

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Ahmed Amer,

Petitioner,

v.

United States of America,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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QUESTION PRESENTED

Does a district court violate double jeopardy and the United States Sentencing Guidelines when it sentences a parent to further imprisonment under the International Parental Kidnapping Crime Act for violation of supervised release based solely on the parent's continued retention of the children post-indictment?

Ahmed Amer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is contained in a Summary Order filed March 26, 1998. App. 1a.

JURISDICTION

This case originated as a federal criminal prosecution by the United States Attorney for the Southern District of New York against Ahmed Amer ("Amer") for violation of the International Parental Kidnapping Crime Act, 18 U.S.C. section 1204. Mr. Amer was indicted and convicted of "knowingly and intentionally removing[ing] and retain[ing] children who had been in the United States, to wit: Mahmoud Amer, Maha Amer and Omer Amer, outside the United States with the intent to obstruct the lawful exercise of parental rights." After conviction, the District Court sentenced Amer to a term of 24 months of imprisonment and one year of supervised release, imposing a special condition that he return his children to the United States. That conviction and sentence were affirmed on appeal by the Second Circuit Court of Appeals in United States v. Amer, 110 F.3d 873 (2d Cir.), cert. denied, 118 S.Ct. 258 (1997).

After Amer's release from prison on April 7, 1997, the District Court imposed a one-year sentence of imprisonment for his violation of the special condition of release. The Circuit then affirmed the judgment of the District Court on March 26, 1998 in an unpublished opinion. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION, TREATY

AND STATUTES 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 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.

The Hague Convention on the Civil Aspects of International Parental Child Abduction is set out in the Appendix. App. 15a.

Title 18, section 1204 of the United States Code provides:

(a) Whoever removes a child from the United States or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section--

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights", with respect to a child, means the right to physical custody of the child--

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defense under this section that--

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence;

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a

result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

Sense of the Congress Regarding Use of Procedures Under The Hague Convention on the Civil Aspects of International Parental Child Abduction

Section 2(b) of Pub.L. 103-173 provided that:

It is the sense of the Congress that inasmuch as use of the procedures under the Hague Convention on the Civil Aspects of International Parental Child Abduction has resulted in the return of many children, those procedures, in circumstances in which they are applicable, should be the option of first choice for a parent who seeks the return of a child who has been removed from the parent. App. 13a.

18 U.S.C. sections 1201 and 3583 and United States Sentencing Guidelines section 5B1.4 and 2A4.1 are set out in the Appendix. App. 51a; App. 29a.

STATEMENT OF THE CASE

I. DISTRICT COURT PROCEEDINGS

On October 19, 1995, Amer was convicted by a jury verdict of a single-count indictment charging that between January 27, 1995 and August 4, 1995, he took his three children, Mahmoud, Maha and Omer, from the United States to Egypt and retained them there in violation of 18 U.S.C. section 1204, the International Parental Kidnapping Crime Act (hereinafter "IPKCA"). App. 32a.

On October 13, 1995, Amer filed a motion to dismiss the indictment on the ground that 18 U.S.C. section 1204(a) is unconstitutionally vague. After the government's case, Amer made an oral motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 based on a variety of grounds, including that: (1) 18 U.S.C. section 1204(a) is unconstitutionally vague and overbroad; and (2) the Government failed to prove Amer's intent under the statute. The District Court denied the motions.

In his defense Amer contended that he was entitled to assert certain defenses not included in the statute that related to the well-being of his children. Amer also sought to introduce at trial an Egyptian court order awarding him custody of the children. The District Court admitted the Egyptian custody order only on the question of Amer's intent, and not for the truth of the matter asserted.

After trial Amer was found guilty on the one count. The Probation Department then issued a Presentence Report recommending that Amer be sentenced under United States Sentencing Guideline section 2A4.1 relating to the general kidnapping statute, 18 U.S.C. section 1201, in lieu of an applicable guideline. App. 29a. Probation also found there was "no information suggesting that the defendant [Amer] impeded or obstructed justice."

Amer argued at sentencing that the general kidnapping sentencing guideline was not analogous and that other, more analogous guidelines required a sentencing range of from zero to six months. Amer argued also that making it a condition of his supervised release that he return the children to Mrs. Amer in the United States would be unconstitutional, illegal under the guidelines and an abuse of the court's discretion. Amer asked again that the court consider the Egyptian court orders and custody proceedings in deciding whether to impose the condition and whether to adjust upward for substantial interference with the administration of justice.

