

No. 21-

In the
Supreme Court of the United States

FERRELL WALKER,
Petitioner,
vs.
UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on plain error review, the defendant's right not to be twice put in jeopardy for the same offense under the Double Jeopardy Clause of the Fifth Amendment was violated where, after being convicted of violating the conditions of his supervision and sentenced under 18 U.S.C. § 3583(k), to the 60-month minimum, mandatory term of imprisonment, the defendant was subsequently indicted, tried, convicted, and sentenced for the same offense that gave rise to his conviction for violating the conditions of his supervision, even though his sentence under 18 U.S.C. § 3583(k) was vacated on appeal?
2. Whether, assuming the merit of the defendant's double jeopardy claim, the district court committed plain error?

PARTIES TO THE PROCEEDINGS

Petitioner (Defendant below) is Ferrell Walker.

Respondent is the United States of America.

RULE 29.6 STATEMENT

Petitioner Ferrell Walker is an individual with no corporate affiliation, no parent corporation, and no publicly held corporation owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit which affirmed Petitioner's conviction and sentence in Case No. 7:17-cr-00034-HL-TQL.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is not reported but appears at 2021 WL 915763 (11th Cir. Mar. 10, 2021), and is reproduced at Pet. App. 1a-14a. The Judgment of the United States District Court for the Middle District of Georgia, Valdosta Division, in Case No. 7:07-cr-00030-HL-TQL-1, is not reported but is reproduced at Pet. App. 15a-27a. The Judgment of the United States District Court for the Middle District of Georgia, Valdosta Division, in Case No. 7:17-cr-00034-HL-TQL, is not reported but is reproduced at Pet. App. 28a-44a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment affirming petitioner's conviction and sentence in Case No. 7:17-cr-00034-HL-TQL on March 10, 2021. Pet. App. 1a-14a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V.

INTRODUCTION

This case presents the question whether a defendant's right not to be twice put in jeopardy for the same offense was violated where he was tried, convicted for violating the conditions of his supervision, and sentenced under 18 U.S.C. § 3583(k) to the minimum, mandatory term of 60 months imprisonment for possession of child pornography and subsequently indicted, tried, convicted, and sentenced to a consecutive term of 168 months imprisonment for possession of the same child pornography on the same date, even after his revocation sentence was vacated on appeal. Because the defendant was twice put in jeopardy for the

same offense, even though he will not have been twice punished for the same offense as a result of the appellate ruling, the defendant's right guaranteed under the Fifth Amendment's Double Jeopardy Clause has been violated.

Further, the precedents of this Court demonstrate the merit of the defendant's claim that he was twice put in jeopardy for the same offense. As such, it was plain error for the defendant to suffer a second prosecution for the same offense. *Jones v. Thomas*, 491 U.S. 376, 380-81 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). For these reasons, the judgment of the court of appeals is due to be reversed and the case remanded to the district court with instructions to vacate the defendant's conviction and sentence in Case No. 7:17-cr-00034-HL-TQL, the second prosecution.

STATEMENT OF THE CASE

1. Defendant Walker is currently incarcerated at FCI Miami.
2. On August 23, 2007, Defendant Walker pleaded guilty to a one-count information charging him with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Defendant Walker was sentenced on November 27, 2007, to a term of imprisonment for 87 months to be followed by a term of supervision for 25 years, a fine of \$2,000.00 and a mandatory assessment fee of \$100.00.
3. On May 16, 2014, Defendant Walker began serving his term of supervision in the Middle District

of Georgia. On November 17, 2017, Defendant Walker was arrested on a new indictment charging him with possession of child pornography and a warrant for violation of his conditions of supervision. *United States v. Walker*, 7:17-cr-00034-HL-TQL.

