IN THE UNITED STATES SUPREME COURT

No. _____

GABRIEL MANGUM,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondents-Appellees.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

ROCKNE O. COLE
209 E. Washington Street
Paul-Helen Building, Ste 305
Iowa City, Iowa 52240
(319) 519-2540 Office
(319) 359-4009Fax
rocknecole@gmail.com
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's 5th Amendment Double Jeopardy rights were violated when he was punished twice for the same conduct, to wit: Escape from Custody, which was also used to revoke his supervised release as a new violation?

2. Whether a residential reentry center qualified as "custody" for purposes of the Escape from Custody statute 18 U.S.C. § 751?

LIST OF PARTIES AND RELATED CASES

1. Mr. Mangum and United States appear in the caption.
2. The related cases are: No. 21-2514, and 21-2505, and Mr. Mangum is only filing a certiorari petition on No. 21-2513, the Escape from Custody conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Cases

Statutes

Rules

CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

8th Circuit

A. *United States v Gabriel Mangum*, Judgment, No. 21-2513 (8th Cir. Aug. 9, 2022)

B. *United States v Gabriel Mangum*, Per Curium Opinion, No. 21-2513 (8th Cir. Aug. 9, 2022)

Northern District of Iowa

C. *United States v. Gabriel Mangum,* No. 1:20-CR-0097-CJW-MAR

JURISDICTION

Mr. Mangum is a federal prisoner serving a 15 month sentence for Escape from Custody in violation of 18 U.S.C. § 751. Federal question jurisdiction exists under 28 U.S.C. § 1331. Mr. Mangum filed a timely notice of appeal on July 7, 2021 after final judgment entered on June 30, 2021. Appx. D and E. The 8th Circuit Court of Appeals issued a per curium opinion and final judgment on August 9, 2022. Appx. B and A. The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit affirmed Mr. Mangum appeal in a per curium opinion on August 9, 2022 and judgment issued on the same date. Appx. B and A. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("Unless otherwise provided by law, a petition for a writ of certiorari to review a

judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.") That deadline falls on November 7, 2022. A document is considered timely filed it were delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for fling to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on November 7, 2022, and post marked for delivery on that date. Thus, it is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Set forth *verbatim* in Appendix F)

1. Double Jeopardy Clause of the 5th Amendment to the United States Constitution
2. Escape from Custody in violation of 18 U.S.C. § 751

STATEMENT OF THE CASE

Nature of the Case:

This is a federal criminal appeal from the Northern District of Iowa involving a revocation of supervised release and an escape from custody charge which provided the basis for the revocation. This led to a sentence of 33 months total: 15 months on the escape from custody and 18 months on the revocation for the exact same conduct.

Relevant Procedural and Factual History

A. The Conviction – United States v. Mangum, No. 1-20-CR-0097-CJW-MAR

On November 4, 2020, the Grand Jury returned an Indictment against Mr. Mangum for escape from custody from the Gerald R. Hinzman Center, a facility for which he was lawfully held in the custody pursuant to his revocation judgments for Possession of a Firearm, CR09-2008, and Escape from Custody in violation of 17-56. Indictment; Docket 2. On December 31, 2020, Defendant entered a plea of guilty pursuant to plea agreement with the United States. Guilty Plea; Docket 26. On June 29, 2021, Judge Williams overruled several objections and sentenced Mr. Mangum to a total of 33 months, representing 15 months on the instant federal offense along with an 18 month sentence on Mr. Mangum's supervised release revocation for the same conduct.

Revocation Proceedings - Possession of a Firearm - 09-CR-2008 and Escape from Custody CR 17-56.

At the combined revocation/sentencing hearing, Mr. Mangum admitted to violations 1 (f), 3, and 4, The Court did not find that Defendant violated conditions 1 (a) - (e) or 2. Minutes at Docket 53; 1:20-CR-97. The Court then revoked release and then sentenced Mr. Mangum to 18 months run consecutively to the Escape from Custody Charge, which he had previously pleaded guilty to. Thus, he received 15 months on the escape from custody and 18 months. Appx. E.

The Final PSI set forth the offense conduct on United States v. Mangum, No. 1:20-CR-00097-CJW-MAR

On March 3, 2010, the defendant was sentenced, in the United States District Court, Northern District of Iowa, to 84 months of imprisonment and three years of supervised release for Possession of a Firearm by a Felon in Docket No. 09-CR-2008-1-LRR. Final PSI ¶ 5; Docket 48. On February 12, 2018, the defendant was sentenced, in the United States District Court, Northern District of Iowa, to 18 months of imprisonment and three years of supervised release for Escape from Custody in Docket No. 17-CR-00056- 1-CJW. Final PSI ¶ 6; Docket 48.