The government argued in opposition that: (1) the Sentencing Commission added 18 U.S.C. section 1204 to the statutory index to the 1995 Guidelines Manual, which became effective November 1, 1995, listing Section 2J1.2 --"Obstruction of Justice"-- as the offense guideline applicable to a violation of 18 U.S.C. section 1204; (2) the two adjustments available under U.S.S.G. section 2J1.2, providing for eight and three level enhancements to the base level of twelve, should be applied to Amer because he threatened the children and substantially interfered with the administration of justice; and (3) the court should upwardly depart because of Amer's

extended retention of the children in Egypt, the fact that he "abducted" the children, and that he inflicted "extreme psychological injury" on Mrs. Amer and the children.

The government also made the following arguments in favor of making it a condition of supervised release that Amer return the children to Mrs. Amer in the United States: (1) restoring Mrs. Amer's parental rights is analogous to an order of restitution under 18 U.S.C. section 3556; and (2) the condition would be a proper exercise of the Court's discretion under 18 U.S.C. section 3583(d).

In reply, Amer argued: (1) application of the amendment to the Sentencing Guidelines. made effective November 1, 1995 violates the Ex Post Facto clause of the United States Constitution because the last date of the offense alleged in the indictment is August 4, 1995; (2) application of the obstruction of justice guideline violates Congressional intent because it removes the option of a fine only created by statute; and (3) no adjustments upward under U.S.S.G. section 2J1.2 were warranted because (a) there was insufficient evidence that Amer threatened his children and any alleged threat to Mrs. Amer was unrelated to the desired goal of the offense stated in the guideline, that is to obstruct justice, and (b) the offense did not result in "substantial interference with the administration of justice." Amer explained there was no evidence that any judicial or investigative process of any kind was thwarted by his conduct (Mrs. Amer was not awarded custody by a United States court until after the children were in Egypt). Amer also challenged the condition of supervised release as violative of double jeopardy and the Sentencing Guidelines. Moreover, an Egyptian court had granted Amer custody of

his children, ordered Mrs. Amer, an Egyptian citizen, to return to Egypt, and under Egyptian law Mrs. Amer no longer had any parental rights to the oldest son, Mahmoud, at the time he went to Egypt because he was ten years old.

In sentencing Amer, the court applied U.S.S.G. section 2J1.2, which has a base offense level of twelve, then adjusted upward by three, concluding that Amer had substantially interfered with the administration of justice, resulting in a sentencing range of 18 to 24 months. The court declined to adjust upward based on the other reasons provided by the government or the Probation Department, concluding that the obstruction guideline did not permit an upward departure based on length of retention of the children.¹ In all other respects, the court relied on the factual findings of the Presentence Report. The court then sentenced Amer to the maximum allowed within the guideline range, 24 months. The court also sentenced Amer to a one-year term of supervised release, and ordered as a condition thereof that Amer return the children to Mrs. Amer in the United States.

II. APPELLATE PROCEEDINGS

Amer appealed the judgment and sentence to the Second Circuit Court of Appeals, challenging the constitutionality of IPKCA and the legality of his sentence. He first challenged IPKCA on vagueness and due process grounds, arguing that IPKCA usurps and detracts from the Hague Convention on The Civil Aspects of International Parental Child

¹This reference is included in the transcript of the sentencing on March 6, 1996, at p. 12, which was included as no. 9 in the Excerpts of Record in the Second Circuit.

Abduction (hereinafter "Hague Convention"), an international treaty creating a civil mechanism for the return of abducted children. Amer further argued that IPKCA, in its attempts, both directly and sub silentio, to acknowledge the Hague Convention, creates a confusing and discriminatory prosecutorial scheme that further violates the separation of powers doctrine and ignores customary international law. Amer also challenged IPKCA as overbroad because its enforcement has a discriminatory impact on Arabs and adherents to the Muslim faith.

Amer then challenged the condition of supervised release compelling him to return his children to their mother in the United States as illegal and in violation of Congressional intent. He argued that increased punishment for violation of the condition would be double jeopardy, that the district court has no power under the statutory and sentencing scheme to increase punishment based on the length of retention of the children, and the condition, which affects the best interests of the innocent third party children, is one more appropriately made by a state court with jurisdiction over the Amers' domestic dispute. Amer further challenged the upward sentence adjustment, arguing that the increase for substantial interference with administration of justice was illegal because Amer's actions did not interfere with any judicial or investigative process.

