

97-1442

*To be argued by:
Henry H. Rossbacher*

***UNITED STATES COURT OF APPEALS
For The Second Circuit***

UNITED STATES OF AMERICA,

Appellee,

--against--

AHMED AMER,

Defendant-Appellant.

***On Appeal From The United States District Court
For The Eastern District of New York***

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant Ahmed Amer ("Amer") hereby submits his brief in reply to the Government's brief in opposition.

ARGUMENT

I. INTRODUCTION

Amer respectfully disagrees with this Court's opinion confirming his conviction and sentence, particularly the position that although the objection was then not yet ripe, "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, 883-884 (1997). Further imprisoning Amer for keeping the children in Egypt beyond the period in the indictment would not have been allowed ab initio and should not be allowed as a sentencing option for violation of a supervised release condition. As such, the additional imprisonment is not authorized and constitutes increased punishment for the same offense for which Amer was indicted, convicted and sentenced.

The condition of supervised release, return of the Amer children, also imposes a particular domestic relationship on the Amers and violently influences the lives of the Amer children, who are not under the District Court's jurisdiction. Amer maintains that the government did not prove his violation of supervised release by a preponderance of the evidence. The record shows that Amer took steps to effect the return of his children. There is no evidence that the children were not available for pickup at the time the probation officer wrote the violation.

The sentence imposed by the District Court for the supervised release violation further exceeds the range proposed under the

Sentencing Guidelines. The Court abused its discretion in departing upward. For these reasons, and those included in Appellant's Opening Brief, the violation should be reversed.

**II. IMPRISONMENT FOR FAILURE TO COMPLY WITH THE SPECIAL
CONDITION OF SUPERVISED RELEASE THAT AMER RETURN THE
CHILDREN TO THE UNITED STATES VIOLATED THE DOUBLE JEOPARDY
CLAUSE**

The Government again indirectly threatens to prosecute Amer repeatedly under the International Parental Kidnapping Act (the "Act") if he does not return his children to the United States. As support for its defense of the supervised release condition, the Government argues that Amer's continued retention of the children is a new crime. It is not. The Act neither expressly nor impliedly sanctions a further prosecution for retention continuing post-indictment; both the statutory and sentencing schemes compel the opposite result.

Congress did not intend the Act to support multiple prosecutions for a single, continued retention. In order to determine Congressional intent, the entire statutory scheme, including the related kidnapping statutes, must be addressed. In the kidnapping prohibitions, Congress and the Sentencing Commission chose only to increase punishment and not liability based on the length of time a kidnapper retains his victim. See 18 U.S.C. § 1201; United States Sentencing Guidelines ("U.S.S.G.") § 2A4.1. Here, Congress and the Sentencing Commission then chose not to increase penalties for lengthier retentions of children, instead treating violations of the Act much more leniently than general kidnapping (maximum of three

years versus life imprisonment), and specifically excluding parental kidnapping of their minors from the crime of kidnapping. See 18 U.S.C. § 1201A. Congress did not intend the Act to support multiple prosecutions. There is no language increasing penalties for continued retention. Allowing additional, endless prosecutions ad infinitum for continued retention blatantly violates Congressional intent.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING A CONDITION OF SUPERVISED RELEASE THAT AMER RETURN THE CHILDREN TO THE UNITED STATES

The Government claims that the condition of supervised release requiring the return of the children to Mona Amer is proper because the condition itself does not deprive Amer of liberty and double jeopardy does not attach to revocation proceedings. The Government misses the point.

The District Court did not have the power to enhance the original sentence based on the length of the children's retention. Yet the behavior that would trigger a violation of the condition and increased incarceration, continued retention of the children in Egypt, is the exact same behavior that the District Court could not use to enhance the original sentence. If revocation is part of the punishment that arises out of the defendant's original sentence and the length of the original sentence here could not be increased for continued retention of the children, then the condition threatening increased incarceration for that same behavior is improper.

The condition imposed by the District Court is also not included in, and is inconsistent with, the 25 conditions of supervised release

recommended by the Sentencing Commission in U.S.S.G. Section 5B1.4. In fact, none of the 25 conditions listed in Section 5B1.4, involve acts which will drastically affect the liberty and other direct interests of persons other than Amer. The condition imposed by the District Court directly affects the lives and liberty interests of the Amer children. It places them in the untenable position of being forced to return to their mother in the United States in spite of their wishes, Egyptian law and existing Egyptian custody orders. Amer is being compelled by the District Court to violate what could very well be the "best interests" of his own children in order to avoid further imprisonment.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REVOKING AMER'S SUPERVISED RELEASE BASED ON HIS ALLEGED FAILURE TO COMPLY WITH THE RETURN CONDITION

The District Court abused its discretion in revoking Amer's supervised release because the government failed to meet its burden of proof. 18 U.S.C. § 3583(e)(3) sets out the conditions for revocation of a supervised release term. A term of supervised release may be revoked:

. . . if the court, pursuant to Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . .

