3583(e)(3) is a sanction connected to the original offense, and the statute affords the district court wide discretion to determine whether to revoke supervision and what sentence to impose. *United States v. Doka*, 955 F.3d 290, 296–97 (2d Cir. 2020); *see also United States v. Wilson*, 939 F.3d 929, 933 (8th Cir. 2019) (holding *Haymond* inapplicable to revocations under § 3583(g)). Even assuming that, in a future case, the Court follows the plurality and holds "a small set of [§ 3583(e)] cases" do "turn[] out to raise Sixth Amendment issues" when the sum of a defendant's initial and revocation sentences is a total term of imprisonment exceeding the statutory maximum for the original crime of conviction, Eagle Chasing would not be impacted because his second degree murder conviction carries a maximum sentence of life in prison. *Id.* at 2384 (plurality opinion); 18 U.S.C. § 1111(b).

"[A]s an inferior federal court 'we are not at liberty to browse through the[] tea leaves and vaticinate what future holdings the Supreme Court may (or may not) make.'" *Doka*, 955 F.3d at 298 (quoting *United States v. Gonzalez*, 949 F.3d 30, 42 (1st Cir. 2020)). Until the Supreme Court invalidates § 3583(e)(3), we must follow our precedent and hold that the revocation of Eagle Chasing's release did not violate his constitutional rights.

III.

Eagle Chasing next challenges the district court's denial of his motion requesting recusal because of alleged bias. We review for an abuse of discretion. *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006).

A judge must recuse from "any proceeding in which his impartiality might reasonably be questioned" or when "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a) & (b)(1). "A judge is presumed to be impartial and 'the party seeking disqualification bears the substantial burden of proving otherwise.'" *Denton*, 434 F.3d at 1111 (quoting *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003)).

To meet this burden, Eagle Chasing points to three statements made by the district court. First, Eagle Chasing suggests that the court admitted to prejudging his case when it wrote, in its order denying the motion for recusal,

> Petitioner is apparently concerned about the length of the sentence he faces upon his third revocation. His concern is well placed. Defendants who continue to flaunt the orders of the Court by violating the conditions imposed upon them rightly assume that they will be subject to harsher penalties with each additional revocation.

D. Ct. Dkt. 200 at 3. Second, at the revocation hearing the court noted, although it had sentenced "way over 3,000 people" and did not remember many of those cases, it "definitely remember[ed] this one because it was so cruel and so needless." D. Ct. Dkt. 223 at 10:18–24. Finally, Eagle Chasing points to the district court's statement at an earlier revocation hearing, that Eagle Chasing "has admitted he doesn't trust the court system and maybe for a valid reason. I don't know." D. Ct. Dkt. 127 at 5:22–23.

When a defendant attempts to prove bias based on in-court conduct, that conduct must be "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555 (emphasis added).

Eagle Chasing has not satisfied that standard. The first two statements stem from opinions formed during a prior proceeding and neither shows deep-seated antagonism toward Eagle Chasing. Further, both relate to factors the district court must consider in revoking supervised release. 18 U.S.C. § 3553(a) (listing factors including"the history and characteristics of the defendant" and the need"to promote respect for the law"). The third statement, suggesting that Eagle Chasing might have a "valid reason" for not trusting the court system also falls far short of the "substantial

burden" that Eagle Chasing carries when seeking recusal. In context, the district court was encouraging Eagle Chasing to trust the court system and telling him it was only "trying to get him off the path of self destruction." D. Ct. Dkt. 127 at 5:25–6:1.

IV.

Eagle Chasing next argues the evidence did not show that he violated the conditions of his release by failing to reside at his residential re-entry center and by eluding the police. We review a district court's decision to revoke supervised release for an abuse of discretion and review factfinding supporting that decision for clear error. *United States v. Frosch*, 758 F.3d 1012, 1014 (8th Cir. 2014).

As a condition of his supervised release, Eagle Chasing resided at Glory House, a residential re-entry center in Sioux Falls, South Dakota. He was required to notify his probation officer in advance of any change in residence, or, if that was not possible, to notify him within 72 hours of an unexpected change. Just over two months after he arrived at Glory House, Eagle Chasing kicked out the window screen in his room and absconded. Three days later, he called his probation officer from Eagle Butte, South Dakota, a town on the Cheyenne River Reservation. Eagle Chasing suggests he complied with the conditions of his release because he made the call and because he only fled from Glory House after he was stabbed by another resident. There is scant evidence in the record that any stabbing occurred and, even if it had, it would not justify Eagle Chasing kicking out his window, leaving Glory House without notifying anyone, and traveling 300 miles across the state before calling his probation officer. The district court did not clearly err in finding Eagle Chasing violated the terms of his release when he left Glory House without permission.

