21-5053

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HERNANDO JAVIER VERGARA

Petitioner

V

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Hernando Javier Vergara

Pro Se

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Questions Presented

In a previous holding (United States v Haymond, 588 U.S., 139 S.Ct._, 204 L. Ed. 2d 897 LEXIS 4398 (2019), this Court ruled that 18 U.S.C. §3583(k) was unconstitutional due to its requirement of a mandatory minimum sentence without the benefit of a jury. This had the effect of, for the first time, applying criminal protections to the Supervised Release Statute (18 U.S.C. §3583). The Questions Presented in this petition are:

1) Should the Haymond ruling be considered retroactive?

2) Is Haymond in fact, a new line of jurisprudence?

3) Does the Unconstitutionality of §3583(k) invite Constitutional scrutiny upon the entirety of §3583?

4) If so, then does §3583 violate the 5th, 6th, and 8th Amendments?

5) Is a Supervised Release Term of Life Unconstitutional?

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Opinion Below

The 11th Circuit Court of Appeals determined that jurists of reason would not find these issues debatable, and refused to grant a Certificate of Appealability. It did not reach the merits of the argument beyond that.

Jurisdiction

The United States District Court, Middle District of Florida, had jurisdiction over this case under 28 U.S.C. §2255. The Court of Appeals for the Eleventh Circuit had jurisdiction for review of the final order of the District Court under 28 U.S.C. §1291.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254. This petition is filed in a timely manner.

Constitutional Provisions Involved

A. 5th Amendment:

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 or 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. (emphasis added)

B. 6th Amendment:

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. (emphasis added)

C. 8th Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. (emphasis added)

Statement of the Case

This case presents a pressing and recurring question of great national importance that is even more pressing in light of the COVID-19 Pandemic following United States v Haymond, 588 U.S._, 139 S.Ct._, 204 L. Ed. 2d 897 (2019); about whether the Constitution allows for the theoretical framework of Supervised Release at all, and if so, to what extent?

The Fifth Amendment prohibits multiple punishments for a single conviction. Yet current jurisprudence considers Supervised Release to be part of a single punishment. Supervised Release, however, fails the Blockberger Test AND fails to fall into the traditional framework of Parole.

The Sixth Amendment provides that all criminal prosecutions shall enjoy the benefit of a right to trial by jury, yet despite Haymond's clearly establishing that Supervised Release revocations proceedings are a criminal prosecution, there is currently no such benefit.

The Eighth Amendment prohibits Cruel and Unusual Punishment, AND punishment beyond the statutory maximum has been declared such. Yet Supervised Release has been imposed here for Life, despite the fact that the statutory maximum for Petitioner's crime is 20 years. There is also no limit to the final amount of times a Supervised person may be sent back to prison, which exposes someone with Supervised Release to a potential Life sentence in prison, despite the 20 year statutory maximum. This scheme blatantly violates the Eighth Amendment.

Reasons For Granting the Petition

I. The Questions Presented Raise Constitutional Issues That Apply In Nearly Every Federal Proceeding

Supervised Release, by statute, is imposed in nearly every federal conviction; the exceptions being a limited number of criminal prosecutions (carved out by statute), and instances where the only punishment is probation. Supervised Release is imposed after a prisoner serves his full term of statutory incarceration. It does not run in lieu of part of his sentence, such as in an instance of parole or probation. Like parole, it is considered to be a continuation of his sentence under Johnson (2000), yet if that is so, it only invites further Constitutional challenge. Unlike parole, when a federal prisoner completes his sentence, the government must release him. Supposedly this is under a "breach of trust" paradigm, but how can there be a "trust" paradigm to begin with when one has served the entirety of one's sentence? Petitioner avers that it cannot. It is instead that a releasee has a liberty interest, and the Supervised Release scheme violates this. To say that a releasee can violate a "trust" to "conditional release" after he has served his entire sentence is to say that every citizen lives under the same obligations prior to ever having been charged with a crime. Even then this scheme would implicate equal protection principles, as releasees face potential imprisonment without having to violate any law... and this applies in nearly all federal procedures... rather than a benefit, Supervised Release is a stick used to beat defendants.