The Second Circuit Court of Appeals affirmed the judgment and sentence. In a published opinion, the Circuit concluded that IPKCA is not unconstitutionally vague as applied to Amer because the period of the children's stay in the United States prior to removal and their retention in Egypt was substantial and that "parental rights" as

defined by IPKCA are determined by the laws of New York. App. 6a. The Circuit noted, however, that "it might be debatable whether a two- or three-day retention outside the United States would be sufficient to trigger the Act." App. 6a. The Circuit noted also that "there might be room for argument as to whether foreign children who were merely visiting the United States on a week-long vacation would be protected by the Act." App. 6a. The Circuit found that Amer had forfeited his argument that IPKCA is overbroad because it infringes on his right to religious freedom, and the argument is not reviewable as "plain error." App. 7a.

With respect to Amer's arguments concerning the interaction between the Hague Convention and IPKCA, the Circuit found that "at least in this case" (because Egypt is not a signatory to the Hague Convention), to preclude Amer from asserting the defenses available to a parent in a civil action under the Hague Convention does not violate section 1204(d) of IPKCA, which provides that the statute "does not detract from the Hague Convention." 18 U.S.C. § 1204(d). App. 8a. The Circuit did not address Amer's Constitutional vagueness, due process and separation of powers arguments insofar as they addressed the interaction between IPKCA and the Hague Convention.

The Circuit then upheld the condition of Amer's supervised release that he return the children to their mother. App. 10a. It found that the "return" condition was related to "the nature and circumstances of the offense" of child abduction and "history and characteristics" of Amer and served the goal of general deterrence. App. 10a. The Circuit also concluded that the condition was based

on the fact of Amer's continued retention of the children, not the duration of the retention, which rendered inapposite Amer's claim that the Sentencing Commission did not intend to penalize an offender based on the duration of retention. App. 11a. Amer's argument that further imprisonment for violating the condition offends the Double Jeopardy Clause was deemed unripe. In any event, the Circuit opined there was no double jeopardy because the additional imprisonment was punishment for the original offense. App. 11a.² Finally, the Circuit rejected Amer's claim that the condition conflicts with the Egyptian custody orders because (1) the District Court was not seeking to settle the underlying custody dispute, only to restore the status quo; and (2) Amer obtained the Egyptian orders only after violating United States law. App. 12a.

With respect to the sentence enhancement for substantial interference with the administration of justice pursuant to U.S.S.G. section 2J1.2, the Circuit found the enhancement proper. In its Conclusion, the Circuit then rejected Amer's "remaining arguments as either forfeited because not previously raised, or simply without merit." App. 12a.

III. SUBSEQUENT REVOCATION PROCEEDINGS

²In dicta the Circuit suggested that even if the government were to reindict Amer for the separate retention of the children, it would be a new offense and not double jeopardy. App. 11a.

Amer's term of supervised release began on April 7, 1997. Hearings on Amer's alleged violation of the condition of supervised release that he return the children to their mother were held on May 29, 1997 and June 5, 1997. The District Court revoked Amer's supervised release and issued its Order explaining its reasoning on supervised release on July 3, 1997. Amer filed a Notice of Appeal from that Order on July 21, 1997. The Circuit, in an unpublished opinion, rejected Amer's Double Jeopardy claim for the reasons stated in United States v. Amer, 110 F.3d 873, 884 (2d Cir.), cert. denied, 118 S.Ct. 258 (1997). App. 55a. The Circuit explained that "the entire sentence, including the period of supervised release, is the punishment for the original crime, and 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms' of his release." (citation omitted). App. 11a. The Circuit further stated that revocation of supervised release for the violation of release is not a new punishment for a new crime, but part of the whole matrix of punishment which arises out of a defendant's original crime. App. 11a.

REASONS FOR GRANTING THE WRIT

Amer's crime, taking and retaining the children in Egypt, was complete upon his indictment. He received the maximum sentence of incarceration permitted under the Sentencing Guidelines, which prohibit enhancing the sentence of parents for kidnapping their children to reflect the length of their retention. In doing nothing further and continuing to retain his children in Egypt, Amer received another year in prison beyond the maximum authorized for the same offense. This additional punishment for the same prior act violates

the Double Jeopardy Clause of the Constitution and violates the United States Sentencing Guidelines.