On or about February 6, 2019, while the defendant was still in the custody of the Bureau of Prisons (BOP), the Court modified the defendant's TSR in both of the above noted cases to include a special condition requiring the defendant to reside in a residential reentry center (RRC) for up to 120 days upon the commencement of his TSR. Final PSI ¶ 7; Docket 48.

On July 12, 2019, the defendant was released from BOP custody and began residing at the Hinzman Center in Cedar Rapids. On July 30, 2019, the defendant intentionally left the Hinzman Center without authorization and absconded from the Hinzman Center. On July 31, 2019, United States District Court Judge C.J. Williams issued a warrant for the defendant's arrest pursuant to a Petition to Revoke Supervision that was filed in Docket Nos. 09-CR-2008-1-LRR and 17-CR-00056-1-CJW. Final PSI ¶ 8; Docket 48.

The defendant was arrested on the above noted warrant on October 25, 2020, after he asked someone to call law enforcement because of his outstanding arrest warrant. Final PSI ¶ 9; Docket 48.

Summary of Plea Agreement

The Parties entered into a written plea agreement and agreed to guideline calculations while understanding that the Court was not bound by the plea agreement. Under the plea agreement, Defendant and United States agreed to following:

A. The base offense level is 13, pursuant to USSG §2P1.1(a);

B. A four-level decrease is appropriate based on the defendant's escape from a "halfway house", USSG §2P1.1(b)(3);

C. No agreement was reached regarding the defendant's criminal history; and

D. No other agreements were reached and the parties are free to litigate any and all other applicable adjustments, departures, or cross references under the United States Sentencing Guidelines.

However, the parties agree there are no grounds for a variance of any kind from the advisory guideline range, in any amount, in either direction. Final PSI ¶ 3; Docket 48.

Further, the United States agreed to recommend the bottom of the advisory guideline range in the defendant's pending revocation of supervised release in case numbers 09-CR- 2008-1-LRR and 17-CR-00056-1-CJW. The prosecutor will recommend that any sentences of imprisonment imposed in case numbers 09-CR2008-1-LRR and 17-CR-00056-1-CJW be imposed concurrently. The prosecutor will recommend that any sentence of imprisonment imposed for the instant offense be imposed consecutively to any sentences of imprisonment imposed in case numbers 09-CR-2008-1-LRR and 17-CR-00056-1-CJW.

Concerns Expressed by Mr. Mangum Relating to Counsel Below

Mr. Mangum expressed significant dissatisfaction with undersigned relating to primarily two legal issues over which they expressed good faith disagreement. Mr. Mangum filed three separate Motions to Discharge Counsel at Dockets 20, 33, and 39. Defense Counsel briefly mentioned argument in his Sentencing Memorandum about Mr. Mangum's Double Jeopardy argument about having

Escape from Custody serve as a new charge while also serving as a basis to revoke probation. Additionally, Mr. Mangum also raised concerns about whether he was in "custody" for purposes of Escape from Custody since he escaped from a halfway house. Both arguments are squarely foreclosed by existing precedent, but Mr. Mangum asks to revisit both holdings and Mr. Mangum's counsel does so.

8TH Circuit Proceedings

Following merits briefing, the 8th Circuit issued a per curium opinion finding no double jeopardy violation or reason to visit its definition of "custody" for purposes of a 18 U.S.C. Section 751. Per Curium Opinion, Appx. B. Final Judgment issued on the same date. Appx. A.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AN IMPORTANT, BUT UNRESOLVED AREA OF THE LAW, TO WIT: WHETHER A PERSON'S DOUBLE JEOPARDY RIGHTS ARE VIOLATED WHEN HE IS PUNISHED FOR THE CRIMINAL CONDUCT AND THAT SAME CONDUCT FORMS THE BASIS FOR A SUPSERVISED RELEASE VIOLATION?