4. On May 9, 2018, the district court, sitting without a jury, heard evidence relating to the charges that Defendant Walker violated the conditions of his supervision. At the conclusion of the hearing, the district court found by a preponderance of the evidence that Defendant Walker had violated several conditions of his supervision, including that Defendant Walker had possessed child pornography, and, pursuant to the provisions of 18 U.S.C. § 3583(k), sentenced him to a minimum, mandatory term of imprisonment of 60 months to be followed by a term of supervision of 25 years. *United States v. Walker*, 7:07-cr-00030-HL.

5. Counsel for Defendant Walker timely objected to the district court’s sentence as did Defendant Walker when asked by the Court if he had any objections to the Court’s sentence. Defendant Walker appealed the imposition of the minimum, mandatory sentence of 60 months pursuant to 18 U.S.C. § 3583(k), for violation of the conditions of supervision based only on judge-found facts, including a finding that Defendant possessed child pornography, under a preponderance-of-the-evidence standard of proof. *United States v. Walker*, ___ Fed. App’x. ___, 2021 WL 915763 (11th Cir. Mar. 10, 2021) (No. 18-12256-EE).

6. Subsequently, in July 2018, Defendant Walker went to trial on the indictment returned against him in *United States v. Walker*, 7:17-cr-00034-HL-TQL. The jury returned a verdict of guilty on July 31, 2018. At sentencing on December 4, 2018, based on the report of the presentence investigation, the district court found that the defendant's advisory sentencing guideline range was from 135 to 168 months based on an offense level of 31 and a criminal history category of III. The district court sentenced the defendant to a term of imprisonment of 168 months to be followed by a term of supervision for life to run consecutive to the sentence previously-imposed for the defendant's violation of his conditions of supervised release in case no. 7:07-cr-0030-HL. *Id.* Defendant Walker appealed from the Court's 168-month sentence in *United States v. Walker*, 7:17-cr-00034-HL-TQL. *See, United States v. Walker*, __ Fed. App'x. __, 2021 WL 915763 (11th Cir. Mar. 10, 2021) (No. 18-15283-EE). The court of appeals consolidated the two appeals.

7. On appeal, the court of appeals found that the defendant's sentence under 18 U.S.C. § 3583(k) violated the Ex Post Facto Clause because the conduct for which the defendant was originally prosecuted occurred before the effective date of the statute under which he was sentenced. *United States v. Walker*, __ Fed. App'x. __, 2021 WL 915763 (11th Cir. Mar. 10, 2021) (No. 18-12256-EE). The court of appeals vacated the defendant's sentence for violating the conditions of his supervision and remanded the case for further proceedings consistent with its opinion. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari, review the proceedings below, reverse the judgment of the court of appeals, and remand the case to the district court with instructions to vacate the defendant's conviction and sentence in Case No. 7:17-cr-00034-HL-TQL, the second prosecution. There are several reasons for this outcome.

1. The Defendant was Twice Put in Jeopardy For the Same Offense

Defendant went to trial in May, 2018, and again in July, 2018, for possessing the same child pornography on September 20, 2017. The first trial was on the charge of violating the conditions of the defendant's supervision by possessing child pornography. Upon conviction, the defendant was sentenced under 18 U.S.C. § 3583(k), to the minimum, mandatory term of 60 months imprisonment.

The second trial was on the indictment charging the defendant with possessing the same child pornography on the same date, *i.e.* the same offense, as was charged in the first trial. Following his conviction on the second trial, the defendant was sentenced to a term of imprisonment for 168 months to run consecutive to the 60-month sentence imposed following the first trial.

The Fifth Amendment's Double Jeopardy Clause guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The protection afforded by this provision guarantees against a second prosecution for the same

offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *See, Jones v. Thomas*, 491 U.S. 376, 380-81 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Relevant to this case is the prohibition embodied in the Double Jeopardy Clause against a second prosecution after conviction of the same offense.

