

23-6834

No. _____

FILED

FEB 05 2024

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JEREMY L. SESTAK

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Tenth Circuit

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

PETITION FOR WRIT OF CERTIORARI

JEREMY SESTAK

(Your Name)

F.C.I. #17437-091, 9595 W. Quincy Ave.

(Address)

Littleton CO 80123

(City, State, Zip Code)

NA

(Phone Number)

QUESTION(S) PRESENTED

1. Can a defendant bring an as-applied petition for modification of the supervised conditions?
2. Does supervised release conditions as applied invoke Double Jeopardy protections?
3. Does the inconsistent policy statements found in the U.S.S.G. §4B1.5 and §5D1.2 demonstrate make the "special" conditions of supervised release excessive?
4. Is the addition of supervised release term a separate and different sentence imposed in a criminal proceeding?
5. Is §5D1.2, by omitting an offense "not to include the receipt of, the possession of, or the trafficking in child pornography" expressly as defined to include offenses involving a specific victim (e.g. a contact offense/hands on being perpetrated against a minor?
6. Does the additional "prosecutions" attributed to the original offense implicate Double Jeopardy protections?
7. Does "any time" under the provisions of 18 §3583(e)(2) mean just that, or is it only when convenient for the government?
8. Does the plain language of §3553 expressly, strongly suggest that the conditions of supervised release must meet not only sentencing factors but constitutional protections as well?

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. ENGLEMEYER, 2022 WL 17184579 (W.D. Okla. Nov. 23, 2022).

UNITED STATES V. LEE, 2022 WL 17418460 (D. Colo. Dec. 05, 2022).

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 A to the petition and is

☒ reported at 794 F.App'x 799 (10th Cir. 2020); 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 B 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 _____ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 02, 2023.

☒ 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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

The Fifth Amendment Double Jeopardy.

18 U.S.C. §3583(e)2. Provides in pertinent part, allows courts to modify supervised release at any time prior to the expiration or the termination of the supervised release term.

18 U.S.C. §3583(d)(2) provides in pertinent part, the policy statements made in the Sentencing Guidelines be consistent. And must be reasonably related and involve no greater deprivation of liberty, implicates a constitutional "liberty" pertaining to the supervised release conditions.

18 U.S.C. §3553(a) provides the same language as cited above.

STATEMENT OF THE CASE

Sestak asserts that it is the application of the supervised release conditions that implicate Double Jeopardy protections and not supervised release itself. In other words, Sestak is not making a facial challenge but an As-Applied challenge, challenging its application of those conditions.

The plain language of 18§3583(e)(2) provides that a defendant or government can petition a court to modify or reduce conditions of supervised release prior to the termination or the expiration of the supervised release term. It not until Sestak violates any one of the conditions that he is subject to the application of the conditions and triggers an unlimited prosecutions, prison terms and additional supervised release term(s). This is what the Fifth Amendment Double Jeopardy is suppose to protect Sestak from.

Supervised release, imposed at the sentencing hearing is a second and separate sentence. Virtually every court, when imposing a term of supervised release, the term exceeds the Sentencing Guideline, and without the court's providing a reason for the "upward departure" or why the "sentence" exceeds the given guideline range.

18§3583(d)(2) and 18§3553(a) both make clear that Sestak can bring a constitutional and legal question when challenging the supervised release conditions. By both providing that the conditions must be "no greater deprivation of liberty" strongly suggests constitutional restraint and that the conditions be consistant with policy statements of the Commission.

STATEMENT OF THE CASE
(Cont.)

Sestak provides that there is an inconsistency in the policy statements made by the Sentencing Commission. Compare U.S.S.G §4B1.b App. Note, Definitions, defining a "covered sex offense" as an offense "perpetrated against a minor" and does not include "the receipt of, possession of or the trafficking in" of child pornography. IN U.S.S.G. §5D1.2 Sex Offender Treatment and Monitoring, defines a sex offense containing similar language but omitting that it does not include the receipt of, possession of, or the trafficking in of child pornography. This inconsistent statement(s) make it clear that §5D1.2 is intended to apply to those convicted of a "contact" or "hands on" sex offense versus a "non-contact" sex offense. This has been established in the Fourth Circuit in United States v. Ellis, 37 F.4th 971 (4th Cir. 2022) and United States v. Castellano, 60 F.4th 217 (4th Cir. 2023). Additionally, Sestak's offense of conviction lacks the element of having a "specific victim" demonstrating that his offense is a "non-contact" sex offense. See United States v. Goodwin, 717 F.3d 511 518-20 (7th Cir. 2013) and United States v. Segura, 747 F.3d 323, 329 (5th Cir. 2014). Both Courts held similar decisions, stating that the failure to register as a sex offender lacked the required element of involving a "specific victim" can not be a sex offense.

The supervised release term is a separate sentence. 18§3583 provides that a district court may impose as part of the sentence, a term of supervised release. If supervised release is a "part of the sentence" then in order to cure

the "separate sentence" issue would be to include any supervised release term into the prison sentence as both, the imprisonment and supervised release are punitive. Or in other words, the court should include Sestak's supervised release in the 180 month "sentence" and subject Sestak to serve any time remaining of the "original sentence". Thus, making the supervised release as a part of the sentence. Accordingly, the application of the supervised release conditions are, as supervised release operates, is a separate and different sentence imposed in a criminal proceeding and implicates Double Jeopardy protections.