The second violation, for eluding the police, is trickier. A few weeks after he left Glory House, an officer of the Cheyenne River Sioux Tribe Police Department attempted to pull Eagle Chasing over after he witnessed Eagle Chasing fail to come to a complete stop at a stop sign. The officer, who was in uniform, was driving an unmarked car equipped with lights and a siren, which he activated. Despite hearing the siren Eagle Chasing continued to drive for some time before pulling over.

The tribal traffic code[2] defines eluding as "[i]ntentionally fail[ing] or refus[ing] to bring the vehicle to a stop," when given a "hand, voice, emergency light, or siren" signal by law enforcement, provided that the signaling officer is "in a vehicle appropriately marked showing it to be a police vehicle." But the officer's vehicle in this case was unmarked and so, Eagle Chasing argues, he cannot be charged with eluding. Relying on *Williams v. State*, 24 A.3d 210 (Md. Ct. Spec. App. 2011), which interpreted a similar statute, he argues that reading "appropriately marked" to include those police vehicles that are not painted with police markings but are equipped with sirens and flashing lights would reduce the marking requirement to surplusage in light of the separate signaling requirement. We disagree. Interpreting "appropriately marked" to include marked with flashing lights and sirens does not render the signaling requirement meaningless since those items are not necessary to properly signal a driver to stop. *See State v. Montano*, 423 P.3d 1, 16 (N.M. Ct. App. 2018). Rather, we think the better view is that in cases where the signal is delivered through the use of flashing lights and sirens, those elements may also serve as the markings that put the recipient on notice that the person giving the signal is a law enforcement officer. *Id.*

Even if the district court's conclusion that Eagle Chasing's conduct amounted to eluding the police was incorrect, we doubt it affected his sentence. Eagle Chasing's 30 month sentence was the maximum allowed and represented a 19-month variance above the top of his range based on his Grade C violations. The sentence was the result of the district court's normal practice of "imposing a longer sentence with each revocation," its consideration of Eagle Chasing's two prior revocations, and his lengthy history of criminal conduct, including the "cruel and needless" murder of his girlfriend. "We conclude any error was harmless, given the evidence of other supervised release violations." *United States v. Fry*, 276 Fed. App'x 547, 548 (8th Cir. 2008) (unpublished) (per curiam) (citing Fed. R. Crim. P. 52(a)).

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[2] Eagle Chasing suggests that there was no lawfully enacted traffic code on the Cheyenne River Reservation when he was pulled over and that he therefore cannot have violated any law when he failed to heed the officer's sirens and lights. However, an officer from the Cheyenne River Sioux Tribe Police Department testified at the hearing that the provision at issue was lawfully enacted as of the date of Eagle Chasing's arrest. It was not clearly erroneous to credit that testimony.

V.

Finally, Eagle Chasing argues his sentence is both procedurally unsound and substantively unreasonable. We first assess whether the district court committed significant procedural error. *United States v. Williams*, 624 F.3d 889, 896 (8th Cir. 2010). If we find none, we review the substantive reasonableness of the sentences, applying a deferential abuse of discretion standard. *United States v. Stoner*, 795 F.3d 883, 884 (8th Cir. 2015).

Eagle Chasing alleges the district court procedurally erred when it considered facts in his presentence report to which he objected. Although it is ordinarily true that a district court commits procedural error if, after a defendant objects to facts in his presentence report, it relies on those facts in setting his sentence, *United States v. Hammer*, 3 F.3d 266, 273 (8th Cir. 1993), in this case Eagle Chasing had previously admitted to those same contested facts by failing to object to them at his previous sentencing hearings, *United States v. Menteer*, 408 F.3d 445, 446 (8th Cir. 2005) (per curiam). Prior admissions by the defendant are evidence that the district court may rely on to find that facts related in a presentence report are accurate. The district court did not procedurally err by relying on Eagle Chasing's admissions.

Eagle Chasing's claim that his sentence was substantively unreasonable also fails. His argument boils down to the assertion that the district court placed too much weight on the murder of his girlfriend. The district court appropriately considered the murder as part of its sentencing process and it was under no obligation to weigh it the way that Eagle Chasing would have preferred. *United States v. Anderson*, 618 F.3d 873, 883 (8th Cir. 2010). The record also shows that in varying upward the district court focused on Eagle Chasing's repeated failures to abide by the terms of his supervised release. Eagle Chasing's sentence was substantively reasonable.

The judgment of the district court is affirmed.