A. Overview

As it stands now, there is a gaping hole in the bedrock protection of the bill of the rights. Under existing 8th Circuit precedent, a person can be punished twice for the exact same conduct, which is precisely the harm that the Double Jeopardy

Clause seeks to protect against. In this case, Mr. Mangum left the halfway house without authorization while he was on supervised release. That same act formed the basis for two punishments: a new charge, Escape from Custody, and as a new law violation for revocation of supervised release. If left uncorrected, countless supervised release violators throughout the 8th Circuit will be subject to cumulative punishments for the same act. As it stands now, all other circuits have reached the same conclusion, but this Court has not. Consequently, this remains an important, but unresolved area of law and certiorari should be granted on that basis. See Supreme Court Rule 10 (c) (certiorari may be granted to address important, but unresolved areas of federal law).

B. The Argument Below and the 8th Circuit's Analysis

Mr. Mangum argued that the 8th Circuit Double Jeopardy precedent, *United States v. Wilson*, 939 F.3d 929, 932 (8th Cir. 2019), cert. denied, 140 S. Ct. 1242, 206 L. Ed. 2d 229 (2020) could not be reconciled with this Court's analysis in *United States v United States v. Haymond*, —— U.S. ——, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019) (finding that federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, violated the Due Process Clause and the Sixth Amendment right to jury trial, as applied).

The 8th Circuit Panel rejected Mr. Mangum's request to revisit prior *Wilson*, finding that it was bound by the prior panel's interpretation of *Haymond*. Panel Decision at p. 3, Appx. B – 3.

C. This Case Presents Substantial and Unresolved Question Whether a Supervised Release Defendant Can Be Punished for a New Violation on Supervised Release and Pursuant to a New Indictment for the Exact Same Conduct.

The 5th Amendment's Double Jeopardy Clause provides that no "any person be subject for the same offense to be twice put in jeopardy of life or limb." As it stands now in the 8th Circuit, a person such as Mr. Mangum can be punished and indeed was punished for twice for the same offense. He was indicted for leaving the halfway house in violation of 18 U.S.C. § 751 and his supervised release was revoked as a new law violation. He received 15 months on the former and 18 months on the latter.

Yet, based upon longstanding 8th Circuit precedent, the Double Jeopardy Clause provides no such protection for persons indicted for new law violations, which all also serve as the basis for a revocation of supervised release. In spite of the clear text of the 5th Amendment, the 8th Circuit has found that this protection does not apply because a hearing to determine whether supervised release should be revoked "is not a criminal prosecution." *See United States v. Bennett*, 561 F.3d

799, 802–03 (8th Cir. 2009) (citations omitted). Additionally, the 8th Circuit found that the revocation sentence is a penalty attributable to the original conviction, not a new punishment and therefore, no new double jeopardy violation occurs. *See Johnson v. United States*, 529 U.S. 694, 700-01, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000).

D. This Case Provides the Perfect Vehicle to Address Concerns Raised in United States v. Haymond.

The precedent seemed effectively settled until this Court's decision *in United States v. Haymond*, 204 L. Ed. 2d 897, 139 S. Ct. 2369, 2379 (2019). Both the plurality and dissenting opinion raised substantial constitutional concerns about how supervised release proceedings are handled in the United States.

In that case, this Court held that a mandatory minimum penalty of five years prison, which arose from a violation of supervised release, which were trigged by factual findings that were not found by a jury, violated the right to trial by jury guaranteed by the 5th and 6th Amendments. *United States v. Haymond*, 204 L. Ed. 2d 897, 139 S. Ct. 2369 (2019). This Court's extended discussion between plurality and dissenting opinions caused the 8th Circuit to revisit its prior double jeopardy precedent. *United States v. Wilson*, 939 F.3d 929, 931–33 (8th Cir. 2019) ("Following oral argument, we requested supplemental briefing from the parties to address the application of the Supreme Court's recent decision in *United States v.*

Haymond, —— U.S. ——, 139 S.Ct. 2369, 204 L.Ed.2d 897 (2019).").

The *Wilson* panel ultimately found that *Haymond* provided no reason to disturb its prior precedent relating to Double Jeopardy and Revocation. It ultimately concluded that Haymond did not address double jeopardy and was instead about fact finding in a revocation triggering punishment in excess of that what was originally authorized by the offense of conviction.

> Unlike the mandatory five years to life sentence provision under § 3583(k), "in most cases ..., combining a defendant's initial and post-revocation sentences issued under § 3583(e) will not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction." Haymond, 139 S.Ct. at 2384 (plurality opinion). **This is true for Wilson, who was originally sentenced to 87 months' imprisonment and received an additional 18 months following revocation of his supervised release. The total 105-month sentence is less than the statutory maximum 120 months authorized for Wilson's violation of 18 U.S.C. § 922(g)(1). See 18 U.S.C. § 924(a)(2).** Because the imposition of a sentence under § 3583(g) is a sanction rather than a punishment for a separate offense, criminal prosecution does not violate double jeopardy.