REASONS FOR GRANTING THE PETITION

Sestak motioned the district court to modify the supervised release conditions pursuant to 18 U.S.C. §3583(e)(2) and the district court denied the motion stating that Sestak's motion to modify can not make a legal or constitutional challenge to the supervised release conditions and that the motion is properly brought under §2255. The Tenth Circuit held that " thus, because the statute... makes supervised release a discretionary (825 F.Supp. 2d 988) component of a final sentence, and it is punishment, appellate courts have jurisdiction to consider the legality of its terms." (internal quotations and citations omitted)). The plain language found in 18 U.S.C. §3583(e)(2) provides that Sestak may seek to modify conditions of supervised release "at any time prior to the expiration of supervised release. A case that mirrors Sestak's motion to modify supervised release conditions can be found in United States v. Beech-Nut Nutrition Corp., 925 F.2d 604,607 (2d Cir. 1991) "a threshold issue raised by the government is whether a appellant lost the right to appeal because he failed to appeal from his original sentence. The government argues that appellant is, in effect, contesting the conditions of his probation, and not having done so at the time he was sentenced should be barred from appealing those conditions now. We disagree. The appellant is contesting the district court's application of the conditions of probation, not challenging the conditions themselves. This is made clear that, in Sestak's motion to modify supervised release conditions is a challenge of the application of those

REASONS FOR GRANTING THE PETITION (cont.)

conditions and not supervised release conditions themselves. Several courts have held that a defendant can not make a legal or constitutional challenge under 3583(e)(2) *United States v. Lussier*, 104 F.3d 32, 34-37 (2d Cir. 1997); *United States v. Faber*, 950 F.3d 356, 358-59 (6th Cir. 2020); *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002); *United States v. Hatten*, 167 F.3d 884, 886 (5th Cir. 1999) and *United States v. Grigsby*, 737 F.App'x 375, 378 n5 (10th Cir. 2018). All state that the defendant could challenge the legality of supervised release conditions only via direct appeal or by a collateral challenge to his sentence under 28 U.S.c. § 2255.

There seems to be a conflict within the same circuits as well. The Fifth Circuit in *United States v. Brigham*, 569 F.3d 220, 232-34 (5th Cir. 2009) held that analyzing the as-applied challenge under de novo review. *United States v. Locke*, 482 F.3d 764, 766-68 (5th Cir. 2007) (same). In *Brigham*, "because Brigham did not object to the imposition of these special conditions of supervised release at sentencing, the court considers them only on an as-applied basis." In *Locke* the court reviewed Locke's arguments as challenges to the constitutionality of certain conditions as-applied. Other Circuits have allowed motions brought by defendants under § 3583 (e)(2). *United States v. Neal*, 810 F.3d 512, 518 (7th Cir. 2016); *United States v. Garrasteguy*, 559 F.3d 34, 43 n12 (1st Cir. 2009); (describing *United States v. Smith*, 445 F.3d 713 (3d Cir. 2006)), as left open the question of whether "significantly changed circumstances are [a] prerequisite to modification.

Accordingly, Sestak has established that there exists a "split" within the Circuits as to how a defendant is to petition the courts

REASONS FOR GRANTING THE PETITION (cont.)

for modifying supervised release conditions and whether a change in circumstances or new evidence must be presented before modification of supervised release. And this question is in the best interest of the nation as it effects those incarcerated as well as the free citizens.

The question Sestak raised concerning the Double Jeopardy protections which come into play at the application of the supervised release conditions and the revocation proceedings are additional prosecutions, trials, and imprisonment attributed to the original offense. Being attributed to the original offense, as-applied, Sestak is clearly subject to an unlimited number of arrest, prosecution, and prison terms. This is what the Fifth Amendment's Double Jeopardy is supposed to protect against. And if the return to prison is a "sanction" as the government contends, the meaning of a sanction is to punish. And if Sestak is subject to further punishment for the original offense, then that "sanction" implicates Double Jeopardy protections as Sestak asserted in the petition. This issue has not been genuinely tested and the district court did not address in dismissing the petition.

Under the provisions of supervised release, the supervised release term is at the discretion and may include as part of the sentence, a term of supervised release. In order to have supervised release as a "part of the sentence" and stay within the confines of the Sentencing guidelines, Sestak was "sentenced to 180 months followed by ten years of supervised release. In order to include

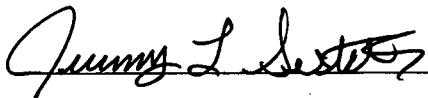
supervised release as part of the sentence, the supervised release term should then, be a part of the 180 months as agreed upon by the United States. This does not cure the fact that the application of the terms of supervised release implicate Double Jeopardy protections.

The supervised release "special conditions and term is excessive. In accordance with the provisions of §3553, the conditions must be no greater deprivation of liberty than is necessary and must be consistent with the Commissions' policy statements. The statement, "no greater deprivation of liberty" has a strong constitutional luster, indicating the conditions must then, comply with the Constitution. Thus allowing for constitutional challenges of the conditions. Additionally, the inconsistency in two policy statements, §4B1.5 and §5D1.2 define the same, identical offense (sex offense) with two conflicting meanings. This can only mean that Sestak's offense of conviction is a "non-contact" sex offense versus a "contact" or "hands-on" sex offense. This was made clear in the Fourth Circuit United States v. Ellis, 984 F.3d 1092 (4th Cir. 2021) and in United States v. Castellano, 60 F.4th 217 (4th Cir. 2023). This can further be seen in Title 18 U.S.C. §20911(5)(i)(iii) Amie Zyla expansion of sex offense definition. (i) " a criminal offense that has an element involving a sexual act or sexual contact with another;" (iii) provides an exhaustive list of statutes constituting a "sexual element or sexual contact" in that list, Sestak's offense of conviction is not found.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: February 05, 2024