II. This Is The Right Time For The Court To Intervene, As Supervised Release Revocations Are A Driving Force For Mass Incarcerations, Which Due to COVID-19, Is Killing Many Americans

In Haymond, Justice Alito mentioned that in 2018, there were 16,946 revocations of supervised release (Haymond, at 917); if only half of those ended in additional prison time, and if that new number (roughly 8,450) occurs as an average yearly rate, then on average, the federal prison population is approximately one third revoked supervisees (Petitioner must guess on these numbers, as they are not readily available to prisoner due to a lack of internet... but that is another appeal to be made and will not be argued here). Simply removing the revoked supervisees would reduce the federal prison population to below maximum capacity. This would be just, as Supervised Release is not being used to re-introduce former prisoners into society, but rather as a stick to justify further punishment without necessarily having committed any further crimes. As a prime example, Petitioner points to United States v Everhart, 805 Fed. Appx. 638 (11th Cir. Feb 13, 2020), where the defendant, after serving a 60 month sentence stemming from a 2006 conviction, was violated numerous times. He served an additional 45 months on six revocations, and his Supervised Release was extended to Life. No wonder that he developed an "angry, combative, and abusive" (at 641) attitude. The timeline of the revocations, and the extensions, as well as the manner in which his release conditions were used against him to drive him into homelessness all prevented rather than assisted his re-entry.

Everhart had many hurdles to overcome without Supervised Release, but his release conditions only added extra hurdles, and eventually he gave up trying as anyone in a hopeless situation would. Now, he is dependant upon the BOP to obtain sustenance... this seems, Petitioner avers, to be the true

purpose of Supervised Release.

III. Supervised Release Violates the Fifth Amendment

In Johnson (2000), the Supreme Court "recognized that supervised release punishments arise from and are 'treat[ed]... as part of the penalty for the initial offense'" Justice Gorsuch, in Haymond quoting Johnson at 907. Fortunately, Justice Gorsuch also distinguishes between traditional probation / parole and §3583(k) in the following: "...the government contends that §3583(k)'s supervised release revocation procedures are practically identical to historical parole and probation revocation procedures... That argument overlooks a critical difference between §3583(k) and traditional parole and probation practices. Where parole and probation violations traditionally exposed a defendant only to the remaining prison term authorized for his crime of conviction, §3583(k) exposes a defendant to an additional mandatory minimum prison term beyond that authorized by the jury's verdict - all based on facts found by a judge by a mere preponderance of the evidence." (Gorsuch, in Haymond at 899) (emphasis added). Also telling is Justice Alito's dissent wherein he states, at 916, referring to Justice Gorsuch's opinion at 906: "The meaning of this statement is unmistakable and cannot have been inadvertent: A supervised release revocation proceeding is a criminal prosecution and is therefore governed by the Sixth Amendment (and the Fifth Amendment to boot)" (emphasis added). Like §3583(k)'s subjection to prison time beyond the jury's verdict, the rest of §3583 subjects the defendant to extra prison time beyond the jury's verdict. Even without the mandatory minimum aspect, §3583 adds prison time and is therefore a criminal prosecution subject to Double Jeopardy protections, whereas traditional probation and parole only subject a defendant prison time deferred. This additional prison time means that the Supervised

Release Proceedings fail the Blockburger test against Double Jeopardy: "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately... If the latter, there can be but one penalty" 76 L. Ed. 306, 284 US 299 Blockburger v United States, at 308 (internal quotations and citations omitted, emphasis added). The fact that §3583 cannot be imposed upon a defendant unless they have been convicted of another violation of a statute causes it to necessarily require that the exact same element be proven for §3583 to apply, and the new rule declaring revocation proceedings to be criminal prosecutions creates a situation where two statutes punish nearly every crime. According to Blockburger, only one penalty may apply. Unfortunately though, every time a supervised release revocation is held, the defendant is, for a second time, third time, fourth time, ad infinitum time subjected to "jeopardy of life or limb" (5th Amendment). This additional punishment cannot be divorced from §3583 without nullifying the entire statute. Thusly, §3583 is, in its entirety, Unconstitutional and a violation of Double Jeopardy. Also thusly, this requires that Johnson (2000) be overturned, and so petitioner turns to Stare Decisis. "...according to Blackstone, judges should disregard precedent that articulates a rule incorrectly when necessary to 'vindicate the old [rule] from misrepresentation' Blackstone 70; see also 1 Kent 443 ('If... any solemnly adjudged case can be shown to be founded in error, it is no doubt the right and the duty of the judges who have a similar case before them, to correct the error'). He went further: when a 'former decision is manifestly unjust or fails to conform to reason, it is not simply 'bad law' but 'not law' at all. Blackstone 70." (emphasis and quotations/citations intact) (underlines added) Justice Thomas, concurring in Gamble v United States 204 L. Ed. 2d 322 S. Ct. at 348. Justice Thomas goes on to say: "A demonstrably incorrect judicial decision... is tantamount to making law, and adhering to it both

disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power" in Gamble at 349. Beyond Justice Thomas, we can go back to the founding of our Republic to find support: "No legislative act, therefore, contrary to the Constitution, can be valid" The Federalist No. 78 at 467. Support can even be found in the history of the Fifth Amendment itself. The first draft of the Fifth Amendment read, in part: "more than one trial or one punishment for the same offence" (emphasis added) in reference to Double Jeopardy - 1 Annals of Congress, 753 (1789), so it was clearly understood at the founding of the Republic to include two punishments on the same conviction, one being heaped upon the other without the benefit of a separate trial (as happens with §3583 at the very least at each revocation hearing), as being unjust and in violation of Double Jeopardy. The final text doesn't even preclude this interpretation; rather, it presents the same view in more elegant terms. Because of the preceding, petitioner asks for this Court to Grant Certiorari for the purpose of settling the disparities in Supreme Court precedent and rectifying Constitutional violations which have been enumerated herein.