The Second Circuit's decision is a gross miscarriage of justice that is unduly harsh in its impact. Resolution of the issue of whether further imprisoning parents convicted under IPKCA solely for the continued retention of their children violates Double Jeopardy and the law, an issue of first impression, will provide much needed guidance to district courts whose sentencing decisions in cases under IPKCA seriously impact not only the convicted parent, but also the interests and well-being of the family as a whole.

IV. ARGUMENT

A. Amer Cannot Be Sentenced Twice For The Same Offense

Further imprisonment for failing to return the children would impermissibly violate the Double Jeopardy Clause of the United States Constitution.³ The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." United States Const. amend. V. As this Court has explained, the clause "applies both to successive punishments and to successive prosecutions for the same criminal offense." United States v. Dixon, 509 U.S. 688, 694 (1993). The Double Jeopardy Clause prohibits the condition imposed by this Court because it exposes Amer to additional punishment for the same offense for which he was indicted, convicted and sentenced--keeping the children in Egypt. Any failure by Mr. Amer to comply with the condition in question would not constitute new behavior. The Court cannot punish through the back door what the Congress did not punish through the front. See United States v. Chagra, 653 F.2d 26, 31 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982).

³The United States Court of Appeals for the Second Circuit, in affirming Amer's original conviction on the kidnapping offense, discussed the double jeopardy issue: "Even if this objection is ripe, which we do not think it is, no double jeopardy violation will occur if Ahmed is subsequently re-imprisoned for violating the special condition." United States v. Amer, 110 F.3d 873, 883 (2nd Cir. 1997). In violating Amer, the District Court did not re-examine the validity of the condition of supervised release, relying instead on the decision of the Court of Appeals. "The Court of Appeals had occasion to address the particular special condition of supervised release that the Court imposed and found that it was an appropriate condition of supervised release and that it was one that was closely tailored to the crime and it served functions of the specific deterrence it made reference to." 6/5/97 RT:59-60.

As noted by Justice Brennan in Ashe v. Swenson,
[The] Double Jeopardy Clause requires the
prosecution . . . to join at one trial all the
charges against a defendant that grow out of a
single criminal act, occurrence, episode or
transaction. This "same transaction" test of
"same offense" not only enforces the ancient
prohibition against vexatious multiple
prosecutions embodied in the Double Jeopardy
Clause, but responds as well to the increasingly
widespread recognition that the consolidation
in one lawsuit of all issues arising out of a
single transaction or occurrence best promotes
justice, economy, and convenience.

Ashe v. Swenson, 397 U.S. 436, 454-455 (1970). The prosecution here
was obligated to, and did, charge Amer with all of the offenses that
grew out of the transaction underlying his indictment--his taking the
children to Egypt, where they remain. As such, the prosecutors were
confined by the "unit of prosecution" chosen by Congress: removal
and retention. All of Amer's acts were one crime. And Congress
chose one three-year sentence. See Chagra, 653 F.2d at 29.

The civil concept of res judicata, or "merger and bar," is
embodied in the Fifth Amendment's guarantee against double jeopardy
and would equally bar further punishment for keeping the children in
Egypt. See Ashe, 397 U.S. at 443 (applying the federal rule of
collateral estoppel to criminal cases). As noted by the Second
Circuit Court of Appeals in Burka v. New York City Transit Authority,

32 F.3d 654, 657 (2d Cir. 1994), "New York adheres to a transactional analysis of res judicata, 'barring a later claim arising out of the same factual grouping as an earlier litigated claim'. The earlier claim, the charge of taking and retaining the children in Egypt, comprises factually any claim that the children remain there.

The characterization of the additional punishment as one imposed for violating a condition of the supervised release, as opposed to committing a new crime, is not dispositive. Amer's crime, taking and retaining the children in Egypt, is complete. He received the maximum sentence of incarceration permitted under the Guidelines (24 months). Under the charges as filed, in doing nothing further, Amer received another year in prison for that very same offense, not a new one. This additional punishment for the same prior act violates the Double Jeopardy Clause.

B. The Sentencing Guidelines Prohibit a District Court From Enhancing the Punishment of Parents for Continued Retention of their Minor Children Who They Have Been Convicted of Kidnapping

The Sentencing Guidelines prohibit a District Court from increasing the base offense level of parents convicted of kidnapping their minor children based on the continued retention of the children. Congress did not provide for lengthier penalties dependent on the length of time the parent keeps the child out of the country. See 18 U.S.C. § 1204.⁴ Congress did so provide in 18 U.S.C. section 1201,

⁴Moreover, giving Amer the maximum term of imprisonment and an extra year for keeping the children in Egypt far exceeds the statutory maximum authorized by 18 U.S.C. section 1204(a).

the general kidnapping statute, but explicitly excluded ". . . a minor [kidnapped] by the parent thereof" 18 U.S.C. § 1201A.⁵ App. 40a. The tiered approach of the general kidnapping laws was purposefully left out of IPKCA.