United States v. Wilson, 939 F.3d 929, 933 (8th Cir. 2019) (Emphasis supplied). The 8th Circuit's test here seems to imply that Double Jeopardy violation *could still occur* where the combined penalty of new law violation and the revocation arising from that violation exceed the statutory maximum of the new sentence. Under this test, it's not the fact the Defendant is punished twice for the same law violation. The revocation penalty does not become "punishment", for Double Jeopardy

purposes, until the combined punishment of the new offense and the revocation based upon the new offense, exceed the statutory maximum penalty for the new offense.

Justice Breyer provided the 5th vote and concurred with plurality finding that, under certain circumstances, revocation could become "punishment" where the combined sentence revocation along with the total sentence on original offense exceeded the statutory maximum authorized by the first sentence giving rise to supervised release. *United States v. Haymond*, 204 L. Ed. 2d 897, 139 S. Ct. 2369, 2386 (2019) (J. Breyer concurring).

The dissent in Haymond viewed the plurality as much broader than plurality claimed it was noting that it appeared to the dissent that the nearly supervised release proceedings could be subject to its analysis.

> **Many statements and passages in the plurality opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding**. Take the opinion's opening line: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." Ante, at 2373. In a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that "take[s] a person's liberty," ibid., in the sense that the defendant is sent back to prison. Later, after noting that the Sixth Amendment applies to a "criminal prosecution," the plurality gives that term a broad definition that appears to encompass any supervised-release revocation proceeding. The plurality defines 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.' " Ante, at 2376. These definitions explain what the terms in question mean in general use, but they were not formulated for the purpose

> of specifying what "criminal prosecution" means in the specific context of the Sixth Amendment. The plurality, however, uses them for precisely that purpose, and in so doing boldly suggests **that every supervised-release revocation proceeding is a criminal prosecution**. See ante, 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").

United States v. Haymond, 204 L. Ed. 2d 897, 139 S. Ct. 2369, 2387 (2019) (emphasis added).

Justice Breyer has now retired. Thus, the 5th controlling vote is no longer on the bench to clarify the scope of what he actually meant in his concurring opinion. Four justices suggested that the logic of the plurality required its reasoning to apply to every supervised release proceeding, fearing the "revolutionary" implications for supervised release proceeding. If, as the dissent, suggests that every supervised could be classified more of as a criminal proceeding rather than probation or parole revocation, Mr. Mangum's escape from custody charge would certainly violate Double Jeopardy protections where he has already is subject to punishment for the same offense.

Now that the Honorable Justice Jackson has been appointed, this Court should grant the Writ to clarify this important area of law. Unless she adopts the reasoning of Justice Breyer, her 5th vote could lead to "revolutionary" implications potentially breaking down the entire system of supervised release. Mr. Mangum

candidly acknowledges that every prior circuit has reached the same conclusion as the 8th Circuit, but given the robust discussion in relating to the consequences of a potential 5th vote in favor of the majority, this Court should not wait for the traditional circuit split to emerge. If Judge Jackson adopts the reasoning of the majority and takes to the logical extension of the dissenting judges, this is an issue that should be resolved as quickly as possible.

It's an important, but unresolved area of law and hence, *certiorari* should be granted on that basis. See Supreme Court Rule 10 (c).

II. THIS COURT RESOLVE A CIRCUIT SPLIT BETWEEN 8TH AND 9TH CIRCUITS REGARDING WHETHER A LEAVING A HALFWAY HOUSE QUALIFIES AS "CUSTODY" OR "CONFINEMENT" FOR PURPOSES OF ESCAPE FROM CUSTODY.

This Court should grant the Writ to resolve a circuit split between the 8th and 9th Circuits relating to whether escaping from a "residential reentry center" or commonly referred to as a "halfway" house meets the definition of "custody" or "confinement" for purposes of violating the Escape from Custody statute 18 U.S.C. § 751.

A. 8th Circuit

Before the 8th Circuit, Mr. Mangum argued that a residential reentry center qualifies did not qualify a corrections facility for purposes of Section 751, though

he acknowledged his argument was squarely foreclosed by 8th Circuit precedent. He relied upon contrary precedent from the 9th Circuit.