IV. Supervised Release Violates the Sixth Amendment

In Haymond, the Supreme Court granted the right to Trial By Jury in §3583(k) proceedings. Petitioner will now make his case that the rest of 18 U.S.C.S. §3583 requires the same protection as was granted in Haymond. Petitioner begins with Justice Gorsuch, for Majority (plurality decision): "While the Sixth Amendment surely does not require a jury to find every fact the government relies on to adjust the terms of a prisoner's confinement (say, by reducing some of his privileges as a sanction for violating the prison rules), that does not mean the government can send a free man back to prison

for years based on judge found facts." Haymond at 910 (emphasis added). He goes on to say: "the few courts that grappled with this issue [in the early Republic] seem to have recognized that 'infamous' punishments, such as a substantial additional term in prison, might implicate the right to trial by jury. See, e.g. Gross v Rice, 71 Me. 241, 246-252 (1810); In re Edwards, 43 N.J.L. 555. 557-558 (1881)." Haymond at 911 (emphasis added). Even Justice Alito in his dissent admits that Haymond must be interpreted in this manner: "The plurality opinion appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of much broader scope" Haymond at 915. Justice Alito goes on to complain: "Also telling is the plurality's response to the Government's argument that Apprendi v New Jersey, Blakley, and Alleyne v United States, apply only to a defendant's sentence proceeding and not, to a supervised-release revocation proceeding, which the Government describes as a 'post judgement sentence-administration proceedin[g].' Rejecting this argument, the plurality huffs 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'. The meaning of this statement is unmistakable and cannot have been inadvertent: A supervised-release revocation proceeding is a CRIMINAL PROSECUTION and is therefore governed by the sixth Amendment (and the fifth Amendment to boot). And there is more. ('any accusation triggering new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt') ('a jury must find all of the facts necessary to authorize a judicial punishment') Alito, in Haymond dissenting at 916 (citations omitted, quotes intact, underlining added). Petitioner argues that these statements create a clear intent by the Supreme Court that all of §3583 be afforded the Right to Trial by Jury in revocation proceedings.

V. Supervised Release Violates the Eighth Amendment

Haymond also opens §3583 to a challenge based upon Apprendi v New Jersey, 530 US 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435. "In [Apprendi], for example, this Court held Unconstitutional a sentencing scheme that allowed a judge to increase a defendant's sentence beyond the statutory maximum based upon the judge's finding of new facts by a preponderance of the evidence." Gorsuch, in Haymond at 898-899. §3583 likewise allows for the extension of prison time beyond the statutory maximum (regardless of whether each instance of revocation places the term beyond the maximum, this statute still exposes the defendant to the possibility) based on a preponderance of the evidence scheme, with no check provided to prevent an extension beyond the maximum prison time for the statute. This means that a purely technical violation without breaking another law can easily expose a defendant to additional prison time, as per Johnson (supposedly for the same offense), beyond the maximum allowed by law, which necessarily violates Apprendi. Thus one or the other must be overruled. Petitioner advocates that Johnson be overruled, as that disparity solves the most issues most elegantly. Unfortunately for the Government, this means the death of §3583.

Conclusion

Petitioner has outlined three reasons why he believes 18 U.S.C. §3583 to be Unconstitutional on its face. He has presented his arguments based upon a New Rule of Constitutional Law announced in Haymond, that being that supervised release revocation proceedings are now to be considered a criminal proceeding and therefore subject to 5th, 6th, and 8th Amendment protections. Petitioner has been sentenced to a term of supervised release, and being

exposed now to the proceedings therein, has standing to challenge the Constitutionality of §3583. In this mien, he now asks this Court to Grant Certiorari for the purpose of settling the disparities in the Supreme Court precedent and rectifying Constitutional violations which have been enumerated herein.

Respectfully Submitted,

Hernando Javier Vergara 05/23/21

Signed Date

CERTIFICATE OF SERVICE

I, Hernando Javier Vergara, hereby swear, under penalty of perjury that the foregoing Motion was placed in the hands of the FSL Jesup Legal Mail Representative on 05/24, 2021; and ask the Court to provide copies to:

Attorney of Record

U.S. Attorney's Office, M.D. of Florida

Hernando Javier Vergara 05/24/21

Signed Date