The Second Circuit concluded, however, that Amer's further imprisonment for violating a condition of supervised release by retaining his children in Egypt was part of the "matrix of punishment" for the original offense, and was thus not violative of Double Jeopardy as punishment for a new offense. App. 11a. Yet such enhanced punishment for retention of the children is a blatant violation of the above-stated policy of the Sentencing Guidelines precluding an increase of the sentence for continued retention of the children. The District Court recognized this policy at the original sentencing hearing when it agreed it could not enhance Amer's sentence for his continued retention of the children in Egypt. Yet the condition it ordered yielded the same result. As such, the sentence for violation of supervised release is illegal, either as part of the punishment for the original offense, which violates the guidelines, or as additional punishment for the same offense, rendering it in violation of Double Jeopardy.

⁵Subsection G also includes specific instructions to the Sentencing Commission to add enhancements for various special circumstances involving minors (sexual exploitation, etc.), except where the defendant is a "parent" or other specified relative or person having legal custody of the minor.

The government has attempted to justify the District Court's sentence by arguing that multiple prosecutions under IPKCA do not violate double jeopardy, so that even if the sentence here were for a new offense, double jeopardy would not apply. The government has argued it can perpetually reindict under IPKCA free from any limitation under the Double Jeopardy clause. The government's threatened actions would create a life sentence for a crime Congress determined warranted a three-year maximum prison sentence with a minimum sentence of only a fine.

As Justice Berger for the First Circuit pointed out in Chagra, Ex Parte Nielsen, 131 U.S. 176 (1889), held the prosecutors could not charge one period of continuous violation (polygamy) through one date and charge adultery on the next date. Chagra, 653 F.2d at 30. Here the Government would charge the same retention as a separate offense in arbitrarily defined increments. As Justice Berger noted, in Ex Parte Snow, 120 U.S. 274 (1887), the Supreme Court "held that the federal government could prosecute a Mormon only once for cohabiting for three years straight with more than one woman as his wife; it could not prosecute him three times, once for each year." Chagra, 653 F.2d at 30.

This rationale comports with the rule that prosecutors cannot avoid the double jeopardy clause "by the simple expedient of dividing a single crime into a series of temporal or spatial units." Brown v. Ohio, 432 U.S. 161, 168 (1977). As such, the threatened incarceration violates the Supreme Court's decision in United States v. Halper, 490 U.S. 435 (1989). The very nature of the condition imposed creates the double jeopardy. Mr. Amer is subject to

incarceration for literally doing nothing. In short, this punishment is additional incarceration for the already charged and proved act of removal and retention. Yet this Court has already held that the maximum sentence for those acts is two years' incarceration. The condition is a subterfuge to add a third year.

As in Halper, Amer has committed a single offense and, for that offense, he is being subjected to both an overtly criminal punishment--two years in prison--and an ostensibly "remedial" sanction, an additional year. The label of remedial supervised release revocation is not controlling. Id. at 447-448. As Justice Blackmun held:

Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

Id. Here, the District Court's sentence attaches one more year of imprisonment under a different label than the Sentencing Guidelines allow for the charged conduct.

In United States v. Dixon, 509 U.S. at 692, this Court struck down the attempt by the government to punish conduct as crimes when the same conduct had already been punished as criminal contempt. The principle of a single punishment for a single offense is clear. Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), is the same. The government sought an overtly criminal punishment and a second tax punishment for the same criminal conduct. The Double Jeopardy Clause prohibited this result. Id. at 783.

The Second Circuit's conclusion that the additional punishment arose from the original "matrix" of punishment for the original offense; and, thus, jeopardy did not attach to the revocation proceedings is, Amer submits, pure sophistry. United States v. Amer, 110 F.3d at 884. To apply this principle under the circumstances of this case would exalt form over substance. The act of retention was complete before sentencing. Punishment of additional imprisonment for keeping the children in Egypt beyond the period in the indictment would not have been allowed ab initio.

CONCLUSION

For the reasons stated above, Amer's Petition for Writ of Certiorari should be granted.

DATED: June ____, 1998

Respectfully submitted,

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