Here, there is an 8th Circuit directly on point. In *Goad*, the 8th Circuit directly addressed the claim that Mr. Mangum is making here. He addressed whether "residency in a residential reentry center as a condition of supervised release constitutes 'custody' under § 751(a)." *United States v. Goad*, 788 F.3d 873, 875 (8th Cir. 2015). *Goad* began by setting forth statute. Section 751(a) condemns those who: escape[ ] or attempt[ ] to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, ... if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense. Custody may occur even when the "restraints upon him are minimal and even though the custody be deemed constructive, rather than actual." Id. (citing *United States v. Cluck*, 542 F.2d 728, 736 (8th Cir.1976). And "it is not necessary ... that the escape be from a conventional penal housing unit such as a cell or cell block." Id. at 731. *Goad* specifically found that the Hinzman qualified as "custody" for purposes of Section 751.

B. 9th Circuit Conflicts with Goad along all other circuits that have addressed this issue.

Nevertheless, Mr. Mangum raised this because the 9th Circuit conflicts with *Goad*. In *Burke*, the 9th Circuit found that halfway houses are much more akin to the "non-penological, transitional purposes of supervised release," apparently believing his confinement was " 'much more analogous to probation than ... to imprisonment.' " (Quoting *United States v. Burke*, 694 F.3d 1062, 1064 (9th Cir.2012)). Mr. Goad relied on the Ninth Circuit's decision in *Burke* to propose, "[A]n individual is not in 'custody' when he (1) has completed a term of imprisonment and no longer is in the custody of the Attorney General and/or the [Bureau of Prisons], and instead is subject only to the supervision of the United States Probation Office, and (2) is subject to conditions of supervised release that are less restrictive than those in a prison or jail setting." (Emphasis added). The 8th Circuit rejected that argument.

Other than 9th Circuit, all other circuits addressing the issue appear to have reached the same conclusion as the 8th Circuit

- 2nd Circuit – *United States v. Edeleman*, 726 F.3d 305 2013 WL 4033968 (2nd Cir. 2013) (reentry center custody)
- 11th Circuit – *United States v. Gowdy*, 628 F.3d 1265 2010 WL 525765 (11th Cir. 2010)

- 6th Circuit - *U.S. v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971) (treatment center qualifies as custody)

- 4th Cir. *U.S. v. Evans*, 159 F.3d 908 1998 WL 759092 (4th Cir. 1988) ("custody" does not require physical restraint)

- 10th Circ. *U.S. v. Foster*, 754 F.3d 1186 (10th Cir. 2014) (escape from residential reentry "custody" for purposes of 751)

C. <u>Classic Grounds Exist to Grant Writ</u>.

The most compelling grounds exist to grant the writ where there is a split in the circuits. See Supreme Court Rule 10 (a). Here the 9th Circuit stands alone, but approximately 66 million live in the 9th Circuit. If Mr. Mangum lived there, he would be serving 15 months less on his prison sentence because that circuit does not even consider leaving a reentry center as a crime. This Court should remedy this conflict and resolve this important circuit split

CONCLUSION AND REQUESTED RELIEF

For the above reasons, Mr. Mangum requests a writ of certiorari.

RESPECTFULLY SUBMITTED,

ROCKNE O. COLE

AT:00001675
209 E. Washington Street
Paul-Helen Building, Ste 305
Iowa City, Iowa 52240
(319) 519-2540 Office
(319) 359-4009 Fax
ATTORNEY FOR PETITIONER

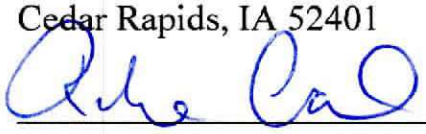
CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on November 7, 2022, I mailed an original and 10 copies to the Supreme Court via United States Postal Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

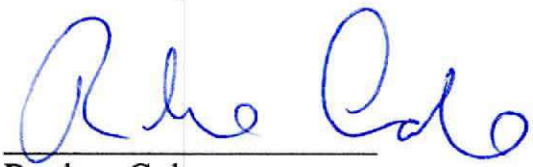
and one copy to:

Anthony Morfitt
U.S. Attorney's Office
111 7th Ave, SE
Box #1
Cedar Rapids, IA 52401



CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes words, was prepared in 14 Point New Times Roman, Microsoft Word, and therefore, complies with US Supreme Court Rule 33.1.



Rockne Cole