The District Court found that Amer did not comply with the condition for supervised release that he effect the return of his children to the United States. However, Amer took affirmative steps

to bring his children back to the United States. Amer telephoned his mother as instructed, told her of the initial plan to return his children, and his mother agreed to follow his instructions. 5/29/97 RT:18.¹ Later, it was Mona Amer's mother who refused to go pick up the children. 5/29/97 RT:27. There is no evidence that the children were not available for pickup at the time the probation officer, Druker, wrote the violation. 5/29/97 RT:27.

Nor did the evidence show that Amer was the sole custodian of his children. For almost three years, the children have been raised by their extended family in Egypt. The Government presented no evidence that Amer had absolute control over other members of the family whose concerns about the well-being of the Amer children were excluded from the court's determination. A preponderance of the evidence does not support the violation finding upon which the subsequent revocation is based.

Furthermore, at the revocation proceedings Mona Amer asserted that she had custody of the children in Egypt. As discussed in section V, the District Court's decision was a child custody decision more appropriately made by the state court (or Egyptian court) with civil jurisdiction over the Amers' domestic dispute.

¹"RT" refers to the transcript of the revocation proceedings in Amer's appendix.

V. **THE DISTRICT COURT ABUSED ITS DISCRETION BY SENTENCING AMER TO A TERM OF IMPRISONMENT GREATER THAN THAT RECOMMENDED IN THE SENTENCING GUIDELINES**

The Sentencing Guidelines do not explicitly address what constitutes an appropriate sentence upon finding a violation of supervised release conditions. United States v. Dillard, 910 F.2d 461, 466 (7th Cir. 1990). Neither the Congress, in its role as drafter of criminal laws, nor the court, in sentencing, should be in the business of deciding international domestic disputes and resolving custody battles.

The sentence involves a greater deprivation of liberty than is reasonably necessary "to afford adequate deterrence to [the] criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Congress and the Sentencing Commission have clearly expressed their position that a lengthier retention of the children does not warrant increased punishment. The punishment scheme envisioned by Congress as an adequate deterrent for violations of Section 1204, including a fine only and/or zero (0) to three (3) years imprisonment, is applicable both to the taking and the retention of children outside the United States. See 18 U.S.C. § 1204. The scheme does not include enhanced penalties related to the length of retention, although it could have. Rather, the statutory scheme shows Congress and the Sentencing Commissions deliberately chose not to make increased penalties for lengthier retention of the children part of the sentencing options for Section 1204 violations.

In setting forth the punishment scheme for the crime of "Kidnapping" under 18 U.S.C. Section 1201, Congress and the

Sentencing Commission created a scheme whereby kidnappers violating 18 USC Section 1201 who detain their victims for lengthier periods can be punished more severely. See U.S.S.G. § 2A4.1. Congress also expressly stated that the Kidnapping Statute (18 U.S.C. § 1201), does not apply to parental kidnapping of a minor. See 18 U.S.C. § 1201A. Then, in accordance with this prohibition, the Sentencing Commission did not make the guideline for general Kidnapping applicable to International Parental Kidnapping, choosing instead the "Obstruction of Justice" guideline found in U.S.S.G. § 2J1.2. That guideline does not include enhancements for increased retention of the children.

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CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, it is respectfully submitted that the Court should vacate the condition and order Amer's release forthwith. In the alternative, Amer's sentence should be vacated and he should be re-sentenced in accordance with the United States Sentencing Guidelines.

DATED: November 7, 1997

RESPECTFULLY SUBMITTED,

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I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is: Union Bank Plaza, 24th Floor, 445 South Figueroa Street, Los Angeles, California, 90071.

On February 7, 2010, I served the foregoing document described as **REPLY BRIEF FOR DEFENDANT-APPELLANT** on the interested parties in this action by placing [] the original [] a true copy thereof enclosed in a sealed envelope addressed as follows:

Timothy Macht, Esq.
Assistant United States Attorney
225 Cadman Plaza East
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I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 7, 1997, at Los Angeles, California.

Tina Walling

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