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18 USCS § 1153

Current through Public Law 116-158, approved August 14, 2020.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part I. Crimes (Chs. 1 — 123) > CHAPTER 53. Indians (§§ 1151 — 1170)

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [*18 USCS §§ 2241* et seq], incest, a felony assault under section 113 [*18 USCS § 113*], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [*18 USCS § 661*] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

History

HISTORY:

Act June 25, 1948, ch 645, § 1, *62 Stat. 758*; May 24, 1949, ch 139, § 26, *63 Stat. 94*; Nov. 2, 1966, *P. L. 89-707*, § 1, *80 Stat. 1100*; April 11, 1968, *P. L. 90-284*, Title V, § 501, *82 Stat. 80*; May 29, 1976, *P. L. 94-297*, § 2, *90 Stat. 585*; Oct. 12, 1984, *P. L. 98-473*, Title II, Ch X, Part H, § 1009, *98 Stat. 2141*; May 15, 1986, *P. L. 99-303*, *100 Stat. 438*; Nov. 10, 1986, *P. L. 99-646*, § 87(c)(5), *100 Stat. 3623*; Nov. 14, 1986, *P. L. 99-654*, § 3(a)(5), *100 Stat. 3663*; Nov. 18, 1988, *P. L. 100-690*, Title VII, Subtitle B, § 7027, *102 Stat. 4397*; Sept. 13, 1994, *P. L. 103-322*, Title XVII, Subtitle B, § 170201(e), Title XXXIII, § 330021(1), *108 Stat. 2043*, 2150; July 27, 2006, *P. L. 109-248*, Title II, § 215, *120 Stat. 617*; March 7, 2013, *P. L. 113-4*, Title IX, § 906(b), *127 Stat. 125*.

Current through Public Law 116-158, approved August 14, 2020.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [*18 USCS § 3561(b)*].

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [*18 USCS § 3561(b)*] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender

Registration and Notification Act [*34 USCS §§ 20901* et seq.], that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [*42 USCS § 14135a*]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [*18 USCS § 3583(g)*] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

> **(1)**is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), and (a)(2)(D)];
>
> **(2)**involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [*18 USCS § 3553(a)(2)(B)*, (a)(2)(C), and (a)(2)(D)]; and
>
> **(3)**is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to *28 U.S.C. 994(a)*;

any condition set forth as a discretionary condition of probation in section 3563(b) [*18 USCS § 3563(b)*] and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) [28 USCS § 3563(b)(10)] shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) [*18 USCS § 3583(e)(2)*] and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act [*34 USCS §§ 20901* et seq.], that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a

condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [*18 USCS § 3553(a)(1)*, (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]—

(1)terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2)extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3)revoke a term of supervised release, and require 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 without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4)order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant—

(1)possesses a controlled substance in violation of the condition set forth in subsection (d);

(2)possesses a firearm, as such term is defined in section 921 of this title [*18 USCS § 921*], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3)refuses to comply with drug testing imposed as a condition of supervised release; or

(4)as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. 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.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [*18 USCS § 2332b(g)(5)(B)*] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [*18 USCS § 1201*] involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [*18 USCS § 1591*, *1594(c)*, *2241*, *2242*, *2244(a)(1)*, *2244(a)(2)*, *2251*, *2251A*, *2252*, *2252A*, *2260*, *2421*, *2422*, *2423*, or *2425*], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [*18 USCS §§ 2241* et seq., *2251* et seq., *2421* et seq., *1201*, or *1591*], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

History

HISTORY:

Added Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 212(a)(2), 98 Stat. 1999; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, § 1006(a)(1)–(3), 100 Stat. 3207-6; Nov. 10, 1986, P. L. 99-646, § 14(a), 100 Stat. 3594; Dec. 7, 1987, P. L. 100-182, §§ 8, 9, 12, 25, 101 Stat. 1267, 1268, 1272; Nov. 18, 1988, *P. L. 100-690*, Title VII, Subtitle C, § 7108, Subtitle G, §§ 7303(b), 7305(b), *102 Stat. 4418*, 4464, 4465; Nov. 29, 1990, *P. L. 101-647*, Title XXXV, § 3589, *104 Stat. 4930*; Sept. 13, 1994, *P. L. 103-322*, Title II, Subtitle D, § 20414(c), Title XI, Subtitle E, § 110505, Title XXXII, Subtitle I, § 320921(c), *108 Stat. 1831*, 2016, 2130; Nov. 26, 1997, *P. L. 105-119*, Title I, § 115(a)(8)(B)(iv), *111 Stat. 2466*; Dec. 19, 2000, *P. L. 106-546*, § 7(b), *114 Stat. 2734*; Oct. 26, 2001, *P. L. 107-56*, Title VIII, § 812, *115 Stat. 382*; Nov. 2, 2002, *P. L. 107-273*, Div B, Title II, Subtitle A, § 2103(b), Title III, § 3007, *116 Stat. 1793*, 1806; April 30, 2003, *P. L. 108-21*, Title I, § 101, *117 Stat. 651*; March 9, 2006, *P. L. 109-177*, Title II, Subtitle A, § 212, *120 Stat. 230*; July 27, 2006, *P. L. 109-248*, Title I, Subtitle B, § 141(e), Title II, § 210(b), *120 Stat. 603*, 615; Oct. 13, 2008, *P. L. 110-406*, § 14(b), *122 Stat. 4294*, May 29, 2015, *P. L. 114-22*, Title I, § 114(d), *129 Stat. 242*; Dec. 16, 2016, P. L. 114-324, § 2(a), 130 Stat. 1948.

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