The prohibition is against “being twice put in jeopardy The ‘twice put in jeopardy’ language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the ‘same offense’ for which he was initially tried.” *Price v. Georgia*, 398 U.S. 323, 326 (1970). In *Abney v. United States*, 431 U.S. 651, 661 (1977), this Court stated:

Because of this focus on the “risk” of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced . . . to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

Id. *See also, Green v. United States*, 355 U.S. 184, 187-88 (1957) (“. . . the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well

as enhancing the possibility that even though innocent he may be found guilty.”)

Because Walker was sentenced for the violation of his conditions of supervision under 18 U.S.C. § 3583(k), which “more closely resembles the punishment for [a] new criminal offense,” *United States v. Haymond*, 139 S.Ct. 2369 (2019), and does not relate back to his original offense, his subsequent indictment and trial for the same offense, possession of child pornography, violated his right under the Double Jeopardy Clause not to be twice put in jeopardy. *Johnson v. United States*, 529 U.S. 694, 700 (2000).

The violation of the defendant’s Fifth Amendment right is not remedied by the mere vacation of his sentence imposed following the first trial. Whether the defendant was acquitted or convicted in the first trial is not the issue. The violation occurred because the defendant had “to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.” *Abney*, 431 U.S. at 661. This proposition is deeply ingrained in the Anglo-American system of jurisprudence. In *Ex parte Lange*, 18 Wall. 163, 169, 21 L.Ed. 872 (1874), this Court stated:

The common law not only prohibited a second punishment for the same offence, but it went further and (forbade) a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Id. Thus, the judgment in the appellate court below vacating the defendant's sentence from the first trial does not remedy the violation of his Fifth Amendment right not to be twice put in jeopardy for the same offense. The constitutional violation was complete upon the defendant's indictment and second trial for the same offense.

Further, there can be no doubt that the two trials to which the defendant was subjected were both for the same offense. In the first trial, it was the defendant's possession of child pornography that constituted the violation of the conditions of his supervision. In the second trial, it was the defendant's possession of the same child pornography on the same date, September 20, 2017, as charged in the first trial that constituted the basis for his indictment. The offense in both trials was the defendant's possession of child pornography on September 20, 2017.

Because this case does not involve prosecution under two separate statutes proscribing the same conduct, it is not necessary to resort to this Court's test of statutory construction set out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). There, the appropriate inquiry is "whether each provision requires proof of a fact which the other does not." Here, there is one statute, the statute prohibiting possession of child pornography. *See*, 18 U.S.C. § 2252A.

In *United States v. Haymond*, 139 S.Ct. 2369 (2019), this Court found that the imposition of a minimum, mandatory 60-month term of imprisonment for violation of conditions of supervision under 18 U.S.C. § 3583(k), violated the defendant's Fifth and Sixth Amendment

rights because certain features of the statute “more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution.” *Id.* at 2386 (Breyer, J., concurring). Until *Haymond*, punishment imposed on a defendant for his violation of conditions of supervision was understood to be part of the punishment for the original offense because, for one thing, the maximum term of imprisonment could not exceed the maximum punishment for the initial offense. *Johnson v. United States*, 529 U.S. 694, 700 (2000). To view such punishment otherwise “would raise an issue of double jeopardy.” *Id.*

But because § 3583(k) authorized a greater minimum as well as maximum punishment than that authorized by the defendant’s initial offense, punishment under § 3583(k) implicates constitutional rights, including the protection afforded by the Double Jeopardy Clause, attending prosecution for a new criminal offense. This is especially true where, as with Walker’s case, the conduct constituting the violation of the conditions of supervision is itself a criminal offense. The double jeopardy issue foreseen by the Court in *Johnson* is squarely presented after the decision in *Haymond* because, unlike *Haymond*, Walker was twice put in jeopardy for the same offense by his re-prosecution for the same offense that led to his conviction for violating the conditions of his supervision. Walker’s conviction and sentence resulting from his second prosecution for the same offense in case no. 7:17-0034, are due to be vacated.

2. The District Court Committed Plain Error¹ By Trying the Defendant Twice for the Same Offense.

In response to the defendant's contention that his constitutional rights under the Double Jeopardy Clause were violated by his second trial for the same offense, possession of child pornography on September 20, 2017, the court of appeals, on review for plain error, ruled that the defendant had failed to show an error that is obvious and clear under current law because there is no precedent from the court of appeals or from this Court directly resolving the issue. *United States v. Walker*, __ Fed. App'x. ___, 2021 WL 915763 at *8 (11th Cir. Mar. 10, 2021). Pet. App. 8a. However, there is substantial authority to support the defendant's position that his meritorious double jeopardy claim constitutes plain error.

In *Olano*, the Court distinguished between waiver and forfeiture for purposes of defining "a single category of forfeited-but-reversible error" under Fed. R. Crim. P. 52(b). *Olano*, 507 U.S. at 732. While forfeiture occurs when a defendant fails to assert a right in timely fashion, waiver requires an "intentional relinquishment or abandonment of a known right." *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Id.* By operation of Fed. R. Crim. P. 12(b),

¹ The defendant raised his double jeopardy claim for the first time in the court of appeals. It was reviewed only for plain error. See, *United States v. Olano*, 507 U.S. 725 (1993).

Walker forfeited, but did not waive, his double jeopardy claim with respect to his second prosecution for possession of child pornography by failing to lodge a contemporaneous objection at some point during those proceedings.

The text of the Double Jeopardy Clause itself makes it clear that Walker’s prosecution a second time for possessing the same child pornography for which he was convicted of violating the conditions of his supervision was “error,” defined as a deviation from the legal rule, as required by the first prong of the test set out in *Olano*. *Id.* Moreover, Walker did not intentionally relinquish a known right.

With respect to the second *Olano* consideration, it is “clear under current law” that multiple prosecutions for the same offense in violation of the Double Jeopardy Clause are constitutionally forbidden. This Court’s decision in *Haymond*, 139 S.Ct. 2369, 2385 (2019) (Breyer, J. concurring), clarified that sentences imposed under 18 U.S.C. § 3583(k) more closely resemble punishment for new criminal offenses than had been understood where revocation of supervision occurred under other statutes, such as 18 U.S.C. § 3583(e)(3). *Id.* at 2386. Sentences imposed under the latter statute are generally viewed as part of the penalty for the initial offense in order to avoid the serious issue of double jeopardy associated with re-prosecution for the same offense. *See Johnson v. United States*, 529 U.S. 694, 700 (2000).

With respect to the third *Olano* consideration, there is no doubt that prosecuting Walker again for the same offense resulting in a sentence of 168 months to be served consecutively to his sentence for his conviction in the first trial affected his substantial rights. The error must have been prejudicial, meaning that it must have affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-57 (1988)). But it is difficult to conceive of a more prejudicial outcome than allowing the government to obtain a conviction of Walker after a trial that should have been constitutionally barred from the beginning.

The final hurdle under plain error review is to present sufficient reason for the exercise of remedial discretion to correct a plain, forfeited error affecting substantial rights. Under *United States v. Atkinson*, 297 U.S. 157 (1936), that discretion should be exercised if the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 160.

This Court should exercise its remedial discretion to correct the error here because Walker’s right that was violated was a right of constitutional dimension. Walker’s second prosecution for the same offense for which he was convicted for violating the conditions of his supervision is a flagrant violation of the Double Jeopardy Clause. It is difficult to imagine an error more likely to “seriously affect the fairness, integrity, or public reputation of judicial proceedings” than to

allow Walker's conviction and 168-month sentence to stand. *Olano*, 507 U.S. at 734.

Walker's second prosecution in violation of the Double Jeopardy Clause is a "particularly egregious error," *United States v. Young*, 470 U.S. 1, 15 (1985), that has caused a "miscarriage of justice," *id.*, in the instant case. Walker's conviction and sentence resulting from his second prosecution for the same offense in case no. 7:17-cr-0034, are due to be vacated.

CONCLUSION

Based on the foregoing arguments and authorities, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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